

(2016) 03 GUJ CK 0081
In the Gujarat High Court

Case No : Petn. Under Arbitration Act No. 24 of 2016

Sambhav Media Limited

APPELLANT

Vs

Karnavati Club Limited

RESPONDENT

Date of Decision : 11-03-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2016) 03 GUJ CK 0081

Hon'ble Judges : Akil Abdul Hamid Kureshi, J.

Bench : Single Bench

Advocate : A.B. Munshi, Advocate, for the Appellant; Dhaval M. Barot, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Akil Abdul Hamid Kureshi, J.—1. Petitioner seeks appointment of an arbitrator to resolve the disputes arising between the petitioner and the respondent-club.

2. Brief facts are as under:

"The petitioner is a limited company. The respondent is a recreational club registered under the Companies Act. The petitioner, an institutional member of the respondent-club places reliance on the arbitration clause contained in the bylaws of the respondent-club. The petitioner seeks appointment of an arbitrator."

3. It is not in dispute that effective from the year 2004, Article 37 of the Articles of Association pertaining to voting rights of different members provided as under:

"37. At a general meeting of the Company, an Ordinary member, Life member or Institutional Member shall have Voting Right. Every such Member shall have one vote. Junior Members, Temporary Members, Playing members, Spouse members, Honourary Members, Service Members shall have no Voting Right. Notwithstanding anything contained in the Articles of Association of the Company, in case of Institutional Membership, the voting right shall be given to

each nominee of such member."

4. As per this clause, thus, an ordinary member or a life member would have one vote at general meeting of the club. Insofar as the institutional members are concerned, voting rights were given to each nominee of such member. I am informed that each institutional member had specified number of persons it could nominate for voting.

5. On 30.11.2015, a meeting of the Board of Directors of the club was convened. One of the issues discussed was brought up by a director Mr. Trilokbhai R. Parikh, who proposed that the pattern of giving multiple votes to institutional members be done away with since it is not in consonance with the provisions of the Companies Act and is also otherwise objected to by the Ministry of Corporate Affairs. He suggested that for such purpose, Article 37 of the Articles of Association have to be amended. The Board considered the matter and approved the same. On 22.12.2015, the Board of Directors of the club met again and besides other issues, considered the proposal to amend Article 37 by removing special voting rights to the institutional members. In connection with this proposal and several other proposals, the Board resolved as under:

"RESOLVED THAT an Extra Ordinary General meeting of the members of the club be convened on Thursday, the 4th February 2016 at 4.00 p.m. at the club premises and that the President and Secretary of the club be and are hereby severally authorized to finalise the notice on receipt of advise from the legal committee of the club to adopt the new set of Articles of Association of the club and that they are further authorized to appoint e-voting agency and scrutineer in case e-voting is decided and do all such other acts, deeds, things and matters as may be requisite to give effect to this resolution including signing and dispatch of notice of Extra Ordinary General meeting to the eligible members in accordance with the provisions of the Act."

6. On 29.12.2015, the petitioner, an institutional member of the club, issued a notice seeking appointment of an arbitrator. In such notice, the petitioner referred to the meeting of the Board of Directors of the club convened on 22.12.2015 to transact the agenda for amendment of Article 37 besides other issues. In such notice, the petitioner stated that, as per its information, a resolution was passed by the Board of Directors amending Article 37 removing voting rights to institutional members and has taken a decision to amend the same and place it before the EGM for necessary action. The petitioner contended that unilateral decision taken by the Board of Directors to amend Article 37 limiting the voting rights of the institutional member was ex-facie illegal. The petitioner pointed out that, the company was exercising such special voting rights since the year 2004. The same could not have been discontinued without even a notice to the petitioner. The petitioner thereafter referred to the arbitration clause in the Articles of Association and suggested names of two retired judges of the Supreme Court any one of whom may be chosen as a sole arbitrator to resolve such disputes.

7. In response to such notice, Karnavati Club replied under a communication dated 09.01.2016 pointing out that in its meeting dated 22.12.2015, the Board of Directors had only recommended the amendments in the Articles of Association to be discussed at extraordinary general meeting of the company and would be implemented, only if the members passed such special resolution at such meeting. At that stage, the arbitration petition came to be filed. I am informed that subsequently, under notice dated 08.02.2016, the EGM was convened on 04.03.2016 and one of the issues taken up for consideration was the amendment of Article 37. With these later developments, we are not directly concerned.

8. The petitioner seeks appointment of an arbitrator in context of the decision of the Board of Directors dated 22.12.2015 regarding amendment of Article 37 of the Articles of Association taking away the special voting rights of the institutional members. According to the petitioner, such a dispute would fall within the arbitration clause contained in the articles of association.

9. On the other hand, the respondent raised three contentions to oppose this petition:

"(i) The arbitration petition is premature. No decision was taken during the meeting of the Board of Directors held on 22.12.2015.

(ii) The petitioner has also not followed the necessary procedure for appointment of an arbitrator envisaged in the arbitration clause which requires an attempt of amicable settlement. The petitioner's notice which is referring both, to the amicable settlement and appointment of an arbitrator, is a combined notice not envisaged in the arbitration agreement.

(iii) This cannot be considered a dispute between the members and Board of Directors and, therefore, does not fall within the arbitration clause."

10. The arbitration clause in the articles of association reads as under:

"80. In the event a dispute or disagreement ("Dispute") arises between the Members and the Board of Directors"/Office Bearers ("Parties") In connection with the interpretation of any provision of these Articles or the rules, regulations, by laws etc. as may be framed by the Club from time to time ("Rules") or the compliance or non-compliance therewith, or the validity or enforceability thereof, or the performance or non-performance of such Rules, the disputing Parties must resolve the Dispute by negotiation in the following manner:

(i) A dispute will be deemed to have arisen upon the receipt of a written "Dispute Notice" intimating the nature of the dispute by the aggrieved Member to the Office Bearers or any committee if formed for the purpose of settlement of disputes by the Board of Directors.

(ii) Upon delivery of such Dispute Notice, the Office Beares or the Committee as the case may be shall promptly meet and attempt to negotiate in good faith to

resolve the Dispute. The Parties agree to attempt to resolve the Dispute in a prompt and expeditious Manner.

(iii) In the event that the parties are unable to resolve the Dispute amicably as provided above within a period of (30) days the Dispute shall be referred to arbitrator Mr. Girish T. Nanavati, retired Judge of the Supreme Court of India or Mr. C.K. Thakkar, retired Judge of the Supreme Court of India or any retired Judge of the Supreme Court or Gujarat High Court. If any, one of the above named arbitrators are not available. However, such other member has to be decided by the Board of Directors of the Club ("Arbitral Tribunal").

(iv) The venue of such arbitration shall be at Ahmedabad and the language shall be English. Notwithstanding the existence of a Dispute, the aggrieved Member(s) shall and will continue to perform their respective obligation/duties under Rules of the Club.

(v) The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 and the award made by such arbitrator shall be final and binding on the Parties.

(vi) Any Dispute arising between the Parties shall only be subject to the jurisdiction of the Arbitral Tribunal as defined in sub clause (iii) of the said clause.

(vii) The cost of arbitration will be borne by the club."

11. There is thus a dispute resolution mechanism in the form of arbitration to be conducted by one of the two named arbitrators. This clause provides that, in the event a dispute or disagreement arises between the members and the Board of Directors or office bearers in connection with the interpretation of any provision of the articles or the rules, regulations, bylaws etc. as may be framed by the club or the compliance or non-compliance therewith or the validity or enforceability thereof or the performance or non-performance of such rules, the parties would resolve the disputes in the manner provided in the said clause. The mechanism further provides that a dispute will be deemed to even have arisen upon receipt of a written "dispute notice" intimating the nature of the dispute by the aggrieved member further purpose of settlement of disputes by the Board of Directors. Upon delivery of such dispute notice, the office bearers or the committee would promptly meet and attempt to negotiate to resolve the dispute. In the event, parties are unable to resolve the disputes amicably within a period of 30 days, the dispute would be referred to the arbitrator.

12. Firstly, therefore, in case of any dispute or disagreement which arises between the members and Board of Directors with respect to any of the matters mentioned in the arbitration clause, this dispute resolution mechanism would apply. This arbitration clause is worded widely and takes within its sweep any dispute concerning the interpretation of the provisions of the articles, rules, regulations or the bylaws or compliance or noncompliance thereof and also the validity or enforceability thereof. If therefore, there is dispute between the

members of the club regarding validity of certain article or a bylaw, it would certainly fall within this clause since it can be stated to be a dispute or disagreement between a member and the Board of Directors with respect to the validity of a certain article. The contention, that the dispute is between members and the club and, therefore, would not fall within this clause, cannot be accepted. The club is governed and represented by Board of Directors. The decision of the club taken at the EGM would be taken by the club through its hierarchy of decision making mechanism and if a member of the club questions the validity of any article of association framed during such meeting, it would be a dispute between the member and the Board of Directors.

13. Two questions however remain. First is, was the petition premature? And, second is, did the petitioner attempt for settlement as envisaged in the dispute resolution mechanism? In this context, one may recall, on 22.12.2015, all that the Board of Directors did was to discuss the proposal to amend Article 37 and to do away with the special voting rights of the institutional members and place it before EGM. Earlier on 30.11.2015 one of the members had pointed out that the same would be in conformity with the provisions of the Companies Act and was also objected by Ministry of Corporate Affairs. On 22.12.2015 the Board of Directors did not take any decision which can be stated to have aggrieved the petitioner. In fact, the matter was, to be referred to the EGM to be convened shortly. On that day, the Board of Directors had not adopted the resolution for change. Thus all that happened on 22.12.2015 was to place this issue for consideration by the EGM. The approach of the petitioner against this decision of the Board is thus premature. Articles of association was not amended. It would be amended only if EGM voted for it.

14. In the notice for appointment of the arbitrator, the petitioner has referred to this decision of the Board of Directors on 22.12.2015 and has averred that the decision taken by the Board of Directors was illegal. This was the genesis of the petitioner's notice for appointment of an arbitrator. In this context, I agree with the counsel for the respondent that the notice for appointment of arbitrator and arbitration petition founded on such notice was premature.

15. Equally, the petitioner failed to resort to the dispute resolution mechanism envisaged in Article 80 of the Articles of Association. As noted, it required an aggrieved member to first give a dispute notice intimating the nature of disputes upon which, the office bearers of the committee would promptly make an attempt to negotiate in good faith to resolve the dispute. Despite such efforts, if the parties are unable to resolve the dispute amicably within 30 days, the dispute would be referred to arbitrator.

16. In the present case, the petitioner issued a two-in-one notice on 29.12.2015 and, in addition to voicing its grievance, stated as under:

"9. In view of the aforesaid facts and circumstances, we hereby issue a "Dispute Notice" and raise a "Dispute" to resolve the same amicably and the same shall be

referred to Arbitrator Mr. Girish T. Nanavati, retired Judge of the Supreme Court of India or Mr. C.K. Thakkar, retired Judge of the Supreme Court of India or any retired Judge of the Gujarat High Court when the aforesaid Arbitrators are not available any constraint to refer the above dispute to the named arbitrator within 30 days from the receipt of the aforesaid Dispute Notice, we have no other option to take appropriate action under the available law.

10. The foregoing is not intended nor shall it be construed as a complete recitation of the facts and events concerning the above referenced matter, nor shall it be construed as a waiver of any rights, remedies or claims, legal or equitable, which Sambhav Media Limited may have."

17. Thus, what the petitioner did was to issue a dispute notice and raise the dispute to resolve same amicably and to refer to arbitration of one of the two named arbitrators within 30 days from the receipt of the dispute notice. In my opinion the dispute resolution mechanism did not envisage such a combined notice. What is envisaged is the notice of dispute upon which the office bearers would attempt to bring about an amicable settlement failing which alone the question of making a reference of the arbitrator would arise.

18. Instead, the petitioner issued a notice urging the Board of Directors to amicably settle the dispute or else within 30 days refer the matter to arbitration. Quite apart from this dispute mechanism provided in the agreement, Section 11 of the Arbitration and Conciliation Act envisages certain procedure to be followed before an approach can be made to Chief Justice or his designate for appointment of an arbitrator. The notice issued by the petitioner does not satisfy the requirement of dispute resolution mechanism and without making such attempt, issuance of notice for appointment of an arbitrator straightaway was not envisaged in the said clause.

19. For these reasons, the petition is dismissed.