
(2001) 10 BOM CK 0015
In the Bombay High Court
Case No : Arbitration Application No. 1 of 2001

Sunil Girdharilal Shah

APPELLANT

Vs

Sanjay Navneetdas Shah and Others

RESPONDENT

Date of Decision : 05-10-2001

Acts Referred:

Arbitration Act, 1940 — Section 20, 8
Arbitration and Conciliation Act, 1996 — Section 11, 34
Partnership Act, 1932 — Section 69(2)

Citation : (2002) 3 BomCR 355

Hon'ble Judges : V.K. Barde, J

Bench : Single Bench

Advocate : R.P. Totla, for the Appellant; P.M. Shah, Sr. A. for Amol Savant, for the Respondent

Judgement

V.K. Barde, J.—Heard Mr. Totla, learned Counsel for the petitioner and Mr. P.M Shah, learned Senior Counsel holding for Mr. Amol Savant, learned Counsel for the respondents.

2. The petitioner has contended that he and the respondents formed a partnership under the name of M/s. Vision House, Dalalwadi, Aurangabad. There arose a dispute in respect of the accounts between the petitioner and other partners and he therefore demanded the accounts from the respondents but they failed to furnish the accounts. Therefore, by his letter dated 2-8-2000 he called upon the respondents to appoint an arbitrator as per provisions of Clauses 12 and 17 of the Partnership deed. The respondents failed to give any response to this demand of the petitioner. The petitioner had given three names in his letter dated 2-8-2000 and as there was no appointment of any arbitrator he filed the present matter as per the provisions of section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 1996 Act).

3. The respondents have appeared and have filed two separate Civil Application bearing C.A. No. 1857 of 2001 and C.A. No. 2230 of 2001 and in both the

applications they have taken a stand that the partnership was not registered as per the provisions of the Partnership Act, and therefore, the present matter is not maintainable because of the provisions of section 69 of the Partnership Act.

4. However, it is worth nothing that the respondents have nowhere contended that there was no partnership deed between the petitioner and the respondents. They have also not contended that there was no partnership as per Annexure "A" between the petitioner and respondents. They have also not contended that there is no provision for appointment of arbitrator in case of any dispute arising between the partners with respect to the business of the partnership. So it clearly appears that just to prolong the matter these two applications are filed.

5. However, as the respondents have raised a point that the matter is not maintainable for want of registration of the partnership because of the provisions of section 69 of the Partnership Act, this point is being considered.

6. The learned Counsel for the respondent has placed reliance on the ruling of the learned Single Judge of Gauhati High Court in the matter of Mohd. Monirul Hasan and others v. Mohd. Iftikar Ahmed, reported in 2000 (3) Arb.L.R. 54 and also on the ruling of the Supreme Court in the matter of Jagdish Chander Gupta Vs. Kajaria Traders (India) Ltd., .

7. The learned Counsel for the respondents has argued that the partnership is not registered as per the provisions of Partnership Act. The terms of appointment of arbitrator are there in the partnership deed. The petitioner is trying to exercise the rights arising out of a contract regarding the Partnership and therefore, considering the provisions of section 69 of the Partnership Act, the matter is not maintainable. The learned Single Judge of Gauhati High Court has observed :

"A proceeding for appointment of an arbitrator in terms of the contract is only a step in enforcement of rights and obligations arising from the contract, including for settlement of dispute by arbitrator. Therefore, section 69(3) of the Partnership Act will apply to proceedings u/s 11 of the Act as well."

For this purpose the learned Single Judge has placed reliance on the ruling of the Apex Court referred to above.

8. The other ruling of the Apex Court in the matter of M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., was also cited before the learned Single Judge. However, the learned Single Judge in para No. 12 held that:

"12. As a matter of fact, the Supreme Court was examining the difference between the provisions of section 20 of 1940 Act and section 8 of the new Act. According to the provisions of section 8 of the new Act, where a matter was pending before a judicial authority which is the subject matter of an arbitration agreement, a party may apply u/s 8, for referring the parties to arbitration. It was held that u/s 20 of the old Act, a party could apply for appointment of an arbitrator without there being any matter pending before the Court. In that connection it was observed that under the new Act, appointment of an arbitrator

is made as per provision of section 11, which does not require that Court to pass judicial order appointing arbitrator. It may be observed that according to the Honourable Supreme Court, a petition u/s 20 of the old Act could be moved for appointment of an arbitration where the matter may not be pending before a Court. That situation is like as contained u/s 11 of the new Act, where too, a petition can be made without any matter in that regard being pending before a Court. Here we are not concerned with the differences between section 20 of the old Act and section 8 of the new Act, as was the case in question. Rather there is similarity to some extent between the provisions of section 20 of the old Act and section 11 of the Act. Where a petition can be moved for appointment of an arbitrator even though no judicial proceeding may be pending in any Court.

With respect to the learned Single Judge, I do not agree with the view taken above.

9. In the matter of Jagdish Chandra Gupta, an application was filed u/s 8(2) of the Indian Arbitration Act, 1940 and therefore, the question arose whether such an application was maintainable in the teeth of provisions of section 69 of the Partnership Act and in the given circumstances by interpreting the provisions of section 8(2) of the 1940 Act, and the agreement, the Apex Court held that such an application was not maintainable when the partnership is not registered because of the provisions of section 69 of the Partnership Act. However, the Apex Court in the matter of M/s. Sundaram Finance Ltd. observed in para No. 9 as follows:

"9. The 1996 Act is very different from Arbitration Act, 1940. The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconstruction. In other words, the provisions of the 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions, it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act."

So here a difference is pointed out between the provisions of 1940 Act and provisions of 1996 Act and it is specifically observed that u/s 11 of 1996 Act a "Court" is not required to pass a judicial order appointing arbitrator. The important word is Court because sub-section (2) of section 20 of 1940 Act makes a provision that an application is to be filed before the Court for appointment of arbitrator even when there is no matter pending before the Court.

10. As against this sub-section (4) of section 11 of 1996 Act makes the provisions that the party has to make a request to the Chief Justice or any person or institution designated by him for appointment of arbitrator and accordingly as per sub-section (6) of section 11 of 1996 Act, the order of appointment of arbitrator is to be passed.

11. It is very clear that when an application is made to a Court then it becomes a judicial proceeding and then the question arises whether such a proceeding is

barred because of the provisions of section 69 of the Partnership Act. The Apex Court in the matter of Jagdish Chandra Gupta held that such a proceeding is barred u/s 69 of the Partnership Act, because the application which was made to the Court was a judicial enquiry within the meaning of section 8(2) of 1940 Act. So, if the application is as per the provisions of section 8(2) of the 1940 Act in view of this decision of the Supreme Court, it would not be maintainable if there is bar u/s 69 of the Partnership Act.

12. Section 69 of the Partnership Act contemplates a proceeding before the Court. No doubt, while interpreting the word "other proceedings" in sub-section (3) of section 69 of the Partnership Act, in Jagdish Chandra's case, the Apex Court has given a wide meaning to this term "other proceeding" and has not restricted it by applying the doctrine of ejusdem generis but even then the fact remains that such proceeding must be a judicial proceeding before a Court because sub-section (2) of section 69 of the Partnership Act, specifically makes a provision with respect to the proceeding before the Court. While the matter u/s 11 of 1996 Act is not before the Court but before the Chief Justice or his nominee. In the light of these circumstances, it will have to be held that the ruling of the Apex Court in the matter of Jagdish Chandra's case will not be applicable when there is a request made u/s 11 of the 1996 Act.

13. The difference is already pointed out between the provisions of section 11 of 1996 Act and the provisions of section 20 of the 1940 Act. u/s 20 of 1940 Act even though no proceeding is pending before the Court, an application can be made to the Court for appointment of an arbitrator. However, the word "Court" is not used in section 11 of 1996 Act. This is done with a purpose. The main purpose of 1996 Act is to provide for an alternative and speedy remedy for the redressal of the grievances without any intervention of the Court. The order, therefore, passed u/s 11 of the 1996 Act is not a judicial order but an administrative order. The Apex Court in the matter of Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., has specifically held that the order which is being passed by the Chief Justice or his nominee is an administrative order and not a judicial order. This ruling of the Apex Court was not before the learned Single Judge of Gauhati High Court. Certain observations made by the Apex Court in this ruling are required to be noted. In para No. 4 of the said judgment, the Apex Court has observed:

"A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act, 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny of a Court of law."

"The existing provisions in 1940 Act relating to arbitration through intervention of Court, when there is no suit pending or by order of the Court when there is a suit pending, have been removed."

"This being the legislative intent, it would be proper for the Chief Justice or his nominee just to appoint an arbitrator without wasting any time or without entertaining any contentious issue at that stage, by a party objecting to the appointment of an arbitrator."

"In fact, a Bench of this Court in *Sundaram Finance*, AIR 1996 S.C.W. 225 (supra) while considering the scope of section 9 of the Act has approached the problem from this perspective and incidental observation has been made that section 11 does not require the Court to pass a judicial order appointing arbitrator."

Therefore, in para Nos. 5 and 6 of the judgment the Apex Court has further observed as under:

"5. An analysis of different sub-sections of section 11 would indicate the character of the order, which the Chief Justice or his nominee passes under sub-section (6) of section 11. Sub-section (3) and sub-section (4) deals with cases, in which a party fails to appoint an arbitrator or the arbitrators fail to agree on the third arbitrator and thus seeks to avoid frustration or unreasonable delay in the matter of Constitution of the arbitral Tribunal. It authorises the Chief Justice of India or the Chief Justice of a High Court concerned, or any person or institution designated by him to make the appointment upon request of a party, if the other party was failed to appoint an arbitrator within thirty days from the receipt of a request to that and, sub-sections (4), (5) and (6) designedly use the expression "Chief Justice" in preference to a Court or other authority as in paragraphs (3) and (4) of Article 11 of the Model Law. Obviously for the reason that the Chief Justice acting in its administrative capacity, is expected to act quickly without encroaching on the requirements that only competent persons are appointed as arbitrators. Sub-section (4) does not lay down any time limit within which, the Chief Justice or his nominee, designated by him, has to make the appointment. It however expects that these functionaries would act promptly. While sub-sections (4) and (5) deal with removal of obstacles arising in the absence of agreement between the parties on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) seeks to remove obstacles arising when there is an agreed appointment procedure. These obstacles were identified in Clauses (a), (b) and (c) of sub-section (6). Sub-section (6) provides a cure to these problems by permitting the aggrieved party to request the Chief Justice or any person or institution designated by him to take the necessary measure i.e. to make the appointment, unless the agreement on the appointment procedure provides other means for securing the appointment. Sub-section (6), therefore, aims at removing any dead-lock or undue delay in the appointment process. This being the position, it is reasonable to hold that while discharging the functions under sub-section (6), the Chief Justice or his nominee will be acting in his administrative capacity and such a construction would subserve the very object of the new Arbitration Law.

6. The nature of the function performed by the Chief Justice being essentially to

aid the Constitution of Arbitration Tribunal immediately and the legislature having consciously chosen to confer the power on the Chief Justice and not a Court, it is apparent that the order passed by the Chief Justice or his nominee is an administrative order, as has been held by this Court in Ador Samia Private Limited Vs. Peekay Holdings Limited and Others, and the observations of this Court in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., also is quite appropriate and neither of those decisions require any re-consideration."

14. In view of this, it is very clear that when a request is made to the Chief Justice or his nominee for appointment of arbitrator is not "other proceeding" as contemplated under sub-section (3) of section 69 of the Partnership Act. This is merely a request made to the Chief Justice or to his nominee. The Chief Justice or his nominee has to step in for appointment of arbitrator only because the party to the agreement has failed to make the appointment of arbitrator even after demand by other party as per the terms of the agreement. So what is left to be done by one party to the agreement is being done by the Chief Justice or his nominee. So this step taken by the Chief Justice or his nominee cannot be considered as a proceeding. The provisions of the Act of 1996 are quite different than the provisions of Act of 1940 in this respect as observed by the Apex Court. I, therefore, do not find any substance in the stand taken by the respondents that the matter filed by the petitioner u/s 11 of the Act is not maintainable because of the provisions of section 69 of the Partnership Act.

15. It is already pointed out that the respondents have filed appearance and have raised objections but have nowhere denied that there is the partnership deed which provides for appointment of arbitrator in Clause Nos. 12 and 17 of the partnership agreement. It is also very clear that the dispute has arisen between the partners and therefore, by resorting to the provisions of Clauses 12 and 17 of the partnership agreement, an arbitrator has to be appointed. The petitioner has given three names and he had requested the respondents to select either of them or to suggest their own name for being appointed as arbitrator.

16. Today, the learned Counsel for the respondent has suggested three names for appointment as arbitrator. So after considering all six names, the learned Counsel for the parties have agreed upon the name of Shri A.H. Joshi, Advocate, for being appointed as arbitrator. Hence, Shri A.H. Joshi, is appointed arbitrator. Copy of this order be sent to him. He is to decide the dispute raised by the petitioner by his letter dated 2-8-2000 by taking into consideration the relevant provisions of 1996 Act.