

IN THE HIGH COURT OF DELHI AT NEW DELHI
ARB. P. NO.141/2007 & I.A. No.4898/2007

Date of decision : 07.05.2008

IN THE MATTER OF :

#SMT. PREM LATA Petitioner

! Through : Mr. Sandeep Sharma, Adv.

Versus

\$M/S DELUX FREIGHT CARRIERS (REGD.) & ORS.. Respondents

^ Through : Mr. Aly Mirza for R-2 & 4.
Mr. Niloy Das Gupta, Adv. for R-3 & 5.

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*** HON'BLE MS.JUSTICE HIMA KOHLI**

1. Whether Reporters of Local papers may be allowed to see the Judgment? No
2. To be referred to the Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

HIMA KOHLI, J. (ORAL)

The present petition is filed by the petitioner under Section 11 of the Arbitration & Conciliation Act, 1996 for appointment of an independent person as an Arbitrator to adjudicate the disputes between the petitioner and the respondents.

2. Counsel for the petitioner states that the petitioner and the respondents No. 2 to 5 are partners of the respondent No.1 firm. He submits that the last partnership deed governing

the partnership firm is dated 25th September, 2003 and that Clause 14 thereof contains the arbitration clause, which is reproduced hereinbelow :

“14. ARBITRATION

That in case of any dispute or difference which may arise in the ordinary course of business, amongst the partners or their authorized representatives as regards the constitution, meaning and effect of this deed or any part thereof or profits and losses of the business, or their rights and liabilities under this deed or the dissolution or winding up of the business or any other matter relating to the firm not provided for herein-before shall be referred to arbitration under the Indian Arbitration Act as in force.”

3. It is stated by the counsel for the petitioner that towards the end of the year 2001, certain issues and disputes arose between the petitioner and the respondents No.2 to 5 in respect of the affairs of the partnership firm. Efforts were made by the relatives and the well wishers of the parties to assist the parties in arriving at a settlement towards the end of January, 2002 and the matter was thereafter amicably resolved. It is stated that in terms of the agreement between the petitioner and the respondents No.2 to 5, the parties agreed that the partnership firm would continue till 30.6.2004 and the same would stand dissolved on the said date automatically. The aforesaid oral understanding was reduced into writing and

appropriate affidavits to that effect were drawn up by all the respondents.

4. It is further stated by the counsel for the petitioner that one of the original partners, Shri Shyam Lal Jain, died on 24.9.2003, pursuant to which his legal heirs were called for negotiations with other remaining partners so as to try and continue the aforesaid partnership business at least till the stipulated date, i.e. 30.6.2004. Accordingly, a fresh partnership deed was drawn on 25.9.2003, wherein the wife of the deceased Shri Shyam Lal Jain was substituted as a partner in place of her husband. He submits that thereafter, a decree of eviction was passed against the petitioner by the trial court in respect of the premises from which the partnership business was being run, as a result whereof, the petitioner served a legal notice on the respondents on 22.4.2004 calling upon the respondents to dissolve the partnership w.e.f. 30.6.2004.

5. As per the petitioner, the partnership firm stood dissolved w.e.f.30.6.2004. This was followed by a public notice dated 10.10.2004, which was duly published in The Statesman, Delhi edition on 22.10.2004. Thereafter, the petitioner served another notice dated 19.12.2006 upon the respondents invoking the arbitration clause and calling upon the respondents to agree on one of the names suggested by her for appointment as an Arbitrator. The aforesaid notice was duly replied to by the

respondent No.2, vide his letter dated 16.1.2007, wherein he refused to accept any demand for initiating any arbitral proceeding in the case and further stated that since the very basis of such an arbitration agreement is not available, no arbitration proceedings can be initiated.

6. Counsel for the petitioner states that in the light of the stand taken by the respondent No.2 and in view of failure on the part of the remaining respondents No.3 to 5 to respond to the aforesaid notice, the present petition has been filed.

7. Appearance is entered on behalf of the respondents No.2 and 4 and respondents No.3 and 5 and replies have been filed. Counsel for the respondents states that the present dispute between the parties has a chequered history inasmuch as there are certain other litigations pending interse the parties. He submits that the husband of the petitioner has also filed a substantive suit in respect of the use and occupation charges of the premises from where the partnership firm is being run, wherein the petitioner and all the other respondents are parties, and the same is stated to be pending disposal in this Court. He submits that by filing the present petition, the petitioner is seeking to initiate a parallel litigation with the respondents. He also submits that claims/disputes at items no.(e) and (f), as raised by the petitioner in the petition cannot be referred to the

Arbitrator, the same being subject matter of consideration in the aforesaid suit pending in this Court.

8. I have heard the parties and given a careful consideration to their submissions. Counsels for the respondents do not deny the execution of the partnership deed dated 25.9.2003 and the fact that the respondents are parties to the aforesaid partnership deed. They do not deny the fact that the parties are governed by an arbitration clause as contained in Clause 14 of the partnership deed. Receipt of the petitioner's legal notice dated 19.12.2006 is admitted. The respondents admit that they have not responded till date to the request of the petitioner for appointment of an agreed Arbitrator. It is also not a case where none of the claims raised by the petitioner are alive. In other words, the claims raised by the petitioner are not barred by limitation. The contention raised on behalf of the respondents that the claims raised by the petitioner cannot be entertained in view of the pendency of the suit instituted by her husband is untenable and cannot be treated as a bar on the right of the petitioner to invoke the arbitration clause governing the parties, in her own right as a partner of respondent No.1 firm.

9. In the case of Datar Switchgears Ltd. Versus Tata Finance Ltd. & Anr., reported in **IV (2000) CLT 191 (SC)=VII (2000) SLT 543=JT 2000 (Suppl.2) SC 226**, the Supreme Court has held that if the vacancy of an arbitrator is not filled till

the party approaches the Court and files a petition for appointment of an arbitrator by the designated authority of the Chief Justice of that Court under Section 11(6) of the Arbitration and Conciliation Act, the right to supply the vacancy by the opposite party stands extinguished. The ratio of the aforesaid case was approved by the Supreme Court in Punj Lloyed Ltd. Versus Petronet MHB Ltd., reported in **(2006) 2SCC 682** and it was again followed by a Division Bench of this Court in the case of Delkon (India) Pvt. Ltd. Versus G.M. Bharat Heavy Electricals Ltd., reported in **120 (2005) DLT 542 (DB)**.

10. In view of the aforesaid judgments, the respondents have lost their right to appoint an Arbitrator, they having failed to do so within 30 days from the date of receipt of the notice from the petitioner for appointment of an Arbitrator or even prior to the date of institution of the present petition.

11. Thus, this Court has no option but to allow the present petition filed by the petitioner. Accordingly, Shri G.P. Thareja (Retired Additional District Judge) is appointed as an Arbitrator to adjudicate the disputes between the parties. The parties are directed to appear before the Arbitrator on 21.5.2008 at 4.30 P.M. The fee of the learned Arbitrator, as fixed by him, shall be shared by the petitioner and the respondents No.2 to 5 in equal proportions, apart from the administrative expenses.

12. The parties are at liberty to raise all their disputes in respect of the partnership firm, as envisaged in the arbitration clause, before the learned Arbitrator. The respondents shall be at liberty to raise objections, if any, as to the maintainability of the claims made by the petitioner, as raised hereinabove. The petition as also the pending application are disposed of.

13. A copy of this order be forwarded by the Registry to the learned Arbitrator for information. The parties are also at liberty to inform the learned Arbitrator about this order.

MAY 07, 2008
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HIMA KOHLI,J