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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 481/2007

RAJENDRA DORIAN PUNJ

..... Petitioner

Through: Mr. Harish Malhotra, Senior
Advocate with Mr. Anupam
Sharma, Advocate.

versus

S.P. PUNJ & ORS.

..... Respondents

Through: Mr. Rajeev Sharma with
Mr. Uddyam Mukherjee,
Advocates for R-2, 4 and 5

CORAM: JUSTICE S. MURALIDHAR

ORDER

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13.12.2011

1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act') seeking the appointment of an Arbitrator to adjudicate the disputes between the Petitioner and the Respondent.

2. The Petitioner states that he is the son of late Shri V.P. Punj who by virtue of his Will dated 8th April 2005 had bequeathed all his assets, business and interests in favour of the Petitioner including entitlement of his claims against the Respondents.

3. The Petitioner states that Respondent Nos. 1 to 3 are brothers of father of the Petitioner and Respondent No. 4 is the son of Respondent No. 2.

Respondent No. 5 is a company managed, run and controlled by Respondent Nos. 2 and 4 who either directly or indirectly holds its majority shares.

4. It is stated that after death of late Pandit K.L. Punj, the grandfather of the Petitioner, differences arose in respect of ownership of the companies, firms, proprietorship concerns, factories and immovable properties between the members of the Punj family represented by the 7 sons of Pandit K.L. Punj. An agreement was executed on 11th July 1987 between the said 7 sons, also representing their respective family members whose names were mentioned in the Agreement, agreeing to refer their disputes to Mr. Suresh C. Mathur, a Chartered Accountant who would act as the Sole Arbitrator. The Petitioner's father late Shri V.P. Punj was also a party to the said agreement.

5. The learned Sole Arbitrator made an Award on 5th /6th August 1987. In the Award the learned Sole Arbitrator divided the legal heirs of late Pandit K.L. Punj into three categories as under:

- “Group I - Sh. S.P. Punj, Sh. Y.P. Punj & Sh. T.V.P. Punj
 all sons Sh. K.L. Punj.
- Group II - Sh. V.P. Punj, Sh. S.N.P. Punj, Sh. N.P. Punj,

and Sh. R.P. Punj all sons of Sh. K.L. Punj.
Group III - Smt. Dayawanit Punj W/o Late Sh. K.L. Punj
and Ms. Prem Jagjit Singh D/o Late Sh. K.L.
Punj.”

6. Although the Petitioner’s father was placed in Group II, he was given 8% financial share in the business of coating carried on by Group I at Kandla and Guna. Para 5 of the Award which is relevant in the said context reads as under:

“5. In Group-II, Shri VPP has agreed to have his financial interest with Group – I, to the extent of eight percent in the business carried on by Group-I in the business of Coating carried on at Kandla and Guna.

In case he decides otherwise at any time, his financial share with Group – I will be offered First to Group – I and he shall be entitled to receive back his share as per the Balance Sheet of the above said Companies. In other words, Mr. VPP’s share with Group-II stands reduced to this extent.”

7. In para 11 of the Award, it was stated by the learned Arbitrator as under:

“The above negotiated family settlement is hereby confirmed as an Award by me in my capacity as Arbitrator for disputes arising among these family members. The implementation and interpretation of this Award shall be undertaken by me and any dispute arising therefrom shall be referred to me by family

members for settlement and resolution. This Award and all subsequent clarification shall be binding on all the members of the family in confirmation of which they have signed thereunder.”

8. Admittedly, the above Award was made rule of Court and not challenged by anyone.

9. It is stated in the petition that Respondent No. 5 took over the running of the business of coating carried on at Kandla and Guna by M/s Punj Sons Pvt. Ltd. in terms of the Award and was therefore responsible to pay 8% share in the business of the Petitioner who had now become entitled to it in terms of the Will of his late father. By a letter dated 21st April 2005 the Petitioner’s father called upon Respondent No. 4 to pay him 8% shares in the company. When this letter was not replied, the Petitioner’s father sent another letter dated 25th May 2005. It is stated that by replies to the said letters Respondent No. 4 declined to accede to the request of the Petitioner’s father. Thereafter, the Petitioner’s father sent another letter dated 9th June 2005 insisting on his 8% share in the business of M/s Punj Sons Pvt. Ltd. being carried out at Kandla and Guna. The Petitioner’s father died on 8th October 2006. Thereafter, the Petitioner exchanged correspondence with the Respondents following up on the claims of his

father. Thereafter, through a notice dated 31st August 2007 the Petitioner invoked the arbitration clause. However, the Petitioner sought settlement of the dispute through independent Arbitrator since according to the Petitioner Shri S.C. Mathur was continuously working for the Respondents and therefore financially interested and not fit to act as an Arbitrator. The Petitioner nominated a retired judge of this Court as the Sole Arbitrator and required the Respondents to give their consent. By reply to the said notice, the Respondents denied the claims of the Petitioner. Thereafter, the present petition was filed.

10. In the present petition in para 5 it is stated as under:

“Shri S.C. Mathur was originally named as an arbitrator to adjudicate upon this matter, but since he is continuously working for the respondent, therefore, he is not a fit person to act as an Arbitrator as he is not expected to be unbiased and consequently a new arbitrator, preferably a retired Judge of this Court is liable to be appointed.”

11. The Respondents have in the reply pointed out that the present petition is not maintainable at all in the first place under Section 11 of the Act as no ingredient of the said provision was satisfied. Further, the petition itself was barred by limitation. The stand taken by the Respondents in the reply

is that the Award held late Shri V.P. Punj entitled to a 8% share in the company “to be incorporated to take over the Pipe Coathing business of Punj Sons Private Ltd. at Kandal and Guna.” Thereafter, it is stated in paras 12 and 13 of the reply as under:

“12. That according to the petitioner, what the award implies is that his father was entitled to 8% shareholding in the companies, which were to be incorporated to take over the business of pipe coating. As a matter of fact, two companies, i.e. PSL Holding Pvt. Limited and PSL Pipe Coaters Pvt. Ltd. were incorporated on 24th August, 1987 to take over the business of pipe coating. Both these companies were incorporated with respondent No. 4 and Ms. Sandhya Punj being the signatories to their respective memorandum of association.

13. That near about that time, the paternal grand mother of the petitioner and respondent No. 4 herein (mother of petitioner’s father and respondents No. 1, 2 & 3) suggested to the petitioner’s father that it would not be appropriate for him to have his business interests with both Group-1 and Group-2. In deference to her wishes, a settlement within the family was arrived at and petitioner’s father decided to be a part of Group-2 only. In this view of the matter, he did not take any step whatsoever to subscribe to the shares of the two newly formed companies.”

12. It is further stated that at no point in time the Petitioner sought to subscribe to the shares of the new company or to seek allotment thereof. It

was Respondent Nos. 2 to 4 who invested their own monies and mortgaged the personal properties for securing loans for the said company. It is alleged that the Petitioner's father, after nearly three years, decide to back track on his earlier decision and by a memo dated 28th September 1990 asked for the issuance of share scrips for the 8% shares in the pipe coating companies at Kandla and Guna. The said memo dated 28th September 1990 reads as under:

“September 28, 1990

TO : SCM
FROM : VPP

In terms of para 5 at page 2 of your award 6.8.87, which has since become a rule of the court, I am to receive 8% of the shares in the capital of the Pipecoating Companies in Kandla and Guna.

I understand that since the award following the companies have been formed:

- i) PSU Pipe Coaters Pvt. Ltd.
- ii) PSL Holding Pvt. Ltd.
- iii) and any other company undertaking this work.

I presume they have issued me 8% shares in these companies. Please arrange to have the share scrips delivered to me early enable me list them in my returns.

Sd/-
V.P. Punj”

13. The above letter was followed by a reminder dated 15th November 1990. Shri Ashok Punj, Respondent No. 4, replied to the above letter on 29th November 1990 as under:

“To: Shri V.P. Punj

Dear Sir,

I am indeed surprised to have received from Shri S.C. Mathur, his memo dated 21.11.1990, enclosing your Memo of 15.11.1990. Though I have not received your note of 28.9.1990 addressed to Shri S.C. Mathur, it apparently relates to 8% shares of the companies involved in pipe coating. I am indeed surprised at the contents of the Memo. I need not remind you that you had, immediately after Mr. S.C. Mathur's Award decided to sever your financial interest in Group I viz. to the extent of 8% in the business of coating carried on at Kandla and Guna and it was agreed that your 8% share as per the Balance Sheet which was drawn up and prepared then would be adjusted in the accounts between yourself and Group I.

It appears that this claim has been made by you for the first time now after a lapse of three years with some ulterior motives and probably in view of your disputes with the

members of Group II interse (*sic* interest). It is too late in the day for you to rescind from the agreement and there is no question of any share being given to you in the pipe coating companies.

I trust you will not precipitate the matter further.

Yours sincerely,
Sd/-
(ASHOK PUNJ)”

14. Shri V.P. Punj again wrote to Shri Ashok Punj on 5th December 1990 and 28th December 1990, which was replied by letters dated 22nd December 1990 and 11th January 1991. In the last mentioned letter Mr. Ashok Punj, *inter alia*, took the following stand:

“The very fact that despite your having full information of the formation of the companies, you never offered to pay your percentage of share or even inquire about the 8% contribution, clearly shows that the claim now made is an afterthought. Since the incorporation of the companies and your decision not to participate in Group-I, things have changed and, it is now, too late in the day for you to stake a claim.”

15. Shri Rajeev Sharma, learned counsel appearing for Respondent Nos. 2 to 4 reiterates the preliminary objection that the present petition is not

maintainable under Section 11 of the Act. Referring to Sections 11(2) and 11(6) of the Act, he submits that the parties had agreed, when the earlier Award was made rule of the Court, that it would be Shri S.C. Mathur who would act as an Arbitrator to adjudicate the disputes between the parties. Consequently, the question of the Petitioner nominating another Arbitrator and requiring concurrence of Respondent Nos. 2 to 4 did not arise. This petition was therefore misconceived.

16. Shri Sharma further points out that subsequent to the arbitral Award dated 5th/6th August 1987, which was made rule of the Court by an order dated 17th March 1988, late Shri V.P. Punj had given up his claim to the 8% share in the business of coating carried on at Kandla and Guna. After nearly three years he decided to backtrack and revive the claim which was negatived by Respondent Nos. 2 to 4. This was evident from the letters exchanged between the parties between 28th September 1990 and 11th January 1991. Late Shri V.P. Punj did not raise any claim thereafter till 21st April 2005. The present petition was purportedly as a follow up of the said claim made on 21st April 2005 which was clearly barred by limitation. Shri Sharma further submits that apart from the claims, the Petitioner being barred by limitation it was also not open to the Petitioner to doubt the impartiality of Shri S.C. Mathur and seek his substitution by

way of a petition under Section 11 of the Act. Even if he did he had to first take recourse to the procedure outlined under Section 12(2) of the Act read with Section 13 thereof and go before the learned Arbitrator with a proper application. Thereafter, in terms of Section 13(5) of the Act if such a decision went against the Petitioner he would have to await the passing of the Award and to thereafter raise it one of the grounds in the challenge to the Award under Section 34 of the Act. Shri Sharma relied on the decision of the Supreme Court in ***ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation Ltd. (2007) 5 SCC 304***. He further submitted that it was not open for the Petitioner to convert the present petition into one under Section 14 of the Act to seek intervention of the Court for the appointment of an Arbitrator.

17. Mr. Harish Malhotra, learned Senior counsel for the Petitioner, on the other hand, submitted that the correspondence exchanged between the parties between 28th September 1990 and 11th January 1991 was only regarding the distribution of the share scrips constituting the 8% share of the Petitioner's late father in the business of coating carried on by the companies at Kandla and Guna. These letters were not an exercise by the Petitioner's late father of the option provided to him under Clause 5 of the Arbitral Award dated 5th /6th August 1987. The first time the option was

exercised on 21st April 2005. The present petition under Section 11 of the Act was filed within three years thereafter and was therefore within time.

18. As regards the Petitioner's objection to Shri S.C. Mathur continuing to act as an Arbitrator, Shri Malhotra relied on the decisions of this Court in ***National Highway Authority of India v. K.K. Sarin 159 (2009) DLT 314*** and ***Alcove Industries Ltd. v. Oriental Structural Engineers Ltd. 2008 (1) Arb. LR 393 (Delhi)*** to submit that it was open to the Petitioner to seek intervention of the Court under Section 14 of the Act to appoint an Arbitrator where the Petitioner was able to demonstrate that the named Arbitrator, as agreed by the parties, would be unable to function impartially and *de jure* unable to discharge his functions as an Arbitrator in terms of Section 14(1)(a) of the Act.

19. Having considered the above submissions, this Court would first like to examine whether the preliminary objection raised by the Petitioner as regards the claim of the Petitioner being barred by limitation is sustainable.

20. Although Clause 5 of the Award dated 5th /6th August 1987 gave the Petitioner's late father an option of foregoing his 8% financial interest in

the business of coating carried on at Kandla and Guna by Group-I at any time and receive back his share “as per the Balance Sheet of the above said companies”, it appears that the assertion made by the Petitioner’s father in that behalf way back in September 1990 was disputed by the Respondent by the letter that soon followed. In his rejoinder, the Petitioner has not specifically denied the covenants in paras 12 and 13 of the reply. The only reply in the rejoinder to para 12 of the reply is that “the dispute is very much arbitratable in view of the terms of the award as stated in the petition which are not repeated for the sake of brevity.” As regards the reference in para 14 of the reply to the correspondence exchanged between the parties on 28th September 1990 and 15th November 1990, there is again no denial. A perusal of the copies of the letters exchanged between the late father of the Petitioner and Respondent No. 4 between 28th September 1990 and 11th January 1991 indicates that the very claim of the Petitioner’s father to his 8% interest in the companies that undertook coating business at Kandla and Guna was disputed by the Respondents by their letters dated 29th November, 22nd December 1990 and 11th January 1991. The extracted portion of the last mentioned letter is unambiguous that the entire claim of the Petitioner’s late father with reference to Para 5 of the Award was disputed. With there being an assertion of a claim and its denial by the Respondents way back

on 11th January 1991, the period of limitation as regards such claim must be held to have commenced with effect from 11th January 1991 itself. Clearly, the Petitioner's late father did not pursue that claim till 21st April 2005, even on the Petitioner's own showing. There is no explanation why the Petitioner's father chose to remain silent for over 14 years. When the Award dated 5th /6th August 1987 had been made rule of the Court by an order dated 17th March 1988 it was open to the Petitioner's late father, as a result of the denial of his claim by Respondent Nos. 2 to 4, to seek execution of the said Award in appropriate proceedings. This he did not do. Consequently, as far as the present case is concerned, the Petitioner's claim under Para 5 of the Award dated 5th /6th August 1987 is barred by limitation.

21. In that view of the matter, it is not necessary for this Court to deal with the other issues raised by the Respondents, viz., that petition is not as such maintainable under Section 11 of the Act or that the Petitioner cannot ask for a change of the Arbitrator even in a petition under Section 14 of the Act. However, as regards the latter submission, this Court notes that a Division Bench of this Court, in ***Progressive Career Academy P. Ltd. v. FIIT JEE 2011 (180) DLT 714***, has categorically ruled that "curial interference is not possible at the pre-Award stage on the allegations of

bias or impartiality of the Arbitral Tribunal” and that “the Single Benches who interfered with the progress of the proceedings of the Arbitral Tribunal in the pre-Award stage fell in error”. The Division Bench has impliedly held that the decisions in ***National Highway Authority of India v. K. K. Sarin*** (supra) and ***Alcove Industries Ltd. v. Oriental Structural Engineers Ltd.*** (supra) are no longer good law.

22. The petition is dismissed, but in the circumstances, with no order as to costs.

S. MURALIDHAR, J

DECEMBER 13, 2011

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