

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB. P. 309/2010

Reserved on: 31st January, 2012

Decision on: 8th February, 2012

M/S SUNRISE INDUSTRIES & ORS. Petitioners

Through: Mr. Pradeep Dhingra and
Mr. Sachin Sood, Advocates.

versus

M/S ROSHAN LAL AGGARWAL & ANR. Respondents

Through: Mr. Rajiv Aneja and
Mr. Asit Tewari, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

8.02.2012

1. This Petition under Section 11 of the Arbitration & Conciliation Act, 1996 ('Act') seeks the appointment of an arbitrator to adjudicate disputes between the Petitioners and the Respondents arising out of an Agency Agreement dated 22nd November 2008.

2. Petitioner No.1 is a partnership firm M/s Sunrise Industries. It is shown as being represented by its partners, Shri Raj Kumar Aggarwal and Shri Ravi Chander Aggarwal, Petitioners 2 and 3 respectively. Petitioner No. 4 is 'Shri Dharam Pal Gupta @ Shri Dharam Pal Aggarwal'. The case of the Petitioners is that the aforesaid Agency Agreement was first executed between the parties on 1st April 2006 and was renewed on 22nd November 2008. It contained an arbitration clause whereby "disputes arising between the parties referring to this agency agreement or vacating the premises or any other matters referred in this agreement shall be decided by arbitration."

3. The petition states that the Petitioners own property at Plot No. D-6, SMA, Cooperative Industrial Estate, G.T. Karnal Road, Delhi – 110033 (hereafter ‘the property in question’). It was allotted by the DDA to the Petitioner No.1 firm by a perpetual lease deed dated 10th March 1978. It is stated that sheds were constructed on the property in question and were fitted with electrical connections and sanitary fittings. It is stated that the Respondents, i.e., M/s. Roshan Lal Aggarwal (HUF) (Respondent No.1) and M/s. Prekom Industries (Respondent No. 2) a proprietary concern of which Shri Roshan Lal Aggarwal is the sole proprietor, had been handed over part-possession of the sheds in the property in question admeasuring about 3000 sq. ft. on the ground floor by the said Agency Agreement dated 22nd November 2008 for manufacturing steel fabrications. The Petitioners were appointed as the sole selling agent for selling all products manufactured in the premises. The price was to be fixed by the Respondents and the Petitioners were to get two per cent commission on the sale price of all goods sold by the Respondents. The Agreement was for the period from 22nd November 2008 till 21st March 2013.

4. It is stated that a family arrangement took place between the partners by a Family Settlement Deed (‘FSD’) dated 8th May 2010 which was confirmed by this Court by an order dated 11th May 2010 in CS (OS) No. 350 of 2009. In terms of Clause 17 of the FSD, Shri Raj Kumar Aggarwal and Shri Ravi Chander Aggarwal were authorised to initiate proceedings to get the property in question vacated. Thereafter a legal notice was sent on 20th September 2010 to the Respondents stating that the Agency Agreement stood terminated and that the Respondents should hand over vacant and peaceful possession of the portion under their occupation on or before 30th October 2010. The Petitioner also proposed Shri Alok Bhola, Advocate, to act as the sole Arbitrator.

5. The Respondents replied on 11th October 2010 rejecting the request for appointment of the said sole Arbitrator and denied that there was any dispute. The Respondents suggested the name of Shri B.L. Garg, retired Additional District Judge ('ADJ') as their Arbitrator. In the circumstances, the present petition was filed.

6. In response to the notice issued in this petition on 2nd November 2010, the Respondents have filed a reply in which there are several preliminary objections raised. The first is that Petitioner No.1 is not a registered firm. It is pointed out that the partnership deed dated 15th May 2010 enclosed with the petition is not registered either. It is stated that the present proceedings under Section 11 of the Act are, therefore, barred in terms of Section 69(2) of the Partnership Act, 1932 ('PA'). Secondly, it is pointed out that Petitioner Nos. 2, 3 and 5 are not signatories to the Agency Agreement dated 22nd November 2008 containing the arbitration clause. Consequently, Petitioner Nos. 2, 3 and 5 lack *locus standi* to file the present petition. Thirdly, it is submitted that the petition has not been signed, verified and instituted by persons duly authorized to represent the Petitioner No.1 firm. Particularly, it is pointed out that Petitioner Nos. 2 and 3 who have sworn affidavits in support of the petition were not partners of Petitioner No.1 on the date of the Agency Agreement i.e. 22nd November 2008. It is submitted that the Petitioners in their Partnership Deed dated 15th May 2010 have claimed to run the Petitioner No.1 firm but in Clauses 11 and 12 of the FSD have disclosed their intention to sell the property in question and reconstitute Petitioner No.1. It is stated that in view of the contradictory pleas, the petition ought to be dismissed.

7. Shri Pradeep Dhingra, learned counsel for the Petitioner submitted that the Respondents have conceded to the existence of the arbitration agreement and have, in fact, proposed the name of Shri B.L. Garg as sole

Arbitrator. Consequently, they ought not to object to the appointment of an arbitrator by this Court. Secondly, it is submitted that under Section 11(6) of the Act, all that has to be seen is whether there is a valid arbitration clause. The other disputes as regards the partnership firm and its status can be decided by the learned Arbitrator. Reliance is placed on judgment in ***Ashok Traders v. Gurumukh Das Saluja*, AIR 2004 SC 1433**. It is submitted that in terms of the Delhi Partnership (Registration of Firms) Rules, 1972 a partnership can be said to have been dissolved only when the name of the firm is struck off from the register of firms. That event is yet to occur. Relying on the judgment in ***Sharad Vasant Kotak v. Ramniklal Mohanlal Chawda* AIR 1998 SC 877**, it is submitted that the change in the partnership due to induction of legal heirs, after the death of a partner, does not affect the registration of the firm. It is then submitted that a statutory right of seeking eviction of an unauthorized occupant from the premises in question can be sought to be enforced even by an unregistered firm. Reliance is placed on the decision in ***Haldiram Bhujawala v. Anand Kumar Deepak Kumar* AIR 2000 SC 1287**. It is stated that even if a partnership firm is dissolved, it can sue for its property and Section 69(2) or Section 9(3) would not come in the way of such proceedings being instituted. Reliance is placed on the decisions in ***Kamal Pushp Enterprises v. D.R. Construction Co.* (2000) 6 SCC 659** and ***Raptakos Brett & Co. Ltd. v. Ganesh Property* (1998) 7 SCC 184**. It is sought to be explained that Shri Dharam Pal Gupta is also known as Shri Dharam Pal Aggarwal and has throughout remained a partner of the Petitioner No.1 firm and, therefore, can maintain the present petition on behalf of the firm. It is submitted that a mere change in the constitution of the firm does not affect its essential character as a registered partnership firm. Reference is made to the decision in ***International Business Corporation v. Bhagirath Dolkheria*, 159 (2009) DLT 145**. Lastly, it is submitted that another family partnership concern of the Petitioner M/s. Gauri Mal Shyam Sunder had

filed Arbitration Petition No. 310 of 2010 in this Court against certain other licensees with whom agency agreements had also been entered into. By a judgment dated 27th July 2007, this Court appointed an Arbitrator in terms of Clause 14 in those proceedings.

8. Shri Rajiv Aneja, learned counsel for the Respondent, on the other hand, pointed out that the pleas of the Petitioners were inconsistent and contradictory. In a partnership deed dated 2nd July 2001, between Petitioner No.4 Shri Dharam Pal Aggarwal and his two sons Shri Rajeev Kumar Aggarwal and Shri Brij Mohan Aggarwal it was stated that the earlier partnership stood dissolved under Section 42 (c) PA after the death of Shri Shyam Sunder Aggarwal, father of Shri Dharam Pal Aggarwal and that a new firm, in the same name M/s. Sunrise Industries was being constituted. Admittedly that new firm was not registered. It is submitted that therefore the bar under Section 69 PA applies and the said firm cannot maintain the present petition or any other suit or proceedings in a court. Reference is made to the decisions in ***Ess Vee Traders v. Ambuja Cement Rajasthan Limited 2006 VIII AD (Delhi) 164***, ***Kanahi Ram v. Kartar Singh 72 (1998) DLT 740*** and ***S Parvathammal v. Commissioner of Income-Tax 1984 Law Suit (Mad) 3***. It is submitted that the entire petition is *mala fide* since there were *inter se* disputes between the partners themselves with criminal cases being instituted by one faction of the family against the other. With there being highly disputed questions of fact, even as to the validity of the partnership deed, the present petition was *per se* not maintainable.

9. The first issue that arises for consideration is the status of Petitioner No.1 firm, M/s. Sunrise Industries as that in turn will determine if the present petition can be maintained by it. The documents placed on record by the Petitioner show that initially Petitioner No.1 firm was registered on

4th June 1982. A copy of the extract of Form-A in the Register of Firms shows that the firm had two partners, Shri Shyam Sunder and Shri Dharam Pal. The other curious feature is that Shri Dharam Pal Aggarwal is arrayed as Petitioner No.4 with the alias of Shri Dharam Pal Gupta. Counsel for the Petitioners suggests that these names of Petitioner No.4 can and are used interchangeably. Be that as it may, an affidavit dated 21st July 2011 has been filed by Shri Dharam Pal Gupta. According to this affidavit a partnership deed dated 1st April 1982 was executed by Shri Shyam Sunder Gauri Mal (father of Shri Dharam Pal Gupta) and Shri Dharam Pal Gupta with a shareholding of 60% and 40%. This deed was registered on 4th June 1982. It is then stated that “for the purpose of effective tax management” the same arrangement continued till the death of Shri Shyam Sunder Aggarwal (who presumably used an alternative name of Shri Shyam Sunder Gauri Mal) on 28th June 2001. It is stated that Shri Shyam Sunder Aggarwal left behind his wife and three sons, namely, Shri Dharam Pal Gupta, Shri Raj Kumar Aggarwal and Shri Ravi Chander Aggarwal. It is then stated in para 3.5 of the affidavit as under:

“That not knowing, that my father has left a will, unknowingly, I wrongly entered into a partnership deed dated 2nd day of July, 2001, wherein I wrongly against the provisions of Hindu Succession Act, as well as due to my ignorance about will, inserted my sons as partners and when this mistake was realized, the said deed dated 2nd July, 2001 was replaced with Deed dated 15th May, 2010, to give effect to the, will of Late Sh. Shyam Sunder Aggarwal.”

10. It is then claimed that the agency agreement was entered into with the Respondent on 1st April 2006 for a period of three years which was renewed on 22nd November 2008.

11. A perusal of the partnership deed dated 2nd July 2001 indicates that it was between Shri Dharam Pal Aggarwal (as party No.1) and his sons Shri Rajiv Kumar Aggarwal, Shri Brij Mohan Aggarwal and Shri Naveen

Kumar Aggarwal. Two recitals in the deed which are relevant read as under:

“Whereas parties no. one above had been carrying on business of indenting commission, knitting wools and engineering goods and leasing, etc. under the name & style of M/s. Sunrise Industries, at no.355, Press Street, Sadar Bazar, Delhi and with its factory at no.D-6, SMA Cooperative Industrial Estate, G.T. Karnal Road, Delhi – 33. In partnership with Shri Shyam Sunder Aggarwal, son of Late Shri Gaurimal Aggarwal, R/o G-98, Ashok Vihar, Phase-I, Delhi under deed of partnership dated 01.04.1999.

And whereas the said Shri Shyam Sunder Aggarwal died on 28.06.2011 the partnership stood dissolved on that date under section 42(c) of the Indian Partnership Act, 1932.

And whereas the surviving partner has constituted a new partnership deed along with partners Shri Rajeev Kumar Aggarwal, Shri Brij Mohan Aggarwal and Shri Naveen Kumar Aggarwal the partners of 2nd and 3rd and 4th parts and have also agree to take over all the assets and liabilities of the business of the old firm M/s. Sunrise Industries, at no.355, Press Street, Sadar Bazar, Delhi and with its factory at no.D-6, SMA Cooperative Industrial Estate, G.T. Karnal Road, Delhi – 33 as a going concern and to continue the said business as such in the partnership w.e.f. today the 2nd day of July, 2001 on the terms and conditions mutually agreed them and now appearing herein below.”

12. The above ‘newly’ constituted firm was admittedly not a registered one. It is clear from a reading of the above partnership deed that reference was made to Section 42(c) of the PA claiming dissolution of the erstwhile partnership firm of the same name M/s. Sunrise Industries with the demise of Shri Shyam Sunder Aggarwal. It was the above firm, which was re-constituted, that was a party to the agency agreement dated 1st June 2006 which was renewed on 22nd November 2008. Clearly therefore, at the time when the agency agreement was executed, the firm was not a registered one. In fact, the agreement of agency clearly states that “M/s. Sunrise Industries is represented by its Managing Partner, Dharam Pal Aggarwal,

who is authorized to bind the firm.” As of that date, even according to Shri Dharam Pal Aggarwal, this was a newly constituted firm in place of the erstwhile registered one which stood dissolved on the death of Shri Shyam Sunder Aggarwal. In other words the firm that entered into the agency agreement was not the same firm which stood registered on 4th June 1982. Clearly therefore the bar under Section 69 (2) PA was attracted as far as the institution of the present proceedings by an unregistered firm of doubtful validity is concerned. The subsequent denouncement of the constitution of the ‘new’ firm by the partnership deed dated 2nd July 2001 as a ‘mistake’ and “against the provisions of Hindu Succession Act” and due to the “ignorance” of Shri Dharam Pal Gupta alias Shri Dharam Pal Aggarwal, only makes the problem worse for the Petitioners.

13. It is not clear whether the family settlement subsequently arrived at in May 2010 had the effect of reviving the erstwhile firm that was registered and which was apparently dissolved in terms of the partnership deed dated 2nd July 2001, which Shri Dharam Pal Gupta now terms a ‘mistake’. Whether this is a self-serving plea to get out of a difficult situation will require a detailed examination and perhaps is a matter for evidence. It is also interesting that in the body of this very affidavit of Shri Dharam Pal Gupta dated 20th July 2011, in para 3.13 is set out a “List of Additional Documents” filed on behalf of the Petitioners’ and Sl. No. 6 states ‘After death of Father, Mr. Dharam Pal fraudulently entered into a deed with his son against the Fathers Will.’ Further, Sl. No.8 describes the partnership deed dated 15th May 2010 as “Fresh Deed to give effect to Fathers Will and cancelling the fraudulent deed dated 2.07.2001.” The said ‘fresh partnership deed’ dated 15th May 2010 in para 5 recites an admission by Dharam Pal Gupta @ Dharam Pal Aggarwal that he had entered into a partnership deed dated 2nd July 2001 in violation of the Will by Late Shyam Sunder Aggarwal. Thereafter, the said deed states “that the partnership

business has been and shall continue to be carried on under the name and style of M/s. Sunrise Industries.” Whether the erstwhile firm can be sought to be revived in this manner, with all manner of self-contradictory and self-inculpatory statements of questionable legality will again be a matter for evidence. Suffice it to say, it is unsafe for this Court to proceed to act on such documents and statements and grant the relief of appointment of an arbitrator under Section 11 of the Act.

14. All of the above statements and documents also give rise to disputed questions of fact concerning the status of Petitioner No.1 firm. The cases cited by the learned counsel for the Petitioners do not help his submission that notwithstanding the fact that Shri Dharam Pal Aggarwal, the only surviving partner of the erstwhile Petitioner No.1 firm that was registered, pronounced the said firm as ‘dissolved’ and constituted a new firm in the same name with his own sons as partners, the said ‘mistake’ could somehow be rectified and the erstwhile firm revived. Added to this is the fact that Petitioner Nos. 2, 3 and 5 were not parties to the Agency Agreement dated 22nd November 2008 containing the arbitration clause and therefore cannot seek to maintain a petition under Section 11 of the Act invoking the said clause.

15. Under Section 11 of the Act, the Court is not bound to appoint an arbitrator notwithstanding the legal status and *locus standi* of the petitioners seeking such relief. It is necessary for the Court to examine the validity of the arbitration agreement that is pleaded and be *prima facie* satisfied that it is a legally tenable document on the basis of which an arbitrator can be appointed. In the present case, this requirement is not satisfied.

16. The petition is accordingly dismissed. This will, however, not preclude

all or any of the Petitioners from seeking other appropriate remedies that may be available to them in accordance with law.

S. MURALIDHAR, J.

February 8, 2012

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