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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION PETITION NO. 246 OF 2018
WITH
COMM DIVISION NOTICE OF MOTION NO. 460 OF 2019
AND
IPA NO. 156 OF 2018
AND
COMM ARBITRATION APPLICATION NO. 43 OF 2019
AND
IPA NO. 29 OF 2019

Sadiqhusain Shaikh Shamsuddin Pachorawala ...Petitioner
Versus
Shabbir Shaikh Shamsuddin Pachorawala & Ors ...Respondents

Mr Vishal Kanade, *i/b Dave & Co., for the Petitioner/Applicant.*
Mr Shabbir S Pachorawala, *Respondent No. 1, in person.*
Mr Tejesh Dande, *Amicus Curaie, is present.*

CORAM: G.S. PATEL, J.
DATED: 26th November 2019

PC:-

1. The delay in filing the Section 11 petition is condoned.

2. The petitioner and the 1st respondent are brothers. The dispute is ostensibly about a partnership firm called Raj Bucket Factory. I had occasion to deal with some of these long-standing disputes some time ago in the context of appellate side work coming up from the City Civil Court. Those orders are not relevant today, although the 1st respondent has attempted to link the two litigations.

3. Mr Kanade for the petitioner points out that the petitioner has filed Arbitration Petition No. 246 of 2018 for interim relief under Section 9. In parallel, the Arbitration Application No. 43 of 2019 under Section 11 of the Arbitration Act invokes clause 18 at typed pages 34A and 35A of a deed of partnership dated 26th May 1978.

4. There is an order of 15th February 2018 which has held the field. By this order the Court said that the immovable property may be handed over in view of the undertakings given by the 1st and 2nd respondents to their Counsel that upon taking possession of this they would maintain status quo until 22nd February 2018.[1]

5. The 1st respondent appears in person. On 4th June 2019 this Court requested the assistance of Mr Tejesh Dande as amicus. I have heard him as well today and I must express gratitude for his assistance.

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1 The incorrect title and reference number was corrected on 6th December 2018. The order was passed in the present Commercial Arbitration Petition No. 246 of 2018.

6. The partnership deed and the signatures on it are undisputed. The petitioner and the 1st respondent are both signatories to it. That it contains an arbitration clause is also not in dispute. What the 1st respondent argues is that this firm, Raj Bucket Factory, constituted under this Deed of Partnership is no longer in existence. It was dissolved in 1991. At that time, he submits, the petitioner knew of the dissolution and accepted it. The petitioner did not invoke the arbitration clause then. He cannot do so now. There is now a subsequent firm of which neither the petitioner nor his son are partners and, therefore, there is no surviving arbitration clause whatsoever.

7. The argument that the arbitration agreement does not survive a call for dissolution is obviously not one that can be accepted. Mr Dande is at some pains to point out that in fact it was the petitioner himself who by an Advocate's letter dated 10th July 1991 said the very same thing. What an advocate says in correspondence, and for what reason, is not always legally sustainable. These are, after all, only contentions. An advocate may say different things at different times depending on what instructions currently are and certainly I cannot see how this can be used to affirmatively hold that there exists no arbitration agreement.

8. There is a serious contention that all the claims made by the petitioner are barred by limitation. That is of course a matter to be decided in arbitration and all those contentions will have to be left open.

9. The 1st respondent also argues that the current disputes raised by the petitioner are not arbitrable. Those are considerations clearly within the meaning of Section 16 of the Arbitration and Conciliation Act 1996.

10. To assist the Court, Mr Dande draws attention to the relevant averments in paragraph 8 at page 10 of the arbitration application. Here, the applicant says that the cause of action for filing the present application arose only in September 2017 when the applicant allegedly learnt for the first time that the firm had been surreptitiously and fraudulently dissolved and the applicant was deprived of his share in the firm. This is the basis on which it is claimed that this application is filed in time. With this, Mr Dande draws attention to the recent judgment of the Supreme Court in *Geo Miller & Co Pvt Ltd v Chairman, Rajasthan Vidyut Utpadak Nigam Limited*[2] decided recently on 3rd September 2019. That case inter alia involved questions of the applicable statute (viz., the 1940 Act or the 1996 Act), and whether the arbitration applications were time-barred. The Supreme Court held that an application under Section 11 of the Arbitration Act is not exempted or immune from the application of the Limitation Act. It returned this finding in a certain factual context. Referring to settled law, the Supreme Court held that an arbitration application can be held to be time-barred if it is shown that the applicant has been indolent and has slept over his rights beyond the period of limitation. In paragraph 19, the three-Judge Bench of the Supreme Court in *Geo Miller* said that a different scheme was evolved under the 1996 Act but the same principles that

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2 2019 SCC OnLine SC 1137.

governed Section 8 and 20 of the earlier 1940 Act continue to govern Section 11(6) of the 1996 Act. Applying these principles, the Supreme Court agreed with the High Court that the applicant's cause of action relating to certain work orders of 1979 and 1980 arose on 8th February 1983 when a final bill under the contract was handed over to the respondent, and became due. Thereafter, all that the respondent did was to enter into correspondence. This would not save the limitation. This is materially different from the pleadings in paragraph 8 of the present arbitration application where the applicant says that he did not even know of the earlier dissolution until 2017; and that his cause of action only arose in 2017.

11. Now it is open to the respondent to dislodge this entire case. But that will undoubtedly require evidence. That is not something I can or am even entitled to do in a Section 11 proceeding, especially since the Section 11(6-A) mandate, as the Supreme Court has held, will continue to apply whether or not the 2019 amendment to that Section is brought into force. The best, therefore, that can be done in fairness to the 1st respondent is to specifically leave all contentions open for arbitration including as to maintainability, arbitrability, limitation, abandonment, waiver, estoppel and other defences as may be available in law. On facts, it is simply not possible to conclude without evidence that the petitioner knew of the 1991 dissolution, or abandoned the arbitration agreement, or that his arbitration application is time-barred.

12. There is a final plea by Mr Dande on behalf of the 1st respondent. Mr Kanade joins Mr Dande in this plea. Both sides believe that the costs of arbitration will undoubtedly be very high. There is already a schedule of fees stipulated in the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018. Both sides request the appointment of a Junior Counsel at our Bar, and submit that the court should enter a request in this order to the learned Sole Arbitrator to accept a schedule or rate of fees below those prescribed in the Rules.

13. Having regard to the nature of the controversy, I will request Mr Kamal Khata, subject to his availability and willingness, to act as a sole arbitrator.

(a) **Appointment of Arbitrator**: Mr Kamal Khata, learned Advocate of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties.

(b) **Communication to Arbitrator of this order**:

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from today of the order being uploaded.

(ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned

Sole Arbitrator at the following postal and email addresses:

Arbitrator	**Mr Kamal Khata, Advocate.**
Address	Techno Heritage Building, 2nd floor, 76, Nagindas Master Road, Kala Ghoda, Fort, Mumbai 400 023
Mobile	+91 98200 88706
Email	kamal.khata@gmail.com

(c) **Disclosure**: The learned Sole Arbitrator is requested to forward his statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Prothonotary and Senior Master of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently in advance of his entering upon the reference to his arbitration. That statement will be retained by the Prothonotary & Senior Master on the file of this application. Copies will be given to both sides.

(d) **Appearance before the Arbitrator**: Parties will appear before the learned Sole Arbitrator on such date and at such place as he nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.

(e) **Contact/communication information of the parties**: Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator

within one week of this order being uploaded. The information is to include a valid and functional email address.

(f) **Section 16 application**: The respondent is at liberty to raise all questions of jurisdiction and competence within the meaning of section 16 of the Arbitration Act. All contentions are left open.

(g) **Interim Application/s**:

(i) Liberty to both sides parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator. Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.

(ii) The present petition under Section 9 will, with a continuance of 15th February 2018 order, be treated as an application under Section 17 of the Arbitration and Conciliation Act 1996. The learned sole arbitrator is requested to dispose of the same at the earliest possible and preferably within four weeks from the date the learned sole arbitrator entered upon the reference to his arbitration. That order will continue pending

disposal and for a period of three weeks thereafter.

(iii) All affidavits filed in the Section 9 petition will be treated as affidavits filed in the Section 17 application. Liberty to apply to the learned Sole Arbitrator for leave to file further affidavits.

(iv) The learned Sole Arbitrator is requested to dispose of all interim applications at the earliest.

(h) **Fees**: The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018, subject to a request to the learned Sole Arbitrator to accept a lower scale having regard to what is set out above.

(i) **Sharing of costs and fees**: Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.

(j) **Consent to an extension if thought necessary**. Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.

(k) **Venue and seat of arbitration**: Parties agree that the venue and seat of the arbitration will be in Mumbai.

14. The application and petition are disposed of in these terms. No costs.

15. In view of this, all pending applications are infructuous and disposed of accordingly.

(G. S. PATEL, J)