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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 13th December, 2018

Date of decision : 15th January, 2019

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O.M.P. 1405/2014

MST. SHAHNAZ BEGUM

..... Petitioner

Through: Mr. Anil K. Khaware & Mr. Virendra
Singh, Advocates (M-9810027839)

versus

MOHD. NASEEM & ORS.

..... Respondents

Through: Mr. Rahul Sharma, Ms. Jyoti Dutt
Sharma, Mr. C.K. Bhatt & Mr. Bilal
Ali, Advocates for R-1, 6, 7 to 9, 11,
18, 19, 20, 24 & 25 (M-9811555971).
Mr. Vishnu Mehra & Mr. Garva
Dhyani, Advocates for R-2 to 5, 10,
12, 22 & 23 (M-9811059674)
Mr. Anand Jha, Advocate for R-13 to
17 (M-98101476840).

CORAM:

JUSTICE PRATHIBA M. SINGH
JUDGMENT

Prathiba M. Singh, J.

1. The present petition by Mst. Shahnaz Begum has been preferred under Section 14 of the Arbitration and Conciliation Act, 1996 for termination of the mandate of the Sole Arbitrator, Sh. L.N. Malik, Chartered Accountant, and seeks substitution of the said Arbitrator. The prayers sought in the present petition are as under:-

*“In the light of the above this hon’ble court may be
pleased to:-*

- (i) *terminate the mandate of sole Arbitrator Shri L.N.
Malik, Chartered Accountant as no fair hearing is
accorded to the petitioner and no procedure is being*

followed, no materials/documents and no arbitral records are made available to petitioner, no inspection are granted and the hearings are conducted in secrecy and clandestine manner and serious detriment is being caused to the petitioner and as such the ld arbitrator cannot be allowed to proceed in this manner and the conduct of the arbitrator has rendered the ld Arbitrator de jure and de facto incapable of conducting the arbitral proceedings and substituted arbitrator may be appointed in his place.

- (ii) hold that the ld Sole Arbitrator has rendered himself de jure incapable of conducting the arbitral proceedings and hence termination of mandate of sole arbitrator is necessary and it be held accordingly.*
- (iii) this hon'ble court may also be pleased to direct that ld arbitrator and other respondents to render the complete accounts to the petitioner in respect of the firm B.Shahbuddin & Co. since 1997 i.e at the time of reconstitution of firm and subsequent dissolution of firm till date depicting the shares and distribution with specifics and complete particulars with existing assets and current assets and the details of disposal of assets and disbursement on the partners/legal heirs and discharge of liability as debt of the firm, transfer and exchange of assets between partners of the firm or to any other entity and flow of fund in this regard, and*
- (iv) pass such other order as may be deemed necessary and expedient in the interest of justice."*

2. The background of the disputes that arise in the present application are that one M/s. Baba Shahabuddin & Co. was established in the year 1949 by Late Mr. Babu Shahabuddin, who had four sons namely, Sheikh Noor Mohammad, Sheikh Dost Mohammad, Sheikh Ghosh Mohammad and Sheikh Faiz Mohammad. The partnership firm thus consisted of five partners. The firm was reconstituted from time to time due to the demise/retirement of various partners and as on 22nd December, 1997, the

following were the partners:-

S.N	Name	Percentage
1.	Sheikh Dost Mohammad	15%
2.	Sheikh Faiz Mohammad	10%
3.	Mohd Shakeel	10%
4.	Mohd Gulzar	17.5%*
5.	Sheikh Ghosh Mohd	15%
6.	Mohd Shakir	10%
7.	Mohd Shain	7%
8.	Mohd Naseem	15.5%*

(indicated devolving of share of Late Sheikh Noor Mohammad as devolved equally on the legal heirs of Late Sheikh Noor Mohammad)*

The firm was constituted upto 31st March, 1999.

3. The Petitioner belongs to the branch of Sheikh Noor Mohammad and has signed the Family settlement. After his demise, his branch was represented by Sheikh Mohd Gulzar. Thereafter this branch was represented by Mohd. Iqbal. After the demise of Mohd. Iqbal in 2014, Mohd. Naseem started to represent this branch. The Petitioner has an objection to Mohd. Naseem's representation of the branch of Late Sheikh Noor Mohammad.

4. Disputes had arisen between the parties who formed part of the firm and CS(OS) No. 1702/1999 came to be filed before this Court. A preliminary decree dated 27th August, 2003 was passed for dissolution of the partnership firm with effect from 1st April, 1999. Even after the preliminary decree was passed, disputes arose in respect of distribution of the assets amongst the various members, constituting different branches of the firm. A

settlement took place in October 2006 which was drawn up as a Memorandum of Family Settlement dated 18th October, 2006.

5. The said Settlement records the various heirs of the original partners, i.e. sons of Shahabuddin. It also records the various assets that are to fall in the share of each of the parties. Distribution of the immovable assets was also agreed to. Clause 10 of the Memorandum is relevant and is set out herein below: -

“10. In respect of the following moveable and immovable assets of the firm, B.Shahabuddin & Co., the Parties agreed as follows:

(i) Factory, Land and Building at D-33, TTC Industrial Area, Turbe Telephone Exchange Road, Navi Mumbai.

(ii) Office at 56, World Trade Centre, Cuffe Parade Colaba, Mumbai.

(iii) Godown at Champasarai Mor, Siliguri.

shall be sold and all proceeds of the sale would be credited to the account of B.Shahabuddin & Co. for (a) discharge of all known third party liabilities of the firm; and thereafter (b) for distribution amongst partners and legal heirs of deceased partners in accordance to their shares in their respective capital accounts in B. Shahabuddin & Co. The Parties agreed that the sale of all the assets would be made by mutual consent of the four families represented respectively by Mohd. Shahid, Mohd. Faisel, Mohd. Gulzar and Sheikh Ghos Mohd. If the Parties cannot mutually agree, the sale to a particular purchaser, the Parties would advertise and call for bids and the same will be sold to the highest bidder.”

6. The said Family Settlement had an arbitration clause, which reads as under: -

“ARBITRATION

23. The Parties agreed and hereby agree that in the event of any dispute or difference in relation to or arising out of the Family Settlement including this Memorandum, all such disputes and differences shall be referred to the sole arbitration of Mr. L.N. Malik, Chartered Accountant having his office presently at 18/13, Western Extension Area, Karol Bagh, Delhi. The venue of arbitration shall be New Delhi. The award of the sole arbitrator shall be final and binding between the Parties. The Parties further agreed that more than one reference may be made to the sole arbitrator as may be necessary. The arbitration shall be governed by the Arbitration & Conciliation Act, 1996. The Parties or each of them shall be entitled to seek specific performance of the Family Settlement as recorded in this Memorandum. The sole arbitrator shall be entitled to decide his own procedure and it shall not be necessary for him to give any reason for his award but any award must be consistent with the spirit of the Family Settlement as recorded in this Memorandum.”

7. Pursuant to the Memorandum of Family Settlement, a decree was passed after recording the same on 2nd November, 2006, in the pending suit.

8. According to the Petitioner, after the execution of the Family Settlement, there has been no fair sale and distribution of assets and accounts in respect of the sale and distribution have not been fully rendered. The Petitioner has received some share but the same is not in any manner proportionate to the large amount of assets which the firm, B.Shahabuddin & Co. owned. The Petitioner, sometime in 2014 came to know that the

named Arbitrator, Sh. L.N. Malik, who was also the Chartered Accountant of the firm, had started holding various proceedings and passing orders in respect of the said proceedings. It is the Petitioner's case that not all the wings of the family were duly represented before Mr. Malik. Moreover, when Mohammad Gulzar expired on 23rd June, 2010, arbitration was invoked in April 2014, and none of the notices were properly served upon the Petitioner. The Petitioner raised repeated protests against Mohd. Naseem being nominated as the representative of the family of Late Sheikh Noor Mohammad. The Petitioner issued a notice to the learned Arbitrator on 3rd June, 2014 which reads as under:

"To
Shri L.N MALIK,
SOLE ARBITRATOR
18/13, WEA, KAROL BAGH
NEW DELHI-110 005

Dear Sir,

*We are concerned about our clients **Shahnaj Begum** and **Mehajabeen Begum** (S.N 6 and 10 respectively) as per purported letter of invocation of Arbitration captioned as **Mohd Naseem and Mst Shaheen Begum & Ors.** It appears from a purported letter of invocation of alleged arbitration that the same is invoked by Mohd Naseem and a letter to that effect was issued by Mohd Naseem and also from your goodself on 10th May 2014. The date of arbitration was communicated as 12th May 2014. Though the time fixed was 11 AM, however, it was taken up at 5 PM.*

It is pertinent to mention that on the date of hearing i.e 12th May 2014 our associate counsels appeared before you on behalf of aforesaid clients and filed vakalatnama on behalf of our clients. Interim application seeking the details were also filed and it was also emphasized that no authority is being

*bestowed on any person or persons by our clients in respect of their claim. However, whereas vakalatnama and the application was taken on record still no order sheet was prepared and it was stated by Id Arbitrator that vakalatnama shall have to contain further details. Let it be stated that vakalatnama on behalf of our clients is filed based on the letter of invocation by Mohd Naseem and as per the names of our clients shown in the list of the parties and in accordance with the serial numbers. It is thus stated that the vakalatnama is perfectly in order and there is no need or occasion for filing any other vakalatnama. We are authorized by our clients above- named in terms of letter of invocation of arbitration and that is adequate. In fact on that day itself i.e on May 12th 2014, after conclusion of hearing, E Mail was sent to your goodself on your ID allenmalik@hotmail.com which has not been responded to by you so far. A copy of the print out of the mail testifying the attached application and the message is enclosed herewith for ready reference as **ANNEXURE A**. To maintain probity in the proceedings we request your goodself to do the following:-*

- (i) Provide certified copy of complete arbitral record as on today containing each and every notices/references/pleadings, agreement containing arbitration clause, high court records which may have been in the record of this tribunal including applications, replies, documents, orders etc. and cost toward that may be intimated to us for remittance.*
- (ii) Simultaneous to providing complete arbitral record please also communicate the next date of hearing*
- (iii) Permit inspection of entire arbitral record by us*

The perusal of entire arbitral records are must as our clients are not aware of any details in this regard other than the letter of invocation without any documents and only pursuant thereto our clients had caused appearance through counsels on 12th May 2014.

Our client has already filed an interim application raising some preliminary issues and seeking documents and specifically emphasizing that it is to be ascertained as to whether the arbitral tribunal is properly constituted and in sync with purported agreement. Our clients are not aware of terms of agreement in this regard as the same has never been provided to our clients and our clients are never made aware about any such agreement or arbitral proceedings. Upon receipt of the terms of agreement and complete arbitral record, comprehensive application and objections if necessary shall be filed, since our client has no idea about arbitration and the record of it. If the arbitral proceedings are ongoing even on the date before the present invocation, then, the present invocation by Mohd Naseem may be untenable as there cannot be multiple invocation of arbitration in ongoing arbitration and if the invocation by Mohd Naseem is the only invocation and there is no arbitration proceedings initiated before, then too arbitral record need perusal before adverting to the issues raised therein. However, in the interim our client has vide an application and the same was filed on 12th May 2014 has already categorically stated that no authority on their behalf are being conferred on any one else.

It is also stated that the minutes of the proceedings be recorded in the presence of counsels and signatures of respective counsels or parties in person may be obtained on the minute with a view to maintain probity and fair play. It is no res integra that arbitrator is creature of the agreement and therefore, terms and tenor of it has to meticulously examined and necessary

issues as a corollary whereof the objections and submissions of the parties can be raised and adjudicated.

In the light of aforesaid we call upon your goodself to communicate to us in relation to (i)(ii) and (iii) above so as to enable us to take the issue raised herein to logical conclusion by raising all such issues on behalf of our clients which may be necessary for just disposal of the matter.

A copy of this communication is retained in our office for record purpose.

Thanking You

Your's Sincerely

Anil K Khaware

M/s. Anil K Khaware & Associates

ADVOCATES''

9. The Arbitrator replied vide email dated 19th June 2014 in the following manner: -

"Dear Mr. Anil K. Khaware

Please refer to your notice dated 03rd June, 2014 sent to me as the Arbitrator of M/s. B. Shahabuddin & Co., Delhi.

I have noted the contents of the said notice.

Since I was away from Delhi and likely to go again out of Delhi, I would request you to keep the matter in abeyance for ten days.

In the meanwhile, I assure you that justification shall be done by this office to every body.

(L.N MALIK)

ARBITRATOR"

10. In the said notice, the Petitioner had asked for a certified copy of the complete arbitral record, permission for inspection of the record and sought that notice should be issued for the next proceedings. The Arbitrator was also requested to record minutes of proceedings in front of the parties. The Arbitrator merely sent a cryptic reply to the said notice, as extracted above. Thereafter, further orders were passed by the Arbitrator, including on 16th July, 2014 and 2nd August 2014. The Petitioner has raised various grievances against the said orders in e-mail dated 20th September, 2014. The said e-mail reads as under:-

“This is in reference to my mail to you on 12th May 2014 and notice dated 3rd June 2014 and the hearing dated 2nd August 2014 before yourself. This is on behalf of and under instructions from my below named clients.

It is to be stated that Application on behalf of our clients Shahnaj Begum and Mehajbeen Begum was filed before yourself inter alia for seeking details of record, rendition of accounts and raising various issues. The copy of the application was handed over to all the parties present in the course of proceedings on 2nd August 2014. However, I am yet to receive the order sheet or any decision on the application. The order sheet is not prepared at the time of hearing despite my raising objection to the said effect. Even no inspection of record is provided, in spite of my written request. It is also requested by me that certified copy of entire record be supplied to me but no avail. More than four months have elapsed since my request but nothing is done in this regard. The applications dated 12th May 2014 is also in limbo.

The arbitration is not being conducted in fair manner and in fact the proceedings are just an eye

wash and the other respondents and vested interests are using the proceedings as a camouflage to perpetuate their misdeeds. Our clients are never taken into confidence or was made to join proceedings before 12.05.2014 and since then the manipulations are evident. You are therefore requested to act upon the application moved on behalf of our client on 12th May 2014 and 2nd August 2014 without delay.

*Thanking you
Your's Sincerely*

*Anil K Khaware
ADVOCATE
Counsel for Shahnaj Begum and Meajbeen Begum”*

11. Thus, the allegation of the Petitioner is that the arbitration is being conducted with a veil of secrecy and without maintaining any proper procedures and systems. The Arbitrator, who is also the Chartered Accountant of the firm, B. Shahabuddin & Co. was also not informing any of the parties as to the status of the accounts of the firm as also the amounts received after the disposal of various assets of the firm. The Petitioner severely apprehends that she may not be given her fair share in the assets of the firm and accordingly seeks substitution of the learned Arbitrator.

12. On behalf of the Respondents, Mr. Vishnu Mehra, Mr. Rahul Sharma and Mr. Anand Jha have been heard. They represent the heirs of Sheikh Dost Mohammad, Sheikh Ghosh Mohammad and Mohd. Naseem. The counsel for the Respondents submits that there is, in fact, no dispute between the other members of the family and the entire dispute is only amongst the family members constituting the branch of Late Sheikh Noor

Mohammad. Since the disputes are only between the said family members *inter se*, the Respondents should not be made to participate in any arbitration proceedings. Further, it is submitted that Mr. L.N. Malik is not an Arbitrator but merely a facilitator, who is helping the parties. He is only functioning as per the wishes of the parties.

13. Initially, when this petition was filed, notice was issued to the parties. Vide order dated 26th October, 2016, the petition was dismissed. The said order came to be challenged and vide order dated 2nd December, 2016, the matter was remitted back to this Court. On 20th January, 2017 notice was issued to Sh. L.N. Malik requiring the production of the entire arbitral record and the orders passed by him from time to time. On 13th July, 2018, arguments were heard in part. Mr. L.N. Malik entered appearance and the following orders were passed: -

“Arguments have been heard in part. The petition seeks termination of proceedings before Mr. L.N. Malik, Chartered Accountant who is the sole arbitrator arbitrating the disputes between the parties. The record, which has been placed on behalf of the Arbitrator, has been supplied to all the parties. It is directed that till the next date of hearing, none of the assets of M/s B.Shahabuddin & Company shall be dealt with and no third party interest shall be created thereon.

Parties are directed to obtain exact pagination of the court record and to file a written synopsis of their submissions. The original arbitral record shall be produced in the Court on the next date. Mr. Ajay Verma, Advocate may make a copy of the arbitral record and hand over the same to the Court Master.

List on 16th August, 2018.”

14. Thereafter, the arbitral record has been filed in the form of a compilation running into 253 pages. A perusal of the same shows that primarily the Arbitrator has commenced the proceedings pursuant to the invocation of arbitration by various members of the family. One order, for example, dated 15th February, 2012 records as under: -

“Award:

15. The undersigned accordingly passed the following arbitral award based on the agreement arrived at between the parties:

*(i) The following legal heirs of deceased Mohammad Gulzar shall substitute him as parties to the **Memorandum of Family Settlement** dated 18.10.2006:*

- (a) Iqbal Begum,*
- (b) Gulnaz Sheikh,*
- (c) Sarfraz Mohammad Sheikh,*
- (d) Mohammad Siraj and*
- (e) Sheikh Mohammad Salim*

*(ii) The said legal heirs of deceased Mohammad Gulzar who substitute him as aforesaid shall step into the shoes of late Mohammad Gulzar for all intents and purposes and shall be entitled to do all acts, deeds and things that may be required to give effect to and conclude the **family settlement** arrived at on 18.10.2006 and subsequently reduced into writing by way of the said **Memorandum of Family Settlement**.*

In so far as the representation of the immediate family of late Mohd. Gulzar is concerned there is consensus amongst the legal heirs of late Mohd. Gulzar that they will be represented by Mohd. Siraj. Ordered accordingly.

(iii) In the said **Memorandum of Family Settlement**, Mohammad Gulzar was the agreed representative signatory on behalf of the family of Late Sheikh Noor Mohammad. The parties consent and agree that after the demise of Mohammad Gulzar, his brother Mohammad Iqbal shall now be the representative signatory of the family of Late Sheikh Noor Mohammad and shall do all, acts deeds and things that Mohammad Gulzar was required to do as the representative signatory of the family of late Sheikh Noor Mohammad to give effect to and conclude the said family settlement. All the parties have appeared before me and unanimously agreed to the appointment of Sh. Mohd. Iqbal as joint signatory alongwith Sheikh Ghos Mohammad, Mohammad Shahid and Mohammad Faisal in terms of clause 10 of the family settlement. The award is corrected /substituted therein above.

(iv) The parties have agreed that the word 'execution' be also added in paragraph 10 of the said **Memorandum of Family Settlement** after the word 'sale' occurring in the said paragraph. Paragraph 10 of the said **Memorandum of family Settlement** stands modified accordingly.

(v) The parties by overwhelming consensus were of the opinion that a six months' time frame be given to the signatories to complete the sale of all assets as envisaged by the family settlement. However, since the Hon'ble High Court has already decreed the suit in terms of the said family settlement, the addition on the said time stipulation shall, according to the opinion of the undersigned, not be within the domain of the undersigned. However, parties are directed to make earnest efforts to effectuate the sale of the assets within six months and keep the undersigned informed of the progress by filing monthly progress reports."

15. In the above 'Award' Mr. Malik records as to who would be representing the various branches of the family of partners of M/s. B. Shahabuddin & Co. The records reveal that various orders have been passed by the Arbitrator from time to time and the firm has also received notices from the Income Tax Department. The record, though claimed to be complete, does not show any systematic conduct of the arbitral proceedings. The assets of the firm are being dealt with by the parties. It is not disputed that Mr. Malik is also acting as the Chartered Accountant for the firm itself. The Petitioner has clearly written repeatedly to the Arbitrator seeking copies of the entire arbitral record, which the Petitioner states has not been provided to her. Without making any comments on the Arbitrator's mandate and whether he was, in fact, acting as Arbitrator, owing to the fact that he is also the Chartered Accountant for the firm and is also known to the family members, it is clear that the Petitioner and other Respondents have also expressed lack of confidence in the Arbitrator. One such reply filed on behalf of Respondents 13 to 17 is also perused by the Court. Clearly several members of the family do not feel that the named Arbitrator is conducting the proceeding impartially. The existence of the Memorandum of Family Settlement is not in dispute. The existence of the Arbitration Clause is also not in dispute. The Arbitrator clearly has an advisory or business relationship with the firm and has been advising several branches of the family. Under these circumstances, the grievance of the Petitioner appears to be justified. The mandate of the Arbitrator is not clear nor is the scope of the disputes raised. It is also unclear if any assets of the Firm were sold and

whether the accounts for the same have been fully rendered to all the partners and their legal heirs.

16. The facts and circumstances in this case clearly show that the Ld. Arbitrator Mr. Malik ought not to be permitted to continue as an arbitrator. The Petitioner wrote several letters including letter dated 19th December 2017 raising objections as to the impartiality of the Arbitrator as also clearly informing the Ld. Arbitrator that she has not authorised anyone to represent her. The said letter concludes by saying that the grounds raised therein ought to be treated as objections under Section 12 and 13 of the Act. Despite these objections, the Ld. Arbitrator continues to act in the matter. This is clearly contrary to the provisions of the Act which require the Arbitrator to decide the objections. An arbitration proceeding can clearly not proceed in this manner.

17. For the reasons stated above, the mandate of Mr. L.N. Malik, is terminated. This Court appoints **Justice Badar Durrez Ahmed (Retd), 14 Friends Colony West, Mathura Road, New Delhi – 110065, (badardurrez.arb@gmail.com; M:07042205786)**, as sole Arbitrator to adjudicate the disputes amongst all the parties. The Petitioner, and any other party who wishes to raise any claims, is permitted to file its claims before the learned Arbitrator, who shall proceed in accordance with law. The Ld. Arbitrator is free to fix his own fee, in consultation with the parties.

18. List before the learned Arbitrator on 4th February 2019. Registry to communicate a copy of this order to the Ld. Arbitrator. The OMP is accordingly disposed of.

**PRATHIBA M. SINGH
JUDGE**

JANUARY 15, 2019
Sindhu/Agastya