IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.1052 OF 2019

Arihant Breakers ... Petitioner

Versus

Government of Goa ... Respondent

Shri Akshay Kolse Patil, Shri Raunaq Rao and Shri Khan Nafeez, Advocate for the Petitioner.
Shri D. Pangam, Advocate General with Shri Deep Shirodkar, Additional Government Advocate for the Respondent.

Coram: DAMA SESHADRI NAIDU, J.

Date: 15th January 2020

ORAL ORDER:

Introduction:

A partnership firm contracts. That contract runs into a dispute. So it must raise an arbitrable dispute, and it does. But by then, the partnership firm gets reduced to a proprietary concern. In the arbitration, the opposite party questions the proprietary concern's standing. The Arbitral Tribunal disagrees. Later, the proprietary concern applies to the District Court under Section 29A of the Arbitration and Conciliation Act for a time extension. The opposite party takes the same objection: that the party to the agreement and the party to the arbitration are different. Is that objection sustainable?

Facts:

2. The Government wanted to clear the remains of a shipwreck. For

this, it floated tenders and awarded the work to the most competent bidder: M/s. Arihant Ship Breakers, then, a partnership firm. In April 2011, the Government and Arihant contracted on this assignment. Later, the parties disputed their duties under the contract, and that led to arbitration.

3. To the Arbitral Tribunal, the parties nominated one arbitrator each. The two nominated arbitrators chose the presiding arbitrator, under the Arbitration and Conciliation Act, 1996 ("the Arbitration Act"). The arbitration proceedings ought to complete in 12 months but, given the contractual complexity, the Tribunal could not complete the proceedings. With the parties' consent, the term of the arbitration stood extended by six months. Still the Tribunal needed more time.

4. So Arihant applied to the "Court" for having the time extended, as provided under Section 29(4) of the Act. The Government opposed it. On 22nd October 2019, the District Court, North Goa, Panaji, dismissed the application. It has reasoned that the party to the arbitral agreement was a partnership firm, but a propriety concern has sought the time extension. This propriety concern, according to the District Court, has no locus or standing to plead for the partnership firm.

5. Aggrieved, Arihant has filed this Writ Petition.

6. Heard Shri Akshay Kolse Patil, the learned counsel for the petitioner; and Shri D. Pangam, the learned Advocate General for the Respondent.

Discussion:

7. Arihant contracted with the Government. In the execution of that contract, both parties had their differences. That necessitated an adjudication through an arbitral tribunal. Undisputed are these facts.

8. Further undisputed is the fact that Arihant contracted with the Government, as a partnership firm. By the time the disputes arose and by the time the matter reached the arbitral tribunal, it whittled itself down to be a proprietary concern—the name remaining unchanged, though. At the beginning, the State questioned the proprietary concern's standing to carry on with the arbitration. The Arbitration Tribunal has ruled on it. It has ruled that the proprietary concern substitutes the partnership firm and that this substitution causes no prejudice to the State. The ruling remains unchallenged.

9. As the statute permits, on one occasion both parties—the proprietary concern and the State—have consensually extended the Tribunal's tenure by six months. For a second extension, the judicial imprimatur is required. So Arihant has applied. But the District Court rejected the extension on a technical premise: "The party to the contract" has not applied for the extension.

The Preliminary Objection:

10. To begin with, the learned Advocate General has raised a

preliminary objection. According to him, Arihant has an efficacious alternative remedy because the order impugned here is an appealable one under the Commercial Courts Act, 2015.

11. To elaborate, the learned Advocate General has drawn my attention to Sections 10(3) and 13(1)(a) of the Commercial Courts Act. He stresses that these two provisions, read with Section 5 of the Arbitration Act, mandate that any order or judgment under the Arbitration Act must be treated as adjudication under the Commercial Courts Act. That order or judgment, then, must be appealed against under Section 13 of the Commercial Courts Act. Let us examine.

12. Section 5 of the Arbitration Act, according to the learned Advocate General, sets jurisdictional bounds to judicial intervention in arbitral disputes. True. Beginning with a non-obstante clause, section 5 mandates that in matters governed by Part I covering Sections 1 to 43, "no judicial authority shall intervene except where so provided in this Part." Here, the dispute falls within Part I. That said, the "judicial authority" and "court" in the Arbitration Act stand distinguished; they are not one and the same.

13. Granted, the Commercial Courts Act does affect adjudication or determination under the Arbitration Act. We will see how this Act affects the remedies under the Arbitration Act. Section 10 of the Commercial Courts Act deals with "jurisdiction in respect of arbitration matters." If a contract involves a commercial dispute of a specified value and if that

arbitration "is other than an international commercial arbitration," all applications or appeals arising out of such arbitration under the Arbitration Act shall be filed in, and heard and disposed of, by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted. Sub-Section (3) of Section 10 reads:

> 10. Jurisdiction in respect of arbitration matters.—Where the subject-matter of an arbitration is a commercial dispute of a specified value and—
>
> (1) . . .
>
> (2) . . .
>
> (3) If such arbitration is other than an international commercial arbitration, *all applications or appeals arising out of such arbitration* under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted.
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> (italics supplied)

14. As section 10(3) of the Commercial Courts Act refers to "applications and appeals" to a Commercial Court, let us examine the remedial provisions in that Act. First, we may refer to the statutory bar. Section 11 of the Commercial Courts Act bars a Commercial Court or a Commercial Division from entertaining or deciding any suit, application, or proceedings relating to any commercial dispute if the civil court's jurisdiction over those matters is either expressly or impliedly barred. That contingency does not obtain here. Now, let us move over to Section

13 of the Commercial Courts Act.

15. Section 13 of the Act provides for appeals from decrees of Commercial Courts and Commercial Divisions. Under subsection (1), against the judgment or order of a Commercial Court below the level of a District Judge, an aggrieved person can appeal to the Commercial Appellate Court in sixty days from the date of judgment or order. Under subsection (1-A), if the judgment or order is by a Commercial Court at the level of District Judge exercising original civil jurisdiction, appeal lies to the Commercial Appellate Division of the High Court in sixty days. Though this provision may have enabled Arihant to file an appeal under Section 13(1-A) of the Commercial Courts Act, its proviso comes in the way. Let us extract this provision:

> 13. Appeals from decrees of Commercial Courts and Commercial Divisions.—(1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.
> (1-A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:
> *Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).*
> (2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal

> shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.
>
> (italics supplied)

16. As seen from above, the order to be impugned under section 13 must have been specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908, as amended by the Commercial Courts Act or Section 37 of the Arbitration Act.

17. To put the issue in perspective, section 10 (3) of the Commercial Courts Act requires the aggrieved party to appeal before the jurisdictional Commercial Court against the orders in arbitration. Had it not been for section 10 of this Act, the appellate revisional remedy would have followed the usual course: regular Civil Court or High Court. But, that said, to appeal under Section 13 of the Commercial Courts Act before the Commercial Court or Commercial Division, the order to be challenged must have been "specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908" as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996.

18. First, Section 37 of the Arbitration Act, beginning with a non-obstante clause, provides for an appeal against only a few "orders", and from no others. The appeal must be "to the *court* authorised by law to hear appeals from original decrees of the *Court* passing the order." Those appealable orders are these: orders (*a*) refusing to refer the parties to arbitration under Section 8; (*b*) granting or refusing to grant any measure

under Section 9; (*c*) setting aside or refusing to set aside an arbitral award under Section 34.

19. But Section 13 of the Commercial Courts Act refers to both "judgment and order", though with a rider as set out in the proviso. Plainly seen, an order or judgment to be appealable under Section 13 of the Commercial Courts Act, it must have been enumerated under Order XLIII of CPC. An order under Section 29A of the Arbitration Act, however, has not been enumerated.

20. Under these circumstances, I must hold that Arihant could not have invoked Section 13 of the Commercial Courts Act. Its invoking Article 227 of the Constitution of India suffers from no jurisdictional shortcoming. Thus, the preliminary objection stands answered—and rejected.

(a) Who has applied for the time extension under Section 29A of the Arbitration Act?

21. What's in the name? "What's in the name, that which we call, a rose, by any other name would smell as sweet," bemoaned Shakespeare's Juliet. When Juliet comes to know of her lover's family origin, she passionately pleads with her Romeo that it is only his name that is her enemy. Romeo would still be himself even if he stopped bearing his family name. Romeo would be just as perfect even if he wasn't called Romeo. So she urges him to lose his name, to trade in his name—which really has nothing to do with him—and take all of Juliet in exchange. But the name

mattered and the couple perished. Here, Arihant maintains the name did not matter; the Government insists it did. Should this case perish, as Romeo and Juliet did?

22. Indisputably, it is a partnership firm that contracted with the Government. Arihant declared so and revealed the partnership details when it contracted and later, too, on many an occasion. But by the time the arbitral dispute arose, only one of the partners, it seems, remained. So, that "sole partner", a contradictory term though, sued—sued as a proprietor. But that suing retained the same trade name: Arihant. The Government objected. Then, the Arbitral Tribunal passed an order on 11th April 2019. Through that order, it has treated the name "Arihant" as a misdescription and allowed the remaining partner, that is the sole proprietor, to carry on the arbitration proceedings in the name of "M/s. Nita Jain, Sole Proprietor of M/s. Arihant Ship Breakers." And the order, in fact, reads:

> "In our opinion, in the case on hand also, there was misdescription of the plaintiff. When such fact had come to notice of the Plaintiff, an Application for Amendment was made. In our opinion, the learned Counsel for the Applicant is right that the Agreement has been entered into between M/s. Arihant Ship Breakers and the Respondent. Hence, there is no question of prejudice to the Respondent."

23. The Arbitral Tribunal did, however, qualify its order by clarifying that "all the observations made in [the] order have been made only for a limited purpose of deciding Amendment Application, and [they] may not be understood to have expressed any opinion on merits

of the matter." Now, we will examine these issues:

(i) Has the same Arihant contracted with the Government and later invoked the Arbitration?

(ii) Has the same contracting Arihant applied under Section 29A of the Arbitration Act?

(iii) And, reduced to a proprietary concern, could Arihant have invoked Section 29A of the Arbitration Act with the same trade name, Arihant?

Answers :

(i) Is it the same Arihant that contracted with the Government that has invoked the Arbitration?

24. Indeed, when it contracted with the Government, Arihant was a partnership firm. By the very nature of it, a partnership firm fluctuates; it is not a fossilised form of a business entity. Scores of people may have walked into the partnership firm, and scores may have walked out of it. Partners may have joined, retired, or died away. Arihant the partnership firm has come down to be Arihant the proprietary concern.

25. That said, neither the partnership firm nor the proprietary concern is a juristic person. But for suing and being sued, there are rules distinct for a partnership firm and for a proprietary concern. First, we may qualify this assertion with another caveat: the Code of CPC does not *per se* apply to the arbitration proceedings. Second, the defect, rightly

treated as a misdescription, stands cured through Arbitral Tribunal's order, dt.11.04.2019. So this question pales into insignificant.

(ii) Is it the same contracting Arihant that has applied under Section 29A of the Arbitration Act?

26. Technically not. Arihant that contracted with the Government was a partnership; Arihant that invoked Section 29A is a proprietary concern. Indeed, the answer to the first question applies here too.

27. To elaborate, under Order 30, Rule 1 of CPC, any two or more persons claiming or being liable as partners and carrying on business may sue or be sued in the name of the firm of which those persons were partners when the cause of action accrued. An analogous provision is Rule 10 of the same Order. Rule 1 of Order 30 deals with the partnerships, whereas Rule 10 deals with the proprietary concerns—that is, individuals with assumed, say, trade names, besides the Hindu joint families.

28. But there is a distinction. A partnership firm can both sue and be sued on its name, but a proprietary concern cannot sue in its name; it must be the proprietor himself or herself.[1] Of course, the proprietary concern can be sued as if it were a legal entity. Thus, a partnership firm can be a plaintiff or a defendant, but a proprietary concern can only be a defendant, not a plaintiff. Any defect in this regard is curable, though.

29. Through judicial interpretations, courts have often clarified that a firm is merely a compendious name for the partners constituting it. And

1 *proprietrix* is a needless gender variant when *proprietor* can fit both the genders

it is not a juristic person. Then, Rule 1 or Order 30 only confers a privilege on the individuals constituting the firm to sue or be sued in the name of the firm. C. K. Thakker's the *Code of Civil Procedure* (EBC, 1st Edn), after collating the case law on the topic, explains that a "suit filed by the plaintiff against a firm by impleading all or any of the members as defendants individually without naming the firm as one of the defendants is, therefore, not bad in law. Similarly, the members of a firm can institute a suit jointly."

30. I, therefore, hold that the partnership transforming into a proprietary concern does not affect its contractual rights which it secured when it was a partnership.

(iii) And, reduced to a proprietary concern, could Arihant have invoked Section 29A of the Arbitration Act with the same trade name, Arihant?

31. Section 29A(3) allows "the parties" to extend the arbitral tribunal's period by consent. That extension should not be more than six months, though. As subsection (5) mandates, the extension of the period may be on the application of any of "the parties." Indeed, the learned Advocate General has argued that the application under Section 29A for the extension of time should be by "a party to the arbitration agreement." For Section 2(1)(h) defines "party" as "a party to an arbitration agreement."

32. I am afraid the Government contention is hyper-technical. Nor can it sustain legal scrutiny. First, the Arbitral Tribunal has repelled the

Government's contention that the contracting Arihant has not invoked the arbitration clause. That order remains unchallenged. It has ruled that a proprietor suing in the name trade is, at best, a misdescription. To answer this assertion, the Advocate General has contended that the Arbitral Tribunal's order does not bind the District Court—that is, the Court under Section 2(1)(e).

33. I am afraid, again, this plea passes no judicial muster. Granted, only a party to the arbitral agreement can invoke the arbitration clause. Under common law, even without explicitly mentioned, "a party" includes successors, assignees, and so on, if not agents. In fact, a successor or an assignee replaces his predecessor or assignor. An agent, on the other hand, deputes for the principal, without affecting the principal's rights. The arbitration clause invoked, only the party can ask for an extension. Section 29A, first, provides for a consensual extension; that is for one time and for a limited duration: six months. Here, that has happened. The same parties that have consented to the first extension have come before the District Court for the second extension. Under the same provision, a party cannot be legitimate at one stage and illegitimate at another stage, while acting to secure the same relief, merely because the means of securing that relief change.

34. Let us examine the precedents the Government has cited. The

question in *Benarsi Krishna Committee v. Karmyogi Shelters Pvt. Ltd.*[2], is whether the service of an Award on the counsel amounts to service on the party himself. In answer, the Supreme Court has held that it is one thing for an Advocate to act and plead for a party in a proceeding and it is another for him to act as the party himself. The expression "party", as defined in Section 2(h) of the Arbitration Act clearly indicates a person who is a party to an arbitration agreement. That definition is not qualified in any way, to include the party's agent. Here, the proprietary concern is not acting as the agent of the partnership firm. On the contrary, the partnership firm has transformed itself into a proprietary concern. This transformation has statutory support. So *Benarsi Krishna Committee* does not apply.

35. In *Indowind Energy Ltd. v. Wescare (I) Ltd.*[3], Company W contracts with Company S. That contract has an arbitration clause. On the strength of that arbitration clause, Company W wants an arbitrator appointed for resolving its disputes with Company I. Company W maintains that both Companies S and I have common Directors and that the correspondence from I was signed by the same person who was the signatory for the Company in S that signed the arbitration agreement.

36. In the above factual backdrop, the Supreme Court has held that

2 (2012) 9 SCC 496

3 (2010) 5 SCC 306

both the Companies S and I are two independent companies incorporated under the Companies Act. Each company is a separate and distinct legal entity. The mere fact that the two companies have common shareholders or common Board of Directors will not make the two companies a single entity. Nor will the existence of common shareholders or Directors lead to an inference that one company will be bound by the acts of the other.

37. *Indowind Energy*, in this context, has examined the significance of the expression "party", as defined in Section 2(1)(h) of the Arbitration Act. An application under Section 11 for the appointment of an arbitrator must fulfil two requirements: Is there an arbitration agreement? Is the person applying under Section 11 a party to the arbitration agreement? For the reasons I have already set out, *Indowind Energy* too remains inapplicable here. Here, there is an arbitration agreement. And the party that is prosecuting the arbitration alone has applied for extension.

38. In *A. Ayyasamy v. A. Paramasivam*[4], parties entered into a deed of partnership containing an arbitration clause. But, despite that, the respondents filed a civil suit. The appellant objected under Section 8 of the Arbitration Act to the maintainability of the suit. The trial Court and the High Court disregarded the objection. Then, setting aside the concurrent findings, the Supreme Court has, among other things, observed that the basic principle to guide the judicial decision making is

4 (2016) 10 SCC 386

that arbitration is essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal. The parties' intent and the commercial understanding is reflected in their agreement. The court must impart to that commercial understanding a sense of business efficacy. A mere allegation of fraud cannot be sufficient to detract the parties from the obligation to submit their disputes to arbitration. I seen no scope for this decision to be applied here.

Tailpiece:

39. All is said and done, I must note old habits die hard. The whole dispute centres on the name. But again, the petitioner has filed this writ petition in the name of Arihant. A proprietary concern, a non-legal entity, must not be suing in its assumed name. The Arbitral Tribunal has acknowledged it and set out in its order the petitioner's name: "M/s. Nita Jain, Sole Proprietor of M/s. Arihant Ship Breakers." Thus, Nita Jain is the petitioner, not Arihant. That said, it is a misdescription. Then, to sue, Arihant the proprietary concern should not have retained its trade name; it must have been the proprietor, the human element, that must have been the plaintiff or the applicant.

40. So, treating "Arihant Breakers" as a misdescription and, thus, treating Nita Jain (the proprietor of M/s. Arihant Ship Breakers) as the petitioner, I allow this Writ Petition. The impugned order, dt.22.10.2019, is set aside and the matter is remanded to the District Court, North Goa,

Panaji.

41. Thus remanded, the trial Court will treat Nita Jain as the party that has sought the extension of time under Section 29A of the Arbitration and consider the application on the merits.

No order on costs.

DAMA SESHADRI NAIDU, J.

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