

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

BEFORE:

The Hon'ble Mr. JUSTICE RAVI KRISHAN KAPUR

AP 61 of 2021

SMT. SARASWATI OJHA AND ORS.

-VS-

SRI BIRENDRA PRASAD SINGH AND ORS.

For the petitioner	: Mr. Amales Ray Ms. Mousumi Bhowal
For the respondent no. 1	: Mr. Amritam Mondal Ms. Madhushri Dutta
For the respondent no. 2.	: Mr. Nabankur Parul Mr. Soumyajit Mishra
Heard on	: 04.02.2021, 12.02.2021, 15.02.2021.
Judgment on	: 25.02.2021

RAVI KRISHAN KAPUR, J.

1. This application is filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act") challenging a decision dated 23.12.2020 passed by the Arbitrator ("the impugned order"). By the impugned order the Arbitrator has dismissed an application filed by the petitioners under Section 16 of the Act.

2. The disputes between the parties arise out of an arbitration clause contained in a partnership deed dated 28 October, 1987. By an order dated 17th December, 2019, passed in AP No. 449 of 2019, this Court had appointed a Sole Arbitrator to adjudicate the disputes by and between the parties arising out of the aforesaid partnership deed.
3. Pursuant to directions, the Sole Arbitrator entered upon reference and directed the parties to file their pleadings.
4. Before the Arbitrator, the petitioners herein (being respondent nos. 1 to 4 to the arbitration proceedings), filed an application under Section 16 of the Act contending that the arbitration proceedings were barred by limitation. It was also urged before the Arbitrator that, on the basis of the allegations contained in the Statement of Claim, the disputes between the parties were barred by limitation and had arisen after dissolution of the firm after an expiry of more than 15 years.
5. By a reasoned decision dated 23rd December, 2020 the Arbitrator rejected the application filed under Section 16, on the ground that the disputes raised by the petitioners did not give rise to a pure question of law but involved a mixed question of law and fact. The Arbitrator further held that, the adjudication of such questions required adducing of evidence by the parties. The Arbitrator has further held that, it was necessary for issues to be framed and evidence to be taken in order to ascertain whether the partnership business has been actually dissolved or not or whether it had been reconstituted.
6. On behalf of the petitioner, it was submitted that, the issue of limitation raised by the petitioners did not involve determination of any fact nor

did it require framing of issues nor adducing of any evidence. In fact, it was contended on behalf of the petitioners, that the partnership business was for a fixed term of 15 years and had automatically dissolved upon expiry of the said term. As such it was contended on behalf of the petitioners that, in view of the admitted facts the claim of the claimant was ex-facie liable to be dismissed on this ground alone.

7. On behalf of the claimants, it was argued that, the application under Section 34 was misconceived and not maintainable. In view of the express language contained in Section 16 (6) of the Act, there was no provision for the petitioner to file this application. Hence, on the ground of maintainability alone the application was liable to be dismissed. On merits it was contended that, the crux of the matter before the Arbitrator was whether the partnership continued or not. In the facts of the instance case, the question of limitation involved a mixed question of law and fact and the Arbitrator has taken a view which did not warrant any interference.
8. On behalf of the respondent no. 2 it was argued that, the application filed under Section 34 was misconceived and not maintainable. It was further submitted on behalf of the respondent no. 2 that, Section 16 of the Act, did not contemplate filing of an application at this stage and the petitioner had to await the final award.
9. I have considered the submissions made on behalf of the parties. At the outset, Section 16 of the Act, provides as follows:

“16. Competence of arbitral tribunal to rule on its jurisdiction:-

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.”(emphasis supplied)

10. In a recent decision, *Deep Industries Ltd. vs. Oil And Natural Gas Corporation Ltd. & Ors.* reported in 2019(17) SCALE 85, the Hon’ble Supreme Court has held as follows;

“The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the

passing of a final award at which stage it may be raised under Section 34.”

11. I am of the view that from the scheme of the Act, it is apparent that at this stage, a challenge under section 34 of the Act is not maintainable against an order dismissing an application under Section 16 of the Act. The legislature does not provide for recourse by way of a challenge under Section 34 against an order under Section 16(5) where the Arbitral Tribunal takes a decision rejecting the plea that the Arbitral Tribunal has no jurisdiction. The intention of the Act appears to be that in such case, the Arbitral Tribunal ought to continue with the arbitral proceedings and make an award without delay. In the interregnum, there ought to be no interference with the arbitral process. [*Gas Authority of India Ltd and Ors. Vs Ketu Construction (I) Ltd and Ors. (2007) 5 SCC 38, SBP & Co. Vs Patel Engineering Ltd & Anr. (2005) 8 SCC 816, Triad India Vs. Tribal Cooperative Marketing and Development Federation of India Limited and Ors. (2007(1)ARBLR327(Delhi), Bharti Cellular Limited Vs. Department of Telecommunications, 2012(4)ARBLR473(Delhi)*]. In any event, I find that in the facts of the instant case, the Arbitrator at this stage of the proceedings has not arrived at any final or conclusive finding which warrants any interference by this Court.
12. For the forgoing reasons, I am of the view that this application filed under Section 34 of the Act is not maintainable. In the facts of this case, there is no scope for challenging the order passed by the Arbitrator dismissing the application under Section 16, at this stage. The parties must continue with the arbitration proceedings and await a final award.

Hence, on the ground of maintainability alone this application is dismissed. The Arbitrator is directed to dispose of the arbitration proceedings as expeditiously as possible in accordance with the mandate contained in the Act.

13. For the foregoing reasons, AP No. 61 of 2021 stands dismissed. However, there will be no order as to costs.
14. Certified website copies of this judgment, if applied for, be given to the parties upon compliance of necessary formalities.

(RAVI KRISHAN KAPUR, J.)