

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

945 ARBITRATION APPLICATION NO.5 OF 2021

M/s. Choudhari Food Industries,
Through its sole proprietor,
Rajesh Madhavrao Choudhari
Having office at Meher Mala,
Janaki Nagar, Sangamner,
District Ahmednagar.

Applicant.

Versus

Ahmednagar District Goad Rearing
and Processing Co-operative
Federation Ltd., 21, Kisan Kranti,
Market Yard, Ahmednagar
Through it's Chairman / Secretary.

Respondent.

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Mr. Mr. P.F. Patni, Advocate holding for
Mr. C.K. Shinde, Advocate for the applicant.
Mr. S.V. Dixit, Advocate for respondent.

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CORAM : **AVINASH G. GHAROTE, J.**

DATE : 30-07-2021.

ORDER :

1. Heard Mr. Patni, learned Counsel for the applicant and Mr. Sushant Dixit, learned Counsel for the non applicant. There is no dispute regarding execution of an agreement dated 27.10.2015 between the non-applicant and M/s Choudhari Food Industries, a Partnership Firm, of which the applicant herein namely Rajesh Madhavrao Chaudhari, was the partner. It is not disputed, that the agreement contains an arbitration clause 16, which is as under :

“16) That, in case, of any disputes as regards the interpretation of these presents or in relation to payment either delayed or otherwise in respect of purchase of the finished goods by the First Party and supply by the Second Party, the parties do hereby agree and undertake to settle down the same by Arbitration and the decision of Arbitrator shall be final, conclusive and binding on both the parties. The appointment of Arbitrator shall be made by both the parties mutually and amicably”.

2. Since there was a dispute between the parties, a notice was given on 29.01.2020 by the applicant invoking the arbitration clause, which was not replied to, as a result of which the present application has been filed for appointment of an Arbitrator.

3. The application is opposed by Mr. S.V. Dixit, learned Counsel for the non-applicant on several grounds as under :

(a) the agreement dated 27.10.2015 which relates to purchase of frozen meat by M/s Choudhari Food Industries from the non applicant, is insufficiently stamped.

(b) the applicant is a Proprietorship Concern, whereas the agreement was with M/s Choudhari Food Industries, a Partnership Firm, and therefore, the same does not satisfy the requirement of Section 7 of the Arbitration and Conciliation Act.

(c) since the Partnership Firm M/s Choudhari Food Industries was not registered under the provisions of the Partnership Act, it is affected by the bar under Section 69 of the Indian Partnership Act, 1932.

(d) the claim is barred by limitation as the supply was stopped on 01.04.2016 and notice invoking arbitration clause was issued on 29.01.2020.

4. In so far as the plea, that the agreement dated 27.10.2015 is insufficiently stamped and is unregistered, it is material to note that the agreement is for purchase of frozen meat, and therefore, does not require registration. For the contention, that the agreement is insufficiently stamped, Mr. Dixit places reliance upon Article 5 (h) (A) (iii) of the Maharashtra Stamp Act, which relates to specific performance by any person or a group of persons and where the value of contract exceeds Rs. 1,00,000/-, and upto Rs. 10,00,000/- the duty payable is 0.25 % of the amount agreed in the contract subject to minimum of Rs. 100/- and in any other case 0.5% of the amount agreed in the contract. A perusal of the agreement dated 27.10.2015, would indicate, that no specific amount was agreed, but a rate was fixed per Kilogram, and the amount would therefore depend upon the orders placed from time to time. This is therefore a case where the agreement, would clearly not fall within the scope of Article 5 (h) (A) (iii) of the Maharashtra Stamp Act. Even otherwise, a claim for compensation, is being sought to be made on account of breach of the contract and it is not a case of specific performance of the contract and therefore, for this reason also the above article would not apply.

5. In so far as the contention that the Partnership Firm

being not registered, the bar under Section 69 of the Partnership Act would apply, it is settled position of law that the bar under Section 69 (1) & (2) of the said Act, applies to filing of a suit and not to initiation of arbitration proceedings. It is also settled position of law, that an Arbitrator is not a Court, as held in ***Union of India vs. Ambika Construction, (2016) 6 SCC 36*** in the following words :

“10. ----- However, the arbitrator is not a Court. The arbitrator is the outcome of agreement. He decides the disputes as per the agreement entered into between the parties. Arbitration is an alternative forum for resolution of disputes but an arbitrator ipso facto does not enjoy or possess all the powers conferred on the courts of law.”

(emphasis supplied)

6. In so far as the expression “other proceedings”, as used in Sec. 69(3) of the Partnership Act, is concerned, it would be apt to refer to what has been held by the hon’ble Apex Court in ***Umesh Goel / Himachal Pradesh Co-operative Group Housing Society Ltd. (2016) 11 SCC 313***, after considering ***Firm Ashok Traders / Gurumukh Das Saluja (2004) 6 SCC 155***- wherein it was held that the bar u/s 69 was not applicatble to proceedings u/s 9 of the A & C Act and ***Kamal Pushp Enterprises / D. R. Constructions (2000) 6 SCC 659***, which is as under :

“10. Though, some of the decisions which were cited before us dealt with Section 69(3) of the Partnership Act, in the instance we wish to analyse the said sub-section along with the other components of the said Section 69. When we read sub-section (3) of Section 69 carefully, we find that as rightly contended by Mr Dhruv Mehta, learned Senior Counsel for the appellant, the provisions of sub-sections (1) and (2) have been impliedly incorporated in sub-section (3). When the opening set of expression in sub-section (3) states that the provisions of sub-sections (1) and (2) shall apply, there is no

difficulty in accepting the said submission of the learned Senior Counsel for the appellant that the entirety of the said two sub-sections should be held to be bodily lifted and incorporated in sub-section (3). It is difficult to state that any one part of sub-sections (1) and (2) alone should be held to be incorporated for the purpose of sub-section (3). Therefore, we are convinced that when we read sub-section (3), it is imperative that all the ingredients contained in sub-sections (1) and (2) should be read into sub-section (3) and thereafter apply the said sub-section when such application is called for in any matter.

11. Once we steer clear of the said position it will be necessary to note what are the specific ingredients contained in sub-sections (1) and (2). When we read sub-section (1) of Section 69, the said sub-section primarily imposes a ban on any person as a partner of a firm from filing any suit to enforce a right arising from a contract or a right conferred under the Partnership Act in any court by or on behalf of an unregistered firm or a person suing as a partner of a firm against the said firm or against any person alleged to be or to have been a partner in that firm. To put it in a nutshell the ban imposed under sub-section (1) of Section 69 is on any person in his capacity as the partner of an unregistered firm against the said firm or any of its partners, in the matter of filing a suit to enforce a right arising from a contract or conferred by the provisions of the Partnership Act. In effect, the ban is in respect of filing a suit against that unregistered firm itself or any of its partners by way of a suit under a contract or under the Partnership Act. Under sub-section (2), the very same ban is imposed on an unregistered firm or on its behalf by any of its partners against any third party by way of a suit to enforce a right arising from a contract in any court.

12. A close reading of sub-sections (1) and (2) of Section 69, therefore, shows that while under sub-section (1) the ban is as against filing a suit in a court by any person as a partner of an unregistered firm against the firm itself or any of its partners, under sub-section (2), such a ban in the same form of a suit in the Court will also operate against any third party at the instance of such an unregistered firm. The common feature in both the sub-sections are filing of a suit, in a court for the enforcement of a right arising from a contract or conferred by the Partnership Act either on behalf of an unregistered firm or by the firm itself or by anyone representing as partners of such an unregistered firm. While under sub-section (1) the ban imposed would operate against the firm itself or any of its partners, under sub-section (2) the ban would operate against any third party.

13. The question for our consideration is by virtue of sub-section (3) whether the expression "other proceedings" contained therein will include arbitral proceedings and can be equated to a suit filed in a court and thereby the ban imposed against an unregistered firm can operate in the matter of arbitral proceedings. If sub-sections (1) and (2) are virtually lifted whole hog and incorporated in sub-section (3), it must be stated that it is not the mere ban that is imposed in sub-sections (1) and (2) that alone is contemplated for the application of sub-section (3). In other words, when the whole of the ingredients contained in sub-sections (1) and (2) are wholly incorporated in sub-section (3), the resultant position would be that the ban can operate in respect of an unregistered firm even relating to a set-off or other proceedings only when such claim of set-off or other proceedings are intrinsically connected with the suit that is pending in a court. To put it differently, in order to invoke sub-section (3) of Section 69 and for the ban to operate either the firm should be an unregistered one or the person who wants to sue should be a partner of an unregistered firm, that its/his endeavour should be to file a suit in a court, in which event even if it pertains to a claim of set-off or in respect of "other proceedings" connected with any right arising from a contract or conferred by the Partnership Act which is sought to be enforced through a court by way of a suit then and then alone the said sub-section can operate to its full extent.

14. As far as the construction of the said sub-section (3) of Section 69 is concerned, we are able to discern the above legal position without any scope of ambiguity. To be more precise, the condition precedent for the operation of ban under sub-section (3) is that the launching of a suit in a court of law should be present and it should be by an unregistered firm or by a person claiming to be partner of an unregistered firm either to a claim for set-off in the said suit or any other proceedings intrinsically connected with the said suit.

15. In the event of the above ingredients set out under sub-sections (1), (2) and (3) being fulfilled then and then alone the ban prescribed against an unregistered firm under Sections 69(1), (2) and (3) would operate and not otherwise.

16. Keeping the above outcome of the legal position that can be derived from a reading of sub-sections (1), (2) and (3) of Section 69 in mind we can draw further conclusions by making specific reference to clauses (a) and (b) of sub-section (3) as well as the exceptions set out in clauses (a) and (b) of sub-section (4) as well. When under sub-section (3) which also relates to a ban concerning "other

proceedings”, the law-makers wanted to specifically exclude from such ban such of those proceedings which are also likely to arise in a suit, but yet the imposition of ban of an unregistered firm need not be imposed. Keeping the said intent of the law-makers in mind, when we read clauses (a) and (b) of sub-section (3), it can be understood that even though such other proceedings may be for the enforcement of any right to sue but yet if it is for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm, the same can be worked out by way of a suit in a court or by way of other proceedings in that suit and the same will not be affected by the ban imposed under sub-section (3). Similarly, any steps initiated at the instance of an official assignee, a receiver or court under the Presidency Towns Insolvency Act, 1909 (3 of 1909) or the Provincial Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner in a pending suit of a court also stand excluded from the ban imposed under sub-section (3). The specific exclusions contained in clauses (a) and (b) of sub-section (3), therefore, makes the position clear to the effect that even though such proceedings may fall under the expression “other proceedings” and may be intrinsically connected with a suit in a court, yet the ban would not operate against such proceedings.

18. We are thus able to arrive at a definite conclusion as to the scope and ambit of Section 69, in particular about Section 69(3). Having thus analysed the provision in such minute details and its implication, we can now apply the said provision to the case on hand and find out whether Section 69(3) is attracted to the arbitral proceedings and the ultimate award passed therein by construing the same as falling under the expression “other proceedings”.

21. Based on the close analysis of Section 69 in its different parts, we are able to discern and hold that in order to attract the said section, first and foremost the pending proceeding must be a suit instituted in a court and in that suit a claim of set-off or other proceedings will also be barred by virtue of the provision set out in sub-sections (1) and (2) of Section 69 as specifically stipulated in sub-section (3) of the said section. Having regard to the manner in which the expressions are couched in sub-section (3), a claim of set-off or other proceedings cannot have independent existence. In other words, the foundation for the application of the said sub-section should be the initiation of a suit in which a claim of set-off or other proceedings which intrinsically connected with the suit arise and not otherwise.

34. Lastly, it was contended by Mr Sharan, learned Senior Counsel that under Section 36 of the 1996 Act, an award of the arbitrator has been equated to decree of the court for the purpose of execution. Under Section 35 of the 1996 Act, an arbitral award will be final and binding on the parties and persons claiming under them subject to the other provisions prescribed in the said part of the Act. Under Section 36 it is provided that where the time for making an application to set aside the arbitral award under Section 34 expired, or such application having been made and referred, the award can be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the court. When we consider the submission of the learned Senior Counsel for the respondent, at the very outset, it must be held that by referring to Sections 35 and 36, it is difficult to draw an inference that based on the deeming provision specifically meant for the enforcement and execution of an award, the arbitral proceedings can be equated to a civil court proceedings. As rightly contended by Mr Dhruv Mehta, learned Senior Counsel for the appellant, Section 36 only creates a statutory fiction which is limited for the purpose of enforcement of the award. The deeming fiction is specifically restricted to treat the award as a decree of a court, exclusively for the purpose of execution, though as a matter of fact, it is only an award of arbitral proceeding. It is a settled proposition, that a statutory provision will have to be construed from the words that are expressly used and it is not for the court to add or substitute any word to it. Therefore, going by Sections 35 and 36 it cannot be held that the entire arbitral proceeding is a civil court proceedings for the purpose of applicability of Section 69(3) of the Partnership Act.

37. Though the learned Senior Counsel for the appellant and the respondent referred to certain other decisions in support of their respective submissions, as we are fortified by our conclusion, based on the interpretation of Section 69 of the Partnership Act vis-à-vis the 1996 Act and the 1940 Act as well as supported by the decisions in *Jagdish Chander [Jagdish Chander Gupta v. Kajaria Traders (India) Ltd., AIR 1964 SC 1882 : (1964) 8 SCR 50]* and *Kamal Pushp Enterprises [Kamal Pushp Enterprises v. D.R. Construction Co., (2000) 6 SCC 659]*, we do not find any necessity to refer to those decisions in detail. Having regard to our conclusion that arbitral proceedings will not come under the expression "other proceedings" of Section 69(3) of the Partnership Act, the ban imposed under the said Section 69 can have no application to arbitral proceedings as well as the arbitration

award. Therefore, the appeal stands allowed, the impugned judgment of the Division Bench is set aside and the judgment of the learned Single Judge stands restored. No costs. ”

(emphasis supplied)

7. It is thus clear that the bar under sec.69 of the Partnership Act, applies does not apply to arbitration proceedings and therefore the contention, is rejected.

8. In so far as the submission, that the applicant, is not entitled, to initiate the proceedings as it is only the partnership firm which could have initiated the same and since the Firm stands dissolved on 27th July 2018, the application is not maintainable, it would be material to state, that the applicant Rajesh Madhavrao Choudhari, was admittedly a partner of the erstwhile Partnership Firm M/s Choudhari Food Industries, as is apparent from the agreement dated 27.10.2015 itself, which has been signed by him for and on behalf of the Firm. A partnership as is evident from a reading of sec.4 of the Partnership Act, is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all and therefore a partnership firm, is not a separate legal entity as is the case of a Company and the relations interse between the partners are governed by the contract between them. The non-applicant when it entered into the agreement dated 27/10/2015, was clearly aware of this position. Sec.40 of the Partnership Act, provides that a firm may be dissolved with the consent of all the partners or in accordance with a contract

between the partners, in which case the terms of the contract dissolving the partnership firm, shall govern the manner in which either the assets or liabilities of the partnership firm have to be liquidated and distributed or who can carry on the business and on what terms. In case the parties agree that one of them on dissolution can carry on the business of the erstwhile partnership firm, then such person, acquires the right to continue with the business of the erstwhile partnership firm and also acquires all rights to its assets, benefits under any contracts and so also becomes responsible for all its liabilities, subject to the terms as agreed. In the present case, it is not disputed that the partnership Firm has been dissolved and consequent to the dissolution of the Firm on 27.07.2018, the entire business of the Firm has been agreed to be continued by the applicant to the exclusion of the other partners of the Firm, which is directly relatable to sec.40 of the partnership Act. The applicant has thus stepped into the shoes of the erstwhile partnership firm and would be entitled to the benefits as well as would be responsible for the obligations and liabilities of the erstwhile partnership firm. That being the case, the applicant, acquires all rights in the property of the erstwhile firm and is clearly entitled to continue with the business of the Firm and so also to enforce all the claims and entitlements of the Firm viz-a-viz third parties and so also to enforce the arbitration clause as contained in the agreement between the non-applicant and the erstwhile partnership firm M/s Choudhari Food Industries as the same enures to his benefit as the applicant was already a

partner of the erstwhile partnership firm.

9. In so far as the plea of limitation is concerned, it is material to note what is laid down by the hon'ble Apex Court in ***State of Goa v. Praveen Enterprises, (2012) 12 SCC 581*** as regards the applicability of the Limitation Act, 1963 and Sec.21 of the Arbitration and Conciliation Act, 1996. It has been held as under :

“16. The purpose of Section 21 is to specify, in the absence of a provision in the arbitration agreement in that behalf, as to when an arbitral proceeding in regard to a dispute commences. This becomes relevant for the purpose of Section 43 of the Act. Sub-section (1) of Section 43 provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in courts. Sub-section (2) of Section 43 provides that for the purposes of Section 43 and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in Section 21 of the Act. Having regard to Section 43 of the Act, any claim made beyond the period of limitation prescribed by the Limitation Act, 1963 will be barred by limitation and the Arbitral Tribunal will have to reject such claims as barred by limitation.”

10. In ***BSNL / Nortel Networks India Pvt. Ltd. 2021 SCC Online SC 207***, while considering the question as to the limitation for filing the claim, it has been held as under :

14. The period of limitation for filing a petition seeking appointment of an arbitrator/s cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognized even under Section 20 of the Arbitration Act 1940. Reference may be made to the judgment of this Court

in *C. Budhraja v. Chairman, Orissa Mining Corporation Ltd.*⁴ wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator. Paragraph 26 of this judgment reads as follows:

“26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4-6-1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Act. Insofar as a petition under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition under Section 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in *Major (Retd.) Inder Singh Rekhi v. DDA* [(1988) 2 SCC 338], *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta* [(1993) 4 SCC 338] and *Utkal Commercial Corpn. v. Central Coal Fields Ltd.* [(1999) 2 SCC 571] also make this position clear.”

11. In view of the language of Section 21 of the A & C Act 1996, which says that the arbitral proceedings commence on the date on which request for that dispute to be referred to arbitration is received by the respondent, read with Section 43 (2) of the A & C Act 1996, which states, that for the purposes of Section 43, and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred in Section 21, the reasoning, given

in ***C. Budhraja v. Chairman, Orissa Mining Corporation Ltd. 2008 (2) SCC 444***, quoted in para 14 of ***Nortel Networks India Pvt. Ltd.*** (supra), with approval would equally be applicable for determination of the limitation, in arbitration proceedings commenced under the A & C Act 1996, as the basic premise, in Section 37 (3) of the Arbitration Act, 1940 and in Section 21 of the A & C Act, 1996, regarding the commencement of the arbitral proceedings remains the same.

12. Regarding the arbitrability viz-a-viz the issue of limitation ***Nortel Networks India Pvt. Ltd.*** (supra) holds as under :

“32. Issue of Limitation- Limitation is normally a mixed question of fact and law, and would lie within the domain of the arbitral tribunal. There is, however, a distinction between jurisdictional and admissibility issues. An issue of ‘jurisdiction’ pertains to the power and authority of the arbitrators to hear and decide a case. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal”.

Even otherwise the issue of limitation relates to arbitrability which can only be decided by the Arbitrator as held in ***Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1***, unless it is a clear case of deadwood.

13. In so far as the limitation for filing an application under Section 11 (6) of the A & C Act 1996 is concerned, **Nortel Networks India Pvt. Ltd.** (supra), holds as under :

“13.It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days' from issuance of the notice invoking arbitration. In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.

And noticing the vacuum in the law, has held as under :

“19. Given the vacuum in the law to provide a period of limitation under Section 11 of the Arbitration and Conciliation 1996, the Courts have taken recourse to the position that the limitation period would be governed by Article 137, which provides a period of 3 years from the date when the right to apply accrues. However, this is an unduly long period for filing an application u/S. 11, since it would defeat the very object of the Act, which provides for expeditious resolution of commercial disputes within a time bound period. The 1996 Act has been amended twice over in 2015 and 2019, to provide for further time limits to ensure that the arbitration proceedings are conducted and concluded expeditiously. Section 29A mandates that the arbitral tribunal will conclude the proceedings within a period of 18 months. In view of the legislative intent, the period of 3 years for filing an application under Section 11 would run contrary to the scheme of the Act. It would be necessary for Parliament to effect an amendment to Section 11, prescribing a specific period of limitation within which a party may move the court for making an application for appointment of the arbitration under Section 11 of the 1996 Act”.

And it was thus held, that the application under Section 11 (6) of the A & C 1996, having been filed, within a period of three years of rejection of the request for appointment of arbitrator, was

within time and considering that the notice invoking the arbitration clause was issued on 29/01/2020, in the present case, the contention, by Mr. Dixit, learned counsel for the non-applicant does not stand to reason and is rejected.

14. I, therefore deem it fit and proper, that the matter needs to be referred to arbitration by appointing an Arbitrator. Both the parties agree to the name of Mr. P.D. Ambekar, retired District Judge resident of Ahmednagar, to act as Arbitrator. Mr. P.D. Ambekar is therefore appointed as Arbitrator to decide the dispute between the parties hereto. Both the parties shall appear before the learned Arbitrator on 20th August 2021. The fees of the Arbitrator shall be as per the Fourth Schedule of Arbitration and Conciliation Act.

15. The application is allowed in above terms.

(AVINASH G. GHAROTE, J.)

VD_Dhirde