

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.83 OF 2020

Ankit Vijaykumar Khandelwal ...Applicant

Versus

Aarti Rajkumar Khandelwal ...Respondent

....

Mr. Vishal Kanade with Mr. Jimish Shah i/b. Divya Shah Associates for
the Applicant.

Mr. Vimal Sanghvi for Respondent.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

JUDGMENT RESERVED ON:21/04/2021

JUDGMENT PRONOUNCED ON :28/4/2021

JUDGMENT:-

With consent, heard finally at the stage of admission.

2. Challenge in this application under Section 115 of the Civil Procedure Code, 1908 (CPC) is to the order dated 21/08/2019 passed by learned Judge, City Civil Court for Greater Bombay dismissing the Notice of Motion No.2094 of 2017 for referring the parties to arbitration.

3. The Respondent is the Plaintiff and the Applicant is the Defendant in a suit for dissolution of Partnership firm and rendition of accounts and shall be hereinafter referred to as the 'Plaintiff' and 'Defendant' respectively.

4. The Defendant filed a Notice of Motion to refer the dispute to Arbitration in terms of clause 19 of the Partnership Deed dated 05/08/2014, under Section 8 of the Arbitration and Conciliation Act, 1996. The Plaintiff contested the Motion mainly on the ground that the dispute between the parties is not covered by clause 19 of the Partnership Deed.

5. Learned Judge has dismissed the notice of motion essentially on three grounds viz. (i) the Partnership is 'at will', and that the right of a partner to dissolve partnership cannot be taken away by arbitration clause and that a partner, who is desirous of dissolving the firm cannot be forced to resort to arbitration. (ii) the arbitration clause would apply only during subsistence of partnership. The partnership firm having been dissolved, the arbitration clause ceases to apply. (iii) the arbitration clause provides for reference of dispute to the Arbitrator only when (a) the dispute relates to interpretation on the terms of the Partnership Deed or (b) dispute relates to conduct of the

business of partnership. The nature of relief claimed in the suit does not fall within the purview of arbitration clause.

6. Mr. Vishal Kanade, learned counsel for the Defendant has relied upon the decision of the Apex Court in ***Branch Manager Magma Leasing and Finance Limited and Anr. Vs. Potluri Madhavalala and Anr., (2009) 10 SCC 103*** to contend that the arbitration clause does not become inoperative with dissolution of partnership or by termination of the contract. He submits that clause 19 of the Partnership Deed is not restricted to two contingencies noted by the Trial Court but covers all disputes between the parties in respect of or in relation to the partnership business or in respect of interpretation, operation or enforcement of any of the terms and conditions of the Partnership Deed. Learned counsel contends that the learned Judge has misinterpreted clause 19 and has failed to appreciate the mandate of Section 8 of the Arbitration and Conciliation Act.

7. Per contra, Mr. Vimal Sangvi, learned counsel for the Plaintiff submits that since the partnership is at will, any of the partners can dissolve the partnership. He further contends that with dissolution of partnership nothing survives except compliance of the natural consequences of dissolution, which cannot be construed as dispute as

contemplated by clause 19 of the Partnership Deed. He submits that the Defendant has not raised any dispute to invoke powers under Section 8 of the Arbitration Act.

8. Before adverting to the facts of the case it would be relevant to consider the scope of Section 8 of Arbitration and Conciliation Act, 1996 which reads thus:-

"8. Power to refer parties to arbitration where there is an arbitration agreement.—

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

9. In the case of **Booz Allen and Hamilton Inc. Vs. SBI Home**

Finance Limited and ORs. (2011) 5 SCC 532 the Apex Court has reiterated as under:-

“19. Where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under [section 8](#) stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide (i) whether there is an arbitration agreement among the parties; (ii) whether all parties to the suit are parties to the arbitration agreement; (iii) whether the disputes which are the subject matter of the suit fall within the scope of arbitration agreement; (iv) whether the defendant had applied under [section 8](#) of the Act before submitting his first statement on the substance of the dispute; and (v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration.”

10. In ***Branch Manager, Magma Leasing and Finance Ltd.*** (supra) the Apex Court has held thus:-

“18. Section 8 is in the form of legislative command to the court and once the prerequisites conditions as aforesaid are satisfied, the Court must refer the parties to arbitration. As a matter of fact, on fulfillment of the conditions of Section 8, no option is left to the Court and the Court has to refer the parties to arbitration.”

11. In the instant case, it is not in dispute that the Plaintiff and the Defendant had entered into a Partnership Deed dated 05/08/2014 to conduct business of manufacturing of auto lamps in the name and style of the firm M/s. V.R. Industries. Clauses (5), (18) and (19) of the Partnership Deed, which are relevant to decide this application read thus:-

“5. DURATION : The duration of the partnership shall be “ AT WILL”. But in case any partner desires to retire from the partnership he/she shall be at liberty to do so on giving 30 days notice.

18. DISSOLUTION: On dissolution of the partnership a full and general account shall be taken all moneys, stock-in-trade, debts and effects that belonging or due to the partnership including capital. Upon the determination of the partnership by efflux of time, or upon its determination by any other means if the option to purchase is not exercised by any other partner then, as soon as convenient, a full and general account of valuation shall be taken of the property and assets and liabilities of the partnership and the property and assets put to sale and the debts realised and the credits paid. The net proceeds inc ash shall be equally divided between the then partners or the partners and the legal representative or representatives the loss shall be made good in equal shares by then partner, or the legal representative or representatives of any deceased

partner.

19. ARBITRATION : If any dispute shall arise between the parties hereto in respect of the conduct of the business of partnership or in respect of interpretation, operation or enforcement of any of the terms and conditions of this deed or in respect of any other matter cause or things whatsoever not herein otherwise provided for the same shall be referred for adjudication to the arbitration subject to the provisions of the Indian Arbitration and Conciliation Act, 1997 or any statutory modification or re-enactment thereof for the time being in force and the decision shall be binding on the parties of their legal representatives.”

12. The Plaintiff issued notice dated 21/11/2016 for dissolution of Partnership alleging acts of misconduct as spelt out in the notice and in view of inability to continue with the business due to old age and failing health. The Plaintiff called upon the Defendant to settle the accounts, assets and liabilities of the Partnership Firm in accordance with Clause 18 of the Partnership Deed. In response, by reply dated 14/12/2016, the Defendant denied having committed any act of misconduct and further alleged that the Plaintiff was not cooperating and carrying out her obligations and duties to promote the business of the firm. The Defendant claimed that the Plaintiff can only retire from the business but cannot dissolve the partnership firm. By further notice

dated 23/12/2016 the Plaintiff called upon the Defendant to attend a joint meeting for settlement of accounts. The Defendant vide reply dated 27/12/2016 declined to comply on the ground that the Defendant had arbitrarily bank account of the firm and further reiterated that Plaintiff cannot dissolve the partnership firm but can only retire from the partnership firm.

13. The Plaintiff therefore filed the suit alleging that the Defendant has declined to comply with the notice and has further averred that despite notice of dissolution the Defendant continues to conduct business in the name of the dissolved partnership firm using assets of the partnership firm as well as the trade mark 'veejulux' which is registered in the name of the partnership firm, for his personal business and gain. On the basis of the said pleadings, the Plaintiff has sought the following reliefs:-

“(a) this Hon’ble Court be pleased to call for the record and proceedings and after examining the legality, validity and propriety thereof be pleased to quash and set aside the Impugned Order dated 21st August, 2019 passed by the Learned City Civil Court for Greater Bombay at Mumbai in Notice of Motion No.2094 of 2017 filed in Long Cause Suit No.1027 of 2017;

- (b) this Hon'ble Court be pleased to allow Notice of Motion No.2094 of 2017 filed by the present Applicant in Long Cause Suit No.1027 of 2017 pending on the file of Court Room No.1 of the Learned City Civil Court for Greater Bombay at Mumbai be stayed;
- (d) interim/ad-interim relief in terms of prayer clause (c) above be granted."

14. The pleadings vis-a-vis the Partnership Deed clearly indicate that the Plaintiff and the Defendant being the only two partners, had entered into a Deed of Partnership to carry out business of manufacturing of auto lamps. There is no dispute that the partnership is at will and therefore in terms of Section 43 of the Partnership Act, it was open to either partner to dissolve the firm by giving notice to the other partner of his intention to dissolve the firm. The dispute between the parties in carrying out the partnership business led to issuance of notice of dissolution and rendition of account. It is to be noted that the dispute in the present case is not restricted to the dissolution of partnership. The pleadings reveal that non compliance of Clause 18 of the Partnership Deed and continuation of business using assets as well as the trademark of the partnership firm for personal gains led to filing of the suit for dissolution of partnership firm, rendition of accounts and

permanent injunction. Essentially therefore, it is a dispute which centers around the Partnership Deed dated 05/08/2014.

15. The Partnership Deed contains an Arbitration Clause, which not only covers disputes in respect of interpretation, operation or enforcement of the terms and conditions of the Partnership Deed and the disputes relating to conduct of partnership business but covers all other disputes whatsoever which are not otherwise provided in the Deed. The Arbitration Clause is all encompassing and would include all the disputes, controversies and differences between the parties relating to the Partnership business or interpretation, operation and enforcement of the terms of the Partnership Deed. It is therefore evident that non-compliance of Clause 18 of the Partnership Deed as well as continuing the partnership business for personal gains after the dissolution would be a dispute covered by clause 18 of the Partnership Deed.

16. It is also pertinent to note that learned Judge has declined to invoke the Arbitration clause in view of dissolution of Partnership. In ***Branch Manager, Magma Leasing and Finance Ltd.*** (supra), the question before the Apex Court was whether the Arbitration Agreement would survive for the purpose of resolution of dispute

arising under or in connection with the contract even if its performance has come to an end on account of termination due to breach. The Apex Court observed that :-

"13. Recently, in the case of P. Manohar Reddy & Bros. vs. Maharashtra Krishna Valley Development Corporation And Ors., while dealing with the argument of the respondent therein that in terms of the contract the claim for extra work or additional work should have been raised during the pendency of the contract itself and not after it came to an end, this Court (2007) 5 SCC 692 (2009) 2 SCC 494 considered the concept of separability of the arbitration clause from the contract and made the following observations :

"27. An arbitration clause, as is well known, is a part of the contract. It being a collateral term need not, in all situations, perish with coming to an end of the contract. It may survive. This concept of separability of the arbitration clause is now widely accepted. In line with this thinking, the UNCITRAL Model Law on International Commercial Arbitration incorporates the doctrine of separability in [Article 16\(1\)](#). The Indian law -- the Arbitration and [Conciliation Act](#), 1996, which is based on the UNCITRAL Model Law, also explicitly adopts this approach in [Section 16\(1\)\(b\)](#), which reads as under:

"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."

(emphasis supplied) Modern laws on arbitration confirm the concept.

28. The United States Supreme Court in a recent judgment in Buckeye Check Cashing Inc. v. Cardegna [546 US 460 (2005)] acknowledged that the separability rule permits a court "to enforce an arbitration agreement in a contract that the arbitrator later finds to be void". The Court, referring to its earlier judgments in Prima Paint Corpn. v. Flood & Conklin Mfg. Co.[18 L.Ed. 2d 1270] and Southland Corpn. v. Keating [465 US 1 (1984)], inter alia, held:

"Prima Paint and Southland answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."

But this must be distinguished from the situation where the claim itself was to be raised during the subsistence of a contract so as to invoke the arbitration agreement would not apply."

14. The statement of law expounded by Viscount Simon, L.C. in the case of Heyman as noticed above, in our view, equally applies to situation where the contract is terminated by one party on account of the breach committed by the other

particularly in a case where the clause is framed in wide and general terms. Merely because the contract has come to an end by its termination due to breach, the arbitration clause does not get perished nor rendered inoperative; rather it survives for resolution of disputes arising "in respect of" or "with regard to" or "under" the contract. This is in line with the earlier decisions of this Court, particularly as laid down in Kishori Lal Gupta & Bros."

17. In the instant case, the Arbitration clause is widely worded and is not restricted or limited to the disputes arising prior to dissolution of partnership firm. The Partnership Deed does not indicate that the parties intended to exclude post dissolution disputes from arbitral reference. Consequently there is no embargo to refer such disputes to the Arbitration. As stated earlier, the dispute relates to non-compliance of Clause 18 of the Partnership Deed. The enforcement of Clause 18 and provisions under Sections 46 and 48 of the Arbitration Act come in operation post dissolution of Partnership. The dispute relating to non enforcement of Clause 18 is covered by Clause 19. In the absence of any embargo to refer post dissolution dispute to the Arbitrator, it is not possible to accept that the Arbitration clause would cease to exist with dissolution of partnership firm.

18. It is thus evident that there is a valid arbitration agreement between the parties. The dispute raised in the suit has its genesis in the arbitration clause. Learned Judge was therefore under an obligation to refer the parties to arbitration.

19. Accordingly, the revision application is allowed. The impugned order is set aside. The dispute raised by the Plaintiff in the suit is referred to arbitration through Arbitrator duly appointed in accordance with law.

20. There shall be no order as to costs.

(SMT. ANUJA PRABHUDESSAI, J.)