

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction

Present:

The Hon'ble Justice Shekhar B. Saraf

AP / 214 /2021

GA / 1 /2021

Jayant Chaurasia

VS

Anup Kumar Chaurasia

For the Petitioner : Mr. Meghnad Dutta, Adv.
Mr. Arindam Paul, Adv.

For the Respondent : Mr. Sourojit Dasputa, Adv.

Last heard on: November 24, 2022

Judgment on: December 15, 2022

Shekhar B. Saraf, J:

1. This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') seeking appointment of a sole arbitrator to arbitrate all disputes and differences which have arisen between the parties in relation to the partnership agreement dated April 25, 1997.

2. The relevant facts necessary for the determination of this application are as follows:

- a. The petitioner and the respondent are cousin brothers and they are partners in equal share in the partnership business being under the name and style of M/s Ganguram & Sons, having its office and place of business at 22/1, Gariahat Road, Kolkata 700 029 and manufacturing unit at 57/A, Purnadas Road, Kolkata 700 029.
- b. Originally, the father and uncle of the petitioner, namely, Shaligram Chaurasia and Kashinath Chaurasia were the partners of the said partnership business. In 1997, the petitioner and respondent were inducted as the partners of the said partnership business on the terms and conditions as recorded and mentioned in the partnership deed dated April 25, 1997.
- c. By efflux of time, Kashinath Chaurasia and Shaligram Chaurasia expired in 2011 and 2012 respectively and their shares devolved upon the petitioner and respondent respectively in terms of the provisions contained in the said partnership deed.
- d. On and from April 2017, there were signs of discord and difference

of opinion between the parties in relation to the management of the said partnership business. Pursuant to such disagreements, two civil suits being T.S No. 916 of 2018 and T.S. No. 1046 of 2018 were filed by the petitioner before the Alipore Court. The respondent had also instituted two civil suits being T.S. No. 551 of 2018 and T.S. No. 985 of 2021 before the Alipore Court. However, the parties failed to resolve the disagreements between them and the same further flared up post filing of the said civil suits. It is to be noted that the T.S. 985 of 2021 was instituted by the respondent after the petitioner had approached this Court in the present application.

- e. On October 19, 2020, the petitioner sent a notice and asked the respondent to adhere to the terms and conditions of the partnership agreement, and to allow access to books of accounts and participation in the business to the petitioner. The petitioner followed up with a legal notice on November 13, 2020 wherein he dissolved the partnership business and called upon the respondent to divide the assets and properties of the said business as per the said agreement.
- f. Finally, on February 11, 2021, the petitioner issued a letter upon the respondent invoking arbitration as per Clause 26 of the said partnership deed and appointed Mr Manabendra Ray as the

Learned Arbitrator to adjudicate the disputes which have arisen between the parties.

- g. On receipt of no response from the respondent, the present petition was filed by the petitioner seeking appointment of a sole arbitrator by the Court to adjudicate the disputes between the parties.

Submissions

- 3. The counsel appearing on behalf of the petitioner has made the following arguments :
 - a. The counsel submitted that the respondent with an ulterior motive and mala fide intention had caused disturbance and/or hindrances in the petitioner's peaceful participation in the partnership business. He further submitted that the petitioner has lost all faith, trust and confidence in the respondent and it became completely impossible to carry on business-in-partnership with the respondent.
 - b. The counsel stated that the statements contained in the affidavit-in-opposition filed by the respondent were wholly false to the

knowledge of the petitioner and the same has been done deliberately and consciously.

- c. Finally, the counsel contended that the partnership deed between the parties is not forged or manufactured and that the disputes between the parties should be referred to arbitration as there exists a valid arbitration clause and that the arbitrator should adjudicate upon all questions including that of jurisdiction and non-arbitrability. To buttress this contention, the counsel has placed reliance upon the decision of the Supreme Court in ***Vidya Droalia v. Durga Trading Corporation*** reported in ***(2021) 2 SCC 1*** and of the Bombay High Court in ***M/s Atul & Arkade Realty v. I.A. & I.C. Private Limited and Ors. (Arbitration Application No. 72 of 2013)***.
4. The counsel appearing on behalf of the respondent has made the following arguments :
 - a. The counsel submitted that the petitioner has no connection whatsoever with the partnership firm, its office and the factory. He further submitted that the partnership deed presented by the petitioner is fake, manufactured and forged.

- b. Continuing his submissions on the partnership deed, the counsel argued that the said document is insufficiently stamped and unregistered, and therefore, the present application cannot be allowed on the basis of an insufficiently stamped and unregistered document.
- c. The counsel further stated that the said partnership deed has already been challenged by the respondent before the Alipore Court being T.S. No. 985 of 2021. He drew the attention of the Court towards two suits, being T.S. No. 916 of 2018 and T.S. No. 1046 of 2018, filed by the petitioner before the Alipore Court to argue that the said the partnership deed is indeed manufactured as the petitioner herein failed to secure any reliefs in the said suits.
- d. Lastly, the counsel argued that the petitioner has failed to disclose existence of any dispute in the Section 21 notice and therefore, reference to arbitration cannot be made in the absence of any dispute.

Analysis

- 5. I have heard both the counsels and have perused the materials on record.

6. First things first - the counsel for the respondents denied the very existence of a partnership deed between the parties and contended that the deed presented by the petitioner is manufactured and fake. Therefore, in the absence of any such deed, there exists no arbitration agreement, and as such this Court cannot hear this application.

7. Following the principle laid down by the Supreme Court in the case of **Vidya Droalia -v- Durga Trading Corporation** reported in **(2021) 2 SCC 1**, this Court has to refer a matter to arbitration or appoint an arbitrator, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding. Further, reliance can also be placed on the decision of **A. Ayyasamy -v- A Paramasivam & Ors.** reported in **(2016) 10 SCC 386**, wherein the Apex Court stated that mere allegation of fraud is not sufficient to detract parties from the obligation to submit their disputes to arbitration. The relevant paragraph has been reproduced below –

“45.1 Hence, it is necessary to emphasise that as a matter of first principle, this Court has not held that a mere allegation of fraud will exclude arbitrability. The burden must lie heavily on a party which avoids compliance with the obligation assumed by it to submit disputes to arbitration to establish the dispute is not arbitrable under the law for the time being in force. In each such case where an objection on the ground of fraud and criminal wrongdoing is raised, it is for the judicial authority to carefully sift

through the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration....”

8. In the present case, the records reveal that the petitioner has presented several documents pertaining to the said partnership firm such as audited balance sheet, rent receipts and an HDFC Bank certificate showing the parties as authorised signatories, to contend that both the petitioner and the respondent are partners in the said partnership firm. On the other hand, the respondent failed to refute the petitioner's argument and could not produce any document or agreement in support of his contention regarding non-existence of a partnership deed.
9. In my opinion, the aforesaid contention by the respondent of a manufactured, forged and fake partnership agreement cannot be accepted as it is merely a dilatory tactic which is manifestly evident from the materials in hand wherein they have failed to provide any evidence in favour of their claim of fabrication and forgery in reference to the authenticity of the partnership agreement. The respondent could have presented strong cogent evidence such as bank account statements, income tax returns, etc. to show that petitioner has no connection with the said partnership business and to prima facie establish a case of non-existence of a partnership agreement. But that ship has long sailed.

10. Moving forward, the counsel for the respondent has contended that the Section 21 notice by the petitioner does not disclose any dispute and that there cannot be any question of nomination of an arbitrator by the parties without the existence of a dispute in the first place. In this context, it will be prudent to reproduce the arbitration clause in the said partnership deed :

“26....That all matters of differences or disputes and all questions whatsoever which may or shall either during the continuance of this partnership or afterwards arise between the partners hereof and/or their heirs and/or legal representatives of a deceased party hereof in regard to any matter or things relating to partnership affairs or to the construction or application of any clause herein contained or to any account, valuation or division to be made hereunder or to any act, deed or omission of any of the parties hereof or to the rights, duties or liabilities of any person under these presents shall forth with be referred to arbitration according and subject to the provisions of the Indian Arbitration Act (Act X of 1940) or any other statutory modification thereof for the being in force.”

From the bare examination of the clause, it is evident that in all matters of differences or disputes and all questions whatsoever which may arise during the continuance of the partnership or even afterwards including conduct of business, construction or application of the clauses in the deed, valuation or division to be made there under and in relation to the rights, duties or liabilities of any person, the parties shall refer such differences or disputes to arbitration.

11. Before adjudicating the foregoing contention, reliance can be placed upon the decision of Supreme Court in ***Deutsche Post Bank Home Finance Ltd. –v- Taduri Sridhar*** reported in **(2011) 11 SCC 375**, the self-explanatory portion of which has been reproduced below –

“18. The existence of an arbitration agreement between the parties to the petition under section 11 of the Act and existence of dispute/s to be referred to arbitration are conditions precedent for appointing an Arbitrator under section 11 of the Act. A dispute can be said to arise only when one party to the arbitration agreement makes or asserts a claim/demand against the other party to the arbitration agreement and the other party refuses/denies such claim or demand.....”

12. In the present facts in hand, it is undeniable that here have been disagreements between the parties since 2017 and that the parties had also instituted civil suits against each other in the Alipore Court. The petitioner had made certain claims with regards to the functioning of the said partnership firm and had also issued an arbitration notice on non-receipt of satisfactory responses from the respondent. In fact, the petitioner’s letter dated November 11, 2020 dissolved the partnership business and called upon the respondent to take steps to divide the assets and properties of the said partnership business in accordance with their proportionate share.

13. In my view, the Section 21 notice dated February 11, 2021 cannot be

looked in isolation as it is the culmination of several letters sent by the petitioner in relation to matters arising out of the partnership business. Further, it is palpable from the above judgment that a dispute can be said to arise when one party makes certain claims and other party refuses or denies the same, and therefore, the Section 21 notice issued by the petitioner referred to the existing disputes between the parties and in pursuance to that, the petitioner had nominated and appointed an arbitrator of its choice.

Hence, the position taken by the respondents denying the existence of any dispute in the Section 21 notice ought to be rejected.

14. Continuing ahead, the counsel for the respondent has contended that this Court cannot entertain the present application as the said partnership deed is insufficiently stamped and unregistered. I express my disagreement with this contention for the following reasons :

- a. A bare perusal of the partnership deed dated April 25, 1997 reveals that it has been stamped for INR 200. Article 46 of Schedule 1A to The Indian Stamp Act, 1899, as amended in West Bengal, provides for a maximum of INR 150 as stamp duty for an instrument of partnership. Hence, in my view, the said partnership deed is not insufficiently stamped.

- b. This Court in the case ***Md. Wasim v. M/s Bengal Refrigeration and Company and Ors. (A.P. 27 of 2022)*** ruled that non-registration of partnership firm would not trigger the bar under Section 69 of the Partnership Act in terms of beginning proceedings under Section 11 of the Arbitration Act. The relevant paragraphs have been extracted below:

*“10. The objection of the respondents is in respect of the bar contained under Section 69 of the Act of 1932. Sub-sections (1) and (2) of Section 69 of the Act of 1932 restrict filing of suit by any person as a partner of unregistered firm. Sub-section (3) of Section 69 of the Act of 1932 makes the provisions of Sub-sections (1) and (2) applicable also to a claim of suit of or “other proceedings” to enforce a right arising from a contract. Hon’ble Supreme Court in the matter of **Umesh Goel vs. Himachal Pradesh Cooperative Group Housing Society Limited** reported in (2016) 11 SCC 313 has settled that the arbitral proceedings will not come under the expression “other proceedings” of Section 69(3) of the Act of 1932 and that the ban imposed under Section 69 can have no application to arbitration proceedings as well as the arbitral award. Madras High Court in the matter of **M/s. Jayamurugan Granite Exports vs. M/s. SQNY Granites** reported in 2015-4-L.W. 385 has considered the similar issue and held that:*

38. If these observations are looked in the context of Section 69 of the Partnership Act, the bar created for institution of the suit or other proceedings is in respect of the same being instituted in any “courts”. But the aforesaid observation shows that the power has to be exercised under Section 11 of the 1996 Act by the Chief

Justice or his delegate and not by the Court. In fact, it is observed in paragraph-20 that there are a variety of reasons as to why the Supreme Court cannot possibly be considered to be “court” within the meaning of Section 2(1)(e) even if it retains seisin over the arbitral proceedings. The Judgment is to the effect that the Chief Justice does not represent the High Court or the Supreme Court, as the case may be, when exercising power under Section 11, albeit a judicial power. This is also the reason for the decision of the Chief Justice or his designate not being the decision of the Supreme Court or High Court, as the case may be, as there is no precedential value being the decision of the judicial authority, which is not a court of record.

39. In addition, as has been discussed aforesaid, the scheme of the 1996 Act is different and the process of mechanism for alternate dispute resolution system has to be construed not identical to the 1940 Act, considering the difference in their schemes.

40. I am thus of the view that non-registration of the petitioner firm would not be a bar under Section 69 of the Partnership Act for institution of proceedings under Section 11 of the 1996 Act.”

11. In view of the above legal position, the objection of the respondent based upon Section 69 of the Act of 1932 cannot be sustained and is hereby rejected.”

Therefore, the said partnership deed has been sufficiently stamped and even though the same is unregistered, this Court can refer the disputes to arbitration under Section 11 of the Act.

15. For the reasons as discussed above and following the *prima facie test* laid down by the Supreme Court in **Vidya Droalia** (supra), I am convinced that there exists a partnership deed with a valid arbitration agreement between the parties, and that the parties must be referred to an arbitrator to decide the disputes between them.
16. Lastly, from the case details on the e-courts website, it appears that in all the afore named civil suits, the parties have failed to secure any favourable order or interim relief. In any case, the civil suits pending before the Alipore Court or elsewhere does not restrain this Court in proceeding with this Section 11 application as there is nothing in law which affects the jurisdiction and powers of this Court in enforcing the arbitration agreement between the parties. In fact, Section 8 of the Act makes it obligatory for the Court to refer parties to arbitration where there is an arbitration clause in the agreement.
17. The afore stated arbitration clause does not specify whether any party can nominate an arbitrator nor does it indicate the requisite strength of the arbitral bench and other related processes. Therefore, the parties would have to mutually decide on this aspect or seek intervention of

this Court to get the arbitration process started. In the light of the Supreme Court decisions in ***Perkins Eastman Architect DPC v. HSSC (India) Ltd.*** reported in ***2019 SCC OnLine SC 1517*** and ***TRF Limited v. Energo Engineering Limited*** reported in ***(2017) 8 SCC 377***, unilateral appointment of an arbitrator by any party is not permissible and consequently, the nomination of a sole arbitrator by the petitioner cannot be permitted.

18. Accordingly, I appoint Sudip Deb, Mobile No. 9830356572 as a sole arbitrator to arbitrate upon the disputes which has arisen between the parties. The learned arbitrator will be guided by the Arbitration and Conciliation Act, 1996, and shall make positive efforts to complete the arbitration proceedings at the earliest. The appointment is subject to submission of declaration by the Arbitrator in terms of Section 12(1) in the form prescribed in the Sixth Schedule of the Act before the Registrar, Original Side of this Court within four weeks from today.
19. The Registry is directed to send a copy of this order to the sole arbitrator. The learned counsels for the parties are also at liberty to bring it to the notice of the learned arbitrator.
20. In terms of prayer (a), the arbitration petition is, accordingly, allowed and the interlocutory application stands disposed of. There shall be no order as to costs.

21. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)