IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMM ARBITRATION APPLICATION NO. 180 OF 2019

Mr. Satish Madhavrao Surve (deceased)
through LRs. ...Applicants

Versus

M/s. Vichare Motors & ors. ...Respondents

Mr. Rajiv Thakur, for the Applicants.
Mr. G. B. Bhatt, for Respondent no.2.
Ms. Shilpa Ovalekar, for Respondent no.3.

CORAM: N. J. JAMADAR, J.
RESERVED ON: 7th APRIL, 2022
PRONOUNCED ON: 19th APRIL, 2022

ORDER:-

1. This application under Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act, 1996") is preferred to appoint an Arbitrator to adjudicate all the disputes arising out of the Deed of Reconstitution dated 30th April, 2000, executed between the predecessor in title of the applicants and respondent nos.2 and 3.

2. Respondent no.1 is a registered partnership firm. Initially the firm was constituted by Mrs. Vimal Raosaheb Gujar, Mrs. Sadhana Madhavrao Surve and Mrs. Shobha Balkrishna Khanvilkar, three daughters of late Tatyasahib Babasahib

Vichare, with equal share in the profits of the firm. On the death of Mrs. Shobha Khanvilkar, her son Mr. Jayraj - respondent no.2 came to be inducted as a partner in the firm under a Deed of (First) Reconstitution of the firm executed on 30th April, 2000. Another partner Mrs. Vimal Gujar expired on 22nd December, 2000. Her son Mr. Nandkumar – respondent no.3 came to be inducted in her place as a partner of the firm under Deed of (Second) Reconstitution of partnership firm dated 12th February, 2011. The applicants are the children of the third original partner Mrs. Sadhana Surve.

3. The applicants assert that Mrs. Sadhana died on 1st June, 2004. The applicants father Madhavrao informed respondent nos.2 and 3 to admit him as a partner in the firm in the place of deceased partner Mrs. Sadhana. Respondent nos.2 and 3 assured the father of the applicants and, later on, the applicant no.1 that he would be inducted as a partner in the partnership firm. Respondent nos.2 and 3 also failed to render the accounts of the firm, carve out the share of deceased partner Mrs. Sadhana and continued to carry on the business of the partnership firm without settling the accounts. The Deeds of Reconstitution of the partnership firm contain a dispute resolution mechanism by reference of the dispute to arbitration.

The applicants thus invoked arbitration by addressing notice dated 21st January, 2017. The notice was duly served on the respondents. They failed to comply with the demand in the said notice. Hence, this application for appointment of an Arbitrator to adjudicate all the disputes between the parties.

4. An affidavit-in-reply is filed on behalf of respondent no.2. It is admitted that respondent no.1 is a partnership firm. The fact that Mrs. Sadhana Surve, the mother of the applicants, was the partner of respondent no.1 firm is not contested. The application is resisted principally on the ground that since Mrs. Sadhana Surve expired on 1st June, 2004 and her name came to be deleted as a partner of the firm, neither the husband of Mrs. Sadhana nor the applicants ever raised any dispute regarding the share of the deceased partner in the partnership firm or claimed right of admission as a partner in the partnership firm. Thus, the reference to arbitration is wholly uncalled for as the substantive claim is hopelessly barred by limitation and there is no live dispute amenable to arbitration. Of course, respondent no.2 has denied the averments in the application that the father of the applicants and later on applicant no.1 made repeated request to induct him as a partner in the partnership firm and render the accounts.

5. In the backdrop of the aforesaid pleadings, I have heard Mr. Thakur, the learned Counsel for the applicant and Mr. Bhatt, the learned Counsel for respondent no.2 and Ms. Ovalekar, the learned Counsel for respondent no.3, at some length.

6. Uncontroverted facts first. It is incontrovertible that the firm was initially constituted by three sisters; Mrs. Vimal Gujar, Mrs. Shobha Khanvilkar and Mrs. Sadhana Surve. It is incontestable that upon the death of Mrs. Shobha Khanvilkar, respondent no.2 Mr. Jayraj Khanvilkar came to be inducted as a partner under the Deed of (First) Reconstitution dated 30th April, 2000 with Mrs. Vimal and Mrs. Sadhana as the continuing partners. Indisputably, after the death of Mrs. Vimal Gujar on 22nd December, 2000, the Deed of (Second) Reconstitution was executed on 12th February, 2001. Mr. Nandkumar – respondent no.3, the son of Mrs. Vimal, came to be inducted as a partner of respondent no.1 firm, with Mrs. Sadhana, the predecessor in title of the applicants, and Mr. Jayaraj – respondent no.2, as continuing partners. There is not much controversy over the fact that Mrs. Sadhana continued to be a partner of the firm till her death i.e. 7th June, 2004. In fact, respondent no.2 placed on record a copy of Deed of (Third) Reconstitution dated 2nd

December, 2005, whereby after recording the factum of death of deceased partner Mrs. Sadhana, respondent nos.1 and 2 continued to carry on the said business with effect from 2nd June, 2004.

7. The Deed of (First) Reconstitution dated 30th April, 2000 and the Deed of (Second) Reconstitution dated 12th February, 2001 made a provision for death retirement and insolvency of partners; which read as under:

> "**12**. Death/Retirement/Insolvency of Partners:
>
> In the event of retirement or death or insolvency of any of the parties hereto, the partnership business shall not stand dissolved. An account of the affairs of the firm shall be prepared upto the concerned date. The share in assets of the Firm after deducting the liabilities of the Firm shall be payable to the parties or to their heirs, successors or nominees, as the case may be, and the remaining partners shall be eligible to continue the business of the firm."

8. The Deeds of Reconstitution contain an arbitration clause as under:

> "**13**. Arbitration:
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> In the event of any dispute arising amongst the parties hereto as regards the interpretation of any of the clauses here to or any other mater concerning with the business, the matter of such disputes shall be referred to arbitration. The parties hereto shall appoint one or more persons to act as arbitrator or arbitrators and the decision of the arbitrator shall be final and binding on all the parties hereto."

9. On the basis of the aforesaid clauses in the Deeds of Reconstitution, the applicants have invoked the arbitration with a case that respondent nos.2 and 3 did not induct the heirs of deceased partner Mrs. Sadhana and render the accounts, as stipulated under Clause 12 extracted above. It is not the case of the respondents that the accounts, as of the date of death of Mrs. Sadhana, the deceased partner, have been settled and the claim of the heirs of the deceased partner satisfied.

10. Respondent no.2 controverts the assertion that first the husband of Mrs. Sadhana and, later on, the applicant not made request for induction as a partner in the firm. On the contrary, according to respondent no.2, no dispute was ever raised, and thus no arbitrable dispute survives after a lapse of 13 years of the death of Mrs. Sadhana, the deceased partner. As the substantive claim is stale and hopelessly barred by law of limitation no case for exercise of jurisdiction under Section 11 of the Act, 1996 is made out, submitted Mr. Bhatt.

11. To buttress the aforesaid submission, Mr. Bhatt placed a strong reliance on the judgment of the Supreme Court in the case of ***Bharat Sanchar Nigam Ltd. and anr. Vs. M/s. Nortel Networks India Pvt. Ltd.***[1]

12. In the said case, the Supreme Court has considered following two issues:

1 (2021) 5 Supreme Court Cases 738.

> (i) The period of limitation for filing an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"); and;
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> (ii) Whether the Court may refuse to make the reference under Section 11 where the claims are *ex facie* time barred?

13. The Supreme Court answered the first issue as under:

> "**15.** 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."

14. On the second issue, the Supreme Court adverted to the legislative history of Section 11, the judgments which governed the field before Section 11 came to be amended by insertion of Sub-section 6(A) and (B) by Arbitration and Conciliation (Amendment) Act, 2015 with effect from 23rd December, 2015, the judicial pronouncements post amendment, especially in the cases of ***Duro Felguera SA vs. Gangavaram Port Ltd.,***[2] ***Mayavati Trading Company Private Ltd. vs. Pradyut Dev Burman***[3] and ***Vidya Drolia vs. Durga Trading Corporation***[4] and concluded that the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the Arbitrator under Section 16, which

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2(2017) 9 SCC 729.

3(2019) 8 SCC 714.

4(2021) 2 SCC 1.

enshrines the *kompetenz-komptenz* principle. The doctrine of *kompetenz-komptenz* implies that the arbitral tribunal is empowered, and has the competence to rule on its own jurisdiction, including determination of all jurisdictional issues. This was intended to minimize judicial intervention at the pre-reference stage, so that the arbitral process is not thwarted at the threshold when a preliminary objection is raised by the parties.

15. In the process of answering issue no.2, the Supreme Court pointed out the distinction between jurisdictional and admissibility issues. It was enunciated, an issue of 'jurisdiction' pertains to the power and authority of the Arbitrator to hear and decide a case. Admissibility issues, however, relate to procedural requirements such as breach of pre-arbitration requirements, for instance, a mandatory requirement for mediation before the commencement of arbitration, or a challenge to a claim or part of the claim being either time-barred or prohibited until some pre-condition has been fulfilled. An admissibility issue is not a challenge to the jurisdiction of the arbitrator to decide the claim.

16. On the nature of the issue of limitation, the Supreme Court observed thus:

> "**32**. The issue limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the arbitral tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some pre-condition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself."
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> (emphasis supplied)

17. Holding thus, the Supreme Court concluded that it is only in very limited category of cases where there is not even a vestige of doubt that the claim is *ex facie* time-barred or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the dispute to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the Tribunal.

18. Mr. Bhatt heavily banked upon the aforesaid enunciation of law to draw home the point that the claim in the instant case is hopelessly time-barred and, therefore, reference to arbitration wholly unwarranted. Laying emphasis on the time-lag of about 13 years between the death of Mrs. Sadhana, the deceased partner and the invocation of arbitration by notice dated 21st January, 2017, Mr. Bhatt would urge that *ex facie* the claim is time-barred.

19. If the submission is considered through the prism of the time-lag alone, it appears attractive on the first blush. However, on a close scrutiny, in the light of the governing provisions of the Limitation Act, 1963, the submission that the claim is simply barred by the law of limitation does not merit acceptance unreservedly.

20. Two provisions of the Limitation Act deserve consideration. First, Article 5 of the Limitation Act which provides limitation for a suit for accounts and share of the profits of a dissolved partnership firm. It provides three years period of limitation, The time begins to run from the date of the dissolution. Second, Article 113 which provides limitation of three years for any suit for which no period of limitation is otherwise expressly provided in the schedule. The time begins to run when the right to sue accrues.

21. In the case at hand, the applicability of Article 5 and Article 113 of the Schedule comes to the fore. Article 5 applies to a suit for accounts and a share of the profits of a dissolved partnership firm. Under Section 42 of the Indian Partnership Act, 1932, subject to the contract between the partners, a firm is dissolved *inter alia* by the death of the partner. In the instant case, we have noted that there is a clear stipulation to the contrary in the partnership deeds for, under Clause 12, it is expressly provided that the firm shall not stand dissolved in the event of retirement or death or insolvency of any of the partners. The remaining partners were to continue the business of the firm and the account of the affairs of the firm were to be prepared up to the date, on which the retirement or death or insolvency of one of the partners occurs, and thereupon the share of the such partner or the legal representatives shall be paid.

22. Thus, on the death of Mrs. Sadhana, the firm did not dissolve. It is the case of respondent no.2 that respondent nos.2 and 3 continued to carry on the business of the firm with effect from the very next day i.e. 2nd June, 2014. In the aforesaid fact situation, the claim of the applicants would not be governed by Article 5 of the Limitation. A suit for accounts which is not covered by Article 5 is governed by the Article 113 of the Schedule, where the time begins to run when right to sue accrues.

23. There is an essential distinction between a suit for the accounts of a partnership firm which is dissolved and a suit where the surviving partners continue to carry on the business of the firm, after the death of one of the partners, and the legal heirs of the deceased partner seek enforcement of the rights to the assets of the deceased partner in the partnership firm. The claim then takes the character of the rights governed by Section 37 of the Indian Partnership Act, which provides that the estate of the deceased partner is entitled to such share of profits made since the deceased partner ceased to be a partner as may be attributable to the use of his share of the property of the firm or to the interest at the rate of 6% p.a. on the amount of his share in the property of the firm. When the surviving partners continue the business of the partnership firm without settlement of the accounts between them and the deceased partner, the cause of action continues from day to day and as long as the business continues, the firm continues to make profit. In such a case, ordinarily, the bar of limitation does not operate.

24. I have adverted to the aforesaid principles, for the limited purpose of determining the issue of reference to arbitration only, with a view to ascertain whether the claim is *ex facie* time-barred and a deadwood. On a *prima facie* review, I do not find that the claim is *ex facie* time-barred. Therefore, the objection on behalf of respondent no.2 to refer the dispute to arbitration does not merit acceptance.

25. The upshot of the aforesaid consideration is that the application deserves to be allowed.

26. Hence, the following order:

: O R D E R :

(i) The application stands allowed.

(ii) Mr. Shanay Shah, Advocate, practicing in this Court is appointed as Sole Arbitrator to adjudicate upon claims and counter claims, if any, and/or all the disputes which arise out of the partnership agreements, between the parties.

(iii) The learned Arbitrator is requested to file his disclosure statement under Section 11(8) read with Section 12(1) of the Act, 1996 within two weeks with the Prothonotary and Senior Master and provide copies to the parties.

(iv) Parties to appear before the Sole Arbitrator on a date to be fixed by him at his earliest convenience.

(v) Fees payable to the Sole Arbitrator will be in accordance with the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

[**N. J. JAMADAR, J.**]