

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

CO 1948 of 2019

**Sanjay Saha
Vs.
Nandita Misri & anr.**

For the petitioner : Mr. Debajyoti Basu
Mr. Subhojit Seal
Mr. Diptomon Talukder

For the opposite parties : Mr. Sanjib Bandopadhyay
Mr. Nabhajit Prasad Basu
Mr. Manos Kumar Bose
Mr. Manoj Kumar Mondal

Heard on : 03.07.2023

Judgment on : 20.07.2023

Ajoy Kumar Mukherjee, J.

1. Order No.9 dated November, 30, 2017 passed by learned Civil Judge (Junior Division), Fast Court, Malda, in connection with O.C. Suit No. 141 of 2017, is under challenge in the present Application. Petitioner's case is that plaintiff/opposite party no. 1 herein filed aforesaid suit praying *inter alia* for declaration and permanent injunction and for rendering accounts of partnership against the defendant no. 1/petitioner and other defendant no, 2,3 and 4.

2. Upon receipt of summon of the said suit the petitioner and opposite party no. 2,3 and 4 herein appeared in the said suit and on September, 18, 2017, the opposite party no. 2 filed impugned petition before the court below challenging the maintainability of the suit. Opposite party no.2 by filing copy of partnership deed, (wherein clause 18 recorded that in case of any dispute between the parties, the matter shall be referred to the arbitrator), prayed before the court that the suit is not maintainable before the civil court and it shall be referred to the arbitration. On November, 11, 2017 the opposite party no. 1 herein being plaintiff filed written objection against the said petition. It is not in dispute that the partnership firm, in question, is a registered firm in which the opposite party no. 1 happens to be the first part and petitioner herein is second part of the firm. The partnership deed was executed and registered on the basis that the profit and loss will be divided and borne between the parties and not by any third party.

3. Mr. Debasis Basu learned counsel appearing on behalf of the petitioner strenuously argued that the partnership deed was entered between the opposite party no. 1 and the petitioner herein and as such opposite party no. 2/defendant No. 2 is a stranger to the deed. Petitioner herein never applied before the court below challenging maintainability of the aforesaid suit. He further submits that by the impugned order dated 30th November, 2017, learned Trial Court upon hearing the respective parties and relying upon Judgment of Apex Court passed in **Branch Manager, Magma leasing and finance Ltd and another Vs. Potluri Madhavalata and another**, reported in (2009) 10 SCC 103 and **M/s Sundaram Finance**

Ltd. and another Vs. T. Thankam, reported in **(2005) 14 SCC 444** was of the view that the matter should be referred to an arbitrator for proper adjudication of the dispute and accordingly order was made allowing the prayer made by opposite party no. 2, challenging the maintainability of the suit, with further observation that the civil court does not have any jurisdiction to try the said suit. Mr. Basu contended that it is surprising that neither of the parties to the partnership agreement challenged maintainability of the aforesaid suit but on the basis of the application made by opposite party no. 2 with whom the subjected partnership deed was not entered, the court below allowed the said application. He further submitted that opposite party no. 1 filed an application under section 11 of the Arbitration and Conciliation Act 1996 before this High Court, being A.P. No. 378 of 2018. By an order dated July, 24, 2018, this High Court was pleased to allow the said application under section 11 filed by opposite party no. 1 herein and relegated the matter into arbitration interalia upon appointing a sole Arbitrator with consequential directions.

4. Being aggrieved and dissatisfied with the said order passed by this High Court, the petitioners herein preferred special Leave Petition before Supreme Court being SLP(Civil) No. 10214 of 2019, which was dismissed summarily by the Apex Court on 06th May, 2019. Meanwhile, pursuant to aforesaid order of appointment by High Court, the sole Arbitrator accepted the appointment and entered into the reference. Furthermore opposite party no. 1 already filed her statement of claim before the learned sole arbitrator. Thereupon the learned arbitrator directed the petitioner herein to file his counter claim/counter statement.

5. Petitioner contended that learned court below proceeded with conjecture and surmises and applied erroneous test of law thereby failed to appreciate that maintainability of aforesaid O.C. Suit being no. 141 of 2017 can only be challenged by a party to the arbitration agreement or any person claiming through or under him and by no one else. In fact the court below failed to appreciate that true scope and ambit of section 8 of Act of 1996 and accordingly prayed for setting aside order impugned.

6. Learned counsel appearing on behalf of the opposite party no. 1 submits that in terms of arbitration clause, the civil court has no jurisdiction and accordingly the court below was justified in referring the matter before the arbitrator and furthermore the arbitration proceeding has already been started in terms of appointment of arbitrator by this court which has not been negated by the Apex Court and accordingly the order impugned does not call for any interference.

7. Before going to further details let me reproduce section 8 of Arbitration and Reconciliation Act 1996:-

8. Power to refer parties to arbitration where there is an arbitration agreement.—1 [(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 to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]

(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: 2 [Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(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.

8. In view of said provision of the Act of 1996, a party to the arbitration agreement or any person claiming through or under him, is entitled to apply not later than the date of submitting his first statement, on the substance of the dispute for referring the issue before the arbitrator, unless it is found that prima facie no valid arbitration agreement exists. The petitioner has annexed copy of the partnership deed which is written in Bengali and paragraph 18 of the agreement says that every dispute in connection with partnership business shall be decided by the arbitrator and the decisions of arbitrator shall be final.

9. On perusal of the prayer made in the aforesaid suit it appears that plaintiff/opposite party no. 1 herein has prayed

- (a)** For a preliminary decree for declaring the shares of the parties as per the terms of the partnership deed.
- (b)** For dissolution of the partnership with effect from 31.08.2017
- (c)** For rendering the accounts.
- (d)** For appointing a receiver in case the defendant No.1 fails to settle the matter amicably.
- (e)** For a permanent injunction restraining the defendant No.1 in association with defendant No.2 to 5 from entering into the Banaful Lodge or in any manner continuing the business Banaful Lodge
- (f)** For all cost of the suit.
- (g)** For any other relief or reliefs to which the plaintiff be found entitle to.

10. Referring ***Sukanya Holdings (p) Limited Vs. Jayesh H. Pandya and another*** reported in **(2003) 5 SCC 531**, Mr. Basu strenuously argued that bifurcation of the cause of action i.e. the subject matter of the suit in two parts, one to be decided by Arbitral Tribunal and the other by the civil court or bifurcation of the parties in between parties to the arbitration agreement and those who are not parties to the agreement, is not permissible. If bifurcation of the subject matter of suit was contemplated, legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before the judicial authority is not allowed. This is because bifurcation of suit into two parts one to be decided by the arbitral authority and other to be decided by the civil court, would inevitably delay the proceedings and whole purpose of speedy disposal of dispute and decreasing cost of litigation would be frustrated by such procedure, as held by the Apex Court in the said judgment. He further stated referring ***Ameet Lal chand Shah and others Vs. Rishabh Enterprises and another*** reported **(2018) 15 SCC 678** that unless all the parties to the suit are not parties to the agreement then the matter cannot be referred to arbitration, since there is no provisions in the Act for partly referring the dispute to arbitration.

11. Accordingly Mr. Basu contended that from the prayer portion of the application it is evident that though some reliefs have been sought for in connection with partnership business but there are some other reliefs which an arbitrator is not entitled to award. Furthermore out of the parties in the suit only the petitioner herein and opposite party no. 1 are the parties to the

arbitration agreement and the other defendants in the suit namely defendant no. 2 to 4 are not the parties to the arbitration agreement and accordingly bifurcation of the relief and bifurcation of the parties is not permissible in the present context and as such following guidelines laid down in **Sukanya Holding (p) Limited (supra)** the court below ought not to have referred the matter to the arbitration. His further limb of argument is in terms of section 8 of the Act of 1996, a party to the arbitration agreement or any person claiming through or under him, is only entitled to apply for referring the dispute before the arbitrator.

12. Learned counsel appearing on behalf of the opposite party no. 1/plaintiff submits that the opposite party no. 2 in fact made the prayer under the plaintiff i.e. opposite party no. 1 and plaintiff/opposite party no. 1 has clearly averred in paragraph 10 of the plaint that defendant no. 2,3 and 4 are Manager, Accountants, and Room Servant who has been appointed by defendant no. 1/petitioner herein and who are more obedient to the defendant no. 1. In view thereof when it is not under challenge that the defendant no. 2 is the Manager of the partnership firm and when it is the specific case of the plaintiff/opposite party no. 1 that opposite party no. 2 has acted under opposite party no. 1, then there is hardly any scope to say that opposite party no. 2 had no *locus standi* to make the aforesaid prayer under section 8 of the Act of 1996, who has acted under the partner of the partnership firm.

13. Now let me consider whether in terms of the judgment passed by the Apex Court in **Sukanya Holding (p) Limited (supra)**, there exists any question of bifurcation of relief claimed or bifurcation of parties in the suit

arises or not so that it can exclude application of section 8 of the Act of 1996, in the present context.

14. I have already quoted the prayers made in the plaint and I have also stated that under clause 18 of the partnership deed, every dispute in connection with the partnership business shall be referred to arbitrator. Now so far as the first prayer of plaint is concerned, it relates to a preliminary decree for declaring the share of the parties as per the terms of partnership deed and second prayer is dissolution of the partnership business with effect from 31st August 2017 and 3rd prayer is rendering the accounts and the 4th prayer is for appointment of receiver in case defendant no. 1 failed to settle the matter amicably and 5th prayer is for permanent injunction restraining the defendant no. 1 and his associates namely defendant no. 2 to 4 from entering into the subject matter of the suit. Prayer 6th and 7th relates to incidental costs etc. Accordingly all the aforesaid prayers are clearly within the ambit of partnership business and the disputes relate to the partnership business. Though the plaintiff has impleaded defendant no. 2 to 4 in the said suit but from the prayer portion, it is clear that plaintiff has prayed for entire relief including prayer for injunction against the defendant no. 1/ petitioner herein and defendant no. 2 to 4 have been added, describing them as associates of defendant no. 1 and no direct relief has been sought for against them including his relief in connection with restraining order which is against defendant no.1 and his associates. Accordingly the question of bifurcation of the parties does not arise in the present context.

15. Bifurcation of cause of action and subject matter of the dispute also does not arise in the present context. Firstly because the prayer made in the plaint relates to dispute in connection with the partnership business and secondly arbitrator has power to adjudicate all the prayers made in the plaint in terms of various provisions of the Act of 1996, including interim measures under section 17 of the Act.

16. Learned counsel appearing on behalf of the petitioner argued that from the order impugned it is clear that relying upon the copy of the arbitration agreement he has allowed the defendant no. 2's application under section 8 of the Act of 1996 though sub-section (2) of section 8 makes it clear that the application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or duly certified copy thereof. Accordingly petitioner contended without accompanying original arbitration agreement or even certified copy of arbitration agreement defendant no. 2 made the application and the court below was not justified in referring the matter before the arbitrator in complete disregard to section 8 (2) of the Act of 1996.

17. Learned counsel appearing on behalf of the plaintiff/opposite party no.1 submits that the original arbitration agreement is with the petitioner/defendant no. 1 and as such they had filed copy of such registered agreement. He further submits such issue was never raised earlier.

18. In this context Mr. Basu on behalf of the petitioner further submits that though this court while disposing section 11 of the Act of 1996, appointed arbitrator but under the said provision this Court did not have

any scope to examine the legality and validity of the arbitration agreement, nor the propriety of the application under section 8 of the Act of 1996. The only question that is to be considered while disposing application under section 11 is whether there exists any arbitration agreement or not. Accordingly even though this High court appointed an arbitrator on the basis of the impugned order but in fact as the order impugned passed by the court below is vitiated for non-filing of the original arbitration agreement or certified copy of the agreement in compliance with section 8(2), so subsequent appointment of arbitrator on the basis of said order is also liable to be vitiated.

19. I have perused the order passed by this Court in AP 378 of 2018. The impugned order passed by Court below referring the dispute before arbitrator was passed on 30th November, 2017. The appointment of arbitrator was made by this High Court in AP No. 378 of 2018 on 14th July, 2018. In the said order it has been categorically observed as follows:-

"I have considered the materials on record and the arguments advanced by the learned counsel appearing for the respective parties. In the present case, the existence of the arbitration agreement contained in clause 18 of the deed of partnership dated April 11, 2014 is not in dispute. Based on the said arbitration agreement, the learned Civil Judge (Junior Division), First Court, Malda referred the parties to the suit presently numbered as CIS No.449 of 2014 to arbitration and it is not the case of the present respondent that the said order dated November30, 2017 passed by the learned Civil Judge (Junior Division), First Court, Malda is erroneous. In the letter dated January 17, 2018 the petitioner has not denied either the existence or applicability of the arbitration agreement between the parties. Considering all these facts, I do not find any merit in the objection raised by the respondent to the prayer of the petitioner in this application.

Accordingly, Mr. Partha Pratim Roy, Advocate of Bar Association Room No.11 is appointed as the sole Arbitrator to adjudicate the disputes between the parties."

20. From the aforesaid order it is quite clear that this court specifically held that it is not the case of the respondent i.e. petitioner herein that the

said order dated November, 30, 2017 passed by the learned Civil Judge(Junior Division) 1st Court Malda is erroneous. In the letter dated January, 17, 2018 the petitioner has not denied either existence or applicability of the arbitration agreement between the parties. The court further observed that the existence of arbitration agreement contained in clause 18 of the deed of partnership dated April, 11, 2019 is not in dispute. Said observation of the court below has not been negated by the Apex Court and as such it attained its finality. Since the petitioner herein never sought for reviewing said observation and since special leave petition dismissed in limini and arbitral process has already been started, petitioners are estopped from challenging the appointment of arbitrator or the Arbitral proceeding, specially when there is no denial that arbitration clause was put in the agreement on consent which suggests the intention of creatures of agreement and also when no allegation so far levelled against appointed arbitrator. In written objection filed before the court below and even in the present Revisional application, the petitioner has not taken such plea. Furthermore opposite party No. 1 herein being plaintiff of the suit happens to have aggrieved first by the order impugned but he has not challenged the order impugned, where his suit has been adjudicated as non-maintainable. Not only that accepting said order opposite party No.1/plaintiff filed application under section 11 of the Act of 1996 and accordingly arbitrator has been appointed, who has already taken up arbitral proceeding and accordingly such question even if existed has now become redundant and more so when existence of consensual arbitration agreement has not been questioned by any of the parties to the agreement and when disputes are

capable of decided through arbitral proceeding and are within the scope of arbitration agreement.

21. Moreover the arbitration proceedings being lesser expensive and a mode of speedy disposal, the petitioner/defendant no. 1 has failed to convince this court as to how he is going to be prejudiced if the dispute is settled through arbitral proceedings by the arbitral authority who has power to proceed with of the prayers in connection with the suit and when all the disputes relating to partnership business are covered by clauses 18 of the registered partnership deed. The object and purpose in framing the Act of 1996 is to provide speedy solution of commercial disputes and to limit the intervention of the court in arbitral process. The court while dealing with the case must not ignore the object and purpose of the enactment of the Act.

22. Having regard to the scheme and object of the Act, I am constrained to conclude once parties of partnership business have decided consensually to resolve their disputes through Arbitration in connection with every disputes relating to business and when the disputes are arbitrable, it is that forum alone, which must be invoked for settlement of the disputes between the parties. Accordingly I do not find any reason to interfere with the order impugned.

23. C.O. 1948 of 2019 is accordingly dismissed.

24. There will be no order as to costs.

25. Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)

Later: After passing of this order, learned counsel for the petitioner prays for stay of the operation of the order.

Prayer is considered and rejected.

(AJAY KUMAR MUKHERJEE, J.)