

In the High Court at Calcutta

Original Civil Jurisdiction

Original Side

The Hon'ble Justice Sabyasachi Bhattacharyya

A.P. No. 2 of 2023

Sanjay Kumar Bhagat (HUF)

-Versus-

Sanjan Kumar Bhagat (HUF) and another

For the petitioner : Mr. Rudraman Bhattacharyya,
Ms. Suchishmita Ghosh Chatterjee,
Mr. Akash Munshi,
Mr. Souvik Kundu

For the respondent : Mr. Jishnu Saha,
Mr. Pranit Bag,
Mr. K. Saraf,

Hearing concluded on : 13.04.2023

Judgment on : 20.04.2023

The Court:-

1. The respondent no. 2 is admittedly an unregistered partnership firm. According to the respondents, the petitioner retired from the firm by oral settlement in the year 2014. However, the petitioner denies such retirement and contends that he, as *Karta* of his HUF, all along continued to be a partner till he issued a notice under Section 43 of the Partnership Act, 1932 to dissolve the firm on November 10, 2022.
2. The petitioner seeks reference to arbitration of the disputes which have currently arisen between the parties with regard to the assets of

the partnership firm, since dissolved. Since the parties failed to agree on an arbitrator, the present application under Article 11 of the Arbitration and Conciliation Act, 1996 (for short, “the 1996 Act”) has been preferred.

3. The respondents object to such reference inter alia on the ground of limitation. Learned counsel for the respondents contends that the petitioner lost *locus standi* to raise dispute as a partner with his retirement in the year 2014, for which limitation has expired in the year 2017. The disputes have only been raised in the year 2022. The respondents have also filed a suit, inter alia seeking a declaration with regard to such retirement, bearing Title Suit No. 1533 of 2016, which is now pending before the City Civil Court at Calcutta.
4. Learned counsel for the respondents cites the judgment of a co-ordinate Bench of this Court in *Partha Pratim Banerjee and Another V. Satya Narayan Jaiswal and Others*, reported at 2023 SCC OnLine Cal 603, where the learned Single Judge, by placing reliance on *Vidya Drolia’s Case* [(2021) 2 SCC 1], observed that the courts can interfere where it is evident that the claims are ex facie time-barred or, in other words, “to cut the deadwood”.
5. It is also argued by the respondents that after the petitioner retired as a partner of the erstwhile partnership firm (respondent no. 2), the same was incorporated into a company under the Companies Act, 2013. Therefore the present application is bad for misjoinder of the dissolved partnership firm.

6. That apart, the assets in respect of which the disputes have been raised belong to the company now, which is a separate juristic entity and would be otherwise required to be impleaded if any such relief is claimed; however, since the company was never a party to the partnership or reconstitution deeds containing the arbitration clause, no relief can be sought before the arbitrator against it. Hence, it is argued that the disputes are not arbitrable at all and the application under Section 11 ought to be dismissed.
7. Learned counsel for the petitioner places reliance on the same decision of the Supreme Court, that is, *Vidya Drolia and Others V. Durga Trading Corporation*, reported at (2021) 2 SCC 1, to highlight that if the question of limitation is debatable, the court would force the parties to abide by the arbitration agreement. Rarely as a demurrer may the court interfere at the Section 8 or 11 stages when it is manifestly and ex facie certain that arbitration agreement is non-existent, invalid or the disputes are demonstrably non-arbitrable, in which case it would “cut off the deadwood”.
8. It is argued that in the present case the dispute involved is ex facie non-arbitrable, since the remedy is time-barred.
9. Learned counsel for the petitioner next cites *Uttarakhand Purv Sainik Kalyan Nigam Limited V. Northern Coal Field Limited*, reported at (2020) 2 SCC 455, where the Supreme Court observed that in view of the legislative mandate contained in Section 11 (6-A) of the 1996 Act, 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 enshrines the kompetenz-kompetenz principle.

- 10.** It is argued that the arbitration clause, which is Clause 18 of the reconstitution of partnership deed, encompasses disputes or differences in connection with the partnership between the partners or any one or more of them. Moreover, the disputes, according to the clause, may arise both during and after the partnership. Irrespective of the formation of the company and dissolution of the partnership, the partners can have their disputes resolved through arbitration.
- 11.** The petitioner also disputes that the petitioner retired from the partnership in 2014 and that the limitation period expired in the year 2017. Learned counsel for the petitioner places reliance on a dissolution notice under Section 43 of the Partnership Act, 1932 dated November 10, 2022 where the petitioner denies that he retired from the firm by virtue of any previous oral agreement and reiterates that the petitioner still continued to be a partner of the firm. Hence, it is contended that the reliefs sought to be resolved by arbitration are not time-barred.
- 12.** Upon hearing the arguments of both sides, what is apparent is that the parties do not directly dispute the arbitration clause itself being contained in the deed of reconstitution of partnership, which was captioned as a 'Deed of Retirement' but described itself as a 'Deed of Partnership', dated April 1, 2006. The application under Section 11 of the 1996 Act is opposed primarily on two counts - that the reliefs sought are time-barred and that the partnership has since been

converted into a company, which is an independent juristic entity and cannot be embroiled in arbitration since it was never a party to the deed containing the arbitration clause, although the reliefs necessarily affect the company's assets.

13. The two issues involved herein are thus:

- (i) Whether the reliefs claimed in arbitration are *ex facie* time-barred;
- (ii) Whether the arbitration proceeding is maintainable against the company, which was never a party to the arbitration agreement.

14. As regards limitation, the respondents argue that the partnership itself stood dissolved in the year 2014 after the petitioner himself retired from the partnership. Hence, the reliefs sought in respect of the dissolved partnership firm are palpably time-barred.

15. In this respect, the respondents rely on a suit filed by the respondent no. 1, another (the latter, since deceased) and the partnership firm in the City Civil Court at Calcutta, bearing Title Suit No. 1533 of 2016. In it, the plaintiffs prayed, *inter alia*, for a declaration that the plaintiff nos. 1 and 2 are the exclusive partners of the plaintiff no. 3 firm having equal share, a declaration that the defendants (including the petitioner) did not have any authority to hold out as partners of the firm or to interfere in any manner with the functioning of the firm or to claim any manner of right, title or interest over any of the properties or assets of the firm, and consequential reliefs such as perpetual injunction.

16. In the said suit (which is still pending), the plaintiffs' prayer for interim relief of injunction was, however, refused and the temporary injunction application dismissed on April 24, 2017. Against the said order of dismissal, an appeal bearing F.M.A.T. No. 758 of 2017 was preferred, which was also dismissed on February 2, 2022.
17. Thus, it was prima facie held by the civil court, and affirmed in appeal, that the petitioner was continuing to be a partner at least till February 2, 2022. On the other hand, there is nothing on record, except the bald allegation of an oral agreement, to indicate that the petitioner has retired from the partnership before November 10, 2022, when he himself gave a dissolution notice under Section 43 of the Partnership Act, 1932.
18. Hence, the respondents' argument that the reliefs claimed by the petitioner are time-barred is not borne out, at least prima facie, from the records. To say the least, the said proposition is debatable and arguable on facts and in law, hence, best left to the arbitrator to decide, if appointed, within the domain of Section 16 of the 1996 Act. The above conclusion, in fact, is strengthened by the following observation made in paragraph no. 153 of *Vidya Drolia (supra)*:

"... In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability."
19. Thus, the first issue is decided in favour of the petitioner.

- 20.** Regarding the second issue, we are to look for answers in the arbitration clause itself:

“18. That in case of any dispute or differences in connection with the partnership between partners or anyone or more of them and the legal representative of other partners during or after the partnership the same shall be referred to the Arbitration in accordance with the provisions of the Arbitration and Conciliation Act 1996.”

- 21.** Three features which stand out are:

- (a) The disputes or differences are to be in connection with the partnership;
- (b) Those have to be between “partners or any one or more of them” and/or their legal representatives; and
- (c) The disputes may arise during or after the partnership.

- 22.** The first feature is quite obvious and does not have direct bearing on the issue at hand. However, conspicuously, the disputes and differences have to be between the partners or their legal representatives, irrespective of whether they arise during the subsistence of the partnership or after the dissolution of the same.

- 23.** Taken in such perspective, the subsequent formation of a company with the assets of the partnership firm is irrelevant for deciding the arbitrability of the disputes.

- 24.** It is settled law that the beneficiary of a wrong is bound by its consequences. If it is ultimately held on adjudication that the petitioner is entitled to a share in the assets, etc. of the partnership

firm, the mere incorporation of a company with such assets cannot absolve the parties from their liabilities as partners.

25. Viewed from another angle, the formation of the company with the assets of the partnership firm without consent of all partners or beyond the scope of the partnership deed itself shall be vitiated if it is ultimately found that the same was done before the partnership firm was actually dissolved.
26. The partnership firm was admittedly an unregistered one. Therefore the bar under Section 69 of the Partnership Act is prima facie applicable. However, a window is still available to the individual partners, post-dissolution of the firm, to claim accounts and their shares in the assets of the firm. Hence, it is at least arguable as to whether the reliefs sought can be granted in law.
27. However, the above discussions only go on to show that the disputes which have arisen between the parties is squarely arbitrable.
28. Abiding by the principle laid down in *Uttarakhand Purv Sainik (supra)*, the scope of this court under Section 11 of the 1996 Act is only to examine the existence of the arbitration clause, which has not been disputed in terms in the present case.
29. Going by paragraph no. 233 of *Vidya Drolia (supra)*, read with Section 11 (6A) of the 1996 Act, the respondents have failed to satisfy this court prima facie that the arbitration clause is non-existent or invalid. The other points agitated are required to be decided on extensive examination of oral and documentary evidence, if adduced.

- 30.** The arbitrability of the disputes, the existence and validity of the arbitration clause and the fact that the disputes fall within the purview of the arbitration clause have, thus, been established sufficiently to refer the matter to arbitration.
- 31.** Hence, AP 2 of 2023 is disposed of by appointing Mr. Sarvapriya Mukherjee (Mobile No. – 9836072782), an Advocate of this Court and a member of the Bar Library Club, as the sole arbitrator to resolve the dispute between the parties, subject to obtaining his declaration/consent under Section 12 of the Arbitration and Conciliation Act, 1996.
- 32.** It is, however, made clear that the merits of the disputes, including the question of maintainability, have not been entered into by this court while deciding the application under Section 11 of the 1996 Act and it will be open to the parties to argue all points before the learned Arbitrator.

(Sabyasachi Bhattacharyya, J.)