

OD-10

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

AP/215/2023

NUPUR MODAK
VS
M/S LILA ENTERPRISE AND ORS.

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 17th May, 2023

Appearance:
Mr. Kaustav Chandra Das, Adv.
Mr. Shaunak Ghosh, Adv.
...for the petitioner

Mr. Arnab Chakraborty, Adv.
Ms. Pragya Bhowmick, Adv.
...for the respondent nos. 2, 3 and 4

The Court:- Learned counsel appearing for the petitioner places reliance on the arbitration clause in the agreement between the parties to indicate that certain disputes have arisen between the parties with regard to non-payment of the petitioner's ratio of profits in a partnership firm, which has, since, been dissolved.

It is argued that since a valid invocation was made and as there exists an arbitration clause in the agreement, the matter ought to be referred to arbitration, since there has not yet been any consensus between the parties on the arbitrator to be appointed.

Learned counsel appearing for the respondent opposes the prayer for reference to arbitration on several scores.

It is argued first that the claim sought to be made by the petitioner, even as it stands on the face of the invocation notice under Section 21 of the Arbitration and Conciliation Act, 1996, is palpably time-barred.

That apart, it is argued that no particulars of any dispute or claim has been disclosed in the invocation, thereby depriving the respondents of any opportunity to consider whether to accept the claim of the petitioner at all. Hence, the reference to arbitration at this stage on the basis of such vague invocation is a futile exercise.

Thirdly, it is argued that the application is bad for mis-joinder of parties since the partnership firm admittedly has no existence at present.

Learned counsel for the respondent cites the judgment of a learned Single Judge of the Delhi High court in the matter of *Alupro Building Systems Pvt. Ltd. Vs. Ozone Overseas Pvt. Ltd.* reported at MANU/DE/0495/2017. By placing specific reliance on paragraphs 23 to 29 of the said judgment, it is argued that a plain reading of Section 21 of the 1996 Act indicates that except whether parties were agreed to the contrary, the date of commencement of arbitration would be the date on which the recipient of the notice receives from the claimants a request for the reference of the dispute to arbitration. The object behind the provisions, it was held, is not difficult to discern. The party to the arbitration agreement against whom a claim is made should know what the claimants are. It is possible that in response to the notice the recipients of the notice may accept

some of the claims, either wholly or in part, and the dispute between the parties may thus, get narrowed down.

The other aspect of the matter, as pointed out by the learned Single Judge of the Delhi High Court, is that such a notice provides an opportunity to the recipient to point out if some of the claims are time-barred or barred by any law or untenable in facts and/or that there are counter claims and so on.

Learned counsel for the respondents next cites the judgment of *Bharat Sanchar Nigam Limited and Another Vs. Nortel Networks India Private Limited*, reported at (2021) 5 Supreme Court Cases 738. It is argued, by placing reliance on the said judgment, that admissibility issues relate to procedural requirements such as breach of pre-arbitration requirements, for instance a mandatory requirement for mediation, or a challenge to the claim or a part of the claim being either time-barred or prohibited until some pre-condition has been fulfilled. Admissibility relates to the nature of the claim or the circumstances connected therewith. An admissibility issue is not a challenge to the jurisdiction of the arbitrator to decide the claim. The issue of limitation, in essence, goes to the maintainability or admissibility of the petition.

By placing reliance on the said judgment, learned counsel argues that a valid invocation under Section 21 of the 1996 Act is a pre-requisite of an application being filed under Section 11 of the 1996 Act. In the absence of such pre-requisite being fulfilled, the present application is itself barred by law.

In support of his contentions regarding limitation, learned counsel also places reliance on *Secunderabad Cantonment Board Vs. B. Ramachandraiah And Sons*, reported at (2021) 5 Supreme Court Cases 705 for the proposition that

where a claim is ex-facie time barred, the same need not be referred to arbitration.

Learned counsel appearing for the petitioner controverts each of the allegations and submits that the invocation was sufficient for the purpose of filing an application under Section 11 of the 1996 Act. That apart, it is denied by the petitioner that the claim made by the petitioner is palpably time-barred.

Learned counsel for the petitioner, it may be noted, also contends that in a proceeding taken out by the petitioner under Section 9 of the 1996 Act, the respondents have taken an objection regarding the maintainability, on this score that the dispute involved between the parties is a commercial dispute and, hence, has to be tried under the trappings of the Commercial Courts Act.

A perusal of the invocation notice in the present case, in the context of the arguments advanced by counsel, clearly indicates that the petitioner had, inter alia, mentioned therein about the petitioner allegedly being never paid the actual ratio of profit accumulated from the business of the partnership firm as per the ratio contemplated in the partnership deed. It was also averred therein that the petitioner did not receive the actual entitlement as per the provision of the partnership deed.

Since the invocation itself discloses that the petitioner was allegedly never paid the actual ratio of the profit accumulated from the business of the partnership firm and/or received her actual entitlement, with a direct reference to the ratio as contemplated in the partnership deed itself, it cannot be said that the petitioner's claim is altogether vague, at least for the limited purpose of an invocation under Section 21 of the 1996 Act. Since the ratio of profits of the

partners is found from a bare reading of the partnership deed itself and the claim, unequivocally, is that the petitioner was never paid the actual ratio of profits, it cannot be said that the dispute disclosed in the invocation is so vague that the respondent has not got any inkling of the dispute sought to be referred to arbitration.

Insofar as particulars and details of the claim are concerned, there cannot be any doubt that the invocation under Section 21 and/or an application under Section 11 are not the pleadings before the arbitrator or a Court of law.

As such, further particulars or details can very well be furnished in a plaint, if a suit is filed, or in a statement of claim before the arbitrator, if so appointed.

Insofar as the argument of limitation, it cannot be said that the claim of the petitioner is “deadwood”, as coined by the Supreme Court in several cases, insofar as the entire claim cannot be said to be ex-facie barred, even accepting the pleading of the respondent. Although it is arguable as to whether the claim of the petitioner prior to the expiry of the limitation period is time-barred, it cannot be gainsaid that at least the claim for the last few years prior to the invocation falls within the ambit of limitation.

As such, the argument/objection on limitation cannot be decided finally and conclusively, let alone on an ex-facie footing, at this premature stage.

With regard to the Commercial Courts Act perspective, it is well within the domain of the arbitrator, if appointed, to determine the procedure to be followed if there is a dispute between the parties as to the applicable procedure.

Although learned counsel for the respondent is justified in arguing that the trappings of the Commercial Courts Act are entirely different from usual claims, it would be open for the arbitrator, if appointed, to decide such issue in the course of the arbitral proceeding.

As such, the said objection is not a sufficient deterrent for the Court to refer the matter to arbitration.

The question of mis-joinder, in any event, is not fatal for the maintainability of the proceeding as superfluity cannot be a ground for outright rejection of a proceeding, more so at a preliminary stage like deciding an application under Section 11 of the 1996 Act.

It is well-settled that the Court, sitting in the jurisdiction under Section 11, is circumscribed by the provision of Sub-Section (6) and (6A) thereof and, as such, the scope of prima facie review or enquiry is extremely limited.

Thus, since there is the existence of a valid arbitration clause in the agreement-in-question and the issues are otherwise arbitrable, it cannot be said that the petitioner's attempt to have the matter referred to arbitration can be precluded at this inchoate stage.

In such view of the matter, AP/215/2023 is allowed, thereby appointing Justice Tapan Kumar Dutt (Mobile No. 9831066037), a former Judge of this Court, as the sole arbitrator to resolve the disputes between the parties, subject to obtaining his declaration/consent under Section 12 of the Arbitration and Conciliation Act, 1996.

It is, however, made clear that all issues, including the questions of maintainability, limitation etc. are kept open to be decided by the arbitrator upon assuming authority.

(SABYASACHI BHATTACHARYYA, J.)