IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble Justice Shekhar B. Saraf

AP 441 of 2021

PARTHA PRATIM BANERJEE & ANR.
VS
SATYA NARAYAN JAISWAL & ORS.

For the petitioners	:	Mr. Debnath Ghosh, Adv. Mr. Biswaroop Mukherjee, Adv. Mr. Avijit Dey, Adv.
For the respondents	:	Mr. Ashim Kr. Roy, Adv. Mr. Sutanu Chakrabarti, Adv

Last Heard on : March 01, 2023
Judgement on : March 14, 2023

Shekhar B. Saraf, J.:

1. The petitioner no. 1, Partha Pratim Banerjee and petitioner no. 2, Joseph Emmanuel Gomes, carry on business under the name and style of "RPS Enterprise" (hereinafter referred to as the 'firm') as partners from premises no. 77/1A, Park Street, Police Station- Park Street, Kolkata 700016.

2. The respondent no. 1, Satya Narayan Jaiswal and respondent no. 2, Pradip Jyoti Agarwal are also partners carrying on business under the name and style of the firm.

3. The respondent no. 3 is the firm having its registered office at premises no. 77/1A, Park Street, Police Station- Park Street, Kolkata 700016 (hereinafter referred to as 'the premises').

Relevant Facts:

4. The petitioners and the respondents no. 1 and 2 (hereinafter referred to as 'the partners') formed a partnership business, that is the firm, for the purpose of running and operating a restaurant and/or bar. The partners named the said restaurant 'Copper Handi'.

5. A deed of partnership dated September 24, 1998 (hereinafter referred to as 'the deed of partnership') was executed between the partners. The firm was brought to life for a period of at-least 21 years for operating the restaurant from the premises.

6. A deed of lease dated February 19, 2000 was executed between the respondent no. 1 and the firm for a period of 21 years. However, the said deed was cancelled on February 21, 2000. Subsequent to which the respondent no. 1, being the landlord of the property, was to receive Rs. 1000 from the tenant, being the firm.

7. The respondent no. 2 filed a title suit no. 260 of 2004 against the petitioner no. 1 and respondent no.1 on October 4, 2002. The present respondent no. 1 along with the present petitioner no. 1 filed an application under Section 5 of the Act read with Section 8 of the Act for stay of the suit. The Learned VIth Bench of the City Civil Court, Calcutta, stayed the suit and directed the parties to refer the matter in disputes to the arbitrator.

8. In the year 2005, a criminal proceeding was initiated against the then manager, Rabindra Prasad Agarwal, for misappropriation of business funds. The respondent no. 1 had, by letter dated June 27, 2005, authorised the petitioner no. 1 to file all necessary documents in connection with the said criminal proceeding. Furthermore, the respondent no. 1 had, by letter dated December 14, 2011, requested the petitioner no. 1 to pursue matters relating to the firm with the excise department, Government of West Bengal.

9. In the minutes of the meeting held on May 17, 2017, the partners of the firm had discussed the disputes and issues among the partners and agreed to resolve the disputes within a reasonable time and the date of the next meeting was fixed on May 26, 2017, which never took place.

10. Being the authorised representative of the partnership firm, the petitioner no. 1 issued a letter dated November 29, 2018 to the Collector of Excise, Kolkata, requesting to grant him an opportunity of

being heard in order to resolve the issue of renewal of the excise license of the firm.

11. Owing to the underlying disputes that had arisen between the partners, the petitioner no. 1 sent a letter dated November 29, 2018 to all co-partners, requesting their cooperation for the renewal of the excise license of the partnership business. Only the petitioner no. 2 had replied to the said letter.

12. The petitioners became aware of alleged breaches of the deed of partnership. They visited the premises and were allegedly prevented from entering the same. They were allegedly refused any books of accounts. The petitioners lodged a complaint with the Park Street Police Station on December 12, 2018. Thereafter, the petitioners got to know that the respondent no. 1 has allegedly inducted tenants in the premises.

13. The petitioners filed a Section 9 application under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') before the Learned City Civil Court, Calcutta, VIth Bench on December 19, 2018. The court was pleased to restrain the respondents from making any constructional work vide order dated December 20, 2018. This was subsequently vacated.

14. By a letter dated January 29, 2019, the petitioner had invoked the arbitration clause and referred the dispute to arbitration. The letter was addressed to all the co-partners. The respondent no. 1, vide a letter, dated February 1, 2019 had refused the appointment of the learned advocate, Mr. Paritosh Pal.

15. The petitioners had filed another application under Section 11 of the Act, which was dismissed for default for non-appearance, by this court. The petitioner has filed an application for restoration of the said matter, but has undertaken to withdraw the said application on the same being restored.

16. Despite receipt of the said notice dated January 29, 2019 from the petitioners, the respondent nos. 1 and 2 have not taken any steps for the appointment of an arbitrator. After more than 30 days of the said letter, the instant application has been filed for appointment of a sole arbitrator.

<u>Submissions</u>

17. At this juncture, it is pertinent to point out the submissions made by both the parties.

18. Mr. Debnath Ghosh, appearing on behalf of the petitioners made the following contentions:

a) The partnership was for a period of 21 years from September 24, 1998 and was to end by mutual agreement of all parties. The firm did not get dissolved at any point before the expiry of the 21 years, despite there being multiple civil and criminal cases filed. A meeting was held as late as May 17, 2017 wherein the minutes convey that the parties were still partners and taking up responsibilities with respect to the firm and the business. Therefore, the claims are not ex-facie time-barred.

b) The earlier section 11 application was not dismissed after a hearing, but was dismissed for default. Correspondingly, the same does not act as res judicata with respect to the instant application.

c) The court is to confine its determination to the existence of an arbitration agreement. The amendment to Section 11(6A) has not yet been notified and therefore the erstwhile section remains in effect. Issue of limitation should be left to be decided by the arbitrator. Reliance has been placed on ***C. Shamsuddin v. Now Realty Ventures LLP & Ors. (2020 [6] Mh.L.J. 108), Uttarakhand Purv Sainik v. Northern Coal Field Limited ([2020] 2 SCC 455), Mayavati Trading ([2019] 8 SCC 715)*** and ***N.N. Global Mercantile v. Indo Unique Flame ([2021] 4 SCC 379)*** for the said proposition.

19. Mr. Ashim Kr. Roy, appearing on behalf of respondent no. 1 submitted the following arguments:

a) The partnership firm had closed down on October 4, 2002 due to disputes and differences between the parties. The cause of action arose on October 4, 2002 and therefore the period of limitation for approaching this court has expired.

b) Notwithstanding the above, the respondent no. 2 filed a title suit against petitioner no. 1, respondent no. 1 and others in 2004. In the said title suit, the respondent no. 1 and petitioner no.1 filed an application under Section 5 and 8 of the Act. There was a direction for reference to arbitration. Therefore, even from 2004, the period of limitation had expired.

c) The time period for reference to arbitration is ex facie time barred. Reliance has been placed on ***Geo Miller ([2020] 14 SCC 643)***, ***Secunderabad Cantonment Board (2021 [5] SCC 705)*** and ***BSNL v. Nortel Networks ([2021] 5 SCC 738)*** for the said argument.

<u>Analysis</u>

20. The law with respect to limitation and reference to arbitration has been exhaustively dealt by me in ***B.K. Consortium v. IIM (2023 SCCC OnLine Cal 124)***. The relevant portions of the judgement are extracted below:

*“**39.** For ease of reference of the parties, I have attempted to encapsulate below the relevant juridical principles which emerge from the various judgments discussed above-*

* * *

b. <u>The three judges' bench in Vidya Drolia v. Durga Trading Corporation (supra) empowered the Courts adjudicating a Section 11 application to intervene in certain circumstances and held that such interventional exercise does not interfere with the principle of competence-competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters gets weeded out at the initial stage.</u> It is to be noted that the Supreme Court in this case observed that an absolute hands off approach would be counterproductive and harm arbitration, whereas limited yet effective intervention is acceptable as it does not obstruct but effectuates arbitration. Thus, the Courts at the Section 11 referral stage, with a view to prevent wastage of public and private resources, can interfere when it is manifest that the claims are ex-facie time barred and dead, or there is no subsisting dispute.

c. Similarly, in DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd., (supra) the apex court affirmed that the limited jurisdiction under Section 11 does not denude this Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood.

The Court went ahead to say it differently that this Court or a High Court, as the case may be, are not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator. A limited review by the Court is not intended to usurp the jurisdiction of the Arbitral Tribunal but is aimed at streamlining the process of arbitration.

d. The Supreme Court further clarified in Bharat Sanchar Nigam Limited v. Nortel Networks India Pvt. Ltd. (supra) that adjudication of the limitation issue at the Section 11 referral stage does not tantamount to stepping into the arbitrator's jurisdictional territory<u>. In essence, it opined, that the issue of limitation is a challenge to the maintainability or admissibility of the claim itself and not a challenge to the jurisdiction of the arbitrator to decide the claim. Basis this reasoning, Uttrakhand Purv Sainik (supra) cited by Mr. Mitra stood distinguished.</u>

e. Again in Bharat Sanchar Nigam Limited v. Nortel Networks India Pvt. Ltd. (supra), the Supreme Court held that there must be a clear notice invoking arbitration setting out the particular dispute (including claims/amounts) <u>which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail. It also concluded that the period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement discussions, where a final bill is rejected by making deductions or otherwise.</u>

Likewise in Geo Miller & Company Private Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd. (supra), the apex court held that 'breaking point' is the date where any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This date would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim."

<u>Emphasis Added</u>

21. The decision in ***N.N. Global Mechantile (supra)*** differed from the judgement in ***Vidya Drolia v. Durga Trading Corporation ([2020] 11 SCR 1001)***. In ***N.N. Global Merchanile (supra)***, the Apex Court stated that courts should restrict their determination to the existence of an arbitration clause. However, the said judgement after differing from ***Vidya Drolia v. Durga Trading Corporation (supra)*** referred the matter to a larger bench. As it stands now, the ratio supplied in ***Vidya Drolia (supra)*** is the law. The courts can interfere wherein it is evident that the claims are ex-facie time barred or, in other words, to cut the deadwood. Let us now apply the law discussed above to the facts of this case.

Conclusion

22. The firm was for a fixed period and was to expire on mutual agreement between the parties. It appears that the accounts have not been cleared and there never was a complete breakdown of the firm. In fact, there was a meeting dated May 17, 2017 wherein parties had allocated different business responsibilities to each other. All these are indications that substantiate the firm's existence for its entire fixed tenure, which was till September 24, 2019. There are ongoing disputes that still need to be ironed out.

23. In the said title suit filed in 2004, the petitioners were not even in dispute with respondent no. 1 and were in fact arrayed as co-respondents. At no particular time can it be said that there was a 'breaking point' from which the limitation period started running. The invocation of arbitration was done on January 29, 2019, which was during the existence of the firm and for adjudication of disputes that had arisen and needed to be resolved.

24. For the reasons stated above, I find that the claims are not ex-facie time barred.

25. Accordingly, I appoint Ayan Banerjee (9830916210) to act as the sole arbitrator to resolve the dispute between the parties. 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 date. Let this order be conveyed to the arbitrator by the Registrar, Original Side forthwith.

26. In light of the above, the petition (being A.P. 441/2021) is disposed of.

27. An urgent photostat-certified copy of this order, if applied for, should be made available to the parties upon compliance with requisite formalities.

(Shekhar B. Saraf, J.)