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

Present:

The Hon'ble Justice Shekhar B. Saraf

A.P. No 439 of 2022

Kanika Seth

VS

Sonali Roy and Ors.

For the petitioner	:	Mr. Amit Chatterjee, Adv. Mr. Varun Kothari, Adv. Ms. Trina Banerjee, Adv. Mr. Rohit Chatterjee, Adv.
For the respondent nos. 1 to 7 & 9	:	Mr. Soumabho Ghose, Adv. Mr. Ratul Das, Adv. Mr. Sanjay Baid, Adv.
For the respondent no. 8	:	Mr. Sourav Kr.Mukherjee, Adv. Ms. Falguni Jana, Adv.

Last heard on: April 17, 2023

Judgment on: May 11, 2023

Shekhar B. Saraf, J.:

1. This is an application under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') for appointment of an arbitrator. The petitioner, Kanika Seth, is the wife of Shri Ranajit Kumar Seth, residing at 10/2F, Deshbandhu Road (East),

Kolkata – 700035 and is a partner of a partnership firm named M/s Ashutosh Roy Prafulla Kumar Roy (hereinafter referred to as 'the firm'), having its registered office at 170, Mahatma Gandhi Road, Kolkata-700007 (hereinafter referred to as 'the premises').

2. The respondent no. 1-8 are the other partners of the firm and the respondent no. 9 is the firm in dispute and they are collectively referred to as 'the respondents'.

<u>Relevant Facts</u>

3. On or about 11 November, 1957, the firm was formed. The firm acquired a property situated at 170, Mahatma Gandhi Road, Kolkata-700007. The rent fetched from the said premises is the sole source of income of the firm.

4. The firm was reconstructed from time to time and the same was lastly reconstituted on July 13, 2013. On mismanagement of affairs pertaining to share of rental income, the arbitration clause was invoked for the first time by predecessors of the respondent nos. 5 to 8 against predecessors of respondent nos. 1 to 4, as per the relevant clause of the partnership deed and it was decided that the premises would be sold out and an order of the Court was obtained to this effect. However, this was not ultimately given effect to.

5. At present, all the partners are heirs of the respective predeceased partners. The firm was purported to be sold to a Trust by respondent nos. 1 to 4. The Trust and respondent nos. 1 to 4 entered into a contract for sale of the former's share in the firm. The petitioner also transferred her 37.5% share of the firm to the Trust, however this transfer was later revoked.

6. The respondent nos. 1 to 4 are presently managing the affairs of the said partnership firm. The respondent no. 8 had invoked the arbitration clause for the alleged breaches committed by Respondent no. 1-4.

7. On April 23, 2022, the petitioner invoked clause 20, being the arbitration clause of the partnership deed, against the respondent nos. 1 to 4. In reply on behalf of respondent no.1, the said respondent neither gave consent nor opposed the appointment of the named arbitrator. The respondent Nos. 2, 3 and 4 duly received the notice, but did not reply. Therefore, the instant application has been preferred.

Rival Submissions

8. Learned Advocate appearing on behalf of the petitioner submitted the following arguments: -

   a) The present proceeding is not misconceived and is not barred by estoppels, acquiescence or waiver and has locus. The petitioner has claims, particularly against respondents nos. 1 to 4 with regards to the firm.

b) The partnership deed of 2013 was not reconstituted after removing the name of petitioner and therefore the petitioner has locus. Moreover, the petitioner has been made a party in 'Terms of Settlement' dated June 20, 2022 and its Supplementary Settlement as respondent no. 10, filed before the arbitrator, and therefore it is evident that the respondents admit that the status of petitioner as that of a partner.

c) The position of Trustees cannot be questioned in the instant proceedings and the petitioner holds good right, title and interest in the firm.

d) The former arbitration initiated by the Trust was for specific performance and it was on separate grounds. Furthermore, multiple references to arbitration can be made with respect to the same arbitration agreement. Reliance was placed on ***Gammon India v. National Highways Authority of India (AIR 2020 Del 132)*** for the said proposition.

e) The instant petition is not premature and the Sec. 21 notice was served. Besides, the petition is not barred by the principle of res judicata.

f) The petitioner is not a party to the settlement agreement dated September 16, 2022 and therefore the instant application that has been filed is bona-fide.

g) All partners are not equally involved in administration of affairs of the premises.

9. Learned advocate, appearing on behalf of respondent no. 1 to 4 and 9 made following contentions: -

a) The Petitioner has no cause of action in the instant matter and the reliefs claimed are barred by laws of limitation. The application suffers from mis-joinder and non-joinder of necessary parties.

b) There was no consensus on the sale and disposal of said premises to the Trust as there was no agreement executed between the Trust and the respondent no. 9 and therefore the Trust is barred from alleging any right over the premises.

c) Mr. Ranajit Kumar Seth, the deponent of the said application is also the husband of the petitioner claiming himself to be one of Joint-Trustees has acted under the garb of the Trust, seeking to grab the entire shareholding of the Firm.

d) As against the claims of the petitioner, she is the shareholder of only 8.9% of the firm. The petitioner transferred her allegedly acquired share of 37.5% in favour of the said Trust which was the cumulative share of the alleged Prabir Kumar Roy, Pinaki Roy and Prasun Kumar Roy even before she received the same from the latter three, which makes the Deed of Gift questionable.

e) The petitioner has grossly suppressed the order passed by Mr. Bose in the arbitration proceeding against the Trust where the latter had claimed itself to be one of the partners and the application challenging the locus of Trust by the respondents were allowed under Sec. 16 of the Act.

f) The purpose of the revoked unregistered Deed of Gift dated December 2, 2015 is different from the purpose mentioned in the instrument dated 2022.

g) Furthermore, the revocation of Gift Deed is contrary to the statutory provisions and therefore the deprivation of a perpetual minor i.e. the Deity cannot be dealt with detriment.

h) The Petitioner has gifted and donated her shareholding in favour of the Deity which is irreversible and irrevocable. Therefore, the rights of petitioner raised as per arbitration agreement are non-arbitrable.

i) The respondents seek a Declaration from an appropriate court regarding the validity of the Revocation of gift for adjudication of any claims of petitioner.

j) That the disputes relating to same issue have been raised by Respondent 8 and referred to arbitration.

k) In June 20, 2017, the terms of settlement were filed in the said arbitration reference between respondent nos. 1 to 4 and 8 and thereafter the arbitration proceedings were terminated. The petitioner was therein made a party to the proceedings as the respondent no. 10. The petitioner had not raised any objection and terms of settlement took effect on basis of the compromise.

l) The Respondent no. 8 filed for recalling the compromise decree. In any event the meeting being held on March 1, 2023 declared the time to publish the award had expired and the arbitration has been terminated and therefore is barred by limitation under Sec. 29A of the Act.

10. Learned Advocate appearing on the behalf of the Respondent no. 5, 6 and 7 submitted that-

a) The present application is not maintainable as the claims have been held against one of the respondents and is therefore a right in personam.

b) In pursuance to a dispute, there must have been an invocation of arbitration through Sec. 21 notice which was never issued and therefore the matter is pre-mature.

c) The said application is misconceived and barred by res judicata as another Respondent no. 8 had initiated an arbitration on the self-same cause of action.

d) A 'Terms of Settlement' was filed by the partners on June 20, 2017 between the partners of the firm resolving disputes between respondent nos. 1 to 4 and 8.

e) The said application is barred by principles of estoppel, acquiescence and waiver as the claims made are in violation of the terms of the said Partnership Deed.

f) The petitioner claimed to have executed a Deed of Gift whereas there cannot be any gift of shares of partnership firm.

g) It was argued that on account of the above dispute, an arbitration proceeding was initiated by the Trust where it was held that the disputes were not arbitrable when arbitration proceedings were held under Sec. 16 of the Act.

h) That the Trust has preferred an appeal under Sec. 37(which was withdrawn subsequently) and therefore the decision has attained finality.

i) The application suffers from mis-joinder and non-joinder of necessary parties and there is misrepresentation of material facts for making illicit gains.

j) There was no induction of any new tenants nor was there mismanagement of administration of affairs in the premises.

k) The Petitioner is not entitled to Rs. 27,97,542/- as it is barred by laws and that it had been receiving its due share of profits from rents collected by the firm.

l) That there were no expenses made without the consent of the petitioner and the annual accounts were also apprised to the partners. There was no misappropriation of funds of the partnership firm by creation of separate bank accounts. There was no unjust loss or prejudice made by the Respondent to Petitioner.

m) The expenses of arbitration is not to be borne by partnership firm and moreover the instant invocation and filing of the application under Sec. 11 is barred by laws of limitation.

11. The Learned Advocate appearing on the behalf of the Respondent no. 8 submits that-

a) There was no consensus in the deliberation of sale of the property in the said premises.

b) The Petitioner had executed a Deed of Gift in favour of the Trust which has been purported to be made out of love and affection for the Deity.

c) On execution of the Gift, the said Trust claimed itself to be a party to the partnership deed of 2013 and Mr. Utpal Bose was nominated as the Arbitrator for resolving the issue regarding the question of partnership of the Trust. The said Arbitrator was pleased to pass an award which became final and binding as the appeal by the Trust challenging the order was withdrawn.

d) From the Deed of Revocation, it appears that the shareholding is onerous and accordingly the Deity being a perpetual minor was saddled with unnecessary litigation. Moreover, the other partners were never acceptable of the Trust becoming a partner.

<u>Observation and Analysis:</u>

12. The Delhi High Court, speaking through J. Pratibha M. Singh, in ***Gammon India (supra)*** has elaborated upon the possibility of there being multiple disputes and references to arbitration with respect to the same contract. The relevant paragraph is extracted herein-below :-

> '25**.** Under Sec. 7 the agreement to arbitrate could be for 'all or certain disputes which have arisen or which may arise'. Under Sec. 8 if a particular proceeding is pending in court and there is a *lis* as whether a particular dispute is arbitrable, for other disputes, arbitration can be commenced or continued and even the award can be made. ***<u>This means that, if the court, thereafter comes to the conclusion that the dispute is arbitrable, after the first reference is either pending or concluded, a second reference can be made.</u>*** The commencement of proceedings under Section 21 is to be construed in respect of a particular dispute. Thus, if there are multiple disputes which have been raised at different times, the commencement of proceedings would be different *qua* each of the disputes. All these provisions show that there can be multiple claims and multiple references at multiple stages."

<u>Emphasis Added</u>

I find myself in consonance with the above view. Even if the first reference stands concluded, disputes with respect to the same contract can be raised by another party who has a live claim with respect to the same.

13. From a perusal of the facts above, it appears that the Trust's share in firm was adjudicated upon and denied by an order of an erstwhile arbitrator. It also surfaces that disputes with regards to the firm were

settled in another arbitral reference vide 'Terms of Settlement'. While all the partners were invited to raise objections to such settlement, failure to do so, nor do the 'Terms of Settlement', ipso facto eradicate the rights of the petitioner as a partner in the firm. Even assuming that the status of the petitioner as a partner is doubtful owing to there being certain developments, such status and its corresponding rights are to be determined in arbitration, notwithstanding there being prior 'Terms of Settlement' arising out of an arbitration initiated by another partner.

14. There cannot be a bar against a future reference with respect to disputes over running of a partnership firm, as a such a firm is an on-going entity wherein lies the possibility of ever-rising difficulties and differences, the fate of which can be decided by different references to arbitration. Therefore, I am of the view that the instant application must be allowed.

15. Accordingly, I appoint Anindya Basu, Mb-9733300151 as the sole arbitrator to resolve the dispute between the parties. The appointment is subject to submission of declaration by the arbitration 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 today.

16. Let this order be conveyed to the arbitrator by the Registrar, Original Side forthwith.

17. In light of the above, the petition (A.P. 439 of 2022) is disposed of.

18. 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.)