

RAJASTHAN HIGH COURT

Dinesh Jangid

Vs.

Laxmi Kant Jangid

Arb. Appln. No. 83 of 2006

(Shiv Kumar Sharma, J.)

04.04.2007

ORDER

Shiv Kumar Sharma, J.

1. By this application the applicant seeks to appoint independent Arbitral Tribunal under Sections 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act').

2. It is averred by the applicant that on December 31, 2003 a partnership deed was executed by the applicant and the respondent for the purpose of running bore-well digging business. Clause 13 of the said deed that related to Arbitration, reads as under:-

"That any dispute or difference which may arise between the partners or between their representatives with regard to the constitution, meaning, effect of this deed or any part or respecting account, profit and loss of the business or right and liabilities of partner under this deed or on the dissolution or winding up of the business or any other matter relating to the partnership profession shall be referred to arbitration and all the provisions of the Indian Arbitration Act shall apply."

3. After having borrowed loan from City Corporation Finance Ltd., two trucks were purchased and machineries got installed by the firm. However with mutual consent of partners the firm was dissolved on August 26, 2005. A decision was arrived at between the partners that the respondent will sell the trucks and machineries and repay outstanding loan amount. The remaining sale proceeds will thereafter be divided equally between the partners. The respondent however did not sell the trucks and machineries but started his own bore-well business and had been earning sum of Rs. two lacs per month. The applicant served notice on the respondent for doing the

needful but all went in vain. Ultimately vide legal notices dated March 6, 2006 and April 8, 2006 the respondent was asked to propose the name of the Arbitrator to settle the dispute but the notices remained un responded.

4. The respondent filed reply to the application raising preliminary objection in regard to maintainability of the application. It was pleased that since partnership deed was not registered it could not be acted upon. It was further stated that Clause 13 did not contemplate for arbitration after dissolution of partnership.

5. I have pondered over rival submissions and scanned the case law placed for my perusal.

6. Before proceeding further it will be useful to refer to the relevant statutory provisions.

7. Section 40 of the Partnership Act, 1932 (for short 1932 Act') provides that a partnership firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

8. Sections 46, 47 and 48 of 1932 Act relate to the rights of partners and mode of settlement of account. These sections read as under:-

"46. Right of partners to have business wound up after dissolution.- On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights."

"47. Continuing authority of partners for purposes of winding up.- After the dissolution of a firm the authority of each partner to bind the firm and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise :

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent."

48. Mode of settlement of accounts between partners.- In settling the accounts of

a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed :-

(a) losses, including deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary by the partners individually in the proportions in which they were entitled to share profits;

(b) the assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order-

(i) in paying the debts of the firm to third parties;

(ii) in paying to each partner ratably what is due to him from the firm for advances as distinguished from capital;

(iii) in paying to each partner ratably what is due to him on account of capital; and

(iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits."

9. Section 69 of 1932 Act indicates the effect of non-registration of partnership firm. This section provides as under:-

"69. Effect of non-registration.- (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person sitting as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register or Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect.-

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realize the property of an insolvency partner.

(4) This section shall not apply.-

(a) to firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in areas to which, by notification under Section 56, this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in Section 19 of the Presidency Small Cause Courts Act, 1882, or outside in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim."

10. As per Halsbury's Laws of England, the partnership subsists even after dissolution, for the purpose of completing pending transactions, winding up the business and adjusting the rights of the partners and for these purposes the authority, rights and obligations of the partners continue.

11. Provisions contained in Section 69 of 1932 Act have been interpreted in various judicial pronouncements. In *Prem Lata v. M/s. Ishar Dass* ¹ the Supreme Court indicated that by an exception carved out by sub-section 3(a) to Section 69 the party can enforce the right by a suit for rendering accounts and for realisation of the property of the dissolved firm pro rata. When right to suit is permissible, there is no prohibition to invoke arbitration clause under the deed of partnership.

12. In *Chaturbhuj v. Damodar* ² the Division Bench of Bombay High Court observed that the dissolution of a firm leads to the dissolution of partnership as between partners, but the partnership itself subsists, though only for the purpose of winding up its business and adjusting the rights of the partners inter se.

13. Their Lordships of the Supreme Court in *Saligram v. Kanwar Rajnath* ³ propounded that after dissolution, the partnership subsists merely for the purpose of completing pending transaction, winding up the business, and adjusting the rights of the partners and for these purposes, and these only, the authority, rights and obligations of the partners continue.

14. Special Bench of Gujarat High Court in the *Chief Controlling Revenue Authority v. Chaturbhuj* ⁴ laid down that the distribution of surplus is for the purpose of adjustment of the rights of the partners in the assets of the partnership, it does not amount to transfer of assets.

15. In *S. V. Chandra Pandian v. S. V. Sivalinga Nadar* ⁵ the Apex Court indicated that

entire property whether brought in by the partners on constitution of the partnership or acquired in course of business of the partnership would constitute property of the firm. During subsistence of the partnership, partners are entitled to an undefined share in such property but after dissolution and settlement of accounts, partners entitled to proportionate share in residue of the property; when the residue is distributed by allocating any property to a partner proportionately to his share, no portion or transfer takes place nor is there any extinguishment of interest of other partners in the allocated property.

16. In *Krishna Motor Service v. H. B. Vittala Kamath*,⁶ the Apex Court propounded that in a case where the parties have agreed for dissolution of partnership by mutual consent, the partnership stood dissolved. There is no dispute as regards the right arising from the contract of a firm. The dispute is only with regard to working out the rights flowing from dissolution for settlement of accounts of the dissolved firm or any right or power to realize the property of the dissolved firm etc. The right would form part of the exception engrafted in sub-section (3) of Section 69.

17. In *Loonkaran Sethia v. Ivan E. John*⁷ it was held that a partner of an erstwhile unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of Section 69.

18. Having closely analyzed the ratio indicated in afore quoted judicial pronouncements, I find that the object intended by the Legislature in engrafting sub-section (3) of Section 69 of 1932 Act appears to be that in spite of the defect of non registration and the prohibition created in the main part of non enforceability of the right arising from a contract, parties having worked under the contract to the limited extent of enforcement of a right to realize assets, settlement of the accounts of dissolved firm or any right or power to realize the property of the dissolved firm are exceptions engrafted therein and gives rights to the parties to enforce the same independent of the right arising from the contract. Therefore, the parties are relieved from the prohibition created by operation of Section 69. After dissolution, the partnership subsists for the purpose of completing pending transactions, winding up the business, and adjusting the rights of the partners and for these purposes, the authority, rights and obligations of the partners continue.

19. As indicated by their Lordships of the Supreme Court in *Prem Lata v. M/s. Ishar Dass* (supra) that by an exception carved out by sub-section 3(a) to Section 69 the party can enforce the right by a suit for rendering accounts and for realisation of the

property of the dissolved firm pro rata, and when right to sue is permissible, there is no prohibition to invoke arbitration clause under the deed of partnership.

20. A look at Clause 13 of the Partnership deed demonstrates that on dissolution or winding up of the business or any other matter relating to the partnership profession shall be referred to arbitration and all the provisions of the Indian Arbitration Act shall apply.

21. In the instant case the applicant served legal notice to respondent to invoke arbitration clause, but the respondent did not respond the same within the time prescribed in the notice. Therefore this Court is empowered to issue necessary directions under Section 11(6) of 1996 Act. In *Datar Switchgears Ltd. v. Tata Finance Ltd.*⁸ the Apex Court propounded thus (para 19) :

"As far as Section 11(6) of the Arbitration and Conciliation Act, 1966 is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party do not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11 that would be sufficient. Only then the right of the opposite party ceases."

22. As a result of the above discussion, I allow the application and appoint Hon'ble Pana Chand Jain (retired) as sole arbitrator to settle the dispute between the parties. The arbitrator shall fix his fee and the time for the disposal of the dispute in the circumstances so warranted. Deputy Registrar (Judicial) shall inform the Arbitrator accordingly.

Application allowed.

Cases Referred.

1. (AIR 1995 SC 714)
2. (AIR 1960 Bom 424)
3. (AIR 1974 SC 1094)
4. (AIR 1977 Guj 1)
5. (1993) 1 SCC 589: (1993 AIR SCW 570)
6. (1996) 10 SCC 88: (AIR 1996 SC 2209)
7. (AIR 1977 SC 336)

8. (2000) 8 SCC 151