

IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION
(Original Side)

A.P. No. 255 of 2021

(Through Video Conference)

Reserved on: 03.03.2022

Pronounced on: 30.03.2022

Dr. Papiya Mukherjee

...Petitioner

-Vs-

Aruna Banerjea and Anr.

...Respondents

Present:-

Mr. Arik Banerjee,
Mr. Ayan Dutta,
Mr. Rajib Mullick,
Ms. Shreyashi Maity, Advocates
... for the petitioner

Mr. Rajarshi Dutta,
Mr. Munir Ahmed,
Mr. Shounak Mukhopadhyay,
Mr. Anurag Ghosh, Advocates
... for the respondents

**Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE**

Prakash Shrivastava, CJ:

1. This application under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed by the applicant for appointment of arbitrator to resolve dispute between the parties.

2. Plea of the applicant is that she is one of the partners of pathological laboratory namely, Calcutta Clinical Laboratory. The said laboratory is being run by virtue of the original partnership deed which was constituted and re-constituted from time to time. In 1980,

fresh partnership deed was executed between Dr. Bonbehari Banerjee, Dr. Dhrubajyoti Banerjea and the applicant. Dr. Bonbehari Banerjee had passed away, therefore, on 20th of May, 1992 Dr. Dhrubajyoti Banerjea and the applicant had entered into a fresh deed of partnership for running the said laboratory business. Dr. Dhrubajyoti Banerjea being of old age had executed the power of attorney in favour of his wife, respondent No.1 herein. Dr. Dhrubajyoti Banerjea also passed away on 09th of April, 2015. Further case of the applicant is that in terms of clause 9 of the partnership deed, respondent Nos.1 and 2 being surviving legal heirs and successors of Dr. Dhrubajyoti Banerjea ought to have been substituted as partners in his place. After the death of Dr. Dhrubajyoti Banerjea, the respondent No.1 started committing various illegalities in relation to the business of the firm, therefore, the applicant had filed application under Section 9 of the Act being Miscellaneous Case No. 99 of 2016 and restrained order was passed on 16th of March, 2016. Subsequently, the arbitrator was appointed and arbitration proceedings continued for more than 4 years in which both the parties had actively participated and after October, 2016 the applicant was allowed to actively participate in the affairs of the laboratory after giving an undertaking by the respondent before the learned arbitrator. Since, talks of settlement took place, therefore, the arbitration proceedings did not proceed further. Around December, 2019 respondent again started creating trouble, therefore, applicant had served the notice dated 10.06.2020 invoking the arbitration clause and making request to the respondent to appoint the arbitrator. The respondent had denied the prayer by taking the stand that there was no valid arbitration agreement between the parties.

3. Submission of learned Counsel for the applicant is that after the death of Dr. Dhrubajyoti Banerjea, respondents being his legal heirs are bound by the arbitration agreement and that earlier arbitration had already taken place and in fact after dissolution of partnership, subsequently respondent No. 1 was shown as partner and that same objection raised by the respondent in the proceedings under Section 9 of the Act were rejected.

4. Objecting to the prayer for appointment of arbitrator, learned Counsel for the respondents submits that Dr. Dhrubajyoti Banerjea has died and in terms of Sections 46 and 48 of the Partnership Act, applicant has only limited right and that applicant has no right, title and interest in the property and their only right is relating to rendition of account.

5. Having heard the learned Counsel for the parties and on perusal of the record, it is noticed that the partnership deed dated 20th of May, 1992 executed between Dr. Dhrubajyoti Banerjea and the applicant Papiya Mukherjee has not been disputed during the course of argument. This partnership deed contains following arbitration clause:

“10. That in case of differences or disputes between parties cropped up with regard to any matter or thing relating to the partnership affairs and terms and conditions and stipulations shall be referred to arbitrator to be appointed by the one part and the decision of such arbitrator shall be binding on the partners.”

6. Dr. Dhrubajyoti Banerjea had died on 09th of April, 2015. Respondents are legal heirs / successors of Dr. Dhrubajyoti Banerjea. Section 40 of the Arbitration Act clearly

provides that arbitration agreement will not be discharged by death of party thereto and will be enforceable by or against the legal representatives of the deceased. Section 42 of the Partnership Act, 1932 provides for dissolution of partnership firm by the death of a partner. In terms of Section 46 of the Partnership Act, on the dissolution of the firm every partner or his legal representative is entitled to, 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 amongst the partners or their representatives according to their rights. Section 47 of the Partnership Act provides for continuing authority of partners for purposes of winding up and Section 48 of the Partnership Act provides for mode of settlement of account after dissolution. The Hon'ble Supreme Court in the matter of **Ravi Prakash Goel vs. Chandra Prakash Goel and Another** reported in **(2008) 13 SCC 667** considering Section 40 of the Arbitration Act has held that:

“18. It is clear from Section 40 of the Arbitration Act that an arbitration agreement is not discharged by the death of any party thereto and on such death it is enforceable by or against the legal representatives of the deceased, nor is the authority of the arbitrator revoked by the death of the party appointing him, subject to the operation of any law by virtue of which the death of a person extinguishes the right of action of that person.

19. Section 2(1)(g) defines “legal representative” which reads thus:

“2. (1)(g) ‘legal representative’ means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a

representative character, the person on whom the estate devolves on the death of the party so acting;”

20. The definition of “legal representative” became necessary because such representatives are bound by and also entitled to enforce an arbitration agreement. Section 40 clearly says that an arbitration agreement is not discharged by the death of a party. The agreement remains enforceable by or against the legal representatives of the deceased. In our opinion, a person who has the right to represent the estate of the deceased person occupies the status of a legal person (*sic* representative). Section 35 of the 1996 Act which imparts the touch of finality to an arbitral award says that the award shall have binding effect on the “*parties and persons claiming under them*”. Persons claiming under the rights of a deceased person are the personal representatives of the deceased party and they have the right to enforce the award and are also bound by it. The arbitration agreement is enforceable by or against the legal representative of a deceased party provided the right to sue in respect of the cause of action survives.”

7. In terms of the above, though the respondents are not signatory to the arbitration agreement dated 20th of May, 1992 but being the legal representatives of Dr. Dhrubajyoti Banerjea, one of the signatory of the agreement, are bound by it to the extent provided in law. At the earlier stage, respondents themselves had sent the notice dated 29th of February, 2016 admitting the partnership deed dated 20th of May, 1992 and invoking the arbitration clause as legal heirs of the deceased Dr. Dhrubajyoti Banerjea with the request to appoint the sole arbitrator and the arbitrator was appointed and some proceedings before the arbitrator had also taken place, therefore, their contrary stand at this stage cannot be accepted.

8. Learned Counsel for the applicant has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Branch Manager, Magma Leasing and Finance Limited and Another vs. Potluri Madhavilata and Another** reported in **(2009) 10 SCC 103** wherein it has been held that with the termination of the contract arbitration clause neither perishes nor becomes inoperative. Reliance is also placed upon by the learned Counsel for the applicant on the judgment of the Hon'ble Supreme Court in the matter of **Aurohill Global Commodities Ltd. vs. Maharashtra STC Ltd.** reported in **(2007) 7 SCC 120** wherein the wide powers of arbitral tribunal has been recognized and the judgment of the Hon'ble Supreme Court in the matter of **Agri Gold Exims Ltd. vs. Sri Lakshmi Knits & Wovens and Others** reported in **(2007) 7 SCC 686** wherein it is held that Section 8 of the Act is preemptory in nature and in a case there exists an arbitration agreement, the Court is under obligation to refer the parties to arbitration in terms of the arbitration agreement.

9. Having regard to the above circumstances of the case, I am of the opinion that the arbitration agreement in the form of partnership deed dated 20th of May, 1992 exists and after the death of Dr. Dhrubajyoti Banerjea, the respondents being his legal representatives are bound by the agreement to the extent provided by law. The dispute exists between the parties, hence present application under Section 11 of the Act is allowed. Shri Kaushik Dey, Advocate resident of 3A, Brindaban Mallick Lane (Behind Amherst Street Police Station), Kolkata – 700 009 (Mobile No. – 9830467715) is appointed as arbitrator. The arbitrator will be free to decide the scope of arbitration and the issues to be taken up in arbitration in accordance with law.

The appointment of arbitrator is subject to obtaining his consent in terms of Section 12(1) in the form prescribed in Schedule VI of the Act.

10. Let this order be conveyed to the Arbitrator by the Registrar, Original Side forthwith.

11. A.P is accordingly disposed of.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

Kolkata
30.03.2022

PA(SS)

(A.F.R./N.A.F.R.)