

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

A.P. No. 27 of 2022

Reserved on: 16.09.2022

Pronounced on: 30.09.2022

Md. Wasim and Another

...Applicants

-Vs-

M/S. Bengal Refrigeration and Company and Others

...Respondents

Present:-

Mr. Rahul Karmakar,
Mr. Sounak Mukherjee, Advocates
... for the applicants

Mr. Wasim Ahmed,
Mr. Anindya Halder, 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 (for short, 'the Act') has been filed for appointment of Arbitrator to resolve the dispute between the parties.

2. The case of the applicants is that the partnership deed dated 4th of May, 1992 was executed between the parties which contained the following Arbitration Clause:

“13. That all disputes and questions whatever, which arise during the partnership or afterwards between the partners shall be referred to a person unanimously appointed to act as Arbitrator and in such case his verdict shall be binding on all the partners.”

3. It is alleged in the AP that the respondent no. 2 had started running parallel business and that the respondent nos. 2 and 3, in order

to suppress the illegal activities, had intentionally taken control of the books of accounts and other relevant documents. It is also the case of the applicant that the sale proceeds of the daily sales were also usurped by the respondents in complete deprivation of the applicant. Hence, applicant had sent the notice dated 8th of September, 2021 to the respondents invoking the Arbitration Clause and proposing the name of Mrs. Rajesh Ghosh, Advocate as sole Arbitrator to resolve the dispute. Respondents had sent the reply dated 17th of September, 2021 denying the appointment of the proposed Arbitrator and taking the stand that the applicants had made false allegations in the notice.

4. The applicants in order to safeguard the interest had filed the application under Section 9 of the Act which was registered as Miscellaneous Case No. 39 of 2022. Learned Judge, 12th Bench, City Civil Court, Calcutta on 7th of January, 2022 had passed the ad-interim order of injunction restraining the respondent nos. 2 and 3 from interfering and/or creating any obstruction to the applicants from participating in the day to day affairs of the firm.

5. It is also disclosed in the AP that respondent no. 3 had filed a suit for partition before the learned Civil Judge (Senior Division) at Sealdah which was registered as T.S. No. 101 of 2009 wherein the counter claim was filed by the applicants. The inclusion has been challenged by the respondent no. 3 by filing an application under Sections 5 and 8 of the Act indicating that the affairs of the respondent no. 1 cannot be challenged by way of suit owing to the existence of an Arbitration Clause in the partnership business.

6. In the present AP filed before this Court under Section 11 of the Act, the prayer is to appoint the sole Arbitrator to resolve the dispute.

7. Respondent no. 2 has filed their affidavit-in-opposition denying the factual averment made in the AP and also raising an objection that the dispute of an unregistered partnership firm cannot be referred to an Arbitrator in view of the bar contained under Section 69 of the Partnership Act, 1932 (for short, 'the Act of 1932).

8. I have heard the learned counsel for the parties and perused the record.

9. The partnership deed containing the Arbitration Clause has not been disputed by the respondents. It is also not in dispute that it is an unregistered partnership deed.

10. The objection of the respondents is in respect of the bar contained under Section 69 of the Act of 1932. Sub-sections (1) and (2) of Section 69 of the Act of 1932 restrict filing of suit by any person as a partner of unregistered firm. Sub-section (3) of Section 69 of the Act of 1932 makes the provisions of Sub-sections (1) and (2) applicable also to a claim of suit or "other proceedings" to enforce a right arising from a contract. Hon'ble Supreme Court in the matter of **Umesh Goel vs. Himachal Pradesh Cooperative Group Housing Society Limited** reported in **(2016) 11 SCC 313** has settled that the arbitral proceedings will not come under the expression "other proceedings" of Section 69(3) of the Act of 1932 and that the ban imposed under Section 69 can have no application to arbitration proceedings as well as the arbitral award. Madras High Court in the matter of **M/s. Jayamurugan Granite Exports vs. M/s. SQNY Granites** reported in **2015-4-L.W. 385** has considered the similar issue and held that:

“38. If these observations are looked in the context of Section 69 of the Partnership Act, the bar created for institution of the suit or other proceedings is in respect of the same being instituted in any “courts”. But the aforesaid observation shows that the power has to be exercised under Section 11 of the 1996 Act by the Chief Justice or his delegate and not by the Court. In fact, it is observed in paragraph-20 that there are a variety of reasons as to why the Supreme Court cannot possibly be considered to be “court” within the meaning of Section 2(1)(e) even if it retains seisin over the arbitral proceedings. The Judgment is to the effect that the Chief Justice does not represent the High Court or the Supreme Court, as the case may be, when exercising power under Section 11, albeit a judicial power. This is also the reason for the decision of the Chief Justice or his designate not being the decision of the Supreme Court or High Court, as the case may be, as there is no precedential value being the decision of the judicial authority, which is not a court of record.

39. In addition, as has been discussed aforesaid, the scheme of the 1996 Act is different and the process of mechanism for alternate dispute resolution system has to be construed not identical to the 1940 Act, considering the difference in their schemes.

40. I am thus of the view that non-registration of the petitioner firm would not be a bar under Section 69 of the Partnership Act for institution of proceedings under Section 11 of the 1996 Act.”

11. In view of the above legal position, the objection of the respondent based upon Section 69 of the Act of 1932 cannot be sustained and is hereby rejected.

12. Another objection raised by learned counsel for the respondents is that no prima facie case exists for referring the dispute to the Arbitrator. The material on record indicates that the dispute exists between the parties. Learned counsel for the applicants has also pointed out the order of the learned Judge, 12th Bench, City Civil Court, Calcutta dated 7th of January, 2022 to show that the prima facie case and dispute exists between the parties and considering the same,

the concerned learned Judge of the City Civil Court has passed the injunction order under Section 9 of the Act.

13. Since the arbitration agreement exists between the parties and the dispute has also arisen and the Arbitration Clause has duly been invoked, therefore, I am of the opinion that a case is made out for allowing the prayer for appointment of the Arbitrator. Hence, AP is allowed.

14. Mr. Debnath Ghosh (Mobile No. 9831343614), Advocate of this Court is appointed as sole arbitrator, 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 today.

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

16. A.P. is accordingly disposed of.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

Kolkata
30.09.2022

PA(RB)