Mr. NavIn Kumar and anr. Vs. Standard Restaurant and ors.

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SooperKanoon Citation : sooperkanoon.com/681166

Court : Delhi

Decided On : Jan-29-2003

Reported in : 2003IIAD(Delhi)289; 2003(1)ARBLR685(Delhi); 103(2003)DLT209; 2003(68)DRJ702; 2003(2)RAJ65

Judge : S. Mukerjee, J.

Acts : Arbitration and Conciliation Act,1996 - Sections 5, 8, 8(1), 8(3), 11, 13 and 16; Arbitration Act, 1940 - Sections 34; Indian Partnership Act - Sections 44; Companies Act; Code of Civil Procedure (CPC) - Sections 89

Appeal No. : I.A. No. 3120/2000 in Suit No. 206 of 2000

Appellant : Mr. NavIn Kumar and anr.

Respondent : Standard Restaurant and ors.

Advocate for Def. : Madan Bhatia, Sr. Adv. and ; Anil Sapra, Adv.

Advocate for Pet/Ap. : Ashok Grover, Sr. Adv. and; Lalit Bhardwaj, Adv

Judgement :

S. Mukerjee, J.

1. is No. 3120/2000 is an application has been filed under Section 8 of the Arbitration Act, 1996 on the short ground that since there is admittedly an

arbitration clause existing between the parties, thereforee according to the defendant/ applicant, this Court has necessarily to refer the matter to arbitration in accordance with the said arbitration agreement as is existing between the parties.

2. Reliance has been placed upon Clauses 15 & 16 of the Partnership Deed which reads as under :-

'Clause 15:

That in the event of any difference or dispute arising between any of the parties herein, such dispute shall first be amicably settled if possible. In case of the disagreement persisting, the decision of the 1st partner (Shri Kamal Nath Monga) shall always prevail. However, if so desired by the party in difference, the dispute may be referred to arbitrator in which case the 1st partner (Shri Kamal Nath Monga) shall have the right to appoint any person as the sole arbitrator for the decision of the disputed matter and the arbitrator's decision shall be conclusive and binding on all the parties. As stated above the reference of any such dispute to arbitration shall not in any way affect the continuity of the business of the firm in any manner. CLAUSE 16: That if for any reason the decision of the 1st partner (Shri Kamal Nath Monga) for the dispute regarding interrogation of this deed or any of the affairs of the firm arising between the partners or any one of them is not available, then in that case the party at difference shall abide by the decision of the majority, even as regards retirement or payment of the deceased partners share to his heirs and if the party at difference even then is not satisfied, he shall have no right to go to court against the firm and the difference shall be got resolved by means of Arbitration as provided for under the Arbitration Act 1940 without in any way affecting the right of the remaining partners to continue to carry on the business of the firm or to cause any other kind of interference in the assets and affairs of the firm.'

3. Reply has been filed by the plaintiff/non-applicant and rejoinder thereto by the defendant.

4. The main objections of Shri Ashok Grover, learned Senior Counsel for the plaintiff are as under :-

(i) Clauses 15 & 16 as relied upon by the defendants, are not by themselves in the nature of an agreement to refer disputes to arbitration. In particular, with emphatic reference to the words 'if so desired by the parties in difference' and to the word 'may', as used in Clause 15, it is submitted by learned counsel for plaintiff that arbitration has to be at the option of the party in difference viz, plaintiff only.

(ii) Secondly the use of the word 'may' necessarily implies that there has to be a further agreement between the parties before there can be an actual reference to arbitration;

(iii) The nature of the allegations of fraud and falsifications, as raised by plaintiff in the present case are such that in terms of the judgment of the Calcutta High Court reported in Nitya Kumar Chaterjee Vs Sukhendu Chandra; 1977 Calcutta page 130., the matter should be decided in 'open Court', and not by an arbitrator;

(iv) The prayer in the main suit is directed against this very Clause 15 of the agreement. Reference is made to Paras 9 and 11 of the plaint to explain the nature of the challenge. On this basis, it is submitted that the claim in the suit itself being whether Clause 15 is void or not, as such that issue will have to be decided by the Court, and not by the Arbitrator;

(v) Another submission of the plaintiffs/non-applicant is that dissolution of partnership, is to be ordered by the Court under Section 44 of the Partnership Act, and thereforee the subject matter of the present suit, which involves a prayer for dissolution, cannot be referred for adjudication by arbitration.

5. On the other hand, the contention of Shri Madan Bhatia, learned senior counsel for the defendant, is that the arguments put forward by the plaintiffs are at variance with it's own pleadings of the present suit, and also are totally contrary to the stand taken by the plaintiff himself in an earlier suit bearing Suit No. _2071/93 which is also pending in this very Court;

6. Shri Madan Bhatia has also drawn my attention to the averments at page 9 of the plaint to the effect that Clause 15 is alleged to have lost its meaning and significance. In another words, according to him, the contention of the plaintiff is

that, according to the plaintiff, clause 15 has become irrelevant or 'Otiose'.

7. I find with reference to page 9 of the plaint itself, that the plaintiff has himself actually used this word 'Otiose', though the submission has also been made to the effect, that this clause should be declared as void.

8. According to Shri Bhatia, once the existence of the arbitration clause has been accepted, and only its irrelevancy or redundancy is pleaded, then that would be the end of the matter as far as the objection to Section 8 of the application is concerned.

9. According to learned senior counsel for defendant, the contention of the plaintiff regarding the arbitration clause having become irrelevant or 'Otiose' and/ or on that account becomes void, is a principle unheard in law, and thereforee no cognizance need be taken on this objection.

10. He submits that the entire concept under the Arbitration Act 1996, has suffered a sea change, and that moreover presently the statute specifically observes that the arbitration clause is independent of the other provisions in terms of Section 16(i)(a) of the new Act. In this connection he further submits that plaintiff's contention that on account of other dealings and developments between the parties, in their relationship as partners under the Partnership Deed, would have the effect of rendering the same irrelevant and Otiose, is not only, not a valid contention even under the old Act, but atleast as far as the new Act is concerned, is absolutely untenable in the face of Section 16(i)(a) of the new Act. No matter how the relationships have developed or worsened or de-generated (even assuming the contentions of the plaintiffs to be correct), that would not be a ground to render the arbitration clause as irrelevant or 'Otiose', and the same will continue to operate as an agreement independent of the other terms of the contract.

11. Shri Madan Bhatia, learned senior counsel for the defendant has also referred to and relied upon the affidavit filed by the plaintiff himself in the earlier suit filed by present defendant No. 5, being Suit No. 2071/93, where plaintiff along with the present defendants 1-4, had while moving an application under Section 34 of the

Arbitration Act 1940, relied upon this very clause 15 itself, and along with the other defendants, had placed before this Court, the proceedings which had then taken place under clause 15 of the Partnership Deed in relation to those proceedings.

12. It is thereforee the submission of the learned counsel for the defendant, that plaintiff is thus stopped from now singing a different tune, and the present suit is nothing else but a malafide attempt to get out of the admissions on this aspect, made in the earlier suit.

13. Shri Madan Bhatia, learned senior counsel has also submitted that under the provisions of the Arbitration Act of 1996, there is no option left for the Court but to refer the matter to arbitration, and that to this extent there is a difference in the situation now, as compared to the situation prevailing earlier under Section 34 of the Arbitration Act, 1940. Furthermore he submits that in terms of Clause 16 of Arbitration Act 1996, the Arbitral Tribunal, is to rule on its own jurisdiction including for giving a ruling on any objections with respect to the existence or validity of the arbitration agreement.

14. Having considered the contentions of learned senior counsel on both sides, who have argued the matter with great eloquence, I find that the new Act has brought in a significant change. In terms of Section 5 of the new Act, it is stipulated that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part-I of the new Act, no Judicial Authority, should intervene except where so provided in the said part (viz Part-1).

15. Part-II of the new Act deals with the enforcement of foreign awards which is a subject with which we are not concerned. All the statutory provisions involved in the present case fall in Part-I, and thereforee, the strong prohibition against judicial intervention except where so provided under Part-I of the new Act, cannot be lost-sight-of.

16. Under the Scheme of the new act, and in particular Section 16 thereof, competence has been conferred on the Arbitral Tribunal to rule on its jurisdiction, including giving ruling on any objection with respect to the existence or validity of the arbitration agreement. It is further provided in Section 16(2) that such a plea

will have to be raised not later than the submission of the statement of defense.

17. In terms of Section 16(6), in case any parties are aggrieved of such decision, the challenge has to be by way of challenge to the final arbitration award.

18. Furthermore, in terms of Section 8 of the new Act, a judicial authority before whom an action is filed, in any matter which is the subject of an arbitration agreement, shall refer the parties to arbitration provided the party or parties so relying upon the arbitration clause, applies for the same up to the stage of submitting their first statement on the substance of the dispute.

19. It is further provided that notwithstanding the pendency of consideration by the Court under Section 8(1), and even during the pendency of proceedings before the judicial authority, the arbitration may be commenced and continued and even arbitral award passed.

20. The objection of the plaintiff to the effect that dissolution under Section 44 of the Partnership Act, is a statutory right to be necessarily performed by the Court only and not to be adjudicated upon by the Arbitrator, does not prima facie appear to be the correct proposition of law. This submission seems to be based on the ratio of the Apex Court decision in Haryana Telecom case : [1999]3SCR861 which judgment is distinguishable since the winding up order under the Companies Act, is an order in rem, while an order for dissolution of a firm, is basically an order in personam.

Likewise, reference may also be made to the decision of the Apex Court in Olympus Super Structures Pvt. Ltd. : [1999]3SCR490 where the Apex Court has observed that the new Act does not prohibit the reference to Arbitration of issues relating to even specific performance, which again was sometimes considered to be a statutory right enforceable only in a Civil Court.

After the judgment was reserved, the Learned Counsel for the defendants 1-4 has handed over photocopy of a reported judgment in the case of J. B Dadachanji and others V. Ravinder Narain and another reported as 2002 (65) DRJ 770. It was a case under section 11 of the Arbitration and Conciliation Act,1996 praying for the

appointment of Arbitrator in relation to certain disputes. On behalf of the respondent there was vehement opposition inter-alia on the ground that during the pendency of a suit seeking the dissolution of a firm, on just and equitable grounds in terms of section 44(g) of the Indian Partnership Act, the Arbitrator would not be competent to adjudicate upon the disputes raised by the applicant.

Reliance was placed on the decision of the Apex Court in Harayana Telecom ltd. V. Sterlite Industries (India) Ltd. : [1999]3SCR861 wherein it was held that the Arbitrator would have no jurisdiction to order winding up of a company, because the said power was a power conferred with the Court under the Companies Act. Reference was also made by the respondent to the decision of the Punjab & Haryana High Court reported as Narinder Singh Randhawa v. Hardial Singh Dhillon; , where it was held that after the dissolution of a partnership, the question of rendition of accounts could not be gone into by the Arbitrator and ought to be decided by a Civil Court.

The learned Senior Counsel appearing on behalf of the petitioner in that case, apart from relying on the decision of the Apex Court in Kalpana Kothari v. Sudha Yadav : AIR 2002 SC404 , Konkan Railway Corporation Limited v. Rani Construction Pvt. Ltd. (2002)1 SCC 388, had also placed reliance on the decision of the Supreme Court in V.H. Patel & Co. v. Hirubhai Himabhai Patel : (2000)4SCC368 and Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan : [1999]3SCR490 in support of the submission that even where the dissolution is sought on just and equitable grounds, the matter can be referred to arbitration.

Hon'ble D.K. Jain, J of this Court has aptly summarized the position under the Arbitration & Conciliation Act, 1996 as under :-

'.....When the matter is placed before the Chief Justice or his nominee under Section 11 of the Act it is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the Arbitral Tribunal itself. At that stage it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same. A bare reading of Sections 13 and 16 of the Act

makes it crystal clear that questions with regard to the qualifications, independence and impartiality of the arbitrator, and in respect of the jurisdiction of the arbitrator could be raised before the arbitrator who would decide the same.'

It was further observed:

'Section 16 empowers the Arbitral Tribunal to rule on its own as well as on objections with respect to the existence or validity of the arbitration agreement. Conferment of such power on the arbitrator under the 1996 Act indicates the intention of the Legislature and its anxiety to see that the arbitral process is set in motion. This being the legislative intent, it would be proper for the Chief Justice or his nominee just to appoint an arbitrator without wasting any time or without entertaining any contentious issues at that stage, by a party objecting to the appointment of an arbitrator.....'

It has been further held that the Court while exercising power under Section 11 of the Act, cannot entertain or decide upon issues such as existence of arbitration agreement, its validity or scope of jurisdiction of the arbitrator to decide about the disputes that was sought to be referred to the arbitration. All issues are to be left for decision of the Arbitrator since the jurisdiction of the Arbitral Tribunal under Section 16 of the 1996 Act, is now very wide, so as to include even the deciding of all objections regarding jurisdiction. Rather, the width of the jurisdiction of the arbitrator even extends to decide whether he has the jurisdiction or not.

While dealing with the submissions of the learned Senior Counsel for the respondent in that case in relation to Section 8(1) of the 1996 Act Hon'ble D.K. Jain, J., after reciting the nature of objections of the respondent has referred to the Apex Court decision in Kalpana Kothari case) (Supra), where it was held as under :-

'... ... In striking contrast to the said scheme underlying the provisions of the 1940 Act, in the new 1996 Act, there is no provision corresponding to Section 34 of the old Act and Section 8 of the 1996 Act mandates that the judicial authority before which an action has been brought in respect of a matter, which is the subject-matter of an arbitration agreement, shall refer the parties to arbitration if a party to

such an agreement applies not later than when submitting his first statement. The provisions of the 1996 Act do not envisage the specific obtaining of any stay as under the 1940 Act, for the reason that not only the direction to make reference is mandatory but notwithstanding the pendency of the proceedings before the judicial authority or the making of an application under Section 8(1) of the 1996 Act, the arbitration proceedings are enabled, under Section 8(3) of the 1996 Act to be commenced or continued an arbitral award also made unhampered by such pendency.'

After analyzing the above judgment, Hon'ble D.K. Jain, J. has gone on to hold that the provisions of Section 8 of the new Act, are of comprehensive as well as of mandatory character in relation to the disputes covered by the Arbitration Agreement. It was held that there is no substance in the contention of the respondent that before referring the parties to arbitration, the Court must adjudicate whether the disputes fall within the ambit of the Arbitration Clause or not. Reliance was also placed by Hon'ble D.K. Jain, J. on V.H. Patel case : (2000)4SCC368 where the Supreme Court observed as under:-

'So far as the power of the arbitrator to dissolve the partnership is concerned, the law is clear that where there is a clause in the articles of partnership or agreement or order referring all the matters in difference between the partners to arbitration, the arbitrator has power to decide whether or not the partnership shall be dissolved and to award its dissolution. Power of the arbitrator will primarily depend upon the arbitration clause and the reference made by the Court to it. If under the terms of the reference all disputes and differences arising between the parties have been referred to arbitration, the arbitrator will, in general, be able to deal with all matters, including dissolution. There is no principle of law or any provision which bars an arbitrator to examine such a question. Although the learned counsel for the petitioner relied upon a passage of Pollock & Mulla, that passage is only confined to the inherent powers to the Court as to whether dissolution of partnership is just and equitable, but we have demonstrated in the course of our order that it is permissible for the Court to refer to arbitration a dispute in relation to dissolution as well on grounds such as destruction of mutual trust and confidence between the partners which is the foundation thereforee.'

Thereafter, in conclusion, it has been held that where the arbitration clause in the partnership deed is couched in wide terms, the arbitrator will be competent to decide all the questions thereto, including the question of whether or not the partnership shall be dissolved.

21. In view of the above, I find that there is no other option left for this Court but to refer the matter to arbitration.' In any case, in view of Section 16 of the new Act, I do not propose to render any finding on this aspect, since it will be open to the Arbitrator to whom the matter is referred, to decide also this question whether the dispute or difference, is an arbitrable dispute or not.

22. As regards the objection of the plaintiff that serious allegations of fraud and falsifications, have been made and thereforee the matter must be decided 'in open Court', I find that to be an unsustainable contention. Arbitration clauses cannot be given go-bye simply on the basis of what type of the allegations are chosen to be made out by the parties to the litigation, except perhaps where there are serious disputes regarding fraud in relation to the execution of the arbitration agreement itself.

23. As regards the contention of the plaintiff that the use of the word 'may', and on the allegedly optional nature of the clause is concerned, to my mind, if Clauses 15 & 16 are read together, there can be no manner of doubt regarding the certainty of recourse to arbitration for resolution of disputes. No doubt, the word 'may' has been used in clause 15, but as is well settled, the word 'may' often means 'shall', and this is one such case.

24. In any event, if the two Clauses 15 & 16 are read together, there can be no doubt that by virtue of the concluding sentence of Clause 16, the dispute shall be referred for arbitration.

25. It is also stands agreed by the parties specifically, that instead of going to Court, they would resolve their differences by recourse to arbitration.

26. The phrase 'if so desired by the parties in difference', as used in Clause 15 refers not to the party who has approached the Court, but the party who after

making an attempt for amicable settlement, and who then at second stage after availing the decision of the first partner Shri Kamal Nath Monga, is at difference on the issue whether the said decision of the first partner Shri Kamal Nath Monga is to prevail or not. In the present case that stage has not yet been reached.

27. Accordingly, I hold that in view of the existence of Clauses 15 & 16 in the Partnership Deed, to which the parties are signatories, and the application under Section 8 having been made at required early stage, thereforee, the parties have to be sent to arbitration.

28. The only question which remains is as to the manner in which the disputes between the parties, are to be referred for arbitration, viz in the light of Clauses 15 & 16 having laid down a particular sequence of resolving matters. The first stage provided by agreement between the parties, is of amicable solution. I would thereforee consider it the duty of this Court, to direct the parties to make an attempt at amicable settlement by all the partners attending a meeting for the said purpose to be held at the Standard Restaurant premises on Saturday, the 22.02.2003 at 11.00 AM, for which meeting I appoint Shri Valmiki Mehta, Senior Advocate of this Court, to be the Conciliator along the lines of newly incorporated Section 89 of the Code of Civil Procedure. His fee is fixed at Rs.30,000/-, to be paid from the funds of the firm, in the event of the parties actually availing his services as a conciliator in relation to the dispute.

29. Otherwise, the visit of Shri Valmiki Mehta Senior Advocate, to the premises of M/s Standard Restaurant on the date and time fixed above, shall be considered as assistance to this Court, as amices Curiae.

30. In case the partners do not all attend on the date and time so directed, it would be deemed that the matter cannot be amicably resolved. Similar would be the position in case after meeting, the partners are not able to iron out their differences within a period of one week thereafter (unless of course the said period be enlarged by consent of all partners).

31. Thereafter, Shri Kamal Nath Monga shall within one week thereof give his decision on the disputes between the parties forming the present subject matter of

the present suit, including also any further differences as may come to light pursuant to the efforts at amicable settlement/conciliation.

32. In case that decision is accepted by all the partners, that would be the end of the matter. In case any difference persists, then Shri Kamal Nath Monga shall refer the matter to an arbitrator.

33. Although the clause does not restrict the choice of arbitrator by Sh. Kamal Nath Monga in any manner, however, during the course of hearing, pursuant to the efforts made at an earlier stage, calling upon both parties to agree on a common name of Arbitrator, and for reference to be made by consent without deciding this application on merits, Shri Madan Bhatia, learned Senior Counsel for defendants 1-4, had assured this Court that whenever in the past the subject matter cropped up, the defendant No. 1 had always evinced interest in favor of appointing a retired Hon'ble Judge as Sole Arbitrator. In fact, without even consulting his client, Shri Madan Bhatia had stated that the name of former Chief Justice of India, would be at the forefront of consideration regarding choice for appointment as Sole Arbitrator.

34. With these observations the application of the defendant is allowed and the matter referred to arbitration. In the peculiar facts and circumstances of this case, and the agreed terms of clauses 15 & 16 of the Partnership Deed, certain directions have been passed as pre-cursor to the actual reference in the light of the principle that there is some sanctity regarding the dispute redressal mechanism as agreed to by the parties and, thereforee, every stage thereof needs to be adhered to. In case the matters are not resolved up to the stage of appointment of an Hon'ble Retired Judge as Sole Arbitrator, then out of a panel of three Retired Hon'ble Judges to be proposed by the defendant within one week of being called upon to do so, the plaintiff will make a choice, failing which, the first of the names in the list will prevail. The application is No. 3120/2000 is allowed but with no order as to costs.

S. No. 206/2000

35. In view of the orders passed on is No. 3120/2000, suit and all pending IAs shall stand disposed of accordingly.