

T.K. Aggarwal and ors. Vs. Tara Chand Jain and ors.

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Court : Delhi

Decided On : Mar-16-2005

Reported in : 119(2005)DLT470; 2005(81)DRJ567

Judge : Pradeep Nandrajog, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 34; [Arbitration Act, 1940](#)

Appeal No. : OMP 16/2002

Appellant : T.K. Aggarwal and ors.

Respondent : Tara Chand Jain and ors.

Advocate for Def. : Raman Kapoor, Adv.

Advocate for Pet/Ap. : Manish Sharma, Adv

Judgement :

Pradeep Nandrajog, J.

1. Application under Section 34 of the [Arbitration and Conciliation Act, 1996](#) challenges award dated 17.9.2001 passed by Justice M.L. Jain (Retd.)

2. Objectors filed a suit in this Court for dissolution of partnership and rendition of accounts being Suit No. 2752/89. It was stated in the plaint that the first objector was a qualified Engineer and that objectors No. 2 and 3 were his sons. Objector

No. 1 was known to one B.P. Jain, an Assistant Engineer with CPWD. Respondent No. 7 was brother of B.P. Jain. Respondent No. 1, Tara Chand Jain, was a close associate of B.P. Jain. Respondent No. 1 was engaged in business as a contractor and was working under the name and style 'M/s Jain Construction Co.' with office at 149, Civil Lines, South Muzaffar Nagar (U.P.). It was further averred that respondent No. 2 is the son of respondent No. 7, respondent No. 3 is the wife of respondent No. 7 and respondents 4 and 5 are the daughters of respondent No. 7. It was stated that respondent No. 6 is the wife of B.P. Jain, elder brother of respondent No. 7.

3. Further allegations in the plaint were that U.P. State Sugar Corporation, respondent No. 8 had awarded a contract of about Rs.2 crores to M/s Jain Construction Co. and Northern Railways, respondent No. 9, had awarded a contract of about Rs.75 lacs to the said firm. With said two major contracts at hand, respondents 1 and 7 approached objector No. 1 to participate in the business with him. After discussions, it was agreed that the objectors and respondents 1 to 6 would enter into a partnership accordingly, on 28.1.1988, a deed of partnership was executed by the objectors and respondents 1 to 6.

4. Further case pleaded by the objectors was that business was to be conducted under name and style 'M/s Jain Construction Co.' with head office at 81-A, East Azad Nagar, Delhi and the office at 149, Civil Lines, South Muzaffar Nagar (U.P.) was to be treated as a branch office. Another branch office was set up at D-222, Shastri Nagar, Meerut.

5. In a nutshell, case set up by the objectors was that w.e.f. 28.1.1988, the firm 'M/s Jain Construction Co.' with office 149, Civil Lines, Muzaffar Nagar (U.P.), belonging to respondent No. 1 ceased to exist and 'Jain Construction Co.', the partnership firm which came into existence as a result of the partnership deed dated 28.1.1988 was the only firm by said name.

6. As per the objectors, their share in the profit and loss of the partnership firm was 30% and that of respondents 1 to 6 was 70%. Objectors claimed to have contributed capital. It was alleged that the 2 contracts awarded by U.P. State Sugar Corporation and Northern Railways were executed by the partnership firm.

Alleging ouster from the affairs of the business of the firm and non-rendition of accounts, objectors filed suit No. 2752/89 praying for dissolution of the firm and rendition of accounts.

7. In the plaint, objectors referred to business of the firm in relation to 2 contracts and no other business.

8. defense set-up by respondent 1 to 7 was that objector No. 1 was a petty contractor. His son Dr. V.K. Aggarwal and daughter-in-law Dr. Manju Aggarwal were practicing from C-1, East Krishna Nagar, Delhi-110051. Respondents 3 and 7 were under treatment of Dr. V.K. Aggarwal and Dr. Manju Aggarwal. Patient doctor relationship turned into friendship.

9. Respondent No. 2, son of respondent No. 7 and objector No. 1 agreed to start construction business. Objector No. 1 had submitted a tender for construction of a bottling plant at Haridwar of I.O.C., earnest money was paid by respondents 3 and 6. Respondent No. 2 was well known to respondent No. 1 and wanted help so that his venture with objector No. 1 could be successful.

10. Since respondent No. 1 was of helpful nature, it was agreed that respondent No. 1 would allow the use of name of his firm 'Jain Construction Co.' in the manner that objectors and respondents 1 to 6 would enter into a partnership which would also use the name 'Jain Construction Co.'

11. In other words, according to the defense, there were two 'Jain Construction Co.' w.e.f. 28.1.1988. The first was the firm of respondent No. 1 which was already existing and the second was the partnership firm created on 28.1.1988.

12. It was further stated in the written statement that objector No. 1 who is very clever purchased 2 sets of stamp papers bearing Seriall No. 21299 and 21300. A deed of partnership dated 28.1.1988 was got typed on the stamp paper bearing Seriall No. 21299. It was executed, but respondent No. 1 had some reservation and accordingly a revised deed of partnership was got typed on the stamp paper bearing Seriall No. 21300. It was also dated 28.1.1988 (an anti date). This deed of partnership stated that head office of the partnership firm would be 81-A, East

Azad Nagar, Delhi with branch office at D-222, Shastri Nagar, Meerut. Only business to be carried on by this firm was the work of :

'Zone No. II earthwork in embankment from KM 29.6 to 53.6. Construction of minor bridges No. 48 to 93 and construction of Rail Level Platform and approach road at Sonik Railway Station and Cabins on Stations etc. in connection with B.G. Doubling between Lucknow-Kanpur and Kanpur-Anwarganj.'

13. Further case pleaded was that the work was executed under supervision of objectors 1 and 2 and respondent No. 7 as attorney of respondents 3 to 6 in absence of respondent No. 2 who was a student at Pune. Respondent No. 1 remained a dormant partner. It was pleaded that all accounts were maintained by objector No. 1.

14. Being relevant, it may be noted at this stage that deed of partnership relied upon by the objectors stated that head office of the firm was at 81-A, East Patel Nagar, Delhi with branch office at 149, Civil Lines Muzaffar Nagar (U.P.) and D-222, Shastri Nagar, Meerut. The one relied upon by the respondents stated that head office of the firm was at 81-A, East Azad Nagar, Delhi with branch office at D-222, Shastri Nagar, Meerut (U.P.)

15. Case set up by the respondents was that the first deed of partnership was destroyed when second was executed.

16. Objectors never produced the original deed of partnership on which they relied and submitted only photocopy thereof. Respondents produced the original deed of partnership on which they relied.

17. Respondents 1 to 7 squarely laid the blame on shoulders of objector No. 1. They alleged in the written statement that objector No. 1 was in possession of the record. In the concluding para of the written statement, respondents 1 to 7 pleaded and prayed :

'It is respectfully prayed that the suit of the plaintiffs may kindly be dismissed with costs, and the plaintiffs may kindly be directed to file true and faithful accounts of suit firm, along with the original account books, ledgers, passbooks, vouchers and

used cheque books in this Hon'ble Court forthwith.'

18. Vide order dated 8.4.1996, Justice G.C. Jain (Retd.) was appointed as sole arbitrator and disputes between the parties as laid in the pleadings in the suit were referred to arbitration. He framed the following issues :

1. What were the terms of the partnership between the parties?
2. Whether the partnership firm was awarded only one work (awarded by defendant No. 9) or it had executed two works?
3. What are the assets of the partnership firm 'Jain Construction Co.' and who is in possession of these assets?
4. How much amount was contributed by each partner towards the capital of the firm?
5. How much profit, if any, was earned by the partnership firm?
6. Did the partnership firm suffer any loss, if so, the amount thereof?
7. To what amount each of the partner is entitled?
8. Whether the defendants are liable to be restrained from carrying on any business in the name and style of Jain Construction Co.?
9. What amount, if any, was received by the defendants from defendant No. 9 in connection with the partnership work after disputes arose between the parties?
10. Whether the parties had withdrawn any amount from the partnership account No. 4508 (Current Account) at Punjab National Bank, Shahdara?
11. Relief.'

19. On death of Justice G.C. Jain (Retd.), Justice M.L. Jain (Retd.) was appointed as an arbitrator to fill up the vacancy vide order dated 17.2.1999.

20. After recording evidence, award was published on 17.9.2001. Findings and reasons on the issues are as under :

i) Issue No. 1 was decided by holding that partnership deed executed on stamp paper bearing Seriall No. 21300 was the deed of partnership which set out the terms of agreement between the parties to constitute a partnership., Reason recorded is that only this deed was filed and that letter heads prepared gave only two addresses of the firm as per said deed of partnership.

ii) Issue No. 2 was decided by holding that partnership executed only one work, awarded by Northern Railways and had no concern with the work awarded by U.P. State Sugar Corporation. Reason recorded is that both parties admitted that only one current account No. 4508 at P.N.B., Shahdara was opened in the name of the firm, which account showed that only the amount received from Railways was credited to said account. Second reason stated was that U.P. State Sugar Corporation had awarded work to 'Jain Construction Co., Muzaffar Nagar'. (I may note that though not stated in the reasons, but on page 3 of the award, while noting the backdrop facts, it has been recorded that this work was awarded on 5.1.1988. Partnership in questionamen into in existence on 19.1.1988).

iii) Issue No. 3 to 7, 9 and 10 were decided together. It was stated that objectors had to pay Rs. 4,87,480/- to the respondents. Reasons recorded are that :

a) Contract by Railways was awarded on 13.7.1988 and the firm executed the works up to 31.5.1989. Railways forfeited security deposit of Rs.1.5 lacs. Stores were under custody of Railways and neither party showed interest for release of the stock.

b) Apart from the account with P.N.B., Shahdara, 2 more accounts were opened at site of work being A/c No. 743 with Central Bank Unnao and A/c No. 441/3 with S.B.I. Usapur, Kanpur.

c) Account at P.N.B., Shahdara was operated by any 2 persons, being objector No. 1, respondents 2, 3 and 7. Account with Central Bank was operated by objector No. 1 and respondent No. 7. Account with S.B.I. was operated by

respondent No. 7.

d) Parties did not submit agreed accounts. Account drawn by each party was taken and in light of bank statements was redrawn. Money deposited in the bank accounts was noted as also withdrawals. Amounts transferred to personal accounts of parties were noted.

e) Profits were determined by taking into account the money received from the Railways, minus expenses. Profit was assessed at Rs.2,92,620/-. Since share of respondents in the profits and loss was 70%, Rs.2,04,835/- was held as their entitlement.

f) Objectors were found to have withdrawn amount in excess of the capital invested and their share in the profits. Respondents capital investment lying to their credit was determined at Rs. 2,82,645/-.

g) While determining profit, objectors plea that in such types of contracts profit was 50% was found to be absurd and not substantial. It was noted that due to disputes, work was not completed and not only full profits could not be earned but Railways even forfeited Rs.1.5 lacs deposited as security.

iv) Issue No. 8 was decided against the objectors. In my opinion, it had to be so in view of decision on issue No. 1 and 2.

21. Respondents were awarded Rs.4,87,480/- with interest @ 12% from date of suit i.e. 3.10.1989 till date of payment. Cost of arbitration in sum of Rs.50,000/- was held payable by the objector to the respondents.

22. The first objection to the award is that at no stage the learned arbitrator sought extension of time from the parties and thus, he was functus officio when award was pronounced.

23. The [Arbitration and Conciliation Act, 1996](#), vide sub-section (3) of Section 1 is deemed to have come into force on 25.1.1996. Objectors had filed a suit for dissolution, rendition of accounts and injunction. In said suit, reference was made to Justice G.C. Jain (Retd.) as sole arbitrator vide order dated 8.4.1996. Unlike the

[Arbitration Act, 1940](#), the new Act does not fix any time limit for the arbitrator to make the award. The objection is, therefore, without merits. It has also to be noted that at no stage of the proceedings did the objectors raise any issue of time having expired. Neither any extension was sought nor was any granted. Having participated without demur or protest, objectors are precluded from raising the said objection.

24. Second objection urged is to the findings of the arbitrator on issue No. 1. Learned counsel for the objectors urged that partnership deed executed on stamp paper No. 21299 was the deed which contained the terms of partnership and not the one executed on stamp paper No. 21300. Counsel urged that the learned arbitrator had ignored the evidence that it was copies of the former which were sent to government departments.

25. The deed drawn on stamp paper No. 21299 had 3 addresses of the firm and that drawn on stamp paper No. 21300 had 2 addresses. Learned arbitrator has noted that letter heads of the firm had only 2 addresses printed thereon. Original of the former was never produced but the latter was. Circumstances under which the former was executed and, thereafter the latter has been explained by the respondents. Respondents had explained that objector No. 1 was having control of the account books and had mala fide sent copies of the former deed to the government departments.

26. Finding relates to a matter of fact. Learned arbitrator has sustained his reasons on the basis of evidence. He has acted within his mandate which was to appraise the evidence led before him. I cannot sit in appeal over findings of facts. As long as there is some evidence to sustain a finding of fact, finding cannot be interfered with.

27. Findings of the arbitrator to the settlement of accounts was challenged by urging that finds mentioned on page 7 of the award that 'respondents have submitted the accounts of expenditure made by them supported by vouchers and receipts signed by Shri A.K. Aggarwal, one of the claimants, who was on the spot along with Mr. Y.K. Jain' are baseless and not borne out from the record.

28. I am afraid, objection has been taken for the sake of objection. File No. II of the record of arbitrator contains the statement of account referred to by the learned arbitrator. Ex.DW-48/1(a)(i), Ex.DW-48/1(b)(i) to (iii), Ex.DW-48/2(a), (b)(i) to (b)(ix), Ex.DW-48/3(a)(i)(ii), Ex.DW-48/3(b)(i), Ex.DW-48/4(a)(i) to (iv), Ex.DW-48/4(b)(ii) to (iv) and so on till Ex.DW-48/25 running into over 200 pages are bills and vouchers pertaining to the accounts.

29. It was urged that the account at S.B.I., Usmapur was operated by Y.K. Jain, respondent No. 7, who was not a partner and said account was irrelevant and the learned arbitrator could not look into the same.

30. Perusal of case pleaded by the objectors shows that it is their case that respondent No. 7 was the person who along with respondent No. 1 had approached objector No. 1 with the proposal to enter into a partnership. Objectors had pleaded that respondent No. 7 being in service got his family members as partners.

31. In the written statement filed by respondents, in the preliminary submissions, at pages 11 and 12, said respondents have made averments pertaining to the expenses incurred by respondent No. 7 at Unnao. In the replication, in para 18 of reply to preliminary submissions in the written statement, objectors have pleaded :

'Subsequently the plaintiff No. 1 and defendant No. 7 went to bank and got a draft for Rs.1,60,000/- prepared from the account maintained in the name of plaintiff No. 2 and defendant No. 7 at Unnao and another amount of Rs.1,20,000/- was withdrawn and was taken by defendant No. 7 under the pretext that he will have a round of the site and will carry the amount along with him. Since it is the defendant No. 7 and plaintiff No. 2, who were in charge of the work and investments to be made at the sit, said amount was handed over to defendant No. 7.'

32. In the teeth of the aforementioned pleadings of the objector, I am surprised at the objection taken. Besides, documentary evidence shows that respondent No. 7 was looking after the work along with objector No. 2.

33. It was then urged that learned arbitrator wrongly concluded that contract could not yield 50% profit and finding was non-substantiated.

34. Reasoning of the arbitrator has been noted in para 20(iii)(g) above. I find the same reasonable. Besides, it was for the objector to show that such contracts yielded 50% profits. Besides, learned arbitrator, as is noted in paras 20(iii)(a) to (f) above, has determined the profits by settling the accounts. If we are in the realm of the real, why speculate?

35. It was urged that the accounts settled by the arbitrator are faulty.

36. I am afraid, neither party brought on record original accounts. Learned arbitrator had to recreate the same from the bills and vouchers and bank statements. Any statement of account so prepared cannot be perfect. But that would not vitiate the award. What has to be shown, if such an account has to be challenged, is that the learned arbitrator has settled the accounts ignoring known and recognized accounting principles. An arbitrator's work, if result of rough justice, is acceptable. In the instant case, it has to be more so as parties gave incomplete tools to the learned arbitrator.

37. It was finally urged that respondents did not have a counter claim and, therefore, learned arbitrator exceeded his mandate by awarding Rs. 2,87,480/- to respondents 1 to 6.

38. Suit which was referred to arbitration was for dissolution of the partnership firm and rendition of accounts. In the adjudication, a net negative balance can be struck against the plaintiffs, besides, as noted in para 17 above, in the written statement filed by them, respondents had prayed that plaintiffs be directed to file true and faithful account and produce the original books of account. Award is not vitiated on account of the amount awarded to respondents upon settlement of accounts.

39. Objections being wholly frivolous and vexatious are dismissed with costs in sum of Rs. 25,000/-.

