

Mohammed Hashim Vs. Ameeruddin

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Court : Karnataka

Decided On : Mar-31-2006

Judge : D.V. Shylendra Kumar, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11 and 11(6); [Limitation Act, 1963](#) - Schedule - Article 137; [Arbitration Act, 1940](#) - Sections 8 and 20

Appeal No. : Civil Miscellaneous Petition No. 50 of 2005

Appellant : Mohammed Hashim

Respondent : Ameeruddin

Advocate for Def. : A. Radhakrishna and ;J. Abdul Hameed, Adv.

Advocate for Pet/Ap. : Abdulla, Adv. for ;Hegde Associates

Disposition : Petition allowed

Judgement :

ORDER

D.V. Shylendra Kumar, J.

1. This is a petition under Section 11. of the [Arbitration and Conciliation Act, 1996](#) (for short, 'the Act').

2. Petitioner and the respondent are brothers and partners of a partnership firm in terms of a Partnership Deed dated 1-4-1986 (copy at Annexure-A), The partnership deed contains clause for referring the disputes and questions in connection with the partnership or under the Deed as between the partners or their legal representatives etc., to be referred for arbitration etc..

3. Clause 15 of the Partnership Deed reads as under:

15. All disputes and questions in connection with the partnership or this Deed arising between the partners or between any of them and the legal representatives of the other or between their respective legal representatives and whether during the continuation of the partnership or after the determination thereof shall be referred to arbitration of two Arbitrators, one to be appointed by each partner and in case of their disagreement to an UMPIRE appointed by the said Arbitrators or in case of their default by the partners.

4. Petitioner it appears had sought for settling the accounts and the share of profit etc., in terms of a legal notice dated 16-2-2005 (copy at Annexure-B). Respondent did reply disputing the claim in terms of reply letter under Annexure-C on several aspects. Respondent also indicated that there is nothing to arbitrate as the claim itself is not tenable. It is thereafter, the present petition.

5. Petition having been admitted and respondent having been put on notice had entered appearance through Counsel Sri Abdul Hameed and has also filed its objections.

6. It is, inter alia, contended in the objections that there was never any real partnership firm; that the deed was only a nominal one which was never acted upon; that even though arrangement had been discontinued on and after the year 2000, the activity was given to another brother; that there was no activity after the year 2000 and demand either for settling the accounts or for appointment of the Arbitrator in the year 2005 is barred by limitation and therefore the petition is only to be dismissed.

7. Submission of Sri Abdulla, learned Counsel for the petitioner is that from the notice under Annexure-B, the petitioner had while demanding the amount and calling upon the respondent to settle the account due under the deed etc., had called upon the respondent to nominate an Arbitrator if the amount is not being settled and having nominated an Arbitrator on his part.

8. Further submission of learned Counsel for the petitioner is that as the agreement provided for nomination of an Arbitrator on either side and the Arbitrators in turn appointing an Umpire, the petitioner had nominated his Arbitrator, but the respondent has neither conceded to the demand nor nominated an Arbitrator on his side but had only raised untenable objections not only for the Arbitrator nominated by the petitioner but also for the claim etc., and therefore the petitioner is forced to approach this Court by the present petition as the procedure agreed upon between the parties has not worked for appointment of the Arbitrator or for resolution of the disputes by arbitration.

9. Per contra, Sri Abdul Hameed, learned Counsel for the respondent has while reiterating the factual resistance mentioned in the objection statement and referred to above, has also put forth the contention that the petition is hit by limitation, particularly, the petition filed being beyond three years from the date of the cause of action which if at all is one which had arisen when the alternative arrangement of handing over the business in favour of the other brother was made in the year 2000 and a petition in the year 2005 being beyond the period of three years stipulated under Article 137 to Schedule II of the [Limitation Act, 1963](#), the petition is to be dismissed on this ground alone.

10. In support of such submission, learned Counsel for the respondent has placed reliance on the following decisions:

(a) Sindh Construction Company, Mirzapur v. Union of India AIR 1983 All. 462;

(b) Utkal Commercial Corporation v. Central Coal Fields Limited : [1999]1SCR166

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(c) Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority : [1988]3SCR351 .

11. Submission is that in all these decisions rendered in the context of Section 8 of the [Arbitration Act, 1940](#) seeking for intervention of the Court for appointing an Arbitrator, the Court had found that Article 137 of the [Limitation Act, 1963](#) does operate and unless the petition to the Court whether under Section 8 or under Section 20 of this Act was one within the period of three years, it could not be maintained etc.

12. While Section 11 of the Arbitration Act, 1996 is not necessarily in pan materia with Section 8 or Section 20 of the [Arbitration Act, 1940](#), the principle could have been followed if it did apply. However, in the present case, it is noticed that the dispute is in the context of the request of the petitioner for accounts of the partnership firm which admittedly has not been dissolved in a manner known to law. As of now, even if it has become defunct according to the respondent and as submitted by learned Counsel for the respondent, unless accounts are settled, it will not be known as to what is the precise amount due to each of the partner in the partnership firm and in the absence of any plea that accounts had been settled at any time earlier etc., the defence does not rescue the respondent for acceding to the prayer for dismissing the petition on the ground of limitation.

13. So far as other submission that factually partnership firm had not come into existence at all; that it had not, in fact, worked at any point of time and had also become defunct are all not matters which this Court can take note of as even on the basis of the admitted record what can be recognised in law is to the contrary, So long as the existence of the partnership deed which is registered as was submitted by Sri Abdulla, learned Counsel for the petitioner by drawing attention to the certified copy of the deed issued by the Registrar of Firms (copy at Annexure-A) and in the absence of any dissolution deed or any other material acceptable in law for having put an end to such partnership deed, partnership firm continues to exist in the eye of law and therefore the submissions/averments to the contrary cannot be accepted.

14. Arbitration clause in the agreement did provide for nominating an Arbitrator on the part of each party and they in turn selecting a third Arbitrator/Umpire. But, that procedure as envisaged under the agreement has not worked and therefore the parties are now governed by the situation as provided for under Section 11(6) of the Act and one of the parties having petitioned to this Court for appointment of an Arbitrator under this provision, it is inevitable that this Court will have to undertake necessary measure for appointing the Arbitrator/Arbitrators.

15. Sri Abdulla, learned Counsel for the petitioner submits that a sole Arbitrator will suffice for the purpose of resolving the dispute and an Arbitrator stationed at Mangalore will be convenient as the parties are also stationed at Mangalore and dispute arose at Mangalore and it will be in the interest of the parties that a person who is a resident of Mangalore Arbitrates over the proceedings.

16. From amongst the list of Arbitrators, I find Sri Umesh Shetty, Retired District Judge, is a person residing at Mangalore and neither learned Counsel for the petitioner nor learned Counsel for the respondent have any objection for appointing Sri Umesh Shetty as an Arbitrator for resolution of the dispute as raised by the petitioner.

17. In the circumstances, Sri Umesh Shetty, Retired District Judge, residing at No. 205, I Erase Apartment, Jail Road, Mangalore, is appointed as a sole Arbitrator to arbitrate the dispute between the parties. The Arbitrator can settle his fee in consultation with the parties.

18. Necessary notice may be issued in this regard to the Arbitrator. Registry to send a copy of this order to Mr. Umesh Shetty, Retired District Judge, who is appointed as an Arbitrator.

19. The Arbitrator to file a copy of the Award before the registry of this Court so that it can serve as a record to know that the arbitration proceedings is concluded though there is no such requirement in law.

20. Petition allowed No costs.

