

(2000) 01 GAU CK 0017

Gauhati High Court

Case No: Civil Ref. (Arb.) No. 3 of 1996

Mohd. Monirul Hasan and
Others

APPELLANT

Vs

Mohd. Iftikar Ahmed and Others

RESPONDENT

Date of Decision: Jan. 11, 2000

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(4)
- Partnership Act, 1932 - Section 43, 69, 69(3)

Citation: AIR 2000 Guw 108 : (2000) 1 GLT 325

Hon'ble Judges: Brijesh Kumar, C.J

Bench: Single Bench

Advocate: C.K. Sharma, Baruah, A.K. Baruah and A. Dey, for the Appellant; A.B. Choudhury, M. Hazarika, D. Choudhury and P. Khataniar, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Brijesh Kumar, C.J.

This is a petition, filed u/s 11 of the Arbitration and Conciliation Ordinance, 1996 (later passed as the Arbitration and Conciliation Act, No. 26 of 1996 (hereinafter referred to as the Act).

2. Heard Shri C. K. Sarma Baruah, learned counsel for the petitioners and Shri A. B. Choudhury, learned counsel for the respondents.

3. The petitioners and the respondents Nos. 1 to 5, entered into a partnership under the name and style of "M/s. Pancharatna Transport Company", to run ferry service on annual lease basis from the Inland Water Transport Department, Government of Assam. According to the averments made in the petition, the partnership was at will having 12 partners. A copy of the partnership deed has been filed as Annexure-1 to

the petition.

4. According to the petitioners, the work under the partnership deed had started from 1-4-1988, and the books of accounts were being kept by Mohd. Iftikar Ahmed, opposite party No. 1; but the petitioners were not being paid share of their profit in accordance with the partnership agreement for certain periods. Hence, ultimately, petitioner No. 3, Mohd. Kamrul Hasan, gave a notice dated 23-1-95, on his behalf and on behalf of the other petitioners, addressed to the respondent No. 1, Mohd. Iftikar Ahmed, raising grievance about the non-payment of their share and yet another notice was sent, addressed to the respondent No. 1, on 26-9-95, through counsel. The request, however, made for settlement of accounts, was not accepted. It is also indicated that a reply was also given by the respondent to the notices. But, ultimately, when the accounts were not settled and the share in the profits were not paid, a notice dated 7-3-96 was issued by the petitioners to the respondents invoking Clause 10 of the agreement for settlement of the dispute by appointing arbitrator. It was requested that the accounts of partnership business for the period from 1-4-91 to 31-3-96 be settled and amounts payable be determined and be paid to the petitioners. A copy of the said notice invoking arbitration clause, dated 7-3-96, has been filed as Annexure-IV to the petition. It is said that a reply was also sent to the said notice saying that no dispute had arisen between the parties. Hence, there was no occasion to appoint any arbitrator. A copy of the reply dated 9-4-96, said to be sent by the respondents, has been filed as Annexure-V to the petition.

5. Since no arbitrator was appointed, the present petition was filed on 5-6-96, with a prayer for appointment of an arbitrator.

6. An affidavit-in-opposition has been filed disputing the factual aspects of the matter and also reiterating the fact that there was no dispute liable to be referred to arbitration. The maintainability of the petition u/s 11 of the Arbitration and Conciliation Act, 1996 was also challenged on the ground of Section 69 of the Partnership Act, 1932. Since the partnership firm was an unregistered firm, hence no proceedings could be initiated for appointment of an arbitrator.

7. Learned counsel appearing for the respondents raised a preliminary objection about the maintainability of the present petition in view of bar u/s 69(3) of the Partnership Act.

8. It is undisputed that the firm is unregistered. The effect of non-registration of a firm is to be found u/s 69 of the Partnership Act, 1932, which reads as un-

"69. Effect of non-registration.-(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-Sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect,-

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner.

9. From the perusal of the above provision apparently, bar of Section 69 of the Partnership Act would come into play against the maintainability of the present proceedings. However, the learned counsel for the petitioners has based his case on Sub-Section (3) of Section 69 and exceptions provided therein; and on that basis has made two contentions--one, that a petition u/s 11 of the Arbitration and Conciliation Act, 1996 would not be a proceeding to enforce a right arising from a contract; and, secondly, that the bar will not affect the enforcement of any right to sue for dissolution of a firm or for accounts of a dissolved firm or to realise the property of a dissolved firm, as provided under Clause (a) of sub-Section (3) of Section 69 of the Partnership Act. Hence, a petition for appointment of arbitrator to settle such nature of dispute shall also be maintainable.

10. We may take up the first point first, namely, a petition u/s 11 of the Arbitration and Conciliation Act, 1996, would or not be "other proceeding", so as to attract the bar of Section 69 of the Partnership Act. First of all. it may be observed that the main provision contained in Sub-Section (3) of Section 69 of the Partnership Act only places emphasis of bar of Section 69 and clarifies that it would apply also to a claim of set-off or "other proceeding" to enforce a right arising from a contract. It appears to have been provided with a view to make the provision clear and dispel any doubt or confusion about the applicability of the bar in proceedings other than suits. Sub-sections (1) and (2) of Section 69 provide for the applicability of the bar on suits; but the bar would also apply to other proceedings as well, which has been emphasised and is stressed upon under Sub-Section (3), To claim a right to make a prayer for appointment of arbitrator in view of Clause 10 of the agreement, would undoubtedly be a case of enforcement of a right arising from a contract. We may come to the latter part of Sub-Section (3) providing two exceptions, as contained in Clauses (a) and (b), later on. Now, we may deal with the question whether a petition u/s 11 of the Arbitration and Conciliation Act, which is for enforcing a right under a contract, is "other proceeding" or not for the purposes of Section 69 of the Partnership Act.

11. In a case reported in [Jagdish Chander Gupta Vs. Kajaria Traders \(India\) Ltd.](#), it has been held that the phrase "other proceeding" used in Sub-Section (3) of Section 69 of the Partnership Act, will include proceedings u/s 8(2) of the Arbitration Act, 1940, as well. Learned counsel for the petitioners has, however, tried to distinguish the above cited case on the ground that the view taken by the Hon"ble Supreme Court in the case of Jagdish Ch. Gupta [supra) was in reference to the provisions contained under the Arbitration Act, 1940. It is submitted that there is a great difference between the provisions of the old Act and the new Act. In the old Act, provisions have been different, more particularly, relating to appointment and reference to arbitrator. It is also indicated that u/s 11 of the new Act, under which the present petition has been filed, it has been provided under Sub-Section (4) of Section 11 that appointment of an arbitrator shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. The submission is that since it is a request which is required to be made for appointment of an arbitrator, such a petition would not partake the character of a proceeding. A reference to a decision of Hon"ble Supreme Court has also been made, as reported in [M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.](#), Our attention has been pointedly drawn to paragraphs 8, 9 and 12 of the decision, where an observation is made in Para 9 that the 1996 Act is very different from the Arbitration Act, 1940; therefore, the provisions of the new Act have to be interpreted and construed independently and in case interpretation is made in reference to the Act of 1940, It may lead to misconstruction of the provision. In paragraph 12 of the Judgment, the provision as contained u/s 20 of the old Act has been construed and in the end of the paragraph, it is observed as follows :-

"Under the 1996 Act, appointment of arbitrator/s is made as per the provision of Section 11 which does not require the Court to pass a judicial order appointing arbitrator/s. The High Court was, therefore, wrong in referring to these provisions of the 1940 Act while interpreting Section 9 of the new Act."

12. As a matter of fact, the Supreme Court was examining the difference between the provisions of Section 20 of the 1940 Act and Section 8 of the new Act. According to the provision of Section 8 of the new Act, where a matter was pending before a judicial authority which is the subject matter of an arbitration agreement, a party may apply u/s 8, for referring the parties to arbitration. It was held that u/s 20 of the old Act, a party could apply for appointment of an arbitrator without there being any matter pending before the Court. In that view, there was difference between the provisions of Section 20 of the old Act and Section 8 of the new Act. In that connection, It was observed that under the new Act, appointment of an arbitrator is made as per provision of Section 11, which does not require the Court to pass a judicial order appointing arbitrator. It may be observed that according to the Hon"ble Supreme Court, a petition u/s 20 of the old Act could be moved for appointment of an arbitrator where the matter may not be pending before a Court. That situation is like as contained u/s 11 of the new Act, where too, a petition can be

made without any matter in that regard being pending before a Court. Here, we are not concerned with the differences between Section 20 of the old Act and Section 8 of the new Act, as was the case in question. Rather there is similarity to some extent between the provisions of Section 20 of the old Act and Section 11 of the new Act, where a petition can be moved for appointment of an arbitrator even though no judicial proceeding may be pending in any Court.

13. It may also be noticed that for the purposes of the bar u/s 69 of the Partnership Act, what will be relevant will be as to whether it is a suit, a claim of set-off or "other proceeding" for the purposes of enforcement of a right arising out of a contract or not. May be, a judicial order may not be required to be passed for appointment of an arbitrator, as observed by the Hon^{ble} Supreme Court in context of the controversy indicated above; nonetheless, the fact remains that a petition is to be moved to a designated authority to appoint an arbitrator in view of the provisions contained in an agreement. It is such a right to get a dispute settled through arbitration by appointment of an arbitrator, which is invoked and enforced as against a party who is not acting in consonance with the terms of the agreement and avoiding to discharge its duty cast under a given clause of the contract. On a petition moved u/s 11 of the new Act, notices are issued and parties are heard and the matter is examined as to whether an arbitrator is to be appointed or not in terms of the agreement. After hearing the parties on that question, a decision is taken and an order is passed. The remedy to get the arbitration clause enforced in the matter of appointment of an arbitrator is a statutory remedy. Therefore, it would not be possible to contend that It will not be covered under the phrase, "other proceeding", as used u/s 69(3) of the Partnership Act. The mere fact that Sub-Section (4) of Section 11 of the Arbitration and Conciliation Act, 1996 provides that a request is to be made for appointment of an arbitrator, would not make any material difference. The procedure involved in dealing with a matter relating to appointment of an arbitrator u/s 11 of the new Act, cannot be said to be devoid of the character of a proceeding, by merely providing that a request is to be made for appointment of an arbitrator. Through a petition u/s 11 of the new Act, a right arising from a contract is enforced, which in substance is a requisite attracting application of bar to "other proceeding" u/s 69 of the Partnership Act. Needless to emphasise that it is the substance which is to be taken into account, and not the form. Thus, there is no force in the submission that a petition moved for enforcement of a right arising from a contract would not be "other proceeding", as provided under Sub-section (3) of Section 69 of the Partnership Act.

14. Coming to the next submission. Clause (a) of Sub-Section (3) of Section 69 of the Partnership Act may be considered. Sub-Section (3) provides that the bar contained under Sub-Sections (1) and (2) of Section 69 will not affect the enforcement of any right to sue for dissolution of a firm or for accounts of a dissolved firm, or to realise the property of a dissolved firm, as provided under Clause (a). It is submitted on behalf of the respondents that so as to be free from the bar of Section 69, the

proceeding must relate to enforcement of a right to sue for dissolution of the firm, or for accounts of a dissolved firm, or to realise the property of a dissolved firm, which is not the case here, since the dispute sought to be resolved through arbitration is not for dissolution of the firm, nor it relates to a dissolved firm; therefore, it is not a case for appointment of an arbitrator for settlement of dispute excepted under Clause (a) of Sub-Section (3) of Section 69 of the Partnership Act.

15. To counter this submission, learned counsel for the petitioners submits that it was a partnership at will, which was dissolved by giving notice dated 7-3-96, u/s 43 of the Partnership Act. He has referred to Sections 7 and 43 of the Partnership Act, which read as follows :-

"7, Partnership at will.- Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will"."

"43. Dissolution by notice of partnership at will.-

(1) Where the partnership is at will, the firm may be dissolved by any partner by giving notice in writing to all the other partners of his intention to dissolve the firm.

(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice."

16. It is submitted that the partnership agreement does not provide for any duration of the partnership. Therefore, it will be partnership at will, which would require only a notice to dissolve the firm, as provided u/s 43. Since a notice was given, the firm was a dissolved firm and an arbitrator is sought to be appointed to settle the dispute relating to accounts and recovery of the shares of the petitioners in the dissolved firm. In support of the above contention, besides drawing the attention of the Court to the notice dated 7-3-96, it is submitted that in paragraph 2 of the petition it was mentioned that it was a partnership at will. The said fact, according to the petitioners, has not been denied by the respondents in their reply. On the other hand, in their reply, opposing the petition it is mentioned in the end of paragraph 10, that in the event the petition is allowed, the respondents also demanded a reference of settlement of accounts and their dues to be paid by the petitioners, in the arbitration proceedings. In view of the above position, it is submitted on behalf of the petitioners that it is not open for the respondents to say that it was not a partnership at will.

17. We find that the averments made in paragraph 2 of the petition have been replied to in paragraph 8 of the affidavit-in-opposition and it has been stated that matters based on partnership deed executed by the parties are not denied, except those which are contrary to the terms of the partnership deed. That is to say, for the purposes of ascertaining whether it was a partnership at will or not, the terms of the

partnership deed were relied upon. They have to be looked into and construed as to whether it would be partnership at will or not. It may be mentioned here that plea of bar of Section 69(3) of the Partnership Act had been raised in paragraphs 12 and 15 of" the affidavit-in-opposition. In connection with the averment made in the end of paragraph 10 of the affidavit-in-opposition that in case an arbitrator is appointed, he may consider the claims of the respondents also, it may be observed that it is a plea in alternative and it would be difficult to accept that there was any admission on the part of the respondents that it is a partnership at will. Since the question as to whether it is a partnership at will or not, depends upon the meaning of Section 7 of the Partnership Act and construction of Clause 2 of the agreement deed and it having become relevant for the purposes of deciding the plea, as raised, about maintainability of the petition u/s 11 of the Arbitration and Conciliation Act, 1996, in view of bar of Section 69 of the Partnership Act, it would be appropriate to decide the question in these proceedings u/s 11 of the Act itself, and also for the reason that it hardly requires any factual enquiry into the matter. The question of maintainability of the petition u/s 11 of the Act cannot appropriately be dealt with and decided by the arbitrator, as suggested at one stage by the petitioner.

18. The relevant provisions relating to duration of the partnership is Clause (2) of the agreement. It reads as under :-

"2. COMMENCEMENT AND DURATION:

That the business of the firm shall be deemed to have commenced on and from 1st April, 1988 and all the terms of this Deed shall be applicable from that date. This partnership business shall continue till it is dissolved in the manner mutually decided by the partners."

19. Section 7 of the Partnership Act provides that where there is no period or duration provided in the agreement for the partnership or for the determination of the partnership, it shall be partnership at will. According to the learned counsel for the petitioners, since no duration is provided for the partnership, it is to be taken to be partnership at will. But, while so arguing, the other part of Section 7 has been totally ignored, where it also provides that if no provision is made in the contract between the parties "for the determination of their partnership", it would then be a partnership

20. A perusal of the clause relating to commencement and duration of the partnership quoted above shows that it has been specifically provided that the partnership is to continue till it is dissolved "in the manner mutually decided by the partners". That is to say, though no duration was fixed in the agreement, the stipulation was about as continuance till dissolved in accordance with mutually agreed manner between the parties. There should have been a manner mutually decided by the partners in which manner alone the partnership could be dissolved. This clause of the agreement read with the other part of Section 7 of the Partnership

Act, makes it clear that it was not intended to be a partnership at will. The partners while entering into the agreement were quite conscious about the duration of the partnership. Without fixing any duration, the parties had agreed for dissolution of the firm in a manner to be decided mutually by the partners. It cannot be said that there is no provision in the contract about the dissolution of the partnership. The manner of dissolution of the partnership was to be as decided by the partners, is a part of the contract amongst the partners. Therefore, a notice given by the petitioners u/s 43 of the Partnership Act, which is meant for dissolution of a partnership at will by giving notice, the said provision is not attracted in this case. In terms of Clause 2 of the contract, the possibility of the partnership being a partnership at will, is excluded. The manner in which it is to be dissolved was subject to mutual decision of the partners. No such mutual decision about, the manner of dissolution of the firm has even been pleaded by the petitioners. According to the clause in question, it could not be an unilateral act of one of the partners to dissolve the firm.

21. The terms of Clause 2 of the contract being clear, as also the provision of Section 7 of the Partnership Act, it requires no probing into the factual aspects so as to arrive at a conclusion, as being apparent on the face of it that the partnership is not at will. Therefore, unilateral act of a partner in giving notice of dissolution of the firm u/s 43 of the Partnership Act, would be bereft of any legal consequence. Thus, the relief sought through arbitration proceedings would not be covered by Clause (a) of Sub-Section (3) of Section 69 of the Partnership Act. Glaring facts which stare on the face of the record cannot be ignored, nor eyes can be shut to them to enable the petitioners to avoid clutches of a legal provision. A proceeding for appointment of an arbitrator in terms of the contract is only a step in enforcement of rights and obligations arising from the contract, including for settlement of dispute by arbitrator. Therefore, Section 69(3) of the Partnership Act will apply to proceedings u/s 11 of the "Act as well.

22. Learned counsel for the respondents has referred to a decision of the Hon"ble Supreme Court, reported, in [M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property](#), M/s. Raptakos Brett & Co. Ltd. v. Ganesh Property; more particularly, to the observations made in paragraph 22 of the decision. It has been observed that the bar of Sub-section (2) of Section 69 of the Partnership Act deprives the plaintiff of its right to get its case examined on merits by the Court; therefore, the provision has to be strictly construed. But, once the bar u/s 69 of the Partnership Act is attracted, it would make the suit incompetent on the very threshold, it being a mandatory provision. In such matters, Sub-section (2) of Section 69 has been held to be condition precedent for a firm while filing a suit. If the firm is not registered, the suit would be incompetent from the inception.

23. There are some other decisions which have been referred to by the parties, as reported in [M/s. Krishna Motor Service by its Partners Vs. H.B. Vittala Kamath, Smt.](#)

[Premalata and another Vs. M/s. Ishar Dass Chaman Lal and others,](#) Premiata (Smt.) v. Isher Dass Chaman Lal. which also lead to the conclusion that the embargo as placed under Subsection (3) of Section 69 of the Partnership Act would be operative unless the matter is brought within the exceptions, as provided under Clauses (a) and (b) of Sub-section (3) of Section 69.

24. Since the conclusions drawn on the two points involved are to the effect that the petition u/s 11 of the Arbitration and Conciliation Act, 1996, would be "other proceeding", within the meaning of subsection (3) of Section 69 of the Partnership Act, and the dispute sought to be settled will not be covered by the exception as provided under Clause (a) of Sub-section (3) of Section 69 of the Partnership Act, the embargo as contained u/s 69 of the Partnership Act would operate and the present proceedings initiated for enforcement of right arising from the contract, would not be maintainable.

25. In the result, the petition fails and It is dismissed. There would, however, be no order as to costs.