Case No. 68

2002 V AD (DELHI) 821
Delhi High Court

AA No 122/2000 OMP NO. 60/2000 & IA's 6995,6996,7004,8704,
12081/00, 9422,9602,9727,11341, &, 11350/01.
Suit No. 1084/2000 & IA's 6989,7010,8913/00,4878,11226,
2540/00, &, 8678/01.

9.7.2002
J.B.Dadachanji vs. Ravinder Narain & Anr.

D.K.JAIN J.

Partnership agreement - scope for arbitration - arbitration clause couched in wide terms and includes all matters indifferences - whether arbitrator can decide if the firm is to be dissolved - Yes in view of the wording of the arbitration clause.

Appearences
Mr. Rajiv Nayar, Sr. Adv., with Mr. B.A.Ranganathan, Adv., for the Applicant.
Mr.V.P.Singh, Sr. Adv., with Mr. Sajan Narain, Adv. for Respondent 1.

OMP NO.60/2000
J.B.Dadachanji vs. Ravinder Narain & Anr.

Appearances:
Mr. Rajiv Nayar, Sr. Adv., with Mr. B.A.Ranganathan Adv., for the Petitioner
Mr.V.P.Singh, Sr. Adv., with Mr. Sajan Narain Adv for Respondent 1.

Suit No 1084/2000
Ravinder Narain Vs J.B.Dadachanji & Ors

Appearances:
Mr.V.P.Singh, Sr. Adv., with Mr. Sajan Narain Adv for the Plaintiff.
Mr. Rajiv Nayar, Sr. Adv., with Mr. B.A.Ranganathan Adv., for the Defendant.

Held : In the present case the arbitration clause in th partnership deeds. extracted above, is couched in wide terms and includes all the matters in difference relating to the firm, its affairs and its partners and, therefore, the arbitrator will be

compenent to decide all the questions in relation thereto, including the question whether or not the partnerships shall be dissolved or not and make the award accordingly. (para 25)

Result : Suit disposed of.

Cases Referred :

1. Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., (1999) 5 SCC 688
2. Kalpana Kothari Vs. Sudha Yadav & Ors. (2002) 1 SCC 203.
3. Konkan Railway Corporation & Anr. Vs. Rani Construction Private Limited (2002) 2 SCC 388
4. Konkan Railway Corporation Limited & Ors. Vs. Mehul Construction Co., (2000) 7 SCC 201.
5. Olympus Superstructures Pvt. Ltd. Vs. Meera Vijay Kheton & Ors., (1999) 5 SCC 651.
6. Monro Vs. Bognor Urban District Council (1915) 3 KB 167
7. Narinder Singh Randhawar & Anr. Vs. Hardial Singh Dhillon & Ors., AIR 1985 Punjab and Haryana 41.
8. Thyssen Stahlunion GMBH Vs. Steel Authority of India Limited: (1999) 9 SCC 334).
9. V.H. Patel & Co. and Ors. Vs. Hirubhai Himabhai Patel & Ors., (2000) 4 SCC 368.
10. Wellington Associates Ltd. Vs. Kirit Mehta, 2000 (3) SCALE 23.

D.K. JAIN, J

Over four decades ago, three eminent lawyers, JBD, RN and OCM decided to carry on their profession jointly as a firm under the name and style of M/s. J.B. Dadachanji & Co. little realising that one day their legal acumen would be tried and tested in the law courts against each other. Pursuant thereto, a somewhat complicated, deed of Partnership was executed between the three on 1 July 1961, setting out the terms and conditions agreed upon between them. The deed contained an arbitration clause, which reads as under.

> "31. That in the event of any dispute with regard to any matter (sic) relating to the firm, its affairs and its partners, the matter shall be referred to the sole arbitration of Shri M.C.Setalvad, failing him Shri C.K. Daphtary and in the event of both of them reusing, then to an arbitrator mutually agreed upon, failing which to an arbitrator appointed by the Court."

2. The Original Deed of Partnership was modified from time to time but the arbitration clause remained unchanged.

3. A new firm under the name and style of M/s. D.B. Dadachanji Ravinder Narain Mathur and Co. was constituted by means of another Deed of Partnership dated 1 April 1979 between the aforenoted three persons and four others. This Deed of Partnership also contained an arbitration clause, which was in the following terms:

> "25. Any dispute arising out of or in relation to the Partnership shall be resolved cy Arbitration and the parties hereto agree to refer the same to the Sole Arbitrator who shall be Mr. S.P. Mehta, failing him Mr. F.S.Nariman and failing him Mr.S.J.Sorabjee or such other persons as may be mutually agreed."

4. As of date only JBD, RN and OCM continue to be the partners in the second firm as the other four partners retired between the period forms 1981-2000

5. Some differences having surfaced between the partners, levelling certain allegations against the other partners and challenging the authenticity of Modification Deed dated 1 April 1997, pertaining to the first firm, alleged to have been obtained from him fraudulently on 22 March 2000 JRD filed a petition under section 9 of the Arbitration and Conciliation Act 1996 (for short the new Act) being OMP No. 60/2000, inter alias, praying for appointment of a receiver to take over the control of the two firms and further restraining the other two partners from interfering, parting with or alienating any of the properties and assets of the two firms and also from operating the bank accounts of the firms.

6. Simultaneously on 15 May 2000, JBD also filed an application (AA No. 122/00) under section 11(5) and 11(6) of the new Act, praying for appointment of an arbitrator to resolve the ongoing disputes in the first firm.

7. Perhaps reposing more confidence in the civil courts, on 24 May 2000, RN filed a suit for dissolution of the two firms: for rendition of accounts and for restraining JRD and OCM from withdrawing any moneys from the said firms etc. Both JRD and OCM moved applications under order 7 Rule 11 CPC (IA Nos. 6989 and 8913 of 2000) for rejection of the plaint, inter alia, on the ground that the suit was not maintainable in law in view of the existence of an arbitration agreement between the parties. As expected, OCM also moved an application under Section 8 of the new Act (IA No. 7010/ 2000) seeking reference of the parties to arbitration.

8. I propose to dispose of AA No. 122/2000. OMP No. 60/00, IA Nos. 6989, 7010, 8913/00 and other connected application in the Suit by this common order.

9. In that affidavit in opposition filed by RN, all the application/ petition are resisted on the ground that: (i) in view of an express bar in clause 5 of the Partnership Deed dated 1 July 1961, against dissolution upon notice by one of the partners of the firm, unless there is unanimous agreement amongst the partners to do so, the question whether or not the firm ought to be dissolved cannot be considered to be a dispute amenable to arbitration: (ii) if at all there is such a dispute, it can only be adjudicated upon in a properly constituted suit under section 44 of the partnership Act, 1932, more so when RN has already sought dissolution under the said provision (iii) the afore- mentioned modification Deed dated 1 April 1997 having been signed and acted upon by all the parties, it cannot be invalidated by the arbitration (iv) since the applicant seeks to refer the question of validity of the modification Deed dated 1 April 1997 for arbitration, the dispute cannot be covered by the arbitration clause because it is rested on allegation of fraud, coercion, misrepresentation and collusion, which cannot be tested by an arbitration and (v) as the arbitration agreement was entered into which the provisions of the Arbitration Act,1940 (for short the old Act) in mind, there have never been ad idem between the parties for arbitration under the new Act and , therefore, the present application under section 11 of the Act is not maintainable.

10. In his reply affidavit, OCM supports the prayer for appointment of an independent arbitrator. In an additional affidavit dated 17 August 2001, filed by JRD, it is stated that he does not press for appointment of receiver or even a dissolution of the firms in the arbitration proceedings.

11. I have heard Mr. Rajiv Nayar, learned senior counsel for the JBD, Mr.V.P.Singh learned senior counsel for the contesting respondent RN and Mr. O.C. Mathur at some length.

12. It is vehemently submitted by Mr. V.P.Singh that in view of the tendency of the suit, seeking dissolution of the firm on just and equitable ground in terms of section 44(g) of the Partnership Act, the arbitrator would not be competent to adjudicate upon the disputes sought to be raised by the applicant and therefore applications under section 8 and 11 of the new Act are not maintainable; and (ii) the allegation of fraud and misrepresentation being the base for getting the Modification Deed dated 1 April 1997, declared as void, the issue raised does not fall within the ambit of the arbitration clause because it refers to the process of entering into the arbitration agreement. In support of the first proposition, reliance is placed on the decision of

the Supreme Court in Haryana Telecom Ltd. Vs. Sterlite industries (India) Ltd., (1999) 5 SCC 688, wherein it was held that an arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company is contained under the Companies Act and is conferred on the court. Reference is also made to a decision of the Punjab and Haryana High Court in Narinder Singh Randhawa & Anr. Vs. Hardial Singh Dhillon & Ors. AIR 1985 Punjab and Haryana 41, wherein a learned Single Judge of that court while dismissing an application under section 34 of the old Act, seeking stay of the suit for dissolution of partnership, has observed that the question of rendition of accounts could not be gone into by the arbitrator after the dissolution of the partnership but had to be decided by a civil court. In support of the second proposition learned counsel has relied on Monro Vs. Bognor Urban District Council (1915) 3 KB 167, wherein it was held that when A party seeks a declaration that the contract is void on the ground that it was obtained by fraudulent misrepresentation and it be rescinded, the disputes allegedly arising out of the same contract, could not be said to be a dispute " upon or in relation to or in connection with contract" within the meaning of the arbitration clause. Drawing support from an order passed by Hon'ble Mr. Justice M.J.Rao (as his Lordship then was), as a designate of the Chief Justice of India, in Wellington Associates Ltd. Vs. Kirit Mehta, 2000 (3) scale 23, it is urged that while deciding an application under section 8 of the new Act, unlike section 11, this court is exercising judicial function and therefore, it must decide the question whether at all the dispute raised by the applicant is referable to arbitration or not.

13. Mr. Rajiv Nayar, learned senior counsel for JBD and Mr. O.C.Mathur have on the other hand, submitted that section 5 read with section 8 of the new Act casts a mandatory duty on court before whom an action is brought to refer the parties to arbitration, if the matter before the court is the subject mater of an arbitration agreement. In support reliance is placed on a decision of the Supreme Court in Kalpana Kothari Vs. Sudha Yadav & Ors., (2000) 1 SCC 203. Relying on Konkan Railway Corporation Limited & Ors. Vs. Mehul Construction Cc., (2000) 7 SCC 201 and Konkan Railway Corporation Ltd. Vs. Rani Construction Pvt. Ltd., (2000) 2 SCC 388, it is vehemently contended that while deciding an application under section 11 of Act, the Court is not to decide any contentious issue between the parties and it has only to see if there is an arbitration agreement between the parties and if so, the Court is obliged to refer the parties to arbitration. Refuting the stand of RN that the partnership deed prohibits dissolution of the partnership on notice by one of the parties, it is submitted by learned counsel for the applicant that the question whether the firm needs to be dissolved or not and whether the dissolution is merited at all is

for the arbitrator to decide and such an issue cannot be decided at this stage. In support of the submission that the arbitrator has the jurisdiction to decide whether or not the partnership shall be dissolved, even when dissolution is sought on just and equitable ground, reliance is placed on the decisions of the Supreme Court in V.H. Patel & Co. and Ors. Vs. Hirubhai Himabhai Patel & Ors., (2000) 4 SCC 368 and Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan & Ors., (1999) 5 SCC 651.

14. Having given my thoughtful consideration be the rival submissions, I am of the view that in the light of the case law now available on the subject, the objections raised on behalf of RN are devoid of any merit.

15. The Arbitration Act, 1940, applying on the date of agreement in the form of deeds of partnership, stands repealed by virtue of Section 85 of the Act. The new Act is deemed to have come into force on the 25th day of January 1996 and applies to all disputes raised thereafter. In the instant case, the arbitration clause, contained in deed of partnership dated 1 July 1961 having been invoked after 25 January 1996, the provisions contained in the new Act would be applicable (See: Thyssen Stahlunion GMBH Vs. Steel Authority of India Limited: (1999) 9 SCC 334). I, therefore, reject the objection that since the Arbitration agreements between the parties were under the old Act, an application under section 11 is not maintainable in the absence of further agreement under the new Act.

16. Section 11 of the new Act lays down the procedure for appointment of arbitrators by the parties. Sub-section (5) operates where the number of arbitrators agreed upon is one sole arbitrator but there is no agreed procedure for his appointment. Sub-section (6) thereof, inter alia, provides that in case of failure of a party to act as required under the appointment procedure agreed upon by the parties, a party may request the Chief Justice or any person designated by him to take the necessary measures for securing the appointment of arbitrator. The scope and ambit of Section 11 of the new Act has been succinctly explained by the Apex Court in the case of Konkan Railway Corporation Limited v. Mehul Construction Co case (supra), as follows:

> "……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 appro-

priate 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, 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…"

17. Affirming the decision of the three Judges Bench in the aforenoted case, the Constitution Bench of the Supreme Court in Konkan Railway Corporation & Anr. Vs. Rani Construction Private Limited (2002) 2 SCC 388, inter alia, observed that there is nothing in Section 11 which contemplates a decision by the Chief Justice or his designate on any controversy that the other party may raise, even in regard to its failure to appoint an arbitrator within the period of thirty days. The only function of the Chief Justice or his designate under the said Section is to fill the gap left by a party to the arbitration agreement.

18. In the light of the aforenoted decisions, it is clear that under Section 11 of the Act the. Chief Justice or his designate, while exercising his power under the said provisions, cannot entertain or decide the issues like existence of arbitration agreement, its validity or scope or the jurisdiction of the arbitrator to decide the disputes that are sought to be referred to his arbitration. All issues are to be left to the decision of the arbitrator/arbitrators. This is so because the jurisdiction of the Arbitral Tribunal under Section 16 of the Act is very wide to include all objections to its jurisdiction. It is not confined to the width of its jurisdiction but extends to deciding whether it has any jurisdiction at all to deal with the matter before it.

19. In the instant case all the parties being adidem on the existence of an arbitration clause in both the afore- mentioned deeds of partnership and the arbitrators named in the deed dated 1 July 1961 not being available and the arbitrators named in the deed dated 1 April 1979 not willing to act as arbitrator, in my opinion JBD is justified in moving this court under section 11(6) of the Act. In view of the aforenoted settled legal position, this court is not competent to go into the objections raised on behalf of RN in opposition to the application. All these issues are to be raised before to be considered by the arbitrator.

20. Having come to the aforenoted conclusion, it is unnecessary for me to go into the issues raised by RN opposing the applications under section 8 of the Act, but since learned counsel for him has addressed me on these issues at some length. I shall briefly deal with them.

21. Section 8(1) of the new Act, relevant for our purpose, lays down that a judicial authority before which an action is brought in a matter which is subject of an arbitration agreement shall, if a party so applies not later than when submitting his statement on the substance of the dispute, refer the parties to arbitration. As noted above, objection of RN for referring the parties to arbitration is mainly on two counts, namely (i) the arbitration does not have jurisdiction to dissolve the firm on just and equitable ground in terms of section 44(g) of the Partnership Act and (ii) the arbitrator cannot adjudicate on the validity of the Modification Deed dated 1 April 1997 because the claim is based on the allegation of fraud and misrepresentation, which is beyond the scope of arbitration agreement. In other words, both the objections touch upon the competency of the arbitrator to adjudicate on the disputes.

22. In a recent decision in Kalpana Kothari's case (supra), while drawing a distinction between section 34 of the old Act and section 8 of the new Act, the Supreme Court observed as follows:

> .." 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 tendency 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 and an arbitral award also made unhampered by such pendency.

(Underlined for emphasis)

23. The Supreme Court has thus held that the provision of section 8 of the new Act is all-comprehensive and of mandatory character to have the matter relating to the disputes referred to arbitration in terms of the arbitration agreement. As a matter of fact in that case the court held that application under section 8 of the new Act in a suit for dissolution of the partnership firm through the court under section 44 (g) of the Partnership Act, as in the present case should not have been dismissed on the plea of estoppel taken by the plaintiff as defendants (in the suit) application under section 34 of the new Act and particularly in the light of the ratio of the decision in Kalpana Kothari's case (supra) I do not find any substance in the contension of learned counsel for RN that on the filing of an application under the said provision before referring the parties to arbitrator the court must adjudicate whether disputes raised fall within the ambit of the arbitration clause or not.

24. Similarly the argument in opposition taken on behalf of RN that the arbitrator has no power to dissolve a partnership, especially when dissolution is sought on just and equitable ground and, therefore the dispute, subject matter of the suit cannot be adjudicated by the arbitrator is devoid of any force. Dealing with a similar situation in V.H.Patel's case (supra) the Supreme Court observed as under (p.379):

"12. So far as the power of the arbitrator to dissolve the partnership is concerved, 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 (see: Phoenix Vs Pope). 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, quoted earlier, that passage is only confined to the inherent powers of 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 therefore."

25. In the present case the arbitration clause in the partnership deeds, extracted above is couched in wide terms and includes all the matters in difference relating to the firm, its affairs and its partners and therefore the arbitrator will be competent to decide all the questions relation thereto, including the question whether or not the partnerships shall be dissolved or not make the award accordingly.

26. The ratio of the decision of the Supreme Court in Haryana Telecom (supra) heavily relied upon by learned counsel for the contesting party is not applicable to the facts of the present case. In that case the court was dealing with a question whether an arbitrator has the jurisdiction to wind up a company. An order of winding up of a company has a different connotation as compared to an order of dissolution of partnership. A winding up order under the Companies Act is an order in rem, in contrast to an order for dissolution of a firm, which is basically an order in personam. In fact in Olympus Superstructures Private Limited (supra) the Apex Court has observed that the new Act does not prohibit reference to arbitration all issues relating to specific performance, which action again is a statutory right under the Specific Relief Act, 1963 enforceable in a civil court.

27. In view of the foregoing discussion AA No 122/2000 and IA No. 7010/2000 are allowed and Dr Justice A.S.Anand former Chief Justice of the Supreme Court of India is appointed as the sole arbitrator to resolve the disputes / differences between the parties arising out of the partnership deeds dated 1 July 1961 and 1 April 1979 as amended form time to time. The learned arbitrator shall fix his own fees in consultation with counsel for the parties. The fees so fixed shall be shared, in the first instance by all the three aforenoted parties in equal proportion subject to determination of costs by the arbitrator.

28. Any observation above, touching upon the merits of the case shall not be construed as expression of final opinion on the merits of the case of either of the parties and it goes without saying that it will be open to the parties to raise before the arbitrator any objection including the one raised in the present proceedings as may be available to them in law.

29. In view of the above order Suit No 1084/2000 shall be treated as disposed of and consequently no further orders are required in IA Nos 6989/2000 and 8913/2000 filed for rejection of the plaint and IA Nos 4878/00, 11226/00, 2540/00 and 8678/02, seeking interim relief. These applications also stand disposed of accordingly. The next date (15.7.02) fixed in the suit and IAs stands cancelled.

30. Insofar as OMP No 60/2000 is concerned interim orders passed by this court from time to time shall continue till the learned arbitrator makes and publishes his award, subject to the parties seeking modification by the arbitrator of any of the orders passed by this court. Accordingly the OMP and IAS 6995/00, 6996/00, 8704/00, 12081/00,9422/00,9602/00,9727/00, 11341/01 and 11350/01 stand disposed of.

This order shall be communicated to the learned arbitrator by the office directly. Copies of the order may be issued to counsel for the parties for being delivered to the learned arbitrator.