

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO.1847 OF 2016
IN
ARBITRATION APPLICATION NO.101 OF 2015

M/s Krishna Allied Industries Private Limited Company .. Applicant

In the matter between:

M/s Krishna Allied Industries Private Limited Company .. Applicant

Versus

Steel Authority of India Ltd. & Ors. .. Respondents

Mr. Shyam Kapadia i/b. Kartikeya and Associates for the Applicant.

Mr. S.C. Naidu a/w. Mr. A. Poojari i/b. M/s. C.R. Naidu and Company for the Respondents.

CORAM : S.J. KATHAWALLA, J.
DATED : 5TH AUGUST, 2016

P.C.:

1. In the above Arbitration Application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (the Act), the Applicant had initially due to inadvertence approached this Court in the name of the partnership firm M/s. Krishna Industries, though on the date of the filing of the Application, the partnership firm already having been converted into a private limited company. The matter stood disposed off vide Orders of this Court dated 22nd July 2015 and 21st September 2015 wherein a sole

arbitrator was appointed to adjudicate the disputes between the parties. The Applicant has by way of the present Notice of Motion has prayed for a clarification / modification of the order dated 22nd July, 2015 to include the Applicant within the meaning of the words 'parties to the dispute' referred to therein.

2. The brief facts giving rise to the present Motion are as follows:

(a) On 15th December 2004, a Tripartite Agreement was entered into between a proprietorship concern, M/s Krishna Industries, the Respondent and one HEC Limited. This Agreement related to the purchase of certain steel plates from the Respondent, processing by the proprietorship concern and onward supply to HEC Limited.

(b) On 1st April 2011, the proprietorship concern became a registered partnership firm continuing to carry on business in the name of M/s Krishna Industries.

(c) On 7th November 2012, the partnership firm entered into an Agreement with the Respondent, which incorporated the previous Agreement dated 15th December 2004.

(d) On 10th September 2013, the partnership firm was converted into a private limited company under the name of Krishna Allied Industries Pvt. Ltd., which is the Applicant before me. The certificate of incorporation of the Applicant company

shows that the said Company was incorporated under Part IX of the Companies Act, 1956.

(e) Sometime in mid 2013, disputes arose between the parties relating to the lifting and supply of the stock of steel.

(f) On 4th April 2015, the above Arbitration Application was filed before this Court in the name of the partnership firm.

(g) On 22nd July 2015, this Court disposed off the Arbitration Application by referring the disputes between the parties to the sole arbitration of a particular advocate of this Court. This Court recorded that there was no dispute between the parties regarding the existence of an arbitration agreement. It was also noticed that for a period of more than 7 months the Respondent had not notified the names of arbitrators as required under the Agreement. It was therefore held that the appointing authority had not acted within a reasonable period of time and this Court could proceed to exercise its powers under Section 11(6) of the Act.

(h) On 21st September 2015, this Court was again seized of the matter on account of the advocate appointed as sole arbitrator having not accepted his appointment. By consent of parties, the dispute was referred to the sole arbitration of another advocate of this Court.

(i) On 11th February 2016, the partnership firm filed its Statement of Claim in the arbitration proceedings.

(j) On 29th March 2016, the Respondent filed its Written Statement in the arbitration proceedings, *inter alia*, raising various objections to the maintainability of the claim. One such objection was that the partnership firm did not exist and was therefore incapable of maintaining a claim. Also, given that the Orders of this Court disposing of the application under Section 11 only referred disputes between the partnership firm and the Respondent to arbitration, the Applicant company was a third party to the arbitration proceedings and could not participate.

(k) On 29th April 2016, the Applicant sought to amend its Statement of Claim in the arbitration proceedings to clarify that the private limited company was the Claimant and not the partnership firm, which had ceased to exist.

(l) On 13th June 2016 and 23rd June 2016, meetings in the arbitration proceedings were held and it was stated that the Applicant would seek a clarification from this Court that it is entitled to be substituted as the Claimant on account of it being the successor-in-title to the partnership firm.

3. Accordingly, the present Motion was taken out by the Applicant on 21st June 2016. An Additional Affidavit in Support was filed on 29th June 2016. The Respondent has filed its reply to the Motion and the Additional Affidavit on 30th June 2016 and 1st August 2016, respectively. The Applicant has filed its rejoinder to the first reply of the Respondent on 13th July 2016.

4. Mr. Kapadia, the Ld. Advocate for the Applicant, has pointed my attention to the previous Orders of this Court dated 22nd July 2015 and 21st September 2015 as well as drawn my attention to the Certificate of Incorporation of the Applicant at page 17 of the Motion. He submits that the partnership firm had been converted into a private limited company under Part IX of the Companies Act, 1956. This was evident from the Certificate of Incorporation of the Applicant, which stated so in as many words. It is submitted that, upon conversion of the partnership firm into a private limited company, all the rights and obligations of the partnership firm would vest in the private limited company by statutory operation. He submits that there is no requirement for any separate document, deed of transfer, assignment, etc. to be entered into and/or executed by the partnership firm in favor of the private limited company.

5. Counsel for the Applicant draws my attention to Section 565, 568 and 575 of the Companies Act, 1956, the relevant portions of which are extracted below:

“565. (1) With the exceptions and subject to the provisions contained in this Section,-

(a) any company consisting of seven or more members, which was in existence on the first day of May 1882, including any company registered under Act No.19 of 1857 and Act No.7 of 1860 or either oca 391 of 2016 (911)f them or under any laws or law in force in a Part B State, corresponding to those Acts or either of them; and

(b) any company formed after the date aforesaid, whether before or after the commencement of this Act, in pursuance of any Act of Parliament other than this Act or of any other Indian Law (including a law in force in a Part B State), or of any Act of Parliament of the United Kingdom or Letters Patent in force in India, or being otherwise duly constituted according to law, and consisting of seven or more members;

may at any time register under this Act as an unlimited company, or as a company limited by shares, or as a company limited by guarantee.....

568. *Before the registration in pursuance of this Part of any company not being a joint-stock company, there shall be delivered to the Registrar the following documents:-*

.....

(b) a copy of any Act of Parliament or other India law, Act of Parliament of the United Kingdom, Letters Patent, deed of settlement, deed of partnership or other instrument constituting or regulating the company; and.....

575. *All property, movable and immovable (including actionable claims), belonging to or vested in a company at the date of its registration in pursuance of this Part, shall, on such registration, pass to and vest in the company as incorporated under this Act, for all the estate and interest of the company therein.”*

6. Placing reliance on the above provisions, Mr. Kapadia contends that Part IX of the Companies Act allows companies (which term includes partnerships as evident from Section 568) to register as companies under the Companies Act, 1956. He submits that the provisions under Part IX were meant to encourage entities to register as companies under the Companies Act, 1956. Upon such registration, all property including any actionable claims, vest in the newly incorporated company under the Companies Act, 1956. The statute specifically provides for actionable claims to fall within such property. Therefore, it is submitted that the claim which the partnership firm had against the Respondent and which is the subject matter of adjudication before the Ld. Sole Arbitrator would vest in the Applicant Company.

7. He also drew my attention to the judgment of a Division Bench of this Court in the matter of *Commissioner of Income Tax vs Texspin Engg. & Mfg. Works*¹. In that

1[2003] 263 ITR 345 (Bom)

matter, which was in the context of an income tax claim being made against a partnership firm which had been converted into a private limited company under Part IX of the Companies Act, 1956, an opinion of this Court was sought by the Income Tax Department in relation to the effect of such conversion. The Division Bench, *inter alia*, held that when a partnership firm is converted under Part IX into a registered company, all property of the partnership firm vests in it. This was a statutory vesting and it was only the cloak given to the partnership firm which was replaced by a different cloak, being that of the private limited company. It was in fact the same firm which was now being treated as a company and, accordingly, in that case, there was no transfer of assets and merely a transmission.

8. Mr. Kapadia has also drawn my attention to a judgment of the Division Bench of the Andhra Pradesh High Court in the matter of *Vali Pattabhirama Rao and Anr vs Sri Ramanuja Ginning and Rice Factory P. Ltd and Ors*². In that matter, the Division Bench stated that it was faced with an interesting issue relating to Company Law regarding whether a conveyance was necessary to vest the property of a firm when the firm was converted into a Company under Part IX of the Companies Act, 1956. The Division Bench took cognizance of the provisions of Section 565 and 568 to hold that a partnership was one of the entities which could be converted under Part IX of the Companies Act, 1956. With reference to Section 575 of the Companies Act, 1956, the Division Bench of the Andhra Pradesh High Court held that the provision was

2[1986] 60CompCas 568 (AP)

mandatory in nature and a statutory vesting of the properties in the incorporated company would automatically take place. No conveyance was necessary when such a partnership was converted into the Company.

9. In light of the judgments and the Certificate of Incorporation of the Applicant Company, it was submitted that the claim which the partnership firm had against the Respondent would automatically stand vested in the Applicant Company. Mr. Kapadia submitted that the argument of the Respondent, i.e. that the Applicant company is a third party to the disputes, is accordingly misconceived.

10. In respect of the reasons for not having instituted the Arbitration Application in name of the Applicant Company despite the partnership firm already having been converted under Part IX of the Companies Act, Counsel for the Applicant draws my attention to the Affidavit dated 21st June 2016 in Support of the above Motion. It is stated therein that there was inadvertence on the part of the Applicant company in not informing the Applicant's Advocates about the change in the constitution of the entity. Hence, as a matter of inadvertence, the Arbitration Application was filed in the name of the partnership firm.

11. On the other hand, Mr. Naidu, Ld. Advocate for the Respondent contends that the provisions of Sections 575 require an actionable claim to exist at the stage of conversion to a private limited company. In this regard, it is submitted that the Contract dated 7th November 2012 stood formally closed on 26th July 2013 after the

partnership firm had paid certain amounts aggregating to approximately Rs. 1.21 crores to the Respondent. On this basis, he submitted that there was no pending dispute or actionable claim with the partnership firm. Accordingly, no actionable claim existed to be transferred or vest in the private limited company on the date on which it was registered.

12. Mr. Naidu states that the Applicant Company was effectively a third party and could not now seek to participate in the arbitration proceedings. He drew my attention to the Respondent's Affidavit in Reply dated 30th June 2016 as well as the Respondent's reply to the Additional Affidavit dated 1st August 2016. In particular, Mr. Naidu argued that a physical verification of the balance material lying with the partnership firm had been undertaken and a demand against the partnership firm crystallized. In fact, the partnership firm had itself made payments aggregating to approximately Rs.1.21 crores and had therefore accepted that the transaction stood closed. On this basis, he submits that there was no actionable claim to vest in the Applicant.

13. I have heard both Advocates at length and perused the papers before me. I find no merit in the Respondent's objections to the Applicant Company being allowed to take the place of the partnership firm in the ongoing arbitration proceedings. The Respondent's contention that the contract stood closed as on 26th July 2013 on account of the dues of the Applicant (or its predecessor) having been crystallized and paid could perhaps have been taken at the stage of disposing off the Arbitration Application

under Section 11 of the Act. As of today, there is admittedly an ongoing arbitration between the Respondent and the partnership firm in respect of disputes arising from the contract which Mr. Naidu contends is closed. Moreover, this Court has recorded that there is no dispute that an arbitration agreement exists. Given the limited scope of judicial inquiry at the stage of an application under Section 11 of the Act, once the arbitration agreement admittedly exists, the Respondent is at liberty to agitate all other issues before the Ld. Arbitrator.

14. Further, in light of the unambiguous provisions of Part IX, and particularly Section 575, of the Companies Act, 1956, and the judicial authorities cited by Mr. Kapadia, it is clear that the Applicant company is merely an avatar of the Respondent. As stated by the Division Bench of this Court in the matter of Commissioner of Income Tax vs Texspin Engg. Mfg. Works (*supra*), the partnership firm has merely changed its cloak from that of a partnership firm to that of a private limited company. It can, by no stretch, be said that it is a third party or an alien to the transaction with the Respondent or the arbitration proceedings which are presently ongoing. Since an arbitration agreement admittedly exists between the Respondent and the partnership firm, it must also exist between the Respondent and the partnership firm now wearing the cloak of the Applicant company.

15. As a result, the Applicant Company is allowed to participate in the place of the partnership firm in the arbitration proceedings. The Respondent is at liberty to agitate

all issues regarding maintainability of the claim before the Ld. Sole Arbitrator. All contentions of the Respondent are specifically left open.

16. The present Notice of Motion is accordingly disposed off in terms of the above.

(S.J. Kathawalla, J.)

Bombay High Court