

GAHC010046762022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Arb.P./9/2022

KANDARPA CHALIHA
S/O- ANIL CHALIHA, R/O- NAMTI CHARIALI, KAKOTY GAON, P.O. NAMTI
CHARIALI, DIST. SIVASAGAR, ASSAM

VERSUS

BHABEN BHARALI
S/O- LATE SENIRAM BHARALI, R/O- K.K. PATH, NATUN NIRMALI GAON,
P.O. C.R. BUILDING, P.S. DIBRUGARH, DIST. DIBRUGARH, ASSAM

Advocate for the Petitioner : MR R SENSUA

Advocate for the Respondent : MR. S BISWAKARMA

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 01.08.2023

Heard Mr. R. Sensue, learned counsel for the petitioner and Mr. S. Biswakarma, learned counsel for the respondent.

2. By filing this application under Section 11 of the Arbitration and Conciliation Act, the learned counsel for the petitioner has prayed for

appointment of an Arbitrator to adjudicate upon the disputes arising out of partnership business which was based on the partnership deed dated 07.04.2010 registered as Deed no. 204 before the office of the Senior Sub-Registrar, Dibrugarh. The said partnership deed contains an arbitration clause, which reads as under:

(xiii) That if any dispute arose between the parties they will try to their best to settle the dispute amicably, and in the event of non-settlement of dispute amicably then will refer to an arbitration jointly appointed by them and the decision of the arbitrator shall be final and binding.

3. The case projected by the petitioner is that he had entered into an agreement dated 06.04.2010 with Dr. Lal Path Labs Pvt. Ltd., New Delhi for opening of an authorised sample collection centre under the name and style of "Pragati" situated at AMC Road, Opp. Sanjivani Hospital, PS Jalan Nagar, Dibrugarh- 786001. It is projected that the sample collection centre agreement was entered into between the petitioner and the Dr. Lal Path Labs Pvt. Ltd. on 06.04.2010. Pursuant to the said agreement, the partnership deed dated 07.04.2010 was entered into between the petitioner and the respondent. As per the narration contained in the said partnership deed, it is provided that the partners had desired to start an authorized sample collection centre of Dr. Lal Path Lab Pvt. Ltd., New Delhi in partnership. In course of time, partnership dispute arose between the petitioner and the respondent for which the petitioner had issued a notice dated 27.11.2020, amongst others, stating that the respondent has started his own sample collection centre for Dr. Lal Path Labs Pvt. Ltd. under the name and style of "Progoti" by excluding the petitioner, the said centre is now run by the respondent. This was followed by issuance of notice dated 10.05.2021 under Section 11 of the Arbitration and Conciliation

Act, wherein it is alleged, amongst others, that the petitioner had taken a huge loan in his individual capacity for running of the said sample collection centre and that the respondent has set up a new centre at the same location by retaining all equipments without bringing the partnership to an end and that the centre is now being run from change of spelling from "Pragati" to "Progoti". Accordingly, the arbitration clause in the partnership agreement was invoked by suggesting the appointment of an advocate named therein as the sole arbitrator. The learned counsel for the petitioner has submitted that the partnership agreement is valid and subsisting and that the arbitration clause contained in the said agreement was alive and therefore, the parties be relegated to settle the dispute before an arbitrator.

4. Per contra, the learned counsel for the respondent has referred to the provisions of the sample collection agreement dated 06.04.2010 between the petitioner and Dr. Lal Path Labs Pvt. Ltd. and it is submitted that as per clause 9.0 of the said agreement, the said agreement was valid for a period of five calendar years from the date of its signing and thereafter, the said agreement was required to be renewed for a further term with mutual consent. It is submitted that as per the narration contained in the partnership agreement, the proposed business was for a specific purpose to start an authorized sample collection centre. Hence, it is submitted that on completion of the tenure of the agreement dated 06.04.2010, the provisions of Section 42(b) of the Partnership Act, 1932 would apply by which the partnership between the parties are deemed to have been dissolved because the partnership was constituted to carry out one particular business of sample collection centre of Dr. Lal Path Labs Pvt. Ltd., which stood terminated on completion of the tenure of the agreement. Hence, it is submitted that the partnership is deemed to have been dissolved

and therefore, the arbitration clause would not be enforceable. In support of his submission that validity of the agreement is to be adjudicated first, the learned counsel for the petitioner has referred to the decision of the Supreme Court of India in the case of *Magic Eye Developers Pvt. Ltd. Vs. Green Edge Infrastructure Pvt. Ltd. and ors.* 2023 SCC Online SC 620. Para 16 on which the reliance is placed is extracted below.

“16. At this stage, it is required to be noted that as per the settled position of law, pre-referral jurisdiction of the court under Section 11(6) of the Arbitration Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. The said matter requires a thorough examination by the referral court. paragraph 25 of the decision in the case of NTPC Ltd. (supra)]. The Secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute. Both are different and distinct. So far as the first issue with respect to the existence and the validity of an arbitration agreement is concerned, as the same goes to the root of the matter, the same has to be conclusively decided by the referral court at the referral stage itself. Now, so far as the non arbitrability of the dispute is concerned, even as per the law laid- down by this Court in the case of Vidya Drolia (supra), the court at pre- referral stage and while examining the jurisdiction under Section 11(6) of the Act may even consider prima facie examining the arbitrability of claims. As observed, the prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. However, so far as the dispute with respect to the existence and validity of an arbitration agreement is concerned and when the same is raised at pre-referral stage, the referral court has to decide the said issue conclusively and finally and should not leave the said issue to be determined by the arbitral tribunal. The reason is that the issue with respect to the existence and validity of an arbitration agreement goes to the root of the matter. As observed by the Constitution Bench in the case of N.N. Global Mercantile Pvt. Ltd. (supra) Sans an agreement, there cannot be any reference to the arbitration. In the said decision this Court has also specifically observed and held that the intention behind the insertion of Section 11(6A) In the Act was to confine the Court, acting under Section 11, to examine and ascertain about the existence of an arbitration agreement. We are of the opinion that therefore, if the

dispute/issue with respect to the existence and validity of an arbitration agreement is not conclusively and finally decided by the referral court while exercising the pre-referral jurisdiction under Section 11(6) and it is left to the arbitral tribunal, it will be contrary to Section 11(6A) of the Arbitration Act. It is the duty of the referral court to decide the said issue first conclusively to protect the parties from being forced to arbitrate when there does not exist any arbitration agreement and/or when there is no valid arbitration agreement at all."

5. In the considered opinion of this Court notwithstanding whether the partnership agreement between the petitioner and the respondent exists or not, it is well settled in arbitration jurisprudence that an arbitration agreement is a distinct and separate agreement which is independent from the substantive commercial contract in which it is embedded. It would be now appropriate to quote paragraphs 5 to 12 of the case of Weatherford Oil Tool Middle East Limited Vs. Baker Hughes Singapore PTE, (2022) 0 Supreme (Gau) 1082, which reads as follows:

5. At the outset, it may be noted that Sub-section 6A of Section 11 of the Arbitration Act, 1996 was inserted by the Act 3 of 2016 with retrospective effect from 23.10.2015, which read as under:-

"(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

6. The said sub-sections 6 A came to be omitted by the Act 33 of 2019 which came into force on 30.08.2019. Meaning thereby the said sub-section (6A) stands omitted as on the date.

7. Further, Section 16 of the Arbitration Act pertains to the competence of Arbitral Tribunal to rule on its own jurisdiction. The relevant sub-section 1 of Section 16 reads as under: -

"Section 16 - Competence of arbitral tribunal to rule on its jurisdiction- (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”

8. The bare reading of the afore-stated provision makes it clear that arbitral tribunal is competent not only to rule on its own jurisdiction but to rule on the issue of the existence or validity of the arbitration agreement. It further clarifies that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and that a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

9. The doctrine of separability and the doctrine of kompetenz-kompetenz encompassed in the arbitration jurisprudence, have been succinctly explained by a three-judge Bench of this Court in the recent case of N.N. Global Mercantile (P) Ltd. (supra):

“4. It is well settled in arbitration jurisprudence that an arbitration agreement is a distinct and separate agreement, which is independent from the substantive commercial contract in which it is embedded. This is based on the premise that when parties enter into a commercial contract containing an arbitration clause, they are entering into two separate agreements viz.: (i) the substantive contract which contains the rights and obligations of the parties arising from the commercial transaction; and (ii) the arbitration agreement which contains the binding obligation of the parties to resolve their disputes through the mode of arbitration.

4.1. The autonomy of the arbitration agreement is based on the twin concepts of separability and kompetenz-kompetenz. The doctrines of separability and kompetenz-kompetenz though inter-related, are distinct, and play an important role in promoting the autonomy of the arbitral process.

4.2. The doctrine of separability of the arbitration agreement connotes that the invalidity, ineffectiveness, or termination of the substantive commercial contract, would not affect the validity of the arbitration agreement, except if the arbitration agreement itself is directly impeached on the ground that the arbitration agreement is void ab initio.

4.3. The doctrine of kompetenz-kompetenz implies that the Arbitral Tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity, and scope of the arbitration agreement, in the first instance, which is subject to judicial scrutiny by the courts at a later stage of the proceedings. Under the Arbitration Act, the challenge before the Court is maintainable only after the final award is passed as provided by sub-section (6) of Section 16. The stage at which the order of the tribunal regarding its jurisdiction is amenable to judicial review, varies from jurisdiction to jurisdiction. The doctrine of kompetenz-kompetenz has evolved to minimise judicial intervention at the pre-

reference stage, and reduce unmeritorious challenges raised on the issue of jurisdiction of the Arbitral Tribunal."

10. In the said case of N.N. Global Mercantile (P) Ltd. (supra), the issue whether the arbitration agreement contained in an unstamped contract can be acted upon had also arisen and the court observed as under:

"21. The issue which has arisen in the present case is whether the arbitration agreement incorporated in the unstamped work order dated 28-9-2015, would also be legally unenforceable, till such time that the work order is subjected to payment of stamp duty. Undisputedly, the work order is chargeable to payment of stamp duty under Item 63 of the First Schedule to the Maharashtra Stamp Act, 1958.

22. In our view, the non-payment or deficiency of stamp duty on the work order does not invalidate the main contract. Section 34 provides that an unstamped instrument would not be admissible in evidence, or be acted upon, till the requisite stamp duty is paid. This would amount only to a deficiency, which can be cured on the payment of the requisite stamp duty.

23. The point for consideration is whether the non-payment of stamp duty on the work order, would render the arbitration clause invalid, non-existent, or unenforceable in law, till the stamp duty is paid on the substantive commercial contract.

24. The arbitration agreement contained in the work order is independent and distinct from the underlying commercial contract. The arbitration agreement is an agreement which provides the mode of dispute resolution. Section 3 of the Maharashtra Stamp Act does not subject an arbitration agreement to payment of stamp duty, unlike various other agreements enlisted in the Schedule to the Act. This is for the obvious reason that an arbitration agreement is an agreement to resolve disputes arising out of a commercial agreement, through the mode of arbitration. On the basis of the doctrine of separability, the arbitration agreement being a separate and distinct agreement from the underlying commercial contract, would survive independent of the substantive contract. The arbitration agreement would not be rendered invalid, unenforceable or non-existent, even if the substantive contract is not admissible in evidence, or cannot be acted upon on account of non-payment of stamp duty.

26. In our view, there is no legal impediment to the enforceability of the arbitration agreement, pending payment of stamp duty on the substantive contract. The adjudication of the rights and obligations under the work order or the substantive commercial contract would, however, not proceed before complying with the mandatory provisions of the Stamp Act.

27. The Stamp Act is a fiscal enactment for payment of stamp duty to the State on certain classes of instruments specified in the Stamp Act. Section 40 of the Stamp Act, 1899 provides the procedure for instruments which have been impounded, and sub-section (1) of Section 42 requires the instrument to be endorsed after it is duly stamped by the Collector concerned. Section 42(2) provides that after the document is duly stamped, it shall be admissible in evidence, and may be acted upon."

11. The three-judge Bench in the said case (N.N. Global Mercantile(P) Ltd.) overruled the judgment in SMS Tea Estates (P) Ltd v. Chandmari Tea Co. (P) Ltd, (2011) 14 SCC 66 in which it was held that an arbitration agreement in an unstamped commercial contract cannot be acted upon and is unenforceable in law. The court further held therein that the Judgment in case of Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 which had followed the judgment in SMS Tea Estates (supra) did not lay down the correct position in law. However, the Court noticed that the judgment in Garware Wall Ropes Ltd. (supra) was cited with approval by the Co-ordinate Bench of this Court in Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1 and therefore the court (in N.N. Global Mercantile case) observed as under:

"33. We notice that the judgment in Garware Wall Ropes Ltd. has been cited with approval by a coordinate Bench of this Court in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., Paras 146-147 of the judgment reads thus: (Vidya Drolia Case SCC pp. 115-16)

"146. We now proceed to examine the question, whether the word "existence" in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word "existence". However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good

reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law.

147. We would proceed to elaborate and give further reasons:

147.1. (i) In Garware Wall Ropes Ltd. this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to "existence" and "validity" of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing para 29 thereof : (SCC p. 238)

‘29. This judgment in Hyundai Engg. case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607] is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in Hyundai Engg. case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607], as followed by us.’

Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement."

34. We doubt the correctness of the view taken in paras 146 and 147 of the three-Judge Bench in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1]. We consider it appropriate to refer the findings in paras 22 and 29 of Garware Wall Ropes Ltd. [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209], which has been affirmed in paras 146 and 147 of Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1], to a Constitution Bench of five Judges."

12. The Court ultimately referred the following issue to be authoritatively settled by a Constitution Bench of five Judges: -

“58. We consider it appropriate to refer the following issue, to be authoritatively settled by a Constitution Bench of five Judges of this Court:

“Whether the statutory bar contained in Section 35 of the Stamp Act, 1899 applicable to instruments chargeable to stamp duty under Section 3 read with the Schedule to the Act, would also render the arbitration agreement contained in such an instrument, which is not chargeable to payment of stamp duty, as being nonexistent, unenforceable, or invalid, pending payment of stamp duty on the substantive contract/instrument?”

6. From the above, it is seen that insofar as Sub-Section 6A of the Arbitration and Conciliation Act, 1996 is concerned, the said provision came to be omitted by Act 33 of 2019 which came into force on 13.08.2019. Therefore, as per the said judgment, on and from the said date, Sub-Section 6A of Section 11 of the 1996 Act stands omitted. Therefore, para 7 of the said judgment makes the interpretation of Section 11(6) of the Arbitration and Conciliation Act to the effect that the Arbitral Tribunal will have competence to rule on its own jurisdiction.

7. The learned counsel for the petitioner has referred to the reply dated 02.07.2022 (Annexure-K to the affidavit-in-opposition filed by the respondent) against the notice under section 11 of the Arbitration and Conciliation Act for appointment of an arbitrator dated 10.05.2021. Two paragraphs of the said letter are quoted below:

“That I am always ready and willing to settle the disputes and difference crept out of us and as such in my Legal Notice reply dated 28- 03-2018 as well as in my reply against your letter dated 27-11-2020 I, clearly mentioned you to come forward and communicate with me to settle the profit and loss a/c of the aforesaid partnership firm but unfortunately you were always mum in this regard and never came forward.

Regarding appointment of Mr. Surajit Bharali, Advocate, Gauhati High Court, as the sole Arbitrator for resolution of disputes and differences I had to say that, I have objection in the appointment of said arbitrator as I shall be not able to go to Guwahati for arbitration matter and moreover in this pandemic time it will not be possible on my part to travel for Guwahati. Better you may appoint any arbitrator locally in Dibrugarh or communicate me personally in this regard as I, am always willing to sit and settle the matter with you."

8. Therefore, it appears that the respondent had not objected to the appointment of an arbitrator and that the only objection was for appointment of an arbitrator at Guwahati.

9. Insofar as the above referred partnership agreement is concerned, without commenting whether or not the stand of the respondent is right that the purpose for which the partnership was opened is not live as the tenure of the principle agreement between the petitioner and the Dr. Lal Path Labs Pvt. Ltd. had expired, yet unless a registered partnership agreement is brought to its logical termination, merely because the original agreement between the petitioner and the Dr. Lal Path Labs Pvt. Ltd. had lapsed would not make the arbitration agreement contained in the partnership deed infructuous.

10. As per the stand taken by the petitioner, some assets were created in the said partnership business and according to the petitioner the assets of the partnership firm has been retained by the respondent. Therefore, even for the purpose of dispute which arise in relation to the partnership assets, the Court would inclined to hold that the arbitration clause would be valid and binding and would constitute a separate agreement which can be enforced even if the submission of the learned counsel for the respondent is accepted that the partnership agreement itself has come to an end.

11. Therefore, insofar as the case of *Magic Eye Developers Pvt. Ltd. (supra)* cited by the learned counsel for the respondent is concerned, the Court finds that the said decision would not be applicable in the present case in hand for the simple reason that in the present case in hand there is a registered partnership agreement which contains an arbitration clause and therefore, the Court has arrived at a conclusion that notwithstanding whether the tenure of the agreement had expired or not, but for the purpose of determination of dispute *inter se* between the partners, the arbitration clause in the agreement would survive.

12. Accordingly, the objection made against the appointment of an arbitrator is rejected.

13. The Court is inclined to allow this application for appointment of an arbitrator to adjudicate the dispute between the petitioner and the respondent arising out of the registered deed of partnership dated 07.04.2010 which contain arbitration clause (xiii) thereof by appointing Sri Mrinmoy Kumar Bhattacharjee, Retired District & Sessions Judge, having address at Flat No.5C, Protech Harkanan, Ganesh Mandir Path, Noonmati, Near Ganesh Mandir, Guwahati-781020, whose name appears at sl. No.6 of the panel of the arbitrators vide this Court's notification no. 47 dated 26.04.2023 as sole arbitrator to resolve the disputes between the parties in accordance with the Arbitration and Conciliation Act, 1996. The learned Arbitrator will have the competence to decide the rules of procedure for conducting the arbitration.

14. The petitioner shall produce a certified copy of this order before the appointed arbitrator within a period of 3(three) weeks from the date of this order and seek further instruction.

15. Accordingly, this application stands disposed of.

JUDGE

Comparing Assistant