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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO.275 OF 2013

1. Manvir Singh Kaushal,
Age 54 years., Occu: Business,
R/at B/601, Mount Classic-1,
Yougi Hill, Mulund (W),
Mumbai – 400 080.

2. Kaushal Industries,
A registered partnership firm,
having office address at 19,
Sardar Pratap Singh Industrial
Estate No.3, L.B.S. Marg,
Bhandup (W), Mumbai–400 078.

3. Kaushal Equipment Manufacturers,
A registered partnership firm,
having its factory Unit at 22,
Sardar Pratap Singh Industrial
Estate No.3, L.B.S. Marg,
Bhandup (W), Mumbai–400 078. ..Applicants.

V/s.

Mr. Surinderpal Singh Kaushal,
having his residential address at Flat
No.A-1303, Chheda Heights, L.B.S. Marg,
Bhandup (W), Mumbai–400 078. ..Respondent.

Mr. C.G.Gavnekar with Mr.Asit Singh i/b. Sunil Singh for the Applicants.

Mr.Ashish Kamat with Mr.A.P.Singh i/b.C.Wahid for Respondent.

CORAM : A.K. MENON, J.

RESERVED ON : 29TH JUNE, 2015

PRONOUNCED ON : 17TH JULY, 2015

JUDGMENT

1. This Arbitration Application is filed by one Manvir Singh Kaushal, an individual. Applicant Nos.2 & 3 Kaushal Industries and M/s. Kaushal Equipment Manufacturers are registered Partnership firms. The Respondent Surinderpal Singh Kaushal is the other partner in the Applicant No.2 and Applicant No.3. Applicant No.1 and the Respondent are brothers. Thus, the first Applicant and the Respondent are both partners in Applicants No.2 & 3. Applicant No.2 carries on business at 19, Sardar Pratap Singh Industrial Estate No.3, L.B.S. Marg, Bhandup (W), Mumbai-400 078. Applicant No.3 carries on business in Unit No.22 the same industrial estate

2. The Applicants carry on business of dealers, manufacturers of equipment, machines and engineering and fabricators. The Applicants claims to have acquired Unit No.15 at Sardar Pratap Singh Industrial Estate No.3 in the name of M/s. Gold Star Enterprises wherein Applicant No.1 and Respondent are partners. However, the said firm is not doing any business. Applicant No.1 and Balbir Kaur Kaushal, wife of the Respondent have formed a Partnership Firm by name M/s. Gagan International and had acquired Unit No.16 in the same industrial estate. The Respondent and Mrs. Harbinder Kaur Kaushal, wife of Applicant No.1 formed a Partnership Firm by name M/s. Do-Well India Enterprises which has acquired unit No.6 in the said industrial estate. It is the case of the Applicants that all these industrial unit Nos.6, 15, 16, 18, 19 & 22 are tenanted premises. The tenancy in respect of unit Nos.18, 19 & 22 stand

in the name of Applicant No.2. It appears that the Applicant acquired one more premises being Plot No.R/38, situated at MIDC at Industrial Area, Rabale, Navi Mumbai wherein Applicant No.3 Kaushal Equipment Manufacturers started business from 2005 and which continued till March, 2011. Thereafter, Applicant No.1 and his son formed another firm of the same name Kaushal Equipment Manufacture and carry on the business at Rabale, Navi Mumbai independent of Respondent but allegedly with the implied consent and knowledge of the Respondent, since the Respondent and the Applicant No.1 are the only partners of Applicant No.2. The businesses continued till 2010 without much difficulty. However, the Applicant alleges that the Respondent has withdrawn substantial money from the account of Applicant Nos.2 & 3 without his consent and knowledge.

3. Allegations of misuse and misappropriation appear to be the principle dispute. Applicant No.1 has further contended that he and the Respondent have arrived at an oral agreement that Applicant No.1 would carry on business at Rabale in the same firm name as that of Applicant No.3. This firm of Applicant No.1 and his son is not a registered Partnership Firm. Meanwhile, it was agreed between Applicant No.1 and the Respondent that all the accounts will be settled at earliest and both the partners will clear their bank dues and also sales tax and VAT by contributing in equal shares. It is contended by Applicant No.1 that old orders were completed in the Rabale factory by Applicant No.1 and his son and Applicant No.1 also claims to have contributed diverse sums of money from different sources for clearing the liabilities of Applicant Nos.2

& 3 as set out in paragraph 8 of the application totalling Rs.5,51,87,967/-, Rs.78,75,000/-, Rs.30,00,000/-, Rs.19,76,162/- and Rs.17,00,000/-.

4. On the other hand, the Respondent is alleged to have contributed only Rs.59,94,151/-. According to Applicant No.1, the Respondent opened a new account in the name of Applicant No.3 and diverted income. On account of subsequent quarrels, the Respondent has lodged an FIR against Applicant No.1 and is alleged to have interfered with the functioning of the factory at Rabale where Applicant No.1 and his son are carrying on business. As a result, Applicant No.1 was constrained to file an application under Section 9 of the Arbitration and Conciliation Act, 1996 and had obtained an injunction from the District Court requiring the parties to maintain status quo. Applicant No.1 through his Advocate's letter dated 17th June, 2012 sought appointment of an Arbitrator. There were disputes in respect of the tenanted premises and suits are also pending in the Small Causes Court, Mumbai in respect of the tenanted premises. The Applicants have, therefore, prayed for appointment of an Arbitrator as a result of the failure of the Respondent to appoint an Arbitrator.

5. Mr.Gavnekar, learned counsel appearing on behalf of the Applicants contended that the invocation of the arbitration is complete by virtue of the letter dated 17th July, 2012, a copy of which is to be found at Exhibit-D. The Applicants' Advocate has suggested the name two gentlemen. Although the letter has been dated 17th July, 2012 the reference therein is made to the Arbitration and Conciliation Act, 1940

and seeks an appointment of an umpire. For the purposes of this application, I proceed on the basis that what was intended is appointment of a presiding arbitrator. Mr.Gavnekar submitted that the Deeds of Partnership of Applicant Nos.2 & 3 are dated 17th September, 1984 and 14th February, 2004. Mr.Gavnekar refers to the provision of the Partnership Deed of 2004 wherein the Arbitration agreement is incorporated in paragraph 16, which reads as under:-

> *"That any dispute or difference which may arise between the partners or their legal representatives with regard to construction, meaning or effect, of this Deed or any part thereof or in respect of accounts, profit and loss of the business or the rights and liabilities of the Partnership under this Deed, of dissolution or winding up, is to be referred to arbitrators one to be nominated by party in difference and in case of difference of opinion between the arbitrators the matter shall be referred to an umpire whose ruling shall be final and provisions of arbitration act, 1940 shall apply. "*

6. In the Deed of Partnership dated 17th September, 1984, the arbitration clause is provided in paragraph 23 which reads as under:-

> "*In case of dispute among the partners regarding their rights and liabilities, constructions of this deed or terms used therein or regarding working of partnership such dispute will be referred to arbitration of the arbitrator / arbitrators constituted according to the provisions of the Indian Arbitration Act, 1940 as amended from time to time. The award of such arbitrators will be final conclusive and binding or all the partners on the point of points referred to it.*"

7. The Partnership Deed dated 14th February, 2004 discloses the name of Subhash L. Jagnani. The third party is not added as a

Respondent. He submitted that the invocation of these two clauses was contemplated in the letter dated 17th July, 2012. Paragraph 2 of the said letter states as follows:-

> "*My client states that, as per the Partnership Deed entered into and executed between my client and yourself, in respect of the Kaushal Industries, Kaushal Equipment Manufacturers, the arbitration clauses were incorporated in the said Partnership deed, wherein it has been specifically mentioned that, in case any dispute arises between both the partners, regarding the rights and liabilities the matter should be referred to the arbitration under Indian Arbitration Act, 1940.* "

On reading of the same, it is clear that Applicant No.1 has referred to the two Partnership Deeds and the arbitration clauses incorporated therein. The said clauses have been invoked and the names of Arbitrators have been suggested. Mr.Gavnekar, therefore, submits that the application be allowed. He submitted that the Arbitration Act being a self contained code and there are no reasons for denying it. He submitted that the provisions of the Civil Procedure Code are not applicable unless specifically made applicable. Both the submission are made in anticipation of the Respondent's case that the application is bad for misjoinder of the parties. Mr.Gavnekar relied upon the judgment of the Single Judge of this Court in the case of [1]**Pushpa P. Mulchandani & Ors. V/s. Admiral Radhakrishin Tahilani (Retd) & Ors.** and relied upon paragraphs 19 and 20 of the said judgment wherein it is held that the 1996 Act are self contained code and unless the provisions of the Code of Civil Procedure are specifically incorporated, the same are not

1 **2000 (4) Mh. L.J. 819**

applicable. Mr.Gavnekar submitted that in the present Arbitration Agreement there is no specific incorporation of the applicability of the Code of Civil Procedure. Mr.Gavnekar relied upon the judgment of another Single Judge of this Court in the case of [2]**Delta Construction Systems Ltd., Hyderabad V/s. Narmada Cement Company Ltd., Hyderabad** who has also taken the view that substantive provisions of the Code of Civil Procedure are not applicable in the proceedings under the Arbitration Act. However, only the procedural provisions not provided in the Arbitration Act or the Rules which are not inconsistent and are required for purpose of effectively disposing of the proceedings will be applicable. He places reliance upon paragraph 8 of the said decision in respect of the contention that the objections raised by the Respondent and the substantive provisions are not applicable.

8. Mr.Kamat, learned counsel for the Respondent submitted that the Respondent has opposed the application by filing Written Statement (dated 24th July, 2013). The principle contention in the written statement are that on the existence of agreement there is no dispute between the parties but the agreement was executed by fraudulent means. According to the Respondent, Applicant No.1 has filed this application to overcome the complaints of criminal prosecution lodged against him at Belapur Court, Thane against the Applicant. Applicant No.1 had filed an Arbitration Petition No.80 of 2013 and it was later withdrawn with liberty to file a fresh petition. He submitted that before the subsequent arbitration petition was filed, the Respondent had lodged an F.I.R. for cheating, forgery, misrepresentation, etc. against Applicant

2 **2002(2) Raj 213 (Bom)**

No.1 and his son. Those proceedings are still pending. The written statement also contends that the Respondent had also filed a RAD Suit in respect of Unit Nos.18, 19 & 22 and obtained an interim injunction against Applicant No.1. According to the Respondent, the Applicants were not concerned with Unit Nos.6 and 16 at Sardar Pratap Singh Industrial Estate, Bhandup since they were belonging to another concern wherein the wife of the Respondent was partner. In paragraph 27 of the written statement, the Respondent contends that he has not received the notice invoking the arbitration dated 17th June, 2012. Furthermore, he submits that the dispute is not maintainable in view of cases of fraud, forgery and misrepresentation being criminal in nature. These are the principle defences in the present arbitration. Various documents are annexed to the written statement.

9. In the rejoinder dated 7th August, 2013 filed by Applicant No.1 he reiterates that the notice has been duly served. The office copy of the letter is produced in the affidavit in rejoinder along with the proof of service which was produced in the District Court, Thane. In a further affidavit-in-reply dated 14th August, 2013, the Respondent reiterates that the alleged notice of invocation of arbitration has not been received. According to Applicants, the notice has been duly served. The Court at Thane has not found to the contrary. Suffice it to say that the arbitration clause appears to have been invoked.

10. Mr.Kamat on behalf of the Respondent seeks to raise the following defences:-

i) The agreement of the Partnership is not properly stamped and, therefore, likely to be impounded;

ii) The subject matter of the dispute is not capable of being adjudicated upon in arbitration since the premises are tenanted premises and the proceedings are pending in the Small Causes Court. It is, therefore, not possible for the Arbitrator to pass Award in respect of the premises;

iii) Criminal cases are pending which will take precedence over invocation of arbitration.

11. Relying on the judgment of Supreme Court in the case of [1]**SBP & Co. V/s. Patel Engineering Ltd. & Anr.**, particularly paragraph 36, Mr.Gavnekar submitted that the Chief Justice when confronted with two points of view presented by rival parties is called upon to decide between and the decision vitally affects the rights of the parties in that, either the claim for appointing an Arbitral Tribunal leading to an award is denied to a party or the claim to have an arbitration proceeding, it is, therefore, not administrative in nature but is a judicial one.

12. Mr.Kamat further submitted that in the matter of appointing an Arbitrator, in the present case, it is necessary to take into consideration the fact that there are no real disputes that can be adjudicated by the Arbitrator. He then relied upon the decision of the Supreme Court in the case of [2]**Sukanya Holdings (P) Ltd. V/s. Jayesh**

1 **(2005) 8 Supreme Court Cases 618**
2 **(2003) 5 Supreme Court Cases 531**

H. Pandya & Anr. and submitted that although the judgment in the case of Sukanya deals with applicability of Section 8 of the Act, the principles set out in the said judgment will apply to the present case as well. He relied upon the provisions in paragraph 16 to state that it is not possible to bifurcate the causes of action. He submitted that in the present case a similar situation arises as to whether the part of the claim relating to tenancy could be determined by the Arbitrator. Therefore, he submitted that no reference should be made to the Arbitrator and the principles analogous to those culled out in the judgment of Sukanya (supra) would apply. He further submitted that no reference should be made in the present case and, therefore, no arbitrator needs to be appointed.

13. The next contention of Mr.Kamat is that the agreement in question was not properly stamped in accordance with the Bombay Stamp Act and criminal cases are pending for adjudication.

14. Mr.Kamat further contended that the disputes are not arbitrable. The second Partnership Firm known by the same name as Applicant No.2 is illegally carrying on the business. He further submitted that the Respondent has counterclaim against the Applicant No.1 and his son who is not a party to the arbitration agreement, since the dispute involves the Applicants' business which is conducted illegally by Applicant No.1 and his son, the claims cannot be bifurcated and the same cannot be adjudicated in arbitration.

15. Mr.Gavnekar in rejoinder submitted that the issue of

stamping is a non issue inasmuch as, the stamp duty payable on a Deed of Partnership in 2004 was Rs.100/-. He relied upon the provisions of the Bombay Stamp Act applicable at the relevant time and pointed out that stamp duty applicable to the Deed of Partnership at the material time was Rs.100/- and was duly registered with the Registrar of Firms at A.91988 on 3rd October, 2005. Mr.Kamat disputed the contentions of Mr. Gavnekar. In this respect perusal of Article 47 of the Bombay Stamp Act applicable at the material time and relied upon by Mr.Gavnekar demonstrates that stamp duty on an instrument of partnership wherein share capital does not exceed Rs.10,000/- was Rs.100/-. In the present case, the capital clause in the Deed of Partnership of 1984 is silent on the issue and parties were to contribute as per their mutual convenience, therefore, there can be no doubt that challenge on the basis of insufficient stamp duty of the documents has no merits. In the case of the second Partnership Deed, Article 47 provides that where the contribution in partnership brought in by way of cash does not exceed Rs.50,000/-, the stamp duty payable is Rs.500/-. Scrutiny of the second Partnership Deed of 2004 does not indicate the share to be brought in and accordingly, there is a presumption that clearly subscribes the capital of the Partnership to be brought in by each of the partners does not exceed Rs.50,000/-, Rs.10,000/- by Manvir Singh Kaushal, Rs.20,000/- by Surinder Pal Singh Kaushal and Rs.20,000/- Mr.Subhash L. Jagnani. However, these aspects which has been raised by the Respondent is within the limits provided by Article 47. Therefore, the contributions of the partners do not fall foul of Article 47(1)(c) and the duty payable is only Rs.500/-. Incidentally, I may mention that this plea on under-stamping is neither taken in the written statement nor in the additional written statement but is being urged by the counsel for the first time.

16. Having heard the parties and having considered the various submissions, I am of the opinion that there is no substance in the contentions raised by the Respondent. An Arbitration Agreement is required to be in writing. This requirement stands satisfied. A notice invoking the arbitration clearly discloses the intention of the Applicant to invoke arbitration which does not specify any dispute. There is no occasion to consider the possible bifurcation of the cause of action at this stage. The Applicant wishes to invoke the arbitration clause. Merely because the Respondent may raise any objection in a counterclaim as to the arbitrability is no reason for declining relief on the present application. The contention that the criminal proceedings having precedence over the present proceedings has no merits. In the circumstances, the application is allowed and I pass the following order:-

a) All disputes between the parties are referred to the Sole Arbitration of Mr. Justice S.S.Parkar, retired High Court Judge.

b) Prothonotary & Senior Master to intimate the learned Arbitrator of his appointment at the earliest.

c) There will be no order as to costs.

(A.K. MENON, J.)