IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.12.2021

Coram:

THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

Arb.O.P. (Comm.Div.) No.157 of 2021

1.M/s. New Natural Fibre, Firm
Rep.by its Partner Mr.S.Habebullah,
Office at No.3/1, Ramanimudali Pudur,
Anaimalai, Pollachi (tk), Coimbatore – 624104.

2.S.Habebullah
Partner of New Natural Fibre,
Office at No.3/1, Ramanimudalipudur,
Anaimalai, Pollachi (tk), Coimbatore – 624104.

3.A.Sengiskhan
Partner of New Natural Fibre,
Office at No.3/1, Ramanimudalipudur,
Anaimalai, Pollachi (tk), Coimbatore – 624104.

4.Z.Imran Khan
Partner of New Natural Fibre,
Office at No.3/1, Ramanimudalipudur,
Anaimalai, Pollachi (tk), Coimbatore – 624104. .. Petitioners

Vs.

S.Eliyas .. Respondent

This Original Petition has been filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 praying to constitute an arbitral tribunal consisting of a sole arbitrator, seated in Chennai, to decide all disputes under the Partnership Deed dated 14.09.2018.

For petitioners : Mr.I.Abrar Md.Abdullah

For respondent : Mr.S.S.Rajesh,
For Mr.R.Ravee Kumar

ORDER

This petition is filed by a partnership firm and three of its partners against the other partner of the partnership firm. The petitioners refer to and rely upon the Deed of Partnership dated 14.09.2018 (the Partnership Deed) and, in particular, Clause 20 thereof, which is as under:

> *"20.In the case of disputes between the partners, the partners can refer such disputes to arbitration and for such arbitrations; the Arbitration Act shall be applicable."*

2. The petitioners also refer to the notices issued to the respondent on 08.01.2021 and 28.01.2021. By such notices, it was alleged that the respondent had misappropriated funds of the partnership firm to the extent stated therein. For such reason, it was stated that the other partners decided to expel the respondent. The present petition is filed because the respondent did not respond to such notices.

3. The above submissions are refuted by the respondent. The respondent states that the petitioners can only refer a dispute to arbitration. By adverting to Sections 7 and 21 of the Arbitration and Conciliation Act, 1996, it is contended that arbitral proceedings are held in order to resolve a particular dispute. The respondent also points out that he had issued a notice of dissolution of the partnership firm prior to the notice from the petitioners. In the case at hand, the respondent contends that the notice dated 28.01.2021, which preceded this petition, does not set out the nature of dispute which is proposed to be referred for arbitration. Instead, the respondent contends that an allegation of misappropriation is made and it is asserted that the arbitrator would decide the amount misappropriated by the respondent and the amount due to the

respondent. According to the respondent, the petitioners are attempting to engage the services of the arbitrator to conduct an audit.

4. In support of these contentions, learned counsel for the respondent relies upon the judgment of the Hon'ble Supreme Court in *DLF Home Developers Limited v. Rajapura Homes Private Limited and Another, (2021) SCC OnLine SC 781,* and, in particular, paragraph 18 thereof, wherein the Hon'ble Supreme Court held that a Court may examine the existence of the arbitration agreement and whether the disputes are ex facie non-arbitrable. In exercise of such jurisdiction, the respondent contends that the present petition is liable to be rejected on the ground that no particular or specific dispute has been set out in the notice invoking arbitration.

5. On this issue, the respondent also relies upon the judgment of this Court in *N.Rajagopal, Proprietor v. Motor Co. (2021) 5 CTC 187*, wherein this Court referred to several judgments as to what constitutes a dispute and held that the existence of a dispute is an essential pre-requisite to the exercise of jurisdiction by an arbitral tribunal. On the facts of that case, the Court

concluded that the arbitral proceedings were without jurisdiction in the absence of a dispute.

6. In light of the rival contentions, the question to be determined is to whether the petitioners have made out a case to refer the dispute for arbitration. In paragraph 154.4 of *Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1*, the Hon'ble Supreme Court held as under:

> *"154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deedwood. The court by default would refer the matter when contentions relating to non-*

arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

7. The above judgment of the Hon'ble Supreme Court instructs that the scope of review under Section 11 of the Arbitration and Conciliation Act, 1996 is limited to examining whether it is manifestly and *ex facie* clear that the arbitration agreement is non-existent or invalid and whether the dispute is *ex facie* non-arbitrable. If the said test is applied to this case, the undisputed position is that Clause 20 of the Partnership Deed contains an arbitration clause. The only question that remains is whether the petition should be rejected because the dispute has not been precisely set out in the notice

invoking arbitration. Therefore, the said notice should be examined. In paragraph 2 of the notice, the petitioners referred to the report of the auditor for the period 01.01.2020 to 31.08.2020 and stated that the said report indicates misappropriation by the respondent of the funds of the firm to an extent of Rs.30,23,000/-. The notice proceeds to record that the other partners decided to expel the respondent on such account. In paragraph 3, the petitioners state that the arbitrator should decide the quantum of amounts misappropriated by the respondent and the actual amount, if any, due to the respondent from the partnership firm.

8. Given the limited scope of scrutiny under Section 11 of the Arbitration and Conciliation Act, 1996, I am of the view that the notice dated 28.01.2021 satisfies the requirements for purposes of reference of the dispute to arbitration. However, it is open to the respondent to raise objections as to the arbitrability of claims or even to the jurisdiction of the arbitral tribunal, if appropriate.

9. For reasons set out above, Arb.O.P.No.157 of 2021 is allowed by appointing Mr.Daniel Haridoss, retired Sub Judge, No.2C, KARSNA

Apartments, Egmore, Chennai, as the Sole Arbitrator. The Sole Arbitrator is directed to enter upon reference and adjudicate the dispute between the parties in accordance with law. The Sole Arbitrator may fix his fees and expenses in connection with such arbitral proceedings.

21.12.2021

Internet: Yes/No
Index: Yes/No
smv

SENTHILKUMAR RAMAMOORTHY J.

smv

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