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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 1st October, 2021

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ARB.P. 365/2021 & I.A. 3808/2021

NARENDRA KUMAR SAXENA

..... Petitioner

Through: Mr. Rahul Sharma, Ms. Jyoti Dutt
Sharma and Mr. C.K. Bhatt,
Advocates.

versus

NEERJA SAXENA

.....Respondent

Through: Mr. Abhinay, Mr. Himanshu
Sachdeva and Ms. Aishwarya
Samal, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the 'Act'*] has been filed seeking appointment of an Arbitrator for adjudication of disputes in relation to a Partnership Deed dated 1st July 1996 executed between the Petitioner and the Respondent. The said deed contains an arbitration clause which reads as follows:

"That in case of any dispute between the partners hereto relating to any terms of this instrument or of any other matter relating to partnership business, the same shall be referred to arbitration and the Indian Arbitration Act in force shall be binding on the firm and the partners."

(sic)

2. According to the Petitioner, disputes have arisen between the parties, who were the erstwhile partners of a partnership firm called Hindustan Cement Tiles, in relation to division of assets purchased from the income

generated through the business of the firm, comprising of the following immovable properties [*hereinafter collectively referred to as the ‘Disputed Properties’*]:

- i. 601, Suneja Tower, District Centre, Janakpuri, Delhi-110046.
- ii. Plot No. 90, First Floor, Marble Market, Dwarka, New Delhi- 110075.
- iii. F-156, 157, MIA, Alwar, Rajasthan- 301030.

RESPONDENT’S CONTENTIONS

3. The Respondent does not dispute the existence of the Partnership Deed dated 1st July 1996. However, he strongly opposes the present petition by raising several objections, which are summarised hereinbelow:

3.1. Beyond limitation: The claim of the Petitioner is *ex facie* barred by limitation. It is Petitioner’s own case, as set out in the petition, that the firm has been dissolved by mutual consent on 8th September 2007. Petitioner has remained silent since then, with no continuing cause of action averred, and filed the present petition several years beyond the three-year period provided under Article 5 of the Limitation Act, 1963. To support this submission, reliance is placed upon the judgment of the Supreme Court in ***Bharat Sanchar Nigam Ltd. v. Nortel Networks***.¹ Without prejudice, even if it is assumed that the partnership firm is ongoing, then the petition would be premature as there is no cause of action to initiate the arbitral proceedings.

3.2. No jurisdiction: The partnership deed was executed at Rajasthan. The

¹ 2021 SCC Online 207.

principal place of business of the partnership is also Rajasthan. The Respondent resides in Rajasthan. No cause of action has arisen within the jurisdiction of this Court. Thus, this Court does not have territorial jurisdiction to entertain the present petition.

3.3. Unenforceable agreement: The Partnership Deed is neither stamped nor registered, as per the Rajasthan Stamp Act 1998, applicable thereto, or under the Registration Act, 1908, and is therefore not enforceable and cannot be relied upon for initiation of arbitration proceedings between the parties. In support of this submission, reliance has been placed on ***Garware Wall Ropes Ltd. v. Coastal Marine Constructions***,² and ***Vidya Drolia v. Durga Trading Corporation***.³

3.4. Family settlement: A family settlement dated 15th January 2009 / 5th March 2009 was entered into between the Petitioner and the husband of the Respondent, in the presence of the Respondent, for all the assets belonging to the family business, including the Disputed Properties. This fact has not been disclosed to this Court and the present petition has been filed only to harass the Respondent. In view of the family settlement, the Respondent cannot be forced to participate in arbitration proceedings in relation to the disputed properties. Moreover, the family settlement dated 15th January 2009 / 05th March 2009 which was entered between the Petitioner and Respondent is the main agreement governing the disputed properties, as the said settlement was entered later in time and thus has an overriding effect on the

² AIR 2019 SC 2053.

³ (2019) 20 SCC 406.

partnership deed dated 01st July 1996.

PETITIONER'S CONTENTIONS

4. Per contra, counsel for the Petitioner argues that the objections raised by the Respondent are misconceived and makes the following submissions:

4.1. The existence and execution of the partnership deed is admitted. It is an admitted position that the properties in question were purchased in the name of the firm during the course of its business. The Petitioner has a right to seek division of the assets of the partnership firm and therefore the cause of action is subsisting and is a continuing one.

4.2. Respondents in their reply have taken a contradictory stand in the plea of limitation. It has been alleged that the partnership is continuing. If such is the position, the Respondent surely cannot contend that the claim is barred by limitation. Limitation, nevertheless, is a mixed question of fact in law, and thus requires trial.

4.3. The question regarding maintainability, on the ground that the underlying agreement is unstamped and unregistered, has been answered by this Court in *IMZ Corporate Pvt. Ltd v. MSD Telematics Pvt. Ltd.*,⁴ wherein this court has also taken into consideration the view of the Supreme Court in *Garware Wall Roles (supra)* and *Vidya Drolia (supra)*.

⁴ 2021 SCC OnLine Del 3016.

4.4. This Court has the jurisdiction to entertain the present petition. In the absence of a defined seat of arbitration, the Court can determine the jurisdiction by referring to Section 20 (2) of the Act read with the provisions of the Code of Civil Procedure, 1908. The disputes and differences pertain to immovable properties situated at Delhi, and therefore this Court would have the jurisdiction to entertain the present petition. Besides, the bank account of the firm was at Delhi; the Petitioner permanently resides at Delhi and all the relevant records also indicate that the husband of the Respondent also resided at Delhi.

4.5. As regards family settlement dated 15th January 2009 / 5rd March 2009, it is submitted that the Respondent has withheld from the Court the fact that the Respondent's husband preferred a suit bearing No. 284/2009 [later renumbered at 188/2011] titled as *Surender Kumar Saxena v. Virender Kumar Saxena and Ors.* before the District Courts in Delhi in respect of a property bearing no. Flat No. 39, 3rd Floor, Cosmos Group Housing Society, Sector-10, Dwarka, Delhi, on the basis of another family settlement of the same date i.e., 15th January 2009. In that suit, the Petitioner had denied and objected vehemently to that family settlement in that suit, as well the family settlement mentioned in the present case. The suit was dismissed as withdrawn on 10th September 2014. The settlement therein had never been acted upon, as is the case with several other previous family settlements between the parties, which are also part of judicial records, well within the knowledge of the Respondent and her husband, yet have not been disclosed by the Respondent. Thereafter, none of the parties has sought specific performance of the alleged family settlement(s) *qua* the firm properties or

for any other aspect, which finds mention therein.

4.6. Since the Petitioner objected to the family settlement way back in 2009, it was, for the Respondent to have taken recourse to appropriate proceedings and seek specific performance of the family settlement incase they were aggrieved with Petitioner's denial.

4.7. The execution of the Partnership Deed is admitted, the properties in question still continue to be in the name of the partnership firm and, therefore, the Petitioner has the right to seek resolution of disputes *qua* such properties by way of arbitration.

4.8. After the filing of the present petition, Respondent has filed a suit in the District Court at Alwar, apparently seeking execution of the family settlement. However, it is pertinent to mention that the Respondent there is not seeking execution of the entire settlement, but only *qua* two or three properties.

RESPONDENT'S REJOINDER CONTENTIONS

5. The execution of the family settlement is admitted. The Petitioner has not taken any action to get the said settlement deed declared as void. In the present petition, no mention has been made of the family settlement. A suit has been filed seeking execution of the family settlement [*being* Civil (Misc.) No. 152/2021, pending before the District Court, Alwar], but in the said suit there has been no response from Petitioner's side.

ANALYSIS

6. The Court has considered the contentions of the parties.

6.1. The existence of the Partnership Deed dated 1st July 1996 is not in dispute. The same evidently contains an arbitration clause extracted above.

6.2. The Petitioner seeks adjudication of disputes in relation to the assets of the partnership firm, which were purchased during the course of the business of the partnership firm. The titles of the said properties are in the name of the partnership firm, and this too is not in dispute.

6.3. In the afore-noted background, since the existence of the arbitration agreement is not in dispute, *prima facie* the Court is inclined to allow the present petition. Nevertheless, since the Respondent has raised preliminary objections that merit consideration, the same are dealt with below.

Limitation

7. It is a trite law that if limitation is mixed question of fact and law, it would require adjudication by granting to the parties an opportunity to lead evidence and establish the facts. The same cannot be decided as a preliminary issue and certainly not while exercising jurisdiction under section 11 (6A) of the Act.

7.1. The Respondent has raised the plea of limitation by alleging that the partnership firm stopped its business and was dissolved by mutual consent since the year 2007, and therefore, the claims of the Petitioner governed by

Article 5 of the Limitation Act, 1963, are barred by time. At the same time, the Respondent has also contended that in case it is held that the partnership firm is still ongoing, and has not been dissolved, the present petition is premature. Be that as it may, in the opinion of the Court, the afore-noted contention is devoid of merit. Article 5 of the Limitation Act, 1963, relied upon by the Respondent, which provides three years as a period of limitation, has no application in the instant case as it deals with suit for accounts and share of profits of a dissolved partnership, which is not the case here.

7.2. The Petitioner has alleged that the firm stopped working and was dissolved by mutual consent by the parties. However, notwithstanding such dissolution, the assets of the firm in the three immovable properties have not been partitioned. Since the titles of the said properties continue to vest in the name of the partnership firm, having admittedly not been divided amongst the partners, the Petitioner's action for seeking division of the properties cannot be said to be barred by limitation. Therefore, the Court does not find this to be a valid ground to reject the present petition.

7.3. For the afore-noted reasons the judgment of the Supreme Court in ***Bharat Sanchar Nigam Ltd. v. Nortel Networks India Pvt. Ltd.***,⁵ too is not applicable to the present case.

Whether non-stamping and non-registration of the partnership deed renders the petition non-maintainable.

⁵ 2021 SCC Online 207.

8. The Respondent has contended that the agreement is not enforceable as the same is not sufficiently stamped as per Entry 43 of the Rajasthan Stamp Act, 1998, which covers Partnership Deed.

8.1. The question regarding maintainability of a petition under Section 11 of the Act in respect of documents/instruments which are unstamped or insufficiently stamped, has been dealt with by this Court in the case of **IMZ Corporate** (*supra*).

8.2. In the said judgment this Court, while following the decision of the full Bench of the Supreme Court in **N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.**,⁶ on the basis of doctrine of separability, it was held that the arbitration agreement is separate and distinct from the underlying commercial contract and would survive, and not be rendered invalid or un-enforceable, even if the main contract cannot be acted upon on account of non-payment of stamp duty. Therefore, even if the present Partnership Deed is insufficiently stamped, it does not affect the validity of the arbitration agreement.

8.3. As regards the objection regarding non-registration of the Partnership Deed, it must be noted that a Partnership Deed is not compulsorily registerable under the Registration Act. Registration is at the discretion of the partners. Therefore, the embargo regarding admissibility of a document which is required to be compulsorily registered under the Registration Act,

⁶ 2021 SCC OnLine SC 13.

too, would not be attracted in the instant case. Even otherwise, as held by this Court in **IMZ Corporate** (*supra*), the non-registration of a document would not *de facto* render a petition under Section 11 to be not maintainable. The afore-noted grounds, therefore, do not merit the rejection of the present petition.

Whether this court has the territorial jurisdiction to entertain the present petition.

9. The arbitration agreement invoked is contained in the Partnership Deed which is stated to have been signed at Rajasthan. The Respondent further contends that the partnership firm was to conduct business within the state of Rajasthan and even the Respondent resides there.

9.1. The parties have not provided for seat of arbitration in the present agreement. In absence thereof, as held by the Supreme Court in **BGS SGS Soma JV v. NHPC Ltd.**,⁷ the Court would have to determine the seat having regard to Sections 16 to 20 of the Code of Civil Procedure, 1908. In the instant case, the Petitioner is seeking arbitration *qua* division of the partnership's properties. Two of these properties are located at Delhi. Thus, this Court would have jurisdiction to decide the question forming the subject matter of arbitration.

Whether the dispute sought to be urged by the Petitioner, is part of the family settlement dated 15th January 2009/05th March 2009, which does not have an arbitration clause.

⁷ (2020) 4 SCC 234.

10. The Petitioner and the husband of the Respondent have, apparently, executed a family settlement which also deals with the assets of the partnership firm. Respondent contends that as per the family settlement it was agreed between the parties that the ownership and share of two of the afore-noted Disputed Properties (i.e, except the third property bearing number F-156 and 157, Matasya Industrial Area, Alwar having 301030) will be transferred to the husband of the Respondent and he will be the sole owner of the same.

10.1. The Respondent contends that since the Disputed Properties have to be governed as per the family settlement (which was entered into later in time, overriding the Partnership Deed), the Petitioner could only take recourse to the family settlement for settlement of its disputes. Since the family settlement does not contain an arbitration clause, it is contended that the Respondent cannot be forced to participate in the arbitration proceedings as she has not consented to adjudicate the disputes through arbitration.

10.2. Much has been said on this issue by both the parties, as noted above. The fact remains that the settlement deed is not between the Petitioner and the instant Respondent, although it has been executed in her presence. Further, despite having executed the family settlement in 2009, none of the parties have acted on the same till the filing of the present petition. It also remains an undisputed fact that the properties sought to be partitioned continue to be in the name of partnership firm. There is no transfer of the said properties in the name of the Petitioner or the Respondent in terms of the family settlement. Besides the Petitioner states that it had categorically

denied family settlement when Respondent's husband, referring to a Civil Suit bearing No. 284/2009 as noted earlier. Despite that breach, Respondent has not sought specific performance till date.

10.3. Without getting into the above, it is trite to mention that, post the 2015 amendment to the Act, judicial interference at this stage has been substantially curtailed by the dicta of the Supreme Court in the case of **Vidya Drolia** (*supra*). Thus, to ascertain whether the proposed claims fall within the arbitration agreement is an aspect on which the Court cannot hold an in-depth examination. The Court must only form a *prima facie* view and not give any conclusive finding as to whether the dispute sought to be adjudicated is arbitrable. Unless on a *prima facie* basis the court finds that the dispute is beyond the ambit of the arbitration agreement, the question regarding existence and arbitrability should be left for adjudication by the arbitral tribunal. If there is an element of doubt or there is an arguable case made out by the Petitioner, the Court must invariably refer the parties to arbitration.

10.4. In the instant case, the Court finds that the properties for which the division has been sought, continue to be in the name of partnership firm. Though a suit was filed by the husband of the Respondent on the basis of a family settlement of the same date, it was subsequently withdrawn in 2014. The counsels have not disputed that notwithstanding the execution of family settlement(s), there was no action taken by either of the parties to seek execution of the family settlement. Hence, *prima facie* it appears that none of the parties have acted upon the family settlement, although now

apparently a suit has been filed in Alwar, the scope whereof is also challenged as not binding. Overall, no concrete action has been taken regarding transfer of the Disputed Properties, and thus the status regarding the disputed properties remains the same till date.

10.5. In view of the above, in the considered opinion of the Court, the parties have to be referred to arbitration. Giving any opinion on the arbitrability of the disputes in light of the disputed family settlement(s) would prejudice the case of either party.

Whether the family settlement would re-align the shares of the parties qua the disputed properties?

10.6. This aspect too would have to be examined by the Arbitrator after awarding an opportunity to the parties to lead evidence. Since it is established that the parties have entered into a Partnership Deed which contains an arbitration agreement, the Court is inclined to relegate the parties to that forum. The question as to whether the rights of the parties stood discharged in view of the family settlement, and whether the disputes have to be adjudicated only in terms thereof, is a question which is left open to be considered by the Arbitrator, if so raised by the parties.

CONCLUSION

11. In view of the foregoing, the Court does not find any merit in the objections raised by the Respondent and deems it appropriate to allow the present petition.

11.1. Accordingly, Hon'ble Mr. Justice M. L. Mehta (Retd.), former Judge of this Court, [Contact No.: +91 9910384620] is appointed as the Sole Arbitrator to adjudicate upon the disputes that have arisen in relation to a Partnership Deed dated 1st July 1996.

11.2. The parties are directed to appear before the learned Arbitrator as and when notified. This is subject to the learned Arbitrator making the necessary disclosures under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

11.3. The learned Arbitrator shall settle his fees in consultation with the parties.

11.4. It is clarified that Court has not examined any of the claims of the parties and all the rights and contentions on merits are left open. Both the parties shall be free to raise their claims/ counter claims before the learned Arbitrator, in accordance with the law.

11.5. The present petition along with pending application, is disposed of.

SANJEEV NARULA, J

OCTOBER 1, 2021

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(corrected and released on 27th October, 2021)