

\$~2

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 04th August, 2021

+ ARB. P. 432/2021 & I.As. 9484/2021, 9485/2021, 9498/2021,
9499/2021 & 9500/2021.

SAKSHAM IMPEX PVT. LTD. Petitioner

Through: Mr. Krishnendu Datta, Senior
Advocate with Ms. Shivambika
Sinha, Ms. Neelambika Singh and
Ms. Mehak Khurana, Advocates.

versus

MR. NAGESH BC Respondent

Through: Mr. Sanjoy Ghosh, Senior Advocate
with Mr. Surjeet Singh Malhotra,
Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. M/s Saksham Impex Pvt. Ltd. - the employer, contends that disputes have arisen with its erstwhile employee Mr. Nagesh BC, and the court should appoint a Sole Arbitrator.

2. The Arbitration Agreement is contained in an Appraisal Letter dated 11th July, 2018, signed on 23rd July, 2018. The said document is

accompanied with annexures, which contain an arbitration agreement at clause No. 2, that reads as under:

"27. General

A. Arbitration Clause

In case of any dispute or difference arising between the parties hereto as regards interpretation or implementation of any the terms and conditions, the same shall be resolved through arbitration and such arbitration shall be governed by the Arbitration and Conciliation Act, 1956 and rules there under. The venue of the arbitration shall be only at Delhi and procedure of the Arbitration shall be as may be decided by the Arbitrators.

B. Governing Law; Consent to Personal Jurisdiction:

The laws of the State of Delhi will govern the Terms and Conditions of employment, and you hereby expressly consent to the personal jurisdiction of the High Court located therein for any lawsuit filed there by the Company arising from or relating to my assignment."

3. The existence of and the signatures on the afore-said document, are not in dispute.
4. However, Mr. Sanjoy Ghosh, learned Senior Counsel for the Respondent, strongly opposes the petition for appointment on several grounds which are urged as follows:
 - 4.1. Respondent was appointed to his job position in the Company *vide* an Appointment Letter dated 30th January, 2012. The said document would govern the terms of appointment. It however does not contain an arbitration clause.
 - 4.2. Respondent has raised an industrial dispute before the Conciliation Officer at Pushpa Bhavan, Labour Office, Government of NCT of Delhi, New Delhi against the Petitioner and its management for unfair labour practices against the Respondent. The Conciliation Officer has

fixed the matter for 20th September, 2021.

- 4.3. In June, 2018, Ms. Akansha Shah and Mr. Rahul Sachdev, part of management of the Petitioner company, on instructions from Managing Director, called the Respondent for a meeting. During this meeting, the management asked the Respondent to sign voluminous documents and papers, which were blank. When Respondent refused to oblige, the Petitioner was told that the documents were for the purpose of providing salary increment and disbursing bonus to the Respondent. In these circumstances, he was intimidated to sign the documents by threatening false prosecution. The Appraisal Letter dated 11th July, 2018, signed relied upon by the Petitioner for seeking appointment of the Arbitrator, was thus signed under coercion and by force.
- 4.4. In March 2019, Respondent resigned from Petitioner's employment as Area Sales Manager. Thereafter the Respondent joined services of another organization as a Regional Sales Manager. Later, in December, 2020 he further switched and joined another organization. There is no competition between the Petitioner and the present Employer of the Respondent i.e., Monin India Private Limited which is the subsidiary of the Georges Monin SAS.
- 4.5. The Petitioner has deliberately and willfully concealed this fact, and for this reason, an application under Section 340 of the Code of Criminal Procedure, 1973, has been filed for the offence of perjury.
- 4.6. The Petitioner seeks to enforce negative covenant in the Appraisal Letter, which is not permissible. The Non-Compete Clause in the alleged Appraisal Letter dated 11th July, 2018, is in conflict with Section 27 of the Indian Contract Act, 1872 and was absent in the

original Appointment Letter. This submission is supported by placing reliance upon ***Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Ors***, AIR 1975 SC 2238, ***Vimal Kishor Shah Vs. Jayesh Dinesh Shah***, (2016) 4 SCC OnLine SC 825 and ***Tarlok Chand and Ors. Vs. National Industrial Development Corporation Ltd. and Ors.***, (1994) DLT 157.

4.7. In case an Arbitral Tribunal is appointed, considering that Respondent is a workman, not in a financially and economically viable position to participate the proceedings, the arbitral fee and also the litigation expenses should be borne by the Petitioner.

5. Mr. Krishnendu Datta, learned Senior Counsel controverts the contentions of the Petitioner and makes submissions as follows:

5.1. The contentions of the Respondent touching upon the merits of the disputes, which can only be agitated before the Arbitral Tribunal and not before this Court.

5.2. The scope of jurisdiction of this Court under Section 11(6A) of the Act is limited. The Court only has to form a *prima facie* view on the question of the existence of the arbitration agreement by examination the document in question, and nothing more. In support of his contentions, Mr. Datta relies upon the judgments in ***Vidya Drolia & Ors. v. Durga Trading Corporation***, (2021) 2 SCC 1 and ***Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engineering Pvt. Ltd***, 2021 SCC OnLine SC 190.

5.3. The existence of the arbitration agreement is not in dispute. Whether the Appraisal Letter dated 11th July, 2018 has been signed forcefully or

by coercion is an aspect that can be considered by the Arbitral Tribunal.

5.4. The Respondent is not a workman. He was holding a managerial position in the company. The subject matter of the dispute arises from the agreement executed by the parties and is arbitrable.

5.5. The industrial dispute raised by the Respondent, if any, is misconceived and would be defended by the Petitioner on its own merits.

6. The Court has considered the submissions of the counsels. The contentions raised by the Respondent, in the opinion of the Court, are questions that have to be adjudicated before the learned Tribunal. The Supreme Court in its authoritative decision in ***Vidya Drolia v. Durga Trading Corporation*** (*supra*), has delineated the scope of jurisdiction of this Court under Section 11 (6A) of the Act. The said provision, introduced by 2015 Amendment, indeed restricts the scope of examination of this Court to examination of existence of arbitration agreement and nothing more. In exceptional cases, the Court can enter into the realm of dispute being time barred or being non-arbitrable. At the same time, if a doubt is entertained, the court must refer the dispute to arbitration. Since the signatures on the document are not in dispute, Respondent's contention of coerced execution of the Appraisal Letter would have to be proved and this would have to be considered by the Arbitral Tribunal. Similarly, Respondent's contention relating to the dispute being an industrial dispute and thus non-arbitrable is again a question that requires factual determination. According to the Petitioner, the Respondent is not a workman and is holding a Managerial position in the company and drawing a salary of more than one lakh. On

prima facie basis, the Letter of Appointment relied upon by the Respondent suggests that he was appointed as ‘Area Sales Manager’. The nature of his employment cannot be analysed in the present proceedings.

7. The *prima facie* test of existence of arbitration agreement and disputes being arbitrable is certainly met. The court is inclined to keep all the jurisdictional objections relating to validity and existence of the arbitration agreement and arbitrability of disputes open, for the adjudication of the Arbitral Tribunal, having regard to Section 16 of the Act which enshrines the *kompetenz-kompetenz* principle, commanding minimal judicial interference.

8. At this stage, Mr. Ghosh states that he would not like to press his relief for payment of litigation expenses and would urge the same before the Arbitral Tribunal. Mr. Datta submits that such a request is not maintainable under the scheme of the Act and in the event such a request is made, the same shall be dealt with in accordance with law before the Arbitral Tribunal.

9. In view of the above, the present petition is allowed. Accordingly, Mr. Raj Kumar Sharma, Retd. ADJ, Delhi (Ph: 9871369899) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties arising out of and in relation the Appraisal Letter dated 11th July, 2018.

10. The parties are directed to appear before the learned Arbitrator as and when notified. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act. Parties shall be free to file their claims and counter claims before the Arbitrator.

11. The learned Arbitrator will be paid their fee in terms of the provisions of the Fourth Schedule appended to the Act.

12. It is clarified that the Court has not examined any of the claims of the parties and all 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 law.

13. In view of the fact that the Respondent has raised certain jurisdictional objection regarding the arbitrability of the disputes, the learned Arbitrator is requested to decide the jurisdictional issues, if raised in terms Section 16 of the Act, as a preliminary issue before deciding the matters.

14. In view of the fore-going, the present petition is allowed and disposed of, along with all pending applications.

CRL. M.A. No. 12090/2021 (u/Section 340 CRPC r/w Section 195(1) (B) of CRPC, 1973, for initiating proceedings)

15. The Respondent seeks initiation of proceedings under Section 195 of the Criminal Procedure Code, 1973, against the Petitioner for suppressing evidence and making false statements intentionally while knowing such statements to be false.

16. In the opinion of the Court, the contentions raised in the application would require factual determination before the Court can take form an opinion. As the parties have been referred to arbitration, the present

application is not required to be adjudicated by this Court at this stage as well.

17. The application is disposed of with liberty to the Applicant to initiate appropriate proceedings after conclusion of the arbitration proceedings, if so advised.

AUGUST 4, 2021

as

(corrected and released on 13th August, 2021)

SANJEEV NARULA, J