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

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Date of Decision: 04th May, 2021

+ ARB.P. 1/2019

BANGA ELECTRONICS PVT. LTD.

..... Petitioner

Through:

versus

JAGMOHAN SINGH

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

ORAL JUDGMENT

1. The petitioner is seeking appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act.
2. On 13th August, 2018, the petitioner agreed to purchase 50% undivided share in property bearing No.C-41, Rajouri Garden, New Delhi-110027 from the respondent for Rs.8,90,00,000/-. The petitioner paid Rs.1,50,00,000/- to the respondent (Rs.10,00,000/- in cash on 12th August, 2018, Rs.1 crore through RTGS on 13th August, 2018, and Rs.40,00,000/- in cash on 24th August, 2018). The balance sale consideration of Rs.7,40,00,000/- was payable on or before 15th January, 2019 against the execution of a sale deed. The arbitration agreement between the parties is contained in clause no.14 of the agreement dated 13th August, 2018.
3. On 19th September, 2018, the respondent's wife issued a legal notice to the petitioner notifying him that the entire property bearing No.C-41,

Rajouri Garden, New Delhi-110027 was her matrimonial home and purchased out of her own funds in the joint names of herself and her husband out of natural love and affection and she has instituted proceedings under Section 125 Cr.P.C. against her husband in which the Court restrained the respondent from selling the subject property on 09th March, 2018. It was further notified that the alleged agreement dated 13th August, 2018 was in violation of the stay order dated 09th March, 2018 and was illegal. The respondent's wife notified the petitioner not to proceed with the agreement.

4. On 19th October, 2018, the respondent intimated the petitioner about the stay order dated 09th March, 2018 passed by the Principal Judge, Family Court, Tis Hazari restraining him from creating any third party interest with respect to the suit property. The respondent intimated the petitioner that he became aware of the stay order on 28th September, 2018. The respondent further notified that the agreement dated 13th August, 2018 was null and void on account of violation of the stay order and therefore, the respondent has returned the advance amount of Rs.1,40,00,000/- to the petitioner by online transfer to the petitioner's account on 18th October, 2018. The respondent returned the balance Rs.10,00,000/- to the petitioner in January, 2019.

5. On 26th October, 2018, the petitioner instituted a petition under Section 9 of the Arbitration and Conciliation Act being OMP(I) 20/2018 against the respondent which he withdrew on 21st December, 2018.

6. On 12th November, 2018, the petitioner invoked the arbitration by legal notice.

7. On 21st December, 2018, the petitioner instituted this petition for appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act.

8. The respondent is opposing this petition on the ground that the impugned agreement dated 13th August, 2018 is null and void being in violation of the stay order dated 09th March, 2018 and therefore, not enforceable in law.

Submissions of the petitioner

9. The agreement dated 13th August, 2018 is valid and enforceable. The arbitration agreement between the parties is contained in clause 14 of the agreement dated 13th August, 2018. The petitioner invoked the arbitration vide notice dated 12th November, 2018.

10. With respect to the stay order dated 09th March, 2018, it is submitted that the petitioner was not aware of the stay order dated 09th March, 2018 at the time of execution of the agreement dated 13th August, 2018.

11. The stay order was vacated on 27th August, 2019 when the respondent's wife withdrew the petition with liberty to file a fresh one and there is no impediment to the enforcement of the agreement dated 13th August, 2018.

12. Even if the stay order is continuing, the petitioner is entitled to the specific performance. It is submitted that the petitioner may be guilty of contempt for violation of the stay order but the petitioner cannot be denied the relief of specific performance.

Submissions of the respondent

13. The respondent is 70 years old and he executed the agreement dated 13th August, 2018 to get rid of the matrimonial disputes by selling of his one half share to the petitioner at a lower price just to buy peace of mind.

14. The respondent was not aware of the stay order dated 09th March, 2018 at that time. The respondent was not present before the Family Court

on 09th March, 2018 when the stay order was passed restraining the respondent from selling the subject property. The respondent's counsel was present before the Family Court on 09th March, 2021 but there was a communication gap with his counsel and he was unaware of the stay order.

15. The respondent appeared before the Family Court on 29th September, 2018 when he came to know of the stay order dated 09th March, 2018. The respondent immediately contacted the petitioner and informed him about the stay order. The respondent sent a written intimation to the petitioner by *e-mail* on 19th October, 2018. The respondent transferred Rs.1,40,00,000/- to the petitioner on 18th October, 2018 and Rs.10,00,000/- in January, 2019. The respondent also offered Rs.10,00,000/- as interest for two months but the respondent demanded Rs.40,00,000/- towards interest for keeping Rs.1,50,00,000/- for two months.

16. The alleged agreement dated 13th August, 2018 is in contravention of the stay order. The learned counsel for the respondent vehemently disputes that the stay order has been vacated on 27th August, 2019. According to the respondent, the matter was listed before the Family Court on 18th November, 2019, when the Id. Court adjourned the matter to 19th December, 2019 for awaiting the record from this Court. The original record of the Family Court dispute was requisitioned by this Court and it can be confirmed that the stay order is still continuing.

17. The agreement dated 13th August, 2018 has not been signed by the petitioner and was not a concluded contract. There was no Board Resolution of the petitioner company at the relevant time for execution of the agreement.

Discussion and Analysis

18. The first question arises for consideration - ***Whether the stay order dated 09th March, 2018 is continuing as alleged by the respondent or it was vacated on 27th August, 2019 as alleged by the petitioner?***

19. Vide order dated 03rd July, 2019, this Court requisitioned the record of the maintenance case bearing M.T.No.222/2017 titled ***Manjeet Sahni v. Jagmohan Sahni*** pending before the Family Court (West). The record of the aforesaid case has been examined and the record reveals that on 20th September, 2017, the respondent's wife instituted a petition for maintenance under Section 125 Cr.PC. against the respondent in which notice was issued to the respondent on 27th September, 2017, returnable on 09th March, 2018.

20. On 09th March, 2018, the respondent appeared through his counsel. The respondent's wife submitted before the Ld. Family Court that the respondent had sold few properties and she sought restraint against respondent from selling the matrimonial home at Rajouri Garden where the parties were residing whereupon the Court directed the parties not to create any third party interest in the matrimonial home at Rajouri Garden. The order dated 09th March, 2018 is reproduced hereunder:

“Manjeet (64 yrs) Vs. Jagmohan (70 yrs)

2/13

MT.CASE

362/2018

*Present: Petitioner in person with her son Harpal Singh with counsel Mr.Imran,
Counsel Sh. Sameer Diwan for the respondent.*

V/N by Sh. Diwan filed.

Petitioner submits that the respondent has sold few properties and he may be restrained from selling the matrimonial home at Rajouri Garden where the parties are residing. Admittedly, both the parties are getting the rental income of Rs.2,48,000/- per month each.

In the given facts and circumstances, till NDOH both the parties are directed not to create any third party interest in the matrimonial home at Rajouri Garden.

Both the parties are directed to file their affidavit on their assets, income and expenditure along with documents. The affidavit shall be in format at Annexure A1 which can be downloaded from the website: www.delhicourts.nic.in/july17/27x.pdf.

Towards litigation costs sum of Rs.11,000/- in cash be brought by the male spouse to be paid to the female spouse.

The divorce case of the male spouse is stated to be fixed on 26.03.2018 in court no.8 Tis Hazari, Delhi.

Put up on 26.03.2018.

(Sd/-)

*ADDL.PRINCIPAL JUDGE,
FAMILY COURT, TIS HAZARI, DELHI
09.03.2018”*

(Emphasis supplied)

21. The record of the Family Court reveals that the respondent had filed a petition for divorce against his wife in 2014 and the maintenance case was transferred and listed before the Family Court along with the divorce petition on 11th May, 2018, 30th May, 2018, 09th July, 2018, 16th July, 2018, 30th August, 2018 and 28th September, 2018, 30th October, 2018, 06th February, 2019 and 04th April, 2019 when the respondent was present along with his counsel. On 28th September, 2018, the learned Family Court extended the interim order dated 09th March, 2018 till further orders.

22. The record of the Family Court requisitioned by this Court on 03rd July, 2019 is still with this Court along with this case and there is no order

dated 27th August, 2019 as alleged by the petitioner. The stay order dated 09th March, 2018 is still continuing and the submission of the petitioner that the stay order was vacated on 27th August, 2019, is false and incorrect.

23. The second question arises for consideration - ***Whether the agreement dated 13th August, 2018 is not enforceable in view of the stay order dated 09th March, 2018 passed by the Family Court?***

24. According to the petitioner, the agreement dated 13th August, 2018 is enforceable whereas according to the respondent, the agreement dated 13th August, 2018 is not enforceable by law.

25. The law with respect to the scope of Section 11 of the Arbitration and Conciliation Act has been settled by three Judges Bench of the Supreme Court in ***Vidya Drolia v. Durga Trading Corporation***, (2021) 2 SCC 1. The Supreme Court held that the Court is empowered to examine the existence as well as validity of an arbitration agreement in proceedings under Section 11 of the Arbitration and Conciliation Act. The relevant portion of the Supreme Court judgment is reproduced hereunder:-

“21. The term “agreement” is not defined in the Arbitration Act, albeit it is defined in Section 10 of the Contract Act, 1872 (for short “the Contract Act”), [“10. What agreements are contracts.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.”] as contracts made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not thereby expressly declared to be void. Section 10 of the Contract Act also stipulates that aforesaid requirements shall not affect any law in force in India (and not expressly repealed) by which a contract is required to

be made in writing, in presence of witnesses or any law relating to registration of documents. Thus, an arbitration agreement should satisfy the mandate of Section 10 of the Contract Act, in addition to satisfying other requirements stipulated in Section 7 of the Arbitration Act.

22. Sections 12 to 18 of the Contract Act state when a person can be said to be of a sound mind for the purpose of contracting and define the expressions “consent”, “free consent”, “coercion”, “undue influence”, “fraud” and “misrepresentation”. Sections 19 to 23 relate to voidability of agreements, the power to set aside contracts induced by undue influence, when both the parties are under mistake as to a matter of fact, effect of a mistake as to the law, effect of a mistake by one party as to a matter of fact and what considerations and objects are lawful and unlawful. Sections 24 to 30 relate to void contracts and Sections 26 and 27 therein state that agreements in restraint of marriage and agreements in restraint of trade, respectively are void, albeit Exception (1) to Section 27 saves agreements for not carrying out the business of which goodwill is sold. Section 28 of the Contract Act states that agreements in restraint of legal proceedings are void, but Exception (1) specifically saves contracts by which two or more persons agree that any dispute, or one which may arise between them, in respect of any subject or class of subjects shall be referred to arbitration.

23. Arbitration agreement must satisfy the objective mandates of the law of contract to qualify as an agreement. Clauses (g) and (h) of Section 2 of the Contract Act state that an agreement not enforceable in law is void and an agreement enforceable in law is a contract. As a sequitur, it follows that an arbitration agreement that is not enforceable in law is void and not legally valid.

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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.

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147.1.....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.

147.2. The court at the reference stage exercises judicial powers. ‘Examination’, as an ordinary expression in common parlance, refers to an act of looking or considering something carefully in order to discover something (as per Cambridge Dictionary). It requires the person to inspect closely, to test the condition of, or to inquire into carefully (as per Merriam- Webster Dictionary). It would be rather odd for the court to hold and say that the arbitration agreement exists, though ex facie and manifestly the arbitration agreement is invalid in law and the dispute in question is non-arbitrable. The court is not powerless and would not act beyond jurisdiction, if it rejects an application for reference, when the arbitration clause is admittedly or without doubt is with a minor, lunatic or the only claim seeks a probate of a Will.

147.3. Most scholars and jurists accept and agree that the existence and validity of an arbitration agreement are the same. Even Starvos

Brekoulakis accepts that validity, in terms of substantive and formal validity, are questions of contract and hence for the court to examine.

147.4. Most jurisdictions accept and require prima facie review by the court on non-arbitrability aspects at the referral stage.

147.5. Sections 8 and 11 of the Arbitration Act are complementary provisions as was held in Patel Engineering Ltd.. The object and purpose behind the two provisions is identical to compel and force parties to abide by their contractual understanding. This being so, the two provisions should be read as laying down similar standard and not as laying down different and separate parameters. Section 11 does not prescribe any standard of judicial review by the court for determining whether an arbitration agreement is in existence. Section 8 states that the judicial review at the stage of reference is prima facie and not final. Prima facie standard equally applies when the power of judicial review is exercised by the court under Section 11 of the Arbitration Act. Therefore, we can read the mandate of valid arbitration agreement in Section 8 into mandate of Section 11, that is, 'existence of an arbitration agreement'.

147.6. Exercise of power of prima facie judicial review of existence as including validity is justified as a court is the first forum that examines and decides the request for the referral. Absolute "hands off" approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration.

147.7. Exercise of the limited prima facie review does not in any way interfere with the principle of competence— competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage.

*147.8. Exercise of prima facie power of judicial review as to the validity of the arbitration agreement would save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability. In **Subrata Roy Sahara v. Union of India**, (2014) 8 SCC 470, this Court has observed:*

“191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in

mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a “Code of Compulsory Costs”.

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147.11. The interpretation appropriately balances the allocation of the decision-making authority between the court at the referral stage and the arbitrators’ primary jurisdiction to decide disputes on merits. The court as the judicial forum of the first instance can exercise prima facie test jurisdiction to screen and knockdown ex facie meritless, frivolous and dishonest litigation. Limited jurisdiction of the courts ensures expeditious, alacritous and efficient disposal when required at the referral stage.

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153. Accordingly, we hold that the expression ‘existence of an arbitration agreement’ in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the arbitral tribunal has primary jurisdiction and authority to decide the disputes

including the question of jurisdiction and non-arbitrability.”

(Emphasis supplied)

26. Applying the well settled principles of law laid by the Supreme Court, this Court has to consider the existence as well as validity of the arbitration agreement in the present proceedings under Section 11 of the Arbitration and Conciliation Act. An agreement enforceable by law is a contract defined in Section 2 (h) of the Indian Contract Act whereas an agreement not enforceable in law is void as per Section 2 (g) of the Indian Contract Act.

27. In the present case, the agreement dated 13th August, 2018 is in violation of the stay order dated 09th March, 2018 which is continuing. The agreement dated 13th August, 2018 is therefore, not enforceable and is void in terms of Section 2(g) of the Contract Act. This Court is of the view that an arbitrator cannot be appointed to enforce a void agreement.

28. This petition for appointment of an arbitrator is dismissed.

MAY 04, 2021

dk/ds/ak

J.R. MIDHA, J.