

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side

Present:

The Hon'ble Justice Shekhar B. Saraf

AP/80/2020

SMT. MANIKA SETT

Versus

SETT IRON FOUNDRY AND ORS.

For the Petitioner

: Mr. Siddhartha Banerjee, Advocate,
Ms. Soni Ojha, Advocate
Ms. Sambrita B. Chatterjee, Advocate

For the Respondents

: Mr. Subrata Kr. Dutt, Advocate
Mr. Dilip Kumar Ghosh, Advocate

Last Heard on: July 19, 2022

Judgment on: July 28, 2022

Shekhar B. Saraf, J.:

1. The petitioner Smt. Manika Sett has filed this arbitration application under Section 11(6) of the Arbitration and Conciliation Act 1996 seeking appointment of an arbitrator by this Court for adjudication of disputes with the respondents.

Facts

2. The respondent no. 1 is an unregistered partnership firm, having its principal place of business at 8/1 'Q' Road, Mansatala, P.O. Dasnagar, Howrah – 711105 and carrying on business of moulding unit and several other manufacturing activities. The petitioner is one of the partners of the said partnership firm.
3. The said partnership firm was originally constituted with three female members of the 'Sett family' namely the petitioner herein, the respondent no. 2 and one Smt Ujjala Sett (since deceased). Over the course of subsequent years, the respondents no. 3, 4 and 5 were inducted into the said partnership firm as partners. Accordingly, a partnership deed dated April 1, 2006 was executed between the parties recording the terms and conditions, and superseding the earlier partnership deed dated April 1, 2003.
4. The petitioner alleges to have been kept in dark as regard the business run in the name of the partnership firm and unlawfully deprived of her share in the net profits earned by the firm. The petitioner further alleges that she was denied access to the books as well as the annual Balance Sheet and Profit & Loss Account of the said business.

5. Subsequently, the petitioner communicated its intent to retire from the said partnership business with all her legitimate dues, and called upon the respondents to handover the copies of books of accounts.
6. Be that as it may, the petitioner issued an arbitration notice dated July 25, 2019 under Section 21 of the said Act seeking to settle the disputes between the parties by way of arbitration in terms of Clause 18 of the Partnership Deed dated April 1, 2006, and thereby appointed a Sole Arbitrator for adjudication of such disputes.
7. The respondents failed to turn up to either accept the nomination of the Sole Arbitrator, or to suggest any other person to act as an Arbitrator. The respondent no. 1 issued a reply dated August 1, 2019 denying the existence of any dispute and negating the request of the petitioner to refer the alleged dispute to arbitration by saying that the said Clause in the partnership deed has been erroneously interpreted by the petitioner to mean arbitration under the said Act.
8. This application seeks the intervention of the Court to appoint an arbitrator for adjudication of disputes between the parties.

Submissions

9. Counsel appearing on behalf of the petitioner has made the following arguments:

- a. The counsel states that the position taken by the respondents denying the existence of any dispute and the consequent referral to arbitration without the existence of dispute in the first place is incorrect and that the same should be rejected.
- b. The counsel places reliance on the decision of **Vidya Drolia -v- Durga Trading Corporation** reported in **(2021) 2 SCC 1** to advance the argument that the Court must refer parties to arbitration unless it finds that prima facie no valid arbitration agreement exists and that all questions pertaining to the validity and existence of the arbitration agreement must be determined by the Arbitral Tribunal. The relevant portions of the judgment are delineated below –

“134. Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straight forward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial.”

“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.”

“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.”

“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.”

10. Counsel appearing on behalf of the respondents has made the following arguments:

- a. The counsel states that as per Clause 18 of the partnership deed no right to appoint any arbitrator by any of the partners had been created. It gives liberty to the partners to take every effort to settle any dispute among them by arbitration before approaching any Civil Court. The above clause had been made with a view to settle any dispute among the partners by mutual settlement before approaching the Court to avoid any serious litigation among the partners affecting the interest of said family partnership business.
- b. The counsel draws the attention of the Court towards the expression “such partner shall be free to seek interference of the court for remedy” and “...to settle the dispute by arbitration”. The counsel submits that when the entire clause 18 of the partnership deed is read as a whole giving particular attention to the said two expressions appearing therein, the intention of the partners of the said firm to incorporate such a clause in the said deed becomes absolutely clear to the effect that in the event of any dispute between the partners the same may be settled mutually among themselves before approaching the Civil Court.

- c. The counsel states that there is no dispute between the parties and that no right to nominate any arbitrator has accrued to any of the partners to settle any dispute.
- d. The respondents are willing to settle the dispute by making payment of the share that the petitioner is entitled to receive, but they are seeking dismissal of this application on the ground that the arbitration clause is not mandatory.
- e. The counsel has placed the decision of the Supreme Court in ***State of Orissa and Anr -v- Sri Damodar Das*** reported in ***AIR 1996 SC 942*** to argue that the arbitration agreement must expressly or by necessary implication refer their dispute or difference for arbitration. The relevant portion of the judgment reads as follows –

“11. It would, thereby, be clear that this Court laid down as a rule that the arbitration agreement must expressly or by implication be spelt out that there is an agreement to refer any dispute or difference for an arbitration and the clause in the contract must contain such an agreement. We are in respectful agreement with the above ratio. It is obvious that for resolution of any dispute or difference arising between two parties to a contract, the agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein or otherwise of any dispute or difference and in its absence it is difficult to spell out existence of such an agreement for reference to an arbitration

to resolve the dispute or difference contracted between the parties...”

- f. The counsel further submits that an agreement between the parties needs to be an arbitration agreement as per Section 7(1) of the said Act, without which no reference can be made to the Arbitral Tribunal. To buttress his arguments, the counsel has placed reliance on **Wellington Associates Ltd. -v- Kirit Mehta** reported in **AIR 2000 SC 1397**, the relevant portion of which is extracted below –

“17. The words in sub-section (1) of Section 7, “means an agreement by the parties to submit to arbitration”, in my opinion, postulate an agreement which necessarily or rather mandatorily requires the appointment of an arbitrator/arbitrators. Section 7 does not cover a case where the parties agree that they “may” go to a suit or that they “may” also go to arbitration.

18. Thus, unless the document filed by the party before the Chief Justice of India or his designate is an “arbitration agreement” as defined in Section 7 as explained above, requiring a reference in a mandatory sense, no reference, in my view, can be made to the Arbitral Tribunal...”

- g. The counsel continues to emphasise on the requirement of the parties to submit their disputes to arbitration and places the decision of the Supreme Court in **Payal Chawla Singh -v- Coca-Cola Company and Another** reported in **(2015) 13 SCC 699**,

the relevant paragraph of which has been reproduced as follows

–

“11. Besides, under Section 7 of the 1996 Act the parties to an arbitration agreement must agree to submit their disputes to arbitration. What is contemplated under the "solutions programme" is a mere possibility of the employee seeking arbitration as opposed to an obligation to refer all disputes to arbitration.”

Observations with Order

11. I have heard the counsel appearing for the respective parties and perused the materials on record.

12. First things first – the counsel for the respondents denies the very existence of a dispute between the parties and that there cannot be any question of nomination of an arbitrator by the parties without the existence of a dispute in the first place. The counsel places the decision of the Supreme Court in ***Deutsche Post Bank Home Finance Ltd. -v- Taduri Sridhar*** reported in **(2011) 11 SCC 375** in its favour, the relevant portion of which has been reproduced below –

“18. The existence of an arbitration agreement between the parties to the petition under section 11 of the Act and existence of dispute/s to be referred to arbitration are conditions precedent for appointing an Arbitrator under section 11 of the Act. A dispute can be said to arise only when one party to the arbitration agreement makes or

asserts a claim/demand against the other party to the arbitration agreement and the other party refuses/denies such claim or demand.....”

In the present facts in hand, the petitioner had made certain claims with regards to the functioning of the said partnership firm and had also issued an arbitration notice on non-receipt of satisfactory responses from the respondents. It is evident from the above judgment that a dispute can be said to arise when one party makes certain claims and other party refuses or denies the same, and therefore, this judgment does not in any manner help the case of the respondents. In my view, the position taken by the respondents denying the existence of any dispute ought to be rejected.

13. Moving on, one of the requirements for an enforceable arbitration agreement under Arbitration and Conciliation Act, 1996 is ‘Consensus ad-idem of parties to submit their existing or a future dispute to arbitration’. Therefore, before proceeding to adjudicate the matter, it is prudent that the relevant clause of the said partnership deed is reproduced. Clause 18 of the partnership deed provides -

“In the event of any dispute arising between the partners, in the conduct of the business or as to the interpretation, operation or enforcement of the terms of the partnership deed, such partner shall be free to seek interference of the Court for remedy although every effort should be made by the partners to settle the dispute by arbitration.”

14. From the bare examination of the clause, it is evident that in case of any dispute with regards to the conduct of business, interpretation or enforcement of the terms of the partnership deed, the parties are free to approach the courts for remedy, but before that the parties should make every effort to settle the dispute by arbitration.

15. The counsel for the respondents' places reliance on **Y.L. eServices Pvt. Ltd. -v- Silverline Business & Tech Park Pvt. Ltd.** reported in **AIR 2008 Karnataka 127** to submit that mere use of terms 'arbitrator' or 'arbitration' in the clause does not necessarily make it an arbitration agreement. The relevant paragraph has been reproduced below –

“16. An arbitration agreement is not required to be in any particular form. An agreement to arbitrate, apart from what the Arbitration Act prescribes, is not required to be stated in any particular form or wording and the use of technical or formal words is not required. Mere use of the terms "arbitrator" or "arbitration" in an agreement does not necessarily make it an agreement of arbitration; and similarly, mere absence of the use of the terms like "arbitrator" or "arbitration" cannot in law necessarily have the effect of taking an agreement out of the category of arbitration agreement, if otherwise the intention of the parties to agree to arbitrate is clear. An arbitration rests on mutual voluntary agreement of the parties to submit their matters of difference to selected persons whose determination is to be accepted as a substitute for the judgment of a Court. The

essential requirement is that the parties should intend to make a reference, a submission to arbitration and should be ad idem in this respect.”

The counsel continues to submit that there was never a true intention of the parties to submit to arbitration as the first phrase of the said clause, viz., “*In the event of any dispute interference of the Court for remedy*” and second phrase of the said clause, viz., “*although every effort should be made by the partners to settle the dispute by arbitration*” are inherently contradictory due to the final and binding nature of arbitral awards issued by the arbitral tribunal which is a settled principle of law; the requirement of approaching the Court after arbitration does not unambiguously convey the intent of the parties to enter into arbitration in the first place, and that by merely mentioning the term ‘arbitration’ in the said clause, the parties had never really intended to consider the same as equivalent to an arbitration agreement.

16. It is a settled principle of law that the consent by the parties to arbitrate must be univocal and unambiguous as held by the Apex Court in the case of **Jagdish Chander -v- Ramesh Chander** reported in **(2007) 5 SCC 719**. Further reliance can be placed on the decisions of the Supreme Court in **Rickmers Verwaltung -v- IOCL** reported in **(1999) 1 SCC 1** and **Shakti Bhog Foods Ltd -v- Kola Shipping Ltd.** reported in **(2009) 2 SCC 134**, wherein it has stressed that the Courts have

consistently striven to understand the true intention of the parties and whether there existed consensus ad idem.

17. I am of the view that the phrase in the aforementioned clause '*although every effort should be made to settle the dispute by arbitration*' should be given literal interpretation wherein the intent of the parties obligates them to undertake every effort to settle the dispute by arbitration before approaching the appropriate court for remedy. Further reliance can be placed on the judgment by the England and Wales High Court in the case ***Rhodia Int'l Holdings Ltd. & Rhodia UK Ltd. -v- Huntsman Int'l LLC*** reported in ***(2007) EWHC 292 (Comm)***, wherein it held that the reasonable efforts clause in a contract probably only requires the obliged party to take only one reasonable course, whereas the best-efforts clause requires a party to take all the reasonable efforts. The relevant paragraph is reproduced below –

“33.....As a matter of language and business common sense, untrammelled by authority, one would surely conclude that they did not. This is because there may be a number of reasonable courses which could be taken in a given situation to achieve a particular aim. An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can. In that context, it may well be that an obligation to use all reasonable endeavours equates with using best endeavours.....”

18. Upon application of my mind, I am of the view that the term “every effort” in the said clause of the partnership deed can be equated with the term “best effort”, in fact, the term “every effort” is much wider in nature in comparison to the phrase “best effort”, and therefore, expands the scope and ambit of the arbitration clause. Connected and incidental matters, unless the arbitration clause suggests to the contrary, would normally be covered.
19. The said second phrase in the clause clearly and unambiguously conveys the intention of the parties to settle their dispute by way of arbitration. The clause when read in its entirety may appear to be vague with regards to the first phrase, but it is equally true that the Arbitration and Conciliation Act, 1996 provides various grounds on which the parties can approach the Court during and even after the arbitral proceedings. Reliance can be placed on the case of ***Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd -v- Jade Elevator Components*** reported in ***(2018) SCC Online SC 1503***, wherein a three judges’ bench of the Supreme Court while dealing with a vague and unclear arbitration clause, held that such a clause can hold validity as long as the intention to refer the parties to arbitration is clear. Here, the court observed that emphasis must be laid on the intention of the parties to have their disputes arbitrated and that the same is paramount even where the

dispute resolution clauses are vaguely worded or where there is an ambiguity in choice of the mechanism to be adopted. Further, the judgment of **Y.L. eServices Pvt. Ltd. (supra)** relied upon by the counsel for the respondents does not help his case as the paragraph cited above makes it patently clear that an arbitration agreement is not required to be any particular form, and that the clause should instead communicate the intention of the parties to arbitrate their disputes and differences.

20. Moreover, as contended otherwise by the respondents, the said clause in no manner whatsoever hints at resolution of disputes by mutual settlement, in fact the said phrase in the said clause clearly indicates the intention of the parties to resolve their disputes by arbitration and approach courts for remedy, if and when required. To replace and read the term '*arbitration*' with mutual settlement or any other dispute resolution mechanism would tantamount to this Court re-writing the said partnership deed for the parties.
21. For the reasons above and following the *prima facie test* laid down by the Supreme Court in **Vidya Droalia (supra)**, I am convinced that there exists a valid arbitration agreement between the parties, and that the parties must be referred to an arbitrator to decide the disputes between them including the questions, if any, of jurisdiction and non-arbitrability.

22. Thus, in the case in hand, the petitioner has rightly invoked the arbitration clause. Accordingly, I appoint Mr. Raj Ratan Sen, Advocate, Bar Library Club as sole arbitrator to arbitrate upon the disputes which has arisen between the parties. The learned arbitrator will be guided by the Arbitration and Conciliation Act, 1996, and shall make positive efforts to complete the arbitration proceedings at the earliest. The appointment is subject to submission of declaration by the Arbitrator in terms of Section 12(1) in the form prescribed in the Sixth Schedule of the Act before the Registrar, Original Side of this Court within four weeks from today.
23. The Registry is directed to send a copy of this order to the sole arbitrator. The learned counsels for the parties are also at liberty to bring it to the notice of the learned arbitrator.
24. The arbitrator petition is, accordingly, allowed. There shall be no order as to costs.
25. Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SHEKHAR B. SARAF, J.)