

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

MISC. CIVIL APPLICATION NO. 189/2022

Shri Anil Rathi, S/o. Late Shri O.L.Rathi,
aged about 50 years, R/o. 201,
Park Regency, Opp. Tilak Vidyalaya,
Dhantoli, Nagpur – 440012.

... **APPLICANT**

VERSUS

1. M/s. Pyramid Realtors,
5 Software Technology Park
(STP) Link Road, Sadar, Nagpur.
2. Shri Prashant S/o Babasaheb
Wasade, Partner, Pyramid
Realtors, R/o G-2 Himalaya
Paradise, GPO Square, Civil
Lines, Nagpur.
3. Shri Naved Ali S/o Sajid Ali,
(Partner, Pyramid Realtors),
R/o. 448, Darus Sukoon, New
Colony, Nagpur.
4. Shri Gaurav S/o Rajinder Kumar
Jain, Partner, Pyramid Realtors,
R/o. B-3/1202, World Spa
(West) Sector 30 Gurgaon.
5. Shri Sanjay S/o Babasaheb
Wasade, Partner, Pyramid
Realtors, R/o. Civil Lines,
Chandrapur.

6. Shri Vishwas S/o Sudhakar
Chaknalwar, R/o. Flat No. 801,
Royal Park, Plot No. 72, near
Dagdi Park, Ramdaspheth,
Nagpur.

Alternate address of non-
applicant Nos. 2 to 6 office at 5
Software Technology Park (STP)
Link Road, Sadar Nagpur.

...NON-APPLICANTS

Mr. C. S. Dhore, Advocate for applicant.
Mr. R.L. Khapre, Senior Advocate with Mr. M.R. Joharapurkar,
Advocate for non-applicant Nos. 1 o 5.

<u>CORAM</u>	: <u>VINAY JOSHI, J.</u>
<u>RESERVING THE JUDGMENT ON</u>	: <u>19/09/2022</u>
<u>PRONOUNCING THE JUDGMENT ON</u>	: <u>25/11/2022.</u>

JUDGMENT :

This is an application seeking the appointment of Arbitrator in terms of Section 11(6) of the Arbitration Act, 1996 ('Act'). The appointment of Arbitrator has been claimed on the basis of Clause No. 13 incorporated in the partnership deed dated 01.04.2019 executed in between the parties.

2. The applicant and non-applicants are partners of the firm. The partnership firm has been formed for carrying the business of

promoters and developers of real estate under the name and style of M/s. Pyramid Realtors. The partnership business commenced in the year 2007 and time to time it was reconstituted by varying the terms. The first partnership deed was executed on 23.09.2007. The firm was registered on 27.09.2008 having registration No. NGP-10678/2008-2009. The partnership deeds were executed in Nagpur as well as office of the firm is in the Nagpur City.

3. It is applicant's case that initially applicant along with M/s. Tarangan Developers Pvt. Ltd, M/s. Jagadamba Infrastructure Pvt. Ltd and non-applicant Nos. 2, 3 and 6 were partners. The applicant was holding 1/4th share in the partnership firm. The said share holding was continued till July 2011. However, in the month of July 2011 M/s. Tarangan Developers Pvt. Ltd, M/s. Jagadamba Infrastructure Pvt. Ltd retired from the firm on which non-applicant Nos. 4 and 5 were inducted as new partners. Accordingly, on 16.07.2011, partnership firm was reconstituted by executing a deed. While reconstituting the partnership firm, applicant's share was reduced to 22.75% from 24.60%. Later on, the partnership deed was amended in the year 2016 by execution of fresh partnership deed again reducing applicant's share to the extent of 22%.

4. It is applicant's case that since rest of the partners were in majority, though the applicant raised grievance it was sidelined. It is the principal grievance that the non-applicants have raised various loan from banks and finance institutions by mortgaging firm's property. The said loan was raised for the personal business of respective partners jeopardizing development of partnership business. It resulted into severely affecting the partnership business. Since the loan was not timely repaid, the bank has classified it as non performing assets (NPA) which has also affected the firms business. It is contended that non-applicant No. 2 i.e. one of the partner of firm had provided partnership property for economically weaker sections construction despite resistance of applicant.

5. The applicant was always kept away from the partnership business affairs. The applicant noted that the non-applicants were not acting to further the interest of partnership firm. On repeated grievance, the partners have mutually agreed to workout amicable settlement and distribute the assets. With such object, partnership deed was once again amended/reconstituted on 01.04.2019 under which certain land of firm came to be reserved for different partners including the applicant. In furtherance of reservation of land in favour of the applicant, a power of attorney dated 13.07.2020 was executed

by rest of the partners in favour of applicant. The said power of attorney was in lieu of settlement *inter se* arrived by the partners towards the applicant's share.

6. It is applicant's case that he was entitled to receive sum of more than Rs. 35 crores, however the other partners by denying genuine claim, admitted to pay Rs. 10 crores only. Since the applicant was authorized to sell some of the property, he started to negotiate with the customers on which realized that most of the property was under litigation. According to the applicant, the said fact was within the knowledge of non-applicants, however in order to deceive the applicant, said arrangement was made. On applicant's grievance, the non-applicants assured to pay sum of Rs. 15 crores within stipulated period. Upon such assurance, the applicant has executed another power of attorney dated 21.06.2021 in respect of firm's land including the land which was already reserved for him. The said power of attorney was executed in favour of non-applicant No. 3 to further the settlement of applicant.

7. It is applicant's contention that despite authorizing non-applicant No. 3 by way of power of attorney dated 21.06.2021, the applicant's dues were not paid. The property which was reserved for applicant and authorized under power of attorney dated 13.07.2020,

was not cleared despite assurance. It is alleged that the non-applicants have continued illegal activities. On the other hand, they borrowed huge sum from Kanyaka Nagari Sahakari Bank Branch Sita Buldi, Naghpur on the strength of power of attorney dated 21.06.2021. The firm's property has been illegally mortgaged and the applicant has been treated as a co-borrower for said loan. The applicant tried to settle, however the non-applicants have multiplied the differences by entering into illegal activities. The dispute pertains to accounts, profit of business and rights and liabilities relating to firm.

8. Since the non-applicants have not settled the huge monetary dues of applicant to the tune of Rs. 35 crores, the applicant has invoked Arbitration Clause No. 13 vide notice dated 24.02.2022. By issuing said notice, the applicant suggested two names of Arbitrators and asked for concurrence. It is applicant's contention that the claim to be referred to the Arbitrator arose out of and in relation to the partnership deed mutually executed on 01.04.2019. The deed bears a dispute resolution method by way of Arbitration vide Clause No. 13 of the document. The applicant would submit that in response to the invocation of the Arbitration Clause, the non-applicants vide notice reply dated 03.03.2022 sought to negotiate the issue by seeking certain documents. The non-applicant No. 3 vide notice reply dated

24.02.2022 has not agreed with the names of Arbitrator proposed by the applicant. One another notice was issued by the applicant, however the non-applicants did not agree for the Arbitrator. It is the applicant's case that despite vast differences, the non-applicants were dealing with the properties of the firm in derogation to the interest of the applicant. The applicant has applied under Section 9 of the Act for interim reliefs. In said proceeding, the applicant came to know about one more partnership deed dated 30.06.2021, which according to him was never executed. It is applicant's contention that entire dispute arose out of the partnership business. The parties have mutually chosen mode of settlement of all disputes relating to partnership business by way of appointment of arbitrator. It is contended that Arbitration Clause exists in the document as well as their exists arbitral dispute. Since the non-applicants have refused to agree for appointment of arbitrator, the applicant urged for his appointment.

9. Application is resisted by non-applicants vide joint reply dated 29.06.2022. Non-applicants have not denied commencement of partnership business in the year 2007 and execution of multiple revised partnership deeds in between the parties. The non-applicants have not denied the execution of partnership deed dated 01.04.2019 bearing Arbitration Clause. It is not denied that the applicant was one of the

partner of firm which was revised time to time. Besides that the non-applicants have denied all other allegations levelled against them.

10. It is contended that there is no foundation for claiming huge sum of Rs. 35 crores. The applicant has not produced documents to substantiate his grievance. It is stated that in absence of agreement to pay the sum to the applicant, matter cannot be referred for arbitration. It is also stated that the Court has no jurisdiction to appoint an Arbitrator as there is no agreement of arbitration in respect of claim raised by the applicant. According to the non-applicants, though Arbitration Clause exist in the agreement, the same do not contain a clause or averment that the applicant is entitled to raise claim about the amount stated. According to the non-applicants the agreement is not within the meaning of Section 7 of the Act, therefore application is not tenable.

11. Non-applicants have mainly resisted the application on the ground of suppression of material facts by the applicant. It is stated that the parties have reconstructed partnership on 13.08.2018 and 30.06.2021 which has been suppressed. The power of attorney executed in favour of applicant was also cancelled which is not brought on record. More particularly, it is contended that as per reconstructed partnership deed, the applicant has sold most of the properties assigned

to him and thus, he is not coming with clean hands. Particularly, it is contended that there is no disclosure of execution of reconstructed partnership deeds.

12. The non-applicants stated that the applicant has accepted the reconstructed partnership deed dated 30.06.2021. He has given exclusive rights to non-applicants to deal with the firm's property as well as authorized to raise the funds. It is stated that the applicant has signed authority letters while raising loan. In relation to said contention, certain clauses of partnership deeds have been cited. The non-applicants would state that, under reconstructed deed dated 13.08.2018, the applicant admitted the settlement. Non-applicants have pointed certain terms of partnership deed dated 01.04.2019 authorizing them to operate bank account and borrowing power. Moreover, it is contended that those things have been accepted by the applicant while reconstructing partnership deed dated 03.06.2021.

13. While summarizing the resistance, it is stated that the applicant's claim for sum of Rs. 35 crores is fictitious and not supported by documents. The applicant was well aware that he is nominal partner in the firm with only 0.1% share in the profit and loss. Though he is nominal partner, he is trying to extort money. According to non-applicants, this application is filed with ulterior motive with sole object

of pressurizing rest partners, therefore urged for rejection.

14. Both have produced voluminous documents in support of their respective contentions. Partnership deed dated 01.04.2019 on the basis of which Arbitration Clause has been invoked is tendered on record. The applicant has been shown as partner No. 5 whilst rest are remaining partners of the firm. It bears a reference that the partnership business commenced on 23.09.2007 and revised time to time. The applicant's share is shown as 0.1% in the partnership deed whilst the remuneration payable to the applicant shall be 70%. The partnership deed specifies the rights and liabilities of the partners. Clause No. 12-C specifies that the applicant has been authorized to sell the property described in Scheduled 1 and Scheduled 2 of the deed. The applicant also undertook to clear the dues of competent authority and taxes. Particularly, Clause No. 13 of the deed specifies the dispute resolution mechanism by way of appointment of Arbitrator. The said Clause runs as below:-

“Clause No. 13. Reference to Arbitration:

That if any dispute or difference which may arise between the parties or their representatives with regard to the preparation of accounts, profits or losses of business, the rights and liabilities of the business or any other matter relating to the firm shall be referred to the arbitration of one or more arbitrators (to be appointed by the mutual consent of all the partners) whose decision shall be final and binding on all the partners and their representatives.”

15. On the basis of above clause, the applicant has urged for appointment of Arbitrator for resolution of dispute. Initial, partnership deed dated 23.09.2007 has been produced to show that the applicant was a second partner since inception having 12.50% share in the business. The said deed also bears Clause No. 12 pertaining to the appointment of Arbitrator. One another revised partnership deed dated 16.07.2011 is produced on record, equally bearing the similar mechanism for resolution of dispute. The same is the case of further partnership deed dated 12.01.2016. In each partnership document, there happens to be Arbitration Clause for which there can be no dispute. On the other hand, the non-applicants have produced partnership deeds dated 13.08.2018 and 30.06.2021 which were allegedly suppressed, rather denied. The last partnership deed dated 30.06.2021, equally shows that the applicant is a partner No. 5 having share 0.1%. This partnership deed tendered by non-applicants also bears an Arbitration Clause No. 14 similar to Clause No. 13 of the partnership deed dated 01.04.2019.

16. In support of his contention, the applicant has produced a general power of attorney dated 13.07.2020 authorizing him to sell scheduled property. He has also produced a general power of attorney dated 21.06.2021 which according to him was got executed by

deceitful means in favour of partner Naved Sajid Ali. Besides that the applicant has produced the loan sanction documents.

17. It is submitted on behalf of non-applicants that as per partnership deed, the applicant's share was only 0.1% which itself shows that he was nominal partner. Only to facilitate the applicant to sell the scheduled property, 0.1% share was assigned to him. According to non-applicants, since share of the applicant was minuscule, the claim of huge amount of Rs. 35 crores is wholly untenable. The non-applicants have produced a document to show that the applicant has authorized other partners to raise loan. It is submitted that the applicant is one way challenging the loan transaction as well as mortgage created in favour of financier bank. He would submit that without bank being a party and as a mortgagee's rights are *in rem*, the matter cannot be referred to the Arbitrator. The learned counsel appearing for the non-applicants has referred certain sale-deeds to impress that the applicant has already sold certain properties and thus he is not coming with clean hands.

18. By relying on the decision of the Supreme Court in case of ***Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and ors, AIR 2011 SC 2507***, the non-applicants submitted that enforcement of mortgage is a right *in rem* therefore, a dispute shall be decided by the

Civil Court and not by Arbitral Tribunal. Undoubtedly, a mortgage is a transfer of right *in rem*. A mortgage suit for sale of the mortgaged property is an action *in rem*, meaning thereby the enforcement is *in rem*. Pertinent to note that the applicant has not challenged the mortgage transaction, but it is his bid to show that the non-applicants who are partners of firm have acted against the interest of firm. The reference is primly sought for settlement of partnership *inter se* dispute, therefore the said submission would not come to the aid of non-applicants.

19. Both sides have relied on the decision of the Supreme Court in case of ***Vidya Drolia and others Vs. Durga Trading Corporation with other connected matters, (2021) 2 SCC 1*** to substantiate their respective contentions. As regards to the scope of judicial intervention relating to application under Section 11 of the Act, three Judge Bench of the Supreme Court has eloquently clarified the position. The relevant observations made therein reads as below:-

“154.2. Scope of judicial review and jurisdiction of the court under Section 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been

conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

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 deadwood. 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.

244.1 Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2 Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it’s a clear case of deadwood.

244.3 The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4 The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above, i.e., ‘when in doubt, do refer’.

244.5 The scope of the Court to examine the prima facie validity of an arbitration agreement includes on only.”

20. The said decision is pressed into service by both sides on the point of scope of application under Section 11(6) of the Act. In the said decision, the Supreme Court has considered the different situations in which who has to decide the question of non-arbitrability. It is expressed that the general rule is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. Rarely as a demurrer, the Court may interfere at the stage of Section 11 of the Act when it is manifestly and *ex facie* certain that the arbitration agreement is non-existent, invalid or disputes are non-arbitrable. It conveys that the Court has to appoint Arbitrator unless a party has established a *prima facie* case of non-existence of valid arbitration agreement.

21. The learned counsel appearing for non-applicants by placing reliance on the decision in case of ***Indian Oil Corporation Limited Vs. NCC Limited, 2022 SCC Onlien SC 896*** would submit that in cases of restricted Arbitration Clause specifically excluding certain area from Arbitration, it cannot be invoked. Pertinent to note that in the said decision, it has also been observed that the Court at the stage of deciding Section 11 application, it is always advisable and appropriate that in case of debatable and disputed facts, the same should be left to the Arbitral Tribunal.

22. According to the non-applicants, unless the Court decides about existence of arbitral dispute, the matter cannot be referred. In this regard, reliance is placed on the decision in case of ***KSS KSSIPL Consortium Vs. Gail (India) Limited, (2015) 4 SCC 210***, of which my attention is invited to para 9 which reads as under:-

“9. There can be no manner of doubt that before exercising the power under Section 11(6) of the Arbitration Act to make appointment of an arbitrator the Court will have to decide on the existence of an arbitrable dispute/enforceable claim by and between the parties to the contract. The existence of a claim and denial thereof giving rise to a dispute is required to be determined on the basis of what the parties had agreed upon as embodied in the terms of the contract and only for the purpose of a decision on the question of arbitrability and nothing beyond. It is from the aforesaid standpoint that the issues raised in the present proceedings will have to be considered.”

23. On the other hand, the learned counsel appearing for the applicant submits that the applicant is a partner of firm which is not in dispute. Existence of Arbitration Clause in the agreement is also not denied. It is submitted that this is a case where the inbuilt Arbitration Clause has not restricted the scope of reference.

24. While dealing with the application under Section 11(6) of the Act, there is a narrow scope of examination, confined only to trace out whether there exists an ‘arbitrable dispute’ and a ‘written contract’ providing Arbitration Clause as a dispute resolution mechanism. It is consistently followed that once the existence of the arbitration

agreement was established, all other incidental issues should be left to be decided by the Arbitrator as prescribed under Section 16 of the Act.

25. The learned counsel appearing for the applicant relied on the decision of the Supreme Court in case of *DLF Home Developers Limited Vs. Rajapura Homes Private Limited with connected another matter* (Arbitration Petition (Civil) No. 17/2020), decided on 22.09.2021 to contend that jurisdiction of Court under Section 11 of the Act is primarily to find out whether there exist a written agreement by which the parties agreed to resolve dispute through arbitration. Further, by placing reliance on the decision of the Supreme Court in case of *Bharat Sanchar Nigam Ltd & another Vs. M/s. Nortel Networks India Pvt. Ltd.* (Civil Appeal Nos. 843-844 of 2021, decided on 10.03.2021), it has been submitted that, if there is even a slightest doubt, the rule is to refer the disputes for arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the Tribunal.

26. The objection is about non-arbitrability of the issue involved. It is argued by the non-applicants there is no agreement in between the parties to pay dues as has been claimed. In other words, it is the submission that though the applicant claims sum of Rs. 35 crores, it is without foundation as well as there is no agreement about

payment and thus, in absence of valid agreement, the matter cannot be referred. The dispute arose out of partnership business mainly on account of sharing of profit or property in lieu of profit. This, essentially relates to the facts certainly to be decided by the Tribunal. Worth of factual allegations relating to the issue in dispute is not permissible to be considered within the limited scope and ambit of inquiry under Section 11 of the Act. The Supreme Court in case of ***Mohammed Masroor Shaikh Vs. Bharat Bhushan Gupta and others***, (Civil Appeal No. 874/2022, decided on 02.02.2022) by referring its earlier decision in case of Vidya Drolia (*supra*) ruled that if the matter is plainly arguable, the matter requires to be referred to the Tribunal. The relevant observations made in para 11 reads as under:-

“11. Thus, this Court held that while dealing with petition under Section 11, the Court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable. In such case, the issue of non-arbitrability is left open to be decided by the Arbitral Tribunal. On perusal of the impugned order, we find that the issues of non-arbitrability and the claim being time barred have not been concluded by the learned Single Judge of the Bombay High Court, In fact, in clause (vii) of the operative part of the impugned Order, the learned Single Judge has observed that the contentions of the parties have been kept open. The petitions filed by the appellant under Section 34 of the Arbitration Act, challenging the Order dated 25th May 2021 are pending before the High Court in which the appellant can raise all permissible contentions.”

27. The non-applicant has submitted that the applicant has sold some of the property in furtherance of settlement arrived between the parties. Certain copies of documents have been tendered on record to contend that the applicant though sold the property, it has been suppressed. It reveals that the power of attorney has been issued in favour of the applicant authorizing him to sell scheduled property. Non-disclosure of sale instances does not mean that entire dispute is fully and finally settled. There exists arguable issue whether the claim arising out of partnership business has been finally settled or not which is a question of fact requires resolution by the appropriate authority. The learned counsel appearing for the non-applicants would submit that since the applicant has acted in fraudulent manner, the matter cannot be referred for arbitration. In response, the learned counsel appearing for the applicant would submit that mere allegation of fraud is not enough to take the matter out of the purview of arbitration. To substantiate said contention, he relied on the decision of the Supreme Court in case of *A. Ayyasamy Vs. A. Paramasivam and others, (2016) 10 SCC 386*, wherein it is ruled that mere allegation of fraud is not sufficient to detract parties from the obligation to submit their dispute to arbitration. The said course is permissible only if serious issue of fraud involving criminal wrong exist *ex facie*.

28. Arbitration Clause No. 13 does not restrict the scope of arbitration to particular area. The parties have agreed to refer a dispute regarding preparation of accounts, profit or loss of business along with right and liabilities. The monetary claim raised on account of partnership dues cannot be said to be out of the preview of the agreed terms. The learned counsel appearing for the applicant has relied on the decision of the Supreme Court in case of ***Pravin Electricals Pvt. Ltd. Vs. Galaxy Infra And Engineering Pvt. Ltd.*** (Civil Appeal No. 825/2021, decided on 08.03.2021) to contend that at referral stage, the Court would apply only *prima facie* test and in case of debatable and arguable case then matter be referred for arbitration as the Arbitral Tribunal has primary jurisdiction and authority to decide the dispute including the question of jurisdiction and non-arbitrability. The dispute is *prima facie* covered under Clause No. 13 of the agreement. The term 'dispute' must be read in general sense by giving ordinary meaning. Claim is about dues from the partnership firm and thus, it relates to the agreed terms.

29. Perusal of all partnership deeds convey in unequivocal terms that the parties have agreed to resolve the dispute by way of arbitration. The applicant's claim is based on the deed of partnership dated 01.04.2019 which bears Arbitration Clause No. 13 in

unambiguous terms. Though the applicant denied the existence of revised partnership deed dated 30.06.2021, it also bears Clause No. 14 which is in resemblance to Clause No. 13 of admitted document. The Arbitration Clause does not limit the extent to be referred for arbitration. On deliberation of rival contention, it emerges that arbitral dispute exists in between the parties. In view of settled position of law, the case is made out to refer the dispute to be resolved by Arbitrator. The application deserves to be allowed and it is allowed accordingly.

30. When it is expressed that the sole Arbitrator is to be appointed, both learned counsel agreed to appoint Former Justice R. K. Deshpande, as a sole Arbitrator.

31. Accordingly, Former Justice R. K. Deshpande, is appointed as a sole Arbitrator. It is made clear that all objections sought to be raised on behalf of the non-applicants, are kept open, may be raised before the learned Arbitrator.

32. The Registry is directed to request the learned Arbitrator for consent letter and for disclosure statement as per the provisions of the Act.