



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

% *Date of decision: August 29, 2022*

+ ARB.P. 383/2021 & I.A. 13204/2021

NARENDRA KUMAR SAXENA & ANR.

..... Petitioners

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

versus

SURENDRA KUMAR SAXENA & ANR.

..... Respondents

Through: Mr. Abhinay, Mr. Utsav Trivedi,
Mr. Himanshu Sachdeva, Mr. Pooran
Chand Roy, Ms. Shivani Bhuhan
Ms. Manini Roy, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

I.A. 13204/2021

This is an application filed by the respondent seeking permission to file additional documents on record.

For the reasons stated in the application, the same is allowed and the additional documents are taken on record.

Application is disposed of.

ARB.P. 383/2021

1. This petition has been filed by the petitioner seeking an appointment of an Arbitrator for adjudicating the dispute between the parties.



2. The case of the petitioners is, they and Surender Kumar Saxena with Neerja Saxena established an unregistered partnership firm carrying on the business under the name and style “M/s Bharat Interlock Tiles” having its office in Alwar, Rajasthan. The partnership firm while carrying its business had purchased an immovable property bearing No. E-86, MIA Alwar, Rajasthan, having ownership in the name of M/s Bharat Interlock Tiles and all the partners having equal share in the property and the possession of the same is with the respondents. It is their case that both the parties to the petition lost interest in carrying out the business and the firm completely stopped working and became *functus officio*.

3. The firm was dissolved by mutual consent of the partners except the abovementioned immovable property of the firm on September 08, 2007.

4. It is the case of the petitioners that as per clause 3 of the partnership deed dated September 26, 1998 all the four partners having equal share in the ratio of 25% in partnership firm are entitled to the equal distribution of the abovementioned property.

5. The submission of Mr. Rahul Sharma is that as per Clause 12 of the Partnership Deed the parties have agreed to refer all the disputes arising out of the partnership deed to the arbitration. He stated that the arbitration clause in the partnership deed reads as under:-

“That in case of any dispute between the partners hereto relating to any terms of this instrument or of any other matter relating to the partnership business the same shall be refer to the Arbitration and the Indian



Arbitration Act enforce shall be binding on the firm and the partners.”

6. According to Mr. Sharma, the place of arbitration has not been defined in the partnership deed. It is left open to the discretion of parties to decide the place of arbitration. The parties being residents of Delhi have approached this Court for appointment of an Arbitrator. In support of his submission he has relied upon the judgment between the some of the parties herein i.e., *Narendra Kumar Saxena v. Neerja Saxena, ARB. PET. 365/2021* decided on October 01, 2021.

7. A reply has been filed by the respondents. It is contended by Mr. Abhinay, their counsel that there is no notice issued by the petitioners invoking arbitration (in the present matter) as the same is pre-requisite for commencement of the proceedings under Section 21 of the Act. He relied upon the judgment of the Supreme Court in the case of *Milk food Ltd. V. GMC Ice cream Pvt. Ltd., (2004) 7 SCC 288*.

8. He stated that this Court has no territorial jurisdiction to adjudicate the matter as no cause of action has arisen within the territorial jurisdiction of this Court, as:

i. The immovable property in dispute is in the state of Rajasthan. It is well settled law that if the suit is regarding distribution of immovable properties then such a suit can be instituted only in the local limits of the jurisdiction of the immovable property.

ii. The partnership deed under which the petitioners are invoking the arbitration was signed in the State of Rajasthan



iii. A perusal of the partnership deed shows that the registered office of the partnership firm was within the territory of State of Rajasthan.

9. He submitted that the seat of arbitration was not decided by the parties while entering into a partnership deed dated September 26, 1998 because of an understanding that the registered place of business will be the place of adjudication for any kind of dispute that may arise between the parties. Further, most of the obligations under the partnership deed were performed in the State of Rajasthan. The partnership firm had no transaction within the territorial jurisdiction of this Court. He relied upon the judgment of the High Court of Uttarakhand in the matter of ***Sh. Hanuman Trust v. Indian Compressor Ltd., 2018 SCC OnLine UTT 211***. He also relied upon the judgment of the Supreme Court in the case of ***Harshad Chimanlal Modi v. DLF Universal Ltd. & Anr., 2005 7 SCC 791***.

10. It was also the submission of the counsel that the claim of the petitioners is *ex facie* barred by limitation. In this regard he stated that the said property was purchased during the course of business by the partnership firm. The partnership firm stopped its business and was dissolved by mutual consent in the year 2007 more particularly, on September 08, 2007. The petitioners remained silent for several years and filed this petition in the year 2021 for harassing the respondents.

11. He also submitted that the petitioners should have approached the Court within three years from the date of dissolution of the firm. According to him, the plea of limitation is governed by Section 5 of the Limitation Act, 1963, which stipulates that if a suit is for accounts and a



share of the profits of a dissolved partnership firm the date of limitation is three years from the date of dissolution. He also stated that not even a single averment made by the petitioners with regard to the intervening facts which would extend the period of limitation. He also stated that the petitioners cannot seek partition of the property as the property is of the partnership firm and not between the partners as co-owners.

12. He also pleaded that the partnership deed is not duly stamped under the Rajasthan Stamp Act, 1998. It is not registered and cannot be invoked as the same is no agreement in the eyes of law.

13. Finally, he relied upon a Family Settlement (hereinafter referred as 'settlement deed') dated January 15, 2009 and March 05, 2009 which does not have an arbitration clause. In terms of the Family Settlement Deed, it was agreed between the parties that ownership of the shares will be transferred to the respondents and the respondents shall be the owners of the property. In fact, the parties have acted upon the family settlement, being in the possession of their respective shares.

14. The petitioners have never disputed the existence of the family settlement dated January 15, 2009 which had been superseded by the last and final family settlement dated March 05, 2009. Since, the partition of few properties has not been effected the respondents have filed a suit before the District Court (Alwar) seeking declaration in their favour that all the properties which were suppose to be received by the respondents by virtue of the Settlement Deed to come to them. The Civil Judge, Alwar, vide order dated July 22, 2021 has directed disputed properties will not be disposed of till the next date of hearing which includes the property in question. He states that all the above



facts clearly demonstrate that the present petition filed by the petitioner is totally misconceived and not maintainable on facts and in law and hence the petition is liable to be dismissed.

15. Suffice to state, that the petitioners have filed rejoinder controverting all the pleas taken by the respondents and their counsel in their reply and seeks the dismissal of the same.

16. I have heard the learned counsel for the parties. There is no dispute with regard to the existence of the partnership deed dated September 26, 1998. The petitioners' claim is with regard to the immoveable property of the partnership firm which was purchased during the course of business of the partnership firm and is in the name of the partnership firm.

17. This petition is filed for appointment of an Arbitrator in view of the arbitration clause in the partnership deed. A plea has been taken by the learned counsel for the respondents that the partnership deed being not duly stamped and registered, the same cannot be considered for appointment of an Arbitrator.

18. According to him, the partnership deed is not duly stamped as per entry 43 of the Rajasthan Stamp Act, 1998 which covers the partnership deed. So, the arbitration clause being invalid and non-existent cannot be looked into for the appointment of an Arbitrator.

19. The question with regard to maintainability of a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act of 1996', for short) for appointment of an Arbitrator based on a clause in an instrument which is stamped or insufficiently stamped has been considered by the Supreme Court in its latest judgment in the case of



Intercontinental Hotels Group v. Waterline Hotels Pvt. Ltd., ARB. P. (Civil) 12/2019, wherein the Supreme Court has held as under:

“21. The reasoning for the above was provided in the captioned judgment as follows:

“24. The arbitration agreement contained in the Work Order is independent and distinct from the underlying commercial contract. The arbitration agreement is an agreement which provides the mode of dispute resolution. Section 3 of the Maharashtra Stamp Act does not subject an arbitration agreement to payment of Stamp Duty, unlike various other agreements enlisted in the Schedule to the Act. This is for the obvious reason that an arbitration agreement is an agreement to resolve disputes arising out of a commercial agreement, through the mode of arbitration. On the basis of the doctrine of separability, the arbitration agreement being a separate and distinct agreement from the underlying commercial contract, would survive independent of the substantive contract. The arbitration agreement would not be rendered invalid, un-enforceable or non-existent, even if the substantive contract is not admissible in evidence, or cannot be acted upon on account of non-payment of Stamp Duty.”

22. Although we agree that there is a need to constitute a larger Bench to settle the jurisprudence, we are also cognizant of time-sensitivity when dealing with arbitration issues. All these matters are still at a pre-appointment stage, and we cannot leave them hanging until the larger Bench settles the issue. In view of the same, this Court – until the larger Bench decides on the interplay between Sections 11(6) and 16 – should ensure that arbitrations are carried on, unless the issue before the Court patently indicates existence of deadwood.

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26. Upon reading Vidya Drolia (supra), the issue of ‘existence’ and/or ‘validity’ of the arbitration clause, would not be needed to be looked into herein, as payment of stamp



duty, sufficient or otherwise, has taken place herein. In order to ascertain whether adequate stamp duty has been paid in terms of the Karnataka Stamp Act, this Court needs to examine the nature of the substantive agreement, the nature of the arbitration agreement, and whether a separate stamp fee would be payable for the arbitration agreement at all. It may be noted that the petitioners, have themselves attempted to self-adjudicate the required stamp duty and have paid, on 29.07.19, a stamp duty of Rs 2,200/-, describing the HMA as a “bond”. On 10.06.2020, the petitioners further purchased 11 e-stamps for Rs. 200/- each, describing the HMA as an ‘agreement’ under article 5(j). Therefore, it falls upon the Court, under the stamp act to review the nature of the agreement in order to ascertain the stamp duty payable. From the above it is clear, that stamp duty has been paid, whether it be insufficient or appropriate is a question that maybe answered at a later stage as this court cannot review or go into this aspect under Section 11(6). If it was a question of complete non stamping, then this court, might have had an occasion to examine the concern raised in N. N. Global (supra), however, this case, is not one such scenario.”

(emphasis supplied)

20. In the case in hand, the partnership deed is stamped. Whether it is sufficiently stamped or not, is a question that can be answered at a later stage and shall not be a bar for this Court to consider the present petition.

21. Hence, the submission of learned counsel for the respondents is rejected.

22. Having said that, the next question I intend to consider is the plea of the learned counsel for the respondents that this Court does not have the jurisdiction to entertain this petition, inasmuch as; (i) the subject matter of the dispute is with regard to a property situated in State of Rajasthan; (ii) partnership deed under which the petitioners are



invoking the arbitration was signed in the State of Rajasthan; (iii) the registered office of the partnership firm was within the territory of Rajasthan. In the absence of parties agreeing to the seat of arbitration, it is the State of Rajasthan where the cause of action has arisen and the petition of this nature need to be filed in the High Court of Rajasthan.

23. This submission of the learned counsel for the respondents is opposed by Mr. Sharma by stating that the respondents are residents of Delhi and one of the bank account of the partnership firm was in a bank situated in Delhi.

24. He has heavily relied upon the judgment of a Coordinate Bench of this Court in the *Narendra Kumar Saxena v. Neerja Saxena, Arb. Pet. 365/2021*. I must at this stage state that the judgment on which reliance has been placed by Mr. Sharma in *Narendra Kumar Saxena (supra)* is in Appeal before the Supreme Court in *Neerja Saxena v. Narendra Kumar Saxena* in *SLP No. 18843/2021*. As the counsel for the parties have argued the matter and the Supreme Court in the case of *M/s Shree Vishnu Constructions v. The Engineer in Chief Military Engineering Service & Ors., Special Leave Petition (C) No. 5306/2022*, has directed the High Courts to ensure that all pending applications under Sections 11(5) and 11(6) of the Arbitration Act and / or any other applications either for substitution of arbitrator and / or change of arbitrator, which are pending for more than one year from the date of filing, must be decided within six months from May 19, 2022, I deem it appropriate to hear and decide this petition.

25. The parties in the above judgment *Narendra Kumar Saxena (supra)* are also parties in this case (with almost identical facts) wherein



the Court, noting the fact, that two out of three properties are situated in Delhi, has held, that this Court has jurisdiction to entertain the petition and appointed an Arbitrator.

26. Suffice to state, the judgment is distinguishable, inasmuch as in the case in hand the subject matter of the dispute is with regard to one property which is situated at Alwar, Rajasthan. It is a settled law in terms of the judgment of the Supreme Court in the case **BGS SGS Soma JV v. NHPC Ltd., (2020) 4 SCC 234**, wherein the Supreme Court held that where the parties have not provided the seat of arbitration, the Court would have to determine the seat having regard to Section 2(1)(e) of the Act of 1996 read with Section 16 to 20 of the Code of Civil Procedure, 1908. The Section 16 of the CPC stipulates the Court where the suits can be instituted, that too relatable to an immovable property which includes a suit for the determination of any right or interest in immovable property. It provides the same shall be instituted in the Court within the local limits of whose jurisdiction the property is situated. So, the reliance placed by Mr. Sharma on the judgment shall have no applicability in the facts of this case and as such would not come to his aid.

27. The plea of the learned counsel for the petitioner was also that the respondents are residents of Delhi and the partnership firm had maintained a bank account in Delhi is not appealing, as the same would not determine jurisdiction, as the immovable property is situated in Alwar.

28. Since, the learned counsel for the petitioners has relied upon only one judgment in the case of **Narendra Kumar Saxena (supra)**, in



view of the aforesaid conclusion, the present petition is not maintainable in this Court and the same is dismissed, without going into other submissions made by the learned counsel for the parties as any finding in that regard would prejudice either of the parties. Liberty is with the petitioners to seek such remedy as available in law. No costs.

V. KAMESWAR RAO, J.

AUGUST 29, 2022/ds/aky

