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

Decided on: 15.11.2022

+ **ARB.P. 683/2015**

ANIL GOEL

..... Petitioner

Through: Mr. Ajay Verma, Senior Advocate
with Mr. Ishaan Verma, Ms. Diviani
K. Verma & Mr. Armaan Verma,
Advocates.

versus

SATISH GOEL

..... Respondents

Through: Mr. Sacchin Puri, Senior Advocate
with Mr. Gurmeher S. Sistani, Mr.
Aayush Goel, & Ms. Nidhi Rana,
Advocates for R-1.
Ms. Kanika Agnihotri, Mr. Rohan
Anand, Ms. Snehal Kaila & Ms.
Yashodhara Gupta, Advocates for R-
2.
Mr. Praveen K. Sharma & Mr. Sahil
Nagpal, Advocates for Sachin Goel.

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CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

JUDGMENT

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 [hereinafter, "the Act"] arises out of a Memorandum of Understanding dated 12.11.2014 [hereinafter, "MoU"]. It appears from a reading of the MoU that it was intended to

settle issues between two brothers- the petitioner and the respondent No.1 herein-and members of their family with regard to division of certain businesses and properties. Regrettably, that salutary objective has not been fulfilled and parties are before this Court, disputes having arisen at the stage of appointment of an arbitrator.

2. During the pendency of proceedings in this Court, several efforts at settlement, including by mediation and through the intervention of the Court, have been made but they have unfortunately been unsuccessful.

A. Factual Background

3. The petitioner and the respondent No.1 are brothers. They are referred to in the MoU as “Party of Part I” [Satish Goel, respondent No.1] and “Party of Part II” [Anil Goel, petitioner]. However, it is undisputed that several other signatures also appear on the MoU. The petitioner’s wife, Mrs. Harish Goel and his two sons, Mr. Sumeet Goel and Mr. Sanjay Goel, as well as the wife of respondent No.1, Mrs. Vinnu Goel, his son, Mr. Sachin Goel and daughter-in-law, Mrs. Vanita Goel, have signed the MoU, both at the end of the MoU and at the foot of each page. The signatures of the parties and the aforesaid members of their immediate family also appear on a list of properties annexed to the MoU. The brothers have three sisters, Ms. Indu Goyle, Ms. Veena Gupta and Ms. Madhu Bansal. The signatures of Veena Gupta (since deceased) and her husband Mr. Vishwinder Gupta appear as witnesses to the MoU. As there is some controversy as to the capacity in which members of the family of petitioner and respondent No.1 have signed the MoU, I refrain at this stage from describing them

as “parties” to the MoU. The members of the family will be referred to by their first names for ease of reference. It may be mentioned that Satish and Vinnu also have a daughter, Ms. Praneeta Shamnath, who is not a signatory to the MoU.

4. The circumstances in which the MoU was entered into and the effect thereof are both matters of controversy between the parties. Having regard to the view that I propose to take in this petition, it is not necessary to enter into those controversies in detail. Suffice it to say that disputes having arisen under the MoU, by a legal notice dated 23.09.2015 addressed on behalf of Anil to Satish, the arbitration clause was invoked and an arbitrator was nominated as a member of the arbitral tribunal.¹ Satish was also called upon to nominate a member of the tribunal. As Satish declined to do so, by a letter dated 21.10.2015², the present petition was filed seeking appointment of an arbitrator on his behalf towards consideration of the three-member tribunal contemplated by the MoU.

B. Relevant clauses of the MoU

5. Reproduction of the following clauses of the MoU is essential for adjudication of the contentions raised by learned counsel for the parties: -

“MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (MOU) is made on this 12th day of November 2014, between:

- 1 Sh. Satish Goel son of Late Sh. L.N. Goel, hereinafter referred to as Party of Part I, and**

¹ Legal notice dated 23.09.2015 sent by Anil to Satish at Document-13 of the petitioner’s list of documents.

² Satish’s reply dated 21.10.2015 to Anil’s legal notice dated 23.09.2015 at Document-14 of the petitioner’s list of documents.

2 **Sh. Anil Goel son Late sh. L.N. Goel, hereinafter referred to as Party of Part II.**

Whereas Sh. Satish Goel and Sh. Anil Goel are both brothers and have been carrying out business jointly since 1970, when Sh. Anil Goel left Delhi and joined the business with Sh. Satish Goel.

Both the parties have, since 1970, jointly incorporated and built up companies and immovable properties consisting of land and buildings and other movable assets like Shares, PPF, jewellery, Silverware, Life insurance policies. The movable assets will be as per the books of accounts as on 31st March 2011.

Both the parties have today decided to divide the companies and movable and immovable properties, equally amongst themselves, in the following manner.

In order to divide the assets, both the parties have decided on the following:

1 COMPANIES:

The various companies would be divided as under:

xxxx

xxxx

xxxx

2 IMMOVABLE PROPERTIES

The immovable properties owned by both the parties and their family members, which are a part of this MOU are listed out in the annexure attached to this MOU. The properties maybe in joint names or in individual names. It is understood that these properties were acquired through joint funds and belong equally to both the parties.

It has been decided that a family settlement agreement will be drawn up which will enumerate the distribution of the properties among both the parties.

The properties will be valued by two independent valuers and the final value of the property shall be the average of both the values. This process will be started immediately and to be concluded by 15th December.

xxxx

xxxx

xxxx

It is decided among the parties that the residential houses at Neb Sarai, Delhi and Chanchani Colony Dhanbad, shall be liquidated by 31st March 2015. If the same are not liquidated by that date, the same shall be vacated by both the parties and kept vacant till their liquidation. Both these houses shall not be a part of the list of the properties to be drawn up for division among the parties as mentioned above. Both the properties as mentioned above shall be definitely liquidated by 31st March 2016 on the basis of the best offer available till that date.

MOVABLE PROPERTY

1 Jewellery

xxx

xxx

xxx

2 Other Movable Assets:

xxx

xxx

xxx

Once the division of property is decided among the parties. A family settlement agreement will be drawn up mentioning the division of the properties and necessary legal steps shall be taken to get the family settlement agreement recognized by a Court of Law.

*The parties shall take immediate steps to finalise the family settlement agreement, which is the crux of this MOU. **These are the broad parameters of the family settlement, which shall be detailed in the family Settlement agreement to be drafted.***

Both the parties have decided that all future statutory matters, in respect of the above mentioned companies and/or properties shall be jointly handled and any liability shall be jointly met.

The parties to this agreement have decided that in case of any dispute in the implementation of this MOU, the matter will be referred to a panel of three arbitrators, one arbitrator to be appointed by each of the parties and the third arbitrator to be appointed mutually by the two arbitrators.”³

³ Emphasis supplied.

C. Pleadings and submissions

6. In the present petition, as originally filed, Anil was the only petitioner and Satish was the sole respondent. However, Vinu filed an application for impleadment in the proceedings as she opposes any attempt to deal with her properties under the guise of the MoU [I.A. No. 6781/2017]. This application was allowed by an order dated 25.05.2022. By the same order, notice was also issued to Harish, Sanjay, Sumeet, Sachin, and Vanita to ascertain their stand as far as arbitration is concerned. Mr. Ajay Verma, learned Senior Counsel for the petitioner, stated in the course of hearing that he has taken instructions from Harish, Sanjay, and Sumeet and they all support the petitioner. Vinu, Sachin, and Vanita have each been independently represented. Their contentions have been somewhat at variance with each other and with the contentions advanced by Satish, except to the extent that Vanita has largely adopted the submissions of Vinu.

7. The contentions of Anil in the petition are that he and Satish have been doing business jointly since approximately 1970. From the joint business and its investments, they acquired various immovable and movable properties as well as business interests. According to Anil, although the assets of the businesses were held in the name of different family members, both brothers, directly or with their respective family members, held equal interest in the assets.

8. Anil contends that disputes arose between the families since 2010, which they sought to resolve with the intervention of other members of the family and friends. According to him, the MoU finally

came to be signed as a result of these efforts, particularly with the intervention of Sachin. It has been averred that the MoU was signed in the presence of Veena and Vishwinder as well as the parties' Chartered Accountant, Mr. Sanjiv Gupta [hereinafter, "Sanjiv"]. The principal objective of the MoU was to ensure that the families' joint assets were equally divided between the two branches. As far as the status of other signatories is concerned, Anil's averment in the petition is that the MoU was "*signed by both the parties, but to show complete unanimity and agreement, it was also confirmed by*" Harish, Sanjay, Sumeet, Vinnu, Sachin, and Vanita.⁴

9. Anil has detailed various actions purportedly taken by him and his branch of the family pursuant to the MoU, but claims that Satish and his branch of the family did not reciprocate. It is unnecessary for the purposes of the present petition to enumerate the details of these disputes. Suffice it to say that correspondence ensued between the parties and a meeting was also held with other members of the family on 14.09.2015 to attempt a resolution in terms of the MoU. As the disputes remained unresolved, Anil addressed the aforesaid legal notice dated 23.09.2015 to Satish seeking to invoke the arbitration clause and to constitute the arbitral tribunal.⁵ Satish's refusal to do so has led to the filing of the present petition, seeking appointment of an arbitrator in lieu of the arbitrator to be nominated by Satish as a member of the three-member tribunal contemplated by the MoU.

⁴ Para 9.2 of the statement on behalf of petitioner in support of the petition.

⁵ Supra (note 1).

10. Although Satish has filed a reply to the present petition, Mr. Sacchin Puri, learned Senior Advocate appearing on his behalf, did not ultimately press the objections raised. He instead conceded that the arbitral tribunal may be constituted with regard to the disputes between Anil and Satish, reserving Satish's various objections to arbitrability, interpretation of the MoU, enforceability of the MoU in view of its non-registration, and also on merits, for adjudication by the arbitral tribunal.

11. In these circumstances, the principal objections to the reference have come from Vinnu, Sachin, and Vanita.

12. In the application for impleadment filed by Vinnu, she contends that she has income from various sources which she has deployed towards the acquisition of movable and immovable assets. She is aware of disputes between her husband Satish and his brother Anil, and that some litigation between them has commenced. She claims that disputes have also arisen between Satish and Sachin, in the course of which she learnt about the MoU, which according to her seeks to divide properties which are hers alone. The application suggests that Vinnu does not recollect signing any such MoU, and an apprehension is expressed that her signature may have been obtained on a blank paper. It is also averred that she has signed documents without reading or verifying their contents as a consequence of her implicit faith on her family- including not only her son, Sachin but also Anil's son, Sanjay.

13. Based on these pleadings, Mr. Verma raised the following principal submissions: -

- a. Mr. Verma referred to the contents of the MoU to contend that both branches of the family have accepted that the family business has been carried out jointly by Anil and Satish and that the businesses and properties acquired by them are the fruits of this joint business, owned equally by both branches, regardless of nominal ownership.
- b. Mr. Verma submitted that although only the two brothers were originally sought to be made parties to the MoU, other members of their immediate family, enumerated above, signed the MoU signifying their acceptance and confirmation of the contents thereof. He drew my attention particularly to an email dated 18.11.2014 addressed by Sachin to Anil, Sumeet, and Sanjay in which Sachin stated that the MoU between Satish and Anil *“needs to be signed by”* Sanjay and Sumeet.⁶
- c. To meet Vinnu’s assertion in her application that she was not party to the MoU and had no knowledge thereof, Mr. Verma referred to two communications which suggest that she was present at a meeting held between family members for resolution of disputes in terms of the MoU. The first communication dated 12.09.2015, was addressed by Vijay Bansal, whose wife Madhu is one of the sisters of Anil and Satish.⁷ Vijay’s email refers to a meeting of “Family Elders” to be held on 14.09.2015 at Satish’s instance. It is particularly mentioned that all elders in the family, including the five

⁶ Sachin’s e-mail dated 18.11.2014 at Document-3 of the petitioner’s list of documents.

⁷ Vijay’s e-mail dated 12.09.2015 at Document-12(colly) of the petitioner’s list of documents.

siblings [Indu, Veena, Satish, Anil, and Madhu] and their surviving spouses [Vishwinder, Vinnu, Harish, and Vijay], were requested to attend the family meeting. Reference is made in this communication to the MoU drawn up by Sachin in the presence of Sanjiv, Vishwinder, and Veena, and signed by Anil, Satish and all members of the Goel family. The second communication is of 15.09.2015 and is addressed by Sachin to Vijay, Anil, Madhu and the sons of Indu and Veena.⁸ The contents of the email are relied upon particularly for a reference to the meeting being between Sachin's aunts and uncles and his "parents".⁹ It is contended that his use of the word "parents" in plural indicated that both Satish and Vinnu were present at the meeting.

- d. Mr. Verma relied upon other correspondence on record to submit that MoU has, in fact, been acted upon substantially and the benefit of the MoU has been taken by Satish and his branch of the family.
- e. With regard to the sufficiency of the invocation of arbitration by a communication addressed to Satish alone, Mr. Verma submitted that the contents of the MoU make it clear that the brothers were to represent their respective branches of the family. As such, he submitted that the notice of invocation addressed to Satish alone would suffice for a reference *qua* Vinnu, Sachin, and Vanita as well. For this purpose, Mr. Verma

⁸ Sachin's e-mail dated 15.09.2015 at Document-12(colly) of the petitioner's list of documents.

⁹ Ibid.

relied upon two judgments- one of the Supreme Court in *Anilkumar Jinabhai Patel vs. Pravinchandra Jinabhai Patel & Ors.*¹⁰ and the other of the Madhya Pradesh High Court in *Keshrimal & Ors. vs. Basantilal*¹¹.

f. Mr. Verma relied upon a judgment of this Court in *Ormaa Impex Pvt. Ltd. vs. Nissai Asb Pte. Ltd.*¹² to resist Vinnu's submission that her signature did not signify consent to the terms of the MoU. He also relied upon this Court's decision in *Sanjeev Sahni vs. Arvind Sahni & Ors.*¹³ to argue that the Court can refer a non-party to arbitration in view of a commonality of subject matter.

14. Ms. Kanika Agnihotri, learned counsel for Vinnu, submitted as follows: -

a. With regard to the scope of examination of this Court under Section 11 of the Act, Ms. Agnihotri submitted that the question of whether or not the MoU is a document obtained by fraud or undue influence, at least as far as Vinnu is concerned, is a matter which the Court is required to examine at this stage. She contended that the present arbitration proceedings having been "commenced" with the issuance of the letter of invocation on 23.09.2015¹⁴, under Section 21 of the Act, the present case is not covered by Section 11 (6A) of the Act, which came into force only on 23.10.2015. For this purpose, she relied upon the

¹⁰ (2018) 15 SCC 178.

¹¹ 1963 SCC OnLine MP 77.

¹² 1997 SCC OnLine Del 140.

¹³ Judgment dated 25.04.2019 in CS (OS) 157/2017.

¹⁴ Supra (note 1).

judgment of the Supreme Court in *Union of India vs. Parmar Construction Company*¹⁵. As a consequence, Ms. Agnihotri submitted that the validity of an agreement is a question that the Court is required to consider, as laid down by the judgments of the Supreme Court in *National Insurance Company Ltd. vs. Boghara Polyfab Pvt. Ltd.*¹⁶ and *Velugubanti Hari Babu vs. Parvathini Narasimha Rao & Anr.*¹⁷. She also cited a recent decision of this Court in *Amrish Gupta vs. Gurchait Singh Chima*¹⁸ in which *Boghara*¹⁹ was followed and an arbitral award was set aside on the ground that the arbitration agreement was vitiated by fraud.

- b. Ms. Agnihotri cited Section 7 of the Act to submit that the existence of an arbitration agreement is only between the “parties” thereto. On the facts of the present case, her submission was that Vinnu is not a party to the MoU even if it is assumed that she is a signatory thereto. She referred to the judgment of the Supreme Court in *Veena Singh (Dead) Through Legal Representative vs. District Registrar/Additional Collector (F/R) & Anr.*²⁰ and the judgment of the Bombay High Court in *Kamlabai and Ors. vs. Shantirai & Ors.*²¹ in support of her contention that mere signing of a document does not amount to due execution thereof.

¹⁵ (2019) 15 SCC 682 [paragraphs 25 to 28].

¹⁶ (2009) 1 SCC 267 [paragraph 22.1].

¹⁷ (2016) 14 SCC 126 [paragraph 8].

¹⁸ 2022 SCC OnLine Del 1116.

¹⁹ Supra (note 16).

²⁰ (2022) 7 SCC 1.

²¹ 1980 SCC OnLine Bom 152.

- c. In the present case, Ms. Agnihotri submitted that the materials on record do not support Anil's contention that Vinnu is bound by the MoU. She emphasized that none of the correspondence related to the MoU was addressed to Vinnu or sent by Vinnu. According to her, the pleadings in Vinnu's application with regard to lack of her consent for the inclusion of her personal properties in the division between Anil and Satish and/or their families is borne out by the fact that she has taken civil proceedings immediately to ensure that the MoU has no effect in respect of her properties. Ms. Agnihotri referred to a suit filed by Vinnu in this Court against Anil as well as against her own husband and son (Satish and Sachin respectively) [CS (OS) No. 371/2017], in which an interim order dated 17.08.2017 has been passed. She emphasized that Anil has made an application for reference to arbitration under Section 8 of the Act in her suit, which remains pending. She urged the Court to defer a decision in the present petition until that application is heard and decided.
- d. With regard to Vinnu's civil suit, Ms. Agnihotri referred to the Supreme Court's decision in *India Household and Healthcare Ltd. vs. LG Household and Healthcare Ltd.*²² to submit that fraud would vitiate the arbitration agreement and that the Court should not pass an order which would have the effect of violating the order of another Court.

²² (2007) 5 SCC 510.

- e. Ms. Agnihotri argued that Anil's position in the correspondence and in the pleadings in the present petition clearly indicate that, even he regarded only Satish and himself to be the "parties" to the agreement.
- f. In the absence of an invocation of the arbitration clause against her, Ms. Agnihotri submitted that the petition under Section 11 of the Act is not maintainable as against Vinu. In support of this argument, she referred to the judgments of this Court in *Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.*²³, *Active Media vs. Divisional Commercial Manager, Northern Railway*²⁴, *Bharat Chugh vs. MC Agrawal HUF*²⁵ and *P.L. Kalra vs. Braham Dutt Saini*²⁶.
- g. Ms. Agnihotri also submitted that the claims sought to be raised by Anil against her at this stage would be barred by limitation and that the MoU, taken at face value, tantamounts to an admission of illegal transactions in properties contrary to the Prohibition of *Benami* Property Transactions Act, 1988.

15. On behalf of Sachin, Mr. Praveen Sharma, learned counsel, supported the submissions of Ms. Agnihotri with regard to the nature of the MoU as a binding document on members of the family other than Anil and Satish. He characterized other family members, including Sachin, as "conforming parties", whose signature was taken to confirm the arrangement between Anil and Satish, including as to

²³ 2017 SCC OnLine Del 7228.

²⁴ 2020 SCC OnLine Del 1999.

²⁵ 2021 SCC OnLine Del 5373.

²⁶ 2013 SCC OnLine Del 2262.

the division of the properties in their names. However, Mr. Sharma contended that this could not bind the other family members to the arbitration agreement, which was between Anil and Satish alone.

16. On the terms of the arbitration clause in the MoU, Mr. Sharma submitted that reference of several parties to arbitration would be unworkable as the clause requires a panel of three arbitrators, one to be appointed by each party and the third to be appointed by the two arbitrators. He submitted that this arrangement also indicates an intention that only Anil and Satish would be “parties” to the arbitration agreement.

17. Mr. Sharma relied upon the decision of the Supreme Court in *Bihar State Mineral Development Corporation and Anr. vs. Encon Builders (I) (P) Ltd.*²⁷ to submit that a consensus between the parties is required before reference to arbitration, which according to him is missing in the present case.

18. Mr. Samit Khosla, learned counsel appearing for Vanita, adopted the submissions of Ms. Agnihotri on all counts.

19. In rejoinder, Mr. Verma submitted as follows: -

- a. Mr. Verma disputed Ms. Agnihotri’s contention that questions of fraud and validity of the arbitration agreement must be examined by the Court in every case, even in the legal regime antecedent to the insertion of Section 11 (6A) into the Act. He submitted that the Supreme Court in *Bharat Rasiklal Ashra vs. Gautam Rasiklal Ashra & Anr.*²⁸ laid down the conditions in

²⁷ (2003) 7 SCC 418.

²⁸ (2012) 2 SCC 144 [paragraph 17].

which such an examination was required. In case of an agreement which has been partly performed - as has the MoU, according to Mr. Verma - he submitted that these questions are not required to be examined at this stage and are, in fact, false and vexatious claims to defeat the chosen adjudicatory forum of arbitration. Mr. Verma disputed Ms. Agnihotri's reliance on *Veena Singh*²⁹ to draw a distinction between being a signatory to an agreement and execution thereof, on the ground that the judgment was rendered in the specific context of the provisions of the Registration Act, 1908. Mr. Verma referred to the judgment of the Supreme Court in *Bihar State Electricity Board, Patna & Ors. vs. Green Rubber Industries and Ors.*³⁰, and two judgments of this Court in *Ormaa Impex*³¹, and *Benara Bearings & Pistons Ltd. vs. Mahle Engine Components India Pvt. Ltd.*³² in this connection.

- b. Mr. Verma urged the Court to decide these questions in the context of the character of the MoU as a family settlement. He submitted that the considerations for assessment of the validity or effect of a family settlement are very different from those which might prevail in other transactions. He commended to the Court the approach approved by the Supreme Court in a line of decisions with regard to family settlements such as *Kale & Ors.*

²⁹ Supra (note 20).

³⁰ (1990) 1 SCC 731.

³¹ Supra (note 12).

³² 2017 SCC OnLine Del 7226.

*vs. Deputy Director of Consolidation & Ors.*³³ and *Hari Shankar Singhania & Ors. vs. Gaur Hari Singhania & Ors.*³⁴.

c. Relying upon the decisions rendered in *Kale*³⁵ and *Hari Shankar Singhania*³⁶, Mr. Verma submitted that the invocation of the arbitration clause in the present case by a communication addressed to Satish alone ought not to be taken as a technical defence to the reference by other members of the family who were also made parties to the MoU. He cited the decisions of the Supreme Court in *Appasaheb Peerappa Chamdgade vs. Devendra Peerappa Chamdgade & Ors.*³⁷, *K.V. Narayanaswami vs. K.V. Ramakrishna Iyer & Ors.*³⁸, and *Mudi Gowda Gowdappa Sankh vs. Ram Chandra Ravagowda Sankh*³⁹ and the judgments of this Court in *Amit Johri vs. Deepak Johri & Ors.*⁴⁰ and *Sanjeev Sahni*⁴¹ with regard to characteristics of various forms of joint family properties. With specific reference to the context of arbitral proceedings, Mr. Verma referred to the Supreme Court's decision in *Anilkumar Jinabhai Patel*⁴², the decision of this Court in *S.N.P. Punj vs. V.P. Punj & Ors.*⁴³ and the decision of the Madhya Pradesh High Court in *Keshrimal*⁴⁴ to submit that the heads of the groups of the family have a

³³ (1976) 3 SCC 119.

³⁴ (2006) 4 SCC 658.

³⁵ Supra (note 33).

³⁶ Supra (note 34).

³⁷ (2007) 1 SCC 521 [paragraphs 9 and 12].

³⁸ AIR 1965 SC 289 [paragraph 15].

³⁹ (1969) 1 SCC 386 [paragraph 6].

⁴⁰ 2014 SCC OnLine Del 822.

⁴¹ Supra (note 13).

⁴² Supra (note 10).

⁴³ 2009 SCC OnLine Del 484.

⁴⁴ Supra (note 11).

primary role, which renders the invocation of arbitration addressed to Satish sufficient for the purposes of the Act.

D. Analysis

20. On the basis of the aforesaid submissions, I first take up the question of whether any persons other than Anil and Satish can be referred to arbitration in the present petition in the context of the invocation letter dated 23.09.2015⁴⁵ and the averments of the parties in the present case.

21. At the outset, it is clear from a reading of Section 11 of the Act that the appointment of arbitrators is ordinarily to be made by the parties or in accordance with the procedure agreed by the parties. The intervention of the Court under Section 11 of the Act arises only when the parties are unable to agree on an appointment or the procedure otherwise fails. In addition to the aforesaid question of invocation of the arbitration clause for purposes of Section 11, an ancillary question arises as to whether an arbitral proceeding can at all be commenced against other family members without a notice addressed to them in terms of Section 21 of the Act.

22. In the present case, the parties have, in the MoU, signified their intention to appoint a three-member tribunal, of which two arbitrators are to be appointed by the parties and a third arbitrator appointed by the nominated arbitrators. The plea with which Anil has approached this Court is that he called upon Satish, the opposing party to nominate an arbitrator which Satish has failed to do. For this reason, the relief sought is for the Court to appoint an arbitrator on behalf of Satish and

⁴⁵ Supra (note 1).

for a consequent reference to the tribunal constituted in terms of the MoU.

23. The significance of the letter of invocation in the context of proceedings under Section 11 of the Act has been emphasized by the Supreme Court in *Bharat Sanchar Nigam Ltd. & Anr. vs. Nortel Networks (India) (P) Ltd.*⁴⁶ as follows:-

*“15. It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days from issuance of the notice invoking arbitration. **In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.**”⁴⁷*

24. Four judgments of coordinate benches of this Court on this point have been placed by Ms. Agnihotri: -

- a. In *P.L. Kalra*⁴⁸, the Court was considering an application under Section 11 of the Act. The Court relied upon the judgment in *Kailash Prajapati vs. Citicorp Finance (I) Ltd.*⁴⁹ to hold that the petition was not maintainable on account of the petitioner's failure to issue mandatory notice to the respondent prior to the filing of the petition under Section 11 of the Act.
- b. In *Alupro*⁵⁰, the Court held that a failure to serve notice invoking the arbitral proceedings under Section 21 of the Act would vitiate the arbitral proceedings, even to the extent that the award would be set aside. The Court came to the conclusion

⁴⁶ (2021) 5 SCC 738.

⁴⁷ Emphasis supplied.

⁴⁸ Supra (note 26).

⁴⁹ 2012 SCC OnLine Del 834.

⁵⁰ Supra (note 23).

that the notice under Section 21 is mandatory for several reasons, including to ensure that the procedure for appointment of the arbitrator contemplated by the agreement is followed and for a determination of the scope of disputes requiring adjudication. The relevant observations of the Court in this regard are as follows: -

“26. Thirdly, and importantly, where the parties have agreed on a procedure for the appointment of an arbitrator, unless there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure as envisaged in the arbitration clause has been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties. There has to be a consensus. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

28. Lastly, for the purposes of Section 11(6) of the Act, without the notice under Section 21 of the Act, a party seeking reference of disputes to arbitration will be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. The trigger for the Court's jurisdiction under Section 11 of the Act is such failure by one party to respond.

30. Considering that the running theme of the Act is the consent or agreement between the parties at every stage, Section 21 performs an important function of forging such consensus on several aspects viz. the scope of the disputes, the determination of which disputes remain unresolved; of which disputes are time-barred; of identification of the claims and counter-claims and most importantly, on the choice of arbitrator. Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the claimant invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, without such notice, the arbitration proceedings that are commenced would be unsustainable in law.”⁵¹

⁵¹ Emphasis supplied.

c. In *Active Media*⁵², a petition under Section 11 of the Act was dismissed for want of a proper notice invoking arbitration, following the judgment in *Alupro*⁵³ and a judgment of the Division Bench of Madras High Court in *Indus Ind Bank Ltd. vs. Mulchand B. Jain*.⁵⁴

d. In *Bharat Chugh*⁵⁵, an ongoing arbitration was terminated on the ground that notice under Section 21 had not been given.

25. In *Anacon Process Control Pvt. Ltd vs. Gammon India Ltd.*⁵⁶, the Bombay High Court has also held that no order under Section 11 of the Act can be passed in the absence of a valid invocation of arbitration under Section 21 thereof.

26. It is in the context of these judgments that we must read the letter of invocation and the pleadings in the present case.

27. The letter of invocation dated 23.09.2015 was addressed by learned counsel for the petitioner to Satish alone.⁵⁷ The contents of the letter, reproduced below, are relevant to determine whether it can be treated as an invocation against other members of Satish's family also, as urged by Mr. Verma: -

"Dear Sir,

Under instructions from and on behalf of our client, Mr. Anil Goel, s/o late Mr. L.N. Goel, r/o 154, Neb Sarai, IGNOU Road, New Delhi 110068, we hereby serve upon you the following notice:
1-Our client and you are brothers and have been doing business jointly since around 1970. From the joint business, joint investments and other joint actions, our Client and you have over

⁵² Supra (note 24)

⁵³ Supra (note 23).

⁵⁴ 2013 SCC OnLine Mad 555.

⁵⁵ Supra (note 25)

⁵⁶ 2016 SCC OnLine Bom 10076.

⁵⁷ Supra (note 1).

the years jointly acquired various movable and immovable properties besides business/business interest.

2-With differences having arisen between our Client and you, through the intervention of common family friends and relatives, a Memorandum of Understanding dated November 12, 2014 ("MOU") was arrived at between our Client and you.

xxxx

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xxxx

4-However, despite repeated requests from our Client, you have failed to act in a similar manner. In this respect, our Client as a last resort communicated various issues by his email dated 04.08.2015 which may kindly be considered as part hereof and a copy of the same is annexed hereto as Annexure-1. By the said email, our Client, inter alia, called upon you to act in terms of the MOU and do all such deeds and things as were required to fully implement the MOU as well as remove all irritants which you were creating with respect to the various joint businesses and properties.

5-Despite the earnest and fervent request of our Client, you have failed to take any action or come forward to implement the MOU and resolve all disputes and differences, inter alia, arising from your failure and recalcitrance to implement the MOU.

xxxx

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7-In these circumstances, as disputes and differences relating to the implementation of the MOU between our Client and you have not been resolved due to your recalcitrance, our Client has no option but to, and does by this Notice, hereby invoke arbitration pursuant to the Arbitration Clause in the MOU which is to the following effect:

"The parties to this agreement have decided that in case of any dispute in the implementation of this MOU, the matter will be referred to a panel of three arbitrators, one arbitrator to be appointed by each of the parties and the third arbitrator to be appointed mutually by the two arbitrators."

8-Our Client hereby appoints Justice (retd.) Anil Dev Singh as the Arbitrator to be appointed by him. You are hereby called upon to appoint your Arbitrator immediately so that both arbitrators can appoint the third arbitrator.

9-Kindly note that in the event you fail to act, our Client shall be constrained to approach the Hon'ble High Court of Delhi for appointment of an Arbitrator on your behalf, which proceedings shall be at your risk as to cost and consequence."

28. It may be noted that this communication makes no reference to any member of the family other than Anil, on whose behalf it was

sent, and Satish, to whom it was sent. The contents of the communication clearly suggest that Anil's allegations are against Satish alone and that the MoU was between both of them. With regard to the appointment of the arbitrator also, a demand is made upon Satish and Satish is cautioned of the consequence of non-compliance.

29. The petition filed before this Court also proceeds on the same basis. Satish alone was made a party to the petition and the petition is prefaced by a table which includes the following assertions:-

2.	<i>Name & Address of Applicant</i>	<i>Mr. Anil Goel</i> <i>s/o Late Mr.</i> <i>L.N. Goel</i> <i>r/o 154, Neb</i> <i>Sarai, IGNOU</i> <i>Road, New</i> <i>Delhi-110068</i>
3.	<u>Name & Addresses of Other Parties to Arbitration Agreement</u>	<u>Mr. Satish Goel</u> <i>s/o Late Mr.</i> <i>L.N. Goel</i> <i>r/o 154, Neb</i> <i>Sarai, IGNOU</i> <i>Road,</i> <i>New Delhi-</i> <i>110068</i>
4.	<i>Name of arbitrator, if any, already appointed by the parties</i>	<i>Justice (retd.)</i> <i>Anil Dev Singh</i> <i>has been</i> <i>appointed as</i> <i>the Arbitrator</i> <i>by Petitioner.</i> <u>Respondent</u> <u>has failed to</u> <u>appoint his</u> <u>arbitrator</u> <i>and</i> <i>the third</i> <i>arbitrator who</i>

		was to be appointed by the said arbitrators could not be appointed. ⁵⁸
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In the supporting statement affirmed by the petitioner, the following averments are relevant: -

“2. Petitioner and Respondent are brothers and have been doing business jointly since around 1970. From the joint business, joint investments and other joint actions, Petitioner and Respondent have over the years jointly acquired various movable and immovable properties besides business/business interest. For family purposes, however, most of the businesses/properties were nominally in the names of different family members of both the parties, but both brothers, directly or with their respective family members held equal holdings/interests in such properties.

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4. Due to many unwarranted actions of Respondent/his family, there was complete stoppage of the parties' 4-decade old coal related business in West Bokaro, Hazaribagh, Jharkhand, with Tata steel, which was the core family business which both of parties had set up and which prospered because of their hard labour.

*5. **Petitioner repeatedly requested Respondent for amicably resolving all issues** between them so that not just the good name of their family could be protected but also their respective interests could be protected.*

xxxx

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*8. Fortunately, in November, 2014, due to the intervention of family and common friends, and the intervention of Mr. Sachin Goel, the son of Respondent, to amicably resolve the disputes between the two branches of the family, in the presence of the parties' Chartered Accountant, Mr. Sanjiv Gupta, and the sister and brother-in-law of the parties, **an agreement was arrived at between the parties** after a marathon session of nearly 12 hours lasting till late in the night, which was recorded in Memorandum of Understanding dated 12.11.2014 ("MOU") (Annexure 1 hereto) as prepared by and typed by the Chartered Accountant, Mr. Sanjiv Gupta. Four (4) originals of the MOU were so signed. In fact, Respondent's son kept making changes to various drafts of the*

⁵⁸ Emphasis supplied.

MOU in his own hand and it was Respondent/his son who desired the arbitration clause therein.

xxxx

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9.2 The MOU was signed by both the parties, but to show complete unanimity and agreement, it was also confirmed by the various family members of the parties who included the following:

Petitioner

Wife (Mrs. Harish Goel)

2 sons (Mr. Sanjay Goel and Mr. Sumeet Goel)

Respondent

Wife (Mrs. Vinnu Goel)

Son (Mr. Sachin Goel)

Daughter-in-law (Mrs. Vanita Goel)

xxxx

xxxx

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*23. Petitioner, in compliance with Arbitration clause of the MOU, through the said notice dated 23.9.2015 also appointed Justice (retd) Anil Dev Singh as the Arbitrator to be appointed by him and **made written demand on Respondent to appoint his Arbitrator immediately so that both arbitrators can appoint third arbitrator in the terms of Arbitration clause. It was clarified that if Respondent failed to act, Petitioner would be constrained to approach the court for appointment of an arbitrator on his behalf.**"*⁵⁹

30. Anil's pleadings in this petition also thus proceed on the basis that only he and Satish were *parties* to the arbitration agreement. It is for this reason that the invocation letter was neither addressed to any other person, nor was any other person sought to be impleaded in this petition. Although Vinnu was impleaded at her own instance by the order dated 25.05.2022, she stated in the application that she wished to oppose the petition on the ground that she is not a party to the MoU at all and her personal properties could not be subjected to division. The arbitration petition has not been amended to incorporate any pleadings against her. The other members of the family were issued notice to

⁵⁹ Emphasis supplied.

ascertain their stand on the question of reference in the hope that a composite adjudication of disputes between the parties may be possible. That hope has, unfortunately, remained unfulfilled. Be that as it may, it cannot be disputed that no letter of invocation of arbitration was addressed to any of them.

31. In such circumstances, it is not possible to refer any parties other than Anil and Satish to arbitration in these proceedings. The mandatory nature of a notice invoking arbitration has been emphasized in the aforesaid judgments. Such a notice must be addressed to the party against whom arbitration is sought, both for the fulfilment of Section 21 of the Act, and a condition precedent to the exercise of jurisdiction under Section 11 of the Act.

32. The decisions cited by Mr. Verma do not persuade me to conclude that the invocation addressed to Satish was sufficient to bind other members of Satish's branch of the family. Turning first to the judgments which have been rendered in the context of the Arbitration Act, Mr. Verma placed considerable reliance upon the view taken by the Supreme Court in *Anilkumar Jinabhai Patel*⁶⁰. The Court was concerned with a challenge to an arbitral award, which had been dismissed by the High Court as time barred. The award arose out of disputes between brothers. One of the contentions raised in appeal was that the arbitral award had not been served upon the family members of one of the brothers, and the period of limitation for the setting aside of the award had not, therefore, commenced. The Court rejected this contention for the following reasons:-

⁶⁰ Supra (note 10).

“24. Award dated 7-7-1996 was received by Anilkumar Patel for himself and on behalf of his family members. In interim MoU dated 29-6-1996, Anilkumar Patel signed for self and as a power-of-attorney holder for his wife and his all sons and daughter-in-law. Challenging the award dated 7-7-1996, Anilkumar Patel and his family members have filed a single petition under Section 34 of the Act. Likewise they have also filed a single petition for amending Arbitration Petition No. 202 of 2005. Anilkumar Patel, being the head of his family, was a person directly connected with and involved in the proceeding and was also in control of the proceeding. Being head of the family, Anilkumar Patel would have been the best person to understand and appreciate the arbitral award and take a decision as to whether an application under Section 34 of the Act was required to be filed or not. In such facts and circumstances, in our considered view, service of arbitral award on Anilkumar Patel amounts to service on the other Appellants 1(a) to 1(d) and Respondent 10 and they cannot plead non-compliance with Section 31(5) of the Act.”⁶¹

This judgment is distinguishable on facts as Anilkumar, in fact, held a power of attorney for his wife, sons, and daughter-in-law and had also conducted the arbitration proceedings on behalf of all his family members.⁶² In the present case, in contrast, there is no basis to come to the conclusion that Satish was authorized to receive or act upon a request for arbitration on behalf of his family members.

33. In the judgment of the Madhya Pradesh High Court in *Keshrimal*⁶³, disputes arose in the context of an award given by two arbitrators instead of four, to whom it was referred. The Division Bench rejected the contention on behalf of the sons of one of the parties, who claimed not to have assented to such a course. The Division Bench found that the heads of the branches of the family were competent to refer to the disputes ***“as to the division of their***

⁶¹ Emphasis supplied.

⁶² Supra (note 10) [paragraphs 4 and 24].

⁶³ Supra (note 11).

joint family property to arbitration of only two arbitrators in place of four”⁶⁴. The High Court held that a *karta* of a joint family can make a valid reference to arbitration as he would represent the interest of other members of his branch with regard to the division of joint family property. This judgment too is of little assistance in the present case, where the characterisation of the property as joint family property is disputed and the relief sought is of reference to arbitration under Section 11 of the Act. It may also be noted that it is nobody’s case that the present disputes are in respect of property of a Hindu Undivided Family headed by a *karta*.

34. The Division Bench of this Court in *S.N.P. Punj*⁶⁵ bound the daughter of one of the parties to the award on the ground that she had given a power of attorney in favor of her father, which had not been revoked. The Court found that the parties had put properties purchased in the names of their children in the common hotch-potch of properties available for division. These factors are absent in the present case. Further, in *S.N.P. Punj*⁶⁶, the question arose in terms of setting aside of the award and the question of compliance with Section 11 of the Act did not arise.

35. The judgment in *Sanjeev Sahni*⁶⁷ was rendered in an application under Section 8 of the Act. A non-signatory to the arbitration agreement was referred to arbitration in the context of partition of family property on the ground of direct commonality of subject

⁶⁴ Page 310 of the judgment [emphasis supplied].

⁶⁵ Supra (note 43).

⁶⁶ Ibid.

⁶⁷ Supra (note 13).

matter. As noted above, the issue of whether the properties in the present case are family properties is very much the subject matter of the proposed adjudication and the existence and validity of the arbitration clause as against parties other than Satish is also disputed. In such a context, I am of the view that this judgment would not apply.

36. The judgments in *K.V. Narayanaswami*⁶⁸, *Mudi Gowda*⁶⁹, and *Appasaheb*⁷⁰, as well as the judgment of this Court in *Amit Johri*⁷¹, deal with the nature of joint family property and its various characteristics. While these issues may be relevant to the adjudication of the substantive disputes between the parties, the question of compliance with Sections 11 and 21 of the Act cannot be decided on a *presumption* in favour of Anil that the properties in question are joint family properties, capable of division in the manner provided. This is the very point of dispute which has necessitated the reference in the first place.

37. On point of principle also, I cannot accept Mr. Verma's suggestion that the requirement of a proper invocation of arbitration against other parties is a technical objection which ought to be overlooked in line with the objectives articulated in *Kale*⁷², *Hari Shankar Singhania*⁷³, etc. This line of decision emphasises that technical or procedural objections to implementation of family settlements should be rejected in order to give effect to an instrument

⁶⁸ Supra (note 38).

⁶⁹ Supra (note 39).

⁷⁰ Supra (note 37).

⁷¹ Supra (note 40).

⁷² Supra (note 33).

⁷³ Supra (note 34).

which seeks to bring peace and harmony within a family. Having regard to the purposes of a notice of invocation, as indicated in *Alupro*⁷⁴, the requirement of putting all individuals on notice as to the likelihood of proceedings being commenced against them, and being called upon to participate in the constitution of the arbitral tribunal cannot be said to be a “technical” objection.

38. For the aforesaid reasons, I am of the view that only Satish and Anil can be referred to arbitration in the present proceedings. In view of this conclusion, it is not necessary to examine any other contention of the parties. Such contentions are left open for adjudication in appropriate proceedings. It is made clear that this judgment has been rendered only in the context of appointment of an arbitrator under Section 11 of the Act.

E. Conclusion

39. The petition is, therefore, disposed of with the following directions:-

- a. The petitioner, Anil Goel and respondent No.1, Satish Goel are referred to arbitration for settlement of their disputes under the Memorandum of Understanding dated 12.11.2014. In the course of hearing, they indicated that they wish to nominate Hon’ble Mr. Justice Mukul Mudgal, former Chief Justice of the Punjab and Haryana High Court, and Hon’ble Dr. Justice M.K. Sharma, former Judge of the Supreme Court of India, as their respective nominees on the arbitral tribunal. The learned

⁷⁴ Supra (note 23).

arbitrators are requested to nominate the third arbitrator in accordance with the agreement, failing which either party may approach this Court in accordance with law.

- b. The remuneration of the learned arbitrators will be computed in accordance with the Fourth Schedule to the Act.
- c. It is made clear that all the rights and contentions of Anil and Satish including with regard to arbitrability, interpretation and enforceability of the MoU, and on merits are reserved for adjudication by the arbitral tribunal.
- d. As far as the other members of the family are concerned, all questions with regard to reference to arbitration *qua* them are left open for adjudication in appropriate proceedings, including in CS (OS) 371/2017 filed by respondent No.2-Ms. Vinnu Goel. It is made clear that the present decision has been rendered on the specific requirements of Section 11 of the Act.
- e. In the event Anil seeks to invoke the arbitration clause in respect of any other person at this stage, the effect thereof is also left open for consideration in appropriate proceedings.

40. There will be no order as to costs.

PRATEEK JALAN, J

NOVEMBER 15, 2022/‘vp’