

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

911 ARBITRATION APPLICATION NO.4 OF 2023

BHUSHANRAJ DEVRAJ MUKHATE
VERSUS
ANNASAHEB SUNDARRAO JOGDAND

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Advocate for Applicant : Mr. Swapnil S. Patankar h/f J. P. Legal
Associates.

Advocate for Respondent Nos.1, 2 & 4 : Mr. Harish S. Adwant
h/f Mr. S. V. Adwant.

Arbitrator : Mr. R. M. Borde, Former Judge of this Hon'ble
Court.

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CORAM : S. G. MEHARE, J.

DATE : 19.10.2023

PER COURT :-

1. The petitioner has filed this application under Section 11 of the Arbitration and Conciliation Act 1996 (Arbitration Act for short) for the appointment of the sole Arbitrator.

2. The petitioner is the partner of the partnership firm M/s "Aurangabad Industrial Park". In the partnership deed, an arbitration clause states that if any dispute arose, it would be referred to the sole Arbitrator. Further, the petitioner contended that the respondent did not give him the profit and interest. The respondents are disposing of the property of the firm without the consent of the other partners. The dispute

cropped up for the above reasons. The petitioner wishes to dissolve the firm and settle the accounts. Since the respondent did not agree to appoint an Arbitrator as per the Arbitration clause, a notice dated 17.02.2023 under Section 21 of the Arbitration Act was issued to the respondents. The notice was served but not replied. Hence, he approached this Court under Section 11 of the Arbitration Act. On notice, the respondents appeared.

3. Learned counsel Mr. Adwant for respondent Nos.1, 2 and 4 has opposed the application, contending that in the notice dated 17.02.2023, the applicant did set out or disclose the particular disputes. Hence, the respondents could not know the exact disputes that were cropped up. If the particular disputes were mentioned in the notice, they would be able to know the exact nature of the dispute raised by the petitioner. Some of the disputes might be time-barred. The notice is not clear to understand the nature of the dispute cropped up. The petitioner had filed an application under Section 9 of the Arbitration Act before the learned District Judge for interim measures. In that application, the private properties of the respondents were also included. The notice invoking

arbitration is not strictly as per Section 21 of the Arbitration Act.

4. He relied upon the case of *Alupro Building Systems Pvt. Ltd. Vs. Ozone Overseas Pvt. Ltd.*; 2017 SCC OnLine Del 7228 of High Court of Delhi. In the said case, the Delhi High Court has interpreted Section 21 of the Act, 1996 and held that “in the absence of agreement to contrary notice by claimant invoking arbitration clause preceding reference of disputes to arbitration mandatory”. He has referred to para No.30 as reproduced follows:

“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.”

5. He further relied on the case of *Bharat Chugh Vs. M. C. Agrawal HUF; 2022 SCC OnLine Del. 5373*. He also referred to the case of *Bharat Sanchar Nigam Ltd. and another Vs. M/s Nortel Networks India Pvt. Ltd.; Supreme Court Civil Appeal Nos.843-844 of 2021*, dated March 10, 2021. In the said case, it has been held that there must be a clear notice invoking arbitration setting out the “particular dispute” (including claims/amounts) which must be received by the other party within a period of three years from the rejection of a final bill, failing which, the time bar would prevail.

6. In reply, the learned counsel for the applicant would submit that in the notice, particular disputes were mentioned that no profits, interest and other benefits arising out of the partnership business were given to him. In a notice, it has been specifically brought to the notice of the respondent that the petitioner wishes to dissolve the firm and settle the accounts. Therefore, the notice was complying with Section 21 of the Arbitration Act.

7. He relied upon the case of *Duro Felguera, S. A. Vs. Gangavaram Port Limited; (2017) 9 Supreme Court Cases 729*, in which it has been held that the Court has to see whether an

arbitration agreement exists, nothing more, nothing less. It is not in dispute that there was an arbitration agreement. If the contention of the respondents is accepted, it would be difficult to get the Arbitrator appointed. Whatever disputes crop up, those may be put into the reference to the Arbitrator.

8. Perusal of the notice inviting the arbitration issued by the applicant dated 17.02.2023 reveals that he has specifically raised the dispute that no profits, interest and remuneration were paid to him. The respondents are disposing of the properties of the firm. The partnership business was for constructing the buildings and the sale purchase of the immovable properties. Lastly, he expressed that the partnership firm needs to be dissolved and accounts settled. There may be thousands of entries in the account books. So, it would be very difficult to mention the dispute about each entry in the account seeking its settlement. The account is the source to decide the profit, loss, liabilities, etc.

9. Reading the notice, there appears to be no substance in the argument of the learned counsel for the respondents that the notice was not strictly as per Section 21 of the Arbitration Act. The disputes that cropped up were from the partnership

business. In such a type of business, the terms of partnership play an important role. Considering the nature of disputes, the accounts are settled finally at the time of the dissolution of the firm. In view of the facts of the case, with due respect to the Hon'ble Supreme Court, the case of *Bharat Sanchar Nigam Ltd. (cited supra)* is not helpful to the respondents, as it is distinguishable on facts.

10. The applicant appears entitled to invoke arbitration as the respondents did not respond to his notice dated 17.02.2023. Therefore, the arbitration application deserves to be allowed. Hence, the following order:

ORDER

- (i) The arbitration application is allowed.
- (ii) Shri R. M. Borde, the Ex High Court Judge, is appointed Arbitrator under Section 11 of the Arbitration Act by consent of the parties.
- (iii) The parties to act as per the provisions of the Arbitration and Conciliation Act, 1996.
- (iv) Registry is directed to issue a letter of request to Shri. R. M. Borde, Retired High Court Judge requesting him to consent to the appointment and

to further submit the statement of disclosure within four weeks from today.

- (v) Parties to bear the fees and processing charges in accordance with the rules.

(S. G. MEHARE, J.)

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vmk/-