

Kavita S. J.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.108 OF 2023

Aakash Prahlad Khandelwal & Ors.,

...Petitioners

Versus

Rahul Vilas Nahata & Anr.,

...Respondents

Mr. Ankur Khandelwal i/b R.C. Barge, Advocate for Petitioners.

Shiplan Gaokar a/w R.P. Shirole i/b R.P. Shirole, Advocate for Respondents.

CORAM : R.I. CHAGLA, J.

DATE : 29TH NOVEMBER, 2023.

ORDER :

1. By this Arbitration Petition, the Petitioners are seeking appointment of the Arbitrator as per Clause 22 of the Partnership Deed dated 10th November, 2011 from Pune to adjudicate all the disputes by and between the Petitioners and Respondents arising out of the Partnership Deed ("Partnership Agreement") dated 10th November, 2011.

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2. The learned Counsel for the Petitioners has taken this Court

through the relevant clauses of Partnership Agreement and in particular the obligations of the Petitioners and Respondents under the Partnership Agreement. It is the contention of the Petitioners that the Financials including Bank Account of the Partnership Firm was to be operated by the Respondents as provided in Clause 13 of the Partnership Deed. Under the said Clause it is provided that the Bank Account standing in the name of the Partnership Firm will be operated by the signature of any one from Party of the first and second part viz. The Respondents herein or as mutually decided by the partners. Further, net profits / losses of the Partnership Firm are to be divided in between the partners in the manner mentioned in Clause 10 i.e. between the parties of first and second part / the Respondents herein at 16% each and parties of third to fifth parts / the Petitioners herein as 22.66%, 22.67% and 22.67% respectively.

3. The learned Counsel for the Petitioners has referred to Clause 16(c) of the Partnership Agreement which provides that each partner shall be just and faithful to the other partners in all transactions relating to the partnership and at all times give to the other partners full information and truthful explanations and accounts on all matters relating to the affairs of the partnership and

afford every assistance in their power in the carrying on the business of the partnership for their mutual advantage.

4. Clause 22 of the Partnership Agreement provides for arbitration and under which the disputes among the partners of the Partnership Firm which are touching the Partnership Agreement or construction or application thereof or any Clause or thing therein contained or any account, valuation or division of assets, debts or liabilities to be made thereunder or as to any other matter in anyway relating to the partnership business or the affairs thereof or the rights, duties or liabilities of any person under the Partnership Agreement shall be referred to arbitration in accordance with and subject to the provisions of the Indian Arbitration and Conciliation Act, 1996.

5. The learned Counsel for the Petitioner has referred to Notice dated 13th September, 2021 which had been addressed by the Advocate for the Petitioners to the Respondents wherein mention was made that the Respondents had not given any particulars of any receipts and payments including profits and surplus to the Petitioners though it was agreed to share all details and which is binding obligation as per the law. The particulars of the un-audited Balance

Sheets, Income Tax Returns have not been provided by the Respondents. Further, it is mentioned that the Petitioner had time again demanded details from the Respondents but till date had not been received by the Petitioners. It is further mentioned that since the project is complete and sold out or nearly sold out, it is now the time to take and settle the accounts and to distribute the profits with interest. It is further mentioned that it is the bounden duties of partners in the light of mutuality of rights and obligations. The Respondents have been called upon to co-operate with the Petitioners to provide the requisite information as to the financials as aforementioned.

6. The learned Counsel for the Petitioner has thereafter referred to the response of the Respondent to the notice dated 13th September, 2021 which is by their letter dated 9th October, 2021, wherein there are bear denials and it is merely mentioned that all Books of Accounts, Balance Sheet, Income Tax Returns and other documents relating to the Partnership firm have been furnished from time to time i.e. from Respondent to the Petitioners.

7. The learned Counsel for the Petitioner has referred to the Notice invoking the arbitration dated 21st December, 2022, wherein

the Demand Notice dated 13th September, 2021 has been referred to and the response thereto. Further, the non co-operation from the Respondents is mentioned. Notice is given to the Respondents calling upon them to name any suitable and mutually acceptable person as Arbitrator to resolve the dispute between the parties to the Partnership Agreement and response is expected thereof within fifteen days of this formal Notice. He has submitted that despite receipt of the Notice invoking arbitration, there is no response to the said Notice.

8. The learned Counsel for the Respondents has submitted that the Notice invoking Arbitration is not in conformity with the procedure under Section 11 and in particular the procedure laid down in Section 11(5) of the Arbitration Act. He has submitted that the Petitioner fails to nominate an Arbitrator in the said notice invoking arbitration despite Section 11(5) of the Arbitration Act providing for the same. Under Section 11(5) it is provided therein that if the parties failed to agree on the Arbitrator within 30 days from receipt of a request by one party from the other party to so agree, the appointment shall be made on an application of the party by this Court. Section 21 of the Arbitration Act provides that the

commencement of arbitral proceedings in respect of a particular dispute is on the date on which a request for that dispute to be referred to arbitration is received by the Respondent. He has submitted that Section 21 is required to be read with Section 11(5) of the Arbitration Act and that it is not merely sufficient for the Petitioner invoking arbitration to merely request for the dispute to be referred to arbitration but also nominate an Arbitrator and call upon the Respondent to agree upon such nomination within thirty days from receipt of a request.

9. The learned Counsel for the Respondent has referred to the decision of this Court in *M/s D.P. Construction Vs. M/s Vishvaraj Environment Pvt. Ltd.*¹, wherein the learned Single Judge of this Court has considered the provisions of Section 11 read with Section 21 of the Arbitration Act and in the context of whether the Applicant had in fact invoked arbitration as per the provisions. The learned Single Judge has held that the invocation of arbitration has to be absolutely clear with reference to the arbitration clause calling upon the rival party to proceed for appointment of an Arbitrator and referring the disputes to arbitration. The mere stating the claims and disputes in the Notice is not sufficient. Therefore, merely because

¹ *Misc. Civil Application (ARBN.) No.31 of 2021 dated 6th July, 2022*

there is an arbitration clause, it cannot be said this Court ought to exercise jurisdiction under Section 11 (6) of the Arbitration Act.

10. The learned Counsel for the Respondent has also referred to the decision of Delhi High Court in **Alupro Building Systems Pvt. Ltd. Vs. Ozone Overseas Pvt. Ltd.**², wherein the arbitration clause in that case had been construed. The arbitration clause in that case permitted one of the parties to choose the Arbitrator and the Court held that even then it is necessary for the party making such appointment to let the other party know in advance the name of the person it proposes to appoint. It is quite possible that such person may be 'disqualified' to act as an Arbitrator for various reasons. On receiving such notice, the recipient of the notice may be able to point out this defect and the claimant may be persuaded to appoint a qualified person. This will avoid the wastage of time in arbitration proceedings being conducted by a person not qualified to do so.

11. The learned Counsel for the Respondent also referred to the decision of this Court in **Voltas Limited Vs. Rolta India Limited**³, wherein the learned Single Judge has in Paragraph 36 held that a valid appointment of an Arbitrator requires at least a transmission of

² 2017 SCC OnLine Del 7228

³ 2010 SCC OnLine Bom 1747

the communication thereof to a concerned party. The communication must name the Arbitrator failing which it would not constitute a communication of the appointment at all. In other words it is not sufficient for a party to merely state that it has appointed an Arbitrator but will not disclose the name. The purpose of communication is then not served. An appointment which remains only in the mind or even on the records of the appointor is no appointment.

12. The learned Counsel for the Respondent has accordingly submitted that in the present case there is no communication / notice in accordance with the procedure contemplated under Section 11(5) of the Arbitration Act. Thus, it cannot be construed that there has been commencement of the arbitral proceeding and / or this Court will have jurisdiction to entertain an application under Section 11 of the Arbitration Act.

13. The learned Counsel for the Respondent has submitted that apart from the preliminary objection to the jurisdiction of this Court to entertain the present Petition under Section 11(6) of the Arbitration Act, the claim of the Petitioner is a stale claim, in view of the dispute on accounts being raised despite the accounts having

been at all times provided by the Respondents since the execution of the Partnership Agreement on 10th November, 2011. It is for the first time that notice was issued by the Advocates for the Petitioners on 13th September, 2021 expressing grievance of non-furnishing of accounts by the Respondents i.e. nearly 10 years after entering into the Partnership Agreement. He has accordingly submitted that there is no merit in the Petition filed under Section 11 of the Arbitration Act.

14. Having considered the rival submissions, there appears to be no dispute that there is an Arbitration Agreement under Clause 22 of the Partnership Deed dated 10th November, 2011 (“Partnership Agreement”). The issue raised by the Respondents is on whether there is a valid Notice invoking arbitration in conformity with Section 11(5) read with Section 21 of the Act. The contention of the Respondents is that the Notice invoking arbitration was required to nominate an Arbitrator and only upon such nomination could there have been an agreement for appointment of the nominated Arbitrator as contemplated in Section 11(5) of the Arbitration Act.

15. In considering the contention of the Respondents’ on the Notice invoking Arbitration, the provision of Section 11(5) is required

to be construed with Section 21 of the Arbitration Act. Under Section 11 (5) of the Arbitration Act it is provided that if the party fails to agree on the Arbitrator within thirty days from receipt of request of one party from the other party to so agree, an application can be made to this Court for appointment of an Arbitrator. The commencement of arbitration is provided under Section 21 of the Arbitration Act. Under that provision, the dispute will commence on the date on which a request for that dispute to be referred to arbitration is received by the Respondent. Thus, it is necessary to consider as to whether there is a request of a dispute to be referred to Arbitration in the Notice issued by the Petitioner and received by a Respondent for commencement of arbitration proceeding. It is only upon such receipt of the Notice by the Respondent that the Petitioner and the Respondent are to agree on the Arbitrator within 30 days. Section 11 (5) does not provide for the nomination of an Arbitrator in the Notice invoking Arbitration. This will depend upon the arbitration Clause in the respective Agreement and whether such nomination is to be made in the Notice.

16. From a perusal of the arbitration Clause viz. Clause 22 of the Partnership Agreement it is apparent that the nomination of an

Arbitrator by the Petitioner in the Notice is not contemplated. Further, Clause 22 is extremely wide. It provides for any dispute touching the Partnership Agreement and / or relating to the partnership business or the affairs thereof or the rights, duties or liabilities of any person under the Partnership Agreement to be referred to arbitration in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof from time to time. The Petitioners had invoked the arbitration Clause 22 through their Advocates Notice dated 24th December, 2022 and called upon the Respondents to name any suitable and mutually acceptable person as Arbitrator to dissolve the disputes between the parties through the Partnership Agreement.

17. Thus, the Petitioners by calling upon the Respondents to name any suitable and mutually acceptable person as Arbitrator is neither contrary to Section 11(5) of the Arbitration Act nor to Section 21 of the Arbitration Act. Although the notice given is of 15 days for agreeing to appointing an Arbitrator, it is an accepted position that well over 30 days had expired when the present Arbitration Petition under Section 11(6) was filed. I do not find the Notice invoking arbitration to be one which is not contemplated under Section 11(5)

of the Arbitration Act read with Section 21 of the Arbitration Act. Further, the disputes have been mentioned in the Demand Notice dated 13th September, 2021 of which reference has been made in the Notice invoking arbitration and thus, upon receipt of Notice invoking arbitration, there has been a commencement of arbitration as contemplated under Section 21 of the Arbitration Act.

18. In *M/s Meenakshi Solar Power Pvt. Ltd. Vs. M/s Abhyudaya Green Economic Zones Pvt. Ltd. and Ors.*⁴, the Supreme Court has observed that the Court at the referral stage can interfere only when it is manifest that the claims are ex-facie time-barred and dead, or there is no subsisting dispute. Further, in the context of issue of limitation period, it should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”.

19. The Respondents have contended that the claim of the Petitioners is a stale claim. However, upon perusal of the communications exchanged between the Petitioners and the Respondents, it appears that there is a dispute as to non-furnishing of

⁴ Civil Appeal No.8818 of 2022 decided on 23/11/2022

the particulars of accounts i.e. receipt and payments of including profits and surplus by the Respondents to the Petitioners though it was agreed under the Partnership Agreement to share all details and which is a binding obligation as per the law as well. The Respondents have claimed that they have time to time furnished the accounts to the Petitioners regarding the Partnership Firm but this has been disputed by the Petitioners. Thus, there appears to be a clear dispute which can be referred to arbitration under Clause 22 of the Partnership Agreement as the dispute is touching the Partnership Agreement and relating to the partnership business or affairs thereof. The decisions relied upon by the Defendant are distinguishable on the arbitration Clauses in those cases which were the subject matter therein and hence, are inapplicable in the present case.

20. Having arrived at the above findings, this Court has jurisdiction to entertain the Petition under Section 11(6) of the Arbitration Act. The disputes between the Petitioners and Respondents are in my view are clearly referable to arbitration and hence, the relief sought for in the Arbitration Petition requires to be granted. Hence the following order:

- (i) Smt. Shalini Phansalkar-Joshi (Retired Judge of this Court) is appointed as Arbitrator to adjudicate the disputes between the Petitioner and the Respondent as per Clause 22 of the Partnership Deed dated 10th November, 2011 under the provisions of Arbitration and Conciliation Act, 1996.
- (ii) The venue of arbitration shall be at Pune.
- (iii) Office to inform the Sole Arbitrator of her appointment.
- (iv) The appointed Sole Arbitrator is requested to file her disclosure statement under Section 11(8) and 12(1) of the Arbitration and Conciliation Act, 1996 within a period of three weeks from the date of receipt of intimation, with the Registrar (Judicial-I) and provides copies to the parties.
- (v) Parties to appear before the Sole Arbitrator on the date fixed by her.
- (vi) Fee applicable to the Sole Arbitrator will be in accordance with the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

(vii) Arbitration Petition is disposed of in the above terms.

(viii) There shall be no orders as to costs.

[R.I. CHAGLA, J.]