



2024:DHC:5358



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **ARB.P. 138/2023****SAROJ KHEMKA**

.....Petitioner

Through: Mr. Arun Vohra and Mr. Dilip
Kumar, Advs

versus

MUKAT BEHARI KHEMKA & ORS.

.....Respondents

Through: Mr. Anil Kumar, Adv. for R-1
and R-3

Mr. Virendra Kumar Singh, Adv. for R-2

CORAM:**HON'BLE MR. JUSTICE C.HARI SHANKAR****JUDGMENT (ORAL)**

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15.07.2024**ARB.P. 138/2023**

1. This is a petition under Section 11(6)¹ of the Arbitration and Conciliation Act, 1996² ("the 1996 Act"), seeking appointment of an arbitrator to arbitrate on the disputes between the parties.

2. The disputes arose in the context of a Partnership Deed dated 1 April 2002, between the petitioner and the respondents. The Partnership Deed contained the following clause which envisaged

¹ (6) Where, under an appointment procedure agreed upon by the parties,—
(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

² "the 1996 Act" hereinafter



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resolution of the disputes, if any, by arbitration:

“17. That in case of any dispute between the parties hereto, with regard to interpretation of the partnership deed or any other matter relating to the affairs of the partnership firm, no party shall be allowed to go to Court of law or close the business, rather the same shall be referred to Sole Arbitrator mutually agreed by the parties hereto at that time, according to and subject to the provisions of the Indian Arbitration act, 1940. Whose decision shall be binding on all parties hereto.”

3. Alleging, among other things, that Respondent 1 had not maintained true and correct accounts of the partnership firm and had diverted its business, the petitioner addressed a legal notice to the respondents on 18 November 2020, invoking Clause 17 of the Partnership Deed and seeking reference of the disputes to arbitration.

4. The petitioner suggested the name of a practicing advocate as the arbitrator.

5. Respondent 1, in his reply dated 11 December 2020, denied all allegations against him and did not condescend to reference of the disputes to arbitration.

6. The petitioner has, in these circumstances, now approached this Court under Section 11(6) of the 1996 Act, praying that the Court may appoint an arbitrator to arbitrate on the disputes.

7. Mr. Anil Kumar, learned Counsel for the respondents strongly opposes the petition. He submits that the petitioner has waived his right to invoke the arbitration clause. This, he submits, is because the petitioner earlier addressed a notice dated 23 December 2014 to the

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respondents, invoking the arbitration clause and suggested the names of two advocates to act as arbitrators. Respondent 2, in her response dated 1 January 2015, denied all allegations in the legal notice, and also claimed that there was no arbitral dispute in existence. Nonetheless, it was suggested that, if the petitioner was insistent on referring the matter to arbitration, reference be made to three Chartered Accountants, whose names were suggested by Respondent 2.

8. Consequent to the submission of this reply, Mr Anil Kumar points out that the petitioner instituted CS/118/2015 before the learned Civil Judge, seeking the very same reliefs of partition and rendition of accounts of the partnership firm which the petitioner, in this petition, seeks to be referred to arbitration. In para 12 of the plaint, the petitioner disclosed the fact that on 7 October 2014, the petitioner had served a legal notice on the respondents, which was followed by a notice dated 23 December 2014 under Section 21³ of the 1996 Act, seeking reference of the disputes to arbitration. It was sought to be submitted that, as the respondents did not respond, the petitioner was instituting the suit. Mr. Anil Kumar, further points out that, in para 13 of the plaint in that suit, the petitioner had specifically stated that the cause of action for filing the suit arose, *inter alia*, on 7 October 2014 and 23 December 2014. The prayer in the suit, he points out, is for the same relief as is now being sought in the arbitration, which is a decree of partition of the assets of the firm and furnishing true and correct accounts of the firm.

³ 21. **Commencement of arbitral proceedings.** – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be



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9. In the said suit, Mr. Anil Kumar points out that Respondent 2 filed an application under Section 8⁴ of the 1996 Act, drawing attention to the arbitration clause in the Partnership Deed and seeking reference of the disputes to arbitration. The petitioner filed a reply to the said application, staunchly opposing the prayer for referring the disputes to arbitration. Having thus opposed the prayer for referring the disputes to arbitration, when raised by Respondent 2 in the suit instituted by the petitioner, Mr. Anil Kumar's contention is that the petitioner cannot now seek to enforce the arbitration clause.

10. CS/118/2015 was ultimately dismissed by the learned Civil Judge on 7 March 2020 as withdrawn by the petitioner. The order is one of unconditional withdrawal and reads thus:

"07.03.2020

Present: Sh. Saurabh Kumar, counsel for plaintiff
Sh. Narender Kumar, proxy counsel for defendants.

Fresh v/n filed today on behalf of plaintiff.

It is submitted by counsel for plaintiff that plaintiff does not wish to proceed further with the present matter. Therefore, he may be allowed to withdraw the present matter. Separate statement as made by counsel for plaintiff is recorded.

Being satisfied, suit is hereby disposed of as withdrawn.

File be consigned to record room after due compliance.

Sd.
(Rahul Verma)

referred to arbitration is received by the respondent.

⁴ 8. **Power to refer parties to arbitration where there is an arbitration agreement. –**

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

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CJ-07(C)/THC/Delhi/07.03.2020”

11. Mr. Anil Kumar contends that, in these circumstances, the petitioner is foreclosed from invoking the arbitration clause. He relies, in this context, on paras 8, 9 and 12 of the judgment of the learned Single Judge of the High Court of the Calcutta in *Saha & Gupta Enterprise v. IOCL*⁵, which read thus:

“8. In this case, the petitioner has filed the suit in Malda Court in breach of the arbitration agreement. The first respondent, as defendant in that suit, resisted the suit by filing an application in the nature of demurrer. The first application was in furtherance of Clause 20 of the agreement. The second application, for enforcing the arbitration agreement, was also filed at a stage before the respondents herein submitted their first statement on the substance of the dispute in the suit. Section 8 does not recognise any disqualification on the part of a party setting up an arbitration agreement other than having already submitted its first statement on the substance of the dispute. The application made by the respondents herein before the Malda Court for disposal of the suit on the ground that there was an arbitration agreement appears to have been perfectly in order. It is on record that the petitioner resisted it. Upon the petitioner having resisted such application, the petitioner could no longer enforce the arbitration agreement. It would be completely opposed to public policy and, indeed, a gross abuse of the process if the petitioner were permitted to assert that it had a right to maintain the suit and thereafter change tack upon the suit having been stayed to assert that it could fall on the arbitration agreement. Even this could have been countenanced if the petitioner had offered unconditionally, and at the first instance, to withdraw the suit filed in Malda Court. This the petitioner has not.

9. Instead, the petitioner has to justify the institution of the suit, its resistance to the respondents' application for reference of the disputes to arbitration by referring to the provisions of the 1996 Act and by asserting that in making the first application for dismissal of the suit on the allegation that the Malda Court lacked authority to receive it, the respondents herein lost the right to assert the arbitration agreement at the first instance.



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12. In the other case, the Supreme Court has, in a part of the paragraph 4 of the reported judgment, referred to the scope of Section 8 of the 1996 Act and it has been held that Section 8 can be used only in furtherance of the arbitration agreement and not to resist the arbitral proceedings. There is no dispute with such proposition and the same cannot take the petitioner's case forward. In this case, the petitioner in instituting the suit evinced its intention of giving up the arbitration agreement to which it was a party; in resisting the respondents' application Under Section 8, it stood its ground. In making this application, it appeared that the petitioner had probably been better advised, but in not offering first to unconditionally withdraw the Malda suit, the petitioner is precluded from proceeding with this petition.”

12. As an alternative argument, Mr. Anil Kumar submits that the claims of the petitioner are barred by time as the partnership firm was admittedly dissolved in 2014. He submits that, even on this ground, the arbitration petition is not maintainable.

13. Mr. Virendra Kumar Singh, learned Counsel for Respondent 2 adopts the submission of Mr. Anil Kumar.

14. Responding to Mr. Anil Kumar's submissions, Mr. Arun Vohra draws my attention to para 44 of the judgment of the High Court of Bombay in *Priya Rishi Bhuta v. Vardhaman Engineers and Builders*⁶, in which it is held as under:

“44. The decision of the learned Single Judge of the Calcutta High Court in *Saha & Gupta Enterprise* would also not assist the respondent. This was a case in which the petitioner had approached the Court praying for appointment of an arbitral tribunal after he had instituted a suit before the Civil Court. In the said suit, the defendants (respondents therein) had applied for rejection of the plaint on the ground that the Civil Court did not have the jurisdiction to receive such suit relying on the forum selection clause No.20 found in the agreement. Such application was dismissed by the Civil Court. After such application was



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dismissed, the defendant/respondent applied inter alia under section 8 of the Act for the disposal or dismissal of the Civil Suit on the ground that there was an arbitration agreement between the parties and hence adjudication of the disputes under the agreement could only be by way of an arbitration. The Section 8 Application was resisted by the petitioner/plaintiff. Learned trial Judge dismissed the 38 arbap 149-21 grp.doc said application on a peculiar reasoning that Clause 19 of the agreement did not specifically mention that the disputes be referred to an arbitrator in case of termination of the contract. In these circumstances, the plaintiff having succeeded in defeating the respondent/defendant's application under section 8 of the Act, thereafter, approached the High Court praying for appointment of an arbitrator on the ground that his request for appointment of an arbitrator by the Director (Marketing) of respondent/defendant was not accepted. It is on such facts the Court rejected the petitioner/plaintiff's application for appointment of an arbitral tribunal and in so dismissing, the following observations were made:

"7. The matters relating to the institution of the Malda suit, the respondents' attempts to resist the suit and to assert the arbitration agreement, found no mention in the petition. The petitioner is as simple as they come; the arbitration agreement has been referred to, the appointing authority has been blamed for not acting with reasonable despatch and the claim in the footnote of the appointing authority having lost his jurisdiction to name an arbitrator. The fundamental principles, however, have to be remembered. For one, arbitration is consensual. Both parties have to agree for the jurisdiction of the Court to be ousted. Again, merely because there is an arbitration agreement, the jurisdiction of the Court is not to be ousted. Upon a party acting in breach of the arbitration agreement it is for the other to assert it if one acts in breach and the other that does not assert the arbitration agreement, the parties waive the arbitration agreement and the ouster of the Civil Court is washed away.

8. In this case, the petitioner has filed the suit in Malda Court in breach of the arbitration agreement. The first respondent, as defendant in that suit, resisted the suit by filing an application in the nature of demurrer. The first application was in furtherance of Clause 20 of the agreement. The second application, for enforcing the arbitration agreement, was also filed at a stage before the respondents herein submitted their first statement on the substance of the dispute in the suit. Section 8 does not recognize any disqualification on the part of a party setting

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up an arbitration agreement other than having already submitted its first statement on the substance of the dispute. The application made by the respondents herein before the Malda Court for disposal of the suit on the ground that there was an arbitration agreement appears to have been perfectly in order. It is on record that the petitioner resisted it. Upon the petitioner having resisted such application, the petitioner could no longer enforce the arbitration agreement. It would be completely opposed to public policy and, indeed, a gross abuse of the process if the petitioner were permitted to assert that it had a right to maintain the suit and thereafter change tack upon the suit having been stayed to assert that it could fall on the arbitration agreement. Even this could have been countenanced if the petitioner had offered unconditionally, and at the first instance, to withdraw the suit filed in Malda Court. Thus the petitioner has not."

Thus the facts in the above decision would in no manner support the respondents to contend any waiver of rights by the applicants to take recourse to arbitration under the Deed of Partnership in question."

Analysis

15. This Court is acutely conscious of the limited nature of its jurisdiction under Section 11(6) of the 1996 Act. Prior to the introduction of sub section (6A)⁷ in Section 11 of the Arbitration and Conciliation (Amendment) Act 2015, the Supreme Court had, in various cases, including *National Insurance Co. Ltd v. Boghara Polyfab (P) Ltd*⁸, been adopting the view that the Section 11(6) Court was required to examine various aspects before condescending to refer a dispute to arbitration. This included the aspect of whether the claim was barred by time, whether there was any allegation of fraud or whether the dispute was contested as having been discharged by

⁷ (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.



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accord and satisfaction, amongst others.

16. The 2015 Amendment Act amended Section 11 by introducing, therein, sub-section (6A). Sub-section (6A) was removed from Section 11 by Section 3(v) of the Arbitration and Conciliation (Amendment) Act, 2019⁹. Section 3(v) of the 2019 Act is, however, yet to be notified. The Supreme Court therefore held, in *Vidya Drolia v. Durga Trading Corporation*¹⁰, that sub-section (6A) continues to remain in force.

17. In this background, the Supreme Court held, in *Duro Felguera, S.A. v. Gangavaram Port Ltd*¹¹ that the legal position as it existed prior to 2015 Amendment Act no longer holds the field. After the introduction of sub section (6A) in Section 11, the scope of examination by the Section 11(6) Court is heavily circumscribed. Fundamentally, the court is only required to examine whether a valid arbitration clause was in existence between the parties or not. In *Vidya Drolia*, the Supreme Court held that if there was a valid arbitration clause, and if the disputes between the parties were not *ex facie* non-arbitrable in nature, the Court was required, as far as possible, to respect the autonomy of the arbitral institution and refer all disputes to arbitration. The attempt has, therefore, to be pro arbitration, rather than towards interdicting the arbitral process even before it commences.

⁸ (2009) 1 SCC 267

⁹ “the 2019 Amendment Act” hereinafter

¹⁰ 2020 SCC OnLine SC 1018.

¹¹ (2017) 9 SCC 729



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18. The submission of Mr. Anil Kumar that, as the petitioner had resisted the Section 8 application filed by the respondents, the petitioner is foreclosed from invoking the arbitration clause, in my view, is not sustainable in law. Insofar as the judgment of Calcutta in *Saha & Gupta Enterprise* is concerned, the observations in para 44 of the judgment of the High Court of Bombay in para 44 in *Priya Rishi Bhuta* commend themselves eminently to acceptance. In the said paragraph, the High Court of Bombay has noted the fact that the petitioner in *Saha & Gupta Enterprise*, after successfully opposing the respondent's application under Section 8 seeking reference of the dispute to arbitration, itself approached the High Court seeking appointment of an arbitrator. The High Court of Bombay notes that the decision in *Saha & Gupta Enterprise* had been rendered in this particular fact-situation. Following this line of reasoning, the Bombay High Court held that there was no estoppel on the petitioner invoking the arbitration clause in the Partnership Deed, even if it had resisted the Section 8 application filed by the respondent in the earlier suit that the petitioner had instituted.

19. I respectfully concur with the decision of the Bombay High Court in *Priya Rishi Bhuta*.

20. I must confess that, even *de hors* the manner in which *Priya Rishi Bhuta* distinguishes *Saha & Gupta Enterprise*, I have been unable to bring myself to agree with the latter decision. *Saha & Gupta Enterprise* holds that, if the petitioner were to invoke the arbitration clause prior to resisting the Section 8 application of the respondents, the invocation was permissible. If, however, the

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petitioner *resists the Section 8 application of the respondents*, the petitioner would thereafter stand foreclosed from invoking the arbitration clause.

21. With greatest respect to the High Court, I am unable to subscribe to this line of reasoning. The right of the petitioner to invoke the arbitration clause cannot, in my view, be made dependent on whether the petitioner opposes, or does not oppose, the Section 8 application filed by the respondent.

22. In the facts of the present case, ultimately, no orders were passed on the Section 8 application filed by Respondent 2. The proceedings in that regard remained inchoate. The petitioner ultimately withdrew CS/118/2015. The withdrawal was unconditional.

23. In that view of the matter, there cannot, in my view, be any legal embargo on the petitioner enforcing the arbitration clause contained in the Partnership Deed.

24. Insofar as the plea of limitation is concerned, *Vidya Drolia* holds:

“148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. 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. All other cases should be

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referred to the Arbitral Tribunal for decision on merits.”

The petitioner contests the respondent’s stand that the petitioner’s claims are time barred. Following the principles enunciated in *Vidya Drolia*, I am of the opinion that the plea of limitation ought, more appropriately, to be addressed by the Arbitral Tribunal.

25. In that view of the matter, the objections of Mr. Anil Kumar to the grant of relief sought in this petition are found to be devoid of merit and are accordingly rejected.

26. Following the above, this petition has undoubtedly to succeed as the parties have not been able to arrive at a consensus regarding arbitrator to arbitrate on the disputes.

27. This Court appoints Ms. Swati Surbhi, Advocate (Mob: 9899999785) as arbitrator to arbitrate on the disputes between the parties.

28. The arbitration shall take place in accordance with the provisions of the 1996 Act. The learned arbitrator would be entitled to fix her fees after consultation with the parties.

29. The learned arbitrator is requested to file the requisite disclosure under Section 12 of the 1996 Act within a week of entering on reference.

30. This Court has not expressed any opinion on any contention,

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including the plea of limitation raised by the respondent. All issues of fact and law shall remain open to be adjudicated before the learned Arbitrator.

31. The petition stands disposed of in the aforesaid terms.

I.A. 2324/2023 (Exemption), I.A. 2325/2023 (for condonation of delay of 495 days in re-filing), I.A. 11849/2023 (for condonation of delay of 11 days in filing CA) and I.A. 11941/2023 (for condonation of delay of 11 days filing CADD)

32. These applications do not survive for consideration and stand disposed of.

C.HARI SHANKAR, J

JULY 15, 2024

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Click here to check corrigendum, if any

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