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

+ **ARB.P. 111/2024**

NIRMAL KUMAR

..... Petitioner

Through: Mr. Vinam Gupta and Mr. Aamir
Siraj, Advs.

versus

DINESH KUMAR & ORS.

..... Respondent

Through: Mr. Dayan Krishnan, Sr. Adv. with
Mr. Ashwath Sitaraman, Mr. Sridhar
Kale and Ms. B. Gupta, Advs. for R-
1.
Mr. Ishan Jain, Adv. for R-2 & 3.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

08.04.2024

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1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter, "the Act") seeking appointment of an Arbitrator to adjudicate the disputes between the parties.
2. At the outset, Mr. Krishnan, learned senior counsel on instructions of the respondent No. 1 states that he does not wish to file a reply and will only rely on the documents filed in the petition.
3. On the last date of hearing, respondent Nos. 2 and 3 had already given their no objection for appointment of an Arbitrator.
4. The Arbitration Agreement is contained in the e-mail dated 18.07.2020, which reads as under:-

*"Mr. Nirmal Kumar,
S/O Late Shri Prem Sagar Goel,
R/O H-7, Ashok Vihar, Phase 1,*



Delhi-110052.

I am writing this letter solely to request for a peaceful closure of division of joint business and Joint Properties.

Papaji expired on 14th October 2019 and thereafter, I have been requesting for the resolution and division of joint Business being run pursuant to Partnership Firms, Companies and other joint Properties. The joint Properties are those Properties which are jointly in the name of the persons of your family along with persons of my family or jointly owned amongst our parents. All such Properties along with joint Business is to be divided amongst us.

For some reason or the other, we have not been able to reach on an amicable solution. You will appreciate that ultimately, the division is to be fair and rightful.

I am requesting you to consider that it is absolutely necessary between two of us to resolve the matter and taking any action, which would result in court proceedings, is neither beneficial to you nor to me. We will end up paying lawyers and other expenses and I will again like to stress that ultimately, the settlement is to happen between two of us. There is an Arbitration Clause in Partnership Deed and I am agreeable to have division of Business and Properties decided by a single Arbitrator as against three Arbitrators if we fail to divide the Assets in an amicable manner.

In the event you are agreeable on this course of action, I invite your suggestion as to how you intend to resolve this long pending issue. If you ask as to how I would propose the division to happen, in my opinion, the joint business as well as immovable joint properties are to be divided in the manner so as to give exclusively to each of the family without interference of each other.



In the event you are not agreeable for amicable resolution, then I will have no option but to approach the Court for division of the assets in accordance with law at your cost and expense, which step I would surely like to avoid and request you to look for the resolution of division of the joint properties in the manner, which is rightful to both brothers.

I am expecting a reply from you in the next seven days' time.

Regards

*Dinesh Kumar
S/O Late Shri Prem Sagar Goel,
R/O H-6, Ashok Vihar, Phase 1,
Delhi-110052"*

5. The said proposal was duly responded by the petitioner vide e-mail dated 25.07.2020, which reads as under:-

"Respected Mr Dinesh Goel

We have had two Phone conversations with Mr Tushar Goel regarding all the pending issues (on 21.7.20 and 23.7.20).

We are awaiting your response on the steps to be taken going forward"

6. Again, on 29.07.2020, the respondent wrote an e-mail which reads as under:-

"Respected Mr. Nirmal Kumar,

Phone calls will not get any solution. We need to draw a conclusive settlement. Let us be concrete and formalise a settlement where both the brothers get their share and also the personal accounts are squared so as to have complete independent existence and severance of Business.

I would like to emphasise that legal battle would be disadvantageous to both the families. If you desire, we can take



professional services at our own cost who can help us achieve settlement.

*Regards,
Dinesh Kumar”*

7. There are series of e-mails thereafter between the parties for settling the issues involved. The parties were also in Pre-Institution Mediation before the Delhi High Court Mediation and Conciliation Centre from 06.09.2022 to 06.12.2023.
8. Since the Pre-Institution Mediation could not result in a settlement, the petitioner issued a notice invoking arbitration under Section 21 of the Act on 19.12.2023.
9. Hence the present petition.
10. Mr. Krishnan, learned senior counsel appearing for the respondent No.1 has relied upon ***Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719***, the operative portion of which reads as under:-

“8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in K.K. Modi v. K.N. Modi [(1998) 3 SCC 573] , Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd. [(1999) 2 SCC 166] and Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd. [(2003) 7 SCC 418] In State of Orissa v. Damodar Das [(1996) 2 SCC 216] this Court held that a clause in a contract can be construed as an “arbitration agreement” only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well-settled principles in regard to what constitutes an arbitration agreement:

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to



be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words “arbitration” and “Arbitral Tribunal (or arbitrator)” are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of



the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word “arbitration” or “arbitrator” in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as “parties can, if they so desire, refer their disputes to arbitration” or “in the event of any dispute, the parties may also agree to refer the same to arbitration” or “if any disputes arise between the parties, they should consider settlement by arbitration” in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that “if the parties so decide, the disputes shall be referred to arbitration” or “any disputes between parties, if they so agree, shall be referred to arbitration” is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.”

11. Mr. Krishnan states that at best, there was only an intention of the respondent No.1 to refer the disputes to arbitration, but there was no arbitration agreement.

12. I am unable to agree.

13. Section 7 of the Act reads as under:-

*“7. Arbitration agreement.—(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*



(3) *An arbitration agreement shall be in writing.*

(4) *An arbitration agreement is in writing if it is contained in—*

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

14. As per sub-section (4)(b), an arbitration agreement would mean and include a clause for arbitration contained in an exchange of letters, telex, telegrams or other means of telecommunication (including communication through electronic means) which provide a record of the agreement.

15. According to me, *prima facie*, the said communication clearly shows that it has all the elements of the arbitration agreement, namely; a) the agreement is in writing b) the respondent agreed to refer the disputes between them to a private tribunal, c) the tribunal would be empowered to adjudicate upon the disputes in an impartial manner; and d) the decision of the tribunal would be binding.

16. The very fact that the respondent No. 1 suggested arbitration means and would mean that the parties would have agreed to be bound by the decision of that arbitral tribunal.

17. For the said reasons, the petition is allowed. Since the parties are still having disputes between them, the following directions are issued:-

i) Ms. Anita Sahni, (Advocate) (Mob. No. 9810113256) is appointed as a Sole Arbitrator to adjudicate the disputes



between the parties.

ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.

iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.

v) The parties shall approach the learned Arbitrator within two weeks from today.

18. The petition is allowed and disposed of in the aforesaid terms.

19. The respondent No. 1 has also stated that the disputes are not arbitrable. The respondent No. 1 shall have all rights available in law to raise issues before the learned Arbitrator, including the issue of jurisdiction of the learned Arbitrator and the issue that the respondent No. 1 has also instituted a suit for partition which is yet to be listed.

JASMEET SINGH, J

APRIL 8, 2024/NG

Click here to check corrigendum, if any