



\$~3

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

+ **ARB.P. 1159/2023**

MRS. VINITA DANG MOHONI

..... Petitioner

Through: Mr. Anuj P. Agarwala, Ms. Bhumika
Sharma and Mr. Kunj Mehra,
Advocates.

versus

MRS. URVASHI JETHRA

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER

24.04.2024

%

1. The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the A&C Act'*) by the petitioner seeking appointment of Sole Arbitrator in terms of a clause contained in the last Will and testament of Commodore Bal Krishna Dang, and the Applicant, being a surviving heir of Bal Krishna, allege that since the disputes have arisen with another surviving heir, the Respondent, an Arbitrator nominated in the Will, may be appointed for resolving them.
2. The facts in brief are that Late Bal Krishna Dang executed a registered Will dated 28.02.2005 whereby House No. D-4/8, Vasant Vihar, New Delhi-110057 was bequeathed to the parties as detailed in Clause 7 and 8 of the Will. Additionally, in terms of Clause 8 of the Will, the petitioner has the exclusive right for further construction at her cost on all floors, as



permissible in Bye-Laws and sanctioned by MCD.

3. The petitioner submits that she is desirous of augmenting her resources by further construction on all the floors and/or reselling her portion of the property as per rights available to her under the will. It has been submitted that the proposal made to the respondent has been rejected therefore, disputes have arisen between parties which are required to be referred to arbitration. Therefore the petitioner was constrained to invoke the arbitration in terms of clause 10 of the will vide notice dated 21.12.2022. Since the respondent did not respond, the present petition has been filed.

4. Notice of the present petition was served on the respondent, however, the respondent has failed to appear despite being served.

5. Learned counsel for the petitioner submits that since there are disputes between the parties and an arbitration clause i.e., clause 10 exists in the Will, the matter may be referred to arbitration.

6. The question which is to be considered at this stage is whether the clause 10 in 'the will/testamentary document' can be executed and 'the will' can be considered as an arbitration agreement which would bind the parties.

7. The clause 10 of the will dated 28.02.2005 is reproduced herein below for convenience:

“10. In case of any difference or dispute between my two daughters relating to my house D-4/8, Vasant Vihar, New Delhi or further construction thereon, this shall be resolved by arbitration to be conducted by my brother Ravi Kant Dang as sole arbitrator in accordance with the Arbitration and Conciliation Act.”

8. The appointment of the arbitrator from court is sought on the ground that the respondent has failed to reply to the section 21 notice invoking the



arbitration and since the respondent has failed to respond to the reply to the appointment of the arbitrator as specified in clause 10 to adjudicate upon the disputes in between the parties.

9. The scope of jurisdiction of the court under section 11(6) of the Arbitration and Conciliation Act, 1996 is very limited to examine whether prima facie an arbitration agreement exists between the parties. Reliance can be placed on ***M/S Duro Felguera, S.A. vs. Gangavaram Port Limited*** (2017) 9 SCC 729 wherein the court inter-alia held as under:

“The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. (supra) and Boghara Polyfab (supra). This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court’s intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected.”

10. Therefore before proceeding further this court has to examine that whether the will which is a testamentary document is an arbitration agreement which binds both the parties or not. The section 7 of the A&C Act provides for the definition of arbitration agreement which 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.”*

11. The Supreme Court has time and again held that an arbitration agreement as per section 7 of the A&C Act is an agreement wherein it is mandatory to have the agreement in writing and further it has to be signed by both the parties. A prerequisite for any agreement to be valid is "consensus ad idem," which states that the parties to the agreement must concur on the same issue and in the same sense. Based on the aforementioned interpretation, it is evident that clause 10 of the 'Will/testamentary document' will not establish a legally binding agreement between the parties, because no document signed by them or any correspondence via letter, telegraph, telex, or other means of communication exists that serves as a record of their arbitration agreement, as required by Section 7(4) of the A&C Act.

12. The Will dated 28.02.2005, executed in front of witnesses, does not have the consent of the deceased's legal heirs. It grants them certain rights and guides the executor in distributing the deceased's assets, estate, and properties. The testator has directed the disposition of his assets in the manner specified in the document, and the Petitioner and Respondent are not signatories to it, therefore the condition that the agreement between the



parties be in writing is not met.

13. Further on perusal of the will dated 28.02.2005, it is clear that the testator has only expressed his desire for dispute resolving mechanism to be arbitration, which should be conducted by the testator's brother. The clause 10 of the will is merely a provision that tells that in the event the parties don't agree to the way the estate is managed in the will, such grievances shall be resolved by a neutral party. Therefore the main necessary ingredients of an arbitration agreement are missing in the present will which renders clause 10 un-invokable. In the present case, it is not the petitioner and respondent that have made the consensus to go to a third party for resolution of disagreements. Rather it is the testator's wish/desire. The intention of the parties is to be given weightage to consider the arbitration which is absent in the present case.

14. Further now the remaining question which requires to be answered is whether a will is an arbitration agreement or not. A will is only a legal testamentary document that is made for the distribution/management of the assets of the testator after his death.

15. In the case of **Ashvin Maganlal Savani vs. Himadri Davda**, Comm. Arb. P. (L) No. 9910/2021, the Bombay High Court recently addressed the extent of judicial jurisdiction with respect to Wills. Among other things, the court stated that since a "Will" is a testamentary instrument, it does not include the heirs' signatures. Consensus ad idem is a necessary condition for an agreement, but as the parties are not signatories to the "Will", they cannot be obligated by its provisions. According to the Indian Contract Act of 1872, a will is a document that specifies how the testator's property will be distributed and it is not to be interpreted as a "contract." The instructions in



the “Will” are not to be interpreted as an “arbitration clause.”

16. In ***Vijay Kumar Sharma alias Manju vs. Raghunandan Sharma Alais Baburam & Ors.*** (2010) 2 SCC 486, the Apex court inter-alia held that:

20 ...Even if the will had provided for reference of disputes to arbitration, it would be merely an expression of a wish by the testator that the disputes should be settled by arbitration and cannot be considered as an arbitration agreement among the legatees.”

17. In the present case, there is only a Will of Late Bal Krishna Dang which provides that in case of any dispute, the same may be referred to arbitration. Therefore, the same cannot be termed as an arbitration agreement between the parties. Hence, the plea of the petitioner is not plausible in the eyes of the law and since the will is only a testamentary document therefore it cannot be termed as an arbitration agreement.

18. In the absence of any arbitration agreement, the matter cannot be referred to the arbitral tribunal. Therefore, the present petition is dismissed.

DINESH KUMAR SHARMA, J

APRIL 24, 2024/ssc..