[2024:RJ-JD:29963]

HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Arbitration Application No. 22/2024

Dilip Kumar Choudhary S/o Dharmpal Choudhary, Aged About 47 Years, R/o House No. 2, Ram Singhji-Ki-Bari, Near Nagada Dairy, Sector-11, Hiran Magri, Udaipur-313001

----Petitioner

Versus

1. Dharampal Choudhary S/o Dulla Ram Choudhary, R/o 2, Ram Singhji-Ki-Bari, Near Nagada Dairy, Sector-11, Hiran Magri, Udaipur-313001
2. Punesh Choudhary S/o Shri Dharampal Choudhary, R/o 2, Ram Singhji-Ki-Bari, Near Nagada Dairy, Sector-11, Hiran Magri, Udaipur-313001

----Respondents

For Petitioner(s) : Ms. Abhilasha Bora
For Respondent(s) : Mr. Akshat Verma

HON'BLE DR. JUSTICE NUPUR BHATI

Judgment

Reserved on: 15/07/2024
Pronounced on: 29/07/2024

1. The present misc. appeal has been filed by the appellant/applicant under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act of 1996') seeking appointment of an arbitrator at an early date for resolving of the disputes by way of arbitration. Certain other ancillary relief(s) have also been sought by the appellants.

2. Briefly stated, the facts of the case are that a partnership firm, had been created vide the deed of partnership dated 29.06.2019 (Annex.2) between the three parties, respondent no.1, Dharampal Choudhary, appellant/applicant who is the real

son of respondent no. 1 and respondent no. 2, Punesh Choudhary, who is the step-son of respondent no. 2, for the business and property including the petroleum outlet in the name and style of Çhoudhary Petroleum House' located at Balicha NH-8, Udaipur and commercial space admeasuring 46,000 sq. ft. at Balicha, Udaipur, building and machinery including tank, lorry motor bike, on the basis of the family settlement dated 29.06.2019 (Annex.1), which bears the signatures of all the family members. According to the said settlement, three parties, appellant/applicant, respondent no.1 and 2 had a share of profit and loss in the ratio 10:45:45 respectively and for the purpose of the same, appellant/applicant and respondent no. 2 deposited a sum of Rs. 1 crores jointly to respondent no. 1, to do their part.

2. By virtue of the said partnership deed (Annex.2), the entire property of the proprietorship firm, i.e. Choudhary Petroleum House including the petroleum outlet and the adjoining commercial space was brought in the partnership firm. Also, in the said partnership deed (Annex.2), clause 21 provided for the dispute resolution mechanism, wherein it was agreed by the parties that in case of any dispute between the partners, the same shall be resolved through mutual dialogue, failing which, the same would be referred to arbitration by a sole arbitration in accordance with the provisions of Arbitration and Conciliation Act, 1996.

3. The dispute between the two parties to the present appeal arose on account of an e-auction, which took place on 28.11.2023 subsequent to the default in payment made by respondent no. 1 towards a loan taken by him, wherein the property of Choudhary Petroleum House and the commercial space was offered as

security. Vide the said auction dated 28.11.2023, the bank received Rs. 4.5 crores for the said property and thereafter had to deduct the due loan money i.e. Rs. 1,13,36,946/- from the mentioned amount and disbursed the rest in accordance with the partnership-deed amongst the partners. Subsequently, when the appellant/applicant did not get his 45% of the share as per the partnership deed (Annex.2), he tried resolving the dispute through dialogue, however, the same failed.

4. Thereafter, a legal notice was sent by appellant/applicant on 11.12.2023 whereby his share of 45% has been sought from the respondent no. 1. However, when response was given by the respondent no.1, appellant/applicant invoked clause 21 of the partnership-deed dated 29.06.2019 (Annex.2) and therefore, a notice for referring the matter to arbitration was duly sent by the appellant/applicant to the respondents on 21.03.2024 (Annex.3). To the said notice (Annex.3), the respondents filed a reply on 02.04.2024 (Annex.4) stating that the dispute is not arbitrable and the said auction falls beyond the purview of arbitration.

5. Thus, aggrieved of the said action of the respondents and for appointment of the arbitrator, the appellant/applicant has preferred this appeal.

6. Learned counsel for the appellant submitted that the said Petroleum outlet, Choudhary Petroleum House, along with the adjoining commercial property was the property of the partnership firm by virtue of the partnership deed drawn on 29.06.2019 (Annex.2), which was created on the basis of the family settlement (Annex.1), and the said property was kept as security by the respondent no. 1, therefore, the appellant/applicant, who

was also one of the partners to the partnership firm, too is entitled to receive the due amount as per the said partnership deed (Annex.2).

7. Learned counsel for the appellant/applicant also submitted that the respondents have not adhered to the partnership deed (Annex.2) as well as the memorandum of family settlement (Annex.1) and are trying to take away the 45% of the remaining amount i.e. Rs. 1,13,36,946/-, which is a legitimate share of the appellant/applicant.

8. *Per contra*, learned counsel for the respondents submitted that the present appeal is not maintainable owing to the fact that a writ petition, i.e. S.B.C.W.P No. 19379/2023 claiming same prayers on the same cause of action, is already filed by the appellant/applicant, which is currently pending before this Court, and therefore, the present appeal operates as *res-judicata*.

9. Learned counsel for the respondents also submitted that clause 1 of the partnership deed (Annex.2) clearly stipulates that the partnership firm shall carry on the business of 'operating' and 'running' the petroleum outlet, and that the said auction, from which the appellant/applicant is claiming his due amount was nowhere related to the 'operation' or 'running' of the petroleum outlet. He thus submitted that the said e-auction falls beyond the purview of the arbitration. For the purpose of the same, he relied upon the definition of 'operate' under the Justice C.K. Thakker's ***Encyclopaedic Law Lexicon***, 7th ed. 2024, Vol. 3, published by Whytes & Co., which is reproduced as under:

> "**Operate.-** A systematic manipulation from the body from the body performed with or without instruments, to bring

change or **to act or making a change in the value** or form or quantity."

He also relied upon the definition of 'working' as mentioned in the ***New Webster's Dictionary and Thesaurus of the English Language***, published by Lexicon Publications, Inc., Danbury, CT, which is reproduced as under:

"**work·ing** (wɜrkɪŋ) **1.** *adj.* Enagaging in manual labour or production, *the working class* || sufficient or adequate to allow work to be done or for a desired end to be achieved, *a working knowledge of German* || accurate enough to work by a *working rule* || capable of being operated, *a working model*. **2.** *n. (pl.)* excavations made in mining etc."

He also placed reliance upon the definition of 'operational' as mentioned in the ***Black's Law Dictionary***, 8th ed., published by Thomson Reuters, which is reproduced as under:

"**operational**, *adj.* **1.** Engaged in operation; able to function. **2.** Ministerial."

10. Learned counsel for the respondents also placed reliance upon the judgment passed by the Hon'ble Apex Court in the case of ***NTPC Ltd. v. M/s SPML Infra Ltd.*** [Civil Appeal No. 4778 of 2022 decided on 10.04.2023] wherein it has been observed that the pre-referral jurisdiction of the Court under Section 11(6) of the Act of 1996 is narrow and thus includes only two inquiries to be made by the Court, *firstly*, whether the arbitration agreement was in existence and *secondly*, it must reject those claims which are manifestly and *ex-facie non-arbitrable*, and in the present case, the appellant/applicant's claim is *ex-facie non-arbitrable*, therefore, the same deserved to be dismissed.

11. Heard learned counsel for the parties, perused material available on record and judgments cited at the Bar.

12. This Court finds that in the case of ***Vidya Drolia and Ors. v. Durga Trading Corporation*** reported in **(2021) 2 SCC 1,** the Hon'ble Apex Court has clarified by way of propounding a four-fold test in order to determine when the subject matter of a dispute in an arbitration agreement is not arbitrable, which is reproduced as under:

> "45. In view of the above discussion, we would like to propound a fourfold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:
>
> (1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.
>
> (2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;
>
> (3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and
>
> (4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).
>
> These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable. However, the aforesaid

principles have to be applied with care and caution as observed in Olympus Superstructures Pvt. Ltd.:

> "35...Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of fats relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst, Wilson v. Wilson and Cahill v. Cahill).""

It is seen that the present dispute does not fall under any of the four parameters observed by the Hon'ble Apex Court and therefore, the said dispute cannot be treated as non-arbitrable at a very nascent stage.

13. Furthermore, the Hon'ble Apex Court in the case of ***Vidya Drolia (supra.)***, also considered the question as to 'who decided the arbitrability', while upholding that, owing to the principle of *competence-competence*, the Arbitral Tribunal is the preferred first authority to decide as well as determine the questions of non-arbitrability and that, the Courts have been conferred the power of only "second look" after the passing of an award. Therefore, this Court refrains itself from granting indulgence so far as the question of arbitrability of dispute is concerned. The relevant paras of the judgment are reproduced as under:

> "96. Discussion under the heading 'Who decides Arbitrability?' can be crystallized as under:
>
> (a) Ratio of the decision in Patel Engineering Ltd. on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective

effect from 23.10.2015) and even post the amendments vide Act 33 of 2019 (with effect from 09.08.2019), is no longer applicable.

(b) Scope of judicial review and jurisdiction of the court under Section 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

(c) The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

(d) Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is nonexistent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable' and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

Therefore, this Court finds that it is for the Arbitral Tribunal to deal whether the dispute among the parties in the present case is arbitrable or not.

14. This Court also observes that the contention of the respondents that the present appeal operates as *res judicata* since there is a writ petition already pending on the same cause of action and having the same prayers, is devoid of merit since the Hon'ble High Court in the case of ***Indian Oil Corp. Ltd vs M/S Sps Engineering Ltd*** reported in **(2011) 3 SCC 507**, has categorically held that the question whether the claim is barred by res judicata, does not arise for consideration in proceedings under Section 11 of the Act of 1996 and therefore, the same has to be dealt by the Arbitral Tribunal. The relevant para of the judgment is reproduced as under:

> "3. The question whether a claim is barred by res judicata, does not arise for consideration in a proceedings under section 11 of the Act. Such an issue will have to be examined by the arbitral tribunal. A decision on res judicata requires consideration of the pleadings as also the claims/issues/points and the award in the first round of arbitration, in juxtaposition with the pleadings and the issues/points/claims in the second arbitration. The limited scope of Section 11 of the Act does not permit such examination of the maintainability or tenability of a claim either on facts or in law. It is for the arbitral tribunal to examine and decide whether the claim was barred by res judicata. There can be no threshold consideration and rejection of a claim on the ground of res judicata, while considering an application under Section 11 of the Act."

15. Furthermore, this Court takes into consideration the judgment passed by the Hon'ble Delhi High Court in the case of

SK Construction Company v. Telecommunication Consultant India Limited, Arb. P. 1206/2022, decided on 09.12.2022 wherein the court allowed petition under Section 11 of the Act of 1996 for appointment of an arbitrator even though the petitioner had already approached High Court of Madhya Pradesh at Jabalpur, seeking appointment of an arbitrator even when a writ petition had already been filed by the applicant, would not amount to an admission of the petitioner towards the full and final settlement of its claim under the concerned Arbitration Agreement and/or waiver of their right to seek arbitration. The relevant paras are reproduced as under:

> "1. On 28.10.2022, when these petitions were first listed before this Court, the learned counsel for the respondent had submitted that the present petitions would not be maintainable as the petitioner has already approached the High Court of Madhya Pradesh at Jabalpur for substantive relief by filing Writ Petitions and has already obtained relief from the said Court. The petitioner was, therefore, directed to file on record the Writ Petitions that had been filed by the petitioner before the High Court of Madhya Pradesh. The same have been filed. …
>
> 8. I have perused the contents of the above-mentioned reply of the respondent. In my prima facie opinion, the same cannot be read as an admission of the petitioner to a full and final settlement of its claims under the Arbitration Agreement and/or waiver of the right to seek arbitration. At that stage, the petitioner was contending that deduction of Liquidated Damages from the Running Bill of the petitioner by the respondent was illegal and that the Final Bill cleared by the respondent must be paid by the respondent.
>
> 9. In view of the above, at least prima facie, it cannot be said that there was a full and final settlement of all

> disputes between the parties, thereby leading to exhaustion of the Arbitration Agreement between the parties. I may emphasize herein that, at this stage, this Court is not to conclude one way or the other that the above acts of the petitioner would amount to exhaustion of the Arbitration Agreement or as an estoppel against invoking the Arbitration Agreement. As held by the Supreme Court in inter alia Vijay Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 and Sanjiv Prakash v. Seema Kukreja, (2021) 9 SCC 732, the objections of the respondent cannot possibly be decided in exercise of a limited prima facie review as to whether an arbitration agreement exists between the parties. The questions raised by the respondent are necessarily to be left to be determined by the Arbitrator."

16. Thus, this Court observes that it has to look into the fact that whether there was an arbitration agreement existing between the parties, and there is no denial to such agreement by the learned counsel for the respondents. Upon perusal of the record, it is seen that the arbitration agreement is existing as per Clause 21 of the Partnership Deed (Annex.2), which reads as under:

> "**21**. In case of any dispute between the partners regarding the working of the Partnership Firm, the partners shall communicate the same to the other partners in writing and shall try to resolve through mutual dialogue and if not so resolved then the same shall be referred to Arbitration by a Sole Arbitrator as per the provisions of the Arbitration and Conciliation Act, 1996 and the principal office shall be the seat of arbitration."

17. Therefore, taking into consideration the judgment passed by the Hon'ble Apex Court in the case of ***BSNL and Anr. v. Nortel Networks India (P) Ltd.,*** reported in **(2021) 5 SCC 738**, which has been reiterated by the Hon'ble Apex Court in the case of

NTPC Ltd. v. M/S SPML Infra Ltd., [Civil Appeal No. 4778 of 2022, decided on 10.04.2023], this Court, in exception to the general rule, should grant indulgence only when it is demonstrated that the application under Section 11 is ex-facie time-barred and dead or, there is no subsisting dispute. The relevant para of the judgment passed by the Hon'ble Apex Court in the case of ***NTPC (supra.)*** is reproduced as under:

> "24. Following the general rule and the principle laid down in Vidya Drolia (supra), this Court has consistently been holding that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. In Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engg. Pvt. Ltd., Sanjiv Prakash v. Seema Kukreja and Ors., and Indian Oil Corporation Ltd. v. NCC Ltd., the parties were referred to arbitration, as the prima facie review in each of these cases on the objection of non-arbitrability was found to be inconclusive. Following the exception to the general principle that the court may not refer parties to arbitration when it is clear that the case is manifestly and ex facie non-arbitrable, in BSNL and Anr. v. Nortel Networks India (P) Ltd. and Secunderabad Cantonment Board v. B. Ramachandraiah & Sons, arbitration was refused as the claims of the parties were demonstrably time-barred.
>
> 25. **Eye of the Needle**: The above-referred precedents crystallise the position of law that the pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the referral court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

26. As a general rule and a principle, the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the referral court may reject claims which are manifestly and ex-facie non-arbitrable. Explaining this position, flowing from the principles laid down in Vidya Drolia (supra), this Court in a subsequent decision in Nortel Networks (supra) held:

> "45.1 ...While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute..."""

18. Accordingly, in the light of the judgments cited and taking into consideration the intent of the legislation as well the clause 21 of the Partnership deed (Annex.2), this Court deems it fit to appoint and Arbitrator and thus, the instant applications, filed by the appellant/applicant, are allowed, and while exercising the power conferred under Section 11 of the Act of 1996, ***Dr. Yuvraj Singh***, R/9914/2006; House No. 2, Old Public Park, Rai ka Bagh, Jodhpur, Contact No. 9784679198, is appointed as the Sole Arbitrator, to adjudicate the dispute between the parties. The payment of cost of arbitration proceedings and arbitration fee shall be made as per the 4th Schedule appended to the Act of 1996.

19. The intimation of appointment, as aforesaid, may be given by the counsel for the parties as well as by the Registry to ShriAkhilesh Kumar (Retd. Spl. D.G., CPWD Deptt.). The above appointment is subject to necessary disclosure being made under Section 12 of the Act of 1996.

20. All pending applications, if any, stand disposed of.

(DR. NUPUR BHATI),J

18-devesh/-