

A.F.R.

Neutral Citation No. - 2024:AHC:178270

Court No. - 21

Case :- ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 95 of 2023

Applicant :- Ram Taulan Yadav And Another

Opposite Party :- Himanshu Kesarwani And 2 Others

Counsel for Applicant :- Prabhav Srivastava, Rishabh Srivastava, Ujjawal Satsangi

Counsel for Opposite Party :- Abhay Kumar Singh

Hon'ble Manoj Kumar Gupta, J.

1. As per office report dated 26.07.2023, opposite party No. 1 has been duly served by registered post but no one has appeared on his behalf. In respect of opposite party No. 2, the notice sent to him by registered post has returned with the endorsement of refusal. Thus, service on the said respondent is also sufficient. However, no one has appeared on his behalf also.

2. Heard Shri Ujjawal Satsangi and Shri Rishabh Srivastava along with Shri Prabhav Srivastava, learned counsel for the applicants and Shri Abhay Kumar Singh, learned counsel for opposite party No. 3.

3. The instant application under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed by the applicants invoking the power of this Court to constitute an arbitral tribunal in respect of the disputes arising between the parties out of partnership agreements dated 29 August 2016, 2 March 2020 and 20 February 2021.

4. The facts in brief are that a partnership agreement was executed on 29 August 2016 between applicant no. 1 (Ram Taulan Yadav) and one Sheela Yadav for doing business in the

name of M/s Autar & Associates. As per Clause 14 of the said agreement all disputes and differences arising between the parties would be referred to mutually acceptable arbitration. On 2 March 2020, a retirement-cum-partnership deed was executed in respect of the partnership business. Thereby, Smt. Sheela Yadav retired from the partnership firm while Smt. Madhu Yadav (Applicant No. 2), Ram Milan Yadav, Himanshu Kesarwani (Opposite party No. 1) Saurabh Kesarwani (Opposite party No. 2) were introduced as new partners. The share of each of them is mentioned in Clause-1 of the partnership deed. Clause 17 of the said agreement also contains an arbitration clause for referring all disputes and differences to mutually acceptable arbitration. On 20 February 2021, a supplementary deed of partnership was executed whereby Ram Milan Yadav retired from the partnership firm with effect from 31 March 2021 and Radhey Shyam Mishra (opposite party No. 3) was inducted as a new partner. It seems that thereafter a memorandum of understanding (MoU) dated 09.09.2022 was executed between the partners of the firm and thereunder, the parties agreed that the properties given by the applicants in mortgage to secure the loan taken by the firm from the financial institutions would be released and thereafter, the applicants would retire from the partnership firm. In compliance of the said arrangement, four properties of the applicants were redeemed from mortgage, however, five properties remained mortgaged. This gave rise to disputes and differences between the parties, the resolution of which has been sought through arbitration. The applicants suggested name of three arbitrators vide its notice dated 15 April 2023. Opposite party no. 1 agreed to the name of Mr. Justice

Vipin Sinha, Former Judge of this Court whereas opposite parties No. 2 & 3 did not respond to the notice.

5. Opposite party No. 3 has filed counter affidavit and has opposed the appointment of arbitral tribunal. The main grounds to oppose the constitution of arbitral tribunal are (1) the partnership firm was unregistered and partnership deed was not properly stamped, therefore, bar of Section 69 of the Partnership Act, 1932 and Sections 33 and 35 of the Stamp Act, 1899 would apply; (2) there was no arbitration clause in the supplementary partnership agreement dated 20 February 2021 whereby opposite party No. 3 was inducted as partner in the partnership firm for the first time. The arbitration clauses in the previous agreements are not binding on opposite party No. 3 as he was not signatory to these agreements.

6. Learned counsel for the applicants, on the other hand, submits that bar under Section 69 of the Partnership Act does not apply to arbitration proceedings. He further submits that in case, there is any deficiency in stamp duty, the same can be agitated before the arbitral tribunal but on this ground the prayer for appointment of arbitrator cannot be rejected. In support of his contention, he places reliance on a recent Constitution Bench judgment in **Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, In Re¹**. It is further submitted by him that the supplementary agreement whereby opposite party no. 3 was inducted as partner in the partnership firm was in continuation of the earlier two partnership agreements. Therefore, all the three agreements have to be read together. In support of his contention, he places reliance on the judgment of the Supreme Court in **All India**

¹ (2024) 6 SCC 1

Power Engineer Federation v. Sasan Power Ltd.². It is further submitted that the question as to whether opposite party No. 3 was signatory and a consenting party to the arbitration clause should be left for being decided by the arbitral tribunal as laid down by Supreme Court in **Cox & Kings Ltd. v. SAP India Pvt. Ltd. & another**³ and in **Arbitration Petition No. 38 of 2020** decided on 9 September 2024.

7. The first issue which, thus, falls for consideration is whether the partnership deed being unregistered, the dispute between the partners could be referred to the arbitral tribunal or the bar contained in Section 69(3) of the Partnership Act would operate. The issue is no more *res integra*. In **Umesh Goel vs. Himachal Pradesh Cooperative Group Housing Society Limited**⁴, the Supreme Court has held that the expression “other proceedings” in Section 69(3) of the Partnership Act does not cover arbitral proceedings as well as arbitral award. The same view has been taken in **Shiv Developers through its partner Sunilbhai Sombhai Ajmeri vs. Aksharay Developers and Others**⁵. Accordingly, the contention is devoid of any merit.

8. The issue as to whether the agreements could not be enforced because of any deficiency in stamp duty is also squarely covered by the judgement of Supreme Court in **Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, In Re**⁶. In the said Constitution Bench judgement, the Supreme Court in the conclusions recorded in paragraph 235 has observed as follows:

2 2017 (1) SCC 487

3 (2024) 4 SCC 1

4 (2016) 11 SCC 313

5 (2022) 13 SCC 772

6 (2024) 6 SCC 1

“235. The conclusions reached in this judgment are summarised below:

235.1. Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered void or void ab initio or unenforceable;

235.2. Non-stamping or inadequate stamping is a curable defect;

235.3. An objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The Court concerned must examine whether the arbitration agreement prima facie exists;

235.4. Any objections in relation to the stamping of the agreement fall within the ambit of the Arbitral Tribunal; and

235.5. The decision in **N.N. Global (2)**⁷ and **SMS Tea Estates**⁸ are overruled. Paras 22 and 29 of **Garware Wall Ropes**⁹ are overruled to that extent.”

9. Thus, in case, there is any deficiency in stamp duty an objection to the said effect can be taken before the arbitral tribunal but the same would not detain the Court from entertaining application for constitution of an arbitral tribunal.

10. The second and the main issue is whether the arbitration clauses in two previous agreements between the earlier partners is enforceable as against opposite party no.3, who was inducted into the partnership firm in pursuance of the supplementary partnership agreement dated 20 February, 2021 and which admittedly does not contain any arbitration clause. As noted above, the partnership firm was constituted in pursuance of the partnership agreement dated 29 August, 2016. It was between Ram Taulan Yadav (applicant no.1) and Sheela Yadav. The share

7 N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2023) 7 SCC 1 : (2023) 3 SCC (Civ) 564

8 SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777

9 Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324

of the partners was 65% and 35% respectively. On 2 March, 2020, a retirement-cum-partnership deed was executed whereby Sheela Yadav retired from the partnership firm and four new partners were inducted namely, Madhu Yadav, Ram Milan Yadav, Himanshu Kesarwani and Saurabh Kesarwani. The said partnership agreement, as noted above, specifically refers to the previous partnership deed dated 1 March, 2020 and also contains an arbitration clause in same terms. The supplementary partnership deed dated 20 February, 2021 whereby opposite party no.3 was inducted as a partner and Ram Milan Yadav retired from the partnership firm since 31 March, 2021 also refers to the previous partnership deed dated 2 March, 2020. It also specifically mentions that the business will be continued by the reconstituted firm in the same name i.e. M/s Autar & Associates.

11. Some of the crucial clauses of the preamble to the supplementary partnership deed dated 20 February, 2021 are as follows:

“As they are planning to expand their business they have introduced new partners to the above firm namely, Sri Radhey Shyam Mishra and one of the partners Sri Ram Milan Yadav has decided as per his own will to retire from the partnership.

In case of death of introduced partner i.e. Shri Radhey Shyam Mishra, his legal successors Mr. Anil Mishra (Aadhar Card No. 7858 9014 5303) S/o Sri Radhey Shyam Mishra R/o 89/76, Mahaviran Lane Mutthiganj, Allahabad and Mr. Rahul Mishra (Aadhaar Card No. 7553 1490 1256) S/o Sri Radhey Shyam Mishra R/o 89/76, Mahaviran Lane Mutthiganj, Allahabad will receive all the rights of partnership deed.

AND WHEREAS to avoid any disputes or misunderstanding in future, the parties have agreed to certain terms and conditions and it is desirable to reduce the amended terms and conditions governing the said partnership to this deed of partnership into writing.”

(emphasis supplied)

12. A perusal of the aforesaid clauses reveals that supplementary partnership deed was executed in continuation of the earlier partnership deed. It specifically mentions that the same was executed so as to reduce to writing the amended terms and conditions governing the said partnership. Clause 1 of the supplementary partnership deed specifies the contribution of each partner and Clause 2, their shares which is equal to their contribution. The manner in which the profits and losses were to be shared is mentioned in Clause 3. The manner in which the bank accounts were to be operated by the reconstituted firm is mentioned in Clauses 4 and 5. It is pertinent to note that various other matter dealt with in the previous deed relating to interest and remuneration, books of accounts, partners dealings, terms of partnership, disputes and differences have not been dealt with in the supplementary partnership deed. It is evidently for the reason that these clauses in the previous deed would continue to bind the parties. It is only the terms which required amendment as a result of reconstitution of the firm which were mentioned in the supplementary partnership deed. The intention of the parties that their legal relationship in respect of other matters would continue to be governed by the previous partnership deed is also borne out from the preamble of the supplementary partnership deed, wherein it is specifically mentioned that the supplementary partnership deed was being executed to have a record of the amended terms and conditions of the partnership deed.

13. It is noteworthy that memorandum of understanding executed between the parties and to which opposite party No. 3 is also a signatory, also refers to the original partnership deed dated 29.08.2016, and amended deeds dated 02.03.2020 and

20.02.2021. *Prima facie*, it evinces that the subsequent deeds were executed to reduce to writing the change in constitution of the firm while the firm name and other legal obligations not specifically altered by subsequent deeds remain the same.

14. Above view stands fortified by some of the decisions noted hereinafter. A similar controversy was considered by Calcutta High Court in **Juggilal Kamlatpat v. N.V. Internationale Crediet-En-Handels Vereeniging ‘Rotterdam’**¹⁰. It was held that the arbitration clause contained in the earlier deeds would continue to govern the rights and obligations of the parties. The relevant extract is as follows:

“The effect of the alterations or modifications is that there is a new arrangement; in the language of Viscount Haldane in *Morris v. Baron & Co.* (1) (1918 Appeal Cases, 1 at 17), “a new contract containing as an entirety the old terms together with and as modified by the new terms incorporated.” The modifications are read into and become part and parcel of the original contract. The original terms also continue to be part of the contract and are not rescinded and/or superseded except in so far as they are inconsistent with the modifications. Those of the original terms which cannot make sense when read with the alterations must be rejected. In my view the arbitration clause in this case is in no way inconsistent with the subsequent modifications and continues to subsist.” [para 15]”

15. Similar view has been taken by Gujarat High Court in **Creative Infocity Ltd. vs. Gujarat Informatics Ltd.**¹¹. In the said case, a concession agreement was executed between Gujarat Informatics Limited, a Government owned company and a private joint venture company (appellant) for private sector participation in infrastructure projects. It contemplated execution of master lease in favour of the appellant in furtherance of the

10 AIR 1955 Cal 65

11 MANU/GJ/0516/2009

concession agreement. The concession agreement provided for arbitration clause but it was missing in the master lease agreement. The issue before the court was whether arbitration clause in concession agreement would survive after execution of master lease agreement. The entire objective of the scheme was examined and it was concluded that the master lease agreement was entered into between parties in pursuance of concession agreement. Accordingly, the arbitration clause in the original concession agreement was held to govern the jural relationship between the parties. The relevant observations in this behalf are as follows:

"7. As stated above, the Master Lease Agreement was entered into between the defendant and the plaintiff and 116 acres of the land came to be leased to be plaintiff as per Concession Agreement. Therefore, it can be said that the Master Lease Agreement is in furtherance of Concession Agreement and the parties were to act as provided in Concession Agreement as well as in Master Lease Agreement. Therefore, it can be said that the Concession Agreement can be said to be the main agreement, and therefore, as such both the agreements, Concession Agreement and Master Lease Agreement are required to be read together and cannot be read in isolation, as sought to be contended on behalf of the plaintiff. As stated hereinabove, the Concession Agreement contemplated as one of its Schedule Master Lease Agreement. It appears that thereafter dispute arose between the plaintiff and the defendant with respect to various breaches by the plaintiff, and therefore, the defendant issued Preliminary Notice with respect to the Concession Agreement and a termination notice in respect to the Master Lease Agreement providing an opportunity to the plaintiff to cure and remedies the breaches within 60 days. Thereafter, as the defendant (G.I.L.) was satisfied with the cause of issuance of the notices were largely unresolved, despite the lapse of more than 15 months, the defendant issued the notice of termination of Concession Agreement and the Master Lease Agreement vide Termination Notices dated 12-8-2008. The said termination notices were challenged by the plaintiff before this Court by way of Special Civil Application No. 10840 of 2008 which came to be withdrawn by the plaintiff. It is to be noted at this stage that in Special Civil Application No. 10840 of 2008, it was specifically contended on behalf of the plaintiff that the Concession Agreement takes part and does not stand terminated

upon execution of the Master Lease Agreement and it was also specifically pleaded while challenging the termination notices in the said Special Civil Application that the dispute was required to be resolved through arbitration as provided under Clause 24 of the Concession Agreement and a grievance was made that the defendant had not proceeded thereunder. It is also to be noted that in Para 33(a) in the said Special Civil Application No. 10840 of 2008 even the plaintiff had prayed for writ, direction and/ or order commanding the respondent herein-original defendant to annul the termination notices dated 12-8-2008 and to hold that the aforesaid Concession Agreement and the Master Lease Agreement continue to operate and hold the field. Even considering various correspondences between the plaintiff and the defendant i.e. documents which are produced at Exh. 39/1 to 39/9, all throughout the case of the plaintiff is that both the agreements, Concession Agreement and Master Lease Agreement exist and in fact even the plaintiff has admitted the shelter of the Arbitration Clause provided in Concession Agreement. Therefore, the contention on behalf of the plaintiff that on execution of the Master Lease Agreement, Concession Agreement does not exist and/or has come to an end cannot be accepted."

16. Undoubtedly, all the parties, except opposite party No. 3 has signed the previous agreement dated 2 March 2020. *Prima facie*, opposite party No.3, though not signatory to the said agreement, had consented to its terms and conditions to the extent not altered or amended by subsequent supplementary partnership deed dated 20.02.2021.

17. The Constitution Bench in **Cox and Kings Ltd.** (supra) examined the issue as to whether a non-signatory to an agreement can be held bound by it. It is held that the said issue may require consideration of evidence on factual aspects and ordinarily it should be left to the tribunal to decide the same. At the referral stage, a referral court should not enter into the said issue. Following the law laid down in the Constitution Bench judgement in **Cox and Kings Ltd.** (supra), the Supreme Court while deciding Arbitration Petition No.38 of 2020, constituted

the arbitral tribunal but left it open to the parties to raise the said issue before it. Accordingly, I am of the view that the said issue which involves appreciation of evidence should be left to the wisdom of the arbitral tribunal for being decided in accordance with law.

18. In the result, I am of the opinion that the arbitration clause in the partnership agreement dated 2 March 2020 read with supplementary partnership agreement dated 20 February 2021 would merit constitution of an arbitral tribunal. This would be without prejudice to the pleas and contentions of the parties.

19. The court proposes the name of Mr. Justice Vipin Sinha, Former Judge of this Court R/o 10, N.K. Mukherji Road, behind Rajapur Roadways Workshop, Civil Lines, Prayagraj (Mob. No. 9415309091) as arbitrator to decide the disputes between the parties. The fees shall be as provided under the Fourth Schedule to the Arbitration and Conciliation Act, 1996.

20. Let the office seek consent and obtain disclosures as contemplated under Section 11(8) of the Act.

21. The instant application will be put up for further orders after receipt of consent/disclosures from the proposed arbitrator in the month of December, 2024.

Order Date :- 8.11.2024

Mukesh Kr.

(Manoj Kumar Gupta,J.)