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

Date of Decision: 07th December, 2021

\+ O.M.P.(I) (COMM.) 281/2021, I.As. 10492/2021 & 13499/2021

SAPNA GUPTA ..... Petitioner

Through: Ms. Geeta Luthra, Senior Advocate with Mr. Siddharth Bhatti, Ms. Lashita Dingra, Ms. Asmita Narula, Ms. Apoorv Maheshwari and Ms. Shivani Luthra Lohiya, Advocates.

versus

AJAY KUMAR GUPTA & ORS. ..... Respondents

Through: Mr. Pawanjit Singh Bindra, Senior Advocate with Mr. Chetan Lokur and Mr. Vaibhav Kaul, Advocates for D-1 & 2.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA HYBRID MODE]

SANJEEV NARULA, J (Oral):

1. The present petition under Section 9 of the Arbitration and Conciliation Act, 1996 [*hereinafter the* '***Act***'] seeks interim measures to preserve and protect the rights of the Petitioner in a partnership firm – Metal Cans Company, New Delhi, pending constitution of arbitral tribunal for adjudication of disputes *inter se* partners of the firm.

2. *Vide* an *ex-parte* order dated 23rd August, 2021, Respondents have been restrained from alienating or creating third party interest in respect of

immovable properties of the partnership firm and have further been directed to maintain *status quo* in respect of a property that is stated to have been purchased by siphoning off monies of the firm. The said order is currently in force.

3. The Respondents, at the outset, raised a preliminary issue regarding maintainability of the present petition on the ground that the clause contained in the partnership deed falls short of the essential requirements contemplated under law to constitute an arbitration agreement. On this issue, Ms. Geeta Luthra, Senior Counsel for the Petitioner and Mr. Pawanjit Singh Bindra, Senior Counsel for the Respondents have been heard extensively.

4. In order to appreciate the controversy, it would be apposite to note the clause contained in the Partnership Deed dated 1st April 2011, on which the petition is premised. The same reads as follows:

> *"Clause 21*
> *Any other matter for which there is no provision in the Deed and dispute relating to the affairs of the Firm shall be mutually decided by the partners. The provisions of the Indian Partnership Act, 1932 which are not in consistent or repugnant to the provisions of this Deed shall apply to all matters not specifically mentioned herein. However the dispute can also be decided under the provisions of the Indian Arbitration Act."*

CONTENTIONS

5. Ms. Geeta Luthra, Senior Counsel for the Petitioner has made the following submissions:

5.1. The objection of Respondents regarding maintainability is frivolous and completely misconceived.

5.2. The clause has all the necessary ingredients for qualifying as an arbitration agreement between the parties.

5.3. There is no specific form of arbitration agreement provided under the Act and existence of the same has to be decided based on the facts and circumstances of a particular case.

5.4. For deciding the validity of an arbitration agreement, intention of the parties is to be gathered from the agreement, as well as conduct of parties, correspondences exchanged, and the surrounding circumstances.

5.5. As long as there is a clear intention of parties to opt for arbitration for settlement of disputes, no party should be allowed to take advantage of inartistic drafting of an arbitration agreement, as it would defeat a valid claim.

5.6 The intention of the parties in the present case can be gathered from the fact that the first Partnership Deed dated 01st April, 1997 between Ajay Kumar Gupta, Shashi Gupta, Amit Kumar Gupta and Sapna Gupta, provided for settlement of disputes by way of arbitration, by way of the following clause:

> *"23. That all the disputes relating to the Partnership Business shall be decided by an Arbitrator and his decision shall be final and binding."*

5.7. Upon the proposal of Respondent No. 1, the Petitioner allowed induction of Respondent No. 2, pursuant to which the Partnership was re-

constituted on 01st April, 2011. The new partnership deed also provides for dispute resolution by way of arbitration. Relevant clause thereof has already been reproduced in paragraph no. 4 hereinabove.

5.8. Thereafter, on 30th May, 2011, family members entered into a settlement whereby the partnership business devolved onto the families of the Petitioner and her brother-in-law, i.e., the Respondent No. 1 and Respondent No. 2. The said family settlement also provides for dispute resolution by way of arbitration, as under:

> *"Settlement of Dispute:- The Parties agree that any disputes arising. between them under this Memorandum of Family Settlement shall be referred for arbitration proceeding in accordance with the provisions of the Indian Arbitration and Conciliation Act 1996. The decision of the said arbitrator shall be final and binding on the parties."*

5.9. It is thus evident that the Parties had a clear and unequivocal intention to refer the disputes between them to arbitration from the very inception i.e., since the year 1997 till the very last Agreement dated 30th May, 2011.

5.10. Reliance was placed upon the judgment in ***Visa International Ltd. v. Continental Resources (USA) Ltd.***,[1] ***Powertech World Wide Ltd. v. Delvin International General Trading LLC***,[2] ***Suresh Tulshan Trustee of K.P. Foundation & Ors. v. Marco Polo Restaurant Pvt. Ltd.***,[3] and ***Vidya Drolia & Ors. v. Durga Trading Corp***.[4]

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[1] (2009) 2 SCC 55.
[2] (2012) 1 SCC 361.
[3] 2015 SCC Online Cal 6582.
[4] (2021) 2 SCC 1.

6. Per contra, Mr. Pawanjit Singh Bindra's submissions for the Respondents are summarised as follows:

6.1. Clause 21 does not reflect an unequivocal intention of the parties to resolve their disputes by way of arbitration and is therefore not a valid arbitration agreement.

6.2. The word "*can*" used in the clause merely expresses an intention that parties can opt for resolution of their disputes by way of arbitration. It is not an arbitration agreement in itself, but only empowers the parties to possibly enter into an arbitration agreement at a later stage. As such, there is no valid arbitration agreement and as a necessary corollary, the petition is not maintainable.

6.3. In support of his submissions, reliance is placed on ***K.K. Modi v. KN Modi***,[5] ***Mysore Construction Company v. Karnataka Power Corporation***,[6] ***Rukmanibai Gupta v. Collector***,[7] ***Wellington Associates Ltd. v. Kirit Mehta***,[8] ***Food Corporation of India v. National Collateral Management***,[9] and ***Jagdish Chander v. Ramesh Chander***.[10]

ANALYSIS

7. Before dealing with the contentions on the preliminary objections, it must be noted that both the counsel have addressed arguments on the merits of the

[5] AIR 1998 SC 1297.
[6] 2001 (2) Kar. LJ 411.
[7] AIR 1981 SC 479.
[8] AIR 2000 SC 1379.
[9] 2019 (178) DRJ 462.

case as well. However, since preliminary objection had been raised regarding maintainability, the said issue is being taken up first, and merits thereof shall only be gone into if the petition is found to be maintainable.

8. The question of maintainability, as noted above, hinges on the construction of the clause which has been relied upon as an arbitration agreement by the Petitioner.

9. Needless to say, arbitration is a creature of a consensus. It is completely dependent on party autonomy and the intention expressed in the agreement [*See*: ***Vidya Drolia*** (*supra*)]. In ***Visa International Ltd.*** (*supra*), the Court held that no party can be allowed to take advantage of inartistic drafting of an arbitration clause; as long as clear intention of parties to go for arbitration for future disputes is evident from the agreement, the material on record, as well as surrounding circumstances. Keeping this principle in mind, we now proceed to analyse the clause.

10. The clause herein is *ex-facie* ambiguous. It can be split-up into three parts for convenience and better understanding of the intention of the parties. The first part provides that for matters where there is no provision in the deed and a dispute arises relating to affairs of the firm, the same has to be mutually decided by the partners. The second part provides for applicability of Indian Partnership Act, 1932 which has actually no correlation to the preceding or succeeding parts. The third part stipulates - "*however the dispute can also be decided under the provisions of Indian*

[10] (2007) 5 SCC 719.

Arbitration Act".

11. It is noted that the third part, which refers to 'arbitration', begins with the expression "*however*" and further stipulates that "*disputes can also be decided*" under the provisions of the "*Indian Arbitration Act*". It is, in essence, a proviso to the first part which provides for dispute resolution by mutual discussions amongst the partners. Thus, the first and third parts, when read together, imply that parties can resolve disputes mutually or if they so desire, can also take recourse to "Indian Arbitration Act". There is no binding agreement for arbitration. It does not use the phrase '*agree'* or '*reference'*. However, even if we were to construe the clause to be a case of inartistic drafting and give the benefit of the doubt to the Petitioner, on a plain reading it manifests the requirement of a fresh consent for arbitration from the usage of the phrase "*can also be decided*", meaning thereby that the parties may agree to refer the disputes to arbitration in the future. This clause, thus, merely indicates a desire or hope to have the disputes settled through arbitration, or at best, a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Respondent's consent for arbitration, in the instant case, is absent. Therefore, as the clause contemplates further consent or consensus for reference to arbitration, it is not an arbitration agreement, but at the highest, only an agreement to enter into an arbitration agreement in the future.

12. Both the parties have relied upon several case laws on this issue. However, the Court does not feel the need to discuss each and every judgment. The principles enshrined in the case laws unanimously hold that

the main attribute of an arbitration agreement is consensus *ad idem* to refer the disputes to arbitration. In case the same is missing, it is not an arbitration agreement as defined under Section 7 of the Act, and in the absence thereof, the present petition cannot be entertained.

13. That apart, the case laws relied upon by the Petitioner are of no assistance to them as the judgments are clearly distinguishable and, in fact, do not support the case of the Petitioner. In ***Visa International*** (*supra*), the arbitration clause which came up for consideration is as follows:

> *"Any dispute arising out of this agreement and which cannot be settled amicable shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996."*

14. The ambiguity in the aforesaid clause arose because it also stipulates that disputes arising out of the agreement could be settled amicably. In the said judgment, though one of the questions that arose for consideration was with respect to the existence of a valid agreement, the Respondent therein never disputed the same. Instead, a plea was taken that the agreement which contained the arbitration clause itself was not a valid and was incapable of being enforced. Further, it must also be noted that the Respondent therein, in response to the notice of invocation, merely objected to the names suggested by the other party and contended that suggested arbitration would not be cost effective and demand for arbitration itself was premature. In this background, the Respondent therein took the plea that the disputes should be settled through conciliation and relied upon the clause contained in another agreement which was actually not between the same parties. Rejecting such contention(s), the Court observed that the intent of the parties can be

gathered from the surrounding circumstances including their conduct and the correspondence exchanged between them. In that light, the Court observed that the absence of the word "*reference*" may not clinch the issue in as much as and the whole clause has to be interpreted in order to gather the intention of the parties. In such circumstances, the Court stressed that no party can be allowed to take advantage of inartistic drafting of arbitration clause and instead emphasised on the intention of the parties. Clearly, the afore-noted judgment is wholly inapplicable, having regard to the distinguishing facts noted above and the marked distinction between the arbitration clause that came up for consideration in the said case with the one in the instant case.

15. In ***Suresh Tulshan*** (*supra*), again, the arbitration clause in question was extensive, however, ambiguity arose because of the phrase "*may*" used therein. The Court refer to the judgments in ***Wellington Associates*** (*supra*) and ***Jagdish Chander v. Ramesh Chander*** (*supra*) but found marked distinguishing factors and observed that the arbitration clause contained an option that the parties either resort to arbitration or file a suit. The filing of an application under Order 7 Rule 11 of the CPC by the defendant therein was noted to be evident of its intent to submit to the jurisdiction of ordinary courts. Thus, on facts, the clause was found to be an invalid arbitration agreement.

16. In ***Enercon (India) v. Enercon GMBH***,[11] the arbitration clause that fell for consideration was entirely different. The question regarding validity of arbitration agreement arose on account of workability of the arbitration

clause in dispute. Hence, this judgment is also distinguishable.

17. Next, in ***Powertech*** (*supra*), the arbitration clause that fell for consideration was as under:

> *"Any dispute arising out of this purchase contract shall be settled amicably between both the parties to through an arbitrator in India/UAE."*

18. The aforesaid judgment is also distinguishable. The afore-noted clause, on a plain reading, made arbitration optional in view of the use of the conjunction "*or*". However, the Supreme Court, on the basis of correspondence between the parties on record, as well as on the basis of attending circumstances, held that parties had an arbitration agreement in writing and were *ad idem* in their intention to refer disputed matters to an Arbitrator in accordance with the provisions of the Act. This was concluded on the basis of letters exchanged between the parties as is evident from the following observation:

> "[…] *thus any ambiguity in the arbitration clause contained in the purchase contract stood extinct by the correspondence between the parties* […]"

19. Next, we come to the contentions urged by Ms. Luthra regarding surrounding circumstances in the instant case. A considerable emphasis has been laid on the fact that the Partnership Deed dated 1st April, 1997 which too contained an arbitration clause. The same was also found in the family settlement of 30th May, 2011, thereby indicating unequivocal intention to refer the disputes to arbitration. This presumption is not correct. Each agreement has to be considered independently. One cannot take into consideration the terms of other contracts, especially when the parties to the

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[11] (2014) 5 SCC 1.

contracts are different. Further, since the subsequent document does not specifically contain an arbitration clause when compared to the previous ones, it can also lead to the conclusion that the parties have, by intention, not opted for arbitration. Pertinently, apart from the afore-noted partnership deeds, no other surrounding circumstances, correspondences, or conduct of parties has been shown to evidence an arbitration agreement.

20. Lastly, the Court also does not find merit in the contention of Ms. Luthra that the question regarding existence of arbitration agreement should be left open for decision of the Arbitral Tribunal. On this issue, reliance has been placed on the judgment of the Supreme Court in ***Vidya Drolia*** (*supra*), and in particular paragraphs No. 150 and 151. In the opinion of the Court, reliance on ***Vidya Drolia*** (*supra*), though correct, is misplaced. Ordinarily, in case of a doubt regarding existence of an arbitration agreement, the Court would refer said disputes for arbitration having regard to the principles of *kompetenz-kompetenz,* however, at the same time, where the Court can *ex-facie* notice that there is no arbitration agreement, the parties need not be referred to arbitration. The existence of arbitration agreement, as defined under Section 7 of the Act, is a condition precedent for exercise of the Court's power to appoint an Arbitrator.

21. In view of the above, since existence of the arbitration agreement is absent, the necessary corollary is that the present petition under Section 9 of the Act would not be maintainable.

22. Accordingly the present petition is dismissed, along with all pending

applications.

23. The interim order dated 23rd August, 2021 stands vacated.

24. At this stage, Ms. Luthra requests for extension of the interim protection for a short period to enable her to take appropriate remedy in accordance with law. Although Mr. Bindra strongly opposes the request and argues that the interim order has been obtained by misleading the court and should not be extended once the court has held that it has no jurisdiction, however, without prejudice to his rights and contentions, and on instruction, he says that for a period of 10 days from today, the Respondents shall refrain from alienating any of the assets of the partnership firm. His statement is taken on record.

25. The Petitioner shall be at liberty to invoke other remedies as are available under law. The observations made hereinabove and in the previous orders, are only a tentative view of the Court which shall not influence any further adjudication on the merits of the dispute before any other court of law. The Respondents shall remain bound by such undertaking.

26. Dismissed along with pending applications.

SANJEEV NARULA, J

DECEMBER 07, 2021
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