IN THE HIGH COURT OF MADHYA PRADESH AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE ANAND PATHAK

ARBITRATION CASE NO. 44 of 2021

GOKUL BANSAL
Vs.
VIPIN GOYAL & ORS.

APPEARANCE:

Shri Anmol Khedkar – Advocate for the applicant.
Shri Somyadeep Dwivedi – Advocate for respondents No.1&2.

Order

{Passed on 8th Day of January, 2025}

1. Present application is preferred by the applicant under Section 11(4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996') for appointment of Arbitrator.

2. Precisely stated facts of the case are that M/s Om Jai Gurudev is a partnership firm constituted on 07-11-2014 and partnership deed was executed on 18-07-2017. In the said registered partnership firm, initially 11 partners existed. However, with amended deed dated 20-03-2019, the partnership firm was reconstituted and except the applicant and the non-applicants, other partners resigned from the said firm. Present applicant has 13% share in the partnership firm.

3. Firm is having an immovable property situate at Mahadik Ka Bada, Lohiya Bazar, Lashkar, Gwalior. The said property was purchased by the firm by various sale deeds and a commercial complex has been constructed over it.

4. Applicant repeatedly requested the non-applicants to bifurcate his share to the tune of 13% in the said property. In spite of repeated

requests and reminders nothing affirmative came out. Therefore, this application has been filed for appointment of Arbitrator because according to clause 11 of the amended partnership deed dated 20-03-2019, dispute is to be resolved through appointment of Arbitrator under the Act of 1996.

5. Notice dated 04-01-2021 was issued and non-applicants were informed about the intention. Non-applicants No.1 and 2 replied the notice vide reply dated 12-01-2021. Several objections were raised into it including the issue of tenancy. According to the said reply, there is no dispute in respect of partners and their working. Therefore, application has been filed by the applicant for appointment of Arbitrator.

6. It is the submission of learned counsel for applicant that Clause 11 indicates that dispute can be resolved through appointment of Arbitrator. Applicant wants property to be divided into metes and bounds and he seeks property correspondingly to his share in the partnership firm. Learned counsel for applicant also refers the fact that dispute involves tenancy rights also and fate of three parties (tenants) would affect the proceedings because they would not be before the Arbitrator. He relied upon a judicial pronouncement in the case of **VGP Marine Kingdom Private Limited and Another Versus Kay Ellen Arnold, AIR 2022 SC 5474.**

7. Learned counsel for non-applicants/respondents No.1 and 2 opposed the prayer on the ground that no dispute exists between the parties. Even if any dispute exists under the Indian Partnership Act, 1932, appropriate remedy would be to approach Civil Court rather than appointment of Arbitrator because it would be beyond the domain of Arbitrator. He relied upon the judgment of Apex Court in the case of

Vidya Drolia and Ors. vs. Durga Trading Corporation, (2021) 2 SCC 1. He referred para 51, 54 and 55 to assert his submission. He also relied upon judgment of Apex Court in the case of **Addanki Narayanappa and another vs. Bhaskara Krishnappa (dead) and thereafter his heirs and others, AIR 1966 SC 1300** and refers para 5 of the said judgment to demonstrate that the whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Therefore, during the subsistence of the partnership a partner can get share of property. Dissolution /retirement etc. as provided in Indian Partnership Act, 1932 are the means to get share.

8. He also relied upon the judgment of **Arif Azim Co. Ltd. v. Aptech Ltd. AIR 2024 SC 1347** and submits that Apex Court has reiterated the principles/propositions as laid down in **Vidya Drolia (supra).** Non-arbitrable claims based upon point of limitation or otherwise ought not to be referred to Arbitrator. He prayed for dismissal of application.

9. Shri K.N. Gupta, learned senior counsel on the request of this Court refers the judgments of **Vidya Drolia (supra) and Arif Azim Co. Ltd. (supra)** and stressed over the legal position that certain Acts like Indian Partnership Act, 1932, Companies Act, 1956 as well as 2013, M.P. Accommodation Control Act, 1961 and The Specific Relief Act, 1963 are meant for specific situation and they cannot be referred to Arbitrator for adjudication in normal facts and circumstances. Here unless dissolution is sought for, applicant may not get any relief.

10. Heard the learned counsel for the parties at length and perused the documents appended thereto.

11. This is the case where applicant who is partner (to the extent of 13%)

is demanding share of 13% in the subject property in metes and bounds. Subject property is building/apartment at Gwalior. Property belongs to partnership firm is for its benefit and the entitlement of the partners is to the profit in "**Proportion of his Share**" and not to in "**Portion of such Property**".

12. Non-applicants No.1 and 2 rightly relied upon the judgment rendered by the Apex Court in the case of **Addanki Narayanappa and another (supra)**. Relevant discussion can be reiterated for bringing clarity to the issue:

> "*5. It seems to us that looking to the scheme of the Indian Act no other view can reasonably be taken. The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership. As already stated, his right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from partnership of the value of his share in the*

net, partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges. It is true that even during the subsistence of the partnership a partner may assign his share to another. In that case what the assignee would get would be only that which is permitted by S. 29(1), that is to say, the right to receive the share of profits of the assignor and accept the account of profits agreed to by the partners. There are not many decisions of the High Courts on the point. In the few that there are the preponderating view is in support of the position which we have stated. In Joharmal v. Tejram Jagrup (1893 ILR 17 Bom. 235) which was decided by Jardine and Telang JJ., the latter took the view that though a partner's share does not include any specific part of any specific item of partnership property, still where the partnership is entitled to immovable property, such share does include an interest in immovable property and, therefore, every instrument operating to create or transfer a right to such share requires to be registered under the Registration Act. In coming to this conclusion he mainly purported to rely upon an observation contained in the fifth edition of Lindley on Partnership at p.347. This observation is not to be found in the present edition of Lindley's Partnership nor in the 9th or 10th editions which were brought to our notice. The 5th edition, however, is not available. The learned Judge after quoting an earlier statement which is that the "doctrine merely amounts to this that on the death of a partner his share in the partnership property is to be treated as money, not as land" says: This obviously would not affect matters

either during the lifetime of a partner -Lindley, L.J., says in so many words that it has no practical operation till his death (p. 348) or as against parties strangers to the partnership,' e.g., the firm's debtors. "While it is true that the position so far as third persons are concerned would be different it may be pointed out that in Forbes v. Steven {(1870) 10 Eq 178} James V.C., has, as quoted by the learned Judge, said : "It has long been the settled law of this Court that real estate bought or acquired by a partnership for partnership purposes (in the absence of some controlling agreement or direction to the contrary), is, as between the partners and as between the real and personal property, and devolves and is distributable and applicable as personal estate and as legal assets." Telang J., seems to have overlooked, and we say so with great respect, the words "as between the partners" which precede the words "and as between the real and personal representative of the partner deceased" and to have confined his attention solely to the' latter. We have not found in any of the editions of Lindley's Partnership an adverse criticism of the view of the Vice-Chancellor, But, on the contrary, as already stated, the view expressed is in full accord with these observations. Jardine J., has discussed the English authorities at length and after referring to the documents upon which reliance was placed on behalf of the defendant stated his opinion thus:

> *"To lay down that the three letters in question, which deal generally with the assets, movable and immovable, without specifying any particular mortgage or other interest in real property require registration, would, I incline to think, in*

the present state of the authorities, go too far. It may be argued that such letters are not 'instruments of gift of immovable property' but 'rather disposals of a share in a' partnership of which the business, is money lending, and the mortgage securities merely incidental thereto."

The view, of Telang J., was not accepted by the Madras High Court. In Venkataratnam v. Subba Rao(ILR 49 Madras 738): (AIR 1926 Mad. 1040). The learned Judges there discussed all the English decisions as also the decisions in Sudarsanam Maistri v. Narasimhulu Maistri (1902 ILR 25 Mad. 149) and Gopala Chetty v. Vijayaraghavachariar (ILR 45 Mad 378: 1992 -1 AC 488: (AIR 1922 PC 115 and the opinion of Jardine J in Joharmal's case 1893 ILR 17 Bom. 235 held that, an unregistered deed of release by a partner of his share in the, partnership business is admissible in evidence, even where the partnership owns immovable property. The learned Judges pointed out that though a partner may be a co-owner in the partnership property he has no right to ask for a share in the property but; only that the partnership business should be wound up including, therein the sale of immovable property and to ask for his share in the resulting assets. This decision was not accepted as laying down the correct law by a Division Bench of the same High Court in Samuvier v. Ramasubbier, ILR 55 Mad. 72 : (AIR 1931 Mad. 580). The learned Judges there relied upon the decision in Ashworth v. Munn, (1880) 15 Ch D 363 in addition to the opinion of Telang, J., and also referred to the decision Gray v. Smith (1889) 43 Ch D 208 in coming to a conclusion contrary to the one in the earlier case. It may be

pointed out that the learned Judges have made no reference to the decision of the Privy Council in Gopla Chetty's case ILR 45 Mad. 378 : 1922 -1 AC 488 : (AIR 1922 PC 115) though that was one of the decisions relied upon by Phillips, J., in the earlier case. In so far as Ashworth's case, (1880) 15 Ch D 363 is concerned that was a case which turned on the provisions of the Mortmain Acts and is not quite pertinent for the decision on the point which was before them and which is now before us. In Gray. v. Smith (1889) 43 Ch.D 208 Kekewich, J., held that an agreement by one of the partners to retire and to assign his share in the partnership assets including, immovable property, is an agreement to assign an interest in land, and falls within the statute of Frauds. The view of Kekewich, J. seems to have received the approval of Cotton L.J., one of the Judges of the court of Appeal, though no argument was raised before it challenging its correctness. It may, however, be observed that even according to Kekewich, J., the authorities (1800) 5 Ves 308 (1846) 5 Har 369 on appeal to (1847) 2 Ph 266 establish that one may have an agreement of partnership by parol, notwithstanding that the partnership is to deal with land. He, however, went on to observe:

> *"But it does not seem to me to follow that an agreement for the dissolution of such a partnership need not be expressed in writing, or rather than there need not be a memorandum of the agreement for dissolution when one of the terms of the agreement, either expressly or by necessary implication, is that the party sought to be charged must part with and*

assign to others an interest in land. That seems to me to give rise to entirely different considerations. In the one case you prove the partnership by parol; you prove the object, the terms of the partnership, and so on. But in the other case it is one of the essential terms of the agreement that the party to be charged shall convey an interest in land, and that seems therefore to bring it necessarily within the 4th section of the Statute of Frauds".

In the case before, us also in Samuvier's case, ILR 55 Mad. 72 : (AIR 1931 Mad. 580) the document cannot be said to convey any immovable property by a partner to another expressly or by necessary implication. If we may recall, the document executed by the Addanki partners in favour of the Bhaskara partners records the fact that the partnership business has come to an end and that the latter have given up their share in "the machine etc., and in the business" and that they have "made over same to you alone completely by way of adjustment". There is no express reference to any immovable property herein. No doubt, the document does recite the fact that the Bhaskara family has given to the Addanki family certain property. This, however, is merely a recital of a fact which had taken place earlier. To cases of this type the observations of Kekewich J, which we have quoted do not apply. The view taken in Samuvier's case ILR 55 Mad. 72 : (AIR 1931 Mad. 580) seemed to commend itself to Varadachariar, J., in Thirumalappa v. Ramappa *(AIR 1938 Mad. 133) but he was reversed in Ramappa v. Thirumalappa(AIR 1939 Mad. 884).*

13. Thus, the relief of partition of subject property as sought by the applicant during subsistence of partnership firm is barred by law. Therefore, matter is non-arbitrable.

14. It is indeed true that scope of enquiry having the trappings of adjudication is limited at the stage of application under Section 11 of the Act of 1996 but Court can certainly determine existence of arbitration agreement and also to enquire whether there is *prima facie* arbitration dispute or not. Contention of non-applicant/respondent appear to be correct because the applicant cannot seek prayer for physical share (metes and bounds) in the property of partnership firm without praying for retirement from the firm or for dissolution, in that condition only entitlement of a partner upon severance of status of the partnership firm would be of money equivalent to the value of his share therein. Therefore, demand of applicant is prohibited in law and appears to be a dead wood claim.

15. The Apex Court in the case of **NTPC Ltd. Vs. M/s SPML Infra Ltd. AIR 2023 SC 1974** refused reference upon the claim being found meritless and dishonest. Relevant discussion can be reproduced for ready reference:

> "***28.*** *The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the referral court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable. It has been termed as a legitimate interference by courts to refuse reference in order to prevent wastage of public and private resources. Further, as noted in Vidya Drolia (supra), if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene,*

it may undermine the effectiveness of both, arbitration and the Court. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator, as explained in DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd., 2021 SCC OnLine Sc 781 para 18, 20 Home Developers Limited V. Rajapura Homes Pvt. Ltd."

16. Earlier in the case of **Vidya Drolia (supra)**, the Apex Court held therein that reference should be refused when third party rights are likely to be affected. In the present case, admittedly tenants are inducted and that too they are not signatory to the partnership deed which contains arbitration clause and therefore, they cannot be bound by any award emanating out of prospective arbitration proceedings. Relevant discussion finds place in para 76 which reads as under:

76. *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:*

76.1.(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.*

76.2.(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;

76.3.(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*

76.4.(4) *when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).*

76.5. *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.*

76.6. *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).”*

17. Therefore, in the considered opinion of this Court when matter relates to Partnership Act and partnership deed and third party rights are also involved then it cannot be referred to arbitration. Applicant may resort to other remedy in accordance with law. Hence, the application preferred for appointment of arbitrator is hereby dismissed.

18. The Arbitration Case stands **dismissed**.

(ANAND PATHAK)
JUDGE

Mani/Anil*