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2025:BHC-AS:726

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
ARBITRATION PETITION NO. 131 OF 2024

Shreegopal Barasia ...Petitioner

Versus

M/s. Creative Homes & Ors. ...Respondents

SHRADDHA KAMLESH TALEKAR
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Date: 2025.01.08 20:42:52 +0530

Mr. Mayur Khandeparkar *a/w. Mr. Nishant Tripathi, Mr.Pranav Vaidya i/b M. Tripathi & Co., for Petitioner.*

Mr. Rohaan Cama *a/w. Mr. Abhishek Adke i/b Adv. Abhishek Adke, for Respondent Nos. 1, 3 to 10.*

Mr. Mikhail Behl *a/w. Mr. Rupesh Geete, Ms. Priya Danagt i/b Satyaki Law Associates, for respondent No. 2.*

CORAM : SOMASEKHAR SUNDARESAN, J.

Date : January 6, 2025

Oral Judgement:

1. This is a Petition under Section 11 of the Arbitration and Conciliation Act, 1996 ("***the Act***") seeking to refer disputes and differences that have arisen between the parties in connection with an agreement dated February 19, 2007, and another deed dated August 14, 2015 (which cancelled the agreement dated February 19, 2007).

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2. The arbitration agreement contained in each of the aforesaid instruments is identical in terms, and reads thus :

> *15 **In case any dispute or difference arise** between the parties hereto **in regard to the said project** or **in regard to the construction and/ or interpretation** of any of the clauses herein contained then **the same shall be referred to the sole arbitrator as per the provisions of the Arbitration and Conciliation Act, 1996**. The Venue of the arbitration shall be Navi Mumbai and language English.*
>
> *[**Emphasis Supplied**]*

3. Each of these clauses relates to disputes and differences in connection with the construction or interpretation of any of the clauses of the respective instrument. The venue of the arbitration is within the territorial jurisdiction of this Court.

Respondents' Objections:

4. The primary opposition by the Respondents, to the reference by this Court to an arbitrator under Section 11 of the Act, is two-fold. *First*, that Respondent No. 2, the individual partner who executed the agreement on behalf of Respondent No. 1, which is a partnership firm, did not have any implied authority to bind the firm to the arbitration clause contained in these two instruments. The submission of Learned Counsel for the Respondent Nos. 1 and 3 to 10 is that executing any contract which has an arbitration clause in it, constitutes "submission of a dispute to arbitration". According to

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him, executing such a contract would require an explicit authorisation, since Section 19(2)(a) of the *Indian Partnership Act, 1933* ("***Partnership Act***") provides that there can be no implied authority for a partner to submit a dispute relating to the business of the firm to arbitration.

5. *Second*, that the very existence of the agreements is in doubt, in view of the foregoing proposition. In other words, a partner not having any implied authority to "submit disputes to arbitration" would have no implied authority to sign any agreement containing an arbitration clause. If such an agreement is indeed signed, it would mean that the agreement in question was not validly executed, and therefore, that agreement does not exist. The corollary is that for a partnership firm to sign any contract containing an arbitration clause, there ought to be an express authorization to the partner executing the said contract, in the absence of which, in view of Section 19(2)(a) of the Partnership Act, the Arbitration Agreement would not be in existence.

6. Learned Counsel for Respondent No. 2 (the individual partner who has executed the agreements containing the arbitration clause), supplements the aforesaid contentions with his own objection. He would submit that the dispute on existence of an agreement cannot even be referred to an Arbitral

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Tribunal, unless the arbitration clause expressly places the determination of existence of an agreement as a matter of dispute that can be referred to arbitration. If the arbitration agreement does not expressly empower the Arbitral Tribunal to determine validity and existence of the agreement, according to him, such question is outside the jurisdiction of the Arbitral Tribunal.

Analysis and Findings:

7. Having heard the Learned Counsel for the parties and having perused the record with their assistance, it is writ large on the face of the record that there exists a formal agreement at both instances, namely, the agreement dated February 19, 2007, and the cancellation deed dated August 14, 2015. As stated above, each of these instruments has an arbitration agreement inherent in it, which essentially requires disputes between the parties in connection with construction or interpretation of such instrument to be referred to a sole arbitrator.

8. To begin with, the submission made on behalf of Respondent No. 2 has to be stated to be rejected. The jurisdiction to adjudicate disputes relating to the construction or interpretation of an agreement would necessarily bring within its ambit, any dispute about whether the agreement exists. That apart,

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as a matter of statute, it is quite clear from Section 16 of the Act that the scope of power of the Arbitral Tribunal is indeed extremely wide and expansive. Under Section 16(1) of the Act, the Arbitral Tribunal may rule on its own jurisdiction. In doing so, the Arbitral Tribunal may also rule on any objections with respect to the existence or validity of the arbitration agreement. Towards such purpose of ruling on its own jurisdiction, and dealing with objections as to existence and validity, two specific sub-clauses have been inserted in Section 16(1) of the Act. The arbitration clause in a contract is treated as an independent agreement that is distinct from the other terms of the contract. Besides, a decision that the contract containing the arbitration clause is void, would not entail the legal outcome that the arbitration clause is invalid.

9. It is also now trite law that the referral court under Section 11 of the Act ought to restrict its scrutiny in the course of such proceedings solely to the existence of an arbitration agreement. Multiple judgments have emanated from the Supreme Court on the point. More recently, in *In re: Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899*[1] (***"Interplay Judgment"***), an entire chapter has been dedicated to the scope of the jurisdiction of the Section 11 Court by a seven-judge bench of the

[1] *(2024) 6 SCC 1*

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Supreme Court. The Court exercising jurisdiction under Section 11 ought to restrict its scrutiny to ascertaining the existence of an agreement. The existential questions about whether the agreement that is seen as executed on the face of the record, in fact truly exists, and if it exists, whether it validly exists, would all be a matter of merits for consideration by the Arbitral Tribunal.

10. In *Ajay Madhusudan Patel & Ors. Vs. Jyotindra s. Patel & Ors.*[2], extracting from various judgements to show the march of the law governing the scope of review under Section 11 of the Act, the Supreme Court summarised the ***Interplay Judgement*** in these words:

> *• In In Re : Interplay (supra) the position taken in Vidya Drolia (supra) was clarified to state that* ***the scope of examination under Section 11(6) should be confined to the "existence of the arbitration agreement" under Section 7 of the Act, 1996*** *and* ***the "validity of an arbitration agreement" must be restricted to the requirement of formal validity such as the requirement that the agreement be in writing****. Therefore,* ***substantive objections pertaining to existence and validity on the basis of evidence must be left to the arbitral tribunal*** *since it can "rule" on its own jurisdiction.*
>
> ***[Emphasis Supplied]***

Section 19(2)(a) of the Partnership Act:

11. The argument that Section 19(2)(a) of the Partnership Act undermines the very existence of an arbitration agreement too has to be stated to be

[2] *2024 SCC OnLine SC 2597*

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rejected, at the least, for purposes of my review under Section 11 of the Act. Section 19(2)(a) of the Act provides as follows:

> ***Section 19 Implied authority of partner as agent of the firm.***
> *(1) .....*
> *(2) In the* ***absence of any usage or custom of trade to the contrary****, the* ***implied authority*** *of a partner* ***does not empower*** *him to--*
>
> *(a)* ***submit a dispute relating to the business of the firm to arbitration***
>
> *[**Emphasis Supplied**]*

12. It is clarified that extracting the aforesaid provision and commenting on it, is not intended to enter upon interpreting this provision as a matter of commenting on the merits of the dispute. I have done so, only to deal with the objection of the Respondents, and to state that arguments in this regard are in the domain of the Arbitral Tribunal, to which a reference ought to be made in this case. In this context, to my mind, it is apparent even from a plain reading of the aforesaid provision that what is envisaged in the aforesaid provision is that one has to examine whether there is no custom or usage of trade to the contrary in connection with a partner submitting a dispute relating to the business of a partnership firm to arbitration. If it is concluded that there is no custom or usage of trade for a partner to submit disputes to arbitration, then an express authority would be required to submit disputes to arbitration. In any case, all of this would be irrelevant

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unless it is found that the very execution of any contract containing an arbitration clause constitutes "submitting a dispute to arbitration".

13. *Prima facie,* it is apparent to me that "submission of a dispute" relating to the business of the firm to arbitration would necessarily entail the existence of a dispute. Unless a dispute comes into existence, there would be no question of submitting it to arbitration. This is the action – of submitting a dispute that exists, to arbitration – that is covered by Section 19(2)(a) of the Partnership Act. A dispute that has arisen can be submitted to arbitration only when there is a right to submit it to arbitration. Such a right can come into existence only when there is an agreement containing an arbitration clause. When there exists a right to submit a dispute to arbitration by reason of an arbitration clause, the action of actually submitting to arbitration, an actual dispute that has arisen, could perhaps not be done without express authority (that too would depend on custom and usage of trade).

14. Arbitration clauses being embedded in contracts executed in the course of trade and business is widely prevalent and customary. Even if one were to presume that signing an agreement with an arbitration clause could be regarded as "submission" of a (non-existent) "dispute to arbitration", it would not follow that as a matter of law, there is no implied authority to

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execute such a contract. Evidence would need to be led about whether executing such contracts is customary. *Prima facie*, the proposition canvassed is extreme (to say the least) to be convincing enough to prevent referral of a dispute to arbitration (to which the parties had bound themselves). The objection is absurd and simply does not lend itself to acceptance. The only accurate position in law is that all these are issues that would pose mixed questions of fact and law and would relate to the substance of existence rather than the form of existence i.e. a written agreement. The only forum for determination of substance of existence, in the scheme of the Act, is the Arbitral Tribunal.

15. An arbitration clause in a commercial agreement only means creation of a framework under which future disputes could be submitted in the future to arbitration. It is such decision to actually "submit" an actual "dispute" that has arisen in the course of business, that, *prima facie*, in my opinion, would attract the jurisdiction of Section 19(2)(a) of the Partnership Act. Section 19(2)(a) of the Partnership Act, *prima facie*, appears to be one that protects the partnership firm from a partner subjecting the firm to arbitration proceedings without consulting other partners. It could perhaps be regarded as a provision that prevents a partner from agreeing to opt for arbitration instead of pursuing litigation in Court, when faced with a dispute. There was an era when arbitration was considered inferior to court litigation, and opting

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for arbitration could have been seen as compromising what could be a stronger prospect for the firm in a Court. Doing so without consulting other partners, could be the scope of Section 19(2)(1) of the Partnership Act. Even in such situations, whether there is a custom or usage of trade, would also need to be examined.

16. All these are matters of evidence that only the Arbitral Tribunal would need to deal with. Be that as it may, these are *prima facie* observations only to repel the contention that an existential question about the agreement exists, and that too by reason of not being executed by a validly authorised person. I am not dissuaded, presiding over proceedings under Section 11 of the Act, from referring the disputes in these proceedings to arbitration.

17. It is made clear that all such contentions of the Respondents may well be raised by the parties before the arbitrator being appointed pursuant to this order, including issues relating to existence in substance, and validity of the agreements in question.

Order:

18. Without intending to pronounce upon the merits of the case, and yet discharging the duty of the Court under Section 11 of the Act (by restricting the scrutiny to the existence of an arbitration agreement), the following order is passed:

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a. Justice Akil Kureshi, former judge of this Court and former Chief Justice of Rajasthan and Tripura, is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above; The contact particulars of Justice Kureshi are set out below:-

Address : 617, Raheja Chambers, 6th Floor,
Free Press journal Marg,
213 Nariman Point, Mumbai-400021.
Email id : akil.kureshi@gmail.com

b. A copy of this Order will be communicated to the learned Sole Arbitrator by the Advocates for the Petitioner within a period of one week from today. The Petitioner shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

c. The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order;

d. The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of

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the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;

e. All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs; and

f. The parties have agreed that the venue and seat of the arbitration will be in Mumbai. It is clarified that it shall be open to the Arbitral Tribunal to conduct the proceedings online through electronic mode.

19. This Petition is ***finally disposed of.***

20. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]

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