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

Date of Decision: 31st August, 2021

\+ **ARB.P. 761/2021 & I.A. 10064/2021**

VERSHA SETHI ALIAS VARSHA SETHI & ORS. ..... Petitioners

Through: Mr. Deepak Vohra, Advocate.
Ms. Mahima Ahuja and Mr. Paras Mithal, Advocates for Petitioner No. 2.

versus

RAMAN SETHI & ORS. ..... Respondents

Through: Mr. Akshay Makhija, Senior Advocate with Mr. Saurabh Seth and Ms. Seerat Deep Singh, Advocates for Respondent Nos. 1 to 4.

\+ **O.M.P.(I) (COMM.) 262/2020 & I.A. 9510/2020**

VERSHA SETHI & ORS. ..... Petitioners

Through: Mr. Mohit Chaudhary and Mr. Kunal Sachdeva, Advocates for Petitioner No. 1
Ms. Mahima Ahuja and Mr. Paras Mithal, Advocates for Petitioner No. 2.

versus

SHRI RAMAN SETHI & ORS. ..... Respondents

Through: Mr. Akshay Makhija, Senior Advocate with Mr. Saurabh Seth and Ms. Seerat Deep Singh, Advocates for Respondent Nos. 1 to 4.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

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1. A controversy arises in the present petitions on account of the

ambiguously-worded Clause 12 of the Partnership Deed dated 10th February, 1994, which has been construed by the Petitioner as an arbitration agreement between the parties. The said clause reads as under:

> *"12. That an all points when this partnership deed will be silent, two provisions of the Indian Arbitration Act 1940 will be applicable."* [sic]

2. The execution of the Partnership Deed is not in dispute. The Respondents, however, strongly oppose the present petitions on the ground of maintainability, arguing that the aforenoted clause does not constitute a valid arbitration agreement.

Petitioners' Contentions

3. Mr. Mohit Chaudhry and Mr. Deepak Vohra, counsel for the Petitioners, argue that the afore-noted clause fulfils the requirement, in law, for constituting an arbitration agreement; thus, recourse to arbitration proceedings is permissible. Their submissions are summarized as follows:

3.1. The afore-noted clause makes a reference to 'arbitration' under the applicable Act. It is not necessary that the words 'dispute/difference' between the parties be specifically mentioned in the arbitration clause. The arbitration proceedings would be for reference of 'differences' or 'disputes' is implied. The clause provides that where the Partnership Deed is silent, reference has to be made under the 'Indian Arbitration Act 1940'. This demonstrates that parties have chosen to go for arbitration, and to exclude the jurisdiction of Civil Courts. In support of this, reliance is placed upon the judgments of the Supreme Court in:

(i) ***Jagdish Chander v. Ramesh Chander***,[1] relevant portion whereof reads as under:

> *"8. (...) a clause in a contract can be construed as an "arbitration agreement" only if an agreement to refer disputes or differences to arbitration is expressly or* ***impliedly spelt out*** *from the clause."*
>
> [emphasis supplied]

(ii) ***M. Dayanand Reddy v. A.P. Industrial Infrastructure Corporation Limited***,[2] wherein it was observed that:

> *"8. An arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression 'arbitration' or 'arbitrator' or 'arbitrators' has been used in the agreement."*

(iii) ***Visa International Limited v. Continental Resources (USA) Limited***,[3] which held that:

> *"25 ... No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future dispute is evident from the agreement and material on record including surrounding circumstances.*
>
> *26. What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence such as exchange of correspondence between the parties (...)"*

3.2. The dominant purpose underlying the agreement is to arbitrate, as is evident from the language of the arbitration clause. Reliance is placed upon the judgment of the Supreme Court in ***Brahmani River Pellets Ltd. v.***

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[1] (2007) 5 SCC 719.

[2] (1993) 3 SCC 137.

[3] (2009) 2 SCC 55.

Kamachi Industries Ltd.,[4] wherein the Court recognised the following clause to be a valid arbitration agreement:

> *"18. Arbitration shall be under Indian Arbitration and Conciliation Law, 1996 and the Venue of Arbitration shall be Bhubaneshwar"*

3.3. Even if the parties only agreed that the Arbitration Act would apply, it would be sufficient to infer that the parties have the intention to arbitrate and not go to the Civil Court. If such was not their intent, there would be no reason to mention the applicability of the "Indian Arbitration Act, 1940" in the clause.

3.4. The partnership deed is exhaustive and in various clauses, spells out the percentage of interest of each partner, details of working of the business, books/accounts related clauses, and even provides for the non-dissolution of business in the event of death of a partner. Parties specifically and consciously agreed that the points on which said Deed is silent (like for resolution in the event of breach/interim arrangements etc.), the "Indian Arbitration Act, 1940" will be applicable.

3.5. When a reference is opposed by a party, the principle which guides the judicial authority is quoted in ***A. Ayyasamy v. A. Paramasivam***,[5] wherein, while referring to the words of the House of Lords, the Court held as under:

> *"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship*

[4] (2020) 5 SCC 462.

[5] (2016) 10 SCC 386.

> *into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from arbitrator's jurisdiction (...)"*

3.6. Reliance was also placed on the judgment of the Supreme Court in ***Enercon (India) Limited v. Enercon GMBH***,[6] relevant portion whereof, reads as under:

> *"It is a well recognized principle of arbitration jurisprudence in almost off the jurisdictions, especially those following the UNCITRAL Model Law, that the Courts play a supportive role in encouraging the arbitration to proceed rather than letting it come to a grinding halt."*

Respondents' Contentions

4. Mr. Akshay Makhija, Senior Counsel for Respondents No. 1 to 4, on the other hand, controverts the contentions of the Petitioner and makes submissions, which are summarised as follows:

4.1. A bare perusal of the clause clearly depicts that there is no arbitration agreement between the parties.

4.2. The reference in the clause is to the Indian Arbitration Act, 1940 and not to the 1996 Act under which the present petition has been filed.

4.3. The present clause, described as a 'pathological clause',[7] is replete with

[6] (2014) 5 SCC 1.

[7] The term "*pathological clauses*" or "*clauses pathologiques*" was coined by Frédéric Eisemann in "La clause d'arbitrage pathologique" in *Commercial Arbitration Essays in Memoriam Eugenio Minoli* (Torino: Unione Tipografico-editrice Torinese, 1974). The term is used to describe an arbitration clause with defective

mistakes and does not specify which 'two provisions' of the 1940 Act are to be invoked. The clause in question is incomplete, ambiguous, unworkable and cannot be relied upon by the Petitioners for any purpose whatsoever.

4.4. The disputes sought to be raised by the Petitioners are covered by the partnership deed, which are as follows:

> *a) "Allegation of inequality amongst partners are covered by the Shareholding Clause 3 at Page 12 of the Petitioners Documents;*
> *b) Employees are covered by Clause 8 Page 13 of the Petitioners Documents.*
> *c) Rendering accounts are covered by Clause 5 at Page 13 of the Petitioners' documents.*
> *d) Allegations of non transparency are covered by Clause 6 Page 13 of the Petitioners Documents.*
> *e) Allegation of inequality amongst partners are covered by the Shareholding Clause 3 at Page 12 of the Petitioners Documents;"*

4.5. The parties never intended to arbitrate their disputes. This can also be gathered from another partnership deed dated 26th February, 2004 between the same parties (albeit for another firm styled as PCL Estate & Construction Co.), wherein an almost identical clause was incorporated, which stated that when the Deed was silent, the provisions of the Indian Partnership Act, 1932 would apply. Thus, it appears that what the parties wanted to apply was the Indian Partnership Act, 1932, instead.

4.6. The judgments relied upon by the Petitioners, are clearly distinguishable.

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drafting, which does not allow the constitution of an arbitral tribunal without intervention, or makes it impossible to establish arbitral jurisdiction, rendering such the arbitration agreement invalid.

Analysis and findings

5. The Court has considered the contentions of the parties at length.

6. Before we discuss the applicable law, let us take a closer look at the clause in question. It stipulates that, on aspects where the Partnership Deed is silent, "two provisions of the Indian Arbitration Act, 1940" will be applicable. Thus, on a plain reading, if any meaning at all is sought to be gathered or inferred from this clause, it can only mean that "Indian Arbitration Act, 1940" would be applicable in respect of certain issues which are not provided for in the Partnership Deed. What those conditions of the Deed are, or what provisions of the 1940 Act are to apply, is anyone's guess, as it is left open-ended.

7. Keeping that in view, let us examine the relevant provisions of the Act in question i.e., the Arbitration Act, 1940, as it was the prevailing Act on the date of execution of the Partnership Deed, to see if the clause in question fulfils the requirement in law to constitute an arbitration agreement. At first blush, it would be apposite to note the definition of 'arbitration agreement' provided therein, which reads as follows:

> *"2. Definitions:*
> *(a) "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;"*

8. It must be noted that on the date of dispute, the applicable Act would be the Arbitration and Conciliation Act, 1996. Thus, it would also be imperative to see if ingredients of 'arbitration agreement' as provided in Section 7 of the said Act, are met in the instant case. For convenience, relevant

provision thereof is extracted hereinbelow:

> *"7. Arbitration agreement. – (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."*
> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
> *(3) An arbitration agreement shall be in writing.*
> *(4) An arbitration agreement is in writing if it is contained in—*
> *(a) a document signed by the parties;*
> *(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or*
> *(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*
> *(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."*

9. The pre-requisites for a valid arbitration agreement, in terms of the afore-noted provision, are that the parties must agree to submit to arbitration all or certain disputes which have arisen or which may arise between them with respect of any defined legal relationship. Thus, the essentials are: (a) an agreement between the parties, (b) intention to submit to arbitration all or certain disputes which have arisen or which may arise between them, (d) the disputes have to be in respect of a defined legal relationship, whether contractual or not.

10. In this context, it would also be profitable to take note of the views of the Supreme Court in ***Shyam Sunder Agarwal v. P. Narotham Rao***,[8] wherein, by referring to the earlier decision in ***K K Modi v. K N Modi***,[9] the Court noted

[8] (2018) 8 SCC 230.

[9] (1998) 3 SCC 573.

that the pre-requisites to constitute an arbitration agreement are - (a) an agreement in writing, (b) to refer disputes/ differences between the parties pertaining to substantive rights of parties, (c) to an Arbitral Tribunal, (d) decision of such dispute resolution shall be binding on the parties.

11. Keeping the above criteria in mind, on a bare perusal of the clause in question, it is found that there is no arbitration agreement between the parties, as the agreement in question does not satisfy the requirement of law – neither under Section 7 of the 1996 Act, nor under Section 2 of the 1940 Act. The clause in question merely makes a reference with respect to the applicability of the "Indian Arbitration Act, 1940". That reference itself, is in the context of two specific provisions of the "Indian Arbitration Act, 1940" which are not specifically provided for in the Indian Partnership Act, 1932. Firstly, it is perplexing to identify such 'silent' provisions of the Partnership Deed. Secondly, it is difficult to go on a fact-finding mission to find the relevant "two provisions" of the Arbitration Act, that are purportedly made applicable by this clause. The clause, as worded, is indeed vague, ambiguous and does not convey any meaningful sense. It is thus rightly described as a pathological clause and is entirely unworkable and replete with contradictions and vagueness. The most fundamental requirement of an arbitration agreement - clear and unequivocal intent to resort to arbitration – can't be deciphered here. This intention has to be in relation to reference of disputes to an Arbitral Tribunal.

12. Be that as it may, even if the Court were to ignore the abovesaid manifest lacuna in the clause and assume that the entire "Arbitration Act,

1940" would apply, that too would not constitute a valid an arbitration agreement. The basic necessity for the arbitration enactments to apply is the existence of an arbitration agreement. This is also true for other enactments such as the Indian Partnership Act, 1932. The precondition of applicability of the Indian Partnership Act, 1932 would be the existence of a defined legal relationship of partnership between the parties within the defined meaning prescribed under the Act. Similarly, the 1996 Act, as a law being in force applicable all over India, would apply *ipso facto*, even if it was not so stated, apply to the present clause, provided there was a valid arbitration agreement to this effect. Unfortunately for the Petitioner, that is not the case. Thus, applicability of the "Indian arbitration Act 1940" in the clause is of no consequence. The Court does not find any merit in the contention of the Petitioner that since the parties have agreed that the "Indian Arbitration Act, 1940" will be applicable, it would tantamount to an arbitration agreement.

13. Now coming to the caselaw relied upon by the Petitioner. The court finds that the Petitioner has conveniently ignored that in ***Jagdish Chandra*** (*supra*), the Supreme Court had also held that mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration clause. Relevant portion of the judgment reads as under:

> *"8. ... ...*
> *(iv) But mere use of the word "arbitration" or "arbitration" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to "arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states*

that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to got to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

14. The judgment in ***M. Dayanand Reddy*** (*supra*), is also distinguishable on facts. There, the original contract did not have any arbitration clause and the question arose whether the arbitration clause in the other document which was later forwarded to parties to be incorporated by reference in the main agreement constituted as an arbitration agreement. The Supreme Court held that there was no intention of the parties to arbitrate the disputes and further held that there was no arbitration clause between the parties. This judgment, therefore, is inapplicable to the case advanced by the Petitioners.

15. Likewise in ***Visa International*** (*supra*), again the arbitration clause which fell for consideration was dealt with as under:

"12. The disputed arbitration clause in the present case reads as under:
"Any dispute arising out of this agreement and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996"

xx ... xx ... xx

25. (...) No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future dispute is evident from the agreement and material on record including surrounding circumstances.

26. What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the

evidence such as exchange of correspondence between the parties (...)"

Plainly, the observations made by the Supreme Court therein were based on the language of the arbitration clause, and therefore the same have to be appreciated in that context.

16. The judgment in ***Brahmani River Pellets*** (*supra*), is also not applicable to the facts of the present case. In that case, it was not in dispute that the arbitration clause did not exist. The relevant clause thereunder read as under:

> *"4. Clause 18 of the agreement between the parties contains an arbitration clause which reads as under:*
>
> > *"18. Arbitration shall be under Indian Arbitration and Conciliation Law, 1996 and the Venue of Arbitration shall be Bhubaneshwar"*

The observations made by the Supreme Court were in the context of a dispute relating to the 'seat versus venue' debate, and thus the same are also not relevant to the present case.

17. The judgment in ***A. Ayyasamy*** (*supra*), too, like the other judgments cited by the Petitioner, is distinguishable on facts.

18. On the issue in hand, much depends on the wording of the clause, as arbitration is based on consent – whether there is an implied or express consent given by the parties to refer the matters for arbitration. This has to be gathered from the language used in the arbitration clause. This necessary attribute of arbitration agreement is grossly lacking in the present case, as discussed above.

19. The Respondents have also argued that disputes sought to be raised by the Petitioners in the Petition are clearly covered by the Partnership Deed, and

thus the entire grievance of the Petitioners is covered in and provided for in the Partnership Deed. However, the court finds no reason to delve into this controversy, as the arbitration agreement itself is found to be lacking in the present case.

20. Before parting, the Court would also like to observe that it finds merit in the contention of the Respondents that the reference to "Indian Arbitration Act, 1940" is erroneous, keeping in mind the words preceding thereto. Mr. Makhija, has explained that Clause 12 of the partnership deed inadvertently makes reference to "Indian Arbitration Act, 1940", when the intention of the parties, instead, was to make reference to the "Indian Partnership Act, 1932". Thus, in case one was to replace the reference to "Indian Arbitration Act, 1940" with "Indian Partnership Act, 1932", the clause immediately makes logical sense. It would then mean that parties are governed by the terms and conditions as provided in the Partnership Deed dated 1994, except when it is silent; in which event the provisions of the Indian Partnership Act, 1932 would be attracted. This implication can also be gathered from the fact that there is indeed no "Indian Arbitration Act, 1940"; the Act is known as "Arbitration Act, 1940". Apparently, the parties wanted to refer to "Indian Partnership Act, 1932" and not the "Indian Arbitration Act, 1940". These observations, are made only to gather the real intention of the parties, and are on *prima facie* basis.

21. Regardless, the Court cannot read the existence of any arbitral agreement between the parties for referring the disputes/differences to arbitration since the pre-requisite of valid arbitration agreement under Section

7 have not been met. There is no merit in the present petition.

22. Accordingly, the petition under Section 11 of the Act is dismissed, along with pending applications.

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23. Once it is established that there is no arbitration agreement, proceedings under section 9 of the Act cannot be maintained since the same are premised on the existence of an arbitration agreement. Accordingly, the said petition is also dismissed along with pending applications.

SANJEEV NARULA, J

AUGUST 31, 2021
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(corrected and released on 10th October, 2021)