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

\+ CS(COMM) 626/2022, I.A. 19669/2022, I.A. 4678/2023 & I.A. 13160/2023

Reserved on: 26th September, 2024
Date of Decision: 30th December, 2024

M/S. MGM PAPERS LLP .....Plaintiff

Through: Ms. Monica Goel, Ms. Kajal Pal and Mr. Yash Nagpal and Ms. Muskan Aggarwal, Advocates along with Mr. Sarvesh Sharma, AR

versus

M S SAMMAN LAL SHER SINGH PAPER PVT LTD AND ORS .....Defendants

Through: Mr. Kamil Khan, Mr. Suman Raj, Mr. Fardeen Khan and Ms. Aashna Bhola, Advocates

CORAM:
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J:

I.A. 19669/2022 (on behalf of the defendants under Section 8 of the Arbitration and Conciliation Act, 1996 seeking reference of the disputes to arbitration)

1. This is an application under Section 8 of the Arbitration and Conciliation Act, 1996 [‘Act of 1996’] filed by the defendants relying upon

Clause 28 of the Settlement Agreement dated 30.12.2019 ['Settlement Agreement'] for seeking reference of the disputes, which are the subject matter of this suit to arbitration.

2. It is stated at paragraph 10 of the application that though the Settlement Agreement has been signed by defendant nos. 2 and 4, defendant nos. 1 and 3 acknowledge that they are bound by the said Settlement Agreement.

3. In reply, non-applicant/plaintiffs state that the said application is not maintainable as it is barred by limitation since the application has been filed beyond 30 days from date of service of the summons in the suit. It is stated that defendants were served with the summons vide email on 18.10.2022 and therefore, the present application filed on 21.11.2022 is barred by limitation.

3.1. It is stated that Clause 28 of the Settlement Agreement has to be read with Clause 23 of the Settlement Agreement. It is contended that the said Clause is applicable only if disputes are referred between 30.12.2019 and 31.01.2020. It is contended that the said arbitration clause is thus valid for only one (1) month and thereafter, the disputes have to be resolved through the process of Civil Courts.

3.2. In addition, it is stated that Clause 23 names two (2) arbitrators, whereas, Section 10(1) of the Act of 1996 stipulates that the number of arbitrators cannot be even and therefore, the Clause is unenforceable being contrary to the statutory provision.

3.3. It is stated at paragraph 12 of the reply that though it is correct that plaintiff nos. 2 and 4 executed the Settlement Agreement on behalf of plaintiff no. 3 as well; however, since plaintiff no. 3 has not actually signed

the Settlement Agreement, the said Agreement is voidable at its instance.

3.4. Similarly, at paragraph 18 of the reply, it is admitted that plaintiff nos. 2 and 4 signed the Settlement Agreement on behalf of plaintiff nos. 1 and 3; however, it is contended that it may not be right to contend that the non-signatory plaintiff nos. 1 and 3 are bound by the Settlement Agreement.

3.5. It is stated that defendants have submitted to the jurisdiction of the Civil Court and waived their right to seek reference to arbitration as defendants in their reply dated 29.08.2022 to the legal notice dated 22.07.2022 did not suggest reference to arbitration. It is stated that similarly, defendants in their reply dated 19.08.2022 refused to participate in pre-institution mediation; however, in this reply as well they did not seek reference to arbitration.

4. This Court has considered the submissions of the parties and perused the record.

5. The relevant Clauses 23 and 28 of the Settlement Agreement refer to by the parties in the pleading reads as under: -

> "23. That in case of dispute or difference between the parties on any matters, the same shall be referred to following **'Arbitrators' (1) Sh. Raj Kumar Bindal and (2) Sh. Satya Narain Gupta**, being respected members of the Paper market and their decision shall be final and binding on both the parties.
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> 28. It has been further agreed amongst the parties that if any matter, which has been left or overlooked or has not been considered in this Final Consolidated Balance Sheet as on 31st March 2019 of joint businesses of both the Families as stated above, shall be checked and verified by both the parties within a period of one month i.e. upto 31st Jan. 2020 and shall be settled by both the parties with mutual consent. **If, however, there is some dispute or disagreement on the same then in such case, the decision of 'Arbitrators' as stated above, shall be binding on both the parties.** However, it does not include interest recovery matter of any party or customer which has been

considered in point below."

(Emphasis Supplied)

6. The Settlement Agreement has been relied upon by plaintiff nos. 1 to 4 in their plaint in its entirety without any exception or reservation. The captioned suit for recovery of money against the defendants has been filed relying upon the contents of the Settlement Agreement. It is thus evident from the averments in the plaint that plaintiff nos. 1 and 3, who are otherwise non-signatories to the Settlement Agreement; admit and ratify the terms of the said agreement. Thus, the submissions of the non-applicant/plaintiffs at paragraph nos. 12 and 18 of the reply that the non-signatories can avoid the arbitration Clause in the Settlement Agreement is without any merit, as the said plaintiff nos. 1 and 3 have by filing the plaint relying upon the Settlement Agreement, unequivocally accepted the arbitration Clause of the Settlement Agreement. The relevant paragraph of the amended plaint reads as under:

> "16. That, both the parties, Plaintiff nos. 2 to 4 and Defendant nos. 2 to 5, had decided to make a Final Settlement Agreement through mutually settled terms and conditions which is documented and named as 'Final Settlement Agreement' along with the E-Stamp no. IN-DL03034360793135R on 30.12.2019 which is duly notarised and signed by Plaintiff no. 2 and 3 on behalf of all the Plaintiffs and by Defendant nos. 2 and 4 on behalf of all the Defendants and two witnesses, and a true copy is annexed herein as **DOCUMENT D-5**.
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> 31. That, this Hon'ble Court has territorial jurisdiction to entertain and adjudicate the present suit as the Final Settlement Agreement dated 30.12.2019 between the Plaintiffs and the Defendants was formed and signed at Delhi. The CoA arose in the jurisdiction of this Hon'ble Court and both the parties resides and have their registered offices in Delhi. Hence, this Hon'ble Court has territorial Jurisdiction to entertain and try this commercial dispute within the meaning and scope of Section 2(1)c of the Commercial Courts Act, 2015."
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> (Emphasis Supplied)

7. The Supreme Court in its recent judgment in **Ajay Madhusudan Patel and Others v. Jyotrindra S. Patel and Others**[1], has held that if the consent of a non-signatory party is discernible from the circumstances surrounding the negotiation and performance of the contract containing the arbitration agreement, the referral Court can draw a legitimate inference that such a non-signatory is a party to the arbitration agreement. The relevant paragraph 71 of the said judgment reads as under: -

> "71. It is evident that the intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such an agreement. Further, when the conduct of the non-signatory is in harmony with the conduct of the others, it might lead the other party or parties to legitimately believe that the non-signatory was a veritable party to the contract containing the arbitration agreement. However, in order to infer consent of the non-signatory party, their involvement in the negotiation or performance of the contract must be positive, direct and substantial and not be merely incidental. Thus, the conduct of the non-signatory party along with the other attending circumstances may lead the referral court to draw a legitimate inference that it is a veritable party to the arbitration agreement."

8. The amended plaint duly records the averments as regards participation of plaintiff nos. 1 and 3 in the negotiation and performance of the Settlement Agreement. The said plaintiffs admit that plaintiff nos. 2 and 4 signed the Settlement Agreement on their behalf. In these admitted facts, the plea of plaintiff nos. 1 and 3 of being non-signatory ceases to have effect as the said plaintiffs have filed the plaint for enforcement of the said Settlement Agreement.

9. The next plea of the plaintiffs that Clause 28 of the Settlement

[1] 2024 SCC OnLine SC 2597

Agreement could be invoked only during the period 30.12.2019 and 31.01.2020 is also incorrect. On a conjoint reading of Clauses 23 and 28 of the Settlement Agreement, it is evident that the said Clause was to operate with respect to any dispute or difference between the parties. The period of 30.12.2019 to 31.01.2020 is only with respect to period provided for verification of the entries in the Final Consolidated Balance Sheet; however, the said period does not govern the operability of the arbitration agreement recorded at Clause 23 of the Settlement Agreement.

10. The plea of the plaintiffs that since Clause 23 provides two (2) arbitrators, the same does not fulfil the criteria of Section 10(1) of the Act of 1996 and thus no reference can be made, is misconceived. The intent of the parties to have the disputes settled through arbitration and the preference to have the arbitration presided over by the members of the Trade all indicate that the parties agreed to this remedy of arbitration for expeditious resolution of the disputes. The intent of Section 10(1) of the Act of 1996 is to prevent a deadlock in the final opinion of a multi-member tribunal, which is likely if tribunal has even number of members. The Section 10 of the Act of 1996, thus stipulates that the number of members in a multi-member Tribunal should not be even.

11. At this juncture, it would be relevant to refer to the judgment of the Supreme Court in **Narayan Prasad Lohia v. Nikunj Kumar Lohia**[2],

> 17. We are also unable to accept Mr Venugopal's argument that, as a matter of public policy, Section 10 should be held to be non-derogable. Even though the said Act is now an integrated law on the subject of arbitration, it cannot and does not provide for all contingencies. An arbitration being a creature of agreement between the parties, it would be impossible for the legislature to cover all

[2] (2002) 3 SCC 572

aspects. Just by way of example Section 10 permits the parties to determine the number of arbitrators, provided that such number is not an even number. Section 11(2) permits parties to agree on a procedure for appointing the arbitrator or arbitrators. Section 11 then provides how arbitrators are to be appointed if the parties do not agree on a procedure or if there is failure of the agreed procedure. A reading of Section 11 would show that it only provides for appointments in cases where there is only one arbitrator or three arbitrators. By agreement parties may provide for appointment of 5 or 7 arbitrators. If they do not provide for a procedure for their appointment or there is failure of the agreed procedure, then Section 11 does not contain any provision for such a contingency. Can this be taken to mean that the agreement of the parties is invalid? The answer obviously has to be in the negative. Undoubtedly the procedure provided in Section 11 will mutatis mutandis apply for appointment of 5 or 7 or more arbitrators. **Similarly, even if parties provide for appointment of only two arbitrators, that does not mean that the agreement becomes invalid. Under Section 11(3) the two arbitrators should then appoint a third arbitrator who shall act as the presiding arbitrator. Such an appointment should preferably be made at the beginning**. However, we see no reason, why the two arbitrators cannot appoint a third arbitrator at a later stage i.e. if and when they differ. This would ensure that on a difference of opinion the arbitration proceedings are not frustrated. But if the two arbitrators agree and give a common award there is no frustration of the proceedings. In such a case their common opinion would have prevailed, even if the third arbitrator, presuming there was one, had differed. Thus we do not see how there would be waste of time, money and expense if a party, with open eyes, agrees to go to arbitration of two persons and then participates in the proceedings. On the contrary there would be waste of time, money and energy if such a party is allowed to resile because the award is not to its liking. Allowing such a party to resile would not be in furtherance of any public policy and would be most inequitable.

(Emphasis Supplied)

12. It is apparent that the Clause 23 of the Settlement Agreement provides names of two (2) arbitrators to adjudicate the disputes between the parties and in view of the law settled in **Narayan Prasad Lohia** (supra), the said Clause 23 is not invalid. Accordingly, to give effect to the intent of the

parties in Clause 23 of the Settlement Agreement to have the dispute referred through arbitration in consonance with the mandate of Section 10 of the Act of 1996, the two (2) named arbitrators at Clause 23 will be at liberty to appoint a Presiding Arbitrator with mutual consent so as to form an Arbitral Tribunal consisting of three (3) members. However, the arbitration agreement does not fail on account of the ground raised by the non-applicant/plaintiffs.

13. Lastly, the plea of the plaintiffs that the application is barred by limitation is also misconceived. The summons through email were served on 18.10.2022. The statutory period of 30 days for filing written statement expired on 17.11.2022; however, the grace period of additional 90 days for filing written statement expired on 15.02.2023.

14. The applicant/defendants filed this application under Section 8 with the registry on 23.11.2022 and the written statement was first filed with the registry on 30.01.2023 and thereafter, was finally re-filed on 18.02.2023.

15. It is thus apparent that the captioned application has been filed during the period available to the defendants to file their written statement. The defendants right to file written statement has not been foreclosed. Thus, the contention that the Section 8 application is barred by limitation is without any merit.

16. The plaintiffs/non-applicants do not dispute that the subject matter of the suit is covered by the arbitration clause in the Settlement Agreement. This Court is therefore satisfied that valid arbitration agreement exists between the parties. Consequently, the application is allowed. The parties herein are referred to arbitration in terms of the arbitration clause contained in the Settlement Agreement dated 30.12.2019 executed between the parties

herein.

17. With the aforesaid directions, the present proceedings are drawn to a close. The decree sheet be drawn up.

I.A. 4678/2023

18. This is an application under Section 151 of the Code of Civil Procedure, 1908 ('CPC') filed by the defendants seeking condonation of delay of 76 days in filing the written statement. It is stated that the summons in the suit were served on 18.10.2022 through email and the delay in filing the written statement occurred due to the illness of the father of the counsel on record. It is stated that however, the written statement has been filed on with a delay of 76 days.

19. It is apparent that the written statement has been filed by the defendants with the registry of this Court on 30.01.2023, within the grace period of 90 days permissible under the amended Order VIII Rule 1 CPC as applicable to the Commercial suit.

20. This Court is satisfied that the defendants have shown sufficient cause for the delay in filing the written statement and the same is hereby condoned and the written statement along with affidavit of admission/denial of documents is taken on record.

21. The written statement is also being taken on record so as to bind down the defendants to the stand already taken so that the arbitral proceedings can proceed without any further delay.

22. With the aforesaid directions, the application is allowed and stands disposed of.

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23. In view of the orders passed in I.A. 19669/2022, the present suit is

disposed of.

24. Pending applications are disposed of.

25. All future dates stand cancelled.

MANMEET PRITAM SINGH ARORA, J

DECEMBER 30, 2024/hp/MG

Click here to check corrigendum, if any