Prajakta/Vidya

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 149 OF 2021
WITH
COMMERCIAL ARBITRATION PETITION NO. 410 OF 2021

Priya Rishi Bhuta & Anr. …Applicants/Petitioners
V/s.
Vardhaman Engineers and Builders & Ors. ... Respondents

WITH
COMMERCIAL ARBITRATION PETITION NO. 412 OF 2021
WITH
ARBITRATION APPLICATION NO. 245 OF 2021
WITH
ARBITRATION APPLICATION NO. 246 OF 2021

Priya Rishi Bhuta & Anr. … Petitioners
V/s.
Vardhaman Land Development Corporation & Ors.... Respondents

WITH
COMMERCIAL ARBITRATION PETITION NO. 605 OF 2021

Priya Rishi Bhuta & Anr. … Petitioners
V/s.
Pioneer Housing & Ors. ... Respondents

WITH
COMMERCIAL ARBITRATION PETITION (L) NO. 15937 OF 2021
WITH
ARBITRATION APPLICATION NO. 310 OF 2021

Priya Rishi Bhuta & Anr. … Petitioners
V/s.
Pioneer Construction and Consultants & Ors. ... Respondents

Mr. Sanjay Jain a/w. Mr. Nishant Sasidharan, Mr. Ashvin Bhalekar, Mr. Ashwin Bhadang, Ms. Shruti Lakhani and Ms. Khushbu Shah i/b. Dipti Shah for Applicants/Petitioners.
Mr. Mayur Khandeparkar with Mr. Rajesh A. Revankar i/b. A.G. Revankar & Co. for respondent nos. 1, 5 to 10.
Mr. Ankit Lohia with Mr. Chetan Yadav and Mr. Samarth Patel i/b. R. V. &

Co. for Respondent Nos.2 & 3.

CORAM : G.S. KULKARNI, J.
RESERVED ON : 12 APRIL 2022.
PRONOUNCED ON : 6 JUNE 2022

JUDGMENT:

1. These are four applications filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") whereby the applicants, who claim to be the daughters of deceased Amritlal Jain, who was a Partner in the partnership firm - respondent no.1 in each of these applications, are before the Court praying that the disputes and differences between the applicants and the respondents as arising under these partnership deeds be referred to arbitration.

2. The applicants are invoking the arbitration agreement as contained in each of the partnership deed. The facts in relation to all these applications are common, except that respondent no.1-partnership firm in each of these applications is different. Also the arbitration clause as contained in each of the partnership deed(s) is similar. The arbitration agreement as contained in clause 19 reads thus:-

> "19. During the continuance of the partnership or at any time afterwards, if any difference arises among the parties hereto or the executors or administrators or their heirs such difference shall be forthwith referred to an arbitrator or arbitrators as appointed by partners. The decision of arbitrator or arbitrators will be final and binding on all the parties hereto and shall be deemed to an arbitration in accordance with and subject to the provisions of the Indian Arbitration Act, 1940 (X of 1940) and Statutory modification or re-enactment thereof for the time being in force."

3. For convenience, the facts pertaining to Arbitration Application No. 149 of 2021 are being referred. Respondent no.1 is the partnership firm of which the applicants claim to have interest as per clause 17 of the Partnership Deed dated 12 March, 2012. Respondent nos.2 and 3 are existing partners. Respondent no.4 has been inducted as a partner after the death of applicants' father Mr. Amritlal Jain. Respondent no.5 is the original partner, who is a signatory to the deed of partnership. Respondent nos. 6 to 10 were inducted as partners within the percentage of respondent no.5's share in the partnership firm and as permitted under the partnership deed. In other words, respondent nos.4, 6, 7 and 10 are not the partners in the original partnership deed, and have been inducted subsequently by the original partners within the share of such original partners and without disturbing such fixed share.

4. The case of the applicants is that respondent no.1 was originally constituted on 14 November, 1985 in which 20% of the share in the profits and losses of respondent no.1 firm stood in the name of Utsav Amritlal Jain. Respondent no.1 firm was reconstituted from time to time. It is contended by the applicants that Amritlal Jain introduced his parents as well as himself (in the capacity of Karta of a Hindu Undivided Family) as partners in the respondent no.1 firm.

5. By a Deed of Partnership dated 12 March, 2012 (for short, "2012 Partnership Deed"), namely, the partnership in question, respondent no.1 was reconstituted. Some of the salient clauses of the partnership deed recognized the following agreement between the partners:

> "(i) **The 2012 DOP is binding on the parties thereto as well as on their heirs, executors, administrators and assigns.**
> (ii) The partners of Respondent No.1 had agreed to constitute two groups, namely, the Vardhan and the Jain group
> (iii) The Vardhan Group consisted of Respondent No.5, 8 and 9 as well as Kushal Vardhan.
> (iv) The Jain Group consisted of Amritlal, Utsav, Respondent No.2 and Respondent No.3 holding in aggregate 35%.
> (v) Respondents No.4, 6, 7 and 10 were not parties to the 2012 DOP
> (vi) **Clause 17 thereof gave the right to the heir of a deceased partner to be inducted as a new partner in place of the latter.**
> (vii) **Clause 19 is the arbitration clause which could be invoked by a party or his heir."**
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> (emphasis supplied)

6. On 28 October, 2018, the applicant's father Amritlal Jain expired. Immediately two days thereafter i.e. on 30 October, 2018, Utsav Jain, mother of the applicant also expired. Consequently, on 17 January, 2019, 'Deed of Retirement-cum-Partnership' came to be executed whereby respondent no.5 (Hirachand Vardhan) diluted his share in the partnership in favour of his sons i.e. respondent nos.6 and 7 who came to be inducted as partners. The shares standing in the name of Amritlal Jain (father) and Utsav Jain (mother) were distributed between respondent no.2 (Deepak Amritlal Jain) and respondent no.3 (Ajay Amritlal Jain). The other provisions of the Deed of Partnership dated 17 January, 2019 are similar to the Partnership Deed dated 12 March, 2012 including clauses 17 to 19 thereof.

7. Thereafter on 23 May, 2019 another document namely 'Deed of Retirement-cum-Partnership' came to be executed, whereby respondent no.2 (Deepak Jain), applicant's brother diluted his share in respondent no.1 firm in favour of his wife i.e. respondent no.4 (Rakhee Deepak Jain) who was inducted as a partner. Also as respondent no.9's mother had passed away, his wife i.e. respondent no.10 was inducted as a partner in her place. Except for such changes, the provisions of such deed of partnership dated 23 May, 2019 are similar to those of 2012 Deed of Partnership, including clause 17 thereof.

8. In or about March 2020, the applicants filed a Civil Suit being Suit No.117 of 2021 in this Court interalia against respondent no.2 (Deepak Jain) and respondent no.3 (Ajay Jain) for administration and partition of the estate of deceased Amritlal Jain and Utsav Jain (their parents). In such suit, the applicants have specifically pleaded that they reserve their right to adopt appropriate proceedings against Pioneer Housing (a partnership firm relevant to Arbitration Application No.246 of 2021) at later point of time. The applicants have also stated that they were not aware about the exact nature, extent and status of their parents'/family estate.

9. The applicants in espousing their rights in the partnership firms, being the legal heirs of their late parents, *de hors* the said civil suit filed

by them, invoked the arbitration agreement as contained in Clause 19 of the 2012 Deed of Partnership, by their notice dated 02 June, 2021 addressed to the respondents whereby the applicants called upon the respondents to refer the disputes and differences as arisen between the parties under the said partnership deed for adjudication by appointing an arbitral tribunal. As the respondents did not agree for appointment of an arbitral tribunal, the present proceedings are filed.

10. The case of the applicants is primarily based on clause 17 of the Deed of Partnership which reads thus:-

> "17. Upon death, retirement, lunacy, insolvency or incapacity of any partner, the firm shall not be dissolved but in place of the said partner, a legal heir or his/her nominee from the same family shall be inducted into partnership as a new partner and the share of profit/loss of the said partner in the partnership firm will be allocated to the said new partner(s). Such new partner(s) shall belong to the same group to which the said partner belonged. In case there is no person to represent or/ are not willing to represent such partner then the accounts of the partnership shall be made upto the date of death, retirement, lunacy, insolvency or incapacity, as the case may be and the amount which may be arrived and found due and payable to such partner by valuation of his/her share in the profits, assets and including goodwill of the firm upto the date of any happening event will be paid within a period of six months from such date. Alternatively, the said partner's share in partnership shall be allotted/allocated to any remaining partner/s of that Group to which the said partner belonged alongwith his capital in the firm."
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> (emphasis supplied)

11. Relying on the above clause, it is contended by the applicants that the clause 17 is clear to *inter alia* provide that upon death, retirement, lunacy, insolvency or incapacity of any partner, the firm shall not be dissolved but in place of the said partner, a legal heir or his/her nominee from the same family shall be inducted into partnership as a new

partner and the share of profit/loss of the said partner in the partnership firm would be allocated to the said new partner(s). It is contended that also it is provided that alternatively, the said partner's share in partnership shall be allotted/allocated to any remaining partner/s of that Group to which the said partner belonged alongwith his capital in the firm. The applicants contend that such clause is required to be read with the opening paragraph of the partnership deed, which reads thus:-

> "THIS DEED of Partnership made on this 12th day of March, 2012 BETWEEN (1) SHRI HEERACHAND SANWALCHAND VARDHAN, hereinafter referred to as party of FIRST PART, (2) SMT. UTSAV AMRITLAL JAIN, hereinafter referred to as party of SECOND PART, (3) SHRI MOTICHANDRA SANWALCHAND VARDHAN, hereinafter referred to as party of THIRD PART, (4) SHRI AMRITLAL JAWAHARLAL JAIN, representing KARTA of A.J. JAIN & SONS, H.U.F., hereinafter referred to as party of FOURTH PART, (5) SHRI SANDESH LAXMICHANDRA VARDHAN, hereinafter referred to as party of FIFTH PART, (6) SHRI AMRITLAL JAWAHARLAL JAIN, representing KARTA of J.R. JAIN H.U.F., hereinafter referred to as party of SIXTH PART, (7) SMT KUSHAL LAXMICHANDRA VARDHAN, hereinafter referred to as party of SEVENTH PART, (8) SHRI DEEPAK AMRITLAL JAIN, hereinafter referred to as party of EIGHTH PART AND (9) SHRI AJAY AMRITLAL JAIN, hereinafter referred to as party of NINTH PART all of Mumbai and Indian Inhabitants (which **expression shall unless it be repugnant to the context or meaning thereof mean and include his/her legal heirs, administrators, and assigns)."**
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> (emphasis supplied)

According to the applicants, such content of the deed of partnership clearly describes the partners to include his/her legal heirs, administrators and assigns. The applicants contend that these wordings of the deed of partnership, would become relevant to create a deeming fiction that after the death of their father Amritlal Jain, who was the erstwhile partner, the applicants are deemed to be the partners of the

said partnership firm and in law had become entitled to invoke the arbitration agreement. The other contentions as urged on behalf of the applicants in supporting the prayers for appointment of an arbitral tribunal are hereafter set out.

12. The applicants contend that the 2012 Deed of Partnership is binding on the parties thereto as well as on their heirs, executors, administrators and assigns as clear from paragraph 1 of the deed. The partners of each of respondent no.1 firms have agreed to constitute two groups as set out in the partnership deed namely 'Vardhan Group' and 'Jain Group'. Vardhan Group consisted of respondent nos.5, 8 and 9 as well as Mr. Kaushal Vardhan. Jain Group consisted of Amritlal Jain, Utsav Jain, respondent no.2 and respondent no.3. The share of the partners in the partnership firm was also defined to include the authority of the partner to distribute such percentage, by bringing in new partners, within such individual share of the partner. Illustratively, in so far as the firm Vardhan is concerned, respondent nos.4, 6, 7 and 10 are not the original partners to the Deed of Partnership and were inducted by the respective original partners within their respective shares as permitted under the partnership deed.

13. Consequent to the applicants' father Amritlal Jain having expired on 28 October, 2018 and immediately in two days, their mother also

having expired on 30 October, 2018, the applicants in such circumstances are espousing clause 17 of the 2012 Partnership Deed which as noted above *inter alia* provides that upon death etc., the firm shall not be dissolved, but in place of the said partner, a legal heir or his/her nominee from the same family shall be inducted into partnership as a new partner and the share of profit/loss of the said partner in the partnership firm will be allocated to the said new partner(s).

14. The applicants have contended that soon after their parents expired on 17 January, 2019, a Deed of Retirement-cum-Partnership was signed whereby respondent no.5 (their brother) diluted his share in respondent no.1 in favour of his sons respondent nos.6 and 7, who were inducted as partners. The shares standing in the name of deceased Amritlal Jain and Utsav Jain (parents of the applicants) were distributed between respondent no.2 (Deepak Amritlal Jain) and respondent no.3 (Ajay Amritlal Jain), the brothers of the applicants. Except for these changes, the other provisions of the Deed of Retirement-cum-Partnership are similar to those of 2012 Partnership Deed, including clauses 17 to 19 thereof.

15. Thereafter on 23 May, 2019 another Deed of Retirement-cum-Partnership was executed between the partners whereby respondent no.2 (Deepak Amritlal Jain), brother of the applicants inducted his wife

(Rakhee Deepak Jain) - respondent no.4 as a partner. Further, as respondent no. 9's mother had passed away, his wife i.e. respondent no.10 was inducted as a partner in her place. The other provisions of this deed of partnership are similar to those of 2012 Deed of Partnership, including clause 17 thereof.

16. Apart from their interest in the partnership firms, there was other estate which was left by the deceased parents of the applicants, the applicants hence had filed in this Court the said suit (Suit No.117 of 2021) inter alia for administration and partition of the estate of their parents Amritlal Jain and Utsav Jain (for short, the partition suit). In the plaint of such suit, the applicants have specifically pleaded that they reserved their right to adopt appropriate proceedings against one of the firms in which their late parents were partners namely Pioneer Housing impleaded as defendant no.3 in the said suit. The applicants also averred in the plaint that they were not aware about the exact nature, extent and status of their parents' estate.

17. It is in these circumstances, Clause 19 of 2012 Deed of Partnership being the arbitration agreement was invoked by the applicants by their notice dated 02 June, 2021 calling upon the respondents to refer the disputes and differences as arising between the parties to arbitration. As such notice was not responded, the present

application came to be filed on or about 14 July, 2021.

18. The applicants have contended that the parents of the applicants i.e. Amritlal and Utsav were indisputedly the partners of respondent no.1 - firm, subject matter of these Section 11 applications. Mr. Jain contends that the parents having expired, the applicants being their daughters were entitled to be admitted as partners in place of their deceased parents as per clause 17 of the 2012 Partnership Deed. Respondent nos.2 and 3, who are the brothers of the applicants and who were already partners of respondent no.1, had no authority to usurp their parents' share. The applicants contend that the 2012 Deed of Partnership was enforceable against the parties thereto as well as against their heirs and assigns and hence, when clause 17 has been espoused by the applicants. It is also contended that considering the specific clauses of the 2012 Partnership Deed, the subsequently added partners, by virtue of the Deed(s) of Retirement-cum-Partnership dated 17 January, 2019 and 23 May, 2019, also become necessary parties. This for the reason that the 2012 Deed of Partnership is enforceable against such added partners apart from being enforceable against the parties as well as their heirs and assigns.

19. The applicant would contend that even otherwise Section 40 of the Arbitration and Conciliation Act, read with Sections 46 to 48 of the

Indian Partnership Act, 1932, the arbitration agreement as contained in the 2012 Deed of Partnership was enforceable against the respondents. It is submitted that the partition suit was filed purely for the purpose of administration and partition of the estate of the deceased parents of the applicants, whereas the present application is filed for appointment of an arbitral tribunal for adjudication of the disputes between the applicants and the respondents under the 2012 Deed of Partnership. It is thus submitted that the cause of action for both such proceedings is different as the cause of action to file the present application is completely different from the cause of action which accrues the applicants to file the partition suit. Also the suit was filed reserving the applicants' right to invoke appropriate remedy qua the interest the applicants would have in the partnership firms.

20. Reply affidavits are filed by the brothers of the applicants i.e. respondent nos.2 and 3 as also a reply affidavit has been filed by respondent nos.1, 5, 6, 8 to 10.

21. The principal opposition on the part of the brothers of the applicant, namely, of respondent nos.2 and 3, is to the effect that once the applicants have filed a partition suit in this Court, asserting their alleged share and partition of the estate of their deceased parents Amritlal and Utsav, the present application would not be maintainable.

It is contended that in such suit, the applicants have claimed their shares in the entities/firms/companies wherein the deceased parents had share. It is contended that the applicants have also challenged the entitlement of respondent nos.2 and 3 in respect of the shares standing in the name of respondent nos.2 and 3. It is thus the case of these respondents that once the foundation of the Section 11 application as also that of the suit is common, then certainly a remedy under Section 11 to seek appointment of an arbitral tribunal even for adjudication of the disputes qua the partnership firms was not available to the applicants. It is next contended that invocation of the arbitration as seen from the notice dated 02 June, 2021 is under the 2012 Partnership Deed whereas new partnership deeds are executed in respect of these firms namely the partnership deeds dated 17 January, 2019 and 23 May, 2019, hence also for such reason, these applications would not be maintainable as the invocation itself is defective. In short, the contention of the respondent nos.2 and 3 is that the applicants not being parties to the 2012 Partnership Deed as also to the subsequent partnership deeds dated 17 January, 2019 and 23 May, 2019, they are not entitled to invoke the arbitration agreement as contained in the said partnership deeds. It is contended that the invocation of the arbitration by the applicants itself is beyond the scope of the arbitration agreement.

22. The next contention as urged on behalf of respondent nos.2 and

3 is that invocation of the arbitration by the applicants is for adjudicating civil disputes between the applicants and respondent nos.2 and 3 and per se it is not a dispute relating to respondent no.1 firm(s). This, according to them, is clear from the invocation notice inasmuch as the applicants have invoked the arbitration inter alia to challenge the new partnership deeds (dated 17 January, 2019 and 23 May, 2019) for not admitting the applicants as partners in respect of 35% share in the profits and losses held by their late parents as also in Amritlal Jain & Sons HUF which according to them is clear from paragraph 4.4 of the memo of application. There are some other contentions as urged by respondent nos.2 and 3 which may not be relevant for the purpose of the present Section 11 applications.

23. In so far as reply affidavit as filed on behalf of respondent nos.1, 5, 6, 8 to 10 are concerned, the contentions are not too different from what has been urged on behalf of respondent nos.2 and 3. It is their contention that the present applications pertain to a family dispute between the applicants and respondent nos.2 and 3 for which, a civil suit is already filed and is pending and hence, the application is not maintainable. It is next contended that the subject matter of the dispute is not arbitrable for any reliefs to be granted in favour of the applicants, in the arbitration proceedings inasmuch as the entire claim of the applicants is based on an intestate succession. The arbitral tribunal in

such case would be required to enter upon and decide issues on succession in respect of the estate of the deceased, which cannot be the subject matter of the arbitral proceedings when tested on the anvil of its arbitrability. It is contended that the applicants have thus failed to establish the existence of the arbitration agreement between the applicants and these respondents.

24. There is a rejoinder affidavit filed on behalf of the applicants in reply to the affidavits filed by the respondents disputing and denying the case of the respondents in the reply affidavit, to be untenable. The applicants say that the applicants are entitled to file Section 11 applications, invoking the arbitration as per clause 19 of the 2012 Partnership Deed, the applicants being the legal heirs of Amritlal and Utsav, their parents, being the persons recognized under Clause 17 of the deed of partnership, which got triggered on the death of their parents. Also Utsav and AJJ & Son HUF were partners in respondent no.1 under the 2012 Partnership Deed, the applicants being legal heirs and representatives of Utsav and the HUF were entitled to be admitted as partners of respondent no.1-firms, as per Clause 17 of the 2012 Partnership Deed. It is contended that clause 17 of the 2012 Partnership Deed entitled the applicants to be admitted as partners of respondent no.1 and respondent no.1 had executed the Deed of Partnership dated 17 January, 2019 and 23 May, 2019 in breach of clause 17 of the 2012

Partnership Deed. Also these subsequent amendment deeds of partnership were executed without any notice to the applicants, much less with the consent of the applicants and hence the same were unenforceable and not binding on the applicants. It is contended that respondent no.1 under the 2012 Partnership Deed had fiduciary duty towards the estate of Utsav and the HUF and were bound and obligated to admit the applicants as partners to represent their share in respondent no.1. It is thus contended that the subject matter of the dispute is fully arbitrable.

SUBMISSIONS

25. Referring to their respective pleadings, learned counsel for the parties have made extensive submissions.

26. Mr. Jain, learned counsel for the applicants/petitioners in all these applications would submit that the common thread running into the deed of partnerships is that it recognizes the applicants right and locus as legal heirs of the deceased partners to invoke the arbitration agreement as contained in clause 19, by virtue of the clear content of clause 17 of the 2012 Partnership Deeds. It is his submission that the applicants, being legal heirs of their parents who were the partners, on the demise of their parents were entitled to be inducted as partners of the said firm by virtue of clause 17 of the deed of partnership.

According to Mr. Jain, clause 17 of the deed of partnership in no uncertain terms provides that upon death of any partner, the firm shall not be dissolved and in place of the partner who has expired, a legal heir or his/her nominee from the same family shall be inducted into partnership as a new partner, and in such event, the share of profit/loss of the said partner in the partnership firm will be allocated to the said new partner(s), as also that such new partner(s) shall belong to the same group to which the said partner belonged. It is hence submitted that unless such requirement as postulated and recognized by first part of clause 17, the other part of the clause 17 could not be invoked, when it provides that alternatively, the deceased partner's share in partnership shall be allotted/allocated to any remaining partner/s of that Group to which the said partner belonged alongwith his capital in the firm. According to Mr. Jain, such eventuality becomes a secondary consideration once the applicants as legal heirs of the deceased partner namely parents of the applicants were available to be admitted as partners in place of the deceased partner and that more particularly when the brothers were already the partners. It is Mr. Jain's submission that as the partition suit pertains to the administration of the estate of the deceased parents which in no manner whatsoever is concerned in regard to the dispute integral to the partnership firms in question, the applicants cannot be precluded from espousing in their interest in the

partnership being conferred on them as the legal heirs of the deceased partner. It is submitted that there is no question of applicants seeking any reliefs in the administration suit integral to the partnership firm and its businesses, thus the reliefs in the present application are completely independent from the ones in relation to the administration of the estate of the deceased parents. In support of his contention, Mr. Jain has placed reliance on the cases of **Indapur Dairy and Milk Products Limited Vs. Global Energy Private Limited**[1], **Ravi Prakash Goel Vs. Chandra Prakash Goel and Another**[2].

27. On the other hand, Mr. Lohia and Mr. Khandeparkar in opposing the reliefs have reiterated their contentions on the present application not being maintainable as pleaded in the reply affidavits. It is their submission that the applicants are not concerned qua any of the deeds of partnerships, much less are parties to the said arbitration agreement and for such reason, the arbitration application is not maintainable. It is their submission that the present application is not maintainable also for the reason that already a civil suit has been filed before this Court by the applicants seeking partition of the estate of their deceased parents and hence on that count also, the present application is not maintainable. It is their contention that even assuming that the applicants even remotely have some rights under the 2012 Partnership Deed, however, the

1. 2019 SCC OnLine Bom 1678
2. (2008) 13 SCC 667

applicants have abandoned such rights when the applicants have filed the partition suit in question. Hence, there is no question of the applicants being entitled to file the present proceedings and praying for appointment of an arbitral tribunal. In support of their contentions, Mr. Khandeparkar and Mr. Lohia have placed reliance on the decisions of **V. G. Santhosam and others V. Shanthi Gnanasekaran and others**[3], **Mohd. Rafique Mohd. Hussain Tinwala v. M/s. S.S. Enterprises and others**[4], **Mallikarjun Gurlingappa Valikhindi v. Shrikant Panachand Shah (decd) through legal heirs**[5], **Saha & Gupta Enterprise v. Indian Oil Corporation Ltd. & Ors.**[6] and **Onyx Musicabsolute.com Pvt.Ltd. & ors. v. Yash Raj Films Pvt. Ltd. & ors.**[7]

Discussions and Conclusion

28. Having heard learned counsel for the parties and having perused the record of these Section 11 Applications, in my opinion, the central issue which is required to be decided is whether the applicants have any arbitral interest to invoke the arbitration agreement as contained in the Deed of Partnership dated 12 March, 2012. A party seeking reference of the disputes to arbitration would be required to satisfy that such party is a party to an arbitration agreement and seek reference of the disputes to arbitration. In other words, a person who is absolutely alien and not a

3. 2020 SCC Online Mad 560
4 2018 SCC OnLine Bom 3702
5 Arbitration Petition No.93 of 2017
6 2007 SCC OnLine Cal 339
7 2008(6) Bom.C.R. 418

party to the arbitration agreement cannot invoke the arbitration agreement. At the behest of such person, neither any invocation of such arbitration agreement nor a Section 11 application would be maintainable. The legislative intent to this effect can also be discerned from the amended provisions of Section 11 by insertion of sub-section (6A) as incorporated by 2016 amendment with effect from 23 October, 2015, namely that the Court considering any application under sub-section (4) or sub-section (5) or sub-section (6) of Section 11, shall notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement. Interpreting the provisions of sub-section (6-A), it is a settled principle of law that the primary consideration for the Court would be to consider the existence of an arbitration agreement and not to any other disputed aspects as held by the Supreme Court in case of **Duro Felguera, S.A. vs. M/s. Gangavaram Port Ltd.**[8]

29. Adverting to such requirements of law, the present proceedings would be required to be considered. It appears to be not in dispute that the deceased parents of the applicant, namely, Amritlal and Utsav were partners in the said partnership firms. They were independent partners apart from respondent nos. 2 and 3, their sons, being the partners. The applicants are daughters of the deceased partners and are sisters of

8 (2017) 9 SCC 729

respondent nos. 2 and 3. From the pleadings on record, it clearly appears that the applicants are espousing Clause 17 of the Deed of Partnership dated 12 March, 2012. There are two relevant clauses in the said Deed of Partnership which, in my opinion, are vital for the determination of the issue in the present proceedings, firstly, the opening paragraph of the Partnership Deed and Clause 17, which depict the basic intention of the original partners and secondly, the arbitration agreement as contained in Clause 19 of the Partnership Deed which are already noted above.

30. A cumulative reading of these three clauses would plainly indicate that each of the partners which at the relevant time included the deceased parents of the applicants and respondent nos. 2 and 3 were described to mean and include his/her legal heirs, administrators and assigns. There can not be an inch of doubt that in the context of any dispute under the Deed of Partnership dated 12 March, 2012, the applicants, being the legal heirs, by such clear fiction are deemed to be the partners of the partnership firm on the original partners having expired.

31. Further, the Partnership Deed expressly recognizes the right of a legal heir to be made a partner on the death of a partner, such intention of the partner is explicit in Clause 17 of the partnership deed which

provides that a legal heir or his/her nominee from the same family shall be inducted into partnership as a new partner, and that the share of profit/loss of the said partner in the partnership firm would be allocated to the said new partner provided that such new partner shall belong to the same group to which the said partner belongs. It is also provided that in case there is no person to represent or there is no willingness on the part of any person to represent such partner, in such event, the accounts of the partnership shall be made upto the date of death, retirement, lunacy etc. as the case may be and the amount which may be arrived and found due and payable to such partner by valuation of his/her share in the profits and assets including goodwill of the firm upto the date of happening of the event will be paid within a period of six months from such date. It is further provided that alternatively, the said partners share in the partnership shall be allotted/allocated to any remaining partner of that group to which the said partner belong alongwith his capital in the firm.

32. The effect of the opening paragraph of the Deed of Partnership as noted above as also Clause 17, in my opinion, would indicate that in two situations the inclusion of the legal heirs has been recognized by the partners, firstly, to recognize their rights *de hors* what has been provided for in Clause 17, i.e. even assuming that the legal heirs are not

interested to demand any share in the partnership, in the event of death, retirement, lunacy, insolvency, incapacity etc. of any partner and secondly, a right being conferred on the legal heirs to step into the shoes of a partner, who has expired or retired or who has suffered lunacy, insolvency or incapacity, to be inducted into the partnership as a new partner in an eventuality is recognized by Clause 17. It is from such clear perspective and context, the arbitration agreement would be required to be considered. The arbitration agreement as contained in Clause 19 clearly provides that during the continuance of the partnership (about which there is no dispute) any differences arise amongst the parties hereto (the original partners) or the executors or administrators or their heirs, such differences shall be forthwith referred to an arbitrator or arbitrators as appointed by the partners. Thus, even the arbitration agreement also independently recognizes the right of the legal heirs of the partners to raise any disputes and differences in relation to the business of the partnership firm or any rights which were generated and/or accrued to the partners under the partnership firm and to assert adjudication of said disputes by reference to arbitration.

33. In my opinion, the applicants are persons as recognized by the deed of partnership, who are conferred an interest in the partnership firm in the capacity as legal heirs. This is recognized in the three clauses of the Deed of Partnership dated 12 March 2012, firstly, the inherent

recognition in the opening paragraph of the partnership deed namely the expression 'person' shall include the legal heirs; secondly, Clause 17 recognizing the entitlement of the legal heirs on the death of the partner to be included into the partnership as a new partner; and thirdly, the arbitration agreement contained in Clause 19 also recognizes the 'heirs'. On a cumulative reading of these clauses, they clearly recognize the rights of the legal heirs also to raise any disputes and differences which may arise under the partnership deed and to refer to such dispute to arbitration. Hence in my opinion, the dispute which the applicants seek to espouse being confined only to the affairs of the partnership firm, necessarily, credence would be required to be given to such express clauses of the partnership deed recognizing their rights as legal heirs of the deceased partners. It is difficult to attribute any other meaning to these clauses and if no meaning is attributed, these clauses of the partnership deed would be rendered nugatory, which is not the intention of the parties. Bearing in mind such purport of the clauses of the partnership deed which to my mind is plain and unambiguous, the contentions as urged on behalf of the respondent in opposing the Applications are required to be examined.

34. The first contention as urged on behalf of the respondent is to the effect that the applicants having filed the partition suit as also one of the

partnership firm, namely, Pioneer being made a party to the suit would bring about a consequence that once the applicants have chosen to prosecute the suit in relation to the estate of the deceased parents, who were the partners in the partnership firm, necessarily the subject matter of the reference to arbitration is required to be considered to be the subject matter of the suit and on such ground, Section 11 Application would not be maintainable. In other words, once a suit is filed which is for administration of estate of the deceased parents, which includes their interest in the partnership firm, there cannot be a parallel demand from the applicants to assert any independent rights under the partnership deed. A remedy of suit once chosen by the applicants would prohibit the applicant from seeking any reference to arbitration.

35. The next contention as urged on behalf of the respondents is that the applicants are not parties to the arbitration agreement and therefore they have no right to invoke the arbitration agreement. It is also their submission that the disputes which are sought to be raised by the applicants are not arbitral inasmuch as it is a relief against the estate of the deceased partners and such a relief cannot be granted in arbitral proceedings. In my opinion, none of these contentions as urged on behalf of the respondents are tenable.

36. There is an absolute fallacy in regard to the contention as urged

on behalf of the respondent, that the applicants having filed a suit which is for partition and/or for administration of estate of the deceased parents, the present application would not be maintainable. The reason being that a prayer for administration of estate or partition of the estate of the deceased parents of the applicants, is a matter completely *inter se* between the applicants and respondent nos. 1 and 2-brothers. The suit cannot be said to be confined to what has been espoused by the applicants by reference to arbitration which is purely qua the partnership firms. It is also clear that the suit of the applicants is not specifically confined to any right, the applicants are espousing as to what they are asserting, as permissible to them under the partnership deed in the capacity as legal heirs of their deceased parents qua the issues falling under the partnership. The partition suit is a suit for a variety of reliefs which are completely at variance and/or different from any relief which are being claimed by the applicants specifically under the partnerships in question. The reliefs being claimed by the applicants in arbitration are in relation to the applicants' having a right as recognized by Clause 17 to be inducted into partnership. Such is not the relief as prayed for in the suit. If the deed of partnership itself recognizes a right of the legal heirs for the purposes of the partnerships in question and when the partnership itself is a combination of persons who are not merely family members of the applicants and who are from

different groups, then necessarily the applicants would have an entitlement and a locus to assert such a right which is purely a creation between the parties being the partners of the partnership, and arising out of and confined only to the partnership deeds. The applicants suit in question, (as clear from the prayers as made in the suit,) in no manner can be equated to any such relief being espoused under the partnership deed. Merely because the deceased parents of the applicants were partners in the partnership firms, this would not change the complexion of the rights of the applicants as recognized by Clause 17 and Clause 19 to assert something under the partnership deed. Thus, the contentions as urged on behalf of the respondent are directly opposed to the plain and unambiguous intention of the partners as contained in such Clauses of the partnership deed as discussed above. Thus, the contention as urged on behalf of the respondent that as the applicants having filed a suit for partition of the estate of their deceased parent would, disentitle the applicants to make any reference of disputes under the deed of partnership to arbitration is totally untenable and would be required to be rejected for the above reasons.

37. The next contention as urged on behalf of the respondents that the applicants are not parties to the arbitration agreement also would be required to be rejected considering the plain language of Clauses 17 and 19 and opening paragraph of the partnership deed as discussed in detail

in the foregoing paragraphs which recognizes the rights of the legal heirs to be partners qua the partnership deed and the share of the deceased partners.

38. In so far as the contention of the respondent that the dispute is not arbitral is also not well-founded, as the applicants are purely espousing their rights as recognized in the Deed(s) of Partnership. The applicants right as legal heirs, in my opinion, is firmly ingrained in clauses 17 and 19 of the Deed(s) of Partnership, and once such rights gets triggered on the death of the partners and are recognized on the happening of such event, all the subsequent events, actions and consequences which have taken place at the hands of the existing partners necessarily form subject matter of being questioned by the applicants in espousing these express rights as provided under the opening part of Deed of Partnership read with Clauses 17 and 19. Thus, Mr. Jain's contention that his clients are asserting and espousing such rights under the Deed of Partnership, would necessarily include a right of the applicants to question all subsequent and further actions taken by the partners post the death of their parents, including the actions of a further Deed(s) of Partnership dated 17 January, 2019 and 23 May, 2019, being made, in my opinion, is an argument worthy of acceptance. Once the rights of the applicants as legal heirs under the Deed of

Partnership dated 12 March, 2012 are recognized, all actions of the partners, the genesis of which lies under the Deed of Partnership can be questioned by the applicants and any dispute in that regard certainly can be sought to be referred to arbitration.

39. It needs to be re-observed that the cause of action for the applicants to pursue the suit filed by the applicants for administration of estate of deceased parents stands completely independent from the cause of action which has accrued to the applicants to assert any of the rights falling under the Deed of Partnership dated 12 March, 2012. By no stretch of imagination, a cause of action accrued to the applicants as legal heirs being members of the family of the deceased parents and to assert rights for the administration of estate of their deceased parents can be said to be a right purely emanating under the Deed of Partnership and more particularly to seek induction as a member of the partnership. Merely because the deceased parents whose estate is now sought to be administered and partitioned in the suit in question were partners in the partnership in question, would not mean that the rights which are accrued to the legal heirs under the Deed of Partnership and in a manner as recognized by the Deed of Partnership would stand extinguished as the applicants have filed a suit for administration of the estate of their deceased parents. If such an interpretation as sought to be urged on behalf of the respondents is accepted, it would amount to

destroying the rights created in the legal heirs by the Deed of Partnership as also it would amount to doing a violence to the rights a legal heir would be entitled in law to seek partition and/or administration of the estate of deceased members of his/her family. Thus, the rights accrued to the applicants as legal heirs of their deceased parents in their estate stand completely independent from the rights of these legal heirs, which the partnership deed would recognize. The rights of the legal heir as recognized by the partnership deed are confined only and only to the business and the affairs of the partnership and not otherwise. These being independent rights of the partners and their legal heirs, there ought not to be any confusion for the respondents on such rights of the applicants as the applicants rights under the partnership deeds are totally compartmentalized and distinct from their rights qua the estate of their parents in the capacity of as legal heirs.

40. In dealing with the respondent's contention that the applicants have waived their rights to pursue arbitration and to prosecute the present proceeding, Mr. Jain has correctly submitted that there cannot be any inference of a waiver of such nature, for the reason that the cause of action for the arbitration is distinct and independent from the cause of action which has arisen to the applicants to file the suit for administration of estate of the deceased parents. Mr. Jain would also be correct in his contention that even assuming that the suit was filed in the

context of the very same cause of action, nonetheless as Section 8 of the Act would postulate and as a general principle in law, it is always open to the plaintiffs to withdraw the suit by making such application in the suit, not later than the date the defendants submitting their first statement on the substance of the dispute. Applying such principle, Mr. Jain's contention is that in the event if the applicants find that the issue in regard to a Partnership Deed to some extent and/or inadvertently stood included in the suit, the same can be given up and/or withdrawn and deleted by the applicants from such suit, which is a permissible course of action for the applicants, considering the clear provisions of Section 8 of the Arbitration and Conciliation Act. This more particularly, when the defendants are yet to submit their first statement on the substnace of the dispute. In support of his submission, Mr. Jain's reliance on the decision of this Court in **Indapur Dairy and Milk Products Ltd.** *(supra)*, is quite apposite. In such decision, this Court has observed that there cannot be a straight jacket contention that once a suit was filed, the plaintiff would waive his rights to invoke arbitration or to seek adjudication of the disputes in arbitral proceedings. The relevant observations of the Court reads thus:

> "8. A straight jacket contention is urged on behalf of the respondent that once a suit was filed by the petitioner, the petitioner waived its rights to invoke arbitration or to seek adjudication of the disputes in arbitral proceedings. Such a blanket contention cannot be accepted.
>
> 9. A perusal of the amended provision shows that the canvass of sub-section (1) of Section 8 has been widened as now the words "if a party to the arbitration agreement or any person claiming through or

under him" have now been incorporated along with the further addition of the words "notwithstanding any judgment, decree or order of the Supreme Court or any Court, the judicial authority shall refer the parties to arbitration unless it finds that prima facie there is no valid arbitration agreement exists". It is thus clear that the judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, would have jurisdiction, to mandatorily (as clear from the words "shall")refer the parties to arbitration unless it finds that prima facie there no valid arbitration agreement exists. Thus what is required to be noted is that sub-section (1) of Section 8 confers such right "on a party to the arbitration agreement". The provision would contemplate such application to be made by a defendant, being a party to the arbitration agreement, praying for reference of the disputes in the suit to arbitration before filing his first statement on the substance of the disputes. It cannot be accepted to be an interpretation of Section 8 that on one hand it would confer a right on the defendant to pray that the disputes in the suit be referred to arbitration, there being an arbitration between the parties, and on the other hand it would not permit the plaintiff to withdraw the suit before the defendant files his first statement on the substance of the dispute. Section 8(1) certainly does not create such an anomaly.

10. Before the defendant submitting the first statement on the substance of the dispute, certainly it is permissible for the Civil Court to consider an application of the plaintiff to permit withdrawal of the suit, when there is an arbitration agreement, and refers the parties for arbitration.

11. It cannot be conceived that sub-section (1) of Section 8 when it confers a right on the defendant to object to the suit and seek reference of disputes to arbitration as to why before a stage as contemplated by sub-section (1) is reached, it would not confer a right on the plaintiff, and in any case before the defendant appears, to contend before the civil court, that there is an arbitration agreement between the plaintiff and defendant and being a party to the arbitration agreement, the plaintiff be permitted to withdraw the suit, and espouse arbitration.

12. Further considering the provisions of Section 8(1) in my opinion, the objection as raised on behalf of the respondent on the petitioner having waived its right to arbitration, cannot be accepted, even referring to Section 4 of the Act. The provisions of Section 8 are required to be read harmoniously with Section 4. If the argument on behalf respondent is accepted, it would render Section 8 otiose. This apart Sub-section (3) of Section 8 clearly provides that notwithstanding that an application has been made under sub-section (1) and even if the issue is pending before the judicial authority, the party would have right to commence arbitration and/or the arbitration could be continued and an arbitral award can be passed. Sub-section (3) is in fact a clear indication of the legislative intent of a party autonomy so as to give a complete effect to the arbitration agreement as arrived between the parties and when an arbitration agreement exists then the party should not be precluded from commencing the arbitration proceeding. Commencing of the

> arbitration proceeding would be by issuing of notice as Section 21 of the Act would contemplate.
>
> 16. In "***Ministry of Sound International Ltd. VS. Indus Renaissance Partners"***[9], a learned Single Judge of the Delhi High Court has held that "mere filing of civil suit would not amount to party abandoning or waiving its rights under arbitration clause."
>
> 17. It is thus clear that although a suit was filed by the petitioner before the Civil Court and the respondent-defendant is yet to appear in the said suit, the petitioner had a right to withdraw the said suit. Even if the defendant/respondent was to appear and file an application under section 8(1) objecting to the suit, the civil court would have nonetheless referred the parties to arbitration, considering the shape of the suit."

41. In the context of the above proposition reliance placed by Mr. Lohia on the order dated 12 June, 2019 passed by this Court on Arbitration Petition No. 93 of 2017 in the case of **Mallikarjun Gurlingappa Valikhindi** *(supra)* is not well-founded. Relying on such decision, Mr. Lohia has contended that once a civil suit was filed, it was not permissible for the applicant to invoke arbitration and seek appointment of an arbitral tribunal. The facts of the said case were totally different. This was a case where the petitioner (Mallikarjun) had instituted a suit. He did not prosecute the said suit and/or having abandoned the suit, had invoked arbitration after a long lapse. It is in such circumstances, the Court held that the petitioner (Mallikarjun) was not entitled to prosecute arbitration, having abandoned the suit. Also such petition praying for appointment of arbitral tribunal was filed after seven years from the dismissal of the suit for want of prosecution. It is in such context the petition for appointment of arbitral tribunal was

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dismissed. The following are the relevant observations as made by the Court:

> "7. The petitioner by filing of the suit in the year 2001, had categorically waived his rights to espouse arbitration. Further, it is also required to be held that this petition is time barred, as it is not filed within the prescribed limit as stipulated period under Article 137 of the Limitation Act. The petition is filed after about 7 years from the dismissal of the suit and if the suit itself is required to be taken as an invocation notice, it is stated that after 16 years from the date of the suit. The petition is thus, barred by limitation."

42. On the same proposition, reliance is placed by Mr. Khandeparkar on a decision of the learned Single Judge of this Court in **Mohd. Rafique Mohd. Hussain Tinwala** *(supra).* The issue before the Court in such case had arisen from an order passed by the City Civil Court whereby the original defendant in a suit filed before the City Civil Court had assailed an order passed in favour of the plaintiffs/respondents to file arbitration proceedings after withdrawal of the suit. The defendant contended that such course of action, to be adopted by the plaintiffs, was not permissible for the reason that the defendant had earlier raised an objection to the maintainability of the suit on the ground that there was an arbitration agreement between the parties. Considering such objections, the learned trial Judge had framed a preliminary issue under section 9-A of the Code of Civil Procedure. The preliminary issue was answered by the trial Court holding that the Civil Court had jurisdiction to entertain the suit. Such order deciding the preliminary issue was accepted by the plaintiffs. It was also accepted by the defendant. Once

such an order was accepted by both the parties to the suit, it certainly created legal consequences, namely, it was not permissible for the plaintiffs and/or they were estopped to take a position contrary to the orders of the Civil Court which held that the Civil Court had jurisdiction and that too considering the objection of the defendant that there was an arbitration agreement between the parties. On the other hand, the defendant having accepted such order also changed his position and acquiesced in the adjudication of the suit. In such circumstances, the defendant did not file an application under section 8 of the Act, as already, the issue was decided as a preliminary issue by the trial court, the adjudication of which was akin to the adjudication on an objection which could be raised under section 8 of the Act. It is in such context, learned Single Judge held that it was not permissible for the respondents/plaintiffs to reverse their position and by nullifying the orders passed by the Civil Court on the preliminary issue, make an application to withdraw the suit that the parties be referred to arbitration. It is in these circumstances, the Court set aside the order passed by the City Civil Court whereby the suit was permitted to be withdrawn to take recourse to arbitration. Certainly the facts are totally incomparable to the facts in hand. As noted above, the cause of action for arbitration is totally independent and different from what is being pursued by applicants in the suit. Thus, reliance on the decision in

Mohd. Rafique Mohd. Hussain Tinwala *(supra)* is totally misplaced.

43. The decision of the learned Single Judge of this Court in **Onyx Musicabsolute.com Pvt. Ltd.** *(supra)* would also not assist the respondent. In such case, the Court was considering an issue on an injunction application filed by the plaintiff in a suit filed before the City Civil Court. In addition to the suit, the plaintiffs had also filed an Arbitration Petition under section 9 of the Act praying for interim measures pending the arbitral proceedings. In such context, the Court considered an issue as to whether the suit and the arbitration petition can simultaneously be pursued. An argument was advanced on behalf of the plaintiffs that the points in issue in the suit and points in issue in the arbitration proceedings were not the same. The Court observed that there was a common issue in both, the proceedings (the suit and the Arbitration petition), namely, whether the agreement dated 23 April, 2005 (in question) was in force and was binding on the parties. It is in such context the Court made an observation that it is only one forum which can decide such dispute and when no application was filed under section 8 questioning the jurisdiction of the Court to entertain the suit, the public forum of the Civil Court will hear the dispute to the exclusion of a private forum of an arbitral tribunal. It was observed that, the plaintiff after having filed two Arbitration Petitions under Section 9 of the Act, had chosen to file the suit, and that the decision of the

arbitration proceedings and the suit concerned the very same issue. It is in these circumstances, the Court observed that the plaintiffs themselves had chosen to waive the jurisdiction of an arbitral tribunal by choosing the public forum and thus held that the plaintiffs were not entitled to any reliefs in the arbitration petitions. These facts with which the Court was concerned were certainly different from the facts which have fallen for consideration in the present case.

44. The decision of the learned Single Judge of the Calcutta High Court in **Saha & Gupta Enterprise** *(supra)* would also not assist the respondent. This was a case in which the petitioner had approached the Court praying for appointment of an arbitral tribunal after he had instituted a suit before the Civil Court. In the said suit, the defendants (respondents therein) had applied for rejection of the plaint on the ground that the Civil Court did not have the jurisdiction to receive such suit relying on the forum selection clause No.20 found in the agreement. Such application was dismissed by the Civil Court. After such application was dismissed, the defendant/respondent applied *inter alia* under section 8 of the Act for the disposal or dismissal of the Civil Suit on the ground that there was an arbitration agreement between the parties and hence adjudication of the disputes under the agreement could only be by way of an arbitration. The Section 8 Application was resisted by the petitioner/plaintiff. Learned trial Judge dismissed the

said application on a peculiar reasoning that Clause 19 of the agreement did not specifically mention that the disputes be referred to an arbitrator in case of termination of the contract. In these circumstances, the plaintiff having succeeded in defeating the respondent/defendant's application under section 8 of the Act, thereafter, approached the High Court praying for appointment of an arbitrator on the ground that his request for appointment of an arbitrator by the Director (Marketing) of respondent/defendant was not accepted. It is on such facts the Court rejected the petitioner/plaintiff's application for appointment of an arbitral tribunal and in so dismissing, the following observations were made:

> "7. The matters relating to the institution of the Malda suit, the respondents' attempts to resist the suit and to assert the arbitration agreement, found no mention in the petition. The petitioner is as simple as they come; the arbitration agreement has been referred to, the appointing authority has been blamed for not acting with reasonable despatch and the claim in the footnote of the appointing authority having lost his jurisdiction to name an arbitrator. The fundamental principles, however, have to be remembered. For one, arbitration is consensual. Both parties have to agree for the jurisdiction of the Court to be ousted. Again, merely because there is an arbitration agreement, the jurisdiction of the Court is not to be ousted. Upon a party acting in breach of the arbitration agreement it is for the other to assert it if one acts in breach and the other that does not assert the arbitration agreement, the parties waive the arbitration agreement and the ouster of the Civil Court is washed away.
>
> 8. In this case, the petitioner has filed the suit in Malda Court in breach of the arbitration agreement. The first respondent, as defendant in that suit, resisted the suit by filing an application in the nature of demurrer. The first application was in furtherance of Clause 20 of the agreement. The second application, for enforcing the arbitration agreement, was also filed at a stage before the respondents herein submitted their first statement on the substance of the dispute in the suit. Section 8 does not recognize any disqualification on the part of a party setting up an arbitration

> agreement other than having already submitted its first statement on the substance of the dispute. The application made by the respondents herein before the Malda Court for disposal of the suit on the ground that there was an arbitration agreement appears to have been perfectly in order. It is on record that the petitioner resisted it. Upon the petitioner having resisted such application, the petitioner could no longer enforce the arbitration agreement. It would be completely opposed to public policy and, indeed, a gross abuse of the process if the petitioner were permitted to assert that it had a right to maintain the suit and thereafter change tack upon the suit having been stayed to assert that it could fall on the arbitration agreement. Even this could have been countenanced if the petitioner had offered unconditionally, and at the first instance, to withdraw the suit filed in Malda Court. Thus the petitioner has not."

Thus the facts in the above decision would in no manner support the respondents to contend any waiver of rights by the applicants to take recourse to arbitration under the Deed of Partnership in question.

45. Mr. Khandeparkar's reliance on the decision of the learned Single Judge of Madras High Court in **V.G. Santhosam** *(supra)* is also not well founded. In such case before the Madras High Court, the arbitral tribunal had impleaded a third party to an arbitration in the adjudication process. Assailing such order passed by the arbitral tribunal, it was contended that a third party to an arbitration agreement cannot be admitted to an arbitral adjudication. The Court, in such circumstances, held that as the third party was not nominated as a partner, the only recourse which was available to the third party was to file a Civil Suit. The Court in paragraph 80 observed thus:

> "80. This Court is of the considered opinion that even such a right is traceable in favour of the first respondent, then the only possible course would be to approach the Competent Court of Law and

> establish her legal right, if any, available based on the documents or the evidences. Civil rights are to be established independently before the Competent Civil Court by the parties. However, such civil rights cannot be adjudicated or enforced by the arbitrator in the contracted arbitration proceedings under the provisions of the Act. If an arbitrator is allowed to adjudicate the civil rights of the parties or the rights regarding inheritance of properties, then it would result in submerger of the very Arbitration Agreement."

46. In view of the above discussion, in my opinion, it is wholly untenable for Mr. Lohia and Mr. Khandeparkar to contend that the present Section 11 applications at the behest of the applicants would not be maintainable.

47. This apart even considering the clear provisions of Section 40 of the Arbitration and Conciliation Act, an arbitration agreement would not be discharged by death of a party thereto. Section 40 reads thus:

> "40. Arbitration agreement not to be discharged by death of party thereto.—
> (1) An arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.
> (2) The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.
> (3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person."

As plainly seen Section 40 recognizes the salutary principle that the rights of a party to an arbitration agreement would not stand discharged and/or extinguished by the death of any party to the arbitration agreement. Thus, the legal heirs of a party to the arbitration agreement would step into the shoes of such party, in the event of his

death which would enable the legal heirs to prosecute as to what the arbitration agreement would provide. Hence, even otherwise, the applicants, being legal heirs of the deceased partner, are required to be recognized to have a locus to invoke the arbitration agreement. Section 40 fell for consideration of the Supreme Court in the case of **Ravi Prakash Goel** *(supra).* The Supreme Court has held that the arbitration agreement would not be discharged by death of any party thereto, and would be enforceable by or against the legal representative of the deceased. The Supreme Court observed thus:

> "18. It is clear from Section 40 of the Arbitration Act that an arbitration agreement is not discharged by the death of any party thereto and on such death it is enforceable by or against the legal representatives of the deceased, nor is the authority of the arbitrator revoked by the death of the party appointing him, subject to the operation of any law by virtue of which the death of a person extinguishes the right of action of that person.
>
> 19. Section 2(1)(g) defines "legal representative" which reads thus:
>
> > "2. (1) (g) 'legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased person , and, where a party acts in a representative character, the person on whom the estate develops on the death of the party so acting."
>
> 20. The definition of 'legal representative' became necessary because such representatives are bound by and also entitled to enforce an arbitration agreement. Section 40 clearly says that an arbitration agreement is not discharged by the death of a party. The agreement remains enforceable by or against the legal representatives of the deceased. In our opinion, a person who has the right to represent the estate of deceased person occupies the status of a legal person (*sic* representative). Section 35 of the 1996 Act which imparts the touch of finality to an arbitral award says that the award shall have binding effect on the "*parties and persons claiming under them*". Persons claiming under the rights of a deceased person are the personal

> representatives of the deceased party and they have the right to enforce the award and are also bound by it. The arbitration agreement is enforceable by or against the legal representative of a deceased party provided the right to sue in respect of the cause of action survives."

48. The decision of the Supreme Court in the case of **Ravi Prakash Goel** *(supra)* was followed in a decision of a learned Single Judge of the Calcutta High Court in the case of **Dr. Papiya Mukherjee vs. Aruna Banerjea and Anr., A.P. No. 255 of 2021 dated 30 March, 2022.** In the said case, an application under section 11 of the Act was filed by one of the partners (Dr. Papia Mukherjee) invoking arbitration against the legal heirs of the deceased partner Dr. Dhrubajyoti. Such application filed under Section 11 was opposed by the legal heirs on the ground that there was no valid arbitration agreement between the parties, the Court observed that under section 40 of the Act, an arbitration agreement would not be discharged by death of the party thereto and will be enforceable by or against the heirs of the deceased. While allowing the application under section 11, the relevant observations as made by the Court needs to be noted which read thus:-

> "6. Dr. Dhrubajyoti Banerjea had died on 09th of April, 2015. Respondents are legal heirs / successors of Dr. Dhrubajyoti Banerjea. Section 40 of the Arbitration Act clearly provides that arbitration agreement will not be discharged by death of party thereto and will be enforceable by or against the legal representatives of the deceased. Section 42 of the Partnership Act, 1932 provides for dissolution of partnership firm by the death of a partner. In terms of Section 46 of the Partnership Act, on the dissolution of the firm every partner or his legal representative is entitled to, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed amongst the partners or their representatives according to their rights. Section 47 of the Partnership Act provides for continuing

authority of partners for purposes of winding up and Section 48 of the Partnership Act provides for mode of settlement of account after dissolution. The Hon'ble Supreme Court in the matter of Ravi Prakash Goel vs. Chandra Prakash Goel and Another reported in (2008) 13 SCC 667 considering Section 40 of the Arbitration Act has held that:

> "18. It is clear from Section 40 of the Arbitration Act that an arbitration agreement is not discharged by the death of any party thereto and on such death it is enforceable by or against the legal representatives of the deceased, nor is the authority of the arbitrator revoked by the death of the party appointing him, subject to the operation of any law by virtue of which the death of a person extinguishes the right of action of that person.
>
> 19. Section 2(1)(g) defines "legal representative" which reads thus:
>
> > "2. (1)(g) 'legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;"
>
> 20. The definition of "legal representative" became necessary because such representatives are bound by and also entitled to enforce an arbitration agreement. Section 40 clearly says that an arbitration agreement is not discharged by the death of a party. The agreement remains enforceable by or against the legal representatives of the deceased. In our opinion, a person who has the right to represent the estate of the deceased person occupies the status of a legal person (sic representative). Section 35 of the 1996 Act which imparts the touch of finality to an arbitral award says that the award shall have binding effect on the "parties and persons claiming under them". Persons claiming under the rights of a deceased person are the personal representatives of the deceased party and they have the right to enforce the award and are also bound by it. The arbitration agreement is enforceable by or against the legal representative of a deceased party provided the right to sue in respect of the cause of action survives."

49. As a sequel to the above discussion, the present arbitration applications are required to be allowed, as the right of the applicants to take recourse to arbitration is clearly relatable and recognized under Clause 19 read with Clause 17 of the Deed of Partnership.

50. Before parting it needs to be observed that I have not discussed the facts in relation to the other Arbitration Applications for the reason that the learned counsel for the parties have stated that the facts are identical except that the partnership firms are different as also their arguments were confined to the application as discussed.

51. The above Arbitration Applications are accordingly allowed in terms of the following order:

ORDER

(i) Mr. Justice Naresh H. Patil, Former Chief Justice of Bombay High Court is appointed as a sole arbitrator to adjudicate the disputes between the parties.

(ii) The learned sole arbitrator, before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act,1996, to the Prothonotary & Senior Master of this Court by email id – rgpsm-bhc@nic.in, to be placed on record of this application with a copy to be forwarded to both the parties;

(iii) As now an arbitral tribunal has been appointed, it would be appropriate that the Section 9 petitions filed by the applicants be permitted to be treated as applications under Section 17 of the Act to be adjudicated by the learned prospective sole arbitrator;

(iv) The arbitral tribunal shall adjudicate the Section 17 applications as expeditiously as possible.

(v) At the first instance, the parties shall appear before the prospective arbitrator within 10 days from today on a date which may be mutually fixed by the learned sole arbitrator;

(vi) The fees payable to the arbitral tribunal shall be as prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules,2018 and shall be borne by the parties in equal proportion.

(vii) All contentions of the parties including on merits of the matter are expressly kept open;

(viii) All the above proceedings are disposed of in the above terms. No costs.

(ix) Office to forward a copy of this order to the learned Arbitrator on the following address:

"Mr. Justice Naresh H. Patil,
Former Chief Justice of Bombay High Court,
"Rajgir Chambers, Office No.63,
7th Floor, Opposite Old Customs House,
Fort, Mumbai – 400 001.
Mobile No. 9422210444
E-mail ID – nareshhpatil7@gmail.com"

[G.S. KULKARNI, J.]