

COMMERCIAL ARBITRATION APPLICATION NO.483 OF 2019

Respondent nos. 2 and 3 are also individuals. Respondent no. 3 however is Karta and Manager of Dhiren N. Mehta HUF, Respondent no. 4 is a limited company. All of whom are partners of the firms.

3. It is the Applicant's case that the firm was initially constituted on 19th June, 2004 for carrying out the business of construction and development of immovable property. Clause 23 of this deed of 19th June, 2004 contained an arbitration clause which provides for reference to Arbitrators nominated by parties and a tribunal constituted under the provisions of the Arbitration and Conciliation Act.

4. It is the case of the Applicant that in 2005 the constitution of the firm underwent changes and Respondent no. 1 was admitted as partner. Respondent no. 1 - Nainesh Gandhi is said to be Karta and Manager of Nainesh Gandhi HUF. The partners of the reconstituted firm executed a Deed of Partnership dated 1st April, 2005. Clause 24 of the Deed of 2005 contained an arbitration clause providing for reference of disputes to a Sole Arbitrator or to Arbitrators nominated by each contesting party and for those Arbitrators to appoint a presiding Arbitrator. Under the said Deed there were five partners two of whom are not parties to the present application. The applicant, respondent no. 1 and respondent no. 3 were the remaining partners under the 2005 Deed.

5. Thereafter the firm underwent a further change and reconstitution as recorded under Partnership Deed dated 4th September, 2006 in which firm the applicant and respondent nos. 1 to 3 to the present application and one State Street Securities Pvt. Ltd. were partners. Reliance is placed on the said Partnership Deed of 2006. While this partnership was at will, Clause 24 embodied an Arbitration Agreement. Under the deed of 2006 share of the applicant was 35% and those of the respondent nos. 1, 2 and 3 were 10%, 15% and 25% respectively.

6. It is the Applicant's case as canvassed by Mr. Purohit that the original Partnership Deeds are not available with him. Only photocopies thereof are available. Mr. Purohit submits that between 2004 to 2007 various businesses were carried out by the the firm and the partners were entitled to their share of profit. Respondent no. 1's share was Rs.3,79,43,828/-. This amount was said to have been drawn till March, 2008. However, it was found that respondent no. 1 had drawn a sum of Rs.5.53 crores from the firms' bank account and upon ascertaining the share of respondent no. 1 in the partnership, respondent no. 1 was found to have drawn in excess of Rs. 2,31,15,500/- as of 6th August, 2007. On that date respondent no. 1 is said to have transferred the said amount to one Mahaveer Corporation wherein the applicant along with one Mr. Suresh Gaikwad and Mr. Pinakin Shah were partners. The overdrawn amount was reflected in the balance sheet of J. P. Enterprises. Mr. Purohit has relied upon Income Tax Returns of

J.P. Enterprises as well for the period 2007-08, 2008-09 and 2017-18 and as late as 2018-19. These returns are believed to reflect the amounts overdrawn by respondent no. 1.

7. Mr. Purohit submitted that respondent no.1, Mr. Nainesh Gandhi had filed a Summary Suit No. 612 of 2018 in this court against the said Mahaveer Corporation and its partners which included the applicant seeking recovery of a sum of Rs. 2,31,15,000/- which was transferred to Mahaveer Corporation by respondent no.1. In the Summary Suit respondent no. 1 claims that the amount was advanced for purchase of flats but was thereafter converted to a loan. Thus he sought to recover the amount of loan advanced to the firm. In that suit the current partnership J. P. Enterprises is not impleaded. In an affidavit in rejoinder filed in the Summons for Judgment while dealing with the contents of the applicant's reply, respondent no. 1 had apparently stated that all his accounts with J. P. Enterprises had been "squared up" and that the credit/debit balances in J.P. Enterprises were reduced to "Nil".

8. According to Mr. Purohit this was a wrong statement since respondent no.1 had siphoned out funds from J. P. Enterprises and had not returned it. Whether the amount was siphoned or not is not currently known since the applicant himself is a partner in Mahaveer Corporation, the recipient of the said funds. The application contains references to contents of the plaint and the affidavit in rejoinder which Mr. Purohit has pressed into service to point out that there is indeed a partnership arrangement between the parties to the

application and that in the ledger accounts in the books of J. P. Enterprises a sum of Rs.5.53 crores approximately was shown payable by respondent no. 1 to the firm as of 31st March, 2018. Upon receiving this sum the amounts are required to be distributed amongst other partners viz. applicant and respondent nos. 2 to 4 and accordingly it is now necessary to proceed against respondent no.1. The applicant intends to recover the amount by invoking the Arbitration Clause embodied in the Partnership Deed of 2006. Mr. Purohit submits that Arbitration was invoked vide letter dated 9th October, 2019 and three names were proposed of which a Sole Arbitrator was required to be appointed.

9. Respondent no. 1 vide his reply dated 29th October, 2019 contended that he had not signed the Partnership Deed dated 1st April, 2005, reiterated that his accounts and that of J. P. Enterprises had been drawn up and settled in 2007 and therefore there is no occasion to make him liable under the Partnership Deeds. Mr. Purohit while canvassing the applicants case has pointed out that the denial by respondent no. 1 is incorrect and dishonest, inasmuch as he invites my attention to the fact that in the affidavit in rejoinder filed in the Summons for Judgment respondent no. 1 has denied his signature on the Partnership Deed dated 1st April, 2005 but has omitted to mention how he became a partner in J.P Enterprises.

10. Secondly in the letter of 29th October, 2019 in response to invocation of the Arbitration Agreement, respondent no. 1 did not specify the Deed under

which he was inducted as partner of the firm. He also did not mention his share in the profits and losses. He contended that he had retired from the firm and his accounts had been settled without reference to any document. He also admitted that he had withdrawn his share in the capital account of the firm as of 31st March, 2007 clearly acknowledging the fact that he was indeed a partner. However, the fact that accounts had been settled and that he owed nothing has not been established. The fact that he was a working partner and handling the funds of the firm has not been disputed at any stage and hence Mr. Purohit submitted that there is a obvious admission which cannot be overlooked and cannot be brushed aside. The invocation of arbitration therefore is good and he sought appointment of a Sole Arbitrator.

11. Mr Purohit has placed reliance on the observations of the Supreme Court in *Vidya Drolia and Ors. vs. Durga Trading Corporation and Ors.*¹ in support of his contention that there was an agreement in writing as between respondent no. 1 and the others, in particular the applicant. The Arbitration Agreement satisfies Section 10 of the Contract Act and Section 7 of the Arbitration and Conciliation Act. He also relied upon decision of *Pravin Electricals Pvt. Ltd. vs. Galaxy Infra & Engineering Pvt. Ltd.*² in which the Supreme Court held in paragraph 27 that the existence of an Arbitration Agreement would involve a deeper consideration of a case. *Pravin Electricals*

1 (2021) 2 SCC 1

2 (2021) 3 SCJ 164

(*supra*) refers to the judgment of *Vidya Drolia (supra)* and the conclusion that on a case to case basis one will have to consider whether an Arbitration Agreement existed and then a deeper consideration of the case would be left to the Arbitrator(s) who will examine the documentary evidence produced and after witnesses were cross examined Mr. Purohit referred to the fact that the Delhi High Court had appointed an Arbitrator and had requested the Arbitrator to consider a preliminary issue as to whether an Arbitration Agreement existed between the parties and go on to decide the merits, only if such agreement is found to exist.

12. The application is opposed by Dr. Saraf on behalf of respondent no.1. At the outset Dr. Saraf submits that the existence of the Arbitration Agreement is not established. It is not admitted since the application does not comply with the provisions of the Arbitration and Conciliation Act. A party approaching this court under Section 11 is required to furnish and annex the originals or certified true copies of the agreements or instrument containing the arbitration clause, whereas in the present case what has been annexed is neither the original nor a true copy of the Partnership Deed and therein the annexures to the Arbitration application and the subsequent Deed dated 19th June, 2004 and 1st April, 2005 to which the respondent no. 1 is said to be a party and the Partnership Deed dated 4th September, 2006 in which respondent no.1 is said to be a party, but is not seen to have been executed by him. Besides all are certified to be true copies of photocopies of the

agreement. Dr Saraf submits that respondent no.1 was not a party to the Partnership Deed. He had not executed it and he reiterated the case of the respondent no. 1 in his reply to the notice of invocation by contending that the deeds in question have not been signed by his clients since the signatures are clearly forged.

13. Dr. Saraf has invited my attention to the Respondent no. 1's Advocates letter dated 29th October, 2019 by which respondent no.1 disputed having executed the Partnership Deeds. In paragraph 5 respondent no. 1 has dealt with paragraph 1 of the applicants Advocate letter invoking arbitration. Dr Saraf submitted that accounts have already been settled and the applicant is unable to demonstrate that the Partnership Deed has indeed been executed. According to Dr. Saraf the first Partnership Deed of 19th June, 2004 is of relevance inasmuch as it is the case of the applicant that when the firm was incorporated as J. P. Enterprises on 19th June, 2004, respondent no. 1 was not a party. The only partners were one Praful Mehta, M/s. State Street Securities Pvt. Ltd. and M/s. Bhuta Securities Pvt. Ltd. Since respondent no. 1 was not a party to the said Partnership Deed, the Arbitration clause contained in Clause 23 of the Partnership Deed at Exhibit A was not binding on respondent no.1.

14. As far as second Partnership Deed of 1st April, 2005 is concerned Dr Saraf submitted that he was never a partner in the firm upon its first incorporation and hence there no liability in that behalf. Respondent no. 1 had denied his signature on the Partnership Deed. Dr. Saraf submitted that

the signature of respondent no. 1 was forged. He had never executed the Partnership Deed and hence there is no question of being liable under clause 24 which provides for reference to arbitration. The third Partnership Deed of 4th September 2006 once again shows respondent no. 1 as a party but it is evident from the face of the document that respondent no. 1 had not executed it. In these circumstances Dr Saraf submitted that there is no case made out against his client.

15. Inviting my attention to affidavit in reply of respondent no. 1 dated 14th May, 2020 Dr Saraf submitted that the application was merely a collusive application as between the applicant and respondent nos. 2 to 4. The affidavit reiterates the fact that respondent no. 1 had caused searches to be taken in the office of the Registrar of firms and found that the firm J. P. Enterprises had not been registered. He reiterated the fact that respondent no. 1 had not signed the alleged Deed of 4th September, 2006 and apparently seeks to dissolve and reconstitute the firm.

16. Meanwhile Dr. Saraf had relied upon decision of the Supreme Court *Young Achievers vs. IMS Learning Resources Private Limited*³ and invited my attention to paragraph 5 in which the Supreme Court considered the survival of an arbitration clause as between two agreements. According to Dr Saraf there has been a novation and the invocation of Arbitration vide letter dated 9th October, 2019 proceeded on the basis that the partnership was dissolved

3 (2013) 10 SCC 535

vide letter dated 27th December, 2018. The notice makes mention of the Deed of Partnership dated 19th June, 2004 read with subsequent dates ending with Partnership Deed dated 4th September, 2006. Dr. Saraf submits that respondent no. 1 was admittedly not a partner on 19th June, 2004 when J .P. Enterprises was formed. The contention that respondent no. 1 was a party to the second Partnership Deed dated 1st April, 2005 has been denied since according to the respondent his signature appearing on the document is forged and in any event it is the applicant's case that the arbitration was being invoked by virtue of the last deed dated 4th September, 2006 thereby effectively contending that there was a novation and such a novated agreement has not been signed by the respondent no. 1 and hence the arbitration clause embodied in the Partnership Deed dated 4th September, 2006 is not binding on respondent no.1. It is in support of this contention that he has relied upon the decision of *Young achievers (supra)* wherein the court considered the survival of an arbitration clause as between two agreements one dated 1st April, 2007 and one dated 1st April, 2010. The court observed that an arbitration clause in an agreement cannot survive if the agreement containing the Arbitration clause has been superseded or novated by a later agreement. Reference must then be made to the arbitration clause embodied in such later agreement.

17. Relying upon this observation of the Supreme Court in *Young Achievers (supra)* Dr. Saraf invited me to hold that in the present case

novation is evident from the different Partnership Deeds that have been pressed into service by the applicant and by virtue of the novation and the last deed containing the arbitration clause had admittedly not been signed by respondent no. 1 and therefore there is no arbitration agreement in existence. On this basis learned counsel for the respondent no. 1 has invited me to hold against the applicant.

18. Having heard the learned counsel for the parties and having perused the record I am of the view that an Arbitrator is required to be appointed. Even assuming there has been a novation, I am unable to accept the contention that as a result of a novation the arbitration clause cannot be invoked. In the facts of the present case I find that there is an unequivocal admission on the part of respondent no. 1 to having been involved in the partnership business. In paragraph 7 of his Advocates reply to the notice invoking arbitration, respondent no. 1 has contended thus *“profit and loss of the firm were made up and settled in or about 2007 when you retired my client from all your concerns and took charge of all projects from my client”*. This contention on behalf of respondent no.1 in its Advocates letter clearly admits to the respondent no. 1 having been a partner not only of the present concern J. P. Enterprises but also other concerns, probably including Mahaveer Corporation to which I have made reference earlier.

19. This admission and the contention in paragraph 8 of respondent no.1's Advocate reiterating that accounts had been drawn up in 2007 and

hence there was no question of respondent no. 1 making payment or discharging any alleged liability must be held against respondent no.1. All the Partnership Deeds contain arbitration clauses. Respondent no. 1 has not pointed out under which deed he was inducted as a partner and under which deed he was made to retire. If it is his case that he was partner, it was incumbent upon respondent no. 1 to disclose the document under which he was inducted into the partnership business. The relationship between the parties as partners at some point in time has not been disputed. It is the Deed of Partnership dated 4th September, 2006 that the respondent no. 1 claims that he has not signed. However Exhibit K to the Arbitration Application is a Deed of Retirement also dated 4th September, 2006 in relation to the firm J. P. Enterprises which evidences retirement of M/s. Bhuta Securities Pvt. Ltd. This Deed of Retirement appears to have been signed by respondent no. 1. It is also pertinent to note that in paragraph 2.19 (vi) the applicant has stated that on 4th September, 2006 a Deed of Partnership was executed by all other partners except respondent no. 1 but a Deed of Retirement was also been executed on the same date which was signed by respondent no. 1 as a continuing partner. This is a clear indication of the fact that the 4th September, 2006 Partnership Deed is admitted. Continuation of the partnership including respondent no. 1 as a partner is evident since he has been described as one of the continuing partners in the said Deed of Retirement. The Deed of Retirement copy of which appears at Exhibit K has not been denied by the respondent no. 1

reference being had to paragraph 31 of the affidavit in reply dated 14th May, 2020 filed by respondent no.1. In that affidavit while dealing with sub-paras 2.18 and 2.19 all that the respondent no. 1 states is that the applicant could not invoke arbitration since it was barred. Without prejudice it is further contended that all persons suggested by the applicant as Arbitrators are/or have been, in one or the other way, connected with the applicant and all of them have derived some benefits from the applicant. There is no allegation of forgery as far as the Deed of Retirement is concerned.

20. Prima facie I find that the contentions of the respondent no. 1 cannot be accepted since he has not explained under which Partnership Deed he was inducted into the partnership. Secondly perusal of Exhibit B to the petition reveals that the bank account of J. P. Enterprises was been operated by respondent no. 1 and all these entries therein are attributed to operations by respondent no.1. The address at which the firm was carrying on business is shown to be the very address provided in the Partnership Deed viz. *99 Radha Nivas, P. M. Road (North), Vile Parle (East), Mumbai-400 057*. This address is also to be found in the bank statement under the name of respondent no.1. There is no joint holder shown in the account at that stage. Furthermore copies of Income Tax Return for the year 2007-08 which has been furnished reflect the name of the respondent no. 1 (HUF) with debit entry of Rs. 2.32 crores against his name and that is carried forward even as of 2017-18 where the opening balance in the partners current capital account for the

year 31st March, 2017 is shown against the name of respondent no. 1 is shown to be Rs. 5.53 crores with profit share shown at 10% which is identical to that disclosed in the Partnership Deeds. This debit balance is carried forward to the next year and even as of 31st March, 2018 the same amount of Rs.5.53 crores is showing as debit balance in the name of respondent no.1. Thus prima facie it is evident that an Arbitration Agreement exists as between the parties.

21. The allegation of forgery is something that would be gone into at the stage of trial before the Sole Arbitrator. I am not persuaded by the contention of respondent no. 1 that there has been a novation which has rendered the above Arbitration Application incompetent. The contention that the arbitration clause being a component of the contract, superseded by another by a novation as contemplated in *Young Achievers (supra)* would not apply to the present case since the signature of respondent no. 1 appears on the Retirement Deed of 4th September, 2006 which signature has not been denied. Therefore I am of the view that the decision of *Young Achievers (supra)* is of no assistance to respondent no.1.

22. It is also pertinent that I make reference to the admissions in the affidavit in reply of respondent no. 1 which in paragraph 25 admits that he has “left the firm” long back and that he was not aware of the working of the firm and hence could not comment on the same. This was obviously an incorrect statement since it is respondent no. 1 who was handling bank

account at the material time. He also goes on to incorrectly deny that he has been paid any amount more than his dues since it is his own case that Summary Suit has been filed against Mahaveer Corporation in which the applicant is also a partner. The respondent no. 1 reiterates in paragraph 25 of his affidavit that his account in respect of profit and loss of the firm after taking into consideration all current and future benefits were made up and settled in 2007 and then “ *I retired me from J. P. Enterprises*” * Although there is a denial of having overdrawn a sum of Rs.5.53 crores, the fact remains that this is an aspect that needs to be gone into in the arbitration. All other aspects in the affidavit in reply pertain to the merits of the case and which are not relevant at this stage of appointment of an Arbitrator.

*(sic)

23. Prima facie I am satisfied that there is an Arbitration Agreement and the dispute will have to be referred to arbitration. In view of the above I pass the following order :

- (i) Petition is allowed in terms of prayer clause (a)
- (ii) Shri Hormaz Daruwalla, Advocate is appointed as Sole Arbitrator to adjudicate upon claims and counter claims, if any.
- (iii) The learned Arbitrator is requested to file his disclosure statement under Section 11(8) and Section 12(1) within three weeks with the Prothonotary and Senior Master and provide copies to the parties.

- (iv) Parties to appear before the Sole Arbitrator on a date to be fixed by him at his earliest convenience.
- (v) Fees payable to the Sole Arbitrator will be in accordance with the Bombay High Court (Fee Payable to the Arbitrators) Rules, 2018.
- (vi) Application is disposed in the above terms.

(A. K. MENON, J.)