

**Court No. - 46**

**Case :-** ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 74 of 2022

**Applicant :-** Anand Agarwal And Another

**Opposite Party :-** Dr. Narendra Malhotra And Another

**Counsel for Applicant :-** Tanmay Sadh, Gautam Kumar, Pankaj Dubey

**Counsel for Opposite Party :-** Ram Prakash Dwivedi, Anurag Gupta

**Hon'ble Ashwani Kumar Mishra, J.**

Heard learned counsel for the applicant and Sri H.N. Singh, learned Senior counsel assisted by Sri Anurag Gupta, learned counsel for opposite party.

This petition has been filed with the prayer to refer the dispute between the parties to arbitrator.

It transpires that a partnership agreement was signed between the applicant and the opposite party on 01.12.2016 containing clause 21, as per which in case of any dispute among the partners, the law of arbitration prevailing at the time shall be applicable. It is alleged that a dispute has come into existence later between the parties and consequently a notice was sent to the opposite party requesting for appointment of Sri Rishi Sood, Advocate as arbitrator. The request of applicant has been acknowledged. However, a recital is made in para 4 of reply that there is no dispute between the parties and consequently there is no reason or basis for appointment of any arbitrator. It is thereafter that the present application has been filed contending that parties have failed to agree on the appointment of an arbitrator.

Sri Anurag Khanna, learned Senior counsel for the applicant states that the parties are bound by the terms of the contract as per which their dispute shall be resolved by way of arbitration and since such a claim has been made, the dispute is liable to be referred to the arbitrator.

On behalf of opposite party, an objection is taken to the prayer made for appointment of arbitrator. In addition to the assertions made in the counter affidavit, which primarily dispute the liability

of the opposite party in respect of the claim for appointment of arbitrator, learned counsel at the time of hearing contends that in fact there is no specific arbitration clause and, therefore, the petition under Section 11 is not maintainable.

Reliance is placed upon a judgment of the Delhi High Court in *Atul Ltd. vs. Prakash Industries Ltd.* 2003 SCC OnLine Del 301, in order to contend that in the absence of a specific clause of arbitration, the application under Section 11 is not maintainable.

I have heard learned counsel for the parties and perused the materials on record.

So far as the agreement between the parties is concerned, clause 21 is specific and is extracted hereinafter:-

*"21. That in case of any dispute among the partners the Law of Arbitration prevailing at the time shall be applicable."*

In terms of the aforesaid clause, the applicant has made a prayer for reference of dispute to arbitrator. The opposite party has not raised any defense on the premise that there is no arbitration clause. The counter affidavit which has been filed before this Court also does not state anywhere that there is no agreement between the parties for reference of dispute to arbitrator. Although clause 21 is not happily worded, yet the intent of parties in the event of any dispute between partners was to adhere to the law of arbitration prevailing at the time. Clause 21 has to be construed in context of the material available on record including written correspondence conveying the intent of the parties to have their dispute resolved by way of arbitration. The categorical case of the applicant for dispute to be referred to the arbitrator has been responded by the opposite party by merely stating that there is no dispute between the parties, on account of which appointment of arbitrator is not warranted.

Section 2(b) provides for arbitration clause to mean an agreement referred to in Section 7 of the Act of 1996. Sub-section 1 of Section 7 states that an arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Sub-section 2 contemplates that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of separate agreement.

Sub-section 3 provides that an arbitration agreement shall be in writing.

Sub-section 4 of Section 7 is relevant for the present purposes in order to ascertain the true intent of the parties and is extracted hereinafter:-

*"(4) An arbitration agreement is in writing if it is contained in-*

*(a) a document signed by the parties;*

*(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or*

*(c) an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other."*

The statute while defining arbitration agreement in writing not only limits it to the specified clause of arbitration in the agreement but permits such agreement in the form of exchange of letters etc also. Clause 21 of the agreement is thus to be construed together with the exchange of letters and correspondence between the parties. The legal notice sent by the applicants on 09.02.2022 invoking clause 21 of the partnership deal dated 01.12.2016 specifically refers to existence of arbitration clause. Para 12 and para 14 of the legal notice is reproduced hereinafter:-

*"12. In view of the above, we conclude that a dispute has arisen between Intended Claimants and you the Intended Respondents on the said matter and as per the Partnership Deed executed between Intended Claimants and you the Intended Respondents it has been agreed that the same has to be referred to the Arbitration. The relevant clause 21 of arbitration is reiterated herein below:*

*"THAT in case of any dispute among the partners the Law of Arbitration prevailing at the time shall be applicable."*

*14. Therefore, we propose independent arbitration under the aegis of Sole Arbitrator Mr. Rishi Sood, Advocate (Mobile No. 9650133112) at New Delhi for determination/settlement of dispute and also accord our consent for the same."*

The reply of opposite party to the notice is contained in annexure 6 to the arbitration petition.

The legal notice, sent in reply, does not dispute existence of arbitration clause for settlement of dispute between the parties. Clause 4 of the reply is relevant and is reproduced hereinafter:-

*"4. That my clients further state that since there is no dispute between your clients and my clients, there is no reason or basis, for appointment of any Arbitrator. Consequently my clients do not accept your proposal for appointment of Mr. Rishi Sood, Advocate as Arbitrator. My clients do not give any consent for Mr. Rishi Sood, Advocate."*

In view of the fact that opposite party at no stage has ever disputed the existence of arbitration clause between them for settlement of dispute, this Court is not inclined to accept the objection of the opposite party that dispute is not liable to be referred to arbitration. This view is in consonance with clause 21 of the partnership agreement.

This Court finds support for its view from the observations contained in the judgment of the Supreme Court in Chloro Controls India (P) Ltd. vs. Severn Trent Water Purification Inc., (2013) 1 SCC 641, which is reproduced hereinafter:-

*"Examined from the point of view of the legislative object and the intent of the farmers of the statute i.e. the necessity to encourage arbitration, the court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious causes of action, parties and prayers."*

The intent of the parties to resort to arbitration for settlement of their dispute is, therefore, apparent when the correspondence on record is examined in conjunction with clause 21.

In that view of the matter, this petition for appointment of Arbitrator succeeds and is allowed.

Accordingly, Hon'ble Mr. Justice Ajay Tyagi, a Former Judge of this Court, R/o A-31, Sector 35, Noida, UP-201307, Mobile No. 8630652446, is appointed as an Arbitrator to enter upon the reference and adjudicate the dispute in accordance with provisions of Arbitration and Conciliation Act, 1996, subject to his consent in terms of section 11-A of the Arbitration and Conciliation Act.

The Arbitrator shall be entitled to fees, in accordance with the provisions of fourth schedule inserted by Act No.3 of 2016. The expenses shall be borne equally by the parties.

**Order Date :- 10.8.2023**

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