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

+ ARB.P. 1010/2023, I.A. 1862/2024

PANKAJ SINGH..... Petitioner

Through: Mr. Umesh Kumar Burnwal and
Ms.Parul Sagar, advts. with Mr.Ram
Bhawan Singh, SPA

versus

BASHIR AHMED HAROON & ORS. Respondents

Through: Mr.Sanjiv Bahl, Mr.Eklavya Bahl,
Ms.Apoorva Bahl and Mr.Pawas
Agarwal, Advts. for respondents no.1,
2 and 4.

Mr.Raj Bahadur Singh and Mr.Vikas
Yadav, advts. for respondents no.3, 5
and 6.

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Date of Judgment: 05.04.2024.

CORAM: BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G E M E N T

DINESH KUMAR SHARMA, J. (ORAL)

1. By way of the present petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the „A&C Act“), the petitioner seeks appointment of an Arbitral Tribunal comprising of a sole arbitrator, to adjudicate the disputes *inter se* the parties.
2. The facts in brief as stated by the petitioner is that a registered

partnership Firm Falcon was running under the name and style of M/s Falcon. The firm and company M/s Sky Lark Fashions Pvt. Ltd were solely owned by respondent no.1 namely Mr. Bashir Ahmed Haroon and respondent no.2 namely Ms. Nazia Bashir. Respondents no.1 and 2 were running a business of manufacturing and export of various things including furniture, leather goods and accessories.

3. Learned Counsel for the plaintiff submitted that on 11.12.2020, the petitioner and respondent no. 5 became partners of a share of 10 % each in the Firm M/s FALCON through a reconstituted partnership deed. It has been submitted that Petitioner and respondent no.5 purchased the firm and company for a total sum of Rs. 16 crores. Thereafter, they reconstituted the partnership deed dated 28.06.2021 whereby the petitioner and respondent No.5 became the only partners in the firm with a share of 50 % each and respondent no.1 and 2 got retired from the firm. Pursuant to this, the petitioner and respondent no.5 got registered themselves as authorized partners of the firm M/s FALCON in the Department of GST and started running the firm.
4. The plaintiff's case is that respondent no.1, respondent no.2 and respondent no.5 conspired and at gunpoint illegally obtained the signature of the petitioner over the reconstituted partnership deed dated 13.01.2022. Vide this reconstituted partnership deed, the petitioner was shown to have retired from the partnership firm and respondents no.1 and 2 re-entered as partners with a 50% share each. It has further been stated that the petitioner was ousted from the partnership deed by an illegal partnership deed dated 13.01.2022 and even the money invested by him and share was not paid. Subsequently, the petitioner registered an FIR at

Noida and further filed a civil suit for cancellation and reconstitution of the partnership deed dated 13.01.2022 which is pending adjudication before learned Civil Judge, Saket court. The petitioner's plea is that even in the reconstituted partnership deed dated 13.01.2022, there is no mention of M/s Sky Lark Fashions Pvt. Ltd. and as per the mother agreement dated 10.06.2020, the petitioner had share in the same.

5. It has been submitted that a dispute has arisen between the parties. It has further been submitted that there is an arbitration clause in the mother agreement dated 10.06.2020. The arbitration was invoked vide notice dated 01.04.2023.
6. Learned Counsel for the petitioner has submitted that a reply was received wherein it was stated that respondents no.1 and 2 had once again through a compromise deed retired and made respondent no.5 (Anita Goyal) and his son Shivam Goyal as partners with 50 % shares to each in firm M/s FALCON. It has been further submitted that defendant no.5/Anita Goyal also filed a civil suit bearing CS (Comm) No.452/2022 against respondents no.1 and 2 and the petitioner regarding the Payment of consideration made for the partnership deed.
7. Learned counsel for the petitioner has submitted that the civil suit was filed for declaration of the reconstituted partnership deed dated 13.01.2022 as null and void. Learned counsel also submits that the named arbitrator Mr. Shri Lakhan Lal Aggarwal had a conflict of interest as he was a consultant with respondent no.1, therefore is not eligible to be an arbitrator as per the Arbitration Act. Subsequently, another notice was issued to the respondents to appoint Mr. Vaibhav Srivastav as the sole arbitrator, however, the respondent did not agree.

8. The respondents in the written statement have taken a preliminary objection that the present petition is not maintainable as the reconstituted partnership deed dated 11.12.2020 and MOU dated 19.06.2021 has been superseded by the subsequent reconstituted partnership deeds dated 28.06.2021 and 13.01.2022. It has been further submitted that there is no arbitration clause in the reconstituted partnership deeds dated 28.06.2021 and 13.01.2022.
9. Learned counsel for respondent no.1, 2 and 4 has submitted that in fact, the petitioner had filed a civil suit bearing CS(SCJ) 104/2022 titled as “Pankaj Singh vs. Bashir Ahmed Haroon & Ors.” claiming the relief under the partnership deed dated 28.06.2021 and as the petitioner has chosen to file the civil suit, now he cannot invoke the arbitration clause. Learned counsel has further submitted that respondent no.5 Ms. Anita Goyal has also filed a civil suit bearing no. CS (COMM) No. 452/2022 titled as “Anita Singh vs Bashir Ahmed Haroon & Ors” on the basis of the MOU dated 19.06.2021 and reconstituted partnership deed dated 28.06.2021.
10. Learned counsel for respondent 1, 2 and 4 also submits that in that case petitioner filed his written statement for defendant no.3 but never filed an application under Section 8 of the Arbitration and Conciliation Act. Learned counsel has also submitted that the present petition is a misuse and abuse of the process of the court.
11. It has further been submitted that since the petitioner failed to get any relief in the civil suit from the court concerned or in the appeal court, the present petition has been filed. Learned counsel has submitted that various material facts have also been concealed from this court and the

same have been detailed in the reply.

12. The court has gone through the objections and the same are not being reproduced herein for the sake of brevity. Learned counsel has also taken an objection that the matter cannot be referred to the arbitration as respondents no.3, 4 and 6 were not even the parties to the agreement/MOU relied upon by the petitioner.
13. The jurisdiction of conducting an enquiry at the time of making reference is very well settled. In *DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd.* (2021) 16 SCC 743 wherein it was *inter alia* held as under:

21. The jurisdiction of this Court under Section 11 is primarily to find out whether there exists a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party has made out a prima facie arbitrable case. The limited jurisdiction, however, does not denude this Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. A three-Judge Bench in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, paras 236, 237, 244.3, 244.4, 244.5, 244.5.1-244.5.3 : (2021) 1 SCC (Civ) 549] , has eloquently clarified that this Court, with a view to prevent wastage of public and private resources, may conduct —prima facie review at the stage of reference to weed out any frivolous or vexatious claims.

22. In this context, the Court, speaking through Sanjiv Khanna, J. held that : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, paras 236, 237, 244.3, 244.4, 244.5, 244.5.1-244.5.3 : (2021) 1 SCC (Civ) 549] , SCC p. 121, para 154).

154. ... 154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the

principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of —second look on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably —non-arbitrable and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

23. N.V. Ramana, J. (as his Lordship then was) in his supplementary opinion further crystallised the position as follows : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, paras 236, 237, 244.3, 244.4, 244.5, 244.5.1-244.5.3 : (2021) 1 SCC (Civ) 549] , SCC p. 162, para 244)

“244. Before we part, the conclusions reached, with respect to Question 1, are:

respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. “when in doubt, do refer”.

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? Or

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?”

14. In regard to the plea taken by the learned counsel for the respondents that the matter cannot be referred to an arbitrator against the persons who were not party to the arbitration agreement. The petitioner has relied upon *Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. and Others* (2013) 1 SCC 641 wherein it has inter alia been held that non-signatory or third party can be subjected to arbitration without their prior consent only in the exceptional cases. The test laid down is to examine the touchstone of direct relationship to the party signatory to the arbitration agreement or direct commonality of the

transaction. It was further inter alia held that the basic test is the intention of the parties to refer all the disputes between all the parties to the arbitral tribunal as one of the determinative factors.

15. I consider that besides the facts and circumstances of the case first of all the basic test is the intention of the parties. Herein the petitioner himself filed the civil suit regarding the dispute between the parties and did not resort to the arbitration. Secondly, in another civil suit filed by respondent No. 5, the petitioner did not invoke the arbitration nor did he file any application under Section 8 of the Arbitration and Conciliation Act. Thus, intention of the petitioner to go for the arbitration is doubtful.
16. Further, in *Raj & Associates vs. Videsh Sanchar Nigam Limited & Ors* 2004 SCC Online Del 548, the coordinate bench of this court relying upon *Magma Leasing Limited vs. NEPC Micon Limited and another* AIR 1998 Calcutta 94 inter alia held that once the plaintiff opts to file a suit it is no longer open to him to pray to the court that the parties be referred to arbitration.
17. Section 7 of the Arbitration and Conciliation Act defines the arbitration agreement. Section 7 (5) of the Arbitration and Conciliation Act provides as under:

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.
18. Section 7 (5) came up for discussion before the Apex court in *NBCC (India) Limited vs. Zillin Infraprojects Pvt. Ltd.* 2024 SCC OnLine SC 323 wherein it was inter alia held as under:

9. *The issue is no more res integra. The provisions of subsection (5) of Section 7 of the Arbitration Act have been considered by this Court in the case of M.R. Engineers and Contractors Private Limited (supra). After considering the relevant passages from Russell on Arbitration and various English judgments, this Court held thus:*

“24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:

(1) the contract should contain a clear reference to the documents containing arbitration clause,

(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there

is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v.) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.”

19. In ***Magic Eye Developers Pvt. Ltd. vs. M/s Green Edge Infrastructure Pvt. Ltd.*** SLP No.18339-42 of 2021, the Supreme Court has held as under:

“We are of the opinion that therefore, if the dispute/issue with respect to the existence and validity of an arbitration agreement is not conclusively and finally decided by the referral court while exercising the pre-referral jurisdiction under Section 11(6) and it is left to the arbitral tribunal, it will be contrary to Section 11(6A) of the Arbitration Act. It is the duty of the referral court to decide the said issue first conclusively to protect the parties from being forced to arbitrate when there does not exist any arbitration agreement and/or when there is no valid arbitration agreement at all.

20. The case of the petitioner is that the MOU dated 10.06.2020 has an arbitration clause. Similarly, the reconstituted partnership deed dated 11.12.2020 also has an arbitration clause. Similarly, the MOU dated 19.06.2021 also had an arbitration clause. However, there was no arbitration clause in the reconstituted partnership deed dated 28.06.2021 and 01.10.2021 & 13.01.2022. If we peruse the reconstituted partnership deed dated 28.06.2021, there is no reference to the MOU dated 10.06.2020 and the reconstituted partnership deed dated 11.12.2020.
21. The plea of the learned counsel for the petitioner that the reconstituted partnership deed dated 28.06.2021 was amended on 01.10.2021 and in the same, it was specifically mentioned that the rest terms and conditions of the partnership will remain the same as mentioned in the partnership deeds dated 28.06.2021 & 11.12.2021.
22. Thus, arguments on the fact of it may seem attractive but is liable to be rejected for two reasons. Firstly, that the terms and conditions may remain the same but there should be an explicit intention of the parties to resolve the dispute through arbitrations. Secondly, to the amendment dated 01.10.2021 only the petitioner and respondent no.5 are the signatories. Furthermore, in the reconstituted partnership deed dated 13.01.2022 again there is no arbitration clause and there is no reference to the MOU dated 10.06.20 and the reconstituted partnership deed dated 11.12.2021.
23. Though the jurisdiction of the court at the time of making reference is limited but the court is not expected to refer the matter mechanically. I

consider that there is no substance in the petition. Accordingly, the petition along with the pending application is dismissed.

24. Order *dasti*.

DINESH KUMAR SHARMA, J

APRIL 5, 2024

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