

THE HON'BLE SRI JUSTICE B. VIJAYSEN REDDY

ARBITRATION APPLICATION No.160 of 2021

ORDER:

This application is filed to appoint an arbitrator to resolve the disputes between the applicant and the respondents.

2. The applicant and the respondents No.2 and 3 are *inter se* related. It is the case of the applicant that he has settled down in USA, accumulated surplus funds and decided to invest in real estate in India. In consultation with his brother, Sri Jitender Agarwal, the applicant formed a company under the name and style of M/s. Jeetendra Apartments Pvt. Ltd., on 11.09.2000 with his brothers Jitender Agarwal, Pavan Kumar Agarwal, Prem Kumar Sanghi, Smt. Santosh Agarwal, W/o. Rajendra Agarawal as initial directors. The entire working capital and funds were contributed by the applicant alone and three properties were purchased. An account was opened with M/s. Mahesh Bank, Begum Bazar Branch, Hyderabad, in the name of the company. After some time, another company was formed under the name and style of M/s. Tayal Builders Private Limited on 20.11.2002 with the respondents No.2 and 3 and Smt. Sushma Sanghi, W/o. Prem Kumar, as its directors. With the funds sent by the applicant, property bearing Municipal No.2-2-35/A, situated at Amberpet, Hyderabad, was purchased under deed of agreement of sale-cum-

general power of attorney dated 29.07.2006 registered as document No.2975/2006.

3. It is stated that the respondent No.2 created rift between the applicant and Prem Kumar Sanghi and as differences increased, the applicant withdrew himself from the companies and thereafter, Prem Kumar Sanghi retired from directorship of M/s. Jeetendra Apartments Pvt. Ltd. and his wife retired from M/s. Tayal Builders Pvt. Ltd in 2002. At the request of respondent No.2, the applicant executed a general power of attorney on 10.10.2002 in USA in favour of the respondent No.2, which included all financial powers including banking operations. As per the request of the respondent No.2, the applicant used to transfer money into the NRI Account from time to time. The respondents No.2 and 3 proposed to purchase another property and on their insistence, the applicant formed a new partnership firm under the name and style of M/s. TIA Constructions i.e. respondent No.1 under deed dated 25.04.2015 with the applicant and the respondents No.2 and 3 as partners. Later, the property bearing No.3-6-69/4/3 situated at Basheerbagh, Hyderabad, was purchased in the name of the firm under the agreement of sale cum GPA dated 04.05.2015, registered as document No.1401/2015. In total, the applicant has transferred a sum of Rs.14,00,38,512/- into his account in M/s. State Bank of

India, NRI Branch, Himayatnagar, Hyderabad (earlier State Bank of Hyderabad) for investment and to his benefit.

4. It is alleged that the entire money was misused by the respondents No.2 and 3 causing financial loss to the applicant. On the insistence of the respondent No.2, the applicant executed a fresh GPA on 28.01.2012. As the applicant found the respondent No.2 indulging in mischief and mismanagement of the funds of the firm, the deeds of power of attorney were cancelled by the applicant and the respondent No.2 accepted the cancellation by making necessary endorsement on copies of said deeds of power of attorney and handed over to biological brother of the applicant and present power of attorney Prem Kumar Sanghi. When the applicant came down to India, he executed a fresh deed of power of attorney on 21.04.2018 in favour of Prem Kumar Sanghi and the respondent No.2 witnessed the same. Later, the applicant came to know that the respondents No.2 and 3 had been acting detrimental to his interest and questioned them but could not get proper response from them. The applicant invoked clause 23 of the partnership deed, which provides for resolution of disputes between the parties by way of arbitration.

5. The applicant filed C.O.P.No.91 of 2018 under Section 9 of the Arbitration and Conciliation Act, 1996 (for short 'the Act')

seeking interim relief against the respondents No.2 and 3 not to alienate, encumber, part with possession or create third party interest in respect of the property of the firm and the building constructed thereon. The application was dismissed on 28.02.2019. The applicant preferred COMCA.No.28 of 2009 before this Court and the same was allowed by judgment dated 10.12.2019 restraining the respondents No.2 and 3 from alienating Flat Nos.212, 213, 511 and 112. The applicant issued legal notice dated 04.08.2021 dissolving the partnership firm and calling upon the respondents to furnish true and complete statement of account of the partnership firm and to give applicant 35% share in the property, profits and business of the firm and also other assets and monies thereof. The respondents were informed that an arbitrator was nominated by the applicant for resolution of disputes between. Notice was served on the respondents No.2 and 3 and they issued reply notice dated 25.08.2021 with false and baseless allegations and contended that the proceedings are barred under the provisions of the Partnership Act, 1963. Thus, the instant application was filed for appointment of the arbitrator.

6. The respondents filed counter affidavit principally contending that for the purpose of enforcement of any right arising out of contract even *inter se* between the partners, the partnership firm is required to be registered under Section 69(1) of the Partnership

Act. Admittedly, the partnership firm is not registered with the Registrar of Firms. When the main contract itself is hit by Section 69(1) of the Partnership Act, the arbitration clause is not enforceable. Further, the definition of suit also extends to the arbitration proceedings as per the judgment of the Supreme Court in ***Ethiopian Airlines v. Ganesh Narain Saboo*** [(2011) 8 SCC 539]. Regarding other averments in the arbitration application viz. mismanagement and misuse of funds is concerned, it is stated that the firm is assessed to income tax and the returns were also filed up to 31.03.2018 and whatever share of the profit that was arrived at was also paid and the applicant also received his share of profit. Even after 31.03.2018 the firm paid Rs.45 lakhs to the applicant and the amount was transferred on 16.04.2018. The applicant was aware that almost 14 flats at Basheerbagh, Hyderabad, were already booked and the amount so collected was accounted for and the applicant also derived benefit. Hence, with *malafide* intention, the present application is filed.

7. Mr. Shyam S. Agarwal, learned counsel for the applicant, submitted that the contention of the respondents with respect to non-registration of the firm and that Section 69(1) of the Partnership Act creates bar for invoking arbitration clause, which is akin to the suit proceedings, is contrary to the settled legal position as held by the Supreme Court in **M/S. UMESH GOEL v.**

**HIMACHAL PRADESH COOPERATIVE GROUP HOUSING
SOCIETY LTD.¹** wherein it was held as under:

"32. The learned senior counsel then contended that while interpreting Section 14 of the Limitation Act, it was held that Arbitration Proceedings are to be treated on par with civil proceedings. Though, in the first blush, the submission looks more attractive, on a deeper scrutiny it must be held that it is always well settled that a judgment can be a binding precedent on a question of law, which was canvassed before it and decided. Keeping the said principle in mind when we consider the said submission, we have clearly held as to how a reading of Section 69 as a whole does not permit of any interpretation that would cover Arbitral proceedings, de hors, filing of a suit in a Court and that too in respect of a right under a contract governed by the provisions of the Indian Partnership Act, especially after the coming into force of the 1996 Act and the proceedings governed by the special features contained in the said Act ..."

8. Learned counsel for the applicant also relied upon a decision of the Supreme Court in **ANANTHESH BHAKTA v. NAYANA S. BHAKTA**² wherein the Supreme Court while dealing with similar issue, held under issue No.3 therein as under:

"28. The submission by the petitioner is that partnership being an unregistered partnership, no reference can be made to the arbitration. In the present case there is no dispute between the parties that both Retirement deed and Partnership deed contain an arbitration clause ...
When the partners and those who claim through

¹ AIR 016 SC 3116

² (2017) 5 SCC 185

partners agreed to get the dispute settled by arbitration, it is not open for the appellants to contend that partnership being unregistered partnership, the dispute cannot be referred.

29. The petitioners have not been able to show any statutory provision either in 1996 Act or in any other statute from which it can be said that dispute concerning unregistered partnership deed cannot be referred to arbitration ...”

9. Further, the learned counsel relied upon a judgment of the Gauhati High Court in **SUPRATIK DEY v. NILOTPAL DEY**³, which also referred to the decision of the Supreme Court in **ANANTHESH BHAKTA**’s case (1 supra). The Gauhati High Court made the following observations:

“**19.** Section 69 is relevant as it deals with effect of non-registration. While sub-section (1) thereof says that no suit to enforce a right arising from a contract or conferred by the Partnership Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or who have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

20. Sub-Section (2) thereof also does not permit filing of suit by an unregistered firm against any third party.

³ 2020 (1) GauLT 880

As per sub-section (3), such provision shall also apply to a claim of set-off or other proceeding to enforce a right arising from a contract, however such provision shall not affect the enforcement of any right to sue for dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved firm.

21. In *Kamal Pushp Enterprises v. DR Construction Co., (2006) 6 SCC 659*, Supreme Court was considering correctness of the decision of the Madhya Pradesh High Court holding that provisions of section 69 of the Partnership Act do not stand in the way of an unregistered firm defending proceedings against it and that it only precluded initiation of any proceeding by such a firm. Referring to the previous decision of the Supreme Court in the case of Jagdish Chandra Gupta (supra) and other cases, Supreme Court held that the prohibition contained in Section 69 is in respect of instituting a proceeding to enforce a right arising from a contract in any by an unregistered firm and it would have no application to a proceeding before an arbitrator and that too, when the reference to the arbitrator was at the instance of the other side.

22. This point was elaborated by the Supreme Court in *Umesh Goel v. Himachal Pradesh Cooperative Group Housing Society Ltd., (2016) 11 SCC 313* wherein it was held that arbitral proceedings will not come under the expression "other proceedings" as appearing in Section 69 can have no application to

arbitral proceedings as well as to the arbitration award.

23. Following the above, Supreme Court in ***Ananthesh Bhakta v. Narayan S. Bhakta, (2017) 5 SCC 185*** made it clear that when the partners and those who claim through partners agreed to get their dispute settled by arbitration, it is not open to any of the partners or anyone claiming through the partners to contend that partnership being unregistered, the dispute cannot be referred to arbitration. It was further held that neither in the Arbitration and Conciliation Act, 1996 nor in any other statute, there was any prohibition for referring any dispute concerning unregistered partnership deed to arbitration."

10. On the other hand, Mr. K.K. Waghray, learned counsel for the respondents, relied upon decisions of the Supreme Court in **JAGDISH CHANDRA GUPTA v. KAJARIA TRADERS (INDIA) LTD.**⁴ And **GARWARE WALL ROPES LTD. v. COASTAL MARINE CONSTRUCTION AND ENGINEERING LTD.**⁵

11. In **JAGDISH CHANDRA GUPTA's** case (3 supra) the point involved was whether an application under Section 8(2) of the Arbitration Act, 1940 can be entertained in a suit filed by an unregistered firm. The Supreme Court held that bar contained under Section 69(3) of the Partnership Act also includes

⁴ AIR 1964 SC 1882

⁵ AIR 2019 SC 2053

proceedings under Section 8(2) of the Arbitration Act and accordingly, the application filed under Section 8(2) of the Arbitration Act was dismissed. However, in view of the decision of the Supreme Court in **ANANTHESH BHAKTA's** case (1 supra) arising out of the Arbitration and Conciliation Act, 1996, the decision in **JAGDISH CHANDRA GUPTA's** case (3 supra), which arises out of the Arbitration Act, 1940, cannot be applied to the instant dispute.

12. In **GARWARE WALL ROPES LTD.'s** case (4 supra), it was held by the Supreme Court that arbitration clause in an agreement would not exist when it is not enforceable by law. In the said matter, objection was raised by the respondent to the arbitration clause that the contract providing for arbitration is not properly stamped. The Supreme Court made the following observations:

"21. Therefore, when a lease deed or any other instrument is relied upon as contending the arbitration agreement, the court should consider at the outset, whether an objection in that behalf is raised or not, whether the document is properly stamped. If it comes to the conclusion that it is not properly stamped, it should be impounded and dealt with in the manner specified in Section 38 of the Stamp Act. The court cannot act upon such a document or the arbitration clause therein. But if the deficit duty and penalty is paid in the manner set out in Section 35 or Section 40 of the Stamp Act, the document can be acted upon or admitted in evidence.

...

22.3. If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the court or before the Collector (as contemplated in Section 35 or Section 40 of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped."

13. By referring to the judgment supra, learned counsel for the respondents, submitted that as per the law laid down by the Supreme Court, if an agreement does not contain proper stamp, it become unenforceable and so also the arbitration clause contained therein cannot be invoked. That applying the said ratio to instant case also, since the partnership deed entered into between the parties is not registered, the same cannot be enforced as there is a bar contained under Section 69(3) of the Partnership Act.

14. As discussed above, in view of the decision of the Supreme Court in **ANANTHESH BHAKTA's** case (1 supra) holding that the bar contained under Section 69(1) of the Partnership Act for institution of a suit is not applicable to arbitration proceedings, the contention of learned counsel for the respondents that the decision in **GARWARE WALL ROPES LTD.'s** case (4 supra) applies to the facts of the case, is without any legal basis.

15. In the light of the above discussion, arbitration application is allowed. Sri Justice A. Gopal Reddy, Retired High Court Judge,

is appointed as arbitrator to adjudicate the claims and disputes between the parties and to pass an award in accordance with law.

16. The learned Arbitrator is entitled to fees as per the rates specified in the Fourth Schedule to the Act of 1996, inserted by Act 3 of 2016 with effect from 23.10.2015, which shall be borne by both parties in equal shares.

The miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

B. VIJAYSEN REDDY, J

July 1, 2022

Note: LR copy to marked
(**B/o**) DSK