

The High Court of Madhya Pradesh : Bench At Indore

BEFORE SINGLE BENCH : HON'BLE MR. JUSTICE VIVEK RUSIA

Arbitration Case No.84/2018

Deepak v/s Virendra & Others

Shri Jagdish Baheti, learned counsel for the applicant.
Shri Vijay Asudani, learned counsel for respondents No.1 & 4.

Arbitration Case No.91/2018

Manoharlal v/s Virendra & Others

Shri Ajay Jain, learned counsel for the applicant.
Shri Vijay Asudani, learned counsel for respondents No.1 & 4.
Shri Jagdish Baheti, learned counsel for respondent No.5.

Arbitration Case No.92/2018

Gopaldas Khandelwal v/s Virendra & Others

Arbitration Case No.93/2018

Rajesh Kahndelwal v/s Virendra & Others

Arbitration Case No.94/2018

Smt. Shobha v/s Virendra & Others

Arbitration Case No.95/2018

Anand Satyanarayan Ji v/s Virendra & Others

Shri Ajay Jain, learned counsel for the applicant.
Shri Hemant Purohit, learned counsel for respondents No.1 & 4.
Shri Jagdish Baheti, learned counsel for respondent No.5.

Arbitration Case No.96/2018

Rajkumar Satyanarayan v/s Virendra & Others

Shri Ajay Jain, learned counsel for the applicant.
Shri Hemant Purohit, learned counsel for respondents No.1 & 4.

Indore, dated 31.01.2022

Heard through Video Conferencing.

Regard being had to the similitude in the controversy involved in the present case, on the joint request of the parties, matters are heard. Some facts are being taken from AC No.84/2018 in order to understand the controversy between the contesting parties.

ORDER

All the applicants have invoked the jurisdiction of this Court by filing the above arbitration cases under Section 11 of the Arbitration & Conciliation Act, 1996 seeking the appointment of an arbitrator to resolve the dispute with respondent No.1 to 4(in AC no 84/2018).

02. The facts of the case, in short, are as under: -

2.1. On 03.08.2007, a partnership Firm in the name of 'Shri Shiva Construction' (hereinafter referred to as Firm) came into existence with two partners namely (i) Virendra Modi and (ii) Nitesh Khandelwal. The Firm has its registered office at 23 Shraddhanand Marg, Indore and is mainly engaged in the business of real estate, construction and development. On 04.02.2008, the Firm has undergone a change, when Nitesh Khandelwal left the Firm and in his place, 13 new partners joined the Firm, and the partnership deed dated 04.02.2008 was executed. Clause – 6 of the partnership deed has described the share of 14 partners in the Firm. Applicant – Deepak Khandelwal got 9% share in the Firm. Clause – 11 of the partnership deed deals with the resolution of the dispute between the partners by way of arbitration under the Arbitration & Conciliation Act,1996 and for all-purpose, the Court at Indore shall have the jurisdiction.

2.2. On 27.01.2015, the partnership has undergone another change because two partners namely Prafull S/o Ramchandra Ijardar and Gyarsilal S/o Harlal Agrawal left the Firm leaving 12 partners in the Firm.

2.3. After some time, another partnership deed was registered on 27.10.2015 when these applicants have decided to leave the

Firm leaving the remaining four partners namely (i) Virendra Modi, (ii) Vimal Modi, (iii) Vinay Modi and (iv) Smt. Manorma Modi i.e. non-applicants No.1 to 4 as partners in the Firm. As per contents of the partnership deed dated 27.10.2015, except applicants – Deepak Khandelwal, others retiring partners viz Gopaldas, Rajesh, Smt. Shobha, Rajkumar Anand, Manoharlal and Bilkis Bee received their shares from Virendra Modi in the form of money in cash. So far as the applicant – Deepak Khandelwal is concerned, he agreed to take a land admeasuring 16000 (actual is 17000) sq. ft. situated at Shivdham Colony from 'Shri Shiva Construction' in lieu of share in the Firm. It is mentioned in the partnership deed that after registration of the sale deed of said land, this application shall be removed from the Firm. The share of the four partners has been ascertained w.e.f. 27.10.2015 in new the partnership deed. The deed also contains an arbitration clause for the resolution of disputes between the partners which is under invocation by these ACs. The said deed was registered with the Registrar of Stamp on 27.10.2015.

2.4. According to the applicant – Deepak Khandelwal, a relinquished deed was also executed for leaving an area of 3804 sq. ft. of 17000 sq ft. land mentioned in the partnership deed dated 27.10.2015. A deed was prepared but Virendra Modi did not remain present for registration in the office of the sub-registrar. It is further submitted by the applicant – Deepak Khandelwal that no sale deed has been executed by the non-applicants in respect of the sale of 17000 sq. ft. land by partnership deed dated 27.10.2015, hence, he is still one of the partners of the Firm by deed dated 04.02.2008 and entitled to know the affairs of the Firm.

2.5. The applicant – Deepak Khandelwal served a notice dated 07.02.2017 demanding details of accounts, transactions, income, expenditure etc, being a partner. The aforesaid notice was replied by the non-applicants vide reply dated 20.02.2017 stating that the applicant is no more member of the Firm to claim details of accounts and other transactions. The applicant served another legal notice dated 27.04.2008 invoking the arbitration clause of the partnership deed dated 27.10.2015. The said notice was replied to by the non-applicants on 04.08.2018 denying the appointment of an arbitrator, hence, the applicant has approached this Court by filing this AC No.84/2018.

2.6. Other remaining six partners namely Manoharlal, Gopaldas Khandelwal, Rajesh Khandelwal, Smt. Shobha, Anand Satyanarayan and Rajkumar Satyanarayan have also filed AC Nos.91/2018, 92/2018, 93/2018, 94/2018, 95/2018 & 96/2018 seeking appointment of an arbitrator on the ground that by deed dated 04.02.2008 they are still a partner in the Firm and entitled to know the account details and day to day functioning of the Firm.

03. The non-applicants have filed the reply opposing the aforesaid prayer on the ground that applicants have to right to invoke arbitration clause No.11 of the partnership deed dated 27.10.2015 as they are no more partners in the Firm. From the language of Clause – 11 of the last partnership deed it is clear that disputes between the four partners are liable to be referred to the arbitrator, hence, applications are liable to be dismissed. By way of additional reply, non-applicants No.1 to 4 have also raised alegal issue that partnership deed dated 27.10.2015 is also a deed of retirement of the applicant – Deepak Khandelwal, hence, the

stamp duty as provided under Article 49 Schedule 1A of the Stamp Act, 1899 is liable to be paid in the partnership deed for invocation of the arbitration clause. As per Article 49-B of the Stamp Act where on the dissolution of partnership or retirement of a partner, any immovable property is taken as his share by a partner other than a partner who brought in that property as his share of contribution in the partnership, the same duty as a **conveyance** (No.25) on the market value of such property is liable to be paid. It is further submitted by the learned counsel for the applicant – Deepak Khandelwal, vide partnership deed dated 27.10.2015 has accepted that he will be getting 16000 sq. ft. land of the Firm on quitting from the firm, thus, as per Article 25 of the said Act, the stamp duty of 5% of the market value of the property ie 16000 sqft land is liable to be paid by him to invoke the arbitration clause. It is further submitted that that market value of 16000 sq. ft. of land comes to Rs.1,28,00,000/- and on which the stamp duty of Rs.6,40,000/- is liable to be paid and unless the applicant-Deepak Khandelwal gets the deed dated 27.10.2015 impounded, he is not entitled to invoke the arbitration Clause – 11.

04. Shri Vijay Asudani, learned counsel for Non-applicants No.1 and 4, in support of the aforesaid objection, has placed reliance upon a judgment delivered by the Apex Court in the case of *SMS Tea Estates Private Limited v/s Chandmari Tea Company Private Limited reported in (2011) 14 SCC 66*, in which it is held that until the stamp duty and penalty in respect of such instrument are paid, the arbitration agreement including the arbitration clause cannot be acted upon. In the case of *Black Pearl Hotels Private Limited v/s Planet M Retail Limited reported in*

(2017) 4 SCC 498 has affirmed the aforesaid view and since the partnership Firm is unregistered, therefore, the arbitration case is not maintainable and liable to be dismissed. Reliance has also been placed upon a judgment delivered in the case of *Garware Wall Ropes Limited v/s Coastal Marine Construction & Engineering Limited* reported in *(2019) 9 SCC 2009*.

05. After the aforesaid objection the applicant-Deepak Khandelwal has filed an application under Order VI Rule 17 r/w section 151 of the Code of Civil Procedure, 1908 seeking an amendment to the effect that earlier partnership deed dated 04.02.2008, by which he was inducted as a partner also contains the arbitration clause and since the condition of a deed dated 27.10.2015 has not been completed by executing a sale deed of land admeasuring 16000 sq. ft., the applicant-Deepak Khandelwal is entitled to invoke the arbitration clause under the deed dated 04.02.2008. The non-applicants have opposed the aforesaid application by submitting that the partnership deed executed on 27.10.2015 is altogether a new partnership deed than the deed dated 04.02.2008. No notice has been issued under Clause 11 of the partnership deed dated 04.02.2008, therefore, the condition precedent of issuance of notice under Clause 11 has not been fulfilled, hence, the application is liable to be dismissed.

06. Shri Jagdish Baheti, learned counsel for the applicant submits that the applicant-Deepak Khandelwal was inducted as a partner in the Firm by deed dated 04.02.2008 which contains an arbitration clause, thereafter, another deed was executed on 27.10.2015, whereby the applicant – Deepak Khandelwal did agree to leave the Firm on a condition of returning his share by execution of a sale deed in respect of 16000 sq. ft. land (actual

17000 sq. ft.). Since till today, no sale deed has been executed, therefore, the applicant cannot be said to have retired from the partnership Firm w.e.f. 27.10.2015. Hence, he is entitled to invoke the arbitration clause by virtue of partnership deed dated 04.02.2008 which is neither required to be registered nor stamped as per the market value of the property. In support of his contention, he has also placed reliance upon a judgment delivered in the case of ***Black Pearl Hotels Private Limited v/s Planet M Retail Limited reported in (2017) 4 SCC 498***, in which the Apex Court has held that stamp duty is payable on a document containing an arbitration clause, the Court must consider the nature of the agreement to decide whether document required stamp duty and if so whether it was duly stamped. He has further placed reliance on para – 26 of the judgment delivered in the case of ***N.N. Global Mercantile Private Limited v/s Indo Unique Flame Limited & Others reported in (2021) 4 SCC 379***, in which the Apex Court has held that there is no legal impediment to the enforceability of the arbitration agreement pending payment of stamp duty on the substantive contract, the case of *SMS Estate Tea (supra)* does not lay down the correct position of law on two issues (i) that the arbitration agreement is an unstamped commercial contract and cannot be acted upon or is rendered unenforceable in law and (ii) the arbitration agreement would be invalid whether the contract or instrument is voidable. The judgment passed in the case of *Garware Wall Ropes Limited (supra)* has now been referred to Larger Bench and the Apex Court prescribed three modes for referring a dispute for arbitration.

07. Shri Asudani, learned counsel appearing on behalf of

non-applicants No.1 and 4 has argued that the applicant-Deepak Khandelwal served notice for invoking the arbitration clause contained in the partnership deed dated 04.02.2008, in which the arbitration clause is restricted between the partners, hence, the applicant is not entitled to invoke the said clause. It is further submitted that the present application is not maintainable because the applicant has retired from the Firm after taking the land admeasuring 16000 sq. ft. valued Rs.1,28,00,000/- and unless 5% stamp duty is paid, and the deed is impounded till then this application is not maintainable. It is further submitted that as per the arbitration clause contained in the partnership deed dated 04.02.2008, no notice has been served upon the non-applicants, hence, on this count, also the present case is not maintainable. So far as other applicants in other arbitration cases are concerned, they have also left the Firm on 27.10.2015, hence, not being a partner, they cannot invoke Clause 11 of the deed dated 04.02.2008, their applications are also liable to be dismissed.

08. I have heard Shri Jagdish Baheti, Shri Vijay Asudani, Shri Ajay Jain and Shri Hemand Purohit, learned counsel for the parties at length and perused the record.

09. The case of Deepak Khandelwalis different from others applicants. It is not in dispute that all the applicants including Deepak Khandelwal became partners in the Firm by executing a partnership deed dated 04.02.2008 with a respective share in the Firm. The Firm purchased the land bearing Survey No.96 and 97 from the Firm's income for a sale consideration of Rs.1,12,50,000/- by sale deed dated 14.03.2008 for development of a residential township in the name of Shivdham. Out of 14 partners, two left the Firm on 27.10.2015, and thereafter, on

27.10.2015, another partnership deed was executed, in which out of the remaining 12, 8 partners decided to leave the Firm by taking their share by way of the cash amount or by way of property. Except Deepak Khandelwal, others have taken the share from Virendra Modi although there are no details of the said transaction in the deed dated 27.10.2015. So far as applicant – Deepak is concerned, he did agree to leave the Firm on a condition of execution of a registered sale deed in respect of land admeasuring 16000 sq. ft. The relevant portion of the deed is reproduced below:-

“इसी प्रकार 8 पूर्व भागीदारगण में से पूर्व के भागीदार दीपक पिता हरिनारायण खंडेलवाल द्वारा फर्म में अपनी पूंजी लेने के स्थान पर 16000 वर्गफीट जमीन जो कि श्री शिवा कंस्ट्रक्शन की कन्नौद स्थित कालोनी “शिवधाम” में आगे सड़क पर स्थित है, लेने की रजामंदी देकर फर्म से अलग होने में अपनी सहमती दी है। अतः दीपक खंडेलवाल को उक्त 16000 वर्गफीट भूमि का पंजीयन विलेख पंजीबद्ध कर फर्म श्री शिवा कंस्ट्रक्शन से उनका पृथक्कीकरण हो रहा है। अब फर्म श्री शिवा कंस्ट्रक्शन की कन्नौद स्थित विकसित व अविकसित भूमि में फर्म के शेष रहे 4 भागीदारों के मध्य आज दिनांक 27/10/2015 से अंश निम्नानुसार रहेगा”

10. It is not the case of non-applicants that this condition has been fulfilled by executing a sale deed. In reply to the legal notice sent by the applicant it has been alleged that on a guarantee given by this applicant-Deepak Khandelwal certain amount was given to his brother and the same has not been returned by his so far, therefore, the sale deed has not been executed. They have also filed a civil suit for recovery of the amount given to the brother of Deepak Khandelwal. Whatever may be the reasons behind the non-execution of the sale deed but the fact remains that the condition of leaving the Firm has not been fulfilled, therefore, *prima facie* the applicant is still in the Firm and his leaving the Firm has not been finalized which was subject to the condition of execution of sale deed, therefore, this deed cannot be termed as retirement deed which requires payment of

stamp duty as a conveyance under Article 49 1A of the Stamp Act, 1899. The non-applicants have also filed the money suit for recovery of the amount hence they cannot say that amount in lieu of shares of Deepak Khandelwal in the firm has been returned to him and he is no more partner in the firm. The applicant-Deepak Khandelwal became the partner by partnership deed dated 04.02.2008 which contains an arbitration clause, and accordingly, he is entitled to invoke the arbitration clause.

11. Shri Asudani has objected that no notice was served to invoke the arbitration clause in the partnership deed dated 04.02.2008, hence, the present AC is not maintainable. Both partnership deeds dated 04.02.2008 and 27.10.2015 bear the same arbitration clause and the applicant is claiming partnership by both the deed, hence, no separate notice is required to be issued in the arbitration clause contained in both the partnership deed. Hence, such an objection is not tenable and liable to be rejected.

12. Even otherwise as per Article 49-B(a) of the Stamp Act, 1899, 5% as a conveyance on the market value of the property is liable to be paid where on a dissolution of the partnership or retirement of partner any immovable property is taken as his share by a leaving partner. But in the present case, the property has not been taken so far by a leaving partner i.e. Deepak Khandelwal and the condition of leaving the Firm has not been fulfilled. Had the property (16000 or 17000 sq.ft. Land) been sold to the Deepak Khandelwal by the Firm, Article 49-B (a) of the Stamp Act, 1899 would have certainly applied. Neither the applicant has left the Firm, nor the property has been taken by him, therefore, Article 49-B(a) would not apply in this case and

any other case, Rs.1,000/-, as stamp duty is liable to be paid. As per the deed dated 27.10.2015, the stamp duty has already been paid at the time of registration, therefore, the objections are rejected.

In view of the above discussions, all arbitration applications are allowed. The dispute between the partners i.e. applicants and non-applicants is referred to the sole arbitrator.

List all these cases on 24th February 2022 for proposing the names of the arbitrator by the parties.

(VIVEK RUSIA)
J U D G E

Ravi