IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 31st OF MAY, 2024

ARBITRATION CASE No. 19 of 2024

BETWEEN:-

YESHWANT BOOLANI (DEAD) THROUGH LRS. TARUN DHAMEJA S/O LATE YESHWANT BOOLANI, AGED ABOUT 74 YEARS, R/O 605-B LOTUS GARDEN 26/2 MANORAMAGANJ INDORE 452001 (MADHYA PRADESH)

.....APPLICANT

(BY SHRI RAJAT LOHIA, ADVOCATE)

AND

1. **SUNIL DHAMEJA S/O LATE SHRI ARJUNDAS BOOLANI OCCUPATION: PARTNER M/S DHAMEJA HOME INDUSTRIES R/O 2/5 SOUTH TUKOGANJ INDORE (MADHYA PRADESH)**

2. **SHRI PITAMBERDAS OOLANI PARTNER M/S DHAMEJA HOME INDUSTRIES S/O SHRI CHUHADMAL BOOLANI 2/5, SOUTH TUKOGANJ, INDORE (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI VAIBHAV BHAGWAT, ADVOCATE FOR RESPONDENT NO.2)

……..

This application coming on for admission this day, the court passed the following:

ORDER

1**]** This application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996') read with Rule 2 of the Scheme of Appointment of

Arbitrator by the Hon'ble Chief Justice of the Madhya Pradesh High Court.

2] In brief, the facts of the case are that the applicant happens to be the son of late shri Yeshwant Boolani, who was a partner in M/s. Dhameja Home Industries, a partnership firm, in which the non-applicant Nos.1 and 2 are also the partners. Admittedly, shri Yeshwant Boolani has died on 18.09.2023, and since his son, the present applicant, wants to be a partner in the aforesaid firm, a notice in this regard was also sent by him on 01.12.2023, and subsequently, a notice invoking the arbitration clause of the partnership firm was also issued to the non-applicants on 10.01.2024.

3] Counsel for the applicant has submitted that the applicant being the legal heir of the deceased Yeshwant Boolani, is entitled to be inducted as a partner in the firm and is entitled to inherit the share of the partnership firm. Counsel has also drawn the attention of this Court to the deed of partnership, para 23 of which provides for arbitration. It is submitted that even though the arbitration clause do reflect that the arbitration is optional, however, if read in consonance with the other parts of the aforesaid clause, it is abundantly clear that the parties are bound to refer the dispute to the arbitrator.

4] In support of his submission that the intention of the agreement is to be seen, counsel has also referred to the decision rendered by the Supreme Court in the case of ***Zhejiang Bonly Elevator Guide Rail Manufacture Company Limited Vs. Jade Elevator Components*** reported as ***(2018) 9 SCC 774***, paras 7, 8, 9 and 10. Thus, it is submitted that appropriate arbitrator may be appointed in this case.

5] Counsel for the applicant has also relied upon Section 40 of the Act of 1996, which provides that the arbitration agreement shall not be discharged by the death of a party, and it shall be enforceable by or against the legal representatives of the deceased.

6] Shri Vaibhav Bhagwat, learned counsel for the non-applicant No.2, on the other hand, has opposed the prayer and it is submitted that no case for interference is made out, for the reasons that firstly, the applicant himself is not a partner and a bare reading of the arbitration clause would reveal that it can only be invoked by a partner, and secondly, the arbitration is optional and cannot be forced on the parties.

7] Shri Bhagwat has also referred to Clause 21 of the partnership deed, which refers to the *effect of death of a partner*. It is submitted that since Clause 21 provides a discretion to the partner(s) that they may or may not induct the legal heir of a deceased partner, and since the non-applicants do not want him to be a partner, he cannot invoke the arbitration clause.

8] In support of his submissions, counsel has relied upon a decision rendered by this Court in the case of ***Trbex Impex Pvt. Ltd. Vs. M/s Ashok Fine Spun***, passed in ***A.C. No.106/2023*** dated ***10.05.2024***. Thus, it is submitted that the application being devoid of merits, be dismissed.

9] Heard, counsel for the parties and perused the record. So far as the relevant clauses 21 and 23 of the deed of partnership are concerned, the same read as under:-

> **“ 21 EFFECT OF DEATH**
> That death (God forbid), insolvency or retirement of any partner(s) shall not dissolve the firm but it shall continue with or without the

> successor or successors of the deceased or outgoing partner as the remaining partners may decide.
> xxxx
> **23 ARBITRATION**
> That if at any time either during the continuance of the partnership or after the retirement of any partner, any dispute or difference shall arise between the partners or their respective heirs or any one claiming through or under them, the same shall be referred to arbitration. Arbitration shall be optional & the arbitrator will be appointed by partners with their mutual consent. In any case of dispute arise then the jurisdiction of Indore Civil Court shall be applicable & acceptable by the partners."
>
> ***(Emphasis Supplied)***

10] A perusal of the arbitration clause clearly reveals that it was agreed by and between the partners of the firm that the arbitration shall be optional and the arbitrator will be appointed by the partners with mutual consent.

11] So far as the *locus* of the applicant is concerned, which has also been challenged by the respondent on the ground that the applicant has not yet been inducted in the partnership firm as the partner, and considering the fact that the applicant happens to be the son of Late Yeshwant Boolani, who was the partner and as per Clause 21, the effect of death of a partner is that his successor can be inducted as partner as the remaining partners may decide, meaning thereby, it was left to the discretion of the remaining partner to induct or not to induct a legal heir of deceased partner. So far as Section 40 of the Act of 1996 is concerned, the same reads as under:-

> **"40. Arbitration agreement not to be discharged by death of party thereto.—**(1) An arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but **shall in such event been forceable by or against the legal representative of the deceased.**
>
> (2) & (3) …..(not relevant hence not reproduced)."
>
> ***(Emphasis Supplied)***

12] On bare perusal of Section 40 of the Act of 1996, this Court is of the considered opinion that when an arbitration agreement is

enforceable against the legal representatives of the deceased, in that case, such representative cannot be deprived of enforcing the same for adjudication of his claims, and apart from that, even according to the arbitration clause, it clearly provides that *if any dispute or difference arise between the partners or their respective heirs or any one claiming through or under them, the same shall be referred to the arbitration*. Reference in this regard may also be had to the decision rendered by the Supreme Court in the case of ***Ravi Prakash Goel Vs. Chandra Prakash Goel,*** reported as ***(2008) 13 SCC 667,*** para 23 and 27**.** In such circumstances, so far as the contention made by the respondent that the appellant being a partner cannot invoke the arbitration clause, cannot be accepted and is hereby, rejected.

13] However, the question that remains to be decided is that if the arbitration itself was optional and was not binding on the parties.

14] Shri Rajat Lohia, learned counsel appearing for the applicant has relied upon a decision rendered by the Supreme Court in the case of ***Zhejiang Bonly (Supra),*** in which also, the Supreme Court had the occasion to decide the aforesaid issue, the relevant paras of the same, read as under:-

> **"4.** To appreciate the controversy, it is required to be seen whether there is an arbitration clause for resolution of the disputes. Clause 15 of the agreement as translated in English reads as follows:
>
> "15. *Dispute handling*.—Common processing contract disputes, the parties should be settled through consultation; consultation fails by treatment of to the arbitration body for arbitration or the court."
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> **5.** It is submitted by the learned counsel for the petitioner that if the clause of "dispute handling" is scrutinised appropriately, the disputes are to be settled through consultation and, if the consultation fails by treatment of to the arbitration body for arbitration or court and, therefore, the matter has to be referred to arbitration. It is canvassed by him that the clause is not

categorically specific that it has to be adjudicated in a court of law. It leads to choices and the choice expressed by the petitioner is arbitration.

6. The learned counsel for the respondent, in his turn, would urge that when it is stated as arbitration or court, the petitioner should knock at the doors of the competent court but not resort to arbitration, for the clause cannot be regarded as an arbitration clause which stipulates that the disputes shall be referred to arbitration.

7. To appreciate the clause in question, it is necessary to appositely understand the anatomy of the clause. It stipulates the caption given to the clause "dispute handling". It states that the disputes should be settled through consultation and if the consultation fails by treatment of to the arbitration body for arbitration or the court. On a query being made, the learned counsel for the parties very fairly stated that though the translation is not happily worded, yet it postulates that the words "arbitration or the court" are indisputable as far as the adjudication of the disputes is concerned. There is assertion that disputes have arisen between the parties. The intention of the parties, as it flows from the clause, is that efforts have to be made to settle the disputes in an amicable manner and, therefore, two options are available, either to go for arbitration or for litigation in a court of law.

8. This Court had the occasion to deal with such a clause in the agreement in *Indtel Technical Services (P) Ltd.* v. *W.S. Atkins Rail Ltd.* [*Indtel Technical Services (P) Ltd.* v. *W.S. Atkins Rail Ltd.*, (2008) 10 SCC 308] In the said agreement, Clause 13 dealt with the settlement of disputes. Clauses 13.2 and 13.3 that throw light on the present case were couched in the following language : (SCC p. 311, para 6)

> "*6.* … '13.2. Subject to Clause 13.3 all disputes or differences arising out of, or in connection with, this agreement which cannot be settled amicably by the parties shall be referred to adjudication;
>
> 13.3. If any dispute or difference under this agreement touches or concerns any dispute or difference under either of the sub-contract agreements, then the parties agree that such dispute or difference hereunder will be referred to the adjudicator or the courts as the case may be appointed to decide the dispute or difference under the relevant sub-contract agreement and the parties hereto agree to abide by such decision as if it were a decision under this agreement.'"

9. Interpreting the aforesaid clauses, the Judge designated by the learned Chief Justice of India held thus : (*Indtel Technical Services case* [*Indtel Technical Services (P) Ltd.* v. *W.S. Atkins Rail Ltd.*, (2008) 10 SCC 308] , SCC p. 318, para 38)

> "*38.* Furthermore, from the wording of Clause 13.2 and Clause 13.3 I am convinced, for the purpose of this application, that the parties to the memorandum intended to have their disputes resolved by arbitration and in the facts of this case the petition has to be allowed."
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> The aforesaid passage makes it clear as crystal that emphasis has been laid on the intention of the parties to have their disputes resolved by arbitration.
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> **10.** In the case at hand, as we find, Clause 15 refers to arbitration or court. Thus, there is an option and the petitioner has invoked the arbitration clause and, therefore, we have no hesitation, in the obtaining factual matrix of the case, for appointment of an arbitrator and, accordingly, Justice Prakash Prabhakar Naolekar, formerly a Judge of this Court, is appointed as sole arbitrator to arbitrate upon the disputes which have arisen between the parties. The learned arbitrator shall be guided by the Arbitration and Conciliation (Amendment) Act, 2015. The learned arbitrator shall make positive efforts to complete the arbitration proceedings as per the 2015 Act."
>
> ***(Emphasis Supplied)***

15] If Clause 15, which refers to *Dispute Handling* in the aforesaid case is compared *vis-à-vis* with Clause 23 of the case at hand, it is found that in the aforesaid case of ***Zhejiang Bonly (Supra),*** even the Supreme Court has observed that the translation of the arbitration clause is not happily worded and in such circumstances, on the given arbitration clause, it has come to a conclusion that the intention of the parties was to refer the dispute to the arbitrator, as two options were available, viz., either to go for arbitration or for litigation in the Court. In such circumstances, it was held that the parties were bound by the arbitration. Whereas, in the present case, the arbitration clause is specific and unambiguous that the arbitration shall be optional, and the wordings used are, "Arbitration shall be optional & the arbitrator will be appointed by partners with their mutual consent."

16] In this regard, reference may also had to the decision rendered by this Court in the case of ***Trbex Impex Pvt. Ltd. (Supra)***, in which

also, an identical arbitration clause existed, the relevant paras of the same, read as under:-

> "13] T *(sic)* The dispute resolution clause in the case at hand, as provided in Clause 14.7, which is once again being reproduced herein for the sake of convenience, reads as under:-
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> **14.7 DISPUTE RESOLUTION**
>
> "If any dispute, difference or claim arises between the Parties hereto in connection with this Agreement or the validity, interpretation, implementation or breach of this Agreement or anything done or omitted to be done pursuant to this Agreement, the parties ***shall*** make a good faith effort in the first instance to resolve the same through negotiation. If the dispute is not resolved through negotiation within (3) days after commencement of discussions or within such longer period as the Parties may mutually agree to in writing, then the Parties ***may*** refer the dispute for resolution to a panel of three Arbitrators – one each appointed by the Parties and the third appointed by the two arbitrators. The arbitration shall be in accordance with the provisions of the Arbitration and Conciliation Act, 1996, or any statutory modification or re-enactment for the time being in force and shall take place in Indore. The award of arbitration shall be final and binding on the Parties, and the Parties shall comply with/carry out all directions and orders of the arbitrators."

It reveals that the parties have agreed that they ***shall*** try to resolve the dispute through negotiation within three days or such additional time as is mutually agreed upon by them, and if they fail in resolving the dispute, in that case, they ***may*** refer the dispute for Arbitration as provided in the agreement. Thus, the parties have used the words 'shall' and 'may', at appropriate stages of the agreement clearly expressing their intentions. It is apparent that the parties had left it open if they wanted to refer the dispute to the Arbitrators, and this discretion was to be exercised by both the parties in unison that they intend to appoint the Arbitrators for resolution of their dispute, and ones they agreed to appoint the Arbitrators, the procedure as provided under the Act of 1996 was to be followed by them in strict compliance of the same.

14] In such circumstances, this Court is of the considered opinion that the respondent cannot be compelled to opt for Arbitration when it was provided in the Agreement itself that it shall be the

discretion of the parties to refer the dispute to the Arbitration, and they may or may not refer the dispute to the arbitration."

(Emphasis Supplied)

17] In such circumstances, the aforesaid decision in the case of ***Zhejiang Bonly (Supra),*** is clearly distinguishable and cannot be applied in the facts and circumstances of the case.

18] In view of the same, the application fails and is hereby ***dismissed***. However, with liberty reserved to the applicant to take recourse of such remedy as is available to him under law. Needless to say, the time spent in prosecuting this application shall be excluded from the period of limitation.

19] With the aforesaid, the application stands ***dismissed*** and ***disposed of***.

(SUBODH ABHYANKAR)
JUDGE

Bahar