

RAJASTHAN HIGH COURT

Raghu Nandan Sharma

Vs.

Vijay Kumar

Arb. Appln. No.72 of 2007

(Shiv Kumar Sharma, J.)

16.05.2008

ORDER

Shiv Kumar Sharma, J.

1. The applicant in the instant application seeks appointment of independent arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (for short '1996 Act').
2. The applicant (for short 'RN') and respondent No. 1 (for short 'VK') are real brothers and beneficiary of Will drawn by their father Durga Narayan Sharma on October 21, 2003. During his lifetime Durga Narayan Sharma made a declaration on October 15, 2005 that if any dispute in regard to Will arises the same shall be decided by sole Arbitrator Shri U. N. Bhandari, Senior Advocate, whose decision would be final and binding.
3. It may also be noticed that respondents Nos. 2 and 3 were declared the executors of the will who also put their signatures on the Will as attesting witnesses.
4. After the death of Durga Narayan Sharma, RN served a notice on October 8, 2006 to the respondent No. 2 asking for execution of Will. Respondents Nos. 2 and 3 in turn issued notice to VK but he did not favorably respond. RN then filed civil suit bearing No. 53/2007 but it was dismissed with the observation that the dispute could be decided by the designated sole arbitrator.
5. RN thereafter moved application before Shri UN Bhandari, the sole Arbitrator. He issued notice to VK and respondents Nos. 2 and 3. The parties appeared before Sri Bhandari, who decide to withdraw from the office of Sole Arbitrator and passed following order on November 17, 2007 :

"ORDER

Petitioner with his counsel present Non-petitioner Nos. 1, 2 and 3 present In the present arbitration proceedings, counsel for the petitioner filed statement of claim on 20-10-2007 along with documents as per the list enclosed and an affidavit in support thereto. Notices were issued to the opposite parties under Registered AD cover intimating them the next date and place of hearing as 5-11-2007 at 5.00 p. m. at S-7, *Peeyush Path, Bapu Nagar, Jaipur*.

On 5-11-2007 petitioner along with his counsel as well as non-petitioner Nos. 1, 2 and 3 were present. Non-petitioner No. 1 submitted an application, copy of which was given to the petitioner as well as to non-petitioner Nos. 2 and 3. They sought time to file reply which was given and the case was then fixed for further hearing on 17-11 -2007 at 5.00 p.m. with the consent of all the parties.

Thereafter on 17-11-2007 at 5.00 p.m. the case was taken up. Petitioner as well as non-petitioner Nos. 2 and 3 submitted their replies to the petition filed by non-petitioner No. 1 which were placed on record. Copies of the replies filed were given to non-petitioner No. 1. Then with the consent of all the parties arguments were heard.

The first objection raised by non-petitioner No. 1 is that there was no arbitration agreement between the parties as per Section 7 of the Arbitration and Conciliation Act, 1996.

The second objection raised was to the effects that the deed of declaration dated 15-10-2005 executed by late Sri Durga Narain appointing U. N. Bhandari as sole arbitrator was not signed by the parties to this case and they had never given their consent hence U. N. Bhandari has no right to interfere in this matter as arbitrator.

The aforesaid two objections in addition to others were raised by the non-petitioner No. 1 herein before the Addl. DJ No. 2, Jaipur City in (*Raghunandan Sharma v. Vijay Kumar*).¹ The said suit which was also between the present parties had been decided by the learned Addl. DJ No. 2 vide its judgment dated 19-9-2007 wherein while placing reliance on the latest decision of the Hon'ble Supreme Court in the case of *Ravi Prakash v. Chandra Prakash* ² and other decisions of the Hon'ble Supreme Court it was held that in the relevant document a specific provision has been incorporated to the effect that in case of any dispute in connection with these documents, the same shall be referred for decision to an Arbitration Tribunal and name of the arbitrator has been given hence this suit is not maintainable and is dismissed and the application filed by

Sri Om Prakash and Sri Satya Kumar under Section 8 of the Arbitration and Conciliation Act, 1996 is allowed and directed that the present disputes raised in the suit are to be adjudicated by Arbitrator.

In view of the above judgments it is not necessary for me to take any other view in the matter which is also supported by latest decision of the Hon'ble Supreme Court, keeping in view the object of the Act to advance decision of disputes by arbitration if the intention of the executor of document is clear.

Now as regards other allegations made in the petition filed by non-petitioner No. 1, though not supported by producing any document or even by an affidavit of justifiable doubt in support thereof about my independence or impartiality which are denied but in the light of the well known dicta laid down by Lord Denning in Metropolitan Corporation's case, I would not like to proceed further in the matter except repeating the dicta as under :

"Justice is rooted in confidence and that confidence is destroyed when a person walks out of the Court thinking that the Judge is biased."

An effort has been made by non-petitioner No. 1 to linger on with the proceedings to frustrate the intention of the executor to prevent his heirs to enter into long and expensive litigation, instead of taking recourse to expeditious and unexpensive arbitral proceedings. However in the facts and circumstances, I deem it proper to withdraw from my office as sole arbitrator in the matter and would advise the parties to approach the Hon'ble Chief Justice or his designated Hon'ble Judge to take necessary measures under relevant provisions of the Act.

Order pronounced and copies given to all the parties present.

Sd/-

(U. N. Bhandari)

Sole Arbitrator"

6. RN under these circumstances has invoked Section 11 of 1996 Act.

7. In the reply the respondent Nos. 2 and 3 supported the prayer made in the application by RN.

8. VK, however, raised preliminary objection to the effect that the application was not maintainable since there was no "arbitration agreement" as defined in Section 7 of 1996 Act. It is averred that Section 11 of 1996 Act presupposes an arbitration agreement. Since the parties have not agreed to refer their dispute to the arbitrator, application under Section 11 is not maintainable. The unilateral declaration made by the deceased in his Will that after his death any dispute amongst his sons should be

referred to the Arbitrator does not constitute an agreement to refer the dispute to arbitration. It is further pleaded that VK was neither the signatory nor the consenting party to the Will and declaration, rather he had challenged the legality and validity of Will, declaration and creation of the trust by his late father.

9. I have reflected over the rival submissions and scanned the material on record.

10. The question that emerges for my consideration is - Whether a father can refer the disputes relating to his personal properties through his Will to arbitrator?

11. This question has to be answered in full view of Section 7 of 1996 Act, which reads as under:-

"7. Arbitration agreement. - (1) In this part "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.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. (3) An arbitration agreement shall be in writing.

(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.

(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."

(Emphasis supplied)

12. The Apex Court in *Jagdish Chander v. Ramesh Chander*³ considered the scope of arbitration agreement and indicated thus:-

(Para 8)

"This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in *K. K. Modi v. K. N. Modi*⁴ *Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd.*⁵ and *Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd.*⁶ In *State of Orissa v. Damodar*⁷ this

Court held that a clause in a contract can be construed as an 'arbitration agreement' only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement:

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private Tribunal for adjudication and an willingness to be bound by the decision of such Tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral Tribunal (of arbitrator)' are not used with reference to the process of settlement or with reference to the private Tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private Tribunal. (c) The private Tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a

claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or " if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

13. Admittedly the disputes in the instant case have arisen in respect of defined legal relationship. Durga Narayan Sharma had every right to draw the Will in regard to his personal property. RN and VK being the beneficiary of the Will have pious obligation to fulfill the last desire of their father. It is a settled law that to constitute an arbitration agreement in writing it is not necessary that it should be signed by the parties. Arbitration clause incorporated by a father in his Will, is binding on the sons after his death, even if they are not the signatories of the Will and it shall be treated as arbitration agreement as defined under Section 7 of 1996 Act.

14. In *Raj Kumar v. Shiva Prasad Gupta* ⁸ it was held that a father has power to refer to arbitration, disputes relating to joint family property provided such reference is for the benefit of the family. The other members of the family including minors are bound by the reference and by award made upon it.

15. For these reasons, I allow the instant application and appoint Hon'ble Chief Justice S. N. Bhargava (Retired) as Arbitrator to resolve the dispute. Fees and other terms and conditions of arbitration shall be settled by the Arbitrator. A copy of the order be sent to the Arbitrator.

Application allowed.

Cases Referred.

1. Civil Suit No. 100/06
2. (2007 (3) Supreme Today 1: (AIR 2007 SC 1517)
3. (2007 (2) Arb LR 302 (SC))
4. (1998 (3) SCC 573): (AIR 1998 SC 1297)
5. (1999 (2) SCC 166): (AIR 1999 SC 899)
6. (2003 (7) SCC 418): (AIR 2003 SC 3688)
7. Das (1996 (2) SCC 216): (AIR 1996 SC 942)
8. (AIR 1939 Cal 500)