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

Decided on: 17.11.2022

\+ **ARB.P. 539/2017**

RAHUL JAIN & ORS. ..... Petitioners

Through: Mr. Ratan K. Singh, Senior Advocate with Mr. Sumit Kaushal, Mr. Rajeev Gurung & Ms. Kanishka Shivhare, Advocates (Enrolment No. D/4465/2018, Mobile No. 9950840466).

versus

ATUL JAIN & ORS. ..... Respondent

Through: Mr. Tanmaya Mehta, Advocate for R-1, R-2 and R-4.
Mr. Ankit Jain, Ms. Neha Jain, Mr. Abhay P. Singh, & Mr. Aditya Chauhan, Advocates for R-3.
Mr. Jai Sahai Endlaw and Mr. Ashish Kumar, Advocates for R-5.
Ms. Padmapriya, Advocate for Intervenor.

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CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

JUDGMENT

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 [hereinafter, "the Act"] has been filed by the petitioners for appointment of an arbitrator to adjudicate disputes

arising between the parties under a "Memorandum of Family Settlement" dated 23.07.2016 [hereinafter, "MOFS"].[1]

A. ***Factual Background***

2. The parties belong to the family of late Mr. R.C. Jain and Mrs. Asha Lata Jain, who is arrayed as respondent No. 5 in this petition. The petitioner No. 1- Mr. Rahul Jain is the younger of their two sons. The other petitioners are his wife, Mrs. Nipur Jain and two children, Aastha and Aviral, who is a minor. Other than Mrs. Asha Lata Jain, four persons have been arrayed as respondents—Mr. Atul Jain, brother of petitioner No. 1, his wife- Mrs. Meenakshi Jain and his children, Apoorv and Ananya. Mr. R.C. Jain and Mrs. Asha Lata Jain also have two daughters, Mrs. Alka Jain (who is not a party to these proceedings), and Mrs. Poonam Gupta (who has sought to intervene). For ease of reference, the parties will be referred to by their first names.

3. The MOFS is purportedly between three entities, being Atul's branch of the family (described therein as the "AJ Group")[2], Rahul's branch of the family (described therein as the "RJ Group")[3], and Asha Lata (described therein as "ALJ").[4] The description of the parties in the MOFS reads as follows: -

> *"1. **SHRI ATUL JAIN**, son of Late Shri R.C. Jain, residing at 148E, Club Road, Lane No.4, **Sainik Farms, New Delhi-110062***

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[1] Memorandum of Family Settlement dated 23.07.2016 at document-1 of the petitioners' list of documents.
[2] Clause 1 of the description of the parties in the MOFS.
[3] Clause 2 of the description of the parties in the MOFS.
[4] Clause 3 of the description of the parties in the MOFS.

> ***(hereinafter referred to as "AJ") being the head of the family and representing himself and the following individuals; (i) Smt. Meenakshi Jain, wife of Shri Atul Jain, (ii) Ms. Ananya Jain, daughter of Shri Atul Jain, and (iii) Shri Apoorv jain son of Shri Atul Jain;*** *all residing at 148E, Club Road, Lane No. 4, Sainik Farms New Delhi-110062,* ***who have appended their signatures to this Memorandum as concurrence thereof*** *(Shri Atul Jain along with the aforesaid individuals are hereinafter collectively referred to as the "AJ Group");*
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> *2.* ***SHRI RAHUL JAIN****, son of Late Shri R.C. Jain, residing at H 27 B, Western Avenue, Lane No. W-8E, Sainik Farms New Delhi-110062 (hereinafter referred to as "RJ")* ***being the head of the family and representing himself and the following individuals: (i) Smt. Nipur Jain, wife of Shri Rahul Jain, (ii) Ms. Aastha Jain, daughter of Shri Rahul Jain, and (iii) Shri Aviral Jain minor son of Shri Rahul Jain (executing through his legal guardian Shri Rahul Jain);*** *all residing at H 27 B, Western Avenue, Lane No. W-8E, Sainik Farms New Delhi-110062,* ***who have appended their signatures to this Memorandum as concurrence thereof*** *(Shri Rahul Jain along with the aforesaid individuals are hereinafter collectively referred to as the "RJ Group"); and*
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> *3.* ***SMT. ASHA LATA JAIN****, wife of Late Shri R.C. Jain, residing at 148E, Club Road, Lane No. 4, Sainik Farms, New Delhi-110062 (hereinafter referred to as "ALJ").* [5]

4. Although it is stated at the opening of the MOFS that Atul and Rahul "*being the head of the family*"[6] represent themselves and their respective spouses and children, it is also mentioned that other members of the AJ Group and RJ Group have signed the MOFS *"as concurrence thereof"*.[7] The MOFS is, in fact, signed by Meenakshi, Ananya, Nipur and Aastha, in addition to Atul, Rahul and Asha Lata. The aforesaid seven individuals have also signed on each page of the MOFS, but not on certain additional sheets which, according to the petitioners, were annexures thereto. Four persons have been named as

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[5] Emphasis supplied.
[6] Clauses 1 and 2 of the description of the parties in the MOFS.
[7] Ibid.

witnesses, *viz*, Mr. Ravi Jain, Mr. Anuj Gupta, Mr. Nimit Jain and Mr. Arvind K. Jain. All except Mr. Ravi Jain have signed.

5. Disputes having arisen between the parties relating to the conduct of business and control and ownership of assets, the MOFS states that the parties arrived at an oral family settlement, which was sought to be reduced to writing.

6. In the recitals to the MOFS, Atul and Rahul are stated to have been carrying on the business of manufacturing and trading of garments through various private limited companies and certain partnership firms, managed and controlled by them directly or indirectly. It is also stated that they own various immovable properties, individually or through their *"group members"*.[8] The MOFS contemplates that those companies, firms, and immovable properties are enumerated in the schedules to the Memorandum.

7. The recitals also state that Atul, Rahul, and Asha Lata each have acted on their own behalf and on behalf of other members of their respective groups, whom they were duly empowered to represent, and that the settlement is acceptable to themselves and to their respective groups. The MOFS was intended to arrive at a fair division of the businesses and assets between the various groups. The substantive clauses of the MOFS seek to allot various businesses and assets to each of the two groups and to make some provision for Asha Lata as well.

[8] Recital A to the MOFS.

8. Although some arguments were addressed on the substantive contents of the MOFS, it is unnecessary to enter into the details of the same for the purpose of the present petition. Suffice it to note that as far as certain properties belonging to the Hindu Undivided Family [hereinafter, "HUF"] known as the "R.C. Jain (HUF)" are concerned, the MOFS contemplates that a No Objection Certificate [hereinafter, "NOC"] would be obtained from the other interested parties.

9. The following clauses of the MOFS have also been referred to in the course of arguments: -

> ***"19.5 No Partial Settlement.***
> *Unless otherwise to the contrary in writing, the Parties hereby agree, confirm and undertake that* ***the oral family settlement recorded in this Memorandum is the entire settlement between the Parties and shall be completed in totality. In the event the entire settlement recorded in this Memorandum cannot be completed by any or all the Parties on or prior to dates mentioned in this Memorandum, the Parties shall mutually agree on the way forward, and shall capture such understanding in writing.***
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> *xxxx xxxx xxxx*
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> ***19.18 Mediation, Arbitration, Governing Law, and Jurisdiction***
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> ***19.18.1***
> *Dispute: In the case of any dispute in arising out of, involving or relating to, or in connection with, this Memorandum, or in the interpretation of any provisions of this Memorandum, or the breach, termination or invalidity hereof or thereof ("Dispute"), parties to the Dispute shall attempt to first resolve such Dispute or claim through discissions.* ***The Parties agree that if the Dispute cannot be resolved by mutual consent the following resolution procedure shall be used to settle the matter.***
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> ***19.18.2 Arbitration***
> *The parties hereto agree that should there be any disputes wrt the interpretation or giving effect to the terms of this indenture****, the same would be referred for arbitration to Sh. Abhya Kumar Jain,*** *S/o Late Sh. Tannu Mal Jain of 309, Naya Katra Chandni Chowk,*

> *Delhi-06, **who shall be the sole Arbitrator and whose decision shall be final and binding on all the parties hereto.***
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> ***19.18.3 Jurisdiction of the Courts***
> *The parties hereto agree that should there be any disputes wrt the interpretation or giving effect to the terms of this indenture, which remain un-reconciled or un-resolved even after the final decision of the arbitrator, the said disputes qua this indenture shall be subjected to the competent Courts having Jurisdiction over Delhi only.*[9]

10. The petitioners have pleaded that disputes arose between the parties with regard to implementation of the MOFS. They have placed on record the following correspondence: -

A. Rahul wrote a letter dated 26.11.2016 to Mr. Abhay Kumar Jain, the arbitrator named in Clause 19.18.2.[10] He referred to the MOFS and requested the arbitrator to convene the arbitration proceedings at the earliest so that the MOFS is executed without delay.

B. The arbitrator responded on 16.12.2016[11] in the following terms:-

> *"This is with reference to your communication dated 26th November, 2016, **it shall be in all fitness of things that you should first issue Notice to other parties to the MOS and accordingly, make the appropriate reference in accordance with law.** It has been noticed that Sh. Rahul Jain has sent the communication for making the due compliance of the MOS.*
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> *All the concern parties to the MOS are called upon to put the appearance on 23.12.2016 for putting the reference in as per the MOU."*[12]

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[9] Emphasis supplied.
[10] Rahul's letter dated 26.11.2016 at document-2 of the petitioners' list of documents.
[11] The arbitrator's response dated 16.12.2016 to Rahul's letter dated 26.11.2016 at document-3 of the petitioners' list of documents.

The letter was addressed to Rahul and copied to Atul and Asha Lata.

C. It appears that the proposed meeting on 23.12.2016 did not take place, but the arbitrator addressed another letter to the parties on 05.08.2017.[13] By this letter, he fixed a meeting on 12.08.2017. This letter was addressed to all the nine parties to this petition.

D. Atul sent a legal notice to the arbitrator dated 10.08.2017 stating that he had entrusted certain original documents to the arbitrator for the purpose of attempting a settlement between him and Rahul and called upon the arbitrator to return the documents forthwith. [14]

E. By separate letters dated 10.08.2017, Meenakshi, Apoorv, Ananya and Asha Lata responded to the letter dated 05.08.2017, raising various objections to appearing before the arbitrator.[15] They noted that the arbitrator's communication neither discloses who has appointed him as the arbitrator nor the identity of the claimant and the nature of the claims. They also stated that the arbitrator himself had sent two legal notices to Atul, Meenakshi, Apoorv, and two of the family's business concerns (M/s Charming Apparels Pvt. Ltd. and M/s Charming Obsession) demanding various sums, and filed a complaint in the police

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[12] Emphasis supplied.

[13] The arbitrator's letter dated 05.08.2017 to all the parties herein at document-4 of the petitioners' list of documents.

[14] Atul's letter dated 10.08.2017 in response to the arbitrator's letter dated 05.08.2017 at document-5(colly) of the petitioners' list of documents.

[15] Meenakshi, Apoorv, Ananya, and Asha Lata's letters dated 10.08.2017 in response to the arbitrator's letter dated 05.08.2017 at document-5(colly) of the petitioners' list of documents.

station. They, therefore, disputed his ability to act fairly and impartially.

F. Apoorv additionally objected to the arbitration proceedings on the ground that he was not a party to any arbitration agreement and had no knowledge of the arbitration proceedings, which were stated to be pending. He also disclosed that he had filed a civil suit in this Court for partition of the property No. H-27-C, Sainik Farms, New Delhi [CS(OS) 612/2016][16], wherein this Court had rejected an application by Rahul and Nipur for reference of the matter to arbitration, *vide* order dated 30.05.2017.[17]

G. By an order dated 12.08.2017, the arbitrator noted that he had supplied copies of the communications received in response to his letter dated 05.08.2017 to Rahul. He also withdrew from the case by the aforesaid order.[18]

H. Alongwith the documents placed on record by the petitioners, a copy of a declaration by the arbitrator, purportedly under Section 12(1)(b) of the Act, has also been filed.[19] The arbitrator notes that he was appointed as the arbitrator as he had business relations with Rahul and Atul for many years and that he participated in negotiations and was a mediator between the

[16] Plaint filed by Apoorv in CS(OS) 612/2016 at document-1 of respondents' list of documents.
[17] This court's order dated 30.05.2017 in CS(OS) 612/2016 at document-5 of respondents' list of documents.
[18] The arbitrator's order dated 12.08.2017 at document-6 of the petitioners' list of documents.
[19] The arbitrator's declaration under Section 12(1)(b) of the Act at document-6 of the petitioners' list of documents.

family members. He also declared that he had sent legal notices to some of the parties (including both Atul and Rahul) and business entities claiming dues of approximately Rs. 2 crores on behalf of his own business entity.

11. The present petition was filed by Rahul, Nipur, Aastha and Aviral on 23.08.2017. In the course of proceedings, parties were also referred to mediation, which has regrettably been unsuccessful.[20]

12. There is also reference in the documents on record to the following civil proceedings instituted by the family members:-

a. Apoorv has filed CS(OS) 612/2016 in this Court against Rahul and Nipur, principally claiming partition of property No. H-27-C, Sainik Farms, New Delhi. In this suit, it is an admitted position that the petitioners herein filed I.A. No. 6898/2017, under Sections 5 and 8 of the Act, which was dismissed on 30.05.2017. This order is discussed in greater detail later in this judgment.

b. Apoorv has also placed certain documents on record to show that he has filed CS(OS) 136/2019 seeking a declaration that the MOFS is illegal, as also possession and injunction in respect of property No. 409-412, Ward No. V, Katra Chauban, Chandni Chowk, Delhi-110006.[21]

c. Poonam, who has sought to intervene in this petition, has placed on record a copy of a suit filed by her [CS (OS) 79/2018] against all the parties in this petition, as well as her sister

[20] Order of this Court dated 14.05.2019 in the present petition.
[21] Apoorv's plaint in CS(OS) 136/2019 at document-1 of Apoorv's list of documents.

Alka.[22] In this suit, she claims a declaration that the MOFS and any action taken pursuant thereto is null and void and partition of the assets of the R.C. Jain (HUF) and of the personal assets of late Mr. R.C. Jain.

B. Submissions

13. I have heard Mr. Ratan Kumar Singh, learned Senior Counsel for the petitioners, in support of the petition. Mr. Ankit Jain, learned counsel for Apoorv, Ms. Padma Priya, learned counsel for Poonam, Mr. Jai Sahai Endlaw, learned counsel for Asha Lata, and Mr. Tanmaya Mehta, learned counsel for Atul, Meenakshi and Ananya, have made their submissions opposing the petition. Learned counsel for the parties have also cited several authorities in support of their arguments. The relevant authorities will be cited and discussed while dealing with the arguments in question.

14. In the opening arguments, the principal submissions of Mr. Singh were as follows: -

A. At the stage of proceedings under Section 11 of the Act, the Court is only required to come to a *prima facie* finding with regard to the existence of an arbitration clause. That requirement is clearly fulfilled in the present case.

B. Allegations of fraud, misrepresentation, undue influence etc., are required to be decided on evidence and are best left for

[22] Poonam's plaint in CS(OS) 79/2018 at document-1 of Poonam's list of documents.

adjudication by the arbitral tribunal. Moreover, allegations of such nature are not grounds to nullify an arbitration agreement.

C. In the context of a family settlement, the Court should be particularly vigilant to ensure that the agreement between family members is duly implemented without undue emphasis on technical requirements.

D. Although the MOFS does not bear Apoorv's signature, it was clearly signed by Atul on behalf of Apoorv. In fact, Recital A and various sub-clauses of Clause 19 of the MOFS show that it was executed with the consent, knowledge, and participation of Apoorv. It has also been acted upon to the benefit of Apoorv and other members of Atul's branch of the family. Therefore, Apoorv cannot now resile from the applicability of the MOFS to him. The written statement filed by Rahul and Nipur in CS(OS) 612/2016 has been extensively placed in support of this contention.[23]

E. The dismissal of the application filed by the petitioners herein, under Section 8 of the Act, in CS(OS) 612/2016, would not bind the Court in the context of Section 11 of the Act, as the scope of the two provisions are different. While considering an application under Section 8 of the Act, one of the primary considerations is that such an application should have been filed prior to filing of the written statement. However, no such

[23] Written statement filed by Rahul and Nipur in CS(OS) 612/2016 at document-2 of the respondents' list of documents.

requirement exists for determining an application under Section 11 of the Act.

15. Learned counsel for the respondents took the following common objections to the appointment of an arbitrator in the present case: -

A. The MOFS is unstamped and unregistered and, therefore, incapable of being acted upon, even for the purpose of appointment of an arbitrator.

B. Some of the businesses and assets referred to in the MOFS are incapable of division in the manner contemplated thereby. It is submitted that, by virtue of Clause 19.5 extracted above[24], the MOFS is, therefore, not workable, and the parties are required to enter into a further understanding regarding their respective rights. For example, it is submitted that one of the private limited companies of the family- M/s Charming Apparels Pvt. Ltd. - was subjected to proceedings under the Insolvency and Bankruptcy Code, 2016. By an order dated 06.12.2017, the National Company Law Tribunal granted an order of *status quo* in respect of the said company, following which it has already been transferred to third parties.[25] It is also submitted that certain other divisions of the company, namely M/s Charming Industries Pvt. Ltd., M/s Charming Cottons Pvt. Ltd., and

[24] Extracted in paragraph 9 of this judgment.
[25] NCLT's order dated 06.12.2017 in CP No. 410(ND)/2017 at document-6 of the respondents' list of documents.

partnership firms by the names of M/s Samyak Exports and M/s C.G. Retail, have no business or assets.

C. The MOFS is, in effect, an agreement to enter into an agreement and as such not enforceable. Moreover, it is not a final agreement and is more in the nature of a draft for future discussion. For instance, Clause 19.17 of the MOFS contemplates further documentation to be executed between the parties.

D. To the extent that the MOFS seeks to deal with the assets of the R.C. Jain (HUF), it is submitted that it required the assent of all members of the HUF, which it admittedly did not have.

E. The MOFS is an incomplete document, inasmuch as the schedules thereto were never agreed between the parties. It is pointed out that the purported schedules to the MOFS, which have been filed with the petition, are unsigned documents whereas each page of the MOFS bears the signature of the seven signatories. The respondents referred to various clauses of the MOFS to submit that the schedules were intended to be integral parts of the MOFS, without which it is rendered meaningless.

F. Although the MOFS purports to deal with the assets of various companies and business entities, none of them have been made parties thereto.

G. Learned counsel submitted that the correspondence placed on record does not demonstrate invocation of the arbitration clause by the petitioners, in terms of Section 21 of the Act. They pointed out that there was no request addressed by the petitioners to the respondents for a reference of any dispute to arbitration.

16. In addition to these arguments, Mr. Jain, learned counsel for Apoorv, emphasized that Apoorv is *ex facie* not a party to the MOFS as it does not bear his signature. He submitted that the petitioners have suppressed the order of this Court dated 30.05.2017 in CS(OS) 612/2016 whereby this Court has noticed the absence of a valid arbitration agreement, as against him. Mr. Jain contended that the petitioners' failure to disclose the fact that their application under Section 8 of the Act had been dismissed vide order dated 30.05.2017, and to place a copy of the order before the Court in this petition, renders the petition liable to be dismissed on the ground of suppression of material facts.

17. Mr. Mehta, learned counsel for Atul, Meenakshi and Ananya, submitted that Clause 19.18.2 of the MOFS[26] contemplates arbitration only by the named arbitrator and in the event of the named arbitrator being unable to act, it ought not to be presumed that the parties intended to go to arbitration. He submitted that, particularly in the context of a family settlement, parties may repose their trust in a

[26] Extracted in paragraph 9 of this judgment.

particular named individual without intending generally to bind themselves to resolution of disputes by arbitration.

18. Mr. Endlaw's submissions, on behalf of Asha Lata, centered around allegations of fraud and misrepresentation surrounding Asha Lata's signature on the MOFS document. He submitted that Asha Lata was made to believe that she was signing the document in the capacity of a witness to certain business arrangements or settlements between her sons. He contends that she was not informed, at any stage, of any disposition of her own assets by virtue of the said document. She claims to have been advised of the contents of the MOFS only by Mr. Ravi Jain, who is one of her close associates and was a proposed witness to the document. It is submitted that Mr. Ravi Jain apprised her of the contents when it was brought to him for attestation. Mr. Endlaw pointed out that, although Mr. Ravi Jain's name appears as one of the witnesses, the MOFS does not bear his signature.

19. Ms. Padma Priya submitted on behalf of Poonam that she was never informed about the execution of the MOFS, and her consent was not obtained, despite the fact that she is entitled to a share, both in properties of the R.C. Jain (HUF) and in the personal assets of her late father. She has consequently filed CS(OS) 79/2018 before this Court in which the existence and validity of the MOFS has been squarely challenged, and interim orders passed with respect to the HUF assets, as well as the estate of late Mr. R.C. Jain.[27]

[27] This Court's order dated 23.02.2018 at Document-1 annexed to the intervenor's application to intervene in the present petition.

20. In rejoinder, Mr. Singh reiterated the contents of his opening submissions. He also submitted that the opposition to the MOFS and the appointment of an arbitrator has been orchestrated by Atul, roping in his wife and children, as well as Asha Lata. He submits that Asha Lata's allegations of fraud, directed both against Rahul and Atul, are belied by the fact that she has, subsequent to the MOFS, executed a gift deed of her immovable property in favour of Atul's son, Apoorv. He submitted that the respondents' arguments tend to embroil this Court in a mini-trial at the stage of proceedings under Section 11 of the Act, which is not permissible.

21. With regard to the position of Apoorv, Mr. Singh submitted that multi-party arbitrations involving some parties who are signatories to the agreement, and some who are not, are known to law and do not invalidate the arbitration agreement. He submitted that Apoorv has not only taken advantage of the MOFS, but has also failed to challenge the authority of his father to enter into the MOFS on his behalf, in any properly constituted proceedings.

22. Mr. Singh contended that the position of Poonam and Alka is secured by the MOFS clauses providing for their consent (Clause 6). In any event, he conceded in arguments that the petitioners are willing to give up any claim for reference to arbitration in respect of the HUF properties in which the sisters have a share.

23. With reference to the order of this Court dated 30.05.2017, Mr. Singh submitted that a holistic reading of the order shows that it was predicated only upon the question of delay in making of the

application and the aforesaid ground would not apply under Section 11 of the Act. He submitted that the petitioners ought not to be blamed for their failure to place the order on record which was, in fact, the responsibility of their erstwhile counsel.

24. On the question of invocation of the arbitration clause, Mr. Singh submitted that the validity of the invocation can also be decided by the arbitrator. He submitted that the communication dated 26.11.2016 from Rahul to the named arbitrator, and subsequent communications of the arbitrator dated 16.12.2016 and 05.08.2017 were sufficient to satisfy the requirements of a valid invocation, particularly in the context of a family settlement. Mr. Singh argued that a particularisation of the claims is not required in the letter of invocation.

C. Analysis:

1. Scope of proceedings

25. While dealing with the present petition under Section 11 of the Act, the scope of the Court's jurisdiction is limited. If the Court is *prima facie* satisfied about the existence of an arbitration agreement between the parties, that disputes have emerged which require adjudication, that the arbitration clause has been duly invoked, and that the agreed procedure for constitution of the arbitral tribunal has failed, the Court would normally appoint an arbitrator. However, narrow exceptions to this principle have been carved out, as explained in the recent judgments of the Supreme Court, *inter alia* in *Vidya*

Drolia & Ors. vs. Durga Trading Corporation[28], *Bharat Sanchar Nigam Limited & Anr. vs. Nortel Networks India Private Limited*[29], and *DLF Home Developers Limited vs. Rajapura Homes (P) Ltd.*[30] The Court's emphasis has been on permitting parties to resolve their differences through the agreed mechanism of arbitration. This includes reference of questions as to the arbitrability of disputes, as recently reiterated in *VGP Marine Kingdom Pvt. Ltd. & Anr. vs. Kay Ellen Arnold*[31]. However, the Court may decline reference if the disputes fall in the admittedly narrow exceptions as discussed in these judgments.

26. In the present case, learned counsel for the respondents have raised various objections as to the existence and validity of the arbitration clause, as well as with regard to the implementation of the purported settlement reflected in the MOFS. They have submitted that the arbitration proceedings, in the present case, would be futile as the disputes are within the category of "*deadwood*". They have alleged that, at least as far as Asha Lata is concerned, the agreement is born out of fraud and undue influence; that Apoorv is not a party to the MOFS at all; that the disputes cannot be resolved in the absence of various necessary parties (including Poonam and Alka, as well as various companies and other business entities); and that the substratum of the agreement in the form of various assets have disappeared.

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[28] (2019) 20 SCC 406.
[29] (2021) 5 SCC 738.
[30] 2021 SCC OnLine SC 781.
[31] 2022 SCC OnLine SC 1517.

27. Although the arguments as noted above have cover a wide canvas, I am of the view that the present petition can be disposed of on relatively narrow grounds. The first relates to the validity of the purported invocation of arbitration by the petitioners. While this affects all the respondents, including Apoorv, I propose also to deal with the specific contention regarding his status *viś-a-viś* the arbitration agreement, as a serious allegation of suppression has been made against the petitioners in this connection.

2. Validity of invocation

28. As far as all the respondents are concerned, a ground which goes to the root of the matter concerns the invocation of the arbitration clause. The judgment of the Supreme Court in *Nortel*[32] indicates that a proper invocation is mandatory: -

> *"15. It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days from issuance of the notice invoking arbitration.* ***In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment****."*[33]

29. The purpose behind such a provision has been laid down by this Court in *Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.*[34] in the following terms: -

> "*26. Thirdly, and importantly, where the parties have agreed on a procedure for the appointment of an arbitrator, unless there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure as envisaged in the arbitration clause*

[32] Supra (note 29).
[33] Emphasis supplied.
[34] 2017 SCC OnLine Del 7228.

has been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties. There has to be a consensus. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

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28. Lastly, for the purposes of Section 11(6) of the Act, without the notice under Section 21 of the Act, a party seeking reference of disputes to arbitration will be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. The trigger for the Court's jurisdiction under Section 11 of the Act is such failure by one party to respond.

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30. Considering that the running theme of the Act is the consent or agreement between the parties at every stage, Section 21 performs an important function of forging such consensus on several aspects viz. the scope of the disputes, the determination of which disputes remain unresolved; of which disputes are time-barred; of identification of the claims and counter-claims and most importantly, on the choice of arbitrator. Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the claimant invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, without such notice, the arbitration proceedings that are commenced would be unsustainable in law."

30. This view has also been followed in subsequent judgments of this Court in *Active Media vs. Divisional Commercial Manager, Northern Railway*[35], *Badri Singh Vinimay Pvt. Ltd. vs. MMTC Ltd.*[36], and *Bharat Chugh vs. MC Agrawal HUF.*[37] I have also had occasion to consider these decisions in a judgment delivered on 15.11.2022.[38]

31. Applying these principles to the present case, the chain of correspondence outlined in paragraph 10 hereinabove, does not fulfil

[35] 2020 SCC OnLine Del 1999.
[36] 2020 SCC OnLine Del 106.
[37] 2021 SCC OnLine Del 5373.
[38] *Anil Goel vs. Satish Goel*; judgment dated 15.11.2022 in ARB.P. 683/2015 [Neutral Citation Number: 2022/DHC/004826].

the conditions of a valid invocation of the arbitration clause as the alleged parties to the arbitration agreement were not put on notice thereof. The arbitration before Mr. Abhay Kumar Jain purportedly commenced with a communication dated 26.11.2016 addressed by Rahul to him alone. In the said communication, Rahul referred to the MOFS and the appointment of Mr. Abhay Kumar Jain as the arbitrator thereunder and requested him to convene the arbitration proceedings at the earliest so that the MOFS is executed without any delay. The communication was not addressed to the other parties to the MOFS at all. It appears from the arbitrator's response to Rahul dated 16.12.2016 that the arbitrator, in fact, recognised these deficiencies. He suggested that Rahul should "*first issue Notice to other parties to the MOS and accordingly, make the appropriate reference in accordance with law*".[39] Although this letter was copied to Atul and Asha Lata, it was not addressed to any other party to the MOFS. Despite this communication of the arbitrator, it is undisputed that Rahul did not, in fact, issue notice to any other party to the MOFS or take any action pursuant thereto. Although the arbitrator nevertheless called for a meeting on 23.12.2016 and subsequently on 12.08.2017, as noted above, the respondents objected to the proceedings. Consequently, the arbitrator withdrew from arbitration by an order dated 12.08.2017. Parties other than Rahul, Atul and Asha Lata thus had no notice of the proceedings until the arbitrator's communication dated 05.08.2017, by which he merely fixed an adjourned date of hearing of the arbitration.

[39] Extracted in paragraph 10(B) above.

32. Although the Court in a family settlement is obliged to take a pragmatic view in support of enforcing the agreement, and not to rely upon technicalities, having regard to the considerations emphasised in *Alupro*[40], the requirement of a proper invocation of the arbitration clause cannot be characterized as a mere technicality. The principle iterated by the Supreme Court in *Kale & Ors. vs. Deputy Director of Consolidation and Ors.* [41] is based upon the value in settling and resolving conflicting claims within a family so as to bring about peace and harmony between the parties. This is not inconsistent with the purposes of a proper invocation of the arbitration clause to put the concerned persons on notice regarding the potential proceedings against them. In many cases, it also serves the important purpose of inviting them to participate in the due constitution of the arbitral tribunal in the manner contemplated under the agreement, without which the claimant cannot initiate proceedings under Section 11 of the Act.

33. On the point of invocation, Mr. Singh referred me to a judgment of a Single Judge of the Bombay High Court in *Malvika Rajnikant Mehta v. JESS Construction*[42] wherein the High Court *inter alia* cited the judgment of this Court in *Alupro*[43] and came to the conclusion that there was a factual controversy as to whether the communication of the claimant to the named arbitrator was addressed to the other parties, so as to constitute a proper invocation of the arbitration clause under

[40] Supra (note 34).
[41] (1976) 3 SCC 119.
[42] 2022 SCC OnLine Bom 920.
[43] Supra (note 34).

Section 21 of the Act. In view of this factual dispute, the Court appointed the arbitrator and referred the question of proper invocation also to the arbitrator for consideration, expressly "*in the peculiar facts of the case*".[44]

34. The present case, in contrast, does not raise any controversy as to whether the letter of invocation sent by Rahul to Mr. Abhay Kumar Jain was served upon the other parties to the MOFS. There is no suggestion that it was so served, so as to raise a factual controversy requiring determination by the learned arbitrator. The judgment in *Malvika Rajnikant Mehta*[45] is, therefore, inapplicable to the facts of the present case.

35. Mr. Endlaw placed reliance upon a judgment of the Bombay High Court in *D.P. Construction vs. Vishvaraj Environment (P) Ltd.*[46], wherein the High Court has relied upon *Nortel*[47] and the judgment of this Court in *Alupro*[48] to come to the following conclusions: -

> *"23. It becomes clear from the position of law pertaining to section 21 of the said Act, **that invocation of arbitration has to be in clear terms, as specified in the said provision, and that mere reference to claims and disputes sought to be raised by a party and existence of an arbitration clause would not itself mean that arbitration has indeed been invoked by such a party.** Therefore, it becomes necessary to examine in detail the legal notice issued by the applicant in the present case and the reply sent by the non-applicant. If it can be said that the legal notice sent by the applicant amounted to invoking the arbitration clause and seeking reference of the dispute to arbitration, failure on the part of the non-applicant to respond to the same, would certainly entitle the applicant to maintain the present application filed under section 11(6) of the said Act before this Court.*

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[44] Supra (note 42) [paragraph 36].
[45] Ibid.
[46] 2022 SCC OnLine Bom 1410.
[47] Supra (note 29).
[48] Supra (note 34).

xxxx xxxx xxxx

*26. Considering the position of law as clarified by this Court in the case of Malvika Rajnikant Mehta v. JESS Construction (supra) and the Delhi High Court in the case of Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd. (supra) pertaining to the purposes that a notice invoking arbitration under section 21 of the said Act serves, with which this Court is in agreement**, the notice invoking arbitration ought to be absolutely clear with reference to the arbitration clause and with clear intent of calling upon the rival party to proceed for appointment of an Arbitrator and referring the disputes to arbitration.** The words in section 21 of the said Act, as regards commencement of arbitral proceedings specifically refer to a request for the dispute to be referred to arbitration. Hence, unless there is a request by a party that the dispute is to be referred to arbitration, merely stating the claims and disputes in the notice would not suffice. In the present case, even in the reply sent by the non-applicant, there is no reference to the arbitration clause or any intent on the part of the non-applicant to refer the dispute to arbitration, despite claiming huge amount from the applicant. This clearly indicates that in the present case, arbitration itself was not invoked by either party as per the agreed procedure under section 11(2) of the said Act read with section 21 thereof.*

xxxx xxxx xxxx

*27. In absence of the agreed procedure being triggered by either party for reference of the dispute to arbitration, the question of failure thereof would not arise and hence, the precondition for invoking section 11(6) of the said Act for approaching this Court was not satisfied. **This aspect goes to the very root of the matter and hits at the very jurisdiction of this Court to entertain the application for appointment of Arbitrator, filed by the applicant under section 11(6) of the said Act.** The non-applicant is justified in contending that therefore, the present application deserves to be rejected only on the said limited ground. The learned counsel for the applicant is not justified in contending that the legal notice dated 07/10/2020, can be constructively read as a notice invoking arbitration under section 21 of the said Act and that the preliminary objection is hyper-technical in nature. **This is for the reason that there are legal consequences to invoking of arbitration as contemplated under section 21 of the said Act, including the aspect of limitation, and other such purposes which have been enumerated in the above quoted judgments of this Court and the Delhi High Court.** Therefore, merely because there*

> *is an arbitration clause, it cannot be said that this Court ought to exercise jurisdiction under section 11(6) of the said Act."*[49]

36. It may be noted that the judgment in *Malvika Rajnikant Mehta*[50] has also been considered by the same Court in *D.P. Construction*[51] as extracted above.

37. Mr. Singh sought to argue that these considerations would be inapplicable to the present case where the arbitration proceedings had already been commenced before the named arbitrator. He pointed out that the present petition has been necessitated by the arbitrator withdrawing from the arbitration proceedings. Relying upon the judgments in *Cinevistaas Ltd. vs. Prasar Bharti*[52] and *Enarch Consultant Pvt. Ltd. vs. Lalji Superspecialty Hospital & Research*[53], he submitted that the present petition itself ought to be treated as a petition under Section 14 and 15 of the Act, and a substitute arbitrator be appointed in place of Mr. Abhay Kumar Jain.

38. I am of the view that this course would also be inappropriate in the present case, when the purported arbitration proceedings before Mr. Abhay Kumar Jain were themselves not properly instituted. In the absence of invocation of the arbitration clause, for the reasons stated above, arbitration proceedings, in terms of Section 21 of the Act, had not commenced. There was also no substantive proceeding before the arbitrator at all.

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[49] Emphasis supplied.
[50] Supra (note 42).
[51] Supra (note 46).
[52] 2008 SCC OnLine Del 1173.
[53] 2021 SCC OnLine Del 3858.

39. For the aforesaid reasons, I am of the view that the arbitration proceedings were not properly invoked in terms of Section 21 of the Act, which disentitles the petitioners to relief under Section 11 of the Act.

3. *Reference to arbitration qua Apoorv*

40. Apoorv admittedly did not sign the MOFS himself. His impleadment as a party to this petition and to the proposed arbitration proceedings is sought to be justified on the ground that the MOFS was signed by Atul on behalf of other members of his family, including Meenakshi, Ananya and Apoorv. In the course of arguments, Mr. Singh emphasised that at the time of signing of the MOFS, Apoorv was a young man of approximately 24 years of age and was a student overseas. He relied upon various decisions, including the celebrated decision of the Supreme Court in *Kale*[54], and *Korukonda Chalapathi Rao & Anr. vs. Korukonda Annapurna Sampath Kumar*[55] to urge the Court to jettison technical objections in favour of upholding and implementing a family settlement. He submitted, relying upon the decision of this Court in *Vijay Kumar Munjal & Ors. vs. Pawal Munjal & Ors.*[56], that at least for the *prima facie* finding required in these proceedings, Atul's assertion that he was authorised to sign the MOFS on behalf of his son is satisfactory for a reference to be made. Mr. Singh also drew my attention to the written statement filed by Atul and Nipur in the civil suit filed by Apoorv to contend that

[54] Supra (note 41).
[55] 2021 SCC OnLine SC 847.
[56] 2022 SCC OnLine Del 499.

Apoorv has, in fact, taken the benefit of the MOFS and cannot now resile from its terms, including as to the resolution of disputes.

41. In this connection, it may be noted that the description of the parties in the opening part of the MOFS refers to Atul and Rahul as representing themselves and the other named individuals, being their respective wives and children. However, it also states that all the individuals "*have appended their signatures to this memorandum as concurrence thereof*". The undisputed fact is that Apoorv has not appended his signature to the MOFS and, notwithstanding any arguments as to the actual or ostensible authority of his father to sign the document on his behalf, no assumption of his concurrence can be made in view of the specific stipulation that the signature of each of the parties would be appended to signify their concurrence.

42. Mr. Jain drew my attention to another significant development in connection with Apoorv's amenability to arbitration. He submitted that the petitioners have concealed from the Court the order dated 30.05.2017 by which an application made by Rahul and Nipur under Section 8 of the Act was dismissed. He submitted that a *status quo* order was granted in favour of Apoorv in the said suit, which continues to subsist. Mr. Jain argued that, after the unchallenged dismissal of the application under Section 8 of the Act, the proceedings in the suit are liable to continue to their logical conclusion.

43. Apoorv's suit was filed on 06.12.2016 and pertains to the Sainik Farms property, which, according to the petitioners herein, has been allocated to the share of Rahul in the MOFS. The title documents are,

however, in the name of Rahul and Apoorv. The plaint has been placed on record by Apoorv, in which he clearly asserts that he has neither dealt with the property nor authorised anyone else to do so. In the written statement filed by Rahul and Nipur on 27.01.2017, reference was made to the MOFS but not to the arbitration clause. Four months thereafter, they filed an application under Section 8 of the Act, which came to be dismissed on 30.05.2017.

44. The order dated 30.05.2017 reads as follows: -

> *"This is an application filed by the defendant under Sections 5 and 8 of the Arbitration Act. This Court is not inclined to issue notice on this application.*
> *Record shows that the present suit is a suit for partition which has been filed by the plaintiff against the defendants. The suit had been filed on 06.12.2016. There are two defendants. Both had been served. A common written statement had been filed by them. This is dated 27.01.2017.* ***Admittedly in this written statement, there is no mention of any arbitration clause contained in any agreement inter-se the parties****. The written statement runs into several pages but the entire body of the written statement shows that no claim had been set up by the defendant seeking arbitration qua the present proceedings. This has also been admitted by the defendants.*
> *Present application has been premised on the submission of the defendants that Section 8 (3) is independent of Section 8 (1) of the said Act. His submission is that if an arbitration proceeding is pending, the same must reach its ultimate goal and the suit which has been filed (as is in the present case) cannot continue. To elucidate his submission, learned counsel for the defendants has placed reliance upon a letter purported to have been written by the alleged Arbitrator Abhay Kumar Jain (dated 16.12.2016) to the defendants asking the parties to appear before him on 23.12.2016. Learned counsel for the defendants submits that on 23.12.2016, since none had appeared before Abhay Kumar Jain (the alleged Arbitrator), proceedings did not continue. Meanwhile, this suit had been filed on 06.12.2016 and the written statement was also filed.*
> *At the cost of repetition, the submission now set up by the defendants is that the matter should have in fact been referred to arbitration was never taken as a defence.* ***Learned counsel for the defendants in support of his application has placed reliance upon***

> ***an arbitration clause which as per him is contained in a memorandum of a family settlement dated 23.07.2016.*** *This memorandum of family settlement as per the defendants is dated 23.07.2016. There is no mention of any such family settlement dated 23.07.2016 in the present proceedings.* ***A valid arbitration agreement is a pre requisite to entertain an application under Section 8 of the said Act. This is clearly missing.***
>
> *That apart this Court is wholly unable to understand how the provisions of Section 8 (3) of the said Act which reads herein as under:-*
>
> > *"(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made. "*
>
> *would come to the aid of the defendants. The non-obstante clause states that notwithstanding any application having been made under Section 8 (1), the arbitration may be commenced or continued and an arbitral award be made. At the cost of repetition, the memorandum of family settlement dated 23.07.2016 (sought to be relied upon by the defendants) is nowhere a part of the plaint; written statement having been filed long back i.e. in January, 2017 and no plea having been set up that there was an arbitration clause in a memorandum of a family settlement and the matter be referred to arbitration,* ***this application filed at this stage is nothing but an abuse of the process of the Court.***
>
> *This Court is of the view that this application has been filed only to de-rail the proceedings. Application is mala fide and without any merit. Dismissed with costs quantified at Rs.25,000/."*[57]

45. Mr. Singh sought to explain this order by arguing that it was only on the ground of delay in filing of the application that the Court declined reference to arbitration. He cited the judgment of a learned Single Judge of Calcutta High Court in *TRL Krosaki Refractories Ltd. vs. Lindsay International Pvt. Ltd*.[58] to contend that the appointment of an arbitrator, under Section 11 of the Act, is not precluded by dismissal of an application under Section 8 of the Act in a civil suit. He submitted that the Supreme Court declined special leave to appeal

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[57] Emphasis supplied.
[58] Judgment dated 22.01.2019 in A.P. No. 969 of 2017.

against this judgment[59] and also dismissed a review petition[60] and a curative petition[61] filed against the said judgment.

46. Mr. Singh's argument in this regard does not commend to me. The order of the Court is based not just upon the stage of proceedings at which the application was filed, or the lack of any pleading regarding the arbitration agreement in the written statement, but also upon a clear finding that there is no valid arbitration agreement between the parties to the suit. The Court finds the pre-requisite of a valid arbitration agreement between the parties to be missing. The order was not challenged, and the suit remains pending. The finding regarding lack of an arbitration agreement, at least as against Apoorv, cannot be wished away by the petitioners. It is binding upon the parties, as indeed upon this Court. I am of the view that this legal position renders the other arguments of Mr. Singh regarding Apoorv's amenability to arbitration futile. The order dated 30.05.2017 is conclusive, as far as existence of an arbitration agreement *qua* Apoorv is concerned. It is, therefore, not necessary to consider Mr. Singh's submission regarding the proper interpretation of the MOFS in the context of its character as a family settlement.

47. I also note that in the petitioners' rejoinder to Apoorv's reply to this petition, the petitioners have not proceeded on the basis now urged by Mr. Singh, but expressly averred that the Court dismissed the application "*on a hyper-technical point that the Application was filed*

[59] Order dated 15.02.2019 in SLP (C) No. 4285/2019.
[60] Order dated 23.04.2019 in Review Petition (Civil) No. 864/2019.
[61] Order dated 04.03.2020 in Curative Petition (C) No. 398/2019.

at a belated stage".[62] It is suggested that the failure of the defendants therein to file the application alongwith the written statement was due to an error of counsel and ought not to prejudice the petitioners' hearing. In similar vein, answering the allegation of suppression, Mr. Singh submits that the petitioners ought not to be prejudiced by counsel's failure to place the order dated 30.05.2017 before this Court alongwith the present petition.

48. I am unable to agree with Mr. Singh's contentions in this regard. Two judgments cited by Mr. Jain clearly render a litigant liable for the consequences of suppression of material facts. In *S.P. Chengalvaraya Naidu vs. Jagannath & Ors.*[63], the Supreme Court held as follows: -

> *"4.* ***The High Court reversed the findings of the trial court on the following reasonings:***
>
> > *"Let us assume for the purpose of argument that this document, Ex. B-15, was of the latter category and the plaintiff, the benamidar, had completely divested himself of all rights of every description. Even so, it cannot be held that his failure to disclose the execution of Ex. B-15 would amount to collateral or extrinsic fraud. The utmost that can be said in favour of the defendants is that a plaintiff who had no title (at the time when the suit was filed) to the properties, has falsely asserted title and one of the questions that would arise either expressly or by necessary implication is whether the plaintiff had a subsisting title to the properties****. It was up to the defendants, to plead and establish by gathering all the necessary materials, oral and documentary, that the plaintiff had no title to the suit properties. It is their duty to obtain an encumbrance certificate and find out whether the plaintiff had still a subsisting title at the time of the suit.*** *The plaintiff did not prevent the defendants, did not use any contrivance, nor any trick nor any deceit by which the*

[62] Paragraph 4 of the preliminary objections, paragraphs 4 and 5 of the reply on merits of the rejoinder filed by petitioners to Apoorv's reply.
[63] (1994) 1 SCC 1.

defendants were prevented from raising proper pleas and adducing the necessary evidence. ***The parties were fighting at arm's length and it is the duty of each to traverse or question the allegations made by the other and to adduce all available evidence regarding the basis of the plaintiff's claim or the defence of the defendants and the truth or falsehood concerning the same.*** *A party litigant cannot be indifferent, and negligent in his duty to place the materials in support of his contention and afterwards seek to show that the case of his opponent was false. The position would be entirely different if a party litigant could establish that in a prior litigation his opponent prevented him by an independent, collateral wrongful act such as keeping his witnesses in wrongful or secret confinement, stealing his documents to prevent him from adducing any evidence, conducting his case by tricks and misrepresentation resulting in his misleading of the Court. Here, nothing of the kind had happened and the contesting defendants could have easily produced a certified registration copy of Ex. B-15 and non-suited the plaintiff; and, it is absurd for them to take advantage of or make a point of their own acts of omission or negligence or carelessness in the conduct of their own defence."*

The High Court further held as under:

*"****From this decision it follows that except proceedings for probate and other proceedings where a duty is cast upon a party litigant to disclose all the facts, in all other cases, there is no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence.*** *It would cut at the root of the fundamental principle of law of finality of litigation enunciated in the maxim 'interest reipublicae ut sit finis litium' if it should be held that a judgment obtained by a plaintiff in a false case, false to his knowledge, could be set aside on the ground of fraud, in a subsequent litigation."*

Finally, the High Court held as under:

"The principle of this decision governs the instant case. At the worst the plaintiff is guilty of fraud in having falsely alleged, at the time when he filed the suit for partition, he had subsisting interest in the property though he had already executed Ex. B-15. Even so, that would not amount to extrinsic fraud because that is a matter which could well have been traversed and established to be false by the appellant by adducing the necessary evidence. The preliminary decree in the partition suit necessarily involves

an adjudication though impliedly that the plaintiff has a subsisting interest in the property."

5. ***The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court.*** *The High Court, however, went haywire and made observations which are wholly perverse.* ***We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence****". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely.* ***We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation****."*[64]

Similarly, this Court in *Satnam Chand Kohli vs. Ashwinder Kumar ETC*[65] followed the view taken by the Supreme Court in the above judgment and dismissed a suit on the ground of abuse of process. The following observations of the Court are pertinent: -

"20. In my considered view, the present suit falls within the four-corners of aforesaid legal parameters. ***The plaintiff is clearly guilty of suppressio veri suggestio falsi by seeking to state only half baked facts whereby the proceedings for grant of letter of administration were mentioned and the action taken by defendant No.1. The plaintiff kept silent about the action taken by him and the Orders passed by the competent Court.***

xxxx xxxx xxxx

27.In my considered view that the suit and the application are clear abuse of process of the Court. A recent trend has been noticed where parties approach the Court by concealing material facts or mis-declaring facts in order to overreach the other party. ***Such action must be put down with a firm hand, as it sullies the stream***

[64] Emphasis supplied.

[65] Judgment dated 23.05.2006 in CS(OS) 705/2006.

> ***of justice.*** *I am thus of the considered view that not only the suit and the application of the plaintiff are liable to be dismissed, but the plaintiff must be burdened with exemplary costs for his conduct, which is quantified at Rs.50,000/-. The costs be paid to defendant No.8 within a period of 15 days from today. The suit and the application for stay are accordingly dismissed and the application of the defendant No.8 for vacation of the interim order is allowed."*[66]

49. As in *Satnam Chand Kohli*[67], in the present case also, the petitioners have referred to Apoorv's suit in paragraph 18 of the petition but not to the application filed by them under Section 8 of the Act, or the orders passed thereupon. Their pleading in rejoinder, as noted above, also does not make out the case that the suppression of the order in the present petition was due to the erroneous legal advice.

50. In this light, I am of the view that the petitioners were obliged to disclose the fact that they had made an application under Section 8 of the Act in the proceedings instituted by Apoorv. The inclusion of a reference to Apoorv's suit in the petition clearly shows that the petitioners were aware of its relevance. While seeking appointment of an arbitrator in the present case, the fact that they had been refused reference to arbitration in the suit, cannot possibly be discounted as irrelevant. A litigant is certainly entitled to offer any explanation available to explain a particular fact—or indeed an adverse order of a Court —but cannot get away by avoiding reference to a relevant fact or order altogether. For the aforesaid reasons, at least as far as Apoorv is concerned, the petition is not only liable to be rejected, but the petitioners are guilty of a suppression of material facts and must be visited with an order of costs.

[66] Emphasis supplied.

[67] Supra (note 65).

D. Conclusion

51. In view of the aforesaid findings on these significant aspects, I am of the view that the present petition cannot succeed, and it is not necessary to consider the other arguments raised by the respondents. It is, however, open to the petitioners to take such further or other proceedings in this regard, including by invocation of the arbitration clause, if they are so entitled in law. The rights and contentions of the respondents in this regard are reserved.

52. For the aforesaid reasons, the petition is dismissed. In view of the finding of suppression of material facts by the petitioners, as far as Apoorv is concerned, the petitioners will pay costs of ₹50,000/- to Apoorv. As against the other parties, there will be no order as to costs.

PRATEEK JALAN, J.

NOVEMBER 17, 2022

'Bhupi'/Ananya

HIGH COURT OF DELHI
सत्यमेव जयते