

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/PETN. UNDER ARBITRATION ACT NO. 116 of 2021****With****R/PETN. UNDER ARBITRATION ACT NO. 117 of 2021**

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YASHANG NAVINBHAI PATEL

Versus

DILIPBHAI PRABHUBHAI PATEL

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Appearance:

MR.KUNAL VYAS, ADVOCATE FOR GANDHI LAW ASSOCIATES(12275)  
for the Petitioner(s) No. 1,2

ANAND R PATEL(7352) for the Respondent(s) No. 2

SHASHVATA U SHUKLA(8069) with HEET JHAVERI, ADVOCATE for the  
Respondent(s) No. 1

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**CORAM:HONOURABLE MR. JUSTICE BIREN VAISHNAV****Date : 21/04/2023****ORAL ORDER**

1 Both these petitions are filed under Sec.11(6) of the Arbitration Act for appointment of an arbitrator in context of a dispute. For the purposes of this order, facts of Arbitration Petition No. 116 of 2020 are taken into consideration.

2 The case of the arbitration petitioner is that a firm was formed by original partnership deed dated 13.07.1999 for the purposes of engaging in the business of manufacturing, purchase and sale of all types of pump, motor and their spare parts. The partnership was

reconstituted by a partnership deed dated 01.04.2002. It is the case of the petitioners that petitioner Nos. 1 and 2 held 17% and 34% share in the firm, whereas respondents Nos. 1 and 2 held 34% and 15% respectively. The case of the petitioners further is that despite they holding majority share of 51%, the respondent No.1 started conducting business affairs without consent and knowledge of the petitioners and further from the year 2010-2011, he started going in a unilateral manner. An application, therefore, was filed under Sec.9 of the Arbitration and Conciliation Act before the City Civil Court being Civil Misc. Application No. 489 of 2012. The application is still pending.

2.1 An arbitration notice at the relevant point of time was given on 21.09.2012 for appointment of an arbitrator. The respondent No.1 having disagreed in response to the notice, by its reply dated 14.10.2012, a further notice was given on 18.12.2018 which met the same fate at the hands of the respondents by a response dated 22.12.2018. Section 11 was invoked and arbitration

petitions were filed before this Court being Arbitration Petitions Nos. 88 and 89 of 2019 respectively. It appears that the firm was subsequently dissolved pursuant to a notice of dissolution at the hands of the arbitration petitioner.

2.2 The present petitions have been filed invoking the arbitration clause pursuant to the notice under the Act dated 24.02.2021. This notice too was disputed by the respondents.

3 Mr.Kunal Vyas, learned counsel for the petitioners would submit drawing the Court's attention to Clause 24 of the partnership deed and submit that the disputes amongst the partners was a subject matter of a dispute which was arbitrable under the Arbitration Act, and therefore, invoking the clause in terms of the Act, this Court ought to appoint an arbitrator under Sec.11(6) of the Act.

4 Mr.Shashvat Shukla, learned counsel appearing for

respondent No.1 would submit that apart from the contention that there is no valid clause of arbitration in the partnership deed, he would also submit that the partnership firm has been closed since the year 2006 and no business has been done on and from 01.04.2006. The arbitration notice of 2012 and 2018 failed to suggest appointment of arbitrator and this is one more shot at appointment of an arbitrator when it is not possible to do so post dissolution of partnership.

4.1 In support of his submissions that once the partnership has been dissolved, it is not open for the Court to appoint an arbitrator, Mr. Shashvat Shukla, learned counsel, would rely on a decision of this Court in the case of ***Mohanlal Sajandas vs. Hareshkumar Narandas & Ors.***, reported in ***2001 (3) GLH 532***. He would draw support on this submission also by relying on a decision in the case of ***Manibhai Shankerbhai Patel vs. Swashray Construction Co. & Ors.***, which was followed by a co-ordinate Bench of this Court in the case of ***Hemendra Babulal Shah vs. Dilipkumar Babulal***

***Shah & Anr.***, reported in ***2006 (2) GLH 498***.

4.2 Adverting to the Clause of the partnership agreement, Mr.Shukla, learned counsel, would submit that the disputes that can be resolved were in context of the dealings of the firm and once the firm has been dissolved, in light of the decision of the Bombay High Court in the case of ***M.W.Pradhan vs. M/s. Panchal Engineering Works.***, reported in ***AIR 1967 BOM 48***, he would submit that the arbitration petitions need not be entertained. Disputing these decisions, learned counsel for the petitioner would submit that the arbitration clause itself is an independent clause and, therefore, merely because of the termination and/or dissolution of the partnership, the arbitration clause itself would not lose its significance. It is an independent clause, and therefore, merely because the partnership is dissolved, the dispute cannot be rendered as dead and not subject to arbitration. He would further submit that though in the earlier round arbitration petitions were withdrawn, admittedly because of the staleness of the dispute, the

notice of dissolution itself gave a fresh cause of action.

4.3 Mr.Shukla, learned counsel, would also rely on the decision in the case of ***V.H.Patel & Co & Ors vs. Hirubhai Himabhai Patel & Ors.***, reported in **(2000) 4 SCC 368, National Agricultural COOP Marketing Federation India Ltd vs. Gains Trading Ltd.**, reported in **(2007) 5 SCC 692**, and ***Ashapura Mine-Chem Limited vs. Gujarat Mineral Development Corporation***, reported in **(2015) 8 SCC 193**, to support his submission with regard to the independence of the arbitration clause.

5 Having considered the submissions of the learned counsels for the respective parties, what is to be noted is that the parties to these petitions had entered into a partnership deed executed on first day of April 2002. The partnership was at will with regard to the business in question. Clause 24 of the partnership deed which is a clause relating to the arbitration, reads as under:

*“24. Disputes:-*

*In case of dispute amongst the partners as regard to the dealings of the firm and / or interpretation of the clause of this indenture, the matter shall be decided according to the provision of the Indian Arbitration Act, 1950 with due regard to any amendment made in the said Act from time to time in future.”*

5.1 Perusal of the civil miscellaneous application filed invoking Sec.9 of the Arbitration Act before the City Civil Court indicates that it was not the case of the applicants that the firm continued to work pursuant to the partnership deed till the end of 31.03.2008. It was their case that the respondents were syphoning of stocks and machineries and they were unaware of the accounts till the year of March, 2012. Under the circumstances, they invoked Clause 24 for appointing an arbitrator. Once again in the year 2018, a notice was given invoking the Arbitration Act. It is undisputed that on both these occasions the respondents disputed the arbitration agreement and the clause thereunder. The petitioners then filed a petition under Sec.11 of the Arbitration Act, wherein, apparently because of the staleness of the dispute, this Court, by an order dated 30.07.2020

permitted the applicants to withdraw these petitions with a liberty reserved to approach an appropriate forum. The order dated 30.07.2020 reads as under:

*“After having argued extensively, Mr.Harsh Gajjar, learned advocate appearing for the petitioner seeks permission to withdraw these petitions with a liberty to approach the appropriate forum. Permission is granted with the aforesaid liberty. The appropriate forum shall decide the dispute between the parties in accordance with law. Liberty is also reserved to the respondents to take all contentions available under the law including the contentions of limitation. Petitions stand disposed of as having been withdrawn.”*

5.2 In the year 2021, pursuant to a notice of dissolution, the firm stood dissolved. A notice under the Arbitration Act was then given on 24.02.2021.

6 Considering the circumstances under which the present petitions have been filed, apparently reading clause 24 of the agreement indicates that the dispute amongst the partners with regard to the “dealing of the firm” were the subject matter which can be referred to arbitration. The term “dealing” as is pointed out by the learned counsel for the respondents would mean

engaging in business inasmuch as, the firm must be subsisting and that is the purview within which clause 24 would operate. As held in the case of **Mohanlal Sajandas (supra)**, once the partnership stands cancelled, the dispute arising thereunder is a dispute which can be referred to arbitration. Para 11 of the judgement reads as under:

*“11 In the facts and circumstances, in my opinion, the present petition is not maintainable. It is not id dispute by and between the parties that partnership firm was entered into between the parties. It is also undisputed that partnership was partnership at will. In accordance with provisions of the Partnership Act, therefore, such partnership could be dissolved by any partners at any time. Only thing required was that there must be an intentin on the part of such partner to bring to an end the partnership. From various documents placed on record, in my opinion, it is clearly established that respondent No.1 has conveyed his intention to the petitioners that partnership firm shall be deemed to be dissolved and accordingly it stood dissolved with effect from 31<sup>st</sup> March 1999. If any question has arisen thereafter, such question can not be said to have arised during or in the course of partnership business. Such dispute obviously cannot be dealt with settled or decided in accordance with clause 21 of the partnership deed inasmuch as after the dissolution of partnership that clause would not operate and cannot be invoked by the parties. Since the contention of the learned advocate for respondent No.1 that partnership firm was dissolved after 31<sup>st</sup> March 1999 is well founded, the present*

*petition filed by the petitioners is not maintainable and deserves to be dismissed.”*

6.1 Even in the case of **Manibhai Shankerbhai (supra)**, which was subsequently followed by this Court, this Court, considering the provisions of Sec.43 of the Partnership Act, held as under

*“5 No provision is made in the partnership deed fixing the duration of the partnership and, therefore, by virtue of Section 7 of the Partnership Act, where no such provision is made by contract between the partners, the partnership is a ‘partnership at will’. Section 43 of the Partnership Act next provides that where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. Once such a notice is given, the firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if not date is so mentioned, as from the date of the communication of the notice. It is well-settled that if a suit is instituted for the dissolution of the partnership and for rendition of accounts, the service of the summons along with the copy of the plaint on the other partners is notice of dissolution within the meaning of Section 43 of the Partnership Act. It is, therefore, obvious that if in a partnership at will one of the partners does not desire to carry on business in partnership with the other partners and serves notice of dissolution, the firm stands dissolved from the date of dissolution mentioned in the notice and if no such date is mentioned, from the date of communication of the notice to the other partners. That is the effect of Section 43 of the Partnership Act. It is in the context of this statutory position*

*emerging from a conjoint reading of Section 7 and Section 43 of the Partnership Act, that one has to determine the scope of Clause (16) of the partnership deed. Now, that clause states that if there is any dispute in regard to any matter concerning the firm between the partners, without resorting to the Court of law the partners shall have it determined under the Arbitration Act through an arbitrator and the decision of the arbitrator will be binding on all the partners. If under the provisions of the Partnership Act it is open to a partner to dissolve a partnership at will in the manner provided by Section 43 of the Partnership Act that right conferred on a partner cannot be denied to him on the interpretation that Clause (16) of the partnership deed is wide enough to cover any and every dispute between the partners. If a partner does not desire to carry on business with his other partners and has a right to dissolve the firm under Section 43 of the Partnership Act, can it be said on an interpretation of Clause (16) of the partnership deed that that right is taken away and the partner has no remedy but to continue with the partnership, assuming the arbitrator holds against him in the proceeding that may be commenced under the Arbitration Act? The answer to this poser must necessarily be in the negative. In a partnership at will it is open to a partner, even if there is no dispute between the partners whatsoever, to dissolve the firm by virtue of Section 43 of the Partnership Act. That Section does not lay down that there must exist a dispute between the partners for the purpose of dissolving the firm. All that it says is that if the partnership is at will, it is open to any partner to dissolve the firm by giving notice in writing to all the other partners of his intention so to do and on the service of such notice the partnership will stand dissolved from the date of communication, as the case may be. Therefore, in a partnership at will if a partner desires to dissolve the firm by giving*

*notice as required by Section 43 of the Partnership Act, his right cannot be taken away by such an arbitration clause in the partnership deed. If it was the intention of the partners that the partnership should not be dissolved till a certain event happened, then such a specific provision would have been found in the document and the partnership would not have been a partnership at will. It is, therefore, difficult to understand how a partner who desires to dissolve the firm can be forced to resort to arbitration. It, therefore, necessarily follows that Clause (16) of the partnership deed has application only during the subsistence of the partnership and it does not have the effect of taking away the right conferred on a partner by Section 43 of the Partnership Act to have the partnership dissolved by notice if the partnership is a partnership at will. On this interpretation as regards the scope of Clause (16) of the partnership deed, it must be held that the learned trial Judge was not right in staying further proceedings in the suit under Section 34 of the Arbitration Act.*

*6 Two further submissions were made by Mr. Jadeja, the learned Advocate for the appellant, on the basis of averments made in Exhibits 16 and 26, respectively: (i) by Section 34 of the Arbitration Act discretion has been conferred on the Court to direct stay that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and (ii) the applicant was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration. Mr. Jadeja submitted that the learned trial Judge had overlooked the fact that before the appellant took the extreme step of having the firm dissolved and prayed for rendition of accounts by the institution of the suit, he had made endeavours for almost two years to have the dispute or difference*

*between him and the other partners settled through arbitration. It is obvious from the averments made in Exhibits 16 and 26, respectively that in the past efforts were made to have the disputes settled through arbitration, but unfortunately those efforts were unsuccessful. In Exhibit 16 even respondent No.2 admits that twice efforts were made to resolve the dispute by arbitration but in vain. It is averred in paragraph (d) that the dispute was referred to Dahyabhai Fulabhai Patel and Jashbhai Ashabhai Patel and the said two arbitrators had entered upon arbitration and had held as may as three sittings at the residence of the appellant himself but because of non-cooperation on the part of the appellant and his refusal to furnish details as demanded by the arbitrators, the arbitrators were unable to resolve the dispute. It is further averred that thereafter somewhere in the month of August 1979 the appellant suggested the name of one Chartered Accountant Shri Arvind bhai N. Shah as his arbitrator while the respondent No.2 appointed Shri Kanubhai Patel, also a Chartered Accountant as his arbitrator; but thereafter on the question of settling the terms of arbitration the matter was delayed and ultimately a draft was prepared for referring the dispute to the said two arbitrators but the appellant instead of signing the document of reference, instituted the present suit in question. Of course, on the part of the appellant the allegation is that the dispute could not be settled by arbitration because of non-cooperation on the part of respondent No.2. Correspondence has also been placed on record to show who was to blame for the failure of the earlier two efforts to have the dispute resolved by arbitration. It is not necessary for me to determine who was responsible for the failure of the arbitration proceedings but it is sufficient to state that two precious years were lost in attempting to have the dispute settled by arbitration. The learned trial Judge ought to have taken this fact into*

*consideration before exercising discretion under Section 34 of the Arbitration Act. It is needless to emphasise that it was the appellant who was keen to have the dispute with the other partners settled and that is why efforts were made to settle the dispute by arbitration before taking the extreme step of having the firm dissolved. When these efforts failed, he saw no alternative but to seek dissolution of the firm and rendition of accounts through Courts. The learned trial Judge ought to have appreciated these efforts to have the disputes resolved by arbitration, no matter who was to blame, before exercising his discretion under Section 34 of the Arbitration Act. I think in this background of the facts emerging from the averments in Exhibits 16 and 26 respectively, the learned trial Judge ought not to have exercised the discretion in favour of staying the suit under Section 34 of the Arbitration Act.*

7 *There is also substance in the contention that one of the requirements of Section 34 of the Arbitration Act is that the party applying for stay of proceedings under Section 34 must show that he was at the time when the proceedings were commenced, ready and willing to do all things necessary to the proper conduct of the arbitration and that he continues to remain ready and willing to do so at the date of the disposal of the application. Nowhere in Exhibit 16 has the respondent No.2 while applying for stay of proceedings under Section 34 of Arbitration Act stated that he was at the date of the making of that application ready and willing to do all things necessary to the proper conduct of arbitration. Even after the appellant in his reply, Exhibit 26, averred that the respondent No.2 was not ready and willing to do all things necessary to the proper conduct of arbitration not only at the date of the presentation of Exhibit 16 but even thereafter, respondent No.2 did not file any affidavit-in-rejoinder denying that allegation. Therefore,*

*having regard to this fact also, I think that the learned trial Judge was not justified in the background of the facts placed before him in directing stay of proceedings under Section 34 of the Arbitration Act.”*

6.2 As far as judgements relied upon by the learned counsel for the petitioners is concerned, the disputes that were to be referred to arbitration were directly in connection with the termination of the agreements and the cause of action was directly consequential to such termination. Here is a case where the relationship which itself was severed pursuant to dissolution would give rise to the extinguishment of the clause of arbitration itself.

7 For the aforesaid reasons, the petitions stand dismissed.

BIMAL

**(BIREN VAISHNAV, J)**