



\$~3

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 10th January, 2024
+ **ARB.P. 134/2023**
M/S OPUSKART ENTERPRISES & ORS. Petitioners
Through: Mr. Shyam Kumar and Ms. Iqra
Khan, Advs. (M. 9999154100)
versus

KAUSHAL KISHORE TYAGI Respondent
Through: Mr. Suhail Sehgal and Mr. Prashant
Drolia, Advs. (M. 9582111448)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 arises out of a partnership deed dated 27th June, 2016 between the following person:
 1. Mr. Prashant Sharma
 2. Mr. Jayant Bhandari
 3. Mr. Jayant Sati
 4. Mr. Mohit Sharma
 5. Mr. Kaushal Kishore Tyagi
3. The partnership deed clearly narrates that the above parties intended to carry on the business of trading, import and export of books and any other businesses which the partners intended to deal with at its head office at 266 E/3/1C 2nd Floor, Ward No.2, Khasra No.1151/3, Mehrauli, New Delhi-110030. The partners also agreed that the name of the partnership business



would be known as M/s Opuskart Enterprises. The partnership came into effect from 27th June, 2016 and as on date is also subsisting. The respective shares of the parties is contained in the partnership deed. Paragraph 12 of the partnership deed requires each of the partners to be just and faithful and render true accounts and full information relating to the firm to the other partners and also pay their separate private debts on their own. Relevant clause 12 is set out below:

*“12. That each partner shall –
(a) be just and faithful to each other and shall render true accounts and full information of all things which come to his knowledge affecting the firm, to other partners and in case of death of partner, to his legal representative.
(b) pay his separate and private debts himself and in case of loss to the the partnership on his account shall indemnify the other partner or partners of the partnership against all proceeding, claims or demands in respect thereof.”*

4. The case of the Petitioners is that the Respondent - Mr. Kaushal Kishore Tyagi has indulged in misappropriation of funds of the firm. Accordingly, notice dated 18th June, 2021 was issued initially raising a claim of Rs.60,50,000/-. The reply was issued to the said notice on 28th June, 2021 wherein the Respondent states that apart from being a partner in the partnership firm, the said partners are also Directors in M/s Opuskart India Pvt. Ltd. In the said reply to the legal notice, an allegation was raised by the Respondent that the Petitioners intend to hijack, usurp and run away with the business of both the firm as also the company. The notice is thus refuted by the Respondent.

5. Thereafter, the Petitioners invoked the arbitration clause vide letter



dated 25th June, 2022 in which the claims are raised to the tune of Rs.3.88 crores. After the service of the said notice, since no reply is received, the present petition has been filed.

6. Notice was issued in this petition on 7th February, 2023. Thereafter, pleadings have been completed in the matter and the petition has been taken up for hearing.

7. Mr. Shyam Kumar, Id. Counsel for the Petitioners submits that broadly the objections raised in the reply are:

- i) that the clause 16 of the partnership deed refers to the Indian Arbitration Act, 1940 and not the Arbitration and Conciliation Act, 1996;
- ii) that the arbitration agreement is unstamped;
- iii) that there is a variance in the claimed amounts in the initial notice and the notice invoking arbitration;
- iv) that the claims relating to the company cannot be raised as part of the arbitration notice as the company is not a party to the arbitration agreement;
- v) that the claims are barred by limitation.

In respect of each of the above contentions, Id. Counsel has made his submissions.

8. It is his submission with respect to objection (i) i.e., regarding the Act referred in the agreement, is that he relies upon the decision of the judgment of the Supreme Court in *Purushottam s/o Tulsiram Badwaik v. Anil & Ors.* [SLP (Civil) No. 14589/2016, 4SCC (Civ) 21] to argue that the arbitration agreement would not be invalid due to wrong reference of the statute.

9. Insofar as the unstamped arbitration agreement is concerned i.e.



objection (ii), reliance is placed by the Counsel upon the recent decision of the Seven Judges' Bench in *In Re: Interplay Between Arbitration Agreements Under The Arbitration And Conciliation Act 1996 And The Indian Stamp Act 1899 (2023 SCC OnLine SC 1666)* which holds that the stamping of the arbitration agreement is not compulsory for invoking arbitration.

10. Insofar as variance in the claim notice is concerned, it is his submission on the basis of the decision of a Id. Judge of this Court in *Ministry of Youth Affairs & Sports v. Agility Logistics Pvt. Ltd. [O.M.P.(COMM) 95/2019, decided on 7th April, 2022, 2022:DHC:1258]* that the letter invoking arbitration need not even quantify the amount. Thus, any discrepancy would not affect the invocation or the appointment of the Arbitrator.

11. Insofar as the claims relating to the partnership firm and the company are concerned, it is his submission that the Respondent was misusing the credit card given by the business for the purposes of his own private and personal expenses and various transfers were made which were unauthorized and not within the knowledge of the partners. Since the business was common between the firm and the company, the claim is arbitrable.

12. Insofar as the issue of limitation is concerned, he submits that the siphoning off may have taken place from 2016 onwards, but limitation would run from the time when the Petitioners acquires knowledge of the alleged misappropriation. As per the petition, it is his case that the Petitioners' firm realized that there was misappropriation only in 2020 and the notice invoking arbitration was sent on 25th June, 2022 which was well within the period of limitation.



13. On behalf of the Respondent, Mr. Suhail Sehgal, Id. Counsel has only raised two broad objections. Firstly, that the claims relating to the firm or the company cannot be raised as part of the present arbitrable proceedings as neither the firm nor the company are parties to the arbitration agreement. Secondly he submitted that the audited accounts are being signed by all the partners and hence the claim that the Petitioners acquired knowledge only in 2020 is bereft of any merit. He thus submits that the claims are barred by limitation.

14. Further, Id. Counsel for Respondent stated that the amounts relating to the company accounts would not be arbitrable and in any case the firm itself being not a party to the arbitration agreement, no Arbitrator would be liable to be appointed.

15. The Court has considered the matter and heard the Id. Counsels for the parties.

16. A perusal of the partnership deed would show clearly that the intention of the parties was to carry on the business of trading, import and export of all books and also any other business which the partners wish to deal with.

17. Clause 16 of the partnership deed which is the arbitration clause reads as under:

“16. Any dispute or difference which may arise, either before or after the determination of the partnership between the parties or their representative with regard to the construction meaning and effect of the deed or any part thereof or respecting the accounts, profit or losses or the business or the right and the liabilities of the partners under this deed or the dissolution or winding



up of the business, or any other matter regarding the firm shall be referred to arbitration under the provisions of the Indian Arbitration Act, 1940.”

18. The arbitration clause in the partnership deed in itself is quite wide and deals with the disputes and differences between the parties either in respect of the construction, meaning and effect of the deed or a part thereof. The clause would also cover any disputes or differences in respect of the accounts, profits and losses or the business or the rights and liabilities of the partners. This phrase is broad enough to include all the businesses of the parties to the partnership deed.

19. The reply to the legal notice which was given by the Respondent clearly also acknowledges the fact that the partners had started the company which was doing the common business as that of the firm. In fact, in the reply, the Respondent has made repeated references to the firm and the company which clearly gives the impression to the Court that the stand of the Petitioners that the business between the five partners is common is correct. The relevant extracts of the Reply given by the Respondent dated 28th June, 2021 is set out below:

“That true facts and circumstances of the matter being that my client Sh. Kaushal Kishor Tyagi is one of the partners of your client firm M/s Opuskart Enterprises which is engaged in the business of online/ e-commerce sale of books since 27th June, 2016. My client had toiled very hard, worked day and night and employed his intelligent business acumen and business sense to make the business of your client firm growing and profitable over the years. It will be not out of place to mention here that apart from being partners in your client firm M/S Opuskart Enterprises, aforesaid 04 partners are also Directors in the Company M/ s Opuskart India Pvt. Ltd. along with my client and one other person Sh. Kundal Lal



S/o Sh. Joga Ram.

*That seeing the business of the firm and said company growing over the years and becoming very profitable, intentions of aforesaid 04 partners have become dishonest and fraudulent and **they want my client to be sidelined/ expelled/ ousted from both, your client firm as well as aforesaid Company M/ s Opuskart India Pvt. Ltd.** and hijack, usurp and run away with the business of both of them. Apparently, said partners/ directors have no legal authority and valid reason to behave and conduct themselves in that manner except for their seeming greed for money and business of your client firm and that of afore said company.*

xxx

xxx

xxx

*It is important to mention here that in place of my client, **it is your clients i.e. remaining 04 partners or your client firm, who have in connivance and conspiracy with each other and above said Kundan Lal, one of the Directors in the company have committed cheating and frauds upon my client at one hand and your client firm M/ s Opus Enterprises and the company M/s Opuskart India Pvt. Ltd. on the other hand in as much as they got a new Bank Account** in the name of said Company in the Greenfield Colony, Faridabad, Branch of ICICI Bank; at the back of my client and without his information and approval and thereafter transferring entire funds of the company i.e. a sum of Rs. 32,90,000/- available in the previous existing account of the company in the Chiranjeev Vihar, Shastri Nagar, Ghaziabad, U.P. Branch of ICICI Bank to aforesaid fresh account opened by them at aforesaid Greenfield Colony, Faridabad Branch of ICIO Bank and thereafter further transferring the funds of the company so transferred to fresh account to their personal accounts, which is impressible under the Company Law and is an open fraud upon the company and my client.”*

20. The above reply is itself quite revealing i.e., that the partners had started the firm and the company and that disputes have arisen between them in respect of their businesses. This being the position, considering the broad



nature of the clause, the ground taken by the Respondent that the accounts relating to the firm or the company would not be arbitrable, is not tenable inasmuch as any disputes relating to the business between the partners would be arbitrable. Since the business by the partners is being conducted both through the firm and by the company, the disputes raised would be arbitrable. Further, it is laid down by the Supreme Court in the case of *Cox and Kings Ltd. Vs. SAP India Pvt. Ltd. and Ors (MANU/SC/1310/2023)*, a non-signatory affiliate or sister or parent company can be a party to an arbitration agreement if there is mutual intention of the signatories and non-signatories to this effect. The relevant paragraphs are set out below:

"219. The existence of an arbitration agreement with a non-signatory is a matter of interpretation and construction. The express words employed by the parties enable the court to ascertain the intention of the parties and their agreement to resolve disputes through arbitration. For ascertaining the true meaning of the express words, the court or tribunal may look into the surrounding circumstances such as nature and object of the contract and the conduct of the parties during the formation, performance, and discharge of the contract. While interpreting and constructing the contract, courts or tribunals may adopt well-established principles, which aid and assist proper adjudication and determination. The Group of Companies doctrine is one such principle. It may be adopted by courts or arbitral tribunals while interpreting the record of agreement to determine whether the non-signatory company is a party to it.

220. Although the application of the Group of Companies doctrine in India has until now been independent of Section 7, its juxtaposition with Section 7(4)(b) case-law shows that the inquiry under both is premised on determining the mutual intention of parties to submit to arbitration. The mutual intention of the parties is discernible from their



conduct in the performance of the contract and this inquiry is common to Section 7(4)(b) jurisprudence and the Group of Companies doctrine. Even the precedents on the doctrine, national and international, look to additional factors beyond the non-signatory being in the same group of companies, such as commonality of subject-matter, composite nature of transaction, and interdependence of the performance of the contracts to determine mutual intent.

221. Since the fundamental issue before the court or tribunal Under Section 7(4)(b) and the Group of Companies doctrine is the same, the doctrine can be subsumed within Section 7(4)(b). Consequently, the record of agreement that evidences conduct of the non-signatory in the formation, performance, and termination of the contract and surrounding circumstances such as its direct relationship with the signatory parties, commonality of subject-matter, and composite nature of transaction, must be comprehensively used to ascertain the existence of the arbitration agreement with the non-signatory. In this inquiry, the fact of a non-signatory being a part of the same group of companies will strengthen its conclusion. In this light, there is no difficulty in applying the Group of Companies doctrine as it would be statutorily anchored in Section 7 of the Act.”

21. Insofar as limitation is concerned, the issue of limitation would arise only after the claims are filed and the said issue would have to be considered by the Id. Arbitrator and decided in accordance with law.

22. In the facts and circumstances of the present case, the Court is convinced that this is a case for appointment of a Sole Arbitrator for the purposes of adjudicating the disputes between the parties. Accordingly, Mr. **Justice V.K. Jain (Retired) (M:9650116555)** is appointed as the Id. Sole Arbitrator to adjudicate the disputes between the parties. The sole Arbitrator



shall be paid fee in terms of the fourth schedule of the Act.

23. It is made clear that any observations made in this order would not bind the Id. Sole Arbitrator either in any interim application or in the final award.

24. The parties shall appear before the Id. Sole Arbitrator on 23rd January, 2024.

25. Petition is disposed of in these terms. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

JANURARY 10, 2024

Rahul/bh