

BHARAT RASIKLAL ASHRA

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v.

GAUTAM RASIKLAL ASHRA & ANR.

(Civil Appeal No.7334 of 2011)

AUGUST 25, 2011

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[R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.]

Arbitration and Conciliation Act, 1996 – s.11 – Appointment of arbitrator – Application u/s.11 – Duty of the Chief Justice of the Supreme Court / High Court or his designate – Partnership deed dated 12-6-1988 entered between the appellant, the first respondent and their grandfather contained an arbitration agreement – Dispute between appellant and first respondent pursuant to death of their grandfather – First respondent filed application u/s.11 seeking appointment of arbitrator not with reference to the partnership deed dated 12-6-1998, but with reference to another partnership deed dated 19-5-2000 allegedly entered between the appellant and the first respondent – Appellant denied the existence of the deed dated 19-5-2000 contending that the same was forged and fraudulent and therefore there was no question of appointment of arbitrator in terms of the arbitration clause contained therein – Designate of the Chief Justice of the High Court, however, allowed the application u/s.11 and appointed an arbitrator – Whether the designate of the Chief Justice, in exercise of power u/s.11, could appoint an arbitrator without deciding the question whether there was an arbitration agreement between the parties, leaving it open to be decided by the arbitrator – Held: The question whether there is arbitration agreement is a jurisdictional issue – Such issue ought to have been decided by the designate of the Chief Justice and only if the finding was in the affirmative he could have proceeded to appoint the Arbitrator – Unless the first respondent was able to make out that there was a valid

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A *arbitration clause as per the deed dated 19-5-2000, there could be no appointment of arbitrator u/s.11 – Since serious allegations of fraud and fabrication were made, the Court could not have proceeded to appoint an arbitrator without deciding the said issue which related to the very validity of the arbitration agreement – Order of the High Court appointing an arbitrator accordingly set aside – Matter remitted to High Court for deciding the questions whether the deed dated 19-5-2000 was forged or fabricated and whether there was a valid and enforceable arbitration agreement between the parties.*

C **The appellant and the first respondent are brothers. A deed of partnership dated 12.6.1988 was entered amongst the appellant, the first respondent and their grandfather 'K' to carry on business, their shares being 30%, 30% and 40% respectively. The said partnership deed provided that all disputes between the partners shall be referred to arbitration.**

E **It was the stand of the first respondent that immediately after the death of 'K', fresh partnership deeds were executed between him and the appellant on 6.9.1991 and again on 19.5.2000; and consequently the share of the appellant was reduced to 10% while the share of the first respondent stood at 90%. The first respondent sent letter to the appellant stating that several issues relating to the firm had arisen; and that it was necessary to sort out those disputes by arbitration. The first respondent therefore appointed his arbitrator and called upon the appellant to appoint his arbitrator. The appellant replied stating that he had not signed the partnership deeds dated 6.9.1991 or 19.5.2010 and the said documents were forged documents and not binding and therefore the question of appointing an arbitrator in terms of the said documents did not arise.**

H **The first respondent thereafter filed application under**

section 11 of the Arbitration and Conciliation Act, 1996 A
alleging that disputes had arisen between appellant and
first respondent, who were the partners of the second
respondent firm governed by partnership deed dated
19.5.2000; and that clause 12 thereof provided for
settlement of disputes by arbitration. He therefore prayed B
that a sole arbitrator be appointed in terms of the
arbitration agreement contained in the partnership deed
dated 19.5.2000. The designate of the Chief Justice
allowed the application under section 11 of the Act and
appointed a sole arbitrator and left open the question C
whether the two subsequent partnership deeds had been
executed by the appellant or not, for the decision of the
arbitrator.

In the instant appeal, the appellant contended that
the Chief Justice or his designate was required to decide D
the issue relating to the existence of an arbitration
agreement before referring the dispute between the
parties; and since serious questions of fraud, forgery and
fabrication of documents were made out, the Chief
Justice or his designate should not have appointed an E
arbitrator.

The question which therefore arose for consideration
was "Where the arbitration agreement between the
parties is denied by the respondent, whether the Chief F
Justice or his designate, in exercise of power under
section 11 of the Act, can appoint an arbitrator without
deciding the question whether there was an arbitration
agreement between the parties, leaving it open to be
decided by the arbitrator?" G

Allowing the appeal, the Court

HELD: 1. The preliminary issues that may arise for
consideration in an application under section 11 of the
Arbitration and Conciliation Act, 1996 can be identified H

A and segregated the into three categories, that is (i) issues
 which the Chief Justice or his Designate is bound to
 decide; (ii) issues which he can also decide, that is
 issues which he may choose to decide; and (iii) issues
 which should be left to the Arbitral Tribunal to decide. The
 B issues (first category) which Chief Justice/his designate
 will have to decide are: (a) Whether the party making the
 application has approached the appropriate High Court
 and (b) Whether there is an arbitration agreement and
 whether the party who has applied under section 11 of
 C the Act, is a party to such an agreement. The issues
 (second category) which the Chief Justice/his designate
 may choose to decide (or leave them to the decision of
 the arbitral tribunal) are: (a) Whether the claim is a dead
 (long barred) claim or a live claim and (b) Whether the
 D parties have concluded the contract/ transaction by
 recording satisfaction of their mutual rights and
 obligation or by receiving the final payment without
 objection. The issues (third category) which the Chief
 Justice/his designate should leave exclusively to the
 E arbitral tribunal are: (I) Whether a claim made falls within
 the arbitration clause (as for example, a matter which is
 reserved for final decision of a departmental authority
 and excepted or excluded from arbitration) and (ii) merits
 or any claim involved in the arbitration. [Para 8] [695-A-
 H; 696-A-C]

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 1.2. The question whether there is an arbitration
 agreement has to be decided only by the Chief Justice
 or his designate and should not be left to the decision of
 the arbitral tribunal. This is because the question whether
 G there is arbitration agreement is a jurisdictional issue and
 unless there is a valid arbitration agreement, the
 application under section 11 of the Act will not be
 maintainable and the Chief Justice or his designate will
 have no jurisdiction to appoint an arbitrator under section
 H 11 of the Act. Only in regard to the issues shown in the

second category, the Chief Justice or his designate has the choice of either deciding them or leaving them to the decision of the arbitral tribunal. Even in regard to the issues falling under the second category, where allegations of forgery or fabrication are made in regard to the documents, it would be appropriate for the Chief Justice or his designate to decide the issue. In view of this settled position of law, the issue whether there was an arbitration agreement ought to have been decided by the designate of the Chief Justice and only if the finding was in the affirmative he could have proceeded to appoint the Arbitrator. [Para 9] [696-D-H]

S.B.P. & Co. vs. Patel Engineering Ltd. 2005 (8) SCC 618; 2005 (4) Suppl. SCR 688 and *National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd.* 2009 (1) SCC 267; 2008 (13) SCR 638 – relied on.

2. It is well settled that an arbitrator can be appointed only if there is an arbitration agreement in regard to the contract in question. If there is an arbitration agreement in regard to contract A and no arbitration agreement in regard to contract B, obviously a dispute relating to contract B cannot be referred to arbitration on the ground that contract A has an arbitration agreement. Therefore, where there is an arbitration agreement in the partnership deed dated 12.6.1988, but the dispute is raised and an appointment of arbitrator is sought not with reference to the said partnership deed, but with reference to another partnership deed dated 19.5.2000, unless the party filing the application under section 11 of the Act is able to make out that there is a valid arbitration clause as per the contract dated 19.5.2000, there can be no appointment of an arbitrator. [Paras 10, 11] [697-A-G]

3. Existence of a valid and enforceable arbitration agreement is a condition precedent before an arbitrator can be appointed under section 11 of the Act. When

A serious allegations of fraud and fabrication are made, it is not possible for the Court to proceed to appoint an arbitrator without deciding the said issue which relates to the very validity of the arbitration agreement. The fact that the allegations of fraud, forgery and fabrication are likely to involve recording of evidence or involve some delay in disposal, are not grounds for refusing to consider the existence of a valid arbitration agreement. The apprehension that such contentions are likely to be raised frequently to protract the proceedings under section 11 of the Act or to delay the arbitration process, thereby defeating the purpose of section 11 of the Act is also without basis. Where agreements have been performed in part, such a contention will not be entertained. It is only in a very few cases, where an agreement which had not seen the light of the day is suddenly propounded, or where the agreement had never been acted upon or where sufficient circumstances exist to doubt the genuineness of the agreement, the Chief Justice of his designate will examine this issue. On the ground of termination, performance or frustration of the contract, arbitration agreement cannot be avoided. The legislature has entrusted the power of appointment of an arbitrator to the holders of high judicial offices like the Chief Justice or Judge of the Supreme Court/High Court, with a view that they can identify and effectively deal with false or vexatious claims made only to protract the proceedings or defeat arbitration. If a party is found to have falsely contended that the contract was forged/fabricated, the Chief Justice or his designate may subject such part to heavy costs so that such false claims are discouraged. [Paras 12, 13] [698-B-H; 699-A]

H 4. The order of the High Court appointing an arbitrator is set aside and the matter is remitted to the High Court for deciding the questions whether the deed dated 19.5.2000 was forged or fabricated and whether

there was a valid and enforceable arbitration agreement A
between the parties. [Para 14] [699-B-C]

Case Law Reference:

2005 (4) Suppl. SCR 688 relied on Para 8

2008 (13) SCR 638 relied on Para 8 B

CIVIL APPELLATE JURISDICTION : Civil Appeal No.
7334 of 2011.

From the Judgment & Order dated 31.03.2011 of the High C
Court of Judicature at Bombay in Arbitration No. 160 of 2010.

L.N. Rao, Pratap Venugopal, Surekha Raman, Namrata
Sood (for K.J. John & Co.) for the Appellant.

Shyam Divan, Ayaz Billawala, Mahesh Agarwal, E.C. D
Agrawala, Radhika Gautam for the Respondents.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. Leave granted. Heard. E

2. The appellant and first respondent are brothers. A deed
of partnership dated 12.6.1988 was entered among Mr. Kanji
Pitamber Ashra and his two grandsons (appellant and first
respondent) to carry on the business under the name and style
of M/s. Kanji Pitamber & Co., their shares being 40%, 30% and F
30% respectively. Clause 10 provided that death of any partner
shall not dissolve the partnership firm as to the surviving
partners. Clause 11 of the said agreement provided that all
disputes between the partners regarding the rights and liabilities
of partners or in regard to the transactions or accounts of the G
partnership shall be referred to arbitration.

3. The appellant is permanent resident of United States
of America. Kanji Pitamber Ashra died on 4.9.1991. According
to appellant, the appellant and first respondent continued the H

A business of M/s. Kanji Pitamber & Co., (second respondent firm), by increasing their profit and loss ratio from 30% to 50% each. The appellant alleges that in or about 2008 he came to know that the first respondent was claiming that fresh partnership deeds were executed by the parties on 6.9.1991 and 19.5.2000. The appellant claims that he did not execute any such deeds. He claims that the firm's bankers by their letter dated 7.7.2008 have confirmed that the only partnership deed of the firm held by them was the deed dated 12.6.1988. He also claims that the first respondent, as partner of the second respondent firm had sent a letter dated 1.7.2008 to the Foreign Exchange Brokers Association of India (of which the second respondent is a member) confirming that the appellant and first respondent were the partners as per the deed dated 12.6.1988 and there was no change in the said partnership deed.

4. According to the first respondent, immediately after the death of their grandfather, a fresh partnership deed was executed on 6.9.1991 and again another deed was executed on 19.5.2000 by the appellant and first respondent; that under deed dated 6.9.1991, the share of the appellant was reduced from 50% to 25% and under the deed dated 19.5.2000, the share of the appellant was reduced from 25% to 10% with a further condition that if the appellant did not attend to the business on account of his commitments elsewhere, the entire profit and loss of the business shall belong to or borne by the first respondent. The first respondent by letter dated 19.8.2010 stated that the shares of appellant and first respondent in the firm were 10% and 90% respectively; that the appellant had abandoned his interest in the firm and showed no inclination to participate in its business; that several issues relating to the firm had arisen; and that it was necessary to sort out those disputes by arbitration. The first respondent therefore appointed his arbitrator and called upon the appellant to appoint his arbitrator. The appellant sent a reply dated 7.9.2010 stating that he had not signed the partnership deeds dated 6.9.1991 or 19.5.2010 and the said documents were forged documents

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and not binding and therefore the question of appointing an arbitrator in terms of the said documents did not arise. A

5. The first respondent filed an application under section 11 of the Arbitration and Conciliation Act, 1996 ('Act' for short) alleging that disputes had arisen between appellant and first respondent, who were the partners of the second respondent firm governed by partnership deed dated 19.5.2000; and that clause 12 thereof provided for settlement of disputes by arbitration. He therefore prayed that the person named in his notice dated 19.8.2010, as his arbitrator, be appointed as the sole arbitrator in terms of the arbitration agreement contained in the partnership deed dated 19.5.2000. The appellant resisted the said petition by filing detailed objections denying the existence of the partnership deeds dated 6.9.1991 and 19.5.2000. The appellant asserted that they were governed by the partnership deed dated 12.6.1988 and therefore question of appointment of arbitrator in terms of the arbitration clause contained in the alleged partnership deed dated 19.5.2000 did not arise. B
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6. The learned designate of the Chief Justice made an order dated 11.2.2011 for appointing a Commissioner for recording the evidence of parties as it was necessary to decide whether said two partnership deeds dated 6.9.1991 and 19.5.2000 were valid or not, before a reference could be made in terms of an arbitration clause contained in the deed dated 19.5.2000. However, when the application subsequently came up for hearing before another designate of the Chief Justice, the earlier order for recording evidence was ignored and by order dated 31.3.2011, the application under section 11 of the Act was allowed and Mr. Ketan Parekh, Advocate, was appointed as arbitrator. The learned designate held that a dispute raised by Vijayaben Kanji Ashra, grandmother of the parties, claiming a share in the second respondent firm as the legal heir of Kanji Pitamber Ashra, was the subject matter of an application under section 11 of the Act in Arbitration E
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- A Application No.161/2010 and in that petition, by consent of all parties, Mr. Ketan Parekh had already been appointed as arbitrator; and that therefore, it will be appropriate to appoint the said Mr. Ketan Parekh as the Arbitrator and leave open the question whether the two subsequent partnership deeds had
- B been executed by the appellant or not, for the decision of the arbitrator.

7. The said order is challenged in this appeal by special leave. The appellant submitted that this Court has repeatedly held that the the Chief Justice or his designate will have to

C decide the issue relating to the existence of an arbitration agreement before referring the dispute between the parties; and that where serious questions of fraud, forgery and fabrication of documents have been made out, the Chief Justice or his

D designate should not appoint an arbitrator. Learned counsel for the appellant made it clear that if the first respondent wanted appointment of an arbitrator as per the arbitration clause contained in the partnership deed dated 12.6.1988 and wanted the disputes to be resolved in terms of the said partnership deed, the appellant would not have any objection for

E appointment of an arbitrator. He submitted that appellant's objection was to appoint an arbitrator under clause 12 of a forged and fabricated deed dated 19.5.2000 execution of which had been denied by him. Therefore, the following question arises for consideration in this appeal:

F "Where the arbitration agreement between the parties is denied by the respondent, whether the Chief Justice or his designate, in exercise of power under section 11 of the Act, can appoint an arbitrator without deciding the question

G whether there was an arbitration agreement between the parties, leaving it open to be decided by the arbitrator?"

8. The question is covered by the decisions of this Court in *S.B.P. & Co. vs. Patel Engineering Ltd.* [2005 (8) SCC 618] and *National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd.* H [2009 (1) SCC 267]. In *S.B.P.& Co.*, a Constitution Bench of

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this court held that when an application under section 11 of the Act is filed, it is for the Chief Justice or his designate to decide whether there is an arbitration agreement, as defined in the Act and whether the party who has made a request before him, is a party to such an agreement. The said decision also made it clear as to which issues could be left to the decision of the arbitrator. Following the decision in *S.B.P. & Co.*, this court in *National Insurance Co. Ltd.* held as follows :

“17. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.* This Court identified and segregated the preliminary issues that may arise for consideration in an application under section 11 of the Act into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

17.1) The issues (first category) which Chief Justice/his designate will have to decide are:

- (a) Whether the party making the application has approached the appropriate High Court.
- (b) *Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement.*

17.2) The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

- (a) Whether the claim is a dead (long barred) claim or a live claim.
- (b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual

A rights and obligation or by receiving the final payment without objection.

17.3) The issues (third category) which the Chief Justice/ his designate should leave exclusively to the arbitral tribunal are :

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(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

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(ii) Merits or any claim involved in the arbitration."

(emphasis supplied)

9. It is clear from the said two decisions that the question whether there is an arbitration agreement has to be decided only by the Chief Justice or his designate and should not be left to the decision of the arbitral tribunal. This is because the question whether there is arbitration agreement is a jurisdictional issue and unless there is a valid arbitration agreement, the application under section 11 of the Act will not be maintainable and the Chief Justice or his designate will have no jurisdiction to appoint an arbitrator under section 11 of the Act. This Court also made it clear that only in regard to the issues shown in the second category, the Chief Justice or his designate has the choice of either deciding them or leaving them to the decision of the arbitral tribunal. Even in regard to the issues falling under the second category, this court made it clear that where allegations of forgery or fabrication are made in regard to the documents, it would be appropriate for the Chief Justice or his designate to decide the issue. In view of this settled position of law, the issue whether there was an arbitration agreement ought to have been decided by the designate of the Chief Justice and only if the finding was in the affirmative he could have proceeded to appoint the Arbitrator.

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10. Learned counsel for the first respondent submitted that the appellant has already agreed for the appointment of Mr. Ketan Parekh as the arbitrator in the application filed by their grandmother under section 11 of the Act, with respect to her claim for a share in the firm; and the dispute between the two brothers also being in regard to the extent of the shares in the firm, it would be proper to have it decided by the same arbitrator. Disagreeing with the said submission, learned counsel for the appellant submitted that his grandmother's claim was with reference to the partnership deed dated 12.6.1988 and as the said deed contained an arbitration agreement, he had agreed for appointment of an arbitrator. He submitted that merely because he had consented for appointment of an arbitrator in regard to the deed dated 12.6.1988, and had expressed confidence in the arbitrator, it does not mean that he should agree for arbitration even where arbitration was claimed in pursuance of a provision contained in a forged and fabricated document, which was materially different from the deed dated 12.6.1988.

11. It is well settled that an arbitrator can be appointed only if there is an arbitration agreement in regard to the contract in question. If there is an arbitration agreement in regard to contract A and no arbitration agreement in regard to contract B, obviously a dispute relating to contract B cannot be referred to arbitration on the ground that contract A has an arbitration agreement. Therefore, where there is an arbitration agreement in the partnership deed dated 12.6.1988, but the dispute is raised and an appointment of arbitrator is sought not with reference to the said partnership deed, but with reference to another partnership deed dated 19.5.2000, unless the party filing the application under section 11 of the Act is able to make out that there is a valid arbitration clause as per the contract dated 19.5.2000, there can be no appointment of an arbitrator.

12. The learned counsel for the first respondent next submitted that if the Chief Justice or his designate is required

A to examine the allegations of fabrication and forgery made by
a party in regard to the contract containing the arbitration
agreement, before appointing an arbitrator under section 11 of
the Act, the proceedings under the said section will cease to
be a summary proceedings, and become cumbersome and
B protracted, necessitating recording of evidence, thereby
defeating the object of the Act. In our considered view this
apprehension has no relevance or merit. Existence of a valid
and enforceable arbitration agreement is a condition precedent
before an arbitrator can be appointed under section 11 of the
C Act. When serious allegations of fraud and fabrication are
made, it is not possible for the Court to proceed to appoint an
arbitrator without deciding the said issue which relates to the
very validity of the arbitration agreement. Therefore the fact that
the allegations of fraud, forgery and fabrication are likely to
involve recording of evidence or involve some delay in
D disposal, are not grounds for refusing to consider the existence
of a valid arbitration agreement.

13. The apprehension that such contentions are likely to
be raised frequently to protract the proceedings under section
E 11 of the Act or to delay the arbitration process, thereby
defeating the purpose of section 11 of the Act is also without
basis. Where agreements have been performed in part, such
a contention will not be entertained. It is only in a very few cases,
where an agreement which had not seen the light of the day is
F suddenly propounded, or where the agreement had never been
acted upon or where sufficient circumstances exist to doubt the
genuineness of the agreement, the Chief Justice of his
designate will examine this issue. This course has repeatedly
held that on the ground of termination, performance or
G frustration of the contract, arbitration agreement cannot be
avoided. The legislature has entrusted the power of
appointment of an arbitrator to the holders of high judicial offices
like the Chief Justice or Judge of the Supreme Court/High
Court, with a view that they can identify and effectively deal with
H false or vexatious claims made only to protract the proceedings

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or defeat arbitration. If a party is found to have falsely contended that the contract was forged/fabricated, the Chief Justice or his designate may subject such part to heavy costs so that such false claims are discouraged. Be that as it may. A

14. We therefore allow this appeal, set aside the order of the High Court appointing an arbitrator and remit the matter to the High Court for deciding the questions whether the deed dated 19.5.2000 was forged or fabricated and whether there is a valid and enforceable arbitration agreement between the parties. Nothing stated herein shall be construed as expression of any opinion on the merits of the case. B
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Appeal allowed.