NEUTRAL CITATION NO: 2023/DHC/000376

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

% **Reserved on : 1st December, 2022**
Pronounced on: 18th January, 2023

\+ ARB.P. 137/2019, CRL.M.A. 1480/2021, I.A. 18203/2019, I.A. 1618/2020, I.A. 1619/2020 & I.A. 6083/2022

M/S SHYAMJEE PREPAID SERVICES ..... Petitioner

Through: Mr. Surender Gupta and Mr. Gaurav Saini, Advocates

versus

M/S TOP STEELS AND MRS. RENU DEVI & ANR.

..... Respondent/ Applicant

Through: Mr. Sunil K. Jain, Advocate for R-1/Applicant
Mr. Vivek K. Tandon, Mr. Anil K. Aggarwal, Ms. Nitu Yadav and Ms. Prerna Tandon, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

REVIEW APPLICATION NOS. 529/2019, 53/2020, 54/2020 &1619/2020

1. The instant review petitions under Section 114 read with Section 151 of the Code of Civil Procedure, 1908 have been filed on behalf of the partners of the respondent-firm seeking review of the order dated 2nd September, 2019 and consequently praying for an order cancelling the

appointment of Sole Arbitrator vide Order dated 2nd September, 2019 in the captioned matter.

2. Learned counsel for the respondent-firm argued that the petitioner-firm herein did not approach this Court with clean hands & mind and thereby, obtained the order dated 2nd September, 2019 for appointment of the arbitrator in reference to an arbitration clause in the Agency Agreement to which the petitioner firm is not a party. It is argued that the impugned order, dated 2nd September, 2019, clearly demonstrates that petitioners were kept in the dark with respect to appointment of the arbitrator. It is also submitted that the respondents / applicant did not receive any notice in accordance with Section 21 of Arbitration and Conciliation Act, 1996 **(hereinafter referred to as "the Act, 1996")** invoking the arbitration clause, nor were they added as parties in the aforementioned Arbitration Petition. Upon receiving notification from the Sole Arbitrator, the respondents / applicants learned for the first time of the claims and the Arbitrator appointed.

3. Learned counsel appearing on behalf of respondent-firm/applicant submitted that both the firms, which are the parties to the Agency Agreement containing the arbitration clause, have been dissolved and thus, the petitioner firm herein, being a new firm, lacks legal status and *locus standi* to invoke the arbitration clause.

Facts of the Case

4. The following are the events that caused the respondent-firm to file the present application for review:

i. The petitioner firm i.e. M/s Shyamjee Prepaid Services is a partnership firm, duly registered with the registrar of firms having

its Registered office at B-1-C/51A, Janakpuri, New Delhi -110058, is a trader who imports hot-rolled steel wires in coils, rods, thermax bars, M.S. ingots, M.S. billets, and other forms.

ii. The respondent, a partnership firm, is a manufacturer of hot-rolled steel wires in coils, rods, Thermax bars, M.S. ingots, M.S. billet, and other products utilized in its plant having its registered office at DC-256, Town Samalkha, Ward No.3 Padav Mohalla, Distt Samalkha, Panipat (Haryana)-132101.

iii. The parties executed an agreement dated 27th October, 2014 whereby the petitioner was appointed to be the respondent's agent in the State of Haryana to market the products that are hot Rolled steel wires in coils, rods/ thermax bars /M.S. ingot /M.S. billet etc. in accordance with the said agreement.

iv. According to the terms and conditions of the signed agreement dated 27th October, 2014, it was agreed that the petitioner firm would provide the material to the respondent firm, so that they may sell and dispose of the petitioner's goods for the highest profit. Additionally, it was agreed that the respondent would deliver the unsold products and commodities to the petitioner prior to the agreement's expiration or cancellation. It was further agreed that the statement of account would be periodically reconciled by both parties.

v. According to clause 11 of the agreement dated 27th October 2014, the respondent was required to pay a commission of Rs. 50/- per metric tonne on the sale of hot rolled steel wire rods, thermax bars, M.S. ingots, M.S. billets, etc. It was also agreed that the respondent

was not permitted to make purchases for and on behalf of the petitioner or to pledge the firm's credit in any other way under clause 12 of the agreement. It was also agreed that the respondent would not sell the petitioner business's goods and commodities, nor would it make any claims or provide any guarantees that were not included in the terms and conditions that the petitioner firm has periodically released.

vi. Further, it was agreed upon in accordance with clause 16 of the contract that any party may terminate the agreement of 27th October, 2014, not earlier than the expiration of four months, by giving the other party a written notice 30-days prior.

vii. The agreement also comprised of an arbitration clause i.e. clause 18, which provides that courts in Delhi shall have authority to try and adjudicate any disputes between the parties and that any issue arising between the parties shall be submitted to arbitration in accordance with the rules of the Act, 1996.

viii. It was submitted by the Petitioner that material was delivered by the petitioner-firm to the respondent-firm for sale during the duration of the agency arrangement, and the petitioner received payments in exchange for the supplies as described below. This left a balance of Rs. 9,67,16,507.39 that was owed to and receivable from the respondent firm.

ix. It is submitted that despite the petitioner firm's repeated requests, the respondent firm has not paid the outstanding balance to the petitioner firm nor approached them to address their complaints of not being paid for the material received, instead, they raised the

disputes in an effort to avoid making the payment on fictitious and baseless grounds.

x. It has been submitted on behalf of the petitioner firm that due to daily quarrels and disputes between the parties, the erstwhile partner of the Petitioner firm, Mr. Vinod Kumar Goel committed suicide.

xi. In view of the foregoing facts, the petitioner firm was therefore constrained to invoke the arbitration clause vide legal notice dated 12th December, 2018. Awaiting the reply of respondent firm, the petitioner firm came before this court by virtue of Section 11 of the Act, 1996.

xii. Keeping in view the submissions made by the learned counsels appearing on behalf of the parties, the predecessor bench of this Court vide order dated 2nd September, 2019 appointed the sole arbitrator in the captioned Arbitration Petition. The relevant paras of the said order are reproduced hereunder:

> *"2. The arbitration agreement between the parties is contained in clause 18 of the agreement dated 27th October, 2014. The petitioner invoked the arbitration agreement by notice dated 12th December, 2018.*
>
> *3. Learned counsel for the respondent does not dispute the existence of the arbitration agreement as well as the notice of invocation. It is submitted that the respondent's firm dissolved on 02nd September, 2016 and the petitioner should have impleaded all the partners namely Renu, Manju Devi and Jai Prakash.*
>
> *4. Learned counsel for the petitioner submits that he will implead all the partners of the firm in the statement of claim before the arbitration.*

> *5. The application is allowed and Justice Veena Birbal, former Judge of this Court is appointed as a sole arbitrator to adjudicate the claims and counter claims of the parties. All the objections of the respondent shall be considered by the learned arbitrator in accordance with the law."*

5. Being aggrieved by the said order the respondent firm through its partners has filed the present application for review.

Submissions by the Respondent/ Applicant

6. It has been submitted by the learned counsel on behalf of the respondent / applicant that the petition filed by the petitioner firm under section 11 of the Act, 1996, herein is *prima facie* not maintainable. To back the said contention, it has been submitted that the aforementioned Agency Agreement was executed on 27th October, 2014 between the erstwhile partners of the respective firms. It is further submitted that since the Petitioner firm consisted of only two partners i.e. Mr. Saurabh Gupta and Mr. Vinod Kumar Goel, the petitioner firm in line with Section 42 (c) of the Indian Partnership Act, 1932 **(hereinafter referred to as "the Act, 1932")** dissolved automatically with the demise of Mr. Vinod Kumar Goel.

7. In support of his arguments, learned counsel appearing on behalf of respondent herein has relied upon the judgments passed by the Hon'ble Supreme Court titled as ***C.I.T., M.P vs. Seth Govindram Sugal Mills*** reported as ***AIR 1966 SC 24*** and ***Mohd. Laiquidding & Ors. vs. Kamala Devi Misra (Dead) by L.Rs. & Ors.*** reported as ***(2010) 2 SCC 407***. According to the said argument, the Hon'ble Supreme Court has ruled in both cases that because a partnership is solely a contractual arrangement between two people and not a question of heritable status, it terminates at

the death of one of the partners and does not continue. Furthermore, it has been ruled that in this situation, the surviving ex-partner may form a new partnership with the heirs of the deceased partner. However, this would be a new partnership and have no connection to the disbanded firm. It is submitted that on dissolution of petitioner firm, the erstwhile and surviving partner Mr. Saurabh Gupta constituted a new partnership firm in the same name inducting Smt. Vimla Goel as the second partner. It is further submitted that it is an admitted fact that respondent firm also dissolved in 2016 and a proprietorship firm in the same name was constituted by Sh. Rajeev Goel, one of its erstwhile partners.

8. It is adamantly asserted that the agency agreement containing arbitration clause between the parties was severed before the arbitration petition was even filed. The petitioner firm, which shares the same name as the disbanded firm but was recently formed, is unrelated to it and lacks any standing under the Agency Agreement to assert any claims emanating from it. In order to invoke the arbitration clause and request the appointment of the arbitrator, the Petitioner-firm lacks both *locus standi* and legal standing. It is further submitted that legal notice dated 12th December, 2018 invoking arbitration clause was issued after dissolution of petitioner firm, without disclosing the alleged fact. The aforementioned notice cannot be interpreted as having been issued on behalf of the dissolved business, a living former partner, or the legal heirs of a deceased former partner. Since a new firm with the same name was admittedly formed after the original petitioner firm was dissolved, the notice was unquestionably sent by and on behalf of the newly formed firm, which is not a party to the agency agreement that contains the

arbitration clause. As a result, the notice under section 21 of the Act, 1996 is erroneous and unenforceable.

9. Learned counsel appearing on behalf of respondent/applicant further submitted that in the case of ***Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.*** reported as **2017 (162) DRJ 412**, the Co-ordinate bench of this Court has ruled that for initiation of Arbitration, the respondents must have received the Section 21 Notice. Furthermore, Section 11(6) of the Act of 1996 does not apply because arbitration proceedings cannot begin without a valid notice of dispute being sent and received by the Claimant and Respondent Parties, respectively. It is argued that there was no notice under Section 21 given or received by, or on behalf of, any party to the Agency Agreement's second party in the present case. Secondly, the notice was in any case sent to the incorrect address for the second party. Thirdly, a man named Ram Dhan (Munak Wale), who was not a partner of the disbanded M/s. Top Steels i.e. the respondent-firm, the second party to the agency agreement, was the target of the claim. As a result, the notice is void and unenforceable, and arbitration cannot be said to have initiated as a result. It is also argued that in accordance with Section 19(2) of the Act 1932, a firm's partners do not automatically have the right to refer issues pertaining to its business to arbitration.

10. Learned counsel for the respondent has further relied upon the judgment passed by this Court in the case of ***NSIC Limited vs. Punjab Tin Printing & Metal Ind.*** reported as **ILR (1979) I Delhi 381**. He submitted that it has been held that under Section 19(2) of the Act, 1932 a partner who has no implied authority to submit dispute relating to

partnership firm to arbitration unless agreed to the contrary. Further, it has been held that since there cannot be any reference to arbitration in absence of an agreement to refer, the word 'submit' used in the Section 19(2) includes 'agreement to refer' besides 'actual reference'. In view of Section 19(2), it is essential that either all partners agree to refer the dispute to arbitration, or they shall expressly authorize one partner to so act. The partner who alone signed the agreement was therefore, not competent to agree to refer the disputes to arbitration.

11. Learned counsel appearing on behalf of respondent/ applicant submitted that Mr. Saurabh Gupta, representing the newly formed firm, presented a false declaration before the learned sole arbitrator, alleging that the former partnership firm, M/s Shyamjee Prepaid Services, through its former partner Mr. Saurabh Gupta, invoked the arbitration provision included in the agency agreement. In light of the facts and circumstances, it is argued that the order obtained by the petitioner in this case by misleading the Court and the order issued by this Court are contrary to certain provisions of the Act, 1932 and also disregard the fact that both firms were dissolved before the date of the Section 21 notice. Consequently, the applications for prompt review may be allowed.

Submissions by the Petitioner/ Non-Applicant

12. *Per contra*, learned counsel for the petitioner/non-applicant said that the current review petitions/applications are filed by the respondent/ applicant with ulterior purposes and in bad faith. In the instant applications, it is contended that no basis exists for a review of the impugned order dated 2nd September, 2019 passed by this Court in the arbitration petition. It is further argued that it is a well-established legal

principle that the remedy of review is a legislative remedy, and if a statute is silent about the remedy of review, it cannot be inferred with and therefore, cannot be entertained.

13. For strengthening his arguments, he has relied upon the judgment passed by the Hon'ble Supreme Court in the case of ***Grindlays Bank Ltd vs. Central Government Industrial Tribunal*** reported as ***AIR 1981 SC 606***. It was decided that the jurisdiction to conduct a review is not one that is inherently conferred by the Constitution, but rather must be granted by legislation either expressly or by necessary inference. He has also placed reliance on the judgment passed by the Hon'ble Supreme Court titled as ***Kapra Mazdoor Ekta Union vs Management Of Birla Cotton Spinning And Weaving Mills Ltd; 2005 (13) SCC 777***, in which it was ruled that when a court, or for that matter, any judicial authority, exercises its jurisdiction to render a judgement or order on the basis of merit, its judgement or order can only be reviewed on the basis of merit if the court, or judicial authority, is endowed with the power of review by express statutory provision, or by necessary implication. In light of the aforementioned judgements, it is argued that it is established case law that a review of an order appointing an arbitrator under Section l1 of the Act, 1996 is not permissible in law. This is due to the fact that the statute in question, the Act, 1996, does not contain any provision as such regarding the review of an order appointing an arbitrator.

14. Learned counsel appearing on behalf of petitioner/ non-applicant submitted that on 27th October, 2014, representatives from the petitioner and the respondents' firms signed an agency agreement in which respondents committed to sell the petitioner firm's products. The

agreement also included an arbitration clause stating that any disputes would be settled by an impartial arbitrator. The parties' disagreement arose from the respondent's failure to pay the sum owed, prompting the filing of an application/petition for appointment of an arbitrator under Section 11(6) of the Act, 1996. The arbitration provision was activated by legal notice for invocation of arbitration dated 12th December 2018 whereby this Court appointed Justice Ms. Veena Birbal (Retired) to adjudicate the disputes arising between the parties. For respondent-firm and Sh. Rajiv Goel (Partner of respondent-firm), it is claimed that one Mr. Sahil Kakkar, Advocate appeared before this Court during the arbitration procedures. Learned counsel for the respondent firm, M/s. Top Steels, neither contested the arbitration agreement dated 27th October, 2014 nor notice dated 12th December, 2018 for invocation of arbitration clause.

15. It is submitted that the spine of present review petitions is that the petitioners / non-applicants, M/s. Shayamjee Prepaid Services consisted of only two partners, namely, Sh. Saurabh Gupta and Late Sh. Vinod Kumar Goel, and following the demise of Sh. Vinod Goel on 5th October, 2017, the partnership firm was dissolved by virtue of Section 42 (c) of the Act, 1932. Thus, the arbitration petition filed by the petitioner under Section 11(6) of the Act, 1996 is not maintainable because the petitioner, as of the filing date, was not a party to the agreement dated 27th October, 2014 that was originally signed between the petitioner M/s. Shaymjee Prepaid Services (through partner Sh. Saurabh Gupta) and the respondent M/s. Top Steels; as a result of the passing away of Sh. Vinod Goel, it is submitted that the plea taken in the applications for review is not tenable

as the arbitration petition was filed in the name of the same firm, namely, M/s. Shyamjee Prepaid Services which had entered into agreement dated 27th October 2014 with the respondent M/s. Top Steels. It has further been submitted that there is no material evidence on the record to establish the fact that the arbitration petition was filed by a new or different firm other than M/s. Shyamjee Prepaid Services which consisted of Sh. Saurabh Gupta and Sh. Vinod Kumar Goel, who were the partners and the arbitration petition filed is fully covered under Section 69 (3) (a) of the Act, 1932 read with Order XXX, Rule 3, *Proviso* of the Civil Procedure Code, 1908.

16. Learned counsel appearing on behalf of non-applicant/petitioner submitted that the dissolved firm has a right to realize and recover the amount due from the 3rd party as well as from one of the partners under Section 69(3)(a) of the Act, 1932. He has relied upon the judgment passed in the case of ***Shea Dutt V/s Pushi Ram*** reported as **AIR 1947 All 229**, wherein it was observed that "any right or power to realise the property of a dissolved firm under Section 69 (3) (a) includes the right to recover from the third party as well as from one of the partners." Further, in the case of ***Sri Baba Commercial Syndicate & Anr vs. Channamasetti Dasu & Anr.*** reported as **AIR 1968 AP 378**, the Hon'ble Andhra Pradesh High Court observed as follows:

> *"a. Sub-section (3) to Section 69 ofthe Partnership Act, 1932 provides certain exceptions to the general rule laid down in Sub-Sections (l) and (2) of Section 69 of the Partnership Act, 1932. It provides that a partner can enforce any right to sue for realizing the property of a dissolved firm. The word "property" is used in its widest sense and would inevitably*

> *include realization of the debt due to the partnership firm from a third party.*
> *b. On dissolution of the firm, the obligations of third parties to the firm may be enforced in the course of the winding up of the firm even though the firm was not a registered one. It can also be enforced if the firm is dissolved and by an arrangement the collection of the debts is entrusted to one of the partners or if one partner gives up his right and the remaining sole partner is the only partner left."*

17. Learned counsel appearing on behalf of petitioner / non-applicant relying on the judgements cited above submitted that in view of the settled law, the dissolved partnership firm is not barred to file a petition under Section 11(6) for appointment of the arbitrator for resolution of dispute that has arisen between the petitioner and respondent firms. Therefore, the argument of the respondent/ applicant that the dissolved partnership firm is barred from filing a petition for the appointment of an arbitrator in order to adjudicate conflicts taken in the review petition should be nipped in bud.

18. It is further submitted that the decision passed by the Hon'ble Supreme Court on 4th December, 2018, titled as ***Municipal Corporation of Greater Mumbai and Anr vs. Pratibha Industries Ltd. and Ors***, cannot come to the rescue of respondent/applicant since the dispute that was addressed in that decision concerned the appointment of an arbitrator in absence of an arbitration clause, mandating one to be present. As a consequence of this, the circumstances of the current case are different from the decision in question.

FINDINGS AND ANALYSIS

19. Heard learned counsel for the parties and perused the record.

20. During the course of arguments of the present applications for review, a preliminary objection to the maintainability was raised by the learned counsel for the applicant/ respondent.

21. In light of the submissions / arguments advanced on behalf of the learned counsel for the parties, this Court finds it appropriate to trifurcate the present applications into following issues:

Issues

i. **Whether dissolution of partnership firm will bar the erstwhile partner to invoke Section 11 of the Act, 1996, in case of a disagreement with a third party?**

ii. **Whether appointment of an arbitrator by the virtue of Section 11 of the Act, 1996 be reviewed? AND**

iii. **What is the scope of review and whether the present application seeking review of Order dated 2nd September, 2019 be allowed?**

Issue i: **Whether dissolution of partnership firm will bar the erstwhile partner to invoke Section 11 of the Act, 1996, in case of a disagreement with a third party?**

22. The learned counsel for the respondent / applicant argued that both of firms that were parties to the Agency Agreement that contained the arbitration clause had already been dissolved and that the petitioner-Firm, which is a new firm, does not have the legal status or locus standi to invoke the arbitration clause. Under this guise, the question that has been

brought before this court to be decided is whether or not, in the event that one of the partners in a partnership firm has passed away or resigned from their position, it is possible for remaining partner to make a claim against the partnership for debts that were incurred prior to the death or resignation of any partner, to a third party. To put it another way, if one partner dies or resigns, the partnership can be regarded as dissolved, and the other partners are barred from making any claim against it because it no longer exists as a legal entity. This is important for situations in which the other partners want to collect on a liability.

23. Section 19 of the Act, 1932 addresses a partner's implied authority as the firm's agent. Sub-section (1) provides that, subject to the rules of Section 22, the act of a partner committed in the ordinary course of business of the kind conducted by the partnership binds the firm. This authority of the partner to bind the partnership is known as "Implied Authority." It cannot be contested that in a continuing partnership firm, if one of the partners offers an acknowledgment, it would bind the firm since the partner has implicit power to sign such an acknowledgment as an agent of the firm, which is done to carry on the firm's business in the normal manner. A promise by one partner to pay debt owed by the firm undoubtedly binds the firm. In the case of ***Firm of Sarabhai Hathising and another vs. Shah Ratilal Nathalal, Share Broker and others***, **AIR 1979 Gujarat 110**, it was ruled that when a partner recognizes a debt on behalf of the firm, such an acknowledgment is lawful since the partner has the capacity to do so. This is the status of a firm with an ongoing collaboration. In the case of ***Babu vs. Dayambai and others,*** **AIR 1935 Bombay 357,** the Bombay High Court took the view that

acknowledgement made by a partner even after the dissolution of firm would bind other partners where creditors had no notice of the dissolution. While holding so, Court took into consideration provisions of Section 264 of the Contract Act which reads as under:

> *"Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution".*

24. Section 264 now stands repealed after the enactment of the Act, 1932. However, corresponding provision in the Act, 1932 is to be found in Section 45 his reads as under:

> *"Section 45- Liability for acts of partners done after dissolution.-(1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any to them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution:*
> *Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.*
> *(2) Notices under sub-section (1) may be given by any partner."*

25. Therefore, perusal of this section makes it abundantly evident that until public notice is made of the dissolution, even after the dissolution of a firm, partners continue to be responsible as such to third parties for any conduct committed by them that would have constituted an act of the firm if committed before the dissolution. Thus, until public notice of the dissolution is issued, other partners will continue to be accountable for

the conduct of a single partner, as if the act had been committed in a continuous partnership. Consequently, the notion of supposed continuation of "mutual agency" undergirds the norm which is subject to the exemption specified in the Section 45 proviso. However, if the creditor has knowledge of the partnership's dissolution or public notice had been made for dissolution, the acknowledgment of one partner cannot bind the other. If a partner is allowed to collect and pay the partnership's outstanding obligation, he can legitimately recognize the partnership's indebtedness.

26. It would further be relevant to peruse section 47 of the Act, 1932, which reads as follows:

> *"47. Continuing authority of partners for purposes of winding up.—After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners continue notwithstanding the dissolution, so far as may be necessary to wind up the affair of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise: Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent."*

This section makes it abundantly apparent that even after the dissolution of a Partnership firm, the partner's rights and responsibilities continue to accrue in order to complete the uncompleted transactions at the time of dissolution.

27. In order to deal with the present issue, it would also be relevant to deal with the "Doctrine of Severability" of an arbitration clause.

Conceptually and practically, arbitration law relies heavily on the idea of severability. This implies that the arbitration provision will remain in effect notwithstanding the contract's termination, breach, or invalidity, since it is treated as a stand-alone agreement. When one party alleges a complete violation by the other, severability assures that the contract is not rendered null and void. Instead, it continues in effect for the purpose of assessing the value of claims based on the breach, and the arbitration provision continues in effect for the purpose of defining the manner of settling such claims. The relevant sections of the Act, 1996 required for efficient adjudication of the dispute in question are reproduced hereunder:-

> *"16. Competence of arbitral tribunal to rule on its jurisdiction.—*
> *(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—*
> *(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and*
> *(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*
> *(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.*
> *(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*

> *(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.*
> *(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.*
> *(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."*
> *XXXXXXX*
> *40. Arbitration agreement not to be discharged by death of party thereto.—*
> *(1) An arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.*
> *(2) The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.*
> *(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person."*

A combined interpretation of Section 16(1)(a) and Section 40(1) of the Act, 1996 demonstrates unequivocally that the arbitration provision will continue in effect even after the death of a partner causes the dissolution of the partnership. The law regarding the severability of an arbitration agreement has been repeatedly determined. According to this philosophy, the arbitration clause should be recognized as an independent agreement and shall remain distinct from the main contract of which it is a part, surviving the main contract's termination, breach, and invalidity. Consequently, the arbitration agreement between the petitioner firm and

the respondent survives the dissolution of the petitioner firm, as claimed by the Respondent.

28. Thus in view of the statutory provisions, judgments and submissions made by the parties, it is imperative to note that a partnership firm is nothing more than a compendium of the partners' individual names. An act done by a firm is an act done by its partners. Moreover, for the purposes of winding up or dissolution, it is necessary to complete the entire transaction pending between the firm and third party. Consequently, the said firm shall not be barred from invoking the arbitration clause.

Issue ii: Whether appointment of an arbitrator by the virtue of Section 11 of the Act, 1996 shall be reviewed?

29. The Act 1996 does not contain any legislative provisions for reviewing the order recorded by the Court according to Section 11(6) of the Act, 1996. It has been implicitly recognized that unlike the Hon'ble Supreme Court, which is bestowed with a power of review under Article 137 of the Constitution of India, High Courts have no power of review under the Constitution. It is also well-established that a substantive review is distinct from a procedural review. The power of substantive review must be bestowed in a court by statute, and in the absence of such power, the court cannot engage in substantive review. However, every court and tribunal is obligated to conduct a procedural review of its judgement and, if a procedural error is discovered, to reverse the decision. A matter of process would include not serving the opposing party, proceeding *ex parte*, and pronouncing a verdict. An application bringing

to the notice of the Court that the party was not served and the Court proceeded *ex-parte* erroneously, would be an instance of the Court exercising procedural review jurisdiction. Similarly, a case being adjourned on a date notified to the parties, but erroneously noted by the Registry of the Court to be listed on an earlier date and as a result being shown in the cause list on a wrong date and the matter being dismissed in default, on an application filed to correct the error, would be a case of procedural review for the reason the error relates to one of procedure.

30. Where a Court takes wrong/erroneous seisin of a matter and proceeds to pass an order on merits, an application filed pleading that the Court had no jurisdiction to take cognizance of the matter would relate to a substantive review being sought because the pleadings constituting the review would relate to the substance of the nature of *lis* brought before the Court.

31. A word by way of clarification needs to be penned concerning the decisions of the Hon'ble Supreme Court in ***Municipal Corporation of Greater Mumbai vs. Pratibha Industries Ltd; (2019) 3 SCC 203***. The Pratibha Industries had offered bids as per tender notice dated 19th September 2008, clause 13 of the General Conditions of Contract specifically recorded that no arbitration was allowed and in case of disputes or differences the matter would be referred to the Municipal Commissioner of Greater Mumbai, whose decision will be final. Notwithstanding that, Pratibha Industries filed an application under Section 9 of the Act before the Bombay High Court praying for an interim injunction to restrain the Corporation from invoking the Bank Guarantees. Taking cognizance of the same on 23rd June, 2017 granting

ad-interim injunction next date fixed was 27th June, 2017 when the learned Single Judge proceeded to record that on the instructions of the Assistant Engineer of the Corporation, who was present in Court, Mr. Bharucha Senior Counsel for the Corporation stated that the Corporation has no objection to the suggestion made by Mr. Makhija the learned Counsel for Pratibha Industries that Justice V.M. Kanade (Retd.) be appointed as the Sole Arbitrator. In view of such statement Justice V.M.Kanade (Retd.) was appointed as a Sole Arbitrator to decide the disputes between the parties arising out of tender notice dated 19th September, 2008. On 3rd July, 2017, a Notice of Motion was filed on behalf of the Corporation pointing out to the Court that the agreement between the parties barred Arbitration and hence the prayer that the order dated 27th June, 2017 be recalled. By an order dated 12th September, 2017, referring to the applicable clause of the General Conditions of Contract the learned Single Judge observed that there being no arbitration clause at all, but-in- house proceedings, which could be taken at the behest of the parties, recalled the order appointing Justice V.M. Kanade (Retd.) as the Sole Arbitrator. Appeal filed under Section 37 of the Act by Pratibha Industries succeeded before the Division Bench on the reasoning that there being no power of review vested in the Court under the Act, the review application filed was not maintainable. The decision of the Division Bench was overruled by the Supreme Court on the reasoning that a Court of record has inherent jurisdiction to correct erroneous orders. Suffice it to record that the decision of the Supreme Court in Pratibha Industries' case was dealing with a situation where the learned

Single Judge had exercised power of a Court because it was passed in an application filed under Section 9 of the Act.

32. Prior to the amendment of the Act by the Arbitration & Conciliation (Amendment) Act, 2015 brought into force with effect from 1st January 2016, when in Sub-Section 4, 5 & 6 of Section 11 of the Act the words 'the Chief Justice or any person or institution designated by him' wherever they occur were replaced by the words the Hon'ble Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court', the position was that under the Act the procedure for appointment in case of Sub-Section 3 being applicable was to file an application before the Chief Justice of a High Court or any person or institution designated by him, in a case of domestic arbitration and before the Chief Justice of India or any person or institution designated by him in International Commercial Arbitration.

33. In the decision titled as ***S.B.P. & Co. vs. Patel Engineering Ltd. & Anr*; *(2005) 8 SCC 618***, a 7-Judge Bench of the Court held that the power under Section 11 of the Act was a judicial power. Furthermore, in its decision titled as ***Jain Studios Ltd. vs. Shin Satellite Public Co. Ltd.; (2006) 5 SCC 501,*** the position with respect to breadth and depth of judicial review of orders passed under section 11 of the Act, 1996 is no longer *res integra*. The court's jurisdictional ability to review the orders under section 11 of the Act, 1996 has no influence whatsoever on substantive concerns or questions touching upon the merits of the case, such as the jurisdiction of a Tribunal or the validity of evidence.

34. Though a judicial power, the power under Section 11, prior to the Act, 1996 being amended with effect from 1st January, 2016 was not the

power vested in the Court, but vested in the Chief Justice or his delegate. Power under Section 9 and Section 34 of the Act is in the Court, and the Court would be as defined under clause (e) of Sub-section 1 of Section 2 as it then existed in the Act. In the decision titled as ***State of West Bengal & Ors. vs. Associated Contractor; (2015) 1 SCC 32***, in paragraphs 16 and 17 the Supreme Court noted that

> *'it is obvious that Section 11 applications are not to be moved before the Court as defined but before the Chief Justice either of the High Court or of the Supreme Court as the case may be, or there delegates.'..... 'the decision of the Chief Justice or his designate, not being the decision of the Supreme Court or the High Court, as the case may be, has no precedential value, being a decision of a judicial authority which is not a Court of record'.*

35. Thus, in light of the judgments and submissions referred above, it is imperative that the position with respect to review is clear. Conclusively, judicial review of Section 11 orders is no longer res integra. Courts can examine orders with procedural irregularities such wrong hearing dates, no notification, etc. Furthermore, the Courts' competence to review Section 11 orders is unaffected by substantive concerns like a Tribunal's jurisdiction or the authenticity of evidence.

Issue iii: What is the scope of review and whether the present application seeking review of Order dated 2nd September, 2019 be allowed?

36. It has been settled time and again that the power of review is distinct from Court's power to hear appeals, i.e., the appellate jurisdiction. The power to review is not an inherent power. It must be

granted by legislation, either expressly or obliquely. The review is not a covert appeal either. The administration of justice cannot be impeded by legal formalities or procedural restrictions since justice is a virtue that cuts beyond all distinctions. Justice must flex before the law. Nothing would prevent the Court from correcting the error if it is determined that the error raised in the review petition was the consequence of an error and that the earlier decision would not have been rendered but for an incorrect assumption that in fact did not exist.

37. Review refers to a re-examination or reconsideration both literally and legally. It has as its fundamental concept the acknowledgment of human fallibility. However, in the legal system, the courts and even the law firmly support the finality of a judgement that has been reached in a lawful and correct manner. To address unintentional errors or injustice, exceptions have been carved out both statutorily and legally. The courts withheld this authority to prevent misuse of the legal system or a miscarriage of justice, even in the absence of any statutes or norms defining the situations under which it may review an order.

38. It has been settled by former Chief Justice Gwyer, authoring the judgment titled as ***Raja Prithwi Chand Lall Choudhary v. Sukrai; 1941 FC 1*** that a court cannot act as an appellate court for its own judgements, nor can it grant petitions for review based only on the claim that one of the parties believes the judgement has wronged him. If matters that the Court has already decided on could be reopened and reheard, we believe that this would be unacceptable and extremely detrimental to the public interest. There is a wise principle that should be followed by all courts of last resort, i.e., *Interest reipublicae quod sit finis litium.* (The State is

concerned that lawsuits should come to an end. The State's interest is served by the cessation of litigation.) Its rigorous adherence may occasionally put individual litigants through hardship, but that harm must be minimal as compared to the enormous harm that would inevitably ensue from casting doubt on the finality of such a Tribunal's rulings.

39. It is further relevant to point out the essential grounds that has been carved out by the Hon'ble Supreme Court in its judgment titled as ***Kamlesh Verma vs. Mayawati*** reported as ***(2013) 8 SCC 320.*** The relevant paragraph of the said judgment is reproduced hereunder:

> *"20.1. When the review will be maintainable:*
>
> *(i) Discovery of new and important matter of evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;*
>
> *(ii) Mistake or error apparent on the face of the record;*
>
> *(iii) Any Sufficient reason.*
>
> *The words "any other sufficient reason" have been interpreted in Chhajju Ram v. Neki[18] and approved by this Court in Moran Mar Basselios Catholics v. Most Rev. Mar Poulose Athanasius[19] to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd.[25]*
>
> *20.2When a review will not be maintainable:*
>
> *(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.*
>
> *(ii) Minor mistakes of inconsequential import.*
>
> *(iii) Review proceedings cannot be equated with the original hearing of the case.*
>
> *(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.*
>
> *(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for*

patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent of the face of record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

40. It is essential to take note of the fact that the respondent / applicant in this case did not contest the presence of the arbitration clause or the section 21 notice dated 12th December, 2019 that was served upon the respondent by the petitioner. In addition to this, despite the factum of death of the former partner Mr. Vinod Kumar Goel was mentioned in the petition by the petitioner, the respondent chose to keep silent with respect to the dissolution of the partnership on said account, and the respondent is presenting the said basis for the first time in the current review petitions. In light of the case laws cited above, the respondent / applicant has failed to point out any mistake that is obvious on the face of the record, which is required for a cause of review.

41. This court finds that only errors that are apparent on record may be reviewed and errors required to be discovered through a process of reasoning cannot. Consequently, the respondent/ applicant has failed to point out any ground for review in the instant applications and thus, the instant applications for review are liable to dismissed at threshold. Thus, there is no irregularity in order dated 2nd September, 2019 that requires intervention of this Court by way of review.

CONCLUSION

42. In accordance with the circumstances of the present case, the petitioner firm was dissolved since one of the members had passed away and other partners had been added in his stead. However, the partnership firm continued to operate under the same name following the addition of the new partners. Admittedly, there is no notice of the joint firm's dissolution. As a result, this Court is of view that the petitioner firm, which consisted of former partners Mr. Saurabh Gupta and Mr. Vinod Kumar Goel, has undoubtedly been dissolved by virtue of section 42(c) of the Act, 1932. However, the dissolution of the petitioner firm shall not have any influence on the pending transactions between the erstwhile partners of the petitioner and respondent firm.

43. At the time when this Court delivered its order appointing an arbitrator, all parties were present whereby, the respondent/applicant herein failed to express any objections. Therefore, this Court finds no basis to interfere with or reconsider the impugned order appointing the Sole Arbitrator, dated 2nd September, 2019, for review.

44. Taking into consideration the facts and circumstances as well as the discussions that have been presented so far, this Court finds that the respondent/applicant in the present case failed to establish adequate reasons for reviewing the order that was passed on 2nd September, 2019. Resultantly, all the applications for review are dismissed being devoid of any merit.

45. Pending applications, if any, also stand disposed of.

46. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

JANUARY 18, 2023
dy/ug