IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM. ARBITRATION APPLICATION NO. 31 OF 2022

KARTIK RADIA ...Applicant

Versus

M/s. BDO INDIA LLP AND ANR. ...Respondents

Mr. Amrut Joshi *a/w. Mr. Prashant Trivedi and Petal Chandok i/b Khushboo Jain, for Applicant.*

Mr. Gaurav Joshi, Senior Advocate *a/w. Mr. Jatin Pore, Sreeram VG, Karan Jain i/b DSK Legal, for Respondent No. 1.*

Mr. Mayur Khandeparkar *a/w.Mr. Jatin Pore, Sreeram VG, Karan Jain i/b DSK Legal, for Respondent No. 2.*

CORAM : SOMASEKHAR SUNDARESAN, J.

Reserved on :January 28, 2025

Pronounced on : March 4, 2025

JUDGEMENT:

1. Whether disputes between partners of a limited liability partnership ("**LLP**") and the LLP can at all be covered by the arbitration agreement contained in a limited liability partnership agreement ("***LLP Agreement***") to which the LLP is not a signatory, is the short question that has arisen in this Application filed under Section 11 of the *Arbitration and Conciliation Act, 1996* ("***Arbitration Act***").

2. For the reasons set out below, I reject the absolute proposition canvassed by the Respondents – that because an LLP is not a signatory to the LLP Agreement, it can never be a party to proceedings initiated under the arbitration clause in such agreement.

The Parties:

3. The Applicant, Mr. Kartik Radia ("***Radia***") is a former partner of BDO India LLP, which is Respondent No. 1 ("***BDO***"). Mr. Milind Kothari, the Managing Partner of the LLP is Respondent No. 2 ("***Kothari***"). Both Respondents present trenchant objection to arbitration initiated under the LLP Agreement dated August 1, 2014, on the premise that BDO is not a signatory to the LLP Agreement.

Issue for Consideration:

4. Radia has been expelled from the LLP. Radia's grievances relate to his manner of treatment by the Respondents – expulsion from BDO; and the alleged high-handed behaviour and misconduct by Kothari, the Managing Partner of BDO, in effecting the expulsion. Radia seeks to initiate arbitration, which has been repelled by the Respondents. Hence this Application.

5. The Respondents' opposition is in marginally varying tones. Mr. Gaurav Joshi, Learned Senior Counsel on behalf of BDO, asserts that Radia's

desire is to initiate arbitration proceedings against BDO, which is not a party to the arbitration agreement. Mr. Mayur Khandeparkar, Learned Counsel on behalf of Kothari, asserts that Radia's allegations and expressions of grievances are all squarely personal against Kothari. The invocation notice is issued to Kothari, and therefore, they both submit, the invocation too is not against BDO.

6. Both the Counsel seek to draw the Section 11 Court into this issue with a view to have this Application dismissed. Mr. Joshi seeks to draw a clear distinction between: (i) disputes among the partners of the LLP; and (ii) disputes between partners and the LLP. According to him, the jurisdiction of the arbitral tribunal created by the arbitration clause contained in the LLP Agreement can never extend to disputes that a partner may have with the LLP.

Arbitration Agreement:

7. Clause 23 of the LLP Agreement, which contains the arbitration agreement, is extracted below:

> *23.1* ***Any disputes, differences, claims and questions whatsoever*** *which* ***arise during the continuance of the LLP or afterwards****,* ***between the Partners or their respective representatives*** *or between any Partner or Partners* ***and the representatives of any other Partners*** ***relating to*** *this Agreement* ***or the construction or***

> ***application thereof or any clause or thing herein contained or any account****, valuation or division of assets, debts or liabilities to be made hereunder* ***or as to any act, deed or omission of any Partner*** ***or as to any other matter in any way relating to the Business or affairs of the LLP*** ***or the rights, duties or liabilities of any of the Parties under this Agreement****, shall in the first instance,* ***be attempted to be resolved amicably*** *between the disputing parties.*
>
> *23.2 In the event the parties to the dispute* ***are not able to resolve the same amicably within [30] Business Days from the date the dispute arose, the same shall be referred to the Executive Board*** *to be decided in accordance with this Agreement.*
>
> *23.3* ***If the Executive Board cannot resolve the dispute within 60 Business Days from the date such dispute was referred to it, the same shall be referred to arbitration in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996*** *or any statutory modification or re-enactment thereof for the time being in force.* ***One arbitrator each shall be appointed by the Partners in dispute, and the third arbitrator who shall be the chairperson****, shall be selected by the two party-appointed arbitrators. The arbitrators shall give a reasoned decision or award, including as to the costs of the arbitration, which shall be final and binding on the Parties.*
>
> ***[Emphasis Supplied]***

8. According to Mr. Joshi, Clause 23.1 is clear in its terms – it only covers disputes between partners, and in relation to the subjects set out in it. He would submit that the disputes at hand between Radia and BDO cannot be a dispute among partners of BDO. It is the LLP that has expelled Radia and therefore the dispute is between Radia and BDO. Therefore, he would submit,

this Section 11 Application is not maintainable since disputes between Radia and BDO are not arbitrable.

9. In my opinion, such an argument is flawed. Even a plain reading of the arbitration agreement would show that the subject matter of arbitration would include any construction or application of the LLP Agreement. It would also include any matter in any way relating to the business and affairs of BDO. It also includes interpretation of any rights, duties or liabilities of any partner of BDO. This would necessarily entail BDO being a necessary party in a dispute such as the one involved in the matter at hand.

Statutory Scheme – LLP Act:

10. Indian law governing privity of non-signatories to arbitration agreements is well developed now. The law declared in *Cox and Kings Ltd. Vs. SAP India Pvt. Ltd. – (2024) 4 SCC 1* is not being extracted here, to avoid prolixity. Suffice it to say, that the facts at hand do not even need one to look for any inter-connected agreements or multiple agreements relating to the same transaction. An LLP is not a "third party" to an LLP Agreement in the manner that the concept of "third parties" is conventionally understood. Far from being extraneous to the relationship between the parties to the LLP Agreement, the running of the LLP is the very subject matter of the LLP

Agreement. The conduct of the affairs of the LLP is what the partners agree upon in an LLP Agreement. An LLP is a body corporate. To incorporate an LLP, partners need to execute an incorporation document. It is a charter document akin to the Memorandum of Association in the case of companies. For an LLP to operate, its partners need to execute an LLP Agreement, which is what gives agency to the partners to operate the LLP. It is a charter document too, akin to the Articles of Association in the case of companies. The existence of an LLP Agreement is non-optional and a requirement of law. If partners do not have an LLP Agreement, or where the LLP Agreement is silent on any matter, the contents of the First Schedule of the *Limited Liability Partnership Act, 2008* ("***LLP Act***") would be deemed to be the LLP Agreement governing the LLP. The First Schedule to the LLP Act which is a deemed LLP Agreement is akin to the statutory articles contained in Table A in the Companies Act, 1956 and in Table F in the Companies Act, 2013.

11. Arguing that the LLP is a "third party" to the LLP Agreement is much like arguing that a company is a third party to its own Articles of Association. A company is duty-bound to act in accordance with the Articles of Association. So is an LLP duty-bound to act in accordance with the LLP Agreement. The body corporate is the very cause for the existence of such an agreement. To argue that there is no privity to the very document governing

the body corporate, and that too in a Section 11 Court, is hardly a sustainable argument. Radia is the *dominus litus* and it is for him to choose who to make parties in his claim.

12. Whether a non-signatory has accorded implicit consent to the arbitration agreement is a matter to be inferred through the acts, conduct and circumstances including relationship between the contracting parties, the commonality of subject matter and the involvement of such party in the performance of the very contract containing the arbitration clause. The very operation of the LLP during its existence is the common commercial objective of the parties to the LLP Agreement. Therefore, I have no hesitation in holding that there is no merit at all in the argument that despite the LLP being the very subject matter of the LLP Agreement, the LLP itself is extraneous to the LLP Agreement. This issue ought not to have been a matter that detained my attention when exercising jurisdiction under Section 11 of the Arbitration Act, since the consideration of such an issue would normally fall in the domain of the Arbitral Tribunal. The need for me to discuss this issue has arisen because of the stance of the Respondents that the arbitration agreement insofar as it relates to the LLP does not exist. The scope of my review for a Section 11 Application is to examine the existence of an arbitration agreement, and owing to the trenchant objection of the Respondents, it became necessary to rule on this issue.

13. Without meaning to put too fine a point, the submission that the LLP is an alien to the LLP Agreement is totally untenable as would be seen from the very scheme of the LLP Act. That an LLP is an entity that ***enjoys rights*** against, and ***owes obligations*** to its partners, is expressly set out in Paragraph 4(ii) of the Statement of Objects and Reasons to the LLP Act. Section 2(1)(o) of the LLP Act, which defines "limited liability partnership agreement" makes it clear that the subject matter of the LLP Agreement is the determination of the mutual rights and duties of the partners, and their rights and duties ***in relation*** to the LLP. In terms of Section 2(1)(q) of the LLP Act, which defines "partner", the very entry into and exit from an LLP is meant to be governed by the LLP Agreement. The same is the position emerging from Section 7(2)(ii) of the LLP Act; Section 22 of the LLP Act (governing entry of new partners into an LLP); and Section 24 of the LLP Act (governing cessation of a partner's role in the LLP).

14. If Mr. Joshi and Mr. Khandeparkar are right, in every arbitration relating to an LLP among its partners, the LLP itself which would be at the core of the dispute would have to be kept out of the proceedings. Such an approach would render the arbitration nugatory and ineffective. I am afraid the contentions of the Respondents is akin to the approach they would adopt in their day-to-day professional work (BDO's practice area includes the field of advisory services relating to fiscal statute and accounting). The regulatory

framework of the LLP Act and its interplay with the Arbitration Act, requires a diametrically opposite approach of adopting purposive interpretation. Where two views are possible, the view that furthers the objective of the legislation must be adopted. Under the LLP Act, the LLP Agreement is a mandatory statutory charter document governing the very LLP that the Respondents would wish me to hold as being a non-signatory and extraneous "third party". Under the Arbitration Act, arbitration is meant to be a speedy, effective and alternate mechanism for dispute resolution. Thanks to the approach adopted by the Respondents, a dispute that entailed an invocation notice as long ago as October 20, 2020 is still languishing in the Section 11 Court. Besides, it is trite law that whether a party is a necessary party or a proper party is really for the Arbitral Tribunal to decide while the scope of jurisdiction of the Section 11 Court is to examine the prima facie existence of the arbitration agreement, and the prima facie logic in the joinder of parties proposed by the Applicant.

Section 23 of LLP Act:

15. Mr. Joshi essentially relies on Section 23 of the LLP Act, which reads thus:

> *23. Relationship of partners.—*
>
> *(1) Save as otherwise provided by this Act,* ***the mutual rights and duties of the partners*** *of a limited liability partnership, and* ***the mutual rights and***

> ***duties of a limited liability partnership and its partners****, shall be* ***governed by the limited liability partnership agreement*** ***between the partners****, or* ***between the limited liability partnership and its partners****.*
>
> *(2) The limited liability partnership agreement and any changes, if any, made therein shall be filed with the Registrar in such form, manner and accompanied by such fees as may be prescribed.*
>
> *(3)* ***An agreement in writing made before the incorporation*** *of a limited liability partnership* ***between the persons who subscribe their names to the incorporation document*** *may* ***impose obligations on the limited liability partnership****, provided* ***such agreement is ratified by all the partners after the incorporation*** *of the limited liability partnership.*
>
> *(4)* ***In the absence of agreement as to any matter****, the* ***mutual rights and duties of the partners*** *and the* ***mutual rights and duties of the limited liability partnership and the partners*** *shall be* ***determined by the provisions*** *relating to that matter as are* ***set-out in the First Schedule****.*
>
> *[**Emphasis Supplied**]*

16. The very subject matter of Section 23 is the relationship of the partners. Mr. Joshi's submission is that every LLP has two options – of having an agreement only among the partners, and of having an agreement between the LLP and its partners. According to him, if an LLP has chosen the former i.e. of executing an LLP Agreement only among the partners, then there is a conscious choice of leaving the LLP out of the mix of rights and duties – thereby suggesting that the exclusion from arbitration would be a conscious choice. In my view, this is a fallacious distinction sought to be drawn, because it makes no difference to the issue. Even a bare perusal of the LLP Agreement in question, and the very scheme of the LLP Act would make such an absolute and sweeping proposition invalid. Indeed, Section

23(1) of the LLP Act may point to two types of agreement that may be executed. However, it would still make no difference for purposes of treating the LLP as an alien to the LLP Agreement. Evidently, the LLP Agreement contains various provisions that confer rights on the partners vis-à-vis the LLP and imposes obligations on the partners vis-à-vis the LLP. Mr. Joshi would submit that the existence of such provisions is irrelevant since, according to him, what is to be seen is whether the arbitration agreement was intended to bind the LLP too, or just its partners.

17. Section 23(4) of the LLP Act itself provides that if there is no agreement ***on any matter***, then the mutual rights and duties of the partners and the mutual rights and duties of the LLP and its partners, would be governed by the First Schedule. Item 1 and Item 14 of the First Schedule merit extraction:

> *1. The mutual rights and duties of the partners* ***and*** *the* ***mutual rights and duties of the limited liability partnership and its partners*** *shall be determined,* ***subject to the terms of any limited liability partnership agreement*** *or in the absence of any such agreement on any matter,* ***by the provisions in this Schedule****.*
>
> *14.* ***All disputes between the partners*** *arising out of the limited liability partnership agreement* ***which cannot be resolved in terms of such agreement shall be referred for arbitration*** *as per the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996).*
>
> *[**Emphasis Supplied**]*

18. Under Item 1 of the First Schedule the mutual rights and duties of the LLP and its partners, subject to the LLP Agreement, is governed by the provisions of the First Schedule. Item 14 of the First Schedule provides that all disputes among partners arising out of the LLP Agreement that cannot be resolved in terms of the LLP Agreement, shall be referred to arbitration under the Arbitration Act. This is another statutory indication that the subject matter of the LLP Agreement includes duties owed by partners to the LLP and also duties owed to the partners by the LLP. This would necessarily render the LLP a necessary party to the arbitration proceedings relating to the LLP's operations and governance, despite the LLP not being a signatory to the LLP Agreement. Therefore, even if there had been no arbitration clause at all in the LLP Agreement, the First Schedule would lead to an arbitration agreement being in existence in the eyes of law, for disputes among the partners. The analysis made above about the necessity of the LLP as a party to such proceedings and the absence of implications of the LLP not being a signatory to the arbitration agreement, would still be as valid even if the LLP Agreement had no arbitration clause at all. This is because under Item 14 of the First Schedule to the LLP Act, there would emerge a deemed and statutory arbitration agreement.

19. On the face of it, the dispute at hand relates to the expulsion of a partner from the LLP. Whether the Managing Partner alone was responsible

for it and other partners acquiesced in or approved of that decision is a subject matter of merits of the dispute. Whether the expelled partner's conduct warranted expulsion, is a question that would necessarily require examination of the injury, if any, occasioned to the LLP's interests by such partner's conduct for the drastic step of expulsion to be taken. Therefore, it would be simply impossible for this Court to reject this Application under Section 11 on the basis of the objections pressed into service by Mr. Joshi.

20. Mr. Khandeparkar attempts to throw another spanner in the works on the question of making a reference to arbitration. He would submit that the invocation notice dated October 10, 2020 is issued to Kothari and makes accusations about Kothari, which would show that the dispute is with the partner and not with the LLP. The upshot of this contention is that the LLP is not a necessary party to the dispute. Even a plain reading of the invocation notice addressed to Kothari would show that it was issued to him in his capacity as the Managing Partner. Therefore, to read it as a personal dispute of Radia with Kothari in his individual capacity is a misconceived contention. This argument has to be stated to be rejected. The dispute *inter alia* relates to expulsion of Radia. The expulsion is from the LLP. The cause for expulsion would necessarily have to relate to the injury allegedly occasioned to the LLP and to its partners, by the alleged conduct of Radia that led to the expulsion. The invocation notice may make allegations about the conduct of Kothari but

that would not render the LLP as being irrelevant to the dispute at hand. A notice issued to the Managing Partner of an LLP could well be regarded as a notice issued to the LLP. In my opinion, this is a frivolous objection that deserves to be rejected. In fact, Mr. Amrut Joshi, Learned Counsel for Radia is right in his contention that under Section 26 of the LLP Act every partner is an agent of the LLP. He also rightly shows that under Section 27(2) of the LLP Act, the LLP is liable for the acts of its partners.

21. There is yet another frivolous objection – that Radia is now an expelled partner while the arbitration agreement is only meant to resolve disputes among partners. The disputes relate to the expulsion of Radia from the partnership. The act of expulsion is itself pre-conditioned on his partnership in BDO, and therefore this submission is to only be stated to be rejected. That apart, as rightly pointed out by Mr. Amrut Joshi, on the face of the record, the allegation by Radia is that the expulsion is back-dated inasmuch as Radia issued a legal notice dated June 3, 2019, after the receipt of which, he was served with a letter of expulsion dated June 1, 2019. While these are matters of merits that only the Arbitral Tribunal can examine, the objection that disputes raised by a former partner cannot be amenable to arbitration is facetious to say the least, particularly when raised in such factual context.

22. One more objection from Mr. Khandeparkar is based on Radia having made reference to the injury to his image and to his defamation at the hands of BDO and Kothari. Defamation is not arbitrable, Mr. Khandeparkar would contend. Here again, what part of the claim is arbitrable and what the approach should be, squarely falls in the domain of the Arbitral Tribunal. The Arbitral Tribunal clearly has the power to rule on its own jurisdiction under Section 16 of the Arbitration Act. Holding up a Section 11 Application on such grounds deserves to be squarely rejected.

23. In these circumstances the objections raised by the Respondents to allowing this Section 11 Application are totally devoid of merit. Despite the existence of an arbitration clause in the LLP Agreement and in Item 14 of the First Schedule, the contention that the LLP itself is extraneous to the very LLP Agreement governing the LLP, in my opinion, is untenable and frivolous. Such objections have been raised evidently to delay and frustrate the commencement of arbitration proceedings.

24. Radia has nominated Justice (Retd.) C. M. Nayar as an arbitrator. The Respondents have refused to nominate an arbitrator, which failure to nominate has led to this Application. Consequently, this Application is ***finally disposed of*** in the following terms:

A] Justice (Retd.) Manoj Sanklecha, a former judge of this Court, and failing him (due to any conflict) Justice (Retd.) Gautam Patel, also a former judge of this Court, is hereby appointed as the nominee arbitrator of the Respondents. The Presiding Arbitrator shall be appointed by the two nominated Arbitrators;

B] A copy of this Order will be communicated to the aforesaid nominee arbitrator by the Advocates for Radia within a period of one week from today;

C] The nominee arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order; and

D] After the nominee arbitrators have selected the Presiding Arbitrator (which they are requested to do within a period of three weeks from the time the nominee arbitrator appointed hereby assumes office), the Arbitral Tribunal shall give directions to the parties on how to proceed further in the matter.

Shraddha

25. Needless to say, the costs of prosecuting this Application is a matter that the Arbitral Tribunal would take into account when dealing with the merits of the matter in the course of the arbitral proceedings.

26. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN J.]

Shraddha