

(2023) 1 Supreme Court Cases 597

(BEFORE M.R. SHAH AND KRISHNA MURARI, JJ.)

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a VGP MARINE KINGDOM PRIVATE
LIMITED AND ANOTHER . . . Appellants;

Versus

KAY ELLEN ARNOLD . . . Respondent.

Civil Appeal No. 6679 of 2022[†], decided on November 4, 2022

b **A. Arbitration and Conciliation Act, 1996 — Ss. 11(6) and 16 — Appointment of arbitrator — Dispute with respect to arbitrability — Reiterated, ordinarily to be left to arbitrator**

c — Objection to appointment of arbitrator on ground that in view of earlier award with respect to other two agreements, present dispute with respect to third agreement shall not be maintainable — Sustainability — Share subscription and shareholders agreement entered into between parties contained arbitration clause, in case of dispute between parties — Held, High Court ought to have allowed application under S. 11(6) and ought to have left issue on arbitrability of dispute between parties to arbitrator — Unless on the face of it, is found that dispute is not arbitrable and if it requires further/deeper consideration, dispute with respect to arbitrability should be left to arbitrator

(Paras 6, 8, 10 and 11)

Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549, *followed*
Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781; *Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689, *cited*

e **B. Arbitration and Conciliation Act, 1996 — S. 11(6) — Appointment of arbitrator — Denial on ground that proceedings at instance of respondent as minority shareholder for oppression and mismanagement are pending before NCLT — Whether proper**

f — Held, on pendency of such proceedings, application under S. 11(6) cannot be dismissed — It should be left to arbitrator to consider entire aspect — Dispute is with respect to share subscription and shareholders agreement which is altogether different from allegations of mismanagement and oppression at instance of minority shareholder initiated by respondent — Arbitrator to resolve dispute between parties — Corporate Laws — Companies Act, 2013, S. 241 (Paras 12 and 14)

VGP Marine Kingdom (P) Ltd. v. Kay Ellen Arnold, 2021 SCC OnLine Mad 16528, *reversed*

g Appeal allowed RM-D/69433/CV

Advocates who appeared in this case :

K.V. Viswanathan, Senior Advocate [Aditya Verma (Advocate-on-Record), Advocate], for the Appellants;

M. Yogesh Kanna (Advocate-on-Record), S.K. Srinivasan, Raja Rajeshwaran and Ms Gangadarsana P.G., Advocates, for the Respondent.

h [†] Arising from the Judgment and Order in *VGP Marine Kingdom (P) Ltd. v. Kay Ellen Arnold*, 2021 SCC OnLine Mad 16528 (Madras High Court, OP No. 304 of 2019, dt. 5-8-2021) [**Reversed**]

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Chronological list of cases cited *on page(s)*

1. (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549, *Vidya Drolia v. Durga Trading Corpn.* 599b-c, 599c, 599c-d, 601a, 601a-b a
2. 2021 SCC OnLine Mad 16528, *VGP Marine Kingdom (P) Ltd. v. Kay Ellen Arnold (reversed)* 598b-c, 598d-e, 599c, 600f, 601d-e
3. (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689, *Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc.* 599c
4. (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781, *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.* 599c b

The Judgment of the Court was delivered by

M.R. SHAH, J.— Feeling aggrieved and dissatisfied with the impugned judgment and order dated 5-8-2021¹ passed by the High Court of Judicature at Madras in OP No. 304 of 2019, by which, the High Court has dismissed the said application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) and has refused to appoint an arbitrator and refer the dispute to the arbitrator, the original applicant has preferred the present appeal. c

2. That the appellants herein approached the High Court under Section 11(6) of the 1996 Act by way of OP No. 304 of 2019 to appoint an arbitrator so that the Arbitral Tribunal can be constituted in terms of Clause 17.1.2 of the share subscription and shareholders agreement entered into between the appellants and the respondent at Chennai on 27-4-2016. By the impugned judgment and order¹ the High Court has dismissed the said application and refused to appoint an arbitrator mainly on the grounds that at the time when the application under Section 11(6) of the 1996 Act was filed in the year 2019, the matter was already referred to the Arbitral Tribunal with respect to the agreement dated 27-4-2016, subsequent amendment agreement dated 6-12-2017 and addendum agreement dated 28-5-2018 and also on the ground that the proceedings were pending before the National Company Law Tribunal (“NCLT”) initiated by the respondent for various acts of oppression and mismanagement as a minority shareholder. d
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3. Shri K.V. Viswanathan, learned Senior Advocate appearing on behalf of the appellants has submitted that in the present case there is a different share subscription and shareholders agreement dated 27-4-2016 which contains the arbitration clause in case of any dispute between the parties (Clause 17.1.2 of the share subscription and shareholders agreement). It is further submitted that in view of the dispute between the parties the appellants issued notice of termination of the second SHA (shareholders agreement). It is submitted that thereafter the appellants served a notice upon the respondent invoking the arbitration Clause 17.1.2. However, there was a failure on the part of the respondent to nominate an arbitrator which compelled and/or constrained the appellants approaching the High Court for appointment of an arbitrator under Section 11(6) of the 1996 Act. It is vehemently submitted by Shri K.V. g
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¹ *VGP Marine Kingdom (P) Ltd. v. Kay Ellen Arnold*, 2021 SCC OnLine Mad 16528

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a Viswanathan, learned Senior Advocate appearing on behalf of the appellants that the dispute between the parties is with respect to a separate shareholders agreement and the said dispute was the subject-matter of another arbitral proceedings. It is submitted that even the appellant was not a party to the earlier arbitral proceedings.

b 4. Now so far as the proceedings pending before NCLT initiated by the respondent with respect to the oppression and mismanagement as a minority shareholder is concerned, pendency of such proceedings cannot be a ground to not to refer the dispute between the parties and appoint an arbitrator.

5. Making the above submissions and relying upon the decision of this Court in *Vidya Drolia v. Durga Trading Corpn.*² (paras 147.9, 147.11 and 225), it is prayed to allow the present appeal.

c 6. The learned counsel appearing on behalf of the respondent relying upon the decisions of this Court in *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*³, *Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc.*⁴ and *Vidya Drolia*² and by supporting the impugned judgment and order¹ passed by the High Court and even relying upon some of the observations made by this Court in *Vidya Drolia*² has prayed to dismiss the present appeal.

d 7. It is submitted that all the three agreements are/were interlinked and therefore, in view of the earlier award with respect to other two agreements the present dispute with respect to the third agreement shall not be maintainable. Making the above submissions it is prayed to dismiss the present appeal.

e 8. Having heard the learned counsel appearing on behalf of the respective parties and considering the fact that share subscription and shareholders agreement dated 27-4-2016 entered into between the appellants and the respondent contains the arbitration clause in case of dispute between the parties arising out of the said agreement, we are of the opinion that the High Court ought to have allowed the application under Section 11(6) of the 1996 Act and ought to have left the issue on arbitrability of dispute between the parties to the arbitrator.

f 9. Clause 17 of the agreement which contains the dispute resolution process/arbitration clause reads as under:

“17. Dispute resolution

17.1. Dispute Resolution, Jurisdiction and Governing Law

g 17.1.1. The parties agree that this agreement shall be governed by and construed in accordance with the laws of India. If any question, dispute, controversy or claim shall at any time arise between the parties inter se or between a party(ies) and the Company, with respect to the validity, interpretation, implementation or alleged material breach of any provision of this agreement or the rights or obligations of the parties and the Company

h 2 (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549

3 (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781

4 (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689

1 *VGP Marine Kingdom (P) Ltd. v. Kay Ellen Arnold*, 2021 SCC OnLine Mad 16528

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hereunder, or regarding any question including the question as to whether the termination of this agreement by either party has been legitimate, (collectively, “the dispute”) then the parties shall attempt to settle such dispute amicably between them by reference to the management of the parties. In case of KEA, such management shall be represented by a Director, and in case of VGP, such management shall be represented by a Director.

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17.1.2. In the event that such management representatives have not agreed upon a decision within thirty (30) business days after reference of the matter to them, then either party may within thirty (30) business days after the first thirty (30) business days referenced above, give to the other party, a notice of intention to submit the dispute to arbitration under this Clause 17.

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17.1.3. Upon issuance of such notice, the dispute shall be referred to a board of three (3) arbitrators. Each party shall be entitled to appoint one (1) arbitrator and the two (2) arbitrators so appointed by the parties shall appoint the third arbitrator. The award of the arbitrators shall be final and binding on the parties and the Company.

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17.1.4. The seat of arbitration shall be Chennai and the language to be used in the arbitral proceedings in all instances shall be English.

17.1.5. The arbitration shall be governed by the provisions of the Indian Arbitration and Conciliation Act, 1996 (as amended from time to time and any statutory re-enactment governing arbitrations).

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17.1.6. The fees of the arbitrators shall be borne equally by the parties. All other costs and expenses of the arbitration shall be borne by the parties as the arbitrator may award.

17.1.7. Subject to Clauses 17.1.1 to 17.1.6, each party submits to the exclusive jurisdiction of the courts of Chennai. *Provided that*, the parties agree to submit to the exclusive jurisdiction of the competent courts as may be necessary for the enforcement of an arbitral award obtained in accordance with this Clause 17.

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17.1.8. Notwithstanding any other provision of this agreement, the rights and obligations of the parties under this clause shall survive termination of this agreement.” (emphasis supplied)

10. As observed hereinabove and from the impugned judgment and order¹ passed by the High Court it appears that the High Court has refused to appoint an arbitrator, inter alia, on the ground that at the time when the application was filed there were already arbitral proceedings pending between the parties and the award was passed and also on the ground that the proceedings were pending before NCLT at the instance of the respondent on the allegation of mismanagement and oppression which was filed by the respondent as minority shareholder.

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11. So far as the first ground is concerned, at the outset it is required to be noted that according to the appellant, the appellant was not a party to the said proceedings and the present share subscription and shareholders agreement dated 27-4-2016 is an independent agreement and it is the case on behalf of

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a the respondent that all the three agreements are interlinked and therefore, in view of the above declared award with respect to the other two agreements the present application shall not be maintainable. As per the decision of this Court in *Vidya Drolia*² unless on the face it is found that the dispute is not arbitrable and if it requires further/deeper consideration, the dispute with respect to the arbitrability should be left to the arbitrator. The decision of this Court in *Vidya Drolia*² is a three-Judge Bench subsequent decision in which the entire law on the scope and ambit of the Court at the stage of application under Section 11(6) of the 1996 Act has been dealt with and considered by the Court.

b 12. So far as the second ground on which the High Court has refused to refer the dispute between the parties and appoint an arbitrator, namely, that the proceedings at the instance of the respondent as minority shareholder for oppression and mismanagement are pending before NCLT is concerned, on the pendency of such proceedings the application under Section 11(6) of the 1996 Act cannot be dismissed. It should be left to the arbitrator to consider the entire aspect. The dispute is with respect to the share subscription and shareholders agreement which is altogether different from the allegations of mismanagement and oppression at the instance of minority shareholder initiated by the respondent.

c 13. In view of the above and for the reasons stated above the High Court has erred in dismissing the application under Section 11(6) of the 1996 Act and has erred in refusing to appoint an arbitrator with respect to the dispute between the parties with respect to the share subscription and shareholders agreement dated 27-4-2016. The impugned judgment and order¹ passed by the High Court is set aside and the application submitted by the appellants under Section 11(6) of the 1996 Act is hereby allowed.

d 14. Shri Justice K. Ravichandrababu Former Judge, Madras High Court is hereby appointed as an arbitrator to resolve the dispute between the parties arising out of the share subscription and shareholders agreement dated 27-4-2016. The issue with respect to the arbitrability of the dispute is left to be decided by the learned arbitrator. The fees of the arbitrator shall be decided by the learned arbitrator with the consent of the respective parties as per the Schedule to the 1996 Act as amended from time to time. The present appeal is allowed accordingly.

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g 2 *Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549

h 1 *VGP Marine Kingdom (P) Ltd. v. Kay Ellen Arnold*, 2021 SCC OnLine Mad 16528