(2010) 10 DEL CK 0288

In the Delhi High Court

Case No : Writ Petition (C) 2782 of 2010 and C.M. No. 5556 of 2010

Cadre Estate Pvt. Ltd. APPELLANT

Vs

Salochna Goyal and Others RESPONDENT

Date of Decision : 05-10-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 12, 12(3), 13, 13(4)
Constitution of India, 1950 — Article 226, 227
Foreign Exchange Management Act, 1999 — Section 35

Citation : (2010) 119 DRJ 457

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Ramji Srinivasan and Rajeev Saxena, for the Appellant; A.K. Singla Priya Kumar, for R-1, Rajiv Garg, for R-2, S.K. Pruthi, for R-3 and Ankit Shah, for R-4, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—There are two questions that arise for consideration in this petition. The first concerns the question of maintainability of this petition which challenges the order dated 18th December 2009 of a learned Arbitrator in an application filed by Respondent No. 1 u/s 17 of the Arbitration and Conciliation Act 1996 (''AC Act''). The second question, which arises if the petition is held to be maintainable, is as to who is a proper party to an arbitration proceedings?

Background Facts

2. This writ petition under Article 226 of the Constitution is by M/s Cadre Estate Private Limited (''CEPL'') which claims to have purchased a property bearing No. L-10, New Delhi South Extension Part-II, New Delhi admeasuring 495 sq. yards (''property in question'') on 31st December, 2008 for a consideration of Rs. 7.50 crores by virtue of a tripartite agreement executed between the Petitioner, Shri Saroj Kumar Bagaria (''Bagaria'') Respondent No. 2 herein and the Punjab National Bank (''PNB''), Respondent No. 3 herein in full and final settlement of

the claims of PNB against Respondent No. 2 under a One Time Settlement (''OTS''). The Petitioner claims that after the payment of Rs. 7.5 crores by the Petitioner on 31st December 2008 directly to the PNB a sale deed was executed with regard to the said property and duly registered in the office of Sub Registrar, Delhi. Upon taking possession of the property, the Petitioner claims to have commenced construction thereon. The Petitioner states that at that stage it received notice in a petition OMP No. 168/2009 filed by Respondent No. 1 Smt. Salochna Goyal (''Goyal'') in this Court u/s 9 of the AC Act.

3. In OMP No. 168/2010, Goyal arrayed Bagaria, PNB, CEPL and M/s Standard Chartered Bank (''SCB''), Respondent No. 4 herein, as party respondents. In the said petition Goyal stated that she had entered into an Agreement to Sell dated 30th September, 2008 with Bagaria in respect of the property in question for a total sale consideration of Rs. 9.45 crores. Admittedly, out of the said consideration she paid Rs. 95 lakhs to Bagaria as earnest money deposit (''EMD''). Goyal stated that she had recently come to know that Bagaria and the PNB had, in collusion with each other and in contravention of the order passed by the Debt Recovery Tribunal (''DRT''), disposed of the suit property to CEPL by a sale deed dated 30th December, 2008, thereby depriving her of her lawful rights in the Agreement to Sell dated 30th September 2008 entered into between her and Bagaria. Goyal drew attention to the Clause 12 of the agreement to sell dated 30th September 2008 whereby the parties had agreed that the disputes or differences between them arising out of the agreement shall be adjudicated through the arbitration of a sole Arbitrator. The appointment of the Arbitrator and the conduct of the arbitral proceedings were to be governed by the AC Act or any other enactment in force at the time of reference or the Award as the case may be. The prayer in the OMP No. 168/2009 filed u/s 9 of the AC Act was for an ad-interim order directing the Respondents to maintain status quo in respect of the property in question.

4. OMP 168/2009 was listed first before this Court on 31st March, 2009. On the said date a learned Single Judge of this Court passed the following order:

Notice.

Notice is accepted by Mr. Rajiv Garg, Counsel for respondent No. 1.

The petitioner in this petition u/s 9 of the Arbitration and Conciliation Act, 1996 made respondents No. 2, 3 and 4 as party to this petition who are not parties to the agreement to sell.

It is submitted by Counsel for the petitioner that the petitioner does not press these respondents No. 2, 3 and 4 as parties to this petition and their names may be deleted from the array of parties. Accordingly, names of respondents No. 2, 3 and 4 are hereby deleted from the array of parties.

Respondent No. 1 shall file reply to this petition within four weeks. Rejoinder thereto, if any, be filed two weeks thereafter.

List on 31st July 2009.

Till disposal of the instant petition, respondent No. 1 shall maintain status quo as far as its right in the property are concerned.

The petitioner shall be at liberty to seek other legal remedies available under law to protect her interest.

5. Resultantly, PNB, CEPL and SCB who were parties to the above Section 9 application as Respondent Nos. 2, 3 and 4 respectively, were dropped as parties by Goyal even while she was granted the liberty to seek other legal remedies under law to protect her interest.

6. On 1st April, 2009, Learned Counsel for Bagaria wrote to Goyal, inter alia, giving consent for the appointment of Justice K. Ramamoorthy as a sole Arbitrator to adjudicate upon the disputes between the parties.

7. It may be noticed at this stage that in the Section 9 AC Act application, Goyal stated that Bagaria had committed default in repayment of the loan borrowed by him from PNB and for which the property in question had been mortgaged to PNB. She stated that Bagaria entered into a full and final settlement with PNB on 29th May 2008 in terms of which Bagaria had to pay PNB Rs. 6.92 crores. Thereafter, PNB would have no lien over the suit property. It was stated that since Bagaria was unable to generate that amount, he entered into an Agreement to Sell dated 30th September, 2008 with Goyal agreeing to sell the property in question to her for Rs. 9.5 crores. In her Section 9 AC Act petition Goyal proceeded to state that she was subsequently surprised to learn of an order dated 20th October, 2008 passed by DRT in RC No. 263/2002 titled as Standard Chartered Bank v. Vishal Global Limited and Ors. attaching the property in question. Bagaria was the second Respondent in the above recovery claim before the DRT. Goyal stated that when she approached Bagaria, he assured her that the above attachment would stand vacated. On 29th December, 2008 the Recovery Officer DRT vacated the earlier attachment order dated 20th August, 2008 in an application filed in the said claim of PNB. The DRT clarified that the right of the Certificate Holder (CH) bank i.e. SCB was confined to sharing of surplus amount which PNB might realize in excess of its dues. It was further directed by the DRT that the exercise of realisation of the amount by PNB had to be transparent and to be ratified by the competent authority of the SCB. Goyal stated that on 29th December 2008 she received a notice from Bagaria asking her to deposit the balance sale consideration by 31st December 2008. According to Goyal, notwithstanding her reply of 30th December 2008 asking for a copy of the order of the DRT, Bagaria, and PNB acted in collusion and sold the property to CEPL on 31st December 2008.

8. To continue chronologically, it may also be noticed that certain applications were filed before the DRT in O.A. No. 410/2009 (which was a recovery claim by PNB against VTL (India) Limited, Bagaria and Canara Bank). One of the IAs was by SCB seeking to implead itself and another by SCB seeking impleadment of

CEPL as ''appropriate and necessary parties''. The PNB filed an IA citing the settlement arrived at between it and Bagaria and seeking to withdraw its claim petition. By an order dated 22nd June 2009 the DRT held that the sale deed dated 31st December 2008 executed by Bagaria in favour of CEPL was void. However, the question of refund of the sale consideration to CEPL was held by the DRT to be beyond its jurisdiction. Accordingly it was left to CEPL to claim its money from Bagaria through other appropriate legal remedies. The sale consideration was asked to be deposited with the PNB. The DRT declined to permit the PNB to withdraw its claim and restored its order of attachment of the property in question.

9. Thereafter the Section 9 AC Act petition, OMP No. 168 of 2009 was disposed of by this Court by an order dated 31st July 2009. After noticing that the disputes had been referred to arbitration and the order dated 22nd June 2009 passed by the DRT, this Court directed that Bagaria "shall maintain status quo in respect of his rights whatever are left in him in pursuance of the order of the DRT till the pendency of the proceedings before the Arbitrator."

10. Goyal thereafter filed a claim before the learned Arbitrator on 28th October 2009 along with an application u/s 17 AC Act for interim directions. Goyal arrayed Bagaria as Respondent No. 1, and CEPL, SCB and PNB as Respondent Nos. 2, 3 and 4 respectively in the arbitration proceedings. The main claim in the arbitration petition was for a decree of specific performance of the Agreement to Sell dated 30th September, 2008 between Goyal and Bagaria in respect of the property in question. The second relief was for declaration of the sale deed executed by Bagaria in favour of CEPL on 31st December, 2008 was void. In para 10 of the application u/s 17 it was averred:

10. Apprehending further breach of the Agreement to Sell, the applicant/claimant approached the Hon''ble Court for interim orders wherein the orders of maintaining status-quo in respect of the respondent No. 1 were passed on 31.03.2009. This order was made absolute by an order dated 31.07.2009 and the petition was disposed off in the light of the present Arbitral Tribunal having been constituted.

Goyal made no mention of the fact that by the order dated 31st March 2009 of this Court Goyal dropped CEPL as a party to the application u/s 9 AC Act.

11. Goyal''s claim was taken up by the learned Arbitrator on 18th December 2009, on which date Bagaria entered appearance through his counsel. Notice was then issued to Respondent Nos. 2 to 4, i.e. CEPL, SCB and PNB respectively. A separate order was passed by the learned Arbitrator in the Section 17 application for interim relief. The learned Arbitrator noted in the order dated 18th December, 2009:

The Ld. Counsel for the Claimant submits that even though the second respondent is not a party to the agreement for sale, as it is a subsequent purchaser, for the purpose of this arbitration, in law, the second respondent is to be deemed to be a party to the arbitration. Therefore, second respondent is bound by the ultimate outcome of the arbitration proceedings.

12. Thereafter the learned Arbitrator proceeded to pass an order restraining both Bagaria as well as CEPL from dealing with the property in question in any manner or putting up any construction or demolishing the existing structure or creating any sort of encumbrance by way of equitable mortgage or in any other form till further orders in the application u/s 17. This order has been challenged in the present petition by the CEPL inter alia questioning the very jurisdiction of the learned Arbitrator to issue notice to and restrain CEPL which was not a party to the arbitration agreement.

13. The Petitioner states that it learnt of the above restraint order only on 1st February, 2010 when a letter was sent to it by Learned Counsel for Goyal. The Petitioner states that it appeared before the learned Arbitrator on 19th February, 2010 and filed an application u/s 16 of the AC Act requiring the learned Arbitrator to rule on his jurisdiction as well as on the objections raised by the CEPL with respect to the existence and validity of the arbitration agreement.

14. It appears that the Petitioner also filed application under Sections 12 and 14 AC Act asking the learned Arbitrator to recuse himself. The Petitioner alleged that the learned Arbitrator was an interested party and ought not to adjudicate the dispute since he had in the past purchased a flat from Goyal''s brother-in-law, Sri Rajinder Kumar Goyal. The learned Arbitrator by an order dated 19th March 2010 rejected the above applications holding as under:

It is stated in the application itself that the flat was purchased in 2001. It is not stated anywhere in the petition that I am interested in any away in any of the companies in which the claimant or others are shareholders. Due to the above said reason, the application u/s 12 and 14 filed by Mr. Rajeev Saxena, Ld. Counsel for Respondent No. 2 is dismissed.

The Petitioner''s application u/s 16 AC Act was adjourned to 23rd April 2010 for arguments.

15. Meanwhile on 10th March 2010, the order dated 22nd June 2009 of the DRT was reversed by the Debt Recovery Appellate Tribunal (''DRAT'') in Appeal Nos. 208 and 209 of 2009 filed by Bagaria and the PNB. By the order dated 11th March, 2010 the DRAT held the settlement between Bagaria and the PNB to be lawful. The sale in favour of CEPL was held to be legal. The recovery proceedings instituted by the PNB before the DRT was dismissed as withdrawn in view of the settlement between the PNB and Bagaria.

Submissions of counsel

16. Mr. Ramji Srinivasan, learned Senior Counsel for CEPL submitted that the present petition under Article 226 of the Constitution against the assumption of jurisdiction by the learned Arbitrator against CEPL in general and the order dated 18th December 2009 of the learned Arbitrator restraining it from dealing with the

property in question was maintainable as there was no other efficacious remedy available to CEPL. To expect CEPL to wait for the outcome of the Section 16 AC Act application was not justified as the rejection of that application would offer no relief to CEPL. It would have to wait for the Award to challenge the assumption of jurisdiction of the learned Arbitrator against CEPL. Relying on the decisions in Anuptech Equipments (P) Ltd. v. Ganpati Co-operative Housing Society Limited 1999 (3) Arb LR 231 (Bom.), Unik Accurates Pvt. Ltd. v. Sumedha Fiscal Services Ltd. 2003(4) Raj 571 (Cal) and Archon v. Sewda Construction Co. 2004 Legal Eagle 2877 (Gau.) it was submitted that the powers of the High Court under Article 226 of the Constitution could not be whittled down even by Section 5 of the AC Act.

17. On merits, it was submitted by Mr. Srinivasan that having dropped CEPL as a party in the application filed by her u/s 9 AC Act before this Court, it was not open to Goyal to again array CEPL as a party to the arbitration proceedings filed subsequently. He pointed out that CEPL was not party to the agreement to sell dated 30th September 2008 between Bagaria and Goyal which contained an arbitration clause. The sale of the property in question by Bagaria to CEPL on 31st December 2008 was independent of the dispute between Bagaria and Goyal. Referring to Section 7 and Section 2(h) of the AC Act, it is submitted that CEPL is not a proper party to the arbitration proceedings. Mr. Srinivasan submitted that the law as regards proper parties to arbitration proceedings was settled. He referred to the decisions in Sandeep Kumar v. Master Ritesh 2006 (13) SCC 567 , Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, and Yogi Agarwal Vs. Inspiration Clothes and U and Others, .

18. Mr. A.K. Singla, learned Senior Counsel for Goyal submitted that whatever be the grievance of a party against the order of an Arbitrator, the remedy had to be worked out within the confines of the AC Act itself. Recourse could not be had to a petition under Article 226 to achieve indirectly a result that was expressly barred u/s 5 AC Act. CEPL having filed an application u/s 16 AC Act before the learned Arbitrator had to pursue that remedy and thereafter proceed in accordance with the AC Act for further relief. This petition was therefore premature in any event.

19. On merits it is submitted by Mr. Singla that whatever was possible for a plaintiff to seek as a remedy in a suit for specific performance, was available to her in the arbitration proceedings. Inasmuch as CEPL was claiming to be a bonafide third party purchaser of the property in question, it was a necessary and a proper party to the suit for specific performance and therefore to the arbitration proceedings. He referred to the decisions in Lala Durga Prasad and Another Vs. Lala Deep Chand and Others, , Dwarka Prasad Singh and Others Vs. Harikant Prasad Singh and Others, , Kafiladdin and Others Vs. Samiraddin and Others, and Brawn Laboratories Limited Vs. Fittydent International Gmbh and Another, .

Maintainability of the petition

20. The first issue to be considered is whether the present petition under Article 226 of the Constitution is maintainable against an order dated 18th December 2009 of the learned Arbitrator directing the notice to issue to the Petitioner, who is not a party to the arbitration agreement, and restraining the Petitioner from dealing with the property of which the Petitioner claims to be a bonafide purchaser?

21. The AC Act restricts the scope of interference by judicial authorities with arbitral proceedings. This legislative intent has been made express in Section 5 AC Act which reads as under:

5. Extent of judicial intervention - Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

22. Under Part I of the AC Act, interference by the Court is only to the extent permissible thereunder. Section 8 enables the Court before which an action is brought to refer parties to arbitration. A court can pass orders of an interim nature even before the commencement of arbitral proceedings. This is envisaged in the circumstances outlined in Section 9 AC Act. The power of the Chief Justice to appoint an arbitrator where any of the parties fails to appoint one despite an arbitration agreement is contained in Section 11. The grounds for challenging the appointment of an Arbitrator are set out in Section 12 and the challenge procedure is in Section 13 of the AC Act. However, Section 13(4) makes it clear that if a challenge procedure is not successful, the Arbitral Tribunal shall continue the arbitral proceedings and make an arbitral award.

23. A challenge to the jurisdiction of the Arbitral Tribunal including the existence or validity of the arbitration agreement is envisaged u/s 16(1) of the AC Act. Section 16(1)(b) clarifies that the decision of the Arbitral Tribunal that the contract is null and void "shall not entail ipso jure the invalidity of the arbitration clause". u/s 16(2) of the AC Act, the plea objecting to the jurisdiction of the Arbitral Tribunal should be raised by the objector not later than the submission of the statement of defence. However, a party shall not be precluded from raising such a plea merely because he has been appointed, or participated in the appointment of an Arbitrator. u/s 16(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. u/s 16(4) the Arbitral Tribunal can excuse the delay under Sections 16 (2) and (3) if it considers the delay justified. Section 16(5) states that whether the Arbitral Tribunal takes a decision rejecting the plea under Sections 16 (2) and (3), it shall continue with the arbitral proceedings and make an arbitral award. u/s 16(6) the party aggrieved by such an arbitral award may make an application for setting aside the award in accordance with Section 34.

24. Although a party may raise a challenge to the jurisdiction of the Arbitrator u/s 16(1) of the AC Act, if such challenge is unsuccessful, such party will have to

wait for the award to be made and then raise the plea again as a ground to challenge the award u/s 34 of the AC Act. This position is also reiterated in Section 37(2) AC Act. It provides the right of an appeal to the Court only where the Arbitral Tribunal upholds the objection to its jurisdiction u/s 16(2) or 16(3) of the AC Act. No appeal is provided where it rejects such objection. An appeal is provided u/s 37(2)(b) against an order of the Arbitral Tribunal granting or refusing interim relief u/s 17 of the AC Act. Consequently, the AC Act cannot be said to be silent on what happens if the plea of a party objecting to the jurisdiction of the Arbitrator is negatived by the Arbitral Tribunal. Section 16(5) read with Section 16(6) makes it clear that the aggrieved party has to wait till the award is passed by the Arbitral Tribunal before raising a challenge to the Award on the grounds outlined in Section 34 of the AC Act.

25. In Anuptech Equipments (P) Ltd. v. Ganpati Co-operative Housing Society Limited the facts were that the arbitral tribunal met on 18th July 1997 to decide to terminate the proceedings u/s 25(1) of the AC Act on the ground that without sufficient cause the claimant had failed to file its statement of claim in accordance with Section 23(1) of the AC Act. On that very date, the Petitioners there wrote a letter objecting to the appointment of one of the arbitrators as he was not duly qualified. The Award of the tribunal dated 1st August 1987 rejecting the plea of the Petitioner was also challenged in the writ petition. Meanwhile, the Petitioner had filed a separate petition in the High Court for the appointment of a suitable person as arbitrator. The Petitioner sought to invoke the jurisdiction of the High Court under Sections 12(3)(b), 13, 14, 15 and 24 of the AC Act. An objection was raised as to the maintainability of the writ petition. It may be mentioned here that the above writ petition was decided at the time when decision of the Supreme Court in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, had not been rendered. The learned Single Judge of the Bombay High Court analysed the provisions of the AC Act and held that although the arbitral tribunal was not subject to the supervisory jurisdiction of the High Court, a writ could still issue to it. It was further held that although one of the objects of the AC Act was to minimise the supervisory role of the Court, no party could be remediless. Since the High Court concluded that the arbitral tribunal was not properly constituted and therefore lacked jurisdiction, it was held that a defect in jurisdiction "strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of the parties."

26. The above decision is distinguishable on facts. It did not envisage a situation where the party had invoked Section 16 of the AC Act and invited the Arbitral Tribunal to rule on its own jurisdiction. The Bombay High Court therefore did not have the occasion to discuss the combined effect of Sections 16(5) and Section 16(6) in the context of the Arbitral Tribunal ruling on its jurisdiction.

27. In Unik Accurates Pvt. Ltd. v. Sumedha Fiscal Services Ltd., a learned Single Judge of the Calcutta High Court held that under Article 227 of the Constitution an Arbitral Tribunal was subject to the supervisory jurisdiction of the High Court

and, therefore, an order passed by an Arbitral Tribunal u/s 16 of the Act could be challenged before the High Court by way of a writ petition. However, having so held the High Court did not find any substance in the challenge to the order of the Arbitral Tribunal on merits. Consequently, the writ petition was dismissed on merits. Again this decision is distinguishable as the High Court was approached with a writ petition after the Arbitral Tribunal had ruled on its jurisdiction and not before.

28. In Archon v. Sewda Construction Co., the Gauhati High Court held that the mere existence of an alternative remedy by way of an appeal against the impugned order of the Arbitrator would not by itself be a bar to the High Court exercising its powers under Articles 226 and 227 of the Constitution. This decision is again distinguishable on facts. The question whether the jurisdiction under Article 226 could be exercised even when Section 16(6) read with Section 16(5) AC Act requires the aggrieved party to await the passing of the Award, was not considered by the Gauhati High Court.

29. The reliance by the learned Senior Counsel for the Petitioner on the decision of this Court in Union of India v. Classic Credit Ltd. decision dated 20th October 2008 in LPA No. 123/2008 is misplaced. Although it was held that a writ petition against the order of Foreign Exchange Appellate Tribunal would be maintainable, the said decision is no longer good law in view of the recent judgment of the Supreme Court in Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another, where it has been held that against any order of the Appellate Tribunal only an appeal will lie u/s 35 of the Foreign Exchange Management Act, 1999.

30. It may be observed that as regards the Petitioner''s challenge to the jurisdiction of the learned Arbitrator it is not as if it has no remedy. If its application u/s 16 of the AC Act is allowed by the learned Arbitrator it will have no grievance left. If not, the Petitioner has to abide by the legislative scheme outlined in Section 16(5) read with Section 16(6) AC Act and await the passing of the Award. If the Award goes against the Petitioner, it can challenge the Award on the grounds available to it u/s 34 of the AC Act. The mere fact that this may cause it the inconvenience of having to await the conclusion of the arbitral proceedings is no ground to entertain a writ petition at an intermediate stage in a manner contrary to the legislative scheme u/s 16 AC Act. The AC Act being a complete code in itself and with Section 5 of the AC Act limiting interference by judicial authorities, any attempt to expand the scope for interference by the High Court in exercise of its powers under Article 226 of the Constitution would defeat the object and purposes of the AC Act.

31. As regards the grievance of the Petitioner against the status quo order dated 18th December 2009 passed by the learned Arbitrator u/s 17 of the AC Act, the Petitioner has a statutory remedy by way of an appeal u/s 37(2)(b) of the AC Act. Merely because the Petitioner files such an appeal will not mean that it has waived its objection to the jurisdiction of the learned Arbitrator, as long as it has

also filed an application u/s 16(1) AC Act before the learned Arbitrator.

32. Consequently, this Court holds that the present writ petition under Article 226 of the Constitution read with Article 227 thereof, to challenge either the jurisdiction of the learned Arbitrator generally or the order dated 18th December 2009 passed by the learned Arbitrator in particular, is not maintainable.

No need to decide the second question

33. Since this Court has held against the Petitioner as regards maintainability, there is no need to consider the submissions made by either party on the second question whether CEPL is a proper party to the arbitral proceedings. That is an issue on which the learned Arbitrator will opine while deciding the application filed by CEPL u/s 16 AC Act. All the contentions raised on merits by either party, including the tenability in law of Respondent No. 1 making the Petitioner a party to the arbitral proceedings after earlier dropping it as a party to the Section 9 AC Act petition, are left open to be raised before the learned Arbitrator who will give a decision thereon at his earliest convenience, uninfluenced by any observation that may have been made by this Court on merits.

34. The writ petition is dismissed being not maintainable but, in the circumstances, with no order as to costs. The pending application is also dismissed.

