
(2013) 01 DEL CK 0178
In the Delhi High Court
Case No : OMP No. 856 of 2012

Dorling Kindersley (India) Pvt. Ltd.

APPELLANT

Vs

Sanguine Technical Publishers and Others

RESPONDENT

Date of Decision : 21-01-2013

Acts Referred:

Citation : (2013) 4 AD 46

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Akhil Sibal, with Mr. Alok K. Agarwal and Mr. Ashutosh, for the Appellant; Rahul, for Ms. Nidhi Jain, for R-1 to R-3, Mr. Nikhil Rohatgi, for R-4 and Mr. Saurabh Kirpal, with Mr. Gurmehar Sistani, for Applicant in I.A. No. 646/2013, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh, J.

OMP No. 856/2012 & I.A. No. 646/2013 (filed by applicant Reed Elsevier India Pvt. Ltd.)

1. Dorling Kindersley (India) Pvt. Ltd., the petitioner, has filed the above mentioned petition u/s 9 of the Arbitration and Conciliation Act, 1996 (in short, called the "Act") against the four respondents, namely, Sanguine Technical Publishers and its three partners, M.R. Kamalakar Pandit, Lal. M. Prasad and Dr. D. Ganesh Rao. The said petition was first time listed before Court on 12th September, 2012 when after hearing the learned counsel for the petitioner, the following order was passed:-

1. The background to the present petition u/s 9 of the Arbitration and Conciliation Act, 1996 ("Act"), is that the Petitioner under the name and style "Pearson Education" ("Pearson") entered into an agreement dated 14th December 2009 with Respondent No. 1 partnership firm (hereinafter "Sanguine") having its registered office at Bangalore, Karnataka of which Respondent Nos. 2

to 4 are partners. In terms of the said agreement, Pearson and Sanguine undertook to co-brand the engineering (book) titles, as mentioned under the Schedules to the agreement for providing quality material to the students. A list of titles of books published by Sanguine were set out in Schedule-A to the agreement. The titles that were being developed or were to be developed in future were set out in Schedule-B. An additional list of titles was also appended, a copy of which is at page 15 of the documents.

2. According to the Petitioner, the agreement subsists. It is for a period of 48 months and can be extended up to 60 months. Clause 15.1 of the agreement provides for arbitration to be held in Delhi under the Act and Clause 16.1 states that the parties will submit to the jurisdiction of the Courts in Delhi.

3. The Petitioner states that on 13th February 2012, it received a communication from the Respondent No. 3 stating that Respondent No. 4 had resigned from the partnership firm two days earlier and that he would no longer be interested in getting the books/titles for which he was an Author/co-Author published under the agreement. The Petitioner protested pointing out that this was in breach of the agreement. It sought copies of the author agreements signed with Respondent No. 1. However, the Respondent No. 1 claimed that this could not be divulged. It is stated that despite several rounds of meetings, the issues that arose could not be resolved.

4. Meanwhile, the Petitioner discovered that titles which were listed in Schedule-A to the agreement, are now being published by another publication house viz., Reed Elsevier India Private Limited ("Elsevier"). The Court has been shown three publications, one under the title "Field Theory" by Respondent No. 4 Dr. D. Ganesh Rao published by Pearson in 2011 and another publication under the same name published subsequently in 2012 by Elsevier by the same author. It is pointed out that the book subsequently published by Elsevier is virtually the same except a few additional chapters. Likewise, another title "The 8051 Microcontrollers; Architecture, Programming & Applications" by Dr. K. Uma Rao and Dr. Andhe Pallavi published by Pearson in 2011, appears to have been published in 2012 under more or less the same title by Elsevier with the same authors. There is another book "Network Analysis" published by Elsevier, as a near verbatim copy of the book "Network Theory" published by Pearson.

5. In the circumstances, it is prayed by the Petitioner that the Respondents should be restrained from committing further breach of the agreement.

6. Issue notice to the Respondents, returnable on 3rd December 2012. Dasti in addition.

7. Till the next date the Respondents, their agents, servants, nominees, assignees, attorneys or their representatives are restrained from publishing/printing, marketing, selling any of the titles/books of the authors vested under the agreement dated 14th December 2009 with or without modification in the nomenclature of the title with same contents in addition to the titles mentioned

at page 15 of the paper book, till further orders. The Petitioner will also send the Respondents within ten days, a notice invoking the arbitration clause and within four weeks thereafter take the next logical step for the appointment of an arbitral Tribunal in terms of the agreement.

8. The Petitioner prays for the appointment of Local Commissioners ("LCs") to visit the locations mentioned in the petition and make an inventory of the books/publications of the titles/books of the authors listed in Schedules A and B to the agreement which are apprehended to have been printed through some other publication house and are stored or being sold by the Respondents and to seize the same.

9. Accordingly, this Court appoints three LCs to visit the following addresses:

(i) Mr. Anil Verma, Advocate (Mob. 9958014454) will visit:

(a) Reed Elsevier India Pvt. Ltd.

C/o Agility Logistics Pvt. Ltd.

Khasra No. 7/17/1

18/1, Village Safiabab

Narela, Sonapat Road

Sonapat, Haryana-131001.

(d) Empire House,

Phase-II,

Sector-19, Gurgaon, Haryana.

(ii) Ms. Swati Gupta, Advocate (Mob. 9711566266) will visit:

(b) A-14, Industrial Area,

Moti Nagar, New Delhi

(c) 2/14, Near Happy School,

Ansari Road, Daryaganj, New Delhi.

(iii) Mr. Parameshwar, Advocate (Mob. 09818113824) will visit:

(e) UBS Publishers Distributors Ltd.

148, Cresscent 2nd Floor

Mysore Road, Bengaluru-560026

(f) TBH Publishers and Distributors

Vikram Trinetra House,

81/10, Vatal Lnagaraj Road,
Okalipuram, Rajaji Nagar, Bangalore-560021.

10. The aforementioned LCs will visit the respective locations as indicated during working hours on any week day, within next ten days. Each LC will draw up an inventory of the books/publications of the titles/books of the authors in terms of Schedules A and B of the agreement dated 14th December 2009, as well as the list appended at page 15 of the documents, and seize the books that are found to be printed through a publication house other than Pearson and are stored or being sold by the Respondents. The seized books will be preserved separately and kept under a seal to be affixed and signed by the LC and produced by the Respondents as and when ordered by the Court. The records kept at each premises will be inspected and the details of the vendors and the quantity sold and marketed by the agents of the Respondents will be noted and copies of the relevant pages of such records taken. The LCs will sign the relevant pages of the said records in original after inspection. Photographs and/or video where necessary shall be taken. Each LC will be accompanied by one representative of the Petitioner during the visit. Each LC is permitted to take the assistance of the local police in the event that any resistance is offered by anyone to the execution of the above directions. A report be submitted by each of the LCs to the Court within a further period of ten days after the respective visits. The fees of each of the LCs is fixed at Rs. 75,000 which shall be paid by the Petitioner to each of them within ten days. This will be independent of the travel, transport and other incidental expenses which shall be borne by the Petitioner.

11. Copy of this order be given dasti.

Sd/-

Dr. S. Muralidhar

Judge

In terms of the above said order, the Local Commissioners visited the premises at the different sites of the parties as directed by the Court and they recovered the books in question and filed their respective reports.

2. Thereafter, the applicant, Reed Elsevier India Pvt. Ltd. filed a review petition bearing No. 676/2012 under Sections 114, 151 & 152 CPC, seeking review/clarification of the order dated 12th September, 2012. The said application along with an application for condonation of delay being I.A. No. 20730/2012 was listed before the Court on 19th November, 2012 when notice was issued to the non-applicants for 3rd December, 2012. On 3rd December, 2012 an adjournment was sought by the petitioner for filing the reply. On the said date, respondent No. 4 appeared before the Court and sought time to file the reply to the main petition and notice was also issued to the remaining unserved respondent Nos. 1 to 3.

3. On 9th January, 2013, after hearing Mr. Saurabh Kirpal, learned counsel for

the applicant, the prayer of review of order was rejected with the observations that no grounds are made out for review of the order dated 12th September, 2012. However, for the purpose of remaining prayer made in the petition, the matter was sent to the roster Bench for 16th January, 2013 after renumbering the same as an IA. The application for condonation of delay in filing the review petition was also disposed of.

4. When the matter was taken up on 16th January, 2013, it appears from the record that no reply in the main petition was filed by the respondents nor in the application being I.A. No. 646/2013. Oral statement made by counsel appearing that they have no objection if prayer made in I.A. No. 646/2013 is allowed. The petitioner filed its reply to the said application. Mr. Saurabh Kirpal, learned counsel for the applicant pressed for hearing and disposal of his application due to hardship addressed by him on behalf of his client despite of objection of petitioner's counsel that reply to the main petition by the respondents is necessary for the purpose of deciding the I.A. No. 646/2013. In view of above, this Court has heard the I.A. No. 646/2013 on merit.

5. The remaining prayer made in the application is that the Court should clarify that the applicant is not bound by the order dated 12th September, 2012 and the said order does not operate against the applicant and further directions be issued to the Local Commissioners to de-seal the books in question seized by them from the premises of the applicant.

6. First submission of Mr. Kirpal is that the applicant is not an agent, servant, nominee, assignee, attorney or representative of the respondents. The applicant has a valid arrangement with Fillip Learning which in turn has valid existing contracts with the respective authors with respect to the five titles which the Local Commissioners have seized. The details of the said titles and the names of the authors are mentioned as below:-

7. Second submission of Mr. Kirpal is that the Local Commissioners have also raided the premises of the distributors of the applicant, namely UBS Publishers Distributors Ltd. and TBH Publishers and Distributors located at Bengaluru and sealed the stock of the books published by the applicant. Thus, a great hardship is caused to the applicant without being party to the agreement. In case, the petitioner has any grievances against the applicant for infringement of its copyrights claimed in books which are part and parcel of Annexure-A, the petitioner should have gone for civil remedy of infringement of copyright, if any.

8. The third submission of Mr. Kirpal is that the present petition u/s 9 of the Act is not maintainable against a party which is not itself a party to the arbitration agreement. As the applicant is not a party to the agreement, no such order could have been passed. The petitioner by filing of the petition u/s 9 cannot cause prejudice to the applicant who is not a party to any agreement with the petitioner. Hence, no interim order can be granted against the applicant. Therefore, clarification is sought by the applicant as to whether the interim order

passed on 12th September, 2012 would operate against the applicant or not. In support of his third submissions, he referred the following judgments:-

(i) National Agricultural Co-operative Marketing Federation of India Ltd. (NAFED) vs. Earthtech Enterprises Ltd. & Anr., OMP No. 558/2007, decided on 23rd April, 2009.

(ii) Ajay Makhija vs. M/s. Dollarmine Exports Pvt. Ltd. & Ors., OMP No. 472/2009 decided on 19th August, 2009.

(iii) Shoney Sanil Vs. M/s. Coastal Foundations (P) Ltd. and Others, .

(iv) P.R. Shah, Shares and Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd. and Others, .

9. Mr. Akhil Sibal, learned counsel appearing on behalf of the petitioner has strongly opposed the prayer made in the application. His first submission is that the application suffers from the vice of malafides. The same has been filed in order to defeat and frustrate the order dated 12th September, 2012, as the applicant is in collusion with respondents particularly with respondent No. 4 who is not only the partner of respondent No. 1 but also co-author of some of the impugned books in question. Secondly, it is a deliberate move by the respondents not to file the reply to the main petition because in the reply they have to disclose certain vital information which are necessary to decide the present application as well as the main petition. He referred para-16 of the petition wherein the statement was made to the effect that the petitioner recently learnt that the respondents in order to completely frustrate the agreement dated 14th December, 2009 are in discussion with other publishing houses for printing the same titles, the exclusive rights whereas are vested with the petitioner. Respondent No. 4 is the co-author of book entitled "Field Theory" which is now published by the applicant. The other book namely "The 8051 Microcontrollers" of which the rights to publish has been given to the petitioner also published by the applicant.

10. Mr. Sibal's third statement is that in the absence of vital information to be disclosed by the respondent, his client apprehends that Fillip Learning is either owned by respondent No. 4 or the other respondents who must have some connection directly or indirectly, as there was no reason not to disclose the said copies of contracts and arrangement between the applicant, the respondents and the entity called as Fillip Learning.

11. There is no dispute that the contents of the books published by the applicant and which are seized by the Local Commissioners are the same reproduction as those books published by the petitioner. In case, at this stage if the application is allowed and the applicant is allowed to sell the books in question or to de-seal the books, a great prejudice would cause to the petitioner and the applicant would achieve in his move to frustrate the order passed on 12th September, 2012 without providing the relevant information to the Court as well as to the

petitioner.

12. His fourth submission is that the respondents are litigating with the petitioner through the shoulder of applicant by frustrating the valid terms and conditions of valid agreement dated 14th December, 2009 between the petitioner and respondents, wherein respondent undertook to co-brand titles. In order to show mala fide on the part of the applicant, it is alleged by Mr. Sibal that one Mr. J. Saravanan was the senior employee of the petitioner-Company since December, 2009 who had played a pivotal role in negotiating the terms and conditions of the agreement dated 14th December, 2009 with the respondents which is valid for a period of 4 years i.e. up to 13th September, 2013 (can be extended up to 60 months). But, later on, Mr. J. Saravanan resigned from the petitioner-Company on 6th August, 2010 and took up employment with the applicant despite of having full knowledge of the agreement signed by the petitioner-Company and the respondents as well as having knowledge of titles and the markets as he was working as a General Manager (Marketing). Mr. Sibal submits that it has been done by the respondents who are behind the conspiracy to give benefit to the applicant who is playing a major role with the aid and assistance of ex-employee i.e. Phillip Learning. Hence, without making full disclosure, the applicant cannot call himself an alien to the dispute. As the respondents No. 1 to 4 are sitting totally silent, the Court should draw the inference of their conduct. According to him, both applicant and respondents are trying to mislead the Court.

13. An oral plea was raised by respondents' counsel that respondent No. 4 is no more partner with respondent No. 1 and he is now not bound by the terms and conditions of the agreement as alleged by Mr. Sibal. However, the respondents are unable to produce the copy of fresh partnership deed if executed which would show that the respondent No. 4 is no more a partner in respondent No. 1.

14. After having considered the rival submissions of the parties, I am of the considered view that at this stage, the application filed by the applicant whereby the applicant has sought to clarify as to whether the interim order is operating against the applicant or not and to de-seal the books, is not maintainable. The application is dismissed for the following reasons:

i) That when the order dated 12th September, 2012 was passed, the pleading qua the applicant were available with the Court, (particularly para 16 of the petition).

ii) The applicant's prayer for review of order dated 12th September, 2012 was rejected by the same very Court on 9th January, 2013. No appeal either against the order dated 12th September, 2012 or 9th January, 2013 was filed by the respondents. The applicant does not want to become party in the present proceedings.

iii) In the application, a statement was made by the applicant in para 7 that the applicant has a valid agreement with Phillip Learning which in turn has valid existing contracts with the respective authors. The applicant did not file the

copies of such contracts. The details about constitution of Fillip Learning are not disclosed. The arrangement arrived between them is also not produced before Court when asked. The address of the said firm or even dates of contracts by respective authors or co-publishers are not mentioned in the application.

iv) The respondents also did not want to disclose their relations with Fillip Learning or any arrangement between respondent No. 4 and the applicant. They have not produced the copy of the new partnership in order to show that respondent No. 4 is no more the partner of respondent No. 4. They have not filed the reply to the main petition. They simply informed the Court that they have no objection if the prayer made in the application is allowed. v) This Court is conscious about the law that normally, no interim order in the application u/s 9 can be passed against the party who is not a party to the arbitration agreement except in very exceptional cases like one case referred by Mr. Sibal. See Value Advisory Services Vs. ZTE Corporation and Others, . Relevant paras 14 to 21 read as under:-

14. In my view, if as a general rule it is laid down that in exercise of power u/s 9, no direction can be issued to parties not parties to agreement containing an arbitration clause or not parties to arbitration proceedings, the same will hamper the efficacy of the said provision. Under clause (i) thereof, the guardian to be appointed may not be such a party; similarly the goods under clause (ii) (a) may be or may be required to be in custody of or delivered to or sold to such third parties - further orders against such third parties may also be required in connection with such sale; under clause (ii)(b) the amount to be secured may be in the form of money payable or property in hands of such third party - the scope cannot/ought not to be restricted to securing possible with orders against parties to arbitration only. Similar examples can be given with respect to other clauses also.

15. The proceedings in a court, as distinct from those before an arbitrator, are also between parties to an agreement/transaction only. Still, the practice of issuing interim orders/directions qua third parties exists; not only in execution proceeding, provisions wherefor exists in Sections 47, 60 and Order 21 Rules 46 and 46A to F but also in pre-decretal stage, as provided for in Order 38 Rules 6 to 11A of CPC. It is difficult to fathom and there is no indication whatsoever of it in the Act, that the legislature while empowering the court u/s 9 to grant interim measures has restricted the power aforesaid of the court in any manner. On the contrary, Section 9 provides that the court for the purposes of Section 9 "shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it". The conclusion is thus inescapable that if the court, in relation to proceedings before it could have made an order against/ qua third parties, similar order can be made u/s 9 as well, subject to the discussion below.

16. The CPC, at pre decretal stage, permits attachment of property to satisfy any decree which may be passed in the suit (Order 38 Rule 6). Such attachment can

also be of property of defendant, not in possession of defendant but belonging to the defendant and over which defendant has disposing power or which is in possession of another person in trust for or on behalf of judgment debtor. The rules for such attachment are the same as of attachment in execution of decree (Order 38 Rule 7). Such attachment of property of judgment debtor in hands of others is permissible u/s 60 CPC. There is no reason for holding that if the claimant in an arbitration had been a plaintiff in a suit and could have obtained attachment before judgment of property of defendant in hands of third parties, merely because he is before an arbitrator, he is not entitled to such order. Such orders can be crucial. Normally proceedings before court or before arbitrator take time. The defendant cannot during the said time be permitted to arrange his affairs in a manner to leave the plaintiff/claimant with merely a paper decree/award. An attachment before judgment under Order 38 Rule 11 CPC continues post judgment also. If it is to be held that in arbitration proceedings such interim relief of attachment of properties of respondent/defendant is not possible, it will discourage rather than encourage arbitration, which is the need of the hour.

17. However whenever attachment qua properties/monies in hands of third parties is made, the possibility of such third party contesting the same cannot be ruled out; while the party seeking attachment may aver the property to be of person against whom he is seeking a decree, the third party may set up title in such property in himself or in yet another party or resist attachment on other grounds. Order 38 Rule 8 CPC provides for adjudication of such claims by the court. The question which arises is, whether and how such disputes to attachment, if raised pursuant to attachment u/s 9 are also to be adjudicated. The necessary corollary to what I have held above is that the court, even in a proceeding u/s 9 will have to adjudicate such disputes. Order 38 Rules 7, 8 and 11A apply the provisions of attachment in relation to execution in Order 21 Rules 46, 46A to F, to attachment before judgment also. Rule 46C of Order 21 provides for trial of disputed questions where such third party disputes liability, as a suit.

18. However, considering the nature of proceeding u/s 9, I find that the court is not bound to, where the third party, with respect to property/money in whose hands attachment is issued, denies liability and such denial raises disputed questions of fact which cannot be adjudicated without trial, to conduct trial. The court, in such cases in its discretion can on a prima facie view of the matter, either refuse to exercise powers u/s 9 or pass other appropriate order to protect the interest of all parties concerned.

19. Thus the first point of controversy framed above is answered accordingly. Axiomatically, interim measure in the nature of attachment before judgment can be sought by petitioner against respondent No. 3 and the plea of respondent No. 3 to such an order is to be decided in these proceedings only. That will answer the second point of controversy as well. The plea of respondent No. 3 does not entail any disputed questions of facts requiring trial.

20. Under Order 21 Rule 46 attachment is prescribed to effect by prohibiting

payment/delivery until further orders, to the defendant/judgment debtor. To that extent, the respondent No. 3 has in the earlier OMP already consented. The question is whether an order of deposit in court of the monies due from respondent No. 3 to Respondents No. 1 and 2 can be made. Prior to 1976 amendment of CPC, such order of deposit was not contemplated under Rule 46 of Order 21. Under sub-rule 3 an option was given to the third party with respect to monies/goods in whose hands attachment was issued to deposit the same in court, in discharge of his liability. However, the court could not compel such third party to deposit in court. It was so held in *Maharajadhiraj Sir Kameshwar Singh Bahadur Vs. Kuleshwar Singh and Ors.*, AIR 1942 Patna 508. By the 1976 amendment of CPC, Rule 46A was introduced, whereunder the order against third party of deposit in court also became possible. However, that provision is in Order 21 relating to execution of decree. Though by virtue of Order 38 Rules 7, 8 and 11A attachment before judgment has to be in the same manner as in Order 21, but the court is not bound to direct deposit in court. Rule 46A itself uses the word "may" and the power thereunder is discretionary.

21. Thus in the present case, where as yet there is no decree or award in favour of petitioner and when the claims of the petitioner are being disputed by respondents No. 1 and 2, and when the interest of the petitioner is sufficiently protected by order in the earlier petition, it is not deemed appropriate to direct the respondent No. 3 to deposit the monies owed by it to respondents No. 1 and 2, in this court. The reason of respondent No. 3 using the said monies for its own purpose also does not sway me to direct so, for the reasons of Section 22 of SICA, 1985, though ordinarily the possibility of such third party/garnishee dissipating the monies may be a reason for directing deposit in court. I do not find the respondent No. 3 to be in the position of a trustee. Also, there is considerable force in the contention of counsel for respondent No. 3 that the petitioner had sought the said relief in the earlier petition also and it was not so granted. There is no change in position since then. The principles of *res judicata* apply to interim orders also and the petitioner cannot re-litigate.

This Court has yet to counter the issues raised by the applicant as to whether the present case is covered in that category. The respondents are apparently waiting the decision of this application before filing any reply to the main petition. No doubt, the issues raised by the applicant have to be determined and same would be considered when all the relevant and full disclosure and details would be provided. Due to such peculiar facts and circumstances in the present case, I am of the view that without full disclosure made either in the reply to the main petition by the respondents to deal with the allegations made by the petitioner or by the applicant, as per statement made in para 7 of its application or by the present application or by filing of proper application, the prayer made in the application at this stage cannot be granted as this Court feels that the said details are necessary to consider the issues raised by the applicant. The application is hereby dismissed.

O.M.P. No. 856/2012

No reply is filed by the respondents. One more opportunity is granted to file the same within four weeks with an advance copy to the learned counsel for the petitioner who may file the rejoinder within two weeks thereafter.

List on 18th March, 2013 for hearing.