
(2013) 05 DEL CK 0543

In the Delhi High Court

Case No : Arbitration Petition No. 455 of 2012 and O.M.P. 748-2012

Kapil Chopra (Partner SKN) and Others

APPELLANT

Vs

Satish Chopra (Partner SKN) and Others

RESPONDENT

Date of Decision : 06-05-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 8, 9
Companies Act, 1956 — Section 111

Citation : (2013) 05 DEL CK 0543

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Rakesh Tikku with Mr. Sanjay Mishra, Mr. Santosh Tiwari and Mr. Ankur Gupta, for the Appellant; Anil Sapra with Mr. Sumit Babbar, for the Respondent

Judgement

Manmohan Singh, J.—By this order, I propose to decide two petitions filed by the petitioners. The same are:

(a) Arb. P. No. 455/2012 u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") for appointment of sole Arbitrator against the illegal acts of diverting the funds, investments of the partnership firm without authority etc. by the respondent Nos. 1 & 2.

(b) O.M.P. No. 748/2012 filed u/s 9 of the Act for granting of various interim reliefs.

Learned counsel appearing on behalf of both parties have made their submissions in Arb. P. No. 455/2012. Mr. Tikku, learned Senior advocate submits that incase prayer for appointment of sole Arbitrator is allowed, his clients may not press OMP at this stage as the petitioners would be moving the petition for interim protection before Arbitral Tribunal. The submissions of Mr. Anil Sapra, learned Senior advocate for respondents is that both the petitions filed by the petitioners are not maintainable.

2. Brief facts as per both petitions are:

(i) The three petitioners and respondent Nos. 1 and 2 are holding 20% share each of respondent No. 3 i.e. M/s. SKN Energy, an unregistered partnership firm (hereinafter referred to as "the firm"). The said firm had been holding 31% shares of the M/s. Haryana City Gas Distribution Limited (herein referred to as "the company") who is in the business of distribution of gas in the industrial and residential premises. All five partners are also promoters and directors of the company.

(ii) The firm was created by way of execution of a partnership deed between the parties to the dispute who are joint family members but also partners of various joint business and cross holding in the group of companies headed by the different persons severally and jointly.

(iii) The object of the partnership firm as per partnership deed was to acquire the right from the various gas distribution companies for appointment of the operator for running of the CNG Pump Stations and to get the commission per kilo from the gas distribution company on the total gas sold from the CNG Station.

(iv) The capital of the firm was initially fixed at Rs. 50,000/- as per clause 5 of the partnership deed which was to be contributed by the partners of the firm in their profit sharing ratio i.e. in equal ratio but due to the huge amount of the deposit under tripartite agreement received, invested in the company by the firm against which the shares were allotted to the firm it all came down to be 20% profit sharing ratio for each partner as per clause 6(b) of the partnership deed.

(v) The firm invested the money in the company which was incorporated vide incorporation certificate dated 27th March, 2000 under the Companies Act, 1956 having total authorized shares capital of Rs. 30,00,00,000/- divided into 3,00,00,000/- @ Rs. 10/- each, engaged in the main business of natural gas distribution divided into two segments PNG & CNG.

(vi) The petitioners are the promoters/first directors of the said gas company which is not a listed company but a closely held company under the family business by the popular trade name SKN Bentex Group. The petitioners submit that the petitioner No. 1 holds 104, 31, 853 equity shares in the company due to their hard work, devotion, dedication and created enviable social reputation. They diligently carried out the functions in the capacity of the director of the company and took the responsibility of corporate planning, bringing money in the company from time to time to deal all the matters related with the franchisee.

(vii) The firm holds 77 lacs shares in the company i.e. 31% of the total equity which is the main subject matter of the dispute among the partners.

3. The petitioners allege that various properties were purchased by the joint and collective efforts of the three sons of late Shri Kundan Lal Chopra i.e. Shri Satish Chopra, Shri Kapil Chopra and late Shri Nishit Chopra and various companies, firms were floated for the facilitation of the joint family business but Shri Nishit

Chopra died on 8th October, 2005 leaving behind the parties of the third part as his legal heirs to succeed to his estate, share and properties. The fourth party admits not to claim any share/right in the estate, share and properties of late Shri Nishit Chopra and if at all there be any, the fourth party agree and admit to have relinquished the same in favour of the third party herein.

4. It is submitted that there has been some disputes amongst various members of the family in respect of functioning, management, with regard to the ownership, title of the various properties and disproportionate distribution of assets to the input of work etc. In order to preserve the family dignity, progress of each member of the family the parties arrived at an oral settlement on 6th June, 2012 for the distribution/division/settlement of the properties. The parties in order to avoid any doubt, litigation amongst themselves, their family member in future desired to reduce the said oral family settlement in writing. One agreement was signed but it was not finalized due to the dishonest intentions and illegal control of the respondents over the affairs of the firm.

5. The petitioners have made the allegations against the respondent Nos. 1 and 2 about the cheating and fraud perpetuated and practiced by the respondents as well as by manipulating the clauses of the partnership agreement in order to take the benefit of tampered and altered partnership deed. The case of the petitioners is that there is non-compliance of the clauses of the partnership deed which was executed between the partners, which is in violation of the provisions of Partnership Act, 1932 and there is cheating and fraud perpetuated and practiced by the respondents with the partners to take over the control and management of the company in their own hands and by manipulating the clauses of the Partnership agreement. It is also alleged that the respondents tampered with the clauses of the partnership deed without any knowledge to the petitioners' group and aimed to take benefit of the tampered and altered Partnership Deed. The respondents changed the clause 10 of the partnership deed. This clause mentions the authority and manner of opening and operating the bank accounts. The clause in the original deed stated as under:

that the bank account in the name of the firm shall be opened with such bank as may be mutually decided by the partners and shall be operated under the signature of Mrs. Satish Chopra or as mutually decided by the partners from time to time.

Whereas the clause which has been tampered by the respondents to fulfil their wishes of wrongful financial gains states as under:-

that the bank account in the name of the firm shall be opened with such bank as may be mutually decided by the partners and shall be operated under the signature of Mr. Satish Chopra or as mutually decided by the partners from time to time. Further Mr. Satish Chopra and Karan Chopra shall collectively take the decision regarding investment activity of the firm and may transfer the investment to themselves at the face value of the shares and it will be binding on

the other partners.

6. The original Partnership Deed is bearing Bank Stamp which is obtained from the bank by the petitioners on its level because it was submitted at the time of opening of the account with the bank, whereas the tampered partnership deed does not show the same. The last page and the starting page alongwith other pages are same that as of the original deed except the page containing clause 10 as the same has been changed and then attached to the Partnership Deed afterwards without the knowledge of the petitioners.

7. The respondents are the anti-social elements and also threatened to the petitioners and his employees of the firm that all the original documents i.e. MOU, company title deeds, properties title deeds are in the illegal possession of the respondents and there is a great chance of the misuse of such documents and cheque books.

8. Various other serious allegations are made by the petitioners against the respondent Nos. 1 and 2 which are mentioned in both petitions.

9. The respondents have denied all allegations made by the petitioners in their reply. It is argued that both the petitions are not maintainable and deserve dismissal as the averments made are flimsy, self claimed without any supporting documents and cannot be referred and relied upon. It is alleged that all the allegations made by the petitioners about fraud, cheating, tampering, mischief and forgery are wrong, baseless and without any merits. The said transfers of shares are with the consent of all the partners. The transfer of shares dates back to July, 2011 and the moneys stands transferred in the account of the partnership firm at the relevant time itself. The petitioners have enjoyed the fruits of money transferred by the respondents with the knowledge of the petitioners. The present belated litigation is nothing but an afterthought just to pressurize the respondents and for ulterior motives as the petitioners have not denied the fact that the shares in question have been transferred in favour of respondent Nos. 1 and 2, but they are alleging that the transfer of shares of respondent No. 3 is illegal and by fraud. The issue of transfer of shares or controversies arising out of it cannot be adjudicated before the Arbitrator/ arbitration proceedings but the appropriate forum under the scheme of the provisions of Section 111, Companies Act, 1956.

10. The respondents submit that respondent Nos. 1 & 2 are holding 5253542 & 2500000 shares of the company in their individual capacity. M/s. SKN Energy is not the shareholder of the company. They have not diverted any funds of the partnership firm-SKN Energy violating any norms of contracts/agreement executed or entered into. The company is not a party in the present case. It is submitted that the petitioners have admitted in their pleadings that they are not in possession of any records of the firm in order to deceive this court moreover neither there is a supporting document to tripartite agreement nor there is mention whatsoever of the parties to the alleged tripartite or date/purpose of the

alleged tripartite agreement.

11. It is also submitted by the respondents that having the same very allegations, two cross petitions have been filed by both the rival parties under various provisions of Companies Act, 1956 and are listed for final disposal. Thus, the same issue cannot be litigated before Arbitral Tribunal who may not be able to decide the serious allegations raised by the petitioners in the absence of recording of evidence. It is only the civil court who would be able to decide the issues raised in the petition.

12. It is specifically denied by the respondents that there are no documents to support that 104, 31, 853 equity shares of M/s. Haryana City Gas Distribution Ltd. are held by the petitioner No. 1. The averments made in para 5(iii) of the petition are contradictory and conflicting in light of the submissions made by petitioners under para 8(v) of the petition as the shares mentioned under para 5 of the petition belongs to the respondent Nos. 1 & 2 in the proportion as admittedly stated by the petitioners in para 8(v) of the petition, is the result of independent transaction between the respondent Nos. 1 and 2 and M/s. SKN Energy.

13. The respondents submit that the settlement as stated in para 6(iii-v) of the petition was never approved, created, arrived at vis-?-vis the respondents and oral agreement dated 6th June, 2012 is beyond the knowledge of respondents. The respondents have denied that they neither tampered with the clause/s of partnership agreement nor was there any non-compliance of its clauses by them also they are not relying on any other agreement except partnership agreement. The respondent Nos. 1 and 2 never declared themselves to be the sole owner of M/s. SKN Energy and never blocked any information from the petitioners, conducted the operations in fair manner in accordance with the mandate of the firm as all the partners are equally responsible for non-maintenance of records.

14. No rejoinder to the reply has been filed by the petitioners in both petitions. Respondent No. 1 has also filed additional affidavit in which it is stated that the payment of Rs. 5,25,35,420 was made to M/s. S.K.N. Energy for 52, 53, 542 shares @ Rs. 10 per share of the company on 20th July, 2011 and credited to the account. The details are annexed as Annexure A. It is also stated that on 23rd March, 2012 he filed a criminal complaint against petitioner Nos. 1 and 2 and unknown person in which it is stated that the official record of the company HCG being stolen from the office. Copy of the complaint dated 23rd March, 2012 is annexed as Annexure B. Mr. Tikku, appearing on behalf of the petitioners, has refuted the statement made in the additional affidavit filed by the respondent No. 1. He argued that the payment of Rs. 5,25,35,420/- as alleged transferred to M/s. S.K.N. Energy for 52, 53, 542 shares have not been credited to the accounts of the firm. He referred to various entries in order to show that the respondent Nos. 1 and 2 under one hand withdrawn the amount of respondent No. 3 and after short period the same very amount was deposited and now trying to establish that the payment of Rs. 5,25,35,420/- was transferred to the firm for

52, 53, 542 shares @ Rs. 10 per share of the company.

15. Clause 16 of the partnership deed dated 9th January, 2010 contains the arbitration clause which reads as under:

16. Arbitration: In case of any dispute among the partners relating to this partnership firm arising during the continuation of the partnership or afterwards or in regard to interpretation of any of the terms and continuation of this deed and in general relating to any matter in regard to this partnership the same shall be referred to sole arbitrator to be appointed by the parties with mutual consent. The provisions of various statutes relating to arbitration as applicable in India from time to time shall govern the proceedings. The arbitrage proceedings shall be held at any place mutually agreed upon by the parties.

16. The main case of the petitioners is that there is a non-compliance of clauses of the partnership deed which was executed between the partners as well as violation thereof. There are allegations against the respondents for violation of various provisions of Partnership Act, 1932, fraud, cheating, forgery and manipulation in order to take over the control and management of the company in their hands and by tampering with the clauses of the partnership agreement, the details of which are mentioned in para 7 of the petition. It is the admitted position that the event of transfer of shares relates back to July 2011. The case of the respondents is that the amount stands transferred in the accounts of the partnership firm during that time itself and the said transfer was made with the consent of the parties. All the partners of the firm have enjoyed the fruits of the money transferred by the respondent Nos. 1 and 2.

17. It is not denied by the petitioners that a separate cross litigation with regard to transfer of shares of 31% of the total equity is pending between the parties on the ground of illegal transfer. There is prescribed procedure under Sections 111 and other relevant provisions of the Companies Act, 1956 for rectification of register on transfer.

18. The petitioners' own case is that the transfer of shares of respondent No. 3 is illegal and by fraud. The company is not a party either in the partnership firm or in the present proceedings. The petitioners have made various allegations against the respondent Nos. 1 and 2 about cheating, fraud and manipulation while transferring of shares of respondent No. 3. They have also alleged that the respondent Nos. 1 and 2 have tampered with various clauses of the partnership deed which contains the arbitration clause. The respondents have alleged that the official record of the company was being stolen from the office. The complaint dated 23rd March, 2012 in this regard is also pending. Under these circumstances, the question before this Court is as to whether the disputes between the parties with regard to illegal transfer by playing "fraud", which are admittedly pending by filing cross petitions filed by the parties should be referred to the arbitration proceedings or the same are to be tried and determined in a Court of law.

19. The following cases were referred to by the respondents:

i) In the case of N. Radhakrishnan Vs. Maestro Engineers and Others, , the Supreme Court in a similar situation observed:

21. In our opinion, the contention of the respondents relating to the jurisdiction of the Arbitrator to decide a dispute pertaining to a matter of this proportion should be upheld, in view of the facts and circumstances of the case. The High Court in its impugned judgment has rightly held that since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation can not be properly gone into by the Arbitrator.

ii) In the case of Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak, it was observed:

There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference. But it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a court to take the matter out of the forum which the parties themselves have chosen. This to our mind is clear even from the decision in Bussel's case (6). In that case there were allegations of constructive and actual fraud by one brother against the other and it was in those circumstances that the court made the observations to which we have referred above. Even so, the learned master of the Rolls also observed in the course of the judgment at p. 476 as follows:

Why should it be necessarily beyond the purview of this contract to refer to an arbitrator questions of account, even when those questions do involve misconduct amounting even to dishonesty on the part of some partner? I do not see it. I do not say that in many cases which I will come to in the second branch of the case before the Court, the Court may not, in the exercise of its discretion, refuse to interfere; but it does not appear to me to follow of necessity that this clause was not intended to apply to all questions, even including questions either imputing moral dishonesty or moral misconduct to one or other of the parties.

We are clearly of opinion that merely because some allegations have been made that accounts are not correct or that certain items are exaggerated and so on that is not enough to induce the court to refuse to make a reference to arbitration. It is only in cases of allegations of fraud of a serious nature that the court will refuse as decided in Russel's case (1880) 14 Ch D 471 to order an arbitration agreement to be filed and will not make a reference. We may in this connection refer to Minifie v. The Railway Passengers Assurance Company (1881) 44 The learned Tribunal 552. There the question was whether certain proceedings should be stayed; and it was held that not with standing the fact

that the issue and the evidence in support of it might bear upon the conduct of a certain persons and of those who attended him and so might involve a question similar to that of fraud or no fraud, that was no ground for refusing stay. It is only when serious allegations of fraud are made which it is desirable should be tried in open court that a court would be justified in refusing to order the arbitration agreement to be filed and in refusing to make a reference.

iii) In the decision of Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., wherein this Court under para 4 observed:

4. Sub-section (1) of Section 8 provides that where the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the Arbitrator is only that dispute or matter which the Arbitrator is competent or empowered to decide.

iv) In the case of Oomor Sait HG v. Asiam Sait, 2001(3) CTC 269 wherein it was held:

The civil court can refuse to refer matter to arbitration if complicated question of fact or law is involved or where allegation of fraud is made.

Allegations regarding clandestine operation of business under some other name, issue of bogus bills, manipulation of accounts, carrying on similar business without consent of other partner are serious allegations of fraud, misrepresentations etc., and therefore application for reference to Arbitrator is liable to be rejected.

20. In view of settled law and the peculiar facts and circumstances of the present matter, I am of the view that the disputes are not warranted to be tried and decided by the Arbitrator. The Competent Court would be the appropriate forum to decide the serious issues involved in the case despite of arbitration clause.

21. Thus, this Court is not inclined to allow the relief as prayed for. The petition is, therefore, dismissed. No costs.

O.M.P. 748/2012

In view of the dismissal of the arbitration petition, being Arb. P. No. 455/2012, the present petition becomes infructuous. The same is also dismissed.