(2015) 07 CAL CK 0049

In the Calcutta High Court

Case No : G.A. No. 1911 of 2015 and C.S. No. 154 of 2015

Madan Lall Jain and Others APPELLANT

Vs

Kamlesh Sogani and Others RESPONDENT

Date of Decision : 23-07-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Civil Procedure Code, 1908 (CPC) — Section 42, 47

Citation : (2015) 07 CAL CK 0049

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : S.N. Mitra, Senior Advocate and Sananda Mukhopadhyay, for the Appellant; Pratap Chatterjee, Abhrajit Mitra, Sr. Advs. and Nirmalya Dasgupta, Advocates for the Respondent

Judgement

Soumen Sen, J—The plaintiff has filed this application injunction restraining the respondent No. 1 being the custodian appointed under the award from handing over possession of various documents to the respondent No. 2 till discharge by the respondent No. 2 and/or their Group of all their obligations under the award dated 3rd January, 2013 to the petitioners and/or to their Group in satisfaction of the petitioners.

2. A preliminary point is taken with regard to the maintainability of the suit.

3. Mr. Pratap Chatterjee, learned Senior Counsel appearing with Mr. Abhrajit Mitra, learned Senior Counsel submitted that the plaintiff has instituted the suit without availing remedy under the Arbitration and Conciliation Act, 1996. It is submitted that the custodian is a creature of the award and if the plaintiff is having any grievance against the custodian or with regard to the enforcement of the said award the remedy lies not in filing the suit but by taking appropriate steps under the provisions of the Arbitration and Conciliation Act or by levying an execution proceeding.

4. Mr. Chatterjee has referred to the various paragraphs of the plaint and submits that the said paragraphs would clearly show that pith and substance of the suit is enforcement of an award. The addition of defendant No. 1 who has appointed as a custodian under the award is of no consequence. The plaintiffs did not challenge the award and, in fact, had accepted the said award. The suit has been instituted in an attempt to reopen the said award which has now become enforceable.

5. Mr. S.N. Mitra, learned Senior Counsel appearing on behalf of the plaintiffs submitted that the suit has been filed principally by reason of failure on the part of the respondent No. 1 who was appointed as custodian of the award in failing to discharge his obligation under the said award. The said defendant No. 1 is more inclined to the other Group and without requiring the said Group to discharge their obligation is releasing or making over necessary documents to the said Group which is contrary to the said award. It is submitted that the plaintiffs are not challenging the said award. The plaintiffs are, in fact, accepting the said award. Since the defendant No. 1 is not a party to the arbitration proceeding the only remedy available against the defendant No. 1 is by filing a suit. No proceeding under the provisions of the Arbitration and Conciliation Act could be initiated against the defendant No. 1. It is further submitted that the questions involved in the suit are not the questions that can be decided in the execution application. Even if an application is filed for enforcement of the said award, no relief against the defendant No. 1 could be claimed in the said execution proceeding as the defendant No. 1 is not a party to the arbitration agreement.

6. I have considered the said award dated 3rd January, 2013. The relevant portions of the said award that are essential for adjudication of the present issue are stated below:--

"(i) The Tribunal appoints Mr. Kamlesh Sogani, Chartered Accountant of 1, R.N. Mukherjee Road, 2nd Floor, Room No. 209, Kolkata-700001 as custodian of various documents deeds, instruments, books of account properties etc. to hold the same till the Award is implemented in terms hereof as also to take all steps required for implementation of this Award, including issuing directions and/or making requests to the parties. The parties will immediately make over all original title deeds and documents relating to all the properties (including supporting documents for those mortgaged/hypothecated/pledged/kept under lien with lenders) either standing in individual name/s or in the name of company/ies or firm/s, books of account and/or any other documents relating to the companies, firms and/or business and/or properties to Mr. Kamlesh Sogani. All the parties will duly execute the requisite number of Demat Instruction Slips and/or Share Transfer Deeds and will keep such documents and/or instruments together with original share scripts of all the companies mentioned herein above in the custody of Mr. Kamlesh Sogani. The parties will call meetings of Board of Directors of respective companies to ensure approval and recording to transfer/

transmission of shares of various companies in implementation of this Award. Mr. Kamlesh Sogani will hold all documents, including share certificates, share transfer instruments, minutes of the meetings, etc. till individual businesses, properties, companies and/or firms are transferred and the guarantees given by any of the parties are released/discharged in terms of and in complete implementation of this Award. Mr. Kamlesh Sogani will effect and/or cause to be effected transfer of shares, requisite documents for control of firms and/or businesses and/or properties once the parties discharge their respective obligation in terms of this Award and only thereafter will hand over the related documents to the person/s who is/are entitled to receive the same in terms of this Award. It is agreed between the parties that the assessment and/or valuation of any assets and/or liabilities of any of the aforesaid entities as on 31st December, 2012 will be finally done by Mr. Kamlesh Sogani, whose assessment and/or valuation will be final and binding on parties and will not be subject to any challenge in any manner, whatsoever. The parties also agree that they will always comply with the directions and/or requests issued by Mr. Kamlesh Sogani if any of the parties fail and/or neglect to comply with the directions and/or requests issued/made by Mr. Kamlesh Sogani, the defaulting party will be liable to pay a sum of Rs. 2,50,000/- (Rupees Two Lacs Fifty Thousand) only for each day of default to the other party who is/are not at fault till the time of the default ceases.

(ii) If any of the party fails and/or neglects to perform his/their obligations and/or duties as envisaged in this Award then in such an event in addition to the penal clause mentioned elsewhere in this Award the defaulting party shall also be liable to pay sum calculated @ Rs. 1,00,000/- (Rupees One Lakh only) for each day to the party not in default till the time default continues and/or obligations and/or duties are performed by the defaulting party. Further the defaulting party will not be entitled to receive any documents and/or papers with regard to allotments made in favour of such defaulting party till such time the defaulting party performs his/their obligation in terms of this Award.

(iii) It is agreed by and between the parties that each of the parties undertake and pledge to each other that neither of them will interfere into the day to day business affairs of the Company/ies and/or Firm/s allotted to each other during the transition period from the date of this award to the date of complete hand over of the Company/ies and/or Firm/s to the allottee for smooth conduct of business operations.

(iv) A copy of this Award is being forwarded to Mr. Kamlesh Sogani, Chartered Accountant, to enable him to do all acts, deeds and things required to be done under this Award. Mr. Kamlesh Sogani, if required, will call meeting/s of parties and/or issue directions and/or requests to the parties for the purpose of implementation of this Award. Mr. Kamlesh Sogani will record minutes of such meetings, if required by him at his absolute discretion."

7. The plaintiffs alleged that the respondent No. 1 as custodian appointed by and

under the award are in custody of 32 Cartoons of sealed documents. The petitioners in terms of the said award had deposited a sum of Rs. 450 lakhs with the defendant No. 1. It is stated that under the award, the said amount was to be paid to Suresh Kumar Jain Group at the time of transfer of shares standing in the name of Suresh Kumar Jain Group to Madan Lall Jain Group and in complete implementation by the Suresh Kumar Jain Group and on discharge of all obligations of Suresh Kumar Jain Group in terms of the award yet the said sum or at least a part of it has been released by the respondent No. 1 to the respondent No. 2 in spite of the fact that the respondent No. 1 had failed and, in fact, neglected to discharge his obligations to Madan Lall Jain Group in terms of the award. The plaintiffs alleged that the respondent No. 2 and particularly Suresh Kumar Jain Group has taken various steps in implementation of the said award which are beneficial and/or advantageous to the said Group. The petitioners alleged that by reason of the award your petitioners are entitled to and have a right to carry on business of the proforma respondent Nos. 3 to 25 peacefully and without any interference by the respondent No. 2 or its associates. It is further alleged that respondent No. 2 along with family members have taken steps on the basis of, inter alia, the said award dated 3rd January, 2013 and have also taken complete control of the Companies allotted to Suresh Kumar Jain Group yet the respondent No. 2 acted contrary to the said award and are malicious proceedings and/or wrongfully and illegally interfering with the right of your petitioners to carry on their business. In paragraph 23 of the Plaint the petitioner had set out the obligations which the respondent No. 2 by himself and representing the Suresh Kumar Jain Group has failed to discharge under the award.

8. I agree with the submission made by Mr. Pratap Chatterjee, learned Senior Counsel that the pith and substance of the suit is enforcement of an arbitral award dated 3rd January, 2013. In the event, the plaintiff is of the view that the certain interim protections are required so that the said award is not rendered infructuous, the plaintiffs have remedy under the provisions of the Arbitration and Conciliation Act, 1996. Moreover, the plaintiff could have filed an application for execution of the award. The plaintiff could have filed an execution application for enforcement of the award since the questions arising in the said plaint are all relating to execution, discharge or satisfaction of the award which is a deemed decree. The award, however, could not be challenged on grounds on which an award is liable to be set aside under Section 34 of the Arbitration and Conciliation Act, 1996. The expressions ''execution'', ''discharge'' or ''satisfaction'' of the decree is and/or of seminal importance. "All questions" are qualified by the said three words which if read together gives a clear impression that such questions must relate to execution, discharge or satisfaction of the decree. In Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Others, AIR 1956 SC 359 : (1956) 1 SCR 62 the Hon''ble Supreme Court was considering a decree imposing mutual and reciprocal obligations of both sides. In Paragraph 18 of the said report it is stated:--

"18. Much of the argument about this revolved round the question whether the equitable rules that obtain before decree in a suit for specific performance continue at the stage of execution. It is not necessary for us to go into that here because the position in the present case is much simpler.

When a decree imposes obligations on both sides which are so conditioned that performance by one is conditional on performance by the other execution will not be ordered unless the party seeking execution not only offers to perform his side but, when objection is raised, satisfies the executing Court that he is in a position to do so. Any other rule would have the effect of varying the conditions of the decree; a thing that an executing Court cannot do.

There may of course be decrees where the obligations imposed on each side are distinct and severable and in such a case each party might well be left to its own execution. But when the obligations are reciprocal and are interlinked so that they cannot be separated, any attempt to enforce performance unilaterally would be to defeat the directions in the decree and to go behind them which, of course, an executing Court cannot do. The only question therefore is whether the decree in the present case is of this nature. We are clear that it is."

9. In Paragraph 23 of the said report, the Hon''ble Supreme Court observed that the executing Court has to see that the defendant gives the plaintiff a very thing that the decree directs and not something else, so if there is no dispute about its identity or substance nobody but the Court executing the decree can determine it. The said Paragraph is reproduced hereinbelow:--

"23. The only question that remains is whether the executing Court can consider whether the defendant is in a position to perform his part of the decree. But of course it can. If the executing Court cannot consider this question who can? The executing Court has to see that the defendant gives the plaintiff the very thing that the decree directs and not something else, so if there is any dispute about its identity or substance nobody but the Court executing the decree can determine it.

It is a matter distinctly relating to the execution, discharge and satisfaction of the decree and so, under S. 47, Civil P. C., it can only be determined by the Court executing the decree. And as for the first Court''s conclusion that it could not decide these matters because it was not the Court that passed the decree, it is enough to say, as the High Court did, that S. 42 of the code expressly gives the Court executing a decree sent to it the same powers in executing such decree as if it had been passed by itself."

10. The custodian was appointed under the award so as to protect the interest of both the parties and to ensure that reciprocal obligations are discharged. In the event, the plaintiffs feel that the custodian has failed to ensure discharge of obligation by the defendants then, in my view, the proper remedy would be to apply for execution of the award. It is well-settled a decree based on compromise is executable. Where the machinery provided for working out a consent decree

fails it is a duty of the Court to fill up the gap caused by such failure by making necessary orders in order that the consent decree may be worked out as agreed between the parties. (Adelia Dos Remedios Vs. Anand Giri Keni (Deceased by Lrs)., AIR 2005 Bom 421 : (2006) 1 ALLMR 530 : (2006) 2 BomCR 822 : (2006) 1 MhLj 627 , Smt. Kamla Devi v. Addl. District Judge Dehradun & Ors; 1996 AIHC 2292(All) and Nebubala Sardar Vs. Abdul Aziz Baidya, AIR 1991 Cal 402 : (1991) 2 CALLT 155 : (1991) 1 CHN 318 : 95 CWN 1139 . It is only to that extent an executing Court can step in and pass appropriate orders for working out of the consent decree.

11. To the extent to which any controversy calls for an adjudication, the same can be taken care of by the executing Court which can still compel fulfillment of obligations respectively to the extent to which either party is obliged to do but has failed in discharging the same. Under such circumstances, I hold that the suit is not maintainable. Since the custodian is required to discharge his obligation under the award and there are grievances that the custodian has failed to discharge his duties, the interim order passed on 18th June, 2015 shall continue for a period of two weeks from date or until any order that may be passed, in the event, any proceeding is initiated by the plaintiffs for execution of the award whichever is earlier. In view thereof, G.A. No. 1911 of 2015 stands dismissed. C.S. No. 154 of 2015 stands dismissed. However, there shall be no order as to costs.

12. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.

