(2018) 09 DEL CK 0214

In the Delhi High Court

Case No : First Appeal From Order (Os) No.136 Of 2018, Civill Miscellaneous Application No.36463-36464 Of 2018

Nirmala Jain And Ors — APPELLANT

Vs

Jasbir Singh And Ors — RESPONDENT

Date of Decision : 13-09-2018

Acts Referred:

Arbitration and Conciliation Act 1996 — Section 9, 37<Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 — Section 17

Citation : (2018) 09 DEL CK 0214

Hon'ble Judges : S. Ravindra Bhat, J;A.K. Chawla, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S. RAVINDRA BHAT, J

1. Issue notice. Sh. Aditya Malhotra and Sh. P.S. Bindra, Advocates accept notice on behalf of the respondents. With learned counselsâ?? consent,

the appeal was heard finally â?" as the record of the learned Single Judge was available electronically.

2. The appellants in this appeal under Section 37 of the Arbitration and Conciliation Act [hereafter â??the Actâ?] are aggrieved by the order of the

learned Single Judge made under Section 9 of the Act, in effect, permitting impleadment of a third party to the arbitration proceedings. The appellants

are also aggrieved by the direction of the learned Single Judge, whereby the premises (which are the subject matter of arbitration proceedings), had

been sealed pendente lite, were required to be desealed.

3. The essential facts are that the appellant and her husband were shareholders in one M/s. SS Leasing and Finance Limited [hereafter â??the

debtor companyâ?] - a closely owned entity. The property, owned by Sh. R.L. Jain was mortgaged to the UCO Bank in 1986 to secure an advance

by the bank. Since the debtor company defaulted in the fulfilment of its obligation to repay the loan, proceedings were initiated under the Recovery of

Debts due to Banks and Financial Institutions Act, 1993before the Debts Recovery Tribunal [hereafter â??DRTâ?] in 1997. These proceedings did

not resolve and continued to remain pending. In the meanwhile, the appellant and her husband - Sh. R.L Jain, the owners of the property entered into

an agreement to sell, agreeing to convey title, possession of the said property to respondents â?" Sh. Batra and Sh. Manjinder Singh [hereafter

referred to as â??the purchasersâ??].

4. The agreement to sell spawned disputes which were referred to arbitration; the appellant claimed that he could not convey the property and alleged

that the agreement to sell was void. Since the proceedings before the DRT did not attain any finality, the bank resorted to the provisions of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI). Eventually, the proceedings

culminated in the possession of the property being taken-over by the bank. Through advertisement (dated 30.07.2007), sale of the property in auction

was resorted to, which culminated in a Sale Certificate dated 17.08.2007. This sale was confirmed. Ultimately, the proceedings before DRT resulted

in the dismissal of the appeal (preferred under Section 17 of the SARFAESI by the borrowers) by order of the DRT dated 06.08.2012. The appeal

against that decision is said to be pending.

5. It is a matter of record that in the pending arbitration proceedings status quo prevails and binds the parties, which was made in 2004.

Concededly, it has not been varied. In these circumstances, the auction purchaser - Jasbir Singh (who is also the father of Sh. Manjinder Singh - one

of the purchasers who had approached this Court under Section 9), approached claiming two main reliefs â?" (1) to be permitted impleadment in the

pending arbitration proceedings, and (2) the property, which is lying sealed since 2014, ought to be handed over to him subject to the status quo order

prevailing. The learned Single Judge granted both reliefs.

6. Sh. Ravi Sikri, learned senior counsel urges that the learned Single Judge fell into error in permitting third party to intervene in the arbitration

proceedings. Learned senior counsel was at pains to point out that the auction notice expressly spelt out that the sale of the property was subject to

the pending arbitration proceedings. It was noted by all parties, especially the impleaded third party - Jasbir Singh that his rights would be subject to

the arbitration proceedings. Highlighting that past attempts were made for variation of status quo order and expressly seeking desealing of the

property, learned senior counsel submitted that given these attendant circumstances, the learned Single Judge should not have permitted a rank

outsider to be impleaded and grant the relief which was all along refused to him. It is submitted that the principle of res judicata would squarely apply

in the circumstances.

7. The impugned order to the extent the appellant is aggrieved reads as follows:

â??9. The auction sale in which the applicant purchased the property was subject to the outcome of the arbitration proceedings pending between the

Petitioner and Respondent nos 1 and 2. It is also noticed that the public notice relating to the auction of the property, itself provided that the auction

proceedings are subject to the arbitration proceedings. Relevant portion of the said public notice is extracted herein below.

â??...................................... Public at large is also put on notice that confirmation of sale will be made by â??ARCIL? upon the terms of payment

being complied with by the successful bidder and upon such compliance, a sale certificate for the scheduled property in favour of the purchaser will

be executed by the constituted attorney of ARCIL under the Securitisation Act. However, the sale ofthe said property would be subject to

theadjudication of the rights/claims of variousparties which are pending adjudication inarbitration case before Honâ??ble Justice A.B.Saharya

(Retd.).â??

10. Thus, in effect, the applicantâ??s fate in respect of the property is intertwined with the pending arbitration. In view thereof, the applicant

purchaser is permitted to be impleaded as a party in the arbitration proceedings and to put forth his case before the present Sole Arbitrator, Justice

Mr. Anil Dev Singh (Retd.). It is directed that the applicant shall also participate regularly in the arbitration proceedings and shall not cause any delays

in the adjudication thereof.

11. For the time being, the property is not being put to any use. It is the case of

the applicant that the Respondent No.1, who is in possession of the

property, ought to be directed to give possession to him inasmuch as the sale in his favour having being confirmed by the DRT, the applicant should be

allowed to enjoy the property. Learned counsel for the applicant has undertaken to this Court that he will not carry out any unauthorised construction

in the suit property and also not part with possession or create any third party interest during the pendency of the arbitration proceedings.

12. Subject to the said undertaking, which is accepted by the Court, possession of the property is directed to be given to the proposed applicant within

a period of three days.â??

8. As to the first question, whether third party can be added in an arbitration proceedings, the answer cannot always be a categorical and

unambiguous â??NOâ?. Per Section 7, the â??parties to arbitrationâ? are those who are â??parties to the arbitration agreementâ?. Yet, there is

growing recognition of the fact that there exist certain layered transactions which by their very nature hinge upon interdependence of the obligations

of third parties. These are in the case of group company transactions or transactions where the obligation incurred by one company is to be

discharged by a subsidiary or group concern. There are instances where the shareholding in a company and transactions pertaining to the company

arise. Such transactions have in occasions in the past, been subject to the decisions of the Supreme Court [Chloro Controls (I) Pvt. Ltd. v. Severn

Trent Water Purification Inc. and Ors. 2013 (1) SCC 641and Cheran PropertiesLimited v. Kasturi and Sons Limited 2018 SCC Online (SC) 431]. In

Cheran Properties (supra),this Court stated as follows:

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29. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There

may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both

signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the Court approaches the

matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors

such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject matter and the composite

nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held

intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non- signatories. The effort is to find the

true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not

formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

Â XXXXÂ XXXXÂ Â XXXX

30. International conventions on arbitration as well as the UNCITRAL Model Law mandate that an arbitration agreement must be in writing.Section

7of the Arbitration andConciliationAct, 1996 affirms the same principle. Why does the law postulate that there should be a written agreement to

arbitrate? The reason is simple. An agreement to arbitrate excludes the jurisdiction of national courts. Where parties have agreed to resolve their

disputes by arbitration, they seek to substitute a private forum for dispute resolution in place of the adjudicatory institutions constituted by the state.

According to Redfern and Hunter on International Arbitration, the requirement of an agreement to arbitrate in writing is an elucidation of the principle

that the existence of such an agreement should be clearly established, since its effect is to exclude the authority of national courts to adjudicate upon

disputes.

31. Does the requirement, as inSection 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be

signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in

certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. Redfern and Hunter explain the

theoretical foundation of this principle: â??..The requirement of a signed agreement in writing, however, does not altogether exclude the possibility of

an arbitration agreement concluded in proper form between two or more parties also binding other parties. Third parties to an arbitration agreement

have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways: first, by operation of the â??group of companies?

doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended to other members

of the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession..â??

9. One notices that the learned Single Judge, in the impugned order has significantly alluded to the interdependence or intertwining of transactions

which are the subject matter of arbitration as well as claims of third parties (Jasbir Singh in this case.)

10. In Cheran Properties(supra), this very aspect was emphasized and the Court held factors such as commonality and composite nature of

transactions between a party and a non-party or commonality of subject matter as instances where participation of non-parties to an arbitration

agreement is permissible. Here too, the commonality of subject matter needs to be highlighted. Though the applicant third party was made aware of

the arbitration proceedings in this case, he remained sanguine perhaps hoping that the arbitral proceedings would end fast. Given that the Sale

Certificate attained finality and even appeal preferred by the borrowers, i.e. the applicants was rejected in 2012 and the further circumstance that the

auction purchaser deposited the amounts towards the sale of the property as far back as in 2007, this Court is of the opinion that there is no basic

infirmity or serious error in the approach of the learned Single Judge as regards impleadment.

11. As regards the question of desealing of the property, no doubt, the appellant is correct when he urges that similar attempts were unfruitful in the

past; those, no doubt, were at the behest of the purchasers, who are also related to the third party applicant. While the Court has considered and

applied the principles of res judicata during the pendency of civil proceedings (Arjun Singh v. Mohindra Kumar and Ors. AIR 1964 SC 993), this

Court is of the opinion that a strict application of that doctrine cannot be insisted upon, at least in arbitration proceedings. In the overall circumstances,

relatable to exercise of discretion, the learned Single Judge quite correctly surmised that keeping the premises locked and idle once the auction

purchaser deposited the consideration over 11 years ago, was not justified. Furthermore, the partiesâ?? interest continues to be protected since the

status quo order bind them. The status quo order would also bind the third party, i.e. Jasbir Singh, who is now a party in arbitration.

12. In view of the above observations, this Court finds no merit in the appeal. It is accordingly dismissed.

Order dasti.

