

(2016) 08 MP CK 0009

In the Madhya Pradesh High Court

Case No : Arb. Appeal No. 39 of 2013.

Salman Anwar - Appellant @HASH Ram Jharokhi and Others

Date of Decision : 08-08-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2(1)(g), Section 2(h), Section 9
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11

Citation : (2016) 4 MPLJ 428

Hon'ble Judges : Sujoy Paul, J.

Bench : Single Bench

Advocate : Dhruv Verma, Advocate, for the Appellant; Aditya Adhikari, Senior Advocate with Ritwik Parashar, Advocate, for the Respondents

Final Decision : Allowed

Judgement

Sujoy Paul, J. - This appeal filed under section 37 of Arbitration and Conciliation Act, 1996 (for short "Act") raises an interesting legal question. The question is whether the word "a party" used in section 9 of the Act includes legal representative or not ? Ancillary question is whether appellant's application under section 9 of the Act was maintainable ?

2. Draped in brevity, the relevant facts are that an agreement to sell was executed between present appellant and Shri Rajesh Deshwali on 18-5-2007. The agreement contains certain terms and conditions. Clause 12 of the agreement contains an arbitration clause pursuant to which in the event of any dispute between the parties, the dispute needs to be referred to sole Arbitrator Shri Ashraf Ali, Advocate.

3. The case of appellant is that Shri Rajesh Deshwali failed to perform his part of contractual obligation within the stipulated time and; therefore, appellant filed arbitration application before sole Arbitrator on 30-9-2010 Annexure A/3. After filing said arbitration application, petitioner received the information that Shri Rajesh Deshwali has died. Thus, an application was preferred by appellant before the Arbitrator for taking legal representatives of said Shri Rajesh Deshwali on record.

4. The appellant filed an application under section 9 of the Act before the Court below. In the said application, the legal representatives of Shri Rajesh Deshwali were impleaded as non-applicants. It was prayed that non-applicant No. 1 or any other person may be appointed as a guardian for the purpose of arbitral proceedings.

5. The respondents, upon receiving notices of aforesaid application filed under section 9 of the Act, preferred application under Order 7. Rule 11, Civil Procedure Code dated 8-2-2013. It is averred that as per section 9 of the Act and as per the definition of "party" under the Act, the application against legal representatives is not maintainable. Since non-applicants are not "party" as per the Act, the applicant is not entitled to maintain his application under section 9 of the Act.

6. The Court below after hearing both the parties on the said application, passed the impugned order dated 21-3-2013 and held that application filed under section 9 of the Act is not maintainable.

7. This order is called in question by appellant by contending that the said finding given by Court below runs contrary to object and scheme of the Act. In proceedings under section 9 of the Act, the application/objection under Order 7, Rule 11, Civil Procedure Code is not maintainable. Shri Dhruv Verma, learned counsel for the appellant contended that the Court below has taken a hyper technical view which is liable to be disapproved.

8. Shri Aditya Adhikari, learned senior counsel, per contra, relied on the definition of "party" and "legal representative". He submits that a combined reading of section 2(1)(g), (h) and section 9 of the Act makes it clear that section 9 application is maintainable by or against a party. Legal Representative, by not stretch of imagination, can be held to be a "party". The parties confined their arguments to the extent indicated here in above.

9. Before dealing with the rival contentions advanced, it is apt to quote the relevant provisions which read as under :

"2(1)(g) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;

(h) "party" means a party to an arbitration agreement.

"9. Interim measures, etc. by Court. - (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court:-

9-A. A plain reading of section 9 makes it clear that the word "party" is used in relation to a person who "apply to a Court" for certain directions enumerated in the section. Admittedly, the present appellant is a party to the arbitration

agreement who applied for getting certain interim measures/directions. The present appellant even as per strict interpretation, falls within the definition of "party" as per section 2(h). Section 9 does not deal with the aspect whether other side/non-applicant should also be a party to the arbitration agreement. On this score itself, the order of Court below cannot sustain judicial scrutiny.

10. The matter can be examined from another angle. The basic purpose of bringing the Act is to provide an alternative dispute resolution mechanism. Section 40 of the Act reads as under :

"40. Arbitration agreement not to be discharged by death of party thereto. - (1) An arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2) The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed. "

(emphasis supplied)

Section 40 is inserted in the Statute Book to ensure that arbitration agreement is not vanished in thin air because of death of party to the agreement. Thus intention of law makers is to ensure that arbitration agreement and proceedings based thereupon are not frustrated on death of a party. Thus, the word "party" in section 9 must receive liberal construction. It has to be read with the aim, object and scheme of the Act. This is trite law that judicial key to construction is the composite perception of the deha and dehi of the provision. The text and context both must be seen while interpreting a provision [See: (1977) 2 SCC 256, *The Chairman, Board of Mining Examination and Chief Inspector of Mines and another v. Ramjee*], The interpretation given by the Court below runs contrary to the scheme of the Act and such narrow interpretation cannot be upheld. I also find force in the argument of Shri Dhruv Verma that application under Order 7, Rule 11 , Civil Procedure Code was not maintainable in a proceeding under section 9 of the Act. The proceedings under section 9 of the Act cannot be equated with plaint or a suit. I am in respectful agreement with the view taken by the Karnataka High Court in ILR 2002 Karnataka 1476, *Valliappa Software v. C. Sundaram and others*.

11. In the nutshell, the Court below has clearly erred in entertaining the application under Order 7, Rule 11 , Civil Procedure Code and rejecting the application of the appellant preferred under section 9 of the Act. Resultantly, the order dated 21-3-2013 is set aside. The application preferred by non-applicants under Order 7, Rule 11 is rejected. The matter is remitted back before the Court below to decide the application of appellant preferred under section 9 of the Act in accordance with law.

12. Appeal is allowed. No cost.