

(2009) 02 DEL CK 0064

In the Delhi High Court

Case No : O.M.P. 105 of 2005 and O.M.P. 34 of 2005

Sh. Harjinder Pal

APPELLANT

Vs

Sh. Harmesh Kumar
 Harmesh Kumar Vs Sh. Harjinder Pal

RESPONDENT

Date of Decision : 02-02-2009

Acts Referred:

Citation : (2009) 157 DLT 151 : (2010) 8 RCR(Civil) 1278

Hon'ble Judges : Reva Khetrapal, J

Bench : Single Bench

Advocate : Sanjeev Anand and D. Nishant, in O.M.P. 105/2005 and Pawan Upadhyay, Shubhra Goyal and Puneet Parihar, in O.M.P. 34/200, for the Appellant; Pawan Upadhyay, Shubhra Goyal and Puneet Parihar, in O.M.P. 105/2005 and Sanjeev Anand and D. Nishant, in O.M.P. 34/2005, for the Respondent

Judgement

Reva Khetrapal, J.—By this common order and judgment, it is proposed to decide two petitions, being OMP No. 105/2005 titled Sh. Harjinder Pal v. Sh. Harmesh Kumar u/s 34 of the Arbitration and Conciliation Act, 1996 and OMP No. 34/2005 titled Harmesh Kumar v. Sh. Harjinder Pal u/s 9 of the said Act.

2. The facts leading to the filing of the present petitions are within a narrow compass and are as follows.

3. The petitioner and the respondent are real brothers, who were carrying on the business of timber traders jointly from a shop bearing No. 456-C, Chirag Delhi, New Delhi. On 31st May, 2000, a Memorandum of Understanding (hereinafter referred to as "MOU") was signed between the petitioner and the respondent whereunder they came to the following understanding (Annexure-P1):

Re: Residential property bearing No. C-3/19, Janakpuri, New Delhi

(i) The petitioner will get the said property converted into freehold.

(ii) Once it is converted into freehold, the entire first floor (with second mezzanine room) and the entire top third floor (with third mezzanine room) and roof/terrace rights alongwith one-half share in land would be transferred by way of execution of proper sale deeds by the petitioner in favour of the respondent.

Re: Commercial shop bearing No. A-36, W.H.S. Kirti Nagar, New Delhi

(i) This shop would be sold jointly by the petitioner and the respondent only when the transfer of the aforesaid residential premises portion was made by the petitioner in favour of the respondent by way of execution of proper sale deed.

(ii) The sale proceeds of the said shop will be distributed equally between the petitioner and the respondent.

Re: Flat at Dayalpur Society, Dwarka

(i) This flat will be sold and shared equally between the petitioner and the respondent.

4. Clause 6 of the MOU, which is the focal point of controversy between the parties, reads as follows:

6. That all business matters of these two brothers Shri Harjinder Pal & Shri Harmesh Kumar will be sorted out under the supervision of their eldest maternal uncle Shri Mulakh Raj Ajmani, R/o F-57, Kirti Nagar, New Delhi-110015. He shall be Sole Arbitrator between the parties.

5. With reference to the above Clause, the petitioner asserts in the petition that a bare glance at Clause 6 shows that Shri Mulakh Raj Ajmani was to act as mediator between the two brothers, that is, the petitioner and the respondent only in matters relating to "business" and not with respect to any other matter. The petitioner alleges that the words: "He shall be Sole Arbitrator between the parties" have been inserted into Clause 6 without his knowledge, consent or authority and behind his back. And that he came to know of the said interpolation only after the commencement of the arbitral proceedings. Per contra, the respondent contends that the said words were added in the aforesaid clause with the full knowledge and consent of the petitioner, and that the petitioner was duly aware of the arbitration agreement, and is making allegations of interpolation simply to circumvent the proceedings.

6. It is further set out in the petition that the respondent, vide legal notice dated 12th July, 2004 addressed to the petitioner, sought to enforce some of the conditions of the MOU and called upon the petitioner to execute the Sale Deed in his favour in respect of the residential property bearing No. C-3/19, First Floor, Janakpuri, New Delhi, failing which "he shall be constrained to invoke clause 6 of the MOU and refer the matter to arbitration" (Annexure-P2). The petitioner replied to the aforesaid legal notice vide his Advocate's letter dated 22nd July, 2004 taking a clear stand that there was no arbitration agreement between the petitioner and the respondent, as was being claimed in the notice (Annexure-P3).

On 27th July, 2004, however, the petitioner received a letter dated 19th July, 2004 from Shri Mulakh Raj Ajmani apprising him of his appointment as a Sole Arbitrator to adjudicate upon the dispute arising with respect to the terms and conditions of the MOU, and claiming to enter upon the reference as an Arbitrator at the request of the respondent, and calling upon the parties to appear before him on 24th July, 2004 (Annexure-P4).

7. On 27th August, 2004, the petitioner filed a statement of claim before Shri Mulakh Raj Ajmani, which is enclosed with the petition as Annexure-P6. By his letter dated 31st July, 2004 addressed to Shri Mulakh Raj Ajmani, the petitioner once again asserted that he had not entered into and executed any Memorandum of Understanding containing an arbitration clause, appointing or authorising him to act as Arbitrator and hence he had no jurisdiction to act as an Arbitrator (Annexure-P5). The petitioner also called upon Shri Ajmani to furnish him with a copy of the document containing the arbitration clause being relied upon by the respondent. The petitioner asserts that thereupon a copy of the document purporting to be a Memorandum of Understanding also dated 31st May, 2000 and claiming to contain an arbitration clause was handed over to the petitioner (Annexure-P7), and on perusal of the same he came to know that the said document had been interpolated and tampered with by insertion of the words "He shall be Sole Arbitrator between the parties". The petitioner immediately vide his letter dated 4th September, 2004 addressed to Shri Mulakh Raj Ajmani notified him that he had not executed the said document and he was not a party to the same (Annexure-P8). By the said letter, the petitioner also called upon the respondent to produce the original of the said document for inspection. On 11th September, 2004, inspection of the original of the said MOU dated 31st May, 2000 was given to the petitioner. And on 9th October, 2004, the petitioner filed a petition u/s 16 of the Act before Shri Mulakh Raj Ajmani objecting to his jurisdiction (Annexure-P9). In paragraph 4 of the said petition, the petitioner stated as follows:

4. That it is stated that at the request of the applicant, non-applicant Shri Harmesh Kumar produced the original document dated 31.5.2000 on 11.9.2004 and on the perusal of the same it was noticed that the original Memorandum of Understanding dated 31.5.2000, signed between the parties and which was in possession of Shri Harmesh Kumar, has been tampered with by Shri Harmesh Kumar by interpolating and inserting hand-written words subsequent to the original document having been signed by Shri Harjinder Pal witnessed and notarised. At the time, Shri Harjinder Pal had signed the Memorandum of Understanding dated 31.5.2000 the words "First Party and Second Party in the Memorandum of Understanding dated 31.5.2000, the words between the First Party and Second Party in paragraph 3, and words First Party and Second Party in paragraph 4 and more particularly the words/sentence in paragraph 6 of the aforesaid Memorandum of Understanding dated 31.5.2000 "He shall be sole arbitrator between the parties" appearing in the document dated 31.5.2004 being relied upon by Shri Harmesh Kumar were not there, and have been

inserted subsequently by Shri Harmesh Kumar without the knowledge/consent or authority of Shri Harjinder Pal and behind his back to cheat and gain himself unlawfully and to play fraud upon the applicant and such tampering/interpolation is not warranted under law and Shri Harmesh Kumar is liable to be prosecuted under the relevant provisions of Indian Penal Code for his criminal and illegal acts. The present proceedings are therefore non-est and void.

8. A reply to the aforesaid petition was filed by the respondent strongly denying that any interpolation had been done in the agreement and stating that whatever changes were there in the agreement were done in the presence of the parties and their common relatives - Shri Ashwani Sachdeva, Shri Vijay Kumar Saluja, Shri Tilak Raj Ajmani, Shri S.N. Juneja, Shri Devender Ajmani, the learned Arbitrator and Shri L.C. Sethi. It was further stated:

The said correction was necessary because it was not clear as to who was the first party and 2nd party and it was further agreed that Shri Mulakh Raj Ajmani will take care of not only the business matter but also arbitrate the dispute between both the parties relating to their property and business.

9. Thereafter, admittedly the proceedings before Shri Mulakh Raj Ajmani were held on various dates. On 26th November, 2004, the petitioner filed another letter of protest objecting to Shri Mulakh Raj Ajmani's jurisdiction as an Arbitrator (Annexure-P11). On 5th January, 2005, the award under challenge was passed, directing the petitioner to transfer by way of execution of Sale Deed the entire First Floor (with second mezzanine room) and the entire top (third Floor) with Third mezzanine room and roof/terrace rights alongwith one half share in land beneath the property No. C-3/19, Janakpuri, New Delhi in favour of the respondent (Annexure-P12). The petitioner received this award by post on 31st January, 2005.

10. Being aggrieved by the aforesaid award, the petitioner has filed the present petition challenging the same as a nullity on the ground that there was no arbitration agreement between the parties. The sole question which arises in the present case is:

Whether the award dated 5th January, 2005 is liable to be set aside on the ground that there existed no arbitration agreement between the parties.

11. I have heard Mr. Sanjeev Anand, the learned Counsel for the petitioner and Mr. Pawan Upadhyay, the learned Counsel for the respondent and perused the records. Mr. Sanjeev Anand, the learned Counsel for the petitioner contended that the entire picture being painted, that the arbitration clause was added in the document in the presence of the parties and some other persons was only to cover up the tampering. He further contended that a reading of the so-called arbitration clause would also show that the same does not even constitute an arbitration clause, inasmuch as the said clause does not empower Shri Mulakh Raj Ajmani to give his decision. No finality has been attached to his so-called decision. This, apart from the fact that he was only authorised to supervise and

as such, to act as a mediator between the two brothers, and that too only in relation to their business matters. Reference was made by him in this regard to the judgment of the Supreme Court in K.K. Modi Vs. K.N. Modi and Others, to contend that such a clause in a Memorandum cannot constitute an arbitration agreement nor the decision was an award as the clause did not contemplate any judicial determination by recording of evidence, etc. The clause was not intended to be for any different decision than what was already agreed upon between the parties to the dispute.

12. Mr. Anand, the learned Counsel for the petitioner also contended that the fact that the arbitration clause was interpolated in the document as a subsequent insertion behind the back of the petitioner is also evidenced from the following facts:

(i) The additions in the document including the insertion of the words "He shall be Sole Arbitrator between the parties" are not countersigned or initialled by the parties, though the document itself has been executed on a stamp paper and is signed on page 1 as well as on page 2 by both the parties, who have also mentioned the date of the execution thereof beneath their signatures. The two witnesses have also dated their signatures.

(ii) It is unthinkable that the parties would have appointed Shri Mulakh Raj Ajmani as an Arbitrator in view of the fact that Shri Mulakh Raj Ajmani is an old man aged 78 years, who has studied only up to class VI, and that too in Urdu medium. He can neither read nor write nor understand English. As set out in the award itself, he admittedly took the help of Shri Dubey, Advocate for the preparation of the arbitral proceedings and merely signed the same.

(iii) The witnesses produced by the respondent to prove the insertion of the arbitration clause were "bogus" witnesses as is apparent from the face of the document itself, inasmuch as they are not shown as witnesses in the MOU. The only two witnesses shown as witnesses in the MOU are Shri Mulakh Raj Ajmani (the arbitrator himself) and Shri Lakshmi Chander Sethi (not examined). The witnesses examined, on the other hand, are Shri Ashwani Sachdeva, Shri Vijay Kumar Saluja, Shri Tilak Raj Ajmani, Shri S.N. Juneja and Shri Devender Ajmani.

(iv) The best evidence has been suppressed by the respondent, inasmuch as Shri Lakshmi Chander Sethi would have been the only material witness, as the other witness is the Arbitrator himself, namely, Shri Mulakh Raj Ajmani.

(v) No reason has been given in the award as to why Shri Lakshmi Chander Sethi has not been examined as a witness.

(vi) The production of Shri Lakshmi Chander Sethi was also necessary by virtue of the fact that according to the respondent himself, the additions/corrections were made in the handwriting of a person who had accompanied Shri Lakshmi Chander Sethi. It is so stated by the respondent in para 3 of his reply to the petitioner's petition u/s 16 of the Arbitration Act (Annexure-P10 to the petition).

(vii) It is admitted by the respondent that after the raising of the disputes by the petitioner, the copy of the original agreement was given by Shri Mulakh Raj Ajmani to the respondent (Shri Harmesh Kumar) and was in his possession and custody [Ref: para 3 of the respondent's reply to the petitioner's petition u/s 16 of the Arbitration Act (Annexure-P10 to the petition)].

(viii) The Arbitrator in his award has sought to portray that he was not present at the time of entering into the arbitration agreement between the parties, thereby falsifying the entire case of the respondent. Reliance is placed by the learned Counsel for the petitioner, in this context, on the following observations made by the Arbitrator in his award to substantiate this contention:

The claimant has adduced the witnesses, who are the common and close relatives of both the parties. These witnesses have stated that the corrections in the agreement dtd. 31.5.2000, was made in presence of them with the consent of both the parties. I have also for personal satisfaction, inquired about the corrections, made in the agreement they have in the affirmative have reiterated that the corrections were made in the agreement in their presence with the consent of both the parties. (sic.).

13. I find substance in the aforesaid contentions of the learned Counsel for the petitioner. It is trite that an agreement for arbitration is the very foundation on which the jurisdiction of the Arbitrator rests and where that is not in existence at the time when the Arbitrator embarks upon the arbitral proceedings, the proceedings must be held to be wholly without jurisdiction and a nullity. In the instant case, the petitioner does not dispute that a MOU was entered into between him and the respondent on 31st May, 2000, which was witnessed by two witnesses. The petitioner also does not dispute the fact that one of the maternal uncles of the parties, namely, Shri Mulakh Raj Ajmani, who was in the same line of trade, was to act as a mediator between the two brothers in matters relating to "business". What the petitioner challenges [apart from the addition of the words "First Party and Second Party" in the MOU (which additions are inconsequential)] is the insertion of the words "He shall be Sole Arbitrator". The contention of the petitioner is that the agreement between the parties was not an arbitration agreement but an agreement that the maternal uncle of the parties was to act as a mediator and that too only in business matters.

14. The above stand of the petitioner is, in my view, borne out by the reply of the respondent to the objection petition filed in the course of arbitral proceedings, in paragraph 3 whereof the respondent himself states as follows:

The said correction was necessary because it was not clear as to who was the first party and 2nd party and it was further agreed that Mr. Mulakh Raj Ajmani will take care of not only the business matter but also the arbitrate the dispute between both the parties relating to their property and business.

15. I also find merit in the contention of the petitioner that the witnesses produced by the respondent in the witness-box do not further the case of the

respondent in any manner. Two of the aforesaid witnesses, namely, Shri Vijay Kumar Saluja and Shri Ashwani Sachdeva have stated that the agreement was prepared by Shri L.C. Sethi, the maternal uncle of Mrs. Harjinder Pal, but Shri L.C. Sethi, who would have been the most material witness to depose about the arbitration agreement has not been produced in the witness box. The reason why he has not been called into the witness box also remains mysterious. Then again, it is indeed surprising that the learned Arbitrator, who is a witness to the agreement and was presumably present at the time when the corrections were made has, in his award, stated that for his personal satisfaction he inquired about the corrections made in the agreement from the witnesses. If he was present at the time when the corrections were made in the agreement, whence arises the question of his inquiring from the witnesses about the corrections made for his personal satisfaction. It is no doubt true that the petitioner did not choose to cross-examine the five witnesses produced in the witness box by the respondent, but a bare glance at their testimony shows that the said witnesses in their testimony in a parrot-like fashion deposed that a dispute had arisen between the parties and a Memorandum of Understanding was entered into by the parties dated 31st May, 2000 executed in their presence and the necessary corrections were made in their presence including the addition of the words "Sole Arbitrator". In addition, one of the witnesses, namely, Shri Devender Ajmani has stated that the correction in the agreement was made at the residence of his father F/57, Kirti Nagar, New Delhi. If the reply of the respondent filed before the Arbitrator is looked into, however, it becomes apparent that the so-called corrections were not made at the time of the execution of the agreement, but subsequently when a meeting took place at F/57, Kirti Nagar, New Delhi. It is thus not at all clear when the said meeting took place, i.e., whether it took place on 31st May, 2000 itself or on some subsequent date. None of the witnesses examined by the respondent have stated in their testimony whether the corrections were carried out on the same day or on some subsequent date or as to whether the said corrections were carried out after the parties had affixed their signatures on the agreement or prior thereto. As a matter of fact, the testimony of the witnesses is totally bereft of any material particulars, and, in my view, is wholly unreliable, more so, as there are glaring inconsistencies between the stand taken by the respondent himself and the stand taken by the witnesses. The respondent asserts in his reply that it was the petitioner who prepared the agreement, the witnesses state that it was Shri L.C. Sethi who did so. As already stated, Shri L.C. Sethi has been kept out of the witness box for reasons best known to the respondent and in such circumstances, in my view, the evidence of the only witness who had admittedly witnessed the agreement has been suppressed from the Court.

16. In the aforesaid circumstances, for this Court to rely upon the arbitration clause, which was admittedly inserted later on in the MOU and is not signed by the parties or even initialled by them, would be unwarranted and unjustified. Even otherwise, I am of the view that the so-called arbitration agreement

contained in clause 6 of the MOU is not in tandem with the earlier part of the said clause. Had it been the intention of the parties to name Shri Mulakh Raj Ajmani as a Sole Arbitrator, the parties would not have stated that all business matters of these two brothers will be sorted out under the supervision of their eldest maternal uncle Shri Mulakh Raj Ajmani. This portion of Clause 6 and the second portion of clause 6 added in hand "He shall be Sole Arbitrator between the parties" appear to me to be irreconcilable, more so, as the respondent himself admits that initially Shri Mulakh Raj Ajmani was to be only the mediator in respect of business matters, but states that subsequently he was appointed as a Sole Arbitrator between the parties in respect of property and business matters.

17. The attributes of an arbitration agreement have been dwelt upon by the Hon"ble Supreme Court in the Modi's case (supra) wherein the following dimensions have been delineated:

17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:

(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

(2) That the jurisdiction of the tribunals to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5) That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

18. In the Modi case, a Memorandum of Settlement was arrived at between the two groups of the same family, which provided that implementation of such settlement would be done by the Chairman of the Financial Corporation which had lent money to the family concern, and in case of dispute regarding implementation the matter would be referred to the Chairman. Such a clause of the Memorandum was held not to be an arbitration agreement nor the decision of the Chairman an award, as it was held that the clause did not contemplate any judicial determination by the Chairman and was not intended to be for any different decision than what was already agreed upon between the parties to the

dispute. It was meant for the proper implementation of the settlement already arrived at. A judicial determination, recording of evidence etc. were not contemplated or intended by the parties. In such a case, the fact that the submissions were made before the Chairman would not turn the decision-making process into an arbitration.

19. Applying the aforesaid yardstick laid down by the Hon'ble Supreme Court, the award rendered in the instant case can by no stretch of imagination be said to be an arbitral award. It is, however, not necessary to dwell further upon the question as to whether or not the latter part of Clause 6 would amount to an arbitral clause in view of my findings rendered hereinbefore that the respondent has miserably failed to prove the existence of the arbitration agreement itself, which according to him was incorporated by way of amendment.

20. The award in OMP No. 105/2005 is accordingly set aside as being without jurisdiction. Needless to say that the aggrieved party will be at liberty to approach an appropriate forum for the implementation of the Memorandum of Understanding in its true spirit and content.

21. Adverting next to OMP No. 34/2005, this Court by order dated 28th January, 2005 had directed the petitioner (respondent in the said petition) to maintain status quo with regard to property bearing No. C-3/19, Janak Puri, New Delhi. The said order was modified by order dated 25th April, 2005 on account of the submission made by the learned Counsel for the petitioner that the dispute was only with regard to the entire first floor (with second mezzanine room) and the entire top/third floor with third mezzanine room and roof/terrace rights along with one-half share in land beneath the property in question and there was no dispute with regard to the remaining portion of the said property, to read as follows:

In view of above, order dated 28.1.2005 directing parties to maintain status quo shall confine only to the above suit property....

22. The aforesaid status quo order in respect of the disputed portion of the property is still in subsistence and is extended for a further period of fifteen days to enable the respondent Shri Harmesh Kumar to seek his remedy in respect of the Memorandum of Understanding in an appropriate Court or forum, if so advised.

23. Both the petitions stand disposed of accordingly, leaving the parties to bear their own costs.