

(2001) 04 DEL CK 0010

In the Delhi High Court

Case No : IA No. 2413 of 2001 in OMP No. 93/99

Sh. P.D. Khanna and Others

APPELLANT

Vs

Sh. Ashwani Khanna and Others

RESPONDENT

Date of Decision : 23-04-2001

Acts Referred:

Citation : (2001) 4 AD 20 : (2001) 106 CompCas 138 : (2001) 92 DLT 18 :
(2001) 59 DRJ 263 : (2002) 1 RAJ 344

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Sandip Sethi, for the Appellant; Rajiv Bansal, Ashok Bhasin, Chetan Dutt, Arun Khosla, V. Seshagiri and Mr. Asim Vachhar, for the Respondent

Judgement

A. K. Sikri, J.—This is an application filed on behalf of the Bank of India(hereinafter called the "applicant bank") which is seeking an order for allowing it to appropriate a sum of Rs.67,46,090.47 paisa + Rs. 19,65,086.93 paisa outstanding in the account of M/s Prem Engineering Works and M/s Okhla Ice & Food Products respectively.

2. It may be mentioned that OMP 93/99 is the petition filed u/s 34 of the Arbitration & Conciliation Act, 1996 (for short "Act"). By means of this petition, petitioners have filed objections to the award dated 1st January, 1999 passed by Sh. Navin Pal Singh Bhandari who was appointed as the sole Arbitrator. Vide this award the Arbitrator has decided certain disputes between the parties who are related to each other. These parties which form five Groups and are described as Groups A,B,C,D & E were doing various businesses in different names and styles. Some of these business firms had taken loans from various banks. Two such business units namely M/s Prem Engineering Works and M/s Okhla Ice and Food Products being run by these Groups had taken loans from the applicant bank. These loans were secured by mortgaging of properties situated at Plot No.18, C-7 and C-8 Okhla Industrial Area, Delhi. As the advances/loans were not repaid the applicant bank filed two suits for recovery of money in this court which were

subsequently transferred to the Debt Recovery Tribunal. On 15th June, 1998 suit against M/s Prem Engineering Works was decreed in the sum of Rs.21,52,047.97 paisa with interest at the rate of 19.5 per cent per annum to be calculated from the date of filing of the suit till realisation. On 19th June, 1998 the Recovery Officer issued a notice to the aforesaid Groups of the family to pay a sum of Rs.69,78,015.54 paisa to the applicant bank on or before 21st July, 1998. As the amount was still not paid the Recovery Officer attached the mortgaged property situated at Plot No.18, C-7 and C-8, Okhla Industrial Area, Delhi by order dated 30th October, 1998. Thereafter by another order dated 16th April, 1999 the Recovery Officer directed the sale of the aforesaid mortgaged property on 27th May, 1999. Thus in normal course the applicant bank would have realised the amount payable to under the decree by sale of the aforesaid mortgaged property. However, in the meantime the aforementioned arbitration proceedings started which resulted into family settlement and impugned award in terms of family settlement was passed which is the subject matter of the challenge in the main OMP.

3. Certain proceedings which took place in this OMP stalled the sale of the aforesaid mortgaged property. This was done by mutual consent of all the parties and being relevant for the disposal of present application, it would be appropriate to take note of these proceedings at this stage.

4. It may be significant to note at this stage that as per the arbitration award parties had agreed that the dues of the applicant bank be paid out of the sale proceeds of Vasant Vihar property of the family namely A-9/13-C, Vasant Vihar. It may also be relevant to point out that apart from present OMP there are other OMPs and one suit between the parties wherein the arbitration award(s) have been challenged by one or the other Group. Different orders are passed in the present OMP and/or other OMPs to which we shall avert now.

5. In the instant OMP, is No. 4537/99 was filed, inter alia, stating that as per the arbitration award property at Plot No.18, C-7 and C-8 Okhla Industrial area had fallen to the share of the objector and that as per the award the liability of the applicant bank was to be discharged from the sale proceeds of the plot at Vasant Vihar and from the dues respectively from Group A or Group B. Direction was accordingly sought to the effect that Arbitrator be directed to release Rs.15 lacs for the purpose of satisfaction of the applicant bank liability/decreed and the Registrar be directed to pay the balance sum of Rs.45 lacs (with whom the money had been deposited by Groups A and Group B). Since as per the arbitration award liability of the bank was to be discharged from the sale proceeds of the property A-9/13-C, Vasant Vihar, New Delhi all the parties agreed for this course of action namely sale of this property and discharge of the applicant bank's liability from the sale proceeds thereof. Accordingly consent order dated 13th May, 1999 was passed in is No.2490/99 & OMP 71/99, which reads as under:

"It is agreed by the parties present, represented today in Court, that the

property bearing No.A-9/13-C, Vasant Vihar, New Delhi be sold to Mr. Jagdip Singh Chandha, for Rs.2.95 crores at which price this property is agreed to be sold to him by Mr. Y.P.Khanna in terms of a hand written receipt dated 12th May, 1997."

The order dated 13th May, 1999 passed in is No.4537/99 in OMP 93/99, also records as follows:

"Under the award the Arbitrator had directed that the amount due to the Bank of India be paid from out of the sale proceeds of the Vasant Vihar property and from the dues receivable from Group A and B family subject to any receipt and payments made. Admittedly Vasant Vihar property has been agreed to be sold by all the parties to this award"

By an order dated 21st May, 1999 passed in IAs. 4537/99 & 9246/99 in OMP 93/99, it was observed as follows:

"As it was agreed by the parties that the sale proceeds of the Vasant Vihar property can be paid to the bank for liquidating the amount due to them, it may not be required to be purchased by Mr. Jagdip Singh Chandha and it was for this reason that notice was directed to be issued to him"

6. Notice was sent to Mr. Jagdip Singh Chandha who appeared and also gave his no objection to the sale of Vasant Vihar property. He also agreed to vacate the same provided a sum of Rs.58 lacs which was paid by him for the purchase of the property as an advance consideration is repaid to him along with interest. His stand was recorded by the court in its order dated 11th August, 1999. After recording some other submissions in the said order further directions in the following terms were made:

"Mr. V. Seshagiri, learned counsel appearing on behalf of Bank of India in OMP No.93/99 states that the Bank of India has dues to the tune of Rs.63,09,031.00 as per the orders dated 13.5.199 & 21.5.1999 the portions of which have been extracted above.

It is also clear that out of sale proceeds a sum of Rs.63,09,031.00 is payable to the Bank of India.

In view of the orders of this court dated 13.5.199 & 21.5.199 where all the parties have agreed that the Vasant Vihar property be sold. Accordingly, it is directed that property at A-9/13-c, Vasant Vihar, New Delhi be sold so as to implement the orders of this court dated 13.5.1999 & 21.5.1999 out of the sale proceeds and for payment of Rs.58 lacs to Mr. Chandha, plaintiff in suit No.1275/99 and Rs.63,09,031,00 to the Bank of India."

7. It may also be relevant to point out at this stage that all the parties to this OMP had agreed for sale of Vasant Vihar property and discharge of the applicant bank's liability from the sale proceeds thereof. Respondents had also moved an application for deferment of sale of property mortgaged with the applicant bank

i.e Plot No.18,C-7 and C-8, Okhla Industrial Area, Delhi on the ground that all the outstanding dues of the applicant bank shall be paid on the sale of Vasant Vihar property. The applicant bank was accordingly summoned in these proceedings although not party to these proceedings. Since steps were taken for the sale of the Vasant Vihar property, the orders of the Recovery Officer, Debt Recovery Tribunal for sale of the property at plot No.18, Okhla Industrial Area, Delhi were stayed.

8. Against order dated 11th August, 1999 by which the property at Vasant Vihar was directed to be auctioned, Sh. Y.P. Khanna(respondent No.6 herein) filed appeal being FAO (OS) No.272/99. This appeal was disposed of by judgment dated 2nd August, 2000. The relevant portion of the order reads as under:

"In any case, in order to give effect to the said order passed on 15.10.1999, the following directions/clarifications are issued:

i) parties are and will continue to be bound by their respective undertakings as incorporated in the order dated 15.10.1999 and 25.5.2000.

ii) Appellant and/or respondents 5 to 21 will take all requisite steps in expeditiously moving the requisite application in Form 34-A for a certificate u/s 230A(1) of the Income Tax Act. On requisite certificate being granted by the appropriate authorities, within a period of four weeks thereafter the requisite sale deed will be executed by the appellant and respondents 5 to 21 or their nominee(s) before the Registrar on simultaneously handing over by respondents 1 to 4 the requisite demand draft for Rs.2.37 crores to be made in the name of the Registrar of this Court as per order dated 15.10.1999. The said amount will be invested by the Registrar with the Bank of India, Hauz Khas Branch, New Delhi, initially for a period of 45 days, where after the same will be dealt with as per the directions to be made in the pending suit.

iii) Sale deed thereafter will be got duly registered in accordance with law.

(iv) After the aforesaid balance sale consideration has been deposited and duly invested, it will be open for the Bank of India to apply to learned Single Judge for appropriate orders as regards disbursement of its dues. Out of the balance amount a sum of Rs.63,00,000/- will be kept apart and will continue to be invested in fixed deposit in order to meet tax liabilities, if any, arising out of sale of the property, for which appropriate orders will be obtained by the parties from learned Single Judge.

9. Property of Vasant Vihar was thereafter sold and the money is lying with the applicant bank. This application is now filed by the applicant bank for appropriating a sum of Rs.67,46,909.47 paisa outstanding in the account of M/s Prem Engineering Works and Rs.19,65,083.93 paisa outstanding in the account of M/s Okhla Ice and Food Products. No other Group except respondent No.6(Group-C) has objected to the prayer made in this application. The main opposition of respondent No.6 is to the maintainability of such an application on

the ground that the applicant bank is not a party to these proceedings and there is no provision for joining of any party to the proceedings under the Act if such a party is not signatory to the Arbitration Agreement. The proceedings are in the nature of objection to the award and in such proceedings the applicant bank, which is totally stranger to the award, could not maintain any such application. The application for interim measures can be filed only u/s 9 of the said Act. Therefore, application filed by the applicant bank is not maintainable which is even otherwise neither necessary or appropriate party. It is further submitted that till the objections u/s 34 of the Act are pending and award is under challenge there cannot be any disbursement of any money to any party and such piecemeal disbursement would amount to execution of the award. It is also submitted that by orders dated 15th October, 1999 and 2nd August, 2000 passed by the Division Bench in FAO(OS) 272/99 the applicant bank was only given liberty "to apply to the learned Single Judge for orders" and Therefore there is no automatic right accrued in the applicant bank to get the money. The orders are to be passed by this court in accordance with law. It is also submitted if the money is disbursed to the applicant bank, it would be inequitable because in the process the liability of one of the five Groups of the feuding family would be discharged while liability of the other four Groups would remain unpaid. It is also argued that Vasant Vihar property was not mortgaged with the applicant bank, and Therefore, the applicant bank has no lien on this property, although it is admitted that title documents of this property were placed with the applicant bank. In the end the respondent No.6 suggested that the equitable approach would be if both the sale proceeds from Vasant Vihar and the sum of Rs.1.34 crores to be received from Group A be applied towards proportionate distribution amongst Groups C,D & E and also towards the proportionate discharge of the liability of the all the Groups.

10. I have perused the record and given my utmost consideration to the various objections raised by the respondent No.6. The disclosure of the events which have already been narrated above, including extracts of various orders, became necessary because of the vehemently opposition put forth on behalf of respondent No.6 to this application. The gist of the aforesaid proceedings is that the applicant bank has to recover the dues from the aforesaid two firms namely M/s Prem Engineering Works and M/s Okhla Ice and Food Products Admittedly both these firms belonged to all the five Groups and Therefore, all the five Groups are responsible and liable for payment of dues of the applicant bank. For taking the loan facilities in favor of these two firms, property at Plot No.18, Okhla Industrial Area, Delhi was mortgaged to the applicant bank. It is the case of the applicant bank that there was a collateral security in respect of Vasant Vihar property as well. This is not denied by all other Groups except respondent No.6. In any case, what is admitted by even respondent No.6 is that the title documents of this Vasant Vihar property were also kept with the applicant bank and were in fact in possession of the applicant bank. The liability to pay the amount also cannot be disputed as there is a decree in favor of the applicant

bank passed by the Debt Recovery Tribunal. Not only this, in the execution proceedings before the Recovery Officer, Okhla property which is mortgaged with the applicant bank was even directed to be sold. The date of sale/auction was also fixed. At this stage the application was filed by one of the Groups in these and connected proceedings to avert the sale of Okhla property. The ground taken was that as per the settlement resulting into arbitration award it was agreed by all the parties that to discharge the liabilities of the applicant bank property at Vasant Vihar should be sold. It was in these circumstances orders were passed from time to time and all the parties agreed for sale of the Vasant Vihar property. All the parties acted in unison. They were speaking in one voice. Different orders were passed on consent of all the parties including the respondent No.6. In order to give effect to such a course of action agreed to by all the parties, the applicant bank was summoned. Although the applicant bank was not a party to these proceedings, help and cooperation of the applicant bank was sought. The applicant bank could very well go-ahead with the sale of the Okhla property. However, going by the consideration that the ultimate aim of the applicant bank was to receive its dues and as all the parties were unanimous and agreeable to sell the Vasant Vihar so that the liability of the applicant bank is discharged from the sale proceeds thereof, the applicant bank also agreed to this course of action. It not only agreed to the effect that property at Okhla be not sold, to facilitate the sale of Vasant Vihar property, the application bank even gave away the title deeds of the said property. But for this concession given by the application bank and the fairness shown, the property at Vasant Vihar could not have been sold. The applicant bank has agreed to this course of action as all the parties including the respondent No.6 had in no uncertain terms agreed for the sale of Vasant Vihar property and for discharge of the liability of the applicant bank from the sale proceeds of this property. It appeared that the dust had settled atleast in so far as this issue is concerned. However, having taken the cooperation of the applicant bank, when the applicant bank approaches this court for appropriation of the money to liquidate the outstanding payments against the aforesaid two firms, the respondent No.6 now takes somersault and objects to the request of the applicant bank.

11. The objection now raised by respondent No.6 are to be considered in the light of aforesaid glaring facts. Most of the objections raised are hyper technical in nature. After having agreed for a particular course of action which led to the sale of the property at Vasant Vihar only after the applicant bank handed back the title deeds and when an irreversible situation has been created now the controversy is raised and respondent No.6 wants to enter the legal arena and is trying to take shield of the legal objections about the maintainability of such an application thereby making an attempt to thwart all the efforts to settle the dues of the applicant bank. It does not behave the respondent No.6 to now challenge the locus stand of the applicant bank in moving such an application on the ground that it is not a party to these proceedings particularly after obtaining various orders in these very proceedings which could be possible only after

summoning the applicant bank and allowing the applicant bank to join these proceedings and seeking its cooperation.

12. The matter can be looked into yet from another angle. Liability of the applicant bank has to be discharged. Admittedly this liability falls on all the Groups. If the liability is not discharged interest would keep mounting which is ultimately going to act to the prejudice of all the parties including respondent No.6. Money is lying with the applicant bank itself. On a pointed query the respondent No.6 even admitted that the applicant bank has lien over this money. However, respondent No.6 still does not want applicant bank to appropriate the same and would accept the position where liability would keep growing even if the money remains with the applicant bank. This attitude is beyond comprehension. After all applicant bank could still seek appropriate orders from Debt Recovery Tribunal as well for appropriating this very amount and same result can be achieved. Therefore such technical plea of the respondent No.6 should not be allowed to foil the efforts of all other parties which are in the interest of all the parties including respondent No.6.

13. In any case there is another way out to meet this technical objection of locus stand as well. Even if it is presumed that the applicant bank could not move such an application, no such bar would operate against the parties to the proceedings. There can be a request to this effect by other parties to the proceedings. Admittedly all other four Groups have agreed to the aforesaid course of action. Therefore, if not on this application even otherwise on the request of other four Groups which are parties to these proceedings order can be passed for remitting the amount to the applicant bank thereby allowing the applicant bank to appropriate the requisite amount for clearing the outstanding in the account in M/s Prem Engineering Works and M/s Okhla Ice and Food Products. Once this course of action is adopted all the objections of respondent No.6 are put into the pale of insignificance. At the instance of the other Groups, the aforesaid interim measure can be taken u/s 9 of the Act which is not only beneficial for all the Groups but was even agreed upon by all the parties. Therefore the request of all other four Groups is hereby treated as oral application for same relief. Thus we have the application of the applicant bank as well as all other parties i.e. four Groups other than respondent No.6.

14. Other objections of the respondent No.6 are also without merit. Disbursement of money in this way is not going to be inequitable. After all interim orders are being passed for discharge of other liabilities even when Section 34 objections are pending. Respondent No.6 has no objection when other liabilities are discharged by way of interim measure. Here also up to the particular stage respondent No.6 was sailing with the current. He is estopped from changing his course now. There is a Latin legal maxim "Agreement makes law". So respondent No.6 cannot be allowed to break that law which he himself made. If he tries, same very "law" he made by agreement would frown upon him. Sir Richard Richards observed in *Hitchcock Vs. Giddings* (1817) 4 price

135;" If a man will make a purchase of a chance he must abide by the consequence."

15. Prayer of the applicant bank and other parties is accordingly allowed . It is directed that the applicant bank would be permitted to appropriate the sum of Rs.67,46,090.47 paisa + Rs.19,65,086.93 paisa from the sale proceeds of Vasant Vihar property lying with it. This is accordingly disposed of.