

(2001) 09 DEL CK 0241

In the Delhi High Court

Case No : IA. No. 1513/96 in Suit No. 18/96

Shri Prem Sagar Khanna

APPELLANT

Vs

Shri Ravi Khanna and others

RESPONDENT

Date of Decision : 28-09-2001

Acts Referred:

Arbitration Act, 1940 — Section 34

Arbitration and Conciliation Act, 1996 — Section 11, 16, 21, 7, 8

General Clauses Act, 1897 — Section 6

Citation : AIR 2002 Delhi 98

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

Bench : Single Bench

Advocate : Mr. V.K. Makhija and Ms Vandana Khurana, for the Appellant; Mr. P.C. Khanna Mr. Ajay Verma, Mr. K. Dutta, Ms Ruchi Sindhwani and Mr. V.K. Srivastava, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sikri, J.—The plaintiff has filed the instant suit for declaration, partition and permanent injunction. Para-19 of the plaint contains the prayer clause which reads as under

"a. a decree for declaration be passed in favor of the plaintiff and against the defendants holding that the oral family arrangement dated 2nd August, 1986 is final and binding on the parties in all respects.

In the alternative it is prayed that a preliminary decree for partition be passed in favor of the plaintiff and against the defendants 1 to 5 in relation to property bearing No. 64, Golf Link, New Delhi , A-140, Niti Bagh, New Delhi and 27 acres of agricultural land in Village Mohd Amin Khan, Tehsil Najibabad, District Bijnor, UP and declare the share of each of the parties to the said properties.

b. Thereafter this Hon"ble Court may be pleased to appoint a Local Commissioner to suggest the mode of partition.

c. pass a final decree for partition in relation to the above properties and put the plaintiff in possession of the portion which comes to his share in respect of the aforesaid properties.

d. a decree for permanent injunction be passed in favor of the plaintiff and against the defendants 1 and 2 restraining the said defendants from making any addition or alteration or structural change in the property bearing No.64 Golf Link, New Delhi.

e. Cost of the suit be also awarded."

2. A perusal of the aforesaid prayers would show that the plaintiff is seeking a declaration that family arrangement dated 2nd August, 1986 is final and binding on the parties in all respects. It is only if it is decided that the aforesaid family arrangement dated 2nd August, 1986 is not final and binding, the plaintiff is seeking, in the alternative, partition of the suit property mentioned in prayer clause "a" above.

3. It is an admitted case that family arrangement dated 2nd August, 1986 was entered into between the parties recording that the parties had partitioned the suit properties. In para-6 of the plaint the plaintiff has even alleged that the said family arrangement was acted upon by the parties. It may be mentioned that there are three sets of defendants. One is agreeing with the plaintiff by contending that the aforesaid family arrangement is final and binding on the parties whereas other two sets of the defendants are challenging the aforesaid family arrangement.

4. Be that as it may, IA.1513/96 is filed by defendant No.1 which is an application u/s 8 of the Arbitration and Conciliation act, 1996 (hereinafter to be referred as "new Act"). In this application which was filed by the defendant No.1, immediately after receiving the summons in the suit and before filing the written statement, it is stated by the defendant No.1 that Clause-7 of the family arrangement contains an arbitration agreement and, Therefore, disputes between the parties relating to their respective rights in the properties covered by the family arrangement are to be resolved by means of arbitration and the present suit is not competent. Clause-7 of the family arrangement provides as follows:

"7. And doubt, difference or dispute arising regarding this family arrangement or regarding and property or right referred to hereinabove, shall be referred to the sole arbitration of Shri K. K. Jain, Senior Advocate, new Delhi."

5. This application is resisted by the plaintiff who is represented by Mr. V.K.Makhija, Sr. Advocate and three sets of defendants represented by Mr. V.K.Srivastava, Advocate and Mr.P.C.Khanna, Sr. Advocate.

6. Since apparently the disputes and differences which are subject matter of the present suit are covered by the aforesaid arbitration clause, it would be appropriate to examine the objections of the non-applicants.

7. The main objection of Mr.V.K.Makhija, learned senior counsel appearing for the plaintiff was that apart from declaration, the plaintiff has sought partition also. However, this argument is of no avail to the plaintiff inasmuch as the main disputes revolves upon family arrangement dated 2nd August, 1986 whereas the plaintiff says that this arrangement is final and binding. It is disputed by two sets of defendants as mentioned above. Therefore, the primary issue which has to be decided is as to whether this family arrangement is final and binding on all the parties. This dispute is covered by arbitration agreement contained in Clause-7 of the family arrangement. Only if it is decided that such a family arrangement is not valid and binding, the question of partition of the properties as per, the alternate prayer would arise. Therefore, simply because the plaintiff has made alternate prayer is no ground to reject the application filed by defendant No.1 under Section-8 of the Arbitration and Conciliation Act, 1996.

8. The other objection of Mr. Makhija was that the dispute have not been specifically spelled out in this application and, Therefore, such an application is to be rejected. For this, learned counsel referred to the judgment of Punjab High Court (Circuit Bench at Delhi) in the case of Dwarka Nath Kapur Vs. Rameshwar Nath and others 1966 Lxviii P L R 91. This judgment relates to Section 34 of the Arbitration Act, 1940 (hereinafter to be called as "old Act"). Although Mr.P.C. Khanna, learned senior counsel appearing on behalf of defendant No.3 argued that in the present case provisions of Section 34 of the Arbitration Act, 1940 would be applicable and that aspect is considered later at the relevant stage, suffice it to state that the contention of learned counsel for the plaintiff is factually incorrect inasmuch as in para-10 of the application, the applicant has stated the nature of disputes by mentioning that the dispute between the parties primarily relate of their respective rights in their properties covered by family arrangement including specifically the Golf Link House. Therefore, there is no substance in the objections raised by the plaintiff.

9. The objection of Mr. V.K. Srivastava, learned counsel for defendants 5 to 8 was that these defendants in the written statement had included certain other properties as well and had sought the partition thereof. Therefore, the parties should not be relegated to the arbitration. This objection is noted to be rejected. Merely, by adding certain more properties and seeking partition thereof, the arbitration clause contained in family arrangement cannot be frustrated. Insofar as properties mentioned in this family arrangement are concerned, any, doubt, dispute or differences arising in respect thereof are to be resorted by means of arbitration.

10. Mr. P.C.Khanna, learned senior counsel appearing for defendant No.3 raised the following objections:

1. The present case was governed by Arbitration Act, 1940. His submission was that the suit was filed in December, 1995 when neither Arbitration Ordinance, 1996 nor Arbitration Act, 1996 had been enforced. Although Section 85 of the new Act repealed the old Act, this section categorically saved the proceedings

already pending. In these circumstances, matter would be governed by Section 6 of the General Clauses act. Consequently, it is Section 34 of the old Act which would be applicable and not Section 8 of the new Act. Once that be so, it was the discretion of the Court to stay or not to stay the proceedings in the appropriate case and it was a fit case that such discretion should not be exercised.

11. In order to appreciate this contention, we may first note down the provisions of Section 85 of the new Act and Section 6 of the General Clauses Act. which are as follows:

"Section-85. Repeal and saving.- (1) The Arbitration (Protocol and Convention) Act 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal,-

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this act, be deemed respectively to have been made or issued under this Act."

"Section-6. Effect of repeal. - Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered there under; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

12. A bare perusal of sub-Section 2 of Section 85, which is a non-obstante

clause, would show that provisions of this Act would apply in relation to arbitral proceedings which commenced before the new Act came into force. Therefore, old act shall apply only "in relation to arbitral proceedings which commenced before this Act (i.e. new Act) came into force". There were no such proceedings pending under the old Act which are to continue. It is the present suit which was filed by the plaintiff when new Act had not come into force. However, by the time summons in the suit were received by the defendants, the Arbitration and Conciliation Ordinance, 1996 had been promulgated and consequently applicant filed the present application under this Ordinance. Admittedly, as on the date when the application was moved, it was this Ordinance which was in operation and as on that date old Act stood repealed and, Therefore, it was apposite for the applicant to file the present application under the provisions of this Ordinance "subsequently enacted as Act". The expression "in relation to" occurring in sub-Section-2 of Section 85 of the new Act came up for consideration in the case of Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd., and the matter was also examined in the context of Section 6 of the General Clauses Act. and on the facts of that case it was held that provisions of Section-6 of the General Clauses Act would be inapplicable. The Court noticed that respondent had invoked arbitration clause in the Agreement by letter dated January 19,1996 which was received by the appellant on January 31, 1996. The arbitral proceedings were, Therefore, treated to have commenced as per Section 21 of the new Act on January 31, 1996 as by that time new Act had come into force. Same is the position here. As already mentioned above by that time notice of summons in the suit were received by the applicant and which gave cause to the applicant to file the present applications, provisions of new Act had been enforced. It may also be worthwhile to quote the following observations contained in para-31 of the aforesaid judgment:

"31. Various decisions have been cited before us to show as to what is a mere right and what is right accrued or acquired. We have to examine this question with reference to the provisions of Section 6 of the General Clauses Act if it could be said that when the arbitral proceedings have commenced under the old Act, a party has acquired a right to have the award given thereafter enforced under the old Act. The question that arises for consideration is if a right has accrued to the party or it is merely an inchoate right. The three cases referred to, namely, Abbott Vs. The Minister for Lands 1895 AC 425 ; Hungerfort Investment Trust Ltd. Vs. Haridas Mundhra & Ors. ; and D.C. Bhatia and Others Vs. Union of India (UOI) and Another, show that something more is required for vested right to accrue. Right did exist but then nothing was done to show that any act was done or advantage taken of the enactment under which the right existed till it was repealed. An act gave the right and the new Act which right. Mere right to take advantage of the provision of an Act is not a right accrued."

13. In the case of Varun Seacon Ltd. Vs. Bharat Bijlee Ltd., this very questions as posed by Mr.P.C.Khanna, came up for consideration and the Court opined that the provisions of new Act shall apply. The relevant discussion is contained in

paras-10 and 11 of the said judgment which reads as under:

"10. Looking to the provisions of sub-section (2) of Section 85 of the New Act, it is clear that the New Act, while repealing the Old Act, intended to save the repealed Act only for the pending arbitral proceedings. Thus, an intention inconsistent with the provisions of Section 6 of the General Clauses Act is clearly manifested insofar as the question of applicability of Section 34 of the Old Act to pending judicial proceedings is concerned and, Therefore, applications u/s 34 of the Old Act which are pending in a Civil Court on the date of commencement of the New Act are governed by the New Act and not by the Old Act.

11. Even otherwise, even if one were to apply the provisions of Section 6 of the General Clauses Act, what the said provisions save are rights, privileges, obligations and liabilities but not any procedural disabilities. In the case of *Qudrat Ullah Vs. Municipal Board, Bareilly*, the Supreme Court has laid down that where a party to the proceedings had no right or privilege under the repealed Act, which imposed a procedural restriction or a procedural disability on the other side, repeal of the Old Act and simultaneous re-enactment without that disability does not continue the procedural disability, even on application of Section 6 of the General Clauses Act. It is clear that the restriction contained in Section 34 of the Old Act that the party should not have taken any other step in the proceedings was a procedural disability on the defendant rather than a right on the plaintiff. This Court is, Therefore, justified in taking the view that pending applications u/s 34 of the Old Act such as Civil Misc. Application No.113 of 1995 in the present case are covered by the provisions of Section 8 of the New Act and not by Section 34 of the Old Act."

14. I am in respectful agreement with the aforesaid view taken by Gujarat High Court. It may be mentioned that it would be the application under Section-8 of the new Act which would tantamount to giving notice of arbitration and, Therefore, arbitration proceedings would be treated as commenced from the date of this application. As on that date new Act came into force the provisions of new Act would be application and thus application u/s 8 filed by the applicant is clearly maintainable.

15. The order contention was that when the family arrangement itself is null and void, arbitration clause contained therein cannot be acted upon. This contention is fallacious on two reasons. First, the argument goes on the presumption that the family arrangement is invalid which aspect has to be decided. Secondly, such a question has to be decided by the Arbitrator as even if one has to proceed on this presumption that as per the provisions of Section 16(1)(b) the arbitration clause would still not be treated as invalid. Section 16(1)(b) reads as under:

"16. Competent of arbitral tribunal to rule on its jurisdiction.- (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a).....

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

16. It may be mentioned that as per the judgment of the Supreme Court in the case of Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., the Supreme Court laid down the law in the following words:

"Section 16 empowers the Arbitral Tribunal to rule on its own as well as on objections with respect to the existence or validity of the arbitration agreement. Therefore, it would be proper for the Chief Justice or his nominee just to appoint an arbitrator without wasting any time. If this approach is adhered to, then there would be no grievance of any party and in the arbitral proceeding, it would be open to raise any objection, as provided under the Act."

(emphasis supplied)"

17. Second case in the line is Nimet Resources Inc. and Another Vs. Essar Steels Ltd., . In this case, the Supreme Court held that even if there was doubt as to the existence of arbitration agreement but the appropriate course would be for the arbitrator to decide the question u/s 16 rather than Chief Justice or his nominee u/s 11 by making the following observations:

xxxx

"Under Section 7 of the Arbitration and Conciliation Act, 1996, if the contract is in writing and reference is made to a document containing arbitration clause as part of the transaction it would mean that the arbitration agreement is part of the contract. Therefore, in a matter where there has been some transaction between the parties and the existence or the arbitration is in challenge, the proper course for the parties is to thrash out such question u/s 16 of the Act and not u/s 11 of the Act.

xxxx

It is permissible u/s 11 of the Act to decide a question as to the existence or otherwise of the arbitration agreement but when the correspondence or exchange or documents between the parties are not clear as to the existence or non-existence of an arbitration agreement, in terms of Section 7 of the Act, the appropriate course would be that the arbitrator should decide such a question u/s 16 of the Act rather than the Chief Justice of India or his nominee u/s 11 of the Act."

(emphasis added)

18. Section-8 is couched in mandatory form. It is a significant departure from the similar provision contained in Section 34 of the Old Act which gave discretion to the court to stay or not to stay the proceedings. In fact Section 8 of the new Act does not even mention about the stay of the suit but empowers the Court to

refer the parties to arbitration.

19. This application is accordingly allowed. The dispute relating to the validity of the family arrangement and the respective rights of the parties in the properties covered by the family arrangement are hereby referred to Mr. K. K. Jain, Senior Advocate who is named as Arbitrator in Clause-7 of the family arrangement.