

(2002) 03 DEL CK 0115
In the Delhi High Court
Case No : Suit No. 2383 of 1990

Shri Rajesh Chandra Sood

APPELLANT

Vs

Umesh Chandra Sood

RESPONDENT

Date of Decision : 20-03-2002

Acts Referred:

Arbitration Act, 1940 — Section 20
Arbitration and Conciliation Act, 1996 — Section 20
Hindu Succession Act, 1956 — Section 15
Limitation Act, 1963 — Article 137
Registration Act, 1908 — Section 17, 17(2), 49

Citation : (2002) 03 DEL CK 0115

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Amit Chadha and Ritesh Kumar, for the Appellant; Kamal Mehta, for the Respondent

Judgement

Mukundakam Sharma, J.—This petition is filed by the petitioner u/s 20 of the Arbitration Act of 1940 praying for referring the disputes arising between the parties to the sole arbitrator, in terms of the family arrangement dated 2.1.1982. It is stated that a family arrangement was arrived at on 2.1.1982 amongst the petitioner, the respondent and their mother Smt. Lilawati Sood, since deceased. The aforesaid family arrangement is placed on record and proved as an exhibit being Ex. PW/1. The said family arrangement contained a clause to the following effect:-

"In case any dispute arises between the said parties regarding this settlement, it will be referred to Shri Umrao Singh Choraria, an arbitrator appointed by mutual consent of all parties, who is so appointed as the arbitrator."

2. It is contended in the petition that disputes have arisen between the parties in respect of the said family arrangement in respect of the issues specifically mentioned in paragraph 5 of the petition which are to the following effect:-

"5. It is submitted that in the facts and circumstances of the case, the following disputes have arisen between the petitioner and the respondent.

(a) whether the petitioner is entitled to the possession of the first floor of the superstructure at A-81, East of Kailash, New Delhi after paying Rs.1,75,000/- (Rupees One Lac seventy five thousand only) to the respondent;

(b) whether the petitioner has disentitled himself by his conduct from claiming vacant possession of the first floor of superstructure at A-81, East of Kailash, New Delhi after paying Rs. 1,75,000/- (Rupees One lac and seventy five thousand only) to the respondent.

It is also stated in the petition that the named Arbitrator Shri Umrao Singh Choraria, in the said arbitration agreement, has expired and, Therefore, the disputes arising between the parties are required to be referred to the Arbitrator to be appointed by the Court in terms of Section 20 of the Arbitration and Conciliation Act, 1996.

3. The petition is contested by the respondents contending, inter alia, that the aforesaid family arrangement cannot be considered as the said document is a document of title and the said deed require registration as it seeks to create rights in favor of the parties in respect of the properties mentioned in the said deed and in absence of such registration the said document cannot be looked into by this court. It was also pleaded that the said alleged family settlement was superseded by subsequent oral family settlement and, Therefore, no reliance could be placed on the contents of the said deed which even, otherwise, cannot be considered in absence of registration as required u/s 17 of the Registration Act. It was also contended that the petitioner should have filed a suit for possession.

4. On the basis of the pleadings of the parties, issues were framed by this Court on 4.2.1994 to the following effect:-

1. Whether the disputes mentioned in Para 5 of the petition are liable to be referred to the Arbitration as alleged in Para 5 of the petition?

2. Whether the present petition is not maintainable for the reasons stated in para No.1 of the written statement (Preliminary objections)?

3. Whether the present petition is barred by time as alleged in Para No.2 of the written statement (preliminary objections)?

4. Whether the alleged agreement dated January 2, 1982 was superseded by an oral and voluntary agreement as alleged in para No.3 of the written Statement (Preliminary Objections)? If so, its effect?

5. To what relief, if any, is the petitioner entitled?

5. The parties were allowed to lead evidence by filing affidavits which have been filed and on the basis of such affidavits I proceed to dispose of the petition.

Before dealing with Issue No.1 which is one of the main contention in this petition, it would be appropriate to take up Issues No.2, 3 & 4 first and on the basis of the decisions thereon, issue No.1 shall be dealt with.

ISSUE NOS. 2 and 3

The property in question bearing No.A-81, East of Kailash, New Delhi, is the subject matter of the dispute. The said property is a lease-hold property, which stood registered in the name of the mother of the parties, who was also a signatory to the family settlement dated 2.1.1982. In the said deed it was mentioned that the said property is owned by Smt. Lilawati Sood and on the said plot a double storey house was built up by the respondent out of the funds managed by himself approximately to the tune of about Rs. Three Lacs and that it had been decided by all the parties that the respondent would reside in the said house along with his family and the entire house would remain under his possession. It was also decided by all the parties thereto that if any of the brother would get complete house or any part of the house by virtue of the will made by their mother Smt. Lilawati Sood, then they would divide the house in the manner mentioned in the deed or they would relinquish the right for each other for the part mentioned in the family settlement. In terms thereof the ground floor of the house would remain under the ownership of the respondent and the first floor will remain under the ownership of the petitioner but the petitioner would be entitled to reside or to take the possession of the first floor of the house mentioned above only after paying Rs.1,75,000/- to the respondent before he takes possession of the first floor and until and unless the said amount of Rs.1,75,000/- is paid to the respondent the possession of the first floor would remain with the respondent. There are certain other clauses in the said deed which, however, may not be relevant for the purposes of deciding the disputes arising between the parties.

6. As stated hereinabove, the said deed also contains an arbitration clause. It is contended on behalf of the respondent that the petitioner should have filed a suit for possession instead of filing a petition u/s 20 of the Arbitration Act. In case the aforesaid document is held to be a family settlement and if the arbitration clause therein is attracted in the present case, in that even the petitioner is entitled to file a petition u/s 20 of the Arbitration Act seeking for giving effect to the arbitration clause. In that event it is not necessary for him to file a suit as stated by the respondent. Therefore, the aforesaid issue No.2 is decided in favor of the petitioner and against the respondent holding that the present petition u/s 20 of the Arbitration Act is maintainable.

Although a general statement is made in the written statement, however, no specific details are given in the written statement to show and prove that the present petition is barred by time. Only a bald statement is made in the affidavit filed by the respondent that the petition is barred by limitation. In absence of any evidence led by the respondent to show that the petition is barred by limitation, it cannot be held that the present petition is barred by limitation. The

petition was filed u/s 20 of the Arbitration Act. No period of limitation is prescribed under the Limitation Act for application u/s 20 of the Arbitration Act. However, even if it is assumed that the provisions of Article 137 of the Limitation Act, 1963 applies to the facts and circumstances of the present case, the petition is within the period of limitation as the said article provides limitation of three years from the date the right to apply accrues. The family arrangement Ex. PW1/1 provided that the petitioner would be entitled to possession of first floor only on paying Rs. 1,75,000/- which the petitioner offered to pay in the month of January, 1989 and confirmed by letter dated 27.1.1989 (Ex. PW1/2). The respondent agreed to give possession after a couple of months but failed to give possession and, Therefore, the dispute arose between the parties. If the period of limitation is computed even from the aforesaid date, the petition would be within the period of limitation as the present petition was filed on 27.7.1990. Thus the petition is held to be not barred by limitation and the aforesaid issue No.3 is also answered in favor of the petitioner and against the respondent.

ISSUES NO. 1 & 4

I propose to discuss there issues together as they are inter-related and inter-connected. The aforesaid family arrangement was entered into by the petitioner, the respondent and their mother Smt. Lilawati Sood, since deceased which is Ex.PW1/1 and is dated 2.1.1982. I have extensively referred to the relevant contents of the said family arrangement as also set out the arbitration agreement contained therein.

The aforesaid family arrangement is an admitted document and, as a matter of fact, no issue was framed in the suit challenging the legality and validity of the said family arrangement nor the admissibility of the said document was challenge on the ground that it is not registered. The said family settlement is an admitted document by the parties. In terms of the aforesaid family settlement the petitioner offered to pay Rs.1,75,000/- to the respondent some time in the middle of January, 1989 by writing letter dated 27.1.1989 (Ex.PW1/2.). By the said letter the petitioner claimed possession of the first floor. The said letter further discloses that the respondent agreed to handover vacant possession of the first floor of the petitioner after completing his some other tasks. No response was made by the respondent to the aforesaid confirmatory letter dated 27-1-1989 sent by the petitioner. The respondent has placed three documents on record which are marked Ens. RW1/1 to RW1/3 which are all undated documents. In the present petition, however, the relevancy and admissibility of the said document are not required to be gone into. If it is found on consideration of the materials on record that an arbitration agreement exists between the parties then the said disputes as raised by the respondent would also be a matter within the domain of the arbitrator and, Therefore, it is not necessary for me to proceed to decide the said disputes also in this said petition. However, one thing is clear from the aforesaid documents that there are disputes between the parties in respect of the property in question and the said disputes

are required to be resolved either by way of arbitration proceedings or by filing a suit. There can also be no dispute that if there exists an arbitration agreement between the parties, the said disputes arising between the parties would be required to be resolved through the process of arbitration. If, it is, however, held that there is no arbitration agreement then the petitioner would be entitled to seek remedy for adjudication of the disputes raised, through a civil court.

It was sought to be contended by the Respondent that the arbitration agreement, even if there be any, was superseded by subsequent oral agreement between the parties. In respect of the said subsequent oral agreement some evidence was sought to be led by filing an affidavit. However, the said plea seems to be an afterthought as by writing letter dated 27.1.1989 (Ex. PW1/2) the petitioner sought to give effect to the various clauses in the family arrangement and even in spite of receipt of the said letter, admittedly no reply was sent thereto. If there would have been any supersession of the said family arrangement by subsequent oral arrangement between the parties, as alleged the natural course would have been for the respondent to write a letter to the petitioner informing him that the stipulations in the family arrangement was superseded by subsequent oral agreement between the parties. No such steps were taken nor any document is placed on record to prove and establish that immediately thereafter the respondent put the petitioner to notice of the existence of a subsequent oral agreement which superseded the earlier oral arrangement between the parties. The respondent kept quite even after receiving a letter Ex. PW1/2 dated 27.1.1989. Even subsequent thereto notice dated 10.4.1990 was issued by the petitioner to the respondent which Ex.Pw1/5. The said notice was also served and replied by the respondent and in the said reply also which is Ex. PW1/8 it is stated that the petitioner had by his conduct disentitled himself from claiming his share in A-81, East of Kailash, New Delhi. Even in that reply it is not specifically stated by the respondent that the family arrangement got superseded by subsequent oral agreement between the parties. Therefore, the stand taken in respect of the family arrangement being superseded by subsequent oral agreement, is an after thought cannot be accepted. It is held that the respondent has failed to prove that the family settlement dated 2.1.1982 was superseded by subsequent oral agreement between the parties which could supersede the family arrangement between the parties.

Having held thus, it would be required for me to consider the other plea that is sought to be raised by the learned counsel for the respondent. During the course of his argument it was submitted by him that the family arrangement is not admissible in evidence as it is not registered. He further submitted that even if it is assumed that such an unregistered family arrangement could be used only for a collateral purpose, the arbitration agreement cannot be held to be a matter of collateral purpose and, Therefore, the said document neither could be looked into nor given effect to by this Court.

Section 17 of the Registration Act requires a document to be compulsorily registered if it is a no testamentary instrument which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

Smt. Lilawati Sood, who was the owner of the aforesaid property had only two sons namely, the petitioner and the respondent and in absence of a will the right to inherit the said property, in the natural course, would devolve upon the petitioner and the respondent in equal shares. The said document, however, records that on the said property a double storey house is constructed by the respondent out of his own funds and, Therefore, in case the petitioner desires to take possession, he has to pay an amount of Rs. 1,75,000/- to the respondent and thereafter he could get possession of the first floor of the property. Therefore, the said document cannot be strictly said to be a document which declares, assigns or extinguishes any right of the parties in the said immovable properties. The said document merely records what have been agreed upon by the members of the family. A distinction is always to be made between the document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation. In such a case the Memorandum itself does not create or extinguish any rights in immovable properties and, Therefore, does not fall within the mischief of Section 17(2) of the Registration act and is, Therefore, not compulsorily registrable. In paragraph 9 of the decision of the Supreme Court in *Kale and Others Vs. Deputy Director of Consolidation and Others*, , the Court discussed in general the effect and value of family arrangements entered into between the parties with a view to resolve the disputes once for all. It was held that the family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made. The Supreme Court referred to certain passages in *Kerr on Fraud* at page 364 which states as follows:--

"The principles which apply to the case of ordinary compromise between strangers do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend."

The Supreme Court further stated that the object of the arrangement is to protect the family from long-drawn litigation or perpetual strife which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. The Supreme Court further stated that a family arrangement by which the property is equitably divided between the various

contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hand of a few is undoubtedly a milestone in the administration of social justice."

The Supreme Court in paragraph 9 of the said judgment further held that is why the term "family" has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successions so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The courts have, Therefore, leaned in favor of upholding a family arrangement instead of disturbing the same on technical or trivial grounds.

In paragraph 10 of the said judgment the Supreme Court laid down the following propositions when it stated that to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

"(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and Therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, Therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favor of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement."

After noticing various earlier decisions in paragraph 19, the Supreme Court held that:-

"Thus it would appear from a review of the decisions analysed above that the courts have taken a very liberal and broad view of the validity of the family settlement and have always tried to uphold it and maintain it. The central idea in the approach made by the courts is that if by consent of parties a matter has been settled, it should not be allowed to be reopened by the parties to the agreement on frivolous or untenable grounds."

In paragraph 23 the Supreme Court after noticing the decision of the Patna High Court in Awadh Narain Singh and Others Vs. Narain Mishra and Others, approved the said decision wherein it was stated that:-

"a compromise petition not embodying any terms of agreement but merely conveying information to the court that family arrangement had already been arrived at between the parties did not require registration and can be looked into for ascertaining the terms of family arrangement."

To the similar effect is the judgment of the Supreme Court in Tek Bahadur Bhujil Vs. Debi Singh Bhujil and Others, . IN the said decision it was held by the Supreme Court that the terms of the family arrangement could be arrived at even orally and such terms could also be recorded in writing as a memorandum of what had been agreed upon between the parties. It was further held that the said memorandum need not be prepared for the purpose of being used as a document on which future title of the parties is to be founded. It is generally prepared as a record of what had been agreed upon, in order that there are no hazy notions about it in future and the document which is no more than a memorandum of what had been agreed to between the parties does not require compulsory registration u/s 17 of the Registration Act.

In Roshan Singh and Ors., v. Zile Singh and Ors., reported in (1988) 2 S.C.R.1106 the Supreme Court after noticing various earlier decisions held that the true principle is that if the arrangement of compromise is one under which a person having an absolute title to the property transfers his title in some of the items thereof to the others, the formalities prescribed by law have to be complied with, since the transferees derive their respective title through the transferor. If, on the other hand, the parties set up competing titles and the differences are resolved by the compromise, there is no question of one deriving title from the other, and Therefore, the arrangement does not fall within the mischief of Section 17 read with Section 49 of the Registration Act as no interest in property is created or declared by the document for the first time. It is assumed that the title had always resided in him or her so far as the property falling to his or her share is concerned and Therefore to conveyance is necessary.

In the present case, the petitioner and the respondent were the two sons of late Smt. Lilawati Sood and, Therefore, they were and are the only heirs of said Smt. Lilawati Sood u/s 15(a) of the Hindu Succession Act. Being the sons, both of them were/are entitled to half share of the property by virtue of Section 15(a) of Hindu Succession Act, and the title to the said property would and is being derived through such right. Said Smt. Lilawati died on 3.2.1986 intestate and on her death undivided share each in the said property devolves on the parties by virtue of Section 15(a) thereof and they became owners of the said property in terms of the aforesaid previous share of half undivided share in the property. What the family settlement intended to do was to ascertain the portion of their share with definite identification, and the mode of acquiring possession by the petitioner and, Therefore, the said document cannot be treated to be a document of title requiring registration.

Even if it is assumed for the purpose of argument that the said document created right and title to the property, the clause relating to arbitration agreement could be looked into by the Court without there being any registration of the said document. In *Damodar Valley Corporation Vs. K.K. Kar*, of the said judgment the Supreme Court referred to the decision of *The Union of India Vs. Kishorilal Gupta and Bros.*, and mentioned with approval the decision recorded by Hon'ble Mr. Justice Subha Rao (as his Lordship then was) that an arbitration clause is a collateral term of a contract as distinguished from its substantive terms. It was also stated that nonetheless it is an integral part of it. Therefore, ratio of the aforesaid decision is that although the arbitration clause is an integral part of the main agreement but the said arbitration clause is a collateral term of contract. In that view of the matter such a clause could be looked into by the Court being a matter of collateral purpose without there being any registration in respect of the same. Therefore, even if the arbitration agreement is a transaction affecting such immovable property u/s 49(c) of the Registration Act, then the same is also said to be for a collateral purpose and, Therefore, could be looked into and given effect to.

Counsel appearing for the respondent however, sought to rely upon several decisions in support his contention that the family arrangement not being a registered document was illegal and void and, Therefore, arbitration clause also perished with it. In support of the said contention he mainly relied upon the decision in *Union of India v. Kishorilal Gupta* (supra). In my considered view the said decision instead of helping the respondent helps the petitioner as dealt with hereinabove. In the present case the family arrangement cannot be said to be void and non est as was the case before the Supreme Court in *Union of India v. Kishori Lal Gupta* (supra). The respondent himself did not challenge the legality and validity of the said family arrangement in the present proceedings at all and the said document is an admitted document nor a plea was taken that the said document is not even admissible the same being not registered. The decisions relied upon by the counsel appearing for the respondent Therefore, shall have no application to the facts of the circumstances of the case and as they are

distinguishable on facts. Accordingly, I hold that the aforesaid two issues namely, Issues No. 1 & 4 are also answered in favor of the petitioner and against the respondent.

In the light of the discussions above, I hold that the arbitrating agreement survives and could be looked into and given effect to by the court u/s 20 of the Arbitration Act.

In view of the aforesaid conclusions arrived at by me, I also hold that with the death of the named Arbitrator in the aforesaid arbitration agreement the present petition filed by the petitioner u/s 20 of the Arbitration Act for appointment of an independent Arbitrator is maintainable and in terms thereof I direct that the disputes arising between the parties shall be resolved through the process of arbitration and the said disputes are referred to Hon''ble Shri C.L. Chaudhry, a retired Judge of this Court for adjudication in accordance with law who is appointed as an independent Sole Arbitrator. The Arbitrator named herein would enter into the reference and shall decide the disputes arising between the parties in accordance with law. It shall be open to the Arbitrator to fix his own remuneration after discussion with the parties. the petition stands disposed of leaving the parties to bear their own cost.