(2009) 08 DEL CK 0081

In the Delhi High Court

Case No : C.S. (OS) No''s. 3721 and 3722/91

Smt. Sangita Aggarwal and Another — APPELLANT

Vs

Shri Virender Singh Rohtagi and Another — RESPONDENT

Date of Decision : 28-08-2009

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 14, 30, 33

Citation : (2009) 08 DEL CK 0081

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Vijaya Lakshmi, for the Appellant; Ashok Chhabra, for the Respondent

Judgement

Shiv Narayan Dhingra, J.—During pendency of the suit No. 3721/1991 for partition and rendition of accounts of the assets and business of partnership firm, the parties agreed to have the disputes settled through arbitration. With the consent of parties, Justice N.N. Goswami (Retd.) was appointed as a sole Arbitrator. Justice N.N. Goswami (Retd.) gave his award on 24th December, 1994. Both the sides have filed objections against the award under Sections 30/33 of Arbitration Act 1940. Smt. Sangita Aggarwal who had initially filed the petition died during the pendency of proceedings. However, her legal heirs herein shall be referred as petitioner and Sh. Virender Singh Rohtagi, the respondent and his branch/family shall be referred to as objector.

2. The learned Arbitrator on the basis of pleadings of the parties framed following issues:

1. Whether the reliefs claimed or any of the claims by the Claimants are beyond the terms of reference? O.P. Respondents

2. What are the immovable/moveable assets of the firm and what is the manner and mode of distribution and partition thereof between the parties? O.P. Parties.

3. To what amount are the parties entitled towards capital account of the firm?

4. To what amount is the Claimant entitled as a consequence of rendition of accounts by the Respondents?

5. To what amount, if any, the Claimants are entitled towards the payment received and or that due to firm relating to the chits subscribed by the partnership firm or the partner thereof or the subscription thereof were paid out of funds of the partnership firm?

6. Whether the Claimants are entitled to any interest towards their share in the capital of partnership firm and amount due to them as a result of rendition of accounts, if so, to what amount?

7. Whether Claimant no.1 is entitled to any amount from the partnership firm towards loan obtained by the firm from her?

8. Whether the Respondents have been using assets for running business in other names, if so, to what effect?

9. Relief.

3. The learned Arbitrator after recording evidence of the parties and after considering the material and documents placed before him came to conclusion that the assets of the partnership firm included premises No. G-23/1767-68, Bhagirathi Place, Delhi. The property was owned by the partnership firm. He divided this property in two portions, prepared the site plan of two portions and gave an award awarding one portion to the petitioner and the other to the objector. The other assets comprised of two shops in premises bearing No. 1809, Bismal Colony, New Delhi. Shops had been used as godowns for the business of the firm. One of the shops, the learned Arbitrator held was under tenancy of the claimant, i.e., petitioner and other was under tenancy of the respondent (objector). He awarded the shop under the tenancy of claimant to the claimant and shop under tenancy of the respondent to the respondent. Regarding value of remaining assets, business worth of partnership, the learned Arbitrator came to conclusion that the value of the remaining assets of the firm was Rs. 70 lakhs. This conclusion was arrived at not only on the basis of pleadings but also on the basis of offer and counter offer made by the parties in presence of the Arbitrator, when efforts for settlement were being made. Proper account books of the partnership firm were not before the Arbitrator. The Arbitrator made an objective assessment of the value of assets of the partnership business as Rs. 70 lakhs. Since the business was continued even after death of Mr. Jugal Kishore Aggarwal by his son without informing the death to the bank, to the Sales Tax Authority and other Authorities and the name of the firm was used continuously, he assessed the profits of the business @ 10% of the value of the assets. He thus gave award that the remaining assets of the firm be divided equally and out of profits, after death of Mr. J.K. Aggarwal which he assessed of Rs. 18 lakhs, 50% would go to the petitioner. She was also held entitled to the interest on the said amount @ 12% per annum. He clarified that out of Nine lakh mesne profits she would be entitled for the interest on Rs. 2.75 lakhs for a period of 2 years and 4

months, on the next Rs. 2.75 lakhs she would be entitled for the interest for a period of one year 4 months, on next Rs.2.75 lakhs interest would be payable only for a period of 4 months, since this profit had accumulated over a period of 3 years. On remaining 75,000/- no interest was allowed. He also allowed interest on entire amount of Rs. 9 lakhs from the date of award till the date of decree. The claim of the petitioner against the contribution made by partnership firm into chits was rejected on the ground that there was no material on record that firm had contributed towards the chits. The partnership firm accounts showed a sum of Rs. 59,000/- to the credit of the claimant/petitioner prior to her marriage. Since a sum of Rs.51,000/- was given to the claimant at the time of marriage, he allowed only Rs. 8,000/- payable to her with interest @ 12%. The counter claim of the respondent/objector that petitioner?s husband business in the name of JK Enterprise and SP Industrial Corporation were carried on from the funds transferred by late Sh. Jugal Kishore Aggarwal were dismissed since there was no material placed before him to show that any funds of the firm were utilized by claimant?s husband in the above firms.

4. The petitioner in her objections submitted that the learned Arbitrator failed to award sum of money representing capital of the claimant and/or predecessor in interest, thus he misconducted himself. He also failed to award amount against chit funds for which partnership firm had contributed, therefore he mis-conducted. She submitted that out of chit funds money defendant purchased Bunglow No.C-18, Mahindroo Enclave, Delhi and also re-built the house spending an amount of Rs. 18.5 lakhs thereon. She submitted that Exhibit C-1/2 which was a document in the handwriting of Sh.Jugal Kishore Aggarwal was ignored by the Arbitrator. It was also submitted that the learned Arbitrator erred and mis-conducted himself and he failed to award the petitioner the amount wrongly withdrawn by the defendant after death of Sh. Jugal Kishore Aggarwal and the Arbitrator failed to award amount against the value of goodwill of the name of the partnership firm. The learned Arbitrator also mis-conducted himself when he failed to award the claimant money relating to the stocks of the firm and goods and stocks in transit of the partnership firm. She submitted that the rights of the claimant were not fully ascertained and the respondent was allowed to continue to retain illegal gains made by him. A prayer was made for modification of the award.

5. The respondents in their objections submitted that the Arbitrator mis-conducted himself in conducting the proceedings and had travelled beyond the scope of reference. He committed judicial impropriety by giving findings which were not based on any material or evidence or documents and were erroneous. The Arbitrator did not appreciate the relevancy of the witnesses and had adopted a partial approach in favour of the claimant and against the objector. He did not follow the principles of natural justice.

6. It is further submitted that the learned Arbitrator suggested to the parties for amicable settlement and parties counsels initiated talks for settlement and all

throughout the Arbitrator was party to the settlement talks. The Arbitrator from time to time insisted and forced the objector to settle the claim and for this purpose the matter was adjourned from time to time and ultimately when the objector agreed to the payments to the claimant and for division of property the claimant backed out from the settlement creating an impression as if it was the respondent who was backing out of the compromise. Thereafter, the Arbitrator gave an award in favour of the claimant, having become biased, and the Arbitrator was not ready to accommodate the objector. Since the learned Arbitrator was part and parcel of offer and counter offer made by the parties he should not have taken into consideration, while deciding the main claims of the petitioner, offers and counter offers in order to evaluate the assets of the firm. The Arbitrator became disqualified to arbitrate because of his participation in the offers and counter offers. It is also stated that the respondent had filed a petition u/s 14 of the Arbitration Act, 1940 for removal of the Arbitrator, however without success.

7. The respondent has given details of the proceedings before the Arbitrator which I consider this Court need not to go into. Suffice it to say that the respondent?s objection regarding biasness of Arbitrator is baseless. The record rather shows that Arbitrator had been giving latitude and accommodation to the respondent time and again. The respondent had been trying, not only to delay the proceedings, but had been deliberately trying to see that the proceedings do not come to an end. At several occasions when the respondent did not appear before the Arbitrator, without any intimation, the Arbitrator did not proceed ex parte against him and sent notice to the respondent for appearance. The principle of natural justice does not mean a license to a party not to appear and to prolong the proceedings. The notion of principle of natural justice is often being mistaken as a license to prolong the proceedings. A Court or an Arbitrator can only give an opportunity to a party to present its case and on failure of availing this opportunity by the party, the defence of the party can be closed unless this failure had been for some reasonable ground. Where a party deliberately does not appear before the Court or the Arbitrator with the intention of prolonging the proceedings, the Court and Arbitrator both have right to proceed ex parte. The principles of natural justice are sufficiently met on giving an opportunity to a party. The principle of natural justice does not warrant that a party should be called to the Court repeatedly by sending notices by the Arbitrator, for appearance. Once a party appears before the Arbitrator on hearing, it is obligatory on the party to appear on all subsequent hearings which are notified to it at the time of proceedings. However, the Arbitrator in this case has shown extra latitude to the respondent in accommodating and giving repeated adjournments and time and again issuing notices for appearance. The allegations made by the respondent against the Arbitrator are malafide and unfounded.

8. I also find no force in the plea of the respondent that since talks of settlement had taken place in presence of the Arbitrator, the Arbitrator should not have

proceeded with the arbitration proceedings or he had became a party to the settlement talks. In fact the law does not prohibit an Arbitrator from making an effort for amicable settlement of the dispute between the parties. This duty has been cast on Arbitrator as well as on the Courts that if possible the dispute between the parties should be got settled amicably. Neither the Court nor the Arbitrator becomes party to the dispute by making efforts of amicable settlement. The objection raised by the objector/respondent is baseless.

9. The other plea taken by the respondent is that the Arbitrator failed to appreciate the relevancy of witnesses as pointed out by the respondent/objector and dismissed an application for summoning additional witnesses thereby the Arbitrator committed an impropriety. It is also stated that the Arbitrator wrongly decided the Bhagirath Palace shop to be under rent of the firm/its partner without calling the owner of the shop, who was a necessary party.

10. It is settled law that an Arbitrator is a judge selected by the parties and he is not bound by the technicalities of CPC or the Evidence Act. The Arbitrator is the sole Judge to decide as to what evidence was relevant and necessary to be examined. It is not for the Court, while deciding objections to an award, to judge whether the evidence before the Arbitrator was relevant or irrelevant; inadequate or adequate. The award given by the Arbitrator cannot be challenged on the basis of inadequacy or inadmissibility or impropriety of the evidence. In this case, the Arbitrator gave full opportunity to both the parties to lead evidence and to argue their respective cases. The respondent/objector during proceedings had been acting with the sole motive of prolonging the proceedings. If the Arbitrator had considered that certain witnesses were not relevant for deciding the disputes, this Court cannot enter into the controversy whether the witnesses were relevant or not, nor the award can be set aside on this ground. Similarly, the Arbitrator was also competent to decide whether the shop was under the tenancy of the partnership firm or not. He was not deciding the rights of the owner. The Arbitrator in this case has taken into consideration, the entire evidence and material produced before him to come at the conclusions arrived by him.

11. The other ground of challenging the award by respondent is that the Arbitrator could not have divided the premises into two portions as done by him in respect of two properties of the firm. It is argued that law prohibits the division of the tenancy, without consent and knowledge of the landlord. I consider that this plea must fail. The landlord can take care of his rights. The Arbitrator was not deciding the rights of landlord. After the dissolution of the partnership firm, division of the tenanted portion between two partners does not violate law and if this gives right to the landlord to throw out the partners from the tenanted portion, the landlord can exercise his rights in accordance with law and can take care of his rights.

12. The next objection taken by the respondent against the award is about valuation of the business assets and the method of deciding the valuation of the

assets by the Arbitrator. It is stated that the observation of the learned Arbitrator that respondent had agreed to pay 30 to 35 lakhs to the claimant as his share is only an imaginary act. I consider that this objection is again a baseless objection made by the respondent. The respondent has admitted that the talks of compromise had taken place in presence of the Arbitrator. The Chartered Accountant of the respondent had appeared before the Arbitrator and had admitted that he had no personal knowledge about the correctness of the entries in the books of accounts of the firm and he had not audited the same. He also admitted that Pushplata Aggarwal had written a letter to him and asked him for supplying copies of old balance sheets of the firm. He also received another letter dated 8th November, 1991 for the same purpose but he did not comply with the said request even on the reminder because he was told by Sh.Virender Singh Rohtagi (respondent) that since a dispute has arisen between the parties he (Chartered Accountant) would not supply documents to Pushplata, without his permission. It is also admitted by the respondent that he continued business of partnership firm even after the death of Sh.Jugal Kishore Aggarwal and the cheques received in the account of the firm were being diverted and the banks were not informed about the death of Sh. J.K.Aggarwal, neither the Sales Tax Department was informed.

13. Normally valuation of business assets of a firm is done on the basis of books of accounts of the firm. However where books of accounts are not properly maintained or audited and the business is carried out by one of the parties even after death of the partner, it is not unlawful for the Arbitrator to take into account the offers and counter offers made in his presence by the parties to assess the real value of the assets of the firm. The Arbitrator committed no error by evaluating the assets of the firm on the basis of talks of compromise which took place in his presence wherein offers and counter offers were made. The parties, after assessing the real value of the assets and prospectus of the firm make offer and counter offers. The respondent had been handling the business of partnership firm after death of Sh.Jugal Kishore Aggarwal and had been in the complete knowledge of the value of the business assets of the firm. The Arbitrator rightly took into consideration the offer made by the respondent to the petitioner regarding her share for assessing the value of the assets of the firm.

14. The objection of the respondents that the Arbitrator exceeded his jurisdiction is also untenable. The Arbitrator was appointed by the Court with wide reference of determining the immovable/moveable assets of the firm and to divide the same between the parties and to have the accounts of the firm settled upon rendition of accounts, to determine value of the firm, including its registered trade mark and to determine whether the premises at Bhagirath Place, Delhi was part of the business of the partnership firm and to settle the capital accounts of the firm. Apart from deciding these disputes, the Arbitrator was also given reference to decide all necessary matters to give effect to the award. Thus, nothing was left out of the scope of the Arbitrator, in view of vast reference order. The plea of the respondent regarding the Arbitrator?s jurisdiction is baseless.

15. The objections raised by the petitioner against the award are in the nature of an appeal against the award. It is settled law that while considering objections u/s 30 of the Arbitration and Conciliation Act, 1940, the Court does not act as a Court of appeal. It is not open to challenge the award on the ground of Arbitrator having reached wrong conclusion or having failed to appreciate the facts. The jurisdiction of the Court is limited u/s 30 as clearly indicated in Arbitration Act. The Court cannot examine the correctness of the award on merits with reference to the material produced before the Arbitrator. I therefore find no merits in the objections raised by the petitioner as well.

16. The objections raised by the petitioner as well as raised by the respondents are hereby dismissed being meritless. The award passed by the learned Arbitrator is made rule of the Court. A decree sheet in terms of award be prepared.