

(2001) 10 DEL CK 0163

In the Delhi High Court

Case No : IA 7834 of 2000 in Suit No. 1272/93

S.S. Brijbasi and Sons

APPELLANT

Vs

Chander Bhan Garg and Others

RESPONDENT

Date of Decision : 03-10-2001

Acts Referred:

Arbitration Act, 1940 — Section 20, 44
Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1, 151

Citation : (2001) 10 DEL CK 0163

Hon'ble Judges : Vinod Sagar Aggarwal, J

Bench : Single Bench

Advocate : N.N. Gupta, for the Appellant; Ashok Bhasin and S.S. Gautam, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Aggarwal, J.—S.S. Brijbasi & Sons have filed a petition u/s 20 of the Arbitration act, 1940. The sum and substance of the assertions are that defendants 1 to 8 are the partners of M/s S.S. Brijbasi & Sons besides M.L. Garg. Because of certain diverse reasons the partners for amicable and smooth running of the business decided to dissolve the partnership. They called a joint meeting of all the partners and shareholders in the first week of July 1992. A Memorandum of Understanding was signed by all the partners. All the partners consequently met and during the meeting only defendant no. 1 fell out and created differences and dispute. Because of this fact the meeting ended without reaching any decision. Defendant no. 1 then started unilateral actions and threatened to stop all business and approached the courts to obstruct the business. He threatened occupying the business premises by force and got issued a notice served on defendant no. 9 (Oriental Bank of Commerce). He requested the bankers to stop the payments and withdrawal to all other partners. It is further asserted that defendant no. 1 came to the premises at Fatehpuri and in the absence of plaintiff no. 2 threatened his two employees to leave the premises. He wanted to take possession of the same. But when one of the

employees threatened to telephone the police defendant no. 1 left. According to the plaintiffs there is an arbitration clause in the partnership and invoking the same it has been prayed that the disputes be referred for arbitration.

2. Defendant no. 1 had filed the written statement and alleged that petition could not be filed u/s 20 of the Arbitration Act by the partnership concern. Shri M.L. Garg, one of the partners of M/s S.S. Brijbasi & Sons has no better right than any other partner. In the partnership deed of 27th June 1986 it is mentioned that duration of the partnership shall be at will. The firm as such would have been dissolved by any of the partners. However as the partners were the different branches of the one of the family and the family was increasing, it was decided by heads of the branches of the family that partnership M/s S.S. Brijbasi & Sons as well as other business including limited and private limited companies may be wound up. For that on 5th May 1982 a meeting was arranged and a memorandum of understanding was prepared. It was signed by M.L. Garg and defendants 1 to 4 and 6. Other defendants 5, 7 and 8 are sons of defendant no. 2 and M.L. Garg. By this memorandum of understanding it was mutually decided that the partition of firm S.S. Brijbasi & Sons as well as other firms and companies will be held on basis of balance sheet as on 31st May, 1992. It was also settled that no partner or person effected by the settlement shall carry out any new business or transfer or liquidate any capital until the final settlement of above-mentioned firms and properties has been made to the satisfaction of all. It was settled that all agreements and statement of account should be completed by 30th September, 1992. By virtue of this memorandum of understanding the firm S.S. Brijbasi & Sons at Delhi, Bombay and Mathura stood dissolved. The only thing to be done was for payment of amounts due to the respective partners. Since firms stood dissolved the arbitration clause could not be enforced which otherwise is stated to be vague. It has been asserted further that defendant 8 had filed a civil suit in the court at Mathura u/s 44 of the Arbitration Act making serious allegations of misappropriation against M.L. Garg. The said suit is stated to be pending. It is denied that defendant no. 1 had threatened to occupy the premises. But it is asserted that M.L. Garg is misappropriating huge amounts.

3. Suffice to say that defendant no. 3, 4 and 6 and defendants 8 have filed their separate statements.

4. During the pendency of the present proceedings defendant no. 1 had filed the application (IA 7834/2000) under Order 40 Rule 1 and Order 38 read with Section 151 of the Code of Civil Procedure. It has been prayed that double storied premises at Okhla Industrial Area may be sealed along with office premises 32/1 Fatehpuri and that a receiver may be appointed to take charge of double storied building at Okhla Industrial Area and the office premises referred to above, inventory of the stocks may be prepared. By this order the said application is proposed to be disposed.

5. It has been asserted that the plaintiff no. 2 has pleaded that a joint meeting of

partners and shareholders had been called as there were different firms in which six brothers were partners. There are private limited companies in which families of all the brothers are shareholders and that a memorandum of understanding had been arrived at. The plea of defendant no. 1 as already referred to above has been that in view of this memorandum of understanding partnership deed came to an end and arbitration clause has no application. It is asserted that M.L. Garg that the plaintiff no. 2 was the accounting party in respect of the business of S.S. Brijbasi & Sons carried on at 32/1 Fatehpuri Main Market. The accounts as per memorandum of understanding were not furnished by Murari Lal Garg. The factory premises E-46/11 Okhla Industrial area is a double storeyed building and constructed on a plot of 600 sq. yards. This is in the name of M/s S.S. Brijbasi and Sons but M.L. Garg has started his individual business by getting private limited company formed under the name and style of M/s Brijbasi Art Press Pvt. Ltd. No accounts of S.S. Brijbasi & Sons are being maintained. The partner has no right to carry on business in his own name in factory premises of the partnership. It is in this backdrop that above relief has been claimed.

6. In the reply filed by plaintiff no. 2 it has been asserted that regarding the memorandum of understanding it had not contained the signatures of all the partners and Therefore is not binding on every partners. The memorandum of understanding has no impact whatsoever on the merits of the case. Due to inadvertence the plaintiff mentioned in his application that memorandum of understanding is signed by all the partners. It has further been asserted that no shareholder or nearly 10 shareholders either attended the meeting or signed the memorandum of understanding.

7. Plea has been raised that large number of facts mentioned by defendant no. 1 in his application have got no bearing on the present suit. M/s S.S. Brijbasi & Sons was stated to be having its branches at Mathura, Bombay and Delhi. Mathura branch is being looked after by defendant no. 1/applicant and his son Gaurav Garg besides two others look after the branch at Bombay. The Delhi Branch is being looked after by the plaintiff. The plaintiff claim that he was not in a position to comment about functioning of the firm/branches at Mathura and Bombay. It is denied that the assertions claimed by defendant no. 1 has any basis or that there is any need to appoint a receiver or for sealing of the property.

8. Defendants 4, 6 and 7 had filed their separate replies and opposed the application filed by defendant no. 1.

9. The short question in the face of the aforesaid that comes up for consideration is as to whether in the facts of the case, it would be appropriate to seal the property which is commercial premises and to appoint a receiver or not.

10. Order 40 Rule 1 CPC gives the power to the court to appoint a receiver in the facts of a particular case. The receiver ordinarily would be appointed in extreme cases and in case of T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and Others, the said court had laid down the principles for the courts exercising the

jurisdiction for appointment of the receivers.

(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the facts that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceedings.....

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit.....

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonable clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm.....

(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a "de facto" possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be "in medio", that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less in "in medio" is sufficient to vest a Court with jurisdiction to appoint a receiver.....

(5) The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disintitiled himself to the equitable relief by laches, delay, acquiescence etc.

11. In other words the high prerogative act of taking property out of the hands of one and putting it in pound under the orders of the court ought only to be taken in exceptional cases. It can be done to prevent manifest wrong or imminent danger in this regard. The appointment of receiver as is apparent from the principles referred to above is one of the harsh remedies which the law provides for enforcement of rights. it has to be adhered to as referred to above, in

extreme cases and circumstances. Therefore, this is a delicate duty to be performed by the court. One agrees with the principle of the Madras High Court that ordinarily the defendant or a person in de facto possession would not be disposed unless irreparable harm is carried.

12. In all fairness to the learned counsel for defendant no. 1/applicant he referred a great deal of documents to bring home the point that the plaintiff no. 2 was trying to invoke and use his possession which is detrimental to the interest of the firm and others and Therefore the receiver as such should be appointed.

13. But in the present case what is apparent is that two suits have been filed which are pending in this court. plaintiff no. 2 as has been alleged by defendant no. 1 is in de facto possession of a commercial premises at Okhla. At this stage when M.L. Garg is in possession of the same and is alleged to be carrying on come business of a company floated by him the equities have to be looked into keeping in view the certain basic facts. It appears from annexure 1 filed that defendant no. 1 had known this fact some time in September 1993. No such action was taken at that time. Even if the contention of defendant no. 1 is believed that he came to know of this fact in 1998 still the defendant no. 1 delayed the action, Keeping in view the delay on part of defendant no. 1 at this stage deems it inappropriate to appoint a receiver because that will not be in the interest of justice. There are no circumstances which may compel the court to take the said action because by imposing certain other conditions in this regard necessary care can be taken.

14. Reference was made to the letter of 2nd March 1993 asserting it to be forged. At this moment no opinion need be expressed but suffice to say that it is not an appropriate case where de facto possession of plaintiff no. 2 by appointment of the receiver should be taken.

15. As a result of the delay that has been caused the other controversies need not be gone into. The application for appointment of receiver or sealing of the property is dismissed. But it is directed that (a) plaintiff no. 2 M.L. Garg will not create any third party interest in E-46/11 Okhla Industrial Area and (b) plaintiff no. 2 will maintain accounts with respect to the business being conducted at the said premises and must produce the same as and when directed by the court.

16. Re-list it for framing of issues on 12th March, 2002.