
(2006) 01 DEL CK 0035

In the Delhi High Court

Case No : IA No. 4651 of 2004 in CS (OS) No. 750 of 2004

Super Seals India Limited

APPELLANT

Vs

SOS Automotive Components (P) Ltd.

RESPONDENT

Date of Decision : 20-01-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 34, 8
Companies Act, 1956 — Section 391, 394

Citation : AIR 2006 Delhi 203 : (2006) 1 ARBLR 218 : (2006) 129 DLT 23 :
(2006) 87 DRJ 268

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

Bench : Single Bench

Advocate : Rajiv Nayar and Anjoo Jain, for the Appellant; Manish Kumar, Amit Kumar and Vrinda Bajaj, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—This is in application filed by the defendant u/s 8 of the Arbitration and Conciliation Act, 1996 (in short "The Act") on the ground that there is an arbitration clause contained in the Deed of Family Settlement (hereinafter referred to as the "Deed of Settlement") as per which, the matter needs to be referred to arbitration. The relevant clause is clause 6.11 in the said Deed of Settlement which reads as under:-

6.11 All disputes or differences arising between the parties hereto in respect of, relating to, concerning or otherwise arising out of this settlement shall be settled by the arbitration of the said UNM and VD. The arbitration proceedings shall be conducted at New Delhi and shall be governed by the Arbitration and Conciliation Act, 1996. The Arbitrator (s) shall give an Award in writing on each reference and their decision shall be final and binding upon the parties. Any dispute or difference between UNM and VD shall be settled by GCB who shall be the umpire in the matter.

2. plaintiff has resisted the prayer made in this application on the ground that

the Deed of Settlement is not between the parties to this dispute and, Therefore, there is no arbitration agreement between the parties and further that in any case the disputes, which are the subject-matter of the suit, do not fall within the scope of the aforesaid arbitration clause. In order to appreciate the rival contentions, it would be necessary to take note of the factual matrix leading to the filing of the suit.

3. plaintiff's suit is for permanent injunction restraining passing off, infringement, copyright, rendition of accounts, delivery up etc. It has been manufacturing Oil Seals, Water Pump Seals, Valve Stem Seals, Mechanical Seals etc. (hereinafter referred to as the "said seals") for the automotive and tractor industry since its inception in the year 1962. It is stated that the plaintiff company had given different part numbers/reference numbers to different types of seals used by different automobile companies. The part numbers/reference numbers allotted by the plaintiff company are, Therefore, their own creation and the plaintiff is continuously using the said part numbers/reference numbers for more than four decades and has acquired legal right over the said part numbers/reference numbers. It is further explained that in the year 1962 late Sh. R.N. Talwar, who was one of the promoters/directors of the plaintiff company, made a list of all the parts which were manufactured by the plaintiff and allotted numbers to each and every part. The allotment of such number to each and every part was necessary to identify the specific part and to determine its price, according to its size and design. Preparation of the detailed list of all the parts and allotment of numbers to each of the parts of the said seals was a skilled job. The plaintiff company has, Therefore, copyright in the compilation of such an exhaustive list of parts and allotment of numbers to each of the parts of the said equipment. It is, Therefore, pleaded that the defendant company cannot use same part numbers/reference numbers in respect of the aforesaid parts.

4. Some of the admitted facts, which have, however, given rise to the disputes may also be noted at this stage. Apart from the plaintiff company, there was another company with the name M/s. Super Seals Hydraulics Ltd. (in short the "SSHL"). Both these companies were family concerns, as the shareholders in both the companies were closely related to each other. A Scheme of Arrangement under Sections 391 and 394 of the Companies Act was formulated by the two companies which was duly approved by this Court in Co. Pet. No. 67/97. As per this Scheme, which was effective from 1st April, 1996, the plaintiff had transferred the Seal Division to SSHL. Name of SSHL was subsequently changed to M/s. Super Oil Seals (India) Ltd. (in short the "SOSIL"). In order to avoid any disputes and differences between the shareholders of the two companies, which was common and family members, a Deed of Family Settlement was also executed by them on 27th March 1997. As per this, 60% of the Seal Division remained with SOSIL (then SSHL) and 40% remained with the plaintiff company. It is admitted by the plaintiff in the plaint itself that consequent upon this family settlement all the part numbers/reference numbers and similar styles of writing their trademark subsequent to the scheme was continued by the plaintiff

company as well as SOSIL. In fact, as per the said family settlement, three sons of late Sh. R.L. Talwar, namely, Mr. Anil Talwar, Mr. Deepak Talwar and Mr. Kamal Talwar had settled the terms in writing between themselves. The territories of the Seal Division were demarcated as Zone A and Zone B. Zone A was allotted to Sh. Anil Talwar and Zone B was jointly allotted to Sh. Deepak Talwar and Sh. Kamal Talwar. Clause 3.2 of the Deed of Settlement further provided the goodwill of the business of Seals Division will be retained by each party in respect of their respective zones. After this division of family business by means of the aforesaid family settlement, the plaintiff company was jointly run by Sh. Deepak Talwar and Sh. Kamal Talwar. On the other hand, SOSIL came under the control and management of Sh. Anil Talwar.

5. It is, Therefore, not in dispute that SOSIL was using the trademark as well as part numbers/reference numbers in respect of all kinds of seals. The right of SOSIL to manufacture the same product with similar trademark and similar style is also not in dispute.

6. Sh. Anil Talwar, who was controlling SOSIL along with his son Sh. Siddharth Talwar expired on 9th November 2001. Sh. Siddharth Talwar has permitted use of part numbers/reference numbers to the defendant herein, i.e. M/s. SOS Automotive Components Pvt. Ltd. He himself is the Chief Executive Officer of this company. The two Directors in the said company are Sh. Amrik Singh Walia (maternal grand-father of Sh. Siddharth Talwar) and Sh. Deepak Khosla (father-in-law of Sh. Siddharth Talwar). The case of the defendant is that SOSIL has the indubitable right to use the trade name/part numbers/reference numbers in respect of different kinds of oil seals manufactured by it. It also has right to assign the said marks or copyright therein to other persons, including the defendant company. The defense of the defendant company is Therefore, that it is an assignee of the trademark and thus entitled to use the same. In this backdrop, it is to be decided as to whether the aforesaid dispute or difference can be settled through the means of arbitration by virtue of clause 6.11 contained in the Deed of Settlement.

7. The present case is filed by the plaintiff against the defendant, who is not a party to the Deed of Settlement. The party to the settlement, namely late Sh. Anil Talwar through whom Sh. Siddharth Talwar claims, is not party to the suit. It is a matter of interest to note that Sh. Siddharth Talwar filed an application under Order I Rule 10 of the CPC for his impleadment in the suit on the ground that he is a necessary party. That application has already been dismissed by this Court vide order dated 9th September 2004. No doubt, it is clarified in the said order that the view expressed therein only pertains to the said application seeking impleadment and application u/s 8 will be decided separately, dismissal of the said application has a definite bearing. If this application u/s 8 is accepted and parties are relegated to the arbitration, it would be between the plaintiff and the defendant without Sh. Siddharth Talwar. However, so far as the defendant is concerned, it is not a party to the family settlement and consequently not a party

to the arbitration agreement. The Supreme Court in the case of Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, held that where a suit is commenced in respect of a matter which falls partly within the arbitration agreement and partly outside and which involves parties some of whom are parties to the arbitration agreement while other are not so, Section 8 of the Act would not be attracted. The Court concluded that the words "a matter" in Section 8 of the Act indicate that the entire subject-matter of the suit should be subject to the arbitration agreement and there is no provision in the Act for bifurcating the suit in two parts, one to be referred to arbitration for adjudication and other to be decided by civil court. Similarly, in Akshay Kapur and Ors. v. Rishav Kapur and Ors. 2003 (2) Arb LR 508, this Court took the view that the subject-matter of an agreement is different from the question raised in the suit, Section 8 would have no application. After making reference to some Supreme Court judgments the Court summarised the legal position in the following words:-

Significantly, before referring the parties to arbitration u/s 8 of the present Act, the Court must be satisfied that the action pending before it is "the subject of an arbitration agreement". If the Court or judicial authority comes to the contrary conclusion, it must continue and conclude the proceeding before it. To my mind, Therefore, a little change has been brought about by the amending Act. It also seems to me that while it is no longer possible for a party to have the arbitrability of a dispute decided by a Court, the same position can be brought about through the device of a legal action such as the present suit. In the regime of the 1940 Act it was felt that such question could not be left to the Arbitrator to decide and rule upon; he could not be a judge in his own case, so to speak. Since the intention of the legislature to ensure the continuance of arbitral proceedings is palpably present, giving the Arbitrator the untrammelled power to decide all questions touching upon his jurisdiction, I would have readily read down the opening words of Section 8 to achieve this objective. But such an interpretation would do violence to and would be irreconcilable with the plain meaning of the words used therein, and Therefore I shall refrain from undertaking such an exercise. The essence of the erstwhile Section 34, as extracted in the Kothari case (supra), makes the judgment's ratio relevant even in respect of the new Act.

8. Learned counsel for the defendant/applicant relied upon the observations made by this Court in its order dated September 9, 2004 while dealing with application of Sh. Siddharth Talwar under I Rule 10 of the CPC wherein the Court stated that "the rights of the Defendant and the Applicant Siddharth Talwar indubitably coalesce with each other." However, this sentence appears in the following paragraph:-

The rights of the Defendant and the Applicant Siddharth Talwar indubitably coalesce with each other, but there is not even a hint that unless Shri Siddharth Talwar is imp leaded his interest would be imperiled in any manner. If the Defendant is a separate entity, it would be virtually impossible to defend the

plaintiff's case. The real issue is that the Defendant is not a signatory or a party to the Family Settlement and, Therefore, cannot implement and enforce the Arbitration Clause contained therein. This clause would avowedly be attracted if Shri Siddharth Talwar is a party, and in his absence it would be a moot question whether Section 8 is at all attracted.

9. Therefore, defendant has to read the entire paragraph and cannot take out two lines in isolation and read out of context. Argument of learned counsel for the defendant of piercing the corporate veil will also be of no significance. It, in fact, amounts to begging the question. Defendant wants that while deciding this application u/s 8, the Court should record a finding (without allowing the parties to lead evidence) that Siddharth Talwar and the defendant company are one and the same and, Therefore, arbitration agreement is binding. Such a finding, obviously, cannot be recorded in this application without evidence and without coming to such a conclusion matter cannot be referred to arbitration as the defendant is not party to the family settlement. The defendant is so called assignee and that is its defense. It is a third party, alien to the family settlement. The defendant asserts that assignment in its favor is the sheet-anchor of the defendant's case. It will, Therefore, be appropriate to determine the said issue in these proceedings.

10. In view of this, it is not even necessary to discuss the judgment in the case of New Horizons Limited and Another Vs. Union of India (UOI) and Others, relied upon by the defendant except observing that said judgment is totally out of context and the issue involved therein was entirely different. Similarly, order passed by the Supreme Court in the case of Angang Group International Trade Corporation v. Pipava Railway Corporation Ltd. will be of no assistance to the defendant. That was a case where order dated May 9, 2003 was passed by the Supreme Court in Arbitration Petition No. 9/2003 in a petition u/s 11 of the Arbitration and Conciliation Act. The defendant had objected to the existence of contract between the parties. The Court observed that it was not one of those clear-cut cases as contended and the matter is such that may require probe and enquiry to the objections raised by the respondent and it is only feasible and appropriate that the arbitrator himself may embark upon any such enquiry. These observations were made in view of the Constitution Bench judgment of the Supreme Court in the case of Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., which held the field at the relevant time as per which the function of the Court u/s 11 was administrative and all such issues were to be decided by the Arbitrator. Position is totally changed after seven Judge judgment of the Supreme Court in the case of S.B.P. & Co.(M/s) v. Patel Engineering Ltd. and Anr. (M/s) reported as 2005 IX AD (SC) 473 . Case of Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, is also of no avail. In that case it was held that where arbitration clause exists the Court has a mandatory duty to refer the dispute arising between the contracting parties to arbitrator. There is no quarrel about this proposition of law. However, in the instant case there is no arbitration clause between the plaintiff and the

defendant. This application is, Therefore, without any merit and is accordingly dismissed.