

(1974) 05 DEL CK 0024

In the Delhi High Court

Case No : C.A. No. 626 of 1972 in C.P. No. 73 of 1973

Surendra Kumar Dhawan and Another

APPELLANT

Vs

R. Vir and Others

RESPONDENT

Date of Decision : 06-05-1974

Acts Referred:

Citation : (1974) 05 DEL CK 0024

Hon'ble Judges : D.K. Kapur, J

Bench : Single Bench

Advocate : S.D. Sharma, for the Appellant; D.D. Sharma, for the Respondent

Judgement

D.K. Kapur, J.—Although I had heard arguments in this matter some time ago, I had adjourned the application without delivering judgment in view of the proposals made during the course of hearing concerning the settlement of the case. Unfortunately, a full settlement in the main petition has not been finalised between the parties on account of the fact that the settlement arrived at requires a considerable period for fulfillment. The settlement arrived at is fully stated in the order which is being passed today in C.A. No. 650 of 1972, which is an application u/s 403 of the Companies Act, 1956, for interim order. I am passing interim order.

2. This application was instituted by the respondents for stay of the proceedings on account of the fact that there was an arbitration clause in the articles of the company. I am of the view that the articles cannot debar the court's jurisdiction in the matter of a petition under sections 397 and 398 of the Companies Act, 1956.

3. The article in question is No. 38 in the articles of M/s. Kare Private Limited, which runs as follows :

" In case any difference shall arise between the company and the directors or between the directors themselves or between any members of the company or between the company and any person to whom these presents shall apply the

same shall be referred to arbitration and if the parties cannot agree upon a single arbitrator there shall be two arbitrators who shall have power to choose an umpire and in either case such reference shall be so arranged and conducted in all other respects as to conform to the provision in that behalf contained in the Arbitration Act, 1940, or any Act in force for the time being in the Republic of India."

4. This article shows that if there is a difference between the company and its directors or between the directors themselves or between any members of the company or between the company and any person, then the same will be referred to arbitration. The jurisdiction of the court under sections 397 and 398 of the Companies Act, 1956, or u/s 433 is concerned with the management of the company in the special circumstances provided in sections 397 and 398 or for winding up when the situation provided in Section 433 arises. This is a statutory jurisdiction which cannot be ousted by arbitration clause.

5. Although the learned counsel for the respondents has urged that the articles are binding on the members of a company, the said articles cannot override the operation of the Act. It is only necessary to mention the provisions of Section 9 of the Companies Act, 1956, which states as follows:

"9. Act to override memorandum, articles, etc.--Save as otherwise expressly provided in the Act-

(a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its board of directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and

(b) any provision contained in the memorandum, articles, agreement or resolution aforesaid shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be." This section shows that even if the articles operate to oust the jurisdiction of court, they cannot effectively do so, and in fact, the Act is effective and operative even if anything contrary to the same is contained in the article. Sub-clause (b) reproduced above shows that the article if repugnant to the provisions of the Act will be void. I think this is sufficient to decide this application u/s 34 of the Arbitration Act, 1940.

6. The member of a company has a right to file a winding-up petition u/s 433 of the Companies Act, 1956, in certain circumstances. That statutory right cannot be ousted by articles or any provisions of the same. Similarly, the shareholders of a company have a right to file a petition u/s 397 or Section 398 of the Act if the provisions of Section 399 are satisfied. This right is a statutory right, which cannot be ousted by a provision of the article. I have, Therefore, found it unnecessary to deal with any of the submissions made on behalf of the

respondents-applicants or the case-law cited by him. There is no case in which the question now raised before the court has been urged as a ground for staying a winding-up petition or a petition u/s 397 or 398 of the Companies Act, 1956. All the cases cited deal with completely different situations. Needless to say, the provisions of Section 9 of the Companies Act, 1956, reproduced above are a complete answer to the case of the respondents. I, Therefore, decline to stay the petition. As this question is a novel one, I do not make any order as to costs.