

(2009) 12 DEL CK 0011

In the Delhi High Court

Case No : FAO (OS) 551 of 2009 and CM No"s. 16267-68 of 2009 and FAO (OS) 552 of 2009 and CM No"s. 16277-78 of 2009

Tandav Film Enterrainment Pvt. Ltd.

APPELLANT

Vs

Four Frame Pictures and Another

RESPONDENT

Date of Decision : 03-12-2009

Acts Referred:

Arbitration Act, 1940 — Section 20, 21, 34, 39, 39(1)

Arbitration and Conciliation Act, 1996 — Section 11, 16, 16(1), 16(2), 16(3)

Citation : (2009) 7 ILR Delhi 795

Hon'ble Judges : Reva Khetrapal, J;Mukul Mudgal, J

Bench : Division Bench

Advocate : Jagdish Sagar, for the Appellant; Nemo, for the Respondent

Final Decision : Dismissed

Judgement

Reva Khetrapal, J.—These appeals are directed against the judgment dated 20.10.2009 passed by the learned Single Judge in IA No. 10000/2008 in CS(OS) No. 1456/2008 and IA No. 10408/2009 in CS(OS) No. 1913/2008 whereby the aforesaid applications filed by the respondent No. 2 UTV Software Communications Ltd. ("UTV Software") u/s 8 of the Arbitration and Conciliation Act, 1996 seeking reference of the dispute between the parties to arbitration were allowed by the learned Single Judge with the following directions:

21. In terms of the above clause, Tandav Films and Padmalaya Telefilms on the one hand and UTV Software on the other will have to appoint an arbitrator each and those two arbitrators have to choose the third arbitrator. This will be done by each of the parties within a period of two weeks from today. The place of arbitration shall be in Mumbai. Upon the failure of the parties to appoint an arbitrator each or those two arbitrators to appoint a third arbitrator, it will be open to the Defendant No. 2 to apply to the High Court of Judicature at Mumbai u/s 11 of the Act for appointment of an arbitrator or arbitrators in accordance with law.

2. The facts relevant to the present appeals are as follows.

3. CS(OS) No. 1456/2008 had been filed by the appellant M/s. Tandav Films Entertainment P. Ltd. ("Tandav Films") against M/s Four Frames Pictures (Respondent No. 1) ("Four Frames"), UTV Software (Respondent No. 2), M/s Big Music and Home Entertainment (Respondent No. 3) ("Big Music") and M/s. Living Media India Ltd. (Respondent No. 4) ("Living Media") for a decree of permanent injunction restraining Respondents No. 1 to 3 and their agents and others acting on their behalf from reproducing, making a film or sound recording of, issuing copies of, publicly performing, communicating to the public, adapting or in any other manner infringing the appellant's copyright in the music of the song Chak De Phathey or any other music from the appellant's Hindi film Khosla Ka Ghosla. The other prayers were for a decree for damages in the sum of Rs. 20,05,000 and for rendition of accounts and profits of the respondents.

4. The connected suit had been filed jointly by the appellant M/s. Tandav Films and the respondent No. 4 M/s. Padmalaya Telefilms Ltd. ("Padmalaya Telefilms") against Four Frames (Respondent No. 1), UTV Software (Respondent No. 2) and Mr. Jaideep Sahni (Respondent No. 3) seeking a permanent injunction against the Defendants from "marketing, exhibiting, distributing or communicating to the public the rights of the Tamil film Poi Solla Porom" which according to the appellant infringed its copyright in the literature and dramatic works created by Mr. Jaideep Sahni for the appellant. In the said suit, a permanent injunction was also sought to restrain the respondents from making any sequels or prequels of the film "Khosla Ka Ghosla" and from releasing, exhibiting, distributing the said film "Poi Solla Porom" which infringes the appellant's special rights as author of the film "Khosla Ka Ghosla". A further prayer was for decree of damages in the sum of Rs. 23,00,000.

5. On 10th June, 2002, an exclusive licence agreement was entered into between the appellant and the respondent No. 3 (Mr. Jaideep Sahni) in terms of which the script of certain songs and the writer's rights were exclusively licenced to the appellant. Consequent thereto, the appellant signed several licence agreements relating to dialogues, screen play, music, etc.

6. On 5th May, 2003, a Memorandum of Understanding was entered into between the appellant and the respondent No. 4, Padmalaya Telefilms Ltd. for a joint venture for the making of the Hindi film "Khosla ka Ghosla".

7. On 15th November, 2005, an agreement was entered into between the appellant, the respondent No. 4 and the respondent No. 2 whereby the exclusive rights, excluding music rights in the Hindi film "Khosla ka Ghosla" worldwide were transferred to the respondent No. 2 for a period of 15 years. This agreement contained an arbitration clause, being Clause No. 13, which reads as under:

13. Arbitration

13.1. The parties to this Agreement hereby agree that they intend to discharge their obligations in utmost good faith. The parties therefore agree that they shall at all times act in good faith, and make all attempts to resolve all differences howsoever arising out of or in connection with this agreement by discussion failing which, by arbitration.

13.2. The parties shall be bound to submit all disputes and differences howsoever arising out of or in connection with this to arbitration by one arbitrator mutually appointed, failing which by three arbitrators; one each nominated by UTV and First Party and the other chosen by the two (2) arbitrators so nominated by the parties. The parties agree that until the arbitration proceedings are complete, they shall not take their disputes to a court of law. The Arbitration shall be in all matters be governed by the Arbitration and Conciliation Act, 1996.

13.3. The Arbitrators shall be persons of professional repute who are not directly or indirectly connected with any of the parties to this Agreement. They shall have prior experience as arbitrators,

13.4. The place of arbitration shall be at Mumbai, India. The language to be used shall be English.

13.5. The award of the arbitration proceedings will be final and binding on both the parties to the Agreement.

8. On 22nd September, 2006, the Hindi film "Khosla ka Ghosla" was released which was a tremendous success and which generated unexpected revenue.

9. On 11th October, 2007, the composing of the musical work for the Tamil film "Poi Solla Porom" commenced. The shooting of the said Tamil film also commenced on 21st October, 2007. The music of the said film was released on 11th July, 2008. A day prior thereto, an assignment agreement was entered into between the respondent No. 2 and Big Music whereby the musical works in "Poi Solla Porom" were assigned to Big Music.

10. Disputes having arisen between the appellant and the respondent No. 2, CS(OS) No. 1456/2008 was filed by the appellant on 29th July, 2008 and CS(OS) No. 1913/2008 on 11th September, 2008. The respondent No. 2 along with its written statements filed applications u/s 8 of the Act in each of the two suits contending that in terms of the arbitration Clause of the agreement dated 15th November, 2005, the disputes forming subject matter of the suits should be referred to arbitration. As already stated, a learned Single Judge of this Court after hearing the parties at length allowed both the applications and dismissed both the suits as not maintainable. Aggrieved by the said judgment of the learned Single Judge, the present appeals have been filed by the appellant relating to both the suits.

11. A number of contentions were sought to be raised by Mr. Jagdish Sagar, the learned Counsel for the appellant, including the contention that the relief sought

by the plaintiff was beyond the scope of the agreement dated 15th November, 2005 and as such the arbitration Clause contained in the said agreement cannot be pressed into service by the respondent No. 2. It was also contended by him that since there was no arbitration agreement between the appellant and any of the respondents except the respondent No. 2, the impugned order dismissing the suits filed by the appellant against the remaining respondents was outside the scope of the applications u/s 8 of the Arbitration and Conciliation Act. Reliance in this regard was placed on the judgment of the Hon'ble Supreme Court in Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, . It was urged that the learned Single Judge after noting that the respondent No. 1 was not a party to the arbitration Clause and was, therefore, not bound by it and likewise the respondents No. 3 and 4 in CS(OS) No. 1456/2008 and the respondents No. 1 and 3 in CS(OS) No. 1913/2008 were not parties to the arbitration agreement, erred in holding that the parties should be referred to arbitration and all the points urged by the plaintiff concerning the scope and ambit of arbitration Clause should be urged before the Arbitral Tribunal and that in fact the other parties to the suit had all derived their rights from UTV Software itself, i.e., the respondent No. 2.

12. Having heard the learned Counsel for the appellant, we are of the view that the merits of the present appeals cannot be gone into by us in view of the fact that by virtue of the provisions of Section 37(1) of the Act, the present appeals are not maintainable. Section 37 of the Act reads as follows:

37. Appealable orders.- (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:

(a) granting or refusing to grant any measure u/s 9:

(b) setting aside or refusing to set aside an arbitral award u/s 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.-

(a) accepting the plea referred in Sub-section (2) or Sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure u/s 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this Section shall affect or taken away any right to appeal to the Supreme Court.

13. A bare reading of the provisions of the aforesaid Section are sufficient to show that the only orders of a Court arising out of the Act against which an appeal lies u/s 37(1) of the Act are those granting or refusing to grant any measure u/s 9 [Clause (a)] and setting aside or refusing to set aside an arbitral award u/s 34 of the Act [Clause (b)]. The legislature in order to place matters

beyond the pale of controversy has mandated that "an appeal shall lie only from the orders covered by Clause (a) and Clause (b) of Sub-section (1) of Section 37 and from no others". There is no manner of doubt that the impugned order passed by the learned Single Judge u/s 8 of the Act is neither an order granting or refusing to grant any measure u/s 9 of the Act nor an order setting aside or refusing to set aside an arbitral award u/s 34. Sub-section (2) of Section 37 clearly has no application since the said Sub-section deals with the appeals to the Court from orders of the arbitral tribunal. Mr. Sagar, the learned Counsel for the appellant, when faced with this situation contended that even if the impugned order was otherwise a correct order u/s 8 of the Act (and not erroneous as it is), the decision to dismiss the appellant's suit would still be appealable in view of the fact that the Arbitration and Conciliation Act, 1996 does not contemplate such an order of dismissal nor even requires stay of the suit upon reference to arbitration. Reliance was placed by him in this context upon the judgment of the Hon'ble Supreme Court in Smt. Kalpana Kothari Vs. Smt. Sudha Yadav and Others, , the relevant portion of which reads as follows:

The provisions of the 1996 Act do not envisage the specific obtaining of any stay as under the 1940 Act, for the reason that not only the direction to make reference is mandatory but notwithstanding the pendency of the proceedings before the Judicial Authority or the making of an application u/s 8(1) of the 1996 Act, the arbitration proceedings are enabled, u/s 8(3) of the 1996 Act to be commenced or continued and an arbitral award also made unhampered by such pendency. We have to test the order under appeal on this basis.

14. We have carefully gone through the said judgment rendered by the Hon'ble Supreme Court and we find no merit in the contention of the learned Counsel for the appellant that the Arbitration and Conciliation Act, 1996 does not contemplate an order of dismissal such as the one passed in the present case nor even requires stay of the suit upon reference to arbitration. It is clearly stated by the Hon'ble Supreme Court in Smt. Kalpana Kothari's case (supra) that:

We are of the view that the High Court did not properly appreciate the relevant and respective scope, object and purpose as also the considerations necessary for dealing with and disposing of the respective applications envisaged u/s 34 of the 1940 Act and Section 8 of the 1996 Act. Section 34 of the 1940 Act provided for filing an application to stay legal proceedings instituted by any party to an arbitration agreement against any other party to such agreement, in derogation of the arbitration Clause and attempts for settlement of disputes otherwise than in accordance with the arbitration Clause by substantiating the existence of an arbitration Clause and the judicial authority concerned may stay such proceedings on being satisfied that there is no sufficient reason as to why the matter should not be referred to for decision in accordance with the arbitration agreement, and that the applicant seeking for stay was at the time when the proceedings were commenced and still remained ready and willing to do all things necessary to the proper conduct of the arbitration. This provision under

the 1940 Act had nothing to do with actual reference to the arbitration of the disputes and that was left to be taken care of under Sections 8 and 20 of the 1940 Act. In striking contrast to the said scheme underlying the provisions of the 1940 Act, in the new 1996 Act, there is no provision corresponding to Section 34 of the old Act and Section 8 of the 1996 Act mandates that the Judicial Authority before which an action has been brought in respect of a matter, which is the subject-matter of an arbitration agreement, shall refer the parties to arbitration if a party to such an agreement applies not later than when submitting his first statement.

15. We are fortified in our above view by the judgment of the Hon^{ble} Supreme Court rendered in *Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits and Wovens and Others*, . In paragraphs 9 and 13 of the said judgment, it was laid down as follows:

9. Difference between Section 34 of the Arbitration Act, 1940 and Section 8 of the 1996 Act is distinct and apparent. Section 8 of the 1996 Act makes a radical departure from Section 34 of the 1940 Act. The 1996 Act was enacted in the light of UNCITRAL Model Rules.

We need not dilate on this issue as this aspect of the matter has been considered by this Court in *Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company*, , wherein this Court noticed:

Section 34 of the repealed 1940 Act employs the expression "steps in the proceedings". Only in terms of Section 21 of the 1940 Act, the dispute could be referred to arbitration provided parties thereto agreed. Under the 1940 Act, the suit was not barred. The Court would not automatically refer the dispute to an arbitral tribunal. In the event, it having arrived at satisfaction that there is no sufficient reason that the dispute should not be referred and no step in relation thereto was taken by the applicant, it could stay the suit.

Section 8 of the 1996 Act contemplates some departure from Section 34 of the 1940 Act. Whereas Section 34 of the 1940 Act contemplated stay of the suit; Section 8 of the 1996 Act mandates a reference. Exercise of discretion by the judicial authority, which was the hallmark of Section 34 of the 1940 Act, has been taken away under the 1996 Act. The direction to make reference is not only mandatory, but the arbitration proceedings to be commenced or continued and conclusion thereof by an arbitral award remain unhampered by such pendency. [See O.P. Malhotra's "The Law and Practice of Arbitration and Conciliation", 2nd Edition, pp. 346-347].

13. Section 8 of the 1996 Act is peremptory in nature. In a case where there exists an arbitration agreement, the court is under obligation to refer the parties to arbitration in terms of the arbitration agreement. See *Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums*, and *Rashtriya Ispat Nigam Limited* (supra). No issue, therefore, would remain to be decided in a suit. Existence of arbitration agreement is not disputed. The High Court, therefore, in our opinion,

was right in referring the dispute between the parties to arbitration.

16. In *Canbank Financial Services Ltd. Vs. Haryana PetroChemicals Ltd. and Another*, the preliminary objection raised to the maintainability of the appeal was that in view of Section 37 of the Arbitration and Conciliation Act, 1996 it was not open to the appellant to file an appeal against the order referring the disputes raised in the suit to arbitration. A Division Bench of this Court holding that an appeal against an order referring the parties to arbitration could not be entertained u/s 37 of the Act dismissed the appeal as not maintainable even under Clause 10 of the Letters Patent. In doing so, the Division Bench discussed the provisions of Section 39 of the Old Arbitration Act, 1940, which read as follows:

39. Appealable orders. (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order:

An order-

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award;

Provided that the provisions of this Section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this Section shall affect or take away any right to appeal to the [Supreme Court].

17. The Division Bench in the *Canbank* case (*supra*) also referred to the judgment of the Supreme Court rendered while interpreting the provisions of Section 39 of the Act (analogous to the provisions of Section 37 of the 1996 Act) in *Union of India (UOI) Vs. Mohindra Supply Company*, . The relevant portion of the judgment in *Canbank* is as under:

8. The Supreme Court while interpreting the said provision in *Union of India (UOI) Vs. Mohindra Supply Company*, held as under:

(5) ...Under Section 39(1), an appeal lies from the orders specified in that Sub-section and from no others. The legislature has plainly expressed itself that right of appeal against orders passed under the Arbitration Act may be exercised only

in respect of certain orders. The right to appeal against other orders is expressly taken away. If by the express provision contained in Section 39(1), a right to appeal from a judgment which may otherwise be available under the Letters patent is restricted, there is no ground for holding that Clause (2) does not similarly restrict the exercise of appellate power granted by the Letters Patent....

(6) ...But the right to appeal is a creature of statute; no litigant has an inherent right to appeal against a decision of a Court....

(14) The intention of the legislature in enacting Sub-section (1) of Section 104 is clear : the right to appeal conferred by any other law for the time being in force is expressly preserved. This intention is emphasized by Section 4 which provides that in the absence of any specific provision to the contrary, nothing in the Code is intended to limit or otherwise affect any special jurisdiction or power conferred by or under any other law for the time being in force....

(19) ...The Arbitration Act which is a consolidating and amending Act, being substantially in the form of a code relating to arbitration must be construed without any assumption that it was not intended to alter the law relating to appeals. The words of the statute are plain and explicit and they must be given their full effect and must be interpreted in their natural meaning, uninfluenced by any assumptions derived from the previous state of the law and without any assumption that the legislature must have intended to leave the existing law unaltered. In our view the legislature has made a deliberate departure from the law prevailing before the enactment of Act of 1940 by codifying the law relating to appeals in Section 39....

18. The Division Bench in the Canbank case held that in view of Mohinder Supply (supra) and also in view of a Full Bench judgment of this Court reported in Union of India v. A.S. Dhupia AIR 1970 Delhi 108 and a Division Bench judgment of this Court in Banwari Lal Radhey Mohan Vs. The Punjab State Co-operation Supply and Marketing Federation Ltd., (which also considers the decision of the Supreme Court in Shah Babulal Khimji Vs. Jayaben D. Kania and Another,), even an appeal under Clause 10 of the Letters Patent would not be maintainable, and the judgment of the Supreme Court in Mohinder Supply case holding that on a bare reading of Section 39 of the Arbitration Act the right to appeal against orders other than those spelt out in Sub-section (1) of Section 39 was expressly taken away, was binding.

19. In a recent Division Bench judgment of this Court in Rites Limited v. JMC Projects (India) Ltd. in FAO(OS) 173/2007 decided on 18.03.2009, another Division Bench of the Delhi High Court while dealing with the scope and ambit of Section 37 of the 1996 Act, after referring to several judgments of the Hon'ble Supreme Court and the Delhi High Court, including Groupe Chimique Tunisien SA Vs. Southern Petrochemicals Industries Corpn. Ltd., , P.S. Sathaappan (Dead) by Lrs. v. Andhra Bank Ltd and Ors. AIR 2004 SC 515, Vanita M. Khanolkar v. Pragna M. Pai AIR 1998 SC 424, Shri R.K. Sharma and others in RFA(OS) No.

32/2000 Shri Vishnu Kumar Goyal and others in RFA(OS) No.35/2000 Vs. Ashok Nagar Welfare Association and Co., , Gurmauj Saran Baluja Vs. Mrs. Joyce C. Salim and Others, , Jugal Kishore Paliwal v. Saj Jit Singh (1984) SCC 358 and Shah Babulal Khimji, Mohindra Supply Co., A.S. Dhupia and Banwari Lal Radhey Mohan (supra), expressed concurrence with the view taken by the Division Bench in the Canbank case. The Division Bench also rejected the contention of the respondent that the judgment rendered in Canbank was per incurium. In paragraph 22 of its judgment, it held as follows:

22. We find no merit in the appellant's submission that the impugned order having been passed in a civil suit, Section 37 of the Act cannot be invoked to bar the appeal. The order has been passed by the learned Single Judge on an application preferred by the appellant by invoking Section 8 of the Act. Obviously, it is an order passed under the Act. This submission of the appellant is, therefore, rejected.

20. Applying the aforesaid law laid down by the Supreme Court and by this Court, we have no hesitation in holding that the present appeals are not maintainable and hence cannot be entertained by this Court in view of the stringent provisions of Section 37 of the Act. It also cannot be lost sight of that judicial intervention in arbitration must be minimised in consonance with the provisions of the new Act. Presumably for this reason, the provision in the 1996 Act requiring reference to arbitration in terms of the arbitration agreement is pre-emptory in nature and on such reference being made as held by the Supreme Court in Agri Gold Exims Ltd. (supra) "no issue would remain to be decided in a suit". The learned Single Judge, therefore, in our view, was justified in dismissing the suits after referring the matter to arbitration.

21. As regards the applicability of the judgment in Sukanya Holdings Pvt. Ltd. (supra), which was strongly pressed into service by the learned Counsel for the appellant, we agree with the findings of the learned Single Judge who held, and we think rightly so, that the said decision is distinguishable in its application to the present case. Here, both the suits arise out of the claims made by the appellant as to its copyright in the underlying work of the Hindi film "Khosla ka Ghosla". Even the claim for damages stems from the alleged infringement of the aforementioned copyright of the appellant in the underlying work. Apart from this, we find that the other parties to the suit have all derived their rights from the respondent No. 2 itself. The respondent No. 1 M/s. Four Frame is in fact represented by Mr. Priya Darshan who happens to be the Director of "Poi Solla Porom", which is the Tamil version of "Khosla ka Ghosla". The respondent No. 3 Big Music in CS(OS) No. 1456/2008 has been assigned the music rights in the said Tamil film by the respondent No. 2 UTV Software. Then again, the music rights in "Khosla ka Ghosla" are given to Living Media, the respondent No. 4 in CS(OS) No. 1456/2008 while the entire residuary rights in the said film have been transferred to the respondent No. 2. Therefore, any dispute arising between the parties which is outside the music rights given to Living Media (the

respondent No. 4 in CS(OS) No. 1456/2008) has to be referred to arbitration in terms of the agreement dated 15th November, 2005 between the appellant and the respondent No. 2. Therefore, it cannot be said that the subject matter of the dispute in both the suits has nothing to do with the agreement dated 15th November, 2005 see W.P.I.L. v. NTPC Ltd. 2009 (1) ArbLR 378. Insofar as Mr. Jaideep Sahni, the respondent No. 3 in CS(OS) No. 1913/2008 is concerned, even according to the appellant he is a proforma party since no relief is sought against him. The respondent No. 4 in CS(OS) No. 1456/2008 is also admittedly a proforma party.

22. We, however, hasten to clarify that the above are only our tentative views and it will be open to the Arbitral Tribunal to resolve the scope of the arbitration agreement as envisaged by the provisions of Section 16(1) of the Act, which reads as under:

16. Competence of arbitral tribunal to rule on its jurisdiction.-(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration Clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

23. The present appeals are accordingly dismissed as not maintainable. We, however, leave it open to the arbitrators to be appointed by the parties to consider the scope and extent of their jurisdiction as mandated by Section 16 of the 1996 Act, in case the same is challenged before the arbitrators, and to rule on the same.

24. FAO(OS) 551/2009 and CM Nos. 16267-68/2009 and FAO(OS) 552/2009 and CM Nos. 16277-78/2009 stand disposed of accordingly.