

(2004) 03 DEL CK 0042

In the Delhi High Court

Case No : IA No. 8584 of 2002 in CS (OS) 2079 of 1986, is No. 8677 of 2002 in CS (OS) 2312-A of 1986 and is No. 8678 of 2002 in CS (OS) 2313-A of 1986

Veena Duggal

APPELLANT

Vs

H.S. Vedi and Others

RESPONDENT

Date of Decision : 18-03-2004

Acts Referred:

Citation : (2004) 1 ARBLR 590 : (2004) 110 DLT 747 : (2004) 74 DRJ 54 : (2004) 137 PLR 1

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : G.L. Rawal and Kuljeet Rawal, for the Appellant; Raman Duggal, for defendant No. 1 and Kirti Uppal, for defendant No. 2., for the Respondent

Final Decision : Dismissed

Judgement

Mukundakam Sharma, J.—By this order I propose to dispose of application filed by the defendant No.1 which is registered as is No.8678/2002 filed u/s 114 read with Order XLVII Rule 1 CPC; application filed by the defendant No.1 which is registered as is No.8677/2002 filed under Order IX Rule 13 CPC; and also application filed by the defendant No.2 which is registered as is No.8584/2002 filed u/s 151 CPC.

2. The plaintiff herein filed a suit seeking for rendition of accounts / settlement of the claim of the plaintiff, which was registered as Suit No.2079/1986. In the said suit an application u/s 34 of the Arbitration Act was preferred by the defendants. The plaintiff also filed two petitions u/s 20 of the Arbitration Act, 1940, which were registered as Suit Nos.2312-A/1986 and 2313-A/1986. All the aforesaid suits were directed to be listed together. On 4.12.1998, the following issues were framed in suit No.2312-A/1986:

1. Whether this Court has no territorial jurisdiction to decide this petition?

2. Relief.

3. It was also recorded in the said order that no other issue arises or is pressed for. This Court, however, directed in the said order that no oral evidence is required to be led on the aforesaid issues. The parties were, however, given the liberty to file affidavit along with documents, if any, by way of evidence. An application was, however, filed by the defendant No.1, which was registered as is No.4246/1999 whereby the defendant No.1 sought for a liberty to file additional affidavit by way of rebuttal evidence. An additional affidavit was also filed along with the said application. In that context it was observed in the order dated 28.4.1999 that the aforesaid application would be disposed of along with the disposal of the preliminary issue framed on 4.12.1998. It is, however, to be made clear that the aforesaid application was filed by defendant No.1 in Suit No.2079/1986. The said order dated 28.4.1999 also makes it explicitly clear that the issues framed on 4.12.1998 in suit No.2313-A/1986 were also the issues for consideration in suit No.2079/1986 as also in suit No.2312-A/1986.

4. After filing of the affidavit by way of evidence the matter was listed before the Court in the category of "short cause" for final disposal on 10.7.2002. However, on the said date none appeared for the defendant No.1. Accordingly, the counsel present for the plaintiff and the defendant No.2 were heard and judgment was reserved after hearing arguments of the aforesaid learned counsel. By an order passed on 16.8.2002, the Court held that this Court has territorial jurisdiction to decide the cases. It was also held that in fact the issue No.1 framed on 4.12.1998 had placed onus upon the defendant No.1 but the defendant No.1 was not present and, Therefore, did not make any submission whereas the defendant No.2 was agreeable to the matter being referred to the sole Arbitrator to be appointed by this Court subject to all contentions being decided by the said sole arbitrator. It was also held that no issue having been pressed or got framed by the respondent in any manner challenging the existence of the arbitration clause, the petitioners would be entitled to a relief for appointment of a sole arbitrator, to whom the disputes, as contained in the petition filed by the petitioners, would stand referred to the sole arbitrator to adjudicate upon in accordance with law. This Court appointed Hon"ble Mr.Justice A.K. Srivastava (Retired Judge of this Court) as the sole arbitrator to adjudicate upon and decide the disputes raised by the petitioners as contained in and arising out of the petition u/s 20 of the Arbitration Act. Similar orders were also passed in the other two connected matters and in terms of the said order all the suits stood disposed of by the said order dated 16.8.2002. Thereafter the parties filed the aforesaid two applications in this Court whereas another application which is registered as is No.8677/2002 is also filed by the defendant No.1 under Order IX Rule 13 CPC for setting aside the ex parte impugned order.

5. The aforesaid applications were listed for arguments before me on which I have heard the counsel appearing for the plaintiff as also the counsel for the defendant No.1 and the defendant No.2. Counsel appearing for the plaintiff

submitted that the two applications being is No.8678/2002 and 8584/2002 have been filed seeking for review of the order dated 16.8.2002 although the defendant No.2 has styled his application as u/s 151 of the Code of Civil Procedure. It is submitted that both the aforesaid applications are barred by limitation as for filing a review application the period of limitation prescribed is 30 days. According to him, both the applications having been filed beyond the statutory period of limitation and no application having been filed by any of the aforesaid defendants u/s 5 of the Limitation Act praying for condensation of delay, the said applications should be dismissed at the very threshold. He also submitted that there is no ground for setting aside the order dated 16.8.2002, which was passed by this Court after considering the entire records of the case. He also submitted that no ground for review of the said order has been made out in the present cases as this Court, while passing the order dated 16.8.2002, has taken notice of all the existing facts and has given cogent reasons for passing the said order referring the disputes to the sole arbitrator.

6. Counsel appearing for the defendant No.2 submitted that the disputes between the plaintiff and the defendant No.2 were resolved and, Therefore, there was no scope of making reference of the disputes between the defendant No.2 and the plaintiff to the arbitrator. It was also submitted that in the order dated 16.8.2002, the Court wrongly observed that the counsel for the defendant had stated before the Court that he had no objection to the appointment of the arbitrator provided all aspects of the matter including territorial jurisdiction or other wise and other defenses be also adjudicated upon by the arbitrator. According to him, no such statement, as recorded by this Court in the order dated 16.8.2002, was made by the counsel. It is also stated that the aforesaid aspect was also brought to the notice of the learned arbitrator by filing an application to the effect that the defendant No.2 had no role to play in the arbitration proceedings but the said application, it is submitted, has been dismissed by the learned arbitrator by order dated 20.9.2003. In that view of the matter it is submitted that the application u/s 151 of the CPC is filed seeking for clarification of the order dated 16.8.2002.

7. Counsel appearing for the defendant No.1, on the other hand, submitted that the findings recorded by this Court on territorial jurisdiction are ex facie illegal as no part of cause of action had arisen within the jurisdiction of this Court, for the arbitration clause in the two partnership deeds which are still operative were executed outside India. It was also submitted that as the partnership deeds, which contain the aforesaid clause, were made and executed and the work as envisaged under the said partnership were executed outside the territorial jurisdiction of India, the said petitions were required to be dismissed on the ground of want of territorial jurisdiction and the same having not been done, this is a fit case for review. It is also submitted that even suit No.2079/1986, which was filed by the plaintiff for rendition of accounts has in fact been rendered infructuous after filing of the two suits being suit No.2312-A/1986 and 2313-A/1986 but this Court by the said order dated 16.8.2002 not only referred the

disputes mentioned in the subsequent two suits filed u/s 20 of the Arbitration Act but also referred the disputes spelt out in suit No.2079/1986 also for adjudication and decision of the sole arbitrator. It was submitted that this Court did not have the jurisdiction to refer the disputes to an arbitrator appointed by this Court straightway as in terms of the arbitration clause it was necessary to direct the parties to appoint an arbitrator as mutually agreed upon by the parties in terms of the arbitration agreement. It is submitted that by appointing an arbitrator straightway by the Court, this Court committed an error in exercising the jurisdiction. The counsel also submitted that the application filed and registered as is No.4246/1999 for bringing on record rebuttal evidence was not disposed of till the date when the aforesaid suits were taken up for consideration by this Court on 10.7.2002 and, Therefore, this Court committed error apparent on the face of the records in recording that the said application was dismissed earlier to passing of the said order dated 16.8.2002.

8. I have carefully considered the aforesaid submissions of the counsel appearing for the parties in the light of the records placed before me. The application which is filed by the defendant No.2 u/s 151 CPC is an application seeking for clarification in the order dated 16.8.2002. However, when the contents of the said application are carefully considered and examined, it is crystal clear that by filing the said application, what the said defendant No.2 has sought for is a review of the order dated 16.8.2002 when it calls for deletion of the statement recorded by the Court to the effect that the counsel had raised no objection to the appointment of the arbitrator. It is also submitted that the said aspect was also brought to the notice of the learned arbitrator but the learned arbitrator rejected the said application by order dated 20.9.2003. The other application which is filed by the defendant No.1 and registered as is No.8678/2002 is an application seeking for review of the said order. Therefore, both the aforesaid applications are filed in this Court manifestly praying for review of the order dated 16.8.2002. Admittedly, the said applications have been filed beyond the statutory period of limitation of 30 days and, Therefore, an application u/s 5 of the Limitation Act was required to be filed by both the parties which have not been filed and in absence of such an application praying for condensation of delay in filing the review applications, the said two applications have to be dismissed being barred by limitation. Even otherwise, so far the application of the defendant No.2 is concerned, an application was filed by the said defendant No.2 before the arbitrator, which was entertained and was dismissed by a speaking order dated 20.9.2003. The arbitrator has given his reasons for dismissing the said application. The relevant statute provides that such an order could be challenged in accordance with the statutory provisions as made in the Arbitration Act. Therefore, this application, which is filed by the defendant No.2, is held to be not maintainable. Even otherwise, reference of the disputes was made by this Court holding that disputes arise between the parties and in that regard statement of the counsel for the defendant No.2 is recorded by this Court. In view of the aforesaid position, I am not inclined to accept the statement of the

counsel for the defendant No.2 in that regard and, Therefore, the application filed by the defendant No.2 is rejected in the light of the discussions made herein above.

9. So far the application filed by the defendant No.1 is concerned, the same was also filed beyond the period of statutory limitation of 30 days as prescribed without filing an application praying for condensation of delay and, Therefore, the said application has also to be dismissed being barred by limitation. Besides, on 4.12.1998 this Court, on the pleadings of the parties framed two specific issues, one relating to territorial jurisdiction and the other relating to relief to be given. This Court has observed specifically in the said order dated 4.12.1998 that no other issue arises or is pressed by any of the parties. The said order makes it explicitly clear that existence of the arbitration clause in the agreement was never in dispute. The aforesaid order dated 4.12.1998 was not challenged by any of the parties in accordance with the provisions of law and accordingly, the same has become final and binding on the parties. The said aspect cannot be re-opened by the defendant No.1 by filing the aforesaid review application. The said order dated 4.12.1998 cannot be recalled on the basis of is No.8678/2002.

10. In view of the aforesaid position, the only question that survived for consideration in the aforesaid three cases was whether or not this Court has territorial jurisdiction to decide and try the same. The plaintiff herein filed affidavit by way of evidence. The defendant No.1 also filed evidence whereas the defendant No.2 did not file any evidence. No request for cross-examination was made from either side but only an application which was registered as is No.4246/1999 filed in suit No.2079/1986 praying for allowing the said defendant to lead rebuttal evidence. However, the said defendant No.1 did not appear before the Court when the aforesaid suits were taken up for final arguments and the said fact is clearly recorded in the order dated 16.8.2002. As none appeared on behalf of the defendant No.1 to press the said application, the said application was accordingly dismissed by order dated 16.8.2002. Consequence of the said order is also recorded in the order dated 16.8.2002 holding that the effect of disposal of the said application is that additional affidavit though filed is not taken on record. Therefore, there is no factual error as sought to be pointed out by the counsel for the defendant No.1 during the course of arguments in that regard. The said contention is ex facie found to be without any merit.

11. The next contention of the counsel for the defendant No.1 is that suit No.2079/1986, which was filed by the plaintiff for rendition of accounts having been rendered infructuous upon filing of the petitions u/s 20 of the Arbitration Act, could not have been referred to the sole arbitrator and, Therefore, there is an error apparent on the face of the records. There is no dispute to the fact that the aforesaid suit, which was registered as suit No.2079/1986 was filed by the plaintiff praying for rendering of accounts. In the said suit, the defendant / respondent No.1 filed an application u/s 34 of the Arbitration Act praying for stay of the said suit as according to the defendant No.1 the said disputes are covered

by an arbitration clause, which is contained in the partnership deed. Whether or not due to reference of the other two suits before the sole arbitrator the cause of action and the subject matter of the said suit for rendition of accounts on the basis of the partnership deed became infructuous is an aspect which is also to be considered by the arbitrator. The disputes arising thereof have also been referred to the arbitrator for his adjudication and decision. As disputes arise between the parties in respect of the aforesaid subject of the suit also, this Court rightly referred the said disputes including the dispute as to whether or not the subject matters of the said suit have been rendered infructuous. The counsel also sought to submit during the course of his submissions that this Court committed error apparent on the face of the records by holding that this Court has territorial jurisdiction, which, according to him, is illegal as no part of cause of action had arisen within the jurisdiction of this Court. The aforesaid issue was also considered by this Court and on the basis of the unrebutted testimony of the petitioner and evidence on record, it was held that this Court has territorial jurisdiction to decide all the three suits. It is also held that the onus to show and prove that this Court does not have territorial jurisdiction was on the defendant/respondent No.1, who had failed to discharge the said onus to prove and establish that this Court did not have the territorial jurisdiction. This Court cannot re-appreciate the evidence on record to hold and to come to a contrary conclusion on the basis of the review application filed by the defendant No.1. It cannot be said that there is any error apparent on the face of the record in view of the aforesaid findings recorded by this Court that this Court does not have territorial jurisdiction to decide the suits. A contention was also sought to be raised on behalf of the defendants that the petitions u/s 20 of the Act are not maintainable. The said contention is also without any merit as no issue in respect of the same arose for consideration in all the three suits, which is also recorded in the order dated 4.12.1998. Therefore, the said issue cannot be raised by filing a review application and cannot be made subject matter of a review application.

12. In view of the aforesaid discussions and findings, it is held that the aforesaid application filed by the defendant No.1 is also not maintainable and is without any merit and is dismissed.

13. The defendant No.1 has also filed an application under Order IX Rule 13 CPC, which is registered as is No.8677/2002 for setting aside the order dated 16.8.2002. I have considered the averments made in the said application very carefully. It is stated that the counsel for the said defendant No.1 was out of station till 11.7.2002. In this connection reference may be made to the order dated 21.3.2002 when Mr.Rajesh Benati appeared on behalf of the respondent as proxy counsel. All the three matters listed on the said date were adjourned till 10.7.2002. All the three matters were accordingly again listed on 10.7.2002 when it was specifically recorded that none appeared for the defendant No.1. Although the counsel appearing for the plaintiff and the defendant No.2 were heard on the same day, however, the final order was passed only on 16.8.2002. The contention of the defendant No.1 in the said application cannot be accepted

in view of the fact that although the matters were heard on 10.7.2002, the judgments and final orders were delivered on 16.8.2002 and till then no steps, whatever were at all taken by the defendant No.1 at least from 11.7.2002 till 16.8.2002. It is stated in the aforesaid application that on 31.7.2002, an application u/s 151 CPC was moved by the defendant / respondent No.1 but no such application exist on record. It is also to be noticed that even if counsel for the defendant No.1 could not be present in Court due to his personal difficulty, it was necessary for the defendant No.1 and also his counsel to make alternative arrangement, if necessary, at least to get an adjournment on 10.7.2002. The same having not been done and no effective steps having been taken by the defendant No.1 / respondent No.1 till the disposal of the petition on 16.8.2002 negligence and laches are apparent on the face of the records, which does not call for any interference by this Court. The said application is also found to be without any merit and is dismissed accordingly.

14. In the light of the aforesaid discussion, all the three applications filed are dismissed leaving the parties to bear their own cost.