(2012) 01 DEL CK 0461

In the Delhi High Court

Case No : CRP No. 9 of 2012 and CM No''s. 1005-1007 of 2012

Virender Singal and Others — APPELLANT

Vs

Delhi Express Travels Pvt. Ltd. — RESPONDENT

Date of Decision : 24-01-2012

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 17, 8, 8(1), 8(2)

Citation : (2012) 1 ARBLR 395

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Sandeep Sethi with Diwakar, Ajay Bhargava and Preeti Gupta, for the Appellant; Ashok Chhabra, Amit Saxena and Pawan Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—The order impugned is the order dated 19.12.2011 whereby application u/s 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ''the Act'') filed by the petitioner/defendant no. 1 seeking a stay of the present suit has been dismissed. Record shows that the plaintiff (M/s. Delhi Express Travels Pvt. Ltd.) had filed a suit for declaration, possession, permanent injunction and mesne profits against the four defendants of whom defendant no. 1 is M/s. Dex Aviation Pvt. Ltd., Virender Kumar Singal and Varun Singal have been described as defendant nos. 2 and 3 and M/s. Swan Travels Pvt. Ltd. is defendant no. 4. Suit premises are premises bearing No. 105, First Floor, Local Shopping Center-cum-Office Complex Safdarjung Residential Scheme, Aurbindo Place, Aurbindo Marg, Hauz Khas, New Delhi. Averments made in the plaint are that the plaintiff had entered into an agreement to sell, general power of attorneys (3) and other related documents all dated 06.07.2007; this was pursuant to a fraud played upon the plaintiff under which the plaintiff had executed these documents; said documents are bogus and have no legality; accordingly, prayer for declaration, declaring the said documents to be null and void has been prayed for. A decree of possession of the suit premises has also been prayed for; contention of the plaintiff being that he had in fact never agreed to sell this property to defendant no. 1.

2. In the course of these proceedings, an application u/s 8 of the Arbitration Act had been filed by the defendant no. 1. His contention is that the subject matter of the present suit is the subject matter of disputes which are pending between the parties before the sole arbitrator Shri Satpal, retired judge of the High Court who had been appointed by the orders of this court dated 11.05.2005. He has accordingly prayed for a stay of the present suit.

3. Record shows that the family tree of the parties comprise of three brothers, namely, Vipin Kumar Singal, Virender Kumar Singal and Viney Kumar Singal; plaintiff in the present suit is Vipin Kumar Singal who is the Director of the company M/s. Delhi Express Travels Pvt. Ltd., defendant no. 2 is Virender Kumar Sehgal who is the Managing Director of defendant no. 1, i.e. M/s. Dex Aviation Pvt. Ltd.; third brother Viney Kumar Singal is not a party in the present suit.

4. The contents of the plaint disclose that a transaction had been entered into between the defendant no. 1 whereby the plaintiff, pursuant to an alleged fraud having been played upon him by the defendant no. 1, had entered into certain documents of sale deed dated 06.07.2007 in favour of his brother (defendant no. 2) which as per the contents in the plaint being a fraudulent transaction were sham and illegal documents; accordingly, the prayer in the plaint seeks a cancellation of the said documents.

5. On 22.07.2004, a memorandum of understanding had been entered into between the three brothers whereby they had agreed to get their assets evaluated by their respective evaluators and thereafter to refer their disputes to an arbitrator. Clause 5 contains an arbitration clause; it is not in dispute that the subject matter of the present suit (the property bearing No. 105, First Floor, Local Shopping Center-cum-Office Complex, Safdarjung Residential Scheme, Aurbindo Place, Aurbindo Marg, Hauz Khas, New Delhi) was also the subject matter of this interim family arrangement dated 22.07.2004.

6. A Section 9 petition was filed by the present petitioner in the year 2005 seeking certain interim relief''s wherein it had been contended that the family of defendant no. 1 is a joint family group known as JKS Group; the details of the family assets had been enclosed along with this application which admittedly make a reference to the suit property. On 28.01.2005, a bench of this court had passed orders on this application directing the parties to maintain status quo; on 11.05.2005, the disputes between the parties had been referred to the sole arbitrator, Justice Satpal, a retired judge of this court. Admittedly, the proceedings before the arbitral tribunal are yet pending where in the hotchpotch of the joint family properties the present suit property also forms a part.

7. Record further shows that two petitions u/s 17 of the said Act have been filed before the arbitral tribunal by the third brother (not a party in the present suit)

(Viney Kumar Singal) to which a reply had been filed by the present petitioner; that reply is relevant. Petitioner in the said reply has stated that M/s. Dex Aviation Pvt. Ltd. (defendant no. 1) is not created out of the joint family funds; contention being that it has no concern or nexus with the family owned companies; further contention being that the plaintiff (M/s. Delhi Express Travels Pvt. Ltd.) is no longer the owner of the present suit property as the said suit property has been transferred by the plaintiff in favour of the defendant no. 1 by way of a legal transaction; contention being that an MoU dated 29.11.2006 had been executed between Vipin Singal (plaintiff) and Virender Kumar Singal (defendant no. 2) as also his sons pursuant to which the ownership of the said premises was transferred to defendant no. 1.

8. It is in this background that the application u/s 8 of the Arbitration Act has to be considered.

9. The averments made in the plaint as also the prayer sought for have been considered. The test for dealing with an application u/s 8 of the Arbitration Act essentially is to see as to whether the subject matter of the present suit is the subject matter of a dispute pending before the arbitrator and if the subject matter between the two is identical then the proceedings in the suit shall be stayed; the other essential ingredient being that there must be an arbitration clause between the parties.

10. Record shows that on the first count, the application u/s 8 of the said Act must fail. The subject matter of the disputes pending before the arbitrator is the hotchpotch of the joint family properties of the three brothers of the JKS Group namely Vipin Kumar Singal, Viney Kumar Singal and Virender Kumar Singal of which admittedly the present suit property is also a part. This was in terms of the MoU entered into between the brothers dated 22.07.2004. Relevant would it be to extract this MoU dated 22.07.2004 entered into between the three brothers and the arbitration clause contained in Clause 5:

INTERIM FAMILY AGREEMENT (IFA)

Whereas families of Mr. Vipin K. Singal, Mr. Viney K. Singal and Mr. Virender K. Singal (herein referred as "VKS1", "VKS2" and "VKS3" have been carrying on joint family business popularly known as JKS group. Due to disputes/dissentions, certain differences have arisen because of which VKS2 has requested the other two (VKS1 and VKS3) to divide/distribute the share of VKS3 to him and his family in the joint businesses/properties/ other assets adjusting/clearing the liabilities.

After deliberations and due to intervention of family friend Mr. Somnath, VKS1, VKS2 and VKS3 have agreed to an interim arrangement, pending a final family settlements/distribution of business/assets on the following broad terms and conditions.

1. VKS1, VKS2 and VKS3 have expressed their desire to takeover and handle

joint family running businesses of airlines ticketing, i.e. the (1) wholesale (IATA) being done in Delhi Express Travels Private Limited and Dex Travels Private Limited; (2) Corporate (IATA)-being done in Trans World Travels proprietor G.B. Morison Travels Private Limited; and (3) GSA-being done in Maharani Tours Private Limited; respectively. It is, therefore, agreed that the above settlement will not alter this broad principle.

2. The evaluation of assets/liabilities/business shall be carried out by Mr. Arun K. Gupta for and on behalf of VKS1.

3. The evaluation of assets/liabilities business shall be carried out by Mr. Y.K. Sharma for and on behalf of VKS2.

4. Similarly, Mr. Amod Aggarwal shall carry out the evaluation of assets/ liabilities/business for and on behalf of VKS3.

5. Upon completion of evaluation the matter shall be referred to a panel of arbitrators, that is one arbitrator each on behalf of VKS1 and VKS2, and one arbitrator will be nominated by VKS3.

6. Mr. Somnath shall be the Chairman of this panel of arbitration.

7. VKS3 will shift his own office during the interim period to the family owned commercial building situated at 42, Community Centre, Zamrudhpur from 11, Community Centre, East of Kailash.

8. VKS1, VKS2 and VKS3 and their family members shall maintain status quo on running of the joint family business activities as well as other assets of the family.

9. No major financial transaction other than in the ordinary course of joint business activity shall be carried out. In case of any deviation, warranted by business requirements, the same shall only be with consent in writing from Mr. Som Nath, who is responsible for protecting interest of all parties.

10. The process of evaluation, arbitration and final settlement will be completed by 31st August, 2004. This date can be extended if the need arises by mutual consent or as per approval of Mr. Som Nath.

11. All parties shall maintain harmony, cordiality during this interim period.

12. This has been signed in New Delhi, on July 22nd, 2004.

11. Pursuant thereto, on 11.05.2005, the sole arbitrator had been appointed to decide the disputes in terms of its arbitration clause. These proceedings are admittedly pending. However, the averments made in the plaint disclose that the case of the plaintiff is that a fraud has been played upon him and pursuant thereto he was made to sign certain documents dated 06.07.2007 whereby he had entered into a sham transaction for the sale of the suit property to defendant no. 1; cancellation of the aforenoted documents is the first prayer made by him. In these circumstances, an issue on the question of fraud will essentially have to be framed to decide this contention between the parties. The agreement in terms

of the arbitration clause contained in the MoU dated 22.07.2004 had only clothed the arbitrator to deal with the hotchpotch of the joint family properties of the three brothers after their evaluation; no doubt the suit property was also thrown into this hotchpotch but the question of the alleged fraudulent sale of this property by the plaintiff in favour of defendant no. 1 on 06.07.2007 was a question which could not be within the jurisdiction of the arbitrator; in fact, this transaction is after the appointment of the arbitrator. This question of fraud which would require a detailed examination of the allegations which if found true would vitiate the entire alleged transaction of 06.07.2007 could not have been gone into by the arbitrator. Stand of defendant no. 2 (as is clear from his reply to the petition u/s 17 of the said Act) had relied upon an MoU dated 29.11.2006 purportedly entered into between the plaintiff, defendant no. 2 and his sons; this document is also a document entered into after the date of the appointment of the arbitrator; that apart to decide the validity of this transaction the allegations of fraud and its counter allegations would have to be examined. This power was not vested with the arbitrator. In these circumstances, the trial court declining the prayer made by the petitioner for reference of the disputes to the arbitrator does not in any manner suffer from an infirmity.

12. Section 8 of the said Act contains the words--"in a matter which is the subject matter of an arbitration agreement" which are relevant; the suit should be in respect of the same subject matter which the parties have agreed to refer to arbitrator and which comes within the ambit of the arbitration clause contained in the arbitration agreement. However, a dispute which is distinct from the subject matter of the disputes pending in reference before the arbitrator would not lead to the applicability of Section 8. There is no dispute to the factum that where all the ingredients of Section 8 have been fulfilled only then there is a mandate upon the court to make a reference of the disputes to arbitration and suit proceedings filed qua the same subject matter are liable to be stayed.

13. In P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, titled as P. Anand Gajapathi Raju and others vs. P.V.G. Raju (Dead) and others, the Apex Court has noted the conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 of the Arbitration Act before the court can exercise its power to refer parties to arbitration are (para 5, page 206 of Arb. LR):

(1) there is an arbitration agreement; (2) a party to the agreement brings an action in the court against the other party; (3) subject matter of the action is same as the subject matter of the arbitration agreement; (4) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. The last provision creates a right in the person bringing the action to have the dispute adjudicated by court, once the other party has submitted his first statement.

14. The Apex Court in N. Radhakrishnan Vs. Maestro Engineers and Others, Arb. LR 210 (SC)--N. Radhakrishnan vs. Maestro Engineers and others has held as

under (paras 12 and 13, pages 579 and 580 of SCACTC=page 216 of Arb. LR):

The learned counsel for the respondents on the other hand argued that when a case involves substantial questions relating to facts where detailed material evidence (both documentary and oral) needed to be produced by either parties, and serious allegations pertaining to fraud and malpractices were raised, then the matter must be tried in court and the arbitrator could not be competent to deal with such matters which involved an elaborate production of evidence to establish the claims relating to fraud and criminal misappropriation.

In our opinion, the contention of the respondents relating to the jurisdiction of the arbitrator to decide a dispute pertaining to a matter of this proportion should be upheld, in view of the facts and circumstances of the case. The High Court in its impugned judgment has rightly held that since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation cannot be properly gone into by the arbitrator.

15. The Apex Court in India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd., Arb. LR 468 (SO--India Household and Healthcare Ltd. vs. LG Household and Healthcare Ltd. has held as under (para 10, page 144 of SCACTC=page 472 of Arb. LR):

It is also no doubt true that where existence of an arbitration agreement can be found, apart from the existence of the original agreement, the courts would construe the agreement in such a manner so as to uphold the arbitration agreement. However, when a question of fraud is raised, the same has to be considered differently. Fraud, as is well-known, vitiates all solemn acts. A contract would mean a valid contract; an arbitration agreement would mean an agreement which is enforceable in law.

16. Furthermore, the plaintiff in the present case has sought the following relief''s:

(a) Pass a decree of declaration declaring the agreement to sell, power of attorney and 3 power of attorneys, all dated 06.07.2007 as null and void;

(b) Pass a decree of possession directing the defendant nos. 1 to 3 to hand over the possession of the suit property bearing No. 105, First Floor, Local Shopping Center-Cum-Office Complex, at Safdarjung Residential Scheme, Aurobindo Place, Aurobindo Marg, Hauz Khas, New Delhi admeasuring 241.60 sq. meters to the plaintiff;

(c) Pass a decree of permanent injunction, restraining/prohibiting the defendant nos. 1 to 3, their agents, representatives, servants, nominees, attorneys, assignees, etc. from in any manner dealing with the suit property;

(d) Pass a decree awarding mesne profits and damages to the plaintiff for the use and occupation of the premises by the defendants;

(e) Pass any other order/orders which this hon''ble court may deem fit and proper in the facts and circumstances of the case.

17. The said prayers especially Prayer (d) for damages/mesne profits are definitely outside the domain of the reference before the arbitrator which is clear from the MoU dated 22.07.2004 and Clause 5 which is the arbitration clause.

18. It is also not in dispute that the defendants have appeared before the trial court and out of the four defendants one has filed his written statement and the other defendants had sought adjournment on four different occasions to file the written statement; vehement contention of the respondent being that the defendant had in fact already submitted himself to the jurisdiction of the civil court.

19. In these circumstances, the impugned judgment declining the prayer made by the defendant in his application u/s 8 of the Arbitration Act suffers from no infirmity. Reliance by the learned counsel for the petitioner on the judgment reported as MMTC Ltd. Vs. Shyam Singh Chaudhary and Others is misplaced. There is no dispute that where the subject matter of the suit and the subject matter of the proceedings pending before the arbitrator are the same, the suit proceedings are necessarily be stayed. This is not so in the present factual scenario. Petition is without any merit; it is dismissed.

