

IN THE HIGH COURT OF DELHI AT NEW DELHI

FAO (OS) Nos. 159-160/2002 & CM Nos. 5908/08, 4994/08

Reserved on: July 10, 2008

Date of decision: August 1, 2008

P.D. KHANNA & ORS. Appellants
Through: Mr. Sandeep Sethi, Sr. Advocate
with Mr. Vikram Nandrajog, Advocate (for
Group A)
Mr. Shantnu Rastogi and Mr. Animesh Sham,
Advocates for Group B

versus

ASHWANI KHANNA & ORS. Respondents
Through: Mr. Jay Savla, Advocate for
Group D.
Mr. Sanjeev Anand, Advocate
for Group E.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT

Dr. S. MURALIDHAR, J.

1. These appeals are directed against the judgment dated 15th March 2002 passed by the learned Single Judge dismissing OMP Nos. 71 and 93 of 1999 filed by the Appellants challenging an Award dated 1st January 1999.

2. The background to the filing of the present appeal are that an arbitration agreement dated 4th September 1996 was entered into by the members of the “Khanna Family” whereby the disputes

concerning distribution of the properties amongst them were referred for arbitration by a Sole Arbitrator Mr. Navinpal Singh Bhandari. There are five groups in the Khanna family. Group A is headed by Mr. P.D. Khanna, Group B by Mr. L.R. Khanna, Group C by Mr. Y.P. Khanna, Group-D is represented by Mr. Ashwani Khanna son of late Mr. O.P. Khanna and Group E by Mr. P.P. Khanna. The disputes related to the distribution of 17 different immovable properties as well as the assets of the businesses run by the different groups. The incidental issues concerning the liabilities of the businesses of the different groups were referred for arbitration. It was stated in the arbitration agreement that the immovable properties standing in the individual names of any of the parties would be treated as belonging equally to all the brothers or their family members and would be included in the family hotchpotch along with all other assets.

3. As regards the scope of the reference, it was agreed that:

“it shall be for the arbitrator to divide/bifurcate and to allocate with/without possession and settle the rights/ownership and otherwise of each of these properties which deciding all the controversies. They shall be competent to decide the respective share of each party in these and also to see as to what were which of the party is entitled to have in any one of these properties of otherwise to take into consideration the value of the properties while giving consideration to whole of the aspect.”

It was further agreed as under:

“We all hereby appoint Mr. Navinpal Singh Bhandari, resident of R-25, Greater Kailash Part-1, as Sole Arbitrator to settle all our above mentioned matters. It is further

agreed that the award given by Mr. Navinpal Singh shall be final and binding on all properties the decision will not be challengeable in court of law. It is further agreed that during the course of arbitration, Sh. Navinpal shall be receiver of the above mentioned properties.”

4. During the pendency of the proceedings before the Sole Arbitrator, a family settlement was entered into between the groups on 9th May 1997. In terms of the family settlement each of the groups was given a combination of one residential and one industrial plot at the minimum. Some of the groups were given an extra plot in exchange of some other plot. For instance, Group A was given the residential property at C-17, Kalkaji Extension an industrial plot at 22, Okhla Industrial Estate, a property at 28, Community Centre, East of Kailash, (subject to clearing the liabilities of M/s. A V Industries owed to the State Bank of India) and another at B-258, Okhla Industrial Area, Phase-I. By way of exchange, Group-A was to surrender the property at 212, Okhla Industrial Estate which was to go to Group B. The settlement also set out the manner in which other groups were to surrender the properties in their respective possession in lieu of what was allotted to them under the settlement.

5. In terms of the settlement it was further agreed that left over properties would be sold in cash in the first instance to someone within the family. Alternatively it would be sold in the market and the money collected would remain in the custody of the Sole Arbitrator who shall first clear off all the liabilities pertaining to all the properties arising out of their personal and business transactions in

order to clear the debts and redeem the mortgage, if any, and recover the title deed in order to facilitate the smooth transfer and exchange of properties between the parties. The Sole Arbitrator was given a General Power of Attorney ('GPA') for, inter alia, engaging the services of an Advocate for terminating the lease of M/s. A.V. Industries with M/s. National Fertilizers Ltd. in relation to the property at 28, Community Centre, East of Kailash and getting it vacated either through a compromise or through other appropriate legal proceedings. The settlement finally recorded that:

“That the parties hereto shall confirm, abide and implement and no party hereto shall challenge and/or question this family settlement/agreement to be made a part of the award of the Sole Arbitrator as well as to be a rule of the Court if necessary.”

Simultaneously, a GPA was executed on 9th May 1997 in favour of Mr. Navinpal Singh Bhandari.

6. The subsequent events are the bone of contention between the parties. While the Groups A and B, the Appellants herein, contend that the arbitration proceedings could not continue after the settlement, the contesting groups (D and E) maintain that the disputes did not get fully resolved at that stage. According to them, the issue of valuation of the properties remained to be settled and this explained the following proceedings dated 8th June 1997 recorded by Mr. Navinpal Singh Bhandari and signed by all the parties:

“Present:

All present agreed that the price/valuation of the properties allocated in combination of residential and industrial, acceptable to all as

per family settlement, is left to the discretion of the arbitrator and is ascertainment thereof shall and is acceptable/accepted. Agreed also that the price/valuation will not be required to be disclosed prior to the award, and shall form part of the award in consequence of the family settlement already signed and assisted by Mr. Jagdish Sahni.”

“All are directed to put up their respective claims from pool and/or one another with evidence, if any. Next meeting/hearing shall be duly brought to the notice of the heads of the group A,B,C,D and E.

Arun Khanna	sd/-
Y.P. Khanna	sd/-
Vinod Khanna	sd/-
P.D.Khanna	sd/-
Ajit Khanna	sd/-
Ashish Khanna	sd/-
Prem Khanna	sd/-“

7. The appellants object to the authenticity of the above proceedings stating that the words “and assisted by Mr. Jagdish Sahni” were added by way of interpolation since at this stage Mr. Jagdish Sahni was not even in the picture. The appellants belonging to Group A also dispute their signatures. Be that as it may, it appears that after 8th June 1997 Mr. Navinpal Singh Bhandari continued to hold proceedings till the parties entered into the further agreement referring the disputes to the arbitration of Mr. Jagdish Sahni. The Appellants belonging to Group A did not participate in any of the proceedings subsequent to 8th June 1997.

8. As far as the subsequent agreement dated 25th July 1998, it is not in dispute that Mr. Jagdish Sahni, to whom the disputes were referred, did not conduct any proceedings. Significantly, the said agreement makes no reference whatsoever to the earlier reference to Mr.

Navinpal Singh Bhandari or to the family settlement dated 9th May 1997. The circumstances under which the subsequent reference of the disputes was made to Sahri Sahni remains unclear. Mr. Sahni appears to have come into the picture at the stage of Mr. Bhandari undertaking the task of valuation of the properties.

9. The Award dated 1st January 1999 was signed both by Mr. Navinpal Singh Bhandari as well as Mr. Jagdish Sahni. At the foot of the Award both Mr. Bhandari and Mr. Sahni have appended their signatures in the following manner:

“I, Navin P.S. Bhandari s/o Mr. Swarn Singhji r/o R-25, Greater Kailash-I, New Delhi do hereby append my signatures and verify this award made by me on this 31st day of December 1998 announce the same on 1st January 1999 and place before the representatives of the Group A to E in presence of Mr. Jagdish Sahni, MLA (Punjab) for their acceptance and signatures therefor on the index of this Award.

Sd/-
(Navin P.S. Bhandari)

I, Jagdish Sahni, also appointed as Arbitrator, have read the contents of this Award dated 31.12.1998, announced in my presence at Conference Hall, South Delhi Club, Greater Kailash-I, New Delhi on 1.1.1999 and accepted by all heads of the Group A,B,C,D and E, who accordingly signed their acceptance in my presence. I agree and confirm with this Award made by Mr. Navin Pal Singh Bhandari.

Sd/-
(Jagdish Sahni)”

Mr. Jagdish Sahni has also signed on each of the annexures as well as the cover page of the Award.

10. Group A filed OMP No. 93 of 1999 in this Court under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') objecting to the Award, inter alia, on the following grounds:

“(i) It deals with disputes not contemplated by and not falling within the terms of submission to the Arbitrator. It contains decisions on matters beyond the scope of the submission to arbitration;

(ii) the arbitral procedure was not in accordance with the agreement between the parties and the Arbitration & Conciliation Act, 1996 and particularly Part-I thereof.

(iii) the arbitral award is in conflict with the public policy”

11. It needs to be noticed that even before the Award was made, a petition being OMP No. 206 of 1998 was filed by Group D in this Court under Section 9 of the Act seeking an interim relief to the effect that Sole Arbitrator Mr. Bhandari should be appointed as Receiver of the property at C-28, Community Centre, East of Kailash. When this petition was first heard on 14th September 1998, the Arbitrator appeared through counsel and an order was passed appointing him as Receiver. Subsequently, a detailed order was passed by the learned Single Judge of this Court on 4th June 2001 vacating the earlier order and putting Group A in possession of the said property subject to terms. Group A have remained in possession of C-28 Community Centre East of Kailash since then.

12. The other set of Appellants Group B filed a separate OMP No. 71 of 1999 assailing the Award more or less on the similar grounds as

Group A.

13. In the impugned order, the learned Single Judge accepted the contention of Groups C, D and E that notwithstanding the family settlement, the dispute concerning the valuation of the properties remained to be resolved. The learned Single Judge thereafter proceeded to identify the issues arising for determination as under:

“a) Whether the authority of Sh. N.P.S. Bhandari, arbitrator appointed by the first arbitration agreement stood superseded after agreement dated 25th July, 1998 was signed by the parties appointing Mr. Jagdish Sahni as the arbitrator? If the answer to the aforesaid question is in the negative, then

b) Whether the award of the arbitrator is liable to be set aside as against public policy?

While deciding this question, following aspects need to be determined.

i) Whether the arbitrator did not give proper notice of hearings after May, 1997 and interpolated certain minutes?

ii) Whether Sh. Bhandari acted in a biased manner?”

14. On the first issue the learned Single Judge observed that “complete picture and whole truth is not projected by the parties” and that “the agreement dated 25th June 1998 is shrouded in mystery.” Consequently it was held: “The only inference which is capable of being drawn in such circumstances is that by entering into such an agreement, it was never intended by the parties that the mandate of Mr. Bhandari would be terminated.” On the issue whether the Award was opposed to public policy the learned Single Judge concluded:

“Thus the scope of challenge to an award under the new Act is extremely limited. Furthermore, as already pointed out above, award has been substantially acted upon and even during the proceedings before this court, various orders were passed from time to time in the interim

applications filed by the parties seeking various directions for payment of the amounts to various creditors etc. At this stage, it would not be appropriate to unsettle these things.”

15. Mr. Sandeep Sethi, the learned Senior Counsel, appearing for Group A, first submitted that the Award was on the face of it vitiated in law since it had been signed by two arbitrators although the reference to disputes was made to a sole arbitrator. Referring to Section 10 of the Act he submitted that an Award by an even number of arbitrators was per se invalid. Referring to the minutes of the meeting of 8th June 1997, he submits that they were interpolated by the sole Arbitrator and further that the signatures of the members of Group A therein were forged. He submits that although the learned Single Judge framed an issue whether there was an interpolation of the record, the impugned judgment did not deal with it.

16. On merits Mr.Sethi submitted that the Award is patently unreasonable, and shocking to judicial conscience, in so far as it deals with the rights and entitlements of Group A. It is pointed out that Group A had already paid the bank a sum of Rs. 35 lakhs for redemption of the mortgage in relation to the property at C-28 Community Centre, East of Kailash. Further Group A had also deposited Rs. 15 lakhs in this Court in terms of Clause 9 of the Award. However, in terms of Clause 9 of the Award, if Group A failed to pay the Arbitrator the sum of Rs. 1,34,07,000/- less Rs. 15 lakhs within 90 days from the date of the Award, the said property

would revert to the family pool to be offered to any other group against payment for exchange value or put to the sale. Of the amount recovered in this process Group A was to be paid Rs. 1,15,93,000/- from which interest at 18 per cent per annum on Rs. 1,34,07,000/- from the date of the award till the date of the realization of the money was to be deducted. Rs. 15 lakhs already paid by the appellant was to be forfeited. No mention was made as to whether the sum of Rs. 35 lakhs already paid to the bank would be refunded to Group A. Further, in terms of Clause 18 of the Award the constructive possession of all immovable properties in Schedules I and II and the physical possession of C-28 Community Centre, East of Kailash was to remain with the Sole Arbitrator along with the proceeds from the sale of plot of Vasant Vihar till implementation of this award *in toto*. Further he points out that the Award did not state how the sum of Rs. 1,34,07,000/- paid to the Arbitrator would be distributed among the groups. Apart from the fact that by the above process Group A would get nothing under the Award, it would end up paying a huge sum. This was contrary to the family settlement which was never intended by the parties to be dislodged. Therefore the Award was plainly unreasonable as far as it dealt with Group A. The bias of the Arbitrator was evident. Also, the above clauses showed that the Arbitrator had acted contrary to the terms of reference by retaining the control over the monies and properties and that this was never intended when the parties entered into the settlement. Without prejudice to these contentions, Mr. Sethi submitted that Group A was willing to deposit in this Court the sum of Rs.84,07,000 (i.e.

Rs1,34,07,000 minus Rs.15,00,000 minus Rs.35,00,000) subject to the property at C-28 Community Centre, East of Kailash being transferred to Group A and the money deposited being distributed among the Groups pro rata.

17. Appearing for Group B, Mr. S.Rastogi, learned counsel tendered the affidavit of Mr. Vinod Khanna, who represented that group wherein it was stated that Group B has discharged a substantial amount of the liability in terms of the Award and this is without prejudice to its objections to the Award. It is stated that of the total liability of Rs.36.04 lakhs, Group D has made a total payment of Rs.35,00,866.

18. Appearing for the Group E, Mr. Sanjeev Anand, the learned counsel submits that the impugned judgment of the learned Single Judge, does not call for any interference. According to him, the settlement was never really acted upon and as the minutes of the proceedings of 8th June 1997 show, the parties had agreed before the sole arbitrator that the property should be got valued. This led to the parties approaching Mr. Sahni for that purpose. He urged that the appeal should be dismissed and the property earmarked to the share of the appellants should revert to the family pool and be disposed of in terms of the Award.

19. Appearing for Group D, Mr. Jay Savla, the learned Advocate points out that a substantial portion of the Award has already been

implemented and, therefore, it would not be in the interests of justice now to set the clock back. On the question of award being signed by the two arbitrators, he points out that this ground was never raised before the learned Single Judge or even in the memorandum of grounds of the present appeal. He places reliance upon the judgment of the Supreme Court in *Narayan Prasad Lohia v. Nikunj Lohia* **2002 (3) SCC 572** to submit that the Award need not be set aside only on this ground particularly since it has been substantially implemented and does not suffer from any infirmity. On instructions from his clients, Mr. Savla submits that they would have no objection if Group A is permitted to retain the property at C-28, Community Centre, East of Kailash subject to their paying the sum as determined by the Arbitrator together with interest at 18% per annum.

20. During the course of the hearing of this appeal, when it transpired that Groups B, C and D would have no objection to Group A retaining the property at C-28, Community Centre, East of Kailash subject to making payment in terms of the Award, the Court sought the response of Group E whether they too would agree to such a course. On instructions from his clients, Mr. Sanjeev Anand submitted that Group E were unwilling since according to them present value of the property in question had increased several-fold. The Court therefore proceeds to deal with the submissions of counsel for the parties.

21. There are two broad issues that arise for determination in this appeal. One concerns the signing of the Award by two Arbitrators

and the other the objections to it on merits. As regards the first issue, counsel for the respondents are right in their contention that no specific ground that the Award could not have been signed in terms of Section 10 of the Act by two Arbitrators when the reference was made to a Sole Arbitrator was raised by the appellants before the learned Single Judge either in the OMP or even during arguments. There is no such ground raised in the memorandum of the present appeal as well. Therefore this Court is not inclined to entertain this objection. Further, this Court finds force in the submission of the learned counsel appearing for Group D. on the strength of the judgment of the Supreme Court in *Narayan Prasad Lohia*, that it would not be in the interests of justice to set aside the award only on this ground since it has been substantially acted upon by the parties.

22. After examining the records and the pleadings, this Court is inclined to concur with the learned Single Judge that the circumstances under which the parties entered into the subsequent agreement dated 25th June 1998 referring the disputes to Mr. Sahni is not clear at all. It is an admitted position that Mr. Sahni never conducted any proceedings. On the other hand, Mr. Bhandari appears to have continued to hold proceedings even after the family settlement. The proceedings of 8th June, 1997 appears to have signed by all the parties. Although Mr. Sethi sought to dispute the signatures of the members of Group A as recorded in the minutes, we do not find merit in the objection. Accordingly we are not inclined to interfere with the Award only on the ground that it has been signed by an even

number of persons. Also, in the circumstances, it is not possible to accept the case of the appellants that the intention was not to continue with Mr. Bhandari as Arbitrator.

23. However, as regards the objection raised by the appellants to the Award on merits, this Court finds that Clause 9 of the Award, is on the face of it patently unreasonable and irrational in so far as it deals with the rights and entitlement of Group A. There are several reasons why this Court finds that parts of Clause 9 read with Clause 18 appear to 'shock the judicial conscience'. First, the intention of the parties in continuing the proceedings before Mr. Bhandari died not mean that the family settlement was abandoned altogether. While the valuation of the properties was an exercise remaining to be undertaken, the essential agreement as regards the identity if the properties allocated to each of the groups appears to have attained finality. In other words, it was not the intention of the parties to deprive any of the groups of the properties already allocated to each of them in terms of the family settlement.

24. To the extent that Clause 9 requires a certain amount to be paid by Groups A and D, this Court does not propose to interfere with the Award. However, there was no question of payment of such monies being made to the Arbitrator as indicated in Clause 9, without any further stipulation that such money will be distributed pro rata among the groups. Therefore the direction that the money will be paid to the Arbitrator is plainly unsustainable in law. Secondly, Clause 9 does not

account for the payments already made and those to be made by Group A to the bank. Thirdly, the cash payment by Group A of Rs. 15 lakhs in terms of Clause 9 could not have been ordered to be forfeited in the event of their not paying the sum of Rs. 1.34 crores. Such a stipulation is plainly unreasonable and unacceptable. If after the sale of the property, interest at 18% per annum on Rs. 1.34 crores has to be deducted, Group A will not only get nothing but would have ended paying sums which were non-refundable. This read together with Clause 18 which deprived Group A of possession of the property falling to their share undoubtedly renders the above portion of the Award vis-à-vis Group A unsustainable in law. We are therefore unable to agree with the learned Single Judge that the arrangement brought about by the learned Arbitrator was a fair resolution of disputes as far as Group A was concerned or that there was no loss caused to Group A.

25. At the same time, this Court is conscious that the Award has been substantially worked out by the parties. In fact Group B also appears to have complied with the Award substantially. This Court therefore considers it to be interests of justice to partially modify Clause 9 and Clause 18 of the Award in so far it concerns the property at C-28, Community Centre, East of Kailash which has fallen to the share of Group A. It is directed that within a period of eight weeks from today, Group A will deposit in this Court the balance sum of Rs. 84,07,000/-, (i.e., Rs. 1,34,07,000/- minus Rs. 50 lakhs) together with the simple interest at 18 per cent per annum from the expiry of 90 days after the

date of the Award till the date of payment. Upon this payment being made by Group A the property at C-28, Community Centre, East of Kailash will be transferred to Group A. The direction contained in Clause 18 that constructive possession of the property would remain with the Arbitrator till the entire amount is worked out is hereby set aside. The possession of the aforementioned property will, subject to Group A abiding by the above direction, remain with Group A. The authorities concerned will act on the certified copy of this order to effect the necessary changes in the records. The rest of the Award is not being interfered with and will be worked out in terms thereof in accordance with law. It will be open to the parties to institute appropriate proceedings to ensure that their respective pro rata shares of the monies deposited in this Court are made available to each of the groups.

26. The appeals accordingly stand disposed of with no orders as to costs.

S. MURALIDHAR, J.

CHIEF JUSTICE

AUGUST 01, 2008
rk/ak