

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP No. 125/1997**

% **Date of Decision: January 15, 2009**

Jagdish Rai Petitioner

! Through: Mr. Harish Malhotra, Sr. Advocate
with Ms. Chandrani Prasad
Advocate

Versus

\$ Ram Kishan & Ors.

.....Respondents

^ Through: Ms. Nandini Sahni for respondents
No. 1 and 4

CORAM:

HON'BLE MR. JUSTICE S.N. AGGARWAL

1. Whether reporters of Local paper may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

S.N.AGGARWAL, J (ORAL)

This is an objection petition filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 read with Sections 94 and 151 of the CPC seeking to challenge the arbitral award dated 18.11.1996 given by panel of three arbitrators appointed during pendency of partition suit filed by the petitioner

being CS(OS) No.620/1992.

2 Briefly stated the facts of the case are that the petitioner has filed a suit for partition in this Court being CS(OS) No.620/1992 seeking partition of two properties being built up property bearing No. B-2/23, Ashok Vihar, Phase-II, Delhi (built on a plot area of 1080 square yards) and industrial plot No. 5, Block A, Wazirpur Industrial Area (built on a plot area of 2300 square yards). While this suit for partition filed by the petitioner was pending, the respondents filed an application purported to be an arbitration agreement along with list of documents vide diary No. 7457 dated 11.03.1996. The copy of the said application purported to be an arbitration agreement between the parties is at pages 124-125 of the paper book. The petitioner filed his response by way of his reply to the said application on 08.07.1996 and disputed the correctness of the contents of the application purported to be an arbitration agreement filed by the respondents on 11.03.1996. However, the arbitrators named in the application filed by the respondents on 11.03.1996 gave notice to the petitioner for appearance before them. The first notice was given by the arbitrators on 11.06.1996, second notice on 08.07.1996 and third notice on 24.08.1996 before the petitioner was proceeded ex-parte in the arbitration

proceedings pending before the arbitrators on 12.09.1996. These three notices given by the arbitrators to the petitioner for his appearance in the arbitration proceedings are at pages 134, 135 and 139 of the paper book. The petitioner gave two telegrams, first on 10.08.1996 and second on 11.09.1996 disputing the reference of dispute for arbitration stating that his signatures on the application purported to be an arbitration agreement were obtained under pressure. These telegrams sent by the petitioner are available at pages 136 & 147 of the paper book. However, the arbitrators chose to continue with the reference and proceeded to give an award dated 18.11.1996, which has been challenged by the petitioner in the present proceedings inter-alia on the following grounds:-

- (i) There was no valid arbitration agreement between the parties;
- (ii) No reference to the arbitrators was permissible during pendency of partition suit filed by the petitioner;
- (iii) Decision by arbitrators on merit without deciding the question of their own jurisdiction is not valid and legal and
- (iv) The petitioner was wrongly proceeded ex-parte by the arbitrators on 12.09.1996.

3 I have heard the arguments of learned counsel for both the parties and have also perused the entire case file with utmost care.

4 Ms. Nandini Sahni, learned counsel appearing on behalf of respondents No. 1 & 4 has opposed this petition relying upon Section 7 (4) of the Arbitration and Conciliation Act, 1996 according to which a document signed by the parties is deemed to be an arbitration agreement. The contention of Ms. Sahni appearing on behalf of respondents No. 1 & 4 is that the application filed by the respondents in partition suit being CS(OS) No. 620/1992 on 11.03.1996 bears signatures of the petitioner and also of the respondents and therefore, according to her, the said document has to be treated as valid arbitration agreement between the parties. Learned counsel appearing on behalf of respondents No. 1 & 4 has further contended that the objections against the arbitral award dated 18.11.1996 filed by the petitioner are hit by Sections 12, 13 & 34 of the Arbitration and Conciliation Act, 1996. She has also argued that in view of provisions contained in Section 16 (2) & (5) of the new Arbitration Act, it was for the arbitrators to have decided the question of their own jurisdiction and it was not open for the petitioner to raise the objection of jurisdiction of the arbitrators after the pronouncement of the award.

5 Per contra, Mr. Harish Malhotra, learned senior counsel appearing on behalf of the petitioner has vehemently argued that

the petitioner never signed the application purported to be an arbitration agreement consciously and according to him, the signatures of the petitioner on the said application were obtained under pressure. Mr. Malhotra has submitted that the petitioner on receipt of copy of the application purported to be an arbitration agreement immediately filed his response to the said application in the Court and informed the Court that he was not a party to the arbitration agreement as mentioned in the aforesaid application filed by the respondents in partition suit. The copy of the reply filed by the petitioner to the application of the respondents purported to be an arbitration agreement is at pages 121-126 of the paper book. Mr. Malhotra has referred to a judgment of the Hon'ble Supreme Court in ***Naraindas Vs. Vallabhdas & Ors AIR 1972 SC 1*** and on the strength of the said judgment, he has contended that no valid reference could have been made to the arbitrators for deciding the dispute which was subject matter of partition suit without obtaining the orders of the Court. The contention of Mr. Malhotra is that since the permission of the Court was not taken by either of the parties before the reference was made to the arbitrators on the basis of application purported to be an arbitration agreement, the award dated 18.11.1996 passed by the arbitrators cannot be acted upon.

6 I have given my anxious thought to the above rival arguments advanced by learned counsel for the parties but I could not persuade myself to agree with the contentions advanced on behalf of respondents No. 1 & 4. Nobody has appeared on behalf of respondents No. 2 & 3 at the time of hearing of the present objection petition and therefore the Court could not have had the advantage of knowing the stand of these respondents.

7 The Hon'ble Supreme Court has categorically held in Naraindas's case (Supra) that in case a suit is pending in respect of subject matter of dispute, there can be no valid reference to the arbitrators without the orders of the Court. The relevant portion of the judgment in Naraindas's case (Supra) is extracted below:-

"It is always open to parties to refer a dispute to arbitration without the intervention of the Court. In case, a suit is pending in respect of the subject matter of the dispute there can be no valid reference during the pendency of the suit, to arbitration without the order of the Court. The underlying reason for that is to avoid conflict of jurisdiction by both the Court and the arbitrator dealing concurrently with the same dispute. An award given on a reference during the pendency of a suit relating to dispute which is the subject matter of reference without obtaining the order of the Court cannot be enforced."

8 On being asked, learned counsel appearing on behalf of respondents No. 1 & 4 could not give any contrary judgment to the judgment in Naraindas's case referred and relied upon by the counsel for the petitioner. Admittedly in the present case, the petitioner's suit for partition was pending on the date the disputes were referred to the arbitrators on the basis of purported arbitration agreement contained in the application filed by the respondents in partition suit on 11.03.1996. The permission of the Court was not taken for referring the dispute to the arbitrators. In that view of the matter without going any further into the contentions advanced by the counsel for the parties, it can be safely said that reference to the arbitrators which led to passing of the impugned award was not valid. Furthermore, it may be noted that the stand of the petitioner all throughout was that his signatures on the application purported to be an arbitration agreement were obtained under pressure. He informed about the same not only to the Court but also to the arbitrators through his telegrams referred above. The relevant portion of the stand of the petitioner taken by him in his reply filed before the court is extracted below:-

5..... The signatures of the plaintiff were obtained by pressurising the plaintiff by all the defendants who are his elder brothers and their wives and he had never given his

free consent thereto.

6. *That the defendants exercised the pressure that they would construct and transfer the property in favour of third parties taking advantage of the plaintiff's absence from Delhi and from their illegal and contumacious acts and deeds as stated before the Hon'ble Court already. The plaintiff was cornered by all the defendants. The plaintiff was not given any opportunity even to read the matter or to think over the same or understand the effect or consequences. The plaintiff was told that the same was only in the nature of draft and was not to be acted upon till the plaintiff gave his consent or agreement to mutual settlement of the disputes. The plaintiff was not given any opportunity even to show the same to the Counsel but was pressurised by his brothers into signing the same. The plaintiff was informed that the signatures on the draft were necessary to show to the three persons named therein so as to obtain their consent. The plaintiff had clearly informed the defendants that he was not ready or willing to consent to withdrawal of the cases or to adjudication by any person other than by this Hon'ble Court. The defendants pressurised the plaintiff fully knowing that the plaintiff had to return to Bangalore and would not be able to personally control or check the illegal activities on the property of the plaintiff at Delhi.*

9 It is more than evident from the above pleadings of the petitioner contained in his reply to the application purported to be an arbitration agreement that the petitioner never agreed

consciously for referring the dispute which was subject matter of partition suit for arbitration. Clouds of doubt about the validity and legality of the arbitration agreement are hovering all around the document purported to be an arbitration agreement. It may be seen from the arbitral award that the arbitrators did not address the question relating to existence of a valid arbitration agreement, though a dispute in this regard was brought to their notice by the petitioner through his two telegrams sent on 10.08.1996 and 11.09.1996 referred above.

10 In view of the above facts and circumstances of the case, I have no hesitation in holding that there was no valid subsisting arbitration agreement between the parties and the reference of dispute to the arbitrators during pendency of partition suit without orders of the Court was also not valid. The impugned award based upon such an illegal reference cannot be either acted upon or sustained in law. The said award is liable to be set aside.

11 It may be noted that no prejudice is going to be caused to the parties by setting aside of the impugned award because the suit for partition in respect of two suit properties being CS(OS) No.620/1992 is already pending before the Court. The respective rights of the parties in the said properties shall be adjudicated upon by the Court

after giving a hearing to all of them.

12 For the foregoing reasons, this objection petition is allowed. The impugned award dated 18.11.1996 is hereby set aside. The parties are left to bear their own costs.

January 15, 2009
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S.N.AGGARWAL
[JUDGE]