

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA(OS) No.68/2009 & CM No.11652/2009

OVAL INVESTMENT P. LTD. & ORS.....Appellant through

Mr. C.A. Sundaram, Sr.
Adv., Mr. Arun Bhardwaj,
Sr. Adv. with Mr. Manish
Sharma, Ms. Rohini Musa,
Mr. Vishal Malhotra,
Mr. Rohan Sharma, Advs.

versus

INDIABULLS FINANCIAL
SERVICES LTD. & ORS.

.....Respondent through
Mr. A.S. Chandhiok, Sr.
Adv., Dr. A.M. Singhvi, Sr.
Adv., Mr. B.B. Sawhney, Sr.
Adv. with Ms.Sweta
Kakkad, Mr.Varun
Pathak & Ms. Dimple
Murria, Advs.

% Date of Hearing : August 21, 2009

Date of Decision : November 03, 2009

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE V.K. JAIN

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| 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 the Digest? | Yes |

VIKRAMAJIT SEN, J.

1. This Appeal is directed against the Judgment of the learned Single Judge passed on 18.8.2009, whereby the Plaint of the Appellant was rejected in terms of Order VII Rule 11(d) of the Code of Civil Procedure, 1908 ('CPC' for short). The Plaintiff had filed a suit for declaration and permanent injunction.

2. The Prayers read as follows:-

- (a) pass a decree of declaration in favour of the plaintiff companies and against the defendant No.1 company that the invocation of arbitration/reference to arbitration in terms of letter dated 17.07.2009 of the defendant No.1 company is vitiated and liable to be struck down on account of it being improper and based on fraud, forgery and illegality.
- (b) pass a decree of perpetual injunction restraining the defendant No.1 from invoking the arbitration clause qua the plaintiff companies without following the due process mentioned in the said clause and as per law.
- (c) pass a decree of perpetual injunction restraining the defendant No.1 from selling, transferring, alienating or in any manner creating a third party interest in relation to shares of M/s GHCL and GTL as mentioned in para No.27 of the suit and further in relation to property No.F7/1 to F7/4 and F7/8 to F7/11, F Block, Connaught Place, New Delhi and Khasra No.352/2, 563 (0-9) min and 564 (0-11) min Village Bijwasan Tehsil Mehrauli, New Delhi.
- (d) pass such order(s) as this Hon'ble Court may deem fit and appropriate in the facts and circumstances of the case.

3. The crux of the controversy is the alleged non-service of a Notice dated 17.7.2009, whereby the Respondent/Defendant had made an invocation of arbitration clause. This Notice was stated to have been dispatched by the Defendant to the Appellant under Certificate of Posting (UPC), Registered Post

Acknowledgement Due, and thirdly by Courier. The contention of the Appellant is that non-service of the said Notice would have the consequence of rendering arbitral proceedings void *ab initio* on a plain reading of Section 21 of the Arbitration and Conciliation Act, 1996 ('A&C Act' for short).

4. Before the learned Single Judge the submission of the Respondent was that the existence of an arbitration clause was not in doubt; that if the Plaintiff had no objection as to the legal propriety of the arbitral proceedings, these objections should have been ventilated before the Arbitral Tribunal itself, on a conjoint reading of Section 16 and Section 5 of the A&C Act. According to the Respondent, the only exception to the general rule that Civil Courts possessed no jurisdiction over arbitral proceedings was the power conferred by the statute under Section 9 of the A&C Act to pass interim measures. Therefore, the suit was not maintainable.

5. Reliance was placed on ***Secur Industries Ltd.*** –vs- *Godrej & Boyce Mfg. Co. Ltd.*, (2004) 3 SCC 447, ***Milkfood Ltd.*** –vs- *GMC Ice Cream (P) Ltd.*, (2004) 7 SCC 288, *Singhal & Brothers* –vs- *Mahanagar Telephone Nigam Ltd.*, 2005 (5) Bom CR 261 and ***SBP & Co.*** –vs- *Patel Engineering Ltd.*, (2005) 8 SCC 618.

6. The learned Single Judge has very concisely traversed the relevant provisions of the A&C Act. In particular, it has been noted that under Section 37(2) of the A&C Act an appeal can be filed against orders passed by the arbitrators on the question of jurisdiction, as well as by a challenge to any interim orders/measures passed by the Arbitral Tribunal under Section 17 of the A&C Act. Furthermore, a note has been taken of the wording of Section 16(1) which confers on the Arbitral Tribunal the power to rule on its own jurisdiction. The Plaintiff/Appellant's contention before the learned Single Judge, as well as before us, is that in the event Section 21 of the A&C Act is breached, the Arbitral Tribunal is not competent to assume the power of ruling on its jurisdiction. For doing so, the essential prerequisite would be that the Arbitral Tribunal should be properly and legally constituted.

7. The following paragraphs from ***Secur Industries Ltd.*** remove altogether any scope for debate itself:-

14. This brings us to the ground on which the High Court stayed the proceedings before the Council, namely, the alleged failure of the appellant to serve notice under Section 21 of the 1996 Act. The point was not raised before the High Court at all by Respondent 1. This was candidly stated by the learned counsel for Respondent 1. Our attention was not drawn to any other legal provision which requires a notice to be

given prior to commencing proceedings apart from Section 21 of the 1996 Act. Whether the notice was a notice under Section 21 and whether the giving of notice under Section 21 is to be construed as a precondition to the exercise of jurisdiction by the Council are questions which the Council will have to decide. This debate could not be a ground for the High Court interfering with the Council's jurisdiction and staying proceedings before it.

15. To sum up : the High Court erred in staying proceedings before the Council. It had no jurisdiction to do so.

8. It is a moot question whether despite the pronouncement in ***Secur Industries Ltd.*** if a claimant neglects altogether to issue a notice invoking the arbitration clause the jurisdiction of the Civil Court would be barred on the contention that such a notice was the springboard or *sine qua non* for commencement of arbitration proceedings. In ***Secur Industries Ltd.***, as well as before us, the Defendant asserts that notices were dispatched and despite the attempts of the Plaintiff to avoid service (Respondent in the Claim raised before the Arbitral Tribunal) it had been served. It is indeed remarkable that this contention has been raised by learned Senior Counsel despite being unsuccessful in ***Secur Industries Ltd.***, the facts of which are strikingly similar to the one which obtains in the case in hand.

9. The central question in *Milkfood Ltd.* was the applicability of the Arbitration Act, 1940. The determination of this nodus would be dependent on the date on which notice of arbitration was issued and received by the Respondents. It was in that context that their Lordships observed that – “service of notice and/or issuance of request for appointment of arbitrator in terms of the arbitration agreement must be held to be determinative of the commencement of the arbitral proceedings”. Extrapolation of these observations to the case in hand is, therefore, not appropriate. Indubitably, it is the A&C Act which is applicable to the parties before us. The issue before us, namely, the competence of the Arbitral Tribunal to rule on the aspect whether it was properly constituted, did not arise and, therefore, was not pronounced upon.

10. Mr. C.A. Sundaram, learned Senior Counsel for the Appellant, has also raised a neat question of law, namely, that since the Appellant/Plaintiff had alleged fraud (inasmuch as notice had been issued to a wrong address) on the part of the Respondent/Claimant, it was impermissible to dismiss the Suit under Order VII Rule 11 of the CPC. Although arguments had been addressed to the contrary, we do not think it logical to go into this question. This is for the reason that once one arrives at the conclusion that it is within the competence of the Arbitral

Tribunal to rule on its own jurisdiction, then the appropriate forum for adjudication whether a fraud had been perpetrated by the Claimant on the Respondent by issuing notice to the Respondent at the wrong address, would lie before the Arbitral Tribunal. By ignoring the averments in the plaint in this regard, the learned Single Judge has not rendered any opinion on this point. All that has been done is to direct the Plaintiff/Appellant to raise these questions before the Arbitrator.

11. It needs to be reiterated that ***SBP & Co.*** is not a precedent for the proposition that the Court must be fully satisfied on the existence of an arbitration clause etc. What the Seven-Judge Constitution Bench has observed is that before issuing interims orders under Section 9 of the A&C Act the Court should be fully satisfied that the A&C Act applies to the parties. This is obviously because a reckless exercise of powers under Section 9 would work incalculable injustice when it is subsequently found that the A&C Act was not applicable to the parties at all.

12. The Judgment of the learned Single Judge has taken into consideration the relevant pronouncements on this subject and has articulated in detail the arguments which have persuaded him to dismiss the Plaint.

13. We are also satisfied that the learned Single Judge has rightly concluded that the suit is barred under Section 34 of the Specific Relief Act, 1963. It has noted that the consequential relief that would flow from the first prayer, viz. for the declaration that the letter dated 17.7.2009 invoking arbitration proceedings was invalid, would be that proceedings based thereon would also be invalid. Such a relief could not be granted as that would tantamount to restraint of arbitral proceedings, which is precisely what should be assiduously avoided where the existence of an arbitration clause is not in dispute. The consequential relief of injunction was, therefore, deliberately drafted in the manner so as to claim what was essentially and logically the consequential relief. We are reminded of the observations in *T. Arivandandam -vs- T.V. Satyapal*, (1977) 4 SCC 467, which are to the effect that the Court should not fall prey to clever drafting. This case has recently been adverted to in *Abdul Gafur -vs- State of Uttarakhand*, (2008) 10 SCC 97 where his Lordship D.K. Jain, speaking for the Bench, had recommended that wherever “the High Court is convinced that the plaint read as a whole does not disclose any cause of action, it may reject the plaint in terms of Order 7 Rule 11 of the Code. As a matter of fact, as observed by V.R. Krishna Iyer, J., in *T. Arivandandam -vs- T.V. Satyapal*, (1977) 4 SCC 467, if on a

meaningful – not formal – reading of the plaint, it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the court should exercise its power under the said provision. And if clever drafting has created an illusion of a cause of action, it should be nipped in the bud”

14. The Appeal, as well as the pending application, is without merit and is dismissed.

(VIKRAMAJIT SEN)
JUDGE

November 03, 2009
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(V.K. JAIN)
JUDGE