

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

Date of Reserve: 2nd February, 2010
Date of Order: 8th February, 2010

CM (M) No. 223/2009 & CM No. 3792/2009

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08.02.2010

Amrit Lal Madan & Anr.

... Petitioners

Through: Mr. Dinesh Agnani, Advocate

Versus

K.D.Ahuja & Ors.

... Respondents

Through: Mr. Virender Mehta, Advocate for R-1&2
Mr. Anshuman Sood, Advocate for R-3

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT

By this petition under Article 227 of the Constitution of India, the petitioners have assailed an order dated 28th February, 2009 whereby an application of the petitioners under Order 7 Rule 11 read with Section 151 CPC for rejection of petition under Section 9 of the Arbitration and Conciliation Act, 1996 on the ground of jurisdiction was dismissed. The application was dismissed on two grounds; one that application under Order 7 Rule 11 CPC was not maintainable in proceedings under Section 9 of the Arbitration & Conciliation Act, 1996 and second though the application was in respect of immovable property situated at Gurgaon, but the relief claimed by the respondents could be obtained by person obedience of the petitioners and, therefore, court at Delhi shall have jurisdiction.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioners and the respondents had entered into a lease agreement in respect of premises situated at Gurgaon. The lease agreement contained an arbitration clause which provided that the seat of arbitration shall be Delhi. The respondents filed a petition under Section 9 of the Arbitration & Conciliation Act, 1996 with a prayer that the Court should pass an injunction restraining the petitioners and their agents, servants etc. from disturbing peaceful use and enjoyment of the property in question ie. 830 sq. feet of area situated on the second floor of Mall-cum-Entertainment

Centre of the building at MG Road, Gurgaon. The other prayer was that the petitioners and their agents should be restrained from dispossessing respondents and from dislocating and withholding any of the maintenance services including electricity and water to the demised premises.

3. It is submitted by the Counsel for the petitioners that the order of the trial Court entertaining the application of the petitioner under Section 9 was contrary to the established law and without jurisdiction. The trial Court had no jurisdiction to entertain application under Section 9 and wrongly dismissed the application under Order 7 Rule 11 CPC. The counsel for respondents on the other hand maintained that the order of the trial Court was well within jurisdiction. An application under Order 7 Rule 11 CPC was not maintainable in an application under Section 9 and the case of the respondents was covered under exception to Section 16.

4. It is settled law that an objection to jurisdiction must be taken by a party at the first instance. In this case, the petitioners took objection to entertaining of petition by the trial Court at the very first instance by filing an application under Order 7 Rule 11 CPC. This objection could have been taken by filing reply to Section 9 itself or filing an application under Section 151 CPC. The Court is bound to decide its jurisdiction at the very inception if the issue does not involve recording of any evidence and the issue of jurisdiction can be decided on the face of the admitted facts itself. Thus, the plea taken by the respondents that an application under Order 7 Rule 11 CPC was not maintainable has no force. Whatever be the provision mentioned on the application, the issue of jurisdiction has to be gone into by the trial Court once it is raised before the trial Court.

5. Section 2(1)(e) of the Arbitration & Conciliation Act, 1996 prescribed the Court which can entertain application under Section 9. Section 2(1)(e) reads as under:

“2(1) In this Part, unless the context otherwise requires, -

(e) “Court” means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes”

6. It is apparent that the question which the Court has to ask is that if on the same facts a suit had been filed, would the Court have jurisdiction to entertain the suit.

7. In the present case, the property in respect of which the relief is claimed by the respondents is situated outside Delhi. The reliefs claimed are regarding dispossession from the property not disturbing the peaceful possession of the respondents. Thus all reliefs are in respect of the property. The plea taken by the respondents that the case was covered under exception is not tenable. This Court had occasion to deal with such a plea in OMP No. 507/2009 Trehan Promoters & Builders Pvt. Ltd. v. Welldone Technology Parks Development Pvt. Ltd. decided on 4th September, 2009 and this Court laid down as under:

7. I also consider since the property is situated outside the territorial jurisdiction of Delhi this Court would have no jurisdiction. The parties entered into the collaboration agreement for developing the immovable property. The disputes regarding development of the property, construction, entry, exit are the disputes in respect of immovable property and the rights of the parties therein. Clause 16(d) of CPC provides that for determination of any right or interest for immovable property, the suit has to be instituted in the Court within the local limits of whose jurisdiction the immovable property is situated. Whether the petitioner should have a gate on the main Gurgaon-Sohna Road or on the side road as sought to be constructed by respondent is a dispute of rights of petitioner in respect of the property only. It is not a dispute qua a personal right against the respondent. The proviso cannot be explained in a manner that for every relief under Section 16 CPC personal obedience is pleaded. For example, in case of Clause 16(a) CPC, if respondent is in possession of the immovable property, he can be directed to handover possession of immovable property and the immovable property can be recovered by the respondent being compelled by personal obedience of such a direction of the Court. Similarly, respondent can be compelled by personal obedience to partition the immovable property by handing him over a site plan and drawings of lines on site plan where he has to construct the walls. Even the foreclosure of mortgage, sale or redemption can be got done through the personal obedience of the parties. The immovable property is incapable of performing any act in itself. It is only the owner/ lessor/ lessee /mortgagee/ licensee who has to do the different acts in respect of the property. If the property has to be transferred from A to B, A has to personally execute a sale deed in favour of B. It is the person concerned with the property who has to do certain acts in respect of the property for all purposes concerning the property. I, therefore, consider that personal obedience cannot be stretched to such an extent that Section 16 of CPC itself becomes redundant. I find no act in respect of the property which cannot be got done through personal obedience by directing the owner/ person concerned with the property.

8. *In my view, the proviso would not be applicable in order to invoke the jurisdiction under Section 2 (i) (e) read with Section 9 of the Arbitration & Conciliation Act, 1996 so as to claim relief qua the property situated in Gurgaon, Haryana from the Court in Delhi.*

8. Merely because the seat of arbitration was provided as Delhi or the agreement between the parties was executed in Delhi, would not give jurisdiction to the Court at Delhi to entertain a petition under Section 9 of Arbitration & Conciliation Act, 1996 unless and until the Court entertaining application under Section 9 was the Court as defined under Section 2(1)(e) of the Act. In the present case, if the suit had been filed by the petitioner for claiming the reliefs in respect of the immovable property situated at Gurgaon as claimed in the application under Section 9, the suit would not have been entertainable in Delhi as the suit was in respect of immovable property and not in respect of any act to done personally by any defendant.

9. I, therefore consider that the Court below had no jurisdiction to entertain the petition under Section 9 and the appropriate Court having jurisdiction would be the Court where property is situated. The petition is allowed. The order dated 28th February, 2009 of the trial court is hereby set aside. The application under Section 9 made by the respondent before the trial Court is liable to be returned to be presented before the Court of appropriate jurisdiction.

February 08, 2010
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SHIV NARAYAN DHINGRA, J.