

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

C.R. No. 3961 of 2013

Reserved on:- 29.01.2015

Date of decision: 04.03.2015

M/s. Commander Realtors Pvt. Ltd.

...Petitioner(s)

Versus

Satbir and others

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Mr. Sanjeev Sharma, Sr. Advocate,
with Mr. Shekhar Verma, Advocate,
for the petitioner.

Mr. Sudhir Aggarwal, Advocate,
for the respondents.

G.S.SANDHAWALIA, J.

Challenge in the present revision petition by the defendant-petitioner is to the order dated 23.05.2013 (Annexure P-1) passed by the Civil Judge (Jr. Divn.), Gurgaon whereby, while deciding the application filed by the petitioner under Section 8 of the Arbitration and Conciliation Act, 1996 (in short 'the Act'), the trial Court came to the conclusion that the Civil Court would be the appropriate Forum to decide the dispute inter se the parties since the issue of fraud was involved and the nature of inquiry before the Arbitrator would be summary. It was further held that since detailed investigation had to be gone into as to whether the collaboration agreement which was in English and bore the thumb impression of the father of the plaintiffs-respondents, the matter should be adjudicated by the Court. In order to adjudicate on the above said issue, the facts will necessarily be to be taken into in detail which are as under:-

The collaboration agreement dated 20.04.2009 (Annexure P-3) was entered into by the petitioner-company with Late Chandan Singh, predecessor-in-interest of the present plaintiffs and who are arrayed as respondents. By virtue of the said agreement, land measuring 8 kanals (1 acre) situated in the revenue estate of village Ullhawas, Tehsil Sohna, District Gurgaon was handed over to the petitioner-developer and as per clause 6, sum of ₹1,65,00,000/- as non-refundable security was to be paid to the owner within one year of the execution of agreement. Out of the said amount, sum of ₹65,00,000/- was to be paid within one year of the execution of the agreement and the balance 1 crore was to be paid within 18 months of the execution of the agreement. The developer was also to allot a developed plotted area in the said land or any other land equivalent to 200 sq. yds. plotted area to the owner of the land. The owner was to execute a registered General Power of Attorney (in short 'GPA') and various special Power of Attornies which were irrevocable as per clause 18. Clause 31 provided that in event of any dispute or difference between the parties, the matter was to be referred to the sole Arbitrator to be appointed by the developer, whose decision was to be final and binding on the parties and the proceedings were to be conducted as per the 1996 Act. The said collaboration agreement written in English was thumb marked by Chandan Singh. A GPA dated 23.03.2010 (Annexure P-4) registered with the Sub-Registrar, Sohna was also executed. Thereafter, Chandan Singh expired on 08.01.2011 and mutation was sanctioned in favour of the legal heirs of the deceased.

The suit thereafter came to be filed on 21.02.2012 for declaration and possession with consequential relief of permanent

injunction on the ground that the deceased was 80 years old, suffering from various serious ailments and a patient of cancer having failing memory. The cause of action was alleged to be of 27.01.2012 that the officials and neighbourers have come to the spot of the developer to effect measurement and at that point of time, the plaintiffs had come to know of the collaboration agreement and the GPA. The market rate of the land was stated to be ₹5 crores and builders were offering 1200 sq. yds. of plotted area per acre to the land owners. Thus, the said agreement was challenged on the ground of being illegal and void. The petitioner-company filed the application under Section 8 of the Act placing reliance upon clause 31 and alleging that suit was a misuse of the process of law and the plaint was liable to be rejected and the matter referred to Arbitration.

The plaintiffs-respondents, in reply to the application, took the plea of fraud that the deceased Chandan Singh was illiterate, ailing, having loss of memory and unable to distinguish between good or bad and the thumb impressions had been obtained by taking benefit of his condition. In the intervening period, on the strength of the GPA, the nominee of the company namely Mr. Jagdeep Aggarwal executed a sale deed in favour of the developer-company on 21.08.2012 (Annexure P-11) for a sale consideration of ₹1,97,00,000/-. The details of the cheques issued to Chandan Singh were mentioned in the sale deed, payment of which was made between 26.03.2010 to 24.09.2010 i.e. before the date of death of Chandan Singh.

Initially, the application under Section 8 was dismissed on the ground that it was not accompanied by the original arbitration agreement or duly certified copy thereof on 21.12.2012 (Annexure P-8). The petitioner-

company approached this Court in C.R. No. 1106 of 2013 and the said order was set aside on 18.01.2013 (Annexure P-9) with a direction to the trial Court to decide the application afresh on the filing of the original or certified copy of the agreement since the parties were not at issue with regard to the execution of the agreement. Resultantly, the present impugned order has been passed.

Apart from the said litigation, another suit was filed on 22.11.2013 by the plaintiffs (respondents herein) challenging the sale deed dated 21.08.2012 executed by the nominee of the company Mr. Jagdeep Aggarwal in favour of the petitioner-developer company. The cause of action which arose was stated to be the sale deed and the summons received under Section 9 application filed by the developer-company, for which they had been served for appearing on 30.10.2013. The developer filed a counter claim in the said suit that he was a lawful owner in possession of the land and the mutation was a void mutation and injunction should be granted in the favour of the developer and protection should be granted and the plaintiffs and the agents be restrained from interfering in the peaceful possession of the land. In the injunction application in the said suit, the Additional Civil Judge (Sr. Divn.) Gurgaon, declined the injunction to the plaintiffs/respondents on the ground that possession had been shown delivered to the developer and payment had been made through cheques to the tune of ₹1,97,00,000/- and the deceased had never questioned the legality and validity of the documents during his lifetime. Accordingly, keeping in view the fact that no prima facie case was made out, the said application for stay of the plaintiffs was dismissed and the said application of the present petitioner-defendant in the second suit was allowed on

15.07.2014 (Annexure P-13). Civil miscellaneous appeal was carried to the Court of the Additional District Judge, Gurgaon by the respondents-plaintiffs against the declining of the relief of injunction and the said Court was also dealing with the petition under Section 9 of the Act filed by the developer. Accordingly, vide order dated 10.11.2014, the appeal filed by the plaintiffs was dismissed by noticing that the balance of convenience was not in the favour of the plaintiffs and developer had paid consideration of ₹1,97,00,000/- and taken possession of the suit land from deceased Chandan Singh who had not challenged the collaboration agreement during his lifetime. The Section 9 application of the Act filed by the developer was, however, dismissed on the ground that once a counter claim had been preferred, two separate Forums should not have been resorted to.

It is further a matter of record that the orders passed in second suit dated 15.07.2014 and 10.11.2014 by the Appellate Court are now subject matter of consideration before a Co-ordinate Bench in C.R. No. 8117 of 2014 filed by the plaintiffs (respondents herein).

Senior counsel for the petitioner has thus submitted that there is never any dispute regarding the collaboration agreement inter se the developer and Chandan Singh and the issue was only whether he was suffering from any disability. It is further submitted that the suit never disclosed the consideration which had passed to him by cheque during his lifetime. It is accordingly contended that once there was an arbitration agreement inter se the parties, the dispute had to be resolved by as agreed and the arbitrator could always under Section 26 of the Act appoint an expert to report on any specific issue to be determined by the Arbitral Tribunal. The assistance of the Court could also be asked for under Section

27 of the Act and, therefore, the trial Court was not justified in declining the application under Section 8 of the Act. Reference was also made to Section 16 of the Act that the Arbitral Tribunal could rule on its jurisdiction and that the contract inter se the parties was null and void and an appeal was also provided under Section 37(2) of the Act against any such order passed under Sections 16(2) and 16(3) of the Act where the Arbitral Tribunal could rule on its own jurisdiction. The judgment of the Apex Court in ***Abdul Kadir Shamsuddin Bubere vs. Madhav Prabhakar Oak, AIR 1962 SC 406*** was thus sought to be distinguished on this ground. Reliance was placed upon the judgments of the Apex Court in ***Hindustan Petroleum Corporation Ltd. vs. Pinkcity Midway Petroleums, 2003 (6) SCC 503; M/s. Agri Gold Exims Ltd. vs. M/s. Sri Lakshmi Knits and Wovens and others, 2007 (3) SCC 686; Branch Manager, Magma Leasing and Finance Ltd. and another vs. Potluri Madhavalata and another, 2009 (10) SCC 103*** and ***Bharat Rasiklal Ashra vs. Gautam Rasiklal Ashra and another, 2012 (2) SCC 144*** to contend that it was mandatory for the Civil Court to refer the matter to arbitration. It was accordingly submitted that there was no fraud as such and the judgment in ***N. Radhakrishnan vs. Maestro Engineers and others, 2010 (1) SCC 72*** would not be applicable as it was the case of the plaintiffs themselves that the agreement had been entered into and rather they were only aggrieved against a lower amount of sale price.

Secondly, it was submitted that the death of Chandan Singh would not take away the right of the developer who had paid the sale consideration to the tune of ₹1,97,00,000/- and thus had an interest in the land and thus, transfer had been effected on account of irrevocable GPA and

in terms of Section 202 of the Indian Contract Act, 1872 the defendants could have transferred the property keeping in view the observations of the Apex Court in ***Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana and another, 2012 (1) SCC 656*** and the judgments of the Delhi High Court in ***Sh. Karamvir and another vs. Shri Maan Singh and others, 2014 (3) PLR 25 (Delhi)*** and ***Hardip Kaur vs. Kailash and another, 2012 (193) DLT 168***.

Counsel for the plaintiffs, on the other hand, has submitted that the fraud is apparent on the face of the record since admittedly, even after the death of Chandan Singh, the sale deed was executed on 21.08.2012 by the official of the company without disclosing that he had expired. The said factor had also been held back from the trial Court even though the order was passed 9 months later in May, 2013. It is thus submitted that in such circumstances the judgment of the Apex Court in *N. Radhakrishnan's case (supra)* would be directly applicable and the arbitrator appointed by the developer would not be an independent person and the petitioner will be gravely prejudiced if the impugned order is disturbed.

In the opinion of this Court, the present order is liable to be upheld though on different account which could not be considered by the trial Court at that stage in view of the subsequent developments which have taken place. Admittedly, as noticed, sale deed dated 21.08.2012 (Annexure P-11), on the strength of the irrevocable GPA, executed on 23.03.2010 has been executed in favour of the petitioner-developer. The said sale deed is a subject matter of another suit bearing No. 76 filed on 22.11.2013/13.12.2013. In the said civil suit also, though the main challenge is to the sale deed which is arising out of the same collaboration

agreement, a separate cause of action has arisen to the plaintiffs. The ground of fraud has again been taken in the said suit and the prayer to execute the sale deed after the death of Chandan Singh has been questioned. The petitioner-developer has submitted to the jurisdiction of the Court and filed written statement and rather also filed a counter claim before the civil Court. It has thus not disputed the jurisdiction of the Civil Court and rather has been protected by a grant of injunction on 15.07.2014 (Annexure P-13) which has been further upheld on 10.11.2014. Once the petitioner-company has itself sought the protection of the civil Court for the purpose of protecting its possession and submitted to its jurisdiction, in such circumstances, the same subject matter cannot be adjudicated upon in two different Forums as it would lead to a scope for contradictory findings being recorded and only render the purpose of arbitration to naught. The bifurcation of the dispute before two Forums and the chance of a contradictory finding being arrived at would only complicate the lis in question.

To take this view, this Court is supported by the judgment of the Apex Court in ***Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya and another, 2003 (5) SCC 531***. In the said case, the dispute arose from the partnership agreement and one party filed suit for dissolution of the partnership firm before the High Court of Bombay. The other partner filed an application for referring the dispute to Arbitrator under Section 8 of the Act. The High Court dismissed the application under Section 8 on the ground that the purpose of the Act was to avoid multiplicity of pleadings and not to allow two Forums to proceed with the matter. After taking into consideration the provisions of Section 8 of the Act, the Apex Court came

to the conclusion that the bifurcation of the suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the Civil Court, would only delay the proceedings and increase the cost of litigation and there was the possibility of conflicting judgments of two different Forums. Accordingly, the appeal was dismissed and the order passed by the Bombay High Court was upheld by rejecting the argument that there could be bifurcation of the disputes. The relevant observations read thus:-

“16. The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of

conflicting judgments and orders by two different forums.”

The said view has been followed by this Court in ***M/s. Sharda Ginning Pressing & Oil Mills and others vs. Smt. Bimla Devi, 2007 (2) PLR 807*** and ***Sanjeev Goyal vs. H.L. Goyal and others, 2010 (2) RCR (Civil) 44***. It has been held that the splitting up of the dispute is not permissible and the matter was thus not liable to be referred for arbitration.

Resultantly, keeping in view the subsequent events which have taken place inter se the parties, this Court is of the opinion that in the present facts and circumstances, it would be appropriate if the matter is decided by the Civil Court only and the application filed under Section 8 of the Act is not liable to be allowed as has been held by the trial Court, though for different reasons given by this Court.

Accordingly, finding no merit, the present revision petition stands dismissed.

04.03.2015
shivani

(G.S. SANDHAWALIA)
JUDGE

