

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

Decided on: 13.09.2018

+ **FAO (OS) 136/2018, C.M. APPL.36463-36464/2018**

NIRMALA JAIN AND ORS.

.....Appellants

Through: Sh. Ravi Sikri, Sr. Advocate with Ms.
Palak. N, Advocate.

Appellant Nos. 2 and 3 in person.

Versus

JASBIR SINGH AND ORS.

.....Respondents

Through: Sh. Sachin Datta, Sr. Advocate with Sh.
Aditya Malhotra and Sh. Madhu Sudan, Advocate,
for Respondent No.1.

Sh. P.S. Bindra, Advocate, for Respondent No.3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. Issue notice. Sh. Aditya Malhotra and Sh. P.S. Bindra, Advocates accept notice on behalf of the respondents. With learned counsels' consent, the appeal was heard finally – as the record of the learned Single Judge was available electronically.

2. The appellants in this appeal under Section 37 of the Arbitration and Conciliation Act [hereafter “the Act”] are aggrieved by the order of the learned Single Judge made under Section 9 of the Act, in effect, permitting impleadment of a third party to the arbitration proceedings. The appellants are also aggrieved by the direction of the learned Single Judge, whereby the premises (which are the subject matter of arbitration proceedings), had been sealed *pendente lite*, were required to be desealed.

3. The essential facts are that the appellant and her husband were shareholders in one M/s. SS Leasing and Finance Limited [hereafter “the

debtor company”] - a closely owned entity. The property, owned by Sh. R.L. Jain was mortgaged to the UCO Bank in 1986 to secure an advance by the bank. Since the debtor company defaulted in the fulfilment of its obligation to repay the loan, proceedings were initiated under the *Recovery of Debts due to Banks and Financial Institutions Act, 1993* before the Debts Recovery Tribunal [hereafter “DRT”] in 1997. These proceedings did not resolve and continued to remain pending. In the meanwhile, the appellant and her husband - Sh. R.L Jain, the owners of the property entered into an agreement to sell, agreeing to convey title, possession of the said property to respondents – Sh. Batra and Sh. Manjinder Singh [hereafter referred to as “the purchasers”].

4. The agreement to sell spawned disputes which were referred to arbitration; the appellant claimed that he could not convey the property and alleged that the agreement to sell was void. Since the proceedings before the DRT did not attain any finality, the bank resorted to the provisions of *the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI)*. Eventually, the proceedings culminated in the possession of the property being taken-over by the bank. Through advertisement (dated 30.07.2007), sale of the property in auction was resorted to, which culminated in a Sale Certificate dated 17.08.2007. This sale was confirmed. Ultimately, the proceedings before DRT resulted in the dismissal of the appeal (preferred under Section 17 of the SARFAESI by the borrowers) by order of the DRT dated 06.08.2012. The appeal against that decision is said to be pending.

5. It is a matter of record that in the pending arbitration proceedings *status quo* prevails and binds the parties, which was made in 2004.

Concededly, it has not been varied. In these circumstances, the auction purchaser - Jasbir Singh (who is also the father of Sh. Manjinder Singh - one of the purchasers who had approached this Court under Section 9), approached claiming two main reliefs – (1) to be permitted impleadment in the pending arbitration proceedings, and (2) the property, which is lying sealed since 2014, ought to be handed over to him subject to the *status quo* order prevailing. The learned Single Judge granted both reliefs.

6. Sh. Ravi Sikri, learned senior counsel urges that the learned Single Judge fell into error in permitting third party to intervene in the arbitration proceedings. Learned senior counsel was at pains to point out that the auction notice expressly spelt out that the sale of the property was subject to the pending arbitration proceedings. It was noted by all parties, especially the impleaded third party - Jasbir Singh that his rights would be subject to the arbitration proceedings. Highlighting that past attempts were made for variation of *status quo* order and expressly seeking desealing of the property, learned senior counsel submitted that given these attendant circumstances, the learned Single Judge should not have permitted a rank outsider to be impleaded and grant the relief which was all along refused to him. It is submitted that the principle of *res judicata* would squarely apply in the circumstances.

7. The impugned order to the extent the appellant is aggrieved reads as follows:

“9. The auction sale in which the applicant purchased the property was subject to the outcome of the arbitration proceedings pending between the Petitioner and Respondent nos 1 and 2. It is also noticed that the public notice relating to the auction of the property, itself provided that the auction

proceedings are subject to the arbitration proceedings. Relevant portion of the said public notice is extracted herein below.

*“..... Public at large is also put on notice that confirmation of sale will be made by “ARCIL” upon the terms of payment being complied with by the successful bidder and upon such compliance, a sale certificate for the scheduled property in favour of the purchaser will be executed by the constituted attorney of ARCIL under the Securitisation Act. **However, the sale of the said property would be subject to the adjudication of the rights/claims of various parties which are pending adjudication in arbitration case before Hon’ble Justice A.B. Saharya (Retd.).**”*

10. Thus, in effect, the applicant’s fate in respect of the property is intertwined with the pending arbitration. In view thereof, the applicant purchaser is permitted to be impleaded as a party in the arbitration proceedings and to put forth his case before the present Sole Arbitrator, Justice Mr. Anil Dev Singh (Retd.). It is directed that the applicant shall also participate regularly in the arbitration proceedings and shall not cause any delays in the adjudication thereof.

11. For the time being, the property is not being put to any use. It is the case of the applicant that the Respondent No.1, who is in possession of the property, ought to be directed to give possession to him inasmuch as the sale in his favour having being confirmed by the DRT, the applicant should be allowed to enjoy the property. Learned counsel for the applicant has undertaken to this Court that he will not carry out any unauthorised construction in the suit property and also not part with possession or create any third party interest during the pendency of the arbitration proceedings.

12. Subject to the said undertaking, which is accepted by the

Court, possession of the property is directed to be given to the proposed applicant within a period of three days.”

8. As to the first question, whether third party can be added in an arbitration proceedings, the answer cannot always be a categorical and unambiguous “NO”. Per Section 7, the “parties to arbitration” are those who are “parties to the arbitration agreement”. Yet, there is growing recognition of the fact that there exist certain layered transactions which by their very nature hinge upon interdependence of the obligations of third parties. These are in the case of group company transactions or transactions where the obligation incurred by one company is to be discharged by a subsidiary or group concern. There are instances where the shareholding in a company and transactions pertaining to the company arise. Such transactions have in occasions in the past, been subject to the decisions of the Supreme Court [*Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors.* 2013 (1) SCC 641 and *Cheran Properties Limited v. Kasturi and Sons Limited* 2018 SCC Online (SC) 431]. In *Cheran Properties (supra)*, this Court stated as follows:

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29. *As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the Court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a*

signatory to the agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

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30. *International conventions on arbitration as well as the UNCITRAL Model Law mandate that an arbitration agreement must be in writing. [Section 7](#) of the Arbitration and [Conciliation Act](#), 1996 affirms the same principle. Why does the law postulate that there should be a written agreement to arbitrate? The reason is simple. An agreement to arbitrate excludes the jurisdiction of national courts. Where parties have agreed to resolve their disputes by arbitration, they seek to substitute a private forum for dispute resolution in place of the adjudicatory institutions constituted by the state. According to Redfern and Hunter on International Arbitration, the requirement of an agreement to arbitrate in writing is an elucidation of the principle that the existence of such an agreement should be clearly established, since its effect is to exclude the authority of national courts to adjudicate upon disputes.*

31. *Does the requirement, as in [Section 7](#), that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. Redfern and Hunter explain the theoretical foundation of this principle:*

“..The requirement of a signed agreement in writing, however, does not altogether exclude the possibility of an arbitration agreement concluded in proper form between two or more parties also binding other parties. Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways: first, by operation of the ‘group of companies’ doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended to other members of the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession..”

9. One notices that the learned Single Judge, in the impugned order has significantly alluded to the interdependence or intertwining of transactions which are the subject matter of arbitration as well as claims of third parties (Jasbir Singh in this case.)

10. In *Cheran Properties (supra)*, this very aspect was emphasized and the Court held factors such as commonality and composite nature of transactions between a party and a non-party or commonality of subject matter as instances where participation of non-parties to an arbitration agreement is permissible. Here too, the commonality of subject matter needs to be highlighted. Though the applicant third party was made aware of the arbitration proceedings in this case, he remained sanguine perhaps hoping that the arbitral proceedings would end fast. Given that the Sale Certificate attained finality and even appeal preferred by the borrowers, i.e. the applicants was rejected in 2012 and the further circumstance that the auction purchaser deposited the amounts towards the sale of the property as far back

as in 2007, this Court is of the opinion that there is no basic infirmity or serious error in the approach of the learned Single Judge as regards impleadment.

11. As regards the question of desealing of the property, no doubt, the appellant is correct when he urges that similar attempts were unfruitful in the past; those, no doubt, were at the behest of the purchasers, who are also related to the third party applicant. While the Court has considered and applied the principles of *res judicata* during the pendency of civil proceedings (*Arjun Singh v. Mohindra Kumar and Ors.* AIR 1964 SC 993), this Court is of the opinion that a strict application of that doctrine cannot be insisted upon, at least in arbitration proceedings. In the overall circumstances, relatable to exercise of discretion, the learned Single Judge quite correctly surmised that keeping the premises locked and idle once the auction purchaser deposited the consideration over 11 years ago, was not justified. Furthermore, the parties' interest continues to be protected since the *status quo* order bind them. The *status quo* order would also bind the third party, i.e. Jasbir Singh, who is now a party in arbitration.

12. In view of the above observations, this Court finds no merit in the appeal. It is accordingly dismissed.

Order *dasti*.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

SEPTEMBER 13, 2018