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

% *Date of decision: 20th November, 2018*

\+ FAO(OS) 168/2018, CM Nos. 48154-48155/2018

DEVINDER KHOSLA

..... Appellant

Through: Mr. Sourabh Malhotra, Adv.

versus

ANIL KHOSLA & ANR

..... Respondent

Through:

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

CM Nos. 48154-48155/2018

Exemption allowed subject to all just exceptions.

Applications stand disposed of.

FAO(OS) 168/2018

1. The present appeal has been filed by the appellant challenging the order dated October 03, 2018 passed by the learned Single Judge in OMP 23/2018 whereby the learned Single Judge has dismissed the petition filed by the appellant under Section 34 of the Arbitration & Conciliation Act, 1996 (Act in short).

2. The facts as noted from the record are that the parties herein are brothers, who are carrying joint partnership business. A dispute arose between them and accordingly they entered into an arbitration agreement dated February 05, 2016. The arbitration proceedings initiated resulted in an interim award dated March 08, 2006. The relevant extract of the same is reproduced below: -

> *"The parties desired to have their family business separated and distributed amongst them, which are enumerated as below:*
>
> *a) National Marble & Sanitary Store (Head Office) C-25, Vasant Vihar Shopping Complex, New Delhi*
>
> *b) National Marble & Sanitary Store (Branch) T-1, Chirag Delhi, New Delhi*
>
> *c) National Marble & Sanitary Store (NCR) DLF, Gurgaon, Haryana.*
>
> *d) National Marble House G-9, Hauz Khas, New Delhi*
>
> *e) Blue Circle Paint and Chemicals Industries G-9, Hauz Khas, New Delhi.*
>
> *f) A& P Stores Pvt. Ltd. C-25, Basement Vasant Vihar Shopping Complex New Delhi.*
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> ***********
>
> *Now since the parties have agreed that the existing assets and liabilities of family business shall be separated and distributed amongst them as per agreed Schedule-A & Schedule-B, which shall form part of this award as agreed by the parties on 8th February, 2006, during the course of arbitration proceedings. Therefore, we do hereby award and direct that Schedule A & B which*

contain the agreed terms amongst the parties shall form part of this award and further direct that the items mentioned in Schedule-A shall be exclusive business assets of Sh. Devinder Khosla, Party No.1 and liabilities mentioned as on date of the award in the said schedule shall be discharged by him. Similarly the items mentioned in Schedule –B shall be exclusive business assets of Sh. Anil Khosla & Sh. Raman Khosla jointly Party No.2 and liabilities mentioned as on date of the award in the said schedule shall be discharged by them."

3. The appellant challenged the award by way of a petition under Section 34 of the Act being OMP No. 320/2006. On July 24, 2006, the following directions were passed with the consent of the parties:-

"3. Learned counsel for the parties agree that OMP could disposed of with the following directions:

(i) That the award dated 8th March, 2006 would be treated as an interim award.

(ii) That the parties accept the interim award in so far it declares the right of the parties in the businesses and immovable properties.

(iii) That in respect of apportionment of liabilities and the stocks, the liabilities and stocks need to be valued.

(iv) That amount recoverable from third parties need to be determined.

(v) Post valuation of the stocks, liabilities and assets the same would be apportioned in terms of the award dated 8.3.2006.

(vi) For a period of 2 weeks, all business premises would be kept locked and no stock would be removed till the Arbitrators value the same.

(vii) If learned Arbitrators complete the valuation before 2 weeks, on written orders by the Arbitrators permitting either party to operate from the business premises or use the stocks, same would be opened or used.

(viii) As per books of accounts, quantification of debts and liabilities of the various businesses would be completed within 2 weeks and debts payable dues recoverable would be apportioned by the Arbitrators.

(ix) Stocks brought in or removed by the parties post 8th March, 2006 till today would be accounted for before the Learned Arbitrators. Monies realised from the debtors of the businesses and monies paid over to the creditors of the businesses would also be accounted for before the learned Arbitrators within 2 weeks.

(x) Parties will co-operate with the Arbitrators in producing the books and relevant records. If any record is in electronic form, Arbitrators would be given access to computers.

(xi) Today itself learned arbitrators would be permitted access to the records in the respective possession of the parties including records in electronic form."

4. On an interim application being IA 11619/2006 filed in the abovementioned petition, an order was passed on November 23, 2006 by the learned Single Judge of this Court, which was on the following terms:-

"9. Whether or not the consent recorded in the interim award which was questioned in the OMP was conditional upon the arbitrartors deciding the entire dispute in one go or not is itself a dispute of substantive nature.

xxxxxx

11. I dispose of the application recording consent of parties that a sole arbitrator be appointed. I appoint justice R.C.Chopra (Retd.), N-113, Greater Kailash-1, New Delhi110048, Mobile No.9818097777, a former judge of this Court as the sole arbitrator to decide the disputes between the petitioners and the respondents. It would be within the mandate of the sole arbitrator to decide whether the consent given by the petitioners which formed the basis of the interim award was conditional or not as pleaded by the petitioners.

12. If learned arbitrator holds that the consent granted was conditional, effect thereof would also be decided by the learned arbitrator."

5. The respondents herein challenged the said order in FAO(OS) No. 755-56/2006 when the Division Bench vide its order dated August 04, 2018 set aside the afore quoted portion of the order dated November 23, 2006 and held that the learned Arbitrator shall proceed with the arbitration in terms of order dated July 24, 2006. An application for clarification filed by the petitioner being CM No. 17754/2008 was disposed of on April 17, 2009 inter-alia holding that the learned Arbitrator shall proceed further in accordance with the directions contained in the last para of the orders, having regard to the aforesaid aspect along which is decided in the appeal.

6. It was the contention on behalf of the appellant before the learned Arbitrator that there were other properties, which were also jointly owned by the parties or had been bought out of the joint business funds and form part of the "disputes" between the parties, need to be adjudicated by the Ld. Arbitrator. The Ld. Arbitrator rejected the said submission made on behalf of the appellant by holding as under:

> *"In view of the foregoing I have no hesitation in concluding that the Claims raised by the Claimant in regard to the other properties as well as stocks and shares, which were in the individual names of parties were not included in the reference made vide agreement dated 05.02.2006. The same were not referred to this Tribunal also for adjudication / division. The appointment of present Arbitral Tribunal by the Court vide Orders dated 23.11.2006 was to complete what the Interim Award dated 08.03.2006 had left by dividing the stocks, movables and the creditors and debtors of the businesses. The plea raised by the Claimant that personal / individual properties as well as stocks and shares in the names of the parties or their parents even have to be divided and partitioned by this Tribunal is without any merit. This plea is an afterthought only which was never raised before the erstwhile Arbitral Tribunal or the Courts before whom this matter cam up for various clarifications and orders. It is therefore held that this Tribunal was not referred any other dispute between the parties except the division of the stocks / movables of the firms partitioned by the Award dated 08.03.2006 and determination of the debtors and creditors of those firms so that those could also be transferred to the parties to whom the businesses / firms*

had been allocated by way of division under Award dated 08.03.2006.

7. The learned Single Judge also held that the said submission was beyond the scope of limited reference as made before the learned Arbitrator. According to him, under the guise of additional claim, the appellant was seeking modification of the interim order dated March 08, 2006.

8. In para 16, the learned Single Judge has held as under:-

> *"16. In my view, the Interim Award can decide certain issues finally. Once such Award become final, it cannot be reopened while passing the Final Award. In the present case, the only scope left after passing of the Interim Award was to make a determination of the stock and the liabilities of the partnership businesses of the parties and division thereof. To add properties into such dispute would clearly be a modification of the Interim Award already passed and was, therefore, rightly rejected by the Arbitrator."*

9. The counsel for the appellant has reiterated the submission as made before the learned Single Judge, inasmuch as the other properties should have been included in the reference made before the learned Arbitrator. We are unable to agree with the said submission made by the learned counsel for the appellant. The order dated July 24, 2006 is very clear, inasmuch as the only issue which remained was, with respect to the division of liabilities and

stock that need to be valued. In fact, the Division Bench in FAO(OS) Nos. 755-56/2006 wherein the Division Bench has held, it was not open to the appellant to turn around to re-open the issue of validity of the interim award. In other words, the interim award has attained finality and could not have been the subject-matter of reference, as sought to be contended by the learned counsel for the appellant.

10. We find that the learned Single Judge has rightly dismissed the petition filed by the appellant under Section 34 of the Act. The appeal is dismissed.

V. KAMESWAR RAO, J

CHIEF JUSTICE

NOVEMBER 20, 2018/*ak*