

\$~

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

Reserved on: 19.01.2018

Pronounced on: 09.05.2018

+ **FAO(OS) 318/2017, CM APPL. 46006-46010/2017**

VINEET KHOSLA

..... Appellant

Through: Mr. Deepak Khosla and Ms. Pooja
Tiwari, Advocates.

versus

VIKRAM BAKSHI & ORS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J.

1. In this appeal, the appellant, Mr. Vineet Khosla, acting through his Power of Attorney, Mr. Rajinder Pal Khosla seeks to challenge an order of a Learned Single Judge of this Court dated 16.11.2010 in OMP No. 613 of 2010, whereby the Learned Single Judge granted relief under Section 9 of the Arbitration and Conciliation Act, 1996 ("the Act") to Mr. Vikram Bakshi, the respondent in this appeal.

2. Mr. Vikram Bakshi had approached this Court under Section 9 of the Arbitration Act seeking interim relief against, among others, Ms. Sonia Khosla, Mr. R.P. Khosla, Mr. Deepak Khosla and Mr. Vineet Khosla. Mr. Bakshi had entered into a Memorandum of Understanding (MoU) with

Mr. R.P. Khosla, Mr. Deepak Khosla and M/s. Montreaux Resorts Pvt. Ltd. (“the Company”) on 21.12.2005 to implement a Joint Venture Project involving lands contracted to be purchased in the name of the Company as well as in the names of the members of the Khosla family, which were to be assigned in favour of the Company. The MoU broadly set out the rights and obligations of the parties. Thereafter, Mr. Bakshi also entered into an agreement dated 31.03.2006 with Ms. Sonia Khosla, Mr. R.P. Khosla and the Company.

3. Clause 29 of the said agreement provided for arbitration of disputes that arose between the contracting parties. Mr. Bakshi alleged that Ms. Sonia Khosla and Mr. Deepak Khosla were not allowing the arbitration proceedings to proceed and simultaneously were calling for and convening board and shareholder meetings in breach of the agreement dated 31.03.2006 and without his knowledge. Mr. Vikram Bakshi in his Section 9 petition sought, *inter alia*, relief in terms of restraining the respondents in that petition from giving effect to any resolution passed in any EGM, board or shareholder meeting, till the passing of the award by the arbitrators. Further, he also sought an injunction against holding any board or shareholding meeting of the Company till the award of the arbitrators, restraining Mr. Deepak Khosla from acting as the managing director or shareholder of the Company and furthermore, restraining the Registrar of Companies from accepting any forms from any of the respondents till the passing of the award.

4. By order dated 16.11.2010, the Learned Single Judge found that unless the reliefs claimed by Mr. Bakshi were granted, they would prejudice

the arbitral proceedings and also affect the rights of the parties. Therefore, he granted interim relief under Section 9 in the application filed by Mr. Bakshi. Against this order, Mr. Deepak Khosla (Respondent No. 3 in OMP 613 of 2010) filed FAO (OS) No. 359 of 2011. The appeal was accompanied by an application for condonation of delay which was allowed by the Court and the appeal was taken on record. The appeal was listed from time to time.

5. On 11.02.2015, an order was passed by this court, whereby the court dismissed the appeal for non-prosecution as no one appeared for the appellants when the matter was called out, even the second time. Thereafter, CM No. 16893/2017 was filed, to restore the appeal (FAO (OS) No. 359/2011) to the file of the court. However, this application was filed after a delay of 805 days.

6. CM 16893/2017 for condonation of delay was rejected by this Court by order dated 19.01.2018. Accordingly, the application for restoration of FAO (OS) 359/2011 was also dismissed. Resultantly, the appeal - FAO (OS) 359/2011 also lapsed.

7. The present appeal - FAO(OS) 318/2017 has been filed by Mr. Vineet Khosla, who was Respondent No. 4 in OMP 613 of 2010, challenging the same judgment of the Learned Single Judge, against which FAO (OS) 359/2011 filed by Mr. Deepak Khosla was dismissed by this Court. The appeal is also accompanied by an application for condonation of delay of 2549 days – CM No. 46008/2017.

8. Mr. Deepak Khosla, appearing for the appellant, contends that the delay in filing this appeal must be condoned. It is urged that the appellant

received knowledge of the order of the Learned Single Judge on 22.12.2010, when the proxy counsel appointed by them appeared before the Learned Single Judge and was informed that an order had been passed. He argued that no copy of the order was served on the appellant by the Court.

9. Mr. Khosla further urged that the impugned order was passed without jurisdiction and contrary to the principles of *audi alterum partem*, and moreover was a product of fraud played on the Court, and hence the order was a nullity. It is urged that the law of limitation does not apply to an order that is a nullity in law, because such an order is *void ab initio* as if *non est*, that is it never existed. Such an order, urged Mr. Khosla, can be challenged any time. Reliance is placed on the following part of the decision in *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340 to advance this proposition:

“It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties.”

To further the same proposition, Mr. Khosla has also relied on the judgments of the Supreme Court in *Nawabkhan Abbaskhan v. State of Gujarat*, (1974) 2 SCC 121, *Kamini Jaiswal v. Union of India*, W.P. (Cr1.) No. 176 of 2017 dated 24.11.2017 and *Tayabbhai M. Bagasarwalla v. Hind Rubber*, AIR 1997 SC 1240, as well as the decision of the Calcutta High Court in *Angelo Brothers v. Bennett*, (2017) 203 Comp Cas 180.

10. At the outset, it must be noticed that this appeal challenges the same order of the Learned Single Judge and raises the same issues as was raised by FAO (OS) 359/2011, which came to be dismissed by judgment of this Court dated 19.01.2018, on the ground of delay in filing the application for restoration of appeal. Through this appeal, another respondent (Respondent No. 4) in the original OMP (OMP 613 of 2010) has challenged the same order of the Learned Single Judge.

11. Such an appeal however attracts the bar of *res judicata*, which is a general principle applicable to all legal proceedings and is codified in Section 11 of the Code of Civil Procedure, 1908. Section 11 states:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.--The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.--For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.--The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.--Any matter which might and ought to have been made ground of defence or attack in such former suit shall

be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.--Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.--Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.--The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.--An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.”

12. The Supreme Court in *Gulabchand v. State of Bombay*, AIR 1965 SC 1153 also held that the general principle of *res judicata* was applicable in substance to all disputes before courts, even outside of the ambit of Section 11 of the CPC; in essence, the Court held that Section 11 was not an exhaustive or exclusive formulation of the law on *res judicata*. The Court noted:

“The general principle of res judicata, has been applied to suits even though the decision on the same matter in controversy had been previously given by a competent Court in proceedings where were not suits under the Code of Civil Procedure. The

case law on the subject will be discussed later. It is urged that there seems to be no good principle behind applying the general principles of res judicata to suits in circumstances which do not bring the previous decision within the language of section 11, and that the legislature's restricting the application of the general principles of res judicata to the circumstances mentioned in section 11 must be deemed to indicate that the general principle of res judicata be not applied to bar a subsequent suit if the earlier decision of the same controversy between the same parties had been arrived at in proceedings other than suits and in which the entire procedure provided for the decision of the dispute in a regular suit might not have been followed. It appears to us that the reason for the specific provisions of section 11 is not that the legislature intended to bar the application of the general principles of res judicata to suits when the previous decision is arrived at in proceedings other than suits."

13. Therefore, the principle of *res judicata* stipulates that a matter directly and substantially in issue between the same parties, or between parties under whom they or any of them claim, which has already been decided by a court and attained finality, cannot be regurgitated in another, separate legal proceeding. Further, Explanation VI to Section 11 provides that in case of persons litigating *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this provision, be deemed to claim under the persons so litigating. The principle of *res judicata* was examined by the Supreme Court in the case of *Sheodan Singh v. Daryao Kunwar*, AIR 1966 SC 1332, and the Court held:

"It is well-settled that where a decree on the merits is appealed from, the decision of the trial court loses its character of finality and what was once res judicata again becomes res sub judice and it is the decree of appeal court which will then be res

judicata. But if the contention of the appellant were to be accepted and it is held that if the appeal court dismisses the appeal on any preliminary ground, like limitation or default in printing, thus confirming in toto the trial court's decision on merits, the appeal court's decree cannot be res judicata, the result would be that even though the decision of the trial court given on the merits is confirmed by the dismissal of the appeal on a preliminary ground there can never be res judicata. We cannot therefore accept the contention that even though the trial court may have decided the matter on the merits there can be no res judicata if the appeal court dismisses the appeal on the preliminary ground without going into the merits, even though the result of the dismissal of the appeal by the appeal court is confirmation of the decision of the trial court given on the merits. Acceptance of such a proposition will mean that all that the losing party has to do to destroy the effect of a decision given by the trial court on the merits is to file an appeal and let that appeal be dismissed on some preliminary ground, with the result that the decision given on the merits also becomes useless as between the parties.

[...]A consideration of the cases cited on behalf of the appellant therefore shows that most of them are not exactly in point so far as the facts of the present case are concerned. Our conclusion on the question of res judicata raised in the present appeals is this. Where the trial court has decided two suits having common issues on the merit and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial court's decision stands confirmed, the decision of the appeal court will be res judicata and the appeal court must be deemed to have heard and finally decided the matter. In such a case result of the decision of the appeal court is to confirm the decision of the trial court given on merits, and if that is so, the decision of the appeal court will be res judicata whatever may be the reason for the dismissal."

14. Relying on the decision of the Supreme Court in *Sheodan Singh (supra)*, the Allahabad High Court in *Ganga Prasad v. Dy. Director of Consolidation, U.P.*, (2000) 3 AWC 1793 (All) held:

*“Almost all the Courts in India, including the Supreme Court have, however, held that it applies to appeals as well. Now, when two or more suits are consolidated and decided by a common judgment and appeals are filed against the decrees passed in all the suits and in the same Court, no question of res judicata can really arise if the appeals are also heard and decided simultaneously. Difficulties, however, arise when one of such appeals is either heard and decided separately or for want of prosecution or for some other reason is dismissed and the decision of the Court below stands confirmed as a result thereof. The bar of res judicata will under those circumstances be applicable to the other surviving appeal, or appeals. This, as I understand, is the legal position which emerges out of the decision of the Supreme Court in *Sheodan Singh v. Daryao Kunwar AIR 1966 SC 1332.*”*

15. The Supreme Court in *Ramagya Prasad Gupta v. Murli Prasad*, AIR 1974 SC 1320, while not expressing its own views on the matter, also noted that where two appeals have been preferred from the same judgment by two different parties, and one of the appeals is dismissed either on merits or for any other reasons, it has been held by different High Courts that the other appeal also has to be dismissed because it is barred by the principles of *res judicata*. From the above decisions, it is clear that where one appeal has been filed by one aggrieved party against an order of a court, even if that appeal is dismissed on procedural grounds such as for want of prosecution or delay, then another appeal filed by a different aggrieved party to assail the same order which raises the same issues, cannot be held to be maintainable and would attract the doctrine of *res judicata*. Were it to be held otherwise,

it would create an absurd situation in a matter where there are multiple respondents (as is in the present case). In essence then, when a decision is passed against all the respondents through a common judgment, but one of the respondents appeals that decision in the hope of overturning it, which would be in the interest of all other respondents too, and espouses rights which accrue to all the respondents as well, when that appeal is dismissed by the appellate court on any ground, a subsequent appeal against the same decision can nonetheless be filed by each of the other respondents, and so on. This would create a spate of litigations where each respondent, turn by turn, could file a new appeal to assail the same impugned order, alleging that the matter has not attained finality as against them and the principle of *res judicata* would not apply.

16. Applying that principle to the facts of the case at hand, it is clear that once the appeal filed by Mr. Deepak Khosla assailing the Learned Single Judge's decision dated 16.11.2010 was dismissed by this Court by judgment dated 19.01.2018, another appeal by a different Respondent (Mr. Vineet Khosla) to assail the same decision of the Learned Single Judge, raising the same grounds, would be hit by the bar of *res judicata*.

17. Furthermore, this Court is of the opinion that the delay in filing the present appeal - that of more than 2500 days, is such as to warrant the dismissal of the appeal in any case. In the application for condonation of delay CM No. 46008/2017, the only reason advanced for this inordinate delay is the plea of the impugned order being a nullity. On the strength of this plea, it is urged by the appellant that the principle of limitation or the concept of *laches* would not apply and hence the impugned order can be

challenged at any time, even after the limitation period. A similar plea raised by the appellant was rejected by this Court, after noticing a number of decisions of the Supreme Court, in *Deepak Khosla v. VikramBakshi*, (CM Nos. 16893/2017 & 16894/2017 in FAO (OS) No. 359/2011), by judgment dated 19.01.2018, where this Court held that the allegation that the impugned order was invalid would not exclude the application of the law of limitation or serve to keep alive the appellant's claim way beyond the period of limitation. In that case, the delay of 805 days, in similar circumstances, was found to be inordinate. *A fortiori*, a delay of more than 2500 days, in this case, would also be fatal to the maintainability of the appeal.

18. In the circumstances therefore, the appeal has to be dismissed as it is not maintainable. There shall be no order on costs.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

MAY 09, 2018