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

% Date of Decision: 25.04.2019

\+ CS(OS) 157/2017

SANJEEV SAHNI ..... Plaintiff

Through Mr.Mohit Chaudhry, Ms.Garima Sharma, Mr.Shrishti Gupta, Mr.Anup Kumar Mishra and Mr.Aaray Mehra, Advs.

versus

ARVIND SAHNI & ORS ..... Defendants

Through Mr.Neeraj Sharma, Ms.Archana Lakhotia and Mr. Basit K. Zaidi, Advs. for D-1 to D-4.

JAYANT NATH, J. (Oral)

IA No.7067/2017

1. This application is filed under Section 8 of the Arbitration and Conciliation Act, 1996 seeking reference of the disputes between the parties to the arbitration.

2. None has appeared for defendant No. 5 nor he has filed any reply to this application.

3. Learned counsel for the defendants has pointed out that the said defendant No. 5 is neither a necessary nor a proper party as no relief has been sought in this plaint against the said defendant No. 5.

4. The accompanying suit is filed by the plaintiff for partition, permanent injunction, declaration, cancellation, rendition of accounts, etc. It has been prayed in the suit that a decree of declaration be passed that the plaintiff is a joint owner of the family properties:-

(i) D-916, New Friends Colony, New Delhi. This is a house constructed on 500 Sq. Yards of land wherein two floors are constructed.

(ii) 303, Splendor Forum, Jasola, New Delhi, admeasuring 700 Sq. Ft.

(iii) A-7, Atrium Shopping Arcade, Suryaa Hotel, New Delhi, shop space admeasuring 325 Sq. Ft.

(iv) Land/Building standing thereupon along with all fixtures, furniture attached thereto at Village Sadhaura, Kewat Khatoni no 238/257 Khasra No. 51/20/3; Kewat Khatoni no 203/221 Khasra No. 51/20/4; Kewat Khatoni no 204/222 Khasra No. 52/16/1; Khasra No. 52/25/1; Khasra No. 51/21/1; Kewat Khatoni no 1067/1196 Khasra No.52/25/1, Tehsil Sadhaura, District Yamuna Nagar, (Haryana), Tehsil Sadhaura, District Yamuna Nagar, (Haryana), admeasuring one acre (approximately).

5. A preliminary decree of partition is also sought to partition the suit properties and thereafter, to appoint a Local Commissioner and pass a final decree thereafter. A decree of cancellation cancelling the transfer documents executed on 22.03.2013, 06.10.2015 and 15.10.2015 in respect of land at Village Sadhaura is also sought.

6. Parties are family members. Plaintiff, defendant No. 1 and defendant No. 5 are brothers. Defendant No. 2 is the wife of defendant No. 1. Defendant No. 3 is the son of defendant No. 1. Defendant No. 4 is the mother of the plaintiff, defendant No. 1 and defendant No. 5.

7. The case of the plaintiff is that the parties to the suit are family members and are part of a joint family/undivided family. Family income was put into a common pool from the beginning from which resources were drawn to meet the needs of all the family members and was being regulated by the head of family, namely, Sh. Chunni Lal Sahni, the father of plaintiff, defendant No. 1 and defendant No. 5 and husband of defendant No.4.

8. In the present application filed by defendant No. 1, it is pleaded that the present suit is wholly the subject matter of arbitration agreement in the partnership firms.

9. Essentially what is pleaded is that the arbitration agreements between the applicant and the plaintiff are contained in the Partnership deed of A.K. Enterprises dated 01.04.1997, Partnership Deed of Sahni Exports dated 17.09.1993. There is a third partnership firm known as Sahni Carpets in which the original partners were defendant No. 2, 3 and late Sh. Chunni Lal Sahni. The partnership deed dated 01.04.2016 of the said firm which is duly registered has an arbitration clause. The plaintiff however claims rights through late Sh.Chunni Lal Sahni, the deceased partner who was the father of the applicant and the plaintiff. Relying upon the averments made in the plaint, it is stated that the entire disputes which are subject matter of the present suit are subject to arbitration agreements. Hence the present application.

10. Learned counsel for the plaintiff has opposed the present application. He has pointed out that the present application would be barred in view of the judgment of the Supreme Court in the case of ***Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. & Ors., (2011) 5 SCC 532***. He submits that in the present plaint there is a relief seeking cancellation of the title deeds which cancelation would be covered by Section 31 of the Specific Relief Act. He states that Section 31 clearly states that the court has powers in its discretion to adjudge a written instrument to be void or voidable and may order it to be delivered up and cancelled. He submits that such a power cannot be exercised by an arbitrator in view of the above judgment. Based on the above, he has opposed the present application.

11. Learned counsel appearing for the applicant has however pointed out that there are no such observations made by the Supreme Court in the judgment of ***Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. & Ors. (supra)*** to state that all reliefs under the Specific Relief Act cannot be adjudicated by a learned arbitrator. He also relies upon the judgment of the Supreme Court in the case of ***Vidya Drolla & Ors. Vs.Durga Trading***

Corporation, 2019 SCC OnLine SC 358 to contend that the issues of applicability of arbitration regarding lease of property under Transfer of Property Act have been referred to a Three-Judge Bench. He submits that in this judgment there are clear observations that arbitration proceedings can be commenced seeking relief under the Specific Relief Act.

12. I may note that on 02.08.2018, this court noted the submission of the learned counsel of the plaintiff as follows:

> "The learned counsel appearing for the plaintiff states that some of the parties to the suit are not signatories to the arbitration agreement which may create problems. He also submits that a decree of cancellation has also been prayed for which relief the arbitrator may not be able to pass. He also submits that defendant Nos.l to 4 should first indicate their willingness to have all disputes adjudicated by the arbitrator."

13. A direction was passed directing defendant No. 1 to 4 to file their affidavits confirming their willingness to support the application.

14. The necessary affidavits have been filed by defendants No. 1 to 4. On 10.09. 2018 instead of agreeing for arbitration as noted on 02.08.2018, learned counsel for the plaintiff submitted another proposal where he has listed out properties other than those which are subject matter of the present suit stating that these entire disputes including issues relating to the additional properties be referred to arbitration. Today, learned counsel for the defendant has refused to accede to the said request of the plaintiff.

15. I may only note that the plaint contains a list of four immovable properties for which a preliminary decree of partition is sought. However, in the present list which has now been handed over by the learned counsel for the plaintiff there are 19 properties which are sought to now be made subject matter of the arbitration proceedings. To the same effect are the details of business concerns. In the plaint a reference is made to three firms while in the list now filed by the learned counsel for the plaintiff a

reference is made to 9 business concerns which are sought to be made subject matter of the arbitration. Clearly, the plaintiff is needlessly trying to expand the scope of the dispute beyond the dispute raised in the suit while arguing the present application, seeking reference of disputes to Arbitration.

16. Section 8 of the Arbitration Act reads as follows:-

> "8. Power to refer parties to arbitration where there is an arbitration agreement.—
> (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.
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> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
> Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.
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> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

17. The admitted fact is that there exists an arbitration clause in each of the three partnership deeds for the three different business concerns which are subject matter of this suit, namely, A.K. Enterpries, Sahni Exports and

Sahni Carpets.

18. Relevant arbitration clause in the partnership deed dated 01.04.2016 regarding Sahni Carpets reads as follows:-

> "19. That in case of dispute amongst the Partners as to the interpretation, operation or enforcement of the terms and conditions of the partnership deed, it shall be decided by the conciliation and the same shall be referred to arbitration and provision of "INDIAN ARBITRATION & CONCILIATION ACT", 1996 shall apply:"

19. Relevant arbitration clause in the partnership deed dated 01.04.1997 regarding A.K. Enterprises reads as follows:-

> "20. That in the case of dispute amongst the partners regarding any partnership matter, the same shall be referred to Arbitration and the Provisions of "INDIAN ARBITRATION & CONCILIATION ACT, 1996shall apply."

20. Relevant arbitration clause in the partnership deed dated 17.09.1993 regarding Sahni Exports reads as follows:-

> "14. That in case of dispute between the partners regarding any partnership matter it shall be referred to the arbitration and the provisions of "Indian Arbitration Act" shall apply."

21. A perusal of the plaint would show that it is the contention of the plaintiff that the parties to the present suit are a joint family/undivided family. It is further pleaded in the plaint that the father while running the various factories got his three sons settled in Sahni Carpets, A.K.Enterprises, Jagriti Carpets. The three sons grew the business and created wealth and resources which were put in to common pool of the undivided family. It is further pleaded that from the joint family business and the accounts of the business concerns, over a period of time, properties were purchased. These properties, it is pleaded, are joint family properties which were purchased from common fund and for the benefit of the undivided family. All the suit properties which are detailed in the

subsequent paras of the plaint were thrown in the common hotchpotch. Clearly, the case of the plaintiff in the plaint is that the three businesses are part of the joint family business and from the income of these three joint family businesses various immovable properties have been purchased which have been thrown into common hotchpotch of the HUF. Hence, as per the plaint the immovable properties are closely linked and relate to the three firms. It is manifestly clear that the entire dispute as raised in the suit is covered by the aforenoted three arbitration agreements.

22. I may also note that regarding the firm AK Enterprises a petition under Section 9 of the Arbitration and Conciliation Act was filed in this court by some of the defendants which was disposed of with the following directions:-

> "2. The learned counsel appearing for the parties state that although the efforts before the Delhi High Court Mediation and Conciliation Centre have failed, the parties are still endeavouring to settle their disputes amicably.
> 3. It is seen that the present petition was moved on 25.07.2017 and on that date this Court had passed an order, inter alia, observing that it is expected that the parties would not take any precipitate steps that would strain the inter se relationship.
> 4. The learned counsel appearing for the parties request that the said order be extended for a further period of two months from today to enable the parties to settle their disputes and failing which to approach the Arbitral Tribunal as and when constituted.
> It is so directed."

The said Arbitration Tribunal is yet to be constituted.

23. As far as the plea of the learned counsel for the plaintiff that the disputes under the Specific Relief Act cannot be referred to arbitration is concerned, the said plea is misplaced. The Supreme Court in ***Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. & Ors.. (supra)*** noted as follows:-

"36. The well recognized examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

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43. A different perspective on the issue is found in Olympus Superstructures Pvt Ltd vs. Meena Vijay Khetan and others - 1999 (5) SCC 651, where this Court considered whether an arbitrator has the power and jurisdiction to grant specific performance of contracts relating to immovable property. This Court held :

> "34. ...We are of the view that the right to specific performance of an agreement of sale deals with contractual rights and it is certainly open to the parties to agree - with a view to shorten litigation in regular courts - to refer the issues relating to specific performance to arbitration. There is no prohibition in the Specific Relief Act, 1963 that issues relating to specific performance of contract relating to immovable property cannot be referred to arbitration. Nor is there such a prohibition contained in the Arbitration and Conciliation Act, 1996 as contrasted with Section 15 of the English Arbitration Act, 1950 or Section 48(5)(b) of the English Arbitration Act, 1996 which contained a prohibition relating to specific performance of contracts concerning immoveable property."

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46. An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but create only a personal obligation. Therefore if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance will be arbitrable. On the other hand, a mortgage is a transfer of a right in rem. A mortgage suit

> for sale of the mortgaged property is an action in rem, for enforcement of a right in rem. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided by courts of law and not by arbitral tribunals.

24. Similarly, the Supreme Court in the case of ***Vidya Drolla & Ors. Vs.Durga Trading Corporation(supra)*** regarding reference of disputes under the Specific Relief Act to arbitration noted as follows:-

> "27. In a similar situation, this court in Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan, (1999) 5 SCC 651, held that when it came to the grant of specific performance, there is no prohibition in the Specific Relief Act that issues relating to specific performance cannot be referred to arbitration, unlike the English statute [see paragraph 34].
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> 28. Equally, merely because a discretion had to be exercised by the court on whether or not to grant specific performance, would no militate against specific performance being granted [see paragraph 44, in particular, of Booz Allen (supra)]. It is clear, therefore, that the judgment in Himangni Enterprises (supra) will require a relook by a Bench of three Hon'ble Judges of this Court."

25. Accordingly, merely because one of the numerous reliefs sought by the plaintiff includes seeking a decree of cancellation for cancelling transfer document executed for the land of Village Sadhaura cannot and does not in my opinion bar referring of the disputes in question to arbitration.

26. In my opinion, there clearly exists an arbitration agreement applicable to the disputes between the parties. There is commonality of the subject matter. A composite reference of such disputes would serve the ends of justice. Reference in this context may be had to the judgment of the Supreme Court in the case of ***Cheran Properties Limited v. Kasturi and Sons Limited and Ors. (2018) 16 SCC 413*** where the Supreme Court held as follows:-

"20. Both these decisions were prior to the three Judge Bench decision in *Chloro Controls* (supra). In Chloro Controls this Court observed that ordinarily, an arbitration takes place between persons who have been parties to both the arbitration agreement and the substantive contract underlying it. English Law has evolved the "group of companies doctrine" under which an arbitration agreement entered into by a company within a group of corporate entities can in certain circumstances bind non-signatory affiliates. The test as formulated by this Court, noticing the position in English law, is as follows:

> "71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [*Russell on Arbitration* (23rd Edn.)]
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> 72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties."

The Court held that it would examine the facts of the case on the touch-stone of the existence of a direct relationship with a party which is a signatory to the arbitration agreement, a 'direct commonality' of the subject matter and on whether the agreement between the parties is a part of a composite transaction:

> “73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.”

21. Explaining the legal basis that may be applied to bind a non-signatory to an arbitration agreement, this Court held thus:

> “103.1The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.
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> 103.2 The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called “the alter ego”), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.
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> 105 We have already discussed that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties."

27. In view of the above-stated legal position, the present application is

allowed.

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At this stage, learned counsel for the defendants stated that if this court is allowing the above application, the court may also appoint a learned arbitrator. Learned counsel for the plaintiff does not object to this contention.

Accordingly, Hon'ble Ms. Justice Indermeet Kaur (Retd.), (Mobile No.9910384614) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties. Learned Arbitrator is requested to consider charging fees in terms of Schedule IV of the Arbitration Act.

The suit and all pending applications stands disposed of.

JAYANT NATH, J.

APRIL 25, 2019
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corrected and released on 25.5.2019