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

Date of decision: 16th January, 2019

+ **O.M.P. 643/2007, CRL.M.As. 13622/2015, 2073/2017, I.A. 10911/2016, 12188/2016, 15856/2016, 1557/2017, 1562/2017 & 559/2019**

ADARSH KUMAR KHERA

..... Petitioner

Through: Ms. Isha Aggarwal, Mr. Akhil Sharma and Mr. Sachin Jain, Advocates. (M:9810793583)

versus

KEWAL KISHAN KHERA AND ORS.

..... Respondents

Through: Mr. Sanjeev Mahajan, Advocate for R-1 with Respondent No.1 in person. (M:9811156437)
Mr. A.K. Vashishtha, Advocate for R-2 with Respondent No.2 in person. (M:9810008639)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('The Act') has been filed challenging the arbitral Awards dated 13th July, 2007, 12th May, 2007 and 28th May, 2007, which are collectively annexed as Annexure-P-2 to the petition. There is also a fourth Award dated 8th June, 2007 which was also passed by the learned Sole Arbitrator.

2. Disputes have arisen between three brothers namely; Shri Adarsh Kumar Khera, Shri Kewal Kishan Khera and Shri Mahesh Kumar Khera. All

three are sons of late Shri Som Nath Khera. The three brothers were engaged in joint business in three partnership firms namely; M/s. Vijay Electricals, M/s. Vijay Sippy Electrical and M/s. Khera Brothers. The shares of the brothers vary in each of the firms. They have entered into an arbitration agreement on 28th February, 2007 which reads as under: -

“ARBITRATION AGREEMENT

This agreement made and entered into between

Smt. Kaushalya Devi w/o Late Sh. Som Nath Khera R/o B-183 Derawala Nagar, Delhi

&

Sh. Kewal Krishan Khera S/o Late Sh. Som Nath Khera R/o B-183 Derawala Nagar, Delhi

&

Sh. Adarsh Kumar Khera S/o Late Sh. Som Nath Khera R/o 4/1 Racquet Court Road, Civil Lines, Delhi

&

Sh. Mahesh Kumar Khera S/o Late Sh. Som Nath Khera R/o B-183 Derawala Nagar, Delhi

on _____ day of February, 2007 witnesses as follows:-

Whereas differences & disputes have arisen between the said parties above mentioned regarding immovable & moveable assets of our ancestral properties & other assets of the partnership firms.

Whereas the above mentioned parties could not settle the above disputes amicably.

Now the parties to the dispute hereby mutually agree to appoint Sh. Bhim Sain Gupta, Chairman of Plaza Group of Industries, E-21 Netaji Subhash Marg, Daryaganj, New Delhi as an arbitrator to decide the ownership of the above said disputes according to the ratio of the Partnership Deeds duly executed from time to time & other assets as stated above.

That the parties above shall abide by the award so given by the arbitrator, which shall be final and

binding on them.

That the said arbitrator shall give his award within three months of the date of this agreement, which can be extended with the mutual consent of the parties.

That all the parties agree that they would cooperate and lead evidence etc. with the arbitrator as expeditiously as possible.

Having agreed to the above by all the parties, the said parties affix their signatures to this agreement on _____ day of _____ 2007 in the presence of the following witnesses as a token of their acceptance.

WITNESSES

EXECUTANTS

01. _____ (SMT. KAUSHALYA DEVI)
02. _____ (SH.KEWAL KRISHAN KHERA)
Sd/-
03. _____ (SH. ADARSH KUMAR KHERA)
(SH. MAHESH KHERA) ”

3. The above arbitration agreement is an admitted document between the parties.
4. The named Arbitrator, Shri Bhim Sain Gupta, entered reference and passed four Awards, Award No.1 dated 12th May, 2007, Award No.2 dated 28th May, 2007, Award No.3 dated 8th June, 2007 and Award No. 4 dated 13th July, 2007. Some other documents including a draft MOU were also drawn up by the Arbitrator but the said documents are not admitted by some of the parties.
5. Ms. Isha Aggarwal appearing for the Petitioner submits that the third Award was not in the knowledge of the Petitioner at the time of filing of the present petition. She further submits that the arbitration proceedings were conducted in a completely ad hoc and haphazard manner. No hearings were

held, and no evidence was led before the Arbitrator. The Arbitrator in fact did not conduct any adjudication in accordance with law. All the four Awards have been simply passed on the basis of the documents/pleadings filed by the parties. It is her case that even self acquired properties of the Petitioner which are in the name of the Petitioner/his family members have been wrongly included in the common hotchpotch. It is submitted that the shares of the parties have also been wrongly determined.

6. Learned counsel for Respondent No.2 submits that his client also has objections to all the Awards which have been passed and thus seeks that the entire dispute between the parties may be decided afresh. This submission is reiterated by learned counsel appearing for Respondent No.1. Smt. Kaushalya Devi, Respondent No.3, the mother of all three parties has already passed away. Respondent No.4 is the Arbitrator, who is deleted from the array of parties.

7. The Court has heard the submissions on behalf of the parties. A perusal of the various Awards passed by the learned Arbitrator shows that the Arbitrator has decided the matter simply on the basis of the statement of claims made by all the parties. Though the Arbitrator is not bound by the strict provisions of the CPC, each of the parties ought to have been given an opportunity to respond to the case set up by the other, which is a basic feature in any arbitration proceedings. Further, submissions have to be heard in respect of any party's objection to a property/asset being included in the common pool. The learned Arbitrator appears to have taken all properties as belonging to the partnership firms. Such an approach would be clearly contrary to the Act itself. It is submitted by all the parties that the firms ran active businesses, owned various properties and also had interests in various

properties. The Respondents submit that even though some properties may be in the name of the Petitioner, Shri Adarsh Kumar Khera, or his family members, the same have been purchased from the profits earned by the common businesses. This contention is disputed by learned counsel for the Petitioner, who has objected to the inclusion of the properties which belong to either him and his wife/son.

8. The question as to which of the properties need to be considered as properties of the firms, i.e., the assets which are to be divided amongst the members of the partnership, including the valuation of the trademarks and others assets namely, deposits in banks, rental incomes, shares and other instruments, goodwill of the firms etc. has to be determined by the Arbitrator. On this issue, the learned Arbitrator, after hearing the parties, would have to adjudicate the shares of each of the partners. The learned Arbitrator would also have to take into consideration the respective liabilities of each of the firms before determining the shares of each of the parties. This has clearly not been done by the learned Arbitrator.

9. All parties agree that the four Awards dated 13th July, 2007, 12th May, 2007, 28th May, 2007 and 8th June, 2007 be set aside. The said Awards are accordingly set aside.

10. Since there is an arbitration agreement between the parties and all parties are agreeable for an independent Arbitrator to be appointed by this Court, **Justice G.P. Mittal (Retd.) (M:- 9910384619, Email address: gpmittal@gmail.com, Address: H-37, Green Park Extension, New Delhi-16)** is appointed as a Sole Arbitrator to adjudicate the disputes between the parties. The learned Arbitrator would be free to determine as to which of the properties is to be included in the common pool for being

divided, the valuation of all movable/immovable assets of the firms, liabilities of the firms and adjustments to the given, the share of each of the parties, the manner of sale of any of the properties including the market rates thereof, the manner of disbursement of the various amounts due to the respective parties and all other issues which may arise during the course of the arbitration proceedings. There shall be no fetter of any kind in the adjudication of all the disputes that arise amongst the three brothers. All parties are permitted to raise their respective claims before the Arbitrator. It is made clear that strict provisions of CPC do not apply. However, all parties shall be allowed to file their responses to each other's claims, and be given hearing/s before the learned Arbitrator.

11. Owing to the age of all the brothers and considering the fact that this petition has remained pending before this Court since 2007, it is directed that the learned Arbitrator would endeavour to conclude the proceedings within a period of 6 months from the date of filing of claims by all the parties.

12. Parties to appear for directions before the learned Arbitrator on 25th February, 2019. All parties to file their respective claims before the learned Arbitrator on the said date.

13. As agreed between the parties, at this stage, the fee of the Arbitrator is fixed at a lumpsum of Rs.9 lakhs. The payment shall be made in three instalments. The fee would be shared equally by all the parties. The first payment shall be made on the date of filing of claims (Rs.1 lakh each = Rs.3 lakhs), the second payment of Rs. 3 lakhs (Rs. 1 lakh each) shall be made on the date when the respective responses are filed and the matter is fixed for oral arguments and the third and the final instalment of Rs. 3 lakhs (Rs. 1

lakh each) shall be paid on or before the pronouncement of the Award.

14. Considering the nature of work that may be entailed in the arbitration proceedings, the fee of the Arbitrator may be enhanced with the mutual agreement of all the three parties.

15. Status quo was operating vide order dated 23rd January 2009. It is thus directed that status quo shall be maintained qua title and possession of all the properties that are the subject matter of arbitration. It is submitted that Respondent No.2 has sold one plot in Bawana prior to the interim order passed by this Court on 23rd January, 2009. The said sale and the proceeds thereof shall be considered by the Ld. Arbitrator while determining the shares. Parties are permitted to approach the learned Arbitrator if they wish to seek variation of the interim order.

16. Learned counsel for the Petitioner submits that in a connected O.M.P. being 678/2009, the key of one of the properties has been deposited by the Petitioner in this Court. Respondent No.1 also submits that his share of rent in the Noida property and other fixed deposit is lying deposited in the said O.M.P.

17. Subject to the orders of the Hon'ble Judge-in-charge (Original Side), the file of O.M.P. 678/2009 be put up on 22nd January, 2019.

18. Copy of this order be sent by the Registry to the Ld. Arbitrator, Justice G.P. Mittal (Retd.) at H-37, Green Park Extension, New Delhi-16.

19. *Dasti.*

PRATHIBA M. SINGH
JUDGE

JANUARY 16, 2019

Rekha