

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 02.05.2022

+ **ARB.A. 4/2021**

RAJESH GUPTA AND OTHERS

..... Appellants

versus

DINESH GUPTA AND OTHERS

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Sanjay Gupta, Mr. Ateev Mathur
& Mr. Jagriti Ahuja, Advs.

For the Respondent : Mr. Ravi Gupta Sr. Adv. with Mr.
Rishi Agrawala, Ms. Niyati Kohli,
Mr. Pranjit Bhattacharya & Ms.
Megha Bengani, Advs.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellants have filed the present appeal under Section 37(2)(a) of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act'), impugning orders dated 22.07.2020 and 24.06.2021 (hereafter 'the impugned orders') passed by the Arbitral Tribunal.

2. The appellants' challenge to the impugned order dated

22.07.2020 is confined to the findings of the Arbitral Tribunal that no cause of action had arisen for the appellants in respect of certain counter-claims (referred to as Claims A, C, D, E and H). In respect of these counter-claims, the Arbitral Tribunal also granted liberty to revive the same at a subsequent stage.

3. The appellants, subsequently, sought revival of two counter-claims referred to as Claim A and H. However, by the impugned order dated 24.06.2021, the Arbitral Tribunal did not entertain the same. In respect of Claim A, the Arbitral Tribunal held that there was no material to indicate that the said claim had arisen in connection with the Family Settlements. In respect of Claim H, the Arbitral Tribunal, in effect, held that the same was premature. The Arbitral Tribunal's order dated 24.06.2021 is challenged to the limited extent that the aforesaid claims have not been entertained.

Factual Context

4. The disputes between the parties arise in the context of the Family Settlements dated 02.12.2017 and 09.12.2017.

5. Appellant no.1 (Rajesh Gupta) and respondent no.1 (Dinesh Gupta) are brothers and were jointly engaged in the business of dealing / development in real estate. Admittedly, during the course of the business, they promoted and incorporated several companies and carried on their businesses through and in the form of the said incorporated entities. It is stated that sometime in the year 2017, disputes arose between the two brothers and they agreed to divide their

assets / businesses. The broad agreement entailed each of the two brothers and their respective families acquiring exclusive control of certain assets and companies. The appellant companies are under the control of Rajesh Gupta (appellant no.1). The appellants are collectively referred to as Rajesh Gupta Group – ‘**RGG**’, and the respondents are collectively referred to as Dinesh Gupta Group – ‘**DGG**’. Rajesh Gupta and Dinesh Gupta (respondent no.1) entered into Family Settlements dated 02.12.2017 and 09.12.2017, as noted above.

6. The disputes between the two groups (RGG and DGG) continued to fester even after the two brothers had entered into the Family Settlements. DGG instituted a suit [CS(OS) No.51/2018] seeking a decree of permanent injunction restraining RGG from acting in contravention of the Family Settlements. DGG also instituted two other suits [CS(OS) No.100/2018 and CS(OS) No.101/2018] impugning the notices issued in respect of certain companies, as being in contravention of the Family Settlements. Essentially, DGG moved this Court seeking implementation of the Family Settlements. Certain interim orders were passed by this Court in the said suits, subject to DGG making certain payments to RGG. DGG appealed against the said interim orders to the Division Bench [FAO(OS) No.6/2019].

7. During the course of the proceedings before the Division Bench, RGG and DGG agreed to refer their disputes to an Arbitral Tribunal comprising of a Sole Arbitrator of Justice (Retd.) Arjan Sikri, former Judge of the Supreme Court. Accordingly, this Court, by an order dated 18.03.2019, referred the parties to arbitration.

8. DGG filed certain claims before the Arbitral Tribunal. The appellants (RGG) raised certain counter-claims (21 in number). DGG (who are claimants before the Arbitral Tribunal) also filed additional claims. In this regard, both the parties, RGG and DGG, filed applications under Section 16 of the A&C Act raising objections as to the arbitrability of the additional claims and counter-claims respectively. The Arbitral Tribunal found that certain counter-claims raised by the appellants were without any cause of action at the relevant stage, and therefore did not entertain the same. Subsequently, RGG sought revival of certain counter-claims, which were not accepted.

9. Being aggrieved by the aforesaid decisions, RGG has filed the present appeal

Re: Impugned Order dated 22.07.2020

10. By the impugned order dated 22.07.2020, the Arbitral Tribunal decided five applications: two applications filed by DGG under Section 17 of the A&C Act; an application filed by RGG under Section 17 of the A&C Act; an application filed by RGG under Section 33 of the A&C Act; and, an application filed by DGG under Section 16 of the A&C Act, in respect of certain counter-claims made by RGG. RGG's grievance, in this appeal, in regard to the said impugned order, is confined to the Arbitral Tribunal's decision to not entertain the five counter-claims (A, C, D, E and H).

11. Mr. Sanjay Gupta, learned counsel appearing for RGG, contends that the finding of the Arbitral Tribunal is beyond the scope of Section

16 of the A&C Act. He submitted that at the stage of examination under Section 16 of the A&C Act, it is impermissible for the Arbitral Tribunal to return any findings on merit. He also contended that the Arbitral Tribunal's conclusion that the cause of action had not arisen is a decision on merits and does not relate to the question of jurisdiction of the Arbitral Tribunal.

12. At this stage, it would be relevant to briefly indicate the counter-claims, which were not entertained by the Arbitral Tribunal, on the ground that the cause of action had not arisen.

13. Claim No. A was in regard to an actionable claim against one Mr Gopal Kanda and his Company, M/s Nageshwar Builders Private Limited.

14. In terms of Clause 6 of the Family Settlement dated 09.12.2017, it was agreed that certain actionable claims would vest with Mr Rajesh Gupta (appellant no. 1). It is stated that the appellants are a part of the RGG. Clause 6 of the Family Settlement is relevant and set out below:-

“6. The list of actionable claims (only if received) which shall vest in Rajesh Gupta & shall be transferred to Rajesh Gupta by the companies vested in Dinesh Gupta and by Dinesh Gupta and Associates is Annexed herewith as Annexure -F.”

15. One of the actionable claims, as listed in Annexure-F to the said Family Settlement, was the claim of BDR Builders and Developers Private Limited against M/s Nageshwar Builders Private Limited. The

appellants claim that M/s Nageshwar Builders Private Limited belongs to Mr Gopal Kanda and any claims against Mr Gopal Kanda also fall to the share of RGG as Mr Gopal Kanda's name is also mentioned in Annexure - H to the Family Settlement. Clause 10 of the Family Settlement, which includes a reference to Annexure – H, is relevant and set out below: -

“10. The parties agree that the tax will be borne respectively by the respective parties as per Annexure-A & B. however, taxes pertaining to claims as per annexure E & F as list as per annexure H shall be borne by the respective beneficiary.”

16. Three proceedings had been initiated against Mr Gopal Kanda and/or his company M/s Nageshwar Builders Private Limited on behalf of BDR Builders and Developers Private Limited. The Arbitral Tribunal had noted that, the proceedings before the Sole Arbitrator - Mr Manish Goel; complaint under Section 138 of the Negotiable Instrument Act, 1881 (hereafter 'the NI Act'); and FIR bearing no. 177 before the EOW, Delhi Police, were pending.

17. RGG claims that whereas, in the normal course, he/his group would have recovered at least ₹100 crores from Mr Gopal Kanda and/or M/s Nageshwar Builders Private Limited; the said claims had been settled for a sum of ₹20 crores without his consent. Thus, the action of DGG in settlement of claims of BDR Builders and Developers Private Limited against Mr Gopal Kanda and M/s Nageshwar Builders Private Limited had caused a loss to RGG.

18. In this regard, RGG preferred a counter-claim for a sum of ₹100 crores along with interests and damages quantified at ₹25 crores. DGG had disputed the contentions raised by RGG. The Arbitral Tribunal found that at the material time, the proceedings against Mr Gopal Kanda and/or M/s Nageshwar Builders Private Limited were continuing and therefore, the stage had not arrived for RGG to raise any claim. It is in this context that the Arbitral Tribunal declined to entertain the said counter-claim while giving liberty to RGG to file the said claim, if the cause of action arises in future.

19. The counter-claim nos. C, D and E were raised by RGG alleging non-cooperation on the part of DGG in pursuing certain claims and/or assisting RGG to pursue certain claims against third parties, which were pending. The Arbitral Tribunal concluded that no loss had been caused to RGG at that stage and therefore, RGG's counter-claims were rejected with liberty to raise the same, if a cause of action arose in future.

20. Claim H was a counter-claim for a sum of ₹10 crores. The claim for specific performance had been filed in respect of a property bearing no. F-41, East of Kailash, New Delhi. The said property fell to the share of RGG. RGG alleged that proceedings had been significantly delayed on account of non-cooperation on the part of DGG. RGG had quantified the said claim at ₹10 crores. The Arbitral Tribunal held that since the proceedings for specific performance in respect of the said property were pending, no loss had been caused at that stage. The said claim was also rejected permitting RGG to file the said claim, if a fresh cause of action arose in the future.

21. This Court finds no ground to interfere with the Arbitral Tribunal's decision to not entertain the aforementioned counter-claims on the ground that a cause of action had not arisen. As noted above, the impugned order is assailed on the ground that it is beyond the scope of Section 16 of the A&C Act. It is contended on behalf of RGG that it is not open for the Arbitral Tribunal to take any decision on the merits of the counter-claims, while deciding an application under Section 16 of the A&C Act. It is also pointed out that in respect of the other claims filed by DGG, the Arbitral Tribunal accepted that the question whether the said disputes are arbitrable or arise in connection with the Family Settlements, was required to be addressed at the final stage. However, in respect of counter-claims raised by RGG, the Arbitral Tribunal did not defer the consideration but declined to entertain the same.

22. The contentions advanced by Mr. Sanjay Gupta, learned counsel appearing for RGG, are unmerited. The question whether a cause of action for making any claim has arisen clearly strikes at the arbitrability of the said dispute. If it is found that the cause of action has not arisen or a claim is premature, it would follow that an arbitrable dispute does not exist. Undisputedly, in the absence of an arbitrable dispute, the question of an arbitral tribunal exercising any jurisdiction would not arise. Thus, the question whether any cause of action has arisen for a particular claim cannot be excluded from the scope of Section 16 of the Act. It is also material to note that the Arbitral Tribunal had not foreclosed the remedies available to RGG. RGG was granted liberty to raise the said counter-claims, as and when the cause to do so fructifies.

The matters in respect of which the counter-claims were raised, were pending and the Arbitral Tribunal was of the view that unless the said matters reached any conclusion, the question of entertaining any claims on that basis would be premature. RGG's appeal against the impugned order dated 22.07.2020 is, thus, liable to be rejected.

Re: Impugned Order dated 24.06.2021

23. The impugned order dated 24.06.2021 is a common order passed by the Arbitral Tribunal disposing of two applications. The first application was filed under Section 27(5) of the A&C Act seeking initiation of contempt proceedings against DGG; and, the second application was filed seeking re-filing of the counter-claims 'A' and 'H'. The said applications were not entertained earlier as being premature. Mr. Sanjay Gupta had confined the present appeal to the Arbitral Tribunal's decision in respect of RGG's application for revival of the said claims.

24. In respect of counter-claim 'A', RGG contended that DGG had settled the disputes with Mr. Gopal Kanda and M/s Nageshwar Builders Private Limited at a consideration of ₹20 crores. The complaint initiated under Section 138 of the NI Act as well as the arbitration proceedings commenced against Mr Gopal Kanda / M/s Nageshwar Builders Private Limited were terminated. According to RGG, it had suffered a loss as the actionable claims in respect of M/s Nageshwar Builders Private Limited as well as Mr. Gopal Kanda fell to the share of RGG. However, DGG had settled the said disputes without reference or seeking

concurrence of RGG. RGG further claims that it would have received at least ₹100 crores from Mr. Gopal Kanda and M/s Nageshwar Builders Private Limited and the settlement was to the prejudice of RGG. RGG had articulated the said claim as under:

“A.3 It was explained that without taking consent of the Counter-Claimants, DGG settled the matter for Rs.20 crores. The Counter-Claimants would have received at least an amount of Rs.100 crore from Gopal Kanda and Nageshwar Builders P Limited collectively on account of certain investment made by the BDR group and such amounts were to accrue to the benefit of RGG under family settlements. However, on account of this arbitrary settlement by DGG, which was done in blatant breach of the Family Settlements, the Counter-Claimants were deprived of this amount which they could have easily recovered from the above named person. That Gopal Kanda would have been arrested for his acts of cheating and at one point of time was agreeable to pay the entire dues but by setting the issue of Nageshwar, Gopal Kanda has refused to pay and settle the other claims of RGG. A tremendous loss has been caused to RGG. Thus, the RGG are entitled to an amount of Rs.100 crore plus damages of Rs.25 crore is claimed on account of loss and damage suffered by RGG. It is recorded that when the proceedings were pending before the High Court, DGG were restrained from settling any of the actionable claims fallen to RGG.”

25. According to DGG, the said claim did not arise in connection with the Family Settlements. In terms of Clause 6 of the Family Settlements, it was agreed that certain actionable claims would vest with appellant no.1 (Rajesh Gupta). Admittedly, the said claims included the claim of BDR Builders & Developers Private Limited against M/s Nageshwar Builders Private Limited. The said company

had also issued a cheque (apparently signed by Mr Gopal Kanda) in discharge of its liability. However, the said cheque was dishonoured. There is no dispute that M/s Nageshwar Builders Private Limited had settled its liability to BDR Builders & Developers Private Limited, in full. The proceedings under Section 138 of the NI Act initiated against the company and Mr Gopal Kanda were, accordingly, withdrawn. It appears to be RGG's case that it could compel Mr Gopal Kanda to also settle the claims with other entities as well. Essentially, it is contended on behalf of RGG that the proceedings initiated against M/s Nageshwar Builders Private Limited and Mr Gopal Kanda by BDR Builders & Developers Private Limited (which is part of DGG) could be leveraged to compel Mr Gopal Kanda and M/s Nageshwar Builders Private Limited to not only settle the claims of BDR Builders & Developers Private Limited but also other entities as well. It is also contended that since Mr Gopal Kanda's name is mentioned in Schedule 'H' to the Family Settlements, all dues recoverable from him are allocated to RGG. Thus, settling the proceedings initiated under Section 138 of NI Act without concurrence of appellant no.1 (Rajesh Gupta) is contrary to the Family Settlements.

26. It is material to note that the actionable claims of BDR Builders & Developers Private Limited. had been allocated to Rajesh Gupta (appellant no. 1) and the proceedings in relation to that actionable claim have been settled by DGG by recovering the amount due. The settlement between DGG (BDR Builders & Developers Private Limited) and M/s Nageshwar Builders Private Limited / Mr Gopal

Kanda does not, in any manner, deprive RGG of the actionable claim in respect of the said entities as the same has been recovered in full. It is important to note that in terms of the Family Settlement, actionable claims were allocated to RGG and not the right to control or use the proceedings against M/s Nageshwar Builders Private Limited / Mr Gopal Kanda (assuming that they had any independent value in addition to that of the actionable claim in question). It is in the aforesaid context that the Arbitral Tribunal held as under:

- “31. Having said that, it needs to be considered as to whether the claim arises out of Family Settlements. If it is *de-hors* the Family Settlements, the same would be outside the jurisdiction of this Tribunal to entertain.
32. It is a common case of the parties that actionable claims pertaining to Nageshwar Builders Pvt Ltd had fallen in the share of RGG. Because of this reason, in the order dated 22.07.2020, the Tribunal has directed DGG to pay a sum of Rs. 12.00 crore to RGG which is an admitted amount received by DGG from Nageshwar Builders Pvt Ltd in terms of the said Settlements. As per RGG, actual amount received is Rs. 20.00 crore, which is denied by DGG. Therefore, the issue as to whether DGG had received Rs. 20.00 crore or Rs. 12.00 crore is a subject matter of dispute before this Tribunal, which shall be determined by the Tribunal at the appropriate stage. Additionally, Counterclaim A for Rs.100 crore is preferred on the ground that RGG would have received Rs.100 crore from Gopal Kanda in case the Settlement with Nageshwar Builders had not been arrived at. However, the Claimant has not stated the basis for this claim and no particulars are given as to how the claim against Gopal Kanda is connected with the Family

Settlement. Further, it is also not stated as to how the settlement in question which is arrived at with Nageshwar Builders has the effect on the purported claim against Gopal Kanda. For lack of the aforesaid particulars, the Tribunal is not in a position to decide as to whether the claim in respect of Gopal Kanda can be associated with the Family Settlement or arises out of Family Settlement. For these reasons, the Tribunal feels that, for time being, it may not be proper to adjudicate upon this claim as no connect between this claim and Family Settlements is provided by RGG.”

27. This Court finds no infirmity with the aforesaid view. Unless RGG establishes that its claim arises in connection with violation of any of its rights under the Family Settlements; the claim in question would fall outside the scope of the Arbitration Agreement as the same is confined to the disputes arising in respect of the Family Settlements. In order to sustain such a claim, it is necessary for RGG to establish that (a) it had a right; and, (b) that right has been frustrated or violated. Mr. Rajesh Gupta’s right to the actionable claim (“only if received”) would be frustrated or violated if he was deprived of the value of the said claim. However, there is nothing to indicate that RGG is being deprived of the amount recovered by BDR Builders & Developers Private Limited against its claim. Thus, it is essential for RGG to establish that it has any other right under the Family Settlements, which was violated by withdrawal of the complaint against Mr Gopal Kanda in respect of an amount owed by him/his company to BDR Builders & Developers Private Limited.

28. RGG had claimed a sum of ₹10 crores as the loss caused to it on account of delay in pursuing the suit for specific performance in respect of a property at F-41, East of Kailash, New Delhi. RGG claims that it would be entitled to the suit property and was deprived of the benefit of the same on account of failure on the part of DGG in rendering the necessary cooperation for pursuing the said litigation. The relevant averments made in this regard by RGG are set out below:

“H.2 There is a deliberate breach on the part of DGG in cooperating with RGG to pursue the litigation and the required support is not being provided by DGG in spite of requests made from time to time and which fact can be established from the written documents and court proceedings.

H.3 On account of the deliberate failure of DGG in complying with the terms of the Family Settlements and to help and cooperate RGG to bring an end to the litigation and enjoy the property, DGG is liable to pay an amount of Rs.10 crores to RGG.”

29. RGG’s grievance, essentially, is that DGG had not been appearing in the said proceedings. It was pointed out that a Court Commissioner had been appointed to record the evidence in that case but the said proceedings had been deferred as Mr. Dinesh Gupta had not appeared. Before the Arbitral Tribunal, a statement was made on behalf of Mr. Dinesh Gupta that he would appear before the Court Commissioner on 31.05.2021 and also on the future dates. In view of the said statement, the Arbitral Tribunal had not entertained the counter-claim.

30. The decision of the Arbitral Tribunal must be read in conjunction with the impugned order dated 22.07.2020, whereby RGG's right to revive the counter-claims was preserved. In the present case, RGG's counter-claim is based on the premise that it is entitled to specific performance of the Agreement to Sell relating to a property situated at F-41, East of Kailash, New Delhi and the Court would decree the suit. In essence, RGG claims that since DGG has delayed RGG enjoying the fruits of the litigation, it must be compensated for the delay.

31. Clearly, this claim would not survive if the Court were to dismiss the suit. Thus, the question of RGG suffering any loss on account of delay is clearly premature. As noted above, the Arbitral Tribunal has not foreclosed RGG's right to make a counter-claim, if a cause of action so arises.

32. In view of the above, this Court finds no ground to interfere with the impugned orders.

33. The appeal is, accordingly, dismissed.

VIBHU BAKHRU, J

MAY 02, 2022

pkv/gsr

[Click here to check corrigendum, if any](#)