Item No. 5
31.01.2024
Court. No. 19
GB

C.O. 3577 of 2023

Omnitech Engineers (India) Private Limited
Vs.
Spark Dealers Private Limited & Ors.

Mr. Dwaipayan Basu Mallick,
Mr. Lal Ratan Mondal,
Mr. Tapajit Das
... for the Petitioner.

1. The revisional application arises out of an order dated May 10, 2023, passed by the learned Judge, Commercial Court at Alipore in Title Suit No.09 of 2020.
2. The suit was filed by the petitioner for declaration, permanent injunction and delivery of possession, upon cancellation of the terms of settlement dated February 27, 2011 and the memorandum of understanding dated August 12, 2011.
3. In the said suit, the petitioner filed an application being I.A. No.5 of 2022 praying for a summary judgment under Order 13A of the Code of Civil Procedure by setting aside the terms of settlement dated February 27, 2011 and the memorandum of understanding dated August 12, 2011. Further summary judgment restraining the defendant nos.2, 3 and 4 and each of them from giving any

effect to the said memorandum of understanding and terms of settlement, was also prayed.

4. The said application was filed on the ground that the defendants had admitted the contentions of the plaintiff that the terms of settlement and the memorandum of understanding were fraudulently executed, by not specifically denying such allegations.

5. In the said application being IA No.5 of 2022, the petitioners contended as follows;-

(a) that the proceeding before the arbitral tribunal was a sham and collusive one, between the defendants. Such sham and collusive arbitral proceedings were initiated on August 12, 2011, with the intention to remove the assets of the company by circumventing the orders dated August 7, 2013 and June 21, 2016, passed by the Hon'ble High Court at Calcutta, thereby depriving the plaintiff/petitioner of his right over the assets of the company. The plaint was accordingly amended to include fraud, misrepresentation and such collusive activities of the defendants.

(b) that the defendant nos.3 and 4, within seven days from the order passed by the High Court on August 7, 2013, filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 on August 14, 2013 and subsequently filed another application under Section 11 of the said Act on September 6, 2013.

(c) A bare perusal of the said applications would make it clear that the defendants were collusively trying to defraud the plaintiff by seeking implementation of the terms of settlement and the memorandum of understanding.

(d) Upon gathering knowledge of such application, the plaintiff filed two separate applications before the Delhi High Court seeking to intervene in both the proceedings initiated by defendant nos.3 and 4. The Delhi High Court did not allow the petitioner to intervene. Finding no other alternative, the petitioner filed the instant suit. Again, the petitioner wanted to participate in the arbitration proceedings and took out an application for intervention, which was rejected.

(e) From the statement of claim in the arbitration proceeding, it would appear that the claimant had sought for specific performance of the purported MOU dated August 12, 2011 and consequential reliefs in respect of the Cossipore property. The claim of the defendant no.3 for specific performance was rejected by the arbitral tribunal on the ground that the agreement was unenforceable in law. Only, the respondent in the arbitration proceedings was directed to make payment of sums allegedly paid under the agreement by the claimant.

(f) There was unequivocal admission that the property vested with the official liquidator and there were admissions before the learned Arbitrator that the defendant no.2 had wrongfully and illegally entered into the MOU and the terms of settlement on behalf of the company. There were further admissions by the defendant no.4 that the defendant no.2 had no right either to represent the defendant no.1 company or enter into any agreement with respect to the Cossipore property.

6. On the basis of the above contentions and the observations by the learned arbitrator and specifically on the ground that the allegation of fraud had not been elaborately denied and disputed by the defendants, the application for a summary judgement was filed. The said application was rejected. Hence, the revisional application.

7. Mr. Basu Mallick, learned advocate appearing on behalf of the petitioner submits as follows:-

   A) The defendants had fraudulently entered into the terms of settlement and the memorandum of understanding, only to deny and deprive the plaintiff.

   B) The arbitration award dated December 9, 2021, especially paragraph 100 thereof, would indicate that the transactions were sham and collusive.

C) In answer to question no.26, in the said proceedings, one of the defendants had admitted that the MOU dated August 12, 2011 was not enforceable and the same was signed under coercion. The memorandum of understanding which had been challenged in the suit, should be cancelled summarily without any further oral evidence, on the basis of such admission.

D) The finding of the learned arbitrator that the claim nos. 1 to 4 were not established before the learned arbitrator and a declaration as prayed for by the claimant could not be made, as the property had vested in the official liquidator under the orders of the Hon'ble Calcutta High Court, would go to show that the defendant Nos.3 and 4 had no defence at all.

8. On these grounds, according to Mr. Basu Mallick, the commercial suit should have been decreed summarily by allowing the prayers therein.

9. The learned court was of the view that the application could not be allowed and a summary judgment could not be passed, upon noting the following submissions of the defendants:-

a) The defendant nos.3 and 4 contended that the plaintiff had no cause of action to bring the suit.

b) The plaintiff's alleged claim of being 49% shareholder in the defendant company, was a frivolous claim.

c) Shares were allotted on April 28, 1997 and such shares were transferred to Mr. G.S. Jain on May 5, 1997. Such fact was available from the shares, transfer certificates and transfer deeds.

d) The plaintiff had filed a declaratory suit in the High Court being C.S.556 of 2001 after a period of four years from such transfer had been effected, and also for other reliefs.

e) Until the prayers in the said suit were allowed, the plaintiff would not have any claim as to the share holding in the defendant no.1 company.

f) The terms of settlement and the memorandum of understanding were executed by and between the defendant no.2 and defendant nos.3 and 4.

g) Pursuant to the arbitral award, the defendant nos.3 and 4 made a payment to the tune of Rs.15 crores to the defendant no.2. The plaintiff was not a party to such agreement.

The plaintiff was not a party to the arbitration proceeding.

h) After the award was passed which was in the nature of a monetary relief, the plaintiff was trying to protect the defendant no.2 by seeking judgment on the basis of the award, although the plaintiff was not a party to the said arbitral proceedings. Rather, the defendant no.2 in collusion with the plaintiff had caused the suit to be filed and the application under Order 13A of the Code to be initiated.

i) There was a clear admission in paragraph 16 of the application that the plaintiff got all the papers, documents, etc., from the defendant no.2.

10. Upon considering the provisions of Order 13A of the Code and the circumstances under which a summary judgment could be delivered, the learned court was of the view that only when there is no real prospect of successfully defending the claim and the court is able to reach a fair and just determination on the merits of the application for summary judgment, could the court allow such an application and a deliver judgement summarily. A decision of the Hon'ble Apex Court was also discussed.

11. The basis for seeking summary judgment is that there are no triable issues which arise for consideration and there are reasons for allowing the claim, without oral evidence. The defence raised by the defendants is an omnibus denial of the plaint case, without setting up any adversarial claim.

12. Consequently, this court is of the view that only when an application for summary judgment allows the court to find the necessary facts to resolve the dispute, and proceeding for trial would generally not be proportionate, timely or cost effective, a summary judgment can be passed. Whether the application gives the Court the confidence that the court could find the necessary facts and apply the relevant legal principles so as to resolve the dispute without trial, would be the prime consideration.

13. The defendant in the suit has elaborately denied the claim of the plaintiff in the purported company and also has discussed how the defendants have come upon the shares of the company. Moreover, the award which was the basis for seeking summary judgment, is under challenge before the appropriate forum and an observation by the arbitrator or answer to a question in evidence by one of the defendants, would not be a ground for holding that the defendants did not have the prospect of successfully defending their claim.

There are elaborate factual aspects with regard to the shareholdings, the transfers, the agreements, etc., and there was also an allegation of fraud and collusion between the plaintiff and the defendant no.2. It is true that there may not be very elaborate denial of the allegation of fraud, but the defendants have categorically, in various paragraphs, stated how the suit was not maintainable and the suit was the outcome of misconceived and false statements.

14. Under such circumstances, this Court is not inclined to interfere with the order impugned. The order impugned does not suffer from any perversity. The learned court has elaborately dealt with the submissions of each of the parties. The other contention of Mr. Basu Mallick that the written statement does not comply with the provisions of Order VIII Rules 3A of the Code of Civil Procedure, is also not accepted as this Court finds that the defendants have not only denied the claim of the plaintiff but has also elaborately discussed their defence case.

15. Accordingly, the revisional application is dismissed. The issues raised are to be decided in the trial.

16. However, there will be no order as to costs.

17. All the parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)