

Deepak Kumar & Ors vs. Manoj Gupta

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SooperKanoon Citation : sooperkanoon.com/1222106

Court : Delhi

Decided On : Mar-18-2019

Appellant : Deepak Kumar & Ors

Respondent : Manoj Gupta

Judgement :

\$~1 * IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of Judgment:

18. 03.2019 + FAO(OS) (COMM) 54/2019 DEEPAK KUMAR & ORS
Appellants Through: Mr. J.N. Singh & Mr. Santosh Sahu, Advocates versus
MANOJ GUPTA Through: In person Respondent CORAM: HON'BLE MR.
JUSTICE G.S. SISTANI HON'BLE MS. JUSTICE JYOTI SINGH G.S. SISTANI, J.

(ORAL) CM APPL. 11106/2019 1. Exemption allowed, subject to all just exceptions.

2. The application stands disposed of. CM APPL. 11107/2019 3. This is an application seeking condonation of delay of 18 days in filing the appeal.

4. For the reasons stated in the application, the same is allowed and the delay of 18 days in filing the appeal is condoned.

5. The application stands disposed of. FAO (OS) (COMM) No.54/2019 Page 1 of 13 FAO(OS) (COMM) 54/2019 6. Challenge in this appeal is to the order dated 04.12.2018 passed by a learned Single Judge of this Court by which a petition

bearing OMP (COMM) No.50/2017 under Section 34 of the Arbitration & Conciliation Act, 1996 assailing the award passed by the Sole Arbitrator dated 15.02.2010 has been dismissed.

7. In this case, an agreement of collaboration was entered into between the brother of the father of appellant Nos. 1 and 3 and brother-in-law of appellant No.2 as well as other co-owners on one hand and the respondent on the other hand, on 25.06.1997, with respect to development of property bearing No.229 situated in Khasra No.378 situated at Masjid Moth Village, New Delhi, admeasuring 300 sq. yards. The respondent agreed to construct 5 flats on the second floor and 5 flats on the third floor of the property and pay a sum of Rs. 25 Lacs in lieu thereof.

8. It is not in dispute that the flats stand duly constructed. The dispute which arises is the payment of Rs. 25 Lacs out of which Rs. 10 Lacs stand paid. A notice was issued by Attar Singh and Phoolwati, two of the co-owners of the property, to the respondent on 12.12.2008 invoking the arbitration clause. Since no reply was filed to the aforesaid notice, a petition under Section 11 of the Arbitration & Conciliation Act, 1996, bearing Arb.P. 79/2009 was filed by them. Shri Manoj Gupta, the respondent herein was impleaded as a respondent in the said petition. However, despite service, he did not appear and an ex-parte order was passed on 07.08.2009 appointing FAO (OS) (COMM) No.54/2019 Page 2 of 13 Shri Dinesh Dayal, District Judge (Retired) as the Sole Arbitrator to adjudicate upon the disputes between the parties.

9. The father of the appellant, namely, Ranjeet Singh, Attar Singh and some co-owners of the property in question, filed their claims before the Arbitrator. The respondent chose not to appear before the Arbitrator initially. However, subsequently, an application under Section 16 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act) was filed by him challenging the jurisdiction of the Arbitrator. However, the Arbitrator found that the agreement had been entered into in 1997 and the arbitration having been invoked in 2008, the claims were barred by limitation and therefore rejected the aforesaid claims vide an award dated 15.02.2010.

10. The said award of the Arbitrator was challenged in this Court by filing an OMP No.367/2010 re-numbered as OMP (COMM) No.50/2017. During the pendency of the OMP, Shri Ranjit, the father of the appellant Nos. 1 & 3 and husband of appellant No.2, died. Appellant Nos. 1 and 3 who are the sons of Shri Ranjit Singh were brought on record as his legal heirs along with appellant No.2, who is his widow, vide order dated 20.10.2011.

11. The learned Single Judge vide the impugned order dated 04.12.2018, dismissed the OMP and upheld the award of the learned Arbitrator dated 15.02.2010.

12. The first submission of learned counsel for the appellant is that once the dispute was referred under Section 11 to the Arbitrator, the FAO (OS) (COMM) No.54/2019 Page 3 of 13 question of jurisdiction could not have been raked up either by the respondent or by the arbitrator himself. He submits that while deciding the application under Section 11, it is expected that the Court would decide whether the claim is a live claim or not and once the Arbitrator was appointed, the claim was deemed to be a live claim and the Arbitrator could not have dismissed the claim on the ground of limitation.

13. The other ground urged before us is that the last transaction took place in the year 2008 and thus the cause of action arose only in the year 2008, when the legal notice was issued and the Arbitrator was appointed in 2009. Thus, the claim was well within the period of limitation.

14. The respondent has entered appearance in person. He submits that the collaboration agreement was between him and one, Shri Attar Singh, who is the brother of the father of appellant Nos. 1 & 3 and brother-in-law of appellant No.2 along with some other co-owners. He submits that Sh. Ranjit Singh was not party to the collaboration agreement, which contained the arbitration clause, and thus neither he nor his legal heirs have any locus standi to challenge either the appointment of the Arbitrator or the proceedings and the final award. He further submits that even otherwise there is no infirmity in the award, and the claims have been rightly rejected being barred by limitation by the learned Single Judge.

15. We have heard learned counsel for the appellants and the respondent, who appears in person. FAO (OS) (COMM) No.54/2019 Page 4 of 13 16. There is no quarrel with the proposition that while deciding an application under Section 11 of the Act, the Court has to consider whether there is an arbitration agreement between the parties, that there was a live and subsisting claim/dispute for being referred to arbitration and that the claims are arbitrable. The Honble Supreme Court in the case of National Insurance Company Ltd. vs. Boghara Polyfac Private Limited (2009) 1 SCC267 considered the earlier judgment in the case of SBP & Co. v. Patel Engineering Ltd. & Anr. (2005) 8 SCC618 and has carved out three categories to be considered while deciding a petition under Section 11 of the Act. The three categories set out in para 22 of the said judgment are reproduced as under: 22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide. 22.1 The issues (first category) which Justice/his designate will have to decide are: (a) Whether the party making the application has approached the appropriate High Court. (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement. 22.2 The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are: the Chief FAO (OS) (COMM) No.54/2019 Page 5 of 13 (a) Whether the claim is a dead (long-barred) claim or a live claim. (b) Whether the parties the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection. concluded have 22.3 The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are: (i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration. (ii) Merits or any claim involved in the arbitration. (emphasis added) 17. The issue as to whether the

claim is dead or alive, falls in category II. The Honble Supreme Court while dealing with the issues in category II held that if the issues fall in the second category and are raised in any application under Section 11 of the Act, the Chief Justice/his Designate may decide them or alternatively, he may leave these issues open, with a direction to the Arbitral Tribunal to decide the same. In case, the Chief Justice/his Designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the said issue. The relevant portion of the judgment is extracted hereinunder: 23. It is clear from the scheme of the Act as explained by this Court in SBP & Co., that in regard to issues falling under the second category, if raised in any application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his Designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot FAO (OS) (COMM) No.54/2019 Page 6 of 13 re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue. 18. The issue of limitation would clearly fall in category II. Thus this issue, in view of the judgment of the Apex Court in National Insurance Company (Supra) could have been either decided by the Chief Justice/his Designate or could have been left to be decided by the Arbitral Tribunal.

19. In the present case, the petition under Section 11 of the Act, was disposed of vide order dated 07.08.2009. The said order is extracted hereinunder: I have heard learned counsel appearing for the petitioner. The respondent is absent despite service. The Collaboration Agreement between the parties contains an arbitration clause being Clause 9 which reads as follows: That in case of any dispute between the parties in respect to the said agreement of any matter incidental thereto, the matter will be referred to a mutually appointed arbitrator ***** A perusal of the order shows that the respondent had not appeared in the matter and the question of limitation was neither raised nor decided by the said

order. Since the Chief Justice had not decided the issue at that stage, it was obviously left to be decided by the Arbitral Tribunal.

20. After the sole arbitrator was appointed by this Court, the claim FAO (OS) (COMM) No.54/2019 Page 7 of 13 statement had been filed. The respondent did not appear initially, but when he did appear, he challenged the jurisdiction of the Arbitrator by filing an application under Section 16 of the Act.

21. The Arbitrator held that the limitation for filing the claims was three years under Article 113 of the Schedule to the Limitation Act, 1963 and since the claims were filed almost 10 years after the right to sue had accrued to the claimants, they were barred by limitation and not maintainable. Relevant para of the award is extracted hereinunder: 19. The limitation for filing the suit for recovery of balance amount due on contract is governed by Article 113 of the schedule to the Limitation Act, 1963. This Article provides that the limitation for filing any suit for which no period of limitation is provided elsewhere in this schedule is three years from the date when right to sue accrues. Apparently, arbitration proceedings were commenced by the claimants almost 10 years after the right to sue accrued to the claimants. Claim is thus barred by limitation and is not maintainable. 22. The learned Single Judge has upheld the Award and dismissed the petition by relying on the judgment of the National Insurance Company (supra) holding that the Arbitral Tribunal had rightly decided the issue of limitation as there was no adjudication on this issue in the order dated 07.08.2009, by which the Arbitrator was appointed. The learned Single Judge observed that to hold that the Tribunal cannot decide the issue of limitation once the Court appoints the Arbitrator, would put shackles on the powers of the Arbitral Tribunal which the Act did not intend. In our view, the learned Single FAO (OS) (COMM) No.54/2019 Page 8 of 13 Judge is right in her observations that a reading of the order dated 07.08.2009 shows that neither the question of limitation was raised at that stage nor was it decided and therefore, it has to be presumed that it was left to be decided by the Arbitral Tribunal. Once there was no express adjudication of the issue of limitation in the order appointing the Arbitrator, the Arbitral Tribunal had the powers to decide the issue of limitation. We do not agree with the contention of the appellant that since there was no express direction by the Chief Justice at the time of appointment of the Arbitrator conferring

powers on him to decide the issue of limitation, the Tribunal could not have gone into this issue. This argument runs contrary to the observations of the Apex Court in the case of National Insurance Company (Supra). Once the Chief Justice has not adjudicated on the issue of limitation, at the time of appointment of the Arbitrator, which he could have, it goes without saying that it was left to be adjudicated by the Arbitral Tribunal. There is no force even in the contention that once the dispute was referred under Section 11 to the Arbitrator, the question of jurisdiction could not have been raked up for the aforesaid reasons.

23. The Arbitrator has returned a finding that the cause of action arose in 1999 since it was the contention of the claimants that the building was completed in the year 1999 and it is at that point of time when claims were entitled to receive the balance amount. The notice of appointment of the Arbitrator was given only on 12.12.2008 and since the claimants approached the Court for the first time in January, 2009, the claims were patently time barred as the same had been preferred after a lapse of ten years. The Arbitrator relied on Section 43 of the FAO (OS) (COMM) No.54/2019 Page 9 of 13 Act which provides that the Limitation Act shall apply to arbitration proceedings.

24. The contention of the appellant that the last transaction was in the year 2008, and notice was issued in 2008 and thus the claims were not time barred, cannot be accepted. The learned Arbitrator has found as a matter of fact that the cause of action had arisen in 1999 and we find no reason to disturb this finding. No fault can be found with this finding of the Arbitrator in view of Article 113 of the Schedule of the Limitation Act. Limitation is no doubt a mixed question of fact and law. The Arbitrator who is a master of both facts and law has after analyzing, taken a view, and rejected the claims. It is not open to us while sitting as an appellate court in an appeal under Section 37 of the Act to go behind the finding that the cause of action had arisen in 1997.

25. It is contended by the respondent who appears in person that late Sh. Ranjit Singh had no locus either to be a party to the arbitration proceedings or challenge the Award as he was neither a party to the arbitration agreement or to the collaboration agreement and therefore the present appellants who are his legal

heirs also have no locus to file the present appeal. We find that the learned Single Judge also dealt with this issue of locus and has given a finding that Sh. Ranjit Singh was the brother of Sh. Attar Singh, who was a party to the collaboration agreement and who had collaborated even on behalf of Sh. Ranjit Singh. The learned Single Judge has also observed that Sh. Rajit Singh was a party in the arbitration proceedings as he was one of FAO (OS) (COMM) No.54/2019 Page 10 of 13 the claimants and therefore the locus could not be questioned. We find no infirmity with this finding of the learned Single Judge and hence there is no merit in this contention of the respondent.

26. In our view, the learned Single Judge has rightly dismissed the petition of the appellant upholding the award of the learned Tribunal. The scope of interference in the proceedings in an appeal filed under Section 37 of the Act is extremely limited as has been held by several judgments of the Apex Court as well as this Court. The position of law stands crystalised that findings of fact and law of the Arbitral Tribunal/Arbitrator are ordinarily not amenable to interference under Section 34 or Section 37 and can only be interfered if they are perverse or contrary to the contractual terms. The Arbitrator is the final authority on facts as well as law. The scope of judicial scrutiny by an appellate court under Section 37 of the Act is far more restricted than judicial review under Section 34 of the Act. In this regard, we refer to a paragraph of the judgment of the Honble Supreme court in the case of McDermott International Inc. vs. Burn Standard Co. Ltd. (2006) 11 SCC181 which we quote as under: 52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a FAO (OS) (COMM) No.54/2019 Page 11 of 13 conscious decision to exclude the courts jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it. 27. In Associate Builders vs. Delhi Development Authority reported as (2015) 3 SCC49 the Supreme Court explained the scope of intervention in an appeal under Section 37 and held as under: It must

clearly be understood that when a court is applying the public policy test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts In P.R. Shah, Shares and Stock Brokers (P) Ltd.. v. B.H.H. Securities (P) Ltd.: (2012) 1 SCC594 this Court held: A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable. The case as put forward by the first Respondent has been accepted. Even the minority view was that the second Respondent was liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye- law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the Appellant did the transaction in the name of the second Respondent and is FAO (OS) (COMM) No.54/2019 Page 12 of 13 therefore, liable along with the second Respondent. Therefore, in the absence of any ground Under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at. 28. We thus find no ground to interfere in the impugned order passed by the learned Single Judge.

29. Resultantly, the appeal is dismissed being without merits along with all pending applications. G.S.SISTANI, J JYOTI SINGH, J MARCH18 2019 rd FAO (OS) (COMM) No.54/2019 Page 13 of 13