

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

Date of Reserve: 27.4.2009
Date of Order: 30th April, 2009

FAO No. 432/2002

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30.04.2009

Arun Kapur

... Appellant

Through: Mr.Vibhu Bhakru with Ms. Priya
Bansal & Mr. Gaurav, Chauhan, Advocates

Versus

Vikram Kapur & Ors.

... Respondents

Through: Mr. Sudhir K. Makkar, Adv. for
R- 4 to 7, 9 & 10.

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

This appeal has been preferred against order dated 31.5.2002 passed by the learned Sole Arbitrator whereby the learned Arbitrator dismissed the objections of the appellant against the report of Ernst & Young, Chartered Accountants and accepted the report, except in respect of item no.6 and found that the amount as stated in the report (except sum of item no.6) was payable by

the appellant which he should make good within a period of three months, failing which the order could be executed by the other group or groups as belonging to the Malanpur unit.

2. Brief facts relevant for the purpose of deciding this appeal are that the parties had entered into a Memorandum of Understanding (MoU) on 8.1.1999 whereby it was agreed between the parties that the business being managed and controlled by the different family members and the various assets in the individual names and in the names of different companies, private limited companies, partnership firms, charitable trusts, joint properties & firms and other personal assets owned by different persons be divided among the three family groups in equal parts. The three family groups were mentioned in the MoU. The three groups were headed by Mr. Bishamber Das Kapur, Mr. Jai Dev Kapur and Mr. Jagdish Kapur. The appellant belonged to the first family group viz. group headed by Mr. Bishamber Das Kapur consisting of Mr. Bishamber Das Kapur, Mr. Arun Kapur, Mr. Vikram Kapur, Mr. Rajiv Kapur, Mr. Akshay Kapur, Mr. Ashwath Kapur & Mr. Angad Kapur. Clause 6 of MoU provided that in case of difference of opinion on any matter and if a settlement was not arrived at, the matter would be referred to the arbitration of Shri A.M.Ahmadi, retired Chief Justice of the Supreme Court of India, who was unanimously selected by the three groups as the Sole Arbitrator. Since the parties could not mutually settle

the division of assets and properties, the matter was referred to Justice A.M.Ahmadi (Retd.) for arbitration.

3. During pendency of the arbitration, a status quo order was passed and later on it transpired that Mr. Arun Kapur, who was managing Malanpur plant had siphoned off huge amounts from the unit. On an application by other family member Mr. Arun Kapur was directed to restore the original position. The record shows that Mr. Arun Kapur had siphoned off around 6 crores of rupees and later on with great difficulty had restored this amount. During further progress of arbitration proceedings, again it was brought to notice of the learned Arbitrator that in Malanpur plant being managed by Mr. Arun Kapur, there were accounting discrepancies worth crores of rupees and allegations of fictitious purchases and other allegations were made, alleging that Mr. Arun Kapur had siphoned off huge amounts. With the agreement of the parties, M/s Ernst and Young, Chartered Accountants' firm was appointed to go into the accounts. Mr. Arun Kapur had specifically contended that allegations were false and let M/s Ernst & Young verify the accounts and give a report. M/s Ernst & Young went into the accounts and gave a report about the allegations made by the other members of the group in respect of Malanpur Unit. An objection was raised against the report on the ground that M/s Ernst & Young themselves had not done the job and got this job done through S.R. Batliboi & Co. These objections were found untenable since S.R. Batliboi & Co. was a partner of M/s Ernst & Young, in India and the report

was found to be credible and that of Ernst & Young. Against the previous order of learned Arbitrator regarding report of Ernst & Young, the present appellant filed an FAO No. 450/2001, which was dismissed by this Court with costs. The learned Arbitrator thereafter proceeded further to consider the report of Ernst & Young. The learned Arbitrator after considering the report of Ernst & Young came to the conclusion that the report was reliable and had been given by the Chartered Accountants after following the proper procedure. Mr. Manoj Gupta who was one of the team members and who carried out the review of the accounts was also subjected to cross examination by the counsel for the appellant before the learned Arbitrator and the learned Arbitrator found that Mr. Manoj Gupta stood the cross examination well and dismissed all objections of the appellant against the report. After accepting the report, the learned Arbitrator passed the impugned order asking the appellant to make good the loss except for item no.6 and in case it was not made good, this could be executed.

4. Learned Counsel for the appellant has submitted that the report given by Ernst & Young was not a reliable report since Ernst & Young had not made any enquiries from the appellant and did not seek any explanation from the appellant. This argument was advanced before the learned Arbitrator also. The learned Arbitrator, in fact immediately after receipt of the report had sent a copy of the report to the appellant and asked his response. A detailed response was given by the appellant, which was sent to the Chartered Accountants. Chartered

Accountants gave their explanation and thereafter Mr. Manoj Gupta one of the team members of the S.R. Batliboi & Co., Chartered Accounts was subjected to cross examination. It is also pertinent to note that the appellant was very well aware of the team members going to Malanpur plant for looking into the accounts of the company. He did not raise any objection against any of the team members during the period when the members were going into the accounts and looking into the aspect of siphoning off funds. He raised objections against involvement of S.R. Batliboi & Co. only after the report went against him. The appellant thus had full opportunity to raise objection or give response to the report before the learned Arbitrator.

5. Another issue raised by the appellant is that the order of learned Arbitrator was beyond the scope of arbitration clause. It is submitted that no dispute inter se members of a group could be subject matter of arbitration and learned Arbitrator on an application of appellant had refused to pass an order against another company on the ground of jurisdiction. This argument does not hold ground since appellant initially violated the status quo order and then made siphoning off of money by falsification of accounts when the matter was being considered by the Arbitrator. The appellant himself proposed appointment of M/s Ernst & Young to go into the allegations and give a report. Thus, by consent, the appellant and the respondent agreed to the arbitration by the learned Arbitrator in this inter se matter and now this argument cannot be heard.

6. I find that the ground taken by the appellant that the report was not by Ernst & Young and was by S.R. Batliboi & Co., whom the appellant had not agreed to, is not tenable since S.R. Batliboi & Co. and Ernst & Young were partners and work done by one partner has to be considered to be the work done by the other partner. I find no force in the grounds raised in the appeal. The appeal is hereby dismissed.

April 30, 2009
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SHIV NARAYAN DHINGRA, J.