THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 14.01.2010
Judgment delivered on: 22.01.2010

IA No. 1123/2009 (under Section 5 r/w Section 8 of Arbitration & Conciliation Act, 1996 by defendant.no.1) in CS(OS) No. 1970/2008

HAZRAT MAULANA ARSHAD MADANI & ORS ..... PLAINTIFFS

Vs

MAULANA QUARI MOHAMMAD USMAN & ORS ..... DEFENDANTS

Advocates who appeared in this case:

For the Plaintiffs : Mr Kailash Vasudev, Sr Advocate, Mr Harish Malhotra, Sr Advocate with Mr Rakesh Kansal & Mr S Mehdi Imam.

For the Defendants: Mr Anoop G Chaudhary, Sr Advocate with Mr Sunil Malhotra, Mr Tayaib Khan & Mr Abhishek Puri for defendant no.1.
Mr Siddharth Yadav, Advocate for defendant no.2.
Mohd Moonis Abbasi for counsel for Mr Saud Ahmed Syed for defendant nos 3 to 18.

CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER

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

RAJIV SHAKDHER, J

1. This is an application filed by defendant no.1 under Section 5 read with Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to in short as 'the Arbitration Act'). The only relief that the defendant no.1 has sought is as follows:-

> ***" That this Hon'ble Court may be pleased not to intervene in the dispute and entertain the suit (C.S.(OS) No. 1970/2008) as it is beyond the jurisdiction of this Hon'ble Court….."***

2. Briefly, the facts in so far as those, which are relevant for the purposes of disposal of this application, are as follows:

2.1 Plaintiff no.1 alongwith plaintiff nos 2 to 18 claim to be the president and the members of the working committee of Jamiat Ulama-i-Hind (in short 'JUH') respectively. It is to be noted that it is not disputed that JUH is an unregistered society. Plaintiff no.1 has averred broadly in the plaint that after the death of Maulana Sayed Asad Madni R.A. in February, 2006, plaintiff no.1 was elected to the post of the President of JUH.

2.2 The immediate predecessor of plaintiff no.1, i.e., Maulana Sayed Asad Madni R.A. had continued as a president of JUH for a period of more than 32 years since August 1973 till 06.02.2006. After initial posturing between plaintiff no.1 and defendant no.2 in the contest for the post of President of JUH, defendant no.2 withdrew from the contest. For this purpose, reliance is placed on the letter dated 16.04.2006 (Annexure P1). It is averred that plaintiff no. 1 in these circumstances was appointed as a President of JUH for the remaining term which expired in December, 2006.

2.3 It is also averred that in so far as 2007-08 was concerned, pursuant to an election process initiated in February, 2007 which was completed in July, 2007 after giving due regard to the provisions of Section 51(a) of the JUH Constitution; plaintiff no.1 was declared the President. In support of this submission, reliance is placed on the letter dated 19.07.2007 evidently issued by defendant no.2 as well as a press release of even date i.e., 19.07.2007 being Annexures P2 and P3.

2.4 It is the stand of plaintiff no.1 that at the relevant time defendant no.2 was the General Secretary of JUH. It has also been averred that on taking over as the President, plaintiff no.1, as mandated under the provisions of Section 46 of the JUH Constitution, proceeded to nominate new members to the working committee of JUH. This, plaintiff no.1 has averred, was achieved at the meeting held on 06.03.2008 whereby, 16 persons were nominated to the working committee. It is further the stand of plaintiff no.1 that since a new working committee was positioned on 06.03.2008 in consonance with the provisions of Section 45 of the JUH Constitution the earlier working committee stood

dissolved. This led to a dispute, according to the plaintiffs, as the members of the erstwhile working committee did not approve of the actions of plaintiff no.1.

3. There is, at this juncture, a dispute as to the situation which actually obtained on the ground. Let me, therefore, also refer to the stand of defendant No.1. Defendant no.1 has taken a stand in his written statement that on 06.03.2008 a resolution was passed by the working committee whereby, plaintiff no.1 who, according to defendant no.1, was the "Interim President" was removed and instead, defendant no.1 was appointed as an Interim President in his place. (See paragraph 21 of the written statement filed by defendant no.1) It is the stand of defendant no.1 that at the said meeting of the working committee a decision was taken to convene a meeting of the Central Managing Committee/General Body on 26.03.2008.

3.1 Being aggrieved, plaintiff no.1 through one of his supporters, who was a member of the Central Managing Committee, instituted a suit in Lucknow. In response thereto, defendant nos. 1 and 2 filed a writ petition before the Lucknow Bench of the High Court of Allahabad. It is the stand of defendant no.1 that the said writ petition came to be admitted on 20.03.2008, while the notice to the respondents in the writ petition was made returnable in the second week of April, 2008. However, in the interregnum, the High Court of Allahabad directed that the trial court shall defer the suit till last week of April, 2008. It appears that the writ petitioners sought a clarification from the High Court of Allahabad as to whether the meeting of the Central Managing Committee/General Body could be convened on the date already fixed i.e., 26.03.2008. It is averred that clarification as sought was granted albeit on 26.03.2008, the date fixed for meeting. Since it was not possible to convene the meeting on the same day i.e., 26.03.2008, the meeting of the Central Managing Committee was postponed to 05.04.2008.

3.2 In the meanwhile, perhaps due to intercession of well meaning persons Maulana Marghoobur Rahman, Rector of the Darul-Uloom-Deoband, who was also the member

of the JUH at the relevant point in time, offered to resolve the dispute between the two warring groups.

3.3 It would be relevant to note at this stage that plaintiff No.1 had moved this court on 20.03.2008 by way of a suit bearing no. 519/2008. Amongst various reliefs sought one relief pertained to seeking declaration that the meeting dated 06.03.2008 conducted by defendant no.1, whereby a motion of no confidence was allegedly moved against plaintiff no.1, be declared void. The said suit, according to defendant no.1, came to be listed on 24.03.2008 when, it was adjourned to 24.04.2008. It is the say of defendant no.1 that the adjournment was accorded by the Court on an '***oral'*** request made on behalf of plaintiff no.1 that ***'arbitration proceedings'*** were in progress, and that he would like to await the decision of the Arbitrator.

3.4 It is, however, important to note that defendant no.1 has clearly averred in paragraph 29 of its written statement that the court in its order of 24.03.2008 has made no such observation. This averment being relevant, I propose to extract it hereinbelow for the sake of convenience:-

> ***"29. That the plaintiffs had filed a suit in the Delhi High Court on 20.03.2008 which was listed for hearing on 24.03.2008. On 24.03.2008 the plaintiff no.1 sought adjournment on the oral plea, through not recorded by the Court, that there was an arbitration proceeding in the progress and he would like to wait for the decision of the arbitrator. The case was adjourned to 24.04.2008."***

3.5 Only to complete the narration of facts a second suit being CS(OS) No. 685/2008 came to be filed in the name of JUH through plaintiff no.1. The Court initially granted an order in favour of the plaintiffs therein vide its order dated 11.04.2008. However, by an order dated 25.08.2008 the plaint was returned. In this suit as well, amongst other reliefs, a declaration was sought that the meeting dated 06.03.2008, as also meeting dated 05.04.2008, conducted by defendant no. 1, whereby allegedly a no confidence motion was brought against plaintiff no.2 (plaintiff no.1 herein) was void ab initio. This Court, however, by its order dated 25.08.2008 was pleased to reject the plaint. The operative part of the order reads as follows:-

> ***"28. In this case, the plaintiff's application, IA 6338/2008, under Order 1 Rule 8 generally mentions about the District Committees having authorized him to file the suit on behalf of Jamat. However, the membership of those committees remains undisclosed; the membership of the Jamat, whose interests are allegedly affected due to the impugned resolution, has not been shown. According to the suit, the Jamat has a membership base of one crore. These lacunae are, in the opinion of this court, incurable.***
> ***For the above reasons, it is held that the suit is not maintainable. IA 6047/08 and IA 6348/2008 accordingly deserve to succeed and are allowed. The plaint is accordingly rejected; the interim orders are vacated. All pending applications are disposed of accordingly. In the circumstances of this case, parties shall bear their costs."***

4. It is in the background of the aforesaid broad facts that the present suit was moved by plaintiff no.1 on 19.09.2008.

4.1 In the present suit as well, the plaintiffs have laid a challenge, amongst others, to the proceedings of 06.03.2008 and 05.04.2008 conducted by defendant Nos.1 and 2 to which reference has been made hereinabove.

5. With this backdrop Shri Anoop G. Choudhary, the learned senior counsel for defendant No.1/applicant has made the following submissions in support of the relief sought in the captioned application:-

(i) there is an arbitration agreement obtaining between the defendants and the plaintiffs. A reference in this regard was made to the averments made by defendant No.1 in paragraph 29 of his written statement; the relevant portion of which has been extracted hereinabove;

(ii) the failure on the part of the plaintiffs to specifically deal with the said averments, that whether or not there is in existence an arbitration agreement — should necessarily lead to an admission that there is an arbitration agreement in existence;

(iii) apart from the above, the contents of letter dated 24.03.2008, evidently written by plaintiff No.1 to Maulana Marghoobur Rahman, the Rector [which is appended as Annexure D-1 to the rejoinder filed on

behalf of plaintiffs to the application of defendant No.1 under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC')] would demonstrate existence of an arbitration agreement. The submission being that in the English translation of the said letter there is a reference to the fact that Maulana Marghoobur Rahman, was engaged in an arbitration with the parties;

(iv) the letter dated 29.03.2008 (appended at page 104 of the documents filed by the defendants) written by Maulana Marghoobur Rahman, to defendant no.2 would show that an interim award had been made by Maulana Marghoobur Rahman which was binding on the plaintiffs; and,

(v) lastly, since letter dated 24.03.2008 was accompanied by a statement of claim a vague denial of the averments made in the aforementioned paragraph 29 of the written statement would necessarily lead to the conclusion in terms of the provisions of Section 7(c) of the Arbitration Act and Order 8 Rule 6 of CPC that an arbitration agreement obtained between the parties.

6. As against this, Mr.Harish Malhotra along with Mr.Kailash Vasudev, Senior Advocates made the following submissions:-

(i) in order to trigger the provisions of Section 8 of the Arbitration Act, the pre-requisite contained therein have to be fulfilled:

(a) there ought to be an arbitration agreement in existence;

(b) the party seeking reference should file a copy of the agreement in original; and

(c) lastly, the party seeking reference is required to file an application under Section 8 read with Section 5 of the Arbitration Act prior to the institution of the first statement on the substance of the dispute.

In other words it was their submission that what had been agreed to between the two warring groups was a conciliation under the aegis of Maulana Marghoobur Rahman.

(ii) Furthermore, it was the contention of the learned senior counsels that defendant No.1/applicant was required to move the captioned application in the first instance even before defendant no. 1 had filed his first statement on the substance of the dispute, that is, the written statement. It was contended that in the present case there cannot be a dispute that written statement was filed by defendant No.1/applicant prior to moving the instant application.

(iii) In so far as defendant No.1/applicant's reliance on the letter dated 24.03.2008 was concerned, of which much had been made out based on the translation filed by the plaintiffs, they submitted that it was not accurate. It was their contention that original letter was written in Urdu. In the original letter Maulana Marghoobur Rahman was referred to as the "Hakam". The literal meaning of which is a 'Mediator'; and not arbitrator as erroneously referred to in the translation filed by them. It was their contention that defendant no. 1/applicant could not impose an arbitration where there was none agreed to between the parties, based on an erroneous translation. The learned counsels in order to buttress their submission referred to the letter dated 29.03.2008, which the learned senior counsel for defendant no. 1/ applicant, had alluded to as an interim award. My attention was drawn to the fact that the so called interim award made a reference to conciliation proceedings and not arbitration.

7. I have heard the learned counsel for the parties. I am of the view that the present application is not maintainable for the reasons given hereinbelow:

7.1 The fact of the matter is that somewhere in March, 2008, Maulana Marghoobur Rahman, interceded in the disputes obtaining between the plaintiffs and the defendants. This led to exchange of correspondence on the subject between Maulana Marghoobur

Rahman and plaintiff no. 1. One such letter, on which reliance is placed by defendant no.1, is dated 24.03.2008. There is no dispute that the following lines in the translated version of the letter dated 24.03.2008 filed by the plaintiffs find a mention:-

> "But fact of the matter is that I am the first party who had welcomed your effort to Arbitrate (Musalahat). Since you are honest, intelligent and trustworthy, therefore I have complete faith in you. But I do not trust this aforesaid committee constituted by you. Therefore, I once again request you to assume the role of arbitrator (Hakam)."

7.2 A perusal of the extract would show that in the translation filed by the plaintiffs there is a reference to the word '***arbitrate***' and the expression '***role of arbitrator***'. It is not disputed that the Urdu expression used is 'Hakam'. The literal meaning of the word 'Hakam' is "an umpire, arbitrator, mediator" (See "***A Dictionary of Urdu Classical Hindi and English by John T. Platts Edition 2000 A.D. at page 480***). To shed light on the matter vide order dated 07.01.2010, I directed that an official translation of letter dated 24.03.2008 be carried out. The relevant extract from the official translation read as follows:

> "As a matter of fact, it was I who had welcomed your effort to arrive at a ***compromise*** (Musalahat) because you are honest, intelligent and trustworthy, therefore I have full trust on you as before but not in the aforesaid committee. Therefore, I once again request you to assume the role of a ***Mediator*** (Hakam). "

7.3 A perusal of the letter would show that there is much to be said as to whether parties were ***ad-idem*** as to the exact status and the role which was conferred on Maulana Marghoobur Rahman. A perusal of the letter dated 24.03.2008 would show that because of the sterling reputation of Maulana Marghoobur Rahman, plaintiff no. 1 wanted him to intercede in the matter and towards this end suggested that he should take the assistance of, a retired Judge in whom both the parties have faith as also, representatives of both parties. On the other hand, defendant No.1/applicant has taken the stand that the plaintiffs had agreed to the appointment of Maulana Marghoobur

Rahman, as an arbitrator to adjudicate upon the disputes which had arisen between the parties.

7.4 In my view, an arbitration agreement is no different from any other agreement. For an agreement to be valid in the eyes of law the parties should have arrived at a consensus on which they were ad-idem. If one party had in their mind an adjudicatory process which was different than what the other party had in mind, then the parties had not arrived at a ***consensus ad-idem***. In my view the agreement, even if arrived at between the parties, would fail on this short ground. A holistic reading of the letter suggests that parties were not ad-idem as indicated above as to the methodology to be followed for resolution of the disputes between them. There is no gainsaying that Section 7 of the Arbitration Act provides for an arbitration agreement being culled out based on correspondence exchanged between the parties; as all that the law requires is the existence of an agreement in writing; it need not necessarily be signed. However, as observed by me above in view of lack of consensus on what was agreed to between parties – the provisions of Sections 8 and 5 of the Arbitration Act, cannot be invoked.

8. The other submissions with regard to the applicability of the provisions of Sections 5 and 8 of the Arbitration Act need not really be commented upon by me.

8.1 Since, extensive submissions were made by the learned senior counsel, Mr.Anoop G.Chaudhary with regard to the fact that the arbitration agreement must necessarily be construed as having been in existence between the parties based on the fact that an objection was taken in paragraph 29 of the written statement which was not specifically denied in the replication filed by the plaintiff. According to me this submission is not quite accurate for the following short reasons: A perusal of the plaint would show that not in one place but at several places the plaintiff has repeatedly alluded to the fact that they had agreed to a mediation. In this context see averments made in paragraphs 9(xxv), 9(xxviii)(c), 9(xxviii) (e) and 9(xxviii)(h) of the plaint .

Prolixity in submission is not the mandate of the provisions of Order 8 Rule 6 of the CPC. Pleadings should be able to demonstrate with clarity the stand of each party. Lack of repetition cannot be construed as an admission. In these circumstances, to suggest that the plaintiffs admitted that there was an arbitration agreement obtaining between them is completely inaccurate. In paragraph 29 of the preliminary submissions in the written statement of defendant No.1/applicant, reference is made to the proceedings of the court held on 24.03.2008 in suit No.519/2008, when evidently the matter was adjourned on an '***oral***' submission made by plaintiff No.1 that matter should be stood over on account of pendency of the arbitration proceedings. The plaintiff No.1 in his replication to the averments made in paragraph 29 has stated as follows:-

> "29. Contents of para 29 are matter of record. The plaintiff No.1 would, however, crave leave of this Hon'ble Court to rely upon the orders passed by this Hon'ble court."

8.2 In my view, on reading the plaint and the replication together, it is quite clear, in so far as, the plaintiffs are concerned that the role and the status conferred on Maulana Marghoobur Rahman, was that of a mediator. Plaintiff No.1, therefore, in the replication stated that the record of proceedings dated 24.03.2008 in suit No.519/2008 would be relied upon. As is evident from the stand taken in the written statement, defendant No.1 also says that there was only an oral submission. It is well settled that the record of the court is final unless corrected by an appropriate proceedings taken out in the concerned court. No such proceedings were admittedly taken out. The replication, in my view, not even by implication takes a contrary stand. This submission is thus untenable, and is accordingly rejected.

9. It was next contended that the letter dated 29.03.2008 written by Maulana Marghoobur Rahman, to defendant no.2 constitutes an interim award. The letter being both short as also crucial, for the sake of convenience, I propose to extract the same:

> "I received your letter. I am deeply pained to learn that these unfortunate actions have been taken before pronouncement of decision by the conciliator. As per your writing, I do not want to weaken one party to the dispute. You are allowed to commence a meeting of the Central Managing Committee of Jamiat Ulama-i-Hind but out side of Masjid Abdun Nabi. I hope you will abide by my instructions."

9.1 A bare reading of the letter would show that it alludes to 'conciliation' and not 'arbitration'.

10. The submission of the plaintiffs/non-applicants that the captioned application ought to be rejected solely on the ground that it was not moved prior to filing of the written statement is in my view untenable. The reason being: Section 8 of the Arbitration Act does not use the expression 'written statement'; it refers to ***'first statement on the substance of the dispute'*** of the case. In the instant case the objection to the suit is admittedly taken in the form of a preliminary objection contained in the written statement prior to the averments made in the very same written statement on the substance of the dispute. Therefore, to say that the captioned application ought to be rejected on this ground alone does not find favour with me. See observations in ***Aspire Investments Private Ltd vs M/s Nexgen Edusolutions Priavte Ltd I.A. No. 5332/2009 dated 20.11.2009***.

12. In view of the discussions above I am not inclined to entertain the application. The application is accordingly dismissed.

RAJIV SHAKDHER, J

JANUARY 22, 2010
mb/da