

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

Date of Reserve 11th January 2008
Date of judgment: 5th February, 2008

+ **OMP No. 265/2003**

% 05.02.2008

M/s. Supreme Structure Pvt. Ltd. ...Petitioner
Through: Mr. Dinesh Kr. Gupta, Advocate

Versus

M/s Harbans Singh & Anr. ...Respondents
Through: Mr. Harish Malhotra, Sr. Adv. with Mr. Rajender Aggarwal,
Advocates for R-1.

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT:

1. This petition under Section 34 of the Arbitration & Conciliation Act, 1996 (for short "the Act") has been preferred by the petitioner against an award dated 12th April 2003 whereby the Arbitral Tribunal upheld the claim of the respondent of Rs.7,85,858/- with interest @ 24% from 9th November 2001 to 15th October 2002 amounting to Rs.76,204/- and further interest @ 24% from 16th October 2002 till realization. Another claim of Rs.3,40,000/- for loss of profit was also upheld. Thus total claim of Rs.13,27,62.78 plus interest on Rs.7,85,852/- @ 24% from 16.10.2002 was allowed and the award was passed against the petitioner.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner purchased Swarn Cinema from its erstwhile owner Mr. Sarabjit Singh through valid documents. Mr. Sarabjit Singh, owner of firm M/s Swarn Cinema, was having an agreement/contract with M/s Harbans Singh and Company under which M/s Harbans Singh and Company used to supply movies for running on Swarn Cinema on sharing basis. M/s Harbans Singh and Company and Mr. Sarabjit Singh, owner of Swarn Cinema, both were members of Motion Pictures Association and as per the rules of Motion Pictures Association, all disputes between its members

were to be referred to the Arbitral Tribunal, one Arbitrator to be appointed by each party and the two Arbitrators jointly to appoint the Third Arbitrator. M/s Harbans Singh and Company raised a dispute that its agreement with M/s Swarn Cinema was breached by the petitioner/purchaser as the petitioner had not allowed movies of respondent to run on the cinema. Petitioner had also not paid the old dues when the Cinema was owned by Mr. Sarabjit Singh. Respondent No.1 referred the matter to Motion Pictures Association for Arbitration and made M/s Swarn Cinema and the present petitioner as parties.

3. It is to be noted that M/s Swarn Cinema was a proprietorship firm of Mr. Sarabjit Singh and he was running the cinema in the name of this proprietorship firm. The agreement for supplying movies was between M/s Swarn Cinema and M/s Harbans Singh and Company. After the matter was taken to the Motion Picture Association, a notice was served upon petitioner and Mr. Sarabjit Singh both for appointing an Arbitrator. It was informed that M/s Harbans Singh and Company had appointed its own arbitrator and the respondent i.e. M/s Swarn Cinema and petitioner should appoint their side of arbitrator. Mr. Sarabjit Singh appeared before the Arbitrator and told that he had sold the cinema to petitioner and he abstained himself from the proceedings. The petitioner raised objection that there was no arbitration agreement between the petitioner and M/s Harbans Singh and Company. There was no privity of contract between petitioner and M/s Harbans Singh and Company at any point of time. The Arbitrator had no jurisdiction to entertain the dispute. When the firm M/s Swarn Cinema and the present petitioner did not propose the name of any of the arbitrators, the Motion Pictures Association of its own nominated Mr. Surinder Paul as arbitrator to act on behalf of petitioner herein. Before the Arbitral Tribunal was appointed, M/s Harbans Singh and Company had also filed an application under Section 9 of the Act before this Court. However, during pendency of the proceedings under Section 9 of the Act, the applicant M/s Harbans Singh and Company was asked to file original

written arbitration agreement between claimant and the respondent, but instead of filing the arbitral agreement, the application itself was withdrawn.

4. Even before the Tribunal, the petitioner raised the objections about the authority of tribunal to proceed with the matter. The very first objection being that there was no agreement between claimant and the petitioner. The other issue raised was that Arbitral Tribunal was not properly constituted and the third objection was that the Arbitral Tribunal has no jurisdiction to give the award fourth being that there was no privity of contract between claimant and respondent. All these objections were considered by the Arbitral Tribunal and dismissed/rejected. The Arbitral Tribunal held that the petitioner, who purchased the cinema from its previous owner Mr. Sarabjit Singh, was bound by the agreement entered between M/s Swarn Cinema and M/s Harbans Singh and Company regarding movies since the petitioner purchased a running cinema and he had stepped into the shoes of Mr. Sarabjit Singh. It was also stated that Picture "Ashoka" running at the time of purchase of Cinema, was allowed to be run by the petitioner also at Cinema. This picture was running under the agreement between Mr. Sarabjit Singh and M/s Harbans Singh and Company and the fact that this picture was allowed to run by petitioner shows that the petitioner had stepped into the shoes of M/s Swarn Cinema and he was bound by the agreement. The Tribunal also held that since the petitioner and Claimant M/s Harbans Singh and Company both were members of Association, as per the rules of the Motion Pictures Association, a company duly incorporated under the Companies Act, both were found by the Memorandum and Article of Association of the Motion Pictures Association and the rule containing Arbitration was binding on both of them.

5. After holding that the petitioner was bound by the Contract with M/s Harbans Singh and Company and holding that the petitioner was also bound by the Arbitration Agreement between M/s Harbans Singh and Mr.

Sarabjit Singh, the Arbitral Tribunal gave the impugned award upholding the claim of the claimant/respondent.

6. The award has been challenged before this Court on inter alia twin grounds; one that there was no Arbitration agreement between parties, second that the Arbitral Tribunal was constituted in an illegal manner.

7. It is undisputed fact that M/s Swarn Cinema is a proprietorship firm of Mr. Sarabjit Singh and there was an agreement between M/s Swarn Cinema and claimant M/s Harbans Singh and Company in respect of supply of movies for exhibiting at the Cinema. It is also undisputed that the petitioner was not a party to this agreement.

8. The proprietorship firm is not a legal entity and it is known by its proprietor and acts through proprietor. Thus the agreement between M/s Swarn Cinema and claimant was in fact an agreement between Mr. Sarabjit Singh (proprietor of M/s Swarn Cinema) and M/s Harbans Singh and Company. The present petitioner had nothing to do with the agreement. Merely because the present petitioner purchased Swarn Cinema complex , he did not become a party to the agreement entered into between Mr. Sarabjit Singh and M/s Harbans Singh and Company. If, at the time of purchase of Cinema by the present petitioner, there was an agreement between the present petitioner and previous owner that petitioner would be bound by previous contract then and only then, the petitioner would have been bound by the contract between M/s Swarn Cinema and the third parties. In absence of any agreement between the present petitioner and M/s Swarn Cinema in respect of the petitioner being bound by the contract entered into with third parties, the petitioner was not bound by any such agreement which Mr. Sarabjit Singh had entered with third parties.

9. The present petitioner had purchased Swarn Cinema complex with all its structure, fittings and fixtures in a running condition on payment of a valid consideration by a duly registered conveyance deed. The liability of the petitioner in respect of the property is only after the date of

purchase if there are any taxes, cess, dues qua the property before date of sale, the liability is of previous owner, liability of the petitioner cannot be in respect of the previous owner's dues in respect of contracts entered by previous owner with third parties concerning maintenance or providing of movies, security services, house keeping services etc. The petitioner, after purchasing the Cinema had a right not to continue with any of the previous contracts and to enter into fresh contracts in respect of running the cinema. A person who purchases a proprietorship firm or a cinema hall or any running business from its proprietor, does not step into the shoes of previous owner for the liabilities of earlier period unless it is specifically provided in the conveyance deed. He is liable only for liabilities mentioned in the contract/conveyance deed of the purchase. I, therefore, consider that the petitioner cannot be said to have stepped into the shoes of Mr. Sarabjit Singh for any intents and purposes, much less for the purpose of bearing the liabilities of M/s Swarn Cinema, a firm being run by the previous owner. The petitioner had not inherited the Cinema without payment or consideration, that it would inherit the liabilities attached with the Cinema also. The previous owner had charged the market value from the present petitioner for the Cinema Complex and all previous liabilities ought to be paid by the previous owner and not by the present petitioner. Neither the present petitioner can be bound by the contract between the previous owner and the third parties unless it is specifically mentioned in the conveyance deed.

10. I consider that the Arbitral Tribunal's decision that the petitioner was bound by arbitration agreement between previous owner and M/s Harbans Singh and Company because the petitioner stepped into the shoes of the Mr. Sarabjit Singh is wrong. Neither the petitioner can be held bound by the arbitration agreement because the petitioner subsequently became the member of Motion Pictures Association. Merely by becoming member of the Motion Picture Association, the petitioner does not incur liabilities of the previous contract. By becoming a member

of Motion Pictures Association, the petitioner in fact bound itself to the future contracts between its suppliers of movies and he could not have incurred liabilities of the previous owner by just becoming member of Motion Pictures Association. The Arbitration Tribunal went wrong in holding that by becoming member of Motion Pictures Association, the petitioner became bound by the contract between the previous owner and the third party.

11. In ***M/s Sahani Enterprises v. New Filmistan Cinema 1986(1) Arbitration Law Reporter 411***, this Court held as under:

"4. The conclusion that there was no valid agreement was also reached by the learned Single Judge on the evidence of Shri. K.K. Jalan, one of the Directors of Filmistan Exhibitors Pvt. Ltd., who stated that there was no such person employed by the Company as Dhani Ram. There was also a reference to some other letters in which the appellant themselves had described Dhani Ram belonging to M/s Movies Pvt. Ltd. It was thus concluded that the agreement was not concluded between the appellant and M/s Filmistan Exhibitors Pvt. Ltd. As the case of the appellant was that the film had been exhibited and as such it was sought to be urged that there must have been some agreement on the basis of which that picture was screened. As no alternative agreement had been put forward, it is urged that the picture 'Aaina' must have been screened under the agreement under which an arbitration is sought. We must say that this is not the real point to be decided in an arbitration. There must first be an arbitration agreement and there must be a dispute between the parties to that arbitration agreement. What is being sought to be referred is a dispute between M/s Sahni Enterprises and M/s Filmistan Exhibitors Pvt. Ltd. on the basis of an agreement signed by M/s Sahni Enterprises and Shri Dhani Ram for Filmistan Cinema. There is no dispute arising on this agreement because M/s Filmistan Exhibitors Pvt. Ltd. is not a party to this agreement. This is

why this matter cannot be referred to arbitration and the appellant must be left to go to the ordinary civil court. As the matter cannot be referred to arbitration, the appeal is dismissed but we leave the parties to bear their own costs."

12. It is apparent that merely because the film Ashoka was continued screening by the petitioner, that does not bring into existence of an arbitration agreement between the petitioner and the respondent.

13. In ***Shakuntla Silk Mills vs. Swadeshi Cotton Mills 1985(3) Arbitration Law Reporter 405***, the Court held that if the defendants, were not a party to the Arbitration Agreement, they were not bound by the Arbitration Clause. The Court also observed that despite the fact that defendants 1 to 4 were primarily liable to pay the price but since they were not a party to the arbitration clause the disputes qua them cannot be referred to the arbitrator.

14. The procedure which has been followed by Motion Pictures Association in appointment of the Arbitrator is also illegal. The arbitration agreement, even if considered valid provided that one Arbitrator shall be appointed by each party. In the present case, previous owner of the Cinema was party to the agreement. He appeared before the Arbitrator appointed by the claimant stated that he had nothing to do with the Cinema and went away without even contesting the claim. Since no arbitrator was appointed by the present petitioner on the plea that there was no arbitration agreement, the Motion Picture Association itself appointed an arbitrator on behalf of the petitioner and the two arbitrators appointed a third arbitrator. It is stated by the Arbitral Tribunal in the award that Motion Pictures Association appointed the second arbitrator on behalf of the petitioner in terms of Article 63 of the Article of Association and such an appointment was a valid appointment. Where the arbitration agreement provides that one arbitrator has to be appointed by each party, if one of the parties failed to appoint an arbitrator, there is no alternative before the claimant but to approach the Court for appointment of a sole Arbitrator and the claimant or Association cannot itself appoint

the second arbitrator on behalf of the petitioner. The rules of an association cannot override the statutory provisions of law.

12. The appointment of an Arbitrator is a matter of agreement between the parties. The agreement cannot be unilaterally altered either by the claimant or by Motion Picture Association and the Motion Pictures Association cannot usurp the right of appointment of an arbitrator on behalf of the non cooperating party, more so when the claim of the petitioner was that there was no arbitration agreement between the petitioner and the claimant. I consider that the appointment of an Arbitrator in the present case was contrary to law as well as contrary to the alleged agreement.

15. The rules and regulations of the Motion Pictures Association cannot take the precedence over the statutory provisions of law. There has to be a written arbitration agreement between the parties in order to invoke the arbitration clause and the arbitrator must be appointed in terms agreement and not in terms of the policies and articles of Motion Pictures Association.

16. In view of my foregoing discussion, I hold that the award passed by the Arbitral Tribunal suffers from inherent defect. There was no agreement between the petitioner and the claimant but still the Arbitral Tribunal proceeded to decide the dispute. I consider that the constitution of the Tribunal itself was not valid. The award passed by the Arbitral Tribunal has no validity or sanctity under law. Resultantly, the petition is allowed and the award passed by the Arbitral Tribunal is hereby set aside.

February 05, 2008
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SHIV NARAYAN DHINGRA J.