

* HIGH COURT OF DELHI : NEW DELHI

FAO. No.59/2002 & Cross Objections.

% Judgment reserved on: 9th November, 2009

Judgment delivered on: 17th November, 2009

Shri Kailash Nath Agarwal,
Son of Shri Hanuman Prasad Agarwal,
Proprietor, M/S Ashish Textiles Corporation,
1454, Gali Chipian, Maliwada,
Nai Sarak, Delhi-110 006

....Appellant

Through: Mr. Pramod B. Agarwala with Mr. Abhishek
Baid, Adv.

Versus

1. M/s Aaren Exports,
A partnership firm,
Registered under the Partnership Act, 1932,
Having its Principal Place of business at
B-17, Focal Point Extn.,
Jullundur, Punjab.
2. Shri Subhash Aggarwal,
Partner
M/s Aaren Exports,
B-17, Focal Point Extn.,
Jullundur, Punjab.
3. Shri Mohinder Pal Goel,
Arbitrator,
Delhi Hindustani Mercantile Association (Regd.)
1210/16, Chandni Chowk, Delhi-110006.
4. Delhi Hindustani Mercantile Association (Regd.)
1210/16, Chandni Chowk,
Delhi-110006.

....Respondents.

Through: Dr. Anurag Kumar with Mr.Umesh Mishra,
Adv.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

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

V.B.Gupta, J.

Appellant has filed this appeal against judgment dated 1st November, 2001, passed by Additional District Judge, Delhi, vide which application under Section 34 of the Arbitration and Conciliation Act, 1996 (for short as Act) filed by respondents no. 1 and 2 was allowed and award passed by the Arbitrator was set aside.

2. Brief facts are that appellant is member of Delhi Hindustani Mercantile Association (Regd.). It sold cloth on credit to respondents no. 1 and 2 and raised bills. Since respondents made only part payment and balance amount was to be paid, appellant applied to respondent no. 4 for appointment of an Arbitrator. Respondent no. 3 was appointed as Arbitrator. On 20th April, 1998, Arbitrator passed the award. Thereafter, respondent no.1 filed an application under Section 34 of Act for setting aside the award.

3. It is contended by learned counsel for appellant that there was arbitration agreement between the parties and the same was printed on the invoices itself. Trial court misinterpreted Section 7 of the Act. A perusal of sub section 3 and 4 of Section 7 of the Act would indicate that arbitration agreement has to be in writing. Assuming that

arbitration agreement in the present case was not signed by the parties, however, documents on record disclose that invoices containing the arbitration clause were duly received and accepted by the respondents.

4. It is further contended that respondents also made part payment against the invoices by writing various letters. The acceptance of the invoices, receipt of the good based on the same and part payment made by respondents vide various letters signed by it, clearly indicate acceptance of the arbitration agreement by respondents.

5. Lastly, it is contended that respondents had appeared before the Arbitrator and also filed their defence but later on absented.

6. In support, learned counsel for appellants relied upon following judgments;

- (i) ***Shakti Bhog Foods Limited Vs. Kola Shipping Limited;***
(2009)2 Supreme Court Cases 134;
- (ii) ***Chaudhry Hukam Chand And Sons Vs. Sagar Silk And Sarees And Others;*** 22 (1982) Delhi Law Times 196 and
- (iii) ***Sohan Lal Vs. Krishan Chander Ramesh Chander And Brothers*** 24 (1983) Delhi Law Times 305.

7. On the other hand, it is contended by learned counsel for respondents that respondents were not served with any notice of appointment of Arbitrator. Respondents moved two separate applications before the Arbitrator, one for inspection of file and seeking time to file written statement and another for production of documents relied upon by the appellant. However, Arbitrator passed the arbitral award, leaving those applications of respondents as undecided. Thus, no opportunity was given to the respondents to present their case before the Arbitrator.

8. Another contention is that as per Section 21 of the Act, arbitration proceedings commence on the date on which a notice for referring the disputes to arbitration is received. In the present case, no such notice or request was ever received by respondents from the appellant for referring the alleged disputes for arbitration.

9. Further, the impugned award does not disclose whether any evidence was led by the appellant in respect of the alleged documents. The conclusion drawn by the Arbitrator is not based upon appreciation of any evidence. The Arbitrator has not assigned any reason in the impugned award which could justify his conclusion.

10. Another contention is that no evidence in relation to the supply of alleged goods to the respondents was led by the appellant before the Arbitrator. No receipt was ever produced by the appellant before the Arbitrator which could be suggestive of the fact that goods in question were transported/supplied or received by the respondents. In support, learned counsel for respondents referred the following judgments;

- (i) *Atmaram Vinayak Kirtikar Vs. Lalji Lakhamshi*, AIR 1940 Bombay 158.
- (ii) *Milkfood Ltd. Vs. M/s GMC Ice Cream (P) Ltd*, AIR 2004 Supreme Court 3145.
- (iii) *Union of India And Another Vs. British India Corporation Ltd. And Others*; (2003) 9 Supreme Court Cases 505
- (iv) *Oil & Natural Gas Corporation Ltd. Vs. M/s Amtek Geophysical Pvt. Ltd* 115(2004) Delhi Law Times 624

11. Section 34 of the Act, which is relevant for deciding the controversy between the parties, reads as under:-

“34. Application for setting aside arbitral award-(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub Section (3)

(2) An arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation- Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal;

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application with a further period of thirty days, but not thereafter.

(4) On receipt of an application under subsection (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

12. Supreme Court in *Grid Corporation of Orissa Ltd.& Anr. V . Balasore Technical School*, JT 1999(2) SC 480 observed;

“The award of the Arbitrator is ordinarily final and conclusive as long as the Arbitrator has acted within its authority and according to the

principle of fair play. An Arbitrator's adjudication is generally considered binding between the parties for he is a Tribunal selected by the parties and the power of the court to set aside the award is restricted to cases set out in Section 30 of the Arbitration Act. It is not open to the Court to speculate where no reasons are given by the Arbitrator, as to what impelled him to arrive at his conclusion. If the dispute is within the scope of the arbitration clause it is no part of the province of the court to enter into the merits of the dispute. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere with such an award."

13. Similarly, in *Markfed Vanaspati and Allied Industries v. Union of India*, **JT 2007 (11) SC 141**, Supreme Court observed that scope of interference is extremely limited in a non speaking award. It held;

"15. The decided cases of this Court demonstrate that this Court has consistently taken the view that scope of interference in a non-speaking award is extremely limited. The Court cannot probe into the mental process of the Arbitrator. The court should endeavour to support a non-speaking arbitration award provided it adhered to the parties agreement and was not invalidated due to Arbitrator's misconduct.

16. Russell on Arbitration 19th Edition at Pages 110-111 described the entire genesis of arbitration as under;

An Arbitrator is neither more or less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him: he is not a mere investigator but a person before whom material is placed by the parties, being either or both of evidence and

submissions: he gives a decision in accordance with his duty to hold the scales fairly between the disputants in accordance with some recognized system of law and rules of natural justice. He is private in so far as (1) he is chosen and paid by the disputants (2) he does not sit in public (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy (4) so far as the law allows he is set up to the exclusion of the State Courts (5) his authority and powers are only whatsoever he is given by the disputants agreement (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of those powers must not be contrary to the proper law of the contract or the public policy of England bearing in mind that the paramount public policy is that freedom of contract is not lightly to be inferred with.”

14. In the light of above principles, it is to be seen;

- (i) Whether there was an arbitration agreement between the parties or not;
- (ii) Whether arbitrator has acted according to the principle of fair play;
- (iii) Whether award goes beyond the references;
- (iv) Whether claim is time barred and
- (v) Whether arbitrator has misconducted.

15. First and foremost question is as to whether there was an arbitration agreement between the parties or not. Case of appellant is that he has sold cloth on credit to respondent nos. 1 and 2 and one of the terms, printed on the bills was as follows:

“5. All disputes regarding this bill will be settled through Delhi Hindustani Mercantile Association’s Judge or Tribunal”.

16. In this regard, trial court observed;

“15. Section 16 of Arbitration and Conciliation Act, empowers the arbitrator to rule on his own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. Sub-section 5 of Section 16 further provides that whether the arbitrator takes a decision rejecting the plea of non-existence of arbitration agreement, he shall continue with the arbitral proceedings and make an award. Sub-section 6 of Section 16 enables the aggrieved party to challenge the finding of the arbitrator in this regard by way of an application under Section 34 of the Act.

16. In the present case, the objector made an application on 19-02-98 before the arbitrator and contended that there was neither any agreement nor any consent for arbitration. He prayed that the claimant be directed to produce the alleged agreement containing the arbitration clause. The claimant replied to the application and stated that the terms and conditions printed on the bills contained a valid arbitration clause. The claimant also pointed out that the original bills were in the custody of the objection.

17. The arbitrator framed a specific issue in the following terms:-

“Whether there is an arbitration agreement between the plaintiff and the defendant?”

18. The arbitrator dealt with the above issue and observed that it was clearly mentioned on the

bills that all the disputes in respect of the bills would be decided by Delhi Hindustani Mercantile Association. Replying on the terms and conditions printed on the bills, the arbitrator decided the issue in favour of the claimant. The question is whether the finding of the arbitrator was correct in law. As I have noted above, sub-section 6 of Section 16 of the Act enables the aggrieved party to challenge such finding before the court. Section 34 (2) (A) (II) also lays down that an arbitral award may be set aside by the court if the arbitration agreement is not valid under law.

17. It further observed;

“21. Thus, while there was no requirement of law under the said Act of 1940 that the arbitration agreement must be signed by the parties, the requirement of the law under the new Act is that the arbitration clause must be contained in document signed by the parties. If the arbitration agreement or the documents containing the arbitration agreement or the documents containing the arbitration clause does not bear signature of any party, it will not be treated as a written agreement under the new Act and it would not be binding on the party who has not signed it. In the present case, none of the invoices bears signature of the objector. Therefore, the terms printed on the invoices cannot constitute a written agreement between the parties within the meaning of Section 7 of Arbitration and Conciliation Act, 1996. Accordingly, I hold that there was no valid arbitration agreement between the parties. Consequently the proceedings held by the arbitrator were without jurisdiction. Issued is decided accordingly.

18. As per appellant's case, original invoices are with respondents. In their counter claim, respondents admit that there was business dealing between the parties. However, plea of respondents is that none of the bill/invoices were signed by them.

19. On the one hand, respondents admit that they had business dealing with appellant, on the other, respondents states that they had not received any goods. If respondents had not received the goods, then in what connection they made various payments to the appellant. As per cross-objections, it is the case of respondents, that following three drafts were issued by them after purchasing the *goods in question* on credit basis:

- (i) Demand Draft No. 213064 dated 27-10-94 for Rs.40,000/-
- (ii) Demand Draft No. 213252 dated 8-11-94 for Rs.50,000/-
- (iii) Demand Draft No. 213794 dated 10-12-94 for Rs.50,000/-

In cross-objections it is also stated;

“that the respondent nos. 1 and 2 gave the aforesaid drafts to the petitioner in relation to full and final settlement of *some other previous transactions*”

20. What were those previous transactions? Respondents have not given any details of those “previous transactions” either to the arbitrator or to the trial court nor mentioned it in the cross-objections.

21. Section 7 of the Act defines as to what constitutes arbitration agreement. It reads as under:

“7. Arbitration agreement-

(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract”.

22. In *Shakti Bhog Food Limited Vs. Kola Shipping Limited (Supra)*, it was observed by Supreme Court;

“We would want to reiterate that as far as the provision of Section 7 of the Act is concerned, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement and furthermore an arbitration is considered to be in writing if it is contained in a document signed by the parties or in a exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. So from the provisions of Section 7, it is clear that a charter party agreement need not be in writing signed by both parties and this could as well be made out from the acts of the parties to the agreement by way of their exchange of letters and information through fax, e-mails, etc.”

23. In the case in hand, admittedly there had been business transactions between the parties. Respondents have not placed any document with regard to these transactions, On the other hand, appellant has placed various invoices/bills before the Arbitrator, which contained the clause with regard to the arbitration.

24. Clause 5 mentioned on various invoices/bills is an arbitration agreement between the parties. As respondents have themselves admitted in their cross-objections that they had the business dealing with the appellant and have made various payments to the appellant by demand draft after purchasing the goods in question on credit basis. Since respondents admits the purchase of goods in question, it was their duty to have placed on record the invoices/bill through which they had purchased the goods from the appellant. In the absence of any document being placed by the respondents before the Arbitrator, it is apparently clear that respondents received the goods only through the invoices/bills which were filed by the appellant before the Arbitrator. Thus, there was an arbitration agreement between the parties as per clause 5 of the invoice.

25. Second question to be considered is as to whether any notice of arbitration proceedings was given to the respondents or not, and whether respondents had any knowledge of the arbitration proceedings or not?

26. In this regard, trial court observed;

“On perusal of the record of arbitration proceedings, I find that the objector did appear before the arbitrator but did not raise any objection regarding non-compliance of the requirements of Section 21 of the Act. Therefore, the objector shall be deemed to have waived the objection regarding non-service of notice contemplated by Section 21. Non-service of notice was at best an irregularity which was

duly cured by the appearance of objector and his failure to raise any objection in that regard. Issues is decided accordingly”.

27. Even otherwise as per arbitration proceedings, respondents have appeared before the Arbitrator. They also moved an application dated 19th February, 1998, before the Arbitrator for “Production of documents under inherent powers”. In this application, it stated;

“ That the above reference is pending before this office for adjudication and the respondents received the notice from this office and after receiving the same came to about the reference of some disputes for arbitration to yours good self.

That there is no agreement neither any consent was given by respondents for arbitration, with the petitioners. The petitioner may be directed to produce the alleged agreement containing alleged clause of Arbitration.

That petitioner may also be directed to produce the Agreement/ Memorandum of understanding with Delhi Hindustani mercantile Association (Regd.) on the strength of which the dispute under reference has been assigned for Arbitration.

That both the documents are the primary documents and without perusal of these documents it is neither feasible nor possible to file the return submission effectively. Moreover these documents are very much necessary for the proper adjudication of the matter”.

29. Appellant in reply to this application stated;

“ The respondent has not come with clean hands with the present application and he has

concealed true and material facts as the respondent purchased goods from claimant vide bills in question bearing Nos. 2298, dt. 8.12.1994 for Rs. 98228/-, Bill No. 2286, dt. 11.11.94. for Rs. 32886-60 and Bill No. 2285 dt. 10.11.94 for Rs. 31387/- under the terms & conditions of bills in question which contain a valid arbitration agreement at item no. 5 that all the disputes regarding this will be settled through Delhi Hindustani Mercantile Association's Judge or Tribunal. As such this Hon'ble Association has the jurisdiction to entertain this reference. It is further submitted that the aforesaid three original bills are in custody, power, possession and control of respondent. Thus the question of supplying the same to respondent does not arise at all."

30. Respondents thereafter, never appeared before the Arbitrator, which is apparent from the record of the arbitral proceedings. As per proceedings conducted before the arbitrator, on 22nd January, 1998 Suresh Kumar Sharma, Sales Executive of respondent's firm appeared and gave a statement that Mr. Subhash Aggarwal (respondent no.2 and partner of respondent no. 1) who looks after all the accounts, is out of India and one week time was sought. Arbitrator adjourned the matter for 5th February, 1998. Thereafter, on 19th February, 1998, Mr. Vinay, Advocate for respondent nos. 1 and 2 appeared before Arbitrator and matter was adjourned to 19th March, 1998. On that day, adjournment was sought by way of telegram on behalf of respondents. Thereafter, none appeared on behalf of respondents before the arbitrator. The Arbitrator after considering the claim of the appellant, passed the award in question.

31. Under these circumstances, it cannot be said that respondents no. 1 and 2 had no knowledge of the arbitration proceedings and arbitrator did not act according to the principles of fair play.

32. With regard to the plea of respondents that claim is time barred, this plea was never taken before the Arbitrator. For the first time, point of Limitation has been raised in these proceedings. Respondents have admitted in their cross-objections about business transaction with the appellant. They also admit having made payment through drafts for “some other previous transactions”. But no detail of “some other previous transactions” and its period has been mentioned. Thus, there is no force in the plea of respondents that claim is time barred. Accordingly, various judgments cited by learned counsel for respondents, on point of Limitation are not applicable to the facts of the present case.

33. In view of above discussion, the impugned judgment cannot be sustained and same is aside.

34. Cross-objections filed by respondents no. 1 and 2 are not maintainable and same are dismissed.

35. Consequently, the appeal stands allowed.

36. Parties shall bear their own costs.

37. Trial court record be sent back.

November 17, 2009
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V.B.Gupta, J.