

* HIGH COURT OF DELHI : NEW DELHI

FAO No.298/2007 & CM No. 10296/07

% Judgment reserved on: 5th October, 2009

Judgment delivered on: 27th October, 2009

1. Smt. Anita Mittal
Sole Proprietor of
M/s. Amog Creations,
A -357, Meera Bagh,
Outer Ring Road,
Paschim Vihar,
New Delhi.
2. M/s Amog Creations
Through its Sole Proprietor
Smt. Anita Mittal
A -357, Meera Bagh,
Outer Ring Road,
Paschim Vihar,
New Delhi.

....Appellants

Through: Mr. V.K. Sharma, Adv.

Versus

1. M/s Pal Singh Kartar Singh,
814, Sangam Market, Katra Neel,
Chandani Chowk,
Delhi-110006.
2. Shri Rajender Gupta
Sole Arbitrator
Delhi Hindustani Mercantile Association (Regd.)
Chandani Chowk,
Delhi-110006.

...Respondents
Through: Mr. R. G. Srivastava
with Mr. D. K. Goswami, Advs.

Coram:
HON'BLE MR. JUSTICE V.B. GUPTA

- | | |
|--|-----|
| 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.

Present appeal has been filed by appellants under Section 37 of Arbitration and Conciliation Act, 1996 (for short as 'Act'), against judgment dated 28th May, 2007 passed by Additional District Judge, Delhi, vide which objections preferred by appellants against ex parte award dated 12th September, 2002, were dismissed.

2. Brief facts are that respondent no.1-claimant, filed claim against appellants before Arbitrator. Arbitrator sent summons to both parties. Claimant

appeared before Arbitrator, whereas, appellants did not appear. The Arbitrator proceeded ex parte against appellants. After considering the claim of claimant, Arbitrator passed an award in his favour, on 12th September, 2002.

3. It is contended by learned counsel for appellants that as per Arbitration clause, both parties had to jointly approach Delhi Hindustani Mercantile Association or the Arbitral Tribunal, appointed by them for settlement in case of any disputes regarding payment etc. In the present case, respondent no. 1 approached Delhi Hindustani Mercantile Association on its own, without any request from the appellants. This unilateral act of respondent no.1 in approaching the Association, was contrary to the arbitration clause and not tenable. Appointment of Arbitrator was thus contrary to the provisions and spirit of Arbitration clause.

4. Other contention is that no notice of Arbitration proceedings was actually served upon the appellants.

As per various notices sent at different addresses allegedly pertaining to that of appellants, it was clear that appellants were not available at those addresses. Thus there was no proper intimation with regard to the Arbitration proceedings to the appellants. The impugned judgment is thus liable to be set aside.

5. In support of its contentions, learned counsel for appellant relied upon a decision of Supreme Court; ***Municipal Corporation, Jabalpur and others Vs. M/s Rajesh Construction Co.*** AIR 2007, SC 2069 and a decision of this Court; FAO 112/05, decided on 18th April, 2007.

6. On the other hand, it is contended by learned counsel for respondent no. 1, that Arbitrator had sent notices to appellants on the addresses given by appellants. As per arbitration clause, both parties had the right to approach for appointment of the Arbitrator. It is nowhere stated that both parties had to jointly approach for appointment of the Arbitrator.

Hence, there is no ambiguity in the impugned judgment.

7. Arbitration clause mentioned on the bills reads as under:-

“In case of any dispute between you and us regarding payment etc. or any other business matter we both shall approach the Delhi Hindustani Mercantile Association Delhi or the arbitrator or tribunal appointed by them for settlement by arbitration according to their rules & the decision given by them shall be binding on both of us & we shall have no objection to it.”

8. As per this clause, in case of any dispute between the parties, both of them had to approach the Delhi Hindustani Mercantile Association, Delhi or Arbitrator or tribunal appointed by them for settlement by Arbitration.

9. Admittedly, in the present case, appellants never approached Delhi Hindustani Mercantile Association or Arbitrator. It is respondent no. 1 who alone had approached Delhi Hindustani Mercantile Association

for appointment of the Arbitrator. Thus, there is clear violation of above clause of the Arbitration.

10. In ***Municipal Corporation, Jabalpur (Supra)***, it was observed that;

“It has to be kept in mind that it is always duty of the Court to construe the arbitration agreement in a manner so as to uphold the same. Therefore, we must hold that the High Court ought not to have appointed an arbitrator in a manner, which was inconsistent with the arbitration agreement”.

11. So, the appointment of Arbitrator only at the instance of respondent no. 1 alone, is contrary to the arbitration agreement. The matter could have been referred to Arbitrator, only after both parties i.e appellants as well as respondent no.1, had approached Delhi Hindustani Mercantile Association or Arbitrator for settlement of their disputes, which is not so, in the present case. On this ground alone, the award of arbitrator is liable to be set aside.

12. Now, coming to the service of notices sent by the Arbitrator to the appellants, trial court has laid all the

emphasis on service report dated 4th April, 2002 which states “intimation delivered”. This notice was admittedly sent at “A-353, Meera Bagh, Outer Ring Road, Paschim Vihar, New Delhi”. As per appellants’ case they have no concern with these premises.

13. During the course of arguments, learned counsel for respondent no. 1 fairly conceded that there is nothing on record to show that “A-353, Meera Bagh, Outer Ring Road, Paschim Vihar, New Delhi” was the recorded address, available with respondent no. 1 or the Arbitrator.

14. As per appellants case their correct address is “A-357, Meera Bagh, Outer Ring Road, Paschim Vihar, New Delhi”. Admittedly, no notice was ever sent by Arbitrator at “A-357, Meera Bagh, Outer Ring Road, Paschim Vihar, New Delhi”. None of the notices sent at other addresses, namely that of “Budh Vihar and Krishan Vihar” was ever received by the appellants. Various reports on the notices sent at the addresses of

“Budh Vihar and Krishan Vihar” states; “left” and “no such firm at the given address”.

15. Since there has been no valid and proper service on the appellants, under these circumstances, there was no occasion for the trial court to reach at the conclusions that, service of notices sent by Arbitrator upon the appellants is complete. Appellants must have been given due opportunity by the Arbitrator and they should not suffer unheard.

16. It has been observed by Supreme Court in ***Kailash Rani Dang Vs. Rakesh Bala Aneja and Anr., AIR 2009, Supreme Court, 1662;***

“The mere entry of refusal of acceptance by the postman upon the registered envelop should not be given so much importance as to shut the entire available avenues for the redressal of his grievance of a party which has been quite adversely effected by it.”

17. Since, there was no intimation to the appellants with regard to the Arbitration proceedings as no notices have been sent by the Arbitrator to the

appellants at their given address, the impugned judgment of the trial court under these circumstances cannot be sustained and the same is hereby set aside.

CM NO. 10296/2007

18. On 1st August, 2007, when the appeal was listed for admission, the appellant was directed to deposit entire decretal amount in the shape of FDR on year to year basis with the Registrar General of this Court. The amount so deposited by the appellant was ordered not to be paid to anyone, till further orders. As present appeal has been allowed, amount lying deposited in the fixed deposit along with up to date interest, be paid back to the appellants only after expiry of period of limitation of appeal. This application thus stands disposed of.

19. Under the circumstances, appeal filed by the appellants stands allowed.

20. Parties shall bear their own costs.

21. Trial court record be sent back forthwith.

October 27, 2009
bhatti

V.B.GUPTA, J.