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IN THE HIGH COURT OF DELHI AT NEW DELHI

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20th January, 2010.

1. **OMP No. 242/2002**

A.P. NIRMAN

...Petitioner

Through: Mr. Siddharth Yadav, Advocate.

VERSUS

SINDHU TRADE LINKS

....Respondent

Through:

2. **OMP No.170/2005**

A.P. NIRMAN LIMITED

Through: Mr. Siddharth Yadav, Advocate.

VERSUS

M/S. SINDHU TRADE LINKS LTD. & ANOTHER

Through:

3. **OMP No. 169/2005**

A.P. NIRMAN LIMITED

Through: Mr. Siddharth Yadav, Advocate.

VERSUS

M/S. SINDHU TRADE LINKS LTD. & ANOTHER

Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

1. The facts of all these cases are similar, therefore, for the sake of convenience, I am referring to the facts of O.M.P. No.242/02.
2. By virtue of these objections under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as Act) the petitioner challenges the Award dated 30.12.2000 passed by the sole Arbitrator.
3. The disputes arose between the parties, i.e the petitioner and the respondent, on account of the petitioner having taken a loan for purchase of machinery from the respondent and not repaying the same. On account of non-payment of the dues by the present petitioner to the respondent, the respondent invoked the Arbitration Clause under the Agreement and as per which clause the Arbitrator was to be appointed by the respondent. The Award is an ex-parte Award. The petitioner did not appear in the arbitration proceedings and nor did it file any statement of defence and also no one was present on its behalf to

argue and press the application filed under Section 13 of the Act challenging the jurisdiction of the Arbitrator.

4. Mr. Siddharth Yadav, on behalf of the petitioner has stressed the following contentions:

(i) The Arbitrator was bound to decide petitioner's application under Section 13 and hold that the Arbitrator had no jurisdiction inasmuch as for invoking the Arbitration Clause, a prior notice of invocation was required and no such notice of the invocation was given to the petitioner before the Arbitrator was appointed.

(ii) The petitioner did not have sufficient time for appearing before the Arbitrator to contest the proceedings.

(iii) Reliance is placed on a decision of Madras High Court reported as ***Aoki India Limited and Anr. Vs. Mira International and Anr. 2006(3) Arb. LR 503*** to contend that the application under Section 13 ought to have been decided by the Arbitrator before proceeding to decide the merits of the matter.

(iv) That the Arbitrator could not have held the proceedings in Delhi because the entire cause of action had accrued in Korba in Chhattisgarh.

5. The jurisdiction of this Court while hearing objections under Section 34 of the Act is limited. The Court interferes with an Award only in case the Award is illegal, that is the same is against the law of the land or the same is violative of the contractual provisions or that it is in any manner perverse which shocks the judicial conscience. In case the Award is an ex-parte

Award, where a person after admitted service does not appear, the scope of challenge to the Award, in my opinion, becomes further restricted.

6. In my opinion, the objections which have been raised by the present petitioner in this Court are neither maintainable nor can they be sustained. Only objections going to the root of the matter with regard to the jurisdiction of the Arbitrator can be looked into and not other issues of merits.

7. So far as the objection that the Arbitrator has wrongly decided the application under Section 13, because no notice of invocation of Arbitration was given to the petitioner, I find that this objection cannot be accepted. Firstly this objection is factually incorrect because a legal notice dated 3.7.2000 was issued invoking Arbitration and which fact is duly noted in the Award and secondly because under Section 11(2) of the Arbitration and Conciliation Act, 1996, the Arbitrator has been appointed as per the agreed procedure. The agreed procedure is one which is contained in the Arbitration Agreement. It is not unknown, that one of the parties, especially the borrower of a loan, agrees that the Arbitrator is appointed by the other party namely the lender. In this case, the Arbitrator has been appointed by the respondent/lender and which the lender was entitled to do under the Agreement. Therefore, in my opinion, there cannot be any challenge laid to the procedure relying on Section 11(2) inasmuch as in terms of the contract, it was the respondent who was entitled to appoint an Arbitrator and who has so done.

8. On the issue that application under Section 13 ought to have been considered before passing the Award, once again I find that this objection has no factual basis. The order sheet dated 25.9.2000 shows that this application was considered and rejected i.e. the Arbitrator has decided this application before proceeding in the matter. In fact the evidence has been led only thereafter. Also the fact of the matter is that any person who seeks a relief by virtue of an application is bound to necessarily appear, and argue the application before the forum, in which the application is filed before a quarrel is made as to wrongly deciding of the same. A Court or a forum including an Arbitrator, is not bound to decide an application unless this application is pressed by the party filing the application by appearing before the Arbitrator or the said forum and arguing the said application. Admittedly, this application under Section 13 filed by the petitioner was not pursued inasmuch as no one appeared on behalf of the present petitioner to argue such an application. Even in spite of this, the Arbitrator has decided this application by holding that the contents of the application are not proved. No doubt this is a cryptic finding, but, no fault can be found with the same because as is already noted by me above, a legal notice invoking arbitration was in fact sent. Accordingly, in my opinion, no challenge can be laid to the Award, on the ground that the Arbitrator should have first decided the application under Section 13(2) and only thereafter should have proceeded to pass the Award, because not only this argument is factually

incorrect but no one was present on behalf of the petitioner to press this application when the same was dismissed on 25.9.2000.

9. The next argument which was addressed by the counsel for the petitioner was on the basis of the judgment of Madras High Court in *Aoki India Limited's case (supra)*. Each case has to be read in the context of the facts of the said case. I put a query to the counsel for the petitioner that in the case decided by the Madras High Court was it the position that the application under Section 13 was simply filed and thereafter no one appeared to pursue the application like in the present case. The counsel for the petitioner conceded that that was not the position in the case of *Aoki India Limited's case (supra)*. The said judgment of *Aoki India Limited's case (supra)* therefore has no application to the facts of the case. Another reason for non-applicability of the *Aoki India's* case is because in the said case the application under Section 13 was only dealt with in the Award and not earlier whereas in the present case the application was decided on 25.9.2000 i.e. before the Award was made on 30.10.2000 and before the evidence was led by the respondent herein. Other related issues have already been considered by me in paras 8 above.

10. I would like to reiterate that challenge to an ex-parte Award becomes more restricted in an objection filed under Section 34, dealing with in any case in the first place, there is very limited jurisdiction of the Court. If the petitioner was vigilant and in fact wanted to pursue its rights, there was nothing which prevented it from appearing before the Arbitrator. No doubt

comparatively short dates appears to have been given by the Arbitrator but in these days of advanced transportation system, it is not possible to accept the stand of the counsel for the petitioner that the petitioner could not have appeared before the Arbitrator. Especially the one date which I may note is of 7.9.2000 on which it is alleged that the same was a very short date from the earlier date being 16.8.2000, but, in my opinion three weeks is a sufficiently long period. I may note that even before this date the present petitioner was admittedly served and in fact he had filed an application under Section 13 before the Arbitrator. It is not necessary that person who is to appear before an Arbitrator has only to appear on a specific date. If the petitioner was really vigilant, he ought to have personally appeared before the Arbitrator on any one of the many dates of hearing, and, not only that, there is no written statement of defence filed by the present petitioner before the Arbitrator.

11. The final argument urged was that as the entire cause of action has accrued in Korba and thus Arbitration proceedings could not be held in Delhi. This argument is misconceived as in law the venue of Arbitration can be at any place and it need not be at the place where whole or part of cause of action arises. In any case the argument cannot be accepted also because of two further reasons. Firstly the petition itself has invoked the jurisdiction of the courts of Delhi for these objections and secondly the respondent had urged in the Arbitration proceedings that the agreement of loan was executed at Delhi and

the petitioner did not appear in the arbitration proceedings to prove the case otherwise.

12. In my opinion, therefore, the objection petitions are misconceived and are dismissed with costs of Rs.25,000/- for each of the three petitions.

VALMIKI J.MEHTA, J

January 20, 2010

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