

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

+ **FAO 455/2002**

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Reserved on : 09.03.2011

Date of Decision : 21.03.2011

DELHI STATE INDUST.DEVP.CORPN. Appellant
Through Ms. Renuka Arora, Advocate

VERSUS

DELHI YOUNG ENTREP. ASSOC. & ORS. Respondents
Through Ms. Anju Lal, Ms. Shalu Lal,
Advocates for R-1.

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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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 |

: **MOOL CHAND GARG,J**

1. The sole arbitrator Shri Omesh Saigal, Chairman-cum-Managing Director, Delhi State Industrial Development Corporation, passed the following award:

“And whereas on perusal of the file it was seen that both the parties agreed to had file their evidence by way of affidavit and accordingly, I fixed the matter of evidence on 31.07.1992, notice for which was sent to parties under Registered A.D. cover and U.P.C. on 31.07.1992 representative for the claimant was present but none appeared for the respondent. In the interest of justice I decide to give one more opportunity to the respondent to adduce their evidence. Accordingly, matter was adjourned to 14.08.1992 was sent to respondents and their counsel under Regd. Ad. cover and UPC with directions that in case they failed to appear on 14.08.1992, representative for claimant was present but none appeared for respondent again. Since in spite of notice none appeared for the respondent, it amounted to willful absence and accordingly, matter was proceeded ex-parte against them. Since claimants had already filed their pleadings and evidence by way of affidavit,

matter was reserved for award.

After going through the pleadings filed by both the parties as also the evidence by way of affidavit of the claimants already on record, the oral submission etc. I decide as under:

The claim will be allowed.

(1)	Outstanding on account of Sale of exercise book	₹1,06,648.34
(2)	Outstanding on account of Balance papers lying The respondent	<u>₹ 31,694.12</u> <u>₹ 1,38,342.46</u>

Further the Corporation is also allowed interest @ 10% on the amount due from 16.11.1980 till the amount is paid by the respondent to the claimant Corporation.

Accordingly, an award of ₹ 1,38,342.46 (Rupees one lakh thirty eight thousand three hundred forty two and forty six paise) only along with interest @ 10% from 16.11.80 till the amount is paid to the claimant Corporation, is made in favour of the claimant Corporation and against the Respondent.

Given this 19th day of August, 1992

Sd/-
(Omesh Saigal)
Sole arbitrator

2. The respondents filed objections to the aforesaid award. Primarily, they were aggrieved of the award given by the arbitrator regarding the claim of the appellant claiming outstanding amount from sale of exercise books to the tune of ₹ 1,06,648.34 which was awarded by the arbitrator against them along with interest @10 % w.e.f. 16.11.1980.

3. Before the Addl. District Judge it was contended on behalf of the respondent that:

“The arbitrator has misconducted himself, there were no valid and binding agreement subsisting between the parties wherein Arbitration clause was provided. Similarly on merits it was alleged that although the agreement was entered into for manufacturing of exercise books, but that agreement was not covering all the disputes hence the reference was bad in law and other legal objections regarding pecuniary jurisdiction and the conduct of the Arbitrator were taken.”

4. The Addl. District Judge framed the following issues:

- (i) Whether the disputes referred to the Ld. Arbitrator were covered under the Arbitration Clause contained in the agreement dated 05.12.1997?
- (ii) Whether the Ld. Arbitrator had misconducted himself by not granting sufficient opportunity to the present respondents to plead their case before him?
- (iii) Whether Respondents No. 2 to 5 have been wrongly impleaded in their individual capacity?

5. The Addl. District Judge while holding that there was an arbitration Clause between the parties allowed the objections of the respondent to the extent that the claim towards sale of exercise book could not have been awarded by the arbitrator because it was not covered by the arbitration Clause. The relevant observation made by the Addl. District Judge are as follows:

“The second head under which the claimant/ Corporation has claimed the amount is in respect of the sale of exercise books. The claimant had claimed ₹ 1,06,648.34p, which is stated to be the amount due from the respondents on account of sale of exercise books. No other agreement containing the arbitration clause except the agreement dated 05.12.1974, has been brought to my knowledge. This agreement dated 05.12.1974 is only in respect of manufacturing of exercise books. It is nowhere provided that the respondents would also sell the exercise books. If there is no clause dealing with the sale of exercise books, then there cannot be any reference under the Arbitration Clause for claiming the amount due from the respondents under this head. The reference regarding claim of the arrears of sale of exercise books is without jurisdiction and accordingly the Ld. Arbitrator had no jurisdiction decide the said dispute and the award is void to the said extent. It was held in the matter of Sohan Nayyar Vs. Lt. Governor of Delhi AIR 1983 Delhi 287 (301) that where award in respect of the item is invalid and the same is severable then the award can be set aside in respect of that claim only.

This issue is accordingly decide that the valid reference was made to the ld. Arbitrator in respect of the excess un-utilised stock of paper weighing 10.026 M.t. but the reference and the award regarding recovery of ₹ 1,06,648.34p is bad and void. The claim of the petitioner/ claimant to the extent of ₹ 31,694.12p is maintainable and award is liable to be upheld only to the extent.”

6. It is this portion of the order passed by the Addl. District Judge which has been assailed by the appellant before us by filing this appeal under Section 37 of the Arbitration & Conciliation Act 1996.

7. According to the appellants:

“(i) The Ld. Additional District Judge erred in holding that the agreement between the parties does not mention of the sale of exercise books by the respondents. The agreement entered between the parties clearly provided for sale of exercise books and that the same fact has not been controverted before the Arbitrator.

(ii) The appellant had filed an affidavit before the Arbitrator along with statement of account showing that an amount of ₹ 1,06,648.34 was due and payable in respect of supply of exercise books. Relevant part of the affidavit is as under:

“That besides claimant/ corporation also supplied to the respondents No.1 exercise books for sale and as per statement of account a sum of ₹ 1,06,648.34p was due from the respondent as on 15.11.1980 and the respondent has failed to account for the said amount in spite of repeated requests and demands as well as reminders. The account in respect of the supply of exercise books and the amount due is shown in annexure ‘B’ which is true and correct annexure according to the account books of the claimant/corporation and same is Ex.P5.

That the respondent has failed to account for the aforesaid amount and the goods; therefore a notice dated 19.10.1979 was issued to the respondent but in spite of the said notice respondent failed to account for the same to the claimant/ corporation. As such claimant/ corporation was left with no other alternative but to refer the matter to our goodself for deciding the dispute in accordance with the terms & conditions of the agreement dated 5.12.1974 entered into between the claimant/ corporation and the respondent association, copy of which is ex.P6. As on 15.11.1980 the respondent Association was liable to pay ₹ 1,06,648.34p on account of standing amount of exercise books and ₹ 31,694.12p on account of balance papers. Thus totaling as well as interest @ 10% per annum on the said amount with future interest and claimant/ corporation is entitled to the award of the said amount”. Copy of the affidavit filed is annexed as Annexure A-6 to this petition.”

8. The appellant also relied upon the agreement entered into between the parties which is available at page 39 of the paper book and asserts that the following portion of the agreement leaves no room for doubt that the responsibility of the Business Associates was that of the sale of exercise books and therefore they were required to account for such sale. The relevant portion is reproduced hereunder:

“AND WHEREAS the Corporation has purchased 50 merits tonnes of white paper for manufacturing exercise books for school students of Delhi.

AND WHEREAS the Business Associate has agreed to manufacture exercise books at the rates and specifications given in schedule or as may be given afterwards after execution of this agreement.

AND WHEREAS the business Associate has represented for manufacturing exercise books and the Business Associate shall supply exercise books as per specifications, rates, deserist and quantity shown in schedule “A” within the acquired the specified in the schedule. The Business Associate also undertakes that in case there is a delay or non-delivery of goods of in case the goods supplied are found by the corporation of sub-standard quality or defective in any manner, whatsoever, the Business Associate shall be required to take back the rejected goods at his own cost and risk and indemnify the Corporation to such less as may be incurred by the Corporation. The certificate of the Managing Director of the Corporation in this behalf shall be final.

The Business Associate shall alone be responsible and liable to complete the order by making timely supplies as indicated in schedule “A”.

The Business Associate shall bear eartage for obtaining consign months of paper from the Corporation godown and will carry the goods at his own risk or to such please as he may like fit.

The Corporation shall have the right to reduce the order to such extent as it may decide and also to terminate the agreement without assigning any reasons thereto.

The Corporation shall have the right to increase the order by 50% and the business Associate shall be bound to supply the same with the same specifications, description and rates within the time as may be fixed therefore.

The Business Associate understands that he shall keep the papers and exercise books free of any legal proceedings, attachment seizure or sale and in case such event happens, it shall be lawful for the Corporation to be reimbursed and claim damages which amount shall be double of the loss suffered thereby.

That the Business Associate shall supply samples of each exercise book as may be needed by the corporation before undertaking the job.

That the Business Associate undertakes that he shall use

the paper supplied only for the manufacture of exercise books served under this agreement. In case these papers are not utilized, the Business Associate shall be liable to damages which amount shall be double of the value of the papers not so utilized.

That the Corporation has agreed to allow one and a half present as wastage on the total quantity of the supplied papers.

That all disputes and differences arising between the parties shall be decided by the Managing Director of the Corporation whose decision shall be final and binding on the Business Associate.

That the cost of preparation and execution of this deed of agreement shall be borne and paid by the Business Associate.”

9. It is submitted on behalf of the appellant that a bare reading of this agreement clarifies that the responsibilities of business associates was not only to manufacture the exercise books of the paper supplied but also included sale of the paper book and as such any dispute with regard to the sale of the paper book was covered by the arbitration Clause. To that extent it is submitted that the decision given by the Addl. District Judge cannot be sustained. However, it is the case of the respondent that the interpretation as put forward by the appellant cannot be given to the agreement in question. The question of covering sale of exercise books was absolutely not the subject matter of the agreement between the parties. This is apparent from the reading of the agreement itself and therefore, the Additional District Judge was justified in allowing the objection with respect to the price of the sale towards exercise books as claimed by the appellant. It is submitted that in fact the claim is even otherwise time barred.

10. At this juncture, a perusal of the claim petition filed by the appellant, available on page No. 247 to 257 of the Arbitrator's record would be appropriate, which shows that the argument advanced by the Ld. Counsel for the appellant is incorrect. In para No. 5 thereof it is stated by them:

“5. That the claimant corporation also supplied to the respondents exercise books for sale and as per the account books of the claimant a sum of ₹ 1,06,648.34 is still due from the respondents on account of the sale of exercise

books which has not been remitted by the respondents in spite of repeated demands, letters and reminders and personal efforts and visits of the claimant. A statement of account showing the balance amount of ₹ 1,06,648.34 is Annexure “b”.

11. From the said para it is clear that claimant-corporation had supplied books for sale to respondent No.1 and the claim in that respect was based on basis of accounts and was not covered under the agreement dated 5.12.1974. It was not claimants’ case that the respondent No.1 had sold the exercise books manufactured by it from the paper supplied by the claimant for manufacture of exercise books. In Annexure “b” filed by the claimant it is stated as follows:-

(Being the amount of sale of exercise books through DYEA in the year 76-77)

(Being the amount of sale of exercise books through DYEA in the year 77-78)

12. The respondent No.1 had filed its reply/ counter claim (available on page No. 137 to 149 of the Arbitrator’s record). In the reply the respondent No.1 had raised several preliminary objections. In para 4 (page 141) it was specifically averred that the claims of the claimant were time barred. The claims of claimant pertained to various transactions which did not form part of the subject matter of the agreement dated 5.12.1974 (page 141). Again in para No. 5 (page 147) it was reiterated that “the exercise books do not form part of the agreement under which the present reference has been made by the claimant.” In para No. 6 (page 147) it was stated that “At any rate the disputes, if any, alleged to have been arisen cannot be referred to the arbitration for want of an agreement to that effect and the same is outside the ambit and scope of the agreement dated 5.12.1974.

13. That thereafter, the respondent No.1 had filed an application dated 24.04.1990 (page 93-97) for production of original documents on which claim of claimant was based. The said application was allowed by Ld. Arbitrator on 24.04.1990. However, the claimant failed to produce the original documents for the reasons best known to them.

14. That the claimant corporation filed affidavit of Shri Shiv Kumar Gupta, Secretary of claimant corporation (pages 105-109) in evidence.

In para No. 4 of the affidavit it was stated that claimant corporation also supplied to the respondent No.1 exercise books for sale and as per statement of account a sum of ₹ 1,06,648.34p was due from the respondent as on 15.11.1980. To prove the said fact no original record was neither any material nor any evidence before the Ld. Arbitrator to allow the claim of claimant for a sum of ₹ 1,06,648.34 along with interest on account of sale of exercise books.

15. It is the submissions of the respondents that the claim with respect to sale of exercise books, thus, was an independent issue and it was not covered under the Agreement dated 5.12.1974. The remedy available with the claimant was to file a separate suit for recovery.

16. That the respondent No.1 filed its objections u/s 30 and 33 of the Arbitration Act (available on page No. 70-76 of the paper book filed by the appellant). The respondent No.1 besides reiterating the objections raised before the Ld. Arbitrator, raised several other objections. In paras No. 12 and 13 of the objections (page 73) it was stated that the Ld. Arbitrator had entered a time barred claim pertaining to the year 1974 and also that the Ld. Arbitrator had entertained the claim of the plaintiff pertaining to the various transactions which do not form part of and/or were the subject matter of Agreement dated 15.12.1974. The agreement dated 15.12.1974 pertains to the manufacture and supply of exercise books out of the 50 metric tones of white paper purchased by the plaintiff. This agreement does not take within its ambit the transactions which do not form part of Schedule "A" to the Agreement. Thus, entertaining the claim of DSIDC amount to misconduct on their part.

17. It may also be observed that though time was granted to both appellant and respondent to file written synopsis, however the appellant has not filed any written synopsis while respondent has filed his written synopsis.

18. I have heard the parties and have also perused the records including the award as well the impugned order. The claim in respect of sale of exercise books was an independent issue and related to arrears of sale of exercise books, the set supplied was not covered under the Agreement dated 05.12.1974 and was outside the jurisdiction of the

Arbitrator. Thus, there is no infirmity in the judgment delivered by the learned ADJ.

19. In such circumstances the appeal cannot be sustained and is dismissed with no orders as to costs.

20. TCR be sent back along with a copy of this order.

MOOL CHAND GARG,J

MARCH 21, 2011

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