

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**FAO No.2301 of 2015 (O&M)
Date of Decision: May 07, 2015**

LS Industries Limited

.. Appellant

vs.

Xerox India Limited and another

.. Respondents

CORAM: HON'BLE MR. JUSTICE KULDIP SINGH

Present: Mr. Deepak Sabherwal, Advocate for the appellant.
Mr. Naresh Markanda, Senior Advocate with
Ms. Kavita Markanda, Advocate
for the Caveator-respondent No.1.

- 1. Whether Reporters of Local Newspapers may be allowed to see the judgment ?*
- 2. To be referred to the Reporters or not ?*
- 3. Whether the judgment should be reported in the Digest?*

Kuldip Singh J.

The appellant has filed this appeal against the judgment dated 21.01.2015 passed by learned Addl. District Judge, Chandigarh, whereby the objection petition filed by appellant under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'the Arbitration Act') against the ex parte Award dated 12.04.2012 passed by Shri R.N. Yadav, Sole Arbitrator, was dismissed.

The case of the appellant before the learned Addl. District Judge, Chandigarh was that they had entered into an agreement of sale dated 30.12.2009 with eSys Information Technologies Pvt. Ltd., Chandigarh (in short 'eSys'), whereas respondent induced the petitioner to invest in eSys. No agreement was entered between the

petitioner and respondent No.1. The agreement dated 01.09.2010 produced by respondent No.1, was forged and fabricated. The petitioner challenged the said agreement by filing of a civil suit titled as ***“L.S. Industries vs Xerox India Ltd. & anr.”*** in the Civil Court at Chandigarh on 21.12.2011, wherein the validity of the agreement dated 01.09.2010 was challenged.

The Civil Court vide order dated 13.02.2012 sought the report of Cental Forensic Science Laboratory (CFSL), Chandigarh regarding the genuineness of the signatures of Birender Kumar, an employee of the appellant-company, who is stated to have signed on behalf of the appellant. On the direction of the Court, the Arbitrator was informed on 05.01.2012. The appellant-Company requested the Arbitrator not to proceed the arbitration proceedings since the civil suit is pending. However, the Arbitrator passed the Award on 12.04.2012 without waiting for the result of the civil proceedings. It is stated that the said Award is illegal and arbitrary. Learned Addl. District Judge, Chandigarh dismissed the said objections.

I have heard learned counsel for the parties and have also carefully gone through the case file.

A perusal of the file shows that as per the respondent-Company, the appellant had entered into an agreement dated 01.09.2010 for promotion and sale of the product of the respondent-company. Certain claims were made by the respondent-company before the Arbitrator. It is stated that the present appellant received goods to the value of ₹4,52,19,423/- (rupees four crore fifty two lac

nineteen thousand four hundred twenty three only). ₹1, 02,81,429/- (rupees one crore two lac eighty one thousand four twenty nine only) are also recoverable as interest as on 03.09.2011 with further interest @ 1.5% per month in terms of the agreement. The amount has not been paid by the present appellant. On 17.10.2011, the respondent-Company issued a termination-cum-demand notice calling upon the present appellant to pay the total outstanding amount. The notice was replied but the amount was not paid. Therefore, Clause 33 of the Agreement was invoked by the respondent-company and the present appellant was ordered to appoint the Arbitrator. As per the arbitration Award, the notice dated 08.12.2011 of the arbitration proceedings was issued for preliminary hearing on 06.01.2012 and later on registered notice was issued on 15.12.2011 but the appellant did not appear and was proceeded against ex parte. Accordingly, the ex parte Award was passed.

The facts and circumstances as coming out from the appeal file as well as arbitration file, are that there is an agreement on 01.09.2010 between the parties, which was stated to be signed by Birender Kumar, an employee of the present appellant. The appellant denied the signatures of the said employee. It is also not disputed that said Birender Kumar had left the service and now he is not traceable. It also comes out that the respondent-Company issued a notice on 17.10.2011 for calling upon the present appellant to make the payment. The appellant sent the reply to the said notice on 20.10.2011 and the rejoinder to the reply was sent by the

respondent-Company on 15.11.2011. Vide letter dated 28.11.2011 (Annexure P-3). The respondent-Company invoked the arbitration clause and on 02.12.2011, the Sole Arbitrator was appointed by respondent No.1. The Arbitrator entered into reference on 08.12.2011. In the meanwhile, the present appellant filed a civil suit in the court of Civil Judge (Sr. Divn.), Chandigarh, on 21.12.2011, claiming that the said agreement dated 01.09.2010 is forged and fabricated. In the said case, no injunction has been granted so far. It is also not denied that in civil suit both the parties had produced the report of the experts regarding the genuineness or otherwise of the signatures of Birender Kumar. However, as agreed by both the parties the signatures were sent to the CFSL for comparison. The Arbitrator was also ordered to be informed regarding the proceedings of civil suit, vide order dated 13.02.2012 by the Civil Court. Accordingly, the appellant sent the e.mail to the Arbitrator on 05.03.2012. The same was acknowledged on 07.03.2012 by the Arbitrator. However, the Arbitrator passed the impugned Award on 12.04.2012. The objections thereafter were filed under Section 34 of the Arbitration Act within time.

The contention of learned counsel for the respondent is that under Section 21 of the Arbitration Act, the arbitration proceedings commenced on the date on which a request for dispute to be referred to the Arbitrator, is received by the respondent-Company. It has been argued that the Arbitrator has entered into arbitration proceedings before filing of the civil suit by the appellant. Therefore, mere

pendency of the civil suit is no ground for the Arbitrator not to proceed further in the matter. It has been further argued that under Section 16 of the Arbitration Act, the question regarding existence and validity of the agreement could have been raised before the Arbitrator including the challenge to the jurisdiction of the Arbitrator to proceed the matter. However, it was not done. It has been argued that the present appellant intentionally did not appear.

On the other hand, learned counsel of the appellant has argued that the present appellant had filed an application under Order 7 Rule 11 CPC for rejection of the plaint on the ground that the arbitration proceedings are going on. But the same was dismissed on 22.05.2013. The said order was not challenged in appeal and has now become final.

It has been argued that since the civil suit for genuineness of the agreement dated 01.09.2010 is pending, therefore, the appellant did not appear before the Arbitrator and the Arbitrator should not have rushed to pronounce the Award.

In the last, the prayer on behalf of the appellant is that in any case, ex parte Award should be set aside and the appellant should have be allowed to join the proceedings before the Arbitrator and lead evidence in support of its case and also raise the legal pleas before the Arbitrator under the Arbitration Act.

Learned counsel for the respondent-Company vehemently opposed the same and has argued that the absence of the appellant was intentional. The pendency of the civil suit was no

bar to proceed with the arbitration proceedings. There is no impropriety on the part of the Arbitrator to pronounce the ex parte Award. It has been further argued that Section 8 of the Arbitration Act, is not attracted in the present case, since the arbitration proceedings had also commenced before the filing of the civil suit by the appellant.

After considering the rival contentions of learned counsel for the parties, I am of the view that this Court is not to comment on the merits of the proceedings before the civil court and the orders passed therein except taking note of the fact that a civil suit is pending, which was filed on 22.11.2012 where in the agreement in question was challenged claiming that is forged and fabricated. However, the arbitration proceedings commenced on 08.12.2011 as noted above. This Court also refrains from making any comment on the evidentiary value and evidence produced before the civil court and Arbitrator as the same may prejudice the case of the either party at one or the other stage.

Learned counsel for the appellant has relied upon the authority of **“N. Radhakrishnan vs Maestro Engineers and others” 2010(1) SCC 72** to press that a civil suit was competent to challenge the validity of an agreement. Further reliance has been placed upon the authority of the Hon'ble Apex Court in **“Ravindra and Associates vs Union of India”, 2010 (1) SCC 80** and further reliance has been placed on the authority of **“Haryana Telecom Ltd. Vs Sterlite Industries (India) Ltd.” (1999) 5 SCC 688** and **“Vijay**

Vishwanath Talwar vs Meshreq Bank, PSC & Ors” ILR (2203) II

Delhi 392. It has been pressed that civil court is competent to decide the existence and validity of the arbitration agreement and the court cannot remain a silent spectator to such an oppressive, vexatious and unjust tactic adopted by the defence. The court may examine question of validity of the arbitration agreement if the same is forged and fabricated and invalid.

On the other hand, learned counsel for the respondent has relied upon the authority of ***“Mahanagar Telephone Nigam Ltd. Vs Fujitsu India Pvt. Ltd.”, 2015 (2) Arbitration Law Reporter 335,*** to press that while exercising the jurisdiction under Section 37 of the Arbitration Act, the court cannot revisit and reappraise the documents or evidence and arrived at different findings then returned by the Arbitrator. Further reliance has been placed on the authority of ***“Gas Authority of India Ltd. vs. Ketu Construction (I) Ltd. and other”, 2007 (5) SCC 38*** and ***“Drishticon Properties (P) Ltd. Vs Chopra Marketing Pvt. Ltd. and others”, 2009(1) Arb. LR 353 (Delhi)***

I am of the view that in this case, the present appellant has disputed the genuineness of the agreement on the basis of which the reference to the Arbitrator was made.

Learned counsel of the respondent has stated that there were about 231 transactions between the parties from 01.09.2010 to 05.04.2011, vide which some orders were placed and some payments were made on the basis of said agreement.

I am of the view that the arbitration proceedings commenced on 08.12.2011 and the present appellant filed a civil suit challenging the validity of the agreement dated 21.12.2011 and it is probably for this reason that he did not appear before the Arbitrator. As per the order of the civil court, on 13.01.2012 the Arbitrator was informed about the pendency of the civil suit. Anyhow, there was no stay order. The Arbitrator passed the ex parte Award on 12.04.2012.

Keeping in view the fact that due to the pendency of civil suit, the appellant most probably took liberty and did not appear before the Arbitrator as the appellant was of the view that civil suit was pending, which was to decide about the validity of the arbitration agreement. Therefore, absence of the appellant from the arbitral proceedings is due to misunderstanding and misappreciation of factual and legal position.

In view of the foregoing discussion, I am of the view that it is a fit case where the ex parte Award should be set aside and the Arbitrator should be asked to decide the matter afresh after giving the opportunity to both the parties to lead the evidence and raise their legal objections, if any, available to them under the provisions of the Arbitration Act. There the present appellant shall be at liberty to raise the plea regarding the genuineness of the agreement in question and challenge the existence and validity of the same and also challenge the jurisdiction of the Arbitrator under Section 16 of the Arbitration Act. The appellant can avail all the remedies as may be available to it under the law.

In view of the aforesaid, the impugned ex parte Award dated 12.04.2012 as well as the judgment dated 21.01.2015 passed by the learned Addl. District Judge, Chandigarh are set aside. The case is remanded back to Shri R.N. Yadav, Advocate, Arbitrator with a direction to hear both the parties and allow them to lead their respective evidence and also hear their legal objections as discussed above and decide the matter afresh. However, it is made clear to the appellant that on the receipt of the notice from the Arbitrator, it shall be bound to put in appearance before the Arbitrator and join the proceedings.

The present appeal is disposed of accordingly.

May 07, 2015
sarita

(KULDIP SINGH)
JUDGE