

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

F.A.O.No.4771 of 2013 (O&M)

Date of Decision: February 04, 2016

1. **F.A.O.No.4771 of 2013 (O&M)**

M/s Nirmal Agro Services, Railway Road, Ropar

...Appellant

Versus

HMT Limited, Pinjore & another

...Respondents

2. **F.A.O.No.4772 of 2013 (O&M)**

M/s Nirmal Agro Services, Railway Road, Ropar

...Appellant

Versus

HMT Limited, Pinjore & another

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

1. Whether Reporters of local papers 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?

Present: Mr.Amarjit Markan, Advocate and
Mr.B.S.Thind, Advocate,
for the appellant in both the appeals

Mr.Anand Chhibber, Senior Advocate with
Mr.Lalit Thakur, Advocate,
for respondent No.1 in both the appeals.

AMIT RAWAL, J.

By this order, I intend to dispose of two F.A.Os. bearing No.4771 and 4772 of 2013 as the common questions of law and fact involved in both the appeals are the same. The appeals have been filed at the instance of the appellant-firm against the dismissal of their objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short

“1996 Act”) for setting-aside of the arbitration award dated 10.9.2009. The facts are being taken from FAO No.4771 of 2013.

Mr.Amarjit Markan, learned counsel appearing on behalf of the appellant submits that the appellant-firm was appointed dealer by the HMT Ltd.for selling of the Tractors. The appellant-firm was a sole partnership firm formed by Nirmal Singh, who unfortunately died on 26.1.2004. The HMT Ltd.raised the dispute and sought the reference by appointing the Arbitrator. The claim petition was filed on 24.10.2007. In the arbitration proceedings, initially the firm was proceeded *ex-parte* on 13.9.2008, but the said order was set-aside on 7.2.2009, subject to payment of ₹7,000/-, however, the cost was not deposited and, therefore, as per the order dated 28.2.2009, the *ex-parte* order dated 13.9.2008 stood revived, yet the appellant-firm was allowed to join the proceedings. On 2.8.2009, affidavits of two witnesses, namely, Rajiv Chadha and Sudhir Khullar were filed and copies thereof were also given to the appellant, but the appellant was not permitted to cross-examine them. Consequently, the *ex-parte* award, aforementioned, was passed.

The Objecting Court framed the issues and permitted the parties to lead evidence in support of their claims. Before the Arbitrator, the HMT-claimant relied upon the statements of account Ex.C1 to Ex.C53, but heavily reliance was laid on Ex.C42, Ex.C43, Ex.C44 and Ex.C45. Ex.C42 is dated 20.5.2005, whereas other are the photo copies of all the documents. There is no admission/acknowledgment of the liability and, thus, the claim before the Arbitrator was *ex-parte and* barred by limitation.

In the testimony of RW-1 J.Rehman, it has come on record that Ex.C42, Ex.C43, Ex.C44 and Ex.C45 are the photocopies, but during the

course of the cross-examination, original of Ex.C42 was traced out, but again surfaced that Ex.C42 was not executed in his presence and it was acknowledged against the signature of one Karnail Singh Rana and said document has not been entered into in any register. Ex.C42 was written by one Vijay Kapoor, who had not been examined before the Arbitrator, much less even before the Objecting Court, though as per the statement of the aforementioned witness, he was still in service and, thus, submits that the the respondents have failed to prove on record that their claim was within limitation, de hors of the fact that appellant-firm was proceeded *ex-parte*. He further submits that the factum of death of Nirmal Singh has also been admitted by the aforementioned witness. Once Nirmal Singh died in the year 2004, he could, nowhere, admit the liability as per Ex.C42.

On the other hand, Mr.Anand Chibber, learned Senior Counsel assisted by Mr.Lalit Thakur, appearing on behalf of respondent No.1 submits that the objections were not within the provisions of Section 34 of 1996 Act. The Arbitrator has taken into consideration all the facts and found that the appellant-firm owed a sum of ₹42,73,064/- as on 31.3.2008. The Arbitrator has relied upon the joint meeting held at Panchkula in the year 2005. He has also drawn the attention of this Court to para 8 of the award, whereby the documents Ex.C42, C43, C44 and C45 have been admitted in extenso. The Scope of Section 34 of 1996 Act is very limited. This Court cannot sit in appeal to re-appreciate the entire evidence and, thus, prays for dismissal of the appeal.

I have heard learned counsel for the parties and appraised the paper book and am of the view that the appellant has been prevented from contesting the one sided case of the claimant-HMT. The plea of

Mr.Chhibber that it was running an account and there are certain documents on record, which show acknowledgment by wife of deceased- Nirmal Singh. Those documents are photocopies and this fact has surfaced during the cross examination in the proceedings initiated under Section 34 of 1996 Act. No doubt, that appellant has adopted callous and tardy approach in not depositing ₹7,000/- as costs. Had it been so, opportunity should have been granted to rebut the documents submitted by the claimants. The respondent-HMT has placed on record the photocopies of the documents and not the original ones and appellant has also been prevented from controverting the same. In the absence of original documents, I am of the view that the matter is required to be remanded back to the Arbitrator for adjudication of the lis between the parties afresh within a time bound period.

The appellant would be at liberty to take all pleas vis-a-vis mode of proof, limitation and all other possible legal pleas before the Arbitrator, in essence, parties to the lis shall be at liberty to take all legal pleas available in law, in support of respective claims.

Accordingly, order dated 23.2.2013 and award dated 10.9.2009 are hereby set aside and I am invoking the powers under sub-section (4) of Section 34 of 1996 Act.

It is ex parte award, therefore, the ratio decidendi culled out by the Division Bench of Bombay High Court in **Geojit Financial Services Ltd. vs. Kritika Nagpal decided on 25.06.2013** that there is no provision for remitting the matter back would not apply to the facts and circumstances of the present case. Both the parties have agreed for appointment of independent Arbitrator than the one who had passed the Award.

Accordingly, I appoint Mr. K.C.Puri, Retired Judge of this Court as

Arbitrator and after obtaining his consent, the arbitration proceedings shall be held at Mediation and Conciliation Centre, Sector 17, Chandigarh within norms prescribed, vis-a-vis fees, procedural charges etc.

It is expected that Arbitrator shall decide the lis between the parties as expeditiously as possible.

Parties through their counsel are directed to appear before the Arbitrator.

On receipt of his consent, Arbitrator shall inform about entering into reference and thereupon the parties will be informed through Mr.B.S.Thind, representing the appellant in the High Court, to appear before the Arbitrator. Thereafter, parties shall be at liberty to raise pleas in support of their respective claims.

The complete record of both cases be sent to the Arbitrator for his facilitation.

The appeals stand disposed of.

February 04, 2016
ramesh/savita

(AMIT RAWAL)
JUDGE