

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

FAO No. 6133 of 2015(O&M)
Date of decision : April 21, 2016

M/s Jindal Aluminum Ltd.

..... Appellant

Versus

M/s Encon Thermal Engineers Pvt. Ltd.

..... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Vipul Dharmani, Advocate
for the appellant.

Mr. Sonam Sharma, Advocate and
Mr. Aditya Jain, Advocate
for the respondent.

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?

Amit Rawal, J (oral).
CM No. 5941-CII of 2016

C.M.is allowed.

Annexures R-1 to R-3 taken on record.

FAO No. 6133 of 2015(O&M)

The appellant is aggrieved of the dismissal of the objections filed against ex-parte award on the premise that the purchase order is a contract and therefore the entire proceedings

before the arbitrator are vitiated in law, much less the arbitrator does not have jurisdiction. In support of his contentions he has relied upon the judgment rendered by Delhi High Court in **M/s Tripack Ltd.and others Vs. Ram Kishore Nagar Mal, 2007 (3) ArbiLR 402,** thus urges this Court that the objections were within the parameters of Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '1996 Act'). All these aspects have not been noticed by the objecting court.

Mr. Sonam Sharma, learned counsel appearing on behalf of the respondent submits that Annexure R-1 and R-2 enclosed with the miscellaneous application show that the appellant had written two letters to the arbitrator challenging the arbitration proceedings but thereafter absented and in view of the provisions of Section 16 (2) of the 1996 Act, the jurisdiction of the arbitrator cannot be assailed for the first time by filing objections under Section 34 of the 1996 Act. In support of his contentions he has relied upon the judgment rendered by this Court in **Octave Apparels Vs. Store One Retail India Ltd. 2012 SCC Online P&H 952** where a similar controversy with regard to the interpretation of terms and conditions of the printed invoice came up for adjudication and it was held that it was binding contract. In essence there was consensus ad idem by relying upon the ratio decidendi culled out in the judgment rendered by Hon'ble Supreme Court in **Fair Air Engineers Pvt. Ltd. Vs. N. K. Modi (1996) 6 SCC 385.** He further relies upon the judgment in **Gas Authority of India Ltd.and another Vs. Ketl Construction (I) Ltd.and others (2007) 5 SCC 38** to contend that where a party has

received notice and does not raise a plea of lack of jurisdiction before the Arbitral Tribunal, he must make out a strong case why he did not do so, thus, urges this Court for dismissal of the appeal.

I have heard learned counsel for the parties and appraised the paper book and of the view that there is no substance in the plea of learned counsel for the appellant, for, this Court in **Octave Apparels's case (supra)** had an occasion to deliberate upon the terms and conditions of the invoice containing arbitration clause. For the sake of brevity, paragraphs 4 to 6 of the judgment reads thus:-

“Having heard learned counsel for the parties, I find that the disputes between the parties in respect of overdue amount require adjudication by an Arbitrator. Though the terms of trade have been settled on 08.06.2007, wherein there is no clause for resolving the disputes by an Arbitrator. But the fact remains that each of the invoices through which the petitioner has supplied goods to the respondent, there is a printed arbitration clause. Once the goods have been received by the respondent in terms of the invoices issued, the terms on the invoices constitute a binding contract. In Fair Air Engineers Pvt. Ltd. and another Vs. N.K.Modi (1996) 6 SCC 385, the Hon'ble Supreme Court returned a finding that there was consensus ad idem, when a quotation with the conditions enumerated thereunder and a counter-offer is made giving technical details. But in disputing any of the conditions enumerated in the quotation, it was held that it was a case of consensus ad idem. It was observed as under:

“6.The State Commissioner expressly has gone into the question and held that by operation of clause (12) of the quotation there is an arbitration agreement brought into vogue between the parties. It envisages reference to arbitration and thereby there was consensus ad idem. It is seen that when the quotation was offered with the conditions enumerated thereunder, the respondent merely made a counter-offer giving technical details of a part of the offer as counter-offer and when it was accepted by the appellant, the parties agreed for that offer and the counter-offer. In other words, they became an integral part of the contract of the parties. Thereby, clause (12) of the agreement became an integral part of the contract. Thus, there is an arbitration agreement between the parties.”

Similar issue came up for consideration before me sitting singly in RSA No.655 of 2006 titled “M/s Neel Kanth Tubes Private Limited Vs. M/s Classical Tubes Private Limited” decided on 02.09.2009. It was held that printed clause on the invoice pertaining to jurisdiction is binding. It was observed as under:

“Before this Court, learned counsel for the appellant has vehemently argued that the printed clause in the invoice is not binding clause so as to confer jurisdiction on the Courts at Chandigarh. It is also argued that on the basis of independent evidence on record, it is apparent that the Chandigarh Courts do not have any territorial jurisdiction to entertain the suit. It is also sought to be argued that the present suit is barred by limitation, therefore, no decree could have been passed by the learned first Appellate Court.

The Hon'ble Supreme Court in A.B.C.Laminart Pvt. Ltd. Vs. A.P.Agencies, Salem, AIR 1989 Supreme Court 1239, has held that where there are two or more Courts competent to entertain the suit, then the parties may by contract vest jurisdiction in one of such Courts to try the dispute which might arise as between them.

In view of the said judgment, the finding of the learned first Appellate Court that the parties have agreed to submit their disputes to the jurisdiction of the Chandigarh Courts and, thus, the Chandigarh Courts have the jurisdiction to entertain the suit, cannot be said to be erroneous.”

In view of the said judgments, the argument that there is no arbitration agreement between the parties is not tenable.”

It has been brought to the notice of this Court that the appellant had chosen to file a civil suit by invoking territorial jurisdiction of the Court at Bangalore by giving incorrect address of defendants (therein) and respondents herein and obtained ex-parte decree and on transfer of the ex-parte decree notice was sent at the correct address. An application under Order 9 Rule 13 CPC was filed which is stated to be pending and there is interim stay. This fact is noticed from Annexure R-1 attached with the miscellaneous application. No explanation has come forth in not contesting the arbitration proceedings by filing reply and challenging the jurisdiction. In essence, deemed to have waived the right as per Section 4 of 1996 Act.

In view of the aforementioned observations, there is

no illegality and perversity in the impugned order. No ground for interference is made out. The order under challenge is affirmed.

The appeal stands dismissed.

(AMIT RAWAL)
JUDGE

April 21 , 2016
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