

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 22.03.2018

+ **O.M.P. (COMM) 374/2016 & IA No.9569/2016**

PRIKNIT RETAILS LTD. & ORS.

.....Petitioners

Versus

ANEJA AGENCIES

..... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr Kamal Gupta, Mr Neeraj Gupta and
: Mr Anirudh Kanav, Advocates.
For the Respondent : Mr R. G. Srivastava with Mr. D. K.
: Goswami, Advocates.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 20.03.2016 (hereafter 'the impugned award') passed by the Arbitral Tribunal comprising of three arbitrators (Panel no. 1 of Delhi Hindustani Mercantile Association – hereafter 'the Arbitral Tribunal').

2. By the impugned award, the Arbitral Tribunal has awarded a sum of ₹1,72,63,398/- along with *pendente lite* interest and future interest at the rate of 15% per annum. The said amount of ₹1,72,63,398/- comprises of a sum of ₹98,84,438/- being the balance

amount held to be payable by the petitioners in respect of goods purchased by the petitioner no.1; ₹73,45,960/- as interest at the rate of 18% per annum till 21.12.2010; ₹11,000/- as charges for the notice; and ₹22,000/- as costs of the arbitration proceedings.

3. The petitioners claim that there is no arbitration agreement between the parties and, therefore, the Arbitral Tribunal had no jurisdiction to render the impugned award.

4. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

4.1 The respondent is a registered partnership firm and is, *inter alia*, engaged in the business of sale and purchase of various kinds of fabric (suitings and shirtings). The respondent is also a member of the Delhi Hindustani Mercantile Association (Regd.). Petitioner no.1 is a company incorporated under the provisions of the Companies Act, 1956 and petitioner nos. 2 and 3 are directors of petitioner no.1 company.

4.2 The respondent firm claims that petitioner nos. 2 and 3 (who were arrayed as respondent nos. 3 & 4 before the Arbitral Tribunal) used to purchase fabrics in the name of M/s Priknit Apparels Pvt. Ltd. (arrayed as respondent no.1 before the Arbitral Tribunal), on credit basis, from the respondent. Petitioner no.1 was arrayed as respondent no.2 before the Arbitral Tribunal. The respondent claimed that during the period 02.12.2006 to 12.06.2008, they supplied goods for a total value of ₹2,25,82,801.90/-. The respondent submitted that it had

received part payments from time to time. The respondent further claimed that it maintained the running account in its books in respect of the goods supplied and, as on 01.04.2009, a sum of ₹1,58,84,458/- was due and payable by the petitioners. The respondent also stated that petitioner nos. 2 and 3 had issued number of cheques but the same were dishonoured on presentation. However, after much persuasion, the petitioners made a part payment of ₹40 lakhs in installments during the period 17.07.2009 to 02.02.2010 and after adjustment of the said amount, a balance amount of ₹1,18,84,438/- was due and payable by the petitioners along with interest.

4.3 Admittedly, M/s Priknit Apparels Pvt. Ltd. was converted to a public company with a changed name – M/s Priknit Retails Ltd. (petitioner no.1). Thus, petitioner no. 1 and M/s Priknit Apparels Pvt. Ltd. are essentially one and the same entity. Petitioner no.1 (through its directors) had issued 16 post dated cheques aggregating a sum of ₹1,23,84,267/- in order to settle the principal amount along with part interest of ₹73,45,960/-, but the same were also dishonoured on presentation. It is stated that the respondent has filed criminal complaint under Section 138 of the Negotiable Instruments Act, 1881, which are pending.

5. On 07.05.2011, the respondent referred the disputes to Delhi Hindustani Mercantile Association, which were then placed before the Arbitral Tribunal by the Secretary of the said Association in accordance with its bylaws. The respondent thereafter filed its Statement of Claims.

6. In the Statement of Claims, the respondent, *inter alia*, prayed for an amount of ₹1,92,41,398/- which comprised of (i) ₹1,18,84,438/- as principal amount; (ii) interest of ₹73,45,960/- computed till 21.12.2010; and ₹11,000/- as notice charges. In addition, the respondent also prayed for interest at the rate of 18% per annum and costs of arbitration.

7. On 17.09.2011, the petitioners filed an application under Section 12, 14 and Section 16 of the Act. The petitioners not only challenged the independence and partiality of the Arbitral Tribunal but also disputed the existence of an arbitration agreement.

8. The petitioners, thereafter, filed a petition under Section 14(2) of the Act before this Court being OMP 474/2012 captioned “*Priknit Retails Ltd. v. Aneja Agencies*”, which was dismissed by this Court by an order dated 08.02.2013.

9. In the meanwhile, the parties settled their disputes by entering into a Memorandum of Understanding dated 15.02.2014 (MOU), whereby petitioner no.1 agreed to pay a sum of ₹60 lakhs as full and final settlement of the claims made by the respondent. The said payment was to be made in three tranches of ₹20 lakhs each. The said tranches were to be paid on 10.04.2014, 20.05.2014 and 20.06.2014 respectively.

10. Although, petitioner no.1 paid a sum of ₹ 20 lakhs, it failed to pay the balance two instalments of ₹20 lakhs each.

11. In the circumstances, the respondent re-filed the proceedings before the Arbitral Tribunal, which culminated in the impugned award.

Submissions

12. Mr Gupta, the learned counsel appearing for the petitioners has assailed the impugned award, essentially, on five fronts. First, he contended that there was no arbitration agreement between the parties and, therefore, the impugned award is wholly without jurisdiction. He referred to the arbitration agreement contained in the invoices raised by the respondent in respect of the goods supplied and pointed out that the said clause was inchoate, as the blanks had not been filled in and, further, the same did not bear the signatures of any party. He relied on the decision of this Court in ***Taipack Limited and Ors. v. Ram Kishore Nagar Mal: OMP 361/2001, decided on 23.05.2007*** in support of his contention that an arbitration agreement contained in an invoice would not be binding on the purchaser.

13. Second, he submitted that reference to arbitration is also not in terms of the alleged arbitration agreement, which expressly provided that both the parties would approach Delhi Hindustani Mercantile Association or the Arbitrator/ Arbitral Tribunal appointed by them. He submitted that both the parties were to jointly approach the Arbitral Tribunal, and the same could not be unilaterally invoked by the respondent firm.

14. Third, he contended that in any event, the invoices were raised in the name of Priknit Apparels Pvt. Ltd (petitioner no.1 before the Arbitral Tribunal) and, therefore, there was no agreement between petitioner nos. 2 and 3 and the respondent. He submitted that the Arbitral Tribunal had no jurisdiction to lift the corporate veil. He relied on the decision of this Court in ***Sudhir Gopi v. Indira Gandhi National Open University and Anr.: OMP (COMM) 22/2016, decided on 16.05.2017*** in support of his contention.

15. Fourth, he submitted that the parties had settled their disputes by entering into a MOU, which did not contain an arbitration agreement. Thus, the earlier agreements stood novated and the arbitration agreement, if any, did not survive.

16. Lastly, he submitted that the Arbitral Tribunal had also erred on merits by accepting the claim of the respondent firm without an affidavit as required under Section 65B of the Evidence Act, 1872.

17. Mr R.G. Srivastava, the learned counsel appearing for the respondent countered the submissions made on behalf of the petitioners. He submitted that the contentions advanced on behalf of the petitioners had been rejected by this Court in its decision ***Priknit Retails Ltd. v. Aneja Agencies: OMP 474/2012, decided on 08.02.2013***. He submitted that an arbitration clause contained in an invoice was binding on the parties. He relied on the decision of this Court in ***M/s Luda Ram Ved Parkash v. M/s Maharani of India and Anr.: AIR 1989 Delhi 169*** in support of his contention. He also stated that this Court had referred to various decisions in the order dated

08.02.2013 passed in OMP 474/2012: ***J.N. Textiles v. Bon Chance & Anr.: 2000 IV AD (Delhi) 860, Tikkan Lal Sewa Ram v. Seth Jiwan Dass Des Raj: 18 (1980) DLT 248*** and ***P.C. Aggarwal v. K.N. Khosla, AIR 1975 Del 54.***

18. Mr R.G. Srivastava, the learned counsel appearing for the respondent also referred to the decision of the Supreme Court in ***Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49*** in support of his contention that the decision of the Arbitral Tribunal on merits was final and could not be re-agitated in proceedings under Section 34 of the Act.

Reasons and Conclusions

19. At the outset, it is relevant to state that Mr Srivastava did not contest that petitioner nos. 2 & 3 were not parties to any arbitration agreement. Thus, concededly, the impugned award, to the extent that it awards sums against petitioner nos. 2 and 3, is not sustainable.

20. The first and foremost question to be addressed is whether any arbitration agreement exists between petitioner no.1 and the respondent firm. The contention that the said issue is covered by the decision of this Court in ***Priknit Retails Ltd. v. Aneja Agencies (supra)*** is erroneous. The said decision was rendered in the context of the application submitted under Section 14(2) of the Act, which was rejected. This Court in that case had held that the challenge laid by the petitioner was premature, and the issues relating to the arbitrary appointment of arbitrators would be open to challenge under Section

34 as well as Section 37 of the Act. The Court was also of the view that the termination of the mandate of an arbitrator would entail reappointment of an arbitrator under Section 15 of the Act, and the process of termination of the mandate of an arbitrator could not be used to terminate the arbitration proceedings. It is clear from the above that none of the challenges made by the petitioner to the Arbitration proceedings were finally considered by this Court in that matter, as the Court was of the view that none of the prayers fell within the scope of Section 14 of the Act. The Court had also expressly observed that the petitioners' remedy would be by filing objections under Section 34 of the Act at an appropriate stage. In this view, the contention, that the petitioners are precluded from urging their challenge to the jurisdiction of the Arbitral Tribunal by virtue of the decision of this Court in **Priknit Retails Ltd.** (*supra*), is unmerited.

21. The principal question to be addressed is whether an arbitration agreement exists between petitioner no.1 and the respondent? The said agreement is stated to be embodied in the invoices raised by the respondent in respect of the goods supplied by them. These invoices are for the goods supplied to petitioner no.1. The invoices are raised in favour of Priknit Apparels Pvt. Ltd.

22. The invoices are in three parts. The first section contains the name of the purchaser; name of the broker; the date and number of the invoice; the entity through which the goods are dispatched; the person/agency that has selected the goods; and the mode of payment. The second section contains the price; the quantity; the rate/the price;

and the amount paid. The third section, which is at the bottom of the invoice, contains the arbitration clause and is reproduced below:-

“M/s Pcs..... Received the above goods from ANEJA AGENCIES, Katra Neel, Chandni Chowk, Delhi as per Bill. Dated..... in good order and condition, according to the rules & regulation of the Delhi Hindustani Mercantile Association Delhi. In case of any dispute between you and us regarding payment etc. or any other business matter we both shall approach the Delhi Hindustani Mercantile Association or the Arbitrator or tribunal appointed by them for settlement by arbitration according to their rules & the decision given by them shall be binding on both of us & we shall have no objection to it.

Signature”

23. The first two sections, as described above, had been filled in with the necessary particulars; however, the third section, which contained the arbitration clause, was not filled in at all. The name of the party, the quantity of the goods as well as the date remained blank. Although, the said section also provided a place for affixation of signatures, the same was also not filled in. Thus, admittedly, the arbitration clause was not signed by either party.

24. Although, petitioner no.1 had accepted the delivery of the goods, it is difficult to accept that petitioner no.1 had also agreed to the arbitration clause as set out in the invoice. As noticed above, the name, quantity, as well as the date of the bill, is blank and the said clause also does not bear the signatures of either parties. A plain reading of the said clause indicates that it also purports to be a receipt

for delivery of the goods acknowledging that the goods supplied are in good order and condition. Thus, for the said acknowledgement to be effective, it was necessary for it to be communicated to the respondent. However, as a signed copy of the said receipt was not returned by petitioner no.1 to the respondent, it is not possible to accept that the said receipt/arbitration agreement became effective. A purported receipt of goods, which is neither signed nor communicated by the recipient, cannot be considered as a receipt.

25. It is also necessary to refer to Section 7 of the Act, which reads as under:-

“7. Arbitration agreement.—(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication 1[including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

26. Section 7(4) of the Act makes it explicitly clear that an arbitration agreement would be in writing, if it is contained in a document signed by the parties; or contained in exchange of letters, telex, telegrams or other means of telecommunications, which provides a record of the agreement; or in an exchange of Statements of Claim and Defence in which the existence of the agreement is alleged and not denied. In the present case, none of the three clauses of Section 7(4) of the Act are satisfied. The arbitration clause is not signed by any party. It is also not possible to accept that the said agreement was embodied in exchange of letters, telex, telegrams or other means of telecommunication. An exchange of such communications, which record the agreement between the parties to refer the disputes to arbitration, would be sufficient to fulfil the requisites of Section 7 of the Act. However, it is necessary that such an agreement between the parties is discernible without any ambiguity.

27. Mere fact, that the delivery of goods had been accepted, would not imply that petitioner no.1 had also agreed to the arbitration clause. As stated above, the said agreement is inchoate inasmuch as the blanks

were never filled in. Further, the agreement remained unsigned. The contention, that petitioner no.1 had not disputed the invoices would necessarily mean that petitioner no.1 had also agreed to the arbitration agreement, is unmerited. This is so because in order to communicate its acceptance to the arbitration clause, petitioner no.1 would require acknowledgement of the goods in the form as indicated in the invoices and further also affix its signatures. Admittedly, petitioner no.1 has neither signed the arbitration agreement nor communicated its acceptance to the same.

28. It is well settled that the arbitration agreement is a separate and an independent agreement, although it may be embodied in as a clause in the main agreement. In the present case, the respondent seems to have acknowledged this distinction and, therefore, had provided a separate receipt at the bottom of the invoice. This was separate from the main invoice. This receipt-cum-arbitration agreement was not executed by the parties and, thus, it is not possible to accept that an arbitration agreement existed between the parties.

29. In *M/s Taipack Limited and Ors. v. Ram Kishore Nagar Mal (supra)*, a Coordinate Bench of this Court had held that the goods supplied pursuant to an offer to purchase would conclude the contract between the parties. The arbitration clause on the reverse of the invoice would not fructify in an agreement, unless specifically accepted by the purchaser.

30. In *M/s Inspiration Cloths & U v. Yash Traders: A.P. No. 408/2008, decided on 22.12.2014*, the Calcutta High Court also

declined to accept the existence of an arbitration agreement, which contained an invoice raised. The relevant extract of the said decision reads as under:-

“According to Section 7 an arbitration agreement has to be in writing. It is said to be in writing in three circumstances stipulated in Section 7 (4) of the Arbitration and Conciliation Act, 1996. The first is if the document is signed by the parties. Secondly, if there is an exchange of documents to show a record of the agreement. Thirdly, when the agreement is pleaded in the statement of claim and not denied by the respondent.

Admittedly, the bills or invoices were not signed or executed by the petitioner. Neither did they confirm the existence of the arbitration agreement in their statement of defence.

Now, the question arises whether there was an exchange of documents to show formation of the agreement.

I am afraid, not. The respondent unilaterally wrote on the bills that all disputes would be subject to the arbitration rules of Bharat Merchants' Chamber. There is no exchange of documents on the part of the petitioner to show acceptance of this term or clause. What is provided in Section 7 is an express acceptance of the arbitration agreement by means of telecommunication or by traditional methods of communication like letters, telex and telegrams. There is no such exchange between the parties to show acceptance of the arbitration clause by the petitioner. Acceptance of the bills by the petitioner will not do as it is not part of the method of communication expressed in 7(4)(b). Any act to show acquiescence will not do unless it is communication of the type mentioned in 7(4)(b).”

31. In ***Luda Ram Ved Parkash*** (*supra*), a Coordinate Bench of this Court had accepted that a printed clause appearing in the bills was binding. The Court held that the law did not require that an arbitration agreement must be signed by the parties before the same could be considered as binding. The said decision would not be applicable in the facts of the present case. First of all, for the reason that the said decision was rendered in the context of the Arbitration Act, 1940. Section 2(a) of the Arbitration Act, 1940 merely required that an agreement must be in writing. There was no requirement that the agreement must also be signed by the parties. There is a material difference between the 1940 Act and the 1996 Act. Section 7 (4) of the Act clearly defines the parameters that must be satisfied in order for an arbitration agreement to be in writing. Thus, the decisions rendered in the context of the 1940 Act may not be applicable.

32. Secondly, in that case, the Court found that there was no dispute that the goods were sold subject to the Rules and Regulations of the Association. In the facts of the present case, there is a serious dispute as to the existence of the arbitration agreement; as stated above, the arbitration clause was required to be signed and filled in. This was admittedly not done and, therefore, it is not possible to accept that the parties had agreed to the same. In cases where there is no provision for affixing the signatures, it may be possible to conclude, from attendant circumstances, that the parties had agreed to the arbitration clause. However, where the respondent is required to sign the arbitration clause, but does not do so, it cannot be readily inferred that party had

agreed to the arbitration agreement. The facts in the present case are thus materially different from the facts in the case of **Luda Ram Ved Parkash** (*supra*).

33. The decision of the Coordinate Bench of this Court in **M/s J.N. Textiles v. M/s Bon Chance & Anr.** (*supra*) was also rendered in the context of the Arbitration Act, 1940. The decision in the case of **Tikkan Lal Sewa Ram** (*supra*) is also not applicable as, in that case, there was no dispute between the parties that an arbitration agreement existed between them.

34. In order to ascertain whether an agreement exists between the parties, it is necessary to establish that there was consensus *ad idem* between the parties. In the present case, it is not possible to accept that petitioner no.1 had accepted the arbitration clause printed at the bottom of the invoice, as the same was neither filled in nor signed by petitioner no.1. It is also not possible to accept that petitioner no.1 had agreed to the arbitration clause.

35. In view of the above conclusion, the impugned award cannot be sustained. The petition is, accordingly, allowed and the impugned award is set aside. The pending application also stands disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MARCH 22, 2018

pkv/RK