

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

FAO No. 2790 of 2013 (O&M)

Date of decision: March 11, 2019

M/s R.K. Automobiles and another

...Appellants

Versus

H.M.T. Limited and others

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Aakash Singla, Advocate,
for the appellants.

Mr. Shikhar Sarin, Advocate, for
Mr. Vaibhav Sahni, Advocate,
for respondent No.1.

JAISHREE THAKUR, J.

1. This appeal has been filed against the judgment of the Additional District Judge, Panchkula, dated 28.1.2013, who dismissed the objections of the appellants filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '**the Act**') and upheld the award dated 15.1.2009 passed by the Arbitrator in favour of respondent No.1.

2. A few facts need to be noticed for the adjudication of the instant appeal. Respondent No.1 herein being manufacturer of various kind of tractors and tractor parts appointed appellant No.1 as its authorized dealer for the sale of tractors and its spare parts in the area of District Fatehgarh

Sahib. Various Memo of Understandings (MOU) were signed upto 2002-

2003, but there was no provision in the MOU regarding charging of interest. It was alleged that as on 31.12.2005 a sum of ₹47,56,913.58 paise was outstanding against the appellants. However, since the appellants failed to clear the outstanding amount, a dispute arose between the parties and the matter was referred to an Arbitrator. Evidence was led by the respondents and on consideration of the same, an ex-parte award dated 15.1.2009 came to be passed in favour of the respondents.

3. Aggrieved against the award dated 15.1.2009, the appellants filed objections under Section 34 of the Act before the Additional District Judge, Panchkula, who dismissed the same. Aggrieved against the said judgment, the instant appeal has been filed.

4. Learned counsel for the appellants submits that the Additional District Judge has wrongly dismissed the objections filed by the appellants on the premises, that since the appellants were proceeded against exparte before the Arbitrator, therefore, the objections could not be considered on merit. It is submitted that there is no provision in law that if a party is proceeded against exparte during the arbitration proceedings, then he cannot be allowed to challenge the award on merits under Section 34 of the Act. It is further submitted that rather the impugned order is against the principles of natural justice and the objections taken by the appellants ought to have been considered in its right perspective. In support of his contention, learned counsel for the appellants relies on the judgment rendered in **Narmada Valley Development Authority and others Versus Vasudev R. Mendiratta and another 2006 (3) M.P.L.J. 75** wherein it was held that the petitioner therein, who did not participate in the proceedings before the

Arbitrator at all, an opportunity might be granted to him to challenge the award under Section 34 of the Arbitration and Conciliation Act, 1996. Therefore, the impugned order deserves to be set aside on this score alone.

5. Per contra, learned counsel for respondent No.1 submits that there is no infirmity in the judgment so impugned and no interference is called for in the instant appeal.

6. I have heard learned counsel for the parties and have also perused the judgment of the Additional District Judge. The provisions of Section 34 of the Act provides for setting aside of an arbitral award under Section 34 of the Act, which is re-produced as under:-

“34 Application for setting aside arbitral award. — (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to

arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or*
- (b) the Court finds that—*
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or*
 - (ii) the arbitral award is in conflict with the public policy of India.”*

7. A bare perusal of the record would reveal that upon reference, a notice was issued to the appellants and they put in appearance through counsel before the Arbitrator, however, Shri Gurloveleen Singh, who was arrayed as respondent No.3 was proceeded ex-parte. Thereafter, both the respondents No. 1 and 2, the appellants herein, requested for time to file written statement. The first request was made on 29.9.2007 when the matter was adjourned to 20.10.2007 and similar request was made on 20.10.2007 and 17.11.2007. On 1.12.2007, there was no appearance on behalf of the appellants and in the interest of justice, the Arbitrator, adjourned the matter in their absence on 21.12.2007 and gave them last opportunity to file written statement and adjourned the proceedings for 21.12.2007 on which date again appearance was caused by the advocate for adjournment to file reply/written statement, which was allowed subject to payment ₹1,000/- as

costs. The proceedings were adjourned for 5.1.2008 and the Arbitrator, while taking note that the appellants remained absent and neither costs were paid nor the written statement was filed, proceeded against them ex-parte and from the pleadings of the claimant framed issues. On 9.2.2008, the claimants/respondents herein sought time to lead ex-parte evidence and the matter was adjourned to 23.2.2008 and a similar request was made for adjournment and the case was then adjourned for 1.3.2008. On 1.3.2008, appearance was caused on behalf of the appellants herein and an application for setting aside ex-parte order was filed, which was allowed subject to payment of costs, as the ex-parte proceedings were set aside, the appellants herein allowed to join the proceedings and another opportunity was given to them for filing the written statement on the adjourned date i.e. 5.4.2008. The appellants herein did not file the written statement and one more opportunity was given to them to do the needful by order dated 5.4.2008. A copy of this order was directed to be sent to the appellants through posts informing them about proceedings. Again on the adjourned date, appellant No.2 through a telephonic message requested the Arbitrator for more time to file the written statement and the case was then adjourned for 17.5.2008, on which date there was no appearance on behalf of the appellants herein nor was the written statement filed. The matter was once again adjourned giving the appellants an opportunity to join the proceedings, however, since no one appeared on behalf of the appellants on the adjourned date i.e. 31.5.2008, the case was adjourned for ex-parte evidence of the claimant. The claimant tendered two affidavits in ex-parte evidence and PW2 tendered his affidavit along with Ex. P.32 to P63. The evidence was closed by order dated

4.10.2008. Thereafter, the award followed allowing the claim against the appellants for a sum of ₹43,18,014.58 along with interest @ 12% interest per annum.

8. Aggrieved against the said award, the appellants herein filed objections under Section 34 of the Act primarily taking the grounds (i) that appointment of Shri Harish Kumar Bansal, as Arbitrator was not acceptable to the appellants as he had been appointed unilaterally by M/s HMT Limited without consent of the appellants and without giving any prior notice in this regard; (ii) Clause 28 of the Memorandum of Understanding is against the principles of natural justice and in fact, some independent Arbitrator should have been appointed; (iii) that as per the Memorandum of Understanding got signed between the parties, there was no agreement between the appellants and the respondent to pay interest and compound penal interest; and (iv) that the respondent/claimants was not maintaining the account properly and was not adhering to the financial discipline, while contending that no amount is payable by the appellants to M/s HMT Limited. It was also pleaded that certain spare parts were returned by the appellants to the respondent, which have not been credited into the account and no credit note has been issued, meaning thereby necessary adjustment has not been made. On filing of the said objections, Additional District Judge, Panchkula, dismissed the same as being without any merit, while stating that the court cannot sit as the court of appeal and re-appreciate the evidence produced on record.

9. The appellants herein would be entitled to challenge the award if any of the conditions as specified herein had been satisfied. A perusal of

the Award would clearly reflect that proper notice had been given to the appellants herein to put in appearance and to file their written statement. However, despite having availed several opportunities, including last opportunities, to file the written statement, the same was not filed. So much so the Arbitrator was liberal enough to have the ex-parte proceedings set aside and allow the appellants to join the proceedings, but still the written statement was not filed. The plea of the appellants that the sole Arbitrator had been appointed unilaterally was a plea that could have been taken before the Arbitrator itself. Further by choosing not to take up the plea that the Arbitrator had been appointed unilaterally, it is deemed that the appellants herein had waived their right to his appointment. In this regard, reliance can be placed on the judgment of this Court in **M/s Mahavir Rice & General Mills Versus Punjab State Warehousing Corporation Chandigarh and others 2010 (5) R.C.R. (Civil) 827**.

10. As regard the other pleas which have now been set up in the objection, the same could have been taken before the Arbitrator which was not done. Once, the appellants chose to remain ex-parte and did not contest the case, the Arbitrator has no option but to pass the award based on the claim petition and the evidence presented which has been done in the instant case.

11. A bare perusal of the Section 34 of the Arbitration and Conciliation Act, 1996 would show that the provisions are stringent wherein it is specified that an arbitral award may be set aside by the Court only if: (i) a party was under some incapacity, or (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any

indication thereon, under the law for the time being in force; or (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; and or (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or if the Court finds that:- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or (ii) the arbitral award is in conflict with the public policy of India.

12. In **M/s Mahavir Rice & General Mills (supra)**, an objection had been raised against the ex-parte award of the Arbitrator primarily challenging the jurisdiction of the Arbitrator and it came to be held by this Court that by remaining absent from the arbitration proceedings a party waives his right to raise any such objection which in the instant case. The facts of **M/s Mahavir Rice & General Mills (Supra)** are squarely applicable to the facts of the present case whereas, the case relied upon by the learned counsel for the appellants herein (**Narmada Valley Development Authority (supra)**) is not applicable since in that case a writ petition came to be filed under Articles 226/227 of the Constitution of India seeking to challenge the attachment order after an ex-parte award had been

passed and the High Court held that a writ petition would not be maintainable and the proper remedy would be by way of filing objections under Section 34 of the Arbitration and Conciliation Act, 1996.

13. The Delhi High Court in **FAO 364 of 2017 titled Kanika Banal Versus India Bulls Finance Services Pvt. Ltd. and others decided on 6.9.2017**, in a similar situation, dismissed the appeal holding that the scope to challenge an award under Section 34 of the Arbitration and Conciliation Act, 1996 is limited. This challenge becomes further limited when the award is an ex-parte award deciding merits of the matter and where there is no defence of the appellant/objector.

14. Thus, the scope of interference by the court in the objections filed becomes limited since the court deciding the objections cannot re-appreciate the evidence that has been led and has to decide the objections within the parameters as set out in Section 34 of the Act. Therefore, the inescapable conclusion that this Court arrives at is that after the appellants failed to file the written statement or lead ex-parte evidence, despite availing adequate opportunities, the Arbitrator had no option but to pass an award and the court could not go beyond the evidence available before it and allow fresh pleadings and evidence in the form of objections.

15. Consequently, the appeal is dismissed.

March 11, 2019
prem

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
No