

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

FAO No. 3778 of 2015 (O&M)
Date of decision: April 26, 2019

M/s OCM Retail Shop and others

...Appellants

Versus

M/s Birla VXL Ltd.

...Respondent

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Vivek Aggarwal, Advocate,
for the appellants.

Mr. Puneet Kansal, Advocate,
for the respondent.

JAISHREE THAKUR, J.

1. This first appeal has been filed against the order dated 25.2.2015 passed by the Additional District Judge, Amritsar, whereby the objections to the execution filed by the appellants under Order 21 read with Section 34 of the Arbitration and Conciliation Act, 1996 (henceforth called '**the Act**' for short) has been dismissed being not maintainable.

2. In brief, a few facts need to be noted for proper appreciation of the case. The appellant No.1 entered into a franchisee agreement with the respondent herein on 27.8.1992 and appellants No.2 and 3 stood as guarantors for payment of the goods supplied to appellant No.1. Initially for the goods supplied to appellant No.1, it used to make the payment in due course and the amount so paid was being duly credited to the account of the

respondent—Company. It was alleged that appellant No.1 suddenly stopped making the payment and as a result an amount of ₹25,88,583.60 paise became outstanding against it. Since despite repeated requests and notice, the payment was not made by the appellants, it gave rise to the arbitration proceedings. It was claimed that a total sum of ₹33,00,927.60 was due and payable by the appellants. The amount claimed by the respondent herein was awarded by the Arbitrator, vide Award dated 4.6.2003, as the appellants did not appear before the Arbitrator and they were proceeded ex-parte. The respondent filed an execution petition for implementation of the Award dated 4.6.2003.

3. On notice in the execution proceedings, the appellants put in an appearance and submitted that the award dated 4.6.2003 cannot be implemented as there was no arbitration agreement between the parties. Furthermore, it was stated that neither the appellants were served with any notice of arbitration proceedings; nor copy of the award was ever sent to the appellants as required under Section 31 (5) of the Act. It was also submitted that the respondent earlier too had moved execution application on 6.10.2008 and the appellants then had filed objection against that execution, in which issues were framed on 14.8.2010, but the respondent herein cleverly and with a malafide intention got the same dismissed in default and subsequently they also withdrew the application filed for restoration of the execution. It was also alleged that agreement dated 27.8.1992, on the basis of which award has been passed, was for five years, which expired on 26.8.1997 and therefore, the Arbitrator had no jurisdiction to proceed on the basis of the agreement which had already expired and was never renewed.

4. The Additional District Judge, Amritsar, after considering the arguments as well as perusing the documents, held that the executing court cannot go beyond the decree and has to implement the same as it is and dismissed the objections filed under Section 34 of the Act being not maintainable, giving rise to the instant appeal.

5. Learned counsel for the appellants submits that the impugned order passed by the Additional District Judge is not sustainable in the eyes of law. It is submitted that an Arbitrator derives his jurisdiction from a valid agreement and in the absence of any such agreement, the proceedings carried by an Arbitrator would be without jurisdiction. It is submitted that in the present case, the agreement was dated 27.8.1992 was valid for 5 years and it was never extended or renewed. However, the Arbitrator acted on the basis of the agreement which was not valid on the date he entered into arbitration proceedings. Therefore, the order is liable to be set aside. It is also submitted that principle of res-judicata would operate under Section 11 of the Code of Civil Procedure as earlier too, two applications for execution of the Award were dismissed. This was the third execution application filed by the respondent in which impugned order has been passed. In support of his submission, learned counsel relies on **Chhattigarh State Electricity Board Versus Central Electricity Regulatory Commission and others (2010) 5 Supreme Court Cases 23**.

6. Per contra, learned counsel for the respondent, while supporting the impugned order, submits that since the present execution application was filed within a period of limitation, then the fate of the execution application filed earlier cannot be taken into consideration.

7. I have heard learned counsel for the parties and perused the documents.

8. The genesis of the dispute emanates from an arbitration award dated 4.6.2003. The sole Arbitrator after entering into the arbitration reference, issued notice to the appellants. The appellants herein did not put in appearance before the Arbitrator despite notice having been sent through registered post, which was not received back served or otherwise. The Arbitrator raised a legal presumption that service had been effected upon the appellants and accordingly proceeded against them ex-parte. The claim was allowed by taking into account that the supply of goods was not in dispute as the same had been admitted by the appellants in their reply to the legal notice served upon them. The Arbitrator passed an award for ₹33,00,927.60 to be paid by the appellants jointly and severally. An execution petition was filed by the decree-holder/respondent and service was then effected upon the appellants herein who filed objection to the execution application filed under Order 21 of the Code of Civil Procedure, while also stating them to be objections read with Section 34 of the Act. The objections were dismissed by the executing court by the impugned order dated 25.2.2015 on the ground that the objections, if any, are to be filed under Section 34 of the Act.

9. Learned counsel appearing on behalf of the appellants herein would contend that the executing court by this impugned order has dismissed the objections and the same order is not maintainable. It is argued that the Additional District Judge, Amritsar has failed to appreciate the law laid down under Section 47 of the Code of Civil Procedure as this was the third execution application filed by the respondent in which the impugned

order has been passed. It is contended that no notice of initiation of arbitration proceedings was ever given to the appellants by the Arbitrator and this itself is violative of principle of natural justice, while further submitting that copy of the award was also not sent by the Arbitrator to the appellants which is clearly violation of provision of Section 31 (5) of the Act. It is contended that initially the respondents had filed execution petition in the year 2004 in which proceedings, the appellants had taken all objections as available to them and on the basis of these objections, the District Judge framed the issues, however, the execution petition came to be dismissed for want of prosecution and dismissal of the execution petition could not lead to the conclusion that the objections raised against the award stood concluded in favour of the respondent. It is argued that current execution petition has been filed on similar ground and all the objections taken therein have been dismissed by the executing court which is not sustainable, as the same has been dismissed primarily on the ground that the appellants ought to have filed objections under Section 34 of the Act, while also holding that the objections are time barred.

10. Learned counsel appearing on behalf of the respondent would argue that the service was duly effected upon the appellants herein but they deliberately chose not to put any appearance before the Arbitrator and, therefore, the Arbitrator took into account the evidence available passed the award, which has now become executable.

11. In the opinion of the Court, there is no infirmity in the order as passed by the executing court. The Arbitration and Conciliation Act, 1996 is a complete Code in itself, which allows an Arbitrator to settle all the

disputes in case there is an arbitration agreement. In the instant case, the Arbitrator who entered into arbitration reference made attempt to serve the appellants herein by sending notice through registered post which was not received back served or otherwise, therefore, the Arbitrator drew presumption of the service having been effected. This is how the award came into existence.

12. It is settled that if any person is aggrieved against the award passed by a duly appointed Arbitrator, then the same can be challenged by the aggrieved person way of filing objections as provided under Section Section 34 of the Act before the District Judge of the Principal Court within specified period of three months. The objector could also seek condonation of delay if the objections are not filed within the stipulated period by explaining justifiable reasons thereto. One of the reasons for delay could be that copy of the award, as stipulated under Section 35 (2) of the Act was never served upon the objector.

13. Admittedly, the appellants herein have not availed of their remedy under Section 34 of the Act and in fact appeared before the executing court and filed objections to the execution petition, while claiming it to be objections under Section 34 of the Act itself. This plea is not acceptable since the remedy would have been to file objections under Section 34 of the Act independently and not in the proceedings that have been initiated before the executing court.

14. Learned counsel for the appellants relied upon two judgments rendered in **Benarsi Krishna Committee and Ors Versus Karmyogi**

Shelters Pvt. Ltd. 2012 (4) R.C.R. (Civil) 584 and M/s Gupta Flour and

Oil Mills Versus National Insurance Company Ltd. and another 2004

(3) R.C.R (Civil) 104. There is no dispute to the proposition of law as laid down in **Benarasi Krishna Committee's case (supra)** that when a copy of the signed award is not delivered to the party himself, it would not amount to compliance with the provisions of Section 31 (5) of the Act. Similarly the ratio as laid down in **M/s Gupta Flour and Oil Mills (supra)** is not in dispute, wherein it has been held that an award is vitiated if the appointment of the Arbitrator is contrary to the arbitration clause. However, these could have been grounds to challenge the award of the Arbitrator under Section 34 of the Act. Therefore, the judgments relied upon by the learned counsel for the appellants are not applicable to the facts of the present case.

15. Consequently, finding no infirmity in the impugned order, this appeal is dismissed.

April 26, 2019
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(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned	Yes
Whether reportable	No