



\$~14

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 29th May, 2023

+ O.M.P. (COMM) 198/2023
M/S SHRI JAI GURUDEV TEXTILE AGENCIES Petitioner
Through: Ms.Mansi Gosain, Mr.Vineet Roy,
Advs.

versus

SURYA PROCESSORS PRIVATE LIMITED Respondent
Through: Mr.Abhishek Malhotra,
Ms.Atmaja Tripathy, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

CAV 289/2023

1. The learned counsel for the respondent has been heard on advance notice, the caveat stands discharged.

I.A.10554-55/2023 (exemption)

2. Allowed, subject to all just exceptions.

O.M.P. (COMM) 198/2023 & I.A. 10553/2023

3. This petition, filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act"), challenges the Impugned Arbitral Award dated 14.03.2023 passed by the learned Sole Arbitrator, adjudicating the disputes that had arisen between the parties in relation to the supply of textiles by the respondent to the



petitioner and the alleged payments due thereon, claimed by the respondent from the petitioner.

4. By the Impugned Arbitral Award, the learned Sole Arbitrator has found the respondent to be entitled to recover a sum of Rs.1,32,87,823/- from the petitioner, along with interest at the rate of 18% per annum from 17.04.2018 till the amount is recovered, and further to the cost of Rs.6,29,162/-.

5. The learned counsel for the petitioner submits that the Impugned Arbitral Award is liable to be set aside inasmuch as the learned Arbitrator has wrongly held the claim of the respondent to be within the period of limitation. She submits that the claim of the respondent was based on the balance confirmation dated 04.11.2016; the notice invoking the arbitration was issued only on 20.01.2020, that is, beyond the period of limitation.

6. She submits that the learned Arbitrator has wrongly relied upon the payment made vide a cheque dated 15.02.2018 by the petitioner to the respondent, when the admitted case of the respondent was that the payment was for specific invoices. She submits that such payment, therefore, could not have extended the period of limitation for filing of the claim. She submits that the period of limitation for commencing an arbitration runs from the date on which the “cause of arbitration” accrues, similar to the cause of action in a civil suit. In support, she relies upon the judgments of the Supreme Court in *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta*, (1993) 4 SCC 338 and *State of Orissa v. Damodar Das*, AIR 1996 SC 942.



7. She submits that the period of limitation does not get extended only because the respondent continued to demand the payment allegedly due. In support she places reliance upon the judgment in *M/s Geo Miller & Co. Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.*, (2020) 14 SCC 643.

8. On the other hand, the learned counsel for the respondent, who appears on an advance notice, submits that as admittedly the last payment made against the running account by the petitioner was on 15.02.2018, and the Notice of Invocation having been issued on 20.01.2020, the claim of the respondent was within the period of limitation. He submits that even otherwise, in the pleadings, the petitioner had not raised the plea of limitation. It was only during the course of the final arguments, when such a plea was raised. The limitation being a mixed plea of facts and law, the respondent could not have been prejudiced by such belated plea being raised inasmuch as the respondent got no opportunity to lead evidence on this issue. The learned Arbitrator still considered this plea and has held in favour of the respondent. This Court in exercise of its limited jurisdiction under Section 34 of the Act would, therefore, not interfere with such finding.

9. I have considered the submissions of the learned counsels for the parties on this issue.

10. It is not disputed by the learned counsel for the petitioner that the plea of claims of the respondent being barred by the limitation was not raised in the pleadings by the petitioner. It was raised belatedly during the course of the final submissions. The learned Arbitrator has rightly



recorded that the nature of the plea raised by the petitioner herein is a plea mixed in facts and law. It was not a pure question of law that could be determined by the learned Arbitrator without giving parties an opportunity to lead evidence. In spite of the same, the learned Arbitrator proceeded to consider this issue on the basis of evidence that was on record before the learned Arbitrator. The learned Arbitrator found that the last on-account payment made by the petitioner was on 15.02.2018. The Notice of Invocation of arbitration having been issued on 20.01.2020 was therefore, within the period of limitation.

11. The submission of the learned counsel for the petitioner that the payment of 15.02.2018 was on account of some specific invoices, cannot be accepted. In the absence of evidence being led on the issue of limitation on this account, the petitioner cannot be allowed to ambush the respondent at the stage of final arguments, having not raised this issue in the pleadings.

12. Even otherwise, the pleadings on the basis of which the petitioner bases the above the submission, do not support the petitioner. Paragraphs 11 and 15 of the Statement of Claim of the respondent read as under:

“11. It is stated that by virtue of the running account maintained by the Claimant, adjustments were made towards Invoice No. 13305 dated 03.02.2016. It is noteworthy that the amount of INR 1,82,299/- received from the Respondent on 22.11.2017 & 25.11.2017 were adjusted against Invoice No. 13305 which was to a total tune of INR 4,28,409/-. After the adjustment of the amounts received and rebate & discount of INR 28/- the outstanding due against Invoice No. 13305 Is INR 2,46,138/-. Thereafter, pursuant to Respondent's verbal request, payments received



were also used to clear outstanding due of INR 3,88,236/- payable against invoice no.13538 dated 08.02.2016 and INR 1,01,375/- payable against invoice no. 14346 dated 25.02.2016. The Respondent started defaulting in its commitment to pay against the outstanding invoices from February 2016. From 2016, the Respondent's cheques were being dishonored frequently, upon tendering for encashment before the bank.

xxx

15. It is stated that the last payment credited to Claimant's account was on 15.02.2018, pursuant to encashment of cheque dated 14.02.2018, bearing No. 114941, drawn on Syndicate Bank. Thereafter, while Respondent has issued cheques on other dates, the same have been dishonored by banks. Print out setting out the tabular summary of the amounts pending against invoices raised in lieu of raw materials supplied to the Respondent is annexed herewith, marked as Annexure C-3.”

13. In reply to the above averments, the petitioner stated as under:

“11. That the contents of para 11 of the Statement of Claim are completely false and denied that by virtue of the running account maintained by the Claimant, adjustments were made towards Invoice No. 13305 dated 03.02.2016. It is denied that an amount of INR 1,82,299/- received from the Respondent on 22.11.2017 & 25.11.2017 were adjusted against Invoice No.13305 which was to a total tune of INR 4,28,409/-. It is further denied that after the adjustment of the amounts received and rebate & discount of INR 28/- the outstanding due against Invoice No. 13305 Is INR 2,46,138/-. It is also false that pursuant to Respondent's verbal request, payments received were also used to clear outstanding due of INR 3,88,236/- payable against invoice no. 13538 dated 08.02.2016 and INR 1,01,375/- payable against invoice no. 14346 dated 25.02.2016. It is also wrongly stated that the Respondent started

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 03.06.2023

16:37:55



OMP(COMM) 198/2023

Page 5 of 12



defaulting in its commitment to pay against the outstanding invoices from February 2016. From 2016, the Respondent's cheques were being dishonored frequently, upon tendering for encashment before the bank. Whereas, it is submitted that there was no running account between the Claimant and the Respondent throughout their business relation. It is further submitted that if the alleged FIFO system was followed between the parties then how the said amounts of Rs. 1,82,299/- received on 22.11.2017 and 25.11.2017 were adjusted towards invoice no. 13305 dated 03.02.2016 and thereafter invoice no. 13538 dated 08.02.2016 and Invoice no. 14346 dated 25.02.2016 of amounts Rs. 3,88,236/- and Rs. 1,01,375/- respectively. It is submitted that the claimant is contradicting their own statements. It is further submitted that in actual the Respondent used to pay the invoice to invoice upon receipt of goods from the claimant directly and no FIFO system or running accounts were adopted throughout the business relationship.

xxx

15. That the contents of para 15 of the Statement of Claim are matter of fact that the last payment credited to Claimant's account was on 15.02.2018, pursuant to encashment of cheque dated 14.02.2018, bearing No. 114941, drawn on Syndicate Bank. However, it is denied that the Respondent has issued cheques on other dates, the same have been dishonored by banks. It is submitted that the Respondent has not issued any other cheque to the Claimant after 14.02.2018."

14. While the adjustment of the invoices was mentioned by the respondent in Paragraph 11, the same was vaguely denied by the petitioner in its reply. In Paragraph 15 of the Statement of Claim, the respondent stated that the last payment was made by the petitioner on 15.02.2018. This statement was not denied by the petitioner. Therefore,



in my view, the plea of limitation has been rightly decided by the learned Arbitrator and no fault can be found in the same.

15. The next challenge of the petitioner to the Impugned Arbitral Award is on the rejection of the plea of the petitioner of non-existence of the Arbitration Agreement between the parties. The learned counsel for the petitioner submits that admittedly there was no Arbitration Agreement between the parties contained in the Indent or in the Purchase Order. The Arbitration Agreement was contained in the invoices raised unilaterally by the respondent. Relying upon the judgment in *M/s Concrete Additives and Chemicals Pvt. Ltd. v. SN Engineering Services Pvt. Ltd.*, 2022 SCC OnLine Bom 8034; *Parmeet Singh Chatwal and Ors. v. Ashwani Sahani*, 2020 SCC OnLine Del 1881 and *Taipack Limited and Ors. v. Ram Kishore Nagar Mal*, 2007 (3) ARBLR 402, she submits that the insertion of the said clause in the invoices unilaterally by the supplier would not satisfy the test of Section 7 of the Act and, therefore, would not result in a binding Arbitration Agreement between the parties. She further submits that the petitioner is not a member of the Delhi Hindustani Mercantile Association and, therefore, the Arbitration Agreement would not bind the petitioner.

16. On the other hand, the learned counsel for the respondent submits that the petitioner, in response to the notice dated 20.01.2020 invoking the arbitration, had itself admitted to the Arbitration Agreement between the parties. He further submits that the invoices were acted upon by the parties and there was never a dispute on the same. The petitioner had disputed the receipt of textile under certain invoices, however, such



dispute would be arbitrable.

17. I have considered the submissions made by the learned counsels for the parties.

18. Admittedly, the Arbitration Agreement between the parties is contained only in the invoices raised by the respondent on the petitioner. These invoices were not disputed at least with respect to the Arbitration Agreement contained therein. More importantly, the petitioner in its reply to the notice issued by the respondent invoking the arbitration, stated as under:

"3. That as mentioned in paragraph no. 14 of the said notice, that your, client has already initiated criminal proceedings under section 138 NI Act at the Ghaziabad District Courts and whereas in paragraph no. 15 of the said notice the arbitration clause is mentioned and is being reproduced as under:

"All disputes are to be decided by Delhi Hindustani Mercantile Association (Regd.), as per the Rules & Regulations as under Arbitration & Conciliation Act."

The above said, "All disputes .. " also include the dispute regarding the alleged cheque bouncing. Why has your client not referred it to the Arbitration or Conciliation for recovery of the alleged payment prior to filing 138 Complaint?

Secondly, our client was pressurized, threatened and defamed by Denim Mills Association to whom your client had contacted to pressurize our client by passing a resolution of sanction by Denim Mill Association against our client. In this case also, why was Delhi Hindustani Mercantile Association (Regd.) not referred for arbitration first?

Your client has himself defied and contravened the alleged terms of arbitration by (i) by filing false criminal complaint u/s 138 N.I. Act and (ii) by

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 03.06.2023

16:37:55



OMP(COMM) 198/2023

Page 8 of 12



approaching DMA to pressurize our client and to put sanction of denim trade against our client.

When your client's above said tools did not work, then your client is now trying to explore a new venture of legal exploration, in the name of Arbitration with sole intention to harass and extort our client.

4. That in view of the paragraph no. 14 & 15 of the said notice it becomes of great significance that when your client has himself violated the arbitration clause by initiating the criminal proceedings against our client, you the addressee stand in no position whatsoever to force our client to enter appearance before the Arbitration Association namely, Delhi Hindustani Mercantile Association (Regd.)."

19. From the above, it would be evident that the petitioner did not dispute the existence of the arbitration agreement, however, contended that in the facts of the case, the respondent cannot invoke or rely upon the arbitration agreement. The learned Arbitrator has also relied upon the above admission of the petitioner on the existence of the Arbitration Agreement, by observing as under:

"6.1.9 Therefore, it is the duty of this Tribunal to examine the Arbitration clause in way that it is workable. In my view small font and the location of the arbitration clause in the invoices are not the determinative factors to reach the conclusion as to whether the arbitration clause existed or not. What it requires is a common-sense approach as to whether parties knew about the arbitration clause and knew that this is the framework for the resolution of their dispute. It has already been stated before, there is every reason to say that Respondent knew about the arbitration clause and it never raised any objection to it and the reply to the notice invoking arbitration clause further shows that Respondent had issues with the





referring of dispute to Delhi Hindustani Mercantile Association and Complaint case being filed under section 138 of the NI Act without having resorted to the Arbitration Clause but as such had nothing against the Arbitration clause per se.

xxxx

6.1.13 In the present Respondent not only does not deny having received the Invoices but also claims that the payments were required to made in respect of invoices on invoice-to-invoices basis and also that it has made all the payments and nothing remains to be paid from its side. Further, like it has been stated before in reply to the notice invoking arbitration clause there is no dispute raised as to the arbitration clause.

xxx

6.1.19 In the light of the foregoing discussion, I would conclude that there is valid arbitration agreement between the parties. The issue is accordingly decided in favour of the Claimant and against the Respondent.”

20. I find no reason to interfere with the above finding of the learned Arbitrator. The petitioner having not disputed the existence of the Arbitration Agreement in its reply to the notice of the respondent invoking the same, cannot be heard to deny the existence of the Arbitration Agreement later. The only dispute raised by the petitioner in the reply to the notice invoking arbitration was that the respondent having initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881, is deemed to have waived the Arbitration Agreement. This submission apart from being erroneous in law, cannot be read as a denial of the existence of Arbitration Agreement.

21. The plea of the learned counsel for the petitioner that as the petitioner is not a member of the Delhi Hindustani Mercantile

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 03.06.2023

16:37:55



OMP(COMM) 198/2023



Association, therefore, the Arbitration Agreement would not bind the petitioner, also does not impress me. It has not been shown that arbitration proceedings through the Delhi Hindustani Mercantile Association are possible only for the members of the said Association. Even otherwise, in the present case, the learned Arbitrator had been appointed by this Court on a petition filed under Section 11 of the Act.

22. I therefore, find no merit in the objection of the petitioner of non-existence of the Arbitration Agreement between the parties.

23. The learned counsel for the petitioner then challenges the Impugned Award on the merits of the claim raised. She submits that the respondent has been unable to prove its claim before the learned Arbitrator.

24. The above submission is disputed by the learned counsel for the respondent.

25. I have considered the submissions made by the learned counsels for the parties.

26. The learned Arbitrator on the merits of the claim has placed reliance on the balance confirmation statement admittedly executed by the petitioner on 04.11.2016. The learned Arbitrator also finds that the petitioner has not disputed the payments reflected by the respondent in its subsequent accounts. It has also not claimed that any payment made by the petitioner was not reflected in such account or was claimed by the respondent as due. The learned Arbitrator on appreciation of the evidence found that the respondent has been able to prove its claim. This being a finding on fact, in the limited jurisdiction that is vested in this



Court under Section 34 of the Act, I find no ground being made out. The Supreme Court in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, and *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.*, (2022) 1 SCC 131, has authoritatively held that a Court under Section 34 of the Act is not to act as a Court of Appeal against the findings of the learned Arbitrator. The learned Arbitrator is the final adjudicator of the facts and unless the same are shown to be completely perverse, interference by this Court would not be warranted.

27. In view of the above, I find no merit in the present petition. The same is accordingly dismissed. There shall be no order as to costs.

NAVIN CHAWLA, J

MAY 29, 2023/Arya/SS

[Click here to check corrigendum, if any](#)

भारतमेव जयते

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 03.06.2023

16:37:55



OMP(COMM) 198/2023