

(1991) 04 DEL CK 0053

In the Delhi High Court

Case No : First Appeal No. 133 of 1989

Chand Chits and Finance (P) Ltd.

APPELLANT

Vs

Super Advertisers and Others

RESPONDENT

Date of Decision : 08-04-1991

Acts Referred:

Citation : (1993) 2 BC 75 : (1991) 44 DLT 443

Hon'ble Judges : P.N. Nag, J

Bench : Single Bench

Advocate : P.D. Gupta and S.P. Singh, for the Appellant;

Judgement

P.N. Nag, J.

(1) This appeal has been directed against the judgment/order dated 1st April, 1989 passed by Shri G.S. Dakha, Additional District judge Delhi whereby he has stayed the suit u/s 34 of the Arbitration Act, filed by the appellant-plaintiff, after holding that there is a valid arbitration agreement between the parties and the plaintiff can have his remedy by referring the dispute regarding non-payment of Installments to arbitration as per the arbitration clause.

(2) The appellant-plaintiff had filed a suit under the provisions of Section 37 of the CPC against the defendants for the recovery of Rs. 31,800.00 on the ground that defendant No. I became the subscriber of the chit fund the business which the appellant-plaintiff is transacting. Defendant No. I, after he was declared prize bidder for the chit for the month of July, 1987, in the auction held on 25th July, 1987, was entitled to receive the chit amount less Rs. 15,200.00 as bid amount and to pay Rs. 100.00 towards incidental charges for preparation of documents etc. On 5th August, 1987 the defendants executed certain documents in favor of the plaintiff and undertook to pay the liability of Rs. 85,600.00 as by then Rs. 14,400.00 were received from the subscriber. In terms of the agreement, defendant No. I paid certain amounts. However, a sum of Rs. 30,000.00 still remains to be paid and is due to the plaintiff-appellant by the defendants. As

mentioned above, certain documents, e.g.. Promissory Note dated 5.8.1987, agreement of guarantee dated 5.8.1987 and a letter dated 5.8.1987 etc., were executed. The present suit has been filed by the plaintiff-appellant for the recovery of this sum of Rs. 30,000.00 , which the defendants had failed to pay to the plaintiff. The suit has been filed for Rs. 31,800.00 which includes interest at the rate of 12% p.a.

(3) During the pendency of the suit, an application u/s 34 of the Arbitration Act was filed on behalf of defendants 1 & 3 praying therein that in accordance with the terms of the agreement of guarantee entered into between the appellant-plaintiff and defendants 2 & 3 (guarantors) the disputes arising out of the transaction are to be referred to the arbitrator and the defendants are ready and willing to participate in the arbitration proceedings and, Therefore, the matter should have been referred to the arbitrator. This application u/s 34 filed by defendants 1 & 3 was allowed by the learned Additional District Judge. As stated above, against this order of the learned Additional District Judge, the present appeal has been filed.

(4) In order to determine the point in controversy, it would be relevant to refer to two documents, viz.. Agreement of Guarantee dated 5.8.1987 and also the Promissory Note dated 5.8.1987. The Agreement of Guarantee has been executed and signed by defendants 2 & 3 (guarantors) and accepted by the appellant-plaintiff whereby defendants have agreed to pay the appellant-plaintiff on demand all principle, interest, costs, charges and expenses due or which may be due at any tune or become due to the appellant-plaintiff from the successful bidder/principal borrower to the date of payment and also all losses or damages, costs, charges and expenses and in -the case of legal costs as between the attorney and clients occasioned to the appellant-plaintiff by reason of the omission, failure, default temporary or otherwise in the payment of the successful bidder/ principal borrower or by the guarantor or any of them including costs in enforcement of payment by suit or otherwise. On furnishing of this Agreement of Guarantee dated 5.8.1987 by defendants 2 & 3, the appellant-plaintiff had agreed to pay a sum of Rs. 84,700.00 to the defendant No. 1. This Agreement of Guarantee contains an arbitration clause which is reproduced below :-

"12.That all questions and matters in differences or disputes between the parties hereto, there representative touching the construction hereof, any act or thing in regard to or concerning or connected to rights, duties and obligations on their enforcement or performance, including the failure to pay a claim or Installment herein before recited and/or arising out of or relating to this agreement or the subject matter hereof shall be referred to the mutually agreed arbitrator appointed by the Company or the Register of Chit Funds, Delhi Administration, or the Courts of law, Delhi, whose decision will be final and binding on the parties concerned. Cost shall be at the discretion or the arbitrator and the award shall be final and binding on the parties concerned. The provisions of the Arbitration Act

or any statutory modifications thereof shall apply to the arbitration and this submission shall not be determined by the death of the "Successful Bidder/s" or the Guarantors or winding up the Company."

(5) The sole contention of the learned counsel for the appellant was that the agreement of guarantee, which is a tripartite agreement, which contained an arbitration clause, had not been signed and executed by defendant No. I, successful bidder/principal borrower and as such there is no valid arbitration agreement. According to him, Therefore, the matter could not have been referred to the arbitrator by the learned Additional District Judge.

(6) I regret I am unable to accept this contention of the learned counsel for the appellant. It is no doubt true that the Agreement of Guarantee has not been signed by defendant No. I successful bidder/principal borrower but however, the scheme and intention of various clauses of Agreement of Guarantee, if read together, do establish one fact that the defendant No. I-successful bidder/principal borrower-by implication is a party to the Agreement although he has not signed it. The surrounding circumstances further demonstrate that the defendant No. I has full knowledge of the contents of the Agreement of Guarantee. In this connection it would be relevant to refer to the Promissory Note executed by the successful bidder/principal borrower and the guarantors, i.e. defendants I to 3 in which they have jointly and severally promised to pay on demand to the appellant-plaintiff a sum of Rs. 85,600.00 , the same amount as mentioned in the Agreement of Guarantee. In Suresh Narain Sinha Vs. Akhauri Balbhadra Prasad and Others, it has been observed that it is not necessary the principal debtor should as a matter of law be an express party to the contract of guarantee, it is sufficient that the principal debtor is a party by implication to the contract.

(7) Further in the letter dated 5.8.1987 executed by the defendants -1 to 3, the defendants have agreed that in the event of default of deposit of any one Installment in the above chit by the subscriber, i.e. defendant No. I, the appellant-plaintiff may file the suit against them or any one of them in Delhi where the Head Office is situated, for the recovery of the whole of the amount due in respect of the Pronote and that they submit to the jurisdiction of courts at Delhi and they or any one of them will have no objection for the filing of suit against them in Delhi. This letter clearly demonstrates that the defendant No. 1-successful bidder/principal borrower-has full knowledge of the Agreement of Guarantee and to which he has not signed.

(8) Taking into consideration all the above circumstances in view, I have no doubt in mind that in the Agreement of Guarantee, defendant No. I- successful bidder-is also a party to the contract by implication although he may not have signed the same.

(9) In Jugal Kishore Rameshwardas Vs. Mrs. Goolbai Hormusji, it has been held by the Supreme Court that to constitute an arbitration agreement in writing it is

not necessary that it should be signed by the parties, and it is sufficient if the terms are reduced to writing and the agreement, of the parties thereto is established.

(10) In the present case, the terms and conditions have been reduced to writing and clearly contains an arbitration clause, according to- which the matter is required to be referred to the arbitrator. Although the successful bidder/ principal borrower, defendant No. I, has not signed the Agreement of Guarantee but, as already stated above, it is firmly established that he is a party to the Agreement of Guarantee containing an arbitration clause, as referred to above, and as such the matter is required to be referred to the arbitrator. In view of this the matter has been correctly referred to the arbitrator by the learned single Judge.

(11) No other point has been urged.

(12) There is no force in the appeal which is dismissed. In the circumstances, I make no order as to costs.