
(2008) 04 DEL CK 0159

In the Delhi High Court

Case No : FAO No. : 258 of 1998

M/s. Faire Brothers (Export Import) Pvt. Ltd. and Another

APPELLANT

Vs

M/s. Nagpur Textiles and Others

RESPONDENT

Date of Decision : 08-04-2008

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (2008) 9 ILR Delhi 1 Supp : (2008) RLR 97

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : V.N. Kaura and Ms. Anjali Chopra, for the Appellant;

Final Decision : Allowed

Judgement

Pradeep Nandrajog, J.—An ex-parte award was passed against the appellant on 5.8.1995. The same was challenged by the appellant when sought to be made a rule of the court. Objections u/s 30 and 33 of the Arbitration Act 1940 were filed. The same have been dismissed vide an order dated 23.12.1997. It is urged in the instant appeal that the impugned order as also the award have to be set aside for the reasons:

A. There existed no arbitration clause having consent of the appellant.

B. Learned arbitrator did not serve any notice upon the appellant when he entered upon reference and hence the award is vitiated on account of violation of the principles of natural justice.

C. The claim filed by the respondent purported to be in respect of 5 bills but as proof a statement of account was relied upon showing an opening balance of Rs. 2,02,422.30. Thereafter debit entry(s) were effected in the account pertaining to the 5 bills totaling Rs. 1,31,344.00. 5 credit entries totaling Rs. 2,64,077.50 were also reflected in the statement of account meaning thereby in the financial year in question Rs. 2,64,077.50 was admitted to have been received by the respondents. The said statement of account showed a credit balance of Rs.

69,688.80. That this was the sum awarded by the learned arbitrator. That it was obvious that the claim was on a statement of account and not the bills.

D. That only 3 out of the 5 (sic) had a printed clause that the goods were sold subject to arbitration by the Delhi Hindustani Mercantile Association. 2 bills even did not contain said printed clause. That no bill was signed by the appellant.

E. That the claim was lodged on 21.3.1995. The bills relied upon bear dates between 5.4.1991 to 20.9.1991 and hence the claim was barred by limitation.

F. Lastly, it was urged that it was not clear as to which was the award which had been passed. It was urged that even after the award was passed the Delhi Hindustani Mercantile Association continued with a correspondence with the appellant calling upon the appellant to appear before its Managing Committee and on 9.10.1995 informed the appellant that the Managing Committee decided on 7.10.1995 to refer the claim of the opposite party to its procedural committee.

2. Pertaining to the first contention urged namely there being no arbitration clause having consent of the appellant suffice would it be to note that 3 out of the 5 bills relied upon by the claimant had a clause printed thereon that goods sold would be subject to arbitration by the Delhi Hindustani Mercantile Association.

3. It would thus become an arguable case whether pertaining to sale under the two bills, subject matter of said sales could or could not be arbitrated upon. Ground No. D urged is also a limb of ground No. A for the reason ground No. D is predicated on the plea that 2 out of 5 bills did not contain a printed clause that disputes would be subject to arbitration by the Delhi Hindustani Mercantile Association.

4. It is unfortunate that neither the learned arbitrator nor the learned Trial Judge has considered this aspect of the matter.

5. It has to be noted that though claim was predicated on 5 bills but actually it was based on a statement of account. Further, it is not the case of the claimant that all the sales were under bills recording that disputes would be arbitrable as per the rules of the Delhi Hindustani Mercantile Association. Further, the statement of account shows an opening balance of Rs. 2,02,422.30. The statement of account shows that Rs. 2,64,077.50 was paid and duly credited for. In the absence of any evidence that the opening balance pertained to transactions relatable to bills having a printed clause that all disputes would be subject to arbitration by the Delhi Hindustani Mercantile Association, prima facie it would be difficult to hold that as lodged before the learned arbitrator, the claim was arbitrable.

6. It would not be out of place to mention that the learned arbitrator never issued a notice to the appellants informing that the dispute has been referred to him for arbitration. A perusal of the record shows that the Secretary of the Association had been writing to the appellants pertaining to the claim of the

respondent and had been notifying that the appellants should be present at the office of the association and report to Shri Mukund Chaudhary. It was never informed to the appellants that Shri Mukund Chaudhary had been appointed as an arbitrator. As noted above, the ex-parte award was published by Shri Mukund Chaudhary on 5.8.1995 but in spite thereof the Secretary of the Delhi Hindustani Mercantile Association continued to inform the appellants that the claim of the respondent would be considered by the managing committee of the association. I note only one such letter written by the Secretary of the Association. It reads as under:-

DELHI HINDUSTANI MERCANTILE
ASSOCIATION (REGD.)

1210/16, Chandini Chowk, Delhi-110 006.

In case No. 324/94-95, the claim filed by the petitioner will come up for the consideration of the Managing Committee for consideration in its meeting scheduled u/s 21 (ii) of the Constitution and Regulations to be held at the office of the Association on 07/10/1995 at 5 PM. You are requested to be present.

Kindly take note.

Date: 20.9.1995

Mercantile Association

Sd/-

For Secretary

P.T.O.

Copy to Capt.B.Katyal, Director of M/s. Faire Brother Export Import Pvt. Ltd., B-62, Swami Nagar, Near Panchsheel Park, New Delhi.

7. On 9.10.1990 the Secretary of the Association informed the appellants as under:

DELHI HINDUSTANI MERCANTILE
ASSOCIATION (REGD.)

1210/16, Chandini Chowk, Delhi-110 006.

Dear Sir,

In respect of the above matter, despite having been informed u/s 21(11) of the Constitution, you remained absent. Thus the Managing Committee of the Association on 7/10/1995 has decided, that you pay the Petitioner's claim within one week and inform the Association. If you fail to do so then the Association will be constrained as per the Rules to refer it to procedural committee.

Kindly take note.

Yours faithfully

Sd/

Secretary

Copy to:

M/s. Nagpur Textile, Prop. M/s. Metropole Textiles Enterprises Pvt. Ltd., Wholesale Dealer, 4951, Chandini Chowk, Delhi-110 006 for information, if within the above given time, you do not receive the money, then kindly inform the Association.

Secretary

8. The manner in which the Association has interacted with the appellants does not inspire confidence. The appellant was never informed in categorical language that Shri Mukund Chaudhary was appointed as an arbitrator. The possibility of the appellants being misled regarding appointment of an arbitrator cannot be ruled out.

9. It would also be not out of place to record that no material has been placed before the arbitrator where from the personal liability of Capt. B. Katyal, the director of appellant No. 1 can be culled out. It is simple law. Unless a director is a guarantor or stands as surety for the company he would not be personally liable in respect of the debts of the company.

10. On the issue of limitation, suffice would it be to note that if the claim is considered as based on an open current and a mutual account limitation commences from the end of the financial year in which last entry is recorded and so viewed, the claim filed would be within limitation. But this would mean that the claim has to be read as predicated on a current open and a mutual account and under the 5 bills. If the claim is predicated on the bills, limitation would commence from the date of each bill and in the facts and circumstances of the instant case the claim would prima facie be barred by limitation.

11. Since nothing has come on record with clarity on the issue pertaining to the basis of the claim hence it would be difficult to conclude on the issue of limitation. But, this would be fatal to the award for the reason the claim has to stand on its own legs.

12. The appeal is allowed. Impugned order dated 23.12.1997 is quashed. Objections filed by the appellants u/s 30/33 of the Arbitration Act 1940 challenging the award dated 5.8.1995 are allowed. The award is set aside.

13. I note that pursuant to the order dated 23.8.1999 the decretal amount which was deposited with the learned Trial Court together with interest and costs was permitted to be withdrawn by the respondent on furnishing security to the satisfaction of the learned Trial Court for restitution.

14. Since the appeal has been allowed and the award has been set aside, appellants would be entitled to restitution. The sum deposited by the appellants and withdrawn by the respondent shall be refunded by the respondent to the appellants together with interest @ 18% per annum from the date respondent withdrew the sum till the date appellants receive back the same.

15. I am ordering restitution with interest @18% per annum for the reason even the appellants while depositing the decretal amount paid interest @18% per annum, being the rate stipulated in the award and affirmed vide impugned order dated 23.12.1997. No costs.