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

Reserved on: 16.07.2013
Pronounced on: 19.07.2013

\+ **FAO (OS) 184/2013, C.M. APPL. 5414/2013 (for stay), C.M. APPL. 5416/2013 (for delay in filing) & C.M. APPL. 5417/2013 (for delay in refilling)**

SCHOLAR PUBLISHING HOUSE PVT. LTD..... Appellant

Through: Sh. Akhil Sibal, Sh. Chirag Jamwal, Sh. Ajay Upadhyay and Sh. Pradeep Chhindra, Advocates.

versus

M/S. KHANNA TRADERS ..... Respondent

Through: Sh. Sandeep Sethi, Sr. Advocate with Sh. Samrat Nigam and Ms. Ankita Mahajan, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR. JUSTICE S. RAVINDRA BHAT**

1. The question sought to be agitated in the present appeal directed against the judgment and order of a Learned Single Judge of this court is whether the award rendered on a dispute referred to arbitration by the respondent/claimant was legal and binding inasmuch as did the parties enter into an arbitration agreement.

2. The facts relating to the disputes are that the appellant used to receive paper supplied by the respondent/claimant, a sole proprietorship concern. The Appellant is engaged in the business of printing and publishing. In the normal course of trade, the claimant

used to supply paper according to the specification and requirements of the appellant, and also furnish an invoice for the goods delivered. The invoice would contain a stipulation which read as follows:

> *"In case of any dispute including dispute of non-payment in respect of this bill the same shall be referred to the "Paper Merchants Association (Regd) Delhi" for sole arbitration and the judgment given by the arbitrator/arbitrators appointed by the executive committee shall be final and binding on both the Parties. The Civil Suit at Delhi can also be filed at the option of the Seller."*

3. The Claimant had approached this Court filing an application under Section 9 of the Arbitration and Conciliation Act 1996, (hereafter called "the Act") seeking interim relief against the appellant. The Appellant appeared before the Court on 28.07.2006 and submitted that he was denying existence of the arbitration agreement. In the meanwhile, the respondent preferred claims before the arbitrator based on the dispute raised by it, which pertained to supplies made to the appellant during the period 01.04.2004 and 23.07.2005, based upon the invoices issued for that period towards the goods supplied. The appellant concededly did not participate in the arbitration proceedings. Eventually, on 21.12.2006 the arbitrator published award holding that the appellant had to pay to the respondent/claimant a sum of Rs. 3,44,28,861/- including *pendente lite* interest and future interest @ 12% per annum. The appellant objected to the award under Section 34 of the Act, contending that it was unenforceable because the parties had never agreed to submit their disputes to arbitration. The Learned Single Judge negatived the Appellant's argument that the stipulation in the invoice, referring to

arbitration of disputes was unilateral, and was never consented to. The Appellant had contended that the mere issuance of an invoice did not indicate consent for the condition, and the relevant conditions spelt out in Section 7 with regard to existence of an arbitration agreement were not fulfilled. In rejecting this submission, the Learned Single Judge relied upon a previous Single Judge decision of this Court in *Newsprint Sales Corporation v The Daily Pratap.* [CS(OS)2630-A of 1992 dated 1st September 2006]

4. It is argued by the Appellant's counsel, Shri Akhil Sibal that the impugned order is *ex facie* erroneous. Counsel underlined the fact that the Single Judge in this case based his conclusions on an entirely erroneous premise that *Newsprint Sales Corporation (supra)* had ruled that printed conditions, stipulating submission of disputes to arbitration, in invoices can be construed as arbitration agreements, whereas in truth, the decision holds quite the opposite. Relying extensively on the decision in *Newsprint Sales Corporation (supra)*, learned counsel submitted that for a court or arbitrator to hold that the parties had entered into a legally binding arbitration agreement, it is necessary to prove *consensus ad idem*, in that regard. The issuance of an invoice after conclusion of transaction, essentially an oral agreement for sale and delivery of goods, cannot evidence such *consensus* especially when one party to the transaction disputes the agreement and enforceability of such clause.

5. Learned Senior Counsel for the respondents submitted that the appeal lacks in merit. He relied on the observations in *Newsprint Sales Corporation (supra)*, as well as the decisions reported as *Lewis W. Fernandez v Jivatlal Partapshi & Ors* AIR 1947 Bom 65 and *Ram*

Chandra Ram Nag Ram Rice & Oil Mills Ltd v Howrah Oil Mills Ltd. and Anr. AIR 1958 Cal 620. The respondent/claimants also urge that the history of transactions between the parties clearly showed that the appellant had accepted by his conduct, the invoices which contained the arbitration clause, and on most occasions honored them. It was therefore, not open for him to contest the existence of an arbitration agreement. Reliance was also placed on the findings and observations of the arbitrator in the award published by him.

6. In the award, while dealing with the question of whether the parties had entered into an arbitration agreement, the arbitrator held as follows:

> *"……..The bills filed with the petition clearly show that there is an arbitration clause between the parties and the claimant is the member of the Paper Merchant Association. The bills/invoices issued by the claimant have been duly received and acknowledged by the defendants. The claimant and defendants are working together since 1996 and the opposite party has made payment against the supplies made by the claimant prior to the arising of the present controversy. From 1996 when the business dealings were started the claimant and defendants were duly placing orders and were receiving goods and was making the payments. The bills issued were having arbitration clause as per which this Arbitrator has got power to adjudicate the dispute.The rates and terms mentioned on all the bills have been acknowledged and accepted by the defendants. The statements of accounts have been signed by the Director and confirmed by the defendants. The Debit Notes for interest issued by the claimant were accepted and the required TDS was deducted and TDS certificates were issued. The defendants have never made any objection with regard to the bills, rates and terms or the adjudication of the dispute by this tribunal, thus, it can*

be easily said that defendants have nothing to say in their defence……"

7. In *Newsprint Sales Corporation (supra),* the Learned Single Judge noticed the Bombay and Calcutta High Court decisions, and concluded correctly, if one may say so, that there is no strait- jacket formula to say that such invoices cannot or can amount to binding arbitration clauses. The decision correctly surmised that the views of the other High Court had stressed the necessity to consider the conduct of the parties, evident from the record. Thereafter, in *Newsprint Sales Corporation (supra),* dealing with the facts in question, the Learned Single Judge concluded that there was no agreement. The relevant observations are as follows:

"32. None of the delivery challans refers that the supply made is on the condition that the disputes, if any, would be referred to the arbitration of an arbitrator appointed by the Paper Merchants Association (Regd.).

33. It is a case where pursuant to an oral contract where goods were delivered, post delivery, bills have been raised and in the said bills, referred to as debit memo, terms have been printed, one of which being the term, that disputes would be referred for sole arbitration.

34. Parties have to be ad idem on material terms of the contract when they enter into a contract and not post execution of the contract, unless of course, at the post execution stage, parties agree on certain terms to vary or modify terms of the contract.

35. Petitioner has not brought any material on record to show that before or at the time of effecting supply, it had made known to the respondent that delivery would be on a term that dispute, if any, would be referred to arbitration in terms of the rules and regulations or bye

laws of the Paper Merchants Association. In that view of the matter, the inevitable conclusion is that the respondent objector cannot be bound by the arbitration clause contained in the bye laws of the Paper Merchant Association for the reason parties were not ad idem that dispute would be referred to an arbitrator to be nominated by the Paper Merchants Association."

8. The Bombay High Court, dealing with an identical question in *Lewis. W. Fernandez (supra)* about existence of an arbitration agreement contained in a contract note issued after delivery of the goods, agreeing to submit disputes to arbitration in terms of Bye laws of an association, held that the conduct of the parties was relevant and determinative in that case. The court observed that:

"It is also clear that up to June 30, 1944, and some time later there was no dispute whatever raised by the plaintiff as regards the transactions effected by the defendants for and on behalf of the plaintiff in accordance with the instructions conveyed by the plaintiff through the sub-broker and in effect the plaintiff accepted the contract notes. It was only when the contract note in respect of the closing transaction of June 30, 1914, was sent by the defendants to the plaintiff and a demand for the sum of Rs. 11,112-8-0 was made by the defendants upon the plaintiff by their letter dated July 18, 1944, that the plaintiff came out by his letter in reply of July 20, 1944, stating that the amount shown as due by him to the defendants, viz, Rs. 11,112-80 was not correct inasmuch as it did not show the statement of his sale of 500 bales of September 1944 delivery. It is admitted that this statement as regards 500 bales of September 1944 delivery was a mistake on the part of the plaintiff and that really it ought to have been a sale of 1,000 bales of September 1944 delivery which according to the plaintiff was outstanding on that date. The plaintiff by his letter called upon the defendants to send to him a complete statement of his account with the defendants showing

separately the transactions for the month of July and September settlements after which he stated that he would settle the account of the defendants. It is significant to note that in that letter the plaintiff did not state that he had not received all the contract notes or all the statements of account in respect of the several transactions which the defendants entered into for July 1944 and September 1944 settlements as he seems to have done in the subsequent correspondence. The defendants wrote to the plaintiff on July 21, 1944, expressing their surprise at the attitude taken up by the plaintiff and referred the plaintiff to the contracts and weekly statements which had been submitted by them to the plaintiff as usual. The defendants stated that on perusing the same the plaintiff would be convinced that there was no outstanding business in his account and that the total amount of Rs. 11,112-8-0 shown by the defendants to his debit was correct. The plaintiff replied by his letter dated July 25, 1944, where he disingenuously stated that he had not been receiving the defendants' contracts and weekly statements regularly and that he had to rely upon verbal information from the sub-broker who he considered was the agent and sub-broker of the defendants for information regarding his position. The plaintiff, therefore, called upon the defendants to send to him a complete statement of account showing separately the July and September transactions. He further expressed his astonishment to learn that he had no outstanding business with the defendants and called upon the defendants to let him know under whose instructions the outstanding sale of 1,000 bales of September had been cut off, again repeating the mistake as to 500 bales instead of 1,000 bales of September 1944 settlement. It is significant, however, to note that in this letter also he did not deny that he had received the contract notes and the weekly statements of account which the defendants alleged they had been sending to him as usual, the only allegation made by him being that he had not been receiving the same regularly. The statements made by Jivatlal

Partapshi, the partner of the defendants' firm in paragraph 3 of his affidavit in support of this notice of motion dated september 30, 1944, in that behalf were also denied in that affidavit of the plaintiff dated October 11, 1944, in the same vague and indefinite manner by stating:

> *"I further deny that the defendants had submitted all the contract notes and statements of accounts as falsely alleged in the said affidavit or that I have acknowledged receipts in respect of contract notes and statements of accounts in respect of all my transactions in the office despatch book of the defendants."*

5. This denial, in my opinion, is not honest and leads me to the conclusion that the plaintiff in fact received all the contract notes and the statements of accounts as alleged by the defendants in the usual course at the address given by the plaintiff to the defendants in that behalf and in effect accepted the contract notes which had been so sent by the defendants to him. I am satisfied on these materials that the contract notes in respect of all the transactions except the last disputed one of the purchase of 1,000 bales of September 1944 settlement on June 30,1944, were sent by the defendants to the plaintiff and were in effect accepted by the plaintiff by his conduct, with the result that in respect of all of the contracts except the last disputed one which I have mentioned above there were arbitration agreements within the meaning of the Indian Arbitration Act of 1940."

The Calcutta High Court, in the decision *Ram Chandra Ram Nag and Ram Rice & Oil Mills Ltd* echoed the views of the Bombay High Court, and held as follows:

> *"2……The first point raised by Mr. Mukherjee is that it cannot be said that there was any arbitration agreement between the plaintiff and the*

defendant No. 1 and consequently the courts below acted without jurisdiction in making an order of stay under Section 34 of the Indian Arbitration Act. The contract in this case was entered into by the delivery and acceptance of bought and sold notes to the buyer and seller respectively. The bought notes delivered by the broker to me defendant No. 1 have been produced by them but the sold notes, though produced by the plaintiff in the Gaya Court, have not been produced in the Howrah Court, and both the Courts have drawn an adverse inference against the plaintiff for the non-production and have held that the sold notes, if produced would have shown that they are the counter parts of the bought notes which have been produced by the defendant No. 1. The bought notes which have been produced by the defendant No. 1 contain an arbitration clause which runs as follows: "All disputes regarding the contract are to be settled by two Arbitrators one nominated by buyers and one nominated by sellers respectively in accordance with the Indian Arbitration Act in Calcutta". The bought notes which have been produced by the defendant No. 1 also show that they are signed by the broker only and so it may be inferred that the sold notes were similarly signed by the broker only. From this fact Mr. Mukherjee at one stage sought to argue that the acceptance of these bought and sold notes by the buyer and seller respectively at best created a contract between the buyer and the broker on the one hand and the seller and the broker on the other, and that it did not create any privity of contract between the buyer and the seller. When, however, it was realised that this argument would strike at the very foundation of the plaintiff's claim against the defendant No. 1, it was abandoned. It was, however, still argued that the contract did not create an arbitration agreement between the plaintiff and the defendant No. 1 within the meaning of the Arbitration Act. Reliance was placed on the definition of "arbitration agreement" as given in Section 2(a) of the Indian Arbitration Act, and it was argued that in order to constitute an arbitration agreement, the agreement must be signed by both the parties. This view

was taken in certain English cases which were followed by Page, J., in the case of John Batt and Co. v. Kanoolal and Co. (A). This view, however, was expressly dissented from by a Division Bench presided over by Rankin, C. J., in the case of Radha Kanta Das v. Bearlien Brothers Ltd. AIR 1929 Cal 97 . After referring to the view taken by Page, J. in John Batt's case (A), Sir George Rankin observed as follows :

"In my judgment, the law is the other way. The Arbitration Act of 1889 and the Indian Arbitration Act, for the best of good reasons have not required that the agreement to submit should be signed by both parties."

The same view was taken in the case of Sankar Lal Lachmi Narain v. Jainey Brothers : AIR1931All136 . In the case of Keshoram Cotton Mills v. Kunhyalal Bagwani 44 CWN 607 (D), Panckridge, J. also followed this view."

9. The Court also notices that Section 7 of the Act does not compel the parties to adhere to any particular form of agreement or document. An arbitration agreement can be inferred through a series of correspondence, or even on demur of one of the parties to an arbitration proceeding, who can otherwise object to it, on the ground of absence of agreement; if such party does not urge the contention in the reply to claim, the arbitration agreement is deemed to exist.

10. In the present case, there is a wealth of material in the form of more than a decade of commercial relationship during which identically phrased invoices containing the arbitration stipulation were accepted and acted upon. It is not the appellant's case that the disputed invoices were the only documents containing such stipulations, which were freshly introduced. Having regard to these circumstances, the court is of opinion that there is no merit in the

appeal; it is therefore dismissed along with pending applications without any order as to costs.

S. RAVINDRA BHAT, J
(JUDGE)

NAJMI WAZIRI, J
(JUDGE)

JULY 19, 2013