

(2009) 10 DEL CK 0363

Delhi High Court

Case No: F.A.O. No. 194 of 2006 and C.M. No. 10446 of 2006

Sh. Shyam Sunder Maheshwari
(HUF) through its Karta Mr.
Shyam Sunder Maheshwari Prop.
Shyam Sunder Maheshwari

APPELLANT

Vs

Garg and Company though its
Proprietor, Sh. Kamal Kumar

RESPONDENT

Date of Decision: Oct. 15, 2009

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34, 37
- Negotiable Instruments Act, 1881 (NI) - Section 138

Hon'ble Judges: Vidya Bhushan Gupta, J

Bench: Single Bench

Advocate: Ramesh Chandra and Geeta Mehrotra, for the Appellant; None, for the Respondent

Final Decision: Dismissed

Judgement

V.B. Gupta, J.

This appeal has been filed by appellant u/s 37 of Arbitration and Conciliation Act, 1996 (for short as "Act") against order dated 22nd May, 2006 passed by Additional District Judge, Delhi.

2. Appellant filed a claim before Arbitrator regarding recovery of money for goods supplied to respondent. Respondent did not participate in the proceedings and ex-parte award was passed on 27th April, 2005. Intimation of the same was given to respondent by Arbitrator on 9th May, 2005 by registered AD. Application u/s 34 of the Act, for setting aside the award, was filed by respondent on 27th October, 2005 only i.e. clearly beyond the period of limitation.

3. Trial court vide impugned order modified the award and awarded interest @ 6% per annum on the cheque amount from the date of notice i.e. 10th July, 2004 till realisation, whereas Arbitrator awarded interest @ 18% per annum.

4. On 28th May, 2009, counsel for respondent stated before this Court that the principal amount was Rs. 1,49,353/- and in order to settle the matter, respondent is ready to pay equivalent to that amount as interest. Appellant refused to accept the same and matter was renotified for 24th August, 2009 for hearing.

5. On 24th August, 2009, only counsel for appellant appeared, while there was no appearance on behalf of respondent. Matter was admitted and ordered to be listed in due course.

6. On 11th September, 2009, when it came up for hearing, only counsel for appellant appeared, while there was no appearance on behalf of respondent. Under these circumstances, arguments advanced by learned Counsel for appellant have been heard.

7. It is contended by learned Counsel for appellant that trial court wrongly held that petition u/s 34 of the Act, filed by respondent is within time. The same was filed on 27th October, 2005, i.e. clearly beyond the period of limitation.

8. Appellant filed the claim before Arbitrator, prior to filing of complaint u/s 138 of Negotiable Instruments Act. On the date, when award was passed, complaint case was pending and was adjourned to 28th May, 2005 for making the payment. The same was finally disposed of on 19th November, 2005.

9. It is contended that proceedings under Negotiable Instruments Act and those in Arbitration, are entirely separate and distinct proceedings and one has no bearing or relevance on the other.

10. Since objections filed by respondent are time barred, the same are not maintainable. In support, learned Counsel referred a decision of Supreme Court, Union of India Vs. M/s Popular Construction Co.,

11. There is no dispute about principles of law laid down in Popular Construction Co. (Supra), that time limit prescribed u/s 34 of the Act, is absolute and unextendable. This judgment is not applicable to the facts of the present case since in the case in hand, the respondent has paid the entire amount and Arbitrator was not aware of these facts which are apparent from the record of this case.

12. There is no doubt that appellant has concealed the fact about compromise made in the court of Metropolitan Magistrate from the Arbitrators. In the statement of claim made before the Arbitrator, there is no mention of filing of the complaint u/s 138 of the Negotiable Instruments Act. The principal amount of the dishonoured cheque is the same in both the matters. Thus, it cannot be said that both matter are totally distinct. The Arbitrator had passed the award being unaware of such

concealment. The appellant has, thus, not approached the Arbitrator nor he had come to the court with clean hands.

13. The observations made by trial court in this regard are as under;

The respondent had filed a complaint u/s 138 of Negotiable Instruments Act prior to invoking the arbitration proceedings i.e. 8.9.2004. The summons of this complaint were issued to the accused/petitioner for 21.4.2005. On the said date of hearing, the petitioner as well as the respondent had appeared before the court and made statements. The petitioner had admitted his liability in respect of the cheque and has stated that he is ready and willing to make the payment. He had undertaken to pay the cheque amount in a monthly instalments of Rs. 25,000/- and had further undertaken that in case he commits any default then he shall pay interest @ 15% per annum from the date of cheque on the balance amount. The said statement of the petitioner has been accepted by the respondent in his statement. He had undertaken that after receiving the payment as undertaken by the petitioner, he shall withdraw his complaint.

The petitioner is stated to have made the entire payment on 19.11.2005. On the said date of hearing the respondent made statement that he had received the entire payment with respect to the settlement with the petitioner and had prayed that his complaint may be disposed of as compromised. However, in the statement of claim made before the Ld. Arbitrator, the respondent has concealed the fact regarding filing of the complaint u/s 138 of Negotiable Instruments Act.

Admittedly, the principal amount with respect to the dishonoured cheque is one and the same in both the proceedings. Since the respondent had concealed the fact regarding filing of the complaint before the Ld. Arbitrator. Thus the Ld. Arbitrator had also passed the award with respect to the cheque amount also. The award has been passed on 27.4.2005. Whereas the statement of the parties with respect to the compromise was recorded before the Ld. Metropolitan Magistrate on 21.4.2005. Thus, the respondent has concealed this fact about compromise from the Ld. Arbitrators.

Admittedly, the petitioner has made the payment of the dishonoured cheque in the proceedings u/s 138 of Negotiable Instruments Act to the tune of Rs. 1,49,211/- Had this fact been brought to the notice of the Ld. Arbitrators then the award with respect to the amount of dishonoured cheque would not have been passed. Moreover, the petitioner had undertaken by to pay interest @ 15% per annum on balance amount of instalments in case he defaulted to make the payment of dishonoured cheque. The respondent has not disputed the said statement made by the petitioner before the Ld. Metropolitan Magistrate. The respondent has also not disputed that the petitioner made no default in making instalments as undertaken by him. Thus, award passed by the Ld. Arbitrator awarding interest @ 18% per annum is also not tenable as the respondent have agreed to receive interest @ 15%

per annum subsequently.

However, the fact cannot be ignored that the petitioner did not participate in the arbitration proceedings though the same were in his knowledge. It is also not the case of the respondent that he had given up the rate of the interest on the principal amount. In these circumstances, keeping in view the current rate of interest being paid in different classes of deposits by the Schedule Banks in accordance with the directions issued to the Banking Companies by RBI under Banking Regulation Act, the pendente lite and future interest 6% per annum is awarded to the respondent on the cheque amount from the date of notice i.e. 10.7.2004 till realisation.

14. The trial court, accordingly, modified the award of Arbitrator and awarded appellant interest @ 6% per annum on the cheque amount from the date of notice i.e. 10th July, 2004 till realisation. Admittedly as there was concealment of the material facts by the appellant, I do not find any infirmity in the impugned judgment, passed by the trial court. Hence, present appeal is, hereby, dismissed.

15. No order as to costs.

16. Trial court record be sent back.

17. Dismissed.