

\* **HIGH COURT OF DELHI : NEW DELHI**

**FAO No.366-367/ 2005 & CM No. 16459-60/2005**

% Judgment reserved on: 14<sup>TH</sup> September, 2009

Judgment delivered on: 12<sup>TH</sup> October, 2009

1. Shri Sheru  
S/o Sh. Uday Bhan.
2. Shri Subhan Khan  
S/o Sh. Amru

Both appellants are  
R/o Village Bhimsika,  
P.O & Tehsil Hathin,  
District Faridabad, Haryana.

....Appellants  
Through: Mr. Zafar Khan, Adv.

Versus

M.G.F. Services Ltd.  
Having its Registered Office  
At 4<sup>th</sup> Floor, Indra Prakash Building,  
21, Barakhamba Road,  
New Delhi- 110 001.  
Through Sh. Javed Akhtar

....Respondent.  
Through: Mr. Sunil Magon, Adv.

Coram:

**HON'BLE MR. JUSTICE V.B. GUPTA**

1. Whether the Reporters of local papers may  
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported  
in the Digest? Yes

**V.B.Gupta, J.**

Present appeal has been filed by appellants under Section 37 of Arbitration & Conciliation Act, 1996 (for short as 'Act') against order dated 30<sup>th</sup> September, 2004 of Additional District Judge, Delhi.

2. Brief facts are that, respondent is a hire purchase and leasing company. Appellants approached respondent company with a proposal to take one Ashok Leyland Cargo 709 vehicle on lease basis. Their request was accepted. Accordingly on 7<sup>th</sup> July, 1996, parties entered into an agreement. Gajender Singh and Deendar stood as guarantors. In view of the agreement, vehicle was delivered to them. Appellants were irregular in paying the installments and thus committed breach of the terms and conditions of the said lease agreement.

3. Vide notice dated 17<sup>th</sup> November, 2001, respondent terminated the said agreement and appellants were called upon to pay the outstanding dues and to return the vehicle, failing which the disputes were to be referred to the mutually appointed arbitrator. As per clause 39 of the said agreement, Sh. Surya Kant Singla, Advocate was appointed as sole arbitrator. Arbitrator made his award on 16<sup>th</sup> May, 2002.

4. Vide impugned order, application under Section 34 of the Act read with Order 9 Rule 13 of the Code of Civil Procedure 1908 ( for short as 'Code') for setting aside the ex-parte award passed by Arbitrator, dated 16<sup>th</sup> May, 2002, was dismissed.

5. It is contended by learned counsel for appellants that the award has been improperly obtained in the absence of appellants. The Arbitrator, thus, personally and legally misconduct in the proceedings. No attempt was made by the Arbitrator to secure attendance nor

any proper intimation was given to the appellants, with regard to the appointment of Arbitrator and proceedings conducted by him. The Arbitrator was obliged to ensure services of notices upon appellants through reliable means and as such impugned order is liable to be set aside.

6. The award is a nullity since it is based upon concealment, deception and had been procured. Lastly, it is contended that appellants came to know about passing of the award, only on 3<sup>rd</sup> December, 2003.

7. On the other hand, it is contended by learned counsel for respondent that, appellants were duly served on the address furnished by them. The service was also affected through UPC. Despite number of notices, appellants failed to join the proceedings and they were rightly proceeded ex-parte. Present appeal is nothing but abuse of process of law and has been filed just to delay the proceedings.

8. The question is to be seen in the present case is as to whether proper intimation about appointment of Arbitrator and proceedings conducted by him was given to the appellants or not. Secondly, whether Arbitrator has misconducted in arbitration proceedings.

9. Section 34 of the Act read as under:-

**“34. Application for setting aside arbitral award-(1)** Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub Section (3)

**(2)** An arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on

matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
- (b) the court finds that-
  - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
  - (ii) the arbitral award is in conflict with the public policy of India.

*Explanation-* Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or , if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal;

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application with a further period of thirty days, but not thereafter.

- (4) On receipt of an application under subsection (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

10. Supreme Court in ***Grid Corporation of Orissa Ltd.& Anr. V . Balasore Technical School***, JT 1999(2) SC 480 held;

“The award of the Arbitrator is ordinarily final and conclusive as long as the Arbitrator has acted within its authority and according to the principle of fair play. An Arbitrator’s adjudication is generally considered binding between the parties for he is a Tribunal selected by the parties and the power of the court to set aside the award is restricted to cases set out in Section 30 of the Arbitration Act. It is not open to the Court to speculate where no reasons are given by the Arbitrator, as to what impelled him to arrive at his conclusion. If the dispute is within the scope of the arbitration clause it is no part of

the province of the court to enter into the merits of the dispute. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere with such an award.”

11. In ***Food Corporation of India v. Chandu Construction and Anr., JT 2007 (5) SC 305***, Supreme Court laid down as to what constitute misconduct;

“While considering objections under Section 30 of the Arbitration Act, 1940 (for short ‘the Act’), the jurisdiction of the Court to set aside an award is limited. One of the grounds, stipulated in the Section, on which the Court can interfere with the award is when the Arbitrator has ‘misconducted’ himself or the proceedings. The word “misconduct” has neither been defined in the Act nor is it possible for the Court to exhaustively define it or to enumerate the line of cases in which alone interference either could or could not be made. Nevertheless, the word “misconduct” in Section 30(a) of the Act does not necessarily comprehend or include misconduct or fraudulent or improper conduct or moral lapse but does comprehend and include actions on the part of the Arbitrator, which on the face of the award, are opposed to all rational and reasonable principles resulting in excessive award or unjust result.”

12. In another decision of Supreme Court in ***Markfed Vanaspati and Allied Industries v. Union of India, JT 2007 (11) SC 141***, it observed that scope of interference is extremely limited in a non speaking award. The Court held;

“15. The decided cases of this Court demonstrate that this Court has consistently taken the view that scope of interference in a non-speaking award is extremely limited. The Court cannot probe into the mental process of the Arbitrator. The court should endeavour to support a non-speaking arbitration award provided it adhered to the parties agreement and was not invalidated due to Arbitrator’s misconduct.

16. Russell on Arbitration 19<sup>th</sup> Edition at Pages 110-111 described the entire genesis of arbitration as under;  
An Arbitrator is neither more or less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him: he is not a mere investigator but a person before whom material is placed by the parties, being either or both of evidence and submissions: he gives a decision in accordance with his duty to hold the scales fairly between the disputants in accordance with some recognized system of law and rules of natural justice. He is

private in so far as (1) he is chosen and paid by the disputants (2) he does not sit in public (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy (4) so far as the law allows he is set up to the exclusion of the State Courts (5) his authority and powers are only whatsoever he is given by the disputants agreement (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of those powers must not be contrary to the proper law of the contract or the public policy of England bearing in mind that the paramount public policy is that freedom of contract is not lightly to be inferred with."

13. The execution of lease agreement between the parties has been admitted, which is apparent from the record as well as from the following findings of the trial court;

"A perusal of the proceedings of the Ld. Arbitrator reveals that vehicle lease agreement was executed between the lessor M.G. F. Services Ltd. and Sheru and Subhan Khan the lessees and Gajender Singh and Deendar the guarantors on 27.7.1996. This fact has also been admitted by the applicants in para 1 of the application that they had obtained one Ashok Leyland Cargo Truck under hire purchase from the respondent M.G.F Services Ltd. in the year 1996. Thus

execution of this vehicle lease agreement stands admitted”.

Trial court further observed;

“This agreement is also thumb marked by the lessor, lessee and guarantors. Since, this agreement has been admitted by the applicants, now it does not lie in the mouth of the applicants to say that the arbitrator namely Sh. Surya Kant Singla has closed links with the respondent because it was agreed between the parties that all disputes and differences arising out of this agreement shall be referred either to Sh. Abhinav Vashist or in case of death, refusal or otherwise, the same was to be referred to Sh. Surya Kant Singla, Advocate. This plea now raised by the applicants is not available to them and thus falls to the ground”.

14. Coming to the service of notices, trial court observed;

“The notices were sent by the Ld. Arbitrator by way of UPC and registered AD. The notices sent to Sheru and Deendar has been received back duly served. While the applicant Sheru had put his thumb impression along with his signature on the AD card received back, the guarantor Deendar had signed on the AD card received back after due service. A bare comparison of the thumb impress appearing on the agreement with the thumb impress appearing on the AD card reveals that it is of one and the same person. Similarly,

signature of Deendar on the agreement and the AD card with naked eye, leaves no room for doubt that they belong to one and the same person”.

15. The above findings of the trial court with regard to the service of notices sent by Arbitrator is a finding of fact. Even otherwise, as per record of Arbitral proceedings, guarantor Deendar had signed on the A.D. Card while another A.D. Card, bears the thumb impression of appellant-Sheru. Thus, due notice of Arbitration proceedings was sent by the Arbitrator. Now after receipt of the notices from the Arbitrator, it does not lie in the mouth of the appellants to say that they did not have the knowledge about Arbitration proceedings.

16. Case of the appellants before this Court is that, they came to know about passing of the award only on 3<sup>rd</sup> December, 2003, when Revenue Officer (Patwari concerned), informed about the attachment under execution proceedings. Appellants have not filed any affidavit of the concerned Revenue Officer, who

informed them about the execution proceedings nor copies of any attachment proceedings, which took place in execution have been placed on record. The story mentioned in the objections as well as application under Order 9 Rule 13 of the Code, is a cock and bull story which does not inspire any confidence.

17. I do not find any infirmity or ambiguity in the impugned order passed by the trial court.

18. Present appeal is most bogus and frivolous one. It is nothing but an abuse of the process of law. Hence, this appeal is dismissed with costs of Rs.20,000/-.

19. Appellants are directed to deposit the costs with trial court within a period of one month from today, failing which trial court shall recover the same in accordance with law.

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20. Dismissed.

October 12, 2009

**V.B.GUPTA, J.**

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