

HIGH COURT AT CALCUTTA**Bench: The Hon'ble Justice Prasenjit Biswas****Date of Decision: 02.04.2024**

Case Number: C.O. No. 3689 of 2015

CIVIL REVISIONAL JURISDICTION

APPELLATE SIDE

M/S Fullerton India Credit Company LimitedPetitioner**Versus****Ms. Manju Khati.Respondent****Legislation and Rules:**

Article 227 of the Constitution of India

Section 5, 8 of the Arbitration and Conciliation Act, 1996

Order 39 Rule 1 and 2 read with Section 151 of the Code of Civil Procedure

Subject: Revisional application against the order rejecting an application filed under Section 8 of the Arbitration and Conciliation Act, 1996, challenging the jurisdiction of the civil court in light of an arbitration clause in an agreement.

Headnotes:

Arbitration Agreement - Referral to Arbitration - Interpretation of Section 8 of the Arbitration and Conciliation Act, 1996 - Petitioner sought reference to arbitration pursuant to an arbitration clause in the agreement governing their relationship - Trial Court rejected the application, citing failure to produce original or duly certified copy of the agreement - Petitioner contended that a duly certified copy of the agreement, attested by a Notary Public, was provided, fulfilling the statutory requirement - Held, Trial Court's refusal to refer the dispute to arbitration was erroneous - Section 8 mandates referral to arbitration upon satisfaction of specified conditions, including existence of an arbitration agreement and timely application by a party - Once prerequisites are met, Court has no discretion but to refer the parties to arbitration - Court must not delve into detailed analysis of agreement's terms, but ensure prima facie validity of arbitration clause - Compliance with Section 8(2) satisfied, rendering Court empowered to refer the matter to arbitration - Trial Court directed to refer the matter to arbitrator within specified timeframe - Revisional application allowed.

Referred Cases:

- Sundaram Finance Limited Vs. T. Thankam reported in (2015) 14 SCC 444 [Para 14, 15].

- Hema Khattar v. Shiv Khera reported in (2017) 7 SCC 716 [Para 19].
- Vidya Drolia v. Durga Trading Corpn. Reported in (2021) 2 SCC 1 [Para 20].
- SBP & Co. V. Patel Engg. Ltd. Reported in (2005) 8 SCC 618 [Para 22].
- M/s. Sundaram Finance Limited vs T. Thankam reported in AIR 2015 Supreme Court 1303 [Para 23].

Representing Advocates:

For Petitioner: Mr. Shaunak Mukherjee, Mr. Amitava Mitra, Ms. Antara Choudhury, Ms. Sanghamitra Majumder, Mr. P. Sinha

Prasenjit Biswas, J:-

1. This revisional application is directed against the order dated 7th July, 2015 passed by the learned Civil Judge (Junior Division), Siliguri in Title Suit No. 210 of 2013.
2. Being aggrieved and dissatisfied with the impugned order passed by the learned Trial Court, the present petitioner has filed this revisional application filed under Article 227 of the Constitution of India.
3. By passing the impugned order learned Trial Court rejected the application filed by the present petitioner/defendant filed under Section 8 of the Arbitration and Conciliation Act read with Section 5 of the Act of 1996.
4. The plaintiff/opposite party (herein) instituted a suit with a prayer for declaration, injunction and consequential relief against the present petitioner before the Trial Court which has been registered as Title Suit No. 210 of 2013. The plaintiff/opposite party also filed an application with a prayer for injunction filed under Order 39 rule 1 and 2 read with Section 151 of the Code of Civil Procedure. After receiving summons the present petitioner entered appearance in that suit and filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 read with Section 5 of the Act of 1996 with a prayer to refer the matter before the arbitrator to resolve the disputes cropped up in between them. The plaintiff/

opposite party filed written objection to the said application filed by the defendant/petitioner. The said application filed by the defendant was rejected by the Trial Court by passing an order dated June 10, 2014 and the said order passed by the Trial Court was challenged by the defendant before this Court by filing an application under Article 227 of the Constitution of India which was registered as C.O. No. 2550 of 2014. This said revisional application was allowed by this Court by passing an order dated August 26, 2014 by setting aside the impugned order dated June 10, 2014 passed by the learned Trial Court. This Court remanded the application filed by the defendant to the Trial Court with a direction to consider the same in accordance with law and dispose it within two months from the date of receive of copy of the order.

5. In pursuance of the said direction passed by this Court dated August 26, 2014 the application filed by the defendant under Section 8 read with Section 5 of the Arbitration and Conciliation Act a fresh order was passed on July 7, 2015 and by passing the said order learned Trial Court rejected the application filed by the defendant/petitioner (herein) on the grounds stated in the impugned order.
6. The order dated July 7, 2015 is under challenge in this revisional application which has been preferred by the defendant of the Title Suit No. 210 of 2013.
7. In pursuance of the direction passed by this Court service was affected upon the opposite party/plaintiff but she did not venture to appear and contest the present revisional application.
8. Learned Counsel appearing on behalf of the petitioner submits before this Court interalia that the learned Trial Court did not at all consider the statements made out in the application filed under Section 8 and 5 of the Arbitration and Conciliation Act, 1996. It is further submitted by the learned Counsel that when there is an agreement between the parties which contains an arbitration clause, the civil court has no jurisdiction to

try the said suit and as such the learned Trial Court misrepresented the Section 8(1) and (2) of the Arbitration and Conciliation Act, 1996 at the time of passing of the impugned order.

9. Learned Counsel further assailed that the learned Trial Court has hopelessly failed to appreciate the fact that the present petitioner filed duly certified copy of the original agreement attested by the Notary Public, which is to be said duly certified copy of the original agreement in view of the legal proposition as settled by this Court. It is submitted by the learned Counsel that while passing the impugned order learned Trial Court failed to appreciate that the Trial Court has no jurisdiction to try and determine the said suit and the same may be referred to the arbitrator for proper adjudication of the disputes between the parties.
10. I have anxiously considered the submission advanced by the learned Counsel on behalf of the petitioner and have gone through the impugned order passed by the Trial Court.
11. It appears that the relationship of the plaintiff and the defendant is governed by one agreement dated 18.04.2013 wherein a clause being no 4/4.1 is incorporated which says that both the parties were agreed by that all future dispute and differences between the parties thereto shall be referred to arbitration. The clause 4/4.1 is hereby reproduced for proper appreciation of

the terms of the agreement

“All disputes, differences and/or claims arising out of or in relation to this Agreement shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof and the same shall be referred to sole arbitrator by a sole arbitrator to be nominated/appointed by FICCL. In the event of death, refusal, neglect, inability or incapability of the persons so appointed to act as an arbitrator, FICCL may appoint another person to act as an arbitrator. The award including the interim award/s of the

arbitrator shall be final and binding on all parties concerned. The arbitrator may lay down from time to time procedure to be followed by him in conducting arbitration proceedings and shall conduct arbitration proceedings in such manner as he considers appropriate. The arbitration proceedings shall be held at the place mentioned in the Loan Summery Schedule. Subject to the arbitration clause contained herein, the competent courts at the place mentioned in the Loan Summery Schedule shall have exclusive jurisdiction over any matter or legal proceedings arising out of or in relation to this Agreement”.

12. In passing the impugned order learned Trial Court held that the defendant/petitioner has failed to produce either the original or the certificate copy of the agreement as required under Section 8(2) of the Arbitration and Conciliation Act, 1996. But in fact the petitioner/defendant filed the certified copy of the original agreement duly attested by the Notary Public which in terms of the law cannot be said to be a not duly certified copy of the original agreement as required under the provision of the Act. It appears that after getting summons from the Trial Court the petitioner as defendant entered appearance in the said suit and filed an application under Section 8 of the Arbitration and Conciliation Act with a prayer to refer the matter before the arbitrator over the disputes cropped up in between the parties and from the arbitration clause it is clear that all disputes, differences and/or claims arising out of or in relation to this agreement shall be settled by arbitration in accordance with the provisions of the Act of 1996.
13. In this case the plaintiff/opposite party has filed the suit against the present petitioner with a prayer for declaration, injunction and consequential reliefs along with an application under Order 39 Rule 1 and 2 read with Section 151 of the Code of Civil Procedure and when there is a specific clause in the agreement to refer the matter over the dispute to the arbitrator then it can be said as per provision of the Act,

the civil court has no jurisdiction to entertain the suit filed by the plaintiff. Therefore, refusal by Court to refer dispute on ground that the said clause applies only to dispute connected with agreement is not proper. More so, when it was repeatedly held by the Hon'ble Apex Court that the Court has only to see the matter of suit is subject matter of the arbitration agreement. So, learned Trial Court came to a wrong conclusion that Arbitral Tribunal can only decide regarding terms and conditions of the agreement.

14. At the time of hearing learned Counsel appearing on behalf of the petitioner draws attention to the Court about the decision rendered by the Hon'ble Apex Court in case of Sundaram Finance Limited Vs. T. Thankam reported in (2015) 14 SCC 444.
15. It is profitable to quote the relevant paragraph of the said decision which entails as follows:-

“13. Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law - *generalia specialibus non derogant*. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court.”

16. Section 8 of the Arbitration and Conciliation Act entails thus:

“8. Power to refer parties to arbitration where there is an arbitration agreement.—(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under subsection (1) and that the issue is pending before the judicial authority, an

arbitration may be commenced or continued and an arbitral award made.” 17. An analysis of Section 8 would show that for its applicability, the following conditions must be satisfied:

(a) that there exists an arbitration agreement;

(b) that action has been brought to the court by one party to the arbitration agreement against the other party;

(c) that the subject-matter of the suit is same as the subject-matter of the arbitration agreement;

(d) that the other party before he submits his first statement of the substance of the dispute, moves the court for referring the parties to arbitration; and

(e) that along with the application the other party tenders the original arbitration agreement or duly certified copy thereof.

18. Thus, once the prerequisite conditions as stated above are satisfied, the court must refer the parties to arbitration. As a matter of fact, on fulfilment of the conditions of Section 8, no option is left to the court and the court has to refer the parties to arbitration. There is nothing on record that the prerequisite conditions of Section 8 are not fully satisfied in the present case.

The trial court, in the circumstances, ought to have referred the parties to arbitration as per arbitration clause incorporated in the arbitration agreement.

19. It is profitable to quote the observation of the Hon'ble Apex Court in case of Hema Khattar v. Shiv Khera reported in (2017) 7 SCC 716.

“36. In view of the above, we are of the considered opinion that in the present case, the prerequisites for an application under Section 8 are fulfilled viz. there is an arbitration agreement; the party to the agreement brings an action in the court against the other party; the subject-matter of the action is the same as the subject-matter of the arbitration agreement; and the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. We have come to the conclusion that the civil court had no jurisdiction to entertain a suit after an application under Section 8 of the Act is made for arbitration. In such a situation, refusal to refer the dispute to arbitration would amount to failure of justice as also causing irreparable injury to the defendant.”

20. The Hon'ble Apex Court in Vidya Drolia v. Durga Trading Corpn. reported in (2021) 2 SCC 1, laid down a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable.

These were:

“(1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem. (2) When cause of action and subject matter of the dispute affects third-party rights; have erga omnes effect; require centralised

adjudication, and mutual adjudication would not be appropriate and enforceable. (3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable. (4) When the

subject-matter of the dispute is expressly or by necessary implication nonarbitrable as per mandatory statute(s). These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when the answer is affirmative that the subject-matter of the dispute would be non-arbitrable.”

In Vidya Drolia (supra), the Apex Court has held that Court will only decline reference under Section 8 of the Act in rare cases where the Court is certain that either the arbitration agreement is non-existent, or the dispute is itself “manifestly non-arbitrable”.

21. Section 5 of the Arbitration Act reads as under:

Extent of judicial intervention. — Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

22. Major amendments were made in the Arbitration Act in the year 2015, interalia in Section 8 of the Act, in order to further reduce any chances of judicial interference. In view of above referred decision the Civil Court should first see whether there is ouster of jurisdiction in terms or compliance with the procedure under special statute. In SBP & Co. v. Patel Engg. Ltd. reported in (2005) 8 SCC 618 the Hon’ble Apex Court unequivocally held that where there is an arbitration agreement between the parties and one of the parties, ignoring it, files an action before a judicial authority and the other party raises the objection that there is an arbitration clause, the judicial authority has to consider that objection and if the objection is found sustainable the court is bound to refer the parties to arbitration. It is difficult to understand why the learned Trial Court hold that the act of one of the parties to the case can be termed as crime and the arbitration tribunal does not have jurisdiction to deal with such crime.

When it prima facie satisfies that the arbitration clause is valid and has the effect of mutual consent of the parties to the contract the court is bound to refer the parties to arbitration on satisfying all other ingredients mandated under Section 8 of the Arbitration and Conciliation Act.

23. The legal position is settled down by the Apex Court in M/s. Sundaram Finance Limited vs T. Thankam reported in AIR 2015 Supreme Court 1303 interalia that-

“15.Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the Civil Court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the Civil Court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law-generalia specialibus non derogant. In such a situation, the approach shall not be to see whether there is still jurisdiction in the Civil Court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court.”

So, the learned Trial Court failed to appreciate the true scope and spirit as provided under Section 8 and 5 of the Arbitration and Conciliation Act, 1996.

24. Since the certified copy of the agreement attested by the Notary Public was filed within the requirement of Section 8(2) of the Act, it must be held that the mandatory requirement under the Act had been complied with. Accordingly, the Court would be empowered to refer the matter to an arbitrator due to the compliance with the provisions mentioned under Section 8(2) of the Act.

25. So, it is not at all necessary for the Trial Court to go into each and every part of the agreement to conduct a meticulous analysis of the arbitration clause. When it prima facie satisfied that there is a valid arbitration clause and has been entered into agreement on mutual consent of the parties to the contract the Court is bound to refer the parties to arbitration on satisfying all other ingredients as mandated under the Act of 1996.
26. The order of the Trial Court is hereby set aside.
27. The learned Trial Court is hereby directed to refer the matter before the arbitrator within one month from the date of receive of copy of this order.
28. C.O. being no. 3689 of 2015 is hereby allowed and disposed of.
29. There will be no order as to costs.
30. Urgent Photostat certified copy of this order, if applied for, be given to the parties on payment of requisite fees.

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