

GAHC030004422023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP/9/2023

Kailash Prasad Jain
S/o Late Madanlal Jain, R/o 56A, Rafi Ahmed Kidwai Road, 5th Floor, Park Street
West Bengal, Kolkata

VERSUS

Sh Lalbiakzama
S/o L.T.Zauva, Chanmari West, Aizawl ER Enterprise Office Ramhlun South, Aizawl,
Mizoram

Advocate for the Petitioner : Mr Lalchhanliana Khiangte

Advocate for the Respondent :

Linked Case : I.A.(Civil)/101/2023

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Mizoram

Advocate for the Petitioner : Mr Lalchhanliana Khiangte
Advocate for the Respondent : Mr B Lalramenga

BEFORE
HON'BLE MR. JUSTICE KAUSHIK GOSWAMI
ORDER

11.09.2024

1. Heard Mr. Lalchhanliana Khiangte, learned counsel appearing for the petitioner/defendant. Also heard Mr. B. Lalramenga, learned counsel appearing for the sole respondent/plaintiff.

2. This Civil Revision Petition has been filed under Section 115 of the Code of Civil Procedure, 1908 read with Article 227 of the Constitution of India assailing the Order dated 21.04.2023 passed by the Court of learned Senior Civil Judge-IV, Aizawl Judicial District, Aizawl in Civil Suit No. 7/2022, whereby the Trial Court was pleased to maintain the Civil Suit with a direction to the petitioner/defendant to file written statement.

3. The facts of the case is as follows:-

The respondent/plaintiff approached and requested Rarity Agencies Ltd., Kolkata and JM Fiscal Pvt. Ltd., Kolkata to join him as financial partner in order to complete work order allotted to him by M/s Reliance Corporate IT Park Ltd.

Agreeing to the said proposal, Memorandum of Understandings (MoUs) dated 11.2.2017 and 19.3.2018 were executed by the parties and JM Fiscal Services Pvt. Ltd. was represented by the petitioner/defendant in the first MoU dated 11.2.2017. As per the arbitration clause in the two MoUs, any disputes or differences arising out of the MoU has to be referred to Arbitration under the Arbitration & Conciliation Act, 1996 and no parties shall commence legal proceedings without first referring the matter to Arbitration which shall be at Kolkata only and the Court at Kolkata only shall have jurisdiction in the matter.

However, the respondent/plaintiff filed Civil Suit No. 7 of 2022 at Aizawl against the petitioner/defendant without impleading JM Fiscal Services Ltd. and Rarity Agencies Ltd., Kolkata in gross violation of the Arbitration clause. The petitioner/defendant filed preliminary objection before the learned Court below and vehemently objected entertainment and further proceedings of the case as being barred by Arbitration clause in the MoUs. However, the learned Senior Civil Judge-IV was pleased to maintain the case vide Order dated 21.4.2023. Hence, this revision petition.

4. Mr. Lalchhanliana Khiantge, learned counsel for the petitioner/defendant submits that in view of the Arbitration Clause in the MoUs dated 11.02.2017 and 19.03.2018, the suit filed by the respondent/plaintiff is not maintainable and accordingly, upon receiving summons from the Trial Court, a written objection was filed before the Trial Court wherein the issue of maintainability of the suit was raised as a preliminary issue. He, accordingly, submits that the order of the Trial Court rejecting the said issue raised as regards the maintainability of the suit in view of the existence of an arbitration agreement is totally erroneous and the same is ought to be interfered with by this revisional Court.

5. Per contra, Mr. B. Lalramenga, learned counsel for the respondent/plaintiff

submits that there is no jurisdictional error whatsoever in the order of the Trial Court dated 21.04.2023 holding the suit maintainable and therefore, the said order of the Trial Court warrants no interference whatsoever from this Court while exercising revisional jurisdiction under Section 115 of the Code of Civil Procedure.

6. He further submits that the petitioner/defendant has neither filed any appropriate application under Section 8 of the Arbitration and Conciliation Act, 1996 nor filed any application under Order VII Rule 11 of the Code of Civil Procedure for rejection of the plaint and therefore, cannot in this revision petition argue that the suit is not maintainable due to existence of the arbitration clause in the subject MoUs. He further submits that the dispute raised in the suit is not covered under the Arbitration agreement.

7. I have heard the learned counsels for the parties and I have perused the materials available on record.

8. Before proceeding with the arguments made by the contesting parties apt to refer to the plaint filed in Civil Suit No. 7/2022. It appears that the said suit has been filed for damaged compensation amounting to Rs. 1.50 crore (Rupees one crore fifty lakhs) against the defendant for loss of profit, goodwill and reputation of the respondent/plaintiff.

9. Paragraphs 2 to 12 of the said plaint is reproduced hereunder for ready reference:-

“2. The brief facts which led to file this instant civil suit is that the Plaintiff was into the business of construction and is the Proprietor of ER Enterprises having its Office at Ramhlun South, Aizawl, Mizoram. The plaintiff had obtained a work Order No. 189/31242903, dated 12.1.2017; P31/630016431, dated 14.02.2018; and P31/630020499, dated 23.03.2018 from Reliance Corporate IT Park Limited, 2nd

Floor, Peter Street, Aizawl, Mizoram for installation of the ISHB (Indian Standard High Beam) (Steel Construction) poles for aerial cabling in Aizawl Lunglei stretch.

3. That in connection with the aforementioned work order the Plaintiff along with two other companies viz. JM Fiscal Services Pvt. Ltd., represented by Aakanksha Jain and Rarity Agencies Ltd. represented by Deepak Agarwal signed a Memorandum of Understanding (MOU) for executing the aforementioned contract work. The aforementioned contract work was completed and completion certificate was issued by the Area Manager, Reliance Corporate IT Park Limited, Aizawl.

(Photocopy of Completion Certificate issued by the Area Manager, Reliance Corporate IT Park Limited, Aizawl and MoU signed by Plaintiff and defendant are annexed hereto and marked as Annexure-I & II colly)

4. Since the work done was completed all the necessary payment was done by the employer and the three parties to the aforementioned memorandum have received their due share/dividends according to the memorandum of understanding. Hence, the MOU date 11.02.2017 and 19.03.2018 stands dissolved and no longer have any binding on the parties.

5. During the signing of the MOU aforementioned the Plaintiff deposited fourteen blank cheques bearing Cheque No. 232134, No. 232135, No. 232136, No. 232137, No. 232138, No. 232139, No. 232140. No. 049644, No. 049645, No. 049646, No. 049647, No. 049648, No. 049649 and No. 049650 and 15 IndusInd Bank, Blank Cheque No. 242014, No. 242015, No. 242016, No. 242017, No. 242018, No. 242019, No. 242020, No. 242021, No. 242022, No. 242023, No. 242024, No. 242025, No. 242026, No. 242027 & No. 242028 which was duly signed by him to the defendant for emergency uses during the construction work.

6. The Plaintiff was under the notion that since the contract was completed and all the dividends were divided among the parties there is no longer any requirement for the blank cheque deposited to have any more uses, and the same was to be returned to the Plaintiff.

7. To the utter shock of the Plaintiff on 07.04.2021 the defendant presented Cheque No. 232134 and intended to withdraw Rs. 47,00,000/- (Rupees Forty Seven Lakhs) from Park Street Branch, State Bank of India, Kolkata favoring "Jain Udyog Ltd." and upon receiving the verification phone call from the said Bank the same was denied and was returned dishonored.

8. That the defendant after the aforementioned denial, withdrew Rs. 30,00,000/- (Rupees Thirty Lakhs) by making three different withdrawal by presenting three different Cheques No. 232139, 232137 & 232140 amounting to Rs. 10,00,000/- (Rupees Ten Lakhs) each. And the same was transferred to the defendant's personal bank account.

(Photocopy of Transaction Statement made on 07.04.2021 is annexed hereto and marked as Annexure-III)

9. The Plaintiff upon learning such action of the defendant tried his best by contacting his home Branch at Ramhlun, State Bank of India, at Aizawl and the same bears fruitful result and the amount of Rs. 30,00,000/- was reversed and returned to the Plaintiff's bank account by night at around 7:00PM on the same date.

10. That due to the action of the defendant being mala fide and having the motive to deceive the plaintiff, the plaintiff therefore filed a necessary Criminal Complaint before the Court of Judicial Magistrate First Class and the same was registered as Criminal Complaint No. 28 of 2021. And the same is pending disposal.

(Copy of Order passed in Criminal Complaint No. 28/2021 is annexed hereto and marked as Annexure – IV)

11. It may be brought to the notice of the Court that the statement showing payment received and paid by the plaintiff to the defendant in connection with MoU mentioned above is shown in schedule below:-

STATEMENT SHOWING PAYMENT RECEIVED AND PAID BY ER ENTERPRISES TO KPJ GROUP

AMOUNT PAID TO KPJ AND ADJUSTMENTS IN VARIOUS ACCOUNTS		
Particulars	Annexure No.	Amount (Rs.)
Amount paid to KPJ/Groups	A1	38,480,673.40
LESS		
PROFITS	B	8,671,739.50
FARUKH	C	12,550,905.00
ZODIN	D	3,475,000.00
GST (BILLED BY KPJ TO ER)	E1	3,152,335.01
EMI	F	1,069,970.00
TOTAL ADJUSTMENTS	G-TOTAL B TO F	28,919,949.51
BALANCE	H=A1-G	9,560,723.89
AMOUNT RECEIVED FROM KPJ AS CAPITAL & ADJUSTMENTS		

Particulars	Annexure No.	AMOUNT (Rs.)
CAPITAL INTRODUCED (Bank + Direct)	I	15,884,456.00
ADD:KPJ COMMO EXPENSES	J	159,947.60
(Rs 399869 x 40% share of ER)		
BALANCE	K=I+J	16,044,403.60
LESS:		
COMMON EXPENSES AT ER	L	1,308,085.20
LOSSES IN TOWER BUSINESS	L	19,41,627.64
GST RELATING TO FARUKH	N	965,430.00
SHARE OF LOSS IN MARPARA PROJECT	O	2,314,583.07
LIQUIDATED DAMAGES IMPOSED (Aizawl-CTI Sesawng)	P	47,063.76
Excess Interest Paid on EMI	F-1	46,441.82
TOTAL ADJUSTMENTS	Q=L+L+N+O+P+F1	66,23,231.49
BALANCE	R=K-Q	94,21,172.11
Excess paid as Capital receivable by ER	S=H-R	1,39,551.78
Add: Cash paid by Sh. Sanjay Jain to KPJ charged to E.R. Enterprises		6,00,000.00
Payable by KPJ to ER Enterprises		7,39,551.78

The above statement of account was audited and proved by Akas & Associates, Chartered Accountants vide auditor's report dated 04.10.2021. This account statement shows and proved that the plaintiff had already honored the aforesaid MoU on his part and all the necessary payment, adjustments, etc. were made according to the profit and loss ratio of the MoU.

(Copy of audit report and statement showing payment received and paid by ER Enterprises to KPJ Group is annexed hereto and marked as Annexure - V).

12. The plaintiff and defendant further collaborated in handling civil job at Marpara Sub-station under the project handled by PGCIL Corporate. This instant work was done as sub-contract work under Sterling & Wilson Pvt. Ltd. The aforesaid civil work sustained heavy loss and the plaintiff made necessary adjustment in their financial transaction as mentioned in para 11 (transaction between the plaintiff and the defendant) and the amount still payable by the defendant amounts to Rs. 7,39,551.78/- (seven lakhs thirty nine thousand five hundred and fifty one and seventy eight paise) only.

(Copy of an electronic mail communication from Sterling & Wilson is annexed hereto and marked as Annexure -VI)."

10. Apt also to refer to the preliminary objection filed by the appellant/defendant which is reproduced hereunder for ready reference:-

"2. That the Plaintiff has no locus standi to file this suit against the answering Defendant.

3. That this Hon'ble Court has no jurisdiction to entertain this suit and the dispute between the Plaintiff and the Defendant could not be adjudicated by this Hon'ble Court as being barred by Arbitration clause of the Memorandum of Understanding (MoU) dt.11.2.2017 duly signed and executed by the parties on the following grounds:-

(i) The Defendant would like to submit before this Hon'ble Court that as admitted by the Plaintiff himself at Para No. 2 & 3 of the Plaint that the instant suit relates to the dispute arising out of the agreement between the two parties namely JM Fiscal Services Private Ltd. r/b the Defendant and ER Enterprises r/b by the Plaintiff (Shri. Lalbiakzama) as per the Memorandum of Understanding (MoU) dt.11.2.2017 (Annexure-II of the Plaint) duly executed by the Plaintiff and the Defendant and the subsequent MoU dt.19.3.2018 duly signed by the Plaintiff and JM Fiscal Services Private Ltd. r/b Aakanksha Jain (Annexure-IIA).

(ii) Clause 10.1 of the MoU dt.11.2.2017 stated that any dispute or differences in relation to or arising out of or touching the MoU or the validity, interpretation, construction, performance, breach or enforceability of the said MoU shall be referred to the Arbitral Tribunal and the same shall be finally resolved by Arbitration under the Arbitration and Conciliation Act, 1996.

(iii) As per clause 10.1.1 of the said MoU, the Arbitral Tribunal shall consist of 3 Arbitrators out of them each party shall appoint one Arbitrator each and the third

Arbitrator shall be appointed by those two Arbitrators, who shall compulsory be an Advocate.

(iv) The parties had also agreed by executing the said MoU that the place of Arbitration shall be Kolkata only.

(v) The award of the Arbitral Tribunal shall be binding on the parties and also that neither of the parties shall commence legal proceedings without first referring the matter to Arbitration and till the Arbitral Tribunal has given its direction/award.

(vi) The MoU also provided that the Court at Kolkata only shall have jurisdiction to receive, entertain, try and determine all actions and proceedings.

(vii) The second MoU also provided the same alternative dispute resolution clause.

4. That the suit, is therefore, liable to dismissed and rejected outright due to Arbitration clause in the MoU duly signed by the parties.”

11. It appears that the sole objection for maintainability of the suit is the existence of an Arbitration Agreement in the MoU dated 11.02.2017 and subsequent MoU dated 19.03.2018. However, it appears that no application under Section 8 of the Arbitration and Conciliation Act, 1996 was filed before the Trial Court.

12. Section 8 of the said Act is reproduced hereunder for ready reference:-

“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 to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]*

(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:

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

13. It is correct that where dispute is referable to arbitration, parties cannot be compelled to take recourse to in Civil Court.

14. It appears that in the present case, no application under Section 8 of the Arbitration and Conciliation Act, 1996 was filed by the appellant/defendant before the Trial Court.

15. In view of the above, in the ends of justice, this Court deems appropriate to dispose of the instant revision petition by giving a liberty to the petitioner/defendant to file appropriate application before the Trial Court in accordance with law.

16. It is needless to clarify that in the event, such application is filed, the Trial Court shall dispose of the same in accordance with law and the Order dated 21.04.2023 impugned in this revision petition shall not be binding in such proceedings.

17. Civil Revision petition accordingly stands disposed of.

18. Interim order passed earlier stands vacated.

JUDGE

Comparing Assistant