

**THE HIGH COURT OF TRIPURA
AGARTALA**

RSA 43 OF 2006

Sri Lakshmi Kanta Bhattacharjee,
S/O Sri Paresh Nath Bhattacharjee,
Proprietor of M/s B.C. Construction,
North Nayapara, P.S.- Dharmanagar,
Dist- North Tripura.

... **Plaintiff-Appellant**

- **Versus** -

1. **The State of Tripura,**
Through the Secretary,
To the Government of Tripura,
Public Works Department, Agartala.
2. **The Chief Engineer,**
Public Health Engineering,
Government of Tripura, Kunjaban,
Agartala, West Tripura.
3. **The Superintending Engineer,**
P.H.E. Circle No.-II,
Ambassa, District- Dhalai Tripura.
4. **The Executive Engineer,**
P.H.E. Division No.-II, Kumarghat,
P.O. & P.S.- Kumarghat, North Tripura.
5. **The District Magistrate & Collector,**
North Tripura, Kailasahar.

Defendant Respondents

**BEFORE
THE HON'BLE MR. JUSTICE U.B.SAHA**

For the appellant : Mr. SM Chakraborty, Sr. Advocate.

For the respondents : None.

Date of hearing & delivery
of Judgment and Order : **01.06.2015.**

Whether fit for reporting : YES / No.

JUDGEMENT AND ORDER (ORAL)

This appeal under Section 100 of the Code of Civil Procedure is against the judgment and decree dated 27.06.2006 passed in Money Appeal No. 02 of 2005 by the learned Additional District Judge, North Tripura, Dharmanagar whereunder the learned Additional District Judge affirmed the judgment and decree dated 08.09.2005 and 16.09.2005 respectively passed by the learned Civil Judge, Senior Division, North Tripura, Dharmanagar in Money Suit No. 01 of 2004 dismissing the suit of the appellant.

2. At the time of admission of this appeal, following substantial questions of law were framed:

“(i) Whether both the learned Appellate Court and the trial Court erred in law while passing the impugned judgment by misinterpreting and misconstruing the document marked Exbt.D dated 09.08.1999 issued by the respondent No.3, or not ?

(ii) Is the suit not maintainable on the ground of existence of the arbitration clause in the contract agreement between the parties ?”

3. There is no dispute that the suit instituted by the appellant was for realization of the amount of Rs.1,74,215/- for which a bill was submitted through Junior Engineer, Public Health Engineering, Sub-Division No. IV to the Assistant Engineer, Public Health Engineering, Sub Division No. IV, Dharmanagar but the same was not paid on the ground that the claim of the appellant was not permissible under the agreement. Being aggrieved by the said action of the respondents, the appellant filed the suit and the respondents also filed written statement questioning the maintainability of the suit. The learned trial Court after considering the petition of the parties framed the following issues, which are as follows:-

- “(i) Whether the suit is maintainable in its present form ?**
- (ii) Whether the plaintiff is entitled to get declaration that letter No. F.12(4)/PHE/C-II/2059 dated 18.07.03 issued by defendant no.3 and letter No. F.10(115)/EE/PHE/D-II/2212, dated 31.7.03 issued by defendant no.4 are illegal, unauthorized, unlawful, unenforceable and null and void ?**
- (iii) Whether the plaintiff is entitled to get decree in the suit?**
- (iv) What other relief/reliefs the parties are entitled to get ?”**

4. The learned trial Court decided the issue no. (i) against the plaintiff holding that the suit is hit by the arbitration clause no. 25 appended with the agreement. The learned trial Court also decided issue no. (ii) and (iii) against the plaintiff in view of the decision in issue no. (i). Being aggrieved by the decision of the learned Civil Judge, Senior Division i.e. the trial Court, the plaintiff preferred the First Appeal being Money Appeal no. 2 of 2005 wherein the learned appellate Court after hearing the parties and considering the impugned judgment therein dismissed the appeal affirming the judgment of the trial Court.

5. Facts needed to be discussed are as follows:

The appellant being enlisted contractor entered into an agreement with respondent no.4 for construction of urban water supply scheme at Dharmanagar/laying of rising main line from water treatment plant at Huruah, Dharmanagar over head tanks / construction of 2 nos. steel bridge including abutments over river Kakri and Juri (2nd call) and ultimately the said work was awarded to the plaintiff appellant on the basis of negotiation held between the plaintiff appellant and respondent no.3. After completion of the said negotiation, respondent no.3 changed the terms of the negotiation behind the back of the plaintiff appellant without the consent of the plaintiff appellant by way of inserting an extra

clause namely 'Variation in respect of design of steel at the rate of 2% either on higher or lower site shall be accepted without any involvement of expenditure. No extra claim shall be entertained for use of any excess quantity of steel beyond 2%' and included the changed terms and conditions (Exbt.-D) with the agreement. The plaintiff appellant completed the work as per terms and conditions in the agreement and finally submitted his bill amounting to Rs.1,74,215/- to the respondent no.3 which was forwarded to the respondent no.4 but the said bill was not paid. Being aggrieved by the action of the respondents, the plaintiff appellant issued a notice under Section 80(1) of the Code of Civil Procedure and consequent thereto filed the suit.

6. The respondent no.3, 4 and 5 submitted written statement but the respondent no.1 and 2 did not file any written statement and the case proceeded exparte against those respondents. The respondent no. 3,4 and 5 denied all the allegations brought by the plaintiff appellant against them. It is also stated that during the negotiation, the clause of variation of steel, as stated by the plaintiff appellant has not been accepted by the Superintending Engineer, P.H.E., Circle No. II, Kunjaban, Agartala as communicated by it vide its letter No. F.12-4/SE/PHE-II/99/281, dated 09.08.1999 to the Executive Engineer, PHE Division No.II, Kumarghat and that has also formed a part of the agreement and while signing the agreement between the plaintiff and the defendant no. 4 no objection has also been raised by the plaintiff, rather agreed and signed the agreement bearing no. 15/SE/EE/PHE/99-2000, hence the claim is not tenable. The learned trial Court considering the pleadings of the parties and hearing the learned counsel decided the issues framed against the plaintiff appellant, as stated supra.

7. Mr. SM Chakraborty, learned senior counsel while urging for setting aside both the judgment and decree passed by the learned trial Court as well as by the First appellate Court would contend that the instant appeal is fully covered by the judgment of this Court in Bipul Chandra Das vs. Rakhi Acharjee and others reported in (2014)2 TLR 386, where the question came up as to whether a civil suit is maintainable even when an arbitration clause is available in the agreement, particularly para No. 13, which reads as follows:

“13. Now, the question that has precisely fallen for consideration is whether mere existence of an arbitration clause would entail dismissal of the suit. This court has been urged by Mr. Chakraborty, learned senior counsel that the controversy is not merely confined to the partners of the purported arbitration agreement. The reliefs are also against the respondent Nos. 2 and 3 for rendering accounts of income from the vehicle TR-02-3111 from 25.1.2004 till the recovery of the same and also for mandatory injunction for the recovery of possession of the Commander Jeep bearing No. TR-02-3111 against the respondent Nos. 2 and 3 inasmuch as the said vehicle in terms of the purported settlement is in the custody of the respondent Nos. 2 and 3. As such, it cannot be stated that the entire dispute is related to the dispute emerging from the arbitration agreement or of the business related to the partnership firm. In this view of the matter the impugned finding is entirely uncalled for. Even in *Bal Kishan Bansal (supra)* a decision of the Apex Court in *State of Uttar Pradesh and Another v. M/s. Janki Saran Kailash Chandra and Another*, AIR 1973 SC 2071 has been referred where it has been held :

“It is, however, to be clearly understood that the mere existence of any arbitration clause in an agreement does not by itself operate as a bar to a suit in the court. It does not by itself impose any obligation on the court to stay the suit or to give any opportunity to the defendant to consider the question of enforcing the arbitration agreement. The right to institute a suit in some court is conferred, on a person having a grievance of a civil nature, under the general law. It is a fundamental principle of law that where there is a right there is a remedy. Section 9 of the Code of civil Procedure confers this general right of suit on aggrieved person except where the cognizance of the suit is barred either expressly or impliedly. A party seeking to curtail this general right of suit has to discharge the onus of establishing his right to do so and the law curtailing such general right has to be strictly

complied with. To enable a defendant to obtain an order staying the suit, apart from other conditions mentioned in section 34 of the Arbitration Act, he is required to present his application praying for stay before filing his written statement or taking any other step in the suit proceedings. In the present case the written statement was indisputably not filed before the application for stay was presented.”

Therefore, unless it is shown that the ‘matters’ to the arbitration agreement are the matters in the dispute in the suit, the bar as provided under section 5 of the Act cannot eclipse the general rights of an aggrieved person as provided under section 9 of the Code of Civil Procedure, 1908. Moreover for taking the advantage of section 8(1) of the Act there should be an application before the first statement on the plea of referring the parties to arbitration. Raising of objection regarding maintainability does not constitute application even by the broader yardstick as envisaged in *Bal Kishan Bansal (supra)*. What is required is that there must be a specific and categorical request for referring the parties to arbitration. This court has not found any such request even in the written statement and, thus there can be no import of section 8 of the Act and as such the dispute cannot be referred to the arbitration.”

Mr. Chakraborty also submits that in view of the substantial question no.2 the first question formulated is redundant. Mr. Chakraborty finally contended that the State respondents did not make any request under Sub section 1 of Section 8 for referring the dispute of arbitration but the learned trial Court taking note of the arbitration clause in the agreement held that the civil suit is not maintainable.

8. Mr. J. Majumder, learned counsel appearing for the respondents submits that when there is an arbitration clause in the agreement, the Court has no jurisdiction to entertain a civil suit arising out of the said agreement in view of Section 5 of the Act.

9. As indicated earlier, this Court has already decided that mere existence of any arbitration clause in an agreement does not by itself operate as a bar to a suit in the civil Court. It also appears that Section 5

of the Act is subject to Section 8 of the Act. Section 5 of the Act deals with jurisdiction of the Civil Court and states that 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. Section 8 of the Act is also included in Part-I of the Act and the said provisions has given a right to a party for making an application to refer the parties to arbitration when there is an arbitration agreement but in the instant case admittedly the defendants did not make any application not later than when submitting the first statement for referring the parties to arbitration. Thus, the jurisdiction of the Civil Court cannot be said to be ousted.

10. In view of the above, the impugned findings as returned by the courts below are entirely perverse, hence those are liable to be set aside particularly when there was no request by the respondents as contemplated under Section 8(1) of the said Act and more so there was no mention even in the written statement regarding the Arbitration clause.

11. In the result, the impugned judgment as well as the judgment so affirmed is set aside and quashed. As the learned trial Court did not consider the provisions of Section 8 of the Arbitration and Conciliation Act while dismissing the suit, the matter is remanded for fresh decision on the materials available on record as per law. It is expected that the entire matter shall be disposed of within a period of 6 (six) months from the date of receipt of the LCRs and the copy of this judgment and order.

12. In view of the above observation, the appeal stands allowed to the extent, as indicated.

13. Registry is directed to send down the LCRs forthwith with the copy of this judgment and order.

14. No order as to costs.

JUDGE

Saikat