

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 520 of 2013

Mr. G. Laxminarayan,
Major of age,
No.1105, Sanjeevini,
10th Main Road,
R.P.C. Layout,
Vijaynagar, Bangalore-40

... Petitioner.

Versus

1. Sesa Goa Limited
a company incorporated under
the provisions of the Companies
Act 1956 having its registered
office a 'Sesa Ghor' 20 EDC
Complex Patto, Panaji-Goa
through Its Director Production
and Logistic Mr. A. K. Rai
2. Mr. B. D. Hanuman Singh
32/42, 15th Main Road,
17th Cross, Padmanabhanagar,
BSK, 2nd Stage, Bangalore-70

... Respondents.

Mr. Rohit Bras De Sa, Advocate for the petitioner.

Mr. R. G. Ramani, Advocate for the respondent no.1.

CORAM :- M. S. SANKLECHA, J.

DATE : 29th April, 2015

ORAL ORDER :

This petition under Articles 226 and 227 of the
Constitution of India assails the order dated 18/04/2013 passed

by the Civil Judge, Senior Division. By the impugned order dated 18/04/2013, the petitioner's application under Section 8 of the Arbitration and Conciliation Act, 1996 (the Act, for short) to refer the dispute arising out between the parties to the Arbitrator under the said Act, was dismissed.

2. Briefly, the facts leading to this petition are as under :

(a) The respondent no.2 was the holder of a mining lease in Tumkur District of Karnataka. The respondent no.2 and the petitioner, as power of attorney of the respondent no.2 as well as confirming party and the respondent no.1 as transferee/buyer of the lease, entered into an agreement dated 21/12/2004. By the agreement dated 21/12/2004, it was agreed to transfer the rights of the respondent no.2 in the mining lease of situated in Tumkur District of Karnataka in favour of the respondent no.1 for a total consideration of Rs.110 Million. The aforesaid agreement dated 21/12/2004 in terms of clause 6 thereof provided for an arbitration clause under the said Act in respect of any disputes arising between the parties in respect of the agreement.

(b) The respondent no.1, in terms of the above agreement, paid to the petitioner and the respondent no.2 part payment of Rs.15 Million out of Rs.110 Million. However, the

petitioner and the respondent no.2 failed to perform their obligation under the above agreement. This led the respondent no.1, to issue a letter dated 30/06/2006 informing to the petitioner and the respondent no.2 that they were treating the agreement dated 21/12/2004 as terminated and called upon the petitioner to pay back/ refund the amount received.

(c) Thereafter, the petitioner, by a letter dated 07/08/2006, addressed to the respondent no.1 proposed the termination of the agreement dated 21/12/2004 by paying Rs.1 Crore immediately and the balance to be paid within another two months. The respondent no.1, by its letter dated 08/08/2006, intimated to the petitioner that they are agreeable to the proposal and directed the petitioner to hand over Rs.1 Crore to its nominee one Mr. Lobo immediately.

(d) On receipt of the letter dated 08/08/2006, the petitioner has acted upon the same and paid to the respondent no.1 an amount of Rs.1 Crore i.e. Rs.10 Million. However, thereafter, inspite of repeated requests, the petitioner has not paid the balance amount of Rs.5 Million payable under the letter dated 08/08/2006.

(e) This led the respondent no.1 to file a suit before the Civil Judge, Senior Division, seeking to recover Rs.5 Million together with interest thereon from the petitioner No.1 and

respondent no.2 as defendant nos.1 and 2 in the suit. The petitioner filed an application under Section 8 of the Act, seeking an order referring the parties to Arbitration in view of clause 6 of the agreement dated 21/12/2004.

(f) The petitioner had not accompanied its application under Section 8 of the said Act either with the original or a copy of the arbitration agreement dated 21/12/2004 nor was any reference made in its application under Section 8 of the Act that it was relying upon the copy of the Arbitration Agreement dated 21/12/2004 filed by the respondent no.1. However, the petitioner, at the hearing before the Trial Court, placed reliance upon the arbitration agreement dated 21/12/2004 filed by the respondent no.1 along with its plaint for recovery of money. This, according to the petitioner, satisfied the mandate of Section 8(2) of the Act.

(g) The Trial Court, by the impugned order, rejected the application filed by the petitioner under Section 8 of the Act, inter alia, on the following grounds :

(a) The application under Section 8 of the Act is not accompanied by the arbitration agreement and thus, the same could not be entertained in view of Section 8(2) of the Act; and

(b) The plaintiff has filed his suit for recovery of money on the basis of an agreement as evidenced in

letters exchanged between the parties being letters dated 07/08/2006 and 08/08/2006. Consequently, the impugned order holds that the basis of the suit/ dispute is not the agreement dated 21/12/2004, which contains the arbitration clause.

3. Mr. Rohit Bras De Sa, the learned Counsel appearing for the petitioner, in support, submits that the filing of arbitration agreement either in original or a certified copy of the same with application under Section 8 of the Act, was not necessary when the same has been filed by the plaintiff and is a part of the record. It is submitted that the petitioner is entitled to rely upon the agreement dated 21/12/2004 as filed by the respondent no.1 along with the plaint. This issue, according to the petitioner, is no longer debatable as the issue has been decided by this Court in Civil Revision Application No.11/2011 in the matter of **Saurashtra Fuels Pvt. Ltd. V. Western India Shipyard Ltd.**, decision rendered on 11/01/2013 and in Writ Petition No.189/2013 in **M/s. Indiabulls Securities Ltd. Vs. Rasiklal Gangani**, decision rendered on 25/07/2013. So far as the second ground of rejection in the impugned order is concerned, it is submitted that once an arbitration agreement is noticed by the Court in this case by virtue of the agreement dated 21/12/2004,

the Trial Judge is obliged to refer the dispute to the arbitrator. It is for the arbitrator under Section 16 of the said Act to decide whether or not he has jurisdiction to entertain the dispute and not for the Trial Court. Besides, it was pointed out that earlier also the Trial Court had, by an order dated 01/12/2009, dismissed the petitioner's application to refer the dispute to an arbitrator under Section 8 of the Act. This is on the ground that Arbitration Agreement dated 21/12/2004 stood terminated. It was challenged by the petitioner by W.P. No.108/2010 before this Court. On 24/01/2011, this Court set aside the order dated 01/12/2009 of the Trial Court and remanded the matter to the Trial Court to decide the matter afresh, in accordance with law. In the above order, this Court also referred the decision of the Supreme Court ***Magma Leasing and Finance Ltd and another vs. Potluri Madhavalata and another***, reported in (2009)10 SCC 103 and directed the Trial Court to decide the application keeping in view the observations made therein. However, it is submitted that the Trial Court has passed a similar order ignoring the directions contained in the order dated 24/01/2011 of this Court in earlier Writ Petition No.108/2010. Thus, the impugned order be quashed and set aside.

4. As against the above, Mr. Ramani, the learned

Counsel appearing for the respondent no.1 states that the decision of the learned Single Judge of this Court in **Saurashtra Fuels Private Ltd** (supra) and **Indiabulls Securities Ltd** (supra) are *per incuriam* as they have been passed in the face of the decision of the Apex Court in **Atul Singh and Others vs. Sunil Kumar and Others, reported in 2008(2)SCC 602** and **N. Radhakrishnan Vs. Mestro Engineers and others, reported in 2010(1) SCC 72**, wherein the Apex Court held that the Court would not be empowered to refer the matter to an arbitrator if the Arbitration Agreement was not filed along with an application under Section 8 of the Act. This is in view of the clear mandate of Section 8(2) of the Act. The aforesaid decision of the Apex Court in **N. Radhakrishnan** (supra) was not brought to the notice of the learned Trial Judge, who passed the orders in **Indiabulls Securities** (supra) and **Saurashtra Fuels Pvt Ltd** (supra). It is further submitted that the suit, as filed, is not in respect of an agreement dated 21/12/2004, which contains an arbitration clause. The arbitration agreement dated 21/12/2004 stood terminated / modified to be replaced by a fresh agreement as contained in the letters dated 07/08/2006 and 08/08/2006. This fresh agreement does not contain any clause for arbitration. This suit has been filed for recovery of money on the basis of the agreement contained in the aforesaid two letters, which record a

fresh contract entered between the parties and further acted upon. Therefore, the impugned order cannot be found fault with. Moreover, the earlier order of this Court dated 24/01/2011 in W.P.No.108/2010 had specifically not considered the above aspect as it was not a part of the reasons in the order of the Trial Court, impugned before it. Thus, the same would not govern the issue.

5. So far as the first ground in the impugned order rejecting the application under Section 8 of the Act viz. the application is not accompanied by the original or true copy of the Arbitration Agreement is concerned, it is undisputed position that the application was not accompanied with the original or copy of the Arbitration Agreement dated 21/12/2004 nor did the application make any reference to placing reliance upon the agreement as filed by the respondent No.2 (plaintiff). It is also an undisputed position that the respondent no.1 (plaintiff) disputes the applicability of the Arbitration Agreement dated 21/12/2004 to this dispute. According to the respondent no.1, the dispute emanates from failure to pay the amounts due to it under the Agreement as contained to the letters dated 07/08/2006 and 08/08/2006 exchanged between the parties.

6. The requirement under the law under Section 8(2) of the Act is that an application should be accompanied by the Arbitration Agreement or its copy. This has been so held by the Apex Court in **Atul Singh and Ors** (supra) and **N. Radhakrishna** (supra). The decision of this Court in **Saurashtra Fuels (P) Ltd** (supra) held that non-filing of the Agreement of Arbitration along with the application under Section 8 of the Act, will not render the application bad in law as it proceeded on the premise that the basis of the suit is the Arbitration Agreement dated 21/12/2004. In this case, the basis of the suit is not the Arbitration Agreement, but the agreement as contained in the two letters dated 07/08/2006 and 08/08/2006. Thus, on facts, the decision in **Saurashtra Fuels (P) Ltd** (supra) would have no application. Further in **India Bull Securities Ltd** (supra), the applicant had filed a xerox copy of the Arbitration Agreement along with the application and there was no dispute about the basis of the suit being the Arbitration Agreement filed along with the plaint. Therefore, the earlier decision of this Court in **Saurashtra Fuels (P) Ltd** was followed. Therefore, the decision rendered by this Court in **India Bulls Securities Ltd** (supra) will also not apply to the present facts. In this case, the basis of the suit is not the arbitration agreement relied upon by the petitioner nor has even a xerox copy of the Arbitration Agreement been

annexed to the application under Section 8 of the Act. Therefore, no fault can be found with the impugned order in rejecting the application in view of the application not being accompanied by the original or copy of the Arbitration Agreement dated 21/12/2004.

7. So far as the second ground in the impugned order rejecting the application under Section 8 of the Act viz. the suit is not filed in respect of agreement dated 21/12/2004 but on the basis of another agreement as evidenced by letter dated 07/08/2006 and 08/08/2006, which has no arbitration clause. The case of the respondent no.1 in the suit, was for recovery of money as contained in agreement found in the exchange of letters dated 07/08/2006 and 08/08/2006. It is not a suit filed to enforce the agreement dated 21/12/2004 which contains the arbitration clause. The order of this Court dated 24/01/2011 in Writ Petition No.108/2010 was set aside merely on the ground that the dispute was not referable to arbitration, as the agreement dated 21/12/2004 was terminated. This was by following the decision of the Apex Court in ***Magma Leasing and Finance Ltd*** (supra). However, the order dated 24/01/2011 specifically recorded that the alternative contention of the respondent no.1 that the suit was filed on the basis of subsequent agreement as found in letters

dated 07/08/2006 and 08/08/2006, was not considered, as the Trial Court in its order dated 01/12/2009 had not dealt with and / or considered the same. It was in the above context that this court, by its order dated 24/01/2011, did not deal with the issue now arising and the order dated 01/12/2009 of the Trial Court was set aside on the finding that the Trial Court had not correctly held that the agreement dated 21/12/2004 stood terminated. Thus, the issue was restored to the trial Court to pass fresh order, in accordance with law along with other contentions of the parties.

8. In the present case, the impugned order deals with the alternative submission advanced by the respondent no.1 before this Court (not dealt by the Trial Court earlier) and it has concluded that the agreement found in letters dated 07/08/2006 and 08/08/2006 is a new contract/ agreement. It is under this new contract that the respondent no.1 is seeking to recover the monies payable. Therefore, the decision of this Court in earlier round, leading to an order dated 24/01/2011 in Writ Petition No.108/2010, would not govern the issue. The view taken by the Trial Court that there is new agreement, as reflected with the exchange of letters dated 07/08/2006 and 08/08/2006, does not contain any arbitration clause, cannot be said to be even remotely

perverse. So far as the submission that the trial Court ought to have considered and decided the issue on the basis of the decision of the Supreme Court in ***Magma Leasing and Finance Ltd*** (supra) is concerned, I find that the above decision of the Apex Court is completely distinguishable for the reasons that in that case, the arbitration clause, stood unilaterally terminated i.e. one of the parties to the agreement terminated the same and it was not the case of mutual termination as in this case. In any event, the suit as filed is not on the basis of the agreement containing an arbitration clause, but the agreement is contained in the two letters dated 07/08/2006 and 08/08/2006 which does not contain any arbitration clause. Therefore, the occasion to invoke Section 8 of the Act does not arise.

9. For the above reasons, I see no reason to interfere with the order dated 18/04/2013 of the Trial Court.

10. Accordingly, the petition is dismissed. No order as to costs.

M. S. SANKLECHA, J.

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