

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.952 OF 2014

Sesa Sterlite Limited	]	
Formerly Sterlite Industries (India) Ltd.	]	
A Public Limited Company constituted	]	
under Indian Companies Act, 1956	]	
having its Registered Office at	]	
Sesa Ghor, 20, EDC Complex, Patto	]	 Applicants
Panaji, Goa – 403001	]	(Org. Defendants)

versus

M/s. BLR Logistiks (I) Ltd.	]	
A Public Limited Company constituted	]	
under the Indian Companies Act, 1956	]	
having its Registered office at	]	
39 Fancy Chamber, 94 Surat Street,	]	 Respondents
Masjid Bunder, Mumbai 400 009	]	(Org. Plaintiffs)

Miss Ambrn Saheed a/w Ms. Purvi Joshi i/by MDP Partners for the Applicant.
Mr.Mukesh J Pabari for the Respondent.

CORAM : R. M. SAVANT, J.
DATE : 31st August 2015

ORIGINAL JUDGMENT

1 Admit. By the consent of the learned counsel for the parties heard forthwith.

2 The revisionary jurisdiction of this court is invoked against the order dated 31/07/2014 passed by the learned Judge, City Civil Court, Mumbai by which order the Notice of Motion filed by the Petitioner/Defendant

for referring the parties to arbitration by invoking Section 8 of the Arbitration and Conciliation Act, 1996 came to be rejected.

2 The facts giving rise to filing of the above Civil Revision Application in brief can be stated thus :-

A contract was entered into between the Applicant and the Respondent in the matter of providing outbound logistical services to the Petitioner by the Respondent. The said contract is dated 01/10/2010. This was pursuant to the offers that were invited by the Respondent vide an Expression of Interest dated 17/06/2010. In the context of the instant Civil Revision Application the following clauses of the said Contract are material and are reproduced herein under :-

“C. Period of Contract :-

The contract will be valid from 01.10.2010 to 30.09.2011. The contract may be extended further at our discretion on the same terms and conditions. Renewal of the contract will be made on the basis of performance of the transporter during above contract period. We reserved the right to curtail the above period and terminate the contract without assigning any reason thereof.

D. Schedule of Rates and Payment terms :-

The rate schedule is shown in Annexure – 1. The basis rates shall remain firm throughout the contract period. Any change in diesel price shall be added/subtracted over to basic price as per increase/decrease in price. The effect of change in diesel price shall be considered only based on actual freight impact in the lorry market.

Calculation of diesel price effect on freight will be done on the basis of % increase or decrease in diesel in DNH (Union Territory of Dadra & Nagar Haveli)/3.5 i.e. average run in km per liter of diesel. Any increase or decrease shall be affected only if diesel price increased/decrease is by one rupee onward from the present rate. Any increase on toll tax will be reimbursed on actuals, transporter to provide government notification in support of the same.

You shall submit one bill in first week of every month for the transactions carried out during the last month. You have to submit your bills with all necessary acknowledged lorry receipts to us for which the payment will be released within 15 days from the date of receipt of bills complete in all respects.”

O. Arbitration :- In the event of dispute arising between the parties relating to various terms and condition set forth, the parties undertake to resolve the differences by mutual consultation. In the event of their inability to resolve the dispute, it will be referred to a sole arbitrator nominated by Head operations, Silvassa. The award of Arbitrator so appointed shall be final and binding on both the parties to contract. The Arbitration will be held at Silvassa.”

A reading of the clauses of the contract therefore discloses that the contract was to be in operation from 01/10/2010 to 30/09/2011 during which period logistical services were to be provided to the Applicant by the Respondent. It seems that the Respondent was raising bills for the trips of the lorries/trucks which the Respondent was providing to the Applicant. It seems that a dispute arose as regards the payments of the said bills which were raised by the Respondent resulting in the notice dated 20/12/2012 issued by the advocate of

the Respondent one Pabari Legal Associates. In the context of the above Civil Revision Application Paragraphs 1 and 3 of the said notice are material and are therefore reproduced herein under for the sake of ready reference :-

“1. Our clients state that our clients were entrusted with the transportation job of transporting your consignments from Vapi Silvassa to all over India as per contract.

3. Our clients state that on the basis of the transportation agreement, our clients had executed the transportation job and after execution of the various transportation job, covering various Lorry Receipts, our clients had submitted their following freight bills to you, which is accepted by you without any demur or dispute and as per the terms of the contract your were required to make payment to our clients within 15 days of receipt of the bill duly completed in all aspects.”

(emphasis supplied.)

A reading of the said paragraphs therefore discloses that in paragraph 1 the Respondent has referred tot he transportation job which has been carried out by it as per the contract and in paragraph 3 it has been stated that in spite of the payments which were required to be made within 15 days of the receipt of the bills in terms of the contract, the same was not done.

3 After the said notice was addressed by the Respondent, the suit in question being S.C. Suit No.3183 of 2013 came to be filed wherein the Respondent/Plaintiff claimed the amount of more than Rs.Twenty Three lacs from the Petitioner/Defendant. It appears that the suit was adjourned from time to time for filing of the Written Statement by the Petitioner/Defendant.

However, in view of the final opportunity given to the Petitioner/Defendant, that the Written Statement it seems came to be filed on 07/01/2014. It seems that on the same day, the instant Notice of Motion was also sought to be tendered/filed in the Court. However, since the procedure requires that the leave is required to be granted for registration of the Motion, after following the said gamut of procedure, the instant Notice of Motion came to be actually taken on board on 10/04/2014. At this stage, it is required to be noted that the affidavit in support of the Notice of Motion has been sworn on 27/11/2013. The said fact lends credence to the case of the Defendant that the Notice of Motion was also tendered on the same day as the Written Statement. The Written Statement has been affirmed on 06/01/2014 i.e. after the affidavit in support of the Notice of Motion was affirmed on behalf of the Petitioner/Defendant. As indicated above the above Notice of Motion has been filed for referring the parties to arbitration in view of Clause (O) of the said agreement dated 01/10/2010. To the said Notice of Motion a copy of the said agreement dated 01/10/2010 was annexed. In so far as the Written Statement is concerned, it is required to be noted that in the Written Statement also a preliminary objection as regards the maintainability of the suit has been raised vide paragraphs 8 and 9 of the said Written Statement.

4 The said Notice of Motion was replied to on behalf of the Respondent/Plaintiff.

5 The Trial Court considered the said Notice of Motion and principally on two grounds viz. that the original of the arbitration agreement or certified copy has not been filed, as also on the ground that the said Notice of Motion was not tendered/filed by the Defendant before filing its first statement of defence, rejected the said Notice of Motion and thereby declined to refer the parties to arbitration. It is the said order dated 31/07/2014 which is taken exception to by way of the above Civil Revision Application.

6 Heard the learned counsel for the parties. The learned counsel appearing on behalf of the Petitioner/Defendant Miss. Ambrn Saheed would contend that the Notice of Motion having been filed/tendered simultaneously with the Written Statement, the Trial Court has erred in refusing to refer the parties to arbitration. The learned counsel would next contend that since there is no dispute as regards the existence of the agreement as the Plaintiff in terms has referred to the contract in the notice as well as in the suit, the Trial Court has taken a hyper technical view of the matter by rejecting the Notice of Motion on the ground that the original or the certified copy has not been filed. In support of the said contention, the learned counsel for the Petitioner sought to place reliance on the judgment of a learned Single Judge of the Delhi High Court reported in 2014(2) Arb. LR 136 (Delhi) in the matter of Sharad P. Jagtiani v/s. Edelweiss Securities Limited, as also the judgment of the Apex Court reported in AIR 2007 SC 2961 in the matter of Bharat Sewa Sansthan.

v/s Electronics Corporation Limited. It is therefore the submission of the learned counsel for the Applicant/Defendant that once there is an arbitration clause, then it is the duty of the judicial authority before whom the application is filed to refer the parties to arbitration.

7 Per contra, the learned counsel appearing on behalf of the Respondent/Plaintiff Shri Mukesh Pabari sought to support and thereby sustain the impugned order. The learned counsel would contend that a reading of Subsection (2) of Section 8 of the said Act makes it clear that it is the intention of the legislature that the original or certified copy should be filed by the parties who are seeking reference to arbitration. The learned counsel would contend that this is not a case where it is the case of the Defendant that the original is lost and therefore it may be permitted to rely upon a copy of the said arbitration agreement. The learned counsel would therefore contend that the order passed by the Trial Court cannot be faulted with.

8 Having heard the learned counsel for the parties, I have considered the rival contentions. The issue that arises for consideration is, whether the parties are required to be referred to arbitration. In the said context, Section 8 of the said Act assumes significance which for the sake of ready reference is produced herein under :-

“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 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.”

Hence Section 8 (1) and (2) of the said Act prescribes the pre-requisites for making an application for the parties to be referred to arbitration. The requirements are that the application has to be filed before the first statement of defence and that the application has to be accompanied with the original or the certified copy of the arbitration agreement. It is in the context of the requirements of the said provision that the facts of the instant case would have to be seen. In the instant case, as indicated above, in view of the final opportunity granted to the Defendant that the Defendant filed its Written Statement on 7/1/2014 in which Written Statement in paragraph 8 and 9 a preliminary objection as regards maintainability of the suit has been raised in view of the arbitration clause which can be seen from Clause (O) of the said agreement. It is simultaneously with Written Statement that the instant Notice of Motion was filed by the Defendant i.e. the Petitioner seeking the relief that

the parties be referred to arbitration. Tendering or filing of the Notice of Motion on the same day i.e. 7/1/2014 is supported by the fact that the affidavit in support of the said Notice of Motion was sworn on 27/11/2014. The question therefore that arises for consideration is whether the Defendant has fallen foul of the said provision of Section 8(1) of the said Act in the matter of not taking the said objection before filing the Written Statement. At this stage a reference to the judgment in *Sharad P Jagtiani's* case (supra) can be made. In the said judgment, a learned Single Judge of the Delhi High Court held that even if an objection is raised on the basis of the arbitration clause in the Written Statement which has been filed that the parties be referred to arbitration, the same would suffice and, there is no requirement for filing a separate application. The said judgment in my view supports the case of the Applicant for the parties being referred to arbitration. In the instant case, as indicated above, in the Written Statement in the opening paragraphs i.e. paragraphs 8 and 9, a preliminary objection is raised as regards the maintainability of the suit on the touchstone of the clause relating to arbitration agreement. In my view, therefore, the instant case cannot be said to be a case where the Defendant can be said to have raised an objection long after filing its first statement of defence.

9 Now coming to the aspect whether the requirements of filing of the original or certified copy has not been complied with. In the instant case as

indicated above in the notice itself the Plaintiff has referred to the contract in paragraphs 1 and 3 of the notice dated 20/12/2012. A reference to the contract is therefore a reference to the instant agreement dated 01/10/2010 containing the arbitration clause. It is in the terms of clause (D) of the said agreement that the bills were required to be cleared within 15 days. Implicit in the reference to the contract in the said notice is the acceptance of the fact by the Plaintiff of the said contract. Once there is no dispute about the existence of the contract then the requirement of filing the original or certified copy of the said contract gets diluted. If the Plaintiff was to dispute the existence of the contract, then it would have been another matter and probably in such a scenario the strict compliance of section 8(2) of the said Act would have been required. However, once the Plaintiff itself relied upon the contract so as to raise a claim on the said basis then having regard to the fact that the Defendant had placed a copy of the said agreement by way of annexing it to its Written Statement as well as affidavit in support, it would have to be held that there was a compliance of Section 8(2) of the said Act in the matter of annexing the copy of agreement to the application for making a reference to arbitration. A useful reference can be made to the judgment of the Apex Court reported in AIR 2000 SC 1886 in the matter of P. Anand Ganapathi Raju and others v/s. P.V.G. Raju (died) and others wherein the Apex Court held that once there is an arbitration clause then the language of Section 8 being peremptory, it is therefore obligatory for the Court to refer the parties to

arbitration in terms of their arbitration agreement. In my view, in the instant case the Trial Court has glossed over the aforesaid legal position and on mere technicalities has rejected the application for parties being referred to arbitration. The Trial Court in the said process has not exercised the jurisdiction vested in it. The impugned order would therefore have to be quashed and set aside and is accordingly quashed and set aside. Resultantly, the Notice of Motion would stand allowed. The parties are accordingly referred to arbitration. The above Civil Revision Application is allowed to the aforesaid extent. The Plaintiff i.e. the Respondent herein would be entitled to refund of court fees as per Rules.

[R.M.SAVANT, J]