

In the High Court of Punjab and Haryana at Chandigarh.

**CR No.3328 of 2013
Decided on 27.2.2015**

M/s.Vishal Retail Limited

--Petitioner

Vs.

Sachin Deep Sood and others

--Respondents

CORAM: HON'BLE MR.JUSTICE RAKESH KUMAR JAIN

Whether Reporters of Local Newspapers may be allowed to see the judgment ?

To be referred to Reporters or not ?

Whether judgment should be reported in the Digest ?

Present: Mr. M.S.Ahluwalia, Advocate, for the petitioner

Mr.V.KSandhir,Advocate, for the respondents

Rakesh Kumar Jain,J: (Oral)

The petitioner has challenged the order dated 23.4.2014, dismissing an application filed by it under Section 8 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act'), for referring the dispute to the Arbitrator.

In brief, the petitioner alleged to have desired to take on rent an area measuring 16,000 square feet for starting its retail business at Tarn Taran. A lease-cum-memorandum of understanding was entered into between the parties on 20.6.2008. The petitioner was to occupy 8000 square feet on the ground floor and 8000 square feet on the first floor of the property owned by the respondent. The petitioner cancelled the lease through a e-mail dated 19.9.2008.

Thereafter, the respondents filed a Civil Suit in the Court at

Tarn Taran for recovery of ₹32,25, 215/- as principal and ₹1,63,380/- as interest in all ₹33,78,595/- because of termination of the lease-cum-memorandum of understanding dated 20.6.2008.

The petitioner filed an application under Section 8 of the Act, alleging that as per clause 18 of the said document, in case of any difference or dispute arising between the parties herein on any of the terms and conditions contained herein, such difference or dispute can be referred to the sole arbitrator appointed by the LESSEE and the LESSOR. Therefore, the Civil Court has no jurisdiction to try the suit.

The application has been dismissed by the trial Court, inter-alia, on the grounds that :-

- “(i) the petitioner did not produce the original/certified copy of memorandum of understanding;
- (ii) the application under Section 8 of the Act was filed after a great delay; and
- (iii) the agreement itself has been cancelled by the petitioner in its entirety, therefore, they cannot rely upon it for the purpose of maintaining the application”.

Learned counsel for the petitioner has argued that insofar as Section 8 of the Act is concerned, it is provided therein that application under Section 8 of the Act, can be filed before filing the written statement and in this case, no written statement has been filed. He has further submitted that since the respondents have relied upon the agreement dated 20.6.2008 for the purpose of maintaining the suit for recovery, they cannot turn around and say that the petitioner had to file original documents as in such a circumstance, the photo copy thereof is suffice.

It is further submitted that the clause of arbitration, in the

agreement, is an independent clause and can be invoked despite the fact that the agreement itself has been terminated by the petitioner. In support of his submission, learned counsel has relied upon a decision of the Supreme Court in the case of **Bharat Sewa Sansthan Vs. U.P. Electronic Corpn. Ltd.** AIR 2007 Supreme Court 2961; **THIRUMURUHA KIRUPANANDA VARIYAR THAVATHIRU SUNDARA SWAMIGAL MEDICAL EDUCATIONAL AND CHARITABLE TRUST VS. SAHU TRUST** 2009 (5) R.A.J 402 (Mad). He has also relied upon a decision of the Supreme Court in the case of **M/s. AGRI GOLD EXIMS LTD. VS. M/S. SRI LAKSHMI KNITS & WOVENS AND OTHERS** (2007) 3 Supreme Court Cases, 686, to contend that provision of Section 8 is per-emptory in nature. In case where there exists an arbitration agreement, the Court is under obligation to refer the parties to arbitration in terms of the arbitration agreement.

Insofar as the delay part is concerned, it is submitted that the application has been filed at the time when they were wrongly proceeded against *exparte* before the Court below and order of their *ex-parte* proceedings was set aside.

Lastly, the learned counsel for the petitioner has relied upon a decision of the Supreme Court in the case of **REVA ELECTRIC CAR COMPANY PRIVATE LIMITED VS. GREEN MOBIL** (2012) 2 Supreme Court Cases 93.

On the other hand, learned counsel for the respondents has submitted that Section 8 of the Act is mandatory in nature because as per Section 8 (2) of the Act, the petitioner was required to file the original or certified copy of memorandum of understanding and in the absence of the

same, the application has rightly been dismissed. In support of his submission, he has relied upon a judgment of the Supreme Court in the case of **Atul Singh and Ors Vs. Sunil Kumar Singh and others** 2008 (1) R.C.R.(Civil) 908.

In order to support his second point on which the trial Court has dismissed the application, it is submitted that the suit was filed on 17.3.2009 in which the petitioner was proceeded against exparte, though the said order was set aside on 15.9.2009 and again it was proceeded against exparte on 02.3.2010 which was again set aside on 17.9.2010. In this manner, has played hide and seek with the Court.

While supporting the third point decided in its favour, learned counsel for the petitioner has argued that clause 18 of the Act, clearly stipulates that the matter can be referred to the Arbitrator if the dispute arose between the parties in respect of terms and conditions of the agreement.

I have heard learned counsel for the parties and after examining the record, am of the considered opinion that the present petition is meritorious and deserves to be allowed.

Insofar as the first point is concerned, there is no dispute that Section 8 (2) of the Act provides that the appellant has to file original or certified copy of the agreement for the perusal of the Court. There is no quarrel with the judgment relied upon by the learned counsel for the respondents in the case of **Atul Singh and others** (Supra), but at the same time, this Court cannot loose sight of the fact that the suit was filed seeking recovery of the huge amount against the present appellant and the very base of the suit is the same agreement dated 20.6.2008 and there is no objection or denial to the fact that the agreement which has been attached is

different than the agreement relied upon by the learned counsel for the respondents while filing the suit. In such circumstances, the judgment relied upon by learned counsel for the petitioner in the case of **Bharat Sewa** (Supra) would come to his rescue to the effect that where the opposite party is not disputing photo copy of the document produced on record by filing an application under Section 8 of the Act, filing of certified copy of the same can be exempted.

Insofar as delay part is concerned, application has been filed before filing the written statement.

Coming to the third point, once the respondents have themselves terminated the contract in its entirety, they cannot rely upon clause 18 of the Act for the purpose of ousting the jurisdiction of the Civil Court. In that regard, judgment relied upon by learned counsel for the petitioner in the case of **Rewa Electricals** (Supra) would be applicable because in that case, the Supreme Court has held that Section 16 (1) (a) of the Arbitration and Conciliation Act, 1996 provides that an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. The plain meaning of the aforesaid clause would tend to show that even on the termination of the agreement/contract, the arbitration agreement would still survive.

In view of the aforesaid discussion, I am of the considered view that there is a patent error of law in the order passed by the Court below and the same is hereby set aside.

27.2.2015
RR

(Rakesh Kumar Jain)
Judge