

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11170 OF 2015**

ISMT Limited

Petitioner

Vs

Valency Compounds Services
Pvt Ltd

.. Respondent

Mr. Tejesh Dande a/w Mr. Bharat Gadhavi a/w Mr. Prasanna Dadpe
and Mr. Akshay Tapkir i/b Tejesh Dande and Associates,
Advocates for Petitioner.

Mr. Chandrakant Lad, Advocate for Respondent.

CORAM : R.G.KETKAR,J.

DATE : 25/02/2016

PC:

1. Heard Mr. Tejesh Dande, learned counsel for the petitioner and Mr. Chandrakant Lad at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 7.9.2015 passed by the learned 2nd Jt. Civil Judge, Sr. Dn., Pune below Exh.23 in Spl. Summary Suit 2 of 2014. By that order, the learned trial Judge allowed the application for leave to defend made by the petitioner, hereinafter referred to as 'defendant', subject to condition that the defendant furnishes bank guarantee of full claim amount in the Court within one month from the date of the order. The learned trial judge clarified that leave to defend is allowed only on the ground of jurisdiction as mentioned in the application and directed the defendant to file written statement within one month from the date of the order.

3. Respondent, hereinafter referred to as 'plaintiff', has instituted Summary Suit against the defendant for recovery of amount of Rs.84,41,531/-. The defendant filed application for leave to defend. In paragraph 6, the defendant extracted arbitration clause. In paragraph 7, the defendant prayed for referring the parties to arbitration in view of the arbitration clause. By the impugned order, the learned trial judge, as noted above, allowed the application for leave to defend. It is against this decision, the defendant has instituted the present petition.

4. Mr. Dande submitted that once the attention of the court was invited to the existence of an arbitration agreement, the Court had no option but to refer the parties to arbitration within parameters of section 8 of the Arbitration and Conciliation Act, 1996 (for short, 'Act')

5. On the other hand, Mr. Lad submitted that the suit is based on the invoices and not the purchase order which contains the arbitration clause. Alternatively, he submitted that on the reverse side of the purchase order, there is clause of jurisdiction as also arbitration. In such eventuality, option is given to the parties either to approach the court having jurisdiction or to invoke arbitration clause. In the present case, plaintiff exercised the option and instituted Summary Suit in Pune Court. He further submitted that the defendant did not file application under Section 8 of the Act and filed application seeking leave to defend.

In other words, he submitted that since the application was not made under Section 8 of the Act, the Court was not obliged to refer the parties to arbitration. Apart from that, in the impugned order, the learned trial Judge has specifically observed that leave to defend is granted on the ground of jurisdiction only subject to imposing conditions. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. On one hand, the plaintiff claims that the suit is based on invoices and, on the other, the defendant claims that suit is based on purchase order. Perusal of the purchase order shows that it contains clauses pertaining to jurisdiction and arbitration. The said clauses read thus:

“Jurisdiction

In case of disputes arising out of this purchase order, Court in Pune only will have jurisdiction.

Arbitration

All demurrage and differences whatsoever which shall arise between the parties hereto out of or in connection with this purchase order, the contract to be made in pursuance thereof or as to construction or application thereof or the respective rights and obligations of the parties shall be decided by arbitration. Such arbitration shall in absence of the contract to the contrary be in accordance with rules in that behalf of the Maratha Chamber of Commerce & Industry, Pune. The reference to such arbitration shall be condition precedence to any legal precedence between the Company and the seller in respect of such dispute and difference any award made in such arbitration shall be final

and binding on both the parties.”

7. Perusal of the application Exhibit-23 and in particular paragraphs 6 and 7 thereof shows that the defendant specifically extracted arbitration clause in paragraph 6. In paragraph 7, the defendant requested the Court for referring the matter to arbitration.

8. Section 8 of the Act reads thus :

“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.”

Perusal of the extracted provisions of Section 8 shows that a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement has to, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. The language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their

arbitration agreement. (See. P. Anand Gajapathi Raji Vs. P.V.G.Raju, AIR 2000 SC 1886).

9. In the present case, the learned trial Judge has not adverted this aspect at all. Even the arguments which are advanced by Mr. Lad that clauses pertaining to jurisdiction and arbitration on the purchase orders are optional, were also not advanced before the trial Court and consequently the trial Court did not consider the said submission. In view thereof, the impugned order is required to be set aside thereby restoring the application Exh.23 for de-novo consideration. The learned trial Judge will deal with the contentions recorded in this order as also any other contentions that are available to the parties. Hence, the order.

- i. Impugned order dated 7.9.2015 is quashed and set aside and application Exhibit 23 is restored to the file of the trial Court.
- ii. Parties agree that they will appear before the trial Court on 3.3.2016 and for that purpose no fresh notice be issued to them.
- iii. The learned trial Judge is requested to consider application Exh.23 de-novo and deal with the contentions recorded herein as also any other contentions that are available to the parties. The learned trial Judge is requested to decide the application as expeditiously as possible and preferably within 4 weeks from the date of appearance of the parties.
- iv. All contentions on merits are expressly kept open.

v. Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)