IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Revision No.2311 of 2015 (O&M)
Date of Decision: 28.09.2016

M/s Ireo Waterfront Pvt. Ltd., and others

......Petitioners

Vs

Keshav Gupta and another

.....Respondents

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. Sanjeev Sharma, Senior Advocate with
Mr. Shekhar Verma, Advocate
for the petitioners.

Mr. H.C. Arora, Advocate
for the respondents.

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RAJ MOHAN SINGH, J.

[1]. Petitioners have assailed order dated 27.01.2015 (Annexure P-15) passed by Civil Judge (Jr. Divn.) Ludhiana, whereby application of the petitioners under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as 'the Act') was dismissed.

[2]. Brief facts of the case as gathered from the record are that the petitioners were developing a residential project at Ludhiana. They are defendants in the suit. Plaintiff/respondents filed a suit for mandatory injunction directing the defendants to

comply with the terms and conditions of the Plot Buyer's Agreement dated 09.01.2012, more particularly *qua* clause No.7.1 of the agreement so entered between the parties with regard to plot No.B-343, Type K, measuring 200.93 sq. yards, as shown in the site plan produced along with the plaint. Further directions were sought against the defendants to withdraw their illegal notices dated 29.01.2014, 11.03.2014 and 25.04.2014 as the plaintiffs were not liable to pay any such amount to the defendants as the defendants have utterly failed to make compliance of the agreement in question. Permanent injunction was also sought to restrain the defendants from cancelling the allotment of the plot and also restraining them from re-allotting the plot in question to other person.

[3]. Respondent/plaintiffs applied for allotment of plot measuring 200.93 sq. yards bearing No.B-343 and in pursuant to that a formal Plot Buyer's Agreement was executed between the parties. Terms and conditions were mutually settled as per the said agreement. Clause B of the agreement was to the following effect:-

> *"The Company has thereupon embarked upon a phase-wise development of the IREO Waterfront and out of the said Land, the Company has obtained CLU for approximately 476 acres at present and exemption under the provisions of Section 44(2) of the Punjab Apartment*

and Property Regulation Act, 1995 (hereinafter referred to as the 'Act'), save and except from Section 32 thereof, read with Industrial Policy, 2003 as framed by the Government of Punjab."

[4]. The payment of installment were the subject matter of Clause No. 7 and in Clause No.33 arbitration clause was given to the following effect:-

"33. Dispute Resolution by Arbitration

All or any disputes arising out of or touching or in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms hereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by a resolution of the Board of Directors of the Company, whose decision shall be final and binding upon the Parties. The Allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or advocate of the Company or is otherwise connected to the Company and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said Sole Arbitrator to conduct the arbitration. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments /modifications thereto and shall be held at the Company's office or at a location designated by the said sole Arbitrator in Ludhiana. The language of the arbitration proceedings and the Award shall *be English. Both the parties will share the fees of the Arbitrator in equal proportion."*

[5]. In view of arbitration clause, petitioners/defendants filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 along with certified copy of the agreement as required under Section 8(2) of the said Act. Petitioners sought reference of the dispute to the Arbitrator for resolution in terms of Plot Buyer's Agreement dated 09.01.2012 entered into between the parties. Trial Court vide order dated 27.01.2015 dismissed the application by observing in the following manner:-

> *"3. Heard. Present application moved by the defendant for referring the matter to arbitrator. On the other hand Ld. Counsel for plaintiff objected to this application as the civil court has jurisdiction to decide this case. The law laid down by Supreme Court in judgment titled as Booz Allen & Hamilton vs. SBI Home Finance Ltd. And others 2011(5) SCC 532 in application under Section 8 of Arbitration and Conciliation Act 1996 wherein it is held that all dispute relating to rights in rem are to be adjudicated by court. Public tribunals to being unsuited for private arbitration. Further reliance is being placed on a recent Supreme Court judgment titled as Yogi Aggarwal vs. Inspiration Clothes and ors (2009) 1 Scc 372 it is held that two conditions for an arbitrator agreement to invoke Section 8 of Arbitration and Conciliation.*
>
> *(III) It should be between the parties to the dispute.*

(IV) It should relate to or be applicable to the dispute.”

[6]. Learned Senior counsel for the petitioners contended that the suit itself is not maintainable in view of arbitration clause as well as the interpretation of Section 41(e) of the Specific Relief Act. In any case, as per arbitration clause, the matter should have been referred for arbitration. Learned Senior counsel relied upon ***M/s Sundaram Finance Limited and Another vs. T. Thankan, 2015(2) RCR (Civil) 920*** to contend that once an application in due compliance of the Section 8 of the Act is filed, the approach of the civil Court should be not to see the Court has jurisdiction, but it should see whether its jurisdiction has been ousted. General law should yield to special law – *generalia specialibus non derogant*. The trial Court should have passed orders on the application under Section 8 of the Act as per clause of the arbitration. In para No.15 of the aforecited judgment the Hon'ble Apex Court held in the following manner:-

> *“15. Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the*

procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law-generalia specialibus non derogant. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court."

[7]. On the other hand, learned counsel for the respondents submitted that time is the essence of the agreement and by relying upon Section 6 of the Punjab Apartment and Property Regulation Act, 1995, learned counsel contended that timely performance by the allottee of all its obligations under the agreement was the essence of the agreement. Learned counsel relied upon clause 19.1 of the agreement. Perusal of the clause of the agreement would show that as per Section 42(2) of the Punjab Apartment and Property Regulation Act, 1995 and as per clause B of the agreement itself, the provisions of the Act are not made applicable to the case in hand and the project is exempted from the applicability of the Act except Section 32 which deals with accounts etc. Even the Competent Authority has granted exemption by framing Industrial Policy of 2003. Learned counsel also stressed that in view of Section 6 of the

Act, whether Arbitrator would be in a position to answer Section 6 and sub-Section 2 of the Act.

[8]. The respondents were very much privy to the agreement. The application under Arbitration and Conciliation Act is meant to encourage alternative modes, disputes, resolution i.e. Arbitration, Mediation and Conciliation. Once the bilateral agreement is entered into between the parties and the same provide for arbitration clause then it would be just and appropriate to honour the onerous obligations even though the arbitrator to be appointed by the company from the hierarchy of its officials/employees. The such reference in dispute cannot be said to be harsh or taking away any harsh, oppressive or inequitable, nor the same would be said to be inequitable bargain. Plaintiff was very much conscious about the said clause and thereafter agreement came to be executed.

[9]. In ***Hindustan Petroleum Corporation Limited Vs. M/s Pinkcity Midway Petroleums, 2003 RCR (Civil) 686***, the Hon'ble Apex Court while interpreting under Sections 8 and 16 of the Arbitration and Conciliation Act, held that once the agreement and existence of arbitration clause are admitted then as per mandatory language of Section 8 of the Act, the Court is bound to refer the dispute to the Arbitrator. The question

whether that arbitration clause applied to the facts of the dispute, has to be raised and decided before the Arbitrator. The Arbitrator is competent and has the jurisdiction to adjudicate upon and decide upon his jurisdiction and validity and existence of arbitration agreement with reference to arbitrability of the subject matter of dispute under arbitration clause. Once the existence of agreement between the parties is found containing arbitration clause, the jurisdiction of the civil Court in such matter is barred.

[10]. In ***Konkan Railway Corporation Ltd., vs. Rana Construction, (2002) 2 SCC 388***, the facts involved in ***Hindustan Petroleum Corporation Limited's*** case (supra) were similar to the facts involved in the aforesaid case, wherein the dispute was relating to performance of contract by the parties. The ratio of ***Hindustan Petroleum Corporation Limited's*** case (supra) was approved in ***Swiss Timing Ltd., vs. Commonwealth Games 2010 Organizing Committee, (2014) 6 SCC 677***.

[11]. In ***Shree Subhlaxmi Fabrics Private Limited Vs. Chand Mal Baradia and others, Air 2005 (SC) 2161***, the Hon'ble Apex Court held that the contentious issues should not be gone into or decide at the stage of appointment of arbitrator

and no time should be wasted in such an exercise. The remedy of the aggrieved party is to raise a objection before the arbitral Tribunal. As provided under Section 16 of the Act, it is empowered to rule about its own jurisdiction. It is, therefore, open to the plaintiff to raise all these issues and pleas before the arbitral Tribunal, including a plea that there is no arbitration agreement between the parties for referring the dispute for arbitration. In nutshell, the 'Act' itself is a complete code and provides for all channels of adjudication. In ***Rewa Electricals vs. Movil, 2012(II) SCC 93***, it was held that the Legislature in Section 16 made it clear that any objection with regard to objection or validity of arbitration agreement has to be treated as an agreement independent of other terms of the contract.

[12]. Having taken note of the rival contentions of both sides, I am of the view that as per clauses of agreement, more particularly in terms of arbitration clause 33 of the agreement, the issue is legally required to be demonstrated before the Arbitrator and the reference to this effect has to be made under Section 8 of the Act. Clause has already been invoked by the petitioners by moving an application under Section 8 of the Act along with certified copy of the arbitration agreement as per requirement of Section 8(2) of the Act. It appears that the trial Court has passed a totally non-speaking order without adverting

to the arbitration clause and other attending circumstances of the case.

[13]. In view of aforesaid, I am of the view that impugned order is liable to be set aside. The same is accordingly set aside and the application under Section 8 of the Act is hereby allowed. Normal consequences to follow.

September 28, 2016 **(RAJ MOHAN SINGH)**
Atik **JUDGE**

Whether speaking/reasoned Yes / No

Whether reportable Yes / No