

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**Civil Revision No.6733 of 2015
Date of decision : 19.05.2016**

Tata Teleservices Limited

.....Petitioner

Versus

Pawan Aggarwal and another

...Respondents

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

- 1. Whether Reporters of the local papers may be allowed to see the judgment ? **Yes***
- 2. To be referred to the Reporters or not ? **Yes***
- 3. Whether the judgment should be reported in the Digest? **Yes***

Present: Mr. Vipin Mahajan, Advocate for petitioner.

Mr. R.P. Ahluwalia, Advocate for respondent No.1.

DARSHAN SINGH, J.

The present revision petition has been preferred against the order dated 14.09.2015 passed by the learned Civil Judge (Junior Division) Ambala, whereby the application moved by the petitioner-defendant No.1 under Section 8 of The Arbitration and Conciliation Act, 1996 (for short the 'Act') for referring the matter in dispute to the arbitrator has been dismissed.

2. The respondent No.1-plaintiff has filed the suit for recovery of Rs.6,97,537.20 against the present petitioner and perform respondent No.2 on account of the licence fees due with respect to 1200 square feet built up space at the basement of 5, Jasmeet Nagar, near Vita Milk Plant,

Ambala City, lease out by the plaintiff-respondent No.1 to the petitioner as a licensee. It is alleged that the defendants are in arrears of licence fees from August 2009 to February 2012.

3. The petitioner moved an application under Section 8 of the Act for making reference of the dispute to the arbitration on the plea that there exists leave and licence agreement dated 01.03.2009 containing the specific arbitration clause covering the matter in dispute. The said application was contested by the respondent No.1-plaintiff.

4. The learned trial Court dismissed the application filed by the petitioner-defendant No.1 primarily on the ground that as the petitioner-defendant No.1 had stepped into the proceedings, the application was not maintainable. Hence this revision.

5. I have heard learned counsel for the parties and gone through the paper-book carefully.

6. Learned counsel for the petitioner contended that the learned trial Court has wrongly applied the ratio of law laid down by Hon'ble Supreme Court in case ***Rachappa Gurudappa Bijapur Vs. Gurusidappa Nuraniappa and others 1989(1) ArbiLR 157.*** That was a case under Section 34 of the Arbitration Act, 1940, whereas the present application was moved under Section 8 of the Act. He further contended that this fact is not disputed that there exists the leave and licence agreement dated 01.03.2009 between the parties. It is also not disputed that there exists arbitration clause in the agreement. Section 8 of the Act is mandatory in nature. So, the learned trial Court was legally required to refer the matter to the arbitrator.

He contended that the application was moved by the petitioner before filing the written statement. So, the application was maintainable.

7. On the other hand, Mr. R.P. Ahluwalia, Advocate, learned counsel for respondent No.1-plaintiff contended that after appearance before the trial Court, the petitioner-defendant No.1 had sought adjournments for filing the written statement. He contended that seeking adjournment to file the written statement amounts to the statement on behalf of the petitioner-defendant No.1 before the trial Court and the application moved under Section 8 of the Act thereafter is not maintainable. Thus, the trial Court has rightly dismissed the application.

8. I have duly considered the aforesaid contentions.

9. As already mentioned respondent No.1-plaintiff has filed the suit for recovery of Rs.6,97,537.20 on the plea that the defendants are in arrears of the licence fees of the demised premises from August, 2009 to February 2012. It is an admitted case that there exists the leave and licence agreement dated 01.03.2009 between the parties with respect to the terms and conditions of the licence of the demised premises. In the agreement dated 01.03.2009, there exists Clause 16, the arbitration clause, which reads as under:-

“It is mutually agreed between the parties that in the event of any dispute, or difference in the matter of interpretation, execution or carrying out the objects and functions under this agreement, the same shall be referred to a sole arbitrator, within two (2) months from the date of any dispute who shall be appointed with joint consent of the parties herein. In the event of the parties failing to agree to a sole arbitrator, each party shall nominate an arbitrator,

and the two arbitrators shall appoint a third arbitrator. The provisions of the Arbitration and Conciliation Act of 1996, as amended from time to time, shall apply to the proceedings, which shall be conducted in English and the suits of such proceedings shall be at Karnal.”

10. Learned counsel for respondent No.1 has not disputed the fact that there exists arbitration clause in the agreement between the parties as well as the fact that the dispute raised in the suit by respondent No.1-plaintiff is covered under the arbitration clause. He has tried to defend the impugned order simply on the ground that as the petitioner-defendant No.1 had stepped into the proceedings of the case by seeking adjournments for filing the written statement, so they have waived their right for arbitration and the application was not maintainable.

11. The impugned order shows that the petitioner-defendants have sought adjournments on 23.08.2012 and 09.11.2012 for filing the written statement but before filing the written statement, the present application was moved.

12. Section 8 of the Act reads as 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.”

13. As per the aforesaid provision of law, a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall refer the parties to the arbitration, if a party so applies not later than when submitting his first statement on the substance of the dispute. Admittedly, in the instant case the petitioner-defendants have not filed any written statement i.e. statement on the substance of the dispute before filing the application under Section 8 of the Act. The defendants have simply sought adjournment to file the written statement, that will not amount to submit the statement by the petitioner-defendants on the substance of the dispute. That is simply a request to adjourn the case for filing the written statement but instead of filing the written statement, the present application under Section 8 of the Act was moved to refer the matter to arbitration.

14. Learned trial Court has wrongly relied upon case ***Rachappa Guruadappa Bijapur Vs. Gurusidappa Nuraniappa and others*** (supra) which related to Section 34 of the Arbitration Act, 1940. The application under Section 34 of the Arbitration Act, 1940 was maintainable when the application is filed at any time before filing a written statement or taking any other step in the proceedings. In case ***Rachappa Guruadappa Bijapur Vs. Gurusidappa Nuraniappa and others*** (supra), the Hon’ble Apex Court held that the expression 'taking any other steps in the

proceeding' does not mean that every step in the proceedings would come in the way of enforcement of the arbitration agreement. The step must be such as is clearly and unambiguously manifest the intention to waive the benefit of arbitration agreement. In that case, the learned counsel appearing for the petitioner has sought adjournment specifically for filing the written statement. The Hon'ble Apex Court held that it shows an intention to have the matter adjudicated upon by the Court but the expression "taking any other steps in the proceedings" is clearly missing in Section 8 of the Act. As per Section 8 of the Act, the application will not be maintainable **if a party so applies not later than when submitting his first statement on the substance of the dispute**. Admittedly, no such statement on the substance of the dispute has been submitted by the petitioner defendants before the trial Court before moving this application. Thus, in view of the difference in phraseology in the wordings of Section 34 of the Arbitration Act, 1940 and Section 8 of the Act, mere request for adjournment to file the written statement cannot render the application under Section 8 of the Act not maintainable, as said request will not amount **to submit the statement on the substance on the dispute**. Thus, the approach of the learned trial Court was erroneous.

15. To attract Section 8 of the Act, the following condition should be satisfied:-

- (1) there is an arbitration agreement;
- (2) a party to the agreement brings an action in the Court against the other party;
- (3) subject-matter of the action is the same as the subject-matter

of the arbitration agreement;

- (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

16. All the four conditions in the present case stand satisfied as the existence of arbitration agreement between the parties is admitted. Respondent No.1-plaintiff a party to the agreement has brought the civil suit for recovery against the petitioner-defendant, the other party of the agreement. The subject matter of the suit is also covered under the subject matter of the arbitration agreement. The application under Section 8 of the Act has been moved by the defendants before submitting their first statement on the substance of the dispute. The Hon'ble Supreme Court in case ***Hindustan Petroleum Corpn. Ltd. Vs. M/s Pinkcity Midway Petroleums 2003(3) RCR (Civil) 686*** laid down that once there exists arbitration clause in the agreement in view of the mandatory language of Section 8 of the Act the Court is bound to refer the dispute to the arbitrator. Similarly, in case ***The Branch Manager, M/s. Magma Leasing & Finance Ltd. & Anr. Vs. Potluri Madhavilata & Anr. AIR 2010 SC 488***, the Hon'ble Apex Court has laid down that Section 8 of the Act is in the form of legislative command to court where once the conditions prescribed therein are satisfied, the court must refer the parties to the arbitration. No other option is left to the court. Thus, in view of the aforesaid authoritative pronouncements of the Hon'ble Apex Court, as all the conditions prescribed under Section 8 of the Act are fulfilled in this case, so the application filed by the petitioner deserves to be allowed and the matter in dispute is required

to be referred to the arbitrator.

17. Thus, keeping in view my aforesaid discussion, the present revision petition is hereby allowed. The impugned order is hereby set aside. The application moved by the petitioner-defendant No.1 under Section 8 of the Arbitration and Conciliation Act, 1996 is hereby allowed. The learned trial Court instead of proceeding with the suit, will direct the parties to refer the matter in dispute to the arbitrator as per Clause 16 of the leave and licence agreement dated 01.03.2009 between the parties.

19.05.2016

sunil yadav

**(DARSHAN SINGH)
JUDGE**