

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

**Civil Revision No.6249 of 2016
Date of Decision: 03.08.2017**

**M/S SUVIDHA ENGINEERS INDIA PVT LTD
.....Petitioner**

Vs

**COSMAS RESEARCH LAB LTD
....Respondent**

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

Present: Ms. Vanita Sapra Kataria, Advocate
for the petitioner.

Mr. Nitin Thatai, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. Present revision petition has been filed by the petitioner against the order dated 04.08.2016 passed by Civil Judge (Sr. Divn.) Ludhiana whereby prayer of the petitioner/defendant for trying the issue No.3 relating to arbitration clause as preliminary issue was declined.

[2]. Issue No.3 was to the following effect:-

“Whether the present suit is liable to be dismissed as premature in the view of Arbitration Agreement? OPD”

[3]. Admittedly, there was an agreement having arbitration

clause. Brief facts are that a suit for mandatory injunction was filed by the plaintiff directing the defendant to complete the pending jobs as per non-compliance report dated 19.08.2013 and to replace the substandard material supplied by the defendant instead of material agreed in the Purchase Orders. Suit for recovery of damages in the context of non-compliance by the defendant was also sought. Evidently, none of the parties has resorted to Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as 'the Act').

[4]. Defendant/petitioner while filing written statement has taken the objection with regard to the suit being premature on the ground of non-invoking of arbitration clause.

[5]. Issues were framed by the trial Court. At that stage, defendant filed application under Order 14 Rule 2 CPC for treating the issue No.3 to be a preliminary issue. The case was fixed for plaintiff's evidence for 18.12.2015, when the application was filed before the trial Court. The trial Court dismissed the application vide order dated 04.08.2016. That is how the present revision petition has been filed before this Court.

[6]. Learned counsel for the petitioner vehemently contended that once the objection was taken in the written

statement, it was obligatory upon the Court to refer the dispute to the Arbitrator. By referring to the ratio laid down in **Hindustan Petroleum Corpn. Ltd. vs. M/s Pinkcity Midway Petroleums, 2003(3) RCR (Civil) 686** contended that once the agreement and arbitration clause were admitted between the parties, then in view of mandatory language used in Section 8 of the Act, the Court was bound to refer the dispute to the Arbitrator. The applicability and non-applicability of the arbitration clause was to be raised before the Arbitrator and it was to be decided by the Arbitrator only. The Arbitrator has the jurisdiction to adjudicate and decide upon his own jurisdiction, validity and existence of arbitration agreement and the arbitrability of the subject matter.

[7]. Learned counsel also referred to **Sharad P. Jagtiani vs. Edelweiss Securities Ltd., 2015(2) R.A.J. 165** and submitted that Section 8 of the Act does not specify the manner in which the party has to submit its first statement on the substance of the dispute. Normally the first statement of the substance of the dispute by the defendant would be the written statement. If the written statement was filed and it was brought to the notice of the Court that there was an arbitration agreement in existence between the parties which covers the subject matter of the suit, then the Court was under obligation to refer the parties to the arbitration.

[8]. Learned counsel for the respondent by relying upon **Ombir @ Om bir vs. Smt. Richa Sharma and another, 2016 (2) PLR 717; Vijay Kumar Sondhi vs. The Zira Cooperative Sugar Mills Ltd., Zira, 2012(13) R.C.R. (Civil) 173** and **V.K. Mantrao & sons and others vs. M/s Select Global Hotel Pvt. Ltd., and others, 2016(2) PLR 257** contended that the framing of preliminary issue in terms of Order 14 Rule 2 CPC can only be framed for expeditious disposal of the case. The parties cannot be allowed to lead evidence. If the issue requires leading of evidence, then such an issue cannot be allowed to be framed as a preliminary issue. Such an issue has to be decided along with other issues on the basis of evidence to be led by the parties.

[9]. Learned counsel also pointed out that the petitioner/defendant has also resorted to winding of proceedings and in those proceedings also the arbitration clause was never invoked, nor any application under Section 8 of the Act was filed. The petitioner has submitted itself to the jurisdiction of the Civil Court and the same amounts to acquiescence.

[10]. I have heard learned counsel for the parties.

[11]. There cannot be any dispute regarding the propositions enunciated and culled out by the Hon'ble Apex Court in the

aforesaid precedents. The scope of the present revision petition is to see the feasibility of treating issue No.3 to be a preliminary issue. The petitioner has already submitted to the jurisdiction of the Civil Court by filing written statement and thereafter participating in the subsequent proceedings including framing of issues.

[12]. Evidently, the petitioner did not move any application under Section 8 of the Act before filing of the written statement. Such an application was to be moved before filing of the written statement, if the real intention of the petitioner was to get the subject matter of agreement referred to the Arbitrator. The objections taken in the written statement in respect of arbitration clause does not meet the requirement of Section 8 of the Act. The petitioner never invoked the provisions of Section 8 of the Act for the purposes of getting the matter referred to the Arbitrator. Having not done so, the plaintiff cannot be non-suited on the aforesaid ground. Surprisingly, this was not the ground taken in this petition, rather the subject matter of the present petition is only confined to trial of issue No.3 as preliminary issue or otherwise.

[13]. As per nature of the prayer made by the petitioner, the petitioner wishes to get the issue No.3 to be treated as preliminary issue so as to get the suit dismissed as premature in

view of existence of arbitration clause in the agreement. Necessarily such type of prayer has the effect of Order 7 Rule 11 CPC. Once the written statement was filed, it amounted to waiving of right to invoke arbitration clause. The petitioner never resorted to the proceedings under Section 8 of the Act till date.

[14]. In the instant case, even issues were framed and the trial Court proceeded with the case and fixed the case for plaintiff's evidence. Petitioner/defendant has already taken the defence by filing the written statement. Having not invoked the provisions in terms of Section 8 of the Act, in my considered opinion, no such indulgence can be granted for treating issue No.3 to be a preliminary issue for the purposes of allowing the petitioner to have recourse to the proceedings similar to Order 7 Rule 11 CPC.

[15]. Taking into totality of the facts and circumstances of the case, I do not find any merit in the present petition and the same is accordingly dismissed.

August 03, 2017

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**(RAJ MOHAN SINGH)
JUDGE**

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No