

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

CR No.7351 of 2016.

Date of Decision: 27.02.2017.

Ingram Micro India Pvt. Ltd. and others

....Petitioners.

VERSUS

Naresh Kumar and others

....Respondents.

CORAM: HON'BLE MRS. JUSTICE SNEH PRASHAR.

Present: Mr. Hemant Bassi, Advocate for the petitioners.

SNEH PRASHAR, J.

The petitioners are aggrieved of the order dated 09.09.2016 passed by learned Additional Civil Judge (Senior Division), Bhiwani by virtue of which an application under Section 8 of the Arbitration & Conciliation Act, 1996 (for short, 'the Act of 1996') read with Order VII Rule 11 and Section 151 of the Code of Civil Procedure (for short, 'the Code') filed by the petitioners-defendants No.1 to 5 was dismissed.

The relevant facts, as they emerge from the impugned order, are that respondent No.1-plaintiff filed a suit for mandatory injunction seeking direction to petitioners (defendants No.1 to 5) to get released the Bank Guarantee from proforma respondents No.2 and 3 (defendants No.6 and 7) given by the said respondents on behalf of respondent No.1-plaintiff bearing No.0337IGFIN000113 dated 01.09.2015 for an amount of Rs.10,00,000/- and Bank Guarantee No.0337IGFIN000512 dated

01.09.2015 for an amount of Rs.15,00,000/- commencing from 13.09.2015 to 12.09.2016 and for direction to petitioners-defendants No.1 to 5 to return the blank cheques to respondent No.1-plaintiff. By way of application filed under Section 8 of the Act of 1996 read with Order VII Rule 11 and Section 151 of the Code, the petitioners-defendants No.1 to 5 averred that as per agreement between the parties and as per each and every invoice (including invoice dated 1st June, 2016) issued by petitioner No.1-M/s Ingram Micro India Pvt. Ltd., the dispute raised by respondent No.1-plaintiff is required to be adjudicated through arbitration as agreed between the parties. There being an agreement between the said company and respondent No.1-plaintiff consisting of an arbitration clause, the Civil Court had no jurisdiction to entertain and try the suit.

The application was opposed by the respondents raising preliminary objection that neither the original arbitration agreement nor its certified copy had been placed on record by the petitioners-defendants No.1 to 5. It was also alleged that only the first three pages of the photocopy of document produce bear the signatures of respondent No.1-plaintiff and the remaining two sheets do not bear his signatures. Further that the terms and conditions of E-commerce contract attached with the application were not applicable in the instant case and the dispute between the parties was not covered by the said arbitration clause.

Considering the submissions made by learned counsel for the parties, learned trial Court dismissed the application of the petitioners-defendants No.1 to 5 on the ground that the original arbitration agreement or its duly certified copy, which was an essential condition under Section 8 (2)

The submissions made Mr. Hemant Bassi, learned counsel representing the petitioners have been considered.

Learned counsel for the petitioners argues that the original agreement executed between the parties is in possession of respondent No.1-plaintiff and it was for him to place the same on record because it was under the terms of the said agreement that the dispute, which was subject matter of the suit, had been raised by him. Learned counsel also submits that the terms and conditions printed on the invoices constitute a written agreement and as per the same the dispute arising out of or in connection with the transaction had to be referred to a sole arbitrator appointed by petitioner No.1 company. In this context, he relies upon *M/s. Punjab Pen House vs. M/s Samrat Bicycle Ltd., 1992 AIR (Delhi) 1; P. Anand Gajapathi Raju and others vs. P.V.G. Raju (died) and others, 2000 AIR (SC) 1886; Hindustan Petroleum Corpn. Ltd. vs. M/s. Pinkcity Midway Petroleums, 2003(3) R.C.R. (Civil) 686; Rashtriya Ispat Nigam Limited & Anr. vs. M/s Verma Transport Company, 2006(4) R.C.R. (Civil) 478' and the judgment dated 20.02.2015 passed by Hon'ble Supreme Court in Civil Appeal No.2079 of 2015 titled M/s. Sundram Finance Limited and another vs. T. Thankam.*

The operative portion of the impugned order passed by learned trial Court is as under:-

“I have carefully considered the rival contention of learned counsel for the parties and have gone through the case file. One of the essential conditions under Section 8 sub clause 2 of the 1996 Act is that the application should be accompanied by original arbitration agreement or duly

certified copy thereof. In the present case only photocopies of the alleged agreements has been placed on record. The Hon'ble Supreme Court of India in Atul Singh vs. Sunil Kumar Singh [2008(1) RCR Civil 908] has held that section 8 (2) of the 1996 Act is mandatory provision and where the application is not accompanied by original agreement or its certified copy as required under Section 8 sub clause 2 of the 1996 Act, no order referring the dispute to arbitration could have been passed. In view of the said enunciation of law the present application is liable to be dismissed solely on this ground that neither arbitration agreement nor certified copy thereof has been placed on record. Accordingly the application in hand is dismissed.”

Admittedly, the original arbitration agreement or its duly certified copy was not filed by the petitioners-defendants No.1 to 5 alongwith the application filed by them invoking the provisions of Section 8(2) of the Act of 1996. In P. Anand Gajapathi Raju and others' case (supra), relied upon by learned counsel for the petitioners-defendants No.1 to 5, the Hon'ble Apex Court has laid down the conditions which are required to be satisfied under sub Sections (1) and (2) of Section 8 of the Act of 1996 before the Court can exercise its powers thereof. The same are: (i) there is an arbitration agreement; (ii) a party to the agreement brings an action in the Court against the other party; (iii) subject matter of the action is the same as the subject matter of the arbitration agreement; (iv) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. It was also laid

down that the last provision creates a right in the person bringing the action to have the dispute adjudicated by Court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the Court after submission of his statement and the party who has brought the action does not object, there is no bar on the Court referring the parties to arbitration.

Applying the ratio of **P. Anand Gajapathi Raju and others'** case (supra), in the case in hand the first condition which was required to be satisfied by the petitioners before invoking the provisions of Sections (1) and (2) of Section 8 of the Act of 1996 was that there was an arbitration agreement between the parties. Admittedly, the original document or its certified copy was not produced by the petitioners. In absence of the agreement, neither the Court could be satisfied that there was an arbitration agreement between the parties nor that the subject matter of the action was the same as the subject matter of the arbitration agreement. Where there was a written agreement between the parties, the validity and legality of the terms printed on the invoices would be relevant only when the terms of the agreement so provide.

In the case in hand, the respondent-plaintiff disputed that only the first three pages of the photostat copy produced bear his signatures whereas the remaining two sheets do not bear his signatures. To meet out that objection also production of original agreement was necessary. It does not lie in the mouth of the petitioners-defendants No.1 to 5 to say that the original agreement is in possession of the respondent-plaintiff and is not with them. The original agreement had to be with the petitioners-defendants No.1 to 5. Even if, for the sake of argument, it was with respondent-

plaintiff, the petitioners-defendants No.1 to 5 were within their right to move an application before learned trial Court seeking direction to the respondent-plaintiff to produce the agreement. But it was neither their case that the agreement with was the respondent-plaintiff any step was taken to produce or get produced the agreement. In Atul Singh's case (supra) (relied upon by learned trial Court), it was held by Hon'ble Apex Court that Sub-section (2) of Section 8 of the Act of 1996 says that 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.

Thus, the application of the petitioners-defendants No.1 to 5 not accompanied by the original agreement or certified copy of the agreement was rightly dismissed. There being no illegality or perversity warranting interference in the order of learned trial Court, the petition is hereby dismissed.

(SNEH PRASHAR)
JUDGE

27.02.2017.
jitender sharma

Whether speaking/ reasoned : **Yes/ No**

Whether Reportable : **Yes/ No**