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

**FAO No. 6270 of 2012 (O&M)**
**Date of Decision: 01.11.2017**

Jaspal and another

.......... Appellants

**Versus**

Punjab State Warehousing Corporation Ltd. and another

.......... Respondents

**CORAM: HON'BLE MR. JUSTICE JASWANT SINGH**

Present: Mr. S.K. Singla, Advocate
for the appellants.

Mr. Harsh Aggarwal, Advocate
for respondent No. 1.

Service of respondent No. 2 (Arbitrator) stands
dispensed with vide order dated 08.02.2013.

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**JASWANT SINGH, J.**

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'Act'), is filed assailing Order dated 17.08.2012 passed by Additional District Judge, Patiala whereby objection petition under Section 34 of the Act has been allowed and matter has been remitted back to Managing Director of the respondent-corporation to refer the matter to arbitrator.

2. The facts emerging from the pleading and record are that the respondent-Corporation allotted work of custom milling of paddy and for the said purpose, an agreement dated 22.11.1997 on the proforma prescribed by Punjab Government was entered into both the parties. The appellant deposited an amount of ₹ 50,000/- vide cheque dated 05.03.1998 as security and respondent-Corporation supplied 40000 bags of paddy for shelling out

rice. On account of dispute between the parties, an Arbitrator was appointed by the respondent-Corporation who vide his award dated 04.05.2007 **(Annexure P-1)** held that claimant-respondent has failed to prove that there was any valid agreement between the parties and in the absence of any such valid agreement no reference could be made. The reference made in this case is clearly invalid and can not be arbitrated upon by the arbitrator.

The claimant-respondent filed objection petition under Section 34 of the Act and Ld. ADJ, Patiala vide Order dated 17.08.2012 set aside order passed by Arbitrator and remitted the matter back to the Managing Director of the Corporation to send the same to the Arbitrator to decide it afresh on merits. The objecting court held that although copy of agreement available on the arbitration file is not clear yet it can be seen that blanks have been duly filled in the agreement and respondent-miller himself has referred to various clauses of the agreement in his written statement while stating that the dispute between the parties is an 'excepted matter' and cannot be referred to the Arbitrator.

3. Mr. S.K. Singla, Advocate for the appellant raised three issues namely: i) Existence of Agreement; ii) Limitation; and iii) Power to remand.

Mr. Singla *inter alia* contended that the respondent has failed to place on record original copy of agreement, he had signed blank papers and agreement produced by respondent is not signed by competent authority so Arbitrator had rightly rejected claim of the corporation holding that there was no agreement between the parties. On the question of limitation, he contended that matter relates to 1997-98 and Claimant-corporation referred the matter to arbitrator in March 2004 i.e. after the expiry of more than 3 years from the relevant period. On the question of remand, he contended that court under Section 34 of the Act has no power to remand and can only either uphold or set aside the award.

In support of his contentions, he relied upon judgment of Hon'ble Supreme Court in the case of ***Kinnari Mullick and Others versus Ghanshyam Das Damani, 2017 (3) R.C.R. (Civil) 251***, ***Monga Roller Mills Pvt. Ltd. versus Punjab State Civil Supplies Corporation Ltd., FAO No. 686 of 2012, Patela Rice Mills and Other versus Punjab State Civil Supplies Corporation Ltd. FAO No. 520 of 2012, Bharat Sewa Sansthan versus U.P. Electronics Corporation Limited, 2007(4) R.C.R. (Civil) 98, ITC Classic Finance Ltd. versus Grapco Mining and Co. Ltd. and another 1997 AIR (Calcutta) 397 and Deb Kumar Basu versus Amarpali Barter (P) Ltd. 2014 (61) R.C.R. (Civil) 842***.

4. Mr. Harsh Aggarwal, counsel for the respondent-Corporation supported findings of the objecting Court. He *inter alia* contended that in terms of Section 7 of the Act, an Arbitration Agreement should be in writing and it may be by way of exchange of letters, telex, telegrams or other means of tele-communication. The appellant had received paddy from the respondent but failed to supply required quantity of rice. The agreement was signed by District Manager on behalf of the Corporation on second and last page of the agreement and he was competent to sign the documents. There is no particular form or format for an agreement containing arbitration clause and Clause 22 of the agreement directs that all the disputes and differences arising out of or in any manner touching or concerning the agreement shall be referred to sole arbitrator. The appellant is not denying signature on the agreement but is taking only excuse that he was made to sign on blank agreement form.

Learned counsel cited judgments in the case of ***Great Offshore Ltd. versus Iranian Offshore Engineering & Construction Company-2009(2) R.C.R. (Civil-390)***, ***Trimex International FZE Ltd. Dubai versus Vedanta Aluminium Ltd., India-2010(1) R.C.R. (Civil) 887, M/s Daler Singh versus District Food and Supplies Controller, Kurukshetra 2010(1) R.C.R. (Civil) 358*** to canvass that there is no requirement of Section 7 of the Act that there should be an original agreement signed by the parties on every page and stamped by both the parties, and even if it was stamped by one party and not the other party, even then it can be construed as a valid Arbitration Agreement under Section 7 of the Act. An Arbitration Agreement can be considered to be concluded even without execution of formal agreement between the parties based on exchange of letters, e-mails etc. and absence of formal/signed contract is of no consequence. Even if one of the parties had not signed the agreement, the Arbitration Agreement would be valid, if the parties had acted upon the contract. Still further, even a photocopy of the agreement to show the arbitration clause is sufficient to invoke the arbitration proceedings.

5. This court has considered arguments of both the counsel and scrutinized record of the case. The undisputed facts emerging from the arguments of both counsels and record of the case are that the present appellant is a Miller who was getting paddy to shell out rice. The appellant was required to return agreed quantity of rice being shelled out from paddy supplied by the respondent-Corporation. As per Clause 22 of the agreement, it was agreed between parties that all the dispute and differences touching the said agreement shall be referred to sole Arbitrator. The appellant has not disputed his signature on the said agreement except to say that he was made

to sign blank agreement form. The paddy was supplied during 1997-98 and matter was referred to the Arbitrator in March 2004. The original agreement is not available with either of the contesting parties. As per the respondent, original agreement has since been lost and a police case has been registered. The Arbitrator rejected reference on the ground that there is no valid agreement. Ld. ADJ under section 34 of the Act, set aside the award and remanded the matter back to Managing Director of the respondent-corporation to send the matter to arbitrator, holding that the present appellant had signed agreement even though blank as contended by him and he has placed reliance upon various clauses of the agreement.

6. On the various issues raised by both the counsels, the matter was finally heard and reserved on 12.09.2017, however, while dictating judgment, I came across Section 16 of the Act and found that in view of embargo engrafted by Section 37(3) read with Section 16 of the Act, this appeal is not maintainable, therefore, it would be gainful to have a look at below reproduced both the sections:

> **Section 16. Competence of arbitral tribunal to rule on its jurisdiction**:- (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose-
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> (a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
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> (b) A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
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> (2) The plea **that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator**.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

**Section 37. Appealable orders**: (1) An appeal shall lie from the following orders (and from no other) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) Refusing to refer the parties to arbitration under section 8;

(b) Granting or refusing to grant any measure under section 9;

(c) Setting aside or refusing to set aside an arbitral award under section 34.

(2) **An appeal shall also lie to a Court from an order of the arbitral tribunal**-

(a) **accepting the plea referred to in sub-section (2) or sub-section (3) of section 16**; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

**(Emphasis Supplied)**

From the conjoint reading of both the above quoted sections, it is culled out that arbitrator has authority to decide objection with respect to existence or validity of the arbitration agreement and plea of jurisdiction needs to be raised at the time of submission of statement of defence. If the plea is rejected and award is passed, aggrieved party may file petition under Section 34 of the Act, however, if plea of lack of jurisdiction is accepted, then it amounts to an order under Section 16 (2) of the Act, and the remedy available is appeal under Section 37(2) (a) of the Act and not objection Petition under Section 34 of the Act. High Court has no jurisdiction to entertain second appeal against the order passed by Court below under Section 37(2) of the Act.

7. In the present case, the respondent-contractor at the first instance raised plea of existence of arbitration agreement i.e. jurisdiction of arbitrator. The arbitrator accepted plea of the respondent-contractor and held that claimant has failed to prove that there was any valid agreement and in the absence of any such valid agreement, no reference could be made. Against the said order being an order under Section 16 (2) and not an Award, the respondent-Corporation had remedy to file appeal whereas Corporation filed objection petition under Section 34 of the Act which Court allowed by way of remand.

8. In the backdrop of aforesaid facts and legal position, two questions emerge for the consideration of this court and disposal of present appeal i.e. (i) whether petition filed under Section 34 of the Act before objecting Court can be assumed as an "appeal filed under Section 37 of the Act" at this stage and (ii) whether this Court (i.e. High Court) can entertain present appeal under Section 37 of the Act.

In the State of Punjab and Haryana, an objection petition filed under Section 34 of the Act and appeal filed under Section 37(2) of the Act is heard and decided by District Judge/Additional District Judge as Court of original jurisdiction. In the present case, objection petition under Section 34 of the Act was filed though appeal under Section 37(2) of the Act was maintainable, nevertheless, had appeal been filed, it would have been heard by same Court, therefore, illegality committed by the respondent as well Court below is curable and is not of such a grave nature that on this ground impugned order should be set aside. It is settled law that an order would not be invalid if it is passed by a Competent Court though with a wrong nomenclature unless some prejudice is caused to other party. It is settled law that scope of appeal is much wider than objection petition under section 34 of the Act. In the present case, had impugned order been passed under Section 37, there would not have been different court and no prejudice has been caused to the appellant-Contractor. Even otherwise, there is no such argument of both the parties and respondent-Corporation by filing objection petition instead of appeal took a risk of narrow jurisdiction, therefore, this Court finds it appropriate to treat the order passed by Ld. ADJ as an appellate order passed under Section 37 of the Act, and, therefore, competent to remand the matter after setting aside the Award.

Once, it is held that impugned order though passed under Section 34 of the Act should be treated as passed under Section 37 of the Act; this Court is precluded from entertaining further appeal, in view of embargo created by Section 37(3) of the Act.

With the aforesaid observations, the instant appeal is dismissed as not maintainable in terms of Section 37(3) of the 1996 Act. The Managing Director of the respondent-Corporation is at liberty to proceed in accordance with impugned order passed by Ld. Additional District Judge, Patiala. No order as to costs.

**November 1st, 2017** **( JASWANT SINGH )**
*'dk kamra'* **JUDGE**

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| *Whether Speaking/reasoned* | *Yes* |
| *Whether Reportable* | *Yes* |