

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 12th October, 2017.**

+ **CM(M) 753/2017**

CONCRETE SOLUTIONS **..... Petitioner**

Through: Mr. S.S. Sastry & Mr. Siddhartha
Jain, Advs.

Versus

SANY HEAVY INDUSTRY INDIA PVT LTD **..... Respondent**

Through: Mr. Amaresh K. Singh & Mr. Brijesh
Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. On 24th July, 2017, when this petition came up first before this Court, *inter alia* the following order was passed:

“CM(M) No.753/2017 & CM No.25715/2017 (for stay).

5. This petition under Article 227 of the Constitution of India though intended to impugn the order dated 6th April, 2017 in M. No.8748/16 of the Court of the Additional District Judge-01 (South), Saket Courts, New Delhi, but in the prayer paragraph seeks setting aside of the order dated 4th July, 2017. There is however no order dated 4th July, 2017.

6. The counsel for the petitioner to, in future, be careful and read before signing the petitions preferred in the Court.

7. On an application of the petitioner / defendant under Section 8 of the Arbitration and Conciliation Act, 1996, the suit from which this petition arises were on 4th July, 2014 disposed of as under:-

“Thus, as defendant has taken objection at the first available movement, the application of the defendant is allowed with the direction that necessary steps be initiated by the defendant for appointment of the

arbitrator upto 30.09.2014. In case the defendant does not initiate any steps for appointment of arbitrator before 30.09.2014, the plaintiff shall be at liberty to get present suit revived and said suit shall thereafter proceed as per law.

With these observations, file is consigned to record room.”

8. Thus though it *prima facie* appears that the order so disposing of the suit was not in accordance with law but the petitioner / defendant did not challenge the same and allowed it to attain finality.

9. The respondent / plaintiff applied for revival of the suit and which has been revived vide order dated 6th April, 2017, owing to the earlier order, for the reason of the petitioner/defendant having not initiated steps for appointment of arbitrator.

10. *Prima facie* it appears that even if the order dated 4th July, 2014 was defective, the learned Additional District Judge in view of the well settled position in law, ought not to have revived the suit.

11. The learned Additional District Judge, after reviving the suit, listed the same on 21st April, 2017 for arguments on the application for leave to defend.

12. The counsel for the petitioner / defendant on enquiry states that on 21st April, 2017 the proceedings were adjourned for tomorrow i.e. 25th July, 2017.

13. Issue notice to the respondent / plaintiff by all modes including *dasti* and electronic and through counsel before the Court of the Additional District Judge, returnable on 4th September, 2017.

14. Subject to the petitioner / defendant paying costs of Rs.20,000/- to the counsel for the respondent / plaintiff tomorrow i.e. 25th July, 2017 before the learned Additional District Judge for tomorrow's adjournment, there shall be stay of further proceedings in the suit.

15. The counsel for the petitioner / defendant to inform this order to the Court of the Additional District Judge tomorrow i.e. 25th July, 2017.”

2. The respondent remained unserved on 4th September, 2017 and the matter was adjourned to 14th September, 2017.
3. On 14th September, 2017, Mr. Brijesh Singh, Advocate appeared for the respondent and sought adjournment stating that the main counsel Mr. Amaresh K. Singh was out of station.
4. Subject to the respondent depositing costs of Rs.5,000/- with the Delhi High Court Bar Association Lawyers' Social Security & Welfare Fund, New Delhi, the matter was posted for today.
5. Today, both Mr. Amaresh K. Singh and Mr. Brijesh Singh appear and Mr. Amaresh K. Singh, Advocate seeks time to file reply to this petition.
6. There is no reply to a petition under Article 227 of the Constitution of India which is only to adjudge the proceedings before the Courts within the supervisory jurisdiction of this Court and is to be decided on the basis of the record of the subject proceedings and is not to be decided by allowing fresh pleadings.
7. Mr. Amaresh K. Singh, Advocate then states that the respondent / plaintiff is to appoint another "AR".
8. The same also cannot be a ground for adjournment. Moreover, as borne out from above, the issue for consideration is purely legal and does not require any participation of the respondent / plaintiff or its authorized representative.
9. Mr. Amaresh K. Singh, Advocate then states that he has not even filed his vakalatnama.
10. For own fault, adjournments cannot be sought.

11. The respondent has also not deposited the costs of Rs.5,000/-. For this reason alone, the respondent has no right to be heard. Be that as it may, Mr. Amaresh K. Singh, Advocate has been asked to argue but states that he has no arguments to make. The counsel for the petitioner / defendant also has not argued anything.

12. The controversy is already spelt out in the order dated 24th July, 2017 reproduced hereinabove.

13. The question for consideration is, whether the Court which has on application of a party under Section 8 of the Act referred the parties to the suit to arbitration can bind the party so applying under Section 8 of the Act to take steps for appointment of an Arbitrator within the prescribed time and on such party not taking such steps within the said time, revive the suit.

14. The language of Section 8 does not empower the Court to impose any such limitations or conditions on the party applying thereunder and Section 5 of the Act prohibits Court's intervention except where provided. Though the Act does not bar/prohibit a party to an arbitration agreement from, instead of invoking arbitration, instituting a civil suit but if the other party to the arbitration agreement applies to the Court in which the suit is instituted under Section 8 of the Act, the same requires the Court to refer the parties to arbitration.

15. What is the nature of the order, while allowing the application under Section 8, is not *res integra*. Supreme Court in ***P. Anand Gajapathi Raju Vs. P.V.G. Raju*** (2000) 4 SCC 539 held (i) that once an application under Section 8 is allowed and the parties referred to arbitration, nothing remains to be decided in the original action and there is no question of stay of the

proceedings in the suit till arbitration proceedings conclude; (ii) that the arbitral award becomes final and all the rights and obligations and remedies of the parties are then to be governed by the Act including the right to challenge the award; (iii) that an application before the Court under Section 8 merely brings to the Court's notice that the subject matter of action before it is the subject matter of arbitration agreement; and, (iv) that an application under Section 8 is distinct from an application under Section 42 of the Arbitration Act, 1940, as under the Arbitration Act, 1996, the Court in which the suit was instituted and which has allowed the application under Section 8 had no jurisdiction to try the suit to start with. Supreme Court again, in ***Hindustan Petroleum Corporation Ltd. Vs. Pinkcity Midway Petroleums*** (2003) 6 SCC 503, held that the Civil Court had no jurisdiction to entertain a suit, after an application under Section 8 of the Act is made for arbitration

16. This Court, in ***MMTC Ltd. Vs. Shyam Singh Chaudhary*** 2001 (57) DRJ 743 held that once the parties in exercise of power under Section 8 have been referred to arbitration, the suit is rendered infructuous. The High Court of Madras also, in ***M/s H.J. Hansen Recycling Industry Ltd. Vs. M/s Shree Ganesh Steel Rolling Mills Pvt. Ltd.*** 2014-1-L.W. 811, on a conspectus of the case law in this regard held that after allowing an application under Section 8, the Court becomes *functus officio* and cannot subsequently pass an order.

17. Supreme Court, yet again, recently in ***Hema Khattar Vs. Shiv Khera*** (2017) 7 SCC 716 held that in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration

in terms of their arbitration agreement and nothing remains to be decided in the original action, after such an application is made, except to refer the dispute to an arbitrator. It was reiterated that the Civil Court had no jurisdiction to entertain a suit, after an application under Section 8 of the Act is made.

18. Once it is so, it has thus but to be held that the Civil Court, while allowing the application under Section 8 and referring the parties to arbitration, has no jurisdiction to impose any condition and/or to permit revival of the suit on breach of such condition.

19. The liberty given for revival of the suit would mean that some vestige of life remains in the suit for it to be revived—the same would however be contrary to the judgments aforesaid holding that the Court, in which the suit was instituted, on an application under Section 8 being filed and allowed, being left with no jurisdiction to entertain the suit and having become *functus officio*.

20. As far as the anxiety/apprehension that the party applying under Section 8 of the Arbitration Act would not take steps for initiating arbitration, presumably owing whereto the learned ADJ has passed the conditional order allowing the application under Section 8 and on non-fulfilment of which condition, the learned ADJ has revived the suit, is concerned, the Arbitration Act is a complete Code in itself and it is not as if there are no remedies available thereunder to address the said anxiety/apprehension. Section 11 of the Act provides for the procedure to be followed for appointment of Arbitrator and which procedure entitled both/all parties to the arbitration agreement to seek appointment of

Arbitrator in accordance with the arbitration clause. Thus, it is not as if the steps for appointment of Arbitrator and initiation of arbitration proceedings can be taken only by one of the parties or the party which is applying under Section 8 of the Act. Once the parties have been referred to arbitration and the Civil Court has no jurisdiction, even if the party which has so applied under Section 8 does not take any steps for appointment of Arbitrator and/or for initiation of arbitral proceedings, the party which had in breach of the arbitration agreement approached the Civil Court, is fully entitled to initiate arbitration and/or to seek appointment of Arbitrator in accordance with the arbitration agreement and the law. For this reason also, once the remedy for initiating arbitration and/or for appointment of Arbitrator is available under the Arbitration Act, the jurisdiction of the Civil Court to compel initiation of arbitration and appointment of Arbitrator by imposing such conditions, while allowing application under Section 8 of the Act, would be barred by Section 5 of the Act.

21. Thus, notwithstanding the order dated 4th July, 2014 in the suit granting liberty to the respondent / plaintiff to revive the suit if the petitioner / defendant did not initiate any steps for appointment of an Arbitrator before 30th September, 2014, the suit once ceased to exist could not have been revived. Moreover, the order dated 4th July, 2014 on the application under Section 8 of the Arbitration Act, to the extent imposes condition and allows revival of the suit, is found to be illegal and there can be no proceedings consequent to an illegality.

22. The petition is thus allowed.

23. The order dated 6th April, 2017 in M.No.8748/2016 of the Court of

Additional District Judge-01 (South), Saket Courts, New Delhi is set aside. The suit from which this petition arises shall remain disposed of allowing the application of the petitioner / defendant under Section 8 supra.

24. The parties shall however be entitled to invoke their appropriate remedies in accordance with law.

OCTOBER 12, 2017
'gsr/bs'

RAJIV SAHAI ENDLAW, J.

