

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

% **Date of decision: 26th July, 2017.**

+ **CM(M) No.784/2017 & CM No.26357/2017 (for stay)**

ASHA SAINI

..... Petitioner

Through: Mr. Praveen Mahajan, Adv.

Versus

OMAXE LTD

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.26358/2017 (for exemption)

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

CM(M) No.784/2017 & CM No.26357/2017 (for stay).

3. This petition under Article 227 of the Constitution of India impugns the order (dated 25th January, 2017 in Suit No.570/16 of the Court of Additional District Judge-04 (South-East), Saket Courts, New Delhi) allowing the application of the respondent / defendant under Section 8 of the Arbitration and Conciliation Act, 1996.
4. I have enquired from the counsel for the petitioner / plaintiff, whether a petition under Article 227 of the Constitution of India lies to the High Court against an order of the Civil Judge or the District Judge allowing an application under Section 8 of the Arbitration Act.
5. The counsel for the petitioner / plaintiff fairly states that he has not

examined the said aspect.

6. Though I find this Court in (i) ***West Coast Paper Mills Ltd. Vs. Asha Kapoor*** (2009) 157 DLT 696; (ii) ***Neeraj Chopra Vs. Beena S. Aggarwal*** 2013 SCC OnLine Del 2914; and, (iii) ***Milistore Switchgears Pvt. Ltd. Vs. Samtal Colour Ltd.*** 2014 SCC OnLine Del 2652 and the High Court of Punjab and Haryana in (i) ***Ashok Kumar Jain Vs. Haryana Iron & Steel Rolling Mill, Hisar*** 2009 SCC OnLine P&H 7823; (ii) ***Pushpinder Kumar Vs. Joginder Pal*** 2010 SCC OnLine P&H 6413; (iii) ***Lovely Obsessions Pvt. Ltd., Gurgaon Vs. Sahara India Commercial Corporation Ltd., Gurgaon*** 2012 SCC OnLine P&H 11449; (iv) ***Inam Vs. Shri Ram City Union Finance Ltd.*** 2013 SCC OnLine P&H 14192; and, (v) ***Munish Singal Vs. B.S.N.L.*** 2012 SCC OnLine P&H 8903 and the High Court of Kerala in ***K. Sanil Vs. Bharath Sanchar Nigam Limited*** 2016 SCC OnLine Ker 33517 and the Bombay High Court in ***Sudam Singh Vs. S.K. Builders*** 2014 SCC OnLine Bom 2266 to have entertained petitions under Article 227 of the Constitution of India against the orders of the District Court on applications under Section 8 of the Arbitration Act but in none of the said judgments has the question of very maintainability of the petition been discussed. The said judgments cannot thus be said to be judgments laying down that a petition under Article 227 of the Constitution of India lies against the order of the District Court on an application under Section 8 of the Arbitration Act.

7. Before I proceed to discuss this aspect further, notice may also be taken of the amendment w.e.f. 23rd October, 2015 of Section 37 of the Arbitration Act whereby an appeal has been provided against an order refusing to refer the parties to arbitration under Section 8 of the Arbitration

Act. Thus, while prior to 23rd October, 2015 appeal did not lie against the order on an application under Section 8 of the Arbitration Act whether of referring the parties to arbitration or of refusing to refer the parties to arbitration, now w.e.f. 23rd October, 2015 while an order refusing to refer the parties to arbitration is appealable, an order referring the parties to arbitration is not appealable.

8. The amendment w.e.f. 23rd October, 2015 has also amended Section 8 of the Arbitration Act. While Section 8 of the Arbitration Act prior to the said amendment was as under:-

“(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.”

Section 8 of the Arbitration Act post amendment is 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 to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the

substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

(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;

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(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.”

The impact of the said amendment will also be discussed hereinafter.

9. Owing to the language of Section 37(1) providing that an appeal shall lie against the orders mentioned thereunder and from no others, the Division Bench of this Court in ***Canbank Financial Services Ltd. Vs. Haryana Petrochemicals Ltd.*** 2008 (104) DRJ 59 (DB) held that the embargo on appeals in Section 37 is an absolute and categorical embargo and even an appeal under Clause 10 of Letters Patent would not be maintainable against an order referring the parties to arbitration. The same view has been followed by subsequent Division Bench in ***Today Hotels (New Delhi) Pvt.***

Ltd. Vs. Intecture India Designs Pvt. Ltd. (2016) 226 DLT 706 as well as by the Full Bench of the High Court of Bombay in *Conros Steels Pvt. Ltd. Vs. Lu Qin (Hong Kong) Company Ltd.* 2015 (1) Mh. L.J.434 qua its own Letters Patent. I have also in *Roshan Lal Gupta Vs. Parasram Holidings Pvt. Ltd.* 2009 (109) DRJ 101 and in *Hemant Jain Vs. Sidharth Jaju* 2016 SCC OnLine Del 3245 followed the same.

10. Though a constitutional remedy under Article 227 of the Constitution of India is not barred by the prohibition contained in a Statute against an appeal but ordinarily this Court would refrain from exercising jurisdiction under Article 227 of the Constitution of India where the language of the Statute gives a finality to an order. One of the reasons which prevailed in the judgments aforesaid holding the appeal under Letters Patent of this Court or of the High Court of Bombay to be not available was, that the Arbitration Act being a consolidating and amending Act, substantially in the form of a Code relating to arbitration, must be construed without any assumption that it was not intended to alter the law relating to appeals. It was held that the words of the statute are plain and explicit and they must be given their full effect and must be interpreted in their natural meaning, uninfluenced by any assumptions derived from the previous state of the law and without any assumption that the legislature must have intended to leave the existing law unaltered. In this respect it may also be noticed that in *Shakti Bhog Foods Limited Vs. Kola Shipping Limited* (2009) 2 SCC 134 in the context of Section 45 of Arbitration Act it was held that the claim raised before the Court about the non-existence of the agreement containing the arbitration clause can be raised before the Arbitral Tribunal also; reference was made to

Section 16 of the Act whereby the Arbitral Tribunal can decide on its own jurisdiction as also the existence and validity of the Arbitration Agreement. Per Section 8(3) also pendency of an application under Section 8(1) is not a bar to the arbitration being commenced and continued and even an Arbitral Award being made. In ***Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd.*** (2005) 7 SCC 234 also it was held that the view taken under Section 45 is only a *prima facie* view. This Court also in ***Vijay Vishwanath Talwar Vs. Meshreq Bank, PSC*** ILR (2003) II Del 392, ***Tandav Films Entertainment P. Ltd. Vs. Four Frames Pictures*** 2009 SCC OnLine Del 3292, ***Saipem Triune Engineering Pvt. Ltd. Vs. Indian Oil Petronas Pvt. Ltd.*** 2011 SCC OnLine Del 1104 (DB) and in ***Havels India Ltd. Vs. Electrium Sales Ltd.*** 2013 SCC OnLine Del 1474 held that the view taken under Section 8 of the Arbitration Act is a *prima facie* view. Thus, an order under Section 8 referring the parties to arbitration does not come in the way of any of the said parties before the Arbitral Tribunal setting-up of a plea under Section 16 of the Arbitration Act qua the existence or validity of the arbitration agreement and which finding is assailable under Section 34 of the Act. Section 8 of the Arbitration Act as amended w.e.f. 23rd October, 2015 also requires the Court to only return a *prima facie* view about the existence of the arbitration agreement.

11. Notice in this regard may also be taken of ***SBP and Company Vs. Patel Engineering Ltd.*** (2005) 8 SCC 618 holding that there is no warrant for approach of some of the High Courts holding that any order passed by the Arbitral Tribunal during arbitration would be capable of being challenged under Articles 226 or 227 of the Constitution of India. It was

held that once Section 37 makes certain orders of the Arbitral Tribunal appealable and under Section 34 the aggrieved party has an avenue for ventilating his grievances against the award including any in-between the orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act, the party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This was held to be the scheme of the Arbitration Act and the approach of the High Courts of entertaining petitions under Articles 226 and 227 of the Constitution of India against the orders of the Arbitral Tribunal was held to be not permissible. It was further reasoned that the object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the Arbitral Tribunal.

12. What has been held by the Supreme Court qua maintainability of a petition under Article 227 of the Constitution of India against the orders of the Arbitral Tribunal would in my opinion also apply to maintainability to a petition under Article 227 of the Constitution of India against the order of the District Court on an application under Section 8 of the Arbitration Act.

13. ***Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums*** (2003) 6 SCC 503 may however also be noticed. That was a case of refusal to refer the parties to arbitration under Section 8 of the Arbitration Act. Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) preferred to the High Court was also dismissed. Upon the Supreme

Court being approached, it was held that the trial court failed to exercise its jurisdiction when it rejected the application under Section 8 of the Act inasmuch as the refusal to refer the parties to arbitration amounted to failure of justice and that the High Court erred in coming to the conclusion that the relief could not be granted under Section 115 of the CPC. However the aspect of maintainability of a Revision Petition was not gone into. Moreover, there is an inherent difference between an order allowing an application under Section 8 of the Act and an order refusing an application under Section 8 of the Act. While in the case of the former, the existence and opportunity of challenge to the existence and validity of the arbitration agreement is available before the Arbitral Tribunal also, in the case of latter, the rights and obligations of the parties would then be determined by the Civil Court instead of by arbitration agreed upon between the parties and the order has a sense, in that context, of finality. It is perhaps for this reason that vide amendment w.e.f. 23rd October, 2015 the order refusing to refer the parties to arbitration under Section 8 has been made appealable and not the order referring the parties to arbitration. Thus merely because in ***Pinkcity Midway Petroleums*** supra the Supreme set-aside the order of the High Court dismissing the Revision Petition does not lead me to hold in favour of maintainability of the Revision Petition or a petition under Article 227 of Constitution of India.

14. Be that as it may, on a reading of the paper book I am of the *prima facie* view that there is no merit in the challenge to the impugned order otherwise also. Thus, *de hors* the aspect of maintainability of this petition, the counsel for the petitioner / plaintiff has been heard on merits of the order

also and I proceed to adjudicate the same.

15. The suit, from which this petition arises, was filed by the petitioner / plaintiff for recovery of Rs.29,50,062/- from the respondent / defendant on account of compensation / damages for delay by the respondent / defendant in delivery of possession of residential flat no.706, Petronas Tower, Omaxe North Avenue, Bahadurgarh, Haryana.

16. The counsel for the petitioner / plaintiff has argued (i) that the petitioner / plaintiff at the time of booking the flat with the respondent / defendant on 23rd March, 2006 had signed a two page document titled “Basic Terms and Conditions” and which did not contain any Arbitration Agreement; (ii) that all payments were made by the petitioner / plaintiff to the respondent / defendant in accordance with the aforesaid document; (iii) that the respondent / defendant subsequently on 9th February, 2012 made the petitioner / plaintiff sign a printed form booklet titled “Agreement” and which in clause 49 thereof provided as under:-

“All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 and / or any statutory amendments / modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate location in Delhi / New Delhi.”

(iv) that subsequently on 8th January, 2014, the respondent / defendant

registered a Sale Deed in favour of the petitioner / plaintiff with respect to the said flat and which Sale Deed though had no Arbitration Agreement / clause but clause 5(j) thereof provided as under:-

“That all terms and conditions of the Buyer’s Agreement in respect of the said Unit shall be deemed to have been incorporated in this Deed save and except those of the terms and conditions of the Buyer’s Agreement which are at variance with the terms and conditions contained in this Deed in which case same terms and conditions contained herein shall prevail.”

17. The counsel for the petitioner / plaintiff has firstly argued that since there is no arbitration clause in the Sale Deed, the same would be treated as variance with the terms and conditions in the Agreement dated 9th February, 2012 and the arbitration clause contained in the Agreement dated 9th February, 2012 has thus been novated by virtue of Section 62 of the Indian Contract Act, 1872.

18. I am unable to agree.

19. The only reasonable way to interpret clause 5(j) aforesaid is that unless there is anything in the Sale Deed dated 8th January, 2014 to suggest that the resolution of disputes between the parties would not be by way of arbitration as provided in the Agreement dated 9th February, 2012, the arbitration clause aforesaid in the Agreement would be deemed to have been incorporated in the Sale Deed.

20. The counsel for the petitioner / plaintiff has not drawn attention to any clause in the Sale Deed which can be said to be at variance with the arbitration clause in the Agreement or which can said to be negating the

agreement of the parties of resolution of disputes by arbitration. Mere absence of an arbitration clause in the Sale Deed cannot be variance with the terms and conditions of the Agreement dated 9th February, 2012 for it to be said that the arbitration clause in the Agreement dated 9th February, 2012 stands novated.

21. I have in fact drawn attention of the counsel for the petitioner / plaintiff to Section 7(5) of the Arbitration Act which provides that the reference in contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make a arbitration clause part of the contract.

22. The counsel for the petitioner / plaintiff states that “the matter can be looked at in that perspective also”.

23. In my view no two opinions are possible in the face of the aforesaid clause 5(j) and the admission of the counsel for the petitioner, that there is nothing to the contrary to the arbitration clause, except by way of silence, leads to inescapable conclusion that the arbitration clause in the Agreement stands incorporated in the Sale Deed between the parties.

24. In fact from the admission of the counsel for the petitioner / plaintiff that the clauses aforesaid are capable of being interpreted, as have been done by the learned Additional District Judge, the jurisdiction under Article 227 is excluded inasmuch as the said jurisdiction is not intended to interfere with a possible interpretation of the Courts below.

25. The second argument of the counsel for the petitioner / plaintiff is that the Agreement dated 9th February, 2012 was imposed upon the petitioner / plaintiff and the petitioner / plaintiff was compelled to sign the same owing

to having made all the payments to the respondent / defendant. The counsel states that an application had also been filed in the suit for seeking production of the original Arbitration Agreement and for amendment of the plaint to seek a declaration in this regard. It is argued that the said application has not been decided.

26. Admittedly in the suit as existing at the time when Section 8 application was filed, there was no such relief of declaration that the petitioner / plaintiff had been compelled to sign the Agreement dated 9th February, 2012 or that the same was not binding on the petitioner / plaintiff.

27. Be that as it may, even if that be so it has been held in the consistent lines of judgments in *Roshan Lal Gupta Vs. Parasram Holdings Pvt. Ltd.* 2009 (109) DRJ 101, *Spentex Industries Ltd. Vs. Dunvant S.A.* 2009 (113) DRJ 397 (DB), *Accord Alloys Ltd. Vs. Asia Minerals Ltd.* 2010 SCC OnLine Del 1840 (DB), *Handicrafts & Handlooms Exports Corporation of India Limited Vs. Ashok Metal Corporation* 2010 (117) DRJ 370 and *Devinder Kumar Gupta Vs. Realogy Corporation* 2011 (125) DRJ 129 (DB) that such a suit is not maintainable.

28. Last argument of the counsel for the petitioner / plaintiff is that the respondent / defendant along with the application under Section 8 of the Act only filed a photocopy of the Agreement dated 9th February, 2012 containing the arbitration clause and never filed original. There is however no dispute that the photocopy which was filed is a true copy of the Agreement signed by the petitioner / plaintiff.

29. Section 8(2) of the Act permits an application under sub Section (1) thereof even when the application is accompanied with a copy of the

Arbitration Agreement or the contract containing the Arbitration Agreement. Once there is no dispute as to the genuineness of the document, the said plea also has no merit.

30. No other argument has been urged.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

JULY 26, 2017

‘pp’..

(corrected & released on 28th August, 2017)