

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1156 of 2016

Om Astha Construction Pvt. Ltd. a company duly incorporated & Regd. under Company Act, 1956 having its Regd. Office at- 301, Majestic Vishnu, North S.K. Puri, P.S.- S.K. Puri, District- Patna, through one of its directors Sri Bishambhar Singh Son of Late Jagdeo Singh resident of Mohalla- Jay Prakash Nagar, PO- Ashiyana Nagar, P.S.- Shastri Nagar, District- Patna.

... .. Appellant/s

Versus

1. Axon Construction Pvt. Ltd., having its office at 1st Floor, Western Wing, 14, Dr. Giriappa Road, T.Nagar, Chennai- 600017 (Tamil Nadu) represented by its Managing Director, Dr. Mrs. Andal Arumugam W/o Dr. S.Arumugam
2. Mr. S. Subburaj, D.G.M. (Civil), Axon Construction Pvt. Ltd. 1st Floor, Western Wing, 14, Dr. Giriappa Road, T.Nagar, Chennai- 600017.
3. Mr. V.V. Ram, AGM (Civil) & Authorized Signatory, Axon Construction Pvt. Ltd. 1st Floor, Western Wing, 14, Dr. Giriappa Road, T.Nagar, Chennai- 600017.
4. Mr. T.M. Singravel, Director, Axon Construction Pvt. Ltd. 1st Floor, Western Wing, 14, Dr. Giriappa Road, T.Nagar, Chennai- 600017.
5. Mr. J.Mohan, Director, Axon Construction Pvt. Ltd. 1st Floor, Western Wing, 14, Dr. Giriappa Road, T.Nagar, Chennai- 600017, Tamil Nadu.
6. Mr. Murugasen, General Manager (Civil), Axon Construction Pvt. Ltd. 1st Floor, Western Wing, 14, Dr. Giriappa Road, T.Nagar, Chennai- 600017.
7. Mr. K.M. Natrajan, D.G.M. (Civil), Axon Construction Pvt. Ltd. 1st Floor, Western Wing, 14, Dr. Giriappa Road, T.Nagar, Chennai- 600017.
8. R.K.M. Powergen Pvt. Ltd., having its office at Axon Construction Pvt. Ltd. 1st Floor, Western Wing, 14, Dr. Giriappa Road, T.Nagar, Chennai- 600017 represented by Managing Director Dr. Mrs. Andl Arumugam W/o Dr. S. Arumugam
9. Mr. R. Sarvanan Chief General Manager (Civil), R.K.M. Pwergen Pvt. Ltd. office at 1st Floor, Western Wing, 14, Dr. Giriappa Road, T.Nagar, Chennai- 600017
10. Canara Bank, Main Branch, South Gandhi Maidan, Patna, Bihar.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. S.D. Sanjay, Sr. Advocate
with Mr. Sheo Narayan Singh, Advocate

For the Respondent/s : Mr. P.K. Shahi, Sr. Advocate
with Mr. Rajan Ghoshrave, Advocate
Mr. Manish Kumar & Mr. Ajay Kumar
Advocates

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

CAV JUDGMENT

Date : 21-06-2018



This Civil Miscellaneous case has been filed under Article 227 of the Constitution of India, seeking quashing of the order, dated 04.06.2016, passed by learned Sub-Judge-2, Patna, whereby he has asked the parties to the said title suit to appear before the sole Arbitrator at Chennai and place their case. The petitioner has also sought for a direction to the court below to determine first as to whether there is any arbitration agreement among the parties expressly accepting for resolution of a dispute by an Arbitrator or not. It is the case of the petitioner that in fact there is no arbitration agreement between the parties within the meaning of the provisions under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'), and, therefore, there would have been no occasion for the trial Court to have asked the parties to appear before the Arbitrator.

2. I have heard Mr. S. D. Sanjay, learned Senior Counsel, for the petitioner assisted by Mr. S.N.Singh, learned Counsel and Mr. P.K. Shahi, learned Senior Counsel appearing on behalf of the contesting respondents assisted by Mr. Ranjan Ghoshrahe, learned Counsel.

Case of the petitioner

3. The petitioner is a Private Limited Company carrying on its Infra business & Construction works on contract



basis at different sites within and outside the State of Bihar. One of its working sites was at Village-Uchhpinda, P.S-Kharasiya, District-Jajgir-Champa (Chhatisgarh). The Respondent No.1, Axon Construction Pvt. Limited and Respondent No.8, R.K.M. Powergen Pvt. Ltd are sister concern Companies. The Respondent No.8 had entered into a contract agreement with respondent No.1 for civil construction work for the packages which formed part of the Power Plant, viz, (i) Coal-Shed (ii) Road works which included canal road, Plant Internal Roads & PWD Road rectification works at the said Village-Uchhpinda in Chhatisgarh. The Respondent No.1 in order to execute the work, sublet the same to the petitioner and asked the petitioner to execute the work on their behalf. The understanding between Respondent No.1 and the petitioner to get the work executed through the petitioner was followed by work orders issued by the Respondent Nos. 1 and 2 for four works, which was communicated to the petitioner through *email*. The work orders have been brought on record by way of Annexure-1 series to this application. The work orders contained several general conditions including the following in Clause 28 of the General Conditions:-

“28. In the event of any difference or dispute out of or in connection with this work



order, the same shall be first amicably settled by mutual dialogue, if the parties fall to settle their difference or dispute arising out of or in connection with this work order (including interpretation of the term thereof), the same shall be referred to arbitration. The Arbitration proceedings shall be conducted by a Sole Arbitrator appointed by the Managing Director of Axon and the award/decision of such arbitrator shall be final and binding upon both the parties. The 'venue of the arbitration shall be Chennai, Tamil Nadu. However, the Contractor will not stop the work during the tendency of the proceedings and shall ensure that work is proceeds uninterruptedly.”

4. It is the case of the petitioner that there was no written agreement signed between the parties containing any specific terms and conditions including any arbitration agreement and in view of the oral understanding to do the work followed by the work orders describing the exact nature of the work, the petitioner installed its plant, machineries, equipments and aggregates. The petitioner is said to have requested Respondent No.1 for payment of mobilization advance of a sum of Rs. 1,35,00,000/- (One crore & thirty five lacs) when, in turn, Respondent No.1 requested the petitioner to furnish Bank



Guarantee against the said amount, of Rs. 1,35,00,000/0- as security for mobilization advance. The petitioner submitted Bank Guarantees for a sum of Rs. 35,00,00/- on 19.03.2012 valid for the period from 19.03.2012 to 18.03.2013 and for 1,00,00,000/- dated 30.05.2012 valid for the period from 30.05.2012 to 29.05.2013. Respondent No.1 thereafter, made available the mobilization advance of Rs. 1,35,00,000/-, which amount has been adjusted and recovered by the Respondent No.1 from the running account bills of the petitioner. On 28.01.2013, Respondent No.3 suddenly invoked the Bank Guarantees furnished by the petitioner without giving any prior notice/information to the petitioner by presenting them before the Bank for encashment, whereafter the Bank informed the petitioner to deposit the said amount of Rs. 1,35,00,000/- with the Bank, within 12 hours. However, with the intervention of the well wishers of both the parties, the validity period of both Bank Guarantees were extended by Respondent No.10/banker. In the meanwhile, substantial work was done by the petitioner for which a total sum of Rs. 3,60,39,358/- was received by the petitioner except its claim of Rs. 50,11,843/- from Respondent No.1. Since the entire mobilization advance of Rs. 1.35 crore was adjusted and the petitioner was entitled for a further sum of



Rs. 50,000/- and odd and the petitioner was required to pay the commitment charges for the two Bank Guarantees, the petitioner requested Respondent Nos. 1 and 2 to return the original Bank Guarantees. Respondent Nos. 1 and 2 did not return the original Bank Guarantees and instead invoked them. This made the petitioner file the Title Suit which came to be registered as Title Suit No. 789 of 2013. The petitioner also filed a petition under Order 39, Rule 1 & 2 of the Code of Civil Procedure, seeking an order of injunction against the Respondents restraining them from encashing the Bank Guarantees with intimation to Respondent No. 10/Bank not to make payment of the amount of Bank Guarantee. Learned Court below by an order dated 04.01.2014, directed the respondents to maintain status-quo till the final hearing, while issuing notices to the defendants.

5. The Respondents thereafter, appeared, after having received summons, before the Court and filed their written statements. Respondent Nos. 1,3,5,8 and 9 filed a petition before the Court below under Section 8 of the Act. It is the specific case of the petitioner that for the first time, the said respondents brought on record forged and fabricated documents, including a “xerox copy of Notarized work order which also contained forged and fabricated seal and signature of somebody



purported to be on behalf of the petitioner”. Relying on the said document, particularly, Clause 28, said respondents took a plea that an Arbitrator had been appointed and, therefore, the petitioner/plaintiff in the suit should be directed to pursue their arbitration proceeding. The petitioner, by filing an objection to the said prayer for referring the matter to the Arbitrator took plea that there was no arbitration agreement and, therefore, there was no question of reference of the dispute to the arbitration proceeding. They took a plea that unless the original agreement containing any arbitration agreement or unless the original arbitration agreement was brought on record, there was no question of referring the matter to the arbitration proceeding. They asserted that the xerox copies of the documents filed by Respondent Nos. 1 to 9 were forged and fabricated. The petitioner is also said to have filed an application under Section 340 of the Code of Criminal Procedure, 1973 for causing an enquiry into the forgery committed by Respondent Nos. 1 to 9 in respect of the documents on which they placed reliance which contained, *inter alia*, the arbitration agreement. The Court below has, however, without appreciating the apparent forgery in the documents produced by the respondents and without calling for the original records, held that in view of Section 5 of



the Act, the Court could not intervene, since the arbitration was pending before the learned Sole Arbitrator, retired Judge of a High Court.

6. There is a statement made in paragraph 25 of the application that merely because the petitioner had executed the work on the basis of the understanding with Respondent Nos. 1 to 9, it could not be presumed that the petitioner had entered into a written agreement with Respondent Nos. 1 to 9 and had agreed to all the terms and conditions including that of the arbitration clause. Since there is no original copy of the arbitration agreement filed by Respondent Nos. 1 to 9 and only a xerox copy of the agreement, which was forged and fabricated was filed, the Court below committed an error in relying on such documents which was seriously disputed by the petitioner.

Case of the contesting Respondents

7. A Counter affidavit and supplementary counter affidavit have been filed on behalf of the contesting respondents. Since, in course of hearing it transpired that the copy of the counter affidavit was not served on the learned petitioner's counsel, this Court has not gone into the same. Apart from raising an objection over improper impleadment of



the parties, it has been asserted that the petitioner and the Axon Construction Private Limited had entered into an agreement based on which a work order for the constructions etc, at the said power plant was issued by the Respondent. Clause 28 of the general conditions of the said work order stipulated that in the event of any dispute and differences arising out of the work order, the same shall be settled through mutual dialogue and in case of failure, reference of the dispute to arbitration at Chennai. The respondents have brought on record a copy of the First Information Report lodged at the instance of Shailendra Pratap, one of the Directors of Om Astha Construction Private Limited to which a copy of the said work order in question was annexed. The said First Information Report being S.K. Puri P.S. Case No. 263 of 2014 dated 24.07.2014 has been brought on record by way of N to the supplementary counter affidavit. The said document which is a photo copy contains the signature of the authorized signatory of the petitioner. The said document has been brought on record to counter the claim of the petitioner that there was no written agreement between the petitioner and Respondent No.1 for referring the matter to arbitration in case of any dispute. It has been asserted that after reference of the matter, the arbitration proceeding had started before Hon'ble



Mr. Justice P. Shanmugam (retired) who has already made his award in the arbitration proceeding on 07.09.2016, in favour of respondent No.1. It has been asserted that the learned Arbitrator has commented upon the irresponsible behaviour of the petitioner for not appearing before the Arbitrator despite several notices to them and instead they kept by sending representations before the Sole Arbitrator through letters and emails for grant of time, on the pretext of some compromise mechanism going on between the parties. It has, accordingly, been asserted that the petitioner was in the know of things in terms of pendency of the arbitration proceeding but he did not effectively participate in the proceeding. It has also been asserted that the learned Court below had passed an *ex parte* status-quo order on 04.01.2014, in respect of the two Bank Guarantees, since the clause pertaining to the arbitration agreement was not brought to the notice of the Court. The said order dated 04.01.2014, passed by the Court below was assailed before this Court by filing a petition giving rise to CWJC No. 10572 of 2015, which was dismissed by an order dated 08.12.2015. The order dated 08.12.2015, was assailed before the Supreme Court in SLP © 5430 of 2016. The Supreme Court disposed of the Special Leave Petition by an order dated 29.02.2016, with a direction to the



learned Sub-Judge-VI, Patna to dispose of the petition filed on behalf of the defendants under Section 8 of the Act, within a period of six weeks from the date of production/receipt of a copy of the said order. In compliance of the Supreme Court's order, dated 29.02.2016, the learned Sub-Judge-II, Patna, passed the impugned order, dated 04.06.2016, referring the matter to the Arbitrator where after, the Arbitrator passed an award on 07.09.2016.

8. In the supplementary counter affidavit filed on behalf of Respondent No.1, it has also been asserted that in the rejoinder filed on behalf of the petitioner to the petition filed by respondent No.1 under Section 8 of the Act, the petitioner had accepted the existence of arbitration agreement under Clause 28 of the General Conditions. Without questioning the existence of Clause 28 in the agreement/work order, the petitioner questioned the reasonableness of the said provisions which authorized defendant No.1 to appoint sole Arbitrator. The petitioner had rather assailed Clause 28 of the work order, which authorized respondent No.1 to appoint sole Arbitrator, as unilateral and violative of fundamental rights.

9. In the reply affidavit, the petitioner has, however, asserted that the petitioner never admitted Clause 28 of the



work order and the appointment of learned sole Arbitrator is against the law.

10. Be it noted that this application was filed on 30.09.2016, assailing the order dated 04.06.2016, passed by the Court below asking the parties to go before the sole Arbitrator, for the resolution of their disputes. When the matter was taken up on 19.10.2016, this Court stayed the operation of the impugned order, dated 04.06.2016, after considering the following submissions made on behalf of the petitioner:-

*“Learned Senior counsel, Mr. Sanjay, for the petitioner relying on the decision of the Supreme Court reported in **AIR 2009 SC 1098, AIR 2000 SC 1379 and AIR 2000 SC 1886** submitted that there was no compliance of the provision as contained under Section 8 Sub-section 2 of the Arbitration and Consolidation Act, 1996. The court below without considering this aspect of the matter and the fact that the petitioner is challenging the arbitration agreement itself that there was no such agreement between the parties and the so called agreement produced by the defendants is forged agreement. Only on the application filed by the respondent Nos. 1 to 9., the court below directed the parties to appear before the arbitrator at Chennai*



relying on the so called agreement. The learned Senior counsel further submitted that earlier orally the petitioner was directed to carry on the work and subsequently only letters were issued wherein unilaterally the so called arbitration clause was inserted in the letter without consent of the petitioner and there is no signature of the petitioner on the so called agreement, therefore, it is not binding on the petitioner.”

11. It appears from the pleadings on record that learned Arbitrator has already made his award on 07.09.2016, i.e. before filing of the present writ application and much before the interim order, dated 19.10.2016, was passed by this Court.

Submission on behalf of the petitioner

12. Mr. S.D. Sanjay, learned senior counsel appearing on behalf of the petitioner, has submitted that the impugned order is *ex facie* illegal and in teeth of specific provision under Section 8(2) of the Act which puts a bar on the Court to entertain an application under Sub Section (1) of Section 8 of the Act, unless the application is accompanied by the original arbitration agreement or a duly certified copy thereof. He has vehemently contended that there was no written arbitration agreement and in the absence of such a written arbitration



agreement, the parties could not be forced to go for arbitration proceeding.

13. In support of his submission he has placed reliance on the Supreme Court's decision in the case of **Atul Singh and others vs. Sunil Kumar Singh and others** reported in **(2008) 2 SCC 602** and in the case of **Yogi Agarwal vs. M/S Inspiration Clothes and U and others (AIR 2009 SC 1098)**. Reliance has also been placed on a decision of the Supreme Court in the case of **Wellington Associates Limited vs. Kriti Mehta (AIR 2000 SC 1379)** to buttress his contention that in the absence of an arbitration, agreement the parties could not have been referred to the Arbitrator, by the impugned order.

Submission on behalf of the contesting respondents

14. Mr. Prashant Kumar Shahi, learned senior counsel, appearing on behalf of the contesting respondents, on the other hand, has submitted that the petitioner has attempted to mislead this Court by suppressing relevant materials at the time of filing of the present civil misc. application and has been able to obtain an *ex parte* interim order of stay of the impugned order, by an act of concealment of facts. He contends that the petitioner is estopped from taking the plea of non existence of the arbitration agreement between the parties under Clause 28 of the general



conditions of the work agreement on the basis of which the petitioner had executed the work, in view of the fact that the petitioner herself had relied on the copies of the work order/agreement containing the signature of the authorized signatory of the petitioner. He has submitted that the plaintiff had filed a copy of the work order on the basis of which the work was assigned to the petitioner and there is no difference between the contents of the agreement in the document filed on behalf of the petitioner and the one, which the respondents are placing reliance on. Referring to Section 8(2) of the Act, Mr. Shahi, contends that the respondents had relied on the certified copy of the written agreement which contained, *inter alia*, the arbitration agreement. Since the contents of the work order could not be disputed which included the arbitration agreement and the certified copy of the agreement was available before the Court below, there has been due compliance of Section 8(2) of the Act in filing of the application for referring the dispute to the Arbitrator. He has placed reliance on the Supreme Court's decision in the case of ***Unissi (India) Private Limited Vs. Post Graduate Institute of Medical Education and Research*** reported in ***(2009) 1 SCC 107***, in order to contend that even in the absence of execution of the formal agreement, existence of



arbitration clause will have to be presumed in view of the admitted facts, as have already been noticed. He has relied on the Supreme Court's decision in the case of ***Rashtriya Ispat Nigam Ltd. Vs. Verma Transport Company and others*** (***AIR 2006 SC 2800***) to submit that notice of appointment of the Arbitrator is not essential. He has further contended that after the award has already been made by the Arbitrator, duly appointed in terms of Clause 28 of the General Conditions, the only remedy that the petitioner can avail is now to challenge the award in accordance with the provisions under Section 34 of the Act. In support of his contention, he has relied on the Supreme Court's decision in the case of ***M.S. Commercial and others Vs. Calikat Engineering works Limited*** reported in (***2004***) ***10 SCC 656***. He, relying on another decision of the Supreme Court's in the case of ***Nimet Resources Inc. and Anr. Vs. Essar Limited*** (***AIR 2000 AC 3107***) has submitted that the Arbitrator had the jurisdiction to decide the question regarding the existence of the arbitration agreement, in view of Section 16 (5) of the Act, as to whether there was an arbitration agreement or not. He submits that once the Arbitrator had taken a decision that there was an arbitration agreement, he was statutorily required to proceed with the arbitration proceeding. Relying on



this decision, he contends that an Arbitrator is competent to decide, not only its jurisdiction, but also his appointment under Section 16 of the Arbitration Agreement. He has relied on the decisions of the Supreme Court reported in **(2009) 5 SCC 116** and in the case of ***Municipal Corporation of Delhi Vs. Sh. Ram Pratap Singh (2010) AIR SCW 5968*** to contend that this Court's power of superintendence under Article 227 of the Constitution of India needs to be exercised sparingly only for keeping the Tribunal and Courts within their authority, when any manifest miscarriage has occasioned and it should not be exercised to correct the mistake of fact and law. He has concluded his submission with the contention that the petitioner is not entitled to any relief in the background of its conduct inasmuch as it has attempted to mislead this Court by suppressing materials fact. Reliance has been placed in support of the submission on the decision of the Supreme Court in the case of ***Prestige Lights Limited Vs. State Bank of India*** reported in **(2007) 8 SCC 449**.

Discussions

15. From the conspectus of the pleadings, materials on record and submissions made on behalf of the petitioner, it emerges that the main challenge of the petitioner to the



impugned order is on the ground that even without an original arbitration agreement having been produced before the Court below as mandated under Section 8(2) of the Act, the Court below referred the parties to the arbitration. It is the case of the petitioner, as has been noticed above and as canvassed in the application that there was no written agreement at all and the document which was presented by the respondents before the Court below for referring the matter to an arbitrator under Section 8(2) of the Act was forged and fabricated.

16. I intend to take up the submission of the petitioner of imperative requirement of accompaniment of the original arbitration agreement with the application before a Court under Section 8(1) of the Act, for referring the parties to arbitration. Section 8 of the Act as it existed prior to amendment w.e.f. 23.10.2015 by the Act of 2016 reads thus:-

“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 ny person claiming through or under him, so applied 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 alongwith 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.”



17. A bare reading of sub-Section (2) of the Act would suggest that there is a bar on entertaining an application under sub-Section (1) unless the said application is accompanied by (i) an original arbitration agreement or a duly certified copy thereof. There is no compulsion for a party, of making an application for referring the parties to arbitration under Section 8(1) of the Act accompanying the original arbitration agreement, since a 'duly certified copy thereof' is sufficient to satisfy the requirement of Section 8(2) of the Act. The respondents had produced the copy of the work order along with the application seeking reference under Section 8(1) of the Act.

18. Mr. Shahi, learned senior counsel, appearing on behalf of the respondents, in my view, is correct in his submission that the Director of the Company had himself relied on the same document in his written statement to the officer Incharge of Sri Krishnapuri Police Station, Patna, based on which Sri Krishnapuri P.S. Case No. 263/2014 had been registered against the respondent-company. A petition filed on behalf of the petitioner before the Court below under Order 1 Rule 10(2) for impleading the learned Arbitrator as party has been brought on record by way of Annexure K to the supplementary counter affidavit filed on behalf of the contesting



respondents, wherein existence of Clause 28 of the agreement has been accepted by the petitioner. The petitioner, however, had taken a plea in the said application that the arbitrator could not have entertained the issue of bank guarantees and their invocation by defendant no. 1, since those bank guarantees were beyond the purview and terms of the contract and the work order. It was his plea that the appointment of Mr. Justice P. Shanmugam as the sole arbitrator is not valid and in accordance with the Clause 28 of the agreement. Paragraph 16 of the said application reads thus:-

“16. That plaintiff humbly states that under present scenario the matter of Bank Guarantees & their invocations are different & beyond the purview of clause-28 of work order and specially when these matters of Bank Guarantees & its invocation are under adjudication before this Hon’ble Court at Patna & specially during the relevant period when status quo order passed by this Hon’ble Court has been enforced, appointment & functioning of P. Shanmugam as Sole Arbitrator at Chennai is illegal against statutory provisions & so fit to be set aside by this Hon’ble Court.”



19. The petitioner, thus, accepted the existence of the arbitration agreement and did not raise any dispute in this regard.

20. The application filed by the respondents for referring the matter to the Arbitrator has been brought on record by way of Annexure-4 to this Civil Miscellaneous application. Along with the said application copies of work orders were filed.

21. Mr. S. D. Sanjay, learned Senior Counsel has attempted to persuade this Court that the said document is forged and fabricated, by referring to certain seals over them. On perusal of the documents, I find, however, that they contained the seal of the Notary Public at Chennai. The document was apparently notarized to satisfy the requirement of Section 8(2) of the Act, which provides that the application under sub-Section (1) must be accompanied by the original arbitration agreement or 'a duly certified copy thereof'. Certified copy has been defined in Black's Law Dictionary as "certified copy. "A duplicate of an original (usu. official) document, certified as an exact reproduction *usu.* by the officer responsible for issuing or keeping the original.- Also termed attested copy;" Notary's certificate has also been defined in the



Black's Law Dictionary as follows:-

“A notary's signed and sealed or stamped statement attesting to the time and place that the specified acts and documents were authenticated.”

22. Notary's signed and sealed or stamped over agreement (in the present case work order) filed by the respondents, along with an application under Section 8(1) of the Act, satisfies the requirement of Section 8(2) of the Act, in y view.

23. To be precise, it is held that accompaniment of a duly certified copy of the original arbitration agreement with the application under sub-Section (1) of Section 8 of the Act for referring the parties to arbitration satisfies the requirement of sub-Section (2) of Section 8 of the said Act. Further, a notarized copy of such arbitration agreement would specify that the documents are authenticated, unless otherwise challenged.

24. The petitioner having accepted the existence of the written arbitration agreement in view of the above noted facts is estopped from questioning the existence of the arbitration agreement, at this stage. The Supreme Court's decision in the case of *Atul Singh* (supra), on which reliance has



been placed by Mr. S.D. Sanjay, learned senior Counsel has held in paragraph 19 as follows:-

“9. There is no whisper in the petition dated 28-2-2005 that the original arbitration agreement or a duly certified copy thereof is being filed along with the application. Therefore, there was a clear non-compliance with sub-section (2) of Section 8 of the 1996 Act which is a mandatory provision and the dispute could not have been referred to arbitration. Learned counsel for the respondent has submitted that a copy of the partnership deed was on the record of the case. However, in order to satisfy the requirement of sub-section (2) of Section 8 of the Act, Defendant 3 should have filed the original arbitration agreement or a duly certified copy thereof along with the petition filed by him on 28-2-2005, which he did not do. Therefore, no order for referring the dispute to arbitration could have been passed in the suit.”

25. As has already been held, there was available before the Court below a certified copy of the arbitration



agreement, the impugned order cannot be said to be suffering from any error on the ground of non-compliance of the requirement of sub-Section (2) of Section 8 of the Act, which is apparently mandatory. The Supreme Court's decisions in the case of *Yogi Agarwal* (supra) and *Wellington Associates* (supra) do not have any application in the facts and circumstances of the present case since those are the cases where the Court had found that there was no arbitration agreement in respect of the dispute. So far as the decision in the case of *P. Anand Gajapathi Raj Vs. P. V. G. Raju (AIR 2000 SC 1886)*, I find no reason why the said case has been relied on, on behalf of the petitioner. The decision in the case of *Harshad Chiman Lal Mdo Vs. DLF Universal Ltd. And another* reported in *(2005) 7 SCC 791* has been relied on, on behalf of the petitioner to answer the question of maintainability of the suit itself before the Court below on the ground of lack of territorial jurisdiction. I am not going into the said aspect of the matter now, since that is not the real issue involved in the present case, particularly, since the arbitration award has already been made by the learned sole Arbitrator.

26. Mr. Shahi, learned Senior Counsel has rightly contended, referring to the Supreme Court's decision in the case of *Wellington Associates* (supra) to submit that the Arbitrator



himself was well within the jurisdiction to decide the question of existence of the arbitration agreement in terms of Section 16 of the Act. Section 16 of the Act specifically provides that 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 itself before the arbitral Tribunal. Section 16(6) of the Act allows the party aggrieved to make an application for setting aside the arbitral award in accordance with Section 34 of the Act. The Supreme Court in the case of ***Konkan Railway Corporation Ltd. And others V. Mehul Construction Company (2000 (6) Scale 71)*** has held, dealing with Section 16 of the Act, that it empowers arbitral Tribunal to rule on its own jurisdiction as well as on objections with respect to the existence or validity of the arbitration agreement. Explaining the purpose behind such provision, the Supreme Court observed that conferment of such power on the arbitrator under 1996 Act indicated the intention of the legislature and its anxiety to see that the arbitral process is set in motion. This decision has been followed in the case of ***Nimet Resources Inc. and anr. Vs. Essar Steels Ltd*** (supra).

27. I, therefore, do not find any merit in this application.



28. Before I part with this judgment, I am constrained to comment upon the conduct of the petitioner. The petitioner asserted in his main application that the entire document of work order containing the arbitration agreement which bore the signature of the petitioner's authorized representative as produced by the respondent before the Court below was forged and fabricated. The plea has been taken on the basis of location of seals and signatures of the Notary Public at different places on the certified copy of the agreement. This plea has been deliberately taken to mislead this Court, since the petitioner, in Court's view, deliberately suppressed the fact that an FIR was registered by the company against the Respondents, to which the said work orders were annexed as annexures. The suppression by the petitioner, in the Court's opinion, is deliberate. Further, the petitioner in his rejoinder to the application filed under Section 8(1) of the Act had not disputed the existence of Clause 28 of the work orders, rather a plea was taken that Clause 28 was for settlement of dispute between the parties and the same had no concern at all with the bank guarantee no. 25/2012 for sum of Rs. 1,00,00,000/- and bank guarantee no. 19/2012 for sum of Rs. 35,00,000/-.

29. By concealing such facts, the petitioner obtained



an *ex parte* order of stay on 19.10.2016, by this Court of the impugned order. In my view, therefore, this application deserves to be dismissed with some cost which is assessed as Rs. 20,000/-.

30. In view of the discussions above, this application is dismissed with cost of Rs. 20,000/- to be paid by the petitioner to respondent no. 1, within three months from the date of receipt/production of a copy of this order.

(Chakradhari Sharan Singh, J)

arun/-

AFR/NAFR	AFR
CAV DATE	07.05.2018
Uploading Date	25.06.2018
Transmission Date	N/A

