

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

CR No.834 of 2017(O&M)

Date of Decision: 06.09.2018

M/s Educomp Solutions Limited and another

..... Petitioners

Versus

St. Sai Convent School

.....Respondent

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. Nitin Thatai, Advocate
for the petitioners.

Mr. Sanjay Verma, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. Petitioners have assailed the order dated 17.10.2016 passed by Civil Judge (Senior Division), Faridabad whereby application filed by the petitioner/Company under Sections 5 and 8 of the Arbitration and Conciliation Act was dismissed.

[2]. Respondent/School filed a suit for declaration with consequential relief of permanent injunction and refund of amount of Rs.1 lac already paid to the defendants in the suit with all interests and costs.

[3]. It has been alleged that the defendants approached the

plaintiff in the month of 2012 to install projectors and other hardware to provide content repository, its user licence, resource coordinator etc. and also to provide necessary consumables items like printer ribbons, cartridges, floppies, printing paper in the school of the plaintiff/respondent for the purpose of implementing smart classes programme in the school. Assurance was given that by the start of smart classes programme, it will nurture the growth and talent of the students and empower the teachers with technology right inside the class rooms.

[4]. A tripartite agreement was executed between the defendants and the plaintiff on 15.03.2012. Plaintiff pleaded in the suit that the said agreement was obtained by misrepresentation and fraud. Later on, defendants adopted undue influence and coercive methods upon the plaintiff with a motive to pressurize the plaintiff to extend the duration of their agreement knowing fully well that they could not provide any such service as promised by them. The agreement was made for a period of 60 months.

[5]. As per clause in the agreement, it was the responsibility of defendant No.2 to comply with the requirement as shown in para No.4 of the plaint. Plaintiff pleaded in the suit that the defendants/petitioners have failed to install projectors and other

hardware to provide content repository and other items as promised, details of which have been pleaded in para No.6 of the plaint. Plaintiff also pleaded that despite entering into alleged agreement and obtaining advance payment, the defendants could not install the project successfully till date. Defendants got realized an amount of Rs.1 lac from the plaintiff without completing the installation. Plaintiff was used as captured customer by the defendant for charging a substantial amount. Defendants also obtained installation certificate duly signed from the plaintiff by misrepresentations and under deceptive tactics with a motive to raise the bill and realise the amount from the plaintiff. Plaintiff claimed that there is no relationship for any practical purpose as one of the contract and the agreement is totally nullified.

[6]. Several technical defects and snags have come in the project due to inadequacy and impropriety in the service of the defendants. Defendants provided training to the staff of the plaintiff only for two days and the plaintiff could not use the project and had to lodge urgent complaint regarding issues arising in the project regarding technical issues. Plaintiff further pleaded that defendants have acknowledged about their fault in writing time and again and still did not provide any updated contents and licence after 01.04.2013 despite

acknowledgement. Gross negligence and faults were committed by the defendants and they withdrew their legal notice dated 11.02.2014.

[7]. On 25.09.2015, one Mr. Wazir on behalf of defendant No.1 approached the plaintiff for termination of the agreement and ultimately, a legal notice dated 28.10.2015 was again sent to the plaintiff by the defendants, thereby terminating the alleged agreement at their own without any notice of their intention to do so. Plaintiff claimed that acts of the defendants are deceptive and conduct of the defendants is threatening. Defendants appointed a sole Arbitrator i.e. Mr. Pankaj Kumar, Advocate at Delhi without seeking any acceptance of such appointment in terms of alleged agreement. Plaintiff further pleaded that Mr. Praveen from the side of the defendants advised the plaintiff to ignore the notice issued by the sole Arbitrator, claiming the proceedings to be illegal. Since the defendants did not provide service to the plaintiff, therefore, the plaintiff could not use smart classes and in-action on the part of the defendants were acknowledged by them.

[8]. As per Clause 9.1 of the agreement, it has been provided that in case of any dispute between the parties, the matter should be decided by the sole Arbitrator appointed by defendant No.1/petitioner. Clause reads as under:-

“If any dispute or difference of any kind whatsoever arise between the parties in connection with or arising out of this agreement or any part thereof such dispute or difference shall be referred to any acceptable sole Arbitrator under the provisions of the Indian Arbitration and Conciliation Act 1996, or any enactment or modification thereunder. The sole Arbitrator shall be appointed by Party A. The venue for the Arbitration shall be at New Delhi and the language shall be English. The Courts in New Delhi shall have jurisdiction to entertain all disputes between the parties.”

[9]. On the basis of aforesaid clause, defendants/petitioners filed an application under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996 for referring the matter to the Arbitrator.

[10]. The application was contested by the respondent on the ground that in case of fraud, only Civil Court has got jurisdiction.

[11]. Trial Court vide the impugned order dismissed the application on the ground that there is no dispute between the parties with regard to agreement, but the plaintiff has challenged the entire agreement being illegal and not binding upon the plaintiff and the matter cannot be referred to Arbitration and it is the Civil Court who can decide the validity of alleged agreement. The application was held to be not maintainable and was accordingly dismissed.

[12]. Perusal of the different paragraphs of the plaint would show that the plaintiff has alleged non-compliance of the commitments made by the defendants for installation of project and to provide content repository, licence, appoint resource coordinator, impart training to the staff of the plaintiff and to fulfill all other commitments from the inception of the agreement. Plaintiff asserted that training was given only for two days and other promises were not made good. The installation was not complete and several technical defects were not removed in the project.

[13]. On 06.02.2017, while issuing notice of motion, following order was passed:-

“Inter-alia, it has been contended by learned counsel for the petitioners that in a suit filed for declaration and permanent injunction, the plaintiff has claimed the relief on the basis of agreement, which was attached with the plaint as Annexure A. In view thereof, requirement of Section 8 (2) of Arbitration and Conciliation Act, 1996 (for short 'Act') stood substantially complied with inasmuch as there is no dispute between the parties that aforesaid agreement was entered into by the parties, copies of which have already been available on record of the civil suit. Thus, there was no dispute about the agreement in question. Therefore, application filed by the defendant under Section 8 of the Act could not have been dismissed. In

support of his contention, learned counsel for the petitioners relies upon judgment “Reliance Communications Infrastructure Ltd. & others vs. Rajesh Chawla, 2010(2) PLR 3”.

Notice of motion for 14.07.2017.

Meanwhile, proceedings before the trial court are stayed.”

[14]. Learned counsel for the petitioners submitted that in view of arbitration clause in the agreement, the matter has to be referred to the Arbitration as Civil Court has no jurisdiction to entertain the suit. In view of arbitration clause, it is obligatory on the Court to refer the parties to the Arbitration in terms of arbitration clause and nothing remains to be decided in the original action after such an application is made except to refer the dispute to the Arbitrator. Learned counsel further submitted that in cases where there are serious allegations of fraud, they are to be treated as non-arbitrable and it is only the Civil Court which should decide such matters, but in case of allegations of fraud simpliciter and in view of mere allegations, it may not be necessary to nullify the effect of arbitration agreement and clause therein. Learned counsel referred to **A. Ayyasamy Vs. A. Paramasivam and others, 2017(2) RCR (Civil) 518** in the aforesaid context.

[15]. On the other hand, learned counsel for the respondent

submitted that there are allegations of fraud and as such, it is only the Civil Court which will decide the controversy on merits. When a question in respect of validity or otherwise of the arbitration agreement arises, only a Civil Court would have the jurisdiction to go into such question in view of ratio laid down by the Hon'ble Apex Court in **India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd., 2007(2) RCR (Civil) 362.** Learned counsel also referred to **Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and another, 2003 (3) RCR (Civil) 647.**

[16]. I have considered the submissions made by learned counsel for the parties.

[17]. The ratio of **Sukanya Holdings Pvt. Ltd. case (supra)** would apply in case the parties to the agreement do not take appropriate steps as contemplated under Sections 8(1) and 8(2) of the Act. Apparently, the aforesaid ratio would not apply to the facts of the present case.

[18]. In view of Section 16 of the Arbitration Act, it is explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised, and a conjoint reading of sub Sections (2), (4) and (6) of Section 16 of the Act

would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Arbitration Act. Reference can be made to **Kvaerner Cementation India Limited Vs. Bajranglal Agarwal and another, (2012) 5 SCC 214.**

[19]. In **Pappu Rice Mills Vs. Punjab State Cooperative Supply, Air 2000 P&H 276**, It was held that all the disputes and differences arising out of the agreement or in any manner touching or concerning the agreement, shall be referred to the sole Arbitrator. Since the Arbitrator has already issued notice to the parties, therefore, plaintiff would be competent to raise all the pleas before the Arbitrator including plea of competence of Arbitrator in respect of its own jurisdiction. In the event of dismissal of the objection of the plaintiff, Section 34 of the Arbitration Act would be resorted to. Civil Court would not be competent to restrain the Arbitrator to proceed with the arbitration proceedings in view of Section 5 of the Arbitration Act.

[20]. In **Hughes Communication India Ltd. and others Vs. East West Traders and another, (2013-3) PLR 258**, it was held that Arbitration and Conciliation Act, 1996 is a complete Code and once arbitral process has started, the interference by the Civil Court would not be justified. In Mrs. **Hema Khattar and**

another Vs. Shiv Khera, 2017(3) RCR (Civil) 277, the Hon'ble Apex Court while referring to Section 8 of the Arbitration and Conciliation Act, 1996 held that Civil Court has no jurisdiction to entertain a suit. The reference was made to the oral conversation between the parties. The oral agreement as evidenced by the transcript of conversation between the parties, substituting the alleged written agreement having arbitral clause would be applicable to the oral agreement. The Court held that same clause for arbitration would also be applicable to the oral agreement and the reference to the Arbitrator can be made.

[21]. In **Hindustan Petroleum Corporation Limited Vs. M/s Pinkcity Midway Petroleums, 2003 RCR (Civil) 686**, the Hon'ble Apex Court while interpreting Sections 8 and 16 of the Arbitration and Conciliation Act, held that once the agreement and existence of arbitration clause are admitted, then as per mandatory language of Section 8 of the Act, the Court is bound to refer the dispute to the Arbitrator. The applicability and non-applicability of arbitration clause has to be raised and decided before the Arbitrator. The Arbitrator is competent to adjudicate upon and decide his jurisdiction and validity and existence of arbitration agreement with reference to arbitrability of the subject matter of dispute under arbitration clause. Once the existence of agreement between the parties is found containing

arbitration clause, the jurisdiction of the Civil Court in such matter is barred.

[22]. The application under Arbitration and Conciliation Act is meant to encourage alternate mode of redressal of dispute. Once the bilateral agreement is executed between the parties and the same provides for arbitration clause by way of alternate mode of redressal, then, it would be just and appropriate to honour the onerous obligations. The ratio of **Hindustan Petroleum Corporation Limited's case (supra)** was approved by the Hon'ble Apex Court in **Swiss Timing Ltd., Vs Commonwealth Games 2010 Organizing Committee, (2014) 6 SCC 677.**

[23]. In **Rewa Electricals Vs. Movil, 2012(II) SCC 93**, the Hon'ble Apex Court held that the Legislature in Section 16 of the Act made it clear that any obligation with regard to objection or validity of arbitration agreement has to be treated as an agreement independent of other terms of the contract. The contentious issues should not be gone into or to be decided at the stage of appointment of Arbitrator and no time should be wasted in such an exercise. The remedy of the aggrieved party is to raise the objections before the arbitral Tribunal. The arbitral Tribunal is always empowered under Section 16 of the Act to rule about its own jurisdiction. It is, therefore, open to the

plaintiff to raise all these issues and pleas before the arbitral Tribunal. The Arbitration Act in itself is a complete Code and provides for all channels of adjudication.

[24]. In **M/s Sundaram Finance Limited and another Vs. T. Thankan, 2015(2) RCR (Civil) 920**, it was held that once an application in due compliance of Section 8 of the Act is filed, the approach of the Civil Court should be not to see whether Court has jurisdiction, but it should see whether its jurisdiction has been ousted. The general law should yield to special law- *generalia specialibus non derogant*. Similar view was expressed by the Hon'ble Apex Court in **Greaves Cotton Limited Vs. United Machinery and Appliances, 2017(1) RCR (Civil) 737** after relying upon ratio of **Booz Allen and Hamilton Inc. Vs. SBI Homes Finance Limited and others, 2011(5) RCR (Civil) 168**.

[25]. Respondent would be having remedy of objection under Section 34 of the Act only after passing of the arbitral award by the Arbitrator. Once the conditions required to be satisfied under sub Sections 1 and 2 of Section 8 of the Act are fulfilled, the Court is bound to refer the matter to Arbitrator. Conditions which are required to be satisfied are:-

“(1) there is an arbitration agreement;

(2) a party to the agreement brings an action in the Court against the other party;

(3) subject matter of the action is the same as the subject matter of the arbitration agreement;

(4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.”

Section 8 of the Act is pre-emptory in nature, therefore, it is mandatory for the Civil Court to refer the dispute to an Arbitrator.

[26]. It is a settled principle of law that judicial intervention in arbitration proceedings should be minimal. The existence of arbitral dispute is *sine quo non* for adjudication of the same by an Arbitrator. The judicial authority has to consider the objection objectively and is not supposed to act in a mechanical manner.

[27]. Taking note of the aforesaid precedents and in view of facts and circumstances of the present case, I find that there was an agreement between the parties in respect of installation of project in the school. The said agreement contains an arbitration clause as reproduced in the preceding para of the judgment. The arbitration clause has been invoked by the petitioner by way of moving an application under Section 8 of the Act. The compliance of sub Sections 1 and 2 of Section 8 of

the Act has been made. Even part of the project has been implemented in the school. Even though, the plea of fraud has been taken by the respondent/School, but intensity of fraud has to be seen for the purpose of arbitrable and non-arbitrable nature of allegations. The plea of fraud taken in the plaint itself indicates that the grievance of the plaintiff is aimed to highlight non-compliance of the terms and conditions of the arbitration agreement by the defendants/petitioners. The intensity of fraud has been pleaded so as to bring out the case as non-arbitrable by the Arbitrator. The ratio of A. Ayyasamy Vs. A. Paramasivam and others, case (supra) is applicable to the present case.

[28]. For the reasons recorded hereinabove, I deem it appropriate to set aside the impugned order dated 17.10.2016 passed by Civil Judge (Senior Division), Faridabad and accept the application under Section 8 of the Arbitration Act. Normal consequences to follow.

September 06, 2018

Prince

(RAJ MOHAN SINGH)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No