

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

*CM Nos.10829 & 10830 of 2018 and
CWP No.18092 of 2018
Date of Decision: 27.08.2018*

M/s Sawariya Filling Station

..... Petitioner

Vs.

Union of India and others

..... Respondents

CORAM: HON'BLE MR.JUSTICE RAKESH KUMAR JAIN

Present: - Mr.Raman Sharma, Advocate,
for the applicant/respondent No.2.

Mr.Anil Malhotra, Advocate,
for the non-applicant/petitioner.

RAKESH KUMAR JAIN, J.

The applicant/respondent No.2 has filed an application bearing CM No.10830 of 2018 under Sections 5 & 8 of the Arbitration and Conciliation Act, 1996 (as amended in the year 2015) [for short 'the Act'] to relegate the non-applicant/petitioner to the remedy of arbitration in terms of the arbitration Clause No.66 of the agreement dated 11.11.2014 executed between them to which they are bound. It is averred in the application that the applicant/respondent No.2 and non-applicant/petitioner have entered into an agreement on 11.11.2014 by which the non-applicant/petitioner has been appointed as the dealer/licensee and vide order dated 11.07.2018 the dealership/license of the petitioner has been terminated. The non-applicant/petitioner has challenged the order of termination dated 11.7.2018 by way of this petition in which notice of motion was issued on 24.7.2018 and the operation of the impugned order dated 11.7.2018 was stayed till the next date of hearing. It is submitted that since there is an

arbitration clause in the agreement which says that *“all disputes or differences of any nature whatsoever or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement or on account of termination thereof (other than those in respect of which the decision of any person, is by the agreement expressed to be final and binding) shall be referred to the sole arbitration of the Chairman and Managing Director of the Corporation or of some Officer/retired Officer of the Corporation or retired Officer of other oil PSUs or retired senior Central Govt. Officer who may be nominated by the Chairman and Managing Director. The dealer will not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator is or was an Officer and/or share holder of the Corporation or that he has to deal with or dealt with the matters to which the contract relates. In the event of the arbitrator to whom the matter is originally referred vacating his office or being unable to act for any reason the Chairman and Managing Director as aforesaid at the time of such vacation of Officer or inability to act, shall designate another person as above to act as arbitrator. In accordance with the terms of the agreement such person shall be entitled to proceed with the reference from the point at which it was left by his predecessor. It is also a term of this contract that no person other than the Chairman and Managing Director or a person nominated by such Chairman and Managing Director of the Corporation as aforesaid shall act as arbitrator hereunder. The fee and expenses of arbitration shall be as per the Corporation’s policy in this regard and shall be shared equally by the parties. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to the agreement, subject to the provisions of the Arbitration and Conciliation Act,*

made there under and for the time being in force shall apply to the arbitration proceedings under this clause. The proceedings shall be conducted in English. The award shall state reasons and made in writing”, therefore, the non-applicant/petitioner should have taken recourse to the remedy of arbitration instead of filing the present writ petition. Therefore, respondent No.2 has filed this application dated 26.7.2018 under Sections 5 & 8 of the Act along with another application bearing CM No.10829 of 2018 under Article 226(3) of the Constitution of India for vacation of the *ex parte* interim order of stay passed by this Court on 24.7.2018.

Notice in both the applications was issued by this Court on 2.8.2018 in which separate replies, filed by the non-applicant/petitioner, were taken on record on 10.8.2018 and arguments in the applications were heard and the order was reserved on 20.08.2018.

Learned counsel for the applicant/respondent No.2 has pressed the application bearing CM No.10830 of 2018 filed under Sections 5 & 8 of the Act which has been contested by the non-applicant/petitioner on the ground that the said application is not maintainable because the applicant/respondent No.2 has also filed an application bearing CM No.10829 of 2018 under Article 226(3) of the Constitution of India for vacation of *ex parte* interim order of stay which should be treated to have been filed first as it has been numbered as CM No.10829 of 2018 and the present application filed under Sections 5 & 8 of the Act has been numbered as CM No.10830 of 2018 and as the applicant/respondent No.2 has submitted to the jurisdiction of this Court by filing this application, even prior to the filing of the written statement it would be construed as submission of statement on the substance of the dispute and hence the

arbitration. In support of his submission, he has relied upon the judgments in the case of *“Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and others”* 2011 (5) SCC 532 and *“Greaves Cotton Limited Vs. United Machinery and Appliances”* 2017 AIR (SC) 120.

On the other hand, learned counsel for the applicant/respondent No.2 has submitted that the application filed under Article 226(3) of the Constitution of India for vacation of the interim *ex parte* order of stay passed by this Court is though numbered earlier the application filed under Section 5 & 8 of the Act yet both the applications were filed together on 26.7.2018 and the present application bearing CM No.10830 of 2018 filed under Sections 5 & 8 of the Act cannot be treated to have been filed subsequently. It is further submitted that the applicant/respondent No.2, by filing the application under Article 226(3) of the Constitution of India for seeking vacation of the *ex parte* interim order of stay has not submitted itself to the jurisdiction of this Court and waived its right to seek reference to arbitration. In this regard, he has relied upon a decision rendered by the Supreme Court in the case of *“Rashtriya Ispat Nigam Ltd. and another Vs. Verma Transport Co.”* (2006) 7 Supreme Court Cases 275.

I have heard both the learned counsel for the parties and perused the record with their able assistance.

The question involved in this case is as to whether by filing an application under Article 226(3) of the Constitution of India for vacation of *ex parte* interim order of stay passed in the writ petition together with an application under Sections 5 & 8 of the Act would tantamount to submission to jurisdiction of this Court and waiver of the right to invoke arbitration clause?

It is not disputed that the relationship of the parties to the *lis* are because of the memorandum of agreement dated 11.11.2014 in which Clause 55 deals with the power/reasons for termination and Clause 66 deals with the arbitration clause which provides that all disputes and differences of any nature whatsoever or regarding any right, liability, act, omission or on account of any of the parties or in relation to the agreement or on account of termination thereof has to be referred to the arbitration. The applicant/respondent No.2 has pressed Sections 5 & 8 of the Act into service which are reproduced as under: -

(5) Extent of Judicial Intervention --

Notwithstanding anything contained in any other law for the time being in force, in matter governed by this Part, no judicial authority shall intervene except where so provided in this part.

(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 of retained by the other party to that agreement, then, there 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 application filed by the applicant/respondent No.2 is resisted by the petitioner/non-applicant only on the ground that by filing the application under Article 226(3) of the Constitution of India it has submitted

the arbitration. The petitioner has referred to para 17 of the judgment rendered by the Supreme Court in the case of **Booz Allen and Hamilton Inc. (Supra)** in which it has been held that “*not only filing of the written statement in a suit, but filing of any statement, application, affidavit filed by a defendant prior to the filing of the written statement will be construed as submission of a statement on the substance of the dispute, if by filing such statement/application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the Court and waive his right to seek reference to arbitration*”. He has also relied upon a decision rendered by the Supreme Court in the case of **Greaves Cotton Limited (Supra)** in which there is a reference of the decision rendered by the Supreme Court in the case of **Booz Allen and Hamilton Inc. (Supra)**.

On the other hand, learned counsel for the applicant/respondent No.2 has relied upon a decision rendered by the Supreme Court in the case of **Rashtriya Ispat Nigam Ltd. (Supra)** in which it has been held by the Supreme Court that if an application is filed to oppose the prayer for granting *ad interim* injunction, it would not be submission of the applicant to the jurisdiction of the Court.

The argument of the learned counsel for the non-applicant/petitioner is not at all attractive because in the same paragraph No.17 of the decision in the case of **Boon Allen and Hamilton Inc. (Supra)**, the Supreme Court has referred to the decision rendered by it in the case of **Rashtriya Ispat Nigam Ltd. (Supra)** holding that the reply to an application for temporary injunction cannot be considered as submission of a statement on the substance of the dispute as that is done to avoid an interim order being made against him.

Thus, in view thereof, the present application bearing CM No.10830 of 2018 is found to be maintainable and the objection raised by the non-applicant/petitioner is hereby rejected.

Since it is categorically provided in the agreement itself that in case of any dispute regarding termination of the contract, parties shall go in for arbitration, therefore, the present application bearing CM No.10830 of 2018 is hereby allowed and as a consequence thereof, the parties to the *lis* much less the petitioner/non-applicant is relegated to its remedy of invoking the clause of arbitration in terms of the provisions of the Act.

The applications and the writ petition are accordingly disposed of.

27.08.2018

Vivek

(RAKESH KUMAR JAIN)
JUDGE

Whether speaking /reasoned : *Yes/No*

Whether Reportable : *Yes/No*