

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

RSA-4422-2011(O&M)

Date of decision:-11.12.2018

M/s Surinder Kumar and Company

...Appellant

Versus

Municipal Council Guru Har Sahai and others

...Respondents

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.V.K. Jindal, Senior Advocate with
Ms.Janya Sirohi, Advocate
for the appellant.

Mr.Suvir Kumar, Advocate
for respondent No.1.

H.S. MADAAN, J.

Briefly stated, facts of the case are that plaintiff
Municipal Council, Guru Har Sahai, Tehsil Jalalabad, District
Ferozepur through its Executive Officer had brought a suit against
M/s Surinder Kumar and Company, Guru Har Sahai, Tehsil
Jalalabad, District Ferozepur through its partners (a) Surinder Kumar
Sikri (b) Gurmeet Singh (c)Amarjit Singh (d) Sanjeev Kumar (e)
Mukesh Kumar (f) Pawan Kumar (g) Ashwani Kumar, (h) Rajesh (i)
Suraj Parkash (j) Ashok Kumar, (k) Ashwani Kakkar, (l) Ashwani
Kumar, (m) Naresh Kumar and Oriental Bank of Commerce,

Guruhar Sahai through its Branch Manager on the averments that defendants No.1 is a partnership firm of which defendants No.1(a) to 1(m) are partners as per partnership deed dated 10.5.1999; that the plaintiff auctioned the work of collection of Octroi for the year 1999-2000 from 11.5.1999 to 10.5.2000; the defendant No.1 had given highest bid of Rs.77,35,000/- on 5.5.1999 in an auction; the bid was accepted; an agreement was entered into between the parties on 10.5.1999; as per the terms and conditions agreed upon between the parties, the defendant No.1 was to take full control of all Octroi posts and was to collect the octroi from the persons liable to pay the same under Punjab Municipal Act; the amount of Rs.77.35 lacs was to paid in weekly installments; the accounts were to be settled every week; that the defendants were also liable to pay electricity bills, income tax, telephone bills and other miscellaneous expenses; that defendant No.2 had stood as guarantor with the plaintiff and executing a bank guarantee deed through its manager; that defendant No.2 had undertaken to pay Rs.7,75,000/- to the plaintiff on behalf of defendant No.1 and its partners and he was to pay the sum of Rs.7,75,000/- on demand till 10.5.2000; that the liability of defendants was to get discharged after 10.5.2000; that in case of any breach of terms of agreement by defendant No.1, defendant No.2 was to make payment of Rs.7,75,000/- to the plaintiff.

According to the case of the plaintiff, defendant No.1

committed defaults in making regular payments per week. Notices dated 22.6.1999, 5.7.99, 6.7.99, 29.7.99, 11.8.99, 3.8.99, 15.9.99, 29.9.99, 15.10.99, 22.11.99, 10.12.99, 29.12.99, 10.1.2000, 11.1.2000, 19.1.2000, 28.1.2000, 4.2.2000, 22.2.2000 and 28.2.2000 sent by the plaintiff to defendants failed to have any desired effect. Hence the suit.

On notice, defendant No.1 put in appearance and filed written statement taking preliminary objections challenging maintainability of the suit for the reason that as per Clause 17 of the agreement, in case of any dispute between the parties, the matter was to be referred to the Regional Deputy Director, Ferozepur, therefore, the Court had no jurisdiction to try the suit. The defendant No.1 admitted the agreement having been entered into between the parties. However, according to answering defendant, the plaintiff had committed breach of the terms and conditions of the agreement since as per Clause No.11 of the agreement, the plaintiff was to provide 15 clerks, an Inspector and 4 peons to the defendants but the plaintiff provided only 11 Clerks and remaining 4 clerks were not provided despite repeated requests, therefore, it caused loss to the defendants and wrongful gain to the plaintiff. It was admitted that auction amount was to be paid in weekly installments and the accounts were to be settled every week. On 30.5.1999, the defendant had made a complaint of theft against one Ashok Kumar and requested the

plaintiff to take necessary action but that was not to be. Several other pleas on merits were taken. In the end, such defendant prayed for dismissal of the suit.

Defendant No.2 had not appeared despite service, as such was proceeded against *ex parte*.

The plaintiff had filed replication controverting the allegations in the written statement whereas reiterating the averments in the plaint.

On the pleadings of the parties, following issues were framed vide order dated 11.11.2002:

1. Whether the plaintiff is entitled to recover a sum of Rs.6,08,874.51 paise on the grounds mentioned in the suit? OPP.
2. Whether the suit is not maintainable in the present form? OPD.
3. Whether the suit has been filed through competent person? OPD.
4. Whether this Court has no jurisdiction to entertain and decide the present suit in view of the arbitration clause executed between the parties? OPD.
5. Relief.

In order to prove its case, the plaintiff had examined PW1 Boor Chand, who tendered in evidence his duly sworn affidavit Ex.PW1/A. The plaintiff also tendered in evidence documents Ex.P1

to Ex.P21 in support of its case.

On the other hand, defendant No.1 examined Rajesh Kumar as DW1, who tendered in evidence his duly sworn affidavit as Ex.DW1/A and the said defendant also examined Sh.Om Parkash SDO, Telephone Exchange as DW2. The defendant No.1 also tendered in evidence documents Ex.D1 to Ex.D5, Mark A and Mark B, Ex.D1/A to Ex.D1/F, Ex.D1/X, Ex.D2/A and Ex.D3/A in support of its case.

After hearing the learned counsel for the parties, the trial Court decided issues No.1 and 3 in favour of the plaintiff, issue No.2 against the defendants and issue No.4 against the plaintiff, resultantly the suit was decreed for recovery of Rs.6,08,674.51 with costs and interest @ Rs.1% per month from the date of accrual till payment.

Feeling aggrieved by the said judgment and decree, the defendant No.1 – through its partners Rajesh Kumar and Ashwani Kumar had filed an appeal in the Court of District Judge, Ferozepur. However, learned District Judge, Ferozepur dismissed the said appeal, which left the defendant firm aggrieved and it has filed the present regular second appeal before this Court, notice of which was issued and contesting respondent No.1 appeared through counsel.

I have heard learned counsel for the parties besides going through the record.

Learned counsel for the appellant has confined his

arguments to the effect that there was a valid arbitration clause between the parties in terms of the written agreement between them. The plaintiff has been agitating this issue before the Courts below. Learned trial Court wrongly declined such prayer of the defendant. An application for review was also preferred in the trial Court, which was wrongly dismissed. According to the learned counsel for the appellant, the judgment and decree passed by the trial Court were challenged before learned District Judge, Ferozepur in which this contention has been raised in grounds of appeal but learned District Judge, Ferozepur did not give any finding in that regard. As such, the case is required to be remanded to the Court of learned District Judge, Ferozepur for giving finding with regard to such issue.

In support of his arguments, learned counsel for the appellant has referred to authority **Satyadhyan Ghosal and others Versus Smt.Deorjin Debi and another, 1960 AIR(SC) 941** wherein it was observed that interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order. He has further referred to authority **Hindustan Petroleum Corpn. Ltd. Versus M/s Pinkcity Midway Petroleums, 2003(3) RCR(Civil) 686** by the Apex Court wherein it was observed that once it is found that agreement between the parties contains a clause for arbitration, the jurisdiction of the civil Court in such

matters is barred and if the civil Court dismissed an application under Sections 8 and 5 of the Arbitration Act for referring the dispute to arbitration, revision under Section 15 CPC is maintainable.

In support of his arguments, he has further placed reliance upon authorities *Chloro Controls (I) P. Ltd. Versus Severn Trent Water Purification Inc. and others, 2012(4) RCR(Civil) 638* by Hon'ble Supreme Court and *M/s Uberoi Mohinder Singh Vs. The State of Haryana and others* with *M/s Doon Construction Co. Versus The State of Haryana and others, 1991 AIR SCW 734.*

On the other hand, learned counsel for the respondent has contended that application for referring the dispute to arbitration was dismissed by the trial Court and even the review application was declined by such Court and further the appellant/defendant had submitted itself to the jurisdiction of civil Court filing written statement to the plaint, cross-examining witnesses of the plaintiff and itself leading evidence, its counsel addressing arguments and further when the suit was decreed against the appellant/defendant, such defendant preferred an appeal to the Court of District Judge, now it does not lie in the mouth of appellant/defendant that it wanted to invoke the arbitration clause and the dispute should be referred to the arbitration. He has further contended that as a matter of fact there is no valid and subsisting arbitration clause between the parties since as per the clause relied upon by the defendant, there is no reference to

the word 'arbitrator' or 'arbitration'. Rather it is only a finality clause to the effect that the decision rendered by Regional Deputy Director, Ferozepur would be binding on the parties and this can certainly be not termed as an arbitration clause. In support of his that contention, he has relied upon authority **M/s Garg Builders and Engineers Versus U.P. Rajkiya Nirman Nigam Ltd. and others, AIR 1995 Delhi 111.**

The relevant clause 17 of the agreement runs as follows:

“That in case of any dispute with regard to the contract, the matter will be subject to the jurisdiction of the Regional Deputy Director, Local Bodies, Ferozepur and the decision made by the said authority will be final and binding upon both these parties. Any appeal rising from the decision of the Deputy Director Local Bodies will be submitted to the Director Local Bodies Pb Chandigarh and the final appeal to the Secretary Punjab Government Local Bodies Department. The limitation for final appeal to the Deputy Director, Local Bodies will be of 8 days and the limitation for filing appeal before the Director Local Bodies will be of 15 days after the decision by the Deputy Director Local Bodies. No appeal will be heard if filed after the expiry of this limitation period.”

As per the own case of the appellant, it had moved an application dated 19.11.2001 before the trial Court for referring the matter to arbitration. After getting reply, the trial Court had dismissed the said application vide order dated 20.7.2002 observing that nature of the claim to be referred to the arbitration as clause 17 of the agreement and the claim of the plaintiff in the suit are entirely different since it relates to default by the defendant in making regular payment to the plaintiff. Therefore, clause 17 of the agreement between the parties was not applicable, which otherwise was quite vague. The defendant had moved an application for review of that order, which was dismissed vide detailed order dated 6.11.2007 finding it to be time barred and not maintainable.

Admittedly, the appellant/defendant had not challenged that order by way of filing any revision etc., therefore, the defendant is bound by the said order. Even in the authority ***Hindustan Petroleum Corpn. Ltd.*** (supra) referred to by learned counsel for the appellant/defendant, it was observed that a revision petition against order dismissing an application under Section 8 and 5 of Arbitration Act for referring the dispute to arbitration is maintainable. The defendant having not done so is bound by the said order vide which the trial Court had refused to refer the dispute to the Arbitration.

Now coming to the grievance of the appellant that learned District Judge, Ferozepur, while disposing of the appeal had

not touched that point, a perusal of judgment by learned District Ferozepur goes to show that the contentions raised by the appellant/defendant have been discussed in detail. In para No.13, learned District Judge, Ferozepur observed as under:

“There is also no force in the contention of the learned counsel for the appellant firm that in case of any dispute having arisen between the parties, the matter was to be referred to the arbitrator. It is worthwhile to mention here that the appellant firm had moved an application before the learned lower Court on 19.11.2001, which was dismissed vide order dated 20.7.2002. Even thereafter, the appellant firm moved a review application, which was also dismissed vide order dated 6.11.2007. That order was not challenged by the appellant firm by way of filing revision etc. So the order having not been challenged has attained finality and now this point cannot be re-agitated in the appeal. So, taking the case of the appellants from any of the angles, this Court does not find any illegality in the findings recorded by the learned lower Court and accordingly, there is no ground to interfere with the same and as such the same is affirmed.”

That goes to show that the contention was considered and

rejected. The dismissal of the application for referring the dispute before arbitration by the trial Court and again dismissal of the review application and failure of the appellant/defendant to challenge it by way of filing revision etc. was one of the factors for rejecting the contention. The Appellate Court has clearly observed that taking the case of the appellant from any of the angle, the Court did not find any illegality in the findings recorded by the lower Court and accordingly, there was no ground to interfere with the same, as such those were affirmed. There is no vagueness with regard to the observations and it cannot be said that the points so raised by the appellant were not discussed or decided. There is absolutely no ground to remand the case to first Appellate Court for fresh decision. It may be mentioned here that the trial Court had struck a specific issue No.4 with regard to the fact whether the civil Court had no jurisdiction to entertain and decide the suit in view of arbitration clause between the parties. Finding with regard to issue No.4 has been given against the plaintiff. Therefore, the contentions so raised by learned counsel for the appellant is found to be without any force.

No other point was pressed or put forward on behalf of the appellant.

The judgments and decrees passed by both the Courts below are well reasoned, based upon proper appraisal and appreciation of evidence and correct interpretation of law. There is

no illegality or infirmity therein.

Finding no merit in the present appeal, the same stands dismissed with costs.

11.12.2018
Brij

(H.S.MADAAN)
JUDGE

Whether reasoned/speaking: Yes/No

Whether reportable : Yes/No