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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO 417/2018**

M/S VILLAYATI RAM MITTAL PVT L TD & ORS Appellants

Through: **Mr.Sandeep Sharma and Ms.Risha
Mittal, Advocates**

versus

INSTITUTE FOR SOCIALIST EDUCATION Respondent

Through: **Ms.Manjula Baxla and Mr.Kapil
Arora,Advocates**

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER

% **07.09.2018**

CM No. 36346/2018 (Exemption)

Exemption allowed, subject to just exceptions.

CM No. 36347/2018

Along with the appeal is CM No. 36347/2018, an application under Section 5 of the Limitation Act, 1963 filed by the appellants seeking condonation of 365 days' delay in filing the appeal against the impugned order dated 25.4.2017 in CS No. 58677/16 of the Court of the Additional District Judge-01, New Delhi, Patiala House Courts, whereby an application under Section 8 of the Arbitration & Conciliation Act, 1996 filed by the appellants herein as defendants of the said suit was dismissed.

It has been submitted through the application seeking condonation of delay against the order dated 25.4.2017 that the appellants had filed CM (Main) No. 769/2017 which was dismissed

on 29.5.2018 and the certified copy of the said order was received on 3.7.2018 and thus the present appeal has been filed on 21.7.2018 in as much as the appellants pursuant to their remedies through the CM(M) 769/2017 and thus placed reliance on Section 14 of the Limitation Act, 1963. It has further been submitted on behalf of the appellants that whilst dismissing CM(M) 769/2017 it had been observed to the effect that the appellants' remedy lay elsewhere through an appeal in terms of the Arbitration & Conciliation Act, 1996 through Section 37 thereof and thus the delay, if any in institution of the present appeal against the impugned order dated 25.4.2017 was *bona fide* and not intentional.

The said application is supported with an affidavit of one of the directors of the appellant No.1.

The application is vehemently opposed on behalf of the respondent by the learned counsel submitting to the effect that the said application does not specifically explain the delay and that there was no liberty granted whilst dismissal of the CM (Main) No.769/2017 vide order dated 29.5.2018 of this Court to prompt the appellant herein to seek redressal against the order dated 25.4.2017.

A perusal of the order dated 29.5.2018 in CM(Main) 769/2017, indicates categorically to the effect that it had been observed therein vide paragraph 15 thereof which reads to the effect:

“15. Following the aforesaid ratio, notwithstanding the suit in which the petitioners application under Section 8 of the Arbitration Act has been dismissed, having been instituted prior to coming into force of the Amendment Act and the application under Section 8 having also been

filed prior to commencement of the Amendment Act, Section 37(1)(a) of the Arbitration Act as amended w.e.f. 23rd October, 2015 would apply to the order of dismissal of the application of the petitioners under Section 8 of the Arbitration Act and the remedy thereagainst would be of appeal under Section 37 of the Arbitration Act and not by way of this petition under Article 227 of the Constitution of India.”

holding thus thereby as held in ***Sadhana Lodh Vs. National Insurance Co. Ltd.*** (2003) 3 SCC 524, that the statutory remedy lay elsewhere and thus the jurisdiction under Article 227 of the Constitution of India cannot be invoked and that apparently the remedy lay with the appellants herein by filing the appeal under Section 37 of the Arbitration & Conciliation Act, 1996. Though specifically it has not been observed to the effect vide order dated 29.5.2018 in CM(Main) 769/2017 that any liberty was granted for institution of the present appeal, but apparently the remedy to the appellants herein against the impugned order dated 25.4.2017 in CS No.58677/16 lay by institution of the appeal as now instituted. In view thereof in terms of Section 14 of the Limitation Act, 1963, apparently, as the appellants herein appear to have *bona fide*ly persued the wrong remedy by institution of CM(Main) 769/2017, in the circumstances, the CM No.36347/2018 is thus allowed and the delay in institution of the present appeal is condoned.

CM No.36348/2018

This is an application filed on behalf of the appellant under Section 5 read with Section 14 of the Limitation Act, 1963, which is sought to be confined to one under Section 5 of the Limitation Act,

1963 seeking condonation of delay of 15 days in re-filing the appeal after removing all the objections and the record being bulky it took some time in preparation of the documents.

For the reasons explained in the application, the said application is allowed and the delay of 15 days' in re-filing the appeal is condoned.

FAO 417/2018 and CM No. 36345/2018 (Stay)

Vide the impugned order dated 25.4.2017 in CS No. 58677/16 as observed herein above, the application filed by the defendants i.e. the appellants herein under Section 8 of the Arbitration & Conciliation Act, 1996 placing reliance on a collaboration Agreement dated 8.3.1995 between the parties allegedly herein qua clause 8 thereof which reads to the effect:

“viii. That in case of any misunderstanding while construction Activity remains in progress, the matter will be referred to the Arbitrator who shall be nominated by both the parties and his decision will be binding on both the parties. The venue of the Arbitration shall be at New Delhi.”

In relation to which the submission made on behalf of the appellant herein is to the effect that in the suit pending before the learned Trial Court along with the plaint itself. A copy of the said very same collaboration agreement qua the very same clause 8 reproduced herein above was annexed and that the appellant thus sought invocation of the proceedings in terms of Section 8 of the Arbitration & Conciliation Act, 1996, but vide the impugned order

dated 25.4.2017, the application of the appellants herein was dismissed, though as indicated vide the impugned order dated 25.4.2017 itself it has been brought forth that part arguments in relation thereto were being addressed and vide order dated 25.4.2017 the impugned order, the said application had been declined as it had been observed by the learned Trial Court to the effect that the documents produced were merely a scanned copy and not an original copy and that in the list of documents that had been filed by the defendants i.e., the appellants herein, only a copy of the agreement had been mentioned and the certified copy of the original copy whereof had not been filed and thus the application was not maintainable in terms of Section 8 Sub Clause 2 of the Arbitration & Conciliation Act, 1996 apart from also observing to the effect that it was not the case of the defendants that the case of the defendants i.e., the appellant herein fell within the proviso of Section 8 Sub Clause 2 of the Arbitration & Conciliation Act, 1996.

It has been submitted on behalf of the appellant that the appellants had sought to produce the originals of the said arbitration clause incorporated into the collaboration agreement copies of which have been filed by either side before the learned Trial court by the plaintiff of the said suit along with plaint and by the defendants through the application under Section 8 of the Arbitration & Conciliation Act, 1996. It has also been submitted on behalf of the appellants whilst placing reliance on proceedings dated 18.3.2013 in this very suit as it bore the number CS 526/13, before it was transferred to the District Court in view of the change of the pecuniary

jurisdiction through the observations in para 6 of the said order:

“6. It is the case of the plaintiff itself that the new building has been constructed by the defendants No.1 to 3 at their own cost and expense and in terms of the Minutes of the Meeting of the plaintiff held on 28th January, 1995 and they are in possession of the said first floor under the arrangement recorded in the said Minutes. Though the defendants No. 1 to 3 in response to a legal notice preceding the suit have also relied on a Collaboration Agreement dated 8th March, 1995 having been signed between the plaintiff on the one hand and the said defendants on the other hand but the plaintiff claims that the same is not in its record and the plaintiff is not in a position at present to comment on the signatures thereon.”

submitting to the effect that the collaboration agreement dated 8.3.1995 it as contended contains the Arbitration Clause vide Clause 8 thereof, had already been adverted to during the course of proceedings on the date 18.3.2013 and on that stage, the plaintiffs stated that they were not in a position to comment on the said documents in relation to the signatures thereon as it was not in possession of its records and that the contention that has now been sought to be urged during the course of submission made to the effect that the said documents was a forged document is an improvement of submissions made on 18.3.2013 in the course of the very same suit in relation to which the learned counsel for the plaintiff submits that the said submission has been made since inception to the effect that the collaboration agreement was infringed and fabricated.

Be that as it may, placed on record is a copy of the collaboration agreement dated 8.3.1995 which contains the purported

clause 8 containing the arbitration agreement between the parties in relation to which the application under Section 8 containing the arbitration agreement between the parties in relation to which the application under Section 8 of the Arbitration & Conciliation Act, 1996 had been filed by the defendants to the said suit on the date 16.4.2013 and as rightly contended on behalf of the appellants herein that the proviso of Section 8 Sub Clause 2 of the Arbitration & Conciliation Act, 1996 which reads to the effect:

“8. Power to refer parties to arbitration where there is an arbitration agreement.

(1)

(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.”

Order coming into force on 23.10.2015 and would thus being no application.

It is essential to observe however that Section 8 Sub Clause 2 as it stood even before incorporation of the proviso thereto to Section 8 Sub Clause 2 thereof to the Arbitration & Conciliation Act, 1996 in the form categorically observed to the effect that the application referred to in Sub Section 1 of the said enactment therein shall not be entertained unless a duly certified copy thereof is placed on the record in relation to this aspect, it is submitted on behalf of the appellants whilst placing reliance on the verdict of the Supreme Court in *Ananthesh bhakta v. Nayana S. Bhakta and Others* (2017) 5 Supreme Court Cases 185, that in that context of the proviso to

Section 8 Sub Clause 2 of Section 8 of the Arbitration & Conciliation Act, 1996 it has been observed by the Hon'ble Supreme Court to the effect:

*“28. Section 8(2) has to be interpreted to mean that the court shall not consider any application filed by the party under Section 8(1) unless it is accompanied by the original arbitration agreement or duly certified copy thereof. **The filing of the application without such original or certified copy, but bring original arbitration agreement on record at the time when the Court is considering the application shall not entail rejection of the application under Section 8(2).**”*

Thus it has been submitted that the filing of the application under Section 8 of the Arbitration & Conciliation Act, 1996 without such original or certified copy but bringing the original arbitration on record at the time when the Court is considering the application, shall not entail rejection of the application under Clause 8 sub Clause 2 of the said enactment.

It has been submitted on behalf of the respondent however that even at the time of the consideration of the application, the original document, the arbitration agreement was not sought to be placed before the learned Trial Court of the petitioner. Taking into account the factum that the collaboration agreement is indicated to have been claimed to be in existence as brought forth through the averments made through the plaint and the documents filed there itself and by the contention of the respondents and the respondents, i.e., the appellants herein, that the said copy of the document having been

filed by either side on the record at the time of institution of the suit with the said collaboration agreement having also been taken into account through proceedings dated 18.3.2013, it is considered appropriate that the said original arbitration agreement which has now been produced is allowed to be taken on record and is directed to be placed before the learned Trial Court on the date 1.11.2018 and thus the impugned order dated 25.4.2017 in CS No. 58677/16 is set aside.

The appeal is disposed of.

ANU MALHOTRA, J

SEPTEMBER 07, 2018/sv