

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 29th May, 2018**

+ **CM(M) No.769/2017 & CM No.26038/2017 (for stay)**

VILLAYATI RAM MITTAL PVT. LTD. & ORS. Plaintiffs

Through: Ms. Risha Mittal, Adv.

Versus

INSTITUTE FOR SOCIALIST EDUCATIONDefendant

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Article 227 of the Constitution of India impugns the order [dated 25th April, 2017 in CS No.58677/2016 of the Court of Additional District Judge (ADJ)-01, Patiala House Courts, New Delhi] of dismissal of the application of the petitioners / defendants under Section 8 of the Arbitration & Conciliation Act, 1996 as not maintainable for the reason of the petitioners / defendants, along with the application, having filed merely a scanned copy of the Collaboration Agreement containing the arbitration clause and not the original Collaboration Agreement containing the arbitration clause or certified copy thereof.

2. The petition came up before this Court first on 25th July, 2017 when it was enquired from the counsel for the petitioners as to how the remedy under Article 227 of the Constitution of India was maintainable when the

impugned order was appealable under Section 37(1)(a) of the Arbitration Act.

3. The counsel for the petitioners stated that the suit, from which this petition arises, was instituted in the year 2013 and the application under Section 8 of the Arbitration Act also had been filed in the year 2013 though had been dismissed on 25th April, 2017. It was further argued that the order of dismissal of an application under Section 8 of the Arbitration Act had been made appealable under Section 37, only vide the amendment of Arbitration Act by the Arbitration & Conciliation Amendment Act, 2015 which had come into force on 23rd October, 2015. The counsel for the petitioners drew attention to Section 26 of the Amendment Act and contended that owing thereto, the remedy of appeal under Section 37 was not available to the petitioners.

4. It was however enquired from the counsel for the petitioners as to how Section 26 of the Amendment Act was relevant to an appeal against an order of refusal to refer to arbitration under Section 8 of the Act and which had nothing to do with arbitration proceedings referred to in Section 26 of the Act.

5. On request of the counsel for the petitioners, further hearing was adjourned to 9th August, 2007 and thereafter from time to time to 13th October, 2017.

6. On 13th October, 2017, the counsel for the petitioners referred to i) *Ardee Infrastructure Pvt. Ltd. Vs. Anuradha Bhatia* 237 (2017) DLT 140 (DB), ii) *Shyam Sundar Vs. Ram Kumar* AIR 2001 SC 2472, iii) *Hitendra Vishnu Thakur Vs. State of Maharashtra* (1994) 4 SCC 602, iv) *Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction* (1998) 5 SCC 599, v) *Milkfood Ltd. Vs. GMC Ice Cream (P) Ltd.* (2004) 7 SCC 288, and, vi) *Ananthesh Bhakta Vs. Nayana S. Bhakta* (2017) 5 SCC 185 and to Section 6 of the General Clauses Act, 1897.

7. During the hearing on 13th October, 2017, attention of the counsel for petitioners was drawn to *Raffles Design International India Private Limited Vs. Educomp Professional Education Limited* 2016 (234) DLT 349 though taking a view different from that taken in *Ardee Infrastructure Pvt. Ltd.* supra but not noticed by the Division Bench.

8. Though being *prima facie* not satisfied with the maintainability of the petition, the file was sent to the chamber for dictating the order but learning

of the controversy also pending in the Supreme Court, passing of orders in the petition went on a backburner and the orders are being pronounced now.

9. The Division Bench in *Ardee Infrastructure Pvt. Ltd.* supra was concerned with the question, whether the amendments made by the Amendment Act to Section 34 and Section 36 of the Arbitration Act would apply to arbitral proceedings commenced prior to coming into force of the Amendment Act on 23rd October, 2015 and in which arbitral award was also made prior to 23rd October, 2015 but a petition under Section 34 of the Act was pending on 23rd October, 2015. It was held that only those provisions of the Amendment Act would apply to the pending proceedings which were merely procedural and did not affect any accrued rights and axiomatically it was held that the amendments to Section 34 and Section 36 pertaining to enforceability of the arbitral award affected accrued rights of the parties therein and thus petitions under Section 34 of the Act would have to be construed under unamended Act and the petitioners would be entitled to automatic stay of enforcement of the arbitral award till the disposal of the petition.

10. *Shyam Sundar & Hitendra Vishnu Thakur* supra were cited on the proposition of law that when the repeal of enactment is followed by a fresh

legislation, such legislation does not affect the substantive rights of the parties on the date of the suit or adjudication of suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from had been rendered because the rights of the parties in an appeal are determined under the law in force on the date of the suit, save in the matters which relate to procedure.

11. *Shetty's Construction Co. Pvt. Ltd.* supra holding that where the request for referring the dispute to arbitration was moved for consideration before coming into force of the Arbitration & Conciliation Act, 1996 on 26th January, 1996, then the proceedings would be governed by the Arbitration Act, 1940 and only where the request was subsequent thereto would the proceedings be governed by the 1996 Act is not found to be relevant for the present purpose.

12. Insofar as *Milkfood Ltd.* supra is concerned, attention was drawn to paras no.45 and 46 thereof holding that 'commencement of arbitration proceedings' and 'commencement of proceeding before the arbitrator' are two different expressions and carry different meanings and that only for the

purpose of Section 21 of the Arbitration Act providing for commencement of an arbitration, does a notice of arbitration assume significance.

13. **Ananthesh Bhakta** supra lays down that what is prohibited by Section 8(2) is only entertainment of application unless it is accompanied by original Arbitration Agreement or its certified copies and thus an application filed under Section 8 (1) without such original or certified copy shall not entail rejection under Section 8(2) when original Arbitration Agreement or its certified copy is brought on record at the time when the Court is considering the said application and is on the merits of the challenge made in the petition and not on the maintainability thereof.

14. Supreme Court, recently in **Board of Control for Cricket in India Vs. Kochi Cricket Pvt. Ltd.** 2018 SCC OnLine SC 232, has held that the words ‘arbitral proceedings’ under Section 26 of the Amendment Act refer to proceedings before an Arbitral Tribunal and axiomatically it was held that Section 36 as substituted by the Amendment Act would apply even to pending Section 34 applications on the date of commencement of the Amendment Act.

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.

16. It has been held in *Sadhana Lodh Vs. National Insurance Co. Ltd.* (2003) 3 SCC 524 that where a statutory remedy or a remedy under CPC is available, jurisdiction under Article 227 cannot be invoked.

17. The petition is thus dismissed.

No costs.

MAY 29, 2018
'gsr'

RAJIV SAHAI ENDLAW, J.