

AP/350/2018
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

RAJIA BEGUM
VERSUS
BARNALI MUKHERJEE

BEFORE:
The Hon'ble JUSTICE DEBANGSU BASAK
Date: 11th March, 2021.

(Via Video Conference)

Appearance:
Mr. Debajyoti Basu, Adv.
Mr. Subhojit Seal, Adv.

Mr. Reetobroto Mitra, Adv.
Mr. Lal Ratan Mondal, Adv.
Mr. Aditya Kumar, Adv.

The Court: By this application under Section 11(6) of the Arbitration and Conciliation Act, 1996, the petitioner seeks reference of the disputes to arbitration.

There is a pending suit being Title Suit No.71 of 2018 between the parties. In such suit, the petitioner herein applied under Section 8 of the Arbitration and Conciliation Act, 1996 read with Section 5 thereof. Such application was dismissed by an order dated September 9, 2018. An appeal was carried from such order of dismissal of the Section 8 petition. The appeal being Misc. Appeal No. 21 of 2018 was dismissed on September 25, 2020.

There is a revisional application being CO 128 of 2021 pending as against the order of the Appeal Court dated September 25, 2020. There is a stay of Title Suit no. 71 of 2018 pending before the learned Civil Judge (Junior Division) Sadar Court, Suri, Birbhum granted by the order dated January 21, 2021 for a period of 5 months or until further orders whichever is earlier.

The **Supreme Court in 2021 Volumn 2 Supreme Court Cases page 1 (Vidya Drolia and Others versus Durga Trading Corporation)** is of the following view :

“Before we part, the conclusions reached, with respect to question no.1, are:

- a. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.
- b. Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.
- c. The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.
- d. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above, i.e., ‘when in doubt, do refer’.
- e. The scope of the Court to examine the prima facie validity of an arbitration agreement includes only:

- a. Whether the arbitration agreement was in writing?
- or
- b. Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?
- c. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?
- d. On rare occasions, whether the subject-matter of dispute is arbitrable?"

Vidya Drolia (supra) is of the view that Section 8 and Section 11 of the Act of 1996 have the same mandate with respect to judicial interference.

In the facts of the present case, since the parties are litigating in the title suit in which an application under Section 8 of the Arbitration and Conciliation Act, 1996 was filed and rejected up to the Appeal Court stage, in my view, the issue as to whether, there is an arbitration agreement between the parties or not stands decided as between the parties. Till such time, the revisional Court returns a finding that there is an arbitration agreement, I am afraid, as a Court exercising jurisdiction under the provisions of Section 11 of the Act of 1996, I should not allow the parties to agitate otherwise than the decision of the Appeal Court. The parties are visited with the principles of issue res judicata so far as the existence of the arbitration agreement is concerned. The same agreement containing the same arbitration clause was considered in the application under Section 8 of the Arbitration and Conciliation Act, 1996. Till such time such issue is decided in favour of the petitioner in the revisional application, I am afraid, I

cannot allow to petitioner to contend otherwise in this application under Section 11 of the Act of 1996.

In such circumstances, AP 350 of 2018 is dismissed. This will, however, not prevent the petitioner to file afresh subsequent to the revisional Court returning any finding of existence of an arbitration agreement in TS No.71 of 2018.

(DEBANGSU BASAK, J.)

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