

03-05-2023
Court No.3
Sh/45.

**In The High Court At Calcutta
Jalpaiguri Circuit Bench**

C.O. 37 of 2023

Smt. Manju Choudhary & Ors.
-Vs-
M/s. Asmi Construction.

Mr. Rahul Kedia,
Mr. Ajay Singhal,
Mr. Abhishek Singh,
Mr. Amit Saha,
Miss. Shaikh Heena Yasmin.

..For the Petitioners.

Mr. Rahul Agarwal,
Mr. Deborshi Dhar,
Mr. Nabankur Paul.

For the Opposite party.

Being aggrieved and dissatisfied with the judgment dated 30th March, 2023 passed by learned Additional District Judge, 3rd Court, Darjeeling in Civil Revision No.4 of 2022, arising out of Title Suit No.102 of 2020 pending before Civil Judge, Junior Division at Siliguri, the present application under Article 227 of the Constitution of India has been preferred.

The petitioners contended that the petitioners and the opposite party herein had entered into a registered development agreement on 19-08-2016. The petitioners submit that the said development agreement was terminated by the petitioners herein on 17-12-2019 on the ground of non performance of the obligation on the part of the opposite party.

The opposite party herein subsequently instituted the aforesaid suit being no. 102/2020

against the petitioners herein for declaration that the cancellation notice is void and liable to be set aside and for injunction and for consequential relief in terms of the said development agreement.

The petitioners submit that the said development agreement contains the arbitration clause which runs as follows;

"17.0 In case of any dispute, difference or question arising between the parties hereto with regard to this Agreement, the same shall be referred to the arbitration of an arbitrator to be appointed by the parties herein. The proceedings shall be conducted at Siliguri in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and/or any other statutory modification and/or enactment relating thereto"

The petitioners herein as defendants appeared in the said suit and filed an application under Section 8 read with Section 5 of the Arbitration and Conciliation Act, wherein it has been stated that the suit is barred by law in view of the aforesaid arbitration clause in the said agreement.

The opposite party herein filed written objection to the said application and the same was taken up for hearing by the trial Court on 20-09-2022 and the trial Court rejected the said application.

Being aggrieved by the said order passed by the trial Court on 26-08-2022 the petitioners herein preferred an application for revision under Section 115 A of the Code of Civil Procedure. After hearing, learned Court below has been pleased to dismiss the said

revisional application as not maintainable by the impugned order no.6 dated 30-03-2023.

Mr. Rahul Kedia, learned advocate appearing on behalf of the petitioners submits that the Court below has erred in law in passing the impugned order and failed to apply his judicial mind in passing the impugned order. The Court below has failed to understand that if an order in the said civil revision was passed in favour of the petitioners it would have ended the lis and as such the said civil revision was maintainable and the view taken by the Court below is not sustainable. He further submits that under Section 16(1) (a) of the Arbitration and Conciliation Act 1996 an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Accordingly an arbitration clause is a contract in itself and is a separate and distinct agreement, independent from the other terms of agreement and the arbitration agreement survives even if such other terms of agreement is terminated.

According to the petitioners, they have not terminated the arbitration agreement while terminating the development agreement and as such the suit filed by the opposite party is no longer maintainable under the provision of Arbitration and Conciliation Act, 1996, which the Courts below has failed to appreciate. Accordingly, he has prayed for setting aside the order passed by both the Courts below.

Learned counsel appearing on behalf of the opposite parties raised strong objection contending

that once the arbitration agreement has been cancelled all the terms and conditions of the agreement including the arbitration clause has been cancelled. In this context he referred to arbitration clause of the agreement which says "in case any dispute, difference or question arising between the parties herein with regard to the agreement" which means when the agreement itself has been cancelled the arbitration clause must not survive. Accordingly, he submits that Court below has not committed any mistake in rejecting the prayer made by the petitioners herein.

He further submits that Article XVIII of the said agreement stipulates the jurisdiction of the Court which states that the Courts at Siliguri alone shall have jurisdiction to entertain, try and determine all suits and proceedings arising out of the agreement between the parties. He further submits that the revisional application was not maintainable under Section 115A of the Code and the learned Court below rightly held that the trial Court did not dispose of the dispute between the parties finally and he has merely rejected the application under Section 8 read with Section 5 of the Act of 1996, and as such it is an interlocutory order and court below correctly came to a conclusion that the revisional application is not maintainable and such finding does not call for interference by this Court.

It is not in dispute that the arbitration agreement has been unilaterally cancelled by the petitioners herein. Learned counsel for the opposite party further submits that though there is no clause giving power to the petitioners to cancel the deed unilaterally but in spite of that they have cancelled the

development agreement unilaterally without informing the opposite party herein.

I have considered the submission made by both the parties.

The main question that has been cropped up in the present context is with the termination of development agreement by the petitioner herein, whether the arbitration clause has also been cancelled or arbitration clause under the said contract has its separate and independent existence from the original agreement and is still surviving even if development agreement is terminated.

Similar question was raised before the Apex Court in **Branch Manager Magma Leasing & Finance Limited & Anr. Vs Potluri Madhavalata & Anr. (2009) 10 Supreme Court Cases 103** and it has been clearly laid down in paragraph 14 of the said judgment that merely because contract has come to an end by its termination due to breach, the arbitration clause does not perish nor is rendered inoperative; rather it survives for resolution of disputes arising "in respect of" or "with regard to" or "under" the contract and this judgment was passed in line with the earlier decisions of Apex Court particularly, as laid down in *Union of India Vs. Kishorilal Gupta & others* reported in AIR (1959) S.C. 1362.

Learned counsel appearing on behalf of the petitioner in this context referring the judgment on **Boozallen And Hamilton INC. Vs. SBI Home Finance Limited & Ors., reported in (2011)5**

Supreme Court Cases 532, contended that a right in rem is right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interest of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Accordingly petitioners contended that development agreement does not involve any transfer of right in rem but creates only a personal obligation and therefore is arbitrable.

Similarly, in *Sundaram Finance Limited & Anr. Vs. T. Thankam* reported in (2015) 14 SCC 444, it has been clearly laid down that once there is agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of Section 8 of Arbitration Act, 1996 moved the Court for referring the parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Act, it is obligatory for the court to refer the parties to arbitration in terms of the agreement.

Coming to the present context I find that in the development agreement it has been clearly stipulated that in case of any dispute, differences or question arising between the parties with regard to the agreement the same shall be referred to the arbitration upon arbitrator to be appointed by the parties herein. In the present context the allegation leveled in the suit is that the petitioners herein have

unilaterally and without informing the other side has revoked/cancelled, the arbitration agreement and as such moved before the Court for enforcing right under the provision of Specific Relief Act.

Accordingly, the defendant/petitioners came out with the arbitration clause and as such the substance of the dispute between the parties as to whether the petitioners have right to rescind the agreement unilaterally or not has become an issue before the arbitral authority.

Therefore, in view of the mandatory language of Section 8 of the Act, the trial Court ought to have referred the matter before the arbitrator for adjudication of the disputes between the parties including the dispute as to whether the petitioners have any right to cancel the development agreement unilaterally.

In this context, I am agreeable with the contention made by the petitioners that the civil revision preferred by the petitioners herein is maintainable in view of the fact that if it was decided in favour of the petitioners then the entire lis could have come to an end and as such it does not attract the rigour of Section 115A of the Code.

In view of the above, C.O. 37 of 2023 is allowed.

The order impugned passed by the District Judge, Darjeeling in Civil Revision No.4 of 2022 and the order dated 26-08-2022 passed by the learned Civil Judge Sr. Division, Siliguri in Title Suit No.102/2020 are hereby set aside.

Learned Civil Judge Senior Division, Siliguri will direct the parties to refer their dispute before the arbitral authority in terms of the arbitration clause mentioned in Article XVII of the development agreement dated 19-08-2016.

Photostat Certified copy of this order, if applied for, be supplied to the learned advocates appearing for the parties expeditiously subject to compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)