

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
(Civil Revisional Jurisdiction)**

Present:

The Hon'ble Justice Krishna Rao

CO 82 of 2021

Anupam Ghosh & Anr.

Versus

Sankar Ghosh & Anr.

Mr. Sudipto Kr. Mazumdar

Mr. Ajoy Kumar Singhania

.....For the Petitioner.

Mr. Subham Ghosh

Mr. Mayank Roy

.....For the respondent no. 1.

Heard On : 05.06.2023

Judgment on : 14.06.2023

Krishna Rao, J.:

1. This application under Article 227 of the Constitution of India has been filed against the judgment and order dated 4th August, 2021 passed by the Learned Additional District Judge, 1st Court, Siliguri in Civil Revision No. 01(1) Of 2014 by setting aside the order No.14, dated

26th November, 2013 passed by Learned Civil Judge (Junior Division), Siliguri in Title Suit No. 26 of 2012.

- 2.** The opposite party No.1 being the tenant of the premises filed a suit against the petitioners herein being Title Suit No. 26 of 2012 before the learned Court of Civil Judge (Junior Division) at Siliguri, inter alia, praying for a decree declaring that the opposite party no.1 is a lawful tenant with regard to the suit property and other reliefs.
- 3.** The petitioners filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 before the learned Civil Judge (Junior Division) praying for referring the parties to arbitration in terms of Clause 19 of the partnership deed entered between the parties. The opposite party has filed written objection to the said application.
- 4.** The learned Trial Court by an order dated 26th November, 2013 had allowed the application by referring the parties to the arbitration.
- 5.** The order dated 26th November, 2013 was challenged by the opposite parties by filing a revisional application under Section 115A of the Code of Civil Procedure, 1908 before the learned Court of Additional District Judge, 1st Court, Siliguri.
- 6.** Upon hearing the parties, the learned Additional District Judge, 1st Court, Siliguri, by impugned order No. 40 dated 4th August, 2021 had

set aside the order No.14, dated 26th November 2013 passed by the learned Civil Judge, Junior Division, Siliguri.

7. Mr. Sudipto Kr. Mazumdar, learned Advocate representing the petitioners submitted that the revisional application was filed under Section 115A of the Code of Civil Procedure, 1908 when the power of revision of the Court under Section 115A of the Civil Procedure Code, 1908 was restricted by the Code of Civil Procedure Amendment Act, 2002 (hereinafter referred to as Amended Act). In view of such amendment, the Revisional Court had no jurisdiction to interfere with an order unless such order, if passed in favour of revisionist, would have finally disposed of a suit or other proceeding.
8. In support of his contention, Mr. Mazumdar has relied upon the judgment reported in **(2003) 6 SCC 503 (Hindustan Petroleum Corpn. Ltd -vs- M/s. Pinkcity Midway Petroleums)** and **(2003) 6 SCC 659 (Shiv Shakti Coop. Housing Society, Nagpur -vs- M/s. Swaraj Developers and Others)**.
9. He submits that an order by allowing an application under Section 8 of the Arbitration and Conciliation Act, 1996 does not finally dispose of any suit or other proceeding and, therefore, was not amenable to Section 115 of the Code of Civil Procedure, as amended by the amended Act.

10. Mr. Subham Ghosh, learned Advocate representing the opposite party submitted that this issue had not been canvassed before the learned Court below at the time of disposal of the revisional application and hence the petitioners were precluded from raising the same for the first time before this Court.
11. Mr. Ghosh further submits that the Learned Civil Judge, Junior Division by an order dated 26th November, 2013 had allowed an application under Section 8 of the Arbitration and Conciliation Act, 1996 by referring the parties to the arbitration which amounts to disposal of the suit itself as nothing remains in the suit and thus the revisional application was maintainable before the learned Court of Additional District Judge and accordingly the learned Additional District Judge has allowed the same.
12. Mr. Ghosh further submits that the partnership deed on the basis of which the petitioner intends to refer the matter to the Arbitrator in terms of Clause 19, the said partnership deed has no existence as on the date of filing of the suit before the learned Trial Court.
13. Mr. Ghosh relied upon the judgment reported ***in 2019 (199) AIC (CAL., H.C.) (Loknath Construction and Another -vs- Rabindra Chandra Sarkar and Another)***.

14. Heard the learned counsel for the respective parties, produce the materials on record and the judgments relied by the parties.
15. The issue which falls for decision is whether the Revisional Court had jurisdiction to pass the impugned order in the light of the amendment to Section 115 of the Code of Civil Procedure by the amended Act.
16. The amended Act restricted the power of revision of High Court by adding the following proviso:

“Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.”

17. Such amendment came into effect on 2nd July, 2002 and restricted the revisional jurisdiction of the Court only to those orders, which if passed in favour of revisionist, would finally dispose of a suit or other proceeding.
18. The question which, therefore, arises is, whether in view of the truncated revisional powers, the District Court could have interfered with the order of the Trial Court disposing of an application under Section 8 of the Arbitration and Conciliation Act, 1996 or in other words, whether a proceeding under the provision of Section 8 of the Arbitration and Conciliation Act can come within ambit of “other

proceeding” so as to bring the impugned order disposing such application within the proviso of Section 115 of Code of Civil Procedure as amended by the amended Act.

19. The word “*other proceeding*” in the proviso to Section 115 of the Code of Civil Procedure fell for decision in the case of ***Mrityunjay Sen -vs- Shrimati Shikha Sen reported in 2003 (1) CLJ 263*** wherein this Hon’ble Court held that:

“Now, I proposed to consider the meaning of the expression ‘other proceeding’ referred to in the proviso to sub-section (1) of Section 115 of the Code. My reading of the statute is it was never the intention of the makers of the law that by inclusion of the expression ‘other proceeding’ they intended to vest the High Court with the power of revision even in respect of the order that may be passed in interlocutory or supplemental proceeding to a suit. In my view, the expression in the course of a suit is sufficient to vest the High Court with the power of revision against the interlocutory orders passed by the Court subordinate to it provided, however, the requirements of the proviso are satisfied. My reading is that by insertion of the expression other proceeding the legislature intended to vest the High Court with the power of revision in respect of orders passed in the civil proceedings, which are registered other than suits. The expression ‘other’ indicates different and distinct proceedings from those, which are registered as suits. A Full Bench of this Court in the case of Deb Narain Dutt -vs- Narendra Krishna and Another reported in ILR 16 Calcutta 267 held that the word “proceeding” is a very general one, it is not limited to proceedings connected with the civil suits; but includes, I suppose, proceedings other than civil proceedings, and civil proceedings other than suits.”

- 20.** In the present suit, the petitioner/ defendants had filed an application before the learned Trial Court under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the matter to arbitrator in terms of Clause 19 of the partnership deed and the learned Trial Court had referred the matter to the arbitrator.

Section 8 of the Arbitration and Conciliation Act, 1996 reads as follows:

“8. Power to refer parties to arbitration where there is an arbitration agreement.- [(A)

A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]

(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:

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

- 21.** The language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to an arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an Arbitrator.
- 22.** The legislatures were conscious that allowing an application under Section 8 of the Arbitration and Conciliation Act, 1996 cannot be treated as an appealable order which could be evident from the other clauses of Section 37 of Arbitration and Conciliation Act. The harmonious reading of the various clauses of the said section, leaves no doubt that the right of appeal was not conferred upon the litigant in the event, application under Section 8 of the said Act is allowed. Such right is evident only when Judicial Authority refused to refer the parties to arbitration on an application under Section 8 of the said Act. This Court finds that the plaintiff/opposite party had filed revisional application under Section 115A of the Code of Civil Procedure for the simple reason that the learned Court of Civil Judge, Junior Division had referred the parties to arbitration under Section 8, in effect, bring the lis to an end, therefore, the conditions laid down in proviso to Section 115 of the Code of Civil Procedure is satisfied.
- 23.** Learned Counsel appearing for the opposite party/plaintiff contends that since the applicability of the arbitration clause to the facts of the

case goes to the very root of the jurisdiction of the reference to arbitration and this question will have to be decided by the Civil Court before referring the matter to arbitration even in cases where there is admittedly an arbitration clause. The answer to this argument in my opinion, is found in Section 16 of the Act itself. It has empowered the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. In the case of ***Konkan Railway Corporation Limited and Another -vs- Rani Construction Private Limited reported in 2001 (1) RCR (Civil) 263 (SC)*** held that:

“It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule on its own jurisdiction. That the arbitral Tribunal may rule “on any objections with respect to the existence or validity of the arbitration agreement” shows that the Arbitral Tribunal’s authority under Section 16 is not confined to the width of its jurisdiction, as was submitted by the learned counsel for the appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had not nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction.”

- 24.** It is clear from the language of Section, as interpreted by the Constitution Bench judgement in Konkan Railway (supra) that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the concerned Arbitral Tribunal. Therefore, in my opinion, in the present case, the learned Additional District Judge, 1st Court, Siliguri ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by the Arbitral Tribunal as contemplated in Clause 19 of the partnership deed and as required under Sections 8 and 16 of the Act.
- 25.** In view of the above, this Court finds that the learned Additional District Judge, 1st Court, Siliguri has exceeded his jurisdiction while deciding the revisional application.
- 26.** The judgement and order passed by learned Additional District Judge, 1st Court, Siliguri in Civil Revision No. 01(1) of 2014 dated 4th August, 2021 is set aside and quashed and the order passed by the learned Civil Judge (Junior Division) in Title Suit No. 26 of 2012 dated 26th November, 2013 is upheld.
- 27. CO No. 82 of 2021 is thus allowed.**

Parties shall be entitled to act on the basis of a server copy of the Judgment placed on the official website of the Court.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)