

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**ARBITRATION APPEAL NO. 40 OF 2022
WITH
CIVIL APPLICATION NO. 16378 OF 2022**

Mr. Chandrashekhar S. Nagral,
Age : 62 years, Occu : Business,
Sole Propreitor of
M/s. C.S. Construction,
R/o. K-21, Bharatnagar,
Amravati Road, Nagpur.

...Petitioner

Versus

Abhikalp Infrastructure Pvt. Ltd.
A Private Limited Company
having its corporate identity No.
U-45200PN2009PTC134114 and its office at:-
101, Pushkar Complex, Near Yashodanagar,
Pipeline Road, Ahmednagar – 414 003
Maharashtra, Through its
Managing Director,
Mr. Jambeshwar R. Patnaik,
Age : 50 years, Occupation : Business,
R/o. : 101, Pushkar Complex,
Near Yashodanagar, Pipeline Road,
Ahmednagar – 414 003.

...Respondents

Advocate for Application : Mr. Vinod B. Jadhav
Advocate for Respondent : Mr. Yuvraj S. Choudhari

CORAM : SHAILESH P. BRAHME, J.

Judgment reserved on : 10th November, 2023

Judgment pronounced on : 28th November, 2023

JUDGMENT :

1. Heard learned counsel for both the sides finally at the admission stage.

2. Being aggrieved by order dated 23.03.2022, passed below exhibit 10 in Special Civil Suit No. 127 of 2020 by learned Civil Judge Senior Division, Ahmednagar, the appellant has preferred this Appeal. The application of the appellant exhibit 10 for returning the plaint and referring matter to the arbitration in view of arbitral clause in an agreement between the parties has been rejected. The appellant is defendant and the respondent is original plaintiff.

3. The appellant was allotted work of construction by the Central Railway. The respondent was a subcontractor of the appellant. On 20.06.2014, memorandum of understanding was executed between the parties. The following is the provision for arbitration :

“7.1. If any case any issue dispute or any illegal issue made by Central railway for said project and AI IPL will take interest to go for arbitration then CSC will be authorize the power of attorney to AI IPL for appoint the arbitrator. Any loss or profit with Central Railway against shall be account of AI IPL with the royalty of CSC.

7.2 Any dispute between CSC and AI IPL connection with the execution of work shall be resolved amicably by the representatives of both the parties, failing which, the matter

shall be referred as per provision of arbitration and conciliation act of 1996. The place of arbitration shall be at Nagpur."

4. There arose dispute between the parties over the payment of money. Respondent preferred Special Civil Suit No. 127 of 2020, for recovery of an amount of Rs. 2,90,44,326/- against the appellant in the Court of Civil Judge Senior Division, Ahmednagar. The claim is founded on the terms and conditions of the agreement which is evident from paragraph no. 4 of the plaint. The cause of action is also founded on the memorandum of understanding.

5. The appellant appeared before the Trial Court and submitted application exhibit 10 under Section 9 A, under Order VII Rule 11 (d) of Code of Civil Procedure, and under Section 8 of Arbitration and Conciliation Act, 1996. Referring to the clause no. 7.2 of the memorandum of understanding, the appellant prayed to reject the plaint as there is a valid provision for arbitration. The application is resisted by the respondent by filing say at exhibit 11. The application exhibit 10 is rejected by the impugned order holding that the arbitration clause appearing in the memorandum of understanding is with regard to the execution of work which had already been executed and not for the recovery of amount. Being aggrieved the present appeal is preferred.

6. Learned counsel for the appellant has produced on record copy of memorandum of understanding and my attention is invited to clause no. 7. He would submit that the claim for recovery of amount against the appellant is arising out of the execution of work which is regulated by the memorandum of understanding. He submits that learned Judge has committed perversity when there is an unequivocal and valid agreement between the parties to refer any dispute to the arbitration. He would submit that the Civil Court has no jurisdiction to entertain the suit and prays to allow the Appeal.

7. The learned counsel for the appellant has placed reliance on the following judgment :

a) *Bharat Sewa Sansthan Versus U.P. Electronics Corpn. Ltd.*, (2007) 7 **Supreme Court Cases 737** ;

b) *Noorul Huda English Medium School Lucknow Road Fatehpur and others Versus Sohail Ahmad Siddiqui and others*, judgment passed by Allahabad High Court, in Matters Under Article 227 No. 5252 of 2022 ;

c) *A. Ayyarsami Versus A. Paramasivam and others*, (2016) 10 **Supreme Court Cases 386** ;

d) *Sundaram Finance Limited and another Versus T. Thankam*, (2015) 14 **Supreme Court Cases 444** ;

e) *P. Anand Gajapathi Raju and others Versus P.V.G. Raju (Dead) and others*, (2000) 4 **Supreme Court Cases 539** ;

f) *Hindustan Petroleum Corpn. Ltd. Versus Pinkcity Midway Petroleums*,
(2003) 6 Supreme Court Cases 503 ;

g) *N.N. Global Mercantile Private Limited Versus Indo Unique Flame Limited and others*, **(2021) 4 Supreme Court Cases 379 ;**

8. Learned counsel for the respondent has repelled the submissions of the petitioner. It is submitted that there is non compliance of Section 8 (2) of Arbitration and Conciliation Act. The appellant has not placed original or certified copy of the memorandum of understanding. He would further submit that the suit is on the verge of completion and the next date is kept on 01.12.2023. It proceeded in the absence of the appellant and it would not be proper to refer the dispute to the arbitration. Learned counsel relies upon the judgment rendered by the Supreme Court in the matter of *N. Radhakrishnan Versus Maestro Engineers and others*, **(2010) 1 Supreme Court Cases 72** and *Atul Singh and others Versus Sunil Kumar Singh and others*, **2008 ALL SCR 800**.

9. I have considered rival submissions of the parties. The appellant is called upon to satisfy the maintainability of Arbitration Appeal. Learned counsel has referred to Section 8 (1) which refers to a judicial authority before whom an action is brought. The Civil Court who is seized of the matter is judicial authority. Therefore, the order passed by the Civil Court can be questioned by preferring Arbitration

Appeal. He has relied upon the judgment rendered by the Supreme Court in the matter of *N.N. Global Mercantile Private Limited* (supra). In that matter the objection was raised on the basis of arbitral clause in a commercial suit. The submissions of the learned counsel for the petitioner has merit and arbitration appeal is entertainable.

10. The litigating parties are ad idem on the memorandum of understanding and the clause no. 7. Clause no. 7.2 has been reproduced earlier. It refers to any dispute between appellant and the respondent in connection with the execution of the work shall be resolved amicably and by referring to the arbitration. The suit is for the recovery of amount pertaining to the work executed under the Contract between the parties. I am of the considered view that there is a arbitration agreement.

11. The suit for recovery is founded on the terms of conditions of the memorandum of understanding. The plaint is produced on record. Its para no. 4 and the cause of action unequivocally refers to the terms of agreement. The arbitral clause is valid. The respondent has not brought anything on record to demonstrate that the said agreement is void or not binding between the parties.

12. The learned counsel for the respondent has raised strong objection for non compliance of Section 8 (2) of the Arbitration and Conciliation Act. The controversy between the parties is arising out of contract and it is purely civil in nature. During the course of the

argument also the learned counsel for the respondent has not disputed the arbitration clause. When the parties are ad idem over arbitration clause, the requirement to produce on record certified copy or original copy is a mere formality. The Civil Court does not have jurisdiction when there is clear cut arbitration clause and arbitrability cannot be halted because of the non compliance of Section 8 (2) of the Act.

13. The learned counsel for the respondent has submitted that the Civil Suit is on the verge of conclusion and the next date is kept on 01.12.2023 for the final hearing. Its an admitted position that the suit has proceeded without written statement of the appellant. After the impugned order, present appeal is preferred on 13.09.2022. The objection of the appellant which is over ruled by the Civil Court goes to the root of the matter. When its a question of jurisdiction, just because the suit is for final hearing cannot be a ground to overlook the maintainability of the proceedings. The laches on the part of appellant can be taken care of by saddling appropriate costs on the appellant. Therefore, this submission of the respondent does not commend me any further.

14. The learned counsel for the respondent has referred to judgment rendered in the matter of *N. Radhakrishnan* (supra). My attention is invited to paragraph No. 29. The facts and circumstances in that matter were peculiar. There were allegations of mal practices and misappropriation. Intricate questions were involved therefore, the request to refer the dispute to the arbitration was rejected. Though in paragraph

no. 29 of the judgment the compliance of Section 8 (2) of the Act, has been referred to but it cannot be said to be a ratio as proposed by the respondent. Besides that, judgment in the matter of *N. Radhakrishnan* (supra) has been further explained in the matter of *A. Ayyasamy* (supra). Paragraph no. 19 and 45 are referred to and, therefore, it cannot be said that *N. Radhakrishnan* (supra) is an authority for the proposition that for non compliance of Section 8 (2) of the Act, the matter cannot be referred to the arbitration.

15. Learned counsel for the respondent has further relied on the judgment rendered in the matter of *Atul Singh and others* (supra), to buttress the submission that compliance of Section 8 (2) of the Act is mandatory. The discussion in paragraph no. 10 of the judgment may not be applicable to the present case. In the present case the parties are ad idem over the memorandum of understanding and the clause of arbitration.

16. Learned counsel for the petitioner has relied upon the judgment rendered in *Bharat Sewa* (supra). My attention is invited to paragraph no. 23 and 24 to contend that a photocopy of agreement is also sufficient to refer the dispute for the arbitration. As I have already discussed, the respondent has not disputed the agreement, rather the respondent is relying upon the self same agreement and has instituted a suit. I am further fortified in my view by the judgment rendered by the learned Single Judge of the Allahabad High Court in the matter of

Noorul Huda English Medium School (supra), specifically internal page no. 9 of the said judgment.

17. The judgments rendered in the matter of *Sundaram Finance Limited* (supra), *P. Anand Gajpathi Raju* (supra) and *Hindustan Petroleum Corpn. Ltd.* (supra) are on the scope of Section 8 when there is valid arbitral clause then there is no alternate than not to refer the matter to the arbitration.

18. For the reasons discussed above, I am of the considered view that impugned order is unsustainable and petition deserves to be allowed. Hence, I pass following order :

- i. The order dated 23.03.2022, below exhibit 10 in Special Civil Suit no. 127 of 2020, passed by learned Civil Judge Senior Division, Ahmednagar, is quashed and set aside.
- ii. Special Civil Suit no. 127 of 2020 filed by the respondent shall be referred to arbitration by following due procedure of law by returning the plaint to the respondent.
- iii. The petitioner shall pay costs of Rs. 10,000/- to the respondent within a period of one week from today either by depositing in the Trial Court or by directly making payment.

- iv. The Rule is made absolute in above terms.
- v. Pending Civil Application stands disposed of.

[SHAILESH P. BRAHME, J.]

LATER ON :

19. After pronouncement of judgment in this matter, learned counsel for the respondent prays to stay operation and execution of this order.

20. Learned counsel for the appellant opposes the prayer.

21. By reasoned judgment, I have held that there is arbitral clause between the parties. The suit is almost three years old. I do not deem it fit to grant stay. The prayer is rejected.

[SHAILESH P. BRAHME, J.]

spc/