

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
283 CR-60-2023 (O&M)
Date of decision: 15.05.2023

M/s Dharma Enterprises & Another

...Petitioner(s)

Vs.

M/s Teson Construction

...Respondent(s)

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

Present:- Mr.Mukesh Yadav, Advocate
for the petitioners.

Mr. Kanwaljit, Senior Advocate with
Ms. Neha Anand Mahajan, Advocate
for respondent.

NIDHI GUPTA, J.

CM-9032-CII-2023

This is an application under Section 151 CPC seeking
correction in the Index of the petition.

After going through the contents of the application, the
same is allowed subject to all just exceptions.

MAIN CASE

Present Revision Petition has been filed by the
defendants seeking setting aside of order dated 09.12.2022 (Annexure
P6) passed by learned Civil Judge (Junior Division), Sirsa whereby
application filed by the petitioners/defendants under Section 8 of the
Arbitration and Conciliation Act, 1996 (Amendment) 2015 (3 of 2016)
(hereinafter referred to as "the Act"), for granting stay of suit and to
refer the matter to arbitration, has been dismissed.

2. Brief facts of the case are that the respondent filed a Suit (Annexure P1) for recovery of Rs.67,66,757.16/- against the petitioners along with interest @ 12% per annum on account of the work done by the respondent/plaintiff under contract dated 11.10.2017 executed between the parties. Upon notice, the petitioner/respondent appeared and filed an application dated 02.12.2019 (Annexure P4) under Section 8 of the Act praying that the proceedings of the Suit be stayed and matter be referred to Arbitration. The respondent/plaintiff filed reply to the said application dated 09.01.2020 (Annexure P5). However, vide impugned order dated 09.12.2022 (Annexure P6), application (Annexure P4) filed by the petitioners has been dismissed. Hence, present Revision Petition.

3. It is submitted by learned counsel for the petitioners that as per clause 28 of the agreement dated 15.09.2017 (Annexure P2) entered into between the parties, it was stipulated that in case of any dispute between the parties, the same shall be settled by way of arbitration. It is submitted that however, the respondent filed Civil Suit in the first instance without first resorting to arbitration proceedings as was stipulated in the agreement in question. It is submitted that even as per contract dated 11.10.2017 entered into between the parties, the respondent was bound by the conditions as contained in agreement dated 15.09.2017 (Annexure P2). It is further submitted that the petitioners' business is in Gurugram whereas the respondent/plaintiff

has filed the Suit for recovery in Sirsa. It is submitted that therefore, impugned order is prima facie erroneous and deserves to be set aside.

4. In response, it is submitted by learned Senior Counsel for the respondent/plaintiff that the petitioners were awarded the work order for job work on Kundli Manesar Expressway Limited by PAN India Infraprojects Pvt. Ltd. vide work order dated 15.09.2017 (Annexure P2). It is submitted that the respondent/plaintiff was not a party to the said work order dated 15.09.2017. It is stated that the Kundli Manesar Highway has an approximate length of 11 km of which the petitioners sub-contracted 720 metres of road to the respondent for the sector between Sirsa. Thus, only 720 metre work of the 11 km long highway was sub-contracted to the respondent/plaintiff by way of sub-contract dated 11.10.2017 (Annexure P3). The said sub-contract was executed at Sirsa and therefore, the Court at Sirsa has territorial jurisdiction to entertain the dispute. It is further submitted that the respondent had duly executed and completed the work in record time for which about Rs.67,00,000/- payment is due from the petitioners. Admittedly, the road is operational and no defect in the work as executed by the respondent has been pointed out. It is submitted that accordingly grave injustice is being caused to the respondent/plaintiff who is suffering for no fault on his part. In support, learned counsel relies upon Division Bench judgment of this Court in **Soben Contract & Commercial Ltd. Vs. Qonquests Technical Solutions Pvt. Ltd. (P&H)(DB)** Law Finder Doc ID # **2060877**.

5. No other argument is raised on behalf of the parties.
6. I have heard learned counsel for the parties.
7. I find merit in the submissions advanced on behalf of the respondent/plaintiff. Admittedly, the respondent/plaintiff is not a party to the work order dated 15.09.2017 executed between the petitioners and PAN India Infraprojects Pvt. Ltd. whereby petitioners were awarded the work contract for construction of 11 kms length of the Kundli Manesar Highway. Accordingly, clause 28 of the said work order dated 15.09.2017 being relied upon by the petitioners is not binding upon the respondent as there is no such arbitration clause in the sub-contract between the parties.
8. It has been submitted on behalf of the petitioners that in sub-contract dated 11.10.2017, it has been stated in clause (2) that *"All terms & condition as per our PO (8612000881) from Pan India Infraproject Pvt. Ltd."*, and therefore, respondent/plaintiff is bound by the arbitration clause No.28 contained in work order dated 15.09.2017; and therefore, respondent ought to have first resorted to arbitration proceeding instead of filing Civil Suit. However, I find the said argument to be flimsy as admittedly, respondent was not a party to the said work order dated 15.09.2017. As such, there is no occasion for the respondent to be aware of any agreement and/or arbitration clause between the petitioners and PAN India Infraproject Pvt. Ltd. It is not the case of the petitioners that the said work order dated 15.09.2017 formed a part of the sub-contract dated 11.10.2017. Admittedly, there is no such

arbitration clause in the sub-contract between the parties and there is no agreement between the parties herein to refer the matter to arbitration.

9. In this regard findings/observations of the learned Court below in the impugned order are apposite, and may be noticed as here under: –

“4. The present application has been filed under Section 8 Arbitration & Conciliation Act for referring the present suit to arbitrator. Before proceeding further, it is essential to lay down the conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the court can exercise its power for referring the matter to arbitration which are as follows:-

- 1) *there is an arbitration agreement;*
- 2) *a party to the agreement brings an action in the court against the other party;*
- 3) *subject-matter of the action is the same as the subject-matter of the arbitration agreement;*
- 4) *the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.*

In the present case the defendant is relying upon clause 28 of work order which reads as under:-

“The applicable laws of India shall govern the PO with the supplier/seller. Any dispute or difference which may arise out of the POS and cannot be settled an amicable way between the parties shall be settled by arbitration in Mumbai/Delhi, as per provisions of the Arbitration and Conciliation Act, 1996”

5. This Court is of the considered view that the defendant is relying upon clause 28 of General terms and conditions. It is

worthwhile to mention that no arbitration agreement has been placed on record by the defendant. Further, the general terms and conditions cannot be said to be the arbitration agreement between the parties. Even otherwise, the general terms and conditions do not bear any signature of the plaintiff. Hence, the essential requisite of section 8 i.e. existence of an agreement between the parties is not satisfied. Resultantly, when no arbitration agreement has been placed on record, no ground is made to refer the present matter to arbitrator only on the basis of a clause of general terms and conditions. Hence, no ground is made out to allow the present application and the same is hereby dismissed.”

10. In this regard reference may also be made to the judgment relied upon by learned Senior Counsel for the respondent in case of **Soben Contract & Commercial Ltd.** (Supra) wherein it has been held as follows: –

“13. It is not in dispute that under the Memorandum of Understanding, there is no clause for arbitration. The clause, if any, is in the Consulting Agreements which would not be applicable in the case as the claim of respondent No.1 - plaintiff is based exclusively on the Memorandum of Understanding. In the given facts and circumstances, we are of the considered view that the dispute and the claims which have been made in the civil suit when do not flow from the Purchase Orders or Consulting Agreements, the same cannot be made the basis for rejection of the suit and similarly, the question of separation of the claims does not arise. The claim which is based upon an agreement, which does not include an arbitration clause, would not bound the parties. The plea

of the appellant that the suit deserves to be dismissed as there is an arbitration clause, therefore, cannot sustain.”

11. No judgment to the contrary has been cited by learned counsel for the petitioners.

12. In view of above discussion, present Revision Petition accordingly stands **dismissed**.

13. Pending application(s) if any also stand(s) disposed of.

15.05.2023
Sunena

(Nidhi Gupta)
Judge

Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No