IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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CR No. 5395 of 2016 (O & M)
Date of Decision : 24.1.2023

Vinay Chhatwal ...... *Petitioner*

Vs.

Sukhdev Singh and another ...... *Respondents*

CORAM : HON'BLE MR. JUSTICE TRIBHUVAN DAHIYA

Present : Mr. Rakesh Gupta, Advocate, for the petitioner
Mr. Deepak Aggarwal, Advocate, for the respondents

TRIBHUVAN DAHIYA, J.

1. This petition has been filed under Article 227 of the Constitution of India for setting aside the order dated 26.7.2016 (Annexure P-1) passed by the trial Court declining the petitioner/defendant's (hereinafter referred to as 'the defendant') application to refer the dispute arising in the civil suit in question to an arbitrator, and rejecting the plaint being not maintainable under Order VII Rule 11 CPC.

2. The facts of the case in brief are, the respondents/plaintiffs (hereinafter referred to as 'the plaintiffs') filed a suit, dated 23.7.2012 (Annexure P-3), for rendition of accounts of the firm M/s Zamindara Tractors, Patiala Road, Nabha. The firm stood dissolved on serving of legal notice upon the defendants on 21.5.2012. On receiving notice of the suit, the defendant filed an application for its dismissal on account of death of plaintiff no.2 in December 2013. Since the suit was filed by him jointly with plaintiff no.1, it would not be maintainable any longer. Thereafter, second application was filed by the defendant under Order XI Rule 14 CPC, seeking production of documents in

original on the Court file, viz., partnership deeds dated 1.4.1992, 1.9.2001 and 4.5.2007, and the agreement. Pursuant thereto, the said documents were produced by the plaintiffs on 18.12.2014. Still, the defendant did not file written statement, and moved third application dated 30.1.2015 (Annexure P-2) for referring the dispute to arbitration and rejection of the plaint under Order VII Rule 11 CPC on account of arbitration clause in the partnership deed(s). The said application was dismissed by the trial Court vide impugned order dated 26.7.2016 on the ground; firstly, that as per law laid down in *M/s Sharda Ginning Pressing and Oil Mills and others v. Smt. Bimla Devi,* 2007 (1) RCR (Civil) 818, a suit for dissolution and rendition of accounts of a firm has to be adjudicated upon by the Civil Court and not the arbitrator. Another judgment of this Court to the same effect, passed in *M/s Makkar Cotton Mills v. Harmander Singh,* 2001 (1) RCR (Civil) 47, was also relied upon. Secondly, the trial Court held that after putting appearance on 23.10.2012 the defendant moved two applications, (i) for dismissal of suit on account of death of plaintiff no. 2 (Annexure P-4); and (ii) for production of documents under Order XI Rules 14 and 15 CPC (Annexure P-5). Thereupon, the instant third application for referring the matter to arbitration and rejection of the plaint under Order VII Rule 11 CPC was filed. Apparently, the defendant did not avail the opportunity to refer the matter to arbitrator at the first instance, and made statements by way of filing the aforesaid applications. He, therefore, abandoned the claim for referring the matter to arbitrator in terms of Section 8 of the Arbitration and Conciliation Act, 1996 (for short 'the Act of 1996').

3. Learned counsel for the parties have been heard.

4. The following two issues arise for consideration:

(i) Whether filing of miscellaneous applications by the defendant before the trial Court seeking dismissal of the suit on account of plaintiff's death and for production of documents, before filing written statement, amount to making his first statement on the substance of the dispute in terms of Section 8 of the Act of 1996.

(ii) Whether a suit for rendition of accounts is to be compulsorily tried by the trial Court, and cannot be referred to an arbitrator for adjudication.

5. Section 8 of the Act of 1996 is reproduced hereunder for reference:

> **8. Power to refer parties to arbitration where there is an arbitration agreement.—**
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> (1) 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 other 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.
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> (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.
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> Provided that where the original arbitration agreement or a c 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 agreement or its duly certified copy before that court.
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> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an
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> arbitration may be commenced or continued and an arbitral award made.

FIRST ISSUE

6. Can it be said the defendant has waived his right to get the matter referred to an arbitrator by filing two miscellaneous applications; (i) for dismissal of suit on account of death of plaintiff no. 2; and (ii) for production of documents in original under Order XI Rule 14 and 15 CPC. Do these applications amount to the defendant making his first statement on the substance of the dispute before the trial Court? Filing of every application will not amount to making first statement on substance of the dispute. Such a statement can only be said to have been made once allegations in the plaint are replied to by filing a written statement or otherwise. The aforementioned two applications said to have been filed by the defendant do not in any manner reply to the allegations levelled in the suit against him. The first application seeking dismissal of suit on account of death of plaintiff no.2, is to question maintainability of the suit itself on account of a plaintiff's death, without replying to the allegations levelled in the suit against. The second application, seeking production of documents under Order XI Rule 14 and 15 CPC, also is not a reply to the allegations levelled in the suit. Seeking of original documents, at best, can be termed as a step to prepare a reply, but not a reply in itself to the allegations levelled.

6.1 Similar issue has been decided by the Supreme Court in *Greaves Cotton Limited v. United Machinery and Appliances,* 2017(2) SCC 268, holding that moving an application seeking further time to file written statement would not amount to making first statement on substance of the dispute. The *ratio* of the judgment as apparent from paragraph no.12 thereto, reads as under:

> 12. In view of the law laid down by this Court, as above, we find it difficult to agree with the High Court that in the present case merely moving an application seeking further time of eight weeks to file the

> written statement would amount to making first statement on the substance of the dispute. In our opinion, filing of an application without reply to the allegations of the plaint does not constitute first statement on the substance of the dispute. It does not appear from the language of sub-section (1) of Section 8 of the 1996 Act that the Legislature intended to include such a step like moving simple application of seeking extension of time to file written statement as first statement on the substance of the dispute. Therefore, in the facts and circumstances of the present case, as already narrated above, we are unable to hold that the appellant, by moving an application for extension of time of eight weeks to file written statement, has waived right to object to the jurisdiction of judicial authority.

6.2 Therefore, the trial Court was wrong in declining the defendant's application to refer the matter to arbitrator by holding that filing of the aforementioned two miscellaneous applications would amount to making first statement on substance of the dispute in the civil suit.

SECOND ISSUE

7. In holding that a suit for rendition of accounts cannot be referred to arbitrator, the trial Court appears to have proceeded on a wrong premise. The finding has been recorded by relying upon the judgments which are not applicable to the facts of the case and do not answer the issue raised in the application in question filed by the defendant.

7.1 The nature of disputes that can be referred to arbitral Tribunals have been delineated by the Supreme Court in *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and others,* 2011 (5) SCC 532. It has been held that every contractual or non-contractual dispute which can be decided by a Court, is capable of being adjudicated upon by an arbitrator also, unless the latter is excepted, either expressly or by necessary implication, from doing so. Further, only in those cases which pertain to actions in *rem*, as against actions in *personam*, the matters are not considered amenable to arbitration. Relevant paragraphs no. 22 and 23 of the judgment read as under:

> 22. Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.
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> 23. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a 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 interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an

interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and Judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide: Black's Law Dictionary). Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

7.2 Undisputedly, the instant suit refers to a dispute between the plaintiffs and the defendant with regard to rendition of accounts of a firm, which stands dissolved. It is an action in *personam* and not in *rem*. Therefore, the dispute in question would not fall in the category of non-arbitral disputes as held by the Supreme Court in the aforesaid judgment; nor is it a dispute which is required to be referred to a special Tribunal or Court set-up for the purpose by a Statute. Therefore, there is no basis for the trial Court to deny reference of dispute arising in the suit to the arbitrator.

7.3. Further, a reference can be made to the arbitration clause in the agreement entered into between the parties, dated 4.5.2007 (Annexure P-9 colly), to establish that the dispute raised in the suit is not excluded from arbitration. The Clause reads as under:

> 15. That disputes and questions in connection with the partnership or this deed arising between partners and whether during or after the partnership shall be referred for adjudication to an arbitrtor appointed under the Arbitration and Conciliation Act, 1996.

The Clause simply says that all the disputes and questions in connection with the partnership or the deed arising between the parties, during or after partnership, shall be referred for adjudication to an arbitrator to be appointed under the Act of 1996. Therefore, terms of the arbitration Clause also do not exclude the nature of dispute raised in the civil suit, i.e., rendition of accounts, from being adjudicated upon by an arbitrator. It simply states, all disputes and questions in connection with the partnership are to be referred to an arbitrator, which undoubtedly includes a dispute pertaining to rendition of accounts as well.

JUDGMENTS RELIED UPON BY THE TRIAL COURT

8. In dismissing the application for referring the dispute to arbitration, the trial Court's reliance upon the judgment of this Court in *M/s Sharda Ginning Pressing and Oil Mills case* (*supra*) is mis-placed. It was a case where in a suit for dissolution of firm and rendition of accounts, reference to arbitration under Section 8 of the Act of 1996 was declined by the trial Court. This Court upheld the view primarily because the arbitration agreement was entered into between some of the parties, and not all of them. By placing reliance upon the Supreme Court judgments in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and another,* 2003 (5) SCC 531 and *Haryana Telecom Limited v. Sterlite Industries (India) Ltd.,* 1999 (5) SCC 688**,** this Court held as under:

> 12. I have considered the arguments raised by the learned Counsel for the parties and find no force in the contention raised by the learned Counsel for the petitioners.
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> 13. It is not in dispute that defendants No. 6 and 7 are not parties to the agreement of partnership deed dated 1.4.1991 and therefore, the matter did not fall within the ambit of arbitration clause No. 15 referred to above. The learned Trial Court was right in coming to the conclusion that in view of judgment of Hon'ble Supreme Court in Sukanya Holdings's case (supra) the matter cannot be referred to the arbitration. The suit should be in respect of a matter which the parties have agreed

to refer and which comes within the ambit of arbitration agreement. When a suit is commenced as to a matter which lies outside the arbitration agreement and is also between the some of the parties who are not parties to the arbitration agreement, there is no question of moving application under Section 8 as the word "matter" referred to in Section 8 indicates the entire subject-matter of the suit should be subject-matter of arbitration agreement. Not only this, it has been held by this Court in the case of M/s Makkar Cotton Mills's case (supra) by replying upon the judgment of Hon'ble Supreme Court in Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd., 1999 (3) R.C.R. (Civil) 619 that the suit for dissolution of partnership and rendition of account has to be adjudicated by the civil court itself and not by the arbitrator. In view of this authoritative pronouncement, the learned Trial Court was right in rejecting the application.

8.1 It needs to be seen what is the *ratio* of the judgment in *Sukanya Holdings Pvt. Ltd*. (*supra*), which has been relied upon in *M/s Sharda Ginning Pressing and Oil Mills case* (*supra*). The relevant paragraphs no.13 and 15 of the judgment are as under:

13. Secondly, there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

14. xxx xxx xxx

15. The relevant language used in Section 8 is "in a matter which is the subject matter of an arbitration agreement", Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement.

Therefore, as apparent, it has not been held by the Supreme Court that a suit for dissolution of partnership and rendition of accounts cannot be referred to arbitrator. It lays down, when entire matter of a suit is subject matter of the arbitration agreement also, it can be referred to arbitral Tribunal. There is no provision for splitting the cause of action and referring the subject matter of the suit to arbitrator, when it includes other disputes as well. And also, that all the parties to the suit must be parties to the arbitration agreement for that purpose.

8.2 Reference needs to be made to the other judgment of the Supreme Court in *Haryana Telecom Limited (supra)*, relied upon by this Court in *M/s Sharda Ginning Pressing and Oil Mills case (supra)*. The former judgment is on the point that a matter pertaining to winding-up proceedings of a company cannot be referred to arbitration, since the Companies Act, 1956, specifically confers powers of winding-up upon the High Court. The *ratio* of the judgment laid down in para 5, is as under:

> 5. The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the petitioner herein was relating to winding up of the company. That could obviously not be referred to the arbitration and, therefore, the High Court, in our opinion was right in rejecting the application.

Therefore, this judgment also does not hold that a suit for dissolution of partnership and rendition of accounts cannot be referred to arbitrator. It pertains to a petition for winding-up of a company, which is different form a suit for rendition of accounts; besides, Statute does not specifically confer jurisdiction to decide such a suit upon any special Court or Tribunal.

8.3 The second judgment of this Court, relied upon by the trial Court and referred to in *M/s Sharda Ginning Pressing and Oil Mills* case (*supra*), is *M/s Makkar Cotton Mills* case (*supra*). The judgment in its entirety reads as under:

> 1. Counsel for the petitioners relies upon a judgment of this Court reported in *Bank Bandhu Co-op. Group Society v. M/s. Manasvi Construction Engineers and Contractors, 1999 (3) PLR 850: 1999 (4) RCR (Civil) 205 (P & H),* and submits that there was an arbitration clause between the parties and, in these circumstances, the respondents were bound by the said arbitration clause and the matter was liable to be referred to the Arbitrator under Section 8 of the New Arbitration Act.
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> 2. On the contrary, counsel for the respondents relies upon a judgment of the Hon'ble Supreme Court reported in *Haryana Telecom Ltd. V. Sterlite Industries (India) Ltd., 1999 (3) RCR (Civil) 619*, and submits that in a suit for dissolution of the partnership and rendition of accounts, this aspect of the case has to be adjudicated by the court itself and not by the Arbitrator.
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> 3. In view of the judgment of the Hon'ble Supreme Court and by distinguishing the judgment relied upon by the counsel for the petitioners, I am of the considered opinion that the present revision petition must fail and I do not see any illegality or impropriety in the impugned order.
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> 4. No merit. Dismissed.

8.4 This judgment also cannot be relied upon to decline reference of the dispute in question to arbitrator. Although the issue in *M/s Makkar Cotton Mills* case (*supra*) pertained to a suit for dissolution of partnership and rendition of accounts, it declined reference of the matter to arbitrator under Section 8 of the 1996 Act solely by placing reliance upon *Haryana Telecom Limited* (*supra*) case and not providing any other reasoning in that regard. And, latter judgment, as discussed above, does not relate to the issue of referring a suit for dissolution of partnership and rendition of accounts to arbitrator. Instead, it concerns winding-up of a company for which the powers have been conferred on the High Court, thereby excluding jurisdiction of an arbitrator to decide the issue. The judgment in *M/s Makkar Cotton Mills* (*supra*), therefore, cannot be relied upon to decline the defendant's application, since the issue raised in the suit does not pertain to winding-up of a company.

8.5 In view of the discussion above, both the judgments of this Court relied upon by the trial Court, i.e., *M/s Sharda Ginning Pressing and Oil Mills case* (*supra*) and *M/s Makkar Cotton Mills* (*supra*), cannot be the basis to decline reference of the dispute in question to arbitrator. The same are based upon the Supreme Court judgments in *Sukanya Holdings Pvt. Ltd.* (*supra*) and *Haryana Telecom Limited* (*supra*) cases, and none of them bars reference of a suit for rendition of accounts to arbitrator.

9. Resultantly, the impugned order, dated 26.7.2016, is set aside and the matter is remanded to the trial Court to pass appropriate orders on the defendant's application, in accordance with law.

10. The petition stands allowed in the aforesaid terms.

(TRIBHUVAN DAHIYA)
JUDGE

24.1.2023
Ashwani

Speaking/Reasoned : Yes/No
Reportable : Yes/No