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RESERVED ON 11.08.2022
DELIVERED ON 02.09.2022

Court No. - 5

Case :- MATTERS UNDER ARTICLE 227 No. - 5252 of 2022

Petitioner :- Noorul Huda English Medium School Lucknow
Road Fatehpur And 2 Others

Respondent :- Soheli Ahmad Siddiqui And 4 Others

Counsel for Petitioner :- Sanjay Agrawal

Counsel for Respondent :- Ejaz Ahmad Khan, Mohd. Monis
Chauhan, P.K. Tyagi, R.K. Saini

Hon'ble Salil Kumar Rai, J.

The is a defendants' petition challenging the order dated 5.12.2019 passed by the Civil Judge (Senior Division), District Fatehpur in Original Suit No. 175 of 2012 (Soheli Ahmad Siddiqui vs. Central Board of Secondary Education & Ors.) as well as against the order dated 15.3.2022 passed by the Additional District Judge, Court No.03, District Fatehpur in Misc. Civil Appeal No. 04 of 2020 (Noorul Huda English Medium School & Ors. vs. Soheli Ahmad Siddiqui & Ors.). Through order dated 5.12.2019, the Civil Judge (Senior Division) has dismissed the application of the petitioners filed under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, 'Act, 1996') and the consequential appeal filed under Section 37 of the Act, 1996 has been dismissed by the Additional District Judge vide his order dated 15.3.2022.

The relevant facts of the case are that the plaintiff – respondent no. 1 instituted Original Suit No. 175 of 2012 praying for a decree declaring him to be in service of Noorul Huda English Medium School, Lucknow Road, Fatehpur, i.e., the petitioner no. 1 who shall hereinafter be referred as the

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‘Institution’, in terms of contract dated 6.7.2004 for teaching work and for a decree that the plaintiff was entitled to arrears of salary and other allowances since 2008 as well as for a decree of permanent prohibitory injunction restraining the Institution from obstructing the plaintiff – respondent no. 1 in doing his duties in the Institution. In the plaint instituting Original Suit No. 175 of 2012, the plaintiff – respondent no. 1 pleaded that he was appointed as Teacher in the Institution through a written contract dated 6.7.2004 and was being illegally prevented from doing his duties since July, 2011. In his plaint, the plaintiff – respondent no. 1 also stated that according to Paragraph 19 of the written contract dated 6.7.2004, the dispute between the plaintiff and the defendant – Institution was to be referred to an arbitrator appointed by the Committee of Management of the Society which governed the Institution but the Committee of Management of the Institution as well as of the Society have not appointed any arbitrator for resolution of the dispute between the plaintiff and the Institution. In the aforesaid Original Suit No. 175 of 2012, the petitioners filed an application numbered as Paper No. 23-C2 stating that the original agreement dated 6.7.2004 was not available in their office and, therefore, prayed that the plaintiff be directed to file the original agreement dated 6.7.2004. The said application was dismissed by the trial court vide its order dated 10.11.2014 and an application for review of the said order was also rejected by the trial court vide its order dated 13.7.2018. The trial court vide its order dated 24.1.2018 directed the petitioners – defendants to file the original agreement dated 6.7.2004. Subsequently, the petitioners filed an application numbered as Paper No. 31-C under Section 8 of the Act, 1996 praying that the dispute be referred to an arbitrator in light of the pleadings of the plaintiff – respondent no. 1. The

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said application was dismissed by the trial court vide its order dated 5.12.2019 and the consequential Misc. Civil Appeal No. 04 of 2020 has been dismissed by the appellate court vide its order dated 15.3.2022. The courts below have rejected the plea of the petitioners to refer the matter to the arbitrator on the ground that the original agreement dated 6.7.2004 is not on the records of the case and under Section 8 of the Act, 1996, the application could not be entertained unless the same was accompanied by the original arbitration agreement or a duly certified copy thereof. Hence, the present petition.

It was argued by the counsel for the petitioners that the written agreement dated 6.7.2004 and the existence of arbitration clause in the agreement was admitted by the plaintiff and a photo copy of the same was already on record of the case as would be evident from the order dated 5.12.2019. It was argued that the arbitration agreement was not in possession of the petitioners – defendants and the courts below have taken a hyper technical view in dismissing the application of the petitioners for referring the matter to the arbitrator on the ground that the original agreement dated 6.7.2004 containing the arbitration clause had not been filed and was not on record. It was argued that it was within the jurisdiction of the trial court to consider the matter for reference to arbitrator if the photo copy of the agreement which was admitted by the parties was on record and the application of the petitioners – defendants could not have been dismissed only on the ground that the original agreement containing the arbitration clause was not on record. In support of his contention, the counsel for the petitioners has relied on the judgment of the Supreme Court reported in *Rashtriya Ispat Nigam Limited & Anr. vs. M/s Verma Transport Company 2006 (7) SCC 275* as well as the

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judgment of this Court reported in *M/s. Kapila Krishi Udyog Ltd. vs. M/s. Kamdhenu Cattle Feeds Pvt. Ltd. 2018 (11) ADJ 274.*

Rebutting the arguments of the counsel for the petitioners, the counsel for the respondents has argued that the application under Section 8 of the Act, 1996 was filed by the petitioners only to delay the proceedings in Original Suit No. 175 of 2012 and before the institution of the aforesaid case by the plaintiff – respondent no. 1, the defendants – petitioners failed to appoint an arbitrator despite repeated notices having been sent to them by the plaintiff – respondent no. 1. It was argued that under Section 8 of the Act, 1996, an application for referring the matter to the arbitrator cannot be entertained if the original agreement or its certified copy is not on record and, therefore, no error has been committed by the courts below in rejecting the application numbered as Paper No. 31-C filed by the petitioners – defendants. It was argued that for the aforesaid reasons, the petition lacks merit and is liable to be dismissed.

I have considered the submission of the counsel for the parties.

Before proceeding further, it would be relevant to note that the agreement dated 6.7.2004 is admitted by the plaintiff – respondent no. 1. In fact, the agreement dated 6.7.2004 executed by the parties is the basis of Original Suit No. 175 of 2012. A perusal of the plaint instituting Original Suit No. 175 of 2012 shows that the plaintiff has claimed violation of the aforesaid agreement by the petitioners – defendants and has also prayed for a decree declaring him to be in service under the agreement dated 6.7.2004. It has been stated in the plaint that Clause – 19 of the said agreement provides for reference to

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arbitration in relation to any dispute arising out of the aforesaid agreement. A photo copy of the agreement dated 6.7.2004 is also on the records of the case in the trial court and the said fact is evident from the order dated 5.12.2019 passed by the trial court wherein the trial court has acknowledged the availability of a photo copy of the agreement on record. A copy of the agreement dated 6.7.2004 has also been annexed with the present petition and has not been denied by the respondent in his counter affidavit. Paragraph 19 of the agreement provides as follows : -

“19. The committee and the Party No. 1 agree that any dispute arising out of or relating to his contract including any disciplinary action leading to the dismissal or removal from service or reduction in rank etc. shall be referred for arbitration of any person to be nominated by the Chairman of Society running the School and if the arbitrator fails or neglects to act or becomes incapacitated, the Chairman of the Society shall nominate any other person to fill the vacancy of arbitrator.”

The agreement dated 6.7.2004 and the existence of the aforesaid arbitration agreement has also been admitted by the defendants – petitioners in their present petition as would be evident from the averments made in Paragraph nos. 3 and 4 of the petition. Further, the filing of the application under Section 8 of the Act, 1996 also indicates that the existence of the agreement dated 6.7.2004 as well as the arbitration clause in the said agreement is admitted by the defendants – petitioners.

In light of the aforesaid facts, the issue before this Court is as to whether mere absence of the original agreement dated 6.7.2004 or a certified copy of the same on the record can, by itself, be a reason to dismiss an application filed under Section 8 of the Act, 1996 to refer the matter before the arbitrator.

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Section 7 of the Act, 1996 provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement and shall be in writing. Section 7(4)(c) of the Act, 1996 provides that an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which existence of the agreement is alleged by one party and not denied by the other. In ***S.N. Prasad, Hitek Industries (Bihar) Ltd. vs. Monnet Finance Limited & Ors. 2011 (1) SCC 320***, the Supreme Court observed that the statements of claim and defence occurring in Section 7(4)(c) of the Act, 1996 was not restricted to the statements filed before the arbitrator but also included the statements filed before any court. The observations of the Supreme Court in Paragraph 12 of the judgment reported in ***S.N. Prasad (supra)*** are reproduced below : -

“12. But the words, “statements of claim and defence” occurring in Section 7(4)(c) of the Act, are not restricted to the statements of claim and defence filed before the arbitrator. If there is an assertion of existence of an arbitration agreement in any suit, petition or application filed before any court, and if there is no denial thereof in the defence / counter/written statement thereto filed by the other party to such suit, petition or application, then it can be said that there is an "exchange of statements of claim and defence" for the purposes of Section 7(4) (c) of the Act. It follows that if in the application filed under Section 11 of the Act, the applicant asserts the existence of an arbitration agreement with each of the respondents and if the respondents do not deny the said assertion, in their statement of defence, the court can proceed on the basis that there is an arbitration agreement in writing between the parties.”

A reading of Section 8 with Section 7(4)(c) of the Act, 1996 leads to the conclusion that the requirement in Section 8(2) that the original arbitration agreement or its duly certified copy should accompany the application filed under Section 8(1)

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is not mandatory and the judicial authority shall decide the application if the existence of the arbitration agreement in the plaint is alleged by the plaintiff and not denied by the defendants.

The conditions which are required to be satisfied under Section 8 of the Act, 1996 for referring the matter to arbitration are (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; and (4) the other party applies to the court for referring the matter to arbitration before it submits his first statement on the substance of the dispute. As held by the Supreme Court in *Ameet Lalchand Shah & Ors. vs. Rishabh Enterprises & Anr.* 2018 (15) SCC 678 and *Emaar MGF Land Limited vs. Aftab Singh* 2019 (12) SCC 751, the nature of examination by the judicial authority regarding the existence of a valid arbitration agreement is only on a *prima facie* basis, i.e., the judicial authority has only to consider the question as to whether the parties have a valid arbitration agreement and cannot refuse to refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists. In this context, the observations in Paragraphs 28 and 29 in *Ameet Lalchand Shah (supra)* are reproduced below :-

“28. Principally four amendments to Section 8(1) have been introduced by the 2015 Amendments - (i) the relevant "party" that is entitled to apply seeking reference to arbitration has been clarified / amplified to include persons claiming "through or under" such a party to the arbitration agreement; (ii) scope of examination by the judicial authority is restricted to a finding whether "no valid arbitration agreement exists" and the nature of examination by the judicial authority is clarified to be on a "prima facie" basis; (iii) the cut-off date by which an application under Section 8 is to

be presented has been defined to mean "the date of" submitting the first statement on the substance of the dispute; and (iv) the amendments are expressed to apply notwithstanding any prior judicial precedent. The proviso to Section 8(2) has been added to allow a party that does not possess the original or certified copy of the arbitration agreement on account of it being retained by the other party, to nevertheless apply under Section 8 seeking reference, and call upon the other party to produce the same.

29. Amendment to Section 8 by the 2015 Act, are to be seen in the background of the recommendations set out in the 246th Law Commission Report. In its 246th Report, Law Commission, while recommending the amendment to Section 8, made the following observation/comment:-

LC Comment:

The words "such of the parties ... to the arbitration agreement" and proviso (i) of the amendment have been proposed in the context of the decision of the Supreme Court in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya* in cases where all the parties to the dispute are not parties to the arbitration agreement, the reference is to be rejected only where such parties are necessary parties to the action – and not if they are only proper parties, or are otherwise legal strangers to the action and have been added only to circumvent the arbitration agreement. Proviso (ii) of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. **The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie.** The amendment also envisages that there shall be a conclusive determination as to whether the arbitration

agreement is null and void.”

(emphasis added)

Apparently, the judicial authority has to only decide on a *prima facie* basis as to whether a valid arbitration agreement exists between the parties because of which the dispute brought before it was to be referred to an arbitrator. In any case, under Section 16(1) of the Act, 1996, the power to finally decide on the existence or the validity of the arbitration agreement vests with the Arbitral Tribunal itself. ***The requirement that the original agreement containing the arbitration clause should be on record is only to expedite the proceedings and to enable the court to reach a prima facie conclusion regarding the existence of an arbitration agreement with reference to the dispute brought before the judicial authority.*** In the circumstances, if a photo copy of the said arbitration agreement is already on record and is not denied by either of the parties, the mere absence of the original agreement cannot be a reason for the judicial authority to refuse to consider the application filed under Section 8(1) of the Act, 1996. In this context, it would also be appropriate to refer to the judgment of the Supreme Court in ***Bharat Sewa Sansthan vs. U.P. Electronics Corpn. Ltd. 2007 (7) SCC 737***. In the aforesaid case, the High Court had allowed the application under Section 8(1) of the Act, 1996 even though the original agreement was not on record and there was a dispute between the parties as to who was in possession of the original agreement but the photo copies of the agreement were on record of the court. The Supreme Court approved the order of the High Court and refused to interfere in the same. The observations of the Supreme Court in Paragraphs 23 and 24 of the aforesaid judgment which are relevant for the

purpose are reproduced below : -

“23. The High Court in writ petition filed by the respondent-Corporation against the order of the trial court, allowed the application of the respondent-Corporation filed under Section 8(1) of the Arbitration Act. It was the specific case of the respondent-Corporation before the High Court that the original agreements are in the possession of the appellant-Sansthan, whereas the stand of the appellant-Sansthan was that the original agreements are not in its possession.

24. The respondent-Corporation placed on record of the trial court photocopies of the agreements along with an application under Section 8(1) of the Arbitration Act. The High Court, in our view, has rightly held that the photocopies of the lease agreements could be taken on record under Section 8 of the Arbitration Act for ascertaining the existence of arbitration clause. Thus, the dispute raised by the appellant-Sansthan against the respondent-Corporation in terms of the arbitration clause contained in the lease agreement is arbitral.”

In the present case also, the photo copy of the agreement dated 6.7.2004 which is the basis of Original Suit No. 175 of 2012 and which contains the arbitration clause in Clause – 19 is admitted between the parties and there is a dispute as to which party is in possession of the original agreement. However, the contents of the photo copy of the agreement dated 6.7.2004 has not been disputed by either of the parties. In the circumstances, the application of the petitioner for referring the matter to the arbitrator could not have been dismissed merely on the ground that the original agreement was not on record or that the application 31-C was not accompanied by original agreement or its certified copy. Clearly, the orders dated 5.12.2019 and 15.3.2022 passed by the courts below are contrary to law and are liable to be set-aside and the matter is to be remitted to the trial court for a fresh decision on the application (numbered as Paper No. 31-C) filed by the petitioners for referring the matter

to the arbitrator.

The petition is *allowed*.

The orders dated 5.12.2019 passed by the Civil Judge (Senior Division), District Fatehpur in Original Suit No. 175 of 2012 and 15.3.2022 passed by the Additional District Judge, Court No.03, District Fatehpur in Misc. Civil Appeal No. 04 of 2020 are, hereby, quashed.

The matter is remitted back to the Civil Judge (Senior Division), District Fatehpur to pass fresh orders on the application numbered as Paper No. 31-C filed by the petitioners in Original Suit No. 175 of 2012 within a period of one month from the date a certified copy of this order is produced before him in light of the observations made above.

Order Date :- 2.9.2022
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