

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Reserved on: 15th February, 2023
Pronounced on: 14th March, 2023

+ REVIEW PETITION 20/2023 in ARB.P.762/2019

CHADHA MOTOR TRANSPORT COMPANY PVT. LTD.

.....Respondent/ Review Petitioner
Through: Mr. P.S. Patwalia, Sr. Advocate
with Ms. Natasha Dalmia, Mr.
Vanshdeep Dalmia & Ms. Anisha
Jain, Advocates.

versus

BARINDERJIT SINGH SAHNI Petitioner

Through: Mr. S.C. Singhal, Advocate.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

REVIEW PETITION 20/2023

1. The present Review Petition under Order XXXXVII Rule 1 read with Section 151 of the Code of Civil Procedure, 1908 (*hereinafter referred to as "CPC, 1908"*) has been made by the Petitioner (who was the Respondent in the main petition) for procedural review of the Order dated 27.09.2022 passed in the Arbitration Petition bearing No. ARB.P. 762/2019 under Section 11 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as the "Act, 1996"*).

2. The facts in brief are that Arbitration Petition under Section 11 of the Act, 1996 was filed on behalf of the Respondent wherein amongst other objections, one objection taken by the Petitioner was that the Respondent had not raised any issue on the maintainability of the Civil Suit bearing No. 306/2018 filed by the respondent, or it being barred by the Arbitration but had vehemently contested the suit by filing the Written Statement. The Suit was taken up on twelve occasions and at no point of time did the Respondent file any Application under Section 8 of the Act, 1996 for Invocation of Arbitration proceedings or for resolving the disputes through Arbitration. The Respondent by filing the Written Statement had waived off the right to Arbitration. This issue is fundamental and goes to the root of the matter and thus, the impugned Judgement/Order dated 27.09.2022 allowing the Arbitration Petition under Section 11 of the Act, 1996, is liable to be reviewed.

3. The petitioner had challenged the impugned Judgement/Order dated 27.09.2022 before the Supreme Court *vide* Special Leave Petition (Civil) No. 23169/2022, wherein liberty had been granted to the petitioner to seek review of the Order/Judgement dated 27.09.2022 for considering its objections in regard to the maintainability of the Arbitration Petition under Section 11 of the Act, 1996. Hence, the present Review Petition has been filed on the ground that despite the specific plea of abandonment of the right of Arbitration by the respondent which was noted in the impugned Judgement/Order dated 27.09.2022, no finding has been given on this aspect.

4. The main contention of the petitioner is that by participating and by filing the Written Statement in the proceedings before the civil court and

attending the matter on twelve dates, the respondent is now estopped from resorting to Arbitration and the impugned Judgement/Order dated 27.09.2022 is liable to be set aside.

5. **The Respondent in its Reply** has taken the preliminary objection that the present Review Petition is not maintainable as it has not been filed by the competent person on behalf of the Petitioner company as there is no resolution in favour of Mr. Harpreet Singh Chadha who claims himself to be one of the Director to sign and file the present petition.

6. It is further claimed that the ground that the answering respondent was not entitled to seek Arbitration under Section 11(6) of the Act, 1996 was not canvassed before this Court. The only ground taken was that the Partnership Firm was not registered and that on the demise of Late Harbans Singh, father of the answering respondent, the partnership stood dissolved as there were only two partners. These grounds were duly considered while allowing the Arbitration Petition under Section 11(6) of the Act, 1996 for appointment of the Arbitrator.

7. Furthermore, the Civil Suit bearing No. CS(OS) 309/2018 had been filed against the respondent and three other defendants who admittedly did not claim themselves to be the partners of the firm or the legal heirs of Late Harbans Singh Sahni, and therefore, the respondent could not have taken the plea of appointment of an Arbitrator in the presence of three other parties who were not a signatory to the Partnership Deed containing the arbitration clause and, therefore, the application under Section 8 of the Act, 1996 for referral of disputes to arbitration could not be resorted to in the said suit. Moreover, the parties had withdrawn the said Suit with permission to file it afresh which was permitted subject to costs of Rs.

75,000/- . However, no proceedings thereafter have been filed as the petitioner is fully aware that they have no case at all. It is denied that the respondent had waived off its right to invoke Arbitration.

8. In fact, the Supreme Court did not find any substance in the Special Leave Petition (Civil) but only on the request of the petitioner that it may be permitted to file an application for review for consideration of its plea of non-maintainability of the Arbitration Petition, that the liberty has been granted. It is submitted that the present Review Petition is without merit and is liable to be dismissed.

9. **Submissions heard.**

10. To appreciate the contentions of the parties, it would be pertinent to refer to the background giving rise to the disputes. Mr. Charanjit Singh Chadha, Director of the petitioner Company, who is the real maternal uncle of the Respondent and other family members of the Respondent were carrying out various businesses in Delhi, including the Partnership business relating to Liquor shop at 2711, Sadar Thana Road, Sadar Bazar, Delhi.

11. The licence for liquor shop was awarded in the name of the petitioner. The business was agreed to be conducted by the partnership Firm, namely, M/s Chadha Sahni Corporation under the Partnership Deed dated 19.06.2003 between Late Harbans Singh Sahni (father of the Respondent/Barinderjit Singh Sahni) and the petitioner Company, both having equal share in profit and loss and the Head Office of the Firm was agreed to be at Amritsar, Punjab. The profit which accrued from this partnership business was added in the capital account of individual party i.e., Late Harbans Singh Sahni and the petitioner, vide which certain

personal withdrawals were made by the parties from cash sales. Eventually, disputes arose and the petitioner filed a Civil Suit bearing No. CS(OS) 306/2018 seeking a Declaration that it was the exclusive owner of the liquor shop and for an Injunction to restrain the respondent, and the aforementioned defendants from interfering in the business of the petitioner. The Written Statement was filed by the respondent and the said Suit continued for 12 dates whereafter it was withdrawn by the petitioner. Subsequently, the respondent filed the Arbitration Petition bearing No. ARB.P. 762/2019 for appointment of the Arbitrator and same was allowed *vide* impugned Judgement/Order dated 27.09.2022.

12. The basic argument of the petitioner is that the respondent had abandoned its right to seek resolution of the disputes through Arbitration by participating in the proceedings before this Court in Civil Suit bearing No. CS(OS) 306/2018 which were initiated by the petitioner and by not filing any Application under Section 8 of the Act, 1996 for referral of the disputes to Arbitration.

13. The question that arises is whether the participation of the opposite party in the Civil Suit bearing No. CS(OS) 306/2018 amounts to abandonment of its right to seek resolution of disputes through Arbitration and to get an Arbitrator appointed in respect of the disputes between the parties.

14. To appreciate this argument, it would be pertinent to reproduce Section 8 of the Act which reads as under:

“8. Power to refer parties to arbitration where there is an arbitration agreement.—

(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 so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(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.

(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.”

15. From a bare perusal of Section 8 of the Act, 1996, it is evident that despite there being an Arbitration Agreement, the respondent may accept the resolution of the disputes through civil litigation rather than Arbitration. However, if the respondent has any objection, then it is required to move an Application under Section 8 of the Act, 1996 not later than the date of submitting its first statement on the substance of the disputes, and the Court notwithstanding any judgement, decree or order of the Supreme Court or any Court may refer the parties to Arbitration.

16. Admittedly, the respondent had filed the Written Statement and not taken objections to the existence of the Arbitration clause.

17. The **first question** that arises for the consideration is whether the dispute in Civil Suit bearing No CS(OS) 306/2018 was amenable to arbitration in the first instance.

18. The petitioner in the Civil Suit bearing No. CS(OS) 306/2018 sought the following reliefs-

A. Pass a declaration that the Plaintiff Company has the absolute rights, title and interest in Liquor shop being operated from leased premise 27.11, Sardar Thana Road,

Sardar Bazar, Delhi under the L7 Liquor License No. L7/2003/000001 issued by the Excise Department.

B. Pass a decree of permanent injunction restraining the Defendants 1 to 4, their representatives, employees, agents, heirs, relatives etc. from entering the Liquor shop of the Plaintiff Company and interfering with the day to day business affairs of the Liquor Shop, in whatsoever manner.

19. The Kerala High Court in Shriram Transport Finance Co. Ltd. vs. Naduvacheri Balakrishnan 2017 SCC OnLine Ker 8983 while dismissing the revision petition filed against the dismissal of Application under Section 8 of the Act, 1996 observed that though the power to grant or refuse an interim order of either mandatory or prohibitory injunction as available under Order XXXIX Rules 1 and 3 of CPC, 1908 is also vested with the Arbitral Tribunal under Section 17 of the Act, 1996, but it does not imply that the Arbitral Tribunal has any jurisdiction to pass a prohibitory injunction or mandatory injunction or a decree of declaration of title to immovable property of status of a person. So, the Suit either for declaration of title, right or interest in an immovable property or a permanent mandatory injunction is not amenable to any of the provisions contained under the Act, 1996.

20. The relief of Declaration and permanent injunction as sought in Civil Suit by the petitioner, was not amenable to arbitration and thus, participation of the respondent in the Civil suit would not amount to waiver of right to invoke arbitration.

21. The **second aspect** is whether the application under Section 8 of the Arbitration Act, 1996 could have been maintainable in the first instance, when three of the four defendants in the Civil Suit were not signatory to

the Partnership Deed containing the arbitration clause. Admittedly, the Civil Suit bearing No. C S(OS) 306/2018 was filed by the petitioner not only against the Respondent but also against the three other defendants, namely, Daljit Kaur Sahni, wife of Barinderjit Singh Sahni, Sartar Singh Sahni, son of Barinderjit Singh Sahni and Jeet Kaur Sahni, widow of Late Harbans Singh Sahni who were neither partners nor were they signatory to the Partnership Deed containing the Arbitration Agreement. The question is whether the application under Section 8 of the Act, 1996 was maintainable at all.

22. In the case of Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya and Anr. JT 2003 (4) SC 58, similar facts as in hand came up for consideration before the Apex court. The Suit seeking relief of dissolution of Partnership had been filed by the plaintiff where all the defendants to the Suit were not the partners in the Partnership Deed which contained the Arbitration clause. It was observed that since such persons who were not a party to the Partnership Agreement, could not be held bound by it; only a part of the subject matter could have been referred to the Arbitration. Moreover, there is no powers conferred on the Ld. Arbitrator or the Court to add parties who are not a party to the Agreement in Arbitration proceedings. A reference was made to the language of Section 8 of the Act, 1996 which uses the words “*in a matter*” which is subject matter of an Arbitration Agreement, which implies that the Court is required to refer parties to Arbitration in respect of the matter which the parties have agreed to refer and which comes within the ambit of Agreement. The words “*the matter*” indicate that the entire subject matter of the Suit should be subject to Arbitration Agreement. However, where the Suit is

commenced where some of the reliefs lie outside the Arbitration Agreement and also some of the parties in the Civil Suit are not a party to the Arbitration Agreement, then there is no question of preferring an intervening Application under Section 8 of the Act, 1996. There is no bifurcation of reliefs envisaged or else the Legislature would have used appropriate language to permit such a course. Furthermore, such bifurcation of relief into two parts, one by way of Civil Suit and other by way of Arbitration, would not only inevitably delay the proceedings, but also defeat and frustrate the very purpose of speedy disposal of disputes or decreasing the costs of litigation. It was thus clarified that it is only when the entire subject matter can be referred to Arbitration and when all the parties to the Suit are also a party to the Arbitration Agreement, that such an objection about non-maintainability of the Suit can be taken.

23. Admittedly, the Civil Suit bearing No. CS(OS) 306/2018 was filed by the petitioner against the Respondent and three other defendants who were not signatory to Partnership Deed containing Arbitration Clause. Hence, the objection about non-maintainability of the Civil Suit could not have been taken by the Respondent as has been rightly contended on behalf of the respondent, and thus, the question of waiver of arbitration does not arise.

24. The **third aspect** is whether the participation of the respondent in a civil suit initiated by the petitioner in regard to its right, title or claim under the partnership business debars the respondent from initiating independent proceedings by way of arbitration to seek its independent remedies under the Partnership Deed. The objection under Section 8 of the Act, 1996 has to be interpreted to be necessarily confined to that

particular civil litigation initiated against a party and its scope cannot be extended to all other litigation which may subsequently ensue between the parties. Merely because the respondent participated in the Civil Suit bearing No. CS(OS) 306/2018 filed by the petitioner, cannot be interpreted as a waiver to arbitration for all future litigation and does not debar the respondent from seeking the settlement of his disputes/claims against the petitioner through Arbitration, when admittedly there exists an Arbitration clause between the parties. To give such interpretation would not only be object of the Arbitration Act, 1996 but is also against the canons of interpretation of the statute. If the argument addressed by the petitioner is accepted that the referral of the disputes to the Arbitration had been abandoned, then it would lead to an anomalous situation as the respondent would be left with no option of getting his disputes with the petitioner resolved through Arbitration, despite there being a specific Arbitration Agreement.

25. Similar question was considered by the Co-ordinate Bench of this Court in Jyotsana Sinha vs. Snigdha Paper and Packaging LLP and Ors. MANU/DE/0637/2023, wherein a similar objection has been taken that a Suit had already been filed by the plaintiff before the Commercial Court which estops the petitioner from invoking and relying on the Arbitration Agreement. However, this argument was rejected by observing that the plea of the matter being amenable to Arbitration was to be considered only by the Court where the Suit filed by the plaintiff was pending adjudication. Since the existence of Arbitration Agreement and its due invocation was not denied by the parties, the Court before which the Arbitration Petition was filed, cannot go into this question with the liberty

to the parties to contend that the transaction for which the Suit has been filed also relates or has an effect on the claim sought to be agitated by the respondent, before the Arbitrator.

26. Learned counsel for the petitioner has relied upon the decision in SSIPL Lifestyle Private Limited vs. Vama Apparels (India) Private Limited and Another 2020 SCC OnLine Del 1667. However, the said judgement merely observes that the application under Section 8 of the Act, 1996 has to be filed within the time in which the first statement of defence can be filed. It does not address the issue and is not applicable to the facts in hand.

27. Therefore, the objection taken by the petitioner about non maintainability of Petition under Section 11 of the Arbitration Act, 1996 on the ground that the respondent had abandoned his right to claim referral of disputes through Arbitration, is without any merit.

28. Accordingly, the Review Petition is without any merit and the same is hereby dismissed.

**(NEENA BANSAL KRISHNA)
JUDGE**

MARCH 14, 2023

S.Sharma