

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

CJ Court

Reserved on: 25.03.2022
Pronounced on: 27.06.2022

Arb P No.6/2020

Anita Mehta ...Petitioner(s).

Through: Mr. Faheem Nisar Shah, Advocate.

Vs.

Gulkand Hues Private Ltd., & anotherRespondent(s)

Through: Mr. Z. A. Shah, Sr. Advocate, with
Mr. A. Hanan, Advocate.

**CORAM:
HON'BLE THE CHIEF JUSTICE**

JUDGMENT

01. The petitioner-Anita Mehta has applied under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator in terms of the agreement dated 01.06.2016 to resolve the dispute inter-se the parties as the said agreement provides for resolution of disputes through a sole arbitrator to be appointed mutually by the parties.

02. There is no dispute to the fact that the petitioner and the respondents entered into an agreement dated 01.06.2016 wherein it was agreed that the petitioner would provide her premises consisting of a portion on the second floor of a building known as Mahatta's Building to the respondents for the purposes of running a Café named "T Room and

Chai Jaai” in lieu of which she would be provided with 25% of the business revenue on monthly basis. In accordance with the aforesaid agreement, a café was set-up but it is alleged that the respondent no.1 failed to release the due share of payment to the petitioner and at the same time committed several breaches of the terms and conditions of the contract, namely, encroaching upon certain other portions which were not let-out.

03. On account of the above disputes, before the petitioner could take any action, respondents served a notice dated 10.06.2019 upon the petitioner counter alleging that the petitioner failed to comply with the terms and conditions of the agreement and thus filed a suit for specific performance of the agreement dated 01.06.2016 and for a decree of permanent injunction in the court of 1st Munsiff, Sriangar.

04. The petitioner in the aforesaid suit, after putting in appearance, filed an application under Order 7 Rule 11 CPC for rejection of the plaint on the ground that the suit is barred by limitation and the provisions of Section 56(f) read with Section 21(d) of the Specific Relief Act. The aforesaid application was rejected and an order of status-quo was passed on 29.07.2019 against which an appeal has been preferred by the petitioner before the Principal District Judge at Srinagar wherein vide order dated 02.08.2019 the operation of the order of the trial court impugned therein has been stayed till next date.

05. The petitioner, pending the above suit and the appeal, vide notice dated 29.10.2020 terminated the agreement dated 01.06.2016. In response

thereof respondent no.1 filed reply on 19.11.2020. In view of the said response, the petitioner invoked the arbitration clause vide communication dated 26.11.2020 for referring the dispute to the sole arbitrator but as there was no response and the parties mutually failed to agree to appoint a sole arbitrator, the petitioner has approached this Court under Section 11(6) of the Act.

06. The above facts clearly reveal that there are disputes inter-se the parties in relation to the agreement dated 01.06.2016 and that the petitioner has invoked the arbitration clause vide communication dated 26.11.2020 but in vain.

07. At the same time, it is worth noting that respondent no.2 had instituted a civil suit for specific performance and a decree for permanent injunction in respect to the above agreement wherein petitioner has appeared and moved application under Order 7 Rule 11 CPC instead of filing a written statement.

08. It is in the above background that the court has to examine if the disputes between the parties have to be referred to the sole arbitrator as envisaged under the agreement dated 01.06.2016 to be appointed by the court.

09. I have heard Mr. Faheem Nisar Shah, learned counsel for the petitioner and Mr. Z. A. Shah, learned senior counsel assisted by Mr. A. Hanan, Advocate, for the respondents.

10. Mr. Shah has raised a preliminary objection that the petitioner is not entitled to seek appointment of an arbitrator as she had waived her

right in this regard by not moving an application under Section 8 of the Act before the civil court, alleging that the dispute is covered by the arbitration clause and need to be referred to the arbitrator.

11. Mr. Shah submitted that the matter be disposed of on consideration of the above preliminary objection and that there is no necessity for the respondents to file any reply as the facts are admitted and not disputed.

12. In response, Mr. Faheem Nisar Shah, learned counsel for the petitioner, submitted that in view of the amendment of the year 2015 in the Act, whereby Section 11(6A) had been inserted, the court in appointing an arbitrator is only supposed to examine the existence of the arbitration agreement and nothing else. Thus, whether the petitioner has waived her right to seek appointment of an arbitrator is not a question which can be adjudicated upon by this Court at this stage.

13. It may be relevant to note that in *Konkan Railway Corporation Ltd. and Others v. M/s Mehul Construction Company : (2000) 7 SCC 201*, it was laid down that the powers of the Chief Justice or his nominee under Section 11(6) of the Act are administrative in nature and that they does not act as a judicial authority in appointing an arbitrator. The above view was followed and reiterated in the *Konkan Railway Corporation Ltd. & anr. v. Rani Cosnstruction Pvt. Ltd. : (2002) 2 SCC 388*. Subsequently, in *S.B.P. & Company v. Patel Engineering Ltd., & anr. : (2005) 8 SCC 618*, a seven judges' bench over-ruled the above view and held that the power to appoint an arbitrator under Section 11 of the Act is a judicial power and not an administrative one and that the Chief Justice or his

designate judge have the right to decide certain preliminary aspects while proceeding to appoint an arbitrator. It was clarified that the Chief Justice or his designate in deciding an application under Section 11(6) of the Act has the power to decide:

- (a) Whether the party making the application has approached the proper High Court;
- (b) Whether there is an arbitration agreement; and
- (c) Whether the party applying under Section 11 of the Act is a party to such an arbitration agreement.

It was further clarified that the Chief Justice or his designate in proceeding with the appointment of an arbitrator may chose to decide the following preliminary aspects:

- (a) Whether the claim is dead or alive or is otherwise barred by limitation; and
- (b) Whether the parties have concluded the contract by recording mutual satisfaction or by receiving the final payment without objection.

However, the Chief Justice or his designate should ordinarily leave the issues such as whether a claim set-up falls within the arbitration clause or stand excluded and any matter touching to the merits of the claim involved in the arbitration.

14. Pursuant to the recommendations of the Law Commission, Section 11(6A) was introduced/ added vide Arbitration and Conciliation (Amendment) Act No.3 of 2016 with effect from 23.10.2015 and it was provided as under:

“(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”

15. In view of the above amendment and keeping in mind the entire law on the subject, a three judges’ bench of the Supreme Court in ***Mayavati Trading Private Limited v. Pradyut Deb Burman : (2019) 8 SCC 714*** held that the position of law that prevails after the insertion of Section 11(6A) of the Act is that the Supreme Court or the High Court while considering any application under Sections 11(4) to 11(6) of the Act has to confine itself to the examination of existence of arbitration agreement and nothing more or nothing less, and leave any other preliminary issues to be decided by the arbitrator.

16. The above view has been followed by the Supreme Court in ***Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited : (2020) 2 SCC 455*** and it was held that the High Court erred in dismissing the petition for appointment of an arbitrator on the ground that the claim was barred by limitation as such a preliminary objection ought to have been left to be decided by the arbitrator and that the court was only required to determine the existence of the arbitration agreement and if it so existed, it was bound to appoint an arbitrator.

17. In other words, in view of Section 11(6A) of the Act, the Chief Justice or his designate in considering a petition for appointment of an

arbitrator under Section 11 of the Act is supposed to only examine as to the existence of the arbitration agreement pertaining to the disputes raised between the parties and that all other issues have to be left to be adjudicated upon by the arbitrator.

18. It may not be out of context to mention that the aforesaid newly added sub-Section (6A) of the Act has been omitted by Act No. 33 of 2019 but the date from which the said omission would come into force has not been notified meaning thereby that the said provision continues to exist.

19. In view of the above legal position the issue whether the petitioner has waived her right to seek arbitration by not taking the plea of arbitrability in proceedings before the civil court is beyond examination by the court at this stage and may be considered by the arbitrator if any and if necessary.

20. Notwithstanding the above I consider it appropriate to deal with the issue whether non-filing of an application under Section 8 of the Act by the petitioner in a suit instituted by the respondents touching the above agreement would preclude the petitioner from seeking appointment of an arbitrator or amounts to waiver of her right in that regard.

21. In this context, Section 8 of the Act is relevant and material which is reproduced herein below:

“8. Power to refer parties to arbitration where there is an arbitration agreement.—1 [(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 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.]

(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:

[Provided that where the original arbitration agreement or a 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 arbitration agreement or its duly certified copy before that Court.]

(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.”

22. A reading of the aforesaid provision would establish that in the event a suit is brought before a court in respect of a matter which is subject matter of an arbitration agreement, if a party to the agreement or any person claiming through him applies to the court on or before the ***date of submitting his first statement on the substance of the dispute***, the court is

under an obligation to refer the parties to the arbitration unless it finds that prima facie no valid arbitration agreement exists.

23. It is in view of the above provision that Mr. Shah, learned senior counsel, submits that as the petitioner has failed to move under Section 8 of the Act, seeking reference of the disputes to the arbitrator and instead chose to contest the matter by filing an application under Order 7 Rule 11 CPC, she has waived her right for the appointment of an arbitrator.

24. In *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya & Ors* : AIR 2003 SC 2252, it was observed that a matter is not required to be referred to the arbitral tribunal if the parties to the arbitration agreement have not filed an application under Section 8 of the Act for referring the dispute to the arbitrator in a pending suit before submitting his *first statement on the substance of the dispute*.

25. In *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Ors.* : 2011 (5) SCC 532, the Apex Court observed that where a suit is filed by one of the parties to an arbitration agreement against the other party to the agreement, and if the defendants in the said suit file an application under Section 8 of the Act, the court will have to decide the following aspects:

- (a) Whether there is an arbitration agreement between the parties;
- (b) Whether all the parties to the suit are parties to the arbitration agreement;
- (c) Whether the disputes which are subject matter of the suit fall within the scope of arbitration agreement;

- (d) Whether the defendant party had applied under Section 8 of the Act before submitting his *first statement of the substance of the dispute*; and
- (e) Whether the relief sought for in the suit are those that can be adjudicated and granted in arbitration.

26. In answering the above aspects especially the fourth aspect; whether the defendant party had applied under Section 8 of the Act *before submitting his first statement on the substance of the dispute*, the court held that filing of any statement, application, affidavit by the defendant prior to the filing of the written statement will be construed as *submission of a statement on the substance of the dispute*, if by filing such a statement, application, affidavit, the defendant expresses his intention to submit himself to the jurisdiction of the court, thus, waiving his right to seek reference to arbitration. However, filing of a reply by a defendant to an application for temporary injunction/ attachment before judgment/ appointment of receiver cannot be considered as submission of a *statement on the substance of dispute* as all that is done is to avoid an interim order being passed against him and does not amount to submission of response on merits.

In other words what the Supreme Court conveys by the above decision is that a party who willingly participates in the proceedings in the suit and subjects himself to the jurisdiction of the Court cannot subsequently be allowed to turn around and say that the parties should be referred to arbitration.

27. In *Rashtriya Ispat Nigam Limited & anr. v. M/s Verma Transport Company* : (2006) 7 SCC 275, the Supreme Court held that the expression “*first statement on the substance of the dispute*” contained in Section 8(1) of the Act is different from the expression “*written statement*” and observed that supplemental and incidental proceedings are not part of the main proceedings and in view of Section 94 of the CPC supplemental incidental proceedings are those which arise out of the main proceeding and that disclosure of defence for the purposes of opposing a prayer of injunction would not necessarily mean *submission of the statement on the substance of the dispute*.

28. An application for rejecting a plaint is distinct from the main proceedings and the averments or the defence if any taken therein is not required to be considered in rejecting the plaint. The rejection of the plaint is on the basis of the averments made in the plaint and no defence or any document filed in defence is to be examined in deciding an application under Order 7 Rule 11 CPC or rejecting the plaint. The provisions of Order 7 Rule 11 CPC are simply procedural in nature so as to prevent vexatious and frivolous litigation and an application there under cannot be regarded as a written statement on the substance of dispute since the defence even if setup in such an application is not supposed to be treated as a defence and examined in deciding such an application. Thus, it would not fall within the expression “*first statement on the substance of the dispute*”.

29. In a case like the one at hand, where the petitioner has not filed any written statement but an application under Order 7 Rule 11 CPC for the rejection of the plaint, it would be in the nature of a supplemental or an incidental proceeding of the procedural nature. It would not be a submission of the first statement on the substance of the dispute and therefore the petitioner is not precluded to move an application under Section 8 of the Act before the Civil Court or to seek appointment of an arbitrator. Accordingly, non filing of an application under Section 8 of the Act in the case at hand would not mean that the petitioner had surrendered to the jurisdiction of the court and has left her right to get the disputes resolved through arbitration so as to debar the petitioner for seeking appointment of an arbitrator through the intervention of the Court.

30. In view of the above, I appoint Shri Justice Mohammad Yaqoob Mir, Former Chief Justice, Meghalaya High Court, as sole arbitrator who shall proceed in the matter in accordance with the provisions of the Act to make an award within the time provided in the Act itself after charging the prescribed fee along with incidental expenses to be shared by the parties.

31. Arbitration Application stands disposed of.

(PANKAJ MITHAL)
CHIEF JUSTICE

Srinagar

27.06.2022

Abdul Qayoom, Secy.

Whether the order is speaking? Yes.

Whether the order is reportable? Yes.