

**HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT
JABALPUR**

Civil Revision No.547 / 2017

**Union of India & Others
vs.
M/s. K. Kapoor & P.R. Mahant Khandwa**

Date of Order	22.06.2018
Bench Constituted	Single Bench
Order delivered by	Hon'ble Shri Justice Sanjay Dwivedi
Whether approved for reporting	Yes
Name of counsels for parties	For Petitioners: Shri N.S. Ruprah, Advocate. For Respondent : Shri Sankalp Kochar, Advocate.
Law laid down	It is a mandatory requirement to file original or certified copy of the agreement alongwith the application under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the matter for arbitration in a pending suit.
Significant Para Nos.	5 to 13

**(ORDER)
(22.06.2018)**

The instant Civil Revision has been filed by the defendants/applicants being aggrieved with the order dated 07.10.2017 passed in Civil Suit No.RCS-A/114/2017 by the District Judge, Khandwa thereby rejecting the application filed by the defendants/applicants under Section 8 read with Section 9 of the Arbitration and Conciliation Act, 1996 ((for short "Act of 1996") read with Section 151 of Code of Civil Procedure, 1908 (for short "CPC").

2. The facts lie in a narrow compass, leading to the case are as under:-

The non-applicant/plaintiff filed a Civil Suit seeking a decree of quashment of demand notice dated 10.08.2017 whereby applicant No.3 raised a demand of Rs.27,48,096/-. The plaintiff/non-applicant is a licensee, having signed an agreement for sale on 17.08.2003 with respect to sale of fruits, sweetmeat, tea and food stuff within the railway premises. As per the plaintiff, he pays an amount of Rs.12,58,312/- in respect of annual licence in intervals of 3-3 months. The plaintiff/non-applicant performs his sale activities with the help of one tea stall and six trolleys. The plaintiff has also been provided space for Bhatti room, Kitchen and Store room on platform No.5 so that he could make the arrangement for selling his products. As the plaintiff is a licensee of the defendants/applicants, despite that the defendants/applicants have made a demand of Rs.27,48,096/- by way of an order dated 10.08.2017 which has given cause for the plaintiff to file civil suit on 01.09.2017 seeking decree of quashment of demand notice dated 10.08.2017. The plaintiff, along with the plaint, has filed an application under Section 80(2) read with Section 151 of CPC and also an application under Order 39 Rules 1 and 2 of CPC. The application under order 39 Rules 1 and 2 was filed on

01.09.2017 with a prayer that temporary injunction be granted against the defendants restraining them from closing the unit of tea stall and other connected units including the space of Bhatti room, Kitchen and Store Room.

On the next date of hearing of Civil Suit i.e. 07.09.2017, the plaintiff filed another application contending that on previous night i.e. 06.09.2017 at about 10:00 pm, defendant No.6 has closed the Bhatti room, Kitchen and Store room occupied by the plaintiff and also sealed both the main doors. The plaintiff has further contended that because of this act of defendants, he is not in a position to run his business and thus, prayer has been made for maintaining *status quo ante* as on the date of institution of Civil Suit i.e. 01.09.2017.

On 07.09.2017, Vakalatnama was filed on behalf of the defendants. The defendants on 13.09.2017 filed an application under Section 8 r/w Section 9 of Act of 1996 and Section 151 of CPC with a request that the matter be sent for arbitration as the Court below has no jurisdiction to hear the matter. In the application, the defendants raised an objection that in view of the Arbitration Clause available in the agreement, Civil Suit was not maintainable. They have also filed reply saying that the plaintiff since using additional area of 238.55 square meter and current market value of that area was Rs.32,000/-, licence fee

@6% was to be charged and thus, it came to Rs.1920/- per square meter and the annual licence fee comes to Rs.4,58,016/-. The plaintiff was given letters time and again for payment against using the additional area.

The plaintiff filed reply to the application submitted by the defendants under Section 8 of Act of 1996 and contended that the Arbitration Clause is not applicable because the period of agreement was only upto 28.02.2003.

The Trial Court considered the respective applications of both the parties analogously and passed the order on 07.10.2017 allowing the application under Order 39 Rules 1 and 2 CPC thereby maintaining *status quo ante* as was existed on 01.09.2017; further directing the plaintiff to submit a bank guarantee on half of amount of Rs.27,48,096/- demanded in the notice and further directing defendants to remove the seal and lock if has been put to the premises occupied by the plaintiff. The said interim order was directed to be maintained for a period of one year as the Court had observed that the Civil Suit would be decided finally within a period of one year. The Court has rejected the application filed under Section 8 r/w Section 9 of Act of 1996 and under Section 151 of CPC holding that the defendants have not raised objection regarding referring the matter to arbitration at the initial stage and observed that they

have also not filed the original copy of the agreement. The Court below further found that in non-compliance of the mandatory requirement of sub-sections (1) and (2) of Section 8, the application is liable to be rejected. The Court further observed that there is no complete bar for filing a Civil Suit as per the provisions of sub-section (3) of Section 8 of the Act of 1996 even during the pendency of Civil Suit, the parties may initiate arbitration proceedings.

3. Learned counsel for the applicants submits that merely because the original or the certified copy of the arbitration agreement was not filed, the order of the Court below rejecting the application is not proper because it cannot be a ground for rejecting the application as photocopy of the agreement was very much on record. It is contended by Shri Ruprah that original agreement was in tatter condition, kept in a plastic cover and was shown to the Court, but the Court below did not examine the same and rejected the application on this hyper-technical ground. It is further contended that if the application under Section 8 of Act of 1996 is allowed, that entails dismissal of the Civil Suit. Therefore, no question arises for granting any interim relief on the application of the plaintiff under Order 39 Rules 1 and 2 of CPC. Shri Ruprah further submits that the notice of Civil Suit was issued on 01.09.2017;

defendants made first appearance on 07.09.2017 when they filed their Vakalatnama and they wanted to file an application under Section 8 of the Act of 1996 on the first date, but it is the Trial Court who suggested the defendants to file such application along with the reply of the application filed by the plaintiff under Order 39 Rules 1 and 2 CPC. Therefore, the application under Section 8 has been filed along with the reply of the application Order 39, Rules 1 and 2 CPC. As such, learned counsel for the applicants criticizes the order of the Court below saying rejection of their application under Section 8 of the Act 1996 cannot be said to be proper as they did not raise any objection regarding maintainability of the suit at the first instance. To bolster his contention, Shri Ruprah, has relied upon certain decisions in the case reported in **(2000) 4 SCC 539 = AIR 2000 SC 1886 [P. Anand Gajapathi Raju and others Vs. P.V.G. Raju (Dead) and others]; (2007) 7 SCC 737 [Bharat Sewa Sansthan Vs. U.P. Electronics Corpn. Ltd.] and (2009) 2 SCC 134 [Shakti Bhog Foods Limited Vs. Kola Shipping Limited]**.

4. *Per contra*, Shri Kochar learned counsel for the non-applicant/plaintiff supports the order impugned of the Court below contending that as per sub-section (2) of Section 8, it is a mandatory requirement that the application must be

accompanied by the original arbitration agreement or a duly certified copy thereof. He submits that in absence of fulfilling the mandatory requirement, the Court below had no option but to reject the application. He also submits that in absence of original agreement, application filed by the defendants under Section 8 of Act of 1969 cannot be entertained. Shri Kochar further submits that the defendants could have raised the objection regarding maintainability of Civil Suit at the very inception, when they put their appearance i.e. on 07.09.2017. He also contended that Civil Suit is not barred even though there is a Clause of arbitration in the agreement. In support of his contention, he relied upon a decision of the Supreme Court in the case reported in **(2008) 2 SCC 602 [Atul Singh and others Vs. Sunil Kumar Singh and others]**; a decision passed in Civil Appeal No.16850/2017 - SLP(C) No.27722/2017 **[Himangni Enterprises Vs. Kamaljeet Singh Ahluwalia]** and a decision of Delhi High Court in the case of **Anil Mahindra & Anr. Vs. Surender Kumar Makkar & Anr.** rendered in C.M.(M) 243/2016.

5. After hearing the rival contentions of the parties and perusing the record, I find it apposite to reproduce Section 8 of Act of 1996, 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 origin 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.”

The language of sub-section (2) of Section 8 of the Act of 1996 is very specific and clear, according to which, I have no hesitation to say that the filing of original arbitration agreement or a duly certified copy thereof was a mandatory requirement for moving an application under Section 8 of the Act of 1996 or raising an objection that the matter should be referred to the arbitration.

6. The Delhi High Court in case of **Anil Mahindra (Supra)** from paragraph 14 onwards has dealt with the aspect of raising objection at initial stage and ultimately, it was observed that raising an objection regarding proceeding in civil suit and moving application under Section 8 of the Act 1996 is nothing but a delaying tactics and as per the requirement of sub-section (1) of Section 8 of the Act of 1996, the party so

applies should submit his intention before submitting his first statement of the substance of the dispute. In the existing facts of the present case, although the defendants made their appearance with Vakalatnama on 07.09.2017, obviously they had notice of the Civil Suit prior to said date. Despite that, they did not file application under Section 8 of Act of 1996 at that stage. Although, learned counsel for the defendants/applicants submitted that the defendants have shown their intention before the Court below, who asked them to submit the application along with the reply of application under Order 39 Rules 1 & 2 CPC. This Court cannot go by the statement of the parties unless it is reflected from the order of the Court below. Even otherwise, looking to the facts and circumstances, in which, Shri Kochar, learned counsel is placing reliance on sub-section (1) of Section 8 of the Act of 1996 that the aforesaid case is not applicable in the fact situation of the present case as the defendants have filed the application along with their reply to the application under Order 39 Rules 1 & 2 CPC only on 13.09.2017, therefore, it is clear that their intention cannot be construed to be tactics for delaying the proceedings. Therefore, in my opinion the said case will not help the non-applicant.

7. In case of **Atul Singh (supra)**, relied upon by Shri Kochar, learned counsel for the non-applicant, the Supreme Court in para-19 has held as under :-

“19. There is no whisper in the petition dated 28.2.2005 that the original arbitration agreement or a duly certified copy thereof is being filed along with the application. Therefore, there was a clear non-compliance with sub-section (2) of Section 8 of the 1996 Act which is a mandatory provision and the dispute could not have been referred to arbitration. Learned counsel for the respondent has submitted that a copy of the partnership deed was on the record of the case. However, in order to satisfy the requirement of sub-section (2) of Section 8 of the Act, defendant 3 should have filed the original arbitration agreement or a duly certified copy thereof along with the petition filed by him on 28.2.2005, which he did not do. Therefore, no order for referring the dispute to arbitration could have been passed in the suit.”

A perusal of the aforesaid enunciation of law makes it clear that the Supreme Court has clearly observed that filing an original arbitration agreement or duly certified copy thereof is mandatory requirement to refer the matter to the arbitration. If there is a non-compliance of the said mandatory requirement, no order for referring the dispute to the arbitration could have been passed in a Civil Suit. Admittedly, in the case at hand, the defendants have not filed the original copy of the arbitration agreement or duly certified copy thereof, therefore, they failed to fulfill mandatory requirement of sub-section (2) of Section 8 of the Act of 1996. Although, the contention of Shri Ruprah, learned counsel for the applicants that the defendants have

shown the original copy of the agreement to the Court which was in tatter condition and was kept in a plastic cover. But in absence of any discussion regarding such aspect mentioned in the order, this Court cannot go by the statement of the counsel for the defendants while hearing the arguments in civil revision. If situation was so, the applicants could have moved an application for review of the order before the Court below pointing out such fact which was not taken note of by the Court below in its order.

8. In a recent decision, reported in **(2017) 5 SCC 185** parties being **Ananthesh Bhakta and Others vs. Nayana S. Bhakta and Others**, the Supreme Court while following the ratio laid down in case of Atul Singh (supra), has held that it is a mandatory requirement to file original or certified copy of the agreement alongwith the application under Section 8 of the Act of 1996 for referring the matter for arbitration in a pending suit.

9. In the case of **Himangni Enterprise (supra)** relied upon by Shri Kochar, learned counsel for the non-applicant, the Supreme Court has observed that merely because an Arbitration Clause exists in the agreement that does not bar the Civil Suit completely. In paragraphs 22, 23 and 24 of said judgment, the Supreme Court has dealt with the said object and in view of sub-section (3) of Section 8 of the Act of 1996 even

during the pendency of the Civil Suit, the arbitration proceedings can be commenced by the parties which clearly indicates that Civil Suit is not completely barred. Accordingly, I find force in the arguments of Shri Kochar that the defendants failed to substantiate what mistake has been committed by the Court below in dismissing the application under Section 8 of the Act, 1996 in absence of complying mandatory requirement of sub-section (2) of Section 8 of the Act of 1996.

10. In case of **Bharat Sewa Sansthan (supra)**, on which Shri Ruprah, learned counsel for the applicants has placed reliance, the Supreme Court in para 23 and 24 has held as under:-

“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 aforesaid judgment, the Supreme Court has observed that on filing a photocopy of the lease agreement which contained Arbitration Clause is sufficient compliance of Section 8 of Act of 1996. However, I am not convinced with the argument of Shri Ruprah for the reason that in the same case as has been relied upon by him, it has been observed by the Apex Court that the case of the parties before the Court below was that the original copy of the agreement was not in their possession whereas in the present case Shri Ruprah has contended that the copy of original agreement is in possession of the defendants though it was in tatter condition. Further, even after observing and rejecting the application under Section 8 of Act, 1996 on the ground that original agreement was not produced before the Court below, the applicants have not shown the original agreement even to this Court. Therefore, the said case does not provide any help to the defendants/applicants herein.

11. The decision in the case of **Shakti Bhog Foods Limited (supra)** relied upon by Shri Ruprah, learned counsel for the applicants, does not help the applicants because the

Supreme Court after dealing with the facts of that case has been pleased to observe that the mandatory requirement of filing original arbitration agreement or duly certified copy of the same has no relevance in the said case.

12. In the case of **P. Anand Gajapathi Raju (supra)**, relied upon by Shri Ruprah, the Supreme Court has not specifically dealt with the situation as Shri Ruprah is pointing out, but on the contrary the Supreme Court has observed that if parties are agreed to refer the matter to arbitration, the Court in which Civil Suit is pending, should have no hesitation to refer the matter to the arbitration. But, here in this case, the non-applicant was objecting for referring the matter to arbitration as the original arbitration agreement was not produced before the Court.

13. In view of the above settled position of law, I am of the opinion that the Court below has not committed any error exceeding its jurisdiction vested in it and there is no illegality or material irregularity found in the order impugned. Thus, the revision fails and is hereby **dismissed**. No order as to costs.

(Sanjay Dwivedi)
Judge

shukla