

(2018) 04 SHI CK 0010

In the High Court Of Himachal Pradesh

Case No : CMP(M) No. 1019 of 2017 & CRST No. 20072 of 2017

State of Himachal Pradesh & anr.

APPELLANT

Vs

M/S Sanbir Motor Store.

RESPONDENT

Date of Decision : 25-04-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8(1)

Citation : (2018) 04 SHI CK 0010

Hon'ble Judges : DHARAM CHAND CHAUDHARY, VIVEK SINGH THAKUR

Bench : Division Bench

Advocate : SC. Sharma, Vikas Rathore, Narinder Guleria, Ags, Kunal Thakur, Dy. AG.

Final Decision : Dismissed

Judgement

Dharam Chand Chaudhary, J.

1.The delay of 162 days as occurred in filing the revision petition against order dated 28.7.2016 passed by learned Senior Civil Judge, Palampur, District

Kangra in an application under Section 8 (1) of the Arbitration & Conciliation Act, hereinafter referred to as the "Act" in short, has been sought to

be condoned on the ground that the same is neither intentional nor deliberate and rather occurred due to time consuming official process and other

circumstances beyond the control of the applicants.

2.Order dated 28.7.2016 passed by learned Civil Judge (Senior), Court No. 1, Palampur is under challenge in the main petition which is time barred.

Learned trial Court has dismissed an application under Section 8 (1) of the Act filed by the petitioners-defendants in the main suit. The plaintiff has filed

the suit in the trial Court for the recovery of ` 1,55,000/- against the defendants. As per the trial Court record the defendants were served for 19.12.2013

and had entered appearance on that day through learned Assistant District Attorney. They had sought time for filing written statement, which was allowed. On the next day also, further time was prayed for and allowed by the trial Court. The written statement was filed on 2nd May, 2014 as is apparent from the zimni order passed on that day. Annexed thereto was an application under Section 8 (1) of the Act filed with a prayer to refer the matter to Arbitrator for adjudication of the dispute on the ground that there exist an agreement between the parties and in terms thereof the dispute having arisen between them can only be resolved by resorting to arbitral proceedings.

3. Learned trial Court on going through the contents of arbitration clause in the agreement and hearing the parties on both sides has arrived at a conclusion that the work has never commenced on the site and as such, the matter could have not been referred for adjudication to the Arbitrator. Though original agreement has not been filed along with the application, however, a copy thereof is in the trial Court record. Clause 25 thereof reveal that all questions and disputes relating to the designs and drawing etc. and also quality of workmanship of material used or any other question whatsoever concerning the works or the execution or failure to execute the same whether arising during the progress of the works or after the completion or abandonment thereof needs to be referred to the sole arbitration of the person appointed as arbitrator by the Engineer-in-Charge/Chief Engineer, Himachal Pradesh Public Works Department.

4. Learned trial Judge on having considered such provisions in Clause 25 of the agreement has concluded that the disputes brought to the Court in the civil suit have neither arisen during progress of the work or after completion or on its abandonment as the work never commenced at the site. The findings so recorded cannot be said to be illegal nor factually unsustainable for the reasons that as per Clause 25 only those disputes having arisen during the progress of the work or after its completion or abandonment can be referred to the Arbitrator for adjudication. Even if it is believed that the failure to execute the work is also covered under Clause 25 of the agreement, in that event also, the application which has been filed for referring the matter with a prayer to refer the disputes for adjudication to the Arbitrator could have not been allowed because as per the legal requirement an application of this nature can

only be filed by the parties seeking such reference the very first day on entering appearance in the action brought against it in the Court. As pointed out at the outset the defendants were served for 19.12.2013. They entered appearance on that day through learned District Attorney. Instead of filing the application under Section 8(1) of the Act on that day, the time was sought for filing written statement. Not only this, but on the next date i.e. 3.2.2014 also further time as sought for filing written statement was granted. The written statement was filed on 2.5.2014 and on that very day the application under Section 8(1) of the Act was also filed. The order passed by learned trial Court on 2.5.2014 reads as follow:â??Written statement filed. Copy supplied. At this stage, an application U/S 8(1) of the Arbitration & Conciliation Act filed, copy supplied. Put up for reply and consideration on 7.7.2014.â??

5. Therefore, the ratio of the judgment of the Honâ??ble Apex Court in P. Anand Gajapathi Raju and Others versus P.V.G. Raju (Dead) and others, (2000) 4 Supreme Court Cases 539 takes away the right so vested in favour of the petitioners-defendants under Section 8(1) of the Act and as such action the respondent- plaintiff brought against the defendants has to be adjudicated by the Court. The judgment reads as follows:

â??5. The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the court can exercise its powers 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;
- (4) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. This last provision creates a right in the person bringing the action to have the dispute adjudicated by the court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the court referring the parties to arbitration.â??

6. For all the reasons hereinabove, even on merits also no case is made out in favour of petitioners-defendants and as such, even if it is believed that the delay as occurred in filing the main petition stands explained and ordered to be

condoned, no useful purpose is likely to be served thereby. Therefore, not only this application but also the main petition being devoid of any merit are dismissed.

7. Pending application(s), if any, shall also stand disposed of.

8. The parties through learned counsel representing them are directed to appear in the trial Court on 30.5.2018. Record be returned to the trial Court forthwith.",,