

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 8TH DAY OF JUNE 2022

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MS.JUSTICE J.M. KHAZI

M.F.A. NO.4180 OF 2019 (AA)

BETWEEN:

BEML LIMITED
(REGISTERED CORPORATE BODY)
CORPORATE MATERIALS
BEML SOUDHA, NO.23/1, 4TH MAIN ROAD
SAMPANGIRAMANAGAR, BENGALURU - 560 027
REP. BY ITS DEPUTY GENERAL MANAGER (LEGAL)
SHRI. M.K. VIDHYADHARAN.

... APPELLANT

(BY MR. SANDESH J. CHOUTA, SR. COUNSEL FOR
MR. ISMAIL M. MUSBA, ADV.,)

AND:

PRAKASH PARCEL SERVICES LIMITED
HAVING ITS REGISTERED OFFICE AT
NO.18/3, 1ST MAIN, MISSION ROAD
BANGALORE - 560 027
REP. BY ITS MANAGING DIRECTOR
MR. PRAKASH PANDEY.

... RESPONDENT

(BY MR. A.S. GUPTA, ADV.,)

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THIS MFA IS FILED U/S 37(1)(a) OF THE ARBITRATION AND
CONCILIATION ACT, AGAINST THE ORDER DATED. 22.03.2019,
PASSED ON IA NO.4 IN O.S. NO.25714/2017, ON THE FILE OF THE
XXVI ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, MAYO HALL,

BENGALURU (CCH-20), REJECTING THE IA NO.4 FILED BY THE DEFENDANT U/SEC.8 OF THE ARBITRATION AND CONCILIATION ACT, 1996.

THIS M.F.A. COMING ON FOR ADMISSION, THIS DAY, **ALOK ARADHE J.**, DELIVERED THE FOLLOWING:

JUDGMENT

Mr.Sandesh J.Chouta, learned Senior counsel for the appellant.

Mr.A.S.Gupta, learned counsel for the respondent.

This appeal filed under Section 37(1)(a) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act' for short) emanates from an order dated 22.03.2019 passed by the Trial Court insofar as it pertains to rejection of an application filed by the appellant under Section 8 of the Act, *inter alia* on the ground that the appellant has not assailed the validity of the order dated 07.11.2016 passed by the Arbitrator by which the Arbitrator has held that it has no jurisdiction to adjudicate the dispute between the parties.

2. In order to appreciate the grievance of the appellant, few facts need mention which are stated infra.

The appellant is a Government of India undertaking. The appellant entered into an agreement on 25.06.2008 with the respondent who is a transporter. The aforesaid agreement contains an arbitration clause. The arbitration clause reads as under:

"Arbitration:

In case of dispute as regards the satisfactory performance or otherwise of the contract, the decision of the Asst. General Manager – Stores, of the concerned Divisional shall be final and legally binding.

All disputes and differences arising out of or in any way concerning the contract whatsoever shall be referred for decision to 'The Executive Director' of respective BEML Unit, whose decision shall be final and binding on all the parties."

3. A dispute between the parties arose. Thereupon, the respondent filed CMP No.132/2012 before this Court under Section 11(6) of the Act seeking appointment of an independent Arbitrator. A Bench of this Court, by an order dated 14.12.2012, referred the matter to the Executive Director of the appellant, as sole arbitrator, as provided in

the arbitration clause. At the stage of recording of the evidence before the Arbitrator, the respondent filed an objection with regard to jurisdiction of the Arbitrator. The aforesaid objections was adjudicated by an Arbitrator by an order dated 07.11.2006 and it was held that the Arbitrator has no jurisdiction to adjudicate the dispute. The operative portion of the order passed by the Arbitrator reads as under:

"Heard both the parties and proceed to pass the following orders:

Perused the ruling passed in the citation relied by the claimant, I am satisfied that the ruling passed in the above citation applies to the facts and circumstances of the case. Further the claimant had made sincere efforts to amicably settle the matter for which the respondent failed. Therefore, I take cognizance of the ruling passed by the Supreme Court holding that this Tribunal has no jurisdiction to adjudicate the instant dispute. The claimant is permitted to withdraw the claim and liberty is afforded to the claimant to initiate appropriate legal remedies for recovery of the amount. Further the period consumed covering the instant arbitration proceedings is excluded

from the period of limitation in order to enable the claimant to initiate an appropriate legal remedy, in the interests of justice and equity."

4. It is pertinent to mention here that the order dated 07.11.2016 passed by the Arbitrator has attained finality and has not been assailed by any of the parties to the lis. In pursuance of the liberty granted by the Arbitrator, the respondent initiated the proceeding on 24.06.2017 before the Civil Court for recovery of the amount in question. In the civil suit, the appellant filed an application under Section 8 of the Act on 04.01.2018 which was rejected by the Trial Court *inter alia* on the ground that the appellant has not challenged the validity of the order dated 07.11.2016 passed by the Arbitrator. The said order is under challenge in this appeal.

5. Learned counsel for the appellant submitted that the provisions of Section 8 of the Act are mandatory in nature and the respondent by filing a petition namely under Section 11(6) of the Act before this Court, has admitted the existence of the arbitration agreement. Therefore, it is

submitted that the Trial Court erred in rejecting the application preferred by the appellant, under Section 8 of the Act and ought to have relegated the parties to the remedy of arbitration. In support of aforesaid submissions, reliance has been placed on the decisions of the Supreme Court in **'HINDUSTAN PETROLEUM CORPN. LTD. Vs. PINCITY MIDWAY PETROLEUMS' (2003) 6 SCC 503** and **'VIDYA DROLIA AND ORS. Vs. DURGA TRADING CORPORATION' AIR Online 2020 SC 929.**

6. On the other hand, learned counsel for the respondent has submitted that the order passed by the Trial Court does not suffer from any infirmity. It is further submitted that the appellant is not co-operating with the Trial Court for early decision of the civil suit and the appeal should be disposed of with a direction to the Trial Court to adjudicate the dispute between the parties within one month as the issue of damages is an issue which can be decided only by the Civil Court.

7. We have considered the submissions made on both sides and have perused the record. Before proceeding further, it is apposite to take note of 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.

Thus, from perusal of Section 8 of the Act, it is evident that the aforesaid provision is mandatory in nature and where an agreement between the parties contains an

arbitration clause, it is obligatory for the Court to refer the parties to arbitration in terms of arbitration agreement and the Court cannot proceed with the civil suit. The Supreme Court in '**P.ANAND GAJAPATHI RAJU Vs. D.V.G.RAJU**' (2000) 4 SCC 539 which has been followed by **HINDUSTAN PETROLEUM CORPN. LTD., supra** and has held that the provisions of Section 8 of the Act are mandatory in nature and in case an arbitration clause in the agreement is accepted by both the parties, the dispute between the parties is required to be referred to the arbitration. Similar view has also been taken in **VIDYA DROLIA's case, supra**.

8. It is a well settled legal proposition that waiver of a right on the part of a party must be gathered from the fact situation in each case. On facts of each case, an inference has to be drawn whether a party has unequivocal intention to question the maintainability of the suit and has not waived its right to contend that the dispute should be referred for arbitration. (**See: 'RASHTRIYA ISPAT NIGAM LTD. Vs. VERMA TRANSPORT CO.'** (2006) 7 SCC 275.

9. In the instant case, the agreement between the parties admittedly contains an arbitration clause. The dispute between the parties was referred to the sole arbitrator who by an order dated 07.11.2016 held that he has no jurisdiction to adjudicate the dispute and has granted the liberty to the respondent to initiate appropriate legal remedies for recovery of the amount. The aforesaid order was not questioned by the appellant before a higher forum and therefore, the same attained finality. In pursuance of the liberty granted to the respondent, the respondent filed a civil suit on 24.06.2017 seeking recovery of the amount due to it as damages. Thus, in the facts and circumstances of the case, it can safely be inferred that the appellant had accepted the order passed by the sole arbitrator on 07.11.2016 and cannot be permitted to contend that the dispute once again be referred to arbitration. The order dated 07.11.2016 passed by the sole arbitrator binds the appellant as well as the respondent.

10. For the aforementioned reasons, we agree with the conclusion recorded by the Trial Court and hold that the Trial Court has rightly rejected the application preferred by the appellant under Section 8 of the Act.

In the result, we do not find any merit in this appeal. The same fails and is hereby dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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