IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO-COM-3-2021 (O&M)
Date of decision : 04-11-2022

M/s Soben Contract and Commercial Ltd.

.....Appellant

VERSUS

M/s Qonquests Technical Solutions Pvt. Ltd. and others

....Respondents

CORAM:- HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. Alok Mittal, Advocate,
for the appellant.

Mr. Tishampati Sen, Advocate, Mr. Anurag Anand, Advocate
and Mr. Amandeep Singh Talwar, Advocate
for respondent No.1.

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AUGUSTINE GEORGE MASIH, J.

CM-5-FACOM-2021

Prayer in this application is for exemption from filing certified and typed copies of judgment dated 04.07.2013 passed by the Additional District Judge, Gurugram along with Annexures A-1 to A-3.

For the reasons stated in the application, exemption is granted from filing certified and typed copies of judgment dated 04.07.2013 passed by the Additional District Judge, Gurugram along with Annexures A-1 to A-3, subject to all just exception.

Application stands disposed of.

FAO-COM-3-2021

In this appeal, challenge is to the order dated 24.02.2021

passed by the Additional District Judge-cum-Presiding Judge, Exclusive Commercial Court at Gurugram, vide which the application filed by the appellant – defendant No.1 under Order VII Rule 11 (d) of the Code of Civil Procedure read with Section 8 of the Arbitration & conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act'), for rejection of the plaint in terms of Clause 16 in the Consulting Agreement, which provides for referring the matter for arbitration under the provisions of Section 8 of the Arbitration Act and return the plaint as filed by respondent No.1 – plaintiff in view of the Consulting Agreement viz-a-viz confirmation of jurisdiction with laws and Courts of Scotland, has been rejected.

2. It is the contention of the learned counsel for the appellant that the Court below has misread the provisions of the agreements which have been entered into between the parties. It has proceeded on the assumption as if the general Memorandum of Understanding dated 17.03.2017, whereby the broad terms of engagement have been reduced into writing between the parties without taking into consideration the aspect that separate Purchase Orders were secured between the parties by signing and stamping each and every Consulting Agreement before the commencement of the work. The majority of the reliefs, as have been claimed in the commercial suit filed by the respondent No.1 – plaintiff, are alleging breach of Memorandum of Understanding dated 17.03.2017 solely, when in fact majority of the reliefs claimed by respondent No.1 – plaintiff in the civil suit flows from the Purchase Orders and Consulting Agreements. Respondent No.1 – plaintiff has intentionally chosen for not placing on

record the factum of existence of separate Purchase Orders and Consulting Agreement of each project before the Court below due to existence of the arbitration clause in all such agreements executed between the parties. This clause provides for resolution of dispute by way of arbitration and applicable laws of Scotland only.

3. The Court below has ignored the fact that apart from the Memorandum of Understanding, the Consulting Agreements alongwith the Purchase Orders have been admitted by respondent No.1 – plaintiff and therefore, when the majority of claims are based upon these Consulting Agreements and the Purchase Orders, the terms and conditions thereof would have full application. Clause 16 of the Consulting Agreement relates to 'Dispute Resolution' and states that any dispute arising out of or in connection with the agreement, the parties will attempt to resolve the matter through friendly arbitration. Furthermore, in clause 18 it was agreed upon that in such dispute arising out of the subject matter shall be governed and construed in accordance with the laws of Scotland, which clauses have been overlooked by the Court below.

4. It has further been asserted that the application was required to be accepted as the parameters within which the claims have been made would fall within the scope and ambit of the provisions as contained under Order VII Rule 11 of CPC read with Section 8 of the Arbitration Act and therefore, the suit for recovery of outstanding amount ought to be dismissed. In any case, he contends that the suit needs to be returned qua the aspects which may be outside the purview of the Consulting

Agreements and Purchase Orders but qua these aspect, the suit deserves to be dismissed.

5. Reliance has been placed upon the judgment passed by the Calcutta High Court in **Lindsay International Private Limited and others Vs. Laxmi Niwas Mittal and others** (2022) SCC Online Calcutta 170. It has been pointed out that Special Leave to Petition preferred against the said judgment has been dismissed by the Hon'ble Supreme Court vide order dated 19.04.2022 in Special Leave to Appeal (C) Nos.4275-4276 of 2022.

Reliance has also been placed upon the judgment of the Bombay High Court in **Taru Meghani and others Vs. Shree Tirupati Greenfield (Shree Tirupati Greenfield Developers) and others** (2020) SCC Online Bom 110, wherein it has been held that in case, there is an arbitration clause in the agreement, the Court is enjoined to refer the dispute to arbitration in terms of the arbitration clause and the Court would have no jurisdiction to adjudicate the dispute after an application seeking reference under Section 8 of the Arbitration Act has been preferred. The Court would be justified in referring the dispute to arbitration with respect to the transaction which is squarely covered by the arbitration clause and all conditions of Section 8 are fulfilled. Qua other transactions, the parties were at liberty to institute a fresh suit.

6. Counsel for the appellant has also submitted that the judgment in **Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya and another** (2003) 5 SCC 531 would not be applicable for the reason that an amendment has

been brought about in Section 8 of the Arbitration Act in the year 2015, where it has been made mandatory for the judicial authorities to refer the parties to a dispute to arbitration unless the Court is satisfied that the arbitration agreement between the parties is invalid. It has further been stated that Section 8 of the Arbitration Act has been amended to include words "notwithstanding any judgment, decree or order of any Court which has the effect of making it mandatory for the Court to refer the matter for arbitration if there is a clause to that effect on an application being moved under Section 8 of the Arbitration Act". He, on this basis, has prayed that the impugned order dated 24.02.2021 passed by the Court below cannot sustain and deserves to be set aside.

7. On the other hand, learned counsel for respondent No.1 – plaintiff has asserted that the subject of the suit, as has been preferred by respondent No.1 – plaintiff, rests upon the Memorandum of Understanding dated 17.03.2017 executed between the appellant and respondent No.1 – plaintiff. The parties never intended to be covered by the Purchase Orders circulated between the parties as it is apparent from the emails of the appellant that it was for internal audit purposes of the appellant. All the claims which have been made by respondent No.1 - plaintiff in the commercial suit as preferred flow from the Memorandum of Understanding dated 17.03.2017, where there is a direct breach of clause 6 by the appellant by incorporating its Sri Lankan Affiliate and an Indian Affiliate company namely M/s Soben International LLP.

8. Clause 5 of the Memorandum of Understanding i.e. operational

clause has been breached by hiring two employees, Sahil Oberoi and Nikhil Singh, who have been arrayed as defendants No.2 and 3 in the suit, who were employees of respondent No.1 – plaintiff. The injunction as has been prayed for flows from the Memorandum of Understanding and so does the claim for compensation which is for an irreparable loss and harm caused to respondent No.1 – plaintiff because of the breach of the terms of the agreement. Learned counsel for respondent No.1 – plaintiff has referred to the emails which have been received from the appellant to highlight the aspect that the Purchase Orders and the Consulting Agreements were for internal audit purposes of the appellant. He, on this basis, has contended that there was no common intention of the parties to be bound or governed by the terms of the Purchase Orders.

9. As regards the judgment in *Lindsay International Private Limited*'s case (supra), it is submitted by the counsel for respondent No.1 – plaintiff that mere existence of an arbitration clause would not *ipso facto* lead to reference of a dispute to arbitration. There being no clause for arbitration in the Memorandum of Understanding dated 17.03.2017, which is the governing factor and breach whereof has resulted in respondent No.1 – plaintiff being forced to file a suit and the claims are based and arisen from the said agreement itself, the plea of the appellant has rightly been rejected by the Court below. None of the prayers which have been made in the suit would be covered under the Purchase Orders in any manner whatsoever. The arbitration proceedings, as is being alleged by the appellant, would not be the appropriate remedy in view of the relief sought

in the subject suit, as such the relief cannot be covered by the Purchase Order. Counsel for respondent No.1 – plaintiff has submitted that the order impugned, as has been passed by the Court below, does not call for any interference by this Court.

10. We have considered the submissions made by the learned counsel for the parties and with their assistance have gone through the pleadings as also the documents which have been placed on record.

11. What is apparent is that the working relationship of the parties is governed by the Memorandum of Understanding dated 17.03.2017. That was the basic document on which and from where long term relationship initiated. The said agreement became the substratum for the relationship between the parties although they have earlier also, off and on, having worked for each other. Memorandum of Understanding was to form a long term, exclusive, strategic alliance, wherein respondent No.1 – plaintiff would support the appellant – defendant No.1 on their quantity surveying business in United Kingdom. It was for a period of five years and was renewable in march, 2022. In their working relationship, there was no Purchase Order accompanying the Consulting Agreement issued to respondent No.1 – plaintiff. Irrespective of the purchase order accompanied by the Consulting Agreement, the project had been given effect to and triggered by email confirmation, meaning thereby that the parties were not dependent upon the Purchase Orders accompanied by the Consulting Agreement.

12. It so happened that on 10.10.2018, a request was received form

the appellant – defendant No.1 by respondent No.1 – plaintiff to send signed Purchase Order accompanied by Consulting Agreement. When a clarification was sought by respondent No.1 – plaintiff, it was stated through an email that it was due to recent audit which has necessitated signing of Purchase Order and accompanying Consulting Agreement for internal records of the appellant. From the pleadings, therefore, it is apparent that the basis for working relationship governing the conduct between the parties was the Memorandum of Understanding and not the Purchase Orders. The pleadings also make it clear that the claims as have been projected in the suit and the basis for the same arise out of breach of the terms of Memorandum of Understanding by the appellant. It needs to be pointed out that there was an exclusivity clause i.e. Clause 6 of the Memorandum of Understanding, on the basis of which respondent No.1 – plaintiff has sought to injunct the appellant from entering into partnership or contractual agreement with any other affiliate and has sought a declaration qua setup in violation thereof as invalid.

13. It is not in dispute that under the Memorandum of Understanding, there is no clause for arbitration. The clause, if any, is in the Consulting Agreements which would not be applicable in the case as the claim of respondent No.1 – plaintiff is based exclusively on the Memorandum of Understanding. In the given facts and circumstances, we are of the considered view that the dispute and the claims which have been made in the civil suit when do not flow from the Purchase Orders or Consulting Agreements, the same cannot be made the basis for rejection of

the suit and similarly, the question of separation of the claims does not arise. The claim which is based upon an agreement, which does not include an arbitration clause, would not bound the parties. The plea of the appellant that the suit deserves to be dismissed as there is an arbitration clause, therefore, cannot sustain.

14. In view of the above, the judgments on which reliance has been placed by the counsel for the appellant, as referred to above, would not be applicable to the case in hand.

There being no merit in the present appeal, the same stands dismissed.

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In the light of the dismissal of the main appeal, no orders are required to be passed in the present application for stay of proceedings as the same has been rendered infructuous.

Disposed of as such.

(AUGUSTINE GEORGE MASIH)
JUDGE

04.11.2022 **(SANDEEP MOUDGIL)**
Harish **JUDGE**

Whether speaking/reasoned *Yes/No*

Whether reportable *Yes/No*