

IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH.

C.R. No. 5167 of 2008

Date of Decision: August 31, 2009

Ashok Kumar Jain

.....Petitioner

Vs.

M/s Haryana Iron & Steel Rolling Mill, Hisar and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.

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Present:- Mr. D.V. Sharma, Senior Advocate with  
Mr. Nitin Jain, Advocate  
for the petitioner.

Mr.Arun Palli, Senior Advocate with  
Mr.H.O. Atri, Advocate.

Mr.Ashish Gupta, Advocate for respondent No.16.

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**M.M.S. BEDI, J.**

Petitioner has filed this revision petition under Article 227 of the Constitution of India against the order dated September 17, 2008 passed by Civil Judge, Junior Division, Hisar, allowing the application of defendant- respondents under Section 8 of the Arbitration and Conciliation

Act, 1996, (hereinafter referred to as “the Act”) and dismissing the suit of the plaintiff relegating him to the remedy of approaching the Arbitrator as per the arbitration agreement, holding that the subject matter of the suit regarding separate possession by way of partition of the joint land belonging to the partnership firm M/s Haryana Iron and Steel Rolling Mill and the validity of the sale deed dated May 16, 2007 executed by defendant-respondents No.1 to 6 in favour of defendant No.11 regarding 8 kanals 6 marlas of land can be decided by the Arbitrator.

In order to appreciate the controversy and the applicability of Section 8 of the Act, it is appropriate to refer to the facts leading to the passing of the impugned order. Plaintiff- petitioner had filed a suit for separate possession by way of partition of joint land comprising in Khasra No. 4996 (8-6), 5241 (3-5), 5242 min (2-10) totaling 14 K 1 M situated at Hisar and in the alternative for possession by way of dissolution of firm M/s Haryana Iron & Steel Rolling Mill, Delhi Road, Hisar, by declaring sale deed No. 1791 dated May 16, 2007 executed by defendants No.1 to 6 in favour of defendant No.11 in respect of land comprising in Khasra No. 4996 measuring 8 K-6M is illegal, against facts, unauthorized, void ab initio and is not binding upon the right of plaintiff and as a consequential relief of permanent prohibitory injunction restraining defendants No.1 to 6 and 11 from dispossessing the plaintiff from the above land or alienating it by way of sale deed, gift deed, decree or allotting it through defendant No.12 and also making any construction, addition and alteration till the actual partition of land on the basis of evidence oral and documentary of every kind. Copy

of the civil suit has been attached with the petition as annexure P-1. The petitioner was one of the partners alongwith Ferozi Lal Jain, Kul Bhushan Jain, Parmod Jain and Deepak Jain, as per the partnership deed dated June 19, 1978, after few of the earlier partners consisting partnership firm Ms/ Haryana Iron and Steel Rolling Mill w.e.f. October 1963 retired. Copy of the partnership deed dated June 19, 1978 has been placed on record as annexure P-2. The land forming subject matter of the suit is owned by the partnership firm. The father of the plaintiff- petitioner and defendant- respondents No.2 to 4 Sh.Ferozi Lal Jain expired on January 29, 2004. The petitioner- plaintiff claims that dispute regarding the distribution of shares/ properties of the firm arose as such a partnership agreement was entered into between the sons of Ferozi Lal, including the petitioner. The Arbitration Agreement dated September 23, 2006, entered into between the parties reads as follows:-

“We Kulbhushan Jain, Ashok Kumar Jain, Parmod Jain and Deepak Jain, sons of Sh. Ferozi Lal Jain son of Sh.Sher Singh are residents of Hisar, Tehsil and District Hisar. That we have a dispute regarding shares in following properties/ firms:-

1. Land and machinery of firm Haryana Rolling Mill and its liabilities and its dates.
2. Firm Khushiram Sher Singh, Moti Bazaar, Hisar, partnership or HUF.
3. House Moti Bazaar, Hisar, including 3 shops.

4. Nohra Birkhuwala Hisar which includes a tea shop.
5. Agricultural land 55 A.P. Bangla Road of which jamabandi and map is attached.
6. House Factor, House No.77, Urban Estate -2 , Farm House Camry Road Hisar, only constructed area (land will not be included) House No.119, Sector 15-A, Hisar.
7. That we all state that out of the total land of Haryana Rolling Mill leaving 1000 square yards for Kulbhushan's house, for the remaining 7800 square yards approximately, deal has been done by Kulbhushan, Pramod and Deepak, all the parties will be abide by it.

That our father Late Sh.Ferozi Lal Jain for his share in the abovementioned properties at Sr. No.1, 2 and 3 has executed one will dated 22.9.2003 which was written by Sh.M.P. Aggarwal, Advocate in presence of the witnesses at Holi Hospital, Hisar, which we all consider to be correct but Sh.Ferozi Lal's share in percentage in abovementioned properties is in dispute.

That we all have agreed with our own wish to appoint Sh.M.P. Aggarwal and Sh.Subhash Gupta,

Advocate and Sh.Ashok Goyal (C.A.) as our Panch/ Arbitrator.

That abovementioned arbitrators after hearing all the parties and seeing all the documents will give decision as to whether each four of us has any share in each property and to what extent, either by consensus or by majority decision and this will be binding and we will not challenge this anywhere.

Now this Arbitration Agreement has been written which will be binding on us and our legal heirs and representatives. All the three arbitrators will give their award prior to the registration of the Haryana Rolling Mill.”

A perusal of the above said arbitration agreement dated September 23, 2006 indicates that the plaintiff- petitioner, defendant-respondent No.2, defendant-respondent No.3 and defendant- respondent No.4 brothers had agreed that the property of the partnership firm mentioned in the abovesaid agreement of sale would be decided by the Arbitrator and Sh.M.P. Aggarwal, Sh.Subhash Gupta, Advocate and Sh.Ashok Goyal, C.A. Though the Will of Sh.Ferozi Lal Jain dated September 22, 2003 was agreed to be corrected but his share in percentage in the properties mentioned in the arbitration agreement was in dispute and it would be decided by the Arbitrators. An important feature of the arbitration agreement is that out of the total land of Haryana Rolling Mill,

1000 sq. yards would be left for the house of Kulbhushan Jain, defendant-respondent No.2 and for remaining 7800 sq. yards, approximately deal had been done by defendants No.2, 3 and 4 and all parties to the arbitration agreement agreed to abide by, by the said deal.

The plaintiff- petitioner in his suit has sought the partition and possession of the property of partnership firm besides seeking declaration that the sale deed dated May 16, 2007 executed by defendant No.1 i.e. in favour of defendant No.11 regarding Khasra No.4996 measuring 18 K 6 M was illegal and not binding upon his rights. He also sought injunction against the said defendants from dispossessing him from the land besides seeking a prohibitory injunction restraining them from alienating property through defendant No.12. Grievance of the plaintiff- petitioner is that he is a partner in view of the partnership deed dated June 19, 1978 and that he did not retire from the firm. He has asserted in the suit that after the death of Ferozi Lal Jain, the partnership concern was dissolved and the assets stood devolved on the partners as per their share. 1/5<sup>th</sup> share of Ferozi Lal devolved upon his legal representatives i.e. the plaintiff and defendants-respondents No.2 to 4 and defendants No.7 to 10 under Section 8 of the Hindu Succession Act and that no sale deed could have been executed by defendants No.2 to 6. Copy of the sale deed dated May 16, 2007 regarding 8 K 6M of land has been attached as annexure P-4 which indicates that the said property had been sold by defendant No.2 Kulbhushan Jain, Parmod Jain and Deepak Jain, sons of Ferozi Lal Jain and Abhinav Jain and Abhishek Jain, sons of Kulbhushan Jain, who have been defendants No.5

and 6. It is specified in the sale deed that the vendor's partnership concern M/s Haryana Iron and Steel Rolling Mill and except the sale persons none else was partner in the said firm. Defendants No.7 to 10 are the other legal heirs of deceased Ferozi Lal Jain whereas defendant No.11, vendee is alleged to have carved out plots for selling it through one Society, defendant No.12 and had circulated a lay-out plan under a title "Jain Enclave" to various property dealers for selling plots under a scheme. The contesting defendants moved an application under Section 8 of the Act before the Civil Court averring therein that in view of arbitration agreement dated September 23, 2006, the matter stands referred to the Arbitrator and award was to be passed by the Arbitrator but the plaintiff- petitioner has filed a suit which deserves to be referred to the Arbitrator. The plaintiff- petitioner contested the said application taking up the plea that the agreement had become infructuous as defendants No.2 to 6 had forged a partnership deed and had transferred the land measuring 8 K 6 M by a sale deed dated May 16, 2007 and the matter of suit is not covered under the provisions of clause of any of the arbitration agreement. The trial Court in view of the arbitration agreement dated September 23, 2006 allowed the application and dismissed the suit.

Sh.D.V. Sharma, Senior Advocate, on behalf of the plaintiff- petitioner contended that the relief claimed by the plaintiff- petitioner is not covered by the arbitration agreement and the matter lies out of the ambit of the arbitration agreement, besides this the defendant- respondents No.8 to 10 are not party to the arbitration agreement. The trial Court has not

considered the pleas taken by the plaintiff- petitioner in the suit and illegally and arbitrarily allowed the application under Section 8 of the Act.

Mr.Arun Palli, Senior advocate for the defendant- respondents vehemently urged that once it is established that there is an arbitration clause to settle the controversy amongst the rival parties, in view of provisions of Section 8 of the Act, it is incumbent on the civil Court to refer the matter to the Arbitrator. Counsel relies on **Hindustan Petroleum Corporation Ltd. Vs. M/s Pinkcity Midway Petroleums**, 2003 (3) RCR (Civil) 686 to argue that it is mandatory for the Civil Court to refer the matter to the Arbitrator if there is an arbitral clause accepted by both the parties. He also refers to **M/s Agri Gold Exims Ltd. Vs. M/s Sri Lakshmi Knits & Wovens and others**, 2007 (1) RCR (Civil) 851 to contend that whenever there exist an arbitration agreement, Court is under an obligation to refer the parties to Arbitration in terms of the arbitration agreement. **Shree Subhlaxmi Fabrics Pvt. Ltd. Vs. Chand Mal Baradia and others**, 2005 (2) RCR (Civil), 363 was relied on to contend that contentious issues should not be gone into or decided at the stage of appointment of the Arbitrator and that no time should be wasted in referring the description forming subject matter of arbitration clause to the Arbitrator. He argued that the dispute inter-se the parties arise out of the assets of the partnership firm and as per clause 7 of the Arbitration Agreement, immovable property of 7800 sq. yards had been agreed to be sold by Kulbhushan Jain, Parmod Jain and Deepak Jain. The sale deed impugned in the suit falls under the



ambit of clause 7 of the Arbitration Agreement as such the trial Court has rightly allowed the application under Section 8 of the Act.

Counsel for the petitioner relies upon **M/s Sharda Ginning Pressing & Oil Mills and others Vs. Smt. Bimla Devi**, 2007 (2) PLR 807, wherein in a dispute amongst the partners pertaining to dissolution of partnership concern and rendition of accounts, it was held that where the partnership contained an arbitration clause, the dispute regarding dissolution of partnership and rendition of accounts has to be adjudicated by the Civil Court and not by the Arbitrator.

I have heard counsel for the petitioner as well as counsel for the respondents and carefully gone through each document referred to by the parties, in context to the provisions of Section 8 of the Act. Section 8 of the Act reads as follows:-

“**Section 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”

A perusal of the abovesaid provisions indicates that Section 8 of the Act brings out the conditions which are required to be specified by a party under Sections 8(1) and 8(2) of the Act before a Court can be called upon to exercise its powers. The language of Section 8 of the Act suggests that following conditions are necessary before powers under Section 8 of the Act are exercised:-

- “i) there is an arbitration agreement;
- ii) a party to the agreement brings an action in the court against the other party;
- iii) subject matter of the action is the same as the subject matter of the arbitration agreement; and
- iv) the other party moves the court for referring the parties to arbitration when submitting his first statement on the substance of the dispute.”

Whether the abovesaid conditions stipulated in Section 8 of the Act are attracted in the present case, are required to be looked into in context to the pleadings and claim of the plaintiff- petitioner. In the present

case, the arbitration agreement annexure P-3 dated September 23, 2006 has been entered into between four persons i.e. the sons of Ferozi Lal Jain pertaining to the properties of the partnership firm. In the arbitration agreement there is no reference regarding the rendition of account amongst the partners of M/s Haryana Iron and Steel Rolling Mills, even the share of Ferozi Lal Jain, deceased in the properties mentioned in the arbitration agreement is to be as determined by the Arbitrators. The arbitrators are required to find out the share of the four persons mentioned in the Arbitration agreement. Prima facie, the abovesaid four persons had agreed to abide by the deal which stood already struck regarding the sale of 7800 sq. yards by Kulbhushan Jain but the suit has been filed by the plaintiff regarding the subject matter which lies out of the cope of the arbitration agreement. For instance, sale deed executed by Abhinav Jain and Abhishek Jain, sons of Kulbhushan Jain and its effect cannot be looked into by the Arbitrators. The sine qua non for directing the provisions of Section 8 of the Act is that the subject matter of the suit should be the subject matter of the arbitration agreement and the subject matter of the civil suit should coincide with the subject matter which can be gone into by the Arbitrator pursuant to the arbitration agreement between the contesting parties. The arbitrator in the present case, will not be able to determine the rights of the parties who are not parties to the arbitration agreement. The sale deed changed by the plaintiff apparently does not coincide with the deal which is stated to have been entered into by Kulbhushan and Deepak Jain in the arbitration agreement. Besides this, it is pertinent to mention that in the

case of **M/s Makar Cotton Mill Vs. Harminder Singh**, 2002 (1) RCR (Civil) 437 (Delhi) and **Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd.**, 1999 (3) RCR (Civil) 619, a suit for dissolution of partnership and rendition of accounts has to be adjudicated by the Civil Court and not by Arbitrator. The trial Court while allowing the application under Section 8 of the Act did not take into consideration that the parties to the suit are not the same as the parties who are subject matter of the arbitration agreement. The arbitration agreement will bound only the four persons mentioned therein but rights of the other defendants vis-à-vis the plaintiff- petitioner cannot be adjudicated upon by the Arbitrator. I have considered the contention of Mr.Arun Palli, and the judgments cited by him. In view of the judgments cited, there is no dispute regarding the scope of Section 8 of the Act but in view of the subject matter of the Arbitration Agreement and the suit being different, the ratio the abovesaid judgments is not applicable.

In view of the above circumstances, the impugned order dated September 17, 2008, allowing the application under Section 8 of the Act is set aside. The parties are directed to appear before the Civil Court on October 10, 2009 for proceedings in accordance with law.

Allowed in the aforesaid terms.

August 31, 2009  
sanjay

(M.M.S.BEDI)  
JUDGE