

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CM(M) 23/2009 & CM No.272/2009**

% Reserved on: January 30, 2009
 Date of decision: February 06, 2009

THE WEST COAST PAPER
MILLS LTD.

Through Petitioner
 Mr. Sandeep Sethi, Senior
 Advocate with Mr. G. Kejriwal
 and Mr. P.C. Sharma,
 Advocates

versus

ASHA KAPOOR

Through Respondent
 Mr. A.K. Singla, Senior
 Advocate with Mr. Pankaj
 Gupta and Mr. Abhishek
 Gupta, Advocates

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment?No
2. To be referred to the Reporter or not?Yes
3. Whether the judgment should be reported in the Digest?Yes

J U D G M E N T

MANMOHAN, J

1. The present petition under Article 227 of the Constitution of India has been filed seeking quashing of the order dated 23rd October, 2008 whereby the petitioner's application under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act, 1996") was dismissed.

2. Briefly stated, the material facts of this case are that on 26th April, 1971 a lease deed for a fixed term of three years commencing from 20th July, 1970 with two renewal options for one year was executed between the parties in respect of the entire ground floor of bungalow No. 101-102, Sunder Nagar, New Delhi. An agreement for hire of certain goods was also executed between the parties. The total consideration payable under the lease deed as well as the hire agreement was about Rs. 3,000/- per month. Clause 11 of the said lease deed dated 26th April, 1971 which contains an arbitration clause reads as under:-

"11. In case of any difference which may arise between the parties with regard to the construction, meaning and effect of this agreement of any clause, or clauses, thereof they will be referred to the decision of two Arbitrators, one to be appointed by each party. The Arbitrators shall give a unanimous award but in case of disagreement between them, the matter shall be referred to an Umpire, who shall be appointed by the Arbitrators, before the Arbitrators enter upon the references. The decision of the Arbitrator or the Umpire as the case may be shall be binding on the parties. The proceedings will be held in Delhi under the Indian Arbitration Act, as far as applicable."

3. On 21st July, 1995 a suit for declaration and permanent injunction being Suit No. 1717/1995 was filed on the Original Side of this Court by the respondent/plaintiff praying for a declaration that the premises were let out for residential purpose and the petitioner/defendant should be restrained from sub-letting, parting with possession as well as continuing with misuse of the said premises for any commercial activities. On 12th December, 1995 petitioner/defendant filed a written statement in the said suit but subsequently the above suit was dismissed as not pressed.

4. On 26th March, 1997 the respondent/plaintiff filed another civil suit being Suit No. 131/1997 in the Court of District Judge, Delhi for possession and mesne profits by contending that the rent stood revised to Rs. 3,630/- per month pursuant to Sections 6A and 8 of the Delhi Rent Control (Amendment) Act, 1988 (hereinafter referred to as "the DRC Act"). On 29th August, 1997 the petitioner/defendant filed a written statement in the said suit. On 17th September, 2001, the ADJ disposed of Suit No. 131/1997 by holding that the rent stood revised from Rs. 3,000/- to Rs. 3,300/- per month and passed a decree for money consisting of arrears calculated at Rs. 300/- per month for a period of 20 months. Subsequently, even an appeal being RFA No. 587/2001 against the said judgment was dismissed by the Appellate Court.

5. On 20th May, 2002 the respondent/plaintiff filed the present suit being Suit No. 64/2002 for recovery, possession and arrears of rent, damages/mesne profits by stating that the rent stood revised to Rs. 3,630/- per month pursuant to Sections 6A and 8 of the DRC Act.

6. On 6th August, 2002, the petitioner/defendant along with its written statement also filed an application under Section 8 of the Act, 1996, relying upon Clause 11 of the lease deed dated 26th April, 1971.

7. By virtue of the order dated 23rd October, 2008 the ADJ dismissed the petitioner's application under Section 8 of the Act, 1996 on the grounds that there was no valid arbitration agreement in the absence of a registered lease deed and further

the disputes sought to be raised were not covered by the arbitration clause as well as petitioner's application was not maintainable in view of provisions of Section 8(2) of the Act, 1996 having not been complied with.

8. Mr. Sandeep Sethi, learned Senior Counsel for the petitioner submitted that the arbitration clause in the present case was of very wide amplitude and if the lease agreement was referred to in any controversy, then the dispute redressal mechanism in the said agreement would apply. Mr. Sethi further submitted that insistence by the trial court on the original arbitration agreement was misconceived in the present case as the respondent/plaintiff in her plaint had admitted to the execution of the lease deed which contained an arbitration clause. In support of his submissions Mr. Sethi relied upon the following judgments:-

A) ***Food Corporation of India Vs. Indian Council of Arbitration and Ors. etc. etc.*** reported in ***AIR 2003 SC 3011*** wherein it has been held as under :-

"14.....Even under the old law, common sense approach alone was commended for being adopted in construing an arbitration clause more to perpetuate the intention of parties to get their disputes resolved through the alternate disputes redressal method of arbitration rather than thwart it by adopting a narrow, pedantic and legalistic interpretation."

B) ***The Empire Jute Co. Ltd. and Ors. Vs. The Jute Corporation of India Ltd. and Anr.*** reported in ***2008 (1) ALD 70 (SC)*** wherein it has been held as under :-

“14. Construction of the contract entered into by and between the parties is in question before us. There exists an arbitration agreement. The Arbitration Agreement is of wide amplitude; by reason whereof not only the dispute relating to quality of the jute sought to be supplied by the respondent No. 1 may be gone into, the construction, meaning and operation and effect of the contract or breach thereof, if any, would have also fallen for determination of an Arbitrator.”

C) Union of India (UOI) Vs. Salween Timber Construction

(India) and Ors. reported in **AIR 1969 SC 488** wherein it has been held as under :-

“5.....The test for determining the Question is whether recourse to the contract by which both the parties are bound is necessary for the purpose of determining whether the claim of the respondent firm is justified or otherwise. If it is necessary to take recourse to the terms of the contract for the purpose of deciding the matter in dispute, it must be held that the matter is within the scope of the arbitration clause and the arbitrators have jurisdiction to decide this case.....”

9. Learned Senior Counsel for respondent, Mr. A.K. Singla submitted that the present Suit No. 64/2002 could not be referred to arbitration in accordance with Clause 11 of the lease deed as said clause was not an exhaustive one but a restrictive one. He further submitted that differences with regard to ‘construction’ ‘meaning’ and ‘effect’ of the ‘agreement’ ‘clause’ or ‘clauses’ of the agreement alone are covered. Subject matter of suit is not based either upon the ‘construction’, ‘meaning’ and ‘effect’ of the ‘agreement or ‘clause’ or ‘clauses’ of the agreement. He submitted that the expression ‘the matter’ used in Section 8 refers to the entire subject matter of the suit. He further submitted that the subject matter of suit is based upon application of consequences permitted by Sections 6A & 8 of the

DRC Act and Section 106 of the Transfer of Property Act, so as to succeed against protection available to defendant under the Transfer of Property Act. In respect to the subject of such suit, neither the construction, meaning nor effect of the agreement or clause or clauses of the agreement are attracted. In this connection, he referred to a decision of the Supreme Court in ***Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and another*** reported in ***AIR 2003 SC 2252*** wherein it has been held as under:-

“8. Learned senior counsel Mr. Shekhar Naphade appearing for the appellant submitted that under Section 8 of the Act, the Court was required to refer the dispute arising because of the dissolution of the partnership to the arbitrator as contemplated by the arbitration clause. He further submitted that in any case there is no bar in referring the dispute which arises between the appellant and respondent Nos. 1 and 2 who are bound by the agreement to the arbitrator as envisaged in the partnership deed. He next contended that if the interpretation given by the High Court is accepted, arbitration clause could be defeated by an interested party by adding some reliefs which are not covered by the arbitration clause or by adding a few parties who are not bound by the arbitration clause. The interpretation would be against the object and purpose of the Act and against the spirit of Section 89 of Code of Civil Procedure.

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12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matter governed by Part-I of the Act, Judicial authority shall not intervene except where so provided in the Act. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the arbitral Tribunal, if-(1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that Arbitration Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under Sub-sections (1) & (2) of Section 8 of the Act.

13. Secondly, there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

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15. The relevant language used in Section 8 is--"in a matter which is the subject matter of an arbitration agreement". Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The word 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is--even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed."

10. Mr. Singla also submitted that the arbitration agreement contained in lease deed dated 26th April, 1971 was abandoned, waived and jurisdiction of civil court acquiesced to, as shown by conduct and circumstances of previous litigation between the parties viz. Suit Nos. 1717/95 & 131/1997. Therefore, according to him bar of estoppel was applicable.

11. Mr. Singla submitted that application under Section 8 is otherwise not maintainable, since it was filed after submitting

‘first statement on the substance of dispute’ as it was filed along with the written statement. Filing of written statement is contra-distinguished with expression ‘first statement on the substance of dispute’. In this connection, he relied upon a decision in the case of ***Rashtriya Ispat Nigam Ltd. and anr. v. Verma Transport Co.*** reported in **(2006) 7 SCC 275** wherein it has been held as under:-

“36. The expression ‘first statement on the substance of the dispute’ contained in Section 8(1) of the 1996 Act must be contra-distinguished with the expression ‘written statement’. It employs submission of the party to the jurisdiction of the judicial authority. What is, therefore, is needed is a finding on the part of the judicial authority that the party has waived his right to invoke the arbitration clause. If an application is filed before actually filing the first statement on the substance of the dispute, in our opinion, the party cannot be said to have waived his right or acquiesced himself to the jurisdiction of the court. What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application under Section 8 of the 1996 Act, may not be held wholly unmaintainable. We would deal with this question at some details, a little later.

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“42. Waiver of a right on the part of a defendant to the lis must be gathered from the fact situation obtaining in each case. In the instant case, the court had already passed an ad interim ex parte injunction. The Appellants were bound to respond to the notice issued by the Court. While doing so, they raised a specific plea of bar of the suit in view of the existence of an arbitration agreement. Having regard to the provisions of the Act, they had, thus, shown their unequivocal intention to question the maintainability of the suit on the aforementioned ground.”

12. Lastly, Mr. Singla submitted that in absence of ‘defined legal relationship’ under Section 7 of Act, there is no Arbitration Agreement and enabling application of Section 8 of Act. In this connection, he referred to a decision of this Court in ***M/s.***

Chemical Sales Agencies v. Smt. Naraini Newar reported in ***AIR 2005 Delhi 76***.

13. In rejoinder, Mr. Sandeep Sethi submitted that as the Section 8 application was filed along with the written statement, it could not be said that the said application had been filed later than or subsequent to the filing of the written statement. In this connection, he placed reliance on Section 8(1) of the Act, 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.”

14. Mr. Sethi also submitted that the question of waiver or estoppel did not arise in the present case as neither in Suit No. 1717/1995 nor in Suit No. 131/1997 the petitioner could have sought a reference of dispute under Section 8 of the Act, 1996 inasmuch as it was the petitioner's case in those proceedings that it was a tenant protected under the DRC Act and consequently by virtue of Section 50 of the DRC Act, no civil suit could have been filed against it and, therefore, there was no question of seeking any reference under Section 8 of the Act, 1996. In this connection Mr. Sethi relied upon the judgment in the case ***Natraj Studios (P) Ltd. Vs. Navrang Studios and another*** reported in ***AIR 1981 SC 537*** wherein it has been held as under :-

“25. In Sabava Kom Hanmappa Stmpiger v. Basappa Andaneppa Chiniwar, (1955) LVII Bombay Law Reporter p. 261 the question directly arose, as in the present case, whether Section 28 of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947, excluded reference to arbitration of a dispute relating to recovery of rent or possession of premises. It was held by a Division Bench of the Bombay High Court that the expression Court occurring in Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act 1947 included an arbitrator and therefore, the jurisdiction of the Arbitrator to make an award in respect of any dispute of the nature mentioned in Section 28 was excluded.

26. In the light of the foregoing discussion and the authority of the precedents, we hold that both by reason of Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act. 1947 and by reason of the broader considerations of public policy mentioned by us earlier and also in Deccan Merchants Cooperative Bank Ltd. v. Dalichand Jugraj Jain and Ors. (supra), the Court of Small Causes has and the Arbitrator has not the jurisdiction to decide the question whether the respondent-licensor-landlord is entitled to seek possession of the two studios and other premises together with machinery and equipment from the appellant-licensee-tenant. That this is the real dispute between the parties is abundantly clear from the petition filed by the respondents in the High Court of Bombay, under Section 8 of the Arbitration Act seeking a reference to Arbitration. The petition refers to the notices exchanged by the parties, the respondent calling upon the appellant to hand over possession of the studios to him and the appellant claiming to be a tenant or protected licensee in respect of the studios. The relationship between the parties being that of licensor-landlord and licensee-tenant and the dispute between them relating to the possession of the licensed-demised premises, there is no help from the conclusion that the Court of Small Causes alone has the jurisdiction and the Arbitrator has none to adjudicate upon the dispute between the parties.”

15. Mr. Sethi on instructions specifically stated that in the present suit proceedings, the petitioner was not claiming protection under DRC Act and consequently this was the first occasion when the petitioner could have sought reference of a suit proceedings to an arbitrator.

16. In my opinion, I need not either decide the issue of waiver/acquiescence or the issue of defined legal relationship or

whether the mandate of Section 8(2) of the Act was complied with as I agree with the respondent's submission that the disputes raised in Suit No. 64 of 2002 do not arise out of the lease agreement executed between the parties on 26th April, 1971. In fact, the said lease agreement has been stated in the plaint only as a background fact and it has no relevance to the controversy raised in the present suit.

17. It is pertinent to mention that in a suit for possession, the Court has to only see as to whether the following three necessary ingredients are satisfied or not:-

- (a) existence of relationship of landlord-tenant;
- (b) rent in excess of Rs. 3,500/- per month and;
- (c) Determination of tenancy, entitling the landlord to a decree for ejectment.

18. From the petitioner's arguments, it is apparent that there is no dispute with regard to the first two ingredients. For determining the third ingredient, recourse to the lease agreement dated 26th April, 1971 is neither necessary nor relevant. In reaching this conclusion, I am fortified by a judgment of a Division Bench of this Court in the case of ***M/s Cogent Ventures (India) Ltd. V. Raj Karan, FAO (OS) No. 288 of 2008*** decided on 27th August, 2008, wherein it has been held as under:-

"10. In this backdrop, we have to consider the prayer made by the defendant in his application filed under Section 8 of the 1996 Act. This application is filed in a suit filed by

the plaintiff for possession and damages. Arbitration clause contained in the lease agreement is invoked, but not a single dispute is delineated which would arise out of the said lease agreement. The arbitration clause in the agreement categorically mentions that those disputes or differences which relate to the construction, meaning, operation or effect to the said lease agreement or breach thereof, shall be settled by arbitration. We have not been able to find a single dispute mentioned in the application filed by the defendant touching the interpretation, meaning, operation or effect of the lease agreement.

11. Insofar as the lease agreement is concerned, it is not in dispute that their existed a relationship of lesser and lessee between the parties; rent of the premises, as per the agreement, was more than Rs.3,500/- per month and, thus, provisions of the Rent Act are not applicable. As per the plaintiff, tenancy has also been terminated by giving notice under Section 106 of the Transfer of Property Act, 1882. The entire case of the defendant, as depicted in the application filed under Section 8 of the 1996 Act (as so far written statement has not been filed since the defendant chose to move the said application), is that there is an agreement to sell/MOU as per which right to claim the title in the suit property would be with the defendant. For resolution of the disputes which have arisen in respect of the said MOU, which is denied by the plaintiff as forged, the defendant has already filed Arbitration Application No. 335/2006 on the basis of arbitration clause contained in the said MOU dated 17.11.2003. This is an application under Section 11 of the 1996 Act for appointment of the arbitrator. The Court will take appropriate view in the said application and if the defendant is successful in getting the arbitrator appointed, disputes arising out of MOU would be gone into in those proceedings. Those are the disputes which relate to the title of the suit and would not be gone into in a suit for possession filed by the plaintiff on the ground that the suit premises were given on lease to the defendant and the lease has been determined. The application of the defendant could be dismissed on this ground itself.

12. In view of our aforesaid opinion, it is not necessary to decide as to whether such a

clause contained in the arbitration agreement should be looked into or not. We may only mention that there are divergent views taken in different judgments. However, it is not necessary to determine that issue conclusively, which does not arise for consideration in view of our opinion that no disputes arising out of the lease agreement have arisen and, therefore, there was no occasion even to invoke this clause. We, thus, hold that the learned Single Judge rightly dismissed the application of the defendant filed under Section 8 of the 1996 Act, though our reasons for this conclusion are different as spelled out above."

19. In my opinion, as it is not necessary to take recourse to the terms of the lease for the purposes of deciding the matter in dispute in Suit No. 64 of 2002; the said disputes are outside the scope and ambit of the arbitration clause as contained in the lease agreement dated 26th April, 1971. In fact, from what is stated hereinabove, the suit filed by the respondent is not in respect of a matter which the parties had agreed to refer and which comes within the ambit of the arbitration agreement.

20. Moreover, keeping in view the fact that the present suit was filed in the year 2002 and over six years have been spent in deciding a Section 8 application, I direct the trial court to decide the present suit by the end of this calendar year.

21. In view of the aforesaid observations, present petition is dismissed but with no orders as to costs.

MANMOHAN, J

February 06, 2009
rn/sb