

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

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Date of decision: 3, March, 2014.

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CS(OS) 461/2011

SHARAD P JAGTIANI

..... Plaintiff

Through: Ms. Ira Gupta & Mr. Rakesh Mukhija,
Advs.

versus

M/S EDELWEISS SECURITIES LIMITED

..... Defendant

Through: Mr. Madhukar Pandey with Mr.
Umesh Kumar Singh, Advs.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The plaintiff has instituted this suit for recovery of Rs.46,71,768.29p from the defendant, pleading that he was trading in financial markets through the defendant who is a member of the National Stock Exchange and a sum of Rs.46,71,768.29p is due to the plaintiff from the defendant on account of such transactions.

2. Summons of the suit were issued and a written statement contesting the suit claim has been filed by the defendant. Para 3 of the preliminary objections of the said written statement is as under:-

“3. That this Hon’ble Court lacks the necessary jurisdiction to entertain and decide the present Suit in view of Clause 13 of Part A of the Agreements dated 23.05.2008 entered into between the parties, wherein the parties have agreed to refer any claims/disputes arisen between the parties to be resolved by the mode of Arbitration, as per the Rules, Regulations and bye-laws envisaged by the respective stock exchange. The contents of Clause 13 are reproduced herein for the ready reference of this Hon’ble Court.

..13 The Client and the Stock Broker agree to refer any claims and/or disputes to arbitration as per the Rules, Bye-laws and Regulations of the Exchange and Circulars issued there under as may be in force from time to time...”

The defendant, along with the written statement filed a list of documents which include a copy of the Agreement dated 23rd May, 2008 supra purportedly bearing the signatures of the plaintiff and on behalf of the defendant. The counsel for the plaintiff during admission/denial of documents has admitted the said Agreement which has been admitted into evidence as Ex.D3.

3. The plaintiff filed a replication to the written statement aforesaid, denying the contents of para 3 of the preliminary objections in the written statement and further pleading that “the present suit as filed by the plaintiff

is not hit by any agreement of waiver and is well maintainable in law and thus objection raised is devoid of substance”.

4. The suit was listed for framing of issues on 17th February, 2014. Finding, that the claim of the plaintiff was premised on the plaintiff being the client of the defendant, a broker with the National Stock Exchange, it was on 17th February, 2014 enquired from the counsels whether not the bye-laws of the Stock Exchange provide for arbitration.

5. The counsel for the defendant had then invited attention to the preliminary objection aforesaid in the written statement and proposed the following issues thereon:-

“Does this Hon’ble Court lack the jurisdiction to entertain the present suit? OPD

Is the present suit maintainable? OPD”

The counsel for the plaintiff had sought time to address on, as to why the dispute is not referable to arbitration.

6. The counsel for the plaintiff has today not controverted that the action which has been brought by way of this suit before this Court is the subject matter of the arbitration agreement aforesaid between the parties. She has

however, by referring to ***Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited*** (2011) 5 SCC 532 contended that since the plaintiff has also lodged an FIR against the defendant with respect to the same transaction as subject matter of the suit, the dispute relates to rights and liabilities which give rise to or arise out of a criminal offence and are non-arbitrable.

7. There is no merit in the aforesaid contention. What the Supreme Court in the judgment aforesaid has held is that the Arbitral Tribunal cannot decide criminality. The said judgment cannot be read as laying down that the civil disputes which are otherwise subject matter of arbitration agreement become non-arbitrable merely because the actions of the defendant also constitute an offence and FIR of the said offence is lodged.

8. The counsel for the plaintiff then refers to judgment in ***Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya*** (2003) 5 SCC 531 where, in para 12 it has been held that a matter is not required to be referred to the Arbitral Tribunal if the parties to the Arbitration Agreement have not filed any application for referring the dispute to the Arbitrator. The counsel for the plaintiff has argued that the defendant in the present case has not filed any

application under Section 8 of the Arbitration and Conciliation Act, 1996 and the parties are thus not to be referred to the Arbitrator.

9. It has been enquired from the counsel for the plaintiff as to why, a separate application under Section 8 is required and why not the plea thereunder can be contained in the written statement itself in as much as Section 8 permits the plea thereunder to be raised “not later than when submitting.... first statement on the substance of the dispute”.

10. The counsel for the plaintiff then refers to ***Arti Jethani Vs. Daehsan Trading (India) Pvt. Ltd.*** 2011 (180) DLT 511 followed in ***R.R. Enterprises Vs. CMD of M/s. Garware-Wall Ropes Ltd.*** 2013(2) RAJ 532.

11. In ***Arti Jethani***, the defendant pleaded Arbitration Agreement in the written statement but did not file an application under Section 8 of the Act. Thereafter such an application was filed. This Court, after referring in *extenso* to ***Rashtriya Ispat Nigam Ltd. Vs. Verma Transport Co.*** (2006) 7 SCC 275 held that the application under Section 8 of the Act filed after the filing of the written statement was not maintainable. Of course, while holding so it was also observed that mere disclosure of Arbitration Agreement in the written statement and claiming that Civil Court has no

jurisdiction to try the suit would be of no consequence unless the written statement itself contains a prayer for referring the disputes for arbitration.

12. Section 8(1) requires a judicial authority before which an action is brought in a matter which is the subject of an Arbitration Agreement to, if a party so applies not later than when submitting his first statement on the substance of the dispute, to refer the parties to arbitration. The only precondition thereto is contained in sub section (2) which provides that the application under sub Section (1) shall not be entertained unless it is accompanied by the original Arbitration Agreement or a duly certified copy thereof.

13. The condition of sub Section (2) has been complied with by the defendant in the present case by filing a certified copy of the Arbitration Agreement along with the written statement and which agreement during admission/denial of proceedings has been admitted by the plaintiff and been given Ex.D3. The counsel for the plaintiff today also states that the signatures on the agreement are of the plaintiff, though contents are denied. However the said denial of the contents is found limited to certain hand

written contents of the agreement. The arbitration clause is printed and not hand written.

14. The defendant in the present case also, as in *Arti Jethani* supra, has neither in para 3 of the preliminary objections nor in the prayer clause of the written statement, sought reference of the parties to arbitration. However I am unable to, in Section 8, find any requirement for the applicant to seek a reference to arbitration. Section 8 requires a party to arbitration, to only intimate to the Court that the action before the Court is the subject matter of Arbitration Agreement. The duty, to 'refer' the parties to arbitration, is thereafter of the judicial authority and merely because such an obligation has been imposed on the judicial authority, does not mean that the party 'invoking' the arbitration has to seek 'reference to arbitration'. As long as a party to the proceeding before a judicial authority 'invokes' arbitration, not later than when submitting his first statement on the substance of the dispute, that is enough to bring the bar of Section 8 into play and the judicial authority/court then ceases to have jurisdiction. The Supreme Court in *P. Anand Gajapati Raju Vs. P.V. G. Raju* (2000) 4 SCC 539 has held that the language of Section 8 is peremptory and it is obligatory for the Court to refer the parties to arbitration in terms of Arbitration Agreement.

15. The next question for consideration is, whether the making of an application under Section 8 is necessary or the plea, substantially of Section 8 in the written statement, suffices. Though Sub-section (1) of Section 8 merely talks of “if a party so applies” and which can also be in the written statement but Sub-sections (2)&(3) of Section 8 do mention an “application under Sub-section (1)”. However in my opinion, the legislative change as contained in Section 8 of the 1996 Act, as from Section 34 of 1940 Act is not indicative of an application, separate from the written statement being necessitated to be filed for invoking arbitration agreement between the parties. In fact, even in *Arti Jethani* (supra), it has been held that reference under Section 8 of the parties to arbitration can be made if the written statement itself contains a prayer for referring the disputes for arbitration. However, *Arti Jethani* to the extent it holds that there has to be a specific prayer for reference, with due respect to the judgment in *Arti Jethani*, is contrary to the mandate of Section 8. Section 8, as aforesaid, merely requires a party to the action before a judicial authority, to bring to the notice of the judicial authority that the action brought before the judicial authority is the subject of an arbitration agreement. As long as the same is done in the written statement, mere absence of a prayer or use of the words seeking

reference to arbitration cannot come in the way of the obligation of the judicial authority to refer the parties to arbitration.

16. The Supreme Court in *P. Anand Gajapati Raju* (supra) which was not noticed in *Arti Jethani*, has held that “an application before a Court under Section 8 merely brings to the Court’s notice that the subject matter of the action before it is the subject matter of an arbitration agreement”. It was further held that Section 5 of the 1996 Act brings out clearly the object thereof, namely that of encouraging resolution of disputes expeditiously and less expensively and that when there is an arbitration agreement, the Courts intervention should be minimal and Section 8 has to be construed keeping the legislative intention in mind.

17. In my view, the said legislative intent requires the Court to interpret Section 8 widely and not in a constricted and pedantic fashion, as would be the case if it were to be held that though by filing a separate application simultaneously with the filing of the written statement, reference to arbitration would be made but not if the plea to the same effect is taken in the written statement or if it were to be held that the absence of a prayer in the application or the written statement “to refer the parties to arbitration”

would take away a right of having the disputes adjudicated by the agreed mode of arbitration.

18. Similarly, in *Kalpana Kothari Vs. Sudha Yadav* (2002) 1 SCC 203, it was held that in contrast to Section 34 of 1940 Act, Section 8 of the 1996 Act not only mandates that the judicial authority before which an action has been brought in respect of the matter which is the subject matter of an arbitration agreement, shall refer the parties to arbitration but also provides that notwithstanding the pendency of proceedings before the judicial authority or making of an application under Section 8(1), the arbitration proceedings are enabled, under Section 8(3), to be commenced or continued and an arbitral award also made, unhampered by such pendency and that having regard to the said purpose, scope and object of Section 8, the plea of estoppel can have no application to deprive a party from invoking an all comprehensive provision of mandatory character like Section 8, to have the matter relating to the disputes referred to arbitration in terms of the arbitration agreement. The said binding dicta also remained to be noticed in *Arti Jethani*.

19. In my opinion, it matters not that the counsel for the defendant while drafting the written statement, instead of using the words “refer the parties to arbitration” used the words “that the Court lacks jurisdiction to entertain and decide the suit in view of the arbitration agreement”. It is the substance of the plea and not the nomenclature which matters and just like citing of wrong provision of law, in *The Bombay Metal Works (P) Ltd. Vs. Tara Singh* 131 (2006) DLT 327 has been held by the Division Bench of this Court to be not an obstacle for granting the relief, so can non use of the language as used in the statute not be a ground to hold that inspite of the Court being informed of the Arbitration Agreement, not to refer the parties to arbitration.

20. Reference may further be made to:-

(A) *Eastern Media Ltd. Vs. R.S. Sales Corporation* 137 (2007)

DLT 626 where it was held that where a written statement is filed but with strings attached, by challenging the maintainability of the suit in view of the arbitration agreement, in such circumstances, the preliminary objection in the written statement can be treated as an application under Section 8.

Though the said judgment was considered in ***R.R. Enterprises*** but not followed since in that case the plaintiff had given his no objection for the matter to be referred to arbitration. In my respectful opinion, merely because in that case the plaintiff had agreed to reference to arbitration, would not take away from what was held as aforesaid therein.

B. ***Roshan Lal Gupta Vs. Parasram Holdings Pvt. Ltd.*** 157

(2009) DLT 712 where also it was held that a plea by way of preliminary objection in written statement, contesting the jurisdiction of Civil Court to proceed with the suit for arbitration even though referring to Section 5 and not Section 8 of the Arbitration Act, is a plea within the meaning of Section 8 of the Act and the defendant cannot be said to have waived or abandoned the arbitration.

C. ***APL Polyfab Pvt. Ltd. Vs. Technology Information,***

Forecasting and Assessment Council MANU/DE/3186/2011

negating the plea in opposition to a petition under Section 11 of the 1996 Act of the petitioner therein having lost his right to

invoke arbitration by, in a suit filed by the opposite party, having not filed a separate application under Section 8 though having taken the plea of Section 8 in the written statement. However I must mention that the same learned Single Judge subsequently in ***V.M. Mehta Vs. M/s Ultra Agro Securities Pvt. Ltd.*** MANU/DE/3135/2013, following ***R.R. Enterprises*** (supra) held the plea of Section 8 in the written statement to be not sufficient.

D. ***G.K.C. Projects Ltd. Vs. Unitech Machines Ltd.*** MANU/DE/0146/2014 where, following ***Roshan Lal Gupta*** supra, a plea of Section 8 contained in the written statement was held to be tenable.

21. I may further add that in ***Arti Jethani***, what the Court was concerned with, was an application under Section 8 filed after the filing of the written statement and not with the question whether the reference could be on the basis of the plea contained in the written statement.

22. As far as ***Sukanya Holdings (P) Ltd.*** (supra) is concerned, in my respectful view the same was not concerned with the issue as has arisen

herein, as in that case there was no such plea in the written statement. Similarly, ***Rashtriya Ispat Nigam Ltd.*** supra referred to *in extenso* in ***Arti Jethani***, was not concerned with the said issue but is a precedent on, an application under Section 8 being not barred by filing a detailed reply to an application for interim relief.

23. I am therefore of the view that the defendant, inspite of having not filed an application under Section 8, but in view of the preliminary objection in the written statement, even though not referring to Section 8 and not expressly seeking the relief of reference to a arbitration, has invoked Section 8 of the Act and it is the bounden duty of this Court to refer the parties to arbitration.

24. I may record that the High Court of Kerala and the High Court of Guwahati have taken a contrary view to the one taken by me and which judgments were noticed in ***R.R. Enterprises*** (supra).

25. The suit is thus disposed of referring the parties to arbitration.

26. The counsel for the plaintiff at this stage states that since the defendant has not filed any application under Section 8, the plaintiff may be deprived of preferring an appeal as available against an order on such an

application and may be compelled to file RFA(OS) by paying full Court Fees.

27. Since I have held that the making of a separate application under Section 8 is not necessary and it is the Court which owes a duty to refer the parties to arbitration upon the arbitration being invoked, the plaintiff, if in law has a right to prefer an appeal against an order on an application under Section 8 of the Act, would have a right against this order as well.

No costs.

RAJIV SAHAI ENDLAW, J.

MARCH 03, 2014

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