* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 30.05.2014

\+ CM(M) 137/2014

AEZ INFRATECH PVT LTD ..... Petitioner
Through: Mr. Sacchin Puri with
Ms. Aastha Lumba, Ms. Namitha
Mathews, Advs.

versus

SNG DEVELOPERS LTD ..... Respondent
Through: Mr. Sanjay Sehgal, Adv.

\+ CM(M) 138/2014

AEZ INFRATECH PVT LTD ..... Petitioner
Through: Mr. Sacchin Puri with
Ms. Aastha Lumba, Ms. Namitha
Mathews, Advs.

versus

SNG DEVELOPERS LTD ..... Respondent
Through: Mr. Sanjay Sehgal, Adv.

\+ CM(M) 75/2014

AEZ INFRATECH PVT LTD ..... Petitioner
Through: Mr. Sacchin Puri with
Ms. Aastha Lumba, Ms. Namitha
Mathews, Advs.

versus

SNG DEVELOPERS LTD ..... Respondent
Through: Mr. Sanjay Sehgal, Adv.

\+ CM(M) 76/2014

AEZ INFRATECH PVT LTD ..... Petitioner
Through: Mr. Sacchin Puri with
Ms. Aastha Lumba, Ms. Namitha
Mathews, Advs.

versus

SNG DEVELOPERS LTD ..... Respondent
Through: Mr. Sanjay Sehgal, Adv.

\+ CM(M) 79/2014
AEZ INFRATECH PVT LTD ..... Petitioner
Through: Mr. Sacchin Puri with
Ms. Aastha Lumba, Ms. Namitha Mathews, Advs.

versus

SNG DEVELOPERS LTD ..... Respondent
Through: Mr. Sanjay Sehgal, Adv.

\+ CM(M) 81/2014
AEZ INFRATECH PVT LTD ..... Petitioner
Through: Mr. Sacchin Puri with
Ms. Aastha Lumba, Ms. Namitha Mathews, Advs.

versus

SNG DEVELOPERS LTD ..... Respondent
Through: Mr. Sanjay Sehgal, Adv.

\+ CM(M) 82/2014
AEZ INFRATECH PVT LTD ..... Petitioner
Through: Mr. Sacchin Puri with
Ms. Aastha Lumba, Ms. Namitha Mathews, Advs.

versus

SNG DEVELOPERS LTD ..... Respondent
Through: Mr. Sanjay Sehgal, Adv.

\+ CM(M) 83/2014
AEZ INFRATECH PVT LTD ..... Petitioner
Through: Mr. Sacchin Puri with

Ms. Aastha Lumba, Ms. Namitha Mathews, Advs.

versus

SNG DEVELOPERS LTD ..... Respondent
Through: Mr. Sanjay Sehgal, Adv.

\+ CM(M) 89/2014
AEZ INFRATECH PVT LTD ..... Petitioner
Through: Mr. Sacchin Puri with Ms. Aastha Lumba, Ms. Namitha Mathews, Advs.

versus

SNG DEVELOPERS LTD ..... Respondent
Through: Mr. Sanjay Sehgal, Adv.

\+ CM(M) 90/2014
AEZ INFRATECH PVT LTD ..... Petitioner
Through: Mr. Sacchin Puri with Ms. Aastha Lumba, Ms. Namitha Mathews, Advs.

versus

SNG DEVELOPERS LTD ..... Respondent
Through: Mr. Sanjay Sehgal, Adv.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

% MR. JUSTICE NAJMI WAZIRI

1. Learned counsel for the petitioner had submitted that he had not received a copy of the reply. The reply was neither filed within time nor is there any application seeking condonation of delay of almost four weeks. Accordingly, it was not taken into consideration. Counsels for the parties stated that the matter may be heard on merits on the basis of

the records available. Accordingly, the parties have been heard and the matter was reserved for consideration.

2. This batch of petitions challenge an order dated 27.09.2013 passed by the Trial Court which rejected the petitioner's application under Section 8 of the Arbitration and Conciliation Act, 1996 ("**Act**") seeking reference of the suits to Arbitration.

3. The respondent had filed the batch of suits seeking injunction and declaration thereby declaring the letter dated 30.06.2012 as null and void and inoperative against the respondent, as well as for permanent and mandatory injunction restraining the petitioners from selling, parting with, subletting, assigning or otherwise parting with possession of the suit property in the project of the petitioner namely "Aloha" at Rishikesh; etc.

4. The respondent had agreed to book the suit premises in the aforesaid residential apartment project being constructed by the petitioner. By allotment letter dated 17.06.2005 the suit property was allotted to the respondent and a flat buyer's agreement dated 07.07.2006 was executed according to which the petitioner had agreed to deliver the possession of the apartments within 24 months thereafter. Subsequently, the allotment was cancelled and the suit was preferred seeking the reliefs aforesaid among others.

5. Admittedly, the petitioner initially sought time to file Written Statement but, thereafter filed an application under Section 8 of the Act

seeking reference of the matter to arbitration. They relied on Clause 44 of the agreement which reads as under:

> "*All or any disputes arising out of, or touching upon, or in relations to the terms of this agreement, including the interpretation and validity of the terms thereof, and the respective rights and obligations of the parties shall be settled amicably by mutual discussion, failing which, the same shall be settled through arbitration.*"

6. The Trial Court dismissed the application on the ground that the application was not filed with the original Arbitration Agreement or its duly certified copy which is a mandatory requirement of Section 8(2) of the Act and in the absence of which the application would fail. The Court relied upon the ratio of *Atul Singh* v *Sunil Kumar Singh*,[1] which held that non-production of original arbitration agreement or its duly certified copy along with an application under Section 8 of the Act is a clear non-compliance of the requirement of the said Section which is mandatory in nature.

7. Learned counsel for the petitioner submits that the suit itself relies upon the flat buyer's agreement which contains the aforesaid Clause 44. The application under section 8 of the Act was moved before filing of the Written Statement and in the circumstances there was no requirement for a duly certified copy being filed since there was no dispute *apropos* the existence of the arbitration clause regarding the suit property. He relies on the judgment of the Supreme Court in *P. Anand Gajapathi Raju & Others* v *P.V.G. Raju (dead) & Others*,[2] which held that

[1] 2008 (2) SCC 602
[2] (2000) 4 SCC 539.

what is required to be seen by the Court is that the arbitration agreement covered all the disputes between the parties in the proceeding before it. The language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of the arbitration agreement; once an arbitration agreement exists, all rights and obligations of the parties would be governed by the Arbitration Act including the right to challenge the award. "*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 the arbitration agreement."* He further relied on a judgment of this Court in *Jonsons Rubber Industries* v *General Manager, Eastern Railways & Anr.*,[3] wherein VIKRAMAJIT SEN, J. (as he then was) held:

> *"A pedantic approach to statutory provisions, which approach would have the effect of defeating the purpose of law, is to be eschewed. Surely, the intent of Section 8 is to ensure that frivolous objections should not be raised. Having incorporated the Arbitration Clause in the application itself, it would serve no further purpose if the contract or a certified copy thereof is still to be additionally filed. In fact, greater sanctity is bestowed on the pleadings of the parties, especially where these are also supported by the affidavits. Greater reliance should be placed on them, rather than on documents which are yet to be admitted and/or proved. In my view the requirements of Section 8 of the 1996 Act have been substantially and sufficiently met in the present case. This is all the more so since the Agreement between the parties is what is loosely called a 'Standard Form Agreement'. In this genre of contracts, the specific points pertaining to the particular contract at hand, are negotiated, spelt out and thereafter reduced to writing. There is, however, an overriding understanding that if an Agreement is arrived at between the parties, it would be subject to the 'general terms', applicable*

[3] 2000 (54) DRJ 59.

to all other contracts entered into between that party and other individuals.

What this Section requires is that an objection should be taken at the very threshold of the proceedings, as has been done in the present case. It has been consistently held that the filing of a Written Statement in the suit would amount to acting in, or defending the suit, and would preclude a subsequent challenge to the continuance /maintainability of the suit. There is no reason to depart from the old law. The interpretation given in the old law that an objection to the continuance of a civil suit, should be taken prior to the Defendant acting in the matter has been construed to mean the filing of a Written Statement. This is all that the Section states. The words 'first statement on the substance of the dispute' can have no other meaning."

8. He finally relied upon the judgment in *Cash and Gain Finance and Investments & Ors.* v *Manjula Udaya Shankar*,[4] which held that the plea of non-compliance with Section 8(2) of the Act would be unacceptable when the document containing the arbitration agreement is admitted and itself made the basis of the suit. It held that:

"The objections regarding the non-filing of the original or the certified copy of the arbitration agreement itself does not appear to be tenable and the reliance on the decision of the Supreme Court reported in Atual Singh and others v. Sunil Kumar Singh and others, 2008 (2) CTC 856, is not helpful. The Supreme Court has dealt with the case where the arbitration agreement itself was denied and they found that no document had even been filed along with the suit. On the other hand, in the present case, the partnership deed which contains the arbitral agreement is relied on by the plaintiff herself and it is that document which is the basis of the suit.

The revision petitioners refer me to the fact that the partnership deed containing the arbitral agreement has been filed by the petitioners along with the application and the

[4] 2009 (2) CTC 234

expression duly certified copy would include a certification made by the party that it is a true document. The counsel for the revision petitioners refers me also to the following decisions reported in General Manager, Northern Railway, New Delhi v. Metal Powder Co. Ltd., rep. By the Managing Director, Thirumangalam and another, AIR 1997 Cal. 397 : AIR 2003 SC 2252 : 2007 (1) MLJ 769, to the effect that non-filing of the original arbitral agreement is not fatal, even the arbitral agreement itself is not denied.

I have no hesitation in coming to the conclusion that in a case where the document containing an arbitral agreement is admitted and made the basis of the Suit itself, such a party cannot complaint that there has been non-compliance of the requirement under Section 8(2). As stated above, the filing of the copy certified by the party is adequate to satisfy the requirement of Section 8(2)."

9. Learned counsel for the respondent relied on Clause 43 of the said agreement which reads as under:

"43. ***GOVERNING LAWS AND JURISDICTION:***

That the rights and obligations of the Parties under or arising out of this Agreement shall be constructed and enforced in accordance with the laws in India, and the Courts at New Delhi shall have exclusive jurisdiction with regard to all matters arising out of/touching and/or concerning this Agreement."

10. He submits that given the above clause, the arbitration clause was only optional and does not bind the parties to arbitration. He further submits that there was no application of the parties to refer the matter to arbitration and in fact the parties reserved the right to themselves for pursuing the matter in a Court of law, as has been spelt out in Clause 43 of the agreement. He relies on *Atul Singh* (supra) to argue that filing of certified copy of the arbitration was essential; that the petitioner had

sought time to file a Written Statement, instead they filed the application under Section 8 of the Act; they delayed the proceedings by almost a year; and that the said application was not maintainable. He further relies upon *Sankar Sealing Systems P. Ltd. vs. M/s. Jain Motor Trading Co. & Anr.*,[5] to contend that what needs to be determined is whether the relevant clause of the contract was merely an enabling provision for arbitral reference or whether it was mandatory.

11. In rebuttal, Counsel for the petitioner contended that the provisions of Clause 43, ought to be regarded as subject to Clause 44 and, inasmuch as Clause 44 constitutes a mandatory arbitration agreement, parties have to be referred to arbitration. However, he offered no particular reason for this construction being placed on the contract, though he cited a long list of judgements in support of the latter proposition.

12. This Court has considered the submissions made by both parties and is of the view that the petition ought to be allowed. There is merit in the submission of the petitioner that where the plaintiff has itself referred to and relied upon the agreement containing the arbitral clause, and has not denied the averment of the defendant as to the existence of the arbitral clause, the provisions of section 8 (2) ought to not stand in the way of the matter being referred to arbitration.

13. The objective of filing certified copy is to ensure that there is no dispute *apropos* existence of the arbitration clause. However, it would be

[5] AIR 2004 Mad 127.

pedantic to insist upon compliance of the said provision in a situation like the present where the agreement containing the arbitration clause itself forms the basis of the suit and the said clause itself is clearly admitted by the respondent. The consideration before the Court would be that it should refer the matter to arbitration, when it is brought to the notice of the Court that such an agreement exists between the parties, and such request is made before filing of the Written Statement. It is not as if the Court's jurisdiction is ousted by the non-filing of the certified copy or the original copy of the agreement. Conversely, it cannot be said that it is the filing of the certified copy of the original agreement or its certified copy that vests jurisdiction on the Court. What the Court is required to see as per the scheme of the Arbitration Act is that an arbitration clause exists which is accepted by the parties. During the course of the arguments a query was put to counsel for the respondent where he disputed the existence or contents of flat buyer's agreement. His answer was in negative. Therefore, it is admitted that the flat buyer's agreement (containing the arbitration clause) which forms basis of the suit exists. Therefore, quite clearly, the Trial Court fell into error in not referring the parties to arbitration. This view also appears to be in consonance with various pronouncements of the High Courts as well as the Supreme Court, where applications under section 8 of the Act were allowed,[6] except where the plaintiff denied the existence of the agreement itself,[7] or of the dispute actually arising out of the agreement.[8]

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[6] *ITC Classic Finance Ltd.* v *Grapco Mining & Co. Ltd.*, AIR 1937 Cal 397, at para. 6, p. 399 (photocopy of agreement acted on, where agreement was not denied); *Parampal Singh & Ors.* v *Punjab State Ware House Corporation, Chandigarh & Ors.*, AIR 2000 P&H 53, at para. 3, p. 54 (this was, however, overruled in 2004 (2) RAJ 604 (P&H)); *Jonsons Rubber Industries* v *General Manager, Eastern Railways & Anr.*, *supra*, at n. 3, para. 3, p. 498 (agreement was set out *verbatim* and *in extenso* in the application under section 8 itself); *Motilal* v *Kedarmal Jainarayan Bharadiya & Ors.*, 2002 (3) Recent Arb Judgments 403 at para. 8, p.

14. The next contention of the counsel for the respondent was that since clause 43 provides that the Courts in New Delhi *shall* have *exclusive* jurisdiction over all matters arising out of the agreement, the provisions of clause 44 – which provides that all disputes and differences *shall* be referred to arbitration – ought to be regarded as being optional and hence ought to not be enforced. This contention must merely be stated to be rejected, as being contrary to well established principles of interpretation of documents, as well as to the statutory mandate leaning in favour of reference to arbitration.

15. It is a well known and well established principle of interpretation that the word *shall* ought to not be considered as *may*, which the respondent herein seeks to go against. It cannot be said that merely because clause 43 provides that Courts *shall* have *exclusive* jurisdiction, an arbitral tribunal cannot have jurisdiction in respect of the contract at all. Indeed, the Counsel's own admission – that clause 44 ought to be

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411 (where relying on *ITC* v *Grapco*, photocopy of agreement, which was not denied, was acted upon); *Union of India owning the Southern Railway and Anr.* v *Rajesh Damani, Proprietor, Allied General Sales Corporation*, 2008 (5) Arb LR 615 (Mad) at para. 17, p. 620 (where the filing of certified copy of relevant portion was held reasonable compliance with section 8(2), and that even otherwise, Court had discretion to direct filing of entire agreement); *Cholamandalam DBS Finance Ltd.* v *Abdulla*, 2009 (1) KLT SN 31 (where application under section 8 was held maintainable with notarised copy of agreement, when the same is not denied); *Reliance Communications Infrastructure Ltd. & Ors.* v *Rajesh Chawla*, 2010-12 (2) Punj LR 3, at para. 5, p. 4 (where since the plaintiff himself relied upon the agreement containing arbitral clause, the application was allowed on the basis of photocopies).

[7] *India Lease Development Ltd. & Anr.* v *Thimmakka*, AIR 2003 Kant 97, at para 5, p. 97; *Sudarshan Chopra & Ors.* v *Company Law Board & Ors.*, 2004 (2) RAJ 604 (P&H) (where the CLB had held that although the agreement was earlier filed, the party had, at that time, not sought for reference to arbitration, and had thus forgone its claim for reference); *Atul Singh* v *Sunil Kumar Singh*, *supra* at n. 1 (where the existence and validity of the agreement containing arbitral clause was itself denied on the basis of fraud and forgery); *N Radhakrishnan* v *Maestro Engineers & Ors.*, (2010) 1 SCC 72 (where the plaintiff denied the existence of the agreement containing arbitral clause, on the basis that it was fraudulent and forged).

[8] *North Eastern Electric Power Corporation Ltd & Ors.* v *Jiban Kumar Saha*, AIR 2000 Gau 80, at paras. 12-14, p. 82 (where though agreement as set out in pleadings was admitted, but scope of contract and whether it arises from the agreement – and hence is covered by the arbitral clause – was denied).

considered as optional and that the parties *may* refer their disputes to arbitration if they so desire – runs contrary to the contention that the Courts in New Delhi shall have jurisdiction, to the exclusion even of arbitral tribunals. This interpretation would render the provision in clause 44 *otiose*, and thus ought to not be preferred if another reasonable interpretation would give effect to both the clauses; *ut res magis valeat quam pereat*.[9] It is for this reason, that this Court finds itself respectfully disagreeing from the judgement of the Madras High Court cited by the respondent.[10] A perusal of the judgement, specifically paragraphs 20 to 24 thereof, shows that the Court has, after setting out the jurisdiction and arbitration clauses, directly proceeded to hold that in view thereof the arbitration clause is non-mandatory. This Court cannot be bound by a decision that was perhaps given in the peculiar circumstances that necessitated an interpretation that ordinarily ought to not have been preferred.

16. The issue appears to be a regular occurrence in the Courts of England and has been the subject of regular judicial pronouncements; two judgements would be particularly instructive in this regard. The first, and seminal, judgement in this regard, is that of the Queen's Bench Division of the Commercial Court of the England and Wales High Court in *Paul Smith Ltd.* v *H & S International Holding Inc.*,[11] where in respect of

[9] Latin: [The Court ought to prefer the interpretation] which would give effectiveness [to both clauses] rather than let perish [either of them].
[10] *Sankar Sealing Systems P. Ltd.* v *Jain Motors Trading Co & Anr.*, AIR 2004 Mad 127.
[11] [1991] 2 LLR 127.

effectively identical clauses.[12] LORD STEYN refused to regard the clauses as inconsistent or the arbitration as non-mandatory, and observed:[13]

> *"Clause 13 [similar to clause 44 here] is a self-contained agreement for the resolution of disputes by arbitration. Clause 14 [similar to clause 43 here] specifies the lex arbitri the curial law or the law governing the arbitration, which will apply to this particular arbitration. The law governing the arbitration is not to be confused with (1) the proper law of the contract, (2) the proper law of the arbitration agreement, or (3) the procedural rules which will apply in the arbitration. These three regimes depend on the choice, express or presumed, of the parties.*
> ...
> *If cl.14 is read as specifying the law governing the arbitration, there is no inconsistency between cll. 13 and 14."*

17. This interpretation was followed in various cases thereafter, holding that such apparent conflict ought to be resolved in the arbitral clause being given effect and the jurisdiction clause being regarded as vesting Courts with supervisory jurisdiction.[14] Upholding the line of judgements and justifying such an interpretation of the arbitral clause in such contracts, where both jurisdiction as well as arbitration clauses are given, CHRISTOPHER CLARKE J., of the Queen's Bench Division, in *ACE Capital Ltd. & Ors.* v *CMS Energy Corporation*,[15] observed:

> *"Such an interpretation still leaves the Service of Suit clause with meaningful scope. It enables the assured to found jurisdiction in any US Court, including its home court, to declare the arbitrable nature of the dispute, to compel arbitration, to declare the validity of an award, to enforce an award, or to confirm the jurisdiction of US courts on the*

[12] The clauses are reproduced in pp. 128-129 of the report.
[13] [1991] 2 LLR 127, at pp. 129-130.
[14] *Daval Aciers D'Usinor et de Sacilor & Ors* v *Armare Srl (*The Nerarno*)*, [1994] 2 LLR 50 at col. 2, p. 54 to col. 1, p. 55; approved in *Daval Aciers D'Usinor et de Sacilor & Ors* v *Armare Srl (*The Nerarno*)*, [1996] 1 LLR 1, at col. 1, p. 4; *Shell International Petroleum Co Ltd.* v *Coral Oil Co Ltd.*, (No. 1), [1999] 1 LLR 72, at p. 76, cols. 1 and 2; MH *Alshaya Co WLL* v *Retek Information Systems Inc.*, [2001] Masons CLR 99; *Axa Re* v *Ace Global Markets Ltd.*, [2006] EWHC 216 (Comm) at paras. 32-35.
[15] [2008] EWHC 1843 (Comm).

merits in the event that the parties agree to dispense with arbitration..."[16]

18. There is one judgement that ought to be cited here, by WEBSTER J. in *Indian Oil Corporation* v *Vanol Inc.*[17] In that matter, the arbitral clause was held to be overridden by the exclusive jurisdiction clause. However, this was distinguished by GLOSTER J. in *Axa Re* v *Ace Global Markets Ltd.*,[18] where he clarified that *Indian Oil* was a matter involving a standard form arbitration contract, which was specifically deviated from by the jurisdiction clause. This was further followed by the High Court division of the Supreme Court of Singapore in *PT Tri-MG Intra Asia Airlines v Norse Air Charter Ltd.*[19]

19. This Court finds itself in respectful agreement with the judgements, which have been upheld and quoted with approval even as recently as in 2012.[20] The appropriate interpretation, which appeals to business common sense, in matters involving such ostensibly contradictory clauses, would be to – unless a clear intention to the contrary appears from the agreement – regard the parties as having agreed to refer disputes to arbitration, and having agreed to a particular court as having supervisory jurisdiction over the arbitration. Thus, the contention of the respondent on this ground has to be rejected.

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[16] *Ibid.*, at para. 82.
[17] [1991] 2 LLR 634.
[18] *Supra*, at n. 14.
[19] [2009] SGHC 13 (HC (Sing.))
[20] *Interserve Industrial Services Ltd.* v *ZRE Katowicce SA*, [2012] EWHC 3205; *Sulamerica Cia Nacional de Seguros SA* v *Enese Engenharia SA*, [2012] EWCA Civ 638.

20. The learned counsel for the respondent then contended that the arbitration clause, even if it is regarded as mandatory, cannot be taken recourse to, unless the parties attempt to settle the matter amicably through discussions first. He submitted that that the respondent was constrained to file the suits since the petitioner failed to respond to their repeated calls to settle the disputes through conciliation. This Court is unimpressed with this submission; the failure to respond to calls for conciliation indicates a failure of attempts to settle. The next logical step is to invoke arbitration, not to file a suit in the Court. Thus, the contention of the respondent on this ground cannot be accepted.

21. The learned counsel for the respondent further contended that the arbitration clause is vague and is uncertain with respect to who would be the Arbitrator and the manner in which he would be appointed. This contention, too, needs to be rejected. The Act provides the parties complete autonomy in respect of appointment of arbitrators, and also provides for a remedy in a situation where the mechanism agreed to by the parties fails. It is found in section 11 of the Act. Given the same, this contention too is untenable.

22. For the reasons aforesaid, this Court is unable to agree with the reasoning and the conclusion of the impugned order. Accordingly it is set aside and the case is hereby referred to arbitration. The parties shall take steps for arbitration proceedings as per the arbitration agreement. No order as to costs.

NAJMI WAZIRI
(JUDGE)

MAY 30, 2014