

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5880 OF 2014

M/s. Nirmal Lifestyle (Kalyan) Private Ltd.

and others

.. Petitioners

Versus

Mr. Hendrya S/o Bama Patil and others

.. Respondents

**Mr. Bhavik Manek with Mr. Tushar Kadam i/b M/s. MPD & Partners,
Advocate for the Petitioners.**

**Mr. Deepak Natu i/b M/s. N. Deepak & Co., for Respondents No.1 to 7
and 8-1 to 8-4.**

Mr. Prashant Kambli i/b A. S. Rao, for Respondent No.12.

CORAM : R.M. SAVANT, J.

DATE : 20th JANUARY, 2015

PC.

1. The writ jurisdiction of this Court is invoked against the order dated 15.02.2014 passed by the Learned Civil Judge, Senior Division, Kalyan, by which order the application Exh.60 filed under Section 8 of the Arbitration & Conciliation Act by the Petitioners i.e. original Defendants No.3 to 5 to the suit in question being Special Suit No.108 of 2012 came to be rejected.

2. The suit in question i.e. Special Suit No.108 of 2012 has been filed by the Respondents No.1 to 9 herein seeking declaration in respect of the Development Agreement entered into between the Plaintiffs and the

Defendants No.3 to 5. Suffice it to say for the purposes of the instant order the suit is founded on the fact that there is non-compliance of the terms and conditions of the said Development Agreement and one of the non-compliance is as regards the non-payment of the consideration to the Plaintiffs who are the original owners of the lands in question in respect of which the Development Agreement has been executed. The plaint replete with the facts that the Defendants No.3 to 5 have coaxed the Plaintiffs to sell the property at a throw away price. It is not necessary to dilate on this aspect further. It seems that the suit summons came to be served on Defendants No.3 to 5 and in view of the fact that the written statement was not filed by them, the Trial Court on 21.07.2012 passed an order that the suit to proceed ex-parte against the Defendants No.3 to 9 which includes Defendants No.3 to 5 i.e. present Petitioners. It appears that on 21.07.2012 the Defendants No.3 to 5 filed an application under Section 9A of the CPC questioning the maintainability as well as the jurisdiction of the Civil Court to entertain the suit on the ground that there is an Arbitration Clause. However, in the said application, the Defendants sought relief of the dismissal of the suit. The said application filed under Section 9A i.e. Exh.36 was replied to on behalf of the Plaintiffs. The Plaintiffs denied that the suit is not maintainable or that the Civil Court does not have the jurisdiction to entertain the suit. It seems that the Trial

Court heard the application Exh.36 and decided the said application by order dated 14.02.2013 holding that since the application is not filed in terms of Sections 7 and 8 of the Arbitration and Conciliation Act, 1996. The same was required to be rejected.

3. The said order dated 14.02.2013 was challenged by the Defendants No.3 to 5 by filing Writ Petition No.2834 of 2013 in this court. The learned counsel for the Petitioner in the said Petition after arguing for sometime sought withdrawal of the said Petition. The Petition was accordingly dismissed as withdrawn. It is thereafter that the instant application Exh.60 came to be filed by the Defendants No.3 to 5 under Section 8 of the Arbitration and Conciliation Act, 1996. The said application was founded on Clause 29 of the Development Agreement dated 04.02.2008 entered into between the parties. The Defendants sought the relief of return of the plaint and a direction against the Plaintiffs to refer the present dispute to arbitration under the Arbitration and Conciliation Act, 1996. The Plaintiffs filed their reply by way of say to the said application and the stand taken was that the application is devoid of merits and therefore, be dismissed with costs. The Trial Court considered the said application Exh.60 and has by the impugned order dated 15.02.2014 rejected the same. The principal ground, on which the application is rejected is that the Defendants have filed a xerox copy of the

agreement and thereby have not complied with Section 8(2) of the said Act as the provision postulates the filing of the original copy of the agreement or the certified copy of the agreement along with the application. Though the Trial Court has referred to the relief sought in the suit and has fleetingly made an observation that having regard to the said reliefs the machinery by way of Arbitration would not provide relief to the Plaintiffs. However, the application as indicated above has been principally rejected on the ground that there is breach of Section 8(2) of the said Act in the matter of non filing of the original or certified copy of the agreement.

4. During the course of the hearing of the above Petition, it has transpired that after the order came to be passed by the Trial Court on 21.07.2012 to proceed ex-parte, the Defendants No.3 to 5 filed an application Exh.47 for setting aside the said ex-parte order dated 21st July, 2012. The Defendants also filed an application Exh.48 for condonation of delay in filing the application Exh.47. The said applications i.e. Exh.47 and 48 came to be allowed and resultantly, the Defendants No.3 to 5 were permitted to file their written statement. The Defendants have accordingly filed their written statement on 3rd November, 2012 which written statement is marked as Exh.51 and which was tendered on 15th September, 2012. At this stage, it would be apposite to refer to the written statement.

In the written statement in paragraph 9, a reference is made to clause 28 thereby purportedly referring to clause 29 and it is averred that in the event any dispute between the parties, the same would be referred to Arbitration. It has further been averred that the Defendants have moved such an application meaning thereby the application Exh.36 filed invoking Section 9A which was pending. Except the said averments, the written statement is bereft of any averments relating to the said Arbitration clause or that the suit cannot be proceeded and that the parties are to be referred to Arbitration. The rest of the written statement deals with the merits of the Plaintiffs case.

5. In the context of the filing of the written statement, the issue therefore arises whether the filing of the written statement militates against the case of the Defendants that the parties are required to be referred to Arbitration especially having regard to the mandate of Section 8(1) of the said Act. At the cost of repetition, it is required to be stated that Section 8(1) postulates that an application is required to be filed before filing the first statement on the substance of the dispute. Hence, in the facts and circumstances of the present case, it is required to be considered whether the parties are required to be referred to Arbitration or the Defendants No.3 to 5 can be said to have submitted to the jurisdiction of the Civil Court.

6. In so far as the ground on which the impugned order is founded namely that the Plaintiffs have not complied Section 8(2) of the Arbitration and Conciliation Act as they have filed neither a certified copy nor the original copy of the agreement. In my view, in the light of the acceptance of the Development Agreement by the Plaintiffs and having regard to the judgments of the Apex Court reported in (2007) 7 SCC 737 in the matter of **Bharat Sewa Sansthan Vs. U. P Electronics Corpn. Ltd.**, the judgment of the Learned Single Judge of the Kerala High Court reported in 2006(4) Arb. LR 149 in the matter of **Natarajan Vs. General Manager, Southern Railway** and the judgment of the Learned Single Judge of the Madras High Court reported in 2009(2) CTC 234 in the matter of **Cash and Gain Finance and Investments Vs. Manjula Udaya Shankar**. The sum and substance of the judgments is that it would be myopic to read into Section 8(2) any invariable mandate that the arbitration agreement or a copy thereof must be produced along with such request. The said pronouncement seems to suggest that if the agreement is also before the Court or if it is not disputed or if it is produced in the event of a dispute when such dispute is raised, it can still be said that the agreement had accompanied the petition. The underlying principle appears to be that a technical approach should be eschewed and an endeavour made to see to it that the parties are referred to Arbitration.

Hence, in so far as the said ground is concerned on which the application is rejected, the same is unsustainable.

7. However, what remains is the issue as to whether in view of the filing of the written statement the parties can still be referred to Arbitration or that the Defendants have waived their right and have submitted to the jurisdiction of this Court. The learned counsel appearing on behalf of the Petitioners Mr. Manek would place reliance on the judgment of the Apex Court reported in **AIR 2006 SC 2800** in the matter of **Rashtriya Ispat Nigam Limited and Anr. Vs. Verma Transport Company** as also the judgment of the Apex Court reported in **AIR 2011 SC 2507** in the matter of **Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Ors.** In *Rashtriya Ispat Nigam Limited (Supra)*, the Apex Court has interpreted what is meant by filing of the statement on the substance of the dispute', the Apex Court has observed that it employs submission of the party to the jurisdiction of the judicial authority. Hence, what is, therefore, required is a finding by the judicial authority that the party has waived his right to invoke the arbitration clause. In the facts of the case before the Apex Court where the parties i.e. appellants had raised a specific plea of bar of the suit in view of the existence of the 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.

8. In so far as *Booz Allen and Hamilton Inc. (Supra)* is concerned, the Apex Court has observed that though no limitation has been prescribed for filing of an application under Section 8 of the Act, the same should be filed before the submission of the first statement on the substance of the dispute. The Apex Court has further observed that the scheme of the Act and the provisions of the section clearly indicate that the application should be made at the earliest.

9. In the instant case, as indicated herein above the application Exh.36 was filed invoking Section 9A questioning the maintainability of the suit in view of the Arbitration clause. As mentioned herein above, the relief sought vide said application Exh.36 was the dismissal of the suit. Hence, in so far as the said application Exh.36 is concerned, admittedly it was not filed invoking Section 8 of the Arbitration and Conciliation Act is concerned, but the tenor of the said application seems to suggest that the Defendants No.3 to 5 were interested in the dismissal of the suit rather than the parties being referred to Arbitration. The same is sought to be explained by the Defendants by contending that mere mentioning of a wrong provision would not digress from the fact that it was an application for referring the parties to Arbitration. It is required to be borne in mind

that the Defendants No.3 to 5 are developers who are undertaking development of properties in the city of Mumbai as well as in the Suburbs and therefore, such explanation that a wrong provision was invoked cannot be countenanced. The intention as indicated above was to get the proceedings i.e. the suit terminated rather than seeing to it that the parties are referred to Arbitration.

10. Now comes the filing of the written statement, it is required to be noted that the averments in so far as clause 29 is concerned, find a place only in paragraph 9 of the written statement, wherein they have contended that the Defendants have already moved an application for the parties being referred to Arbitration. However there is no prayer in the written statement for the parties be referred to arbitration. In the introductory paragraphs also there is no averment that the written statement is being filed without prejudice to the rights and contentions, in so far as the application Exh.36 is concerned. As indicated herein above, the written statement is a detailed written statement dealing with the Plaintiffs case on merits, hence the written statement can be said to be the entire defence of the Defendants No.3 to 5 to the suit. The averments in the said written statement and the fact that the same has been filed without a caveat to the effect that the same has been filed without prejudice to the rights and contentions of the Defendants in so far as the

said application Exh.36 is concerned, leads to a conclusion that the Defendants No.3 to 5 had waived their right, in so far as the parties being referred to Arbitration is concerned. This is also fortified by the fact that though the application Exh.36 was pending for a long time, no attempt was being made for the hearing of the said application being expedited. Hence, the averments in the written statement as also the relief sought vide the said application Exh.36 would show that the Defendants No.3 to 5 were only interested in seeing to it that the suit is dismissed and that the Plaintiffs do not get any reliefs. There was no unequivocal attempt to see to it that the parties are referred to arbitration. Hence, though the ground of the Defendants No.3 to 5 having subjected themselves to the jurisdiction of the Court is not a ground on which the impugned order has been passed, this Court is required to consider the same as the factum of the written statement being filed is brought to the notice of this Court at the hearing of the above Petition. Hence, the judgments of the Apex Court in *Rashtriya Ispat Nigam Limited (Supra)* and *Booz Allen and Hamilton Inc. (Supra)* would not aid the case of the Petitioners i.e. original Defendants No.3 to 5 to contend that they are still entitled to the relief of the parties being referred to Arbitration in terms of clause 29 of the agreement though they have filed their written statement. The impugned order can therefore be sustained on the aforesaid ground. Hence, the final result

i.e. rejection of the application Exh.60 does not merit interference at the hands of this Court in its writ jurisdiction under Article 227 of the Constitution of India. The Writ Petition is accordingly dismissed.

[R.M. SAVANT, J]