

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 32 OF 2016**

1. Cogent Enterprises Pvt Ltd, a
company ... and Anr.
2. Mr Girimon Puttupara
Thankappan,

..Petitioners/
Orig.Defts.
Nos 1 and 2

Vs

1. Shri Vijay Kumar Jagdishray
Chawla and Ors.

.. Respondents
No.1-Orig.Plff&Defts

Mr. Deepak Dhingra i/b S.C.Wakankar, Advocate for Petitioners.
Mr. Saurabh Butala a/w Harshad Sathe, Advocate for
Respondents.

CORAM : R.G.KETKAR,J.
DATE : 22/01/2016

PC:

1. Heard Mr. Deepak Dhingra, learned counsel for the petitioners and Mr. Saurabh Butala, learned counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 18.12.2015 passed by the learned 10th Jt. Civil Judge, Sr Dn., Pune below Exhibit.41 in Spl. Summary Suit No.25 of 2015. By that order, the learned trial Judge rejected the application made by the petitioners, hereinafter referred to as 'defendants', under Section 8 of Arbitration and Conciliation Act, 1996 (for short, 'Act'). The relevant and material facts for disposal of the present petition, briefly stated, are as under.

3. Respondent no.1, hereinafter referred to as 'plaintiff', has instituted Special Summary Suit against the petitioners, hereinafter referred to 'as defendants no. 1 and 2' and respondents no.2, 3 and 4, hereinafter referred to as 'defendants no.3, 4 and 5', for recovery of Rs.1,51,26,000/- with further interest at 18% per annum from the date of filing of suit till the realisation of the amount. The plaintiff contended that defendants no.1 and 2 agreed to sell Twin Villas No.1 and 2 in the complex known as "Mystica Twin Villas" at Lonavala to the plaintiff. Defendant no.1, through its Director defendant no.2, and the plaintiff entered into Memorandum of Understanding (for short, 'MOU') on 6.7.2011. The defendants agreed to sell the two Villas for a total consideration of Rs.1,50,00,000/-. It is an undisputed position that the plaintiff has paid Rs. One Crore in terms of payments which are reflected in paragraph 5 of the Plaint. During the process of construction of said Villas, differences arose between the plaintiff and defendant no.1, more particularly on the ground that front elevation was not to the like of the plaintiff.

4. It is the case of the plaintiff that the MOU was revoked/cancelled and the defendants agreed to return the amount of Rs.1,65,81,000/- the advance amount of Rs.65,81,000/- being compensation on account of rise in prices

which took place in interregnum. This is reflected in the writing dated 18.12.2013 in which eight cheques for the amount of Rs.1,65,81,000/- have been mentioned. The plaintiff deposited these cheques which were dishonoured. The plaintiff has instituted Summary suit claiming amounts on the basis of the cheques so dishonoured

5. After service of suit summons, it appears that the defendants, firstly applied for condonation of delay in causing for appearance in the suit on 17.3.2015 at Exh.15. The defendants, thereafter, filed application dated 19.6.2015 at Exh.22 for leave to defend. By order dated 26.8.2015, the learned trial Judge rejected the application Exh.22 and granted conditional leave to defend to defendants no.1 to 5 subject to furnishing bank guarantee of Rs. 1,51,26,000/- and file written statement within 15 days strictly. Aggrieved by that order, the defendants instituted Writ Petition (ST) No.24983 of 2015 in this Court. By order dated 7.10.2015, the Writ Petition was partly allowed by directing defendants no.1 to 5 to furnish bank guarantee of Rs. One crore and also file their written statement within 15 days strictly. This was on condition that defendants no.1 to 5 will not deal with the property in question for a period of six weeks. It appears that thereafter defendants 1 to 5 sought extension of 4 weeks time for complying order dated 7.10.2015 by filing

C.A.No.3008 of 2015. That application was disposed of by learned Vacation Judge (R.K.Deshpande, J.) on 5.11.2015. Time was extended for a period of two weeks during which defendants no 1 to 5 were directed to furnish bank guarantee. Again, defendants no.1 to 5 applied for extension of time by filing C.A.No.3044 of 2015. In the order dated 18.11.2015, assurance given by defendants no.1 to 5 that by 30.11.2015 they will furnish bank guarantee in the sum of Rs. One Crore and that they will not seek further extension of time was recorded. In view of that statement, Civil Application was ordered to be listed on 2.12.2015 for compliance. It was made clear that on the next date if bank guarantee was not furnished, no further extension will be granted. The matter was thereafter listed on 9.12.2015 and as defendants no. 1 to 5 did not furnish bank guarantee on or before 30.11.2015, application seeking extension of time was rejected.

6. It appears that in the meantime, defendants no.1 to 5 had filed application Exhibit-41 under section 8 of the Act on 11.9.2015 for referring the dispute to Arbitrator. By the impugned order, the application is rejected. It is against this decision, defendants no.1 and 2 have instituted this petition.

7. In support of this petition Mr. Dhingra strenuously contended that Section 8 of the Act is mandatory and once it is

brought to the notice of the Court that there is valid arbitration clause between the parties, the Court has no option but to refer the dispute to Arbitration. He invited my attention to paragraph III(k) & (l) of the application dated 19.6.2015 Exh.221 filed under section 8 of the Act. After quoting clause no.8 of MOU dated 6.7.2011, it was submitted that as per Section 8 of the Act, the Civil Court has got no jurisdiction to entertain and decide the present suit and request was made for rejecting plaint under Order VII Rule 11 of C.P.C for want of jurisdiction. In other words, Mr Dhingra submitted that existence of arbitration clause was brought to the notice of the trial Court and, therefore, the trial Court ought to have referred the dispute to the arbitration as per clause (8) of the MOU dated 6.7.2011. He further submitted that filing of the application for condonation of delay in filing appearance as also filing of application for leave to defend does not amount to "first statement on substance of dispute" as contemplated by section 8(1) of the Act. In other words, he submitted that the defendants did not submit to the jurisdiction of the civil court. Defendants no. 1 to 5 have also not waived their right to invoke the arbitration clause.

8. He relied upon following decisions:

(1) Rashtriya Ispat Nigam Limited Vs. Verma Transport Company, AIR 2006 S.C. 2800,

(2) Reva Electric Car Company P Ltd Vs. Green Mobile, AIR 2012 SC 739;

(3) The Branch Manager, Magma Leasing and Finance Co Vs. Potluri Madhavalata, AIR, 2010 SC 488,

(4) Everest Holdings Limited Vs Shyam Kumar Shrivastava, (2008) 16 SCC 774;

(5) Ashapura Mine-Chem Ltd Vs Gujrat Mineral Development Corp., (2015) 8 SCC 193; to contend that the defendants did not file 'first statement on substance of dispute' and, therefore it cannot be said that the defendants have waived their rights or acquiesced to jurisdiction of Civil Court.

(6) Swiss Timing Limited V. Organising Committee, Commonwealth Games 2010, AIR 2014 SC 3723;

(7) Full Bench decision of this Court in Conros Steel Pvt Ltd Vs. Lu Qun (Hong Kong), Appeal No.806 of 2011 decided by S.J.Vazifdar, K R Shriram and A.K. Menon, JJ. on 27.11.2014;

(8) Satish Raghuvirchand Sood Vs Gujrat Tale Links Pvt Ltd, L.P.A 102 of 2013 decided on 26.7.2013 by B.R.Gavai and P.N.Deshmukh JJ.

(9) Smt Rashmi Solanki Vs. Sri B.S. Sham Sunder of Karanataka High Court, Writ Petition Nos.27600-601 of 2015, decided on 11.9.2015; to contend that even if MOU is terminated as per the

plaintiff's case, in view of section 16 of the Act even on the termination of the agreement, Arbitration agreement would still survive.

9. Mr. Dhingra further relied upon the following decisions :

(1) G. Rajarajan Vs AIG Consumer Financial Services (India) Ltd 2013 (2) ARB L.R. 438 (Madras), Madras High Court, to contend that filing of application under Order 37, Rule 3(5) seeking unconditional leave to defend claim of the plaintiff, cannot be treated and does not mean filing of first statement on substance of dispute as contemplated under section 8(1) of the Act.

(2) M/s D.C. Textile Mills Pvt Ltd Vs. Mr. Keval Kishan Arora, Summons for Judgment No.343 of 2008 in Summary Suit No.2066 of 2008 of learned Single Judge of this Court dated 30.6.2009, to contend that even after grant of leave to defend the suit to the defendants, the defendants would still have an opportunity to make application under section 8 of the Act before he files written statement in the suit.

(3) Stellar Industries Vs. International Combustion (India) Ltd, 2009(1) ALL M R 182, to contend that application for leave to defend cannot be called 'first statement on substance of dispute'.

(4) P. Anand Gajapathi Raju Vs. P.V.G.Raju (dead) & Ors, (2004) 4 SCC 539, to contend that language of the section is

peremptory and even parties can be referred to arbitration during pendency of the Appeal.

10. On the other hand, Mr. Butala supported the impugned order. He submitted that the defendants have submitted to the jurisdiction of the court and waived their right to seek reference to arbitration. He submitted that after service of suit summons, the defendants applied for condonation of delay in causing for appearance in the suit on 17.3.2015 at Exhibit-15. The defendants thereafter filed application on 18.6.2015 at Exhibits 22 for leave to defend. By order dated 26.8.2015, defendants no. 1 to 5 were allowed to defend on condition of furnishing bank guarantee of Rs.1,51,26,000/- and also filing their written statement within 15 days strictly. Aggrieved by this decision, defendants no. 1 to 5 instituted Writ Petition (St) No. 24983 of 2015 in this Court. Defendants no. 1 to 5 did not advance argument based on Section 8 of the Act to contend that the parties should be referred to arbitration. In fact, the Writ Petition instituted by them was partly allowed and operative part of the order dated 26.8.2015 was modified. Defendants no.1 to 5 were allowed to defend on condition of submitting bank guarantee of Rs. One crore and also filing their written statement within 15 days strictly.

11. Defendants no.1 to 5 thereafter applied for extension of

time on 5.11.2015 and 18.11.2015 for complying the order dated 7.10.2015. Though extension was given upto 30.11.2015 for furnishing bank guarantee in the sum of Rs. One crore and an assurance that defendants no. 1 to 5 will not seek further extension of time was recorded in the order dated 7.10.2015, they did not furnish bank guarantee. By order dated 9.12.2015, extension prayed for was refused. It is only thereafter defendants no.1 to 5 have pressed their application dated 11.9.2015 (Exhibit 41) filed under section 8 of the Act. He submitted that defendants no.1 to 5, though quoted clause 8 of MOU dated 6.7.2011 in the application dated 18.6.2015, they did not press this contention either before trial Court or before this Court. In short, defendants no. 1 to 5 submitted to the jurisdiction of the court and waived their right to seek reference to arbitration.

12. Mr. Butala relied upon Order 37 of CP.C. as also decision of the Division of this Court in *Jadavji Narsidas Shah Vs. Hirachand Chatrabhuj*, AIR 1954 Bombay 174 to contend that by filing application for leave to defend, defendants no. 1 to 5 have submitted their “first statement on the substance of the dispute” and, therefore, in view of Section 8(1) defendants no.1 to 5 are precluded from filing application under section 8. Defendants no. 1 to 5 have also not satisfied the conditions stipulated in Section

8 before invoking that section. He further submitted that the present petition is an abuse of process of court as also abuse of process of law and same may be dismissed with exemplary costs.

13. I have considered the rival submissions advanced by learned counsel appearing for the parties. I have also perused the material on record.

14. Section 8 of the Act reads thus:

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.

[emphasis supplied]

15. Where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under section 8 stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide (i) whether there is an arbitration agreement among the parties; (ii)

whether all parties to the suit are parties to the arbitration agreement; (iii) whether the disputes which are the subject matter of the suit fall within the scope of arbitration agreement; (iv) **whether the defendant had applied under section 8 of the Act before submitting his first statement on the substance of the dispute**; and (v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration, as observed in the case of *Booz Allen and Hamilton Inc V SBI Home Finance Ltd*, AIR 2011 Supreme Court 2507. (Emphasis supplied)

16. In paragraph 17 of that report, it was observed that “not only filing of the written statement in a suit, but filing of any statement, application, affidavit filed by a defendant prior to the filing of the written statement will be construed as ‘submission of a statement on the substance of the dispute’, if by filing such statement/application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waive his right to seek reference to arbitration”. The decision in *Rashtriya Ispat Nigam Ltd (supra)* was referred where it was held that the expression ‘first statement on the substance of the dispute’ contained in Section 8(1) of the Act is different from the expression ‘written statement’, and refers to a submission of the party making the application under section 8 of the Act, to the

jurisdiction of the judicial authority; and what should be decided by the court is whether the party seeking reference to arbitration has waived his right to invoke the arbitration clause. Waiver of a right on the part of a defendant to the lis must be gathered from the fact situation obtaining in each case.

17. In paragraph 19, it was further observed that “Though section 8 does not prescribe any time limit for filing an application under that section, and only states that the application under section 8 of the Act should be filed before submission of the 'first statement on the substance of the dispute', the scheme of the Act and the provisions of the section clearly indicate that the application thereunder should be made at the earliest. Obviously, a party who willingly participates in the proceedings in the suit and subjects himself to the jurisdiction of the court cannot subsequently turn round and say that the parties should be referred to arbitration in view of the existence of an arbitration agreement. Whether a party has waived his right to seek arbitration and subjected himself to the jurisdiction of the court, depends upon the conduct of such party in the suit.

18. As noted earlier, in the present case, after service of suit summons, defendants no. 1 to 5 filed application for condonation of delay caused in appearance in the suit on 17.3.2015 at Exhibit 15. That was allowed on 18.6.2015 in respect of defendant No.2

only, subject to payment of costs of Rs.5000/- by 24.6.2015 with liberty to defendant No.2 to opt for the recourses available in law, to proceed further. Defendant No.2 thereafter filed application dated 8.7.2015, Exhibit-24 for extension of time for paying costs. It was allowed on the same day subject to payment of additional cost of Rs.1000/- immediately. Defendants no. 1 to 5 filed application dated 19.6.2015 at Exhibit 22 wherein it was contended in paragraph (III) (k) & (l) thus:

“k. That, the Memorandum of Understanding specifically mentioned Arbitration Clause:- That, memorandum of Understanding dated 6.7.2011 between defendant no.1 and plaintiff specifically mention arbitration clause. In view of this clause, it is very clear that “An dispute and differences of whatsoever nature that shall arise during the pendency to or their respective representative or between any of them touching these present of construction or application of thereof be made hereinafter or relating to the said Agreement or affairs the roof of rights, duties or obligations or liabilities of any persons under these presents shall be referred to the common single arbitrator by mutual understanding by both parties, in accordance with the provision of the Indian Arbitration and Conciliation Act, 1996 or as amended upto the date thereof for the time being in force and his decision will be binding upon the parties” and the said clause is in the MOU at clause no.8 and so the defendant submits that as per the Section 8 of the Arbitration and Conciliation Act, 1996, the Hon'ble Civil Court has got no jurisdiction to try and decide the present suit so the defendant request Hon'ble Court to reject the plaint of the plaintiff under O.7, R.11 of C.P.C. for want of jurisdiction.

l. That since a dispute has been arisen between the parties in the present facts and circumstances of the case and with regard to the terms and conditions of the

Memorandum of Understanding therefore the matter is liable to be referred to the Arbitration of an Arbitrator as per the terms and conditions of the Agreement.”

19. As noted earlier, on 26.8.2015, the learned trial Judge allowed the application Exh.22 for leave to defend. Though in paragraph-III(k) & (l), defendants no.1 to 5 referred to section 8 of the Act, they did not press this contention before the trial Court. The learned trial Judge granted leave to defend on condition that defendants no. 1 to 5 furnish bank guarantee of Rs.1,51,26,000/- and also file their written statement within 15 days strictly.

20. Defendants no. 1 to 5 instituted Writ Petition (ST) No.24983 of 2015 challenging the order dated 26.8.2015. By order dated 7.10.2015, this Court modified trial Court's order and granted defendants no. 1 to 5 leave to defend on condition of furnishing bank guarantee of Rs. One crore and also filing their written statement within 15 days strictly. Perusal of this Court's order also does not indicate that defendants no. 1 to 5 agitated ground under section 8 of the Act for referring the parties to Arbitration.

21. Defendants no. 1 to 5 did not furnish bank guarantee within 15 days. Defendants no. 1 to 5, though filed application Exh.41 on 11.9.2015 under section 8 of the Act, did not bring this fact to the notice of this Court. On the other hand, defendants no. 1 to 5

applied for extension of time by taking out Civil Application No. 3008 of 2015. By order dated 5.11.2015, this Court gave two weeks extension for furnishing bank guarantee. Defendants no. 1 to 5 thereafter took out Civil Application No. 3044 of 2015 for extension of time for furnishing bank guarantee. By order dated 18.11.2015, extension upto 30.11.2015 for furnishing bank guarantee was given and application was ordered to be listed on 2.12.2015 for compliance. Civil Application was thereafter heard on 9.12.2015 and as defendants no. 1 to 5 did not furnish bank guarantee, application was rejected.

22. Apart from that, in the impugned order the learned trial Judge has observed in paragraph 4 that the defendant firstly applied for condonation of delay causing for appearance in the suit on 17.3.2015 at Exh.15. Defendants no. 1 to 5 also filed application for leave to defend on 18.6.2015 at Exh.22 and the present application is filed on 11.9.2015. It was observed that by filing application for leave to defend, Exh.22, the defendants submitted to the jurisdiction of the civil court to entertain and try the Suit.

23. "Order 37, Rule 3 reads thus :

3. Procedure for the appearance of defendant.- (1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexure thereto and the defendant may, at any time within ten days of such service, enter an

appearance either in person or by pleader and, in either case, he shall file in court an address for service of notice on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a prepaid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may at any time within ten days from the service of such summons for It's affidavit or otherwise d such facts as may be deemed sufficient to entitle him to defend , apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the court or judge to be just:

Provided that leave to defend shall not be refused unless the court-is-satisfied.*hat the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.

(6) At the hearing of such summons for judgment,—

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the court or judge may direct him to give such security and within such time as may be fixed by the court or judge and that, on failure to give such security within the time specified by the court or judge or to carry out such other directions as may have been given by the court or judge, the plaintiff shall be entitled to judgment forthwith.

(7) The court or judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.

24. Perusal of Order 37, Rule 3(5) shows that at any time within ten days from service of summons for judgment, the defendant has to by way of affidavit or otherwise, disclose such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just. Proviso thereto lays down that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious. Sub rule (6) thereof lays down that (a) if the defendant has not applied for leave to defend, or if such

application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or (b) if the defendant is permitted to defend as to the whole or any part of the claim, the court or judge may direct him to give such security and within such time as may be fixed by the court or judge and that, on failure to give such security within the time specified by the court or judge or to carry out such other directions as may have been given by the court or judge, the plaintiff shall be entitled to judgment forthwith. Sub Rule (7) thereof lays down that the court or judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.

25. In paragraphs 6 and 7 , the Division Bench of this Court in *Jadavji Narsidas Shah (supra)* has observed thus;

“6. In the light of these decisions, let us consider the facts of this case. What Mr. Shah says is that the summons for judgment was taken out by the plaintiff and all that the defendants did was to resist that summons and asked the Court to dismiss that summons, and according to Mr, Shah the defendants did not make any application but filed this affidavit. Now that is an entirely erroneous view to take of the affidavit filed by the defendants. Under Order 37, Rule [3](#), the Court has, upon the application by the defendant to give leave to him to appear and to defend the suit, and it is only on such leave being given that a defendant is entitled to be heard in a summary suit. The nature of the affidavit filed by the defendants is clear.

As required by Order 37, Rule [3](#), they disclosed in the

affidavit such facts as the Court may deem sufficient to support the application for leave to defend. They have disclosed the nature of their defence, they have attempted to satisfy the Court that they are entitled to be heard and leave to defend should be given, and, what is more, in the last paragraph of the affidavit they have in terms asked the Court that the summons for judgment be dismissed and that the defendants be granted unconditional leave to defend. What Mr. Shah says is that under our old practice when a defendant used to take out a summons for leave to defend he did apply for leave to defend and such an application would have been a step in the proceedings, but says Mr. Shah that under our new rules it is not the defendant who applies for leave to defend, but the plaintiff takes out a summons for judgment and all that the defendant does is to show cause against the summons for judgment.

The mere fact that instead of the defendant taking out a summons the plaintiff takes out a summons does not really change the substance of the matter. The substance of the matter is that when the summons for judgment comes up before the Court, it is the defendant who has to obtain leave to defend and on that leave being granted he becomes entitled to defend. **Therefore it is clear that by filing this affidavit the defendants expressed an unequivocal intention that the matter should be heard by the civil Court and, gave clear effect to that intention by asking the court to give them leave to defend so that they should resist the plaintiff's claim."**

7. Mr. Shah has relied on a decision reported in --'Pitchers, Ltd. v. Plaza', (Queensbury Ltd.) 1940-1 All ER101 (E), and Mr. Shah says that that decision lays down that if you file an affidavit to show cause against a summons for judgment and then you take out a notice of motion for stay and if the summons for judgment is not disposed of and both the notice of motion and the summons for judgment come up for decision at the same-time, the filing of the affidavit cannot be looked upon as a step in the proceedings. Mr. Shah says that in this case although the notice of motion was taken out after the summons for judgment, the summons for judgment was not disposed of and, therefore, the defendants were not too late in applying for a stay under Section 34. That is not the effect of the decision in -- 'Pitchers, Ltd. v. Plaza, Ltd.', (E). What the learned Judges there point out is that if at the same

time as the-affidavit is filed to show cause against the summons for judgment, an application is made by The defendant for stay, or if in the affidavit itself the arbitration clause is set out and an application is made for stay under Section 34, then the filing of the affidavit would not be a step in the proceedings.

Now that judgment is perfectly understandable on the principle already stated. When the defendant goes to Court to show cause against a summons for judgment and he makes his intention clear that he does not want the Civil Court to adjudicate upon his rights or liabilities, but he wants the domestic forum to decide that, then clearly the mere fact that he has filed an affidavit in reply to the summons cannot be relied upon as a step in the proceedings. But in this case the defendants file an affidavit in reply, make their intention perfectly clear, and then 12 days after that they take out a notice of motion for stay of the proceedings. Therefore when they take out the notice of a motion for stay of proceedings, they have already taken a step in the proceedings by filing their affidavit on 12-7-1953, and unequivocally expressing their intention as to which Court should decide the case. We fail to understand what possible bearing the fact that the summons for judgment was not disposed of has got to do with Section 34." (Emphasis supplied)

26. It is no doubt true that that in that case the Court of considering Section 34 of the Arbitration Act, 1940 and whether the defendant, by applying for leave to defend can be said to have taken step in the proceedings, was under consideration.

27. Section 8(1) lays down that where an action is brought in a matter which is subject of an arbitration agreement before the judicial authority, it shall, **for a party so applies not later than when he is submitting his first statement on the substance of the dispute, refer the parties to arbitration.**

Mr. Dhingra relied upon the decision in the case of M/s D.C.Textile Mills Pvt Ltd (supra). In fact, in paragraph 22 of that report, it was observed that ordinarily, the reply of the defendant to the Summons for Judgment would be his first statement on the substance of the dispute as contemplated under section 8 of the Act inasmuch as in a summons for Judgment taken out in a Summary suit, the occasion for filing written statement may not arise if leave to defend is refused and consequently a decree is passed. In the case of Rashtriya Ispat Nigam Ltd (supra) the Apex Court held that the expression 'first statement on the substance of the dispute' contained in Section 8(2) of the Act is different from the expression 'written statement' and refers to a submission of the party making the application under section 8 of the Act, to the jurisdiction of the judicial authority. (Emphasis supplied).

28. In the facts and circumstances of the present case and also from the conduct of defendants no. 1 to 5 I am more than satisfied that defendants no. 1 to 5 have submitted to the jurisdiction of the civil Court and have waived their right to seek reference to arbitration.

29. Mr.Dhingra relied upon the decisions referred in paragraphs 8 & 9 of this order. As I have already held that the defendants have submitted to the jurisdiction of the Civil Court and waived

their right to seek arbitration, these judgments do not advance the case of defendants no. 1 to 5.

30. As noted earlier, though defendants no. 1 to 5 raised contentions in paragraphs- III (k) & (l) of the application dated 19.6.2015 at Exh.22, they did not press this contention before the trial Court as also before this Court. In fact, they went on applying for extension of time for complying the order for furnishing bank guarantee. From their conduct also, it is evident that defendants no. 1 to 5 have waived their right to seek reference to arbitration.

31. Butala submitted that the present proceedings are abuse of process of court and abuse of process of law. I find merit in the submission. It has come on record that the plaintiff had paid Rs. 1 Crore for purchasing Twin Villas and the said fact is specifically asserted in paragraphs 12 to 14 of the plaint. Defendants no. 1 to 5 admit receipt of one crore. They dispute receipt of balance amount. The plaintiff has instituted Summary Suit on the basis of eight dishonoured cheques. Defendants no. 1 to 5 have participated in the proceedings by applying for condonation of delay in causing appearance in the suit by filing application on 17.3.2015 at Exh.15 and application dated 19.6.2015 at Exh.22 for leave to defend. Again they have applied under section 8 on 11.9.2015 at Exh.41 for referring the matter to the arbitration. It

is only when defendants no. 1 to 5 could not comply conditional order passed by this Court for leave to defend, they have pressed application Exh.41. Learned trial Judge has rightly rejected the application on 18.12.2015. In my opinion, the present proceedings are noting but abuse of process of court as also abuse of process of law. Petition being devoid of any substance, is liable to be rejected and is dismissed subject to imposing exemplary costs of Rs. 50,000/-. Costs shall be paid to the plaintiff within four weeks from today. Copy of this order may be forwarded to Collector, Pune for recovering of this amount as land revenue from defendants no. 1 to 5, in case they do not pay to plaintiff or deposit in the trial Court within four weeks from today. In case defendants no. 1 to 5 obtain suitable order from higher Court, they shall forthwith communicate the said order to the Collector, Pune. Order accordingly.

32. On the oral application made by Mr. Dhingra, proceedings before the trial Court are stayed for a period of three weeks from today.

(R.G.Ketkar,J.)