

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMM. APPEAL (L) NO. 178 OF 2018
IN
COMM. NOTICE OF MOTION NO.126 OF 2017
IN
COMMERCIAL SUIT NO. 243 OF 2016**

Haier Telecom (India) Pvt. Ltd. ..Appellant

v/s.

Drive India Enterprise Solutions Ltd. ..Respondents

Mr.Durgesh Kulkarni i/b. Lex Firms for the Appellants.

Ms. Naira Jejheeboy a.w, Ms. poojam Ms. Sneha Jaisingh i/b.
Bharucha & Partners for the Respondent.

**CORAM : NARESH PATIL &
SMT. ANUJA PRABHUDESSAI,JJ.
DATED : 9TH APRIL 2018.**

JUDGMENT (PER ANUJA PRABHUDESSAI, J.)

1. With consent of parties taken up for final hearing at the stage of admission.

2. The appellant herein, the defendant in Commercial Suit No. 243 of 2017, has challenged the Order dated 12th March, 2018 whereby the learned Single Judge of this Court has dismissed the

Notice of Motion under Section 8 of the Arbitration and Conciliation Act, 1996.

3. The respondent/plaintiff has filed a summary suit for recovery of sum of Rs.54,46,31,354.51 being the amount due under the produce purchase agreement dated 15th April, 2010 and logistic agreement dated 5th April,2010. The respondent filed summons for judgment along with affidavit in support dated 5th June, 2017. The appellant, on receipt of the summons for judgment, filed an application dated 15th June 2017 for leave to defend. During pendency of the said application for leave to defend, the appellant filed notice of motion dated 6th January, 2018 under Section 8 of the Arbitration & Conciliation Act to refer the dispute between the parties to arbitration.

4. By the impugned order dated 6th and 12th March, 2018, the learned Single Judge dismissed the Notice of motion on the ground of non-compliance with the mandate of sub-section (1) of Section 8 of the Arbitration & Conciliation Act, which requires a party to the

arbitration agreement or a person claiming through or under him to apply for a reference, not later than the date of submitting his first statement on the substance of dispute. Being aggrieved by this order, the appellant has preferred this appeal.

5. Mr. Kulkarni, the learned Counsel for the appellant submits that in a suit under Order 37 CPC the defendant is required to file an application for leave to defend the suit within a stipulated period of 10 days. He urges that in the application filed under Order 37 Rule 3 (5), the appellant had not manifested intention to waive the benefit of arbitration agreement or to submit to the jurisdiction of the court. He therefore contends that the said application cannot be construed as the first statement on the substance of the dispute.

6. He further contends that the substance of the dispute can be submitted in the written statement and not in the application for leave to defend. He urges that the application under Section 8, which was filed before the disposal of the application under Order 37 Rule 3(5) and before filing of the written statement, met the

statutory requirements under the 1996 Act.

7. The learned Counsel for the appellant further contends that in view of the conflicting decisions of the coordinate benches of this Court on the issue in *M/s. D.C.Textile Mills Pvt. Ltd. vs. Mr. Keval Kishore Arora, (in Summary Suit No. 2066 of 2008)* and *Stellar Industries vs. M/s. International Combustion [W.P 3251 of 20016 (Nagpur)]*, the learned Single Judge was required to refer the matter to the larger Bench.

8. The learned counsel for the appellant submits that the Apex Court in *Sundaram Finance Ltd. vs. NEPC India Ltd (1992) 2 SCC 479*, has categorically held that the 1996 Act is different from the Arbitration Act, 1940. The provisions of the 1996 Act are therefore to be interpreted and construed independently and that reference to 1940 Act may actually lead to misconstruction and misinterpretation of the provisions under 1996 Act. He has also referred to the decisions of the Apex Court in *Kalpana Kothari vs. Sudha Yadav*

2002(1) SCC 203; and Firm Ashok Traders vs. Gurumukh Das Saluja (2004) 3 SCC 155. Relying upon these judgments, he contends that the learned single judge ought to have interpreted the provisions of 1996 Act without being influenced by the principles underlying the 1940 Act.

9. The learned Counsel for the appellant contends that the learned Single Judge has failed to consider the scope of Section 8 (1) of the Arbitration & Conciliation Act, 1996, which mandates the Judicial Authority before which the action is brought, to refer the parties to arbitration. He submits that the learned Single Judge has misinterpreted the provision under Section 8 of 1996 Act.

10. The learned Counsel for the respondent submits that under Section 8 of 1996 Act the matter could be referred to arbitration only if the party so applied before submitting the first statement on the substance of the dispute. She submits that before filing the application under section 8 of 1996 Act, the appellant had already

filed an application dated 15th June, 2017 under Order 37 Rule 3(5) of CPC seeking leave to defend the suit. In the said application, the appellant had stated all facts with regard to their defence on merit and expressed unequivocal intention to waive the arbitration clause and participate in the proceeding before the Court. She submits that the facts stated in the said application clearly constitute the first statement on the substance of the dispute and as such the learned single judge has rightly dismissed the application under section 8 as not maintainable. In support of these contentions she has placed reliance on the following decisions :

- (i) *Booz Allen & Hamilton INC. v. SBI Home Finance Ltd. & Ors.*
(2011) 5 SCC 532
- (ii) *Jadavji Narsidas Sha & Co. v. Hirachand Chaturbhai (1954)*
Indian Law Reports 348
- (iii) *Cogent Enterprises Pvt. Ltd. & Anr. v Girimon Puttupara Thankappan 2016 SCC Online Bom 727.*

11. We have considered the submissions advanced by the learned

Counsel for the respective parties and perused the records.

12. In a suit filed under Order 37 of CPC the appellant-defendant had invoked provisions under Section 8 of the Arbitration & Conciliation Act, 1996, which 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.

13. Considering the scope of section 8, the Apex Court in *Booz Allen* (supra) has stated thus:

19 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.

14. It is thus clear that one of the conditions to invoke this mandatory provision is that the defendant/party should apply for reference under Section 8 before submitting his "first statement on the substance of dispute".

15. The issue therefore will turn on the meaning of the Expression "first statement on the substance of the dispute". The Apex Court in Booz Allen & Hamilton INC (supra), while considering whether a reply filed by the defendant opposing notice of motion for appointment of receiver and interim injunction could be considered as submission of a first statement on the substance of dispute has

held thus :

17. 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. But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him. [In Rashtriya Ispat Nigam Ltd vs. Verma Transport Company](#) - 2006 (7) SCC 275, this Court 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. This Court then proceeded to consider whether contesting an application for temporary injunction by filing a counter, would amount to subjecting oneself to the jurisdiction of the court.

This Court observed :

"By opposing the prayer for interim injunction, the restriction contained in Sub-section (1) of Section 8 was not attracted. Disclosure of a defence for the purpose of opposing a prayer for injunction would not necessarily mean that substance of the dispute has already been disclosed in the main proceeding. Supplemental and incidental proceeding are not part of the main proceeding.

They are dealt with separately in the Code of Civil Procedure itself. Section 94 of the Code of Civil Procedure deals with supplemental proceedings. Incidental proceedings are those which arise out of the main proceeding. In view of the decision of this Court in [Food Corporation of India vs. Yadav Engineer & Contractor](#) - 1982 (2) SCC 499, the distinction between the main proceeding and supplemental proceeding must be borne in mind. Waiver of a right on the part of a defendant to the lis must be gathered from the fact situation obtaining in each case. In the instant case, the court had already passed an ad interim ex parte injunction. The Appellants were bound to respond to the notice issued by the Court."

18. In this case, the counter affidavit dated 15.12.1999, filed by the appellant in reply to the notice of motion (seeking appointment of a receiver and grant of a temporary injunction) clearly stated that the reply affidavit was being filed for the limited purpose of opposing the interim relief. Even in the absence of such a disclaimer, filing a detailed objection to an application for interim relief cannot be considered to be submission of a statement on the substance of the dispute resulting in submitting oneself to the jurisdiction of the court."

16. It is thus clear that the expression "first statement on the substance of the dispute" contained under Section 8(i) of the Arbitration & Conciliation Act, 1996 is not restricted to the 'written statement' but includes any statement, application, or affidavit filed prior to filing of the written statement, provided such statement, application, or affidavit discloses the intention of the defendant to

submit to the jurisdiction of the court and waiver of his right to seek reference. Nevertheless, the expression "first statement of the substance of the dispute" does not take within its ambit a reply filed to avoid interim order, for instance order of injunction, attachment before judgment, appointment of receiver etc.

17. In the instant case, the respondent had filed a suit under Order XXXVII of CPC. Suffice it to say that in a suit under Order 37 of CPC the defendant is not entitled as of right to put in his defence, unless he applies for leave to defend under Rule 3(5) of Order 37, which reads thus:

“3...

(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 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:

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.”

18. The above referred Rule enables the defendant to apply, at any time within 10 days from the service of summons for judgment, for leave to defend, by filing affidavit or otherwise, disclosing such facts as may be deemed sufficient to entitle him to defend. Accordingly, upon being served with summons for judgment, on 9th June, 2017, the appellant by application dated 15th June, 2017 applied for leave to defend. The question is whether filing of an application for leave to defend can be considered as "first statement on the substance of the dispute", as stated under section 8 of 1996 Act.

19. In this regard, reference can be made to the decision of the Division Bench of this Court in *Jadavji Narsidas Sha (supra)*. In this case also in a suit filed under Order 37, the defendant had filed affidavit-in-reply setting out the defence and asking for leave to defend. Subsequently, the defendants took out a motion to stay the suit under section 34 of the Arbitration Act. The said application was

dismissed on the ground that by filing the affidavit in reply the defendant had taken a step in proceedings within the meaning of section 34 of the Arbitration Act 1940. While considering the question whether filing of affidavit in reply on the summons for judgment and asking for leave to defend amounted to "taking any other step in the proceedings" to disentitle to the stay of the suit under section 34 of Arbitration Act 1940, the Division Bench of this Court held thus:

" Now, it is clear that under section 34 it is necessary that the party who applies for stay should himself take a step in the proceedings before he becomes disentitled to the stay which is asked for. It must be some application made by the party in the proceedings, and as the authorities show that application must be of such a nature as to lead the Court to the conclusion that the party prefers to have his rights and liabilities determined by the civil Court rather than by the domestic forum upon which the parties might have agreed.

...

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 unequivocal intention that the matter should be heard by the Court to give them leave to defend so that they should resist the plaintiffs claim."

20. While explaining the principle in *Pitchers Ltd. vs. Plaza Ltd*

(1940) 1 AII E.R. 151, the Division Bench further observed thus:

" 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 the 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. ...What section 34 requires is that there should be an application made by the defendant; a step taken by the defendant. Section 34 does not require that the application must be disposed of or decided before the defendant would be disabled from asking for stay under s.34"

21. From the above it is clear that filing of an affidavit opposing the summons and seeking leave to defend, without objecting to the jurisdiction of the court, had been construed as the “step in the proceedings” as contemplated under Section 34 of the 1940 Act. However when an application/affidavit seeking leave to defend raises objection to the jurisdiction of the court or does not disclose intention

to relinquish right to invoke the arbitral clause and to submit to the jurisdiction of the court, such application will not amount to “ the step in the proceedings”. In such a case, an application under section 34 would be maintainable, even if the application/affidavit discloses facts in defence of the suit.

22. Though the facts of the case in hand are similar, the learned counsel for the appellant questions the applicability of this decision mainly on the ground that the same was with reference to section 34 of 1996 Act. As stated earlier to attract section 8 of 1996 Act, the party has to apply before filing of the first statement on the substance of the dispute. If the substance of the dispute in the suit is same as in the arbitration agreement, the court has no discretion but to refer the parties to arbitration as provided under sub-section(1). Whereas under section 34 of 1940 Act the party had to apply at any time before the filing of the written statement or taking any other step in the proceedings for stay of the proceedings. The language of section 34 of 1940 Act clearly indicates that even when the defendant satisfied the requirements, the court had discretion not to stay the suit.

23. There can be thus no dispute that there are number of dissimilarities in these two provisions and that section 8 of the 1996 Act is not in pari materia with section 34 of the 1940 Act. Yet, a common feature in both these provisions is that the defendant or the party to the proceedings can invoke provisions of section 34 of the 1940 Act or section 8 of 1996 Act only before submitting to the jurisdiction of the court. These provisions cannot be invoked once the defendant/party files the written statement or takes any other step as contemplated by section 34 of 1940 Act or files the first statement on the substance of dispute as stated in section 8 of 1996 Act and expresses unequivocal intention that the matter should be heard by the court or the judicial authority. The decision in *Jadavji* (supra) precisely covers this issue. The principles as laid down in the said decision are therefore squarely applicable to the facts of the case. Hence, in our considered view, the impugned order, as well as the decision in *Cogent Enterprises Pvt. Ltd.*, which is based on the aforesaid principles, does not suffer from any apparent error of law or misconstruction or mis-interpretation of the provisions of law.

24. As regards the other decisions relied upon by the learned counsel for the appellant, the same are distinguishable and are therefore not applicable to the facts of the case. We have also gone through the decisions in M/s. D.C.Textile Mills Pvt. Ltd., (supra) and Stellar Industries (supra). We find that there is no merit in the contention of the learned counsel for the appellant that there is apparent conflict in the judgments of the coordinate benches. The same have been delivered in respective fact situation and there was no scope for reference.

25. To sum up, what is essential to bring the application, affidavit or statement within the ambit of the expression "first statement on the substance of the dispute" is the intention to waive the right to invoke arbitration clause and submit to the jurisdiction of the court. Such intention has to be gathered from the fact situation of each case. In the instant case, the application for leave to defend was filed on 15th June, 2017, whereas the application under Section 8 of the 1996 Act was filed on 6th January, 2018. We have

perused the affidavit in reply to summons for judgment. It is seen that the appellant had mentioned all the facts and taken all objections on merits of the case. The appellant had neither invoked the arbitration clause nor objected to the jurisdiction of the court, on the contrary had made explicitly clear that they wanted to submit to the jurisdiction of the court. Considering all the above facts and circumstances, the learned Single Judge was perfectly justified in holding that the said application was in fact the first statement of substance of the dispute. In this view of the matter, we are in complete agreement with the decision of the learned single judge that the application under Section 8 was not maintainable.

26. Under the circumstances and in view of discussion supra, we do not find any reason to interfere in this appeal. Hence the appeal is dismissed.

(ANUJA PRABHUDESSAI, J.)

(NARESH H.PATIL, J.)