

Arun

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
ARBITRATION APPEAL (STAMP) NO. 3871 OF 2020**

Parmar Constructions

...Appellant

Versus

Krishnakumar Ramsinh Parmar

...Respondent

**WITH
INTERIM APPLICATION NO. 1 OF 2020
IN
ARBITRATION APPEAL NO. 3871 OF 2020**

**Mr Mehul Shah, i/b Bharat Joshi, for the Appellant.
Mr UP Bobade, i/b JH Ramugade, for the Respondent.**

**CORAM: G.S. PATEL, J.
DATED: 5th March 2020**

PC:-

1. The challenge in this Appeal is to an order dated 14th January 2020 rejecting the Application of the Petitioner (the Defendant in the Suit) under Section 8 of the Arbitration and Conciliation Act 1996. The entire Appeal can be disposed of immediately. Hence, by consent, taken up for hearing and final disposal.
2. Section 8 of the Arbitration Act as amended in 2015 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 to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

(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:

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(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.”

3. Now there is no dispute that paragraph 10 of the Written Statement contained the following averment:

10. It is further submitted that the present suit is based on the agreement for development made on

28.10.00 wherein the clause No. 18 provides the appointment of arbitrators in case of any dispute or difference of opinion based on the agreement. Therefore, when it is specifically provided by the agreement that there must be appointed of two arbitrator each one to be appointed by each party. Therefore, as provided in the amended act of The Arbitration & Conciliation Act, 1996, the present agreement is treated as arbitration agreement as provided under Section-7 and as provided **under Section-8 the Judicial Authority before which and action is brought in the matter which is the subject of an arbitration agreement, shall, refer the dispute to the arbitration.** Hence, being the mandatory provision, the suit is not within the jurisdiction of this Honourable Court. Therefore, the present suit is also beyond the scope of the jurisdiction of the Civil Court and hence preliminary issue for the same may please be framed and should be decided as preliminary issue as provided under Order-14, Rule-2(2)(a) of The Code of the Civil Procedure-1908.

(Emphasis added)

4. It seems that despite this, issues were struck and trial actually began. It is then that (and in fact after some cross-examination) that the present Petitioner on 8th August 2016 filed a substantive application under Section 8 of the Arbitration and Conciliation Act 1996.

5. The arbitration provision is contained in an Development Agreement dated 28th October 2000. The clause reads thus:

“18. In case of any dispute or difference of opinion in implementation of interpretation of this agreement between the parties same shall be referred to two arbitrators, each

one to be appointed by each party. The arbitrators after hearing both the parties and after recording evidence if any shall decide the matter in accordance with the provision of Arbitration Act 1940. The decision of arbitrator shall be final and binding to the parties hereto.”

6. The learned Civil Judge Senior Division seems to have addressed himself, in my view mistakenly, as to whether the statement in paragraph 10 can be treated as a first invocation of Section 8. I do not see how else it can possibly be viewed but the Civil Judge Senior Division then proceeded to reference some decisions of the Rajasthan High Court. He however overlooked the binding decision of a Single Judge of this Court in Civil Revision Application No. 173 of 2017 delivered on 28th September 2016. In an identical circumstance, NM Jamdar J expressly rejected such an argument. In paragraphs 5 and 7, he held:

5. Apart from the merits, learned counsel for the Petitioners submitted that there is an arbitration clause in the memorandum that was executed between the parties on 25 April 2013, which is the basis of the claim made by the Respondent/Plaintiff. **He submitted that, in spite of bringing to the notice of the learned City Civil Court Judge, the existence of the arbitration clause, the learned City Civil Court Judge rejected the contention on the ground that no application has been filed by the Petitioners annexing copy of the agreement as required under Section 8 of the Arbitration and Conciliation Act.** It is the contention of the learned counsel for the Respondent that separate application is required and the language of Section 8 contemplates that an application should be filed not later than a first submitting the first statement on the subject of dispute.

7. The learned Single Judge of the Delhi High Court in the case of *Sharad P. Jagtiani v/s M/s. Edelweiss Securities Ltd* (2014 SCC Online Del. 949) has emphasized the underlining legislative policy and has held that Section 8 has to be led in purposive manner and not in a restrictive manner defeating the object of the legislature. The learned Single Judge has followed the decision of the Apex Court in the case of *P. Anand Gajapati Raju v/s P.V.G. Raju* (2000) 4 SCC 539, **wherein the Apex Court has stressed that the object of Section 8 is to bring to the notice of the Court that an arbitration agreement exists between the parties. Once the arbitration agreement exists which provides for expeditious disposal of a dispute, the intervention of the judicial authorities should be minimum. Section 8 has been construed by the learned Single Judge in the case of *Sharad Jagtiani* as the one which contemplates an application only for the purpose of bringing to the notice of the Court the existence of an arbitration agreement and for that purpose it is not necessary in all cases that a separate application be filed. In the case of *Sharad Jagtiani*, in the written statement, the Defendant had not used the phrase, 'refer the parties to arbitration' but that court lacks jurisdiction to decide the suit. Similar phraseology is used by the Petitioners in their reply. In the reply, the Petitioners have referred to clause 9 of the memorandum, which provides for an arbitration agreement. Therefore, the Petitioners have sought to bring to the notice of the Court that there is an arbitration agreement. The view taken by the learned Single Judge of Delhi High Court has been followed by the learned Single Judge of this Court (R.M. Savant, J.) in Revision Application No. 952 of 2014. Therefore, the reason given by the learned City Civil Court Judge for rejecting the contention based on Section 8 of the Arbitration Act that no separate application was filed, and mere defence is not**

enough, is not correct. If it is held that the parties are to be referred to an arbitration, then, it will substantially change the complexion of the dispute between the parties at this stage and consequently direction to deposit the amount.”

(Emphasis added)

7. The observations of the learned Judge in paragraph 12 cannot be sustained. For instance, the Court held that the Defendant ought to have been “prayed in his Written Statement” for a reference of the matter to arbitration. That is not how Written Statements are to be drawn and filed. That is not what the decision of NM Jamdar J says. The learned Judge then went on to say that the actual application under Section 8 was not filed for seven years thereafter. That is not the test mandated by Section 8 either. The only requirement is that the invocation of Section 8 must happen at the earliest point in time, i.e. not later than the date of submitting his first statement on the substance of the dispute. This does not mean that a substantive application has to be made on that day but only the Section 8 has to be invoked at the time when there is a defence filed on merits to the statement of claim.

8. In my view, unfortunately, the learned Single Judge seems to have singularly misdirected himself.

9. I have no option but to allow the Appeal. The impugned order is quashed and set aside.

10. In the facts and circumstances of the case, the matter will be remanded to the learned Single Judge for decision afresh.

11. The Appeal and Interim Application are disposed of in these terms.

12. All contentions are left open.

(G. S. PATEL, J)