

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 24th December, 2020.**

+ **RFA(OS)(COMM) 13/2020, CMs No.16950/2020 (for ex-parte ad interim injunction) & 20009/2020 (u/S 8 of Arbitration and Conciliation Act)**

ALOK KUMAR LODHA

.....Appellant/Plaintiff

Versus

ASIAN HOTELS (NORTH) LIMITEDRespondent/Defendant

[AND CONNECTED 32 APPEALS AS PER SCHEDULE 'A']

AND

+ **RFA(OS)(COMM) 12/2020 & CM No.16942/2020 (for stay)**

ASIAN HOTELS (NORTH) LIMITED Appellant/Defendant

Versus

ALOK KUMAR LODHA

..... Respondent/Plaintiff

[AND CONNECTED 32 APPEALS AS PER SCHEDULE 'B']

Counsels for the Plaintiffs:

Dr. Abhishek Manu Singhvi, Sr. Adv. with Mr. Avishkar Singhvi, Mr. Nipun Katyal, Ms. Madhavi Khanna & Mr. Dhruv Surana, Advs.

Mr. Dhruv Mehta, Sr. Adv. with Mr. Yashraj Singh Deora, Mr. Anubhav Ray & Ms. Sonal Mashankar, Advs.

Mr. Vivek Prasad Gupta, Adv. & Mr. Saurabh Kumar, Advocate.

Counsels for the Defendant:

Mr. Mukul Rohatgi, Mr. Siddharth Luthra & Mr. Sandeep Sethi, Sr. Advs. with Dr. Lalit Bhasin, Ms. Nina Gupta, Mr. Siddhant Kumar, Ms. Ratna D. Dhingra, Ms. Ananya Marwah, Ms. Ruchika Joshi, Mr. Ajay Pratap Singh, Advs. & Mr. Chirag Nassa, for Asian Hotels (North) Ltd.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

1. This litigation has its origin in the ongoing Covid-19 pandemic, which continues to rage even though this litigation has travelled from the suit Court to the appellate Court. This has also been the season of lockdowns and having an opportunity to watch Over-The-Top (OTT) media platforms and which, as distinct from watching cinema, compressing the story in three odd hours, have shows where the story spans several seasons with each season comprising of several episodes. Holding Court, during the pandemic, virtually from our respective homes instead of from the Courtrooms has also given us opportunity to look at litigation differently and we could not but notice the similarity of litigation with the dramas/shows comprising of several seasons which we have now also had occasion to watch. Not only the stages of the litigation before the suit Court and before the appellate Court are found to have resemblance to the successive seasons of such dramas/shows, other aspects of litigation are also found to have similarity with such dramas/shows. We will thus give this judgment, the flavour of the seasons of the dramas/shows.

2. The season one of this litigation opened with the filing of the suits, from which these appeals arise, on the original side of this Court, by persons/entities claiming to be occupants of the Shopping Arcade in Hyatt

Regency Hotel, Bhikaji Cama Place, New Delhi (hereafter for the sake of convenience and without attributing any legal rights thereto, called as 'Occupants'), with the script in the form of plaint, penned by their counsels. It was *inter alia* their claim that the licences in their respective favour with respect to the shops in occupation of each one of them were irrevocable and in perpetuity and thus the termination by the defendant Asian Hotels (North) Limited (hereinafter called the 'Hotel') vide termination notices, was illegal. The occupants sought a decree, (i) of declaration, declaring them as owners of the shops in their respective favour and in the alternative, as irrevocable licensees in perpetuity; and, (ii) of injunction, restraining the Hotel from dispossessing them from the shops in their respective occupation.

3. The first episode of season one opened when the suits first came up before the Commercial Division of this Court and when the counsels for the Hotel, having advance intimation of the suits, also appeared and at the outset raised objection under Section 8 of the Arbitration and Conciliation Act, 1996 with regard to the maintainability of the suits, in view of the arbitration clause in the Licence Agreements admitted to have been executed with the Hotel by the Occupants also and copies of which Licence Deeds were filed by the Occupants along with their suits.

4. The Commercial Division, "with the consent of the counsels" and without calling for any application or for pleadings in the suits to be filed/completed, proceeded to hear the counsels for the parties, both on the issue of maintainability of the suits in view of objection of Section 8 of the

Arbitration Act as also on the applications for interim injunction filed along with the complaints. It appears that the said hearing before the Commercial Division went on for several dates/episodes, whereafter order/judgment was reserved.

5. Need is not felt to record in this judgment, the respective contentions of the counsels before the Commercial Division, on the applications for interim relief. With respect to the objection of the counsels for the Hotel to the maintainability of the suits, on the ground of Section 8 of the Arbitration Act, it was the contention of the counsels for the Hotel, that Clause 11 of the Licence Agreements provides for arbitration of disputes including disputes relating to interpretation and clarification of the terms of the agreement. Per contra, it was the contention of the counsels for the Occupants (as recorded in the impugned judgment), (i) that at that stage, the prayers in the complaints have to be seen by way of a demurer; since the Occupants had prayed for a judgment and decree of declaration, which were *in rem* and not *in personam*, the reliefs claimed of declaration could not be adjudicated by arbitration and that the arbitration clause in the Licence Agreements was in any case unenforceable as the same provides for an even number of Arbitrators and which is impermissible under Section 10 of the Arbitration Act; (ii) that the arbitration clause was restricted to disputes arising under the Licence Agreements only and the arbitration clause was incapable of governing any dispute pertaining to rights in a property or title to a property; (iii) that the arbitration clause would at best cover disputes like that of payment of licence fee, maintenance charges, dues, conduct in

the premises or alterations etc. and the Arbitral Tribunal could not vest proprietary rights in favour of the Occupants and any declaration of any interest on the subject property granted by the Arbitral Tribunal would not be enforceable in the eyes of law; (iv) that the award of the Arbitral Tribunal could not bind the third parties or affect the public at large and a judgment which determines the status or condition of the property, is a judgment *in rem* and cannot be decided by the Arbitrator; (v) that the Hotel had not filed any application under Section 8 or even under Section 11 of the Arbitration Act and hence the dispute raised in the Civil Court had to be determined in the suit; and, (vi) that though the Occupants did not deny the existence of an arbitration clause, however their claim was that the subject matter of the suit could not be decided in arbitration and the Occupants' right to file a suit could not be circumscribed by Sections 8 and 11 of the Arbitration Act. Per contra, it was contended by the counsels for the Hotel (as recorded in the impugned judgment), that the Licence Agreements were entered into prior to the enactment of the Arbitration Act, 1996 and if the parties did not agree on appointment of Arbitrators, an application under Section 11 of the Arbitration Act would have to be filed and it will be for the Court, in the Section 11 application, to decide whether a Three Members or a One Member Arbitral Tribunal was to be constituted. Else, it was contended that the arbitration clause was widely worded and provides for any disputes and differences between the Hotel and the Occupants with regard to any matter including interpretation of the agreements and clarification thereto, to be referred to Arbitral Tribunal whose decision was to be final and binding on the parties. It was thus the contention of the

counsels for the Hotel that since every dispute including the interpretation of the terms of the Licence Deeds and clarification thereof were also required to be referred to Arbitral Tribunal, the claims of the Occupants, of being owners of their shops in their occupation or of being irrevocable licensees in perpetuity, could be determined by the Arbitral Tribunal. The counsels for the Hotel further contended that there was no bar on the Arbitral Tribunal granting decree of declaration.

6. The Commercial Division, drawing curtains to the first season, in the impugned order/judgment, recorded that the following issues arose for consideration before the Court:

"I. Whether an objection under Section 8 of the Act can be taken without filing an application?

II. On an objection under Section 8 of the Act, whether the Court can decide that the dispute is arbitrable or not or the parties are required to be relegated to the Arbitrator for decision on the arbitrability of the dispute?

III. Whether claims which are relatable to the special statute alone cannot be referred to arbitration or even where there is a claim for a judgment *in rem*, the dispute cannot be referred to arbitration?

IV. Whether *prima facie* plaintiffs have a right in their favour creating an interest in the land or the burden of the covenant running with the land to the extent that the same cannot be decided in arbitration?

V. If the present suit is maintainable, whether on facts the plaintiffs are entitled to grant of interim injunction?"

7. With respect to Issue No.(I) aforesaid, the Commercial Division, in the impugned judgment reasoned, (i) that the argument of the Occupants that in the absence of an application under Section 8, the plea of the Hotel for rejection of the plaint could not be accepted, had no merit in view of ***Parasramka Holdings Pvt. Ltd. Vs. Ambience Pvt. Ltd*** 2018 SCC OnLine Del 6573 wherein this Court held that party invoking the arbitration clause does not have to file a formal application seeking a specific prayer for reference of the dispute to arbitration, as long as it raises an objection in the written statement to that effect; and, (ii) that the Hotel, on the very first day of appearance in the suits, even before filing their written statement had raised an objection under Section 8 of the Arbitration Act and hence the said objection could not be summarily rejected on the ground that no application had been filed under Section 8 of the Arbitration Act.

8. On Issues No.(II) and (III) aforesaid, the Commercial Division reasoned, (i) that the issue whether a dispute is arbitrable or not cannot be gone into in an application under Section 11 of the Act; however in an application under Section 8 of the Act, the Court is required to go into the issue whether the dispute between the parties is an arbitrable dispute or not and if the dispute falls in 'excepted matters' or relates to specific or special remedies, then there can be no reference to arbitration and civil suit has to be proceeded; (ii) that amendment to Section 8 of the Act cannot be given an expansive meaning and intent so as to inundate entire regime of special

legislations where such disputes were held to be not arbitrable; and, (iii) that distinction has been drawn between the scope of consideration in an application under Section 11 and Section 8 of the Arbitration Act and even after the amendment of Section 8, the Court has to consider not only the existence of the arbitration agreement but also whether the subject matter of the dispute is capable of arbitration.

9. On Issue No.(IV) aforesaid, the Commercial Division reasoned, (i) that *prima facie* the Occupants were not mere licensees; and, (ii) that the Occupants have a right in their favour and interest in land which is more than that of a lessee or at least that of an irrevocable licensee.

10. The Commercial Division, on the basis of findings aforesaid on the Issues arising for adjudication, vide impugned order/judgment dated 21st July, 2020 held that "*prima facie* the rights created in favour of the plaintiffs and the interest created in the land is in the nature of an arbitrable dispute in terms of the decision of the Supreme Court in ***Olympus Superstructures Vs. Meena Vijay*** (1999) 5 SCC 651, ***Booz Allen & Hamilton Inc. Vs. SBI Home Finance Limited*** (2011) 5 SCC 532 and ***Vidya Drolia Vs. Durga Trading Corporation*** 2019 SCC OnLine SC 358, the suits and the applications are dismissed with liberty to the parties to avail remedy of arbitration".

11. With respect to the arguments heard by the Commercial Division on the applications for interim relief, the Commercial Division held that "*prima facie* the plaintiffs have a right in their favour and interest in land which is more than that of a lessee or at least that of an irrevocable

licensee....the rights of the plaintiffs herein at best governed by the Transfer of Property Act or the Specific Relief Act, or that of an irrevocable licensee under the Easements Act and the same be decided in arbitration. Consequently, the present suits are not maintainable and the parties may avail the remedy of arbitration".

12. The Occupants are aggrieved from the judgment of the Commercial Division, because their suits have been dismissed. The Hotel is aggrieved from the judgment because of the *prima facie* findings returned by the Commercial Division. The story having thus remained incomplete, both are in appeal in this second season of the litigation, scripted by the counsels for the Occupants as well as the counsels for the Hotel.

13. The first set of appeals, of the Occupants as well as the Hotel came up first before this Bench in the first episode of the second season and with the same star cast as of the first season, on 29th July, 2020, when *inter alia* the following order was passed:

"4. All these appeals are preferred against the common judgment dated 21st July, 2020 of the Single Judge dismissing the suits filed by the plaintiffs, upon the defendant Asian Hotels (North) Limited invoking Section 8 of the Arbitration & Conciliation Act, 1996; while the plaintiffs are aggrieved from such dismissal of the suits, the defendant Asian Hotels (North) Limited is aggrieved from certain findings in the judgment, on the merits of the matter, though ultimately dismissing the suits as well as the applications for interim relief; it is contended that the said observations may prejudice the defendant Asian Hotels (North) Limited in other matters being filed by other occupants of the property as well as in Arbitration.

5. The senior counsels for the defendant Asian Hotels

(North) Limited have raised a preliminary objection to the maintainability of the appeals preferred by the plaintiffs. It is contended that under the Arbitration Act read with the Commercial Courts Act, 2015, no appeal lies against an order allowing the plea under Section 8 of the Arbitration Act.

6. *Finding it to be recorded in the judgment that no application under Section 8 of the Arbitration and Conciliation Act was filed and the Single Judge, relying on certain judgments, having held that there is no need for an application under Section 8, we have enquired from senior counsels for the defendant Asian Hotels (North) Limited, whether a written statement invoking Section 8 or any other pleading invoking Section 8, was filed.*

7. *The senior counsels for the defendant Asian Hotels (North) Limited state that the counsel for the defendant Asian Hotels (North) Limited appeared on the very first date when the suit came up for admission and raised the plea of Section 8 and the Single Judge proceeded to hear the counsels on the said plea and has, accepting the said plea, dismissed the suit.*

8. *Dr. Abhishek Manu Singhvi, senior counsel for the plaintiffs in RFA (OS) (COMM) 12/2020, 13/2020, 14/2020, 15/2020, 17/2020 and 20/2020 states that neither the written statement nor any other pleading was filed by the defendant Asian Hotels (North) Limited.*

9. *In our prima facie view, the use of the expression 'applies' in Section 8(1) and reference to 'the application' in Section 8(2) and pendency of 'the application' and issue not being a bar to arbitrability referred to in Section 8(3), indicate the need for Section 8 being invoked in writing. It also appears that only in defence to such an application, the defence if any available of '.....no valid arbitration agreement exists' within the meaning of Section 8(1) can be raised.*

10. *Though the senior counsels for the defendant Asian Hotels (North) Limited have contended that it is pleaded in the plaint itself that there was an arbitration clause and the reasons*

for the issues arising in the suits being not arbitrable were also pleaded, obviating the need for the defendant Asian Hotels (North) Limited to file an application, but it cannot be lost sight of, that Section 8(1) is not a bar to the maintainability of the suit and is different from Order VII Rule 11 of the Code of Civil Procedure, 1908, which can be urged without even a written statement or an application.

11. If Section 8 of the Arbitration Act has been wrongly invoked, then, in our prima facie view, the same becomes a jurisdictional issue and would also affect the contention as to maintainability of the appeals.

12. The appeals require consideration.

13. Though the senior counsels for the plaintiffs have also opposed the maintainability of the appeals preferred by the defendant Asian Hotels (North) Limited, but all the said questions are also kept open.

14. Admit.

15. The counsels, on inquiry state that entire suit record has been submitted alongwith the appeals and there is no need for call for the suit records.

16. It is informed that during the pendency before the Single Judge, there was an interim arrangement whereby the defendant Asian Hotels (North) Limited had undertaken not to take any action against the plaintiffs pursuant to the impugned notices. The said interim arrangement to continue.

17. It is also informed that certain other occupants of the property have filed applications under Section 9 of the Arbitration and Conciliation Act and which are pending.

18. None of the observations on merits of the claim in the impugned judgment shall have any bearing on the decision of the applications under Section 9 of the Arbitration Act, already pending, or to be filed, or on any other proceeding entailing the same controversy.

19. *List for hearing on 24th September, 2020."*

Thereafter, from time to time other appeals kept on coming for admission and were admitted and tagged for hearing along with the first set of appeals, with all to be heard together.

14. In subsequent episodes of this second season, the counsels were heard on 24th September, 2020, 12th October, 2020 and 6th November, 2020, when order/judgment was reserved.

15. Mr. Mukul Rohatgi, Senior Advocate opening the arguments in the appeals of the Hotel, argued (i) that the complaints in the suits themselves contain pleading of existence of an arbitration clause; (ii) that the Hotel was thus not required to plead existence of an arbitration agreement; (iii) that the need for an application under Section 8 arises when the arbitration agreement is not evident from the complaint and does not arise when the arbitration agreement is admitted in the complaint itself; (iv) that Section 8 mandates the Court to refer the parties to arbitration, with the only exception being, where *prima facie* no valid arbitration agreement exists; (v) that therefore if arbitration agreement is brought to the notice of the Court, whether by the plaintiff or by the defendant, the legislative mandate of referring the parties to arbitration has to be abided by; (vi) that where the plaintiff itself in the complaint shows an arbitration agreement, there is no necessity of an application; (vii) that the Single Judge heard arguments, both on Section 8 as well as Order XXXIX Rules 1&2 of the Code of Civil Procedure, 1908 (CPC), for the eventuality of the argument of the Hotel of

Section 8 failing; (viii) that Section 8(2) cannot be read pedantically as requiring an application where the plaintiff itself has brought the arbitration agreement to the notice of the Court and the defendant is not disputing the same; (ix) that to read Section 8 as requiring an application even where the plaintiff himself has pleaded the arbitration agreement, would be giving it a mechanical interpretation and would be a meaningless exercise; (x) that even if the Hotel was to make an application under Section 8, it would say the same thing as was argued; (xi) that in the subject suits, the Occupants as plaintiffs, themselves made out a case for referring the parties to arbitration under Section 8; (xii) that the Occupants however in the plaints pleaded the disputes to be not arbitrable and which was a legal plea and was opposed verbally by the Hotel; (xiii) reliance was placed on paragraph 29 of ***Ananthesh Bhakta Vs. Nayana S. Bhakta*** (2017) 5 SCC 185 where though it was held, interpreting the word 'entertained' in Section 8(2), that the Court shall not consider any application under Section 8(1) unless it is accompanied by original arbitration agreement or dully certified copy thereof but bringing original arbitration agreement on record at the time when the Court is considering the application, shall not entail rejection of the application under Section 8(2), but it was also noticed that the retirement deed and the partnership deed containing the arbitration clause in that case, had also been relied upon by the plaintiffs and it was held that "hence, the argument of the plaintiffs that the defendant's application was not accompanied by original deeds, hence, liable to be rejected, cannot be accepted"; (xiv) that even if this Court were to hold an application under Section 8 to be necessary, the course of action required to be followed

would be to remand the suits to the Commercial Division and when also the Hotel will have an option to file an application under Section 8, but it would be a worthless exercise, in waste of time, as the conclusion will remain the same as already arrived at in the impugned judgment; (xv) that technicalities of law are to be avoided; (xvi) that be that as it may, the Hotel by way of abundant caution, has filed Section 8 applications in these appeals and since the appeals are continuation of the suits, the Section 8 applications can be dealt with in this Court; (xvii) that the appeals of the Occupants are not maintainable; (xviii) reliance was placed on **BGS SGS Soma JV Vs. NHPC Ltd.** (2020) 4 SCC 234 to contend that since the plea of the Hotel of Section 8 has been allowed, the same is not appealable under Section 37 of the Arbitration Act and Section 13(1)(a) of the Commercial Courts Act, 2015 does not vest substantive right of appeal but only provides for the forum of appeal; (xix) that under Section 37 of the Arbitration Act, appeal lies only against refusal of a plea under Section 8; (xx) that in law, it is permissible to provide an appeal against one eventuality and not against the other; (xxi) example was given of Section 20 of the Slum Areas (Improvement and Clearance) Act, 1956 whereunder appeal lies only against an order of refusal of grant of permission under Section 19 and not against an order granting permission; (xxii) that the Commercial Division, after having upheld the plea of Hotel of Section 8, erred in rendering a *prima facie* view inasmuch as once it was held that the parties have to be relegated to arbitration, the Commercial Division, functioning as the Civil Court, became *functus officio*; (xxiii) that the Courts must not function in a stereo type fashion and insist for an

application in writing; and, (xxiv) reference was made to paragraph 4 of *Ardy International (P) Ltd. Vs. Inspiration Clothes and U* (2006) 1 SCC 417 holding that "Section 8 is not intended to restrain arbitration proceedings before an Arbitral Tribunal. The situation contemplated by Section 8 can arise only at the first instance of an opponent and defendant in a judicial proceeding, or, at the highest, *suo moto* at the instance of the judicial authority, when the Judicial Authority comes to know of the existence of an arbitration agreement", and it was argued that the same permits the Court also, to even in the absence of an application in writing and on a verbal objection of the defendant, refer the parties to arbitration.

16. Mr. Sandeep Sethi, Senior Advocate also appearing for the Hotel, argued (a) that the impugned judgment records that arguments on maintainability were heard with the consent of the counsels; (b) that the same amounts to a waiver by the Occupants of the requirement, even if any of filing an application; (c) that if the Occupants wanted an application to be filed, they should have raised objection in this regard on the very first day but no such objection was raised; (d) attention was drawn to the paragraph in the plaint in one of the cases where the Occupant/plaintiff had himself disclosed the arbitration clause, though had also pleaded the reliefs claimed in the plaint to be not arbitrable and the arbitration clause of even number of Arbitrators to be invalid; (e) that else in the plaint, there was no challenge to the validity of the arbitration clause; (f) that in paragraphs 14 to 18 of *Sharad P. Jagtiani Vs. Edelweiss Securities Ltd.* 2014 SCC OnLine Del 4015 (DB), it has been held that "the requirement is to bring to

the notice of the Court at a point not later than when submitting the first statement on the substance of the dispute that there exists an arbitration clause between the parties..... Thus, if in the written statement filed it is brought to the notice of the Court that there exists an arbitration agreement between the parties which embraces the subject matter of the suit there would (be) complete compliance with the mandate of the law and the Court would be obliged to refer the parties to arbitration if the plea in the written statement is made good..... It is the substance of a matter contained in a document which matters and not the form..... Section 89 of the Code of Civil Procedure, 1908 which empowers a Court to refer the parties to arbitration if in the opinion of the Court it appears that there exists element of a settlement which may be acceptable to the parties. There cannot be a better case where such element exists than a case where the parties themselves have agreed for referring the matter to arbitration at the time of entering into the contract itself", and it was argued that as per the said judgment also, no writing is required and the arbitration clause has to be only brought to the notice of the Court and which was done by the Hotel on the very first day when the suits came up before the Commercial Division; and, (g) reference was also made to (i) paragraphs 7 to 9 of ***Hemant Jain Vs. Sidharth Jaju*** 2016 SCC OnLine Del 3245 where one of us (Rajiv Sahai Endlaw, J.) held that disposal of a suit on an application under Section 8 does not constitute a decree and appeal under Section 96 CPC does not lie; (ii) paragraphs 13 to 15 of ***Kandla Export Corporation Vs. OCI Corporation*** (2018) 14 SCC 715 also holding that "an order which refers parties to arbitration under Section 8, not being appealable under

Section 37(1)(a), would not be appealable under Section 13(1) of the Commercial Courts Act"; (iii) paragraph 8 of ***P. Anand Gajapathi Raju Vs. PVG Raju*** (2000) 4 SCC 539 "the language of Section 8 is pre-emptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude.... An application before a Court under Section 8 merely brings to the notice of the Court that the subject matter of the action before it is the subject matter of an arbitration agreement" and it was argued that the purpose of application under Section 8, of merely bringing the arbitration clause to the notice of the Court was abundantly served by the counsels for the Hotel, when on the very first day took objection to the maintainability of the suits and on which objection the Commercial Division proceeded to hear and adjudicate; and, (iv) paragraphs 23 and 25 of ***Rastriya Ispat Nigam Ltd. Vs. Verma Transport Co.*** (2006) 7 SCC 275 also holding "In the instant case, the existence of a valid agreement stands admitted.... Once the conditions precedent.... are satisfied, the Judicial Authority is statutorily mandated to refer the matter to arbitration. What is necessarily to be looked into therefore, *inter alia*, would be as to whether the subject matter of the dispute is covered by the arbitration agreement or not....Section 8 of the 1996 Act mandates a reference. Exercise of discretion by the Judicial Authority, which was the hallmark of Section 34 of the 1940 Act, has been taken away by the 1996 Act", and it was argued that all the said conditions were/are satisfied in the present case and no need for an application in

writing was felt.

17. Dr. Abhishek Manu Singhvi, Senior Advocate, opening arguments on behalf of the Occupants, argued (i) that the issue which arises for consideration is, whether the impugned judgment is of dismissal of the suits or of reference of the parties to arbitration under Section 8 of the Arbitration Act; (ii) that a reading of the impugned judgment shows the same to be of dismissal of the suits; (iii) that it is only when the parties are referred to arbitration under Section 8, that no appeal lies under Section 37 of the Arbitration Act; (iv) that if the appeals of the Occupants were to be not maintainable, on the same parity, the appeals of the Hotel also would not be maintainable; (v) that the impugned judgment holds the suits to be not maintainable and dismisses the suits with the liberty to avail of arbitration; (vi) that in the impugned judgment there is no reference of the parties to arbitration, as is provided under Section 8 of the Arbitration Act; (vii) that the Occupants, without prejudice to their objection that no application under Section 8 lies in appeal, have filed a common reply to the applications under Section 8 filed by the Hotel and have taken numerous pleas therein, opposing reference under Section 8; (viii) that the impugned judgment nowhere discusses the ingredients of Section 8; (ix) that the counsels for the Hotel are wrong in contending that the counsels for the Occupants waived the filing of any application under Section 8 of the Act; (x) attention is invited to the portions of the impugned judgment where the Single Judge has recorded the argument of the counsel for the Occupants that in the absence of an application under Section 8, the suits had to be

proceeded with; (xi) attention is also invited to the very first issue framed by the Single Judge, with respect to the need for an application; (xii) that thus it cannot be said that no objection was taken by the Occupants/their counsels in this regard; (xiii) that in fact the Commercial Division, in the judgment has also proceeded to adjudicate the said plea of the Occupants but has wrongly, relying on judgments where plea of Section 8 had been taken in a written statement or in some other pleading, held that there is no need for an application; (xiv) reference was made to, (a) paragraphs 14 to 18 of *Harvestdeal Securities Limited Vs. Punjab National Bank* 2016 SCC OnLine Bom 2631 (DB) where, relying on earlier judgments in *Garden Finance Limited Vs. Prakash Industries Limited* 2001 (4) MhLJ 425, *Pamvi Consultancy Services Limited Vs. Global Syntex (Bhilwala) Ltd.* 2004 (4) MhLJ 748 and *Ganesh Trading Co. Vs. Government of Maharashtra* 2007 (4) MhLJ 715, it was held that it is mandatory for a party seeking reference under Section 8 to make an application in writing and it is only then that the Judicial Authority gets jurisdiction to make reference under Section 8; (b) paragraph 12 of *Bharti Televentures Ltd. Vs. DSS Enterprises Pvt. Ltd.* (2005) 123 DLT 532 where difference between the language of Section 8 and Section 45 was noticed and it was held "Section 8 envisages the filing of an application by the party seeking reference whereas Section 45 of the Arbitration and Conciliation Act expects only a 'request' for this purpose" and it was argued that thus application in writing is necessary for invoking Section 8; (c) paragraph 34 of *Parasramka Holdings Pvt. Ltd.* supra relied upon by the Commercial Division merely relied on *Sharad P. Jagtiani* supra but in which case the

plea of Section 8 was contained in the written statement; the Commercial Division did not notice that in the present case there was not written statement also and thus ***Parasramka Holdings Pvt. Ltd.*** has been wrongly relied upon; (d) paragraph 9 of ***Convinio Shopping Nine 2 Nine Vs. Olympia Opaline Owners Association*** 2019 SCC OnLine Mad 646 holding that "the role of the Judicial Authority to refer parties to arbitration will arise only upon an application being made by a party to the arbitration agreement.... It is very clear that a Judicial Authority cannot *suo moto* return/reject a suit on the ground that the parties to the suit have agreed to refer all their disputes to arbitration at the threshold, when the case is filed..... The ouster is only by choice of the defending party"; and, (e) paragraphs 30 and 31 of ***SSIPL Lifestyle Private Limited Vs. Vama Apparels (India) Private Limited*** MANU/DE/0521/2020 holding that limitation applies to an application under Section 8; (xv) that Section 8 leads to ouster of the jurisdiction of the Civil Court, the same cannot be treated casually; (xvi) that since the Commercial Division has not applied Section 8 but otherwise dismissed the suits, the appeals of the Occupants are maintainable under Section 96 read with Order XLI of the CPC and Section 10 of the Delhi High Court Act, 1966; (xvii) ***Ardy International (P) Ltd.*** supra relied on by Mr. Mukul Rohatgi, Senior Advocate appearing for the Hotel has no relevance and stray observations therein cannot be cited as precedent—in that case, the plaintiff had made an application for interim relief seeking stay of arbitration and a statement was made that an application under Section 8 would be filed; thus, the same, rather than supporting the Hotel, goes against the Hotel; (xviii) attention was drawn to

paragraphs 15 and 21 of *Kandla Export Corporation* supra to contend that the appeal is barred only when a application under Section 8 has been filed and is allowed; (xix) that non-filing an application amounts to waiver of Section 8; (xx) that an application is necessary also to see whether the right under Section 8 has been invoked within limitation; (xxi) that an application under Section 8 is also necessary to satisfy the Court of all the ingredients; (xxii) that absence of an application would lead to ambiguity; (xxiii) that both, sub-sections (2) and (3) of Section 8 refer to an application; (xxiv) that the use of the word 'accompanied' in sub-section (2) of Section 8 also means that the plea under Section 8 has to be necessarily in writing; (xxv) that merely because the Occupants in the present case, in their endeavour of making a full disclosure, disclosed the arbitration clause contained in the agreements, would not obviate the filing of an application under Section 8; and, (xxvi) that an application is necessary in the interest of purity of the process and there is no need to bend the law.

18. Mr. Dhruv Mehta, Senior Advocate also appearing for the Occupants, argued (a) that the impugned judgment dismisses the suits as not maintainable; (b) that dismissal of the suits means a decree and once there is a decree, the appeals would be maintainable under Section 96 of the CPC and Section 37 of the Arbitration Act would not apply; (c) reference was made to *Kinnari Mullick Vs. Ghanshyam Das Damani* (2018) 11 SCC 328, in the context of Section 34(4) of the Arbitration Act, holding that the limited discretion available to the Court can be exercised only upon a written application made in that behalf by a party to the arbitration

proceedings and that the Court cannot exercise its limited power of deferring the proceeding before it *suo moto* and it was argued that similarly, for the Court to exercise power under Section 8(1), written application is necessary; (d) reference was made to paragraphs 11 and 12 of ***Sukanya Holding (P). Ltd. Vs. Jayesh H. Pandya*** (2003) 5 SCC 531 holding that "Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the Arbitrator. Further, the matter is not required to be referred to the Arbitral Tribunal, if: (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the Arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such an application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that the Arbitration Act does not ousted the jurisdiction of the Civil Court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated under sub-sections (1) & (2) of Section 8 of the Act" and to paragraph 17 of ***Magma Leasing & Finance Ltd. Vs. Potluri Madhavalata*** (2009) 10 SCC 103 holding that "Section 8 is in the form of legislative command to the Court and once the prerequisite conditions as aforesaid are satisfied, the Court must refer the parties to arbitration"; (e) that sub-sections (1), (2) and (3) of Section 8 contain a scheme and which scheme envisages an application and entertaining a verbal objection under Section 8 would amount to re-writing the statute; (f) that there can be no application under Section 8, in appeal; (g) that sub-section (2) of Section 8 contains a negative language and is peremptory in

nature; (h) that Section 8(3) also uses the word 'accompanied', again indicating a writing; (i) reference was made to paragraph 16 of ***Mannalal Khetan Vs. Kedar Nath Khetan*** (1977) 2 SCC 424 where the words 'shall not register' were held to be mandatory in character owing to the negative form of language and it was held that negative language is worded to emphasise the insistence of compliance with the provisions of the Act and that negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statutory provision imperative; (j) that ***Ananthesh Bhakta*** supra cited by Mr. Mukul Rohatgi, Senior Advocate appearing for the Hotel, instead of supporting the case of the Hotel, supports the Occupants; attention was drawn to paragraphs 5,6,11,14,15,21 to 25, 27 and 28 thereof to contend that in that case there was a written application; Mr. Rohatgi, Senior Advocate relied only on paragraph 29 thereof but which is not the ratio of the judgment; all that the said judgment says is that if the original agreement containing the arbitration clause has been filed by the plaintiff, the defendant may not again file the same with the application; however if the plaintiff only files a copy and not the original, the defendant, even though admits the same, will still have to file the original agreement and if does not do so, the application will be dismissed; (k) that Section 8 application cannot be filed in an appeal; the expression 'judicial authority' in Section 8(1) means the Court of Original Jurisdiction and not the Appellate Court; (l) that no appeal under Section 37 would lie, only if an application under Section 8 has been allowed and not if the suit is dismissed on a verbal plea of Section 8; (m) that the impugned judgment is not a judgment of referring the parties to arbitration but only

gives liberty to the parties to avail of arbitration; (n) reference was made to ***Calcutta Discount Co. Ltd. Vs. Income Tax Officer, Companies District-I, Calcutta*** AIR 1961 SC 372 to contend that if a condition precedent does not exist, the action is non-est; (o) that if the arguments of the counsels for the Hotel as to maintainability of the appeals are to be accepted, then the appeals of the Hotel also have to go; (p) that the Hotel, in its appeals has merely sought setting aside of findings and no appeal lies, unless the appellant is aggrieved by a decree; (q) reference was made to paragraphs 15 to 17 of ***Ganga Bai Vs. Vijay Kumar*** (1974) 2 SCC 393 and to paragraph 8 of ***Banarsi Vs. Ram Phal*** (2003) 9 SCC 606 laying down that no appeal lies against a mere finding; (r) that in ***Sharad P. Jagtiani*** supra cited by Mr. Sandeep Sethi, Senior Advocate, the plea of Section 8 was contained in the written statement; for this judgment to be applied, there has to be a plea in the written statement but in the present suits no written statement even was filed; and, (s) reference was made to ***Martin and Harris Ltd. Vs. VIth Additional District Judge*** (1998) 1 SCC 732 holding in reference to UP Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 that the term "entertain" does not mean initiation of proceedings but necessarily means consideration of the application on the merits of the grounds on which it is based.

19. Mr. Avishkar Singhvi, Advocate for the Occupants also made arguments but with respect to the arbitrability of the reliefs claimed in the suits and which is not the scope of this judgment.

20. Mr. Siddharth Luthra, Senior Advocate also appearing for the Hotel,

(i) drew attention to the Proviso to Section 8(2) inserted vide amendment with effect from 2016, diluting the need for filing the original arbitration agreement; (ii) reliance was placed on paragraph 8 of ***Kedarnath Jute Manufacturing Co. Ltd. Vs. Commercial Tax Officer*** AIR 1966 SC 12 and on paragraph 11 of ***Mackinnon Mackenzie & Co. Ltd. Vs. Audrey D'Costa*** (1987) 2 SCC 469, with respect to the effect of a Proviso; (iii) argued, that with the introduction of the Proviso, the filing of a written application under Section 8 is no longer necessary; (iv) drew attention to the Statement of Objects and Reasons for the amendment with effect from 2016, to contend that the reason was to make the proceedings under Section 8 expeditious; (v) argued that insisting on filing of an application, even when the plaintiff himself has placed the arbitration agreement before the Court, would cause delays; (vi) drew attention to the 246th Report of the Law Commission leading to the amendments to Section 8 of the Arbitration Act as well as to the Parliament Debates in that context; (vii) relied on paragraph 34 to 36 of ***Hema Khattar Vs. Shiv Kherra*** (2017) 7 SCC 716 to contend that Section 8 is peremptory and it is obligatory for the Court to refer the parties to arbitration; and, (viii) referred to ***Krishan Gopal Vs. Parveen Rajput*** (2019) 260 DLT 354 holding that "The agreement being an admitted document and the existence of the arbitration clause in it, being also admitted, the non-filing of the certified copy of the agreement does not preclude the defendant from seeking reference to arbitration. The filing of certified copy of the agreement with a Section 8 application is for the purpose of ensuring that the agreement is not a forged or a fabricated document and that the person seeking reference authenticates the copy of

the agreement being filed. When the plaintiff himself has filed the agreement which contains the arbitration clause, the filing of another certified copy becomes nothing but an empty formality. Every provision has a purpose and the provision has to be read in the light of the purpose behind it".

21. Mr. Sandeep Sethi, Senior Advocate, arguing in rejoinder on behalf of the Hotel, contended (a) that vide the impugned judgment, though the suit has been dismissed but holding the disputes between the parties to be arbitrable and giving liberty to the parties to avail of arbitration—the same amounts to an order under Section 8 of the Arbitration Act; (b) that in ***State of Goa Vs. Praveen Enterprises*** (2012) 12 SCC 581, in similar facts, the order was held to be an order under Section 8; (c) reference was made to ***Ameet Lalchand Shah Vs. Rishab Enterprises*** (2018) 15 SCC 678, where also the words used were "The suit is disposed of"; (d) reference was made to ***Tandav Film Entertainment (P) Ltd. Vs. Four Frame Pictures*** 2009 SCC OnLine Del 3930 (DB) and ***Agri Gold Exims Ltd. Vs. Shri Laxmi Knits & Wovens*** (2007) 3 SCC 686 to contend that even where the suit was dismissed, it was held to be an order under Section 8 and appeal held to be not maintainable; (e) that the Arbitration Act, in other provisions has expressly provided for the plea to be in writing but not in the case of Section 8; (f) attention in this regard was invited to Section 34(4) and (5) of the Arbitration Act; (g) that ***Kinnari Mullick*** supra cited by the counsel for the Occupants is with reference to Section 34(5) and would not apply to Section 8 (Mr. Dhruv Mehta, Senior Advocate for the Occupants

contended that the said judgment is prior to the amendment to Section 34(5)); (h) that the argument of the counsels for the Occupants, of the necessity of placing the original arbitration agreement, runs contrary to the dicta in **Ananthesh Bhakta** supra; (i) that the only purpose of an application is to bring to the notice of the Court that there is an arbitration agreement; once there is an arbitration agreement, the Court is bound to refer the parties to arbitration; (j) that after the amendment of Section 8(1) with effect from 2016, the only plea to be adjudicated in Section 8 is with respect to the validity of the arbitration agreement; (k) that the plaint in the subject suits contain the pleas of invalidity and it was only those pleas on which arguments were to be addressed and were addressed and which have been adjudicated; (l) that even in the Memorandum of Appeals, there is no plea that the arbitration agreement is not valid; (m) that it is not the case of the Occupants that they have been prejudiced in any manner by non-filing of an application; (n) reliance was placed on **P. Anand Gajapathi Raju** supra to contend that reference to arbitration can be made even in an appeal; (o) that the Court is always empowered to put an end to the *lis*, if there is an arbitration agreement between the parties; (p) that even if it were to be held that an application in writing by the defendant is necessary for invoking Section 8, the impugned judgment would not be without jurisdiction because the jurisdiction to refer the parties to arbitration is derived, not from the application, but from the arbitration agreement between the parties and appeal under Section 96 of the CPC would still not be maintainable; (q) that an application under Section 8 is maintainable in appeal, since per Order XLI Rule 33 CPC, the Appellate Court has the same

power as the Suit Court; (r) ***Mannalal Khetan*** supra cited by the counsels for the Occupants was in the context of Section 108 of the Companies Act, 1956 which required a written instrument duly stamped and provided for penal consequences and would have no application to Section 8; (s) that ***Bharti Televentures Ltd.*** supra cited by the counsels for the Occupants is not concerned with Section 8; (t) in ***Convinio Shopping Nine 2 Nine*** supra of the Madras High Court, also cited by the counsels for the Occupants, it was merely held that the Court could not *suo moto* return plaint, if there was an arbitration agreement; (u) reference was again made to ***Ardy International (P) Ltd.*** supra; (v) that ***Harvestdeal Securities Limited*** supra of Bombay High Court and ***Magma Leasing & Finance Ltd.*** supra cited by the Occupants also have no application; (w) that ***Sukanya Holding (P). Ltd.*** supra relied upon by the counsels for the Occupants has been legislatively overruled, as held in ***Emaar MGF Land Limited Vs. Aftab Singh*** (2019) 12 SCC 751; (x) reference was made to ***Narayan Prasad Lohia Vs. Nikunj Kumar Lohia*** (2002) 3 SCC 572 holding that agreement for reference of disputes to two Arbitrators does not mean that the agreement itself become void and in such a situation the two Arbitrators, should under Section 11(3) appoint a third Arbitrator; and, (y) reference was made to ***Midinapore Peoples Co-operative Bank Ltd. Vs. Chunilal Nanda*** (2006) 5 SCC 399 on the aspect of maintainability of the appeal.

22. Dr. Lalit Bhasin, Advocate also appearing for the Hotel, argued (i) that a written application though preferable, is not necessary; (ii) that the word "applies" used in Section 8 only means to make a prayer or request

and which can be orally or in the form of a written application; (iii) reference in this context was made to Mitra's Legal and Commercial Dictionary Vth Edition, Black's Law Dictionary Vth Edition, Stroud's Judicial Dictionary of Words and Phrases and to The Random House Dictionary of the English Language; (iv) reference was made to Article 134-A of the Constitution of India to contend that it is not as if, in law, an application in writing is always required; (v) that the purpose of Section 8 is that a dispute with respect to which an arbitration agreement exists, if brought before the Court, can at the instance of the other party be referred to arbitration; (vi) attention was invited to the judgment of one of us (Rajiv Sahai Endlaw, J.) sitting singly, in ***Sharad P. Jagtiani*** supra holding that all that is required to be done is to invoke Section 8 and not to seek reference; (vii) that Section 8 has to be read widely and not pedantically; (viii) that the Commercial Division, in the impugned judgment, after holding the disputes to be arbitrable and holding the suits to be not maintainable, erred in taking over the role of the Arbitral Tribunal, in returning findings on the merits; and, (ix) that Section 13 of the Commercial Courts Act invoking which the Hotel has filed appeals, enlarges the scope of appeal by conferring the right on "any person aggrieved" and thus the appeals of the Hotel are maintainable.

23. Mr. Dhruv Mehta, Senior Advocate for the Occupants contended (a) that the *prima facie* findings with respect to the nature of the right of the Occupants in the property have been returned by the Commercial Division in the context of deciding the question of arbitrability and without that

could not have decided the arbitrability of the dispute; (b) that the reliance placed by Mr. Sandeep Sethi, Senior Advocate on Order XLI Rule 22 of the CPC is misconceived as findings cannot be challenged; and, (c) that in *P. Anand Gajapathi Raju* supra, the agreement to refer the parties to arbitration was arrived at for the first time in appeal and it was for that reason that reference was made.

24. Mr. Avishkar Singhvi, Advocate for the Occupants cited *State of Goa* supra and has contended that the Single Judge had decided the issues framed and not the plea under Section 8.

25. Mr. Mukul Rohatgi, Senior Advocate for the Hotel clarified that the arguments had been addressed only on the maintainability of the appeals of the Occupants and on the need for filing a written application under Section 8 and if this Court were to decide against the Hotel, arguments will have to be subsequently addressed on the applications filed in the appeals under Section 8.

26. We have bestowed consideration to the elaborate arguments urged.

27. At this stage, only the following legal issues arise for adjudication:

I. Whether for the Judicial Authority, before which an action is brought in a matter which is the subject matter of an arbitration agreement, to refer the parties to arbitration, it is necessary that a party to the arbitration agreement applies in writing for referring the parties to arbitration or a verbal plea in this regard is sufficient?

II. If the answer to the aforesaid question is that a written

application is necessary, then if on a verbal plea of Section 8, the suit is dismissed, whether the order is an order referring the parties to arbitration under Section 8, so as to be not appealable under Section 37?

28. Before we proceed to decide the aforesaid legal questions, we must first deal with the plea of the senior counsels of the Hotel, that the counsels for the Occupants, before the Commercial Division, had consented to the Commercial Division hearing the counsels finally on the objection of the Hotel to the maintainability of the suits owing to Section 8 of the Arbitration Act as well as on applications under Order XXXIX Rules 1&2 CPC and have thereby waived the requirement, even if any, of an application in writing under Section 8 to be filed.

29. The decision of the aforesaid plea will also entail a legal question i.e. if any written application under Section 8 is required, whether such requirement can be waived.

30. For decision of the plea aforesaid, we have nothing but the narration of proceedings as contained in the impugned judgment. Though from a narration in paragraph 2 of the impugned judgment that the counsels for the defendant "at the outset raised the objection with regard to the maintainability of the suits under Section 8 of the Arbitration and Conciliation Act, in view of the clause relating to reference of disputes to arbitration in the Licence Agreement. Consequently, with the consent of the learned counsels for the parties, this Court has heard learned counsels for the parties both on the issue of maintainability of the suits as also on the

interim injunction applications finally at this stage", it does indeed appear that the counsels for the Occupants did not insist on an application in writing under Section 8 and thus cannot now raise the said argument and are estopped from doing so but on a detailed reading of the impugned judgment, that is not found to be the case. The impugned judgment, in paragraph 33 thereof, while recording the arguments on behalf of the Occupants in response to the arguments on behalf of the Hotel as to maintainability of the suits for the reason of the arbitration clause, records "The defendant has filed no application under Section 8 or even Section 11 of the Arbitration and Conciliation Act and hence, the disputes raised in a Civil Court have to be determined in the present suits. While, the plaintiffs do not deny the existence of an arbitration clause, however, their claims is that the subject matter of the suits cannot be decided in arbitration and the plaintiffs' right to file a suit cannot be circumscribed by the mandate of Sections 8 and 11 of the Act". Had the Occupants waived filing of an application in writing under Section 8, the question of the Occupants urging such an argument would not have arisen and even if such an argument was made, would not have been entertained, if the Occupants had unambiguously and unequivocally consented to the plea of Section 8 being considered without an application in writing. Thus, the consent earlier recorded to the hearing has to be necessarily construed as consent to the Hotel being able to satisfy that no application in writing was necessary. This is further confirmed from the Commercial Division, in paragraph 51 of the impugned judgment while recording the issues arising for consideration framed the first issue as "Whether an objection under Section 8 of the Act

can be taken without filing an application?". From a further reading of the judgment, it also transpires that the argument of the counsels for the Hotel indeed was that no application in writing under Section 8 is necessary; however, none of the judgments relied upon by the counsels for the Hotel, before the Commercial Division as well as before this Court in this regard, was/is a case of the parties being referred to arbitration within the meaning of Section 8, merely on a verbal plea/objection. All that the said judgments hold is, that if a plea within the meaning of Section 8 is contained in a written statement or other pleading, in writing, no separate application in writing under Section 8 is required. However as aforesaid, the facts here are different and thus the said judgments have no application. The Commercial Division however in the impugned judgment, referring to ***Parasramka Holdings Pvt. Ltd.*** supra, which is not a case of a verbal plea under Section 8 but a case of a plea under Section 8 contained in a written statement, decided the Issue No.(I) framed in favour of the Hotel, merely holding "In the present case, the defendant on the first day of appearance itself even before filing of the written statement has raised the objection under Section 8 of the Arbitration and Conciliation Act and hence this objection cannot be summarily rejected on the ground that no application has been filed by the defendant under Section 8 of the Act". The question, that there was no writing containing the plea under Section 8, remained to be addressed. Be that as it may, we find that the Occupants cannot today be prevented from raising this plea, on the ground of having waived the same before the Commercial Division. The Hotel, if fails to convince us that no application in writing is required, thus has to suffer the consequences

thereof. Since we have decided that there was no waiver on the part of the Occupants, the need to decide, whether in law, requirement, if any of Section 8 invocation to be in writing can at all be waived, does not arise.

31. We now proceed to decide the first legal issue aforesaid.

32. Suffice it is to state that none of the judgments cited by either counsel is directly on the issue save the dicta of the Bombay High Court in *Harvestdeal Securities Limited* supra and the view taken wherein we find to have been the consistent view of that High Court and which we find to have been also followed by the High Court of Madras in *IndusInd Bank Ltd. Vs. K. Nachimuthu* AIR 2016 Mad 109. We also find a Single Judge of this Court, in *Raj & Associates Vs. Videsh Sanchar Nigam Limited* (2004) 113 DLT 318 to have, referring to the earliest judgment of the Bombay High Court in *Garden Finance Limited* supra as well as to the dicta of the Supreme Court in *Sukanya Holding (P). Ltd.* supra, held that Section 8 specifically envisages that a request of this nature should be contained in a written application. However, since the view of the High Court of Bombay only has persuasive value and the dicta of the Single Judge of this Court to be not binding on us, we have proceeded to examine the issue independently. We may add that the stray observations in some other judgments cited by the counsels for the Hotel, in which the question, whether invocation under Section 8 has to be in writing or not, was not in issue and no arguments were addressed thereon, do not constitute precedent in law.

33. We may however record the reasoning which prevailed with the

Bombay High Court for taking the view aforesaid. It was reasoned, (i) that the application contemplated by Section 8(1) is a written application and not an oral application, so that the other side knows exactly the grounds on which the reference is sought; (ii) that the language of Sections 8(1) and 8(2) indicate that the application that is contemplated is a written application and not merely an oral application; (iii) that one of the aspects to be considered by the Court while considering an application for referring the parties to arbitration is that the subject matter of the action is the same as the subject matter of arbitration agreement and which will involve reference to the context of the plaint as also to the arbitration agreement and the manner in which the applicant wants the Court to read the averments made in the plaint as also the recital in the arbitration agreement; (iv) that the plaintiff who has brought the action would also have the right of audience on such an application; in order to afford the plaintiff a complete opportunity of being heard on an application under Section 8 also, a written application is necessary, so that the plaintiff who has instituted the suit knows exactly the grounds on which the reference is sought; (v) that one of the essential requirements for referring the parties to arbitration is that the subject matter of the action is the same as the subject matter of the arbitration agreement; and, (vi) that in order that under Section 8 matter can be referred to arbitration, there has to be identity of the subject matter of the suit and the arbitration agreement.

34. It is significant that Section 8 does not use the word 'plaintiff' or the 'defendant'. However the plaintiff who has brought the action before the

Court and subject matter of which action is the subject matter of an arbitration agreement, by filing the plaint which qualifies as the first statement on the substance of the dispute within the meaning of Section 8(1), cannot bring an application under Section 8(1). Not only does it follow from the language of Section 8(1) but was so held in ***Raj & Associates*** supra. It is only the defendant who can apply under Section 8(1). Thus, inspite of Section 8 using neutral words, it necessarily follows that the prayer for referring the parties to arbitration has to be of a party which has not brought an action before the Court and which person cannot be the plaintiff. Thus, a party which has brought an action before a Judicial Authority, notwithstanding the subject matter thereof being the subject matter of an arbitration agreement, obviously does not desire arbitration.

35. Law is even otherwise well settled, that an arbitration agreement is not a bar at the threshold, to the filing of a suit. There is no provision in any law or even in the Arbitration Act, to that effect. Thus, even if the plaintiff himself in the plaint pleads existence of an arbitration agreement covering the disputes brought by way of suit and/or himself along with the plaint files the arbitration agreement, a perusal whereof shows the subject matter of the suit to be a subject matter of an arbitration agreement, the Court before which the suit is brought, still cannot reject/return the plaint as under Order VII Rule 10 or Rule 11 of the CPC and has to, if otherwise satisfied, necessarily issue summons of the suit. The arbitration agreement relating to the subject matter of a dispute brought by way of a suit, becomes a bar to the suit only when the defendant applies for the parties to be

referred to arbitration. If the defendant does not apply in the manner provided, notwithstanding the arbitration agreement, the suit has to be proceeded with.

36. Ordinarily, when a suit is brought before the Court for the first time, the defendant/s thereto, unless on caveat, is/are not before the Court and the Court, notwithstanding the subject matter of the suit being the subject matter of an arbitration agreement, as evident from the pleadings and documents of the plaintiff also, is bound to issue summons of the suit to the defendant/s, unless the suit for any other reason is not maintainable. The defendant, within 30 days of the receipt of the summons, is required to file the written statement. However Section 8 requires the defendant, if desirous of ousting the jurisdiction of the Court before which the suit has been brought and of having the disputes raised by way of a suit decided by arbitration, is required to, not later than the date of submitting the first statement on the substance of the dispute, and which has been understood and interpreted as meaning a written statement, apply for referring the parties to arbitration. Where the returnable date of the summons is beyond 30 days, a defendant who on receipt of summons of the suit, desires for the disputes to be referred to arbitration, if does not within 30 days file the written statement and waits for the returnable date of the summons, to verbally apply for being referred to arbitration, will run the risk of his right to file written statement being closed, if his verbal request is not accepted. Thus, ordinarily a defendant in a suit would apply in writing under Section 8 and has an option to file an application under Section 8 simultaneously

with the written statement so as not to run the risk of having the right to file written statement closed in the event of the plea of referring the parties to arbitration being not accepted.

37. It cannot be lost sight of that reference to arbitration is not automatic on a plea therefor being raised. The plaintiff still has the opportunity under Section 8, as amended with effect from 2016, to show that no valid arbitration agreement exists or that the subject matter of the suit is distinct from that of an arbitration agreement.

38. We have enumerated the procedure ordinarily followed in the suit, only to emphasis that interpretation of Section 8 cannot be different for different Courts and has to be the same across the country, at all levels of Courts. The Hotel, being the defendant in the suits from which these appeals arise, appeared before the Commercial Division on the very first date, owing to a 'Practice Direction' of this Court of serving advance copy, as noted in the impugned judgment. However, the said Practice Direction is unique to this Court and does not extend even to the Commercial Courts in Delhi.

39. In this respect we may also emphasize that the Courts across India have a diverse culture, procedure and practices and Courts even in Delhi are often faced with situations where engagement of counsels who appeared before the Court and made statements and on the basis whereof orders are passed, being disputed by the parties, when they themselves appear, often disowning the Advocate who made the statement. To interpret Section 8 as permitting verbal application, is capable of mischief, with the counsel

appearing on behalf of the defendant, merely on the basis of a *Vakalatnama*, having a suit disposed of or referred to arbitration. If the word 'applies' in Section 8 is interpreted as "in writing", such writing would ordinarily be signed by the defendant so desirous of having the disputes referred to arbitration and be accompanied with his affidavit and which would add sanctity to the process. It cannot be lost sight of that all suits where a plea of Section 8 may be required to be taken, do not have such high profile star cast as in the two seasons of this litigation and whose verbal argument carries weight, and to hold the plea of Section 8 to be maintainable, if taken verbally, is fraught of complications and such an interpretation has to be always avoided.

40. We may in this context also notice that the practice of making oral prayers, earlier prevalent in the Calcutta High Court was commented upon adversely and condemned by the Supreme Court in *Samarias Trading Co. Pvt. Ltd. Vs. S. Samuel* (1984) 4 SCC 666 and in *Assistant Collector of Central Excise Vs. Dunlop India Limited* (1985) 1 SCC 260. It was held that "the practice of entertaining oral applications....in matters of consequence without any affidavit having been sworn to as *prima facie* proof of allegations and without any record being kept before the Court may lead to very serious abuse of the process of the Court" and only if some grossly iniquitous act is about to be perpetuated and any delay would result in fait accompli of a monstrosity, urgent oral applications may be moved, but even in such cases at least skeletal applications setting out the bare facts and questions involved should be insisted upon. It was held to be

essential that there be a contemporaneous record and it was said that "otherwise the Court seizes to be a Court of record".

41. The proceedings in a suit are governed by the procedure prescribed in the Code of Civil Procedure, 1908 and Section 141 thereof prescribes that the procedure provided in the Code in regard to suit shall be followed, as far as it can be made applicable, in all proceeding in any Court of civil jurisdiction. An application under Section 8 shall qualify as a proceeding in a Court of civil jurisdiction and will thus be governed by Section 141. The procedure prescribed in the Code for a suit is of the same to be presented to the Court by filing a plaint in writing and which plaint should be compliant with other Rules prescribed in the Code, including of the factual contents thereof being verified and supported by an affidavit of the plaintiff. Applying Section 141 of the CPC, the defendant, to apply under Section 8 must file an application in writing, accompanied by an affidavit of the defendant. There is nothing in Section 8 or its language to hold that the procedure as prescribed in Section 141 CPC is not applicable to Section 8 of the Arbitration Act and there is no other reason to hold that it is not possible to apply the said procedure to Section 8. Rather, the language used in Section 8, as already opined by us in the very first order reproduced above of the date when the appeals first came up before us, also requires a writing. We, fully concur with the view of the High Court of Bombay in the judgments aforementioned and which view was also followed by the High Court of Madras and by a Single Judge of this Court, again in the judgments noted above. The Proviso to Section 8(2) inserted vide the

amendment of the year 2016 to the Arbitration Act further fortifies this by providing that where the original arbitration agreement is not available with the party applying for reference and has been retained by the other party to the agreement, the party applying for arbitration "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....". The use of the word 'petition' in addition to the use of the word 'application' elsewhere in Section 8, leaves no manner of doubt, of the same to be in writing. Section 19 of the Arbitration Act only relieves the Arbitral Tribunal from being bound by the CPC or the Indian Evidence Act but not the Civil Court before which Section 8 is invoked. The arguments of the counsels for the Hotel, of invocation of Section 8 not requiring writing when plaintiff himself admitted and referred to the arbitration agreement and that the Court on the verbal objection of the defendant of Section 8 can proceed to adjudicate whether the subject matter of the *lis* brought before the Court is the subject matter of the arbitration agreement already before the Court, thus cannot be accepted. It is not merely the existence of the arbitration agreement which ousts the jurisdiction of the Court but the invocation thereof in the manner provided in Section 8, which ousts the jurisdiction of the Court. We may notice that on coming into force of the Commercial Courts Act, 2015, disputes arising out of agreements relating to immoveable properties used exclusively in trade or commerce, qualify as commercial dispute and the suits from which these appeals arise were filed as commercial suits. Though Section 16 of the Commercial Courts Act amends the provisions of the CPC in their

application to a commercial dispute but does not amend Section 141 aforesaid of the CPC in its application to commercial disputes. Rather, it amends Section 26 of the CPC pertaining to institution of suits by a plaint accompanied with affidavit, by further providing the form and manner of the affidavit. It is thus not as if, for commercial suits, the requirement of an application being in writing has been dispensed with. Once it is so, the principle that once a thing is prescribed to be done in a prescribed manner, it cannot be done in any other manner, will apply and Section 8 cannot be invoked, without an application in writing accompanied with an affidavit in the prescribed form.

42. As far as this Court is concerned, the Delhi High Court (Original Side) Rules, 2018, in Chapter X thereof dealing with "Interlocutory Applications", as the invocation of Section 8 would qualify, also requires the same to be in writing, supported by affidavit, with advance copy thereof to be served on the opposite party and to be registered. Thus, in accordance with the said Rules also, invocation of Section 8 has to be by an application in writing and the provisions of law in this regard, besides in the Arbitration Act, also in the CPC, Commercial Courts Act and the Rules of this Court, cannot be thrown to the wind and invocation permitted verbally.

43. We may also notice that the absence of an application in writing under Section 8 and reply thereto in writing, also results in the order/judgment of the Court being the sole repository of what transpired in the Court and which again is capable of causing mischief. The havoc, the same can play is quite evident from a bare reading of the impugned

judgment in the present case and as is evident from the arguments of the counsels. Had there been an application under Section 8 in writing, the Commercial Division, if intending to refer the parties to arbitration, would have allowed the application and if not, would have dismissed the application and which would have avoided the ambiguity as has arisen, of the purport of the order, with the counsels for the Occupants contending that the same is not an order of reference of parties to arbitration but of dismissal of suits and the counsels for the Hotel construing it to be an order of reference of parties to arbitration. The advantages of having an application in writing far outweigh the advantage of expediency in entertaining a verbal application and which is reason enough to interpret Section 8, as requiring an application in writing.

44. We thus answer the first legal issue framed hereinabove, by holding that for the Judicial Authority, before which an action is brought in a matter which is the subject matter of an arbitration agreement, to refer the parties to arbitration, it is necessary that a party to the arbitration agreement applies in writing for referring the parties to arbitration and a verbal plea in this regard is not sufficient.

45. Before proceeding to decide the second legal issue aforesaid, it is necessary to first determine, whether the impugned order/judgment is an order/judgment exercising power under Section 8 or an order of dismissal of suit.

46. Having considered the arguments of the counsels for the Occupants, we are of the view that the said aspect is fully covered by the dicta of the

Supreme Court in *State of Goa Vs. Praveen Enterprises* supra cited by Mr. Sandeep Sethi, Senior Advocate. It was held therein (i) that reference to arbitration describes various acts and can be by the parties themselves or by an appointing authority named in the arbitration agreement or by a Court on an application by a party to the arbitration agreement; (ii) that Section 8 is an example of referring the parties to arbitration; (iii) that while Section 11 contemplates appointment of Arbitrator or taking necessary measures as per the appointment procedure under the arbitration agreement, Section 8 does not provide for appointment of an Arbitrator or referring of any disputes to arbitration, but merely requires the Judicial Authority before whom an action is brought in a matter in regard to which there is an arbitration agreement, to refer the parties to arbitration; (iv) that "when the Judicial Authority finds that the subject matter of the suit is covered by a valid arbitration agreement between the parties to the suit, it will refer the parties to arbitration, by refusing to decide the action brought before it and leaving it to the parties to have recourse to their remedies by arbitration"; (v) that "when such an order is made, parties may either agree upon an Arbitrator and refer their disputes to him, or failing agreement, file an application under Section 11 of the Act for appointment of an Arbitrator"; and, (vi) that "the Judicial Authority "referring the parties to arbitration" under Section 8 of the Act, has no power to appoint an Arbitrator".

47. A reading of the impugned judgment leaves no manner of doubt that the Commercial Division, notwithstanding having found a *prima facie* case on merits in favour of the Occupants, found the subject matter of the suit to

be the subject matter of the arbitration between the parties and for this reason only held the suits to be not maintainable and dismissed the suits. The impugned order/judgment thus qualifies as an order referring the parties to arbitration.

48. Once it is so, the same would be not appealable under Section 37 of the Arbitration Act, notwithstanding our conclusion hereinabove, of the order having been made without satisfying the essential ingredients for invocation of Section 8 and that brings us to the question asked by us from the senior counsels for the Hotel on the very first date when the appeals came up before us and which order is reproduced hereinabove i.e. whether the impugned order/judgment, purportedly under Section 8, is without the jurisdiction of the Court under Section 8 being invoked, so as to not qualify as an order under Section 8, for the bar of appeal under Section 37 to apply.

49. Mr. Sandeep Sethi, Senior Counsel for the Hotel replied our aforesaid query by contending that the jurisdiction to refer parties to arbitration is derived from the arbitration agreement and which did exist before the Single Judge and was not in dispute. He thus contended that the question of the Single Judge having exercised power under Section 8 without jurisdiction does not arise.

50. Per contra, Mr. Dhruv Mehta, Senior Advocate for the Occupants, in support of our query aforesaid referred to ***Calcutta Discount Co. Ltd.*** supra. The contention for consideration therein was, that the notices issued by the Income Tax Officer under Section 34 of the Indian Income Tax Act, 1922, calling upon the company to submit fresh return of its total income and the

total world income assessable for the three accounting years, were without the existence of the necessary conditions precedent which confer jurisdiction under Section 34 to the Income Tax Officer; it was argued that for jurisdiction under Section 34 to be invoked, the Income Tax Officer must have reason to believe that such under-assessment had occurred by reason of either omission or failure on the part of the assessee to make a return of his income or omission or failure on the part of the assessee to disclose fully and truly all facts necessary for assessment of these years. The majority opinion of the Supreme Court, as a matter of fact, found that the Income Tax Officer who had issued the notices did not have before him any non-disclosure of material fact and therefore no material before him for believing that there had been any material non-disclosure by reason of which an under-assessment had taken place. It was held in the majority opinion, that the conditions precedent to the exercise of jurisdiction under Section 34 of the Income Tax Act did not exist and the Income Tax Officer therefore had no jurisdiction to issue the impugned notices. Axiomatically, the notices as well as assessment orders in pursuance thereto were quashed.

51. We find, the Supreme Court in *Carona Limited Vs. Parvati Swaminathan & Sons* (2007) 8 SCC 559 to be concerned with an appeal against the judgment of dismissal of a writ petition filed by a tenant against the order of the Small Causes Court confirming the decree of eviction in favour of the landlord. It was the plea of the tenant company before the Supreme Court, that the fact as to the paid up share capital of Rs.1 crore or more of a company, was a jurisdictional fact and in the absence of which

the Court had no jurisdiction to proceed on the basis that the Rent Act was not applicable. The said contention was accepted and it was held that the fact as to paid up share capital of a company could be said to be preliminary or jurisdictional fact as the said fact would confer jurisdiction on the Court to consider the question. It was further held that "Stated simply, the fact or facts upon which the jurisdiction of a Court, a Tribunal or an Authority depends can be said to be a 'jurisdictional fact'. If the jurisdictional fact exists, a Court, Tribunal or Authority has jurisdiction to decide other issues. If such fact does not exist, a Court, Tribunal or Authority cannot act. It is also well settled that a Court or a Tribunal cannot wrongly assume existence of a jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a Subordinate Court or an inferior Tribunal cannot confer upon itself jurisdiction which it otherwise does not possess". Halsbury's Laws of England, IVth Edition stating that "If, at the inception of an enquiry by an inferior Tribunal, a challenge is made to its jurisdiction, the Tribunal has to make up its mind, whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive", was cited with approval. It was further held "The existence of a jurisdictional fact is thus a *sine qua non* or condition precedent to the assumption of jurisdiction by a Court or Tribunal". It was yet further held "But once such a jurisdictional fact is found to exist, the Court or Tribunal has power to decide adjudicatory facts or facts in issue". Similarly, in ***ITW Signode India Limited Vs. Collector of Central Excise*** (2004) 3 SCC 48, it was held that the question of limitation involved a question of jurisdiction

and the findings of fact on the question of jurisdiction would be a jurisdictional fact and the Tribunal in that case committed a manifest error in not determining the said question, particularly when in the absence of any finding of fact that such short levy of excise duty in that case related to any positive act on the part of the assessee by way of fraud, collusion, willful mis-statement or suppression of facts and thus the extended period of limitation could not have been invoked and show cause notice issued. Earlier, in *Amrit Bhikaji Kale Vs. Kashinath Janardhan* (1983) 3 SCC 437, it was held that once the Tribunal in that case had no jurisdiction, all subsequent proceedings were *ab initio void* and without jurisdiction and the orders passed therein were nullity, irrespective of correctness or incorrectness thereof.

52. We are unable to accept the contention of Mr. Sandeep Sethi, Senior Counsel, though undoubtedly attractive, that the jurisdictional fact for referring the party to arbitration in exercise of powers under Section 8 is the existence of the arbitration agreement. The existence of the arbitration agreement relating to the action brought in a matter, applying the aforesaid judgments, in our view, is a adjudicatory fact before an order of reference to arbitration in exercise of powers under Section 8 can be made by a Judicial Authority. However, for the Judicial Authority to adjudicate the aforesaid fact, its jurisdiction to refer the parties to arbitration should have been invoked and which invocation, as aforesaid, has to be by an application in writing in accordance with Section 8 of the Arbitration Act. Even if the arbitration agreement exists but application in accordance with

Section 8 is not filed, no power of referring the parties to arbitration can be exercised by the Judicial Authority. Example may be given, of an application under Section 8 being presented after submitting first statement on the substance of the dispute. In such a case, notwithstanding finding an arbitration agreement to exist, the Judicial Authority would have no jurisdiction to refer the parties to arbitration. The mandate to the Judicial Authority, contained in Section 8, also using negative words in sub-section (2) thereof, to refer the parties to arbitration, comes into play only when an application in writing in accordance with sub-section (1) and accompanied by the original arbitration agreement or duly certified copy thereof, is before the Judicial Authority. In the absence thereof, the Judicial Authority is bound to proceed with the *lis* before it in accordance with law. Merely because purposive interpretation has been given to Section 8(2) and it has been held that if the arbitration agreement has been placed before the Judicial Authority by the plaintiff itself and is not in dispute, the Judicial Authority will not insist on the original or certified copy thereof, will not in our view, obviate the need for an application in writing and which alone can be "accompanied" with the arbitration agreement and notwithstanding pendency whereof, commencement/continuation of arbitration has been permitted. Merely bringing the arbitration agreement to the notice of the Court is not the foundation for ouster of the jurisdiction of the Court. It is the assertion by the defendant of the right to get the matter arbitrated instead of being adjudicated, which is the foundation of ouster of the jurisdiction of the Court. Such ouster, has to be strictly construed and once the law has laid down conditions for such ouster, without fulfilling those

conditions, there can be no ouster of jurisdiction of the Court.

53. In the present cases, the Judicial Authority i.e. the Commercial Division, notwithstanding the preliminary objection of the Occupants, that Section 8 could not be invoked by the Hotel without application in writing, proceeded to decide not only the said jurisdictional fact objection, but also the adjudicatory issue, whether the subject matter of the suits was the subject matter of arbitration agreement between the parties. The Judicial Authority i.e. the Commercial Division, relying on orders/judgments holding that where plea/objection of Section 8 is taken in the written statement or other pleading, separate application is not necessary and without noticing that in the subject suits there was no written statement or pleading invoking Section 8 even by the Hotel, held the verbal objection of Section 8 to be maintainable and with which, as aforesaid, we do not concur. Since the adjudicatory finding of, the subject matter of the suits being the subject matter of arbitration agreement has been rendered without jurisdiction under Section 8, the same also has to necessarily go. The said finding of the adjudicatory fact, in accordance with the judgments aforesaid, being without jurisdiction is non-est and a nullity.

54. We thus hold that the impugned order/judgment purporting to be in exercise of powers under Section 8 of the Arbitration Act, of referring the parties to arbitration, is not in law, an order/judgment of a Judicial Authority of referring the parties to arbitration, in exercise of powers under Section 8 and thus the bar under Section 37 of the Arbitration Act to the maintainability of these appeals, is not applicable. The bar thereunder is

only to the appeals against orders "referring the parties to arbitration under Section 8". The said bar would not apply when the order, even though of referring the parties to arbitration, is not an order under Section 8 inasmuch as the jurisdictional fact of an application in writing in accordance with Section 8 did not exist and in the absence whereof there could be no order referring the parties to arbitration under Section 8. The impugned order/judgment, otherwise of dismissal of the suits, are appealable under Section 96 of the CPC and it is not in dispute that if the impugned order/judgment does not qualify in law as one of referring parties to arbitration in exercise of powers under Section 8, is otherwise not justified in dismissing the suits and the appeals have to be allowed. We thus answer the second legal question aforesaid by holding that the order of dismissal of suits on a verbal plea of Section 8 is not an order referring the parties to arbitration under Section 8, so as to be not appealable under Section 37.

55. We have also considered the factum of the Hotel, without prejudice to its rights and contentions, having filed applications under Section 8 in these appeals. It was the contention of the counsels for the Occupants that no application under Section 8 was maintainable in appeal. However, as aforesaid, the senior counsels clarified that arguments had not been addressed on this aspect. We have considered, whether to now post these appeals for hearing arguments on the said aspect but have decided against the said course of action. Though we have hereinabove, much to our dislike, inasmuch as not permitting verbal objection of Section 8 is against expediency, held as above but are of the view that retaining the appeals

before us for considering the question of maintainability of Section 8 application in appeals is likely to cause further delays and lead to further seasons of this litigation. On the contrary, remanding the matters to the Commercial Division with liberty to the Hotel to file Section 8 applications, is likely to be much more expeditious and will avoid further legal questions which will be agitated till the Supreme Court.

56. During the hearings it was also contended by the counsels for the Occupants that it would now not be open to the Hotel to apply before the Commercial Division under Section 8. We would like to put the said matter also to rest, so as not to delay adjudication of Section 8 applications before the Commercial Division. In our view, the question of the right of the Hotel to apply under Section 8 having been closed, does not arise. The Hotel till now has not filed its first statement on the substance of the dispute and thus remains fully entitled to apply under Section 8 and filing of the appeals by the Hotel against the *prima facie* findings returned by the Commercial Division does not bar the Hotel from invoking Section 8. It cannot be lost sight of that the Hotel, immediately after our order dated 29th July, 2020 aforesaid, filed the applications under Section 8.

57. That brings us to the appeals filed by the Hotel.

58. Once we have held the impugned order/judgment to be not an order/judgment under Section 8, of referring the parties to arbitration and held the appeals of the Occupants to be maintainable under Section 96 of the CPC, the appeals of the Hotel are nothing else but by way of cross-objections permitted by Order XLI Rule 22 of the CPC and the objection of

the Occupants to the maintainability thereof is to the own prejudice of the Occupants.

59. Once we have, in the appeals of the Occupants set aside the impugned order/judgment, all the findings therein, aggrieved wherefrom the Hotel has preferred the appeals, also go and the appeals of the Hotel axiomatically succeed.

60. We may however, for future reference, observe/hold that even if for the eventuality of a plea under Section 8 not succeeding, arguments on the applications for interim relief are also heard simultaneously, once the Court finds in favour of a Section 8 application, no *prima facie* findings even are to be returned on the basis of arguments heard on the applications for interim relief, even if ultimately dismissing the said applications for interim relief, in view of having found in favour of Section 8 application. The counsels for the Hotel are correct in their submission that once the parties are referred to arbitration, the Court is *functus officio*.

61. We thus bring down curtains to this second season of this litigation,

(A) Allowing the appeals of the Occupants as well as the Hotel, by setting aside the impugned order/judgment in entirety including the *prima facie* findings on the *inter se* rights of the parties and by, for the sake of abundant caution, clarifying that the said findings would have no bearing whatsoever at any further stage, be it in Courts or in arbitration.

(B) Remanding the suits from which these appeals arise to the

Commercial Division of this Court.

(C) Permitting the Hotel to, if so desires, on or before 15th January, 2021, prefer applications under Section 8 of the Arbitration and Conciliation Act before the Commercial Division of this Court and which applications, if filed, will be considered and decided in accordance with law.

(D) Extending the interim arrangement as in force till now, till 15th January, 2021.

(E) Disposing all pending applications also, besides the appeals, in terms of above.

(F) Leaving the parties to bear their own costs.

62. We, as students of law, shall wait for the third season, if any.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

DECEMBER 24, 2020

‘gsr/bs’

SCHEDULE– A

**PARTICULARS OF 32 CONNECTED APPEALS JUDGMENT
WHEREIN IS PRONOUNCED ALONG WITH RFA(OS)(COMM)
13/2020 TITLED “ALOK KUMAR LODHA VS. ASIAN HOTELS
(NORTH) LIMITED”.**

- +1. **RFA(OS)(COMM) 14/2020 C.M. No. 16964/2020 (for ex parte ad
interim injunction)**
CHARU LODHA Appellant
Versus
ASIAN HOTELS (NORTH) LTD. Respondent
AND
- +2. **RFA(OS)(COMM) 15/2020 C.M. No. 16974/2020 (for ex-parte ad
interim injunction) C.M. No. 20005/2020 (under Section 8 of
Arbitration and Conciliation Act)**
SITAL DASS JEWELLERS Appellant
versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +3. **RFA(OS)(COMM) 16/2020 C.M. No. 16979/2020 (for interim
relief) C.M. No. 20012/2020 (under Section 8 of Arbitration and
Conciliation Act)**
SATISH KHOSLA & ANR. Appellants
versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +4. **RFA(OS)(COMM) 17/2020 C.M. No. 16983/2020 (for ex parte ad
interim injunction) C.M. No. 20014/2020 (under Section 8 of
Arbitration and Conciliation Act)**
SWEETY SURI Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND

- +5. **RFA(OS)(COMM) 18/2020 C.M. No. 16988/2020 (for interim relief) C.M. No. 20007/2020 (under Section 8 of Arbitration and Conciliation Act)**
DHARAMVIR KHOSLA Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +6. **RFA(OS)(COMM) 23/2020 C.M. No. 17744/2020 (for ex-parte ad interim injunction)**
H.S. NAG AND ORS. Appellants
versus
ASIAN HOTELS (NORTH) LTD. Respondent
AND
- +7. **RFA(OS)(COMM) 25/2020 C.M. No. 17756/2020 (for ex-parte ad interim injunction)**
TEHMINA SEN Appellant
Versus
ASIAN HOTELS (NORTH) LTD Respondent
AND
- +8. **RFA(OS)(COMM) 26/2020 C.M. No. 17763/2020 (for ex-parte ad interim injunction)**
RAM KRISHAN ASSOCIATES PVT. LTD. Appellant
Versus
ASIAN HOTELS (NORTH) LTD. Respondent
AND
- +9. **RFA(OS)(COMM) 27/2020 C.M. No. 17770/2020 (for ex-parte ad interim injunction)**
SITAL DASS SONS Appellant
Versus
ASIAN HOTELS (NORTH) LTD. Respondent
AND

- +10. **RFA(OS)(COMM) 28/2020 C.M. No. 17777/2020 (for ex-parte ad interim injunction)**
SHANTI VIJAY JEWELS Appellant
versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +11. **RFA(OS)(COMM) 30/2020 C.M. No. 17803/2020 (for ex-parte ad interim injunction)**
SULTAN AHMED Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +12. **RFA(OS)(COMM) 35/2020**
SHREE KHANNA GEMS Appellant
versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +13. **RFA(OS)(COMM) 36/2020**
V.P. SACHDEV Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +14. **RFA(OS)(COMM) 37/2020**
ABHUSHAN Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +15. **RFA(OS)(COMM) 43/2020**
AJAY KUMAR RASTOGI Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND

- +16. RFA(OS)(COMM) 44/2020**
J H JEWELLERS Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +17. RFA(OS)(COMM) 45/2020**
BEENA JAIN Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +18. RFA(OS)(COMM) 46/2020**
RAJESH JAIN Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +19. RFA(OS)(COMM) 47/2020**
MEENA RASTOGI Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +20. RFA(OS)(COMM) 48/2020**
KASHMIR CARPET INDUSTRIES EMPORIUM Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +21. RFA(OS)(COMM) 49/2020**
KASHMIR CARPET PALACE Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND

- +22. RFA(OS)(COMM) 50/2020
REGENCY JEWELLERS Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +23. RFA(OS)(COMM) 53/2020
NATIONAL COTTAGE EMPORIUM Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +24. RFA(OS)(COMM) 55/2020
SHAW ART PALACE Appellant
Versus
ASIAN HOTELS (NORTH) LIMITED Respondent
AND
- +25. RFA(OS)(COMM) 60/2020
ARUN KUMAR JAIN Appellant
Versus
ASIAN HOTELS(NORTH) LTD. Respondent
AND
- +26. RFA(OS)(COMM) 61/2020
FAROOQ AHMED & ANR. Appellants
Versus
ASIAN HOTELS NORTH LIMITED Respondent
AND
- +27. RFA(OS)(COMM) 62/2020
JAIPUR JEWEL PALACE AND ANOTHER Appellants
Versus
ASIAN HOTELS (NORTH) LTD Respondent
AND
- +28. RFA(OS)(COMM) 63/2020
CRAFTO Appellant
Versus
ASIAN HOTELS (NORTH) LTD. Respondent
AND

- +29. **RFA(OS)(COMM) 64/2020**
SUGEET BALA AHUJA Appellant
Versus
ASIAN HOTELS (NORTH) LTD. Respondent
AND
- + 30. **RFA(OS)(COMM) 65/2020**
B.L. KAPOOR & ANR. Appellants
Versus
ASIAN HOTELS NORTH LIMITED Respondent
AND
- +31. **RFA(OS)(COMM) 66/2020**
SYED MUJTABA SHAH Appellant
Versus
ASIAN HOTELS NORTH LIMITED Respondent
AND
- +32. **RFA(OS)(COMM) 67/2020**
MAHARANI OF INDIA Appellant
Versus
ASIAN HOTELS NORTH LIMITED Respondent

SCHEDULE- B

**PARTICULARS OF 32 CONNECTED APPEALS JUDGMENT
WHEREIN IS PRONOUNCED ALONG WITH RFA(OS)(COMM)
12/2020 TITLED “ASIAN HOTELS (NORTH) LIMITED Vs. ALOK
KUMAR LODHA”.**

- | | | |
|-----|---|-------------------|
| +1. | <u>RFA(OS)(COMM) 19/2020 C.M. No. 16993/2020 (for stay)</u>
ASIAN HOTELS (NORTH) LIMITED | Appellant |
| | versus | |
| | SATISH KHOSLA & ANR. | Respondents |
| | AND | |
| +2. | <u>RFA(OS)(COMM) 20/2020 C.M. No. 17000/2020 (for stay)</u>
ASIAN HOTELS (NORTH) LIMITED | Appellant |
| | versus | |
| | SITAL DASS JEWELLERS | Respondent |
| | AND | |
| +3. | <u>RFA(OS)(COMM) 21/2020 C.M. No. 17726/2020 (for stay) &
CM APPL. 17730/2020 (under Section 8 of Arbitration and
Conciliation Act, 1996)</u>
ASIAN HOTELS (NORTH) LTD | Appellant |
| | versus | |
| | CHARU LODHA | Respondent |
| | AND | |
| +4. | <u>RFA(OS)(COMM) 22/2020 C.M. No. 17732/2020 (for stay) &
CM APPL. 17737/2020 (under Section 8 of Arbitration and
Conciliation Act)</u>
ASIAN HOTELS (NORTH) LTD | Appellant |
| | versus | |
| | TEHMINA SEN | Respondent |
| | AND | |

- +5. **RFA(OS)(COMM) 24/2020 C.M. No. 17750/2020 (for stay) & CM APPL. 17753/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
versus
SULTAN AHMED Respondent
AND
- +6. **RFA(OS)(COMM) 29/2020 C.M. No. 17783/2020 (for stay) & CM APPL. 17786/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
SITAL DASS SONS Respondent
AND
- +7. **RFA(OS)(COMM) 31/2020 C.M. No. 17820/2020 (for stay) & CM APPL. 23691/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS NORTH LIMITED Appellant
Versus
SHANTI VIJAY JEWELS Respondent
AND
- +8. **RFA(OS)(COMM) 32/2020 & CM APPL. 19312/2020 (under Section 8 of Arbitration and Conciliation Act, 1996)**
ASIAN HOTELS (NORTH) LTD Appellant
versus
SWEETY SURI Respondent
AND
- +9. **RFA(OS)(COMM) 33/2020 & CM APPL. 19317/2020 (under Section 8 of Arbitration and Conciliation Act, 1996)**
ASIAN HOTELS (NORTH) LTD Appellant
versus
DHARAMVIR KHOSLA Respondent
AND

- +10. **RFA(OS)(COMM) 34/2020 & CM APPL. 19321/2020 (under Section 8 of Arbitration and Conciliation Act, 1996)**
ASIAN HOTELS (NORTH) LTD Appellant
versus
CRAFTO Respondent
AND
- +11. **RFA(OS)(COMM) 38/2020 & CM No.20441/2020 (under Section 8 of Arbitration and Conciliation Act, 1996)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
ABHUSHAN Respondent
AND
- +12. **RFA(OS)(COMM) 39/2020 & CM No.20444/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
BEENA JAIN Respondent
AND
- +13. **RFA(OS)(COMM) 40/2020 & CM No.20448/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
SHREE KHANNA GEMS Respondent
AND
- +14. **RFA(OS)(COMM) 41/2020 & CM No.20513/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
REGENCY JEWELLERS Respondent
AND
- +15. **RFA(OS)(COMM) 42/2020 & CM No.20739/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
V.P. SACHDEV Respondent
AND

- +16. RFA(OS)(COMM) 51/2020 & CM No.22130/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
J.H. JEWELLERS Respondent
AND
- +17. RFA(OS)(COMM) 52/2020 & CM No.22133/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
AJAY KUMAR RASTOGI Respondent
AND
- +18. RFA(OS)(COMM) 54/2020 & CM No.22143/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
MAHARANI OF INDIA Respondent
AND
- +19. RFA(OS)(COMM) 56/2020 & CM No.22149/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
SYED MUJTABA SHAH Respondent
AND
- +20. RFA(OS)(COMM) 57/2020 & CM No.22152/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
RAJESH JAIN Respondent
AND
- +21. RFA(OS)(COMM) 58/2020 & CM No.22155/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
B L KAPOOR & ANR. Respondents
AND

- +22. **RFA(OS)(COMM) 59/2020 & CM No.22158/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
MEENA RASTOGI Respondent
AND
- +23. **RFA(OS)(COMM) 68/2020 & CM No.22596/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
KASHMIR CARPET INDUSTRIES EMPORIUM Respondent
AND
- +24. **RFA(OS)(COMM) 69/2020 & CM No.22599/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
SHAW ART PALACE Respondent
AND
- +25. **RFA(OS)(COMM) 70/2020 & CM No.22602/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
ARUN KUMAR JAIN Respondent
AND
- +26. **RFA(OS)(COMM) 71/2020 & CM No.22605/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
RAM KRISHAN ASSOCIATES PVT LTD Respondent
AND
- +27. **RFA(OS)(COMM) 72/2020 & CM No.22608/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
NATIONAL COTTAGE EMPORIUM Respondent
AND

- +28. RFA(OS)(COMM) 73/2020 & CM No.22611/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
FAROOQ AHMED & ANR. Respondents
AND
- +29. RFA(OS)(COMM) 74/2020 & CM No.22614/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
H. S. NAG & ORS. Respondents
AND
- +30. RFA(OS)(COMM) 75/2020 & CM No.22617/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
KASHMIR CARPET PALACE Respondent
AND
- +31. RFA(OS)(COMM) 76/2020, CM Nos.22808/2020 (for stay) & 22811/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
SUGEET BALA AHUJA & ANR. Respondents
AND
- +32. RFA(OS)(COMM) 77/2020, CM Nos.23373/2020 (for stay) & 23375/2020 (under Section 8 of Arbitration and Conciliation Act)**
ASIAN HOTELS (NORTH) LTD Appellant
Versus
JAIPUR JEWEL PALACE Respondent