



CRP(MD).No.145 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 21.02.2023

PRONOUNCED ON : 16.03.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.R.P(MD).No.145 of 2023
and C.M.P(MD).No.713 of 2023

G.T.L.Infrastructure Limited (GIL)
Represented by its Authorized Signatory
Having office at New No.232, Old No.186
City Centre, 3rd Floor
Purasawalkam
Kilpauk, Chennai 600 010

... Petitioner

VS.

Amaladoss

...Respondent

PRAYER:- Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the order and decretal order dated 25.11.2022 passed in I.A.No.2 of 2022 in O.S.No.252 of 2021 on the file of the Additional Subordinate Court, Thanjavur and allow the civil revision petition.

For Petitioner : Mr.M.S.Sureshkumar

For Respondent : Mr.P.Vadivel



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ORDER

This civil revision petition has been filed by the defendant in a money suit challenging the order of dismissal of an application under Section 8 of the Arbitration and Conciliation Act, 1996.

2.The respondent herein had filed O.S.No.252 of 2021 on the file of the Additional Subordinate Court, Thanjavur for the relief of recovery of a sum of Rs.7,32,520/- towards rental arrears and for a mandatory injunction directing the defendant to dismantle a tower situated in the suit property.

3.According to the plaintiff, he is the owner of the suit schedule property and he had entered into an unregistered lease agreement with the defendant on 16.10.2007 to lease out the suit property for the purpose of erecting a mobile tower for a period of 12 years. The defendant had paid a sum of Rs.30,000/- as advance and agreed to pay a monthly rent of Rs.5,000/-. The plaintiff had further contended that the defendant has not paid the rent since November 2017 and the lease has come to end as per agreement on 15.10.2019. After the lease period had expired, the plaintiff had made several requests to the defendant to vacate premises by



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dismantling the tower and also to pay the arrears of lease amount.

However, the defendant has not complied with the same. Therefore, the plaintiff has issued a legal notice on 27.11.2020, but the defendant has not complied with the said demand and hence, the present suit.

4.Summons were served in the said suit upon the defendant on 17.11.2011 and he was set exparte.

5.The defendant had filed I.A.No.134 of 2021 to set aside the exparte order and the same was dismissed for default on 22.12.2021. Thereafter, the defendant had filed I.A.No.96 of 2022 to restore the application filed under Order 9 Rule 7 application and the same was allowed.

6.For the second time, I.A.No.134 of 2021 was dismissed for default on 08.06.2022. Thereafter I.A.No.371 of 2022 was filed to restore I.A.No.134 of 2021 and the same was allowed by the Court on 01.09.2022. Thereafter, the defendant had filed I.A.No.2 of 2022 contending that as per Clause 6.2 of the lease agreement between the plaintiff and the defendant, the parties have agreed to refer the matter to arbitration and place of Arbitration shall be Coimbatore and the decision shall be final upon the parties.



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7. In view of the said arbitration clause, the defendant had prayed that the suit may be referred to Arbitration in terms of Clause 6.2 of the lease deed dated 16.10.2007.

8. The plaintiff had filed a counter contending that the original Arbitration agreement has not been produced and hence, the present application is not maintainable. That apart, the present application has been filed under Section 8 of the Arbitration Act after filing of the written statement.

9. The trial Court after considering the submissions made on either side, had arrived at a finding that as per Proviso to Order 8 Rule 1 of Amended C.P.C, the defendant has to file a written statement within a period of 30 days and the said time can be extended up to 90 days for the reasons to be recorded by the Court.

10. In the present case, summons has been served upon the defendant on 17.11.2011 and the defendant has not filed his written statement within a period of 90 days. When the defendant has forfeited his right to file a written statement, thereafter an application under Section 8 of the Arbitration Act, cannot be filed. The trial Court relied upon a judgement of the Hon'ble Supreme Court reported *in (2019) 12*



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SCC 210 (SCG Contracts (India) Private Limited Vs. K.S.Chamankar

Infrastructure Private Limited and others) to arrive at a finding that outer time limit prescribed under C.P.C for filing of written statement is mandatory in nature and therefore, the present application under Section 8, which was filed after a period of 90 days is not maintainable. The trial Court further found that along with Section 8 application, the defendant had filed a written statement. Therefore, the Section 8 application having been filed after filing of the written statement, is not maintainable. This order is under challenge in the present Civil Revision Petition.

11.The learned counsel for the petitioner had contended that the Hon'ble Supreme Court has held that 90 days prescribed under the proviso to Order 8 Rule 1 of amended C.P.C is only directory in nature and not mandatory. The trial Court had erroneously relied upon the judgement of the Hon'ble Supreme Court reported in ***in (2019) 12 SCC 210 (SCG Contracts (India) Private Limited Vs. K.S.Chamankar Infrastructure Private Limited and others)*** which arises out of a commercial suit. He had further contended that the words “not later than” used in Section 8 will clearly indicate that an application under their Section cannot be filed after filing of the written statement. Therefore,



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there is no bar in filing Section 8 application along with written statement. Filing of Section 8 application along with written statement would not amount to waiver of arbitral jurisdiction and submitting himself to the jurisdiction of the Civil Court. Therefore, he prayed for allowing the revision petition.

12.Per contra, the learned counsel appearing for the respondent/plaintiff had contended that the defendant was originally set exparte and the application under Order 9 Rule 7 C.P.C was twice dismissed for default and thereafter, it was restored. Section 8 application has been filed after a period of 10 months beyond 120 days prescribed for filing of written statement. He had further contended that the trial Court was right in relying upon ***(2019) 12 SCC 210 (SCG Contracts (India) Private Limited Vs. K.S.Chamankar Infrastructure Private Limited and others)*** to arrive at a finding that filing of written statement within a period of 120 days is mandatory in nature.

13.Once 120 days have crossed, the defendant forfeits his right to file a written statement. Thereafter, the defendant cannot file an application under Section 8 of the Arbitration Act to contend that the civil Court has no jurisdiction and the matter shall be referred to



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Arbitration. He had further contended that the conduct of the defendant should also be taken into consideration in view of the fact that twice Order 9 Rule 7 application was dismissed for default and the same was restored by the generosity shown by the trial Court. The very fact that the defendant filed Order 9 Rule 7 application to set aside the exparte order would amount to waiver of his right to file an application under Section 8 of the Arbitration Act. It would only disclose that the defendant wants to file a written statement to contest the suit before the Civil Court. Therefore, the trial Court was right in dismissing a belatedly filed Section 8 application along with the written statement. Therefore, he prayed for sustaining the order passed by the trial Court

14.I have considered the submissions made on either side and perused the materials available on record and the judgments cited by both the parties.

15.A perusal of the plaint indicates that the suit has been filed as a non-commercial suit and therefore, it does not attract the provisions of Commercial Court, Commercial Division, Commercial Appellate Division of High Court Act 2015 which came into force on 23.10.2005 (hereinafter called as Commercial Courts Act).



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16. An amendment was introduced under Order 5 Rule 1 of C.P.C introducing a second proviso to Order 5 Rule 1 (1) of C.P.C. As per the said second proviso it is applicable only to the commercial disputes of a specific value. If the written statement is not filed within a period of 120 days from the date of service of the summons, the defendant forfeits his right to file the written statement and the Court is not allowed to take the the written statement on record.

17. As far as the non-commercial suits are concerned, the time limit for filing of written statement is governed by proviso to Order 8 Rule 1 C.P.C. As per the said proviso, the written statement should be filed within a period of 30 days from the date of receipt of summons which is extendable up to a period of 90 days from the date of service of summons. This outer limit of 90 days for filing a written statement for non commercial suits has been held to be directory and not mandatory by the Hon'ble Supreme Court. The Hon'ble Supreme Court in a judgement reported *in (2005) 4 SCC 480 (Kailash Vs. Nanhku and others)*, paragraph No.41 has held as follows:

“41. Considering the object and purpose behind enacting Rule 1 of Order 8 in the present form and the context in which the provision is placed, we are of the opinion that the provision has to



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be construed as directory and not mandatory. In exceptional situations, the Court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired.....”

18. Therefore, a perusal of the Judgment of the Hon'ble Supreme Court will clearly disclose that the outer time limit for filing of written statement in non-commercial suit is only directory and the Court is empowered to extend the time for the reasons to be recorded. Therefore, in the present case, the suit being a non-commercial in nature, the question of invoking the second proviso to Order 5 Rule 1(1) of C.P.C does not arise. The judgement of the Hon'ble Supreme Court referred by the trial Court reported in ***(2019) 12 SCC 210 (SCG Contracts (India) Private Limited Vs. K.S.Chamankar Infrastructure Private Limited and others)*** arises out of commercial suit and hence, the trial Court was not correct in referring to the said judgement and arrive at a finding that filing of Section 8 application under the Act beyond a period of 120 days is not maintainable.

19. The Division Bench of our High Court in a judgement reported in ***2009-5-L.W.439 (M/s.Sri Ragavendra Advertising and another Vs.***



Prasar Bharati (Broadcasting Corporation of India) represented by the Station Director, Commercial Broadcasting Service, All India Radio, Chennai) in paragraph No.14 has held as follows:

“14. It is true that the defendant did not file the written statement in time and the matter also appeared before the Court under the caption 'undefended board', at the same time, it should not be forgotten that merely because there is inordinate delay in filing the written statement it cannot in any way take away the rigor of [section 8](#) of Arbitration and [Conciliation Act](#). The law mandates whenever it is brought to the notice of the court before filing the written statement that there is arbitral clause and the subject matter of the suit is actually be decided by the arbitrator, it has got to be referred to arbitration. It can be well stated that the provisions pertaining to the filing of the written statement however, cannot be applied to the initiation of an application under [Section 8](#) of the Arbitration and [Conciliation Act](#) 1996 which, in essence, hits at the root of the jurisdiction of the Court to continue a civil action where the parties have themselves compacted to go to Arbitration. Even if the C.P.C. were to apply the right to file a written statement would stand closed. However, this would in no manner dilute the provisions of [Section 8](#) of the said Act since there is indubitably no first statement on the merits of the case. Even though there is inordinate delay, in the considered opinion of the Court, the rigor of [section 8](#) of the said Act cannot be diluted..... “



WEB COPY 20. The Hon'ble Supreme Court in a judgement reported *in (2011)*

5 SCC 532 (Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and others) while considering an application that in paragraph Nos. 29,30 and 31 have held as follows:

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

30. When plaintiffs file applications for interim relief like appointment of a receiver or grant of a temporary injunction, the defendants have to contest the application. Such contest may even lead to appeals and revisions where there may be even stay of further proceedings in the suit. If supplemental proceedings like applications for temporary injunction on appointment of Receiver, have been

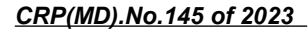


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pending for a considerable time and a defendant has been contesting such supplemental proceedings, it cannot be said that the defendant has lost the right to seek reference to arbitration. At the relevant time, the unamended Rule 1 of Order VIII of the Code was governing the filing of written statements and the said rule did not prescribe any time limit for filing written statement. In such a situation, mere passage of time between the date of entering appearance and date of filing the application under [section 8](#) of the Act, can not lead to an inference that a defendant subjected himself to the jurisdiction of the court for adjudication of the main dispute.

31.The facts in this case show that the plaintiff in the suit had filed an application for temporary injunction and appointment of Receiver and that was pending for some time. Thereafter, talks were in progress for arriving at a settlement out of court. When such talks failed, the appellant filed an application under [section 8](#) of the Act before filing the written statement or filing any other statement which could be considered to be a submission of a statement on the substance of the dispute. The High Court was not therefore justified in rejecting the application on the ground of delay.”

21.The Hon'ble Supreme Court in a judgment reported ***in (2017) 2 SCC 268 (Greaves Cotton Limited Vs. United Machinery and Appliances)*** in paragraph No.12 has held as follows:



22. A careful perusal of the Judgement of the Hon'ble Supreme Court will clearly indicate that mere passage of time between the date of first appearance and the date of filing the application under Section 8 of the Act, cannot be construed that the defendant had subjected himself to the jurisdiction of the Court for adjudication of the main dispute. The Hon'ble Supreme Court has further held that Section 8 does not prescribe any time limit for filing an application, but it has to be filed before



submission of the written statement. In the present case, admittedly there is a delay on the part of the defendant in filing an application under Section 8 to the effect that it was filed on 19.09.2022 while the defendant has received the summons on 17.11.2021. As per proviso to Order 8 Rule 1 of C.P.C, the defendant should have filed his written statement on or before 16.02.2022. However, Section 8 application under Arbitration and Conciliation Act, 1996 has been filed along with written statement on 19.09.2022. However, in view of the judgements of Hon'ble Division Bench and the Supreme Court, this Court is of the view that mere delay in filing of Section 8 application would not amount to waiver of the right of the defendant to refer the matter to Arbitration proceedings and subjecting himself to the jurisdiction of the Civil Court.

23. Section 8 of Arbitration and Conciliation Act, 1996 is extracted as follows:

Section 8: Power to refer parties to arbitration where there is an arbitration agreement.—

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court,



refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

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

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

24.The word employed under Section 8 is that any application under the said section shall be filed not later than the date of submitting his first statement on the substance of the dispute. Therefore, it is clear that an application under Section 8 cannot be filed after filing of the written statement. However, there is no bar to file a Section 8 application along with written statement which cannot be construed to be an application which was was filed later than the date of submission of the written statement.



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25. The Hon'ble Supreme Court in a judgement reported in **(2015) 14 SCC 444 (Sundaram Finance Limited Vs. T.Thankam)** in paragraph No.13 has held as follows:

*“13. Once an application in due compliance of [Section 8](#) of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law - *generalia specialibus non derogant*. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court.”*

26. Therefore, it is clear that once an application under Section 8 of the Arbitration and Conciliation Act is filed, the civil Court should first see that whether there is ouster of jurisdiction in terms special statute



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namely the Arbitration and Conciliation Act 1996. In the present case, the trial Court has proceeded to hold that Section 8 application under Arbitration and Conciliation Act has been filed belatedly relying upon the Judgment of the Hon'ble Supreme Court reported *in (2019) 12 SCC 210 (SCG Contracts (India) Private Limited Vs. K.S.Chamankar Infrastructure Private Limited and others)* which arises out of a commercial suit. Further, the trial Court has erroneously interpreted Section 8 of the Arbitration Act to hold that Section 8 application cannot be filed along with the written statement. The existence of the sale agreement and arbitration clause in the said agreement are admitted by both the parties. Therefore, this Court ought to have referred the matter to the Arbitration without relying upon the delay on the part of the defendant in filing an application under Section 8 of the Arbitration Act. Once the existence of a valid arbitration agreement is brought to the notice of the Court, the Court has no discretion whatsoever except to refer the matter for Arbitration.

27.In the present case, no extraordinary circumstances have been pointed out by the Civil Court to exercise its jurisdiction ignoring the arbitration clause.



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28. In view of the above said deliberations, the order impugned in the revision petition is set aside. This Civil Revision Petition is allowed.

It is declared that the civil Court has no jurisdiction to entertain O.S.No. 252 of 2021 and the parties are at liberty to pursue their remedy under Arbitration and Conciliation Act 1996. No costs. Consequently, connected miscellaneous petition is closed.

16.03.2023

Index : Yes/No
Internet : Yes/No
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To

1. The Additional Subordinate Judge,
Thanjavur
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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Pre-delivery order made in

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and C.M.P(MD).No.713 of 2023

16.03.2023