

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE MADHURESH PRASAD**

**FA 96 of 2023
CAN 1 of 2019
(Old No.CAN 2519 of 2019)
Pramod Kumar Tewari & Anr.
Vs.
Trimurti Complex Pvt. Ltd.**

Appearance:

For the Appellants : **Mr. Prabhat Kumar Srivastava, Adv.
Mr. Pradeep Kumar, Adv.**

For the Respondent : **Mr. S. N. Mitra, Adv.
Mr. Debjit Mukherjee, Adv.
Mr. Ajit Pandey, Adv.
Ms. Susmita Chatterjee, Adv.
Mr. Kaustav Bhattarcharya, Adv.
Ms. Priyanka Jana, Adv.**

Judgment On : **22.04.2024**

Harish Tandon, J.:

An application for stay of the operation of the preliminary decree passed by the Trial Court was listed before us but on the submissions made before us, we feel that the appeal itself can be decided on the question of law involved in the instant appeal.

A plea is taken by the counsel for the appellant that a suit for partition and separation of share is not maintainable in view of the

arbitration clause contained in the memorandum of understanding entered into by and between the parties and therefore, the Trial Court committed error in proceeding with the suit which culminated into an impugned preliminary decree passed therein.

Facts involved in the instant case are more or less undisputed. By dint of a purchase dated 19.5.2009 the appellants and the respondents purchased the schedule property measuring 10 Cottahs 4 Chitaks of bastu land with the structure standing thereupon being the Holding no. 20, Rose Merry Lane, PS- Golabari, Dist- Howrah. The defendant/appellants contributed 25 per cent of the consideration price; on the other hand, the plaintiff/respondent contributed 75 per cent of the consideration price reserved in the said deed of sale. Subsequently, a memorandum of understanding was entered into on 7th May, 2010 between the parties hereto wherein the parties recorded their respective shares in respect of the schedule property to the extent of $\frac{3}{4}$ th undivided shares in favour of the plaintiff/respondent and $\frac{1}{4}$ th undivided shares in respect of the defendant/appellants. The said memorandum of understanding as it appears from the various clauses contained therein, relates to a construction of a multi-storied building at the schedule property and the respective contribution in commensurate with their undivided shares which they held in respect thereof. The modalities relating to working out of the said understanding is also provided by opening a separate bank account in the joint name of the parties and the distribution of their respective allotments in the said multi-storied building. The said memorandum of understanding contained an arbitration clause to the effect that if any

dispute or difference arise or touching the agreement or its terms and conditions relating to the schedule property the same shall be referred to joint arbitrators, each to be appointed by the parties, and the decision of the arbitrators shall be binding on the parties. On the even date association of persons of understanding was also executed indicating that the construction of the multi-storied building shall be under the name and style as **Shukla and Tewari Associates** and the operation of the bank accounts so to be opened shall be operated jointly by them. It also contained the share of expenditures and the allied work to be undertaken while making a construction of a multi-storied building. Apropos of the aforesaid documents executed by the parties a deed of declaration was also entered into identifying the shares of the parties and the segregation thereof in respect of a multi-storied building after the same is constructed. Subsequently, the plaintiff/respondent filed a suit for partition and separation of the shares alleging that after the aforesaid understanding having entered into the defendants/appellants with the *mala fide* intention tried to change the nature and character of the suit property and declared themselves to be in possession of the entire property to the exclusion of the plaintiffs.

The defendant/appellants appeared in the said suit and filed the written statement denying the allegations and/or averments made in the plaint. It is averred in the said written statement that the defendant/appellants are co-sharers to the extent of undivided 25 per cent share in the property and in fact, are residing in a substantial portion of the existing old building to the knowledge of the plaintiffs/respondent. It is

further stated therein that the mother of the plaintiff is in fact, a tenant in respect a 1st floor and an attempt is made to oust her from the said premises. It is further averred that a substantial portion of the old structure has been demolished and the defendants/appellants are compelled to live in a dilapidated structure which could not be demolished by the plaintiff/respondent. Apart from the same, a plea is taken that the said memorandum of understanding dated 7th May, 2010 followed by a deed of association of persons of undertaking and deed of declaration contained an arbitration clause and therefore, the Court does not have the jurisdiction to try the suit for partition.

Such being the undisputed facts, the point urged before us is required to be considered and determined on the basis of the pleadings as well as the admitted documents relied upon by the respective parties. The Trial Court framed as many as 8 issues and held that from the documents so relied upon by the defendant/appellants it does not appear that the parties intended either expressly or impliedly to submit any dispute before the arbitration and rejected the contention of the defendant/appellants that the suit is not maintainable. Since the undivided shares in respect of the schedule property are not in dispute, the Trial Court decreed the suit in preliminary form declaring the share of the plaintiff to the extent of $\frac{3}{4}$ th and that of the defendants/appellant to the extent of $\frac{1}{4}$ th in respect thereof.

The defendant/appellants has not disputed the shares declared by the Trial Court in the preliminary decree but have raised an issue that the moment there is an existence of an arbitration clause, the Civil Court is

incompetent to proceed with the suit in view of the provisions contained under Section 8 of the Arbitration and Conciliation Act, 1996.

The counsel for the defendant/appellants submits that once the parties have brought before the Court that there is an existence of an arbitration clause/agreement, the Civil Court is denuded of its jurisdiction to proceed with the suit. It is further submitted that there is no fetter on the part of the parties to raise an issue relating to existence of an arbitration agreement between the parties while filing the written statement and relied upon an unreported judgment of the Delhi High Court in ***Sharad P. Jagtiani vs. M/s. Edelweiss Securities Ltd. FAO (OS) 188 of 2014 (decided on August 7, 2014).***

It is further submitted that Section 5 of the Act excludes the jurisdiction of the Civil Court if the subject matter of an arbitration agreement is the subject matter of dispute in the suit and therefore, the impugned preliminary decree passed by the Trial Court cannot be sustained.

Per contra, Mr. S. N. Mitra, Senior Counsel appearing for the plaintiff/respondent refuted the contention of the appellant and submits that after receiving the summons, the defendant/appellants did not take any steps under Section 8 of the said Act and thus, waived the right to raise such issue. It is further submitted that Section 8 of the Act does not create an absolute bar in entertaining the dispute involved in the suit unless the procedures provided therein is strictly followed. To further the aforesaid submissions it is contended that the plea of existence of an arbitral agreement in relation to the subject matter of the suit should be raised

before the submission of the first statement which means the written statement and therefore, even if one of the paragraphs of the written statement contained such averments, it is not in conformity with the spirit of the said Section. It is arduously submitted that no attempt was made by the defendant/appellants even after filing of the written statement that the matter should not be proceeded further but to be referred to an arbitrator and therefore, it is too late in a day to take such plea before the 1st Appellate Court. It is vehemently submitted that the defendant/appellants participated in the proceedings of the Trial Court by adducing evidence which clearly indicates that they have waived their right to raise such issue. Such being the seminal point involved in the instant appeal and the respective counsel relied upon several judgments which we feel to deal with while determining the said point as recording the same in the submissions would be a mere repetitions. The Section 8 of the said Act is quoted as under:

“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 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 so 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 arbitral award made.”

The language used in the aforesaid Section mandates that in any action brought before the Civil Court in relation to a subject matter in dispute which is agreed by the parties to be resolved through arbitration, to refer the parties to arbitration. The provision is mandatory subject to the determination to be made that the subject matter of dispute in the suit touches upon the arbitration agreement. Sub-Section (2) of Section 8 of the said Act makes imperative on the part of the party applying under Sub-Section (1) to make an application accompanying the original arbitration agreement or duly certified copy thereof and the proviso inserted thereto postulates that in the event, the same is not available with the said party but with the other party the prayer should also be made before the Court calling upon such party to produce the original arbitration agreement or its duly certified copy. The question often arose for interpretation to the

expression “not later than the date of submitting his first statement on substance of dispute”. The reliance to an unreported judgment of the Delhi High Court in ***Sharad P. Jagtiani (supra)*** as relied upon by the defendants/appellants wherein it is held that the first statement on the substance of dispute is intricately related to a written statement and if a plea of defence is taken in the written statement that the subject matter of dispute is within the folds of the arbitration agreement, it satisfies the condition enshrined under Section 8 of the said Act in the following:

“14. We simply need to highlight the phrase ‘not later than when submitting his first statement on the substance of the dispute’ in sub-section (1) of Section 8. 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 and that the subject matter of the action brought before the Court by way of the suit falls within the ambit of the arbitration clause.

15. Section 8 does not specify the manner in which the party has to submit its first statement on the substance of the dispute, and normally with respect to a suit, the first statement on the substance of the dispute by the defendant would be in the written statement. 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 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.

16. On the facts of the instant case, it may be true that in the written statement filed a specific prayer has not been made to refer the parties to arbitration, but we have highlighted hereinabove that in the written statement filed a preliminary objection has been taken that the suit is barred

in view of the arbitration agreement. The written statement filed is with strings attached by challenging the maintainability of the suit in view of the arbitration clause and therefore in such circumstance the said objection taken by Edelweiss contained in the written statement could be treated as an application under Section 8 of the Arbitration and Conciliation Act, 1996.”

The decision of the Delhi High Court and the ratio deduced from the said report leads to an unambiguous conclusion that the expression “submitting his first statement is a written statement” under the several provisions contained in the Code of Civil Procedure. The decision in **Sharad P. Jagtiani (supra)** though delivered by the Division Bench cannot be held to be an exposition of law in such explicit terms in view of the judgment of the Apex Court rendered in **Rashtriya Ispat Nigam Ltd. & Anr. vs. Verma Transport Co., reported in (2006) 7 SCC 275**. The point arose before the Supreme Court in the said report as to whether participation at the injunction stage would tantamount to filing of the first statement of the substance of dispute. In pursuit of defining the aforesaid expression the Apex Court held that the intention of the legislators under Section 8(1) of the Act is in contradistinction with the expression “written statement”. The Apex Court clarified and distinguished the steps taken in a supplementary or incidental proceedings with the steps taken in the main proceeding. It is held that the supplementary and/or incidental proceedings are not synonymous to the main proceedings having expressly dealt with in a different provision of the Code of Civil Procedure in the following:

“36. The expression “first statement on the substance of the dispute” contained in Section 8(1) of the 1996 Act must be contradistinguished with the expression “written statement”. It employs submission of the party to the

jurisdiction of the judicial authority. What is, therefore, needed is a finding on the part of the judicial authority that the party has waived its right to invoke the arbitration clause. If an application is filed before actually filing the first statement on the substance of the dispute, in our opinion, the party cannot be said to have waived its right of acquiesced itself to the jurisdiction of the court. What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application under Section 8 of the 1996 Act, may not be held wholly unmaintainable. We would deal with this question in some detail, a little later.

38. In Janki Saran Kailash Chandra an application for time to file written statement was considered to be a step in the proceedings. We have noticed hereinabove the respective scope of Section 34 of the 1940 Act vis-à-vis the scope of Section 8 of the 1996 Act. In view of the changes brought about by the 1996 Act, we are of the opinion that what is necessary is disclosure of the entire substance in the main proceeding itself and not taking part in the supplemental proceeding.

39. By opposing the prayer for interim injunction, the restriction contained in sub-section (1) of Section 8 was not attracted. Disclosure of a defence for the purpose of opposing a prayer for injunction would not necessarily mean that substance of the dispute has already been disclosed in the main proceeding. Supplemental and incidental proceedings are not part of the main proceeding. They are dealt with separately in the Code of Civil Procedure itself. Section 94 of the Code of Civil Procedure deals with supplemental proceedings. Incidental proceedings are those which arise out of the main proceeding. In view of the decision of this Court in Food Corpn. Of India the distinction between the main proceeding and supplemental proceeding must be borne in mind.”

The Apex Court in ***Rashtriya Ispat Nigam Ltd. (supra)*** was also considering a question relating to the waiver of a right under Section 8 of the Act and held that it has to be gathered from the conduct and the steps taken by the parties and varies from a case to case in the following :

“42. Waiver of a right on the part of a defendant to the lis must be gathered from the fact situation obtaining in each case. In the instant case, the court had already passed an ad interim ex parte injunction. The appellants were bound to respond to the notice issued by the Court. While doing so, they raised a specific plea of bar of the suit in view of the existence of an arbitration agreement. Having regard to the provision of the Act, they had, thus, shown their unequivocal intention of the question the maintainability of the suit on the aforementioned ground.”

The Delhi High Court in ***Sharad P. Jagtiani (supra)*** did not notice the judgment of the Supreme Court rendered in ***Rashtriya Ispat Nigam Ltd. (supra)*** wherein it is held that the first statement of the dispute is not synonymous to the filing of the written statement. We, therefore, are unable to persuade outself with the ratio of law laid down in ***Sharad P. Jagtiani (supra)***. The decision in ***Rashtriya Ispat Nigam Ltd. (supra)*** is reiterated in a subsequent decision of the Supreme Court rendered in ***Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. Ors., reported in (2011) 5 SCC 532*** in the following:

“26. In Rashtriya Ispat Nigam Ltd. v. Verma Transport Co.2, this Court held that the expression "first statement on the substance of the dispute" contained in Section 8(1) of the Act is different from the expression "written statement", and refers to a submission of the party making the application under Section 8 of the Act, to the jurisdiction of the judicial authority; and

what should be decided by the court is whether the party seeking reference to arbitration has waived his right to invoke the arbitration clause.

27. This Court in Rashtriya Ispat Nigam Ltd. case then proceeded to consider whether contesting an application for temporary injunction by filing a counter, would amount to subjecting oneself to the jurisdiction of the court.

This Court observed: (SCC p. 290, paras 39 & 42)

‘39. By opposing the prayer for interim injunction, the restriction contained in sub-section (1) of Section 8 was not attracted. Disclosure of a defence for the purpose of opposing a prayer for injunction would not necessarily mean that substance of the dispute has already been disclosed in the main proceeding. Supplemental and incidental proceedings are not part of the main proceeding. They are dealt with separately in the Code of Civil Procedure itself. Section 94 of the Code of Civil Procedure deals with supplemental proceedings. Incidental proceedings are those which arise out of the main proceeding. In view of the decision of this Court in Food Corporation of India v. Yadav Engineer & Contractor³ the distinction between the main proceeding and supplemental proceeding must be borne in mind.

* * * * *

42. Waiver of a right on the part of a defendant to the lis must be gathered from the fact situation obtaining in each case. In the instant case, the court had already passed an ad interim ex parte injunction. The appellants were bound to respond to the notice issued by the court.’

28. In this case, the counter-affidavit dated 15-12-1999 filed by the appellant in reply to the notice of motion (seeking appointment of a Receiver and grant of a temporary injunction) clearly stated that the reply-affidavit was being filed for the limited purpose of opposing the interim relief. Even in the

absence of such a disclaimer, filing a detailed objection to an application for interim relief cannot be considered to be submission of a statement on the substance of the dispute resulting in submitting oneself to the jurisdiction of the court.”

In ***Booz Allen and Hamilton Inc. (supra)*** apart from restating the principles of law laid down in ***Rashtriya Ispat Nigam Ltd. (supra)***, the Apex Court held that what is *sine qua non* is whether the party has intended to submit himself to the jurisdiction of the Court and waived his right under sub Section (1) of Section 8 of the Act. While answering the same, the Apex Court held that not only filing of the written statement but any other statement, affidavits or an application filed by the party before filing a written statement shall be construed as submission of a statement on the substance of dispute in the following:

“25. Not only filing of the written statement in a suit, but filing of any statement, application, affidavit by a defendant prior to the filing of the written statement will be construed as “submission of a statement on the substance of the dispute”, if by filing such statement/application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waives his right to seek reference to arbitration. But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/appointment of receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him.”

In ***Hema Khattar & Anr. Vs. Shiv Khera, reported in (2017) 7 SCC 716*** the Apex Court was dealing with the identical question where a suit was filed for declaration, permanent injunction and recovery before the original side of the High Court in relation to an agreement entered into

between the parties to be vitiated and terminated by mutual consent together with the prayer for recovery of a sum of money though the point for consideration was couched in a different manner yet in pursuit of determining the same, the Apex Court held that the provisions contained under Section 8 of the Act is mandatory and it is imperative on the part of the Civil Court to refer the dispute to the arbitrators provided the subject matter of dispute in the suit is within the ambit of the subject matter of dispute touching upon the agreement for which the parties have agreed to resolve through private *fora* in the following:

”35. In P. Anandgajapathi Raju v. P.V.G Raju it was held as under: (SCC p. 542, para 5)

“5. The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the Court can exercise its powers are:

- (1) there is an arbitration agreement;***
- (2) a party to the agreement brings an action in the court against the other party;***
- (3) subject-matter of the action is the same as the subject-matter of the arbitration agreement;***
- (4) the other party moves the court for referring the parties to arbitration before it submits its first statement on the substance of the dispute.***

In view of the above, where an agreement is terminated by one party on account of the breach committed by the other, particularly, in a case where the clause is framed in wide and general terms, merely because agreement has come to an end by its termination by mutual consent, the arbitration clause does not get perished nor is rendered inoperative. This Court, in P. AnandGajapathi Raju, has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the

agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that in an agreement between the parties before the civil court, if there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator.

36. In view of the above, we are of the considered opinion that in the present case, the prerequisites for an application under Section 8 are fulfilled viz. there is an arbitration agreement; the party to the agreement brings an action in the court against the other party; the subject-matter of the action is the same as the subject-matter of the arbitration agreement; and the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. We have come to the conclusion that the civil court had no jurisdiction to entertain a suit after an application under Section 8 of the Act is made for arbitration. In such a situation, refusal to refer the dispute to arbitration would amount to failure of justice as also causing irreparable injury to the defendant.”

A distinguishing feature can be seen in the aforesaid judgment to the effect that in such a suit, an application was filed by the defendant therein under Section 8 of the said Act inviting the attention of the Court that the parties have agreed to resolve the dispute through an arbitrator. In the backdrop of the same, it was held that such steps taken by the defendant therein prior to the submission of the first statement satisfies and fulfils the conditions enshrined under Section 8. The point involved in the instant matter is whether in absence of any application, be it *inter locutory* or otherwise the plea of existence of an arbitration agreement having taken in

the written statement would satisfy the conditions envisaged under Section 8 of the Act.

Reliance upon a judgment of the Apex Court in case of ***Zenith Drugs and Allied Agencies Private Ltd. vs. Nicholas Piramal India Ltd., reported in (2020) 17 SCC 419*** appears to have been misplaced in the context of the points involved in the instant appeal though it has been held by the Apex Court that Section 8 of the Act mandates the fulfillment of the conditions culled out from the aforesaid provision but does not lay down in a specified term, the meaning assigned to an expression “before the submission of the first statement.” The reliance was placed by the plaintiff/respondent for the limited purpose that the word ‘applies’ connotes filing of an application before the submission of the first statement and, therefore, taking a plea in the written statement that there is an existence of an arbitration agreement is not sufficient. We do not find from the meaningful reading of the judgment rendered in the said report that the Apex Court has either attempted or in fact interpreted the word ‘applies’. The Apex Court was considering a matter where an agreement to appoint the appellant therein as clearing and forwarding agent for a specified period; and subsequently a dispute arose when the respondent company therein terminated such agency agreement. A suit was filed before the Court for declaration that the said contract is still valid, subsisting, legal and continuing and the termination is bad and illegal. A compromise was entered into between the parties embodying the terms and conditions reserved therein and subsequently the dispute arose as to whether there is any violation of such terms and conditions and execution proceeding was

taken out and the matter emanating therefrom came before the Apex Court. The Apex Court held that the earlier agreement was superseded by a compromise effected between the parties which does not contain an arbitration clause and, therefore, the plea that the parties should be referred to arbitration is not acceptable. We do not find that the ratio of the said judgment has any applicability in the instant case and the expression 'applies' before the filing the first statement was not point at issue.

In a recent judgment rendered by the Apex Court in ***Asian Avenues Pvt. Ltd. Vs. Syed Shoukat Hussain, reported in (2023) SCC Online SC 514*** the question arose before the Supreme Court was whether a suit for decree directing the appellant therein to execute a deed of cancellation in respect of a development agreement and delivery of possession cannot be entertained by the Civil Court as the dispute originates from a development agreement which contains an arbitration clause. A plea was sought to be taken that such a suit for declaration filed under Section 31 of the Specific Relief Act, 1963 is a suit of such nature where decision would operate in *rem* and, therefore, the arbitration clause cannot be invoked. Repealing aforesaid contention, the Apex Court held that the dispute in effect arise from a development agreement and the suit for specific performance seeking the execution of deed of cancellation cannot be termed to be a suit under Section 31 so as to make the decision therein in *rem* and referred to the parties to arbitration in the following:

“8. The only ground on which the High Court has interfered is that the adjudication pursuant to invocation of Section 31 of the Specific Relief Act is an adjudication in rem. However, in the case of Deccan Paper Mills Company

Limited, this Court has categorically held that it is impossible to hold that an action instituted under Section 31 of the Specific Relief for cancellation of an instrument is an action in rem. In view of the applicability of the arbitration clause to the dispute subject matter of the suit filed by the respondent, the learned Trial Judge was justified in passing an order under Section 8 of the Arbitration Act by directing that the dispute be referred to the arbitration.”

In a subsequent decision rendered in ***Gujarat Composite Ltd. vs. A Infrastructure Ltd. & Ors., reported in (2023) 7 SCC 193***, the Apex Court held that before the Court proceeds to refer the parties to arbitration invoking Section 8 of the said Act, it is a foremost duty of the Court to find out whether there is any correlation of the subject matter of the suit with the subject matter of the arbitration agreement in the following:

“44. There being no doubt about non-existence of arbitration agreement in relation to the entire subject-matter of the suit, and when the substantive reliefs claimed in the suits fall outside the arbitration clause in the original licence agreement, the view taken by the High Court does not appear to be suffering from any infirmity or against any principle laid down by this Court.”

The law as enunciated above is an exposition of the nuances of Section 8 of the Act and its applicability within the specified arena, Section 8 is mandatory in nature and Court shall refer the parties to the arbitration provided the subject matter and the suit is within the folds of the subject matter of the arbitration agreement. It is not an inviolable provision that in every contingencies or in a given situation the Court shall refer the parties to arbitration but depends upon the various factors viz., nature of the

subject matter, the parties to the agreement, the disputes covered under the arbitration agreement, existence of an arbitration agreement and intention of the parties etc. The parties can waive the arbitration clause and submit to the jurisdiction of the Civil Court. The party has to apply under Section 8 not later than the date of submitting his first statement on the substance of dispute which does not necessarily mean the written statement. Any steps in the form of a statement, affidavit or otherwise constituting the waiver of a right to apply under Section 8 of the said Act shall come within the purview of the expression “submission of a statement on the substance of dispute”. As observed in ***Booz Allen and Hamilton Inc (supra)*** the waiver has to be gathered not only from the written statement filed in the suit but from the other applications, statement or affidavits shall be construed as the submission of the statement on substance of dispute and, therefore, the expression “not later than the date of first statement on the substance of dispute” has to be construed in such perspective.

In view of the law as enunciated above, it leads to an inescapable conclusion that the submission of the first statement may not necessarily be a submission of the written statement of the written statement as both have a distinct feature and, therefore, it cannot be said that the plea of existence of an arbitration agreement cannot be taken in the written statement. The Court in this regard has to find out the intention whether the defendant has waived his right in this regard. Our attention is drawn to the written statement filed by the defendant/appellants wherein they have taken a specific plea that in view of the existence of an arbitration agreement between the parties embodied in Memorandum of Understanding, the suit

before the Civil Court is not maintainable. Subsequent thereto the defendant/appellants did not pray for a decision of the Court under Section 8 of the said Act but proceeded to participate in the main proceedings and adduced evidence in this regard. It is brought to our notice that subsequently the defendant/appellants filed an application under Order 8 Rule 8 of the CPC seeking a counter claim. In the said counter claim the defendant/appellants has prayed for a preliminary decree in terms of the aforesaid agreements and the final decree after completion of the multi-storied building in 75:25 ratio. Though the Court had no occasion to consider the counter claim nor we find from the record that such counter claim was accepted but the intention can be gathered from the aforesaid conduct that the defendant/appellants in fact invoked the jurisdiction of the Civil Court and waived the right to raise an objection. The moment the defendant/appellants have submitted to jurisdiction by making a counter claim, even if the same is not decided, there is no fetter on the part of the Court to gather the intention that the defendant/appellants has waived his right to raise objection relating to the existence of an arbitration agreement. The conduct of the parties in course of the proceeding may also be taken into consideration for the purpose of waiver of right as a party can waive the objection or abandoned the same at any point of time. The mandatory character of the provision contained in Section 8 is circumscribed with the intention of the parties and being the parties waived such right and submitted to the jurisdiction of the Court, we do not find any embargo having created in the aforesaid provisions in this regard.

Apart from the same, we find that the first issue relating to the maintainability of the suit in law was 'not pressed' by the parties to the proceedings and the Trial Court therefore, held that the suit is maintainable. We further find that that the specific issue relating to a bar having created under said Act was also framed by the Trial Court which, in our opinion, is intertwined with the first issue. If the Court found that the suit is maintainable in the present law having abandoned it has some impact on the 8th issue relating to a bar created under the Arbitration and Conciliation Act, 1996. Be that as it may since we find from the conduct of the defendant/appellants that they waive their right, we do not find any merit in the instant appeal.

The appeal is thus dismissed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with the requisites formalities.

(Harish Tandon, J.)

I agree.

(Madhuresh Prasad, J.)