

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4193 OF 2024

RBL BANK LTD
a company registered under the
provisions of the Companies Act,
1956, having its registered office at
Shahupuri, Kolhapur 416 001 and
Administrative Office at Mahavir 179/E
Shri Shahu Market Yard, Kolhapur
- 416 005 and Controlling Office at
One Indiabulls Centre, Tower 2B, 6th
Floor, 841, Senapati Bapat Marg,
Lower Parel, Mumbai – 400013.

SNEHA
NITIN
CHAVAN

Digitally signed
by SNEHA
NITIN CHAVAN
Date:
2024.09.27
10:31:54 +0530

...Petitioner

Versus

1. SOHANLAL V. JAIN (HUF)
Flat No. 401, Sheela Niwas, RC Marg,
Vile Parle (East), Mumbai-400 057

2. MEHRAJ S. JAIN
Flat No. 401, Sheela Niwas, RC Marg,
Vile Parle (East), Mumbai-400 057

3. AJIT JAIN
Flat No. 401, Sheela Niwas, RC Marg,
Vile Parle (East), Mumbai - 400057

...Respondents

Mr. Aseem Naphade a/s Nishit Dhruva a/w Khushbu Chhajjed, Pulkit Awasthi i/b MDP & Partners for the Petitioner.

Mr. Pankaj Jain a/w Ms. Tejashree Kamble, Tanmay Sangani and Indesh Rathod i/b P.D. Jain and Co. for Respondents.

CORAM : M.M. SATHAYE, J.

DATE : 26 SEPTEMBER 2024

:JUDGMENT:

1. Heard learned counsel for the Petitioner. Learned counsel for the

Respondents waives service. Taken up for final disposal with consent.

2. This petition under Article 227 of the Constitution of India, takes exception to order dated 29th January 2024 by which Notice of Motion No. 102415 of 2023 filed by the Respondents, seeking reference of the dispute to Arbitrator, under section 8 of The Arbitration and Conciliation Act, 1996 ('the said Act' for short) is allowed, in commercial suit filed by Petitioner.

CASE

3. The Petitioner is plaintiff in Commercial Suit No. 100234 of 2022 filed against the Respondents seeking recovery of the 'deposit amount' paid under Leave and License Agreement dated 31.08.2018 ('the said L&L Agreement' for short) between the Petitioner as licensee and Respondents as licensor. Respondent No.1 HUF is the landlord of the subject matter commercial premises at Borivali (W), Mumbai situated on the ground floor along with basement.

4. The suit summons was issued to the Respondents which was duly served, however, Respondents remained absent and pursuant to order dated 07.07.2022, suit proceeded *ex-parte*. The Trial Court on 31.10.2022, decreed the suit *ex-parte*, directing the Respondents to jointly and severally pay Rs.65,02,100/- along with interest @ 36% per annum till realization. The Respondents filed Notice of Motion No. 4692 of 2022 ('the first motion' for short) praying for setting aside *ex-parte* decree and condonation of delay in filing written statement. It is important to note here that in the affidavit in support of this motion itself, the Respondents placed on record therein case of existence of arbitration clause between parties and need to refer the matter as per mandate under Section 8 of the said Act.

5. The Trial Court by order dated 21.06.2023 allowed the first motion thereby setting aside *ex-parte* decree on the condition that Respondents deposit Rs.36 Lakh in the Court within 2 months and the Respondents were directed to pay costs to the Plaintiff within same time limit. It was directed that after compliance of the said condition, the said suit will be restored and parties were directed to appear on 21.07.2023. The Respondents challenged this order dated 21.06.2023 passed in the first motion by filing Commercial from Order Appeal No. 17 of 2023, which was dismissed by this Court under order dated 01.08.2023.

6. In the meantime, on 05.07.2023 the Respondents filed Notice of Motion No. 102415 of 2023 ('the second motion' for short) in the Trial Court for referring the parties to arbitration under clause 15 of the said Agreement u/s. 8 of the Arbitration and Conciliation Act, 1996 ('the said Act' for short). The Respondents complied with the conditional order passed in the first motion by depositing Rs. 36 Lakh as directed and by order dated 09.11.2023, the suit was restored at the stage of evidence. Thereafter, the Trial Court after hearing both sides, by the impugned order dated 29.01.2024, allowed the second motion, thereby referring the matter to the Arbitration under Section 8 of the said Act. The parties were directed to comply with the concerned clause of the said Agreement. In these circumstances, the Petitioner/original plaintiff has filed the present petition. The said L&L Agreement is not disputed.

SUBMISSIONS

7. Learned counsel Mr. Naphade appearing for the Petitioner submitted that the Respondents have admitted that writ of summons was duly served and they had engaged one Advocate. However, the said

Advocate was negligent and therefore, the Respondents were not represented in the suit. He submitted that though the Respondents had sought permission to file written statement in the first motion, the said relief was not granted. He submitted that as per law laid down in *Mira Gehani v/s. Axis Bank Limited*¹, written statement cannot be filed after 120 days of service of writ of summons. He submitted that the order in first motion is confirmed by this Court while dismissing the Commercial Appeal. He submitted that Respondents could not have filed second motion since they have forfeited their right to file written statement resulting in forfeiture of right to raise defence in the suit. He submitted that since the restored suit is at the stage of evidence of plaintiff, the Respondents can, at the highest, have a right to participate in the Trial by cross-examining the Petitioner's witness and argue the suit finally. He submitted that in any case, Respondents can not have any right to file written submission or raise defence and the second motion under Section 8 of the said Act was not maintainable. On these submissions, it is urged that the impugned Order needs interference.

8. Apart from *Meera Gehani's case (supra)*, Mr. Naphade has also relied upon the Judgment of *SPML Infra Ltd v/s. Trisquare Switchgears Pvt. Ltd.*², *SSIPL Lifestyle Private Limited v/s Vama Apparels (India) Pvt. Ltd. And Anr.*³ and *Assam Petroleum Limited and Ors. v/s. China Petroleum Technology Development Corporation and Ors*⁴ in support of his submissions.

9. Per contra, learned counsel Mr. Jain appearing for Respondents

1 . 2019 SCC OnLine Bom 358

2 . 2022 SCC OnLine Del 1914

3 . 2020 SCC OnLine Del 1667

4 . MANU/DE/1977/2024

submitted that the Petitioner Bank having knowledge of law and being aware of the existence of Arbitration clause between the parties has chosen to go to Civil Court and it has bearing on the case which is considered in the impugned order. He submitted that the effect of Order under Order IX Rule 13 of the Code of Civil Procedure, 1908 ('CPC' for short) setting aside *ex-parte* decree, holding that Respondents have proved sufficient cause, will have to be considered on the aspect of term '*not later than the date of submitting his first statement on the substance of the dispute*' as used in section 8 of the said Act. He submitted that since the suit was over, there was no occasion to raise defence after *ex-parte* decree and the necessary first step was to seek restoration/setting aside *ex-parte* decree. He submits that once the first motion was allowed directing deposit of Rs.36 Lakh and costs, which was duly complied by the Respondents, the suit ought to be held as restored to a status *ante* at a stage when summons are served.

10. He further submitted that there was and is valid agreement to refer the matter to Arbitration and at the very first chance /occasion that the Respondents got, they filed the first motion. He submitted that necessary pleadings about Section 8 of the said Act has been made in the first motion itself, even though the motion was under Order IX Rule 13 of the CPC. He submitted that therefore, there is sufficient compliance with Section 8 of the said Act. He submitted that it was the Court's duty to give effect to the real intention behind Section 8 of the said Act and refer the matter of Arbitration, as soon as it was brought to the notice of the Court. Inviting this Court's attention to the affidavit in support of first motion, he submitted that in paragraph 17 it was specially pleaded that the dispute between parties has to be resolved under the provisions of the said Act. He further pointed out that under

paragraph 9 of the order dated 21.06.2023 on the first motion, just before the concluding, the Trial Court has clearly held that at the stage of considering application Order IX, Rule 13 (for setting aside ex-parte decree), it will not be proper to consider the objection raised by Respondents for referring matter to Arbitrator. He therefore, submitted that the Court has chosen to postpone and not to consider the objections raised by the Respondents for referring the matter to Arbitrator and in view of this clear position, the Respondents' second motion is rightly considered and allowed and no fault can be found with that. He further submitted that the Respondents have also filed petition under Section 11 of the said Act, in this Court, which is pending. This position is disputed by the learned counsel for the Petitioner stating that he is not aware of the same.

11. Mr. Jain further submitted that law of filing written statement within 120 days in a commercial suit will be applied to Respondents who have appeared, but neglected to file written statement in time; however, if motion under Order IX Rule 13 is allowed then, the time of 120 days must begin from the date of restoration of the suit. He submitted that second motion to refer the dispute under Section 8 of the said Act is filed immediately on 05.07.2023. He submitted that the judgments relied upon by the Petitioners are distinguishable on facts. Lastly, he submitted that it cannot be countenanced in law that a party defendant, such as Respondents, prove sufficient cause, their application under Order IX Rule 13 is allowed, they are given opportunity to contest the suit, they comply with conditional order of deposit of Rs.36 Lakh and still they do not get an opportunity to even seek reference to Arbitrator when arbitration clause is admitted under the said L&L agreement.

:REASONS AND CONCLUSION:

12. I have carefully considered the legal submissions and perused record. I have also given my anxious thought to the judgments relied upon.

13. At the outset, it must be noted that in the present case the intervening event of Respondents filing application under Order IX Rule 13 of the CPC, order passed thereon holding that sufficient cause is proved, setting aside *ex-parte* decree on condition of deposit of money and its due compliance by the Respondents, has significant bearing on the issue at hand.

14. Learned counsel for the Petitioner has mainly relied upon the proviso to Order VIII Rule 1 of the CPC, as applicable to the commercial disputes. There is bar to file written statement beyond the period of 120 days from the date of service of summons and forfeiture of right to file written statement beyond time. It is noted that this proviso is introduced under section 16 of The Commercial Courts Act, 2015 (4 of 2016) ('the Act of 2015' for short) read with its Schedule, under which certain provisions of CPC were amended for its application to commercial disputes. It will be appropriate to reproduce provisions of Order VIII Rule 1 as amended and applicable to the parties on the date of suit -

1. **Written statement.** -The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

"Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the Court,

for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record".- [Vide Act 4 of 2016, S. 16 and Sch. (w.r.e.f. 23-10-2015)].

[Emphasis supplied]

It is interesting to note that from this very day 23-10-2015, another amendment is brought into force to section 8 (1) of the said Act, which reads thus :

8. Power to refer parties to arbitration where there is an arbitration agreement- ¹[(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.]

1. Substituted by Act 3 of 2016, S.4, for sub-S (1) (w.r.e.f. 23-10-2015)

[Emphasis supplied]

15. The principal question decided by the Division Bench of the Delhi High Court in relation to commercial dispute, in the case of *SPML Infra Ltd (supra)* is 'whether a party forfeits its right to file an application under Section 8 of the said Act on expiry of time to file written statement of its defence?'. Relying on the judgment of *SPML Infra*, same

view is continued by the learned Single Judge of the Dehli High Court in the case of *Assam Petroleum (supra)*. In *SSIPL Lifestyle Pvt. Ltd.*, the question under consideration was whether there is limited period prescribed for filing application under Section 8 of the said Act and secondly whether the limitation for filing written statement under the CPC as applicable to commercial dispute would be applicable to application under Section 8 of the said Act. In the said Judgment, the learned single Judge of the Delhi High Court has taken a view that Section 8 application was time barred as being filed beyond the time prescribed for filing the written statement.

16. In none of these judgments, there was *ex-parte* decree and subsequent restoration under Order IX Rule 13 by finding sufficient cause in a commercial dispute. In these judgments, the Defendants though duly served and appearing, did not file their written statement in time and application under Section 8 was held as time barred and the right to file such application is held to be forfeited.

17. Even in the judgment of *Mira Gehani (supra)*, this Court has only considered whether in view of amendment to CPC by the Act of 2015, defendant can be allowed to file written statement after 120 days from the date of service of writ of summons in the commercial suit. In that judgment, there was no aspect of setting aside *ex-parte* decree involved where sufficient cause was found to be established in a commercial dispute.

18. In the present case, however, as already indicated above, the intervening event of setting aside *ex-parte* decree, between 'first statement on the substance of dispute' and 'suit getting restored after

setting aside *ex-parte* decree', changes the complexion of the case in my view.

19. In the present case, admittedly the Court hearing commercial dispute has exercised its power under Order IX Rule 13 of the CPC, thereby finding on facts that the Respondents should not suffer for the fault of their lawyer because they were under bona fide belief that the matter is being properly looked after, but their lawyer did not take diligent steps and thus sufficient cause is made out. The *ex-parte* decree is set aside on condition of deposit of money, which is duly complied by the Respondents. The Petitioner/Plaintiff has not challenged the order by which *ex-parte* decree was set aside. The said order was challenged by Respondents/defendants only, which challenge failed in this Court. The Respondents had accordingly accepted the position and complied with the condition of deposit and they are now defending the suit as it stands restored.

20. It is neither argued nor pointed out that the power of the Court under Order IX Rule 13 was modified or curtailed in its application to the commercial dispute. Perusal of section 16 Act of the 2015 Act read with the Schedule shows that Order IX of the CPC has not been amended. The Commercial Court having exercised its jurisdiction for setting aside *ex-parte* decree, and that order attaining finality, will have its effect. If the effect of this confirmed order, holding that there was sufficient cause for the Respondents for failure to appear in the suit and defend it, is not considered, it will amount to ignoring material fact. Also, if it is held that this confirmed order exercising power under Order IX Rule 13 has no effect at all, then it will render the said provisions as nugatory, which can not be countenanced.

21. In such a situation, for the purpose of this petition testing legality of order u/s. 8 of the said Act referring the parties to arbitration, suffice it to say that in the teeth of intervening exercise of power under Order IX, Rule 13 by a Commercial Court finding sufficient cause while setting aside the *ex-parte* judgment, the Respondents can not be held to have applied later than the date of submitting their first statement on the substance of dispute, which was their first motion under Order IX Rule 13 itself.

22. Perusal of the affidavit in support of the first motion, under order IX Rule 13 clearly shows that the Respondents have put on record that there exists arbitration clause between the parties and the matter needs to be referred to Arbitrator. The execution of the said L&L agreement containing arbitration clause between the parties is admitted and indeed it cannot be disputed by the Petitioner because its whole suit is based on that agreement under which it had paid the deposit amount, which is sought to be recovered. When the Trial Judge heard the first motion under Order IX Rule 13 for setting aside *ex-parte* decree, just before concluding order, the Trial Court has recorded as below :

“9.The Ld. Advocate for defendants submitted that the dispute between the parties has to be referred to Arbitrator. It is also argued that as per Section 8 of Arbitration and Consideration Act, the Court has mandatory duty to refer the dispute arose between contracting parties to Arbitrator. Thought Ld. Advocate for the defendants have given much stress upon the merits of the matter, it will not be proper to make any comment while dealing with limited aspect of presence or absence of sufficient ground to set aside the ex-parte judgment and decree. Therefore, at this stage it will not be proper to

consider the objection raised by Ld. Advocate for defendants for referring matter to Arbitrator.”

[Emphasis supplied]

This decision of the Trial Court to postpone the issue of referring the matter to Arbitrator has now attained finality, especially vis-a-vis the Petitioner who has not challenged it. The Respondents can not be blamed for this postponement.

23. The issue whether right to file written statement stands forfeited in peculiar facts of this case, can be argued and the Petitioner's objection about it can be considered by the Arbitrator. In the teeth of admitted existence of arbitration clause and further in the teeth of mandate of amended section 8(1) of the said Act to refer the parties to arbitration, notwithstanding any judgment, decree or order of the Supreme Court or any Court, the matter shall have to be referred to Arbitration. It is settled position that the interference of the Court at the stage of Section 8 or 11 of the said Act is expected to be minimal. The said Act is a self contained code. Parties had agreed for arbitration but the Petitioner Bank chose to file a commercial suit for reasons best known to it. This Court need not go into that aspect. It is sufficient to note that scope of the power of Arbitrator is wide enough to consider and decide all the rival contentions including the objections of the Petitioner about Respondents' right to file written statement, whatever they can be in the peculiar facts of this case.

24. Perusal of the impugned order shows that the learned Judge has considered the existence of Arbitration clause and the mandate under Section 8 of the said Act. The learned Judge has also considered

whether the Respondents/defendants had raised the objections about the dispute being arbitrable at the first appearance and has referred the dispute to arbitration.

25. Lastly, the argument of the Petitioner that language of Section 8 says 'apply' and not 'just mention' and the Respondents have only mentioned about the arbitration in their first motion but permission is prayed to prosecute the suit, is too technical in my view. I have already considered Respondents' case as made out in their affidavit in support of the first motion. Further, the Trial Court, while setting aside the *ex-parte* decree has specifically recorded Respondents' argument about section 8 and insistence to refer the dispute to arbitration in paragraph 9 of that Order, as already indicated above. The Petitioner has not challenged that order. Therefore I do not find merit in such technical argument.

26. In the aforesaid facts and circumstances and for the reasons narrated above, it cannot be said that the Respondents have forfeited their right to file application under section 8 of the said Act. However rival contentions about right to file written statement can be kept open, to be decided by the Arbitrator. In view thereof, I am not inclined to interfere in the impugned order.

27. However, clauses 3 & 4 of the operative part of the impugned order, whereunder, suit is kept pending on dormant file and parties are given liberty to approach the Court to make their submissions after arbitration is over, are quashed and set aside, being completely uncalled for. Remaining clauses of impugned Order are confirmed.

28. The Arbitrator to whom the dispute will be referred, will deal with rival contentions of the parties on merits, including the objections of the Petitioner about Respondents' right to file written statement, in accordance with law and all contentions in that regard are kept open.

29. Depending on the outcome of the Arbitration, the parties will be at liberty to apply for release of amount of Rs.36 lakh deposited in the Trial Court alongwith accrued interest, even though the suit is now disposed of. Such application, when made, will be decided on its own merits in accordance with law. If the amount of Rs.36 lakh deposited by the Respondents is not already invested, the same be invested by the concerned Trial Court periodically as per prevalent practice.

30. All concerned to act on duly authenticated or digitally signed copy of this order.

(M.M. SATHAYE, J.)