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

\+ CS(OS) 125/2017 & I.A. 3242/2017, 7221/2017, 10295/2017, AND 13860/2017

PARASRAMKA HOLDINGS PVT. LTD. ..... Plaintiff
Through Mr. H.L. Tiku, Senior Advocate with Ms. Anupama and Mr. H.L. Raina, Advocates

versus

AMBIENCE PRIVATE LTD. & ANR. ..... Defendants
Through Mr. P.K. Agrawal with Ms. Mercy Hussain and Ms. Tannya Sharma, Advocates

WITH

\+ CS(OS) 126/2017 & I.A. 3244/2017, 7220/2017, 10296/2017, AND 13859/2017

MILI MARKETING PVT. LTD. ..... Plaintiff
Through Mr. H.L. Tiku, Senior Advocate with Ms. Anupama and Mr. H.L. Raina, Advocates

versus

AMBIENCE PRIVATE LTD. & ANR ..... Defendants
Through Mr. P.K. Agrawal with Ms. Mercy Hussain and Ms. Tannya Sharma, Advocates

AND

+ CS(OS) 127/2017 & I.A. 3246/2017, 8000/2017, 10292/2017, AND 13952/2017

MORAN PLANTATION PVT. LTD. ..... Plaintiff
Through Mr. H.L. Tiku, Senior Advocate with Ms. Anupama and Mr. H.L. Raina, Advocates

versus

AMBIENCE PRIVATE LTD. & ANR. ..... Defendants
Through Mr. P.K. Agrawal with Ms. Mercy Hussain and Ms. Tannya Sharma, Advocates

Reserved on : 21st December, 2017
% Date of Decision: 15th January, 2018

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J:

I.A. 12076/2017 in CS(OS) 125/2017, I.A. 12079/2017 in CS(OS) 126/2017 and I.A. 12074/2017 in CS(OS) 127/2017

1. Present applications have been filed by the applicants-defendants under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act") for referring the disputes raised in the present suits to arbitration.

2. It is pertinent to mention that CS(OS) 125/2017, CS(OS) 126/2017 and CS(OS) 127/2017 have been filed by the plaintiffs for

recovery of Rs.3,60,77,292.75, Rs. 3,52,49,060 and Rs. 2,86,84,102 respectively along with interest and permanent injunction.

3. In the applications, it is averred that Clause 6.16. of Apartment Buyer's Agreement dated 27th October, 2009 as well as Clause 21 of the Maintenance Agreement provides that in the event of any question, dispute or difference arising under the said Agreements, the dispute shall be referred to Arbitration. According to learned counsel for the applicants-defendants, as there is a dispute between the parties, the matter needs to be referred to arbitration. The relevant portion of the arbitration clause contained in the Apartment Buyer's Agreement dated 27th October, 2009 is reproduced hereinbelow:-

> *"6.16. Settlement and Arbitration:*
>
> *6.16.1. The parties hereto have agreed that all disputes and/or differences between any two or more of the Purchaser/s Applicants, Allottees, Apartment Owners, Association of Apartment Owners and/or the Company in any manner connected herewith or arising herefrom shall be referred to the independent and sole arbitration of an Arbitral Tribunal (Tribunal) appointed by the Board of Directors of the Company, whose decision will be final and binding on the parties to the reference. The arbitration will be in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification or enactment thereto for the time being in force..."*

4. Learned counsel for the applicants-defendants stated that Clause 13 of the Conveyance Deed dated 26th September, 2014 stipulated that all the terms and conditions enumerated under the Apartment Buyer's

Agreement dated 27th October, 2009 shall be deemed to have been incorporated in the said Conveyance Deed and therefore the arbitration clause being Clause 6.16 of the Apartment Buyer's Agreement forms a part of the conveyance deed.

5. Learned counsel for the applicants-defendants stated that after the dismissal of the applications filed by the defendants under Order VII Rule 11 CPC on 7th September, 2017, the defendants had referred the disputes between the parties to the sole arbitration of Hon'ble Mr. Justice K.K Lahoti (Retd.) in accordance with the aforesaid arbitration clauses. He pointed out that the written statements were filed without prejudice to the right of the defendants to refer the present disputes to Arbitration. In support of his submissions, he relied upon the following judgments:-

A) ***Kalpana Kothari Vs. Sudha Yadav & Ors.*, *(2002) 1 SCC 203***:-

> *"8. .....In striking contrast to the said scheme underlying the provisions of the 1940 Act, in the new 1996 Act, there is no provision corresponding to Section 34 of the old Act and Section 8 of the 1996 Act mandates that the judicial authority before which an action has been brought in respect of a matter, which is the subject-matter of an arbitration agreement, shall refer the parties to arbitration if a party to such an agreement applies not later than when submitting his first statement. The provisions of the 1996 Act do not envisage the specific obtaining of any stay as under the 1940 Act, for the reason that not only the direction to make reference is mandatory but notwithstanding the pendency of the proceedings before the judicial authority or the making of an application under Section*

8(1) of the 1996 Act, the arbitration proceedings are enabled, under Section 8(3) of the 1996 Act to be commenced or continued and an arbitral award also made unhampered by such pendency. We have to test the order under appeal on this basis."

B) ***Vijay Kumar Sharma Vs. Raghunandan Sharma, (2010) 2 SCC 486***:-

"11. ....It is evident from sub-section (3) of Section 8 that the pendency of an application under Section 8 before any court will not come in the way of an arbitration being commenced or continued and an arbitral award being made. The obvious intention of this provision is that neither the filing of any suit by any party to the arbitration agreement nor any application being made by the other party under Section 8 to the court, should obstruct or preclude a party from initiating any proceedings for appointment of an arbitrator or proceeding with the arbitration before the Arbitral Tribunal.

12. Having regard to the specific provision in Section 8(3) providing that the pendency of an application under Section 8(1) will not come in the way of an arbitration being commenced or continued, we are of the view that an application under Section 11 or Section 15(2) of the Act, for appointment of an arbitrator, will not be barred by pendency of an application under Section 8 of the Act in any suit, nor will the designate of the Chief Justice be precluded from considering and disposing of an application under Section 11 or 15(2) of the Act."

C) ***Tech Books International & Ors. Vs. Niti Saxena, 2013 SCC Online Del 4576***:-

"13. Considering the overall facts and circumstances of the case, the impugned order is set aside. The

application filed by the petitioners under Section 8 of the Act is remanded back to the learned trial Court to reconsider the same in view of the statement made in para 3 of the preliminary objections of the written statement as the written statement was filed in the year 2009 wherein a specific plea of arbitration clause was raised. Similarly, the petitioners are also granted liberty to file the certified copy/original or signed copy of the agreement in question within two weeks from today and after considering the same, the application filed by the petitioners under Section 8 of the Act be decided as per its own merit. The petition and the pending applications are disposed of."

6. Per contra, learned counsel for the plaintiffs submitted that the present applications are misconceived in law and not maintainable as an application under Section 8(1) of the Act cannot be filed subsequent to the submission of the first statement on the substance of the dispute before the judicial authority. He stated that in the present cases though the defendants were served with the summons of the suit on 27th March, 2017 and on 25th April, 2017, yet the defendants filed application under Order VII Rule 11 CPC which did not contain any averment as regards the existence of an arbitration clause. He stated that the defendants thereafter filed their written statement on 20th May, 2017 disclosing substance of their defence which merely raised a preliminary objection as regards the existence of the arbitration clause with no specific prayer for referring the present disputes to arbitration. He submitted that merely raising a plea in the written statement that there exists an arbitration agreement between the parties without any specific prayer for referring the dispute to arbitration is inconsequential. He stated that the defendants by filing the written

statement prior to filing of the present applications have submitted themselves to the jurisdiction of this Court and are now estopped from relying on the arbitration clause.

7. Learned counsel for the plaintiffs submitted that this Court in various pronouncements has held that an application under Section 8 of the Act is not maintainable after the written statement on the substance of the dispute has been filed, if the same did not contain a prayer for referring the matter to arbitration. In support of his submission, he relied upon a judgment of this Court in ***Arti Jethani Vs. Daehsan Trading (India) Pvt. Ltd. & Ors., CS(OS)1296/2010***, wherein it has been held as under:-

> *"5. In Sukanya Holdings (supra), Supreme Court, while interpreting Section 8 of the Act, inter alia, observed as under:*
> *"**Further, the matter is not required to be referred to the arbitral Tribunal, if**— (1) the parties to the arbitration agreement have no 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 application is not accompanied by the original arbitration agreement or duly certified copy thereof."*
> *It is true that in the above-referred case, the application under Section 8 of Arbitration and Conciliation Act appears to have been filed before the written statement was filed and, therefore, the question as to whether such an application can be filed after the written statement has already been filed, did not directly come up for consideration in this case, but, the above-referred observations made by the Court do support the view that such an application cannot be filed after the first statement on the substance of the dispute has been filed by the applicant.*
>
> *6. The contention of the learned counsel for the applicant is that since the defendant had already pleaded in the written statement*

that there is an arbitration agreement between the parties and, therefore, this Court has no jurisdiction to adjudicate the instant suit, it is evident that the applicants did not submit to the jurisdiction of the Civil Court and, therefore, the application is maintainable even after filing of the written statement.

7. In my view, if the Court accepts the contention that an application under Section 8 of the Act can be filed even after the first statement on substance of the dispute between the parties has already been filed, this would not only be contrary to the express provisions of law but, would also defeat the very purpose behind stipulating that such an application needs to be filed not later than submitting the first statement on the substance of the dispute. If such an application is entertained after filing of the first statement, it would be possible for a party to the suit to first allow the trial to proceed by not filing the application by the stage stipulated in the Act and then come to the Court at a much later stage when the trial is substantially complete and seek reference of the dispute to arbitration. It is true that in the case before this Court the trial has not commenced as yet, but if the interpretation sought to be given by the learned Counsel for the applicants/defendants is accepted, it would be open to a party to the suit to file such an application even after the trial has commenced.

xxx xxx xxx

9. The learned Counsel for the defendants has relied upon the decision of the Supreme Court in Rashtriya Ispat Nigam Ltd. v. Verma Transport Co., (2006) 7 SCC 275. In the case before Supreme Court, a suit seeking permanent injunction against blacklisting the defendant or terminating the contract was filed. The trial Court directed the parties to maintain status quo. The appellants/defendants sought time to file Written Statement. They also filed a rejoinder to the counter affidavit of the application for injunction, wherein they took a specific plea that the subject matter of the suit being covered by arbitration agreement, it was not maintainable. On 7.6.2002 they filed an application under Section 8 of the Act which was rejected by the trial Court on the ground that the process of the suit had

already begun and the defendants had already entered into a defence of the suit and had thereby subjected themselves to the jurisdiction of this Court. A revision application filed by the defendants having been rejected by the High Court, the matter was taken to Supreme Court. The Supreme Court noted that under Section 8 of the Act, the power to refer the dispute for arbitration has to be exercised, if a party so applies not later than when submitting his first statement on the substance of the dispute. The Court referred to its decision in Food Corporation of India v. Yadav Engineer & Contractor, (1982) 2 SC 499 where it had opined that interlocutory proceedings are only incidental proceedings to the main proceedings and therefore any step taken in interlocutory proceedings does not come within the purview of the main proceedings. The Court then inter alia observed as under:

> *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 or 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.*

In paras 38 & 39 of the judgment, the Supreme Court inter alia observed as under:

> *38. xxx 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 arose out of the main proceedings. In view of the decision of this Court in Food Corporation of India, the distinction between the main proceeding and supplemental proceeding must be borne in mind.

In para 42 of the judgment, the Court inter alia observed as under:

42. Waiver of 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 provisions of the Act, they had thus, shown their unequivocal intention to question the maintainability of the suit on the aforementioned ground.

The facts of this case however, are altogether different. In this case, the [defendants have already filed their Written Statement and have thereby disclosed their entire defence and that has been done in the main proceedings itself, not in the supplemental proceedings. Of course, the application under Section 8 of the Act would be maintainable if the applicant has not filed his first statement on the substance of the dispute, but when the Written Statement is filed, it can hardly be disputed that the applicant has submitted not only the first but whole of his statement on the dispute between the parties. To hold such an application to be maintainable, even after filing of the Written Statement would be contrary to the provisions contained in Section 8 of the Act. Mere disclosure of arbitration agreement in the Written Statement

and claiming that Civil Court has no jurisdiction to try the suit would be of no consequences unless the Written Statement itself contains a prayer for referring the dispute for arbitration. In the case before this Court, though the defendants claimed that there is arbitration agreement between the parties and Civil Court has no jurisdiction in the matter, no prayer was made in the Written Statement to refer the disputes between the parties for arbitration."

8. Learned senior counsel for the plaintiffs stated that the aforesaid view in ***Arti Jethani*** *(*Supra*)* has been reiterated in ***M/s. R.R. Enterprises Vs. C.M.D. of M/s. Garware-Wall Ropes Ltd. & Ors., CS(OS) 2086/2010*** and ***V.M. Mehta Vs. M/s. Ultra Care Securities Pvt. Ltd., CM(M) No.903/2013.***

9. Learned senior counsel for the plaintiffs also relied on ***Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited & Ors., (2011) 5 SCC 532***, ***Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya & Anr., AIR 2003 SC 2252, Ananthesh Bhakta Rep. by Mother Usha A. Bhakta Vs. Nayana S. Bhakta & Ors., 2016 (12) SCALE 8, Greaves Cotton Ltd. Vs. United Machinery & Appliances, (2017) 2 SCC 268 and Pawan Bagaria Vs. Gontermann-Peilpers (I) Ltd., 2004 SCC Online Cal 154***.

10. In rejoinder, learned counsel for defendants submitted that a Coordinate Bench of this Court in ***Sharad P. Jagtiani Vs. Edelweiss Securities Limited, 2014 SCC Online Del 949*** has held that the judgment in ***Arti Jethani*** (Supra) is contrary to mandate of Section 8 of the Act. The relevant portion of the said judgment is reproduced hereinbelow:

"14. The defendant in the present case also, as in Arti Jethani supra, has neither in para 3 of the preliminary objections nor in the prayer clause of the written statement, sought reference of the parties to arbitration. However I am unable to, in Section 8, find any requirement for the applicant to seek a reference to arbitration. Section 8 requires a party to arbitration, to only intimate to the Court that the action before the Court is the subject matter of Arbitration Agreement. The duty, to 'refer' the parties to arbitration, is thereafter of the judicial authority and merely because such an obligation has been imposed on the judicial authority, does not mean that the party 'invoking' the arbitration has to seek 'reference to arbitration'. As long as a party to the proceeding before a judicial authority 'invokes' arbitration, not later than when submitting his first statement on the substance of the dispute, that is enough to bring the bar of Section 8 into play and the judicial authority/court then ceases to have jurisdiction. The Supreme Court in P. Anand Gajapati Raju v. P.V. G. Raju (2000) 4 SCC 539 has held that the language of Section 8 is peremptory and it is obligatory for the Court to refer the parties to arbitration in terms of Arbitration Agreement.

15. The next question for consideration is, whether the making of an application under Section 8 is necessary or the plea, substantially of Section 8 in the written statement, suffices. Though Sub-section (1) of Section 8 merely talks of "if a party so applies" and which can also be in the written statement but Sub-sections (2)&(3) of Section 8 do mention an "application under Sub-section (1)". However in my opinion, the legislative change as contained in Section 8 of the 1996 Act, as from Section 34 of 1940 Act is not indicative of an application, separate from the written statement being necessitated to be filed for invoking arbitration agreement between the parties. In fact, even in Arti Jethani (supra), it has been held that reference under Section 8 of the parties to arbitration can be made if the written statement itself contains a prayer for referring the disputes for arbitration. However, Arti Jethani to the extent it holds that there has to be a specific prayer for reference, with due respect to the judgment in Arti Jethani, is contrary to the

mandate of Section 8. Section 8, as aforesaid, merely requires a party to the action before a judicial authority, to bring to the notice of the judicial authority that the action brought before the judicial authority is the subject of an arbitration agreement. As long as the same is done in the written statement, mere absence of a prayer or use of the words seeking reference to arbitration cannot come in the way of the obligation of the judicial authority to refer the parties to arbitration."

11. Learned counsel for the applicants-defendants stated that the aforesaid decision of the Single Judge has been affirmed by the Division Bench of this Court in appeal in ***Sharad P. Jagtiani Vs. Edelweiss Securities Limited, FAO (OS) 188/2014***.

12. In sur-rejoinder, learned senior counsel for the plaintiffs admitted that ***Arti Jethani*** (Supra) was no longer good law, but stated that the aforesaid judgments relied upon by the learned counsel for the defendants/applicants would not be applicable to the present case as Section 8(1) of the Act had been amended with retrospective effect from 23rd October, 2015. He contended that after the amendment of Section 8(1) of the Act, the filing of the written statement or any other statement indicating (first) statement on the substance of the dispute constituted a waiver of the right to seek reference to arbitration and an application seeking the dispute to be referred to arbitration in terms of the arbitration agreement must be filed within the same period as is prescribed for filing of the written statement. He reiterated that merely raising a plea in the written statement that there exists an arbitration agreement between the parties without any specific prayer for referring the dispute to arbitration is inconsequential. In support of his contention, he relied upon the following judgments:-

A) In ***Krishan Radhu Vs. Emaar MGF Construction Pvt. Ltd., 2017(1) AD (Delhi) 781,*** this Court has held as under:

> *"17. Thus, the third amendment to Section 8(1) whereby the existing words "not later than when submitting" have been substituted by "not later than the date of submitting" are of some import. Under the amended law the defendant is now required to invoke the arbitration clause and apply to the court for a reference thereunder by moving an application but not required to file his written statement or any answer to set out his statement on the substance of the dispute. Rather, the submission of the written statement or reply indicating his (first) statement on the substance of the dispute may be construed as waiver of the right to seek reference to arbitration, or even as submission to or acquiescence of the jurisdiction of the court where the action has been brought by the claimant (the plaintiff). The amended provision of Section 8(1), however, sets out a limit to the period within which such application invoking the arbitration agreement must be presented. It is this limitation period which is indicated by the words "not later than the date of submitting".*

B) In ***Ravinder Kaur Vs. Gagandeep Singh, 2016 SCC OnLine Del 2432,*** a Division Bench of this Court has held as under:

> *"17. Section 8(1) of the Arbitration Act requires a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, "if a party so applies not later than when submitting his first statement on the substance of the dispute", to refer the parties to arbitration. The other precondition to the said power is Section 8(2), which provides that the application under sub-section (1) shall not be entertained unless it is accompanied by the original Arbitration Agreement or a duly certified copy*

thereof. Rashtriya Ispat Nigam Ltd. v. Verma Transport Co. (2006) 7 SCC 275 held that the application under Section 8 of the Act filed after the filing of the written statement was not maintainable. It was also observed that mere disclosure of Arbitration Agreement in the written statement and claiming that Civil Court has no jurisdiction to try the suit would be of no consequence unless the written statement itself contains a prayer for referring the disputes for arbitration. Both the two preconditions were not satisfied in the present case: the written statement filed by the appellant nowhere stated that the dispute pertaining to partition was precluded, as it was arbitrable; furthermore, no arbitration agreement to this effect was ever disclosed. Most importantly the defendant appellant never sought the relief of reference of the disputes pertaining to partition, under Section 8. Such being the case, there was no impediment to the civil court from proceeding to pass the preliminary or final decree. Even otherwise, the Court is satisfied that the disputes before the arbitral tribunal covers an entirely different set of facts and involve the resolution of other entitlements, i.e. the accounts and other matters pertaining to business of the firm. That the plaintiff was 50% owner of the suit property was never in dispute."

13. Having heard the learned counsel for the parties, this Court is of the opinion that the expression, *"so applies not later than the date of submitting his first statement on the substance of the dispute",* means the outer limit for filing the written statement in a particular case. Since in the present case the Order 7 Rule 11 CPC application had been filed prior to the filing of the written statement, the defendant-applicant was entitled to file its written statement within one hundred twenty days after rejection of its Order 7 Rule 11 CPC application.

The Supreme Court in ***R.K. Roja Vs. U.S. Rayudu & Anr., (2016) 14 SCC 275*** has held as under:-

> *"5. Once an application is filed under Order 7 Rule 11 CPC, the court has to dispose of the same before proceeding with the trial. There is no point or sense in proceeding with the trial of the case, in case the plaint (election petition in the present case) is only to be rejected at the threshold. Therefore, the defendant is entitled to file the application for rejection before filing his written statement. In case the application is rejected, the defendant is entitled to file his written statement thereafter (see Saleem Bhai v. State of Maharashtra)…."*

14. In the present case, as the application under Section 8 of the Act has been filed within one hundred twenty days of rejection of the application under Order 7 Rule 11 CPC, this Court of the view that the same has been filed prior to the date of expiry of the time period for filing the written statement.

15. It is pertinent to mention that a written statement under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, has to be filed within a period of one hundred and twenty days and this Court in a number of judgments has held that the Court is powerless to extend the time beyond one hundred and twenty days, the defendants 'playing it safe' filed their written statements. In the present case, as the defendants filed applications under Order VII Rule 11 CPC at the inception stage, they could not have filed applications under Section 8 of the Act, at least

till the disposal of the said applications, as otherwise it would amount to foregoing the right to press for rejection of the plaint.

16. Also the admitted position that emerges is that prior to amendment of Section 8(1) of the Act with retrospective effect from 23rd October, 2015, even an objection in the written statement without a specific prayer for referring the dispute to arbitration was treated as an application under Section 8(1) of the Act.

17. In ***Eastern Medikt Vs. R.S Sales Corporation & Anr., (2007) 137 DLT 626***, a Coordinate Bench of this Court has held that a preliminary objection of the defendants with respect to existence of an arbitration clause contained in the written statement can be treated as an application under Section 8 of the Act. The relevant portion of the said judgment is reproduced hereinbelow:-

> *"7. No doubt, written statement has been filed. However, in the written statement the very first objection taken by the defendants is that the suit is barred under the provisions of the Arbitration Act and the arbitration clause contained in the invoices is reproduced by the defendants. Thus even when the written statement is filed strings are attached by challenging the maintainability of the suit in view of the said arbitration clause. Therefore, in such circumstances the first preliminary objection of the defendants contained in the written statement can be treated as an application under Section 8 of the Arbitration and Conciliation Act, 1996."*
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> (emphasis supplied)

18. A Coordinate Bench of this Court in ***Sharad P. Jagtiani Vs. Edelweiss Securities Limited, 2014 SCC Online Del 949*** has held that un-amended Section 8(1) of the Act required a party to arbitration to

only intimate to the Court that the action before the Court is the subject matter of an arbitration agreement. It was further held that the duty to refer the parties to arbitration, is thereafter of the judicial authority and merely because such an obligation has been imposed on the judicial authority does not mean that the party invoking the arbitration has to specifically seek reference to arbitration.

19. The said judgment has been affirmed by the Division Bench in ***Sharad P. Jagtiani Vs. Edelweiss Securities Limited, FAO (OS) 188/2014***. The relevant portion of the Division Bench judgment is reproduced hereinbelow:-

> *"19. …….We have chosen to decide on merits to interpret the law correctly for the reason we find that a few learned Single Judges of this Court have taken a view that unless an application is filed under Section 8 of the Arbitration and Conciliation Act, 1996, mere raising a plea in the written statement that there exists an arbitration agreement between the parties which embraces the subject matter of the dispute raised in the suit, would be useless. One objection raised by Sharad P. Jagtiani is that judicial discipline demanded the learned Single Judge to follow the view taken by learned Single Judges and if he did not agree the matter ought to have been referred to a larger Bench. We thought it advisable to settle a point of law on which there exists conflicting decisions of learned Single Judges of this Court. We formally declare that the view taken by the learned Single Judges contrary to the view taken by us in the present decision is overruled. The view taken by the learned Single Judge in the instant case is affirmed."*
>
> (emphasis supplied)

20. Now, let us examine as to whether in view of amendment of Section 8(1) of the Act with retrospective effect from 23rd October, 2015 by Act No.3 of 2016, there is an obligation to make a specific prayer in the written statement for referring the dispute to arbitration. The relevant portion of amended Section 8(1) is highlighted hereinbelow:-

> ***"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.]*
>
> (emphasis supplied)

21. The Statement of Objects and Reasons enumerated under the Arbitration and Conciliation (Amendment) Bill, 2015 is reproduced hereinbelow:-

> *"STATEMENT OF OBJECTS AND REASONS*
>
> *The general law relating to arbitration is contained in the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act). The Act, which is based on the UNCITRAL Model Law on International Commercial Arbitration, as adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL), applies to both international as well to domestic arbitration.*

2. The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been noticed. Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, the matter was referred to the Law Commission of India, which examined the issue in detail and submitted its 176th Report. On the basis of the said report, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22nd December, 2003. The said Bill was referred to the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for examination and Report. The said Committee, submitted its Report to the Parliament on 4th August, 2005, wherein the Committee recommended that since many provisions of the said Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering its recommendations. Accordingly, the said Bill was withdrawn from the Rajya Sabha.

3. On a reference made again in pursuance of the above, the Law Commission examined and submitted its 246th Report on "Amendments to the Arbitration and Conciliation Act, 1996" in August, 2014 and recommended various amendments in the Act. The proposed amendments to the Act would facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

4. <u>As India has been ranked at 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in</u>

courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

5. As Parliament was not in session and immediate steps were required to be taken to make necessary amendments to the Arbitration and Conciliation Act, 1996 to attract foreign investment by projecting India as an investor friendly country having a sound legal framework, the President was pleased to promulgate the Arbitration and Conciliation (Amendment) Ordinance, 2015.

6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely:—

xxx xxx xxx

(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

xxx xxx xxx

7. The amendments proposed in the Bill will ensure that arbitration process becomes more user-friendly, cost effective and lead to expeditious disposal of cases.....

8. The Bill seeks to replace the aforesaid Ordinance."

"Notes on Clauses

xxx xxx xxx

Clause 4 of the Bill seeks to amend section 8 of the principal Act to specify that the judicial authority shall refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exits. A proviso below sub-section (2) is inserted to provide that where the original arbitration

agreement or certified copy thereof is not available with the party who apply under sub-section (1), and is retained by the other party, such party shall file a copy of the arbitration agreement along with application under sub-section (1) praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before the Court."

(emphasis supplied)

22. A perusal of amended Section 8(1) of the Act as well as the Statement of Objects and Reasons shows that the previous wording *"not later than when submitting"* has subsequent to the amendment been substituted by the phrase *"not later than the date of submitting"* the first statement of the substance of the dispute. According to Justice R.S. Bachawat's Law of Arbitration & Conciliation, Sixth Edition, there does not appear to have been any discussion on this issue of substitution by the Law Commission in its report nor is there any reference to this or any similar amendment proposed by the Law Commission.

23. This Court is also of the opinion that the judgment in ***Ravinder Kaur*** (Supra) relied upon by learned senior counsel for plaintiff has not discussed the effect of the 2015 amendment of Section 8(1) of the Act. In fact, the Division Bench in the said judgment held as under:-

"……Besides urging Section 5 of the Arbitration Act, the defendant has nothing to show how the suit properly lay, because there is no dispute that the parties own equal share in the suit property. It has not been pleaded or proved that there exists an arbitration agreement, which precludes the disputes that were urged in the partition suit, from the jurisdiction of the civil court; nor was there any document to

show that the Court's jurisdiction in the given facts of the case, was ousted. Besides a bland assertion of nullity, there is no explanation why the preliminary decree was never challenged before the final decree....."

The Hon'ble Division Bench was further pleased to hold:

"……Both the two preconditions were not satisfied in the present case: the written statement filed by the appellant nowhere stated that the dispute pertaining to partition was precluded, as it was arbitrable; furthermore, no arbitration agreement to this effect was ever disclosed. Most importantly the defendant appellant never sought the relief of reference of the disputes pertaining to partition, under Section 8....."

24. This Court is further of the view that the judgment in ***Krishan Radhu*** is entirely based on a different issue. In fact, by the said order and judgment the defendant's Section 8 application under the Act was allowed even though the said application had been filed beyond the period of ninety days, which is permissible for filing of the written statement. Further, by the said order, a chamber appeal filed by the defendant challenging the order of the Joint Registrar closing its right to file written statement for the reason that the period of ninety days permitted for the said purpose had lapsed was also allowed.

25. It was held in the case of ***Krishna Radhu*** (supra) that the submission of the written statement / reply *may be* construed as a waiver of the right to seek reference to arbitration. It is pertinent to mention that in the said case, the court did not examine the effect of arbitration clause being brought to the notice of the Court in the written statement without a specific prayer for reference of the parties

to arbitration. In fact, the Court in ***Krishan Radhu*** *(Supra)* neither considered nor declared the judgment of this court in ***Sharad P. Jagtiani*** *(Supra)* as *per incuriam* or inapplicable in view of the amendment in Section 8(1) of the Act.

26. Consequently, in the opinion of this Court, both ***Krishan Radhu*** (Supra) and ***Ravinder Kaur*** (Supra) are inapplicable to the facts of the present case.

27. Besides, it is settled law that judgments are not to be construed as statutes. The Supreme Court in ***Escorts Ltd. Vs. Commissioner of Central Excise, Delhi-II, (2004) 8 SCC 335*** has held as under:-

> *"8. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton [1951 AC 737 : (1951) 2 All ER 1 (HL)] (AC at p. 761), Lord MacDermott observed: (All ER p. 14 C-D)*
>
> > *"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the*

language actually used by that most distinguished judge,…"

(emphasis supplied)

28. In the opinion of this Court, an arbitration agreement is a contract by which the parties agree to settle certain disputes by way of arbitration rather than by proceedings in Court. It is akin to an exclusive jurisdiction clause and contains a negative obligation not to commence substantive proceedings in any other forum. [*See: AES Ust-Kamenogorsk v. Ust-Kamenogorsk JSC [2013] UKSC 35 at [21]-[28]*.

29. Where the Court action is commenced in breach of an arbitration agreement the other party may apply to stay the Court action, unless it is content to forego its right to have the dispute referred to arbitration and choose instead to defend the action before the Court. However, the other party must apply without delay to the Court for a stay of the proceedings brought in breach of the agreement to arbitrate.

30. Under Section 8 of the Act, the power to stay proceedings is mandatory, unless the Court is satisfied that the arbitration agreement is *"null and void, inoperative, or incapable of being performed"*.

31. The Supreme Court in ***Rashtriya Ispat Nigam Ltd. and Anr. Vs. Verma Transport Co., (2006) 7 SCC 275*** has held as under:-

"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 or 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.

(emphasis supplied)

32. In ***Booz Allen and Hamilton Inc.*** (supra), the Supreme Court has held as under:-

"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."

(emphasis supplied)

33. Keeping in view the aforesaid judgments as well as the judgment in ***Eastern Medikt*** (supra) and judgments of the learned Single Judge and Division Bench of this Court in ***Sharad P. Jagtiani*** (supra), this Court is of the view that the 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 that the present suit is not maintainable in view of the arbitration clause in the agreement.

34. In the present case, the defendants in para 5 of the preliminary objections in the written statement filed on 20th May, 2017 specifically stated that there exists an arbitration agreement between the parties. The said para is reproduced hereinbelow.

> *"5. That there are separate Arbitration Clauses between the Plaintiff and Defendant No.1 and the Plaintiff and Defendant No.2. all disputes and differences arising between the Plaintiff and Defendant No.1 and the Plaintiff and Defendant No.2 are liable to be referred to the separate arbitration of a Sole Arbitrator to be nominated by Defendant No.1 and Defendant No.2 respectively. The Plaintiff without invoking Arbitration has filed the above suit. The above written statement is being filed without prejudice of the rights of the Defendants to refer the disputes to the Arbitration."*
>
> (emphasis supplied)

35. Accordingly the aforesaid objection of the defendants contained in the written statement can be treated as an application under Section 8 of the Act.

36. Consequently, present applications are allowed and the parties are referred to arbitration in accordance with Section 8(1) of the Act.

MANMOHAN, J

JANUARY 15, 2018
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