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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 19th November, 2019

Date of decision: 19th February, 2020

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CS (COMM) 735/2018, I.As. 15576/2018, 2756/2019, 2757/2019 & 2758/2019

SSIPL LIFESTYLE PRIVATE LIMITED Plaintiff

Through: Mr. Alishan Naqvee, Mr. Mohd. Kamran & Ms. Parul Parmar, Advocates. (M:9990034348)

versus

VAMA APPARELS (INDIA) PRIVATE LIMITED & ANR.

..... Defendants

Through: Mr. Somya Jaitly, Advocate.
Mr. Darpan Wadhwa as *Amicus curiae*, Senior Advocate with Ms. Aditi Mohan and Ms. Aishwarya, Advocate. (M:9958535740)

AND

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CS (COMM) 736/2018, I.As. 15575/2018, 2742/2019, 2743/2019 & 2744/2019

SSIPL RETAIL LIMITED Plaintiff

Through: Mr. Alishan Naqvee, Mr. Mohd. Kamran & Ms. Parul Parmar, Advocates.

versus

VAMA APPARELS (INDIA) PRIVATE LIMITED & ANR.

..... Defendants

Through: Mr. Somya Jaitly, Advocate.
Mr. Darpan Wadhwa as *Amicus Curiae*, Senior Advocate with Ms. Aditi Mohan and Ms. Aishwarya, Advocate.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present two suits have been filed by SSIPL Lifestyle Private Limited against two Defendants, namely, Vama Apparels (India) Private Limited and Ms. Jaya Pramanand Patel (*hereinafter 'Vama'*). Both the suits are for recovery of sums of Rs.2,17,31,781/- and Rs.3,38,73,866/- respectively along with interest and other reliefs.

2. The suits arise out of agreement dated 22nd April, 2016 entered into between the parties i.e. SSIPL and Vama. The arrangement as per the said agreement was that SSIPL would supply to Vama various products for sale from the Vama Department Store situated at Kanchenjunga, 72 Peddar Road, Mumbai-400026 (*hereinafter 'space'*). The agreement was signed by the Defendant No.2 on behalf of the Defendant No.1. Security deposits of Rs.35 lakhs and Rs. 70 lakhs respectively were deposited by SSIPL with Vama and the space was to be decorated as per the requirements of the SSIPL. The products supplied by the Plaintiff were to be stocked and stored by Vama at the allocated space. The marketing and brand promotion were to be conducted by SSIPL. The retail prices for the products was to be fixed by SSIPL. The entire sale proceeds of the products supplied was to be collected by Vama which was to be used by Vama for purchasing products from SSIPL. The sale margin of 14% of the net sales value of the products sold from all allocated space, was to be provided to Vama. The agreement contained an arbitration and jurisdiction clause which reads as under:

*“31. **ARBITRATION:** All disputes, differences and questions whatsoever which shall arise between the parties hereto during the continuance of this Agreement thereof or any clause or matter therein contained or the rights, duties and liabilities of either*

party in connection therewith shall be referred to the arbitration of three arbitrators. Out of three, one to be appointed and nominated by the First Party, another to be appointed and nominated by the Second Party and the third to be appointed and nominated by the said two arbitrators nominated and appointed by the parties above named. The arbitration proceedings shall be held in Mumbai and shall be in accordance with the subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modifications(s) re-enactment thereof for the time being in force.

32. JURISDICTION: *The courts at Mumbai shall have exclusive jurisdiction in all matters arising out of this Agreement.”*

3. Along with the agreement, an addendum was also entered into where some minimum amount of sale was also guaranteed by Vama. A further side letter was also exchanged between the parties on the same date. The products that were to be sold included products under the brand names - Nike, Adidas and Sports Station.
4. Various disputes arose between the parties. There were allegations and counter allegations. Vama issued a notice dated 21st August, 2017 wherein refunds were sought of outstanding amounts. Vide letter dated 20th October, 2017, SSIPL terminated the agreement and there was continuous correspondence between the parties including a notice under Section 138 of the Negotiable Instruments Act for dishonouring of a cheque for a sum of Rs.5 lakhs. The present two suits were filed on 17th February, 2018 seeking recoveries.
5. Summons were issued in the suit on 15th March, 2018 and on 16th May, 2018, time was given for filing of the written statement. On 17th May,

2018, insolvency proceedings were commenced against Defendant No.1 before the NCLT which were finally closed on 8th October, 2018.

6. Vama then moved two applications under Section 8 of the Arbitration and Conciliation Act, 1996 in each of the suits. There is a dispute as to when exactly the said applications were filed by Vama. In the said applications, the prayers were for seeking reference to arbitration as per the arbitration clause in the agreements. The said applications remained under objections for some time. Finally, notice was issued in the applications being I.A. 2756/2019 in CS (Comm) No. 735 of 2018 and I.A. 2742/2019 in CS (Comm) NO. 736 OF 2018 on 22nd February, 2019.

7. The said applications along with the applications for condonation of delay have been taken up for hearing. The applications being disposed of by the present order are -

- a. I.A. no. 2756/2019 (under Section 8, Arbitration and Conciliation Act, 1996), in CS(COMM) No.735/2018;
- b. I.A. no. 2757/2019 (seeking condonation of delay u/s 5, Limitation Act, 1963 in filing) in CS(COMM) No.735/2018;
- c. I.A. No. 2758/2019 (for condonation of delay in re-filing under Section 151 CPC) in CS(COMM) No.735/2018;
- d. I.A. No. 2742/2019 (under Section 8 of Arbitration and Conciliation Act, 1996), in Suit No.736/2018
- e. I.A. No. 2743/2019 (under Section 5 of the Limitation Act) in Suit No.736/2018
- f. I.A. No. 2744/2019 (for condonation of delay in re-filing under Section 151 CPC) in Suit No.736/2018.

8. The submission of ld. counsel appearing for Vama is that the present suits for recovery are not maintainable as there is an arbitration clause in the agreement dated 22nd April, 2016. It is submitted that the Section 8 applications, having been filed prior to the filing of any other substantive defence by Vama, are fully maintainable in law. The agreements being admitted, the parties are liable to be referred to arbitration.

9. On the other hand, it is submitted by ld. counsels appearing for SSIPL that no arbitrable dispute exists between the parties as the period of limitation for filing of the Section 8 application has expired. It is submitted that the criteria for invoking Section 8 has not been fulfilled. The applications were initially not accompanied by any application for condonation of delay. It is only when SSIPL raised an objection, that the applications for condonation of delay in filing and re-filing have been filed. It is further argued that the applications are belated in view of the amended provision which has come into effect from 23rd October, 2015. As per the provision as it exists, the Section 8 application has to be filed “*not later than the date of submitting his first statement on the substance of dispute*”. The use of word ‘date’ in effect means that the time period available for filing of Section 8 application has to be read with the time period of filing of written statement under the CPC. If the limitation for filing of written statement expires, even a Section 8 application cannot be filed. Reliance is placed on the following judgments:

- ***Parasramka Holdings Pvt. Ltd. v. Ambience Pvt. Ltd., [CS(OS) 125/2017, decided on 15th January, 2018];***
- ***Krishan Radhu v. Emmar MGF Construction Pvt. Ltd. [CS(OS) 3281/2014, decided on 21st December, 2016]***

10. It is further urged that the maximum period available for filing of Section 8 would, therefore, be 120 days and the applications are thus hopelessly time barred.

11. It is also argued that though the applications are claimed to have been filed on 2nd November, 2018, the affidavits were notarized only on 16th January, 2019. Further, since the original arbitration agreements have not been filed, the applications itself are not maintainable. SSIPL further contends that in fact the application under Section 8 was finally filed on 11th February, 2019 and is thus not liable to be entertained.

Analysis and Findings

12. An important question of law has arisen in this case “Whether there is a limitation period prescribed for filing of an application under Section 8 of the Arbitration and Conciliation Act?” Secondly, whether the limitation for filing of the written statement as prescribed in the Civil Procedure Code, 1908 as also the Commercial Courts Act, 2015 would be applicable for filing of a Section 8 application. Considering the various decisions which have already been rendered and the importance of the issue, this Court appointed Mr. Darpan Wadhwa, Id. Senior Counsel as the Amicus Curiae to assist the Court.

13. The Id. Amicus Curiae has also been heard by the Court. The Id. Amicus Curiae has placed before the Court the provisions under Section 8, 1940 Act (in the un-amended Act). The Id. Amicus Curiae has submitted from the Law Commission report which recommended the amendment in Section 8, no specific reason was traceable as to why the language of Section 8 was changed from what it was prior to the amendment. The

following judgments have also been placed before the Court by the Id. Amicus Curiae:

- *Hughes Communications India Ltd. and Ors. v. Union of India* [CS(COMM) 439/2017, decided on 29th January, 2018];
- *M/s Sri Ragavendra Advertising & Anr v. Prasar Bharti (Broadcasting Corporation of India)* 2009 -5-L.W.439;
- *Parasramka Holdings Pvt. Ltd. v. Ambience Pvt. Ltd.*, [CS(OS) 125/2017, decided on 15th January, 2018];
- *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Ors.* (2011) 5 SCC 532;
- *Ameet Lalchand Shah and Ors. v. Rishabh Enterprises and Anr.* (2018) 15 SCC 678;
- *Rashtriya Ispat Nigam Limited & Anr. v. Verma Transport Co.* (2006) 7 SCC 275

14. The submission of Id. Amicus Curiae is that there is a divergence of opinion on whether the time limit for filing the written statement would apply for filing of Section 8 application. It is further submitted that the Supreme Court in *Booz Allen (supra)* though held that there is no time limit, the application had to be filed 'at the earliest'.

15. Before dealing with the two questions that have arisen in the present case, Section 8, as it stood earlier and as amended by the amendment Act of 2016 with retrospective effect from 23rd October, 2015 are set out herein below:

Section 8 under the 1996 Act is as follows:

“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 so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
- (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.
- (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

Section 8 under the substituted amendment Act 3 of 2016 w.e.f 23rd October, 2015 is as follows:

“8. Power to refer parties to arbitration where there is an arbitration agreement-[(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists]

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

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration

agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]
...”

16. The difference in the language to the extent it is different, for the purpose of this case, is on the phrase “*not later than when submitting*” and “*not later than the date of submitting*”. The question as to what constitutes the first statement on the substance of the dispute, is now well settled by the Supreme Court in ***Rashtriya Ispat Nigam Limited & Anr.*** (supra). The Supreme Court in the said case held:

“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.

..

38. In Janki Saran Kailash Chandra [(1973) 2 SCC 96] an application for time to file written statement was considered to be a step in the proceedings. We have noticed hereinbefore 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 [(1982) 2 SCC 499 : (1983) 1 SCR 95] the distinction between the main proceeding and supplemental proceeding must be borne in mind.”

17. Thus, if the statement of defence is filed by the party, in effect it constitutes a waiver of the arbitration clause. There are various decisions of this Court which hold that in the context of a civil suit, the first statement on the substance of the dispute is the written statement [see ***Sharad P. Jagtiani Vs. Edelweiss Securities Limited, FAO (OS) 188/ 2014 decided on August 7, 2014*** and ***Krishan Radhu v. Emaar MGF Construction Pvt. Ltd. [CS(OS) 3281/2014, decided on 21st December, 2016]***]

18. The difference between the phrases ‘*not later than when submitting*’ and ‘*not later than the date of submitting*’ has been called to question. On behalf of SSIPL, it is argued that the amendment is a conscious amendment. The *date of submitting* in effect, according to SSIPL should mean the *date of*

filing the written statement and hence the limitation for filing of the written statement applies to the filing of a Section 8 application.

19. In the UNCITRAL Model Law, the language of Article 8 reads as under:

“Article 8. Arbitration agreement and substantive claim before court (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.”

20. Thus, the model law was followed in the un-amended Section 8. However, in the amended Section 8, there is a departure. In the un-amended Section 8, it is also settled that the objections as to Section 8 could be contained in the written statement itself [**Sharad P. Jagtiani** (supra)] and it is also settled that a Section 8 application could be moved along with the written statement itself i.e. simultaneously with the written statement [**Krishan Radhu** (supra)]. The question, however, is whether the adding of the words ‘the date of’ means that the date for filing a written statement in a suit would be considered as the limitation period for filing of a Section 8 application.

21. Insofar as this Court is concerned, at least four decisions have been brought to the notice of this Court which have dealt with the amended

Section 8. The first judgment chronologically is a judgment of the Id. Single Judge in **Krishan Radhu** (supra) wherein the Court was dealing with a case where the Section 8 application was filed prior to the amended provision coming into force. In the context of that case, the Court considered that there were three major changes that were introduced in the amended provision and observed as under:

“14. There is no dispute as to the meaning of the words ‘first statement on the substance of the dispute’ used in Section 8 (1) of the Act, either before or after amendment. In the context of civil suit, such expression obviously would mean the ‘written statement’ required to be filed in terms of the provision contained in Order 8 Rule 1 of the Code of Civil Procedure, 1908 (CPC). But, for the purposes of proceedings before other judicial authorities or forums where the Code of Civil Procedure may not strictly apply, it would mean and include the response (or reply) filed by the party against whom action is brought to explain his defences. In Rashtriya Ispat Nigam Ltd. vs. Verma Transport Company, AIR 2006 SC 2800, the Supreme Court observed that this expression must be contra-distinguished with the expression ‘written statement’. It implies submission of the party to the jurisdiction of the judicial authority and, therefore, what is needed is a finding on the part of judicial authority that the party has waived his right to invoke the arbitration clause. If an application is filed before filing the first statement on the substance of the dispute, the party cannot be said to have waived his right or acquiesced himself to the jurisdiction of the court.

15. Noticeably, as a result of the amendment there are three major changes in sub-Section (1) of Section 8. It is now permissible for a person claiming through or under the defendants to claim the benefit of the arbitration clause. The amendment intends to negate

the effect of any judgment or order or decree to the contrary. The third effect of the amendment pertains to cut off date by which the application under Section 8 (1) of the Arbitration and Conciliation Act, 1996 must be presented. Before the amendment, such cut off date was indicated by the words “not later than when submitting (his first statement on the substance of the dispute)”. Under the amended law the words used are “not later than the date of submitting (his first statement on the substance of the dispute)”.

16. Having regard to the plain meaning of the words employed in the pre-amendment on account of arbitration clause contained in Section 8 (1), it appears that the party resisting on account of arbitration agreement the jurisdiction of the forum where the action is brought was permitted to apply for a reference to arbitration even while submitting his reply or written statement. Plainly read, the words “when submitting” would ordinarily imply that such a move under Section 8 (1) could come simultaneous to the filing of the written statement. It arguably could follow that if the written statement were filed and yet simultaneously the defendant was seeking the parties to be referred to arbitration (under the arbitration agreement), the submission of the written statement could not be construed as a waiver of the right to do so, not the least submission, or surrender, or acquiescence to the jurisdiction of the court where the lis was brought.

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”.

18. The provisions of Code of Civil Procedure, 1908 (CPC) regulate the proceedings before the civil court. Order VIII Rule 1 of CPC reads as under:-

“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 same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.”

19. It is clear from the above provision of law that a defendant when called upon to respond to the claim brought by a civil suit and upon being served with the summons is required, by the law, to submit his reply or response in the form of “written statement” within the period of thirty (30) days. So read for purposes of the arbitration law, it is this period which is the period within which “first statement on the substance of the dispute” under the amended law is expected to be submitted. Of course, the period of thirty days is extendable, for just and sufficient reasons to be recorded in writing, naturally upon the prayer to that effect made by the defendant. But the extension of the

period cannot be beyond the maximum period of ninety (90) days in ordinary civil suits. It may be added that by virtue of the amendment incorporated by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, the maximum period for cases involving “commercial dispute” would be one hundred and twenty (120) days of the date of service of the summons.”

22. Thus, as per the above decision, in view of the amended language in Section 8, the limitation for filing of the written statement under CPC for non-commercial suits and under the Commercial Courts Act for commercial suits would be applicable for filing of an application under Section 8. In view thereof, the Court concluded that the maximum period would be 90 days for ordinary civil suits and 120 days for commercial suits.

23. In ***Anil Mahindra v. Surender Kumar Makkar [C.M.(M) 243/2016, decided on 8th November, 2017]***, another Id. Single Judge of this Court while considering a petition under Article 227 wherein the Trial Court had rejected the application under Section 8 as being belated, observed that since the time for filing of the written statement had expired at the time when the Section 8 application was filed, the intention of the Defendant was held to be one for participation in the proceedings and hence the dismissal of the Section 8 application was upheld. The relevant paragraphs of the said judgments are set out herein below:

“14. The trial court by the impugned order has noted that the counsel for the petitioners/defendants appeared on 10.09.2014 and filed vakalatnama and sought adjournment to file written statement. They allowed the extended statutory period prescribed for filing written statement under Order 8 Rule 1 CPC, i.e.

90 days, to expire. Thereafter, the petitioners have filed the present application under Section 8 of the Act. The trial court hence concluded that the act of the petitioners was only an attempt to delay the proceedings.

15. The respondents have clarified that the petitioners were served with summons sometimes much before 13.08.2014. Thereafter, the petitioners have appeared before the court on 10.09.2014 and sought an adjournment to file written statement. The period of 30 days as prescribed under Order 8 Rule 1 CPC had expired. However, the time was given to the petitioners to file written statement within the period prescribed under law. Thereafter, the matter came up for hearing on 18.10.2014 and again 07.11.2014. After the time for filing of the written statement expired, the present application under Section 8 of the Act has been filed.

16. A perusal of the judgment of the Supreme Court in the case of *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors.* (supra), would show that the court had specifically noted that where a party participated in the proceedings, the said party cannot subsequently turn around and say that the matter be referred to arbitration. Whether the party has waived his rights to seek arbitration and subjected itself to jurisdiction of the court would depend on the conduct of the party. In that case, the court specifically noted that unamended Order 8 Rule 1 CPC was dealing with filing of the written statement and the said rule as it then existed did not prescribe any time-limit for filing of the written statement. Factually, in the present case the amended Order 8 Rule 1 CPC is applicable. The petitioners have appeared and sought time to file written statement. Thereafter the petitioners have deliberately let the period of 90 days expire as stated under Order 8 Rule 1 CPC. They have then woken up and filed the present application under Section 8 of the Act.

17. Keeping in view the above legal position, it is

manifest that the petitioners by their conduct have clearly indicated the intention to participate in the suit proceedings. Hence, in my opinion, though for different reasons, the trial court has passed the correct direction.”

24. In ***Parasramka Holdings Pvt. Ltd.*** (supra), the question that arose before the Court was whether the objection as to the existence of the arbitration clause could be taken in the written statement itself. In the said context, the Court considered the amendments to the Act and held that the 120 days’ period for filing of the written statement commenced from the date when the Order VII Rule 11 application had been dismissed. The Id. Single Judge followed the judgment of Id. Division Bench in ***Sharad P. Jagtiani*** (supra) and held that since the Defendant had taken the objection in the written statement itself that there was an arbitration clause and the said written statement was filed within the 120 days period, the parties ought to be referred to arbitration. The Court then observed as under:

“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.”

25. Thereafter, in ***Hughes Communications India Ltd. and Ors.*** (supra), another ld. Single Judge was considering a case in which a Section 8 application was moved after the expiry of 120 days. In fact, Section 8 application was moved on the 130th day from the date of first appearance before the Court. In those circumstances, the Court held as under:

“24. The counsel for the plaintiffs has lastly contended that the defendant in the present case had appeared on 10th July, 2017 when the suit came up first and accepted summons of the suit and kept on filing applications for extension of time for filing the written statement and did not file the written statement till the expiry of 120 days from 10th July, 2017 and whereupon the right of the defendant to file written statement stood closed.

25. It is argued that this application under Section 8 of the Arbitration & Conciliation Act is filed on the 130th day from 10th July, 2017. It is argued that the application under Section 8 of the Arbitration & Conciliation Act does not lie after the right to file

written statement has been closed. Reliance in this regard is placed on *Anil Mahindra & Anr. Vs. Surender Kumar Makkar & Anr.* 2017 SCC OnLine Del 11532 where this Court has reasoned that the petitioners therein having appeared and sought time to file written statement and having thereafter deliberately let the period of 90 days expire, could not have thereafter woken up and filed the application under Section 8 of the Arbitration & Conciliation Act. 26. The language of Section 8 of the Arbitration & Conciliation Act 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 or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists. (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof: Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying

the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

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

does not permit any such interpretation.

27. The judgment in Anil Mahindra supra where this Court in exercise of jurisdiction under Article 227 of the Constitution of India has refused to interfere with the order of the Court below does not discuss the said aspect and cannot be said to be a precedent binding a co-ordinate Bench. The only limitation in Section 8 of the Arbitration & Conciliation Act as distinct from Section 21 of the 1940 Act is that the application is required to be filed “not later than the date of submitting first statement on the substance of the dispute”. Merely because the defendant may have sought time to file written statement, has not been made a ground under the 1996 Act for refusing reference to arbitration as it was under the 1940 Act. Similarly, the closure of the defence or striking off of the defence of the defendant is also not made a ground for rejection of the application under Section 8 of the Arbitration & Conciliation Act. It is also not as if the defendant has allowed any proceedings in the suit to take place after the time for filing the written statement expired, for it to be said that the defendant has allowed the suit to go beyond the stage of written statement. In fact, till date there is no order also of striking off the defence of the defendant or closing the right of the defendant to file the written statement.”

26. In ***Hughes Communication India Ltd. and Ors.*** (supra), the Court was of the opinion that the only limitation that can be read for filing of the Section 8 application was as contained in the provision itself i.e. not later

than the date of submitting first statement on the substance of dispute. The Court then held that the fact that the time for filing of the written statement has expired, would not bar the filing of Section 8 application and referred the parties to arbitration. The Id. Single Judge appears to have cited with approval the judgment of Id. Division Bench of the Madras High Court in *M/s Sri Ragavendra Advertising* (supra). However, it is relevant to point out that *M/s Sri Ragavendra Advertising* (supra) was under the unamended Section 8.

27. Thus, before going into the question as to whether there is a limitation period prescribed for filing of the Section 8 application, this Court wishes to examine the significance of the amendment in the provision, if any. As observed earlier, under the unamended provision, the objection as to the existence of the arbitration clause could be taken anytime (i) prior to the filing of the written statement (ii) in the written statement (iii) along with the written statement. So long as the written statement was not filed, Section 8 application could be filed. The Legislature has now made a conscious change by using the language “not later than the date of”. The use of the word ‘date’ itself signifies precision. A perusal of the various amendments brought about in 2016 Amendment Act show that the intention was to tighten the time limit within which arbitration proceedings should commence and conclude. For example, under Section 9, previously, no limitation was fixed for commencement for invoking arbitration after seeking interim relief. However, in the amended provision, within 90 days after the interim order is passed, the arbitral proceedings have to be commenced. Similar amendments have been brought about in Section 11. Section 29A provides that the award in matters other than international

commercial arbitration may be made as expeditiously as possible and an endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings. Section 29 B provides for the adoption of a fast track procedure and the award under this section shall be made within a period of six months from the date of the arbitral tribunal enters upon the reference. Thus, the entire emphasis in the 2016 amendments have been to speeden arbitral proceedings. It is in this context that the change of language in Section 8 from “when” to the “date of” is to be construed. In the opinion of this Court, the words ‘not later than the date of submitting’ means that the date of submitting the statement on the substance of the dispute i.e. the written statement in a civil suit, is the outer limit for filing of a Section 8. Hence, in effect, there is a limitation period which is prescribed.

28. In ***Booz Allen and Hamilton Inc.*** (*supra*), the Supreme Court while dealing with the unamended Section 8 observed as under:

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

30. When plaintiffs file applications for interim relief like appointment of a receiver or grant of a temporary injunction, the defendants have to contest the application. Such contest may even lead to appeals and revisions where there may be even stay of further proceedings in the suit. If supplemental proceedings like applications for temporary injunction on appointment of Receiver, have been pending for a considerable time and a defendant has been contesting such supplemental proceedings, it cannot be said that the defendant has lost the right to seek reference to arbitration. At the relevant time, the unamended Rule 1 of Order VIII of the Code was governing the filing of written statements and the said rule did not prescribe any time- limit for filing written statement. In such a situation, mere passage of time between the date of entering appearance and date of filing the application under Section 8 of the Act, cannot lead to an inference that a defendant subjected himself to the jurisdiction of the court for adjudication of the main dispute.

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

As per the above findings of the Supreme Court, though the Court found that there was no time limit fixed for filing an application under Section 8, there was an obligation to move such an application “*at the earliest*”. Under the unamended provision, if parties were contesting supplemental proceedings or were in talks of settlement etc., a Section 8 application could be moved

anytime before the filing of the written statement. While in the unamended provision, the emphasis was on filing of the first statement on the substance of the dispute, now the emphasis is on the date of submitting the first statement. Under the unamended Act, the same was a period and that too an unascertained period, it is not so under the amended Act.

29. The amendment also has to be viewed in the background of the various legislative amendments which have been brought about in the Code of Civil Procedure (CPC) as also the Commercial Courts Act. In the CPC, for civil suits, an outer limit of 90 days has been fixed for filing of the written statement which is condonable in terms of the principles laid down in *Krishan Radhu* (supra) and *Salem Advocate Bar Association, Tamil Nadu Vs. Union of India [SC Writ Petition (Civil) Nos. 496 and 570 of 2002, Decided On: 2nd of August, 2005]*. However, in commercial suits, the outer limit of 120 days for filing of the written statement has been held to be mandatory in *M/s SCG Contracts India Pvt. Ltd. V/s. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors. (Civil Appeal No. 1638 of 2019 arising out of S.L.P (C) No. 103/2019, Decided On: 12.02.2019)*

30. Viewed in the background of the amendments in the CPC including the recent amendments in CPC in the context of the Commercial Courts Act, 2015 and the amendments in the Arbitration Act, 2016, this Court concludes that the amendment is a conscious step towards prescribing a limitation period for filing the Section 8 application. The mention of the word “date” in the amended provision means that it is a precise date and usually incapable of ambiguity. The same is a crystalized date and not a ‘period’ prior to the filing of the first statement on the substance of the dispute. The entire intention is that those parties who wish to proceed for arbitration ought to do so with

alacrity and speed and not merely procrastinate.

31. Thus this Court is in agreement with the views taken by the Id. Single Judges in ***Krishan Radhu*** (supra), ***Anil Mahindra*** (supra) and ***Parasramka Holdings Pvt. Ltd.*** (supra). The arbitration clause, can thus be waived by a party under dual circumstances – one by filing of a statement of defence or submitting to jurisdiction and secondly, by unduly delaying the filing of the application under Section 8 by not filing the same till the date by which the statement of defence could have been filed. Under both these situations, there can be no reference to arbitration.

32. In the present case, the Defendants were served on April 23, 2018. Vide order dated 16th May, 2018, the Joint Registrar granted time to file the written statement which they did not do and on 13th July, 2018, the following order was passed:

“CS/COMM 735/2018

Defendants failed to file written statement.
Opportunity closed.

It is submitted by learned counsel for plaintiff that he is going to file some relevant documents regarding insolvency proceeding against D-1. Let same be filed.

Matter be put up before Hon'ble Court for further directions on 16.8.18.”

33. Thus, the opportunity for filing the written statement was closed on 13th July, 2018. The Defendants sought to justify the non-filing of the written statement by arguing that insolvency proceedings had commenced on 17th May, 2018. The service in the present case on the Defendants took place on 23rd April, 2018 as per the proof of delivery in the Court record. From 23rd April, 2018, the time of 30 days for filing the written statement

expired on 23rd May, 2018. The Defendants did not move any application to bring to the knowledge of this Court that insolvency proceedings were underway. Thus, on 13th July, 2018, the opportunity to file the written statement was closed. Even thereafter, on 16th August, 2018, the submission before the Court was recorded as under:

“Parties shall place on record copy of the order passed by the NCLT in respect of the insolvency proceedings, initiated against Defendant No.1. Learned counsel for Plaintiff further submits that the Defendant No.1 has challenged the order of NCLT before the NCLAT. All the relevant orders shall be produced before this Court. Plaintiff shall also bring on record the copy of the claim filed by it before the IRP under the Insolvency and Bankruptcy Code on the next date.

List on 31st August, 2018.”

On 31st August, 2018, the Court was informed that the matter is pending before the NCLAT and the moratorium comes to end on 18th November, 2018. Finally, it is recorded on 6th December, 2018 as under:

“Learned counsel for the Defendants submits that the moratorium period under the Insolvency and Bankruptcy Code, came to end on 8th October, 2018. He submits that he has moved an application under Section 8 of the Arbitration and Conciliation Act, 1996. Learned Senior Counsel for Plaintiff submits that the time for filing section 8 application has already elapsed. Let the application under Section 8 be got listed and Reply be filed to the same within 4 weeks.

List for hearing on 22nd February, 2019.”

A perusal of the above order shows that even after moratorium period came to an end on 8th October, 2018, the Defendants had adequate opportunity to

file the applications under Section 8. However, they merely chose to file some applications without an affidavit on 2nd November, 2018 and did not remove objections till 11th February, 2019. Even if the period when the insolvency proceedings were underway are deducted from the total period for filing of the written statement, it is clear that the applications was finally filed on 11th February, 2019 which is after the expiry of 120 days from 8th October, 2018 (when the moratorium period came to an end). In *M/s SCG Contracts India Pvt. Ltd. (supra)* the Supreme Court held that the period of 120 days for filing of the written statement in commercial suits is mandatory. The Defendant cannot defeat the intention behind the amendments in the Civil Procedure Code and the Arbitration Act, by choosing to file a Section 8 application at its own sweet will.

34. In the overall facts and circumstances therefore, it is clear that the Defendants did not file the applications under Section 8 within the prescribed period and in any case even as per *Booz Allen and Hamilton Inc. (supra)*, they were not filed at the earliest.

35. Under these circumstances, the applications under Section 8 along with the other pending applications are dismissed.

36. List before the Roster Bench for further proceedings on 12th May, 2020.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 19, 2020

Rahul/RC.