

**Chief Justice's Court**

**Case :-** APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 408 of 2024

**Appellant :-** Atul Pratap Singh

**Respondent :-** Indian Oil Corporation Limited and 3 Others

**Counsel for Appellant :-** Tarun Agrawal, Yash Padia

**Counsel for Respondent :-** Chandan Sharma, Devi Shanker Shukla

**Hon'ble Arun Bhansali, Chief Justice**

**Hon'ble Vikas Budhwar, J.**

(Per: Arun Bhansali, CJ)

1. This appeal is directed against order dated 23.08.2024 passed by Commercial Court, Jhansi, whereby the application filed by the appellant under Section 8 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for referring the matter to the arbitration has been dismissed.

2. A suit for recovery of a sum of Rs.33,27,858/- along with interest came to be filed by respondent no.1-plaintiff *inter alia* with the submissions that a retail outlet in the name of M/s Kamadgiri Filling Station at Khoh, District Chitrakoot was being operated by Sri Balendu Kumar Singh and the lease of the RO is valid upto 06.06.2030. Owing to the demise of Sri Balendu Kumar Singh on 16.08.2022, a dispute arose between his legal heirs i.e. the appellant and respondent nos. 3 and 4 but even before that the retail outlet ceased its operations from 17.07.2022. It is claimed that the defendants had purchased petrol and diesel from the plaintiff on three different days before the operations of the RO ceased and, therefore, the suit amount was due from them.

3. It was claimed that by letter dated 23.9.2022, the defendants admitted that due to ongoing family dispute, they were not able to operate the RO. A notice was issued for making payment of the outstanding, however, the amount has not been paid and, therefore, plaintiff is left with no choice but to file the suit.

4. Further reference was made to the proceedings initiated by the appellant herein in filing a writ petition before the High Court and also a contempt petition and that the writ petition was disposed of and the contempt petition was dismissed. Based on the said submissions, prayer was made for decreeing the suit along with interest.

5. The appellant-defendant no.3 filed an application under Section 8 of the Act *inter alia* with the submissions that the suit is based on dealership agreement dated 01.04.2016 and as per the said agreement, an arbitration clause being Clause 61 exists and in view of a clear and unequivocal clause in the agreement dated 01.04.2016, it is imperative that the dispute raised before the Court be referred to arbitration. It was indicated that the application has been filed at the first instance without any delay before submitting his first statement on the dispute. Based on the said submissions, it was prayed that the parties be referred to arbitration in accordance with arbitration clause and the suit be dismissed.

6. The application was contested by the plaintiff with the submissions that the same has been filed to delay the proceedings, the applicant is not a signatory to the dealership agreement dated 01.04.2016 and, therefore, he has no *locus-standi* to file application under Section 8 of the Act. The applicant has himself violated the arbitration clause by approaching the High Court and, therefore, the matter cannot be referred to arbitration. Submissions were made that an undertaking was given before the High Court to abide by letter dated 12.09.2022 and that arbitrator lacks the power to execute the order of the High Court and the same is not covered by arbitration clause and, therefore, the application be dismissed.

7. The Commercial Court, after hearing the parties, came to the conclusion that the plea regarding the appellant lacking *locus standi* to file the application has no substance. On the aspect that there was no arbitrable dispute, the Commercial Court indicated that the appellant had filed Writ Petition No. 35050 of 2022, wherein it was submitted on his behalf that he was ready and willing to comply with the letter of

Corporation dated 12.09.2022 and accordingly, the writ petition was disposed of. It was also noticed that the appellant had filed a contempt petition, wherein also a submission was made that the amount would be deposited within 72 hours, however, the amount was not deposited, leading to filing of the suit for recovery. The Commercial Court further observed that in the application which has been filed seeking reference of the dispute to arbitration, the appellant has nowhere disputed the outstanding amount as claimed by the plaintiff against the defendants and has merely relied on the arbitration clause. Whereafter referring to the judgement of Hon'ble Supreme Court in **Union of India vs. Birla Cotton Spinning and Weaving Mills Ltd. : AIR 1967 SC 688** came to the conclusion that the appellant has never disputed the amount claimed by the plaintiff and even assured before the Court in the writ petition filed by him for payment of the same and the dispute is only among the legal heirs for which a civil suit is pending between them. The Commercial Court concluded that there was no arbitrable dispute as the claim made by the plaintiff has not been disputed by the defendants and consequently, dismissed the application.

8. Learned counsel for the appellant made vehement submissions that the rejection of application by the Commercial Court is contrary to the settled legal position, wherein on an application filed under Section 8 of the Act, the Court is bound to refer the parties to arbitration. The Commercial Court though came to the conclusion that the arbitration clause exists in the dealership agreement under which the amount was being claimed and that the appellant had the *locus standi* to move the application under Section 8 of the Act, however, wrongly came to the conclusion that there was no arbitrable dispute.

9. Submissions have been made that the Court while deciding his application under Section 8 of the Act does not have the jurisdiction to decide the arbitrability of the dispute as has been laid down by Hon'ble Supreme Court in **Vidya Drolia and others vs. Durga Trading**

**Corporation : (2021) 2 SCC 1** and as such, the plea raised by the respondent Corporation regarding absence of arbitrable dispute and the observations made by the Commercial Court are wholly without jurisdiction and, therefore, the rejection on the said count deserves to be set aside.

10. Further submissions have been made that the reliance placed on the proceedings of the writ petition as well as the contempt proceeding, cannot be looked into at the stage of Section 8 application and the determination pertaining to the implication, if any, can only be made by the arbitrator and, therefore, the rejection of the application is not justified.

11. Learned counsel appearing for the Corporation supported the order impugned. It was submitted that in the writ petition filed by the respondent, specific admission was made, rather it was indicated that the appellant was ready and willing to comply with the demand made by the Corporation regarding the outstanding based on which the writ petition came to be disposed of. Further, on a modification application which was filed, parties to the inter se dispute between brothers were referred to mediation. Even the contempt proceedings, which were filed seeking the Corporation to reconstitute the dealership in the name of appellant also came to be dismissed and, therefore, in view of specific admissions, pertaining to the liability, qua the subject matter of suit, in absence of any arbitral dispute, the application has been rightly rejected.

12. We have considered the submissions made by learned counsel for the parties and have perused the material available on record.

13. The Commercial Court rejected the application filed under Section 8 of the Act by the appellant on account of the fact that in the application, the appellant had nowhere disputed the outstanding amount as claimed by the plaintiff against the defendants and simply mentioned that as there is arbitration clause, the parties be referred for arbitration and in view of the

assurance given before the High Court regarding making payment, there did not exist any arbitral dispute.

14. Provisions of Section 8 insofar as relevant *inter alia* read as under:

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

A bare perusal of the above would reveal that on an action being brought in a matter which is the subject matter of arbitration agreement, if a party to the arbitration agreement applies not later than the date of submitting his first statement on the substance of the dispute, a judicial authority is required to refer the parties to arbitration. The only restriction is unless it finds that prima facie no valid arbitration agreement exists.

15. The provision nowhere requires that while filing the application under Section 8 of the Act, the applicant is required to dispute the contents of the plaint. The very fact that an application is filed seeking reference to arbitration, necessarily means that the applicant wants to contest the suit/claim but before the arbitrator. In fact, no such submissions are required to be made as in case, the averments contained in the plaint are disputed, the same may be taken as submission of statement on the substance of the dispute and, therefore, the reason indicated by the Commercial Court regarding the appellant not disputing his liability in the application under Section 8 of the Act for rejecting the said application, cannot be sustained.

16. So far as the issue of existence of arbitrable dispute is concerned, Hon’ble Supreme Court in the case of **Vidya Drolia (supra)**, the Court noticed the issues before it and answered the aspect, relevant to the present case, as under:

“2. A deeper consideration of the order of reference reveals that the issues required to be answered relate to two aspects that are distinct and yet interconnected, namely:

2.1. (i) Meaning of non-arbitrability and when the subject-matter of the dispute is not capable of being resolved through arbitration.

2.2. (ii) The conundrum – “who decides” – whether the court at the reference stage or the Arbitral Tribunal in the arbitration proceedings would decide the question of non-arbitrability.

2.3. The second aspect also relates to the scope and ambit of jurisdiction of the court at the referral stage when an objection of non-arbitrability is raised to an application under Section 8 or 11 of the Arbitration and Conciliation Act, 1996 (for short, the ‘Arbitration Act’).”

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**154.** Discussion under the heading “Who decides Arbitrability?” can be crystallized as under:

**154.1.** Ratio of the decision in *Patel Engineering Ltd.* on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

**154.2.** Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

**154.3.** The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

**154.4.** Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in

summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

155. Reference is, accordingly, answered.”

A perusal of the above determination reveals that the scope of judicial review and jurisdiction of the Court under Sections 8 and 11 of the Act is identical but extremely limited and restricted and rarely a Court may interfere at Sections 8 and 11 stage. The Court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable, when consideration in summary proceedings would be insufficient and inconclusive.

17. In the present case, the suit has been filed against three legal representatives of deceased dealer late Balendu Kumar Singh, when the appellant approached the High Court against the notice issued for recovery, by filing the writ petition, the petition came to be disposed of by observing and directing as under:

“4. Aggrieved with the aforesaid letter, the petitioner has filed the present writ petition. It is stated by the learned counsel for the petitioner that a Civil Suit has been filed by the impleadment applicant for cancellation of alleged Will executed by the deceased.

5. Learned counsel for the petitioner submits that the petitioner is ready and willing to comply with the letter of respondent No.3 dated 12.09.2022.

6. In view of the aforesaid, we find that no cause of action survives in the present case inasmuch as the petitioner himself intent to comply with the letter of respondent No.3 dated 12.09.2022.

7. It is made clear that even if the petitioner comply with the letter of respondent No.3 dated 12.09.2022 and the respondent No.2 allow the operation of the retail outlet in question by him, the same shall be subject to the result of the pending Civil Suit No.32 of 2023 (Vipul Pratap Singh Vs. Atul Pratap Singh before the Civil Judge (Senior Division), Chitrakoot.

8. With the aforesaid observation, the writ petition is **disposed of**.

9. The impleadment application is also **disposed of.**”

The indication made in para-7 above that ‘if payment is made and the appellant is permitted to operate the retail outlet in question’, necessarily means that the submissions made were only in the nature of a proposal and the same cannot be used to claim non arbitrability of the dispute between the parties. The very fact that a contempt petition was filed which after certain proceedings, was dismissed, also is a pointer towards the existence of a dispute between the parties despite submissions made and orders passed in the writ petition.

18. So far as the reliance placed on the judgement in **Birla Cotton Spinning and Weaving Mills Ltd. (supra)** by the Commercial Court is concerned, the observations made therein are very clear wherein the Court came to the conclusion that the dispute raised was not in respect of the liability under the terms of the contract which included the arbitration clause, which is not the case here, as to the said extent, the Commercial Court has held in favour of the appellant.

19. In the above circumstances, the finding recorded by the Commercial Court regarding non-arbitrability of the dispute cannot be sustained both on the ground of determination as made and the jurisdiction as laid down by Hon’ble Supreme Court in the case of **Vidya Drolia (supra)**.

20. In view of the above discussion, the appeal is allowed. Order dated 23.08.2024 passed by the Commercial Court, Jhansi in O.S. No. 01/2024 is set aside. The suit filed by the respondent Corporation is terminated. The parties are referred to arbitration in terms of Clause 61 of the agreement dated 01.04.2016. It is clarified that all rights and contentions of the parties including the question of arbitrability of the disputes are reserved.

**Order Date :-** 22.10.2024

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(Vikas Budhwar, J) (Arun Bhansali, CJ)