

THE HON'BLE SMT JUSTICE MOUSHUMI BHATTACHARYA

AND

THE HON'BLE SMT JUSTICE M.G.PRIYADARSINI

C.R.P.NO.1516 OF 2024

ORDER: *(Per Hon'ble Justice Moushumi Bhattacharya)*

This Civil Revision Petition arises out of an order passed by the Trial Court dated 15.04.2024 referring the parties to arbitration. The order was passed in an application filed by the respondents (defendants) under section 8(1) of The Arbitration and Conciliation Act, 1996. The plaintiff filed a Suit for dissolution of partnership in the Trial Court.

2. The Trial Court relied on the written statement filed by the respondents and was of the view that a separate application was not required to be filed under section 8(1) of the 1996 Act for referring the parties to arbitration.

3. Learned counsel appearing for the petitioners (plaintiff in the Trial Court) refers to certain admitted dates and submits that the application under section 8(1) of the 1996 Act was filed more than 10 years after the respondent No.1/defendant No.1's written statement in the Suit.

4. Learned counsel appearing for the respondents urges, on the other hand, that the respondents (defendant Nos.1-4, 6-8 and 10) had referred to the arbitration clause in their written statement which alone should have been held to be sufficient for referring the parties to arbitration.

5. Notwithstanding the fact that both the parties have primarily referred to the merits of the Suit and the defence raised in the written statement, the only question which falls for adjudication before us is whether the respondents complied with the statutory mandate of section 8(1) of the 1996 Act in so far as filing of an application for referring the parties to arbitration within the window contemplated in section 8(1) of the said Act. We must also mention that an appeal under Section 37(1) of the 1996 Act does not lie from an order referring the parties to arbitration under Section 8 of the Act.

6. The admitted dates which are relevant to answering the question are as follows:

7. The petitioner filed a Suit for Dissolution of Partnership and for appointment of Receiver for managing the partnership business on 17.09.2012. The respondent No.1 filed its written statement on 20.02.2013. The Suit was renumbered after

bifurcation of the State as O.S.No.841 of 2022. The respondents thereafter filed the application for referring of the parties to Arbitration on 21.12.2023.

8. Hence, it is undisputed that the application was filed more than 10 years after the filing of the written statement.

9. Section 8(1) of The Arbitration and Conciliation Act, 1996, was inserted in the Act w.r.e.f. 23.10.2015 and casts a statutory mandate on a judicial authority to refer the parties to arbitration on an application being made before it, provided the application is made “not later than the date of submitting the first statement on the substance of the dispute...”.

Section 8(1), post-substitution, reads 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.”

The changes inserted in section 8(1) are not relevant for the purpose of the present adjudication.

10. The mandate on the judicial authority however is absolute in the sense that the party to an arbitration agreement, or any person claiming through or under him/her, must file an application for referring the parties to arbitration on or before filing of the “first statement” as a substantive response to the dispute. On such application being made, the judicial authority would be divested of any discretion in the matter and would be under an obligation to refer the parties to arbitration regardless of any judgment, decree or order of the Supreme Court or any other Court. The reference would be subject to the existence of a valid arbitration agreement between the parties.

11. Section 8(2) of the 1996 Act requires the party/person making an application to file the original Arbitration Agreement or a duly certified copy of the same to be filed along with the application under section 8(1) of the 1996 Act.

12. Section 8(1) of the 1996 Act forms the issue before us i.e., whether the Trial Court correctly referred the parties to arbitration by allowing the respondents’ application under section 8(1) notwithstanding the admitted fact of the

respondents filing the said application on 21.12.2023 after filing the written statement on 20.02.2013. In essence, the respondent filed the application under section 8(1) after filing the first statement to the merits of the dispute.

13. Since the “first statement” being equated to the written statement filed in a Suit is judicially settled, we only propose to deal with the issue of whether the parties can be referred to arbitration without a formal application being made in that regard.

14. The Trial Court held in the impugned order that no formal application is required under section 8(1). We find this view to be erroneous for the following reasons.

15. First and foremost, section 8(1) uses the words “so *applies*” which would mean that a party is required to make a formal application for referring the parties to arbitration.

16. The other indications bolstering our view are:

- (i) The implied timeline fixed in section 8(1) presumes filing of an application and for the application to be made before filing of the first statement to the dispute.

(ii) Construing the words “*so applies*” in section 8(1) in any other manner would render the express time-frame completely meaningless.

(iii) Further “*so applies*” indicates a positive act, not an act lost or merged with the first statement to the dispute.

(iv) Section 8(2) refers to “the application” in section 8(1) and the requirement of filing such application in proper form.

17. Second, the Trial Court accepted the respondent’s reference to the arbitration agreement in the written statement as being sufficient for the purpose of section 8(1) of the 1996 Act.

18. We disagree with the above finding.

19. The requirement of filing a separate application under section 8(1) is distinct to and independent of the first statement to the substance of the dispute. This has already been discussed above. Second, a reference to the arbitration clause in the written statement, simpliciter, does not satisfy the rigour of section 8(1) in terms of making a separate application for referring the parties to arbitration. We rely on the framing of

section 8(1) and the specific words used therein, particularly the words “*so applies*”.

20. We find that the respondent No.1 referred to the arbitration clause in the written statement and objected to the maintainability of the Suit. However, the objection would not absolve the respondent No.1 from the discipline of filing an application under section 8(1). The respondent No.1 obviously acquiesced and took the timeframe of section 8(1) for granted by making an application after 10 years.

21. We also find it strange that the Trial Court dwelt at length on the written statement mentioning the arbitration clause when it had the application under section 8(1) before it, based on which the impugned order was pronounced. The Trial Court’s reasoning that no progress was made in the Suit or that the Suit being ideally-suited to arbitration are irrelevant to the issue of whether the parties should be referred to arbitration under section 8(1) of the 1996 Act.

22. We should also add that there is a salutary purpose to the timeline contemplated under section 8(1) of the 1996 Act. The requirement of the party/person making an application for referring the parties to arbitration before answering to the

merits of the dispute signifies that the party objects to the jurisdiction of the Court at the very first instance. Therefore, the party raising the objection and refusing to submit to the jurisdiction of the Court on the ground of a valid arbitration agreement covering the entirety of the dispute must act with diligence and promptitude. The party cannot file a substantive written/first statement on the merits of the dispute, sit back and only thereafter apply to the Court for referring the parties to arbitration. It is a matter of firmness of purpose and of electing the forum without blowing hot and cold.

23. In *Sharad P. Jagtiani v. M/s. Edelweiss Securities Limited*¹, a Division Bench of the Delhi High Court relied on the preliminary objection raised in the written statement pertaining to the arbitration agreement and held that the same can be treated as an application under section 8(1) of the 1996 Act. *Sharad P. Jagtiani's* case was recently followed by a Single Bench of the Delhi High Court in *Madhu Sudan Sharma v. Omaxe Ltd.*², where the Court held that the requirement of making an application under section 8(1) is more a requirement of form than of substance and the more relevant issue was

¹ 2014 SCC Online Del 949 : (2014) 208 DLT 487 : (2014)2 Arb LR 136

² 2023 SCC Online Del 7136

whether there existed a valid arbitration agreement between the parties.

24. This Court respectfully disagrees with the view taken by the Delhi High Court in *Sharad P. Jagtiani and Madhu Sudan Sharma* on the construction of section 8(1) of the Act and also to the view that the jurisdiction of a Civil Court is obliterated the moment the arbitration agreement is brought to its notice in the written statement without the necessity of a formal application under section 8(1).

25. The construction of section 8(1) and the necessity for making a formal and separate application for referring the parties to arbitration has already been discussed above. We are of the view that a Court being denuded of jurisdiction is no small matter and must be premised on a positive act by a party to an agreement to divest the Court of its jurisdiction. The ousting of jurisdiction cannot be for the asking or taken lightly and certainly not be made at any point of time circumventing the rigour of section 8(1) of the 1996 Act. Permitting a party to raise the bogey or boon of arbitration at any point of time without the sanctity of time-limits or form would result in thwarting of processes and disruption of procedure. The

resulting uncertainty would be inimical to the quietus which is the end-point of any action filed in a Court of law.

26. In any event, an absolute proposition in favour of reference to arbitration which is entirely dependent on the choice of party with regard to the timing or form is fraught with unjust consequences including abuse of process.

27. Whether the facts in the dispute are amenable to arbitration is not relevant for a decision in section 8(1) of the 1996 Act. The referral Court has only to see whether the statutory indicators/requirements have been satisfied by the party who brings an application to the Court under section 8(1) of the 1996 Act for referring the parties to arbitration.

28. In the facts of the present case, the respondents have failed on this count. The respondents/defendants have made that application not only at an extremely belated stage but clearly after filing of the first statement, which is the written statement filed before the Trial Court. We hence do not find any reason to accept the arguments made on behalf of the respondents. This is purely on a question of law.

29. We accordingly set aside the impugned order dated 15.04.2024 and allow the Civil Revision Petition.

30. C.R.P.No.1516 of 2024 is allowed and disposed of in view of the above reasons. The impugned order dated 15.04.2024 is accordingly set aside.

Miscellaneous applications if any pending shall stand closed. There shall be no order as to costs.

MOUSHUMI BHATTACHARYA, J

M.G.PRIYADARSINI, J

12th July 2024
RRB/BMS