IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 10188 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 9972 of 2023
With
CIVIL APPLICATION (FOR INTERIM RELIEF) NO. 1 of 2024
In R/SPECIAL CIVIL APPLICATION NO. 9972 of 2023
With
CIVIL APPLICATION (FOR JOINING PARTY) NO. 1 of 2023
In R/SPECIAL CIVIL APPLICATION NO. 9972 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 9673 of 2023
With
CIVIL APPLICATION (FOR INTERIM RELIEF) NO. 1 of 2024
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With
CIVIL APPLICATION (FOR JOINING PARTY) NO. 1 of 2023
In R/SPECIAL CIVIL APPLICATION NO. 9673 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J. C. DOSHI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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PRABHUDAS JESANGBHAI PATEL
Versus
VINODBHAI MOHANBHAI TOGADIYA

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Appearance:
MR SHALIN MEHTA, SENIOR ADVOCATE WITH MR MJ PARIKH(577) for the Petitioner(s) No. 1
MS DIMPLE M PARIKH(7500) for the Petitioner(s) No. 1
MR BJ TRIVEDI(921) for the Respondent(s) No. 1
MS JIGNASA B TRIVEDI(3090) for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE J. C. DOSHI**

Date : 08/08/2024
COMMON CAV JUDGMENT

1. Rule. Learned advocate Mr.Brijesh Trivedi waives service of Rule for the respondents in all three petitions. In all these three Special Civil Applications, facts in dispute are same, therefore, with the consent of learned advocates for both sides, all three petitions are taken up for final hearing and are disposed of by this common order.

2. Special Civil Application No.9673 of 2023 is taken up as lead matter. The facts of the each case leading to filing of the present petitions are as under.

2.1 Facts of Special Civil Application No.10188 of 2023 :

The petitioner has filed Regular Civil Suit No.631 of 2022 before learned City Civil Court for cancellation of registered Power of Attorney dated 05.03.2010 in favour of the respondent. The respondent filed written statement to the plaint and also filed application under Order 7 Rule 11 of Code of Civil Procedure, 1908 (for short 'CPC') to reject the plaint. Petitioner filed reply to said application and also produced the Partnership Deed. Learned Trial Court rejected the application of the respondent for rejection of the plaint vide order dated 23.11.2022. The respondent challenged the said order before this Court by filing Civil Revision Application which was later on withdrawn on 23.01.2023. Thereafter, the respondent filed another application under Order 14 of CPC for framing of preliminary issue. The respondent then also filed application

under Section 8 of the Arbitration and Conciliation Act, 1996 before learned City Civil Court and learned City Civil Court allowed the said application vide order dated 29.04.2023 and disposed of the suit relying upon the arbitration clause in partnership deed. Hence, the present petition.

2.2 Facts of Special Civil Application No.9972 of 2023 :

The petitioner has filed Regular Civil Suit No.632 of 2022 before learned City Civil Court for cancellation of registered Sale Deed executed by respondent No.1 in favour of the respondent Nos.2 to 7. The respondents filed written statement to the plaint and also filed application under Order 7 Rule 11 of CPC to reject the plaint. Petitioner filed reply to said application and also produced the Partnership Deed. Learned Trial Court rejected the application of the respondent for rejection of the plaint vide order dated 23.11.2022. The respondent challenged the said order before this Court by filing Civil Revision Application which was later on withdrawn on 23.01.2023. Thereafter, the respondent filed another application under Order 14 of CPC for framing of preliminary issue. The respondent filed another application under Section 8 of the Act of 1996 before learned City Civil Court and learned City Civil Court allowed the said application vide order dated 29.04.2023 and disposed of the suit relying upon the arbitration clause in partnership deed. Hence, the present petition.

2.3 Facts of Special Civil Application No.9673 of 2023 :

The petitioner has filed Regular Civil Suit No.1292 of 2022 before learned City Civil Court for cancellation of registered Sale

Deed dated 14.07.2022 executed by respondent No.1 in favour of respondent No.2. The respondent filed written statement to the plaint and also filed application under Order 7 Rule 11 of CPC to reject the plaint. Petitioner filed reply to said application and also produced the Partnership Deed. Learned Trial Court rejected the application of the respondents for rejection of the plaint vide order dated 23.11.2022. The respondent challenged the said order before this Court by filing Civil Revision Application which was later on withdrawn on 23.01.2023. Thereafter, the respondent filed another application under Order 14 of CPC for framing of preliminary issue. The respondent filed third application under Section 8 of the Act of 1996 before learned City Civil Court and learned City Civil Court allowed the said application vide order dated 29.04.2023 and disposed of the suit relying upon the arbitration clause in partnership deed. Hence, the present petition.

3. Heard learned Senior Counsel Mr.Shalin Mehta along with learned advocate Mr.M.J.Parikh appearing for the petitioners and learned advocate Mr.Brijesh Trivedi appearing for the respondents.

4. In essence, the petitioners challenges the order passed by learned City Civil Court under Section 8 of the Arbitration and Conciliation Act, 1996 (in short 'Act of 1996') whereby learned City Civil Court believed that the dispute raised in the respective suits are arbitrable and as the Partnership Deed executed between the parties contains arbitration clause, the Civil Court is no longer enjoying the jurisdiction to decide the dispute. Consequently, the learned City Civil Court has discontinued the

suit proceedings and referred the parties for the arbitration proceedings.

5. Learned Senior Counsel Mr.Shalin Mehta referring to Section 8 of the Act of 1996 would submit that the power of the Civil Court to refer the parties to arbitration is limited to the date of submitting the first statement on substance of dispute. He would submit that if the party defendant facing the suit proceedings did not raise that in view of Section 8 of the Act of 1996, the Civil Court has no jurisdiction to decide said application as relief prayed to refer dispute for arbitration. If party defendant did not raise the contention to refer dispute to the arbitration before filing first statement on the substance of dispute, it is to be believed that he has submitted to the jurisdiction of the Civil Court and thereafter he cannot move the Court under Section 8 of the Act of 1996 to refer the matter for arbitration. He would further submit that in present case the suit is filed for cancellation of the registered Power of Attorney dated 05.03.2010 in favour of the respondent Vinodbhai Mohanbhai Togadiya on various grounds stated in the plaint and the cancellation of the registered Sale Deed which was executed by the Power of Attorney holder of the petitioner. The first suit was Regular Civil Suit No.631 of 2022. As the sale deed was executed by the power of attorney holder, the second suit was filed being Regular Civil Suit No.632 of 2022 and since again a sale has been made, third suit has been filed being Regular Civil Suit No.1292 of 2022.

6. To set out the dates and events in the proceedings, learned Senior Counsel would submit that on 11.06.2022 the first suit

was filed. The respondent filed written statement in the said plaint on 22.06.2022 and also filed application under Order 7 Rule 11 of CPC to reject the plaint on various grounds on very same date. He would further submit that on 14.07.2022 the petitioner has filed reply to the application filed by the respondent seeking rejection of the plaint and also produced the copy of the Partnership Deed. He would further submit that on 23.11.2022 the City Civil Court rejected the application of the rejection of the plaint. On 23.01.2023 the respondents herein have filed Civil Revision Application before this Court and same was withdrawn as this Court was not inclined to entertain the same. Learned Senior Counsel would submit that thereafter another application was moved in the civil suit on 06.02.2023 under Order 14 of CPC to frame the preliminary issue. Taking this Court through the suit proceedings, he would further submit that in the interregnum period i.e. during the hearing of notice of motion, the respondent insisted to produce record of Criminal Revision Application No.129 of 2018 pending before the learned City Civil and Sessions Court. As such, the petitioner had produced paper-book of the criminal revision. He submits that thereafter on 07.04.2023, the respondent filed application under Section 8 of the Act of 1996. This application was allowed on 29.04.2023 by the learned City Civil Court and referred the issue for arbitration.

7. Learned Senior Counsel would submit that the learned Trial Court has exceeded its jurisdiction not vested with it. He would further submit that once a written statement is filed or first statement on the substance of dispute is filed, the Court does not hold the jurisdiction to entertain the application under

Section 8 of the Act of 1996. He would further submit that this issue has been elaborately discussed by this Court in **First Appeal No.2663 of 2016** between **Krishna Dairy Farm and Coldrinks and others vs. Rasikbhai Khodidas Patel**. He would further submit that this judgment was also relied upon by the petitioner before learned City Civil Court, however, learned City Civil Court on superficial and shallow reasons declined to follow the ratio laid down in this first appeal.

8. Learned Senior Counsel would further submit that learned City Civil Court amongst various grounds to allow the application under Section 8 of the Act of 1996 mainly believed that the Partnership Deed is produced by the plaintiff subsequent to the filing of the first statement on substance of dispute. The petitioner – plaintiff ought to have produced the Partnership Deed at first instance and since the Partnership Deed is produced at later stage after filing of the first statement on substance of dispute, it gives cause of action to the defendant to file application under Section 8 of the Act of 1996. He would further submit that this finding which is the crux of the impugned order is erroneous and totally against the settled principles of law. He would further submit that plaintiff's claim in the suit is that disputed property is his own property and not the property of the Partnership Firm and therefore plaintiff was not required to produce the Partnership Deed before the learned City Civil Court. Yet the plaintiff has produced the Partnership Deed, however production of Partnership Deed could not be reason to move application under Section 8 of the Act of 1996 as within stipulated time period, no such application under Section 8 of the Act of 1996 was moved by the defendant.

9. Learned Senior Counsel would further submit that on perusal of the application filed under Order 7 Rule 11 of the CPC, written statement or the application filed under Order 14 of CPC to frame the preliminary issue, in none of the applications, the respondent has raised the contention with regard to arbitration clause or raise pleading that learned City Civil Court is not possessing jurisdiction to decide the issue as the dispute is arbitrable. Therefore, he submits that since the respondent has failed to raise contention of Section 8 of Act of 1996 on or before filing of first statement on substance of dispute, the application filed at the belated stage cannot be entertained. Learned City Civil Court has committed gross error in not only entertaining the application but also allowing the same. He would further submit that a patent and palpable illegality has been committed by learned City Civil Court. As such, there is arbitrariness in the impugned order which is against the settled principles of law. He would submit that it is unfurled on bare reading of it and therefore under supervisory jurisdiction, this Court may correct the error committed by learned City Civil Court.

9.1 Upon above submissions, he would submit to allow these petitions and to quash and set aside the impugned order and to restore the suits to their original proceedings.

10. On the other hand, learned advocate Mr.Brijesh Trivedi appearing for the respondent would submit that the dispute arise in the suit is out of the Partnership Deed executed between the parties. The petitioner - plaintiff has made a serious

suppression of material fact before learned City Civil Court. He would submit that the investment made by the plaintiff to purchase a property was in fact capital investment of the partnership firm. This issue has been discovered only when the application for framing the preliminary issue was filed under Order 14 of CPC and when the matter was under consideration, the petitioner pursuant to filing of such application by the respondent produced the Partnership Deed and paper-book of the Criminal Revision Application whereby the admission of the petitioner came on record and the Partnership Deed first time came to the light of the record of learned City Civil Court. He would further submit that in view of Section 8 read with Section 5 of the Act of 1996, the Court was bound to adhere to arbitration agreement and the arbitration clause contained therein. The intervention of the judicial authority is completely minimized in such aspect and in view of that learned City Civil Court has rightly decided the application for referring the matter for arbitration. He would further submit that 246th Report of the Law Commission of India 2014 by which the recommendation was made to amend Section 8 and 11 of the Act of 1996, clearly stipulates that when a situation where the Court /judicial authority finds that the arbitration agreement does exist, it is their duty to refer the same for the arbitration. He would further submit that note to the clause for amendment of Section 8 by the Arbitration and Conciliation (Amendment Bill) 2015 also seeks that judicial authority shall refer the parties to the arbitration unless it finds that *prima facie* no valid arbitration agreement exists. He would further submit that the Hon'ble Apex Court in case of **Sushma Shivkumar Daga and another Vs. Madhurkumar Ramkrishnaji Bajaj and others - 2023 INSC**

1081, has referred to both the provisions along with Section 5 and amended Section 8 and also refers the various judgments on the subject to explain the amendment.

11. Learned advocate Mr.Trivedi also submits that as many as fifty two sale deeds have been executed on behalf of the plaintiff by the defendant which was never challenged by the defendant or any other partner of the partnership firm which is placed on record by way of paper-book. He would further submit that in earlier Arbitration Act, 1940, Section 40 was containing the word 'written statement' but it has been replaced by the words 'first statement on substance of dispute' in Section 8 of the Act of 1996. He would submit that since the suit is yet to proceed further towards the trial, no prejudice is caused to the plaintiff by the impugned order whereby the matter is referred to the arbitration. He would further submit that when arbitration agreement exists and it is believed that the subject matter of the suit is covered by the arbitration clause, the Court would rarely decline to refer the matter for arbitration under Section 8 or under Section 11 of the Act of 1996.

12. Referring to judgment of Hon'ble Apex Court in case of **Pravin Electricals Private Limited vs. Galaxy Infra and Engineering Private Limited - (2021) 5 SCC 671**, he would submit that Hon'ble Supreme Court held that *prima facie* test under Section 8 is held on par with Section 11 of the Act of 1996 and thus if the *prima facie* examination of existence of arbitration agreement arrived at, it leaves all other preliminary issues to be decided by the arbitrator. Another judgment which is relied upon by learned advocate Mr.Trivedi is in case of **Cox**

and Kings Ltd. vs. SAP India Private Limited - 2023 (16) Scale 160, to submit that even non-signatory to the arbitration agreement can be referred to the arbitration if the subject matter or a person is claiming under another party to the agreement is capable of resolving their dispute through arbitration proceedings.

13. Another judgment relied upon by learned advocate Mr.Trivedi is in case of **Rashid Raza vs. Sadaf Akhtar- 2019 (8) SCC 710**, to say that mere allegation of fraud is insufficient to make the matter non-arbitrable.

14. Arguing that while deciding an application under Section 8, the Court must view that whether there is ouster of jurisdiction rather than seeing whether there is jurisdiction to proceed as provision of Section 8 is mandatory in nature. To buttress this argument, learned advocate Mr.Trivedi has relied upon the judgment in case of **Hema Khattar vs. Shiv Khera - 2017 (7) SCC 716**. Learned advocate Mr.Trivedi, apart from above judgments, has also referred to and relied upon the judgment of Hon'ble Apex Court in case of **Sukanya Holdings Private Limited vs. Jayesh H. Pandya - 2003 Law Suit (SC) 464, Ameet Lalchand Shah and others vs. Rishabh Enterprises and another - 2018 Law Suit (SC) 468** and **Emaar MGF Land Limited vs. Aftab Singh - 2018 Law Suit (SC) 1247**.

15. Lastly, learned advocate Mr.Brijesh Trivedi would submit that in a categorical finding, learned City Civil Court has held that petitioner is guilty of committing mischief of suppression of material fact, existence of arbitration clause comes on the record

once the Partnership Deed is produced on record pursuant to the application under Order 14 Rule 2 of CPC and thus immediately thereafter the defendant moved an application under Section 8 of the Act of 1996. The application was within four corners of Section 8 of the Act of 1996 and rightly has been decided by the learned City Civil Court. As far as judgment of **Krishna Dairy Farm and Coldrinks (supra)** relied upon by learned Senior Counsel Mr.Shalin Mehta is concerned, he would submit that learned City Civil Court has distinguished this judgment as facts of that case as the facts of the present case are totally different.

15.1 Upon above submissions, he would submit not to interfere with the impugned order and to dismiss all three petitions.

16. Having heard learned advocates for both sides, seemingly the issue that requires for adjudication is that whether it is permissible under the Act of 1996 for the defendant to file an application under Section 8 after submitting their first statement on substance of dispute on the ground that when the written statement came to be filed the Partnership Deed was not on record and they came to know about such Deed of Partnership and arbitration clause contained therein only when it is produced by the plaintiff when application under Order 14 Rule 2 of CPC was filed by the defendant? Another question which is required to be addressed is that whether the defendants have waived their right of preferring application under Section 8 of the Act of 1996 by submitting to the jurisdiction of learned City Civil Court by filing a detailed written statement denying the entire case of the plaintiff?

17. At the outset, I may refer to Section 5 of the Act of 1996, which reads as under :

> ***"5. Extent of judicial intervention.***
>
> *- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*

18. It could be noticed that by Section 5 the extent of the judicial intervention has been delineated by giving it overriding effect with the phrase of notwithstanding in a case where matter is governed by that part. If there is an arbitration agreement or arbitration clause in the agreement, the power to refer the parties to the arbitration is contained in Section 8. This being at bay of the controversy at hand and thus must be taken note of 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 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."*

19. Analysis of Section 8 shows that to attract the operation of Section 8, the conditions which are required to be fulfilled before the Court can refer the matter to the arbitration is that the dispute between the parties slated in the suit should be subject matter of an arbitration agreement; one of the parties to the suit should apply for referring the parties to arbitration and the application should be filed on or before submitting first statement on substance of dispute and the application should be accompanied by original arbitration agreement or certified copy thereof. On 23.10.2015 by Act No.3 of 2016, the provision contained in Section 8(1) of the Act of 1996 was amended with retrospective effect. Prior to its amendment, said sub-section reads as under :

> *""(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."*

20. In **Ravi Prakash Goel vs. Chandra Prakash Goel - AIR 2007 SC 1517**, it is held that where a dispute is referable to arbitration, the party cannot be compelled to take recourse to

remedy in Civil Court. It is further settled that the language in Section 8 is peremptory in nature and therefore, in cases where there is arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided by the Civil Court in the original suit after such an application is made except to refer the dispute to an arbitrator. Useful reference can be taken from the judgment in case of **P. Anand Gajapathi Raju vs. P.V.G. Raju (Dead) - 2000 (4) SCC 539**. At the same time, it is equally true that mere existence of arbitration clause in agreement would not *ipso facto* bar the jurisdiction of the Civil Court. The Civil Court where the prayer is made for such reference to arbitration in terms of the arbitration clause is not forbid to examine and choose the appropriate course of action in light of Section 8 of the Act of 1996. At this juncture, let refer the amended and unamended Section 8 of the Act of 1996.

"Unamended Section 8 :

> ***"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.*
>
> *[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 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."*

Amended Section 8 is referred in earlier part of this judgment in para 18.

21. Noticeably, as a result of the amendment in Section 8, three key changes are introduced in Sub-section (1) of Section 8. It is now permissible for person claiming through or under defendant to claim benefit of arbitration clause. The amendment waters down the effect of any judgment or order or decree to the contrary and the third effect of the amendment pertains to cut off date by which application under Section 8(1) of Act of 1996 may be presented. In prior to amendment, the cut off date was indicated by words 'not later than when submitting (his first statement on substance of dispute)'. By amendment the words used are 'not later than the date of submitting his first statement on the substance of dispute'. The amendment indicates that party resisting the suit proceedings is permitted to apply for reference to arbitration even while submitting his reply or written statement. Plainly reading, the word 'when submitting' would ordinarily imply that such a move under Section 8(1) could come simultaneously to the filing of the written statement. Meaning thereby that if the written statement was filed, yet simultaneously defendant was seeking party to refer the dispute

to the arbitration, the submission of the written statement could not be construed as a waiver of the right to do so or surrender or acquisition of the jurisdiction of the Civil Court where the dispute was brought. By amendment, the words 'not later than when submitting' have been substituted by 'not later than the date of submitting' are replaced which are of some importance and in view of that now the defendant is required to invoke the arbitration clause and apply to the Court for reference thereunder by moving an application but not required to file written statement or any answer to set his statement on the substance of dispute. Rather it could be interpreted that submission of the written statement or reply indicating his first statement on the substance of dispute may be construed as his waiver of right to seek reference to arbitration or even as submission to acquisition of jurisdiction of the Court where the action has been brought by the claimant/plaintiff. By employing the words 'not later than the date of submitting', a time limit is also set to the period within which the said arbitration agreement must be presented.

22. In **Krishna Dairy Farm and Coldrinks (supra)**, the coordinate Bench of this Court interpreted the words 'first statement on the substance of dispute' used in Section 8(1) of the Act of 1996. Para 22 is material, which reads as under :

> *"22. 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 contradistinguished 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."*

23. In **Food Corporation of India Limited vs. Yadav Engineering and Contractor - 1982 (2) SCC 499**, the Hon'ble Apex Court had opined that interlocutory proceedings are only incidental proceedings to the main proceedings and therefore any step taken in the interlocutory proceedings does not come within the purview of the main proceedings. The Hon'ble Apex Court has explained first statement on the substance of dispute in the judgment 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. x x x 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.""*

24. Another judgment which could be taken into consideration is **Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited and others - 2011 (5) SCC 532,** wherein while explaining the scope of Section 8 of the Act of 1996, the Hon'ble Supreme Court observed as under :

"24. The High Court has held that filing a detailed counter affidavit by a defendant setting out its case, in reply to an application for temporary injunction, should be considered to be the submission of the first statement on the substance of the dispute; and that the application under section 8 of the Act having been filed subsequent to filing of such first statement on the substance of the dispute, the appellant's prayer for referring the parties to arbitration cannot be accepted. The question therefore is whether filing a counter to an application for temporary injunction can be considered as submitting the first statement on the substance of the dispute?

25. Not only filing of the written statement in a suit, but filing of any statement, application, affidavit filed 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 waive 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.

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 round 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, can not 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."*

25. Yet another decision which could be pressed in service is in case of **Sukanya Holdings Pvt. Ltd. (supra).** Para 12 thereof is important which reads as under :

> *"12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by Part-I of the Act, Judicial authority shall not intervene except where so provided in the Act. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not*

> *required to be referred to the arbitral Tribunal, if (1) the parties to the arbitration agreement have not 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. This would, therefore, mean that Arbitration Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under sub- sections (1) & (2) of Section 8 of the Act."*

26. In **Sukanya Holdings (supra),** it is delineated that Section 5 which is minimizing the intervention of the judicial authority does not have any bearing. It is also held that except Section 8 there is no other provision in the Act that in pending suit the dispute is required to be referred to the arbitration. It is clearly held by the Hon'ble Apex Court that the matter is not required to be referred to the arbitral tribunal in a pending suit if such application is not filed before submitting the first statement on the substance of the dispute.

27. Thus, what could be noticed from the above decisions that whether party has waived his right in a manner to seek arbitration and submitted himself to the jurisdiction of the Court would depend upon the conduct of such party in the suit but the proposition of law remains that the application under Section 8 (1) of the Act of 1996 should be filed before submission of the first statement on substance of dispute. The party who willingly participated in the proceedings in the suit and subjects himself to the jurisdiction of the Court cannot subsequently turn around and take somersault to say that now party should be referred to

arbitration in view of existence of an arbitration agreement.

28. To be noted the dates and events stated by the petitioner in the matter are undisputed. There is no dispute on the aspect that on 22.06.2022, the defendant in the suit has filed detailed written statement denying each and every facts of the case. The written statement filed by the defendant is on record at Annexure-C; it runs in 22 pages but in none of the paragraphs the defendant claimed that the subject matter of the suit is a part of the arbitration agreement or arbitration clause contained in the partnership deed. Various contentions are raised by the defendant in the suit but no contention of arbitration is taken. Some incidental proceedings also took place in between and subsequent thereto.

29. Only on 07.04.2023 the defendant had filed application under Section 8 of the Act of 1996 to refer the matter for arbitration which is almost after ten months of filing the written statement. The argument was canvassed that no sooner the defendant came to know about the existence of the arbitration clause in the partnership deed as partnership deed was produced by the plaintiff on subsequent dates in suit, the application under Section 8 of the Act of 1996 for referring the dispute to the arbitration was made. The stance is not acceptable. The written statement filed by the defendant is in great detail. Each and every part of the plaintiff's plaint has been dealt with by the defendant in written statement and denied. But as stated earlier no averment is made that the subject matter is referable to the arbitration as arbitration clause exists in the partnership deed. This Court can notice that the partnership

deed was executed between the parties on 05.03.2005 (Annexure-F). Present petitioner and defendant were one of the signatories and parties to the partnership deed. This partnership deed later on was modified on 06.10.2006 (page 150). Again the plaintiff and defendant were parties and signatories therein. Thus, it could be inferred that defendant had knowledge of the partnership deed and the clause therein even before filing written statement. In the circumstances, the defendant cannot claim that he came to know about the partnership deed once it is produced by the plaintiff. It is very hard to believe that the defendant has lost memory or has forgotten about the partnership and execution of the partnership deed containing the arbitration clause. The defendant did not utter to any aspect with regard to partnership or document of Deed of Partnership in the written statement. Thus, the defendant has taken fortuity and when Partnership Deed came on record, filed the application for referring the dispute for arbitration at his convenience, but subsequent to filing of first statement on substance of dispute.

30. In identical fact situation the coordinate Bench of this Court in **Krishna Dairy Farm and Coldrinks (supra)** in para 34 has observed following :

> *"34. According to the learned counsel for the defendants, there is no waiver in the present case. No sooner the defendants came to know about the existence of the arbitration clause in the arbitration deed, then they preferred the application under Section 8 of the Act, 1996 for referring the dispute to the arbitrator. This stance of the defendants, in my view, is not only tenable in law, but also lacking in bona fide. I have more than a fair idea about the written statement filed by the defendants. The written statement is in details. The entire case put by the plaintiff came to be denied by the defendants. The defendants denied that there ever existed a partnership between the parties and that there was a*

> *partnership deed in writing duly signed by them. I take notice of the fact that the partnership deed is dated 13th December 2000. The defendants are admitting their signatures in the partnership deed. The suit came to be filed in 2013. It is very hard for this Court to believe that the defendants, within a period of one decade, would forget about the partnership and the execution of the partnership deed. It appears to me having regard to the materials on record that the defendants consciously submitted to the jurisdiction of the Civil Court by filing a written statement denying the existence of any partnership and the document of deed of partnership. The defendants appears to have taken a chance, but later, when the partnership deed came to be produced, they realised that there was no escape thereafter. I am at one with Mr. Shah, the learned counsel appearing for the plaintiff that as the plaintiff had not produced the partnership deed along with the plaint, the defendants could have called upon the plaintiff to produce the partnership deed on record, and more particularly, when there is a reference in the plaint of the partnership deed being executed between the parties. Having once denied the entire case of the plaintiff, more particularly, the existence of the partnership and the partnership deed, later on the production of the document by the plaintiff, the defendants are not entitled to invoke Section 8 of the Act, 1996."*

31. What could be noticed that in the present case the defendant has filed the application under Section 8 of the Act of 1996 after the first statement of substance of dispute has been filed. Time period of important. Almost eight months has gone in between. Other incidental proceedings in form of application for rejection of the plaint under Order 7 Rule 11 of CPC as well as fixing particular issue as preliminary issue took place at the end of the defendant which by itself shows that the defendant had submitted to the jurisdiction of the learned City Civil Court and waived the right to refer the dispute to the arbitration.

32. In **Krishna Dairy Farm and Coldrinks (supra)**, in para 36 the coordinate Bench has explained about waiver as under :

> *"36. Waiver is a question of fact and as explained by the Supreme Court, the same should be inferred on the basis of the conduct of the parties and the circumstances of the case. In my view, if the Court accepts the contention that an application under Section 8 of the Act, 1996 can be filed even after the first statement of substance of the dispute between the parties has already been filed, then this would not only be any 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. No one can dispute that a Civil Court has no jurisdiction to entertain the suit after application under Section 8 of the Act, 1996 is filed, but this would be subject to the application otherwise being in conformity with the requirement of the said section. The jurisdiction of the Civil Court is not ousted on account of an arbitration agreement between the parties. It is ousted because of an application filed under Section 8 of the Act provided it otherwise confirms to the requirements laid down in the Section."*

33. Thus, in the present case it is established that the defendant having filed the first statement on the substance of the dispute filed the application under Section 8 of the Act of 1996 almost after ten months by taking shelter of Partnership Deed produced later on, is of no use to refer the dispute to the arbitration but the option left with the defendant is to proceed further with the suit having filed detailed written statement disclosing their defense. What further could be noticed that the present petitioner relied upon the judgment of **Krishna Dairy Farm and Coldrinks (supra)** during the argument of application filed under Section 8 of the Act of 1996. Learned City Civil Court in few words distinguished the judgment which in fact was fully applicable to the facts on the case. A serious but jurisdictional

error has been committed by the learned City Civil Court. It is patent and palpable illegality as well as arbitrariness on the part of the learned City Civil Court to entertain the application under Section 8 of the Act of 1996 after ten months of filing the first statement on substance of dispute and thereafter allowing this application ignoring the law laid down by coordinate Bench of this Court in **Krishna Dairy Farm and Coldrinks (supra)**. Thus, under the supervisory jurisdiction under Article 227 of the Constitution of India, the error committed by the learned City Civil Court is required to be corrected.

34. As far as the judgments relied upon by learned advocate Mr.Trivedi are concerned, most of them are on the appointment of arbitrator under Section 11 of the Arbitration and Conciliation Act. Issue of filing of application under Section 8(1) of the Act of 1996 subsequent to filing of first statement on substance of dispute is not the issue under decision in the judgments relied upon by learned advocate Mr.Brijesh Trivedi for the respondent.

35. In wake of the above reasons, all three petitions succeed. Consequently, connected Civil Applications stand disposed of. The impugned orders dated 29.04.2023 passed by learned City Civil Court in Regular Civil Suit Nos.631 of 2022, 632 of 2022 and 1292 of 2022 are quashed and set aside. Consequently, the application filed under Section 8 of the Act of 1996 in these three suits is rejected. The suits being Regular Civil Suit Nos.631 of 2022, 632 of 2022 and 1292 of 2022 are restored to their original proceedings. Rule is made absolute in each petition.

(J. C. DOSHI, J)

GAURAV J THAKER