Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

SUMMONS FOR JUDGMENT NO. 21 OF 2020
IN
COMM SUMMARY SUIT NO. 1420 OF 2019
WITH
INTERIM APPLICATION NO. 834 OF 2020

USP Studios Pvt. Ltd. ...Applicant
In the matter between
USP Studios Pvt. Ltd. ...Plaintiff
Versus
Ganpati Enterprises & ors. ...Defendants

Mr. Priyank Kapadia, i/b Jyoti Ghag, i/b Dua Associates, for the Plaintiffs.
Mr. Amit Patil, a/w Ms. Sailee Dhayalkar, i/b Parinam Law Associates, for the Defendants.

CORAM: N. J. JAMADAR, J.
DATED : 25th AUGUST, 2022

ORDER:-

1. This commercial division summary suit is instituted for recovery of a sum of Rs.3,02,78,710/- along with further interest on the principal sum of Rs.2 Crore at the rate of 18% p.a. from the date of the institution of the suit till payment and/ or realization.

2. The plaintiff is a company incorporated under Companies Act, 1956. It deals in the business, *inter alia,* of production of audio visual contents – programs, which are broadcast on

various digital media platforms like YouTube. Defendant no.2 - Parvinchand Narindernath Sehgal is the proprietor of Ganpati Enterprises, defendant no.1. Defendant no.3 is the *karta* of defendant no.2.

3. The plaintiff claims, on the request of defendant no.2, plaintiff had advanced a sum of Rs.2 Crore to the defendants. A loan agreement dated 28th July, 2016 evidencing the said transaction came to be executed. The loan was to be repaid after a period of 12 months, along with interest at the rate of 18% p.a. The plaintiff remitted the amount of Rs.2 Crore on 28th July, 2016 to the account of defendant no.1 through banking channels. Only an amount of Rs.30,00,000/- towards interest component was paid by the defendants. After expiry of the term of loan and upon repeated demands, the defendant issued two cheques drawn for Rs.1 Crore each payable on 29th January, 2018, towards repayment of the loan. Both the cheques were returned unencashed on presentment. Despite service of a statutory notice under Section 138 of the Negotiable Instruments Act, 1881 ("the N.I. Act"), the defendants committed default in payment of the amount covered by the cheque necessitating the lodging of a complaint under the N.I. Act, being CC No.1583 of 2018, before the Metropolitan Magistrate,

Bandra, Mumbai. Hence, this suit based on written contract and the negotiable instruments.

4. After the plaintiff took out the Summons for Judgment, the defendants have filed an affidavit-in-reply seeking leave to defend the suit. By way of preliminary objection, the defendants have contested the tenability of the suit in view of the arbitration clause contained in the loan agreement and sought the reference of the dispute to arbitration. Clause (8) of the Loan Agreement reads as under:

> "**8**. ARBITRATION: Any claim, controversy or dispute arising out of or in connection with this Agreement shall be referred to arbitration and will be binding on both the parties and will conducted in Mumbai, India and shall be governed by and construed in accordance with the laws of India. The language of the arbitration shall be English."

5. The defendants contend that in view of the aforesaid arbitration clause incorporated in the loan agreement, on the strength of which the plaintiff has instituted this summary suit, the dispute is required to be mandatorily referred to arbitration.

6. I have heard Mr. Kapadia, the learned Counsel for the plaintiff, and Mr. Patil, the learned Counsel for the defendants, at some length, on the issue of reference to arbitration.

7. Mr. Patil, the learned Counsel for the defendants, submitted that in view of the clear and unambiguous arbitration

clause (extracted above), there is no other go but to make an arbitral reference under Section 8 of the Arbitration and Conciliation Act, 1996 ("the Act, 1996"). Laying emphasis on the fact that there can be no dispute about the existence of arbitration agreement as the plaintiff's claim squarely rests on the vary some loan agreement, which contains the aforesaid arbitration clause, Mr. Patil submitted that the resistance to reference cannot be countenanced.

8. Mr. Kapadia, the learned Counsel for the plaintiff, without joining the issue on the aspect of the existence of arbitration agreement, canvassed a submission that the reference under Section 8 of the Act, 1996 would only be warranted where there is a subsisting dispute, which is susceptible to arbitration. In the case at hand, since the liability is unequivocally admitted, reference to arbitration would be unwarranted. Inviting the attention of the Court to the contentions in the affidavit-in-reply, wherein the defendants have also raised defence of inadmissibility of the loan agreement on account of inadequate stamp-duty paid thereon, Mr. Kapadia would urge that this defence implies a clear admission of the execution of the loan agreement.

9. To add to this, according to Mr. Kapadia, the transfer of the amount by the plaintiff to defendant no.1 through banking channels is incontrovertible. In this backdrop, it was further urged that the defendants have not specifically denied the receipt of the said amount and, on the contrary, the defendants made a feeble attempt to contest the plaintiff's claim for interest thereon. Implicit in this defence is an admission of the receipt of the principal loan amount, urged Mr. Kapadia. In the backdrop of the aforesaid contentions in the affidavit-in-reply, Mr. Kapadia made a strenuous effort to draw home the point that, there is no "dispute", as such, and thus reference to arbitration is wholly unwarranted.

10. To bolster up aforesaid submission Mr. Kapadia placed a strong reliance on a judgment of a learned Single Judge of Delhi High Court in the case of ***Maruti Udyog Limited vs. Mahalaxmi Motors Ltd. & Anr.***[1], wherein the learned Single Judge observed that where the liability is admitted, arbitration clause cannot be invoked. This enunciation was based on the premise that if there is an "admitted liability" there exists no dispute which is susceptible to arbitration.

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11. Mr. Kapadia banked upon the following observations in the aforesaid judgment:

> "**3**. It is settled law that the arbitration clause can be invoked only when there are differences and disputes with regard to certain payments or breach of obligations of the respective parties of the terms of the agreement. However wherever there is an admitted liability, the arbitration clause cannot be invoked. The very connotation "admitted liability" suggests that there are no disputes or differences with regard to the said admitted liability.
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> **4**. The extracts of the letter dated 5th April, 1997, the minutes of the meeting and the affidavit filed by Mr. M. C. Mehta in his capacity as Managing Director of the defendant No. 1 company leave no manner of doubt that not only the defendant No. 1 had accepted the liability of 7.63 crores towards the plaintiff but also undertook to discharge the liability by making the payment through Installments.
>
> **5**. What is material for the purpose of Section 8 of the Arbitration Act is that there should be existence of difference or disputes with regard to a particular liability arising out of the terms of the agreement. If the liability is acknowledged and admitted it does not come within the meaning and ambit of disputes and differences.
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> **6**. In view of the foregoing reasons the application under Section 8(1) of the Arbitration and Conciliation Act, 1996 cannot be allowed as arbitration clause is not invokable in respect of admitted liability."
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> (emphasis supplied)

12. Mr. Kapadia would further urge that the aforesaid view finds echo at home as well. Reliance was placed on an order passed by a learned Single Judge of this Court in the case of ***M/s. Gammon India Ltd. vs. M/s. VVR Crushers and Constructions (Arbitration Appeal No.23/2017 with Civil Application No.25/2017, decided on 14th July, 2017.),*** wherein the learned Single Judge declined to interfere in an appeal

under Section 37 of the Act, 1996, challenging the judgment and order passed by the City Civil Court refusing to refer the parties to arbitration on the premise that there was no dispute about the liability to pay the amount claimed by the plaintiff. The learned Single Judge noted that the trial Court had referred to the aforesaid decision of the Delhi High Court in the case of ***Maruti Udyog*** (supra).

13. Reliance was also placed on an order passed by another learned Single Judge of the Delhi High Court in the case of ***M/s. Fenner (India) Ltd. vs. M/s. Brahmaputra Valley Fertilizer Corporation Ltd. GS (O.S.), NO.1281 of 2014,*** wherein the Delhi High Court followed the pronouncement in the case of ***Maruti Udyog*** (supra) and professed to enunciate the law as under:

> "**21**. In the light of the pronouncements of the Hon'ble Supreme Court and of this High Court, it is clear that when no disputes exist between the parties, namely, what is claimed by the plaintiff is admitted by the defendant or impliedly admitted by the defendant, the same cannot be a subject matter of arbitration proceedings. The reasons for this are quite obvious. Court would normally frown upon frivolous and meaningless litigation between the parties when the facts on the face of it shows that there is not scope for any adjudication left."
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> (emphasis supplied)

14. Mr. Kapadia, it must be noted, fairly pointed out that another learned Single Judge has postulated that reference to arbitration under Section 8 of the Act 1996 is peremptory and

the Court has no discretion. Mr. Kapadia also brought to my notice an order passed by me in the case of ***Taru Meghani through his Constituted Attorney Ms. Sharaddha Khandhadia and ors. vs. Shree Tirupati Greenfield (Shree Tirupati Greenfield Developers) and others***[2]**,** wherein, I had referred the parties to arbitration repelling the challenge that reference to arbitration, wherein it entails the bifurcation of the subject matter of the suit, is impermissible in law.

15. From the text of Section 8 of the Act, 1996, referral of the parties to arbitration becomes imperative, if the following conditions are satisfied:

(i) there is an arbitration agreement;

(ii) a party to the agreement brings an action in the court against the other party;

(iii) subject-mater of the action is the same as the subject-matter of the arbitration agreement;

(iv) the opposite party applies to the judicial authority for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

22020 SCC Online Bom 110.

16. In the case at hand, all the aforesaid conditions seem to have been made out as the existence of arbitration clause in the loan agreement is incontestible. The plaintiff, who is a party to the loan agreement, has in fact instituted the suit on the strength of the contract contained therein. There is identity of the subject matter of action as well. And the defendants have sought the reference of the dispute to arbitration.

17. The submission on behalf of the plaintiff that reference to arbitration would be uncalled for seeks to draw support and sustenance from the alleged admission of liability; implied, if not express. I have perused the affidavit-in-reply filed on behalf of the defendants. In all fairness to Mr. Kapadia, it must be recorded that the contentions on behalf of the defendants as regards the inadmissability of the instrument in question on account of insufficiency of stamp-duty are in the alternative and without prejudice to the preliminary objection to the tenability of the suit in the face of the arbitration agreement. Yet, I would deem it appropriate to proceed on the premise that the liability is impliedly admitted, at least to the extent of principal amount. As regards the interest component, the defendants have specifically contested the claim of interest at the rate of 18% p.a.

18. I have perused the aforesaid judgments, which take the view that if the liability is admitted; expressly or impliedily, reference to arbitration would be unwarranted as it can not be said that there is a subsisting arbitrable dispute. I am not persuaded to accede to the aforesaid broad proposition sough to be canvassed on behalf of the plaintiff.

19. In my view, the pronouncement in the case of ***ION Exchange (India) Ltd. vs. MSK Projects (India) Ltd.***[3] enunciates a correct position in law. In the said case, arising out of a summary suit instituted under Order XXXVII of the Code for the recovery of an ascertained sum of money, a submission was canvassed that the suit arose out of a written contract coupled with acknowledgment of liability. Thus, a suit under Order XXXVII of the Code constituted in an exception to the general procedural provisions and it was required to be determined in a summary manner and, therefore, reference of such dispute to arbitration was impermissible. A learned Single Judge of this Court did not accede to the aforesaid submissions and ruled that Section8 of the Act, 1996 would cover within its ambit suits under Order XXXVII of the Code as well. The observations in paragraphs 9 to 11 are material and hence extracted below:

32005 Mh.L.J. 921.

"**9**. All that now remains to be considered is merely because the respondents have filed a suit under Order XXXVI of the Civil Procedure Code, an application under Section 8 would lie or not. The argument based upon Order XXXVII of Civil Procedure Code being salutary and therefore, out of purview of Section 8(1), is entirely misconceived. Section 8(1) in uses word/phraseology "Action". The word "action", according to Law Lexicon has a legal connotation. It is often defined "as a form of suit given by law for recovery of that which is one's due; or it's legal demand of a man's right". The learned author also refers to another meaning of the term as "a litigation in civil Court and for recovery of individuals rights or redress of individual wrong, inclusive, in its proper legal sense suits by the crown." Thus, the distinction between the words "action" and "suit" is not generally observed and wherever the term "action" appears it refers to all civil actions. (See Law Lexicon by P. Ramanatha Aiyar, 1997 edition). Order XXXVII of the Civil Procedure Code is part and parcel of Civil Procedure Code, 1908. Civil Procedure Code, 1908 is an Act to consolidate and amend laws relating to the procedure of Courts of civil judicature. Order XXXVII appears in the same Code. It provides for a summary procedure. A bare perusal of Order XXXVII would show that the same applies to a class of suits which are instituted in Civil Courts by presenting a plaint.

10. It is not possible to agree with the contention of Mr. Parikh that summary procedure provided in Order XXXVII to certain suits being an exception carved out to the general procedural provisions applying Section 8 thereto would be defeating and frustrating the Legislative mandate. Admittedly, Section 8 appears in Arbitration and Conciliation Act, 1996 which is a later Enactment. The Arbitration and Conciliation Act is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. The statement of objects and reasons of this enactment makes it abundantly clear that the enactment is comprehensive piece of Legislation covering international arbitration and conciliation as also domestic arbitration and conciliation. The whole purpose is to make provision for arbitration procedure which is fair, efficient and capable of application in all specific arbitration. The enactment is aimed at encouraging parties to settle their disputes by taking recourse to arbitration and

conciliation. At the same time, it minimises the role, which is supervisory, of the Court in arbitration process. If the purpose of this enactment is to be achieved, then the interpretation of Section 8 as suggested cannot be accepted. Advisedly, when the Legislature has covered actions before Civil Court in Section 8(1) then it is not permissible to whittle down or dilute the same. The term "Action" must be and needs to be construed broadly to fulfill the abovementioned legislative intent. If summary suits are left out of the purview of Section 8(1) then the purpose of enacting a comprehensive Legislation such as Arbitration and Conciliation Act, 1996, cannot be achieved.

11. In my view, Section 8 would cover suits under Order XXXVII of Civil Procedure Code and it is not permissible to leave them out of it's purview. In the light of the admitted factual position, it is clear that the petition deserves to succeed."

The aforesaid reasoning, in my considered view, stands further fortified on account of the significant changes brought about by Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) to further minimize the interference of the Courts in the arbitration proceedings.

20. Section 8(1), pre and post Act 3 of 2016, reads as under:

SECTION 8 (before Act 3 of 2016)	SECTION 8 (before Act 3 of 2016)
"**8. Power to refer parties to arbitration where there is an arbitration agreement.**	**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 subject to 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	(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

arbitration.	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 faice no valid arbitration agreement exists.

21. The legislative object in making the reference to arbitration peremptory becomes absolutely clear and evident from the insertion of the words than "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 only situation, in which the judicial authority would be justified in refusing to refer the parties to arbitration is indicated by the Parliament by use of the expression, "unless it finds that *prima facie,* no valid arbitration agreement exists". That situation would arise where on a *prima facie* review of the material the judicial authority is in a position to record with an amount of certainty that there is no valid arbitration agreement between the parties.

22. This limited nature of the *prima facie* review was instructively expounded by the Supreme Court in a recent Three-Judge Bench judgment in the case of ***Vidya Drolia and***

Ors. vs. Durga Trading Corporation*[4]*. The observations in paragraphs 132 to 134 and 141 are read thus:

> "**132.** The courts at the referral stage do not perform ministerial functions. They exercise and perform judicial functions when they decide objections in terms of Sections 8 and 11 of the Arbitration Act. Section 8 prescribes the courts to refer the parties to arbitration, if the action brought is the subject of an arbitration agreement, unless it finds that prima facie no valid arbitration agreement exists. Examining the term 'prima facie', in *Nirmala J. Jhala v. State of Gujarat and Another*, (2013) 4 SCC 301. this Court had noted:
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> > "*48* '27. ..... A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case were [to be] believed. While determining whether a *prima facie* case had been made out or not the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.'*"
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> **133**. *Prima facie* case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the Arbitral Tribunal. It is restricted to the subject-matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, referral court without getting bogged down would compel the parties to abide unless there are good and substantial reasons to the contrary.
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> **134**. *Prima facie* examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial. This necessarily reflects on the nature of the

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4(2021) 2 Supreme Court Cases 1.

> jurisdiction exercised by the court and in this context, the observations of B. N. Srikrishna, J. of "plainly arguable" case in *Shin-Etsu Chemical Co. Ltd.* are of importance and relevance. Similar views are expressed by this Court in *Vimal Kishore Shah* wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement.
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> ....
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> **141**. <u>The Court would exercise discretion and refer the disputes to arbitration when it is satisfied that the contest requires the Arbitral Tribunal should first decide the disputes and rule on non-arbitrability.</u> Similarly, discretion should be exercised when the party opposing arbitration is adopting delaying tactics and impairing the referral proceedings. Appropriate in this regard, are observations of the Supreme Court of Canada in *Dell Computer Corporation v. Union des consommateurs and Olivier Dumoulin*, which read:(SCC OnLine Can SC paras 85-86).
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> "85. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.
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> 86. Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process."
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> (emphasis supplied)

23. In the light of the aforesaid legislative change, first and foremost, the enunciation of law in the judgments relied upon by Mr. Kapadia, especially of the Delhi High Court, falls within the ambit of the non-obstante clause added by Act 3 of 2016. The binding efficacy of the said judgments, nay persuasive value, stands superseded by the legislative intervention.

Secondly, the question as to whether the liability is, "admitted" is often rooted in thickets of facts. In a fair number of cases, it would warrant an inquiry, albeit preliminary, to record an opinion as to whether in the facts of a given case the liability can be said to be admitted. This would necessarily make the judicial authority to embark upon an inquiry, which the legislature in its endeavour of giving autonomy to the parties to have the dispute resolved through preferred mode of arbitration, has proscribed. In my view, the submission that, "an admitted liability" renders reference of dispute to arbitration unwarranted is fraught with elements which have the propensity to undermine the legislative intent manifested in Section 8 of the Act, 1996, which is made more explicit by the 2016 Amendment. Thirdly, if the liability is impliedly admitted, the Arbitrator can be said to be equally empowered to give effect to the consequences which emanate therefrom. Thus the submission of prejudice to the party in whose favour the admission is claimed to have been made, also falls through.

24. Mr. Patil, the learned Counsel for the defendants, submitted that in the facts of the case, the plaintiff's assertion that liability is admitted is not borne out by either the documents annexed with the plaint or the contentions in the

affidavit-in-reply. Implied admissions, which the plaintiff seeks to press into service, are required to be drawn by a process of reasoning, which is debatable. In any event, according to Mr. Patil, the defendants have specifically contested the liability to pay interest and that surely gives rise to an arbitrable dispute. Mr. Patil would further urge that the term dispute is required to be construed in an expansive sense, to include even dispute over a facet of the claim.

25. I am persuaded to agree with the aforesaid submissions of Mr. Patil. If there is a semblance of dispute, which is covered by an arbitration agreement, the judicial authority is statutorily enjoined to refer the parties to arbitration. A profitable reference, in this context, can be made to the judgment of the Supreme Court in the case of ***Agri gold Exims Ltd. vs. Sri Lakshmi Knits & Wovens and Others***[5]**,** wherein the Supreme Court held that the term 'dispute' must receive its general connotation. The Supreme Court, *inter alia,* observed as under:

> "**18**. The term "dispute" must be given its general meaning under the 1996 Act.
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> **19**. In P. Ramanatha *Aiyar's Advanced Law Lexicon, 3rd edition*, page 1431, it is stated:
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> "In the context of an arbitration the words "disputes" and "differences" should be given their ordinary meanings. Because one man could be said to be indisputably right and

5(2007) 3 Supreme Court Cases 686.

> the other indisputably wrong, that did not necessarily mean that there had never been any dispute between them......"
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> **20**. Admittedly, the appellant's claim is not confined to the question regarding non-payment of the amount under the two dishonoured cheques. Thus, there existed a dispute between the parties. Had the dispute between the parties been confined thereto only, the same had come to an end.
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> **21**. Appellant evidently has taken before us an inconsistent stand. If he was satisfied with the payment of the said demand drafts, he need not pursue the suit. It could have said so explicitly before the High Court. It cannot, therefore, be permitted to approbate and reprobate.
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> **22**. Section 8 of the 1996 Act is peremptory in nature. In a case where there exists an arbitration agreement, the court is under obligation to refer the parties to arbitration in terms of the arbitration agreement. [*See Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503 and Rashtriya Ispat Nigam Limited (supra)*] No issue, therefore, would remain to be decided in a suit. Existence of arbitration agreement is not disputed. The High Court, therefore, in our opinion, was right in referring the dispute between the parties to arbitration."
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> (emphasis supplied)

26. For the foregoing reasons, I am inclined to hold that reference to arbitration is necessary.

27. Hence, the following order:

: O R D E R :

(i) The parties are referred to arbitration in accordance with the arbitration agreement contained in Clause (8) of the Loan Agreement dated 28th July, 2016.

(ii) An arbitrator shall be appointed by the parties in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

(iii) In view of the reference of the parties to arbitration, the Commercial Summary Suit No.1420 of 2019, stands disposed.

(iv) No order as to costs.

(v) The plaintiff is entitled to refund of court-fees, if any, in accordance with Rules.

In view of the disposal of the Suit, Summons for Judgment No.21 of 2020 and Interim Application No.834 of 2020, also stand disposed.

[N. J. JAMADAR, J.]