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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: 6th November 2023

\+ RFA 823/2019 and CM 41007/2019

MADHU SUDAN SHARMA & ORS ..... Appellants
Through: Mr. J. Sai Deepak, Mr. Vineet Sinha, Mr. Arpit Dwivedi and Mr. Avinash Sharma, Advs.

Versus

OMAXE LTD ..... Respondent
Through: Mr. Ramesh Singh, Sr. Adv. with Mr. Shalabh Singhal and Ms. Neha Chaturvedi, Advs.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

% 06.11.2023

1. This appeal, under Section 96 of the Code of Civil Procedure, 1908 (CPC) assails judgment and decree dated 15 July 2019, passed by the learned Additional District Judge ("the learned ADJ"), whereby Suit CS 10977/2016, instituted by the respondent against the appellants, stands decreed in favour of the respondent. Said suit was instituted by the respondent against the appellants under Order XXXVII of the CPC. The appellants, as the defendants in the suit, questioned the maintainability of the suit in the face of an arbitration agreement having been incorporated into the contract between the

appellants and the respondent, relying, for the purpose, on Section 8[1] of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"). This objection was raised in the application filed by the appellants under Order XXXVII Rule 3(5) of the CPC seeking leave to defend the suit. Para 20 of the impugned judgment of the learned ADJ rejects the objection in the following words:

> "20. Before dwelling upon the issues, it is pertinent to mention here that the defendant has taken an objection with respect to continuation of the proceedings before this Court despite having an arbitration clause in the agreement. In this respect, it is stated that the objection with respect to the arbitration clause is to be taken before submitting the first statement of defence before the court which was never done by defendants in the present case and therefore, this objection cannot be taken now. Now I shall proceed to decide the issues."

2. The sole ground urged by the appellants, through Mr. J. Sai Deepak, learned Counsel, is that the learned ADJ erred in rejecting the appellants' objection. The appellants would seek to contend that the objection was required to be accepted and the dispute between the parties referred to arbitration.

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[1] **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.

3. Two questions arise for determination in the present case. Both pertain to Section 8 of the 1996 Act. The first is whether the defendants in a suit, who seek to invoke Section 8(1), have to do so *prior to filing the written statement*, as held by the learned ADJ. The second is whether a mere objection to the maintainability of the suit, advanced by the defendants in the written statement and predicated on Section 8 and the existence of an arbitration agreement between the parties, would suffice, or whether a formal application, seeking reference of the dispute to arbitration, is necessary.

Facts

4. A Memorandum of Understanding (MOU) was executed between the appellants and the respondent on 2 May 2005, whereunder 29 *bighas* of land owned by the respondent were to be acquired by the appellants. For the purposes of this judgment, it is not necessary to enter into the covenants of the MOU. Suffice it to state that, in terms of the MOU, the respondent paid ₹ 64,22,925/– to the appellants. The MOU provided that, in the event of the appellants failing to obtain necessary permissions from statutory authorities in respect of the covenanted land, the MOU would stand terminated at the option of the respondent and the appellants would refund the amount paid by the respondent along with costs, expenses, fees and charges. According to the respondent, the appellants did not fulfil their obligations under the MOU despite repeated requests and, therefore, became liable, as on 2 June 2005, to refund the amount paid

by the respondent along with other charges. A cheque of ₹ 65 lakhs, which had been tendered by the appellants to the respondent purportedly by way of security was also alleged to have been dishonoured by the bank. Predicated on these assertions, the respondent instituted CS (OS) 890/2008 ("the suit", hereinafter) against the appellants under Order XXXVII of the CPC before this Court, seeking recovery of the amount paid by the respondent to the appellants along with interest, totalling to ₹ 87,42,500/–.

5. Consequent on issuance of summons, the appellants filed an application under Order XXXVII Rule 3(5) of the CPC, seeking leave to defend the suit. It was urged that several triable issues arose in the suit, including the issue of whether the suit was maintainable in the face of an arbitration agreement having been incorporated into the MOU executed between the appellants and the respondent. This plea figured in the very first para of the application seeking to defend, which read thus:

> "1. That the suit is filed by the plaintiff is totally without jurisdiction and not maintainable in view of Sections 5[2] & 8 of the Arbitration & Conciliation Act – 1996 as para 14 of the alleged MOU provides for Arbitration."

6. The respondent, in its reply to the appellants' application seeking leave to defend, answered thus, in response to para 1 of the appellants' application:

> "1. In reply to the contents of para 1 of the application are denied being baseless and misconceived. It is denied that the suit

[2] **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.

> filed by the plaintiff is without jurisdiction and not maintainable in view of Section 5 and 8 of the Arbitration & Conciliation Act, 1996 as alleged by the defendant. It is a settled proposition of law through a catena of judgement that Section 5 & 8 of the Arbitration & Conciliation Act, 1996 per se does not bar the jurisdiction of a civil court. Section 8 of the Arbitration & Conciliation Act, 1996 merely provides for reference of the parties to arbitration only in case the party applies for the same and that too before submitting his first statement on the substance of the dispute and subject to fulfilment of other conditions of Section 8. In the present case, the defendant has not filed any such application and has already submitted his first statement on the substance of the disputes by filing application under reply. This Hon'ble Court therefore is having absolute jurisdiction to try the present suit."

7. By order dated 7 May 2010, this Court which, at that time, was in *seisin* of the suit, granted conditional leave to the appellants to contest the suit subject to depositing a Bank Guarantee for ₹ 65 lakhs with the Registrar of this Court. Having referred to various judgments which hold that, if a triable issue is raised, leave to defend has necessarily to be granted, this Court had cited the following reasons, in para 8 of its order, for its decision to grant conditional leave to defend:

> "8. In the light of the aforesaid legal position and the facts of this case, the question of applicability of Section 8 of the Arbitration and Conciliation Act, 1996, entirely depends upon 'Memorandum of Understanding' of 2nd May 2005 (Annexure-A), which contains the arbitration clause. However, it needs to be noted here that the plaintiff has stated in the reply to this application that the aforesaid 'Memorandum of Understanding' is a forged and fabricated document and is not an enforceable contract. In any case, this will not disentitle defendant No. 1 to 'leave to contest' this suit, as this very Memorandum of Understanding (Annexure-A) has been relied upon by the Plaintiff. There is a grave doubt about the defence of defendant No. 1, regarding cheque in question being a forged and fabricated document and of defendant No. 1 having lost the cheque and of its being misused by

> the plaintiff. The third principle, as highlighted in ***Defiance Knitting (supra)***[3], squarely applies to the instant case."

8. The above order, which was rendered by a learned Single Judge of this Court was upheld, in appeal, by the Division Bench *vide* order dated 27 September 2011 in ***FAO (OS) 551/2010***[4], albeit by modifying the condition of furnishing of bank guarantee of ₹ 65 lakhs with furnishing of any alternative solvent security to the satisfaction of the Registrar of this Court.

9. In compliance with the modified direction, the appellants furnished title deeds of immovable property situated at Agra as solvent security for leave to contest the suit. However, as this security was furnished beyond the time granted by the Division Bench, the learned Single Judge opined that the condition, subject to which leave to defend the suit had been granted to the appellants, had not been complied and, on that basis, decreed the suit in full on 10 July 2012.

10. The appellants challenged the said judgment and decree before the Division Bench of this Court by way of RFA (OS) 93/2012. By order dated 8 October 2012, the Division Bench allowed the appellants to withdraw RFA (OS) 93/2012 with liberty to approach the learned Single Judge for review of the order dated 10 July 2012.

[3] **Defiance Knitting Industries Pvt Ltd v. Jay Arts, (2006) 8 SCC 25**
[4] **Madhu Sudan Sharma v. Omaxe Ltd**

11. The appellants, accordingly, filed Review Petition RP 703/2012 before the Single Judge, seeking review of his order dated 10 July 2012. By order dated 4 December 2012, the learned Single Judge dismissed the Review Petition.

12. The appellants assailed this order before the Division Bench by way of RFA (OS) 139/2012. By order dated 25 February 2013, the Division Bench allowed RFA (OS) 139/2012 subject to costs of ₹ 55,000/– being paid by the appellants. The appellants were granted permission to file written statement within one week.

13. In the written statement, the appellants reiterated their objection to the maintainability of the suit in view of the existing arbitration agreement between the appellants and the respondent, citing Section 8 of the 1996 Act in their support. The averments in the written statement relatable to Section 8 read thus:

> "4. That the suit filed by the plaintiff is without jurisdiction and is not maintainable as the Memorandum of Understanding dated 02.05.2005 signed between the parties (hereinafter referred to as "MoU"), which is the basis of the present suit, provides for Arbitration between the parties before coming to the Hon'ble court. The relevant clause of the Memorandum of Understanding is reproduced herein below:
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> > "That in case of any dispute relating to any matter herein, the parties shall try to resolve the same amicably by the intervention of the well wishers of the parties failing which through arbitration under the Arbitration and Conciliation Act 1996 by a mutually agreed Arbitrator. All disputes shall be subject to the territorial jurisdiction of Delhi."

> Therefore, it is clear that the Plaintiff herein has wrongly approached this Hon'ble Court despite the parties having agreed to resolve their disputes by Arbitration."

14. *Vide* order dated 13 September 2013, the learned ADJ framed the following issues as arising in the suit:

> 1. Whether this Court does not have the requisite territorial jurisdiction to adjudicate upon the present plaint? OPD
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> 2. Whether the Defendants fulfilled their obligations under the MOU dated 2nd May 2005? OPD
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> 3. Whether the Plaintiff fulfilled its obligations under the MOU dated 2nd May, 2005? OPP
>
> 4. Whether the Cheque No. 502870 has been forged and fabricated by the Plaintiff? OPD
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> 5. Whether the Defendants have suffered losses due to breach on part of the Plaintiff? OPD
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> 6. Whether the Plaintiff is entitled to recover any amount from the Defendants? If yes the quantum thereof? OPP
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> 7. Whether the Plaintiff is entitled to interest? If yes, on what rate on what amount and for what period? OPP
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> 8. Relief.

15. The suit came to be finally decreed *vide* the impugned judgment dated 15 July 2019. As already noted towards the commencement of this judgment, the learned ADJ refused to consider the objection of the appellants, predicated on Section 8 of the 1996 Act, on the ground that it was not taken before submitting the first statement of defence before the Court.

16. The defendants in the suit are in appeal.

Rival Contentions

17. Arguments have been advanced by Mr. J Sai Deepak, instructed by Mr. Vineet Sinha and his colleagues for the appellants and Mr. Ramesh Singh, learned Senior Counsel, instructed by Mr. Shalabh Singhal for the respondent.

Submissions of Mr. Sai Deepak

18. Mr. Sai Deepak submits that Section 8 of the 1996 Act requires the party, applying under the said provision for referring the dispute to arbitration, to do so "not later than when submitting his first statement of the substance of the dispute". The appellants had, in the present case, raised a Section 8 objection not just in the written statement filed consequent to the liberty granted by the order dated 25 February 2013 passed by the Division Bench in RFA (OS) 139/2012, but, even prior thereto, in the application under Order XXXVII Rules 3(5) of the CPC, whereby the appellants sought leave to defend the suit. As such, the learned ADJ could not have declined to consider the objection raised by the appellants.

19. Mr. Sai Deepak also addressed the issue of whether the objection to jurisdiction, raised in the application seeking leave to defend the suit and in the written statement that came to be

subsequently filed, answered the requirements of Section 8 of the 1996 Act. He relies, for this purpose, on the judgment of Division Benches of this Court in ***Sharad P. Jagtiani v. Edelweiss Securities Ltd***[5] and ***Alok Kumar Lodha v. Asian Hotels (North) Ltd***[6] and of a learned Single Judge of this Court in ***Parasramka Holdings Pvt. Ltd. v. Ambience Pvt. Ltd.***[7].

Submissions by Mr. Ramesh Singh by way of reply

20. Mr. Ramesh Singh did not seriously contest Mr. Sai Deepak's assertion that the learned ADJ had erred in failing to consider the appellants' objection on the ground that it had been raised belatedly. He, however, contends, firstly, that the mere raising of an objection regarding the maintainability of the suit and citing, in support thereof, Section 8 of the 1996 Act, does not amount to compliance with the requirements of the said provision; secondly, that, even if it were to be assumed that the objection, as raised by the appellants, sufficed as compliance with Section 8, the appellants had, subsequently, by contesting the suit and allowing it to proceed to trial and final judgment, waived and abandoned their right to seek recourse to Section 8, for which purpose Mr. Ramesh Singh also relies on Section 4[8] of the 1996 Act; and, thirdly, by granting conditional leave to

[5] **2014 SCC OnLine Del 4015**
[6] **277 (2020) DLT 1 (DB)**
[7] **(2018) 167 DRJ 637 (DB)**
[8] **4. Waiver of right to object**. – A party who knows that –
(a) any provision of this Part from which the parties may derogate, or
(b) any requirement under the arbitration agreement,
has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

defend on 7 May 2010, the learned ADJ had, in fact, considered the appellants' objection under Section 8 and, in the appeal against the said order, the appellants did not invoke either Section 5 or Section 8; and, fourthly, that no issue relatable to Section 8 was framed in the suit. In support of his submissions, Mr. Ramesh Singh relies on paras 12 and 18 of the judgment of the Supreme Court in ***Sukanya Holdings (P) Ltd v. Jayesh H. Pandya***[9], para 33 of ***Tarapore & Co. v. Cochin Shipyard***[10] and paras 7 and 9 of ***U.O.I. v. Kishori Lal Gupta***[11], from this Court, paras 6 and 33 to 45 of ***Alok Kumar Lodha*** and para-16 to 19 of ***SPML Infra Ltd v. Trisquare Switchgears Pvt. Ltd***[12], both by Division Benches of this Court. He also cites para 33 to 35 of the judgment of the Supreme Court in ***World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte Ltd***[13], para 25 and 29 of the decision in ***Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd***[14] and paras 5 to 9 of the judgment of a learned Single Judge of this Court in ***India Infoline Ltd v. Dana Singh Bisht***[15].

21. Mr. Sai Deepak submits, in rejoinder, that the plea of waiver, advanced by Mr. Ramesh Singh, is without substance, as the impugned order specifically notes, in para 20, the objection of the appellants to the continuation of the suit despite the existence of an arbitration agreement. Said objection, he points out, was also

[9] **(2003) 5 SCC 531**
[10] **(1984) 2 SCC 680**
[11] **AIR 1959 SC 1362**
[12] **2022 SCC OnLine Del 1914**
[13] **(2014) 11 SCC 639**
[14] **(2011) 5 SCC 532**
[15] **2018 SCC OnLine Del 10695**

specifically taken in para 4 of the written statement filed by the appellant.

22. ***Kishori Lal Gupta***, submits Mr. Sai Deepak, applies only where the defendant sought to contend that the contract between the parties was null and void. Insofar as the requirement of a separate application under Section 8 of the 1996 Act is concerned, he submits that the issue stands covered by the decision in ***Parasramka Holdings***, from which he specifically cites paras 6, 7, 13, 22 and 34. ***Alok Kumar Lodha***, he submits, merely held that an oral request would not suffice for Section 8, and the required plea had at least to find place in the written statement. ***Sharad P. Jagtiani***, he submits, cannot be distinguished, as Mr. Ramesh Singh has attempted to do, by restricting the decision to non-statutory arbitrations, as the principle that it lays down applies across the board to the 1996 Act. Besides, he points out that ***Sharad P. Jagtiani*** was followed in ***Parasramka Holdings***.

23. Both sides have also placed detailed written submissions, elucidating their respective arguments, on record.

A. Point for determination

24. The only issue which arises for determination in the present case, given the arguments that have been advanced at the Bar, is whether the learned ADJ was in error in proceeding to decide the suit

on merits in view of the objection raised by the appellants predicated on Section 8 of the 1996 Act.

Analysis

25. Clearly, the Court is, in this case, not traversing virgin territory. The issues of the stage when a Section 8 objection has to be raised, and the requisites of such an objection, have both been examined, and discussed, in prior decisions. Both sides have relied on judicial precedents. They, in my view, answer the issues in controversy. The Court has merely to ferret out the answers from the judgments.

Was the plea raised belatedly?

26. The impugned order refuses to consider the appellants' application under Section 8 of the 1996 Act on the sole ground that it was filed belatedly. This finding is obviously incorrect. Mr. Sai Deepak is justified in his contention that Section 8(1) of the 1996 Act requires the application, under the said provision, to be made not later than the date of submission, by the Section 8 applicant, of his first statement of defence on the substance of the dispute. Strictly speaking, the first statement on the substance of the dispute, by the appellant, would be in the written statement filed by him by way of response to the suit instituted by the respondent, consequent to grant of leave to defend the suit. This position stands concluded by para 15

of the judgment of the Division Bench of this court in ***Sharad P. Jagtiani***, which reads thus:

> "15. Section 8 does not specify the manner in which the party has to submit its first statement on the substance of the dispute, and normally with respect to a suit, the first statement on the substance of the dispute by the defendant would be the written statement. Thus, if in the written statement filed it is brought to the notice of the Court that there exists an arbitration agreement between the parties which embraces the subject matter of the suit there would complete compliance with the mandate of the law und the Court would be obliged to refer the parties to arbitration if the plea in the written statement is made good."

27. In the present case, the Section 8 objection was taken by the appellants, not just in the written statement, but even prior thereto, in the application under Order XXXVII Rule 3(5) for grant of leave to defend the suit. The learned Commercial Court was, therefore, clearly in error in holding that the Section 8 objection had been raised at a stage later than that envisaged by the provision.

28. As already noted, Mr. Ramesh Singh, quite fairly, did not contest this point.

29. It has, therefore, to be held that the appellants' objection, predicated on Section 8 of the 1996 Act, could not have been rejected on the ground that it was raised belatedly and that, therefore, the learned Commercial Court erred in so holding.

<u>Did the appellants comply with Section 8?</u>

30. The issue of whether the Section 8 objection, as raised, would suffice as compliance with the provision itself still remains, however, to be decided. Mr. Ramesh Singh's principal contention is that Section 8 requires an application to be made, seeking reference of the dispute to arbitration. A mere objection to the effect that the suit was not maintainable as the MOU between the parties contained an arbitration clause would not suffice. Mr. Sai Deepak submits, on the other hand, that there is no specified format stipulated for the application under Section 8(1) and that, so long as the appellants had raised an objection to the effect that the suit was not maintainable in view of the arbitration clause, it had necessarily to be held that there was substantial compliance with the provision.

31. ***Kishori Lal Gupta***, cited by Mr. Ramesh Singh, has nothing to do with Section 8 of the 1996 Act. Paras 7 and 9 of the said decision, on which Mr. Ramesh Singh placed especial reliance, dealt with the issue of whether, after the original contract had come to an end, the arbitration clause nonetheless survived. As such, this decision is of no particular relevance to the issue in controversy.

32. Paras 12 and 18 of ***Sukanya Holdings***, on which, too, Mr. Ramesh Singh relies, read thus:

> "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, the 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.
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> *****
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> 18. Reliance was placed on Section 89 CPC in support of the argument that the matter should have been referred to arbitration. In our view, Section 89 CPC cannot be resorted to for interpreting Section 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the court has to apply its mind to the condition contemplated under Section 89 CPC and even if application under Section 8 of the Act is rejected, the Court is required to follow the procedure prescribed under the said Section."

33. Mr. Ramesh Singh submits that in para 12 of ***Sukanya Holdings***, the Supreme Court clearly requires compliance with Section 8 of the 1996 Act to be by a specific application seeking reference of the disputes between the parties to arbitration. In the absence of such an application, the Civil Court would be competent to continue with the matter. A mere objection, in the written statement, to the effect that the agreement between the parties contained an arbitration clause does not, he submits, *ipso facto*, amount to an application to refer the dispute to arbitration. The appellants having merely raised an objection that the suit was not maintainable in view of the arbitration agreement between the parties, no proper application under Section 8(1) had been preferred by it.

34. As elucidated by Mr. Ramesh Singh, the submission is undoubtedly attractive.

35. There are, however, three reasons why it cannot be accepted.

36. The first is that the manner in which the objection relatable to the arbitration agreement has been taken by the appellants in their written statement. The appellants had specifically extracted the arbitration clause between the parties. That clause, as extracted, clearly envisages reference of the dispute between the parties to arbitration. Once the clause has been extracted, in my opinion, the appellants were not required to again reproduce the contents of the clause. Extraction of the arbitration clause itself indicates that the appellants were placing reliance thereon. Inasmuch as the arbitration clause envisaged reference of the disputes between the parties to arbitration, the mere fact that the appellants did not separately request that the dispute between the parties be referred to arbitration, would be of little consequence. By extracting and relying on the clause, which specifically envisages reference of the dispute to arbitration, and simultaneously contesting the maintainability of the suit on the basis of the said clause, the appellants clearly evinced their intent to seek reference of the dispute to arbitration. Once the arbitration clause had been extracted, it would be too hypertechnical to hold that, for want of a separate request to refer the dispute between the parties

to arbitration, there was no compliance with Section 8(1) of the 1996 Act.

37. The second reason why the submission of Mr. Ramesh Singh cannot be accepted, is the decision of the Division Bench of this Court in ***Sharad P. Jagtiani***, specifically paras 14 to 17 thereof, which read thus:

> "14. We simply need to highlight the phrase *'not later than when submitting his first statement on the substance of the dispute'* in sub-section (1) of Section 8. *The requirement is to bring to the notice of the Court at a point not later than when submitting the first statement on the substance of the dispute that there exists an arbitration clause between the parties and that the subject matter of the action brought before the Court by way of the suit falls within the ambit of the arbitration clause.*
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> 15. Section 8 does not specify the manner in which the party has to submit its first statement on the substance of the dispute, and normally with respect to a suit, the first statement on the substance of the dispute by the defendant would be the written statement. Thus, if in the written statement filed it is brought to the notice of the Court that there exists an arbitration agreement between the parties which embraces the subject matter of the suit there would complete compliance with the mandate of the law und the Court would be obliged to refer the parties to arbitration if the plea in the written statement is made good.
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> 16. *On the facts of the instant case, it may be true that in the written statement filed a specific prayer has not been made to refer the parties to arbitration, but we have highlighted hereinabove that in the written statement filed a preliminary objection has been taken that the suit is barred in view of the arbitration agreement. The written statement filed is with strings attached by challenging the maintainability of the suit in view of the arbitration clause and therefore in such circumstance the said objection taken by Edelweiss contained in the written statement could be treated as an application under Section 8 of the Arbitration and Conciliation Act, 1996.*

> *17. It is trite that it is the substance of a matter contained in a document which matters and not the form thereof.*"

38. The objection by Mr. Ramesh Singh is clearly covered by the afore-extracted passages from ***Sharad P. Jagtiani*** which, having been rendered by a Division Bench of this Court, binds me. The Division Bench has clearly held that, even if there is no specific request to refer the dispute between the parties to arbitration, the raising of an objection to the effect that the suit is not maintainable in view of the arbitration clause, can be read as an implied request to refer the dispute to arbitration.

39. ***Sharad P. Jagtiani***, I may note, is not really in conflict with para 12 of ***Sukanya Holdings***. Para 12 of ***Sukanya Holdings*** requires the making of a request for referring the dispute to arbitration, as envisaged by Section 8 as one of the conditions for the Civil Court to cede jurisdiction in the matter and for the dispute to be referred to arbitration. ***Sharad P. Jagtiani*** does not say otherwise. It only clarifies that, where an objection regarding maintainability of the suit, predicated on the arbitration agreement between the parties, is raised in the written statement, given the principle that what matters is the form and not the substance of the pleadings, such objection would be entitled to be treated as a deemed request for referring the dispute to arbitration. Thus, ***Sharad P. Jagtiani*** merely supplements the principle contained in para 12 of ***Sukanya Holdings***, and does not, in any manner, supplant, or rule contrary to it.

40. Even otherwise, the decision of the learned Single Judge of this Court in ***Sharad P. Jagtiani v. Edelweiss Securities Ltd***[16], from which the aforesaid appellate judgment of the Division Bench emanated, specifically notes the decision of the Supreme Court in ***Sukanya Holdings***. The opinion in that regard, expressed by the learned Single Judge is thus captured in the following passages:

> "15. The next question for consideration is, whether the making of an application under Section 8 is necessary or the plea, substantially of Section 8 in the written statement, suffices. Though Sub-section (1) of Section 8 merely talks of "if a party so applies" and which can also be in the written statement but Sub-sections (2)&(3) of Section 8 do mention an "application under Sub-section (1)". However *in my opinion, the legislative change as contained in Section 8 of the 1996 Act, as from Section 34 of 1940 Act is not indicative of an application, separate from the written statement being necessitated to be filed for invoking arbitration agreement between the parties*. In fact, even in ***Arti Jethani***[17], it has been held that reference under Section 8 of the parties to arbitration can be made if the written statement itself contains a prayer for referring the disputes for arbitration. However, ***Arti Jethani*** *to the extent it holds that there has to be a specific prayer for reference, with due respect to the judgment in* ***Arti Jethani***, is *contrary to the mandate of Section 8*. Section 8, as aforesaid, merely requires a party to the action before a judicial authority, to bring to the notice of the judicial authority that the action brought before the judicial authority is the subject of an arbitration agreement. As long as the same is done in the written statement, mere absence of a prayer or use of the words seeking reference to arbitration cannot come in the way of the obligation of the judicial authority to refer the parties to arbitration.
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> 16. The Supreme Court in ***P. Anand Gajapati Raju***[18] which was not noticed in ***Arti Jethani***, has held that "an application before a Court under Section 8 merely brings to the Court's notice that the subject matter of the action before it is the subject matter of an arbitration agreement". It was further held that Section 5 of the 1996 Act brings out clearly the object thereof, namely that of

[16] **208 (2014) DLT 487**
[17] **Arti Jethani v. Daehsan Trading (India) Pvt. Ltd. 180 (2011) DLT 511**
[18] **P. Anand Gajapati Raju v. P.V. G. Raju, (2000) 4 SCC 539**

encouraging resolution of disputes expeditiously and less expensively and that when there is an arbitration agreement, the Courts intervention should be minimal and Section 8 has to be construed keeping the legislative intention in mind.

17. *In my view, the said legislative intent requires the Court to interpret Section 8 widely and not in a constricted and pedantic fashion, as would be the case if it were to be held that though by filing a separate application simultaneously with the filing of the written statement, reference to arbitration would be made but not if the plea to the same effect is taken in the written statement or if it were to be held that the absence of a prayer in the application or the written statement "to refer the parties to arbitration" would take away a right of having the disputes adjudicated by the agreed mode of arbitration.*

18. Similarly, in ***Kalpana Kothari v. Sudha Yadav***[19] , it was held that in contrast to Section 34 of 1940 Act, Section 8 of the 1996 Act not only mandates that the judicial authority before which an action has been brought in respect of the matter which is the subject matter of an arbitration agreement, shall refer the parties to arbitration but also provides that notwithstanding the pendency of proceedings before the judicial authority or making of an application under Section 8(1), the arbitration proceedings are enabled, under Section 8(3), to be commenced or continued and an arbitral award also made, unhampered by such pendency and that having regard to the said purpose, scope and object of Section 8, the plea of estoppel can have no application to deprive a party from invoking an all comprehensive provision of mandatory character like Section 8, to have the matter relating to the disputes referred to arbitration in terms of the arbitration agreement. The said binding dicta also remained to be noticed in ***Arti Jethani*.**

19. In my opinion, *it matters not that the counsel for the defendant while drafting the written statement, instead of using the words "refer the parties to arbitration" used the words "that the Court lacks jurisdiction to entertain and decide the suit in view of the arbitration agreement". It is the substance of the plea and not the nomenclature which matters and just like citing of wrong provision of law*, in ***The Bombay Metal Works (P) Ltd. v. Tara Singh***[20] has been held by the Division Bench of this Court to be not an obstacle for granting the relief, so can non use of the language as used in the statute not be a ground to hold that inspite

[19] **(2002) 1 SCC 203**
[20] **131 (2006) DLT 327**

of the Court being informed of the Arbitration Agreement, not to refer the parties to arbitration.

20. Reference may further be made to : -

(A) ***Eastern Media Ltd. v. R.S. Sales Corporation***[21] where it was held that where a written statement is filed but with strings attached, by challenging the maintainability of the suit in view of the arbitration agreement, in such circumstances, the preliminary objection in the written statement can be treated as an application under Section 8. Though the said judgment was considered in ***R.R. Enterprises***[22] but not followed since in that case the plaintiff had given his no objection for the matter to be referred to arbitration. In my respectful opinion, merely because in that case the plaintiff had agreed to reference to arbitration, would not take away from what was held as aforesaid therein.

B. ***Roshan Lal Gupta v. Parasram Holdings Pvt. Ltd.***[23] *where also it was held that a plea by way of preliminary objection in written statement, contesting the jurisdiction of Civil Court to proceed with the suit for arbitration even though referring to Section 5 and not Section 8 of the Arbitration Act, is a plea within the meaning of Section 8 of the Act and the defendant cannot be said to have waived or abandoned the arbitration.*

C. ***APL Polyfab Pvt. Ltd. v. Technology Information, Forcasting and Assessment Council***[24] negativing the plea in opposition to a petition under Section 11 of the 1996 Act of the petitioner therein having lost his right to invoke arbitration by, in a suit filed by the opposite party, having not filed a separate application under Section 8 though having taken the plea of Section 8 in the written statement. However I must mention that the same learned Single Judge subsequently in ***V.M. Mehta v. Ultra Agro Securities Pvt. Ltd.***[25] , following ***R.R. Enterprises*** (supra) held the plea of Section 8 in the written statement to be not sufficient.

[21] **137 (2007) DLT 626**
[22] **R.R. Enterprises v. CMD of Garware-Wall Ropes Ltd., 2013 (2) RAJ 532**
[23] **157 (2009) DLT 712**
[24] **MANU/DE/3186/2011**
[25] **MANU/DE/3135/2013**

> D. ***G.K.C. Projects Ltd. v. Unitech Machines Ltd.***[26] where, following ***Roshan Lal Gupta*** supra, a plea of Section 8 contained in the written statement was held to be tenable.
>
> 21. I may further add that in ***Arti Jethani***, what the Court was concerned with, was an application under Section 8 filed after the filing of the written statement and not with the question whether the reference could be on the basis of the plea contained in the written statement.
>
> 22. As far as ***Sukanya Holdings (P) Ltd.*** (*supra*) is concerned, in my respectful view the same was not concerned with the issue as has arisen herein, as in that case there was no such plea in the written statement. Similarly, ***Rashtriya Ispat Nigam Ltd***.[27] referred to *in extenso* in ***Arti Jethani***, was not concerned with the said issue but is a precedent on, an application under Section 8 being not barred by filing a detailed reply to an application for interim relief.
>
> 23. I am therefore of the view that the defendant, inspite of having not filed an application under Section 8, but in view of the preliminary objection in the written statement, even though not referring to Section 8 and not expressly seeking the relief of reference to a arbitration, has invoked Section 8 of the Act and it is the bounden duty of this Court to refer the parties to arbitration."

41. ***Sharad P. Jagtiani***, therefore, examines, in detail, the issue of whether a specific application, or even a request to refer the parties to arbitration, is a non-negotiable prerequisite for Section 8(1) of the 1996 Act. The issue was answered in the negative, specifically holding that "….*it matters not* that the counsel for the defendant while drafting the written statement, instead of using the words "refer the parties to arbitration" used the words "that the Court lacks jurisdiction to entertain and decide the suit in view of the arbitration agreement"." It is obvious that these passages are not *obiter dicta*, as Mr. Ramesh

[26] **MANU/DE/0146/2014**
[27] **Rashtriya Ispat Nigam Ltd. v. Verma Transport Co., (2006) 7 SCC 275**

Singh would seek to urge, but clearly constitute the *ratio decidendi* of the concerned decisions. In the light of the judgment of the Division Bench in ***Sharad P. Jagtiani*** (which binds me), the objection of Mr. Ramesh Singh, predicated on paras 12 and 18 of ***Sukanya Holdings***, cannot sustain.

42. The third reason why the objection of Mr. Ramesh Singh cannot be accepted is to be found in para 16 of the judgment of the seven Judge Constitution Bench of the Supreme Court in ***SBP & Co. v. Patel Engineering Ltd***[28], which reads as under:

> "16. We may at this stage notice the complementary nature of Sections 8 and 11. *Where there is an arbitration agreement between the parties and one of the parties, ignoring it, files an action before a judicial authority and the other party raises the objection that there is an arbitration clause, the judicial authority has to consider that objection and if the objection is found sustainable to refer the parties to arbitration. The expression used in this section is "shall"* and this Court in ***P. Anand Gajapathi Raju* v. *P.V.G. Raju*** and in ***Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums***[29] has held that the judicial authority is bound to refer the matter to arbitration *once the existence of a valid arbitration clause is established*. Thus, the judicial authority is entitled to, has to and *is bound to decide the jurisdictional issue raised before it*, before making or declining to make a reference."
>
> (Emphasis supplied)

43. Para 16 of the decision in ***SBP & Co.*** holds, unequivocally, that where, in ignorance of the arbitration agreement between the parties, a suit is instituted, and opposite party raises an objection predicated on

[28] **(2005) 8 SCC 618**
[29] **(2003) 6 SCC 503**

Section 8 of the 1996 Act, the Court is bound, if the objection is found to be sustainable, to refer the parties to arbitration. This statement of law completely covers the present case.

44. The position in law, thus, is clear and does not brook of ambiguity. The requirement of making of an application seeking reference of the disputes between the parties to arbitration, as engrafted in Section 8(1) of the 1996 Act, is more a requirement of form than of substance. What matters is *whether there is, in fact, an arbitration agreement between the parties, which is valid and subsisting*. If such an agreement is in place, the jurisdiction of the Civil Court to hear and adjudicate subsists only so long as its attention is not invited to the arbitration agreement. Its jurisdiction perishes the very instant the arbitration agreement is brought to its notice, and a jurisdictional objection, on that ground, is raised – as has indisputably been done in the present case. The absence of any formal request for referring the dispute to arbitration makes no difference. An objection, predicated on Section 8 of the 1996 Act, in the light the existence of the arbitration agreement, *ipso facto* denudes the Court of its power to continue with the suit. It is rendered *coram non judice*. All future acts by the Court, in continuing to entertain the suit are, therefore, rendered *ipso facto* without jurisdiction.

45. There was, indisputably, an arbitration clause between the parties. An objection, predicated on the arbitration clause, was specifically raised by the appellants, firstly in the application under

Order XXXVII Rule 3(5) for grant of leave to defend the suit and, consequent to grant of leave, in the written statement. That being so, the learned ADJ was bound to refer the dispute between the parties to arbitration.

The plea of acquiescence

46. Mr. Ramesh Singh has also placed reliance on the decision of the Supreme Court in ***Tarapore and Company, World Sport Group*** and ***Booz Allen & Hamilton*** to contend that the appellants had, by conduct acquiesced to the conducting of the arbitral proceedings and had, thereby, waived the Section 8 objection.

47. The passages from ***Tarapore and Company, World Sport Group*** and ***Booz Allen & Hamilton***, on which Mr. Ramesh Singh relies, may be reproduced thus:

> ***Tarapore and Co.***
>
> "33. Before we conclude on this point we must take note of a contention of Mr Pai that the respondent cannot be estopped from contending that the arbitrator had no jurisdiction to entertain the dispute as the respondent agreed to the submission without prejudice to its rights to contend to the contrary. It is undoubtedly true that in the letter dated March 29, 1976 by which the respondent agreed to refer the dispute to the arbitrator, it was in terms stated that the reference is being made without prejudice to the position of the respondent as adopted in the letter meaning thereby without prejudice to its rights to contend that the claim of the appellant is not covered by the arbitration clause. In the context in which the expression 'without prejudice' is used, it would only mean that the respondent reserved the right to contend before the

arbitrator that the dispute is not covered by the arbitration clause. It does not appear that what was reserved was a contention that no specific question of law was specifically referred to the arbitrator. It is difficult to spell out such a contention from the letter. And the respondent did raise the contention before the arbitrator that he had no jurisdiction to entertain the dispute as it would not be covered by the arbitration clause. Apart from the technical meaning which the expression 'without prejudice' carries depending upon the context in which it is used, in the present case on a proper reading of the correspondence and in the setting in which the term is used, it only means that the respondent reserved to itself the right to contend before the arbitrator that a dispute raised or the claim made by the contractor was not covered by the arbitration clause. No other meaning can be assigned to it. An action taken without prejudice to one's right cannot necessarily mean that the entire action can be ignored by the party taking the same. In this case, the respondent referred the specific question of law to the arbitrator. This was according to the respondent without prejudice to its right to contend that the claim or the dispute is not covered by the arbitration clause. The contention was to be before the arbitrator. If the respondent wanted to assert that it had reserved to itself the right to contend that no specific question of law was referred to the arbitrator, in the first instance, it should not have made the reference in the terms in which it is made but should have agreed to the proposal of the appellant to make a general reference. If the appellant insisted on the reference of a specific question which error High Court appears to have committed, it could have declined to make the reference of a specific question of law touching his jurisdiction and should have taken recourse to the Court by making an application under Section 33 of the Arbitration Act to have the effect of the arbitration agreement determined by the Court. Not only the respondent did not have recourse to an application under Section 33 of the Arbitration Act, but of its own it referred a specific question of law to the arbitrator for his decision, participated in the arbitration proceeding, invited the arbitrator to decide the specific question and took a chance of a decision. It cannot therefore, now be permitted to turn round and contend to the contrary on the nebulous plea that it had referred the claim/dispute to the sole arbitrator without prejudice to its right to contend to the contrary. Therefore, there is no merit in the contention of Mr Pai."

World Sport Group

"33. Mr Gopal Subramanium's contention, however, is also that the arbitration agreement was inoperative or incapable of being performed as allegations of fraud could be enquired into by the court and not by the arbitrator. The authorities on the meaning of the words "*inoperative or incapable of being performed"* do not support this contention of Mr. Subramanium. The words "*inoperative or incapable of being performed*" in Section 45 of the Act have been taken from Article II(3) of the New York Convention as set out in para 27 of this judgment. *Redfern and Hunter on International Arbitration* (5th Edn.) published by the Oxford University Press has explained the meaning of these words "*inoperative or incapable of being performed*" used in the New York Convention at p. 148, thus:

> "At first sight it is difficult to see a distinction between the terms "inoperative" and "incapable of being performed". However, an arbitration clause is inoperative where it has ceased to have effect as a result, for example, of a failure by the parties to comply with a time-limit, or where the parties have by their conduct impliedly revoked the arbitration agreement. By contrast, the expression 'incapable of being performed' appears to refer to more practical aspects of the prospective arbitration proceedings. It applies, for example, if for some reason it is impossible to establish the arbitral tribunal."

34. Albert Jan Van Den Berg in an article titled "The New York Convention, 1958 — An Overview" published in the website of ICCA (www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of-1958_overview.pdf), referring to Article II(3) of the New York Convention, states:

> "The words '*null and void*' may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence.
>
> The word '*inoperative*' can be said to cover those cases where the arbitration agreement has ceased to have effect, such as revocation by the parties.
>
> The words *'incapable of being performed'* would seem to apply to those cases where the arbitration cannot be effectively set into motion. This may happen where the

> arbitration clause is too vaguely worded, or other terms of the contract contradict the patties' intention to arbitrate, as in the case of the so-called co-equal forum selection clauses. Even in these cases, the courts interpret the contract provisions in favour of arbitration."
>
> (emphasis in original)

35. The book *Recognition and Conferment of Foreign Arbitral Awards: A Global Commentary on the New York Convention* by Kronke, Nacimiento, et al.(ed.) (2010) at p. 82 says:

> "Most authorities hold that the same schools of thought and approaches regarding the term *null and void* also apply to the terms *inoperative and incapable of being performed.* Consequently, the majority of authorities do not interpret these terms uniformly, resulting in an unfortunate lack of uniformity. With that caveat, we shall give an overview of typical examples where arbitration agreements were held to be (or not to be) inoperative or incapable of being performed.
>
> The terms *inoperative* refers to cases where the arbitration agreement has ceased to have effect by the time the court is asked to refer the parties to arbitration. For example, the arbitration agreement ceases to have effect if there has already been an arbitral award or a court decision with res judicata effect concerning the same subject-matter and parties. However, the mere existence of multiple proceedings is not sufficient to render the arbitration agreement inoperative. Additionally, the arbitration agreement can cease to have effect if the time-limit for initiating the arbitration or rendering the award has expired, provided that it was the parties' intent no longer to be bound by the arbitration agreement due to the expiration of this time-limit.
>
> Finally, several authorities have held that the arbitration agreement ceases to have effect if the parties waive arbitration. There are many possible ways of waiving a right to arbitrate. Most commonly, a party will waive the right to arbitrate if, in a court proceeding, it fails to properly invoke the arbitration agreement or if it actively pursues claims covered by the arbitration agreement."
>
> (emphasis in original)"

Booz Allen & Hamilton

> "25. Not only filing of the written statement in a suit, but filing of any statement, application, affidavit 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 waives 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 around and say that the parties should be referred to arbitration in view of the existence of an arbitration agreement. Whether a party has waived his right to seek arbitration and subjected himself to the jurisdiction of the court, depends upon the conduct of such party in the suit*."
>
> (Emphasis supplied)

48. The facts, in the case at hand, are completely at variance with those in the afore-noted decisions. ***Booz Allen & Hamilton***, in fact, supports the appellants, in that it merely requires the Section 8 objection to be raised at the earliest stage, not later than the submission of the first statement on the dispute[30]. By failing to raise the objection at the earliest stage, the defendant allows the Civil Court to proceed with the suit, as it indisputably can, and submits himself to

[30] Though ***Booz Allen & Hamilton*** uses the words "before the submission of the first statement on the dispute", it is obvious that the word "before" has to be understood as "not later than", in view of the clear words of Section 8(1) of the 1996 Act.

its jurisdiction. *In the absence of any Section 8 objection, the Civil Court is not foreclosed from hearing and deciding the suit. It does not, therefore, act coram non judice. The submission to jurisdiction by the defendant is, therefore, submission to jurisdiction of a Court which possesses jurisdiction to proceed with the matter. The entire demographics, however, change if the Section 8 objection is taken at the initial, and appropriate, stage. The Court is, then, ipso facto denuded of jurisdiction to proceed. All proceedings by the Civil Court, towards hearing and deciding the suit on merits are, therefore, in excess of jurisdiction. They cannot be sanctified by acquiescence, or any other conduct of parties.* In relying on ***Booz Allen & Hamilton***, Mr. Ramesh Singh has, I am constrained to observe, albeit with great respect, failed to notice this distinction.

49. In the present case, a specific objection predicated on Section 8 of the 1996 Act was taken in the application under Order XXXVII Rule 3(5) seeking leave to defend the suit. That objection, thereafter, was reiterated in the written statement filed by way of response to the suit. The objection was reiterated during arguments before the learned ADJ. It cannot, therefore, be said that the appellants had waived the said objection. The afore-noted decisions, therefore, have no application to the facts of the present case.

Non-framing of any issue regarding Section 8

50. The only other argument that Mr. Ramesh Singh urged was that, at the time of framing of issues, no issue to the effect as to whether the suit was incompetent on account of the arbitration clause between the parties, or whether the dispute was required to be referred to arbitration, was raised. This submission, again, is based on a fundamentally erroneous premise. The issues, which are struck in a suit, are the issues which are to be decided if the suit were to proceed. The objection under Section 8 is an independent objection, which if found to be sustainable, renders the Civil Court *coram non judice*. The decisions in ***Sukanya Holdings*** as well as ***A. Ayyasamy v. A. Paramasivam***[31] specifically hold that, if the defendant in a suit invokes Section 8 of the 1996 Act, and if there is an arbitration agreement between the parties, the Civil Court cannot continue with the suit and has necessarily to refer the dispute to arbitration. Once, therefore, in the light of a valid arbitration agreement, a Section 8 objection is raised by the defendant, a Civil Court becomes *coram non judice* in the matter. As such, the decision on the Section 8 application cannot be circumscribed by the issues which are struck in the suit as, even if no such issue is struck, the Civil Court is bound, nonetheless, in view of the law laid down by the Supreme Court in ***Sukanya Holdings***, ***SBP & Co.*** and other aforesaid decisions, to refer the dispute to arbitration.

[31] **AIR 1989 SC 1530**

51. That apart, it has been held in ***Mhd. Kareemuddin Khan v. Syed Azam***[32] that the power of the Civil Court to pass orders is not necessarily circumscribed by the issues which are framed and that the Court is not denuded of its power to decide a point which arises in the case, even if no specific issue in that regard has been framed.

52. This objection of Mr. Ramesh Singh, too, has no substance.

Applicability of arbitration clause not in question

53. Mr. Ramesh Singh did not seek to contest the applicability of the arbitration agreement, contained in the MOU, to the dispute between the parties. Even otherwise, with *kompetenz kompetenz* having been conferred statutory colour in the form of Section 16(1)[33] of the 1996 Act, the arbitral tribunal would be competent even to rule on its own jurisdiction.

B. Decision on the point which arises for determination

54. In view of the aforesaid discussion, the point for determination as framed in para 24 *supra* is answered in the affirmative by holding that the learned ADJ could not have proceeded to adjudicate on the

[32] **1997 (2) ALT 625**

[33] **16. Competence of arbitral tribunal to rule on its jurisdiction**. –
(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—
(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

suit on merits. The impugned judgment and decree are liable to be quashed and set aside.

C. Reasons for the decision:

55. The reasons for the afore-noted decision are already set out in the discussions hereinabove. They may briefly be enumerated thus:

(i) A specific objection to the maintainability of the suit had been raised by the appellants, predicated on Section 8 of the 1996 Act.

(ii) This objection was raised at the very first stage when it could be raised firstly, in the application filed under Order XXXVII Rule 3(5) of the CPC seeking leave to defend the suit and, thereafter, in the written statement filed by way of reply to the suit.

(iii) The learned Commercial Court was, therefore, in error in holding that the objection had not been raised at the appropriate stage.

(iv) The objection, as raised, satisfies the requirement of Section 8 of the 1996 Act.

(v) The plea of the respondent, to the effect that the appellants had acquiesced to the adjudication of the suit by the learned Commercial Court is bereft of substance.

(vi) The fact that no specific issue predicated on Section 8 of the 1996 Act was framed by the learned Commercial Court would not alter the above position.

D. Conclusion

56. In view of the aforesaid, the impugned order dated 15 July 2019, passed by the learned ADJ, insofar as it proceeds to adjudicate the suit on merits, despite a valid Section 8 objection having been raised by the appellants, cannot sustain. It is accordingly quashed and set aside.

57. The dispute between the parties would, therefore, be referable to arbitration.

58. The parties are at liberty, therefore, to initiate arbitral proceedings in accordance with law.

59. The appeal is accordingly allowed, albeit without costs.

C.HARI SHANKAR, J

NOVEMBER 6, 2023
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