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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% ***Date of decision: 06th March, 2024***
+ **CS(COMM) 1266/2016, CC(COMM) 33/2018, I.A. 8880/2009,**
I.A. 3428/2010

M/S. ASSAM PETROLEUM LTD. & ORS. Plaintiffs
Through: Ms. Dharitry Phookan and Ms.
Lanutula, Advocates
versus

M/S. CHINA PETROLEUM TECHNOLOGY DEV. CORP. & ORS.
..... Defendants
Through: Mr. Tushar Bhardwaj, Advocate

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T (oral)

I.A. 10608/2022(under Section 151 CPC)

1. Application under Section 151 CPC has been filed on behalf of the Defendant No. 1 for listing of the Application under *Section 8* of the Arbitration and Conciliation Act, 1996.
2. For the reasons stated in the application, it is allowed and the application is listed.
3. The application is accordingly disposed of.

Misc.(J) 08/2006

4. An application under Section 5 and Section 8 read with Section 42 of



the Arbitration and Conciliation Act, 1996 has been filed on behalf of defendant No.1 for referring of the present suit to arbitration.

5. The plaintiff has filed the present suit for Recovery of Rs.4,90,26,208. According to the plaintiff it is a Private Limited Company which is engaged in the provision of various services relating to petroleum and oil field operation including but not limited to supply of man power and oil rig servicing operations primarily in Assam. Defendant No.1 Company a wholly owned subsidiary of M/s China Petroleum Technology and Development Corporation, is engaged in manufacturing and supply of equipment and technology for petroleum operation and petrochemical plants.

6. Defendant No.2 along with one Assam Company Limited was awarded a Contract on 23.02.2001 for exploring, extracting and production of crude oil in and from Amguri Oil Field in Assam in the district of Sibsagarm /Assam. The plaintiff and defendant No.2 entered into an Agreement dated 05.05.2004 with Assam Company Ltd. for carrying out the joint operations under the Production Sharing Contract. The defendant No.2 identified a mobile drilling rig package (Model ZJ 30-750 HP) owned by defendant No.1 and entered into a Memorandum of Understanding dated 12.11.2004 recording the terms of Agreement, with defendant No.1.

7. The plaintiff further submitted that initially the contract was for conducting work over contract and servicing the oil fields as per the tender floated by defendant No.2, but since in the mean time defendant No.2 had identified the rig owned by defendant No.1, the provisions of drilling operations were also made part of the Contract upon the terms and conditions stated therein. The plaintiff, acting at the instance and behest of



defendant No.2 entered into an Agreement to dry lease a drilling rig (hereinafter referred to as "Lease Agreement") with defendant No.1 on 04.11.2004. The plaintiff had asserted that though the Lease Agreement was entered between him and defendant No.1, but it was clear from the various clauses of the Agreement that it was essentially and effectively an Agreement between defendant No.1 and 2, with the plaintiff only being the agent and/or facilitator for the lease of the rig and drilling and work over operation.

8. According to the plaintiff disputes arose inter-se the parties and thus, he filed a suit for declaring that the plaintiff had suffered losses, injury due to omission and commission and sought *recovery* of Rs.75 lacs towards *damages and compensation* from defendant No.1 in respect of Lease Agreement dated 04.11.2004 entered into due to mis-representation regarding the scheduled rig and for recovery of Rs.3,58,04,246/- along with interest, from defendant No.2. The plaintiff also sought *Permanent Injunction* for restraining defendant No.1 from taking away the scheduled rig, mobile drilling rig package from India till the disputes are settled.

9. The defendant No.1 was duly served and appeared on 13.03.2006 and the matter was adjourned for 01.04.2006. *An application under Section 8 Arbitration & Conciliation Act,1996*, dated 11.03.2006 had been filed on behalf of defendant No.1 wherein it was stated that it had made several demands for payment of higher charges as well as return of the rig in conformity with the Agreement for which many correspondences were exchanged between the parties. However, while the plaintiff confirmed vide letter dated 25.01.2006, the deployment of the Rig at a new Well site contrary to the Agreement, as defendant No.2 had extended their contract



upto mid of February, 2006 and that withdrawal of the Rig as demanded by defendant No.1 would create legal complications. In the circumstances, an *Arbitration Petition being OMP39/2006 under Section 9 Arbitration & Conciliation Act,1996* was filed before this Court in which plaintiff and defendant No.2 appeared and submitted to the jurisdiction of this Court and with the consent of the parties, an Order was made on the terms as agreed between the parties.

10. It is submitted that this Court has already exercised jurisdiction by virtue of Section 42 of Arbitration & Conciliation Act, 1996 and no other Court has jurisdiction to try the disputes in respect of Agreement dated 04.11.2004.

11. It is further submitted that the suit is hit by Section 8 of the Arbitration & Conciliation Act, 1996 on account of existence of the Arbitration Clause between the parties. A prayer is, therefore made that the suit be dismissed and the parties be referred to Arbitration as contemplated under Section 8 of the Arbitration & Conciliation Act.

12. **Submissions heard.**

13. Admittedly, there is an Agreement between plaintiff and defendant No.1 dated 04.11.2004 which contains the Arbitration clause No.10.10 of Lease Agreement. It is also admitted that defendant No.1 had filed an OMP39/2006 under Section 9 in which the orders were made with the consent of the parties. Subsequently, the present suit has been filed by the plaintiff in March, 2006 seeking recovery from defendant No.1 and also from defendant No.2.

14. The defendant No.1 by way of this application has raised the objection regarding jurisdiction of this Court to try the suit in view of



Section 8 of the Arbitration & Conciliation Act.

15. The primary issue before this Court for its consideration is: *Whether the suit can be referred to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996.*

16. Section 8 of the Act reads as under:

“8. Power to refer parties to arbitration where there is an arbitration agreement.

- (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.] [Substituted by Act No. 3 of 2016 dated 31.12.2015.]

(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.] [Inserted by Act No. 3 of 2016 dated 31.12.2015.]

(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.”



17. According to this Section 8 *Arbitration & Conciliation Act, 1996*, the defendant No.1 has an option to take the objection to the filing of the suit in the first instance before it submits itself to the jurisdiction of the Court. The defendant has filed its application under Section 8 on 11.03.2006 and raised the objection accordingly.

18. It is submitted on behalf of the plaintiff that even though an application under Section 8 was filed, however the defendant submitted itself to the jurisdiction of this Court thereafter and thus, there can be no reference to arbitration.

19. The issue of reference under Section 8 after the period of filing the Written Statement has expired qua the jurisdiction of Civil Courts, came up for consideration in the case of *SPML Infra Ltd. v. Trisquare Switchgears (P) Ltd., 2022 SCC OnLine Del 1914.* While considering an appeal against the order of the Commercial Court which rejected the appellant's application filed under Section 8 of the Arbitration and Conciliation Act, 1996, the Coordinate Bench of this Court held that the scheme of the Act, 1996 clearly stipulates a framework of time within which an application can be pursued under Section 8(1) of the A&C Act.

20. Consequently, if a party fails pursue an application under Section 8(1) of the Act, 1996 for referring the parties to arbitration within the time available or granted for filing the first statement on the substance of the dispute, including a Written Statement, the party would forfeit its right to apply under Section 8(1) of the A&C Act. Thus, once the defendant has submitted himself to the jurisdiction of the Court, he cannot seek referral of the disputes to arbitration under Section 8 of the Arbitration & Conciliation



Act, 1996 having abandoned the application after filing.

21. The parties may have resorted to Section 9 Arbitration & Conciliation Act, but that in itself would not be any embargo on the plaintiff to file a Civil Suit. S.8 *Arbitration & Conciliation Act, 1996* is only an enabling Section which gives an option to the Defendant to either seek referral of Dispute to arbitration in the first instance, before submitting itself to the jurisdiction of the Court. However, despite there being a valid Arbitration Clause, it may still choose to continue with the trial before the Court.

22. In the present case, though the application had been filed by defendant No.1 on 11.03.2006 immediately on appearance, but it abandoned it and chose not to pursue it and the matter got listed on 22.01.2008 wherein defendant No. 1 was granted time for filing of Written Statement. The defendant No.1 failed to file the Written Statement and his right to file the Written Statement was closed vide Order dated 28.05.2018.

23. It is evident from the conduct of defendant No.1 that he did not pursue his application under Section 8 *Arbitration & Conciliation Act, 1996* and submitted himself to the jurisdiction of the Court by seeking time to file the Written Statement which eventually he failed to file and his right to file the Written Statement was closed. Thus, he had submitted himself to the jurisdiction of this Court. This application under S.8 *Arbitration & Conciliation Act, 1996* got filed in on 11.03.2006 and was abandoned and the trial of the case proceeded thereafter. The defendant cannot now put the clock back to the initial stage after sixteen years, when much water has flown under the bridge.

24. It may be observed that an OMP No.39/2006 under Section 9 of the Act was filed wherein the plaintiff had appeared and a consent Order had



been made. The Order disposing of the OMP is dated 22.02.2006. According to Section 9(2) of Arbitration & Conciliation Act, 1996, once an order under Section 9 is passed, the Notice of invocation of arbitration has to be given within Ninety-days' time, which apparently has not been done. Thereafter, the suit had been filed by the plaintiff.

25. The defendant had a right to invoke arbitration at that stage as well as had a right to seek the referral of the disputes to Arbitration under Section 8 *Arbitration & Conciliation Act, 1996* in the present suit, but as discussed above, he submitted to the jurisdiction of the Court by seeking time to file the written Statement and therefore, his application under Section 8 of the Act, 1996 is held to be without merit as having been abandoned and is hereby, dismissed.

26. The application is accordingly disposed of.

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27. List before learned Joint Registrar for recording of evidence on 26.04.2024.

**(NEENA BANSAL KRISHNA)
JUDGE**

MARCH 06, 2024

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