

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on : 10.08.2023

Pronounced on : 25.08.2023

CFA No. 11/2017 (O&M)

Brij Mohan Sawney.

.....Appellant(s)/Petitioner(s)

Through: Mr. R. K. S. Thakur, Advocate

Vs

Sanjeev Kumar Gupta

..... Respondent(s)

Through: Mr. L. K. Sharma, Sr. Advocate with
Mr. Mohit Kumar, Advocate

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

01. This appeal is directed against the judgment and decree dated 10.09.2016 passed by the learned 1st Addl. District Judge, Jammu (hereinafter to be referred as 'the trial court'), whereby suit filed by the appellant has been dismissed and the parties have been referred to arbitration in terms of section 8 of the J&K Arbitration and Conciliation Act, 1997 (for short, 'the Act').

02. The judgment has been impugned by the appellant on the ground that the learned trial court was not factually correct by returning a finding that the respondent had not taken any defence in an application filed under Section 5 of the Act, as the respondent in an application filed by him under Section 5 of the Act had specifically pleaded that the partnership entered in to between the parties under the name of M/S Sanjeev Exporters was dissolved with mutual consent and the appellant had taken back his capital investment way back in the year 2010.

03. Mr. R. K.S. Thakur, learned counsel for the appellant submitted that respondent had filed an application under Section 5 of the Act for dismissal of the suit, wherein a plea was taken by the respondent that partnership firm was dissolved with the mutual consent of the parties way back in the year 2010 and thereafter the parties started their business separately, which was dismissed by the learned trial court vide order dated 25.04.2015. He further submitted that once the respondent had disclosed his defence to the suit in the application filed under section 5 of the Act, he could not have filed an application under Section 8 of the Act. In order to come out of the preliminary objection in respect of the maintainability of the appeal, learned counsel for the appellant submitted that the present appeal be treated as petition under Article 227 of the Constitution of India. He placed reliance on the judgment of Delhi High Court in **M/s Sunair Hotels ltd. Vs. Union of India , 2000 (88) DLT 781**, judgment of Hon'ble Supreme Court in **Greaves Cotton ltd. Vs. United Machinery and appliances 2017 (2) SCC 268** and judgment of Madras High Court in **Wankanner Jain Social Welfare Society vs. Jugal Kishore Spani, 2001 (3) CCT 656**.

04. *Per contra*, Mr. L. K. Sharma, learned senior counsel for the respondent besides raising preliminary objection in respect of the maintainability of the appeal, submitted that the respondent never waived his right of seeking reference of the dispute to arbitration as in an application under Section 5 of the Act, the respondent sought dismissal of the suit on account of arbitration clause existing in the partnership deed. He further submitted that the application under Section 8 of the Act was filed only when the learned trial court returned a finding that without filing an application under

Section 8 of the Act, the parties cannot be referred to arbitration and application filed under Section 5 of the Act seeking dismissal of the suit was not maintainable. He further submitted that the respondent never waived his right to get the dispute referred to the arbitrator as in both the applications filed under Sections 5 & 8 of the Act, stress was laid by the respondent on the arbitration clause existing in the partnership entered into between the parties. He placed reliance on the judgment of Hon'ble Supreme Court in **Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd and ors, 2011 AIR (SC) 2507.**

05. Heard learned counsel for the parties and perused the record.

06. Briefly stated, the case of the parties is that appellant filed a suit for rendition of accounts and recovery of his share from the partnership firm entered into between the appellant and respondent under the name of M/s Sanjeev Exporters. The respondent initially filed an application under Section 5 of the Act and pleaded that partnership deed entered into between the parties stood dissolved with the mutual consent of the parties and the appellant had taken his capital investment in the year, 2010 and simultaneously, it was also pleaded by the respondent in the said application that in the partnership deed, there was an arbitration clause that provided for referring the dispute between the parties to the arbitrator. It is apt to take note of the prayer part made in the said application, which read as under:

“it is therefore, most humbly prayed that the suit of the plaintiff be dismissed being barred by Arbitration Clause contained in the partnership deed on the basis of which the plaintiff has filed the present suit.”

07. The said application was vehemently opposed by the appellant and ultimately the learned trial court vide its order dated 25.04.2015 dismissed the said application with the observation that the respondent has not filed any application under Section 8 of the Act for referring the dispute to arbitration and the application under Section 5 of the Act, seeking dismissal of the suit, was not maintainable. The respondent assailed the said order through the medium of a revision petition, which was dismissed by this Court vide order dated 06.07.2015. Faced with such the situation, the respondent filed an application under Section 8 of the Act for referring the parties to arbitration. The said application was opposed by the appellant thereby pleading that the application was hit by the *constructive res judicata* as the earlier application filed by the respondent for dismissal of the suit was dismissed. It was also stated that the respondent in his earlier application had submitted '*his first statement*' on the substance of dispute, as such, the respondent now cannot seek reference of dispute to the arbitrator. The learned trial court vide impugned order allowed the application filed by the respondent and referred the parties to arbitration.

08. Section 8 of the J&K Arbitration and Conciliation Act is reproduced 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 so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(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.”

09. A perusal of Section 8(1) of the Act would reveal that if a party applies not later than when submitting his first statement on the substance of the dispute, the judicial authority has to refer the parties to arbitration. Thus, the party can apply under section 8 of the Act for referring the parties to arbitration, either prior to or along with the submission of the first statement of the dispute and not thereafter. A perusal of the prayer part of the application filed by the respondent under Section 5 of the Act, as mentioned above, demonstrates that the respondent sought the dismissal of the suit on the ground of existence of arbitration clause in the partnership deed. The respondent never sought the dismissal of suit of the appellant on merits. The Hon'ble Supreme Court has examined the scope of expression “first statement on the substance of dispute” in various pronouncements. In **Rashtriya Ispat Nigam Ltd. And another v. Verma Transport co. (2006) 7 SCC 275**, the Supreme Court has held as under:

“The expression 'first statement on the substance of the dispute' contained in Section 8(1) of the 1996 Act must be distinguished with the expression 'written statement'. **It employs submission of the party to the jurisdiction of the judicial authority. What is, therefore, is needed is a finding on the part of the judicial authority that the party has waived his right to invoke the arbitration clause. If an application is filed before actually filing the first statement on the substance of the dispute, in our opinion, the party cannot be said to have waived his right or acquiesced himself to the jurisdiction of the court. What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application**

under Section 8 of the 1996 Act, may not be held wholly un-maintainable....”

(emphasis applied)

10. Further, the Supreme Court in **Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd and ors, 2011 AIR (SC) 2507** has observed as under:

“17. Not only filing of the written statement in a suit, but filing of any statement, application, affidavit filed by a defendant prior to the filing of the written statement will be construed as `submission of a statement on the substance of the dispute', if by filing such statement/application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waive his right to seek reference to arbitration. But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him.”

(emphasis applied)

11. From the above enunciation of law, it can be discerned that if the defendant by filing statement/application/affidavit demonstrates his intention to submit himself to the jurisdiction of the Court, then only he is deemed to have waived his right to seek reference to arbitration. In **Booz Allen and Hamilton Inc.** (supra), the Hon'ble Supreme Court did not consider the detailed reply submitted to the application for grant of temporary injunction as a first statement on the substance of the dispute.

12. So far as the present case is concerned, the respondent had demonstrated his intention of defeating the suit of the appellant by placing reliance upon the arbitration clause as contained in the partnership deed but never submitted to the jurisdiction of the Court, thereby waiving his right to seek reference to arbitration. Filing of the application under Section 5 of the Act, which was rightly held to be not maintainable by the learned trial court,

cannot be construed as a submission of statement of the substance of the dispute within the meaning of Section 8(1) of the Act (supra) as the respondent never sought dismissal of the suit on the merits of the claim of the parties, rather the respondent brought to the notice of the court that suit was required to be dismissed as there was an arbitration clause in the partnership deed. After the dismissal of the said application vide order dated 25.04.2015, the respondent filed a formal application under section 8 of the Act and learned trial court referred the parties to arbitration. The judgments relied upon by the learned counsel for the appellant cannot rescue the appellant from the rigours of Section 8 of the Act.

13. In view of what has been said and discussed above, this Court does not find any reason to show indulgence even under Article 227 of the Constitution of India. The present appeal is found to be misconceived and the same is, accordingly, dismissed.

14. Record of the trial court be sent back.

(RAJNESH OSWAL)
JUDGE

Jammu

25.08.2023

Karam Chand/Secy.

Whether the order is speaking: Yes
Whether the order is reportable: Yes