

Before Anil Kshetarpal, J.

**BELLEVUE CENTRAL PARK-II CONDOMINIUM
ASSOCIATION—Petitioner**

versus

**M/S CENTRAL PARK HOSPITALITY SERVICES PVT. LTD.—
Respondent**

CR No.1667 of 2020

March 17, 2020

Arbitration and Conciliation Act, 1996—S. 8—Commercial Court Act, 2015—S.11—Civil suit for recovery—Referring parties to arbitration in view of Arbitration agreement—Held, if a party is interested in referring dispute to Arbitrator he shall have to draw attention of Court immediately, not later than date of submitting his first statement on substance of dispute failing which party objecting would be deemed to have waived his right.

Held that, on careful perusal of Section 8 of the 1996 Act it is apparent that if a party wants a judicial authority to refer the parties to the arbitration, then he must apply but not later than the date of submitting his first statement on the substance of the dispute. In other words, Section 8 can be invoked only if the party applies to the judicial authority before which an action is brought in a matter subject matter of an arbitration agreement but not later than the date of submitting of his first statement on the substance of the dispute. The literal meaning of Section 8 is to the effect that the party has to apply to the judicial authority not later than the date of submitting his first statement on the substance of the dispute. No doubt, Division Bench of Delhi High Court has interpreted that such objection can be taken even in the written statement or while filing counter in the suit, however, that ipso facto would not mean that such objection can be revived, after having abandoned the same, at the stage of final arguments when the trial of the suit is practically over.

(Para 7)

Further held that, keeping in view the aforesaid discussion, the question framed in the beginning is answered against the petitioner and it is held that if a party is interested in referring the dispute to the Arbitrator he shall have to draw the attention of the Court immediately, not later than the date of submitting his first statement on the substance of the dispute, failing which the party objecting would be deemed to

have waived his right.

(Para 12)

Mayank Jain, Advocate
for the petitioner

ANIL KSHETARPAL, J.

(1) Question which this Court is called upon to answer is if a party to an agreement containing a clause for adjudication of dispute through the Arbitral Tribunal, after objecting to the maintainability of the civil suit in the written statement does not pray for reference of the dispute to the arbitral tribunal, whether it will be permissible for such party to object to the jurisdiction of the Civil Court, when the civil suit is ripe for final arguments after conclusion of the trial?

(2) Respondent filed a civil suit before the Special Commercial Court on 12.12.2018 for passing a decree for recovery of certain amount. On receipt of notice, the petitioner (the defendant in the suit before the commercial Court) filed written statement claiming that the jurisdiction of the Court is barred under Section 11 of the Commercial Court Act, 2015. It was further stated that as per clause 13 of the Facility and Management Agreement dated 22.3.2017, the dispute is to be resolved by means of arbitration process, hence, the present suit is not maintainable. Thereafter, on 6.7.2019 in the presence of the learned counsel for the parties, the issues were framed and the Court laid down schedule for the entire proceedings. The order dated 16.7.2019 passed by the Commercial Court is extracted as under:-

“Heard on case management hearing. On the basis of pleadings of the parties the following issues are hereby laid down for adjournment:-

- 1) Whether the plaintiff is entitled to the recovery of Rs.1,12,94,851/- which include principal amount as Rs.98,28,463/- and Rs. 14,66,388/- calculated as interest @ 18% per annum upto 06.10.2018? OPP
- 2) Whether the suit is not maintainable in the present form?
OPD
- 3) Whether the plaintiff is estopped by its own act and conduct? OPD
- 4) Relief.

2. From perusal of the records of the case and nature of controversy in this suit, following schedule for the entire proceedings is hereby laid as under with the consent of the parties/counsel:-

i) **List of witnesses** by both the parties shall be filed on or before 31.7.2019. It is made clear that in case any of the party or parties fail to file list of witnesses within the given time frame they shall have to bring their evidence at own responsibility and they will not be entitled to use the process of the court.

ii) Affidavit of evidence by witnesses by both the parties shall be filed on or before 31.7.2019. It is made clear that in case any of the party fails to file the requisite affidavit within time period same can be filed by parties only after paying cost of Rs.1,000/- per affidavit, per hearing and the cost shall be payable only in fund of District Legal Service Authority.

iii) If the parties wish to move any miscellaneous application, same shall be filed on or before 31.7.2019.

iv) Both plaintiff and defendants are granted almost one month's time each for conclusion of their evidence. The evidence shall be recorded through Local Commissioner.

The schedule for **plaintiff evidence** is laid as under:-

06.08.2019 : First date for plaintiff evidence.

14.08.2019 : Second date for plaintiff evidence

27.08.2019 : For conclusion of plaintiff evidence

(The plaintiff shall also have a right to bring remainder evidence, if any, till 31.8.2019)

vi) The schedule for **defendants' evidence** is laid as under:-

05.9.2019 :First date for defendants evidence.

12.9.2019 :Second date for defendants evidence.

25.9.2019 :For conclusion of defendants evidence.

(The defendant shall also have a right to bring remainder evidence, if any, till 30.9.2019)

5. It is made clear that after conclusion of the parties written

submission be filed within a week and thereafter the case shall be heard and disposed of within a period of one month from 30.9.2019.

6. Now file be first put up on 31.7.2019.”

(3) Thereafter, the plaintiff led its evidence and defendant also led its evidence. After conclusion of the evidence, an application was filed by the defendant-petitioner on 10.1.2020 for referring the dispute to the Arbitral Tribunal which has been dismissed by the learned Commercial Court, on the ground that at this stage, it would not be appropriate to refer the parties to the arbitration.

(4) This Court has heard learned counsel for the petitioner at length and with his able assistance gone through the documents filed.

(5) Learned counsel for the petitioner contends that at a very first opportunity objection to the jurisdiction of the civil court, in view of clause for getting the dispute adjudicated from an arbitral tribunal was taken. He further submitted that the learned Commercial Court ought to have taken note thereof and referred the parties to the arbitral tribunal for adjudication of the dispute. He further submitted that separate application under section 8 of Arbitration and Conciliation Act 1996 (hereinafter referred to as the '1996 Act') was not required to be filed. In support thereof, he relied upon judgment passed by Division Bench of Delhi High Court in '*Sharad P. Jagtiani* versus *Edelweiss Securities Ltd.*¹ He further relied upon judgment passed by the Hon'ble Supreme Court in '*Hindustan Petroleum Corporation Ltd.* versus *M/s Pinkcity Midway Petroleums*² to contend that Section 8 of the 1996 Act is mandatory and the Court is bound to refer the dispute to the Arbitrator. He further placed reliance on the judgment of the Hon'ble Supreme Court in '*P. Anand Gajapathi Raju and others* versus '*P.V.G Raju (died) and others*³ to contend that even at the stage of appeal, the case can be referred to Arbitration.

“**Section 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

¹ 2014(51) RCR (Civil) 598

² 2003 (6) SCC 503

³ 2000 (4) SCC 539

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.

(6) This Court has considered the submission of the learned counsel for the petitioner, however, find no substance therein. At this stage, it would be appropriate to extract Section 8 of the 1996 Act:

(7) On careful perusal of Section 8 of the 1996 Act it is apparent that if a party wants a judicial authority to refer the parties to the arbitration, then he must apply but not later than the date of submitting his first statement on the substance of the dispute. In other words, Section 8 can be invoked only if the party applies to the judicial authority before which an action is brought in a matter subject matter of an arbitration agreement but not later than the date of submitting of his first statement on the substance of the dispute. The literal meaning of Section 8 is to the effect that the party has to apply to the judicial authority not later than the date of submitting his first statement on the substance of the dispute. No doubt, Division Bench of Delhi High Court has interpreted that such objection can be taken even in the written statement or while filing counter in the suit, however, that ipso facto would not mean that such objection can be revived, after having abandoned the same, at the stage of final arguments when the trial of the suit is practically over.

(8) This matter can be examined from another perspective. The 1996 Act does not bar the jurisdiction of the civil court as such. Section 8 of the 1996 Act which mandates a judicial authority before which an action is brought in a matter, which is subject matter of arbitration agreement, to refer the parties to the arbitration if a party to the arbitration agreement so applies but not later than the date of submitting his first statement. Thus, the option is given to a party to apply to the judicial authority in this regard. The Courts have interpreted Section 8 to mean that if the objection to the maintainability of the suit in the presence of arbitration clause in the agreement is brought to the notice of the Court/judicial authority at an appropriate

stage, then the Court is bound to refer the parties to the arbitration. However, it is the party who has to make a choice and elect whether it wants the Court to refer the parties to the arbitration or it wants to continue the proceedings before the judicial authority.

(9) This matter can be examined from an another angle. The Arbitral Tribunal is a forum chosen by the parties by an agreement for getting their dispute adjudicated. Once a party waives his right to object to the maintainability of the civil suit and does not press before the judicial authority to refer the parties to the arbitration then he cannot subsequently be permitted to invoke the aforesaid objection. As noticed above, in the present case after having filed the written statement objecting to the jurisdiction of the Court, the defendant-petitioner neither objected to the maintainability of the suit while framing the issues nor objected while leading evidence. The plaintiff as well as defendant have already concluded their evidence. Hence, at this stage, Section 8 of the 1996 Act cannot be invoked to request the judicial authority to refer the parties to arbitration. Judgments passed by Delhi High Court cited by learned counsel for the petitioner would not be applicable because in the aforesaid case after having taken the objection in the written statement attention of the Court was immediately drawn when the suit was at preliminary stage and the Division Bench held that no separate application is required to be filed.

(10) The judgment in Hindustal Petroleum Corporation Ltd. (*supra*) the Hon'ble Supreme Court was examining a situation where application under Section 8 of the 1996 Act was filed but the same was dismissed by the learned Trial Court as well High Court on the ground that the dispute involved in the suit does not fall within the scope of arbitration agreement. In those circumstances, Hon'ble Supreme Court went on to hold that the judicial authority has no choice but to refer the parties to arbitration once the arbitration agreement is brought to the notice of judicial authority. It was held that it would be for the arbitral tribunal to decide as to whether the dispute falls within the scope of arbitration agreement or not.

(11) Still further, reliance placed by learned counsel for the petitioner on P. Anand Gajapathi Raju (*supra*) a judgment passed by the Hon'ble Supreme Court is misconceived. On careful reading of the judgment it is apparent that during the pendency of the appeal before the Hon'ble Supreme Court parties entered into an arbitration agreement and thereafter requested to the Hon'ble Supreme Court to refer their dispute to sole arbitrator. In that context, the Hon'ble

Supreme Court held that Section 8 of the 1996 Act can be invoked as language of Section 8 is peremptory. However, the aforesaid judgment of the Hon'ble Supreme Court does not apply to the facts of the present case.

(12) Keeping in view the aforesaid discussion, the question framed in the beginning is answered against the petitioner and it is held that if a party is interested in referring the dispute to the Arbitrator he shall have to draw the attention of the Court immediately, not later than the date of submitting his first statement on the substance of the dispute, failing which the party objecting would be deemed to have waived his right.

(13) Accordingly, the present revision petition is dismissed.

Ritambhra Rishi