

(2022) 07 DEL CK 0015

Delhi High Court**Case No:** First Appeal From Order (COMM) No. 81 Of 2022, Civil Miscellaneous No. 24865 Of 2022

M/S Spml Infra Ltd.

APPELLANT

Vs

M/S. Trisquare Switchgears Pvt.
Ltd.RESPONDENT

Date of Decision: July 6, 2022**Acts Referred:**

- Constitution Of India, 1950 - Article 227
- Code Of Civil Procedure, 1908 - Order 8 Rule 1, Order 8 Rule 10
- Arbitration Act, 1940 - Section 8, 8(1), 8(2), 29A, 34
- Arbitration And Conciliation (Amendment) Act, 2015 - Section 16

Hon'ble Judges: Vibhu Bakhru, J; Amit Mahajan, J**Bench:** Division Bench**Advocate:** Shashank Khurana, Parag Chaturvedi, Sanket Khandelwal**Final Decision:** Dismissed

Judgement

Vibhu Bakhru, J

1. The appellant has filed the present appeal impugning an order dated 28.03.2022 (hereinafter "the impugned order") passed by the learned

Commercial Court rejecting the appellant's application filed under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter "the A&C

Act"). The learned Commercial Court had declined to refer the parties to arbitration on the ground that the appellant had filed the said application

after the statutory period to file the written statement had expired and the appellant's right to do so was closed. In addition, the learned

Commercial Court also observed that the proceedings indicated the appellant's intention to participate in the same.

2. It is the appellant's case that it had no intention to participate in the proceedings before the learned Commercial Court or to waive its right to refer the subject disputes to arbitration.

3. The principal question that is required to be addressed is whether a party forfeits its right to file an application under Section 8 of the A&C Act on expiry of time to file the written statement of its defence.

4. Briefly stated, the relevant facts necessary to address the controversy in the present appeal are as under: -

4.1 The respondent (plaintiff) has filed the suit for recovery and claiming a decree against the appellant (defendant) for a sum of Rs. 15,60,000/- along

with pendente lite and future interest at the rate of 18% per annum as well as costs. The plaintiff claims that it had supplied goods and raised invoices

for a value of Rs. 1,06,32,953/-. Against the aforesaid amount, it had received an aggregate amount of Rs. 97,17,481/- till 31.03.2015. It had received

a further payment of Rs. 1,146/- on 18.04.2015. Thus, a balance amount of Rs. 10,20,477/- remains outstanding and payable.

4.2 In its plaint, the plaintiff claims that it is entitled to the said amount along with interest at the rate of 18% per annum from 18.04.2015 till filing of

the plaint on 26.03.2018 computed at Rs. 5,39,700/-. Thus, in aggregate, the plaintiff claims that it was entitled to a sum of Rs. 15,60,177/- inclusive of

interest till the date of filing of the suit, which is rounded off to Rs. 15,60,000/-.

4.3 The said suit was listed before the learned Commercial Court on 11.04.2018 and a copy of the plaint and other documents were provided to the

learned counsel for the defendant (the appellant herein). The learned Commercial Court granted one month's time to file the Written Statement

and listed the suit for further proceedings on 29.07.2018. The appellant failed to file the Written Statement within the specified period and the matter

was adjourned. It was again listed on 03.11.2018. On that date, the learned Commercial Court noted that the appellant had not filed the Written

Statement and the time for doing so had expired. Accordingly, the learned Commercial Court closed the right of the appellant to file the Written

Statement and re-listed the matter for the plaintiff's evidence on 29.01.2019.

4.4 The plaintiff (the respondent) filed an affidavit of its witness and a copy of the same was also provided to the appellant. However, since the representative of the plaintiff (the respondent) had not brought the original documents to court on 29.01.2019, the learned Commercial Court adjourned the matter to 18.04.2019.

4.5 At this stage, the appellant has filed an application under Section 8 of the A&C Act. The appellant relied upon the dispute resolution clause as included in the Purchase Order dated 01.04.2018 and sought reference of the subject disputes to arbitration.

5. Mr Khurana, learned counsel appearing for the appellant, submitted that the learned Commercial Court had relied upon the decision of a Single

Bench of this Court in Anil Mahindra & Anr. v. Surender Kumar Makkar & Anr. 2017 SCC OnLine Del 11532 and on the strength of the said

decision, rejected the appellant's application under Section 8 of the A&C Act. He submitted that the said decision was rendered in a petition filed

under Article 227 of the Constitution of India and the Court had declined to interfere with the orders passed by the learned Trial Court without

examining the language of Section 8 of the A&C Act. He further referred to another decision of the Single Bench of this Court in Hughes

Communication India Ltd. & Ors. v. Union of India 2018 SCC OnLine Del 10879 and drew the attention of this Court to paragraph 27 of the said

judgment, wherein the Court had noted that the decision in Anil Mahindra's case Supra Note 1 was rendered without noting that Section 8 of the

A&C Act did not permit any such interpretation and therefore, the same was not a binding precedent. He submitted that the learned Commercial

Court had erred in following the said decision.

6. In fairness, the learned counsel also referred to the decisions of a Single Bench of this Court in SSIPL Lifestyle Private Limited v. Vama Apparels

(India) Private Limited & Anr. 2020 SCC OnLine Del 1667 and the decision in the case of Krishan Radhu v. The Emmar MGF Construction Pvt. Ltd.

2016 SCC OnLine Del 6499, wherein the Court had taken different view in the context of Section 8 of the A&C Act as amended by virtue of the

Arbitration and Conciliation (Amendment) Act, 2015. Further, he also referred to the decision of a Single Judge of this Court in Shri Chand

Construction and Apartments Private Limited &Anr. v. Tata Capital Housing Finance Ltd. 2020 SCC OnLine Del 472.

7. Prior to enactment of the A&C Act (Arbitration and Conciliation Act, 1996), the law relating to arbitration was embodied in the Arbitration Act,

1940. Section 34 of the said Act empowered the court "to stay legal proceedings where there is an arbitration agreement". Section 34 of the said

Act is relevant and reproduced below:

"34. Power to stay legal proceedings where there is an arbitration agreement." Where any party to an arbitration agreement or any person

claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any

matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the

proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient

reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the

proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority

may make an order staying the proceedings."

8. In terms of Section 34 of the Arbitration Act, 1940, a party was entitled to apply to the court/judicial authority before which the legal proceedings

were pending to stay the proceedings "at any time before filing a written statement or taking any other steps in proceedings". The courts

had interpreted the expression "other steps in the proceedings" to mean "such steps as would manifestly display an unequivocal

intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration" [Food Corpn. of India v. Yadav

Engineer & Contractor: (1982) 2 SCC 499].

9. The Supreme Court had also explained the expression "taking any other steps in the proceedings" does not mean that every step in the

proceedings would come in the way of enforcement of the arbitration agreement. The step must be such as would clearly and unambiguously manifest

the intention to waive the benefit of arbitration agreement” [RachappaGurudappaBijapur v. GurudiddappaNurandappa: (1989) 3 SCC 245].

10. The A&C Act replaced the Arbitration Act, 1940. The A&C Act is based on the UNCITRAL Model Law. Article 8 of the UNCITRAL Model

Law reads as under: -

“Article 8. Arbitration agreement and substantive claim before court (1) A court before which an action is brought in a matter which is the subject

of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the

parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued,

and an award may be made, while the issue is pending before the court.”

11. Section 8 of the A&C Act, as enacted, was somewhat similar to Article 8 of the UNCITRAL Model Law and 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 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.”

12. It is clear from the above that Section 8 of the A&C Act did not prescribe any specific time for filing an application under Section 8 of the A&C

Act for referring the parties to arbitration. It merely provided that such application ought to be moved not later than submission of the first statement

on the substance of the dispute.

13. In *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Ors.* (2011) 5 SCC 532, one of the questions that fell for consideration before the

Supreme Court was whether an application under Section 8 of the A&C Act was liable to be rejected on the ground that it was filed almost twenty

months after the defendant had entered appearance in the suit. The Court answered the question as under: -

“19. 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 round 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.

When plaintiffs file applications for interim relief like appointment of a receiver or grant of a temporary injunction, the defendants have to contest the

application. Such contest may even lead to appeals and revisions where there may be even stay of further proceedings in the suit. If supplemental

proceedings like applications for temporary injunction on appointment of Receiver, have been pending for a considerable time and a defendant has

been contesting such supplemental proceedings, it cannot be said that the defendant has lost the right to seek reference to arbitration. At the relevant

time, the unamended Rule 1 of Order VIII of the Code was governing the filing of written statements and the said rule did not prescribe any time limit

for filing written statement. In such a situation, mere passage of time between the date of entering appearance and date of filing the application under

Section 8 of the Act, can not lead to an inference that a Defendant subjected himself to the jurisdiction of the court for adjudication of the main

dispute. The facts in this case show that the plaintiff in the suit had filed an application for temporary injunction and appointment of Receiver and that

was pending for some time. Thereafter, talks were in progress for arriving at a settlement out of court. When such talks failed, the appellant filed an application under Section 8 of the Act before filing the written statement or filing any other statement which could be considered to be a submission of a statement on the substance of the dispute. The High Court was not therefore justified in rejecting the application on the ground of delay.â€

14. The expression â€œfirst statement on the substance of the disputeâ€ is of wide import. It would take within its sweep any statement filed to join or raise issues regarding the substratum of the matter in dispute. In the context of the civil suit, it would include the written statement as required to be presented under Order VIII Rule 1 of the Code of Civil Procedure, 1908 (CPC).

15. In *Rashtriya Ispat Nigam Ltd. v. Verma Transport Co.* (2006) 7 SCC 275, the Supreme Court had interpreted the expression â€œfirst statement on the substance of the disputeâ€ and observed as under: -

â€œ36. The expression â€œfirst statement on the substance of the disputeâ€™ contained in Section 8(1) of the 1996 Act must be contradistinguished with the expression â€œwritten statementâ€. It employs submission of the party to the jurisdiction of the judicial authority. What is, therefore, needed is a finding on the part of the judicial authority that the party has waived its 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 its right or acquiesced itself 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 unmaintainable.â€

16. The expression â€œnot later thanâ€ as used in Section 8(1) of the A&C Act also makes it amply clear that a party would not be precluded from applying under Section 8 of the A&C Act simultaneously along with filing of a written statement or include such relief in the written statement.

However, the party would forfeit its right to apply under Section 8 of the A&C Act once it has filed the written statement. The expression â€œfirst statement on the substance of the disputeâ€ would also take within its sweep any other filing, whereby a party evinces his intention to contest the

proceedings and subject himself to the jurisdiction of court/judicial authority. Filing of any such statement, would indicate the party's intention to abandon the arbitration agreement. It would preclude the said party to thereafter seek that the parties be referred to arbitration under Section 8 of the A&C Act.

17. Although Section 8 of the A&C Act (as in force prior to 23.10.2015) did not prescribe any time period within which a party must apply under Section 8 of the A&C Act as explained in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Ors.* Supra Note 9, the scheme of the A&C Act and the provisions of Section 8 of the A&C Act clearly indicate that the application under that section should be made at the earliest.

18. It is clear from the scheme of the Act that once the proceedings before the court or judicial authority progress beyond the initial stage, it would no longer be permissible for a party to then turn around and seek recourse to arbitration. A mere delay in making an application under Section 8 of the A&C Act may not be fatal to a party's right; but once the proceedings have progressed beyond the stage of completion of pleadings, such an application would not lie. This is because at that stage, the parties are sufficiently invested in the said proceedings, and it would not be permissible for any party to turn around and apply under Section 8 of the A&C Act.

19. If a party's right to file a statement of defence is closed, the same would also result in its rights accruing in favour of the other party. Clearly, at this stage, it would not be permissible for a party to apply under Section 8 of the A&C Act even though he has not expressly evinced any intention to contest the proceedings. It is implicit in the expression "not later than submitting the first statement of substance of the dispute" that the application under Section 8 of the A&C Act can be made at the stage when it is open for a party to submit such a statement. It, obviously, follows that once such a stage is crossed, the right of the party to apply under Section 8(1) of the A&C Act would also stand closed. The scheme of Section 8 of the A&C Act does not contemplate unraveling concluded proceedings. Once the right of a party to file the written statement of defence is closed, the proceedings in a suit progress beyond the stage of completion of pleadings. It is not open for the defendant to now seek a reference to arbitration.

Although Section 8 of the A&C Act (as in force prior to 23.10.2015) did not specify any time limit, it did indicate the stage of the proceedings at which a party could apply, that is, before filing of the first statement on the substance of the dispute. This clearly implies a stage at which such a statement could be filed and not thereafter.

20. If the contention advanced by the appellant is accepted, it would imply an application under Section 8 of the A&C Act can be allowed to be filed at any stage of the proceedings; even after the evidence is tendered and witnesses have been cross-examined or for that matter just before the matter is fixed for pronouncement of the decision. Clearly, this is not in conformity with the scheme of Section 8 of the A&C Act.

21. The Arbitration and Conciliation (Amendment) Act, 2015 [Act 3 of 2016] amended the A&C Act significantly. By virtue of the said Act, Sub-section (1) of Section 8 of the A&C Act was substituted and a proviso was introduced to Sub-section (2) of Section 8 with retrospective effect from

23.10.2015. Section 8 of the A&C Act, as in force with effect from 23.10.2015, 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]

(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.] ...â€

22. The change in the language of Section 8(1) of the A&C Act is material. Whereas prior to the 2015 Amendment, Sub-section (1) of Section 8 of

the A&C Act used the expression â€œnot later than when submitting his first statement on the substance of the disputeâ€œ. Sub-section (1) of

Section 8, as substituted, uses the expression â€œnot later than the date of submitting his first statement on the substance of the disputeâ€œ.

The legislative intent to introduce the words â€œnot later than the date ofâ€œ clearly stipulates a framework of time within which an application

under Section 8(1) of the A&C Act can be made.

23. This amendment to Section 8 of the A&C Act, cannot be considered in isolation. It is material to note that the Parliament had also enacted the

Commercial Courts Act, 2015 (Act 4 of 2016), which came into force on the same date as the Arbitration and Conciliation (Amendment) Act, 2015,

that is, with effect from 23.10.2015. By virtue of Section 16 of the said Act, certain provisions of the CPC were amended in their application to any

suit in respect of a commercial dispute of the specified value. The said provisions, inter alia, also included amendment to Order VIII Rule 1 and Order

VIII Rule 10 of the CPC. The proviso to Order VIII Rule 1 of the CPC was substituted, which expressly provided that if the defendant failed to file a

written statement within the prescribed period of thirty days, the court could, for reasons to be recorded in writing, extend further time to file the

written statement. However, such extended time could not be later than 120 days from the date of service of summons. Further, the proviso to Order

VIII Rule 10 of the CPC was introduced, which expressly provided that no court would make an order to extend the time provided under Order VIII

Rule 1 of the CPC for filing of the written statement. Thus, the Parliament has curtailed the outer time limit of filing of a written statement in a

commercial suit to 120 days after receipt of summons. The said amendment is obviously to ensure expeditious adjudication of commercial disputes.

24. Arbitration is an alternate dispute resolution mechanism to provide for an expeditious adjudication of disputes. By virtue of the Arbitration and

Conciliation (Amendment) Act, 2015, certain other provisions were also introduced in the A&C Act to provide for time limits for making the arbitral

award. Section 29A of the A&C Act was introduced, which specifically provide that an arbitral award would be made within a period of twelve months from the date the arbitral tribunal enters upon reference. One of the objects of the A&C Act is to provide for an expeditious resolution of disputes in a time bound manner. In *Bharat Sanchar Nigam Limited and Anr. v. M/s Nortel Networks India Private Limited* (2021) 5 SCC 738, the Supreme Court had observed that the A&C Act “has been amended twice over in 2015 and 2019, to provide for further time limits to ensure that the arbitration proceedings are conducted and concluded expeditiously”.

25. As stated above, a written statement would also fall within the sweep of expression “statement on the substance of the dispute” as used in Section 8(1) of the A&C Act. The introduction of the expression “the date of” in the context of the suit would necessarily have to be co-related with the time available or granted for filing of a written statement. The legislative intent of introducing the expression “the date of”, when read with the contemporaneous amendments to Order VIII Rule 1 of the CPC by virtue of the Commercial Courts Act, 2015, is quite clear; it is to introduce the precise time frame within which an application under Section 8(1) of the A&C Act could be filed.

26. Resultantly, if a party fails to file an application under Section 8(1) of the A&C Act for referring the parties to arbitration within the time available or granted for filing the first statement on the substance of the dispute (which would include a written statement in the context of a suit), the party would forfeit its right to apply under Section 8(1) of the A&C Act.

27. This Court is unable to accept that there is any infirmity in the decision of the learned Commercial Court. This Court is unable to concur with the decision of the Single Judge of this Court in *Hughes Communications India Ltd. and Ors. v. Union of India* Supra Note 2 that Section 8 of the A&C Act cannot be read to mean that an application under Section 8(1) of the A&C Act would not lie after the right to file the written statement has been closed. We, accordingly, over-rule the said decision.

28. The decision of the learned Commercial Court to follow the decision of Single Bench of this Court in *Anil Mahindra*’s [Supra Note 1] case

(supra) cannot be faulted. We concur with the decision of the learned Commercial Court that the right of the appellant to file an application under

Section 8(1) of the A&C Act stood closed. We find no infirmity with the impugned decision to reject the appellant's application under Section 8(1)

of the A&C Act.

29. The appeal is, accordingly, dismissed. The pending application is disposed of.