**Update**

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# Appealing an order that closed the right to file written statement does not disentitle a party from seeking reference to arbitration (Delhi High Court)

by , Kriti

**Shri Chand Construction and Apartments Private Ltd. and another v. Tata Capital Housing Finance Ltd.**

**Court**: Delhi High Court | **Case Number**: CS (OS) 179/2019 | **Citation**: 2020 SCC Online Delhi 472 | **Bench**: Rajiv Sahai Endlaw J |**Date**: 04 March 2020

### A. Preface: Section 8 ACA, how to apply and when to apply to refer the matter to arbitration?

Section 8 ACA requires the courts to recognise and give effect to arbitration agreements. If an arbitration agreement covers a dispute, and yet a party goes to a court, the other party can apply under Section 8 to refer the matter to arbitration. This provision is one of the most critical elements of arbitration law.[1] Several cases have considered the method of application to refer the dispute to arbitration, and the timing of the application. [1] Section 8 applies to domestic arbitrations and Section 45 to international commercial arbitrations. Show More

### B. SSIPL case surveys the law

A reader interested in the issue will find one of the latest surveys of the decisions in the judgment of Prathiba Singh J of the Delhi High Court in *SSIPL Lifestyle Private Limited* v. *Vama Apparels (India) Private Limited and another,* CS (Comm.) 735 of 2018, decided on 19 February 2020.

#### B1. How to apply?

As to the method of applying, Prathiba Singh J noted that some cases had held that, if the matter before the court was a civil suit, the written statement could contain the objection and a separate application was not necessary. She referred to Rajiv Sahai Endlaw J's decision in *Sharad P Jagtiani* v*. Edelweiss Securities Ltd.*, 208 (2014) DLT 487[2] [2] Decision of 03 March 2014, which was affirmed in appeal by Pradeep Nandrajog and Mukta Gupta JJ on 07 August 2014. Show More where he had held that even a pleading in the written statement that the matter is arbitrable and the court lacks jurisdiction (without

even a specific reference to Section 8 ACA) is enough for the court to refer the matter to arbitration.[3] [3] *Parasramka Holdings Pvt. Ltd.* v. *Ambience Private Ltd. & another*, CS (OS) 125/2017, decided on 15 January 2018. Sharad was cited, and Manmohan J effectively interpreted Section 8 ACA in the same manner. Tata Capital relied on both these cases. Show More

### B2. When to apply? The timing and limitation

The timing of the Section 8-application was the main issue before Prathiba Singh J. She noted the cases which have held that an application could be made simultaneously with a written statement[4] [4] Since in a suit, a written statement has been considered to be the first statement on the substance of the dispute within the meaning of Section 8 ACA. Show More (or before). She then considered the language of Section 8 before and after the 2015 Amendments. Before the amendment, Section 8 required an application "*not later than when submitting*" the first statement on the substance of the dispute. Now, after the amendment, Section 8 requires an application "*not later than the date of submitting.*"

She concluded that "the amendment is a conscious step towards prescribing a limitation period for filing the Section 8 application" and that the "mention of the word 'date' in the amended provision means that it is a precise date and usually incapable of ambiguity. The same is a crystalized date and not a 'period' prior to the filing of the first statement on the substance of the dispute."

She held that "the date by which the statement of defence could have been filed" is the last date for seeking a reference to arbitration.[5] [5] It was held, "in the CPC, for civil suits, an outer limit of 90 days has been fixed for filing of the written statement which is condonable … However, in commercial suits, the outer limit of 120 days for filing of the written statement. Show More

## C. The *Shri Chand Construction* case

Shri Chand Construction took a loan from Tata Housing Capital and deposited as security the title deed of its immovable property. The loan agreement had an arbitration clause, which also said that if at any point in time Tata Capital comes under the purview of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (thus enabling Tata Capital to enforce the security or make a recovery under that law), the arbitration clause shall "at the option of TCHFL, cease to have any effect."

Shri Chand sued Tata Capital for recovery of damages. There were effectively two questions before Rajiv Sahai Endlaw J sitting singly in the Delhi High Court. The first was whether Tata had waived its right to seek a reference to arbitration.

### C1. Did Tata waive its right to apply?

The question arose because after the court issued a notice, Tata appeared before the Registrar and said that it would apply to refer the matter to arbitration. The Registrar granted time to apply and also to file the written statement. When even after some days the written statement was not filed, Endlaw J closed the right to file it. Tata appealed and got an order from the division bench extending the time for filing the written statement. Shri Chand now argued before Endlaw J that Tata was not entitled to seek a reference to the arbitration because of its conduct and because it appealed against the order of closing the right to file a written statement

(thus opting to file its written statement and proceed with the suit).[6] [6] Relying on *Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*, (2011) 5 SCC 532 where the court had also observed that "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". Show More

Endlaw J rejected those arguments and held the Section 8 application was maintainable:

i. Firstly, he cited the decision of RK Gauba J of Delhi High Court in *Krishan Radhu* v. *Emmar MGF Construction Pvt. Ltd.*, MANU/DE/3422/2016 and noted the conclusion in that decision, namely, that (i) the expression "first statement on the substance of the dispute" means, in a civil suit, the written statement; and (ii) what is needed is a finding that the right to invoke arbitration has been waived. He found that was not the case here.
ii. Secondly, he compared the present law with the Arbitration Act, 1940 and held that, unlike the 1940 enactment, the standard no longer was if the defendant took any other steps in the proceedings [relying on *Greaves Cotton Ltd.* v. *United Machinery and Appliances*, (2017) 2 SCC 268 and a few other cases].[7]] [7] *Vijay Anand & Associates* v. *Ashraf & Co. Pvt. Ltd.*, MANU/DE/1200/2001; *Everest Electric Works* v. *Himachal Futuristics Communications Ltd.*, MANU/DE/1494/2004, *Varun Seacon Ltd.* v. *Bharat Bijlee Ltd.* AIR 1998 Guj. 99 and *Sohani Granites Pvt. Ltd.* v. *Binny Ltd.*, MANU/AP/0524/2002. Show More
iii. He concluded that "the only test which the legislature now requires the applicant to satisfy, to make an application or take a plea under Section 8 of the Arbitration Act, is that it should not be later than the date of submitting his written statement and which admittedly has not happened till now or had happened till the date of filing of this application."
iv. Thirdly, he rejected the argument based on the doctrine of election. Shri Chand had argued that filing the appeal showed an intention to file the written statement rather than to apply to refer the matter to arbitration. Endlaw J said Tata Capital "could not have taken a chance, of not impugning the order closing its right to file written statement, in the hope of succeeding in the Section 8 application."
v. Fourthly, he referred to the decision of Prathiba Singh J in *SSIPL* and noted it did not apply since the division bench on Tata Capital's appeal had extended the period to file the written statement.

**C2. Was the arbitration clause valid?**

On Endlaw J's enquiries during the hearing, it turned out that Tata Capital had, after the agreement, come under the purview of the SARFAESI Act. The question was "whether not the second part of the clause aforesaid in the agreement would apply, ceasing the effect of the arbitration clause."

Tata Capital contended that the arbitration clause would cease to affect only Tata's claim against Shri Chand but not Shri Chand's claim against Tata Capital. Rejecting this argument, Endlaw J held that such agreements could not be valid: –

i. Section 7 ACA defines arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them. The words "all or certain disputes" permit classification of

disputes but do not permit classification of claims.

ii. “The said words, in my view, do not allow a provision providing for claims of one of the parties arising in respect of a defined legal relationship to be adjudicated by arbitration but the claim of the other party arising in respect of the same legal relationship to be adjudicated by any other mode.”

iii. It would be contrary to public policy to split up claims and causes of action. It would result in a multiplicity of proceedings, with claims of one of the parties to a legal relationship being decided by one forum and the claims of the other party to the same legal relationship being decided by another forum and the possibility of conflicting findings.

Several cases were then cited where either the remedy of both court and arbitration was contemplated or where one party had the sole right to invoke arbitration, in each of which the court held that the arbitration clause was not valid.[8] [8] The following cases were referred (description of Endlaw J, not cross-referenced in this Update): *Wellington Associates Ltd.* v. *Kirit Mehra*, (2000) 4 SCC 272 (arbitration was not the sole remedy. It was held that there was no arbitration agreement); *Jagdish Chander* v. *Ramesh Chander*, (2007) 5 SCC 719 (there was merely a possibility of the parties agreeing to arbitration in future. Held, there is no valid and binding arbitration agreement); *Jagatjit Jaiswal* v. *Karmajit Singh Jaiswal*, 2007 SCC OnLine Del 1519 (the dispute resolution committee had an option to either act as an arbitrator or as an expert. Held there was no arbitration agreement); *Union of India* v. *Bharat Engineering Corporation,* 1977 SCC OnLine Del 45 (holding, in the context of Arbitration Act, 1940, that there can be no arbitration agreement where only one party can invoke arbitration); *Bhartia Cutler-Hammer Ltd.* v. *AVN Tubes Ltd.*, 1991 SCC OnLine Del 322 (such a clause cannot be called an arbitration agreement where the power of invoking arbitration is given to one of the parties only. Affirmed in appeal in *AVN* v. *Bharatia Culter* , 46 (1992) DLT 453); *Dharma Prathishthanam* v. *Madhok Construction Pvt. Ltd.* (2005) 9 SCC 686 (one party cannot usurp the jurisdiction of the court and proceed to act unilaterally; a unilateral appointment and a unilateral reference, both will be illegal); *Emmsons International Ltd.* v. *Metal Distributors (UK),* 116 (2005) DLT 559 (the contract where only the seller was entitled to refer any dispute was void); *Lucent Technologies Inc.* v. *ICICI Bank Limited*, 2009 SCC OnLine Del 3213 (holding that a unilateral right conferred on party is void and not enforceable as an arbitration agreement). Endlaw J also noted that *Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd.* v . *Jade Elevator Components*, (2018) 9 SCC 774 without noticing any of the earlier judgments strikes a different note, and distinguished it. There, the agreement provided that the disputes should be settled by arbitration or by the court. It was held that being an option and the option of arbitration having been exercised, the arbitration should proceed. Even if *Zhejiang were* to be applied, Endlaw J said, the plaintiffs having exercised the option of approaching the court, the suit has to continue. Show More

### C3. An Additional Reason—No Arbitrable Dispute

Endlaw J gave an additional reason. He said that even otherwise, the loan agreement required the defendant to release the security (title deed) once the loan was paid. It was not in dispute that the loan was paid. The plaintiffs claimed the title deed was no returned. This dispute was not covered under the dispute resolution clause.

Categories: Arbitration | Arbitration Agreement | First Statement on the Substance of the Dispute | Limitation | Not Later than the Date of Submitting | Power to Refer Parties to Arbitration | Section 8 ACA | Waiver