*** THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI**

AND

THE HONOURABLE SRI JUSTICE CHALLA GUNARANJAN

+ CIVIL MISCELLANEOUS APPEAL NO: 481/2024

%Dated:25.04.2025

M/s.Ivax Paper Chemicals Private Limited…… Appellant

and

$ M/s.Savani Carrying Private Limited **…..** Respondent

! Counsel for the appellant : Sri Nidhi Epur, representing Sri Kailashnath P.S.S.

^ Counsel for the respondent : Sri Gundapu Rajesh Kumar

< GIST :

> HEAD NOTE :

? Cases referred :

(1) ((2023 7 SCC Page 1)
(2) (2024) 6 SCC 1
(3) (2006) 7 SCC 275
(4) (2011) 5 SCC 532
(5) (2021) 2 SCC 1
(6) (2005) 8 SCC 618
(7) (2024) 4 Supreme Court Cases 255

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Dated: 25.04.2025

M/s.Ivax Paper Chemicals Private Limited …… Appellant

and

M/s.Savani Carrying Private Limited **…..** Respondent

DATE OF ORDER PRONOUNCED: 25.04.2025.

(per Hon'ble Sri Justice Ravi Nath Tilhari)

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No

2. Whether the copies of judgment may be Marked to Law Reporters/Journals. Yes/No

3. Whether Their Lordship wishes to see the fair copy of the Judgment? Yes/No

_____

RAVI NATH TILHARI, J

_____

CHALLA GUNARANJAN, J

THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI

THE HONOURABLE SRI JUSTICE CHALLA GUNARANJAN

C.M.A.NO: 481/2024

JUDGMENT: *(per Hon'ble Sri Justice Ravi Nath Tilhari)*

Heard Sri Nidhi Epur, learned counsel representing Sri Kailashnath P.S.S, learned counsel for the appellant, through virtual mode and Sri Gundapu Rajesh Kumar, learned counsel for the respondent.

2. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (in short 'the Act, 1996'), has been filed by the defendant, in O.S.No.368 of 2022 pending in the Court of learned II Additional Senior Civil Judge, Visakhapatnam(in short 'the Trial Court'), challenging the order dated 19.09.2023 passed in I.A.No.209 of 2023 in the said suit.

I. Facts:

3. The plaintiff is the respondent. He filed O.S.No.368 of 2022 against the appellant for recovery of amount and other reliefs *inter alia* on the allegations that the appellant had to pay bills raised by the respondent pertaining to the delivery of consignment goods.

The consignments were bound by the terms and conditions specifically mentioned on the consignment notes.

4. In the suit, the appellant filed I.A.No.209 of 2023 under Section 8 of Act, 1996, to refer the parties to the arbitration as per clause (8) of the consignment notes.

5. The respondent/plaintiff filed objection/counter. It was submitted that the appellant had filed a suit in S.No.1777/2022 against the respondent before the City Civil Court, Mumbai, which was being contested by filing written statement and was pending. The appellant had waived the right to invoke arbitration clause in approaching the City Civil Court and in not invoking the arbitration clause. If the appellant was interested in arbitration proceedings, he ought not to have filed S.No.1777/2022 in the City Civil Court. Objection was also raised that the consignment notes which contained the arbitration clause were not duly stamped and hence, unenforceable and it could not be said that there existed an arbitration agreement. It was requested to reject I.A.No.209 of 2023.

II. Order of the Trial Court:

6. The learned Trial Court framed the following point for determination:

> *"Whether the petitioner is entitled for the relief to refer the matter to arbitration as per clause (8) of the consignment notes issued by the plaintiff, as prayed for?"*

7. The learned Trial Court took a view that the appellant, filed S.No.1777 of 2022 before City Civil Court, Mumbai, basing on the same consignment notes and so he had waived the arbitration clause. It was further observed that the appellant did not disclose in his written statement about the S.No.1777 of 2022, which was considered as the first statement of the substance on the dispute under Section 8 of the Act, 1996 and so, the application under Section 8(1) of the Act, 1996 was not maintainable under law.

8. The learned Trial Court was of the further view that the consignment notes were not stamped as per Section 35 of the Indian Stamp Act, so, based on those consignment notes, the arbitration clause could not be invoked and proceeded further. In this respect, the learned Trial Court relied in ***N.N.Global Mercantiles Private Limited v. Indo Unique Flame Limited***[1]***.***

[1] ((2023 7 SCC Page 1)

9. Thus considered, the learned II Additional Senior Civil Judge, Visakhapatnam, by order dated 19.09.2023, rejected I.A.No.209 of 2023.

III. Submissions of the learned counsel for the appellant:

10. Learned counsel for the appellant submitted that the impugned order cannot be sustained on the reasons assigned. He submitted that the S.No.1777 of 2022 before the City Civil Court, Mumbai, was not with respect to the subject matter of the arbitration agreement. It was for claiming damages for defamation. So, the arbitration clause was not attracted for that suit and there was no question of waiver of the arbitration clause on that count, in O.S.No.368 of 2022 in which the I.A.No.209 of 2023 was filed before filing of the written statement which would be the first statement on the substance of dispute in O.S.No.368 of 2022.

11. The learned counsel for the appellant further submitted that the dispute as raised in O.S.No.368 of 2022 was arbitrable, covered under the consignment notes which contained the arbitration clause. He submitted that in the written statement filed in O.S.No.368/2022, the filing and pendency of S.No.1777/2022 before the City Civil Court, Mumbai, was clearly stated. So, the

learned Trial Court was not correct in observing that the said fact was not disclosed. He referred to para(v) of the written statement annexed to the memo of appeal at page No.83, which reads as under:

> "The Defendant submits that the captioned suit is nothing but a means by the Plaintiff to harass the Defendant. It is pertinent to note that the Defendant has instituted a suit against the Plaintiff before the Hon'ble City Civil Court, Mumbai against the defamatory and libelous statements made by the Plaintiff against the Defendant. The Plaintiff has attempted to harass the Defendant in the past and the Suit is yet another attempt by the Plaintiff to harass and wriggle out monies from the Defendant."

12. Learned counsel for the appellant submitted that in ***N.N.Global Mercantiles Private Limited(supra)***, was over-ruled by the Constitution Bench of the Hon'ble Apex Court in ***Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, In Re*** [2].

IV. Submission of learned counsel for the respondent:

13. Learned counsel for the respondent submitted that there was no illegality in the impugned order. The appellant by filing S.No.1777 of 2022, himself violated the arbitration clause, and it amounted to the waiver of the arbitration clause. So, the appellant, could not say in O.S.No.368 of 2022 filed by the respondent, to refer the parties to arbitration. He also submitted

[2] (2024) 6 SCC 1

that the appellant, in I.A.No.209/2023, did not disclose about S.No.1777 of 2022, in City Civil Court, Mumbai.

14. The learned counsel for the respondent further submitted that on the point of non-stamping or deficit stamping of the consignment notes and so the arbitration clause could not be invoked, was the correct view taken by the learned Trial Court, as per the law in ***N.N.Global Mercantiles Private Limited(supra)*** as it stood at the time when the impugned order was passed.

V. Point for determination:

15. The Point that arises for our consideration and determination is as under:

> ***"Whether the learned Trial Court committed illegality in not referring the parties to arbitration under Section 8 of the Arbitration and conciliation Act, 1996?"***

VI. Analysis:

16. We have considered the submissions of the learned counsels for the parties and perused the material on record.

17. Our consideration on the point of determination, in view of the submissions advanced would be on following aspects:

A) Whether S.No.1777 of 2022 amounted to waiver to invoke Section 8 of the Act, 1996.

B) The affect of non-stamping or deficit stamping of the consignment notes containing the arbitration clause.

C) Arbitrability or non-arbitrability of the dispute in suit filed before the civil court.

A) **WAIVER:**

18. We shall first reproduce Section 8 of the Arbitration and Conciliation Act, 1996, which 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.]*

(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.

19. A bare reading of Section 8 of the Act 1996 makes it evident that the 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 the date of submitting his first statement on the substance of the dispute, refer the parties to the arbitration. Section 8, uses the expression 'not later than the date of submitting his first statement on the substance of the dispute' in the expression, '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'. Learned counsel for the respondent submitted that the institution of S.No.1777 of 2022 in City Civil Court, Mumbai, by the appellant was his first statement of defence and so the application under Section 8 of the Act, 1996 was not maintainable. The same is the view taken by the learned Trial Court. The learned counsel for the appellant submitted that I.A. was filed earlier than filing of the written statement in O.S.No.368 of 2022 and so there was no waiver and the application under Section 8 of the Act, 1996 was maintainable.

20. The moot question therefore is, as to what is meant by the date of submitting his first statement on the substance of dispute by the party filing an application under Section 8 of the Act, 1996.

21. Before proceeding further, we state that the appellant has filed a memo bringing on record, copy of one of the consignment notes containing the terms and conditions of the contract of a special carriage, on its back side, which was not annexed with the appeal and on which there is no dispute raised between the parties.

22. Clauses 8, 10, 11 and 12 of the consignment note in particular read as under:

> *"8. This is contract of special carriage and service and it is specifically agreed that the provisions of carriers act 1865 or any statutory amendments there of will not apply to the parties of this contract i.e. consignor/consignee / beneficiary with the transporter. In case any disputes arise by virtue of this contract of special carriage and service and shall be referred to arbitration under Arbitration and Conciliation. Act 1996 or any amendment thereof.*
>
> *9. xxxxxxxxxxx*
>
> *10. The parties to this special contract of carriage and service agree that in case any dispute, difference of opinion, claim arises out between the transporter, consignor, consignee and also beneficiary due to damaged delivery, short delivery, non-delivery of consignment or with reference to of anything incidental thereto or in pursuance thereof relating to the validity, construction, interpretation, fulfilment of the rights, obligations and liabilities of the parties here to shall be referred to sole arbitrator to be nominated by the transporter that is SCPL under Arbitration and Conciliation Act, 1996 or any statutory amendments thereof.*

11. It is specifically agreed that the venue of arbitration will only be in Chennai,

12. It is also further agreed that the language of the Sole Arbitrator Tribunal shall only be English."

23. Clause (8) of the consignment notes clearly contemplates that in case any dispute arises by virtue of that contract of special carriage and service, that shall be referred to arbitration under the Arbitration and Conciliation Act, 1996 or any amendment thereof.

24. Clause (10) also provides for referring the parties to the sole arbitrator in case of any dispute. difference of opinion etc. as mentioned in the said clause, to the sole arbitrator to be nominated by the transporter i.e. SCPL under the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof.

25. The aforesaid clauses of the terms and conditions on the consignment notes, thus provide for an arbitration clause to refer any dispute under such contract of special carriage and service for arbitration under the Arbitration and Conciliation Act, 1996.

26. There is also no dispute raised for the existence of the arbitration clause as aforesaid. The dispute raised is that the appellant waived that arbitration clause by instituting S.No.1777 of 2022 in City Civil Court, Mumbai.

27. Now, we revert to the moot question, what is meant by 'first statement on the substance of dispute'.

28. In ***Rashtriya Ispat Nigam Ltd. v. Verma Transport Co.***[3] the Hon'ble Apex Court observed that the expression "first statement on the substance of the dispute" contained in Section 8 (1) of the 1996 Act must be contradistinguished with the expression "written statement". It employed submission of the party to the jurisdiction of the judicial authority. What is, therefore, needed was 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, 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. The Hon'ble Apex Court observed that by opposing the prayer for interim injunction, the restriction contained in sub-section (1) of Section 8 was not attracted. The disclosure of a defence for the purpose of opposing a prayer for injunction

[3] (2006) 7 SCC 275

would not necessarily mean that substance of the dispute has already been disclosed in the main proceeding. Supplemental and incidental proceedings are not part of the main proceeding. The distinction between the main proceeding and supplemental proceeding must be borne in mind. The Hon'ble Apex Court further observed that waiver of a right on the part of a defendant to the *lis* must be gathered from the fact situation obtaining in each case.

29. Paragraph Nos.36 to 42 of ***Rashtriya Ispat Nigam Ltd.*** (supra) read as under:

> *"**36.** The expression "first statement on the substance of the dispute" contained in Section 8(1) of the 1996 Act must be contradistinguished with the expression "written statement". 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. We would deal with this question in some detail, a little later.*
> ***37.** Our attention, however, was drawn by the learned counsel for the respondent to State of U.P. v. Janki Saran Kailash Chandra [(1973) 2 SCC 96] which was distinguished in Food Corpn. of India [(1982) 2 SCC 499 : (1983) 1 SCR 95] , inter alia, stating that the view taken therein did not run counter to the view the Court had taken.*
> ***38.** In Janki Saran Kailash Chandra [(1973) 2 SCC 96] an application for time to file written statement was considered to be a step in the proceedings. We have noticed hereinbefore the respective scope of Section 34 of the 1940 Act vis-à-vis the scope of Section 8 of the 1996 Act. In view of the changes*

brought about by the 1996 Act, we are of the opinion that what is necessary is disclosure of the entire substance in the main proceeding itself and not taking part in the supplemental proceeding.

39. *By opposing the prayer for interim injunction, the restriction contained in sub-section (1) of Section 8 was not attracted. Disclosure of a defence for the purpose of opposing a prayer for injunction would not necessarily mean that substance of the dispute has already been disclosed in the main proceeding. Supplemental and incidental proceedings are not part of the main proceeding. They are dealt with separately in the Code of Civil Procedure itself. Section 94 of the Code of Civil Procedure deals with supplemental proceedings. Incidental proceedings are those which arise out of the main proceeding. In view of the decision of this Court in Food Corpn. of India [(1982) 2 SCC 499 : (1983) 1 SCR 95] the distinction between the main proceeding and supplemental proceeding must be borne in mind.*

40. *We may notice that a distinction has been made between supplemental proceedings and incidental proceedings by one of us in Vareed Jacob v. Sosamma Geevarghese [(2004) 6 SCC 378] .*

41. *This aspect of the matter came up for consideration before this Court again in Sadhu Singh Ghuman v. Food Corpn. of India [(1990) 2 SCC 68] wherein it was categorically stated that seeking a direction to the plaintiff to produce the original agreement does not amount to submit to the jurisdiction of the court, which decides the case on merits, opining: (SCC p. 71, para 7)*

"The right to have the dispute settled by arbitration has been conferred by agreement of parties and that right should not be deprived of by technical pleas. The court must go into the circumstances and intention of the party in the step taken. The court must examine whether the party has abandoned his right under the agreement. In the light of these principles and looking to the substance of the application dated 4-1-1985, we cannot form an opinion that the defendants have abandoned their right to have the suit stayed and took a step in the suit to file the written statement."

42. *Waiver of a right on the part of a defendant to the lis must be gathered from the fact situation obtaining in each case. In the instant case, the court had already passed an ad interim ex parte injunction. The appellants were bound to respond to the notice issued by the Court. While doing so, they raised a specific plea of bar of the suit in view of the existence of an arbitration agreement. Having regard to the provisions of the*

Act, they had, thus, shown their unequivocal intention to question the maintainability of the suit on the aforementioned ground."

30. In ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited*** [4] the question No.2 was to the effect "whether the appellants had submitted on the first statement on the substance of the dispute before filing application under Section 8 of the Act? In the said case a detailed affidavit opposing the application for interim injunction was filed and thereafter, that party filed an application under Section 8 of the Act 1996. On the date of filing of the application under Section 8, such party had not filed the written statement. The High Court had taken the view that filing of a detailed counter affidavit in reply to the temporary injunction application was the submission of the first statement on the substance of the dispute and so the application under Section 8 of the Act having been filed subsequent thereto was not maintainable. So, the prayer for referring the parties to arbitration could not be accepted. The Hon'ble Apex Court referring to ***Rashtriya Ispate Nigam Ltd.*** (supra), held that the view taken by the High Court was not correct. The Hon'ble Apex Court held that not only filing of the written statement in a suit but filing of any statement, application, affidavit by a defendant prior to filing of the

[4] (2011) 5 SCC 532

written statement will be considered as submission of a statement on the substance of the dispute if by filing such statement, application, affidavit the defendant showed his intention to submit itself to the jurisdiction of the Court and waived 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 a receiver, cannot be considered as submission of a statement on the substance of the dispute as that is done to avoid interim order being made against him.

31. Paragraph Nos.25 to 30 of ***Booz Allen and Hamilton Inc.*** (supra) read as under:

> *"25. Not only filing of the written statement in a suit, but filing of any statement, application, affidavit 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 waives 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.*
>
> *26. In Rashtriya Ispat Nigam Ltd. v. Verma Transport Co., (2006) 7 SCC 275 this Court held that the expression "first statement on the substance of the dispute" contained in Section 8(1) of the Act is different from the expression "written statement", and refers to a submission of the party making the application under Section 8 of the Act, to the jurisdiction of the judicial authority; and what should be decided by the court is whether the party seeking reference to arbitration has waived his right to invoke the arbitration clause.*
>
> *27. This Court in Rashtriya Ispat Nigam Ltd. case then proceeded to consider whether contesting an application for temporary injunction by filing a counter, would amount to*

subjecting oneself to the jurisdiction of the court. This Court observed: (SCC p. 290, paras 39 & 42)

"39. By opposing the prayer for interim injunction, the restriction contained in sub-section (1) of Section 8 was not attracted. Disclosure of a defence for the purpose of opposing a prayer for injunction would not necessarily mean that substance of the dispute has already been disclosed in the main proceeding. Supplemental and incidental proceedings are not part of the main proceeding. They are dealt with separately in the Code of Civil Procedure itself. Section 94 of the Code of Civil Procedure deals with supplemental proceedings. Incidental proceedings are those which arise out of the main proceeding. In view of the decision of this Court in Food Corporation of India v. Yadav Engineer & Contractor[3] the distinction between the main proceeding and supplemental proceeding must be borne in mind.
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42. Waiver of a right on the part of a defendant to the lis must be gathered from the fact situation obtaining in each case. In the instant case, the court had already passed an ad interim ex parte injunction. The appellants were bound to respond to the notice issued by the court."

28. In this case, the counter-affidavit dated 15-12-1999, filed by the appellant in reply to the notice of motion (seeking appointment of a Receiver and grant of a temporary injunction) clearly stated that the reply-affidavit was being filed for the limited purpose of opposing the interim relief. Even in the absence of such a disclaimer, filing a detailed objection to an application for interim relief cannot be considered to be submission of a statement on the substance of the dispute resulting in submitting oneself to the jurisdiction of the court.

29. 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 around 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.
30. When the 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 8 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, cannot lead to an inference that a defendant had subjected himself to the jurisdiction of the court for adjudication of the main dispute."*

32. In view of the aforesaid judgments, it is settled position in law that the application under Section 8 of the Act, 1996 should be filed before submission of the first statement on the substance of the dispute. A party who willingly participates in the proceedings in the suit and subjects himself to the jurisdiction of the Court cannot subsequently turn around and say that the party should be referred to the arbitration in view of existence of 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.

33. In the present suit No.368 of 2022, the admitted facts on record on which there is no dispute are that the application under Section 8 was filed by the appellant on 21.01.2023 much prior to filing of the written statement dated 23.03.2023. So, admittedly,

the application under Section 8 was filed before the submission of the first statement on the substance of the dispute. It is also not the case, here that, any statement on the substance of dispute in O.S.No.368 of 2022 was filed by the appellant before filing I.A.No.209 of 2023. On any such ground, the maintainability of the application under Section 8 of the Act, 1996 was not questioned. The learned Court has also not rejected the application on any such ground that the appellant submitted the first statement on the substance of the dispute by filing any pleading, application etc., in the same suit i.e., O.S.No.368 of 2022. The rejection of the application as not maintainable is on the ground that the appellant previously filed S.No.1777 of 2022 in City Civil Court, Mumbai. That has been considered as the first statement under Section 8 of the Act, 1996, so as to hold that the appellant waived the right to raise objection to the jurisdiction of the Civil Court on the ground of arbitration clause in O.S.No.368 of 2022.

34. We are of the view that based on the institution of S.No.1777/2022 by the appellant (as plaintiff) in City Civil Court, Mumbai, it cannot be said that the arbitration clause for the dispute being referred to arbitration, with respect to the

controversy in O.S.No.368 of 2022, stood waived. We cannot accept the submission nor are in agreement with the view taken by the learned Trial Court that, the institution of S.No.1777 of 2022, is the first statement of defence on the substance of dispute in O.S.No.368 of 2022 and so there was waiver to the arbitration clause. In our view, this expression 'on the substance of the dispute' refers to the dispute, before the judicial authority before which the action is brought. The first statement on the substance of the dispute would be the first statement filed on the substance of the dispute in that very case, in which the application under Section 8 of the Act, 1996 is filed. In other words, the first statement on the substance of the dispute would be the submission of the first statement with respect to the dispute in O.S.No.368 of 2022. Admittedly, the appellant applied under Section 8 of the Act, 1996 by filing I.A., prior to submission of his written statement in O.S.No.368 of 2022, on the substance of the dispute raised in the said suit. Previous filing of S.No.1777 of 2022 in City Civil Court, Mumbai i.e. in a different court, before a different Judicial Authority for damages for defamation cannot be taken as the submission of the first statement of defence in O.S.No.368 of 2022, for recovery of amount on pay bills.

35. Section 8 of the Arbitration Act does though not specify the manner in which the party has to submit its first statement on the substance of the dispute but normally with respect to a suit the first statement on the substance of the dispute by the defendant would be the written statement.

36. An application under Section 8 of the Act, 1996, can be filed only by the defendant, in a suit filed by the plaintiff. When an action is brought by the plaintiff, which is subject of an arbitration agreement, the defendant has to submit on the substance of the dispute. If he has not to submit to the jurisdiction of the judicial authority before which the suit has been filed, but has to enforce the arbitration clause, ordinarily, before submitting his written statement on the substance of the dispute, he has to file the application or raise the plea of remedy of arbitration, as per Section 8 of the Act, 1996. So, in our view, submission of the first statement on the substance of the dispute means submission of the first statement in that very suit which is brought before the judicial authority, with respect to the dispute as raised in that very suit. The submission of the first statement on the substance of the dispute would arise only after institution of the suit. So, filing of S.No.1777 of 2022 in City Civil Court, Mumbai by the appellant

can in no way be interpreted as the date of submitting the first statement on the substance of the dispute in O.S.No.368 of 2022.

37. We are of the view that the learned trial Court fell into error of law in considering S.No.1777 of 2022 filed by the appellant, as his first statement on the substance of the dispute raised in O.S.No.368 of 2022 and based thereon in holding that the appellant waived his right to invoke the arbitration clause as also to pray for referring the parties to the dispute in O.S.No.368 of 2022 to arbitration. So far as O.S.No.368 of 2022 is concerned, the appellant had filed an application under Section 8 of the Act 1996 much before filing of his written statement in O.S.No.368 of 2022. So, I.A.No.209 of 2022, was legally maintainable.

B. Effect of Non-stamping or deficit stamping of arbitration agreement:

38. The learned trial Court has taken the view based on ***N. N. Global Mercantiles Private Limited*** (supra) that the consignment notes containing the arbitration clause being unstamped could not be used to invoke the arbitration clause without paying the stamp duty. The aforesaid view is contrary to the law settled by the Constitution Bench of the Hon'ble Apex Court in the case of

Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1989, in Re (supra).

39. In ***Interplay*** (supra) the conclusions of the Hon'ble Apex Court in para-235 are reproduced as under:

> ***"235.*** *The conclusions reached in this judgment are summarised below:*
> ***235.1.*** *Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered void or void ab initio or unenforceable;*
> ***235.2.*** *Non-stamping or inadequate stamping is a curable defect;*
> ***235.3.*** *An objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The Court concerned must examine whether the arbitration agreement prima facie exists;*
> ***235.4.*** *Any objections in relation to the stamping of the agreement fall within the ambit of the Arbitral Tribunal; and*
> ***235.5.*** *The decision in N.N. Global (2) [N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2023) 7 SCC 1 : (2023) 3 SCC (Civ) 564] and SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] are overruled. Paras 22 and 29 of Garware Wall Ropes [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] are overruled to that extent."*

40. In ***Interplay*** (supra) the decision in ***N. N. Global Mercantiles Private Limited*** (supra) was overruled. In para 235.1 of ***Interplay*** (supra), the Hon'ble Apex Court held that the agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act and such agreements are not rendered void or *void ab initio* or unenforceable. In para 235.2 of ***Interplay*** (supra), the Hon'ble

Apex Court held that non-stamping or inadequate stamping is a curable defect. In para 235.3 of ***Interplay*** (supra), it was held that an objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The Court concerned must examine whether the arbitration agreement *prima facie* exists.

41. The view taken by the learned Trial Court that since the consignment notes were not duly stamped, they could not be used to invoke the arbitration clause mentioned therein, might have been the correct view, as argued by the learned counsel for the respondent, when it was so taken, in view of the position in law at that time as was declared in ***N.N.Global Mercantiles Private Limited(***supra***)***, but not today, as the law stands today in ***Interplay*** (supra). We have to test the legality of the order as per law as on today while deciding the appeal.

C. <u>Arbitrability or non-arbitrability of the dispute in suit filed before the civil court.</u>

42. In **Vidya Drolla and others vs. Durga Trading Corporation**[5], the Hon'ble Apex Court, *inter alia* considered the question as to 'who decides arbitrability'. It was held that the issue of non-arbitrability can be raised at three stages. First, before the court on an application for reference under Section

[5] (2021) 2 SCC 1

11 or for stay of pending judicial proceedings and reference under Section 8 of the Arbitration Act; secondly, before the arbitral tribunal during the course of the arbitration proceedings; or thirdly, before the court at the stage of the challenge to the award or its enforcement. In the context particularly the jurisdiction of the court at first look stage i.e the referral stage, the Hon'ble Apex Court crystallized in para 154 of the judgment as under:-

> *"154. Discussion under the heading 'Who decides Arbitrability?' can be crystallized as under:*
>
> *154.1. Ratio of the decision in SBP & Co. v. Patel Engineering Ltd.,[6] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23.10.2015) and even post the amendments vide Act 33 of 2019 (with effect from 09.08.2019), is no longer applicable.*
>
> ***154.2 Scope of judicial review and jurisdiction of the court under Section 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.***
>
> *154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.*
>
> ***154.4. Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and ex***

[6] (2005) 8 SCC 618

> ***facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable'*** *and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism*

43. In para 154.4 of **Vidya Drolla** (supra), the Hon'ble Apex Court, held the restricted and limited review at the Section 8 or 11 stage, when it is manifestly and ex facie certain that the arbitration agreement is non- existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable'. But, this is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

44. In **Vidya Drolla** (supra), Hon'ble Justice N.V. Ramana (as his Lordship then was) in his supplemented judgment, in para 244 which reads as under, also held:

> *"244. Before we part, the conclusions reached, with respect to question no. 1, are:*
> *244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.*
> *244.2. Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.*
> *244.3. The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of nonexistence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.*
> *244.4. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above, i.e., 'when in doubt, do refer'.*
> *244.5. The scope of the Court to examine the prima facie validity of an arbitration agreement includes only:*
> *244.5.1. Whether the arbitration agreement was in writing? or*
> *244.5.2 Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?*
> *244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?*
> *244.5.4. On rare occasions, whether the subject matter of dispute is arbitrable?*

45. It has been held that usually, subject matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood. The Court, under Sections

8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

46. In **M. Hemalatha Devi and others vs. B. Udayasri**[7]**,** the Hon'ble Apex Court held that once the Court finds that there is a valid arbitration agreement, it has no option but to refer the matter for arbitration. But this would not mean that where the matter itself is non-arbitrable, or is covered by a special legislation such as the Consumer Protection Act, it still has to be referred for arbitration.

47. Consequently, the arbitrability or non-arbitrability raised before the judicial authorities, can be considered and decided under Section 8, within the restricted and limited scope of consideration as laid down in the aforesaid judgment of **Vidya Drolla** (supra) and **M. Hemalatha Devi** (supra).

48. So, the Principal Civil Judge Court or Judicial authority has power to dismiss the Section 8 application on the ground of arbitrability of a dispute before the Arbitral Tribunal which is to be considered within the limited scope.

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[7] (2024) 4 Supreme Court Cases 255

CONCLUSION:

49. Thus, considered, we are of the view and hold that

(1) the first submission on the substance of the dispute, in Section 8 of the Arbitration and Conciliation Act, shall be on the substance of the dispute involved in that very case which is filed before the civil court or the judicial authority.

(2) The application of the appellant under Section 8 of the Act, 1996 in O.S.No.368 of 2022, having been filed before filing of the written statement was maintainable.

(3) S.No.1777 of 2022 filed by the appellant in City Civil Court, Mumbai for damages for defamation, cannot be the first submission on the substance of the dispute in O.S.No.368 of 2022 in the Court of Principal Civil Judge, for the relief of payment of the amount on the pay bills.

(4) Any objection that the Arbitration Agreement is unstamped or deficiently stamped is outside the determination under Section 8 of the Arbitration Act. The Arbitration agreement prima facie contained the arbitration clause and so on the ground of un-stamping

or deficit stamping, the arbitration clause in the agreement/ consignment notes could not be held unsustainable.

(5) The arbitrabiity or non arbitrability of the dispute as raised in O.S.No.368 of 2022 before the learned Trial court required consideration on merits within the limited scope, as per the judgments in the cases of **Vidya Drolla** (supra) and **M. Hemalatha Devi**(supra).

6. The learned Trial court has illegally rejected the application under Section 8 of the Arbitration and Conciliation Act, 1996 as not maintainable.

VIII Result:

(6) In the result,

i) the impugned order dated 19.09.2023 is set aside;

ii) the learned trial Court shall consider the I.A.No.209 of 2023 under Section 8 of the Arbitration and Conciliation Act, 1996, on merits in accordance with law in the light of the observations made in this judgment;

iii) the appeal is allowed in the aforesaid terms.

No order as to costs.

As a sequel thereto, miscellaneous petitions, if any pending, shall also stand closed.

_____
RAVI NATH TILHARI, J

_____
CHALLA GUNARANJAN, J

Date: 25.04.2025

Pab/Dsr/GK

THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI

AND

THE HONOURABLE SRI JUSTICE CHALLA GUNARANJAN

CIVIL MISCELLANEOUS APPEAL NO:481 OF 2024

Date:- 25.04.2025

Pab/Dsr/Gk