



REFERENCE OF PARTIES TO ARBITRATION IN INDIA: A PRACTITIONER'S PERSPECTIVE

By *Shanu Jain*
From *Associate, Samvad Partners*

Introduction

Often a situation arises during ongoing legal battles, where one party tries to expedite the procedure of dispute resolution while the other party leaves no stone unturned in using any or all of the dilatory tactics to gain undue advantage of the crawling legal proceedings. Such tactics may involve anything and everything including but not limited to procedural loopholes of getting the matters adjourned from one date to another by purposefully skipping a given date or filing applications raising unnecessary objections.

With a view to give a solution to this legal quagmire the Republic of India enacted the Arbitration and Conciliation Act, 1996 ("Act") and earlier enactments, which enabled the parties to a dispute to privately resolve their disputes in a court like setup, as per the procedure of their choice expeditiously.

Though the legal scenario has changed in India due to the introduction of this new scheme under the Act but not the intentions of the parties of keeping the proceedings pending and getting undue advantage of such delay. With such intentions parties even after executing the arbitration agreements go through the fine-tooth comb to take benefit of any loophole to delay the dispute resolution. Such tactics not only

delay the proceedings but sometimes make the objective of the expeditious settlement of disputes redundant.

One such tactic often utilised by the parties is to refer the matter to the jurisdiction of the courts even after executing arbitration agreements to resolve the disputes through arbitration. Fortunately, the legislators while drafting the Act, were wise enough to anticipate use of such dilatory tactics by the litigants and therefore provided a weapon in the form of Section 8 of the Act for the benefit of the exponents of expeditious resolution of disputes to enable them to seek the courts to understand the issues and have the parties directed to the forum of dispute resolution chosen by them in the first place.

Why Section 8

India has adopted Section 8 of the Act, for reference of the parties to the arbitration tribunals by the courts, from Article 8 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration, 1985 ("Model Law"). The drafters of the Model Law had very well anticipated the dilatory tactics which the parties may utilise to make the whole dispute infructuous or gain undue advantage of such delays. Hence, the Model Law insists that the UNCITRAL parties (various nations) should adopt a similar provision in their domestic legislations.

As a result, Section 8 of the Act, reflects the objective behind Article 8 of the Model Law. However, it must be noted that, some deviations have been made in Section 8 by the Indian legislators keeping certain specific Indian practices in mind, which have made the provision tailor made for the



needs of Indian judiciary. Hence, at this juncture, it is expedient to compare these provisions under the Model Law and Section 8, and analyse why these deviations are made under the Indian laws to appreciate the law better in the following section of this paper.

proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

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

Article 8 of the Model Law	Section 8 of the Act.
<p>Article 8 of the Model Law: Arbitration agreement and substantive claim before courts -</p> <p>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.</p> <p>2) Where an action referred to in paragraph (1) of this article has been brought, arbitral</p>	<p>Section 8 - Power to refer parties to arbitration where there is an arbitration agreement -</p> <p>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.</p> <p>2) The application referred to in sub-</p>



	<i>arbitration may be commenced or continued and an arbitral award made.</i>
--	--

Analysis of deviations from Article 8 of the Model Law under Section 8 of the Arbitration Act:

The deviations have been made in the provision by the legislators in India to broaden the ambit of the provision and to give proper opportunity to the judicial authorities to examine the arbitration agreements prior to passing any verdict. The following deviations in Section 8 of the Act from the Article 8 of the Model Law are enumerated and analysed below:

1. Replacement of the term “Court” with the term “Judicial Authority”: Drafters of the Act, have purposefully used the term “Judicial Authority” instead of the term “Court”. Section 2 (e) of the Act defines the term “Court”, however it has a narrow interpretation of the term and includes only “Principle Civil Court of Original Jurisdiction in a District” and the “High Court having Original Civil Jurisdiction”, exclusively to be understood and known as “Court” as per the Act. Therefore, use of the term “Judicial Authority” despite the term “Court” makes it possible for the applicants to challenge under Section 8, not only the matters filed before the “Principle Civil Court of Original Jurisdiction in a District” and the “High Court having Original Civil Jurisdiction” but also any other subordinate courts and even any proceeding having judicial character. It must be noted that, onus of proving that any proceeding had judicial character would be upon the party filing application

under Section 8 of the Act before the court.

2. Addition of the phrases:

- (i) “unless it finds that prima facie no valid arbitration agreement exists”—This is the only test which the courts have to apply before accepting an application under Section 8 of the Act. However, the “validity check” enshrined through the phrase gives a leeway to the parties to delay the proceedings.

- (ii) “or any person claiming through or under him”: The expression “any person” clearly refers to the legislative intent of enlarging the scope of the phrase beyond “the parties to the arbitration agreement” who was not signatory to the arbitration agreement. However, such applicant who was not a party to the agreement would be bound to prove that he somehow claims through the party to the arbitration agreement (a good example of such scenario could be assignment agreements, wherein a party assigns all of its rights and obligations to another party under an agreement). Hence, once this link is established, then the Court would be bound to refer such parties to arbitration.

Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. As explained above, such arrangements may put courts and parties in a state of confusion, but certainly, these are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, is very much possible between a signatory to an



arbitration agreement and a third party but heavy onus lies on that third party to show that, in fact and in law, it is claiming “through” or “under” the signatory party as contemplated under the law.

(iii) “Presentation of original arbitration agreement or a certified copy thereof”-

The said provision gives an opportunity to the court to examine the arbitration agreement once it is presented before the court. However, there are certain recent precedents which have relaxed this condition and now it is not mandatory for applicant to present a certified copy or an original arbitration agreement, if the other party (the respondent) has also presented a copy thereof before the court. The reason behind adopting this practice is that, if both the parties produce the same arbitration agreement, it gives a reason to the court to understand that, certainly both the parties had agreed on the same agreement. Further, in case if the party cannot produce a photo copy of the arbitration agreement, such party can file an application to seek the court to direct the respondent to produce the original/certified copy of the arbitration agreement executed between the parties.

Section 8 of the Act provides for the courts to observe the following mandates and then refer the parties to arbitration:

1. There must be an arbitration agreement between the parties;
2. Dispute must be subject matter of such arbitration agreement;
3. The party seeking to refer the parties to arbitration should present either the original arbitration agreement or certified copy thereof before the court; and,

4. The party seeking arbitration must file an application to refer the parties to arbitrate prior to filing its first statement on the substance of the dispute.

Even if the abovementioned grounds are prima facie proved by the party interested in referring the matter to arbitration several defences are taken by the opponent so as to keep the matter delayed and in the courts. These defences are discussed separately in this paper below.

Challenges to the reference to arbitration by the courts and defences thereof

1. **Dispute is not covered/partly covered under the arbitration agreement:**

A common defence taken by the parties is, stating that the arbitration agreement does not cover the disputes hence the court cannot refer the parties to arbitration. On various occasions courts have analysed the arbitration agreements and have decided the matters accordingly. Hence, it is expedient that, the arbitration agreements so executed between the parties must be very broadly worded. A good example of a widely worded arbitration clause is as below:

“In case of any dispute or difference arising out of or in connection with this Agreement whether during its subsistence or thereafter between the Parties or any third party claiming through any of the Parties, including any dispute or difference relating to the interpretation of the Agreement or any clause enshrined under the Agreement or understood/agreed otherwise by the Parties shall be settled by arbitration in accordance with the provisions of The Arbitration and Conciliation Act, 1996”

2. **Copy of Arbitration Agreement is not certified:** as discussed above it is one of the general defences which are taken by the



parties apposing Section 8 application as the word “*certified*” has not been defined in context of agreements between the private parties in India. However various courts have considered documents certified by notaries, directors, registrars etc, as certified agreements setting precedents in this regard. Also, as guided by the Apex Court in the case of *Ananthesh Bhakta vs. Nayana A. Bhakta*¹, if both the parties have submitted a copy of the same arbitration agreement relying upon the agreement, the court can rely upon such copy of the agreement and dispense the parties from producing the original or a certified copy of the arbitration agreement before the court.

3. **The party has already accepted the jurisdiction of the courts:** This is a critical aspect to be kept in mind while filing an application under Section 8 of the Act. Mostly, because of the fear of running limitation period, parties in hurry file written statements first and then prefer application under Section 8 before the court. In such cases defendants/respondents get an opportunity to convince the court by stating that the other applicant has already accepted the jurisdiction of the court. Hence, in such cases Section 8 application should always be the first document to be filed before the court with the vakalathnama.

It is worth noting that, certain parties have gone to the extent of saying that as the other party has filed vakalathnama they have accepted the jurisdiction of the court however in various judgments courts have ridiculed such arguments and now it is a settled law that filing of vakalathnama does not necessarily mean that the party has

accepted jurisdiction of the court and given away his right to request the court to refer the parties to the arbitration.

Also, in cases wherein parties have filed interlocutory applications prior to filing Section 8 applications, the other parties have made arguments before the court that the party has already accepted jurisdiction of the court and now the court should not entertain an arbitration application. In such cases also, the courts have taken a strict view that filing an interlocutory application does not bar a party from filing an application under Section 8, requesting the court to refer the parties to arbitration.²

4. **Arbitration Agreement is not valid:** This may be a challenging defence in cases where fraud is committed or in the cases wherein arbitration can be barred by the special legislations (for example Consumer Protection Act, 1986). In such cases parties have to get their disputes resolved through the adversarial mechanisms as prescribed by the courts and forums established as per such special legislations. However, in cases where the validity is not challenged on such clear grounds as stated above the court will be obliged to refer the parties to the arbitration.

5. **The arbitration agreement is not duly stamped/registered:** This may be another though less preferred defence to a Section 8 application, where the defendant/respondent may argue that, as the arbitration agreement is not stamped/registered, it is not duly executed and hence the court should not rely upon it. In such circumstances, it is easy to get

¹Ananthesh Bhakta vs. Nayana A. Bhakta, (2017) 5 SCC 185

²Reliance Industries Limited (Petroleum Division v. Usha Devi, (2010) SCC Online Mad 3269



the unstamped agreement stamped by paying the fine as provided under the stamp legislations of the State/Union Territories wherein the agreement was executed/performed and then present the agreement before the court.

However, in the cases relating to non-registered arbitration agreement, as there is no corresponding provision under the Indian registration legislation for getting a document registered on a later date by paying any fine for curbing/compounding the error, the courts cannot oversee such errors and would not refer the parties to the arbitration on the basis on non-registered arbitration agreements.³

Power of courts under Section 8

As guided and interpreted by various judgments passed by various High Courts and the Supreme Court, Section 8 is not a power but a command to the courts, it is *pre-emptory* in nature.⁴ Hence, once an application is filed for seeking to pray before the court to refer the parties to arbitration, the court would upon satisfying itself as provided under Section 8 be bound to refer the parties to the arbitration.⁵ The court cannot go into the merits of the case and after *prima facie* satisfying itself has to refer the parties to the arbitration as mutually agreed between both the parties as per the arbitration agreement.

The courts have to primarily satisfy themselves about whether there is an

arbitration agreement between the parties or not. If the court finds that there is an arbitration agreement then the courts have to refer the parties to arbitration irrespective of the validity of the arbitration agreement or validity of any agreement containing such arbitration clause.⁶

However, in cases wherein there is no arbitration agreement between the parties, courts cannot mandatorily refer the parties under Section 89 of the Civil Procedure Code, 1908 upon request of one of the parties to the suit to arbitration. The said position has been clarified by the Supreme Court recently in a judgment, wherein the court held that, “*Courts cannot under the veil of Section 8 of the Act invoke Section 89 of the Code of Civil Procedure when application for seeking the court to refer the parties to the arbitration was made.*”⁷

Conclusion

In light of the above discussion and analysis, it is fair to conclude that Section 8 is a guarantee of the Indian legislature to the citizens/non-citizens, who have executed arbitration agreements to have their disputes resolved as provided under the Act. Further the role of the court is as per Section 8 is of the executive, to enforce this guarantee, as and when a litigation is initiated before it undermining the arbitration agreement vis-à-vis the will of the parties to an agreement.

³SMS Tea Estates Private Limited v. Chandmari Tea Company Limited (2011) 14 SCC 66

⁴The Branch Manager Magma Leasing and Finance Limited And Anr V. Potluri Madhavi Lata And Anr. (2009) SCC 103

⁵P. Anand Gajapathi Raju and Ors. v. P.V.G. Raju (deceased) and Ors. (2000) 4 SCC 539

⁶Sundaram Finance Ltd v. T Thankam (2015) 14 SCC 444

⁷Kerala State Electricity Board and Anr. v. Kurien E. Kathilal and Anr. (2006) 6 SCC 293