

LEGAL ALERT

Section 8 of the Arbitration and Conciliation Act, 1996: A Saving Beacon

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The Arbitration and Conciliation Act, 1996 (hereinafter the “1996 Act”) supplants the Arbitration Act, 1940. In the 1996 Act, intervention by Courts was limited so that the object behind speedy justice could be well achieved. To further the aforesaid objective, the 1996 Act harbours many provisions. Section 8 of the 1996 Act denotes one such provision which provides for limited judicial intervention and furthers the objective by directing the parties to get involved in arbitration on the basis of the arbitration agreement. In domestic arbitrations, the uses of Section 8 applications in the Courts have spiraled over the years. This piece provides an indepth analysis of Section 8 of the 1996 Act by focusing on the judicial precedents.

Section 8: The Golden Eagle:

A. Condition Precedent Stipulated under Section 8

Section 8 of the Arbitration and Conciliation Act, 1996 is peremptory in nature. It provides that a judicial authority shall, on the basis of the arbitration agreement between the parties, direct the parties to go for arbitration. It also enlists conditions precedent, which need fulfillment before a reference can be made as per the terms of the 1996 Act.¹ In *P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju (Died) & Ors.*,² while iterating the

periphery of Section 8 of the 1996 Act, the Supreme Court said that “*The conditions which are required to be satisfied under Sub-sections (1) and (2) of Section 8 before the Court can exercise its powers are (1) there is an arbitration agreement; (2) a party to the agreement brings an action in the Court against the other party; (3) subject matter of the action is the same as the subject matter of the arbitration agreement; (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. The language of Section 8 is per-emptory.*”

The following factors are to be considered before entertaining an application under Section 8 of the 1996 Act:

- First question to be analyzed is whether it can be made applicable to a civil dispute. The Supreme Court while answering the aforesaid question in *H. Srinivas Pai and Anr. v. H.V. Pai (D) thr. L.Rs. and Ors.*³, said that “*The Act applies to domestic arbitrations, international commercial arbitrations and conciliations. The applicability of the Act does not depend upon the dispute being a commercial dispute. Reference to arbitration and arbitability depends upon the existence of an arbitration agreement, and not upon the question whether it is a civil dispute or commercial dispute. There can be arbitration agreements in non-commercial civil disputes also.*”

¹ See *Rashtriya Ispat Nigam Limited and Anr. v. Verma Transport Company*, 2006 (7) SCC 275; see also *Agri Gold Exims Ltd. v. Sri Lakshmi Knits and Wovens and Ors.*, (2007) 3 SCC 686.

² (2000)4SCC539.

³ (2010) 12 SCC 521.

- The presence of arbitration agreement is another pre-requisite for seeking a reference under Section 8.⁴ Section 7 of the 1996 Act provides the diameter of the term “arbitration agreement”. The importance of arbitration agreement, for seeking a reference under Section 8, was emphasized by the Supreme Court in *Smt. Kalpana Kothari v. Smt. Sudha Yadav and ors.*⁵ wherein the Court said that “As long as the Arbitration clause exists, having recourse to Civil Court for adjudication of disputes envisaged to be resolved through arbitral process or getting any orders of the nature from Civil Court for appointment of Receiver or prohibitory orders without evincing any intention to have recourse to arbitration in terms of the agreement may not arise.”
- Next question which might arise in the step wise analysis of Section 8 is whether the validity of the arbitration clause can be disputed before the Court, in front of which an application for reference is made. The answer to the question was laid in the negative by the Supreme Court in *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*⁶. The Court in this case held that if the existence of the arbitration clause is admitted, in view of the mandatory language of Section 8 of the Act, the courts ought to refer the dispute to arbitration. The Supreme Court, while raising a presumption for the validity of an arbitration clause in an agreement, in *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.*⁷, said that the Courts would construe the agreement in such a manner so as to uphold the arbitration agreement.
- Section 8 further mandates that the subject matter of the dispute is the same as the subject matter of the arbitration agreement. While

articulating on this pre-requisite, the Supreme Court in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr.*⁸, said that “The relevant language used in Section 8 is-“in a matter which is the subject matter of an arbitration agreement”. Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of ‘a matter’ which the parties have agreed to refer and which comes within the ambit of arbitration agreement.”

- An application under Section 8(1) cannot be entertained unless accompanied by original arbitration agreement or a certified copy thereof. Laying emphasis on section 8(2) for the grant of reference, the Supreme Court in *The Branch Manager, Magma Leasing and Finance Limited and Anr. v. Potluri Madhavilata and Anr.*⁹ said that “An analysis of Section 8 would show that for its applicability, the following conditions must be satisfied: (e) that along with the application the other party tenders the original arbitration agreement or duly certified copy thereof.”

B. Implied Inclusion under Section 8

Though not implicit in the reading of Section 8 of the Act, the Court in the case of *Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd.*¹⁰ brought in the competence of the arbitral tribunal as one of the grounds for the grant of reference. The proposition that Section 8, despite providing the explicit grounds on which reference can be made, also lays down the implicit ground of competence of the Arbitral Tribunal, was also read in the affirmative by the Court in the case of *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*¹¹ wherein it was held that where the cause/dispute is inarbitrable, the court where a suit is pending, will

⁴ See *Atul Singh and Ors. v. Sunil Kumar Singh and Ors.*, (2008)2SCC602.

⁵ (2002)1SCC203.

⁶ (2003)6SCC503.

⁷ (2007)5SCC510.

⁸ (2003)5SCC531.

⁹ (2009)10SCC103.

¹⁰ (1999) 5 SCC 688.

¹¹ (2011) 5 SCC 53.

refuse to refer the parties to arbitration, under Section 8 of the Act.

Effect of the Arbitration and Conciliation (Amendment) Ordinance, 2015:

On 23rd October, 2015, the President promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015. The said Ordinance amended Section 8 by stipulating that joinder of non-signatories to an arbitration agreement was not permissible. Further amendment to Section 8 requires that the judicial authority compulsorily refer parties to arbitration irrespective of any decision by the Supreme Court or any other court, if the judicial authority finds that a valid arbitration clause *prima-facie* exists. The amendment essentially nullifies the judgment of the Supreme Court in *Booz Allen Hamilton v. SBI Home finance*¹², where it had ruled that serious allegations of fraud are not arbitrable.



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Conclusion:

Section 8 of the 1996 Act denotes a provision which limits judicial intervention in the process of arbitration. However, the judiciary has drawn exception to the extent of intervention on the basis of the arbitrability of the subject matter and the competence of the arbitral tribunal to deal with it. Though, the Amendment to Section 8 under the Arbitration and Conciliation (Amendment) Ordinance, 2015 nullify the exceptions drawn by the Judiciary, however, the effect of amendments are still to be seen. This said, Section 8 of the 1996 Act still acts as a saving beacon for arbitration and forms the basis for forcing the parties in cases of domestic arbitrations to adopt the model of arbitration where there exists an arbitration agreement.

¹² (2011) 5 SCC 53.