Rashtriya Ispat Nigam Limited & Anr vs M/S Verma Transport Company on 8 August, 2006

Author: S.B. Sinha

Bench: S.B. Sinha, Dalveer Bhandari

CASE NO.:
Appeal (civil) 3420 of 2006

PETITIONER:
Rashtriya Ispat Nigam Limited & Anr.

RESPONDENT:
M/s Verma Transport Company

DATE OF JUDGMENT: 08/08/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:

J U D G M E N T [Arising out of SLP (Civil) No. 1136-37 of 2005] S.B. SINHA, J :

Leave granted.

Interpretation and application of Section 8 of the Arbitration and Conciliation Act, 1996 (for short, 'the 1996' Act) is in question in these appeals which arise out of a judgment and order dated 10.02.2003 passed by a learned Single Judge of the High Court of Punjab & Haryana, dismissing the Civil Revision Application filed by the Appellants herein from a judgment and order dated 03.10.2002 passed by the Civil Judge (Junior Division), Jalandhar and order dated 15.09.2004 refusing to review the said order.

FACTS :

The Appellant No.1 is a Public Sector Undertaking. It is engaged, inter alia, in the business of manufacturing and marketing of iron and steel products. The Respondent is a partnership firm. It is engaged in the business of consignment agents. It has its office at Jalandhar. A contract was entered into by and between the parties hereto in regard to the handling and storage of iron and steel materials of the Appellant at Ludhiana. The Appellants contend that one Shri Anil Verma, Partner of the Respondent-Firm had constituted various firms and companies and obtained several consignment agency contracts from the Appellant pertaining to Delhi, Faridabad,

Chandigarh and Ludhiana etc. who conspired with certain officials of the Appellants and obtained payments @ Rs.140/- per M.T. in place of Rs.36/- per M.T. on a false plea that the Transport Union at Bahadurgarh did not permit transportation of goods without levy of a fee of Rs.100/- per M.T. on transportation of such goods. An investigation was conducted by the Central Bureau of Investigation and a criminal case was initiated against Shri Anil Verma and the concerned officials of the Appellants. Allegedly, with the object of presenting a clean image to the Appellants and with a view to avoid termination of all the contracts by them, a plea was put forth that Shri Anil Verma had resigned from the partnership firm as also from his other firms/companies. According to the Appellants, the said Shri Anil Verma was replaced by his family members as a partner of the said firm but he continued to be in complete control over the firms/companies. The contract of the Respondent was terminated by the Appellants on 23.05.2002. On the same day, a show cause notice was also issued to Shri Anil Verma as to why he and his firms/companies should not be black listed.

The Respondent-Firm, however, filed a suit being Suit No.122 of 2002 for grant of permanent injunction restraining the Appellants herein from in any manner blacklisting the Respondent-Firm or terminating the consignment agency contract. On an application for injunction having been filed, the Civil Judge, Junior Division, directed the parties to maintain status quo in regard to the status of the Respondent-Plaintiff herein qua termination of the contract as also the order of blacklisting. The Appellants appeared to have sought for time to file written statement. They also filed a rejoinder to the counter affidavit to the application for injunction wherein it took a specific plea that the subject-matter of the suit being covered by the arbitration agreement entered into by and between the parties, it was not maintainable. On 07.06.2002, they filed an application under Section 8 of the 1996 Act, which was rejected by the Civil Judge, Junior Division by an order dated 03.10.2002, holding :

"The applicants/defendants have already filed a reply to application u/o 39 Rules 1 and 2 read with Section 151 CPC and sought 15 days time to file written statement clearly proves that the process of the suit has already begun and the defendants have already entered into a defence of the suit meaning thereby they have subjected themselves to the jurisdiction of the Civil Court. The defendants have not spelt out as to what is the dispute or difference between the parties. Rather, they have straightaway black listed the plaintiff firm, without giving them any notice regarding any dispute or difference, which was mandatory. From the perusal of the record, it is very much clear that there is no dispute or difference between the present firm and the company with regard to any of the transactions in the business between both of them. Rather, the company is at a dispute with a person, who no more exists as a partner in the plaintiff firm. The company also wrote appreciation letter to the Plaintiff firm for their cooperation for achieving the desired targets for the year 2001-02. The same was made possible because of untiring efforts made by the

> plaintiff of the present case. In the present case, the straightaway of black listing the firm is not justified, even the principal of natural justice goes in favour of the respondent/plaintiff "

A Revision Application filed by the Appellants before the High Court thereagainst was dismissed by the impugned judgment, inter alia, on the premise that the application filed by them being not accompanied by the original arbitration agreement or a duly certified copy thereof, the same was not maintainable. A Review Application filed thereagainst pointing out that such certified copy had in fact been filed, however, was not entertained.

Mr. R.F. Nariman, the learned Senior Counsel appearing on behalf of the Appellants, inter alia, would submit that the learned Civil Judge and the High Court committed a serious error in construing the provisions of Section 8 of the 1996 Act, insofar as they failed to take into consideration that :

> (1) Section 8 of the 1996 Act cannot be equated with Section 34 of the Arbitration Act, 1940, (for short, 'the 1940 Act) having been made in terms of UNCITRAL Model Rules and having undergone a thorough change.
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> (2) Filing an opposition to the interim injunction would not preclude a defendant from filing an application under Section 8 of the 1996 Act.
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> (3) The High Court committed a serious error in entertaining the plea raised by the Respondent for the first time before it in holding that the application filed by the Appellants was not accompanied by a certified copy of the arbitration agreement. (4) Despite the fact that attention of the High Court was specifically drawn that the said finding was factually incorrect in the review application, the High Court did not address itself on the said question.

Mr. Nagendra Rai, the learned Senior Counsel appearing on behalf of the Respondent, on the other hand, submitted that :

> (1) The premise on which the contract was terminated being de 'hors the conditions of the contract, the same would not be arbitrable.
>
> (2) The suit having been filed questioning both blacklisting as also termination of contract being outside the purview of arbitration, the application under Section 8 of the 1996 Act was not maintainable.
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> (3) The Appellants in their rejoinder having disclosed the substance of the dispute were not entitled to file the said application. (4) An application for time having been filed to file written statement, the impugned orders do not suffer from any infirmity.
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> The High Court in its judgment, inter alia, held :

(1) No notice having been served upon the Respondent before passing an order of blacklisting, the same was bad in law. (2) The Chairman of the First Appellant having not nominated an arbitrator in terms of the arbitration agreement, the application under Section 8 of the 1996 Act was not maintainable. (3) The Appellants having filed the reply to the interim application of the Respondent and their counsel having made a specific statement that he wanted to argue on both the applications together i.e. application under Order 39, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure as also the application under Section 8 of the 1996 Act, joined the process of the suit in their defence and subjected themselves to the jurisdiction of the Civil Court.

(4) The Appellants have not spelt out the dispute and differences between the parties and have straightaway blacklisted the Respondent-Firm.

(5) Anil Verma against whom the allegations had been made having resigned, the application under Section 8 was not maintainable.

(6) The original arbitration agreement or the certified copy of the agreement having not been annexed with the application, the same was not maintainable.

The 1996 Act makes a radical departure from the 1940 Act. It has embodied the relevant rules of the modern law but does not contain all the provisions thereof. The 1996 Act, however, is not as extensive as the English Arbitration Act.

The 1996 Act was enacted by the Parliament in the light of the UNCITRAL Model Rules. In certain respects, the Parliament of India while enacting the said Act has gone beyond the scope of the said Rules.

With a view to appreciate the said question, we may at the outset notice the provisions of Section 4 of the English Arbitration Act, 1899, which was bodily lifted in enacting Section 34 of the 1940 Act, in the following terms :

"4. Power to stay proceedings where there is a submission.-If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance , and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof, if satisfied that there is not sufficient reason why the matter should not be referred in accordance with the submission, 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, may make an order staying the proceedings."

Section 34 of the 1940 Act reads as under :

> "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."

We may furthermore notice that Section 3 of the Arbitration (Protocol and Convention) Act, 1937 and Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 contained similar provisions.

The expression 'steps in the proceedings', however, used in Article 8 of the Rules and Section 8 of the 1996 Act in contrast to the aforementioned provisions and in particular Section 34 of the 1940 Act, may be noticed :

> Article 8 of the Model Rules is as under :
>
> "(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party 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, in such case, arbitral proceedings have already commenced, the arbitral tribunal may continue the proceedings while the issue of its jurisdiction is pending with the court."

Section 8 of the 1996 Act reads as follows :

> "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."

Section 8 of the 1996 Act, however, although lifted the first part of the said Article 8 did not contain the expression contained in the second part therein. The Indian Parliament has gone beyond the recommendations made by the UNCITRAL Model Rules in enacting Sections 8 and 16 of the 1996 Act.

The provisions of Sections 8 and 16 of the 1996 Act may be compared with Sections 45 and 54 thereof. Section 45 deals with New York Convention, whereas Section 54 deals with Geneva Convention Awards. The difference can be immediately noticed. Whereas under Sections 45 and 54, the Court exercises its supervisory jurisdiction in relation to arbitration proceedings, in terms of Section 16 of the 1996 Act, the arbitrator is entitled to determine his own jurisdiction. We, however, do not mean to suggest that Part II of the 1996 Act does not contemplate determination of his own jurisdiction by the arbitral tribunal as we are not called upon to determine the said question. We have referred to the aforementioned provisions only for the purpose of comparing the difference in the language used by the Indian Parliament while dealing with the domestic arbitration vis-`-vis the International arbitration.

Section 8 confers a power on the judicial authority. He must refer the dispute which is the subject-matter of an arbitration agreement if an action is pending before him, subject to the fulfillment of the conditions precedent. The said power, however, shall be exercised if a party so applies not later than when submitting his first statement on the substance of the dispute.

What is the scope and effect of the expression 'substance of the dispute' is also in question to which we shall advert to a little later.

The arbitration agreement is contained in clause 44(a) of the contract entered into by and between the parties which reads as under :-

> "If at any time any question, dispute or difference whatsoever shall arise between the company and the Consignment Agent upon or in relation to or in connection with the contract, either party may forthwith give to the other notice in writing of the existence of such question, dispute or difference and the same shall be referred to the adjudication of an arbitrator to be nominated by the Chief Executive of the Company. The award of the arbitrator shall be final and binding on both the parties and the provisions of the Indian Arbitrator Act, 1940 and the rules thereunder and any statutory modification thereof shall be deemed to apply to and be incorporated in this contract."

The scope and purport of such a clause was considered in Heyman and Another v. Darwins Ltd. [(1942) 1 All ER 337] and it was stated :

> "The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on
>
> (a) what is the dispute, and (b) what disputes the arbitration clause covers. To take (b) first, the language of the arbitration clause in this agreement is as broad as can well be imagined. It embraces any dispute between the parties "in respect of " the agreement or in respect of any provision in the agreement or in respect of anything arising out of it. If the parties are at one on the point that they did enter into a binding agreement in terms which are not in dispute, and the difference that has arisen between them is as to their respective rights under the admitted agreement in the events that have hampered e.g. as to whether the agreement has been broken by either of them; or as to the damage resulting from such breach; or as to whether the breach by one of them goes to the root of the contract and entitles the other party to claim to be discharged from further performance; or as to whether events supervening since the agreement was made have brought the contract to an end so that neither party is required to perform further in all such cases it seems to me that the difference is within such an arbitration clause as this. In view, however, of phrases to be found in the report of some earlier decisions, the availability of the arbitration clause when "frustration" is alleged to have occurred will require closer consideration."

In the instant case, the existence of a valid agreement stands admitted. There cannot also be any dispute that the matter relating to termination of the contract would be a dispute arising out of a contract and, thus, the arbitration agreement contained in clause 44 of the contract would be squarely attracted. Once the conditions precedent contained in the said proceedings are satisfied, the judicial authority is statutorily mandated to refer the matter to arbitration. What is necessary to be looked into therefor, inter alia, would be as to whether the subject-matter of the dispute is covered by the arbitration agreement or not.

Section 34 of the repealed 1940 Act employs the expression 'steps in the proceedings'. Only in terms of Section 21 of the 1940 Act, the dispute could be referred to arbitration provided parties thereto agreed. Under the 1940 Act, the suit was not barred. The Court would not automatically refer the dispute to an arbitral tribunal. In the event, it having arrived at satisfaction that there is no sufficient reason that the dispute should not be referred and no step in relation thereto was taken by the applicant, it could stay the suit.

Section 8 of the 1996 Act contemplates some departure from Section 34 of the 1940 Act. Whereas Section 34 of the 1940 Act contemplated stay of the suit; Section 8 of the 1996 Act mandates a reference. Exercise of discretion by the judicial authority, which was the hallmark of Section 34 of the 1940 Act, has been taken away under the 1996 Act. The direction to make reference is not only mandatory, but the arbitration proceedings to be commenced or continued and conclusion thereof by an arbitral award remain unhampered by such pendency. [See O.P. Malhotra's 'The Law and Practice of Arbitration and Conciliation', 2nd Edition, pp. 346-347] Scope of the said provision fell for consideration before a Division Bench of this Court in P. Anand Gajapathi Raju and Others v.

P.V.G. Raju (Dead) and Others [(2000) 4 SCC 539], wherein this Court held :

> "In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that. As already noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. The language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the award. The court to which the party shall have recourse to challenge the award would be the court as defined in clause (e) of Section 2 of the new Act and not the court to which an application under Section 8 of the new Act is made. An application before a court under Section 8 merely brings to the court's notice that the subject-matter of the action before it is the subject-matter of an arbitration agreement. This would not be such an application as contemplated under Section 42 of the Act as the court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent court within the meaning of Section 2(e) of the new Act."

In Smt. Kalpana Kothari v. Smt. Sudha Yadav and Others [(AIR 2002 SC 404], this Court observed :

> " No doubt, at the appellate stage, after filing a written application for dismissal of the applications filed by the appellants under Section 34 of the Arbitration Act, 1940, as not pressed in view of the repeal of the 1940 Act and coming into force of the 1996 Act and getting orders thereon, the appellants herein have once again moved the High Court under Section 8 of the Act, with a request for stay of proceedings before the High Court as well as the trial court, but the application came to be rejected by the learned Judge in the High Court that no such application could be filed, once the application earlier filed under the 1940 Act was got dismissed as not pressed and also on the ground of estoppel, based on the very fact. We are of the view that the High Court did not properly appreciate the relevant and respective scope, object and purpose as also the considerations necessary for dealing with and disposing of the respective applications envisaged under Section 34 of the 1940 Act and Section 8 of the 1996 Act. Section 34 of the 1940 Act provided for filing an application to stay legal proceedings instituted by any party to an arbitration agreement against any other party to such agreement, in derogation of the arbitration clause and attempts for settlement of disputes otherwise than in accordance with the arbitration clause by substantiating the existence of an arbitration clause and the judicial authority concerned may stay such proceedings on being satisfied that there is no sufficient reason as to why the matter should not be referred to for decision in accordance with the arbitration agreement, and that the applicant seeking for stay was at the time

> when the proceedings were commenced and still remained ready and willing to do all things necessary to the proper conduct of the arbitration. This provision under the 1940 Act had nothing to do with actual reference to the arbitration of the disputes and that was left to be taken care of under Sections 8 and 20 of the 1940 Act. In striking contrast to the said scheme underlying the provisions of the 1940 Act, in the new 1996 Act, there is no provision corresponding to Section 34 of the old Act and Section 8 of the 1996 Act mandates that the judicial authority before which an action has been brought in respect of a matter, which is the subject-matter of an arbitration agreement, shall refer the parties to arbitration if a party to such an agreement applies not later than when submitting his first statement. The provisions of the 1996 Act do not envisage the specific obtaining of any stay as under the 1940 Act, for the reason that not only the direction to make reference is mandatory but notwithstanding the pendency of the proceedings before the judicial authority or the making of an application under Section 8(1) of the 1996 Act, the arbitration proceedings are enabled, under Section 8(3) of the 1996 Act to be commenced or continued and an arbitral award also made unhampered by such pendency. We have to test the order under appeal on this basis."

See also Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums [(2003) 6 SCC 503].

The High Court, in our opinion, proceeded on a wrong premise. It posed unto itself wrong question. It refused to interfere in the matter opining that no notice had been served by the Chairman of the First Appellant in terms of the arbitration agreement. For maintaining an application under Section 8 of the 1996 Act, service of notice under the arbitration agreement was not mandatory. The said stage was yet to be reached. What was necessary was existence of an arbitration agreement.

So far as the question of blacklisting is concerned, an error was committed by the High Court in opining that the Respondent-Firm had been blacklisted without issuing any notice. In fact, from a perusal of the notice dated 23.05.2002, it appears, upon recital of the relevant facts, it was stated :

> "6. In view of the above, before taking a final decision on black listing you and debarring you from participating in tenders floated by RINL, VSP or entering into any agreement with RINL, VSP, you are hereby calling upon to explain as to why you should not be black listed and debarred as mentioned above. You may submit your explanation within seven days of receipt of this notice. In case we do not receive your explanation within the above mentioned period, it will be presumed that you have nothing to say in the matter and decision on further suitable action will be taken accordingly."

No final decision had, therefore, been taken. The basic question was whether there had been breaches of contract on the part of the Respondents. The contention of the Respondent before the trial court had been that the order of blacklisting had arisen from the terms of the contract itself, as would appear from the following averments :

> "14. That the plaintiff have learnt that the defendants without following the basic principles of natural justice are intending to terminate the consignment agency contract of the plaintiff and to blacklist the plaintiff on alleged ground that one of Ex-partner of the plaintiff is claimed to be guilty of misrepresentation of overcharging the freight by misrepresentation from the different company. Anyhow this is no ground to do so."

The principal grievance of the Plaintiff-Respondent was the action on the part of the Appellants terminating the contract. Grounds on which the order of termination were based, had been questioned in the plaint. Such contentions could well be raised before the Arbitrator.

Shri Anil Verma was also acting on behalf of the partnership firm. It has not been found that he had no authority to represent the firm. His subsequent resignation as a partner was irrelevant for the purpose of consideration in regard to the maintainability of the application under Section 8 of the 1996 Act.

Filing of a reply to the injunction application could also not have been a ground to refuse to entertain the plea taken by the Appellants that the suit should be referred to arbitral tribunal particularly when in its reply to injunction application, the appellant categorically stated :

> "1. That the present application under Order 39 Rules 1 and 2 read with Section 151 CPC is liable to be dismissed on the short ground that the plaintiff has himself admitted the existence of the arbitration clause and therefore, the present application under Order 39 Rules 1 and 2 read with Section 151 CPC is not maintainable and consequently the order of this Hon'ble Court is liable to be vacated."

Thus, they did not submit themselves to the jurisdiction of the court. They did not waive their right. They in effect and substance questioned the jurisdiction of the court in proceeding with the matter. In fact, in its application filed under Section 8 of the 1996 Act, the Appellant raised a contention that the suit was liable to be dismissed and the order of injunction vacated in view of the arbitration clause.

This aspect of the matter was considered by this Court in Food Corporation of India & Anr. v. Yadav Enginner & Contractor [1983 (1) SCR 95]. Therein this Court opined that interlocutory proceedings are only incidental proceedings to the main proceedings and, thus, any step taken in the interlocutory proceedings does not come within the purview of main proceedings, stating :

> " When ex parte orders are made at the back of the party the other party is forced to come to the court to vindicate its right. Such compulsion cannot disclose an unambiguous intention to give up the benefit of the arbitration agreement. Therefore, taking any other steps in the proceedings must be confined to taking steps in the proceedings for resolution of the substantial dispute in the suit. Appearing and contesting the interlocutory applications by seeking either vacation thereof or modification thereof cannot be said to be displaying an unambiguous intention to

acquiesce in the suit and to waive the benefit of the arbitration agreement. Any other view would both be harsh and inequitous and contrary to the underlying intendment of the Act. The first party which approaches the court and seeks an ex parte interim order has obviously come to the court in breach of the arbitration agreement. By obtaining an ex parte order if it forces the other party to the agreement to suffer the order, or by merely contesting be imputed the intention of waiving the benefit of arbitration agreement, it would enjoy an undeserved advantage. Such could not be the underlying purpose of Section 34. Therefore, in our opinion, to effectuate the purpose underlying Section 34 the narrow construction of the expression "taking any other steps in the proceedings" as hereinabove set out appears to advance the object and purpose underlying Section 34 and the purpose for which the Act was enacted.

The expression 'first statement on the substance of the dispute' contained in Section 8(1) of the 1996 Act must be contra-distinguished with the expression 'written statement'. It employs submission of the party to the jurisdiction of the judicial authority. What is, therefore, is needed is a finding on the part of the judicial authority that the party has waived his 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 his right or acquiesced himself 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 at some details, a little later.

Our attention, however, was drawn by the learned counsel for the Respondent to The State of Uttar Pradesh and Another v. M/s. Janki Saran Kailash Chandra and Another [(1973) 2 SCC 96], which was distinguished in Food Corporation of India (supra), inter alia, stating that the view taken therein did not run counter to the view the court had taken. In Janki Saran Kailash Chandra (supra), 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- `-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. 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 proceeding 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 (supra), the distinction between the main proceeding and supplemental proceeding must be borne in mind. 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 and Others [(2004) 6 SCC 378].

This aspect of the matter came up for consideration before this Court again in Sadhu Singh Ghuman v. Food Corporation of India & Ors. [(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 :

" 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 January 4, 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."

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 pare 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.

The submission of the learned counsel for the Respondents that the two different causes of action having been raised, namely, illegal termination of contract and blacklisting of the firm, Section 8 of the 1996 Act was not attracted is devoid of merit; inasmuch as according to the Respondents themselves, both the causes of action arose out of the terms of the contract. What was necessary was to consider the substance of the dispute. Once it is found that the dispute between the parties arose out of the contract, Section 8 of the 1996 Act would be attracted. Furthermore, as noticed hereinbefore, the High Court committed a manifest error in holding that the Respondent-Firm had been blacklisted without any notice as only a notice to show cause in that behalf had been issued. A final decision in regard to blacklisting of the Respondent-Firm was yet to be taken. The Respondents could file their show cause and could have satisfied the authorities of the Appellant No.1 that no case has been made out for blacklisting.

Reliance placed by the learned counsel on Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Another [(2003) 5 SCC 531] is misplaced.. Therein, not only a suit for dissolution of the firm was filed, but a different cause of action had arisen in relation whereto apart from parties to the arbitration agreement, other parties had also been impleaded. In the aforementioned fact situation, this Court held :

"Secondly, there is no provision in the Act that when the subject-matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators.

It was further stated :

"The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.

Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

Such a question does not arise herein as the parties herein are parties to the arbitration agreement and the question in regard to the jurisdiction of the arbitrator, if any, can be determined by the arbitrator himself in terms of Section 16 of the 1996 Act.

Strong reliance has been placed by Mr. Rai on a decision of this Court in Union of India v. Birla Cotton Spinning and Weaving Mills Ltd. [AIR 1967 SC 688] contending that when the dispute arises de' hors the agreement, Section 8 of the 1996 Act would not be applicable. The said decision has no application in the instant case as a finding of fact was arrived at therein that the Union of India had withheld payment of a large sum of money on the specious plea that some amount in relation to another contract was due to it. The submission of the respondent therein was that no such contract had been executed by it. In the fact situation obtaining therein, this Court held :

"The evidence recorded by the Trial Court discloses that there was no dispute between the Company and the Union arising under the contract on which the suit was filed. The Union accepted liability to pay the amount claimed by the Company in the suit. The Union still declined to pay the amount asserting that an amount was due from the Company to the Union under a distinct contract. This amount was not sought to be set-off under any term of the contract under which the Company made

> the claim. The dispute raised by the Union was therefore not in respect of the liability under the terms of the contract which included the arbitration clause, but in respect of an alleged liability of the Company under another contract which it may be noted had already been referred to arbitration. The Union had no defence to the action filed by the Company : it was not contended that the amount of Rs. 10,625/- was not due to the Company under the contract relied upon by the Company. For enforcement of the arbitration clause there must exist a dispute : in the absence of a dispute between the parties to the arbitration agreement, there can be no reference."

Such is not the case here.

For the foregoing reasons, we are of the opinion that the application filed by the Appellants under Section 8 of the 1996 Act was maintainable. Before parting with the case, we may notice a disturbing state of affairs. Mr. Nariman made a statement before us that in view of the order of status quo passed by the learned Civil Judge, the Respondents have not only been working for the full term of five years contemplated under the agreement but also for the extended the period of ten years, to which they were not entitled. The order of injunction passed by the learned Trial Judge is not before us. The contention raised by Mr. Nariman if correct, we are sure that corrective measures shall immediately be taken by the court concerned.

For the reasons aforementioned, the impugned judgments cannot be sustained which are set aside. The appeal is allowed with costs. Counsel fee is quantified at Rs.15,000/-.