

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on: 04.03.2025

Pronounced on: 13.03.2025

RFA No. 52/2023

CM No. 7861/2023, 654/2024

CAV No. 1940/2023

- 1. S. Charanjeet Singh,**Appellant(s)/Petitioner(s)
Age 56 Years Prop. M/s Singh
Traders S/O Late S. Hari Singh
R/O Plot No. 234, Shopping
Centre, Bakshi Nagar, Jammu

Through: Mr. Vikram Sharma, Sr. Advocate with
Mr. Sachin Dev Singh, Advocate.

vs

- 1. UT of J&K** Respondent(s)
Th. Director Horticulture (P&M)
Department of Horticulture Planning
and Marketing Jammu.
- 2. Director Horticulture (P&M),**
Department of Horticulture Planning &
Marketing, Fruit & Vegetable Market,
Narwal, Jammu.
- 3. Deputy Director Horticulture
(P&M),**
Department of Horticulture Planning &
Marketing, Fruit & Vegetable Market,
Narwal, Jammu.
- 4. Market Administrative Committee,**
Fruit & Vegetable Market, Narwal,
Jammu Th. Its Member Secretary
Narwal, Jammu

Through: Ms. Priyanka Bhat, Advocate vice
Mr. Suneel Malhotra, GA.
Mr. Rahul Pant, Sr. Advocate with
Mr. Anirudh Sharma, Advocate.

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1. This appeal is directed against the order/judgment dated 30.10.2023 passed by the court of learned Principal District Judge, Jammu (for short the 'trial court') whereby the learned trial court has held the suit preferred by the appellant as not maintainable, with liberty to the parties to approach the nominated arbitrator at the earliest enabling him to settle the dispute *inter se* parties.
2. The brief facts necessary for disposal of the instant appeal are that a suit came to be filed by the petitioner for declaration to the effect that the contract/agreement dated 30.09.2021 executed between the parties, pursuant to e-NIT No. 39 of 2021-22 dated 03.09.2021 and e-NIT No. 40 of 2021-22 dated 03.09.2021, has frustrated and become incapable of performance, on account of deliberate inaction on part of the respondents to close numerous illegally run eat points/canteens/reharis/dhabas, etc. around and in vicinity of the premises of the appellant with consequential relief of mandatory injunction directing the respondents to refund an amount of Rs. 7,48,650/- deposited by the appellant and to return two FDR of Rs. 40,000/- bearing No. 532825 and 532826 dated 16.09.2021 deposited by the appellant alongwith interest, with further relief of compensation of Rs. 10.00 Lacs for frustrating the contract of the appellant and thus damaging goodwill of the appellant in the market and public and further relief of permanent prohibitory injunction restraining the respondents from enforcing the terms of the contract upon the appellant in any manner whatsoever.
3. The respondents after causing appearance, filed their written statement on 20.02.2022 and on 27.07.2023, issue in respect of maintainability of the

suit was framed by the learned trial court as to “Whether in view of the Arbitration Clause, the suit is barred, hence not maintainable before the court?”

4. After hearing the parties, the learned trial court vide order/judgment dated 30.10.2023, decided the suit against the appellant and held the suit not maintainable.
5. The appellant has impugned the judgment/order dated 30.10.2023 on the ground that once the respondents had filed the detailed written statement/defence in respect of the suit filed by the appellant, they shall be deemed to have waived off their right to seek the settlement of dispute through arbitration, as such, the learned trial court could not have asked the parties to approach the arbitrator by referring to the arbitration clause. It is also urged that Arbitration and Conciliation Act, 1996 (for short the ‘Act of 1996’), mandates for filing of application under Section 8 of the Act to seek reference of the dispute to arbitrator before filing the detailed written statement. Having not done so, the respondents cannot raise the issue of arbitration clause in the agreement to defeat the suit of the appellant.
6. Mr. Vikram Sharma, learned senior counsel for the appellant has argued that in absence of any application under Section 8 of the Act of 1996, the learned trial court could not have referred the parties to arbitration and further in terms of the clause 18 of the agreement, the arbitrator has been nominated, who is the official of the respondents, which is not permissible under law. Mr. Vikram Sharma has relied upon the judgments of Hon’ble the Supreme Court of India passed in cases titled ‘**Rashtriya Ispat Nigam**

Limited and another vs. M/s Verma Transport Company’, 2006 AIR SC 2800 and ‘Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and others’, 2011 AIR SC 2507. He has further placed reliance upon judgment passed by this Court in case titled as **Brij Mohan Sawhney vs. Sanjeev Kumar Gupta** decided on 25.08.2023 to substantiate his contention.

7. Per contra, Mr. Rahul Pant, learned Senior Counsel for the respondents has argued that the specific plea in the written statement was taken in respect of the arbitration clause and as such, mandate of Section 8 of the Act 1996 was complied with by the respondents and the learned trial court has rightly come to the conclusion that the suit is not maintainable and referred the parties to arbitration. He has further submitted that the respondents concede to the contention of the appellant that the matter could not have been referred to the nominated arbitrator who was the official of the respondents. Mr. Rahul Pant has relied upon the judgments passed by the Delhi High Court in cases titled as **‘Sharad P. Jagtiani vs. Edelweiss Securities Limited’, 2014 Legal Eagle (DEL) 391** and **‘Madhu Sudan Sharma and others vs. Omaxe Ltd’, 2023:DHC:8044.**
8. Heard learned counsel for the parties and perused the record.
9. For the sake of brevity and reference, Section 8 of the Arbitration and Conciliation Act, 1996 is reproduced hereunder:

8. Power to refer parties to arbitration where there is an arbitration agreement:-

1[(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.

¹¹[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 arbitrator may be commenced or continued and an arbitral award made.”

10. In terms of Section 8 of the Act of 1996, a judicial authority before which an action is brought in a matter, which is the subject of an arbitration agreement shall refer the parties to arbitration, 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. Sub-section (2) of Section 8 of the Act of 1996 provides that 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.
11. So far as the present case is concerned, the appellant himself has annexed the agreement dated 30.09.2021 executed between the Market Administrative Committee (MAC) Fruit and Vegetable Market Narwal Jammu and M/s Singh Traders, th. its Prop. Charanjeet Singh R/o Plot No.

234 Shopping Centre Bakshi Nagar, Jammu i.e. the appellant herein. This is also admitted fact that no formal application was made before the learned trial court accompanied with the arbitration agreement. The conjoint reading of the Sub-sections 1 & 2 of Section 8 of the Act of 1996 would reveal that the purpose of filing an application is to place on record the original arbitration agreement or a duly certified copy thereof, so as to bring to the notice of judicial authority the factum of existence of arbitration agreement. The only embargo contained in Section 8(1) of the Act is that an application for referring the dispute to arbitrator cannot be filed by party or anyone claiming through him, after the submission of his first statement on the substance of the dispute, meaning thereby either prior to or along with the submission of his first statement on the substance of the dispute, the party can bring to the notice of the court, clause in respect of arbitration and thereafter it becomes obligatory on part of the judicial authority to refer the parties to arbitration, unless the party waives off its right voluntarily.

12. In this context it would be appropriate to take note of the judgment passed by the Hon'ble Supreme Court of India in case titled as '**P. Anand Gajapathi Raju and others vs P.V.G Raju (Dead) and others**' (2000) 4 SCC 539, wherein the Hon'ble Supreme Court of India has held as under:

"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."

(emphasis added)

13. A reference to the judgment of the Hon'ble Apex court in case titled as **'Rashtriya Ispat Nigam Ltd. and another vs M/s Verma Transport Company', 2006 AIR SC 2800** would also be relevant, wherein at paras 19, 20 and 21 following has been held:

"19. 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 therefore, inter alia, would be as to whether the subject-matter of the dispute is covered by the arbitration agreement or not.

20. 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 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.

21. 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]"
(emphasis added)

14. There is no quarrel between the parties in respect of dispute being arbitrable in nature, however, it is the contention of the appellant that once the written statement was filed by the respondents and had submitted themselves to the jurisdiction of the court, order impugned could not have been passed. The argument though appears to be attractive but bereft of any legal force, as a preliminary objection in respect of maintainability of suit was raised by the respondents in their written statement in reference to the arbitration clause existing in the agreement and the lack of jurisdiction on part of the learned trial court to proceed ahead with the suit. The respondents brought to the notice of the learned trial court the existence of arbitration clause in the agreement through the medium of written statement and at the same time submitted their first statement on the substance of the dispute, therefore, it cannot be said that the respondents had submitted to the jurisdiction of the learned trial court to proceed ahead with the suit and waived off their right to get the matter adjudicated through arbitration.
15. In the judgment passed by this Court in case titled as '**Brij Mohan Sawhney vs. Sanjeev Kumar Gupta**', it was held by this Court that the respondent had demonstrated his intention of defeating the suit of the appellant by placing reliance upon the arbitration clause as contained in the partnership deed but never submitted to the jurisdiction of the Court, thereby waiving his right to seek reference to arbitration.

16. In this context, it would be appropriate to take note of the judgment of the High Court of Delhi in case titled **‘Sharad P. Jagtiani v. Edelweiss Securities Ltd.’**, 2014 SCC OnLine Del 4015, wherein at paras 14 to 17 following has been held:

"14.We simply need to highlight the phrase not later than when submitting his first statement on the substance of the dispute in sub-section (1) of Section 8. The requirement is to bring to the notice of the Court at a point not later than when submitting the first statement on the substance of the dispute that there exists an arbitration clause between the parties and that the subject matter of the action brought before the Court by way of the suit falls within the ambit of the arbitration clause.

15.Section 8 does not specify the manner in which the party has to submit its first statement on the substance of the dispute, and normally with respect to a suit, the first statement on the substance of the dispute by the defendant would be the written statement. Thus, if in the written statement filed it is brought to the notice of the Court that there exists an arbitration agreement between the parties which embraces the subject matter of the suit there would complete compliance with the mandate of the law und the Court would be obliged to refer the parties to arbitration if the plea in the written statement is made good.

16. On the facts of the instant case, it may be true that in the written statement filed a specific prayer has not been made to refer the parties to arbitration, **but we have highlighted hereinabove that in the written statement filed a preliminary objection has been taken that the suit is barred in view of the arbitration agreement, The written statement filed is with strings attached by challenging the maintainability of the suit in view of the arbitration clause and therefore in such circumstance the said objection taken by Edelweiss contained in the written statement could be treated as an application under Section 8 of the Arbitration and Conciliation Act, 1996.**

17. It is trite that it is the substance of a matter contained in a document which matters and not the form thereof.”

(emphasis added)

17. In view of the above, this Court is of the considered view that once a plea of existence of arbitration clause is taken in the written statement and the defendant persists with the same and objects to the jurisdiction of the trial

court to proceed ahead with the suit, then the judicial authority is left with no discretion but to refer the parties to arbitration.

18. In view of above, this Court does not find any reason to take a view other than that of the learned trial court, however, this Court finds that the learned trial court ought not to have granted liberty to the parties to approach the nominated arbitrator, who was the official of the respondents. Mr. Rahul Pant learned senior counsel for the respondents has conceded that independent arbitrator is required to be appointed.

19. Accordingly, the instant appeal is disposed of by modifying the order passed by the learned trial court to the extent that the suit is disposed of by referring the parties to the arbitration. Decree sheet be prepared accordingly.

20. **Disposed of.**

(RAJNESH OSWAL)
JUDGE

Jammu
13.03.2025
Sahil Padha

Whether the order is speaking:	Yes
Whether the order is reportable:	Yes