

**HIGH COURT OF MADHYA PRADESH BENCH AT INDORE**  
**(S.B.: HON. SHRI JUSTICE PRAKASH SHRIVASTAVA)**

**First appeal No. 273/2000**

**Surajmal (deceased) through his LRs**  
**Appellants**

**Versus**

**Roopchand (deceased) through his LRs**  
**Respondents**

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Shri A.S. Garg learned senior counsel with Shri Aditya Garg learned counsel for the appellants.

Shri A.K. Sethi learned senior counsel with Shri Nitin Phadke learned counsel for the respondents.

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**Whether approved for reporting :**  
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**J U D G M E N T**

**(Passed on 5/9/2019 )**

By this appeal under Section 37 of Arbitration and Conciliation Act appellants have challenged the order of trial court dated 28/2/2000 whereby the objections under Section 34 of Arbitration and Conciliation Act, 1996 ( for short the Act) have been decided and suit has been dismissed as not maintainable.

2/ The original plaintiff was late Phoolchand, the ancestor of appellant, who had filed the suit for declaring the partition dated 26/2/1974 as illegal and void with the plea that the suit properties were his self acquired property and he was the sole owner thereof in which respondents had no right. In the year 1973-74 he was under debt and respondents had pressurized him saying they will repay his debt and on this condition they

had got partition deed executed. In respect of payment of debt, an agreement dated 16/2/1974 was also executed but the original defendant no.1 by manipulating the partition deed had got the suit properties written in his name and had also got the gift deed executed from the plaintiff. Further plea was raised that no partition had taken place hence decree was sought to declare the partition deed dated 16/2/1974 as null and void.

3/ The respondents by filing written statement had denied the plaint averments and had also denied that original plaintiff Moolchand was sole owner of the property. A plea was raised that the suit property was the joint family property and in terms of partition dated 16/2/1974 it was received by respondents which they were using. It was also denied that partition deed was got executed by exerting any pressure.

4/ The suit was filed on 15/2/1983 and during pendency of the suit on 21/1/1999 the parties to the suit had entered into arbitration agreement, therefore, with consent, trial court had referred the matter to the arbitration under the Act by appointing Shri Manoharlal Jain advocate as arbitrator vide order dated 27/1/2000. Trial court had kept the proceedings in the civil suit pending awaiting the award of the arbitrator and arbitrator had given the award on 10/1/2000 and had filed the award in the court. The appellant had filed objections under section 34 of the Act before the trial court and trial court by order under appeal dated 28/2/2000 has rejected the objections under Section 34 of the Act and has dismissed the suit as not maintainable in view of the award of the arbitrator by further directing to prepare a decree accordingly.

5/ Learned counsel for appellant submits that one of the respondent, namely Kamlabai, had died in the year 1995,

during pendency of the suit and before reference was made to the arbitrator, but her LRs were not brought on record, therefore, subsequent proceedings are void. He submits that the arbitration agreement was not signed by Kamlabai or her LRs, hence the decree in her favour is nullity. He submits that issue no. 10 has wrongly been decided by arbitrator and the trial court has committed an error in directing to prepare the decree whereas under the Act of 1996 there is no provision for passing of the decree on the basis of arbitration award. He submits that objections under Section 34 of Act were filed before the same Court because the suit was kept pending before the trial court.

6/ Learned counsel for respondent has raised an objection that first appeal against rejection of objection under section 34 is not maintainable and arbitration appeal is required to be filed. He submits that no such objection about death of Kamlabai was raised in proceedings under section 34 of the Act and question of ascertainment of death itself is a factual issue. He has raised an objection that the arbitration award itself is a decree therefore, mentioning of trial court to prepare decree is inconsequential. He further submits that in terms of Section 19 of the Act all provisions of CPC are not applicable and even the provision relating to return of plaint under Order 7 Rule 10 CPC apply only to plaint therefore, there was no question of returning objections under Section 34 of Act and that the order dated 22/1/1999, by which reference was made, has not been challenged.

7/ I have heard the learned counsel for parties and perused the record.

8/ Section 8 of the Act empowers the trial court to refer

parties to arbitration where there is an arbitration agreement.

9/ It is the settled position in law that Section 8 can be invoked by making a reference even when the arbitration agreement comes into existence during pendency of the suit, if such an agreement meets the requirement of Section 7 of the Act. In this regard the Supreme court in the matter of **P. Anand Gajapathi Raju and others Vs. P.V.G. Raju (Dead) and others reported in (2000) 4 SCC 539** has held as under:

“5. 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.

This last provision creates a right in the person bringing the action to have the dispute adjudicated by Court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the Court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the Court referring the parties to arbitration.

6. In our view, the phrase “which is the subject of an arbitration agreement” does not, in the context, necessarily require that the agreement must be already in existence before the action is brought in the Court. The phrase also connotes an arbitration agreement being brought into existence while the action is pending. *Blacks Law Dictionary* has defined the word “is” as follows:

“This word, although normally referring to the present, often has a future meaning, but is not synonymous with “shall have been”. It may have, however, a past signification, as in the sense of 'has been'.”

10/ The Supreme court in the above judgment has also made it clear that language of Section 8 is peremptory in nature and once the reference to arbitrator is made then nothing remains to

be decided in the original action and there is no justification to stay the proceedings before the concerned court till the arbitration proceedings are concluded. In this regard in the above case it has been held that:

“8. 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 Courts 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. “

11/ In the matter of **Kalpana Kothari (Smt) Vs. Sudha Yadav (Smt) and others reported in (2002) 1 SCC 203** it has been reiterated that provisions of Section 8 are all comprehensive and of mandatory character.

12/ In the matter of **Agri Gold Exmis Ltd. Vs. Sri Lakshmi Knits & Wovens and others reported in (2007) 3 SCC 686** it has again been reiterated that Section 8 of Act is peremptory in nature and in a case where there exists an arbitration agreement the court is under obligation to refer the parties to

arbitration in terms of the arbitration agreement and once the matter is referred to the arbitrator no issue remains to be decided in a suit. In this regard the Supreme court has held that:

“22. Section 8 of the 1996 Act is peremptory in nature. In a case where there exists an arbitration agreement, the court is under obligation to refer the parties to arbitration in terms of the arbitration agreement. [See Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums and Rashtriya Ispat Nigam Limited). No issue, therefore, would remain to be decided in a suit. Existence of arbitration agreement is not disputed. The High Court, therefore, in our opinion, was right in referring the dispute between the parties to arbitration.”

13/ The position of law which emerges from the aforesaid judgment is that the arbitration agreement can be arrived at between the parties even after filing of the suit and if such an agreement satisfies the condition of Section 7, the court is to refer the matter to the arbitrator under Section 8 and once the reference is made then nothing remains to be decided in the suit therefore, the suit is not required to be kept pending and same stands disposed off with the order of reference.

14/ In the present case undisputedly during the pendency of the suit parties had arrived at an arbitration agreement. The proceedings of trial court reveals that an attempt was made by the parties to amicably settle the matter and thereafter parties had entered into the arbitration agreement on 22/1/1999 appointing Shri Manoharlal advocate as arbitrator. This arbitration agreement further reveals that as many as three cases were pending therefore, the arbitrator was required to decide the dispute in all the three matters.

15/ The trial court vide order dated 5/4/1999 had accepted the joint application of the parties for decision of dispute by the

arbitrator. Once it was accepted then section 8 had come into play and in substance the matter was referred to the arbitrator therefore, trial court could not have kept the suit pending awaiting award of the arbitrator. Once the arbitrator was appointed then nothing remain to be decided in the suit, therefore, keeping of suit pending subsequently after the appointment of arbitrator was of no consequence.

16/ The arbitrator had given the award on 10/1/2000. Against such an award the aggrieved party had an option to file objection under Section 34 of Act before the Court. 'Court' has been defined under Section 2(e) of the Act to mean the principal civil court of original jurisdiction in a district. Hence the appellants were not justified in filing the objections under Section 34 in pending proceedings of the civil suit which otherwise were unnecessarily kept pending by the trial court. The trial court has committed error in deciding the objection under Section 34 of the Act, whereas the trial court ought to have returned the objections to the concerned party by giving liberty to file it before the competent court of original jurisdiction. The objections under Section 34 of the Act were required to be separately registered and decided by the competent court. Hence the trial court has proceeded in contravention of the provisions of section 8 and Section 34 of the Act in as much as it had no jurisdiction to keep the proceedings in the civil suit pending after reference to the arbitrator and it also had no jurisdiction to entertain and decide objections under Section 34 of Act in such pending suit proceedings.

17/ That apart, trial court has directed for preparing the decree according to the award of arbitrator whereas in terms of Section 36 of Act award is to be enforced in the same manner

as if it was a decree of the Court. Hence under the Act of 1996 the award is not required to be made the rule of the court.

18/ So far as the issue raised by appellant that respondent Kamlabai had died in the year 1995 and she was not party to the arbitration agreement, is concerned, on perusal of the record, it is prima facie seen that the agreement was signed by LRs of Kamlabai. Even otherwise the factum of death and time of death has been disputed by counsel for respondent. Hence this issue is required to be proved by appellant in appropriate proceedings by leading the evidence in accordance with law.

19/ Hence the issue that the award of the arbitrator was non-est as it was in favour of deceased Kamlabai, is left open for decision by the competent court, if raised by any of the parties.

20/ So far as the objection of the respondent about maintainability of first appeal is concerned, a perusal of record reveals that appellant has filed the appeal under Section 37 of the Arbitration Act 1996. Merely because the office has registered it as First appeal instead of Arbitration Appeal, the appeal cannot be dismissed as not maintainable.

21/ In view of the aforesaid the appeal is allowed. The impugned order dated 28/2/2000 is found to have been passed without jurisdiction, hence set aside, with liberty to concerned parties to question the arbitration award in appropriate proceedings before the proper Court under Section 34 of the Act in accordance with law.

C.C. as per rules.

**(Prakash Shrivastava)**  
**Judge**



**HIGH COURT OF MADHYA PRADESH**  
**BENCH AT INDORE**

1	<b>Case No.</b>	FA No. 273/2000
2	<b>Parties Name</b>	Surajmal (deceased) through his LRs Vs.Roopchand (deceased) through his LRs
3	<b>Date of Judgment</b>	05/09/19
4	<b>Bench constituted of</b>	Hon'ble Shri Justice Prakash Shrivastava
5	<b>Judgment delivered by</b>	Hon'ble Shri Justice Prakash Shrivastava
6	<b>Whether approved for reporting</b>	<b>Yes</b>
7	<b>Name of counsels for parties.</b>	Shri A.S. Garg learned senior counsel with Shri Aditya Garg learned counsel for the appellants. Shri A.K. Sethi learned senior counsel with Shri Nitin Phadke learned counsel for the respondents.
8	<b>Law laid down</b>	(1) Section 8 can be invoked by making a reference even when the arbitration agreement comes into existence during the pendency of the suit. (2) Section 8 is preemptory in nature and once the reference to the arbitrator is made by the Court then nothing remains to be decided in the suit and there is no justification to keep the proceedings in the suit pending till the arbitration proceedings are concluded.
9	<b>Significant paragraph numbers</b>	<b>9 &amp; 10</b>

**(PRAKASH SHRIVASTAVA)**

**J u d g e**