

---

**(2008) 09 DEL CK 0318**  
**In the Delhi High Court**  
**Case No : CM (M) No. 199 of 2006**

Anand and Associates

APPELLANT

Vs

SREI International Finance Ltd.

RESPONDENT

---

**Date of Decision :** 05-09-2008

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 8(1)  
Civil Procedure Code, 1908 (CPC) — Section 10

**Citation :** (2008) 09 DEL CK 0318

**Hon'ble Judges :** S.N. Dhingra, J

**Bench :** Single Bench

**Advocate :** Rajender Agarwal, for the Appellant; Sunder Rao, for the Respondent

**Final Decision :** Dismissed

---

## Judgement

Shiv Narayan Dhingra, J.—The petitioner is aggrieved by an order dated 5.12.2005 of the learned ADJ whereby he allowed an application u/s 10 CPC made by the respondent and stayed the proceedings of the suit pending before him.

2. Brief facts relevant for the purpose of deciding the petition are that the petitioner got Hydraulic Excavator bearing No. L and T 90 CK-3 S. No. A-2331, financed from the respondent. There was a lease agreement/hire purchase agreement in respect of the equipment. The cost of equipment was around Rs. 38,32,400/-. The petitioner had made a down payment of Rs. 8,21,614/- out of which Rs. 5,72,400/- was towards initial payment, Rs. 48,900/- towards management fee, Rs. 2,00,000/- towards security depositing and the machine was financed by the respondent at 17.13% flat rate on the balance amount of Rs. 32,60,000/-. The petitioner had not been able to pay the installment and for this reason the agreement was terminated by the respondent in July, 1997. The respondent had taken possession of the machine while it was lying on the site on 2.10.1999. The petitioner's contention is that this possession was taken forcibly in his absence. The petitioner filed a suit seeking a decree of mandatory

injunction directing respondent/defendant to deliver the machine to him and decree of permanent injunction restraining defendant from selling or transferring the machine to any third party.

3. The defendant filed an application u/s 10 CPC informing the Court that the respondent/defendant had initiated arbitration proceedings in terms of the arbitration clause in the agreement in 1997 itself and filed an arbitration case No. 274/1997 before Kolkata High Court at Kolkata. As a result of this petition, a receiver Mr. Rama Prasad Mukherjee, Advocate was appointed on 19.11.1997 to take symbolic possession of the machine. By subsequent order dated 12.12.1997 in the arbitration petition by Kolkata High Court directed the receiver to take actual physical possession of the machine either personally or through the authorized agent and store the same in secured place. The respondent also reproduced the arbitration clause of the lease agreement under which the matter was referred to the sole arbitrator Shri Jagmohan Jhunjhunwala, Solicitor and Advocate. The lease agreement also contained a clause that Courts at Kolkata alone shall have jurisdiction to entertain the proceedings. The respondent further pointed out that during pendency of the arbitration proceedings, the petitioner had requested for a re- schedulement of the payment and a settlement was arrived at. The petitioner had issued post dated cheques, which were also dishonored .It is stated that the arbitration proceedings were going on before the Arbitrator and therefore the suit was liable to be stayed.

4. The learned ADJ considered the matter and came to the conclusion that since the arbitration proceedings would result into an award, which would be enforceable as a decree of the Court, proceedings before the Court were liable to be stayed. There was no dispute in respect of the fact that parties were same and the subject matter was the same.

5. The petitioner has assailed the order of the learned ADJ on the ground that provision of Section 10 CPC were not applicable in this case because arbitration proceedings were neither a suit nor the arbitrator was a Court and Section 10 was applicable only in case where an earlier suit was pending before a Competent Court. Since, both of the conditions were not satisfied, the order of the learned ADJ was bad. It was further stated that in the suit filed before learned ADJ, the cause of action included all facts even those after initiation of arbitration proceedings. Those facts formed a separate cause of action and therefore Section 10 CPC was not applicable. The petitioner had also assailed the order on the ground that the respondent had already filed WS and therefore, the trial Court could not have stayed the matter on the ground of pendency of arbitration proceedings.

6. In Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company, a question was raised if a party to the suit takes part in proceedings and files reply to an application for interim injunction in a suit, would an application invoking arbitration clause maintainable. It was contended that since the defendant had submitted to the jurisdiction of the Court and therefore, the

matter could not be referred to the arbitrator. The Supreme Court observed that a party cannot be said to have waived its right to invoke arbitration clause or acquiesced itself to the jurisdiction of Court merely by filing a reply to the application for interim injunction. The case before Supreme Court was in respect of invocation of Section 8(1) of the Arbitration and Conciliation Act and the Court observed that the arbitration clause could be invoked by the respondent despite the fact that respondent had filed reply to the interim injunction. The Court further observed as under:

23. 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.

7. The case in hand is on better footing, the respondent had already invoked arbitration clause. He filed WS before the Court wherein he informed the Court that arbitration clause had already been invoked and the Court should restrain from proceeding further in the suit. In application u/s 10 CPC also, the same ground was taken. I consider that once the arbitration clause has already been invoked, the Court should not proceed with the suit in the same subject matter between the same parties and should allow the arbitrator to pass an award and the proceedings before the Court should be stayed.

8. In Owners and Parties interested in the The Owners and Parties Interested in the Vessel M.V. Baltic Confidence and Another Vs. State of Trading Corporation of India Ltd. and Another, , the High Court had refused to stay the proceedings in the suit and had also refused to refer the dispute to arbitration in terms of arbitration clause existing in the contract between the parties, the Supreme Court set aside the judgment of the High Court and allowed the application for stay of suit, observing as under:

21. On a careful consideration of the entire matter, we are of the view that there is no good ground or acceptable reason why the intention of the parties to incorporate the arbitration clause in the Charter Party Agreement in the Bill of Lading should not be given effect to. The High Court was not right in rejecting the prayer of the appellants for stay of the suit.

9. I consider that the Trial Court rightly allowed the application under Order 10 CPC and stayed the proceedings. I find no merits in the petition. The petition is hereby dismissed.