

**HIGH COURT OF TRIPURA
AGARTALA**

Arb. A. No.2 of 2023

1. Indorama India Private Limited (Formerly IRC Agrochemicals Pvt. Ltd.) having its office at Eco-Centre, EM-4,12th Floor, Unit ECSL-1201, Sector-V, Salt Lake, Kolkata-700091, India, represented by its Managing Director.

2. Manager-Legal and Company Secretary, Indorama India Private Limited (Formerly IRC, Agrochemicals Pvt. Ltd.), having its office at Eco-Centre, EM-4,12th Floor, Unit ECSL-1201, Sector-V, Salt Lake, Kolkata- 700091, India.

3. Sri Rajat Panda, Regional Manager IRC Agro Chemicals Pvt. Ltd. having his office at Eco- Centre, EM-4,12th Floor, Unit ECSL-1201, Floor Salt Lake, Sector-V, Kolkata-700091, West Bengal.

4. Sri Ram Avtar Yadav, Guwahati Regional Office, Shima Plaza, Block-C,3rd Floor, G.S. Road Ulubari Chariali, Guwahati-781007.

5.Sri Riddhi Siddhi Customer Service provider, Buffer Handling Agent Shibnagar College Road, Agartala, PO- Agartala, PS-east Agartala, District- West Tripura.

The defendant-appellant No.1 is represented by the duly constituted Attorney, namely, Miss Sushma Shukla, holding the post of Senior Manager Legal & Company Secretary, Indorama India Private Limited (Formerly IRC Agro Chemicals Pvt. Ltd.), having her office at Eco-Centre, EM-4, 12th Floor, Unit ECSL-1201, Sector-V, Salt Lake, Kolkata-700091, India.

..... Appellant(s)

सत्यम् Versus सत्यम्

Sri Nitai Bhowmik, son of Sri Subhash Bhowmik, resident of Ranir Bazar, Assam Para, PO and PS- Ranir Bazar, District- West Tripura, Proprietor of M/s. Arati Fertilizer, at Ranir Bazar Motor Stand, Dainik Bazar Road, Ranir Bazar, PO and PS- Ranir Bazar, District- West Tripura.

..... Respondent(s)

For Appellant(s) : Mr. Somik Deb, Sr. Advocate,
Mr. P. Chakraborty, Advocate.

For Respondent(s) : Mr. S.M. Chakraborty, Sr. Advocate,
Mrs. P. Chakraborty, Advocate,
Ms. Ankita Pal, Advocate.

**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE ARINDAM LODH**

Date of hearing & Judgment : **31.01.2024**

Whether Fit for Reporting : **YES**

JUDGMENT & ORDER (ORAL)

Heard Mr. Somik Deb, learned senior counsel assisted by Mr. P. Chakraborty, learned counsel for the appellants. Also heard Mr. S. M. Chakraborty, learned senior counsel assisted by Mrs. P. Chakraborty together with Ms. Ankita Pal, learned counsel for the respondent.

[2] In the Commercial Suit No.6 of 2021 before the Court of learned Judge, Commercial Court, West Tripura, Agartala, the plaintiff-respondent herein has prayed for a decree for payment of money amounting to Rs.39,40,000/- in his favour along with interest. The plaintiff in so many words in his plaint has averred that a Dealership Agreement was prepared with the defendant No.1 and the signature of the plaintiff in the said Agreement was obtained at Agartala and as per the plaintiff the original Agreement is lying under the custody and control of the defendant No.1 who is appellant No.1 in the present case. After execution of the Dealership Agreement, the defendant No.1 started raising different invoices in the name of the plaintiff for different types of items which the plaintiff would collect from the customer service provider. The plaintiff used to lift the item so invoiced in his name from the custody of the defendant No.5 and sold it in the market without any problem. A chart under paragraph-6 of the plaint shows the number and dates of the invoices. But the plaintiff averred at paragraph-7 of the plaint that after raising invoice for the aforesaid quantity of fertilizer in the name of the plaintiff, the defendant No.1 sent 2600 (two thousand and six hundred) metric tons of fertilizer in their godown in Tripura to credit buffer stock. The price of the said 2600(two thousand and six hundred) metric tons of fertilizer was of less price when the invoice raised in the name of the plaintiff i.e., higher by Rs.200/- (Rupees two hundred) per bag. The said act of the defendant No.1, therefore, posed as a threat and caused loss of business to the plaintiff as he was not in a position to sell the

fertilizer of higher price at the price of the 2600 (two thousand and six hundred) metric tons of fertilizer sent by the defendants after about one month from the date of raising of the invoice in the name of the plaintiff. Thereafter, correspondences took place between the plaintiff and defendants and later the plaintiff could understand that the defendants were not ready to appreciate the fact that because of their arbitrary and unreasonable role the business interest of the plaintiff is going to suffer. Further correspondences took place between the parties. However, the plaintiff realized that the defendants did not have any intention to discharge their obligation and are only interested in making illegal claims. Therefore, he had no other option but to file this suit for realization of the price of 110 (one hundred and ten) DAP amounting to Rs.32,00,000/- (Rupees thirty two lakhs), the amount of Rs.4,40,000/- (Rupees four lakhs and forty thousand) against the loss sustained by him by selling the DAP at a lesser rate because of sending of 2600 (two thousand six hundred) of fertilizer for different categories at a lesser rate than the rate invoiced to the plaintiff for the said items. Another amount of Rs.3,00,000/- (Rupees three lakhs) in the account of godown rent for storing 110(one hundred and ten) metric tons of DAP in the godown of the defendants which had already been paid by the plaintiff to the defendants after raising the invoice. Therefore, the plaintiff is entitled to get the total amount of Rs.39,40,000/- (Rupees thirty nine lakhs and forty thousand) from the defendants. The cause of action for filing this suit arose on different dates and lastly on 18.01.2021 when the defendants without settling the claim of the plaintiff, again made a demand of Rs.25,94,020/- (Rupees twenty five lakhs ninety four thousand and twenty) with 18% interest to the plaintiff. The plaintiff averred at paragraph-15 of the plaint that the cause of action of this suit arose within the jurisdiction of the learned Court at Agartala when the Agreement was signed by the plaintiff at Agartala and since 110 (one hundred and ten) metric tons of DAP are also lying in the godown of the defendants at Agartala under the

custody of the defendant No.5. Therefore, the learned Commercial Court, West Tripura, Agartala has the territorial jurisdiction to try this suit.

[3] The defendant appeared on notice and filed an application under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996, as amended, *inter alia* taking the following plea:-

The defendant No.1 being Indorama India Private Limited (Formerly Known as IRC Agrochemicals Private Limited) is a company engaged in the business of manufacture and marketing and sales of various chemical and fertilizers. The defendant Nos. 1 to 3 are involved in the activities and are representatives of the defendant No.1. The plaintiff approached the defendant No.1 desirous of being a non exclusive dealer of its products. Accordingly a dealership agreement was executed on 1st June, 2018 (hereinafter referred to as the “said agreement”) between the plaintiff and defendant No.1, who were to act in terms of the said agreement.

[4] The defendant also replied on the items of claim raised by the plaintiff and thereafter referred to clause 22.2, 22.3 and 22.4 of the agreement. The defendant further raised an objection that the dispute raised in the suit by the plaintiff is subject matter of arbitration agreement which is executed on 1st June, 2018 and therefore it should be referred to arbitration in terms of the arbitration clause. The defendant also stated that he had filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 before the Hon’ble High Court of Calcutta, being A.P. No.325 of 2021 for appointment of an Arbitrator. The defendant took a plea that the learned Commercial Court may be pleased to refer the parties to arbitration in terms of Clause 22.4 of the said agreement executed between the parties. Thereafter, the impugned order dated 6th February, 2023 was passed which reads as under:

“Learned Advocate Ms. Mampi Chakraborty appearing for the plaintiff is present.

None appeared for the defendants.

I have heard both the sides on 21-01-2023 on the application dated 12-11-2022.

Perused the record.

The defendants have filed the application dated 12-11-2022 under Section 5 & 8 of the Arbitration & Conciliation Act, 1996, here-in-after referred as the Arbitration Act, contending, inter alia, that there was a dealership agreement in between the parties and there is an arbitration clause in the agreement and as such, this suit stands not maintainable.

At the outset let's have a look on the relevant clause of the dealership agreement dated 01-06-2018:-

“22. Dispute Resolution:

22.1. The agreement and all questions of its interpretation shall be construed in accordance with the laws of India as applicable from time to time.

22.2. The parties agree that they shall attempt to resolve through good faith, consultation, and dispute or difference between the parties in respect of or concerning or connected with interpretation or implementation of this agreement or arising out of this agreement (“Dispute”), and such consultation shall begin promptly after a party has delivered to another party a written request for such consultation.

22.3. In the event that the parties have been unable to resolve a dispute within a period of 45 business days in accordance with the mechanism mentioned in the above para, such dispute shall finally be settled according to the process of arbitration as mentioned in the following paragraph”.

What, therefore, emerges is that there is a clause for reference of dispute or differences for arbitration, but the arbitration clause vide clause 22.3 is subject to the provisions vide clause 22.1 and 22.2. There is no prima facie material in the record to show that the provisions mentioned in clause 22.1. and 22.2. were exhausted.

In this view of the matter, we are of the considered opinion that jurisdiction of this Court cannot be ousted in such a simple manner as proposed. We are, therefore, of the considered opinion that the application dated 12-11-2022 has no merit at all and accordingly, stands rejected.

Record further reveals that the statutory period of 120 days for filing written statement has already elapsed. However, a solitary opportunity is granted to the defendants to file their written statement, if any.

Fix 18-04-2023 for filing written statement.”

[5] Thereafter, the defendant approached this Court in the present appeal.

When the matter was taken up on the first occasion on 18th May, 2023 by this Court, the following order was passed:

“Respondent herein approached the District Commercial Court, West Tripura, Agartala in Case No. CS 06 of 2021 for recovery of outstanding dues in respect of works said to be executed under an agreement dated 01.06.2018 entered with the respondent therein/appellant company herein. Appellant herein preferred an application on 12.11.2022 under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996 inter alia taking a plea that the Court should not entertain the suit in presence of an arbitration agreement between the parties. By the impugned order dated 06.02.2023 learned District Commercial Court,

West Tripura rejected the application with an observation that pre-arbitration conciliation mechanism under clause Nos. 22.1 and 22.2 were not exhausted for the arbitration clause to be invoked.

However, learned senior counsel for the appellant has pointed out that in terms of the arbitration clause Nos. 22.3 and 22.4 the appellant had invoked the jurisdiction of Calcutta High Court for appointment of arbitrator in respect of the dispute arising out of the same agreement under Section 11(6) of the Arbitration and Conciliation Act, 1996 as amended. By order dated 01.03.2023, learned Single Bench of the Calcutta High Court has been pleased to appoint one Ms. Radhika Singh, Advocate as the sole arbitrator to resolve the dispute between the parties. Learned senior counsel for the appellant further submits that the first sitting of the arbitration proceedings has been held on 22.03.2023 at 5 pm at the business centre of 'Basu Advisory (Pvt.) Limited', Kolkata where the schedule of the proceedings and guidelines for pleadings and documents as also other ancillary matters relating to conduct of proceedings have been prescribed. Both the parties were represented on the said date. However, he submits that these developments have taken place after passing of the impugned order. The learned Commercial Court, West Tripura, Agartala may not have been properly apprised of these developments. It is further submitted that in the face of an arbitration proceeding having been started pursuant to an order passed by the Calcutta High Court under Section 11(6) of the Act of 1996, the instant suit may itself not be maintainable.

Having heard learned counsel for the appellant and having taken note of these conspicuous facts borne out from record, it appears that the District Commercial Court, West Tripura, Agartala may not be apprised of the initiation of arbitration proceedings pursuant to an order passed by Calcutta High Court under Section 11(6) of the Act of 1996. In such circumstances, we are of the considered view that at the first instance the appellant should approach the District Commercial Court, West Tripura, Agartala with a proper application bringing on record the aforesaid developments for consideration of the issue of maintainability of the suit itself. It appears that the next date is on 06.07.2023. As such, the matter is adjourned to be listed on 13.07.2023.

Let it be made clear that this Court has not made any observation on the plea to be raised by the appellant before the learned District Commercial Court, West Tripura, Agartala.”

[6] The appellant herein approached the learned Court with an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 read with Sections 5 and 8 of the Arbitration and Conciliation Act, 1996, as amended, for rejection of the plaint on the grounds mentioned therein. The learned Court after hearing the parties by an order dated 18th July, 2023 rejected the application dated 06.07.2023 filed by the defendants/ appellants herein observing as under:

“The aforesaid case law also speaks about arbitration agreement and in the present case original arbitration agreement or a duly certified copy has not been produced by the defendants.

Without filing written statement, defendants cannot take the plea on maintainability of the suit. At this stage i.e. before submitting written statement though the defendants can seek for referring the parties to arbitration if there is arbitration clause in the agreement but for that exercise the defendants must produce original arbitration agreement or a duly certified copy thereof.

Thus in view of the aforesaid discussions, the application dated 06-07-2023 filed by the defendants under Order- VII, Rule- 11 of the CPC read with Sections 5 and 8 of the Arbitration and Conciliation Act, 1996 stands rejected.

Defendants are directed to file their written statement on the next date.
Fix 28-08-2023 for filing of written statement by the defendants.”

[7] An objection to this IA has also been filed by the plaintiff/respondent herein.

[8] We have heard the learned counsel for the parties. In order to understand the controversy, it would be proper to refer to the provisions of Sections 5 and 8 of the Arbitration and Conciliation Act, 1996 as amended which are quoted hereunder:

“5. Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”

“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 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:

[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 arbitration may be commenced or continued and an arbitral award made.

[9] It would also be proper to refer to provisions of Section 13(1) and 13 (1-A) of the Commercial Courts Act, 2015 read with Section 37(1) (a) of the Arbitration and Conciliation Act, 1996 which is quoted hereunder:

“13 Appeals from decrees of Commercial Courts and Commercial Divisions.-
(1) Any person aggrieved by the judgment or order of a Commercial Court

below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.

(1-A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:

Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996)”

[10] Section 37 of the Arbitration and Conciliation Act, 1996 is quoted hereunder for better appreciation:

“37. Appealable orders. - (1) [Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:--

[(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.]

(2) An appeal shall also lie to a court from an order of the arbitral tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

[11] Certain facts also need to be gone into. It is not in dispute that the Calcutta High Court, on an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, i.e. AP No. 325 of 2021 has by an order dated 1st March, 2023 appointed an Arbitrator namely Ms. Radhika Singh, Advocate to resolve the dispute between the parties arising out of the agreement dated 01.06.2018. It is also not in dispute that the appointment of an Arbitrator was made by the Calcutta High Court in the presence of the parties after objection being made by the plaintiff/respondent herein. It is, however, also informed that the learned Court left all issues open to be raised before learned Arbitrator. Clause 22 which is an issue

under the agreement dated 01.06.2018 provides for dispute resolution. Clause 22 to 22.5 are also extracted hereunder:

“22. Dispute Resolution:

22.1. The Agreement and all questions of its interpretation shall be construed in accordance with the laws of India as applicable from time to time.

22.2. The Parties agree that they shall attempt to resolve through good faith consultation, and dispute or difference between the Parties in respect of or concerning of connected with the interpretation or implementation of this Agreement or arising out of this Agreement (“Dispute”), and such consultation shall begin promptly after a Party has delivered to another Party a written request for such consultation.

22.3. In the event that the Parties have been unable to resolve a dispute within a period of 45 business days in accordance with the mechanism mentioned in the above Para, such dispute shall finally be settled according by the process of arbitration as mentioned in the following paragraph.

22.4. In the event of any dispute arising out of the Agreement herein recorded either as to the construction, meaning or interpretation of these presents or of the rights and liabilities of the parties or the performance or non-performance thereof, or as to any matter of whatsoever nature touching or pertaining to these present, such dispute shall be referred to a sole arbitrator, in accordance with and in all respects to conform to the provisions in that behalf contained in the Arbitration and Conciliation (Amended) Act, 2015, or any statutory modification or re-enactment thereof for the time being in force and the award of such arbitrator shall be binding upon the parties hereto. The venue of such arbitration proceedings shall be within the local Municipal Jurisdiction of the Registered office of Company as mentioned hereinabove and the arbitration proceedings shall be conducted in English language. The Arbitral Tribunal shall have the power and jurisdiction to award the costs of the arbitration proceedings against either Party. The existence of any dispute(s) or difference(s) or intimation or continuance of the arbitration proceedings shall not permit the Parties to postpone or delay the performance by the Parties to the arbitration of their respective obligations pursuant to this agreement. Provided however that this clause shall not preclude any Party from obtaining relief by way of motion or similar proceedings or an urgent basis or from instituting any interdict, injunction or similar proceedings in any court of competent jurisdiction, pending the decision of the Arbitral Tribunal.

22.5. All notices to be given or served by either party to this Agreement shall be deemed to have been given or served if the same is delivered or served by messenger, on the date of its receipt/ delivery; or on the expiry of 72 hours after dispatch if by courier/fax/email/post/telegram/ registered post, as the case may be, by either party to the other at its registered or principal office as mentioned hereinabove. Provided that either party shall have the right to inform the other in writing in a similar manner of any other addressor addresses at which such notices shall be given or served.”

[12] An argument has been raised by the respondent that the Money Suit preferred by him was prior in point of time than the Arbitration application preferred by the appellant herein under Section 11(6) of the Arbitration and Conciliation Act, 1996 before the Calcutta High Court. However, as noted above it is not in dispute

that the Calcutta High Court has proceeded to appoint an Arbitrator in respect of the dispute arising between the parties and the arbitration proceedings are underway. No award has been delivered. Section 16 of the Arbitration and Conciliation Act, 1996 under chapter IV provides for competence of an arbitral tribunal to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. Section 16 of the Arbitration and Conciliation Act, 1996 is also extracted hereunder:

“16. Competence of arbitral tribunal to rule on its jurisdiction. -

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

[13] We are not aware whether the plaintiff/ respondent herein has raised the objection with respect to the existence or validity of the arbitration agreement before the learned Arbitrator or not. However, averments in his plaint which are part of the paper book give a *prima facie* impression that the claim raised by the plaintiff revolved around execution of work in respect of the dealership agreement dated 01.06.2018 due to non-payment of dues by the defendants/appellants herein arising

out of difference in cost of the products to be sold by the plaintiff as a distributor of the appellant and certain other ancillary claims. Since the order dated 06.02.2023 impugned in the instant appeal amounts to refusal to refer the parties to an arbitration under Section 8 of the Act of 1996, the appeal would lie under Section 37(1)(a) of the Act of 1996 read with Section 13(1-A) of the Commercial Courts Act, 2015. It would be apposite to refer to the provisions of Section 42 of the Act of 1996 which provides that if an application under Part-1 with respect to an arbitration agreement has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court. Learned senior counsel for the respondent has raised a plea that the Money Suit was filed prior in point of time than the arbitration application before the Calcutta High Court. However, learned counsel for both the parties have not been able to supply the exact date of the filing of the respective suit and the application before Commercial Court, West Tripura, Agartala and the arbitration application before the Calcutta High Court. The learned senior counsel for the appellant has, on the other hand, pointed out to Clause 22.4 of the Agreement quoted above which provides that the venue of such arbitration proceedings shall be within the local Municipal Jurisdiction of the Registered office of Company as mentioned hereinabove and the arbitration proceedings shall be conducted in English language. On the basis of this Clause, the appellant herein had approached the Calcutta High Court for appointment of an arbitrator invoking Section 11(6) of the Act of 1996. It is also pointed out that the expression “company”, means the appellant herein since the plaintiff/respondent herein is an individual proprietor as is also borne out from the cause title of the agreement which is part of the paper book.

[14] In the wake of undisputed fact that an arbitration proceeding is underway in respect of the dispute arising out of the agreement dated 01.06.2018 between the parties pursuant to appointment of an arbitrator by the Calcutta High Court in arbitration application No.325/21, the issue raised to be decided herein is whether the refusal on the part of the learned Commercial Court to refer the parties for arbitration in terms of Clause 22.4 of the agreement by the impugned order dated 06.02.2023 was proper in the eye of law or not. This Court after taking note of the appointment of an arbitrator by the Calcutta High Court at the instance of the appellant herein, in its order dated 18.05.2023 itself, felt that this conspicuous facts be brought to the notice of the District Commercial Court, West Tripura, Agartala who may not be apprised of appointment of an arbitrator by the Calcutta High Court. In this background, the appellant was directed to once again move the District Commercial Court, Agartala with proper application bringing on record the aforesaid developments for consideration of the issue of maintainability of the suit itself. That application under Order VII Rule 11 read with Section 5 and 8 of the Arbitration and Conciliation Act, 1996 stands rejected by the order dated 18.07.2023 which has been sought to be assailed in IA No.2 of 2023 by the appellant herein. Such application has been objected to *inter alia* by the respondent herein on a number of grounds including the wrong invocation of the provisions of Order VII Rule 11 and also defect in the affidavit filed in support of the IA. However, since the entire records of the commercial suit No.6/2021 have been summoned pursuant to our order dated 13.12.2023, we take cognizance of the order dated 18.06.2023 whereby the learned Court has rejected the application made by the defendants/appellants herein on the directions passed by this Court. The learned Court appears to have been persuaded by the fact that the defendant could not have raised the plea of maintainability of the suit before filing the written statement though he could have sought for referring the parties to arbitration if there is an

arbitration Clause in the agreement. However, it observed that the defendant had failed to produce the original arbitration agreement or a duly certified copy thereof. In our opinion, the requirement of filing of original or certified copy of the arbitration agreement in terms of Section 8(2) of the Act of 1996 is a curable defect.

[15] The appellant has taken a plea that the original copy of the agreement dated 01.06.2018 was submitted along with the arbitration application before the Calcutta High Court. However, in that case it is always open for the appellant to obtain a certified copy of the agreement for being produced before the learned Commercial Court to properly entertain the application under Section 8(1) of the Act of 1996 on the issue of referring the dispute between the parties to an arbitrator. In this case an arbitration proceeding is already underway by virtue of the order passed by the Calcutta High Court in arbitration application No. 325/21 moved by the appellant herein. It is not clear as to whether the requirement of pre-institution mediation and settlement in terms of Section 12-A under Chapter III-A of the Commercial Courts Act, 2015 has been carried out before institution of the suit. The learned Court in the impugned order dated 06.02.2023 has simply observed that the jurisdiction of the Court could not be ousted in a simple manner as proposed relying upon Clause 22 to 24 of the dealership agreement dated 01.06.2018 by the defendant. The learned Court has given the defendant an opportunity to file written statement without deciding the application under Section 5 and 8(1) of the Arbitration and Conciliation Act, 1996. The subsequent order dated 18.07.2023 passed by the learned Court gives an impression that the learned Court was not inclined to entertain the application filed under Order VII Rule 11 of CPC read with Section 5 and 8 of Arbitration and Conciliation Act, 1996 on the plea of maintainability of the suit before filing of written statement as the original or duly certified copy of the arbitration agreement could not be produced by the defendant.

As observed hereinabove requirement of sub Section 2 of Section 8 of the Act of 1996 is a curable defect and the appellant is required to submit either the original or the duly certified copy of the agreement for the learned Court to take a decision on the application made under Section 5 and 8 of the Act of 1996. The instant provision contemplates that if an action is brought before a judicial authority which is the subject of an arbitration agreement and if the party to the arbitration agreement or any person claiming through or under him, 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, the judicial authority is under an obligation to refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists (*See Sushma Shivkumar Daga & Anr., Vs. Madhurkumar Ramkrishnaji Bajaj & Ors., 2023 SCC OnLine SC 1683*). In this case, the Calcutta High Court has already appointed an Arbitrator to decide the dispute between the parties arising out of the same dealership agreement dated 01.06.2018 and the arbitration proceedings are underway.

[16] From a bare reading of the plaint it appears that the dispute and the claims made by the plaintiff revolved around the work of distributorship and sale of goods as a distributor in respect of the dealership agreement entered between the plaintiff and defendant No.1 i.e. the appellant and respondent herein. In such circumstances when an arbitration proceeding is underway in respect of the dispute raised by the appellant under the same dealership agreement dated 01.06.2018 pursuant to the order of the Calcutta High Court, there could result a parallel proceeding or conflict of decisions in respect of disputes raised by one party before another judicial authority/ commercial court herein arising out of the dealership agreement in question. In such circumstances we feel that the learned commercial court failed to exercise its jurisdiction under Section 8(1) of the Act of 1996 even

though the defendants/appellants herein had at the first instance raised an objection to that effect and before the date of submitting his first statement on the substance of the dispute. This Court at the first instance instead of interfering in the matter thought it proper to relegate the appellant to apprise the learned District Commercial Court with a proper application bringing on record the aforesaid developments for consideration of the issue of maintainability of the suit itself. The learned Court by the subsequent order dated 18.07.2023 again failed to exercise jurisdiction and consider the issue without properly appreciating the entire background of facts and circumstances of the case that a dispute between the parties in respect of dealership agreement dated 01.06.2018 is pending before the learned Arbitrator appointed by the Calcutta High Court. It also failed to consider the relevant provisions of the Arbitration and Conciliation Act, 1996 as referred to hereinabove and the terms of the agreement quoted above as well. The learned Court could have accorded an opportunity to the defendant to produce the original or duly certified copy of the agreement to fulfill the requirement under Section 8(2) of the Act of 1996 before proceeding to decide the issue in substance.

[17] We are, therefore, of the view that the impugned order dated 06.02.2023 cannot be sustained in the eye of law and is set aside. The subsequent order dated 18.07.2023 which has been passed pursuant to our order passed on 18.05.2023 also cannot stand in the eye of law. It is also set aside. The matter is remitted to the learned Commercial Court to take a decision on the application made by the appellant under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996 and also on the maintainability of the commercial suit itself in accordance with law. Let such decision be taken within a reasonable time preferably 8(eight) weeks from the date of receipt of the copy of this judgment.

[18] Let it be made clear that any observation made hereinabove are only for the purpose of testing the correctness and legality of the order dated 06.02.2023 and 18.07.2023 and shall not prejudice the case of the parties before the learned Commercial Court.

Lower Court records be sent to the concerned Court.

Pending application(s), if any, also stands disposed of.

(ARINDAM LODH), J

(APARESH KUMAR SINGH), CJ

