THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SMT. JUSTICE ANIS

<u>CIVIL MISCELLANEOUS APPEAL NO.153 OF 2016</u>

<u>J U D G E M E N T</u>

(*Per Hon'ble Sri Justice Sanjay Kumar*)

The appellants are the plaintiffs in O.S.No.592 of 2012 on the file of the learned II Additional Chief Judge, City Civil Courts, Hyderabad. They filed the said suit for recovery of a sum of Rs.13,84,47,781/- after declaring G.O.Ms.No.8, Infrastructure and Investment (IID-2) Department, dated 20.02.2009 as null and void, if warranted. They also sought interest on Rs.10,00,00,000/- at 12% p.a. from the date of the suit till the date of realization and costs.

The State of Andhra Pradesh and the Infrastructure Corporation of Andhra Pradesh Limited, the defendants in the suit, filed I.A.No.2706 of 2012 therein under Order 7 Rule 11(d) CPC seeking rejection of the plaint. By order dated 18.01.2016, the trial Court held that the plaint could not be rejected but returned it to the plaintiffs for presentation before the proper forum. Aggrieved thereby, the plaintiffs are in appeal under Order 43 Rule 1 CPC.

Parties shall be referred to hereinafter as arrayed in the suit.

The suit claim in O.S.No.592 of 2012 was based on the following plaint averments: The State of Andhra Pradesh, the 1st defendant, proposed to construct an integrated multi-utility complex at Andhra Pradesh Bhavan, New Delhi, and nominated the Infrastructure Corporation of Andhra Pradesh Limited, the 2nd defendant, as the executing agency. The project was to be executed on a Build, Operate and Transfer (BOT) basis, through public-private partnership mode. G.O.Ms.No.423, General Administration (GH.I)

Department, dated 14.09.2005 was issued by the State constituting a Special Empowered Committee in this regard. This Committee was reconstituted under G.O.Ms.No.436, General Administration (GH.I) Department, dated 23.09.2005. A Technical Advisory Committee was also constituted by the State under G.O.Ms.No.6, Infrastructure and Investment (II D.1) Department, dated 12.07.2006. An advertisement was issued by the 2nd defendant Corporation inviting bids from developers of national and international repute to submit their 'Expression of Interest-cum-Request for Qualification' in relation to the proposed project. Fourteen bidders responded thereto and ten of them were shortlisted, including the plaintiffs. Under letter dated 23.04.2008, the 2nd defendant Corporation issued the 'Request for Proposal' to each of the shortlisted bidders. On evaluation of the bids of the shortlisted bidders, the State issued G.O.Ms.No.38, Infrastructure and Investment (II D-2) Department, dated 20.09.2008 approving the bid of the plaintiffs' consortium. In consequence, Letter of Award dated 06.10.2008 was issued to them by the 2nd defendant Corporation. Thereunder, they were called upon to execute the Development and Licence Agreements within a time frame. The plaintiffs' consortium addressed letter dated 21.10.2008 to the 2nd defendant Corporation accepting the terms and conditions stipulated in the Letter of Award. However, the plaintiffs' consortium thereafter raised various issues in relation to the project and addressed letters to the 2nd defendant Corporation seeking clarifications. As there was no response, the plaintiffs also sent draft Development and Licence Agreements to the 2nd defendant Corporation under letter dated 11.02.2009. While so, the State issued G.O.Ms.No.8 dated 20.02.2009 purporting to cancel the Letter of Award dated 06.10.2008 on the ground that the plaintiffs had committed default. Pursuant thereto, the 2nd defendant Corporation addressed letter dated 20.02.2009 to the plaintiffs, communicating the cancellation of their Letter of Award. The plaintiffs then filed W.P.No.3589 of 2009 before the High Court at Hyderabad challenging G.O.Ms.No.8 dated 20.02.2009. This writ petition was dismissed on 26.09.2009, whereupon the plaintiffs filed W.A.No.891 of 2009. However, during the pendency of this writ appeal, the plaintiffs were advised to withdraw the same so as to approach the civil Court. The Memo filed by them seeking leave to withdraw the appeal and the writ petition is still pending consideration. The suit was filed keeping in mind the limitation aspect, even before the withdrawal of the appeal and the writ petition. Raising various issues in relation to the actions of the defendants, the plaintiffs sought the reliefs as set out *supra.*

The 2nd defendant Corporation filed its written statement in the suit in November, 2015. Long prior thereto, I.A.No.2706 of 2012 was filed by the defendants under Order 7 Rule 11(d) CPC in November, 2012 seeking rejection of the plaint. In the affidavit filed in support of this petition, the defendants raised three grounds. The first ground was that as the High Court had dismissed W.P.No.3589 of 2009 filed by the plaintiffs challenging G.O.Ms.No.8 dated 20.02.2009 and as the plaintiffs had not chosen to seek recovery of monies therein, the suit claim in this regard was barred by Order 2 Rule 2 CPC. The second ground was that the suit was barred by limitation as cancellation of the Letter of Award was effected under G.O.Ms.No.8 dated 20.02.2009 but the suit was filed on 19.04.2012, i.e., beyond three years. The third ground was that as per the 'Request for Proposal', the parties were obligated to resolve their disputes through arbitration in the event the same could not be settled through conciliation proceedings, and Section 8 of the Arbitration and Conciliation Act, 1996 (for brevity, 'the Act of 1996') therefore barred the plaintiffs from prosecuting the suit.

The plaintiffs contested the I.A. by filing a counter, wherein they stated that Order 7 Rule 11(d) CPC was inapplicable to the case on hand as the defendants had failed to establish that their suit was barred by any law. As regards the grounds taken by the defendants, the plaintiffs stated that Order 2 Rule 2 CPC had no application as invocation of the bank guarantees by the defendants was only after dismissal of the writ petition and therefore, there was no cause of action at the time of filing of the said writ petition to seek recovery of monies. As regards the limitation aspect, they stated that G.O.Ms.No.8 dated 20.02.2009 did not speak of forfeiture of the amounts deposited by the plaintiffs and that it was only during the writ appeal proceedings that the defendants appropriated the amounts deposited by the plaintiffs towards the losses allegedly incurred owing to their failure in grounding the project. The plaintiffs therefore contended that the suit for recovery of monies in relation to this apportionment was filed within limitation. As to the third ground, the plaintiffs stated that Clause No.34.3, referred to in para 8 of the I.A. affidavit filed by the defendants, did not form part of the 'Request for Proposal' but was part of the draft Development Agreement annexed thereto. As they had not signed the Development Agreement, the plaintiffs contended that the said clause would have no force prior to the parties executing such an agreement and therefore, the question of resolving disputes through arbitration, as contemplated under Clause No.34.3, did not arise.

During the course of arguments before the trial Court, an additional ground was raised by the defendants that Section 76 of the Andhra Pradesh Infrastructure Development Enabling Act, 2001 (for brevity, 'the Act of 2001') would also bar the suit.

Perusal of the order under appeal reflects that the trial Court found that the suit was not barred by limitation and did not accept the plea of the defendants that the suit was barred by the principle of *res judicata* or by Order 2 Rule 2 CPC. The trial Court also held in favour of the plaintiffs in so far as applicability of Section 8 of the Act of 1996 is concerned. In this regard, it was observed that no agreement had been entered into by and between the parties and the arbitration clause in the draft Development Agreement could not be pressed into service. The trial Court also noted that no separate application had been filed under Section 8 of the Act of 1996 and held that Order 7 Rule 11(d) CPC did not permit this issue being raised independently.

However, when it came to Section 76 of the Act of 2001, the trial Court opined that there was complete exclusion thereunder of the jurisdiction of the civil Court in relation to any dispute arising under the said Act and that exclusive jurisdiction was conferred on the High Court. Holding so, the trial Court concluded that the present suit was not barred by law but it was divested of jurisdiction to entertain the suit and returned the plaint for presentation before the proper forum. In effect, though the subject petition was filed by the defendants under Order 7 Rule 11 CPC, the trial Court treated it as one under Order 7 Rule 10 CPC and acted accordingly.

Heard Sri S.Niranjan Reddy, learned senior counsel, Sri Avinash Desai, learned counsel, for the appellants/plaintiffs, and the learned Advocate General for the State of Andhra Pradesh for the respondents/defendants.

The only point which weighed with the trial Court, being Section 76 of the Act of 2001, Sri S.Niranjan Reddy, learned senior counsel, contended that the Act of 2001 had no application whatsoever to the subject project and, therefore, return of the plaint basing on the said statute could not be sustained. Learned senior counsel pointed out that the procedure envisaged under the Act of 2001 was not followed at any point of time in relation to the subject project and it was therefore not open to the defendants to baldly claim that the Act of 2001 had applicability. He would point out that the Act of 2001 had applicability only in the State of Andhra Pradesh and could not be extended to a project at New Delhi.

Per contra, the learned Advocate General argued that the Act of 2001 covered all infrastructure projects, including public buildings, and therefore, the subject project would also fall within its ambit. He contended that the trial Court erred in not accepting the contention urged by the defendants as regards the applicability of Section 8 of the Act of 1996. He would point out that a specific dispute resolution mechanism was contemplated by way of conciliation and thereafter, by way of arbitration, and that the plaintiffs could not, in any event, take recourse to a suit before the civil Court straightaway.

In reply, Sri Avinash Desai, learned counsel, reiterated that the Act of 2001 had no application not only on the ground of territorial limits but also because the documents in relation to the subject project specifically spoke of the Courts at Hyderabad having exclusive jurisdiction which would not have been the case if Section 76 of the Act of 2001 were to apply. This aspect of the matter is countered by the learned Advocate General stating that the statute would prevail over such clauses in the documents relating to the subject project.

Though the learned Advocate General also raised a preliminary objection as to the maintainability of an appeal under Order 43 Rule 1 CPC against an order passed upon a petition filed under Order 7 Rule 11 CPC, it is clear that the trial Court treated the said petition as one under Order 7 Rule 10 CPC and passed the order under appeal returning the plaint for presentation before the proper forum. An order under Order 7 Rule 10 CPC is appealable under Order 43 Rule 1(a) CPC. Therefore, this Court finds that this appeal is maintainable, notwithstanding the fact that the order under appeal was passed upon a petition filed under Order 7 Rule 11 CPC as it had the effect of an order passed under Order 7 Rule 10 CPC.

Now, coming to the main issue, viz., Section 76 of the Act of 2001, it would be apposite to examine the structure and substance of this enactment. The preamble of the Act of 2001 states as under:

> 'An Act to provide for the rapid development of physical and social infrastructure in the State and attract private sector participation in the designing, financing, construction, operation and maintenance of infrastructure projects in the State and provide a comprehensive legislation for, reducing administrative and procedural delays, identifying generic project risks, detailing various incentives, detailing the project delivery process, procedures for reconciliation of disputes and also to provide for other ancillary and incidental matters thereto with a view to presenting bankable projects to the private sector and improving level of infrastructure in the State of Andhra Pradesh and for matters connected therein or incidental thereto.'

Section 1(2) states that the Act of 2001 extends to the whole of the State of Andhra Pradesh. Section 2(q) thereof defines

'Infrastructure Authority' to mean the authority constituted under Section 3. The composition of the Infrastructure Authority is dealt with under Section 4 and reads as under:

'**4. COMPOSITION OF THE AUTHORITY:**

(1) The Authority shall consist of a Chairman, and such other members not exceeding 15 in the aggregate including ex-officio members.

(2) The Chief Secretary to the Government shall be the Chairperson of the Authority.

(3) The ex-officio members of the Authority shall be the following:

i. Secretary to the Government, Finance and Planning (Fin. Wing) Dept. Department.
ii. Secretary to Government, Transport, Roads and Buildings Department.
iii. Secretary to Government, Municipal Administration and Urban Development Department.
iv. Secretary to Government, Information Technology Department.
v. Vice-Chairman and Managing Director, A.P. Industrial Infrastructure Corporation.
vi. Director General, National Academy of Construction, Hyderabad.

(4) The Members other than those specified in sub-section (3) shall be appointed by the Government in the manner prescribed.'

Section 10 of the Act of 2001 deals with the functions of the Infrastructure Authority and states to the effect that the Infrastructure Authority shall conceptualize and identify projects and ensure their conformance to the objectives of the State; receive and consider projects under the Act from the Government or Government Agency or local authority and process the same; advise the Government or the Government Agency or Local Authority, as the case may be, on the project and give recommendations or suggestions in that behalf; co-ordinate between concerned department of the Government and Government Agency for a project; monitor the competitive bidding process for Category II projects and provide for course correction, if required; provide enablers for projects; prioritize and categorize projects and prepare a project shelf; prepare road map for project development; identify inter-sectoral linkages; approve the terms of reference for consultancy assignments in Category II projects and the consultant selection process thereof; decide financial support and approve allocation of contingent liabilities for projects; recommend and approve bid documents, risk sharing principles and bid processes for Category II projects; approve scale and scope of a *suo-motu* proposal or project undertaken through Swiss-Challenge Approach and recommend modifications of a non financial nature if required; resolve issues relating to project approval processes; prescribe time limits for clearances for any project; review periodically the status of clearances and ensure that clearances are accorded within specified time frames and grant clearances if not granted within time frames or if denied; etc.

Section 14 speaks of project identification and states to the effect that either the Infrastructure Authority or the Government Agency or the Local Authority may identify or conceptualize any infrastructure project and if the authority identifies or conceptualizes any such project, the same will be referred by the Authority to the concerned Government Agency or Local Authority for its consideration and further action. If the Government Agency or Local Authority identifies or conceptualizes any infrastructure project, then the same will be referred to the Infrastructure Authority for its consideration, evaluation and further action as may be required. Section 15 empowers the Infrastructure Authority to prioritize projects based on demand and supply gaps, inter-linkages and any other relevant parameters and create a project shelf. Section 16 states that the Government Agency or the Local Authority, in accordance with the advice, recommendations and suggestions of the Infrastructure Authority, shall submit the project to the Government for its consideration and sanction. Section 17 empowers the Government to consider such proposal. Section 19 provides for the Government Agency or Local Authority to adopt appropriate developer selection processes, including any of the processes stipulated thereunder. In case of competitive bidding process resulting in a sole bid, Section 22 provides that the Government Agency or Local Authority shall, in consultation with the Infrastructure Authority, either accept the sole bid or re-negotiate or reject the same. Chapter-VI of the Act of 2001 titled 'Conciliation Proceedings' deals with disputes, claims or differences arising out of or in connection with or in relation to any agreement or contract between the Government Agency or Local Authority on the one hand and the developer on the other. Such disputes, claims or differences are to be referred to the Conciliation Board and in the event the same does not result in an amicable settlement, resort is to be taken to arbitral or judicial proceedings in terms of Section 49 of the Act of 2001.

Section 76 speaks of bar of jurisdiction and states as under:

'**76. <u>BAR OF JURISDICTION:</u>**

Any order or proceedings under the Act including but not limiting to any notification of a Project as Infrastructure Project, categorization or prioritization of Projects, Concession Agreement, bid process, selection of Developer, modification of any proposal, sanction of any proposal, implementation and execution of any Project, actions of Infrastructure Authority, actions of the Government or the Government Agency or the Local Authority, actions of the Board, grievance or objection of any party or person or group in respect of any Infrastructure Project, validity, legality, efficacy of any action or decision in respect of any Infrastructure Project of Infrastructure Authority or the Government or the Board, dispute settlement or dispute resolution in respect of any matters under the Act shall be heard only by the High Court and by no other court or courts subordinate to the High Court.'

Three Schedules are appended to the Act of 2001 and Schedule III relates to sectors in which infrastructure projects are to be undertaken. One such sector, under Clause 10, is public buildings.

This being the statutory milieu of the Act of 2001, it is the contention of the learned Advocate General that it would have application to the project at New Delhi, involving construction of public buildings. To test this proposition further, it would be relevant to examine the documents relating to the subject project.

G.O.Ms.No.423 dated 14.09.2005 was issued by the Government of Andhra Pradesh for utilization of land at Pataudi House and Nursing Hostel, New Delhi, for construction of an integrated office complex and expansion of the A.P.Bhavan, New Delhi. A Special Empowered Committee, comprising the following members, was constituted to guide and monitor the the project.

1. Chief Secretary to Government/Special Chief Secretary to Government (GPM&AR) (Chairperson of the Committee).
2. Resident Commissioner, AP Bhavan, New Delhi.
3. Principal Secretary (Political), General Administration Department.
4. Principal Secretary (R&E), Finance Department.
5. Secretary, TR&B Department.
6. Managing Director, INCAP
7. Engineer-in-Chief, R & B (Buildings)
8. State Architect, R&B Department.

This Committee was reconstituted under G.O.Ms.No.436 dated 23.09.2005 with the following members:

1. Chief Secretary to Government/Special Chief Secretary to Government (GPM&AR) (Chairperson of the Committee).

2. Resident Commissioner, AP Bhavan, New Delhi.
3. Prl.Secy. to Govt., Investment and Infrastructure Department.
4. Principal Secretary (Political), General Administration Department.
5. Principal Secretary (R&E), Finance Department.
6. Secretary, TR&B Department.
7. Managing Director, INCAP
8. Engineer-in-Chief, R & B (Buildings)
9. State Architect, R&B Department.

The advertisement issued by the 2nd defendant Corporation on 13.04.2006 soliciting the 'Expression of Interest-cum-Request for Qualification' from bidders did not at all refer to the Act of 2001 or to the Infrastructure Authority constituted thereunder. Upon shortlisting of ten bidders, the 2nd defendant Corporation addressed letter dated 23.04.2008 to the said bidders forwarding the 'Request for Proposal (Technical)' document, asking them to submit the same within a time frame. In this document, in a separate section dealing with definitions, 'Developer' is defined to mean the developer of the project, being a special purpose vehicle established and owned as per the terms and conditions of the 'Request for Proposal'. 'Dispute Resolution' is defined to mean the process and mechanism as explained in the Development Agreement. Chapter-IV, commencing with Article 4 titled 'Events of Default', speaks of the defaults by the Special Purpose Vehicle and/or Developer. Article 4.1 adumbrates the various events which would be considered 'events of default' by the Special Purpose Vehicle and/or Developer, leading to cancellation of the Letter of Award and consequential forfeiture of bid security and/or performance security. The following events are stipulated as the 'events of default' thereunder:

'i. Failure of the Developer to submit unconditional acceptance of the terms and conditions specified in Letter of Award within the time specified.

ii. Failure to pay the Project Development Expenses and other Payments to INCAP as specified in this RFP Document within the time as specified in the LOA on acceptance of LOA and before the execution of the Development Agreement.

iii. Failure to incorporate and obtain certificate of commencement of business for the Project Company (SPV) well before the execution of the Development Agreement and obtain approval from INCAP of the Memorandum and Articles of Association of the SPV.

iv. Failure to incorporate and establish as per the relevant rules and regulations an International Standard Socio-Cultural Club.

v. Failure to submit the required legal documentation to the satisfaction of INCAP in favour of the authorized persons to negotiate and execute the Development Agreement.

vi. Failure to submit Detailed Project Report to the satisfaction of INCAP within 45 days from date of issue of LOA.

vii. Failure to submit Performance Security before the of execution of the Development Agreement for the Project.

viii. Failure to execute the Development Agreement with INCAP within the specified time.'

Article 3.2.16 in Chapter-III of the 'Request for Proposal' titled 'Terms of Reference' stipulates under Clause v that the Development Agreement and the Licence Agreement shall be effective only upon compliance of certain conditions by all parties to the respective agreements. Be it noted that one of the 'events of default' under Article 4.1 is the failure of the developer to execute the Development Agreement within the specified time. Part-A annexed to the 'Request for Proposal' document embodies the draft Development Agreement. This draft Agreement bears the endorsement 'Preliminary draft for discussion purposes only' on the top of each page. Article 34.3 of the draft Development Agreement speaks of arbitration of any dispute which could not be resolved amicably by conciliation under Article

34.2 thereof. Article 35 titled 'Jurisdiction' states that subject to Article 34.3, the Courts at Hyderabad alone shall have jurisdiction to try and/or entertain any application, petition, suit, complaint or any other matter arising out of or concerning the Development Agreement. Part-B, annexed to the 'Request for Proposal', contains the draft Licence Agreement, again with the endorsement 'Preliminary draft – for discussion purposes only' on each page thereof.

Perusal of the 'Request for Proposal' and the draft Development and Licence Agreements annexed thereto manifests that there is no mention whatsoever of the Infrastructure Authority constituted under the Act of 2001. The Government Orders issued in relation to the subject project, before initiation of the process of inviting bids, reflect that no mention was made therein of the Infrastructure Authority constituted under Section 3 of the Act of 2001. So much so that the Special Empowered Committee constituted by the State had an altogether different composition when compared to that of the Infrastructure Authority under Section 4 of the Act of 2001. It is therefore clear that the subject project was contemplated by the State independent of the procedure provided under the Act of 2001 and the Infrastructure Authority constituted under Sections 3 and 4 thereof had nothing to do with the project at any stage.

That apart, this Court finds merit in the contention urged by Sri S.Niranjan Reddy, learned senior counsel, that by its very import, the Act of 2001 could not have been extended to the subject project at New Delhi. The preamble manifests that the Act of 2001 was enacted to provide for rapid development of physical and social infrastructure 'within the State' by establishing infrastructure projects. Section 1(2) emphasizes in no uncertain terms that the Act of 2001 extends to the whole of the 'State of Andhra Pradesh'. The question of applying the provisions of this enactment to a project at New Delhi therefore does not arise and perhaps, being aware of the same, the State went about conceptualizing and implementing the project at New Delhi independently through separate means, by constituting a Special Empowered Committee. This is further demonstrated by the fact that the core documents relating to the subject project specifically conferred jurisdiction on civil Courts at Hyderabad to entertain disputes, claims or differences arising in relation to the subject project. Had it been the intention of the State to implement the subject project through the Act of 2001, these provisions would not have found place in the 'Request for Proposal' document and the draft Development Agreement. The learned Advocate General would contend that even if such clauses were incorporated in these documents the statute would prevail but this Court is not inclined to accept this rather simplistic attempt at brushing aside specific inclusion of these clauses in the documents. Further, as stated *supra*, the subject project, on the face of it, is not shown to be in any manner connected with the Act of 2001.

This Court therefore holds that the finding of the trial Court that Section 76 of the Act of 2001 applies to the present case is completely baseless. The trial Court did not even examine whether the Act of 2001 had anything to do with the subject project before jumping to this conclusion. Therefore, the only ground on the basis of which the trial Court returned the plaint no longer survives.

The other grounds raised by the defendants as to the suit being barred by limitation, Order 7 Rule 11(d) CPC, the principle of *res judicata* and Order 2 Rule 2 CPC were rightly rejected by the trial

Court. Order 7 Rule 11(d) CPC mandates rejection of the plaint if the suit is barred by law. The defendants failed to demonstrate before the trial Court as to how the suit was barred by law. That apart, the plaintiffs' challenge to G.O.Ms.No.8 dated 20.02.2009 is yet to attain finality, as the dismissal of their writ petition in relation thereto is the subject matter of the pending writ appeal on the file of this Court. Further, the plaint prayer in the suit is primarily for recovery of monies and only if warranted, the plaintiffs sought invalidation of G.O.Ms.No.8 dated 20.02.2009. Therefore, it is for the trial Court, at the stage of adjudication of the suit, to examine as to whether such invalidation is even required. The pendency of the writ appeal therefore does not render the plaintiff's suit liable to dismissal by applying the principle of *res judicata*. In so far as Order 2 Rule 2 CPC is concerned, the answer proffered by Sri S.Niranjan Reddy, learned senior counsel, settles the issue. Invocation of the plaintiffs' bank guarantees and appropriation of the amounts thereunder was only after dismissal of the writ petition. The question of seeking recovery of monies therefore did not arise at that point of time and the contention that the law of limitation barred the suit is baseless.

While so, it may be noted at this stage that though the defendants did not choose to file an appeal in so far as the order of the trial Court went against them, Order 43 Rule 2 CPC enables extension of the rules under Order 41 CPC to appeals under Order 43 CPC. That being so, Order 41 Rule 33 CPC would come to the aid of the defendants and notwithstanding the fact that they have chosen not to file an appeal or objection against the findings of the trial Court against them, they would be entitled to attack such findings in the present appeal. It is therefore open to the defendants to assail the finding of the trial Court that Section 8 of the Act of 1996 had no application to the present case. Notably, had the defendants made out this ground, they could have succeeded in their petition under Order 7 Rule 11(d) CPC. We accordingly deem it appropriate to consider the issue on the strength of Order 41 Rule 33 CPC.

Section 8 of the Act of 1996 reads as under:

> '**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.'

It may be noted that Section 8(1) stipulates in no uncertain terms that a party who seeks to raise an objection thereunder to an action brought before a judicial authority must apply not later than when submitting his first statement on the substance of the dispute. In the present case, the 2nd defendant Corporation filed its written statement in 2015 but long prior thereto, it filed the subject I.A. under Order 7 Rule 11(d) CPC in which it raised, amongst other grounds, the applicability of Section 8 of the Act of 1996. The trial Court, however, was of the opinion that as the defendants had not filed a separate application under Section 8 of the Act of 1996 they could not be permitted to raise such an objection under Order 7 Rule 11(d) CPC. This pedantic approach was not warranted in the light of the broad language in which Section 8(1) of the Act of 1996 is couched. It is sufficient if the aggrieved party 'applies' to the judicial authority, be it in whatever form or manner, under Section 8(1) of the Act of 1996, but before submitting the first statement on the substance of the dispute. Filing of a separate application under Section 8(1) of the Act of 1996 is therefore not mandatory.

In their I.A. affidavit, the defendants specifically referred to the arbitration clause provided in Article 34.3 of the 'Request for Proposal' at page 129 of the documents filed with the plaint and prayed that the case be referred to arbitration in terms thereof. As this objection was raised immediately by the defendants, the understanding of the trial Court that they had failed to abide by the requirements of Section 8(1) of the Act of 1996 is not correct.

However, that being said, the crucial issue is whether there was, in fact, an arbitration agreement between the parties. In this regard, the trial Court opined that as the arbitration clause found place only in the draft Development Agreement and no concluded agreement was entered into by and between the parties, it could not be said to be operative.

An arbitration agreement is defined under Section 2(b) of the Act of 1996 to mean an agreement referred to in Section 7. Section 7 of the Act of 1996 reads as under:

> '**7. Arbitration agreement:**--(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in,--

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.'

Section 7 of the Act of 1996 does not require any format in relation to the execution of an 'arbitration agreement'. Section 7(4) is worded very widely to mean that 'an arbitration agreement is in writing' even if it is contained in a document signed by the parties; in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or in an exchange of statements of claim and defence, in which the existence of the agreement is alleged by one party and not denied by the other.

However, the 'Request for Proposal' is not an 'agreement by and between the parties' as it was not signed by either of them. Significantly, Article 34.3 finds place not in the 'Request for Proposal' but in the draft Development Agreement appended thereto which, as stated earlier, was only for discussion purposes as borne out by the endorsement on each page thereof. It is an admitted fact that no Development Agreement was actually executed by and between the plaintiffs and the 2nd defendant Corporation. Therefore, Article 34.3 could *per se* have no application. However, the 'Request for Proposal' also defined dispute resolution to mean the process and mechanism as explained in the Development Agreement, but there is no separate provision thereafter which deals with the ambit and scope of such dispute resolution in the context of the 'Request for Proposal' itself. This is notwithstanding the fact that the 'Request for Proposal' envisaged certain 'events of default' by the developer even before execution of the Development Agreement, entailing forfeiture of the amounts paid by such developer.

It is also relevant to note that the Letter of Award dated 06.10.2008 addressed by the 2nd defendant Corporation to the plaintiffs required them to execute the Development and Licence Agreements within 60 days from the date of submission of their acceptance of the Letter of Award. In response to this Letter of Award, the plaintiffs addressed letter dated 20.10.2008 to the 2nd defendant Corporation, voicing concerns in relation to the project. However, under letter dated 21.10.2008, the plaintiffs conveyed their unconditional acceptance of the said Letter of Award, duly consenting to all the terms and conditions specified therein. The 2nd defendant Corporation then addressed letter dated 18.11.2008 to the plaintiffs, proposing to hold discussions on the provisions of the Development Agreement and the operational guidelines, in consultation with project consultants, on 25.11.2008 and requested the plaintiffs to prepare their proposals as to the issues mentioned in the statement enclosed and to attend the meeting. Under letter dated 18.12.2008, addressed to the 2nd defendant Corporation, the plaintiffs sought extension by 60 days to execute the Development and Licence Agreements. In response thereto, the 2nd defendant Corporation granted 15 days extension under letter dated 20.12.2008. The plaintiffs again reiterated their request for additional time of 60 days, under letter dated 02.01.2009. This was rejected by the 2nd defendant Corporation under letter dated 03.01.2009, reiterating that the additional 15 days already allowed would prevail. The plaintiffs then addressed letters dated 05.01.2009 and 09.01.2009 to the defendants raising various issues on which they wanted clarifications. Having received no response, the plaintiffs addressed letter dated 11.02.2009 to the State enclosing their own draft Development and Licence Agreements. At this stage, G.O.Ms.No.8 dated 20.02.2009 was issued canceling the plaintiffs' Letter of Award. There was thus no concluded contract between the parties.

Significantly, the Letter of Award did not even assimilate unto itself the terms and conditions contained in the 'Request for Proposal' or the draft Development Agreement. Clause 10 of the Letter of Award merely required the plaintiffs to comply with all conditions precedent, as mentioned in the 'Request for Proposal' prior to handing over the project site. However, these conditions precedent, under Article 3.4.1 of the 'Request for Proposal', have no relevance to the alleged failure on the part of the plaintiffs which led to the cancellation of the Letter of Award. Clause 14 of the Letter of Award only required the plaintiffs to submit their unconditional letter of acceptance to the Letter of Award, consenting to all terms and conditions therein, within 15 days. Pertinent to note, the Letter of Award did not separately require the plaintiffs to consent to the terms and conditions mentioned in the 'Request for Proposal'. That being so, in the absence of a signed Development Agreement, wherein Article 34.3 finds mention, and when the plaintiffs, under their letter dated 21.10.2008, merely conveyed their unconditional acceptance of the Letter of Award which did not independently contain an arbitration clause or incorporate within itself either the 'Request for Proposal' or the draft Development Agreement, this Court finds no agreement between the parties embodying an arbitration clause.

Be it viewed from any angle, none of the documents placed before this Court embodies an 'arbitration agreement' satisfying the requirements of Section 7 of the Act of 1996. That being so, Section 8(1) thereof can have no application and the objection raised by the defendants on this ground, in any event, warranted rejection. This Court therefore finds no reason to interfere with the ultimate finding of the trial Court in this regard, though the reasoning offered by the trial Court was erroneous on facts and in law.

Viewed thus, return of the plaint by the trial Court by applying Section 76 of the Act of 2001 cannot be sustained. The contention urged by the learned Advocate General as to applicability of Section 8(1) of the Arbitration and Conciliation Act, 1996 is also found to be without merit. The order under appeal is therefore set aside and the trial Court is directed to entertain the suit in O.S.No.592 of 2012 and proceed with it in accordance with law.

The Civil Miscellaneous Appeal is accordingly allowed. In consequence, pending miscellaneous petitions shall stand closed. In the circumstances, there shall be no order as to costs.

SANJAY KUMAR, J

ANIS, J

30th NOVEMBER, 2016

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