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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA-3911-2010 (O&M)

Date of decision : 17.08.2016

M/s Shanti Construction Company and another

... Appellants

Versus

Union of India and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Amit Jain, Advocate
for the appellants.

Mr. Sudhir Nar, Advocate
for respondent No.1.

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

AMIT RAWAL, J. (ORAL)

The appellants-plaintiffs are aggrieved of the judgment and decree rendered by the lower Appellate Court, whereby the suit for recovery of ₹ 2,20,000/- with costs and along with interest @ 12% per annum from March 1998 till actual recovery, subject to the payment of Court fees on decreed amount, has been dismissed on the premise that there was an arbitration clause.

Mr. Amit Jain, learned counsel appearing on behalf of the appellants-plaintiffs submits that once the respondents-defendants did not move an application under Section 8 of the Arbitration and Conciliation Act for referring the matter to the arbitration, the right to seek the reference to

the arbitration is deemed to have been waived. This aspect has not been noticed by the lower Appellate Court and simply allowed the appeal on this ground, thus, urges this Court for setting aside the findings under challenge.

Mr. Sudhir Nar, learned counsel appearing on behalf of the respondent No.1-Union of India submits that the suit *ex facie* was not maintainable as the appellants-plaintiffs had concealed the factum of existence of the arbitration clause and rightly so, the lower Appellate Court dismissed the suit. The remedy, if any, for the plaintiffs is to seek the reference, thus, urges this Court for affirming the findings under challenge.

I have heard the learned counsel for the parties and appraised the paper book.

Without commenting on the merit and demerit of the case, I am of the view that the lower Appellate Court ought not to have allowed the appeal by setting aside the judgment and decree of the trial Court simply by holding that the agreement contained the arbitration clause. The suit was contested by the respondents-defendants by filing the written statement, but did not take up the objections for referring to the arbitration, in essence, did not move an application under Section 8 of the 1996 Act. Once the written statement is filed and they participated in the proceedings, they deem to waived a right. The lower Appellate Court ought not to have dismissed the suit on account of a jurisdictional error, much less, availability of arbitration clause. I deem it appropriate that since the lower Appellate Court being the last Court of fact and law, is required to examine the evidence both oral and documentary threadbare, the matter is required to be remitted back to decide the appeal afresh keeping in view the aforementioned observations and

accordingly, the judgment and decree of the lower Appellate Court is hereby set aside and the matter is remitted back to the lower Appellate Court to decide the appeal afresh on merits as noticed above.

Learned counsel for the parties and as well as the parties are directed to appear before the lower Appellate Court on 09.09.2016.

With the aforesaid observations, the appeal stands disposed of.

17.08.2016
yogesh

(AMIT RAWAL)
JUDGE

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Whether speaking/reasoned

Yes/ No

Whether Reportable

Yes/ No