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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ RFA No.365/2016

SHREE CEMENT LIMITED

..... Appellant

Through: Mr. Ravi Gupta, Sr. Adv. with Mr.  
Ravi Verma and Mr. J.P. Verma,  
Advts.

Versus

TREHAN FARMS PVT. LTD. AND ORS

..... Respondents

Through: None.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**ORDER**

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**25.05.2016**

**CM No.20394/2016 (for exemption)**

1. Allowed, subject to just exceptions.
2. The application is disposed of.

**RFA 365/2016 & CM No.20393/2016 (for stay)**

3. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns a judgment and decree dated 15<sup>th</sup> January, 2016 of the Court of the Additional District Judge (ADJ)-03, Patiala House Courts, New Delhi of dismissal of CS No.49/2016 for recovery of Rs.1,94,28,493/- *in limine* (without issuing summons to the respondent/defendant) consequent to rejection of plaint under Order VII Rule 11 of the CPC on the ground of the relief claimed therein being barred by law i.e. the Arbitration and Conciliation Act, 1996.
4. Considering that the suit was dismissed *in limine*, without going into the merits, when it came up for the first time and even without issuing notice

to the respondents/defendants and being further of the view that the order of rejection of the plaint is misconceived and patently illegal and does not permit any two views being entertained in the matter, need to issue notice of this appeal to the respondents/defendants is not felt.

5. The suit was filed under Order 37 of CPC, as per para 24 of the plaint, based *inter alia* on three Memorandums of Understanding (MoUs) dated 1<sup>st</sup> November, 2013, 18<sup>th</sup> November, 2013 and 12<sup>th</sup> December, 2013 between the parties. Needless to state that copies of the said MoUs were filed along with the plaint.

6. The impugned order is reproduced in entirety herein below:

**“15.01.2016**

***Fresh suit received by way of assignment. It be checked and registered as per rules.***

*Present: Shri J P Verma, Ld. Counsel for the plaintiff alongwith Shri A K Talwar, Assistant Vice President, Legal of the plaintiff company.*

*This suit has been filed under Order 37 CPC for recovery of around Rs.1,94,28,493/- with interest.*

*Submissions heard. File perused.*

*Perusal of record reveals that plaintiff entered to an agreement with the defendant company dated 01.11.2013 whereby defendant was supposed to procure some land for establishment of cement grinding unit. Somehow even though plaintiff made around Rs.15 lacs but the defendant did not do their part of the obligation and a dispute arose between them. Under the contract the defendant did not deliver Rs.50 lacs apart from Rs.1.5 crores cheques but these cheques were dishonoured for insufficiency of funds.*

*The petition in hand is the first civil suit filed between them. As per clause dated 01.11.2013 two mandatory stipulation that in case any dispute arose between the parties*

*the same shall be referred to the arbitration and the seat of arbitration is at Beawar.*

*As such by virtue of Arbitration and Conciliation Act read with Order 7 Rule 11 CPC appears to be barred in law.*

***Order 7 Rule 11(d) CPC-***

*“(d) where the suit appears from the statement in the plaint to be barred by any law”.*

*In view of the above, this civil suit is not maintainable and the same is accordingly rejected.*

***File be consigned to record room.”***

7. The arbitration clause in the MoU dated 1<sup>st</sup> November, 2013 is as under:

*“12. If any dispute arises at any time between the parties to this understanding, such dispute shall be referred to for arbitration. The venue of arbitration shall be at Beawar.”*

8. I have hereinabove observed that the impugned order is patently illegal, inasmuch as the Arbitration Act, though a law within the meaning of Order 7 Rule 11 (d) of CPC but is not an absolute bar to the maintainability of a suit. The said Act, vide Section 8 thereof mandates the Judicial Authority before which an action is brought in a matter which is the subject matter of an arbitration agreement to refer the parties to arbitration, only if a party to the arbitration agreement or any person claiming through him or under him applies, not later than when submitting his first statement on the substance of the dispute. If no such application under Section 8 is filed, at the stage provided therefor, the suit will proceed notwithstanding the arbitration agreement between the parties and the Civil Court would not be denuded of its jurisdiction to try the suit. Save for Section 8, there is no

other provision in the Arbitration Act, for it to be said that the very existence of an arbitration clause is a bar to the maintainability of the suit. What follows is, that the existence of an arbitration clause does not come in the way of institution of the suit and only if the defendant(s), upon being served with the summons of the suit, apply under Section 8, would be question of the non-maintainability of the suit and referring the party to arbitration would arise.

9. Though in view of the clear and explicit position in law need to cite a judgment is not felt but the senior counsel for the appellant/plaintiff has drawn attention to ***Ministry of Sound International Ltd. Vs. Indus Renaissance Partners Entertainment Pvt. Ltd.*** MANU/DE/0010/2009, where it has been held as under:

*“An arbitration clause, it is well settled does not bar/prohibit filing of a civil suit. The contesting party always has option to continue with the civil proceedings and give up the right to enforce the arbitration clause. If the contesting party files an application under Sections 8 or 45 of the Act, the parties are relegated to arbitration. Plaintiff takes a risk when he invokes jurisdiction of a civil court inspite of an arbitration clause. Thereafter, it is a wish and will of the defendant which determines whether civil proceedings should continue or the parties should be relegated to arbitration if conditions of the sections 8/45 of the Act are satisfied. Once, however, parties have consented and allowed civil proceedings to continue they cannot subsequently invoke the arbitration clause and make the dead clause alive after the same has been ignored and not invoked. In the case of Bharati Televentures (supra) it was held that once a party has invoked jurisdiction of a civil court, it cannot subsequently rely upon the arbitration clause. Once jurisdiction of the civil court is invoked by a party it tantamounts to abandonment of the arbitration Clause.”*

10. I have, dealing with the said subject in **Roshan Lal Gupta Vs. Parasram Holdings Pvt. Ltd.** MANU/DE/0146/2009 held-

*“It is not as if the civil court per se does not have jurisdiction to entertain a suit emanating from a transaction subject matter of arbitration agreement. A civil court cannot dismiss a suit instituted before it, even though found to be subject matter of an arbitration agreement, at the threshold. It is always open to the defendant to the suit to waive, give up and abandon the plea of arbitration and if that were to happen then the suit will continue before the civil court. The manner in which the defendant in a suit which is the subject matter of an arbitration agreement is to set up the plea of arbitration has been prescribed in Section 8 of the Act. Such a plea has to be raised not later than when submitting the first statement on the substance of the dispute. If such a plea is not raised while submitting the first statement on the substance of the dispute, the defendant is thereafter barred from raising such a plea and if that be the position then it cannot be argued that even though the plea is not raised in the manner prescribed in Section 8 of the Act, it is open to the defendant thereafter also to contend that the suit is barred by virtue of Section 5 of the Act.”*

11. Supreme Court recently in **Sundaram Finance Limited Vs. T. Thankam** 2015 SCC OnLine SC 147 also held:

*“Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms and/or compliance of the procedure under the special statute. The general law should yield to the special law-generalia specialibus non derogant. In such a situation, the approach shall not be to see*

*whether there is still jurisdiction in the Civil Court under the general law.”*

12. The senior counsel for the appellant/plaintiff contends that in fact the MoUs dated 1<sup>st</sup> November, 2013, 18<sup>th</sup> November, 2013 and 12<sup>th</sup> December, 2013 though pleaded in para 24 were superseded by a settlement arrived at before the Court of the Metropolitan Magistrate in a complaint proceeding under Section 138 of Negotiable Instruments Act, 1881, also pleaded in para 24 of the plaint; the suit was filed on the basis of the cause of action contained therein and the said settlement dated 24<sup>th</sup> August, 2015 does not contain any arbitration clause.

13. It thus appears that the impugned order is not only in disregard of law and binding precedents but also without consideration and without even giving an opportunity to the counsel for the appellant/plaintiff to address the Court on the doubts entertained by the learned ADJ. The impugned order is found to also suffer from lack of coherence and grammatical and typographical mistakes and appears to have been made with undue haste. The learned ADJ is reminded, that so soon after transfer of pecuniary jurisdiction of upto Rs.2 crores to the District Courts, if the suits of high value in which the plaintiffs have paid substantial court fees are dealt with in a cursory manner, compelling the plaintiffs to appeal, again at a substantial costs, the same will erode the faith and confidence in the transfer of pecuniary jurisdiction.

14. The appeal thus succeeds and is allowed; the impugned order dated 15<sup>th</sup> January, 2016 of rejection of the plaint in the suit from which the appeal arises is set aside and the suit remanded to its original position.

15. The appellant/plaintiff to, on 31<sup>st</sup> May, 2016, appear before the learned ADJ-03, Patiala House Courts, New Delhi and if the said Court no longer exists, before the Court of District Judge, Patiala House Courts, New Delhi.

16. Finding the mistake to be of the Court, in compelling the appellant/plaintiff to prefer this appeal and to again pay court fees of Rs.1,92,000/-, it is deemed appropriate to *suo motu* invoke Section 13 of the Court Fees Act, 1870 and to order refund of the court fees paid by the appellant/plaintiff on this appeal to the appellant/plaintiff. It is ordered accordingly and requisite certificate entitling the appellant/plaintiff to obtain refund of court fee paid on this appeal be issued to the appellant/plaintiff.

No costs.

Decree sheet be drawn up.

Copy of this order be given *dasti*.

**RAJIV SAHAI ENDLAW, J.**

**MAY 25, 2016**

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