

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on: 03/03/2017

Judgment delivered on: 03/04/2017

FA No. 223 of 2016

1. C. L. Athnagar S/o Ghanshyam Singh Athnagar, Aged About 46 Years
2. T. R. Dewangan, S/o Bhagwan Singh Dewangan, Aged About 47 Years
3. D. R. Sahu, S/o Late Jethuram Sahu, Aged About 46 Years

All Directors Representative Om Bhoo- Vikas & Insurance (P) Ltd., Front Of New Bus Stand, Pachripara, Durg, District- Durg (Chhattisgarh), (Plaintiffs)

---- Appellants

Versus

1. Hiranman Lal Sahu S/o Fool Singh Sahu, Aged About 55 Years R/o 11/24, Spat Nagar, Rishali, Bhilai, Tahsil And District- Durg (Chhattisgarh), (Defendant)

---- Respondent

For Appellants/plaintiffs : Shri Shrawan Ku. Agrawal, Adv.
For Respondent/defendant : Shri Puneet Ruparel, Adv.

Hon'ble Shri Justice Pritinker Diwaker,
Hon'ble Shri Justice Sanjay K. Agrawal

C A V Judgment

Sanjay K. Agrawal, J

01. The distinguished issue that emanates for consideration in this first appeal is whether jurisdiction of the civil Court is expressly or impliedly barred under Section 9 of the Code of Civil

Procedure (in short “CPC”) in case of availability of arbitration clause in the Memorandum of Association read with Section 201 of the Indian Companies Act, 1956?

02. The essential facts requisite in order to decide the plea raised at the bar is as under: (The parties hereinabove shall be referred in this order as per their status shown in the plaint.)

2.1. The appellants/plaintiffs instituted a civil suit before the jurisdictional civil Court against the respondent/defendant for cancellation of agreement dated 5.5.2015 and recovery of ₹ 5 lacs. The suit was filed stating *inter alia* that the plaintiffs and the defendants were directors in one company named as “Om Bhoo Vikas & Insurance Pvt. Ltd.” and the defendant was president who resigned from the company on 13.12.2014. Thereafter, on 5.5.2015 the defendant executed an agreement with the plaintiffs for sale of his share certificate and obtained ₹ 5 lacs in advance. It is further case of the plaintiffs that the defendant also obtained three cheques each of ₹ 33 lacs, in total ₹ 99 lacs, on account of security for sale amount of his shares. Thereafter, the defendant refused to comply with the agreement and also refused to take notice on different dates and failed to submit sale certificate which led to filing of suit seeking for relief of cancellation of the agreement dated 5.5.2015 and in consequence thereof the plaintiffs also sought refund of three cheques and recovery of ₹ 5 lacs with 18% interest.

2.2. On being summoned, the defendant did not file his written statement and only filed an application under Order 7 Rule 11 of CPC on the ground that the suit is not properly valued and according to the Memorandum of Association read with Section 201 of the Indian Companies Act, 1956 (in short “the Act of 1956”), there being provision to resolve the dispute between the parties by way of arbitration, jurisdiction of the civil Court is barred and therefore, the suit is liable to be rejected under Order 7 Rule 11(d) of CPC.

2.3. The present plaintiffs filed their reply opposing the said application filed under Order 7 Rule 11 of CPC stating, *inter alia*, that the dispute is not between the directors of the said company *inter se* but the suit has been filed for cancellation of agreement and for recovery of amount illegally obtained by the defendant and therefore, the suit is cognizable by the civil Court and as such, application under Order 7 Rule 11 of CPC deserves to be rejected.

03. The Trial Court by its impugned order allowed the application under Order 7 Rule 11 of CPC and rejected the plaint finding, *inter alia*, that the suit has been filed by the directors of the company against the former director of the company, subject-matter of the suit is related to the company and that the subject-matter to which the dispute pertains can be resolved by way of arbitration as provided in the Memorandum of Association read

with Section 201 of the Act of 1956 and therefore, the jurisdiction of the civil Court is barred.

04. Feeling aggrieved and dissatisfied with the order of the Trial Court, this appeal under Section 96 of CPC has been filed by the plaintiffs stating, *inter alia*, that the order passed by the Trial Court rejecting the plaint invoking Order 7 Rule 11(d) of CPC is contrary to law and therefore, liable to be set aside and the matter be remanded to the Trial Court to decide the suit on merits in accordance with law.

05. Mr. Shrawal Kumar Agrawal, learned counsel appearing for the plaintiffs/appellants would submit that jurisdiction of the civil Court under Section 9 of CPC has to be construed strictly and unless the jurisdiction is expressly barred or clearly implied by the statute, it cannot be held that the jurisdiction of the civil Court is barred to entertain any dispute. He would further submit that merely availability of arbitration clause in the Memorandum of Association read with Section 201 of the Act of 1956 would not bar the jurisdiction of the civil Court to try the suit of civil nature. He would further submit that the defendant did not file any application under Section 8(1) of the Arbitration and Conciliation Act, 1996 (in short "the Act of 1996") for referring the dispute to arbitrator by filing original arbitration agreement at the first date of hearing, therefore, it cannot be held that jurisdiction of the civil Court is barred. While concluding his submission, he would

submit that while deciding the application under Order 7 Rule 11, it is only the plaint allegations which have to be examined whether the suit is *prima facie* barred by law for the time being in force and the defence of the defendant cannot be looked into for holding that the suit is barred by any law and as such, the impugned order deserves to be set aside.

06. Mr. Puneet Ruparel learned counsel appearing for the respondent/defendant while supporting the impugned order would submit that in view of availability of remedy of arbitration provided in the Memorandum of Association read with Section 201 of the Act of 1956, jurisdiction of the civil Court is expressly excluded/barred, therefore, the Trial court is absolutely justified in rejecting the plaint invoking Order 7 Rule 11(d) of CPC. As such, the impugned order deserves to be upheld and the appeal is liable to be dismissed.

07. We have heard learned counsel for the parties at length and carefully examined the rival submissions made hereinabove and critically examined the record of the Trial Court as well.

08. Admittedly, the plaintiffs and the defendants were directors of the company Om Bhoo Vikas & Insurance Pvt. Ltd., from which the defendant is stated to have resigned on 13.12.2014 and thereafter, it is alleged to have executed an agreement with the plaintiffs on 5.5.2015 for sale of his shares and obtained ₹ 5 lacs in advance and ₹ 99 lacs has been paid to him in three

installments by three cheques each of ₹ 33 lacs for security of sale amount of shares, but the matter could not be settled leading to filing of the present suit for cancellation of the agreement dated 5.5.2015 and recovery of the said amount alongwith interest.

09. Upon summoned, the defendant did not file his written statement and filed only an application under Order 7 Rule 11 of CPC for rejection of the plaint. It would be appropriate at this stage to notice the contents of the application under Order 7 Rule 11 of CPC. Para-4 of the said application states as under:

“(4) यह कि वादीगण अपने वादपत्र में ओम भू विकास एण्ड इंश्योरेंस प्रा. लि. कंपनी का संचालक होने का कथन किया गया ऐसी स्थिति में वादीगण के कंपनी के मेमोरेण्डम ऑफ एसोसिएशन के पेज. नं. 02 के क्लास बी के सब सेक्शन 06 में कंपनी से संबंधी कोई दावा या विवाद आदि के संबंध में चाहे वह विवाद या दावा कंपनी के सदस्य और उनके प्रतिनिधियों के बीच हो गया, कंपनी का तृतीय पक्षकार के साथ हो तो आर्बीट्रेशन के समक्ष कम्पनीज एक्ट 1956 की धारा 201 के प्रावधान के निराकृत किये जाने को प्रावधान किया गया है ऐसी स्थिति में उक्त वाद का सुनवाई करने को माननीय न्यायालय के क्षेत्राधिकार प्राप्त नहीं है।”

10. A focused study of para-4 of the application would show that according to the defendant, as per Memorandum of Association of the company, clause (B) para 6, the dispute relating to the company between the members of the company can be resolved by way of arbitration as provided in the Memorandum of Association read with Section 201 of the Act of 1956. This

application has been opposed by the plaintiffs on the ground that the suit is for cancellation of the agreement and recovery of the amount but the trial Court found merit in the application and allowed the same holding the suit to be barred in view of availability of remedy of arbitration to the plaintiffs.

11. It is well settled principles of law that there is a strong presumption that civil Courts have jurisdiction to decide all questions of civil nature. The exclusion of jurisdiction of civil Courts is therefore not to be readily inferred and such exclusion must either be “explicitly expressed or clearly implied”. [See Secretary of State v. Mask & Co.¹, Gurudwara Prabhandhak v. Shiv Ratan Dev², Magiti Sasmal v. Pandab Bissoi³, Firm of Illuri Subbayya Chetty & Sons v. State of Andhra Pradesh⁴, Laxman v. State of Bombay⁵, Desikacharyulu v. State of A.P.⁶, Provincial Government of Madras v. J. S. Bassappa⁷, Ramswarup v. Shikharchand⁸, Pabbojan Tea Co. v. Dy. Commr. Lakhimpur⁹, Dhulabhi v. State of M.P.¹⁰, Musamia v. Rubbari¹¹, Richpal Singh v. Dalip¹², Bismillah (Smt.) v. Janeshwar Prasad¹³, Sankaranarayanan Potti v. K. Sreedevi¹⁴, State of Andhra

1 AIR 1940 PC 105
2 AIR 1955 SC 576
3 AIR 1962 SC 547
4 AIR 1964 SC 322
5 AIR 1964 SC 436
6 AIR 1964 SC 807
7 AIR 1964 SC 1873
8 AIR 1966 SC 893
9 AIR 1968 SC 271
10 AIR 1969 SC 78
11 AIR 1969 SC 439
12 (1987) 4 SCC410
13 (1990) 1 SCC 207
14 (1998) 3 SCC 751

Pradesh v. Manjeti Laxmi Kantha Rao¹⁵, Sahebgouda v. Ogeppa¹⁶, Dwarika Prasad Agarwal v. Rameshwar Chander¹⁷, Ramesh Chand Ardawatiya v. Anil Panjwani¹⁸, Nahar Industrial Enterprises Limited v. Hongkong and Shanghai Banking Corporation¹⁹]

12. It is a principle of no means to be whittled down and has been referred to as a fundamental rule. As a necessary corollary of this rule provisions excluding jurisdiction of civil Courts and provisions conferring jurisdiction on authorities and tribunals other than civil Courts are strictly construed. The existence of jurisdiction in civil Courts to decide questions of civil nature being the general rule and exclusion being an exception, the burden of proof to show that jurisdiction is excluded in any particular case is on the party raising such a contention. The rule that the exclusion of jurisdiction of civil Courts is not to be readily inferred is based on the theory that civil Courts are Courts of general jurisdiction and people have a right, unless expressly or impliedly debarred, to insist for free access to the Courts of general jurisdiction of the State. [See *Principle of Statutory Interpretation* by Justice G.P. Singh, 10th Edition.]

13. In a recently delivered judgment in the matter of **Vimal**

15 (2000) 3 SCC 689

16 (2003) 6 SCC 151

17 (2003) 6 SCC 220

18 (2003) 7 SCC 350

19 (2009) 8 SCC 646

Kishore Shah and others Vs. Jayesh Dinesh Shah and others²⁰, the Lordships of the Supreme Court reiterating the above principles of law have held that ouster of jurisdiction of the civil Courts cannot be inferred readily. Thus, arbitration clause in an agreement excluding jurisdiction of the civil Court by virtue of Act of 1996 has to be construed strictly. Their Lordship succinctly held as under:

“31. The provision as to reference of disputes to arbitration is a matter that concerns the jurisdiction of courts. Ordinarily, the courts are zealous of their jurisdiction and can only allow it to be curtailed by some provision of law. The provisions of the Indian Arbitration Act constitute such a law, but the provision must be strictly construed.....”

14. A reference may also be made herein gainfully and profitably to a decision of the Supreme Court in the matter of ***Food Corporation of India and another Vs. Yadav Engineer and Contractor***²¹, in which Their Lordships have considered Section 9 of the CPC qua arbitration agreement and pertinently held as under:

5. Ordinarily as provided in Section 9 of the Code of Civil Procedure all suits of a civil nature except suits of which cognizance is either expressly or impliedly barred would be triable by the courts set up for the purpose. If the dispute is of a civil nature the forum is

20 (2016) 8 SCC 788

21 (1982) 2 SCC 499

one or the other court set up for the purpose. The State courts have been set up for an easy access by persons who seek resolution of their disputes. They must be disputes of civil nature and the cognizance of which is not either expressly or impliedly barred. Civil courts set up by the State having defined jurisdiction will be the forum for resolution of such disputes. Ordinarily, therefore, whenever a dispute of a civil nature arises the party claiming relief would approach the court having jurisdiction to resolve the dispute. The party against whom relief is sought will be informed of the cognizance of the dispute being taken by the court and it must come forth and either concede that the dispute is genuine in whole or in part or defend the action. Sometimes a dispute as to jurisdiction, territorial or pecuniary, is raised but apart from such specific exclusions claimed by a party civil courts are set up with the object of resolving civil disputes. A forum thus may readily be available and presumed to be easily accessible. This is the prescribed mode of access to justice. Arbitration Act carves out an exception to the general rule that the forum for resolution of civil disputes is the civil court having jurisdiction to deal with the same by providing that the parties to a dispute by agreement unto themselves may choose a forum of their choice for settlement of disputes between them in preference to the State Courts. Undoubtedly, for making these agreements enforceable sanction of law is necessary. That is the object underlying the Act. Industrial revolution bringing into existence international commercial transactions led to a search for finding a

forum outside the municipal law courts involving protracted and dilatory legal process for simple, uninhibited by intricate rules of evidence and legal grammar. This explains resort to forums for arbitration at international level. No two contracting parties are under any legal obligation to provide for an arbitration agreement. If the parties enter into an arbitration agreement implying that they would like that the disputes covered by the agreement will be resolved by a forum of their choice, the approach of the court must be that parties to the contract are held to their bargain. If in breach or derogation of a solemn contract a party to an arbitration agreement approaches the court and if the other side expeditiously approaches the court invoking the court's jurisdiction to stay the proceedings so that by this negative process the court forces the parties to abide by the bargain, ordinarily the court's approach should be and has been to enforce agreements rather than to find loopholes therein. More often it is found that solemn contracts are entered into on the clearest understanding that any dispute arising out of the contract and covered by the contract shall be referred to arbitration. It may be that one or the other party may not have entered into the contract in the absence of an arbitration agreement. Therefore when in breach of an arbitration agreement a party to the agreement rushes to the court, unless a clear case to the contrary is made out the approach of the court should be to hold parties to their bargain provided necessary conditions for invoking Section 34 are satisfied.

15. After having noticed the principles of law governing the construction of jurisdiction of the civil Court, we would revert to the question as to whether availability of arbitration clause would bar the jurisdiction of the civil Court?

16. The defendant in support of the application under Order 7 Rule 11 also filed copy of the Memorandum of Association of the company and relied upon its sub-clause (B) para-6 to highlight his submission that all the disputes by or against the company or in which the company is interested or concerned and whether between the company and member or members, has to be resolved subject to provisions of Section 201 of the Act of 1956. Sub-clause (B) para-6 of the Memorandum of Association reads as under:

“(B) Objects incidental or ancillary to the attainment of main objects of the company are:

6. To refer or agree to refer other claims, demands, disputes or any other question, by or against the company or in which the company is interested or concerned and whether between the company and member or members or their representatives or between the company and third parties to arbitration in India or at any place outside India and to observe and perform and they do all acts, deeds, matter and things, to carry out or enforce the awards and to institute, defend, compromise, withdraw or abandon any legal or other proceeding and claim by or against the company, by its officers or otherwise, covering the affairs of its

company subject to the provisions of Section 201 of the Companies Act, 1956.

Section 201 of the Act of 1956 provides as under:

201. Avoidance of provisions relieving liability of officers and auditors of company.

(1) Save as provided in this section, any provision, whether contained in the articles of a company or in an agreement with a company or in any other instrument, for exempting any officer of the company or any person employed by the company as auditor from, or indemnifying him against, any liability which, by virtue of any rule of law, would otherwise attach to him in respect of any negligence, default, misfeasance, breach of duty or breach of trust of which he may be guilty in relation to the company, shall be void;

Provided that a company may, in pursuance of any such provision as aforesaid indemnify any such officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or discharged or in connection with any application under section 633 in which relief is granted to him by the Court.

17. Taking the defendant's case as it is, it can only be said that there is an arbitration agreement between the parties and any dispute and claim between them is required to be referred to the arbitration and under the facts and circumstances of the case and arbitration would be governed by the provisions of the Act of 1996.

18. In order to decide the dispute, it is appropriate to notice sub-section (1) of Section [8](#) of the AC Act, 1996 (unamended) which states 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."

19. Section [8\(1\)](#) of the AC Act, 1996 (unamended) has been considered judicially by Their Lordships of the Supreme Court in umpteen number of judgments. However, it would be profitable to notice some of them gainfully herein. Sub-section (1) of Section [8](#) of the AC Act, 1996 came up for consideration before the Supreme Court in **P. Anand Gajapathi Raju and others v. P.V.G. Raju (Dead) and others**²² (supra) in which Their Lordships of the Supreme Court have held that four conditions are required to be satisfied under Sections [8\(1\)](#) and [8\(2\)](#) of the AC Act, 1996 before the court can exercise its powers, and categorized the conditions as under:-

"5. The conditions which are required to be satisfied under sub-sections (1) and (2) of Section [8](#) before the court can exercise its powers are:

- (1) there is an arbitration agreement;
- (2) a party to the agreement brings an action in the court against the other party;
- (3) subject-matter of the action is the same as the subject-matter of the arbitration agreement;

(4) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute."

20. Their Lordships further held that the language of Section 8 is peremptory and it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. The Supreme Court further held as under:-

"8. In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that. As already noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. The language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the award. The court to which the party shall have recourse to challenge the award would be the court as defined in clause (e) of Section 2 of the new Act and not the court to which an application under Section 8 of the new Act is made. An application before a court under Section 8 merely brings to the court's notice that the subject-matter of the action before it is the subject-matter of an arbitration agreement. This would not be such an application as contemplated under Section 42 of the Act as the court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent court within the meaning of Section 2(e) of the new Act."

21. Similarly, in the matter of Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums²³, the Supreme Court has considered the principle of law laid down in P. Anand Gajapathi Raju (supra) and reiterated that Section 8 of the AC Act, 1996 is mandatory in nature and further held that in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and held as under:

"14. This Court in the case of P. Anand Gajapathi Raju v. P.V.G. Raju [(2000) 4 SCC 539] has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the Agreement is accepted by both the parties as also by the courts below but the applicability thereof is disputed by the respondent and the said dispute is accepted by the courts below. Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration."

Their Lordships further held that civil Courts have no

23 (2003) 6 SCC 503

jurisdiction to continue with the suit once an application under Section 8 of the Act of 1996 is filed. In para-24 it was observed as under:

“24. We have come to the conclusion that civil Court had no jurisdiction to entertain a suit after an application under Section 8 of the Act is made for arbitration.”

22. Similar is the proposition of law laid down by the Supreme Court in the matter of **Agri Gold Exims Ltd. v. Sri Lakshmi Knits & Wovens and others**²⁴ .

23. Thereafter, in the matter of **Branch Manager, Magma Leasing and Finance Limited and another v. Potluri Madhavalata and another**²⁵ , Their Lordships of the Supreme Court have held that Section 8 of the AC Act, 1996 is in the form of legislative command to the court and once the prerequisite conditions are satisfied, the court must refer the parties to arbitration. On fulfillment of the conditions of Section [8](#), no option is left to the court and the court has to refer the parties to arbitration. The Supreme Court has observed as follows:-

"17. An analysis of Section [8](#) would show that for its applicability, the following conditions must be satisfied:

- (a) that there exists an arbitration agreement;
- (b) that action has been brought to the court by one party to the arbitration agreement against the other party;

²⁴ (2007) 3 SCC 686

²⁵ (2009) 10 SCC 103

(c) that the subject-matter of the suit is same as the subject-matter of the arbitration agreement;
(d) that the other party before he submits his first statement of the substance of the dispute, moves the court for referring the parties to arbitration; and
(e) that along with the application the other party tenders the original arbitration agreement or duly certified copy thereof.

18. Section 8 is in the form of legislative command to the court and once the prerequisite conditions as aforesaid are satisfied, the court must refer the parties to arbitration. As a matter of fact, on fulfillment of the conditions of Section 8, no option is left to the court and the court has to refer the parties to arbitration. There is nothing on record that the prerequisite conditions of Section 8 are not fully satisfied in the present case. The trial court, in the circumstances, ought to have referred the parties to arbitration as per arbitration Clause 22."

24. Very recently, in the matter of **M/s. Sundaram Finance Limited and Anr. v. T. Thankam**²⁶, Their Lordships of the Supreme Court have noticed the earlier decisions in **P. Anand Gajapathi Raju** (supra) and **Branch Manager, Magma Leasing and Finance Limited** (supra) and held that once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of the Section 8 of the AC Act, 1996, moves the court for referring the

26 AIR 2015 SC 1303

parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section [8](#) of the AC Act, 1996, it is obligatory for the court to refer the parties to arbitration in terms of the agreement, and held as under in paragraphs 13 and 15:-

"13. The attempt of the trial court and the approach made by the High Court in bifurcating the cause of action, is fallacious. It would only lead to delaying and complicating the process. The said issue is also no more res integra. In Sukanya Holdings (P) Limited v. Jayesh Pandya and another [(2003) 5 SCC 531 : (AIR 2003 SC 2252 : 2003 AIR SCW 2209)] at paragraphs-16 and 17, it was held as follows:

"16. The next question which requires consideration is - even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section [8](#) of the Act. In our view, it would be difficult to give an interpretation to Section [8](#) under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the civil court would inevitably delay the proceedings. The

whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

15. 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 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. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court."

25. On a conspectus of the above-stated judgments of the Supreme Court, it is pellucid that Section 8 of the AC Act, 1996 (unamended) is imperative in nature and in case where there is an arbitration clause in the agreement, it is obligatory for the judicial authority necessarily to refer the parties to arbitration in terms of their arbitration agreement and the said reference is a must and there is no discretion left with the judicial authority once the conditions precedent necessary for exercise of power

under Section [8\(1\)](#) of the AC Act, 1996 is fulfilled as held in the above-stated judgments and upon filing of an application under Section 8 of the Act of 1996 for arbitration, civil Courts have no jurisdiction to continue with the suit.

26. For the sake of repetition, it would be appropriate to notice the conditions precedent of Section [8\(1\)](#) of the AC Act, 1996 at this stage also which is as follows:-

- (1) there should be an arbitration agreement;
- (2) action has been brought to the court by one party to the arbitration agreement against the other party;
- (3) the subject-matter of the suit is same as the subject-matter of the arbitration agreement;
- (4) the other party before he submits his first statement of the substance of the dispute, moves the court for referring the parties to arbitration; and
- (5) along with the application the other party tenders the original arbitration agreement or duly certified copy thereof.

27. A focused perusal of the above-stated judgments would show that Section 8 of the Act of 1996 is mandatory in nature and further that in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to the arbitration in terms of the arbitration agreement. The Supreme Court has already held that jurisdiction of the civil Court is barred

after an application under Section 8 of the Act of 1996 is made for arbitration and in view of that, a separate application is required to be filed under Section 8(1) of the Act of 1996 for referring the dispute to the arbitration fulfilling the requirements of Section 8 of the Act. It cannot be held that the civil Courts shall not have jurisdiction to entertain the suit only because there is an arbitration clause in the contract for referring the dispute to the arbitrator and it will not be a case of total ouster of the jurisdiction of the civil Court. Therefore, it cannot be held that once it is found that the contract between the parties contains an arbitration clause, jurisdiction of the civil Court stands ousted automatically and is barred explicitly. To take benefit of arbitration clause, party to the contract has to apply for that relief under Section 8(1) of the Act of 1996 within a specific period. Therefore, we hold that merely because there is an arbitration clause in the Memorandum of Association read with Section 201 of the Act of 1956 for referring the dispute and claim to the arbitration, the civil Court's jurisdiction is not barred but the same is subject to Section 8(1) of the Act of 1996 and its compliances. Therefore, we further hold that the Trial Court was not justified and acted with illegality while allowing the application of the defendant under Order 7 Rule 11 of CPC and thereby rejecting the plaint.

28. An an upshot of the aforesaid discussion, the appeal succeeds and it is held that merely because there is a provision of

arbitration in the Memorandum of Association read with Section 201 of the Act of 1956, jurisdiction of the civil Court is not ousted but the same would be subject to Section 8 of the Act of 1996. Consequently, the impugned judgment/order is set aside and the suit stands restored to its original number of the Trial Court for hearing and disposal in accordance with law.

29. A decree be drawn up accordingly.

Sd/
(Pritinker Diwaker)
Judge

Sd/
(Sanjay K. Agrawal)
Judge