IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF DECEMBER 2020

BEFORE

THE HON'BLE MR. JUSTICE S.G. PANDIT

C.R.P. No.26/2017

BETWEEN:

1 . SRI.E S SATISH KUMAR
S/O.LATE SRI. SUBBAIAH SETTY,
AGED ABOUT 61 YEARS,
R/O OPPOSITE NEW COURT,
MTC COLONY,
GOWRIBIDANUR 561208

2 . SRI.E S SRAMESH KUMAR
S/O.LATE SRI.SUBBAIAH SETTY,
AGED ABOUT 59 YEARS,
R/O 'ESTURI NIVAS', M G ROAD,
GOWRIBIDANUR 561208

3 . SRI.E S SAMPANGIRAM
S/O.LATE SRI. SUBBAIAH SETTY,
AGED ABOUT 57 YEARS,
R/O 'ESTURI NIVAS', M G ROAD,
GOWRIBIDANUR 561208

4 . SRI.E S SRIDHAR
S/O.LATE SRI.SUBBAIAH SETTY,
AGED ABOUT 54 YEARS,
R/O 'ESTURI NIVAS', M G ROAD,
GOWRIBIDANUR 561208

5 . SMT.E S SREEMATHI LAKSHMI
W/O.LATE SRI. SUBBAIAH SETTY,
AGED ABOUT 76 YEARS,
R/O ESTURI NIVAS, M G ROAD,
GOWRIBIDANUR 561208

...PETITIONERS

(By Sri. : K.N.PHANEENDRA, SR.COUNSEL FOR
SMT.VAISHALI HEGDE, ADV)

AND

1 . SRI K V JAYAPRAKASH
S/O.LATE SRI. K S VISHWANATHAM,
AGED ABOUT 47 YEARS,
R/O. THYAGARAJA COLONY,
GOWRIBIDANUR 561208

2 . SRI. K S NAGARAJ
S/O.LATE K SATYANARAYANA GUPTA,
AGED ABOUT 45 YEARS,
R/O. BRAHMINS STREET,
GOWRIBIDANUR 561208

3 . SRI. S CHENNAKRISHNAIAH
S/O.LATE SUNKU CHINNANARASAPA,
AGED ABOUT 87 YEARS,
SUNKU RAMESH BABU & BROTHERS,
WHOLESALE MERCHANTS,
7-3-1950, MAIN BAZAAR ROAD,
HINDUPUR, ANANTHPURA DISTRICT,
ANDHRA PRADESH 515201

4 . SRI. K SURYANARAYANA SETTY
S/O.LATE K SRIKANTAIAH SETTY,
AGED ABOUT 81 YEARS,
R/O. “ANUGRAHA”,

RAILWAY STATION ROAD,
GOWRIBIDANUR 561208

5 . SRI. S RAMESH BABU
S/O.SRI.S.CHENNAKRISHNAIAH,
AGED ABOUT 52 YEARS,
SUNKU RAMESH BABU &
BROTHERS, WHOLESALE MERCHANTS,
7-3-1950, MAIN BAZAAR ROAD,
HINDUPUR, ANANTHPURA DIST,
ANDHRA PRADESH 515201

6 . SRI.S V PRASANNA KUMAR
S/O.SRI.S.CHENNAKRISHNAIAH,
AGED ABOUT 52 YEARS,
SUNKU RAMESH BABU &
BROTHERS, WHOLESALE MERCHANTS,
7-3-1950, MAIN BAZAAR ROAD,
HINDUPUR, ANANTHPURA DIST,
ANDHRA PRADESH 515201

7 . SRI. K V MOHAN
S/O.LATE SRI.K S VISWANATHAM,
AGED ABOUT 51 YEARS,
R/O. VARALAKSHMI TEXTILES,
M.G. ROAD,
GOWRIBIDANUR 561208

8 . SRI. K V VASANTH KUMAR
S/O.LATE. SRI.K S VISWANATHAM,
AGED ABOUT 41 YEARS,
R/O. LAKSHMI JEWELLERS,
M.G. ROAD,
GOWRIBIDANUR 561208

… RESPONDENTS

(By Sri : PRADEEP C YADAV FOR R1 & R2)

THIS CIVIL REVISION PETITION IS FILED UNDER SECTION 115 OF THE CODE OF CIVIL PROCEDURE, 1908, AGAINST THE ORDER DATED 02.09.2016 PASSED ON ISSUE NO.4 IN O.S.NO.134/2015 ON THE FILE OF THE SENIOR CIVIL JUDGE AND J.M.F.C., GOWRIBIDANUR, NEGATIVELY ANSWRING ISSUE NO.4.

THIS CIVIL REVISION PETITION IS COMING ON FOR HEARING THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

The defendants in O.S.No.134/2015 on the file of the Senior Civil Judge and JMFC at Gowribidanur are before this Court in this revision petition under Section 115 of the Code of Civil Procedure, 1908 assailing the order dated 02.09.2016 on preliminary issue No.4, by which, their re quest for referring the dispute to Arbitration is rejected.

2. Parties to this proceeding would be referred to as they stand before the trial Court.

3. Petitioners are defendants, respondents No.1 and 2 are plaintiffs and respondents 3 to 8 are co-defendants in O.S.No.134/2015 which is filed seeking rendition of

accounts of the Partnership Firm and for the relief of partition and separate possession in the suit schedule property.

4. On receiving the suit summons, the defendants appeared and filed their preliminary objections to maintainability of the suit and also alternatively prayed to refer the parties to arbitration. The defendants in their preliminary objection/written statement stated that any dispute arising out of the Partnership Firm will have to be resolved by way of Arbitration and Court has no jurisdiction to try the suit.

5. Based on the pleadings of the parties, the trial Court framed issues. Among other issues, issue No.4 was treated as preliminary issue. On considering the said preliminary issue, the trial Court answered the said preliminary issue in the negative and the request of the defendants for referring the dispute to arbitration was rejected. The trial Court

rejected the request of the defendants for referring the matter to Arbitration on two grounds, first ground being that the defendants have not filed any application before actually filing their preliminary statement on the substance of dispute and the other ground was that, as required under Section 8(2) of the Arbitration and Conciliation Act, 1996 (for short '***the Act***') original Partnership Deed is not placed on record.

6. Heard learned Senior Counsel Sri.K.N.Phaneendra for Smt.Vaishali Hegde, Advocate for petitioners and Sri.Pradeep C.Yadav, Advocate for respondents No.1 and 2.

7. Learned Senior Counsel, Sri.K.N.Phaneendra would submit that the order under challenge is wholly erroneous and has been passed without appreciation of material on record and contrary to law. Learned Senior Counsel referring to preliminary written statement-cum-objections regarding maintainability placed on record as Annexure-E

would submit that the defendants have not submitted themselves to the jurisdiction of the Civil Court and they have stated that in view of arbitration clause, the suit would not be maintainable, hence, they prayed to dismiss the suit and alternatively prayed to refer the parties to arbitration. It is further contended that, a reading of preliminary written statement-cum-objections filed by the defendants at any stretch of imagination could be considered as written statement filed on merit nor could be held that the defendants have submitted themselves to the jurisdiction of the Court, waiving their right to seek reference to arbitration.

8. Nextly, the learned Senior Counsel contended that Xerox Copy of the Partnership Deed was placed on record by the plaintiffs themselves and said partnership deed contained arbitration clause which is not disputed by the plaintiffs. But, the Court failed to exercise its jurisdiction in

proper perspective. Learned Senior counsel relying on the decision of the Hon'ble Apex Court reported in ***(2007) 7 SCC 737*** in the case of ***BHARATH SEWA SANSTHAN v/s U.P.ELECTRONICS CORPORATION LIMITED*** and ***2016 SCC online SC 1272*** in the case of ***ANANTHESH BHAKTA REPRESENTED BY MOTHER USHA A. BHAKTA AND OTHERS v/s NAYANA S. BHAKTA AND OTHERS*** submits that Xerox copy of the agreement on record would suffice the requirement of Section 8(2) of the Act. Learned Senior Counsel points out that, when the Court finds that there is arbitration clause between the parties, grossly erred in rejecting the request of the defendants to refer the dispute to Arbitration.

9. Per contra, Sri.Pradeep C.Yadav, appearing for respondents/plaintiffs justifies the order under challenge. Further, learned counsel for the plaintiffs contends that the defendants have not filed any application under Section 8(1)

of the Act, praying for referring the dispute to the Arbitrator, but on the other hand, the defendants filed their preliminary written statement wherein they denied the plaint allegations and also stated with regard to maintainability of the suit in view of the arbitration clause contained in the Partnership Deed. It is his submission that by filing written statement, the defendants submitted themselves to the jurisdiction of the Court, waiving their rights to seek for appointment of an Arbitrator to resolve the dispute. Further, the learned counsel would submit that the defendants failed to comply with the mandatory requirement of placing on record the original Deed of Partnership. Producing original Deed containing arbitration clause along with the application or at least placing on record at the time of hearing the application would be a precondition to hear and decide the application seeking for appointment of arbitration. Thus, he prays for dismissal of the revision petition.

10. On hearing the learned counsel for both the parties and on perusal of the material on record, the following points would arise for consideration:

> *(a) Whether the trial Court is justified in coming to the conclusion that defendants have not filed any application before actually filing their preliminary statement on the substance of dispute?*
>
> *(b) Whether filing of original or certified copy of the agreement containing arbitration clause is mandatory?*

11. Answer to the above points would be in the negative and affirmative, respectively for the following reasons:

> Section 8 of the Act reads as follows:
>
> ***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.*

A reading of the above provision would makes it clear that, when an action is brought before a judicial authority which is the subject of an arbitration agreement and if the party to the said arbitration agreement applies before submitting himself to the jurisdiction of the judicial authority by filing his defense or substance of dispute, the Court shall refer the matter to Arbitration, if it is based on valid arbitration agreement.

12. The law in this regard is settled by the Apex Court in catena of decisions. The Hon'ble Apex Court in the case of

RASHTRIYA ISPAT NIGAM LIMITED AND ANOTHER v/s VERMA TRANSPORT COMPANY reported in ***(2006) 7 SCC 275*** at paragraph 36 and 42 has held as follows:

> *"**36.** The expression "first statement on the substance of the dispute" contained in Section 8(1) of the 1996 Act must be contradistinguished with the expression "written statement". It employs submission of the party to the jurisdiction of the judicial authority. What is, therefore, needed is a finding on the part of the judicial authority that the party has waived its right to invoke the arbitration clause. If an application is filed before actually filing the first statement on the substance of the dispute, in our opinion, the party cannot be said to have waived its right or acquiesced itself to the jurisdiction of the court. What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application under Section 8 of the 1996 Act, may not be held wholly unmaintainable. We would deal with this question in some detail, a little later.*
>
> ***42.** Waiver of a right on the part of a defendant to the lis must be gathered from the fact situation*

> *obtaining in each case. In the instant case, the court had already passed an ad interim ex parte injunction. The appellants were bound to respond to the notice issued by the Court. While doing so, they raised a specific plea of bar of the suit in view of the existence of an arbitration agreement. Having regard to the provisions of the Act, they had, thus, shown their unequivocal intention to question the maintainability of the suit on the aforementioned ground.*

Reading of the above principles laid down by the Hon'ble Apex Court would disclose that whether the defendant has submitted himself to the jurisdiction of the judicial authority or not is to be gathered from the fact situation obtaining in each case and whether the party has waived his right to invoke the arbitration clause depends on the facts of each case.

13. The division Bench of this Court in MFA No.8750/2019 decided on 05.11.2020 at paragraphs 40 and 48 has held as follows:

> *40. Thus, the law as declared by the Apex Court in respect of an application under Section 8 of the Act is that a party to the arbitration agreement should have indicated his clear intention to submit to the jurisdiction of the Civil Court and should have expressly waived his right to seek for reference to arbitration and only if such a situation existed, the judicial authority could reject the request for reference to arbitration.*
>
> *48. We are of the view that the term 'not later than' used in Section 8 (1) of the Act permits the filing of an application seeking for reference of the parties along the written statement and the filing of the written statement and application for reference under Section 8 simultaneously cannot and should not lead to an inference that the defendant had submitted to the jurisdiction of the Civil Court and had waived its right to seek for reference to arbitration as provided under Section 8 of the Act.*

This Court in the above decision has held that party to the arbitration agreement should have unequivocally submitted himself to the jurisdiction of the Court waiving his right to

seek reference to arbitration. Further, interpreting Section 8(1) of the Act, Division Bench has come to the conclusion that along with the written statement an application could be filed seeking reference to Arbitration.

14. Keeping in mind the above principles laid down by the Hon'ble Apex Court and Division Bench of this Court, the instant case will have to be examined.

15. In the instant case, the defendants appeared through their Advocate before the trial Court on 30.05.2015. They were expected to file the written statement within 30 days or extended period of not later than 90 days, as required under Order VIII Rule 1 of CPC. The defendants filed memorandum of preliminary written statement–cum-objections regarding the maintainability of suit with a prayer for reference on 25.07.2015. Paragraphs 2, 3 and prayer in the objection regarding maintainability reads as follows:

"02. While the Defendants jointly and severally deny all the allegations, averments and contentions raised under the paint as false and groundless and more particularly the averment to the effect that the firm has already dissolved; the Defendants vehemently submit that the very suit is not maintainable and deserves to be curbed at this very stage since the Partnership Deed carries "Arbitration Clause" under which the partners have mutually agreed upon to resolve any disputes through Arbitration.

03. It is trait law that once the parties to a disputes have agreed upon the methodology of the dispute resolution to be "arbitration", a suit under general law cannot be prosecuted by either of the parties and the only way of resolution of disputes shall be via Arbitration alone.

Wherefore, it is most humbly prayed that this Hon'ble court be pleased to DISMISS the suit and alternatively refer the parties to Arbitration in terms of the method of arbitration as provided under the deed of partnership as applicable under law in the interest of justice and equity."

16. A reading of the above averment would clearly indicate that the defendants had not submitted themselves to the jurisdiction of the Civil Court, whereas they had prayed specifically to refer the parties to Arbitration. The defendants as required under Section 8 of the Act had sought for referring the dispute to the Arbitrator along with their first statement on the substance of the dispute. This Court, in the above referred decision has clearly held that along with the written statement, the party could simultaneously seek for referring the matter to the Arbitration. Hence, I am of the view that the trial Court committed an error in coming to the conclusion that the defendants have not filed any application before actually filing their preliminary statement on the substance of dispute.

17. Regarding point No.2, a reading of sub-Section 2 of Section 8 of the Act reveals that an application filed under

sub-Section (1) of Section 8 shall not be entertained unless it is accompanied by original arbitration agreement or duly certified copy thereof. In the present case, it is an admitted fact that neither the original arbitration agreement nor the certified copy thereof is placed on record. The contention of the learned Senior Counsel is that Xerox copy of the arbitration agreement which contains arbitration clause is on record which would suffice the purpose. In support of his contention, learned Senior Counsel banks upon the decision of the Hon'ble Apex Court in the case of ***BHARATH SEWA SANSTHAN (cited supra).*** In ***Bharath Sewa Sansthan*** case, the respondent-Corporation before the High Court contended that original agreements are in possession of the appellant-Sansthan, whereas the Sansthan contended that the original agreements are not in its possession. In those circumstances, the High Court had taken Photocopies of the lease agreements for ascertaining the existence of the arbitration clause. In appeal, the Hon'ble Supreme Court

taking note of the fact situation refused to interfere with the order of the High Court. But, in the subsequent judgments, the Hon'ble Apex Court held that the production of original arbitration agreement or duly certified copy would be mandatory and unless the original or certified copy of the arbitration agreement is placed on record, the Court shall not entertain the application. The Hon'ble Apex Court in a decision reported in ***(2010) 1 SCC 72*** in the case of ***N.RADHAKRISHNAN v/s MAESTRO ENGINEERS AND OTHERS*** at paragraph 29 has held as follows:

> *29. But it is to be noted herein that the claim of the appellant regarding the dispute was under the arbitration clause mentioned under the original partnership deed and not on the subsequent one. Since the original deed was not filed within the requirement of Section 8(2) of the Act, it must be held that the mandatory requirement under the Act had not been complied with. Accordingly, even if we accept the factum of a dispute relating to the retirement of the appellant under the original deed dated 7-4-2003, still*

> *the Court would not be empowered to refer the matter to an Arbitrator due to the non compliance of the provisions mentioned under Section 8(2) of the Act.*

In the above decision, the Hon'ble Apex Court has held that in the absence of non-compliance with the provision of Section 8(2) of the Act, the Court would not be in a position to refer the matter to Arbitration.

18. The Hon'ble Apex Court in the case of ***ANANTHESH BHAKTA*** cited supra, after considering ***BHARATH SEWA SANSTHAN*** case and subsequent decisions, at paragraphs 28 and 29 has held as follows:

> *28. In the present case as n oted above, the original Retirement Deed and Partnership Deed were filed by the defendants on 12th May and it is only after filing of original deeds that Court proceeded to decide the application I.A.No.IV.*
>
> *29. Section 8(2) has to be interpreted to mean that the court shall not consider any application filed by the party under Section 8(1) unless it is accompanied by*

> *original arbitration agreement or duly certified copy thereof. The filing of the application without such original or certified copy, but bringing original arbitration agreement on record at the time when the Court is considering the application shall not entail rejection of the application under Section 8(2).*

In the case of ***ANATHESH BHAKTHA***, the original or certified copy of the arbitration agreement containing the arbitration clause was not filed along with the application filed under Section 8 of the Act. But the same was produced at the time of hearing the application. In the above context, while answering the issue as to whether non-filing of either original or certified copy of retirement deed and partnership deed along with application I.A.No.4 dated 09.05.2014 entailed dismissal of the application as per Section 8(2) of the 1996 Act, held that the original deeds produced while deciding the application I.A.No.4 would suffice the purpose. Further the Hon'ble Apex Court specifically held that Section 8(2) of the Act has to be interpreted to mean that the Court

shall not consider any application filed by the party under Section 8(1) of the Act unless it is accompanied by original or duly certified copy of arbitration agreement. In the case on hand, as the defendants had not placed on record either the original nor certified copy of the agreement containing arbitration clause, the trial Court is justified in rejecting the prayer of the defendants to refer the dispute for Arbitration on the basis of photocopy of the agreement.

19. For the reasons stated above, the revision petition stands rejected.

Sd/-
JUDGE

mpk/-*