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committed by the applicant and therefore, the defendants have to refund the advance amount paid by the first respondent/plaintiff together with interest.

The first respondent/plaintiff had approached the National Company Law Tribunal (NCLT), Chennai. The Corporate Insolvency Resolution Process proceedings initiated by the first respondent / plaintiff before the NCLT, Chennai under the provisions of the Insolvency and Bankruptcy Code (IBC) came to be dismissed. Aggrieved by the same, the first respondent/plaintiff preferred the statutory appeal before the National Company Law Appellate Tribunal (NCLAT), New Delhi. After hearing both the parties, the NCLAT set aside the order of the NCLT, Chennai and remitted the matter back to the NCLT, Chennai for fresh adjudication.

4.The instant suit was also pending when parallel proceedings were pending before the NCLT, Chennai. Before the NCLT, Chennai, the parties had reached a compromise and a Memorandum of Compromise was entered into between the first respondent/plaintiff and the applicant/first defendant.

5.According to the first respondent/plaintiff, the applicant/first defendant committed breach of the Memorandum of Compromise and



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therefore, they were constrained to file an application before this Court seeking for amendment of pleadings in the plaint to record the subsequent developments. The said application was allowed by this Court on 05.10.2023. In the said application, a counter was filed by the applicant/first defendant wherein they have disclosed that there is an arbitration clause in the Memorandum of Compromise and on that ground they had sought for dismissal of the amended application.

6. This Court in its order dated 05.10.2023, while allowing the amendment application, has observed that as on date of the said order, no application under Section 8 of the Arbitration and Conciliation Act was filed by the applicant/first defendant and therefore, the question of raising a contention that in view of the Arbitration Clause, an application seeking for amendment cannot be allowed was rejected by this Court. Pursuant to the order allowing the amendment application, the applicant/first defendant has also filed the additional written statement in the suit. In the additional written statement, no jurisdictional plea on account of the arbitration clause contained in the Memorandum of Compromise recorded by the NCLT, Chennai was raised. Subsequent to the filing of the additional written



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statement by the applicant/first defendant, which was adopted by the second and third defendants, the first respondent/plaintiff had filed an application, which is pending before this Court seeking for summary judgment on the ground that the defendants have acknowledged their liability under the memorandum of compromise. After filing of the application seeking for summary judgment by the first respondent/plaintiff, the applicant/first defendant has now come forward with the present application filed under Section 8 of the Arbitration and Conciliation Act seeking to refer the dispute to arbitration in accordance with the Arbitration clause contained in the Memorandum of Compromise, which was placed on record before the NCLT, Chennai.

7. A counter affidavit has been filed by the first respondent/plaintiff in this application, questioning the maintainability of this application on the following grounds:

a) The defendants have not raised the plea of arbitration neither in the written statement nor in the additional written statement;

b) Mere statement in the counter affidavit filed in the amendment application that there is an arbitration clause will not suffice for the purpose



of satisfying the requirements of Section 8 of the Arbitration and Conciliation Act;

c) Since the defendants have filed their additional written statement, wherein they have not raised the plea of arbitration and the said additional written statement having been filed subsequent to the filing of the counter in the amendment application, the defendants have waived their right to enforce the arbitration clause contained in the Memorandum of Compromise.

8. The learned Senior Counsel for the applicant/first respondent would reiterate the contents of the affidavit filed in support of this application and would submit as follows:

a) There is no necessity for the applicant/first defendant to file a separate application under Section 8 of the Arbitration and Conciliation Act seeking for reference of the dispute to arbitration;

b) It would suffice if at the first instance, the defendants have raised objection with regard to the maintainability of the suit on the ground that there is an arbitration clause in the subject matter of the contract, i.e. the Memorandum of Compromise.



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c) He also drew the attention of this Court to the counter affidavit filed in the amendment application wherein the defendants have disclosed that there is an arbitration clause in the Memorandum of Compromise and had contended that the suit is not maintainable in view of the arbitration clause;

d) Learned counsel for the applicant / first defendant would also state that the defendants never waived their right to go for arbitration as per the arbitration clause contained in the Memorandum of Compromise. In support of his submissions, the learned counsel for the applicant / first defendant drew the attention of this Court to a Judgment of the Delhi High Court in the case of *Madhu Sudan Sharma and Others vs. Omaxe Ltd. rendered in RFA/823/2019 and CM/41007/2019 dated 06.11.2023* and would submit that the Delhi High Court has categorically held that there is no necessity to file a separate application under Section 8 of the Arbitration and Conciliation Act, 1996, seeking for reference of the dispute to arbitration. According to him, as per the Delhi High Court's decision, it would suffice, if at the first instance, a party pleads existence of the arbitration clause and opposes the maintainability of the suit. Therefore, according to him, since the applicant in the counter affidavit filed in the amendment application filed



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by the plaintiff has objected to the maintainability of the said application on the ground that there is an arbitration clause in the Memorandum of Compromise, the dispute will have to be necessarily referred to arbitration in accordance with the arbitration clause contained in the Memorandum of Compromise. He drew the attention of this Court to the relevant paragraphs in the said judgment to support his contentions.

9. Learned counsel for the applicant / first defendant would also submit that only due to the subsequent developments, pursuant to the Memorandum of Compromise, the application under Section 8 of the Arbitration and Conciliation Act, 1996 was not filed earlier in the suit. According to him, only after the amendment application was filed by the plaintiff, there became a necessity for the applicant to seek reference of the dispute to arbitration as the said amendment application was based on the Memorandum of Compromise dated 14.09.2019 entered into between the parties which was placed on record before the NCLT, Chennai.

10. On the other hand, the learned senior counsel for the first respondent / plaintiff would submit that neither in the written statement filed



originally by the defendants nor in the additional written statement filed subsequently after the amendment application came to be allowed, the defendants have raised the plea of arbitration and therefore, the present application is not maintainable.

11. Having waived the right to initiate arbitration in accordance with the arbitration clause contained in the Memorandum of Compromise, the first defendant's application filed under Section 8 of the Arbitration and Conciliation Act at this stage is not maintainable.

12. He also drew the attention of this Court to the following facts:

a) The first defendant had filed its written statement into the Registry of this Court in this suit on 20.01.2021. In the said written statement, though the Memorandum of Compromise was dated 14.09.2019, there was no reference to the same;

b) This Court determined the present suit to be a commercial dispute under Section 2 (c) (vi) of the Commercial Courts Act, 2015 by its order dated 10.02.2022 for which the defendants had no objection;

c) The first defendant filed an application in A.No.3737 of 2022,



seeking to condone the delay of 8 days in re-presenting the written statement on 21.07.2022;

d) This Court allowed the application in A.No.3737 of 2022 filed by the first defendant seeking to condone the delay in re-presenting the written statement by its order dated 30.08.2022;

e) This Court by its order dated 29.09.2022 allowed the application in A.No.3824 of 2022 filed by the first defendant, seeking to condone the delay in filing the written statement;

f) The first defendant filed an application in A.No.5210 of 2022, seeking leave to file statement of truth in support of the written statement dated 18.01.2021 on 26.10.2022;

g) This court allowed application in A.No.5210 of 2022 filed by the first defendant, seeking leave to file statement of truth in support of the written statement on 16.12.2022;

h) The first defendant filed an application in A.No.257 of 2023 to file additional documents and the said additional documents sought to be filed by the first defendant did not contain the Memorandum of Compromise. The said application was filed on 06.01.2023;

i) This Court allowed A.No.257 of 2023 filed by the first defendant



seeking for reception of additional documents by its order dated 14.02.2023;

j) The plaintiff filed two applications in A.Nos.3800 and 3801 of 2023

for

i. amending the plaint to bring on record all the relevant and material facts and subsequent developments;

ii. for taking additional relevant documents including the Memorandum of Compromise dated 14.09.2019;

k) The first to third defendants filed a counter affidavit in the said application. In the counter affidavit, the said defendants reserved their right to file an application under Section 8 of the Arbitration and Conciliation Act, 1996. The said counter affidavit was filed on 14.09.2023;

l) By order dated 05.10.2023, this Court allowed the applications filed by the plaintiff in A.Nos.3800 and 3801 of 2023 and directed the amendment of the plaint. In the said order, this Court had noted the fact that till date no application under Section 8 of the Arbitration and Conciliation Act has been filed by the defendants, seeking reference of the dispute to arbitration in accordance with the Memorandum of Compromise;

m) The first and third defendants filed affidavit of admission and denial of documents of the plaintiff's additional documents. The said



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affidavit of admission and denial of documents was filed on 02.01.2024. In the statement, the defendants admit to the existence and genuineness of the Memorandum of Compromise. They have also stated that the Memorandum of Compromise has been entered after the commencement of the present suit;

n) The first defendant filed the additional written statement to the amended plaint on 02.01.2024. In the said additional written statement, there is no reference to the arbitration clause contained in the Memorandum of Compromise;

o) No application under Section 8 of the Arbitration and Conciliation Act was also filed by the defendants prior to filing of the additional written statement;

p) The second and third defendants have also filed an adoption memo adopting the additional written statement of the first defendant through their adoption memo dated 04.01.2024;

q) The plaintiff even prior to filing of this application on 22.01.2024 has filed an application in A.No.622 of 2024 praying for Summary Judgment under Order XIII A of the Commercial Courts Act, 2015 in her favour;



jurisdiction of this Court to entertain the amendment application;

c) Infact, as seen from the order dated 05.10.2023 passed in the amendment application which was allowed by this Court, the objection of the defendants with regard to the existence of arbitration clause was overruled since as on that date no application under Section 8 of the Arbitration and Conciliation Act was pending before this Court;

d) The order dated 05.10.2023 passed in the amendment application by which the amendment sought for by the plaintiff was granted has also attained finality. Till date, the order has not been challenged by the defendants;

e) Subsequent to the order dated 05.10.2023 allowing the amendment application, the defendants have also filed an additional written statement on 02.01.2024. The said additional written statement has also not questioned the jurisdiction of this Court on account of the existence of the arbitration clause in the Memorandum of Compromise dated 14.09.2019;

f) The defendants had also filed an application before this Court in A.No.257 of 2023, seeking for reception of additional documents on 06.01.2023. In that application as well, they have not questioned the jurisdiction of this Court. Having sought permission of this Court to file



additional documents, it is clear that the defendants have waived their rights to go for arbitration;

g) The defendants have also filed an affidavit of admission / denial of documents wherein they have admitted the existence of the Memorandum of Compromise dated 14.09.2019. The said affidavit of admission / denial of documents filed on behalf of the defendants was filed on 02.01.2024. When the defendants claim that this Court does not have jurisdiction to decide the suit in view of the existence of arbitration clause, the question of filing of affidavit of admission / denial of documents on the side of the defendants at this belated stage will not arise.

14. The learned senior counsel appearing for the first respondent / plaintiff during the course of the submissions also drew the attention of this Court to the arbitration rules framed by this Court which has been notified in the Government Gazette. As seen from the same, it is clear that only through an application, the relief under Section 8 of the Arbitration and Conciliation Act can be entertained by this Court. The relevant rules in the Madras High Court, Arbitration Rules 2020 are extracted hereunder:

"3. Nomenclature and Cause Title: Applications



under the Act are given different nomenclatures in these Rules for the purpose of procedural convenience: (i) Every application filed under Sections 8, 9, 27, 29 A (5), 34 (3), 34 (4), 36 (3), 39 (2), 41 (2), 43 (3), 45 and 54 of the Act shall be numbered as 'Arbitration Application' (;Arb Appln.' in short).

4. Formats: (i) Every Arbitration Application under Rule 3 (i) shall be in the form of a Judge's Summons (in the High Court) or a Petition (in other Courts) containing the relief sought and shall be supported by an affidavit containing the relevant facts and circumstances. "

15. The learned counsel for the applicant / first defendant during the course of his submissions had relied upon the Judgment of the Delhi High Court dated 06.11.2023 in the case of ***Madhu Sudan Sharma and Others vs. Omaxe Ltd. rendered in RFA/823/2019 and CM/41007/2019*** in support of his contentions that there is no necessity to file a separate application under Section 8 of the Arbitration and Conciliation Act and it would suffice if at the first instance before submitting the first statement on the substance



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of dispute, the defendants indicate to this Court that there is an arbitration clause. As seen from the said Judgment, two questions arose for determination in the said decision. The first is whether the defendants in the suit who seek to invoke Section 8 (1), have to do so prior to filing the written statement, as held by the learned Additional District Judge and the second is whether a mere objection to the maintainability of the suit, advanced by the defendants in the written statement and predicated on Section 8 and the existence of the arbitration agreement between the parties would suffice or whether a formal application, seeking reference of the dispute to arbitration is necessary. While deciding the above issues, it has been made clear in the said decision which has followed the Division Bench Judgment of the very same Delhi High Court in Sharad P.Jagtiani case that the first statement on the substance of the dispute by the defendant would be the written statement. The relevant portion of the Delhi High Court decision referred to supra is extracted hereunder:

"26. The impugned order refuses to consider the appellants' application under Section 8 of the 1996 Act on the sole ground that it was filed belatedly. This finding is obviously incorrect. Mr. Sai Deepak is



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justified in his contention that Section 8(1) of the 1996 Act requires the application, under the said provision, to be made not later than the date of submission, by the Section 8 applicant, of his first statement of defence on the substance of the dispute. Strictly speaking, the first statement on the substance of the dispute, by the appellant, would be in the written statement filed by him by way of response to the suit instituted by the respondent, consequent to grant of leave to defend the suit. This position stands concluded by para 15 of the judgment of the Division Bench of this court in Sharad P. Jagtiani, which reads thus:

"15. Section 8 does not specify the manner in which the party has to submit its first statement on the substance of the dispute, and normally with respect to a suit, the first statement on the substance of the dispute by the defendant would be the written statement. Thus, if in the written statement filed it is brought to the notice of the Court that there exists an arbitration agreement between the parties which embraces the subject matter of the suit there would complete compliance with the mandate of the law and the Court would be obliged to refer the parties to arbitration if the plea in the written statement is made good."



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16. In the instant case, admittedly, both in the written statement as well as in the additional written statement, the defendants have not raised the plea that there exists an arbitration clause and therefore, the suit is not maintainable. The decision relied upon by the learned counsel for the plaintiff has no bearing for the facts of the instant case. Having participated in the suit by filing written statement and additional written statement and having filed an application seeking for reception of additional documents, the defendants' application under Section 8 of the Arbitration and Conciliation Act, filed at this belated stage is not maintainable as they have waived their right to file such an application as seen from their own pleadings filed before this Court earlier.

17. For the foregoing reasons, this Court does not find any merit in this application. Accordingly, this application is dismissed.

29.02.2024

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ABDUL QUDDHOSE.J.,

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A.No.1106 of 2024 in C.S. No.46 of 2018

29.02.2024