

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

C.C.C.A.No.123 of 1997

JUDGMENT:

This CCCA is filed by the plaintiff aggrieved by the order dated 30.06.1997 in I.A.No.1968 of 1996 in O.S.No.1651 of 1996 passed by IV Additional Judge, City Civil Court, Hyderabad, whereby and whereunder learned Judge while allowing the said petition filed by the petitioners/defendants 1 to 4 referred the parties to arbitration and consequently dismissed the suit.

2) The plaintiff is the Sanali Heavens Association of Flat and Shop Owners. Its case is that defendant No.4 is the sole and absolute owner of property in an extent of 5,400 square yards in Srinagar Colony, Ameerpet, Hyderabad and she entered into an agreement with defendants 1 to 3/developers and the developers obtained municipal sanction for the plan bearing No.385/TPS/92 dated 09.10.1992 whereby the municipal authorities authorized the developers to construct stilt + three floors. Thereafter, the defendants 1 to 4 entered into individual agreements of sale/constructions with the intending buyers of flats to be constructed by them. Thus, by way of such agreements, defendants have sold away the entire extent of 5,400 square yards to the intending purchasers and after such agreements the defendants have become agents of the purchasers for construction as per the specifications and they have lost their ownership over the site. However, the

defendants instead of restricting the constructions to the extent approved by the Municipal Authorities, have constructed additional FSI in violation of permit plan and such construction of FSI is a classic example of agent constructing on the land of the principal and claiming ownership rights thereof which is impermissible under law. The defendants constructed additional floors without permission and in violation of building permit and applied to the 5th defendant—Municipal Corporation of Hyderabad (MCH) for regularization and the same was refused, but the defendants 1 to 4 got the zoning regulations relaxed by defendant No.6—Government of Andhra Pradesh, Municipal Administration, Hyderabad which is illegal.

a) Further, the defendants in violation of original permit of 1992 and also relaxed zoning regulations by the Government constructed:

- 1) 10 shops in the Northern sub-cellar.
- 2) Constructed shops and offices in the Northern side stilt floor.
- 3) Occupied Southern side stilt floor for construction of shops by not providing common parking and visitors parking area as per the statutory rules.
- 4) Proposed construction of 5 pent houses of 15,000 sq. feet without valid permission.
- 5) Illegally occupied 50% of the stilt floor and portion of drive ways for stationing labour, and construction material since last two years.

6) Not provided maintenance office, recreation hall, association office and Gym etc.

b) Further, case of the plaintiff is that in fact the Municipal Authorities have demolished the illegally constructed shops and extra- floors in May, 1995, but the defendants have since then reconstructed the demolished portions illegally and clandestinely against the rights of the plaintiff— association. Their continuing construction activities since 2½ years causing great hardship to the residents of the flats. Hence, the suit for declaration that the constructions and obstructions caused by the defendants 1 to 4 are in violation of permits and that the defendants have no right to seek any relaxation and regularization over and above permits issued by the MCH and for consequential mandatory injunction directing the defendants to remove the illegal constructions and for permanent injunction restraining the defendants from making any constructions over and above the permits granted by MCH.

c) Defendants 1 to 4 filed written statement and opposed the suit and denied all the material averments made in the plaint. Denying the plaint allegations that entire land was sold to the buyers and the defendants thereafter became agents of the purchasers for construction as per specifications contained in Brochure and municipal permits, the precise case of the defendants is that individual buyers purchased only the undivided share of the land proportionate to the size of their flat and nothing more which

is evident from certain clauses in the construction agreements entered into by individual buyers with the second defendant. As per clause 20, the 2nd defendant/developer shall alone is entitled to all terrace rights and entitled to carry on further construction of upper floors over the flats of the purchasers. The terrace, pent house and open space above the building shall at all time belong to developer absolutely and the purchasers shall not have objections for any inconvenience caused on account of further construction of upper floors. Similarly, under clause 10 the developer is entitled to construct as per sanctioned plan and revised plan and therefore, the buyers cannot object for construction of further floors or any additional construction, if permitted by MCH.

d) Denying that the defendants are making illegal constructions in violation of permit, it is contended that 4th defendant was permitted by MCH for 4th floor vide permit No.430/93 dated 16.09.1993 and subsequently construction of two more floors and sub-cellar and pent house was permitted by MCH pursuant to Government relaxation of zoning regulation and bye-laws contained in G.O.Rt.No.1036 dated 24.08.1995. Thus, the defendants contended that they have full right to make constructions and in fact such constructions were made with the proper permit and regulation of zonal regulations by the concerned authorities.

3 a) While so, defendants 1 to 4 filed I.A.No.1968 under Section 34 of Arbitration Act, 1940 and later as per orders dated 11.12.1996 in I.A.No.1931 of 1996 amended the section of law to Section 8 of Arbitration and Conciliation Act, 1996. It was pleaded in the said petition that as per clause 26 of agreement entered into by the independent purchasers with the developer, all disputes between the parties to the agreement shall be referred to and decided by Arbitrator and for that purpose each party will have the right to have its own Arbitrator and in that view, 2nd defendant had issued notices dated 26.11.1996 to the plaintiffs to appoint their Arbitrator to resolve all outstanding issues between them, but however, instead of replying to the said notice properly the plaintiff filed the present suit. He submitted that the issue involved in the suit with regard to further constructions made by the defendants is also subject matter of agreements and hence the matter can be referred to Arbitrator. In the said petition the defendants prayed to direct the parties to nominate their respective Arbitrators and proceed with the arbitration and consequently dismiss the suit.

b) The respondent/plaintiff filed counter and opposed the petition contending that the Plaintiff—Association was not a party to the agreement said to be entered into by the 2nd defendant with the individual purchasers and hence the alleged arbitration clause in the said agreement does not

bind the plaintiff. It is contended that the petition is not maintainable in view of the provisions of Section 8 of Arbitration Act, as the same requires filing of original arbitration agreement along with petition which is not done by the petitioners/defendants. It is also contended that the arbitration clause envisaged in the agreement relates to the construction activities taken up by the developer for the individual buyers of the flats and it has nothing to do with the issues involved in the suit which are relating to the illegal constructions made by the defendants in violation of rights of the plaintiff—association on one hand and in gross infraction of the permit issued by the MCH. Hence, the arbitration clause cannot be invoked in the present suit.

4) Learned trial Court negated the contention raised by the respondent/plaintiff and held that though the Plaintiff—Association was not a party to the individual agreements entered into by the independent buyers still the Plaintiff—Association is none other than the agent or representative of individual parties to the construction agreement and the said association was formed to protect their rights and therefore, the Plaintiff—Association is bound by the agreement. The trial Court further held that by virtue of clauses 20 and 13 of the agreement, the issues involved in the plaint are susceptible to the arbitration clause contained in the agreements. The trial Court held that the agreements entered into by the individual buyers do contain the arbitration clause and therefore, non-filing of arbitration

agreement between the Plaintiff—Association and defendants within the meaning of Section 8(2) of Arbitration Act is not an issue and it was complied in substance. Ultimately the trial Court allowed the petition and referred the parties to arbitration under clause 26 of agreement and consequently dismissed the suit.

Hence the present appeal by the plaintiff.

5) Heard arguments of Sri M.R.K.Chowdary, learned Senior Counsel appearing for Mr. P.V.Mahesh, learned counsel for appellant and

Sri Nageswara Rao, learned Senior Counsel appearing for Mr. C.Raghu, learned counsel for respondents 1 to 4.

6) The parties in the appeal are referred as they were arrayed in the trial Court.

7 a) Fulminating the judgment, learned counsel for appellant firstly argued the trial Court failed to see that there was no agreement muchless arbitration agreement between the Plaintiff—Association and defendants 1 to 4 at any relevant point of time and the so-called agreements between the individual buyers and defendants 1 to 4 were the agreements in respect of plinth area in the flats and nothing more and such agreements were for construction of flats covered by permit No.495/58 dated 10.10.1995 and except that there had been no agreements at all covering the aspect of illegal constructions made by the defendants

which are the subject matter of the suit. Hence, the trial Court ought not to have been carried away by the arbitration clause contained in the individual agreements entered into by the buyers with the defendants which have nothing to do with the issues involved in the suit. He further argued that the plaintiff failed to file the arbitration agreement in the Court showing the existence of such agreement between the plaintiff and defendants. As such, referring the parties to the arbitration and dismissal of the suit is illegal he contended. Taking the Court through the judgment of the Apex Court reported in ***Atul Singh v. Sunil Kumar Singh***^[1] he submitted that *sine quo non* for referring the parties to arbitration is the existence of arbitration agreement between the parties without which they cannot be compelled. He also cited another decision of the Apex Court reported in ***N.Radhakrishnan v. Maestro Engineers***^[2] to buttress his contention that as per Section 8(2) of Arbitration and Conciliation Act filing of original deed containing arbitration clause is mandatory requirement for referring the parties to the arbitration.

b) Next, he submitted that even assuming that there exists an arbitration clause in the individual agreements and the same is binding on the plaintiff, still the arbitration clause cannot be invoked to the present suit because the scope and ambit of present suit is wide enough to be adjudicated by the Civil Court alone and not by an arbitrator. In

expatiation, he reiterated that the arbitration clause referred in individual agreements relates to the constructions to be made in the individual plinth areas in the flats of the independent buyers and if any disputes arise between the developer and buyers in respect of such construction of independent flats, arbitration clause can be invoked in such cases. However, the present suit wherein declarations and injunction are sought for relates to the illegal constructions made by the defendants without any authority or permit and also questioning the relaxation of the zonal regulations. Hence, these aspects are not covered by arbitration agreement. However, the trial Court has not taken into consideration these aspects and referred the parties to the arbitration. Referring the decision reported in ***Sukanya Holdings Pvt. Ltd. v. Jayesh H.Pandya***^[3] he argued that when the matter in issue is not the subject matter of an arbitration agreement and the individuals are not parties to the arbitration agreement, parties shall not be referred to arbitration. He thus submitted that trial Court committed serious blunder in not only holding that the plaintiff is bound by the so-called arbitration agreement but also in dismissing the suit. He thus prayed to allow the appeal.

8 a) Per contra, while supporting the judgment of the trial Court, learned counsel for respondents 1 to 4 argued that individual buyers entered into independent agreements with the developer which contain arbitration clause and thereafter buyers constituted into an association which is the

plaintiff herein and therefore, the trial Court rightly held that plaintiff is bound by arbitration clause contained in the independent agreements. He contended it is too naive for the plaintiff to argue that it was not a party to the independent agreements and hence not bound by arbitration clause.

b) Secondly, he contended that the agreements would clearly show that developer has right over terrace as well as stilt and sub-cellar whereon the defendants made constructions as per permit issued by MCH and also subsequent relaxation of zonal regulations made by the authorities. Therefore, the plaintiff—association cannot question the constructions made by the defendants.

c) Nextly, supporting the dismissal of the suit, learned counsel argued that after referring the parties to the arbitration nothing was left for adjudication by the trial Court and hence the trial Court rightly dismissed the suit. He submitted that for another reason also there is nothing left for adjudication by the Civil Court. The Plaintiff—Association filed W.P.No.10063 of 1997 against the present defendants seeking relief of declaring G.O.Rt.No.1017 MA—Municipal Administration and Urban Development (M-1) Department, dated 08.11.1996 as arbitrary, violative of principles of natural justice and contrary to Regulation 12 of the Bhagyanagar Urban Development Authority Zoning Regulations, 1981 and the A.P. Apartments (Promotion of

Construction and Ownership) Act, 1987 and for direction to the respondents to dismantle and demolish 14 shops constructed by the respondents 4 to 6 in the stilt area of suit property and on hearing both sides the Division Bench of this Court in its judgment dated 17.06.2015 set aside the impugned G.O.Rt.No.1017 and remanded the matter to respondents 1 to 3 for fresh consideration in accordance with law. He thus submitted that subject matter of the suit and the writ petition are one and the same and as the Government of Andhra Pradesh, Municipal Administration was directed to hear the present plaintiff and pass necessary orders, there is nothing left in the civil suit to be decided. He thus prayed for dismissal of the appeal.

9) In the light of above rival arguments, the points that arise for determination in this appeal are:

1. *Whether an arbitration agreement exists between the appellant/plaintiff and respondents/defendants 1 to 4 and if so, appellant/plaintiff is bound by the same?*
2. *If point No.1 is held in affirmative, whether the subject matter involved in O.S.No.1651 of 1996 is amenable to arbitration to invoke arbitration clause?*
3. *Whether the judgment of the trial Court in referring the parties to arbitration and dismissing the suit is factually and legally correct?*
4. *To what relief?*

10 a) **POINT No.1:** According to plaintiff, defendant No.4 is

the sole and absolute owner of 5,400 sq. yards of the suit property and she entered into development agreement with the defendants 1 to 3 who are developers and the defendants have obtained municipal sanction plan No.385/TPS/92 dated 09.10.1992 for construction of stilt + 3 floors. Thereafter, defendants 1 to 4 entered into individual agreements of sale/constructions with the individual intending buyers of the flats to be constructed by them.

b) Whereas the defendants' plea is that it is true defendant No.4 is the sole and absolute owner of 5,400 square yards bearing Municipal D.No.8-3-948(D), 80-3-949(D),8-3-949/1/1/A, 8-3-949/1/1/B and 8-3-949/1/1/C situated in Srinagar Colony, Ameerpet, Hyderabad and in fact she herself obtained municipal sanction plan permit No.390/93 dated 09.10.1992 for construction of stilt + 3 floors and thereafter, again obtained permission for one more floor vide permit No.430/17 dated 16.09.1993 and after obtaining such permits defendant No.2 entered into individual agreements with the intending buyers of the flats. So, when the pleadings of either party are taken into consideration, there is no much difference. According to the plaintiff, the municipal permits were obtained by the developers but as per defendants 1 to 3 the permits were obtained by defendant No.4 herself. For consideration of the present point that is not the big issue.

c) Then, admitted point is that the developers have

entered into agreements with the individual buyers who intended to purchase the space for flats and to get construction through the developers. It is also an admitted fact that the individual buyers entered into different agreements in respect of their individual floor space. Those agreements were entered into by the individual buyers with the developers during 1993-94 after the municipal permit was obtained in the year 1992. Admittedly, by that time the Plaintiff—Association was not formed and therefore there could not be any direct agreement between the plaintiff and defendants 1 to 4.

d) Sofaras the individual agreements are concerned, a perusal of the agreement entered into by one of the purchasers—R.Subhadra with the developers i.e. M/s.Remax Constructions shows in clause No.26 it is stipulated as follows:

“All disputes in regard to this agreement and rights of the parties hereto vis-à-vis each other shall be referred to and decided as per the Arbitration Act and each party will have the right to have its own arbitrator. Such arbitration shall be subject to the jurisdiction of courts at Hyderabad alone.”

Thus, from this clause, it is clear that all the disputes regarding the construction agreement and the rights of the parties shall be referred to the arbitrator and each party will have the right to have its own arbitrator. Therefore, it is clear that an arbitration clause indeed exists in the agreement between the buyer and the developer. The trial Court also

referred another agreement dated 25.05.1994 and found the existence of arbitration clause No.26 in the said agreement. Thus, all these agreements are more or less similar agreements. Hence, the point is whether the Plaintiff—Association is bound by the said agreement. As per Section 2(h) of Arbitration and Conciliation Act, 1996 ‘party’ means a party to an arbitration agreement. Section 8 of the said Act deals with the power of the Court to refer parties to arbitration, it reads thus:

“Section 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.”

e) Incidentally, it must be noted that Arbitration and Conciliation Act, 1996 came into force with effect from 25.01.1996 as per Section 1 of the said Act. The respondents 1 to 4 herein filed I.A.No.1968 of 1996 on 09.12.1996 i.e. subsequent to the Act, 1996 came into force. It appears initially they filed petition under Section 34 of Arbitration Act, 1940 but they got amended the petition

and incorporated Section 8 of Arbitration and Conciliation Act, 1996 vide order dated 11.12.1996 in I.A.No.1931 of 1996. So, the parties are governed by Arbitration and Conciliation Act, 1996. It is true that the plaintiff is not a direct party to the arbitration agreement. However, the Plaintiff—Association is nothing but conglomeration of individual flat buyers who formed into an association after all of them purchased the respective flats. Therefore, as rightly observed by the trial Court, Plaintiff—Association is a representative of the individual parties to the construction agreement, which association was later formed to protect their rights. In that view of the matter, though plaintiff is not a direct party to the arbitration agreement, still in its representative capacity it can be said as party to the arbitration agreement within the meaning of Section 2(h) of Arbitration and Conciliation Act, 1996. Therefore, the plaintiff is bound by the arbitration clause and the contention of the plaintiff in this regard cannot be countenanced. The cited decisions in **Atul Singh's** case(1 supra) and **N.Radhakrishnan's** case(2 supra) will not help the cause of the appellant/plaintiff.

11) In **Atul Singh's** case (1 supra) the Apex Court refused to refer the parties to arbitration on the observation that neither the appellant/plaintiff nor his predecessor in interest were parties to the partnership deed 17.02.1992 which contains arbitration clause and also on the observation that arbitration agreement was not filed into the Court. This

decision can be distinguished on facts as in the instant case, the plaintiff though not a direct party to the construction agreement but it is a representative of individual buyers who in their turn entered into construction agreement with the developers which contained the arbitration clause.

12) In ***N.Radhakrishnan***'s case (2 supra) the Apex Court held that procedural compliance of Section 8(2) of Arbitration and Conciliation Act i.e. filing of the original arbitration agreement or a duly certified copy along with application is mandatory. This decision can also be distinguished on facts. In the instant case, admittedly there is no direct agreement between the Plaintiff—Association and defendants 1 to 4. However, there exist construction agreements with the individual buyers of the flats and those agreements admittedly contained arbitration clause vide clause No.26. In view of the same, it can be held that Section 8(2) of Arbitration and Conciliation Act, 1996 is substantially complied with.

So, point No.1 is answered against the appellant/plaintiff and in favour of respondents/defendants 1 to 4.

13 a) **POINT Nos.2 and 3**: The next contention of appellant/plaintiff is that even if it is assumed that there exists an arbitration clause and plaintiff is bound by the same, still arbitration clause cannot be invoked as the

subject matter of the suit is beyond the scope of arbitration. I am afraid this argument has no much conviction. As can be seen from the plaint averments, the main contention of the Plaintiff—Association is that after entering into construction agreements with the individual flat buyers, the defendants 1 to 4 have lost their right in the suit property and they became the agents of the buyers and thus they have no right to construct additional floors on the roof and make constructions in the stilt and sub-cellar portions, but they made illegal constructions and the authorities also illegally relaxed zonal regulations. With these averments they prayed for declaration and injunction reliefs. The defendants denied the same and asserted their right to make constructions on the top of the building as well as in the still and cellar areas. So, basically the question is whether the defendants have any right over the terrace, stilt and cellar portions. It appears, before the trial Court the petitioners/defendants referred Clauses 13 and 20 of the construction agreements to assert their right. Clauses 13 and 20 of the construction agreement read thus:

***“Clause 13:** The stilt floor and the cellar floor of the complex Sanali Heavens shall remain to be the absolute property of the Developer and the Developer shall be entitled to sell, alienate or lease out the cellar and the stilt floor or portion thereof as parking space, garages, office, storing place in any manner he chooses.*

***Clause 20:** The Developer shall alone be entitled to all terrace rights and shall be entitled to carry on further construction of upper floors over the said flat of the*

Second Party. The terrace, pent house and the open space above the building shall at all time belong to the Developer absolutely. The Second Party shall not have objections for any inconvenience caused on account of further construction of upper floors.”

So, clauses 13 and 20 purportedly speak about the right reserved by the developer which is being challenged in the suit filed by the plaintiff. So, the validity and binding nature of clauses 13 and 20 is the subject matter of suit and the same can be referred to arbitration because the construction agreement contains arbitration clause therein. Therefore, it cannot be said that subject matter and reliefs claimed in the suit are outside the purview of the arbitration. In view of this, the decision in ***Sukanya Holdings Pvt. Ltd.***'s case (3 supra) will not help to the appellant/plaintiff. Thus on a conspectus of facts and evidence, it can be said that the trial Court rightly dismissed the suit as nothing was left over for adjudication after referring the parties to arbitration. Added to it, in W.P.No.10063 of 1997 the Division Bench of this High court while setting aside the G.O.Rt.No.1017 MA—Municipal Administration and Urban Development (M1) Department dated 08.11.1996 directed the respondents 1 to 3 therein to consider the matter afresh in accordance with law and by virtue of the said direction the Plaintiff—Association has got an opportunity to submit its objections against the constructions made by the defendants 1 to 4. In view of the subsequent events, in my considered view, there is no need to revive the suit after referring the parties to the

arbitration.

Accordingly, point Nos.2 and 3 are held against the appellant/plaintiff and in favour of respondents/defendants 1 to 4.

14) In the result, in view of the above findings, there are no merits in the CCCA No.123 of 1997 and the same is accordingly dismissed by confirming the order passed by the trial Court in I.A.No.1968 of 1996 in O.S.No.1651 of 1996 dated 30.06.1997 and consequent dismissal of the suit. No costs in the appeal.

As a sequel miscellaneous petitions pending if any, shall stand closed.

U.DURGA PRASAD RAO, J

Dt: 09.12.2015

Murthy

[\[1\]](#) (2008) 2 SCC 602

[\[2\]](#) (2010) 1 SCC 72

[\[3\]](#) AIR 2003 SC 2252 (1)