

THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

CRP.No.2699 of 2014

%25-08-2015

Between:

#M/s.Viom Networks Ltd.,

...Petitioner

And

\$M. Veeramani, W/o. Late M. Narsing Rao,

...Respondent

< GIST:

> HEAD NOTE:

!Counsel for the petitioner : Sri M. Balaji.

^ Counsel for respondent : Sri A. Gopala Krishna.

? Cases referred

1. 2003 (5) ALD 26 (SC)
2. (2009) 10 SCC 103
3. (2003) 5 SCC 531
4. (2009) 1 SCC 372
5. 2005 (8) SCC 618
6. 2011 (5) SCC 532
7. 2013 (5) ALT 515
8. AIR 1959 SC 1362

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CRP.No.2699 of 2014

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ORDER :

This Revision is filed under Article 227 of the Constitution of

India challenging order dt.18.02.2014 in I.A.No.850 of 2013 in O.S.No.597 of 2012 on the file of III Senior Civil Judge, City Civil Court, Secunderabad refusing to stay the said suit.

2. The petitioner herein is defendant in the above suit.

3. The premises belonging to respondent was granted under a leave and licence to the petitioner under a deed dt.01.08.2003. The period of leave and licence was initially for five years, but was renewed later and ultimately expired on 31.08.2011.

4. Alleging that the petitioner has not removed a cell tower and electricity power generator erected in his property, the respondent filed the suit on 21.08.2012 seeking vacant possession of plaint schedule property from petitioner. He also sought for a direction to petitioner to pay licence fee at the rate of Rs.22,000/- per month from 01.09.2011 till the end of July, 2012.

5. The petitioner herein filed I.A.No.850 of 2013 invoking Section 8 of the Arbitration and Conciliation Act, 1996, (for short, 'the Act') and contending that the leave and licence agreement dt.01.08.2003 had contained in Clause-15 an arbitration clause, and because of that clause, the present suit is barred.

6. Counter-affidavit was filed to the said application by the respondent contending that the leave and licence agreement itself expired on 31.08.2011; that in spite of its expiry, the petitioner is trying to grab the land; since the agreement itself had lapsed and had not been renewed subsequently, the question of arbitrator under the said agreement entertaining the dispute between the parties, does not arise.

7. By order dt.18.02.2014, the Court below dismissed the said I.A. It held that the leave and licence agreement had ended on 31.08.2011 and had not been renewed subsequently, and

therefore the petitioner cannot rely on the terms and conditions of the said agreement which had worked itself out, and was no longer in force.

8. Challenging the same, the present Revision is filed.

9. Heard Sri M. Balaji, counsel for petitioner; and
Sri A. Gopala Krishna, counsel for respondent.

10. The counsel for petitioner contended that the order passed by the Court below is incorrect and that when there is an arbitration agreement between the parties, the Court below is bound to stay the suit leaving it to the arbitrator to decide under Section 16 of the Act, whether the arbitration clause is attracted or not. He placed reliance on the following decisions of the Supreme Court in **Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums**^[1], and **Branch Manager, Magma Leasing and Finance Limited and another v. Potluri Madhavalata and another**^[2].

11. I have noted the submissions of the counsel for the petitioner.

12. The facts narrated above clearly point out that in the leave and license deed dt.01.08.2003 entered into for a period of five years by the respondent with the petitioner with respect to installation of cell phone tower in the suit schedule property belonging to the respondent, no doubt contained an arbitration clause in Clause 15 thereof. It states:

“15. ARBITRATION :

15.1 *It is mutually agreed between the parties, that in the event of any dispute, or difference of opinion in the matter of interpretation, execution or carrying out the objects and functions of this deed, the same shall be referred to a sole arbitrator, within the two months from the date of any dispute who shall be appointed with joint concurrence of both the parties, who shall decide*

the matters, whose decision shall be binding on the parties to the dispute shall be Hyderabad Jurisdiction only.”

13. This leave and license agreement was renewed twice, i.e., on 21.05.2008 and again on 01.01.2011. Thereafter, the leave and licence period expired on 31.08.2011. The respondent's contention is that in spite of the said period having expired, the petitioner has not vacated the licenced property and has also stopped paying any amounts to him and that it is due to pay at the rate of Rs.22,000/- per month from 01.09.2011 till end of July, 2012, arrears of licence fee of Rs.2,42,000/-, and it should also be directed to vacate the suit schedule property and pay future licence fee from 01.08.2012 onwards till the date of handing over of vacant possession of the suit schedule property to the respondent. Thus, the dispute in the suit is for the period from 01.09.2011 falling outside the leave and license agreement which expired on 31.08.2011.

14. Section 8 of the Arbitration and Conciliation Act, 1996 states :

“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.”

15. In **Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and another**^[3], the court explained that Section 8 contains the words *“in a matter which is the subject of an arbitration agreement”*. It held that the suit should be in respect of *“a matter”* which the

parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced – “as to a matter” which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, it held that there is no question of application of Section 8. The words “a matter” indicate that the entire subject matter of the suit should be subject to arbitration agreement.

16. In Yogi Agarwal v. Inspiration Clothes & U and others^[4], the Supreme Court held that when a defendant invokes Section 8 of the Act by alleging existence of an arbitration agreement, he should establish that such arbitration agreement related to, or is applicable to, the suit transaction/contract. It observed that parties may enter into different contracts at different points of time or may enter into a series of unrelated transactions and it is possible that in regard to some, they may provide for arbitration and in regard to others, they may not provide for it. It observed that the existence of an arbitration agreement with reference to some other transaction/contract to which the plaintiff was or is a party, unconnected with the transactions or contracts to which a suit relates, cannot be considered as existence of an “arbitration agreement” in regard to the suit transactions/contracts. It held that to constitute an arbitration agreement for the purposes of Section 8 of the Act, it should be between the parties to the dispute and it should relate to or be applicable to the dispute.

17. In S.B.P. and Co. v. Patel Engineering Ltd.^[5], a 7 Judge Bench of the Supreme Court explained in para.19 at page 649 that when the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief

disputes the same, the judicial authority, in the absence of any restriction in the Act, *has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it is covered by the arbitration clause.* It held that it is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it and mechanically refer the parties to an arbitration.

18. This principle is also followed in **Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and others** ^[6].

19. No doubt, in **Hindustan Petroleum Corporation Limited** (1 supra) and **Potluri Madhavalata** (2 supra), the Supreme Court held that Section 8 is peremptory and that it is mandatory for civil court to refer dispute to an arbitrator and that if there is an objection as to the applicability of arbitration clause to the facts of a case, the same will have to be raised before the concerned arbitrator or tribunal.

20. In **Hindustan Petroleum Corporation Limited** (1 supra), the Supreme Court held :

*“13. This Court in the case of **P. Anand Gajapathi Raju and others v. P.V.G. Raju (dead) and others** 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.*

14. The question then would arise: what would be the role of the civil

court when an argument is raised that such an arbitration clause does not apply to the facts of the case in hand? Learned counsel for the appellant contends that it is a matter which should be raised before the arbitrator who is competent to adjudicate upon the same and the civil court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case. While learned counsel appearing for the respondent contends that since the applicability of the arbitration clause to the facts of the case goes to the very root of the jurisdiction of the reference to arbitration, this question will have to be decided by the civil court before referring the matter to arbitration even in cases where there is admittedly an arbitration clause. The answer to this argument, in our opinion, is found in Section 16 of the Act itself. It has empowered the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement.

16. It is clear from the language of the section, as interpreted by the Constitution Bench judgment in Konkan Railway (supra) that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the Arbitral Tribunal concerned. Therefore, in our opinion, in this case the courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by the Arbitral Tribunal as contemplated in clause 40 of the Dealership Agreement and as required under Sections 8 and 16 of the Act.”

21. This decision was considered in **S.B.P. and Co.** (5 supra) and the Supreme Court observed a judicial authority is bound to refer the matter to arbitration once the existence of a valid arbitration clause is established. It observed that when there is an arbitration agreement between the parties and one of the parties, ignoring it, files an action before a judicial authority, and the other party raises the objection that there is an arbitration clause, the judicial authority has to consider that objection and if the objection is found sustainable to refer the parties to arbitration. As stated supra, the Court has held in **S.B.P. and Co** (5 supra) that the judicial authority, in the absence of any restriction in the Act, *has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it is covered by the arbitration clause.*

22. Therefore, in view of the ratio in **S.B.P. and Co** (5 supra), the decision in **Hindustan Petroleum Corporation Limited** (1 supra) in so far as the Court therein had held that even the

applicability of the arbitration clause to the subject matter of the suit should be raised only before the arbitrator and not by the Civil Court, cannot be said to be good law. So it cannot be held that even if the arbitration clause relied upon by the defendant in a suit does not cover the dispute in the suit, the Civil court should refer the parties to an arbitrator. Such a view can no longer be valid in view of the judgments in **Yogi Agarwal** (4 supra), **S.B.P. and Co.** (5 supra) and **Booz Allen and Hamilton Inc.** (6 supra).

23. In **Potluri Madhavalata** (2 supra), the Supreme Court had observed :

“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;*
- (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 fulfilment 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. Even the above decision requires that the conditions specified in Section 8 must be fulfilled and then only a reference to arbitration can be made by a court. In other words, the requirement that the “subject matter of the suit is also subject matter of the arbitration agreement” has to be fulfilled. This is the crux of the issue.

25. An issue similar to the present case was considered by a Division Bench of this Court in **Penumalli Sulochana v. Harish**

Rawtani^[7]. In that case also a contract covered by a lease deed containing an arbitration clause commenced on 01.02.2007 and ended on 31.01.2012. After expiry of the period of lease, the petitioner got issued a notice dt.22.02.2012 under Section 106 of the Transfer of Property Act, 1908 for eviction of the respondent, for recovery of arrears of rent, and damages for use and occupation. On receipt of summons in the suit, I.A.No.1494 of 2012 was filed by respondent under Section 8 of the Act to dismiss the suit and refer the matter to arbitration alleging that the lease deed dt.06.12.2006 contained an arbitration clause providing for arbitration of the dispute, if any, between the parties and so the suit was not maintainable. This was opposed, but the trial court allowed it. A Revision was filed challenging the same before this Court. A Division Bench of this Court held that the purpose of the lease deed is to govern the relationship between a lessor and a lessee as long as the lease subsists and the subsistence of the lease under the deed would be up to the specific period mentioned in it. Once the period ends, the relationship between the parties ceases to be governed by the lease deed and that once the lease deed becomes redundant, any clause contained in it also ceases to be of any relevance to the parties. It relied upon the observations of Justice K. Subbarao in **Union of India v.**

Kishorilal Gupta and brothers^[8]. In that case it was held :

“Uninfluenced by authorities or case-law, the logical outcome of the earlier discussion would be that the arbitration clause perished with the original contract. Whether the said clause was a substantive term or a collateral one, it was nonetheless an integral part of the contract, which had no existence de hors the contract. It was intended to cover all the disputes arising under the conditions of, or in connection with, the contracts. Though the phraseology was of the widest amplitude, it is inconceivable that the parties intended its survival even after the contract was mutually rescinded and substituted by a new agreement. The fact that the new contract not only did not provide for the survival of the arbitration clause but also the circumstance that it contained both substantive and procedural terms indicates that the parties gave up the terms of the old contracts, including

the arbitration clause. The case-law referred to by the learned counsel in this connection does not, in our view, lend support to his broad contention and indeed the principle on which the said decisions are based is a pointer to the contrary.”

26. In my considered opinion, the decision in **Penumalli Sulochana** (7 supra) covers the present case on all fours and that a suit for eviction of the petitioner who had entered into possession of the property under a leave and license deed, after the expiry of the period of leave and license cannot be subject matter of arbitration under the arbitration clause contained in the leave and license deed and the plea of the petitioner that its application under Section 8 of the Act should be allowed and the suit filed by the respondent cannot be proceeded with/the plaint should be rejected raised in I.A.No.850 of 2013, is not tenable and is liable to be rejected.

27. In this view of the matter, I do not find any error of jurisdiction in the order passed by the Court below, dismissing I.A.No.850 of 2013.

28. The Civil Revision Petition is without any merit and is accordingly dismissed. No costs.

29. Miscellaneous applications, pending if any in this Revision, shall stand closed.

JUSTICE M.S. RAMACHANDRA RAO

Date: 25-08-2015

Ndr/*

LR Copy to be marked : Yes.

[\[1\]](#) 2003 (5) ALD 26 (SC)

[\[2\]](#) (2009) 10 SCC 103

[\[3\]](#) (2003) 5 SCC 531

[\[4\]](#) (2009) 1 SCC 372

- [\[5\]](#) 2005 (8) SCC 618
- [\[6\]](#) 2011 (5) SCC 532
- [\[7\]](#) 2013 (5) ALT 515
- [\[8\]](#) AIR 1959 SC 1362