

IN THE HIGH COURT OF JUDICATURE AT
HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

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CIVIL REVISION PETITION No.782 of 2015

Between:

M/s.Aliens Developers Private Limited, Hyderabad,
Rep. By its Managing Director.

-
... Petitioner.

and

M.Janardhan Reddy & others.

-
... Respondents

-
DATE OF JUDGMENT PRONOUNCED: .08.2015

-
SUBMITTED FOR APPROVAL:

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HON'BLE SRI JUSTICE R. SUBHASH REDDY
AND
HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

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1. Whether Reporters of Local newspapers
Yes/No

may be allowed to see the Judgment ?

2. Whether the copies of judgment may be
Yes/No

marked to Law Reporters/Journals ?

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3. Whether Their Ladyship/Lordship wish to
Yes/No

see the fair copy of the judgment ?

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HON'BLE SRI JUSTICE R. SUBHASH REDDY
AND
HON'BLE SRI JUSTICE A.SHANKAR NARAYANA

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M.Janardhan Reddy & others.

.....Respondents.

For petitioner : Sri S. Ravi, Senior Counsel.

For Respondents : Sri V. Ravinder Rao, Advocate.

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> Head Note:

? CITATIONS:

1. (2011) 5 SCC 532
2. AIR 2010 SC 488
3. Civil Appeal No.2079 of 2015 (SC)
4. AIR 1999 SC 2354
5. 2006 (2) ALT 724 (D.B)

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HON'BLE SRI JUSTICE R. SUBHASH REDDY
AND
HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CIVIL REVISION PETITION No.782 of 2015

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ORDER :

This civil revision petition is filed under Article 227 of the Constitution of India, by defendant No.1 in the suit in O.S.No.90 of 2014 on the file of learned V-Additional District Judge, Medak at Sanga Reddy, aggrieved by order dated 19.01.2015, passed in I.A.No.1189 of 2014. By the aforesaid order, the petition filed by the petitioner herein under Section 8 of the Arbitration and Conciliation Act, 1996, read with Section 151 of C.P.C., is dismissed. Necessary facts in brief are as under :

2. Respondent-plaintiffs are the owners of land admeasuring Ac.2-32 gts. in Sy.No.385, situated at Tellapur village of Ramchandrapur Mandal in Medak

District. Petitioner is a Company registered under the Companies Act of 1956 and is engaged in the business of constructing multi-storied apartments by entering into development agreements with the owners of land. Respondent-plaintiffs along with 9 others, have executed Development Agreement-cum-Irrevocable Power of Attorney in favour of petitioner vide document No.13321/2007, dated 23.06.2007, registered in the office of Sub-Registrar, Sangareddy. As per the terms of the development agreement, the petitioner shall construct the proposed residential and commercial complex at his own costs and expenses within a period of 36 months from the date of agreement, which period shall include the time to be spent on obtaining approvals from Hyderabad Urban Development Authority (HUDA) and other authorities. If the construction is delayed, there is a provision for grant of grace period subject to condition to pay damages to the respondent-owners of the land at the rate of Rs.5/- per square feet per month for the delayed period in respect of the area that is not completed and delivered to the owners. However, such delay also shall not exceed one year. Further, it is stated in the agreement that in case construction is not completed even within the extended period, the agreement stands cancelled. As per Clause 47 of the development agreement, any dispute arising between the parties shall be settled through arbitration and the same shall be governed by the provisions of the

Arbitration and Conciliation Act, 1996.

3. The respondent-plaintiffs, who have entered into development agreement to the extent of Ac.2-32 gts. along with other owners, have filed the suit in O.S.No.90 of 2014, seeking cancellation of the part of the Development Agreement-cum-Irrevocable Power of Attorney to the extent of their share of land of Ac.2-32 gts. situated at Tellapur village of Ramachandrapuram Mandal and to deliver actual and physical possession of said property to the plaintiffs and for grant of permanent injunction restraining the defendants, their agents and servants from alienating the suit schedule property. Mainly, it is the case of respondent-plaintiffs that as much as the constructions were not completed within the time frame stipulated in the Development Agreement-cum-Irrevocable Power of Attorney and even within the extended period, the agreement stands cancelled.

4. In the aforesaid suit, the petitioner-defendant has filed I.A.No.1189 of 2014 under Section 8 of the Arbitration and Conciliation Act, 1996, read with Section 151 C.P.C., seeking reference of the subject matter of suit for adjudication by the Arbitral Tribunal in terms of the Development Agreement-cum-Irrevocable Power of Attorney document No.13321/2007, dated 23.06.2007. In the affidavit filed in support of the said interlocutory application, it is the case of petitioner-defendant that the

respondents along with others, 9 in total, have entered into Development Agreement-cum-Irrevocable Power of Attorney on 23.06.2007, registered as document No.13321/2007, and the parties to the said agreement belong to five families and the respondents, who belong to one family, are added as parties 10 to 12. Except the family of respondents, all other four families have entered into supplementary agreement and the entire land is being used as a common pool for development as a compact block and gated community with 13 stations, each consisting of four basement plus ground plus 29 upper floors. While referring to the Development Agreement-cum-Irrevocable Power of Attorney dated 23.06.2007, they placed reliance on Clause 47 of the said agreement, which provides that the disputes between the parties are to be resolved through arbitration, as per the provisions of the Arbitration and Conciliation Act, 1996. It is the case of petitioner-defendant that in view of such clause in the agreement, the disputes are to be resolved by Arbitral Tribunal, and accordingly made a request to refer such disputes to the Arbitrator.

5. Respondent-plaintiffs have filed counter affidavit in the said I.A.. In the counter affidavit, while agreeing that they entered into development agreement with the petitioner herein in the year 2007, denied the knowledge of any supplementary agreement as pleaded by the

petitioner. They placed reliance on Clause 19 of the Development Agreement-cum-Irrevocable Power of Attorney, which reads as under:

“That the DEVELOPER shall construct the proposed residential and commercial complexes at its own cost, responsibility and expenses. The development shall be completed in the manner provided under these presents within 36 months from the date of this Agreement, which period shall include the time to be spent on obtaining approvals from HUDA and other authorities. In the event of the construction being delayed beyond the period as specified, further grace period of six months will be granted by the OWNERS and in the event DEVELOPER being unable to complete the construction thereof, the DEVELOPER will be liable to pay damages to the OWNERS @ Rs.5/- per Sft per month for the delayed period in respect of the area that is not completed and delivered to the OWNERS. However, the said delay shall not extend more than one year. In case construction is not completed even within the extended period, the agreement stands cancelled and the OWNERS themselves or through other DEVELOPER will complete the development and the cost incurred for such development shall be recovered from the DEVELOPER herein and as a security the share of the DEVELOPER will be put as charge in favour of the owners. The interest free refundable deposit paid by the DEVELOPER also stands forfeited in case of the cancellation of this Agreement.”

It is their case that as much as the petitioner herein has not completed the construction within the stipulated period or even within the grace period as mentioned in the agreement, the agreement stands cancelled. It is their case that there are only two ways provided under law for cancellation of a registered document; one either by the parties or by the Civil Court. It is pleaded that the petitioner, though a very big Company, has played fraud not only against the respondents but also against other innocent persons, and hence, pleaded for dismissal of the petition filed under Section 8 of the Arbitration and Conciliation Act, 1996.

6. The Civil Court, by impugned order, mainly placing reliance on Clause 19 of the Development Agreement-cum-Irrevocable Power of Attorney, dated 23.06.2007, which is marked as Ex.A-1, has held that as the constructions were not completed within the agreed period, the agreement stands cancelled. It is further held that in view of the expiry of the period of agreement, the Arbitral Tribunal has no jurisdiction to adjudicate the matter.

7. In this civil revision petition, it is contended by Sri S.Ravi, learned Senior Counsel appearing for petitioner that as much as there is a Clause for resolution of disputes through Arbitral Tribunal, the Civil Court ought to have referred the disputes to the Arbitral Tribunal. It is

submitted that the question whether the agreement is to be cancelled or not, is also a matter which can be decided by the Arbitral Tribunal. It is further submitted that unless the jurisdiction of Arbitral Tribunal is excluded either expressly or impliedly, disputes can be resolved by the Arbitrator having regard to the agreement between the parties. It is further submitted that merely because there is an allegation of respondents that the contract has come to an end by breach of the terms, the arbitration clause does not get perished and it survives for resolution of disputes arising out of the agreement. It is further contended that in an application filed under Section 8 of the Arbitration and Conciliation Act, the approach of the Civil Court should be not to see whether the Court has got jurisdiction but it should see whether its jurisdiction has been ousted. In support of his argument, the learned counsel has placed reliance on the judgments of Hon'ble Supreme Court in **Booz Allen & Hamilton Inc. v. SBI Home Finance Limited & others**^[1], in **The Branch Manager, Magna Leasing and Finance Limited & another v. Potluri Madhavalata & another**^[2] and in **M/s.Sundaram Finance Limited & another v. T.Thankam**^[3].

8. On the other hand, it is contended by Sri V.Ravinder Rao, learned counsel appearing for respondents that in the Development Agreement-cum-Irrevocable Power of Attorney, dated 23.06.2007, there is a specific clause

prescribing the period for completion of the project and there is also grace period within which the petitioner was to complete the construction. In the very same Clause, it is clearly stated that in the event of failing to complete the construction within three years and the grace period, the agreement stands cancelled and in view of the same, the suit is filed after expiry of said period. It is submitted that once a document is registered, there are only two options open for its cancellation i.e. either by executing cancellation deed by the parties or by filing a suit before the competent Civil Court. The learned counsel has mainly relied on provision under Section 31 of the Specific Relief Act, 1963. It is contended that under Section 31(1) of the said Act, the Court alone is empowered to order cancellation of written instrument and under Section 31(2) of the Act, if the instrument which has been ordered to be cancelled is registered one, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered, upon which, such officer shall note on the copy of the instrument contained in his books, the fact of its cancellation. It is contended by the learned counsel that in view of the express power conferred on Courts under Section 31(2) of the Specific Relief Act, 1963, the fora available for cancellation of the Development Agreement-cum-Irrevocable Power of Attorney, is only the Court but not the Arbitral Tribunal. Learned counsel, in support of his argument, has also

placed reliance on the very same judgment relied on by the learned counsel for petitioner in **Booz Allen's** case (1 supra) and also relied on the judgment of Hon'ble Supreme Court in **Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd.**^[4] and also on a Division Bench judgment of this Court in **Sri Krishna Sarma v. Ramesh Kumar Joshi & others**^[5].

9. Having heard learned counsel for the parties, we have perused the Development Agreement-cum-Irrevocable Power of Attorney, dated 23.06.2007 entered between the parties. Clause 19 of the agreement prescribes the period for completion of construction, according to which, the construction has to be completed within 36 months from the date of agreement and if it is not completed within the said period, a grace period of not more than one year will be granted. It is the case of respondent-plaintiffs that as the petitioner-defendant did not complete the construction within the specified period in Clause 19, the agreement stands cancelled and inspite of the same, as the respondents have breached the terms of agreement, and as much as the cancellation power is conferred only on the public fora i.e. Courts, it is not for the Arbitral Tribunal to decide the lis between the parties.

10. In **Booz Allen's** case (1 supra), the Hon'ble Supreme Court has held that Adjudication of certain

categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (Courts and Tribunals), may by necessary implication, stand excluded from the purview of private fora. Consequently, where the cause/dispute is non-arbitrable, the Court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes is Arbitral Tribunal. Para 32 of the aforesaid judgment reads as under:

“32. The nature and scope of issues arising for consideration in an application under Section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under Section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of “arbitrability” or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act,

relying upon sub-section (2)(b)(i) of that section.”

In the very same judgment, the Hon’ble Supreme Court has held that suit of mortgage is not a mere suit for money and a suit for enforcement of mortgage being the enforcement of a right in rem, will have to be decided by Courts of Law and not by the Arbitral Tribunal. In para 37 of the judgment, the Hon’ble Supreme Court has held as under :

“37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself.”

11. In the judgment in **Magna Leasing and Finance**

Limited's case (2 supra), the Hon'ble Supreme Court has held that merely because the contract has come to an end by its termination due to breach, the arbitration clause does not get perished nor render inoperative. Similarly, in **M/s.Sundaram Finance Limited's** case (3 supra), the Hon'ble Supreme Court has held that when an application is filed under Section 8 of the Arbitration and Conciliation Act, 1996, the approach of Civil Court should be not to see whether the Court has jurisdiction, but to see whether its jurisdiction has been ousted.

12. In the judgment relied on by the learned counsel for respondents in **Haryana Telecom Ltd.'s** case (4 supra), the Hon'ble Supreme Court has held that power to order winding up of a Company is contained under the provisions of Companies Act and is conferred on the Court. It is further held that an arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a Company.

13. A Division Bench of this Court in **Sri Krishna Sarma's** case (5 supra), has held that the Court cannot mechanically, merely because the arbitration agreement had been presented, refer the parties for arbitration. It is held that it is necessary for the Court or the Judicial authority to go into the facts of the case and arrive at a conclusion as to whether the parties can be referred to arbitration or not.

14. In the case on hand, it is not in dispute that the Development Agreement-cum-Irrevocable Power of Attorney is a registered one and once an agreement for development is entered between the parties and is registered, it becomes a public document. Any person can apply for such a document to know the rights of the parties. In this case, it is to be noticed that there is a specific Clause in the agreement for completion of project and parties have agreed that the agreement stands cancelled if the constructions are not completed within 36 months from the date of agreement or within the grace period as mentioned in the said agreement. If the matter is referred for arbitration as per the terms of the agreement, the power of the Arbitrator will be confined to adjudicate the dispute between the parties, namely, whether the agreement stands cancelled or not having regard to the fact that the petitioner has not completed the project within the time frame as mentioned in the agreement, but, at the same time, the Arbitrator cannot exercise Statutory power conferred under Section 31(2) of the Specific Relief Act, 1963. Under Section 31(2) of the Specific Relief Act, Legislature conferred the power on Courts to send a copy of the cancellation decree to the officer in whose office the instrument has been so registered and such officer shall note on the copy of the instrument contained in his books, the fact of its

cancellation. It is evident from the provision under Section 31(2) that the power of nullifying the effect of registration is conferred only on the Court. In the judgment in **Booz Allen's** case (1 supra), the Hon'ble Supreme Court has held that a right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals and actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas, actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. In the said judgment, it is clearly held that if the adjudicatory effect of the Court is a judgment in rem, only public fora i.e. Courts and Tribunals have to adjudicate such disputes, but not the Arbitral Tribunals as agreed by the parties. As much as the Development Agreement-cum-Irrevocable Power of Attorney is a registered one and is relating to title of the property, any cancellation will effect the removal of rights accrued to the parties, such cancellation is to be communicated to the officer who has registered the document, in view of the provision under Section 31(2) of the Specific Relief Act. Therefore, we are of the considered view that such adjudicatory function in cases like this will operate in rem. In any event, having

regard to the power conferred on Courts by virtue of the provision under Section 31(2) of the Specific Relief Act, only competent Court is empowered to send the cancellation decree, to the officer concerned, to effect such cancellation and note in his books to that effect. When such Statutory power is conferred on Courts, such power cannot be exercised by the Arbitrator, inspite of the fact that there is arbitration clause in the agreement entered between the parties. Hence, we are of the view that the judgment in **Booz Allen's** case (1 supra) would support the case of respondents, but not that of the petitioner. Further, in **Haryana Telecom Ltd.'s** case (4 supra), the Hon'ble Supreme Court has held that Arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a Company in view of conferring such power only on Courts, under the Companies Act of 1956.

15. For the aforesaid reasons, we are of the view that there is no merit in this civil revision petition, so as to interfere with the impugned order passed by the learned V-Additional District Judge, Medak at Sangareddy, in I.A.No.1189 of 2014 in O.S.No.90 of 2014.

16. The civil revision petition is accordingly dismissed. No order as to costs. Pending miscellaneous applications, if any, shall stand closed.

R. SUBHASH REDDY, J

A. SHANKAR NARAYANA, J

31st August 2015

N.B:

1. L.R.Copy be marked.
2. Issue C.C. in one week.

(b/o)

ajr

[\[1\]](#) (2011) 5 SCC 532

[\[2\]](#) AIR 2010 SC 488

[\[3\]](#) Civil Appeal No.2079 of 2015 (SC)

[\[4\]](#) AIR 1999 SC 2354

[\[5\]](#) 2006 (2) ALT 724 (D.B)