

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.07.2016

CORAM

THE HONOURABLE MR.JUSTICE C.T.SELVAM

Civil Revision Petition (PD) No.1883 of 2014

and

M.P.No.1 of 2014

M/s.Shardha Terry Products Ltd.,
represented by its Director
Mr.G.Vijayakumar,
Having office at
No.8, Badrakaliamman Koil Road,
Mettupalayam,
Coimbatore.

... Petitioner

VS

1.M/s.Syhims Granites
represented by its Managing Partner,
K.Yusuf Basha,
S/o.S.P.Kadar Mohideen,
(Old No.237-D), 13D,
Sathiyarayanan Street,
Swarnapuri, Salem - 636 004.

2.K.Yusuf Basha
S/o.S.P.Kada Mohideen,
(Old No.237-D), 13D,
Sathiyarayanan Street,
Swarnapuri, Salem - 636 004.

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the order of learned I Additional Subordinate Judge, Salem, passed in I.A.No.224 of 2012 in O.S.No.519 of 2011 on 12.03.2014.

For Petitioner : Mr.R.Bharath Kumar

For Respondents : No appearance

ORDER

This revision arises against the order of learned I Additional Subordinate Judge, Salem, passed in I.A.No.224 of 2012 in O.S.No.519 of 2011 on 12.03.2014.

2. O.S.No.519 of 2011 is an action moved by respondents/plaintiffs seeking the following reliefs:

- (a) declaring that the MOU dated 17.12.2008 was brought about under undue influence, coercion and therefore not valid in law.
- (b) declaring that the MOU dated 17.12.2008 has come to an end by the discharge of the debt to the defendant.
- (c) declaring that the contract between the plaintiff and defendant is purely a money transaction.

- (d) declaring the condition for unilateral appointment of an arbitrator is capricious, baseless, illegal and against law.
- (e) restraining the defendants and their men and agents by means of a permanent injunction from compelling the plaintiff to part with their property.
- (f) restraining the defendants by means of a permanent injunction from in any way proceeding with the arbitration proceeding in AP.53/2011.

Petitioner/defendant moved I.A.No.224 of 2012 u/s.8 of the Arbitration and Conciliation Act, 1996, to refer the dispute to a sole arbitrator. Informing that as it was the plaintiffs' case that the agreement was obtained by coercion, the dispute could be decided only by Civil Court and could not be referred to Arbitrator, the Court below, under the impugned order, dismissed such application. There against, the present revision has been filed.

3. Heard learned counsel for petitioner. There is no representation for respondents.

4. The order under challenge patently is erroneous. Court below has failed to see that the respondent had moved an application before the

Arbitrator questioning his impartiality and challenging his appointment. The Arbitrator had held that he had jurisdiction. Respondent has not challenged such order. In ***Sundaram Finance Limited and another vs. T.Thankam [2015 (5) CTC 529]***, the Honourable Supreme Court informs:

“10. Once there is an Agreement between the parties to refer the disputes or differences arising out of the Agreement to Arbitration, and in case either party, ignoring the terms of the Agreement, approaches the Civil Court and the other party, in terms of the Section 8 of the Arbitration Act, moves the Court for referring the parties to Arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Arbitration Act, it is obligatory for the Court to refer the parties to Arbitration in terms of the Agreement, as held by this Court in P.Anand Gajapathi Raju and others v. P.V.G.Raju (Dead) and others, 2000 (4) SCC 539.

13. The attempt of the Trial Court and the approach made by the High Court in bifurcating the cause of action, is fallacious. It would only lead to delaying and complicating the process. The said issue is also no more res integra. In Sukanya Holdings (P) Limited v. Jayesh Pandya and another, 2003 (2) CTC 431 (SC) : 2003 (5) SCC 531, at Paragraphs 16 & 17, it was held as follows:

“16. The next question which requires consideration is - even if there is no provision for partly

referring the dispute to Arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the Suit or in some cases bifurcation of the Suit between parties who are parties to the Arbitration Agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a Suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a Judicial Authority is not allowed.

17. Secondly, such bifurcation of Suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the Civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting Judgments and Orders by two different forums.”

15. Once an Application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the Civil Court should be not to see whether the Court has jurisdiction. It should

be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the Notice of the Court that its jurisdiction has been taken away in terms of the procedure prescribed under a Special statute, the Civil Court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the Special statute. The general law should yield to the Special law - generalia specialibus non derogant. In such a situation, the approach shall not be to see whether there is still jurisdiction in the Civil Court under the General law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the Court.”

A reading of the judgment of the Apex Court in ***Swiss Timing Limited v. Commonwealth Games 2010 Organising Committee [2014 (6) SCC 677]***, indicates that the decision of the Apex Court in ***India House hold and Health Care Ltd vs. LG Household and Health Care Ltd [2007 (5) SCC 510]***, a decision relied upon by the Court below was limited to the facts of the particular case. The further decision relied upon by the Court below in ***N.Radhakrishnan vs Mastero Engineers, [2010 (1) SCC 72]*** has been held per incuriam. The Apex court has gone on to explain:

“20. This judgment in P.Anand Gajapathi's case [2000 (4)

SCC 539] was not even brought to the notice of the Court in *N. Radhakrishnan's case* [2010 (1) SCC 72]. In my opinion, judgment in *N. Radhakrishnan's case* is per incuriam on two grounds: firstly, the judgment in *Hindustan Petroleum Corpn. Ltd.* [2003 (6) SCC 503] though referred to has not been distinguished but at the same time is not followed also. The judgment in *P. Anand Gajapathi Raju* was not even brought to the notice of this Court. Therefore, the same has neither been followed nor considered. Secondly, the provisions contained in Section 16 of the Arbitration Act, 1996 were also not brought to the notice by this Court. Therefore, in my opinion, the judgment in *N. Radhakrishnan* does not lay down the correct law and cannot be relied upon.

21. As noticed above, the attention of this Court was not drawn to the provision contained in Section 16 of the Arbitration Act, 1996 in *N. Radhakrishnan*. Section 16 provides that the Arbitral Tribunal would be competent to rule on its own jurisdiction including ruling on any objection with regard to existence or validity of the arbitration agreement. The Arbitration Act emphasises that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It further provides that a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

22. The aforesaid provision came up for consideration by

this Court in Today Homes & Infrastructure (P) Ltd. Vs. Ludhiana Improvement Trust [2014 (5) SCC 68]. In the aforesaid case, the designated Judge of the Punjab & Haryana High Court had refused to refer the disputes to arbitration. The High Court had accepted the plea that since the underlying contract was void, the arbitration clause perished with it. The judgment of the High Court was challenged in this Court, by filing a Special Leave Petition. Before this Court it was submitted by the appellant that the High Court treated the application under Section 11(6) of the Arbitration Act as if it was deciding a suit but without adducing evidence. Relying on SBP & Co. v. Patel Engg. Ltd. [2005 (8) SCC 618], it was submitted that the High Court was only required to conduct a preliminary enquiry as to whether there was a valid arbitration agreement; or whether it was a stale claim. On the other hand, it was submitted by the respondents that once the High Court had found the main agreement to be void, the contents thereof including the arbitration clause are also rendered void.

23. This Court in Today Homes [2014 (5) SCC 68] rejected the aforesaid submission of the respondents with the following observations :

“13. We have carefully considered the submissions made on behalf of the respective parties and we are of the view that the learned Designated Judge exceeded the bounds of his jurisdiction, as envisaged in SBP & Co. In our view, the learned

Designated Judge was not required to undertake a detailed scrutiny of the merits and demerits of the case, almost as if he was deciding a suit. The learned Judge was only required to decide such preliminary issues such as jurisdiction to entertain the application, the existence of a valid arbitration agreement, whether a live claim existed or not, for the purpose of appointment of an arbitrator. By the impugned order, much more than what is contemplated under Section 11(6) of the 1996 Act was sought to be decided, without any evidence being adduced by the parties. The issue regarding the continued existence of the arbitration agreement, notwithstanding the main agreement itself being declared void, was considered by the seven Judge Bench in SBP & Co. and it was held that an arbitration agreement could stand independent of the main agreement and did not necessarily become otiose, even if the main agreement, of which it is a part, is declared void.

14. *The same reasoning was adopted by a member of this Bench (S.S. Nijjar, J.), while deciding Reva Electric Car Co. (P) Ltd. V. Green Mobil [(2012) 2 SCC 93], wherein the provisions of Section 16(1) in the backdrop of the doctrine of kompetenz kompetenz were considered and it was inter alia held that under Section 16(1), the legislature makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement, the arbitration*

clause, which formed part of the contract, had to be treated as an agreement independent of the other terms of the contract. Reference was made in the said judgment to the provisions of Section 16(1)(b) of the 1996 Act, which provides that even if the Arbitral Tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. It was also held that Section 16(1)(a) of the 1996 Act presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b) of the 1996 Act, the arbitration clause continues to be enforceable, notwithstanding a declaration that the contract was null and void.”

24. Keeping in view the aforesaid observations made by this Court in Today Homes case, I see no reason to accept the submission made by the learned counsel for the respondents that since a criminal case has been registered against the Chairman of the Organising Committee and some other officials of the petitioner, this Court would have no jurisdiction to make a reference to arbitration.

25. As noticed above, the concept of separability of the arbitration clause/agreement from the underlying contract has been statutorily recognised by this country under Section 16 of the Arbitration Act, 1996. Having provided for resolution of disputes through arbitration, parties cannot be permitted to

avoid arbitration, without satisfying the Court that it will be just and in the interest of all the parties not to proceed with the arbitration. Section 5 of the Arbitration Act provides that the Court shall not intervene in the arbitration process except in accordance with the provisions contained in Part I of the Arbitration Act. This policy of least interference in arbitration proceedings recognises the general principle that the function of Courts in matters relating to arbitration is to support arbitration process. A conjoint reading of Section 5 and Section 16 would make it clear that all matters including the issue as to whether the main contract was void/voidable can be referred to arbitration. Otherwise, it would be a handy tool available to the unscrupulous parties to avoid arbitration, by raising the bogey of the underlying contract being void. 26. I am of the opinion that whenever a plea is taken to avoid arbitration on the ground that the underlying contract is void, the Court is required to ascertain the true nature of the defence. Often, the terms “void” and “voidable” are confused and used loosely and interchangeably with each other. Therefore, the Court ought to examine the plea by keeping in mind the relevant statutory provisions in the Contract Act, 1872, defining the terms “void” and “voidable”. Section 2, the interpretation clause defines some of the relevant terms as follows:-

“2.(g) An agreement not enforceable by law is said to be void;

(h) An agreement enforceable by law is a contract;

- (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;*
- (j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.”*

The aforesaid clauses clearly delineate and differentiate between term “void” and “voidable”. Section 2(j) clearly provides as to when a voidable contract would reach the stage of being void. Undoubtedly, in cases, where the Court can come to a conclusion that the contract is void without receiving any evidence, it would be justified in declining reference to arbitration but such cases would be few and isolated. These would be cases where the Court can readily conclude that the contract is void upon a meaningful reading of the contract document itself. Some examples of where a contract may fall in this category would be :-

- (a) Where a contract is entered into by a person, who has not attained the age of majority (Section 11);*
- (b) Where both the parties are under a mistake as to a matter of fact essential to the agreement (Section 19);*
- (c) Where the consideration or object of the contract is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law or where the object of the contract is to indulge in any immoral activity or would be opposed to public policy. Glaring examples of this would be where a contract is*

entered into between the parties for running a prostitution racket, smuggling drugs, human trafficking and any other activities falling in that category.

(d) Similarly, Section 30 renders wagering contracts as void. The only exception to this is betting on horse racing. In the circumstances noted above, it may not be necessary for the Court to take any further evidence apart from reading the contract document itself. Therefore, whilst exercising jurisdiction under Section 11(6) of the Arbitration Act, the Court could decline to make a reference to arbitration as the contract would be patently void.

27. However, it would not be possible to shut out arbitration even in cases where the defence taken is that the contract is voidable. These would be cases which are covered under the circumstances narrated in Section 12 - unsoundness of mind; Section 14 - absence of free consent, i.e. where the consent is said to be vitiated as it was obtained by coercion (Section 15), Undue Influence (Section 16), Fraud (Section 17) or Misrepresentation (Section 18). Such a contract will only become void when the party claiming lack of free consent is able to prove the same and thus rendering contract void. This indeed is the provision contained in Section 2(j) of the Contract Act. In exercising powers under Section 11(6) of the Arbitration Act, the Court has to keep in view the provisions contained in Section 8 of the Arbitration Act, which provides that a reference to arbitration shall be made if a party applies not later than when

submitting his first statement on the substance of the dispute. In contrast, Section 45 of the aforesaid Act permits the Court to decline reference to arbitration in case the Court finds that the agreement is null and void, inoperative or incapable of being performed.

28. To shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration. Furthermore, there is no inherent risk of prejudice to any of the parties in permitting arbitration to proceed simultaneously to the criminal proceedings. In an eventuality where ultimately an award is rendered by Arbitral Tribunal, and the criminal proceedings result in conviction rendering the underlying contract void, necessary plea can be taken on the basis of the conviction to resist the execution/enforcement of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal and thus leaving little or no ground for claiming that the underlying contract is void or voidable, it would have the wholly undesirable result of delaying the arbitration. Therefore, I am of the opinion that the Court ought to act with caution and circumspection whilst examining the plea that the main contract is void or voidable. The Court ought to decline reference to arbitration only where the Court can reach the conclusion that the contract is void on a meaningful reading of the contract document itself without the requirement of any further proof.”

Following the decisions referred to, the Civil Revision Petition is allowed and the order under challenge is set aside. I.A.No.224 of 2012 in O.S.No.519 of 2011 on the file of learned I Additional Subordinate Judge, Salem, shall stand allowed. Court below is directed to refer the matter to the Arbitrator. No costs. Connected miscellaneous petition is closed.

22.07.2016

Index:yes/no
Internet:yes
gm

To

The I Additional Subordinate Judge,
Salem.

C.T.SELVAM, J

gm

Civil Revision Petition (PD) No.1883 of 2014

22.07.2016

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