THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

C.C.C.A. No.122 of 2015

JUDGMENT:

This appeal is preferred by the plaintiffs aggrieved by the order dated 24.07.2015 in I.A.No.233 of 2015 in O.S.No.522 of 2015 passed by XVII Additional Senior Civil Judge, City Civil Court, Hyderabad (FAC II Additional Senior Civil Judge) rejecting the plaint.

2) Factual matrix of the case is thus:

a) The plaintiffs' case is that they are carrying on flower vending and decoration business at 81/1, Old Maredpally, Secunderabad. While so, the officials of defendant— Company approached the plaintiffs offering to finance for their business expansion with attractive interest rates, incentives but without explaining the terms and conditions in detail. Defendant offered Rs.61 lakhs as loan repayable in 120 equal monthly instalments. Believing the words of the defendant, plaintiffs executed a blank unstamped and unregistered loan agreement dated 24.06.2010 for a sum of Rs.61 lakhs at Hyderabad. Later the defendant had filled up the blank spaces in the agreement at their office unilaterally without the consent of the plaintiffs.

b) The plaintiffs further case is that initially a sum of Rs.42,11,433/- was released to M/s.Indiabulls Financial Services Limited to clear a pre-existing loan. The same was cleared through the defendant's branch office. However, the plaintiffs were issued a cheque for a sum of Rs.16,93,159/- dated 17.07.2010 out of the total loan amount drawn on HDFC Bank, Hyderabad. It is also the case of the plaintiffs that at the time of taking signatures on documents, the officials of the defendant insisted upon and took away 12 blank signed cheques and ECSs from plaintiffs. Apart from the same, the officials of the defendant also took the original title deed of residential house bearing Plot No.81/1, Old Maredpally, Secunderabad as security. All the original documents relating to the property were in the possession of the defendant.

c) The plaintiffs' further case is that initially defendant had withdrawn EMIs for a period of 27 months but due to major bandhs and disturbances as part of Telangana agitation, they incurred heavy loss in business and slow in making repayments of EMIs and the said fact was also informed to the defendant. However, without recourse or the concern of the plaintiffs, the defendant got issued a legal notice dated 18.09.2012, seeking repayment of the entire loan amount and purportedly recalling the loan facility. Immediately after receipt of above said notice the plaintiffs approached the defendant and paid a sum equivalent to the pending EMIs to prove their bona fides, but the defendant unilaterally approached the Delhi High Court vide OMP No.1020 of 2012 restraining the plaintiffs from alienating the suit property. During the pendency of the proceedings before the High Court, the plaintiffs paid further instalments. Despite the same the defendant with a *mala fide* intention lodged a criminal complaint before the Punjagutta Police Station but later the same was closed as the dispute is civil in nature.

d) The further case of the plaintiffs is that the defendant unilaterally appointed a sole Arbitrator by name Sri Nitin Chadha for settlement of the dispute which was contested by plaintiffs and also by making a counter claim. The learned Arbitrator without following the principles of natural justice passed an award dated 21.05.2014. Aggrieved, plaintiffs filed OMP No.1038 of 2014 before the High Court of Delhi which was allowed on 31.01.2015 by setting aside the arbitration award. When the matter stood thus, despite arbitration award was set aside, the defendant sought for fresh arbitration proceedings again on the self same facts by unilaterally appointing Sri S.C.Jha as Arbitrator. The learned Arbitrator entertained the same and issued notice dated 07.05.2015. The plaintiffs' further case is that Arbitrator without reference to the earlier round of litigation initiated the present arbitration proceedings which are wholly illegal and untenable. Hence, the present suit.

e) In the said suit respondent herein filed I.A.No.233 of 2015 under Order VII Rule 11(d) r/w Section 151 CPC praying the Court to reject the plaint as barred by law contending that suit which is filed basing on agreement between the parties dated 24.06.2010 is not maintainable because as per clause 10.1 of the said agreement, dispute if any, arises out of or in connection with the said agreement shall be dealt under the provisions of Arbitration and Conciliation Act, 1996 (for short "Arbitration Act"). It is also contended that as per Section 16 of Arbitration Act interpretation of terms of the agreement including its validity can be dealt with by the Arbitrator alone and not by the civil court. It is also contended that as per Section 41(h) of Specific Relief Act, 1963 suit for injunction cannot be maintained when there is equally efficacious alternative remedy is available. The learned Judge after hearing both sides allowed the petition. Aggrieved, the plaintiffs filed the instant appeal.

3) The parties in this appeal are referred as they were arrayed in the Court below.

4) Heard arguments of Sri V.Hariharan, learned counsel for appellants/plaintiffs and Sri G.Kalyan Chakravarthy, learned counsel for respondent/defendant.

5) Learned counsel for appellants argued that the trial Court grossly erred in rejecting the plaint under Order VII Rule 11 of C.P.C on unsustainable objections that the said Court was not a principal Civil Court of original jurisdiction within the meaning of Section 2(e) of Arbitration and Conciliation Act, 1996 and so the suit ought to have been filed before the Chief Judge, City Civil Court, Hyderabad and

on another erroneous objection that suit was hit by Section 41(a) & (h) of Specific Relief Act, 1963. Learned counsel argued that the suit in question is a composite and comprehensive civil suit filed by plaintiffs seeking several reliefs under Specific Relief Act, 1963 and the said suit was not filed in terms of any of the provisions of Arbitration Act and therefore, none of the provisions of the aforesaid Act would apply to interdict the prosecution of the civil suit before the trial Court. In that view of the matter, he vehemently argued, the trial Court was palpably wrong in holding that the suit before the said Court was not maintainable in view of Section 2(e) of Arbitration Act. He further submitted that some of the reliefs claimed by the plaintiffs in the impugned suit such as restraining the respondent from presenting the ECSs or cheques and the relief of return of documents of title to the plaintiffs etc., will not come within the purview of Arbitral Tribunal to afford any relief and therefore, the trial Court was legally unjustified in rejecting the plaint holding that an equally efficacious relief was available to the plaintiffs before Arbitrator and hence the suit was not maintainable. He relied upon the decision reported in ***Sukanya Holdings Private Limited v. Jayesh H.Pandya and another***[1] to buttress his argument that when the reliefs claimed in civil suit are beyond the scope and subject matter of arbitral reference, suit need not be rejected to refer the parties to arbitration under Section 8 of Arbitration Act.

He thus argued that the suit is very much maintainable before the trial Court and hence the rejection order may be set aside by allowing the appeal.

b) Incidentally the appellants challenged the maintainability of second arbitration proceedings launched by the respondent on the contention that in OMP No.1038 of 2014, High Court of Delhi has already held that the agreement containing arbitration clause is an unenforceable document and the said decision attained finality and operates as *res judicata* for the second arbitration. On the principle of *res judicata* he relied upon the following decisions.

1) ***K.V.George v. Secretary to Government, Water and Power Department, Trivandrum and another***[2]

2) ***Vaish Aggarwal Panchayat v. Inder Kumar and others***[3]

6) In oppugnation, while supporting the impugned order, learned counsel for respondent argued that the High Court of Delhi in OMP No.1038 of 2014 set aside the previous award only on technical grounds, but it never held that arbitral agreement was unenforceable. By curing the mistakes pointed out in the said order, the respondent launched fresh arbitration proceedings and the same are not hit by the principle of *res judicata*. Therefore, the appellants cannot in the impugned plaint, seek for a

declaration that fresh arbitration proceedings are illegal and contrary to law. Even assuming that the appellants have such a right, they can raise legality of fresh arbitration proceedings, the jurisdiction of the Arbitrator and all other issues legally permissible to them before the Arbitrator and under Section 16 of Arbitration Act; the Arbitrator will answer the same in his award and if the appellants are aggrieved, they can challenge the award under Section 34 of the Arbitration Act. Hence, when an equally efficacious remedy is available to them under law the appellants cannot by trick or camouflage circumvent the provisions of Arbitration Act and file a civil suit on a naive contention that some of the reliefs fall outside the scope of arbitration. He contended that all the reliefs fall within the ambit of arbitration agreement and the civil suit is hopelessly barred under Order VII Rule 11(d) CPC and therefore, the trial Court rightly rejected the plaint. He further submitted that appellants having once participated in arbitration proceedings cannot turn round and say that fresh arbitration proceedings are not maintainable. He thus prayed to dismiss the appeal.

7) In the light of above rival arguments, the point for determination is:

"Whether the order of the trial Court rejecting the plaint is factually and legally sustainable?"

8) **POINT**: In the impugned order the trial Court rejected

the plaint as per Order VII Rule 11(d) CPC. The said provision reads thus:

> *"**Rule 11: Rejection of plaint**- The plaint shall be rejected in the following cases:—*
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> *(a) x x x x*
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> *(b) x x x x*
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> *(c) x x x x*
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> *(d) where the suit appears from the statement in the plaint to be barred by any law*
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> *(e) x x x x*
>
> *(f) x x x x*
>
> *Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff.*

9) The Apex Court in ***Kamala and others v. K.T.Eshwara Sa and others***[4] happened to discuss under what circumstances Order VII Rule 11(d) can be applied. It observed thus:

> *"15. Order VII, Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order VII, Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking Clause (d) of Order VII, Rule 11 of the Code is the averments made in the plaint. For that purpose,*

> *there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order VII, Rule 11 of the Code is one, Order XIV, Rule 2 is another.*
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> *16. For the purpose of invoking Order VII, Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject matter of an order under the said provision."*

So, from the above, it is clear that in order to decide whether the suit is barred by any law or not, the same has to be determined with reference to the averments in the plaint and for this purpose no evidence can be looked into.

10) Keeping the above principle in mind the plaint averments in O.S.No.522 of 2015 are perused. Sofaras the declaration and injunction reliefs relating to the validity of fresh arbitration proceedings are concerned, the plaintiffs in paras-17 to 21 pleaded as if the High Court of Delhi held that the very agreement was unenforceable but the respondent was seeking to initiate arbitration proceedings again on the self same facts under the void and unenforceable agreement by appointing fresh Arbitrator. It is forcibly pleaded that the arbitration proceedings are void and nonest in the eye of law. On these pleas they sought for a declaration that fresh arbitration proceedings initiated pursuant to void and unenforceable agreement are illegal and contrary to law and consequent injunction prohibiting the defendant from proceeding with the arbitration

proceedings.

11) Sofaras the other reliefs such as restraining the defendant from presenting further cheques, electronic cheques, ECIs. and directing the defendant to return the blank cheques and original documents etc. are concerned, necessary pleadings were made in para-5 of the plaint to the effect that the defendant obtained 12 blank cheques and ECIs from the plaintiffs and they started claiming of EMIs through those cheques. Now, the point is whether from the above averments in the plaint, can it be determined that the suit is barred by any law.

12) Since the plaintiffs bank on the order in OMP No.1038 of 2014 to claim that fresh arbitration proceedings are void and unenforceable, I perused the order dated 30.01.2015 in OMP No.1038 of 2014. The appellants challenged the earlier arbitration award on three main grounds. Firstly that the authorized representative of the claimant was not competent to file claim in the arbitration proceedings; secondly the sole Arbitrator was virtually an in-house Arbitrator who acted for respondent in more than 40 arbitrations over a period of three years and thirdly that by way of loan agreement a mortgage was created on immovable property of the petitioners and the said document was compulsorily registerable. The High Court of Delhi accepted the first two contentions and held that Mr. Choudary who filed claim before the Arbitral Tribunal was

only authorized to file execution proceedings but not to initiate arbitration proceedings or file a claim and further sole Arbitrator—Mr.Nitin Chadha appeared atleast in 28 cases as Arbitrator involving respondent as claimant within a short span of three years and so award passed by such an Arbitrator would be against the public policy. However, the High Court of Delhi rejected the third and crucial contention of the appellants regarding the loan agreement. It observed that the loan agreement itself does not create a mortgage, it only refers to the fact that the property belonging to the petitioners was mortgaged and the mortgage in question was the one by deposit of title deeds and even the letter of confirmation only recorded the fact such a mortgage having been already created and the said confirmation letter was not a document creating mortgage and that the document does not create the equitable mortgage and therefore was not compulsorily registerable. The Court further observed that in any event the loan agreement contains arbitration clause on which Arbitral proceedings are initiated. So, in short the High Court of Delhi held that the loan agreement which contains the arbitration clause does not require registration. Ultimately the High Court held that award was unsustainable in law on the first two grounds. Thus, as rightly contended by learned counsel for respondent, it never held that loan agreement was unenforceable or untenable under law. Be that it may, clause 10 of Facility Agreement (loan agreement) contains arbitration clause which reads thus:

> *"**Arbitration and jurisdiction**:*
> *10.1 Any and all disputes, claims, difference arising out of or in connection with this Agreement and the Schedule(s) of Terms/Repayment Schedules/attached hereto or the performance of this Agreement shall be settled by arbitration to be referred to a sole Arbitrator to be appointed by the RFL and the award thereupon shall be binding upon the parties to this Agreement. The place of the arbitration shall in Delhi or any other place as Arbitrator may decide, in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any statutory amendments thereof. The proceeding of Arbitration Tribunal shall be conducted in English Language. Each party to bear cost representing its case before the Arbitrator. Cost and charges of Arbitrator to be shared equally unless otherwise provided for in the award."*

It appears since the award was set aside on two technical grounds, the respondent filed fresh arbitration proceedings by curing the two defects pointed out by High Court of Delhi. Therefore fresh arbitration proceedings are not hit by *res judicata*. The appellants challenged the fresh arbitration proceedings seeking declaratory and injunction reliefs by way of civil suit. Though they claim that civil suit is comprehensive and composite one, it predominantly aims against continuation of fresh arbitration proceedings on the contention that the loan agreement containing arbitration clause was held as unenforceable agreement by the High Court of Delhi. The declaratory and injunction reliefs and the related pleas are against the spirit of judgment in OMP No.1038 of 2014 and hence, in my considered view, civil suit is not maintainable since such claims are barred by aforesaid judgment. The intended suit is barred by law also for another reason. If the appellants wish to challenge the jurisdiction of the Arbitral Tribunal or challenge the existence or validity of arbitration agreement, they can do so under Section 16 of the Arbitration Act before the Arbitrator appointed by the respondent and the Arbitrator will pass the necessary orders thereon and if the Arbitrator passes an ultimate award, the appellants can challenge the same if aggrieved, under Section 34 of the Arbitration Act. So, the remedy has been well-delineated under the provisions of Arbitration and Conciliation Act, 1996. As such, the appellants cannot subvert those provisions and institute the suit. The contention of the appellants that some of the reliefs sought for in the suit would not come within the purview of Arbitration and Conciliation Act, 1996 has no force. All the contentions made and reliefs claimed in the plaint, in my considered view, can be submitted before the Arbitrator for the decision. So at the outset, none of the grounds raised by the appellants are strong enough to set aside the order of the trial Court. Consequently the citations submitted by the appellants will have no application to the facts of the case.

13) In the result, I find no merits in the appeal and accordingly the CCCA No.122 of 2015 is dismissed by confirming the order of the trial Court in I.A.No.233 of 2015 in O.S.No.522 of 2015. No costs in the appeal.

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

U.DURGA PRASAD RAO, J

Date: 24.02.2016

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[1] AIR 2003 SC 2252

[2] (1989) 4 SCC 595

[3] 2015 (9) Scale 270

[4] AIR 2008 SC 3174 = (2008) 12 SCC 661