

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Civil Revision Petition No.2553 of 2012
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ORDER:

This revision under Article 227 of the Constitution of India is directed by the unsuccessful petitioner/defendant against the orders dated 13.02.2012 of the learned Senior Civil Judge, Ramachandrapuram passed in IA.no.963 of 2011 in OS.no.120 of 2011 filed by the defendant under Section 8 of the Arbitration and Conciliation Act, 1996 ('the Act', for short) requesting to refer the suit for arbitration.

2. I have heard the submissions of the learned counsel for the revision petitioner/defendant ('the defendant', for brevity) and the learned counsel for the respondent/plaintiff ('the plaintiff', for brevity). I have perused the material record.

3. The case of the petitioner/defendant in support of its request to refer the suit for arbitration, in brief, is this:

The defendant is a company incorporated under the provisions of the Indian Companies Act, 1956. It is engaged in the business of telecom services. In the course of its business, it had entered into a lease deed dated 09.12.2007 with G. Suryanarayana Murthy, who is the father of the plaintiff. The said lease deed was entered into in respect of the land admeasuring 400 Square Yards bearing H.No.9-129, Mangala Veedhi of East Godavari District. As per the deed of lease, the term of lease is 15 years commencing from 09.12.2007. Thus, the father of the plaintiff is the lessor and the defendant company is the lessee. On the death of the father of the plaintiff, the present plaintiff being his son is the lessor. The suit is filed by the plaintiff leveling various allegations. However, the lease agreement entered into by the father of the plaintiff

with the defendant company is still in force and the defendant company is in possession and enjoyment of the suit schedule property. The original lease deed is filed into Court. Clause 6(f) of the lease deed reads as under: 'It is hereby expressly agreed by and between the parties hereto that if any dispute doubt or difference or question with regard to interpretation of this agreement or in respect of the rights, duties and liabilities of the parties hereto arising out of these presents, then every dispute, doubt, difference or question shall be referred to arbitration as per the Arbitration and Conciliation Act, 1996 and the rules framed thereunder. Two arbitrators shall be appointed by each of the parties and the third to be appointed by the two arbitrators. The decision of the Arbitrators shall be final and binding on the parties'. In view of the above said clause and the provision of Section 8 of the Act, the trial Court, which is a judicial authority before which an action/suit is brought in respect of the matter which is the subject matter of the arbitration agreement, shall refer the parties to arbitration. Hence, the instant application is filed even before submitting the first statement on the substance of the dispute.

4. The case of the plaintiff, in brief, is this:

The allegation that the father of the plaintiff entered into a lease deed dated 09.12.2007 with the defendant company is false and incorrect. It is false to state that as per the terms of the lease, the period of lease is 15 years commencing from 09.12.2007 and that the plaintiff being the successor of his father-Suryanarayana Murthy is the present lessor. The allegation that the alleged lease agreement is in force is also false. In view of the alleged clause 6(f), in the said lease deed, the Court has to refer the parties to arbitration is not correct. The provisions of the Act do not apply to the present alleged lease agreement. The alleged lease agreement is forged; and, the signature on the alleged lease agreement is not that of the father of the plaintiff. The

signature of the father on the Will dated 23.08.2003 executed by him and the signature on the alleged lease deed are different. The lease agreement is not duly stamped and is not registered though it is required under law to be registered. There are blanks in clause 6(f) being relied upon by the defendant. The person who attested the lease deed as a witness is no other than the brother of the plaintiff. There are family disputes between the plaintiff and the said brother. The alleged lease deed might have been created with the help of the said attestor of the alleged lease deed. When a notice was got issued by the plaintiff, the lease deed should have been brought to the notice of the plaintiff, if really it was in existence. The lease deed must have been fabricated and forged and is invalid. The Court has power to refer the matter to Arbitrator when the subject matter of the suit and the dispute mentioned in the arbitration agreement are one and the same. When there is no valid agreement and when the validity of the alleged lease deed is questioned, the request of the defendant cannot be considered. The petition is liable to be dismissed. The petition may be dismissed.

5. At the time of enquiry before the trial Court, no oral and documentary evidence was adduced on either side. On merits and by the orders impugned, the trial Court had dismissed the petition of the defendant. Therefore, the defendant is before this Court.

6. The learned counsel for the defendant while reiterating the pleaded case of the defendant would contend as follows: - 'As per the lease deed entered into between the plaintiff's father and the defendant company, the term of lease is 15 years from 09.12.2007. As per the terms of the lease deed, the son of the lessor, that is, the plaintiff is the present lessor. The Court below ought to have seen that the genuineness or otherwise of the lease deed will have to be decided by the learned Arbitrator. The Court below ought to have seen that whether the lease deed is in operation or not will have to be decided by the

learned Arbitrator. In the decision of the Supreme Court in **National Agricultural Coop. Marketing Federation India Ltd.**^[1] it was observed that Section 16(1) of the Act makes it clear that while considering an objection with respect to existence or validity of the arbitration agreement, the arbitration clause which forms part of the contract has to be treated as independent of the other terms of the contract and that a decision that the contract was null and void shall not entail ipso jure invalidity of the arbitration clause.'

7. On the other hand, the learned counsel for the plaintiff while reiterating the contentions of the plaintiff had supported the orders of the Court below.

8. To begin with, it is necessary to note that the plaintiff, who is the son of Suryanarayana Murthy brought the suit against the defendant company for a mandatory injunction directing the defendant to remove the reliance tower in the plaint schedule property within a specified time that may be granted by the Court and to give liberty to the plaintiff to have it removed through the process of law at the expenses of the defendant on failure of the defendants to so remove the tower, for damages and costs. Admittedly, before submitting the first statement on the substance of the dispute, the defendant had filed the application under Section 8 of the Act *inter alia* contending that the suit that is brought in regard to a matter that is subject matter of an arbitration agreement is not entertainable by the civil Court and that the Civil Court shall refer the parties to arbitration. The plaintiff is resisting the said request of the defendant. Be it noted that the defendant contends that there is a lease deed entered into between the defendant and the late father of the plaintiff and that in the said lease deed dated 09.12.2007 there is an arbitration agreement or arbitration clause, that is, clause 6(f). which reads as under: '**It is hereby expressly agreed by and**

between the Parties hereto that if any dispute, doubt or difference or question with regard to interpretation of this Agreement or in respect of the rights, duties & liabilities of the Parties hereto arising out of these presents, then, every dispute, doubt, difference or question shall be referred to arbitration as per the Arbitration & Conciliation Act, 1996 and the rules framed thereunder. Two arbitrators shall be appointed by each of the Parties and the third to be appointed by the two arbitrators. The place of arbitration shall be []. The decision of the Arbitrators shall be final and binding on the parties.’ [Reproduced verbatim]. *Per contra*, the plaintiff contends that his father never entered into any such lease agreement and that the signature of his father on the lease agreement is forged. He would further contend that since the very document is forged, there is no arbitration agreement, much less valid arbitration agreement. Admittedly, the lease deed being relied upon by the defendant is neither duly stamped nor registered.

9. Therefore, the first question to be considered is – ‘whether on the ground that the lease deed, which contained the aforementioned arbitration clause, is neither duly stamped nor registered as required under law, the request of the defendant can be rejected?’. The answer to this question is no longer *res integra* in view of the decision in **SMS Tea Estates Pvt. Ltd. vs. Chandmari Tea Company Pvt. Ltd.**^[2]

9.1 In this cited case one of the questions that fell for consideration was – “Whether an arbitration agreement contained in an unregistered (but compulsorily registerable) instrument is valid and enforceable?”

The Supreme Court finally answered the question as follows:

An arbitration agreement does not require registration under the Registration Act. Even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. Therefore having regard to the

proviso to Section [49](#) of Registration Act read with Section [16\(1\)\(a\)](#) of the Act, an arbitration agreement in an unregistered but compulsorily registrable document can be acted upon and enforced for the purpose of dispute resolution by arbitration.

So the contention of the plaintiff herein that the arbitration agreement cannot be acted upon for the reason that the lease deed is not registered though registerable is not tenable and cannot be countenanced.

9.2 In the above cited decision, the Supreme Court had also considered the following further question: “What if an arbitration agreement is contained in an unregistered (but compulsorily registerable) instrument which is not duly stamped?” and had held as follows:

To find an answer, it may be necessary to refer to the provisions of the Indian Stamp Act, 1899 ('Stamp Act' for short). Section [33](#) of the Stamp Act relates to examination and impounding of instruments. The relevant portion thereof is extracted below:

33. Examination and impounding of instruments.-(1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed:

x x x x

Section [35](#) of Stamp Act provides that instruments not duly stamped is inadmissible in evidence and cannot be acted upon. The relevant portion of the said section is extracted below:

35. Instruments not duly stamped inadmissible in evidence, etc. -- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped: Provided that--

(a) any such instrument shall be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion.

x x x x

Having regard to Section [35](#) of Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section [35](#) of Stamp Act is distinct and different from Section [49](#) of Registration Act in regard to an unregistered document. Section [35](#) of Stamp Act, does not contain a proviso like to Section [49](#) of Registration Act enabling the instrument to be used to establish a collateral transaction.

The lease deed being relied upon by the defendant Company which is entered into for a term of 15 years in respect of an immovable property is admittedly engrossed on a stamp paper of the value of Rs.100/-. Undeniably it is not duly stamped. Therefore, the contention of the plaintiff that the lease deed is not duly stamped and, therefore, the arbitration agreement contained in the lease deed cannot be looked into unless the required stamp duty and penalty are duly paid is having acceptable merit.

10. Now coming to the contention of the plaintiff that the lease deed is forged, the question is – ‘Whether the trial Court is required under Law to decide the genuineness of the lease deed in question while considering the request in an application filed under Section 8 of the Act requesting to refer the parties to Arbitration?’

10.1 The Court below, after having taken into consideration the contention of the plaintiff in the Counter that the lease deed itself is forged and that the signature thereon does not belong to his father-Suryanarayana Murthy, had held that the requirements of Section 8 of

the Act are not fulfilled. The trial Court in the order impugned had also observed that the defendant did not come forward with the present plea when the plaintiff had got issued a notice prior to the institution of the suit and that the contention of the defendant-Company that the lease deed is in operation is not being accepted to by the plaintiff. The trial Court had thus rendered its decision based on the pleadings of the parties.

10.2 In this backdrop, the learned counsel for the defendant would contend that the Court below ought not to have decided the question in regard to the validity of the lease deed and the further question as to whether the lease agreement is operative or not as it is for the arbitrator to decide the said aspects. In support of the said contention, he had placed reliance on a decision of the Supreme Court in **National Agricultural Coop. Marketing Federation India Ltd.**, (1st supra). The facts of the case are as under: “The petitioner therein alleged that the agreement, which is an agreement to purchase from the petitioner certain goods subject to the terms and conditions therein, contained clause 17 providing for settlement of disputes by arbitration. Therefore the petitioner filed an application under Section 11 (5) of the Act for appointment of a sole arbitrator to adjudicate upon the disputes between the petitioner and the respondent. The respondent had resisted the petition stating that clause 17 is meaningless and redundant and that part I of the Act applies only where the place of arbitration is in India and that as place of arbitration is in Hongkong, outside India, the provisions of part I including Section 11 of the Act are inapplicable and the Court has no jurisdiction to appoint an arbitrator.” On the contentions of the parties, in the cited case, the following three questions were framed: (i) whether an arbitration clause comes to an end, if the contract containing such arbitration agreement, was abrogated? (ii) Whether Section 11 of the Act is inapplicable in regard to the arbitrations which are to take place outside India? (iii) Whether the appointment of the arbitrator and

the reference arbitration are governed by the laws in force in Hong Kong and not by the Arbitration and Conciliation Act, 1996?' On facts, the Supreme Court held that the contentions of the respondent have no merit and, therefore, the petition deserves to be allowed and accordingly, allowed the petition of the petitioner. In my well considered view, the facts of the instant case are totally different and therefore, the ratio in the said decision is not applicable to the facts of the case and is not helpful to the defendant. The decision in **Karnataka State Road Transport Corporation and another v. M. Keshava Raju**^[3] was also relied upon in support of the contention that as per the provision of Section 16 of the Act it is initially and primarily for the arbitral tribunal itself to determine whether it has jurisdiction subject to the ultimate control of the Court and that sub section (1) of Section 16 grants the arbitral tribunal the power to rule on its jurisdiction including ruling on any objections with respect to the existence or validity of arbitration agreement, and therefore, the civil court ought to have referred the parties to arbitration leaving the question in respect of existence or validity of arbitration agreement to be decided by the learned arbitrator. On the same proposition, the decision in **Lakshmi General Finance Limited v. Anantha Raja Rao [2002(1) ALD 716]** is also relied upon and it is contended basing on this decision that existence or non existence of an arbitration agreement is a matter to be left to be decided by the learned Arbitrator.

10.3 I have gone through the decisions. In my well considered view, the decisions are not helpful to the defendant. Be it noted that the learned Arbitrator is a creature of the arbitration agreement. The said question is a jurisdictional issue. Unless there is an arbitration agreement an application under Section 8 is not maintainable. The Civil Court has to refer the parties to arbitration only when there is an arbitration agreement between the parties. Therefore, the question – 'whether or not there is an enforceable or valid arbitration agreement'

shall not be left to the decision of the arbitral tribunal or the arbitrator. The above view of this Court gets reinforced by the ratio in the decision in **Bharat Rasiklal Ashra v. Gautam Rasiklal Ashra and another** ^[4] **[Manu/SC/0978/2011]** wherein the facts and ratio are as follows:

The appellant and 1st respondent are brothers. There was a deed of partnership between the two parties. Clause 11 of the said deed provided that all disputes between the partners regarding the rights and liabilities of partners or in regard to transactions or accounts of the partnership shall be referred to arbitration.

The 1st respondent filed an application under Section 11 of the Act alleging that the disputes has arisen between the appellant and the 1st respondent, who are partners of the 2nd respondent firm governed by the partnership deed and that clause 12 thereof provided for settlement of disputes by arbitration. He, therefore, prayed that the person named in his notice dated 19.08.2010 as arbitrator be appointed as the sole arbitrator in terms of the arbitration agreement contained in the partnership deed. The appellant resisted the said petition denying the existence of partnership deeds and asserted that the parties were governed by another partnership deed dated 12.06.1988 and, therefore, the question of appointment of arbitrator in terms of the arbitration clause contained in the alleged partnership deed dated 19.05.2000 did not arise.

The learned designate of the Chief Justice of the High Court made an order dated 11.02.2011 appointing a Commissioner for recording the evidence of the parties as it was necessary to decide whether the said two partnership deeds relied upon by the 1st respondent dated 06.09.1991 and 19.05.2000 were valid or not before a reference to be made in terms of an arbitration clause contained in the deed dated 19.05.2000. However, when the application subsequently came up for hearing before another designate of the Chief Justice, the earlier order for recording evidence was ignored and by order dated 31.03.2011, the application under Section 11 of the Act was allowed and an advocate was appointed as arbitrator and the learned designate held that a dispute raised was the subject matter of an application under Section 11 of the Act and had left open the question as to the two subsequent partnership deeds had been executed by the appellant or not for the decision of the arbitrator. The said

order is challenged in the appeal by special leave before the Supreme Court.

In the above background, the question before the Supreme Court is this: 'Where the arbitration agreement between the parties is denied by the respondent, whether the Chief Justice or his designate, in exercise of power under Section 11 of the Act, can appoint an arbitrator without deciding the question whether there was an arbitration agreement between the parties, leaving it open to be decided by the arbitrator?' The Supreme Court noted that the question is covered by the decision of **S.B.P & Company v. Patel Engineering Ltd.,[2005(8) SCC 618]** and **National Insurance Company Ltd., v. Boghara Ployfab Pvt., Ltd., [2009(1) SCC 267]** and held as follows:

In **S.B.P.& Company**, a Constitution Bench of this Court held that when an application under Section 11 of the Act is filed, it is for the Chief Justice or his designate to decide whether there is an arbitration agreement, as defined in the Act and whether the party who has made a request before him, is a party to such an agreement. The said decision also made it clear as to which issues could be left to the decision of the arbitrator. Following the decision in **S.B.P. & Company**, this Court in **National Insurance Company Ltd.** held as follows:

17. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in **SBP & Company**. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

17.1) *The issues (first category) which Chief Justice/his designate will have to decide are:*

(a) Whether the party making the application has approached the appropriate High Court.

(b) *Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.*

17.2) The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

(a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

17.3) The issues (third category) which the Chief Justice/his

designate should leave exclusively to the arbitral tribunal are:

(i) Whether a claim made falls within the arbitration Clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.

(emphasis supplied)

9. It is clear from the said two decisions that the question whether there is an arbitration agreement has to be decided only by the Chief Justice or his designate and should not be left to the decision of the arbitral tribunal. This is because the question whether there is arbitration agreement is a jurisdictional issue and unless there is a valid arbitration agreement, the application under Section 11 of the Act will not be maintainable and the Chief Justice or his designate will have No. jurisdiction to appoint an arbitrator under Section 11 of the Act. This Court also made it clear that only in regard to the issues shown in the second category, the Chief Justice or his designate has the choice of either deciding them or leaving them to the decision of the arbitral tribunal. Even in regard to the issues falling under the second category, this Court made it clear that where allegations of forgery or fabrication are made in regard to the documents, it would be appropriate for the Chief Justice or his designate to decide the issue. In view of this settled position of law, the issue whether there was an arbitration agreement ought to have been decided by the designate of the Chief Justice and only if the finding was in the affirmative he could have proceeded to appoint the Arbitrator.

The Supreme Court accordingly allowed the appeal and had set aside the order of the High Court and remitted the matter to the High Court to decide the questions whether the deed dated 19.5.2000 was forged or fabricated and whether there is a valid and enforceable arbitration agreement between the parties.

10.4 In the well considered view of this Court, the ratio in the above decision on an analogy squarely applies to the facts of the instant case. Nevertheless, the Court below having taken into consideration the very contention of the plaintiff that the signature of his father on the lease deed wherein the disputed arbitration agreement is contained is forged had dismissed the petition. Indeed, the Court below ought to have given an opportunity to both the sides to adduce evidence and ought to have decided as to whether the lease deed is genuine or not before coming to a conclusion as to whether or not there is an enforceable and valid arbitration agreement.

10.5 Further, in **Sukanya Holdings Pvt. Ltd., v. Jayesh H. Pandya and another**^[5] [MANU/SC/0310/2003] the Supreme Court held as follows:

The relevant language used in Section 8 is--"*in a matter which is the subject matter of an arbitration agreement*". Court is required to refer the parties to arbitration. Therefore, 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, there is no question of application of Section 8. The word '*a matter*' indicates entire subject matter of the suit should be subject to arbitration agreement.

The Supreme Court further held as follows:

‘.. bifurcation of suit in two parts, one to be decided by the arbitral tribunal and 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.’

Therefore, from the ratio in the decision, it is clear that when the dispute involved in the suit is in two parts; one to be decided by arbitral Tribunal and the other to be decided by the civil Court, it is for the civil Court to decide the suit as bifurcation is not permissible. Therefore, it is for the trial Court also to decide as to whether the subject matter of the suit is also the subject matter of the arbitration clause, in case the Court comes to the conclusion that the lease deed is genuine.

13. Viewed thus, this Court finds that the matter requires to be remitted to the Court below for fresh disposal of the application in accordance with the legal position applicable.

14. In the result, the Civil Revision Petition is allowed and the order

impugned is set aside. IA.no.963 of 2011 in OS.no.120 of 2011 is remitted to the trial Court to also decide the following questions viz., – “(i) whether the lease deed dated 09.12.2007 was forged or not?; (ii) whether there is a valid and enforceable agreement between the parties?; and, (iii) whether the subject matter of the suit is also the subject matter of the valid and enforceable arbitration agreement, if any, between the parties?” while disposing of the said application afresh on merits and in strict accordance with the procedure established by law. It is needless to say that the trial Court shall now give an opportunity to both the sides to adduce oral evidence, if the parties so desire, and then decide the application as directed, however, uninfluenced by any of its observation in the order impugned in this revision. It is made clear that this Court did not express any opinion on the merits of the matter except in regard to the aspect that the document (lease deed) is not duly stamped and that it cannot be admitted for any purpose unless the stamp duty and penalty payable are duly paid and collected.

No order as to costs.

Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SEETHARAMA MURTI, J

24th June 2016

Vjl

[\[1\]](#) (2007) 5 SCC 692

[\[2\]](#) (2011) 14 SCC 66

[\[3\]](#) AIR 2004 Karnataka 109

[\[4\]](#) (2012) 2 SCC 144

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