

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

CIVIL MISCELLANEOUS APPEAL NO.851 OF 2016

Between:

Sunway Opus International (P) Limited .. Appellant

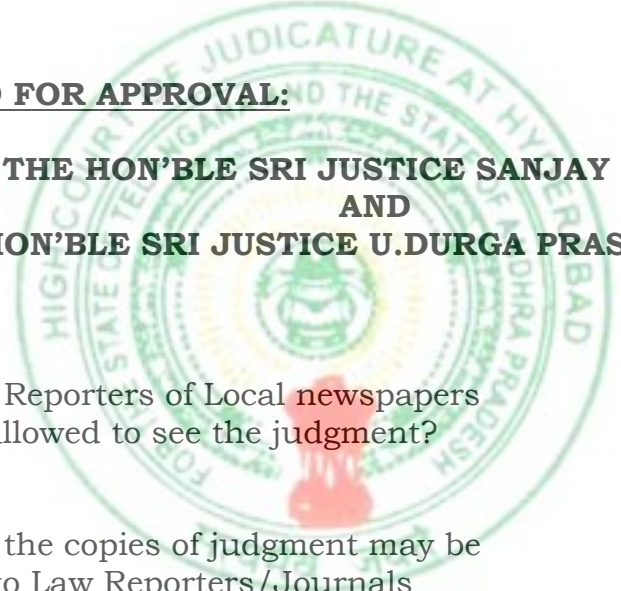
Vs.

Sri Raghava Constructions Limited .. Respondent

DATE OF THE JUDGMENT PRONOUNCED: 23.12.2016

SUBMITTED FOR APPROVAL:

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO**

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1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
 2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No
 3. Whether Their Lordships wish to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

U.DURGA PRASAD RAO, J

*** THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO
+ CIVIL MISCELLANEOUS APPEAL NO.851 OF 2016**

% DATED 23RD DECEMBER, 2016

Sunway Opus International (P) Limited .. Appellant

Vs.

\$ Sri Raghava Constructions Limited .. Respondent

<Gist:

>Head Note:



! Counsel for the Appellant : Sri M.V.Pratap Kumar

^Counsel for Respondent : Smt. Manjiri S. Ganu

? CASES REFERRED:

1. (2012) 9 SCC 552
2. AIR 2014 SC 1093
3. (2000) 9 SCC 512
4. AIR 2002 SC 2308
5. AIR 2004 AP 280
6. (1993) 3 SCC 161
7. 1980 (2) ALT 472
8. AIR 1983 AP 128
9. ALT 2015 (3) 498

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO
CIVIL MISCELLANEOUS APPEAL NO.851 OF 2016

J U D G M E N T

This civil miscellaneous appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for brevity, 'the Act of 1996') arises out of the docket order dated 30.08.2016 passed by the learned XI Additional Chief Judge, City Civil Court, Hyderabad, in I.A.No.885 of 2016 in Arb.O.P.No.1400 of 2016.

The said OP was filed by the respondent herein under Section 9 of the Act of 1996 seeking a direction to the appellant to furnish security for a sum of Rs.37,47,15,776/- or upon its failure to do so, to attach the petition schedule A to L properties. I.A.No.885 of 2016 was filed therein by the respondent seeking an interim injunction restraining the appellant from alienating the said properties until the final outcome of the arbitration proceedings. Initially, by order dated 18.07.2016, the Court below directed both parties to maintain *status quo* in respect of alienation of the petition schedule properties till 01.08.2016.

While so, the appellant, being the respondent in the OP, filed its counter in the IA on 01.08.2016, questioning the very jurisdiction of the Court below to entertain the OP. However, the Court below adjourned the matter thereafter from time to time and heard arguments on 30.08.2016. On the said day, the docket order under appeal was passed extending the interim order granted earlier until further orders and final orders were reserved. As the Court below failed to pronounce final orders despite the lapse of more than 50 days and as 90 days had elapsed since the passing

of the initial *ex parte* order of *status quo* on 18.07.2016, the respondent in the OP preferred this appeal.

Taking note of the issue raised by the appellant with regard to the jurisdiction of the Court below to entertain the O.P, this Court granted interim suspension of the order under appeal on 26.10.2016. CMAMP No.1845 of 2016 was filed by the respondent to vacate the said order. However, as comprehensive arguments were advanced by Sri M.V.Pratap Kumar, learned counsel for the appellant, and Smt. Manjiri S. Ganu, learned counsel for the respondent, the appeal itself is taken up for final disposal.

Sri M.V.Pratap Kumar, learned counsel, would assail the order under appeal on two grounds. Firstly, he would contend that the Court below lacked jurisdiction to entertain the Arbitration OP in view of Section 42 of the Act of 1996. He would state that the contract dated 23.03.2011 between the parties was in relation to construction of town houses at Ameenpur Village, Patancheru Mandal, Medak District, and Clause 9 therein, relating to settlement of disputes, provided for recourse being taken to arbitration and Clause 9.4A provided that the place of arbitration shall be at Hyderabad. *Ergo*, he would contend that the cause of action in relation to the contract or the arbitration proceedings emanating therefrom can be said to arise either in Medak District or at Hyderabad. He would point out that the respondent earlier chose to invoke the jurisdiction of the learned I Additional District Judge, Medak at Sangareddy, under Section 9 of the Act of 1996 in relation to this very contract in Arb.O.P.No.268 of 2013, wherein it sought a direction to the appellant not to terminate the contract and not to encash the bank guarantees furnished by it. This

Arbitration OP was however dismissed as withdrawn on 04.07.2013 on the ground that it had become infructuous as the bank guarantees were already encashed. Learned counsel would therefore assert that Section 42 of the Act of 1996 is attracted and in terms thereof, it was not open to the respondent to thereafter choose a different forum, viz., the Court below at Hyderabad, to file another petition under Section 9 of the Act of 1996.

The second ground of attack urged by the learned counsel is that the Court below ignored the requirements of the Code of Civil Procedure, 1908. He would state that the Court below was mandated thereby to give reasons while passing the *ex parte* order of *status quo* on 18.07.2016 but failed to satisfy this statutory obligation. Learned counsel would point out that the order dated 18.07.2016 is bereft of the reason as to what compelled the Court below to grant such an *ex parte* order of *status quo* with regard to alienation of the petition schedule properties, translating into an *ex parte* injunction, before putting the appellant on notice. Learned counsel would contend that the Court below was also unmindful of the dictates of Order 39 Rule 3-A CPC which ordains that when an injunction is granted without giving notice to the opposite party, the Court should endeavour to finally dispose of the application within 30 days from the date of granting such injunction.

Per contra, Smt. Manjiri S. Ganu, learned counsel, would contend that as the Court below has already concluded the hearing and reserved final orders, no cause is made out at this stage for interference by this Court in exercise of appellate jurisdiction. She would further state that it is premature and wholly unnecessary for this Court to go into the maintainability of the Arbitration OP

before the Court below, when the present appeal is directed only against the order of *status quo* passed therein.

Learned counsel would state that Arb.O.P.No.268 of 2013 filed by her client before the Medak Court was dismissed as infructuous as it was rendered infructuous owing to termination of the contract and invocation of the bank guarantees. She would assert that as there was no adjudication by the Medak Court in the said O.P, Section 42 of the Act of 1996 would not be attracted and that the Court below has jurisdiction to entertain the fresh petition filed by her client under Section 9 of the Act of 1996. She would point out that the 'jurisdiction clause' in the petition filed in Arb.O.P.No.1400 of 2016 clearly brought out that as the seat of the arbitration was at Hyderabad and the arbitration proceedings had also commenced and were being conducted at Hyderabad, the Court below had jurisdiction to entertain the OP. She would lastly contend that the lapses, if any, on the part of the Court below in following the statutory mandate should not be visited upon her client and doing so would result in penalizing the litigant for the mistakes committed by the Court. She would further state that taking advantage of the interim suspension granted by this Court in the present appeal, the appellant already resorted to part-alienation of the petition schedule properties.

At the outset, it would be necessary to examine the statutory embargo posited by Section 42 of the Act of 1996. This provision reads as under:

'42. Jurisdiction :

Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under

this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.’

In effect, the above statutory provision postulates that where two Courts have jurisdiction simultaneously in relation to an arbitration proceeding and recourse is taken by a party to one of them, that Court alone would have jurisdiction thereafter over the arbitral proceedings and all subsequent applications arising out of such arbitration agreement and arbitral proceedings, to the exclusion of the other Court.

Be it noted that in terms of the decision of the Supreme Court in **BHARAT ALUMINIUM COMPANY V/s. KAISER ALUMINIUM TECHNICAL SERVICES INC.**¹, in cases relating to arbitration proceedings, two Courts may possibly have jurisdiction under the Act of 1996 – the Court having jurisdiction over the place/seat of the arbitration proceedings and if such arbitration proceedings are held at a different location, the Court having jurisdiction over the cause of action, the subject matter of the dispute which falls for resolution in such arbitration proceedings. In such an event, as pointed out in **BHARAT ALUMINIUM COMPANY**¹, a party to the arbitration proceedings would have the choice to opt for one of the two jurisdictional Courts. However, by virtue of the statutory bar posited by Section 42 of the Act of 1996, once a party to the arbitration proceedings exercises this choice, it would be binding thereafter on both parties and that Court alone would have jurisdiction over the arbitral proceedings and all

¹ (2012) 9 SCC 552

subsequent applications arising out of the arbitration agreement and the arbitral proceedings to the exclusion of the other Court, which would have otherwise had jurisdiction to entertain the same.

It is relevant to note that Section 42 of the Act of 1996 does not require the Court which is approached in the first instance to adjudicate on merits the application presented to it. The statutory provision merely postulates that once 'any application' with respect to an arbitration agreement is made in the competent Court, that Court alone shall have jurisdiction thereafter. It is therefore sufficient if the party makes 'any application' and no more. Admittedly, the respondent filed Arb.O.P.No.268 of 2013 before the Medak Court, which had jurisdiction to entertain the same as the land which is the subject matter of the contract between the parties is situated within its jurisdiction. Having exercised this choice, the respondent was bound thereby and could not have chosen the Court below at Hyderabad for the next application in relation to the very same contract and arbitration agreement.

The Supreme Court had occasion to consider this very issue in ***EXECUTIVE ENGINEER, ROAD DEVELOPMENT DIVISION NO.III, PANVEL V/s. ATLANTA LIMITED***². Therein, challenge to the Arbitration Award was made on the same day by both parties to the arbitration proceedings before two different Courts. The State questioned the Award before the District Judge, Thane, while the opposite party did so before the Bombay High Court. As both applications were made on the very same day, the Supreme Court found that Section 42 of the Act of 1996 would have no

² AIR 2014 SC 1093

application. However, the following observations made in relation to this statutory provision are of guidance.

‘A perusal of Section 42 of Arbitration Act reveals a clear acknowledgment by the legislature, that the jurisdiction for raising a challenge to the same arbitration agreement, arbitral proceeding or arbitral award, could most definitely arise in more than one court simultaneously. To remedy such a situation Section 42 of the Arbitration Act mandates, that the court wherein the first application arising out of such a challenge is filed, shall alone have the jurisdiction to adjudicate upon the dispute(s), which are filed later in point of time. The above legislative intent must also be understood as mandating, that disputes arising out of the same arbitration agreement, arbitral proceeding or arbitral award, would not be adjudicated upon by more than one court, even though jurisdiction to raise such disputes may legitimately lie before two or more courts.’

It is therefore clear that the Court below had no jurisdiction to entertain the second application filed by the respondent under Section 9 of the Act of 1996, in view of the fact that the respondent had already chosen to approach the jurisdictional Medak Court.

The contention of Smt. Manjiri S. Ganu, learned counsel, that this Court should not go into the maintainability of the Arbitration OP, as the present appeal is directed only against the interlocutory order passed therein, cannot be countenanced. Accepting the argument of the learned counsel would mean that notwithstanding the conclusion arrived at by this Court that Section 42 of the Act of 1996 had application, the Court below would have to be permitted to proceed with the Arbitration OP and render a decision therein, requiring the party aggrieved by such order to invoke the remedy of appeal to get it set aside. This Court, being a superior Court of

record, would not only have the power but also the duty to correct and advise the subordinate Courts as to possible jurisdictional errors so as to prevent miscarriage of justice. Issuance of the writ of prohibition by this Court under Article 226 of the Constitution to an inferior Court usurping jurisdiction which does not belong to it is a species of this inherent power. It would therefore be well within the authority of this Court to interfere at any stage of the proceedings pending before a subordinate Court if a jurisdictional ground is made out, in any related case brought before it, which goes to the very root of the maintainability of the proceedings before the subordinate Court. This would not only help in guiding subordinate Courts but would also prevent unnecessary wastage of precious judicial time and obviate aggrieved litigants from expending valuable time and effort in remedial processes.

Smt. Manjiri S. Ganu, learned counsel, placed reliance on **SHAHZADI BEGUM V/s. BADRUNNISA BEGUM**³. The said case related to a suit for declaration of title wherein an application was filed for an interim injunction. The injunction granted earlier stood vacated by the trial Court leading to the filing of an appeal before the High Court. The High Court disposed of the appeal holding that the suit was not maintainable but notwithstanding the same, directed that the plaintiff should be given an opportunity to file a third claim in the executing Court which was to be decided on merits. In this context, the Supreme Court observed that the action of the High Court in holding that the suit was not maintainable was peculiar and that the directions aforementioned issued by the High Court were totally devoid of jurisdiction. The Supreme Court

³ (2000) 9 SCC 512

held that, on the question of legality of the order passed by the trial Court vacating an ad interim injunction, the appellate Court could decide the question as to whether the plaintiff was entitled to an ad interim injunction during the pendency of the suit. The directions of the High Court were accordingly set aside. This judgment is not an authority to support the proposition canvassed by the learned counsel that this Court has no jurisdiction to go into the maintainability of the proceedings before the Court below while exercising appellate jurisdiction over an interlocutory order arising therefrom. This contention is therefore rejected.

Apart from the jurisdictional aspect referred to *supra*, the Court below seems to be blissfully ignorant of the requirements of the Code of Civil Procedure, 1908. It may be noticed that in ***I.T.I. LTD. V/s. SIEMENS PUBLIC COMMUNICATIONS NETWORK LTD.***⁴, the Supreme Court pointed out that though the Act of 1996 does not specifically provide for application of the Code of Civil Procedure, 1908, there is no express prohibition against its application and therefore, once there is no such express exclusion, applicability of the Code could not be excluded by inference. A similar view was taken by a Division Bench of this Court in ***B.RAMA SWAMY V/s. B.RANGA SWAMY***⁵. Significantly, the respondent itself filed I.A.No.885 of 2016 in Arb.O.P.No.1400 of 2016 under Section 9 of the Act of 1996 read with Order 39 Rules 1 & 2 CPC. The Court below therefore ought to have been sensitive to the mandate of Order 39 Rules 3 and 3-A CPC. The proviso to Order 39 Rule 3 CPC states in no uncertain terms that where the Court proposes to grant an injunction without giving notice to the

⁴ AIR 2002 SC 2308

⁵ AIR 2004 AP 280

opposite party, it shall record the reasons as to why it formed an opinion that the object of granting the injunction would be defeated by delay. Dealing with this provision in **SHIV KUMAR CHADHA V/s. MUNICIPAL CORPORATION OF DELHI**⁶, the Supreme Court observed that the requirement postulated thereby was consistent with the principle that a party to the suit who is being restrained from exercising a right must be informed as to why the Court, instead of following the requirement of putting him on notice under Rule 3, took recourse to the procedure under the proviso thereto. The mandatory nature of this statutory requirement was also stressed upon by this Court in **BACHARAJ SINGHVI V/s. HASTIMAL KOTHARI**⁷, **E.MANAGAMMA V/s. A. MUNISWAMY NAIDU**⁸ and **P.GAYAZUDDIN V/s. STATE OF ANDHRA PRADESH**⁹.

The Court below seems to have been equally unmindful of the mandate of Order 39 Rule 3-A CPC. Having granted an unreasoned *ex parte* order of *status quo* in respect of alienation of the petition schedule properties, the Court below did not even endeavour to dispose of the I.A within 30 days, as statutorily mandated, notwithstanding the appellant herein raising a crucial jurisdictional aspect. That apart, the Court below blindly extended the interim order completely ignoring the said objection.

Viewed thus, this Court finds that the approach of the Court below was erroneous on facts and in law on counts more than one.

The Civil Miscellaneous Appeal is accordingly allowed setting aside the order under appeal. This Court further holds that

⁶ (1993) 3 SCC 161

⁷ 1980 (2) ALT 472

⁸ AIR 1983 AP 128

⁹ ALT 2015 (3) 498

Arb.O.P.No.1400 of 2016 is not maintainable before the learned XI Additional Chief Judge, City Civil Court, Hyderabad, in view of Section 42 of the Arbitration and Conciliation Act, 1996. The Court below shall take steps accordingly.

Pending Miscellaneous Petitions, if any, shall stand closed in the light of this final order. No costs.

SANJAY KUMAR, J.

23rd DECEMBER, 2016.

**Note: L.R. copy to be marked
B/o PGS**

U.DURGA PRASAD RAO, J

