



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 13.02.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P (MD) No.49 of 2017 (PD)
& C.M.P. (MD) No.174 of 2017

Raju, S/o.Perumalsamy

.. Petitioner

Vs.

Muthulakshmi, W/o.Ramraj

.. Respondent

PRAYER: Civil Revision Petition is filed, under Article 227 of the Constitution of India, to set aside the fair and decreetal order, dated 05.12.2016, passed in I.A.No.78 of 2016 in O.S.No.1 of 2016, by the learned District Munsif, Periyakulam.

For Petitioner : Mr.P.Ganapathi Subramanian

For Respondent : Mr.M.A.M.Raja

ORDER

This Civil Revision Petition is filed to set aside the fair and decreetal order, dated 05.12.2016, passed in I.A.No.78 of 2016 in O.S.No.1 of 2016, by the learned District Munsif, Periyakulam.

2. The petitioner is the defendant and the respondent is the plaintiff in O.S.No.1 of 2016 on the file of the District Munsif Court, Periyakulam. The respondent filed the said suit for permanent injunction restraining the petitioner from alienating or encumbering the suit properties either directly or through Power Agent. According to the respondent, both the petitioner and the respondent were carrying on real estate business in partnership. The respondent is selling plots and is not giving account to the petitioner and is committing fraud.

3. The petitioner filed I.A.No.78 of 2016 under Section 8 of the Arbitration and Conciliation Act, 1996 to refer the dispute to the Arbitrator. According to the petitioner, as per Clause 20 of the Partnership Deed, dated 01.04.2012, the dispute between the petitioner and the respondent with regard to partnership ~~dispute should be resolved only by arbitration.~~

4. The respondent filed counter affidavit and submitted that the petitioner played fraud on the respondent and therefore, the



matter can be decided only by way of letting in evidence in the suit and it cannot be referred to the Arbitrator. The learned counsel for the respondent relied on the judgment reported in **2010 (1) SCC 72 [N.Radhakrishnan Vs. Maestro Engineers]** and prayed for dismissal of the application.

5. The learned District Munsif, Periyakulam, considering the averments made in the affidavit, counter affidavit and also the materials available on record, dismissed the application.

6. Against the said order of dismissal, dated 05.12.2016, the petitioner has come out with the present Civil Revision Petition.

7. The learned counsel for the petitioner submitted that when the respondent has admitted the Arbitration Agreement, ought not to have opposed the application to refer to Arbitration and submitted that mere allegation of fraud will not empower the Court to decide the dispute instead of referring the matter to Arbitration.

8. In support of his submissions, the learned counsel for the petitioner relied on the judgment reported in **AIR 2016 SC 4675 [A.Ayyasamy Vs. A.Paramasivam and others]**, wherein at paragraph 18, it has been held as follows:-

"18. A perusal of the aforesaid two paragraphs brings into fore that the Law Commission has recognised that in cases of serious fraud, courts have entertained civil suits. Secondly, it has tried to make a distinction in cases where there are allegations of serious fraud and fraud simpliciter. It, thus, follows that those cases where there are serious allegations of fraud, they are to be treated as non-arbitrable and it is only the civil court which should decide such matters. However, where there are allegations of fraud simpliciter and such allegations are merely alleged, we are of the opinion that it may not be necessary to nullify the effect of the arbitration agreement between the parties as such issues can be determined by the Arbitral Tribunal."

9. Further, the learned counsel for the petitioner submitted that the judgment reported in **2010 (1) SCC 72** [cited supra] relied on by the learned counsel for the respondent before the learned District Munsif, is not applicable to the present case and the said judgment has been overruled in the judgment reported in **AIR 2014 SC 3723 [Swiss Timing Limited Vs. Organising Committee, Common Wealth Games 2010]**, wherein at paragraphs 19 to 21, it has been held as follows:

"19. Having found that the subject-matter of the suit was within the jurisdiction of the arbitration, it was held that the disputes cannot be referred to arbitration. This Court approved the finding of the High Court that since the

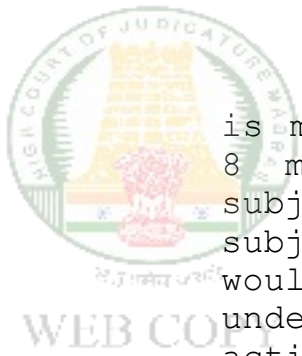


case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation cannot be properly gone into by the arbitrator. In my opinion, the aforesaid observations run counter to the ratio of the law laid down by this Court in *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums* [2003 (6) SCC 503 : AIR 2003 SC 2881], wherein this Court in paragraph 14 observed as follows:

"If in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the agreement is accepted by both the parties as also by the courts below. Therefore, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration."

20. In my opinion, the observations in *Hindustan Petroleum Corpn. Ltd.* [AIR 2003 SC 2881 : 2003 AIR SCW 3558] (*supra*) lays down the correct law. Although, reference has been made to the aforesaid observations in *N. Radhakrishnan* [AIR 2010 SC (Supp) 307 : 2010 AIR SCW 331] (*supra*) but the same have not been distinguished. A two-Judge Bench of this Court in *P. Anand Gajapathi Raju v. P.V.G. Raju* [2000 (4) SCC 539 : AIR 2000 SC 1886], had earlier considered the scope of the provisions contained in Section 8 and observed as follows:

"8. In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that. As already noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. The language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the award. The court to which the party shall have recourse to challenge the award would be the court as defined in clause (e) of Section 2 of the new Act and not the court to which an application under Section 8 of the new Act



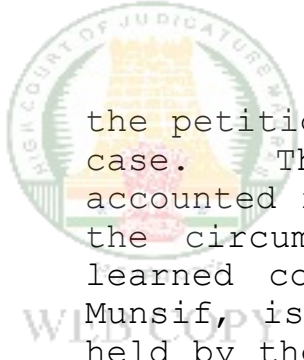
is made. An application before a court under Section 8 merely brings to the court's notice that the subject-matter of the action before it is the subject-matter of an arbitration agreement. This would not be such an application as contemplated under Section 42 of the Act as the court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent court within the meaning of Section 2(e) of the new Act."

21. This judgment was not even brought to the notice of the Court in *N. Radhakrishnan (supra)*. In my opinion, the judgment in *N. Radhakrishnan (AIR 2010 SC (Supp) 307 : 2010 AIR SCW 331) (supra)* is per incuriam on two grounds: Firstly, the judgment in *Hindustan Petroleum Corpn. Ltd. [AIR 2003 SC 2881 : 2003 AIR SCW 3558] (supra)* though referred has not been distinguished but at the same time is not followed also. The judgment in *P. Anand Gajapathi Raju [AIR 2000 SC 1886 : 2000 AIR SCW 1489] (supra)* was not even brought to the notice of this Court. Therefore, the same has neither been followed nor considered. Secondly, the provision 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 (supra)* does not lay down the correct law and cannot be relied upon."

10. The learned counsel for the respondent submitted that the petitioner has committed fraud by not rendering the account after selling plot belonging to the partners and the learned District Munsif has rightly dismissed the application.

11. I have considered the submissions of the learned counsel appearing for the parties and perused the materials available on record.

12. The respondent had admitted that there is an arbitration clause in the partnership agreement. In the averments in the plaint, the respondent has stated that the petitioner has played fraud and has not rendered any account for the plots sold by him. In the circumstances, the respondent has filed the suit for permanent injunction. A reading of the plaint would show that the grievance of the respondent is that the petitioner has sold plots belonging to the partnership firm, in which, both the petitioner and the respondent are partners and did not properly account for sale consideration. The relief sought for by the respondent in the suit is permanent injunction restraining the petitioner from further alienating the suit properties belonging to the partnership firm. The dispute between the parties is that the petitioner after selling plots, failed to account for. In the circumstances, the judgments relied on by the learned counsel for



the petitioner are squarely applicable to the facts of the present case. The allegation that the petitioner has not properly accounted for sale of the plots can be decided in arbitration. In the circumstances, I hold that the judgment relied on by the learned counsel for the respondent before the learned District Munsif, is not applicable to the facts of the case and has been held by the Hon'ble Apex Court that the said judgment does not lay down correct law and cannot be relied on. Hence, the fair and decreetal order, dated 05.12.2016, passed in I.A.No.78 of 2016 in O.S.No.1 of 2016, by the learned District Munsif, Periyakulam, is set aside and the matter is remanded back to the District Munsif Court, Periyakulam, for fresh consideration. The Civil Revision Petition is allowed accordingly. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

/True copy/

Sub Assistant Registrar

To

The District Munsif,
Periyakulam.

+1 cc to M/s.P.Ganapathi Subramanian, Advocate in SR.No.7850

SMN2

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