

THE HON'BLE SRI JUSTICE SANJAY KUMAR

CIVIL REVISION PETITION NO.4725 OF 2017

O R D E R

This civil revision petition under Article 227 of the Constitution arises out of the order dated 18.08.2017 passed by the learned Principal Junior Civil Judge, Rajamahendravaram, in I.A.No.705 of 2017 in O.S.No.63 of 2017. The said I.A. was filed under Section 8(1) of the Arbitration and Conciliation Act, 1996 (for brevity, 'the Act of 1996') to refer the parties to arbitration in terms of the arbitral agreement dated 12.08.2016. By the order under revision, the trial Court allowed the I.A. and referred the parties to arbitration. Aggrieved thereby, the plaintiff in the suit is before this Court.

Heard Sri S.Subba Reddy, learned counsel for the petitioner-plaintiff, and Sri G.Krishna Murthy, learned counsel for respondents 1 to 6-defendants 1 to 6. Respondents 7 to 9 herein are shown as not necessary parties to this revision.

O.S.No.63 of 2017 was filed by the plaintiff for a permanent injunction restraining the defendants from interfering with the suit property by way of altering and changing its nature, by making illegal constructions therein, until the rights of the plaintiff and the defendants were determined. The suit property was shown as an extent of 500 square yards, known as Dwaraka Lodge, at D.No. 29-15-21, Ward No.33, Rajamahendravaram, East Godavari District.

O.S.No.626 of 2011 was earlier filed by the present plaintiff before the learned IV Additional Junior Civil Judge, Rajamahendravaram, in respect of the very same suit property, seeking a permanent injunction restraining defendants 1 to 3 herein from demolishing the structures in the suit property until the rights

of the plaintiff and the said defendants were finally determined. This suit was compromised and judgment dated 10.08.2016 was passed therein decreeing the suit as per the terms of the compromise. The decree therein reads to the following effect:

- ‘1. That the suit be and the same is hereby decreed as per terms of compromise dt.10.08.2016 filed by both parties.
2. The Plaintiff agreed to allow the defendants to construct a multi storied building in the plaint schedule vacant site.
3. The defendants agreed to construct a multi-storied building in the place of demolished building comprised in the suit schedule property by procuring the necessary funds to meet the entire construction activity.
4. The defendants agreed that the plaintiff need not invest any amount for such construction at present and the defendants alone shall be responsible to procure and invest the necessary funds for completion of the entire building, if necessary by accepting the advances from the intending and prospective occupiers as tenants.
5. That the Plaintiff and defendants mutually agreed that all of them shall hold the reconstructed building as their joint property as before and each one of them shall have an equal undivided share in the entire reconstructed building and entitled to share the income in proportion to their respective undivided shares from out of total rents earned by the entire building.
6. That the plaintiff agreed that the defendants shall be entitled to recover the cost of construction from the plaintiff in proportion to the extent of his undivided share of monthly rentals that would be earned on the building till the entire amount invested by the defendants is recovered by them.
7. That the plaintiff shall extend all his co-operation in constructing the proposed multi-storied building in the plaint schedule property without causing any hindrance to the progress of work. Plaintiff and defendants mutually agreed to authorize and empower the 2nd defendant in the suit Sri.R.V.Apparao to represent all of them before the local authority or before any government agencies for obtaining necessary building approvals and to enter into lease agreements with the prospective occupiers/tenants and if necessary register such lease agreements and realise the monthly rentals to achieve the aforesaid objects.
8. That there be no order as to costs.

Copy of terms of compromise and schedule attached to the decree.”

It appears that after decretal of O.S.No.626 of 2011 in terms of the compromise arrived at by and between the parties, they entered into a separate Memorandum of Understanding (MoU). The plaintiff was shown as party 1 therein and defendants 1 to 3 herein were parties 2, 3 and 4. This MoU does not mention a date, but going by the date affixed by the Notary under his signature on each page thereof, it was entered into on 12.08.2016, i.e. two days after decretal of O.S.No.626 of 2011. In terms of this MoU, another property admeasuring 263.70 square yards was clubbed with the suit property in O.S.No.626 of 2011, which was however reduced to 481.72 square yards from 500 square yards, and the parties agreed to construct a multi-storied building in the cumulative extent of 745.42 square yards, being 481.72 square yards owned by parties 1 to 4 therein and 263.70 square yards owned by parties 2 to 7 therein. In terms of the compromise entered into in O.S.No.626 of 2011, this MoU contained a clause to the effect that the plaintiff therein would not be required to invest any amount in the construction of the multi-storied building but he would be bound to reimburse the same from the monthly rentals earned after completion of the building. Significantly, the petitioner-plaintiff affixed his signature on each page of this MoU. This MoU concluded with Clause No.14 which stated that in the event of any dispute between parties 1 to 7 of the MoU, either before, during or after completion of the building, the same shall be resolved by a sole arbitrator to be appointed by mutual consent.

It is on the strength of this MoU and Clause No.14 therein, that defendants 1 to 6 in O.S.No.63 of 2017 filed the subject I.A. under Section 8(1) of the Act of 1996 seeking reference of the dispute to arbitration. Section 8(1) of the Act of 1996 mandates that a judicial

authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

Sri S.Subba Reddy, learned counsel, would contend that a fraud was played upon his client as it was never mentioned at the stage of disposal of O.S.No.626 of 2011 that another property would be clubbed with the extent of 500 square yards which was the subject matter of O.S.No.626 of 2011 and therefore, an arbitrator would not be in a position to resolve the issue of fraud. He would further submit that his client disputed his signature in the subject MoU and in effect, there was no arbitration agreement between the parties, whereby the trial Court could have referred them to arbitration in exercise of power under Section 8 of the Act of 1996.

The latter argument however does not merit acceptance as the counter filed by the petitioner-plaintiff in I.A.No.705 of 2017 in O.S.No.63 of 2017 does not reflect denial of the signature affixed by him on each page of the subject MoU. He denied his signature in the plan obtained from the Municipal Corporation, Rajamahendravaram, but when it came to the MoU, he merely stated that the fourteenth clause therein was not known to him and that it might have been brought into existence behind his back. It cannot therefore be accepted that the petitioner-plaintiff denied his signature in the subject MoU. Having signed the said MoU with open eyes, it is not open to him at this stage to disclaim Clause No.14 thereof, whereunder he agreed with the other parties thereto that any dispute arising amongst them should be resolved by arbitration. The contention of the learned counsel in this regard is therefore rejected.

As regards the submission of Sri S.Subba Reddy, learned counsel, that a fraud was played upon his client and that the issue of fraud cannot be resolved by arbitration, it is no doubt true that the Supreme Court, in **A.AYYASAMY V/s. A.PARAMASIVAM**¹, held that in cases involving serious allegations of fraud which make it a virtual case of a criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues should be decided only by the civil Court on appreciation of voluminous evidence, the civil Court can sidetrack the arbitration agreement and dismiss the application under Section 8 of the Act of 1996. It may however be noticed that in the case on hand, there is not even a whisper of any fraud having been perpetrated upon the petitioner-plaintiff in his plaint in O.S.No.63 of 2017. The word 'fraud' does not even find mention in any paragraph of the plaint. It is settled law that fraud must always be specifically pleaded and proved. In the absence of a pleading as to any fraud having been committed, it is not open to the petitioner-plaintiff to now claim that such a complaint of fraud must be inferred from the pleadings. Reliance placed by Sri S.Subba Reddy, learned counsel, on the aforesaid observations in **A.AYYASAMY**¹ is therefore of no avail to him. It may also be noted that in the very same judgment, the Supreme Court observed that generally and traditionally, all disputes relating to rights *in personam* are considered to be amenable to arbitration while all disputes relating to rights *in rem* are required to be adjudicated by Courts and public Tribunals. Indisputably, the rights now asserted by the petitioner-plaintiff are rights *in personam*.

¹ (2016) 10 SCC 386

As regards the final submission made by Sri S.Subba Reddy, learned counsel, that the trial Court failed to give a finding as to the arbitrability or non-arbitrability of the dispute raised in the suit, it is relevant to note that this was never put in issue by the petitioner-plaintiff before the trial Court. Even before this Court, the petitioner-plaintiff is not in a position to demonstrate that the dispute raised by him is a non-arbitrable one. Therefore, merely because the trial Court did not record a finding on this aspect in so many words, it would not be sufficient to set at naught the order, which is otherwise cogent and well-reasoned.

It may be noted that earlier, in **HINDUSTAN PETROLEUM CORPN. LTD. V/s. PINKCITY MIDWAY PETROLEUMS²**, the Supreme Court, relying upon its observations in **P.ANAND GAJAPATHI RAJU V/s. P.V.G.RAJU³**, affirmed that the language of Section 8 of the Act of 1996 is peremptory in nature and once an arbitration clause is found in the agreement, it is obligatory for the Court to refer the parties to arbitration and nothing remains to be decided in the original action, after such an application is made except to refer the dispute to an arbitrator.

On the above analysis, this Court finds that the subject MoU contains an arbitration agreement and that the dispute raised by the petitioner-plaintiff falls within the ambit thereof. It is also not demonstrated before this Court that such dispute would partake the nature of a non-arbitrable dispute, requiring the civil Court itself to address the issue.

The order passed by the trial Court referring the parties to arbitration therefore does not brook interference. The civil revision

² (2003) 6 SCC 503

³ (2000) 4 SCC 539

petition is therefore devoid of merit and is accordingly dismissed.
Pending miscellaneous petitions, if any, shall also stand dismissed.
No order as to costs.

SANJAY KUMAR, J

20th OCTOBER, 2017

PGS

