

\* HON'BLE SRI JUSTICE SURESH KUMAR KAIT  
AND  
HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

+ C.C.C.A.No.320 of 2007

% 24-10-2017

# M. Shankara Reddy  
and another

... Appellants/ Respondents/  
Plaintiffs

Vs.

\$ Amara Ramakoteswara Rao  
and 3 others.

... Respondents/ Petitioners/  
Defendants

! Counsel for the appellants: Sri Mahmood Ali

Counsel for the Respondents: Sri C.V. Narasimham

< Gist:

> Head Note:

? Cases referred:

1. 1996 (87) Company Cases 258
2. 2003 (115) Company Cases 102
3. Manu/MH/0215/2006
4. (2003) 6 SCC 503
5. (2007) 3 SCC 686
6. (2005) 8 SCC 618
7. (2000) 4 SCC 539
8. (1983) 2 SCC 422
9. (2004) 12 SCC 278
10. (1876) Ch.D 426
11. 1993 SCC (3) 161
12. 1975 (1) SCC 559

**HON'BLE SRI JUSTICE SURESH KUMAR KAIT  
AND  
HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**

**CCCA No.320 of 2007**

**Judgment** (per Hon'ble Sri Justice D.V.S.S. Somayajulu):

This is an appeal filed against the order dated 16.11.2006 passed in I.A.No.1751 of 2006 in O.S.No.118 of 2005. By the impugned order, the I Additional Chief Judge, City Civil Court, Secunderabad rejected the plaint in O.S.No.118 of 2005.

2. O.S.No.118 of 2005 is a suit filed by Sri M. Sankara Reddy and Smt. P. Prabhavati against four (4) defendants viz., A. Ramakoteswararao, A. Susheela, A. Sashi Bindu and M/s. ASB Securities. As can be seen in the description of the plaint, the suit was for recovery of shares of various companies belonging to the plaintiffs' share allegedly sold by the defendants 1 & 2, through defendant No.3 and others or for refund of the value thereof with other reliefs. The suit is valued at Rs.1,81,23,273/-.

3. After the suit was filed, the first defendant filed an application under Order VII Rule 11 CPC pleading *inter alia* that the dispute between the parties should be settled according to arbitration as per Bye-law No.248 (c) of the Bombay Stock Exchange (BSE) Bye-laws. The said Bye-law was reproduced in para-4 of the application. However, instead of asking for an order under Section 8 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') to refer the parties to arbitration, said defendant sought for rejection of the plaint.

4. A reading of the said IA shows that it is filed under Order-VII, Rule-11 CPC. The prayer is to "reject the plaint filed by the plaintiffs as the Hon'ble Court has no jurisdiction to try this matter

in view of the Arbitration Clause, as contained in the contract notes as well as BSE Bye-laws. The application was opposed by the appellants/plaintiffs.

5. After hearing the parties, by order dated 16.11.2006, the learned I Additional Chief Judge held that there is an arbitration clause in the BSE Bye-laws which applies to the dispute raised, therefore, the plaintiffs cannot invoke the jurisdiction of the civil Court. Unfortunately, while holding that there is valid arbitration clause, the learned Chief Judge “rejected” the plaint and left it open to the parties to invoke the arbitration clause for their redressal. Being aggrieved, the appellant has filed present appeal.

6. The matter was heard at length and both the parties were given ample opportunity to present their case. Written arguments were also filed by both the parties.

7. Sri C.V. Narasimham, learned counsel for the respondents/defendants filed certain additional documents during the course of hearing stating that contract notes filed by the plaintiffs/appellants were not complete in all respects and that the reverse side of the contract notes were not xeroxed and filed. Sri Mahmood Ali, learned counsel for the appellants/plaintiffs did not raise any objection to receive these documents. Hence, the same are also taken on record and considered.

8. In order to decide this appeal, the point that arises for consideration is whether the order of the lower Court rejecting the plaint is correct or not?

9. The dispute centers round the sale of shares belonging to the plaintiffs in O.S.No.118 of 2005 by the defendants 1, 2 & 3 who were engaged in the business of selling of shares. The 4<sup>th</sup> defendant is a sole proprietorship concern of the 3<sup>rd</sup> defendant.

As per the averments in the plaint, the 4<sup>th</sup> defendant was a sub-broker of Maliram Makharia, Finstock Pvt. Ltd. Mumbai and a member of the Bombay Stock Exchange. It is also averred that 2<sup>nd</sup> defendant was looking after the affairs of the 4<sup>th</sup> defendant. Thus, it is pleaded that all the defendants were involved in the sale of the shares. The prayer in the suit is also for return of the shares handed over by the plaintiffs by buying back the said shares to the plaintiffs and in the alternative to pay the value of the said shares with damages and interest.

10. The appellants/plaintiffs filed number of documents including the contract notes issued by the members acting for constituents as brokers and agents. The contract notes contained a clause on the face of page itself stating that the “contract is made subject to the Rules, Bye-Laws and Regulations and usages of the Stock Exchange, Mumbai.” It is also clearly printed on the contract notes in bold letters that “the provisions printed overleaf form a part of the contract”. As mentioned earlier, during the course of hearing, the learned counsel for the respondents filed a few contract notes showing clause printed on the reverse of the same. Clause 248 (a) of BSE Bye-laws, which is printed on the reverse of the contract note clearly stating as follows:

**“Reference to Arbitration:**

248 (a) As claims (Whether admitted or not) difference and disputes between a member and non member or non-members (the terms ‘non-member’ and ‘non-members’ shall include a remisier, authorized clerk, a sub-broker who is registered with SEBI as affiliated with that member or employee or any other person with whom the member shares brokerage) arising out of or in relation to dealings, transactions and contracts made subject to the Rules, Bye-laws and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their construction, fulfillment or validity or in relation to the rights, obligations and liabilities of remisiers, authorised clerks, sub-brokers, constituents, employees or any other persons with whom the member shares brokerage in relation to such dealings, transactions and contracts shall be referred to and decided by arbitration as provided in the Rules, Bye-laws and Regulations of the Exchange.”

Similarly, Clause 249 (1)(a) is to be following effect:

**“Appointment of Arbitrators:**

249 (i) (a) All claims, differences and disputes which are required to be referred to arbitration under these Bye-laws and Regulations shall be referred to arbitration of a sole arbitrator or of three arbitrators to be appointed by the Executive Director or by the parties from the Panel of Arbitrators constituted by the Governing Board, in the manner provided in these Bye-laws and Regulations. The Executive Director shall appoint a sole arbitrator and preferably appoint a non-member as sole arbitrator.”

Thus, as per the learned counsel for the respondents, it is clear that the contract note contains an arbitration clause which was also drawn to the attention of the parties by printing in bold letters.

11. However, the stand taken by the learned counsel for the appellants is that they are not a party to the “said clause.” He stated that the arbitration can only apply to the dispute between the 4<sup>th</sup> defendant-ASB Securities and Maliram Makharia Finstock Pvt Ltd. He also pointed out that the respondent No.4 also filed another civil suit O.S.No.13 of 2008 against the appellants and a pro-forma party in which they pleaded in paragraph Nos. 20 & 21 that pursuant to the impugned order in IA No.1751 of 2006, they preferred an arbitration claim (case No.13 of 2007) which was, however, rejected by the order dated 16.07.2007 by the arbitrators on the ground that the transactions are off line transactions.

12. The learned counsel for the respondents/defendants in reply to this has relied upon 3 judgments reported in **Hemendra V Shah v. Stock Exchange, Bombay**<sup>1</sup>, **Viraj Holdings v. Motilal Oswal Securities Private Limited**<sup>2</sup> and **Prashant Commercial v. Rajratan R. Mohta**<sup>3</sup>, wherein it was held that Bye-law 226 (a) provides for arbitration and that the said clause would apply, even to a dispute

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<sup>1</sup> 1996 (87) Company Cases 258

<sup>2</sup> 2003 (115) Company Cases 102

<sup>3</sup> Manu/MH/0215/2006

raised by non-member. The judgment clearly states that in view of the deeming fiction, a word 'non-member' covers everyone who is not a member and therefore, held that even members are bound.

13. It is the submission of the learned counsel for respondents that once it is held that there is an arbitration clause governing the dispute between the parties, this Court is bound to refer the parties to arbitration, particularly in view of the peremptory language used by Section 8 of the Act. The learned counsel for the respondents relied upon **Hindustan Petroleum Corpn Ltd. V. Pinkcity Midway Petroleums**<sup>4</sup> and **Agri Gold Exims Ltd. V. Sri Lakshmi Knits & Wovens and others**<sup>5</sup> wherein it is held that the Court has a mandatory duty to refer the issue for arbitration if it finds that there is an arbitration clause governing the dispute and the parties.

14. As per the learned counsel for respondent, the learned counsel for the petitioners himself cited the constitution Bench decision reported in **SBP & Co., v. Patel Engineering Ltd.**<sup>6</sup>. In this decision itself at paragraph No.16, the Hon'ble Constitution Bench cited **P. Anand Gajapathi Raju & Ors vs P.V.G. Raju (Died ) & Ors**<sup>7</sup>, whereunder the mandatory language of Section 8 of the Act was held to be binding on the Courts. In the present case also, as per the counsel for respondents the application in IA No.1751 of 2006 though styled one under Order VII Rule 11 CPC, makes a reference in paragraph No.4 that there is an arbitration clause and that both the parties must go to arbitration in terms thereof. There is an express reference to Section 8 of the Act in paragraph No.5. It is

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<sup>4</sup> (2003) 6 SCC 503

<sup>5</sup> (2007) 3 SCC 686

<sup>6</sup> (2005) 8 SCC 618

<sup>7</sup> (2000) 4 SCC 539

also averred in this affidavit that filing of the written statement would amount to waiver of the arbitration clause. Thus, in essence, the necessary ingredients of Section 8 of the Act are complied with as per the learned counsel for the respondents, Sri C.V. Narasimham. The learned counsel also argued that the plaintiffs/ appellants submitted to the jurisdiction of the arbitrator by virtue of their letter dated 30.06.2006. A reading of this letter, however, makes it clear that that is in the nature of the complaint of misappropriation, fraud, cheating etc. and is a request to 'probe' into the matter rather than a request for arbitrator.

15. Considering all of the above, the question that arises is whether the lower Court was right in "rejecting" the plaint. The lower Court should have seen that Section 8 of the Act only empowers the Court to "refer" the parties to arbitration but does not give the Court an option to reject a plaint. The lower Court also lost sight of the fact that Order VII Rule 11 CPC empowers the Court to reject the plaint, when there is "bar" to the suit because of any law. Section 8 of the Act is not a bar to a civil Court. It provides an alternative to a defendant against whom a civil suit is initiated to submit to the jurisdiction of the civil Court or to make an appropriate application at appropriate time under Section 8 of the Act seeking an order to refer the parties to arbitration. Therefore, Section 8 of the Act cannot be considered as a "bar" to the civil suit entitling the "rejection" of the plaint under Order-VII Rule-11 CPC. The "bar" under Order VII Rule 11 is an absolute bar to the *lis* which enables the Court to reject the plaint at the threshold itself and by merely reading the plaint. The same is not the case here.

16. In addition to this, the other important issue argued by both the counsels is whether the application that was presented viz., I.A.No.1751 of 2006 was an application under Order VII Rule 11 CPC or an application under Section 8 of the Act. An *ex facie* reading of the application shows that it is filed under Order VII Rule 11 CPC and the relief sought for is that is one of the rejection of plaint filed by the plaintiffs as the Hon'ble Court has no jurisdiction to try the case in view of the arbitration clause. (emphasis supplied).

17. The learned counsel for the appellants submitted and argued that in effect it was an application under Section 8 of the Act only, as can be seen from the averments made in the affidavit, however, the provision of law was wrongly quoted. He also submitted that substance of the application should be looked into if the statutory power is available. The Court can exercise the power even if the wrong provision of law is quoted in the application. The learned counsel for the respondents relied upon ***Municipal Corporation of the City of Ahmedabad v. Ben Hiraben Manilal***<sup>8</sup> and ***N. Mani v. Sangeetha Theatre and others***<sup>9</sup> in support of this preposition of law.

18. However, it is noticed that as per the averments in the application, the petitioners in I.A.No.1751 of 2006 have clearly stated that the Hon'ble Court has no jurisdiction to entertain the instant suit and the plaint is liable to be rejected, in view of the arbitration clause provided. The prayer is for rejection of the plaint filed by the plaintiffs in O.S.No.118 of 2005. It is not a case of a mere wrong provision of law being quoted.

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<sup>8</sup> (1983) 2 SCC 422

<sup>9</sup> (2004) 12 SCC 278

19. At first blush, the argument of the learned counsel for the respondents appears to be reasonable, but it is particularly important to note that when a statute describes or requires a thing to be done in a particular manner; it should be done in that manner or not at all. The popular principle of law is settled in the very old case of **Taylor v. Taylor**<sup>10</sup>, which is cited with approval by the Hon'ble Supreme Court of India in **Shiv Kumar Chandha v. Municipal Corporation of Delhi**<sup>11</sup> and also in **Ram Chandra Keshav Adke v. Govind Joyti**.<sup>12</sup> An application under Section 8 of the Act is an application that should be made in a particular manner and at particular time. The application should be accompanied by the original arbitration agreement or a certified copy thereof under Section 8 (2) of the Act. Even the Andhra Pradesh Arbitration Rules, 2000 as framed by this Court that every application under Section 8 of the Act shall be duly signed and verified. It shall state the provision of law under which it is filed and contain a statement as described in Rule 4 of the Rules. Rule 4 (2) also states a certified copy of the arbitration agreement and certified copies of the relevant documents shall be annexed to every such application. Similarly, Rule 7 says that if the application is not made in accordance with rules, the Court may reject the application but such rejection order shall not be made without giving an opportunity to the applicant to rectify the said defects. The Hon'ble Supreme Court of India in **P. Anand Gajapathi Raju's** case (7 stated supra) also laid down that the manner and method in which an application under Section 8 of the Act should be filed.

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<sup>10</sup> (1876) Ch.D 426

<sup>11</sup> 1993 SCC (3) 161

<sup>12</sup> 1975 (1) SCC 559

20. In view of above discussion and legal position, this Court is of the opinion that the application that is filed in this case viz., I.A.No.1751 of 2006 is not an application under Section 8 of the Act. It is an application under Order VII Rule 11 CPC seeking the rejection of the plaint of the plaint on the ground that the arbitration clause bars the suit.

21. The lower Court understood it as an application under Order VII Rule 11 CPC only; as can be seen from the reading of the order. In paragraph No.11 of the impugned order, the lower Court framed the point for consideration as follows:

“whether the plaint in O.S.No.118 of 2005 can be rejected or not.”

22. In view of all the above, this Court is of the opinion that the application is misconceived, the other point urged and replied to by both the counsels viz., in case of fraud, whether the reference can be made to arbitration or not is **not** considered as the same will not arise in the present set of circumstances.

23. Accordingly, the appeal is allowed and consequently, the order dated 16.11.2006 in I.A.No.1751 of 2006 in O.S.No.118 of 2005 on the file of the I Additional Chief Judge, City Civil Court, Secunderbad is hereby set aside.

24. Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed. No order as to costs.

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**SURESH KUMAR KAIT, J**

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**D.V.S.S. SOMAYAJULU, J**

Date: 24.10.2017

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