

THE HON'BLE THE CHIEF JUSTICE SRI THOTTATHIL B. RADHAKRISHNAN

ARBITRATION APPLICATION No.13 OF 2009

ORDER:

This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, hereinafter referred to as 'the Act'.

2. The applicant and the respondents entered into Annexure-I agreement, dated 25.01.1995. The said document shows among other things that the said agreement for development of the property, scheduled to that agreement, to the best advantage seeking permission from the Municipal Corporation of Hyderabad for constructing multi-storied residential complex. The availability of an arbitration agreement between the parties is evidenced by clause 11 of that agreement, which provides that any disputes with regard to interpretation of that agreement or its implementation shall be referred to arbitration, each party nominating an arbitrator and in the event of those arbitrators disagreeing, to have the matter referred to an Umpire whose decision was to be final.

3. Heard learned Senior Counsel for the appellant and the learned counsel for the respondents.

4. The applicant, who is described as the developer in the aforementioned agreement, has filed this application seeking that requisite measure be taken for appointment of an arbitrator for adjudication of all disputes arising between the parties out of the said agreement.

5. The respondents contested the application pleading that the application is not maintainable since it does not satisfy the conditions for appointment of Arbitrator as laid down by the Hon'ble

Supreme Court of India in **S.B.P.Company vs. Patel Engineering Limited and another**¹ and there is no enforceable right surviving in view of the fact that the applicant's so-called right under the development agreement, dated 25.01.1995 as against the respondents does not survive and remain to be arbitrable and the applicant had abandoned the substantial part of the construction work long back and thereby committed breach of contract. It is pleaded that the applicant never attempted to take up or to complete the project and the disputes which are now attempted to be projected are not available for arbitration as they have become hopelessly belated and sterile. Reference is made to the application made under Section 9 of the Act as O.P.No.39 of 2008 before the City Civil Court, Hyderabad, seeking measure and, this application as well as the proceedings before the City Civil Court, Hyderabad, were instituted without disclosing any dispute, which according to the applicant, is arbitrable. The respondents has further pleaded that the alleged disputes referred to in the notice, dated 13.01.2008 is outside the scope of arbitration clause and are merely afterthought.

6. While the respondents do not deny that they entered into the unregistered development agreement, dated 25.01.1995, with the applicant for the development of that property into a multi-storied residential complex, that the agreement is inadmissible in these proceedings since it is liable on account of it being deficit in payment of stamp duty. The non-performance of the agreement by the applicant from the inception ultimately led the premises being handedover for development to another builder M/s.Sai Durga Constructions and the works were carried forward and was nearing

¹ (2005) 8 SCC 618

completion when O.P.No.39 of 2008 was filed before the City Civil Court, Hyderabad seeking orders which were intended to obstruct the construction over the property and also against alienation. The respondents have pleaded that 17 flats were sold under different sale deeds to third parties. All these transactions pleaded and their details are given in the counter. The respondents had availed loan from M/s.Prudential Cooperative Bank Limited and also availed financial facility from M/s.Sai Durga Constructions, for liquidating the debt due to the Bank, which was settled under the OTS Scheme of that Bank. The respondents have pleaded that the applicant is a chronic litigant and to the knowledge of the respondents, the applicant has not completed any project taken up for development from any owner. The litigation between the applicant and others in relation to some other property is also pointed out in paragraph 8 of the counter to plead that the applicant is habituated to blackmail the owners to make unlawful gains. Relying on the decisions of the Apex Court and of this Court, as are referred to in their pleadings, the respondents had contended that there is no enforceable right under the arbitration agreement on account of the applicant's own conduct in abandoning the substantial part of construction long back and committing breach of contract. It is also pleaded that the applicant has acquiesced the subsequent development taken up by another builder and has also slept over its rights beyond the time permitted by law to agitate. The applicant is estopped from making any right by referring the so-called dispute to arbitration, it is pleaded. The respondents have further pleaded that the claim is hopelessly barred by limitation and sterile one and the applicant cannot request the invocation of powers for resuscitating such claims at this distant

point of time when third party rights are intervened leaving no issue alive for adjudication.

7. The applicant has filed reply to the counter of the respondents. It is pleaded by the applicant that the decision of the Apex Court in **Patel Engineering** (supra) does not apply to the facts of the case in hand and the plea of the respondents that the claims are no more live issues, is unsustainable. It is denied that the applicant has abandoned the substantial part of the construction work and has committed any breach of contract. It is pleaded that the applicant is fighting for accrued rights under the agreement and the respondents have introduced third parties by entering into a development agreement does not defeat the rights of the applicant and the respondents have to suffer the consequences for introducing third parties without even terminating the contract with the applicant. It is denied that the development agreement is liable for payment of deficit stamp duty and penalty or that it is compulsorily registerable in law. It is pleaded that the said issue was raised by the respondents in O.P.No.39 of 2008 before the City Civil Courts, Secunderabad and the learned Judge has referred the document to the opinion of the Collector and the Collector has given an opinion that the document is perfectly stamped and required no registration basing upon the position of law as on the date of development agreement. It is denied that the applicant has delayed for six and half years in obtaining necessary permissions from the Municipal Corporation of Hyderabad. It is denied that 2,400 square yards, out of 2,700 square yards, was handed over to the applicant even by 07.12.2000 and that the respondents were only in occupation of small residential portion of remaining 300 square yards. It is pleaded that as per the advice of

the site engineer that the entire structure should be raised at a time for having good strength of the structure, the applicant and the respondents have mutually decided to make construction at a stretch in modification of the terms and conditions and as such, the respondents have handed over the entire site to the applicant on 09.08.2002, upon which the applicant started the construction work. It is also denied that the applicant has not made any progress in construction work after obtaining necessary sanction. It is pleaded that the applicant has invested several crores of rupees after starting construction work in 2002, but the work was stopped only due to the violent and interfering attitude of the first respondent who has deliberately stopped the work and not allowed the applicant to proceed with the construction work. It is denied that the promoter of applicant Sri Tulasi Ram disappeared and cheated several of his creditors or he has left similar type of contracts unfinished with third parties or that he has blackmailed the respondents. It is pleaded that the third party builder entered subsequent development agreement knowing fully well that the respondents entered that agreement without terminating the development agreement with the applicant. It is also pleaded that the third party builder has forcefully occupied the site and that the construction by the said builder was started subsequent to the filing of O.P.No.39 of 2008. It is denied that the applicant slept over the issue. It is pleaded that the applicant was in possession of the property all through and was trying to proceed with the construction work but was unable to do so due to the intervention and violent attitude of the first respondent and the applicant was all through trying to settle the issue through mutual friends and wellwishers amicably and that Sri K.V.Kiran Kumar, who

is a common friend, had tried to negotiate with the respondents on behalf of the applicant and this fact can be shown by the letter, dated 26.09.2007, signed by the first respondent in proof of the said negotiations. It is pleaded that all the sales to the third parties or the third party builders by the respondents are after initiation of the arbitration proceedings and as such neither the third parties nor the builder can claim equities and the consequences of the litigation have to be faced by them in accordance with law. It is denied that the respondents have obtained loan from Prudential Cooperative Bank to make available funds to the applicant. It is pleaded that the applicant has spent several crores of rupees on construction work in obtaining the permissions from Municipal Corporation of Hyderabad, and as such, the applicant has got every right to proceed with arbitration under arbitration clause in development agreement, and it is denied that the claim of the applicant is barred by limitation.

8. Reading of the reply of the applicant in the context of the counter filed by the respondents would categorically show that the applicant was aware of the sequence of events which were happening in the property covered by the development agreement and the involvement of other developers. The pleadings in the application and the counter would show that the works proposed to be carried under the agreement, dated 25.01.1995 were not carried forward though, even as per the counter, some part of the proposed work, whatever be its extent, appears to have been done. According to respondents, the applicant abandoned the work and deserted the contract, which led the respondents to enter into another development agreement with M/s.Sai Durga Constructions and also to avail loan facilities from M/s.Prudential Cooperative Bank Limited. According to the

respondents, even that loan was paid off under One Time Settlement Scheme. The respondents also pleaded that they have availed financial assistance from M/s.Sai Durga Constructions, which is stated to have completed the work. The application filed under Section 9 of the Act by the applicant before the City Civil Court, Hyderabad, was dismissed. Even before that Court, there were contentions raised by either side touching the performance and discharge of the contract. According to the respondents, the flats have been sold out to third parties. With all these materials, it would appear that the respondents are not unjustified in taking the stand that the application is unduly delayed. However, it cannot be said that the pleadings and materials placed by the applicant does not disclose the existence of disputes. As to what are those disputes and the specific claims, which are to be arbitrated upon, is not required to be specifically pleaded and stated. The arbitration agreement would survive paving way for adjudication of disputes between the parties through arbitration, except in cases where the contract is terminated on mutual consent, or where there is discharge of the contract in its entirety by performance and consequential settlement and discharge of liabilities between the parties, to which settlement and discharge they have concurred. The decisions of the Apex Court in **National Insurance Company Limited vs. Boghara Polyfab Private Limited**², **State of Goa vs. Praveen Enterprises**³ and **Emm Enn Associates vs. Commander Works Engineer**⁴ rendered also by explaining the principles laid down in **Patel Engineering Limited** (supra), are authority for the position that the discretion to reject an

² (2009) 1 SCC 267

³ (2012) 12 SCC 581

⁴ (2016) 13 SCC 61

Application under Section 11 of the Act could be exercised only on finding that the claim is a dead one; or otherwise, the disputes should be left for decision by the Arbitrator. Plea of limitation of any claim and all other defences by the parties on either side to the rival claims are matters to be left to the Arbitrator to decide. This is all the more so in the case in hand, having regard to the arbitration agreement between the parties, which provides that any dispute with regard to interpretation of the agreement and its implementation shall be referred to arbitration. The parties have failed to appoint their Arbitrators in the terms of the development agreement, dated 25.01.1995. The requisite measure to be taken, on the facts and in the circumstances of the case, is to appoint a Sole Arbitrator.

9. For the aforesaid reasons, this Arbitration Application succeeds and is eligible to be allowed.

10. In the result, this Arbitration Application is allowed appointing an Arbitrator.

11. Accordingly, Sri Justice G.V.Seethapathy, former Judge of this Court, is appointed as Arbitrator to arbitrate on the disputes between the applicant and the respondents, including the claims and counter claims of both sides. The said Arbitrator shall enter on reference and proceed with, as enjoined by the Act. No order as to costs.

THOTTATHIL B. RADHAKRISHNAN, CJ

26.10.2018
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