

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

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**CIVIL REVISION PETITION NO.801 OF 2014**

Between:

M/s. Vodafone Essar Infrastructure Ltd. ... Petitioner

and

M/s. Prapoorna Properties Pvt. Ltd. ... Respondent

DATE OF JUDGMENT PRONOUNCEMENT: 19<sup>th</sup> JANUARY, 2018

**SUBMITTED FOR APPROVAL:**

**THE HON'BLE SRI JUSTICE SANJAY KUMAR  
AND  
THE HON'BLE MS. JUSTICE J.UMA DEVI**

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

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**SANJAY KUMAR, J**

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**J.UMA DEVI, J**

**\*THE HON'BLE SRI JUSTICE SANJAY KUMAR  
AND  
THE HON'BLE MS. JUSTICE J.UMA DEVI**

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**% DATED 19<sup>th</sup> JANUARY, 2018**

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>Head Note:

! Counsel for petitioner : Sri Omer Farooq and  
Sri Avinash Desai

^Counsel for respondent : Sri B.Venkata Rama Rao

? CASES REFERRED:

1. (2011) 5 SCC 532
2. (2003) 5 SCC 531
3. AIR 2007 SC 1376 : (2007) 5 SCC 510
4. 2017(5) ALD 289 : 2017(5) ALT 47

**THE HON'BLE SRI JUSTICE SANJAY KUMAR  
AND  
THE HON'BLE MS. JUSTICE J. UMA DEVI  
CIVIL REVISION PETITION NO.801 OF 2014**

**O R D E R**

(per Justice Sanjay Kumar)

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This civil revision petition under Section 115 CPC arises out of the order dated 25.11.2013 passed by the learned VIII Additional Senior Civil Judge, Ranga Reddy District at L.B.Nagar, in I.A.No.420 of 2012 in O.S.No.256 of 2012. The said I.A. was filed by the petitioner company herein, the defendant in the suit, under Section 8 of the Arbitration and Conciliation Act, 1996 (for brevity, 'the Act of 1996') seeking reference of the dispute to arbitration. By the order under revision, the trial Court dismissed the I.A.

By order dated 02.04.2014, this Court granted interim stay of further proceedings in the suit subject to the petitioner company depositing a sum of Rs.3,00,000/- to the credit of the suit. This order is stated to have been duly complied with.

Heard Sri Omer Farooq, learned counsel representing Sri Avinash Desai, learned counsel for the petitioner company /defendant, and Sri B.Venkata Rama Rao, learned counsel on caveat for the respondent company/plaintiff.

Parties shall hereinafter be referred to as arrayed in the suit.

O.S.No.256 of 2006 was instituted by the plaintiff company seeking eviction of the defendant company from the suit schedule property and for delivery of its vacant possession after removal of the defendant company's tower and equipment; a direction to the defendant company to pay a sum of Rs.1,31,178/- towards arrears of licence fee and Rs.50,778/- towards mesne profits/damages with effect from 01.12.2011 to 05.01.2012, at the rate of

Rs.43,726/- per month, for unauthorized use and occupation of the suit schedule property, totaling to a sum of Rs.1,81,956/- along with interest thereon at 24% per annum; a direction to the defendant company to pay the plaintiff company future mesne profits/damages at the rate of Rs.43,726/- per month, i.e., from 06.01.2012 onwards till the vacating and handing over of the suit schedule property to the plaintiff company; and for costs.

The suit schedule property comprises 150 square feet built up area on the terrace of the fifth floor, 150 square feet built up area on the terrace of the sixth floor of Shivam Block and 150 square feet built up area on the ground behind the Shivam Block on the northern side of Ramaraja Nagar township in Survey Nos.73 and 75 of Jeedimetla Village, Qutbullapur Mandal, Ranga Reddy District. Leave and licence agreement dated 17.05.2002 was executed by the predecessor-in-title of the plaintiff company, in the capacity of a licensor, with the predecessor-in-title of the defendant company permitting occupation of the suit schedule property in accordance with the terms and conditions of the licence as set out in the said agreement. There are two clauses numbered as 12 in this agreement and the first such Clause12 reads to the effect that the licensee shall peacefully and quietly surrender to the licensor, the scheduled property thereunder, on the expiration of the term of licence after removing all equipment, tower and other accessories and deliver vacant physical possession of the schedule property to the licensor in the same condition as it was given to them. The term of the licence as per Clause 1 of the agreement was a period of 10 years commencing from 17<sup>th</sup> June, 2002 with an option for renewal for a further period upon the mutual consent of both

parties. Clause 26 of the agreement dealt with disputes and is of relevance. It reads as under:

‘26. DISPUTES: In case of any dispute in respect of interpretation of the clauses mentioned above or the working of terms of Agreement set forth above, the matter shall be decided through arbitration by the sole arbitrator appointed by the consent of both the parties or by each party appointing his own arbitrator sitting together and choosing an umpire in case of difference of opinion. The decision of the arbitrators/s shall be final. The provision of the Indian Arbitration Act, 1940 as amended upto date shall be applicable for the Arbitration proceedings.’

The plaintiff company claims to have issued legal notice dated 08.11.2011 terminating this licence agreement with effect from the end of November, 2011. The further claim of the plaintiff company is that despite service of notice the defendant company did not respond, leading to institution of the suit.

While so, the defendant company, banking upon Clause 26 of the agreement, filed the subject I.A. under Section 8 of the Act of 1996 seeking reference of the dispute to arbitration. Dealing with this application, the trial Court noted that the defendant company entered appearance in the suit on 19.04.2012 by engaging a counsel and thereafter sought time to file its written statement. As it failed to do so despite several adjournments, it was set *ex parte* on 14.12.2012. However, on 18.12.2012, the defendant company filed I.A.No.2195 of 2012 under Order 9 Rule 7 CPC to set aside the said order and the I.A. was allowed subject to the defendant company paying costs and filing its written statement. On 28.12.2012, the defendant company reported part compliance as it paid the costs but did not file its written statement. It however sought extension of time to do so under Section 148 CPC.

The plaintiff company, relying upon the aforestated facts, asserted before the trial Court that the defendant company had subjected itself to the jurisdiction of the Court and had waived its right to rely upon the arbitration clause. The trial Court accepted this argument, observing that the defendant company had sought adjournments for filing a written statement on 26.04.2012, 08.06.2012, 05.07.2012 and 25.07.2012 but did not come up with the subject application under Section 8 of the Act of 1996 and in the meanwhile, it was set *ex parte* on 14.12.2012 and only thereafter filed the subject application on 28.12.2012. Basing on these facts, the trial Court concluded that the defendant company could not seek reference of the dispute to arbitration after subjecting itself to the jurisdiction of the Court. The trial Court further opined that as the main relief in the suit was for eviction, which would be covered by the Transfer of Property Act, 1882 (for brevity, 'the TP Act'), an Arbitrator could not decide the dispute. The trial Court accordingly dismissed the I.A.

At the out set, it may be noted that the conclusion of the trial Court that the defendant company subjected itself to its jurisdiction in the context of maintainability of a petition under Section 8 of the Act of 1996 is misconceived. Section 8(1) of the Act of 1996 posits that a judicial authority before which an action is brought, in a matter that is the subject of an arbitration agreement, shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. The clear language of the provision demonstrates that an application by the party seeking reference to arbitration is to be made not later than submission of its first

statement on the substance of the dispute. Mere seeking of adjournments by the defendant company to file a written statement or an extension petition in that regard or even an application under Order 9 Rule 7 CPC to set aside an order setting it *ex parte* would not amount to filing of its first statement on the substance of the dispute. The provision requires such a party to address the merits of the dispute, be it by way of a counter in an I.A. or a written statement in the suit, to be precluded from thereafter maintaining an application under Section 8 of the Act of 1996. Admittedly, the defendant company did no such thing in the case on hand. The trial Court therefore erred in concluding that the defendant company could no longer maintain the subject I.A. under Section 8 of the Act of 1996, as it had submitted itself to its jurisdiction. Submission of a party to the jurisdiction of the Court, as understood by the trial Court, is completely alien to the scheme as set out in Section 8 of the Act of 1996.

As regards the second issue, i.e., whether the dispute in question was an arbitrable one, the trial Court opined that as the suit was for eviction, falling under the provisions of the TP Act, it would not be an arbitrable dispute. The trial Court referred to ***BOOZ ALLEN AND HAMILTON INC. V/s. SBI HOME FINANCE LTD.***<sup>1</sup>, wherein the Supreme Court set out recognized examples of non-arbitrable disputes: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession

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<sup>1</sup>(2011) 5 SCC 532

certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only specified courts are conferred jurisdiction to grant eviction or decide disputes.

Going by the nomenclature of the agreement executed by and between the parties, the question is whether it gave rise to a lease or a licence. The distinction between the two is well settled and need not trouble this Court for resolution of this case. Suffice it to say that, in the event the subject agreement only confers a licence upon the defendant company, the provisions of the TP Act would have no application and it would be the Indian Easements Act, 1882, which would apply. The bald opinion of the trial Court, without even addressing this aspect of the matter, therefore cannot be accepted.

That being said, the issue still remains as to whether the prayers of the plaintiff company in the suit plaint would constitute arbitrable disputes. Be it noted that the suit prayer is three fold. Firstly, the plaintiff company sought eviction and delivery of vacant possession. Whether this eviction would fall within clause (vi) of the non-arbitrable disputes, set out in **BOOZ ALLEN AND HAMILTON INC.<sup>1</sup>**, would turn upon whether, notwithstanding its nomenclature, the agreement between the parties constituted a lease and if it did, whether the defendant company enjoyed any statutory protection against eviction and whether only specified Courts were conferred jurisdiction to grant such eviction or decide their disputes.

This aspect of the matter however need not detain us in the light of the other two prayers in the suit plaint. Thereunder, the

plaintiff company sought mesne profits/damages for the period after termination of the licence agreement under its legal notice dated 08.11.2011, i.e., from 01.12.2011 to 05.01.2012. As the suit was instituted on 06.01.2012, mesne profits/damages were calculated by way of this suit prayer, quantified at Rs.1,81,956/-. Interest was sought thereon at 24% per annum. The last suit prayer was for future mesne profits after institution of the suit, i.e., from 06.01.2012 onwards till actual vacating of the suit premises and delivery of possession.

Though both the learned counsel for the parties advanced copious and contentious arguments on various aspects and also cited an abundance of case law, we are of the opinion that the issue would squarely turn upon whether the claim of the plaintiff company for past and future damages would form an arbitrable dispute under Clause 26 of the leave and licence agreement dated 17.05.2002, and if not whether the defendant company could still take recourse to arbitration to resolve the same.

Significantly, the *ratio* laid down by the Supreme Court in **SUKANYA HOLDINGS PVT. LTD. V/s. JAYESH H.PANDYA<sup>2</sup>**, followed thereafter in **INDIA HOUSEHOLD AND HEALTHCARE LTD. V/s. L.G HOUSEHOLD AND HEALTHCARE LTD.<sup>3</sup>**, authoritatively answers this issue. These decisions held to the effect that when the subject matter of a suit includes the subject matter of an arbitration agreement as well as other disputes, there is no provision to split the cause of action in the suit and refer the total subject matter of such suit to arbitration.

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<sup>2</sup>(2003) 5 SCC 531

<sup>3</sup>AIR 2007 SC 1376 : (2007) 5 SCC 510

Even if we accept for a moment, without prejudice to the plaintiff company, that the eviction sought by the plaintiff company would be an arbitrable dispute, if the other two prayers with regard to mesne profits form non-arbitrable disputes, the case would fall outside the scope of Clause 26 and the question of splitting up the suit reliefs would not arise.

Clause 26 of the agreement dated 17.05.2002 reads to the effect that any dispute in respect of 'interpretation of its clauses' or 'the working of its terms' should be decided through arbitration.

Sri Omer Farooq, learned counsel, fairly concedes that no clause in the said agreement provides for deciding entitlement to or quantification of mesne profits. On the other hand, as already pointed out, Clause 12 of the agreement postulates peaceful delivery of vacant possession of the property scheduled thereunder upon expiration of the term of licence or sooner determination thereof. Therefore, no machinery is provided under the agreement for ascertaining liability to pay mesne profits or quantifying the same by interpreting the clauses or working the terms of the agreement.

Sri Omer Farooq, learned counsel, would also place reliance on the Division Bench judgment of this Court in **MOHAMMED IMADUDDIN FAROOQUI V/s. KARKHANA ZINDA TILISMATH**<sup>4</sup>. That was a case pertaining to a deed of partnership, wherein there was an arbitration clause that read to the effect that any dispute or difference of opinion arising amongst the partners in connection with interpretation of any of the clauses therein should be referred to arbitration. Considering this clause, the Division Bench observed that the most fundamental and widely accepted principle

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<sup>4</sup>2017(5) ALD 289 : 2017(5) ALT 47

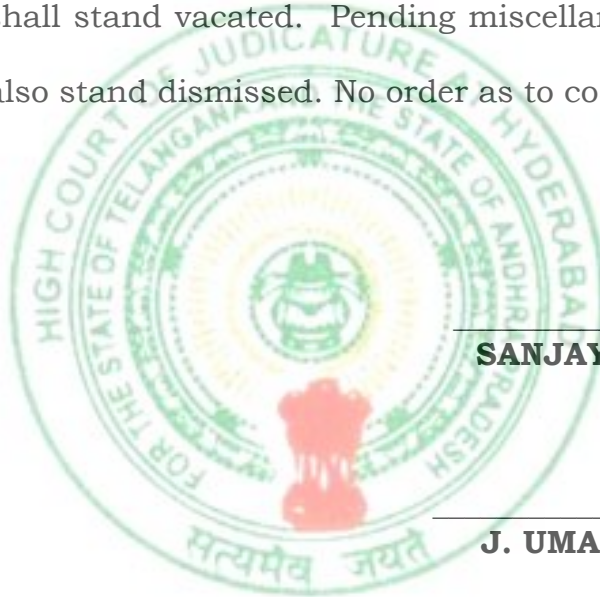
of interpretation applicable to arbitration agreements is the principle of interpretation in good faith and interpretation in good faith is nothing but looking for the intention of the parties, rather than simply restricting oneself to examining the literal meaning of the terms used. The Division Bench found on facts that, even if a restrictive meaning was given to the arbitration agreement, the dispute raised in the suit still squarely fell within the ambit of the arbitration clause. Even applying this parameter of interpretation to Clause 26 of the agreement dated 17.05.2002, we find no scope for an arbitrator to enter into and decide entitlement to and quantification of the past and future profits claimed by the plaintiff company. Trite to state, an arbitrator, being a creature of the arbitration agreement between the parties, cannot venture beyond the limits thereof to resolve other disputes arising between them. When the agreement dated 17.05.2002 did not visualize a situation where the plaintiff company could seek mesne profits/damages or provide a machinery to quantify the same, such a claim would fall outside the scope of the agreement and cannot be brought within the ambit of Clause 26, even by giving the widest possible interpretation to the phrase 'any dispute in respect of interpretation of the clauses or any dispute in respect of working of the terms of the agreement'. The suit prayers (b) and (c) therefore fall squarely outside the ambit of Clause 26 of the agreement dated 17.05.2002 and clearly constitute non-arbitrable disputes.

Applying the law laid down by the Supreme Court in **SUKANYA HOLDINGS PVT. LTD.<sup>2</sup>** and **INDIA HOUSEHOLD AND HEALTHCARE LTD.<sup>3</sup>**, it would not be possible to split up the suit claims so as to permit arbitration in relation to one such claim

while leaving the other two unaddressed. The application filed by the defendant company under Section 8 of the Act of 1996 seeking reference to arbitration of all the suit claims, as reflected in prayers (a), (b) and (c), therefore could not be accepted. Dismissal of such an application was therefore justified, albeit for reasons other than those mentioned by the trial Court in the order under revision.

We therefore find no grounds to interfere with such dismissal, but for the reasons set out hereinbefore.

In consequence, the civil revision petition is found to be devoid of merit and is accordingly dismissed. Interim order dated 02.04.2014 shall stand vacated. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.



**SANJAY KUMAR, J**

**J. UMA DEVI, J**

**19<sup>th</sup> JANUARY, 2018**

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