

**In the High Court of Judicature at Hyderabad
for the State of Telangana and the State of Andhra Pradesh**

C.R.P.No.1315 of 2006

Between:

**Bharat Sanchar Nigam Limited
(A Govt. of India Enterprise)
Rep. by its General Manager,
Visakhapatnam**

... Petitioner

and

**M/s.Alekya Graphic Pvt. Limited,
Rep. by its Director,
Visakhapatnam**

...Respondent

Date of Judgment Pronounced: 01-05-2018

Submitted for Approval:

The Hon'ble Sri Justice C.V.Nagarjuna Reddy

and

The Hon'ble Sri Justice D.V.S.S.Somayajulu

1. Whether Reporters of Local newspapers may be allowed to see the judgments ? Yes/No
2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment ? Yes/No

(C.V.Nagarjuna Reddy, J)

(D.V.S.S.Somayajulu, J)

* The Hon'ble Sri Justice C.V.Nagarjuna Reddy

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! Counsel for the petitioner: Dr.P.Bhaskara Mohan,
SC for BSNL

^ Counsel for the respondent: None appeared

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>HEAD NOTE:

? Cases cited:

AIR 2003 SC 2881
AIR 1989 SC 952
(2003) 5 Supreme Court Cases 531

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Counsel for the Petitioner: Dr.P.Bhaskara Mohan,
SC for BSNL

Counsel for the respondent: None appeared

The Court made the following:

Order: (per Hon'ble Sri Justice C.V.Nagarjuna Reddy)

This Civil Revision Petition is filed by the Bharat Sanchar Nigam Limited, who is the plaintiff in OS.No.41 of 2002, on the file of the IV Additional District Judge, Visakhapatnam, against Order, dated 04-04-2005, in IA.No.1266 of 2002 filed therein.

By the aforementioned order, the lower Court has directed the petitioner to refer the disputes raised in the suit for arbitration in terms of Condition No.23 of Contract Agreement, dated 11.07.1994.

Though notice was received by the respondent-Company, it has not entered appearance. We have heard Dr.P.Bhaskara Mohan, learned Counsel for the petitioner, and perused the record.

The petitioner entered into a contract for execution of the work relating to printing of Visakhapatnam Telephone Directory. As the respondent, allegedly, failed to perform its part of obligations under the contract, the petitioner has levied royalty as well as penalty for the delay in execution of the contract. It has later filed the abovementioned suit for

recovery of a sum of Rs.1,54,32,098/- under various heads including royalty and penalty. The respondent has filed IA.No.1266 of 2002 under Section 8 of the Arbitration and Conciliation Act, 1996 (for short 'the Act'), for reference of the disputes raised in the suit for Arbitration under Clause 23 of the Contract Agreement, dated 11-07-1994, entered between the parties. The petitioner has opposed the said Application on the ground that the disputes relating to collection of royalty and imposition of penalty are excepted matters, which are not referable for Arbitration. It has also raised the plea that where the disputes between the parties include excepted matters, such disputes cannot be segregated and the matters other than the excepted matters cannot be referred for Arbitration. The lower Court, however, by the order under revision, allowed IA.No.1266 of 2002 filed by the respondent directing the petitioner to refer the disputes raised in the suit for Arbitration in terms of Condition No.23 of the Contract Agreement.

The learned Counsel for the petitioner submitted that the lower Court has fallen into a serious error in allowing the IA by placing reliance on the Judgment of the Supreme

Court in **United Petroleum Corporation Limited vs. M/s.Pink City Mid Way Petroleums¹** . With reference to the said judgment, the learned Counsel submitted that in the said case, none of the disputes fall in the excepted matters; that therefore, the observations made therein, on which reliance was placed by the lower Court, have no application to the present case; and that those observations were referred to and relied upon by the lower Court out of context. The learned Counsel further argued that once a dispute is raised in respect of an excepted matter, the Arbitrator is denuded of his jurisdiction to decide the dispute and consequently, the aggrieved party cannot invoke the jurisdiction of the Civil Court under Section 8 of the Act.

We have carefully considered the submissions of the learned Counsel for the petitioner with reference to the record.

The fact that few of the aspects, in respect of which the petitioner filed the suit *viz.*, royalty and penalty fall under the excepted matters is not in dispute. Clause 23 of the Contract Agreement between the parties reads as under:

¹ AIR 2003 SC 2881

“In the event of any question, dispute/difference arising under this agreement or in connection therewith (except as to matters the decision of which is specifically provided under this agreement) the same shall be referred to the sole arbitration (herein after referred to as “THE SAID OFFICER”), or any officer nominated by him. There will be not objection to any such appointment that the Arbitrator is a Government Servant, he will not be one who had an opportunity to deal with the matter to which the agreement relates to that in Course of his duties as Government Servant, he has expressed his views on all or any of the matters in the dispute or in differences. The Award of the said Arbitrator shall be final and binding on both the parties. It is a term of the agreement that in the event of such Arbitrator to whom the matter originally referred to being transferred or vacating his office, resigning, or refusing to work or neglecting his work, or being unable to act for any reasons what so ever “the SAID OFFICER” shall appoint another person to set as an Arbitrator in place of outgoing Arbitrator, in accordance with the terms of this agreement, and the person so appointed shall be entitled to proceed with the reference from the stage at which it was left out by his predecessor?”

In the aforementioned Clause, the obligation to refer the disputes for Arbitration is in respect of matters other than those the decision on which is specifically provided under the Contract Agreement.

Clauses 18.b and 19 of the Contract Agreement, which are relevant for the present purpose, read as under:

“18.b. In the event of delivery of any defective work, which owing to urgency or for any other reasons, cannot be wholly rejected, the Telecom District Manager, Visakhapatnam shall have the power to demand from the contractor the payment of an amount not exceeding to 10% (ten) of the agreed amount, irrespective of the quantum of defective work. Decision of the Telecom District Manager, Visakhapatnam in this regard is final. The amount demanded shall be remitted in cash or in the form of crossed bank draft from any one of the nationalized banks payable to the Accounts Officer (Cash) % TDM – Visakhapatnam within the time limit specified in the letter of demand.

19. An amount equivalent to 1% (one) of the royalty offered will be levied as penalty from the contractor for every week's delay, or part thereof in the supply of (i) specimen copy of the Telephone Directory, (OR) (ii) the first batch of telephone directories (OR) (iii) the required number of copies of telephone directory. This clause shall not operate if the delay is caused by reasons beyond the control of the contractor to the opinion of the Telecom District Manager, Visakhapatnam who shall have the power to waive or impose reduced penalty under this clause and whose decision shall be final.”

Evidently, Items 2 and 4 of the plaint under the head ‘Details of Valuation’ fall under Clauses 18.b and 19 of the Contract Agreement as reproduced above. It is clear from

these Clauses that the decision of the prescribed officer under the said two clauses shall be final and accordingly, they fall outside the scope of arbitration being excepted matters.

In **Viswanath Sood vs. Union of India and Anr²**, the Supreme Court held that the view taken by the Division Bench of the High Court, that the clause laying down that “the Superintending Engineer’s decision shall be final” as referring only to a finality *qua* the department and that the same cannot be construed as excluding the jurisdiction of the Arbitrator, was not sustainable and that such a clause has to be construed to mean that where a dispute falling under the excepted matter arises, the jurisdiction of the Arbitrator for deciding the same is ousted. Once the Arbitrator has no jurisdiction to decide the disputes falling under the excepted matters, the Civil Court is denuded of its jurisdiction to refer such disputes for Arbitration. As rightly submitted by the learned Counsel for the petitioner, **M/s.Pink City** (1 supra) is not concerned with the issue as to whether an excepted matter can be referred for Arbitration under Section 8 of the Act.

² AIR1989 SC 952

Though the suit claim includes certain disputes, which do not fall within the excepted matters, as held in **Sukanya Holdings (P) Ltd. vs. Jayesh H.Pandya and another**³, where the disputes pertain to excepted and other matters, they cannot be segregated so as to permit the suit to continue in respect of the excepted matters and refer the other matters for Arbitration. The observation of the Supreme Court on this aspect are relevant and are extracted herein below:

"12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by Part I of the At, the judicial authority shall not intervene except where so provided in the Act. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the Arbitral Tribunal, if: (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that the Arbitration Act does not oust the jurisdiction of the civil court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as

³ (2003) 5 Supreme Court Cases 531

contemplated under sub-sections (1) and (2) of Section 8 of the Act."

"13. Secondly, there is no provision in the Act that when the subject-matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators.

14. Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under Section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the court may refer the same to arbitration provided that the same can be separated from the rest of the subject-matter of the suit. The section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15. The relevant language used in Section 8 is: "*in a matter which is the subject of an arbitration agreement*". The court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "*a matter*" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced – "*as to a matter*" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words "*a matter*" indicate that the entire subject-matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is - even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between the parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and the other to be decided by the Civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

In the light of the above discussion, we are of the opinion that the lower Court has committed a serious error in directing the petitioner to refer the disputes raised in the suit for Arbitration.

The order under revision is, therefore, set aside and the Civil Revision Petition is, accordingly, allowed.

(C.V.Nagarjuna Reddy, J)

(D.V.S.S.Somayajulu, J)

Date: 01-05-2018

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