THE HON'BLE SRI JUSTICE SANJAY KUMAR

CIVIL REVISION PETITION NO.3644 OF 2018

O R D E R

The petitioner-plaintiff filed O.S.No.1391 of 2017 before the learned XV Additional District Judge, Ranga Reddy District at Kukatpally, for cancellation of the registered Development Agreement-cum-General Power of Attorney (GPA), bearing Document No.7867 of 2008 dated 23.10.2008, executed by him in favour of the respondent-defendant company; for redelivery of possession of the suit schedule properties; for forwarding of the decree to the office of the District Registrar, Ranga Reddy District; perpetual injunction restraining the respondent-defendant company from changing the nature of the suit schedule properties, including making use of the said properties in any manner; and for costs. The suit schedule properties are Plot Nos.9 and 10, admeasuring 400 square yards, situated in Sy.No.38 of Kothaguda Village, Serilingampally Mandal, Ranga Reddy District.

While so, the respondent-defendant company filed I.A.No.117 of 2018 in the suit under Order 7 Rule 11 CPC seeking rejection of the plaint on the ground that the suit was not maintainable in law and to refer the dispute to an Arbitrator. By order dated 13.04.2018 passed therein, the trial Court accepted this plea and referred the parties to arbitration as per Section 8 of the Arbitration and Conciliation Act, 1996 (*for brevity*, 'the Act of 1996') and closed the suit proceedings. Aggrieved thereby, the petitioner-plaintiff is before this Court by way of this revision under Article 227 of the Constitution.

Heard Mr.V.Ravinder Rao, learned senior counsel representing Ms.Sandhya Rani, learned counsel for the petitioner-plaintiff, and Mr.E.Ajay Reddy, learned counsel for the respondent-defendant.

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

The plaintiff entered into an agreement with the defendant company for development of the suit plots belonging to him, under the Registered Development Agreement-cum-GPA dated 23.10.2008, by construction of a multi-storied complex. Building permission dated 15.04.2013 was secured by the defendant company for the said purpose. The defendant company claimed that it commenced construction pursuant thereto and that the same was in progress but at that stage, the plaintiff filed the suit seeking cancellation of the development agreement and other reliefs. It was the case of the defendant company that Clause 34 of the Development Agreement-cum-GPA provided for all disputes arising out of and in connection with the said agreement to be resolved by mutual discussions and in the event of failure thereof, by arbitration in accordance with the provisions of the Act of 1996. Such disputes were to be referred to a mutually agreed upon Arbitrator and the Award passed by him was to be final and binding on both parties. Relying on this clause, the defendant company filed the subject I.A. claiming that the civil Court had no jurisdiction to entertain the suit in relation to the disputes between the parties and prayed for dismissal of the suit on this ground, while referring the dispute to arbitration.

The plaintiff filed a counter contesting this I.A. Therein, he stated that the Development Agreement-cum-GPA was entered into as long back as in the year 2008 and that the defendant company had not even commenced construction pursuant to the building permission granted in the year 2013. He further stated that the building permission itself stood cancelled and in view of the same, the question of the defendant company taking up construction activity at this stage did not arise at all. He asserted that the Development Agreement-cum-GPA had become invalid due to lapse of time and was unenforceable. He also asserted that an Arbitrator would not have the power or jurisdiction to cancel the said agreement or refer the same to registration authorities for cancellation, as such jurisdiction was conferred only upon the civil Court. He claimed that the agreement stood frustrated owing to cancellation of the building permission and it is only the civil Court that would have the jurisdiction to entertain the suit in the context of the prayers made therein. He accordingly prayed for dismissal of the I.A.

The Registered Development Agreement-cum-GPA dated 23.10.2008 was marked as Ex.P1 and the Certificate of Incorporation of the defendant company was marked as Ex.P2. The defendant company marked the building permission dated 15.04.2013 as Ex.R1; the order of the Greater Hyderabad Municipal Corporation dated 16.02.2015 as Ex.R2; and the notice dated 20.11.2017 received from the plaintiff as Ex.R3. No oral evidence was adduced by either party.

Having referred to the pleadings of both the parties, the trial Court observed that there was an arbitration clause in the subject Development Agreement-cum-GPA, *viz*., Clause 34, and that the Court was vested with the power to refer the parties to arbitration in terms of Section 8 of the Act of 1996. The trial Court opined that it would be appropriate that an Arbitrator undertake resolution of the dispute between the parties in view of the said clause and closed the suit proceedings, referring the parties to arbitration.

Mr.V.Ravinder Rao, learned senior counsel, would state that detailed written arguments were submitted on behalf of the plaintiff, wherein reference was made to the Division Bench judgment of this Court in ALIENS DEVELOPERS (P) LTD., HYDERABAD V/s. M.JANARDHAN REDDDY[1]. Learned senior counsel would point out that the trial Court did not even

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[1] 2015 (6) ALD 584 (DB)

bother to refer to the said decision and the law laid down therein, which clearly clinched the issue in favour of the plaintiff. Copy of the written arguments is also placed on record. Perusal thereof reflects that not only did the plaintiff refer to the aforestated judgment but also extracted a paragraph therefrom, but the order under revision is studiously silent on this aspect.

Perusal of ALIENS DEVELOPERS (P) LTD., HYDERABAD[1], reflects that the case arose out of an order passed under Section 8 of the Act of 1996 and involved a Development Agreement-cum-Irrevocable Power of Attorney. As in the case on hand, the petitioner therein was to construct a residential and commercial complex in the land belonging to the respondents therein. As the petitioner failed to complete the construction within the time frame stipulated in the agreement, the respondents claimed that the said agreement stood cancelled and filed the suit seeking cancellation of the agreement, apart from delivery of physical possession and a permanent injunction. Therein, the petitioner, being the defendant in the suit, filed an I.A. under Section 8 of the Act of 1996 seeking reference of the suit dispute to arbitration in terms of the arbitration clause contained in the Development Agreement-cum-Irrevocable Power of Attorney. It is in this context that the Division Bench made the following observations:

> '14. In the case on hand, it is not in dispute that the Development Agreement-cum-Irrevocable Power of Attorney is a registered one and once an agreement for development is entered between the parties and is registered, it becomes a public document. Any person can apply for such a document to know the rights of the parties. In this case, it is to be noticed that there is a specific clause in the agreement for completion of project and parties have agreed that the agreement stands cancelled if the constructions are not completed within 36 months from the date of agreement or within the grace period as mentioned in the said agreement. If the matter is referred for arbitration as per the terms of the agreement, the power of the Arbitrator will be confined to adjudicate the dispute between the parties, namely, whether the agreement stands cancelled or not

having regard to the fact that the petitioner has not completed the project within the time frame as mentioned in the agreement, but, at the same time, the Arbitrator cannot exercise Statutory power conferred under Section 31(2) of the Specific Relief Act, 1963. Under Section 31(2) of the Specific Relief Act, Legislature conferred the power on Courts to send a copy of the cancellation decree to the officer in whose office the instrument has been so registered and such officer shall note on the copy of the instrument contained in his books, the fact of its cancellation. It is evident from the provision under Section 31(2) that the power of nullifying the effect of registration is conferred only on the Court. In the judgment in *Booz Allen's* case (supra), the Hon'ble Supreme Court has held that a right *in rem* is a right exercisable against the world at large, as contrasted from a right *in personam* which is an interest protected solely against specific individuals and actions *in personam* refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas, actions *in rem* refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. In the said judgment, it is clearly held that if the adjudicatory effect of the Court is a judgment *in rem*, only public fora *i.e.* Courts and Tribunals have to adjudicate such disputes, but not the Arbitral Tribunals as agreed by the parties. As much as the Development Agreement-cum-Irrevocable Power of Attorney is a registered one and is relating to title of the property, any cancellation will effect the removal of rights accrued to the parties, such cancellation is to be communicated to the officer who has registered the document, in view of the provision under Section 31(2) of the Specific Relief Act. Therefore, we are of the considered view that such adjudicatory function in cases like this will operate *in rem*. In any event, having regard to the power conferred on Courts by virtue of the provision under Section 31(2) of the Specific Relief Act, only competent Court is empowered to send the cancellation decree, to the officer concerned, to effect such cancellation and note in his books to that effect. When such Statutory power is conferred on Courts, such power cannot be exercised by the Arbitrator, inspite of the fact that there is arbitration clause in the agreement entered between the parties. ...'

Mr.E.Ajay Reddy, learned counsel, would however seek to draw a distinction between the case on hand and ALIENS DEVELOPERS (P) LTD., HYDERABAD[1]. He would point out that the Development Agreement in the said case contained specific time stipulations unlike the Development Agreement in the present case and therefore, the aforestated judgment would have no application. He also cited case law in support of this contention.

This Court is however of the opinion that the aspect sought to be raised by Mr.E.Ajay Reddy, learned counsel, turns upon the merits of the matter and has no relevance to the issue that actually falls for consideration in this revision.The crucial question that arises for consideration presently is whether an Arbitrator can rule upon the validity of the very agreement under which he is created and direct cancellation thereof. That issue stands squarely settled by the aforestated observations made by the Division Bench extracted *supra*. As pointed out by the Division Bench, the Supreme Court in BOOZ ALLEN & HAMILTON INC. V/s. SBI HOME FINANCE LIMITED[2] held that adjudication of certain categories of proceedings was reserved by the Legislature exclusively for public fora, as a matter of public policy, and certain other categories of cases, though not expressly reserved for adjudication by public fora (Courts and Tribunals), may by necessary implication stand excluded from the purview of private fora.

In this regard, reference may also be made to the observations of the Supreme Court in L.CHANDRA KUMAR V/s. UNION OF INDIA[3] in the context of Tribunals constituted under the Administrative Tribunals Act, 1985, to the effect that though such Tribunals would have the power to test the *vires* of subordinate legislations and rules, such power would be subject to one important exception, i.e., the Tribunals shall not entertain any question regarding the *vires* of the parent Statute, following the settled principle that a Tribunal, which is a creature of an Act, cannot declare that

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[2] (2011) 5 SCC 532
[3] (1997) 3 SCC 261

very Act to be unconstitutional. On the same analogy, an Arbitrator, who is the creature of the arbitration clause contained in an agreement, cannot rule upon the cancellation of the said agreement in exercise of arbitral powers under the Act of 1996.

It is indeed unfortunate that the trial Court completely ignored this legal position despite the fact that the law laid down by a Division Bench of this Court was brought to its notice. Pressure of work notwithstanding, the trial Court is expected to at least go through the material placed before it, including written submissions and case law. The order under revision demonstrates that the trial Court failed to do so in the case on hand.

On the above analysis, this Court finds that the order under revision is unsustainable. The suit prayers and more particularly, the prayer for cancellation of the Registered Development Agreement-cum-GPA, were not amenable to arbitration and the plaintiff ought not to have been non-suited on that ground.

The civil revision petition is accordingly allowed setting aside the order dated 13.04.2018 and restoring O.S.No.1391 of 2017 to the file of the learned XV Additional District Judge, Ranga Reddy District at Kukatpally, for consideration on merits in accordance with the due procedure.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

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SANJAY KUMAR, J

27th JULY, 2018

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