

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

CRP Nos.4307 and 4308 of 2012

COMMON ORDER:

Civil Revision Petition No.4307 of 2012 is filed against order dated 24.01.2012 passed in I.A.No.859 of 2011 in O.S.No.356 of 2009 by the III Additional District and Sessions Judge (Fast Track Court), Ranga Reddy District at L.B.Nagar.

2. The said revision arises in the suit O.S.No.356 of 2009 filed by the plaintiff against defendants 1 and 2. The suit was filed for recovery of a sum of Rs.1,20,15,509/- along with interest arising out of the loss of cargo on the high seas during transit. After the suit was filed, the first defendant filed an application in IA No.859 of 2011 under Section 8 of the Arbitration and Conciliation Act, 1996 (for brevity 'the Arbitration Act') to refer the dispute between the petitioner/first defendant and the first respondent/plaintiff to Arbitration. A counter is filed wherein the existence of the arbitration clause was admitted but with a reservation about the qualification of the arbitrator. Later, a joint memo was filed by both the parties in IA No.859 of 2011 and the impugned order was passed on the basis of the memo by which a retired District Judge was appointed as

Arbitrator. This order was challenged on the ground that the lower Court committed a serious error; that the memo was signed by the advocate who was not authorized to give consent; that a reference to arbitration can only be made in accordance with the arbitration clause etc.

3. Civil Revision Petition No.4308 of 2012 is filed against order dated 25.06.2012 passed in IA No.63 of 2012 in IA No.859 of 2011 in OS No.356 of 2009 by the III Additional District and Sessions Judge (Fast Track Court), Ranga Reddy District at L.B.Nagar.

4. After the arbitrator was appointed under the order that is impugned in CRP No.4307 of 2012, the petitioner in IA No.859 of 2011 filed an application IA No.63 of 2012 seeking recall of the order dated 24.01.2012 passed in IA No.859 of 2011, which is impugned in CRP No.4307 of 2012. In the affidavit, it is pleaded that the junior counsel who gave the consent did not have the authority to do so and therefore, they sought for recall of the order. The said application was dismissed by order dated 25.06.2012. This order of dismissal is now impugned in CRP No.4308 of 2012.

5. Both the revisions were heard together. The learned counsel for the petitioner in both the revisions

argued that a junior counsel, who was engaged by them, was actually given a limited mandate of attending to the court, taking adjournments, filing vakalat and such other miscellaneous works, but the actual conduct of the matter was entrusted to the two advocates named in the affidavit. He points out that in IA No.63 of 2012, the junior counsel filed an affidavit stating that she had no instructions to agree for the joint memo that was proposed to be filed. He points out that the junior counsel stated on oath that she acted without taking instructions from the actual lawyers instructed in the matter and that without informing them, she signed on the memo conveying her no objection for appointment of arbitrator. He therefore argued that his client should not suffer from the mistaken act of junior counsel.

6. In reply to this, the learned counsel for the first respondent in both the revisions argued that the said application is misconceived and that under Article 227 of the Constitution of India, the power of this Court does not extend to interfere in such orders. He also submits that the order was passed after the junior counsel signed on the memo and that no error was committed by the lower Court in passing the impugned order. He also cited a judgment of the Hon'ble Supreme

Court of India reported in ***Milkfood Pvt. Ltd. v. GMC Ice Cream (P) Ltd.***¹ and relied upon paragraphs 17 & 18. He argued that it is a consent order that is passed and that therefore it cannot be a questioned, more so under Article 227 of the Constitution of India.

7. This Court on an examination of the facts and circumstances, notices the following points:

- i) The joint memo was filed on 24.01.2012.
- ii) The order impugned in CRP No.4307 of 2012 was passed on the same day appointing the sole arbitrator.
- iii) The learned trial Judge not only appointed an arbitrator but also fixed his remuneration and the first date of hearing.
- iv) The application to recall the order was finalized on 27.01.2012. The supporting affidavit of the junior counsel was also drafted and attested on 27.01.2012.
- v) This application to recall was presented on 30.01.2012.

8. As can be seen from the sequence of dates, immediately after the order of appointment of an

¹ (2011) 12 SCC 573

arbitrator was passed, the second application was presented to recall the order dated 24.01.2012 in IA No.859 of 2011. Thus there is no delay in this regard and it cannot be said that the application to recall the order is an afterthought.

9. The other issue is about the power under Article 227 of the Constitution of India which is a supervisory power. The very purpose of this power is to advance justice and not to thwart the same, as per **Roshan Deen v. Preeti Lal**² following **State of UP v. District Judge Unnao**³. In the case of **Surya Dev Rai v. Ram Chander Rai**⁴, the Hon'ble Supreme Court held that some times it is necessary to act in time to prevent the injustice from happening or being perpetuated. In para-39, the Hon'ble Supreme Court held that 'a stitch in time would save nine'. In fact in para-38, it was held as follows:

"In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

² (2002) 1 SCC 100

³ AIR 1984 SC 1401

⁴ (2003) 6 SCC 675

It is also well-settled law that the party should not suffer from the advocate's mistake or from the courts mistake. Any concession or admission by the lawyer is to made with the authority of the client also particularly in matters which would surrender or conclude the legal rights of the client. The onerous duty that the advocate owns to the client mandates that the advocate should follow the instructions of the client. The judgment of the Honorable Supreme Court of India in the case of **Himalayan Coop. Group Housing Society v. Balwan Singh**⁵ is apposite here.

10. The affidavit of the counsel in IA 63/2012 makes it clear that the junior counsel did not take any instructions from her seniors let alone the clients consent .It is thus clear from a reading of the record that the junior counsel, who gave the consent, did not have actual authority to give the consent. Her seniors themselves did not have such an authority from the client. Even in the counter filed initially in the application u/s.8 of the Arbitration Act, the first respondent said that they have no objection if the arbitrator is a local arbitrator, who is well versed in maritime/marine law. Therefore, the consent given by the respondent is a qualified consent.

⁵ (2015) 7 SCC 373

It is not clear from the memo or from the submissions made by the first respondent whether the retired District Judge named by the lower Court as an arbitrator has the necessary qualifications to decide a claim like this. This claim as can be seen is a claim relating to loss of a cargo on the ship and in the high seas.

11. It is also clear that the junior counsel was not actually authorized to give consent to appoint an arbitrator contrary to the terms and conditions of the contract. The clause in the contract contemplated arbitration by three arbitrators; one to be appointed by each of the parties and the third to be appointed by the two arbitrators. It is not clear if the junior counsel keep this aspect in mind while giving consent.

12. These aspects were not considered by the lower court also which simply dismissed the application for recall and also appointed an arbitrator based on the memo.

13. In view of the above discussion, this Court is of the opinion that both the revision petitions are to be allowed. Accordingly, CRP Nos.4307 and 4308 of 2012 are allowed setting aside the impugned orders. The matter is remanded to the lower Court with a direction to

hear and dispose of the application IA 859/2011 under Section 8 of the Arbitration Act, as per law, within a period of four weeks from the date of receipt of a copy of this order. The lower court should not be influenced by anything said in this order.

14. In the circumstances of the case, there shall be no order as to costs. Miscellaneous Petitions, if any, pending in these revisions, shall stand closed.

Date: 08.08.2018
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D.V.S.S. SOMAYAJULU, J

