

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

+ ARBITRATION APPLICATION No.98 of 2015

% Dated: 26.10.2018

Mrs. Ayesha Oman

... Applicant

VERSUS

\$ M/s.Trend World rep. by its Proprietor S.A.Hyder,
And another.

... Respondents

! Counsel for the applicant : Mohammed Imran Khan

^ Counsel for the respondents : Sri B.Vijaysen Reddy for
R.Shashank Reddy

<GIST:

>HEAD NOTE:

? Cases referred

(2009) 10 SCC 103

2018 (2) ALD 728 (DB)



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

ARBITRATION APPLICATION No.98 OF 2015

ORDER:

This is an application filed under sub-sections (5) and (6) of Section 11 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as 'the A&C Act' seeking to appoint sole arbitrator to adjudicate the claims and disputes between the applicant and the respondents. The affidavit filed in support of the application delineates the applicant's case under Section 11(5) and (6) of the A&C Act.

2. The respondents filed counter admitting execution of 'unregistered lease agreement', dated 06.08.2011 and pleading that the period of lease was for eleven months and on its expiry, the lease agreement itself had expired and therefore, there is no surviving arbitration agreement between the parties. It is their contention that they cannot be reckoned as holding over tenants and there is no question of their holding possession on the basis of the terms of the lease agreement, dated 06.08.2011. They plead that notice under Section 106 of the Transfer of Property Act, 1882, was issued to them and the transaction is governed by the special statute, namely, the Transfer of Property Act, 1882, and therefore, the dispute in the nature sought to be raised cannot be adjudicated by way of arbitration. It is their plea that the arbitration clause is non-existent and such clause is no longer in force in view of the expiry of the lease agreement. Thus, they plead that the application is not eligible to be allowed.

3. Learned counsel for the applicant made reference to the Judgment of the Apex Court in **Magma Leasing & Finance Limited**

v. Potluri Madhavalata¹ and argued for the position that contractual dispute resolution clause in the form of arbitration clause would survive and would not perish nor become inoperative even where there is termination of contract due to breach. The terms of the arbitration agreement in the case in hand is clause 21 of the lease agreement, dated 06.08.2011. It provides that in the event of any dispute with regard to the agreement or the interpretation of any of the terms and conditions thereof or the implementation thereof, including the question of determination of any aspects thereof as applicable, and all of other matters related to or arising out of the same, the parties agree that the dispute shall be referred to the arbitration at the hands of the arbitrator, all other aspects as per the Arbitration and Conciliation Act, 1996. The learned counsel for the applicant argued that this clause is comprehensive enough and is in the widest possible terms and it covers all disputes, differences, claims and questions and all such disputes survive for the purpose of resolution through arbitration. **Magma Leasing & Finance Limited** (supra) and the precedents followed therein were referred to by the learned counsel for the applicant in support of this argument.

4. Per contra, learned counsel for the respondents argued that the Division Bench of this Court in **Vodafone Essar Infrastructure Limited v. Prapoorna Properties Private Limited**² held that the issues of the nature in hand are not referable to arbitration. It is argued that the relationship between the parties to the lease agreement in question no more survives in view of the termination of the limited period of eleven months of the lease agreement, dated

¹ (2009) 10 SCC 103

² 2018 (2) ALD 728 (DB)

06.08.2011 and therefore, the arbitration agreement, which was part of that lease agreement, itself has become inoperative and does not have the efficacy to be enforced through any measure under sub-section (5) or (6) of Section 11 of the A&C Act.

5. It needs to be noted, at the outset, that in **Vodafone Essar Infrastructure Limited** (supra), the Division Bench of this Court decided a Revision arising from an Application under Section 8 of the A&C Act, which was filed before the VIII Additional Senior civil Judge, Ranga Reddy District at L.B.Nagar. The Division Bench made erudite reference to the decision of the Apex Court in **Booz Allen & Hamilton Inc., v. SBI Home Finance Limited**³ and also **Sukanya Holdings Private Limited v. Jayesh H.Pandya**⁴ to hold that within the jurisdiction of Section 8 of the A&C Act, it was impermissible for the trial Court to refuse to try the suit and make a reference on the basis of an arbitration agreement, in cases which fell within the sphere of exclusion on the basis of the law laid down in Booz Allen & Hamilton Inc., (supra). The precedent in **Vodafone Essar Infrastructure Limited** (supra) rendered with reference to Section 8 of the A&C Act has no bearing on the question whether any measure is due under sub-sections (5) and (6) of Section 11 of the A&C Act in the case in hand. While considering an Application under Section 11 of the A&C Act, the Chief Justice or his designate; and now, the High Court; is not to embark upon an examination of the issue of 'arbitrability' or appropriateness of adjudication by a private forum, once that authority finds that there was an arbitration agreement between or among the parties. It would leave the issue of arbitrability

³ (2011) 5 SCC 532

⁴ (2003) 5 SCC 531

for the decision of the arbitration tribunal. This principle was emphasized in **Booz Allen & Hamilton Inc.**, (supra), to state in clear terms that the nature and scope of issues arising for consideration under Section 11 of the A&C Act for appointment of arbitrator are far narrower than those arising under Section 8 of the A&C Act seeking reference of the parties to a suit to arbitration. After requisite measure by way of appointment of arbitrator is taken under Section 11 of the A&C Act, the arbitral tribunal would decide on the issue of arbitrability..., if such issue arises. Then, the aggrieved will have to challenge the award by filing an Application under Section 34 of the A&C Act. However, that would not be the case in the context of an Application under Section 8 of the A&C Act when made in a pending suit. While adjudicating an Application under Section 8 of the A&C Act, the arbitrability would arise for decision, since all aspects of arbitrability will have to be decided by the Court seized of the suit. That would not be left for the decision of the arbitrator. This classic distinction is laid down and well maintained in the judicial precedent **Booz Allen & Hamilton Inc.**, (supra) pointedly in paragraphs 32 and 33 of that Judgment as reported in SCC.

6. In the aforementioned settled position of law, this Arbitration Application under sub-sections (5) and (6) of Section 11 of the A&C Act is eligible to succeed.

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

8. Accordingly, Sri K.Sanga Reddy, Retired District Judge, 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 Arbitration and Conciliation Act. No order as to costs.

THOTTATHIL B. RADHAKRISHNAN, CJ

26.10.2018

Note: LR copy be marked.
(By order)
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