

***THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY**
AND
THE HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU
+C.R.P.No.6384 of 2017

% 02-05-2018

#D. Muralidhar Rao

... Petitioner/Respondent No.1/
Plaintiff

v.

\$1. M/s. Srinivasa Constructions
rep.by its Managing Partner, D. Appa Rao,
Saidabad, Hyderabad,

2. D. Appa Rao, s/o. late D. Anand Rao.

... Respondents/Petitioners/
Defendants 1 & 2

3. M/s. Suyosha Health Care Pvt. Ltd.,
rep.by its Director, Dr. Manjula Anagani,
Srinagar Colony, Hyderabad.

... Respondent/RespondentNo.2 /
Defendant No.3

! Counsel for the petitioner: Sri D. Madhava Rao

Counsel for the Respondents: Sri K. Prabhakar

< Gist:

> Head Note:

? Cases referred:

¹ 2011 (5) SCC 532

² 2016 (10) SCC 386

³ 2017 (4) CCC 55 (SC)

⁴ AIR 1955 Calcutta 65

⁵ (2013) 10 SCC 535

⁶ AIR 2003 SC 2252

THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

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

C.R.P.No.6384 of 2017

Date: 02.05.2018

Between:

D. Muralidhar Rao
s/o. D. Narayana Rao, Hyderabad.

.. Petitioner/Respondent No.1/
Plaintiff

and

1. M/s. Srinivasa Constructions,
Rep.by its Managing Partner, D. Appa Rao,
Saidabad, Hyderabad.,

2. D. Appa Rao, s/o. late D. Anand Rao.

.. Respondents/Petitioners/
Defendants 1 & 2

3. M/s. Suyosha Health Care Pvt. Ltd.,
Rep.by its Director, Dr. Manjula Anagani,
Srinagar Colony, Hyderabad.

.. Respondent/Respondent No.2
/Defendant No.3

Counsel for the petitioner : Sri D. Madhava Rao

Counsel for the respondents : Sri K. Prabhakar

The Court made the following:

ORDER: (Per the Hon'ble Sri Justice D.V.S.S. Somayajulu)

This Civil Revision Petition is filed under Article 227 of the Constitution of India against the order, dated 11.10.2017, passed in I.A.No.460 of 2016 in O.S.No.575 of 2016 by the XV Additional District Judge, Ranga Reddy District at Miyapur.

2. The said suit O.S.No.575 of 2016 is filed by one D. Muralidhar Rao against i) Sri Srinivasa Constructions, represented by its Managing Partner, Sri D. Papa Rao, ii) Sri D. Papa Rao and iii) Suyosha Health Care Private Ltd.

3. The brief averments of the plaint are that the plaintiff entered into an agreement with second defendant to develop a property measuring 1136.20 square yards in Madhapur Village on 17.08.2007. Later, another agreement dated 28.06.2009 was concluded between the plaintiff and the first defendant firm represented by the second defendant as 'Managing Partner' for development of the same property. The building was then constructed and the third defendant is in occupation of the building as a tenant.

4. The case of the plaintiff is that the two agreements dated 17.08.2007 and 28.06.2009 are not valid as they are not properly stamped or registered. The plaintiff also pleads that the lease deed executed in favour of the third defendant by the plaintiff and the second defendant is also not valid, as it is not properly stamped and registered. Hence, the suit is filed for the following reliefs:

- a) Declaring defendant No.3 as the tenant of the plaintiff in respect of plaint schedule property consequentially direct defendant No.3 by mandatory injunction to pay rents to plaintiff.
- b) Direct defendant No.3 to pay the arrears with effect from 01.10.2015 to 30.04.2016 amounting to Rs.53,09,696/- being the arrears of rent and continue to pay future rents.
- c) To grant permanent injunction restraining the defendant Nos.1 & 2 or anyone else claiming through them not to interfere into the suit schedule property.
- d) To grant permanent injunction restraining the defendants 1 & 2 or anyone else claiming through them not to execute any nature of documents in respect of the suit schedule property.
- e) Allow costs of the suit.
- f) And pass other and further orders as this Hon'ble Court deems fit and proper."

5. After the suit was filed, the defendants 1 & 2 filed an application in I.A.No.460 of 2016 under Section 8 (1) of the Arbitration and Conciliation Act, 1996 (for brevity 'the Act') requesting the Court to refer the disputes spelt out in the plaint to arbitration, as per Clause 15 of the Development Agreement dated 17.08.2007. This application was resisted by the plaintiff/revision petitioner on the ground that the agreement dated 17.08.2007 is not valid in law; that the reliefs claimed in the suit cannot be referred to arbitration; that the defendants 1 & 2 are not parties to the second agreement which contains the arbitration clause etc.

6. After considering the respective pleadings and hearing the parties, the lower Court passed the impugned order holding that the first agreement is not superseded by the second agreement; that the parties to the agreement are the same as the first defendant is a firm represented by the second defendant and therefore, it cannot be said that the parties are different. The trial Court ultimately referred the parties to arbitration, as per clause 15 of the Development Agreement dated 17.08.2007. It is this order that is now impugned in the appeal.

7. This Court has heard Sri D. Madhava Rao, learned counsel for the petitioner/plaintiff and Sri K. Prabhakar, learned counsel for the respondents/defendants.

8. The learned counsel for the petitioner/plaintiff argued that the second agreement supersedes the first agreement and that the second agreement does not contain an arbitration clause. Therefore, it is his contention that for any dispute arising under the second agreement dated 28.06.2009, it is only the Civil Court that has the jurisdiction to entertain the same. He argued that under the second agreement, there are fundamental changes in the terms of the contract and that there is a novation and not merely a 'variation' of the earlier contract. He also points out that as the reliefs claimed in the suit are substantially against the third defendant who is not a

party to the arbitration agreement, the dispute cannot be referred to an arbitrator.

9. In reply thereto, the learned counsel for the respondents/defendants argued that the earlier agreement is not superseded by the subsequent agreement and that both of them can be harmoniously read together. He argued that there are some variations in the terms, but not a 'novation' of the contract. He also argued that the reliefs claimed by the plaintiff/present revision petitioner can also be granted by the arbitrator who is a substitute for a Court. He vehemently argued that the impugned order is correct and is valid.

10. After hearing both the learned counsel and considering the submissions made and the evidence introduced, the following points arise for determination:

- i) What are the disputes that can be referred to arbitration and what are the reliefs that can be granted by an arbitrator?
- ii) Is there novation or an alteration to the earlier contract of 17.08.2007, in view of the subsequent agreement dated 28.06.2009?
- iii) Can a dispute be referred to the arbitration under Section 8 of the Arbitration Act, 1996 when there are

third parties in the suit who are not parties to the arbitration agreement?

Re Point No.(i):

11. It is a fact that arbitration is an alternative dispute resolution mechanism chosen as an alternative forum to a civil Court. However, it is clear in view of the decided law on the subject that an arbitrator is not equal to a Court and does not have all the powers that are vested in a civil Court. Even as on date the powers of arbitrator can be circumscribed by the agreement between the parties. As an example, this Court notices Section 31 (7)(a) of the Act clearly stating that if there is a term in the contract prohibiting the award of interest, the arbitrator cannot award interest. Therefore, this Court holds that while an arbitrator is a substitute or alternative forum, he does not have all the powers of a civil Court. The Hon'ble Supreme Court of India in a judgment reported in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*¹ spelt out that the following disputes are not capable of reference to arbitration. Para-22 of the judgment is reproduced here:

“22. Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though

¹ 2011 (5) SCC 532

not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

The well recognized examples of non-arbitrable disputes are: (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 certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.”

This was followed by **A. Ayyasamy v. A. Paramasivam**², in which para-9 is relevant, which is reproduced here:

“9. the Act does not make any provision excluding any category of disputes treating them as non-arbitrable. Notwithstanding the above, the Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The Courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. Following categories of disputes are generally treated as non-arbitrable¹:

- (i) patent, trademarks and copyright;
- (ii) anti-trust/competition laws;
- (iii) insolvency/winding up;
- (iv) bribery/corruption;
- (v) fraud;
- (vi) criminal matters.

.....”

12. On an examination of the plaint filed in this case and the prayers made therein, this Court is of the opinion that the prayers made/sought are not those that are prohibited by law from being

² 2016 (10) SCC 386

referred to arbitration. Such prayers can be made even before an arbitrator. This point is accordingly answered.

Re Point No.(ii):

13. For an easy understanding, a tabular statement is given below setting out the important clauses of Exs.P.1 & P.2.

Sl. No.	Particulars	Ex.P.1 agreement Dated 17.08.2007	Ex.P.2 agreement Dated 28.06.2009
1.	Parties	a) D. Muralidhar Rao (Owner) b) D. Papa Rao (Developer)	a) D. Muralidhar Rao (owner) b) Srinivasa Cosntructions rep.by Managing Partner D. Papa Rao (Developer)
2.	Building	Ground + five floors	Ground + 4 floors
3.	Period	3 (three) years after permission from the concerned authorities	18 months from the date of handing over. Site to be handed over within 30 days
4.	Disputes	To be settled by Arbitration	Nil
5.		GPA to developer to sell	GPA after payment of goodwill only.
6.	Share	Ratio of sharing is 52.5 : 47.5	Ratio of sharing is 52.5 : 47.5
7.	Consideration over and above SHARE		Non-refundable good will of Rs.65 lakhs.
8.	Delay		Agreed penalty of Rs.3.50 lakhs per month for failure to deliver within 18 months.

14. Based on the clauses in the new agreement, the learned counsel for the revision petitioner argued that there is an altogether new contract i.e., a novation of the contract and not a mere alteration. The learned counsel for the respondents however

argued that the overall purpose and intent remain the same; that in both the agreements the percentage of sharing (52.5 to 47.5) remain the same; but only a few terms are altered. He, therefore, argued that the first agreement and the arbitration clause are not changed or superseded.

15. This Court notices that there are certain very important and fundamental changes in the second agreement which in the opinion of the Court go to the root of the matter viz.,

- a) The period of construction is reduced to 18 months from 36 months and a penalty/compensation clause is also included for delay of delivery.
- b) The overall size of the building is changed from ground + five floors to ground + four floors.
- c) In the second agreement, consideration is also specified in the form of non-refundable goodwill, apart from the built-up area.
- d) The alternate dispute resolution to arbitration is eliminated.
- e) The parties to the agreement are a partnership firm in place of an individual.
- f) The second agreement does not say that the new agreement is entered into alter a few terms etc. The entire gamut of operations/obligations is again spelt out in the new agreement.

16. On a review of the clauses, this Court is of the opinion that the argument of the learned counsel for the revision petitioner/plaintiff is correct and that there is a novation of the

contract in view of the fundamental changes introduced in the size of the building, period of construction and the consideration payable. Referring to the doctrine of novation, the Supreme Court in *Chrisomar Corporation v. Mjr Steels Private Limited*³ held as under:

“33. It is clear that where parties to a contract agree to substitute a completely different contract for the first, or to rescind a contract, the performance under the original contract and/or rescinded contract comes to an end. When parties to a contract “alter” a contract, the question that has to be answered is as to whether the original contract is altered in such a manner that performance under it is at an end.”

17. The Hon’ble Supreme Court of India also noticed and approved the judgment of the Calcutta High Court in *Juggilal Kamlapat v. N.V. Internationale Credit-En Handels Vereeniging ‘Rotter-dam’*⁴. This Court holds that the changes effected by Ex.P.2 are fundamental in nature and go to the root of the matter. Therefore, this Court has no hesitation to hold that there is a novation and substitution of existing contract-Ex.P.1 with Ex.P.2-agreement. In this view of the matter, the finding of the lower Court that Ex.P.2 is only in continuation of Ex.P.1 is erroneous. The appellant allowed the building to be constructed and in fact he states that the tenant was inducted with his consent into the building. However, his contention is that the lease deed is not stamped/registered as per law and hence void. The point however remains that the second agreement was entered into after two years

³ 2017 (4) CCC 55 (SC)

⁴ AIR 1955 Calcutta 65

and also acted upon. The judgement in *Young Achievers v. IMS Learning Resources Private Limited* ⁵ is also relevant in this context. Paras 7 and 8 are reproduced here:

“7. The principle laid down is that if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it.

8. We may indicate that so far as the present case is concerned, parties have entered into a fresh contract contained in the Exit paper which does not even indicate any disputes arising under the original contract or about the settlement thereof, it is nothing but a pure and simple novation of the original contract by mutual consent.”

Hence, this Court is of the opinion that the arbitration clause in the earlier Ex.P.1-agreement does not exist as Ex.P.2-agreement is a fresh agreement; which does not provide for arbitration.

Re Point No.(iii):

18. The last question that survives for consideration is whether an order under Section 8 of the Act could be passed directing the parties to go to arbitration, when the plaintiff includes reliefs and also parties who are not parties to the arbitration agreement. A reading of the record makes it clear that the third defendant in the suit viz., Suyosha Health Care Pvt. Ltd. is not a party to either Ex.P.1, agreement dated 17.08.2007 or the subsequent agreement dated 28.06.2009. The reliefs claimed in the suit are for a declaration that the third defendant is a tenant in the premises for a direction to pay the arrears of rent from 01.10.2015 onwards and also the future rents to the plaintiff, besides the relief of permanent injunction.

⁵ (2013) 10 SCC 535

Therefore, a reading of the plaint makes it clear that a substantial relief is claimed against the third defendant in the suit.

19. The plaintiff's case is that there is a breach committed by the defendants 1 & 2 and that on the basis of some untenable documents, construction of the building was carried out. It is also his alternative case that defendants 1 & 2 are collecting the entire rent for the building, instead of limiting it to the development to the share of 47.5%. The issues such as breach of contract and whether the third defendant could be inducted to the tenancy are the matters to be decided in the suit after a full-fledged trial. The reliefs claimed against third defendant cannot be segregated and decided separately. The suit consists of reliefs which are claimed both against defendants 1 & 2 who are parties to the agreement and against third defendant who is not a party to the agreement.

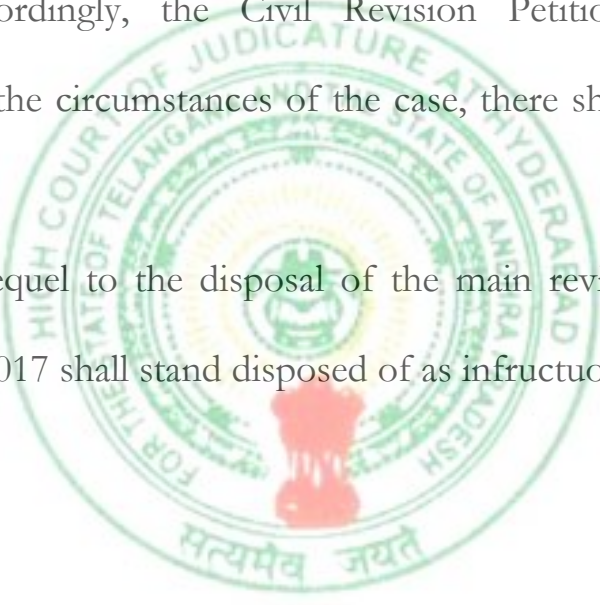
20. The Hon'ble Supreme Court of India in ***Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya***⁶ clearly held that the reliefs cannot be separated in a case like this. There is also a likelihood of conflicting decisions arising if the cause of action is separated and decided by two different tribunals viz., civil Court as far as the third defendant is concerned and the arbitrator as far as defendants 1 & 2 are concerned. To avoid such likelihood of conflicting decisions and to ensure that the lis is decided comprehensively among all the parties, this Court is of the opinion that the suit needs to be adjudicating on

⁶ AIR 2003 SC 2252

merits by the civil court instead of by the arbitrator. Therefore, this Court is of the opinion that the lower Court committed an error in referring the parties to arbitration, when a third party is included as a defendant in the suit. This point is answered accordingly.

21. For all the above reasons, this Court is of the opinion that the impugned order, dated 11.10.2017, passed in I.A.No.460 of 2016 in O.S.No.575 of 2016 by the XV Additional District Judge, Ranga Reddy District at Miyapur, is not sustainable and the same is set aside. Accordingly, the Civil Revision Petition is allowed. However, in the circumstances of the case, there shall be no order as to costs.

22. As a sequel to the disposal of the main revision, CRP MP No.8223 of 2017 shall stand disposed of as infructuous.



C.V. NAGARJUNA REDDY, J

D.V.S.S. SOMAYAJULU, J

Date: 02.05.2018
ISN

Note: L.R. Copies to be marked.