

THE HIGH COURT FOR THE STATE OF TELANGANA::
AT OF JUDICATURE AT HYDERABAD

I.A.No.2 of 2019

In/and

CIVIL REVISION PETITION No.421 of 2019

Between:

Kancham Suresh, S/o.late Rajamouli, aged
about 55 years, Occ : Business, R/o.H.No.1-
2-410/1/4, Gagan Mahal Colony,
Domalguda, Hyderabad.

..... Petitioner.

And

1. Smt.Telukunta Swaroopa,W/o.T.Sanjay
Kumar, D/o.late Sri K.Rajamouli, aged 44
years, Occ: House Wife, R/o.H.No.10-1-18,
TNT, Vaishnavi Apartment, Flat No.301, 3rd
floor, West Maredpally, Secunderabad and
others.

..... Respondents.

Date of Judgment pronounced on : 03-06-2019

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

1. Whether Reporters of Local newspapers : Yes/No
May be allowed to see the judgments?
2. Whether the copies of judgment may be marked : **Yes**
to Law Reporters/Journals:
3. Whether The Lordship wishes to see the fair copy : Yes/No
Of the Judgment?

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO**I.A.No.2 of 2019****In/and****CIVIL REVISION PETITION No.421 of 2019**

03-06-2019

Kancham Suresh, S/o.late Rajamouli,
aged about 55 years, Occ : Business,
R/o.H.No.1-2-410/1/4, Gagan Mahal
Colony, Domalguda, Hyderabad.

..... Petitioner.

Versus

\$1. Smt.Telukunta Swaroopa,W/o.T.Sanjay
Kumar, D/o.late Sri K.Rajamouli, aged 44
years, Occ: House Wife, R/o.H.No.10-1-18,
TNT, Vaishnavi Apartment, Flat No.301, 3rd
floor, West Maredpally, Secunderabad and
others.

.....Respondents.

< **GIST:**> **HEAD NOTE:**

!Counsel for the Petitioner : Sri M.V.Suresh.
^Counsel for respondent-1&2 : Sri T.Nataraj.
^Counsel for respondents-4&8 : Sri P.Suresh
^Counsel for respondent-6 : Sri G.R.Sudhakar
^Counsel for respondent-5 : Sri P.Suryanarayana

? Cases referred

1. 2003 (2) APLJ 289
2. AIR 1988 Gujarat 63
3. (2010) 8 SCC 24
4. Decision of Superior Court of New Jersey dt.25-09-2013

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO**I.A.No.2 of 2019****In/and****CIVIL REVISION PETITION No.421 of 2019****ORDER :**

This Civil Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.31-01-2019 in Tr.O.P. No.2 of 2019 of the Chief Judge, City Civil Court, Hyderabad refusing to transfer O.S.No.944 of 2017 from the file of the IX Additional Chief Judge, City Civil Court, Hyderabad to any other Court of equivalent jurisdiction at the request of the petitioner.

2. Petitioner is defendant No.1 in the said suit.
3. Respondent Nos.1 and 2/plaintiffs filed the said suit for partition of plaint "A" to "K" schedule properties into 9 equal shares and allot 1/9th share to them.
4. Admittedly, petitioner filed I.A.No.2364 of 2018 in the said suit invoking Section 89 C.P.C. and prayed the IX Additional Chief Judge, City Civil Court, Hyderabad to refer the suit for mediation for amicable settlement of the disputes.
5. Respondent Nos.1 and 2 herein and 4th respondent/3rd defendant refused notice in the said application. Respondent No.3/2nd defendant and 8th respondent/7th defendant endorsed "no counter".

6. By order dt.04-01-2019, the Court allowed the said I.A. and referred the matter to mediation directing the Secretary, Legal Services Authority to entrust the case to an experienced mediator.

7. Later on the same day, it allegedly passed another docket order directing both parties to be present for settlement talks before the Court along with their respective counsels by 1 p.m. on that day.

8. Both parties except 2nd defendant were present on 04-01-2019. On 08-01-2019, the said Court noted that respondent Nos.1 and 2/plaintiffs made specific proposals for being worked out for settlement, but defendants sought time to deliberate on the proposal forwarded from the plaintiffs' side. So it adjourned the matter to 22-01-2019 to hear the stand of the defendants regarding the settlement.

Tr.O.P..No.2 of 2019

9. In the meantime, on 21-01-2019, petitioner filed Tr.O.P..No.2 of 2019 before the Chief Judge, City Civil Court, Hyderabad seeking transfer of the suit to any other Court alleging that the Court had changed the order dt.04-01-2019 in his absence and in the absence of defendant Nos.1, 2, 4 and others; there was an oral request by the petitioner to send the matter to mediation, but the Presiding Officer of the Court of IX Additional Chief Judge, City Civil Court, Hyderabad (for short 'the Presiding Officer') did not accept it; and so petitioner entertained a doubt and lost faith in the Court and filed on 05-01-2019

a memo stating that he intends to seek a transfer of the suit to another Court. It is alleged that on 08-01-2019, when all parties were present, the Presiding Officer of the Court, without discussing anything, made a proposal to pay Rs.1.4 crores and give one godown to the plaintiffs/respondent Nos.1 and 2; that defendants requested the Court to decide about their share in the plaint schedule property; that the Presiding Officer then informed that respondent Nos.1 and 2 had filed for partition and only their shares will be decided. It is also contended that the Presiding Officer stated that whether the parties are willing or not, that they should inform by 22-01-2019 or the suit properties will be handed over to a Receiver. It is also stated that defendant No.6, came from U.S.A. on 08-01-2019 and requested in person the Court to decide about her share, but the Presiding Officer told her that she is not the plaintiff and had not sought for partition. It is stated that for the above unilateral decisions, petitioner apprehends that the Court is not acting in a fair and judicious manner and he cannot expect fair play, and so the Chief Judge, City Civil Court, Hyderabad should transfer the suit to another Court of equivalent jurisdiction.

10. On 22-01-2019, the IX Additional Chief Judge, City Civil Court, Hyderabad noted that there was no settlement reported by one of the defendants who was present before it; that Tr.O.P.. No.2 of 2019 was filed before the Chief Judge, City Civil Court, Hyderabad for transfer of the suit to another Court which was adjourned to 23-01-2019; and so posted the suit to 31-01-2019.

The Counter of the respondents in the Tr.O.P

11. Respondent Nos.1 and 2 filed a counter opposing the Tr.O.P.. and stated that it is filed with *mala fide* intention and it is an abuse of process of Court and there are no grounds for transfer. It is stated that the Presiding Officer was competent to conduct mediation under Section 89 of C.P.C. and did so on 08-01-2019 and all parties and counsels participated in it. It is stated that the Presiding Officer did not impose anything on the parties. It was denied that the Court changed the order already passed. It is also stated that Presiding Officer did not make any proposal as is alleged by the petitioner and did not make any threat that she would handover the properties to a Receiver if the parties did not give decision on 22-01-2019. It is contended that the Presiding Officer only stated that if parties did not accept mutual settlement, it will have no bearing on merits and the matter will proceed as per procedure and in accordance with law.

12. Similar counter was filed by respondent Nos.4, 6 and 8. They contended that Section 89 of C.P.C. did not preclude the Court from conducting mediation.

The Order in Tr.O.P.No.2 of 2019

13. By order dt.31-01-2019, the Chief Judge, City Civil Court, Hyderabad dismissed the Tr.O.P. No.2 of 2019.

14. It observed that bias cannot be attributed to the Presiding Officer merely because she conducted mediation in open Court; that

all parties appeared for mediation before the Court and proposals and suggestions were made in the open Court; that the Presiding Officer had stated at the time of mediation, that the result of the mediation will not affect the matter on merits; and that the allegations leveled by the petitioner against the Presiding Officer of the Court of IX Addl. Chief Judge, City Civil Court, Hyderabad were denied by the respondents. It referred to **Pasupala Fakruddin and another Vs. Jamia Mosque and another**¹ wherein this Court had held that unless there is specific instance of bias or Presiding Officer had personal interest in the subject matter of the suit, he cannot be branded as a biased Officer. It also stated that the Supreme Court in **Rajkot Cancer Society Vs. Municipal Corporation, Rajkot**² had held that power to transfer a case should be exercised with due care and caution bearing in mind that there should be no unnecessary, improper and unjustifiable stigma or slur on the Court from which the case is transferred.

15. Assailing the same, this Revision is filed.

Contentions of petitioner in this CRP

16. Learned counsel for petitioner contended that the order passed by the Chief Judge, City Civil Court, Hyderabad cannot be sustained; that there is an order, certified copy of which was supplied to the petitioner by the Court of IX Additional Chief Judge, City Civil

¹ 2003 (2) APLJ 289

² AIR 1988 Gujarat 63

Court, Hyderabad passed on 04-01-2019 in I.A.No.2364 of 2018 specifically referring the matter to mediation and directing the Secretary, Legal Services Authority to entrust the case to an experienced mediator; and so the Presiding Officer, cannot on the same day, start mediation herself contrary to her order, and after failure of such mediation, proceed to adjudicate the suit. He also reiterated the allegations made against the Presiding Officer in the Tr.O.P.

Contentions of respondents

17. Sri T.Nataraj, learned counsel for respondent Nos.1 and 2 supported the order passed by the Court below and contended that the Revision Petition is not maintainable. He reiterated that the Presiding Officer of the Court of the IX Additional Chief Judge, City Civil Court, Hyderabad acted in a fair and transparent manner and the allegations leveled against her by the petitioner are false. According to him, petitioner did participate in the mediation process conducted by the Court on 08-01-2019 along with his counsel and the Court was empowered under Section 89 to conduct mediation.

18. Sri P.Suresh, learned counsel for respondent Nos.4 and 8, Sri G.R.Sudhakar, learned counsel for respondent No.6, Sri P.Suryanarayana, learned counsel for respondent No.5 supported his contentions. The 3rd respondent was served but there is no representation. The notice to respondent No.7 was returned with endorsement “unclaimed” and so she is deemed to be served.

19. I have noted the contentions of the parties.

The consideration by the Court

20. Section 89 C.P.C. states:

“89. Settlement of disputes outside the Court:-

(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the terms of a possible settlement and refer the same for -

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat;

or

(2) Where a dispute has been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of Section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of the Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.”

21. In **Afcons Infrastructure Limited and another Vs. Cherian Varkey Construction Company Private Limited**³, the Supreme Court considered the provisions of Section 89 and Order X Rule 1-A, 1-B and 1-C C.P.C. and held that there is a mixing up of the definitions of “mediation” and “judicial settlement” under Clauses (c) and (d) of sub-Section (2) of Section 89 of the Code. It declared:

“11. ... Clause (c) says that for “judicial settlement”, the court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Clause (d) provides that where the reference is to “mediation”, the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court, as “mediation”, as is done in clause (d). Nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as “judicial settlement”, as is done in clause (c).

12. “Judicial settlement” is a term in vogue in USA referring to a settlement of a civil case with the help of a Judge who is not assigned to adjudicate upon the dispute. “Mediation” is also a well-known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. It is also a synonym of the term “conciliation”. (See Black’s Law Dictionary, 7th Edn., pp. 1377 and 996.)

13. When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, the definitions of those words in Section 89 with interchanged meanings has led to confusion, complications and difficulties in implementation. The mix-up of definitions of the terms “judicial settlement” and “mediation” in Section 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in clauses (c) and (d) of Section 89(2). If the word “mediation” in clause (d) and the words “judicial

³ (2010) 8 SCC 24

settlement” in clause (c) are interchanged, we find that the said clauses make perfect sense.”

22. It thus held that the definitions of “judicial settlement” and “mediation” in clauses (c) and (d) of Section 89(2) shall have to be interchanged to correct the draftsman’s error.

23. Therefore, where a dispute has been referred to mediation, the Court should refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat. Where a dispute has been referred for “judicial settlement”, the Court shall affect a compromise between the parties and shall follow the prescribed procedure.

24. In the instant case, admittedly the IX Additional Chief Judge, City Civil Court, Hyderabad referred the parties to mediation in her order dt.04-01-2019 but subsequently took an active role in the mediation as per the pleadings of both sides.

25. In **Afcons Infrastructure** (3 supra), the Supreme Court held in para-44(iv) at page 47 that *if the Judge in charge of the case assists the parties and if settlement negotiations fails, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice and it is advisable to refer cases proposed for judicial settlement to another Judge.*

26. This principle is also statutorily recognized in Section 80 of the Arbitration and Conciliation Act, 1996 in the following terms:

*“80. **Role of conciliator in other proceedings.** - Unless otherwise agreed by the parties,-*

(a) the conciliator shall not act as an arbitrator or as a representative or counsel for a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;

(b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.”

27. The basis for the rule appears to be that parties make confidential disclosures to mediators that are outside the rules of evidence, and that the parties are assured these disclosures will play no role in future litigation; this ability to talk confidentially to a mediator is the fundamental basis of the mediation process; and so serving as a mediator is inherently incompatible with subsequently serving as a neutral arbitrator. This principle is recognized and accepted in other jurisdictions also.

28. In **Minkowitz Vs. Israeli**⁴, it was held that a mediator, who may become privy to party confidences in guiding disputants to a mediated resolution, cannot thereafter retain the appearance of a neutral fact finder necessary to conduct a binding arbitration proceeding; and consequently, absent the parties' agreement, he cannot assume the role of a mediator. It observed that mediation encourages confidential disclosures to the mediator, whose training is designed to utilize these confidential positions to aid the parties to evaluate their positions, promote understanding of the other side's

⁴ Decision of Superior Court of New Jersey dt.25-09-2013

position and reach a consensus; on the other hand, arbitrations require an arbitrator to weigh evidence, assess credibility, and apply the law when determining whether a party has proven his or request for relief. It also relied on **Canon IV.H of the Code of Ethics for Arbitrators in commercial disputes** approved by the American Bar Association and the American Arbitration Association that *an arbitrator should not be present or otherwise participate in the settlement discussions unless requested to do so by all parties* and that this guideline is directed to the evaluator-facilitator dichotomy. It observed that the positions of arbitrator and mediator are in conflict and if the same person acts as a mediator, obtains party confidences or offers opinions on the issues in dispute, a conflict arises were he or she to then switch roles to act as an arbitrator making the final call.

29. Thus a Judge who acts as a mediator becomes disqualified to be an adjudicator.

30. Therefore the Presiding of the Court of IX Additional Chief Judge, City Civil Court, Hyderabad could not have proceeded to adjudicate the suit O.S.No.944 of 2017 after actively playing a role in the mediation between the parties, which admittedly failed. She disqualified herself to be an adjudicator thereafter and should have herself recused instead of proceeding to decide the matter, particularly when the petitioner expressed reservations about her independence after the mediation failed.

31. The Chief Judge, City Civil Court, Hyderabad therefore clearly erred in refusing to allow Tr.O.P.No.2 of 2019 filed by the petitioner.

32. Accordingly, the Civil Revision Petition is allowed; Tr.O.P.No.2 of 2019 is also allowed; and O.S.No.944 of 2017 pending on the file of the IX Additional Chief Judge, City Civil Court, Hyderabad is transferred to the Court of the III Additional Chief Judge, City Civil Court, Hyderabad. I.A.Nos.336 of 2018, 752 of 2018 and 843 of 2018 pending in the suit be disposed of by the transferee Court within three (03) months.

33. Consequently, I.A.No.2 of 2019 is dismissed. No costs.

34. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 03-06-2019

Note :- L.R.Copy to be marked.

B/o.
Vsv