THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

% 25.11.2019

Arbitration Application No.171 of 2013

Mr. P.Sudarshan Reddy, s/o Sidda Reddy, represented by

SPA Holder, Mr.P.C.Raman

APPLICANT

AND

M/s Narsingi Infrastructures (P) Limited, rep by its Managing Director

and seven others.

RESPONDENTS

Counsel for the applicant: : Sri B.Vijaysen Reddy

Counsel for the respondent No.1 : Sri M.V.S.Suresh Kumar
Counsel for respondents 2, 3,4, 7
and 8 : Sri N.Venkateshwara Rao

Counsel for respondents 5 and 6: None appeared.

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- Head Note.
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?Cases Referred:

1. 2018 SCC Online Sc 1045
2. 2019 SCC On Line TS 1658
3. (2013)1 SCC 641

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O R D E R

This application is filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 (for short 'the Act'), read with the Scheme for Appointment of Arbitrators, 2002, to appoint an arbitrator on behalf of the 1st respondent – company, as it failed to appoint / nominate its arbitrator for adjudication of disputes between the applicant and the respondents in terms of arbitral clause No.45 of the development agreement – cum – General Power of Attorney dated 18-12-2010, so as to enable both the arbitrators to appoint the third arbitrator and to pass decision thereon by them.

2. The case of the applicant is that he owns Acs.4.00 of land in Sy.No.296/2 situated at Poppalaguda village, Rajendranagar Mandal, Rangareddy District by virtue of registered sale deeds. Respondents 2 to 8, also owns different extents of land in the same area. Thus, the land of applicant and respondents 2 to 8 put together would be Acs.6-00. Thus, the applicant and respondents 2 to 8, entered into a registered development agreement – cum – General Power of Attorney dated 18-12-2010, with the 1st respondent, which is a developer company, for the purpose of development of the subject land of Acs.6-00, for mutual benefit. As per the development agreement, the 1st respondent has to complete the construction of independent houses and handover the possession of the constructed area allotted towards the share of the land owners, within a period of thirty six months of getting sanction with a grace period of six months. The grievance of the applicant is that till date, the 1st respondent has not undertaken any development activity in the subject land. There was exchange of notices between the applicant and respondents 2 to 8, and the applicant also addressed legal notice dated 09.11.2011, demanding canceling of development agreement and for execution of fresh one within fifteen days. The 1st respondent sent reply, but failed to adhere to the demand of the

applicant, and though some of the respondents who received the same, failed to respond, and the notices sent to remaining respondents, returned un-served. While so, as the 1st respondent has not undertaken any development activity in terms of the development agreement, applicant got issued legal notice dated 18.09.2013, requiring the 1st respondent to provide its bank account details for depositing Rs.1.2 crores into its account; to deliver back the applicant's original title documents of Acs.4-00 of land in Sy.No.296/2 in Poppalaguda village, Rajendranagar mandal, Rangareddy District, which are in the possession of the 1st respondent as per the development agreement dated 18.12.2010; and that if the 1st respondents fails to fulfill the demands made under the legal notice dated 18.09.2013, within 15 days from the date of receipt of legal notice, it would be taken that the 1st respondent has no intention to settle the matter amicably and intending to litigate it out, and the notice shall be constructed as invoking the arbitration clause No.45 for resolution of dispute, and per clause 45 of the agreement, the applicant nominated Justice T.Ch.Surya Rao, retired Judge of the erstwhile High Court of Andhra Pradesh on his behalf, and sought the 1st respondent to appoint arbitrator on its behalf within a period of forty five days from the date of receipt of the legal notice and in case of default, the applicant will be forced to file an application under Section 11 of the Act. Though the said legal notice was received by the 1st respondent, it failed to accede to the demand of the applicant, therefore, the present application is filed seeking appointment of arbitrator on behalf of respondent No.1.

3. Learned counsel for the applicant submitted that as the arbitrator sought to be nominated by the applicant, is no more, this court may appoint an arbitrator on behalf of the applicant as well.

4. The Managing Director of the 1st respondent – company filed counter affidavit. While denying the allegation of the applicant that the 1st respondent failed to discharge its obligation under the development agreement, it is stated *inter alia* that as per the agreement, the 1st respondent is required to complete

the construction of independent houses and handover possession of the constructed area allotted towards the share of the applicant and respondents 2 to 8, within thirty six months from the date of receiving the sanction for the layout from the Hyderabad Metropolitan Development Authority (HMDA), and other competent authorities. Therefore the completion of project work is contingent on the 1st respondent receiving requisite approvals from HMDA for the layout, which is still pending. Therefore, the averment that the 1st respondent has not acted on the development agreement till date, and breached the terms of the development agreement, is incorrect. It is stated that as per the development agreement, the applicant and respondents 2 to 8, are obligated to lay a 60 feet approach road to the said extent of the land, which is to be developed by the 1st respondent. But the applicant and respondents 2 to 8 failed to provide the said approach road, which has resulted in delaying the project and this has also resulted in substantial injury to the 1st respondent, which this respondent reserves to ventilate at appropriate time.

5. It is further stated in the counter affidavit that as per the knowledge of the 1st respondent, there are certain disputes between the applicant and respondents 2 and 8 in respect of memorandum of understanding dated 18.12.2010, and in order to resolve the said disputes, the applicant is invoking the arbitration clause under 45 and hence the same cannot be permitted, and the applicant has not approached the court with clean hands.

6. It is stated that if this court comes to the conclusion that it is a case for appointment of an arbitrator, and as clause 45 of the development agreement contemplates appointment of three arbitrators, only one by each of the parties and the two arbitrators so named to appoint a third arbitrator, this respondent urges this court to appoint Sri Justice T.N.C.Rangarajan, a retired Judge of this Court, as an arbitrator on behalf of this respondent.

7. With the above averments, the 1st respondent sought to dismiss the application.

8. Counter affidavit is filed on behalf of respondents 2, 3, 4, 7 and 8, stating *inter alia* that as per Clause 24 of the development agreement dated 18.12.2010, the land owners shall provide/procure land for laying 60 feet approach road and unless the said obligation under the agreement is complied with, no obligation is cast on the 1st respondent to initiate development activity. It is stated that the 1st respondent is not co-operating with other land owners to fulfill commitment under clause 24 of the development agreement, which is in the nature of a contingent contract, and as per Sections 31 and 32 of the Indian Contract Act, 1872 and Act 4 of 2003, unless the obligation of land owners is not discharged, arbitration clause cannot be invoked individually or independently. It is stated that the applicant does not fulfill any of the clauses in the development dated 18.12.2010, and thereby no cause of action arises for invoking the arbitration clause. It is stated that a party who breaches the contract, is not entitled to reap benefits out of its own breach and these are all the issues, which have to be resolved in a competent civil court. It is further stated that the applicant is seeking to invoke the arbitration clause to suit his convenience, and he has not made out any case for invocation of arbitration clause, and hence the arbitration application may be dismissed.

9. Though notice is served on respondents 5 and 6, no counter affidavit is filed on their behalf, and there is also no representation.

10. Applicant filed reply affidavits, denying the averments made in the counter affidavits.

11. Sri B.Vijaysen Reddy, learned counsel appearing for the applicant submits that the development agreement dated 18.12.2010 was entered into by applicant and respondents 2 to 8, with respondent No.1 for mutual benefit for developing the subject land into layout of residential plots and construction of

independent gated community houses. As per the Clause 9 of the development agreement, the 1st respondent – developer has to complete construction of independent houses, and handover the possession of the same towards the share of the landowners within thirty six months of getting sanction with a grace period of six months. He submits that, just because no specific time limit has been agreed to between the parties to the agreement, for obtaining sanction from competent authorities, the 1st respondent cannot take advantage of the same, and plead that limitation prescribed under Clause 9 of the development agreement for completion of the project, has not started. He submits that the agreement was entered into on 18.12.2010 and till date ie., even in the year 2019, the 1st respondent has not undertaken any developmental activity and as per the case of the applicant, there is no possibility of taking up the project and completing the same in near future. Therefore, the applicant got issued legal notice dated 18.09.2013 for termination of contract, and made certain demands and in case the 1st respondent is not inclined to settle the dispute, to treat the said notice as notice of invocation of arbitration under clause 45 of the agreement. As the 1st respondent has neither came forward for settlement of disputes, nor agreed for appointment of arbitrator, the applicant is constrained to file the present application under Section 11(5) of the Act, seeking appointment of the arbitrator on behalf of the 1st respondent.

12. Sri M.V.S.Suresh Kumar, learned counsel for the 1st respondent – developer, submits that as per clause 24 of the agreement, the applicant as well as respondents 2 to 8, who are land owners, have to provide 60 feet approach road and since the same has not been provided, the 1st respondent is disabled to obtain necessary sanctions. He submits that the applicant, who is the major share holder, is not cooperating for providing of 60 feet approach road, there is breach on his part and hence cannot be permitted to invoke the arbitration clause.

13. Learned counsel for the 1st respondent, alternatively submits that as per clause 45 of the agreement, in the event of any dispute arising out of the agreement, all the parties have to invoke the arbitration clause, and the applicant cannot seek to invoke arbitration clause alone. Since the applicant alone is seeking for appointment of arbitrator and the remaining owners i.e., respondents 2 to 8 are not seeking for invocation of arbitration clause, the arbitration clause became ineffective and incapable of being enforced and hence no arbitrator can be appointed. In support of this contention, learned counsel relied on the judgment of the Apex Court in ***UNITED INDIA INSURANCE CO., LTD v. HYUNDAI ENGINEERING AND CONSTRUCTION CO. LTD***[1]. With these contentions, learned counsel for 1st respondent sought for dismissal of the application.

14. Sri N.Venkateshwara Rao, learned counsel appearing for respondents 2, 3, 4, 7 and 8, while reiterating the above contentions of the learned counsel for the 1st respondent, further submits that the applicant is seeking to invoke the arbitration clause for cancellation of agreement to suit his convenience and hence he has not approached the court with clean hands. Learned counsel submits that these are all disputed questions, which has to be resolved by a competent civil court. Learned counsel further submits that by appointing an arbitrator these contesting respondents, who are not seeking to invoke arbitration clause, will be made to incur the expenditure, if the arbitrator is appointed. Therefore, the learned counsel submits that the arbitrator may not be appointed and the parties may be relegated to civil court to resolve the dispute.

15. Replying on the above contentions, learned counsel for the applicant denied that the applicant is not co-operating with other respondents in providing 60 feet approach road to the 1st respondent, enabling him to obtain necessary permissions. Learned counsel submits that all the development activity is to be undertaken by the 1st respondent – developer under the development agreement

[1] 2018 SCC Online SC 1045

dated 18.12.2010, therefore question of the applicant doing development of land so as to provide for approach road, are all after thoughts, and hence cannot be taken into consideration. Further, in reply to the contention of the learned counsel for the 1st respondent that as per clause 45 of the agreement all the parties to the agreement have to invoke arbitration clause, learned counsel for the applicant submits that there is no specific bar that applicant alone cannot invoke arbitration clause. He submits that as the 1st respondent has not made any development till date, and as there is no hope for the applicant that the 1st respondent would commence and complete the project, he is seeking for cancellation of agreement. He submits that the other respondents though received notices, have not come forward and hence, the applicant being the major share holder, is seeking to cancel the agreement. Relying on a judgment of a learned single Judge of this court in ***TECPRO SYSTEMS LIMITED v. TELANGANA STATE POWER GENERATION COMPANY LIMITED***[2]***,*** learned counsel for the applicant submits that, this court considering the facts and circumstances in the said case, has even permitted a third party to the agreement, to invoke the arbitration clause in the agreement and hence, the applicant who is party to the agreement, cannot be denied such opportunity to resolve the dispute.

16. From the above averments it could be seen that there is no dispute that the applicant and respondents 2 to 8 have entered into development agreement dated 18.12.2010 with the 1st respondent for mutual benefit by developing the subject land into layout of residential plots and for construction of independent gated community houses. In the total extent of land about Acs.6-00, which is given to the 1st respondent for the purpose of development, as per the agreement, the applicant's share of land is about Acs.4-00 and the remaining extent is owned by respondents 2 to 8. As per clause 9 of the terms of the agreement, the 1st respondent has to complete the construction and handover

[2] 2019 SCC OnLine TS 1658

the possession to the owners as per their respective shares within a period of 36 months of getting sanction, with a grace period of six months.

17. In the present case, though the development agreement was entered into between the parties on 18.12.2010, the fact remains that till date, the 1st respondent has not obtained any sanction from the competent authorities concerned, and started the development activity as agreed to between the parties. Therefore, the applicant, got issued legal notice dated 18.09.2013 to the 1st respondent with certain demands, and in case of failure to comply with the same, sought the 1st respondent to treat the said legal notice as the notice invoking the arbitration clause. Clause 45 of the agreement deals with arbitration. The same is extracted as under for better appreciation:

> " 45. That in the event of any dispute arising with regard to the interpretation, scope and ambit of various clauses stipulated herein above and in respect of this contract, the parties hereto shall seek the redressal of the same through Arbitration by panel of 3 Arbitrators. Out of the said panel of 3 Arbitrators, initially the Landowners together and the Developer shall appoint one Arbitrator each and such 2 Arbitrators shall appoint 3rd Arbitrator and if no consensus reached among the first 2 Arbitrators in appointing / nominating 3rd Arbitrator, such appointment of 3rd Arbitrator shall be sought from the Civil Court / High Court vested with jurisdiction under the provisions of the Arbitration and Reconciliation Act, 1996 and the Award passed by the majority of Arbitrators shall be treated as final and binding on the parties and any such proceedings shall not interfere with the progress of construction and the place of Arbitration shall be at Hyderabad."

The above clause clearly stipulates that in the event of any dispute arising with regard to interpretation, scope and ambit of various clauses in the agreement, the parties have to seek the redressal of the same through arbitration. In view of the above circumstances, the applicant is seeking to redress his grievance by way of referring the same to arbitration under Clause 45 of the agreement. Having regard to the facts and circumstances, this court finds justification on the part of the applicant in seeking to invoke the arbitration clause.

18. The contention of the learned counsel for the 1st respondent, and the learned counsel appearing for respondents 2 to 8 is that as per clause 24 of the agreement, the land owners have to provide/procure land for laying 60 feet

approach road to the land under development at their cost, and as the applicant is not co-operating for the same, the 1st respondent is disabled to obtain necessary permissions for proceeding with the construction activity. On the other hand, the contention of the learned counsel appearing for the applicant is that all the development activity is to be undertaken by the 1st respondent under the development agreement, therefore, question of applicant doing development of land, so as to provide approach road, does not arise. As per Clause 45 of the agreement, this issue pertains to the dispute with regard to interpretation of the clause in the agreement, which needs to be resolved in the arbitration proceedings.

19. The other objection of the learned counsel for the contesting respondents is that the arbitration clause No.45 provides that in the event of dispute arising out of the contract, all the parties have to seek the redressal of the same through arbitration, and since in the present case only the applicant is seeking for referring the dispute to arbitration, the same is not maintainable. The 1st respondent has not taken this objection in the reply given to the legal notice.

20. However, in view of the above objection, the issue that arises for consideration is, when the other parties to the agreement are not coming forward to invoke the arbitration clause, whether the applicant, who is aggrieved by the delay on the part of the developer in commencing and completing the project, should also be prevented from invoking the arbitration clause? To answer this issue, the well considered judgment of the learned single Judge of this court in *Tecpro Systems Limited vs. Telangana State Power Generation Company Limited* (2 supra), requires to be analyzed. The facts of the said case disclose that a consortium of companies entered into agreement with the respondent – Corporation therein for execution of certain works, and one of the companies of consortium, wanted to invoke arbitration clause in the agreement for resolution of the dispute. The respondent has taken an objection that only parties to the arbitration agreement can invoke arbitration clause in the agreement, and non-

signatories to it, are not entitled, to invoke it. The learned single Judge, while not accepting the said objection, and relying on the judgment of the Apex Court in ***CHLORO CONTROLS INDIA PRIVATE LIMITD v. SEVERN TRENT WATER PURIFICATION INC.***[3] held that whether or not the other parties to the consortium agreement have any dispute with the respondent or initiate proceedings against it for the benefit of the applicant, the applicant cannot be prevented by the respondent from invoking the arbitration clause contained in the agreement. The relevant portion of the judgment of the learned single Judge is extracted as under for ready reference:

> "47. Then the questions arises (i) whether the applicant, would be a third party to the arbitration agreement and (ii) whether it can still invoke the above arbitration clause in the General Conditions of Contract?
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> **The Chloro Controls (2012) Case and General Principles**:
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> 48. Here it is necessary to consider the decision of the Supreme Court in *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc*. {(2013) 1SCC 641}, relied upon by the learned counsel for the Applicant.
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> 49. In *Chloro Control's* (2 supra), multiple agreements were signed between different parties and some agreements contained an arbitration clause and others did not; and further the parties were not identically common in proceedings before the Court (in the suit) and the arbitration agreement. The Court held that a reference of disputes as a whole or in part can be made to the arbitral tribunal under Section 45 of the Act where the parties to an action are claiming under or through a party to the arbitration agreement. It applied the "Group of Companies" doctrine. The said case related to international arbitration under Part II of the Act. It was referred therein to the general principles under which third parties to arbitration agreements can in certain circumstances invoke the arbitration clause or be sued in arbitration.
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> 50. I shall now refer to these general principles mentioned in *Chloro Controls* (2 supra) which were applied under part II of the Act dealing with international arbitrations, to enable third parties to the arbitration clause to invoke the arbitration clause or be sued in arbitration proceedings.
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> 58. The question is whether the said general principles applicable to Part II of the Act are attracted also to Part I of the Act in order to enable third parties to invoke the arbitration clause or be sued in arbitration proceedings?
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> 65. Recently in *Mahangar Telephone Nigam Ltd. v. Canara Bank* {2019(10) SCALE 619} the doctrine of "group of Companies" was invoked and applied by the Supreme Court in a case of domestic arbitration under Part I of the Act. The Supreme Court reiterated in this decision that a non-signatory can be bound by an arbitration

[3] (2013)1 SCC 641

> agreement on the basis of the 'Group of Companies' doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties. It held that courts and tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary part to the contract.
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> 87. Whether or not the other parties to the Consortium Agreement have any dispute with the respondent or initiate proceedings against it for the benefit of the applicant, the applicant cannot be prevented by the respondent from invoking the arbitration clause contained in the GCC because its scope of work under the Consortium agreement was different from that of other parties to the Consortium agreement. So it ought to be allowed to do so without reference to other parties to the Consortium agreement.
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> 88. No doubt in *Jai Prakash Associates Ltd.* (1 supra), the Delhi High Court in 2009 held that only parties to an arbitration agreement can invoke it and non-signatories to it are not entitled to invoke it. The said view cannot be said to be correct in the light of the decision of 2012 of the Supreme Court in *Chloro Controls* (2 supra). I am therefore, not inclined to follow it."

21. In the present case, as already noted above, agreement was entered into in the year 2010, till date, no activity has taken place in pursuance of the agreement, therefore, the applicant who is a major share holder, issued legal notice dated 18.09.2013, and sought to invoke arbitration clause. The respondents 2 to 8, who are also land owners, are in a way aggrieved by the action of the 1st respondent – developer, but they are not seeking for arbitration, on the ground that applicant is not co-operating with them in providing 60 feet approach road to the 1st respondent enabling it to seek sanctions from the Government. This allegation is denied by the applicant. Therefore, taking the analogy from the above judgment of this court (2 supra) and the Apex Court (3 supra), wherein it was held that even a non-signatory to the arbitration agreement was entitled to invoke the arbitration agreement considering the intention of the parties, I am of the view that having regard to the facts and circumstances of the present case and clause 45 of the agreement, the applicant, who is aggrieved by the inaction of the 1st respondent, is entitled to invoke arbitration clause for resolution of the dispute.

22. The facts in the judgment of the Apex Court in *United India Insurance Co. Ltd., vs. Hyndai Engineering and Construction Co. Ltd* (1 supra), relied on

by the learned counsel for the 1st respondent, discloses that the respondent – company therein entered into agreement with the appellant – insurance company and the arbitration clause in the agreement was made to operate only when the insurance company admits its liability, and disputes the quantum. The facts of the said case further disclose that the insurance company repudiated the claim of the insured, disputing its liability. In those circumstances, when the respondent – company, which is the insured, sought to invoke the arbitration clause when the appellant – insurance company is categorically disputing its liability, the Apex Court held that when once the insurance company denies its liability to indemnify the loss as claimed by the respondent – company, the arbitration clause becomes ineffective and incapable of being enforced. This judgment of the Apex Court is in no way related to the facts of the present case and hence cannot be of any help to the respondent No.1.

23. For the foregoing reasons, the arbitration application is allowed.

24. As noted above, the 1st respondent, in the counter affidavit stated that if this court comes to the conclusion that it is a case for appointment of an arbitrator, as per clause 45 of the development agreement, Sri Justice T.N.C.Rangarajan, a retired Judge of the erstwhile High Court of Andhra Pradesh, may be nominated on its behalf.

25. Since the arbitrator sought to be nominated by the applicant is no more, Sri Justice G.Bhavani Prasad, retired Judge of the erstwhile High Court of Andhra Pradesh, is appointed as arbitrator on behalf of land-owners.

26. Sri T.N.C. Rangarajan, retired Judge of the erstwhile High Court of Andhra Pradesh, is appointed as arbitrator on behalf of 1st respondent.

27. The above said two arbitrators are at liberty to appoint a third arbitrator on consensus, and the award passed by majority of arbitrators, shall bind the parties. If no consensus could be arrived at by both the arbitrators in

appointing the third arbitrator, it is open for the parties to resort to the procedure prescribed under Clause 45 of the agreement.

28. The learned Arbitrators are entitled to fees as per the rates specified in the Fourth Schedule to the Act of 1996, inserted by Act 3 of 2016 with effect from 23-10-2015, which shall be borne by both parties i.e., by the landowners and developer to the agreement. The fees to be borne by the landowners, shall be in proportion to the share of their land.

29. Interlocutory applications pending, if any, shall stand closed. No order as to costs.

A.RAJASHEKER REDDY,J

DATE:25—11—2019

AVS

Note:

1. L.R. copy to be marked.

2. Mark a copy of this order to

(i) Sri Justice G.Bhavani Prasad,
Retired Judge of the erstwhile High Court of A.P.
R/o Flat No.202, First Floor,
Above Karnataka Bank Ltd.,
UJWAL Bhavishya Complex,
Dr.No.6-3-1219/24, Street No.4,
Umanagar, Kundanbagh, Begumpet, Hyderabad – 16.

(ii) Sri Justice T.N.C.Rangarajan,
Retired Judge of erstwhile High Court of A.P.,
R/o Vishnu's Blue Lotus, 103,
2nd Floor, 8-2-2/1/A/1, 2,3,4 Road No.3,
Banjara Hills, Hyderabad – 34.

B/O
(AVS)