HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND
HONOURABLE SRI JUSTICE K.LAKSHMAN

COMCA No.28 of 2019

JUDGMENT: (Per Hon'ble Sri Justice M.S.Ramachandra Rao)

This appeal is preferred against the order dt.28-02-2019 in C.O.P.No.91 of 2018 of the Judge, Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad dismissing the application filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') by the appellant against the respondents restraining the latter from alienating, encumbering or parting with possession or creating any third party interest or charge over the property, which is subject matter of the said O.P.

2. The appellant, who is a N.R.I., had entered into a deed of partnership on 25-04-2015 along with 3rd respondent with 2nd respondent for doing business in real estate including construction, development and selling of commercial and residential complexes and apartments. The name of the firm was M/s.TIA Constructions (1st respondent herein).

3. Clause-23 of the said partnership deed provided that all disputes between the partners relating to the business and other affairs of the firm shall be settled by arbitration, in accordance with the provisions of the Indian Arbitration Act, 1940.

The case of the appellant

4. The appellant contended that 2nd respondent is the son of his separated brother Rajendra Kumar Gupta and is his nephew and 3rd respondent is the brother-in-law of the 2nd respondent i.e. brother of the wife of 2nd respondent.

5. Appellant contended that as per the instructions of 2nd respondent, he executed a Power of Attorney in favour of 2nd respondent on 10-10-2002 in U.S.A. and sent it to the 2nd respondent, which included all financial powers including Bank account operation; as per the request of the 2nd respondent, the appellant used to transfer money into the N.R.I. Account which was being operated by 2nd respondent under the PoA; but the 2nd respondent started withdrawing amounts from the appellant's bank account and transferring them to the bank account of 2nd respondent to meet the personal requirements of 2nd respondent and not that of the appellant.

6. Appellant contends that certain properties were purchased by the 2nd respondent on 26-09-2003, 23-07-2004 and 23-07-2004 under registered document Nos.5715/2003, 4578/2004 and 4579/2004 respectively in Sy.Nos.669 and 670 of Kapra village, Keesara Mandal, Ranga Reddy District in his own name; that this was not informed to the appellant though they were purchased with the appellant's funds; and that the 2nd respondent was transferring appellant's money into the account of his family business firm by name M/s.Nutanraj Road Lines.

7. Appellant contends that respondent Nos.2 and 3 proposed to purchase another property and on insistence of the appellant, formed a new partnership firm by name M/s.TIA constructions (1st respondent herein) under partnership deed dt.25-04-2015 making the appellant as one of the partners and later property bearing Municipal No.3-6-69/4/3 situated at Basheer Bagh, Hyderabad (mentioned in the O.P. schedule) was purchased in the name of the said firm under a deed of agreement of sale-cum-G.P.A. dt.04-05-2015 registered as Doc.No.1401/2015.

8. According to the appellant, between 1999 to 2011, large sums of money of the appellant were used by 2nd respondent for his personal benefit for purchase of properties in the name of the 2nd respondent; that there was a conspiracy between respondent Nos.2 and 3 to dupe and cheat the appellant and they had also criminally intimidated the appellant.

9. He contended that respondent Nos.2 and 3 have been acting detrimental to the interest of the appellant and are planning to dispose of the O.P. schedule property and appropriate the amounts as their own and they are ought to be restrained from disposing of the property by way of alienation, conveyance, lease, mortgage etc.

10. He also stated that he had addressed a letter on 13-08-2018 to the respondents to refer the disputes to arbitration and the said process would take considerable time, and so he should be granted relief under Section 9 of the Act as above.

11. In the O.P. schedule, he mentioned the property bearing Municipal No.3-6-69/4/3 situated at Shaheed Yar Jung Lane, Basheer Bagh, Hyderabad admeasuring 1371.25 yards along with building within the specified boundaries.

The stand of respondents 2 and 3

12. Counter-affidavit is filed by respondent Nos.2 and 3 opposing the said application. The allegations leveled by the appellant were denied.

13. It was denied that the purchase of land in Sy.Nos.669 and 670 of Kapra village was made from the funds of the appellant or that the 2nd respondent transferred the money into the account of his family business firm M/s.Nutanraj Road Lines.

14. While admitting that there is a partnership firm under the name and style M/s.TIA Constructions (1st respondent) formed under a partnership deed dt.25-04-2015 and that the said firm acquired the O.P. schedule property under a deed of agreement of sale-cum-General Power of Attorney dt.04-05-2015 which is registered as Doc.No.1401/2015, it is stated that the firm obtained sanction for construction of residential complexes from the Greater Hyderabad Municipal Corporation for construction of 15 flats; that at the time of entering into partnership, the appellant is having 30% share, the 2nd respondent had 20% share and 3rd respondent had 50% share and capital required by the firm was to be contributed by all partners as and when required by the firm; that the 3rd respondent invested Rs.4.00 crores (his 50% share), the appellant invested Rs.2.75 crores and the 2nd respondent invested Rs.1.35 crores,

and out of the above funds of the firm, a residential complex was constructed and the same was already completed. It is stated that out of 15 flats, 14 flats were already sold and out of 14 flats, 9 flats were already registered. It is also stated that possession of the 14 flats was delivered to the purchasers after receiving consideration. It is stated that for the flats which were not registered, advances were already received and the appellant was aware of these facts.

15. It is asserted that there was an income tax assessment of the 1st respondent firm and in the returns filed before the Income Tax authorities, it was stated that the firm had paid Rs.45,00,000/- to the appellant on 16-04-2018. It is contended that appellant is liable to be prosecuted under the provisions of the Benami Transactions (Prohibition) Act for contending that properties were purchased in the name of different persons from the funds of the appellant.

16. It is admitted that the appellant executed a G.P.A. in favour of 2nd respondent in 2002 and it is also stated that there was another G.P.A. executed on 28-01-2012 by appellant in favour of 2nd respondent, but it is stated that 2nd respondent never misused the PoA or acted contrary to the interest of the appellant. It was denied that respondent Nos.2 and 3 criminally intimidated the appellant and threatened to get him eliminated.

17. According to respondent Nos.2 and 3, by filing the O.P., appellant's only intention was to harass them. It was denied that respondent Nos.2 and 3 were planning to dispose of the property purchased in the name of

the firm or to appropriate the amounts by cheating the appellant. It is therefore contended that the appellant is not entitled to any relief.

<u>The events in the court below</u>

18. The Court below initially on 28-08-2018 granted *ex parte* interim injunction restraining the respondents from alienating the O.P. schedule property till 12-09-2018.

19. On 28-02-2019, the said O.P. was dismissed by the Court below.

<u>The consideration by this Court</u>

20. After referring to the pleadings of the appellant wherein reference was made to certain transactions of other partnership firms, the Court below held that appellant has not assigned any reasons why the appellant filed petition under Section 9 of the Act ignoring the other partnership firms.

21. Why such reasons ought to be assigned when the appellant is confining his claim only to the 1st respondent firm in the instant O.P., is not stated by the Court below.

22. The Court below then referred to filing of I.T. returns of the 1st respondent for 2018-19 and also bank statement of the 1st respondent and a statement of accounts from the bank of the 1st respondent, and observed that this material showed that there was rendering of accounts to appellant by respondent Nos.2 and 3.

23. The Court below ought to have noted that the appellant is contending that even the purchase of the O.P. schedule property was made only with his funds, and it is not the case of the respondents that they have rendered any account to the appellant or shown the partnership accounts of the 1st respondent to the appellant at any point of time. Therefore this reason assigned by the Court below also does not pass muster.

24. The Court below then went on to refer to Chapter XVI of the Indian Partnership Act, 1932 which deals with dissolution of partnership and Section 48 thereof which deals with mode of settlement of accounts between the partners, and observed that when parties intend to dissolve the firm, the properties of the firm should be intact; that the appellant wants to dissolve the partnership firm; since the 2nd respondent has assets and is also one of the partners of the 1st firm, he is liable to render accounts and the question of alienating the O.P. schedule property against the interests of the appellant by the 1st respondent does not arise.

25. This logic of the Court below is also difficult to accept because even if the 2nd respondent has assets, he cannot be allowed to deal with the assets of the firm pending initiation of arbitration proceedings rendering the whole exercise of initiating proceedings infructuous; more so when the 2nd respondent, in his counter, admitted that he had already registered 9 flats out of 15 flats to the purchasers. In the light of such an admission, the observation of the Court below that there is no question

of alienating the O.P. schedule property by respondents 2 and 3 against the interests of appellant, is absurd.

26. Whether the O.P. schedule property was purchased by respondent Nos.2 and 3 from the funds provided only by the appellant or whether respondent Nos.2 and 3 have also contributed for purchase of O.P. schedule property and its development as is alleged by respondents, is a matter for enquiry before the arbitrator and at this stage, it is not open to the Court below to draw any inference one way or the other merely because certain documents have been filed by respondents before it.

27. A new contention was advanced by the learned counsel for respondents before this Court for the first time that the partnership agreement constituting the 1st respondent partnership firm is unregistered and in view of Section 69(3) of the Partnership Act, 1932, application under Section 9 of the Act is not maintainable. Reliance is placed on the decision of the Supreme Court in **Garware Wall Ropes Limited Vs. Coastal Marine Constructions and Engineering Limited**[1].

28. In **Garware Wall Ropes Limited (1 Supra)**, the question which the Supreme Court considered is whether an arbitration clause contained in a document/agreement/conveyance which was compulsorily required to be stamped, but which is not duly stamped under the provisions of the Indian Stamp Act, 1899 is unenforceable in an application under Section 11 of the said Act. There is no discussion in the said judgment as regards the affect of non-registration of a partnership firm under the

[1] (2019) 9 SCC 209

Partnership Act, 1932 and enforceability of an arbitration clause contained in the partnership deed.

29. This issue has been considered by the Supreme Court in **Firm Ashok Traders and another Vs. Gurumukh Das Saluja and others**[2]. The Supreme Court held, after considering Section 9 of the Act as well as Section 69 of the Partnership Act, 1932, that bar enacted by Section 69 of the Partnership Act does not affect maintainability of an application under Section 9 of the Act. It declared that the relief sought in an application under Section 9 of the Act is neither that in a suit nor under a right arising from a contract; the right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the Court under section 9 is only formulating interim measures to protect the right under adjudication before the Arbitral Tribunal from being frustrated; and so Section 69 of the Act has no bearing on the right of a party to file an application under Section 9 of the Act.

30. This principle was reiterated in another judgment of the Supreme Court in **Umesh Goel Vs. Himachal Pradesh Cooperative Group Housing Society Limited**[3] wherein the Supreme Court upheld the decision of the High Court of Himachal Pradesh that Section 69 has no application to proceedings before the arbitrator.

31. In our considered opinion, Section 16(1)(a) of the Act makes an arbitration clause, which forms part of a contract to be treated as an

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[2] (2004) 3 SCC 155
[3] (2016) 11 SCC 313

agreement independent of the other terms of the contract, and even if the partnership deed in question was not registered with the Registrar of Firms, that would not affect the arbitration clause at all. This is an additional reason for rejecting the plea of the respondents that the application under Sec.9 of the Act is not maintainable.

32. We are of the opinion that the reasons assigned by the Court below for refusing to grant relief under Section 9 of the Act are untenable and since admittedly, even according to respondents, registration of 9 flats out of 15 in the O.P. schedule property have already occurred, the respondents must be restrained from alienating the other flats.

33. Accordingly, this appeal is allowed; the order dt.28-02-2019 in C.O.P.No.91 of 2018 of the Judge, Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad is set aside; the said O.P. is allowed to the extent of restraining the respondents from alienating Flat No.s 212, 213, 511 and 112 in the property bearing Municipal No.3-6-69/4/3 situated at Shaheed Yar Jung Lane, Basheer Bagh, Hyderabad. No costs.

34. Pending miscellaneous petitions, if any, shall stand closed.

M.S.RAMACHANDRA RAO, J

K.LAKSHMAN, J

20th December, 2019
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