

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

Arbitration Application Nos.55, 56 and 57 of 2019

COMMON ORDER

The issue involved in the three applications is similar and hence they are taken up for hearing together and are also being disposed of by this common order.

The respondent is M/s Ncore Constructions and it is represented by its partner G.Ramakrishna Reddy. The respondent in all the three arbitration applications is one and the same. The applicants, in these applications, claim to be the owners and possessors of the subject land. They entered into three different Development Agreements – cum – General Power of Attorneys (DAGPA) with the respondent – firm, which is a developer, for development of the subject land into residential plots in the ratio of 61% to the applicants, and 39% to the respondent – developer, in the developed area along with undivided share in the common areas.

The applicant in A.A.No.55 of 2019 entered into DAGPA with the respondent vide document bearing No. 7696/2015 dated 26.08.2015. The applicant in A.A.No.56 of 2019 entered into DAGPA with the respondent vide document bearing No. 7697/2015 dated 26.08.2015 and the applicant in A.A.No.57 of 2019, entered into DAGPA with the respondent bearing document No. 5791 /2016 dated 15.06.2016.

In the arbitration applications it is alleged that that the respondent despite lapse of four years from the date of agreements, failed to develop the subject property and he has been selling parts of the subject property to the third parties without the consent of the applicants. Therefore, the applicants got issued demand notices dated 20.05.2019 for settlement of the issues.

It is stated that though the said demand notices were sent to the address of the respondent in DAGPA, in A.A.Nos.55 and 56 of 2019, the same were returned with the endorsement 'Party has left the address' and in A.A.No.57 of 2019, the notice was returned with endorsement 'Door Locked'. Therefore, the case of the applicants is that the notices are deemed to have been served.

As the respondent failed to respond, the applicants in A.A.Nos.55 and 56 of 2019 got issued notice dated 02.07.2019 invoking the arbitration clause in the DAGPA to

Mr. G.Ramakrishna Reddy, who is the partner of the respondent and the said notices were returned with endorsement “unclaimed”.

In A.A.No.57 of 2019, the applicant got issued notice dated 15.06.2019 invoking the arbitration clause and the same is stated to have been served on 26.06.2019.

As the respondent did not come forward to give consent for appointing the named arbitrator, the present applications came to be filed.

Respondent filed counter affidavits disputing the claim of the applicants on merits, but the existence of the arbitration clause in the agreements is not disputed.

Heard the learned counsel for the applicants and the learned counsel for the respondents.

In all the three agreements, Clause 9 provides for arbitration. For convenience, the said clause in the agreement bearing No.7696/2015 dated 26.08.2015 in A.A.No.55 of 2019, is extracted as under for ready reference:

9. Jurisdiction and Arbitration:

- 9.1 This agreement shall be governed by and construed in accordance with the Laws of India. The competent Court in Hyderabad alone to the exclusion of all other Courts shall have jurisdiction to try and decide any claim, dispute or difference arising out of or in relation to this agreement.
- 9.2 Any dispute, controversy or claim arising out of or relating to the Agreement or breach thereof, that the parties, are not able to settle in a satisfactory manner, shall be finally settled by arbitration by a sole arbitrator being any retired High Court Judge. The place of Arbitration will be Hyderabad and the Arbitration shall be conducted as per the Indian Arbitration and Conciliation Act, 1996. the Arbitration shall be in English Language. The cost of Arbitration including the fees of the Arbitrator etc shall be paid equally. The award shall, except for reasons in writing by the Tribunal shall be passed within a period of six months.”

From the above clause in the agreement, both the parties have agreed that if the dispute arising out of the agreement is not settled in a satisfactory manner, such dispute shall be finally settled through arbitration.

The case of the applicants is that as disputes arose, they issued legal notices seeking for amicable settlement, but the said notices were returned postal endorsements ‘party has left the address’ and ‘door locked’. As their dispute remained unresolved, they issued arbitration notices, and it is stated that in A.A.Nos.55 and 56 of 2019 the arbitration notices were returned with postal endorsement “unclaimed”. Along with the applications, the applicants filed the copies of the returned postal endorsements. In A.A.No.57 of 2019, it is stated that the arbitration notice dated 15.06.2019 was served on 26.06.2019.

The Apex Court in ***T N. Parameswaran Unni Versus G. Kannan and Another***¹ held that "15. This Court in a catena of cases has held that when a notice is sent by registered post and is returned with postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed".

In view of the above judgment, the arbitration notices sent to the respondent in A.A.No.55 and 56 are presumed to be served.

The arbitration notices in all three applications are issued after the Amendment Act of 2015, which came into force with effect from 23.10.2015, where under Section 11(6-A) of the Act has been inserted. The said provision is as under:

11. Appointment of Arbitrators:

...
(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement."

Considering the above provision, the Apex Court in ***MAYAVATI TRADING (P) LTD. v. PRADYUAT DEB BURMAN***² held that the position of law that prevails after the insertion of Section 11(6-A) is that Supreme Court or, as the case may be, the High Court, while considering any application under Sections 11(4) to 11(6) is to confine itself to examination of existence of arbitration agreement, nothing more, nothing less, and leave all other preliminary issues to be decided by arbitrator.

Since, in the present applications, there is no dispute with regard to existence of arbitration clause in the agreements, this court has to confine to the same, and merits cannot be gone into, and they are required to be left open to be decided by the arbitrator.

For the foregoing reasons, all the three arbitration applications are allowed.

Dr. Justice G.Yethirajulu, Former Judge, erstwhile High Court of A.P., is appointed as sole arbitrator in all three applications, to resolve the disputes between the parties and to pass separate awards in accordance with law.

¹ (2017)5 SCC 737

² (2019)8 SCC 714

The learned Arbitrator is 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 in equal shares.

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

Before parting with the case it is made clear that all the issues are left open to both the parties to agitate before the learned Arbitrator, and the said Arbitrator shall pass award on merits and in accordance with law, uninfluenced by any finding or observation made in this order.

A.RAJASHEKER REDDY,J

DATE: 19.05.2020
AVS

Office to mark a copy of this order to :

Dr. Justice G.Yethirajulu,
Former Judge, erstwhile High Court of A.P.,
R/o Flat No.501, Pruthvi Block,
My Home Navadweepa Apartments,
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