



Arb.O.P.(Com.Div.)No.531 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 23.08.2024	Pronounced on 09.09.2024
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CORAM:

THE HON'BLE MR.JUSTICE K.KUMARESH BABU

Arb.O.P.(Com.Div.)No.531 of 2023

M/s.OMR Developers Private Limited,
Represented by its Authorised Signatory,
Mr.K.S.Gajendra Babu,
Sri Saisubhodaya Apartments,
No.57/2B, East Coast Road, Thiruvanmiyur,
Chennai – 600 041. ... Petitioner

Vs

1.A.S.Sathar
2.Mohammed Riyas ... Respondents

PRAYER:-Arbitration Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an Arbitrator seeking for the following reliefs:-

i) To appoint an Arbitrator for entering upon the reference and adjudicating the dispute which has arisen between the petitioner on the one side and respondents on the other side with regard to disputes in terms of the joint venture agreement dated 23.11.2012 with respect to the schedule of property and direct the Arbitrator to enter upon reference and adjudicate the dispute and pass an



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award, within such time as may be granted by this Court

ii) Direct the respondent to pay costs and

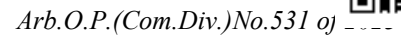
*(iii) Grant such further reliefs as this Hon'ble Court
may deem fit under the circumstances of the case.*

For Petitioner : Mr.K.M.Aasim Shehzad
for Mr.K.Alakendran
For Respondents : Mr.S.P.Raja

ORDER

This instant application has been filed seeking the appointment of an Arbitrator under the provisions of Section 11(6) of the Arbitration and Conciliation Act, 1996.

2. Learned counsel for the petitioner would submit that the petitioner and the respondent had entered into various agreements and disputes had arisen between the parties in respect of the agreement which contains an arbitration clause. He would further submit that notice under Section 21 of the Act was issued by the petitioner on 02.06.2023 nominating Former Chief Justice of a High Court. The same was replied to by the respondent. However, had called upon the petitioner to withdraw the legal notice issued by the petitioner. In spite of further rejoinders and reply to the rejoinders, an



3. Countering his arguments, the learned counsel appearing on behalf of respondent would submit that the petition under Section 11(6) is not maintainable for the simple reason that with a regard to a dispute arising out of the very same agreement, the applicant himself had approached the Principal District Judge in Chengalpet in O.S.No.415 of 2022 where he had sought damages and sought for a permanent injunction as against the respondents from interfering with his peaceful possession. He would also submit that the petitioner herein had filed a ***Arb.O.P.No.715 of 2023*** seeking certain interim reliefs. The said application had been dismissed by a Single Judge against which he had preferred an Intra-Court appeal in



O.S.A.(CAD).No.172 of 2023 which also came to be dismissed. The reason for dismissal of the O.S.A. was that in view of the suit filed by the petitioner herein, the Hon'ble Division Bench of this Court has held that this Court does not have jurisdiction to deal with the issue. Therefore, he would submit that this Court cannot also exercise its power under Section 11(6) of the Act to appoint an Arbitrator and hence, he would pray for dismissal of this Application.

4. I have heard the submissions made by the learned counsels appearing on either side and perused the materials available on record.

5. It is not disputed by the learned counsel for the petitioner that the Division Bench of this Court in an Intra-Court Appeal filed by him had held that since the property is not situated within its Original jurisdiction, an application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to 'the Act') could not have been entertained by this Court. A reference to Provision of Section 2(e) of the Act which defines 'Court' had been relied upon by the Division Bench to come to the said conclusion. Section 11 of the Act empowers the Court to appoint an Arbitrator



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based upon the Clause for arbitration in the Agreement. Admittedly, the applicant had taken recourse by filing a suit before the Principal District Judge, Chengalpet. He had failed in his attempt to get an interim order in his favour. Thereafter, he had also approached this Court by filing an application under Section 9 eventhough which was originally entertained by the learned Single Judge was dismissed thereafter by considering the fact that he had approached the Civil Court at Chengalpet for reliefs. In an intra-court appeal filed by the applicant against the said order, a Division Bench of this Court indicated supra had held that Section 9 application cannot be filed as the property is not within the territorial jurisdiction of the Court and had also set aside the findings of the learned Single Judge who had dismissed the application on other grounds. The Provisions of Order II of Civil Procedure Code envisages that when a person approaches the Court for a relief under the Provisions of Civil Procedure Code, then such an individual shall seek for all the reliefs that is available to him or otherwise reserve his right or seek permission to institute a separate suit. Even in the plaint, the applicant had in clear terms averred that a dispute had arisen between the parties out of the agreement upon which he now seeks to appoint an Arbitrator for resolving the dispute.



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6. The cause of action upon which the plaint had been presented would clearly evidence that the joint venture agreement dated 23.11.2012 was also a part of the cause of action for which the suit had been filed. The first statement of defence by way of a written statement had also been filed by the respondent herein.

7. The arbitration proceedings arise out of a arbitration clause that had been agreed upon by the parties to resolve the dispute that arises between them either out of an agreement or an understanding. The choice of referring the dispute between themselves by way of an appointment of an arbitrator or arbitral proceedings would mean that the parties to the agreement would want to exclude the public fora of jurisdiction and submitting themselves to a private fora. It is also to be borne in mind that the dispute between the parties, if decided involves a decision of a right in rem, then such disputes cannot be resolved by the private fora and could only be resolved by the public fora. As already stated, the parties to an arbitration agreement excludes the public fora by wanting to engage themselves in a private fora. This would mean that the parties can either expressly or implidely waive their right under the arbitration



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agreement and can choose to approach the public fora namely the Courts for resolving the disputes. For better appreciation, I would also place reliance on the judgment of the Hon'ble Apex Court in the case of ***Boozallen and Hamilton INC., Vs SBI Home Finance Limited and others*** reported in **2011 (5) SCC 532** and the relevant paragraphs are extracted hereunder:-

“ 35. The 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 the 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 not expressly reserved for adjudication by 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.



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36. The well-recognised 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.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing,



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right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.”

8. In the present case, the petitioner had approached a Civil Court and I have also found that from the cause of action that had been pleaded in the plaint is based on the same agreement that had been the subject matter of this litigation and that having filed a suit for a dispute arising out of an agreement it could only be concluded that the petitioner had waived his right under the arbitration agreement. Similarly the respondent heren having filed a written statement namely the first statement of defence, it could also be safely concluded that the respondent had also waived his right to file an application under Section 8 of the Arbitration and Conciliation Act, 1996 to refer the matter for arbitration. It is the well settled principle of law that a statutory



rights can be waived and once it is waived, the party cannot seek to re-invoke such a statutory provision which he had either expressly or impliedly waived.

9. Even though, the learned counsel for the petitioner would contend that what is sought to be arbitrated is the joint venture agreement and what is been claimed in the suit is for damages and permanent injunction and hence, the same would not be a bar for the petitioner to invoke the jurisdiction of this Court to appoint an Arbitrator.

10. In my view, such a contention is unsustainable. I have already held that the petitioner himself has pleaded in the suit that the cause of action for the suit is also based on the joint venture agreement in which the arbitration clause is embedded and which is sought to be invoked by the petitioner. Order II Rule 2 of the CPC clearly mandates when a plaintiff institutes a suit on a particular cause of action all the reliefs ought to have been prayed except with the leave of the Court. The present case, the petitioner had not sought for any such leave from the Court. Hence, I am inclined to hold that the present petition is not maintainable.



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11. In fine, this Petition is dismissed. However, there shall be no order as to costs.

09.09.2024

gba

K.KUMARESH BABU,J.

Gba

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