



C.R.P(MD)No.1458 of 2022

WEB COPY

Reserved On : 04.07.2024

Delivered On : 13.08.2024

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

C.R.P(MD)No.1458 of 2022

and

C.M.P.(MD)No.6052 of 2022

- 1.Ponni Delta Retirement Community,
(Registration No.104/2016)
a Society registered under the TN Societies
Registration Act, 1975 having its office,
At Shantha Block, Ponni Delta,
Thimmarayasamundaram Revenue Village,
North Kallani Road,
Thiruvanaikovil,
Tiruchirapalli-620 005.
- 2.S.Indirani
- 3.S.Rajagopal
- 4.V.E.Chandrodayan ... Petitioners/Petitioners/Defendants No.1 to 4

Vs.



C.R.P(MD)No.1458 of 2022

WEB COPY

M/s.Akham Finvest Private Limited,
Representation by its Managing Director,
S.K.Moorthy,
No.H-001 in Sampurna Building in H Block,
Ponni Delta,
Thimmarayasamundaram Revenue Village,
North Kallani Road,
Thiruvanaikovil,
Tiruchirapalli-620 005 ... Respondent/Respondent/Plaintiff

Prayer: Petition filed under Article 227 of the Constitution of India to set aside the impugned docket order passed in I.A.No.04 of 2021 in O.S.No.24 of 2021, dated 29.03.2021 on the file of the District Munsif cum Judicial Magistrate, Srirangam.

For Petitioners : Mr.B.Saravanan
Senior counsel
for Mr.D.Kirubakaran

For Respondent : Mr.K.S.Vamsidhar

ORDER

A. The Civil Revision Petition:

1. The Civil Revision Petition is directed against the order dated 29.03.2021 made in I.A.No.04 of 2021 in O.S.No.24 of 2021 on the file



C.R.P(MD)No.1458 of 2022

WEB COPY

of the District Munsif cum Judicial Magistrate, Srirangam. By the said order, the trial Court dismissed the interlocutory application filed by the petitioners herein under Section 8 of the Arbitration and Conciliation Act.

B. The Parties to the Suit:

2. The first respondent/plaintiff filed a suit in O.S.No.24 of 2021. In the said suit, Ponni Delta Retirement Community, which is a Society of apartment owners registered under the Societies Registration Act, 1860 and bearing Registration No.104/16, represented by its Secretary, who is arrayed as a first defendant. The defendants 2 to 4 are its other Office bearers. The fifth defendant is the Company, which was the builder and promoter of the said apartment complex. The defendants 6 and 7 are its Directors. The State of Tamil Nadu represented by the District Collector is arrayed as eighth defendant and the Registrar of Societies, Tiruchirapalli is arrayed as ninth defendant.



WEB COPY

C. The Case of the Plaintiff:

3. With the above array of parties, it is the contention of the plaintiff that the plaintiff is also the owner of the apartment bearing No.H001 named Sampurna in the Ponni Delta Retirement Community situated in S.No.21/2, Thimmarayasamudram Revenue Village, Srirangam Taluk, Tiruchirapalli District. The plaintiff was a member of the first defendant Association. The crux of the case of the plaintiff is that the first defendant Association and its Office bearers have colluded with the fifth defendant builder/promoter and had not accounted for several sums of money the builder was collecting from the apartment owners. The plaintiff had raised the issue with the first defendant Association which is the apartment owners Association. Enraged by the fact that the plaintiff and the other owners of the H Block have been insisting for the accounts, a special resolution was passed by amending the bye-law to remove S.F.No.21/2 in para 2.1, 2.8 in the memorandum of bye-laws 10.1 and to remove H Block and its residents and to expel them from the very membership of the Association.



C.R.P(MD)No.1458 of 2022

WEB COPY

3.1 Therefore, the plaintiff has laid the suit declaration that the amendment of bye-laws in the Annual General Meeting of the first defendant Association held on 20.12.2020 as null and void; to grant permanent injunction restraining the ninth defendant to give effect to the resolution relating to the amendment of bye-laws in the Annual General Meeting of the first defendant Association held on 20.12.2020; to declare the resolution relating to the expulsion of the plaintiff from the membership of the first defendant Association in the Annual General Meeting of the first defendant Association held on 20.12.2020 as null and void and not binding on the plaintiff and that the plaintiff continues to be a member of the first defendant Association; for a mandatory injunction, directing the ninth defendant to supersede the executive committee of the first defendant Association and appoint a special officer for the first defendant Association and for costs.

D. The Section 8 Application:

4. In the said suit, the defendants 1 to 4, ie., the Society and its Office bearers have filed the present application under Section 8 of the



WEB COPY

Arbitration and Conciliation Act (hereinafter referred to be as 'the Act'). According to them, the bye-laws of the Society contain the following clause in 13.13 regarding the disputes, which is extracted hereunder:

"13.13 Disputes:

(a) The Executive Committee shall amicably settle all disputes either between members and the Association or amongst the members and the Association or amongst the members. When the Executive Committee fails to bring consensus between the parties, the dispute shall be referred to the General Body Meeting for voting and decision. The General Body Meeting after thorough debate shall settle the dispute by majority of votes by the members of the Association.

(b) In the event that any party is aggrieved by the decision rendered by the General Body Meeting, the same shall be referred to sole arbitrator appointed by the President as per relevant arbitration act. The Arbitrator shall be a member other than an office bearer and such Arbitrator shall be appointed by the President. The venue of Arbitration shall be at Trichy and the Courts of Trichy alone will have exclusive Jurisdiction.



WEB COPY

(c) The General Body Meeting shall determine the remuneration to be paid to the Arbitrator. The remuneration fixed will be paid by the party which seeks to refer the matter to Arbitration."

4.1 In view of the same, when there is an arbitration clause, the suit has to be referred for arbitration. The application was resisted by the respondent/plaintiff by filing a counter affidavit. It is contended that there are other parties to the suit and the arbitrator cannot pass an award as against them. Since prayers for special reliefs against the official respondents are also made, only a suit would lie. The petitioners/defendants have colluded with the defendants 5 to 7 resulting in fraud and huge financial loss and therefore, when serious allegations of fraud are made in the plaint arbitration cannot be resorted to.

E. The Order of the Trial Court:

5. The trial Court considered the case of the parties and following the dictum in *Booz Allen and Hamilton Insurance Company Vs. State*



C.R.P(MD)No.1458 of 2022

Bank of India House Finance Limited¹ and the ***Oriental Bank of Commerce Vs. Kikabhai Premchand Trust²***, held that the present nature of disputes requires to be decided only by a public forum and since allegations pertaining to fraud and malpractices are raised, the matter must be tried only by the Court and refused to refer the matter to arbitration and dismissed the petition. Aggrieved by the same, the present Civil Revision Petition is filed.

F. The Arguments:

6. Heard *Mr.B.Saravanan*, the learned Senior counsel appearing on behalf of the petitioners and *Mr.K.S.Vamsidhar*, the learned counsel appearing on behalf of the respondent.

6.1 The learned Senior Counsel appearing on behalf of the petitioners would submit that when an application under Section 8 of the Act is filed duly satisfying the mandatory procedures and when the

¹ *2011 (5) SCC 532*

² *(2010) 1 SCC 72*



C.R.P(MD)No.1458 of 2022

WEB COPY

application is accompanied by a certified copy of the bye-laws which contains the arbitration clause, absolutely no discretion is left with the Trial Court. The reasons mentioned by the trial Court are erroneous in law. The position as to arbitrability with reference to the Court referring the suit for arbitration under Section 8 has since been clarified by the Hon'ble Supreme Court of India in ***Vidya Drolia and Others Vs. Durga Trading Corporation***³. According to the learned Senior Counsel, the Hon'ble Supreme Court of India has categorically held that the discretion of the Court under Section 8 of the Act is extremely limited and restricted particularly after the amendment to the Arbitration and Conciliation Act in the year 2015. Once an arbitration clause is shown to the trial Court, the trial Court has got no other option than to refer the matter for arbitration. The Hon'ble Supreme Court of India has specifically framed a question in paragraph No.210 of the said Judgment whether the issue of "arbitrability" can be analysed by the Courts under Section 8 of the Act and it has been

³ (2021) 2 SCC 1



WEB COPY

specifically answered that post the 2015 amendment, judicial interference at the reference stage has been substantially curtailed and the Hon'ble Supreme Court, further in paragraph No.226 specifically noted that the Act does not exclude any category of disputes as being non-arbitrable and held in paragraph No.227 that in line with the amended language and the statutory scheme, the examination of the subject matter of the arbitrability may not be appropriate at the stage of reference under Section 8 of the Act. Therefore, the reasons adduced by the trial Court are *ex facie* incorrect. Therefore, he would submit that this Court should interfere.

6.2 Per contra, *Mr.K.S.Vamsidhar*, learned counsel appearing on behalf of the respondent, firstly, placing reliance on the judgment of the Hon'ble Supreme Court of India in ***Suganya Holding Pvt. Ltd., Vs. Jayesh H.Pandya and another***⁴ would submit that when there are other defendants to the suit, who are not parties to the arbitration

⁴ AIR 2003 SC 2252



WEB COPY

agreement, in such a case, the matter cannot be referred to arbitration.

He would further point out that on a plain reading of the arbitration clause, unilateral power is given to the President of the Society and that too by appointing another member as an arbitrator. Therefore, there is no fair process and no scope for counter balancing and the arbitrator and the arbitration will be suffering disqualification on account of bias. Therefore, he would submit that the arbitration clause itself is invalid. He would place reliance on the judgment of the Hon'ble Supreme Court of India in *Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd.*,⁵.

G. Discussion & Findings:

7. I have considered the rival submissions made on either side and perused the material records of the case.

7.1 As rightly contended by the learned Senior Counsel appearing on behalf of the petitioners, the ambit of the power of the

⁵ AIR 2020 SC 59



Court dealing with an application under Section 8 of the Act, and the nature of the judicial interference is no longer *res integra* and has since been elucidated by the Hon'ble Supreme Court of India in ***Vidya Drolia*** cited *supra*. It is essential to extract the conclusions reached by the Hon'ble Supreme Court of India in paragraph Nos.244, which reads as under:

"....244.Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3.. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer".



WEB COPY

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing?

or

244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?"

7.2 Thus, it can be seen that the subject matter of arbitrability cannot be decided at the stage of Section 8 of the Act. The Hon'ble Supreme Court of India specifically considered the earlier Judgments in **Booz Allen** cited *supra* and **A.Ayyasamy Vs. A.Paramasivam**⁶, with reference to the issue concerning the arbitrability of fraud and concluded that post the 2015 amendment, judicial interference at the reference stage has been substantially curtailed, in paragraph No.227, it is held that unless the subject matter arbitrability is clearly barred to the

⁶ (2016) 10 SCC 386



WEB COPY

stage whether it can be deemed as deadwood to preserve the efficacy of the arbitral process, in other cases, the subject matter arbitrability may not be gone into at the stage of reference under Section 8 of the Act. The only scope for the reference Court is to consider whether the party has established a *prima facie* case of non-existence of a valid arbitration agreement by summarily portraying a strong case that he is entitled to such a finding.

7.3 The matter is more authoritatively pronounced by the Constitution Bench of the Hon'ble Supreme Court of India in ***Cox and Kings Limited Vs. SAP India Private Limited and Anr***, the relevant portions read thus:

"164. In Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , N.V. Ramana, J. (as the learned Chief Justice then was) held that the amendment to Section 8 rectified the shortcomings pointed out in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] with respect to domestic arbitration. He further observed that the issue of determination of parties to an arbitration agreement is a complicated exercise, and



should best be left to the **Arbitral Tribunals** : (*Vidya Drolia case* [*Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 161, para 239)

“239. ... Jurisdictional issues concerning whether certain parties are bound by a particular arbitration, under group-company doctrine or good faith, etc. in a multi-party arbitration raises complicated factual questions, which are best left for the tribunal to handle. The amendment to Section 8 on this front also indicates the legislative intention to further reduce the judicial interference at the stage of reference.”

165. In Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd. [*Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd.*, (2021) 5 SCC 671 : (2021) 3 SCC (Civ) 307] , a Bench of three Judges of this Court was called upon to decide an appeal arising out of a petition filed under Section 11(6) of the Arbitration Act for appointment of sole arbitrator. The issue before the Court was the determination of existence of an arbitration agreement on the basis of the documentary evidence produced by the parties. This Court *prima facie* opined that there was no conclusive evidence to infer the existence of a valid arbitration agreement between the parties. Therefore, the issue of existence of a valid arbitration agreement was referred to be decided by the Arbitral Tribunal after conducting a detailed examination of documentary evidence and cross-examination of witnesses.

166. The above position of law leads us to the inevitable conclusion that at the referral stage, the Court only has to determine



WEB COPY



C.R.P(MD)No.1458 of 2022

*the prima facie existence of an arbitration agreement. If the referral court cannot decide the issue, it should leave it to be decided by the Arbitral Tribunal. The referral court should not unnecessarily interfere with arbitration proceedings, and rather allow the Arbitral Tribunal to exercise its primary jurisdiction. In **Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.** [**Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234**] , this Court observed that there are distinct advantages to leaving the final determination on matters pertaining to the validity of an arbitration agreement to the Tribunal : (**Shin-Etsu Chemical Co. case [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234**] , SCC p. 267, para 74)*

“74. ... Even if the Court takes the view that the arbitral agreement is not vitiated or that it is not valid, inoperative or unenforceable, based upon purely a prima facie view, nothing prevents the arbitrator from trying the issue fully and rendering a final decision thereupon. If the arbitrator finds the agreement valid, there is no problem as the arbitration will proceed and the award will be made. However, if the arbitrator finds the agreement invalid, inoperative or void, this means that the party who wanted to proceed for arbitration was given an opportunity of proceeding to arbitration, and the arbitrator after



fully trying the issue has found that there is no scope for arbitration.”

7.4 Therefore, the reasons as adduced by the Trial Court for not referring the matter is incorrect. Therefore, this Court has to consider only if prima facie at a glance, there exists an arbitration agreement and if so, refer the parties to arbitration. Already, the array of parties and the crux of the lis was noted supra. In this regard, when third parties are involved in the lis, the Hon’ble Supreme Court of India, in ***Suganya Holdings Ltd.***, cited *supra*, has held that when the suit is commenced with reference to some of the defendants who are not parties to the arbitration agreement, there is no question of application of Section 8 of the Act. It is essential to quote paragraph Nos.12 to 16 which reads as follows:

“...12.For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by Part-I of the Act, Judicial authority shall not intervene except where so provided in the Act. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is



WEB COPY

required to be referred to the arbitrator. Further, the matter is not required to be referred to the arbitral Tribunal, if (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that [Arbitration Act](#) does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under sub- sections (1) & (2) of [Section 8](#) of the Act.

13.Secondly, there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

14.Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under [Section 24](#) of the Arbitration Act, 1940, some of the parties to a suit could apply that



WEB COPY

the matters in difference between them be referred to arbitration and the Court may refer the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. Section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15.The relevant language used in [Section 8](#) is "in a matter which is the subject matter of an arbitration agreement", Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of [Section 8](#). The words 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement.

16.The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under [Section 8](#) of the Act? In our view, it would be difficult to give an interpretation to [Section 8](#) under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit



WEB COPY

between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed."

7.5 In the above backdrop, if the present case of the parties are considered, it can be seen that the core of the *lis* is that the fifth defendant promoter had included S.No.23/2 also in the very same apartment complex for which, the first defendant is the Association of the apartment owners. The said survey number is specifically mentioned in bye-law in paragraph No.2.1 and 2.8 in the memorandum and in bye-law 10.1 except from S.No.21/2. Similarly, the H Block consisting of the plots was also promoted as part of the community. Accordingly to the plaintiff he had questioned the action of the present set of office bearers namely, the defendants 2 to 4 herein of the first



C.R.P(MD)No.1458 of 2022

WEB COPY

respondent Society in colluding with the fifth defendant company to which the sixth and seventh defendants are directors, the entire bye-law itself is now sought to be amended and the H Block is sought to be removed from the community by the impugned resolutions. Thus, it can be seen that the core of the *lis* is not only between the Society and its members but would very much involve and require the original promoter as the party to resolve the *lis*.

7.6 In view thereof, the arbitration clause as per the bye-law is only between the Society and its members and is not between the builder. Even though the contention regarding public authorities cannot be accepted as the arbitral tribunal itself can grant such consequential reliefs with reference to registration etc. Even with reference to validity of the arbitration clause, the parties can agitate before the Tribunal itself or it can be taken care of by seeking to appoint an impartial arbitrator. However since the *lis* involves the defendants 5 to 7 also, and since they are not parties to the arbitration agreement, on the face



C.R.P(MD)No.1458 of 2022

WEB COPY

of it, that is by looking at the arbitration clause the matter cannot be referred to arbitration. Therefore, even though the reasons mentioned by the trial Court that the matter should require a public authority to decide and that it involves serious allegations of fraud are not sustainable, still the matter cannot be referred to arbitration as it involves parties who are not signatories and who are not governed by the arbitration clause in the bye-law. Therefore, the ultimate decision of the Trial Court in rejecting the application under Section 8 of the Act cannot be upset.

H. The Result:

8. Accordingly, finding no merits, the Civil Revision Petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

13.08.2024

NCC : Yes

Sji



WEB COPY



C.R.P(MD)No.1458 of 2022

To

The District Munsif cum Judicial Magistrate, Srirangam.

D.BHARATHA CHAKRAVARTHY,J.

sj1



WEB COPY



C.R.P(MD)No.1458 of 2022

**PRE-DELIVERY ORDER MADE IN
C.R.P(MD)No.1458 of 2022**

13.08.2024