

(2009) 04 AP CK 0086
In the Andhra Pradesh High Court
Case No : A.A. No. 88 of 2008

Dr. Ganta Noble and Others	Vs	APPELLANT
V. Paul Himamsu and Others		RESPONDENT

Date of Decision : 24-04-2009

Acts Referred:

Andhra Pradesh and Telangana Societies Registration Act, 2001 — Section 23, 23(1), 32(2)
Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 16(2), 19, 2(4)
Limitation Act, 1963 — Article 137

Citation : (2009) 6 ALD 711 : (2009) 6 ALT 345

Hon'ble Judges : Nooty Ramamohana Rao, J

Bench : Single Bench

Advocate : P. Vikram, for the Appellant; J.C. Francis, for the Respondent

Judgement

Nooty Ramamohana Rao, J.—This application has been moved seeking intervention for constituting the Arbitral Tribunal for resolving the disputes that have cropped up between the parties. The 6th applicant is a society, which is registered under the provisions of the Andhra Pradesh Societies Registration Act. It is asserted that the 1st applicant was the Secretary-cum-Correspondent of the said society. As per Bye-law No. 5 of the 6th respondent society, the Executive Body shall consist of nine members and as per Bye-law No. 6, the General Body of the society shall meet once in every year in the month of June to elect the Executive Body, though the General Body can be convened at any time by the Executive Body giving ten days notice therefore. The Executive Body was required to meet once in a month or at such earlier point of time. The quorum for the meeting of the General Body and the Executive Body has been fixed as 2/3rd of members. It is represented that the 6th applicant society has been started with the aim and object of promoting educational institutions for imparting education in English and Telugu Media, for securing and promoting high educational standards amongst the religious minority and the weaker sections. The duties and responsibilities of the members of the Executive Body have all

been spelt out in detail. The affairs of the society were conducted very smoothly and without any hitch or hindrance till the year 2003. The 6th applicant society has been maintaining its bank account with the State Bank of India, Surya Bagh Extension counter, Visakhapatnam. However, it is alleged that the respondents fabricated a letter of resignation dated 22-5-2003, said to have been submitted by the 2nd applicant herein and that on 22-6-2003, the 1st applicant is said to have submitted his resignation as Secretary-cum-Correspondent of the society and in his place the 1st respondent was said to have been elected while his wife the 2nd respondent is said to have been elected as the Treasurer at the meeting of the society held on 29-6-2003 and on the strength and basis of these fabricated documents, the respondents have started operating the bank accounts and started exercising extensive control over the affairs of the 6th applicant society. The applicants apart from disputing that they have ever resigned to the respective elected offices of the Executive Body of the society, have also disputed the fact that the meeting was either called or held on 29-6-2003.

2. In those set of circumstances, the 1st applicant filed an Arbitration O.P. No. 426 of 2003 before the District Court, Vizianagaram and initially the District Court has granted an interim injunction restraining the respondents herein from functioning as members of the Executive Body. Another O.P. No. 669 of 2003 has been instituted u/s 11 of the Arbitration and Conciliation Act before the District Court, Vizianagaram for appointment of an Arbitrator. The District Court by its order dated 19-1-2004 appointed Sri J. Janaki Rama Rao, advocate as Arbitrator to adjudicate the disputes amongst the parties. The respondents have also instituted Arbitration O.P. No. 668 of 2003 for appointment of a Receiver for taking care of the affairs of the society pending the arbitration proceedings. In the said O.P Sri J. Janaki Rama Rao, Advocate has been appointed as the Receiver for managing the affairs of the society. The matter was then carried in Appeal by way of C.M.A. Nos. 564 and 565 of 2004 before this Court. It was pointed out by this Court that the District Court ought to have appointed two separate persons as a Receiver and as an Arbitrator instead of appointing the same person. Hence, the District Court on 26-2-2005 appointed Sri D.V.V. Sastry as a Receiver. Initially Sri J. Janaki Rama Rao, the Arbitrator issued notices to the parties after entering upon the reference. Ultimately, the said Arbitrator has made a request to the District Court to discharge him, as he is not in a position to discharge the duties as an Arbitrator due to his pre-occupation. The District Court after issuing notices to all the parties on 17-1-2005 appointed Sri Suryanarayana, a Retired District and Sessions Judge, Visakhapatnam as Arbitrator. The said Arbitrator entered upon the reference and the 2nd applicant herein has filed a detailed statement of claim before the said Arbitrator. The respondents, without filing their statement of defence filed an application u/s 16(2) of the Act, which was dismissed by the Arbitrator. The 2nd respondent herein instituted W.P. No. 11678 of 2003 before this Court calling in question the order passed on 19-1-2004 in Arbitration O.P. No. 669 of 2003. That writ petition came to be dismissed by this Court on 14-11-2005. However, the Arbitrator

appointed by the District Court replacing Sri J. Janaki Rama Rao had moved out of Visakhapatnam as he has preferred to settle down at Bangalore and hence he requested to be discharged as an Arbitrator. Hence, the District Court, Vizianagaram passed an order on 13-7-2006 appointing Sri M.V.S.R. Sarma, Retired District and Sessions Judge, Visakhapatnam as the substitute Arbitrator. That order was called in question by the respondent by instituting C.R.P. No. 4460 of 2006 before this Court. The court passed an order on 26-10-2006 declining to interfere with the order passed by the District Court on 13-7-2006 appointing Sri M.V.S.R. Sarma as the Arbitrator. In the mean time, the Arbitrator has issued notices to both sides. On 10-9-2006, the respondents entered their appearance. Memos were filed under Sections 19 and 24 of the Act before the Arbitrator. The learned Arbitrator directed the respondents to file their statement of defence so as to enable appropriate orders to be passed on the said application. The respondents kept on filing one objection memo or the without filing the detailed statement of defence. At that stage, the respondents have sent up telegraphic notices to the Arbitrator attributing motives for the claimants and the Arbitrator are related to each other and hence the respondents apprehend that no justice would be rendered to their cause at the hands of the Arbitrator. Pained by the baseless allegations leveled against him by the respondents, the learned Arbitrator while setting forth the record straight, has expressed his inclination not to continue with the proceedings and hence he returned the records to the District Court seeking to be discharged. Since no substitute Arbitrator has been appointed replacing Sri M.V.S.R. Sarma, the applicants moved this Court by instituting A.A. No. 26 of 2007. That application has been dismissed by this Court setting out that the District Judge does not have the necessary power to appoint an Arbitrator at the first instance and further the applicants have not complied with the procedure prescribed for appointment or replacement of an Arbitrator. Therefore, the applicants have issued a notice dated 6-3-2008 to the respondents seeking their consent for appointment of Sri K. Sanjeeva Rao Naidu, a Retired District and Sessions Judge as Arbitrator. Though the said notice has been received, the respondents have not replied. Hence, the present application has been moved.

3. The respondents have filed their counter in the above matter. The respondents have traced out the relationship between the 2nd respondent and the applicant and the others. It was also further pointed out that it is only the 2nd respondent who has established the society in memory of her late mother and it is the 2nd respondent who has acquired all the assets that are needed for running an educational institution and that it is the 2nd respondent who is solely responsible for raising the 1st applicant in life and society and that needless controversies are being created by the 1st applicant out of his selfishness. All the allegations leveled by the applicants are motivated and they are not tenable. In fact there is no arbitration agreement amongst the parties for securing the disputes resolved through the mechanism of arbitration and that the applicants have not produced any material to show that they are the subsisting members of the society and

hence they cannot embark upon any enquiry so far as the affairs of the society are concerned. It is further pointed out that the cause of action having arisen in the year 2003, the present application instituted in 2008 is barred by limitation and hence it cannot be entertained at all. Arbitration OP. No. 669 of 2003 has been dismissed as withdrawn without obtaining prior permission for instituting the above Arbitration Application and hence this application should be dismissed on that ground also.

4. A.A.M.P. No. 1070 of 2008 has been instituted by one Sri Venkateswara Sahoo, R/o Akkayyapalem, Visakhapatnam claiming himself as the President of the society and hence sought for impleadment as one of the respondent to the above arbitration proceedings.

5. A.A.M.P. Nos. 1187 and 1188 of 2008 have been filed by the applicants seeking amendment to the Arbitration Application for purpose of adding Paragraph No. 27 thereto, for excluding the time spent in prosecuting the Arbitration O.P. No. 669 of 2008 before the District Court, Vizianagaram, for the purpose of calculation of the period of limitation.

6. I have heard Sri Vikram, learned Counsel for the applicants and Sri J.C. Francis, learned Counsel for the respondents.

7. It will be important to notice the three objections raised on behalf of the respondents. The 1st objection is that there is no agreement subsisting amongst the parties for the purpose of referring the disputes to arbitration. The 2nd objection is that the application is barred by limitation as no permission has been obtained by the applicants while withdrawing Arbitration O.P. No. 669 of 2003 on the file of the District Court, Vizianagaram, for instituting the above Arbitration Application. The 3rd objection I that there is no tenable cause for the applicants to agitate anything concerning the affairs of the society in question.

8. Existence of an arbitration agreement either independently or otherwise is an essential requirement for the purposes of entertaining the application under the Arbitration and Conciliation Act without an arbitration agreement the parties cannot seek intervention of the Chief Justice or his designate for constituting the Arbitral Tribunal for securing resolution of their disputes.

9. At this stage, it will be appropriate to notice that the State Legislature enacted Andhra Pradesh Societies Registration Act, 2001 henceforth referred to as Act 35 of 2001 repealing the Societies Registration Act, 1860, in its application to the Andhra Area of the State of Andhra Pradesh and the Andhra Pradesh (Telangana Area) Public Societies Registration Act, 1350 Fasli. Sub-section (2) of Section 32 of Act 35 of 2001 Act has introduced a fiction by deeming that anything done or any action taken under the aforementioned Acts which are repealed, shall be deemed to have been done or taken in exercise of the powers conferred by or under this Act, as if this Act was in force on the date on which such thing was done or action taken. Therefore, by virtue of the saving provision contained in Sub-section (2) of Section 32 of Act 35 of 2001, the 6th applicant society shall

be deemed to have been registered under this enactment. Section 23 of 2001 Act provided the mechanism for the dispute resolution. Since it will have a bearing on the present controversy, it will be appropriate to notice Section 23 as it reads:

23. Dispute regarding management -In the event of any dispute arising among the Committee or the members of the society, in respect of any matter relating to the affairs of the society, any member of the society may proceed with the dispute under the provisions of the Arbitration and Conciliation Act, 1996, (Central Act 26 of 1996) or may file an application in the District Court concerned and the said Court shall after necessary inquiry pass such order as it may deem fit.

The above provision makes it clear that if any dispute arises amongst the committee or members of the society in respect of any matter relating to the affairs of the society, any member of the society may proceed with the dispute under the provisions of Arbitration and Conciliation Act, 1996 or may file an application in the District Court concerned and the said court after necessary enquiry may pass an order considered appropriate by it thereon. In other words, it is now made clear by Section 23 that the parties may seek resolution of their disputes through the process of Arbitration and Conciliation Act or by way of approaching the District Court and thus a choice has been left to the suitor.

10. Learned Counsel for the respondents has placed strong reliance upon the judgments of the Division Bench in *Superintending Engineer, SRBC and Another Vs. Srinivasa Constructions Ltd., Engineers and Contractors and Another*, and another judgment rendered by the Supreme Court in *Speech and Software Technologies (India) Pvt. Ltd. Vs. Neos Interactive Ltd.*, in support of his contention that the existence of an Arbitration Agreement is a sine qua non for the Chief Justice or his designate to acquire the necessary jurisdiction under the Arbitration and Conciliation Act. In paragraph (11) of the *Speech and Software Technologies (India) (P) Ltd.*'s judgment (supra), the Supreme Court has pointed out that the exercise of power u/s 11(6) of the Act is a judicial power and a designate judge has to consider, claims of both the parties and pass a reasoned order and that existence of an arbitration agreement is a condition precedent before exercise of such powers. It was also further pointed out that as a preliminary measure, the designate judge is required to consider as to whether there was any live issue to be referred to the Arbitrator and as to whether the application is filed within the prescribed period of limitation or not. In fact, the Division Bench in *Srinivasa Constructions Ltd.*'s case (supra) has set out the very same principle and I may respectfully state that these are the basic principles which have been spelt out by the Constitution Bench of the Supreme Court in its judgment rendered in *SBP and Co. v. Patel Engg. Ltd.* 2005 (7) SCJ 461 : (2005) 8 SCC 618 : 2005 (6) ALT 37.1 (DNSC) at paragraph 37. There is hardly any dispute on that count.

11. However, what is important to be noticed is that Section 7 of the Arbitration

and Conciliation Act has set out in detail what constitutes an arbitration agreement. Sub-section (4) of Section 2 of the said Act has clearly spelt out that Part I of the Act shall apply to every arbitration undertaken pursuant to any other enactment, as if the said arbitration, was pursuant to an arbitration agreement and as if the provision contained in that other enactment were an arbitration agreement. Therefore, Sub-section (4) of Section 2 of the Act has got to be read along with Section 7 of the Act to understand what constitutes an Arbitration Agreement. A compendious reading of these provisions would make it clear that an arbitration agreement is liable to be culled out notionally or fictionally wherever any other enactment required a set of parties to settle their disputes through such an arbitration. Section 23 of the 2001 Act, as was already noticed supra, has left a choice in the hands of the suitor to have the disputes resolved through the Arbitration Act also. In other words, Section 23 of Act 35 of 2001 by making a reference to Arbitration and Conciliation Act, 1996, has created a fiction to treat as if an Arbitration Agreement existed amongst the members of the society, for securing resolution of their disputes. Incorporation of the provisions of another enactment either directly or by way of reference is a legislative tool employed for purpose of convenience. By way of referring to the Arbitration and Conciliation Act, Section 23(1) of Act 35 of 2001, treats and considers the parties to have entered into an arbitration agreement as set out u/s 7 of the Act. Hence I do not find the 1st objection as tenable.

12. The next objection raised on behalf of the respondents is that the Arbitration O.P. No. 669 of 2003 has been withdrawn without obtaining any leave for instituting the above arbitration application and hence the present application shall be deemed as not maintainable. It will be appropriate to notice that prior to the Supreme Court rendering its judgment in SBP and Co. (supra), the action of constituting an Arbitral Tribunal either by the Chief Justice or by his designate was not considered to be as an act of exercise of judicial power, but only as an act of administrative power. This scheme, which the Chief Justice has framed earlier, had provided for the District Courts also with the necessary power for appointing the Arbitrators. The change of law brought about by the Supreme Court in SBP and Co. (supra) is that the exercise of power by the Chief Justice or his designate has come to be noticed as a judicial power and it is only the Chief Justice or his designate who have the power to make appointment of Arbitrators and the District Courts cannot exercise any such powers. By virtue of this binding precedent, the Arbitration O.P. No. 669 of 2008 instituted before the District Court, Vizianagaram, came to be considered as not maintainable. Hence, withdrawal of the said application does not render or vitiate in any manner the institution of this present arbitration application. Hence, I do not consider the objection raised in that regard as sustainable either.

13. The next objection raised by the learned Counsel for the respondents is that in the face of the claim that the disputes have cropped up amongst the parties some time during the year 2003 and hence the present Arbitration Application instituted on 2-8-2008 is clearly barred by limitation inasmuch as the period of

limitation prescribed under Article 137 of the Limitation Act is only three years. It is well to remember that Arbitration O.P. No. 669 of 2003 has been instituted by the applicants herein on the file of the District Court, Vizianagaram during the year 2003 itself. The District Court has initially appointed an Arbitrator, replaced him with another Arbitrator and when the respondent has attributed motives to him once again replaced him with another Arbitrator. Therefore, the process has been initiated by the applicants in the year 2003 itself. Till such time a decision has been rendered by the Supreme Court in SBP and Company's case (supra), the legal principles holding the field did not render the institution of the O.P. on the file of the District Court any proper. It is only in the post SBP and Company's case (supra) scenario, institution of the O.P. has become contentious. The applicant therefore has moved A.A.M.P. Nos. 1187 and 1188 of 2008 seeking amendment of the pleadings. Prima facie, there does not appear to be any force behind the submission of Sri J.C. Francis, the learned Counsel for the respondents that this arbitration application is barred by limitation. It will be appropriate to note that the question of limitation is a mixed question of fact and law. Evidence has got to be led in for purposes of definitely determining that the claim and cause are hit by limitation. Where no opinion can be pronounced with certainty it would be only appropriate to leave the matter for adjudication to the Arbitral Tribunal. The Arbitral Tribunal will be able to collect the necessary evidence and then arrive at a definite conclusion as to whether the cause and claim is also hit by limitation or not. Prima facie, the material indicates that the cause is liable to be construed as not being hit by limitation as the period consumed in prosecuting the O.P. No. 669 of 2003 has got to be counted in favour of the claimant. Evidence has got to be therefore led in before the Arbitrator pointedly demonstrating as to the date on which the cause of action has arisen and as to whether the period spent in prosecuting the Arbitration O.P. No. 669 of 2003 is liable to be excluded or not from the computation and if so excluded, the cause can survive or not. I therefore consider it appropriate to leave this question for adjudication to the Arbitral Tribunal. It is not as if that on the face of the material available on record one can arrive at a definite finding that the application is barred by limitation. I therefore do not consider that the objections raised in this regard can be sustained for the present, for purposes of rejecting the Arbitration Application.

14. For the aforementioned reasons, the disputes that have cropped up between the parties deserve to be adjudicated by an Arbitral Tribunal. For that purpose I constitute the Arbitral Tribunal comprising of Sri K. Mohan Rao, Former District and Sessions Judge and Former Member, Andhra Pradesh Administrative Tribunal as an Arbitrator. The Registry to communicate a copy of this order to Sri K. Mohan Rao, Former District and Sessions Judge and Former Member, Andhra Pradesh Administrative Tribunal to enable him to enter upon reference.