

(2017) 01 KAR CK 0162
In the Karnataka High Court
Case No : 477 of 2015

SATISH R SHET & Anr

APPELLANT

Vs

DR. P.R. KUMAR

RESPONDENT

Date of Decision : 03-01-2017

Acts Referred:

[Arbitration Act, 1940](#), [Section 8](#) - Power of Court to appoint arbitrator or umpire

Citation : (2017) 01 KAR CK 0162

Hon'ble Judges : L. Narayana Swamy

Bench : SINGLE BENCH

Advocate : M.J. ALVA, B.P. RENUKAMBA, V.B. SHIVA KUMAR

Judgement

1. Petitioners and the respondent have entered into a Joint Development Agreement (JDA) on 27.08.2014 which is registered in the Office of the Sub-Registrar. The agreement Clause 23 makes provision for Arbitration which says that the parties to the agreement hereto agree that in the event of there being any dispute, the parties shall approach the arbitrator in terms of the said JDA.
2. Notwithstanding the said agreement and more particularly the arbitration clause, the respondent herein filed a suit in O.S.No.2966/2015 seeking declaration to declare the JDA as null and void; and further, sought for a relief of injunction in respect of the property in question.
3. During pendency of the suit, the first petitioner filed an application under Section 8 of the Arbitration Act with a prayer to refer this matter to the arbitrator in view of the arbitration clause in the said agreement. The said application came to the rejected by the court below, against which the present petition is filed.
4. Learned counsel for the first petitioner submits to set aside the order of the trial court rejecting the application made under Section 8 of the Arbitration Clause. Further it is his case that the arbitration clause entitles both the parties to refer the matter to the arbitrator in case of a dispute of an agreement and not

the civil court. Contrary to the said clause in the agreement notwithstanding the fact that it entitles both the parties to approach the arbitrator, the learned trial judge has rejected the application in support of his case, learned counsel for the first petitioner has referred to the judgments of Hon"ble Supreme Court reported in (2009) 10 SCC 103 in the case of "Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavilata and Another"; and 2015 (4) SCJ 52 in the case of "M/s. Sundaram Finance Limited and Another Vs. T. Thankam" and submits that in the facts and circumstances of the case, the Hon"ble Apex Court has held that if any of the party approaches civil court inspite of agreement between the parties for referring the dispute to Arbitrator, if other party files an application under Section 8 of the Act, civil court has to necessarily refer the matter to Arbitration in terms of the agreement.

5. Learned counsel for the first petitioner, in respect of petitioner No.2, referred to an order passed by this court on 17.06.2016 wherein the counsel representing petitioner No.2 had made a submission that this revision petition is not filed at her instance. Therefore, she is not interested in pursuing the same and she submitted that if the matter is referred back to the court below, she is ready and willing to get this matter settled with parties to the said proceedings. Therefore, he submits to allow this petition and set aside the impugned order by allowing the application filed under Section 8 of the Arbitration Act.

6. Learned counsel for the second petitioner submits to vacate the interim order and refer this matter to the civil court. In support of her submission, learned counsel submitted that first petitioner has played fraud with the second petitioner resulting loss of major amount. Under the circumstance, dispute between the parties interse shall not be a subject matter before the arbitrator and accordingly she submits to dismiss this petition and submits that Clause No.23 is not in clear terms and it could be open in case if parties to the agreement agree to approach the arbitrator, then only an arbitrator can get jurisdiction; and secondly Section 8 could be invoked only if the dispute is in clear terms of the agreement only. Contrary to the same, the case of the plaintiff is that first petitioner has played fraud and the signature is in dispute and these are all the questions that cannot be gone into by the arbitrator. For the purpose of arbitration, learned counsel submitted the agreement is only an interpretation of the agreement and if it requires an interference of the arbitrator, then only Section 8 requires to be invoked. In other circumstance, where the dispute between the parties is civil in nature, they have to approach the civil court.

7. Heard the learned counsel for the parties and perused the materials produced before this court as well as the judgments of the Hon"ble Supreme Court.

8. There is a JDA between the petitioners and the respondent. To solve Inter-se dispute between the parties, they have to adjudicate it before the competent court by filing necessary application. In respect of Clause 23 of the agreement, application filed by the first petitioner before the learned Civil judge came to be rejected and challenging the same, this petition is filed. Now the question for

consideration before this court is, whether it is appropriate to refer this case to the arbitrator and whether the arbitrator has jurisdiction to adjudicate the dispute which is civil in nature which has arisen in respect Clause 23 of the agreement?

9. For better understanding Clause 23 of the agreement is extracted: "23. ARBITRATION:

The parties hereto agree that in the event of there being any disputes with regard to this agreement or interpretation of any of the terms of this agreement, the same shall be referred to the arbitration in terms hereof;"

10. A plain reading of this clause makes it clear that if any dispute with regard to the JDA or interpretation of any of the terms of the JDA arises between the parties, then only parties have to take a decision in the event to refer the matter to Arbitrator. But in the instant case, the nature of dispute has risen by the respondent ? plaintiff against the petitioners, and the petitioners, themselves admit regarding fraud and to that extent there is a pleading disputing signature of the parties and all these are not the facts/ disputes described in the agreement. They are of civil nature. When both the parties in clear terms entered into the agreement and if, there is any dispute in terms of an agreement, then only the arbitrator gets jurisdiction to entertain the dispute arisen between them and when it is not open for the arbitrator, it is only the civil court which has got jurisdiction to resolve the dispute. In such circumstances, the learned judge has rightly rejected the application and I concur with it.

11. The Hon"ble Supreme Court in AIR (2007) 5 SCC 719, at paragraph No.8 has held thus:- This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in K.K. Modi V. K.N. Modi, (1998)1 SCR 601, Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd. (1999) 1 SCR 181 and Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd. AIR 2003 SC 3688. In State of Orissa v. Damodar Das, AIR 1996 SC 942, this Court held that a clause in a contract can be construed as an "arbitration agreement" only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement:

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an

obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words "arbitration" and "arbitral tribunal (or arbitrator)" are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a

reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

The above judgment clarifies circumstances in which the arbitration clause could be invoked for the purpose of settlement and what are the circumstances under which the agreement for the purpose of arbitration is enforceable.

12. The instant case is examined in view of the above citation and this court is of the opinion that there is arbitration clause. However, in order to invoke the arbitration clause, there shall be dispute between the parties only in respect of the JDA but the 2nd petitioner has raised a plea that first petitioner has played fraud with her. Similarly, the respondent herein also alleges that petitioners have played fraud with him. When these are all the disputes between the parties, it is not appropriate to drive the parties to the arbitration. As it is referred earlier, in respect of the formation of the arbitrator, since the Act is silent, the arbitration tribunal is not a civil court for the purpose of recording evidence since there is a pleading to the effect of fraud played and an inbuilt dispute has been raised and it is not a civil court to mark the documents and this court is also not competent to declare that an agreement/JDA entered into between the parties is null and void and the nature of dispute is civil in nature, it is not safe to refer the matter to the arbitration. Accordingly, the reasons assigned by the court below is correct. Petition stands dismissed. In view of the dismissal of the present petition, it is appropriate to permit the petitioners to file their written statements within the next date of hearing.