
(2006) 02 AP CK 0009

In the Andhra Pradesh High Court

Case No : CRP Miscellaneous Petition No. 8489 of 2005 and CRP No. 998 of 2006

Vijaya Lakshmi Builders and Developers (P) Ltd. and Others APPELLANT
Vs

A. Rajender and Others RESPONDENT

Date of Decision : 08-02-2006

Acts Referred:

Andhra Pradesh Arbitration Rules, 2000 — Rule 4
Arbitration and Conciliation Act, 1996 — Section 2, 8, 8(1), 8(2), 8(3)

Citation : (2006) 02 AP CK 0009

Hon'ble Judges : P. Swaroop Reddy, J; D.S.R. Varma, J

Bench : Division Bench

Advocate : B. Chandrasen Reddy, for the Appellant; Rajendran, for Respondent Nos. 1 to 8 and P. Venugopal, for Respondent Nos. 9 to 12, for the Respondent

Final Decision : Allowed

Judgement

D.S.R. Varma, J.—Heard both sides.

2. The application in C.R.P.M.P. No. 8489 of 2005 is ordered.

3. This Civil Revision Petition is directed against the order and decree, dt. 29-11-2005, passed by the District Judge, Vizianagaram, allowing the application I.A. No. 3011 of 2005 in O.S. No. 21 of 2005, filed u/s 8 of the Arbitration and Conciliation Act, 1996 (for short "the Act").

4. The petitioners are the plaintiffs and the respondents are the defendants in the suit.

5. For the sake of convenience, the parties will be referred to as per their array in the suit.

6. The facts, which are not in dispute, that led to the filing of the suit are as under:

The defendants filed an application u/s 8 of the Act read with Rule 4 of the A.P. Arbitration Rules, 2000 (For brevity "the Rules"), seeking to refer the suit

disputes to the arbitrator as per the terms of the arbitration clause contained in Memorandum of Understanding (for brevity "the MOU"), dated 27-8-2005. The said application had been allowed by the Court below.

7. It is not in dispute that the defendant No. 1 and the plaintiffs 2 to 4 constitute a limited company by name M/s. Vijaylakshmi Builders and Developers Private Limited (for brevity "the Company"), which in turn is the plaintiff No. 1. Subsequently, defendant Nos. 2 to 12 were inducted as Directors of the said company.

8. Even before the Defendant Nos. 2 to 12 were inducted as Directors of the company, a MOU was entered into between the defendant No. 1 and the plaintiff Nos. 2 to 4. In the said MOU, clause No. 13 is the arbitration clause. Basing on the said clause, the defendant No. 1 along with 7 others filed the present application u/s 8 of the Act seeking to refer the suit disputes for arbitration, as contemplated under Sub-section (1) of Section 8 of the Act. The said application since allowed by the Court below, the plaintiffs filed the present Civil Revision Petition.

9. It is the contention of the learned Counsel appearing for the plaintiffs firstly that the purpose of filing the suit is different as well as the purpose of entering into MOU is also different. There is absolutely no nexus between the cause of action of the suit and the cause of action of the MOU. Therefore, it is contended by the learned Counsel appearing for the plaintiffs that since the subject matter of the MOU and the subject matter of the suit are different, even though there is an arbitration clause in the alleged MOU, the parties need not be referred for arbitration, as contemplated under Sub-section (1) of Section 8 of the Act.

10. On the other hand, it is the contention of the learned Counsel appearing for the defendant No. 1 that defendant No. 1 has been the Managing Director of the Company and the other defendants i.e., defendant Nos. 6 to 12 have been inducted as Directors of the Company and also deal with the suit schedule property. It is his further contention that the entire suit depends upon the MOU and all the transactions in the form of sale deeds and the agreements of General Power of Attorney (for brevity "the GPA") in favour of defendant Nos. 2 to 6 are all related with the MOU and any dispute shall be resolved only by way of arbitration, as contemplated under Clause-13 of the MOU. Therefore, he contends that the impugned order, passed by the Court below, is absolutely in accordance with law, which do not warrant any interference by this Court.

11. In view of the above relative contentions, the only issue that falls for consideration in this Civil Revision Petition is - as to whether the Court below was right in referring the parties to the arbitration.

12. In this connection, it is necessary to look into Section 8 of the Act, which is extracted hereunder:

Power to refer parties to arbitration where there is an arbitration agreement:--

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under Sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

13. The ingredients of Sub-section (1) of Section 8 of the Act are more relevant for the purpose of dealing with the present case. The main ingredients of Sub-section (1) of Section 8 of the Act are:

(a) Action shall be brought before judicial authority by way of a suit;

(b) The subject matter of the said suit shall also be subject matter of the arbitration agreement.

(c) An application under Sub-section (1) of Section 8 of the Act shall be made before submitting the first statement.

14. Sub-section (2) of Section 8 of the Act postulates that it is imperative for the party, which made an application under Sub-section (1), to file the original arbitration agreement along with the application or a duly certified copy thereof.

15. Sub-section (3) of Section 8 of the Act is not relevant for the purpose of deciding the present Civil Revision Petition.

16. In my considered view, the second requirement of the ingredients of Sub-section (1), as referred to above, is crucial factor in a matter like the case on hand.

17. From the above, it is imperative that the subject matter of the proceeding before the judicial authority shall be covered by a matter, which again is the subject matter of an agreement. In other words, only those disputes, which are specifically agreed to be arbitrated alone, can be subject matter of arbitration and only in such an event the parties can be referred to arbitration.

18. The next important aspect to be noted is the subject matter of the suit and the subject matter of the arbitration agreement shall be referable only to the parties to the agreement inasmuch as the language employed in Sub-section (1) is that "refer the parties to arbitration."

19. In our considered view, the second requirement of the ingredients of Sub-section (1), as referred to above, is crucial factor in a matter like the case on hand.

20. From the above facts and contentions, two important aspects would arise for consideration.

Firstly whether it is necessary that the subject matter of the proceeding before the judicial authority shall be covered by a matter, which again is the subject matter of the agreement. Secondly the subject matter of the suit and the subject matter of the arbitration agreement shall be in relation to only to the parties to the agreement inasmuch as the language employed in Sub-section (1) of Section 8 of the Act is that "refer the parties to arbitration".

21. Apropos the first aspect, the answer can be found from the observations of the Supreme Court (at paragraph No. 15) in *Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another*, .

15. The relevant language used in Section 8 is: "in a matter which is the subject of an arbitration agreement". The 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" indicate that the entire subject-matter of the suit should be subject to arbitration agreement.

22. From the above, it is abundantly clear that the subject matter of the suit must be imperatively covered by the subject matter of an agreement. In other words, only those disputes, which are specifically agreed to be arbitrated, alone can be subject matter of the arbitration and only in such an event the parties can be referred to arbitration.

23. As regards the second aspect, a Larger Bench of the apex Court in *SBP& Co. v. Patel Engineering Ltd.* 2005 (7) SCJ 461 : (2005) 8 SCC 618. made the following observations, at paragraph No. 19, which are as under, for ready reference:

19. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the Arbitral Tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include special tribunal like the Consumer Forum (see *M/s. Fair Air Engineers Pvt. Ltd. and another Vs. N.K. Modi*, . When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the

absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration....

24. The Court below passed the impugned order apparently on the sole ground that the subject matter was covered by a decision rendered by the apex Court in P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, , wherein it was held that the language of Section 8 of the Act is peremptory and accordingly, the Court understood the said decision that it was imperative and obligatory for the Court to refer the parties to arbitration in terms of the agreement and eventually, recorded a finding that there is nothing to decide in the suit since the parties are referred to arbitration.

25. Coming to the facts of the case, it is on record that the suit was filed for the following reliefs:

(i) Of cancellation of sale deed vide document No. 2119/2005 dated 1-7-2005 registered with the office of Sub-Registrar, Kothavalasa by the 1st defendant in favour of defendants 2 to 5;

(ii) Of cancellation of Agreement-cum-General Power of Attorney executed by 1st defendant in favour of defendants 2 to 5 bearing document No. 2120/2005 dated 1-7-2005 registered with the office of Sub-Registrar, Kothavalasa;

(iii) Issue permanent injunction restraining the defendants, their agents, servants, employees etc., from changing the nature of the suit lands or to make any plots or raising constructions thereon;

(iv) Issue permanent injunction restraining the defendants, from alienating or in any manner transferring like mortgages, lease, exchange etc., of the suit lands;

(v) Issue permanent injunction restraining the defendants from interfering with the possession and enjoyment of the plaintiffs and their agents over the suit lands;

(vi) Award costs of these proceedings;

(vii) And pass such other and further relief (s) as are deemed fit and proper in the circumstances of the case.

26. Further, the MOU, which contains an arbitration clause, was entered into between plaintiff Nos. 2, 3 and 4 on one hand and defendant No. 1 on the other.

27. Obviously, plaintiff No. 1, which is a limited Company, and defendant Nos. 2 to 12 are not parties to the MOU. The interlocutory application was filed by some of the defendants in the suit along with defendant No. 1 claiming certain rights through defendant No. 1.

28. Further, it is to be seen that the MOU was entered into on 27-8-2004 on a stamp paper obviously purchased on 3-9-2004.

29. The learned Counsel appearing for the plaintiffs contends that obviously the alleged MOU, which was available on the record of this Court, is ante-dated and hence fabricated. The veracity or otherwise of the said document, though shrouded with serious doubt, this Court is not going into that aspect. However, the fact remains that the MOU was entered into between defendant No. 1 and plaintiff Nos. 2, 3 and 4. It is further to be noticed that since plaintiff No. 1/Company was not a party to the MOU, the MOU should be construed and understood as was entered into between those parties in their personal capacity.

30. Furthermore, defendant Nos. 2 to 12, as alleged by defendant No. 1, are the Directors of plaintiff No. 1/Company, who were inducted, again allegedly, by defendant No. 1 himself.

31. From the above facts, it is further obvious that in total exclusion of the Company i.e., Plaintiff No. 1 and other Directors i.e., defendant Nos. 2 to 12, the MOU was entered into apart from the same being brought into existence under doubtful circumstances.

32. Therefore, from a careful perusal of the MOU and the plaint averments, it is apparent that the subject matter of the suit and the subject matter of the MOU are different. There is no direct and apparent nexus between the subject matters of the MOU and the suit claim. There may be some indirect nexus, but that is not clear from the record.

33. From the above judgments of the apex Court, the subject matter of the suit and the subject matter of the agreement, which contains the arbitration clause, must be the same.

34. Further, as already pointed out, in the light of the judgment of the apex Court in SBP & Co. v. Patel Engineering Ltd. (2 supra), it is not peremptory for the Court to refer the matter to the arbitrator, merely because an agreement is presented before the Court. In other words, the relevance, context, the relationship of parties to the agreements and also the conditions shall have to be gone into by the Civil Court while exercising the jurisdiction u/s 8 of the Act. It shall not be mere mechanical and be for mere asking.

35. For the aforementioned reasons, we are of the considered view that the impugned order passed by the Court below, referring the parties for arbitration, deserves to be set aside and accordingly set aside.

36. In the result, the Civil Revision Petition is allowed, at the stage of admission. However, there shall be no order as to costs.