

IN THE HIGH COURT FOR THE STATE OF TELANGANA, HYDERABAD

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ARBITRATION APPLICATION NOs.54, 112 & 118 OF 2018

Between:

ARBITRATION APPLICATION No.54 OF 2018

Neela Satyanarayana

...Applicant

Vs.

Mr.R.Subrahmanyam

....Respondent

ARBITRATION APPLICATION No.112 OF 2018

PVP Capital Limited

...Applicant

Vs.

M/s. Parameswara Art Productions & Others.

....Respondents

ARBITRATION APPLICATION No.118 OF 2018

M/s. Apex Builders and Developers

...Applicant

Vs.

Mr. Kesarkar B.Satyajit

....Respondent

JUDGMENT PRONOUNCED ON:04.04.2022

HON'BLE SRI JUSTICE UJJAL BHUYAN

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| 1. | Whether Reporters of Local newspapers may be allowed to see the Judgments? | : Yes |
| 2. | Whether the copies of judgment may be Marked to Law Reporters/Journals? | : Yes |
| 3. | Whether His Lordship wishes to see the fair copy of the Judgment? | : Yes |

UJJAL BHUYAN, J

*** THE HON'BLE SRI JUSTICE UJJAL BHUYAN**

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....Respondent

! Counsel for Petitioner Mr. Pramod in A.A.Nos.54 & 118 of 2018
 Mr. Pratap Kumar in A.A.No.112 of 2018

^ Counsel for respondents: Mr.Hemendranath Reddy in
 A.A.No.54/2018
 Ms. Divya in A.A.No.112 of 2018
 Mr. J. Prabhakar in A.A.No.118 of 2018

<GIST:

> HEAD NOTE:

? Cases referred

¹ (2011) 14 SCC 66

² (2019) 9 SCC 209

³ (2020) 4 SCC 612

⁴ (2021) 2 SCC 1

⁵ (2021) 4 SCC 379

⁶ 2022 SCC OnLine SC 83

THE HON'BLE SRI JUSTICE UJJAL BHUYAN

ARBITRATION APPLICATION Nos.54, 112 & 118 of 2018

COMMON ORDER:

This common order will dispose of Arbitration Application Nos.54, 112 and 118 of 2018.

2 Heard Mr.Promod, learned counsel representing Mr.A.Venkatesh, learned counsel for the applicant in Arbitration Application Nos.54 and 118 of 2018; Mr. Pratap Kumar, learned counsel for the applicant in Arbitration Application No.112 of 2018. Also heard Mr. Hemendranath Reddy, learned senior counsel for the respondent in Arbitration Application No.54 of 2018: Ms.Divya, learned counsel for the respondent in Arbitration Application No.112 of 2018; and Mr. J. Prabhakar, learned counsel for the respondent in Arbitration Application No.118 of 2018.

3 The three arbitration applications have been filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (briefly, 'the 1996 Act' hereinafter) for appointment of arbitrator to arbitrate on the dispute between the parties.

4 Though at the end of a contentious hearing there emerged a consensus amongst learned counsel for the parties, nonetheless to

place the three applications in perspective it would be apposite to briefly narrate the facts.

ARBITRATION APPLICATION No.54 OF 2018:

5 In Arbitration Application No.54 of 2018, Neela Satyanarayana is the applicant. It is stated that he is a reputed businessman engaged in the business of development of properties, real estate etc., since last many years. Respondent is the absolute owner of a plot of land admeasuring Ac.3-21 in Sy.No.7 (part) of Asmadpet, Balanagar Mandal, Ranga Reddy District within the jurisdiction of Greater Hyderabad Municipal Corporation, Kukatpally Circle (referred to hereinafter as 'the subject property').

6 Applicant and respondent had entered into a development agreement – cum – General Power of Attorney on 07.08.2014 to develop the subject property and avail the benefits therefrom in the ratio of 40 : 60. Pursuant thereto, respondent had delivered vacant possession of the subject property to the applicant to develop the same. Applicant has developed the subject property and in the process has incurred huge expenses. However, on 02.02.2017, applicant came to know that respondent was trying to enter into a development agreement with third parties i.e.

Mr.Srinivas Gupta Tattipalli and Mr. Madhu in respect of the same subject property. Such action of the respondent was in breach of the development agreement dated 07.08.2014. Despite being approached by the applicant, respondent did not pay heed to such request.

7 Clause No.4 of the agreement dated 07.08.2014 says that if any dispute arises between the parties to the said agreement, the parties shall make best effort to resolve the dispute amicably. In the event such effort is not successful, the dispute would be resolved through arbitration in accordance with the 1996 Act by a sole arbitrator to be appointed by the parties mutually, seat of arbitration being at Hyderabad and the proceedings being in English language.

8 Applicant also filed an application under Section 9 of the 1996 Act before the Commercial Court-cum-XIII Additional District Judge, Ranga Reddy District, seeking injunction against the respondent not to act in derogation of the development agreement dated 07.08.2014. The same was registered as COP No.3 of 2017.

9 A notice dated 14.03.2018 was issued by the applicant informing the respondent that it had invoked the arbitration

clause and had nominated Justice C.V.Ramulu, a retired Judge of this Court, as the sole arbitrator. However, there was no response from the respondent. It was at that stage that the present application came to be filed.

10 Respondent has filed counter affidavit. In addition to generally denying the case of the applicant, it is specifically contended that the development agreement dated 07.08.2014 containing the arbitration clause is not a registered document and it is also insufficiently stamped. Being insufficiently stamped, applicant would be debarred from invoking the arbitration clause on the strength of such unenforceable document.

ARBITRATION APPLICATION No.112 OF 2018:

11 In Arbitration Application No.112 of 2018, the applicant is PVP Capital Limited. According to the applicant it is a company incorporated under the Companies Act, 1956 and is engaged in the business of providing finance to the entertainment industry. Respondent No.1 is a film production house, producing films in South India. Respondent No.2 is the proprietor of respondent No.1. Respondent No.2 approached the applicant for finance for production of a Telugu film called 'Temper'.

12 Applicant agreed to provide loan to respondent No.1 to which respondent No.2 stood as guarantor. In this connection, a loan agreement dated 26.02.2014 was entered into between the applicant and respondent No.1. In terms of the loan agreement dated 26.02.2014, applicant released an amount of Rs.22.00 crores as loan to respondent No.1. Respondent No.2 made several representations requesting the applicant for extension of time for repayment of the loan, which was agreed to by the applicant. In this connection, respondent Nos.1 and 2 signed a supplementary agreement along with respondent Nos.3 and 4 to the loan agreement dated 26.02.2014 on 12.02.2015. As per the supplementary agreement, respondent Nos.3 and 4 provided additional guarantee to the loan availed of by respondent No.1 along with the existing guarantor i.e. respondent No.2.

13 Respondent No.1 had made total payment of Rs.20,52,50,000-00 (Rs.15,08,89,726-00 towards principal and Rs.4,71,60,274-00 towards interest). As on 12.02.2015 an amount of Rs.6,91,00,000-00 was outstanding to be paid to the applicant by respondent No.1. However, respondent No.1 defaulted in such payment.

14 Applicant issued legal notice dated 07.03.2015 calling upon the respondents to forthwith pay the outstanding dues. Though

respondent No.2 had issued a cheque bearing No.927903 dated 12.04.2015 drawn on Andhra Bank, Film Nagar branch, Hyderabad, in favour of the applicant for an amount of Rs.7,41,54,588-00, the said cheque was dishonoured when presented before the bank of the applicant on the ground of insufficiency of funds. This compelled the applicant to issue fresh legal notice dated 23.04.2015 which was followed by several subsequent notices.

15 On 09.12.2015 respondent No.1 paid an amount of Rs.1.00 crore to the applicant. But thereafter no further payments were made by respondent No.1.

16 Reference has been made to Clause 5 of the loan agreement, whereafter it is contended that an amount of Rs.11,25,81,133-00 was due and outstanding to the applicant as on 31.08.2018.

17 Invoking Clause 10.1 of the loan agreement, providing for reference of dispute to arbitration by a sole arbitrator at the instance of the applicant, legal notice dated 01.03.2018 was issued by the applicant to the respondents. It was stated therein that a dispute had arisen in terms of the agreement dated 26.02.2014 and that the applicant proposed to appoint Sri C.Rangarajan, a retired Judge of this Court, as the sole arbitrator

for resolution of the dispute between the parties. There was no response from the respondents for which the present application came to be filed.

18 Counter affidavit has been filed by respondent No.2 on behalf of all the respondents. It is stated that in terms of the agreement dated 26.02.2014, respondents have repaid the loan availed of from the applicant. The supplementary agreement dated 12.02.2015 was executed under duress. Parties to the two agreements are different. That apart it is also stated that there is no valid and enforceable arbitration clause in the two loan agreements.

ARBITRATION APPLICATION No.118 OF 2018:

19 The third arbitration application i.e. Arbitration Application No.118 of 2018 has been filed by M/s.Apex Builders and Developers as the applicant which is stated to be a partnership firm engaged in the business of construction and development in and around Hyderabad.

20 Respondent is the owner of a plot of land bearing No.64 under MIG category forming part of Sy.Nos.563/1/1, 564, 566, 567/1, 568, 569, 570/1/2, 571/2, 613, 615, 572/2, 611, 612,

614/2, 560, 561 and 574/4/2 situated at Batukammakunta, Baghamberpet (hereinafter referred to as 'the subject property').

21 A construction agreement dated 23.04.2017 was executed by the respondent in favour of the applicant. As per the said agreement, applicant would construct a residential building with total built up area of 3200 sft for which respondent had agreed to pay an amount of Rs.1,500-00 per sft to the applicant. The period of construction was 11 months from the date of agreement. As per Clause 14, in the event of any dispute or difference arising between the parties, the matter is to be referred to a sole arbitrator under the 1996 Act and during the pendency of the arbitration proceedings the first party would be entitled to entrust the construction activity to a third party.

22 It is stated that applicant had diligently carried out its part of the obligations as per the construction agreement dated 23.04.2017. However, there were delays for reasons beyond the control of the applicant such as obtaining permissions from GHMC etc. That apart, in view of changes made in the specifications at the instance of the respondent, applicant ended up constructing a built up area of more than 4030 sft for which respondent had promised the applicant to make payment for the additional built up area.

23 Not to speak of the additional built up area, respondent failed to pay even the agreed rate as per the agreement for the original built up area. In the meanwhile, there was cost escalation in construction. According to the applicant it is entitled to payment of Rs.70,49,500-00 but has been paid by the respondent an amount of Rs.35,29,000-00. Thus balance amount of Rs.35,20,500-00 is required to be paid.

24 Applicant brought this aspect to the notice of the respondent by addressing letter dated 17.03.2018 to which respondent replied on 22.03.2018 denying the claim of the applicant. Additionally, respondent questioned the quality of the construction work carried out by the applicant and unilaterally terminated the construction agreement dated 23.04.2017. Applicant filed Arbitration O.P.No.778 of 2018 on the file of X Additional Chief Judge, City Civil Court, Hyderabad, seeking interim injunction pending initiation of arbitral proceedings. However, the said petition was dismissed vide order dated 04.06.2018.

25 Referring to Clause 14 of the construction agreement dated 23.04.2017, applicant issued notice dated 28.07.2018 nominating Sri R.L.Shankar, a retired District Judge, as the sole arbitrator to arbitrate on the dispute between the parties.

26 Respondent in the reply dated 27.08.2018 did not agree with the nomination of the sole arbitrator by the applicant; instead proposed the names of two arbitrators viz., Sri V.V.Raghavan and Sri Vithal Rao, which was however not acceptable to the applicant. Hence the related application.

27 Respondent has filed counter affidavit contending that applicant is not a registered firm under the Indian Partnership Act, 1932. The partnership deed is insufficiently stamped and is unregistered. Therefore, it was not competent to enter into the construction agreement dated 23.04.2017. That apart, contentions of the applicant have been disputed by stating that applicant has not even completed 40% of the total work.

SUBMISSIONS:

28 Learned counsel for the applicants have referred to the respective arbitration clauses in the related agreements between the parties and submits that in terms thereof there are clear disputes between the parties which are required to be resolved by way of arbitration as provided by the arbitration clauses.

29 On the other hand, learned counsel for the respondents have raised the objection that the documents of which arbitration clause are a part, are insufficiently stamped. Therefore, such

documents are unexecutable in law. If that be so, prayer of the applicants for making reference to arbitration on the basis of such documents is not permissible. That apart, Mr.J.Prabhakar, learned counsel for the respondent in Arbitration Application No.118 of 2018 further submits that the original of construction agreement dated 23.04.2017 has not been produced before the Court in spite of notice for production of it. Therefore, no cognizance can be taken of such construction agreement.

30 Learned counsel for respondents have relied upon the following decisions: **SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited¹, Garware Wall Ropes Limited Vs. Coastal Marine Constructions And Engineering Limited², Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram Vs. Bhaskar Raju³, and Vidya Drolia Vs. Durga Trading Corporation⁴.**

31 Responding to the objection raised by learned counsel for the respondents, learned counsel for the applicants have placed reliance on **N.N.Global Mercantile Private Limited Vs. Indo Unique Flame Limited⁵**, which has overruled the decision in **SMS**

¹ (2011) 14 SCC 66

² (2019) 9 SCC 209

³ (2020) 4 SCC 612

⁴ (2021) 2 SCC 1

⁵ (2021) 4 SCC 379

Tea Estates Private Limited (1 supra) and has made a reference to a constitution bench of five judges for an authoritative pronouncement. They have further relied upon the decision of the Supreme Court in **Intercontinental Hotels Group (India) Pvt. Limited Vs. Waterline Hotels Pvt. Limited**⁶ to contend that notwithstanding insufficiency of stamp duty or non-registration, parties can be referred to arbitration.

32 Joining issue, Mr. J. Prabhakar learned counsel for the respondent submits that though in **N.N.Global Mercantile Private Limited** (5 supra) a three judge bench of the Supreme Court has made a reference to the constitution bench, the law laid down in **SMS Tea Estates Private Limited** (1 supra), **Garware Wall Ropes Limited** (2 supra), **Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram** (3 supra) and **Vidya Drolia** (4 supra) would continue to hold the field till a contra view is rendered by the constitution bench. It is for making the reference that the three judge bench in **N.N.Global Mercantile Private Limited** (5 supra) disagreed with the view expressed by a coordinate bench in **Vidya Drolia** (4 supra). That does not mean that the view expressed in **Vidya Drolia** (4 supra) has been overruled.

⁶ 2022 SCC OnLine SC 83

ANALYSIS:

33 As already noticed above, at the end of a contentious hearing, learned counsel for the parties had resolved that the three arbitration applications can be disposed of without waiting for rectifying the defects at the first instance. Nonetheless, since the issue raised and involved is of considerable importance, therefore, it would be apposite for the Court to briefly highlight as to how the law has been interpreted by the Supreme Court and where it stands today.

34 In **SMS Tea Estates Private Limited** (1 supra) Supreme Court held that where an arbitration clause is contained in an unstamped agreement, provisions of the Stamp Act, 1899 would require a Judge hearing the Section 11 application to impound the agreement and ensure that stamp duty and penalty, if any, are paid thereon before proceeding with the Section 11 application. That was a decision rendered by a two Judge bench.

35 This view was adopted by a subsequent two Judge bench of the Supreme Court in **Garware Wall Ropes Limited** (2 supra), wherein it was held that when an arbitration clause is contained in a contract, the agreement only becomes a contract if it is enforceable by law. Arbitration clause in an agreement would not

exist when it is not enforceable by law. Finally, the bench held that while proceeding with a Section 11 application the High Court must impound the instrument which has not borne stamp duty and hand it over to the concerned authority who will then decide the issues, *qua*, payment of stamp duty and penalty, if any. As soon as stamp duty and penalty, if any, are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court which will then proceed to expeditiously hear and dispose of the Section 11 application.

36 This view expressed in **SMS Tea Estates Private Limited** (1 *supra*) and followed in **Garware Wall Ropes Limited** (2 *supra*) was adopted by a three Judge bench of the Supreme Court in **Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram** (3 *supra*).

37 Another three Judge bench of the Supreme Court in **Vidya Drolia** (4 *supra*) examined the question as to whether a landlord tenant dispute governed by the provisions of the Transfer of Property Act, 1882, would not be arbitrable as this would be contradictory to public policy. Two distinct yet interconnected aspects also arose for consideration before the Supreme Court. These two aspects were, meaning of non-arbitrability and who decides the question of non-arbitrability. Of course, Supreme

Court answered the reference by holding that a landlord-tenant dispute is an arbitrable dispute as the Transfer of Property Act, 1882 does not forbid or foreclose arbitration.

38 While examining the aspects of non-arbitrability and who decides non-arbitrability, Supreme Court also interpreted the word 'existence' appearing in Section 11; whereafter it came to the conclusion that an agreement evidenced in writing has no meaning unless the parties can be compelled to adhere to and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the 1996 Act as well as the Contract Act and when it is enforceable in law. Existence and validity are intertwined and an arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement.

39 In a separate but supplementary opinion, Justice N.V.Ramana opined that arbitration is a creature of consensus. It is completely dependent on party autonomy and the intention expressed in the agreement. A contract having multiple clauses including an arbitration agreement can be divided into two parts; the clauses relating to the commercial relationship can be referred

to as the main contract, whereas the arbitration agreement would be a separate contract by itself. Explaining further, and upon reference to Section 8 of the 1996 Act, it has been held that the Court should refer the matter to arbitration if the validity of the arbitration agreement cannot be determined on a *prima facie* basis. The rule for the Court would be 'when in doubt, do refer'. Finally, it has been held that subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the 1996 Act unless it is a clear case of deadwood.

40 However, in **N.N.Global Mercantile Private Limited** (5 supra) a three Judge bench of the Supreme Court has taken the view that there is no legal impediment to the enforceability of the arbitration agreement pending payment of stamp duty on the substantive contract. Adjudication of the rights and obligations under the work order or under the substantive commercial contract would not proceed before complying with the mandatory provisions of the Stamp Act. Observing that decision in **SMS Tea Estates Private Limited** (1 supra) does not lay down the correct position in law, it has been held that since the arbitration agreement is an independent agreement between the parties and is not chargeable to payment of stamp duty, the non-payment of stamp duty on the commercial contract would not invalidate the

arbitration clause or render it unenforceable since it has an independent existence of its own. On that basis judgment rendered in **SMS Tea Estates Private Limited** (1 supra) was overruled. Since the view taken in **SMS Tea Estates Private Limited** (1 supra) was also followed by a coordinate bench in **Vidya Drolia** (4 supra), the bench in **N.N.Global Mercantile Private Limited** (5 supra) expressed doubt over the correctness of the view expressed in **Vidya Drolia** (4 supra) and referred it to a constitution bench of five judges for an authoritative pronouncement. In that case both the parties had admitted existence of arbitration agreement. Therefore, the Court directed the Secretary General of the Supreme Court to impound the concerned instrument and forward it to the authority for assessment of stamp duty to be paid by the applicant.

41 Confronted with the above situation, recently, a three judge bench of the Supreme Court in **Intercontinental Hotels Group (India) Pvt. Limited** (6 supra) held that while there is a need to constitute a larger bench to settle the jurisprudence it was also cognizant of time sensitivity while dealing with arbitration issues. It was observed that all the applications were at a pre appointment stage and that Court could not leave them hanging until the issue is settled by the constitution bench. Therefore, till

such time the issue is decided Court should ensure that arbitrations are carried on unless the issue before the Court patently indicates existence of deadwood.

42 In the facts of that case, it was found that applicants had in fact paid the stamp duty. Therefore, the Supreme Court observed that whether the stamp duty so paid is insufficient or appropriate is a question that may be gone into at a later stage; Supreme Court would not review or go into this aspect under Section 11 (6) of the 1996 Act.

CONCLUSIONS:

43 In view of the above legal position, learned counsel for the parties have reached a broad consensus in the following terms:-

- i. Applicants shall produce the respective development agreements dated 07.08.2014, loan agreement dated 26.02.2014 (supplementary agreement dated 12.02.2015) and construction agreement dated 23.04.2017 in original before the Registrar General of this Court within three weeks from today,
- ii. Those agreements shall be sent for scrutiny before the respective competent authority by the Registrar General of this Court within two weeks of receipt,
- iii. While the competent authority will address the issue regarding stamping of the documents, the dispute raised between the parties are to be referred to arbitration of sole arbitrator each to be appointed in terms of the above three agreements,
- iv. However, the arbitration shall commence once adequate stamping is done.

44 Ordered accordingly.

45 Insofar Arbitration Application No.54 of 2018 is concerned, Court appoints Justice A.Gopal Reddy, a former Judge of this Court, Plot No.511, Phase III, Road No.86, Jubilee Hills, Hyderabad – 33, as the sole arbitrator.

46 As regards Arbitration Application No.112 of 2018 is concerned, Court appoints Sri R.L.Shankar, a retired District Judge, 6th Floor, Dimond Block, Lumbini Rockdale, Somajiguda, Hyderabad – 500082, as the sole arbitrator.

47 Finally, in Arbitration Application No.118 of 2018, Court appoints Sri M. Rajamouli Sarma, a retired District Judge, H.No.1-10-40 & 47, Flat No.204, Sai Krupa Apartments, Ashok Nagar, Street No.2, Hyderabad – 500 020, as the sole arbitrator.

48 All the parties shall appear before the respective arbitrators on 10.06.2022 at 11.00 AM. It is clarified that arbitration proceedings shall commence once the statutory requirements are fulfilled. All contentions are kept open.

49 This disposes of all the three arbitration applications. Miscellaneous petitions, if any, pending in these three arbitration applications shall stand closed.

UJJAL BHUYAN, J

Date: 04.04.2022.

L.R.Copy be marked B/o Kvsn