IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

***

C.R.P.Nos.530 & 640 of 2021

Between:

The Regional Manager, Aid et Action
Rep. by Suresh Gutta,
Plot No.9, Pavani Vilas, Dwarakapuri Colony,
Punjagutta, Hyderabad- 500 082.

... **Petitioner**
(in both the revision petitions)

AND

$ 1. M/s. Kolleru Rural Development Service Organization 9KRDSO) rep. by its Executive Secretary, Baddi Varahalarao, Ashok Nagar, Eluru, West Godavari.

2. The District Project Co-ordinator, Aid et Action, Gangula Vari Veedhi, Ashok Nagar, Eluru West Godavari.

3. The Programme Officer, Aid et Action, Plot No.9, Pavani Vilas, Dwarakapur Colony, Punjagutta, Hydeabad-500 082.

4. The State Project Programme Co-ordinator, Aid et Action, Plot No.9, Pavani Vilas, Dwarakapur Colony, Punjagutta, Hydeabad-500 082.

5. The Regional Director, Aid et Action, International South Asia, 16/20, Gilchrist Avenue, Harrington Road, Chet Petitioner, Chennai-600 031.

6. Aid et Action (India), rep. by its Director, 16/20, Gilchrist Avenue, Harrington Road, Chet Petitioner, Chennai-600 031.

... **Respondents**
(in both the revision petitions)

Date of Judgment pronounced on : 21-12-2021

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

1. Whether Reporters of Local newspapers May be allowed to see the judgments? : Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals: : Yes/No

3. Whether the Lordship wishes to see the fair copy Of the Judgment? : Yes/No

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(in both the revision petitions)

! Counsel for petitioner : Sri M. Kanthaiah

^Counsel for Respondent No.1 : Sri P. Bhaskara Narasimha Murthy

<GIST:
>HEAD NOTE:
? Cases referred:

1. (2009) 10 SCC 103
2. AIR 2015 SC 1303
3. (2003) 6 SCC 503
4. (2016) 10 SCC 386
5. (2012) (8) SCC 706
6. (2003) 1 SCC 557
7. (2019) 11 SCC 461
8. (2003) 5 SCC 531 : 2003 SCC OnLine SC 523
9. (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781 : 2011 SCC OnLine SC 636

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

C.R.P.Nos.530 and 640 of 2021

COMMON ORDER:

As both the revision petitions arise out of two applications arising out of the same suit, they are being disposed of by this common order.

2. The 1st respondent had filed O.S.No.74 of 2014 for recovery of an amount of Rs.2,10,61,125/- with costs and interest at 24% per annum on Rs.1,46,39,339/- before the VIII Additional District Judge, West Godavari District at Eluru, against the petitioner herein and four other defendants. The case of the 1st respondent was that the petitioner herein had entered into a Memorandum of Understanding (MOU) with the 1st respondent on 06.02.2012 under which the 1st respondent has to complete certain works entrusted to the 1st respondent and submit bills in due course. As the petitioner did not clear the bills submitted by the 1st respondent after completion of the works entrusted to it, a registered notice was initially issued demanding payment of the amount due, with interest. Upon failure to pay such amount, the present suit was filed for recovery.

3. After receipt of notice of the suit, the petitioner herein filed a written statement on 29.10.2014. In this written statement, the petitioner took the defence that the suit was not maintainable before the civil Court as per Clause-J of the terms of MOU dated 06.02.2012 which reads as follows:

> "**J. Arbitration**: AEA and PP will undertake to resolve any unforeseen events, disputes of misunderstandings in a consensual and amiable manner. Any misunderstanding arising from differing interpretations of the clauses of this MOU or emerging from the field activities, will in the first

> instance be the subject of negotiations on the part of AEA and PP conducted by representatives designated by each Organisation. In the event that no solution is found, AEA and PP will seek the arbitration of a mutually agreed third party such as professional arbitrators, or recognized audit and management".

4. The petitioner took the plea that in view of the above clause, the 1st respondent should have invoked the arbitration clause and a civil suit was not maintainable and the plaint requires to be rejected. The petitioner also stated, in his written statement, that the petitioner reserves the right to file a detailed additional written statement after the preliminary issue raised in the written statement regarding the maintainability of the suit in view of the existence of a specific arbitration clause is decided.

5. Thereafter, the trial Court framed issues on 21.04.2015 and subsequently, additional issues were also framed on 25.04.2019. One of the issues framed on 21.04.2015 reads as follows:

> "Whether the plaintiff is need to invoke Arbitration or not?""

6. Thereafter, the trial of the suit was taken up on 15.06.2015. The trial Court in paragraphs 10 to 14, of the order under revision, recorded various developments which took place in the course of the trial. The record of these developments shows that the petitioner herein had been dragging the trial on various grounds. It is recorded that on account of non-cooperation of the petitioner, the trial Court had set the petitioner *ex parte* and had reopened the evidence of the petitioner on an application being filed. In any event, the petitioner, though being granted adjournments on various grounds, had not raised the issue of arbitration

until 04.11.2019 when two I.As., were filed by the petitioner. It appears that these two applications were returned with some objections and were represented on 13.11.2020 with applications for condonation of delay in re-presentation. The applications for condonation of delay were allowed and the applications were numbered on 16.12.2020 as I.A.No.399 of 2020 and I.A.No.400 of 2020.

7. The prayer in I.A.No.399 of 2020 is as follows:

> "For the reasons stated in the accompanying affidavit, the petitioner prays that this Hon'ble Court may be pleased to refer the matter to the Arbitrator in view of arbitration clause between the parties in the MOU dated 06.02.2012, and pass order or orders as deemed fit and proper in the interest of justice."

8. The prayer in I.A.No.400 of 2020 is as follows:

> "For the reasons stated in the accompanying affidavit, the petitioner prays that this Hon'ble Court may be pleased to decide the preliminary issue, i.e., Issue No.3, with regard to the maintainability of civil suit and allow the petition rejecting the plaint declaring that the civil Court has no jurisdiction to entertain this suit and pass order or orders as deemed fit and proper in the interest of justice."

9. The 1st respondent herein filed counters in both the applications denying the contentions raised by the petitioner.

10. The trial Court by a common order dated 24.02.2021 had dismissed both I.A.No.399 of 2020 and I.A.No.400 of 2020. Aggrieved by the same, the petitioner has approached this Court by way the present revision petitions.

11. Heard Sri M. Kanthaiah, learned counsel appearing for the petitioner and M/s. P. Bhaskara Narasimha Murthy, learned counsel appearing for the 1st respondent.

12. Before considering the issues raised in the impugned applications in the present revision petitions, the following judgments cited by the learned counsel for the petitioner required to be noted.

1. **Branch Manager, Magma Leasing and Finance Limited and Anr., v. Potluri Madhavilata and Anr**.,[1];
2. **M/s. Sundaram Finance Ltd., v. T. Thankam**[2];
3. **Hindustan Petroleum Corpn. Ltd., v. Pinkcity Midway Petroleums**[3]:
4. **A. Ayyasamy v. A. Paramasivam and Ors**.,[4]:

13. In the decisions referred to above, the Hon'ble Supreme Court was considering the question whether disputes, arising out of an agreement containing an arbitration clause, can be contested before a regular Court of law or whether the dispute should be referred to arbitration. The Hon'ble Supreme Court in all these cases held that where there is an arbitration clause, the said disputes require to be referred to arbitration. These judgments may not be relevant for the purpose of this case for the reasons that would be set out below.

14. The petitioner, in the written statement, raised the issue of an arbitration clause being part of the MOU dated 06.02.2012, which is the basis for the suit, and contended that the suit is not maintainable. Thereafter, issues were framed including the issue on the effect of the

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[1] (2009) 10 SCC 103
[2] AIR 2015 SC 1303
[3] (2003) 6 SCC 503
[4] (2016) 10 SCC 386

arbitration clause, and the trial was conducted over five years. At that stage, the present applications have been filed.

15. I.A.No.400 of 2020 has been filed to decide the preliminary issue with regard to the maintainability of the civil suit. The petitioner appears to have relied upon two judgments of the Hon'ble Supreme Court in **Church of Christ Charitable Trust v. M/s. Ponniamman Educational Trust**[5] and **Saleem Bhai and Ors., v. State of Maharashtra and Ors**.,[6] in support of this application.

16. These judgments go into the question of rejection of a plaint and the conditions under which plaints are to be rejected. In **Church of Christ Charitable Trust v. M/s. Ponniamman Educational Trust** the Hon'ble Supreme Court went into the question of shortfall in plaint averments, statutory provisions etc., and held that they can be gone into while deciding the application for rejection of a plaint.

17. In **Saleem Bhai and Ors., v. State of Maharashtra and Ors.,** the Hon'ble Supreme Court had held that the relevant facts that need to be looked into while deciding the application, are the averments in the plaint and the pleas taken by the defendant in the written statement are wholly irrelevant at that stage. The prayer in I. A. No. 400 of 2020 is for considering an issue as a preliminary issue. These judgements are not applicable to the facts of the present case as they relate to rejection of plaints. In any event, the view of this court regarding this issue, as set out in the later part of this judgement, would render this application, infructuous. In the circumstances, rejection of I.A.No.400 of 2020 by the trial Court does not require interference.

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[5] (2012) (8) SCC 706
[6] (2003) 1 SCC 557

18. As far as the order in I.A.No.399 of 2020 is concerned, the trial Court rejected the said application on the ground of delay and that the trial has been going on for the last five years.

19. Sri M. Kanthaiah, learned counsel for the petitioner contended that the stage of the case cannot be a ground for rejecting an application under Section 8. He relied upon the judgment of the Hon'ble Supreme Court in **Caravel Shipping Services Pvt. Ltd., v. Premier Sea Foods Exim Pvt. Ltd**.,[7].

20. In paragraph 11 of **Caravel Shipping Services Pvt. Ltd., v. Premier Sea Foods Exim Pvt. Ltd**. the Hon'ble Supreme Court held as follows:

> "The fact that the stage of the present suit is that a particular witness is being examined would not come in the way of Section 8(3) application being allowed inasmuch as Section 8(3) application was filed in the same year as that of the suit. We may also add that we have not gone into the Multimodal Transportation of Goods Act, 1993 for the reason that whether the present Bill of Lading is governed by the provisions of the Act (Section 26 in particular) or not would not make any difference to the position that an arbitration Clause forms part of an agreement between the parties, and would, therefore, be governed by Section 7 of the Arbitration Act."

21. The case of the petitioner is that, in view of Clause-J of the MOU dated 06.02.2012, a suit is not maintainable and the matter has to be referred to arbitration under Section 8 of the Act.

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[7] (2019) 11 SCC 461

Consideration of the Court:

22. Any dispute, which arises between the parties to a contract, is to be resolved by the civil Courts. However, it is always open to the parties to the contract to include a clause requiring such a dispute to be referred to arbitration. Wherever such a clause is provided in a contract, the Courts, in the judgements referred above, have always held that primacy has to be given to the arbitration clause and such a dispute is to be referred to arbitration even after one of the parties approaches the Court directly.

23. This course of action is based on the provisions of law in the form of Section 8 of the Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act'). Section 8 of the 1996 Act, reads as follows:

> **"8. 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 to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.
>
> (*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:
>
> Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (*1*), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall

> file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.
>
> (*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."

24. From a reading of the above provision, it is clear that the legislative intent has been to give primacy to an arbitration clause in the agreement. However, the said provision does not give absolute primacy to an arbitration clause. Reference to arbitration is always subject to certain conditions.

25. Section 8 of the 1996 Act requires that the request to refer the dispute to arbitration should be made before the first statement of defence, in the main case, is made. Any failure to make the said request within the stipulated time would amount to waiver of the right of the party to seek reference to arbitration. This is a provision which gives an option to a party to either accept the jurisdiction of the Court and continue with the suit or to ask for the dispute to be referred to Arbitration.

26. Another facet of this provision is significant. Section 8 does not bar a suit being filed in the civil Court by one party to an arbitration agreement against another party to the said agreement. The provision only gives a right to the defendant to insist on the dispute being referred to Arbitration. This vital difference requires to be noticed. To elucidate further, this provision cannot be used by a party to the agreement to contend that the suit is not maintainable. The said party can only point out to the Court that since there is an arbitration clause, it would be

necessary for the court to send the matter to arbitration. In other words, an application made, within the time, under Section 8 of the 1996 Act cannot be an application to throw out a suit on the ground that there is a provision for arbitration. Such an application can only seek reference to arbitration.

27. This interpretation of Section 8 is supported by two judgements of the Hon'ble Supreme Court. In **Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya**[8]**,** at page 535, it was held:

> 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, the 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 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 the 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) and (2) of Section 8 of the Act.

28. In **Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.,**[9] at page 544, it was held as follows:

> 29. Though Section 8 does not prescribe any time-limit for filing an application under that section, and only

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[8] (2003) 5 SCC 531 : 2003 SCC OnLine SC 523

[9] (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781 : 2011 SCC OnLine SC 636

> states that the application under Section 8 of the Act should be filed before submission of the first statement on the substance of the dispute, the scheme of the Act and the provisions of the section clearly indicate that the application thereunder should be made at the earliest. Obviously, a party who willingly participates in the proceedings in the suit and subjects himself to the jurisdiction of the court cannot subsequently turn around and say that the parties should be referred to arbitration in view of the existence of an arbitration agreement. Whether a party has waived his right to seek arbitration and subjected himself to the jurisdiction of the court, depends upon the conduct of such party in the suit.

29. In the present case, the petitioner has already filed a written statement reserving it's right to file a more comprehensive written statement. The petitioner contends that the said written statement itself can be treated as an application under Section 8 and in any event, the petitioner having raised the existence of the arbitration clause, cannot be non-suited on technicalities.

30. This contention cannot be brushed aside, as the purpose of section 8 is to give an opportunity to the contesting party to refuse to submit to the jurisdiction of the court and seek reference of the dispute to arbitration. As held by the Hon'ble Supreme court, in ***Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC**, the question that needs to be answered is whether the party seeking reference to arbitration has subjected itself to the jurisdiction of the Court or not. This can be decided by looking at the conduct of the parties.

31. In the present case, the existence of the arbitration clause has been raised in the written statement filed by the petitioner. However, the petitioner did not seek reference to arbitration. It sought dismissal of the

suit on the ground that there is an arbitration clause in the agreement. This stand is not in accordance with requirements of section 8 which is a provision for seeking reference to arbitration rather than dismissal of the suit. The Petitioner, had thereafter, participated in the suit and trial wherein the witnesses of the respondent have been examined and cross-examined. It is only at the stage of producing it's witnesses that the Petitioner has sought to file the present application under section 8. In the said circumstances, the conduct of the petitioner reveals that it has subjected itself to the jurisdiction of the Court and waived it's right to seek reference of the dispute to arbitration.

32. The judgement of the hon'ble Supreme Court in **Caravel Shipping Services Pvt. Ltd., v. Premier Sea Foods Exim Pvt. Ltd**., does not assist the petitioner. In that case, the observations of the Hon'ble Supreme Court would show that the application under Section 8 had been filed at the appropriate time but was not considered and kept pending. In view of the peculiar facts of that case, the Hon'ble Supreme Court had held that once an application under Section 8 had been filed at the appropriate stage, the relief sought under such an application cannot be denied on the ground that further proceedings had been going on in the case. As such, the said judgment would not be applicable to the present case.

33. For all the above reasons, there are no merits in the civil revision petitions and the same are accordingly dismissed. There shall be no order as to costs. As a sequel, pending miscellaneous petitions, if any, shall stand closed.

R. RAGHUNANDAN RAO, J.

21st December, 2021
Js.

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

C.R.P.Nos.530 & 640 of 2021

21st December, 2021

Js.