Velugubanti Hari Babu vs Parvathini Narasimha Rao And Anr on 13 July, 2016

Equivalent citations: AIR 2016 SUPREME COURT 3285, 2016 (3) AJR 715, AIR 2016 SC (CIVIL) 2541, (2016) 4 PAT LJR 108, (2016) 4 ARBILR 148, (2017) 1 JCR 305 (SC), (2016) 5 ANDHLD 3, (2016) 4 CAL HN 134, (2016) 122 CUT LT 936, (2016) 5 MAD LW 673, (2016) 168 ALLINDCAS 34 (SC), (2016) 6 SCALE 797, (2016) 5 ALL WC 4621, (2016) 4 RECCIVR 134, 2016 (14) SCC 126, (2016) 2 CLR 391 (SC), (2016) 3 CIVLJ 913, (2016) 2 WLC(SC)CVL 470, (2016) 4 JLJR 6, 2017 (120) ALR SOC 29 (SC)

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Bench: J. Chelameswar, Abhay Manohar Sapre

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 6198 OF 2016
(ARISING OUT OF SLP (C) No. 25473/2015)

Velugubanti Hari Babu .....Appellant(s)

VERSUS

Parvathini Narasimha Rao & Anr. .....Respondent(s)

J U D G M E N T

Abhay Manohar Sapre, J.

1. Leave granted.

2. This appeal is filed by the appellant against the final judgment and order dated 13.02.2015 passed by the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in Arbitration Application No. 79 of 2014 whereby the High Court allowed the application filed by the respondents herein under Section 11(5) & (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") and appointed the sole arbitrator to decide the disputes

alleged to have arisen between the parties in relation to MoU dated 27.05.2013 and further directed the arbitrator to decide the legality and validity of the MoU by taking evidence.

3. Facts of the case lie in a narrow compass. They, however, need mention in brief to appreciate the short controversy involved in the appeal.

4. The appellant (who was respondent before the High Court) is the owner of the plot of land measuring 15.53 acres situated in Sy. No. 416/2B2 having come into possession of it in the year 1990 by way of a registered gift deed. He is since then enjoying peaceful possession of the said land.

5. According to the respondents, the appellant and the respondents entered into Memorandum of Understanding (MoU) dated 27.05.2013. The MoU, inter alia, provided that the respondents will resolve certain disputes that are pending between the appellant and certain other persons, namely, Mattaparthi Sivayya, Mattaparthi Satyanarayana and Mattaparthi Srinu, sons of late Appa Rao and another dispsute with Kanchumarthi Venkata Ramachandra Rao s/o Seetarama Rao, with respect to the land in question and, in return, the appellant will sell 50% of the land to the respondents at the rate of Rs.1 crore per acre. According to the respondents, as per the MoU, they paid a sum of Rs.7,00,000/- as token money to the appellant.

6. In terms of the MoU, both parties agreed that if any dispute arises in connection with the enforcement of the terms of the MoU, that shall be resolved through an Arbitrator, who would be appointed by both the parties with their mutual consent under the provisions of the Act.

7. On 11.12.2013, the respondents sent a letter to the appellant. In the letter, it was alleged that since disputes have arisen between them in relation to execution of MoU and hence the respondents, in terms of MoU, appoint one Sanyasi Rao – retired District Judge as an arbitrator to decide the disputes.

8. As the respondents did not get any response, they filed an application being Arbitration Application No. 79 of 2014 before the High Court under Section 11(5) and 11(6) of the Act for appointment of an arbitrator out of which this appeal by special leave arises.

9. During the pendency of the arbitration application before the High Court, the respondents also filed a petition being A.A.O.P. No. 41 of 2013 before the Principal Sessions Judge, Rajahmundry under Section 9 of the Act for grant of injunction restraining the appellant herein from alienating the property which was the subject matter of MoU. The appellant contested the application and denied the very execution of MoU by him. It was alleged that the so called MoU relied on by the respondents in their application is forged and fabricated document and that he has never signed any such MoU. It was, therefore, not binding on the appellant. By order dated 20.06.2014, the Principal Sessions Judge allowed the petition.

10. The appellant also contested the petition filed under Section 11(5) & (6) and filed a counter affidavit therein stating, inter alia, that the MoU in question is forged and fabricated document and that he never signed any such document with the respondents.

11. By impugned order dated 13.02.2015, the High Court allowed the application by holding that the legality and validity of the MoU including arbitration agreement can be examined by the Arbitrator on taking evidence and accordingly appointed Mr. B. Prakash Rao, a retired High Court Judge as the sole arbitrator to adjudicate all the disputes raised by the parties including to decide the question regarding legality and genuineness of MoU.

12. Challenging the said order, the appellant has filed this appeal by way of special leave before this Court.

13. Heard Mr. V.V.S. Rao, learned senior counsel for the appellant and Mr. Basant R., learned senior counsel for the respondents.

14. Mr. V.V.S Rao, learned senior counsel appearing for the appellant while assailing the legality and correctness of the impugned order argued two points.

15. In the first place, learned counsel urged that the High Court erred in allowing the application filed by the respondents under Section 11(5) & (6) of the Act and further erred in directing the arbitrator to decide the legality and validity of the MoU along with the disputes arising out of MoU.

16. In the second place, learned counsel urged that the directions issued to the arbitrator to decide the legality and genuineness of the MoU are contrary to the law laid down by this Court in SBP & Co. vs. Patel Engg. Ltd., (2005) 8 SCC 618, National Insurance Co. Ltd. Vs. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 and Bharat Rasiklal Ashra vs. Gautam Rasiklal Ashra & Anr., (2012) 2 SCC 144 and hence such directions are not legally sustainable and are liable to be set aside.

17. Learned counsel further submitted that in a case of this nature where the question arises before the High Court in Section 11 proceedings as to whether the agreement/MoU is a valid and genuine document and whether it is enforceable or not, it is the duty of the High Court to first decide such questions keeping in view the law laid down in SBP & Co. (supra), National Insurance Co. Ltd., (supra) and Bharat Rasiklal Ashra (supra) and if it is held to be a valid and genuine document then whether it is binding on the parties and depending upon the outcome of the findings on such question, appropriate orders as required under Sections 11(5) and (6) of the Act has to be passed.

18. Learned counsel further urged that since in this case, the High Court instead of deciding these questions on their merits, which had admittedly arisen on the basis of pleadings, straightaway proceeded to appoint the arbitrator and directed the arbitrator to decide the validity and genuineness of the MoU, such exercise of power by the High Court was wholly without jurisdiction and renders the impugned order legally unsustainable. In other words, submission of the learned counsel was that the High Court had the jurisdiction under Section 11 of the Act to decide the question of validity and genuineness of MoU one way or other on merits as held by this Court in abovementioned three decisions whereas it had no jurisdiction to ask the arbitrator to decide such question and, therefore, non-deciding the question amounts to failure to exercise jurisdiction vested in it by law and renders the impugned order bad in law.

19. In reply, Mr. Basant R., learned senior counsel appearing for the respondents while elaborating his submissions supported the reasoning and the conclusion arrived at by the learned Chief Justice and contended that no interference is called for in the impugned order.

20. Having heard the learned counsel for the parties and on perusal of the record of the case, we find force in the submissions of the learned counsel for the appellant, which deserve acceptance.

21. This is how the learned Chief Justice dealt with the matter in hand and held as under :

> "I am of the view that the legality and validity of the Memorandum of Understanding and also the Arbitration Agreement can also be examined by the learned Arbitrator on taking evidence in this matter, particularly, under Section 16 of the said Act. As I notice and taking prima facie material, such question cannot be adjudicated conclusively by me effectively and it would be proper for the learned Arbitrator to do so. I, therefore, appoint Mr. Justice B. Prakash Rao, a retired Judge of this Court as sole Arbitrator to adjudicate all the disputes raised by the parties. If the plea of existence and validity of the aforesaid Memorandum of Understanding is taken on any ground and so also the Arbitration Agreement, such pleas have to be adjudicated together with other pleas."

22. The short question which arises for consideration in this appeal is whether the High Court (Designate Judge) was justified in not deciding the question as to whether MoU, which is denied by the appellant herein in Section 11 proceedings, is valid and genuine document and whether the High Court was justified in directing the arbitrator to decide the said question.

23. The question posed by us remains no more res integra and is already answered by the Constitution Bench of this Court in SBP & Co. (supra) and then in National Insurance Co. Ltd. (supra) and lastly in Bharat Rasiklal Ashra (supra). It is really unfortunate that the learned Chief Justice while deciding the application did not take note of any of these decisions and passed the impugned order which is apparently against the law laid down in these decisions.

24. Justice Raveendran, speaking for the Bench in Bharat Rasiklal Ashra's case (supra) which also involved the same question, took note of law laid down in earlier two decisions of SBP & Co. (Supra) and National Insurance Co. Ltd. (supra) and succinctly explaining the ratio of these decisions laid down the following proposition of law in paras 10 to 13 which read as under:

> "10. Therefore, the following question arises for consideration in this appeal:
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> "Where the arbitration agreement between the parties is denied by the respondent, whether the Chief Justice or his designate, in exercise of power under Section 11 of the Act, can appoint an arbitrator without deciding the question whether there was an arbitration agreement between the parties, leaving it open to be decided by the arbitrator?"

11. The question is covered by the decisions of this Court in SBP & Co. v.

Patel Engg. Ltd., (2005) 8 SCC 618 and National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 In SBP & Co.(supra) a Constitution Bench of this Court held that when an application under Section 11 of the Act is filed, it is for the Chief Justice or his designate to decide whether there is an arbitration agreement, as defined in the Act and whether the party who has made a request before him, is a party to such an agreement. The said decision also made it clear as to which issues could be left to the decision of the arbitrator.

12. Following the decision in SBP & Co.(supra) this Court in National Insurance Co. Ltd.(supra) held as follows: (National Insurance Co. Ltd. Case (supra), SCC p. 283, paras 22 & 22.1-22.3) "22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract /transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration." (emphasis supplied)

> 13. It is clear from the said two decisions that the question whether there is an arbitration agreement has to be decided only by the Chief Justice or his designate and should not be left to the decision of the Arbitral Tribunal. This is because the question whether there is an arbitration agreement is a jurisdictional issue and unless there is a valid arbitration agreement, the application under Section 11 of the Act will not be maintainable and the Chief Justice or his designate will have no jurisdiction to appoint an arbitrator under Section 11 of the Act. This Court also made it clear that only in regard to the issues shown in the second category, the Chief Justice or his designate has the choice of either deciding them or leaving them to the decision of the Arbitral Tribunal. Even in regard to the issues falling under the second category, this Court made it clear that where allegations of forgery or fabrication are made in regard to the documents, it would be appropriate for the Chief Justice or his designate to decide the issue. In view of this settled position of law, the issue whether there was an arbitration agreement ought to have been decided by the designate of the Chief Justice and only if the finding was in the affirmative, he could have proceeded to appoint the arbitrator." (emphasis supplied)
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> 25. Keeping in view the law laid down in the aforementioned three cases quoted supra which does not need any more elaboration by us, we have no hesitation in setting aside the direction which directs the arbitrator to decide the question of legality and validity of the agreement/(MoU).
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> 26. In our considered opinion, such directions issued by the High Court are plainly against the law laid down by this Court in three decisions quoted above. Indeed, the High Court ought to have decided the questions itself and recoded a finding as to whether the MoU dated 27.05.2013 is a valid and genuine document or it is a forged and fabricated document and then depending upon the findings, appropriate directions, if necessary, should have been passed for disposal of the application finally.

Unfortunately, it was not done.

27. This takes us to the next argument of Mr. Basant R., learned senior counsel for the respondents. It was argued that since the appellant failed to give reply to the notice given by the respondents for appointment of an arbitrator, the appellant should not be allowed to raise such plea at a belated stage in Section 11 proceedings. We do not agree with the submission.

28. We find that the appellant in reply to the respondents' petition filed under Section 9 of the Act has specifically denied having signed or/and executed such agreement/(MoU). He has also contended therein that it is a bogus and fabricated MoU. The appellant again in his reply to application filed by the respondents under Section 11 of the Act denied the very existence of MoU.

29. In our opinion, this was sufficient for joining issue on the validity and genuineness of the MoU which was raised timely in appropriate proceedings by the appellant. The submission of Mr. Basant

R. is, therefore, wholly devoid of merit and is accordingly rejected.

30. In view of foregoing discussion, the appeal succeeds and is allowed. The impugned order is set aside. The case is remanded to the learned designate Judge to decide the question of legality, validity and genuineness of the agreement/(MoU) in question on its merits on the basis of pleadings and evidence of the parties keeping in view the law laid down by this Court in three decisions referred supra. Depending upon the findings on the question, appropriate orders including the order for appointment of arbitrator, if occasion arises, be passed for final disposal of the application filed under Section 11 of the Act.

31. No costs.

……..……J.
[J. CHELAMESWAR]

….…….……J.
[ABHAY MANOHAR SAPRE] New Delhi;
July 13, 2016
