

Guduguntla Kotaiah vs B.Krishna on 20 July, 2022

Author: K. Lakshman

Bench: K. Lakshman

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HON'BLE SRI JUSTICE K. LAKSHMAN

ARBITRATION APPLICATION No.117 OF 2021

ORDER:

The present Arbitration Application is filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act, 1996') for appointment of a sole arbitrator to resolve the disputes between the parties.

2. Heard Mr. Kiran Palakurthi, learned counsel for the Applicants and Mr. E. Venkata Siddhartha, learned counsel for the Respondents. Perused the record.

3. Contentions of the Applicants:

i. Applicants are the absolute owners of premises bearing No. 5-186, Plots bearing Nos. 47 to 54 forming part of Sy. No. 241/EE situated at Mangalpally Village, Ibrahimpatnam Mandal, Ranga Reddy District (hereinafter 'subject property'). ii. The subject property was leased out to the Respondent vide a Rental Agreement dated 24.03.2018. The period of lease was 36 months starting from 15.03.2018 to 15.03.2021. iii. For the first year the rent was Rs. 40,000/- per month and each subsequent year, the rent was enhanced by 5%. Therefore, for the second year the rent was Rs. 42,100/- and for the third year the rent was Rs. 44,205/- Further, an amount of Rs. 2,40,000/- was paid by the Respondent towards interest free refundable security deposit. iv. The Respondent was a chronic defaulter and never paid the rents on time. The Respondent never enhanced the rent as agreed under the agreement dated 24.03.2018.

v. The Respondent stopped paying rents from June 2020 to 15.03.2021 even after repeated demands. Arrears of Rs. 4,26,457/-

are to be paid by the Respondent from June 2020 to May 2021. vi. The agreement dated 24.03.2018 expired on 31.03.2021. The Applicants demanded the Respondent to vacate the subject property and pay the arrears including damages. In this regard, a legal notice dated 18.02.2021 was issued but the

Respondent failed to comply. Instead of complying, the Respondent filed a suit for permanent injunction against the Applicants. vii. Therefore, the Applicants invoked Clause 6 of the agreement dated 24.03.2018 and issued an arbitration notice dated 22.05.2021.

4. Contentions of Respondent i. The Respondent denied ii. all the allegations of the Applicant and also denied entering into an agreement dated 24.03.2018.

iii. The Applicants obtained the signatures of the respondent and forged the agreement dated 24.03.2018 with a rent of Rs. 40,000/- The said agreement was signed by the Respondent as he was illiterate and could not understand the terms. iv. Later on, finding out the fraud, the Respondent did not want to continue the lease. However, the Applicants assured that the agreement dated 24.03.2021 has been torn and a fresh rental deed will be prepared. Therefore, a fresh rental agreement dated 27.03.2018 was prepared. The agreed rent as per the fresh agreement dated 27.03.2018 was Rs. 12,000 per month and an amount of Rs. 1,20,000/-

v. The Respondent has been regularly paying rents as per the rental deed 27.03.2018 and the Applicants are forcefully trying to dispossess the Respondent. Therefore, a suit bearing O.S. No. 789 of 2020 was filed by the Respondent.

vi. The Applicants are using a forged rental agreement dated 24.03.2018 which was cancelled to invoke arbitral proceedings. No arbitration clause exists as the Respondent never entered into rental agreement dated 24.03.2018.

Findings of the Court

5. It is clear from the facts of the case that the Applicants rely on the agreement dated 24.03.2018 to invoke the arbitral proceedings. On the other hand, the Respondent contends that THE agreement dated 24.03.2018 was cancelled and a fresh agreement dated 27.03.2018 was entered into between the parties. Since, agreement dated 24.03.2018 is non-existent no arbitral proceedings can be initiated under that agreement. Further, during the course of arguments, it was contended that the agreement dated 24.03.2018 was obtained fraudulently. Therefore, disputes relating to fraud are not arbitrable.

6. It is relevant to note that the question of arbitrability of fraud is no longer res integra. In Vidya Drolia v. Durga Trading Corporation¹, the Supreme Court discussed the law on arbitrability of fraud. The Court concurring with the decision in Rashid Raza v. Sadaf Akthar² and Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.³ and held as follows:

73. A recent judgment of this Court in Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713 : 2020 SCC OnLine SC 656] has examined the law on invocation of "fraud exception" in great detail and holds that N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] as a precedent has no legs to stand on. We respectfully concur with the said view and also the observations

made in para 34 of the judgment in Avitel Post Studioz Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 (2021) 2 SCC 1.

(2019) 8 SCC 710.

(2021) 4 SCC 713.

SCC 713 : 2020 SCC OnLine SC 656] , which quotes observations in Rashid Raza v. Sadaf Akhtar [Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 : (2019) 4 SCC (Civ) 503] : (Rashid Raza case [Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 : (2019) 4 SCC (Civ) 503] , SCC p. 712, para 4) "4. The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in para 25 are : (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain."

to observe in Avitel Post Studioz Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713 : 2020 SCC OnLine SC 656] : (SCC para 35) "35. ... it is clear that serious allegations of fraud arise only if either of the two tests laid down are satisfied and not otherwise. The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus, necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof but questions arising in the public law domain."

74. The judgment in Avitel Post Studioz Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713 : 2020 SCC OnLine SC 656] interprets Section 17 of the Contract Act to hold that Section 17 would apply if the contract itself is obtained by fraud or cheating. Thereby, a distinction is made between a contract obtained by fraud, and post-contract fraud and cheating. The latter would fall outside Section 17 of the Contract Act and, therefore, the remedy for damages would be available and not the remedy for treating the contract itself as void.

From the above decision, it is clear that where there are simple allegations of fraud which do not go to the root of the contract and the existence of arbitration agreement, such disputes are arbitrable. However, the party alleging fraud has to prima facie satisfy the court that facts constituting such fraud exist. In the present case, the Respondent has stated that a subsequent agreement dated 27.03.2018 was entered into and regular payments were made under the said agreement. However, the Respondent has failed to place any material on record suggesting that an agreement dated 27.03.2018 was entered into. No copy of the agreement dated 27.03.2018 was placed before this Court. Further, no payment receipts evidencing payment of Rs. 12,000/- per month to the Applicant were produced before this Court. Therefore, the contention of the Respondent that allegations of fraud exist and the dispute is non- arbitrable cannot be accepted.

7. It is also relevant to note that the power of this Court under Section 11 of the Act, 1996 is extremely limited. The Supreme Court in Vidya Drolia (supra) laid down the test to exercise power under Section 11 of the Act, 1996. In his separate opinion, Justice N.V.Ramana held as follows:

244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding. 244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer".

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only: 244.5.1. Whether the arbitration agreement was in writing? or 244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled? 244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?

8. It is also relevant to note that the question whether agreement dated 24.03.2018 was entered into and subsequently cancelled or whether agreement dated 27.03.2018 was entered into between parties involves adjudication of factual aspects after leading evidence. Such questions cannot be decided by this Court under Section 11 of the Act, 1996 and the same shall be decided by an Arbitrator. Therefore, it is appropriate to refer the dispute to arbitration. The parties are at liberty to take all the defences before the learned sole arbitrator.

9. In light of the aforesaid discussion and the law laid down by the Supreme Court, the present Arbitration Application is allowed.

Accordingly, Sri N.Shankaraiah, Retired District Judge, is appointed as the sole Arbitrator to resolve the disputes between the parties.

Consequently, miscellaneous Petitions, pending if any, shall stand closed.

_____ K. LAKSHMAN, J Date: 20.07.2022 vvr