

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.1510 OF 2021
(Arising out of SLP (CIVIL) No.11036 of 2019)

V. Sreenivasa ReddyAppellant(s)

Versus

B.L. Rathnamma Respondent(s)

J U D G M E N T

1. Leave granted.
2. The appellant is before this Court assailing the order dated 31.12.2018 passed by the High Court of Judicature at Hyderabad in Arbitration Application No.52/2016 filed under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 ('Act, 1996' for short) seeking appointment of a sole Arbitrator to resolve the dispute between the parties.

3. The present position leading to the impugned order has a chequered history. The issue essentially arises under the Agreement of Sale dated 23.03.2006 entered into between the parties wherein the appellant is the purchaser having agreed to purchase the property bearing Survey No.35/2 (Old No.35) measuring 19 Acres 1 Gunta situate at Sathanur village, Jala Hobli, Bangalore North Taluk, from the respondent herein for the total sale consideration of Rs.5,53,90,000/- (Rupees five crores fifty-three lakhs and ninety thousand). The appellant had paid the sum of Rs.1,50,00,000/- (Rupees one crore and fifty lakhs) as earnest money deposit. The balance amount of Rs.4,03,90,000/- (Rupees four crores three lakhs and ninety thousand) was to be paid and the transaction was to be completed in the manner agreed therein. The said Agreement of Sale dated 23.11.2006 vide Clause 11 provided for resolution of dispute through arbitration in the event of there being any dispute between the parties.

4. When the position stood thus, the respondent is stated to have got issued a letter dated 09.02.2007 to the appellant directing him to pay the balance sale consideration and secure registration of the sale deed. The appellant had replied to the same on 21.02.2007 raising certain issues relating to the transaction. In that background, the respondent got issued a legal notice dated 17.04.2008 informing the appellant that the agreement of sale dated 23.11.2006 stood cancelled and the advance amount paid is forfeited. The appellant disputed the same through the reply notice dated 05.05.2008, which gave rise to a dispute between the parties. The correctness or otherwise of the allegations made by each party against the other and the appropriate award to be passed was a matter to be considered by the Arbitrator to be appointed by them. Since the same did not happen, the appellant herein invoked Section 11(6) of Act, 1996 and filed the petition bearing CMP No.297/2009 in the High Court of Karnataka at Bangalore. The respondent herein, who was the

respondent to the said petition was served and represented.

5. During the pendency of the petition, the learned Judge noted the submission on behalf of the parties that the matter has been settled out of Court and the petition was disposed of through the order dated 05.07.2011. When this was the position an application was filed by the appellant on 27.06.2014 in the disposed of CMP No.297/2009 seeking recall of the order dated 05.07.2011, to restore the petition and dispose of the same on merits. The Registry, during the scrutiny of the application had raised certain office objections for compliance by the appellant. Since the office objections had not been complied with, the application was placed before the Court regarding non-compliance. The learned Judge through the order dated 13.10.2014 apart from noting that there is non-compliance of the office objections, without indicating detailed reasons has barely observed that the application does not merit consideration as the main order merely records

settlement of the matter out of court. Hence the application was rejected.

6. In that background the appellant was left with no other legal remedy to secure redressal of the grievance and resolution of the dispute. According to the appellant, the settlement though proposed had not fructified, and hence, another petition under Section 11(6) of the Act, 1996 in CMP No.228/2015 was filed. When the said petition was listed for consideration on 02.03.2016 the learned senior counsel for the appellant, with the permission of the Court withdrew the petition with liberty to file a fresh petition before the appropriate court as it was noticed that a petition seeking appointment of the Arbitrator was to be filed before the High Court of Judicature at Hyderabad. The learned Judge through the order dated 02.03.2016 placed the submission on record and dismissed the petition as withdrawn with liberty to file a fresh Civil Miscellaneous Petition before the appropriate court in accordance with law. It is in that circumstance the petition in Arbitration Application

No.52/2016 from which the impugned order arises was filed before the High Court of Judicature at Hyderabad.

7. The said application was opposed by the respondent referring to the earlier proceedings noted above, more particularly the disposal of the first application by recording that the matter is settled between the parties. In the said situation the learned Chief Justice, High Court of Judicature at Hyderabad, having noted the rival contentions was of the view that though the Karnataka High Court had permitted withdrawal of CMP No.228/2015 to file the petition before the appropriate Court, the same is not seen to be one with the consent of the respondent and the earlier orders would continue to evidence that the Karnataka High Court had recorded the submission on behalf of the applicant and the respondent that the matter has been settled out of the court. In that circumstance, the learned Chief Justice was of the opinion that the matter having already been settled out of the court which is noted in the judicial order would be sufficient to decline

the request for appointment of Arbitrator. Accordingly, the application was dismissed.

8. In the above backdrop, we have heard the learned counsel for the appellant, the learned senior counsel for the respondent and perused the appeal papers.

9. The entire issue would revolve around the factual aspect involved in the instant case to come to a conclusion as to whether there was a concluded settlement between the parties after the application in CMP No.297/2009 was filed and, therefore in that circumstance, whether it should be construed that the dispute which had arisen between the parties should be deemed as not subsisting for resolution through arbitration? Whether there is settlement in the nature of Novation of the agreement of sale dated 23.11.2006?

10. In order to arrive at a conclusion on this aspect of the matter, it is necessary to take note of the order dated 05.07.2011 in CMP No.297/2009 which reads as hereunder:

“The counsel for the petitioner and the respondent would submit that the matter has been settled out of the court. Recording this submission, the petition is disposed of.

Sd/-
Judge”

In the said petition, subsequently an application was filed and the same was rejected in terms of the following order:

“There is non-compliance with the office objections on the application in IA No.1/2014. In any event, the application does not merit consideration, as the order merely records the settlement of the matter out of court. The application is rejected.

Sd/-
Judge.”

Both the aforestated orders do not throw light on the nature of the settlement or the conclusiveness of the same so as to bind the parties to the same.

11. On the other hand the settlement proposed itself not being finalized, not just the original dispute had remained unresolved but the non-settlement of the matter as proposed had given rise to a fresh dispute in relation to the same agreement which required resolution

through arbitration. In that view the appellant filed the subsequent petition in CMP No.228/2015 under Section 11(6) of Act, 1996 seeking appointment of Arbitrator to resolve the dispute which subsisted. However, since the appointment of Arbitrator was to be made by the High Court of Judicature at Hyderabad, the petition in CMP No.228/2015 was withdrawn with liberty and the Application No.52/2016 was filed before the High Court of Judicature at Hyderabad.

12. In the said application i.e., Arbitration Application No.52/2016 a detailed affidavit was filed by the appellant. The statement contained in paragraphs 18 and 22 explains the crux of the matter which read as hereunder:

“18. I submit that pursuant to the orders of the Tahsildar, the Respondent herein was duty-bound to execute a Sale Deed in my favour as per the terms of Agreement of Sale dated 23.11.2006. However, the Respondent once again refused to perform her part, as obligated. I submit that I had approached the Respondent on several occasions and the Respondent time and again, has avoided complying with the terms of the Agreement. I further submit that the efforts put forth by me, with the help of

mediators who have helped in settling the differences during the pendency of C.M.P No.297 of 2009, have also gone in vain. The Applicant herein undertook extensive oral discussions and visited the Respondent on numerous occasions seeking to settle dispute amicably. Respondent though reported intention to settle before the Hon'ble High Court, the same were not acted upon. It is further submitted that the issue of preliminary objection about the jurisdiction was not raised or contended by the Respondent in the said CMP No.297 of 2009.

22. I submit that pursuant to the said order dated 02.03.2016, I caused a fresh notice to the Respondent herein on 09.03.2016, informing the Respondent to appoint an Arbitrator, within seven (7) days from the date of receipt of notice, as per the terms of the Agreement of Sale dated 23.11.2006. I submit that the Respondent, despite the service of said notice, had not consented to the appointment of the sole arbitrator within the specified time of 7 days. I submit that I am therefore constrained to approach this Hon'ble Court and file the instant application u/s 11(2) & (6) of the Arbitration and Conciliation Act, 1996 praying for the nomination and appointment of sole arbitrator by this Hon'ble Court. A copy of the notice dated 09.03.2016 is filed herewith as **Annexure P-14**. It is further submitted that the clause of Arbitration encompasses all disputes arising out of the agreement as 'dispute' mentioned in the said clause, and as such, any dispute that arises out of the agreement or connected to the agreement in any manner is referable to Arbitration to resolve such dispute. Therefore, the dispute which arose out of the failure to settle is a 'dispute' as mentioned in the clause of

Arbitration. In the alternative, it is submitted that failure to resolve the 'dispute' amicably as agreed to, revives the original dispute which arose between the parties as the 'dispute' referable in the clause of Arbitration."

(emphasis supplied)

13. The learned Chief Justice, High Court of Judicature, Hyderabad while disposing of the application by noting that the High Court of Karnataka had recorded the settlement had obviously not taken into consideration the sworn statements to the effect that the settlement which was proposed with the help of the mediators had not fructified and that the non-adherence to the proposed settlement itself is a dispute or in the least will revive the original dispute which requires resolution through arbitration.

14. We note that in the said background there is no definite material on record to indicate that there was a concluded settlement between the parties based on which the petition was disposed and, therefore there is no reason to hold that there is no dispute which required resolution through arbitration; nor are we in a position to

hold that there is Novation of the earlier agreement. Though the learned Judge of the High Court of Karnataka through the order dated 05.07.2011 had disposed of the petition under Section 11(6) of the Act, 1996 by recording the submission that the matter has been settled out of court, the so-called settlement has not been recorded nor made a part of the order so as to bind the parties and to indicate that the dispute had been resolved and had accordingly erased the original dispute or amounted to Novation. That apart, no material is placed on record to show that the settlement had been reduced into writing and had been placed before the Court when the petition was disposed of so as to indicate that the right to arbitration under the original agreement cannot be claimed. If that be the position, the rejection of the IA also on the ground that the original order had merely recorded the settlement will not indicate that a concluded settlement was placed before the Court.

15. If that be the position, the observation of the learned Chief Justice, High Court of Judicature at

Hyderabad that the settlement was recorded by the Karnataka High Court and therefore it would not be proper to sit in judgment on the correctness or otherwise of that order does not stand to reason. Further, while referring to the aspect that the application was filed before it after withdrawing the CMP No.228/2015 before the High Court of Karnataka and though noting that liberty had been granted through the order dated 02.03.2016, it is observed that such permission to withdraw with liberty was not with the consent of the respondent. However, what is to be noticed from the order dated 02.03.2016 of the High Court of Karnataka (Annexure P-17) is that the respondent herein who was the respondent in the said petition was represented by her counsel. Even though there is no express consent as noted by the learned Chief Justice, the counsel has neither objected to the withdrawal or the grant of liberty to file the petition before the appropriate court. At that stage it was not even contended on behalf of the respondent that such liberty does not arise since the

matter has been settled, nor were the details of the settlement reached between the parties brought on record in the concerned proceedings. In addition, we also note that though a counter affidavit is filed on behalf of the respondent to this petition and reference is made to the earlier proceedings wherein it is contended that CMP No.297/2009 was disposed of by order dated 05.07.2011 without giving liberty to either of the parties to seek appointment of an Arbitrator in future, it is to be seen that no material is brought on record to indicate the nature of settlement entered into between the parties due to which the dispute does not subsist and the arbitration clause agreed therein cannot be invoked in view of the settlement ending in resolution of the dispute.

16. That apart, as rightly portrayed in the affidavit of the appellant filed in Arbitration Application No.52/2016, not just the original dispute but even the fact as to whether the matter was settled amongst themselves or not is a dispute arising out of and in connection with the agreement dated 23.11.2006 entered into between the

parties. If that be the position, the learned Chief Justice, High Court of Judicature at Hyderabad was not justified in rejecting the application only on the contentions urged therein on behalf of the respondent about the petition being hit by Order II Rule 2 of CPC and also the principles of *res-judicata*. It cannot be accepted in the present facts that there was abandonment of part of any claim nor was there a conclusive adjudication of the dispute between the same parties on merits to constitute *res-judicata*. As already indicated above, the so-called settlement has neither been recorded in the earlier proceedings nor any document brought on record to indicate that factually the settlement had taken place so as to wipe out the original dispute. In such circumstance, a party to the arbitration agreement contending that there was a dispute amongst them cannot be left without a forum for resolution of the dispute by taking a hyper technical view of the matter. In any event, whether the dispute which had arisen at the first instance has been settled; if the dispute subsisted,

whether the claim is within the period of limitation, the nature of relief if any and all other contention on merits are to be considered in the arbitral proceedings. Hence, keeping open all contentions on merits, we are of the view that the sole Arbitrator is to be appointed to resolve the dispute between the parties.

17. Accordingly, the appeal is allowed, the order dated 31.12.2018 passed in AA No.52/2016 is set aside. Consequently Mr. Justice Ramesh Ranganathan Former Chief Justice of the High Court of Uttarakhand is appointed as the sole Arbitrator.

18. Pending application, if any, shall stand disposed of.

.....CJI.
(S. A. Bobde)

.....J.
(A. S. Bopanna)

.....J.
(V.Ramasubramanian)

**New Delhi,
April 08, 2021**