

**IN THE HIGH COURT FOR THE STATE OF TELANGANA:
HYDERABAD**

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CIVIL MISCELLANEOUS APPEAL No.289 of 2023

Between:

Sri Parvez Adi Debara.

Appellant

VERSUS

M/s. Innovation Builders.

Respondent

JUDGMENT PRONOUNCED ON: 24.07.2024

**THE HON'BLE SRI JUSTICE P.SAM KOSHY
AND
THE HON'BLE SRI JUSTICE SAMBASIVARAO NAIDU**

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**

P.SAM KOSHY, J

*** THE HON'BLE SRI JUSTICE P.SAM KOSHY**
AND
THE HON'BLE SRI JUSTICE SAMBASIVARAO NAIDU
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! Counsel for Appellant(s) : Mrs. Manjari S Ganu,

^Counsel for the Respondent(s) : Mr. Vedula Srinivas, learned
Senior Counsel representing
Ms. Vedula Chitralekha

<GIST:

> HEAD NOTE:

? Cases referred

1) (2008) 13 Supreme Court Cases 667

2) (2015) 14 Supreme Court Cases 444

THE HONOURABLE SRI JUSTICE P.SAM KOSHY
AND
THE HONOURABLE SRI JUSTICE SAMBASIVARAO NAIDU
CIVIL MISCELLANEOUS APPEAL No.289 of 2023

JUDGMENT: (per the Hon'ble Sri Justice **P.SAM KOSHY**)

The present is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter, the 'Act of 1996') preferred by the appellant / defendant assailing the order dated 28.03.2023 in I.A.No.2474 of 2023 in O.S.No.105 of 2019 passed by the I Additional Chief Judge, City Civil Court, Secunderabad.

2. Heard Mrs. Manjari S Ganu, learned counsel for the appellant / defendant and Mr. Vedula Srinivas, learned Senior Counsel representing Ms. Vedula Chitralkha, learned counsel for the respondent / plaintiff.

3. Vide the impugned order; the Court below has rejected an application filed by the appellant / defendant under Section 8 of the Act of 1996 and refused to refer the dispute to be resolved by way of arbitration.

4. The dispute revolves around a Flat i.e. Flat No.305 in an apartment known as Innovation Residency constructed by the respondent / plaintiff M/s. Innovation Builders. The appellant / defendant had filed the Original Suit i.e. O.S.No.105 of 2009 for recovery of possession and damages in respect of the aforementioned Flat No.305 in the apartment Innovation Residency located at premises bearing No.142/C, Prenderghast Road, Secunderabad.

5. The case of the respondent / plaintiff was that the appellant / defendant has illegally barged into the property claiming himself to be the owner in the capacity of legal heir of one Sri Rashid H.Debara. According to the respondent / plaintiff their firm was earlier managed by one Sri T.N.Khambati who died on 12.10.2017 and it is only after the death of Sri T.N.Khambati on verification of the records they found the said Flat No.305 having left unsold. That upon further verification they also found that the appellant / defendant having illegally occupied the same. The respondent / plaintiff immediately issued a legal notice on 26.02.2019 calling upon the appellant / defendant to handover possession of the said flat and only on refusal of the same, the Suit had to be filed seeking for

recovery of possession. The appellant / defendant entered appearance before the Court below and immediately filed a petition under Section 8 of the Act of 1996 seeking to direct the dispute to be resolved by way of arbitration in terms of clause 10 of the agreement of sale dated 20.07.1998. According to the appellant / defendant, he is the legal heir of late Sri Rashid H.Debara.

6. According to the appellant / defendant, his uncle Rashid H.Debara had entered into an agreement of sale dated 20.07.1988 for purchase of the said flat in its sale consideration of Rs.2,20,000/- of which Rs.11,000/- was paid as advance and the balance amount was agreed to be paid by 10.08.1988. That Rashid H.Debara had paid sale consideration for the said flat and had also taken possession of the said flat since then. According to the appellant / defendant Rashid H.Debara was his paternal uncle who was issueless and who died in the year 1996. That since he was issueless, the appellant / defendant being the nephew of Rashid H.Debara has inherited the property and he continues to be in occupation of the said property since long.

7. According to the appellant / defendant the name of Rashid H.Debara stood mutated in the revenue records and was also there in the records of GHMC. All the taxes were being paid to GHMC by the then Rashid H.Debara and since his death, the appellant / defendant has been paying all the regular charges. According to the appellant / defendant the agreement of sale dated 12.07.1988 itself had clause 10 which specifically envisages resolution of the dispute by arbitration of one Sri L.N.Prasad and the decision of the Arbitrator shall be final and binding to all. It was in this context that Section 8 petition was filed highlighting that the jurisdiction in the instant case vests with the Arbitrator and not with the civil Court, accordingly, the same be disposed of directing the dispute to be resolved by way of arbitration as agreed upon. In clause 10 of that agreement of sale, there was a dispute redressal mechanism provided, which reads as under:

“10. Any dispute, between the parties, with regard to the interpretation of any of the terms of this contract, or whether any term or condition stipulated herein is complied with or performed and the consequences thereof all such disputes shall be decided by arbitration of Shri L. N. Prasad and decision of the said arbitrator shall be final and binding on all.”

8. It is this application which stands rejected by the Court below and which is under challenge in the present appeal.

9. The said petition was dismissed only on the ground that the said agreement of sale was not entered between the respondent / plaintiff and the appellant / defendant and therefore the arbitration clause cannot be invoked by the defendant.

10. Now in the given factual backdrop, what now needs to be considered is “whether the objection under Section 8 would had been sustainable through a legal heir / legal representative of late Rashid H.Debara”?

11. It would be relevant at this juncture to refer to Section 40 of the Act of 1996 which for ready reference is reproduced herein under:

“40. Arbitration agreement not to be discharged by death of party thereto.-

(1) An arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2)The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.

(3)Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.”

A bare perusal of the contents of the aforesaid Section itself clearly indicates that mere death of a party by itself would not extinguish the right of a party seeking resolution of disputes through arbitration.

12. Likewise, the terminology “legal representative” again stands defined under Section 2(1)(g) of the Act of 1996 which again for ready reference is reproduced herein under:

“2. Definitions.–

(1) In this Part, unless the context otherwise requires,

....

(g) legal representative means a person who in law represents the estate of a deceased person, and includes any person who inter-meddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;”

The plain reading of the said definition also would show that there are various types of person who would fall within the ambit of legal representative. For example:

- a) A person who intermeddles with the estate of the deceased.
- b) A person acting in the representative character.
- c) The person on whom the estate dissolves on the death of the party so acting.

13. From perusal of the pleadings in the plaint as also the contentions raised by the appellant / defendant in his Section 8 petition, *prima facie*, it appears that:

- i.** The agreement of sale dated 20.07.1988 to be not in dispute.
- ii.** Rashid H.Debara occupying the premises during his lifetime and after his death the appellant / defendant occupying the said premises.
- iii.** The property stands in the name of Rashid H.Debara in the revenue records so also in the records of GHMC and the taxes for the said premises being paid by Rashid H.Debara and subsequent to his death by the appellant / defendant herein.

- iv.** The society charges and the maintenance charges of the society also being paid by the said late Rashid H.Debara initially and after his death by the appellant / defendant.
 - v.** As per the plaint, the entire sale and purchase and the entire firm was being managed by one Sri T.N.Khambati.
 - vi.** Sri T.N.Khambati died on 12.10.2017. From the time of agreement to sale, during life time of Sri T.N.Khambati there does not seem to be any dispute or claim raised by Sri T.N.Khambati over the said flat in occupation of the appellant / defendant either during lifetime of Rashid H.Debara or subsequent to his death in the year 1996 till 2017.
 - vii.** The appellant /defendant, Parvez Adi Debara, S/o Adi Debara claims himself to be the nephew of Rashid H.Debara.
 - viii.** Rashid H.Debara was issueless and as such in the capacity of the nephew and the son of the brother of Rashid H.Debara claims himself to be the legal heir.
- 14.** In the aforesaid factual backdrop, read with Section 40 of the Act of 1996 which specifically holds that arbitration agreement not to

be discharged by a party read with Section 2(1)(g) which defines legal representative to include a person on whom the estate devolves on the death of the party so acting and also includes a person who intermeddles with the estate of the deceased.

15. The Hon'ble Supreme Court in the case of **Ravi Prakash Goel v. Chandra Prakash Goel and Another**¹ held at paragraph Nos.18 to 20 as under, viz.,

“18. It is clear from Section 40 of the Arbitration Act that an arbitration agreement is not discharged by the death of any party thereto and on such death it is enforceable by or against the legal representatives of the deceased, nor is the authority of the arbitrator revoked by the death of the party appointing him, subject to the operation of any law by virtue of which the death of a person extinguishes the right of action of that person.

19. Section 2(1)(g) defines "legal representative" which reads thus:

“2. (1)(g) ‘legal representative’ means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;”

20. The definition of “legal representative” became necessary because such representatives are bound by and also entitled to enforce an arbitration agreement. Section 40 clearly says that an arbitration agreement is not discharged by the death of a party. The agreement remains enforceable by or against the legal representatives of the deceased. In our opinion, a person who has

¹ (2008) 13 Supreme Court Cases 667

the right to represent the estate of the deceased person occupies the status of a legal person (sic representative). Section 35 of the 1996 Act which imparts the touch of finality to an arbitral award says that the award shall have binding effect on the “parties and persons claiming under them”. Persons claiming under the rights of a deceased person are the personal representatives of the deceased party and they have the right to enforce the award and are also bound by it. The arbitration agreement is enforceable by or against the legal representative of a deceased party provided the right to sue in respect of the cause of action survives.”

16. Another judgment worth referring is again one rendered by the Hon’ble Supreme Court in the case of **Sundaram Finance Limited v. T.Thankam**² wherein in paragraph No.13 it has been held as under:

“13. Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law - generalia specialibus non derogant. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court.”

² (2015) 14 Supreme Court Cases 444

17. In view of the judicial precedents referred to above and also considering the factual matrix narrated in the earlier paragraphs and also considering the huge time gap after which the Suit has been filed by the respondent / plaintiff for recovery of possession, we are of the considered opinion that rejection of the Section 8 petition by the Court below holding that the appellant / defendant since he was not a party to the agreement of sale was not binding upon him is not proper, legal and justified. The Court below ought to have verified the aspect whether the dispute is one where the arbitration clause is there and whether the appellant / defendant falls within the purview of the definition of legal representative under Section 2(1)(g) taking into consideration the provisions of Section 40 and then should have decided the issue.

18. The question whether the appellant / defendant in fact is a legal representative / a legal heir are also issues which can be gone into the arbitration proceedings where the parties would get an opportunity to substantiate and rebut the contentions put forth on either side by way of oral and documentary evidence.

19. Therefore, the order dated 28.03.2023 in I.A.No.2474 of 2023 in O.S.No.105 of 2019 passed by the I Additional Chief Judge, City Civil Court, Secunderabad is unsustainable and the same deserves to be and is accordingly set-aside. Accordingly, the present appeal is allowed.

20. Since the issue in the present appeal is one which does require resolution of the dispute by way of arbitration as per clause 10 of the agreement of sale, the parties shall be permitted to invoke clause 10 of the said agreement of sale. No costs.

21. As a sequel, miscellaneous applications pending if any, shall stand closed.

P.SAM KOSHY, J

SAMBASIVARAO NAIDU, J

Date: 24.07.2024

Note: LR Copy to be marked.
B/o.GSD