

RadhA.N. Vs. Deepa Restaurant

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Court : Kerala

Decided On : Nov-19-2013

Judge : Honourable Mr.Justice N.K.Balakrishnan

Appellant : RadhA.N.

Respondent : Deepa Restaurant

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE N.K.BALAKRISHNAN TUESDAY, THE 19TH DAY OF NOVEMBER 2013 28TH KARTHIKA, 1935 CRP.No. 63 of 2012 ()
----- OS3512009 of SUB COURT, OTTAPPALAM -----
REVISION PETITIONER(S)/PLAINTIFF :- ----- RADHA.N.
D/O.LATE P.RADHAKRISHNAN NAIR, AGED 44 KALPAKA HOUSE PONNANI TALUK, KALADY VILLAGE, KALADY AMSOM KEEZHMURI DESOM, PONNANI TALUK, MALAPPURAM DISTRICT. BY ADVS.SRI.DEVAN RAMACHANDRAN SRI.K.M.ANEESH SRI.K.SANTHOSH KUMAR (KALIYANAM) SRI.S.NIKHIL SANKAR SRI.ADARSH KUMAR RESPONDENT(S)/DEFENDANTS :-
----- 1. DEEPA RESTAURANT AND BAR ATTACHED CHERPULASSERY AMSOM PANNIYAMKURUSSI DESOM, OTTAPPALAM TALUK, PIN - 679 101 REP. BY MANAGING PARTNER RAMACHANDRAN AGED 61 YEARS, S/O.MATTAYIL JANAKI AMMA THRIKKANDIYOOR AMSOM DESOM, TIRUR TALUK PALAKKAD DISTRICT.

2. ABDU RAHMAN HAJI, AGED56 S/O.MANGALASSERI ALAVI, MANGALASSERY HOUSE, OTTAPPALAM TALUK, NELLAI AMSOM, EZHUVANTHALA DESOM, PALAKKAD DISTRICT, PIN - 680 305.

3. VEERANKUTTY HAJI, AGED54 S/O. MANGALASSERI ALAVI, MANGALASSERY HOUSE, OTTAPPALAM TALUK, NELLAI AMSOM, EZHUVANTHALA DESOM, PALAKKAD DISTRICT, PIN - 680 305.

4. BASHEER HAJI, S/O.KUZHIPPURATHU MOIDEEN KUTTY, AGED40YEARS, KUZHIPPURATH HOUSE, OTTAPPALAM TALUK, NELLAI AMSOM, EZHUVANTHALA DESOM, PALAKKAD DISTRICT.

5. AMEER, AGED31YEARS, S/O.MUHAMMED @ BAPPUTTY HAJI POOLATHARAKKAL HOUSE, CHERPULASSERY AMSOM DESOM PALAKKAD DISTRICT.

6. MATTAYIL RESIDENCY AND HOTELS PVT.LTD. REP. BY MANAGING DIRECTOR, RAMACHANDRAN, AGED61CHERPULASSERY, PALAKKAD DISTRICT. R1 BY ADV. SRI.T.KRISHNAN UNNI (SR.) SRI.SAJU.S.A SMT.P.A.SHEEJA SMT.MEENA.A. SRI.K.C.KIRAN THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON1911-2013, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: N.K. BALAKRISHNAN, JUDGE C.R.P. NO. 63 of 2012 Dated this the 19th day of November, 2013

ORDER

This Civil Revision Petition, filed under section 115 of C.P.C., is directed against the order passed by the learned Sub Judge on a preliminary issue as to the maintainability of the suit filed before that court. The court below found that the suit is not maintainable and hence it was dismissed.

2. The suit is one for declaration that the document executed with respect to plaint B schedule property is sham and nominal as regards the undivided 1/20 share of the plaintiff who is the legal heir of the deceased partner. Consequential injunction was also sought against the defendants.

3. Shorn of the details the case of the plaintiff is stated thus: The plaintiff's father had entered into a partnership agreement with defendants on 30.03.1993 with respect of the conduct of a restaurant by name 'M/s.Deepa C.R.P. NO. 63 of 2012 -:

2. :- Restaurant', of which the 1st defendant was the managing partner. When the father of the plaintiff was not doing well, he sent a notice to the 1st defendant to induct the plaintiff as a partner. The plaintiff's father died on 25.07.2007. The other legal heirs of the plaintiff's father released their undivided right in favour of the plaintiff. It is contended that the 1st defendant, who was the managing partner of the firm, assigned the property shown in schedule A to the plaintiff to defendants 2 to 5.

4. According to the plaintiff, the 1st defendant has no right or authority to assign the property of the firm. Hence, the plaintiff sought for a declaration that the said assignment is invalid and also for a consequential injunction. Defendants 1 and 6 contended that the suit is not maintainable, since as per clause 15(d) of the partnership deed, the dispute between the parties has to be decided by referring to arbitration.

5. The court below found that there is an arbitration clause as stated by the defendants and so the dispute has to C.R.P. NO. 63 of 2012 -:

3. :- be referred to the Arbitrator and as such the suit is not maintainable. Hence, the suit was dismissed.

6. The learned counsel for the petitioner submits that the suit is filed for a declaration that the transaction challenged in the suit is a fraudulent one and so such a dispute cannot be decided by the Arbitrator and if the dispute is not between the parties to the agreement, only the Civil court has jurisdiction. So far as the present suit is concerned, except the 1st defendant, the other defendants are not interested in the partnership business and the dispute is not between the parties to the agreement, it is further argued.

7. Clause 15(d) of the partnership deed reads thus: "All questions arising in or relating to the management and administration of the partnership business and any difference of opinion between the persons either as regards to any provision in this deed or any other matters relating to the business shall be decided in accordance with the provisions of the Indian Arbitration Act then in force." One of the contentions vehemently advanced by the learned counsel for the revision petitioner is that Section 8 (2) of the C.R.P. NO. 63 of 2012 -:

4. :- Act mandates that the application referred to in Sub section (1) shall not be entertained unless it is accompanied by original arbitration agreement or a certified copy thereof. Admittedly the defendants/ respondents did not produce the original arbitration agreement or a duly certified copy thereof along with the statement filed by him and as such the learned counsel submits that the impugned order is liable to be set aside. It is pointed out by the respondents' counsel that the copy of the partnership deed was in fact produced by the plaintiff herself along with the plaint. A perusal of the copy of the partnership deed produced along with the plaint would show that there is an arbitration clause as stated by the defendants in the written statement. Clause 15(d) of the partnership deed as afore quoted would show that there is an arbitration clause. Now the question is whether the non production of the original partnership deed or a duly certified copy by the defendant who sought reference under Sec. 8 (1) of the Act is fatal and whether the impugned order liable to be set aside on C.R.P. NO. 63 of 2012 -:

5. :- that ground. It was held by the Calcutta High Court in ITC Classic Finance Ltd. v. Grapco Mining & Co. Ltd. AIR1997 Calcutta 397 that production of the original agreement or duly certified copy is to find out whether there is an arbitration clause in the agreement and when the original agreement is before the court or when existence of the agreement and the arbitration clause therein is not disputed, failure to produce the original agreement or duly certified copy is not fatal. An identical question arose before this Court in N.I.I.T Ltd. v. Manoharan - 2005 (3) KLT1025 In that case the original document was available in the Court though it was not produced by the party who filed the petition for reference. The question was whether a copy of the agreement produced by the plaintiff would suffice. It was held that since the agreement was already available in court, the

non-production of the said agreement by the party who sought reference is not fatal. Similar is the view taken by this Court in Natarajan v. General Manager, Southern Railways - 2006 (2) KLT C.R.P. NO. 63 of 2012 -:

6. :- 390.

8. In fact there was no dispute with regard to the existence of the agreement or regarding clause 15(d) of the partnership deed which has been extracted above. Since the copy of the partnership deed was produced by the plaintiff herself, the contention that the request for reference under Sec. 8 (1) of the Act should not have been entertained for non-production of the original agreement or the certified copy thereof is found to be bereft of any merit. The same is the view taken by this Court in Chola mandalam Dbs Finance Limited v. K.H.Abdulla and Another - 2009 KHC4372 also. As such the first objection raised by the revision petitioner must fall to the ground.

9. Sri. Adarsh, the learned counsel for the revision petitioner has argued with vehemence that if the impugned order is sustained that would result in bifurcation of the causes of action which is not permissible under Sec. 8 of the Act under which bifurcation of the cause of action, that C.R.P. NO. 63 of 2012 -:

7. :- is to say; the subject matter of the suit or in some cases bifurcation of parties ie; who are parties to the arbitration agreement and who are not parties to the same is not possible. It is further submitted by Sri. Adarsh that the bifurcation of the subject matter of an action before a judicial authority cannot be allowed and such bifurcation of suit in two parts; One, to be decided by the Arbitral Tribunal and the other to be decided by the Civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of the suit and decreasing the cost of litigation would get frustrated by such procedure, the learned counsel further submits.

10. It is vehemently argued by Sri. Adarsh that clause 15 (d) of the partnership deed mentions only about the questions arising in or relating to the management and administration of the partnership business and any difference of opinion between the partners and therefore, the legal question relating to fraudulent

transaction, cancellation of registered deed etc. are not meant to be C.R.P. NO. 63 of 2012 -:

8. :- included in clause 15(d) of the Partnership Deed. It is further submitted that the difference of opinion to be referred can only be dispute between the partners but in the present case there is an admission that the revision petitioner has not been taken as a partner so as to refer the question under Section 8(1) of the Act.

11. It is also argued that the suit is actually one for declaration filed by the co-owner against the person who has committed fraud and five other persons who have colluded with the first respondent in effecting such a fraudulent transaction and, therefore, such a dispute cannot be decided by an arbitrator invoking clause 15 (d) of the Partnership Deed. It is further submitted that defendants 2 to 6 are not at all partners and they have no interest in the partnership deed or its the business.

12. The question whether the first defendant, acting as the Managing Partner of the firm, was authorised or empowered to execute a document with respect to the property belonging to the partnership is also a question C.R.P. NO. 63 of 2012 -:

9. :- which has to be decided by the arbitrator as per clause 15(d) of the Act, the respondents contend. The contention that the permanent prohibitory injunction against the respondents was also sought for as a separate relief and that cannot be granted by the Arbitrator under Clause 15(d) of the Arbitration Act is also untenable since according to the respondents as per clause 15(d) all questions arising in or relating to the management and administration of the partnership business and any difference of opinion between the persons either as regards to any provision in the partnership deed or any other matters relating to the business shall be decided in accordance with the provisions of the Indian Arbitration Act, which was then in force, which is presently replaced by the Arbitration and Aconcilation Act, 1996. The contention that there would be bifurcation of cause of action or bifurcation of the parties to the suit also does not gain ground, so far as the case on hand is concerned, argues the learned counsel for the respondents. C.R.P. NO. 63 of 2012 -:

10. :- 13. The other ground raised by Sri.Adarsh, the learned counsel appearing for the petitioner is that no separate application as required under Sec. 8(2) of the Arbitration and Conciliation Act, 1996 was filed by the defendants in the suit. Section 8(1) of the Act mandates that a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute refer the parties to the arbitration. Therefore, according to the learned counsel, the party should apply before filing his first statement in Court that the matter should be referred to arbitration. The expression "first statement on the substance of dispute" contained in sub section (1) of Sec. 8 must be contra distinguished with the expression "written statement". Smt.Sheeja, the learned counsel for the respondents would submit that the defendants did not submit to the jurisdiction of the judicial authority. A reading of the written statement would leave no doubt that C.R.P. NO. 63 of 2012 -:

11. :- what was stated in the written statement was that there is an arbitration clause and in view of the arbitration clause the suit is not maintainable. It was further made clear that if for any reason the court holds that the suit is maintainable, the defendants reserve with them the right to file a detailed written statement. In other words, what was filed before the Court is actually a statement or an application as required under Sec. 8 (1) of the Act though it was styled as a written statement. The very objection raised in the written statement is that the suit is not maintainable in view of the arbitration clause contained in clause 15(d) of Ext. A1 and that the matter has to be referred to arbitration. That makes it undoubtedly clear that the defendants did not submit to the jurisdiction of the judicial authority so as to hold that the order of reference under Sec. 8(1) is unsustainable. Therefore, the contention that the parties had submitted to the jurisdiction of the court is totally untenable.

14. Similarly, the plea that the defendants had waived C.R.P. NO. 63 of 2012 -:

12. :- their right and acquiesced themselves to the jurisdiction of the Court is also factually incorrect. True, what was filed before Court should have been captioned as an application under Sec. 8(1), but it was captioned as written statement, but

that alone cannot negative the plea raised by the defendants in the statement. What was intended and what was conveyed by filing that statement is that the matter should be referred to arbitration in view of the arbitration clause contained in clause 15(d) of Ext. A1.

15. It is vehemently argued by the learned counsel for the petitioner that mere existence of an arbitration clause in Ext.A1 does not oust the jurisdiction of the civil Court nor can there be an ipso facto exclusion of the jurisdiction of the civil court because of such an agreement. But so far as the case on hand is concerned at the earliest point of time, the defendants had approached the Court with a request to refer the dispute to arbitration though it was filed in the form of a written statement. It is not the form that matters but substance that is to be looked into by the court. C.R.P. NO. 63 of 2012 -:

13. :- 16. The decision of the Apex Court in Sukanya Holdings (P)Ltd. v. Jayesh H.Pandya and Another - (2003) 5 SCC531 has been very much relied upon by the learned counsel for the petitioners in support of his submission that the language employed in Sec. 8 of the Act would make it clear that the suit should be in respect of "a matter" which the party had agreed to refer which comes within the ambit of the arbitration agreement but if the suit is commenced as to a matter" which lies outside the arbitration agreement and if it is also between some of the persons who are not parties to the arbitration agreement, no question of application of Sec. 8 would arise. It is argued that the words "a matter" indicate that the entire subject matter of the suit should be subject to arbitration agreement. The learned counsel for the respondent submits that so far as the case on hand is concerned, the specific case of the respondent that it is a matter which is covered by Ext.A1 agreement and the suit is actually in respect of "a matter" which the parties have agreed to refer. It is C.R.P. NO. 63 of 2012 -:

14. :- further argued by Smt.Sheeja that it is not a case where there would be bifurcation of suit into two parts; one to be decided by the arbitral tribunal and the other to be decided by the civil court but the entire dispute involved in the suit is a matter in respect of which clause 15(d) provides the forum, namely; the arbitration and so it is referable under Sec. 8(1) of the Act. It is not a case where the parties

had submitted themselves to the jurisdiction of the judicial authority or the civil court, further argues the counsel. In the statement filed before court, though it is styled as a written statement, the specific case advanced was that in view of the arbitration clause the suit is not maintainable and that the matter should be referred to arbitration.

17. In *Sukanya Holdings (P)Ltd.* (cited supra) it was held by the Apex Court : "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 C.R.P. NO. 63 of 2012 -:

15. :- 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. It was further held by the Apex Court in the very same decision : "Secondly, there is no provision in the Act that when the subject-matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators".

18. The learned counsel for the revision petitioner relies upon the decision in *Atul Singh and Others v. Sunil Kumar Singh and Others* - 2008 2 SCC602 where it was held:- "There is no whisper in the partition dated 28-2-2005 that the original arbitration agreement or a duly certified copy thereof is being filed along with the application. Therefore, there was a clear non-compliance with sub- section (2) of Section 8 of 1996 Act which is a mandatory provision and the dispute could not have been referred to C.R.P. NO. 63 of 2012 -:

16. :- arbitration. Learned counsel for the respondent has submitted that a copy of the partnership deed was on the record of the case. However, in order to satisfy the requirement of sub-section (2) of Section 8 of the Act, Defendant 3 should have filed the original arbitration agreement or a duly certified copy thereof along with the petition filed by him on 28-2-2005, which he did not do. therefore, no order for referring the dispute to arbitration could have been passed in the suit". According to the learned counsel for the revision petitioner, here also nothing was stated that a copy of the arbitration agreement had already been produced whether it is by the plaintiff or by the defendants. When the statute mandates that the original agreement or a certified copy should be produced along with the application filed under Sec. 8 (1) of the Act it was incumbent on the respondents should have stated in the petition as to who had already produced the agreement or as to the reason why photocopy of the agreement was produced.

19. The decision in Yogi Agarwal v. Inspiration Clothes & U And Others - (2009) 1 SCC372 has also been relied upon in this connection. That was a case where C.R.P. NO. 63 of 2012 -:

17. :- the suit related to a transaction said to have taken place between the plaintiff, first defendant company and its two directors where as the document put forth as containing the arbitration agreement related to some transactions between a proprietary concern of the second defendant and the plaintiff and secondly; the provision for arbitration is not contained in any contract or document relating to the suit transactions, but contained in documents relating to some unconnected independent transactions; namely some invoices. The arbitration agreement referred to therein was not applicable to the suit transaction. Therefore, it is clear, the facts dealt with therein are entirely different.

20. Sri. Adrash, the learned counsel for the revision petitioner submits that if the contention that an application under Sec. 8 of the Act can be filed even after the first statement on substance of the suit between the parties has already been filed that would, not only be contrary to the express provisions of law but would defeat the very purpose object of the provision. It is further submitted that if such C.R.P. NO. 63 of 2012 -:

18. :- an application is entertained after the filing of the first statement it would be possible for a party to the suit to first allow the trial to proceed by not filing the application at the stage stipulated in the Act and then come to the Court at a later stage when the trial is substantially complete and seek reference of the dispute to arbitration. The whole argument proceeds on the footing that the request was made after the written statement was filed. It has already been found that what was filed before the Court, though was captioned as a statement, is in fact a request which should be treated as an application under Sec. 8 (1) of the Act where the specific case advanced was that the suit is not maintainable in view of clause 15(d) of the Arbitration agreement and that the matter is to be referred for arbitration.

21. The decision in *K. Jayakumaran Nair v. Vertex Securities Ltd.* - AIR2005 Kerala 294 also has no application to the facts of this case, since in that case the defendant filed written statement raising a contention that C.R.P. NO. 63 of 2012 :-

19. :- there was an arbitration agreement between the parties but only after framing the issues she filed an application seeking reference of the dispute for arbitration. In that context it was held that the application had to be made not later than submitting the first statement whereas the application in that case was filed after the issues were framed. Therefore, the facts dealt with therein are entirely different.

22. The decision in *West Bengal State Electricity Board and Others v. M/s. Shanti Conductors Pvt. Ltd.* - AIR2004 Gauhati 70 also has no application to the facts of this case. In that case the written statement was filed on 22-09-2000. Long thereafter, ie; on 7.11.2000 the defendants filed an application under Sec. 8 of the Act seeking reference of the dispute to arbitration. Hence, it was found that the application was not maintainable. Therefore, it was held that if such an application is entertained it would be contrary to the provisions contained in Sec. 8 of the Act.

23. It is pointed out that mere disclosure of C.R.P. NO. 63 of 2012 :-

20. :- arbitration agreement in the written statement and claiming that civil court has no jurisdiction to try the suit would be of no consequence unless the written

statement itself contains a prayer for referring the dispute for arbitration and so if there is no prayer in the statement filed by the defendants seeking a reference for arbitration then it cannot be reckoned as an application under Sec. 8 (1) of the Act and if that be so, the order impugned against is unsustainable, the learned counsel Sri.Adarsh submits. The 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 Sec.8(1) and 8(2) of the Act. Merely because there is an arbitration clause, (clause 15(d) of Ext.A1), the court is not bound to refer the dispute to arbitration if it can be found that the defendants submitted to the jurisdiction of the civil court by filing a written statement. But so far as the case on hand is concerned, at the very outset the defendants pointed out that the suit is not maintainable as there is an arbitration C.R.P. NO. 63 of 2012 -:

21. :- clause. It is argued that despite the existence of an arbitration agreement, the defendant may either expressly or by his conduct waive his right to seek arbitration on disputes between the parties and may consent to such disputes being decided by the civil Court. But here, the existence of the arbitration clause was brought to the notice of the court at the earliest point of time and contended that the suit is not maintainable. No waiver or acquiescence is discernible from the conduct of the defendants.

24. The decision in Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and Others - 2011 KHC4388= AIR 2011 SC2507 has been relied upon by the learned counsel for the respondent to fortify his submission that if only by filing statement, application or affidavit the defendant shows his intention to submit himself to the jurisdiction of the Court there would be a waiver of his right to seek reference to arbitration. It was held by the Apex Court in that decision: "Not only filing the written statement in a suit, but filing of any statement, application, affidavit filed by a defendant C.R.P. NO. 63 of 2012 -:

22. :- prior to the filing of the written statement will be construed as 'submission of a statement on the substance of the dispute' if by filing such statement/application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the Court and waive his right to seek reference to arbitration.

But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/ appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him. *Rashtriya Ispat Nigam Ltd. v. Verma Transport Company* - AIR 2006 SC2800 this Court held that the expression 'first statement on the substance of the dispute' contained in S. 8 (1) of the Act is different from the expression 'written statement' and refers to a submission of the party making the application under S. 8 of the Act, to the jurisdiction of the judicial authority; and what should be decided by the Court is whether the party seeking reference to arbitration has waived his right to invoke the arbitration clause". There can be no doubt that waiver of a right on the part of the defendant to the lis must be gathered from the fact situation obtaining in each case. Whether a party has waived his right to seek arbitration and submitted himself to the jurisdiction of the court, depends upon the conduct of such party in the suit. If supplemental proceedings like C.R.P. NO. 63 of 2012 -:

23. :- applications for temporary injunction or for appointment of Receiver have been pending for a considerable time and the defendant has been contesting such supplemental proceedings, it cannot be said that the defendant has lost the right to seek arbitration.

25. It is also argued by the learned counsel for the revision petitioner that the court below, if at all, could have only referred the dispute to an arbitrator for arbitration and should not have dismissed the suit holding that the suit is not maintainable. Sec. 8 was enacted to enable the parties to have a speedy decision of the case. In fact what was filed by the respondents in the suit was actually a written statement as required under Order 8 Rule 1 C.P.C. and all the contentions which were to be raised in the suit were raised by the defendants in detail and so the contention that the statements so filed by the defendants should be treated only as an application under Sec. 8 (1) of the Act is rather unsound and untenable.

26. What can be done under Section 8 (1) is, if the C.R.P. NO. 63 of 2012 -:

24. :- court is convinced, refer the parties to arbitration and not to dismiss the suit. Dismissal of the suit amounts to destroying the lis itself without hearing the suit or

referring the disputes for adjudication of the same by the Arbitral Tribunal. Therefore, to that extent also the impugned order cannot be sustained.

27. It is also argued by the learned counsel for the petitioner that a perusal of the plaint would make it undoubtedly clear that there are causes of action which cannot be split up at all and if that be so the Court below would be justified in treating the written statement filed by the defendant as an application under Sec. 8 (1) of the Act and to dismiss the suit or even to refer the case for arbitration, not only because the defendants in the suit are not parties to Ext.A1 agreement but also because the causes of action alleged against the defendants are distinct and separate and that it was not a referable dispute. The relief (a) sought for in the plaint is to declare the documents executed in respect of plaint A & B schedule C.R.P. NO. 63 of 2012 -:

25. :- properties as sham and nominal and to declare the plaintiffs 1/20 share over the said property devolved upon her consequent to the death of her father. The relief (b) claimed in the suit is for a consequential injunction restraining the defendants from alienating plaint A and B schedule properties without the consent or knowledge of the plaintiff. The further relief claimed as (c) is to restrain the defendants from alienating the properties shown in the schedule C to the plaint. It is argued by Sri.Adarsh that though the first defendant is a party to the agreement admittedly, defendants 2 to 5 are not parties to Ext.A1 agreement. The contention advanced by the plaintiff is that the documents purported to have been executed by the first defendant in favour of defendants 2 to 5 are sham and nominal documents and are invalid and inoperative. The further contention raised in the plaint is that the first defendant effected transfer of the B schedule property to another institution which actually belonged to the first defendant himself. The 6th defendant is shown as a private C.R.P. NO. 63 of 2012 -:

26. :- limited Company. The Private Limited Company is a totally different legal entity than the partnership firm mentioned in the plaint. The 6th defendant private limited company is not a party to Ext.A1 agreement. It is true that the allegation in the plaint is that the first defendant himself has formed that Company and he himself is the managing Director of that Company. Whatever that be, 6th

defendant, Company is not a party to Ext.A1 agreement, and if so, there is no justification in referring the dispute to the arbitrator, for, it cannot be said that there is an agreement between the parties to refer the matter for arbitration. Therefore, according to the learned counsel for the petitioner, the cause of action against defendants 2 to 5 alleged at one place and the cause of action alleged against the 6th defendant at another place are not matters to be referred to arbitration nor are they parties to Ext.A1 agreement.

28. The cause of action alleged with respect to the alienation of the B schedule property that the alienation C.R.P. NO. 63 of 2012 -:

27. :- effected by the first defendant in favour of the 1st defendant is totally deferent from the cause of action against the other defendants namely; that the alienation effected by the first defendant in favour of defendants 2 to 5 is not valid and binding. It is also argued that these are not matters which come within clause 15(d) of Ext.A1 agreement.

29. The judicial authority is statutorily mandated to refer the matter to arbitration and for that purpose the court has to see whether the subject matter of the dispute is covered by arbitration agreement or not. The scope and effect of the expression, "substance of the dispute" is also to be considered. The question whether a dispute falls within an arbitration clause in an agreement must depend upon what disputes the arbitration clause covers. Smt.Sheela, the learned counsel for the respondents would submit that the arbitration clause (clause 15 (d) of Ext.A1) embraces all questions arising in relation to the management and administration of the partnership business; it is so wide enough to take in the dispute projected by the plaintiff C.R.P. NO. 63 of 2012 -:

28. :- and therefore, the contention that the arbitration clause does not cover the dispute involved in the suit is unacceptable. But the learned counsel for the petitioners would submit that so far as the issue involved in the suit is concerned the case of the plaintiff is that the document executed in respect of the A and B schedule properties is sham and nominal. That is not something which arose in or relating to the management and administration of the partnership business.

30. It is also argued that the reliefs sought for in the plaint, if allowed, will have the effect of nullifying the document executed by the first defendant in respect of the plaint A and B schedule properties. That apart, defendants 2 to 5 and even the 6th defendant are not parties to Ext.A1 agreement and the reliefs sought for in the suit, if allowed, will certainly affect the rights of those parties who were stated to have purchased the property from the first defendant. It is further submitted that the cause of action in respect of the suit as against defendants 2 to 5 on C.R.P. NO. 63 of 2012 -:

29. :- the one hand and the 6th defendant on the other hand are entirely different. Therefore, the learned counsel for the petitioners would submit that the very question of arbitrability of the dispute itself is in dispute in this case and so it cannot be viewed so lightly.

31. The Apex Court in P. Anand Gajapathi Raju and Others v. P.V. G. Raju - (2000) 4 SCC539 held: "In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that . As already noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. The language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. there is no question of stay of the proceedings till the arbitration proceedings conclude and the award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the award. the court to which the party shall have recourse to challenge the award would be the court as defined in clause (e) of Section 2 of the new Act and not the court to which an application under Section 8 of the new Act is made. An application before a court under C.R.P. NO. 63 of 2012 -:

30. :- Section 8 merely brings to the court's notice that the subject-matter of the action before it is the subject-matter of an arbitration agreement. This would not be such an application as contemplated under Section 42 of the Act as the Court trying the action may or may not have had jurisdiction to try the suit to start with or

be the competent court within the meaning of Section 2 (e) of the new Act".

32. The Learned counsel for the respondent would submit that the right to have the dispute settled by arbitration, conferred by the agreement entered into between the parties should not be deprived of by technicalities. The intention that can be gathered from the statement filed by the defendants that the suit is not maintainable in view of the existence of the arbitration clause in Ext.A1 would certainly make it clear that they did not submit to the jurisdiction of the judicial authority but they in fact brought to the notice of the court as to the existence of the arbitration clause so as to refer the dispute to the arbitrators. (See also *Rashtriya Ispat Nigam Ltd. v. M/s.Verma Transport Company* - AIR 2006 SC2800. In that case one of the causes of action raised was C.R.P. NO. 63 of 2012 -:

31. :- regarding illegal termination of contract and black listing of the firm and so Sec. 8 of the Act was not attracted. But that was found to be devoid of any merit in as much as according to the respondents themselves both the causes of action arose out of the terms of the contract. What was necessary was to consider the "substance of the dispute" and once it is found that the dispute between the parties arose out of the contract Section 8 would be attracted.

33. The decision in *Sukanya Holdings* (supra) is relied upon by the learned counsel for the petitioner in support of his submission that here a different cause of action had arisen in relation thereto and that apart from the parties to the arbitration agreement, other parties had also been impleaded. Not only that the relief sought for in the plaint would certainly have a bearing on the validity of the documents obtained by defendants 2 to 5 in respect of one property and by the sixth defendant in respect of another property. Therefore, it is argued that when the subject matter of the suit includes subject matter of the arbitration C.R.P. NO. 63 of 2012 -:

32. :- agreement as well as other dispute, the matter cannot be referred to arbitration and that there is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators. It is further submitted by the learned counsel for the revision petitioners that it is difficult to interpret Sec. 8 of the Act under which bifurcation of the cause of action that is the subject matter

of the suit or in some case, bifurcation of the suit between the parties and non-parties to the agreement and others is possible. Thus, according to the learned counsel for the petitioner, this would be totally a new procedure not contemplated under the Act. Therefore, according to the learned counsel for the petitioner, the splitting up of the cause of action is not possible. If so, it is difficult to hold that the matter can be referred to arbitration.

34. In *S.N.Prasad v. Monnet Finance Ltd.* [(2011) 1 SCC320 it was held by the Apex Court : "There can be reference to arbitration only if there is an arbitration agreement between the parties. If there is a dispute between a party to an arbitration agreement, with C.R.P. NO. 63 of 2012 -:

33. :- other parties to the arbitration agreement as also non- parties to the arbitration agreement, reference to arbitration or appointment of arbitration can be only with respect to the parties to the arbitration agreement and not the non-parties..... As there was no arbitration agreement between the parties, the impleading of the appellant as a respondent in the proceedings and the award against the appellant in such arbitration cannot be sustained." Relying on the aforesaid two decisions, it is argued by the learned counsel for the revision petitioner that reference to arbitration can only be with respect to the parties to the arbitration agreement and not the non-parties. Learned counsel for the petitioner would submit that defendants 2 to 6 are not at all partners and they have no interest in the partnership deed or its business. Since they are not parties to the arbitration agreement, no arbitration can be made in respect of the dispute involved in this case. It is further submitted that the petitioner's suit is one for declaration filed by the co-owner against a person who was committed fraud and also against five other persons who have colluded with each other in effecting such a transaction and so, no C.R.P. NO. 63 of 2012 -:

34. :- award can be passed against respondents 2 to 6 as they were not parties to the agreement. Though the award if ultimately passed may be binding on the persons claiming under the parties to that award, since defendants 2 to 6 not at all parties to the agreement and since the suit is for declaration with regard to the transactions entered into by the first defendant and when that transaction is

alleged to be fraud, the dispute pertaining to the same falls outside the arbitration clause contained in the agreement. Therefore, according to the learned counsel, there would be bifurcation/splitting up of cause of action with regard to the claim that may be made against defendants 2 to 6 in the suit. The view taken by the courts below that the clauses in the arbitration agreement will cover the issue does not stand to reason.

35. The decision in Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar & Anr. [(2011) 11 SCC375] has also been relied upon by the learned counsel for the revision petitioner, where the question that arose for C.R.P. NO. 63 of 2012 -:

35. :- consideration was whether the appellant therein could be made a party to the arbitration, even though the appellant was not a party to the agreement. The two decisions of the Hon'ble Supreme Court in Jagdish Chander's case and S.N.Prasad's case were referred to by the Hon'ble Supreme Court in Deutsche Post Bank Home Finance Ltd.'s case. The Hon'ble Supreme Court gave an example : If 'X' enters into two contract, one with 'M' and another with 'D', each containing an arbitration clause providing for settlement of disputes arising under the respective contract, in a claim for arbitration by 'X' against 'M' in regard to the contract with 'M', 'X' cannot implead 'D' as a party on the ground that there is an arbitration clause in the agreement between 'X' and 'D'. Therefore, the learned counsel submits that though the arbitration clause mentioned in this case may be there between the plaintiff and the first defendant, defendants 2 to 6 cannot be roped in to have an award passed by the arbitrator especially when the relief that may have to be granted in the suit cannot be granted by C.R.P. NO. 63 of 2012 -:

36. :- reference to the arbitration. In the case cited supra, it was found by the Hon'ble Supreme Court that there was no arbitration agreement between the developer and the appellant therein and so, the dispute between the first respondent and the developer cannot be arbitrated under Article 11 of the Loan Agreement. Ultimately, the Hon'ble Supreme Court held that the appointment of an arbitrator in so far as the appellant was concerned (who was not a party to the arbitration agreement), was set aside. As stated earlier in S.N.Prasad's case (supra), it was held that reference to arbitration can be only with respect to the

parties to the arbitration agreement and not the non- parties.

36. It is vehemently argued by Smt.Sheeja, the learned counsel appearing for the respondents that in terms of Sec.16 of the Arbitration and Conciliation Act, 1996, the arbitrator himself can decide his own jurisdiction and so, if there is any objection with regard to the arbitrability of the dispute in view of the fact that defendants 2 to 6 are not C.R.P. NO. 63 of 2012 -:

37. :- parties to the arbitration agreement, still that is a matter which may be decided by the arbitrator himself in view of Sec.16 of the Arbitration Agreement. Therefore, according to the learned counsel, that is a matter which is to be left open for consideration by the arbitrator. But in the light of the decisions referred to above, I find it unable to agree with that argument.

37. The decision in N.Radhakrishnan v. M/s.Maestro Engineers & Ors. [(2010) 1 SCC72 has also been referred to here. In that case, the High Court had observed that since the case relates to the allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation cannot be properly gone into by the Arbitrator. The decision of the Hon'ble Supreme Court in Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums [2003 (6) SCC503 was referred to in support of that view. Considering the rival contentions it was held C.R.P. NO. 63 of 2012 -:

38. :- in N.Radhakrishnan's case cited supra : "In our view and relying on the aforesaid observations of this Court in the aforesaid decision and going by the ratio of the above mentioned case, the facts of the present case does not warrant the matter to be tried and decided by the Arbitrator, rather for the furtherance of justice, it should be tried in a court of law which would be more competent and have the means to decide such a complicated matter involving various questions and issues raised in the present dispute." The decision of the Madras High Court in Oomor Sait HG v. Asiam Sait [2001 (3) CTC269 was also referred to therein, where it was held that the civil court is not prevented from proceeding with the suit despite an arbitration clause if dispute involves serious questions of law or complicated questions of fact the adjudication of which would depend upon

detailed oral and documentary evidence and in such cases, the civil court can refuse to refer a matter in arbitration clause. In that case it was observed that the allegations regarding clandestine operation of business under some other name, issue of bogus bills, manipulation of accounts, carrying on similar C.R.P. NO. 63 of 2012 -:

39. :- business without consent of other partners are serious allegations of fraud, misrepresentation etc. and therefore, application for reference to Arbitrator is liable to be rejected. The Hon'ble Supreme Court agreed with the view so taken by the Madras High Court in N.Radhakrishnan's case cited supra. It was also found by the Apex Court in that case that there was a serious dispute that the appellant had made serious allegations against the respondents regarding malpractice in the account books, minutes books etc. which cannot be properly dealt with by the arbitrator and as such, it was held that the High Court was justified in dismissing the petition to refer the matter to an arbitrator. When the subject matter of the suit included the subject matter of arbitration agreement as well as other disputes, as there is no provision for splitting up of causes of action or parties, it has to be held that the subject matter of the suit cannot be bifurcated. Therefore, in the light of the various decisions cited supra including the decision of the Hon'ble Supreme Court in Sukanya Holdings (P) Ltd. v. Jayesh C.R.P. NO. 63 of 2012 -:

40. :- H. Pandya and Another [(2003) 5 SCC531, I am of the considered view that as defendants 2 to 6 are not parties to the arbitration agreement and also because the allegations of fraud etc. and complicated questions of fact and law are involved, it is not just or proper to refer the matter to be tried and decided by the arbitrator. In the interest of justice, it is just and proper that the matter be tried and disposed of by a civil court.

38. To sum up : (a) the contention that the impugned order is unsustainable in view of the fact that the original or certified copy of the agreement was not produced by the first defendant and so, the reference should not have been made is found unsustainable. The original or certified copy of the agreement is required to be produced only to enable the court to find whether the agreement in question contains an arbitration clause and when the plaintiff himself has produced a copy

of the agreement, that itself would suffice the requirements as it was available before the court to look into that agreement to find whether there is an C.R.P. NO. 63 of 2012 -:

41. :- arbitration clause. (b) The argument advanced by the learned counsel for the petitioner that the first defendant had submitted himself to the jurisdiction of the civil court and no separate petition was filed as required under Sec.8(2) of the Act also is found unacceptable. (c) But, since defendants 2 to 6 are not parties to the arbitration agreement and since there would be bifurcation of causes of action and for other reasons stated earlier I hold that the order of reference passed under Secs.8(1) and 8(2) of the 1996 Act cannot be sustained. As such, this CRP is allowed. The impugned order passed by the court below is set aside. The learned Sub Judge will take up the suit and post the same on 17.12.2013. The parties will enter appearance through their counsel before the court on that date. The interim orders passed by this Court in I.A.No.313/2012 on 11.10.2013 and 29.10.2013 will stand extended till 17.12.2013. It is for the parties to approach the trial court for getting appropriate interim reliefs, if any required. The C.R.P. NO. 63 of 2012 -:

42. :- learned Sub Judge will dispose of the suit in accordance with law. Sd/- N.K.BALAKRISHNAN, JUDGE. //True Copy// P.A. To Judge Ani/Jvt

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