

**N.V.R. Constructions. Vs. the General Manager,silk Road Sugar Pvt., Ltd.**

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**Court :** Andhra Pradesh

**Decided On :** Mar-18-2011

**Judge :** Goda Raghuram, J.

**Acts :** [Arbitration and Conciliation Act, 1996](#) - Sections 8, 11, 16 ;

**Appeal No. :** CIVIL REVISION PETITION No.5870 of 2010.

**Appellant :** N.V.R. Constructions.

**Respondent :** The General Manager,silk Road Sugar Pvt., Ltd.

**Advocate for Def. :** Sri V.L.N.G.K. Murthy, Adv.

**Advocate for Pet/Ap. :** Sri G. Krishna Murthy, Adv.

**Judgement :**

1. Heard the learned counsel for the petitioner Sri G. Krishna Murthy and Sri V.L.N.G.K. Murthy, the learned counsel for the respondents.

2. The revision is directed against the order of the learned III-Additional District Judge, Kakinada dated 29-07-2010 allowing I.A.No. 1113 of 2010 in O.S.No. 46 of 2010 filed by the respondents herein as an application under Section 8 of [Arbitration and Conciliation Act, 1996](#) ( for short 'the 1996 Act'), seeking referral of the dispute presented in O.S.No. 46 of 2010 by the revision petitioner, to an Arbitrator.

3. The suit is filed by the revision petitioner seeking recovery of an amount of Rs.74,44,113-00 and with subsequent interest at 24% per annum from the date of the suit till realization and award costs of the suit, claiming the amount as due from the respondents herein (defendants) in the suit for the work done by the plaintiff as per a service order issued by the respondents herein and for failure in paying the said amount under the bills submitted by the plaintiff. The respondents herein, as already stated, filed I.A.No. 1113 of 2010 asserting that according to the terms and conditions annexed to the service order issued by them to the petitioner and on the basis of which the suit is filed claiming the amounts, there is an arbitration clause which enjoins that any dispute arising from and in connection with the agreement shall, if unresolved between the parties, be referred to arbitration in accordance with the provisions of the 1996 Act. On this plea, the respondents herein sought reference of the dispute presented in the suit to arbitration, by filing an application under Section 8 of the 1996 Act. It was the specific defense of the revision petitioner, the respondent to the I.A.No. 1113 of 2010, that there was no communication to him of the terms and conditions allegedly annexed to the service order issued to him and therefore there was no arbitration agreement between the parties. The Court below relying on the decision of a learned single Judge of this Court in Lakshmi General Finance Ltd., v. Anantha Raja Rao<sup>1</sup> held that as the arbitrator has ample power to go into various questions including the existence and validity of an arbitration agreement as well, the respondents herein are entitled to the relief sought in I.A.No. 1113 of 2010 and accordingly allowed the application. Aggrieved whereby is this revision petition filed.

4. The learned counsel for the revision petitioner placed reliance on the judgments of the Supreme Court in SBP & Co., v. Patel Engineering Ltd., and another<sup>2</sup> and in National Insurance Company Limited v. Boghara Polyab Private Limited<sup>3</sup> to assert that where there is a clear dispute asserted as to the very existence of an arbitration agreement between the parties, with the plaintiff in a suit claiming that there is no arbitration clause and the defendant in an application under Section 8 of the 1996 Act claims that there is an arbitration clause and therefore the cause covered by the suit should be referred to the arbitration, it is the duty of the civil Court to determine the existence of an arbitration agreement as a condition precedent to allowing the application of the defendant under Section 8 of the 1996

Act and referring the cause in the suit to arbitration.

5. In *SBP Co.*, (2 *supra*) the Supreme Court, no doubt while considering the scope and the power exercised by the Chief Justices of High Courts and the Chief Justice of India under the provisions of the 1996 Act, held (P.K. Balasubramanyan, J for majority) as follows:

It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the Arbitral Tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2 (e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (see *Fair Air Engineers (P) Ltd., v. N.K. Modi*<sup>4</sup>). When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law

and whether the dispute sought to be raised is covered by the agreement. There is no indication in the Act that the powers of the court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a civil court in the ordinary hierarchy of courts without anything more, the procedure of that court would govern the adjudication. (see R.M.A.R.A. Adaikappa Chettiar v. R. Chandrasekhara Thevar<sup>5</sup>).

6. Again in National Insurance Company Limited (3 supra) R.V. Raveendran, J reiterated the principle set out in SBP Co., (2 supra) and held (again in the context of Section 11 of the 1996 Act) that the issue which the Chief Justice or his designate will have to inter alia decide is 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.

7. Sri V.L.N.G.K. Murthy, the learned counsel for the respondents would strenuously contend that since the law is settled that an arbitrator has power including the power to determine the existence of an arbitration agreement, there is no error in the order of the Court below allowing the application of the respondents herein in I.A.No. 1113 of 2010, in referring the matter to the arbitration. Reliance is placed by Sri V.L.N.G.K. Murthy, learned counsel on the decision of a learned single Judge of this Court in Lakshmi General Finance Ltd., (1 supra). The learned single Judge of this Court after referring to the judgment of the Supreme Court in Renusagar Power Co., Ltd., v. General Electric Company<sup>6</sup> and the provisions of Section 16 of the 1996 Act, which enjoins that the Tribunal (meaning the arbitration tribunal) may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement..." held that even where a defendant moves the Court to refer the dispute to arbitration in view of an arbitration clause in the agreement executed by the plaintiff and the plaintiff denies the existence of such agreement pleading that the defendant obtained his signatures on blank and printed stamp papers and created the agreement, the matter could be referred to the arbitration for a decision including on whether there is an arbitration clause between the parties

and thus excluding the jurisdiction of the civil Court to adjudicate the matter in dispute.

8. With respect, it requires to be held that in view of the decision of the Supreme Court in SBP Co., (2 supra) and National Insurance Company Limited (3 supra) referred to above, the decision of a learned single Judge of this Court in Lakshmi General Finance Ltd., (1 supra) does not constitute the correct statement of law. It is clear from the binding authority of SBP Co., (2 supra) and National Insurance Company Limited (3 supra) that where the plaintiff proceeds by way of a suit to imply the absence of arbitration agreement and a defendant asserts the existence of an arbitration agreement and seeks reference of the cause in the suit to arbitration in an application under Section 8 of the 1996 Act; and in defense to such application the plaintiff asserts that there is no arbitration agreement between the parties, the civil Court is bound to and owes a non-derogable adjudicatory obligation to determine the existence of an arbitration agreement and only thereafter and if on such determination it is found that there is an arbitration agreement operative between the parties could refer the matter to arbitration.

9. In the order impugned herein, the learned III-Additional District Judge, Kakinada, East Godavari District has merely proceeded on the assumption that since the arbitrator has ample power to go into the question including as to the existence of an arbitration agreement between the parties, the application of the respondents, I.A.No. 1113 of 2010 should be allowed and the matter referred to the arbitration under the provisions of the 1996 Act. This decision though in conformity with the decision in Lakshmi General Finance Ltd., (1 supra) is incongruent with the binding authority in SBP Co., (2 supra) and National Insurance Company Limited (3 supra) and is therefore unsustainable as is the decision of this Court in Lakshmi General Finance Ltd., (1 supra) inconsistent with the finding precedents.

10. For the aforesaid reasons, this revision is allowed. The order of the learned III-Additional District Judge, Kakinada, East Godavari District dated 29-07-2010 in I.A.No. 1113 of 2010 in O.S.No. 46 of 2010 is set aside. The application I.A.No. 1113 of 2010 shall stand restored and the learned III-Additional District Judge,

Kakinada, shall proceed to determine on the basis of this application as to whether there is existing and operative arbitration agreement between the parties which warrants consideration of I.A.No. 1113 of 2010. The revision petition is allowed as above, but in the circumstances, without costs.

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