

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 1<sup>ST</sup> DAY OF JULY, 2022

BEFORE

THE HON'BLE MR. JUSTICE SACHIN SHANKAR MAGADUM

**WRIT PETITION NO.12297 OF 2016 (GM-CPC)**

**BETWEEN:**

MASTERS MANAGEMENT CONSULTANTS  
(INDIA) PRIVATE LTD  
HAVING ITS REGISTERED OFFICE AT 70,  
NAGINDAS MASTER ROAD, FORT,  
MUMBAI-400023  
AND ITS ADMINISTRATIVE OFFICE AT  
NEW UDYOG MANDIR NO.2,  
KAMANWALA CHAMBERS, UNIT #7,  
MOGUL LANE, MAHIM (W), MUMBAI-400016.  
REPRESENTED BY ITS REGIONAL MANAGER-  
SOUTH AND AUTHORISED SIGNATORY  
MR.VISHNU PRASADA RAO,  
AGED ABOUT 59 YEARS,  
S/O MR.BHIMASHANKARA RAO PALADUGU,  
RESIDING AT B-8/F3, VIJAYANAGAR COLONY,  
HYDERABAD-500057, TELANGANA, INDIA.

...PETITIONER

(BY SRI.ADITYA VIKRAM BHAT, ADVOCATE)

**AND:**

1. NITESH ESTATES LIMITED  
HAVING ITS REGISTERED OFFICE AT

NITESH TIME SQUARE, 7TH FLOOR,  
NO.8, M.G.ROAD, BENGALURU-560001.  
KARNATAKA, INDIA.  
REPRESENTED BY ITS MANAGING DIRECTOR,  
MR.NITESH SHETTY.

2. NITESH RESIDENCY HOTELS PRIVATE LIMITED  
HAVING ITS REGISTERED OFFICE AT  
25-A, 2ND FLOOR, IMPERIAL COURT,  
CUNNINGHAM ROAD, BENGALURU-560052.  
KARNATAKA, INDIA.  
REPRESENTED BY ITS MANAGING DIRECTOR,  
MR.NITESH SHETTY.

...RESPONDENTS

(BY SRI.CHINMAY J MIRJI, ADVOCATE FOR R1;  
SRI.KIRAN.J, ADVOCATE FOR C/R2)

THIS PETITION IS FILED UNDER ARTICLE 227 OF THE  
CONSTITUTION OF INDIA PRAYING TO SET ASIDE THE ORDER  
DATED 05.02.2016 PASSED IN I.A.NO.2 FILED BY THE  
RESPONDENTS UNDER SECTION 8 OF THE ARBITRATION AND  
CONCILIATION ACT, 1996 READ WITH ORDER VII RULE 11(d) OF  
CPC IN ORIGINAL SUIT BEARING NO.9055/2013 BEFORE THE VII  
ADDL. CITY CIVIL AND SESSIONS JUDGE, AT BANGALORE (CCH-  
19) AT ANNEXURE-A.

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR  
ORDERS ON 16.06.2022, COMING ON FOR PRONOUNCEMENT OF  
ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:

**ORDER**

The captioned writ petition is filed by the plaintiff feeling aggrieved by the order dated 05.02.2016 passed by the learned Judge on I.A.No.2 filed under Section 8 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') wherein the learned Judge has ordered for return of plaint and the same is under challenge.

2. For the sake of brevity, the parties are referred to as per their rank before the Court below.

3. The plaintiff has instituted a suit for recovery of sum of Rs.1,66,99,728/- along with interest at the rate of 18% per annum. The plaintiff claims that it has entered into a project management and construction management agreement with defendant No.2, the owner, and defendant No.1 who appears to be the developer. The plaintiff claims that this agreement was entered into on 30.05.2012. The plaintiff claims that in terms of clause 4.1 of the agreement,

he is entitled for a sum of Rs.5,05,00,000/- plus service tax as per the agreement. The plaintiff has specifically pleaded that in terms of the agreement, he has rendered service as enumerated under the agreement and accordingly invoices are raised in terms of payment schedule under clause 4.1 of the agreement. On these set of pleadings, the suit for recovery is instituted by the present plaintiff herein seeking recovery of the above said amount.

4. The defendants, on receipt of summons, tendered appearance requesting the Court to refer the dispute to arbitration by invoking arbitration clause as provided in clause 12 of the agreement. The said contention was strongly resisted by the plaintiff by filing detailed objections. The present plaintiff specifically pleaded at para 5 of the objection that the arbitration contemplated under the agreement is a non-binding arbitration and contrary to the provisions of the Act. The plaintiff further claims that in absence of valid arbitration agreement between the parties, neither parties are

obligated to commence arbitration under the Act in order to resolve the disputes arising out of or in connection with the agreement. Referring to clause 12.2 of the agreement, plaintiff specifically contended that the said clause clearly indicates that parties intended to refer the disputes to a non-binding arbitration. Therefore, contended that a non-binding arbitration is not a valid arbitration agreement in terms of the Act.

5. The learned Judge having examined the rival contentions has proceeded to allow the application filed under Section 8 of the Act and consequently, plaint is returned. The learned Judge while allowing the application was of the view that clause 12 in the agreement clearly provides alternate dispute resolution mechanism and therefore, plaintiff has to take recourse in terms of clause 12 of the agreement. It is in this background, learned Judge was of the view that the plaintiff without invoking clause 12 of the agreement has approached this Court and therefore, the learned Judge found

that it was necessary to refer the matter to the dispute resolution mechanism relegating the parties to seek redressal of their dispute in terms of agreement dated 30.05.2012. It is this order which is under challenge.

6. Shri Aditya Vikram Bhat, learned counsel appearing for the petitioner/plaintiff reiterating the grounds urged in the writ petition would vehemently argue and contend before this Court that the order of the learned Judge is contrary to law and also contrary to the material placed before the learned Judge. Referring to the relevant clause 12.2 of the agreement, he would contend that the learned Judge has virtually misread the relevant clause incorporated in the agreement. Referring to clause 12.2, he would contend that agreement to refer the dispute to non-binding arbitration is not an arbitration for the purpose of Section 7 of the Act and therefore, he would contend that the defendants are not entitled to invoke Section 8 of the Act at all.

7. To buttress his arguments, he has referred to the meaning of "non-binding" by referring to 'Advanced Law Lexicon'. To demonstrate that the order under challenge is contrary to said proposition of law relating to non-binding arbitration agreement, he has placed reliance on the judgment rendered by this Court in the case of ***Durha Constructions Private Limited vs. Bateman Engineering (India) Private Limited***<sup>1</sup>. To strengthen his hands, he has further placed reliance on the judgment rendered by the Hon'ble Apex Court in the case of ***K.K.Modi vs. K.N.Modi and Others***<sup>2</sup>. Referring to the judgment rendered by the Co-ordinate Bench of this Court in the case of *Durha Constructions (supra)*, he would point out that the words used in the arbitration clause should disclose a determination. He would further point out that the clause in the agreement should clearly demonstrate that the parties have agreed by way of an agreement consenting for referral of dispute to an Arbitrator and further,

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<sup>1</sup> ILR 2012 Kar 1242

<sup>2</sup> (1998) 3 SCC 573

they should agree that the decision of the Tribunal in respect of the disputes will be binding on them.

8. Placing reliance on the principles laid down by the Co-ordinate Bench in the above said judgment, he would further contend that mere use of words "arbitration" or "arbitrator" in the clause will not in itself make an arbitration agreement. He has also placed reliance on the judgment rendered by the Hon'ble Apex Court in the case of **Jagdish Chander vs. Ramesh Chander and Others**<sup>3</sup>. Placing reliance on para 8 of the said judgment, he would contend that where a clause relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it cannot be termed as an arbitration agreement. If the clause in the agreement gives an indication that a party who is not satisfied with the decision of the authority, may seek redressal of his grievance before

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<sup>3</sup> (2007) 5 SCC 719



the Civil Court, then it cannot be termed as an arbitration agreement. Therefore, he would contend that the judgment rendered by the Hon'ble Apex Court in the case **Jagdish Chander** (*supra*), if applied to the present set of facts, then it is quite clear that the present plaintiff is entitled to institute a suit before the competent civil Court seeking recovery of money and clause 12.2 would come to the aid of the plaintiff and therefore, the jurisdiction of competent civil Court would not stand excluded as claimed by defendants.

9. Per contra, Shri Chinmay J.Mirji, learned counsel appearing for the respondents/defendants would straight away take this Court to the operative portion of the order and question the very maintainability of the writ petition before this court. Referring to the operative portion of the order, he would point out that the learned Judge has returned the plaint and therefore, the order under challenge is appealable under the provisions of Order 43 of CPC. Though he would fairly concede to the contentions raised by the plaintiff in regard to

maintainability of the suit but, however, he would submit to this Court that the impugned order cannot be tested before this Court under Article 227 of the Constitution of India as plaintiff has an efficacious remedy by way of a miscellaneous appeal under the provisions of Order 43 of CPC and therefore, he would request this Court to dismiss the writ petition as not maintainable.

10. By way of reply, learned counsel appearing for the plaintiff would straight away place reliance on a reported judgment rendered by the Division Bench of this Court in W.A.No.2505/2015. Referring to the Division Bench judgment of this Court, he would straight away take this Court to para 11 of the said judgment and contend that against an order passed under Section 8 of the Act, no appeal lies and therefore, aggrieved party can seek redressal of his grievances by approaching a writ Court under Article 227 of the Constitution of India.

11. Heard learned counsel appearing for the plaintiff and learned counsel appearing for the defendants. Perused the order under challenge. I have also given my anxious consideration to the judgments cited by the learned counsel appearing for the plaintiff.

12. On meticulous examination of the material on record, the following points would arise for consideration:

*1) Whether the impugned order passed by the learned Judge on an application filed under Section 8 of the Act can be questioned by invoking the writ jurisdiction under Article 227 of the Constitution of India?*

*2) Whether the finding of the learned Judge that plaintiff and defendant Nos.1 and 2 in terms of arbitration clause incorporated at clause 12 of the agreement have to seek redressal of their dispute by referring the dispute to an Arbitrator in terms of clause 12 of the agreement dated 30.05.2012 is palpably erroneous?*

**Re: Point No.1:**

13. Insofar as maintainability of the writ petition is concerned, the law in that regard is no more *res integra*. Learned counsel appearing for the defendants has laid more emphasis on the operative portion of the order. The operative portion of the order under challenge indicate that plaint is returned. The defendants claim that this order is passed under the provisions of Order 7 Rule 11(d) of CPC and plaint is returned and therefore, the plaintiff has a remedy of an appeal. It would be useful for this Court to cull out para 11 of the reported judgment rendered by the Division Bench of this Court in the case of **Jagdish Chander** (*supra*) and the same reads as under:

*"11. The existence of an arbitration agreement as defined under Section 7 of the Act is a condition precedent for exercise of power to appoint an arbitrator/Arbitral Tribunal, under Section 11 of the Act by the Chief Justice or his designate. It is not permissible to appoint an arbitrator to adjudicate the disputes between the parties, in the absence of an*

*arbitration agreement or mutual consent. The designate of the Chief Justice of Delhi High Court could not have appointed the arbitrator in the absence of an arbitration agreement."*

14. If the ratio laid down by the Division Bench at para 11 which is culled out supra is examined, then the objections raised by the defendants in regard to maintainability of the writ petition cannot be acceded to. Admittedly, the application is filed under Section 8 of the Act. At para 11, the Division Bench has held that where an application filed under Section 8 of the Act is rejected, no appeal is provided under the Act and therefore, aggrieved party is entitled to seek redressal of his grievance by knocking the doors of a writ Court under Article 227 of the Constitution of India. Therefore, this Court is of the view that the writ petition is very much maintainable before this Court. Accordingly, point No.1 formulated by this Court is answered in the affirmative.

**Re: Point No.2:**

15. Before I advert to point No.2, it would be useful for this Court to refer to clauses 12.1 and 12.2 of the agreement.

The same are culled out as under:

*"12.1 In the event of disputes, controversies, differences of opinion and claims arising out of or in connection with this Agreement or in any way relating hereto or any term, condition or provisions herein mentioned or the construction or interpretation thereof or otherwise in relation hereto (hereinafter referred to as the 'Dispute') the Parties shall first enter into negotiations in good faith through their authorized representatives in an attempt to prevent the need for arbitration or litigation. A party may develop this negotiation process by giving to the other written notice of the existence of a Dispute with a request to meet within 10 (ten) days at an agreed time and place to resolve the matters in Dispute.*

*12.2 Notwithstanding the above, if, within 15 (fifteen) days after such meeting, the Parties have not succeeded in negotiating a resolution of the Dispute, the Dispute will be immediately submitted to non-binding arbitration under the Arbitration and*

*Conciliation Act, 1996 (hereinafter referred to as the "Rules") by an arbitrator appointed in accordance with the Rules. The arbitration shall be conducted in English and at a mutually agreeable venue in India. If the parties are unable to satisfactorily resolve the dispute pursuant to such non-binding arbitration, either party may initiate litigation. The prevailing party in any litigation arising out of or related to this Agreement shall be entitled to recover its reasonable attorneys' and paralegals' fees and costs through all trial and appellate levels of litigation, and in any settlement, mediation, bankruptcy or administrative proceedings."*

16. It would be also useful for this Court to cull out the definition of 'non-binding' as defined in Advanced Law Lexicon and the same is culled out as under:

*"Non-binding: A document that carries no formal legal obligations, but it may carry moral obligations."*

17. On reading of clauses 12.1 and 12.2 coupled with definition of 'non-binding', this Court would find that there is absolutely no intention on the parties to enter into arbitration

agreement and if there is no intention on the part of the parties to the agreement to refer their disputes to Arbitrator for adjudication and if there is no willingness to be bound by a decision of such Tribunal, the present suit instituted before the Court is very much maintainable. The impugned order under challenge has to be examined in the light of the principles laid down by the Hon'ble Apex Court in the case of **Jagdish Chander** (*supra*). The Hon'ble Apex Court in the judgment cited *supra* was of the view that mere clause in an agreement will not make it an arbitration agreement where a further clause is found in the agreement indicating a further fresh consent of the parties for reference to arbitration. The Hon'ble Apex Court was of the view that the main attribute of an arbitration agreement is consensus of the parties to refer the dispute to an arbitration. Therefore, the principles laid down by the Hon'ble Apex Court in the case of **Jagdish Chander** (*supra*) are squarely applicable to the present case on hand.



18. Clause 12.2 clearly contemplates that dispute will be immediately submitted to non-binding arbitration under the Act. It further contemplates that if parties are unable to satisfactorily resolve the disputes pursuant to such non-binding arbitration, either party may initiate litigation. It is in the background of clause 12.2, this Court is of the view that the agreement cannot be termed as an arbitration agreement. Therefore, clause 12.2 clearly demonstrates that the parties are at liberty to ventilate their grievances by initiating litigation before the Civil Court and therefore, clause 12.2 clearly detracts from an arbitration agreement and therefore, the agreement which is the subject matter of the suit cannot be treated as an arbitration agreement. The present agreement does not impliedly either spells out or contemplates a clause providing reference of dispute to arbitration.

19. In the light of long line of authorities rendered by the Hon'ble Apex Court, clause 12.2 clearly demonstrates that there is no arbitration agreement between the parties and the clause incorporated in the agreement does not contain the attributes that are required to be present for an agreement to be considered as an arbitration agreement. Therefore, the Court below grossly erred in returning the plaint by invoking Section 8 of the Act. Therefore, the order under challenge is not at all sustainable. Accordingly, point No.2 formulated above is answered in the affirmative.

20. Hence, I pass the following:

ORDER

- (i) The writ petition is allowed;
- (ii) The impugned order dated 05.02.2016 passed on I.A.No.2 in O.S.No.9055/2013 is set aside and the plaint is restored to file;

(iii) The parties are relegated to seek adjudication of their rights in the pending suit bearing O.S.No.9055/2013;

(iv) All contentions are kept open.

Sd/-  
JUDGE

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