

## Shyam Sunder Agarwal Vs P. Narotham Rao and Others

**Court:** Andhra Pradesh High Court

**Date of Decision:** July 22, 2011

**Acts Referred:** Arbitration and Conciliation Act, 1996 " Section 11(5), 11(6), 2, 20, 8  
Limitation Act, 1963 " Article 21, 22, 54  
Negotiable Instruments Act, 1881 (NI) " Section 138

**Citation:** (2012) 1 ALD 470

**Hon'ble Judges:** B. Seshasayana Reddy, J

**Bench:** Single Bench

**Advocate:** S. Ravi, for the Appellant; N. Subba Rao, Counsel for the Respondent Nos. 1 and 2, P. Vikram, Counsel for the Respondent No. 3, S. Rajan, Counsel for the Respondent No. 4, R. Sridhar Reddy, Counsel for the Respondent No. 5, Shyam S. Agarwal, Counsel for the Respondent No. 6, L. Venkateswara Rao, Counsel for the Respondent Nos. 7 and 8, Vedula Srinivas, Counsel for the Respondent No. 9, for the Respondent

**Final Decision:** Dismissed

### Judgement

@JUDGMENTTAG-ORDER

B. Seshasayana Reddy, J.

This arbitration application has been taken out under sub-sections (5) and (6) of the Arbitration and

Conciliation Act, 1996 read with the Scheme for Appointment of Arbitrators, 1996 seeking appointment of a sole arbitrator to resolve the disputes

between the applicant and the respondents arising out of the Memorandum of Understanding dated 8.12.2005.  
Background facts, in a nutshell,

leading to filing of this application by the applicant-Shyam Sunder Agarwal are:

(a) Mancherla Cement Company Private Limited (hereinafter referred to as ""MCC"" ) is a company incorporated on 15.7.2004 and it is primarily

engaged in manufacture and sale of cement. The applicant-Shyam Sunder Agarwal is a shareholder in MCC. The authorised share capital of MCC

at the time of incorporation was Rs. 1,00,00,000/- comprising of 10,00,000 equity shares of Rs. 10/- each. The authorised share capital was

subsequently increased to Rs. 11,00,00,000/- in the Extra Ordinary General Meeting held on 14.3.2005. Shyam Sunder Agarwal, Mr. K.

Vidyasagar Rao, Mr. Ashok Kumar Agrawal, Mr. S. Mahendar Rao, Mr. S. Hareender Rao and Mr. S. Anand Rao (hereinafter referred to as

Shyam Sunder Agarwal and others"" ) held 50.20% of the shares in MCC. Whereas, Mr. P. Narotham Rao, Mr. P. Varada Rajeswara Rao, Mr.

J. Jagannadha Rao and Mr. P. Rajanarasinga Rao (hereinafter referred to as ""Narotham Rao and others"" ) held 44.80% of the shares in MCC.

Shyam Sunder Agarwal and P. Narotham Rao entered into a Memorandum of Understanding with Associated Cement Companies (hereinafter

referred to as ""ACC"" ) for the purchase of Mancherial Cement Works (hereinafter referred to as ""MCW"" ). [including the mines, housing colony,

movable and immovable assets except land admeasuring Acs. 130]. The consideration agreed upon between the parties was Rs. 30.33 crores.

10% of the consideration was agreed to be paid at the time of signing the MoU and the balance was agreed to be paid on or before 5.11.2004.

(b) MCC applied for credit facilities with Andhra Bank, St. John's EMHS Branch, Karimnagar (for short, ""Andhra Bank"" ) to raise funds for

purchase of MCW from ACC. Andhra Bank sanctioned term loan of Rs. 25,00,00,000/- and cash credit facility upto Rs. 15,00,000/- and

accordingly, issued a sanctioned letter. As per the terms of the sanctioned letter, all the Directors of MCC were required to give their personal

bank guarantees. In the Board meeting of the Directors of the MCC, Mr. S. Harinder Rao and Mr. P. Narotham Rao were appointed as Joint

Managing Directors of the company. MCC entered into sale agreement with ACC on 25.11.2005 for purchase of MCW for a sale consideration

of Rs. 31,33,00,000/-. Andhra Bank addressed a letter dated 29.11.2005 expressing its readiness to disburse the loan sought for by MCC for

purchase of MCW from ACC. P. Narotham Rao, who was the Joint Managing Director of the company refused to give personal guarantee, which

was mandatory as per the sanctioned terms set by Andhra Bank in its letter dated 31.12.2004. Certain developments took place in ACC and

consequently, ACC declared VRS to its employees and their plant was also closed in terms of the agreement dated 25.11.2005. The Board of

Directors of the MCC in the meeting held on 1.12.2005 resolved to remove Mr. P. Narotham Rao as Joint Managing Director of the company

and to appoint Mr. S. Harinder Rao as Managing Director of the company. Thereupon, Mr. P. Narotham Rao addressed letter to Andhra Bank

not to disburse the loan amount to MCC. Consequently, Andhra Bank cancelled credit facilities to MCC. There was a rapprochement between

the parties on 8.12.2005 whereunder P. Narotham Rao and others agreed to transfer their 44.80% share holding to Shyam Sunder Agarwal and

others for consideration of Rs. 6,50,00,000/-. The shares were valued at Rs. 297- each. Accordingly, a Memorandum of Understanding came to

be executed between the parties and payment schedule has also been indicated in the MoU. As per clause (8) of the MoU, the parties nominated

Mr. K. Sudhakar Rao and Mr. Gone Prakash Rao as mediators/arbitrators in order to ensure successful completion of the transaction and to

avoid any unforeseen litigation. Shyam Sunder Agarwal handed over 9 post-dated cheques drawn in favour of P. Narotham Rao to the mediators.

Share certificates along with duly signed transfer deeds pertaining to the 22,40,000 equity shares of Narotham Rao and others were supposed to

be handed over to the above-referred two persons. Subsequently, Shyam Sunder Agarwal and others substituted the cheques with demand drafts

and expressed their willingness to make the payments as per the MoU. Some correspondence went on between the parties. The applicant-Shyam

Sunder Agarwal and others made payment of Rs. 1,00,00,000/- in cash to the 1st respondent-P. Narotham Rao and others on 22.2.2006. On

20.4.2006, Mr. P. Narotham Rao-1st respondent addressed letter to Mr. K. Sudhakar Rao, one of the mediators expressing his willingness to

settle the issue in relation to MCC undertaking to transfer the shares of his group once he receives the total amount and upon signing of the draft

supplementary agreement. The draft supplementary agreement was also enclosed to the said letter. In the draft supplementary agreement, it has

been mentioned by P. Narotham Rao-1st respondent that Shyam Sunder Agarwal-applicant and others should make payment of Rs. 1.80 crores

and arrange to pay the balance of Rs. 3.70 crores on or before 15th April, 2006. K. Sudhakar Rao, one of the mediators had addressed letter to

the applicant-Shyam Sunder Agarwal informing him of the letter dated 20.4.2006 addressed to him by the 1st respondent-P. Narotham Rao.

Since P. Narotham Rao-1st respondent and others had not been honouring their obligations under the MoU dated 8.12.2005, the applicant-

Shyam Sunder Agarwal and others addressed letter dated 24.5.2007 requesting K. Sudhakar-Rao and Mr. Gone Prakash Rao to enter reference

and mutually agree upon a third arbitrator and commence arbitration proceedings. The applicant-Shyam Sunder Agarwal reiterated his request to

Sri K. Sudhakar Rao and Gone Prakash Rao under letter 1.9.2009 to commence the proceedings. The 1st respondent-P. Narotham Rao issued a

reply dated 15.9.2009 questioning the very validity of the MoU. The 1st respondent-P. Narotham Rao reiterated his stand in the letters dated

15.10.2009 and 30.10.2009. The 1st respondent- Mr. P. Narotham Rao stated in the notices that the claim of the applicant-Shyam Sunder

Agarwal is barred by limitation. For completion of narration of facts, I deem it appropriate to refer paragraphs 20 to 22 of the affidavit filed in

support of the application and they are thus:

20. In response to the contention of Mr. P. Narotham Rao and others in their reply dated 15.9.2009 that the claim is barred by limitation, it is

submitted that the Memorandum of Understanding was entered into on 8.12.2005, cheques were issued by Shyam Sunder Agarwal and others on

8.12.2005, after the cheques were dishonoured, demand drafts were made ready by Shyam Sunder Agarwal and others and 12.4.2006, Shyam

Sunder Agarwal and others paid Rs. 1,00,00,000/- to Narotham Rao and others on 22.2.2006, the jurisdiction of the arbitrators was invoked on

24.5.2007. Since the arbitration clause was invoked on 24.5.2007, legal action has commenced on the said date. Subsequent thereto, there was

abdication on the part of the arbitrators in commencing the arbitration proceedings. Legal proceedings have been initiated in time and, therefore,

the plea of limitation does not hold.

21. The contention of Respondent No. 1 in his letter dated 30.10.2009 that there is no arbitration agreement contained in the MoU is

misconceived. It is submitted that it is clearly stated in Clause 8 of the MoU that the parties to the agreement are mutually appointing Mr. K.

Sudhakar Rao and Mr. Gone Prakash Rao as mediators and arbitrators in order to avoid any unforeseen litigation. The respondents cannot

conveniently ignore one part of the clause and only read the part in which the same persons are appointed as escrow agents to contend that there

was no arbitration agreement in the MoU. All the other objections raised by Mr. Narotham Rao in the letter dated 30.10.2009 can be agitated

before the arbitrator and adjudicated upon by the arbitrator.

22. In view of the fact that the arbitrators appointed by the parties as per the MoU have been unable to agree upon a third arbitrator and

commence the arbitration proceedings for the past two and half years and have, in the process, implicitly expressed their reluctance to act as

arbitrators in the present matter, it becomes imperative that an arbitrator is appointed by this Hon"ble Court in terms of Section 11(6) of the

Arbitration and Conciliation Act, 1996 for resolution of the disputes arising out of the MoU entered into by the applicant and the respondents on

8.12.2005.

2. Notice to the respondents came to be ordered on 30.12.2009. Respondents 1 and 2 filed common counter and whereas respondents 3 and 4

filed counters individually.

3. The counter of respondents 1 and 2, in brief, is:

(a) There is no clause in the MoU dated 8.12.2005 entered into between the parties with regard to reference of disputes to the arbitrators.

Therefore, the application filed by the applicant seeking appointment of arbitrator is barred by limitation under Article 54 of the Limitation Act. The

validity of the MoU dated 8.12.2005 has been ceased by the Company Law Board in Company Petition No. 112 of 2007. The applicant herein is

one of the respondents in the said company petition. Pending proceedings before the Company Law Board, the instant application before this

Court seeking appointment of arbitrator is not maintainable. It is for the Company Law Board to decide whether this respondent and others have

agreed to relinquish their rights in the company under the MoU dated 8.12.2005. Respondent No. 7-S. Ananda Rao and respondent No. 9-S.

Mahender Rao and respondent No. 10-S. Harinder Rao filed OS No. 241 of 2007 on the file of the Chief Judge, City Civil Court, Hyderabad

against the applicant and 2nd respondent herein and others for specific performance of MoU dated 8.12.2005 for a direction to the defendants 6

and 7 therein to handover the signed transfer deeds to the plaintiffs. Since the civil Court ceased of the issue as to the validity of the MoU, the

applicant ought to have got himself impleaded as party defendant in the said suit to put quietus to the disputes centered around the MoU. Some of

the shareholders filed Company Petition No. 73 of 2007 and Company Petition No. 76 of 2007 before the Company Law Board questioning the

validity of the MoU dated 8.12.2005 and sought for a declaration that the MoU dated 8.12.2005 is void and contrary to the Articles 21 and 22 of

the Articles of Association of the company. One of the parties to the MoU, namely, Ashok Kumar Agarwal issued a notice disputing the very

execution of MoU. The applicant in the reply notice dated 1.8.2006 expressed his dismay as to how K. Sudhakar Rao and Gone Prakash Rao

parted with the cheques deposited by him before completion of the transaction and even denied the existence of liability under MoU dated

8.12.2005. Unless the petitioners who filed Company Petition Nos. 73 of 2007 and 76 of 2007 are made as parties in this arbitration application,

no effective adjudication can be taken up with regard to the issue involved in this application. A joint memo was filed in CP Nos. 73, 76 and 112

of 2007 on the file of Company Law Board by both the parties indicating the constitution of the committee of management. The committee

comprises P. Narotham Rao, S. Suman Rao and one to be elected at the extraordinary General meeting to be held on 30.9.2007. The Company

Law Board appointed Sri N.R. Sridharan, CA and CS to chair the EGM. The voting of the EGM shall be as per the share holding of the company

as on 10.11.2005 and the election was held and Management Committee is constituted and the same is managing the affairs of the company. The

1st respondent as the Managing Director of the company filed O.S.375 of 2007 on the file of III Additional Chief Judge, City Civil Court,

Hyderabad seeking injunction against the appellant, respondents 5, 6, 7, 8, 9 and one A. Sandeep Reddy restraining them from interfering with the

day-to-day affairs of the company and the said suit is pending disposal. The applicant issued certain cheques in pursuance of the MoU dated

8.12.2005 and the said cheques came to be dishonoured and thereupon, this respondent initiated proceedings u/s 138 of the N.I. Act and

subsequently, the proceedings under the cheque bouncing case came to be withdrawn. Since the limitation prescribed for specific performance of

the MoU dated 8.12.2005 has been expired, the applicant is not entitled to seek reference of the same. This respondent filed CC No. 142 of

2007 on the file of Special Judge for Economic Offences, Hyderabad against the applicant and respondent No. 8 herein for filing false declaration

in Form No. 32 before the Registrar of Companies, Hyderabad. He also filed CC No. 147 of 2007 on the file of the same Court against

respondents 5, 8 and 9 herein for misappropriation of the company's amount. Another complaint being CC No. 23 of 2009 filed against the

applicant, respondent No. 6 is pending disposal before the Special Court for Economic Offences, Hyderabad.

(b) The persons of the first part to the MoU dated 8.12.2005 hold 5,60,000 shares and whereas the persons of the 2nd part to the MoU dated

8.12.2005 hold 4,80,000 out of 50 lakh shares. Neither the first part nor second part is entitled to enter into MoU on behalf of the persons who

are not parties to the MoU without any authorisation from them. The averment in the application that S. Hareender Rao, K. Vidyasagar Rao,

Shyam Sunder Agarwal, Mr. Ashok Kumar Agarwal, S. Mahender Rao and Mr. S. Anand Rao held 50.20% of the shares in MCC as on the

date of the entering into MoU, i.e., 8.12.2005 is factually incorrect. The sale agreement with ACC was entered into without any authority by Mr.

S. Hareender Rao misrepresenting himself as Managing Director of the company on 25.11.2005. He was only Joint Managing Director of the

company at the relevant point of time. K. Sudhakar Rao and G. Prakash Rao are only mediators and not arbitrators. There is no arbitration

clause in the MoU dated 8.12.2005. The so called demand drafts said to have been issued by the applicant were never handed over to this

respondent or anyone on his behalf at any point of time. The criminal cases initiated u/s 138 of the N.I. Act were withdrawn by this respondent

even before notices/summons were served on the accused in the said criminal cases, as he was not interested in prosecuting the same. Ashok

Kumar Agarwal by his reply notice 22.8.2006 denied the existence of MoU dated 8.12.2005. Hence, sought for dismissal of the application.

4. The 3rd respondent filed counter resisting the application on the similar grounds urged by respondents 1 and 2. It is stated in para (12) of the

counter that clause (8) of the MoU which is referred as arbitration clause by the applicant deals only with nomination of escrow agents, and though

the words "mediators/arbitrators" have been used in respect of Sri K. Sudhakar Rao and Sri Gone Prakash Rao in the said MoU, that itself does

not make them arbitrators nor the applicant can import an arbitration clause in the said MoU for resolution of the disputes, which otherwise has not

been agreed by the parties.

5. The 4th respondent sought for dismissal of the application on almost on the similar grounds urged by respondents 1 and 2. It is suffice to refer

paragraph 9 of the counter, which reads as hereunder:

This respondent further states that there is no pre-existing arbitrable dispute between the applicant and this respondent inasmuch as no notice

seeking specific performance of the terms of the MoU was ever issued to this respondent and therefore, in the absence of any pre-existing

arbitrable dispute, Annexure-U notice insofar as the same pertains to this respondent is bad in law and consequently this application is not

maintainable against this respondent. Furthermore, I state that since the obligation which is sought to be enforced is a composite one, even if the

applicant has issued any notice of dispute to respondent No. 1, still the entire application must fail since it seeks to enforce a composite obligation

against all the respondents to whom no notice of demand was ever issued prior to the purported invocation.

6. The applicant filed reply affidavit to the counter filed on behalf of the respondents 1 and 2 and respondents 3 and 4. It is stated in the reply

affidavit that CP No. 112 of 2007 has not been filed in relation to MoU dated 8.12.2005 and the relief sought for in the said company petition is to

cancel the allotment of 50,00,000 shares allotted on 17.12.2005 to certain shareholders of MCC. The applicant herein along with certain other

respondents therein had filed a counter. The applicant is not a party to OS No. 241 of 2007 said to have been filed by some of the parties to the

MoU. The applicant has not chosen to file a civil suit for specific performance of the MoU dated 8.12.2005 in view of the existence of an

arbitration clause (clause 8 of the MoU). The fact that certain parties to the MoU have not chosen to invoke the arbitration clause cannot be held

against the applicant who acted in accordance with the terms of the MoU by invoking the arbitration clause. Company Petitions 73 of 2007 and 76

of 2007 have been filed at the behest of and in collusion with the 1st respondent herein. The applicant is not bound by the statements made by

respondent No. 6 Mr. Ashok Kumar Agarwal, who stated to have denied the execution of the MoU. Proceedings initiated by the 1st respondent

and others u/s 138 of the Negotiable Instruments Act came to be settled before the Lok Adalat by Award dated 12.3.2007 consequent upon

payment of Rs. 78,12,500/-.

7. The applicant placed on record additional affidavit dated 14.2.2011. It is stated in the affidavit that respondents 8 and 9, who are parties to the

MoU dated 8.12.2005 and who filed the suit being OS No. 241 of 2007 on the file of the Chief Judge, City Civil Court, Hyderabad, for specific

performance of MoU have entered into MoU dated 2.2.2011 and placed the said MoU before the Company Law Board in CP No. 73 of 2007

in which one of the terms is that respondent No. 8 would withdraw all the pending litigations including OS No. 241 of 2007. Accordingly,

respondent No. 8 filed memo before the Company Law Board. A copy of the memo filed before the Company Law Board by respondent No. 8

along with the Memorandum of undertaking has been placed on record.

8. The 7th respondent though entered appearance through a Counsel reported no counter.

9. Heard Sri S. Ravi, learned Senior Counsel appearing for the applicant, Sri N. Subba Rao, learned Counsel appearing for the respondents 1 and

2, Sri P. Vikram, learned Counsel appearing for respondent No. 3, Sri 5. Rajan, learned Counsel appearing for respondent No. 4 and Sri Vedula

Srinivas, learned Counsel appearing for respondent No. 9.

10. Sri S. Ravi, learned Senior Counsel appearing for the applicant submits that the MoU dated 8.12.2005 entered between the parties contains

an arbitration clause, in case of disputes in the process of satisfactory completion of the entire transaction, and as the respondents 1 to 4 who are

the 2nd party to the MoU frustrated the process of transaction, the applicant invoked the arbitration clause. The applicant and respondent No. 5

issued notice dated 24.5.2007 to the named arbitrators to enter into reference and mutually agree upon a third arbitrator and commence arbitration

proceedings. Thereafter, the applicant issued another notice dated 1.9.2009 requesting the named arbitrators to take immediate steps to

commence arbitration proceedings and there being no action on the part of the named arbitrators to proceed with the arbitral proceedings, it is to

be construed that the named arbitrators abdicated their functions and therefore, the applicant has been compelled to approach this Court seeking

appointment of sole arbitrator for resolution of the disputes between the parties relatable to MoU dated 8.12.2005. Learned Senior Counsel

submits that the named arbitrators failed to perform the function entrusted to them under the MoU and therefore, the applicant is entitled to

approach this Court under sub-section (6) of Section 11 seeking appointment of a sole arbitrator for resolution of the disputes between the parties



relatable to agreement dated 8.12.2005. Learned Senior Counsel refers clauses (8) and (12) of the MoU and notices dated 24.5.2007, 1.9.2009

and 15.10.2009 in support of his submissions. It is suffice to refer the contents of notice dated 15.10.2009 which read as hereunder:

Sub: Your letter dated 15.9.2009

This is in response to your letter dated 15.9.2009 which has been sent in reply to a letter dated 1.9.2009 sent by me to Mr. K. Sudhakar Rao and

Gone Prakash Rao, arbitrators requesting them to take steps to commence arbitration proceedings at the earliest. It is clarified that the notice

dated 1.9.2009 has been issued in my individual capacity and not as a representative of any other person or persons. It is denied that there are any

contradictions, between the notice dated 1.9.2009 and the notice dated 24.5.2007.

It is denied that the agreement is void. Even assuming but not admitting that it is void, it is a settled proposition of law that the arbitration clause of

the agreement survives and issue whether the agreement is void or not can be agitated before the arbitral tribunal.

No proceedings have been initiated by me before any other forum as the memorandum of understanding contains an arbitration clause add the

proper forum for deciding disputes that arise out of the memorandum of understanding dated 8.12.2005 is the arbitral tribunal.

It is denied that the claim is barred by limitation. Even assuming but not admitting that it is, this issue can be agitated before the arbitral tribunal.

In view of the fact that a substantial amount of time has elapsed since the arbitration clause was invoked and the arbitrators having failed to initiate

the arbitration proceedings, I am now constrained to approach Hon"ble High Court seeking the appointment of an arbitrator u/s 11(6) of the

Arbitration and Conciliation Act, 1996.

11. Learned Senior Counsel would further contend that a reading of clauses (8) and (11) of the MoU indicates that the named

mediators/arbitrators have been conferred with power of adjudication of disputes during the process of satisfactory completion of the transaction

envisaged therein and any decision taken by them during the period of the entire transaction shall be final. A reading of all the clauses are suggestive

of the parties consenting of the adjudication of the disputes by arbitration. Inartistic drafting of arbitration clause in the agreement cannot be a

ground to reject the application. In support of his submissions, reliance has been placed on the decision of Supreme Court in VISA International

Ltd. Vs. Continental Resources (USA) Ltd., Much emphasis has been laid on paras (25) and (26) of the cited judgment, which read as

hereunder:-

(25) THE submission is unsustainable for more than one reason. No party can be allowed to take advantage of inartistic drafting of arbitration

clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and

material on record including surrounding circumstances.

(26) WHAT is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and

the evidence such as exchange of correspondence between the parties. The respondent in none of its letters addressed to the applicant suggested

that the dispute between the parties is required to be settled through conciliation and not by arbitration. In response to the applicant's letter

invoking the arbitration clause the respondent merely objected to the names inter-alia contending the suggested arbitration would not be cost

effective and the demand for arbitration itself was a premature one.

12. Learned Senior Counsel submits that arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer

the dispute to arbitration can be ascertained from the terms of the agreement, it is immaterial whether or not the expression "arbitration" or

"arbitrator" or "arbitrators" has been used in the agreement. What is required is to gather the intention of the parties as to whether they have

agreed for resolution of the disputes through arbitration. It is also contended by the learned Senior Counsel that the 1st respondent admitted of the

MoU dated 8.12.2005 in proceedings before the civil Court in OS No. 241 of 2007 on the file of the Chief Judge, City Civil Court, Hyderabad, in

which case, it is impermissible for him to deny the existence of arbitration clause in the MoU dated 8.12.2005.

13. Sri N. Subba Rao, learned Counsel appearing for the respondents 1 and 2 submits that the application filed by the applicant seeking

appointment of arbitrator, pursuant to the MoU dated 8.12.2005 is hopelessly barred by limitation under Article 54 of the Limitation Act. He

would also submit that the very validity of the MoU is the subject matter in Company Petitions Nos. 112 of 2007, 73 of 2007, 76 of 2007 and as

the Company Law Board ceased of the matter, the applicant being one of the parties to the MoU and the above-referred company petitions

cannot be permitted to take aid of any of the clauses therein. Appointment of arbitrator by taking aid of any of the provisions in the MoU will

substantially effect the pleadings of the parties before the Company Law Board. Before the Company Law Board, not only the parties to

proceedings but also the shareholders are parties and their rights and validity of the MoU are required to be adjudicated by the Company Law

Board. The respondents 5 to 9, who constitute first part in the MoU, have instituted various civil proceedings giving a go-bye to the arbitration

clause, even if it is to be construed that such a clause exists, and the said suits are pending adjudication and the applicant being one among the first

part in the MoU, cannot be permitted to take a different recourse than that of the respondents 5 to 9 by moving an application before this Court

under sub-sections (5) and (6) of Section 11 of the Arbitration and Conciliation Act. Learned Counsel took me to various proceedings that are

pending before the Civil Court and also the Company Law Board. The pending cases between the parties referred by the learned Counsel are:

Sl. No Case Number On the file of Court/Tribunal

(1) Company Petition 112 of Company Law Board, Addl. Prl. Bench, Chennai  
2007

(2) Company Petition 73 of Company Law Board, Addl. Prl. Bench, Chennai  
2007

(3) Company Petition 76 of Company Law Board, Addl. Prl. Bench, Chennai  
2007

(4) O.S.No. 241 of 2007 Chief Judge, City Civil Court, Hyd.

(5) O.S.No. 375 of 2007 Chief Judge, City Civil Court, Hyd.

(6) O.S.No. 235 of 2007 II Addl. Senior Civil Judge, City Civil Court, Hyd.

(7) O.S.No. 1288 of 2007 V Addl. Senior Civil Judge, City Civil Court, Hyd.

Learned Counsel also drew my attention to OS No. 76 of 2007 filed by respondent No. 5 on the file of Junior Civil Judge, Mancheri, which

subsequently, ended in dismissal as withdrawn. By referring clauses (8) and (11) of the MoU dated 8.12.2005, it is contended by the learned

Counsel that the role of the mediators/arbitrators is only to withhold the cheques issued by the applicant and his party pending successful

completion of the transaction and no adjudicatory role is conferred on the mediators/arbitrators. A reading of clauses (8) and (11) does not give

any room for doubt that they are custodians of the cheques issued by the applicant and his party and nothing more is required to be done by the

named arbitrators.

14. It is also contended by the learned Counsel that the applicant has not explained as to under what circumstances, he came in possession of nine

cheques. The applicant issued two replies to the notice dated 1.8.2006 issued on behalf of the 1st respondent taking contradictory stand. One

reply dated 22.8.2006 got issued by him individually and another reply dated 23.8.2006 got issued by him through D. Balakishen Rao jointly along

with K. Vidyasagar Rao, S. Harinder Rao, S. Mahender Rao and S. Ananda Rao. There is no consistency in the stand of the applicant and

respondents 5 to 9, who constitute first part to the MoU dated 8.12.2005. Learned Counsel took me to the copy of the reply notice dated

22.8.2006 got issued by respondent No. 6-Ashok Kumar Agarwal through Sri Shyam J. Agarwal and reply notice dated 23.8.2006 got issued by

respondent No. 5-K. Vidyasagar Rao, applicant-Shyam Sunder Agarwal, respondent No. 6-Ashok Kumar Agarwal, respondent No. 7-S.

Mahender Rao, respondent No. 9-S. Ananda Rao. In the reply notice dated 23.8.2006, respondent No. 6-Ashok Kumar Agarwal has denied the

execution of MoU/agreement dated 8.12.2005. The relevant portion of the reply notice on which much emphasis has been laid by the learned

Counsel reads as hereunder:

My client reiterates that he has neither entered into any agreement with your client nor he has any nexus with your client nor he has any knowledge

about any such agreement as having taken place with regard to sale and purchase of the shares of the said company and hereby declares that he is

not a party to any such agreement. My client is unable to understand as to on what basis your client has levelled allegations against him and

subjected my client to unnecessary harassment and mental agony. Your client has caused damage to the reputation of my client by getting issued

the notice under reply with copies to several others and has also subjected him to mental agony, for which your client is liable to compensate by the

same to my client by paying damages, which my client estimates at Rs. 5,00,000/-.

Learned Counsel also laid much emphasis on the relevant portion of the reply notice dated 23.8.2006, which came to be issued by D. Balakishen

Rao, Advocate on behalf of the applicant, respondent Nos. 5, 6, 7 and 9 and it is thus:

This is to inform you that your client Sri P. Narotham Rao and others including my clients have reached Memorandum of

Understanding/Agreement for sale and purchase- of shares on 8.10.2005. It is provided in the said Memorandum of Understanding/Agreement as

follows;

Whereas the parties of 1st part and parties of 2nd part together floated and incorporated a Company under the name and style of "M/s.

Mancherla Cement Company (P) Ltd." with the paid up capital of Rs. 5 crores i.e., 50 lakhs shares of face value of Rs. 10/- each.

It is also provided in clause 11 of the said Memorandum of Understanding that till the total transaction is satisfactorily completed and till entire sale

consideration is paid and till the personal guarantees of parties of 2nd part are substituted by the personal guarantees of the Associates of parties of

1st part with M/s. Andhra Bank, the above named Arbitrators/Mediators shall not handover the Share Certificate with duly signed share transfer

deeds in respect of the shares of the parties of 2nd part to the parties of 1st part. It is also provided in Clause 12 thereof that any decision to be

taken by the said Mediators/Arbitrators during the period of entire transaction in the event of any breaches committed by either of the parties shall

be final and binding on all the parties hereinabove.....

It is also not clear how the 9 cheques given by my client to Arbitrators i.e., Sri K. Sudhakar Rao and Gane Prakasha Rao were taken by your

client without completion of the transaction which is clear violation of the clause mentioned in Memorandum of Understanding. It is also not clear

how your client without depositing the 1st for Rs. 25 lakhs has deposited the Cheque No. 450543 dated 9.1.2006 for Rs. 78,12,500/-. There is

no legal enforceable debt existing between my clients and your client in respect of said cheques. It is under these circumstances, my clients had no

alternative except to instruct the Bank to stop the payments for the cheques issued by my clients to your client.

Learned Counsel also drew my attention to the Memo filed before the Company Law Board, Additional Prl. Bench, Chennai in Company

Petitions 73 of 2007, 76 of 2007, 112 of 2007 to buttress his submission that the company Court ceased of the matter and therefore, there is no

live issue relatable to the MoU dated 8.12.2005. It appears that the applicant herein is a signatory to the memo filed before the Company Law

Board. Copy of the joint memo finds place at page No. 312 of the material papers filed by respondents 1 and 2. The Company Law Board taking

on record the joint memo, passed the following order:

Heard learned Counsel for the parties. At the intervention of this Bench, the contesting parties could reach an amicable settlement by way of

interim arrangement in carrying on the day-to-day affairs and operations of the Company in terms of a joint Memo dated 30.8.2007, which is

taken on record and forms part of this order. The parties will strictly act in accordance with the said joint memo. This interim arrangement shall

remain in force until further orders. In these circumstances the order dated 1.8.2007 made in CP. No. 112 of 2007 stand vacated, which is,

however, without prejudice to the rights of the parties therein.

In the meanwhile, the pleadings in the company petitions will be completed by filing counter on or before 17.10.2007 and rejoinder to be filed by

31.10.2007. The company petitions will be heard on 7.11.2007 at 2.30 p.m.

The Bench Officer will forthwith forward a copy of this order to all the parties who are parties to the company petitions and Shri N.R. Sridharan,

CA, Chennai, for necessary compliance in terms of this order. The Company shall bear the remuneration payable to Shri N.R. Sridharan, CA.

The parties are at liberty to apply in case of any difficulty in implementation of this order.

15. Learned Counsel also placed reliance on the following decisions in support of his submissions that stale issue cannot be referred to arbitration

for adjudication.

(1) M/s. S.B.P. and Co. v. M/s. Patel Engineering Ltd., 2006 (1) ALD 10 (SC) : AIR 2006 SC 450 (1)

(2) DHV BV Vs. Tahal Consulting Engineers Ltd. and Others,

(3) Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd.,

(4) Speech and Software Technologies (India) Pvt. Ltd. Vs. Neos Interactive Ltd.,

(5) Visa International Limited v. Continental Resources (US) Limited (supra)

I do not wish to burden the judgment by referring the proposition of law laid down in the above-referred cases. It is suffice to refer the Speech and

Software Technologies" case (supra). In the said case, the Supreme Court held that the existence of arbitration agreement is a condition precedent

before exercise of powers u/s 11(6) of the Act. The preliminary matters to be considered by the Court are:

(1) Existence of arbitration agreement,

(2) Territorial jurisdiction,

(3) Whether there are live issues to be referred to the arbitrator, and

(4) whether application is filed within the period of limitation prescribed by the law. If the Court finds that the arbitration agreement does not exist

or is rescinded then the prayer for referring the dispute to the arbitrator will have to be rejected.

16. In Visa International Ltd."s case (supra), the Supreme Court observed that what is required to be gathered is the intention of the parties as to

whether they had agreed for resolution of the disputes through arbitration.

17. Learned Counsel appearing for the respondent No. 4 submits that clause (8) in the MoU/agreement dated 8.12.2005 does not confer any

adjudicatory role to the mediators/arbitrators and their role is only to retain the custody of the cheques during the process of successful completion

of the transaction, in which case, the question of referring the disputes between the parties to the named persons therein does not arise. In a way,

his contention is that the parties never intended that the disputes between them are required to be adjudicated by way of arbitration. Unless there is

clear, unequivocal intention expressed in the written agreement to resort to arbitration alone, an arbitration agreement does not come into

existence. In support of his submissions, reliance has been placed on the following decisions:

(1) S.B.P. and. Company v. Patel Engineering Ltd., 2009 (4) Arb.L.R 191 (SC)

(2) K. Narayana Raju, Contractor Vs. Union of India (UOI) and Others,

(3) Sai Priya Construction Company v. K. Anantha Kumari Satya Raju and another, 2006 (1) Arb.LR 569 (AP) (DB) : 2006 (3) ALD (NOC)

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(4) National Highways Authority of India and Another Vs. Bumihiway DDB Ltd. (JV) and Others,

(5) M/s. Kamala Solvent v. Manipal Finance Corporation Ltd. Manipal, AIR 2001 Mad. 440

(6) Indowind Energy Ltd. v. Wescare (I) Ltd. and another, 2010 (2) Arb.L.R 232 (SC)

(7) Jagdish Chander Vs. Ramesh Chander and Others,

(8) Jagatjit Jaiswal and another v. Karmajit Singh Jaiswal, 2007 (4) Arb.L.R 300 (Del)

(9) Wellington Associates Ltd. Vs. Mr. Kirit Mehta,

(10) State of Orissa and another etc. Vs. Sri Damodar Das,

(11) Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another,

(12) India Household & Healthcare Ltd. v. LG Household, 2007 (1) Arb. L.R 468

It is suffice to refer the decision of Supreme Court in State of Orissa v. Damodar Das (supra). The clause, which fell for consideration before the

Supreme Court read as hereunder:

25. Decision of Public Health Engineer to be final -- Except where otherwise specified in this contract, the decision of the Public Health Engineer

for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the, meaning of the specifications,

drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question,

claim, right, matter or thing, whatsoever in any way arising out of, or relating to, the contracts, drawings, specifications, estimates, instructions,

orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress

of the work or after the completion or the sooner determination thereof of the contract.

19. The Supreme Court after considering the definition of arbitration agreement in Section 2(a) of the Act came to the conclusion that the above-

referred clause in the contract cannot be construed as an "arbitration clause". Para (10)" of the cited judgment needs to be noted and it is thus:

(10) Section 2(a) of the Act defines ""arbitration agreement"" to mean ""a written agreement to submit present or future differences to arbitration,

whether an arbitrator is named therein or not"". Indisputably, there is no recital in the above clause of the contract to refer any dispute or difference

present or future to arbitration. The learned Counsel for respondent sought to contend from the marginal note, viz., ""the decision of Public Health

Engineer to be final"" and any other words ""claim, right, matter or thing, whatsoever in any way arising out of the contracts, drawings, specifications,

estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same, whether

arising during the progress of the work or after the completion or the sooner determination thereof of the contract"" and contended that this clause

is wide enough to encompass within its ambit, any disputes or differences arising in the aforesaid execution of the contract or any question or claim

or right arising under the contract during the progress of the work or after the completion or sooner determination thereof for reference to an

arbitration. The High Court, therefore, was right in its conclusion that the aforesaid clause gives right to arbitration to the respondent for resolution

of the dispute/claims raised by the respondent. In support thereof he relied on M/s. Ram Lal Jagain Nath v. Punjab State through Collector,

Hissar, AIR 1996 Pun. 436. It is further contended that for the decision of the Public Health Engineer to be final, the contractor must be given an

opportunity to submit his case to be heard either in person or through Counsel and a decision thereon should be given. It envisages by implication

existence of a dispute between the contractor and the department. In other words, the parties construed that the Public Health Engineer should be

the sole arbitrator. When the claim was made in referring the dispute to him, it was not referred to the Court. The respondent is entitled to avail the

remedy under Sections 8 and 20 of the Act. We find it difficult to give acceptance to the contention. A reading of the above clause in the contract

as a conjoint whole would give us an indication that during the progress of the work or after the completion or the sooner determination thereof of

the contract, the Public Health Engineer has been empowered to decide all questions relating to the meaning of the specifications, drawings,

instructions hereinbefore mentioned and as to the quality of workmanship or material used on the work or as to any other question, claim, right,

matter or thing whatsoever in any way arising out of, or relating to, the contracts, drawings, specifications, estimates, instructions, order or those

conditions or otherwise concerning the works or the execution or failure to execute the same has been entrusted to the Public Health Engineer and

his decision shall be final. In other words, he is nominated only to decide the questions arising in the quality of the work or any other matter

enumerated hereinbefore and his decision shall be final and bind the contractor. A clause in the contract cannot be split into two parts so as to

consider one part to give rise to difference or dispute and another part relating to execution of work, its workmanship etc. It is settled now that



clause in the contract must be read as a whole. If the construction suggested by the respondent is given effect then the decision of the Public Health

Engineer would become final and it is not even necessary to have it made rule of the Court under the Arbitration Act. It would be hazardous to the

claim of a contractor to give such instruction and give power to the Public Health Engineer to make any dispute final and binding on the contractor.

A careful reading of the clause in the contract would give us an indication that the Public Health Engineer is empowered to decide all the questions

enumerated therein other than any disputes or differences that have arisen between the contractor and the Government. But for Clause 25, there is

no other contract to refer any dispute or difference to an arbitrator named or otherwise.

19. The question is whether the parties have agreed to resolve their disputes by arbitration or through conciliation. Be it noted that the applicant has

not pleaded in the reply notice dated 23.8.2006 that the disputes relatable to MoU/agreement are required to be resolved by taking recourse to

arbitration or conciliation. What all the applicant stated in the reply notice is that he was not aware as to how nine cheques deposited with K.

Sudhakar Rao and Gone Prakash Rao were taken away by 1st respondent-Narotham Rao without completion of the transaction. Various

proceedings have been initiated by the shareholders of MCC questioning the MoU/Agreement dated 8.12.2005 and allotment of 50000 shares to

third parties. The details of the company petitions filed by the shareholders have been stated in the earlier part of the order. Apart from filing the

company petitions before the Company Law Board questioning the validity of the MoU dated 8.12.2005 and subsequent allotment of shares on

7.12.2005, certain proceedings have been initiated before the civil Court questioning the validity of the MoU dated 8.12.2005 (viz., OS No. 235

of 2007 on the file of II Senior Civil Judge, Hyderabad, OS No. 76 of 2007 on the file of Junior Civil Judge, Mancheri). Pending proceedings

before the Company Law Board and the civil Court, the applicant issued notice dated 1.9.2009 requesting K. Sudhakar Rao and Gone Prakash

Rao to take immediate steps to commence arbitration proceedings. Thereafter, the applicant by letter dated 15.9.2009 invoked the arbitration

clause in the MoU dated 8.12.2005. The 1st respondent issued a detailed reply. Essentially, it is required to be examined whether the two named

arbitrators are required to adjudicate any dispute between the parties or only custodians of certain documents such as nine cheques for successful

completion of the transaction envisaged in the MoU ?

20. There are two parts to the MoU. The 1st part comprises the applicant, respondent No. 5, respondent Nos. 6 to 9 and the 2nd part comprises

respondents 1 to 4. The parties of the 1st part and their associates held 50.20% shareholding whereas the parties of the 2nd part and their

associates held 44.80% share holding in MCC. The parties of the 2nd part sold their share holding to the parties of the 1st part for a total

consideration of Rs. 6.50 crores and the parties of the 1st part agreed to pay the sale consideration as per the schedule mentioned in Clause (4) of

the MoU. It is trite to refer clause (4), which reads as hereunder:

The parties of 1st part and 2nd part mutually agreed to the following schedule in regard to the above sale consideration of Rs. 6,50,00,000/-

(Rupees six crores and fifty lakhs only) the details of which are as follows:

(a) Rs. 25,00,000/- (Rupees twenty five lakhs only) on the date of sale deed being executed by ACC Ltd. in favour of MCC Private Limited.

(b) Rs. 1,56,25,000/- (Rupees one crore, fifty six lakhs and twenty five thousand only) on or before 9.1.2006.

(c) Rs. 1,56,25,000/- (Rupees one crore, fifty six lakhs and twenty five thousand only) on or before 9.2.2006,.

(d) Rs. 1,56,25,000/- (Rupees one crore, fifty six lakhs and twenty five thousand only) on or before 9.3.2006.

(e) Rs. 1,56,25,000/- (Rupees one crore, fifty six lakhs and twenty five thousand only) on or before 9.4.2006.

21. As per the terms of the MoU, the parties of the 1st part agreed to pay the entire sale consideration of Rs. 6,50,00,000/- in the name of P.

Narotham Rao-1st respondent herein who is No. 1 among the parties of the 2nd part and in turn, P. Narotham Rao to distribute the said amount

to the remaining parties of the 2nd part and their associates in proportion to their shareholding. The terms of the MoU also indicate that the parties

of the 1st part handed over nine cheques favouring P. Narotham Rao through K. Sudhakar Rao and Gone Prakash Rao. The purpose for which

the cheques were entrusted to K. Sudhakar Rao and Gone Prakash Rao has been stated in clause (8) of the MoU. Clauses 8 and 12 of the MoU

dated 8.12.2005 need to be noted and they read as hereunder:

8. The parties hereinabove declare and confirm that for successful completion of this transaction in order to avoid any further unforeseen litigations,

both the parties hereby mutually appointed Sri K. Sudhakar Rao S/o Sri late K. Madhava Rao, R/o Plot No. 7, UBI Colony, Road No. 3,

Banjara Hills, Hyderabad and Sri Gone Prakash Rao, S/o Gone Chalapathi Rao R/o Transport Guest House, Tarnaka, Hyderabad as mediators

and arbitrators to whom the above cheques as well as all other following documents are handed over and the same will be under their custody till

satisfactory completion of the entire transaction as per the terms and conditions contained herein.

12. It is further agreed that any decision to be taken by said Mediators/Arbitrators during the period of entire transaction in the event of any

breaches committed by either of the parties shall be final and binding on all the parties hereinabove.

22. What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties as to

whether any adjudicatory role has been assigned to the above-referred two named arbitrators with whom the cheques were deposited ?

23. A reading of Clauses 8 and 12 indicates that though the above-named two persons have been styled as "arbitrators", they are only custodians

of the cheques and certain other documents, which they have to retain pending successful completion of the transaction. They are not empowered

to adjudicate any dispute between the parties relatable to the MoU dated 8.12.2005. Even the conduct of the parties of the 1st part to the MoU in

approaching the civil Court seeking certain reliefs suggests that parties to the MoU never conferred any adjudicatory role on S/Sri K. Sudhakar

Rao and Gone Prakash Rao. There is no material on record to infer that the parties to the MoU intended to resolve their disputes through

conciliation or arbitration. When such is the intention of the parties to the MoU, the instant application under sub-sections (5) and (6) of Section 11

seeking appointment of a sole arbitrator is wholly misconceived. Accordingly, the arbitration application is dismissed. No costs.