

A 2014 (1) SCR 308 relied on Para 17
 2014 (9) SCALE 768 relied on Para 17

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11604 of 2014.

B From the Judgment & Order dated 28.03.2014 of the High Court of Judicature at Bombay, Bench at Aurangabad in Arbitration Application No. 12 of 2013.

C Vivek C. Solshe, C.G. Solshe for the Appellants.

 Amol B. Karande for the Respondents.

 The Judgment of the Court was delivered by

D **KURIAN, J.:** 1. Leave granted.

E 2. Once a judicial authority takes a decision under Section 8(1) of The Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") declining to refer the dispute pending before it to arbitration and the said decision having become final, whether either party to the proceedings can thereafter invoke the jurisdiction of the Chief Justice under Section 11(6) of the Act, is the question arising for consideration in this case. The scope of Section 8(3) of the Act is also an ancillary issue.

F 3. Appellants are defendant nos. 1, 2, 3 in Special Suit No. 211 of 2009 on the file of Civil Judge Senior Division at Aurangabad, Maharashtra. The suit is filed by a partnership firm, viz., M/s. Rana Sahebram Mannulal and three others. The dispute mainly pertains to the partnership business. Following are the reliefs claimed:

G "A) The special civil suit of the plaintiffs may kindly be decreed with costs;

 B) The plaintiffs may kindly be declared as valid partners of the registered partnership firm under the

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name and style M/s S.M. Rana (Rana Sahebram Mannulal) and further it also may kindly be declared that, the plaintiffs are the owners and possessors of the land gut no. 240 situated at Dahegaon Tq. Gangapur to the extent of 81R and the land gut No. 237 to the extent of 5H. 85R. situated at Dahegaon Tq. Gangapur dist. Aurangabad and the land gut no. 97/2 admeasuring 1 Acre 34R. situated at Shranapur Tq. and Dist. Aurangabad and Gut No. 121 admeasuring 1H. 14R. situated at village Tisgaon Tq. and Dist. Aurangabad and the Plot No. 12 out of the land Gut No. 17/2 admeasuring 5.30R. situated at Garkheda Tq. and Dist. Aurangabad and it may also be further declared the said property belongs to the partnership firm and the plaintiffs are the owners and possessors of the said property being the valid partners of the registered firm and it may also be declared that the plaintiffs are the owners of their respective shares in the said properties.

- C) It may kindly be declared that the registered sale deeds dated 1.8.2007 executed by defendant no.1 in favour of defendant no.2 in respect of land gut no.240 to the extent of 81R. situated at village Dahegaon Tq. Gangapur Dist. Aurangabad bearing registration Nos.3942/2007 and the registered sale deed dated 6.9.2007 bearing registration No.4506/2007 in respect of land gut no.237 to the extent of 2H. 82R, situated at village Dahegaon Tq. Gangapur Dist. Aurangabad executed by defendant no.1 in favour of defendant no.7 and the registered sale deed dated 30.7.2007 bearing registration no.4318/2007 executed by defendant no.2 in favour of defendant no.1 in respect of land gut no.97/2 to the extent of 20R. situated at Sharanapur Tq. and Dist. Aurangabad, are null void, ab-initio and not

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binding upon the plaintiffs.

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- D) It may kindly be declared that the property purchased by the defendant no.4 bearing land gut no.17/2 out of it plot no.1 admeasuring 584.36 sq.mtrs. Situated at Garkheda, Tq. and Dist. Aurangabad and the land gut no.186 admeasuring 12A. 7G. purchased in the name of defendant no.4 by defendant no.1 situated at Dahegaon Tq. Gangapur Dist. Aurangabad and the land Gut No.56 in the name of defendant no.3 to the extent of 25R and defendant no.5 to the extent of 25R. situated at Sharanapur Tq. and Dist. Aurangabad and the land gut no.213 admeasuring 35R purchased in the name of defendant no.3, under registered sale deed no.1781 dated 25.4.2007 situated at Dahegaon Tq. Gangapur Dist. Aurangabad and the land gut no.185 to the extent of 4A, 15G purchased in the name of plaintiff no.1 and defendant no.1 to the extent of 4A, 15G, situated at Dahegaon Tq. Gangapur Dist. Aurangabad and the land gut no.167/2 purchased in the name of defendant no.167/2 purchased in the name of defendant no.5 admeasuring 8A. 22G, situated at Dahegaon Tq. Gangapur Dist. Aurangabad, and the land Gut No. 6 purchased in the name of defendant no.5 admeasuring 6A, situated at Rahimpur Tq. and Dist. Aurangabad and the land plot No.16 admeasuring 419 sq. mtrs. Situated at Mustafabad Tq. and Dist. Aurangabad purchased in the name of defendant no.4 is the property of partnership firm. As the said properties are purchased from the nexus and income of the partnership firm and therefore, it may kindly be declared that, the said properties belonging to the partnership firm i.e. M/ s S.M. Rana (Rana Sahebram Mannulal).

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- E) The defendants no. 1 to 7 may kindly be restrained permanently from alienating and creating the third party interest over the suit properties by issue of perpetual injunction against the defendants no.1 to 7 their servants, their relatives, their agents or who so ever claims on their behalf permanently. A
- F) The profit from the whole sale kerosene business run through the partnership firm M/s S.M. Rana (Rana Sahebram Mannul) pursuant to the whole sale kerosene dealers license no.20/88 may kindly be recovered from the defendant nos.1, 2 and 3 from last three years with 18% interest per annum and it may be awarded to the plaintiffs from the defendant nos. 1, 2 and 3. B C
- G) Any other suitable and equitable relief may kindly be granted in favour of the plaintiffs." D

4. The defendants/appellants had filed an application under Section 9A of the Code of Civil Procedure, 1908¹ (hereinafter referred to as "the CPC"), as applicable to the State of Maharashtra, to dismiss the suit for want of jurisdiction since

1. "9A. Whereof the hearing of application relating to interim relief in a suit, objection to jurisdiction is taken such issue to be decided by the court as a preliminary issue.-(1) Notwithstanding anything contained in this Code or any other law for the time being in force, if at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise, made in any suit, an objection to jurisdiction of the Court to entertain such suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. Any such application shall be heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit. E

(2) Notwithstanding anything contained in sub-section (1), at the hearing of any such application, the Court may grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to the jurisdiction". F G H

A the partnership deed contained a provision for arbitration and
hence the disputes were liable to be resolved in terms of the
Act. In other words, application filed by defendants, in essence,
was to be treated as an application under Section 8(1) of the
Act. The same was opposed by the plaintiff. The trial court
B upheld the objection and held that it was within the jurisdiction
of the court to try the dispute and, therefore, it was not required
under law to refer the same to arbitration.

5. The suit proceeded. The parties have examined all their
witnesses.

C 6. While so, the respondents herein approached the Chief
Justice of the High Court of Judicature at Bombay in Arbitration
Application No. 12/2013 under Section 11(6) of the Act seeking
appointment of an arbitrator as per the terms of the partnership
D deed. At paragraph-4 of the application, it is stated as follows:

E "4. The applicants further states and submits that, as per
clause 6 of the Partnership deed dated 13.12.2008
marked and annexed as Exhibit-B, it was decided
between the partners that if any dispute shall arise
between them in respect of the conduct of the business of
partnership or in respect of the interpretation, operation or
enforcement of any of the terms and conditions of the deed
in respect of any other matter, cause or thing whatsoever,
F the same shall be referred to the arbitration of the person
appointed by the partners whose decision shall be final
and binding on all parties and legal representatives."

7. And further at paragraph-9 of the application, it is stated
as follows:

G "9. The applicant has not filed any other petition,
application or other proceedings before this Hon'ble Court
or before the Hon'ble Supreme Court of India, except the
present one touching the subject matter of this Arbitration
Application. However, the applicants deems it necessary
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to disclose that applicants have filed one civil suit for declaration and for other reliefs before the learned Civil Judge Junior Division Aurangabad bearing Regular Civil Suit No.2014/2012 having old special civil suit No.211/2009 which is still pending for adjudication. However, the subject mater of the suit involves some third parties also and therefore that would not be an impediment to allow the present application for appointment of the sole arbitrator. The applicant craves leave and liberty to file the copy of the plaint as and when necessary.”

8. The appellants herein opposed the payer. To quote:

“7. The respondents no.1 to 3 humbly submit that from 2009 the parties are prosecuting the said spl. C.S. No.211/09 (now RCS No. 2014/2012) filed by applicants/petitioners herein and in fact the evidence on their part i.e. plaintiffs is closed long back and the evidence of defendants is going on and rather the defendants are on the verge of closing their evidence after most probably examining another few witnesses.

8. The respondents no.1 to 3 state that the present application u/s 11 of the said Arbitration Act filed by the applicants is nothing but to either delay or overcome the proceedings in the suit pending between the parties.

9. The respondents no.1 to 3 humbly submit that in fact the applicants have waived their right of invoking the arbitration clause the moment they opposed the application filed by this answering respondent in the said suit.”

9. The High Court, as per the impugned order, ignored the objection and held as follows:

“4. Sub-section (3) of Section 8 of the Act does not preclude appointment of arbitration during course of litigation pursuant to agreement. Taking into account sub-

A section (3) of Section 8 and Section 11 of the Arbitration and Conciliation Act, 1996, it would be expedient that pursuant to clause 6 of the partnership deed, a proper person be appointed as arbitrator to entertain dispute between the parties.”

B 10. Heard learned Counsel appearing for both the parties.

C 11. The facts as narrated by us herein before would show that the application filed by the respondents herein under Section 11 of the Act is nothing but an abuse of process. The partnership firm itself is the first plaintiff in the suit. The dispute between the parties is the subject of the suit. Precisely for that reason, the appellants sought the matter to be referred to the arbitrator. That was opposed by the respondents. When the suit is at the final stage, the respondents have sought appointment of an arbitrator under Section 11(6) of the Act. Having approached the civil court and having opposed the reference to arbitration under Section 8(1) of the Act and the decision of the court in that regard having become final, the respondents cannot invoke jurisdiction under Section 11(6) of the Act; it is hit by the principle of issue estoppel.

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E 12. There is yet another angle to the issue. Section 8 of the Act reads as follows:

F **“8. Power to refer parties to arbitration where there is an arbitration agreement.—(1)** 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 arbitration.

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H (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

13. Under Section 8(1) of the Act, either party is free to apply to the judicial authority within the prescribed time to refer the parties to arbitration, in case the matter pending before it is the subject matter of an arbitration agreement. Section 8(3) of the Act however makes it clear that notwithstanding the application under Section 8(1) of the Act and the issue pending before the judicial authority, arbitration may be commenced or continued and an arbitral award can also be made. In other words, despite the pendency of an application under Section 8(1) of the Act before the judicial authority, Section 8(3) of the Act permits the parties to commence and continue the arbitration and the arbitral tribunal is free to pass an award. That alone is what is contemplated under Section 8(3) of the Act.

14. In the suit instituted by the firm and some of the respondents, the order passed by the civil court that it was well within its jurisdiction to try the suit, despite the objection regarding the existence of a clause for arbitration, has become final. Thereafter, Section 11(6) jurisdiction of the Chief Justice cannot be invoked by either party. The principle of *res judicata* will also be attracted in such a case.

15. In Satyadhyan Ghosal and others v. Deorajin Debi (Smt.) and another,² this principle was discussed in detail and it has been settled as follows. To quote:

“7. The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact

2. AIR 1960 SC 941.

A or a question of law — has been decided between two
 B parties in one suit or proceeding and the decision is final,
 either because no appeal was taken to a higher court or
 because the appeal was dismissed, or no appeal lies,
 neither party will be allowed in a future suit or proceeding
 C between the same parties to canvass the matter again.
 This principle of *res judicata* is embodied in relation to
 suits in Section 11 of the Code of Civil Procedure; but even
 where Section 11 does not apply, the principle of *res*
judicata has been applied by courts for the purpose of
 achieving finality in litigation. The result of this is that the
 original court as well as any higher court must in any future
 litigation proceed on the basis that the previous decision
 was correct.

D 8. The principle of *res judicata* applies also as between
 two stages in the same litigation to this extent that a court,
 whether the trial court or a higher court having at an earlier
 stage decided a matter in one way will not allow the parties
 to re-agitate the matter again at a subsequent stage of the
 same proceedings. ...”

E 16. In Hope Plantations Ltd. v. Taluk Land Board,
Peermade and another³, it was held that the general principle
 underlying the doctrine of *res judicata* is ultimately based on
 considerations of public policy. One important consideration of
 F public policy is that the decisions pronounced by courts of
 competent jurisdiction should be final, unless they are modified
 or reversed by appellate authorities; and the other principle is
 that no one should be made to face the same kind of litigation
 twice over, because such a process would be contrary to
 G considerations of fair play and justice.

17. The principles as discussed above on *res judicata*
 have been consistently followed by this Court. And the recent
 judgments in that regard are in Dr. Subramanian Swamy v.

H 3. (1999) 5 SCC 590.

State of Tamil Nadu and others⁴ and in Surjit Singh and others v. Gurwant Kaur and others⁵. Thus, once the judicial authority takes a decision not to refer the parties to arbitration, and the said decision having become final, thereafter Section 11(6) route before the Chief Justice is not available to either party.

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18. With great respect, the designated Judge has gone wholly wrong in passing the order under Section 11 of the Act when the civil court is in seisin of the dispute and where arbitration has already been declined by the said court.

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19. The impugned order is hence set aside. The appeal is allowed with costs of Rs.25,000/-.

Devika Gujral

Appeal allowed.

4. (2014) 5 SCC 75.

5. 2014 (9) SCALE 768.