

SUPREME COURT OF INDIA

Brigadier Man Mohan Sharma, FRGS (Retd.)

Vs.

Lt. Gen. Depinder Singh

C.A.No.6853 of 2008

(Altamas Kabir and Markandey Katju JJ.)

26.11.2008

JUDGMENT

Altamas Kabir, J.

1. Leave granted.

2. The respondent herein, Lt. General Depinder Singh (Retd.), entered into a Publication Agreement with Dattatreya Prakashan in September, 1991, for publication of his book titled "IPKF in Sri Lanka" regarding his experiences while leading the Indian Peace Keeping Force in Sri Lanka. Pursuant to the said Agreement, the first edition of the book was published in 1991. In paragraph 2 of the said Agreement, whereby the respondent assigned his exclusive rights for production and publication of the book to Dattatreya Prakashan, it was indicated as follows:

"2. The AUTHOR(S) hereby assigned to the PUBLISHERS, during the legal terms of copyright including any renewals thereof, the exclusive rights to produce and publish the WORK in a volume form in any part of the world in the original language in which it is written as also to license its translation in any other languages and publication of any other editions, but the copyright in the WORK shall remain vested in the AUTHOR(S). The AUTHOR (S) shall not during the continuance of this Agreement publish or cause to be published in any part of the world any copy of the WORK or any translation thereof save as herein provided."

3. The business interest in Dattatreya Prakashan was acquired by the appellant who was carrying on business in the name and style of "Trishul Publications", which published the second edition of the book in May, 1992. From the materials on record it appears that, although, initially there was a demand for the book, such demand decreased and the appellant was, thereafter, reluctant to invest money in printing further editions of the book. In fact, in response to the respondent's query regarding publication of a further edition the appellant on 11.11.1991 wrote to the respondent and expressed his unwillingness to publish any further edition of the book. He also informed the respondent on 1.6.1993 that the book was a dead

stock and it had to be pushed at a lower price. On 28.10.1997, the appellant again wrote to the respondents stating that he had conducted a market survey and the demand of the book did not warrant any reprint. He also advised the respondent to authorize one Bharat Verma to publish the book. As the said letter is relevant to a decision in this case, the contents thereof are reproduced hereinbelow:

"With reference to our last tele-conversation, I have carried out a thorough market survey and come to the conclusion that there is no large enough demand for the book warranting a special reprint. I have tried to check up from Lancers but drawn a blank. Bharat Verma is a good businessman and has perhaps received some demand from his foreign contacts of which his staff are not aware. He will do a good job for the Book and you may kindly authorize him to publish. No problem. I have, however, a suggestion. You may reshape the book - a new book titled "Failure of IPKF in Srilanka" and draw lessons from it for posterity....."

4. The respondent, thereafter, approached one Shri Upender Arora, sole proprietor of Natraj Publishers, with a request to print and publish the book in question. Thereafter, by a letter dated 28.8.2000 the respondent informed Shri Arora that he had no objection to Mr. Arora's desire to reprint 1000 copies of the book, but he also suggested that Shri Arora should obtain the concurrence of the appellant for doing so.

5. Pursuant to the aforesaid suggestion, Shri Arora wrote to the appellant on 31.8.2000 stating that the respondent had granted permission to reprint the book but had also suggested that concurrence of the appellant should be obtained. Shri Arora, accordingly, requested the appellant to agree to the proposal so that he could go ahead with the reprint of the book. In reply to the said letter, the appellant on 2.9.2000 wrote back to Shri Arora as follows:

"TRISHUL PUBLICATIONS 216, Sector-28, Arun Vihar, Noida-201 303. 2 Sep 2000 NATRAJ PUBLISHERS DEHRADUN THE IPKF IN SRI LANKA

Dear Sir,

Ref. Your letter of Aug 31, 2000.

2. Kindly go ahead with the reprinting of IPKF in Srilanka.

3. Do send us a complimentary copy.

4. We could help you in the marketing at a suitable discount. Yours faithfully, (M.M. SHARMA)"

6. While giving his concurrence to Shri Arora to go ahead with the reprinting of the book, the appellant also wrote to the respondent on 5th September, 2000, indicating that although he had given his consent to the reprint of 1000 copies of the Book the reprint would have to

have the Trishul name on the jacket as well as a suitable noting on the copyright page, namely, "First Published by Trishul Publications, NOIDA". "This edition with special permission from Trishul Publications"

7. Pursuant to the consent given by the appellant, Shri Arora published the book without acknowledging the fact that such publication was with the leave and concurrence of Trishul Publications. Claiming that such publication by Shri Arora amounted to piracy and plagiarism, the appellant sent a detailed report to the Copy Right Board in terms of Section 19A of the Copy Right Act for necessary administrative action. The appellant also issued a notice on 10.5.2002 to the respondent and also to Shri Arora requiring them to desist from distribution of the "Parallel edition of the book".

In stead of doing so, the respondent by a letter dated 20.6.2001 terminated the agreement between the parties, which resulted in the filing of an application by the appellant under Sections 8 and 11 of the Arbitration and Conciliation Act, 1996, before the Chief Justice of Delhi High Court, invoking clause 17 of the Agreement which contains the arbitration agreement in the following terms : "ARBITRATION

17. If any question, difference or dispute shall arise between the AUTHOR (S) and the PUBLISHERS relating to this Agreement or any matter arising there from or incidental thereto, the same shall be submitted to the arbitration of two persons (one to be named by each party) and in case of the said arbitrators not agreeing, then it may be submitted to the award of an umpire to be appointed by the arbitrators in writing before proceeding on the reference. The decision of the arbitrator or, in the event of their agreeing of the umpire appointed by them, shall be final and conclusive. The provisions of the Indian Arbitration Act 1940 and the Rules there under any statutory modifications thereof shall be deemed to apply to the reference."

8. The application was heard by the designated Judge who came to the conclusion that the appellant had forfeited all his rights in connection with the book after having given his consent to Natraj Publishers to go ahead with the reprint of the same. The learned Judge also held that the appellant was estopped by his own act and conduct from asserting any right in support of the said book. According to the learned Judge, there was hardly any dispute which needed further reference to arbitration.

9. Another fact which weighed with the learned Judge was that Shri Arora had filed a suit which was pending in the Court of District Judge, Dehradun, Uttranchal, and the issues involved therein were purportedly identical with those raised in the application for appointment of an Arbitral Tribunal. The learned Judge also observed that this fact had not even been mentioned by the appellant in his application for appointment of an Arbitral Tribunal.

10. On the basis of his said conclusions, the learned Judge dismissed the application filed by the appellant.

11. The Division Bench in appeal taking note of the pending civil suit filed by Shri Arora in which both the appellant as well as the respondent had been made parties, chose not to interfere with the decision of the learned designated Judge and dismissed the appeal in order to avoid conflicting decisions.

12. Appearing in support of the appeal, Mr. M.S. Vинаик, and Ms. Anjali Sharma, learned advocates for the appellant, submitted that both the learned designated Judge and also the Division Bench had misunderstood the scope of Section 11 of the Arbitration and Conciliation Act, 1996, in rejecting the appellant's prayer for appointment of an Arbitral Tribunal on the ground that a civil suit was pending between Shri Arora, the appellant and the respondent. It was urged that the disputes in the pending civil suit and those raised in the application for appointment of an Arbitrator were not the same, though based on the same set of facts.

13. It was urged that while the pending suit had been filed by Shri Arora, who was not a party to the Publication Agreement, the prayer for appointment of an Arbitral Tribunal had been made by the appellant with regard to the disputes that had arisen between the appellant and the respondent out of the same Agreement and had little to do with Shri Arora who had merely been granted permission by the appellant to reprint 1000 copies of the Book. It was submitted that the dispute between the appellant and the respondent stemmed from breach of the conditions of the Agreement, as also the termination thereof, which gave rise to disputes inter se between the parties and that it was for such purpose that paragraph 17 had been included in the Publication Agreement. It was submitted that the learned designated Judge had wrongly dismissed the appellant's application on the erroneous finding that hardly any dispute existed between the parties which warranted the appointment of an Arbitral Tribunal. The decision of the Division Bench was also impugned on the same grounds.

14. Dr. Roxna Swami, who appeared for the respondent, on the other hand contended, that it was clear from the letters addressed by the appellant to the respondent that he had no intention of publishing any further edition of the book and he actually advised the respondent to authorize one Bharat Verma to publish further editions of the book. Instead of entrusting Bharat Verma with the publication of the further edition of the book as suggested by the appellant, the respondent gave such right to Shri Arora and Natraj Publications after terminating the Publication Agreement with the appellant.

15. The learned counsel also submitted that the civil suit filed by Shri Arora covered all the said issues, and, as had been rightly held by the learned designated Judge, continuance of the suit as well as the arbitration proceedings simultaneously, could result in conflicting decisions.

16. Learned counsel submitted that there was no case for interference with the decisions both of the designated Judge and also the Division Bench of the High Court.

17. Having considered the submissions made on behalf of the parties and having further perused the materials on record, we find ourselves unable to agree with the decision of the

learned designated Judge as also that of the Division Bench of the High Court impugned in this appeal.

18. While the learned Single Judge came to the conclusion that there was hardly any dispute between the parties which merited the appointment of an Arbitral Tribunal and that a civil suit was pending over the selfsame issues, the Division Bench relied more on the pendency of the pending civil suit at Dehradun in rejecting the appellant's prayer for appointment of an Arbitral Tribunal for settlement of the dispute which according to the appellant had arisen between the parties.

19. There is no denying the fact that a Publication Agreement had been executed between the appellant and the respondent herein by which the power to produce and publish the book in question during the period of the Copy Right and its extension was assigned by the respondent to the appellant. It is quite true that the appellant did not think it fit to publish a third edition of the book at the relevant point of time as there was little demand for the same, but it also appears from the materials disclosed that he had agreed to reprint of the second edition to the extent of 1000 copies by Shri Arora. The very fact that the Publication Agreement was terminated by the respondent is a matter of dispute between the appellant and the respondent. What would be the commercial ramifications on account of the publication of the edition by Shri Arora is also a matter between the appellant and the respondent to a large extent. These are issues which cannot be decided in the suit filed by Shri Arora, as this amounts to breach of the terms of the Publication Agreement with which Shri Arora had no concern. The principle of estoppel sought to be invoked by the learned designated Judge, also appears to have been wrongly applied to the facts of the case since the learned designated Judge was only required to examine as to whether any dispute existed between the parties which could be referred to arbitration. The said question, in our view, should have been left to the Arbitral Tribunal for a decision.

20. For the reasons aforesaid, we are unable to sustain the order of the Division Bench of the High Court impugned in this appeal or the judgment of the learned designated Judge, and, accordingly, set aside the same. The matter is remanded to the learned designated Judge for appointment of an Arbitral Tribunal in accordance with the Arbitration Agreement contained in paragraph 17 of the Publication Agreement arrived at between the respondent and the appellant in September 1991.

21. The appeal is allowed. There will, however, be no order as to costs.