

SUPREME COURT OF INDIA

Today Homes & Infrastructure Pvt. Ltd.

Vs.

Ludhiana Improvement Trust

C.A.No.4596 of 2013

(Altamas Kabir CJI. and Surinder Singh Nijjar JJ.)

10.05.2013

JUDGMENT

ALTAMAS KABIR, CJI.

1. Special Leave Petition (Civil) No.7334 of 2010 and Special Leave Petition (Civil) No.11778 of 2010 have been filed by M/s Today Homes and Infrastructure Pvt. Ltd. and Mapletree Properties Pvt. Ltd. respectively, against a common judgment and order dated 08.10.2009, passed by the Punjab & Haryana High Court in Arbitration Case No.76 of 2007. Special Leave Petition (Civil) No.10795 of 2010 has been separately filed by M/s Mapletree Properties Pvt. Ltd. against the judgment and order dated 26.03.2010, passed by the aforesaid High Court in R.A. No.49-CII/2010 (of M) in Arbitration Case No.76 of 2007. In addition I.A. No.2 of 2010 has been filed by M/s Mapletree Properties Pvt. Ltd. in Special Leave Petition (Civil) No.26173 of 2010 filed by Ludhiana Improvement Trust for vacating the interim order of stay passed on 15.09.2010, or modification thereof. I.A. No.3 of 2010 has been filed by Ludhiana Improvement Trust in the said Special Leave Petition to bring on record certain additional documents. Both the said IAs have been taken up for hearing along with the four Special Leave Petitions, as referred to hereinabove. Leave granted in all the Special Leave Petitions.

2. The Ludhiana Improvement Trust, hereinafter referred to as "the Trust", the Appellant in the appeal arising out of SLP(C) No. 26173 of 2010, was constituted under the Punjab Town Improvement Act, 1922, hereinafter referred to as "the 1922 Act", for the planned development of the city of Ludhiana. For the purpose of

construction of the City Centre in Ludhiana, the Trust invited bids by a Request of Proposal document dated 15.03.2005, with the intention of entering into a Joint-Venture with developers in the private sector. After evaluation of the bids, M/s. Today Homes and Infrastructure Pvt. Ltd., the Appellant in the appeal arising out of SLP(C) No. 7334 of 2010, was found to be the highest bidder and a Letter of Intent was issued in its favour on 18.05.2005, for development of the City Centre, Ludhiana.

3. The records indicate that after the Letter of Intent was issued in its favour, M/s. Today Homes and Infrastructure Pvt. Ltd. deposited Rs. 3.72 crores with the Trust as Performance Security. According to the agreement arrived at between the parties, the successful bidder would ultimately be required to pay to the Trust Rs.371.12 crores. The records further reveal that possession of an area measuring 25.59 acres was handed over to the successful bidder by the Trust on 24.05.2005 by way of Concession Agreement. A Tripartite Agreement was signed on 25.04.2005, between M/s. Today Homes and Infrastructure Pvt. Ltd., the Trust and the HDFC Bank. In terms of the said agreement, the entire proceeds from booking of the saleable areas were required to be deposited in the Joint Escrow Account of the Company and the Trust with the HDFC Bank, of which 30% was to be credited directly to the account of the Trust and 70% was to be deposited to the account of the Company. Disputes arose regarding the deposits made in the Escrow Account and on 12.09.2006, the Trust issued a letter to the Company seeking an explanation regarding the allegations. On the very next day, a reply was sent on behalf of the Company denying the allegations and indicating that its accounts could be scrutinised, and, if the explanation was not found to be satisfactory, the dispute could be referred to arbitration. In fact, on 14.09.2006, the Trust wrote to M/s. Today Homes and Infrastructure Pvt. Ltd. indicating that it was going to appoint an arbitrator within the next two days. However, before the expiry of the said period, on 15.09.2006, the Company filed an application before the Chief Justice of the Punjab and Haryana High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the 1996 Act", being Arbitration Application No. 263 of 2006.

4. From the submissions made on behalf of the parties, it transpires that on 6.10.2006, a meeting was held between the Principal Secretary and officers of the Trust and the representatives of the Company, wherein it was agreed that instead of the Company and the Trust sharing revenue from the project in the ratio of 70:30, the constructed area would be shared on the same basis. It was also agreed that the demarcation of the operations involved would be done jointly by the architects of

the parties and all bookings prior to 15.10.2006, would be honoured and would go to the share of the Company. It was also decided that a Supplementary Agreement incorporating the said terms and conditions should also be executed. Instead of completing the said agreement, the Trust filed its response to the Arbitration Application No.263 of 2006, raising a plea, for the first time, that the agreement executed with the Company was void. Such plea was raised two years after the agreement was entered into and allowing a substantial portion of the construction of the City Centre, Ludhiana, to be completed, without any protest, after the Trust had received a sum of Rs.23 crores as its share of the sale/lease proceeds from over 300 customers.

5. Faced with the above situation, the Company wrote a letter to the Trust on 08.06.2007, invoking the provisions of Article 17.1(a) and (b) of the Agreement dated 24.05.2005, for appointment of an arbitrator. It was also indicated in the letter that in the event no reply was received, the Company would nominate its arbitrator. Since no reply was received from the Trust, the Company wrote to the Trust on 30.06.2007, indicating that it had appointed its arbitrator. The Trust responded to the said letter by raising an objection that since the matter was sub judice before the Chief Justice of the High Court, no arbitrator could have been appointed by the Company.

6. On 22.08.2007, Arbitration Application No.263 of 2006, was taken up by the Chief Justice of the Punjab and Haryana High Court, but the same was dismissed as withdrawn with liberty to file a fresh petition. On the same day, a fresh petition was filed under Section 11(6) of the 1996 Act, being Arbitration Case No. 76 of 2007. On 04.04.2008, the Chief Justice of the aforesaid High Court appointed retired Chief Justice of India, Shri R.C. Lahoti, as Arbitrator to adjudicate upon the disputes between the parties. Arbitration proceedings were, thereafter, held on 22.04.2008, when the Company filed its Statement of Claims. The next date for arguments, after completion of pleadings, was fixed on 02.06.2008.

7. In the meantime, however, SLP(C) No. 10550 of 2008, filed by the Trust challenging the appointment of the arbitrator, in Arbitration Case No.76 of 2007, came up for consideration before this Court by way of Civil Appeal No.6104 of 2008. Having regard to the decision of the 7-Judge Bench in SBP & Co. Vs. Patel Engineering Ltd. and Another [(2005) 8 SCC 618], this Court set aside the order of the Chief Justice and remitted the matter for a fresh decision in keeping with the decision of the 7-Judge Bench of this Court in the above case.

8. The challenge to the appointment of the arbitrator by the Chief Justice of the Punjab and Haryana High Court was that the agreement itself was void having been entered into in suspicious circumstances. It had been contended that since the main agreement, which contained the arbitration agreement, was itself void, the arbitration agreement could not survive independent of the main agreement. It was also contended that the said question was required to be left to the learned arbitrator in terms of Section 16 of the 1996 Act. Such a course of action, however, did not find favour with this Court, and as indicated hereinbefore, the matter was remanded to the Chief Justice of the Punjab and Haryana High Court for a fresh decision. The matter was, thereafter, taken up by the designate Judge who came to a finding that the agreement dated 24.05.2005 was not legal and valid and, therefore, the disputes between the parties arising out of the said agreement could not be referred to an arbitrator. The application under Section 11(6) of the 1996 Act was, therefore, dismissed.

9. It is the said decision of the designate Judge, which is the subject matter of challenge in these appeals.

10. On behalf of M/s. Today Homes and Infrastructure Pvt. Ltd., it was urged that while considering the matter on remand, the designate Judge treated the matter as if he was deciding a suit, but without adducing evidence. Mr. Uday U. Lalit, learned Senior Advocate submitted that in the parameters for consideration of an application under Section 11(6) of the 1996 Act set out by this Court in the decision rendered by the 7-Judge Bench in SBP & Co. (supra), this Court had intended a preliminary enquiry on the existence of an arbitration agreement and a dispute, which was required to be considered by an arbitrator to be appointed.

11. Mr. Lalit urged that Section 11(6) of the above Act nowhere contemplates an application filed thereunder to be gone into in intricate detail by framing issues and deciding the same without taking any evidence. Mr. Lalit submitted that the essence of the issue before the Arbitrator, was lost sight of by the designated Judge.

12. An attempt was made by Mr. Salil Sagar, learned Senior Advocate, appearing for the Trust, to counter the submissions made by Mr. Lalit and Mr. H. Devarajan, learned Advocate, appearing for the appellants in the appeals arising out of SLP (C) Nos. 11778 of 2010 and 10795 of 2010. The learned counsel supported the decision of the learned designate Judge to distinguish the decision rendered by this Court in SBP & Co. (supra) and the facts of the present case. Mr. Sagar insisted

that once the main agreement had been found to be void, the contents thereof, including any arbitration agreement, was also rendered void. The learned counsel submitted that the arbitration clause contained in the arbitration agreement dated 24.05.2005, stood automatically dissolved upon the agreement itself being held to be void. Mr. Sagar, therefore, urged that the appointment of an arbitrator by the designated Judge in Arbitration Case No.76 of 2007 was void and was liable to be set aside.

13. We have carefully considered the submissions made on behalf of the respective parties and we are of the view that the learned designated Judge exceeded the bounds of his jurisdiction, as envisaged in *SBP & Co.* (supra). In our view, the learned designated Judge was not required to undertake a detailed scrutiny of the merits and de-merits of the case, almost as if he was deciding a suit. The learned Judge was only required to decide such preliminary issues such as jurisdiction to entertain the application, the existence of a valid arbitration agreement, whether a live claim existed or not, for the purpose of appointment of an arbitrator. By the impugned order, much more than what is contemplated under Section 11(6) of the 1996 Act was sought to be decided, without any evidence being adduced by the parties. The issue regarding the continued existence of the arbitration agreement, notwithstanding the main agreement itself being declared void, was considered by the 7-Judge Bench in *SBP & Co.* (supra) and it was held that an arbitration agreement could stand independent of the main agreement and did not necessarily become otiose, even if the main agreement, of which it is a part, is declared void.

14. The same reasoning was adopted by a member of this Bench (S.S. Nijjar, J.), while deciding the case of *Reva Electric Car Company Private Limited Vs. Green Mobil* [(2012) 2 SCC 93], wherein the provisions of Section 16(1) in the backdrop of the doctrine of *kompetenz kompetenz* were considered and it was *inter alia* held that under Section 16(1), the legislature makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement, the arbitration clause, which formed part of the contract, had to be treated as an agreement independent of the other terms of the contract. Reference was made in the said judgment to the provisions of Section 16(1)(b) of the 1996 Act, which provides that even if the arbitral tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. It was also held that Section 16(1)(a) of the 1996 Act presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section

16(1)(b) of the 1996 Act, the arbitration clause continues to be enforceable, notwithstanding a declaration that the contract was null and void.

15. In our view, the learned designated Judge misunderstood the scope of the order dated 14.10.2008, passed in the earlier proceedings and the provisions of Section 16 of the 1996 Act in going into a detailed examination regarding the merits of the case and the existence of an arbitration agreement and in holding that once the main agreement between the parties was declared void, the entire contents thereof, including any arbitration clause that may have been incorporated in the main agreement, were rendered invalid.

16. It may be profitable to remind ourselves of the observations made by the 7-Judge Bench in *SBP & Co.* (supra), regarding what the Chief Justice is really required to decide on an application being made to him under Section 11(6) of the 1996 Act. In paragraph 39 of the judgment, it has been stated that obviously the Chief Justice has to first decide his own jurisdiction and whether the party concerned has approached the right High Court. He also has to decide whether there is an arbitration agreement and as to whether the person who has made the request before him, is a party to such agreement. Their Lordships further indicated that it was necessary to mention that the learned arbitrator could also decide the question as to whether the claim was a dead one or a long-barred claim, that was sought to be resurrected. Summing up its views, in paragraph 47 of the judgment, the 7-Judge Bench, while holding that the power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the 1996 Act is not an administrative power but a judicial one, also held that the Chief Justice or the designated Judge would have the right to decide the preliminary aspects, as indicated hereinbefore.

17. The above views expressed by the 7-Judge Bench and by the learned Single Judge are sufficient to dispose of these appeals. In the light of what has been indicated hereinbefore, we have no hesitation in setting aside the impugned judgment and the order of the designated Judge once again and directing that the matter be again considered *de novo* in the light of the observations made hereinabove and the various decisions cited at the Bar.

18. The appeals are, accordingly, disposed of along with the interlocutory applications. Having regard to the peculiar facts of this case, the parties will bear their own costs.