

SUPREME COURT OF INDIA

International Amusement Limited

Vs.

India Trade Promotion Organisation

C.A.No.11474 of 2014

(V. Gopala Gowda and C.Nagappan JJ.)

17.12.2014

JUDGMENT

V.GOPALA GOWDA, J.

Leave granted.

These appeals are directed by the appellant against the common impugned judgment and order dated 16.07.2007 passed in writ petition (c) No. 2015 of 2001 and C.M. (M) No.553/2007 by the High Court of Delhi, urging various facts and legal grounds and raising two substantial questions of law which read thus:-

Whether the arbitration proceedings can be continued between the International Amusement Limited and the India Trade Promotion Organisation?

b) Whether the Estate Officer appointed as Arbitrator is the correct forum?

Necessary brief facts are stated hereunder with a view to find out whether the questions of law framed in these appeals would arise for our consideration.

The appellant herein was running an amusement park in Pragati Maidan, New Delhi since the year 1984, which was well known as "Appu Ghar". The land for the purpose was initially allotted to the appellant by India Trade Promotion Organisation (for short

'the ITPO) on licence basis as the lease between the Central Government and the ITPO was still pending and as such permanent allotment of the land could not be made in favour of the appellant. Only as an administrative measure, the license agreements were entered into between the appellant and the ITPO. The appellant claimed that it was the permanent allottee of the land for running the amusement park on the similar lines as were allotted in favour of the Statutory Corporations/Instrumentalities of the State and Central Government. It was only on the assurance of the Land & Development Office (for short "the L&DO"), Ministry of Urban Development and ITPO that the appellant made huge amount of investment for establishing and running "Appu Ghar". The last agreement entered into between the parties was on 6.11.1995. In the said agreement, arbitration clauses 27 and 28 were incorporated, which are extracted hereunder :-

"27. The licensed premises are public premises as defined in the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and fall within the jurisdiction of the Estate Officer, Pragati Maidan.

28. In case of any dispute arising out of or in connection with this agreement the disputes shall be referred to the sole arbitration of the Chairman, India Trade Promotion Organisation or his nominee whose decision/award shall be final, conclusive and binding on the parties. Application for reference to arbitration shall be made by either party within two months of arising of the dispute."

The case of the appellant is that it being a permanent allottee of the land at Pragati Maidan, it had made huge investments for opening Water Park, in order to provide additional amusement facilities to the public at large. The ITPO being aware of the permanent status of the appellant in respect of the land as well as the factum of huge investments made by it upon the same towards establishing the Water Park, called upon the appellant to vacate the premises vide letter dated 02.09.1999. The appellant has raised various disputes, claims and counter claims against the ITPO.

Immediately after the notice was received by the appellant, it submitted a detailed representation to ITPO with a request to renew the lease of the land for further period. Being unsuccessful, the appellant commenced proceedings under the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act") invoking its right under clause 28 of the agreement referred to supra. The arbitration notice dated 11.11.1999 was

issued to the ITPO invoking the provisions of clause 28 of the aforesaid licence agreement and filed an application under Section 8 of the Arbitration Act before the Estate Officer for referring the matter for arbitration. On 18.11.1999 ITPO issued notice of eviction under Section 4A of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (for short "the P.P. Act") to the appellant to evict from the land of its unauthorised occupation. The application for arbitration filed by the appellant was rejected by the Estate Officer vide his order dated 28.3.2000 on the ground that the Estate Officer exercises his jurisdiction as provided under the provisions of the P.P. Act. It was further stated that it is an admitted case that the premises in Pragati Maidan for running Appu Ghar was given to the appellant on licence basis and on expiry of the licence period the appellant becomes an unauthorised occupant as defined under Section 2(g) of the P.P. Act and therefore, it was required to vacate the premises and hand over the same to ITPO, hence, the appellant cannot take up the plea that it was a permanent allottee of the premises involved in this case and that there was no dispute at all between the parties, which could be agitated as raised by the appellant.

Being aggrieved by the order of Estate Officer, the appellant filed W.P. (C) No.1425 of 2000 before the Delhi High Court questioning the correctness of the order passed by him. Thereafter, on 08.05.2000, the appellant filed an application being A.A. No.111/2000 under Section 11(6) and petition OMP No.63/2000 under Section 9 of the Arbitration Act before the Chief Justice of Delhi High Court. The learned single Judge, who is the nominee of the learned Chief Justice, vide his order dated 23.01.2001 allowed the application by appointing an arbitrator for deciding the disputes between the parties through the process of arbitration.

Aggrieved by the said order, the ITPO filed Writ Petition (C) No.2015 of 2001 before the Division Bench of Delhi High Court, challenging the correctness of the order of appointment of the arbitrator by the High Court. On 12.04.2001, the High Court stayed the arbitration proceeding which has been in force till the disposal of the writ petition. During the pendency of the above matter, some part of "Appu Ghar" land was required by Delhi Metro Rail Corporation for construction of Pragati Maidan Metro Station which was handed over by the appellant to the ITPO. Thereafter, the land of Appu Ghar was resumed by the L&DO and the same was allotted to the Supreme Court Registry for its expansion plan. The High Court vide its common order dated 16.7.2007 allowed Writ Petition (C)No. 2015 of 2001 filed by the ITPO holding that

the matters enumerated under Section 15 of the P.P. Act cannot be referred to arbitration for adjudication for arbitrator. The application C.M. (M) No. 553 of 2007 filed by the appellant was also dismissed. Hence, these appeals. It is contended by Mrs. Pratibha M. Singh, the learned senior counsel for the appellant that the legal position prevailing with respect to Section 16 of the Arbitration Act, was that any directions qua-jurisdiction ought to be raised before the Arbitrator and the same cannot be adjudicated under Section 11 of the Arbitration Act by the Judge who is a designate of the Chief Justice under Sections 11(6) and 11(7) of the Arbitration Act as per the law laid down by this Court in its judgments in *Konkan Railway Corporation. Ltd. and Ors. v. Mehul Construction Co.*[1] and *Konkan Railway Corpn. Ltd. and Anr. v. Rani Construction Pvt. Ltd.*[2] Further reliance was placed by the learned senior counsel upon the Constitution Bench decision of this Court in *SBP & Co. v. Patel Engineering Limited and Anr.*[3], wherein this Court has succinctly held that power under Section 11(6) of the Arbitration Act is not an administrative power of either the Chief Justice of the High Court or his designate but a judicial power. The said position of law was re-affirmed and re-emphasized by this Court in *Maharshi Dayanand University and Anr. v. Anand Coop. L/C Society Ltd. and Anr.*[4] and again in the case of *S.N. Prasad, Hitek Industries (Bihar) Ltd. v. Monnet Finance Ltd. and Ors.*[5] in support of the above said proposition of law. Further reliance was placed by the learned senior counsel on behalf of appellant on another judgment in the case of *Andhra Pradesh Tourism Development Corpn. Ltd. and Anr. v. Pampa Hotels Ltd.*[6] It is further contended by the learned senior counsel that under Section 15 of the P.P. Act, the bar of jurisdiction applies only to a Court and placed reliance on the judgments in the cases of *Kamal Pushp Enterprises v. D.R. Construction Company*[7], *Firm Ashok Traders & Anr. v. Gurumukh Das Saluja & Ors.*[8] and *Ashoka Marketing Ltd. & Anr. v. Punjab National Bank & Ors.*[9] Without prejudice to the above legal contentions, the learned senior counsel also contended that though in general, licences may be governed by the P.P. Act, in the case on hand, the agreement and the nature of relationship between the parties was not that of a licensee and licensor, as it is evident from the various documents produced on record by the appellant. There are several documents spanning from 1980s to 1997 which reflect that the Government's intention was always to raise the appellant as permanent allottee of the land. However, for various reasons and subsequent events, the permanent allotment of land was not made despite the huge investments made by the appellant and the appellant was forced to vacate the premises. It was under these circumstances, the Government was conscious of the different nature of the relationship of parties and

the arbitration clause was incorporated in the license agreement. On the other hand, Mr. Ravi Sikri, the learned senior counsel appearing on behalf of the ITPO and Mrs. M. Diwan, learned counsel on behalf of Union of India rebutted the above said contentions urged on behalf of the appellant contending that arbitration clause 28 in the agreement does not deal with the arbitration under the provisions of the Arbitration Act. The learned senior counsel contended that the Division Bench of Delhi High Court after examining the provisions of Section 5 and in the light of Section 2(3) of the Arbitration Act, held that Section 2(3) protects the existing laws, both common law as well as statutory law, under which some disputes cannot be made subject matter of arbitration. Further, it is urged that the Division Bench of the High Court has rightly held that Section 15 read with Sections 5 and 7 of the P.P. Act, confers exclusive jurisdiction on the Estate Officer appointed under Section 3 of the P.P. Act, to deal with the application that is filed by the ITPO to evict unauthorised occupants from the public premises and pay the damages as provided under Sections 5 and 7 of the P.P. Act respectively. Further, Section 15 of the P.P. Act bars and prohibits any court from entertaining any suit or proceeding for eviction from the premises etc. as provided under clauses (a) to (e) of Section 15 and that the general power of the Court under Section 9 of the Code of Civil Procedure, 1908 to entertain suit or proceedings is therefore ousted if a dispute raised by the appellant falls in clauses (a) to (e) of Section 15 of the P.P. Act. It was further contended that the Division Bench of the High Court rightly held that the provisions of Sections 5 and 7 of the P.P. Act empower the Estate Officer appointed under Section 3 of the P.P. Act to deal with applications that will be filed by the respondent-ITPO for eviction of unauthorised occupation and for payment of rent and damages in respect of the public premises against the unauthorised occupants. Sections 5 and 7 of the P.P. Act conferred exclusive jurisdiction upon the Estate Officer and makes it very clear that he alone has sole and exclusive jurisdiction to decide such applications of the ITPO in respect of the dispute regarding public premises. The said jurisdiction conferred upon the Estate Officer by the statute cannot be taken away by a contract between the parties by incorporating arbitration clause in the agreement or made subject matter of any dispute in relation to the public premises which will be in occupation of the licensee for reference before an arbitrator to arbitrate the same. It cannot be waiver of statutory provisions of the P.P. Act. The contract between the parties must be within the legal framework and parties cannot contract out of the statute. Further, it was contended that the Estate Officer having exclusive jurisdiction is not arbitrable and parties by a contract cannot agree to refer the matters in respect of which jurisdiction has been

conferred upon the Estate Officer. Therefore, the arbitrability of claims of the appellant covered under Sections 5 and 7 of the P.P. Act, is excluded. To arrive at the said conclusion, the Division Bench of the High Court rightly placed reliance upon the Constitution Bench judgment of this Court in the case of Ashoka Marketing Ltd. (supra), wherein the legal question that arose was as to whether the Rent Control Act, 1995, which is also a Special Act will override the provisions of the P.P. Act. After interpreting the relevant provisions of the Act, the Constitution Bench of this Court in the above case has held that the P.P. Act, is a special statute relating to eviction of unauthorised occupants from public premises and therefore, the same will prevail over the Rent Control Act. In the said case it was held that the 1971 enactment did away with the option of the parties and conferred exclusive jurisdiction on the Estate Officer in relation to the public premises. The power and jurisdiction of a civil court to adjudicate matters enumerated under Section 15 of P.P. Act was withdrawn.

Further, reliance was placed by the learned senior counsel for the respondents upon the judgment of this Court in Haryana Telecom Limited v. Sterlite Industries (India) Limited[10], wherein, this Court has referred to the provisions of the Companies Act and held that power to wind up a company is conferred on the Company Court. The said power cannot be subject matter of arbitration.

In view of the above rival legal contentions urged on behalf of the parties, to answer the aforesaid substantial questions of law, it is necessary for us to examine arbitration clause 28 of the license agreement dated 06.11.1995 entered between the parties, which has been extracted in the earlier portion of this judgment.

This Court must accept the contention of the learned senior counsel on behalf of the ITPO that the said clause in the licence agreement is not an arbitration agreement between the parties for the reasons discussed below. The three Judge Bench decision of this Court (of which two of us were members) in P. Dasaratharama Reddy Complex v. Government of Karnataka & Anr.[11], while examining a similar clause of an arbitration agreement, after careful consideration and interpretation of the clause, has held that in all the matters of dispute arising out of the agreement regarding quality of materials and work, etc., the decision of the Board of Directors of the Nagarika Yodbakashema Mathu Gruha Nirmana Sahakara Sangha, shall be final and binding on the part of the Contractor. Further, the case of Mysore Construction Company v. Karnataka Power Corporation Ltd. & Ors.[12] was discussed in P. Dasaratharama

Reddy (supra) by this Court, at para 14, wherein, the Designated Judge has referred to the passage from Russell, on Arbitration (19th Edition, page 59) and the other judgments of this Court in K.K. Modi v. K.N. Modi and Ors., Chief Conservator of Forests, Rewa v. Ratan Singh Hans[13], Rukmanibai Gupta v. The Collector, Jabalpur[14], State of Uttar Pradesh v. Tipper Chand[15], State of Orissa v. Damodar Das[16], Bharat Bhushan Bansal v. Uttar Pradesh Small Industries Corporation Ltd., Kanpur[17] and observed that the decisions in the abovementioned cases make it clear by laying down the conditions, when an agreement or a clause in the agreement can be construed as an arbitration agreement between the parties.

Further, at paragraph 16 of P. Dasaratharama Reddy (supra), the distinction between an expert determination and arbitration between the parties has been spelt out as per Russell, on Arbitration (21st Edn.) in the following words:-

"16.....Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words such as 'arbitrator', 'Arbitral Tribunal', 'arbitration' or the formula 'as an expert and not as an arbitrator' are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive.... Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be, whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was [pic]held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an Arbitral Tribunal as opposed to the expertise of the expert.... An Arbitral Tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion...."

It was further held that a clause substantially similar to the clauses referred to in P. Dasaratharama Reddy (supra) was interpreted by the three Judge Bench of this Court in the State of Uttar Pradesh v. Tipper Chand (supra) wherein paras 2 and 3 of the said judgment contain the reasons for holding that the clause in the agreement cannot be construed as an arbitration clause.

At para 18 in P. Dasaratharama Reddy (supra), the case of State of Maharashtra v. Ranjeet Construction[18] has been discussed wherein a two Judge Bench of this Court interpreted clause 30 of the agreement entered into between the parties, which is almost identical to the clauses under consideration, relying upon the judgment in the Tipper Chand (supra), and held that clause 30 cannot be relied upon by the parties for seeking reference of any dispute to an Arbitrator arising out of the contract.

At para 17 in the P. Dasaratharama Reddy Complex case (supra), the case of State of Orissa v. Damodar Das (supra) has also been examined, wherein the three Judge Bench of this Court interpreted clause 21 of the contract entered into between the parties. In the said case, this Court referred to clause 25 of the agreement, relied upon the judgment in State of U.P. v. Tipper Chand (supra) and held that the said clause cannot be interpreted for resolution of the dispute by an Arbitrator, the case fell for consideration of this Court in the case of State of Uttar Pradesh v. Tipper Chand (supra) which was relied upon in the said case is extracted at para 20 of the P. Dasaratharama Reddy case (supra) as under:- "20.....(10)..... 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 contract drawings, specifications, estimates, instructions, orders 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 matters 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 a 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 [pic]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."

Further, at paragraph 21 of the case of P. Dasaratharama Reddy (supra) the case of K.K. Modi v. K.N. Modi (supra) fell for consideration, wherein this Court interpreted clause 9 of the Memorandum of Understanding that was signed by the two groups of Modi family. The relevant portion from the said judgment with regard to interpretation of Clause 9 of the Memorandum of Understanding between the parties is extracted below:- "9. Implementation will be done in consultation with the financial institutions. For all disputes, clarifications, etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups."

Further, in the decision of P. Dasaratharama Reddy at para 30 referred to the case of Mallikarjun v. Gulbarga University[19] wherein it was held that the decision of the Superintending Engineer of Gulbarga Circle was final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs etc. whether arising during the progress of the work or after the completion or abandonment thereof in case of dispute arising between the contractor and the Gulbarga University. The case of Punjab State v. Dina Nath[20] was also referred supporting the same view in the case of P. Dasaratharama Reddy (supra). In view of the aforesaid decisions and the law laid down by this Court in catena of cases referred to supra which are reiterated in the case of P. Dasaratharama Reddy (supra) we are of the view that the clause 28 in the agreement which is referred to in the case on hand is not an arbitration clause. Therefore, the appointment of an Arbitrator by the nominee of the Chief Justice has been rightly set aside in the impugned judgment by the Division Bench of the Delhi High Court. The law laid down by this Court in the above referred judgments, after interpretation of relevant arbitration clauses in the agreement

in those cases, are aptly applicable to the fact situation on hand and we answer the questions of law framed by this Court against the appellant and in favour of the ITPO and Union of India.

The other proceedings involved in this case, if any, pending under the provisions of the P.P. Act before the Estate Officer, the same shall be continued by him.

Accordingly, the civil appeals are dismissed as there is no merit for consideration to interfere with the impugned judgment and order. No costs.

[1] (2000) 7 SCC 201 [2] (2002) 2 SCC 388 [3] (2005) 8 SCC 618 [4] (2007) 5 SCC 295 [5] (2011) 1 SCC 320 [6] (2010) 5 SCC 425 [7] (2000) 6 SCC 659 [8] (2004) 3 SCC 155 [9] (1990) 4 SCC 406 [10] (1999) 5 SCC 688 [11] (2014) 2 SCC 201 [12] ILR 2000 KAR 4953 [13] AIR 1967 SC 166 [14] (1980) 4 SCC 556 [15] (1980) 2 SCC 341 [16] (1996) 2 SCC 216 [17] (1992) 2 SCC 166 [18] AIR 1986 Bom 76 [19] (2004) 1 SCC 372 [20] (2007) 5 SCC 28