

(2001) 04 AP CK 0143

In the Andhra Pradesh High Court

Case No : Writ Petition NO. 24239 of 2000

M. Chandrasekhar Rao and another

APPELLANT

Vs

Fortis Financial Services Limited and another

RESPONDENT

Date of Decision : 27-04-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 16, 16(1), 2(1), 7

Citation : (2001) 4 ALD 342 : (2001) 4 ALT 125 : (2001) 3 ARBLR 22 : (2002) 108 CompCas 573

Hon'ble Judges : S.B. Sinha, C.J.;V.V.S. Rao, J

Bench : Division Bench

Advocate : Mr. C. Kodanda Ram, for the Appellant; Mrs. Shireensethna Baria, for the Respondent

Judgement

S.B. Sinha, C.J.—This write petition is directed against the judgment and order dated 20-10-2000 passed by a learned single judge of this Court whereby and whereunder a reference in relation to the disputes and difference between the parties had been referred for arbitration to a former Judge of this Court.

2. Before advertng to the question involved in this writ petition, the facts of the case may be noticed.

An agreement was entered into by and between the respondents 1 and 2 herein and in terms whereof they had agreed to subscribe and the first respondent agreed to allot certain number of shares for consideration on the terms and conditions laid down therein. The 1st respondent alleged that it forwarded a Demand Draft bearing No.024343 for a sum of Rs.25 lakhs together with a covering letter dated 28-4-1995 to the 2nd respondent herein towards the value of the 50,000 equity shares, but, contrary to the terms and conditions of the subscription agreement, it did not take any steps to bring out the public issue of equity shares nor did it get the share of the company listed on OTCEI. In the aforementioned situation, clause 7.1(a) of the Subscription Agreement was sought to be invoked. It stated that although the 2nd respondent agreed to

refund the amount to the 1st respondent, in terms of clause 7.1(a), but such assurances had not been implemented.

3. The said agreement contains an arbitration agreement, being Article IX therein, which reads thus:

"Article IX: Disputes:

9.1 Any dispute or question arising under these presents (including existence or validity hereof) shall be referred to arbitration. The Sponsor/Co-investors and the Company shall appoint their own arbitrators and those two arbitrators so appointed shall appoint an umpire. The two arbitrators shall enter upon any reference unless the umpire has been so appointed. Such arbitrator proceedings will be held at Hyderabad.

9.2 The cost of arbitration shall be borne by the parties jointly.

9.3 Only Courts in Hyderabad shall have jurisdiction to entertain any matter arising under these presents".

4. The writ petitioners herein are not parties to the agreement. They are merely Sponsors/promoters to the respondents. So far as they are concerned, Subscription Agreement provides:

"7.1 In case the said shares are not offered to the Public due to the following reasons:

xxxx

(c) The company's shares are not listed on OTCEI before the end of three months from the date of application.

Then the Sponsor and/or the co-investors shall (which shall be binding on the Company's offer of the said shares in part or in full to the promoter or their friends and relatives) for buyback in one or more instalments as may be decided by the Sponsor. Upon being so offered, the promoters shall promptly repurchase/buyback the said shares at the price mutually agreed so as to ensure to the Sponsor/co-investors a return of minimum of 24% on its investments".

5. The learned single Judge, by reason of the impugned judgment, referring to Clause 7.1(c) aforementioned, held that the writ petitioners herein are also necessary parties to the petition.

6. The learned single Judge did not decide the question as to whether there exists any binding arbitration agreement between the appellants and the 1st respondent herein. The said agreement had been entered into by five companies viz., ITC Classic Financed Limited, Sanmac Motor Finance Limited, Nicholas Piramal India Limited, Weizman Limited and Acrow India Limited. All the parties to the said agreement are juristic persons. As indicated hereinbefore, the petitioners herein are mere promoters/ sponsors. Clause 7.1 upon which reliance has been placed does not bind the promoters.

7. The question, which arises for consideration, is as to whether although the petitioners are not parties to the arbitration agreement, and without determining the question as to whether there existed any disputes and differences by and between the petitioners and respondent No.1, only because they happened to be the promoters of the 2nd respondent-Company, can they be directed to be impleaded as parties in the arbitration proceedings?

8. Before dealing with the question, it is relevant to note the definition of the words "arbitration", "arbitration agreement" and "arbitral tribunal". Section 2(1) (a), (b) and (d) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for the sake of brevity) define the afore-mentioned words, which read thus:

"2. Definitions :--(1) In this Part, unless the context otherwise requires,--

(a) "arbitration" means any arbitration whether or not administered by permanent arbitral institution;

(b) "arbitration agreement" means an agreement referred to in Section 7;

(c) xxxx

(d) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;"

xxxx"

9. Section 7 of the Act reads:

"7. Arbitration Agreement:--

1. In this part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not,

2. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

3. An arbitration agreement shall be in writing.

4. An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

5. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract".

10. In the instant case, as the arbitration agreement is in writing, Section 7(2) and Section 7(4)(a) of the Act would be attracted.

11. In order to bind the parties, an arbitration agreement must be in writing. The same, of course, may not be signed by the parties, but the parties must be *ad-idem* as regards the existence thereof.

12. Article 9.1 of the Subscription Agreement, although is of wide import, the same must be held to be binding only on the parties thereto.

13. Arbitration agreement, as would appear from Section 7(1) of the Act, must revolve around a definite legal relationship. Such relationship may arise or may not arise out of a contract, but the relationship must have a legal flavour.

14. Neither demand was made upon the petitioners herein; nor any dispute and difference by and between the 1st respondent and the petitioners herein had been pointed out. How any action or inaction of the petitioner's touches the legal relationship between the parties has arisen had not been stated.

15. The learned Counsel appearing for the respondents submits that all such questions may be the subject-matter of the decision of the Arbitral Tribunal in terms of Section 16 of the Act. Section 16(1) of the Act, although makes an exception to the general rule that a Tribunal cannot determine the validity of its own reference, a question would always arise as to whether while invoking the administrative jurisdiction of the Chief Justice or his nominee, the persons who are not parties to an agreement can be asked to appear before an Arbitral Tribunal at all.

16. It is one thing to say that the Arbitral Tribunal has the jurisdiction to determine a question as regards existence or validity of the arbitration agreement or interpret the applicability thereof, but it is another thing to direct the parties to take recourse to the arbitral proceedings, although they are not parties to any arbitration agreement. Existence of an arbitration agreement is a *sine qua non* even for exercise of the jurisdiction u/s 11(6) of the Act, which reads:

"11. Appointment of arbitrators:-

xxxx

(6) Where, under an appointment procedure agreed upon by the parties,--

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by

him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment".

17. The provisions of Section 11(6) of the Act can be taken recourse to only in the event the conditions precedent therefore, exist.

18. Section 11 of the Act pre-supposes existence of an agreement which may be valid or invalid, but unless such agreement subsists, the question of referring any dispute involving the petitioners would (sic not) arise. We are, therefore, of the opinion that the learned single Judge committed a jurisdictional error in passing the impugned order.

19. A Division Bench of the Calcutta High Court in *Santiniketan Society v. Stale*, 2001 (1) ICC 449, has noticed what would constitute an error of law thus:

"In *De Smith, Woolf and Jowell on Judicial Review of Administrative Action*, 5th Edn., page 286, it is stated:

The concept of error of law includes the giving of reasons that are bad in law of (where there is a duty to give reasons) inconsistent, unintelligible or substantially inadequate. It includes also the application of wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, exercising a discretion on the basis of any other incorrect legal principles, misdirection as to the burden of proof, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence. Error of law also includes decisions which are unreasonably burdensome or oppressive. Thus whether or not the drawing of an inference from the primary facts, or the application of a statutory term to the facts and inferences drawn therefrom, is held or assumed to be a matter of fact (or fact and degree) or a matter of law, the Court may still hold the decision erroneous in points of law if any of the above defects is present.

This aspect of the matter has also been considered in *Susshil Kumar Sasmal v. State of West Bengal* reported in 1999 (1) CHN 92, wherein it has been held:

If a statutory authority takes into consideration irrelevant fact and fails to take into consideration relevant fact, an error on the fact of the record is committed (see *De Smith's Judicial Review of Administrative Action*, 4th Edn. page 136). It is further well known that a statutory authority must pose unto himself the correct question so as to acquaint himself with the fact of the matter with a view to answer the jurisdictional question, failing which he would be guilty of commission of misdirection in law".

20. In *Dr. Shyamanand Singh v. State of Bihar*, 1978 PLJR 588, it was observed:

".....It is well settled that where the words used in a document are clear, there is no scope for putting gloss over the language used. The language employed in Annexure-1 is clear and as such it has to be held that, as disclosed in Annexure-1, the petitioners have been suspended on the ground that they were

prima facie found guilty of misappropriation. There was no material on the basis of which a prima facie conclusion could be arrived at that the petitioners were guilty of actual misappropriation.

21. In *Secretary of State v. Tameside*, 1976 (3) A1I.ER 665, Lord Diplock held:

"..... Had there been factual foundation on the basis of which reasonable conclusion could be arrived at that the petitioners were guilty of actual misappropriation it would have been a different matter. Here it appears that the authority passing the impugned order did not ask itself the right question and take reasonable step to acquaint itself with the relevant information to enable it to answer it correctly. This amounts to misdirection in law".

22. An error or jurisdiction can be committed not only when there exists an inherent lack thereof, but also while acting within jurisdiction. Reference in this connection can be made to a decision in *Anisminic Limited v. Foreign Compensation Commission*, (1969) 2 Appeal Cases 147, by Lords Pearce and Wilberforce and by Browne J. If such jurisdictional error is committed, the doctrine of ultra vires would be attracted.

23. In *Dias on Jurisprudence*, Fifth Edition at page 143, it is stated-

"Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. Rationale and dicta tend to shade into each other. The former have law-quality and are binding on lower Courts; dicta, too, have law quality but are not binding at all. Vis-a-vis a higher Court even the ratio decidendi of a lower Court decision has only persuasive force like that of a dictum. It has been pointed out that some dicta are so authoritative that the distinction between ratio and dictum is reduced to vanishing point. Dicta, which have no force, are propositions stated by way of illustration or on hypothetical facts. Greater difficulties attend rulings of law which are subsequently relegated to the status of dicta by interpretation. The distinction in such cases between ratio and dictum is but a device employed by subsequent Courts for the adoption or rejection of doctrine expressed in previous cases according to the inclination of the Judges. An example would be the treatment" of Lord Atkin's neighbour proposition in . subsequent cases.

24, In *Salmond on Jurisprudence* 12th Edition, page 29, it is stated-

"One of the essential features of the doctrine of precedent in the common law is that rules of law are developed in the very process of application. This means that they are created by Judges and not by teachers and other academic lawyers. However, learned they may be. It also means that they are created by Judges only when acting as Judges i.e., when deciding cases and not for example when giving lectures or other addresses; statements made by Judges in their extra-judicial capacity, like other extra-judicial opinions, are without binding authority. For the fundamental notion is that the law should result from being applied to live issues raised between actual parties and argued on both sides".

In the course of his judgment, however, a Judge may let fall various observations not precisely relevant to the issue before him. He may for instance illustrate his general reasoning by reference to hypothetical situation and the law which he considers to apply to them. Here of course, since the issue is not one that arises between the parties, full argument by Counsel will be lacking, so that it would be unwise to accord the observation equal weight with that given to his actual decision. Or again, having decided the case on one point, the Judge may feel it unnecessary to pronounce on the other points raised by the parties, but he may nevertheless want to indicate how he would have decided these points if necessary. Here again we are not given the Judge's final decision on a live issue, so that once more it would be unwise to endow it with as much authority as the actual decision. These observations by the way, obiter dicta are without binding authority, but are nonetheless important; not only do they help to rationalise the law but they serve to suggest solutions to problems not yet decided by Courts. Indeed dicta of the House of Lords or of Judges who were masters of their fields, like Lord Blackburn, may often in practice enjoy greater prestige than the rationale of lesser Judges.

25. In H. W.R. Wade and C.F. Forsyth "s Administrative Law, VII Edition, at page No.302 it is stated:

"All errors of law now reviewable:

The Anisminic case became the leading example of jurisdictional error by a Tribunal in the course of its proceedings. It is also an extreme example of an error of law, which might have been considered an error within jurisdiction, being held to be jurisdictional. The Foreign Compensation Commission had rejected a claim for compensation for a property already sold to a foreign buyer on the erroneous ground that the statutory Order in Council required that the successor in title should have been of British nationality at a certain date. The majority of the House of Lords held that this error destroyed the Commission's jurisdiction and rendered their decision a nullity, since on a true view of the law they had no jurisdiction to take the successor in title's nationality into account. By asking themselves the wrong question, and by imposing a requirement which they had no authority to impose, they had overstepped their powers".

26. For the reasons aforementioned, the impugned order of the learned single Judge cannot be sustained and as such the same is set aside and the writ petition is accordingly allowed. However, in the facts and circumstances of this case, there shall be no order as to costs.