
(2009) 01 AP CK 0008

In the Andhra Pradesh High Court

Case No : Arbitration Application No. 6 of 2008

News Today (P) Limited, T.V. Division

APPELLANT

Vs

S. Hari Prasad and Others

RESPONDENT

Date of Decision : 29-01-2009

Acts Referred:

Arbitration Act, 1940 — Section 33

Arbitration and Conciliation Act, 1996 — Section 11, 11(5), 11(6), 11(6)(1), 11(7)

Constitution of India, 1950 — Article 23

Contract Act, 1872 — Section 23, 27

Citation : (2009) 5 ALD 447 : (2009) 4 ALT 657 : (2010) 5 RCR(Civil) 452

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : B. Nalin Kumar, for the Appellant; Anand Kumar Kapoor, for the Respondent

Final Decision : Allowed

Judgement

V.V.S. Rao, J.—This application is filed seeking appointment of an Arbitrator for resolving the dispute arising out of Training-cum-Service Agreement (TCSA), dated 20.09.2004, executed by and between the applicants and respondents 1,2 and 3. The application is opposed by respondents on the ground that TCSA is an agreement, which is void ab initio, and therefore, as per common law principle "ex nihilo nil fit", the agreement itself cannot be enforced and the question of resolving the dispute by arbitration does not arise. This stand of the respondents throws up an interesting question for consideration as to whether Chief Justice of High Court or the Judge nominated by him, in exercise of powers u/s 11(6) of Arbitration and Conciliation Act, 1996 (1996 Act, for brevity) can refer the dispute to Arbitrator for resolving the dispute arising out of an agreement, which is allegedly null and void.

2. The admitted fact of the matter is very short. First respondent executed TCSA agreeing to undergo training in Eenadu Journalism School (EJS), Hyderabad. He agreed to work with applicant for a continuous period of four years including a

period of two years for diploma course. Second and third respondents stood as sureties accepting co-terminus liability. Under the agreement, as per Clause 10(b), if first respondent fails to perform contract obligations, he shall pay compensation to applicant to a tune of Rs. 1,00,000/- (Rupees one lakh only). After completion of training, first respondent was appointed as trainee copy writer/reporter vide letter of appointment, dated 22.11.2005. He went on sick leave for fifteen days from 11.09.2006 while he was under training. After expiry of leave, he did not report to training in spite of telegram issued by applicant on 11.10.2006. First respondent sought extension of leave on medical grounds. Though he was supposed to report to training on 11.11.2006, he did not do so in spite of advice to him to report to training at Khammam office. In view of this, training period was extended by six months from 28.11.2006. First respondent did not report to office and committed breach of agreement. Therefore, on 15.02.2007, a show cause notice was issued to first respondent as to why he should not be discharged from training for unauthorized absence as he voluntarily left the service. He received the notice but he did not send explanation. Therefore, by letter, dated 26.02.2007, first respondent was discharged considering that he left training on his own accord and was decided to recover compensation as per Clause 10(b) of TCSA. Subsequently, applicant's lawyer sent a notice on 08.05.2007 invoking Clause 16 of TCSA and appointing an Advocate as Arbitrator. The consent of respondents 1 and 2 was solicited. They did not reply to the notice and hence, the arbitration application.

3. Counter affidavit is filed by first respondent. The application is opposed by rising following contentions. TCSA is violative of doctrine of restraint of trade and as such void ab initio, unenforceable and negates arbitration clause. As per the decision in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, , Section 11 of 1996 Act overrides Section 11(6) thereof and therefore, the question comes within the jurisdiction u/s 11(6) of 1996 Act. TCSA is "adhesion contract" showcasing unfair and unequal bargaining power and is per se unconscionable and hence, unenforceable and void. The agreement is mockery of constitutional safeguard against practice of begar, slavery and bonded labour. As the applicant is seeking to enforce such an agreement by seeking damages for assumed service loss, the same is not permissible under Law. As per law, damages for breach of employment conditions can be enforced only after the employment ceases, and if it is enforced it would violate doctrine of restraint of trade as such it is a clause compels the applicant to work for others benefit. TCSA is not a contract and the same being a void agreement, enforcement of contract does not arise.

4. Learned Counsel for applicant made the following submissions. The authority u/s 11(6) of 1996 Act is required to decide questions like territorial jurisdiction, existence of arbitration agreement, the parties to the agreement, the existence of rival claim, the question of limitation and compliance with pre-arbitration procedure. Authority u/s 11(6) of 1996 Act cannot decide other questions as to whether the agreement/contract is void or not. In the absence of any such power

under the provisions of the Act, the authority u/s 11(6) of 1996 Act cannot decide the validity of the agreement, and therefore, all contentions must be left to be decided by the Arbitrator u/s 16 of 1996 Act.

5. Learned Counsel for first respondent raised contentions which are as below. Agreement between respondents and applicant is void because it is in contravention of Section 27 of Indian Contract Act, 1872, because it is against Article 23 of Constitution of India and because it is against public policy and hence, void u/s 23 of the Contract Act. When an agreement is void, the Chief Justice or his nominee can go into the question and refuse to refer the matter to Arbitrator if agreement itself is unenforceable. A reading of Section 2(3) read with Sections 11(5) and (6), and 16 of 1996 Act would show that the power u/s 11(6) overrides Section 16 of 1996 Act. The jurisdiction vested in the authority u/s 11(6) of 1996 Act cannot be delegated to the Arbitrator and the finding recorded by the authority u/s 11(6) of 1996 Act has finality u/s 11(7) of 1996 Act and is binding on the Arbitrator. Under common law maxim "ex nihilo nil fit", the Court has power to rule invalidation of agreement and when the agreement itself is void and unenforceable, there is nothing that the Arbitrator can decide.

6. Learned Counsel placed strong reliance on *Khardah Company Limited v. Raymon & Company* AIR 1962 SC 1810 and *Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd.*, . In these two Judgments, Supreme Court applied the common law doctrine while interpreting the power of civil Court or the Arbitrator to decide the question of legality or voidness of a contract. It was held that, "when an agreement is invalid, every part of it including the clause as to arbitration contained therein must also be invalid" (see para 4 of *Khardah Company Limited*). The Supreme Court also held that, "an arbitration clause which is one of the terms (of the void contract) must also perish along with it and that the dispute relating to validity of a contract is one such case for the Court and not for the Arbitrator to decide". The law declared by Supreme Court in these two leading authorities was with reference to the provisions of the Arbitration Act, 1940 (1940 Act, for brevity). Does it continue to hold the field? This Court is afraid to say "no" to this question. The reasons are twofold as enumerated *infra*.

7. The widespread abuse of arbitral process pointed out by Supreme Court in *Guru Nanak Foundation Vs. Rattan Singh and Sons*, was mainly due to 1940 Act itself which gave scope for "interminable, time consuming, complex and expensive Court procedures". This required a law which enables an arbitration as an alternative resolution method in more informal ways and less unenforceable complexity. Seventy-sixth Report of Law Commission (1978), Chief Ministers and Chief Justices Conference recommended a model arbitration law to meet the needs of the day to reduce the problem of arrears in the conventional Court system. The Government of India having regard to various opinions and recommendations decided to adopt new arbitration law, which would be based on Model Law on International Commercial Arbitration established by United Nations

Commission on International Trade Law (UNCITRAL). Accordingly repealing 1940 Act, 1996 Act, which also includes provisions of conciliation, was enacted on 16.01.1996. This came into force on 25.01.1996. The 1996 Act is divided into four parts and contains eighty six Sections and three Schedules, which reproduced Geneva Convention of Execution of Foreign Awards. The Geneva Protocol on Arbitration Clauses, 1993 and New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 respectively. Part I consisting of ten Chapters (Sections 2 - 43) follows the provisions of UNCITRAL Model Law except 10(1) (number of Arbitrators) and Section 11 (Appointment of Arbitrators) and other matters to which reference is not necessary in this order. UNCITRAL Model Law permits the parties to approach a Court or authority specified in the National Law for appointment of third Arbitrator/sole Arbitrator where the parties failed to reach the agreement.

8. Section 11 empowers the Chief Justice of High Court to appoint Arbitrator. 1996 Act drastically deviated from 1940 Act in ways more than one. For instance under 1940 Act, Courts could intervene and give interim orders on whole range of matters concerning arbitration. The New Act minimizes supervisory role of Courts and can intervene only after the award is made by the Arbitral Tribunal (Sections 5 and 16(6) read with Section 34). By reason of Section 16(1) of the 1996 Act, the arbitral Tribunal is all-powerful to decide its own jurisdiction inter alia the question whether the contract is null and void and renders ipso jure arbitral clause invalid. In 1940 Act, this is different. Section 33 thereof enables any party to an arbitration agreement to challenge existence or validity of an arbitration agreement, before the civil Court, which shall be decided based on the affidavits. Section 16(1) of 1996 Act and Section 33 of 1940 Act, in comparison reads as under.

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33 of 1940 Act Section 16(1) of 1996 Act	33.

Arbitration agreement or award to 16. Competence of arbitral tribunal be contested by application.- Any party to rule on its jurisdiction:(1) The to an arbitration agreement or any arbitral tribunal may rule on its person claiming under him desiring own jurisdiction, including ruling to challenge the existence or validity on any objections, with respect to of an arbitration agreement or an the existence or validity of the award or to have the effect of either arbitration agreement, and for determined shall apply to the Court that purpose: and the Court shall decide the question on affidavits: (a) an arbitration clause which forms part of a contract shall Provided that where the Court deems be treated as an agreement it just and expedient, it may set independent of the terms of down the application for hearing the contract; and on other evidence also, and it may pass such orders for discovery (b) a decision by the arbitral and particulars as it may do tribunal that the contract in a suit. is null and void shall not entail ipso jure the invalidity of the arbitration clause.

9. Under 1940 Act, an Arbitrator cannot decide the question whether the agreement is valid, void and/or unenforceable and such a question has to be decided only by civil Court, whereas under 1996 Act, the Arbitral Tribunal can decide all questions including the question whether the contract is null and void rendering arbitral clause itself as void. In view of the glaring departure from 1940 Act, decisions cited by learned Counsel for first respondent cannot have any application. It is well settled that any decision of Supreme Court interpreting the law, which has been repealed by the New enactment cannot be treated as declaration of law with reference to New Act unless and until the Repealing Act contains explicitly and impliedly a similar provision in Repealed Act. Reading Section 33 of 1940 Act and Section 16(1) of the 1996 Act and other provisions, it is not possible to accept the submission of respondents that the Chief Justice or his nominee can decide the validity of agreement u/s 11(6) of 1996 Act.

10. The extent and scope of power u/s 11(6) of the 1996 Act while dealing with the applications for appointment of arbitrator has been well settled after the decision of seven-Judge Bench of Supreme Court in SBP & Company (supra), which has been followed and explained in Shree Ram Mills Limited v. Utility Premises (Private) Limited 2007 (6) SCJ 171 : Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd., and National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., . In the last of these three decisions, Supreme Court on an analysis of SBP & Company (supra) noticed that preliminary issues that might arise for consideration u/s 11 of 1996 Act fall into three categories, viz., (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide i.e., issues which may choose to decide; and (iii) issues which can be left to the Arbitral Tribunal to decide; and explained these in the following manner.

17.1) The issues (first category) which Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied u/s 11 of the Act, is a party to such an agreement.

17.2) The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

(a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

17.3) The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal; are:

(a) Whether a claim made falls within the arbitration Clause (as for example. A matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(b) Merits or any claim involved in the arbitration.

11. Supreme Court also held that when an objection is raised that the dispute is not arbitrable on account of discharge of the contract under a settlement agreement or discharge voucher or no-claim certificate, and the claimant contends that it was obtained by fraud, coercion and under influence, the issue will have to be decided by the Chief Justice/his Designate in the proceedings u/s 11 of the Act or by the Arbitral Tribunal as directed by the order u/s 11 of the Act. Therefore, the question of validity or findings of a contract or arbitration clause cannot be decided by Chief Justice/his Designate.

12. In Rodemadan India Limited Vs. International Trade Expo center Limited,), a question was raised that there is no arbitration agreement in existence, and that for want of consideration, the management agreement is void. Supreme Court held that such issues cannot be considered u/s 11(6) of 1996 Act. The observations are as follows.

The next contention raised by Mr. Ranjit Kumar is that the Petitioner is attempting to obtain specific performance when specific performance of the contract cannot be granted in arbitral proceedings. In fact, this contention has been squarely rejected by the judgment of this Court in Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others,)....

...Further, it was urged that Clauses 8.0 and 8.1 of the Management Agreement are mutually exclusive and, therefore, the relief for specific performance cannot be asked for and since no consideration had been paid the contract was void and unenforceable. In my view, these are not issues to be considered in a petition u/s 11(6) of the Act, as they can all be raised during the arbitral proceedings....

...In short, I am not satisfied that the arbitral agreement was vitiated on any of the grounds, averred by Mr. Ranjit Kumar. I am satisfied that there exists a valid arbitration agreement which contemplates that all disputes between the parties under that agreement be referred to arbitration.

13. In Aurohill Global Commodities Ltd. Vs. M.S.T.C. Ltd., : M. Ramaiah Vs. The Singareni Collieries Company Ltd. and Others, , adverting to a similar question, Supreme Court observed, thus:

In the present case, M/s. Aurohill Global Commodities Ltd. has filed this petition u/s 11(9) read with Section 11(5) of the said Act. Section 11 falls in Part I. The alleged contract is an international transaction, therefore, this Court has the power to appoint an arbitrator in accordance with the terms of the contract. Under the said Act, the arbitral Tribunal has very wide powers. The powers of the Courts have been curtailed. The arbitral Tribunal's authority u/s 16 of the said Act is not confined to the width of its jurisdiction but goes to the very root of its

jurisdiction (see *Secur Industries Ltd. v. Godrej and Boyce Mfg. Co. Ltd.* and *Anr.* : (2004) 3 SCC 447). In the present case, therefore, the question as to whether the Draft Purchase Order acquired the character of a concluded contract or not and the question as to whether the contract was non est can only be decided by the arbitrator. Therefore, the aforesaid question have got to be decided by arbitration proceedings. In my view, therefore, there is no merit in the contention advanced on behalf of M/s. M.S.T.C. Ltd. that the arbitration petition was misconceived and not maintainable in law.

14. Learned Counsel for respondents relies on *Wellington Associates Ltd. Vs. Mr. Kirit Mehta*, , in support of the contention that even after 1996 Act, having regard to the Section 2(3) of 1996 Act, learned Chief Justice/his Designate can decide the question of validity or voidness of the agreement. This Court is afraid the submission is misconceived. A perusal of paragraphs 13, 14 and 15 to which the attention of this Court has been drawn would show that the disability by virtue of Section 33 of 1940 Act, on the part of the Arbitrator has been removed by Section 16 of 1996 Act, but when a question is raised that there is no arbitration clause at all, the jurisdiction of the Chief Justice is not excluded by Section 16 of the 1996 Act. Again on wholesome reading of the ratio *Wellington Associates* (supra) does not lend any support to the submission that legality or voidness can also be decided u/s 11(6) ignoring Section 11(6)(1) of the Act. It is no doubt the principle in *Wellington Associates* (supra) was cited in *SBP & Company* (supra), but the larger Bench laid down as under (para 39 of SCC)

It is necessary to define what exactly the Chief Justice, approached with an application u/s 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator u/s 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal.

15. In *Shree Ram Mills Limited* (supra), the law was further explained as under.

A glance on this para would suggest the scope of the order u/s 11 to be passed by the Chief Justice or his designate. Insofar as the issues regarding territorial jurisdiction and the existence of the arbitration agreement are concerned, the Chief Justice or his designate has to decide those issues because otherwise the arbitration can never proceed. Thus, the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the court for appointment of the arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining this if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining. It is in this sense that the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation.

16. Learned Counsel for applicant has also made wide range of submissions with regard to validity and enforceability of agreement and/or contract, which cannot be gone into in this application. These are the matters to be decided by the Arbitrator including the question as to whether the TCSA executed by respondent is a contract enforceable in law, whether TCSA is void and therefore, arbitration clause also invalid and other related questions. It would be better if these questions are decided by Arbitrator along with main dispute in the case. Therefore, the Arbitration Application is allowed. Sri A. Venku Reddy, retired District Judge, Plot No. 66, Near Bhavya Hospital, New Samathapur Colony,

Nagole X Roads, Hyderabad, is appointed as Arbitrator to resolve the dispute between applicant and respondents. It shall be open to learned Arbitrator to fix his fee.

17. The arbitration application is accordingly allowed. There shall be no order as to costs.