

Zostel Hospitality Private Limited ... vs Oravel Stays Private Limited Through ... on 19 September, 2018

Bench: Chief Justice, A.M. Khanwilkar, D.Y. Chandrachud

AP(C) 28/2018

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IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Arbitration Petition (Civil) No. 28/2018

ZOSTEL HOSPITALITY PRIVATE LIMITED
THROUGH ITS AUTHORISED REPRESENTATIVE
VERSUS

Petiti

ORAVEL STAYS PRIVATE LIMITED THROUGH ITS
DIRECTOR & ORS.

Respon

O R D E R

Heard Mr. Amit Sibal, learned senior counsel for the petitioner and Mr. Gopal Jain, learned senior counsel for the respondent no. 1, the only contesting respondent.

Despite service of notice on all other respondents, there has been no appearance.

The present application has been preferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for brevity, the Act) for appointment of a sole arbitrator as disputes have arisen.

It is submitted by Mr. Amit Sibal, learned senior counsel for the petitioner that an arbitration agreement exists between the parties in the Term Sheet. He has invited our attention to clause 16 of the said Term Sheet. It reads as follows:-

“Governing Law & Arbitration: This Term Sheet will be governed by Indian Law.

Any dispute between the parties arising from or relating to this Term Sheet which cannot be amicably resolved between the parties shall be referred to arbitration in New Delhi in accordance DEEPAK GUGLANI The Tribunal shall consist of 1 arbitrator to be Reason: agreed upon between the parties. The language of the arbitration shall be English and the decision of the arbitrator shall be final and binding on the parties. The law of the arbitration shall be the laws of India.” AP(C) 28/2018 Mr. Gopal Jain, learned senior counsel for the respondent no. 1, per contra, would contend that the same may be construed as an arbitration clause, but the disputes that have been sought to be raised are under the Non- Disclosure Agreement

and, therefore, not arbitrable, inasmuch as, there is no arbitration agreement in that agreement. The learned senior counsel would further submit that respondent no. 1 had filed a suit seeking damages and other reliefs and no steps were taken by the petitioner for stay of the suit.

On a query being made, we have been apprised that the suit has been filed seeking injunction from the Civil Court for restraining the petitioner from making any defamatory statement affecting the goodwill of the respondents and for grant of damages.

In our considered opinion, in such a suit, even if an application under Section 8 of the Act would have been moved, no stay could have been granted. On a scan of the arbitration clause, there can be no doubt that a clause of arbitration exists between the parties in the Term Sheet. Whether the claims are arbitrable or not, is within the domain of the arbitration. In this regard, we may refer to the decision rendered by this Court in *Arasmeta Captive Power Company Ltd. & Anr. vs. Lafarge India Pvt. Ltd.*, (2013) 15 SCC 414, wherein a two-Judge Bench has said :-

“40. From the aforesaid authorities it is luculent that the larger Bench in *SBP & Co. vs. Patel Engg. Ltd.*, (2005) 8 SCC 618, after deliberating at length with regard to the role of the Chief Justice or his designate, while dealing with an application under Section 11(6) of the Act, has thought it appropriate to define what it precisely meant in paragraph 39 of the judgment. The majority, if we allow ourselves to say so, was absolutely conscious that it required to be so stated and hence, it did so. The deliberation was required to be made as the decision in *Konkan AP(C) 28/2018 Railway Corporation Ltd. v. Rani Construction (P) Ltd.*, (2002) 2 SCC 388, where the Constitution Bench had held that an order passed by the Chief Justice under Section 11(6) is an administrative order and not a judicial one and, in that context, the Bench in many a paragraph proceeded to state about the role of the Chief Justice or his designate. The phrases which have been emphasized by Mr. Ranjit Kumar, it can be irrefragably stated, they cannot be brought to the eminence of ratio decidendi of the judgment. The stress laid thereon may be innovative but when the learned Judges themselves have culled out the ratio decidendi in paragraph 39, it is extremely difficult to state that the principle stated in *SBP & Co. (supra)* requires the Chief Justice or his designate to decide the controversy when raised pertaining to arbitrability of the disputes. Or to express an opinion on excepted matters. Such an inference by syllogistic process is likely to usher in catastrophe in jurisprudence developed in this field. We are disposed to think so as it is not apposite to pick up a line from here and there from the judgment or to choose one observation from here or there for raising it to the status of “the ratio decidendi”. That is most likely to pave one on the path of danger and it is to be scrupulously avoided. The propositions set out in *SBP & Co. (supra)*, in our opinion, have been correctly understood by the two-Judge Bench in *National Insurance Co. Ltd. vs. Boghara Polyfab Private Limited*, (2009) 1 SCC 267, and the same have been appositely approved by the three-Judge

Bench in Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc., (2013) 1 SCC 641, and we respectfully concur with the same. We find no substance in the submission that the said decisions require reconsideration, for certain observations made in SBP & Co. (supra), were not noticed. We may hasten to add that the three-Judge Bench has been satisfied that the ratio decidendi of the judgment in SBP & Co. (supra) is really inhered in paragraph 39 of the judgment.

41. xxx xxx xxx

42. We will be failing in our duty if we do not take note of another decision in Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and others, (2011) 5 SCC 532, on which Mr. Ranjit Kumar has heavily relied upon. He has drawn our attention to paragraph 34 where the Court has AP(C) 28/2018 dealt with the meaning of the term “arbitrability” and stated that arbitrability has different meanings in different contexts. The Court enumerated three facets which relate to the jurisdiction of the Arbitral Tribunal. In sub-para

(ii) of the said paragraph it has been stated that one facet of arbitrability is whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the “excepted matters” excluded from the purview of the arbitration agreement. On a careful reading of the said judgment we find that the learned Judges have referred to paragraph 19 of SBP & Co. (supra) and thereafter referred to Section 8 of the Act and opined what the judicial authority should decide.

Thereafter the Court proceeded to deal with nature and scope of the issues arising for consideration in an application under Section 11 of the Act for appointment of the arbitrator and, in that context, it opined thus:-

“While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of “arbitrability” or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon sub-section (2)(b)(i) of that section.” The said ruling is absolutely in consonance with the principle laid down in SBP & Co. (supra). The meaning given to arbitrability thereafter has been restricted to the adjudication under Section 8 and not under Section 11 of the Act. Thus, the reliance on the said decision further reflects how the court has consistently understood the principles laid down in SBP & Co. (supra).” In Duro Felguera, S.A. vs. Gangavaram Port Ltd., (2017) 9 SCC 729, R. Banumathi, J. has also taken the same AP(C) 28/2018 view. Kurian Joseph, J. in his concurring opinion has held as under:-

“59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. vs. Patel Engg. Ltd., (2005) 8 SCC 618 and National Insurance Co. Ltd.

vs. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court’s intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6A) ought to be respected.” In view of the aforesaid, we are of the opinion that the respondents can raise the issue of arbitrability of the disputes before the arbitrator. Needless to say, our expression of the view that an arbitration clause exists and the arbitrator should be appointed, would not affect the suit filed by the respondents.

The Arbitration Petition is accordingly allowed and Mr. Justice A.M. Ahmadi, former Chief Justice of India is appointed as the sole arbitrator. The learned arbitrator shall hold the sittings at New Delhi. The Registry is directed to communicate the present order to the learned Arbitrator. That apart, learned counsel for the parties are at liberty to produce a copy of the order before Mr. Justice A.M. Ahmadi, former Chief Justice of India, who shall enter into reference.

.....CJI.

[Dipak Misra]J. [A.M. Khanwilkar]J. [Dr. D.Y. Chandrachud] New Delhi;

September 19, 2018.

AP(C) 28/2018

ITEM NO.9

COURT NO.1

SECTION XVI-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition for Arbitration (Civil) No. 28/2018 ZOSTEL HOSPITALITY PRIVATE LIMITED THROUGH ITS AUTHORISED REPRESENTATIVE Petitioner VERSUS ORAVEL STAYS PRIVATE LIMITED THROUGH ITS DIRECTOR & ORS. Respondents (IA No.117788/2018-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT) Date : 19-09-2018 This matter was called on for hearing today.

CORAM : HON'BLE THE CHIEF JUSTICE HON'BLE MR. JUSTICE A.M. KHANWILKAR
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD For Petitioner Mr. Amit Sibal, Sr. Adv.

Ms. Nishtha Chaturvedi, Adv.

Mr. Abhishek Malhotra, Adv.

Ms. Sonam Gupta, AOR For Respondents Mr. Gopal Jain, Sr. Adv.

Mr. Sandeep Grover, Adv.

Mr. Mohit Chadha, Adv.

Ms. Vaishnabi Rao, Adv.

Ms. Vara Gaur, Adv.

Mr. Rajat Singh, AOR UPON hearing the counsel the Court made the following O R D E R The Arbitration Petition is allowed in terms of the signed order.

Pending interlocutory applications, if any, shall stand disposed of.

(Deepak Guglani)
Court Master

(H.S. Parasher)
Assistant Registrar

(signed order is placed on the file)