A ANDHRA PRADESH TOURISM DEVELOPMENT CORPN. LTD. & ANR.

v.

M/S. PAMPA HOTELS LTD.

(Civil Appeal No. 3272 of 2007)

B APRIL 20, 2010

[R.V. RAVEENDRAN AND H.L. DATTU, JJ.]

Arbitration and Conciliation Act, 1996:

C

ss. 7 and 2(h) – Party to arbitration agreement – Company entering into contract before the date on which it was entitled to commence business – On dispute invoking arbitration clause of the contract – Held: Since the company was non-existent on the date of contract, there was no contract – Consequently there was no arbitration agreement – The agreement would have been valid, if the contract were entered into by the promoters of the non-existing company on its behalf – Companies Act, 1956 – s. 149 (4) – Specific Relief Act, 1963 – s. 15(h).

D

E

*ss. 11 and 16 – Decision as regards existence or validity of arbitration agreement – Whether to be decided by Chief Justice/Designate or by the arbitrator – Chief Justice/ Designate in application u/s. 11 appointing the arbitrator and leaving the question as regards validity of the arbitration agreement to be decided by arbitrator relying on *Konkan Railway cases – Subsequent decision in **SBP case over-ruling Konkan Railway cases – SBP case resorting to prospective over-ruling – Held: In view of decision in SBP case, validity of arbitration agreement is to be decided by the Chief Justice/Designate – However, in view of prospective over-ruling direction in SBP case, the validity of the arbitration agreement in the present case, has to be decided by the arbitrator – The appeal to the Supreme Court cannot be*

F

G

H

treated as a pending application u/s. 11 and hence decision in SBP case will not apply – Prospective Over-ruling – Doctrine of Merger.

The questions which arose for consideration in the present appeal were:

(i) where the party seeking arbitration is a company which was not in existence on the date of the signing of the contract containing the arbitration agreement, whether it can be said that there is an arbitration agreement between the parties; and

(ii) whether the question as to the existence or validity of the arbitration agreement, has to be decided by the Chief Justice/Designate while considering the petition u/s. 11 of the Act or by the Arbitrator.

Disposing of the appeal, the Court

HELD: 1.1. The certificate of registration issued by Registrar of companies shows the date of its incorporations as 9.4.2003. Section 149(4) of the Companies Act, 1956 provides that any contract made by a company (which is already registered) before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on that company until that date, and on that date it shall become binding. The Lease Agreement and also the Management Agreement were made on 30.3.2002 between the appellant and the respondent. A certificate u/s. 149(3) of the Companies Act was issued by the Registrar of Companies only on 6.6.2003 certifying that respondent is entitled to commence business. It is thus clear that the applicant in application u/s. 11 of the Act was non-existent on 30.3.2002 when the arbitration agreement was entered into. [Paras 8 and 9] [951-B-E; 952-D-F]

1.2. Section 7 of Arbitration and Conciliation Act,

A 1996 defines an arbitration agreement as an agreement by *the parties* to submit to arbitration. The word 'party' is defined in Section 2(h) of the Arbitration Act as a party to an arbitration agreement. An agreement enforceable by law is a contract. An agreement has to be between two
B or more persons. Therefore if one of the two parties to the arbitration agreement was not in existence when the contract was made, then obviously there was no contract and if there was no contract, there is no question of a clause in such contract being an arbitration agreement
C between the parties. [Para 10] [952-G-H; 953-A]

1.3. The agreements are not entered by the promoters of the company, but purportedly by the company itself, represented by its Managing Director. Admittedly on 30.3.2002 there was no such company in existence.
D Admittedly there was no such company having its registered office at the address mentioned on that date. Admittedly, one of the signatories of the agreements was not the Managing Director of any company of that name on that date. When one of the parties to the Lease
E Agreement and Management Agreement, was a non-existent imaginary party, there is no contract. This is not a case of one of the parties being in existence, but being under some legal disability to enter into contracts. This is a case where there was no 'party' at all, but someone
F claiming that there was an existing company capable of entering into contracts. [Para 10] [953-B-E]

1.4. The position would have been different, had the agreement been entered by the promoters of the respondent-company before its incorporation for the
G purposes of the company and such contract was warranted by the terms of incorporation. It is evident from Section 15(h) of Specific Relief Act, 1963 that if the Lease Agreement and the Management Agreement had been entered into by the promoters of the company stating
H that they are entering into the contract for the purpose

of the company to be incorporated, in their capacity as promoters and that such contract is warranted by the terms of the incorporation of the company, the agreement would have been valid; and the term regarding arbitration therein could have been enforced. But for reasons best known to themselves, the agreement was entered not by the promoters on behalf of a company proposed to be incorporated by them, but by a non-existing company claiming to be an existing company. This clearly shows that there is no arbitration agreement between the respondent (applicant in the application u/s. 11 of the Act) and the appellant-company against whom such agreement is sought to be enforced. [Para 11] [953-E-F; 954-B-D]

2.1. The question as to who should decide the question whether there is an existing arbitration agreement or not has been decided in ***SBP** case holding that the question whether there is an arbitration agreement and whether the party who has applied u/s. 11 of the Arbitration Act, is a party to such an agreement, is an issue which is to be decided by the Chief Justice or his Designate u/s.11 of the Act before appointing an arbitrator. Therefore there can be no doubt that the issue ought to have been decided by the Designate of the Chief Justice and could not have been left to the arbitrator. But, since the Designate of the Chief Justice proceeded on the basis that while acting u/s. 11 of the Arbitration Act, he was not acting under a judicial capacity but only under an administrative capacity and therefore he cannot decide these contentious issues by following the two decisions in **Konkan Railway* cases which were then holding the field. [Para 12] [954-E-H; 955-A-B]

2.2. In *SBP* case a seven-Judge Bench of Supreme Court overruled the two decisions in *Konkan Railway.* The decision in *SBP* case was rendered a few weeks after the

A impugned decision by the Designate. Having regard to the fact that several decisions rendered under section 11 of the Arbitration Act had followed the decisions in *Konkan Railway* case, this court, when it rendered its decision in *SBP* case, resorted to prospective overruling. B [Para 13] [955-B-D]

2.3. It is not correct to say that the appeal to this Court should be considered as a continuation of the application u/s. 11 of the Arbitration Act or as pending matter to which the decision in *SBP* case would apply, even C though the Designate had rendered the decision before the judgment passed in SBP case; and that a pending matter would refer not only to the original proceedings but also would include any appeal arising therefrom and therefore any proceeding which has not attained finality D is a pending matter. This would have been the position if there was a statutory provision for appeal and *SBP* case had directed that in view of prospective overruling of *Konkan Railway* cases pending matters will not be affected. But sub-section (7) of Section 11 of the E Arbitration Act makes the decision of the Chief Justice or his Designate final. There is no right of appeal against the decision u/s. 11 of the Act. Further, in *SBP* case, the Court issued the categorical direction that appointment of Arbitrators made till then are to be treated as valid and F all objections are to be left to be decided u/s. 16 of the Act. [Para 15] [956-F-H]

2.4. On account of the prospective overruling direction in *SBP* case, any appointment of an arbitrator u/s. 11 of the Act made prior to 26.10.2005 has to be G treated as valid and all objections including the existence or validity of the arbitration agreement, have to be decided by the arbitrator u/s. 16 of the Act. The legal position enunciated in the judgment in *SBP* case will govern only the applications to be filed u/s. 11 of the Act H from 26.10.2005 as also the applications u/s. 11(6) of the

Act pending as on 26.10.2005 (where the Arbitrator was not yet appointed). In view of this categorical direction in *SBP* case, it is not possible to say that this case should be treated as a pending application. [Para 16] [957-A-C]

2.5. The arbitrator will have to decide the issue as to whether there is an arbitration agreement, with reference to the legal position in regard to the existence of arbitration agreement. Though such an exercise by the arbitrator will only be an academic exercise such an exercise becomes inevitable in view of the peculiar position arising out of the specific direction contained in para 47 (x) of the decision in *SBP* case and the subsequent decision in *Maharishi Dayanand University* case. [Para 17] [957-D-F]

*****SBP and Co. v. Patel Engineering Ltd.* 2005 (8) SCC 618, followed.**

National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd **2009 (1) SCC 267**; *Sarwan Kumar v. Madan Lal Aggarwal* **2003 (4) SCC 147**; *Maharishi Dayanand University v. Anand Coop. L/C Society Ltd. and Anr.* **2007 (5) SCC 295, relied on.**

*****Konkan Railway Corporation Ltd. v. Mehul Construction Co.* **2000 (7) SCC 201**; *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd.* **2002 (2) SCC 388, referred to.**

Case Law Reference:

2005 (8) SCC 618	**followed.**	**Para 12**
2009 (1) SCC 267	**Relied on.**	**Para 12**
2000 (7) SCC 201	**Referred to.**	**Para 12**
2002 (2) SCC 388	**Referred to.**	**Para 12**
2003 (4) SCC 147	**Relied on.**	**Para 13**
2007 (5) SCC 295	**Relied on.**	**Para 16**

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3272 of 2007.

From the Judgment & Order dated 16.8.2005 of the High Court of Andhra Pradesh at Hyderabad in Arbitration
B Application No. 24 of 2005.

Bhaskar P. Gupta, T.V. Ratnam, K. Paari Vendhan for the Appellants.

L. Nageswara Rao, G. Ramakrishna Prasad, B.
C Suyodhan, Amarpal, Bharat J. Joshi for the Respondent.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. The respondent is a company incorporated on 9.4.2003 under the Companies Act, 1956. The
D appellant (Andhra Pradesh Tourism Development Corporation Ltd., for short 'APTDC') is a "government company" within the meaning of that expression in section 617 of the Companies Act, 1956.

E 2. According to the respondent, the parties had entered into two agreements in regard to a property known as Hill View Guest House, Alipiri, Tirupathi, measuring 1.08 acres. The first was a lease agreement under which APTDC granted a lease of the said property to the respondent for a term of 33 years;
F and the second was a development and management agreement under which APTDC entrusted to the respondent, the development of a Three-Star Hotel in Hill View Guest House property on construction, operation and management basis. According to the respondent, both agreements contained a provision for disputes resolution (clause 17 of the lease
G agreement and Article 18 of the management agreement) providing that in the event of disputes, best efforts shall be made to resolve them by mutual discussions, amicably; and in the event of the parties not finding an acceptable solution to the disputes within 30 days (60 days in the case of
H

management agreement), the same shall be referred to arbitration in accordance with the procedure specified in the Act. A

3. APTDC claims that it had terminated the said agreements on 21.4.2004 and took possession of the property on 21.8.2004. The respondent filed Arbitration Application No. 24/2005 in March, 2005 before the Andhra Pradesh High Court under section 11 of the Arbitration and Conciliation Act, 1996 ['Act' for short], alleging that certain disputes had arisen between the parties in regard to the said Lease Agreement and Management Agreement, and the parties could not arrive at a mutually acceptable solution in respect of those disputes. The respondent therefore sought appointment of a sole arbitrator for adjudication of the disputes and differences between the parties (respondent and APTDC) in regard to lease agreement dated 30.3.2002 and the management agreement dated 30.3.2002 entered between the parties. B C D

4. APTDC resisted the application. One of the contentions urged by APTDC was that there was no arbitration Agreement between them and therefore the question of appointing an Arbitrator under section 11 of the Act did not arise. It was pointed out that according to the respondent, the arbitration agreement came into existence on 30.3.2002, when parties executed the Lease Agreement and Management Agreement on 30.3.2002 containing the arbitration clause; that admittedly the respondent was not in existence on that date, as it was incorporated more than a year thereafter on 9.4.2003; and that when it is alleged that the parties to the petition had entered into contracts which contained arbitration agreements on 30.3.2002, and one of the parties thereof had not even come into existence on that date, obviously there was no contract much less any arbitration agreement between the parties. E F G

5. The Designate of the Chief Justice of Andhra Pradesh allowed the application filed by the respondent under Section 11 of the Act by order dated 16.8.2005 and appointed a retired H

A Judge of the said High Court as Arbitrator, with the observation that the appellant herein is entitled to raise all its pleas including the validity of the arbitration agreement before the Arbitrator. He however noticed the contention that there was no arbitration agreement. He held that having regard to the decisions in B *Konkan Railway Corporation Ltd. v. Mehul Construction Co.* [2000 (7) SCC 201] and *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd.* [2002 (2) SCC 388], he had only a limited administrative role under section 11 of the Act, that is, to appoint the arbitrator as per the agreed procedure, leaving C all contentious issues including whether there was any arbitration agreement or not, to be decided by the Arbitrator. The said order is challenged in this appeal by special leave.

6. On the contentions urged, two questions arise for consideration:

D

(i) where the party seeking arbitration is a company which was not in existence on the date of the signing of the contract containing the arbitration agreement, whether it can be said that there is an arbitration agreement between E the parties ?

(ii) whether the question as to the existence or validity of the arbitration agreement, has to be decided by the Chief Justice/Designate when considering the petition under section 11 of the Act or by the Arbitrator ?

F

Re : Question (i) :

7. Section 7 of the Act defines an arbitration agreement. Sub-section (1) thereof provides that an arbitration agreement means an agreement *by the parties* to submit to arbitration all G or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Sub-section (2) provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-

H

section (3) provides that an arbitration agreement shall be in writing. Sub-section (4) inter alia provides that an arbitration agreement is in writing if it is contained in a document signed by the parties. The specific and clear case of the respondent is that the arbitration agreement between the parties, is in writing contained in the Lease Agreement and Management Agreement signed by them on 30.3.2002.

8. The Lease Agreement was made on 30.3.2002 between 'APTDC' (Lessor) and Pampa Hotels Ltd. (Lessee). The opening part containing the description of the parties describes the lessee as follows:

> "M/S Pampa Hotels Limited, a company incorporated under the provisions of the Companies Act, 1956, and having its registered office at 209, T.P.Area, Tirupati through its Managing Director Sri S. Jayarama Chowdary hereinafter referred to as "Lessee", promoted inter alia for the purpose of implementing the project by M/s Sudalagunta Hotels Limited the successful bidder, of the other part."

Similarly the Management Agreement which was also made on 30.3.2002 between APTDC (the first party) and Pampa Hotels Ltd (the second party). described the second party as follows:

> "M/S Pampa Hotels Limited (promoted for the purpose of implementing the project by "the Bidder" Sudalagunta Hotels Limited) a company incorporated under the Companies Act, 1956, having its registered office at 209, T.P.Area, Tirupati represented by Sri S.Jayarama Chowdary, Managing Director (hereinafter referred to as "Company" which expression unless repugnant to the context or meaning thereto include its successors, administrators and assigns on the second part)."

It is not disputed that both the agreements contain a provision for arbitration. It is also not disputed that both of them were

A signed by Mr. C.Anjaneya Reddy as Chairman of APTDC and Mr. S.Jayarama Chowdary as Managing Director of Pampa Hotels Ltd.

9. Pampa Hotels Ltd., (with the registered office at 209, TP Area, Tirupati, Chittoor District, represented by its Manaç,ing Director Shri Jayarama Chowdary), the applicant in the application under section 11 of the Act, was incorporated only on 9.4.2003. The certificate of registration issued by the Registrar of Companies shows the date of its incorporation as 9.4.2003. Section 34(2) of the Companies Act, provides that from the date of incorporation mentioned in the certificate of incorporation, such of the subscribers of the memorandum and other persons, as may from time to time be members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company. Sub-section (3) of section 149 provides that Registrar shall, on the filing of declaration/statement as stated therein, certify that the company is entitled to commence business. Section 149(4) of the Companies Act provides that any contract made by a company (which is already registered) before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on that company until that date, and on that date it shall become binding. A certificate under section 149(3) of the Act was issued by the Registrar of Companies only on 6.6.2003 certifying that respondent is entitled to commence business. It is thus clear that the applicant in application under section 11 of the Act was non-existent on 30.3.2002 when the arbitration agreement was entered into.

10. Section 7 of the Act as noticed above, defines an arbitration agreement as an agreement by *the parties* to submit to arbitration. The word 'party' is defined in section 2(h) of the Act as a party to an arbitration agreement. An agreement enforceable by law is a contract. An agreement has to be between two or more persons. Therefore if one of the two

parties to the arbitration agreement was not in existence when the contract was made, then obviously there was no contract and if there was no contract, there is no question of a clause in such contract being an arbitration agreement between the parties. The two agreements dated 30.3.2002 categorically refer to Pampa Hotels Ltd. as an existing company (promoted for the purpose of implementing the project by Sudalagunta Hotels Ltd.) incorporated under the provisions of the Companies Act, having its registered office at 209, T.P. Area, Tirupati and represented by its Managing Director Sri S. Jayarama Chowdary. The agreements are not entered by the promoters of the company, but purportedly by the company itself, represented by its Managing Director. Admittedly on 30.3.2002 there was no such company in existence. Admittedly there was no such company having its registered office at 209, T.P. Area, Tirupati on that date. Admittedly, S. Jayarama Chowdary was not the Managing Director of any company of that name on that date. When one of the parties to the Lease Agreement and Management Agreement, was a non-existent imaginary party, there is no contract. This is not a case of one of the parties being in existence, but being under some legal disability to enter into contracts. This is a case where there was no 'party' at all, but someone claiming that there was an existing company capable of entering into contracts.

11. The position would have been different, had the agreement been entered by the promoters of the respondent company before its incorporation for the purposes of the company and such contract was warranted by the terms of incorporation. Section 15 of the Specific Relief Act, 1963 provides as follows:

> *"Except as otherwise provided by this Chapter*, the specific performance of a contract may be obtained by – x x x x x (h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the

A terms of the incorporation, the company, provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract."

B It is evident from section 15(h) of Specific Relief Act that if the lease agreement and the management agreement had been entered into by the promoters of the company stating that they are entering into the contract for the purpose of the company to be incorporated, in their capacity as promoters and that such contract is warranted by the terms of the incorporation of the C company, the agreement would have been valid; and the term regarding arbitration therein could have been enforced. But for reasons best known to themselves, the agreement was entered not by the promoters of Pampa Hotels Ltd., on behalf of a company proposed to be incorporated by them, but by a non- D existing company claiming to be an existing company. This clearly shows that there is no arbitration agreement between the respondent (applicant in the application under section 11 of the Act) and APTDC against whom such agreement is sought to be enforced.

E

Re : Question (ii) :

12. Let us next consider the question as to who should decide the question whether there is an existing arbitration agreement or not. Should it be decided by the Chief Justice or F his Designate before making an appointment under section 11 of the Act, or by the Arbitrator who is appointed under section 11 of the Act? This question is no longer res integra. It is held in *SBP & Co. v. Patel Engineering Ltd.* [2005 (8) SCC 618] and *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.* G [2009 (1) SCC 267] that the question whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement, is an issue which is to be decided by the Chief Justice or his Designate under section 11 of the Act before appointing an H arbitrator. Therefore there can be no doubt that the issue ought

to have been decided by the learned Designate of the Chief Justice and could not have been left to the arbitrator. But as noticed above, the learned Designate proceeded on the basis that while acting under section 11 of the Act, he was not acting under a judicial capacity but only under an administrative capacity and therefore he cannot decide these contentious issues. He did so by following the two decisions in *Konkan Railway (supra)* which were then holding the field.

13. In *SBP* (supra), a seven-Judge Bench of this Court overruled the two decisions in *Konkan Railway*. The decision in *SBP* was rendered on 26.10.2005, a few weeks after the impugned decision by the Designate on 16.8.2005. Having regard to the fact that several decisions rendered under section 11 of the Act had followed the decisions in *Konkan Railway,* this court, when it rendered its decision in *SBP*, resorted to prospective overruling by directing as follows:

> "(x) Since all were guided by the decision of this Court in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.* [2002 (2) SCC 388] and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that *appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid*, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act."
>
> (emphasis supplied)

This Court in *Sarwan Kumar v. Madan Lal Aggarwal* [2003 (4) SCC 147] observed:

> "The doctrine of "prospective overruling" was initially made applicable to the matters arising under the Constitution but we understand the same has since been made applicable to the matters arising under the statutes as well. Under the

A doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. *Invocation of*
B *doctrine of "prospective overruling" is left to the discretion of the court to mould with the justice of the cause or the matter before the court."*

(emphasis supplied)

C 14. Learned counsel for the appellants contended that the impugned order was rendered on 16.8.2005; that as on 26.10.2005 when the decision in *SBP* was rendered, the time for filing a special leave petition under Article 136 of the Constitution had not expired; that the special leave petition was
D filed by the appellant on 22.11.2005, which has been entertained by granting leave. The appellants therefore contend that this appeal should be considered as a continuation of the application under section 11 of the Act or as pending matter to which the decision in *SBP* would apply, even though the
E Designate had rendered the decision on 16.8.2005. The appellants submitted that a pending matter would refer not only to the original proceedings but also would include any appeal arising therefrom and therefore any proceeding which has not attained finality is a pending matter.

F 15. What the appellants contend, would have been the position if there was a statutory provision for appeal and *SBP* had directed that in view of prospective overruling of *Konkan Railway* pending matters will not be affected. But sub-section (7) of Section 11 of the Act makes the decision of the Chief
G Justice or his designate final. There is no right of appeal against the decision under Section 11 of the Act. Further, the seven Judge Bench in *SBP* issued the categorical direction that appointment of Arbitrators made till then are to be treated as valid and all objections are to be left to be decided under
H Section 16 of the Act.

16. On account of the prospective overruling direction in *SBP*, any appointment of an arbitrator under Section 11 of the Act made prior to 26.10.2005 has to be treated as valid and all objections including the existence or validity of the arbitration agreement, have to be decided by the arbitrator under section 16 of the Act. The legal position enunciated in the judgment in *SBP* will govern only the applications to be filed under Section 11 of the Act from 26.10.2005 as also the applications under section 11(6) of the Act pending as on 26.10.2005 (where the Arbitrator was not yet appointed). In view of this categorical direction in *SBP*, it is not possible to accept the contention of the appellant that this case should be treated as a pending application. In fact we may mention that in *Maharishi Dayanand University v. Anand Coop. L/C Society Ltd. & Anr.* [2007 (5) SCC 295], this Court held that if any appointment has been made before 26.10.2005, that appointment has to be treated as valid even if it is challenged before this Court.

17. In view of the above, we are not in a position to accept the contention of the appellant. But the arbitrator will have to decide the issue as to whether there is an arbitration agreement, with reference to the legal position explained by us in regard to the existence of arbitration agreement. Though such an exercise by the arbitrator will only be an academic exercise having regard to our decision in this case, such an exercise becomes inevitable in view of the peculiar position arising out of the specific direction contained in para 47 (x) of the decision in *SBP* and the subsequent decision in *Maharishi Dayanand University.*

18. We accordingly dispose of the appeal without interfering with the appointment but with a direction to the Arbitrator to decide the issue in regard to the existence/validity of the arbitration agreement as a preliminary issue relating to jurisdiction in the light of what has been stated above.

K.K.T. Appeal disposed of.