*** THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN**

+ ARBITRATION APPLICATION No.72 OF 2022

% Date: 24-02-2023

M/s. Ranganath Properties Private Limited,
rep. by its Director and others

... Applicants

v.

$ Phoenix Tech Zone Private Limited
(formerly known as Phoenix Embassy Tech Zone Pvt Ltd),
rep. by its Managing Director and others.

... Respondents

! Counsel for applicants : Mr. B.Venkat Rama Rao

^ Counsel for respondents : Mr. V.Ravinder Rao,
learned Senior Counsel for Mr. P.Sambasiva Rao,
learned counsel

< GIST:

➢ HEAD NOTE**:**

? CASES REFERRED:

1. (2021) 2 SCC 1
2. (2021) 5 SCC 671
3. 2022 SCC OnLine SC 1165
4. 2021 SCC OnLine Del 3486
5. 2021 SCC OnLine Mad 5729
6. 2021 SCC OnLine Mad 5943
7. (2020) 15 SCC 161
8. 2021 SCC OnLine SC 255
9. 2021 SCC OnLine SC 439

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN

ARBITRATION APPLICATION No.72 OF 2022

ORDER:

Heard Mr. B.Venkat Rama Rao, learned counsel for the applicants and Mr. V.Ravinder Rao, learned Senior Counsel for Mr. P.Sambasiva Rao, learned counsel representing the respondents.

2. This application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (briefly, 'the 1996 Act', hereinafter) for appointment of arbitrator i.e., the presiding arbitrator (umpire).

3. Sixteen applicants have joined together and have filed the present application through Sri Ramesh Chand Kalantri who is the special power of attorney holder and authorised person on behalf of the applicants, besides being one of the applicants himself. Each of the applicants are owners and possessors of their respective pieces and parcels of land in all admeasuring Acs.6.08 guntas covered by survey Nos.122 and 138 situated at Nanakramguda Village, Serilingampally Mandal of Ranga

Reddy District (referred to hereinafter as 'larger extent'). The details of ownership and possession of each of the applicants *vis-a-vis* their respective pieces and parcels of land are mentioned in paragraph 3 of the supporting affidavit.

4. First respondent which was earlier known as Phoenix Embassy Tech Zone Private Limited and now known as 'Phoenix Tech Zone Private Limited' (referred to hereinafter as 'the developer') is in the business of executing joint ventures in development, construction of multi-storied commercial/Information Technology (IT) buildings and complexes in and around Hyderabad. In the early part of the year 2015, first respondent approached the applicants with a proposal to develop the larger extent as a common project. In the course of several rounds of discussions and deliberations, it was represented by the first respondent that it would develop the larger extent together with land of adjoining land owners into a Special Economic Zone/buildings for the purpose of IT/Information Technology Enabled Services

(ITES)/commercial office space as one composite project at its own cost and expenses for the benefit of the stakeholders. This project would cover land beyond the larger extent as it would encompass total land admeasuring about Acs.15.46 cents covered by survey Nos.118(P), 120(P), 121(P), 122(P) and 138(P) of Nanakramguda Village (referred to hereinafter as 'larger extent project').

5. First respondent had informed the applicants vide e-mail dated 04.04.2015 that it would construct 2,00,000 square feet of saleable/leasable area per acre in the larger extent project. Applicants were assured that they would be given 25% share or 55,000 square feet per acre in such saleable/leasable built-up area with proportionate share in the common areas/parking etc.

6. Following the same, applicants and respondents entered into a common understanding vide preliminary agreement dated 06.12.2015 which is referred to as 'term sheet'. In the term sheet, respondents agreed to give the

applicants' share of 55,000 square feet per acre with proportionate car parking space in the larger extent project. It was also agreed upon that the parties would enter into registered development agreements etc., separately with each of the applicants for getting their respective schedule properties to be developed as one unit in the larger extent project.

7. As per the understanding, applicants formed a society under the name and style of 'JELL - IT Society' and got it registered under the Telangana Societies Registration Act, 2021.

8. Later on, applicants came to know from other sources that the respondents were taking up construction of the built-up area more than the initial plan/understanding. Immediately, applicants through mail dated 02.04.2019 called upon the respondents to maintain the 25% share or 55,000 square feet per acre. Respondents through reply mail dated 03.04.2019 intimated that they would be planning a slight increase

in the project built-up area in high rise buildings though they had not submitted any plan for approval. However, respondents agreed to enhance the sharing ratio of the applicants from 55,000 square feet per acre to 70,000 square feet per acre of saleable/leasable area, further stating that it had the intention to increase the total built-up area from 2,00,000 square feet per acre to 2,69,000 square feet per acre.

9. Accordingly, respondents executed an addendum to the supplemental development agreements during the year 2019 in favour of the applicants revising the share of the applicants from 55,000 square feet per acre to 70,000 square feet per acre of saleable/leasable area along with allocation of each applicant's share in the floors of the proposed project. This would be evident from the first set of development agreements-cum-general power of attorney, second set of supplemental development agreements and addendum to the supplemental development agreements, collectively referred to as 'development agreements'.

10. It is the allegation of the applicants that even during modification of the sharing ratio, respondents did not disclose the permissions that they were obtaining and concealed the master plan of the project. Later on, applicants came to know that respondents had submitted revised applications before the competent authority for construction of six towers increasing the upper floors of the towers as well as increasing the number of towers from 3 to 6. This revised master plan was prepared by the respondents after execution of addendum to the supplemental development agreements and it was never intimated and discussed with the applicants. All such permissions were obtained by the respondents behind the back of the applicants. Applicants have referred to relevant provisions of the development agreements to highlight and substantiate the claim of the applicants *vis-a-vis* the respondents. As per the development agreements, the initial sharing ratio of the applicants was mutually enhanced from 55,000 square feet per acre to 70,000 square feet per acre of saleable/leasable area

based on the intention of the respondents to increase the built-up area in the project from 2,00,000 square feet per acre to 2,69,000 square feet per acre which would ensure or maintain the share of the applicants at 25% of the total built-up area in the larger extent project.

11. Applicants came to know that respondents had revised or modified the earlier master plan of the larger extent project which has led to delay in the execution of the project. Though a meeting took place in this regard between the applicants and the respondents on 23.01.2020, no fruitful result came out of the said meeting. This was followed by exchange of e-mails and letters. Applicants made a request to the respondents to increase the sharing ratio of the applicants in the built-up area in view of the fact that the respondents were constructing more Floor Space Index (FSI). Ultimately, the applicants addressed a letter dated 25.02.2021 to the first respondent highlighting their grievances.

12. On application filed under the Right to Information Act, 2005, applicants received the information on 16.03.2021 that the competent authority had granted permission to the respondents to the extent of building permit dated 04.02.2021 for two towers of 117.45 meter height, each tower having four cellars + one stilt + twenty nine upper floors. In its reply mail dated 25.04.2021, first respondent declined the claim of the applicants for enhancing the sharing ratio, in spite of obtaining sanction approvals for increased FSI. It is the contention of the applicants that intention of the respondents is to construct more than 2,69,000 square feet per acre and if that be so, then share of the applicants would have to increase proportionately. As per the development agreements, the proportionate share between the two sides was in the ratio of 1:3 i.e., 25% and 75%. This ratio cannot be surreptitiously and unilaterally changed by the respondents.

13. In these circumstances, applicants were constrained to invoke clause 23 of the development

agreements as a common action by issuing a notice dated 20.07.2021 raising the following issues as disputes to be resolved by the panel of arbitrators as per the arbitration clause:

> (i) that the applicants are entitled for 25% share in the total saleable/leasable area in the total built-up area taken up by the developer in the entire project coming up in the joint property including the scheduled properties of the applicants.
>
> (ii) that the developer is required to execute a revised/addendum to the development agreements enhancing the applicants share in the development agreements on the basis of the increase in total built-up area of the project and shall consequently give additional allotment of increased share of saleable/leasable area equivalent to 25% share of the currently permitted total saleable/leasable area out of the currently permitted total built-up area in the project together with proportionate share in the common areas, parking and proportionate undivided share in the project by execution of necessary documents as required in law.

14. Applicants through the above notice dated 20.07.2021 and subsequent notice dated 01.10.2021 appointed Sri Justice V.V.S.Rao (Retired) as the nominee arbitrator. Respondents through letters of intimation

dated 18.08.2021 and 13.11.2021 appointed Sri Justice M.Jeyapaul (Retired) as their nominee arbitrator.

15. Nominee arbitrators through various correspondence including dated 03.02.2022 and 07.02.2022 failed to reach an agreement regarding appointment of the third arbitrator to be the presiding arbitrator (umpire) so as to constitute the arbitral tribunal.

16. Accordingly, the present application has been filed seeking the relief as indicated above.

17. First respondent has filed counter affidavit. At the outset it is contended that there is no arbitral issue at all between the parties. There is no clause in the development agreements to revise the area upon revision of plans, at the request of the applicants. Earlier, following negotiations entitlement/share of the applicants was revised from 55,000 square feet per acre to 70,000 square feet per acre. When the applicants again sought for revision vide e-mail dated 20.07.2021, respondents

refused the same as the development agreements did not provide for the same.

17.1. Additionally, another objection taken is that the subject property is part of a Special Economic Zone as defined under Section 2(za) of the Special Economic Zones Act, 2005 (for short, 'the SEZ Act' hereinafter). Applicants themselves have collectively been approved as 'co-developers' as defined under Section 2(f) of the SEZ Act. Definition of 'developer' under Section 2(g) of the SEZ Act includes 'co-developer'. Dispute raised by the applicants in respect of increase in the share proportionate to the built-up area in the larger extent which is located within the Special Economic Zone is nothing but a civil dispute. As per Section 42(1) of the SEZ Act which starts with a *non-obstante* clause, such a dispute is referable to the designated court but if there is no such designation, such a dispute shall be referred to arbitration. When a dispute is referred to arbitration under Section 42(1) of the SEZ Act, the same shall be settled or decided by the arbitrator to be appointed by the

Central Government. It is the contention of the first respondent that present application is not maintainable in view of the alternate scheme of dispute resolution under Section 42 of the SEZ Act which is a special law. As a matter of fact, Section 51 of the SEZ Act clarifies that provisions of the SEZ Act would have an overriding effect over all other Acts including the 1996 Act. Therefore, the arbitration application under Section 11(6) of the 1996 Act is not maintainable.

17.2. Without prejudice to the above, further contention of the first respondent is that the procedure prescribed or the conditions precedent for invoking arbitration were not complied with by the applicants. Applicant Nos.14 to 16 are subsequent purchasers of saleable area in the larger extent vide the deed of conveyance dated 18.05.2019. Therefore, they are not entitled to any claim on the basis of the correspondence prior to 18.05.2019. They are also not privy to the development agreements. Therefore, they cannot seek recourse to the arbitration clause contained in the development agreements.

17.3. In addition to the above, first respondent has alleged suppression of facts by the applicants. According to the first respondent, applicants were intimated of latest plans which were submitted before the Telangana State Industrial Infrastructure Corporation (TSIIC) for approval/permission. Therefore, it is not correct that respondents were seeking revision of plans behind the back of the applicants.

17.4. Thereafter, first respondent has replied to the averments made by the applicants parawise in great detail including on the merit of the case. It may not be necessary to advert to them having regard to the limited scope of the present proceeding. Suffice it to say, first respondent has sought for dismissal of the arbitration application both on the preliminary grounds as well as on merit.

18. Learned counsel for the applicants submits that scope of the application is very limited. The application has been filed under Section 11(6) of the 1996 Act

seeking the relief of appointment of the third arbitrator to be the presiding arbitrator of the arbitral tribunal on account of disagreement between the two nominee arbitrators in naming the presiding arbitrator. According to learned counsel for the applicants, arbitrable dispute arose between the parties on account of denial by the first respondent that owners (applicants) have 25% legitimate share in the larger extent project as per the sanctioned master plan. Referring to clause 23 of the development agreements, he submits that since the dispute between the parties could not be settled mutually by way of negotiations, clause 23 provides for settlement of such dispute by way of arbitration in accordance with the 1996 Act by the arbitral tribunal comprising of three arbitrators; one each to be nominated by the parties, whereafter the third arbitrator who shall be the chairman of the arbitral panel would be appointed by the two arbitrators amongst themselves.

18.1. Adverting to the objections raised by the first respondent, learned counsel for the applicants submits

that the arbitration clause 23 would be binding on the respondents as both the applicants and respondents were *ad idem* with regard to incorporating clause 23 in the development agreements which are the contracts for development of the project. Such a project would be a 'real estate project' within the meaning of Section 2(zn) of the Real Estate (Regulation and Development) Act, 2016 (briefly, 'the Real Estate Act' hereinafter). Both the parties to the development agreements were conscious about resolving their disputes arising out of such development agreements in terms of the arbitration clause. Clause 23 clearly covers all disputes arising out of the contract.

18.2. Contention of learned counsel for the applicants is that dispute raised by the applicants arises out of a contract relating to a real estate project; it is not an infrastructure project within the meaning of the SEZ Act which takes out such a dispute from the purview of the SEZ Act, including Section 42 thereof. In fact, from a reading of the development agreements, it would be evident that it was never the intention of the parties to

submit themselves to the regime of statutory arbitration under Section 42 of the SEZ Act. As a matter of fact, the first respondent had subjected itself to clause 23 of the development agreements by nominating its arbitrator. It is because of the disagreement between the two nominated arbitrators regarding appointment of the third arbitrator, that the applicants have been compelled to file the present application.

18.3. In this connection, learned counsel for the applicants has painstakingly referred to the difference between a real estate project and infrastructure project. The first one is contemplated under the Real Estate Act and the second one is contemplated under the SEZ Act.

18.4. Joining issue with the first respondent, learned counsel for the applicants submits that on merit, applicants have a good case. Whatever be the area of the larger extent project, proportionate share of the two parties in the ratio of 1:3 has to be maintained. Respondents cannot unilaterally enhance the project site

without maintaining the 1:3 ratio. Applicants have raised the dispute which has been denied by the respondents. In such circumstances, it must be construed that the dispute has arisen between the parties within the meaning of the arbitration clause which has now to be referred to the arbitral tribunal. According to learned counsel for the applicants, sincere efforts were made by the applicants to persuade the first respondent to adhere to the agreed terms upon the sharing ratio but the first respondent never intended to resolve such dispute mutually.

18.5. Insofar objection to joinder of applicant Nos.14 to 16 is concerned, learned counsel for the applicants submits that in terms of the deed of conveyance dated 18.05.2019, applicant Nos.14 to 16 have stepped into the shoes of the original owners and possessors.

18.6. Learned counsel for the applicants in support of his various contentions has placed reliance on the following decisions:

1. **Vidya Drolia v. Durga Trading Corporation[1];**
2. **Pravin Electricals (P) Limited v. Galaxy Infra & Engineering (P) Limited[2];**
3. **Babanrao Rajaram Pund v. Samarth Builders & Developers[3];**
4. **Manju Gupta v. Vilas Gupta[4];**
5. **India Pistons Limited v. Ganapathi Chandrasekar[5];** and
6. **K.S.Srinivasan v. Land Mark Housing Projects (India) Private Limited[6].**

19. Learned Senior Counsel for the first respondent at the outset elaborately referred to Section 42 of the SEZ Act and also submits that SEZ Act has overriding effect over the 1996 Act. He submits that the applicants and the respondents had consented to develop Special Economic Zone consisting of office space for IT/ITES in the land belonging to the applicants together with land of other land owners adjacent to the land of the applicants. All along applicants and respondents were aware and conscious of applicability of the SEZ Act. Thereafter, learned Senior Counsel for the first respondent referred

[1] (2021) 2 SCC 1
[2] (2021) 5 SCC 671
[3] 2022 SCC OnLine SC 1165
[4] 2021 SCC OnLine Del 3486
[5] 2021 SCC OnLine Mad 5729
[6] 2021 SCC OnLine Mad 5943

to various clauses in the development agreements and submits from the same that it is clearly discernible that the object was to develop the project into a Special Economic Zone. Applicants have also attained the status of co-developer under Section 2(g) of the SEZ Act. This would be evident from the letter of approval dated 31.03.2017. A developer under the SEZ Act includes a co-developer. Learned Senior Counsel referred to Section 42 of the SEZ Act and submits that Section 42 starts with a *non-obstante* clause meaning thereby that it has overriding effect over other laws. Scheme of Section 42 is that any dispute of civil nature within the meaning of the SEZ Act has to be decided by the designated court but if a court has not been so designated such dispute shall be referred to arbitration. The reference to arbitration shall be settled or decided by the arbitrator to be appointed by the Central Government. When Section 42 of the SEZ Act is in place, Section 11(6) of the 1996 Act would not be applicable.

19.1. On a query by the Court, learned Senior Counsel submits that State Government has not designated any court as a designated court under Section 23(1) of the SEZ Act.

19.2. Adverting to Section 51 of the SEZ Act, learned Senior Counsel submits that not only Section 42 has got overriding effect, the entirety of the SEZ Act has got an overriding effect over anything inconsistent with any other laws for the time being in force.

19.3. Specific contention of learned Senior Counsel for the first respondent is that when Section 42 of the SEZ Act provides for the mode of dispute resolution, clause 23 of the development agreements providing for arbitration under the 1996 Act would no longer be effective. In support of such contention, learned Senior Counsel for the first respondent has placed reliance on the following decisions:

1. **National Highways Authority of India v. Sayedabad Tea Company Limited[7];**

[7] (2020) 15 SCC 161

2. **Chief General Manager (IPC) MP Power Trading Company Limited v. Narmada Equipments Private Limited[8];** and
3. **Silpi Industries v. Kerala State Road Transport Corporation[9].**

19.4. Additionally, learned Senior Counsel submits that on the face of it, there is no live and arbitrable issue in the present case. The built-up area falling to the share of the applicants have been clearly identified, demarcated and allotted in the development agreements. The dispute is only in the minds of the applicants. That apart, there is no basis for the contention advanced by the applicants that the project is only a real estate one and is not SEZ project. In the circumstances, he seeks dismissal of the arbitral application.

20. Submissions made by learned counsel for the parties have received the due consideration of the Court.

21. At the outset, we may advert to the development agreement with general power of attorney dated

[8] 2021 SCC OnLine SC 255
[9] 2021 SCC OnLine SC 439

06.04.2016 entered into between M/s.Ranganath Properties Private Limited and Ramesh Chand Kalantri on the one hand and first respondent on the other hand placed on record at page 73 of the paper book. We may mention that similar development agreements with general power of attorney were executed between each of the applicants and the first respondent. In clause E of the development agreement, it is mentioned that the developer had evinced interest in development of the larger extent together with neighbouring properties into a Special Economic Zone or buildings for IT/ITES office space or residential or any other usage as may be proposed by the developer so as to achieve more advantages and benefits to one and all. Clause E reads as follows:

> E. The developer has evinced interest in development of the schedule property together with neighbouring, adjacent and abutting properties, hereinafter referred to the "joint property", for the purpose of joint development of the total land into an SEZ or buildings for IT/ITES office space or residential or any other usage as may be proposed by the developer with amenities and facilities, more

> fully described in Annexure-1 ('Project'), so as to achieve more advantages and benefits to one and all, such as elegance of the complex, a good marketable extent of developed area and market the same.

21.1. From the above, what transpires is that the developer i.e., first respondent had evinced interest in development of the larger extent together with adjacent lands into a Special Economic Zone or buildings for IT/ITES office space or residential or any other usage so as to achieve more advantages and benefits to one and all. So the intention of the developer was to develop the subject land either into a Special Economic Zone or buildings for IT/ITES office space or residential purposes etc.

22. Having noticed the same, we may now refer to clause 23 which provides for dispute resolution. Clause 23 reads as under:

> **23. Dispute Resolution:**
>
> Any disputes and/or differences whatsoever arising under or in connection with this agreement which could not be settled by the parties through negotiations shall be finally settled by arbitration in

> accordance with the Arbitration and Conciliation Act, 1996 by an arbitral panel comprising of three (3) arbitrators, one appointed by the owners and one by the developer and the two arbitrators so appointed shall appoint the third arbitrator, who shall be the Chairman of the arbitral panel. All proceedings shall be conducted in English. The venue of arbitration shall be Hyderabad and the decision of the arbitrators shall be final and binding on both parties.

22.1. From a perusal of the above, it is seen that as per clause 23, any disputes and/or differences arising under or in connection with the agreement which could not be settled by the parties through negotiations shall be finally settled by arbitration in accordance with the 1996 Act by an arbitral panel comprising of three arbitrators, one appointed by the owners and one appointed by the developer. The two arbitrators so appointed shall appoint the third arbitrator who shall be the Chairman of the arbitral panel. The clause further says that all proceedings shall be conducted in English and that the venue of the arbitration shall be at Hyderabad. Decision of the arbitrators shall be final and binding on both parties.

23. At page 565 of the paper book is a letter dated 20.07.2021 issued by learned counsel of the applicants. After setting out the claims of the applicants, it was stated that applicants had approached the first respondent raising the following issues for amicable resolution:

> (i) to review/increase the applicants share in proportionate to the agreed sharing ratio to the applicants as promised in the total constructed area.
>
> (ii) whatever Floor Area Ratio (F.A.R) is possible in the project shall be for mutual benefit according to the agreed sharing ratio.
>
> (iii) the applicants shall not be deprived of their due share in the undivided interest in the project land and shall be in proportionate to the total saleable/leasable area in the total built-up area of the project as per final approval of the building plans by the authorities concerned.
>
> (iv) the project delay occurred due to the reasons attributable to the developer resulted in significant difference in the applicants asset realization.
>
> (v) and the several other non-compliance of statutory requirements in taking up the project and not disclosing the approval/sanctions of total FSI of the project and non-registration of the project under

> the RERA Act, to hide the information to the owners all concerned.

23.1. The letter goes on to say that in the meetings, first respondent had avoided any resolution of the claim raised by the applicants. Even the letter dated 25.02.2021 did not elicit any favourable response, rather it resulted in a counter reply dated 25.04.2021 raising certain allegations against the applicants. Therefore, it was mentioned that the first respondent did not cooperate in trying to resolve the dispute in an amicable manner. Thereafter, applicants invoked the arbitration clause of the development agreements i.e., clause 23 raising the following disputes to be resolved by a panel of arbitrators.

> (i) that the applicants are entitled for 25% share in the total saleable/leasable area in the total built-up area taken up by the developer in the entire project coming up in the joint property including the scheduled properties of the applicants.
>
> (ii) that the developer is required to execute a revised/addendum to the development agreements enhancing the applicants share in the development agreements on the basis of the increase in total built-up area of the project and shall consequently

> give additional allotment of increased share of saleable/leasable area equivalent to 25% share of the currently permitted total saleable/leasable area out of the currently permitted total built-up area in the project together with proportionate share in the common areas, parking and proportionate undivided share in the land in the project by the execution of necessary documents as required in law.

23.2. Applicants jointly and severally appointed Sri Justice V.V.S.Rao (Retired) as one of the arbitrators on their behalf. First respondent was requested to appoint an arbitrator on its behalf for resolution of the dispute as contemplated in arbitration clause 23. This was followed by notice dated 01.10.2021 issued by the learned counsel for the applicants.

24. First respondent submitted reply dated 18.08.2021 to the learned counsel for the applicants in response to the notice dated 20.07.2021. First respondent denied and disputed the claims made by the applicants.

25. In response to the notice dated 01.10.2021, first respondent issued reply letter dated 13.11.2021

addressed to learned counsel of the applicants. Again disputing and denying the claims lodged by the applicants, in paragraph 11 of the said letter first respondent however without prejudice to its objections nominated Sri Justice M.Jeyapaul (Retired) as its nominee arbitrator. Paragraph 11 reads as follows:

> 11. We, the developer, however, without prejudice to our serious objections to refer the matter for arbitration on the premise that there has been no negotiation between the parties and as such it does not fulfil the condition precedent for initiation of the arbitration and also that there is no privity between your clients and the developer and there is no arbitrable dispute, nominate Mr. Justice M.Jeyapaul (Retired), R/o Plot No.01, IV Main Road, VGP Layout Part III, Palovakkam, Chennai – 41 as our nominee arbitrator. However, we make it clear that such nomination is made without prejudice and shall not be construed neither as our consent nor waiver of our serious objection to arbitration, that there has been no negotiation between the parties and as such it does not fulfil the condition precedent for initiation of the arbitration by your clients and also in the absence of privity between your client Nos.3 to 5 and developer and absence of a live arbitrable issue between your client/your clients' alleged predecessor.

26. Thus, we find that while applicants had nominated Sri Justice V.V.S.Rao (Retired) as their arbitrator, first respondent nominated Sri Justice M.Jeyapaul (Retired) as its arbitrator. Counsel for the applicants thereafter wrote to Sri Justice V.V.S.Rao (Retired), their nominee arbitrator, on 03.02.2022 with a copy marked to Sri Justice M.Jeyapaul (Retired) and the respondents to appoint a presiding arbitrator, preferably a retired Judge of the Supreme Court or a retired Chief Justice of a High Court to complete the constitution of the arbitral tribunal.

27. Sri Justice V.V.S.Rao (Retired) wrote to Sri Justice M.Jeyapaul on 07.02.2022. In the said letter, reference was made to their telephonic discussion on 05.02.2022. In continuation of such discussion, he suggested the name of Sri Justice R.Subhash Reddy, a former Judge of the Supreme Court of India, for appointment as the presiding arbitrator and sought for the views of Sri Justice M.Jeyapaul (Retired). On 08.03.2022, Sri Justice V.V.S.Rao (Retired) wrote to the learned counsel for the

applicants. In the said letter, he stated that on 08.02.2022, Sri Justice M.Jeyapaul (Retired) had sent an e-mail to him informing him that he would be communicated the choice of preference of the presiding arbitrator before the end of the said week. He further stated that on 06.03.2022, he had received an e-mail from Sri Justice M.Jeyapaul (Retired) in the following terms:

> Respected Justice VVS Raoji,
>
> I deeply reflected upon your choice of preference for the nomination of Presiding Arbitrator communicated to me.
>
> Justice S.J.Mukhopadhaya, Judge, Supreme Court of India (Retd.) and former Chairperson of NCLAT (Mobile No.8800555332 & 9868888824) is my affirmative choice of preference for the nomination of Presiding Arbitrator in the arbitration cases we have been nominated by the representative parties.
>
> As it is my well-considered decision, I make it clear that I have no idea to rescind the same.
>
> With ward regards,
>
> Justice M.Jeyapaul (Retd.)

27.1. Therefore, Sri Justice V.V.S.Rao (Retired) informed that the two arbitrators nominated by each of the parties

had failed to agree on the presiding arbitrator. This is how the matter is before the High Court under Section 11(6) of the 1996 Act.

28. It is true that from a perusal of the letters of the first respondent dated 18.08.2021 and 13.11.2021 as well as the e-mail of Sri Justice M.Jeyapaul (Retired) quoted in the letter of Sri Justice V.V.S.Rao (Retired) dated 08.03.2022, there is no reference to the SEZ Act or to the non-maintainability of the claim of the applicants under the 1996 Act because of the provisions contained in Section 42 of the SEZ Act. It was only when the present application was filed that this objection has been taken up by the first respondent, the objection being that in view of the special provision of dispute resolution contained in Section 42 of the SEZ Act, the present application would not be maintainable.

29. Nonetheless, since a great deal of reliance has been placed on the SEZ Act by first respondent, it would be apposite to dilate on the same in some detail. The SEZ

Act is an Act to provide for establishment, development and management of Special Economic Zones for promotion of exports and for matters connected therewith or incidental thereto. Chapter II of the SEZ Act deals with establishment of Special Economic Zone. Section 3 which forms part of Chapter II lays down the procedure for making proposal to establish Special Economic Zone. As per sub-section (1), a Special Economic Zone may be established under the SEZ Act either jointly or severally by the Central Government, State Government or any person for manufacture of goods or rendering services or for both or as a Free Trade and Warehousing Zone. Sub-section (2) says that any person who intends to set up a Special Economic Zone may, after identifying the area, make a proposal to the State Government concerned for the purpose of setting up the Special Economic Zone. Additionally, under sub-section (3), any person who intends to set up a Special Economic Zone may, after identifying the area, at his option, make a proposal directly to the Board of Approval constituted under sub-

section (1) of Section 8 for the purpose of setting up the Special Economic Zone. In such a case, the Board may grant approval, but after receipt of such approval, the person concerned shall obtain the concurrence of the State Government within the period as may be prescribed. In the event, such a proposal is received by the State Government under sub-section (2), in terms of sub-section (6), it shall forward the same together with its recommendations to the Board of Approval, whereafter the Board of Approval may approve the proposal subject to such terms and conditions as may be prescribed. The Board of Approval under sub-section (7) may approve the proposal or modify the proposal or reject the same. Sub-section (9) provides that if the Board approves the proposal with or without modification, it shall communicate the same to the Central Government, whereafter the Central Government under sub-section (10) shall grant a letter of approval to the developer containing the terms and conditions as well as obligations and entitlements.

30. From the materials placed on record by the first respondent in memo dated 14.10.2022, we find that Government of India in the Ministry of Commerce and Industry, Department of Commerce (SEZ Section) vide letter dated 07.12.2016 addressed to the first respondent granted formal approval to the proposal of the first respondent contained in its application dated 23.05.2016 for development, operation and maintenance of the sector specific Special Economic Zone for Information Technology/Information Technology Enabled Services at Nanakramguda Village, Serilingampally Mandal, Ranga Reddy District.

31. Thereafter, Ministry of Commerce and Industry (Department of Commerce) had issued notification dated 22.02.2017 which was published in the Gazette of India in its issue dated 02.03.2017. The notification says that first respondent had proposed under Section 3 of the SEZ Act to set up a sector specific Special Economic Zone for IT/ITES at Nanakramguda Village, Serilingampally

Mandal, Ranga Reddy District. Central Government was satisfied that requirements under sub-section (8) of Section 3 of the SEZ Act and other related requirements were fulfilled and accordingly had granted Letter of Approval under sub-section (10) of Section 3 for development, operation and maintenance of the above sector specific Special Economic Zone on 07.12.2016. Therefore, Central Government in exercise of the powers as conferred by sub-section (1) of Section 4 of the SEZ Act and in pursuance of Rule 8 of the Special Economic Zones Rules, 2006 notified 3.95 hectares (9.76 acres) at the above location as a Special Economic Zone. This includes the larger extent. Central Government also constituted the approval committee besides appointing 22.02.2017 as the date from which the Special Economic Zone had deemed to be an Inland Container Depot under Section 7 of the Customs Act, 1962.

32. If this be so, then Section 42 of the SEZ Act will come into play. Section 42 reads as under:

42. Reference of dispute:- (1) Notwithstanding anything contained in any other law for the time being in force, if—

(a) any dispute of civil nature arises among two or more entrepreneurs or two or more developers or between an entrepreneur and a developer in the Special Economic Zone; and

(b) the court or the courts to try suits in respect of such dispute had not been designated under sub-section (1) of section 23,

such dispute shall be referred to arbitration:

Provided that no dispute shall be referred to the arbitration on or after the date of the designation of court or courts under sub-section (1) of section 23.

(2) Where a dispute has been referred to arbitration under sub-section (1), the same shall be settled or decided by the arbitrator to be appointed by the Central Government.

(3) Save as otherwise provided under this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to all arbitration under this Act as if the proceedings for arbitration were referred in settlement or decision under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996).

33. As per the scheme of Section 42, any dispute of civil nature is required to be adjudicated by the court designated under sub-section (1) of Section 23 but if such a court has not been designated, such a dispute shall be referred to arbitration. When a dispute is referred to arbitration, the arbitrator is to be appointed by the Central Government. Since Section 42 is a statutory provision with a *non-obstante* clause, it would have an overriding effect over clause 23 of the development agreements. Not only Section 42 has an overriding effect, even Section 51 of the SEZ Act makes it clear that provisions of the SEZ Act as a whole shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the SEZ Act.

34. In **Vidya Drolia** (supra), heavily relied upon by learned counsel for the applicants, the issue before the Supreme Court was the meaning of non-arbitrability and who decides the question of non-arbitrability. Related to

the above issue was the second aspect as to the scope and ambit of jurisdiction of the court at the referral stage when an objection of non-arbitrability is raised to an application under Section 8 or Section 11 of the 1996 Act. It was in that context, Supreme Court held that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability which would include aspect of validity of an arbitration agreement.

35. But the issue in the present case is slightly different. Though the first respondent has also raised the issue of non-arbitrability, the core question is arbitrability under which statute – under the 1996 Act or under the SEZ Act?

36. In **Sayedabad Tea Company Limited** (supra), question before the Supreme Court was whether an application under Section 11 of the 1996 Act would be maintainable in view of Section 3-G(5) of the National Highways Act, 1956 which provides for appointment of an arbitrator by

the Central Government. After analysing the facts and the legal provisions, Supreme Court held that when a special law sets out a self-contained code, application of general law would impliedly be excluded. Scheme of the National Highways Act, 1956 being a special law enacted for the purpose and for appointment of an arbitrator by the Central Government, provisions of the 1996 Act shall apply to every arbitration obviously to the extent where the National Highways Act, 1956 is silent. But so far as the appointment of an arbitrator is concerned, the power being exclusively vested with the Central Government as envisaged under sub-section (5) of Section 3G of the National Highways Act, 1956, Section 11 of the 1996 Act would have no application.

37. Likewise in **Shilpi Industries** (supra) a similar issue arose in the context of Micro, Small and Medium Enterprises Development Act, 2006. In the facts of that case, Supreme Court noticed that the 2006 Act had overriding provisions. The 2006 Act being a special

statute will, therefore, have an overriding effect *vis-à-vis* the 1996 Act which is a general enactment.

38. Supreme Court in **Narmada Equipments Private Limited** (supra) held that Section 174 of the Electricity Act, 2003 provides overriding effect over other laws in force or over any instrument having effect by virtue of any law. Section 86(1)(f) of the 2003 Act vests a statutory jurisdiction with the State Electricity Commission to adjudicate upon disputes between licensees and generating companies and to refer any dispute for arbitration. In that context, Supreme court held that when Section 86(1)(f) of the 2003 Act provided for statutory dispute resolution, recourse to Section 11(6) of the 1996 Act would not be permissible. Recourse to Section 11(6) of the 1996 Act would be a defect of jurisdiction which cannot be cured even by consent of the parties.

39. That being the position, we are of the view that the arbitration application so filed is misconceived. Though a

view may be taken that the development agreements including clause 23 thereof containing the arbitration clause were voluntarily entered into between the applicants and the first respondent and first respondent by nominating its arbitrator had subjected itself to clause 23, nonetheless the issue as to whether the dispute resolution provision contained in Section 42 of the SEZ Act would prevail over clause 23 of the development agreements goes to the root of the matter. As discussed above, SEZ Act is a special legislation in contrast to the 1996 Act which is a general one. Therefore, Section 42 of the SEZ Act would prevail over clause 23 of the development agreements. This being a jurisdictional issue, it would render invocation of clause 23 of the development agreements to be of no legal consequence.

40. That being the position, applicants would have their remedy under Section 42 of the SEZ Act and it would be open to them to seek their remedy thereunder.

41. Therefore, and subject to the above, the present arbitration application is not maintainable and is accordingly dismissed. However, there shall be no order as to costs.

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UJJAL BHUYAN, CJ

24.02.2023

Note: LR copy be marked.
(By order)
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