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

**ARBITRATION APPLICATION No.93 of 2021**

**ORDER:**

Heard Mr. Mohammed Abdul Kalam, learned counsel for the applicants and Mr. D.V.Sudhir Kumar, learned counsel for the respondents.

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

3. It appears that applicants and respondents are landlord and tenant. In this connection, a lease deed was entered into between the parties on 06.12.2018. Clause 25 of the lease deed provides for dispute resolution. It says that any dispute between the parties in relation to or incidentally connected to any term, performance, non-performance, interpretation, termination and validity either during the subsistence or expiry of the terms of the lease or early determination, shall be exclusively referred for a decision to a common arbitrator to be mutually agreed upon. If a mutual decision is not possible, the same shall be appointed in terms of the 1996 Act with venue of arbitration being

Hyderabad and the Courts of Hyderabad alone having jurisdiction to adjudicate all disputes.

4. On 22.07.2020, a legal notice was issued on behalf of the applicants to the respondents. Besides making allegation of fraudulently transferring electricity meter etc., it was also alleged that respondents had not paid the monthly rent from February, 2020 to July, 2020 at the rate of Rs.1.60 lakhs per month. Additionally it was alleged that enhanced rent was also not paid from December, 2019 to July, 2020. Applicants further claim various charges and taxes. Thus a total sum of Rs.16,02,378.00 was claimed by the applicants against the respondents. Applicants also referred to clause 25 of the lease deed dated 06.12.2018 and called upon the respondents to pay the amounts due to the applicants within a week failing which the arbitration clause would be invoked. Respondents were also called upon to suggest name of an arbitrator so that he could be mutually appointed.

5. Respondents submitted reply dated 03.08.2020 denying the claim made. It was alleged amongst others that for failure of the applicants, respondents had to invest Rs.5.00 lakhs for installation of transformer. Insofar non-payment of rent was

concerned, stand taken was that because of the pandemic condition due to Covid-19 as well as due to the lockdown declared by the Government, respondents could not make the payment.

6. It is in the above backdrop that the arbitration application came to be filed.

7. Respondents have filed counter affidavit. Stand taken in the counter affidavit is that in view of the Covid-19 pandemic since February, 2020 and due to nationwide lockdown declared by the Government all economic activities were hampered. It affected each and every business. According to the respondents, there was a dispute as to the quantum of rent which was settled at the intervention of elders. Though respondents have deposited an amount of Rs.1.60 lakhs into the bank account of the applicants, applicants have returned the same by re-depositing the said amount into the bank account of the respondents. It is in such circumstances respondents have contended that no case for referring any alleged dispute between the parties to arbitration is made out.

8. Learned counsel for the applicants submits that it is evident from the conduct of the respondents that there is a

dispute between the parties. He submits that right from the inception of the lease there was consistent delay by the respondents in making payment of rent. He has furnished a statement covering the period from December, 2018 to January, 2020 to show the consistent delay. Learned counsel for the applicants has relied upon a decision of the Delhi High Court in **Tejswi Impex Private Limited v. R-Tech Promoters Private Limited**[1] in his support.

9. On the other hand, learned counsel for the respondents has placed reliance on the *doctrine of frustration* and submits that because of reasons beyond the control of the respondents, all business activities during the lockdown period had come to a grinding halt. The situation which evolved was beyond the control of respondents. Therefore, it was impossible for the respondents to meet the claim of the applicants for the period under consideration. He further submits that given the precarious economic condition of the respondents it would be more appropriate if the parties resort to mediation rather than being referred to expensive arbitration. In this connection, learned counsel for the respondents has relied upon a Division

[1] 2021 (226) AIC 498

Bench decision of this Court in **A.P.Mineral Development Corporation Limited v. Pottem Brothers**[2].

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

11. It is true that the lease deed dated 06.12.2018 contains an arbitration clause which is clause 25 providing for reference of disputes to an arbitrator to be appointed under the 1996 Act. However as per the legal notice dated 22.07.2020 claim lodged by the applicants was for the period from February, 2020 to July, 2020. Judicial notice can be taken of the fact that Covid-19 pandemic had broken out in the month of February, 2020 whereafter a nationwide lockdown was declared from 25.03.2020 bringing the entire country to a grinding halt. Most economic activities had come to a standstill. Subsequently steps were taken by the Central Government as well as by the State Government for gradual lifting of the lockdown but the lockdown continued in one form or the other till July, 2020 and even beyond.

[2] 2016 (4) ALD 354 (DB)

12. Section 56 of the Indian Contract Act, 1872 reads as under:

> An agreement to do an act impossible in itself is void.
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> **Contract to do an act afterwards becoming impossible or unlawful.-** A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, becomes void when the act becomes impossible or unlawful.
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> **Compensation for loss through non-performance of act known to be impossible or unlawful.-** Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promise sustains through the non-performance of the promise.

13. Section 56 of the Indian Contract Act deals with an agreement to do an act. It says that an agreement to do an act impossible in itself is void. As per the first statutory explanation, a contract to do an act which after the contract is made becomes impossible or by reason of some event which the promisor could not prevent, becomes void when the act becomes impossible or unlawful.

14. A Division Bench of this Court in **A.P.Mineral Development Corporation Limited** (supra) referred to the aforesaid provision and thereafter held that the common law *principle of frustration* has received statutory recognition by its incorporation in Section 56 of the Indian Contract Act, 1872.

14.1. It has been held that the first paragraph of Section 56 of the Indian Contract Act provides that an agreement to do an act impossible in itself is void. The second paragraph provides that a contract to do an act becomes unenforceable if the act becomes impossible or for reason of some event which the promisor could not prevent. It has been further held that Section 56 also provides that it becomes so unenforceable when the act becomes impossible or unlawful. This Court held as follows:-

> **110.** The common law principle of frustration has received statutory recognition by its incorporation in Section 56 of the Indian Contract Act. (*G.A. Galia Kotwala and Co. Ltd. rep by its Power Agent and Manager, Kalidas D. Desai* v. *K.R.L. Narasimhan,* AIR 1954 Mad 119). The first paragraph of Section 56 of the Contract Act provides that an agreement to do an act impossible in itself is void. The second paragraph provides that a contract to do an act becomes unenforceable if the act becomes (a) impossible; or (b) for reason of some event which the promisor could not prevent. This section also provides that it becomes so unenforceable when the act becomes impossible or unlawful. (*Central Bank of India Staff Co-opertive Building Society Ltd., Vijayawada* v. *Dulipalla Ramachandra Koteswara Rao* (2003 (5) ALD 116 (DB) = AIR 2004 AP 18). The expression 'frustration of the contract' is an elliptical expression. The fuller and more accurate expression is 'frustration of the adventure or of the commercial or practical purpose of the contract'. (*Ram Kumar* v. *P.C. Roy, A*IR 1952 Cal 335). Frustration occurs whenever the law recognizes that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it radically different from that which was undertaken by the contract. There must be such a change, in the significance of the obligation, that the thing undertaken would, if performed, be a different thing from that contracted for. (*Davis Contractors Ltd.* v. *Fareham Urban District Council,* (1956) 2 All ER 145 at 160 + (1956) AC 696 at 728; *Dulipalla Ramachandra Rao's case (supra)*).

**111.** Frustration signifies a certain set of circumstances arising after the formation of the contract, the occurrence of which is due to no fault of either party and which renders performance of the contract by one or both parties physically and commercially impossible. Where the entire performance of a contract becomes substantially impossible without any fault on either side, the contract is prima facie dissolved by the doctrine of frustration. (Dulipalla Ramachandra Koteswara Rao's case (supra)). The law excuses further performance, under the doctrine of frustration, where the contract is silent as to the position of the parties in the event of performance becoming literally impossible or only possible in a very different way from that originally contemplated. (Dulipalla Ramachandra Koteswara Rao's case (supra)). The legal effect of the frustration of the contract depends upon its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure. (*Ram Kumar's case (supra)*; *Hirji Mulji* v. *Cheong Yue Steamshlt), Co. Ltd.,* 1926 AC 497). The whole doctrine of frustration has been described as a reading into the contract of implied terms to give effect to the intention of the parties. (Ram Kumar's case (supra).

**112.** The essential principle upon which the doctrine of frustration, embodied in Section 56 of the contract Act, is based is the impossibility or rather the impracticability in law or fact of the performance of a contract brought about by an unforeseen and unforeseeable sweeping change in the circumstances intervening after the contract was made. In other words while the contract was properly entered into, in the context of certain circumstances which existed at the time it fell to be made, the situation has so radically changed subsequently that the very foundation which subsisted underneath the contract as it were gets shaken, nay, the change of circumstances is so fundamental that it strikes at the very root of the contract, then the principle of frustration steps in and the parties are excused from or relieved of the responsibility of performing the contract which otherwise lay upon them. (*Hamara Radio and General Industries Ltd., Co., Delhi* v. *State of Rajasthan,* AIR 1964 Raj 205).

**113.** In cases where a defence of frustration is raised, what the Court has to consider is whether the circumstances pleaded did exist which could reasonably be considered as sufficient to hold that the parties are absolved from their obligations under the contract. (G.A. Galia Kotwala and Co. Ltd's case (supra)). The relief is given by the Court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. When such an event or change of circumstance occurs, which

> is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the Court which can pronounce the contract to be frustrated and at an end. (*Satyabrata Ghose* v. *Mugneeram Bangur and Co.*; *H.V. Rajan* v. *C.N. Gopal,* AIR 1961 Mys. 29).
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> **114.** Where one party claims that there has been frustration and the other party contests it, the Court has to decide the issue 'ex post facto' on the actual circumstances of the case. (*Ram Kumar's case (supra)*; *Hirji Mulji's case (supra)*; *Twentsche Overseas Trading Co. Ltd.* v. *Uganda Sugar Factory Ltd.,* (1945) 1 MLJ 417 = AIR 1945 SC 144). The question whether frustration has occurred or not depends on the nature of the contract, the surrounding circumstances and the events which have occurred. (Twentsche Overseas Trading Co. Ltd's (supra); Ram Kumar's case (supra)).

15. Insofar the decision of the Delhi High Court in **Tejswi Impex Private Limited** (supra) relied upon by the applicants is concerned, the same deals with the effect of non-registration of the lease deed. Delhi High Court is of the view that non-registration of the lease deed would not *ipso facto* render the arbitration clause invalid.

16. That is not the issue in the present application. The issue in the present application is whether a dispute arose in terms of the lease deed dated 06.12.2018 and whether such dispute should be referred to arbitration.

17. For the reasons cited above, Court is of the view that it was an impossible situation for the respondents to have paid the lease rentals timely, particularly during the period covered by the claim of the applicants. In the circumstances, the

present is not a fit case where the parties should be referred to arbitration. Instead parties may seek resolution of their dispute by way of mediation. Consequently, the application filed for appointment of arbitrator is dismissed. However there shall be no order as to costs.

**UJJAL BHUYAN, CJ**

01.07.2022
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