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A consumer cannot be compelled to arbitrate; Consumer Protection Act, 2019 is a special legislation and provides a special remedy

The Supreme Court of India (“**Supreme Court**”), in the case of *Smt. Hemalatha Devi & Ors. v. B. Udayasri*,¹ has held that the Consumer Protection Act, 2019 (“**CPA 2019**”) is a special legislation and the remedies provided therein are special remedies. After analyzing various precedents, the Supreme Court has held that if a consumer forum was mandated to refer matters to arbitration simply based on the presence of an arbitration agreement, then the very purpose of a beneficial legislation such as the CPA 2019 would be defeated.

Brief Facts

1. The appellants in the present case are builders while the respondent is a home buyer. The appellants agreed to construct a residential house / villa for the respondent. To that effect, the appellants and the respondent entered into an agreement for sale dated August 27, 2013 (“**Agreement**”). The total sale consideration was INR 49,42,000 (Indian Rupees forty nine lakh forty two thousand), to be paid in 2 (two) tranches. The first tranche was paid by the respondent and the second tranche was to be paid at the time of registration of the sale deed. As per the understanding between the parties, the appellants were supposed to hand over possession of the constructed house / villa on or before February 27, 2017.
2. However, instead of handing over possession on the designated date, in 2020, the appellants sent a termination notice to the respondent. The termination was on the basis that the respondent had not signed a ‘Construction Agreement’. Thereafter, the appellants moved an application under Sections 11 (5) and (6) of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) seeking appointment of an arbitrator, before the High Court of Telangana (“**Section 11 Application**”). Subsequently, the Respondent filed a complaint against the Appellants under the CPA 2019.
3. While the matter stood thus, the respondent filed its response to the Section 11 Application and submitted that being a consumer, it had filed a complaint under CPA 2019 before the District Consumer Forum. The respondent also submitted that the appellants can, if required, move an application under Section 8 of the Arbitration Act before the District Consumer Forum. The High Court of Telangana, *vide* an Order dated May 19, 2022, dismissed the Section 11 Application, and granted liberty to the appellants to move an application under Section 8 of the Arbitration Act before the District Consumer Forum (for reference of the dispute to arbitration).
4. Pursuant to the liberty granted above, the appellants moved an application under Section 8 of the Arbitration Act (“**Section 8 Application**”) before the District Consumer Forum. The District Consumer Forum, however, dismissed the Section 8 Application on the ground that the remedy under CPA 2019 was provided with a specific

¹ Civil Appeal Nos. 6500 – 6501 of 2023 decided on 5 October 2023 decided by Justice Sanjay Kishan Kaul and Justice Sudhanshu Dhulia.

purpose and an arbitration clause cannot oust the jurisdiction of the consumer court. In view of the dismissal of the Section 8 Application, the appellants filed a review petition before the High Court of Telangana against the Order dated May 19, 2022 (“**Review Petition**”). However, the Review Petition was also dismissed *vide* an Order dated November 25, 2022.

5. Aggrieved by such dismissal by the High Court of Telangana, the appellants moved the Supreme Court.

Issue

Whether a party, which has availed the remedy under a special beneficial legislation such as the CPA 2019, can be compelled to go for arbitration if there is an arbitration agreement?

Decisions and Observations of the Supreme Court

1. The Supreme Court noted that a court or a tribunal deciding an application under Section 8 of the Arbitration Act must consider 2 (two) things: (i) whether there exists an arbitration agreement; and (ii) whether the disputes sought to be referred to arbitration are arbitrable.
2. The Supreme Court further noted that there are some types of disputes that are arbitrable and some that are not². A dispute may be excluded from the purview of arbitration either expressly or impliedly. The arbitrability of a dispute must be examined when one of the parties to the dispute seeks redressal under a welfare legislation, such as under the CPA 2019. The primary purpose of the CPA 2019 is to protect the interests of a consumer. Therefore, this is covered within the ambit of ‘public policy’. Consequently, consumer disputes will be non-arbitrable. The exception will be if both the parties opt for arbitration willingly.³ It was also noted by the Supreme Court that arbitration is an optional remedy and the option to choose the remedy of arbitration is vested with a consumer⁴.
3. The appellants had also submitted before the Supreme Court that since the Section 11 Application was moved first, the Respondent ought to have submitted to arbitration. While considering this contention of the appellants, the Supreme Court held that it is not a question of which party had approached the court first. Rather, what needs to be taken into consideration is the nature of the dispute. It is also a question of election and the consumer is the one who has the choice of whether to submit to a private forum, namely, an arbitral tribunal, or a public forum, namely, consumer fora. The submission by the respondent before the court hearing the Section 11 Application that it was open for the appellants to file an application under Section 8 of the Arbitration Act (seeking reference of the disputes to arbitration), cannot be taken as her submission to arbitration. Further, merely filing of an application under Section 8 of the Arbitration Act will not clothe the arbitral tribunal with jurisdiction where none exists. Jurisdiction of courts cannot be determined by means of “*fastest finger first*”. Rather, the parameters to be taken into account (which are not exhaustive) are as follows –
 - a) Nature of the dispute;
 - b) Public policy concerns;
 - c) Will of the legislature;
 - d) Election by the consumer.
4. Importantly, in this case, the Supreme Court took into consideration the amendment to the Arbitration Act brought about by the Arbitration and Conciliation (Amendment) Act, 2015 with effect from October 23, 2015. The amendments relevant to the present discussion and as considered by the Supreme Court are to Sections 8 and 11 of the Arbitration Act. Section 8 was amended to introduce the words “...*unless it finds that prima facie no valid arbitration agreement exists.*” and Sub-Section 11 (6A) was introduced which reads as “*The Supreme Court or, as*

² Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Ors., (2011) 5 SCC 532 @ paras 35 and 36.

³ Fair Engineers (P) Ltd. v. N. K. Modi, (1996) 6 SCC 385.

⁴ National Seeds Corporation Limited v. M. Madhusudan Reddy and Another, (2012) 2 SCC 506.

the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of an arbitration agreement.”

5. The issue that arose in view of the foregoing amendments was whether, when complaints were filed before a consumer forum, such complaints were necessarily to be referred to arbitration if there was an arbitration agreement. This question was decided by a 3 (three) member bench of the National Consumer Disputes Redressal Commission (“**NCDRC**”) in the negative on the basis that subsequent to the amendment to the Arbitration Act, there was no change in law pertaining to arbitrability of disputes and therefore, a consumer forum is not bound to refer the matter to arbitration. An appeal against the order of the NCDRC was filed before the Supreme Court, which was dismissed. A review petition was filed against the order of the Supreme Court dismissing the appeal. In review, the Supreme Court, upon a detailed consideration, came to the conclusion that subsequent to the amendments to the Arbitration Act, there was no change in the legal position with respect to arbitrability and thus, upheld the decision of the NCDRC.⁵ Therefore, it was noted by the Supreme Court that if the consumer fora were mandated to refer matters to arbitration simply based on the presence of an arbitration agreement, then the very purpose of a beneficial legislation such as the CPA 2019 would be defeated. Such beneficial legislations as the CPA 2019 have been enacted with the purpose of providing better protection to the interests of consumers as well as a redressal mechanism which is cheaper, easier, expeditious and effective⁶. Moreover, the amendment to the Arbitration Act cannot be given such an expansive meaning as to mean that even non-arbitrable disputes must be referred to arbitration.
6. The conclusion of the Supreme Court in the present case was also premised on the fact that a private adjudication forum such as an arbitral tribunal are not vested with powers which are there with judicial authorities. For instance, an arbitral tribunal will not have the power to impose penalty.
7. Therefore, in conclusion, the Supreme Court held that the consumer proceedings under the CPA 2019 are special proceedings which will subsist despite there being an arbitration agreement.

Conclusion

The decision of the Supreme Court in the present case is detailed and analytical, and rightly concludes that the CPA 2019 is a special and beneficial legislation and that the remedies provided therein are special remedies. The Supreme Court also concludes, and rightly so, that a consumer cannot be deprived of such remedies. Having said that, this principle should be confined in its application to ‘consumer disputes’ alone. As in the present case, the grievance of the respondent pertained to the delay in handing over and the subsequent termination of the agreement between the parties. The inordinate delay by the appellants in handing over the constructed house / villa may perhaps qualify as an unfair trade practice and thereby bring the dispute within the purview of a ‘consumer dispute’. However, there may also be disputes of some other nature which can be arbitrated and may not require the protection afforded by special legislations such as the CPA 2019. Therefore, application of this principle must be on a case-to-case basis; because a definitional categorization on the basis of *rationae personae* alone may render arbitration clauses redundant.

⁵ See Aftab Singh v. Emaar MGF Land Limited and Another, 2017 SCC Online NCDRC 1614; Appeal before SC – Emaar MGF Land Limited v. Aftab Singh, 2018 SCC Online SC 2378; Review Petition before SC - Emaar MGF Land Limited v. Aftab Singh, (2019) 12 SCC 751.

⁶ Statement of Objects and Reasons, CPA 2019.

Consumer Protection Practice

JSA has a vast experience on matters relating to consumer protection laws and related matters. We have advised clients (both domestic and global), across sectors and industries on complex queries around consumer protection laws and rules thereunder, and its interplay with other related legislations, like data privacy and exchange control laws.

We have developed a leading consumer protection practise supported by a group of extraordinarily gifted and experienced solicitors with knowledge of the essential consumer law sector. Our team has experience in managing complex consumer cases at the national level in India. We are renowned for our proficiency in successfully defending the interests of our clients.

Our key areas of advice include:

- Analysis of business activities from consumer protection laws perspective including import regulations and foreign trade policy of India;
- Advise on registration and licensing requirements;
- Advising on e-commerce rules;
- Advise on single brand retail and multi-brand retail from foreign exchange laws perspective;
- Advise on product liability issues and compliances;
- Advising on standards issued by the BIS and quality control orders including advisory in relation to inspection and enquiries by authorities;
- Advising on advertisement, packaging and labelling requirements.









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