

K.Chandrasekaran Vs. Tamil Nadu Tourism Development Corporation Limited

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Court : Chennai

Decided On : Apr-08-2013

Judge : Vinod K.Sharma

Appellant : K.Chandrasekaran

Respondent : Tamil Nadu Tourism Development Corporation Limited

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:

08. 04/2013 CORAM THE HON'BLE MR.JUSTICE VINOD K.SHARMA
O.A.No.169 of 2012 and A.No.1250 of 2012 O.A.No.169 of 2012 ----- K.
CHANDRASEKARAN 1 KAYATHIRI ST DURAISWAMY NAGAR MADURAI 1 VS
TAMIL NADU TOURISM DEVELOPMENT CORPORATION LIMITED REP BY ITS
MANAGING DIRECTOR 2 WALLAJAH ROAD CHENNAI 2 THE MANAGING
DIRECTOR TAMIL NADU TOURISM DEVELOPMENT CORPORATION LIMITED
REP BY ITS MANAGING DIRECTOR 2 WALLAJAH ROAD CHENNAI 2 THE
CHIEF ACCOUNTS MANAGER CUM SECRETARY TAMIL NADU TOURISM
DEVELOPMENT CORPORATION LIMITED REP BY ITS MANAGING DIRECTOR
2 WALLAJAH ROAD CHENNAI THE MANAGER HOTEL TAMIL NADU MADURAI
UNIT II ALAGAR KOIL ST MADURAI 62 002 THE REGIONAL MANAGER HOTEL
TAMIL NADU RAMESWARAM TAMIL NADU THE REGIONAL ACCOUNTS
OFFICER HOTEL TAMIL NADU MADURAI UNIT II ALAGAR KOIL ROAD

MADURAI 2 THE ASSITANT EXECUTIVE ENGINEER (CIVIL) HOTEL TAMIL NADU MADURAI UNIT II ALAGAR KOIL ST MADURAI 62 002 THE ASSISTANT EXECUTIVE ENGINEER (ELECTRICAL) HOTEL TAMIL NADU MADURAI UNIT II ALAGAR KOIL ST MADURAI 62 002 A.No.1250 of 2012 ----- K. CHANDRASEKARAN 1 KAYATHIRI ST DURAISWAMY NAGAR MADURAI 1 VS TAMIL NADU TOURISM DEVELOPMENT CORPORATION LIMITED REP BY ITS MANAGING DIRECTOR 2 WALLAJAH ROAD CHENNAI 2 THE MANAGING DIRECTOR TAMIL NADU TOURISM DEVELOPMENT CORPORATION LIMITED REP BY ITS MANAGING DIRECTOR 2 WALLAJAH ROAD CHENNAI 2 THE CHIEF ACCOUNTS MANAGER CUM SECRETARY TAMIL NADU TOURISM DEVELOPMENT CORPORATION LIMITED REP BY ITS MANAGING DIRECTOR 2 WALLAJAH ROAD CHENNAI THE MANAGER HOTEL TAMIL NADU MADURAI UNIT II ALAGAR KOIL ST MADURAI 62 002 THE REGIONAL MANAGER HOTEL TAMIL NADU RAMESWARAM TAMIL NADU THE REGIONAL ACCOUNTS OFFICER HOTEL TAMIL NADU MADURAI UNIT II ALAGAR KOIL ROAD MADURAI 2 THE ASSITANT EXECUTIVE ENGINEER (CIVIL) HOTEL TAMIL NADU MADURAI UNIT II ALAGAR KOIL ST MADURAI 62 002 THE ASSISTANT EXECUTIVE ENGINEER (ELECTRICAL) HOTEL TAMIL NADU MADURAI UNIT II ALAGAR KOIL ST MADURAI 62 002 ORDER O.A.No.169 of 2012 The applicant has approached this Court Order XIV Rule 8 of O.S. Rules read with Sec.9(d) of the Arbitration and Conciliation Act, with the prayer for grant of permanent injunction restraining the respondents, their men, agents, representatives or any persons claiming under them from interfering with the peaceful possession and enjoyment of the Hotel/Restaurent as a Franchisee running in the name and style of Sindhu Restaurant, Hotel Tamil Nadu, Alagar Koil Road, Madurai pending arbitration proceedings contemplated under Clause 35 of the Agreement, dated 10.9.2007 entered into between the parties. A.No.1250 of 2012: This application under Order XIV Rule 8 of O.S. Rules read with Sec.9(d) of the Arbitration and Conciliation Act, has been filed with the prayer for grant of stay of the order of termination, dated 25.2.2012 of the second respondent, pending finalization of Arbitration proceedings contemplated under Clause 35 of the agreement, dated 10.9.2007 between the applicant and the third respondent. 2 It is pleaded that the Tamil Nadu Tourism Development Corporation Ltd. invited tender on 6.8.2007 for

franchise of hotel and restaurants of the Corporation. One of the terms of the tender was that unit will be handed over to the franchisee on "As is where is condition". Any improvements/modification/additions/alterations therein was the responsibility of the franchisee. The Corporation, permitted that the hotel unit shall run in the name of "Franchisee", but the fact that the property belongs to the Corporation was to be indicated on Name Board. 3 Prior to the issuance of a tender, hotel was being run by the Corporation till 14.9.2007. On 15.9.2007, the hotel unit was handed over to the applicant. On 16.6.2009, the applicant requested the Corporation to give permission to make internal changes for air-conditioning, roof over the conference hall, etc. The applicant was granted permission on 15.11.2009 to utilise additional space in the terrace of conference Hall at Hotel. The Corporation vide letter, dated 31.12.2009 also permitted the applicant to carry out renovation work. 4 It is case of the applicant that on 22.9.2011, a show cause notice was issued by the Corporation to show cause as to why leased Franchise agreement be not terminated, as the applicant had occupied additional space of 2503 sq.ft. without getting proper permission since 15.9.2009 by violating the terms and conditions of the agreement. 5 The applicant was directed to pay additional rent of Rs.6,50,780/- (Rupees six lakhs fifty thousand seven hundred and eighty only) for two years, to surrender additional space immediately on receipt of show cause notice. 6 The show cause notice clearly showed the admission of the Corporation that the applicant was in possession of the alleged additional space since 15.9.2009. 7 On 7.10.2011, the applicant submitted reply to the show cause notice denying the allegations. The stand taken by the applicant was that the unit Franchise was given to the applicant on "As is where is condition" meaning thereby the unit earlier run by the Corporation was handed over to the applicant therefore, it cannot be said that any additional space was occupied. 8 The Corporation did not agree with the reply submitted by the applicant and ordered termination of the agreement with direction to the applicant to hand back the possession of the hotel unit to the Corporation. 9 The applicant challenged the order of termination of the franchisee by filing W.P.(MD) No.2706 of 2012. Writ petition was dismissed on the ground that the applicant had alternative remedy of invoking arbitration clause in the agreement, executed between the parties. Writ appeal filed by the applicant was also dismissed. 10 On 10.3.2012, the applicant

approached the Managing Director for appointing Arbitrator, to adjudicate the dispute with regard to termination of franchisee agreement and additional demand raised by the respondent, on the allegation that applicant was in possession of additional space. 11 After issuance of notice for appointment of Arbitrator, the applicant invoked the Sec.9 of the Arbitration and Conciliation Act for grant of interim injunction restraining the respondent Corporation from acting on the termination notice or to disturb their peaceful possession. 12 The application was allowed by the Hon'ble Single Judge subject to the condition of applicant depositing arrears of usual rent, as well as additional rent from 5.11.2007 to 14.2.2012 as claimed by the Corporation within a period of four weeks, but without prejudice to their rights to dispute it before the Arbitrator. 13 It was also ordered that besides actual rent, the applicant shall continue to make payment of additional rent of Rs.32,539/- (Rupees thirty two thousand five hundred and thirty nine only) for every month from 15.9.2011 to 14.2.2012 without prejudice to his rights. 14 The applicant was also directed not to encroach any further area. The respondents were however given liberty to take steps for recovery of encroached portion, by due process of law, if permissible. 15 The applicant in compliance with the order passed by the Hon'ble Single Judge, deposited a sum of Rs.6,50,780/- (Rupees six lakhs fifty thousand seven hundred and eighty only) as additional rent and another amount of Rs.1,61,695/- (Rupees one lakh sixty one thousand six hundred and ninety five only) being additional rent for five months, by two demand drafts on 21.3.2012. These demand drafts were encashed by the respondent Corporation. 16 In spite of encashment of drafts, the respondent Corporation failed to appoint Arbitrator. The applicant was forced to file application under Sec.11(6) of the Arbitration and Conciliation Act before the Hon'ble Chief Justice for appointment of Arbitrator in terms of the agreement which is said to be pending before the Hon'ble Acting Chief Justice. 17 On 24.7.2012, the Corporation challenged the order passed by the Hon'ble Single Judge along with application to condone the delay in filing the appeal. On 7.8.2012, the respondent Corporation directed the applicant to furnish new Bank Guarantee for a sum of Rs.4,32,500/- (Rupees four lakhs thirty two thousand and five hundred only) on or before 14.9.2012 which also stands complied with by the applicant on 13.9.2012. 18 O.S.A.No.410 and 411 of 2012 filed by the respondent Corporation were allowed by the Hon'ble Division

Bench of this Court and application remitted back to this Court, to consider the application on merit afresh. 19 It is the case of the applicant, that on 19.12.2012 the respondent unauthorisedly took possession of alleged additional area from the applicant. This was brought to the notice of the Hon'ble Single Judge. The Hon'ble Single Judge held that this action amounted to contempt of Court, and passed the following order: "7 It may be true that all the disputes between the parties relating to possession and enjoyment of subject matter of franchisee agreement is to be agitated before the Arbitrator. But this Court on 19.12.2012, after considering the nature of the dispute between the parties and other aspects, passed detailed order and directed the parties to maintain status quo. The status quo ordered to be maintained is with regard to the enjoyment and possession of the applicant in respect of the area in his occupation measuring 7822 sq.ft. In is capacity as franchisee till it is finally decided either by this Court or by Arbitrator. Whereas, the acts of commissions and omissions on the part of the General Manager as above complained of regarding blockage of access to first floor through passage from the ground floor and closure of entry to and from gas room and the issuance of refund order treating the possession as unauthorised possession, in the considered view of this Court, are grossly contrary to the interim order passed by this Court on 19.12.2012 amounting to serious violation of the order of this Court constituting an act of contempt of Court order." 20 The learned counsel for the applicant vehemently contended (i) That the applicant is in possession of the property since 15.9.2007 and also paid additional rent as demanded by the respondent and therefore, is entitled to retain possession as the lease deed could not be terminated by the respondent in an arbitrary manner. (ii) That once it is admitted that the unit was leased out on "As is where is basis" and it is not disputed that whole of the area was used as one unit, it is not open to the respondent to claim that any additional area which has been occupied by the applicant which could entitle the respondent to terminate the lease. (iii) That the applicant has successfully made out prima facie case and the balance of convenience is also in favour of the applicant and furthermore, in the event of non grant of injunction, the applicant will suffer irreparable loss and injury, as the very object of arbitration proceedings will stand defeated. (iv) That inspite of request having been made, the respondent have not taken steps to appoint Arbitrator for initiation of arbitration to

settle the dispute between the parties. 21 The application is opposed by the learned Additional Advocate General by contending (i) That applicant has failed to make out a prima facie case, as the franchise agreement or record shows that the applicant was in possession of 7822 sq.ft. and therefore, any additional area under the occupation of the applicant therefore is result of encroachment which is in violation of terms and conditions of the franchise agreement. (ii) That the applicant is seeking to re-write franchise agreement which does not fall within the jurisdiction of this Court, as this Court cannot re-write the agreement to permit the applicant to hold additional area, than the one covered under the franchise agreement. (iii) That after the order passed by the Hon'ble Division Bench, the applicant voluntarily handed over 212 sq.ft. of area on the second floor as per proceedings, dated 17.12.2012 and thereafter on 19.12.2012, the remaining additional area in occupation was also taken over by the officials of the respondent Corporation. Therefore, the applicant now is not entitled to injunction beyond area of 7822 sq.ft. is in possession of the applicant now. (iv) That the applicant is not entitled to discretionary relief under section 9 of the Act, as he is guilty of encroachment of additional area of 2503 sq.ft. and it is not open to this Court to regularise the illegal possession by issuing direction to pay additional charges for the additional area occupied. (v) That it is not open to the applicant to invoke Sec.9 of the Arbitration and Conciliation Act, before the commencement of arbitral proceedings. 22 The contention of the learned Additional Advocate General therefore was that the applicant has failed to prove prima facie case, balance of convenience and also that no irreparable loss or injury would be caused to the applicant if injunction is not granted. 23 It was also contended by the learned Additional Advocate General that contract which by its very nature is determinable, cannot be specifically enforced therefore, no injunction can be granted to enforce a determinable contract. 24 In support of this contention, reliance was placed on the following judgments of the Hon'ble Delhi High Court:- 1 Rajasthan Breweries Ltd. vs. The Stroh Brewery Co. (2001(1) RAJ 30.(Del) 2 M/s.Raj Electricals (Regd) vs. BSES Rajdhani Power Ltd. (2007(4) RAJ 12.(Del.) 3 Progressive Constructions Ltd. vs. Chairman, NHAI & Others (2009(5) RAJ 42.(Del) 4 M/s.Online Hotel Reservations (P) Ltd. vs. Classic City Investment (P) Ltd. (2009(5) RAJ 60.(Del) 5 M/s.Bharat Catering Corporation vs. Indian Railway Catering Tourism Corporation Ltd.

(2009(6) RAJ 63.(Del) 6 Lt.Col. (Retd) K.S.Ahluwalia vs. Indraprastha Gas Ltd.
(2009(6) RAJ

313) 7 R.P.S.Educational Society (Regd.) vs. Delhi Development Authority
(2010(3) RAJ 36.(Del) 8 M/s.Bharat Catering Corporation vs. IRCTC & another
(2010(1) RAJ 14.(Del) 9 Vishal Gupta vs. Udai K.Lauria (2010(3) RAJ 35.(Del)
wherein the Hon'ble Delhi High court was pleased to lay down that contract which
by its very nature is determinable, cannot be enforced and in respect of such a
contract, no injunction can be granted, being the mandate of law. 25 On
consideration, I find that this application deserves to succeed. Franchise
agreement is a contract with regard to running of a hotel on a land, the possession
of which has been handed over to the applicant in terms of the Franchise
agreement, therefore is not such a contract which could not be specifically
enforced. 26 Even otherwise, the respondent is a State undertaking, therefore, is a
State within the meaning of the Article 12 of the Constitution. Any action of the
State agency which is on the face of it arbitrary, is hit by Article 14 of the
Constitution of India and it is permissible for the Court to grant injunction against
arbitrary action of the State agency. 27 In this case, applicant has successfully
proved prima facie case, as it is not disputed that property was handed over to the
applicant on "As is where is basis", and that prior to allotment to the applicant, the
unit was run by the respondent as a single unit. 28 The question whether the area
or boundaries of the unit will be deciding factor is to be decided by the Arbitrator.
29 Therefore, in absence of adjudication, it is not possible at this stage to say that
the applicant is guilty of encroachment of any additional area which could entitle
the respondent to terminate the franchise agreement and seek possession from
the applicant at this stage. 30 The applicant has successfully proved that he is in
possession of the alleged additional area, since 2009 as admitted by the
respondent in their show cause notice, calling upon the applicant to pay additional
charges for this area. 31 It is also proved that applicant would suffer irreparable
loss and injury, as contract is to run a hotel and possession of which was handed
over to the applicant. The stand of the respondent that applicant voluntarily
handed back possession cannot be accepted, as it is only one room measuring
212 sq.ft. on the second floor, which was handed over by the applicant, whereas
proceedings, dated 19.12.2012 have not been signed by the applicant. Therefore,

no notice can be taken of the proceedings, dated 19.12.2012 as established possession of even unauthorised occupant, cannot be disturbed except by following due process of law. 32 The additional area otherwise also forms part of the arbitration dispute, therefore, it needs to be protected in exercise of powers under section 9 of the Arbitration and Conciliation Act. 33 The action of the respondent in taking possession during pendency of the proceedings under section 9, also cannot come in the way of this Court to grant relief, as the act of possession is hit by the principle of "lis pendence", as the possession was not taken by due process of law. 34 The contention of the learned Additional Advocate General that grant of injunction will amount to re-writing of the contract also cannot be accepted, as it is yet to be determined as to what was the area handed over to the applicant initially. Admittedly, the franchise agreement was with respect to the unit on "As is where is basis" and it is admitted that the unit was being run as one unit by the respondent, prior to this franchise agreement. The judgments on which reliance has been placed by the learned Additional Advocate General, also do not advance the case of the respondent, as the contracting party is State within the meaning of Article 12 of the Constitution of India, and any action of the State hit by Article 14 of the Constitution of India can be challenged in the Court for being set aside. The commercial contract with State in exceptional circumstances can also be specifically enforced. 35 Consequently, O.A.No.169 of 2012 is allowed as prayed. The respondents are directed to hand back the possession of the premises illegally taken back from the applicant on 19.12.2012. However, the respondent shall be entitled to retain possession of the one room, which was voluntarily handed over by the applicant on 17.12.2012. 36 This injunction shall be subject to the condition that the applicant shall deposit lease money regularly and also clear the arrears of the franchise lease rent. 37 It is made clear that acceptance of additional rent over and above the original rent fixed under the franchise agreement, shall not create any equity in favour of the applicant, and it shall be open to the Arbitrator to decide the matter in accordance with law without being influenced by this order passed by this Court under section 9 of the Arbitration and Conciliation Act. A.No.1250 of 2012:

38. For the reasons stated hereinabove, operation of the order terminating the Franchise agreement shall also remain stayed during pendency of arbitration

proceedings. No costs. vaan

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