

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present :

Hon'ble Justice Moushumi Bhattacharya

A.P.- COM 370 of 2024

Cholamandalam Investment and
Finance Company Limited.

Vs.

Uma Earth Movers and Anr.

For the petitioner	:	Mr. Swatarup Banerjee, Adv. Ms. Shrayashee Das, Adv. Mr. Himanshu Bhawsingka, Adv. Mr. Rohan Kr. Thakur, Adv.
For the respondent	:	Mr. Suddhasatva Banerjee, Adv. Mr. Dyutimoy Paul, Adv.
Last heard on	:	15.01.2024
Delivered on	:	22.02.2024.

Moushumi Bhattacharya, J.

1. The petitioner has filed the present application under section 9 of The Arbitration and Conciliation Act, 1996 praying, *inter alia*, for appointment of a Receiver in respect of the asset which was financed by way of a loan given by the petitioner to the respondents. The petitioner also seeks a restraint on the respondents from transferring or disposing of the said asset.

2. The respondents have taken a point of maintainability of the application on 3 grounds. The first of the grounds is that the application is barred under section 42 of The Arbitration and Conciliation Act, 1996. The second objection is that the application is barred under Order XXIII Rule 1 of The Code of Civil Procedure, 1908, which relates to withdrawal of suits. The third objection is that the application has not been filed before the jurisdictional Court in terms of the arbitration agreement between the parties.

3. Learned Counsel for the respondents argues that the learned City Civil Court at Calcutta has the jurisdiction to entertain this application since the first application was made by the petitioner before the learned City Civil Court under section 9 of the 1996 Act. Counsel relies on the fact that the petitioner's claim is of Rs. 67.53 lakhs hence ousting the jurisdiction of this Court. Counsel relies on section 2(1)(b) of The Commercial Courts Act, 2015 for the definition of "Commercial Court" and also submits that Order XXIII Rule 1 of the CPC would be applicable to the present proceeding whereupon the petitioner cannot be permitted to institute a fresh proceeding in respect of the same subject matter after abandoning the earlier proceeding without the permission of the Court to file the fresh proceeding. Counsel relies on Clause 29 of the Loan Agreement to urge that the Courts at Chennai would have exclusive jurisdiction to entertain any dispute arising from the loan agreement.

4. Learned counsel appearing for the petitioner opposes the preliminary objections on the ground that the 1996 Act is a complete Code and that section 2(1)(e) of the said Act makes it clear that proceedings are to be received, tried and adjudicated only by the Court which fulfils the

criteria of section 2(1)(e) of the Act. According to counsel, where there are two principal Civil Courts of Ordinary Original Civil Jurisdiction, only the superior Court will have the jurisdiction to receive and entertain all the proceedings under the 1996 Act. Counsel also argues that there is no financial platform under the 1996 Act and that the learned City Civil Court cannot be the superior principal Court of ordinary original jurisdiction in the district of Kolkata under section 2(1)(e) even if it is conferred with pecuniary jurisdiction to entertain applications under The Commercial Courts Act, 2015.

5. The preliminary objections taken on behalf of the respondents form the crux of the adjudication. The issues, in essence, are :

- a) Whether the Calcutta High Court lacks jurisdiction to entertain the present application;
- b) Whether the present application is barred under section 42 of the 1996 Act and Order XXIII Rule 1 of the CPC; and
- c) Whether the Calcutta High Court is the proper Court in terms of the arbitration clause in the Loan Agreement.

Does the Calcutta High Court lack jurisdiction for entertaining the present application?

6. Section 2(1)(e) of The Arbitration and Conciliation Act, 1996 defines “Court” as

2. (1)

(e) “Court” means—

(i) *in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the*

subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;

7. The definition determines the Court before which a party would have to bring a subject matter concerning arbitration for decision. The definition recognizes and preserves the hierarchy of courts by excluding a civil court inferior to the principal Civil Court in a district.

8. In this regard, the Notification published on 20.3.2020 in the Kolkata Gazette Extraordinary by the Judicial Department, Government of West Bengal, changes the perspective. The pecuniary jurisdiction of the City Civil Court and the Calcutta High Court was notified in exercise of the power conferred under section 3(1-A) of The Commercial Courts Act, 2015. By the said notification, the pecuniary jurisdictions of the Courts was specified in terms of the value of the commercial dispute and provided that the City Civil Court and the Commercial Division of the Calcutta High Court would have concurrent jurisdiction over commercial disputes between Rs. 10 lakhs – Rs. 1 crore. Admittedly, the petitioner's claim is approximately Rs. 67.53 lacs. Therefore, both the learned City Civil Court as well as the Commercial Division of this Court would have concurrent jurisdiction to entertain the present application. The petitioner would hence have the choice of approaching either of the two Courts.

9. The Court disagrees with the argument made on behalf of the learned counsel appearing for the petitioner that The Arbitration and Conciliation Act, 1996 is indifferent to a financial platform in the sense of

pecuniary limits. This argument is belied by section 2(1)(b) of The Commercial Courts Act, 2015 which defines a “Commercial Court” as a Court constituted under section 3(1) of the Act. Section 3(1) in turn, empowers the State Government to specify, after consultation with the concerned High Court, by notification, the local limits of the area to which the jurisdiction of a Commercial Court can extend.

10. Moreover, the pecuniary flavour of commercial matters with particular regard to arbitration in a commercial dispute of a specified value, can be found in section 10 of the 2015 Act. Section 10(2) deals with applications/appeals arising out of arbitrations in a commercial dispute of a specified value which has been filed in the Original Side of the High Court while section 10(3) deals with arbitrations which ordinarily would lie before any Civil Court with Original Jurisdiction in a district, not being a High Court. Both these categories deal with non-international commercial arbitrations. Commercial Courts have been given exclusive jurisdiction to hear and dispose of appeals and applications arising out of domestic arbitrations within the authority of the Principal Civil Court exercising territorial jurisdiction over the arbitration.

11. Section 12(2) of The Commercial Courts Act, which deals with determination of specified value, further takes into account the aggregate value of the claim and counter-claim as set out in the Statement of Claim and Counter-Claim in an arbitration of a commercial dispute as the basis for determining whether the arbitration is subject to the jurisdiction of a Commercial Division, Commercial Appellate Division or Commercial Court, as the case may be.

12. Hence, The Commercial Courts Act, 2015, is replete with pecuniary platforms for the purpose of determining the court which would have the authority to receive, try and entertain a commercial dispute including that of an arbitration of a specified value. The Notification of 20.3.2020 has to be read in this context and applications under The Arbitration and Conciliation Act, 1996 certainly cannot be divorced from the Notification or seen to be excluded from the mandate of the Notification.

13. The Notification dated 20.3.2020 of the Judicial Department, Government of West Bengal, which was published in The Kolkata Gazette Extraordinary, envelopes all Commercial Courts in the State of West Bengal and grades them in a pyramidal structure in or to the extent of their respective pecuniary limits. While the Commercial Courts at Siliguri, Asansol, Alipore and Rajarhat are at the base of the pyramid with a baseline of 30 lakhs, the Commercial Division of the Calcutta High Court is at the peak with exclusive pecuniary jurisdiction over Commercial Disputes in excess of Rs. 1 crore. The middle of the pyramid is for the commercial disputes between Rs. 10 lakhs and 1 crore in respect of which the City Civil Court at Calcutta and the Commercial Division of the High Court have been given concurrent jurisdiction.

14. This Notification was issued by the State Government in exercise of the powers conferred under section 3(1- A) of The Commercial Courts Act, 2015 after consultation with the High Court specifying the pecuniary jurisdiction in terms of the value of the commercial disputes. Section 3(1- A) was inserted in the 2015 Act with effect from 3.5.2018. The hierarchy of Commercial Courts is only with regard to their respective pecuniary limits.

15. As stated above, section 10 of the Commercial Courts Act factors in arbitration matters in a commercial dispute of a specified value and confers the Commercial Division of a High Court to hear and dispose of matters which are filed on the Original Side of the High Court (section 10(2)). Section 10(3) authorises the Commercial Court exercising territorial jurisdiction over an arbitration in a commercial dispute of a specified value where the application would ordinarily lie before any principal Civil Court of Original Jurisdiction in a District which is not a High Court.

16. The Notification of 20.3.2020, which was a subsequent development, fixed the pecuniary jurisdiction of the Commercial Courts, the City Civil Court and the Commercial Division of the High Court for commercial disputes with a specified value. Hence, determining the Court in accordance with the situs of filing the appeal / application under the 1996 Act under section 10(2) and (3) of the 2015 Act stood re-arranged by the subsequent Notification of 20.3.2020 which guides litigants to the Court having pecuniary jurisdiction to hear the matter.

17. Neither the Notification of 20.3.2020 nor section 10(2) and (3) of the 2015 Act carves out any exceptions for a "Court" as defined under section 2(1)(e)(i) of The Arbitration and Conciliation Act, 1996. Importing the definition of "Court" as given in section 2(1)(e)(i) of the 1996 Act would lead to an inevitable conflict between the said provision and section 10(2) and (3) of the Commercial Courts Act, 2015 as well as the Notification of 20.3.2020. The conflict would be in terms of a tussle between two principal Civil Courts in a District where one happens to be the High Court exercising its Ordinary Original Civil Jurisdiction over the subject

matter of the arbitration. In such cases, the High Court being the superior Court of the two, would become the “Court” under section 2(1)(e)(i) to attract all applications made under The Arbitration and Conciliation Act, 1996, even where the High Court has concurrent pecuniary jurisdiction with the City Civil Court at Calcutta.

18. This conclusion does not find support either from the provisions of The Arbitration and Conciliation Act, 1996 or the The Commercial Courts Act, 2015 read with the Notification of 20.3.2020. The practical consequence of this view also cannot be discounted. It would mean that the City Civil Court at Calcutta would be denuded of the authority to hear all applications under The Arbitration and Conciliation Act, 1996 despite having concurrent pecuniary jurisdiction with the Commercial Division of the High Court.

19. Further, section 2(1)(e)(i) of The Arbitration and Conciliation Act, 1996, does not envisage any form of conflict between the Principal Civil Court of Original Jurisdiction in a District and the High Court exercising its Ordinary Original Civil Jurisdiction in the same District. Section 2(1)(e)(i) is inclusive and treats the High Court also to be a principal Civil Court in a District which is empowered to decide the questions forming the subject matter of the arbitration in exercise of its Ordinary Original Civil Jurisdiction, in the same manner as in a suit. Section 2(1)(e)(i) of the 1996 Act may be contrasted with section 10(3) of The Commercial Courts Act, 2015 which expressly excludes a High Court where an application under the 1996 Act has been filed before any principal Civil Court of Original Jurisdiction in a District where the Commercial Court having territorial jurisdiction over the arbitration would be the proper Court.

20. Thus, the choice of a litigant to approach a Court which has been conferred pecuniary jurisdiction to hear an application filed under The Arbitration and Conciliation Act, 1996 cannot be limited or extinguished by reading Calcutta High Court as the only Court under section 2(1)(e)(i) of the 1996 Act. The litigant must be free to approach any Court provided the Court has been designated as the proper Court in terms of pecuniary limits under the Notification of 20.3.2020.

21. Therefore, the choice of the petitioner in the present matter cannot be restricted to the Calcutta High Court as the only principal Civil Court of Original Jurisdiction in the District of Calcutta. It hence follows that the petitioner cannot categorise the City Civil Court as lacking in jurisdiction to receive or try the first application which was filed before it.

Is the present application barred under section 42 of the 1996 Act and Order XXIII Rule 1 of the CPC?

22. The statutory discipline of section 42 of The Arbitration and Conciliation Act, 1996 would consequently follow. Section 42 begins with a non-obstante clause with regard to Part I of the 1996 Act or any other law for the time being in force and confers exclusive jurisdiction on a Court which received the first application under an arbitration agreement to hear all subsequent applications arising out of that arbitration agreement. The petitioner's reason for withdrawing the application from the City Civil Court is hence found to be contrary to the construction as stated above.

23. The principle underlying section 42 of the 1996 Act and Order XXIII Rule 1 of the Code of Civil Procedure, 1908 is one of public policy - which

is to prevent a litigant from abusing the process of Court by instituting proceedings on the same cause of action without any good reason and without obtaining permission of the Court to file a fresh proceeding; *Sarguja Transport Service vs. State Transport Appellate Tribunal; (1987) 1 SCC 5*. In essence, the petitioner after having abandoned its claim before a competent Court having jurisdiction cannot file a fresh application on the same cause of action before the Calcutta High Court.

24. Order XXIII Rule 1(1) of the CPC permits the plaintiff to abandon a suit or a part of his or her claim after institution of a suit subject to Order XXIII Rule 1(3) which requires the satisfaction of a Court on either of the two conditions mentioned therein to grant permission to the plaintiff to withdraw from the suit or part of the claim with liberty to institute a fresh suit in respect of the subject matter or such part of the claim. Order XXIII Rule 1 (3) is set out below :

Order XXIII.

1. Withdrawal of suit or abandonment of part of claim – (1)

.....

(3) Where the Court is satisfied,— (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of suit or part of a claim, It may, on such terms as it thinks fit grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

25. The Court does not wish to delve any further into the question as to whether the rigours of Order XXIII Rule 1(3) would be applicable to the present proceedings. It is sufficient to say that the salient object of Order XXIII, which is obtaining permission from the Court to withdraw a proceeding with liberty to institute a fresh proceeding on the same subject matter, should be preserved. This would particularly be relevant to the

facts of the present case where the petitioner exercised its right to approach the City Civil Court and then withdrew the petition on the premise that the City Civil Court does not have the jurisdiction to entertain the matter. The petitioner thereafter approached this Court on the same cause of action and with the same reliefs as were before the City Civil Court.

Is the Calcutta High Court the proper Court in terms of the Arbitration clause in the Loan Agreement?

26. The relevant part of Clauses 29 and 30 of the Loan Agreement are set out below :

“29. Arbitration:

.....

The venue of arbitration proceedings shall be at Chennai or such place/location/city which the Company at its discretion may decide from time to time.

30. Jurisdiction: Subject to the arbitration clause contained herein, the Courts in Chennai alone shall have exclusive jurisdiction over any matter arising out of or concerning this Agreement. However, the parties hereby agree, confirm and undertake that the Company has a right to file its claim in relation to any amount payable by the Borrower and or Guarantors or any other connect matter/s as mentioned in this Agreement in any other competent Court in India at its sole discretion.”

27. The respondents argue that the Calcutta High Court would not be the proper Court for the present proceeding since Chennai has been designated as the venue / seat of arbitration. The petitioner, on the other hand, seeks to take advantage of the “or” in Clause 29 to say that the venue of arbitration can be at any other place as decided by the Company / petitioner.

28. Clause 29 and 30 read together would inevitably point to Chennai being the chosen venue of arbitration although the arbitration clause gives an option to the petitioner to unilaterally decide the venue of arbitration. The clause is arbitrary on the very face of it. The petitioner has been given the sole discretion to decide on shifting of the venue to any other place. Any change of venue must be chosen by both the parties in sync with free choice in such matters.

29. The present case consists of certain admitted facts; the agreement was entered into at Chennai, the agreement was terminated from Chennai and the registered office of the petitioner is at Chennai. The petitioner has not been able to establish a defence to these admitted facts.

30. *Arvind Constructions Co. (P) Ltd. vs. Kalinga Mining Corporation*; (2007) 6 SCC 798, *ITI Limited vs. Siemens Public Communications*; (2002) 5 SCC 510, *Sanghi Industries Limited vs. Ravin Cables Ltd.*; 2022 SCC OnLine SC 1329 and *Accord Advertising Pvt. Ltd. vs. Airports Director, The Airports Authority of India*; MANU/WB/1919/2019 were cited for the proposition that The Code of Civil Procedure applies to The Arbitration and Conciliation Act, 1996. This aspect has already been dealt with in the earlier section of this judgment. The decision of this Court in *Binoy Trading Co. vs. Tata Motors Finance Limited*; 2023 SCC OnLine Cal 2271 on the provisions of the Commercial Courts Act in relation to pecuniary jurisdiction of Courts may be relevant for the present discussion.

31. *State of Maharashtra vs. Atlanta Limited*; (2014) 11 SCC 619 dealt with the power of the High Court to assume jurisdiction in a challenge to an award. The Supreme Court however did not have any occasion to consider the import and significance of The Commercial Courts Act, 2015

and the hierarchy of Commercial Courts in terms of pecuniary jurisdiction. *State of West Bengal vs Associate Contractors*; (2015) 1 SCC 32 would also not be relevant to the present application for the same reason. *Sri Sushanta Mallick vs. Srei Equipment Finance Limited*; AIR 2015 Cal 335 followed *Associate Contractors* and is accordingly distinguished on the same ground. *Debdas Routh vs. Hinduja Leyland Finance Limited*; AIR 2018 Cal 322 was cited for the proposition that the choice of the Courts is governed by section 2(1)(e)(i) read with section 42 subject to any agreement between the parties. The Division Bench of this Court however gave particular emphasis to establishing the jurisdiction of the concerned Court. The petitioner has not been able to establish any facts which would attract the jurisdiction of the Calcutta High Court.

32. The Court accepts the preliminary objections raised by the respondents in view of the above reasons. AP 691 of 2023 (AP CPOM 370 OF 2024) is accordingly dismissed as not being maintainable. There shall be no orders as to costs.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)