

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

Neutral Citation No. - 2024:AHC:89177
Court No. - 1

MATTERS UNDER ARTICLE 227 NO. 2199 OF 2023

M/S DEVI DAYAL TRUST AND OTHERS

v.

M/S RAJHANS TOWERS PVT. LTD.

For the Petitioner : Sri Manish Goyal, Senior Advocate assisted by
Sri Nikhil Mishra, Advocate
For the Respondents : Sri Munna Pandey and Sri Harshit Pandey,
Advocates

Last heard on: May 15, 2024
Judgement on: May 17, 2024

HON'BLE SHEKHAR B. SARAF, J.

1. This is a writ petition under Article 227 of the Constitution of India wherein the petitioner is aggrieved by the order dated March 15, 2022 passed by the Commercial Court, Gautam Buddh Nagar by which the Commercial Court held that it lacks the territorial jurisdiction to adjudicate the application filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") by the petitioner. The Commercial Court, Gautam Buddh Nagar accordingly, returned the said application with liberty granted to the petitioner to file the said application before the appropriate territorial court.

2. The facts of the instant case are delineated below:

- (a) The parties herein entered into an agreement which contained an arbitration clause.
- (b) As disputes and differences arose between the parties, the respondent filed an application under Section 9 of the Act

before the Commercial Court, Gautam Buddh Nagar on March 20, 2007.

- (c) Subsequently, the petitioners filed an application under Section 11 of the Act before the High Court of Delhi. The High Court of Delhi passed an order on September 11, 2007 appointing the sole arbitrator to decide the dispute between the parties. Subsequently, the arbitrator passed an award on July 3, 2017.
- (d) Challenging the said award, the petitioners filed an application under Section 34 of the Act before the Commercial Court, Gautam Buddh Nagar which was dismissed for want of territorial jurisdiction vide order dated March 15, 2022. Hence, the instant petition has been filed challenging the said order.

CONTENTIONS OF THE PETITIONERS

3. Counsel appearing for the petitioners has made the following submissions:

- (i) Since the application under Section 9 of the Act was filed before the Commercial Court, Gautam Buddh Nagar, the exclusive jurisdiction for hearing the Section 34 application would also lie with the Commercial Court, Gautam Buddh Nagar. Reliance in this regard is placed upon the judgments rendered in **State of West Bengal v. Associated Contractor** reported in (2015) 1 SCC 32; **M/s Ravi Ranjan Developers Pvt. Ltd. v. Aditya Kumar Chatterjee** reported in SLP(C)17397 of 2021 (SC); **Manjusha Premi and Others v. Prakash Gupta and Others** reported in (2016) 6 All LJ 695; **Dalim Kumar Chakraborty v. Smt. Gouri Biswar and Another** reported in 2018 SCC Online Cal 282; **Magma Fincorp Limited v. Maa Vaishno Sales Pvt.**

Ltd. and Others reported in **2015 SCC Online Cal 6267** and **M/s Gammon Engineers & Contractors Pvt. Ltd. v. The State of West Bengal** reported in **AIR 2023 Cal. 338**.

- (ii) Furthermore, the filing of the application under Section 11 of the Act before the Delhi High Court, as the venue was fixed in Delhi would not make it the seat of arbitration. Reliance is placed upon the judgments rendered in **SBP & Co. v. Patel Engineer Ltd.** reported in **(2005) 8 SCC 618**; **State of Jharkhand v. Hindustan Constructions** reported in **(2018) 2 SCC 602**; **State of West Bengal v. Associated Contractor** reported in **(2015) 1 SCC 32**; **Manjusha Premi and Others v. Prakash Gupta and Others** reported in **(2016) 6 All LJ 695** and **Lafarge India Private Limited v. Kishore Kumar Sahoo** reported in **AIR 2017 Cal 116**.
- (iii) Since the application under Section 9 of the Act was made before the Commercial Court, Gautam Budh Nagar, all the subsequent applications under Part-I of the Act will have to be made before the same Court.
- (iv) Bar placed by Section 42 of the Act does not apply to an application under Section 11 of the Act and, therefore, despite the fact that the Section 11 application was filed before the Delhi High Court, the same would not confer jurisdiction upon the Delhi High Court to hear other applications under the Part-I of the Act.
- (v) Relying upon the judgment of the Supreme Court in **M/s Ravi Ranjan Developers Pvt. Ltd. case (supra)**, it is submitted that the doctrine of estoppel would apply upon the respondent as they have themselves filed the application under Section 9 of the Act before the

Commercial Court, Gautam Buddh Nagar. They cannot now contend that the jurisdiction for filing the application under Section 34 of the Act would lie before the High Court of Delhi.

- (vi) Unless the agreement specifically provides for it, venue cannot be treated as the seat of arbitration unless there is contrary indicia present. In the instant case, filing of the application under Section 9 of the Act before the Commercial Court, Gautam Buddh Nagar, acts as contrary indicia preventing the venue to be elevated to the status of seat.

CONTENTIONS OF THE RESPONDENT

4. Counsel appearing for the respondent has made the following submissions:

- (i) In the agreement dated 19.05.2006 between the parties, clause being clause No.53 clearly stipulates that if any disputes or differences arises between the parties in any manner whatsoever, they shall be referred to arbitration in accordance with the provisions of the Act and the "venue" of arbitration proceedings shall be at Delhi.
- (ii) As clause 53 of the agreement, expressly designates a "venue" and does not designate of any alternative place as the "seat" the inexorable conclusion is that the venue is to be treated as the juridical seat of the arbitral proceedings.
- (iii) Since proceedings were finally held at New Delhi without any objection and award was signed in New Delhi as both the parties have chosen New Delhi to be the, the same confers exclusive jurisdiction upon the Courts at New Delhi.

- (iv) An application was filed by the Respondent before the High Court of Delhi for appointment of an arbitrator under Section 11 of the Act. The petitioner herein did not file any objection to the same.
- (v) The order dated March 15, 2022 passed by the Commercial Court, Gautam Buddh Nagar is perfectly legal, fully justified and as such no interference by this Court is warranted against the same.
- (vi) The Supreme Court in the case of **BGS SGS Soma v. NHPC Ltd.** reported in **(2020) 4 SCC 234** and in **Hindustan Construction Company Ltd. v. NHPC Ltd. and Another** reported in **2020 4 SCC 310** has held that whenever there is a designation of a place of arbitration in an arbitration clause as being the venue of the arbitration proceeding the expression "arbitration proceedings" would make it clear that the venue is actually the "seat" of the arbitral proceedings.
- (vii) The High Court of Calcutta after due deliberations has held in A.P. No. 358 of 2020 decided on 08.06.2023 (**Homevista Decor and Furnishing Pvt. Ltd. and another v. Connect Residuary Private Limited**) that the courts of the place selected as having exclusive jurisdiction over disputes should be considered as "Seat" thereby having exclusive jurisdiction to entertain applications under the Act.

ANALYSIS AND CONCLUSION

5. I have heard the learned counsel appearing for the parties and perused the materials on record.

6. Since the crux of the instant dispute revolves around the bar placed by Section 42 of the Act, I have extracted the same herein for ease of reference:

“42. Jurisdiction.—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.”

7. The Hon'ble Supreme Court in **BGS SGS SOMA JV -v- NHPC Limited** reported in **(2020) 4 SCC 234** espoused the intent and purpose behind Section 42 of the Act as follows:

“59. Equally incorrect is the finding in Antrix Corpn. Ltd. [Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., 2018 SCC OnLine Del 9338] that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one court exclusively. This is why the section begins with a non obstante clause, and then goes on to state “...where with respect to an arbitration agreement any application under this part has been made in a court...” It is obvious that the application made under this part to a court must be a court which has jurisdiction to decide such application. The subsequent holdings of this court, that where a seat is designated in an agreement, the courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the court where the seat is located, and that court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no “seat” is designated by agreement, or the so-called “seat” is only a convenient “venue”, then there may be several courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the “seat” of arbitration, and before such “seat” may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a court in which a part of the cause of action arises would then be the exclusive court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled.”

(Emphasis Added)

8. Section 42 of the Act encapsulates the principle of jurisdictional exclusivity. It stipulates that once an application under Part 1 of the Act is made in a court with respect to an arbitration agreement, all subsequent applications under Part 1 of the Act will have to be made before that court only. By vesting exclusive jurisdiction in a single court, Section 42 of the Act obviates the possibility of conflicting judgements and ensures uniformity in the adjudication of arbitral matters. When two entities embroiled in a commercial disagreement, opt for arbitration as their chosen mode of resolution, they may often find themselves at the crossroads of jurisdictional ambiguity. It is here that Section 42 of the Act assumes pivotal importance. By centralizing jurisdiction in a designate court, Section 42 of the Act mitigates the risk of parallel proceedings, thus expediting the resolution of disputes and reducing legal costs.

9. The only exceptions to the bar placed by Section 42 of the Act are applications made under Section 8 of the Act or Section 11 of the Act. Reference in this regard can be made to the judgment of the Hon'ble Supreme Court in ***State of West Bengal -v- Associated Contractors (supra)*** wherein it was held as follows:

“25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as “court” for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression “with respect to an arbitration agreement” makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his

designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be “court” for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.

The reference is answered accordingly.”

(Emphasis Added)

10. As such, the argument presented by the Respondents that since the application under Section 11 of the Act was made before the High Court of Delhi, all subsequent applications will have to be made before the High Court of Delhi, is devoid of any merit and is rejected. The rationale underlying this exception lies in the recognition of the distinctive nature of applications under Section 8 and Section 11 of the Act, which necessitate specialized adjudication and prompt intervention. Furthermore, since the arbitral clause between the parties, provides for only a *venue* and not a *seat*, it is not open for the respondent to argue that the *venue* in the instant case should be exalted to the status of *seat*. This is due to the bar placed by Section 42 of the Act, since an application under Section 9 had already been filed before the District Court at Gautam Buddh Nagar.

11. Whether initiated before, during, or after the conclusion of arbitration, applications under Part 1 of the Act are subject to the jurisdictional constraints imposed by Section 42 of the Act. By availing itself of the jurisdiction of the District Court at Gautam Buddh Nagar, the respondent implicitly recognized the authority of that court to adjudicate matters arising out of the arbitration agreement between the parties. This recognition, coupled with the principles of estoppel, precludes the respondent from subsequently disavowing the jurisdiction of the court at Gautam Buddh Nagar to entertain subsequent applications under Part 1 of the Act.

12. The principle of estoppel operates to prevent a party from resiling its prior representations or conduct to the detriment of another party. Here, the respondent's prior invocation of the jurisdiction of the court at Gautam Buddh Nagar under Section 9 of the Act constitutes a deliberate and unequivocal submission to the authority of that court. Having voluntarily invoked the jurisdiction of the said court, the respondent is estopped from adopting a position contrary to its prior conduct to the detriment of the petitioner. Additionally, the doctrine of forum non conveniens, which empowers a court to decline jurisdiction in favour of a more appropriate forum, is not applicable in the present case. The respondent's attempt to evade the jurisdiction of the court at Gautam Buddh Nagar is nothing but an effort to circumvent the jurisdictional constraints imposed by Section 42 of the Act.

13. In **M/s Ravi Ranjan Developers Pvt. Ltd. case (supra)**, the Supreme Court propounded that once the parties have invoked the jurisdiction of a court, they are estopped from invoking the jurisdiction of another court. Relevant paragraph is extracted herein:

“48. In this case, the parties, as observed above did not agree to refer their disputes to the jurisdiction of the Courts in Kolkata. It was not the intention of the parties that Kolkata should be the seat of arbitration. Kolkata was only intended to be the venue for arbitration sittings. Accordingly, the Respondent himself approached the District Court at Muzaffarpur, and not a Court in Kolkata for interim protection under Section 9 of the A&C Act. The Respondent having himself invoked the jurisdiction of the District Court at

Muzaffarpur, is estopped from contending that the parties had agreed to confer exclusive jurisdiction to the Calcutta High Court to the exclusion of other Courts. Neither of the parties to the agreement construed the arbitration clause to designate Kolkata as the seat of arbitration. We are constrained to hold that Calcutta High Court inherently lacks jurisdiction to entertain the application of the Respondent under Section 11(6) of the Arbitration Act. The High Court should have decided the objection raised by the Appellant, to the jurisdiction of the Calcutta High Court, to entertain the application under Section 11(6) of A&C Act, before appointing an Arbitrator.”

(Emphasis Added)

14. In **Gammon Engineers and Contracts Pvt. Ltd. -v- State of West Bengal (supra)** while dealing with a similar issue, I had concluded that since an application has already been made under Section 9 of the Act at Jalpaiguri, all subsequent applications will lie at Jalpaiguri in light of the bar placed by Section 42 of the Act. Relevant paragraph is extracted herein:

“21. The ratio of the judgment in Swadesh Kumar Agarwal (supra) must be kept in mind, wherein the court has categorically held in paragraph 32 that once an appointment is made under Section 11, the arbitration agreement cannot be invoked for the second time under Section 11. The procedure prescribed in the Act for termination of an arbitral tribunal's mandate is as per Sections 14 and 15 of the Act. The argument raised by the petitioner that a petition can be filed under Section 14 read with Section 15 and Section 11(6) is an argument in sophistry and is superfluous. This is quite evident from the ratio of the judgment in Swadesh Kumar Agarwal (supra), which has been specifically delineated in paragraph 32 of the said judgment and pointed out by me in the preceding paragraphs. In the present case, a Section 9 application was already made to the District Judge at Jalpaiguri, which is, for all purposes, the ‘court’ under Section 2(1)(e) of the Act. Therefore, the bar under Section 42 would lie and all applications to be made to a ‘court’ must be made to the District Judge at Jalpaiguri. An application under Section 14(1)(a) for termination of an arbitrator's mandate, being required to be made before a ‘court’ as under Section 2(1)(e) and 42 of the Act, has to be presented before the District Judge at Jalpaiguri. In light of the above, A.P. 785 of 2022 is disposed of for not being maintainable before the High Court at this stage. I make it clear that the findings with regard to merits of the case in the preceding paragraphs are tentative in nature and the

appropriate court shall decide the Section 14 application in accordance with law.”

15. In **Manjusha Premi and Others -v- Prakash Gupta and Others (supra)**, this Court held that the bar placed by Section 42 of the Act will apply to applications made under Section 9 of the Act. Relevant paragraphs are extracted herein:

“40. He had further submitted that since first application under section 9 of the Act was filed before the District Judge, Varanasi on 28.10.2006, the Varanasi Court in the light of section 42 of the Act would alone have the jurisdiction. The aforesaid case has also discussed in detailed in previous paragraphs.

41. Referring to the judgment of Hon'ble Apex Court in the case of Swastik Gases Private Limited (supra) he submitted that unless the jurisdiction of the Court is excluded in expression as such “exclusive” “alone” “only” the jurisdiction of a Court would not be excluded. For this purpose, a reference would not be excluded. On the strength of the aforesaid, he submitted that since there was no specific clause providing jurisdiction to a Court, thus the jurisdiction of a Civil Court is to be decided with reference to section 2(1)(e) of the Act and thus the same would be at Varanasi in the present case.

42. Sri K.K. Arora had also placed reliance on a decision of Hon'ble Apex Court in the case of State of West Bengal (supra) to submit that if the proceedings initiated is one of the nature of section 8(before judicial authority) and section 11 of the Act (the Chief Justice or his delegates) applications filed before the Court inferior to the Principal Civil Court or to High Court having no original jurisdiction, the bar contained in section 42 would not apply. However, application filed under section 9 of the Act very much within the purview of section 42 as they are filed before the Court.

43. Undisputedly, the application under section 11 of the Act is filed before the Hon'ble Chief Justice or his delegates, which is not a “Court” in the eye of law and as such clearly, the provision of section 42 of the Act would not apply but the same would certainly be applicable if the application is filed under section 9 of the Act, which was done at the first instance before the District Judge, Varanasi on 28.10.2006 in the present case.

44. In view of the aforesaid discussion and the fact that admittedly the property in dispute is situated at Varanasi and the first application under section 9 of the Act was filed on 28.10.2006 in the Court of District Judge, Varanasi, which is undisputedly the Principal Civil Court of original jurisdiction in a district having jurisdiction to decide

questions forming subject-matter of the arbitration as provided under section 2(1)(e) of the Act, as section 42 of the Act had specifically provided that where with respect to any arbitration agreement when any application under this part (Part 1 of the Act which relates to domestic award) has been made in a Court, that Court shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of the agreement and the arbitral proceedings shall be made in that Court and in no other Court, leaves no doubt that the Principal Civil Court of original jurisdiction at Varanasi i.e., District Judge, Varanasi will have the jurisdiction to entertain application under section 34 of the Act against the arbitral award.”

16. Accordingly, this Court holds that in light of Section 42 of the Act, the application under Section 34 of the Act, or for that matter any other application under Part 1 of the Act, will have to be made at Gautam Buddh Nagar.

17. The question that remains now is whether this Court in exercise of its powers under Article 227 of the Constitution of India can set aside the impugned order passed by the District Court at Gautam Buddh Nagar returning the application filed under Section 34 of the Act for want of territorial jurisdiction.

18. Article 227 of the Constitution of India bestows upon the High Courts an extraordinary power of superintendence over all courts and tribunal within their respective jurisdiction. This power is a potent tool for ensuring the proper administration of justice and upholding the rule of law. It serves as a bulwark against judicial error, administrative excess, and procedural irregularity. Power of superintendence under Article 227 is inherent in the High Courts by virtue of their status of superior courts of record. This inherent jurisdiction enables the High Courts to exercise oversight over all subordinate courts and tribunals, irrespective of whether specific statutory provisions provide for such supervision.

19. In **Estelia Rubber -v- Dass Estate (P) Ltd.** reported in (2001) 8 SCC 97, the Hon'ble Supreme Court reiterated the scope of Article 227 as follows:

“6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.”

20. In light of the aforesaid, it is palpably clear that the Commercial Court at Gautam Buddh Nagar has failed to exercise its jurisdiction. Accordingly, this Court, in exercise of its power under Article 227 of the Constitution of India sets aside the impugned order dated March 15, 2022 passed by the Commercial Court, Gautam Buddh Nagar. This Court also directs the Commercial Court, Gautam Buddh Nagar to adjudicate the application filed by the petitioners under Section 34 of the Act expeditiously, preferably within a period of six months from date.

21. With the above directions, this petition is allowed. There shall be no order as to the costs.

Date :- 17.05.2024
Kuldeep

(Shekhar B. Saraf,J.)