

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.32 OF 2022

Hyundai Construction Equipment India Pvt Ltd.,
a Company registered under the Companies Act,
1956 and having registered office at Plot No.A-
2, MIDC Chakan Phase II,
Village Khalumbre, Pune - 410501
Through its Authorized Signatory
Mr. Abhishek Shukla
Occ: Service,
R/at: Ubalenagar, Nagar Road,
Wagholi, Pune 412207

...Petitioner

Versus

- M/s. Saumya Mining Limited,**
a Company registered under the Companies
Act, 1956 and having registered office at
Hari Kripa CB-25, Sector-1,
Salt Lake City, Kolkata-700064
- M/s. Saumya Infraventures Pvt Ltd.,**
a Company registered under the Companies
Act, 1956 and having registered office at
Hari Kripa CB-25, Sector-1,
Salt Lake City, Kolkata-700064

...Respondents

Mr. Nilesh M Wable, for Petitioner.
None for Respondents.

CORAM : DR. NEELA GOKHALE, J.
RESERVED ON : 9th January 2024.
PRONOUNCED ON : 11th January 2024

JUDGMENT:

- The petition seeks appointment of an arbitrator under Section 11 of the Arbitration & Conciliation Act, 1996 (“Act”) to decide the dispute that has arisen between the parties out of agreements dated Shivgan

1st October 2011 and 26th September 2013. Both the agreements are executed at Kolkata, West Bengal. The Petitioner (“**Hyundai**”) is a company engaged in the manufacture and supply of heavy construction equipment having all India operations. The Respondents (“**Saumya**”) is also a company engaged in the business of mining and undertaking infrastructure projects. Saumya has their registered offices in Kolkata.

2. By agreement dated 1st October 2011, Hyundai agreed to deliver to Saumya specified equipment for a purchase consideration. The agreement contains schedule pertaining to installments in which the purchase price would be paid by Saumya to Hyundai. Clause 25 of the agreement pertains to reference to arbitration in case of any dispute. It reads as thus;

"25. If any dispute arises between the parties out of or in connection with the agreement whether in the nature of interpretation or meaning of any term hereof or as to any claim by one against the other, or otherwise the same shall be referred to arbitration of a common arbitrator if agreed upon. Otherwise two arbitrators shall be appointed by each party hereto and the arbitration shall be governed by the Arbitration Act, 1996. The arbitration proceedings shall be conducted at Kolkata, India. This Agreement is executed on the day, month and year first above written, at Kolkata."

3. The 2nd Agreement dated 26th September 2013 is titled ‘Agreement of Sale in Installment’. By way of this agreement, Hyundai agreed to give a hydraulic excavator and other equipment on hire to

Shivgan

Saumya. Saumya intended to use the said equipment for excavation. The hire charges have been mentioned in the agreement. Clause 31 of the agreement is the arbitration clause. It reads as thus;

"31. If any dispute arises between the parties out of or in connection with the agreement whether in the nature of interpretation or meaning of any term hereof or as to any claim by one against the other, or otherwise the same shall be referred to arbitration of a common arbitrator if agreed upon. Otherwise to two arbitrators one to be appointed by each party hereto and the arbitration shall be governed by the Arbitration Act, 1940. The arbitration proceedings shall be conducted at Pune, India."

4. There arose some disputes between the parties out of the 2 agreements leading to Hyundai issuing a demand notice dated 16th October 2015 to Saumya. Saumya failed to reply. The Petitioner thus filed Arbitration Petition No.265 of 2016 in the Kolkata High Court. The Kolkata High Court appointed a Court Receiver to take possession of machinery and other equipment. However, since the Respondent had shifted the machinery to areas unknown to the Petitioner, time was extended for the Court Receiver to take possession of the remaining machinery. Thereafter, by notice dated 16th April 2019, Hyundai invoked the arbitration clause and conveyed to the Saumya that Hyundai had nominated its arbitrators but requested Saumya to nominate its arbitrator if they did not agree to the arbitrator appointed by the Petitioner. Saumya issued reply dated 27th May 2019 to the lawyers of Hyundai through their own Shivgan

counsel. While denying the claim of the Petitioner, Saumya also denied any existing juridical relations between the parties and also raised the issue of limitation in its notice-reply. The Petitioner has thus filed the present petition seeking appointment of an arbitrator.

5. Mr. Wable, learned counsel appearing for the Petitioner contends that since arbitration clause in agreement dated 26th September 2013 specifies that the arbitration proceedings shall be conducted at Pune in India, it is this Court that is vested with jurisdiction to entertain an application under Section 11 of the Act. Conceding that while both agreements being executed at Kolkata, the venue of arbitration as per the latter agreement is Pune. Hence, he asserts that it is the Bombay High Court, which has jurisdiction to appoint an arbitrator. Upon a query of the Court regarding area of operation of the agreement, Mr. Wable agreed that the agreement operated within Kolkata. He also admitted that an application was made under Section 9 of the Act in the Kolkata High Court.

6. Heard the Petitioner and perused the documents on record. Based on the averments in the petition as well as the submissions of the counsel, it is clear that the Petitioner has already moved the Kolkata High Court for appointment of a Court-Receiver and that High Court had passed some orders on the application. Similarly, the cause of action to the dispute also arose within Kolkata. Section 42 of

the Act reads as thus:

"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. Considering the provisions of Section 42 of the Act, I have no hesitation in holding that the present petition is misconceived and is without merit since an application in pursuance of the agreements was already made before the Kolkata High Court, it is only that High Court, which has jurisdiction to entertain any application under the Act. A decision of the Supreme Court in the case of *BGS SGS Soma v NHPC Limited*¹ has dealt with this issue and has held that the earliest application having been made to the Court in which part of cause of action arises would be the exclusive Court under Section 42 of the Act. Paragraph 59 of the judgment reads as under:

"59. Equally incorrect is the finding in Antrix Corporation Ltd. (supra) 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

¹ 2020 Volume 4 SCC 234
Shivgan

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."

8. Since the Kolkata High Court is already the first Court having exercised jurisdiction over the arbitral proceedings, all subsequent applications shall be made in that Court and no other Court. Furthermore, the Supreme Court in its decision in the matter of *M/s Ravi Ranjan Developers Private Limited v. Aditya Kumar Chatterjee*² has held that an application under Section 11 of the Act for

² 2022 SCC Online SC 568
Shivgan

appointment of an arbitrator cannot be moved in any High Court in India, irrespective of its territorial jurisdiction. Section 11(6) of the Act has to be harmoniously read with Section 2(1)(e) of the Act and it is never the intention of Section 11(6) that arbitration proceedings should be initiated in any High Court in India, irrespective of whether the Respondent resided or carried on business within the jurisdiction of that High Court, and irrespective of whether any part of cause of action arose within the jurisdiction of that Court. The reliance of Mr. Wable on the venue of arbitration is of no consequence in view of settled legal position. The agreements have been executed in Kolkata and the Respondent has place of business in Kolkata. On an enquiry by the Court, Mr. Wable has specifically stated that the area of operation of the agreements was within Kolkata. Thus, in terms of Section 2(1)(e) of the Act, no suit could have been filed in any Court over which the Bombay High Court exercises jurisdiction as no part of the cause of action has arisen within the territorial jurisdiction of the Bombay High Court.

9. In view of the above, the instant Arbitration Petition for appointment of an arbitrator in this Court is without jurisdiction and hence, dismissed.

10. There will be no order as to costs.

(DR. NEELA GOKHALE, J.)

Shivgan