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Arb O.P.(Com. Div.)No.338 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 10.08.2022

CORAM

THE HONOURABLE Mr.JUSTICE **M.SUNDAR**

Arb O.P(Com. Div.)No.338 of 2022

1. K.Samad
S/o.K.Kafur
2. S.Meherunisa
W/o.K.Samad

... Petitioners

- Vs -

Reliance Capital Limited,
Having reg. office at 1st Floor,
H.Dhirubhai Ambni Knowledge City,
Koparkhairane, Navi Bombay,
Having Branch Office at Reliance Capital Limited,
Reliance Tower, Haddows Road,
Nungambakkam, Chennai-600 034.

... Respondent

Prayer: Arbitration Original Petition filed under Section 34(2)-a (iii), (iv), b-(ii), (i), 2-A of the Arbitration and Conciliation Act, 1996 praying to (a) set aside the entire Arbitral Award dated 10.10.2013 passed by learned Sole Arbitrator (b) direct the Respondent to pay the cost.

For Petitioners : Ms.P.Uma



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ORDER

The neat and simple question that arises in the captioned Arb OP is a threshold question and that is whether this Court [Madras High Court] is the curial Court which will have jurisdiction to entertain captioned Arb OP.

2. Before proceeding further, this Court considers it appropriate to extract and reproduce the proceedings made by this Court in the previous listing on 29.07.2022, which reads as follows:

'Captioned Arb.OP has been presented in this Court on 03.03.2022 assailing an 'arbitral award dated 10.10.2013 bearing reference LOAN ACCOUNT NO.RLLPCHE000092003' [hereinafter 'impugned award' for the sake of brevity, convenience and clarity]. To be noted, this matter was earlier listed 'FOR MAINTAINABILITY' before this Court, maintainability issue pertained to limitation and this Court based on the Maintainability note and the submissions of learned counsel for petitioners made proceedings dated 05.07.2022, which reads as follows:

'Captioned Arb.OP has been presented in this Court on 03.03.2022 under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' which shall hereinafter be referred to as 'A and C Act' for the sake of brevity assailing an 'arbitral award dated 10.10.2013 bearing reference Loan Account No.RLLPCHE000092003' (hereinafter 'impugned award' for the sake of convenience).



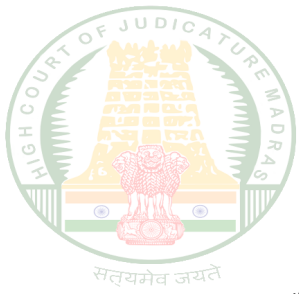
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2. Registry has entertained doubts about limitation in the light of sub-section (3) of Section 34 of A and C Act and the proviso thereat. In other words, Registry is in doubt as to whether the captioned Arb.OP has been presented within 3 months and 30 days time frame beyond which a Section 34 petition cannot be entertained even with a delay condonation petition.

3. Before proceeding further, this Court deems it appropriate to refer to the 'Maintainability Note' placed before this Court by the Registry. The Maintainability Note proceeds on the basis that the impugned award is dated 10.10.2013 and therefore, 3 months and 30 days time frame elapsed on 09.02.2014. This is plainly incorrect. The reason is, the language in which sub-section (3) of Section 34 is couched makes it clear that the reckoning dates are either (a) the date on which the impugned award is received by the party making the Section 34 application or (b) the date on which a request under Section 33 (if there is one) is acceded to. Therefore, it is clear that the reckoning date is not the date of the impugned award. This Court deems it appropriate to make it clear that the Registry taking the date of the impugned award as the reckoning date is plainly incorrect and inappropriate.

4. Be that as it may, proceeding further with the facts of the case on hand, it is unique in certain aspects, more particularly with regard to the limitation aspect.

5. Learned counsel Ms.P.Uma, who is before this Court, submits that the petitioners in the captioned Arb.OP moved the



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jurisdictional Civil Court by way of a suit in O.S.No.4307 of 2015 and an ex parte decree was passed in that suit on 30.09.2015. The respondent moved an application under Order IX Rule 13 of 'The Code of Civil Procedure, 1908 (Central Act V of 1908)' [hereinafter 'CPC' for the sake of convenience and clarity] with delay. Delay was condoned and Order IX Rule 13 CPC application was entertained and Order IX Rule 13 prayer was acceded to. Thereafter, the respondent before this Section 34 Court took out an application in I.A.No.13412 of 2018 in the Civil Court under Section 8 of A and C Act. This Section 8 application was subjected to full contest and after full contest, the trial Court in and by an order dated 29.11.2018 allowed the Section 8 prayer made by the respondent before this Court. To be noted, the Civil Court is I Assistant Judge's Court , City Civil Court, Chennai.

6. The petitioner before this Court carried the matter in revision by filing C.R.P.No.45 of 2019 along with a Civil Miscellaneous Petition thereat. Notice was issued. There was full contest in the CRP and after full contest, a Hon'ble single Judge of this Court in and by order dated 11.01.2022 dismissed the CRP sustaining the Section 8 order dated 29.11.2018 made by the trial Court. While doing so, the Hon'ble single Judge in Paragraph 6 has observed as follows:

'6. Accordingly, this Civil Revision Petition is dismissed as devoid of any merits. No costs. Consequently, connected miscellaneous petition is closed. However, it



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open to the petitioners to challenge the award of Arbitrator before Court by filing an application under Section 34 of the Arbitration and Conciliation Act. The period during which the petitioners were prosecuting the above Civil Revision Petition shall be excluded. However, it is for the petitioners to prove their case that on notice was served on the them by the Arbitrator before passing the final award.'

7. In the aforementioned circumstances, more particularly in the aforementioned chronicle of events, learned counsel for petitioners submits that the reckoning date should necessarily be 11.01.2022 being the date on which CRP order was made by a Hon'ble single Judge of this Court and it cannot be 10.10.2013 being the date of the award.

8. The unique trajectory this matter has taken makes it clear that the submissions are prima facie acceptable at this maintainability stage subject to the rights of the respondent. This Court also takes note of the aforementioned paragraph 6 wherein another Hon'ble single Judge has clearly preserved the rights of the petitioners to move this Section 34 Court after dismissal of the CRP. In sum and substance, the sequitur is the petitioner would be entitled to the benefit of Section 14 of the Limitation Act as they had approached a wrong forum.

9. In the light of the narrative thus far, Registry is directed to process the captioned matter, assign a number and list it for admission if it is otherwise in order i.e., other objections raised by the Registry being cleared by the petitioners.



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10. *It is made clear (as already alluded to supra) that this is a prima facie view at this maintainability stage and the rights of the respondent would stand preserved to raise the limitation plea if so advised, if so desired and if that be so. Registry to do the needful.'*

2. *After aforementioned proceedings, captioned Arb OP is now before this Court in the Admission Board and for the first time the Arbitration clauses namely Clauses 17, 18 and 19 captioned ARBITRATION, SEVERABILITY and GOVERNING LAW AND JURISDICTION respectively in the primary contract being a Loan Agreement captioned Mortgage Loan Agreement dated 03.05.2008 have been placed before this Court. These clauses 17, 18 and 19 of primary contract read as follows:*

'17. ARBITRATION

In the event of any dispute or differences arising under this Agreement including any dispute as to any amount outstanding, the real meaning or purport hereof ("Dispute"), such Dispute shall be finally resolved by arbitration. Such arbitration shall be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 or any amendment or reenactment thereof by a single arbitrator to be appointed by the Lender. The venue of arbitration shall be ___ Mumbai_ and the arbitration shall be conducted in English language.

18. SEVERABILITY

The Articles of the Agreement and the clauses contained in each Article are severable and any illegality, invalidity or



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irregularity, inconsistency or repugnancy of any Article or any clause in Article shall not in any way affect the legality, validity or regularity of any other Article or clause of the Article.

19. GOVERNING LAW AND JURISDICTION

This Agreement shall be governed by and construed in all respects with the Laws in India and the Borrower and Lender hereby mutually agree that any matter or issues arising hereunder or any dispute hereunder shall, at the option/discretion of the Lender, be subject to the exclusive jurisdiction of the Courts of the City of, India. This shall not however limit the rights of the Lender to file/take proceedings in any other Court of Law or Tribunal of Competent jurisdiction.

The Borrower agrees/confirms as follows:

- a) To keep alive the insurance policy/policies assigned in favour of Lender by paying on time the premium as they fall due and produce the receipts to Lender whenever required.*
- b) Lender shall have the right to receive and adjust any payment that it may receive in connection with any insurance policy/policies against the Loan and alter the amortization schedule as set out in Schedule hereunder in any manner as it may deem fit notwithstanding anything to the contrary contained in this Agreement or any other document or paper.*
- c) That the terms and conditions and all the covenants and details of the Schedule hereunder shall be read and construed as part and parcel of these presents.*



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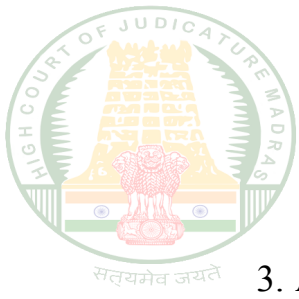
d) That the terms and conditions of this Agreement shall be binding on the legal representatives, heirs, executors, administrators, successors and assigns of the Borrower and the successors and assigns of the Lender.'

3. This Court is informed by Ms.P.Uma, learned counsel for petitioners that the aforementioned Clauses 17, 18 and 19 of primary contract serve as arbitration agreement between the parties i.e., 'arbitration agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act. A careful perusal of arbitration agreement brings to light that the venue of arbitration shall be Mumbai (Clause 17) though exclusive jurisdiction of Courts of the City has been left blank (Clause 19). A further perusal of the impugned award brings to light that the entire arbitral proceedings have been held in Mumbai and the impugned award has been made by a sole Arbitrator who is a retired District Judge in the District Judiciary of State of Maharashtra.

4. Learned counsel refers to Section 8 application taken out by the respondent-Company [respondent in captioned Arb OP]. This takes us to the question as to whether Section 8 is an exception to Section 42 of A and C Act.

5. Faced with the above situation, learned counsel requested for a short accommodation to examine the position and revert to this Court. Request acceded to.

List in the Admission Board on 10.08.2022.'



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3. Aforementioned proceedings are telltale i.e., telltale qua the crux and gravamen of the issue on hand and the trajectory the matter has taken before this Court. It is also made clear that while deciding Maintainability, the arbitration clauses i.e., Clauses 17, 18 and 19 of primary contract were not brought to the notice of this Court. To be noted, Maintainability issue pertains to limitation.

4. Aforementioned 29.07.2022 proceedings shall be read as an integral part and parcel of this order. This also means that the abbreviations, short forms and short references used in the earlier proceedings shall continue to be used in the instant order for the sake of convenience and clarity.

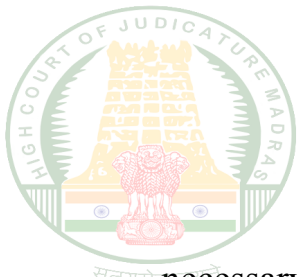
5. Prior to the aforementioned listing, there were other listings and proceedings regarding dispense with prayer but it may not be necessary to allude to the same much less extract and reproduce the same as we are more concerned with aforementioned short and neat question.

6. As would be evident from the earlier proceedings dated 29.07.2022 Clauses 17, 18 and 19 of the primary contract together serve as arbitration agreement between the parties i.e., arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act and in this arbitration agreement. This means that Venue of arbitration is mentioned as Mumbai



(Clause 17) but exclusive jurisdiction of the Courts has been left blank (Clause 19). In the earlier proceedings, learned counsel for petitioners was faced with the question as to whether Section 8 is an exception to Section 42 of A and C Act.

7. Ms.P.Uma, learned counsel for petitioners continuing with her submissions pressed into service **Hardy Exploration** case law i.e., **Union of India (UOI) Vs. Hardy Exploration and Production (India) Inc** reported in **(2019) 13 SCC 472** and drew the attention of this Court to paragraph 30 thereat. To be noted, in **Hardy Exploration** case law paragraph 30 is one where **Imax Corporation** i.e., **Imax Corporation Vs. E-City Entertainment (India) Pvt. Ltd.**, reported in **(2017) 5 SCC 331** has been referred to and paragraphs 24 to 29 of **Imax Corporation** have been extracted and set out. It may really not be necessary to refer to paragraph 30 of **Hardy Exploration** which was rendered by Hon'ble Supreme Court on 25.09.2018 as **Imax Corporation** turns on Part II of A and C Act i.e., foreign awards being foreign awards within the meaning of Section 44 of A and C Act. More importantly, as regards the Seat and Venue conundrum if one may say so, post **Hardy Exploration** Hon'ble Supreme Court has rendered **BGS SGS Soma JV Vs. NHPC** reported in **(2020) 4 SCC 234**. Before proceeding further, it is

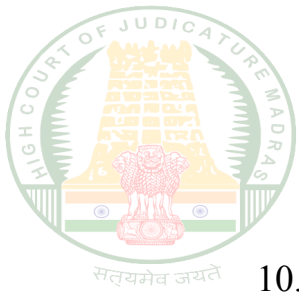


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necessary to notice the paragraphs in **BGS SGS Soma** which talks about **Hardy Exploration**. This is paragraph 91 and the same reads as follows:

*'91. The three-Judge Bench in **Hardy Exploration & Production (India) Inc.** failed to apply the **Shashoua** principle to the arbitration clause in question. Had the **Shashoua** principle been applied, the answer would have been that Kuala Lumpur, which was stated to be the "venue" of arbitration proceedings, being governed by the UNICITRAL Model Law, would be governed by a supranational set of rules, and there being no other contrary indicator, it would be clear that Kuala Lumpur would therefore be the juridical "seat" of the arbitration.'*

8. I leave it at that and proceed to paragraphs 45 and 46 of **BGS SGS Soma** case law. The principle laid down in **BGS SGS Soma** is, the term 'place' occurring in sub-section (3) of Section 20 of A and C Act is 'Venue' and the same term 'place' occurring in sub-section (1) of Section 20 is 'Seat'. This is articulated in paragraph 45 of **BGS SGS Soma** case law.

9. In the case on hand, while Venue has been stipulated as Mumbai, the Seat has been left blank. Therefore, this is a case where the Seat and Venue become the same in the light of **BGS SGS Soma** principle.



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10. However, the problem presents itself in a different form for the petitioners. As would be evident from the narrative in the proceedings made in the previous listing on 29.07.2022, the petitioners by their own volition filed a Civil Suit in Chennai and therefore, the respondent filed a Section 8 application in the Civil Suit obviously in Chennai. This Section 8 prayer was answered in the affirmative i.e., prayer was acceded to and the petitioners carried it in Revision to this Court in and by CRP.No.45 of 2019 and the same came to be disposed of by a Hon'ble Single Judge of this Court on 11.01.2022. Learned counsel submits that Section 8 application having been filed in Chennai would mean that subsequent applications including captioned Section 34 Arb OP should be in Chennai owing to Section 42 of A and C Act, which reads as follows:

'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.'



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11. As already alluded to supra, Section 8 is an exception to Section 42 and this principle was laid down by Hon'ble Supreme Court in *Associated Contractors* i.e., *State of West Bengal Vs. Associated Contractors* reported in (2015) 1 SCC 32. Relevant paragraph in *Associated Contractors* is paragraph 25 and the same reads as follows:

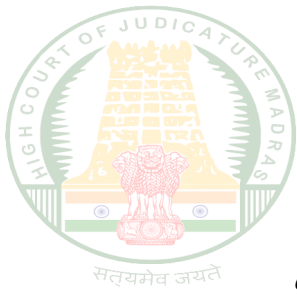
'25. Our conclusions therefore on Section 2(l)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(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



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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.

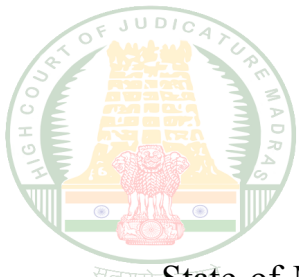
(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without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

The reference is answered accordingly.'

12. Though aforementioned paragraph 25 talks about applications under Sections 8 as well as 11 being exceptions to Section 42 and though it talks about the possibility of a Section 8 application being filed before a judicial



सत्यमेव authority and not necessarily a Court that may not be of relevance as in the case on hand Section 8 was filed before a Court. To amplify and articulate, it is deemed appropriate by this Court to say that as far as Section 8 is concerned, a contracting party has no option other than going to the Civil Court in which the other contracting party files the suit. In other words, the contracting party which is compelled to take out an application under Section 8 has no choice of jurisdiction. It is an Hobson's choice. If a Section 8 is also brought within the ambit and sweep of Section 42, a contracting party which wants to move the Seat or Seat/Venue can go to another jurisdiction and file a suit thereby compelling the other contracting party to file a Section 8 application the other jurisdiction and thereafter say that the other contracting party should file all other applications only in the other jurisdictional Court where a Section 8 application was filed. This would defeat the sublime philosophy underlining arbitration as an ADR mechanism i.e., party autonomy. In this view of the matter also, it is only a natural sequitur that Section 8 is an exception to Section 42. If Section 8 is an exception to Section 42, in the case on hand as already alluded to and delineated supra, entire proceedings were held in the State of Maharashtra (sole Arbitrator was a former Judicial Officer in the District Judiciary in the State of Maharashtra). The award has also been made in the

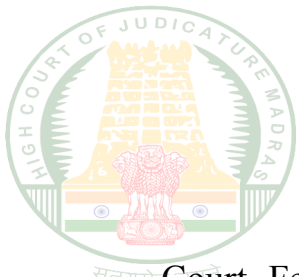


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State of Maharashtra. Therefore, captioned Arb OP is disposed of as returned to the petitioners making it clear that it is open to petitioners to approach the curial Court i.e., supervisory Court if so advised and if so desired. Obviously the earlier proceedings regarding dispense with and Maintainability being proceedings dated 20.07.2022 and 05.07.2022 will stand recalled/effaced as this Court has no jurisdiction qua challenge to the impugned award. It is open for the petitioners to seek exclusion of time spent in this Court (for the purpose of Limitation) *inter alia* under Section 14 of the Limitation Act, 1963 if so advised. If such course is taken, it is obvious that it will be the domain of jurisdictional Court to take a call on the same at its discretion. There shall be no order as to costs.

13. After aforementioned order was dictated, Ms.P.Uma, learned counsel for petitioners submitted that she accepts the aforementioned order, she would approach the appropriate Court i.e., jurisdictional Court in State of Maharashtra and on that basis, learned counsel requested for refund of Court fee paid. Learned counsel made a request to treat this as a request for refund under Section 70 of 'Tamil Nadu Court Fees and Suits Valuation Act, 1955 [Act No.XIV of 1955]' (hereinafter 'Tamil Nadu Court Fees Act' for the sake of convenience and clarity). In other words, learned counsel requested to treat the



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Court Fee paid as one paid by mistake or inadvertence. The Court fee paragraph in the captioned Arb OP is paragraph 10 and the same reads as follows:

'10. The value of the subject matter of the Award to the extent challenge in this petition is 2860541.21. Hence the petitioner pays a Court fees of Rs.one lakh under article 4 of schedule 11 of the Tamil Nadu court fees and suit valuation Act, 1955.'

14. Registry to process the refund of Court fees by observing the applicable procedure other formalities and after making statutory deductions (if any). Learned counsel submits that all necessary procedural formalities will be complied with in this regard. Registry to make refund by way of an instrument drawn in favour of first petitioner [K.Samad S/o.K.Kafur] as requested by learned counsel for petitioners as expeditiously as the business of Registry would permit and in any event within three(3) weeks from today i.e., on or before 01.09.2022.

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Speaking/Non-speaking order

Index : Yes / No

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