

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION******ARBITRATION APPEAL (L) NO.154 OF 2016******IN******MISC.APPLICATION NO.1009 of 2015******IN******OMP NO.101009 OF 2015 along with
CIVIL APPLICATION NO. 7 of 2016***

1.Reliance Infrastructure Ltd	}	
a company incorporated under the		
Companies Act, 1956 and having		
its office at Reliance Centre, Walchand	}	
Hirachand Marg, Ballard Estate, Mumbai		
 2. P.S.Toll Road Pvt.Ltd	}	
a company registered under the		
Companies Act, 1956 having its		
head office at 2 nd floor, Devidas Lane,	}	
Off SVPRoad, Near Devidas Lane		
Borivali (West) Mumbai-400 013.		.. Appellants
vs		
M/s Roadway Solution (I) Pvt.Ltd	}	
having its office at 52,Clover Park Royale,		
South Main Road, Koregaon Park,		
Pune-411 001.	}	.. Respondent

..

Mr.Janak Dwarkadas Sr.Counsel a/r Mr.D.J.Kakalia
a/w Mr.Paresh Patkar, Mr.Tushad Kakalia i/b
Mulla & Mulla Craigie Blunt & Caroe for Appellants

Mr.Ravi Kadam Sr.Counsel a/w Mr.Samit Shukla,
Mr.Sandeep Sharma, Mr.Nirav Shah, Mr.Nilesh Tated
Ms.Nishal Mittal, Mr.Nausher Kohli, Mr.Pethe
Mr.Munaf Virjee i/b Pethe & Co for Respondents

...
CORAM: ***ANOOP V.MOHTA AND
G.S.KULKARNI, JJ***

DATE: **7th JANUARY, 2016**

ORAL JUDGMENT (*Per Anoop V.Mohta, J*)

Admit. Heard finally by consent.

1. The Appellant (Original Respondent) has filed this Appeal under section 37 of the Arbitration and Conciliation Act, 1996 (Amendment Act, 2005) (The Arbitration Act) thereby challenging an ex-parte order dated 1st January 2016 passed by the learned District Judge-II Pune, in Misc.Application No.1009 of 2015 in OMP No.101009 of 2015, filed under section 9 of the Arbitration Act by the respondent herein, for reliefs of injunction on apprehension of invocation of the contractual Bank Guarantees.

2. The Agreement in question is dated 15th April 2011 being a construction contract entered into between appellant no.1 and respondent no.1 at Mumbai. It was for strengthening and widening up of existing road, service, Toll plaza and connected aspects on Pune-Satara section of NH 4 in NHDP Phase 4 BOT basis. In terms of the contract the appellant has submitted four performance Bank Guarantees, which were renewed from

time to time and extended as stated up to 31st March 2016. Disputes arose between the parties. Correspondences were exchanged between parties accordingly. On apprehension therefore respondent no.1 (Original petitioner) filed section 9 Arbitration Act application on 1st January 2016, in the Court of District Judge, Pune and also filed an application for interim orders whereupon an ex-parte impugned order dated 1st January 2016, in question was passed.

3. The learned Judge has considered the averments so made in the application read with clause 43.3 of the Agreement dated 15 April 2011, letter dated 1st August 2015 and 27th June 2015 including termination notice dated 31st May 2015 and the apprehensions so raised about invoking of the Bank Guarantee, granted the order of status-quo, however, at the same time the matter was placed on 16th January 2016, for further hearing.

4. Admittedly, the Appellant has filed the application under section 9A of the Code of Civil Procedure 1908 (CPC) on 2nd January 2016, next day of the impugned order and challenged the jurisdiction of

the District Court Pune to entertain the respondent's section 9 of Arbitration Act application and as also prayed to vacate the ex-parte status order.

5. Normally, pending such matter at this stage, we would not have interfered with the order. Considering the scheme, object and purpose of the Arbitration proceedings and as the Agreement entered into between the parties, is clearly a commercial agreement, where parties knowing fully the nature of the contract and the concept of cause of action have chosen one out of two available forum/Court. They have specifically agreed for following clauses :

“43.4: Place of Arbitration:

The place of Arbitration shall be Mumbai for all disputes

46.3: Governing Law and Jurisdiction:

The Agreement shall be governed by the laws of India. In respect of all matters arising out of or relating to the Agreement, the Courts of Mumbai India shall have jurisdiction.”

Therefore, we are inclined to interfere with the order, at this stage itself, to avoid further delay and for early disposal of the matter in view of the urgency so expressed by the parties.

6. Learned Senior Counsel appearing for the Appellant has

restricted the arguments only on the jurisdiction of the learned District Judge to entertain and to pass such ex-parte order. There was no much discussion in the course of arguments, with regard to the merits of the matter. Learned senior counsel appearing for the respondents however, objected to these submissions and submitted that the aspect of jurisdiction even if so raised, need to be decided by the learned District Judge after giving an opportunity to the respondents, including by permitting to file a reply to the application. This would enable the respondents to raise various issues on the cause of action, the place of execution of work, the nature of work under the agreement and related issues. It is also submitted that the decision of the learned District Judge, with reasons, would assist this Court, to take final decision on the jurisdiction issues. We could have in a given case accepted the submission of the learned senior counsel appearing for the respondents but, considering the admitted position on record pertaining to the commercial Agreements between the parties and the law laid down by the Supreme Court and this Court, we have proceeded with the matter finally so far as the issue of jurisdiction is concerned.

7. Both the learned senior counsel appearing for the parties have

referred to the provisions of the Arbitration Act specifically section 2 (1) (e) which defines 'Court' and section 42 which deals with 'Jurisdiction'.

These provisions read thus:

2 Definitions: (1) *In this Part, unless the context otherwise*

requires-

(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.”*

Section 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 an application under this Part has been made in a Court, the Court alone shall have jurisdiction over the arbitral proceedings and all subsequent application arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.”

8. The provisions and purpose of interim measures by the Court under section 9 of the Arbitration and Conciliation Act and the powers of the Court to deal with the same and to grant protective orders and/or interim measures is not much in dispute. However, as regards the issue whether the District Court could have exercised jurisdiction to pass the impugned injunction order in the teeth of the jurisdiction clause in the agreement entered between the parties, we are inclined to examine and decide the same in our appellate jurisdiction under section 37 of the Act despite the application of the appellants under section 9A of the C.P.C. In our view, the present facts and circumstances are sufficient and would justify we doing so. We may observe that the power of the appellate Court and specifically in view of the scheme and purpose of the Arbitration and Conciliation Act and considering the submissions so raised, in our view a case is made out so as to interfere with the order so passed if it is without jurisdiction and authority. At this stage, we may record that the learned senior counsel appearing for the Appellants on instructions has submitted that the appellants in view of the present appeal being taken up by this Court for final hearing are withdrawing the application under section 9A of

the C.P.C.

9. Learned counsel appearing for the Appellants has placed reliance on the following Judgments :

(i) Bharat Aluminium Company vs Kaiser Aluminium Technical Services Inc ((2012) 9 Supreme Court Cases 552 ;

(ii) Swastik Gases Private Limited vs Indian Oil Corporation Limited (2013) 9 Supreme Court Cases 32;

(iii) Konkola Copper Mines (PLC) & anr vs Stwearts & Lloyds of India Ltd & anr 2013 (5) Bom C.R. 29;

(iv) Alfa Therm Limited vs Canara Bank & anr 2009 (113) DRJ 36.

10. In the decision of the Supreme Court in **Bharat Aluminium Company** (supra) it is observed thus :

96. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

“2. Definitions (1) In this Part, unless the context otherwise requires –

(e) “Court” means 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.”

We are of the opinion, the term “subject matter of the arbitration” cannot be confused with “subject matter of the suit”. The term “subject matter” in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to

identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.”

11. The Division Bench of this Court in **Konkola Copper Mines (PLC) vs Stewarts & Lloyds of India Ltd 2013 (5) Bom.C.R.29** after dealing with the provisions of the Arbitration Act in depth and specifically considering of such similar clauses the basic element namely “the place of arbitration in Mumbai ” to which we are in complete agreement, has held as under :

“ Secondly, the learned Single Judge erred in proceedings on the basis that Mumbai was a venue as distinguished from the place of arbitration. We have indicated earlier our reasons for holding that the place of arbitration was Mumbai. Hence this Court in the exercise of its ordinary original civil jurisdiction over the place of arbitration can entertain a petition under section 89. Section 9 is a provision ancillary to its supervisory role. Hence even as regards the second ground, the learned Single Judge was in error in holding that the seat of arbitration that was initially agreed upon remained as the place of arbitration.”

12. Strikingly, the Supreme Court while dealing with the issue of jurisdiction of Courts when there is a agreement between the parties in respect of the seat of arbitration and dealing with the words “alone” “only” “the exclusive jurisdiction” in the case of **Swastik** (supra) has specifically recorded and observed as under :

31. *“ In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and therefore the Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under section 11. Having regard to Section 11 (2) (b) and Section 2 (e) of the 1996 Act read with section 20 (c) of the Code there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is whether parties by virtue of clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or in other words, whether in view of clause 18 of the agreement, the jurisdiction of the Chief Justice of the Rajasthan High Court has been excluded”*

31. *For answer to the above question, we have to see the affect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like “alone” “only” “exclusive” or exclusive jurisdiction” have not been used but this in our view, is not decisive and does not make any material difference. The intention of the parties by having clause 18 in the*

*agreement is clear and unambiguous that the Courts at Kolkata shall have jurisdiction which means that the Courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim **expressio unius est exclusio alterius** comes into play as there is nothing to indicate to the contrary.”*

In a concurring judgment of Justice Madan B.Lokur, His Lordship has observed as under :

57. “For the reasons mentioned above, I agree with my learned Brother that in the jurisdiction clause of an agreement, the absence of words like “alone” “only” “exclusive” or “exclusive jurisdiction” is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute. In the present case, only the courts in Kolkata had jurisdiction to entertain the disputes between the parties.”

In the present case, the place of arbitration admittedly is Mumbai for all the disputes. This includes disputes and/or issues so raised in section 9 application by the respondent.

13. Parties who have agreed in specific clauses to a seat of arbitration to be at a specified place, in a commercial contract, as noted by us above, in our view cannot be permitted to take chance to file an application for emergent measures at a place other than as agreed in the specific clauses in the contract, when the Court in the clause as agreed between the parties would have jurisdiction to entertain a dispute and bring

about a situation for the opposite party to contest the same. According to the respondents despite the specific clauses in the contract between the parties, so referred above, they are entitled to file such an application under section 9 of the Arbitration Act. The submissions on behalf of the respondent that they would lead evidence and/or make their submissions in the background of the Agreement between the parties and thereafter the District Court will decide the aspect of jurisdiction, cannot be accepted in the context of such arbitration matters specifically in view of arbitration clauses itself. Such approach would defeat the object of the agreements, including the Bank Guarantees and/or performance Bank Guarantee issue and the early decision in such arbitration would be delayed. Merely because appellant has filed section 9A C.P.C. Application, now withdrawn, we are not inclined to accept the contention to wait for decision from District Court Pune on section 9A C.P.C. Application. The maintainability of section 9A Application in arbitration proceedings for want of provision, is itself in doubt.

14. These are commercial contracts and the nature and consequence of which is well within the knowledge of the parties when

these agreements were entered into. The reason for filing the section 9 application at Pune in view of the averments so made in an application could not have prevailed over the specific agreement between the parties in the clauses so referred above.

15. Having once agreed in terms of the above clauses, even the respondent's application under section 9 of the Arbitration Act, ought not to have been entertained even on merit by the learned District Judge, on the basis of the averments so made in para 29 and 30 of the application. The learned District Judge could not have overlooked these clauses before passing the impugned order of status quo in such Bank Guarantees matter. The law of injunction on such Bank Guarantees is quite settled.

16. In the present case both clauses make the position clear about jurisdiction for all the disputes, as per agreement which shall be at Mumbai. No question of proving otherwise at this stage of arbitration proceedings in view of clear written commercial contracts terms between the parties, specifically when there is no challenge to these clauses and the terms. Such terms/clauses bind all.

17. In view of the enunciation of law in the decisions of the Supreme Court in the case of ***Swastik Gases Private Limited (supra) and Bharat Aluminium Company (supra)***, it is clear that the provisions of section 2 (1) (e) of the Arbitration and Conciliation Act are required to be read so as to give recognition to the intention of the parties. In such case it would therefore be the Court where the arbitration would take place which would have jurisdiction to exercise a supervisory control over the arbitral process. We have therefore, no hesitation to hold that the learned District Judge lacked jurisdiction to entertain the application of the respondents filed under section 9 of the Arbitration Act.

18. As regards the submissions of the learned senior counsel for the respondents to give an opportunity to the respondents as an application is filed by the appellants raising the issue of jurisdiction and therefore the learned District Judge should be allowed to decide the same cannot be accepted by us. We are of the opinion that the application itself in view of the clear arbitration agreement between the parties as noted by us above ought not to have been filed at Pune. Merely because an application under

section 9A was filed by the appellant that itself is not sufficient to keep the matter pending before the District Court and compel other party to move for vacating of the injunction and/or status quo order, and/or to compel them to file an application to raise the issue of jurisdiction, in such arbitration related disputes. Therefore, considering the scheme of Arbitration (Amended) Act, 2015 and the purpose and object behind and also in the teeth of section 42, we see that the parties having agreed in the clauses specifically to Mumbai being the place of arbitration for all disputes and for jurisdiction the Courts at Mumbai, in respect of all matters arising out of the agreement, then there is no question of the application under section 9 to be filed at any other Court/place other than the Court/place so agreed between the parties. This would negate/place the purpose and object of the Arbitration Act and including the agreement entered into between the parties apart from delay in early conclusion and/or settlement of disputes between the parties. This would also multiply the arbitration proceedings. Therefore the case is made out to invoke the appellate Court power at this stage itself. We are inclined to do so in the interest of all.

19. However, considering the facts and circumstances, and in view

of the fact that the learned Judge has passed order on 1st January 2016 and the same is in operation till this date, as the original petitioner/respondents are entitled to file if they are instructed to file such section 9 Application in this Court, by keeping all points open, including on merits, to be decided by the learned Judge, we are inclined to continue the order of status quo for one week. Hence, following order by invoking permissible appellate Court's power:

ORDER

(a) The Appeal is allowed.

(b) Impugned order dated 1st January 2016 of the District Judge, Pune is quashed and set aside.

(c) However, status quo order to continue for one week more from today.

(d) Civil Application is disposed accordingly. No costs.

(G.S.KULKARNI, J)

(ANOOP V. MOHTA, J)

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment/order.

