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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB. A. (COMM.) 4/2015 & IA No. 25831/2016

OMAXE LTD

..... Appellant

Through: Mr. Ramesh Singh, Mr. Shalabh Singhal,
Mr. Rohit Kumar, Mr. Abinash Agarwal,
Advocates along with Mr. Ankur Gupta, General
Manager in person.

versus

PVP ENTERTAINMENT LTD & ANR.

..... Respondents

Through: Mr. Chetan Sharma, Senior Advocate
with Mr. Vikas Goel, Mr. Kunal Dutta and Ms.
Arushi, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
27.10.2016

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1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ('Act') is directed against an interim order dated 12th October, 2015 passed by the learned Arbitrator in an application filed by the Respondents under Section 17 of the Act.

2. Although no plea was taken in the reply to the claim, in the course of the submissions today in Court a preliminary objection was raised by Mr. Chetan Sharma, learned Senior counsel for the Respondents that the present appeal was not maintainable.

3. Elaborating his submissions, Mr. Sharma drew the attention of the Court

to the Collaboration Agreement (CA) dated 28th April, 2005 between the parties together with its Addendum. Clauses 42 and 43 of the CA which are relevant for the present purpose read as under:

“42. Arbitration

If any dispute or difference of any kind whatsoever shall arise between the parties in connection with or arising out of this Agreement or any part thereof, such dispute or difference shall be settled amicably by mutual discussion failing which the same shall be referred to the Arbitration under the provisions of the Indian Arbitration and Conciliation Act, 1996 or any statutory modifications or amendment thereof. The venue for arbitration shall be at Delhi/New Delhi and the language shall be English.

43. Jurisdiction

The Courts at Ludhiana shall have exclusive jurisdiction in case of any dispute arising in respect of the subject matter of this agreement or in connection to it.”

4. Mr. Sharma pointed out that consistent with the parties having agreed that the Courts at Ludhiana would have exclusive jurisdiction, initially an application was filed by the Respondents in the Court of the learned Additional District Judge (ADJ), Ludhiana under Section 9 of the Act. An order was also passed by that Court in the said application. Mr. Sharma further pointed out that the appointment of the sole Arbitrator also took place consequent upon an order passed by the High Court of Punjab and Haryana in an application filed by the Respondents under Section 11 of the Act. Mr. Sharma referred to Section 42 of the Act and submitted that all subsequent proceedings will have to be in the Court at Ludhiana.

5. Mr. Ramesh Singh, learned counsel for the Appellant, on the other hand, submitted at the outset that since the Respondents did not raise the above

preliminary objection in the reply filed to this appeal, they should be held to have waived such objection. He referred to Section 4 of the Act. Secondly, Mr Singh submitted that the expression 'subsequent application' appearing in Section 42 of the Act would not include an appeal under Section 37 of the Act. In support of this submission, he relied upon the decision of the Bombay High Court in *Chandrakant P. Sanghvi. v.. Anil Kumar Phoolchand Sanghvi 2016 (3) Arb LR 402 (Bom)*. According to Mr Singh, notwithstanding that the parties may have agreed that the Courts at Ludhiana would have exclusive jurisdiction, and had approached that Court first under Section 9 of the Act, the mandate of Section 42 of the Act would apply only where an 'application' arising from the agreement or the arbitral proceedings is to be filed. According to him for the purposes of an appeal under Section 37 (2) (b) of the Act, it will be open to a party to approach this Court, since the place of arbitration is Delhi and this Court otherwise has jurisdiction.

6. The Court is unable to accept the submission of the learned counsel for the Appellant on the aspect of waiver for the following reasons:

(i) The objection as to the lack of jurisdiction of this Court to entertain the present appeal raises a pure question of law. It requires Section 42 of the Act to be interpreted in the context of Section 37 (2) (b) of the Act. Therefore, it cannot be said that by not raising the objection in its reply, the Respondents have waived their right to do so.

(ii) Section 4 of the Act which talks of 'waiver of right to object' reads as under:

"4. Waiver of right to object: A party who knows that –

(a) any provision of this Part from which the parties may derogate; or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.”

(iii) The doctrine of waiver would get attracted only where one of the parties proceeds with the arbitration “without stating his objection to such non-compliance without undue delay.” In the present case there is nothing to indicate that the Respondent proceeded with the arbitration without stating its objection as to non-compliance with any of the provisions of the Act. Secondly, the said objection does not have to be only written and can even be oral. As long as the objection has been raised in the present appeal and not without undue delay, the Court sees no reason to conclude that the Respondent has waived its right to raise an objection as to lack of jurisdiction of the Court to entertain the present appeal.

7. The substantial question that arises for consideration from the preliminary objection raised by the Respondent is the interpretation that should be placed on Section 42 of the Act which reads as under:

“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.”

8. Section 42 of the Act applies at a stage subsequent to the initial proceedings where an application is made by either party to a Court. The object behind Section 42 of the Act appears to be to ensure that once a Court of proper jurisdiction has been approached by any one of the parties, then the subsequent proceedings that may arise during the arbitral proceedings or from the agreement between the parties should be instituted in that Court alone and "in no other Court". The object is to exclude the jurisdiction of all other Courts once the parties have chosen to go to a particular Court. That explains the word 'alone' in the expression: 'Court alone shall have jurisdiction over the arbitral proceedings'. The Court that the parties first choose to file an application is considered to be the Court which will thereafter supervise the arbitral proceedings. One instance could be the summoning of witnesses to appear before the Arbitral Tribunal (AT). The parties will approach the Court under Section 27 for orders in that regard. Where for some reason the AT is unable to act without undue delay, then the parties can go to the Court under Section 14 (2) of the Act to have the mandate of the AT terminated. In both the above instances, in terms of Section 42 of the Act, the Court that will be approached will be the one the parties first approached. In this context, if a plea that appeals arising out of the orders passed by the AT can be filed in a Court other than the one first chosen by either party were to be accepted, that would be contrary to the purpose of Section 42 of the Act and permit parallel proceedings to take

place in two Courts

9. It is important to recall at this stage that the Constitution Bench of the Supreme Court in *Bharat Aluminium Company Limited v. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 442* recognized that that could be a situation in domestic arbitrations where at the stage of filing an application under Section 9 of the Act, more than one Court would have jurisdiction. One would be the Court within whose jurisdiction the cause of action arises and the other would be the Court within whose jurisdiction the place of arbitration is located. However, once at the stage of Section 9 of the Act, the parties have chosen to go before one Court consistent with what they have agreed amongst themselves, then that Court alone will have jurisdiction at every subsequent stage of the arbitral proceedings. An appeal under Section 37 of the Act is against an interlocutory order of the Arbitral Tribunal. It therefore would be consistent with the object of Section 42 of the Act that such appeal should be filed before the same Court which was first approached by one of the parties. An interpretation of the word 'application' in Section 42 to exclude an appeal under Section 37 of the Act would be contrary to the legislative intent in enacting Section 42 of the Act.

10. The Court has perused the decision of the learned Single Judge of the Bombay High Court in *Chandrakant P. Sanghvi. v. Anil Kumar Phoolchand Sanghvi (supra)* but is unable to agree with the conclusion reached therein that the word 'application' in Section 42 of the Act would not include an appeal under Section 37 of the Act. The correct approach, which has in fact been noticed by the High Court of Bombay, is to ask as to

what should happen if there is no arbitration clause in the agreement between the parties. In such event, the parties will have to approach the concerned civil Court whose exclusive jurisdiction they have agreed upon. In this case that would be the Courts at Ludhiana.

11. It is also not as if the said Court at Ludhiana would otherwise not have jurisdiction. The immovable property which was to be developed in terms of the CA between the parties is located at Ludhiana. To reiterate, while it is correct that since the parties agreed on the venue of arbitration being Delhi, both Courts would have jurisdiction i.e. the Court at Ludhiana as well as the Court at Delhi, however, when the parties consciously choose one of such Courts as the one that would have exclusive jurisdiction, then it is that Court alone, and no other Court which would have jurisdiction. As explained in ***Swastik Gases Pvt. Ltd. v. Indian Oil Corporation Ltd. (2013) 9 SCC 32*** such a clause in an agreement would be valid and binding on the parties.

12. In the present case, had a suit been filed in the Court at Ludhiana and interim measures sought under Order XXXIX Rules 1 and 2 in the same manner sought in the application under Section 17 of the Act, the appeal from an order passed by that Court would obviously lie to the Court which is the appellate Court for the civil Court in Ludhiana. Such appeal would not lie before an appellate Court in Delhi.

13. The Court holds that in the above circumstances, the present appeal under Section 37 (2) (b) of the Act challenging the interim order of the Arbitrator refusing to grant interim measures under Section 17 of the Act

has to be filed only in the Court at Ludhiana which first dealt with the Section 9 application and in no other Court.

14. Since the Court agrees with the submissions of the Respondents on the issue of maintainability of the present appeal, the Court does not propose to discuss the merits of the appeal.

15. The appeal and application are, accordingly, dismissed on the ground of maintainability. This will not preclude the Appellant from approaching the appropriate Court for a similar relief. As regards the limitation for filing such an appeal, if the Appellant seeks to avail the period under Section 14 of the Limitation Act, 1963 then the Court before whom such application is presented will consider such plea on merits.

OCTOBER 27, 2016

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S. MURALIDHAR, J