

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 30th October, 2017**

+ **CM(M) 21/2017**

DAAJ HOTELS AND RESORTS PVT LTD Petitioner

Through: Mr. D. Abhinav Rao, Adv.

Versus

MUKHRAM TEWATIA

..... Respondent

Through: Mr. Vivekanand, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Article 227 of the Constitution of India impugns the order (dated 22nd September, 2016 in CS No.57/2016 of the Court of Additional District Judge-02 (South), Saket Courts, New Delhi) of dismissal of an application of the petitioner / defendant under Order VII Rule 10 of the Code of Civil Procedure, 1908 (CPC).
2. The petition came up first before this Court on 11th January, 2017 and the counsel for the respondent has been appearing throughout.
3. The counsels have been heard.
4. The respondent/plaintiff instituted the suit from which this petition arises, for recovery of Rs.56,75,097/- from the petitioner / defendant towards cost of work done by the respondent / plaintiff in the hotel of the petitioner / defendant at Hyderabad and not paid for.

5. The petitioner / defendant filed the application under Order VII Rule 10 of the CPC controverting that the Courts at Delhi had jurisdiction and further contending that only the Courts at Hyderabad had jurisdiction.

6. The learned Additional District Judge, in the impugned order, has held that the Courts at Delhi as well as Hyderabad have jurisdiction and there was no agreement between the parties restricting the territorial jurisdiction to the Courts at Hyderabad only.

7. The counsel for the petitioner / defendant has argued (i) that the work order was admittedly placed by the petitioner / defendant on the respondent / plaintiff via e-mail and acceptance thereof was also communicated by the respondent / plaintiff to the petitioner / defendant via e-mail; (ii) that the entire work was admittedly carried out by the respondent / plaintiff at the hotel of the petitioner / defendant at Hyderabad; (iii) that the respondent / plaintiff, in the plaint, has however stated that the petitioner / defendant prior to the e-mail had approached the respondent / plaintiff at its office in Delhi and that the acceptance of the work order was communicated by the respondent / plaintiff to the petitioner / defendant from Delhi; (iv) that the part payments for the work done were also made by the petitioner / defendant by cheques drawn on its bank at Hyderabad, though the said cheques were deposited by the respondent / plaintiff in its bank account at Delhi; (v) that the work order placed by the petitioner / defendant on the respondent / plaintiff had a clause as under:-

“L. All disputes arising out of this Work Order will be settled by mutual discussion at Hyderabad only. Any item of dispute not resolved through mutual discussion will be referred to M/s Shakti Parmar & Associates, the Interior Designer and their decision will be final & binding on the contractor.;

(vi) that the respondent / plaintiff instituted Arbitration Petition No.154/2014 in this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 and which was dismissed vide order dated 15th April, 2014, reasoning that the petitioner / defendant was situated at Hyderabad; (vii) that as per the contract entered into between the parties, the disputes arising out of the work order were to be settled at Hyderabad only; (viii) that the Interior Designer with whose decision the parties had agreed to abide is admittedly situated in Mumbai; (ix) that the respondent / plaintiff has invoked the territorial jurisdiction of the Courts at Delhi by stating that the contract between the parties was executed at Delhi; and, (x) however, the admitted position is different; admittedly the signed scanned copy of the work orders were e-mailed to the respondent / plaintiff from Hyderabad and the respondent / plaintiff after appending its signatures on the work orders, e-mailed them back to the petitioner / defendant at Hyderabad and on that account, the respondent / plaintiff could not invoke the territorial jurisdiction of the Courts at Delhi.

8. I have immediately enquired from the counsel for the respondent / plaintiff, that right or wrong, why should this Court in this suit take a different view qua territorial jurisdiction when in the

application under Section 11(6) of the Arbitration and Conciliation Act, 1996, it has, after considering all the same factors, been held that the Courts at Delhi do not have jurisdiction. Attention of the counsel for the respondent / plaintiff has also been drawn to the definition of “Court” in Section 2(e) of the Arbitration Act as it stood prior to the amendment w.e.f. 23rd October, 2015 and it has further been enquired whether not the criteria as laid down therein also is of the Court in whose jurisdiction the dispute subject matter of arbitration, if had been subject matter of a suit, would lie.

9. The counsel for the respondent / plaintiff has referred to ***Gyaneshwar Bhiku Dhargalkar Vs. Executive Engineer, PWD Works Division II, Panaji*** AIR 2000 Bombay 254 and ***State of Maharashtra Vs. Naseer*** 2002 (3) Raj 97 (SC).

10. In ***Gyaneshwar Bhiku Dhargalkar*** supra it was held that the application under Section 20 of the Arbitration Act, 1940 having been held to be not maintainable owing to the coming into force of the Arbitration Act, 1996, the finding of the claims also being barred by time therein would not constitute *res judicata*. In ***Naseer*** supra, it was held that merely because the Government had at some stage agreed to the appointment of Arbitrator would not come in the way of the Government contending before the Court that there was no Arbitration Agreement.

11. On the basis of the aforesaid two judgments, it is argued that in fact the order dated 15th April, 2014 of this Court of dismissal of the application under Section 11(6) on the ground of this Court having no

territorial jurisdiction is a nullity because there was no Arbitration Agreement between the parties and therefore the finding as to territorial jurisdiction therein would be of no avail.

12. The reasoning which prevailed in the aforesaid judgments is not applicable to the present controversy. While it is the settled principle of law that where the previous proceeding is dismissed as not maintainable, any observations on merits of the controversy are not *res judicata* (see *Savitri Devi Vs. Fashion Linkers* (2002) 95 DLT 893, *Harbans Singh Vs. M/s Juggat Pharma* 2013 SCC OnLine Del 5166 and *Phonographic Performance Ltd. Vs. Union of India* (2015) 220 DLT 90), in the present case, the order dated 15th April, 2014 of this Court holding the Courts at Delhi to be not having territorial jurisdiction is not on the point of maintainability of the petition under Section 11(6) of the Act or on any other ground. Thus the finding returned therein on the aspect of territorial jurisdiction would bind the party.

13. It is not open to the respondent / plaintiff to, at this stage, contend that there is no Arbitration Agreement. The respondent / plaintiff instituted the petition under Section 11(6) of the Act relying on an Arbitration Agreement and the said petition was disposed of with liberty to the respondent / plaintiff to approach the Court having territorial jurisdiction to appoint the Arbitrator. Allowing the respondent / plaintiff to, at this stage, contend that the said order is a nullity as there is no Arbitration Agreement would amount to allowing the respondent / plaintiff as a litigant to blow hot and cold as per its

convenience and the respondent / plaintiff is estopped in law from doing so. The principle of it being the bounden duty of the Court to prevent abuse of its process by litigants would also apply.

14. The counsel for the respondent / plaintiff at this stage invokes Section 42 of the Arbitration and Conciliation Act, 1996.

15. The same shows another turn-around now being made by the counsel for the respondent / plaintiff. While it was earlier being argued that there is no Arbitration Agreement, now reliance is placed on Section 42 of the Arbitration Act, question of applicability of which would arise only when there is an Arbitration Agreement between the parties.

16. The petition thus succeeds and is allowed.

17. The impugned order dated 22nd September, 2016 is set aside. Resultantly, the application of the petitioner / defendant under Order VII Rule 10 of the CPC is allowed. The plaint is ordered to be returned to the respondent / plaintiff for filing in the Court of appropriate territorial jurisdiction. Choice has been given to the counsel for the respondent / plaintiff to invoke Rule 10A but has not been availed.

RAJIV SAHAI ENDLAW, J.

OCTOBER 30, 2017'

'pp'

(corrected & released on 29th December, 2017)