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

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Date of Decision: 04.07.2018

+ O.M.P. 28/2016

GAIL (INDIA) LTD.

..... Petitioner

Through Mr.Indranil Ghosh, Adv.

versus

S. K. JAIN

..... Respondent

Through Mr.Divyakant Lahoti, Ms.Amrita  
Grover and Mr.Parikshit Ahuja,  
Advocates

**JAYANT NATH, J. (Oral)**

1. This petition is filed under section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as the 'Arbitration Act, 1996'*) seeking to impugn the award dated 08.03.2016.
2. I have heard the learned counsel for the parties.
3. This matter was heard earlier also and judgment was reserved. Today, the matter was re-fixed for clarifications.
4. The basic contention that has been urged by the learned counsel for the respondent is that for the purpose of pecuniary jurisdiction, the value of the present petition would be Rs.14.55 lacs as an award was passed in favour of the respondent for the said amount. It was also submitted that before the learned arbitrator, the claim of the petitioner was only about Rs.45 lacs. It was submitted though earlier the respondent had filed a petition under section 9 of the Arbitration Act, 1996 before this court but that per se does not confirm jurisdiction on this court as the appropriate court having

jurisdiction would be the district court in view of the valuation of the matter. Reliance is also placed on the judgment of the Division Bench of the Calcutta High Court in *Sri Sushanta Malik @Susanta Malik v. Srei Equipment Finance Limited & Anr., Co.Pet. No.136/2015*.

The learned counsel for the respondent has also pleaded that the petitioner has filed the present objection petition under 34 of the Arbitration Act, 1996 in the wrong court. The only remedy available to the petitioner is to withdraw the present petition and to file it before the appropriate court having pecuniary jurisdiction. He further stresses that in that eventuality, the objections filed by the petitioner would be barred by limitation.

5. The learned counsel for the petitioner has pointed out that prior to this petition, a petition under section 9 of the Arbitration Act, 1996 was filed by the respondent in this court seeking interim relief being OMP 608/2013. It is pleaded that in view of the section 42 of the Arbitration Act, 1996 and the judgment of the Supreme Court in the *State of West Bengal & Ors. v. Associated Contractors, 2015 (1) SCC 32*, this court have the jurisdiction to adjudicate the present matter.

6. I may deal with the contention of the respondent that this court has jurisdiction in view of section 42 of the Arbitration Act as a petition was filed in this court under section 9 of the Arbitration Act earlier. Section 42 of the Arbitration Act 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.”

7. At this stage, I may have a look at the judgment of the Supreme Court in *State of West Bengal & Ors. v. Associated Contractors*(supra). The Supreme Court in that case had culled out the legal position as follows:

“25. Our conclusions therefore on Section 2(1)(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 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.”

8. Hence, an exception was noted, namely, where the application was preferred to a court which is not the Principal Civil Court of original jurisdiction in a district, etc., the court noted as follows:-

“24. If an application were to be preferred to a Court which is not a Principal Civil Court of original jurisdiction in a district, or a High Court exercising original jurisdiction to decide questions forming the subject matter of an arbitration if the same had been the subject matter of a suit, then obviously such application would be outside the four corners of Section 42. If, for example, an application were to be filed in a court inferior to a Principal Civil Court, or to a High Court which has no original jurisdiction, or if an application were to be made to a court which has no subject matter jurisdiction, such application would be outside Section 42 and would not debar subsequent applications from being filed in a court other than such court.”

9. Reference may also be had in this context to the judgment of this court in *Devas Multimedia Pvt. Ltd. v. Antrix Corporation Ltd.*, 238 ( 2017) DLT 103 where this court noted with approval of the judgment of the Madras High Court as follows:

“31. Here, the decisions of some the High Courts require to be referred to as well. In *Surya Pharmaceuticals v. First Leasing Company of India* (supra) the Madras High Court observed:

7.1 The jurisdiction as referred to under Section 42 of the Arbitration and Conciliation Act, 1996, would only mean that the Court which entertain[s] the first application must have jurisdiction. In other words, Section 42 of the Act cannot be invoked unless the party, who raises the plea of jurisdiction demonstrate[s] that the Court which entertained the first application has got the jurisdiction.

7.2 The further fact that the arbitration agreement has been entered into between the parties, is not in dispute. Mere filing of an application before a Court by itself will not oust the jurisdiction. In other words, by merely filing an application before any Court, the bar under Section 42 cannot be extended, when another application is filed by a party before another Court, which has got jurisdiction. Therefore, a party, who raises the plea of lack of jurisdiction, will have to establish the fact that the Court, which entertains the first application at the earliest point of time, has got jurisdiction...

The object and intent enshrined in the Arbitration and Conciliation Act, 1996, is to avoid multiplicity of proceedings and the Forum shopping at the instance of one of the parties to an arbitral agreement. It can only be applied when the first application filed is before a Court of competent jurisdiction and thereafter, the second application is filed by either of parties to avoid the jurisdiction of the Court, which entertain the said earlier application. (emphasis supplied)”

10. In *Sri Sushanta Malik @Susanta Malik v. Srei Equipment Finance Limited & Anr.*(supra), the Division Bench of the Calcutta High Court was dealing with a matter in which disputed claim in arbitration did not exceed

Rs.10 lacs and the original side of the Calcutta High Court did not have pecuniary jurisdiction to entertain the application made under Arbitration Act, 1996. The Calcutta High Court held as follows:

“The question of whether the High Court exercising ordinary original civil jurisdiction would be 'Court' within the meaning of Section 2(1)(e) of the 1996 Act, even though it might lack pecuniary jurisdiction to entertain a suit of equivalent pecuniary value, was neither in issue nor decided by the Supreme Court in Associated Cement (supra).

.....

A statute must be construed and interpreted by ascertaining the intention of the legislature, which enacted the statute. It is the duty of the Courts to give effect to "the mens or sententia legis", that is the true intention of the legislature.

.....

In construing 'Court' under Section 2(1)(e) of the 1996 Act, we cannot overlook the phrase "having jurisdiction to decide the question forming the subject matter of the arbitration, if the same can be the subject matter of a suit". As held by the Full Bench of this Court in Hriday Nath Roy (supra) and affirmed by the Supreme Court in Official Trustees West Bengal Vs. Sachindra Nath Chatterjee (supra), jurisdiction may have to be considered with reference to place, value and nature of the subject matter. The classification of jurisdiction into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject matter is of a fundamental character.

In construing the phrase "having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit" in the definition of "Court" in Section 2(1)(e) of the 1996 Act, there is no reason why the expression jurisdiction should only be read as territorial jurisdiction, to the exclusion of pecuniary jurisdiction. Such a construction would amount to substitution of the words having jurisdiction in Section 2(1)(e) with the words having territorial jurisdiction or alternatively reading into the definition, the words 'excluding territorial jurisdiction', which is not

permissible.”

The 1996 Act being a comprehensive special statute, exhaustively dealing with matters relating to arbitration, an application under the said Act would have to be filed before the highest Civil Court in the district, including the High Court, exercising original civil jurisdiction, and having jurisdiction to decide the subject matter of the arbitration as if the same had been the subject matter of a suit, notwithstanding Section 15 of the Civil Procedure Code, which requires a suit to be filed in the lowest Court having pecuniary jurisdiction. However, where the Court lacks pecuniary jurisdiction it would not be Court within the meaning of Section 2(1)(e) of the 1996 Act.

We agree with the Tandon, J. and hold that where the value of the subject matter of the disputed claim in arbitration does not exceed Rs.10 lakhs, the Original Side of this Court has no jurisdiction to entertain an application under the 1996 Act. If the value of the subject matter of the dispute in arbitration does not exceed Rs.10 lakhs an application under the 1996 Act can only be entertained by the City Civil Court at Calcutta and not the High Court exercising original jurisdiction. However, where the value of the subject matter of the dispute in arbitration exceeds Rs.10 lakhs it is the Original Side of the High Court alone which would have jurisdiction to entertain an application under the 1996 Act.”

11. It would follow that where the first court which heard the matter under Section 9 of the Act is not the appropriate court to adjudicate upon the matter as stated in Section 2(1)(e) of the Arbitration Act then in that eventuality section 42 would not debar subsequent applications being filed in a court other than such a court.

12. I may here note also that section 12(2) of The Commercial Courts, Commercial Division And Commercial Appellate Division of High Courts Act, 2015, reads as follows:

“(2) The aggregate value of the claim and counterclaim, if any as set out in the statement of claim and the counterclaim, if any, in an arbitration of a commercial dispute shall be the basis for determining whether such arbitration is subject to the jurisdiction of a Commercial Division, Commercial Appellate Division or Commercial Court, as the case may be.”

13. Hence, the aggregate value of the claim and counter claim is the basis for determining whether such arbitration is subject to the jurisdiction of a Commercial Division, Commercial Appellate Division or Commercial Court. In the present case, the claim was for about Rs.45 lacs.

14. In view of the above, this court would not have the pecuniary jurisdiction to adjudicate the present matter in exercise of powers under section 34 of the Arbitration Act, 1996. Merely because earlier an application was filed under section 9 of the Act would not attract the jurisdiction of this court.

15. Accordingly, the matter is transferred to the District Court. I am informed that an execution petition has been filed by the respondent, which is pending in the court of Sh.Gaurav Rao, learned ADJ, which was coming up for hearing on 06.07.2018.

16. Let this matter be transferred to the same court to be heard along with the execution proceedings. All rights and contentions of the parties including the plea of the respondent about limitation are left open.

**JAYANT NATH, J.**

**JULY 04, 2018/v**

Corrected and released on 14.08.2018.