

\$~7

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 30th January, 2018

+

O.M.P. (MISC.) 8/2017

RAHEJA DEVELOPERS LIMITED Petitioner
Through: Mr. Shalabh Singhal, Mr. Abinash
Agarwal, Advs.

versus

PROTO DEVELOPERS AND TECHNOLOGIES LIMITED & ORS.
..... Respondents
Through: Ch. Ranjit Singh, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 29-A(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking extension of time for making of the arbitral award by the Arbitral Tribunal.

2. Counsel for the respondents submits that as the Arbitral Tribunal was constituted on an application filed under Section 11 of the Act before the High Court of Punjab and Haryana, the present petition would not be maintainable before this Court in view of Section 42 of the Act.

3. Section 42 of the Act is reproduced hereinbelow:-

“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.”

4. Supreme Court in the case of ***State of West Bengal & Ors. vs. Associated Contractors 2014 (6) R.A.J. 1 (SC)*** considered various situations where section 42 of the Act would apply and held as under:-

“It is obvious that Section 11 applications are not to be moved before the “court” as defined but before the Chief Justice either of the High Court or of the Supreme Court, as the case may be, or their delegates. This is despite the fact that the Chief Justice or his delegate have now to decide judicially and not administratively. Again, Section 42 would not apply to applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or his delegate is not “court” as defined by Section 2(1)(e). The said view was reiterated somewhat differently in Pandey & Co. Builders (P) Ltd. v. State of Bihar & Anr. (2007) 1 SCC 467: 2007 (1) RAJ 83 at Paras 9, 23-26.

Xxxxxxxxxxxxxx

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” (emphasis supplied)

5. In view of the above judgment, it is clear that merely because a petition under Section 11 of the Act was filed before the High Court of Punjab and Haryana, Section 42 of the Act would not stand attracted and this Court, if it otherwise has jurisdiction to entertain the present petition, would not get denuded of such jurisdiction.

6. Counsel for the respondents has placed reliance on the judgment of the Supreme Court in *M/s Bhandari Udyog Ltd. vs. Industrial Facilitation Council and Another*, AIR 2015 SC 1320, to submit that the Supreme Court had held that the Bombay High Court will not have jurisdiction to entertain a petition under Section 34 of the Act where an earlier petition under Section 11 of the Act had been filed before the High Court of Karnataka. In my view, the same was not the ratio of the judgment. In fact, in the said judgment, the Supreme Court had considered the earlier judgment in *State of West Bengal (supra)* and had not expressed any disagreement with the same. In *M/s Bhandari Udyog Ltd. (supra)*, the arbitration proceedings had been conducted within the jurisdiction of Raichur Court, which had jurisdiction as per Section 20 of the CPC and was a Court subordinate to the High Court of Karnataka. The fact that earlier petition which was under Section 11 of the Act, was filed in the High Court of Karnataka was only as a narration of fact to re-emphasize that even the earlier application u/S 11 had been filed in the

proper Court.

7. The Supreme Court in *Indus Mobile Distribution Pvt. Ltd. vs. Datawind Innovations Pvt. Ltd. & Ors.* (2017) 7 SCC 678, has held that the seat of arbitration would determine the Court of exclusive jurisdiction. Paragraphs 19 and 20 of the judgment are quoted below:-

“19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai Courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to “seat” is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction – that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been held above, the moment “seat” is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

20. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd. This was followed in a recent judgment in B.E. Simoes von Staraburg Niedenthal v. Chhattisgarh Investment Ltd. Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment is set aside. The injunction

confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. The appeals are disposed of accordingly.” (emphasis supplied)

8. In the present case, the disputes between the parties are in relation to the Developer Agreement dated 2nd May, 2006. Clause 19 of the said agreement provides for resolution of the disputes through arbitration and is quoted herein below:-

“19. **ARBITRATION**

19.1 All disputes and difference which may rise between the parties hereto and which cannot be settled amicably with regard to the construction, meaning and effect of this Agreement or any part thereof or pertaining thereto shall be resolved by having recourse to arbitration with three Arbitrators each party to appoint one Arbitrator, and the two appointed Arbitrators to appoint the third Arbitrator who shall act as the presiding officer, in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The award made by such Agreement shall be deemed to be a submission to Arbitration within the meaning of the said act including any statutory modification and/or re-enactments thereof from time to time.

19.2 The venue of arbitration shall be at Delhi and jurisdiction will be of the courts in Delhi. It is further agreed that the Arbitral Tribunal, if deemed necessary by them, be extended from time to time for making the award and the parties hereto specially consent and agree and confer of the arbitrators the right and power to extend the period of making the award as aforesaid.” (emphasis supplied)

9. A reading of clause 19.2 would show that the venue of arbitration was to be in Delhi. There is no dispute that, in fact, the Arbitral Tribunal is holding the arbitration proceedings at Delhi. In view of the judgment of the Supreme Court in *Indus Mobile Distribution (supra)*, this Court, therefore, would be the Court of competent jurisdiction to entertain the present petition.

10. On merits, no submission has been made by the counsel for the respondent against the extension of time. Even otherwise, having considered the averments made in the petition, in my view, the time for making of the award deserves to be extended.

11. I accordingly, extend the period of time for making of the award by a further period of six months from today.

12. The petition is allowed in the above terms with no orders as to costs.

NAVIN CHAWLA, J

JANUARY 30, 2018
RN