

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Misc. Civil Application No.11/2019

M/s. S.M.S. Vishwa JV

..... Applicant

Vs.

Thane Municipal Corporation

..... Respondent

Mr. Yashraj Kinkhede a/w. Hitesh B. Sangle I/b. Hrishikesh
Chitale for the Applicant

Mr. N. R. Bubna for the Respondent

CORAM : K.K.TATED, J.

DATED : JULY 4, 2019

P.C.

1 Heard. By this application under section 24 of the Code of Civil Procedure, 1908 the Applicant is seeking transfer of Misc. Civil Application No.405/2018 filed by the Respondent u/s.34 of the Arbitration and Conciliation Act, 1996 (said Act) filed before the District Judge, Thane against the Applicant to the High Court Original Side of this Court.

2 The learned counsel for the Applicant submits that in the present proceedings the Respondent Thane Municipal Corporation had issued tender for commissioning five plants along with construction of manholes for sewerage network, which was Part A of the contract. Part B was in respect of erection, testing, commissioning and starting of seven sewage pumping stations at Kalwa and other work. The total cost of the work was Rs.188.29 crores. The cost of part

- A was Rs.45.82 crores and the cost of Part B was Rs.142.47 crores. He submits that there was dispute between the parties. Hence, initially, the Applicant had filed a civil suit at Thane. During pendency of the said suit, the Applicant had filed Arbitration Petition No.57/2014 in the High Court of Judicature at Bombay for appointment of an Arbitrator u/s.11 of the said Act. He submits that in that petition, by consent of the parties, this court, by order dated 20.11.2014 appointed an Arbitrator to adjudicate upon the dispute between the parties. He submits that they made a statement before this court on 20.11.2014 that the Applicant undertakes to withdraw the suit within a particular time. Thereafter, by subsequent order, this court had appointed the sole Arbitrator Mr. Justice V. M. Kanade, Former Judge of this Court.

3 The learned counsel for the Applicant submits that, the learned Arbitrator has passed the Award dated 14.08.2018. Being aggrieved by the said Award, the Applicant filed Commercial Arbitration Petition No.383/2019, u/s.34 of the said Act on 03.11.2018, wherein this court (Coram : R. D. Dhanuka,J.) passed order dated 04.06.2019 directing other side to file Affidavit in Reply and the matter was posted on 15.07.2019. Thereafter the Respondent Thane Municipal Corporation, on 12.11.2018 filed Misc. Civil Application No.405/2018 in the District Court at Thane u/s.34 of the said Act. To transfer the said subsequent application, the Applicant has filed the present Misc. Civil Application u/s.24 of the Code of Civil Procedure, 1908.

4 The learned counsel for the Applicant submits that in the present proceedings admittedly, an Arbitrator was appointed by consent in Arbitration Petition No.57/2014 before the High Court of Judicature at Bombay. Thereafter, Arbitration was conducted by the Arbitrator only in Mumbai. Not only that the Arbitrator has filed his Award on the Original Side of this Court. Thereafter they immediately filed an application u/s.34 of the said Act on 03.11.2018 which was numbered as Commercial Arbitration Petition No.383/2019. He submits that for the same Award, the Respondent filed subsequent application u/s.34 of the said Act before the District Court at Thane and hence, same is required to be transferred to this court for hearing along with Commercial Arbitration Petition No.383/2019. Therefore, the present application deserves to be allowed.

5 On the other hand, the learned counsel for the Respondent has vehemently opposed the Misc. Civil Application. He has filed Affidavit in Reply. He submits that admittedly, the entire cause of action arose at Thane. Not only that initially, the Applicant had filed the suit at Thane. The learned counsel for the Respondent relied on paragraph 32 of the plaint in Special Civil Suit No.341/2013 filed by the Applicant in the Court of Civil Judge, Senior Division, Thane at Thane for recovery of money and damages amounting to Rs.76,98,31,801/- with further interest, damages, declaration, mandatory injunction and perpetual injunction etc. Para 32 of the plaint reads thus:

“32. The Plaintiffs state that suit contract was executed at Thane, the work under the suit contract was performed at and within the limits of Defendant No.1 i.e. at Thane. The entire cause of action arose within the territorial and pecuniary jurisdiction of this Hon'ble Court. The Defendants are having their office at Thane, hence this Hon'ble Court alone has jurisdiction to entertain, try and adjudicate the present suit.”

Therefore, the present application is not maintainable to transfer the MCA No.405/2018 filed by them before the learned District Judge, Thane to the Original Side of this Court. He submits that Commercial Arbitration Petition No.383/2019 filed by the Applicants in the High Court of Judicature at Bombay, Ordinary Original Civil Jurisdiction itself is not maintainable for want of jurisdiction. Therefore, there is no question of allowing the present transfer application. He submits that in the present proceedings though the Arbitration took place at Mumbai, that cannot be treated as a place of arbitration. In support of this contention, he relies on a judgment of the apex court in the matter of ***Union of India Vs. Hardy Exploration and Production (India) INC 2018 SCC OnLine 1640***. Para 37 to 39 thereof read thus:

“37. In the present case, the place of arbitration was to be agreed upon between the parties. It had not been agreed upon ; and in case of failure of agreement, the Arbitral Tribunal is required to determine the same taking into consideration the convenience of the parties. It is also incumbent on the Arbitral Tribunal that the determination shall be clearly stated in the „form and contents of award“ that is postulated in Article 31. There has been no determination.”

“38. Be it noted, the word „determination” requires a positive act to be done. In the case at hand, the only aspect that has been highlighted by Mr. C.U. Singh, learned senior counsel, is that the arbitrator held the meeting at Kuala Lumpur and signed the award. That, in our considered opinion, does not amount to determination. The clause is categorical. The sittings at various places are relatable to venue. It cannot be equated with the seat of arbitration or place of arbitration which has a different connotation as has been held in Reliance Industries Ltd. (I), (II) (supra), Harmony Innovation Shipping Limited (supra) and in Roger Shashoua (supra).”

“39. The word ‘determination’ has to be contextually determined. When a ‘place’ is agreed upon, it gets the status of seat which means the juridical seat. We have already noted that the terms ‘place’ and ‘seat’ are used interchangeably. When only the term ‘place’ is stated or mentioned and no other condition is postulated, it is equivalent to ‘seat’ and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term ‘place’, the said condition has to be satisfied so that the place can become equivalent to seat. In the instant case, as there are two distinct and disjunct riders, either of them have to be satisfied to become a place. As is evident, there is no agreement. As far as determination is concerned, there has been no determination. In Ashok Leyland Limited and State of T.N. and Another (2004) 3 SCC 1, the Court has reproduced the definition of ‘determination’ from Law Lexicon, 2nd Edition by Aiyar, P. Ramanatha and Black’s Law Dictionary, 6th Edition. The relevant paragraphs read thus:-

(2004) 3 SCC 1 “Determination or order.— The expression ‘determination’ signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal. The expression ‘order’ must have also a similar meaning, except that it need not operate to end the dispute. Determination or order must be judicial or

quasi-judicial. Jaswant Sugar Mills Ltd. v. Lakshmi Chand AIR 1963 SC 677, 680 (Constitution of India, Article 136)."

"A "determination" is a "final judgment" for purposes of appeal when the trial court has completed its adjudication of the rights of the parties in the action. Thomas Van Dyken Joint Venture v. Van Dyken 90 Wis 236."

6 The learned counsel for the Respondent further submits that as per the definition of Court u/s.2(1)(e) of the said Act, only the District Court at Thane has jurisdiction to entertain the present proceedings. Therefore, there is no question of allowing the present application.

7 At this stage, the learned counsel for the Applicant submits that the apex court in the matter of ***Union of India Vs. Hardy Exploration and Production (India) INC in Civil Appeal No.4628 of 2018*** has specifically held that if there is no contract between the parties, in that case, where the arbitration took place, has jurisdiction to entertain the proceedings u/s.34 of the said Act. He relies on paragraph 34 and 39 of the said judgment which read thus:

34. On a perusal of Articles 20 and 31(3) of the UNCITRAL Model Laws, we find that the parties are free to agree on the place of arbitration. Once the said consent is given in the arbitration clause or it is interpretably deduced from the clause and the other concomitant factors like the case of Harmony Innovation Shipping Ltd. which states about the venue and something in addition by which the seat of arbitration is determinable. The other mode, as Article 20 of the UNCITRAL Model Law provides, is that where the parties do not agree on the place of arbitration, the same shall be determined by the Arbitral Tribunal. Such a power of adjudication has

been conferred on the Arbitral Tribunal. Article 31(3) clearly stipulates that the Award shall state the date and the place of arbitration as determined in accordance with Article 20(1).

“39. The word ‘determination’ has to be contextually determined. When a ‘place’ is agreed upon, it gets the status of seat which means the juridical seat. We have already noted that the terms ‘place’ and ‘seat’ are used interchangeably. When only the term ‘place’ is stated or mentioned and no other condition is postulated, it is equivalent to ‘seat’ and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term ‘place’, the said condition has to be satisfied so that the place can become equivalent to seat. In the instant case, as there are two distinct and disjunct riders, either of them have to be satisfied to become a place. As is evident, there is no agreement. As far as determination is concerned, there has been no determination. In Ashok Leyland Limited and State of T.N. and Another (2004) 3 SCC 1, the Court has reproduced the definition of ‘determination’ from Law Lexicon, 2nd Edition by Aiyar, P. Ramanatha and Black’s Law Dictionary, 6th Edition. The relevant paragraphs read thus:-

(2004) 3 SCC 1 “Determination or order.—The expression ‘determination’ signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal. The expression ‘order’ must have also a similar meaning, except that it need not operate to end the dispute. Determination or order must be judicial or quasi-judicial. Jaswant Sugar Mills Ltd. v. Lakshmi Chand AIR 1963 SC 677, 680 (Constitution of India, Article 136).”

“A “determination” is a “final judgment” for purposes of appeal when the trial court has completed its adjudication of the rights of the parties in the action. Thomas Van Dyken Joint Venture v. Van Dyken 90 Wis 236.”

8 The learned counsel for the Applicant submits that

the apex court in the matter of *State of Maharashtra through Executive engineer, Road Development Division No.111, Panvel and Anr. Vs. Atlanta Ltd. (2014) 11 SCC 619* held that whenever there is High Court having Ordinary Original Civil Jurisdiction, in that case the petition can be filed in the High Court having territorial jurisdiction of that court. Therefore, the application filed by them is required to be allowed.

9 I heard both sides at length. It is to be noted that admittedly, in the present proceedings an Arbitrator was appointed by order dated 20.11.2014 passed by this court in Arbitration Petition No.57/2014. Same was passed 'by consent of both the parties'. Thereafter the arbitration was conducted in Mumbai only. Apart from that, even the arbitrator has filed his award in High Court at Bombay. Apart from that the Applicant has filed an application u/s.34 of the said Act being Commercial Arbitration Petition No.383/2019 on the Original Side of this Court on 03.11.2018, subsequently the Respondent has filed application u/s.34 of the said Act being Misc. Civil Application No.405/2018 before the District Court at Thane on 12.11.2018, on this count also the application filed by the Applicant deserves to be allowed.

10 Apart from that the apex court in the matter of Atlanta Ltd. (supra) held that, if option is to be exercised between the High Court under its Ordinary Original Civil Jurisdiction and District Court (as Principal Civil Court of Original Jurisdiction), application lies to the High Court

only, since it is superior-most court exercising ordinary original civil jurisdiction. The judgment cited by the Respondent in the matter of Hardy Exploration and Production (India) INC (supra), is not applicable in the facts of the present case.

11 In view of the above mentioned facts and the law declared by the apex court in the Atlanta Ltd. (supra), I am of the opinion that the Applicant has made out a case for allowing the present application.

12 Hence, following order is passed:

a) The Misc. Civil Application is allowed in terms of prayer clause (a) which reads thus:

“(a) Transfer the Misc. Civil Application No.405/2018 filed under section 34 of the Arbitration & Conciliation Act, 1996 by the Respondent pending before the District & Sessions Court, Thane against the Applicant to this Hon'ble Court having its ordinary original civil jurisdiction and to be heard along with Commercial Arbitration Petition No.383 of 2018.”

b) The Misc. Civil Application stands disposed of accordingly.

c) No order as to costs.

d) Parties to act on an authenticated copy of this order.

(K.K.TATED, J.)