

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 3704 of 2013

**S.N. Engineering Works
Vs
Balmer Lawrie & Co. Limited & Anr.**

For the Petitioner : Mr. Amitava Ghosh
Mr. Tapas Kumar Dey

For the Opposite parties : Mr. Arijit Bhowmick

Heard on : 12.12.2022

Judgment on : 16.02.2023

Ajoy Kumar Mukherjee, J.

1. Being aggrieved by an order dated 26.08.2013 passed by the learned District Judge North 24 Parganas at Barasat in Misc. Case of 133 of 2012 present application under article 227 of the Constitution of India has been preferred. The opposite party no. 1 herein filed aforesaid proceeding before learned District judge Barasat, under section 34 of the Arbitration conciliation Act, challenging the award dated 15th May 2012 passed by opposite party No. 2/Arbitrator Mr. T.N. Sinha. The petitioner when came to learn about pendency

of said proceeding, filed an application for deciding the preliminary point which relates to questioning jurisdiction of the learned Court below to entertain the application under section 34 of the arbitration conciliation Act 1996 (herein after called as Act of 1996) and to reject the said proceeding filed under section 34, holding that the learned court has no jurisdiction.

2. In the said application petitioner stated that the opposite party no. 1 herein was unable to complete the work which they obtained from Hindustan petroleum corporation limited at the state of Haryana. The applicant/opposite party no.1 thereafter engaged few contractors for different works who were unable to complete the work which resulted manifold difficulties and harassment to the applicant. At this juncture the applicant/opposite party no.1 approached the petitioner at his New Delhi office, for the purpose of completing the work left incomplete. The petitioner was initially not agreed to execute the balance work. However at the repeated persuasion and insistence of the applicant/opposite party no. 1, petitioner agreed to execute the balance work, but subject to the rates being agreed upon and terms and conditions being finalized. At the request of the applicant the work was commenced but neither any work order was issued nor any written agreement was finalized nor was signed by and between the parties. The petitioner proceeded with the work and completed the work despite breaches being committed by the opposite party no. 1. Additional works were allotted to the petitioner in respect of non plant building in the year 2006 which too was completed by the petitioner, subject to the work fronts release by opposite party no. 1. Despite the completion of the

work opposite party no. 1 did not make full payment. Repeated notices were served but to no effect. Ultimately petitioner filed a suit before this court being C suit no. 326 of 2009 and the summons of the said suit was duly served. The opposite party herein duly appeared in the suit and filed an application under the caption of section 8 of the Act of 1996 praying reference of the dispute to the arbitrator. Petitioner herein duly contested the said application by filing affidavit in opposition. By an order dated 05.07.2011 this court referred the entire claim in the suit to Mr. T.N. Sinha, whose name was suggested by opposite party no. 1, as sole arbitrator. The said arbitrator after conclusion of the hearing passed the award on 15.05.2012.

3. Accordingly petitioner states that the learned court at Barasat has no territorial jurisdiction at all since no part of cause of action had arisen within the jurisdiction of the said court. The work was executed at Haryana. Discussions took place at the office of applicant at Netaji Subhash Road Kolkata -1 within the jurisdiction of this court and the petitioner has no office within the jurisdiction of the said court. He further submits that the application under caption section 8 of the Act of 1996 was filed before this court in the said C Suit no. 326 of 2009, whereupon by virtue of the affidavit of the parties, Mr. T.N. Sinha was appointed as sole arbitrator, whose name was furnished by the applicant. Petitioner contended that accordingly application under caption section 8 of the Act of 1996 having been made under part 1 of the said Act before the original side of this High Court, this High Court alone

shall have jurisdiction over the arbitral proceeding and all subsequent applications arising out of arbitral proceeding and in no other court.

4. He further submitted that the purported contention of the opposite party No. 1 that the award has been published at Salt Lake and as such the said court has jurisdiction is wholly mis-conceived and contrary to the facts and law. Said court at Barasat has got no territorial jurisdiction to try the said application. Learned judge passed the impugned order dated 26.08.2013 without considering the main aspect of the matter at all. The learned court did not consider that the award passed by the arbitrator and the application under section 34 has not arisen out of arbitration agreement and as such court below should not have held that the objection cannot be sustained. The learned court below did not consider that the term “court” as defined under that Act clearly provides that a court must be a court of original civil jurisdiction of the District and original side of the High Court having territorial jurisdiction and pecuniary jurisdiction. In the instant case no part of cause of action had arisen within the jurisdiction of the said court at Barasat. Petitioner further contended that the situs of hearing of the arbitral tribunal cannot constitute territorial jurisdiction. For the purpose of territorial jurisdiction cause of action must have arisen within the jurisdiction for the purpose of filing a proceeding. In the present context no part of cause of action had arisen within the jurisdiction of the said court. Moreover petitioner had filed suit before the original side of High Court at Calcutta and appointment of arbitrator was made on the basis of supplementary affidavit filed by the parties.

5. Petitioner further submits that at the request of the opposite party No. 1, the work was completed including extra work which was allotted just before the completion but no formal contract was executed. He points out that the part payments were made by the opposite party No. 1 from its Kolkata office. According to petitioner said order of appointment and referring the dispute before the arbitrator is not under section 8 of the Act of 1996 but it was an order on consent and on agreement of the parties before court and as such it is guided by section 42 of the Act of 1996. Learned Counsel for the petitioner Mr. Ghosh further submits that no part of cause of action had arisen within the jurisdiction of learned District Judge at Barasat and neither the petitioner nor opposite party No. 1 has any office within the said jurisdiction. Here admittedly the suit was filed before the original side of the High Court at Calcutta where leave was granted under clause 12 and no application for revocation of such leave has so far been obtained.

6. He further contended as the arbitration agreement was made during pendency of the suit and there was no previous agreement to attract section 8 of the Act, therefore under section 42 of the Act of 1996, all such subsequent applications including the present proceeding, would have to be made before the original side of the High Court at Calcutta and nowhere else, and therefore learned District Judge at Barasat has no jurisdiction. In this context he further submits that sitting relating to arbitration can be held at anywhere by consent of the parties or as per desire of learned arbitrator but it does not confer any

jurisdiction to any court specially when the place of sittings were not fixed by way of any argument.

7. In this context he relies upon the judgments reported in

- (i) ***E.S.M. Dass, Secunderabad Vs. A.L.I. Ltd, Pune***, reported in **2001(3) ARB LR 218 (AP)**.
- (ii) ***Jagson Airlines Ltd & Anr. Vs. Bannari Amman Exports (p) Ltd & another*** reported in **2003 (2) ARB LR 315 (Delhi)**.
- (iii) ***Union of Indian and others Vs. Adani Exports Ltd. and others*** reported in **AIR 2002 SC 126**.
- (iv) ***Executive Engineer Vs. Atlanta Limited*** reported in **AIR 2014 SC 1093**.
- (v) ***Hindustan Petroleum Corporation Ltd. Vs. Barun Sankar Chatterjee and another*** reported in **AIR 2012 CAL 255**.
- (vi) ***JSW Steel Ltd. Vs. Jindal Praxair Oxygen Co. Ltd.*** reported in **(2006) 11 SCC 521**.

8. Learned counsel appearing on behalf of the opposite party submits that owing to an inbuilt arbitration clause in the contract entered into between the parties the respondent had preferred aforesaid application under section 8 of the arbitration and conciliation Act 1996 with the prayer for referring the dispute for arbitration and Hon'ble Court by its order dated 05.07.2011 had disposed of said application under section 8 and was further pleased to refer the matter for arbitration by appointing proforma respondent no. 2 as the sole arbitrator for adjudicating the dispute and differences so arisen between the

parties. The arbitrator subsequently published the award on 15.05.2012 from his residence at FE-364 (2/1) sector-III Kolkata-64. Opposite party No.1 herein being aggrieved by the award preferred the aforesaid Misc. Case being no. 133 of 2012 before the learned District Judge, Barasat, who is the competent Principal civil court of the District. It is the specific case of the opposite party No.1 that an application under section 8 does not fall within the purview of section 42 of the Act and learned District Judge Barasat is the “court” within the meaning of the section 2(1)(e) of the Act. Accordingly after contested hearing learned District Judge Barasat rightly rejected the petitioners contention about the maintainability of the proceeding and accordingly the order impugned does not call for any interference. Learned Counsel for opposite party No. 1 in this context relied on

(a) *P. Anand Gajapathi Raju & others Vs. PBG Raju and others*

reported in **(2000) 4 SCC 539.**

(b) *Jagson Airlines Ltd & Another Vs. Bannari Amman Exports (p)*

Ltd. reported in **2003(69) DRJ 490.**

(c) *BGS SGS Soma JV Vs. NHPC Limited,* reported in **(2020) 4 SCC**

234.

9. On perusal of order dated 05.07.2011 passed by this court in connection with GA No. 2998 of 2010 in C.S. 326/2009, it appears that during hearing, parties agreed by swearing affidavits to have their disputes and differences as in the suit, referred to an arbitrator and as such GA 2998 along with C.S. 326/2009 were disposed of by original side of this court. Opposite parties

herein stated in their written objection against petitioner's prayer for rejection of application that present proceeding has been initiated before Barasat Court taking into consideration of publishing of the award and the place of residence of the respondent No.2 which is within the jurisdiction of Barasat Court.

10. Section 20 of code of civil procedure deals with other suits to be instituted where defendants reside. Section 20 of the code may be reproduced in this context.

“20.. Other suits to be instituted where defendants reside or cause of action arises- Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises

Explanation-

A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any place where it has also a subordinate office, at such place.”

11. Here in the present case other defendant/petitioner have not acquiesced about jurisdiction of Barasat Court. If plaintiff wants to create jurisdiction where one of the defendants namely defendant No.2/Arbitrator resides with the “leave of the Court” then such leave must be specifically sought and granted. There is hardly any scope to construe of granting leave as automatic. In the present case, opposite party/plaintiff has nothing to show that such leave

under section 20(b) of the code was sought for before the court or such leave was granted by the Court. Here petitioner's specific case is work alleged was executed at Haryana, neither the petitioner nor opposite party No. 1 has any office within Barasat court's jurisdiction and as such neither section 20 (b) nor section 20(c) of the code have any application in this case.

12. Opposite party No. 1 herein contended that because some sittings were held at Salt Lake and award was published from Arbitrator's residence, which is at Salt Lake, so Barasat court has got the jurisdiction. It is not in dispute that C.S. 326 of 2009 was filed before original side of High Court, Calcutta on the basis of leave granted under clause 12 of Letters patent. Counsel for the petitioner submits, that before filing said proceeding at Barasat Court, neither leave was taken under section 20(b) of the code nor leave granted earlier under Clause 12 has been revoked. Section 120 of the code of Civil Procedure states section 20 of the Code has no application to the High Court in the exercise of its original civil jurisdiction. Section 2(1) (e) of Arbitration and conciliation Act, 1996 defines court as principal civil court of original jurisdiction in the district or original side of High Court.

13. Opposite party herein contended that an application under section 8 of the Act in C.S. 326 of 2009 was disposed of and as such application under section 8 does not fall within the ambit of section 42 of the Act of 1996. Here comes the question whether reference made in C.S. 326 of 2009 by original side of this Court, was a reference under section 89 of the code of Civil Procedure or a reference under section 8 of the Act of 1996.

14. Petitioner herein in their objection in Paragraph 8 has categorically stated that no formal agreement was ever executed and as such the alleged arbitration agreement is wholly meaningless. Under section 8(2) of Arbitration and conciliation Act, 1996, original arbitration agreement or certified copy of arbitration agreement mandatorily has to be filed along with the application. No such original agreement appears to have been filed along with said application captioned under section 8, for referring the matter before the arbitrator. If there had been any arbitration agreement, parties would not have filed supplementary affidavits to agree for appointment of arbitrator before the court. There was no compliance of section 8(2) of the Act of 1996 and admittedly parties agreed in the suit to refer the dispute to arbitration. Unlike arbitration Act, 1940, in the Act of 1996, there is no such provisions for referring the parties to arbitration out of the suit and as such said order dated 05.07.2011 is an order under section 89 of the code of Civil Procedure. The opposite party No. 1 in paragraph 13 relied on conditions of the contract/tender document being clause No. 5.24 of tender document. Though no annexure filed in connection with Paragraph 13, even then clauses 19.0 of tender document No. CPP/HPCL/NCB/C-01C as quoted, states, any dispute or difference arising under the contract shall be referred for adjudication at Kolkata. Accordingly said tender conditions also refers to Kolkata jurisdiction only, though learned counsel appearing for petitioner submits such condition mentioned in tender document is not an agreement between the parties in compliance with section 7 of the Act of 1996 and for which court referred the

matter to arbitrator on the basis of supplementary affidavits filed by the parties.

15. In the Act of 1996, section 42 has been incorporated to avoid conflicts of jurisdiction of Courts. Said section starts with a non-obstante clause, which makes it clear that all applications made under Part-I, that court shall have exclusive jurisdiction and no other court. Learned Counsel appearing for the opposite party argued to create jurisdiction on the basis of the fact that some sittings took place and award published within the jurisdiction of Barasat Court. Such argument in support of creating jurisdiction at Barasat Court by opposite party No. 1, does not find substance in view of the fact that in the present case venue of sitting or place of publication of arbitration award has not been made in terms of any agreement between the parties. It might have conducted according to convenience of learned arbitrator or parties. Therefore there is hardly any scope to observe that section 42 of the Act of 1996 is rendered ineffective or useless, simply because award was published or some sittings might have taken place within the jurisdiction of Barasat Court. In a similar question a co-ordinate bench of this court in ***Hindustan Petroleum Corporation Ltd. Vs. Barun Sankar Chatterjee*** reported in (AIR 2012 Cal 255) was pleased to held as follows:-

“21. The mandate of Section 42 of the Act is that all future applications must be filed only in the Court where the first application in respect of the arbitral dispute was filed. However, it would be a fraud on statute if an application, in relation to an arbitral dispute between the parties, could be filed either in Court A or B but is filed in Court Z, which is not the Court having jurisdiction to entertain the application, thereby paving the way for all future applications to be filed in Court Z. In such an event, there would arise no requirement to file the subsequent applications in Court Z and if either Court A or B is approached, it would be perfectly legitimate for it to entertain such subsequent application. What follows is

that the jurisdiction of a Court has to be duly invoked by a party and if the jurisdiction of a Court is found to have been invoked erroneously, future applications in respect of the arbitration agreement in question would not lie in that Court where the first application was filed.

“22. It has not been disputed that the opposite party no.2 had approached this Court first with his application under Section 9 of the Act (A.P. No. 432 of 2006) on October 4, 2006. That application was duly made before this Court since this Court had the jurisdiction to entertain it. Once the jurisdiction of this Court was duly invoked, the mandate of Section 42 would require all subsequent applications under Part I of the Act to be filed before this Court. It is not necessary for the Court to render a decision on such application one way or the other so as to guide the parties to file further applications arising out of the same arbitration agreement. Decision on the first application is irrelevant; what is relevant is the date on which the application is duly made to the Court competent to assume jurisdiction. I am of the firm view that the learned Additional District Judge misdirected herself by reading in Section 42 of the Act the requirement of adjudication of the application that is first made.”

16. Learned counsel appearing on behalf of opposite party No. 1 has relied upon Paragraph 8 of **P. Anand Gajapathi Raju (Supra)** case but in that case there was an arbitration agreement which satisfies section 7 of the Act of 1996. Here factual aspect of said case is clearly distinguishable in the present case . In the order dated 05.07.2011, initially it is stated in the order describing application under section 8 but in the second page of the order it has been clearly mentioned “such agreement of the parties is reflected in the supplementary affidavits filed by them in the present proceeding”, which clearly suggests that there was no arbitration agreement between the parties.

17. Referring **Jagson Airlines Ltd. case (supra)** learned counsel for the opposite party No.1 heavily relied upon upshot of the discussion mentioned in paragraph 34(6) & (7). But factual aspect of said case is also clearly distinguishable with the present case in view of the fact that in that case registered office of the parties was at new Delhi and Para 34(1) makes it clear that both the parties had agreed by way of arbitration agreement as to place of

arbitration being new Delhi and accordingly courts at New Delhi had exclusive jurisdiction to try and entertain cases and if the claim of respondent are converted into civil suit, the civil suit will lie at new Delhi. Moreover in that case parties had not agreed to the change of venue. In paragraph 34(7) of the judgment, the court treated application under section 8 and not under section 42 as said application under section 8 emerged from the arbitration clause, which is not the case in hand. In the present case there is no arbitration agreement. Even the arbitration clause as referred in tender document speaks of jurisdiction of Kolkata court and not court at Barasat.

18. Reliance has also been placed by opposite party No. 1 in **BGS SGS Soma JV Case (Supra)** but principle discussed in said case is on different context which relates to a clause in an agreement stating the “seat” of arbitration is whether akin to an exclusive jurisdiction clause . In paragraph 32 of the said judgment observation is as follows:-

“32. It can thus be seen that given the new concept of “juridical seat” of the arbitral proceedings, and the importance given by the Arbitration Act, 1996 to this “seat”, the arbitral award is now not only to state its date, but also the place of arbitration as determined in accordance with Section 20. However, the definition of “court” contained in Section 2(1)(c) of the Arbitration Act, 1940, continued as such in the Arbitration Act, 1996, though narrowed to mean only principal civil court and the High Court in exercise of their original ordinary civil jurisdiction. Thus, the concept of juridical seat of the arbitral proceedings and its relationship to the jurisdiction of courts which are then to look into matters relating to the arbitral proceedings — including challenges to arbitral awards — was unclear, and had to be developed in accordance with international practice on a case by case basis by this Court.”

19. However at the cost of repetition it can be said that said case is also factually distinguishable with the present case in view of the fact that in the present context, neither there was any formal arbitration agreement between

the parties nor the parties agreed about “judicial seat” or date of the arbitral proceedings. On the contrary, it was clearly reiterated by Apex Court in Para 41 of the judgment that judgments of courts are not to be construed as statutes, neither are they to be read as Euclid’s theorems. All observations made must be read in the context they appear.

20. On the contrary in **JSW Steel Ltd. (supra)**, it has been clearly held jurisdiction of a chartered High Court is to be determined by clause 12 of the letters patent and by virtue of section 120 of the code of civil procedure the provision of section 20 of the said code do not apply to chartered High Courts exercising original civil jurisdiction. It has also been observed in **Executive Engineer, Road Development case (supra)** that under the scheme of the provision of the arbitration Act, if the choice is between the High Court (in exercise of it’s ordinary original civil jurisdiction) on the one hand and the principal Civil Court of original jurisdiction in the district, section 2(1) (e) of the Act has made the choice in favour of the High Court.

21. The impugned order dated 26.08.2013 is thus set aside. Learned District Judge, North 24 Parganas at Barasat is hereby directed to return the plaint of Misc. Case NO. 133 of 2012 for being presented to this High Court, exercising original Civil Jurisdiction in compliance with the provisions laid down in order VII, rule 10 of the Code of Civil Procedure, for trial, since court at Barasat has got no jurisdiction to try the same.

22. The revisional application being No. C.O. 3704 of 2013 stands allowed, without any order as to costs.

23. Office is directed to communicate this order to the District Judge, North 24 Parganas at Barasat immediately.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)