

ODC-3

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
(Commercial Division)
ORIGINAL SIDE

AP-COM/217/2024
[S.A.] [OLD NO. AP/359/2021]

SHRACHI DEVELOPERS PRIVATE LIMITED
VS
BIDYUTLATA MAHAPATRA AND ORS.

BEFORE:

The Hon'ble JUSTICE RAVI KRISHAN KAPUR

Date : 28th February, 2024.

Appearance:
Mr. Samrat Sen, Sr. Adv.
Mr. Paritosh Sinha, Adv.
Ms. Manali Bose, Adv.
Ms. S. Chowdhury, Adv.
Ms. T. Bose, Adv.

Mr. Avishek Guha, Adv.
Ms. Sonal Agarwal, Adv.

Mr. Priyankar Saha, Adv.
Mr. Amritam Mondal, Adv.
Ms. Shipra Naskar, Adv.

The Court: This is a post award application under section 9 of the Arbitration and Conciliation Act, 1996.

Briefly, the disputes between the parties arise out of a partnership agreement dated November 1, 2004. The agreement contemplated formation of a partnership firm under the name and style "Pancham Shrachi" for setting up of a housing project. The mutual understanding between the parties being that the respondents who are the owners of the property would bring in an immovable property measuring 14.71 acres of land in Bhubhaneswar morefully described in Schedule A to the agreement as their capital contribution, whereas the petitioner would infuse funds for development and construction work to be undertaken by

the firm which was considered as the capital contribution of the petitioners. After expiry of Tarakanta Mahapatra, disputes and differences arose between the parties. By a letter dated 23 October, 2007 the respondents attempted to terminate the partnership agreement. In view of breach of their obligations, the petitioner was compelled to invoke the arbitration clause. Ultimately, by consent of the parties, the Hon'ble Justice Arijit Pasayat (Retd.) was appointed as the Sole Arbitrator.

By an award dated 25 August, 2020, the Arbitrator inter alia held as follows:

“The basic, fundamental and pivotal point for determination is whether the partnership in question is a partnership at will or was constituted for carrying out a specific undertaking”. [Paragraph 77 of the award]

“It is held that in view of the specific prescriptions in the partnership agreement, i.e. Clauses 3.4, 3.11:1 and 3:14, and the suspicious circumstances surrounding the Form No 1 submitted with the Registrar of Firms, the partnership is no a ‘partnership at will’, and was constituted to carry out a specific undertaking. The point for determination is accordingly answered”. [Paragraph 87 of the award]

“In so far as the claim that Schedule A and Schedule B lands are Partnership properties is concerned, the position is clear that the Partnership was for a specific undertaking, i.e. development, construction, promotion and marketing of a residential house project for Schedule A lands. The materials on record as analysed supra, clearly establish that Schedule A lands was property of the Partnership.” [Paragraph 96 of the award]

It is submitted that in view of award, the premises requires to be preserved and protected until completion of the project in terms of the agreement. In this background, the petitioner seeks protective reliefs for safeguarding of the premises.

On behalf of the respondents, it is contended that this Court has no territorial jurisdiction to entertain this application. It is also contended that section 42 of the Act is inapplicable in case the Court where any prior application which

has been filed is found to be without jurisdiction. The only remedy of the petitioner is to file for execution of the award and an application under section 9 is not maintainable. On a combined reading of the clauses of the agreement, the parties having agreed to choose a forum i.e. the High Court of Orissa, the jurisdiction of that Court would prevail irrespective of whether the cause of action has arisen within the jurisdiction of any other Court. In any event, in view of the subsequent decision in *M/s. Swastik Gases Private Limited versus Indian Oil Corporation Limited*, 2013 (9) SCC 32, the omission of the words ‘alone, ‘only’ or ‘the like’ in the forum selection clause does not render the jurisdiction clause ineffective. Consequently, this Court does not have jurisdiction to entertain this application and all earlier orders passed in proceedings arising out of the arbitration agreement are inconsequential.

On behalf of respondent no 2 it is submitted that, by virtue of section 42 of the Act read with section 2(1)(c), this Court has exclusive jurisdiction to entertain all applications under Part I of the 1996 Act pertaining to the arbitration agreement. In support of such contention, reliance is placed on *Hirak Chowdhury & Ors v. Khagendra Nath Mondal*, AIR 2018 Cal 272(DB), *Dalim Kumar Chakraborty v. Gouri Biswas & Anr.*, 2018 SCC Online Cal 282 and *Nissho Iwai Corporation v. Veejay Impex & Ors.*, AIR 2000 Cal 207.

Section 42 of the Act provides as follows:

“42. 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.”

The underlying legislative intent of the section is to avoid conflict in jurisdiction of Courts by placing the supervisory jurisdiction over all arbitration proceedings in connection with the arbitration in one Court exclusively. The necessity of clothing a single Court with exclusive jurisdiction is to avoid multifarious litigations in different Courts. A conjoint reading of section 2(e) and section 42 of the Act leaves no matter of doubt that the legislature intended to make only one Court the principal Court of original jurisdiction or as the case may be the High Court in exercise of its ordinary original jurisdiction, whichever Court is approached earlier to exercise jurisdiction. Once the parties have approached a certain Court for reliefs at an early stage of the disputes, then it is that Court which the parties must return to for all subsequent proceedings. [*BGS SGS Soma JV vs. NHPC LTD (2020) 4 SCC 234 (paragraph 59)*, *Kumbha Mawji vs. Dominion of India - AIR 1953 SC 313 (paragraph 13)*, *Iridium India Telecom Ltd. vs. Motorola Inc (2005) 2 SCC 145* and *State Of West Bengal And Others vs. Associated Contractors (2015) 1 SCC 32 (paragraph 21)*].

The jurisdiction of this Court has been invoked under section 42 of the Act. Admittedly, repeated applications have been filed before this Court under Section 9 of the Act and interim orders have been passed therein. The particulars of all such prior applications are as follows: i) AP NO. 376 of 2007; ii) AP NO. 228 of 2008; iii) AP NO. 1181 of 2013; iv) AP NO. 1544 of 2015; v) AP NO. 395 of 2020; vi) AP NO. 359 of 2021. In AP/376/2007, by an order dated 10 December 2017, leave under Clause 12 of the Letters Patent, 1865 had been granted by this Court. The said application was ultimately disposed of by an order dated 8 January, 2008. An application filed by the respondents assailing the jurisdiction of this Court had also been dismissed on 8 April, 2010. No appeal has been preferred by the

respondents against the order dated 8 April 2010. The order dated 8 April 2010 has attained finality and it was found that leave under clause 12 had been correctly granted. The question of jurisdiction having been conclusively decided at a prior stage, it is no longer open to the respondents to reagitate the issue of territorial jurisdiction. All subsequent applications under Section 9 of the said Act have been necessarily filed by invoking section 42 of the Act and the respondents are now estopped from raising the question of jurisdiction.

Clauses 4 and 5 of the agreement are as follows:

4. Arbitration:

4.1 All disputes or differences between the parties in any way relating to the partnership shall be referred to arbitration of an Arbitral Tribunal (Tribunal) consisting of three arbitrators out of which one will be appointed jointly by the Mahapatra Partners and one by the fifth Partner and the third to be appointed by the two arbitrators so appointed.

4.2 The Tribunal shall be at liberty to:

4.2.1 Proceed summarily and not give any reason for its award.

4.2.2 Avoid all rules as to procedure and/or evidence that can be lawfully avoided by the mutual consent and/or directions by the Tribunal.

4.3 The Tribunal shall

4.3.1 Make the award within four months from the date of appointment with the right to give extension of not more than one month at a time on emergent grounds but the total extensions shall not be more than four months.

4.3.2 Conduct the proceedings from day-to-day and for about 5 hours per day save for initial sittings.

4.3.3 Not grant to either of the Partners any extension of time and/or adjournment except on grounds beyond their control and only for such periods as be of the absolute minimum.

4.4 The award of the Tribunal shall be final and binding on the Partners.

5. *Jurisdiction: All matters arising in connection with the Agreement shall be settled by the Courts within the Jurisdiction of Bhubaneswar/High Court of Orissa.*

By an order dated 8 April 2010, the question of jurisdiction had been gone into and decided in favour of the petitioner. It was inter-alia held that the forum selection clause is inapplicable and ambiguous. This Court having exercised jurisdiction in respect of the arbitral proceedings arising out of the same arbitration clause, section 42 of the Act has been triggered and all subsequent applications must necessarily have to be made before this Court. There also being no challenge to the order dated 8 April, 2010, the issue of territorial jurisdiction stands finally decided. This is not a case where a Court is found to have exercised jurisdiction without having jurisdiction. On the contrary, the question of territorial jurisdiction has been raised at an earlier stage of the proceedings and conclusively decided in favour of the petitioner. (*State of West Bengal v. Associated Contractors, (2015) 1 SCC 32*).

There is also no merit in the contention that Bhubaneswar being the implied seat of jurisdiction exclusive jurisdiction vests with the Courts at Orissa. In the light of the earlier orders of Court and the repeated applications filed before this Court, there is no scope of this question now being reagitated. (*See Naresh Kanayalal Rajwani & Ors. vs. Kotak Mahindra Bank Ltd. & Anr. (2021) SCC OnLine Bom 367, Gurumahima Heights Cooperative Housing Society Ltd. vs. Admirecon Infrastructure Pvt. Ltd. (2023) SCC OnLine Bom 2703 and Indus Mobile Distribution Pvt. Ltd. vs. Datawind Innovations Pvt. Ltd. (2017) 7 SCC 678*).

Undoubtedly, the powers under section 9 of the Act are wide enough to safeguard the fruits of an award. Appropriate orders can always be passed so that the award is not rendered illusory. (*Hindustan Construction Co. Ltd. v. Union of*

India, (2020) 17 SCC 324 and Ultratech Cement Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd., (2018) 15 SCC 210).

The only prayer made in this application is for preservation of the original title deeds of the premises. It has been held that the agreement is not a partnership at will and contemplates completion and execution of the project. In such circumstances, it is necessary that the premises be preserved and protected. Accordingly, there shall be an order in terms of prayers (a) and (b) of the Notice of Motion.

With the aforesaid directions, GA 2 of 2023 stands disposed of.

Insofar as AP 359 of 2021 is concerned, it is fairly submitted on behalf of the petitioner that save and except prayer (a) of the Notice of Motion all other reliefs may be sought for in execution.

It is submitted on behalf of the petitioner that by three different letters between 22nd September, 2020 to 30th April 2021, the petitioners had repeatedly requested the respondents to execute all such documents but they have failed and refused to do so. In such circumstances, by an ad interim order dated 27th September 2021, a Coordinate-Bench had appointed a Special Officer for the limited purpose of signing and executing all documents which formed the subject matter of the letters written by the petitioners to the respondents between 22nd September, 2020 to 30th April, 2021. The petitioners seek no other reliefs and only seeks that the order dated 27th September, 2021 be confirmed. The objections raised on behalf of the respondents have already been dealt with hereinbefore.

In view of the aforesaid, the petitioners have been able to make out a strong *prima facie case* on merits. The balance of convenience and irreparable injury is also in favour of orders being passed as prayed for. In view of the aforesaid,

AP/359/2021 stands disposed of by confirming the ad interim order dated 27th September, 2021.

Insofar as the remaining reliefs are concerned, the petitioner is directed to file an appropriate application for execution of the award. With the aforesaid directions, AP/359/2021 stands disposed of.

(Ravi Krishan Kapur, J.)

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