

**In the High Court at Calcutta
Original Civil Jurisdiction
Commercial Division**

The Hon'ble Justice Sabyasachi Bhattacharyya

AP-COM No.693 of 2024

**M/s Adhunik Corporation Ltd
Vs
Sri Gouri Shanker Choubey**

For the petitioner	:	Mr. Tanay Agarwal, Adv. Mr. Chitresh Saraogi, Adv.
For the respondent	:	Mr. K. Thaker, Adv.
Hearing concluded on	:	09.09.2024
Judgment on	:	19.09.2024

Sabyasachi Bhattacharyya, J:-

1. The respondent is the sole lessee of certain iron ore mines at Nangalsila in the Mayurbhanj District of Odisha, which are the subject-matter of the present dispute. The respondent approached the Durgapur Corporation Private Limited (DCPL) in early 2019, for the technical expertise and assistance of DCPL. A joint venture agreement was entered into between DCPL and the respondent on May 29, 2019, whereby it was agreed that the respondent would execute a power of attorney in favour of any Director or authorised representative of DCPL to act on its behalf and enter into an agreement for raising activities of operations to be carried out exclusively by a nominee/sister concern of DCPL.

2. Subsequently a power of attorney was executed by the respondent in favour of a nominee of DCPL, namely one Mr. Bhagawati Prasad Todi. An agreement was also entered into between the respondent and the petitioner, M/s. Adhunik Corporation Limited, for raising activities/excavation of iron ore in the mines.
3. Learned counsel for the petitioner argues that all three agreements form a single, composite transaction, notarised by the same notary public and attested by the same set of witnesses, all dated May 29, 2019.
4. On December 4, 2023, the respondent issued a notice in writing, terminating the agreement between the petitioner and the respondent, which was reiterated by the respondent in a letter dated February 13, 2023.
5. The DCPL and the petitioner filed separate applications under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter refer to as “the 1996 Act”), bearing AP Com No. 505 of 2024 and AP Com No. 504 of 2024, which are pending before this Court. Orders have been passed therein from time to time.
6. Thereafter the DCPL and the petitioner issued notices under Section 21 of the 1996 Act on May 10, 2024, proposing the name of a learned arbitrator. The proposal was refused by the respondent by a letter dated June 5, 2024.

7. Learned counsel for the petitioner places reliance on the arbitration clause in the agreement between the petitioner and the respondent, which is as follows:

“11. Arbitration:

Any dispute or difference arising under or in connection with or regarding the interpretation of this Agreement which cannot be settled by mutual discussion shall be settled by an arbitration in accordance with the provisions of the Arbitration and its jurisdiction should be in Kolkata, West Bengal.”

8. It is argued that since the said clause confers jurisdiction over the arbitral proceedings on Kolkata courts exclusively, Kolkata was intended to be seat of arbitration. Accordingly, this Court has jurisdiction to take up the present application under Section 11 of the 1996 Act.
9. It is argued that Section 11 proceedings are exceptions to Section 42 of the 1996 Act. It is contended that a Section 11 court would confine itself only to the question of existence of the arbitration agreement.
10. In support of the said contention, learned counsel cites *Duro Felguera, S.A. vs. Gangaram Port Ltd* reported at (2017) 9 SCC 729 and *Vidya Drolia vs. Durga Trading Corporation* reported at (2021) 2 SCC 1. The said judgement, it is submitted, has been recently followed in a *SBI General Insurance Co. Ltd. vs. Krish Spinning* reported at (2024) SCC OnLine SC 1754.
11. Learned counsel for the petitioner next relies on *Sanjay Kumar Verma vs. Planning and Infrastructural Development Consultants Pvt. Ltd.*

reported at (2024) SCC OnLine Del 59 where the arbitration clause specified that the dispute will be referred to a recognized Arbitrator of the Company's choice whose decision shall be binding on the parties, the same being subject to Patna jurisdiction. The Delhi High Court held in favour of Patna being the seat of arbitration by observing that the parties' right to select a neutral seat of arbitration, irrespective of whether cause of action arose or obligations were performed at such place, is well recognized.

12. Again, in *Hamdard Laboratories (India) vs. Sterling Electro Enterprises* reported at (2020) SCC OnLine Del 2688, the arbitration clause stated that the courts of law at Delhi alone shall have jurisdiction. It was held by the Delhi High Court that the absence of the term 'seat' while referring to the courts at Delhi does not alter the significant fact that the courts of law at Delhi alone have been vested with the jurisdiction upon arbitration proceedings arising out the subject work order. It was reiterated that the law does not prohibit parties from agreeing to confer exclusive jurisdiction in respect of arbitral proceedings on mutually preferred, neutral seats. Thus, the arbitration clause therein was held to be a clear expression of the intent to confer jurisdiction on the courts at Delhi, which helps cull out the fact that the parties chose Delhi as a neutral seat of arbitration.
13. The petitioner cites *Damodar Valley Corporation vs. BLA Projects* reported at (2023) SCC OnLine Cal 3769, where it was held *inter alia* that 'seat' would necessarily be a neutral venue chosen by the parties

and be indifferent to the cause of action which may have arisen, thereby making Section 16-21 of the Code of Civil Procedure, 1908 redundant.

14. Learned counsel for the petitioner next relies on *BGS SGS Soma JV vs. NHPC Ltd* reported at (2020) 4 SCC 234 for the proposition that once a seat of arbitration is chosen, it amounts to exclusive jurisdiction clause insofar as the courts and the seat are concerned.
15. Learned counsel for the petitioner next cites *Height Insurance Services Ltd vs. Reliance Nippon Life Insurance Company Limited* reported at (2023) SCC OnLine Cal 912 to argue that the facts of the said case are distinguishable from the instant case. In the said report, it was clearly mentioned that the arbitration shall be held at Kolkata and exclusive jurisdiction was vested in the courts at Mumbai. There were, therefore, two places mentioned *qua* different matters. The court held that since the arbitration clause specified that the entirety of arbitration proceedings shall be held at Kolkata, the same was taken to be the seat of arbitration. Such dichotomy is not present in the instant case.
16. Learned counsel for the petitioner disputes the contention of the respondent that the petitioner is piggybacking on the arbitration clause of the DCPL agreement and points out that the agreement between the petitioner and the respondent itself has a seat clause.
17. Thus, it is argued that this Court has territorial jurisdiction to take up the matter.

18. Learned counsel for the respondent contends that the arbitration clause in the agreement between the petitioner and the respondent refers to jurisdiction and not the seat of arbitration. Distinguishing between the two concepts, it is submitted that whereas jurisdiction refers to the courts, the designation of a seat has to be in clear terms.
19. Learned counsel argues that Section 11(6) of the 1996 Act has to be read harmoniously with Section 2(1)(e) and construed to mean a High Court exercising Ordinary Original Civil Jurisdiction which exercises superintendence over a court as defined in Section 2(1)(e). In other words, an application under Section 11 must be filed in the High Court having jurisdiction to entertain the application in terms of Sections 16 to 20 of the Code of Civil Procedure, 1908.
20. In the present case, the subject-matter of the dispute arises out of an agreement dated May 29, 2019 appointing the petitioner as the respondent's mining/raising contractor to extract iron ore from the respondent's mines at Nangalsila, Mayurbhanj District of Odisha. The agreement contemplates making over of possession of the mines to the petitioner and return of the mines to the respondent on expiry, in Clause 4(g) of the same.
21. Thus, it is argued that unlike a suit for specific performance, the personal rights of the parties are not involved here. The subject-matter of the dispute comes under the category "suit for land" and thus, the territorial jurisdiction would be of the Odisha courts and not courts at Kolkata. The petitioner cites *Adcon Electronics Pvt. Ltd. v. Daulat and*

Another reported at (2001) 7 SCC 698 in such context, where a 'suit for land' was held to be a suit in which the relief claimed relates to title or delivery of possession or control or management of land. The said principle, it is argued, is squarely applicable here.

22. It is further contended by the petitioner that the purported letters at pages 69 and 70 of the present application are self-serving documents created by DCPL and the petitioner, where the respondent is not a party. The purported letter at page 71, it is alleged, is fabricated by DCPL and was not served on the petitioner.
23. It is argued that the respondent signed the agreement with the petitioner independently. The agreement was not executed on behalf of the respondent by his constituted attorney, Bhagawati Prasad Todi. Secondly, the agreement does not contain any reference to DCPL or DCPL's agreement with the respondent and can be performed independently from such agreement.
24. The DCPL agreement and the subject-agreement unequivocally stipulate that the agreements constitute the entire agreement in each case between the parties. As such, it is argued that the arbitration clauses in the two agreements are entirely distinct and different, with no cross reference or incorporation. Hence, there is no question of composite reference or inter-link between the two.
25. With regard to the *Height case*, the petitioner argues that the issue decided there was whether the Section 11 application was to be filed in this Court or the High Court at Mumbai, as exclusive jurisdiction

was conferred on the later. The arbitration clause therein clearly stipulated that the arbitration shall be held at Kolkata, whereas in the present case, there is no such reference. The present arbitration clause merely refers to the jurisdiction of court.

- 26.** While distinguishing *BGS SGS SOMA*, it is argued that the seat definitely determines the jurisdictional court, but not vice versa. Learned counsel for the petitioner seeks to distinguish the view of the Delhi High Court that conferment of jurisdiction signifies designation of seat.
- 27.** Thus, it is argued that the present application should be dismissed.
- 28.** Upon hearing learned counsel for the parties, it is evident that the true purport of the arbitration clause in the agreement between the petitioner and the respondent acquires utmost importance.
- 29.** However, at the outset, the petitioner has raised a question as to whether this Court can go into other questions than the existence of the arbitration agreement. The petitioner has relied on *Duro Felguera (supra)*, *Vidya Drolia (supra)*, and the *Krish Spinning case (supra)*, in support of such contention.
- 30.** The question whether an arbitration agreement exists can be entered into only by a court having jurisdiction to take up the application under Section 11 in the first place. The question as to the jurisdiction of the court in taking up the application under Section 11 goes to the root of the matter and underlies the very basis of exercise of jurisdiction. Thus, there cannot be any doubt that the said issue has

to be answered first by the court before even taking up the issue of existence of arbitration agreement. Such primary question cannot be shirked by the court, since jurisdiction is the very window which grants the court access even to the basic question of existence of an arbitration agreement.

31. While dealing with the issue of jurisdiction in the present case, it cannot be lost sight of that the Supreme Court and various High Courts have repeatedly reiterated that party autonomy is the spirit of arbitration and the parties themselves can agree upon a seat of arbitration, upon which the courts having jurisdiction over such seat become the jurisdictional courts to take up the subject-matter of arbitration relating to the parties. It is equally well-settled, as held by the Supreme Court in *BGS SOMA*, considering *Balco vs. Kaiser Aluminium Technical Services Inc* reported at (2012) 9 SCC 552, that the seat of the arbitration proceedings as agreed by the parties confers jurisdiction on the courts taking up matters pertaining to such arbitration. Once the seat of arbitration is chosen, it has the effect of clothing the courts having territorial jurisdiction over the seat with exclusive jurisdiction to take up matters connected with the arbitration. Such jurisdiction overrides the general principles embodied in Section 16 to 20 of the Code of Civil Procedure, 1908, which is the general law on the subject.
32. In *Height insurance* (supra), the court was dealing with an arbitration clause which distinguished the seat of arbitration and the jurisdiction

of courts. Such splitting, however, is not sanctioned by the settled judicial position in India. The consistent view of the Supreme Court and High Courts is that the seat, once agreed upon, confers exclusive jurisdiction on courts having territorial jurisdiction over the seat. In the said case, since Kolkata was designated as the seat of arbitration, the conferment of jurisdiction on Mumbai Courts was held to be redundant and it was observed that the Kolkata courts had jurisdiction in respect of the arbitration, being the court of the seat of arbitration.

- 33.** The plinth of the respondent's arguments in the instant case is that the arbitration clause in the agreement between the petitioner and the respondent does not designate the seat to be Kolkata. If such view is to be accepted, there is no doubt that Section 16-20 of the Code of Civil Procedure would apply, in which case the other debate arises as to whether the subject-matter of the dispute comes within the category of "suit for land".
- 34.** Even assuming hypothetically that Kolkata has not been designated as the seat of arbitration, it is seen that the present dispute cannot qualify strictly as a suit for land. In the clauses of the agreement itself, in particular Clause 3, the scope of the agreement is confined to the petitioner undertaking raising operations, including excavation of iron ore from the subject-property. However, it is clearly mentioned in the agreement that the respondent has leasehold rights over the area and there is no whisper of any conferment of sub-rights regarding the land

on the petitioner. Rather, in Clause 10.2, captioned “Exclusion of Assignment”, it has been unambiguously stipulated that the agreement is *personal* (emphasis supplied) to the parties and the rights and obligations arising thereunder shall not be assignable by them without prior consent of the other party.

35. Again Clause 10.6, captioned “Non-agency”, specifies that nothing contained in the agreement shall be construed as assignment, sub-letting or in any manner transferring the right, title and interest of the respondent in respect of the leasehold area in favour of the petitioner or the products excavated therefrom. Hence, there cannot be any manner of doubt that the respondent retained his leasehold interest in the land in exclusion of the petitioner and the parties understood between themselves that no right, title and interest in the land in favour of the petitioner was being created by the agreement. Hence, the right of the petitioner was confined to mining operation and excavation, which was personal in nature and enforceable between the parties and not vis-a-vis the land. Although incidentally such rights touched upon the land comprised of the mines, by the specific exclusion as envisaged in Clauses 10.2 and 10.6, any doubt regarding the petitioner having no right, title or interest on the property has been cleared.

36. Thus, the primary argument of the respondent, that the dispute pertains to a suit for land, is not tenable in the eye of law and in the facts of the case. Accordingly, at least a part of the cause of action

arises within the jurisdiction of this Court *prima facie* as per the averments in the application, since at least some of the notices have been responded to from within the territorial jurisdiction of this Court.

37. The next question which falls for consideration is whether the arbitration clause in the agreement-in-question designates Kolkata as the seat of arbitration.
38. The concerned clause, contrary to the contention of the respondent, does not say that the term “jurisdiction” used therein pertains to courts. The premise of the respondent’s arguments is that the jurisdiction referred to in the arbitration clause relates to the jurisdiction of the courts, as opposed to the subject-matter of the arbitration.
39. It is well-settled that the subject-matter of arbitration and the subject-matter of suit are distinct and different concepts.
40. Looking into the context of the present arbitration clause, it is seen that the term “its” preceding the expression “jurisdiction” qualifies “arbitration” used previously in the same sentence. The complete expression is “...shall be settled by *an arbitration* and in accordance with the provisions of the *Arbitration* and *its Jurisdiction* should be in Kolkata, West Bengal”. Thus, it is the jurisdiction of the arbitration which is fixed at Kolkata, West Bengal.
41. The expression “seat” has not been used anywhere in the 1996 Act. The concept has evolved in arbitration jurisdiction in India in recent years. In the absence of any contrary expression in any other part of

the agreement, thus, there cannot be any manner of doubt that the intention of the parties was unequivocally to fix jurisdiction of the arbitration in Kolkata. There is nothing in the entire agreement to connote that there is any other seat or even alternative venue proposed for the arbitration to be held. Since the expression “jurisdiction” in the arbitration clause does not refer to courts but to the arbitration itself, there cannot be any manner of doubt whatsoever that the expression “jurisdiction” used in the arbitration clause, coupled with the possessive pronoun “its” to qualify the previous expression “arbitration”, connotes the seat of arbitration to be in Kolkata. The expressions “jurisdiction” and “seat” can be loosely interchanged, having not been borrowed from statutory language. The manner in which the expression has been used in the present case removes any doubt that the arbitration was not intended to be held anywhere except exclusively in Kolkata.

- 42.** Thus, as per the arbitration clause, the seat of the arbitration has been agreed by the parties to be in Kolkata. Accordingly, by necessary implication, this Court, being the High Court at Calcutta, has jurisdiction under Section 11 of the 1996 Act over the matter.
- 43.** Thus, the objection as to territorial jurisdiction is turned down.
- 44.** The above issue being decided in favour of the maintainability of the petition, there is no other impediment in referring the matter to arbitration.

- 45.** The question which arises is whether the agreements between DCPL and the respondent and the Power of Attorney executed by the respondent in favour of the nominee of DCPL comprise parts of the same transaction along with the present agreement. From the circumstances of the case and the fact that the all three documents were entered into on the self-same day, there is sufficient indication that the three documents comprise of a string of the same transaction and, thus, may be referrable to the same Arbitrator.
- 46.** However, it would be going too far if the Section 11 court decides whether the disputes arising out of the three documents can be clubbed as a composite reference. Such option is best left to the learned Arbitrator to decide.
- 47.** Accordingly, AP-COM No. 693 of 2024 is allowed on contest, thereby appointing Justice Indira Banerjee, retired Judge of the Supreme Court, as the sole Arbitrator to resolve the dispute between the parties, subject to a declaration under Section 12 of the Arbitration and Conciliation Act, 1996 being obtained from the said learned Arbitrator. The learned Arbitrator shall fix her own remuneration in terms of the 1996 Act and its Fourth Schedule.
- 48.** It is made clear that it will be open to the learned Arbitrator to decide whether the disputes arising out of the agreement between DCPL and the respondent and the present agreement should be clubbed together and taken up as a composite reference or otherwise. Needless to say, this Court has not touched upon the merits of any of the contentions

of the parties, apart from holding that it has jurisdiction to take up the Section 11 application, and it will be open to the parties to argue on all issues before the learned Arbitrator.

- 49.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)