

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction

ORIGINAL SIDE

(COMMERCIAL DIVISION)

AO-COM/13/2024

WITH

AP-COM/217/2024

Bidyutlata Mahapatra And Anr.

VS

Shrachi Developers Pvt Ltd And Ors.

BEFORE: The Hon'ble JUSTICE ARIJIT BANERJEE

AND

The Hon'ble JUSTICE RAI CHATTOPADHYAY

For Appellants : Mr. Avishek Guha, Adv.

Mr. Ankush Majumdar, Adv.

For Respondents : Mr. Samrat Sen, Sr. Adv.

Ms. Manali Ali, Adv.

Mr. Paritosh Sinha, Adv.

Mr. Soubhik Chowdhury, Adv.

Ms. Tapasika Bose, Adv.

Ms. Sayantani Banerjee, Adv.

Judgment on : 24.07.2025

Arijit Banerjee, J. :-

1. This appeal is directed against a judgment and order dated February 28, 2024, whereby A.P. 359 of 2021 and a connected application being G.A. 2 of 2023 were disposed of by a learned Judge of this Court.

2. Briefly stated, the relevant facts of the case are that disputes arose between the parties in connection with a partnership agreement dated November 1, 2024. The agreement contemplated constitution of a partnership firm between the appellants and the respondent nos. 2 and 3 on one hand (in short referred to as the 'Mahapatras') and the respondent no. 1 herein (in short referred to as 'Shrachi'), under the name and style of "Pancham Shrachi" for implementation of a housing project. The understanding between the parties was that the Mahapatras would bring in immovable property belonging to them as their capital contribution and Shrachi would invest funds for development and construction work to be undertaken by the said firm.

3. After the expiry of the original owner of the land in question, disputes and differences arose between the parties. By a letter dated October 23, 2007, the Mahapatras attempted to terminate the partnership agreement. In that factual background, Shrachi invoked the arbitration clause contained in the partnership agreement. By consent of the parties, an Hon'ble former Judge of the Hon'ble Supreme Court was appointed as the sole arbitrator.

4. Ten issues were framed by learned Arbitrator which read as follows:-

"1. Whether the partnership firm under the name and style of 'Pancham Shrachi' (the said Firm) is partnership at will.

2. Whether the Schedule "A" and Schedule "B" lands, described in the statement of claim, is the property of the said firm.

3. Whether the said Firm stood validly dissolved by virtue of the notice dated October 23, 2007, issued by the Respondents.

4. (a) If the answer to issue No. 3 is in the affirmative, to what reliefs are the parties entitled.

(b) Conversely, if the answer to issue no. 3 be in the negative, to what reliefs are the parties entitled.

5. (a) Whether the Declaration on page 1 of the application made in Form 1 under Rule 3 of the Orissa Partnership Rules to the effect that the said firm was a partnership 'at will' is a true and correct reflection of the scope, intent and purport of the partnership.

(b) Whether the entry in respect of sl No. (4) made in Form A under Rule 5 of the Orissa Partnership Rules, 1942, maintained by the Registrar of Firms to the effect that the firm, 'Pancham Shrachi' is a partnership 'At Will' is liable to be rectified and/or amended so to record that the partnership is a particular partnership'.

(c) Whether the Claimant is entitled to a declaration that the parties are not entitled to rely on; or act in furtherance of or on the basis of or to give effect to the impugned entry in sl. No (4) made in Form A maintained by the Registrar of Firms to the effect that the firm 'Pancham Shrachi' is a partnership 'At Will'.

(d) Whether the Registrar of Firms ought to rectify and/or amend the entry in respect of sl. No. (4) made in Form A under Rule 5 of the Orissa Partnership Rules relating to the duration of the partnership firm Pancham Shrachi so as to indicate that the same is a particular partnership and to delete the words 'at will' in the concerned entry in the Registrar maintained by the Registrar of Firms.

6. Whether the claimant is entitled to a declaration that the firm 'Pancham Shrachi' is entitled to continue the development, promotion, construction and marketing of the proposed residential housing complex at Mouza: Rudrapur, District: Khurda, Tehsil: Bhubaneswar, Thana: Ballanta as a specific undertaking under the partnership agreement dated November 1, 2024 and that the respondents and/or their men, servants, agents and assigns are not entitled to interfere in or obstruct or impede the completion thereof.

7. Whether the claimant is entitled to an award for perpetual injunction restraining the respondents and/or their men, servants, assigns from interfering in or obstructing or creating any impediment or impairment to the smooth functioning of the partnership firm of 'Pancham Shrachi' or in the conduct of its affairs or in the execution of the project and/or undertaking of development, promotion, construction and marketing of the residential housing project at Mouza: Rudrapur, District: Khurda, Tehsil – Bhubaneshwar, Thana – Ballanta or from encumbering, selling, dissipating, letting out charging, creating third party rights, mortgaging or howsoever otherwise dealing with the Schedule A and Schedule B lands described in Annexures A & B to the Claimant's Brief of Documents.

8. Whether the claimant is entitled to an Award for damages against the Respondent as claimed in the statement of claim or such other sums as may be found due to be payable on enquiry.

9. Whether the respondents are entitled to their counter-claim.

10. What other relief or reliefs are the parties entitled to.”

5. The arbitral award was made and published on August 25, 2020. Issue no. 1 was decided in favour of Shrachi. It was held that the partnership in question is not a “partnership at will” as was being contended by the Mahapatras, and the firm was constituted to carry out a specific project. It was categorially observed that the partnership was for a specific undertaking i.e. development, construction, promotion and marketing of a residential housing project on Schedule A lands. Shrachi’s claim for damages was, however, negated.

6. After about a year of publication of the award, Shrachi filed an application under Section 9 of the Arbitration and Conciliation Act, 1996, being A.P. No. 359 of 2021, in this Court praying for the following reliefs:-

“a) A fit and proper person be appointed as Receiver to do all acts and deeds, sign and execute all documents on behalf of the respondents nominee in respect of the residential project undertaken by the partnership firm “Pancham Shrachi” at Schedule “A” land which is described in Annexure “B” to this petition;

(b) In the alternative, Mr. Promod Kumar Mohanty, appointed by the Arbitral Tribunal by its order dated June 17, 2020 with consent of both the parties, be given additional powers by this Hon’ble Court to do all acts and deeds, sign and execute all documents on behalf of the respondent nominee in respect of the residential project undertaken by the partnership firm “Pancham

Shrachi” at Schedule “A” land which is described in Annexure “B” to this petition.

(C) The Receiver be empowered and/or authorized and/or directed to

(i) Sign all cheques on behalf of the respondents in respect of joint account of the partnership firm;

(ii) Sign all the applications on behalf of the respondents which are to be submitted before the respective statutory authorities;

(iii) Sign all the documents needed to be executed in respect of the partnership firm “Pancham Shrachi” on behalf of the respondents;

(d) The receiver be directed to immediately ascertain the nature of encroachment which has been taken place in the schedule “A” property (as indicated by the aforesaid Mr. Tapan Chowdhury in his email dated July 24, 2021).

(e) The respondents be directed to immediately share all the information and/or details and/or particular they have about the encroachment in the schedule “A” property, by way of filing of an affidavit in the instant proceeding and/or otherwise.

(f) An order of injunction be passed restraining the respondents from creating any hindrance and/or obstacle in execution of documents and/or in commission of any other acts and/or deeds by the learned Receiver as may be directed by this Hon’ble Court for successful development, construction, promotion and marketing of the residential complex on the Schedule ‘A’ lands, in any manner whatsoever.

(g) An order of injunction be passed restraining the respondents from creating any hindrance and/or disturbance and/or obstacles for smooth running of the housing project as described in Schedule "A": property;

(h) An order of injunction be passed restraining the respondents from dealing with and/or creating third party interest and/or transferring the Schedule A lands;

(i) Liberty be given to the Receiver (s) to appoint an agent for carrying out the duties to be undertaken by Receiver(s) in terms of the order (s) to be passed herein;"

7. In connection with the aforesaid application, Shrachi filed another application being G.A. no. 2 of 2023 claiming the following reliefs:-

"a. Direct the respondents, especially respondent nos. 1 and 3 to forthwith handover the originals of the title deeds in respect of the Schedule A property as described in the partnership Deed as more fully mentioned in Annexure Y to the Learned Special Officer, namely Mr. Bhakti Prasad Das, Advocate so appointed by this Hon'ble Court Vide order dated September 27, 2021 for his inspection, verification and custody.

b. Direct the respondents, especially respondent nos. 1 and 3 to forthwith make over the certified copies of the title deeds in respect of the Schedule A property as described in the Partnership Deed as morefully mentioned in Annexure Y to the Learned Special Officer, namely Mr. Bhakti Prasad Das, Advocate so appointed by this Hon'ble Court vide order dated September 27, 2021.

c. Restrain the respondent, especially respondent nos. 1 and 3, jointly or severally, or their representatives/men/assigns/employees from acting in any manner whatsoever which would prevent the Learned Special Officer, namely Mr. Bhakti Prasad Das, Advocate from complying with the Directives as passed by this Hon'ble Court in its order dated September 27, 2021."

8. By the order impugned in this appeal, GA 2 of 2023, was disposed of by learned Single Judge by allowing prayers (a) + (b) of the application. A.P. No. 359 of 2021 was disposed of by confirming an ad interim order dated September 27, 2021, which had been passed earlier in terms of prayer (a) of the petition.

9. Being aggrieved, some of the Mahapatras have come up by way of this appeal.

10. Mr. Abhishek Guha, learned Advocate for the appellants urged two points before us. Firstly, he argued that this Court lacks territorial jurisdiction to entertain the application under Section 9 of the 1996 Act or the connected application which were both disposed of by the impugned order. This is because the land in question is situate at Bhubaneswar. Further, there is a Forum Selection Clause in the partnership deed conferring exclusive jurisdiction on the Orissa Courts.

11. Learned Counsel further submitted that although on earlier occasions, this Court entertained applications under the 1996 Act, since this Court never had territorial jurisdiction, Section 42 of the 1996 Act would not come into play. Learned Counsel drew our attention to an order

dated April 8, 2010, passed in G.A. no. 2570 of 2008 filed in connection with AP no. 376 of 2007 being a petition under Section 9 of the 1996 Act filed by Shrachi in this Court. After the Section 9 application was disposed of on January 8, 2008, the Mahapatras filed G.A. 2570 of 2008 for recalling such order contending that this Court lacked territorial jurisdiction to entertain, try or dispose of the Section 9 application. While passing the order dated April 8, 2010, which was interim in nature, a learned Single Judge had negated the objection taken on the ground of jurisdiction. Learned Counsel submitted that subsequently while considering yet another application filed by Shrachi, the same learned Judge who had passed the order dated April 8, 2010, passed an order dated December 5, 2013, inter alia, directing exchange of affidavits. In that order the learned Judge observed:- “this order is made without prejudice to the respondents’ contention as to the maintainability of the petition in this Court, though previous Section 9 applications in respect of the same arbitration agreement have been entertained by this Court.” It was urged that the learned Judge therefore left open the question of territorial jurisdiction of this Court to entertain applications under Section 9 of the 1996 Act in respect of the concerned arbitration agreement.

12. Learned Counsel further drew our attention to an order dated September 27, 2021, passed by another learned Judge in A.P. no. 359 of 2021. That was an interim order whereby the learned Judge overruled the objection taken by the Mahapatras on the ground of territorial jurisdiction. Learned Counsel submitted that this order was passed merely by following the order dated April 8, 2010 and without any independent adjudication.

13. In this connection learned Counsel relied on the observations of the Hon'ble Supreme Court in paragraphs 22 and 23 of the reported decision in the case of ***State of West Bengal and Ors. v. Associate Contractors, (2015) 1 SCC 32***. The said paragraphs read as follows:-

“22. One more question that may arise under Section 42 is whether Section 42 would apply in cases where an application made in a court is found to be without jurisdiction. Under Section 31(4) of the old Act, it has been held in *FCI represented by Managing Director & Anr. v. A.M. Ahmed & Co., through MD & Anr.*, (2001) 10 SCC 532 at para 6 and *Neycer India Ltd. v. GNB Ceramics Ltd.*, (2002) 9 SCC 489 at para 3 that Section 31(4) of the 1940 Act would not be applicable if it were found that an application was to be made before a court which had no jurisdiction. In *Jatinder Nath v. Chopra Land Developers Pvt. Ltd.*, (2007) 11 SCC 453 at para 9 and *Rajasthan State Electrical Board v. Universal Petrol Chemical Limited*, (2009) 3 SCC 107 at paras 33 to 36 and *Swastik Gases (P) Ltd. v. Indian Oil Corporation*, 2013 (9) SCC 32 at para 32, it was held that where the agreement between the parties restricted jurisdiction to only one particular court, that court alone would have jurisdiction as neither Section 31(4) nor Section 42 contains a non-obstante clause wiping out a contrary agreement between the parties. It has thus been held that applications preferred to courts outside the exclusive court agreed to by parties would also be without jurisdiction.

23. Even under Section 42 itself, a Designated Judge has held in *HBM Print Ltd. v. Scantrans India (Pvt.) Ltd.*, (2009) 17 SCC 338, that where the Chief Justice has no jurisdiction under Section 11, Section 42 will not apply. This is quite apart from the fact that Section 42, as has been held above, will not apply to Section 11 applications at all.”

14. The other argument advanced by learned Advocate for the appellants is that the application under Section 9 was not maintainable before the learned Single Judge since the award had become final and enforceable prior to such application being filed. He submitted that although the scope of Section 9 is wide, no application under that provision of law can be filed praying for orders which may be obtained in proceedings for execution of the award. He further submitted that Shrachi was not granted any substantive relief under the award, in aid of which an interim order may be passed on a Section 9 application. In this connection learned Counsel relied on a decision of the Madras High Court in the case of ***Gopuram Enterprises Ltd., Chennai v. Integrated Finance Company Ltd., Chennai, reported at AIR 2021 MAD 119.***

15. Learned Counsel then submitted that the contention of Shrachi that the award is declaratory and incapable of execution, is without merits. In this connection reference was made to the following three decisions:-

- (i) *Parkash Chand Khurana, Etc. v. Harnam Singh & Ors., reported at (1973) 2 SCC 484.***
- (ii) *Dr. Ramesh C. Vaish and Ors. v. Banwarilal Jaipuria & Ors., reported at 1999 SCC OnLine Cal 118.***

(iii) *Dirk India Private Limited (Orig. Petitioner) v. Maharashtra State Electricity Generation Company Limited, reported at 2013 SCC OnLine Bom 481.*

I will revert to these decisions later in this judgment, if necessary.

16. Appearing for Shrachi, Mr. Meghojit Mukherjee learned Advocate submitted that the order dated December 5, 2013, passed in A.P. No. 1181 of 2013 was an interim order. That arbitration petition was disposed of by the final order dated March 20, 2014, by confirming the order of injunction that had been passed earlier. At the time of disposal, of the application, the Mahapatras did not press the point of lack of territorial jurisdiction of this Court to entertain the Section 9 application. In fact, the parties agreed that the arbitration petition may be disposed of by confirming the subsisting order of injunction till the disposal of the arbitral reference.

17. Learned Counsel submitted that the jurisdiction of this Court has been invoked on the basis of Section 42 of the 1996 Act. Referring to the decision of the Hon'ble Supreme Court in the case of **BGS SGS SOMA JV v. NHPC LTD, reported at (2020) 4 SCC 234**, learned Counsel submitted that Section 42 is meant to avoid conflict in jurisdiction of Courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the concerned arbitration in one court exclusively. He also referred to the decision in **Kumbha Mawji v. Union of India reported at AIR 1953 SC 313**, wherein while dilating on the legislative policy behind enacting Section 31(4) of the Arbitration Act, 1940 (which was in *pari materia* with Section 42 of the 1996 Act), the Hon'ble Supreme Court observed that "the necessity for clothing a single Court with effective and exclusive jurisdiction, and to bring

about by the combined operation of these three provisions, the avoidance of conflict and scramble is equally essential whether the question arises during the pendency of the arbitration or after the arbitration is completed or before the arbitration is commenced.”

18. It was next submitted that Section 42 of the 1996 Act begins with a non-obstante clause and therefore has overriding effect *vis-à-vis* all other provisions contained in Part-I of the Act or any other law for the time being in force. For the effect of a non-obstante clause the writ petitioner referred to the decision of the Hon’ble Supreme Court in the case of ***Iridium India Telecom Ltd. v. Motorola INC reported at (2005) 2 SCC 145.***

19. Relying on the decision of the Hon’ble Supreme Court in the case of ***State of West Bengal and Ors. v. Associated Contractors, reported at (2015) 1 SCC 32***, Para 21, learned Advocate submitted that the expression “with respect to an arbitration agreement” in Section 42 of the 1996 Act, is of wide import and would encompass all applications made before, during or after the arbitral proceedings are over. At least 4 earlier applications under Section 9 of the 1996 Act have been entertained by this Court and diverse interim protective orders have been passed from time to time. Such applications are:- **(1) AP No. 376 of 2007, (2) AP No. 1544 of 2015, (3) AP No. 395 of 2020, (4) AP No. 359 of 2021.** It was submitted that AP 376 of 2007 was filed in this Court by the respondent no. 1 after obtaining leave under Clause 12 of the Letters Patent, 1865, on December 10, 2007. An order was passed on that date. The application was disposed of on January 8, 2008, by confirming the order dated December 10, 2007. A vacating application being GA no. 2570 of 2008 was filed by the appellants for recall

of the order dated January 8, 2008, contending that this Court had no jurisdiction in the matter. That application was dismissed by a judgment and order dated April 8, 2010. Such dismissal order was not challenged before any higher forum. Accordingly, that order has attained finality on the issue as to whether or not this Court has territorial jurisdiction to entertain proceedings in connection with the concerned arbitration agreement and the same is no more *res integra*.

20. Learned Advocate referred to paragraph 54 of the application filed I AP No. 359 of 2021 which reads as follows:- “Moreover, by virtue of Section 42 of the said Act, this Hon’ble Court has the exclusive jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitration agreement and the arbitral proceedings.”

21. It was then submitted that when AP no. 1181 of 2013 was filed by the respondent no. 1 in this Court, at the ad interim stage, the appellants had raised the issue of territorial jurisdiction of this Court. However, subsequently that issue was not pressed and that arbitration petition was disposed of by an order dated March 20, 2014, passed on consent of the parties. Therefore, the issue of territorial jurisdiction of this Court has been raised only sporadically as a stray issue on some earlier occasions and not at all on other occasions.

22. Learned Counsel submitted that in the aforesaid factual matrix, the appellants are barred by the principles of waiver and/or estoppel from raising the issue of territorial jurisdiction of this Court. An objection as to territorial jurisdiction does not relate to inherent jurisdiction of the Court and can be waived, as has been done by the appellants in the instant case.

Reliance was placed by learned Advocate on the following cases:- **(1) *Hira Lal Patni v. Sri Kali Nath reported at AIR 1962 SC 199*, (2) *Harshad Chiman Lal Modi v. DLF Universal Ltd. and Anr reported at (2005) 7 SCC 791*, (3) *Sneh Lata Goel v. Pushplata & Ors., reported at (2019) 3 SCC 594*, (4) *Hirok Chowdhury & Ors. v. Khagendra Nath Mandal & Ors., reported at AIR 2018 Cal 272*.**

23. As regards the Forum Selection Clause in the subject agreement (Clause 5), learned Counsel submitted that this Court, by its order dated April 8, 2010, passed in GA No. 2570 of 2008, has already decided that the said clause of the Partnership Agreement does not confer exclusive jurisdiction on the Courts in Orissa. That judgment and order, not having been assailed before any competent forum, has become final. In that judgment it has also been held that the so called forum selection clause is not clear or unambiguous. The Court also held that having regard to the absence of words of exclusivity in the Forum Selection Clause and having regard to the connecting factors which link the factual matrix with Kolkata, this Court has jurisdiction to receive actions arising in connection with the arbitration clause contained in the partnership agreement.

24. It was then submitted that Section 42 of 1996 Act, will operate notwithstanding any Forum Selection Clause. The 1996 Act is an exhaustive and comprehensive piece of legislation and is a self-contained Code. In this connection learned Advocate referred to the decision in the case of ***Fuerst Day Lawson Limited v. Jindal Exports Limited reported at (2011) 8 SCC 333***.

25. On the scope of the reliefs which can be granted by the Court in a Section 9 application filed after publication of an arbitral award, learned Counsel submitted that the wording of Section 9 is very wide. In this connection learned Counsel referred to decision of the Hon'ble Supreme Court in the case of ***Hindustan Construction Company Limited & Anr. v. Union of India & Ors., reported at (2020) 17 SCC 324.***

26. It was submitted that the arbitral award in question has not attained finality since both parties have filed applications under Sections 34 of the 1996 Act, challenging the validity of the award. Such applications are still pending. Hence, the award has not become enforceable/executable under Order 21 of the Code of the Civil Procedure. In any event, the protective orders obtained by the respondent no. 1 from this Court under Section 9 of the 1996 Act, could not have been obtained in an execution proceeding. Therefore, the decision of the Madras High Court in the case of ***Gopuram Enterprises Ltd., Chennai v. Integrated Finance Company Ltd., Chennai, (supra)*** would not apply to this case.

27. Learned Advocate submitted that the reliefs obtained by the respondent no. 1 by way of the impugned order are limited to safeguarding the fruit of the proceedings till the eventual enforcement of the arbitral award in question and to ensure that the award is not rendered illusory by dealings on the part of the appellants that would put the subject of the award beyond the pale of enforcement.

28. It was finally submitted that the respondent no. 1 has challenged the concerned award, aggrieved by the fact that the Arbitral Tribunal despite having found that the partnership in question is not one at will but was

constituted to carry out a specific undertaking, refused to grant consequential reliefs in terms of the other prayers in the statement of claim. A mere declaratory award has been made which in its present form is not executable /enforceable.

Court's View

29. Let me take the point of jurisdiction first as it goes to the root of the matter. The appellants contended that this Court did not have territorial jurisdiction to entertain the application under Section 9 of the 1996 Act or the connected application which resulted in the impugned order. This is because the land in question which is the subject matter of dispute between the parties, is situated at Bhubaneswar, Orissa. It was also contended that the partnership agreement between the parties contains a Forum Selection Clause which clothes the Orissa Courts with exclusive jurisdiction. In my view, none of these two points has any merit for the following reasons.

30. An application under Section 9 of the 1996 Act, being AP no. 376 of 2007 was filed by Shrachi in this Court claiming certain interim protections. That application was disposed of by a learned Judge of this Court on January 8, 2008, without any effective order being passed thereon.

31. The Mahapatras filed an application being GA no. 2570 of 2008 for recalling the order dated January 8, 2008, contending that this Court lacked jurisdiction to entertain any petition arising out of or in connection with the partnership agreement dated November 1, 2004. The argument was that no part of the cause of action arose within the jurisdiction of this Court and that there was also a Forum Selection Clause in the partnership agreement.

By an order dated April 8, 2010, the learned Single Judge negated both the contentions of the Mahapatras and dismissed the application for recall of the order dated January 8, 2008. Such order of dismissal was not challenged before any higher forum and thus attained finality.

32. Therefore, all subsequent applications in connection with the concerned arbitration agreement necessarily had to be filed in this Court.

This is because of Section 42 of the Act which reads as follows:-

“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.”

33. Learned Advocate for the appellant argued that Section 42 will not come into play if the Court entertaining the earlier arbitration petition lacked jurisdiction. That may be if the Court lacked inherent jurisdiction. However, we are concerned with territorial jurisdiction of the Court, and that issue has been decided by a learned Judge of this Court. Not only that, even subsequently this Court entertained and decided another arbitration petition being AP 359 of 2021 filed by Shrachi under Section 9 of the 1996 Act. In an order dated September 27, 2021, passed in AP 359 of 2021, a learned Judge rejected the contention of the Mahapatras that this Court

lacked jurisdiction. The learned Judge noted that there are at least 9 orders which have been passed by this Court in applications filed by Shrachi for interim protection before passing of the Award on August 25, 2020.

34. It may also be noted that yet another application under Section 9 of the 1996 Act being AP no. 1181 of 2013 was entertained by a learned Judge of this Court. The learned Judge by an order dated December 5, 2013, directed exchange of affidavits and also observed that “this order is made without prejudice to the respondents’ contention as to the maintainability of the petition in this Court, though previous section 9 petitions in respect of the same arbitration agreement have been entertained by this Court”.

Relying on this observation, learned Advocate for the appellant argued that the learned Judge reopened the question of territorial jurisdiction of this Court.

The contention of learned Advocate for the appellant cannot be accepted. Firstly, I have strong doubts whether, once a learned Judge decides that this Court has territorial jurisdiction in a matter, the same learned Judge or any other Single Judge could reopen that issue in a separate proceeding. Probably that cannot be done. In any event, when AP no. 1181 of 2013 came up for final hearing on March 20, 2014, the same was disposed of by the learned Judge in terms of the following order:

“The Court: The parties agree that no further order need be passed on this petition under Section 9 of the Arbitration and Conciliation Act, 1996, save confirming the subsisting order of injunction till the disposal of the arbitral reference.

The parties also indicate that they would withdraw their rival nominees named as arbitrators and that the respondents would withdraw their request under Section 11 of the 1996 Act lodged before the Chief Justice of the Orissa High Court or his designate.

The parties also agree that Mr. R. K. Patra, a retired Judge of the Orissa High Court, be appointed arbitrator at such remuneration as may be agreed to by the arbitrator in the presence of the parties or their representatives.

The Parties also agree that notwithstanding the arbitration agreement between them providing for a summary award, reasons must be indicated in support of the award in accordance with the 1996 Act and it will also be open to the arbitrator to receive oral evidence.

AP No. 1181 of 2013 is disposed of by confirming the subsisting order of injunction. There will be no order as to costs.”

Therefore, the Mahapatras clearly waived any objection that they may have had as regards the territorial jurisdiction of this Court.

In this connection, it may be noted that lack of territorial jurisdiction of a Court does not render its order a nullity. It is only when there is inherent lack of jurisdiction in a Court that its order or decree would be null and void. In the case of ***Hira Lal Patni v. Shri Kali Nath, (Supra)***, a four Judge Bench of the Hon’ble Supreme Court, referring to the decision of the Privy Council in the case of ***Ledgard v. Bull reported at 1886 SCC Online***

PC 16, held that consent or waiver can cure defect of jurisdiction although it cannot cure inherent lack of jurisdiction. An objection to a Court's territorial jurisdiction is one that does not go to the competence of the Court and can, therefore, be waived. This principle has been given statutory recognition by enactments like section 21 of the Code of Civil Procedure. The same principle was reiterated by the Hon'ble Supreme Court in the case of **Harshad Chiman Lal Modi v. DLF, (Supra)**, and **Sneha Lata Goel v. Pushplata and Ors, (Supra)**.

35. As regards the point of their being a 'Forum Selection Clause' in the partnership agreement, the same reads as follows:-

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

36. By the judgment and order dated April 8, 2010, whereby GA no. 2570 of 2008 dismissed by a learned Single Judge of this Court as noted above, the argument of the Mahapatras on the Forum Selection Clause was rejected in the following words:

"To start with there is no High Court in this country by the name of Bhubaneswar High Court. Even if one were to ignore such minor matter and consider the clause to imply the Orissa High Court at Cuttack it would still not be a forum selection clause conferring exclusivity on any specific court as is ordinarily required for a forum selection clause to be effective. The Orissa High Court has no original jurisdiction and as such the forum selection clause could not have provided that only the Orissa High Court would have exclusive

authority to entertain petitions arising out of the agreement. Further, the clause does not contain the words of exclusivity that have to be incorporated in a clause to make it an effective forum selection clause. If the clause implies that the agreed Court would be a Court over which the Orissa High Court exercises Superintendence under Article 227 of the Constitution of India, it would rob the Clause of any sense of exclusivity that is essential for a forum selection clause to possess. After all, the Orissa High Court exercises superintendence under Article 227 of the Constitution over all subordinate Courts from the eastern-most and northern most of its districts to the western-most and southern-most of them.”

37. As I have indicated above, the said order dated April 8, 2010, was not assailed before any higher forum and has therefore become final and binding between the parties. In my opinion, the issue of territorial jurisdiction of this Court to entertain arbitration petitions arising out of or in connection with the partnership agreement is *res judicata* between the parties hereto. Putting it in different words, the principle of issue estoppel precludes the Mahapatras from urging that this Court did not have territorial jurisdiction to entertain the arbitration petition and the connected application which were disposed of by the judgment and order impugned in this appeal.

38. Once it is established that this Court had jurisdiction to entertain and dispose of AP no.376 of 2007, all subsequent applications in connection with the concerned arbitration agreement could be and can be filed only in

this Court and in no other Court. That is the mandate of Section 42 of the 1996 Act. In fact, having entertained AP no. 376 of 2007, this Court has the exclusive jurisdiction to entertain, try and determine arbitration petitions filed in connection with the arbitration clause in question. As has been observed by the Hon'ble Supreme Court in the case of **BGS SGS SOMA JV v. NHPC limited, (Supra)**, Section 42 is meant to avoid conflict in jurisdiction of Courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with an arbitration in one Court exclusively. It may also be noted that in the case of **Kumbha Mawji v. Union of India reported at AIR 1953 SC 313**, the Hon'ble Supreme Court observed that the legislative policy behind enacting Section 31(4) of the Arbitration Act 1940 (which is in *pari materia* with Section 42 of the 1996 Act) was "the necessity for clothing a single Court with effective and exclusive jurisdiction, and to bring about.....the avoidance of conflict and scramble whether the question arises during the pendency of the arbitration or after the arbitration is completed or before the arbitration is commenced." There is, therefore, no doubt that Section 42 of the 1996 Act, which starts with a non-obstante clause, shall operate notwithstanding the Forum Selection Clause in the partnership agreement. Therefore, the point of lack of territorial jurisdiction of this Court urged by the appellants is rejected.

39. Coming to the second point urged on behalf of the appellants, i.e., that the learned Single Judge ought not to have entertained the application under Section 9 of the 1996 Act since the Arbitral Award had become final and enforceable prior to such application being filed, also lacks merit. Section 9 of the 1996 Act reads as follows:-

“9. Interim measures, etc., by Court.—1[(1)]A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of

arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

[(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.]”

The opening words of the aforesaid provision make it clear that the scope of that provision is extremely wide. An application for interim protection can be made to a Court prior to commencement of arbitral proceedings. In fact, before arbitration commences, the Court is the only forum available to a party seeking interim protection in connection with the proposed arbitration. During pendency of the arbitral proceeding also the Court has jurisdiction to entertain an application under Section 9 of the 1996 Act. However, that is a matter of discretion for the court. In view of availability of the arbitral tribunal and the power of the arbitral tribunal to grant interim protection under Section 17 of the 1996 Act, the Court may refuse to entertain an application under Section 9 once arbitration

commences. Even after making of an arbitral award, the Court has jurisdiction to entertain an application under Section 9 but only till such time when the award is enforced in accordance with Section 36 of the Act. In view of the clear and unambiguous language of the Section, I see no justification in restricting the scope thereof.

40. Section 36 of the 1996 Act, provides for enforcement of an arbitral award. The Section says that where the time for making an application to set aside the arbitral award under Section 34 has expired, then subject to the provisions of sub section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the Court. Sub Section (2) of Section 36 clarifies that mere filing of an application for setting aside the award shall not *per se* render that award unenforceable, unless the Court grants an order of stay of operation of the arbitral award in accordance with the provisions of sub section (3), on a separate application made for that purpose. It is not necessary for the present purpose to advert to sub Section (3) of Section 36. What is important is that till an award is enforced in accordance with Section 36, either party to the arbitral agreement or the arbitral proceedings can approach the Court for interim measures under Section 9 of the 1996 Act.

41. In this connection, one may refer to the decision of the Hon'ble Supreme Court in the case of ***Hindustan Construction Company Limited & Anr. v. Union of India & Ors., Supra***, wherein a three Judge Bench of the Hon'ble Supreme court held, inter alia, as follows at paragraphs 36 to 38 of the reported judgment.

“36. Interpreting Section 9 of the Arbitration Act, 1996, a Division Bench of the Bombay High Court in *Dirk India Pvt. Ltd. v. Maharashtra State Power Generation Company Ltd.* 2013 SCC Online Bom 481 held that:

“13....The second facet of Section 9 is the proximate nexus between the orders that are sought and the arbitral proceedings. When an interim measure of protection is sought before or during arbitral proceedings, such a measure is a step in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. Here again the measure of protection is a step in aid of enforcement. It is intended to ensure that enforcement of the award results in a realisable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement.”

37. This being the legislative intent, the observation in *NALCO* (supra) that once a Section 34 application is filed, “there is no discretion left with the Court to pass any interlocutory order in regard to the said Award...” flies in the face of the opening words of Section 9 of the Arbitration Act, 1996, extracted above.

38. Thus, the reasoning of the judgments in *NALCO* (supra), and *Fiza Developers and Intra-trade Pvt. Ltd.* (supra) being per incuriam in

not noticing Sections 9, 35 and the second part of Section 36 of the Arbitration Act, 1996, do not commend themselves to us and do not state the law correctly. The fact that NALCO (supra) has been followed in National Buildings Construction Corporation Ltd. v. Lloyds Insulation India Ltd. (supra) does not take us any further, as National Buildings Construction Corporation Ltd. (supra) in following NALCO (supra), a *per incuriam* judgement, also does not state the law correctly. Thus, it is clear that the automatic-stay of an award, as laid down by these decisions, is incorrect. The resultant position is that Section 36 - even as originally enacted - is not meant to do away with Article 36(2) of the UNCITRAL Model Law, but is really meant to do away with the two bites at the cherry doctrine in the context of awards made in India, and the fact that enforcement of a final award, when read with Section 35, is to be under the CPC, treating the award as if it were a decree of the court.”

42. The fulcrum of the appellant’s argument on this point was the decision of the Madras High Court in the case of ***Gopuram Enterprises Ltd., Chennai v. Integrated Finance Company Ltd., Chennai, (Supra)***. Apart from the fact that in that case, the attention of the Court was not drawn to the decision of the Hon’ble Supreme Court in ***Hindustan Construction Company Limited & Anr. v. Union of India & Ors., Supra***, what was decided in that case is that however wide the powers of a Court under section 9 of the 1996 Act may be, such powers may not extend to issuing orders for discovering the assets of an award debtor. Order XXI of

the Code of Civil Procedure provides for execution and carries the necessary provisions for such purpose. Section 9 of the Act cannot be enlarged to incorporate the wide authority that an executing Court has to aid the award-holder, who metamorphoses as a decree holder by the legal fiction contained in Section 36(1) of the 1996 Act, to seek or obtain orders of such nature or of arrest or detention of the award debtor or the sequestration of its assets and properties. I am unable to read the said case as an authority for the proposition that once an award becomes final and enforceable, an application under Section 9 of the 1996 Act cannot be filed in the Court. In my considered opinion, such an application would lie inter alia, to preserve and protect the fruits of the award at the instance of the award holder. One must keep in mind the difference between enforceability of an award and enforcement of an award. A Court retains jurisdiction under Section 9 even after an arbitral award may become enforceable but till it is in fact enforced in accordance with the provisions of Section 36 of the Act.

43. In view of the aforesaid, we do not find any infirmity in the judgment and order of the learned Single Judge sought to be assailed before us. Consequently, the appeal and the connected applications stand dismissed. There will be no order as to costs.

44. Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties on compliance of all necessary formalities.

I agree.

(Arijit Banerjee, J.)

(Rai Chattopadhyay, J.)