

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO.426 OF 2024

Keller Ground Engineering
India Private Limited

...Petitioner

Versus

Archon Powerinfra India Pvt. Ltd. & Ors.

...Respondents

WITH

COMMERCIAL ARBITRATION APPLICATION NO.227 OF 2024

Keller Ground Engineering
India Private Limited

...Petitioner

Versus

Archon Powerinfra India Pvt. Ltd. & Ors.

...Respondents

Mr. Shyam Kapadia *a/w. Ravitej Chilumuri, Aishwarya Singh, Kanika Sharma i/b. Khaitan & Co., Advocate for Petitioner.*

Mr. Abhileen Chaturvedi *a/w. Mr. Mohit Prabhu, Mr. Sayyad Saqib Ali & Mr. Sparsh Khosia i/b. Cyril Amarchand Mangaldas, Advocate for Respondent No.1.*

Mr. Mahalakshmi Ganapathy *a/w. Rahul Dhawan, Tanmay Bhawe & Apoorv Bansal, Advocates for Respondent No.2.*

Mr. Chirag Modi, Counsel *a/w. Mr. Sunil Gangan i/b. RMG Law Associates, Advocates for Respondent No.3.*

CORAM: SOMASEKHAR SUNDARESAN, J.

DATE : JANUARY 23, 2025

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JANUARY 23, 2025

Aarti Palkar

(Corrected as per the Speaking to the Minutes of Order dated February 11, 2025.)

ORAL JUDGEMENT (*Per Somasekhar Sundaresan J*):

The Petitions:

1. Commercial Arbitration Petition No.426 of 2024 (“**Section 9 Petition**”) is filed under Section 9 of the Arbitration and Conciliation Act, 1996 (“**the Act**”) seeking various interlocutory reliefs in connection with disputes and differences said to have arisen between Keller Ground Engineering India Private Limited, the Petitioner (“**Keller**”) on the one hand, and Arcon Powerinfra India Pvt. Ltd., Respondent No.1 and Chhabra’s Associates, Respondent No. 2 (“**Contesting Respondents**”).

2. Indian Oil Corporation Limited (“**Indian Oil**”) has been added as Respondent No.3 in the Section 9 Petition since the interlocutory relief to preserve the subject property underlying the arbitration proceedings, required issuance of directions to Indian Oil.

3. Commercial Arbitration Application No.227 of 2024 (“**Section 11 Petition**”) seeks reference of disputes and differences between Keller and the Contesting Respondents to an arbitral tribunal, in accordance with the arbitration agreement between the parties, in exercise of powers under Section 11 of the Act.

Factual Matrix – Two Work Orders:

4. The facts relating to the existence of the arbitration agreement in this case are a bit piquant. Indian Oil gave a work order to Respondent No.2, and Respondent No.2 sub-contracted it with Keller. Thereafter,

the parties agreed that Respondent No.2 would commission the work to Respondent No.1, which would then sub-contract it to Keller – all for the very same work.

5. Respondent No. 2 and Keller executed a Work Order dated October 30, 2019, which is contained at Page No.102 of the Section 11 Petition. The arbitration agreement in that Work Order is contained at Page No.109 of the Section 11 Petition. Another Work Order pertaining to the very same work and activity was subsequently executed between Respondent No. 1 and Keller on November 15, 2019. The arbitration agreement in that Work Order is contained at Page 160 of the Section 11 Petition.

6. In the interest of brevity, the arbitration agreement contained in each Work Order is not extracted here. Suffice it to say that Mumbai is stated to be the agreed venue of arbitration.

Respondents' Objections – Territorial Jurisdiction:

7. The reference to Mumbai, in fact, lies at the heart of dealing with the issue raised by the contesting Respondents. To begin with, Mr. Abhileen Chaturvedi, Learned Counsel for Respondent No.1 submits that nothing in the activity envisaged in the Work Orders has been carried out in the State of Maharashtra. Merely because the arbitration clause refers to Mumbai as the venue of arbitration, he would submit, it would not follow that this Court has jurisdiction to exercise powers under Section 11 of the Act. Learned Counsel also submits that Respondent No.1 is not located in Mumbai and therefore, no part of the

cause of action claimed against this Contesting Respondent has arisen in Mumbai. Consequently, he submits, this Court will not have jurisdiction under Section 11 of the Act.

8. Ms. Mahalakshmi Ganapathy, Learned Counsel for Respondent No.2 submits that Respondent No.2 is not privy to the arbitration agreement contained in the Work Order dated November 15, 2019, under which the work is carried out. All the work is carried out for Respondent No.1 under the Work Order executed by that Contesting Respondent. Not having privity to the Work Order between Keller and Respondent No. 1, she submits, nothing has been done under the Work Order signed by Respondent No.2. Therefore, disputes and differences could only arise under the Work Order to which Respondent No. 2 is not a party. Learned Counsel insinuates that the Work Order executed by Respondent No.2 needs to be proved. According to her, the letterhead that has been annexed in the Affidavit-in-Reply filed by Respondent No.2 is different in design and some of the contents, from the letterhead on which the Work Order dated October 30, 2019 signed by Respondent No.2 as annexed in the Section 11 Petition.

9. In these circumstances, the Contesting Respondents submit that a case has not been made out for this Court to exercise powers under Section 11 of the Act to refer parties to arbitration.

Analysis and Findings:

10. Having heard the parties at significant length, it is clear that the core issue that has been raised for consideration is whether this Court

has jurisdiction under Section 11 of the Act. The main objection is based on territorial jurisdiction purportedly being absent. The secondary objection is on privity of contract to the arbitration agreement governing the contract under which the agreed activity is carried out.

11. On the face of it, each Work Order contains an arbitration clause and the venue of arbitration is Mumbai. Consequently, in my opinion, based on well-settled law, this issue ought not to detain any further attention of this Court despite the copious pleadings. Evidently, the parties, exercising their autonomous choice, have opted for Mumbai as the venue for the arbitration, thereby attracting the jurisdiction of this Court under Section 11.

12. The Work Order executed by Respondent No. 2 is on a letterhead that contains much of the same particulars, including the physical address, the email address and the name of Respondent No. 2, and therefore, the contention that Keller must prove in the Section 11 Court that this is a valid document does not lend itself to acceptance. This is an issue of merits that ought to be raised before the Arbitral Tribunal and not the Section 11 Court. Whether the work carried out can be attributed to only one Work Order or to both as a continuum, is also a matter of merits that would need evidence to be examined, which only the Arbitral Tribunal is entitled to delve into.

13. It would be appropriate to deal with the specific legal submissions of Respondent No.1 on which the objections to territorial

jurisdiction have been raised. According to the Learned Counsel for Respondent No.1, pursuant to a decision of the Supreme Court in ***Ravi Ranjan Developers***¹, it is clear that this Court need not be the forum to which the Section 11 Petition must be presented. He would seek to rely on Paragraphs 26 to 28 of ***Ravi Ranjan Developers***, which, for felicity, is extracted below:-

26. Of course, under Section 11(6), an application for appointment of an Arbitrator necessarily has to be moved in the High Court, irrespective of whether the High Court has the jurisdiction to decide a suit in respect of the subject matter of arbitration and irrespective of whether the High Court at all has original jurisdiction to entertain and decide suits. As such, the definition of Court in Section 2(1)(e) of the A&C Act would not be applicable in the case of a High Court exercising jurisdiction under Section 11(6) of the A&C Act to appoint an Arbitrator/Arbitral Tribunal.

27. At the same time, an application under Section 11(6) of the A&C Act for appointment of an Arbitrator/Arbitral Tribunal cannot be moved in any High Court in India, irrespective of its territorial jurisdiction. Section 11(6) of the A&C Act has to be harmoniously read with Section 2(1)(e) of the A&C Act and construed to mean, a High Court which exercises superintendence/supervisory jurisdiction over a Court within the meaning of Section 2(1)(e) of the A&C Act.

28. It could never have been the intention of Section 11(6) of the A&C Act that arbitration proceedings should be initiated in any High Court in India, irrespective of whether the Respondent resided or carried on business within the jurisdiction of that High Court, and irrespective of whether any part of the cause of action arose within the jurisdiction of that Court, to put an opponent at a disadvantage and steal a march over the opponent.

[Emphasis Supplied]

14. Learned Counsel for Respondent No.1 would also submit that a Learned Single Judge of this Court, exercising jurisdiction under

¹ *Ravi Ranjan Developers (P) Ltd. Vs. Aditya Kumar Chatterjee*, 2022 SCC OnLine SC 568

Section 11, had in the case of ***Hyundai Construction***², sent the parties to the Calcutta High Court instead of exercising powers under Section 11 to appoint an arbitrator. In particular, he would rely on Paragraph 8 in the said decision, which, for felicity, is extracted below :-

8. *Since the Kolkata High Court is already the first Court having exercised jurisdiction over the arbitral proceedings, all subsequent applications shall be made in that Court and no other Court. Furthermore, the Supreme Court in its decision in the matter of Ravi Ranjan Developers Private Limited v. Aditya Kumar Chatterjee has held that an application under Section 11 of the Act for appointment of an arbitrator cannot be moved in any High Court in India, irrespective of its territorial jurisdiction. Section 11(6) of the Act has to be harmoniously read with Section 2(1)(e) of the Act and it is never the intention of Section 11(6) that arbitration proceedings should be initiated in any High Court in India, irrespective of whether the Respondent resided or carried on business within the jurisdiction of that High Court, and irrespective of whether any part of cause of action arose within the jurisdiction of that Court. The reliance of Mr. Wable on the venue of arbitration is of no consequence in view of settled legal position. The agreements have been executed in Kolkata and the Respondent has place of business in Kolkata. On an enquiry by the Court, Mr. Wable has specifically stated that the area of operation of the agreements was within Kolkata. Thus, in terms of Section 2(1)(e) of the Act, no suit could have been filed in any Court over which the Bombay High Court exercises jurisdiction as no part of the cause of action has arisen within the territorial jurisdiction of the Bombay High Court.*

[Emphasis Supplied]

15. I am afraid neither of these judgments would turn the needle in favour of the argument canvassed on behalf of Respondent No.1. The approach to this Court has not been on the premise of going to “***any***” High Court, but to a High Court that has jurisdiction over the seat of the arbitration.

² *Hyundai Construction Equipment India (P) Ltd. Vs. Saumya Mining Ltd. 2024 SCC OnLine Bom 65*

16. To begin with, Paragraph 26 in ***Ravi Ranjan Developers*** is explicit in its terms, stating that indeed under Section 11 of the Act, the High Court, which may not have territorial jurisdiction to try a suit on the same cause of action in a suit, would be the court with jurisdiction under Section 11 to appoint an arbitrator.

17. The factual matrix in which the Supreme Court rendered judgement in ***Ravi Ranjan Developers*** points to the basis for such view having been taken while dealing with a Section 11 Petition. In that case, the agreement was a development agreement for development of property in Muzaffarpur, Bihar. The parties had not agreed on jurisdiction of courts in a particular location as having jurisdiction, but had agreed that Kolkata would be the venue of arbitration. Seeking interim protection under Section 9, one of parties had approached the District Court in Muzaffarpur for interim relief. Thereafter, the Calcutta High Court was approached under Section 11, and that court exercised jurisdiction to appoint an arbitrator. The Supreme Court ruled that the parties did not confer exclusive jurisdiction on any court, and in view of Section 42 of the Act, the Calcutta High Court not having been the court first approached, it was wrong in exercising jurisdiction under Section 11 of the Act.

18. I do not think it necessary to burden this judgment with further analysis of ***Ravi Ranjan Developers***, particularly when the issue turned on more than one court having had jurisdiction and one of them having been approached first. In any case, ***Ravi Ranjan Developers*** has been

dealt with by a judgment of a Learned Single Judge of this Court, to which I shall advert shortly.

19. As regards the judgment in ***Hyundai Construction***, in the facts of that case, the Calcutta High Court had been approached in the first instance under Section 9 of the Act, and this Court, again on the basis of Section 42 of the Act refused to exercise jurisdiction.

20. Section 42 of the Act ordains that the Court that has been first approached under the Act would be the Court that would have to be approached for all subsequent motions pursuant to the Act. This is the pivotal principle on which both the aforesaid judgements were rendered. In the matter at hand, it is common ground that no court has already been approached under the Act.

21. Instead, the decision of the Supreme Court in the case of ***B.G.S. Soma***³, cited by Mr. Shyam Kapadia, Learned Counsel for Keller, would be instructive in determining the issue raised by Learned Counsel for Respondent No.1. In particular, Paragraphs 61 and 82, which speak for themselves, may be fruitfully extracted, as below:-

61. It will thus be seen that wherever there is an express designation of a “venue”, and no designation of any alternative place as the “seat”, combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding.

82. On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of

³ *BGS SGS SOMA JV Vs. NHPC*, (2020) 4 SCC 234

arbitration in an arbitration clause as being the “venue” of the arbitration proceedings, the expression “arbitration proceedings” would make it clear that the “venue” is really the “seat” of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as “tribunals are to meet or have witnesses, experts or the parties” where only hearings are to take place in the “venue”, which may lead to the conclusion, other things being equal, that the venue so stated is not the “seat” of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings “shall be held” at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a “venue” and not the “seat” of the arbitral proceedings, would then conclusively show that such a clause designates a “seat” of the arbitral proceedings. In an international context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that “the venue”, so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the “stated venue”, which then becomes the “seat” for the purposes of arbitration.

[Emphasis Supplied]

22. Applying the aforesaid principle – that the seat and venue are synonymous absent any indicia to the contrary – to the facts of this case, the venue of the arbitration under each Work Order evidently being Mumbai, the seat of the arbitration would necessarily be in Mumbai. There is nothing in the Work Orders to show that the parties had exercised an autonomous view about courts in some other place having jurisdiction to displace the presumption of Mumbai as the venue, also being the seat of arbitration, thereby giving this Court jurisdiction under Section 11 of the Act.

23. As rightly submitted by Learned Counsel for Keller, the decision in *BGS Soma* and *Ravi Ranjan Developers* came up for consideration before a Learned Single Judge of this Court, in the case of *Honey Bee Multitrading*⁴, which dealt with issues very similar to what is in issue in these proceedings. I am in respectful agreement with the analysis contained in *Honey Bee Multitrading*. The following extracts from *Honey Bee Multitrading* would be self explanatory:-

90. This background was appreciated positively by holding that Section 42 of the Act of 1996 is mandatory. The counsel for the respondent pressed into service the decision of *Indus Mobile Distribution Private Limited* (supra) and *BGS SGS Soma JV* (supra), in support of his submission that the seat of arbitration confers a exclusive jurisdiction clause and the arguments advanced were dealt with by recording that the decision in the case of *Indus Mobile Distribution Private Limited* (supra) as well as *BALCO* (supra) was in context of section 2(2) of the Act of 1996 and the Constitution Bench decided upon whether Part-I of the Act of 1996 applied to arbitrations, where the place of arbitration was outside India. The judgment in the case of *BGS SGS Soma JV* (supra) was also held to be rendered in context of Section 2(2) of the Act of 1996 and the applicability of Part-I of the Act to an international commercial arbitration, where the seat of arbitration was not India. *Hardy Exploration* (supra) was relied upon for the proposition that the 'seat of arbitration' and 'place of arbitration' has different connotations. The ultimate conclusion derived is that it was not the intention of the parties that Kolkata should be the seat of arbitration, but it was only intended to be venue for arbitration sittings.

91. The aforesaid observations in *Ravi Ranjan* (supra) are in the peculiar facts of the case, where Section 42 was pressed into service and Their Lordships focused upon the intention of the parties to the effect that Kolkata would not be the seat of arbitration, but was intended to be venue.

94. By applying the principle enunciated by the Constitution Bench in the case of *BALCO* (supra), which is re-affirmed in *BGS SGS Soma JV* (supra), in case of domestic arbitration when the venue of

⁴ *Honey Bee Multitrading (P) Ltd. Vs. Ruchi Soya Industries Ltd.* 2023 SCC OnLine Bom 652

arbitration is decided to be Mumbai, without reference to the seat of arbitration, the Court in Mumbai would be the competent Court to exercise jurisdiction over the proceedings and Section 2(1)(e), which provide for jurisdiction of the subject-matter of a suit, will not be a determinative factor in ascertaining the Court, which would exercise the jurisdiction as regards the appointment of the Arbitrator under Section 11.

[Emphasis Supplied]

24. Having had to burden this order with copious extracts of various judgments, it would be useful to summarize the position adjudicated by this Court in the facts of the instant case, applying the principles obtaining from the cases discussed so far.

25. Under Section 11(6A) of the Act, this Court is required to confine the scope of its review to the existence of an arbitration agreement. It is evident that an arbitration agreement is in existence between Keller and each of the two Contesting Respondents. Each arbitration agreement stipulates Mumbai as the agreed venue of arbitration. Neither is any other *indicia* present to displace Mumbai as the seat of arbitration, nor has any other court been approached for relief under Section 9, to press Section 42 into service to displace the jurisdiction of this Court under Section 11. In the Section 9 Petition, this very Court has already provided certain interlocutory reliefs by an order dated June 19, 2024 – essentially, a direction to withhold pay-outs due from Indian Oil to the Contesting Respondents. This order has not been carried higher in challenge by any of the Contesting Respondents on the ground that this Court did not have jurisdiction. Therefore, applying Section 42 of the Act, the Contesting Respondents' contention that this Court does not have jurisdiction would stand repelled.

26. It would necessarily follow that this Court, having jurisdiction over Mumbai, which is the agreed seat and venue of arbitration, is the High Court vested with jurisdiction to deal with the Section 11 Petition. Since the existence of the arbitration agreement is self-evident, with the parties' express intention to anchor their arbitration at Mumbai, there is no basis to sustain Respondent No. 1's objection on the ground of territorial jurisdiction.

27. Once the aforesaid position is reached, the necessary corollary is that all facets of merits, including as to whether two Work Orders could govern one activity, and the implications of this factual position for the respective Contesting Respondents, and how to reconcile any dichotomy in contractual relationships between the parties, are all matters of merits that fall squarely in the domain of the arbitral tribunal. Therefore, it would also be inappropriate for this Court to comment on any such facet of the matter.

28. The decision in this judgment is to make a composite reference – one under each Work Order dated October 30, 2019 (between Keller and Respondent No.2), and Work Order dated November 15, 2019 (between Keller and Respondent No. 1) – to arbitration by the Arbitral Tribunal appointed hereby. Learned Counsel for Keller submits that the work activity carried out was initially meant to be carried out for Respondent No.2. Subsequently, the parties agreed that Respondent No. 1 would be the instrumentality of the Contesting Respondents that would be well placed to carry on the actual activity. Therefore, an

identical work-order came to be executed by Respondent No.1. He would submit that this would explain the existence of two work-orders. These are all matters of merits to be dealt with by the Arbitral Tribunal. It is for that forum to consider whether contemporaneous instruments are or logically and reasonably inter-connected and whether they evidence the flow of rights between the parties, and whether the existence of two instruments would pose an impediment to adjudicated by arbitration against one of the parties.

29. It would be inappropriate and inadmissible for this Court to delve into such facets of merits of the matter, now that the Supreme Court has made it abundantly clear that the Section 11 Court must restrict itself to examining the formal existence of an arbitration agreement, leaving existential questions about the substance of the agreement to the Arbitral Tribunal, which is empowered under Section 16 to deal with its own jurisdiction. The march of the law in relation to the permissible level of intervention by the Section 11 Court and the movement in the legal position on the scope of intervention, is best summarised by the Supreme Court, in Paragraph 65 in ***Patef***, which is not being repeated here, to avoid prolixity.

Section 9 Petition:

30. With the aforesaid observations, the Section 9 Petition is hereby ***finally disposed of*** in the following terms:-

⁵ *Ajay Patel & Ors. vs. Jyotindra Patel & Ors. – (2024) SCC OnLine SC 2597*

a] The protection already granted under Section 9 of the Act on June 19, 2024, shall continue to operate until the Arbitral Tribunal is seized of the proceedings referred to it hereby, and until it takes a decision on whether to continue, vary, alter, augment or vacate such protection in exercise of powers conferred on it under Section 17 of the Act;

b] Indian Oil shall continue to comply with the directions issued to it by this Court on June 19, 2024 in exercise of its protective powers under Section 9 of the Act;

c] The Contesting Respondents are at liberty to apply to the Arbitral Tribunal for such moulding and modification of the interim reliefs granted on June 19, 2024. In particular, Learned Counsel for the Contesting Respondents submit that the amounts withheld by Indian Oil now exceed the amounts that can be claimed by the Petitioner. This is a submission to be made before the Arbitral Tribunal. The Arbitral Tribunal shall deal with all these facets when presented with material relevant to such decision, when exercising its jurisdiction under Section 17 of the Act.

Section 11 Petition:

31. Learned Counsel for each of the Contesting Respondents, on instructions, states that without prejudice to all that they have contended before me, and without eroding their right to agitate issues or jurisdiction of the Arbitral Tribunal under Section 16 of the Act, purely as a matter of ensuring economy of scales and efficiency, the arbitration may be conducted by a Sole Arbitrator. Learned Counsel for the Petitioner joins in this request. Since each of the Contesting

Respondents has executed one arbitration agreement with the Petitioner, containing an identical arbitration agreement, exercising their autonomy, without prejudice to their contentions under Section 16 of the Act, they are entitled to agree with Keller that the arbitration may be carried out by a Sole Arbitrator instead of a multi-member Arbitral Tribunal.

32. In these circumstances, the Section 11 Petition is *finally disposed of* in the following terms:

- a] Justice (Retd.) J.P. Devadhar, former judge of this Court (email ID: jpdevadhar@gmail.com) is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the two Work Orders referred to above;
- b] A copy of this judgment will be communicated to the Learned Sole Arbitrator by the Advocates for Keller within a period of one week from the date this judgment is uploaded on the official website of this Court, under intimation to the Advocates for Contesting Respondents;
- c] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties;
- d] The parties shall appear before the Arbitral Tribunal on such date and at such place as indicated by the Learned Sole Arbitrator, to obtain appropriate directions with regard to conduct of the arbitration.

33. It is made clear that nothing in this judgment is an expression of an opinion on merits of the case, and nothing contained herein shall preclude the parties from raising such contentions as are available to them in law, in particular, the Act.

34. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]