

**(2017) 03 KAR CK 0254**  
**In the Karnataka High Court**  
**Case No : 88 of 2016**

M/S NAGARDAS KANJI SHAH

APPELLANT

Vs

MS. NAGARJUNA OIL CORPORATION LTD.

RESPONDENT

**Date of Decision :** 22-03-2017

**Acts Referred:**

[Arbitration and Conciliation Act, 1996](#), [Section 20](#), [Section 11](#), [Section 42](#), [Section 9](#), [Section 34](#), [Section 17](#)

**Citation :** (2017) 03 KAR CK 0254

**Hon'ble Judges :** A S Bopanna

**Bench :** SINGLE BENCH

**Advocate :** V V GUNJAL, NANDA KUMAR C K

## **Judgement**

1. The petitioner is before this Court in this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the Act" for short) seeking that a sole Arbitrator be appointed to adjudicate the dispute and differences between the petitioner and the respondent in terms of Clause 23.1 of the purchase order dated 02.11.2010 at Annexure-A.

2. The petitioner and the respondent have entered into a business transaction whereunder the petitioner was to supply seamless pipes during the period 22.10.2010 to 20.09.2011. The petitioner in that regard claims to have supplied pipes worth Rs.9,11,23,274/- and the respondent have paid only a sum of Rs.4,43,74,186/-. In that view, the petitioner claims that the balance of Rs.4,77,49,088/- is to be paid by the respondent and since the repeated correspondence has not borne any fruit, the dispute between the parties is to be resolved through arbitration as contained in clause 23 of the purchase order. Invoking the said clause the petitioner is seeking that an Arbitrator be appointed to resolve the dispute between the parties.

3. The respondent have filed their objections to the petition. Though with regard

to the claim relating to the payment, contention has been raised with regard to the payments already made and also that the claim is barred by limitation, the respondents have also raised preliminary objection with regard to the territorial jurisdiction of this Court to entertain this petition under Section 11 of the Act. In that regard it is contended that the project relating to which the disputes have arisen is situate at Cuddalore in Tamil Nadu and the supplies have been made at that place. In that view the cause of action for the claim has arisen at Chennai or it can be at Mumbai where the suit had been filed. It is contended that the cause of action in any event has not arisen within the jurisdiction of this Court and as such the instant petition is not maintainable. The arbitration agreement no doubt provides for the arbitration proceedings to be held at Bengaluru but that does not give the jurisdiction to this Court as the term "Court" for the purpose of Section 11 of the Act is as contained in Section 2(1)(e) of the Act to mean the Court having jurisdiction to entertain and try a suit. In that view, it is contended that in the absence of the arbitration clause if this Court could not have entertained a suit, a petition under Section 11 to appoint an Arbitrator also cannot be entertained.

4. Since a contention with regard to the maintainability of this petition is urged, that aspect of the matter is taken for consideration at the outset. From the contentions as raised in this petition, it is evident that the existence of the arbitration agreement between the parties is not in dispute. The transaction between the parties having fallen in rough weather and certain disputes having arisen between the parties also cannot be in dispute for the reason that the petitioner herein had filed a suit before the Court having jurisdiction at Mumbai. In the said suit the respondent herein moved a notice of motion seeking dismissal of the suit as the parties are governed by the arbitration agreement and the motion was allowed.

5. It is in that context, the petitioner herein who was the plaintiff in that suit has filed this petition under Section 11 of the Act. The petition is filed before this Court since the arbitration agreement provides that the seat of arbitration shall be at Bengaluru. Except that, the fact that the cause of action has not arisen within the jurisdiction of this Court does not appear to be in dispute. Hence the issue is, keeping in view Sections 2(1)(e), 11, 20 and 42 of the Act whether a petition under Section 11 of the Act for appointment of an Arbitrator can be entertained in a Court within whose jurisdiction, no part of the cause of action has arisen but the place agreed between the parties for the seat of the Arbitration is within the territorial jurisdiction of such Court, as in the instant case. Hence all that is necessary is to take note of the decisions relied upon by the learned counsel for the parties to buttress their respective contentions and analyse the same.

6. The learned counsel for the petitioner has relied on the following decisions;

(i) The case of Bharat Aluminium Company -vs- Kaiser Aluminium Technical Services Inc. and others [(2012) 9 SCC 552] wherein a consideration is made as

follows, "96. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

"2. Definitions- (1) In this Part, unless the context otherwise requires -

(a)-(d)

(e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

We are of the opinion, the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.

97. The definition of Section 2(1)(e) includes "subject matter of the arbitration" to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist. On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term "court" as a court having jurisdiction over the subject-matter of

the award. This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India."

(emphasis supplied)

(ii) The case of NHPC Limited -vs- Hindustan Construction Company Ltd. ( FAO(OS) 131/2015 & CM 5309/2015 dated 28.05.2015) wherein the Division Bench of the High Court of Delhi while considering the petitions under Sections 9 and 34 of the Act, by relying on the decision in BALCO (supra) has held the petitions to be maintainable though Delhi was the place of arbitration agreed to between the parties and no part of the cause of action had arisen therein.

(iii) The case of M/s. Overseas Mobiles Pvt. Ltd. - vs- M/s. ZTE Telecom India Pvt. Ltd. (Arb. P. No. 375/2015 dated 08.03.2016) wherein the learned Judge of the High Court of Delhi while considering a petition under Section 11(6) of the Act, though had referred to similar contentions had taken note of the above referred decisions holding the petition to be maintainable also due to the fact that subject matter of the arbitration was also in New Delhi as a number of events happened in New Delhi.

7. The learned counsel for the respondent on the other hand, on distinguishing the above decisions as not being applicable to the proceedings under Section 11 of the Act, but only a supervisory jurisdiction after the arbitration has commenced, has in that regard relied on the following decisions:

(i) The case of SBP & Co. -vs- Patel Engineering Ltd. and another [(2005) 8 SCC 618] wherein it is held as hereunder:

"39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and

the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

(ii) The case of Swastik Gases Private Limited

-vs- Indian Oil Corporation Limited [(2013) 9 SCC 32] wherein while considering the issue relating to the territorial jurisdiction for entertaining a petition under Section 11 of the Act, the test for deciding such question was laid down as hereunder:

"28. Section 11(12)(b) of the 1996 Act provides that where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an arbitration other than the international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the Principal Civil Court referred to in Section 2(1)(e) is situate, and where the High Court itself is the court referred to in clause (e) of sub-section (1) of Section 2, to the Chief Justice of that High Court. Clause (e) of sub-section (1) of Section 2 defines "Court" which means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

29. When it comes to the question of territorial jurisdiction relating to the application under Section 11, besides the above legislative provisions, Section 20 of the Code is relevant. Section 20 of the Code states that subject to the limitations provided in Sections 15 to 19, every suit shall be instituted in a Court within the local limits of whose jurisdiction:

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

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

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

(emphasis supplied)

(iii) The case of State of West Bengal and others -vs- Associated Contractors

[(2015) 1 SCC 32] wherein while considering the entire conspectus with reference to Sections 2(1)(e), 8, 9, 11, 34 and 42 of the Act has among others, held as hereunder:

"17. That the Chief Justice does not represent the High Court or Supreme Court as the case may be is also clear from Section 11(10):

"11.(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section(5) or sub-section (6) to him."

The scheme referred to in this sub-section is a scheme by which the Chief Justice may provide for the procedure to be followed in cases dealt with by him under Section 11. This again shows that it is not the High Court or the Supreme Court Rules that are to be followed but a separate set of rules made by the Chief Justice for the purposes of Section 11. Sub-section (12) of Section 11 reads as follows:

"11.(12)(a) Where the matters referred to in sub- sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those subsections shall be construed as a reference to the ""Chief Justice of India"".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause

(e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court."

It is obvious that Section 11(12)(b) was necessitated in order that it be clear that the Chief Justice of "the High Court" will only be such Chief Justice within whose local limits the Principal Civil Court referred to in Section 2(1)(e) is situate and the Chief Justice of that High Court which is referred to in the inclusive part of the definition contained in Section 2(1) (e). This sub-section also does not in any manner make the Chief Justice or his designate "court" for the purpose of Section 42. Again, the decision of the Chief Justice or his designate, not being the decision of the Supreme Court or the High Court, as the case may be, has no precedential value being a decision of a judicial authority which is not a Court of Record.

18. In contrast with applications moved under Section 8 and 11 of the Act, applications moved under Section 9 are to the "court" as defined for the passing of interim orders before or during arbitral proceedings or at any time after the making of the arbitral Award but before its enforcement. In case an application is made, as has been made in the present case, before a particular court, Section 42 will apply to preclude the making of all subsequent applications under Part-I to any court except the court to which an application has been made under

Section 9 of the Act."

8. A perusal of the decisions cited supra and a cumulative analysis of the same will indicate that the issue relating to the maintainability of a petition with reference to the territorial jurisdiction under any one of the provisions referred above viz., Sections 8, 9, 34 and 37 of the Act, including a petition under Section 11 of the Act at a place where the cause of action or a part of the cause of action has arisen and if the parties have also agreed that such place itself will be the seat of arbitration, the same will not admit of any controversy and the petition or appeal will be maintainable. Insofar as the petitions or appeals under Sections 9, 34 and 37 of the Act respectively, the Court within whose territorial jurisdiction the seat of arbitration is agreed between the parties as provided under Section 20 of the Act will have supervisory control over the arbitration proceedings though no part of the cause of action relating to the subject matter has arisen within its jurisdiction.

9. However, the position will be different in respect of a petition to be filed under Section 11 of the Act seeking appointment of an Arbitrator. The consideration of such petition will have to be made on various aspects by the Hon'ble Chief Justice or his designate as held in the case of Patel Engineering Ltd. (supra). Therefore, until the petition under Section 11 of the Act is allowed, the Arbitrator is appointed and the Arbitrator so appointed enters reference, the "subject matter of Arbitration" as enunciated in the case of Bharat Aluminium Company (supra) will not come into existence and the question of exercising supervisory jurisdiction will not arise. It is only after the subject matter of the arbitration comes into existence and the arbitration proceeding commences or proposes to commence the supervisory control over such proceedings would arise. In such circumstance, the proceedings under Sections 9, 34 and 37 of the Act, will arise and all proceedings relating to arbitration will be maintainable before the Court at the place where it is only the seat of arbitration. If the same principle is made applicable to the proceedings under Section 11 of the Act, it will amount to the situation of putting the cart before the horse since that Court will not have territorial jurisdiction before an Arbitrator is appointed as such proceeding will be an original proceeding. The crucial test therefore to determine whether there is territorial jurisdiction for a Court to entertain a petition under Section 11 of the Act is the same as determining whether there will be territorial jurisdiction to entertain a civil suit based on the place of cause of action as on the date of the petition. If a civil suit is not maintainable based on such test, a petition under Section 11 of the Act also will not be maintainable.

10. If the above test is applied to the instant facts of the case, neither the subject matter of the suit nor the subject matter of the arbitration is within the jurisdiction of this Court as on the date of this petition. Hence, this Court has no territorial jurisdiction to entertain this petition. The petitioner will have to avail the remedy by filing the petition either in Mumbai or Chennai. If that Court considers all aspects and if the Arbitrator is appointed, thereafter the exercise of

supervisory control will arise.

The petition is accordingly disposed of, reserving the liberty to the petitioner to approach the Court having jurisdiction. No order as to costs.

Registry is directed to return the papers if any sought for by the learned counsel for the petitioner.