

(2012) 08 BOM CK 0135

In the Bombay High Court

Case No : Appeal Under Arbitration Act No. 8 of 2011 and Application for Appointment of Arbitrator No. 14 of 2011

M/s Shree Mallikarjun Shipping Pvt. Ltd.

APPELLANT

Vs

M/s Balaji Logistics Carriers
 M/s Shree Mallikarjun Shipping Pvt. Ltd. Vs M/s Balaji Logistic Carrier, Near Jod Kere, Yellapur

RESPONDENT

Date of Decision : 17-08-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 19, 2(1)(e), 20, 42
Civil Procedure Code, 1908 (CPC) — Section 16, 17, 18, 19, 20

Citation : (2012) 08 BOM CK 0135

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : R.G. Ramani in Appeal Under Arbitration Act No. 8 of 2011 and Mr. N. Sardesai in application for appointment of Arbitrator No. 14 of 2011, for the Appellant; Y.V. Nadkarni, for the Respondent

Judgement

A.P. Lavande, J.—In both these matters the parties are the same and the issues are interconnected. Therefore, both the matters are taken up and being disposed of by common judgment. Heard the learned Counsel for the parties.

2. By consent of the learned counsel for the parties, heard forthwith.

3. M/s Shree Mallikarjun Shipping Private Limited (hereinafter referred to as "the applicant") entered into a contract with M/s Balaji Logistic Carrier (hereinafter referred to as "the respondent") dated 25.2.2008 as the seller and the applicant as the buyer for 40000 M.T. of Iron ore of 63.50% Fe contents at Rs.4,500/- per DMT. Since certain dispute arose between the parties in connection with the said contract the applicant issued notice dated 22.12.2009 calling upon the respondent to refer the dispute to an arbitrator and to agree to arbitration by nominated arbitrator.

4. On 29.12.2009, the applicant filed an application being Arbitration Application

No. 20/2009 u/s 9 of the Arbitration and Conciliation Act, 1996 ("the Act" for short) in the Court of District Judge, South Goa, Margao against the respondent seeking interim reliefs. By order dated 10.3.2011, learned District Judge allowed the application against which the respondent preferred an appeal in this court being Appeal under Arbitration Act no. 3/11. By order dated 7.7.2011, this Court set aside the order passed by the District Court and remanded the matter to the District Court to decide all the issues including issue of jurisdiction. Pursuant to the said remand order, the District Court passed order dated 29.8.2011 dismissing the application filed by the applicant on the ground that it had no jurisdiction to entertain the application. Appeal under Arbitration Act No. 8/11 has been filed by the applicant challenging the said order.

5. The applicant has also filed an application u/s 11 of the Act for appointment of Advocate Mr. M. S. Khandeparkar as a sole arbitrator to adjudicate the disputes between the parties and in the alternative, for appointment of a retired Judge of this Court as an arbitrator.

6. Learned District Judge, South Goa, Margao placing reliance upon the judgment delivered by learned Single Judge of this Court in Kotak Mahindra Finance Ltd. Vs. T. Thomas Educational Trust A Charitable and Educational Trust and Others, held that District Court at Margao had no jurisdiction to entertain the application u/s 9 of the Act and consequently, dismissed the application.

7. Before enumerating the arguments advanced by the learned Counsel for the parties, it would be appropriate to quote Article 13 of the Contract dated 25.2.2008 which contains arbitral clause. The same reads as under:-

All disputes in connection with this contract and the execution thereof shall be settled by amicable negotiations and friendly discussions between both the parties. In case no settlement can be reached, the case under dispute shall be determined by arbitration in India, Place Goa in accordance with the provisional rules of procedure of the Indian Arbitration Act. The decision made by the Arbitrator(s) to be final and binding for both parties. The fee for arbitration shall be borne by losing party unless otherwise awarded by the Arbitrator (s).

8. Mr. Ramani, learned Counsel appearing for the applicant in the appeal, invited my attention to the purchase Contract dated 25.2.2008 and submitted that although learned Single Judge of this Court (F. I. Rebello, J) has taken a certain view in the case of Kotak Mahindra (supra), another Single Judge of Bombay High Court (Annop V. Mohta, J) has taken a different view in the unreported Judgment in the case of Tata Motors Finance Limited Vs. Bhagwan Das Auto Finance Ltd. and Another, and, therefore, the impugned order passed by District Court is liable to be set aside. The respondent having agreed to determine all the disputes by arbitration in Goa in accordance with Indian Arbitration Act, cannot now contend that District Judge at Margao has no jurisdiction to entertain the application u/s 9 of the Act. Learned Counsel further submitted that ratio of the judgment in the case of Tata Motors Finance Limited(supra) is squarely

applicable to the present case and, therefore, the view taken by learned District Judge on the aspect of jurisdiction, is unsustainable in law and, therefore, the impugned order is liable to be set aside. In support of his submissions, Mr. Ramani also placed reliance upon unreported Division Bench Judgment of Andhra Pradesh High Court in the case of M/s Jyothi Turbopower Services Pvt. Ltd Vs. M/s Shenzhen Shandong Nuclear Power Construction Company Ltd., in Civil Miscellaneous Appeal No. 980/2010.

9. Mr. Ramani further submitted that in any case part of the cause of action has arisen within the jurisdiction of District court at Margao inasmuch as the report of SGS India Private Ltd which is annexed to the appeal, clearly discloses that analysis of the ore was done in terms of the contract by SGS India Pvt. Ltd situated at Vasco-da-gama and therefore, the District Court at Margao has jurisdiction to entertain the application u/s 9 of the Act in view of the clauses/Articles of the Contract dated 25.2.2008. Mr. Ramani, placed reliance upon Articles 5, 6, 7, 9 and 13 of the Contract in support of his submission that the District Court at Margao had jurisdiction to entertain the application. According to the learned counsel, the view taken by Justice Rebello in the case of Kotak Mahindra (supra), is not the correct view in view of the provisions of the Act, more particularly Section 2(1) (e), 9, 19, 20 and 42 of the Act. Learned Counsel reiterated that since Fe contents of the ore was below 63% in terms of the analysis carried out by SGS India Private Ltd at Vasco-da-Gama, the applicant was not bound to accept the ore and as such a part of cause of action has arisen within the jurisdiction of the District Court at Margao and therefore the District Court has jurisdiction to entertain the application. On the aspect of jurisdiction, reliance has also been placed on the judgment of Judicial Commissioner's Court in the case of Louis Dreyfus and Co. Vs. Araromal Shivdayal reported in 1909(4) IC 151.

10. Mr. N. Sardessai, learned counsel appearing for the applicant in the application for appointment of an arbitrator, adopted the arguments advanced by Mr. Ramani and further submitted that the view taken by learned Single Judge in the case of Kotak Mahindra (Supra) is not the correct view and the same has been taken without taking into consideration several provisions of the Act. Mr. Sardessai further submitted that parties are free to agree to a particular place for arbitration irrespective of the fact that no part of cause of action has arisen within the jurisdiction of Court at that place. Mr. Sardessai further submitted that for the purpose of entertaining the application upon jurisdiction of Arbitration, emphasis should be on the subject matter and not on the cause of action for the purpose of deciding jurisdiction in arbitration matters. Mr. Sardessai further submitted that under Arbitration Act, 1940 provisions of CPC were made applicable whereas such provisions are conspicuously absent in the Arbitration and Conciliation Act, 1996. According to learned Counsel, legislature in its wisdom has not used the words "cause of action" in Section 9 of the Act and, therefore, the concept of cause of action is foreign to the arbitration proceedings under the Act and the parties are free to agree to a place for the purpose of

arbitration proceedings irrespective of the fact that whether the cause of action has arisen within the jurisdiction of that place. Mr. Sardesai, therefore, submitted that this Court has jurisdiction to appoint an arbitrator in view of Article 13 of the Contract dated 25.2.2008 and an arbitrator be appointed for resolving the dispute between the parties.

11. Per contra, Mr. Nadkarni, learned Counsel for the respondent submitted that the view taken by the learned District Court by placing reliance upon the view taken in Kotak Mahindra (supra), cannot be faulted. According to learned Counsel, the view taken by learned Single Judge in the case of Kotak Mahindra (Supra) being the view taken in consonance with the Act, no fault can be found with the learned District Judge in rejecting the application on the ground of jurisdiction. Learned Counsel further submitted that there is no conflict between the view taken in the case of Kotak Mahindra and Tata Motors Finance (supra) and as such, reference to third judge or a Larger Bench is not warranted. Learned counsel further submitted that although Article 13 of the Contract provides that disputes shall be determined by arbitration in Goa in accordance with Indian Arbitration Act since no part of cause of action has arisen within the jurisdiction of the Court in Goa, the District Court at Margao had no jurisdiction to entertain the application u/s 9 of the Act. Learned Counsel further invited my attention to the paragraph 23 of the application filed by the applicant u/s 9 of the Act and submitted that the applicant had filed an application in the District Court at Margao solely on the ground that the parties accepted that the disputes were to be resolved by way of arbitration in Goa. Inviting my attention to the reply filed to the application u/s 9 of the Act, learned Counsel submitted that the respondent has specifically taken a plea that since the dispute has arisen within territorial jurisdiction at Ankola Taluka, Karnataka State, the District Court at Margao had no jurisdiction. Inviting my attention to the rejoinder filed by the applicant before the District Court, Mr. Nadkarni, submitted that the applicant has reiterated the stand taken by the applicant in the application on the aspect of jurisdiction and at no point of time submitted before the District court that it had jurisdiction to entertain the application on the ground that part of cause of action has arisen within the jurisdiction of this Court. Mr. Nadkarni, therefore, submitted that the new plea taken by the applicant regarding jurisdiction of District Court at Margao on the ground that part of cause of action has arisen within its jurisdiction, may not be entertained.

12. Mr. Nadkarni further submitted that the view taken by learned Single Judge in the case of Tata Motors Finance Ltd. (supra), is based upon clauses 23 and 24 of the Agreement between the parties and as such, it cannot be said that there is a conflict between the view taken by two Judges in the cases of Kotak Mahindra (supra) and Tata Motors Finances Ltd (supra) and as such, no reference is warranted to a Larger Bench.

13. Learned Counsel further submitted that the view taken by Andhra Pradesh High Court in the case of M/s Jyothi Turbopower Services Pvt. Ltd. runs counter

to the view taken by Full Bench Judgment of this Court in the case of Fountain Head Developers Vs. Mrs. Maria Arcangela Sequeira (since deceased through LRs.) and Others, , therefore, cannot be accepted and the view taken by the learned District Judge on the basis of the judgment passed by learned Single Judge in the case of Kotak Mahindra (supra), is the correct view. In support of his submissions, Mr. Nadkarni placed reliance upon following Judgments:-

1. Amrit Lal Madan and Another Vs. K.D. Ahuja and Others .
2. Jatinder Nath Vs. Chopra Land Developers (P) Ltd., reported in (2007) 11 SCC 453.
3. Alchemist Limited and Another Vs. State Bank of Sikkim and Others, .
- 4 GE Countrywide Consumer Financial Services Limited Vs. Surjit Singh Bhatia and Jaspal Kaur, .

14. Mr. Nadkarni, further submitted that in terms of the contract, the ore had to be delivered at Belekeri, Karnataka and on plain reading of the Articles of the Contract it cannot be said that the District Judge at Margao had jurisdiction to entertain the application u/s 9 of the Act. Learned Counsel further submitted that mere fact that the sampling/ analysis of the ore had to be done by SGS India Private Ltd at Vasco-da- Gama by itself would not give jurisdiction to District Court at Margao to entertain the application u/s 9 of the Act.

15. In rejoinder, Mr. Sardesai learned Counsel for the applicant submitted that the view taken by Full Bench of this Court in M/s Fountain Head Developers (supra), instead of supporting the respondent, supports the stand of the applicant and the provisions of Sections 16 to 20 of C.P.C. are not applicable in the present case and it is only the clause in the agreement which gives jurisdiction to the District Court at Margao.

16. Mr. Sardesai placed reliance upon the Judgment of the Apex Court in the case of Yograj Infrastructure Ltd. Vs. Ssang Yong Engineering and Construction Co. Ltd.,

17. I have carefully considered the rival submissions, perused the record and the judgments relied upon.

18. In view of the rival submissions, the following points arise for determination:-

1. Whether the learned District Judge was legally justified in holding that District Court at Margao had no jurisdiction by placing reliance upon the judgment of this Court in the case of Kotak Mahindra Finance Ltd. Vs. T. Thomas Educational Trust A Charitable and Educational Trust and Others,
2. Whether the District Court at Margao had jurisdiction to entertain the application filed by the applicant u/s 9 of the Act since part of cause of action had arisen within the jurisdiction of that Court?
3. Whether this Court has jurisdiction to entertain the application filed by the

applicant u/s 11 of the Act?

19. I propose to deal with point no. 2 first inasmuch as in the event the said point is decided in favour of the applicant, it would not be necessary to give finding on point no. 1.

20. Mr. Nadkarni, learned counsel for the respondent has submitted that the applicant ought not to be allowed to urge that part of cause of action has arisen within the jurisdiction of this Court inasmuch as such a point was neither pleaded nor argued before the District Court.

21. I am unable to accept the said submission of Mr. Nadkarni, inasmuch as the question of jurisdiction goes to the root of the matter and as such I deem it appropriate to permit the applicant to raise the issue of jurisdiction and propose to decide the same on merits. If the cause of action or part of cause of action thereof has arisen within the State of Goa, the District Court at Margao would have jurisdiction to entertain the application u/s 9 of the Act and this Court would have jurisdiction to entertain the application u/s 11 of the Act.

22. In order to appreciate the rival submissions it would be appropriate to quote relevant Articles of the Contract dated 25.2.2008 entered into between the parties upon which reliance has been placed by Mr. Ramani, learned Advocate on behalf of the applicant. The said Articles are 5, 6, 7, 9, 12 and 13. They read thus:-

Article 5: Payment Terms:

The Buyer shall release payment for every 10000Mt against receipt of analysis report from the appointed assayer. Assayer's result shall be basis for the payments. The sampling and analysis will be carried out by M/s SGA Or TCRC and the report will be accepted by both parties.

Article 6: Price Adjustment:

The Buyers have a right to reject the goods if Fe content is below 63.00% and all cost and consequences shall be to the Sellers account.

Article 7: Sampling and Analysis:

Shall be conducted by M/s SGS or TCRC for quality and quantity of the receiving point of Buyer at Buyer's cost for an overall view of quality offered. The Seller at their expenses may have their representatives present during such determination tests.

Article 9: Rejection(s):

If analysis result of sampling of material done at the time of delivery does not meet the contractual terms and specifications. Buyers shall reject such goods and sellers would have to take back the same at their cost and consequences. Buyer shall not be responsible for such goods after informing sellers of rejection.

Article 12:Taxes and Duties:

Taxes and duties levied on the material are included in the price, against Form H to be supplied by the Buyer.

Article 13: Arbitration:

All disputes in connection with this contract and the execution thereof shall be settled by amicable negotiations and friendly discussions between both the parties. In case no settlement can be reached, the case under dispute shall be determined by arbitration in India place Goa in accordance with the provisional rules of procedure of the Indian Arbitration Act. The decision made by the Arbitrator(s) to be final and binding for both parties. The fee for arbitration shall be borne by losing party unless otherwise awarded by the Arbitrator(s).

23. Article 5 inter alia provides that sampling and analysis will be carried out by M/s SGS or TCRC and report would have to be accepted by both the parties. There is no dispute that sampling and analysis was carried out by M/s SGS at Vasco-da-gama.

Article 6 inter alia provides that the buyers have right to reject the goods if Fe content is below 63%.

Article 7 provides that sampling and analysis must be conducted by M/s SGS Vasco-da-Gama for quality and quantity of the receiving point of buyer at buyer's cost for an overall view of quality offered. The sellers at their expenses may have their representatives present during such determination tests.

Article 9 entitles the buyer to reject the goods if analysis result of sampling of material done at the time of delivery does not meet contractual terms and specifications.

Article 13 inter alia provides that the disputes in connection with the contract and the execution thereof shall be determined by arbitration in India place Goa in accordance with the provisions and Rules of Indian Arbitration Act.

24. Upon a harmonious and conjoint reading of the above Articles entered into between the parties what emerges is that the applicant is entitled to reject the ore if Fe content is below 63%.

25. There is no dispute that sampling and analysis of the ore was done by M/s SGS at Vasco-da-Gama and the report prepared by M/s SGS which has been relied upon by the applicant discloses that out of 13218.400MT ore except 71.100MT Fe content was varying between 58.50 and 62.50. This being the position, it is evident that in terms of the contract the buyers have right to reject the goods which was in terms of Contract Act. The necessary sequitur is that a part of the cause of action has arisen at Vasco-da-Gama within the State of Goa.

26. In the case of Louis Dreyfus and Co. (supra), relied upon by Mr. Ramani, the Judicial Commissioner's Court held that Court at Karachi had jurisdiction to

entertain the suit to file an award based on the contract entered into outside Karachi, under which the goods purchased are examined and passed as to quality, weight, condition and admixture in Karachi.

27. In the case of A. B. C. Laminart Pvt. Ltd (Supra), the Apex Court held that the parties by agreement cannot exclude the jurisdiction of the Court but where more than one Court has jurisdiction the parties can agree that one Court to the exclusion of the other would have exclusive jurisdiction to entertain the matter.

28. Therefore, it is evident that a part of cause of action has arisen at Vasco-da-Gama and consequently Courts at Goa have jurisdiction to entertain the applications filed by the applicant under the Act. However, since the applicant has raised the point of jurisdiction on the basis of cause of action for the first time in this Court the applicant deserves to be saddled with costs inasmuch as the applicant ought to have taken such a point before District Court and in case such a point was taken surely the District Court was bound to answer the same one way or other while disposing the application u/s 9 of the Act.

29. In view of the finding that the Courts in Goa have the parties arising out of the Contract dated 25.2.2008, it is not necessary for me to give a finding on point no.1 and to rely upon the other judgments relied upon by the parties. Consequently point nos.2 and 3 are answered in favour of the applicant and it is held that the Courts in Goa have jurisdiction to entertain the application filed under the Act.

30. In so far as the reliefs sought by the applicant u/s 9 of the Act before District Court at Margao are concerned, both the parties have not made any submissions on merits. In any case since the District Court has dismissed the application filed u/s 9 of the Act on the ground that it has no jurisdiction to entertain the application it would be just and proper to remand the matter to the District Court to give a finding on merits as to whether the applicant is entitled to the reliefs sought u/s 9 of the Act. Ordinarily, an application seeking an interim relief has to be decided by the first Court and not by the appellate Court on the well settled principles governing grant or refusal of interim relief. Therefore, the impugned judgment and order dated 29.8.2011 passed by Principal District & Sessions Court, South Goa, Margao in Arbitration Application No.20 of 2009 holding that it has no jurisdiction to entertain the application, is liable to be set aside.

31. In the result therefore, the impugned judgment and order dated 29.8.2011 passed by Principal District & Sessions Court, South Goa, Margao in Arbitration Application No.20 of 2009 is quashed and set aside and the Principal District Judge, South Goa, Margao is directed to decide the application on merits. Parties shall appear before Principal District Court at Margao on 11th September, 2012 at 10.00 a.m. Learned Judge shall decide the application expeditiously in accordance with law.

32. In so far as the application for appointment of arbitration no. 14 of 2011 filed by the applicant is concerned, in view of the findings recorded that the Courts in

Goa have jurisdiction to entertain the application under the Act, Advocate Gurudas U. Bhobe, at Panaji, is appointed as arbitrator to resolve the dispute between the parties arising out of Contract dated 25.2.2008. Learned Arbitrator shall dispose of the arbitration expeditiously. Fees of the arbitrator shall be borne equally by the parties.

33. It is made clear that the findings given in the order are for the limited purpose of deciding the issue of jurisdiction of the Courts in Goa to entertain the application under the Act and the learned Arbitrator is expected to adjudicate the reference on its merits uninfluenced by the findings given in this order.

34. Appeal under Arbitration Act no.8 of 2011 and the application for appointment of Arbitrator no.14 of 2011 stand disposed of accordingly. Applicant shall pay costs of Rs.10,000/- (Rupees ten thousand only) to the respondent for the reasons stated in paragraph no. 29 above within a period of four weeks.