

(2009) 12 AP CK 0025

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 3670 of 2009

Salarjung Museum and Another

APPELLANT

Vs

Design Team Consultants Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 10-12-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 11, 15, 16, 19
Constitution of India, 1950 — Article 226, 227

Citation : (2010) 1 ALT 435

Hon'ble Judges : V.V.S. Rao, J;B.N. Rao Nalla, J

Bench : Division Bench

Advocate : R.S. Murthy, for the Appellant; M. Basith Ali Yavar, for the Respondent

Judgement

1. This revision petition under Article 226 of Constitution of India is filed by Salarjung Museum, Hyderabad (SJM), and its Chairman. Petitioners are aggrieved by the order of the Court of Chief Judge, City Civil Court, Hyderabad, directing return of O.P. (SR) No. 5177 of 2009 filed by petitioners seeking to set aside the award dated 26.12.2008 passed by second respondent (hereafter, arbitral Tribunal) in the matter of arbitration between first respondent, namely, Design Team Consultants Pvt. Ltd., (DTCPL, for brevity) and petitioners herein.

2. SJM, proposed to construct extension buildings for its museum. Be it noted that the contract of construction was entrusted to National Building Construction Corporation (NBCC). In connection thereto, DTCPL (its predecessor M/s. Design Team) was selected to design, make detailed architectural drawings and supervise the construction. The parties entered into contract/ agreement on 17.2.1991. The contract, vide Clause 5, provided payment of 4% of approved preliminary cost estimate as consultation fee to DTCPL. Clause 14 of the agreement provides for arbitration. It also stipulates that the arbitrator will have his seat at Delhi or at such place in India as decided by him. The works are to be executed in Hyderabad. The agreement was signed at Andhra Pradesh Bhavan,

New Delhi. There arose disputes in regard to the total estimated cost of the project and payment of consultation fee thereon to DTCPL. They moved application being A.A. No. 129 of 2000 u/s 11(4) of Arbitration and Conciliation Act, 1996 (the Act, for brevity), before the designate of Chief Justice of Delhi High Court, for appointment of arbitrator. The petitioners opposed application, inter alia, on the ground that CJ/his designate of Delhi High Court has no territorial jurisdiction to consider the application because the contract was executed and payments were made at Hyderabad, and therefore, place of arbitration i.e., Delhi has no relevance as regards territorial jurisdiction. Rejecting the contention Hon"ble Sri Justice K.S. Gupta of Delhi High Court by order dated 27.8.2002 appointed second respondent as sole arbitrator. The said arbitral Tribunal passed award on 26.12.2008 holding that petitioners herein have to pay DTCPL a sum of Rs. 18,10,706/- under different heads within a period of three months, and thereafter with interest at 6% per annum from the date of award till the date of realisation.

3. SJM filed a petition u/s 34 of the Act being O.P. (SR) No. 5177 of 2009 on the file of the Court of the Chief Judge, City Civil Court, Hyderabad, seeking to set aside the arbitral award. Learned Chief Judge returned the O.P. raising objection regarding territorial jurisdiction. SJM represented the case papers and their Counsel made the following endorsement: "Represented. u/s 2(e) of Arbitration and Conciliation Act, jurisdiction is vested with the Court where the suit could be filed and this Hon"ble Court is appropriate u/s 34. The award at Delhi is without jurisdiction and forum non-judis. The award is only questionable before this Hon"ble Court as per settled law. This case hence may be posted before the Hon"ble Court." The request was acceded to and learned Chief Judge heard the matter on Bench on 22.7.2009 and directed to return the O.P. for presenting before appropriate Court having territorial jurisdiction. The said order reads as under.

Heard the counsel for petitioner. The petitioner's counsel has pleaded that the contract was entered into at Hyderabad and the execution was done at Hyderabad, as such, this Court has got jurisdiction to entertain the petitioner u/s 34 of the Arbitration and Conciliation Act, 1996.

As per the pleadings in the petition, it is observed that the arbitrator was appointed by an order of the Delhi High Court and Respondent No. 2 entered into reference in pursuance of the order. More over, it is also pleaded that the contract was signed at A.P. Bhavan, New Delhi, but in the jurisdiction para, it was mentioned that the respondent is residing in Delhi has no bearing, as the contract dated 17.1.1991 is executed at Hyderabad. In view of the above observation, the said plea of the petitioner appears to be false as agreement was executed in A.P. Bhavan, New Delhi. Thus, the award was passed by the Respondent No. 2 in pursuance of the reference made by the Delhi High Court u/s 11(5) of Arbitration and Conciliation Act, 1996. Therefore, this Court has no territorial jurisdiction to entertain the application.

Hence, the petition is returned for presenting before the proper Court having territorial jurisdiction.

4. Learned Counsel for SJM submits that the contract related to construction of two new buildings by SJM which was entrusted to NBCC by separate agreement and DTCPL under the contract was retained as a design team, and therefore, mere signing of agreement at Andhra Pradesh Bhavan, New Delhi, does not confer jurisdiction on Delhi Courts. The application filed u/s 11(5) of the Act before Delhi High Court for appointment of arbitrator was itself not maintainable, as the contract related to Hyderabad. When the appointment of arbitrator is itself not in accordance with the provisions of the Act, the award suffers from the vice contemplated u/s 34(2) of the Act, which makes defect in composition of arbitral Tribunal as one of the grounds to set aside the award. The contract was executed at Hyderabad and mere signing of the same at New Delhi does not amount to execution of the contract, and therefore, the Courts at Hyderabad alone have jurisdiction to deal with pre and post arbitral matters. Lastly, he submits that Section 34 read with Section 2(e) of the Act confers jurisdiction on Chief Judge, City Civil Court, alone and, therefore, impugned order is erroneous. . Per contra, learned Counsel for DTCPL relies on Clause 14 of the agreement and submits that when the parties chose Delhi as seat of arbitration, the Courts at Delhi alone have the jurisdiction to deal with applications filed before commencement of arbitration and applications to set aside the award as well as for enforcement of the Award. He placed reliance on the judgment delivered by one of us (VVSR, J) in *Paramita Constructions Pvt. Limited Vs. UE Development India (P) Ltd., ; TPR Marketing Pvt. Ltd. Vs. Kingsbury Personal Care Pvt. Ltd., and Shakti Bhog Foods Limited Vs. Kola Shipping Limited, .*

5. The only point that arises for consideration is whether the Court at Delhi does not have territorial jurisdiction to entertain the petition u/s 34(1) of the Act, even though arbitral Tribunal was appointed by High Court of Delhi and the arbitral Tribunal conducted arbitration proceedings at Delhi and passed award.

6. The Arbitration Act was enacted taking into account the model law adopted by United Nations Commission on International Trade Law (UNCITRAL) - very often referred to as UNCITRAL Model Law on International Commercial Arbitration. Section 2(d) of the Act defines arbitral Tribunal as a sole arbitrator or panel of arbitrators and as per Section 2(2) of the Act the procedure contemplated in Part I shall apply where the place of arbitration is in India and any award passed thereunder is a domestic award, in distinction with a foreign award in pursuance of International Commercial Arbitration as defined in Section 2(f) of the Act. All the issues relating to domestic arbitration are regulated by Part-I consisting of Sections 2 to 43. Section 7 of the Act deals with arbitration agreement and Section 11 of the Act deals with appointment of arbitrators in the event of failure of the parties to appoint arbitral Tribunal as agreed upon. The power to appoint is conferred on the Chief Justice of High Court or on any person or institution designated by him. The appointment of arbitrator can be challenged in

accordance with the procedure laid down in Sections 12 to 15. Section 20 of the Act deals with place of arbitration and recognizes freedom of the parties to choose the place of arbitration or to confer such power on the arbitrator to decide the place of arbitration. Having regard to exigencies like hearing of witnesses, experts, institution of documents etc., the arbitral Tribunal may meet at any place it considers appropriate. The arbitral Tribunal may appoint experts from any place and also seek assistance of the Court to record evidence. After the award is passed u/s 31 of the Act and after it becomes final as contemplated under Sections 35 and 36 of the Act, the same is enforceable as a decree of the civil Court. The award shall be final and binding on the parties, after expiry of three months from the date of receipt of arbitral award by the parties and/or after application to set aside the award has been refused by competent civil Court.

7. More often than not, question would arise regarding territorial jurisdiction of Chief Justice or his designate to appoint arbitrator, the territorial jurisdiction of the Court to pass interim or interlocutory orders before or during arbitral proceedings and the territorial jurisdiction of the Court to enforce an award when it has become final and binding. These issues assume considerable significance in view of Section 42 of the Act, which lays down that notwithstanding anything in Part II or any other law with respect to an arbitration agreement, any application is made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising within the same and the arbitral proceedings shall be made in that Court and in no other Court. Further, Section 37 of the Act provides an appeal to the Court authorized by law to hear appeals from original decrees of the Court passing the order u/s 34 of the Act. Therefore, to know the Court with territorial jurisdiction with reference to the agreed place of arbitration, a reference need to be made to Sections 2(e), 11(6), 11(11), 34 and 37 of the Act.

8. A reading of Sections 11(11) and 11(12)(b) of the Act would show that if more than one application for appointment of arbitral Tribunal is made to two Chief Justices/their designates, the Chief Justice or his designate to whom the request is made first, shall alone be competent to decide on the request. It further shows that with reference to subsections (4) to (8) and (10) of Section 11 of the Act, Chief Justice referred to therein means the Chief Justice of the High Court within whose local limits the principal Civil Court is situated. If the place of arbitration is indicated in the agreement, the principal Civil Court situated at the agreed place of arbitration shall be the Court for the purpose of filing any application u/s 9 of the Act or application or petition u/s 34 of the Act. The place of arbitration therefore assumes significance. The appellate authority against the order of the principal Court being the High Court to which an appeal would lie u/s 37 of the Act, the place of arbitration is an important issue at pre and post arbitral stage.

9. In *Paramita Constructions Pvt. Ltd (supra)*, after referring to reputed authors on International Commercial Arbitration, this Court made the following

observations.

In their book *Comparative International Commercial Arbitration*, learned Authors, Julian DM Lew QC, Loukas A Mistelis and Stefan M Kroll, explain importance of place of arbitration as under.

The Seat of Arbitration

8-24 The choice of the place or seat of arbitration is one of the key issues in drafting an arbitration agreement. First, it may influence which law governs the arbitration. Second, it has a bearing on the issue which courts can exercise supervisory and supportive powers in relation to the arbitration. Third, the place of arbitration determines the nationality of the award which is relevant for the ultimate enforcement of the award.

8-25 For these reasons parties should check that the arbitration law and its application by the courts of the place of arbitration are supportive to the arbitration process. It is also important that the place of arbitration is in a state party to the New York Convention. Non-legal factors such as available facilities, transportation, accommodation and telecommunication also influence the choice of place of arbitration.

8-26 If the parties cannot or do not agree on the place of the arbitration the decision will be taken by the institution or the tribunal.

8-27 The seat of the arbitration must be distinguished from the place where the actual hearings take place. It may not be convenient for legal and practical reasons for the hearings to be held at the seat of the arbitration. For the avoidance of doubt parties can agree that hearings may be held elsewhere than at the place of arbitration. This is important if they subsequently wish to hold hearings in another country where, e.g., most of the witnesses and the evidence are located. Equally witnesses may be unable or unwilling to travel to the place of the arbitration or a site visit may be appropriate.

To the same effect are the observations of Redfern and Hunter in "*Law and Practice of International Commercial Arbitration*".

10. In *TPR Marketing Pvt. Ltd (supra)*, learned single Judge of this Court, while dealing with application u/s 11 of the Act for appointment of arbitrator having regard to arbitration clause in the agreement that the dispute shall be solved within the jurisdiction of Mumbai, by arbitration only, expressed the same view as above. Relevant observations are as follows.

In view of the above material that was marshaled, it is clear that the parties have consciously agreed for resolution of their disputes through arbitration only and subject to Mumbai jurisdiction. Nothing has been brought out to discredit that consent of the applicant for this term of the contract was either missing or secured by any improper method by the respondent. In the absence thereof, it is fair to construe that both parties have purposefully and clearly agreed to have

their disputes resolved subject to jurisdiction of Courts at Mumbai only....Sub-section (12) of Section 11 clearly points out that the Chief Justice is the one within whose jurisdiction, the civil Court, as defined in Section 2(1)(e) of the Act, falls, which Court can be approached by institution of a civil suit, should the subject matter of the dispute be the subject matter of a civil suit. Undoubtedly, if the contract has not excluded the jurisdiction of any other Court, than those at Mumbai, the Andhra Pradesh High Court would have had jurisdiction to entertain the above arbitration application, as a part of cause of action has arisen within the limits of State of Andhra Pradesh and the civil Courts at Hyderabad could have easily been approached by way of institution of a civil suit concerning the subject-matter of dispute between the parties. Because of the conscious decision of the parties to exclude the jurisdiction of the other Courts including the Courts at Hyderabad, I consider it that only the Chief Justice of the Bombay High Court or his designate alone could have been approached by the applicant for appointment of an Arbitrator for the failure of the opposite parties to have appointed the Arbitrator, though assured to do so through his communication dated 15.7.2007.

11. We may reiterate that when the parties in exercise of their right u/s 20 of the Act, agree on a particular city as place of arbitration, it is a key to decide "the Court" for the purpose of Section 9 and Section 34 of the Act. u/s 1(4) of the Act, the arbitral Tribunal shall state its date and place of arbitration as determined in accordance with Section 20 of the Act and shall be deemed to have been made at that place. In such an event, the principal civil Court of the place of arbitration alone will be "the Court" for dealing with non-set aside as well as set aside applications under the Act. If any other proposition is accepted, it would be cumbersome for a party who agreed to "place of arbitration" to invoke the jurisdiction of "the Court" elsewhere to file application to set aside the award, in which event it would also cause hardship to the other party. In domestic arbitration, such a course of events is not contemplated.

12. As noticed supra, SJM and DTCPL vide Clause 14 accepted that arbitrator will have its seat at Delhi or at such place in India as decided by the arbitrator. Therefore, the arbitral award can only be challenged in the Principal Civil Court at Delhi. The Chief Judge, City Civil Court, Hyderabad, was, therefore, right in directing return of O.P. filed u/s 34 of the Act, for want of territorial jurisdiction. The decision does not warrant any interference in these proceedings under Article 227 of the Constitution of India.

13. In the result, for the above reasons, the civil revision petition fails and is accordingly dismissed.