

(2013) 09 BOM CK 0204

In the Bombay High Court

Case No : Appeal (L) No. 210 of 2013 in Arbitration Petition No. 909 of 2011

Vachaspati Sharma

APPELLANT

Vs

India Cements-Capital and Finance Limited

RESPONDENT

Date of Decision : 26-09-2013

Acts Referred:

Citation : (2013) 6 MhLj 342

Hon'ble Judges : M.S. Sonak, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : C.M. Jadhav instructed by Mahesh Menon and Co, for the Appellant;
Manish Bohra instructed by y A.S. Khan and Associates, for the Respondent

Final Decision : Disposed Off

Judgement

D.Y. Chandrachud, J.—Admit. Learned counsel for the Respondent waives service. The appeal is taken up for hearing and final disposal, by consent and on the request of the learned counsel. This appeal arises from a judgment of a learned Single Judge dated 23 January 2013 on a petition u/s 34 of the Arbitration and Conciliation Act, 1996. The learned Single Judge has come to the conclusion that this Court has no jurisdiction to entertain the petition u/s 34.

2. The Appellant and the Respondent entered into a lease agreement dated 25 March 2000 in two sets, one for a trailer and another for a tractor. There was allegedly a default on the part of the Appellant in repaying the outstanding dues. Clause-33 of the agreement provided for a reference to arbitration in the following terms:

Arbitration:

33. All disputes, differences, claims and questions, which may arise during the subsistence of this Agreement between the Lessor and the Lessee touching any matter covered by this Agreement shall be referred to the arbitration of two Arbitrators one to be appointed by each party to the dispute in accordance with the provisions of Arbitration Act, 1940.

3. The Respondent initially filed a petition u/s 9 of the Arbitration and Conciliation Act, 1996 in the Madras High Court 1 , the Appellant filed a petition u/s 9 before this Court 2. On 25 August 2003, the arbitration petition filed by the Appellant 3.was disposed of by a learned Single Judge as withdrawn in view of the fact that the Respondent had already filed proceedings u/s 9 before the Madras High Court. Accordingly, the Appellant while withdrawing the petition filed before this Court stated that he would seek interim directions in the meantime by moving the Madras High Court. During the course of the hearing, learned counsel for the Respondent informs the Court

that the proceedings before the Madras High Court were also disposed of as withdrawn by the Madras High Court.

4. Subsequently the Appellant filed proceedings u/s 11 of the Act before this Court for appointment of an arbitrator and by an order dated 22 June 2004, the designate of the Chief Justice appointed a sole arbitrator. The sole arbitrator made his award dated 16 June 2011. The place of arbitration was Mumbai. By the award, the counter claim of the Respondent was allowed in the amount of Rs. 21.08 lakhs together with interest, while the claim of the Appellant was dismissed. The Appellant thereupon filed a petition u/s 34 before this Court. By the impugned judgment and order, the learned Single Judge has dismissed the petition. The learned Single Judge has adverted to Clause-33 of the lease agreement (already extracted earlier) and Clause-34 which is to the following effect:

Jurisdiction:

34. Subject to the provisions of Clause-33 above, as a part of cause of action arises in Chennai it is agreed between the parties that in respect of any suit touching any matter, claims or disputes arising out of or in any way relating to this Agreement Chennai City Court alone shall have exclusive jurisdiction.

5. Before we consider the effect of Clause-34 of the agreement, it must be noted that as a principle of law, it has been held in the judgment of the Constitution Bench of the Supreme Court in *Bharat Aluminium Co. Vs. Kaiser Aluminium Technical Service, Inc.*⁴

that under the Arbitration and Conciliation Act, 1996, the Legislature has intentionally conferred jurisdiction upon two courts namely the Court which would have jurisdiction where the cause of action is located and upon the Courts where the arbitration takes place. The Supreme court has held as follows:

... 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 u/s 17 of the Arbitration Act, 1996, the appeal against such an interim order u/s 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.

6. The issue before the Supreme Court in *Bharat Aluminium Co. (supra)* was whether the provisions of Part-1 would apply to a foreign seated international commercial arbitration. The Supreme Court has held that Part-1 is applicable only to arbitrations which take place within the territory of India and in a foreign seated international commercial arbitration, no application for interim relief would be maintainable u/s 9 of the Act. This part of the law so declared has been held to apply prospectively. However, the interpretation which has been placed by the Supreme Court as extracted earlier on Section 2(1)(e), would indicate that both the Courts where the cause of action is located and the courts where the arbitration takes place, would have jurisdiction. In the present case, admittedly the arbitration took place in Mumbai where the award was declared. This Court would have supervisory jurisdiction, and, hence, a petition u/s 34 would be maintainable.

7. However, it was sought to be urged on behalf of the Respondent that u/s 42, once an application u/s 9 was filed by the Respondent before the Madras High Court, it was only that Court which would have the jurisdiction. Now, Section 42 of the Act provides 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.

In the present case, the Respondent in fact did institute proceedings before the Madras High Court u/s 9, before the Appellant moved this Court in proceedings u/s 9 of the Act. However, it is fairly stated before the Court by counsel for the Respondent that the Respondent did not press the proceedings u/s 9 before the Madras High Court. Hence, it is apparent that neither were the proceedings of the Appellant u/s 9 in this Court nor were the proceedings of the Respondent u/s 9 before Madras High Court pressed. Eventually it was the Appellant who filed proceedings u/s 11 of the Act, which were entertained by a learned Single Judge

while appointing a sole arbitrator by an order dated 22 June 2004. Hence, the proceeding u/s 9 of the Respondent before the Madras High Court not having been pressed, Section 42 will not oust PIL. 7 the jurisdiction of this Court.

8. The clause of jurisdiction in this agreement, namely Clause-34, states that in respect of any suit touching any matter, claims or disputes arising out of or in any relating to the agreement, the Chennai City Court alone will have exclusive jurisdiction. It is well settled that an exclusion of jurisdiction must be strictly construed. A clause of this nature, at the highest, can apply where two or more courts have jurisdiction over the subject matter of the suit in which case it is open for the parties to confer exclusive jurisdiction on any one of those courts. Clause-34 ex facie does not apply to an arbitration petition u/s 34 for setting aside an arbitral award.

9. That apart, it is well settled in view of the judgment in Bharat Aluminium Co. (supra) that courts having jurisdiction over the place where the arbitration takes place would have supervisory jurisdiction.

10. For these reasons, we hold that the learned Single Judge was in error in dismissing the arbitration petition for want of jurisdiction. The appeal is accordingly allowed. Arbitration Petition No. 909 of 2011 is restored to the file of learned Single Judge for consideration of the challenge to the arbitral award. The appeal is disposed of. There shall be no order as to costs.

1 Application No. 3407 of 2003

2 Arbitration Petition (I) No. 553 of 2003

3 Subsequently numbered as Arbitration Petition No. 356 of 2003

4 Civil Appeal No. 7019 of 2005 decided on 6 September 2012