

GENERAL MANAGER EAST COAST RAILWAY RAIL SADAN & ANR. A

v.

HINDUSTAN CONSTRUCTION CO. LTD.

(Civil Appeal No. 4747 of 2022)

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JULY 22, 2022

[M. R. SHAH AND B. V. NAGARATHNA, JJ.]

Arbitration and Conciliation Act, 1996 – ss.42 and 11(6) – Jurisdiction over arbitral proceedings – Competent High Court – Dispute between appellant and respondent – Respondent filed application before High Court of Orissa u/s.11(6) seeking appointment of arbitrator – Specific objection raised by appellant on entertainability and/or maintainability of the application u/s.11(6) – Placing reliance on s.42, the appellant submitted that as respondent-claimant had initiated proceedings u/s.9 in the Court at Vishakhapatnam, only the High Court of Andhra Pradesh at Amaravati would have jurisdiction to entertain the application u/s.11(6) – Without deciding the said issue which went to the root of the jurisdiction of the High Court of Orissa, the said High Court entertained the application u/s.11(6) and appointed an arbitrator observing that since the appellants, in principle, had not opposed the appointment of an arbitrator, little purpose would be served in relegating the respondent to the concerned High Court as that will only delay the adjudication of the disputes – Held: The appellants might not have opposed the appointment of an arbitrator (though the fresh appointment of an Arbitrator was also opposed by the appellants) by that itself it will not confer the jurisdiction upon the High Court if otherwise, the High Court had no jurisdiction – Before filing an application u/s.11(6) before the High Court of Orissa, the respondent had moved an application before the Court at Visakhapatnam u/s.9 – In that view of the matter, the High Court of Orissa committed a serious error in entertaining application u/s.11(6) and appointing arbitrator – However, respondent-claimant may submit/move an application u/s.11(6) before the competent High Court having jurisdiction namely the High Court of Andhra Pradesh at Amaravati. C D E F G H

A CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4747 of 2022.

From the Judgment and Order dated 03.12.2021 of the High Court of Orissa at Cuttack in Arbitration Petition No.10 of 2021.

B K. M. Nataraj, ASG, Vivek Gupta, Ms. Kanu Agrawal, Shailesh Madiyal, Ms. Deepabali Dutta, Anuj Srinivas Udupa, Amrish Kumar, Advs. for the Appellants.

Amit Dubey, Adv. for the Respondent.

The Judgment of the Court was delivered by

C **M. R. SHAH, J.**

D 1. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court of Orissa at Cuttack in Arbitration Petition No.10 of 2021 by which the High Court in exercise of powers under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ‘the Act’) has appointed an Arbitrator to adjudicate the dispute between the parties, the original informant – General Manager, East Coast Railway Rail Sadan and Anr., have preferred the present appeal.

E 2. As such the dispute in the present appeal is in a very narrow compass.

F 3. The dispute arose between the appellant and the respondent with respect to the contract/agreement dated 29.11.2018. That the respondent herein - original claimant initiated the proceedings under Section 9 of the Arbitration Act before the learned Additional District Judge, Visakhapatnam seeking interim injunction against the encashment of Performance Bank Guarantee and forfeiture of security deposit. The said application came to be allowed by the learned Additional District Judge vide order dated 06.11.2019 restraining the appellants herein from forfeiting security deposit for period of six months except on the special
G circumstances.

4. That thereafter the respondent vide letter dated 01.12.2019 requested the appellant to constitute the Arbitral Tribunal raising five claims. It appears that in terms of the Arbitration Agreement, arbitration

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proceedings were initiated by the appellants by appointing an arbitrator to adjudicate the dispute between the parties. That the Arbitrator issued notices calling upon the parties to submit their respective claims. The respondent herein sought time vide letter dated 02.04.2020 for filing the claim in view of Covid-19 Pandemic. The Arbitrator adjourned the proceedings to 03.04.2020. Instead of submitting the claim, vide letter dated 01.09.2020 the respondent questioned the validity of arbitral tribunal. Thereafter the respondent filed the Arbitration Petition No.10 of 2021 before the High Court of Orissa at Cuttack under Section 11(6) of the Act seeking appointment of an Arbitrator. The said application was opposed by the appellants relying upon Section 42 of the Arbitration Act and it was the case on behalf of the appellants that in view of Section 42 of the Arbitration Act, the application under Section 11(6) of the Act shall lie before the High Court of Andhra Pradesh at Amaravati as the respondent itself earlier filed Section 9 application before the Court at Vishakhapatnam. It was also submitted on behalf of the appellants that procedure dated 16.11.2016 upon which reliance has been placed by the respondent was superseded by GCC issued by Railway Board in November, 2018. Despite the above jurisdictional issue raised and without addressing on the jurisdiction of the Orissa High Court, by the impugned judgment and order the High Court of Orissa at Cuttack has appointed the Arbitrator solely by observing that since the appellant, East Coast Railways in principle, is not opposing the appointment of an Arbitrator there is little purpose served in relegating the respondent (original petitioner) to the appropriate High Court as that will only delay the adjudication of the disputes.

5. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court of Orissa at Cuttack, the original respondent – General Manager – East Coast Railway has preferred the present appeal.

6. We have heard Shri K.M. Natraj, learned ASG appearing on behalf of the appellants and Shri Amit Dubey, learned Counsel appearing on behalf of the respondent. We have gone through the impugned judgment and order passed by the High Court. A specific objection was raised by the appellant herein before the High Court on the entertainability and/or maintainability of the application under Section 11(6) of the

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- A Arbitration Act before the Orissa High Court. Reliance was placed on Section 42 of the Arbitration Act and it was submitted on behalf of the appellants that as the respondent - claimant had initiated proceedings under Section 9 of the Arbitration Act in the Court at Vishakhapatnam, only the High Court of Andhra Pradesh at Amaravati would have jurisdiction to entertain the application under Section 11(6) of the Act.
- B Without deciding the said issue which goes to the root of the jurisdiction of the High Court of Orissa at Cuttack, the said High Court by the impugned order has entertained the application under Section 11(6) of the Act and has appointed the sole arbitrator by observing that since the appellants – East Coast Railway, in principle, has not opposed the appointment of an arbitrator, there is little purpose served in relegating the original petitioner to the concerned High Court as that will only delay the adjudication of the disputes. The appellants might not have opposed the appointment of an arbitrator (though the fresh appointment of an Arbitrator was also opposed by the appellants herein) by that itself it will not confer the jurisdiction upon the High Court if otherwise, the High Court had no jurisdiction.
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7. Heavy reliance is/was placed on Section 42 of the Arbitration and Conciliation Act, 1996 which reads as under:

- E “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 proceeding shall be made in that Court and in no other Court.”
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- 7.1 It is not in dispute that before filing an application under Section 11(6) of the Act before the High Court of Orissa at Cuttack, the respondent – claimant moved an application before the Court at Visakhapatnam under Section 9 of the Arbitration Act. In that view of the matter considering Section 42 of the Arbitration Act, the High Court of Andhra Pradesh at Amravati alone would have jurisdiction to decide the subsequent applications arising out of the Contract Agreement and the further arbitral proceedings shall have to be made in the High court of Andhra Pradesh at Amaravati alone and in no other court. In that
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view of the matter the High Court of Orissa at Cuttack has committed a serious error in entertaining the application under Section 11(6) of the Act before it and appointing the sole arbitrator. A

8. In view of the above and for the reason stated above, the present Appeal Succeeds. The impugned judgment and order passed by the High Court of Orissa at Cuttack in Arbitration Petition No.10 of 2021 and appointing the sole arbitrator is hereby quashed and set aside solely on the ground that the High Court of Orissa at Cuttack would have no jurisdiction to entertain the application under Section 11(6) of the Act with respect to the contract agreement for which the respondent claimant earlier initiated the arbitration proceedings under Section 9 of the Arbitration Act in the Court at Vishakhapatnam. Present Appeal is accordingly Allowed. However, it is observed that it will be open for the respondent claimant to submit/move an application under Section 11(6) of the Act before the competent High Court having jurisdiction namely the High Court of Andhra Pradesh at Amaravati and if such an application is made before the High Court of Andhra Pradesh at Amaravati within a period of four weeks from today, the same be dealt with and considered in accordance with law and on its own merits at the earliest. B C D

The Present Appeal is Allowed to the aforesaid extent. However, in the facts and circumstances of the case, there shall be no order as to costs. E