

M S Isc Projects Private Limited vs Steel Authority Of India Limited on 21 May, 2024

Author: Dinesh Kumar Sharma

Bench: Dinesh Kumar Sharma

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IN THE HIGH COURT OF DELHI AT NEW DELHI
O.M.P. (COMM) 370/2021, I.A. 17061/2021,
9346/2022

M S ISC PROJECTS PRIVATE LIMITED

Through: Sh. Dayan Krishn
Sh. Rishi Agrawa
Tiku, Sh. Abhay
Vikram Choudhary
Sh. Shreedhar Ka
Agrawal, Advts.

versus

STEEL AUTHORITY OF INDIA LIMITED

Through: Sh. Jayant Mehta,
Anusuya Sadhu Sin
Goswami and Sh. D
Advts.

CORAM:

HON'BLE SH. JUSTICE DINESH KUMAR SHARMA
OR

% 21.05.2024

1. The present application under section 34 of the Arbitration & Conciliation Act, 1996 (herein referred to as 'the A&C Act') has been filed for setting aside the Arbitral Award dated 12.03.2020 passed by the Arbitral Tribunal comprising of HMJ G. P. Mathur (Retd.), Presiding Arbitrator, HMJ Ashok Bhan (Retd.), (Arbitrator) and Sh. S.K. Mukhopadhyay, (Arbitrator), whereby the Arbitral Tribunal has rejected the Applicant's claims in their entirety, and allowed the counter-claims made by the Respondent in the sum of Rs.5,83,10,232/-

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2. Upon the notice being issued, the respondent took a preliminary objection that this court does not have the territorial jurisdiction to entertain the present petition and therefore the present petition is liable to be returned for presentation before the appropriate court. The relevant clauses which are the heart of the matter are reproduced as under:

"46.2.4 Unless, otherwise mentioned, the Arbitration shall be held at SAIL-BSP, Bhilai. The court of Durg India (with exclusion of all other courts) shall have exclusive jurisdiction over all matter of dispute.

46.2.5 Arbitration of contracts, with Indian parties, where contract value is more than Indian Rs. 5 Crores and the contracts with foreign parties for value of more than Indian Rs. 5 Crores and up to Indian Rs. 20 Crores shall be governed by the Rules of Indian Council of Arbitration (ICA)/ "SCOPE Forum of Conciliation and Arbitration"

(SCFA) as agreed by the party. The venue shall be New Delhi.

46.2.6 Arbitration with foreign contractor, if any or in Consortium contracts (including foreign contractor), where the contract value is more than Indian Rs. 20 crores shall be governed by the Rules of Arbitration of International Chamber of Commerce (ICC), Paris. The venue of the arbitral proceedings shall be New Delhi."

3. Sh. Jayant Mehta, learned senior counsel on behalf of the respondent has predominantly raised his arguments on the following grounds:

(i) that the earlier Petition under Section 9 was filed before the commercial court, Raipur, therefore, in view of Section 42 of the A&C Act, the jurisdiction of this court is ousted.

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(ii) In view of clause 46.2.4 of GCC only the Durg court has the exclusive jurisdiction.

4. Sh. Jayant Mehta, learned senior counsel has submitted that besides this the conduct of the parties is also to be noteworthy. It has been submitted that the petitioner earlier filed the petition under Section 9 before court having territorial jurisdiction at Durg. The petition under Section 9 was dismissed, against which the appeal under Section 37 of the A&C Act was filed before High Court at Chhattisgarh. Subsequently, again the petitioner filed a petition under Section 11 (4) of the A&C Act before High Court at Chhattisgarh. Learned senior counsel submits that time and again, the mandate was also extended from the court having territorial jurisdiction at Durg.

5. Sh. Jayant Mehta, learned senior counsel submits that finally after the award was passed, the petition under Section 34 was filed before the court having territorial jurisdiction at Durg. Learned senior counsel submits that this time learned court vide order dated 06.09.2021 rejected the petition under section 34 on the ground of territorial jurisdiction. Learned senior counsel submits that in fact Section 42 of the A&C Act comes to core of the matter and in view of Section 42, since the earlier petition has been filed under Section 9 of the A&C Act before the commercial court and appeal under Section 37 of the A&C Act before the High Court at Chhatisgarh followed by petition filed under Section 11 of the A&C Act before the High Court at Chhatisgarh, the jurisdiction of this court is ousted.

6. Sh. Jayant Mehta, learned senior counsel submits that the wrong submissions made by a particular counsel before a particular court This is a digitally signed order.

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7. Sh. Dayan Krishnan, learned senior counsel for the petitioner has vehemently refuted the averments of the learned senior counsel for the respondent. Learned senior counsel for the petitioner submits that in view of the clause 46.2.5 of GCC, the venue of the arbitration has been determined to be New Delhi. Learned senior counsel submits that it is no longer res integra that if the venue has been determined, by the parties, the courts having jurisdiction over such venue shall exercise the exclusive jurisdiction. Learned senior counsel further submits that clause 46.2.5 is preceded by clause 46.2.4. Learned senior counsel submits that therefore clause 46.2.5 is an exception to clause 46.2.4.

8. Sh. Dayan Krishnan, learned senior counsel has further submitted that issue of estoppel would also come into the way of the respondent for raising his contention regarding the territorial jurisdiction before this court. Learned senior counsel submits that the earlier petition filed under Section 34 of the A&C Act was dismissed on the objection being taken by the respondent regarding territorial jurisdiction and now when the petition is filed before this court, respondent has again taken the same objection. Learned senior counsel submits that the petitioner cannot be left remediless and the respondent cannot be allowed to take the contradictory pleas before the different courts on the same issue. It has further been submitted that in fact earlier petitions filed under Section 9 of the A&C Act and other proceedings before the court at Durg and Bhilai may be an error of the jurisdiction.

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9. In rejoinder submissions, Sh. Jayant Mehta, learned senior counsel has submitted that the issue of estoppel or making different pleas cannot validate the present proceedings before this court without having any jurisdiction. Learned senior counsel has submitted that issue of estoppel cannot operate against a statute. Learned senior counsel has emphasised that Section 42 of the A&C Act has clear cut application on the present case and hence the present petition is liable to be dismissed.

10. In regard to the jurisdiction of the court where the agreement provides the venue, the coordinate bench of this court in Reliance Infrastructure Limited vs. Madhyanchal Vidyut Vitran Nigam Limited OMP (Misc) (Comm) 161/2020 dated 14.08.2023 after referring to all the judgments has inter-alia held as under:

"30. On a conspectus of the aforesaid judgments, the position of law that emerges is that when the contract contains an arbitration clause that specifies a venue, thereby anchoring the arbitral proceedings thereto, then the said venue is really the seat of arbitration. In such a situation the courts having supervisory jurisdiction over the said seat shall exercise supervisory jurisdiction over the arbitral process, notwithstanding that the contract contains a clause seeking to confer exclusive jurisdiction on a different court."

11. The similar view has been taken by the Division Bench of this court in Yassh Deep Builders LLP vs. Sushil Kumar Singh and Anr. FAO (OS) (COMM) 48/2023 dated 01.03.2024 in which reliance was upheld and it was held as under:

"42. In Reliance Infrastructure Limited v. Madhyanchal Vidyut Vitran Nigam Limited, 2023 SCC OnLine Del 4894, another learned single judge of this court referring to This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 07/06/2024 at 21:03:23 several judgments held that the choice of Delhi as the venue of arbitration was demonstrative of the fact that the arbitral proceedings were intended to be anchored to Delhi, and in the absence of any contrary indicia, the inexorable conclusion was that Delhi is the seat of Arbitration. It was further held that when the contract contains an arbitration clause that specifies a "venue", thereby anchoring the arbitral proceedings thereto, then the said "venue" is really the "seat" of arbitration. In such a situation the courts having supervisory jurisdiction over the said "seat" shall exercise supervisory jurisdiction over the arbitral process, notwithstanding that the contract contains a clause seeking to confer "exclusive jurisdiction" on a different court. Further, that a generic clause, not specifically referring to arbitration proceedings would not serve as a "contrary indicia" so as to denude the jurisdiction of the Courts having jurisdiction over the "seat" of Arbitration."

12. Learned counsel for respondent submits that ratio of these judgments would not be applicable as in these judgments Section 42 has not been discussed at all and therefore has no applicability. Learned counsel for respondent has placed reliance upon State of West Bengal vs. Associated Contractors (2015) 1 SCC 32 and Dalim Kumar Chakraborty vs. Gouri Biswas 2018 SCC OnLine Cal 282. In State of West Bengal (Supra), it was inter alia held as under:

"25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court"

for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral This is a digitally signed order.

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(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42. The reference is answered accordingly."

13. In Dalim Kumar Chakraborty (Supra) it has been held as under :

"4. Sections 8 and 11 of the Act of 1996 are beyond the purview of Section 42 thereof. The very nature of the provision of Section 8 in such Act is that Section 42 cannot apply thereto. Indeed, the expression used in Section 8 of the Act of 1996 is "judicial authority" and not "court".

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14. There cannot be any doubt to the settled proposition as has also been merely laid down in Section 42 is that if any application in respect of the arbitration proceedings under part I of the A&C Act has been made in a court that court has exclusive jurisdiction. In this regard it is also necessary and advantageous to refer to the definition of court as defined under Section 2 (1) (e). It reads as under:

"2(1)(e)"Court" means-

(i) in the case of an arbitration other than international commercial arbitration, 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;

(ii) in the case of international commercial arbitration, 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, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;"

15. I consider that the arguments as being raised by learned counsel for the This is a digitally signed order.

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parties has been squarely answered by the apex court in BGS Soma SGS Soma JV v NHPC, Civil Appeal No. 9307/2019 it was inter-alia held as under:

"61. Equally incorrect is the finding in Antrix Corporation Ltd. (supra) that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of Courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one Court exclusively. This is why the section begins with a non-obstante clause, and then goes on to state "...where with respect to an arbitration agreement any application under this Part has been made in a Court..." It is obvious that the application made under this part to a Court must be a Court which has jurisdiction to decide such application. The subsequent holdings of this Court, that where a seat is designated in an agreement, the Courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the Court where the seat is located, and that Court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several Courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a Court in which a part of the cause of action arises would then be the exclusive Court under Section 42, which would have control over the arbitral This is a digitally signed order.

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16. Thus, the intent of the legislator while enacting Section 42 of the A&C Act was to ensure that in the cases where there are multiple courts have jurisdiction, in view of the clauses of the arbitration, then if the parties choose to invoke the jurisdiction of the particular court, where the part of cause of action has arisen then alone that court would have the jurisdiction to entertain the subsequent applications. The basic object behind this is to avoid the multiplicity and conflict of judgment. However, in this regard the court cannot lose sight of the fact as even held in State of West Bengal (supra) that if the earlier applications made in this proceeding are in the court having no jurisdiction as defined under Section 2 (1) (e) of the A&C Act, then Section 42 will not be applicable.

17. Thus, I consider that in the peculiar facts and circumstances, this court considers that the petition cannot be dismissed on the jurisdictional ground. Another fact that has stuck to this court is

that the respondent in this case is taking contradictory pleas which cannot be allowed for the purpose of the administration of justice. The principles of estoppel and resjudicata as being held in Hope Plantation Ltd. vs. Taluk Land Board, Peermade and Anr.; (1999) 5 SCC 590 are based on public policy and justice, wherein it was inter alia held as under:

""26. It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential This is a digitally signed order.

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18. Therefore, testing the different pleas taken by respondent on anvil of estoppel and resjudicata, it is suffice to say that a party who approaches various courts and takes contradictory pleas cannot be allowed to blow hot and cold before the different courts. The purpose and scheme of any act and more so in the A&C Act is the efficient and expeditious disposal of the case. Thus, I consider that the objection regarding the maintainability on the law of jurisdiction merits rejection.

19. List on 05.08.2024 at 2.30 p.m. This is a digitally signed order.

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20. Interim order, if any, to continue.

DINESH KUMAR SHARMA, J MAY 21, 2024/rb/ht..

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