

## **Sasken Communication Technologies ... vs Prime Telesystems Limited And Ors. on 6 August, 2002**

**Equivalent citations: 99(2002)DLT640, [2003]41SCL292(DELHI)**

**Author: R.C. Chopra**

**Bench: R.C. Chopra**

### **JUDGMENT**

R.C. Chopra, J.

1. This petition under Section 11(4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" only) has been filed with a prayer to appoint an Arbitrator on behalf of respondent No. 1 to enter referencer and adjudicate upon the matter. No dispute is stated to be existing with respondents No. 3 and 4 and as such no relief is claimed against them but a right is reserved to institute arbitration proceedings against them also upon their failure to honour their obligations under the Subscription cum Share-holders Agreement dated 28.2.2001.

2. According to the petitioner the applicant Company Along with M/s Citicorp Finance (India) and Intel Capital Corporation (hereinafter referred to as Investors No. 1 and 2 respectively) had entered into a Subscription-cum-Shareholders Agreement dated 28.2.2001 with respondent No. 1 and its promoters respondents 2, 3 and

4. In terms of this agreement the applicant and investors consented to invest in the equity share capital of respondent No. 1 by subscribing to preferential issue on the basis of certain representations, warranties, undertakings, statements and covenants made by respondent No. 2, 3 and 4 on behalf of respondent No. 1. After the applicant and Investors No. 1 and 2 had subscribed to the equity shares of respondent No. 1 and allotment of shares had been made the petitioner-applicant discovered that the representations, warranties, undertaking, statements and covenants made in the agreement by respondents 2, 3 and 4, on behalf of respondent No. 1, were incorrect and untrue. It was stated that these misleading and wrong representations constituted breach of Agreement. In terms of the Agreement the petitioner invoked 'put option' clause as contained in Article 32.2 of the Agreement and required the respondents to purchase the shares owned by the applicant but the respondents No. 1 and 2 failed to fulfill their obligations and as such disputes. Efforts were made to settle disputes and differences amicably but without any result and therefore, in terms of the Arbitration Agreement contained in Article 36.1 of the Agreement the applicant issued notice dated 15.1.2002 nominating Mr. Justice M.L. Pendse (Retd.) as its Arbitrator

and called upon respondent No. 1 to nominate and appoint, within 15 days of the receipt of the notice, its nominee arbitrator to adjudicate the disputes between them. In spite of this notice the respondents No. 1 and 2 did not nominate their Arbitrator and hence the petition for appointment of Arbitrator for respondent No. 1 for adjudication of disputes between the parties.

only. It was signed by respondent No. 2. Respondents No. 3 and 4 did not file any reply adopted the reply filed by respondent No. 1 and opposed the prayer made by the petitioner-applicant.

4. The respondents have opposed the prayer of the applicant for appointment of an Arbitrator on behalf of respondent No. 1 family on two grounds. Firstly, the respondents dispute the existence of any arbitration agreement between the parties and submit that in terms of Articles 2.1 and 2.1.8 of the Agreement no steps were taken within 45 days to comply with the subscription procedure and get the Memorandum and Articles of Association of respondent No. 1 amended so as to make the same consistent with the Agreement. It is submitted that it being a condition precedent the Agreement dated 28.2.2001 did not mature into a concluded contract between the parties and as such there was no Arbitration Agreement between the parties. The Second contention raised by the respondents is that the present petition, under Section 11(4) of the Act, is not maintainable in this Court for the reason that the Arbitration Clause contained in Article 36.1 of the Agreement clearly stipulated that the venue of arbitration proceedings shall be at Mumbai and Article 37.1 further added that this Agreement shall be governed by and construed in accordance with law of India and shall be subject to the exclusive jurisdiction of the Courts at Mumbai. It is also pointed out that one of the investors had already moved High Court of Bombay under Section 9 of the Act and obtained an interim relief against respondent No. 1 pleading that the High Court of Bombay had jurisdiction in the matter. Referring to Section 42 of the Act it is contended that in view of the filing of an application under Section 9 of the Act, in the Bombay High Court all other Courts having jurisdiction in the matter are precluded from entertaining any other petition/application under the Act in regard to the disputes between the parties arising out of alleged agreement between the parties. It is submitted that the petitioner and his co-investors are indulging in forum shopping and after failing to obtain interim relief to their entire satisfaction from the High Court of Bombay they have come to Delhi High Court and filed not only the present application but an application under Section 9 of the Act also in which interim orders have been issued in their favor putting serious restrictions upon respondent No. 1 in the matter of its day to day functioning and operation of Bank Accounts.

5. I have heard Shri Rajiv Nayyar, Sr. Advocate for the petitioner, Shri Manmohan, Advocate for respondents No. 1 and 2, Shri R.K. Anand, Sr. Advocate for respondent No. 4 and Shri S.K. Dubey, Advocate for respondent No. 3.

6. Relying upon the Apex Court Judgment in Konkan Railways Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. Shri Rajiv Nayyar, Sr. Advocate for the petitioner has contended that the existence or validity of Arbitration Agreement between the parties cannot be a subject matter of adjudication by this Court exercising powers under Section 11 of the Act and this matter should be left to be determined by the Arbitrators only for the reason that it involves serious disputes of facts and law. On the other hand Shri R.K. Anand, Sr. Advocate for Respondent No. 4 has argued that in

the absence of an arbitration Agreement this Court cannot assume jurisdiction to exercise powers under Section 11 of the Act and as such it is incumbent upon this Court to determine as to whether an arbitration Agreement exists or not between the parties. After perusing para 18 of the Apex Court judgment in Konkon Railways Construction Corporation Ltd. and Anr. (supra) this Court has no hesitation in holding that a Court exercising powers under Section 11 of the Act does not discharge judicial functions and as such is not obliged to adjudicate the controversies raised by the parties in regard to the existence or non existence of an Arbitration Agreement between the parties. If on first sight it appears to the Court that an arbitration Agreement exists between the parties the matter has to be left to the Arbitration for determining the disputes raised by the parties including those in regard to the existence or otherwise of the Arbitration Agreement. Thus, in view of the arbitration agreement contained in Article 36.1 in the Agreement dated 28.2.2001 between the parties this Court is of the considered view that the petition filed by the applicant cannot be thrown out straightaway. The controversies raised by the parties in regard to the existence or non existence of arbitration agreement have to be adjudicated upon by the arbitrators only.

7. A serious dispute in regard to the territorial jurisdiction of this Court, in the matter of entertaining this petition, is raised by contending that the Arbitration Agreement contained in Article 36.1 itself stipulated that the venue of the arbitration proceedings shall be Mumbai. Article 37.1 relating to jurisdiction of the Courts in respect of the Agreement between the parties further added that the agreement shall be subject to the exclusive jurisdiction of the Courts at Mumbai. It is also submitted that Section 42 of the Act puts an embargo against the filing of the present petition for the reason that one of the co-investors of the petitioner has already invoked the jurisdiction of the High Court of Bombay by filing an application under Section 9 of the Act in which even interim relief was granted by the Court. The petitioner and the said co-investors are entitled to nominate only one Arbitrator under the agreement and as such, there is commonality of interest between them. It is submitted that the petitioner had no right to move Delhi Courts under Section 11 of the Act and this application ought to have been filed in High Court of Bombay only.

8. Counsel for the petitioner, however, submits that the jurisdiction of the Courts in the matter of applications under the Act is governed by Section 2(e) of the Act and since no part of cause of action had arisen within the jurisdiction of High Court of Bombay, the Courts at Mumbai have no jurisdiction to entertain any petition arising out of the Agreement between the parties and only Delhi Courts have jurisdiction in the matter. He contends that the parties have no right to confer jurisdiction on any Court by an agreement. It is pointed out that respondents had pleaded before Bombay High Court that it had no jurisdiction in the matter and only Delhi Courts had jurisdiction to entertain a petition under Section 9 of the Act as and such, now respondents cannot turn around and say that only Bombay High Court has jurisdiction in the matter. It is submitted that Section 42 of the Act comes into play only when a Court having jurisdiction is moved by a party and it does not come into play if a Court having no jurisdiction at all is moved by one of the parties.

9. The legal proposition is well settled that under Section 20 of the Code of Civil Procedure 1908 a choice of forum can be made by the parties to an Agreement but subject to the condition that jurisdiction can be conferred upon that Court only within the jurisdiction of which a part of cause of action arises. This liberty to the parties is intended to make it convenient for them to have litigation

in a Court at a place of their choice but a part of cause of action must have arisen there so as to give exclusivity of jurisdiction to the said Court. However, merely by an Agreement the parties cannot confer jurisdiction upon a Court which otherwise has no jurisdiction. It is also equally settled that for the purpose of proceedings under the Arbitration and Conciliation Act 1996, the territorial jurisdiction of the Courts for entertaining applications under the Act is determined with reference to the question that in case the subject matter of the arbitration had been the subject matter of a civil suit the jurisdiction of such Civil Court of original jurisdiction would have been there for entertaining and deciding that suit. In Tribal Cooperative Marketing Development Federation of India Ltd. v. Manjula Traders as well as in Gulati Construction Co. Jhansi v. Betwa River Board , learned Single Judge of this Court categorically held that the territorial jurisdiction of the Court under the Act is to be determined in terms of Section 20 of the Code of Civil Procedure. It was also held that merely by an Agreement the parties cannot confer jurisdiction on a Court which otherwise has no territorial jurisdiction to entertain a petition under the Act.

10. So far as the aforesaid legal proposition is concerned there are no two views but in the present case not only that Article 36.1 of the Arbitration Agreement mentioned Mumbai as the venue of arbitration proceedings but Article 37.1 of the Agreement, which laid down general conditions governing the jurisdiction of the Courts, specifically stated that the Agreement shall be governed by and shall be subject to the exclusive jurisdiction of the Courts at Mumbai. Anyone who intends to invoke the jurisdiction of a Court other than a Court at Mumbai, therefore, has to show that no part of cause of action had arisen at Mumbai and as such the stipulation in the Agreement was nonest and unenforceable. The petitioner, therefore, was under an obligation to show to this Court that the Courts at Mumbai had no jurisdiction and the stipulations in Article 36.1 and 37.1 of the Agreement were void. The petitioner, however, failed to plead even in his petition anything in this behalf and as such this Court is not in a position to hold that the Courts at Mumbai have no jurisdiction in the matter or that no part of cause of action had arisen within the territorial jurisdiction of Mumbai Courts.

11. It is to be added further that under the Agreement on the basis of which the petitioner has approached this Court, under Section 11 of the Act for nominating an Arbitrator on behalf of Respondent No. 1, a right was given to the petitioner and his Co-investors No. 1 and 2 to appoint one Arbitrator and according to the petitioner Justice M.L. Pendse (retd.) has already been nominated by them. It is, therefore, obvious that there is a commonality of interest between the petitioner and Investors No. 1 and 2 one of whom has invoked the jurisdiction of Bombay High Court under Section 9 of the Act for grant of interim relief. It is not understandable as to how one of them could go to Bombay High Court pleading that it has jurisdiction in the matter and other could come to this Court saying that this Court has jurisdiction in the matter. If both the Courts have jurisdiction then Section 42 of the Act comes into play and precludes the filing of any petition in Delhi Courts. May be that in Bombay High Court the respondents had taken a stand that the said High Court has no territorial jurisdiction whereas in this petition they are raising a contrary plea but the fact remains that this Court being a Court of equivalent jurisdiction cannot entertain and adjudicate upon this controversy between the parties as the Bombay High Court is already seized of matter. Only after a decision of the Bombay High Court that it has no jurisdiction to entertain the petition under Section 9 the Act for want of territorial jurisdiction the parties would be in a position to approach any other

Court under the Act.

12. Section 42 of the Arbitration Act relating to the jurisdiction of the Courts puts a positive embargo against the invoking of the jurisdiction of different Courts by laying down that notwithstanding anything contained elsewhere in the said part of the Act or in any other law for the time being in force, where with respect to an Arbitration Agreement any application under the said part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of an agreement and the arbitral proceedings shall be made in that Court and in no other Court. This Section provides the forum for entertaining the applications under the Act and is intended to ensure that all the proceedings in relation to an Arbitration Agreement take place in the same Court so as to avoid conflict of decisions. It is also intended to prevent undue harassment of the parties by putting them before the same Court inspite of competence of different Courts within the jurisdiction of which different parts of cause of action might have arisen. The contention of learned counsel for the petitioner that Section 42 of the Act creates a bar only when the earlier application is before a Court of competent jurisdiction is absolutely correct but the question as to whether the Court before whom an earlier application has been filed is a Court of competent jurisdiction or not has to be adjudicated by that Court itself. Other Courts cannot come into picture and entertain subsequent applications till the earlier Court holds that it has no jurisdiction. Therefore, so long Bombay High Court does not hold that it has no territorial jurisdiction in the matter and the Agreement between the parties conferring jurisdiction upon the Courts at Mumbai is not enforceable all applications under the Act have to be made before Bombay High Court only and in no other Court even if a part of cause of action has arisen within the jurisdiction of some other Court also.

13. In the case of D.L.F. Industries v. Standard Chartered Bank and Anr. , the terms of Arbitration Agreement between the parties were quite identical to the terms between the parties in the present case. In the said case the parties had agreed that the venue of arbitration shall be at Bangalore and in the jurisdiction clause they had stipulated that the contract shall be governed by the Laws and Regulations of India and will be subject to the exclusive jurisdiction of the Courts at Bangalore. The only difference in the wordings of the Article 36.1 as well as 37.1 in the present case and the Arbitration clauses in the said case was the use of word "Bangalore" instead of "Mumbai". A learned Single Judge of this Court came to the conclusion that the contract was subject to the exclusive jurisdiction of the Courts at Bangalore. In para 7 of the Judgment it was further held that Section 9 and Section 42 of the Act being in part I an application moved under Section 9 also attracts Section 42 of the Act and precludes the parties from moving any other Court in regard to the applications under the Act.

14. In view of the aforesaid facts and circumstances of the case, this Court has no hesitation in holding that the present petition under Section 11 of the Act ought to have been filed in Bombay High Court only where an application under Section 9 of the Act has already been filed and is pending adjudication. The petition, therefore, is returned to the petitioner for filing the same before a Court of competent jurisdiction at Mumbai within 15 days. It is ordered accordingly.