

MANU/DE/1902/2008

Equivalent Citation: (2009)ILR 3Delhi457

I N THE HIGH COURT OF DELHI

E.F.A. (OS) No. 12/2008

Decided On: 19.12.2008

Appellants: Mr. Vijay Gupta
Vs.
Respondent: Ms. Renu Malhotra

Hon'ble Judges/Coram:

A.K. Sikri and Manmohan Singh, JJ.

Counsels:

For Appellant/Petitioner/plaintiff: Chandan Kumar, Adv

For Respondents/Defendant: Deependra Hooda, Adv.

Case Note:

Civil - Maintainability - Whether High Court was justified in returning execution petition holding that said Court has not jurisdiction to seek enforcement of disputed award? - Held, merely because High Court appointed Arbitrator would not mean that subsequent proceedings, including execution petition have to be filed in High Court - If amount of award is less than Rs. 20 lakhs execution petition shall have to be filed before District Court which has necessary pecuniary jurisdiction to entertain same - For this reason, contention mentioned above needs to be rejected - This Court hold that impugned judgment returning execution petition is perfectly in order and does not call for any interference - Hence present petition dismissed

JUDGMENT

A.K. Sikri, J.

1. A brief narration of factual matrix would suffice to decide an interesting and important issue pertaining to the pecuniary jurisdiction of this Court to entertain the execution petition. The appellant herein had filed an execution petition seeking enforcement of award dated 31.8.2005 whereby awarding a sum of Rs. 9,56,760/- with interest @ 10% from 1.9.2005 till payment. Learned Single Judge held that this Court does not have the pecuniary jurisdiction to entertain the said execution petition and therefore, Registry is directed to return the said execution petition to the decree holder for being filed before the appropriate court. It is on the premise that the High Court has original civil jurisdiction in respect of matters where the amount involved is more than Rs. 20 lakhs.

2. The facts, in brief, are as follows:

3. The appellant (hereinafter referred to as the 'decree holder') had certain disputes with the respondent (hereinafter referred as the 'judgment debtor') and therefore, the appellant filed application under Section 11(6) of the Arbitration and Conciliation Act,

1996 (hereinafter referred to as the 'Act') in this Court seeking appointment of arbitrator. This application was filed in December 1998 when pecuniary jurisdiction of this Court was in respect of those matters where value of the suit/proceedings is Rs. 5 lakhs and above. Vide orders dated 27.2.2002 this Court appointed a Sole Arbitrator to adjudicate the disputes. When the proceedings were pending before the Arbitrator, the judgment debtor wanted to summon some additional witnesses. For this purpose, the judgment debtor filed OMP No. 297/2003 in this Court seeking summoning of those four additional witnesses, which application was entertained by this Court and allowed vide orders dated 13.1.2005.

4. The learned Arbitrator had also passed some interim directions in exercise of his powers under Section 17 of the Act. The judgment debtor again approached this Court by filing application under Section 37(2)(b) of the Act (OMP No. 382/2004). This petition was also contested on merits. Initially, vide orders dated 29.10.2004 the impugned order was stayed subject to judgment debtor furnishing an undertaking that she would not dispose of the network/cable connection in question and will not create any third party interest therein. The judgment debtor had furnished such an undertaking. Ultimately, that OMP was also disposed of by orders dated 27.3.2006. In the meantime, as pointed above, the Arbitrator went ahead with the adjudication on the main disputes and rendered his award dated 31.8.2005 awarding a sum of Rs. 9,56,760/- with interest @ 10% per annum from 1.9.2005 till payment in favour of the appellant. Since the judgment debtor did not make payment, the decree holder filed Execution Petition No. 4/2006, which has met the fate as mentioned above, namely, the learned Single Judge of this Court has refused to entertain the same for lack of pecuniary jurisdiction.

5. The pivotal fact which needs to be noted herein is that with effect from 25.5.2003 the pecuniary jurisdiction of this Court was raised from Rs. 5 lakhs to Rs. 20 lakhs and above. Howsoever, all pending applications filed under the Act were allowed to be heard by this Court. The judgment debtor filed petition under Section 34 of the Act in the District Court on 28.11.2005 challenging the award. However, before the learned Additional District Judge the judgment debtor made a request for withdrawing the petition on the ground that as the matter had earlier been proceeded with by the High Court under Section 11 of the Act, the District Court did not have the jurisdiction to try the petition. The petition was allowed to be returned to the judgment debtor for filing the same before the appropriate court. Thereafter, the judgment debtor sought review of order dated 18.4.2006 permitting withdrawal which was also dismissed vide orders dated 22.3.2007. Against that order, FAO No. 155/2007 is preferred by the judgment debtor, which is still pending in this Court.

6. The first relevant provision for examining the issue would be Section 2(e) of the Act which defines "Court" as the entire issue is as to which is the competent "Court" to entertain the execution petition. We will have to initiate our discussion on this issue by taking note of this definition, which is as under:

"court" means 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;

7. What clearly follows is that principal Civil Court of original jurisdiction in a district, which has the jurisdiction to decide the question forming the subject-matter of the

arbitration if the same had been subject-matter of a suit, would be the "Court" for the purpose of this Act. It specifically includes the High Court which has ordinary original civil jurisdiction, like Delhi High Court. The application under Section 11 was filed, in the instant case, in the year 1998 when Delhi High Court had the necessary original civil jurisdiction to entertain the said application as the claim stated therein was more than Rs. 5 lakhs. At that time, the applicants were supposed to approach the District Court. The legal position in this behalf was settled by the Supreme Court in the case of S.B.P. & Co. v. Patel Engineering Ltd. and Anr. MANU/SC/1787/2005 : AIR2006SC450 wherein the Supreme Court, inter alia, held that application under Section 11 could be filed only in the High Court or the Supreme Court inasmuch as per the provisions of Section 11, the power is with the Chief Justice of the High Court or the Supreme Court, as the case may be, to entertain such petitions or any person authorized by him and such a person could not be the District Judge. Therefore, application under Section 11 is to be addressed to the Chief Justice of the High Court which can be entertained by the Chief Justice or any other designated Judge of the High Court.

8. Section 42 of the Act stipulates that where, with respect to an arbitration agreement, any application 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. Precise language of that Section is as under:

Section 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.

9. The question which arose for consideration, on an earlier occasion, was as to whether by virtue of provisions of Section 42 of the Act it would only be the High Court which would entertain the execution petition, if the High Court had appointed the Arbitrator under Section 11 of the Act. By catena of decisions the answer given to this question is in the negative. Some judgments noted by the learned Single Judge in this behalf are:

- i. NDMC v. D.K. Construction Company OMP No. 55/2005.
- ii. National Thermal Power Corporation v. R.S. Avtar Singh and Anr. 2002 (3) ALR 8 (Delhi).
- iii. Kinetic Capital Finance Ld. v. Anil Kumar Misra 87 (2000) DLT 405
- iv. Apparel Export Promotion Council v. Prabhati Patni, Proprietor Comfort Furnishers and Anr. MANU/DE/2402/2005 : 125(2005)DLT511 .

10. The rationale given in the aforesaid judgments is that the expression "Chief Justice" as contained in Section 11 of the Act, is not synonymous with the term the "Court" as defined in Section 2(e) of the Act, and therefore merely because an Arbitrator has been appointed by the High Court, the same in itself would not be sufficient to vest jurisdiction with the High Court to entertain any other/subsequent applications relating to the said arbitral proceedings in which the Arbitrator was

appointed, irrespective of the pecuniary limits on its jurisdiction.

11. There was no quarrel about this proposition of law. We may only note that even the Supreme Court has now affirmed the aforesaid view in the case of Garhwal Mandal Vikas Nigam Ltd. v. Krishna Travel Agency (2008) 6 SCC 741. That was a case where the Supreme Court had constituted the arbitral tribunal in an application filed under Section 11(6) of the Act. After the award was made by the arbitral tribunal, petition under Section 34 of the Act was filed before the Supreme Court challenging that award. The Supreme Court held that if the plea of the respondent is accepted that matter should be decided by the Supreme Court that would mean that in every case where the Supreme Court passes an order, be it on appeal from the order passed by the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996, the Supreme Court will become a Principal Civil Court of Original Jurisdiction. If the argument is further taken to its logical conclusion that would mean that the parties will have to approach the Supreme Court by making an application under Section 34, i.e., for setting aside the award. The expression "Court" used in Section 34 of the Act will also have to be understood ignoring the definition of "court" in the Act. Similarly, if High Court exercises jurisdiction under Section 11(6), the High Court would become Principal Civil Court of Original Jurisdiction. In such a situation, right to appeal under Section 37(1)(b) will also be circumvented. Such a plea cannot therefore be accepted. The position in law was, thus, summed up in the following manner:

10. We further reiterate that the view taken by this Court in National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd. and State of Goa v. Western Builders is the correct approach and we reaffirm the view that in case any appointment of arbitrator is made by the High Court under Section 11(6), the Principal Civil Court of Original Jurisdiction remains the District Court and not the High Court. And likewise, if an appointment of the arbitrator is made by this Court, in that case also, the objection can only be filed before the Principal Civil Court of Original Jurisdiction as defined in Section 2(1)(e) of the 1996 Act. Thus, in this view of the matter, we hold that the plea raised by the learned Counsel for the petitioner that this Court should entertain the award given by the arbitrator appointed by this Court and all objections to it should be disposed of by this Court is unacceptable and consequently, the prayer made in the application is rejected.

12. Learned Counsel for the decree holder, however, wants to rely upon two circumstances on the basis of which he seeks benefit of Section 42 of the Act. These are:

a) when the application was filed by the decree holder under Section 11 of the Act, the High Court had the pecuniary jurisdiction to entertain that application. Therefore, notwithstanding the judgment in Patel Engineering, which clarified the issue later, even otherwise the application under Section 11(6) of the Act in the year 1998 was maintainable only in the High Court and not before the District Court as the claim was more than Rs. 5 lakhs. It is for this reason that application was preferred in the High Court, as otherwise because of the position in law prevailing as on that date, the District Court was competent to entertain the application under Section 11 of the Act in those cases where the claim was less than Rs. 5 lakhs;

b) the judgment debtor had herself filed applications under Sections 27 and 37(2)(b) of the Act in this Court which were entertained by this Court and decided on merits. Thus, when earlier proceedings were filed in this Court

with respect to an arbitration proceeding, this Court only had the jurisdiction over the arbitral proceedings and all subsequent application in view of Section 42 of the Act.

13. Before we proceed to consider these submissions, it would be necessary to take note of certain judgments on which reliance was placed by the counsel for the parties. Learned Counsel for the appellant referred to and relied upon the following judgments to buttress his aforesaid submission:

(i) Sasken Communication Technologies Limited v. Prime Telesystems Limited and Ors. MANU/DE/1049/2002 : 99(2002)DLT640

In this case the competency of Delhi High Court to entertain the petition under Section 11(4) of the Act was challenged on the ground that earlier application under Section 9 of the Act seeking interim measure was filed in the Bombay High Court and therefore, in view of the position of law contained in Section 42, it was only Bombay High Court which had necessary jurisdiction to entertain subsequent proceedings. Accepting this contention, a learned Single Judge of this Court explained the legal position and answered the issue as under:

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 application under the Act and is intended to ensure that all the proceedings relating 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 in spite 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. reported in MANU/DE/0808/1998 : AIR1999Delhi11 , 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.

(ii) S.K. Contractor & Engineers v. Hindustan Petroleum Corporation Limited 2008 (2) ALR 263 (Delhi)

In this case also, an objection with regard to the territorial jurisdiction of Delhi High Court to entertain the petition filed under Section 34 of the Arbitration and Conciliation Act was raised. The agreement between the parties contained a clause by which exclusive jurisdiction of the courts situated at Mumbai was conferred. On this basis it was contended that even if part of cause of action had arisen in Delhi, since exclusive jurisdiction was rested in the court at Mumbai by agreement between the parties, petition under Section 34 could not be filed in Delhi. This argument was countered by the petitioner submitting that on an earlier occasion application under applications under Sections 12 and 13 of the Act was filed in Delhi High Court and the respondent had not raised any objection with regard to jurisdiction and contested the said OMP on merits. Therefore, the agreement by which exclusive jurisdiction was conferred upon the Bombay High Court has been waived and by virtue of Section 42 of the Act, subsequent proceedings have to be filed in Delhi High Court. Learned Single Judge of this Court accepted this contention of the petitioner therein in the following manner:

5. ...The said clause 14.10, therefore, clearly restricted the jurisdiction to the courts at Mumbai. However, this was by agreement between the parties. The case of the petitioner is that it is by agreement between the parties that this clause has been waived. This can be discerned from the fact that when the petitioner filed the earlier OMP No. 388/2006 under Section 12 and 13 of the said Act, the respondents raised no objection with regard to jurisdiction and, in fact, submitted arguments on merits. It is another matter that the said OMP No. 388/2006 was dismissed by this Court but, it was not dismissed on the question of jurisdiction. I am in agreement with the learned Counsel for the petitioner that by virtue of the fact that the respondent did not raise any objection with regard to jurisdiction when the

earlier petition under the said Act had been filed before this Court, the respondent would be deemed to have waived the condition with regard to exclusivity of jurisdiction of the Courts situated at Mumbai. As much as clause 14.10 is contractual, so is waiver (See: Dawsons Bank Ltd. v. Nippon Menkwa Kabushiki Kaish (Japan Cotton Trading Co. Ltd. MANU/PR/0024/1935; Mademsetty Satyanarayana v. G. Yelloji Rao and Ors. MANU/SC/0310/1964 : [1965]2SCR221 ; Supdt. of Taxes, Dhubri and Ors. v. Onkarmal Nathmal Trust MANU/SC/0265/1975 : AIR1975SC2065 ; Krishna Bahadur v. Purna Theatre and Ors. MANU/SC/0667/2004 : (2004)11ILLJ555SC . That being the case, the provisions of Section 42 of the said Act would come into play. Since the first application had been filed before this Court, all subsequent applications under the said Act falling within the ambit of Section 42 would also have to be filed before this Court.

14. Learned Counsel for the respondent, on the other hand, referred to the following judgments in support of his plea:

(i) Pandey & Co. Builders (P) Ltd. v. State of Bihar and Anr. MANU/SC/8643/2006 : AIR2007SC465

In this case, order of the Arbitrator was challenged by filing appeal under Section 37 of the Act. This appeal was filed in the Patna High Court. The question which arose for determination was as to whether the appeal could be entertained by the High Court or it was to be filed in the District Court. In view of definition of 'court' appearing in Section 2(1)(e) of the Act, the Apex Court held that appeal against such an order of the Arbitrator lies before the 'court' and such a court has to be one which has the original jurisdiction. Since Patna High Court did not have the original jurisdiction, appeal was rightly returned by the Patna High Court on that ground.

We are not directly concerned with such a situation in the instant case as Delhi High Court has the original jurisdiction as well. However, the only purpose for citing this judgment by the learned Counsel for the respondent was that the expression "original jurisdiction" is to be read keeping in view the pecuniary jurisdiction and since the amount in question was less than Rs. 20 lakhs, the High Court lacked the pecuniary jurisdiction to entertain the execution petition. He also referred to para 34 of the judgment which provides a distinction between an appeal and application in the following terms:

34. There exists a distinction between an appeal and an application. Whereas Section 31(4) of the 1940 Act or Section 42 of the 1996 Act provides for an application, Sub-section (2) of Section 37 of the 1996 Act provides for a statutory appeal. A forum of an appellate court must be determined with reference to the definition thereof contained in the 1996 Act.

(ii) S.K. Brothers v. Delhi Development Authority MANU/DE/0995/2008 : 152(2008)DLT239

The learned Single Judge of this Court in the case judgment

refused to entertain the execution petition for executing the award/decreed amount of which was less than Rs. 20 lakhs, i.e., less than the pecuniary jurisdiction of this Court. However, in the process the learned Single Judge also expressed his view that execution application is not "arbitral proceedings" within the meaning of Section 42 of the Act and the counsel for the respondent has referred to this judgment highlighting this aspect of the judgment dealt with by the learned Single Judge.

15. We have considered the aforesaid submission in the light of various judgments cited by the counsel for the parties. We have already opined that in view of the law laid down in said judgments, particulars whereof are given hereinabove, merely because the High Court appointed the Arbitrator in the application filed under Section 11(6) of the Act would not mean that subsequent proceedings, including execution petition have to be filed in the High Court. If the amount of the award is less than Rs. 20 lakhs the execution petition shall have to be filed before the District Court which has the necessary pecuniary jurisdiction to entertain the same. For this reason, contention mentioned above needs to be rejected. Even if application under Section 11 filed in the year 1998 was because of the reason that this Court had the pecuniary jurisdiction, would be of no avail. All said and done, order for appointment was passed under Section 11 of the Act and it is now a settled law that the expression 'Chief Justice' as contained in Section 11 of the Act is not synonymous with the term 'Court' as defined in Section 2(e) of the Act. Therefore, benefit of Section 42 cannot be taken on this basis. What remains to be answered is as to whether the execution petition is competent in this Court because on an earlier occasion applications under Sections 27 and 37(2)(b) of the Act were filed in this Court and therefore, all subsequent proceedings would be maintainable in this Court alone by virtue of Section 42 of the Act. No doubt, Section 42 of the Act confers exclusive jurisdiction on this Court over the "arbitral proceedings and all subsequent applications arising out of that agreement." However, execution application would be competent in this Court only if it is in the nature of "arbitral proceedings". It has to be relatable to the arbitral proceedings or be termed as 'application' arising out of the arbitration agreement. Answer to this has to be in the negative in view of *S.K. Brothers v. Delhi Development Authority* (supra) holding that execution application is neither "arbitral proceedings" within the meaning of Section 42 of the Act or subsequent application arising out of the agreement. No doubt, it is the judgment by a learned Single Judge. However, in arriving at this conclusion the learned Single Judge has relied upon the judgment of the Supreme Court in *Pandey & Co. Builders (P) Ltd. v. State of Bihar and Anr.* (supra) and stated the position in the following manner:

7. The Apex Court in *Pandey & Co. Builders (P) Ltd. v. State of Bihar and Anr.* MANU/SC/8643/2006 : AIR2007SC465 , has further held that Section 42 only applies to applications and not to appeals under Section 37 of the Act. Applying the same reasoning, Section 42 would also not apply to execution applications. The execution application is not "arbitral proceedings" within the meaning of Section 42 of the Act and is not a subsequent application arising out of the agreement and the arbitral proceedings. In fact, the arbitral proceedings come to an end when the time for making an application to set aside the arbitral award expires and the execution application is an enforcement of the award which takes the colour of a decree under the CPC, by virtue of the provisions of Section 36 of the Act.

16. We are in agreement with the aforesaid view and the position in law explained by

the learned Single Judge in that judgment. For the aforesaid reasons we hold that the impugned judgment returning the execution petition is perfectly in order and does not call for any interference. We, therefore, dismiss this appeal but leave the parties to bear their own costs.

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