

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

CIMA No. 100/2013
CM No. 143/2013

Pronounced on:21.08.2021

Chief Engineer & ors.

.... Petitioner/Appellant(s)

Through:- Mr. R. Koul, Advocate

V/s

M/s K. K. Chibber
Construction

....Respondent(s)

Through:- Mr. Rahul Pant, Sr. Advocate
with Mr. Anirudh Sharma,
Advocate

CORAM : HON'BLE MRS. JUSTICE SINDHU SHARMA, JUDGE
JUDGMENT

1. This appeal was filed under section 37 of The Jammu and Kashmir Arbitration and Conciliation Act, 1997 (since repealed) hereinafter referred to as 'The Act'. The appellants have challenged the dismissal of the application filed under section 34 of the Act challenging the award dated 11.12.2012 made by Mr. Justice B. A. Khan (retired Chief Justice of Jammu & Kashmir High Court) the sole Arbitrator appointed by the then Chief Justice of Punjab and Haryana High Court vide order dated 16.04.2007.

2. The brief facts necessary to appreciate the controversy are as under:

I. That a work contract was made between the parties on 02.07.2004. As per Clause 55.1 of the agreement all questions or disputes or differences arising between the contractor and the

corporation in relation to or in connection with the contract shall be referred for arbitration in the manner provided as under:

Clause (i) and (ii) being relevant are reproduced below:

(i). Either of the parties may give to the other notice in writing of the existence of such question, dispute or difference.

(ii). Within thirty (30) days of receipt of such notice from either party the Chief Engineer/In charge of the project at the time of such dispute shall send to the contractor panel of three persons and thereafter the contractor within fifteen (15) days of receipt of such panel communicate to the Chief Engineer/In-charge of the project the name of one of the persons from such panel and such a person shall then be appointed sole arbitrator by the Chief Engineer/In charge of the project.

(iii).....”

II. That in the year 2006 dispute arose between the parties but despite legal notice, it appears that the appellants did not accede to the request by appointing the Arbitrator as is evident from the order dated 16.04.2007, passed by the then Chief Justice of the High Court of Punjab and Haryana High Court. Relevant portion of which is extracted below:

“.....Pursuant to the said arbitration clause, legal notice was issued invoking the said clause which is admitted by the respondents. The only objection taken by the respondents is that this Court does not have the territorial jurisdiction as the agreement was entered into at Jammu and Kashmir and the work was also executed at Jammu and Kashmir.

I have perused the arbitration clause. There is no clause conferring sole jurisdiction to the Courts situated in Jammu and Kashmir. Even otherwise, the registered

office of the respondent company is situated at Faridabad, in the State of Haryana. However, as one of the parties is having its presence at Jammu and Kashmir, I appoint Justice B. A. Khan (retired Chief Justice of Jammu and Kashmir) as sole Arbitrator to adjudicate upon all the disputes between the parties.

The Arbitrator shall fix his own fee. He shall also fix the place of sitting.”

3. In the objections filed by the respondents, it has been specifically pleaded that the award having been passed by the sole arbitrator on a reference being made by the Punjab and Haryana High Court on the proceedings instituted under section 11(5) of The Arbitration and Conciliation Act, 1996 all the subsequent proceedings under section 42 of the Act have to be by the Punjab and Haryana High Court.

4. After hearing the parties and reproducing the section 42 of the Arbitration and Conciliation Act of 1997, the District Judge Kishtwar, while considering the objections raised on behalf of the respondents held as under:

“Therefore, the objections raised by the Id. Counsel for respondents as to the jurisdiction of this court is sustainable as only Hon’ble High Court of Punjab and Haryana has jurisdiction to entertain and decide application u/s 34 of the Act. I am also supported in my view by the judgment in case **Steel (Singapore) Trading Pvt. Ltd. V. Bhushan Power & Steel Ltd., AIR 2011 Calcutta 132.**”

5. Learned counsel for the appellant had assailed the judgment stating that it was against Section 2(e) of the 1997 Act because the cause of action arises within the jurisdiction of the District Judge Kishtwar. In opposition of the argument, the respondent has supported the judgment by saying that parties have agreed to the seat of Arbitration being in Delhi and the law applicable being the Arbitration and Conciliation Act of 1996,

therefore, award could not be challenged in the court of District Judge Kishtwar even if the work was executed within the jurisdiction of District Kishtwar.

6. The order dated 16.04.2007 rejecting the preliminary objection of jurisdiction was not challenged by the appellant in an appeal under section 136 of the Constitution of India as laid down by the Constitution Bench in case titled **S.B.P and Co. V/s Patel Engineering Ltd. and another, 2005(8) SCC 618** as summarized in para 47 of the judgment sub-para (i) and (vii) of which are reproduced below:

“47. We, therefore, sum up our conclusions as follows:

i). The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

Vii). Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.”

7. The question of the jurisdiction of the Arbitrator, however, was again raised by the appellant, which is Issue No. 1 of the eight issues framed by the Arbitrator. This issue was decided by the Arbitrator holding as under:

“...On the first issue related to Jurisdiction of the Arbitrator, it is submitted for the Claimant that as the Contract Agreement contains Arbitration clause and as disputes raised fall outside the clause 53 and 36 of the “General conditions of contract”, the Arbitrator’s jurisdiction remains intact and Is not liable to be questioned. Besides, Corporation had admitted all facts invoking the Arbitration clause (55.1) and had not objected to Arbitrator’s jurisdiction in its reply to the Claimant application under section 11 (6) of the Arbitration Act before P & H high Court and had also failed to challenge

Arbitrator's order dated 16.04.2007 appointing Arbitrator, which order had attained finality.....”

So the sole arbitrator rejected the objection.

8. Clause 55.8 and 55.9 of the General Conditions of the contract pertains to the law applicable & place of Arbitration Agreement. These are reproduced as under;

Clause-55.8

Subject to aforesaid modifications, Arbitration and Conciliation Act 1996 or any statutory modifications or re-enactment thereof and the rules made thereunder and for time being in force shall apply to the Arbitration proceedings under this clause.

Clause-55.9

The venue of arbitration proceedings shall be in DELHI or any other suitable and convenient place in India as may be decided by the Learned Arbitrator.

9. As to how the place of Arbitration determines the jurisdiction of the Court. This has been laid down by the Constitutional Bench in **Bharat Aluminum Company v. Kaiser Aluminum Technical Services Inc., (2012) 9 SCC 552**. The relevant portion is reproduced below:

“96.we are of the opinion, the term “subject matter of the arbitration” cannot be confused with “subject matter of the suit”. The term “subject matter” in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. 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.....”

10. As the seat of arbitration proceedings was Delhi and the parties had also agreed (Clause 58.9). That the Arbitration and Conciliation Act, 1996 will be applicable to the proceedings. Therefore, Para-99 of the judgment (supra) gets attracted which is reproduced below:

“99. The fixation of the most convenient “venue” is taken care of by Section 20(3). Section 20, has to be read in the context of Section 2(2), which places a threshold limitation on the applicability of Part I, where the place of arbitration is in India. Therefore, Section 20 would also not support the submission of the extra-territorial applicability of Part I, as canvassed by the learned counsel for the appellants, so far as purely domestic arbitration is concerned.”

11. Further, their lordships have been pleased to hold in Para 196, that the Part-I of the Arbitration Act, 1996.

“196. We conclude that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which take place within the territory of India.”

The then counsel appearing for the respondents fairly considered that Section 42 of the J&K Arbitration and Conciliation Act, 1997 does not stand in the way of the application under Section 34 in a court other than the court that exercise jurisdiction under Section 11 of the Act with the approval of the Arbitrator. The above submissions can be well appreciated in view of the law laid down by the Supreme Court in ‘**State of Maharashtra V/s Atlanta Ltd. 2014(II) SCC 619**’, with reference to Section 42 of the Act:

“29. The first issue which needs to be examined is, whether a challenge to an arbitration award (or arbitral agreement, or

arbitral proceeding), wherein jurisdiction lies with more than one court, can be permitted to proceed simultaneously in two different courts. For the above determination, it is necessary to make a reference to Section 42 of the Arbitration Act. The aforesaid provision accordingly is being extracted hereunder:

“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.”

A perusal of Section 42 of the Arbitration Act reveals a clear acknowledgment by the legislature, that the jurisdiction for raising a challenge to the same arbitration agreement, arbitral proceeding or arbitral award, could most definitely arise in more than one court simultaneously. To remedy such a situation Section 42 of the Arbitration Act mandates, that the court wherein the first application arising out of such a challenge is filed, shall also have the jurisdiction to adjudicate upon the dispute(s), which are filed later in point of time. The above legislative intent must also be understood as mandating, that disputes arising out of the same arbitration agreement, arbitral proceeding or arbitral award, would not be adjudicated upon by more than one court, even though jurisdiction to raise such disputes may legitimately lie before two or more courts.”

Thus, it is only Section 42 of the Act which determines the jurisdiction of the court notwithstanding anything contrary to the Act.

12. The law laid down earlier has been reiterated in ‘**Indus Mobile Distribution Private Limited V. Datawind Innovations Private Limited and others,**’ (2017) 7 SCC 678. Para 19 of which is extracted below:

“19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further

makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to “seat” is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction – that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Section 16 to 21 of the CPC be attracted. In arbitration law however, as has been held above, the moment “seat” is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.”

13. So the learned District Judge, Kishtwar was right in dismissing the application filed under Section 34 of the J&K Arbitration and Conciliation Act, 1997, but he should have refrained from expressing any opinion on which Court will have jurisdiction.

14. In view of the above, this appeal is not maintainable and, accordingly, dismissed alongwith all the connected application(s).

15. Original record of the court below be returned back forthwith.

(Sindhu Sharma)
Judge

JAMMU
21.08.2021
RAM MURTI

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| <i>Whether the order is speaking</i> | : | <i>Yes</i> |
| <i>Whether the order is reportable</i> | : | <i>Yes</i> |