In the High Court at Calcutta

Civil Revisional Jurisdiction

Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

C.O. No. 3328 of 2018

Mohanlal Agarwal

Vs.

Manjan Devi Patni and others

For the petitioner	:	Mr. Abhrajit Mitra, Ms. R. Kajaria, Mr. Saptarshi Mukherjee, Mr. Satadeep Bhattacharyya
For the opposite parties	:	Mr. U.S. Menon, Mr. Rajeev Kumar Jain, Mr. Apurva Daga, Mr. Sayantan Chatterjee
Hearing concluded on	:	21.01.2019

Judgment on : 24.01.2019

Sabyasachi Bhattacharyya, J.:-

1. The present petitioner, having suffered an arbitral award dated February 28, 2018, preferred an application challenging the said award under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"), thereby giving rise to Miscellaneous Case No. 298 of 2018.

2. The present opposite party nos. 1 to 11, being respondent nos. 1 to 11 in the said miscellaneous cases, filed an application challenging the maintainability of the case before the District Judge at Alipore, by relying on Section 42 of the 1996 Act. The trial Judge allowed such application challenging maintainability and returned the application under Section 34 of the 1996 Act to the petitioner for presenting before the concerned court having jurisdiction. The said order, dated August 14, 2018, is under challenge in the present application under Article 227 of the Constitution of India.

3. Learned senior counsel appearing for the petitioner submits that the term "Court", as used in Section 42, has to be seen in the context of definition of "Court", as given in Section 2(1)(e) of the 1996 Act. If such definition is taken into consideration, the court having jurisdiction to take up the challenge under Section 34 of the said Act would be 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

question forming 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, in the case of domestic arbitrations.

4. It is submitted that unless the first court where any application under part 1 of the 1996 Act was made had jurisdiction to take up such matter, Section 42 of the 1996 Act would not be attracted at all.

5. In the present case, since the Alipore court had territorial jurisdiction and the District Judge of the said court was the principal civil court of original jurisdiction of district: South 24 Parganas, where the property-in-question was situated, the application under Section 34 of the 1996 Act was rightly filed before the district court at Alipore.

6. The District Judge proceeded on the premise that, in view of an earlier application under Section 29-A of the 1996 Act having been filed in this court, Section 42 mandated that all subsequent applications, including the present application under Section 34, had to be presented before this court.

7. Such a premise, it is argued by the petitioner, was palpably erroneous since this court did not have jurisdiction, as conferred by Section 2(1)(e) of the Act, to decide the matter and as such, could not come within the purview of "Court" as contemplated in Section 42 of the 1996 Act.

8. In support of such proposition, learned senior counsel for the petitioner cites a judgment reported at *AIR 2012 Cal 255 [Hindustan Petroleum Corporation Ltd. vs. Barun Sankar*

Chatterjee and another], passed by a Single Bench of this court, wherein it was held inter alia that the mandate of Section 42 is that all future applications must be filed only in the court where the first application in respect of the arbitral dispute was filed. However, it would be a fraud on statute if an application, in relation to an arbitral dispute between the parties, could be filed either in court A or B but is filed in court Z, which is not the court having jurisdiction to entertain the application, thereby paving the way for all future applications to be filed in court Z. In such an event, it was held, there would arise no requirement to file the subsequent applications in court Z and if either court A or B is approached, it would be perfectly legitimate for it to entertain such subsequent application. It was further held that even if a party may not have raised objection of jurisdiction to decide the subject matter of dispute, the order or decree suffered is a nullity and its invalidity may be raised wherever and whenever it is sought to be enforced or relied upon.

9. Learned senior counsel next cites a judgment reported at *(2015) 1 SCC 32 [State of West Bengal and others vs. Associated Contractors].* In the said case, it is argued, the Supreme Court categorically held that the Supreme Court would not be a "Court" for the purposes of Section 2(1)(e) and thus section 42 would not apply. It was further held that applications preferred to courts outside the exclusive court agreed to by parties would also be without jurisdiction. It is submitted that, in the said judgment, the Supreme Court observed that 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 1996 Act. Section 42, it was held, only applies to applications made under Part I if they are made to a court as defined.

10. The petitioner next cites a judgment reported at *(2018) 2 SCC 602 [State of Jharkhand and others vs. Hindustan Construction Company Limited]*, wherein it was held inter alia, by relying on *Associated Contractors (supra)*, that the Supreme Court cannot be "Court" for the purposes of Section 42.

11. Learned senior counsel next relies on a division bench judgment of the Madras High Court reported at *MANU/TN/4194/2018 = (2018) 8 MLJ 58 [Karaikal Port Pvt. Ltd. vs. Marg Limited and ors.]* in support of the proposition that the mandate of Section 42 would be available only in a case where the court in which the earlier suit has been filed had the jurisdiction to adjudicate upon the dispute between parties.

12. The petitioner then relies on a division bench judgment of the Delhi High Court reported at *MANU/DE/2068/2018 [Antrix Corporation Ltd. vs. Devas Multimedia Pvt. Ltd.]*, in support of the proposition that a bona fide petition filed under the 1996 Act first in point of time would exclude jurisdiction of other courts. But if the court find that there was a hidden agenda in ousting jurisdiction of another court, the cunning act of filing the petition would not be treated as the said court being the first one to be approached and therefore, excluding the jurisdiction in the other court and vesting jurisdiction in said court alone.

13. The next judgment cited by the petitioner was reported at *AIR 1954 SC 340 [Kiran Singh & Ors. V. Chaman Paswan & Ors.]*, where the four-Judge bench of the Supreme Court held that a decree passed without jurisdiction was a nullity. The same principle, it is submitted, ought to be applied to the present case.

14. The petitioner next cites a judgment reported at *(2005) 7 SCC 791 [Harshad Chiman Lal Modi vs. DLF Universal Ltd and another]*, for the proposition that where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing. The decree passed by a court having no jurisdiction is *non est* and its invalidity can be set up whenever it is sought to be enforced as a foundation for a right.

15. The petitioner also cites judgment of a division bench of this court reported at *AIR 2015 Cal 335 = (2015) 4 CalLT 40 [Sri Sushanta Malik alias Susanta Malik vs. Srei Equipment Finance Limited & anr.]*, in support of the proposition that, in the context of Section 42 of the 1996 Act, in view of the definition of 'court' in Section 2(1)(e) of the said Act, for the purpose of Section 9 or Section 34 or Section 14(2) of the Act, 'Court' would mean the principal civil court of original jurisdiction in the district.

16. Learned senior counsel for the petitioner further argues that since Section 21 of the Code of Civil Procedure is not applicable to the original side of the High Court, in view of Section 120 of the Code, the petitioner could not be debarred from taking objection as to this court having no jurisdiction to take up the previous application under Section 29-A

of the 1996 Act, even if such objection is taken to be one as to territorial jurisdiction and not inherent lack of jurisdiction.

17. The petitioner further argues that if the *lis* is a suit for land, Clause 12 of the Letters Patent is applicable even if it is an arbitration proceeding and the provisions of Section 2 (1) (e) will be read accordingly. In support of such contention, the petitioner cites a judgment of a co-ordinate bench of this court, reported at *AIR 2011 Cal 229 [New Age Realty Pvt. Ltd. V. Karthikeya Ancilaries Pvt. Ltd.].*

18. Learned senior counsel for the petitioner cites another judgment, reported at *AIR 2011 Cal 229 [New Age Realty Pvt. Ltd. v. Karthikeya Ancilaries Pvt. Ltd.]* for the proposition that if an arbitral dispute involves a dispute as to land, Clause 12 of the Letters Patent would apply as in the case of a suit for land. The said judgment was rendered in the context of an application under Section 11 of the 1996 Act.

19. Next placing reliance upon the judgment reported at *(2016) 2 SCC 582 [Sumer Builders Private Limited v. Narendra Gorani]*, the petitioner submits that where the dispute involved in an application under Section 9 of the 1996 Act pertains to possession of land, the matter would fall within the category of "suit for land" and be governed by Clause 12 of the Letters Patent.

20. The petitioner then relies upon the judgment reported at *(2010) 13 SCC 678 [Geeta v. State of Uttar Pradesh & Ors.]*, wherein it was held that the enacting part of a statute must control the non obstante clause where both cannot be read harmoniously and the court

must try to find out the extent to which the legislature had intended to give one provision overriding effect over another. The court, while interpreting a non-obstante clause, is required to find out the extent to which the legislature intended to give it an overriding effect.

21. Learned senior counsel next cites a Division Bench decision of this court, reported at *(2018) 4 CalLT 57 (HC) [Debdas Routh and Ors. v. Hinduja Leyland Finance Ltd. and Ors.]*. It was held therein that it is possible that several courts may have the territorial and pecuniary jurisdiction to receive a civil suit. Thus, several courts may also have the authority to receive a petition or application under Part-I of the 1996 Act in terms of Section 2 (1)(e)(i) thereof pertaining to the same arbitration agreement. However, once a court receives a petition or application under Part-I of the said Act, the jurisdiction of the other possible courts pertaining to the same arbitration agreement stands ousted by virtue of Section 42 of the Act. Again, it was held further, the operation of Section 42 of the Act does not extend, for obvious reasons, to Section 8 or Section 11 of the Act. It was also held that a forum selection clause is subject to the solitary condition that only such a court which is otherwise clothed with the jurisdiction to receive a suit may be chosen by the parties as the desired forum. In other words, it is not open to the parties to confer jurisdiction by agreement on a court that would otherwise not possess the jurisdiction to receive the civil action.

22. Hence, it is argued by the petitioner that the seat of arbitration is irrelevant for ascertaining jurisdiction and even a forum selection clause cannot confer jurisdiction on

a court other than one already having jurisdiction. As such, the petitioner submits that neither the forum selection clause (Clause 15 of the agreement-in-question) nor the factum of the seat of arbitration being mostly within the jurisdiction of this court could confer jurisdiction on this court as envisaged in Section 2 (1) (e) (i) of the 1996 Act. Thus this court could not be the first court where an application is filed under Part I, as contemplated in Section 42 of the said Act. So the application under Section 34 of the 1996 Act was rightly presented before the Alipore court, which otherwise has territorial jurisdiction in view of the dispute relating to land and akin to a suit for land.

23. In answer, learned counsel for the opposite party nos. 1 to 11 begins his submission by placing an order dated September 5, 2017 passed by a co-ordinate bench of this court in A.P. No. 712 of 2017, which is annexed to the present application under Article 227 of the Constitution of India. It is seen from the said order that the learned Single Judge had disposed of an application (apparently under Section 29-A of the 1996 Act) by extending the time for the arbitrator to make and publish his award by 28th February, 2018. The order was passed in presence of both the parties, who are also the present contesting parties.

24. It is argued that since the petitioner submitted to the jurisdiction of this court in conceding to the said order under Section 29-A of the 1996 Act, which has since attained finality, the petitioner must be deemed to have acquiesced to the jurisdiction of this court and cannot now resile from that position by arguing that this court had no

jurisdiction to qualify as the first court where an application is presented, for the purpose of invoking Section 42 of the 1996 Act.

25. In support of such proposition, learned counsel for the opposite party nos. 1 to 11 cites a judgment reported at *1984 (Supp) SCC 661 [Sohan Singh & Ors. v. General Manager, Ordnance Factory, Khamaria, Jabalpur & Ors.]*. It was held therein that if parties initially submitted to the jurisdiction of a labour court instead of challenging the same, later its decision was not open to challenge by the aggrieved party on the ground of its lack of jurisdiction and the said party is barred by estoppel from doing so.

26. A similar view was expressed in another decision, reported at *(2002) 3 SCC 175 [Inder Sain Mittal v. Housing Board, Haryana & Ors.]* wherein the Supreme Court held that the right to raise an objection to an arbitral award, based on the ground that the arbitrator did not fulfil qualifications stipulated in the arbitration agreement and thus lacked jurisdiction, would be defeated if the party raising it had participated in the arbitration proceedings and thus acquiesced in the functioning of the arbitrator despite the invalidity of his conduct.

27. The next judgment cited by the opposite party nos. 1 to 11 was reported at *AIR 2011 Cal 158 (Texmaco Ltd. v. Tirupati Buildestates Pvt. Ltd.]*, wherein a co-ordinate bench of this court held that a subsequent application under Part I of the 1996 Act has necessarily to be made to a court which has received the previous application under Part I of the Act, provided the previous application under Part I of the Act pertaining to the same arbitration agreement was carried to a competent court; or, no objection as to jurisdiction

had been taken even though it had been instituted before a court lacking territorial or pecuniary jurisdiction to receive it. Section 42 of the Act does not imply that even if a previous application is carried to a court and such court is found to have been incompetent to receive it, all subsequent applications under Part I of the Act relating to the arbitration agreement have to be carried to such incompetent court. There is, however, a rider. Since the question of territorial jurisdiction may not go to the root of the matter as in inherent lack of jurisdiction, if the parties allow the proceedings to continue before an apparently incompetent court without raising any objection thereto, subsequent applications under Part I of the Act pertaining to the same arbitration agreement have to be made to the apparently incompetent court which received the earlier application as the parties would be estopped from questioning the jurisdiction of the court subsequently upon not having urged it in course of the earliest application under Part I of the Act in the apparently incompetent court.

28. Learned counsel submits that the aforesaid cited judgment demolishes the petitioner's contention, that the petitioner can raise objection as to jurisdiction of this court in disposing of the application under Section 29-A of the 1996 Act at the present juncture despite having not raised it at the time when such application was entertained, in view of non-applicability of Section 21 of the Code of Civil Procedure to this court in its original side.

29. Moreover, it is contended, Section 120 of the Code of Civil Procedure stipulates that Sections 16, 17 and 20 of the Code will not apply to this court in its original jurisdiction,

which automatically exclude the application of Section 21 of the Code in case of civil suits governed by the Code of Civil Procedure, since the question of any objection does not then arise in view of non-applicability of the abovementioned three sections. However, the Code of Civil Procedure is not applicable to arbitration proceedings and related matters and as such, when this court takes up such matters, there is no application of Sections 16, 17 and 20 but the general principle of estoppel/waiver, as laid down in *Texmaco Ltd. (supra)* is applicable and there is no question of exclusion of the principle embodied in Section 21 of the Code as such.

30. Learned counsel for the opposite party nos. 1 to 11 then points out that clause 15 of the arbitration agreement-in-question dated July 12, 2002, pertaining to jurisdiction, stipulates that the Ordinary Original Civil jurisdiction of the Hon'ble High Court at Kolkata alone and failing whom any other competent court shall have jurisdiction to entertain and try and determine all actions and suits (including the arbitration proceedings) arising out of the agreement.

31. Thus it is submitted that, in any event, this court had the jurisdiction, in the first place, to take up applications arising out of the arbitration-in-question. As such, the contention of the petitioner that this court did not have initial jurisdiction to dispose of the application under Section 29-A of the 1996 Act, is contrary to the arbitration agreement itself.

32. Learned counsel for the opposite party nos. 1 to 11 argues that, apart from the above, most of the sittings of the said arbitration took place within the territorial jurisdiction of the Calcutta High Court. Some of the minutes of the said arbitral proceedings, annexed

to the present revisional application, were placed in this regard. In such a scenario, it is argued that the seat of the arbitration fell within the jurisdiction of this court, thereby conferring jurisdiction on this court to take up applications in connection with the same.

33. Learned counsel places reliance on a judgement reported at *(2017) 7 SCC 678 [Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited & Ors.]* for the above proposition. It was held by the Supreme Court in the said reported judgement, inter alia, that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the said case, it was clear that the seat of arbitration was Mumbai and Clause 19 further made it clear that jurisdiction exclusively vested 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 Sections 16 to 21 of CPC be attracted. In arbitration law however, as was held thereinabove, 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. It was further held that it is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. Upon reference to certain other decisions, the Supreme Court held that Mumbai courts alone

had jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration was at Mumbai.

34. Learned counsel for the opposite party nos. 1 to 11 further contends that the Calcutta High Court had jurisdiction under clause 12 of the Letters Patent to entertain and try arbitration petitions even if no cause of action had arisen within its jurisdiction, provided the respondent had an office in Calcutta. In support of such proposition, learned counsel placed reliance on a judgement reported at *(2006) 11 SCC 521 [Jindal Vijayanagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Co. Ltd.]*, which laid down such proposition in the context of the Mumbai High Court, also a chartered High Court like the Calcutta High Court.

35. As such, the opposite party nos. 1 to 11 argue that the 'court' where the first application, as envisaged under Section 42 of the 1996 Act, was made was this court in view of the previous application filed by the said opposite parties under Section 29-A of the 1996 Act, which was allowed in presence of both parties and attained finality since the petitioner never questioned the same. Not only did Clause 15 of the arbitration agreement-in-question vested jurisdiction in this court, this court was also the seat of the arbitration, thereby rendering it at least one of the courts having jurisdiction to take up the matter and bringing it within the purview of the first court contemplated in Section 42.

36. This apart, it is argued that the parent arbitral proceeding from which the present application under Section 34 of the 1996 Act arises was not a "suit for land", the territorial jurisdiction of which would be determined by the location of the disputed property. Rather, it was a "proceeding" as contemplated in the 1996 Act and would not be governed by the concept of civil law but by the 1996 Act itself, thereby conferring primacy on the seat of the proceeding for the purpose of determining territorial jurisdiction, or, as per *Jindal Vijayanagar Steel (supra)*, the court where the respondent in the arbitration proceeding had its office.

37. Moreover, learned counsel for the opposite party nos. 1 to 11 also takes this court through the pleadings in the arbitral claim to show that the reliefs claimed therein comprised not only of an award for recovery of possession of the property, but several monetary claims in the nature of compensation for monetary loss, mesne profits, municipal rates, taxes and cess, costs, etc. and other diverse reliefs. Hence, the proceeding could not be confined to a "suit for land" as argued by the petitioner.

38. The opposite party nos. 1 to 11 also cite a judgment reported at *(1992) 4 SCC 683 [R.N.Gosain v. Yashpal Dhir]* for the proposition that one cannot approbate and reprobate in the same breath, by not raising any objection as to jurisdiction of this court in the proceeding under Section 29-A of the 1996 Act at the disposal of the same, but raising such issue in the present proceeding under Section 42 of the said Act.

39. Thereafter learned counsel for the opposite party nos. 1 to 11 goes on to distinguish the judgments cited by the petitioner.

40. Referring to *Hindustan Petroleum Corporation Ltd. (supra)*, it is argued that the premise of such judgment was that a fraud on statute was committed if an application is filed in a court not having jurisdiction at all to entertain the first proceeding. However, in the present case this court had jurisdiction, which was conceded to by participation by the petitioner in the proceeding under Section 29-A of the 1996 Act, which was disposed of by this court. Therefore the said premise does not apply to the instant *lis*.

41. Moving on to *Associated Contractors (supra)*, which is a landmark judgment of the Supreme Court cited by the petitioner, it is submitted by learned counsel for the opposite party nos. 1 to 11 that the said decision, if seen in its proper perspective, vindicates the stand of the opposite party nos. 1 to 11 rather than that of the petitioner. The principle laid down in *Jindal Vijayanagar Steel (supra)*, relied on by the opposite party nos. 1 to 11, was reiterated in *Associated Contractors (supra).* Therein, a comparison was made between the definition of "court" in Section 2 (c) of the Arbitration Act, 1940 (hereinafter referred to as "the 1940 Act") and in Section 2 (1) (e) of the 1996 Act, and between Section 31 (4) of the 1940 Act and the corresponding Section 42 in the 1996 Act. It was noticed that the phrases "in any reference" and "has been made in a court competent to entertain it" in Section 31(4) were no longer there in Section 42.

42. While the definition of "court" in Section 2 (c) of the 1940 Act, it was further noticed, spoke of any civil court, the 1996 Act definition defined "court" to be the Principal Civil Court of Original Jurisdiction in a district or the High Court in exercise of its ordinary original civil jurisdiction.

43. In several places in *Associated Contractors (supra)*, it was recorded that the 1996 Act fixes the competent court as "the Principal Civil Court exercising original jurisdiction or a High Court exercising original civil jurisdiction", and no other court.

44. In final analysis, as specified in paragraph nos. 25 of *Associated Contractors (supra)*, it was laid down, inter alia, that Section 2 (1) (e) of the 1996 Act contained 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 1996 Act, that Section 42 applies to applications made under Part I if they are made to a court as defined, that 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. It was also specified that if a first application was made to a court which was neither a Principal Court of Original Jurisdiction in a district nor 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.

45. Ultimately, it was held by the Supreme Court that on the facts of the said reported case, nothing had been shown as to how the High Court of Calcutta did not possess jurisdiction and that leave under Clause 12 had been granted. Thus the judgment of the Calcutta High Court was not interfered with.

46. Learned counsel for the opposite party nos. 1 to 11 submits that this court was the High Court having original jurisdiction in the State and was the court having jurisdiction over the seat of arbitration. Thus the application under Section 29-A of the 1996 Act would be the first application envisaged in Section 42 of the said Act, conferring jurisdiction on this court to take up all subsequent applications in connection with the arbitration agreement-in-question.

47. Next referring to *State of Jharkhand & Ors. v. Hindustan Construction Company Limited (supra),* learned counsel submits on the basis of paragraph no. 36 of the said judgment that the pivot of the said case was *Associated Contractors (supra)* and applied the same line of distinction as drawn by him in respect of the latter judgment.

48. *Karaikal Port Pvt. Ltd. (supra)* also held that the mandate of Section 42 of the 1996 Act would be available only in a case, where the Court in which the earlier suit had been filed had the jurisdiction to adjudicate upon the dispute between parties. In the instant case, it is submitted, this court had such jurisdiction.

49. Dealing with *Antrix Corporation Ltd. (supra)*, learned counsel argues that it was laid down therein that both courts at the seat and the courts within whose jurisdiction the cause of action arises, if the dispute were the subject-matter of a suit, have jurisdiction in respect of applications in connection with arbitral proceedings. As such, in the present case, this court would have jurisdiction.

50. *Kiran Singh (supra)*, it is submitted, was in respect of a civil suit, and as such the ratio therein is not applicable to the present case, which relates to an arbitral proceeding. Moreover, since this court had jurisdiction to hear the initial application under Section 29-A of the 1996 Act, the order passed by this court was not a nullity.

51. This apart, it is argued, it was not for the District Judge at Alipore to hold that this court's previous order was a nullity, particularly since the previous order was passed in presence of the petitioner and the petitioner had not challenged it before any competent forum.

52. With regard to *Harshad Chiman Lal Modi (supra)*, it is again submitted by the opposite party nos. 1 to 11 that the said case arose from a civil suit governed by the Code of Civil Procedure and thus had no applicability to an arbitral proceeding under the 1996 Act.

53. In respect of *Sri Sushanta Malik alias Susanta Malik (supra)*, learned counsel for the opposite party nos. 1 to 11 submits that the point of reference was whether the City Civil Court or this court had jurisdiction to entertain proceedings under the 1996 Act, where the pecuniary value of the subject matter of arbitration was less than Rs. 10 lakhs. The pecuniary limit of valuation was given primacy and the City Civil Court was held to have jurisdiction. As such, it is argued that the point in contention in the present case is entirely different from the point on reference in the cited judgment; hence the latter could not be a binding precedent on the present contention.

54. As regards *Oriental Bank of Commerce (supra)*, also cited on behalf of the petitioner, the opposite party nos. 1 to 11 contend that the ratio laid down therein has no manner of application to the instant case since the said reported judgment pertained to a purely civil suit while the present matter emanates from an arbitral proceeding, where the Code of Civil Procedure is not applicable at all.

55. As regards the Single Bench judgment of this Court in *New Age Realty Pvt. Ltd. (supra)*, learned counsel for the opposite party nos. 1 to 11 argues that in the said case, the objection as to jurisdiction was taken at the inception, unlike the present case, where the petitioner acceded the order passed by this court under Section 29-A of the 1996 Act, thereby acquiescing to the jurisdiction of this court. Moreover, the said citation was rendered in the context of an application under Section 11 of the 1996 Act, which is factually distinctive from the instant case.

56. Distinguishing *Sumer Builders Private Limited (supra)*, learned counsel submits that the objection as to jurisdiction was taken at the first instance and no concession as to such objection had been given in a previous proceeding like the instant case. In any event, it is submitted that the judgment was in *per incuriam*, having overlooked the ratio enunciated in *Associated Contractors*.

57. In so far as *Geeta v. State of Uttar Pradesh and others (supra)* is concerned, the opposite party nos. 1 to 11 submit that the same did not pertain to an arbitration proceeding and the general proposition laid down therein did not take anything away from the propositions argued by the said opposite parties.

58. In answer to the Division Bench judgment of this court in *Debdas Routh and Ors. (supra)*, learned counsel for the opposite party nos. 1 to 11 submits that the same also held contrary to *Associated Contractors (supra)* and was thus *per incuriam* and not binding. Moreover, in *Debdas Routh (supra)*, an objection had been taken at the inception, unlike the present case, thus making it distinguishable with the instant *lis* on a cardinal aspect having relevant bearing on the decision.

59. On the basis of the above submissions, learned Counsel for the opposite party nos. 1 to 11 argues that the trial court was justified in passing the impugned order and as such this court ought to affirm such order. In fact, learned counsel submits that the trial judge was kind enough to return the application under Section 34 of the 1996 Act to the petitioner for presentation before the proper forum, instead of dismissing the same outright.

60. Prior to dealing with the ratio laid down in the several judgments cited by the parties, it is important to examine the language of Sections 2 (1) (e) and Section 42 of the 1996 Act as well as Sections 120 and 21 of the Code of Civil Procedure. The said provisions are thus set out below:

61. ***<u>The Arbitration and Conciliation Act, 1996</u>***

2. Definitions. -

(1) In this Part, unless the context otherwise requires,-

(e) "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;

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.

Code of Civil Procedure, 1908

120. Provisions not applicable to High Court in original civil jurisdiction

(1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

21. Objections to jurisdiction

(1) No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice.

62. The said provisions ought to be understood in context in order to appreciate the ratio laid down in the cited judgments harmoniously and in proper perspective.

63. Section 2 (1) is prefixed with "In this Part, unless the context otherwise requires…" and Section 42 picks up from there, beginning with a non obstante clause : "Notwithstanding anything contained elsewhere in this Part…", both referring to Part I of the 1996 Act.

64. Read in conjunction, the two provisions leave space for each other to operate in their own fields, as the beginning phrases indicate.

65. This apart, both sections specifically confer jurisdiction on courts, without leaving any ambiguity about it. Section 2 (1) (e) defines "Court" with the caveat that such definition would be applicable "unless the context otherwise requires".

66. It is to be kept in mind that though the expression "Court" has a seminal value in fixing jurisdiction, Section 2 itself does not take upon itself the onerous task of conferring jurisdiction but only pertains to definitions of terms which would be used later on in Part I of the same statute, as the side heading "Definitions" of Section 2 suggests.

67. On the contrary, Section 42 carries the side heading "Jurisdiction". In the body of the section, "jurisdiction" is conferred in no uncertain terms on "that Court alone" where any application under Part I has been made with respect to an arbitration agreement, over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings. It is reiterated in the section that all such applications "shall" be made in that court and "in no other Court".

68. Comparing between the two sections, if we apply the ratio laid down in *Geeta v. State of Uttar Pradesh and Others (supra)*, cited by the petitioner, and examine the extent to which the Parliament intended to give the non obstante clause an overriding effect, it will be seen that Section 2 (1) (e) and Section 42 are complementary to each other and the latter overrides the former in situations envisaged under the latter section.

69. Hence, when considering the term "Court" as contemplated in Section 42, Section 2 (1) (e), even if applicable, has to be read in proper perspective in order to give fullest effect to the intention of the legislature in enacting Section 42. Restricting Section 42 only to cases where several courts have jurisdiction and the first application is filed in one of those, would render the section redundant and unnecessary, which cannot be the purpose of interpretation.

70. An essential and peculiar feature of the present case, which has to be kept in mind, is that the petitioner conceded to the jurisdiction of this court when a co-ordinate bench disposed of an application under Section 29-A of the 1996 Act in the petitioner's presence. The resultant order was not challenged by the petitioner before any higher forum, let alone raise the question of jurisdiction before the learned single Judge.

71. In all the judgments cited by the petitioner on jurisdiction of courts pertaining to arbitral proceedings, the objection as to jurisdiction was taken before the first forum itself, which is a point of distinction going to the root of the question. In this context, if we read the judgments rendered by the Supreme Court in *Sohan Singh and Others (supra)* and *Inder Sain Mittal (supra)*, it will be evident that those cases categorically laid down the ratio that if parties initially submit to the jurisdiction of a court, later on it is not open to them to challenge the jurisdiction of the said court. The right to take objection as to jurisdiction of a forum would be defeated if the party raising it had participated in the proceedings and thus acquiesced in functioning of the forum despite there being merit otherwise in the objection.

72. In *Indus Mobile (supra)*, the Supreme Court clearly held that under the Law of Arbitration, unlike the Code of Civil Procedure, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. Designation of seat of arbitration was held to be akin to an exclusive jurisdiction clause as to the courts exercising supervisory powers over the arbitration. In the said case, it was further held that the moment the "seat" was determined at Mumbai, it vested the Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

73. In the case at hand, it is demonstrated from various recorded minutes that most of the sittings of the arbitration-in-question were held within the territorial jurisdiction of the original side of this court. Despite there being no specific clause in the arbitration agreement designating any "seat", by conduct the parties chose venues within such territorial jurisdiction, thereby conferring jurisdiction on this court.

74. The Division Bench of this court, in *Debdas Routh (supra)*, distinguished *Indus Mobile (supra)* on the premise that the said Supreme Court decision applied only when the forum selection clause and seat of arbitration indicate the same place. In the instant case, the forum selection clause (Clause 15 of the agreement-in-question) specifically named the Ordinary Original Civil jurisdiction of this court "alone" and "failing whom any other competent court" as the forum. No question of any such failure, as contemplated in the said clause to invoke the jurisdiction of any other court, arose at all since the first application in connection with the arbitration agreement was presented before this

court, disposed of in presence of both sides without any objection as to jurisdiction and the disposal order was permitted to attain finality by the petitioner by not preferring any challenge against the same. As mentioned above, the parties, by their conduct, also agreed to venues within such jurisdiction, thereby fixing the seat of arbitration also at Kolkata. Hence, even as per the ratio of *Debdas Routh (supra)*, this court in its original side would be the same court wielding jurisdiction by virtue of the forum selection clause as well as seat of arbitration, thus having jurisdiction.

75. This apart, *Debdas Routh (supra)* deals with a matter where the "arbitration court" refused to reject petitions under Section 9 of the 1996 Act on the ground of jurisdiction despite objections having been raised in that regard. The learned single Judge, as such, had no occasion to deal with the scope and applicability of Section 42 of the 1996 Act, nor had the learned single Judge any opportunity to adjudicate upon a situation where previously the jurisdiction of this court had been conceded and left unchallenged and in a subsequent proceeding such question was raised for the first time. Hence the ratio of *Debdas Routh (supra)* is not applicable at all to the present *lis*.

76. Rather, the single Judge decision of this court in *Texmaco Ltd. (supra)*, would be squarely applicable to the instant case. In the said judgment, it was held inter alia that if the parties allow the proceedings to continue before an apparently incompetent court without raising any objection thereto, subsequent applications under Part I of the 1996 Act pertaining to the same arbitration agreement have to be made to the apparently incompetent court which received the earlier application as the parties would be

estopped from questioning the jurisdiction of the court subsequently upon not having urged it in course of the earliest application under Part I of the Act in the apparently incompetent court.

77. Since the parties have their addresses within Kolkata, as per *Jindal Vijayanagar Steel (supra)*, this court has jurisdiction to take up applications arising out of the arbitration agreement between the parties.

78. At this juncture, it would be relevant to discuss the applicability of Section 21 of the Code of Civil Procedure to the present case. It is argued by the petitioner that Section 120 of the Code, by implication, excludes the operation of the said section to matters in the original side of this court. Section 120, however, specifically excludes Sections 16, 17 and 20 of the Code to the High Court in exercise of its original civil jurisdiction. It is trite that the Code of Civil Procedure is not applicable in terms to arbitral proceedings and to connected applications, in particular petitions under Section 34 of the 1996 Act as in the present case. Though in case of suits in the original side of this court, by necessary implication the operation of Section 21 is also excluded, since the inapplicability of Sections 16 and 17 and 20 to such suits under the Code of Civil Procedure would, by necessary implication render Section 21 redundant.

79. However, in case of applications under the 1996 Act, where the Code of Civil Procedure is not applicable, the bar to jurisdiction cannot spring from Sections 16, 17 and 20. In the present case, for example the bar to jurisdiction is stipulated in Section 42 of the 1996 Act

itself, and not from Sections 16, 17 and 20. In such cases, there is nothing to prevent the applicability of Section 21 of the Code, since Section 120 thereof does not mention the said section. The language of Section 21 of the Code is generic, pertaining to all objections under any Act, since no particular statute is specified. Sub-section (1) of Section 21 says that "no objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity…". Thus the petitioner, having not raised such question at the earliest possible opportunity, that too in the proceeding under Section 29-A of the 1996 Act itself, cannot now resile from such acquiescence and set up an objection as to jurisdiction in a subsequent proceeding, more so in the teeth of Section 42 of the 1996 Act.

80. Moreover, Section 21 of the Code has two components – the mandate to raise questions as to territorial and pecuniary jurisdiction at the earliest opportunity and the consequential bar from raising the question later for the first time. In the present case, the petitioner, having lost the opportunity to raise objection as to territorial jurisdiction before this court, cannot approach a hierarchically inferior forum at Alipore, that too in a subsequent proceeding altogether with such objection at this belated stage.

81. Even if Section 21 of the Code of Civil Procedure is taken not to apply to arbitral matters, Section 42 of the 1996 Act itself creates the jurisdiction and the bar – jurisdiction being conferred on the first court where an application is filed and bar to any other court entertaining a subsequent application. Thus Section 42 is complete and self-sufficient

even without the aid of Section 21 of the Code of Civil Procedure or Section 2 (1) (e) of the 1996 Act itself.

82. Section 2(1)(e) of the 1996 Act, if applied in the context of Section 42, *Associated Contractors (supra)* clarifies that only the "Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State" will be a court under the said section. The expression is repeated several times in the judgment. In such context, read conjointly with the principles discussed above, the court having jurisdiction by virtue of a forum selection clause, or the seat of arbitration, or the location of the address of the parties will have jurisdiction to entertain applications in connection with arbitration agreements, since all those places have to be read into the definition of "Court" in Section 2 (1) (e) by virtue of the above-discussed judgments. In the present case, this court, in its original side, is the court which fulfils all the aforementioned three criteria, thus being qualified to be the first court conferring jurisdiction, as envisaged in Section 42 of the 1996 Act.

83. Thus the court below was justified – rather, lenient – in returning the application of the petitioner under Section 34 of the 1996 Act for presentation before the proper court, whereas it could have dismissed the same as not maintainable.

84. In such view of the matter, the impugned order calls for no interference.

85. Hence, C.O. No. 3328 of 2018 is dismissed, thereby affirming the order of the court below. There will be no order as to costs.

86. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)