

OCD 1&2

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

IA NO. GA/1/2024
In AP/868/2023
M/S. SIEMENS HEALTHCARE PRIVATE LIMITED
VS
SUN HOSPITAL AND ORS.

AP-COM/729/2024
SUN HOSPITAL PRIVATE LIMITED
VS
M/S SIEMENS HEALTHCARE PRIVATE LIMITED

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date: 20th August, 2024.

Appearance:
Mr. Krishnaraj Thaker, Adv.
Mr. Tanish Ghaneriwala, Adv.
Mr. Ramendu Agarwal, Adv.
Ms. Rishika Goyal, Adv.
...for the petitioner

Mr. Prabal Mukherjee, Sr. Adv.
Ms. Madhushri Dutta, Adv.
...for the respondent

In Re: IA NO. GA/1/2024

The Court: the present application has been filed for recall of an order dated January 17, 2024 passed by a co-ordinate Bench of this Court in connection with AP/868/2023 under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"), appointing an Arbitrator.

Learned counsel for the petitioner argues that the application under Section 11(5) was filed in the Ordinary Original Civil Jurisdiction of this Court and not in the Commercial Division. As such, the court inherently lacked subject-matter jurisdiction to entertain and decide the said application in the Ordinary Original Civil Side of this Court. Accordingly, the said order ought to be recalled.

In support of his submission, learned counsel appearing for the petitioner places reliance on Section 15 of the Commercial Courts Act, 2015 (for short, “the 2015 Act”), which provides that all suits and applications, including applications under the 1996 Act, relating to a commercial dispute of specified value pending in a High Court where a Commercial Division has been constituted, shall be transferred to the Commercial Division.

In conjunction with the said provision, learned counsel relies on *Laxmi Polyfab Pvt. Ltd Vs. Eden Realty Ventures Pvt. Ltd. and another*, reported at AIR 2021 Cal 190 where a co-ordinate Bench of this Court observed that Section 15 of the 2015 Act has to be read along with Sections 6 and 7 of the said Act. A suit which has been filed subsequent to the Notification of the specified value in the Ordinary Original Civil Jurisdiction of this Court cannot be transferred to the Commercial Division by virtue of Section 15(1) of the Act of 2015. It was held that a suit filed subsequent to the Notification cannot be said to be a “pending” suit within the meaning of Section 15(1) of the 2015 Act. The moment a suit is not “pending” in terms of Section 15(1), the same cannot be transferred to the Commercial Division by virtue of Section 15(1). It was observed that despite the absence of power under Section 15(1), the court has powers under Order VII Rule 10 of the Code of Civil Procedure, 1908 to deal with the same. Power under

Order VII Rule 10 of the Code stands regulated by Section 15(1) so far as pending suits relating to a commercial dispute of the specified value in the Ordinary Original Civil Jurisdiction of this Court. Once the suit has been filed beyond the date of the Notification of the specified value, it was held that Order VII Rule 10 of the Code governs the field.

It is submitted that on the date on which the application was filed under Section 11(5) of the 1996 Act, the Notification had already come into effect. As such, the court, sitting in Ordinary Original Civil Jurisdiction, inherently lacked the power of deciding the matter.

Also, the application itself had been filed in the Ordinary Original Civil Jurisdiction and not the Commercial Division, thus, making it liable to be rejected at the outset.

Learned counsel places reliance on the Commercial Courts Practice Directions, 2021 (in short, “the Practice Directions”) of this Court in that regard. Clause 4 of the same provides that every suit, appeal or other proceeding pending before any Civil Court or the High Court immediately before the date of issuance of the appropriate Notification in terms Section 3(1A) of the 2015 Act shall be transferred by the Registry to the Commercial Division of this Court. Sub-clause (2) provides that the above provision for transfer shall not be applicable to the suits, appeals or other proceedings, instituted before any Civil Court as per the Bengal, Agra and Assam Civil Courts Act, 1887 or in the High Court in its Ordinary Original Civil Jurisdiction after the date of issuance of the appropriate Notification of the pecuniary value in terms of Section 3(1A) of the 2015 Act.

Clause 9(1) of the Practice Directions provides that the High Court or the District Court, as the case may be, shall not, subsequent to the date of issuance

of the appropriate Notification in terms of Section 3(1A), receive, try or determine any suit involving a commercial dispute of and above the specified value if the same is filed in its Ordinary Original Civil Jurisdiction.

Sub-clause (2) of Clause 9 provides an exception in the event any suit or other proceeding involving a commercial dispute is filed in its Ordinary Original Civil Jurisdiction subsequent to the date of issuance of the Notification in case where an application is made by either party, when the court may return the plaint or the application to the plaintiff on principles *pari materia* with Order VII Rule 10 of the Code of Civil Procedure. Under sub-clause (4), in the event of a suit or other proceeding which is barred in terms of Clause 9(1), if neither party applies for the plaint or application to be returned, the court shall reject the plaint or the application, as the case may be. Thus, it is argued that the only recourse open to the court on the relevant date was to reject the application. It is argued that on a composite reading of Clause 9, it cannot but be construed that this Court did not have any jurisdiction even to receive, let alone try or determine the application. In the absence of any application under Order VII Rule 10 of the Code, the only option open to the Court was to reject the same.

Learned counsel next contends that the said legal bar, being one pertaining to inherent jurisdiction of the Court, could not be waived merely because the present petitioner (respondent in the application under Section 11) did not raise any objection in that regard and/or participated before the Arbitrator in subsequent proceedings.

In support of the said argument, learned counsel places reliance on a Division Bench Judgment of this Court in the matter of *STP Limited Vs. State of West Bengal*, reported at *AIR 2023 Cal 46*, where it was held that the defect of

jurisdiction strikes at the authority of the court to pass an order which cannot be cured by consent or waiver of the party. In such backdrop, the suit was required to be transferred to the Commercial Court for hearing.

Learned senior counsel appearing for the respondent, who was the applicant in the Section 11 application, controverts the petitioner's arguments and reiterates that no objection was raised as to the jurisdiction of the court when the order under recall was passed. Further, the present petitioner participated in the proceeding before the learned Arbitrator on several occasions thereafter, never raising the issue of jurisdiction. Thus, the present petitioner is precluded from taking such objection at this belated juncture.

In any event, it is argued that the appropriate remedy of the petitioner, if aggrieved by an order passed under Section 11 of the 1996 Act, does not lie in a recall application but elsewhere.

With regard to Clause 9 of the Practice Directions, learned senior counsel appearing for the respondent argues that the same governs commercial suits and not applications under the 1996 Act. It is pointed out that Clause 9(4) and Clause 9(2) are inherently contradictory and are also contrary to the provisions of Order VII Rule 10 of the Code of Civil Procedure. The Practice Directions, it is argued, cannot override the Code, which is a substantive statute. Moreover, it is pointed out that Section 15 of the 2015 Act does not create any distinction between matters filed before or after the Notification under Section 3(1A) of the 2015 Act.

Learned senior counsel next contends that this Court has been rendered *functus officio* after passing the order under Section 11 and cannot now reopen its own order.

Learned senior counsel argues that on the relevant date, the Bench which passed the order had determination both under the Commercial Division and the Ordinary Original Civil Jurisdiction of this Court. Hence, it cannot be said that the order under recall is vitiated by inherent lack of jurisdiction. Learned senior counsel also places reliance on Section 10(2) of the 2015 Act, which according to him is the relevant provision to be looked into in the present context.

Upon a careful consideration of the arguments advanced by the parties, this Court comes to the following conclusions:

The present petitioner (recall applicant) has laid much stress on the Commercial Courts Practice Directions of this Court. However, a careful scrutiny of the said Practice Directions clearly shows that the same, at least insofar as Clauses 4 and 9 thereof are concerned, does not cover applications under the 1996 Act but only relate to commercial suits and connected proceedings in civil matters.

Clause 4 speaks about suits, appeals or other proceedings “pending before any Civil Court as per the Bengal, Agra and Assam Civil Courts Act, 1887 or in the High Court”. Again, sub-clause (1) of Clause 9 of the Practice Directions refers to “the High Court or the District Court” alternatively.

The 1996 Act clearly distinguishes between “court” as defined in Section 2(1)(e) of the said Act and the “High Court” as contemplated in Section 11 of the same. The underlying theme of Section 11 is that the Chief Justice of the concerned High Court has to designate a panel of Arbitrators for discharging the functions and duties of arbitral institutions. The appointment under Section 11, on an application of the party, has to be made by the arbitral institution so designated or by the High Court in case of arbitrations other than International

Commercial Arbitrations. In contradistinction with “court” as used in the other provisions referring to courts in the 1996 Act, Section 11 clearly refers to the High Court, acting as the High Court, through its Chief Justice or his/her designate.

On the other hand, Clauses 4 and 9 of the Practice Directions refers to matters pending either before a Civil Court as per the Bengal, Agra, Assam Civil Court Act, 1987, or the District Court, in the same bracket as the High Court. Again, Clause 2(3) of the Practice Directions defines “court” to mean the Commercial Division and the Commercial Appellate Division of this Court and also the Commercial Courts and Commercial Appellate Courts at the District level, as the case may be. Thus, the very fact that both Clause 4 and Clause 9 refer to District Courts and Civil Courts having jurisdiction under the Bengal, Agra and Assam Civil Courts Act, 1987 on a parallel footing as the High Court shows that the litigations referred to therein pertain to civil suits and connected applications, appeals or other proceedings. As per the above discussion, no Civil Court under the Bengal, Agra and Assam Civil Courts Act or District Court has the jurisdiction to decide an application under Section 11 of the 1996 Act. Thus, by necessary implication, the matters covered by the provisions of transfer under Clause 4 and improperly filed suits, applications and other proceedings under Clause 9 pertain to matters adjudicable by civil courts acting as such, and not the High Court within the contemplation of the 1996 Act.

Moreover, in the entire Practice Directions, there is not a single reference to any application or other proceeding filed under the 1996 Act, in stark contrast with Sections 10 and 15 of the 2015 Act. In *Laxmi Polyfab Pvt. Ltd (supra)*, the learned Single Judge was dealing with a regular commercial civil suit and not a

proceeding under the 1996 Act. The learned Single Judge took into consideration Sections 6 and 7 read with Section 15 of the 2015 Act, all of which provisions deal with commercial suits and connected applications, as opposed to Section 10 of the 2015 Act, which specifically refers to applications or appeals arising out of arbitration under the 1996 Act. Hence, the said decision cannot be said to be a binding precedent with regard to an application under Section 11 of the 1996 Act.

Therefore, the relevant provision which has to be looked into in the context of an application under Section 11 of the 1996, Act or, for that matter, any application or appeal under the 1996 Act, is Section 10 of the 2015 Act.

Section 10(2) of the 2015 Act deals with domestic arbitrations. It provides that all applications or appeals arising out of an arbitration under the provisions of the 1996 Act that have been filed in the Original Side of the High Court shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court. The specific language of Section 10(2) makes it amply clear that even if an application or appeal under the 1996 Act relating to a commercial dispute is filed on the Original Side of this Court, the same can be heard and disposed by the Commercial Division.

Since, as per the earlier discussion, Clause 9 of the Practice Directions is not made specifically applicable to arbitrations, an application or appeal under the 1996 Act of a commercial nature, even if filed on the Original Side of the High Court, cannot be thrown out at the inception but has to be heard and disposed of by the Commercial Division of this Court. The language used in Section 10(2) is “shall”, which is mandatory and implies that even if an application is filed in the original Side of the High Court (without any distinction between Ordinary

Original Civil Jurisdiction or Commercial Division), it would suffice if the same is heard and disposed of by the Commercial Division.

In the above backdrop, the application under Section 11(5) of the 1996 Act in the present case, which was allowed by the order under recall, was filed in the Original Side of this Court and, thus, could very well be heard and decided by the Commercial Division of this Court on the relevant date.

The next question which arises is whether on the date of passing of the order the concerned Bench had Commercial Division determination. It is an admitted position and also the practice of this Court that the same learned Judge taking up applications and appeal in connection with the 1996 Act takes up both Commercial Division and Ordinary Original Civil Jurisdiction. The present case is not an exception, since the learned judge who passed the order under recall and allowed the Section 11 application had both Commercial Division and Ordinary Original Civil Jurisdiction on the date of the order. Thus, the requirement of Section 10(2) of the 2015 Act is squarely fulfilled, since the application had been filed “on the Original Side of the High Court” and had been heard and disposed of by the Commercial Division.

Seen in such context, the only lacunae in the application on the relevant date was that it was described wrongly in its cause title and that it appeared in the non-Commercial Division list of the concerned Bench on the relevant date. Both the said defects were curable; thus, liable to be waived. The objections at best could be of a technical nature and, if raised at the relevant juncture, could be cured by a simple direction to correct the description and by the court assuming jurisdiction in the Commercial Side or to direct the matter to be listed in the Commercial Division cause list. However, since Section 11 confers

jurisdiction on the Hon'ble Chief Justice of the High Court or his designate to take up "applications under Section 11 of the 1996 Act", the distinction between commercial and non-commercial is irrelevant. Fact remains that even apart from the provisions of Section 10(2) of the 2015 Act, on the concerned day, the Bench passing the order had the determination to take up applications under Section 11 of the 1996 Act, having been so designated by the Master of Roster, that is, the Hon'ble The Chief Justice of this Court. Hence, by no stretch of imagination can it be said that the learned Single Judge lacked inherent jurisdiction or subject-matter jurisdiction to pass an order on the Commercial Side of this Court. What matters in the ultimate analysis is that the application under Section 11 of the 1996 Act was heard and disposed of by a Bench having Commercial Division jurisdiction.

The defects, being technical, do not merit the high ground of inherent lack of jurisdiction of the concerned Bench at the relevant juncture. Hence, there is no scope of recalling the said order on the grounds as urged by the petitioner.

That apart, the recall applicant/petitioner has not come with clean hands. It never raised the objection, which is the only ground of recall, before the concerned court when the matter was heard or the order under recall was passed, despite having participated in the hearing before the learned judge when the application under Section 11(5) of the 1996 Act was allowed. Even thereafter, the recall applicant continued to participate in the arbitral proceeding on several occasions before the very Arbitrator who was appointed by virtue of the order under recall, thereby submitting to the jurisdiction of the learned Arbitrator without urging the issue of jurisdiction at any point of time. Hence, it does not lie

in the mouth of the recall applicant to turn back from such position of complicity now and seek a recall of the order appointing the Arbitrator.

In view of the above, there is no merit in the recall application.

Accordingly, IA No. GA/1/ 2024 in AP/868/2023 is dismissed on contest, however, without any order as to costs, thereby confirming the order dated January 17, 2023 allowing the present respondents' application under Section 11(5) of the Arbitration and Conciliation Act, 1996.

(SABYASACHI BHATTACHARYYA, J.)