

OCD-1

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

AP-COM/490/2024
IA NO: GA-COM/1/2024, GA-COM /8/2024

UPHEALTH HOLDINGS INC
VS
GLOCAL HEALTHCARE SYSTEMS PVT LTD AND ORS

With

SCO/2/2024

DR SYED SABAHAT AZIM
VS
MR MARTIN SAMUEL ARTHUR BECK AND ORS

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 19th July, 2024.

Appearance:

Mr. S.N.Mookherjee, Sr. Adv.
Mr. Ratnanko Banerji, Sr. Adv.
Mr. Suddhasatva Banerjee, Adv.
Mr. Chayan Gupta, Adv.
Mr. Anand S. Pathak, Adv.
Mr. Vijay Purohit, Adv.
Mr. Shivam Pandey, Adv.
Mr. Anujit Mookherji, Adv.
Mr. Anirudhya Dutta, Adv.
Mr. S. Bajaj, Adv.
Mr. S. Hoon, Adv.
Mr. Nav Dhawan, Adv.
Mr. S. Jain, Adv.
Mr. A. Ahuja, Adv.
..for the petitioner

Mr. Jayanta Kr. Mitra, Sr. Adv.
Mr. Piyush Agarwal, Adv.
Mr. Debojyoti Das, Adv.
..for respondent no.1

Mr. Ranjan Bachawat, Sr. Adv.
Mr. Debashis Karmakar, Adv.
Mr. Dhruv Chadha, Adv.

*Mr. Sagnik Bose, Adv.
Mr. Satyam Ojha, Adv.
...for respondent no.2*

*Mr. Krishnaraj Thaker, Adv.
Mr. Dhruv Chadha, Adv.
...for respondent no.3*

*Mr. Dhruva Ghosh, Sr. Adv.
Mr. Amit Kr. Nag, Adv.
Mr. Rajarshi Dutta, Adv.
Ms. Ajeyaa Choudhury, Adv.
...for respondent no.4*

*Mr. Sudipto Sarkar, Sr. Adv.
Mr. Siddhartha Datta, Adv.
Ms. Trisha Mukherjee, Adv.
...for respondent no.5*

*Mr. Abhrajit Mitra, Sr. adv.
Mr. Sarvapriya Mukherjee, Adv.
Mr. Anindya Choudhury, Adv.
...for respondent no.6*

The Court: This is a post-award application under Section 9 of the Arbitration and Consolidation Act, 1996.

A foreign award was passed in Chicago, subsequent to which an application for enforcement of the same has been filed before this Court. There are also connected pending applications under Section 34 of the Code of Criminal Procedure. At the present instance, however, the arguments are confined to the maintainability of the Section 9 application before this Court; or rather, this Bench.

It is to be kept in mind that at an ad interim stage, the order of a coordinate Bench of this Court passed in connection with the present application holding in favour of the jurisdiction of this Court was challenged before the appropriate Division Bench which decided the appeal, keeping the question of maintainability and jurisdiction open to be decided by this Court while taking up the application under Section 9.

Accordingly, counsel for the parties have argued on such question alone for the present.

The primary objection taken to maintainability is on the jurisdiction of a Bench comprised of a learned Single Judge of this Court (which this Bench is, under the Commercial Division of this Court) to entertain the application.

Learned counsel for different sets of respondents place reliance on the language of Section 2(1)(e)(ii) of the Arbitration and Consolation Act, 1996 which is as follows:

“2. Definitions:--(1)

...

(e) “Court” means-

...

(ii) in the case of international commercial arbitration, 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, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;”

It is argued that the subject property being situated in Rajarhat, New Town, the second limb of sub-clause (ii) is applicable. Since this is an International Commercial Arbitration and the High Court, in exercise of its ordinary original civil jurisdiction, does not have the jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, it is to be deemed that the High Court is to hear the application as the court of appeal from decrees of courts subordinate to the High Court.

It is argued that if an appeal was to be preferred against an order or award of the District Court having jurisdiction in Rajarhat, the same would have to be preferred before the Commercial Appellate Division of this Court in terms of the provisions of the Commercial Courts Act, 2015, (hereinafter referred to as, “the CC Act”).

The respondents contend that section 10(1) of the CC Act, has to be read harmoniously with the definition of “Court” in Section 2(1)(e) of the 1996 Act.

Section 10 (1) is as follows:

“10. Jurisdiction in respect of arbitration matter.- *where the subject-matter of an arbitration is commercial dispute of a Specified Value and-*

(1) If such arbitration is an international commercial arbitration, all applications of appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court....”

Since the High Court acts in its appellate jurisdiction as per the second limb of sub-clause (ii) of Section 2(1)(e) of the 1996 Act, the expression “Commercial Division” in Section 10(1) of the CC Act has to be read to include the Commercial Appellate Division in case of applications under the 1996 Act, arising out of original territorial jurisdictions of courts other than the High Court.

Learned Senior Counsel for the respondent no.6 argues that any other interpretation would create an absurdity, since if read literally, it

would mean that both original applications under the 1996 Act and appeals against orders passed in such applications would lie before a Single Judge of this Court, thereby making the same forum the original as well as the appellate court. In order to avoid such absurdity, it is argued that a harmonious construction is to be lent to the above provisions.

Learned senior counsel appearing for the other contesting respondents, in particular respondent nos. 1, 4 and 2, also support such contention.

In addition, learned senior counsel for the respondent no. 2 argues that the arbitrator became *functus officio* before passing the award, since although the arbitral proceeding was governed by the Rules framed by the International Court of Arbitration, which contemplate the power of Courts to grant extension to the mandate of the arbitrator, in view of the arbitration clause itself confining the outer timeline of such mandate to sixty days, which was exceeded in the present case, the agreement would prevail over the Rules.

However, the last such contention is besides the point in the present context, since the present application is under Section 9 of the 1996 Act, which is maintainable at any time between the commencement of arbitration and enforcement of the award. At best, such argument can be germane while deciding the enforcement application on merits or in a challenge against the award itself.

Learned senior counsel appearing for the petitioner controverts such submissions. It is argued that a previous application under Section

9 of the 1996 Act was entertained by this Court where the issue of jurisdiction was not specifically taken.

Even if taken, it is contended that since orders were passed in connection with the said previous application, this Court, sitting singly, is the appropriate court within the contemplation of Section 42 of the 1996 Act to take up a subsequent application under Section 9 of the Act and, as such, the respondents are debarred from raising such issue at all.

The previous judgments of this Court are relied on in that regard.

It is argued by the petitioner that, in fact, in the previous application under Section 9, bearing AP No. 809 of 2022, the respondent no.1, which is the principal respondent, in paragraph no. 246 of its affidavit-in-opposition, had categorically stated that the territorial jurisdiction of this Hon'ble Court "is not in dispute".

A learned Single Judge of this Court had accordingly decided the matter. Hence, the respondents cannot now turn back on such stand and reagitate the issue of territorial jurisdiction of a learned Single Judge of this Court.

The respondents cite the decision in *West Bengal and others vs. Associated Contractors* reported at (2015) 1 SCC 32, where it was held that Section 42 of the 1996 Act would apply in cases where an application is made in a court having jurisdiction. Where the agreement between the parties restricted jurisdiction to only one particular court, that court alone would have jurisdiction, as neither Section 31 (4) nor

Section 42 contains a non-obstante clause wiping out a contrary agreement between the parties.

Thus, it is argued that the stray statement in a previous affidavit-in-opposition cannot confer jurisdiction on a Single Judge of this Court contrary to law, since there cannot be any estoppel against the statute.

While dealing with the said judgment, learned senior counsel for the petitioner reiterates that *Associated Contractor (supra)* was rendered prior to the coming into force of the CC Act in 2015, and, as such, is not applicable in the context of a commercial dispute as envisaged under the 2015 statute.

The question which thus falls for consideration is whether this Bench, sitting singly in Commercial Division, has the determination to take up the matter or it should be decided by the Commercial Appellate Division of this Court, comprised of a Division Bench.

While answering such issue, the hurdle of Section 42 has to be cleared first. Section 42 of the 1996 Act provides that where with respect to an arbitration agreement, any application under Part I 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.

In *Associated Contractors (supra)*, the Court was considering a scenario where there was a specific forum selection clause in the agreement between the parties. The court considered that since the

non-obstante Clause in Section 42 did not cover agreements between the parties, the same was not applicable and Section 42 would not apply if the initial Court had no jurisdiction in law.

In the present case, however, the bar pleaded is in law and not as per the agreement between the parties.

The opening non-obstante clause in Section 42 clearly encompasses anything contained elsewhere in Part I or in any other law for the time being in force, thereby excluding the operation of even the definition clause, which also falls within Part I. Section 2, sub-section (e)(ii), the definition Clause of the 1996 Act, is the only provision which is relied on by the respondents to argue that the matter has to go before the Commercial Appellate Division, since the subject-matter of the dispute lies beyond the territorial original jurisdiction of this Court.

However, as discussed above, the non-obstante clause is squarely applicable, excluding the operation of Section 2 (1)(e)(ii) in a scenario where a previous application has been entertained by a learned Single Judge of this Court.

Hence, Section 42 is squarely applicable in the present case, thereby clothing a Single Judge, sitting in Commercial Division of this Court, with the jurisdiction to take up all subsequent applications in connection with the concerned arbitral proceedings.

Secondly, as rightly argued by the petitioners, the respondent no.1 itself had clearly waived the jurisdiction point and cannot now be permitted to resile from such position in this second Section 9 application before this Court.

In any event, *Associated Contractor (supra)* was rendered before the promulgation of the CC Act, and in any event, does not take into consideration the peculiar provisions of Section 10 thereof.

Again, Section 2(1) (e) (ii) of the 1996 Act is applicable where there is no other conflicting special statute governing the field and addresses general suits. In a non-commercial dispute, it still might have been argued that this Court is having jurisdiction in its appellate side by virtue of the second limb of sub-clause (ii) (although such issue is not being decided here, since no occasion arises therefor).

Be that as it may, the moment the dispute acquires a commercial colour, Section 10 of the CC Act is attracted, since the CC Act is a special statute governing commercial disputes and Section 10 thereof specifically deals with arbitration matters in commercial disputes.

There is no ambiguity in Section 10 of the CC Act, as any application arising out of an International Commercial Arbitration and/or appeal arising out of the same is to be heard under sub-section (1) of Section 10 and disposed of by the Commercial Division where it has been constituted by a High Court.

There is a strict delineation between “Commercial Division” and “Commercial Appellate Division”, which has been defined respectively in clauses (b) and (aa) of Section 2(1) of the CC Act. As per the said definitions, Commercial Division is that division of the High Court which is constituted under sub-section (1) of Section 4 and Commercial Appellate Division constituted under Section 5(1). Section 4(1)

specifically enumerates the composition of Commercial Division as a Single Judge whereas Section 5 provides that a Commercial Appellate Division shall comprise of one or more Division Benches.

Hence, read with Sections 2, 4 and 5 of the CC Act, the particular choice of words used by the legislature in Section 10(1) leaves no manner of doubt that an application or appeal from an International Commercial Arbitration has to be heard and disposed of by a Single Judge sitting in Commercial Division of this Court.

The logic behind the same is also clear, being that at the first instance, an appeal or application is in the nature of an original proceeding. In fact, the only “appeal” provided for in the 1996 Act is an appeal under Section 37 of the said Act, which, under normal circumstance, is taken up by a learned Single Judge of this Court in its original jurisdiction. Regarding applications, there cannot be any ambiguity, since those are, by their very nature, original proceedings.

The only exception is an application under Section 11 which is to be taken up by the Chief Justice or his designate, by natural implication excluding a challenge before a Division Bench of the said High Court.

Another important aspect which cannot be overlooked is that in the Ordinance which preceded the promulgation of the CC Act, Section 10(1) included both Commercial Division and Commercial Appellate Division. Thus, by specific exclusion, the Act, its final form, kept out Commercial Appellate Division as one of the forums under Section 10(1) of the CC Act. Hence, there cannot be any manner of doubt in the

intention of the legislature to confer jurisdiction exclusively on a learned Single Judge sitting in Commercial Division of a High Court to take up all applications and appeals in connection with an International Commercial Arbitration.

Another aspect of the matter cannot be overlooked. One of the arguments advanced by the respondents is that there would be an absurdity, since both original applications and appeals against orders passed in connection therewith would then lie before the same Single Judge. Such argument, however, is specious.

The only provision of an appeal is under Section 37 of the 1996 Act. All other provisions of challenge under the 1996 Act contemplate “applications” and not “appeals”. Section 37 itself provides a concrete clue to the issue at hand. Whereas in Sections 9 and 34, the expression “court” has been used, which is covered by the definition in Section 2(1)(e), Section 37 designates the forum to be “the court authorised by law to hear appeals from original decrees of the Court passing the order”. Thus, in appeals under Section 37 arising out of an order passed by a court under Section 8 or Section 9 or Section 34, the designated forum is the appellate court which would otherwise sit in appeal from original decrees of the court passing such order.

As opposed to the same, in sub-section (2) of Section 37, an appeal from an order passed by the Arbitral Tribunal, either under Section 16 or Section 17, would lie to a ‘Court’ and not the appellate authority from such court.

Hence, the only provision of appeal in the 1996 Act itself provides a solution to the issue raised by the respondents by clearly designating that in case of appeals against an order under Section 9, the appellate court having jurisdiction otherwise over decrees passed by the original court shall have jurisdiction to take up such appeal.

Thus, Section 37 has to be read in conjunction with Section 2 (1) (e)(ii) of the 1996 Act, as well as Section 10 (1) of the CC Act, to arrive at a harmonious construction of the three.

Seen from such perspective as well, the unerring conclusion is that an application under any of the provisions of the 1996 Act, (for example, Section 9 and Section 34), or an appeal arising out of order passed by an Arbitral Tribunal in an International Commercial Arbitration under Section 37 (2) shall lie before the Commercial Division of this Court.

Since Section 37 itself provides that a further challenge under the said provision from an original order passed under Section 9 will lie before the appellate court having jurisdiction in respect of decrees passed by the original court, an order passed under Section 9 by the Commercial Division may be interpreted to lie before the Commercial Appellate Division within the contemplation of Section 37 itself.

However, original applications under the 1996 Act, coming for the first time before this Court, are squarely governed by Section 10 (1) of the CC Act, which provides that if an application or appeal arising out of an International Commercial Arbitration is filed in this Court, the same shall have to be heard and disposed of by the learned Single Judge

sitting in Commercial Division of this Court, which is also the designated 'court' under the 1996 Act.

Hence, the objection as to maintainability/jurisdiction of this Court, sitting singly in its Commercial Division jurisdiction, in respect of the present application under Section 9 of the 1996 Act is turned down, holding that the Single Judge having Commercial Division determination of this Court has the jurisdiction to hear and dispose of an application under Section 9 of the 1996 Act, arising out of an International Commercial Arbitration.

Accordingly, the present Bench has jurisdiction to hear and dispose of the Section 9 application.

Let the matter be listed next on August 6, 2024 along with all connected applications.

(SABYASACHI BHATTACHARYYA, J.)