The seat of the arbitration can be deduced from the conduct of not raising objections as to conduct of arbitration proceedings at a particular territory (Bombay High Court)

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Omprakash and others v. Vijay Dwarkada Varma

Court: High Court of Bombay (Nagpur) | **Case Number**: WP 4248 of 2019 | **Citation**: MANU/MH/0543/202 | **Bench**: Manish Pitale J | **Date**: 27 April 2020

A partnership deed had an arbitration clause. The partners had a dispute. One of them applied for appointment of an arbitrator and the High Court made the appointment. The arbitration proceedings were conducted at Nagpur and the award was made and signed at Nagpur in June 2018.

Omprakash filed a set-aside application under Section 34 ACA in a court at Malkapur district. Vijay challenged the court's jurisdiction and filed an application to send the matter to the Nagpur court.

The Malkapur court determined that the seat of the arbitration was at Nagpur and dismissed the set-aside application.

Omprakash challenged the decision in a writ petition. He said:

(a) The agreement did not determine the place or the seat. The arbitrator did not determine it either.

(b) Under Section 2(e) ACA, which defines the "Court," the Malkapur judge had jurisdiction.

(c) Also, since there was no determination of the seat and because the first application in the matter (the set-aside application) was filed at Malkapur, the Malkapur court alone had jurisdiction under Section 42 ACA.

The court did not agree with Omprakash.

Manish Pitale J dismissed the writ petition and modified the Malkapur judge's order slightly by sending the set-aside application to the court at Nagpur rather than dismissing it. He rejected the argument that because there was no determination by the tribunal, Nagpur was not the seat. He said there was no occasion for the tribunal to determine the seat because there was no dispute on the question.

He then said that the seat may not be expressly specified and can be ascertained from the conduct of the parties. He concluded the seat was at Nagpur because:

(a) Both parties appeared before the arbitrator appointed at Nagpur.

(b) Neither party raised any objection or dispute or controversy with regard to the place of arbitration being Nagpur.

(c) It was not as if the arbitration proceedings were initiated at Nagpur and later conducted at other places.

(d) The award was signed and pronounced at Nagpur.

For this finding, Pitale J relied on *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 as interpreted in *BGS SGS Soma JV* v. *NHPC Ltd.*, in 2019 SCC OnLine SC 1585.

He rejected the argument based on Section 42 ACA, namely, since the set-aside application was the first application in the case, the court at Malkapur had jurisdiction. Pitale J said that that contention stands answered in paragraph 62 of *BGS*.[1]

[1] *BGS*, paragraph 62: "Equally incorrect is the finding in *Antrix Corporation Ltd.* (supra) that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of Courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one Court exclusively. This is why the section begins with a *non-obstante* clause, and then goes on to state "…*where with respect to an arbitration agreement any application under this Part has been made in a Court…*" It is obvious that the application made under this part to a Court must be a Court which has jurisdiction to decide such application. The subsequent holdings of this Court, that where a seat is designated in an agreement, the Courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the Court where the seat is located, and that Court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement or the so-called "seat" is only a convenient "venue", then there may be several Courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a Court in whom a part of the cause of action arises would then be the exclusive Court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled."