

**IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH**

DATED THIS THE 27TH DAY OF APRIL, 2017

BEFORE

THE HON'BLE MR. JUSTICE G.NARENDAR

W.P. No.102073/2016

C/W

W.P. No.102614/2016 (GM-RES)

IN W.P. No.102073/2016

BETWEEN:

M/S R.K. MINING PVT LTD.,
1-2-49/15, NIZAMPET ROAD
HYDERNAGAR, KUKATPALLI
HYDERABAD-500072
REP BY ITS MANAGING DIRECTOR
SRI.B.RAVI KALYAN REDDY
S/O DR.B.V. KRISHNA REDDY
AGED ABOUT 37 YEARS. ...PETITIONER

(BY SHRI. DR. VENKAT REDDY DONTI REDDY-ADV)

AND

M/S OBULAPURAM MINING
COMPANY PVT. LTD.,
KUMARASWAMY TEMPLE
GANESH NAGAR
BELLARY-583101
REP BY ITS MANAGING DIRECTOR
SRI.B.V. SRINIVAS REDDY
S/O VENKATA REDDY
AGED ABOUT 47 YEARS. ... RESPONDENT

(BY SRIYUTHS. J.BASAVARAJ & LAXMI NARAYAN;
SRIYUTHS. K.S. MALLIKARJUNAIAH &
J.S. SOMASHEKAHAR-ADVs FOR C/R)

THIS WP IS FILED UNDER ARTICLES 226 & 227 OF THE
CONSTITUTION OF INDIA, PRAYING TO QUASH THE IMPUGNED
ORDER DATED:20.02.2016, PASSED IN IA.NO.1 OF 2016 IN
ARBITRATION SUIT NO.1 OF 2016 ON THE FILE OF THE
PRINCIPAL DISTRICT JUDGE, BELLARY, ANNEXURE-K AND ETC.

IN W.P. No.102614/2016

BETWEEN:

M/S R.K. MINING PVT LTD.,
1-2-49/15, NIZAMPET ROAD
HYDERNAGAR, KUKATPALLI
HYDERABAD-500072
REP BY ITS MANAGING DIRECTOR
SRI.B.RAVI KALYAN REDDY
S/O DR.B.V. KRISHNA REDDY
AGED ABOUT 37 YEARS.

...PETITIONER

(BY SRIYUTHS. S.K. KAYAKAMATH & V.SRIKANTH RAO-ADVs)

AND

M/S OBULAPURAM MINING
COMPANY PVT. LTD.,
KUMARASWAMY TEMPLE
GANESH NAGAR
BALLARI-583101
REP BY ITS MANAGING DIRECTOR
SRI.B.V. SRINIVAS REDDY
S/O VENKATA REDDY
AGED ABOUT 47 YEARS.

... RESPONDENT

(BY SHRI. K.S. MALLIKARJUNAIAH-ADV)

THIS WP IS FILED UNDER ARTICLES 226 & 227 OF THE
CONSTITUTION OF INDIA, PRAYING TO QUASH THE ORDER
DATED:07.01.2016 PASSED BY THE LEARNED PRINCIPAL
DISTRICT JUDGE, BALLARI OF ISSUANCE OF THE SUMMONS
AGAINST THE WRIT PETITIONER/RESPONDENT IN
ARBITRATION SUIT VIDE ANNEXURE-M.

THESE WPs HAVING BEEN HEARD, RESERVED FOR
ORDERS AND LISTED FOR FURTHER HEARING, THIS DAY THE
COURT MADE THE FOLLOWING:

DATE OF RESERVING THE ORDER : 7.12.2016
DATE OF FUTHER HEARING : 27.3.2017 & 30.3.2017
DATE OF PRONOUNCING THE ORDER : 27.4.2017

ORDER

The parties in both the writ petitions i.e. W.P. No.102073/2016 and W.P. No.102614/2016 are one and the same and genesis for the writ petitions is out of the excavation contract/agreements, entered into between the petitioner and the respondent, dated 11.06.2008 and hence both the writ petitions are taken up for disposal together. Further, the facts involved and the points canvassed are identical and hence the writ petitions are taken up for disposal by this common order.

2. A brief narration of facts is necessary for the adjudication of the issues canvassed by the parties.

3. The respondent entity entered into and executed an excavation contract with the petitioner. The contract was executed on 11.06.2008. The parties agreed upon certain rates payable by the respondent to the petitioner in lieu of the work to be executed under the contract. As per clause-5 of the Contract/Agreement the respondent was required to make the payments due to the petitioner within a period of 15 days. The details regarding

the rates or the quantum of work executed or the amount if any is due from the respondent to the petitioner are all issues beyond the scope of this petition and do not require to be addressed for the purpose of disposal of this writ petitions.

4. It was agreed between the parties and also provided in the agreement under clause 12 that disputes between the parties shall be settled by Arbitration. Further, under clause 16 a Forum clause was inserted into the agreement whereby, the courts in Bellary alone were conferred with the jurisdiction to try any dispute or difference arising out of the agreement dated 11.06.2008. The Forum clause is extracted for the sake of convenience.

“16. It is agreed to between the parties here to that the agreement is executed at Bellary and accordingly, should any dispute or difference arise out of this agreement or in relation to the interpretation of any terms of this agreement the same will be exclusively subject to the jurisdiction

of the competent of courts of law situated in Bellary.”

5. The nature of the contract nor the amount due or if whether any amount is at all due are all issues which this court need not go into for the purpose of disposing of the present writ petitions. But, the sequence of events needs to be recounted in order to determine the sole issue arising for consideration in the present writ petitions.

6. In the first writ petition, the petitioner has called in question the order passed by the court of Principal District and Sessions Judge, Ballari on I.A. No.1 filed in AS No.1/2016, dated 20.02.2016 whereby, the court below has been pleased to allow I.A. No.1 and further has been pleased to stay the operation of the award passed by the sole arbitrator in CMP No.505/2012 dated 13.10.2015, pending disposal of the arbitration suit preferred under section 34 of the Arbitration and Conciliation Act, 1996 (Hereinafter referred to as ‘the Act’ for brevity). The next prayer sought for is for the issuance of writ of declaration to declare that the Principal District Court, Ballari has no jurisdiction to entertain the

Arbitration Suit No.1 /2016 in view of the special provisions u/s 42 of the Act and thirdly for such other reliefs as deems fit.

7. The second writ petition is preferred by the petitioner calling in question the summons issued by the court summoning the petitioner to appear before it in AS No.1/2016 and seeks for the issuance of a writ of certiorari to quash the order dated 07.01.2016 passed by the learned Principal District and Sessions Judge, Ballari directing issuance of summons to the petitioner in A.S. No.1/2016. The second relief i.e., prayer B in the first writ petition and the relief sought for in the second writ petition, though differently worded, if upheld would entail in a similar consequence.

8. It is contended by the learned counsel for the petitioner that the respondent's company vide letter dated 13.11.2010 admitted certain sums as being due from the respondent to the petitioner and that despite several requests, payments were not made. Aggrieved by the non payment, the petitioner moved an application before the

Principal District & Sessions Judge Court at Ballari under the provisions of Section 9 of the Act and the same came to be registered as Arbitration Case No.6/2011. The petition came to be filed praying for directions to the respondent to furnish security to the extent of the claim and also for a permanent injunction restraining the respondent and the men from alienating the schedule properties situated in Ananthapuram District in Andhra Pradesh. The said petition was resisted by the respondent herein on the premise that none of the properties are situated within the jurisdiction of the Ballari Court and hence, Ballari Court has no jurisdiction to try the proceedings and in the absence of any cause of action arising within the jurisdiction of the Ballari Court, it prayed that the Arbitration Case be rejected. The Court at Ballari accepting the defense based on the premise of jurisdiction and lack of cause of action was pleased to dismiss the petition filed under Section 9 of the Act. In fact the Ballari court has rendered a finding at para 31 that the petition schedule-A, E and F Properties are situated outside the jurisdiction of the court. The court also relied upon the fact

that the properties were already seized off by the special CBI Court at Hyderabad and hence, it concluded that it has no jurisdiction to grant the relief as prayed for.

9. Thereafter, the petitioner moved a petition before this court in CMP No.505/2012 by invoking the provisions of Sub-Section (6) of Section 11 of the Act, praying for appointment of an Arbitrator in terms of the agreement dated 11.06.2008. This court after hearing the parties and perusing the records was pleased to allow the petition and further pleased to appoint justice Sri. R. Gururajan Judge (Retd.) of this court and residing at Malleswaram, Bengaluru as the Arbitrator.

10. Upon appointment the learned Arbitrator entered upon the reference and got issued notices to the parties and commenced arbitral proceedings and concluded the same at Bengaluru itself. Thus, Bengaluru became the situs of the arbitral tribunal. Neither of the parties have objected for conducting the arbitral proceedings at Bengaluru and have voluntarily acceded and submitted to the jurisdiction of the arbitral tribunal at

Bengaluru. It is also relevant to note that the Chief Justice's designate of this court while allowing the petition presented under Section 11 (6) of the Act was pleased to direct that the terms of the arbitration would be settled by the Arbitrator.

11. In the interregnum the petitioner had filed another petition under Section 9 of the Act in the court of the Principal District Judge, Ananthapuram, Andhra Pradesh, within whose jurisdiction the properties were situated and the same came to be numbered as O.P No.23/2015. Upon notice the respondent herein appeared and resisted the same on the premise that the Ananthapuram court has no jurisdiction in view of the provisions of Section 42 of the Act. The Ananthapuram court after hearing the parties was pleased to allow the petition filed under Section 9 Act vide its order dated 17.08.2015. The petitioner had also preferred another petition under section 9 of the Act praying for an order of attachment for some other properties belonging to the respondent. The said petition came to be numbered as

O.P. No.243/2015 and in the said proceedings the Ananthapuram court has also granted an order of interim attachment of properties. That the bailiff of the Hassan District court has also filed his report in compliance of the order of interim attachment.

12. In the meanwhile, the Arbitral Tribunal passed the final award on 13.10.2015. By the said award the tribunal had directed the payment of certain sums of moneys to the petitioner herein and on failure to do so, it entitled to claim the future interest @ 15% per annum from the date of award till the realisation.

13. It is the action initiated hereafter by the respondent that is called in question before this court on the premise that the court before which the respondents have moved for relief has no jurisdiction to entertain the Arbitration suit or grant relief under the provisions of Section 34 of the Act much less any interim relief under Section 36 of the Act.

14. After the passing of the award dated 13.10.2015 by the Arbitral Tribunal, Bengaluru, the

respondent herein who has suffered the award has moved the application under the provision of Section 34 of the Act in the Court of the Principal District Judge, Ballari and there along he has also preferred an application invoking the provisions of Section 36 of the Act. The Court of the Principal District Judge at Ballari took the case on board, granted the interim relief prayed for under Section 36 of the Act and also issued notices to the petitioner summoning its attendance before the Court.

15. The first writ petition is filed calling in question the interim relief dated 20.02.2016 granted under the provisions of Section 36 of the Act and therein it is also prayed that this court be pleased to declare that the court of the Principal District Judge, Ballari has no jurisdiction to try the said suit. The second writ petition is apparently filed calling in question the jurisdiction of the Court at Ballari to issue notices to the petitioner or summoning their attendance.

16. It is contended by the learned counsel for the petitioner that the site of the contract and the work

executed under the terms of the excavation agreement is within the district of Ananthapuram in Andhra Pradesh. He would further contend that the proceeding before the Court at Ballari is hit by the principles of issue resjudicata and elaborating on the same he would contend that the issue of jurisdiction of the Ballari Court had already been ruled by the said court itself in the petition moved by the petitioner under the provisions of Section 9 of the Act and hence the present proceedings being contrary to its own ruling dated 30.07.2012 is liable to be interfered with. He would further contend that in the light of the final order passed by the Principal District Court at Ananthapuram in O.P. 23/2015 and the interim order in O.P. 243/2015 entertaining his applications preferred under Section 9 and read with the provisions of Section 42 of the Act, the court with jurisdiction to try the application under Section 34 would be the Court of the Principal District Court at Ananthapuram. He would further contend that in the light of the fact that the orders passed by the Ananthapuram Court having become final, the provisions of Section 42 applied with all its rigor.

17. The counsel for the petitioner has relied on a catena of decisions rendered by the Hon'ble Apex Court and the High Courts of which an elaborate reference is not necessitated for the reasons to be stated subsequently and also in the light of the ruling rendered by a larger bench consisting of three Hon'ble Judges of the Apex Court.

18. Per contra, the learned counsel for the respondent vehemently contends that it has been rightly held by the trial court that it is the application which is filed after the passing of the award which is governed by the provisions of Section 42 of the Act. He would contend that the Court at Ballari while entertaining the application under Section 34 has rightly held that the petitioner who had once submitted himself to the jurisdiction of the said Court cannot now raise objections regarding maintainability of the application i.e. A.S. 1/2016. He would further contend that in the light of the Clause 16 to the agreement, the parties have voluntarily conferred jurisdiction on the Courts at Ballari and hence the

application is maintainable before the Court at Ballari where it is currently pending.

19. In the above facts and circumstances, the point that arises for consideration by this court is, as to “whether the court of the Principal District Judge, Ballari has the jurisdiction to entertain the application preferred by the respondent herein under the provisions of Section 34 of the Act praying to set aside the award dated 13.10.2015 passed by the Arbitral Tribunal at Bengaluru?”

20. Though elaborate arguments have been advanced on both sides by placing reliance on a host of citations, the issue is no more res-intergra in view of the law laid down by the Hon’ble Apex Court in the case of State of West Bengal and Others Vs. Associated Contractors reported in (2015) 1 SCC 32 and followed by the Apex Court in the ruling reported in (2015) 14 SCC 515.

21. A recap of certain facts are necessary.

22. It is undisputed that the petitioner filed an application under Section 9 of the Act before the Ballari

Court which came to be resisted by the respondent herein on the short premise that the courts at Ballari have no jurisdiction. The said objection has been placed before the Ballari court in the Arbitration Case No.6/11. The said objection has manifested itself both in the form of a memo filed on behalf of the respondent dated.29.3.2012 and also reiterated by the said respondent in paragraph 2 of his objections preferred to I.A.No.2 in Arbitration case 6/2011. It is also not in dispute that the court of Ballari while disposing of the said Arbitration Case 6/2011 has considered the objections and upheld the said objection. The said findings have become final having not been called in question by either of the parties. It is also not in dispute that subsequently similar applications came to be moved before the Court at Ananthapuram. It is not in dispute that though objections regarding jurisdiction were raised, the court at Ananthapuram have proceeded to pass orders and out of two petitions, one is still pending consideration for adjudicating the issue regarding the maintainability of the said OP before the Court at Ananthapuram in A.O.P

No.243/2015. In the interregnum, the petitioner moved the Hon'ble High Court under the provision Sub Section (6) of Section 11 and the Chief Justices designate sitting at Dharwad was pleased to hear the parties and allow the petition. While so allowing the petition, was pleased to appoint justice R.Gururajan, retired Judge of this Court as Arbitrator.

23. This Court while so appointing the Arbitrator was pleased to observe as follows :-

“The terms of arbitration shall be settled by the Arbitrator and notifying the respondent, the proceeding be completed in accordance with law”

24. The terms of Arbitration as understood under the Act includes the place of Arbitration. Section 20 of the Act reads as follows :-

20. Place of arbitration – (1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in subsection (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section(1) or sub-section(2) the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.”

25. A reading of the provision would demonstrate that the parties are free to agree on the place of Arbitration, failing which the place of Arbitration shall be determined by the Arbitral Tribunal.

26. In the instant case on hand the Arbitrator came to be appointed by an order of the Chief Justices Designate. While so ordering the petition, the court had left the settlement of the terms of Arbitration to the discretion of the Arbitral Tribunal as defined under Section 2(1)(d) of the Act. It is also undisputed that the said order has become final. In terms of this order the Arbitral Tribunal has fixed the situs of Arbitration at Bengaluru. The situs of the Arbitration has been notified to the parties and the parties have willingly submitted themselves to the jurisdiction of the Arbitral Tribunal having its situs at

Bengaluru. Thereafter the Arbitral Tribunal has conducted its proceedings and rendered the award which is now the subject matter of challenge before the Court at Ballari and the jurisdiction of the court to adjudicate the same has been called in question before this Court.

27. It is seen that the provisions of Section 13 of the Act provide for a challenge to the procedure. If the parties had been aggrieved by the proceedings of the Arbitral Tribunal notifying the situs of the Tribunal at Bengaluru, it was open to the parties to lay challenge to the same by invoking the provisions of Section 13 of the Act.

28. A reference to Section 4 of the Act is pertinent in the light of the peculiar facts and circumstances of this Case. Section 4 of the Act reads as follows :-

“Waiver of right to object:- A party who knows that-

- (a) any provision of this Part from which the parties may derogate, or
- (b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or,

if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.”

29. A reading of the above provision would demonstrate that a party who is aware that he may derogate from any provision of this part or any requirement under the Arbitration agreement has not been complied with and yet proceeds with the Arbitration without stating his objections, he shall be deemed to have waived his right to do so.

30. The peculiar facts of this case is that the petitioner initially volunteered to submit himself to the jurisdiction of the Ballari Court. The said application was resisted on the ground of territorial incompetency. Thereafter the petitioner moved the court at Ananthapuram. Yet again, the respondent raised the bogey of lack of territorial jurisdiction. Thereafter, the petitioner once again submitted himself to the jurisdiction of this High Court in the form of a petition under the provisions of Section 11(6) of the Act. This petition came to be allowed, an Arbitrator appointed and fixation of the

situs of Arbitral Tribunal by the Arbitration and culminating in an award at the situs of the Tribunal.

31. Neither of the parties have even raised a whisper of an objection to the fixation of the situs of Arbitral Tribunal at Bengaluru or the continuance or the conduct of the Arbitral proceeding at Bengaluru. Thus it can be safely concluded that the parties had willingly submitted themselves to the jurisdiction Arbitral Tribunal at Bengaluru. At this juncture, reference to Section 2(1)(e) and Section 42 is necessary for the Court to arrive at a considered decision.

“2(1)(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.”

32. From a reading of Section 2(1)(e) it apparent that the court as defined under part I is the court of original jurisdiction in a District which in exercise of its ordinary original civil jurisdiction, has jurisdiction to decide the questions forming the subject matter of the Arbitration.

42. Jurisdiction – Notwithstanding anything contained elsewhere in the Part or in any other law for the time being in force, where with respect of 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.

33. From a reading of Section 42 what could be culled out is that the court which has jurisdiction is a court which has jurisdiction over the situs of the Arbitral Tribunal.

34. From a conjoint reading of Section 2(1)(e) and Section 42 what follows would be that the court, envisaged under Section 2(1)(e) of the Act and Section 42 of the Act is the court which has jurisdiction to decide the questions

forming the subject matter of the Arbitration. The definition provision clearly distinguishes between the subject matter of an arbitration and the subject matter of a suit by defining the subject matter of an Arbitration as being the questions or issues that requires decision. The reference to the word 'question' would indicate that the legislature intended to make the dispute resolution process as the cause of action for determining the territorial jurisdiction of a Court and in the considered opinion of this Court it is that court which has the supervisory control over the Arbitral Tribunal i.e. the High Court and the Civil Court of original jurisdiction conferred with the territorial jurisdiction over the situs of the Arbitral Tribunal. The parties having willingly submitted themselves to the jurisdiction of the Arbitral Tribunal having situs at Bengaluru, it is to be held that the Court at Bengaluru is the Court which has the jurisdiction to entertain a subsequent application in terms of and as mandated under Section 42 of the Act.

35. Even otherwise from a conjoint reading of Section 20 and Section 13 and Section 4 of the Act, it is apparent

that the right accrues under the Act for the parties to agree upon the situs of the Arbitration. It is left to an agreement between the parties and in the absence of such an agreement, the right to fix the situs of the Arbitral Tribunal is conferred on the Arbitrator and in the event of dissatisfaction, right is conferred to challenge the same. In the absence of any such challenge it is deemed that the parties have waived their right. In the instant facts though the parties have objected to the exercise of jurisdiction by the Courts at Ballari and Ananthapuram, they have willingly submitted themselves to the jurisdiction of the Arbitral Tribunal at Bengaluru and have thereby waived their rights to object.

36. In conclusion it is held that in the light of the above discussion, it is the court at Bengaluru where the Arbitral Tribunal is situated which is the court which has jurisdiction to entertain the application subsequent to the passing of the award in the light of Section 42 of the Act and not the court at Ballari before whom Arbitration Case No.1/2016. Consequently it is held that the court of the

Principal District Judge at Ballari has no jurisdiction to entertain and adjudicate the Arbitration Case No.1/2016.

37. Accordingly the writ petitions are partly allowed.

**Sd/-
JUDGE**

rs/Chs

Not An Official Copy

GNJ : 27.4.2017

W.P. No.102073/2016

C/W

W.P. No.102614/2016

ORDER

A oral request is made that in the light of this Court holding that the Ballari Court has no jurisdiction, it is prayed that the interim relief granted may be extended by two months in order to enable the respondent, petitioner in A.S.No.1/2016, to obtain the return of papers and re-present the same before the Bengaluru Court.

Keeping in view the ensuing holidays the request of the respondent herein, petitioner in A.S.No.1/2016, deserves consideration and there shall be an interim order of stay of the operation of the impugned award for a period of eight weeks from today.

**Sd/-
JUDGE**

rs/Chs