

Dispute Resolution Hotline

June 15, 2018

THE ANTRIX-DEVAS SAGA 2.0: DELHI HIGH COURT RULES IN FAVOUR OF ANTRIX

The Division Bench of the Delhi High Court has:

- Set aside an order of the single judge which had allowed Devas to seek interim measures for securing the ICC arbitral award before Delhi HC;
- Held that an appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Court's Act, 2015 is only restricted to appealable orders under Order XLIII of the Code of Civil Procedure, 1908 and Section 37 of the Arbitration and Conciliation Act, 1996 and a wider import is not permissible;
- Held that only if the parties confer exclusive jurisdiction as well as the seat of the arbitration to a designated place, the territorial court of that designated place would have exclusive jurisdiction. Else, the jurisdiction will have to be determined basis the subject matter and the seat of the arbitration;
- Held that a vexatious or mala-fide petition cannot attract the bar under Section 42 of the Arbitration and Conciliation Act, 1996, and the court which hears the dispute first has to decide whether such a petition is indeed vexatious and an abuse of the process of law.

BRIEF BACKGROUND:

A Division Bench of the Delhi High Court ("**Delhi HC**") in *Antrix Corporation Ltd. ("Antrix") v. Devas Multimedia Pvt. Ltd. ("Devas")*¹ has set aside the decision passed by the single judge. In particular, the single Judge of the Delhi HC had allowed Devas, a Bangalore based media company to secure USD 562.5 million awarded in an ICC arbitration against Antrix, the commercial arm of the Indian Space Research Organization ("**ISRO**"). This is despite the fact that Antrix had already filed a petition under Section 9² of the Arbitration & Conciliation Act, 1996 ("**Act**") before the Bangalore City Civil Court ("**Bangalore Court**") seeking interim protection. The single judge adopted a purposive interpretation of Section 42³ of the Act, and held that the petition must be 'valid' and the court which is approached in the first instance must be 'competent' to entertain and grant the reliefs prayed for in order to become the 'one stop' court for all the subsequent proceedings.⁴ The Single judge allowed interim protection to Devas on the premise that the Section 9 petition filed by Devas was not maintainable.

Antrix appealed against the decision of the single judge before the Division Bench of the Delhi HC under Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Court's Act, 2015 ("**CC Act**").

ISSUES BEFORE THE COURT:

The Delhi HC had to consider the following issues:

- Maintainability of Antrix's appeal under of Section 13 of the CC Act⁵;
- If the appeal is maintainable, whether Delhi HC had the exclusive jurisdiction to adjudicate any applications arising out of the arbitration agreement between Antrix and Devas;
- If the above is in the negative, whether the bar under Section 42 precludes Devas' interim relief application under Section 9 of the Act in view of Antrix's previous Section 9 petition before the Bangalore Court.

CONTENTIONS AND JUDGMENT:

i. Maintainability of the appeal under Section 13 of the CC Act:

The Delhi HC had to deal with the interpretation of Section 13 of the CC Act, which provides for the right of appeal from decisions of the Commercial Courts or Commercial Divisions of High Court.

Antrix contended that the proviso to Section 13 does not restrict the right of appeal to only those orders specified therein and instead was exhaustive and intended to include appeals against orders such as the one passed by the single judge which, although not a final decision on the Section 9 petition, was adversarial to Antrix as it *inter alia* directed Antrix to furnish particulars of assets. Antrix also relied on the fact that while the draft Section 14 (1) of the 253rd Report used the words "*only*" and "*and from no other orders*", such words were absent in Section 13 of the CC Act. Antrix contended that this was purposely omitted and hence Section 13 of the CC Act has to be given a wider meaning.

Devas contended that the purport of the proviso was to include only appealable orders within the purview of Section 13 of the CC Act, and more specifically those mentioned in Order XLIII of the Code of Civil Procedure,

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1908 (“CPC”) and Section 37 of the Act. In view of the fact that the single judge’s order is not a final order, the sequence of events have not been completed, and more particularly, Antrix has not faced any adverse order under Section 9 of the Act, Antrix’s appeal under Section 13 of the CC Act is not maintainable.

The Delhi HC Court relied on their own decision in *Harmanprit Singh Sidhu⁶ and HPL (India) Limited⁷* and took a strict view that the appealable orders under Section 13 of the CC Act are only those that are referred to in the proviso to Section 13 (1) of the CC Act. Consequently, the Delhi HC opined that the only appealable orders in the context of arbitration are those mentioned in Section 37 of the Act. The Delhi HC was not impressed with the submission on difference in wording between the draft provision in the Law Commission Report and the final Section 13 of the CC Act, and opined that the expression “from no other orders” occurring in Section 104 of the CPC would be applicable and Section 13 would have to be interpreted likewise.

Delhi HC thereafter relied on *Samson Maritime Limited v. Hardy Exploration⁸*, and observed that an application seeking furnishing of details of assets would also amount to an interim measure under Section 9, because the reason that those details are sought are only to seek consequential or follow up relief in the event of the respondent’s failure to furnish securities. Accordingly, it was held that an order mandating a party to disclose assets would be an interim measure within the meaning of Section 9 and consequently, Antrix’s appeal under Section 13 of the CC Act is maintainable.

ii. Whether Delhi HC has Exclusive Jurisdiction:

Delhi HC has to opine on whether they had the exclusive jurisdiction over the dispute between Antrix and Devas. Antrix contended that the Bangalore Court had concurrent jurisdiction because the cause of action arose there and its registered office was in Bangalore. In view of the same, the Bangalore Court was approached first for seeking interim protection under Section 9 of the Act. Devas relied on Section 42 of the Act to contend that once Bangalore Court had been approached all consequential recourse to any court had to be in Bangalore.

Devas argued that Section 42 would not apply to this case as parties had designated New Delhi as the seat of the arbitration, and by virtue of such designation, they conferred exclusive jurisdiction on the Courts at New Delhi. Devas placed reliance on the case of *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.⁹*, contending that the mere designation of the seat would confer exclusive jurisdiction to the courts therein.

The Delhi HC relied on the decision of the Supreme Court in *Bharat Aluminium Company v. Kaiser Aluminium Technical Service¹⁰* (“*Balco*”) to note that Section 2(1) (e) of the Act confers jurisdiction upon two courts over the arbitral process i.e., the courts having subject matter jurisdiction and the courts of the seat. It distinguished the judgment in *Datawind* as in that case the parties had particularly mentioned that a particular court was to have exclusive jurisdiction in addition to the designation of the seat. Delhi HC, therefore, went on to hold that, if the findings in *Datawind* are to be seen in the background of the larger bench decision in *Balco*, then only if the parties had designated the seat as New Delhi and also provided an exclusive forum selection clause in favour of the courts at New Delhi, then only could it be said that Delhi HC would have exclusive jurisdiction. Holding otherwise would in effect render Section 42 of the Act ineffective and useless, it held.

iii. Whether the bar under Section 42 of the Act applies to this case:

Once Delhi HC held that the Bangalore Court had the jurisdiction to entertain the arbitration application, it had to then examine whether the interim application under Section 9 filed before the Bangalore Court would constitute an “application” to attract the mandate of Section 42. Devas had argued (and which argument was upheld by the Single Judge) that since the reliefs claimed by Antrix in the Section 9 application were not maintainable, the same would not constitute a valid petition and therefore, not attract the bar under Section 42 of the Act.

The Delhi HC, however, took a different view and observed that there is a difference between the existence of jurisdiction and the exercise of it. It held that while a vexatious or mala-fide petition cannot attract the bar under Section 42, yet, the mandate of the law and principle of comity of courts would require that the other court which is seized of the dispute first, has to first decide whether such a petition is indeed vexatious and an abuse of the process of law. Allowing parties to approach the Delhi HC, in spite of the pending petition in the Bangalore Court and without waiting for its decision on the maintainability of it would amount to giving a go-bye to the mandate of Section 42 and run afoul of the principle of comity of courts.

Accordingly, the Delhi HC concluded that the bar under Section 42 would indeed apply to the present case and consequently, the Delhi HC would be barred from entertaining the present petition. Consequently, the appeal was allowed and the order passed by the single judge was set aside.

ANALYSIS:

While the Single Judge of the Delhi HC had adopted a purposive interpretation of Section 42 in order to avoid wastage of time on technicalities, the division bench has chosen to take a more technical stance in an attempt to uphold the sanctity and purpose of Section 42. It is now certain that the Antrix-Devas saga is far from over and that Devas will have to wait even longer before it is able to secure the arbitral award in its favour. Parties can take an important lesson out of this and make sure that while drafting the dispute resolution clauses, apart from designating the seat, they also particularly confer exclusive jurisdiction on a particular court if they wish to avoid such a situation. Careful drafting of the dispute resolution clause and specifically conferring exclusive jurisdiction would also ensure that there is no scope for forum shopping and filing of petitions that have no validity, only for delaying proceedings.

– Siddharth Ratho, Alipak Banerjee & Vyapak Desai
You can direct your queries or comments to the authors

¹ FAO (OS) (COMM) 67/2017, C.M. APPL.11214 & 17730/2017

² Section 9 of the Act pertains to interim measures etc. by Court.

³ Section 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...*”

⁴ For a more detailed background and in-depth analysis of the order of the single judge, please refer to our previous hotline [here](#)).

⁵ Section 13 of CC Act: "...*Section 13 – Appeals from decrees of Commercial Courts and Commercial Divisions (1) Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of judgment or order, as the case may be: Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996). (2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act...*"

⁶ Harmanprit Singh Sidhu v. Arcadia Shares & Stock Brokers Pvt. Ltd., 2016 (159) DRJ 514

⁷ HPL (India) Limited v. QRG Enterprises, 2017 (166) DRJ 671

⁸ 2016 SCC Online Mad 9122

⁹ (2017) 7 SCC 678

¹⁰ (2012) 9 SCC 552

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