

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ARB.APPEAL No. 279/2009

9th October, 2009

MASYC Projects Private Limited Petitioner
Through : Mr. Tarun Sharma, Advocate
versus

Sterlite Industries India Ltd. Respondent
Through : Mr. Manish Garg, Mr. S.K. Bansal,
Advocates

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? yes
3. Whether the judgment should be reported in the Digest? yes

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JUDGMENT (ORAL)

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1. This is a petition under Section 11 of the Arbitration & Conciliation Act, 1996 for appointment of an Arbitrator. The contract in question was a contract whereby the petitioner supplied various Conveyors and also did related civil, electrical & instrumentation work at the Concentrate Warehouse of the respondent at Tuticorin, Tamil Nadu. The present petition is filed because as per the petitioner the total value of the contract is Rs. 7,22,88,413/- out of which according

to the petitioner it has received only Rs. 6,36,66,404/- and consequently the petitioner claims inter alia a sum of Rs. 86,22,009/- in addition to the other claims as mentioned in para 7.8 of the petition. The respondent has entered appearance and has filed reply. The basic contention on behalf of the respondent is that this Court has no territorial jurisdiction in view of the agreed clause 18 between the parties which reads as under:-

“ARBITRATION AND LAW

Any dispute, difference or claim arising out of or under this Agreement or with regard to interpretation or any of the terms contained herein, if not resolved mutually, the same shall be referred to arbitration. The buyer and seller will appoint one arbitrator each and the two such arbitrators will appoint third arbitrator. This Contract shall be governed by the laws of the Republic of India and arbitration shall be as per the Indian Arbitration Act and Conciliation Act 1996 and shall be held at Chennai. In the event of any party hereto having referred any disputes, differences or claim arising out of or under the agreements/contract and/or work orders entered into pursuant thereto then any dispute, difference or claim arising out of or under the Contract, shall be referred to the same Arbitral Tribunal which has been so constituted for deciding the said disputes. The Arbitrators shall give reasoned award separately in respect of each claim. The language of arbitration shall be English. This agreement has been finalized and agreed upon by the parties in Chennai and shall be subject to the exclusive jurisdiction of Chennai Courts only.”

2. The respondent has contended that this Court has no territorial jurisdiction as per para 1.3 of its reply. The same reads as under:

“1.3 It is most respectfully submitted that this Hon’ble Court has no territorial jurisdiction to try and entertain the present arbitration petition merely on the ground that the arbitration clause has not invoked from Delhi and the petitioner is working at New Delhi or that any cause of action has accrued in favour of Petitioner Company at Delhi. The submissions regarding jurisdiction raised by the petitioner company are contrary to clause 18 of the arbitration clause between the parties and also in light of the following issues:-

(a) All three contracts have been entered into between the parties at Tuticorin, the Registered Office of the respondent company is at Tuticorin.

(b) The contracts scope, works and contract site at SIPCOT Industrial Complex, Tuticorin, Tamil Nadu. Performance guarantee was given at Tuticorin.

(c) As per clause 16, all correspondences were to be addressed at Tuticorin, Tamil Nadu.

(d) All invoices in terms of Clause 16.2 were to be addressed to Project Head at Tuticorin, Tamil Nadu.

(e) The venue of the arbitration is contemplated at Chennai in terms of Clause 18 of the Arbitration Agreement. It has been agreed upon between the parties that “this agreement has been finalized and agreed upon by the parties in Chennai and shall be subject to the exclusive jurisdiction of Chennai Courts only.”

It is noted that the clause in question obviously contains a mistake in that it states that the agreement has been finalized and agreed upon by the parties in Chennai. It is not disputed that all the contracts have been signed and executed at Tuticorin and not at Chennai. Accordingly, counsel for the petitioner has strenuously contended that since no part of the cause of action arose at Chennai therefore the Courts at Chennai cannot have jurisdiction because parties by consent cannot confer jurisdiction on a Court which

otherwise has none. This position of law is no doubt undisputed because if a Court does not have jurisdiction, then, parties by consent cannot confer jurisdiction on such Court.

3. However, this is not conclusive of the matter. When in para 1.3 of the reply of the respondent it contended that this Court has no territorial jurisdiction the petitioner in its reply to this para has stated as under:

“It is pertinent to mention herein that admittedly all the Three Contracts between the Parties herein have been offered from Tuticorin, Tamil Nadu. The mentioning of the finalization and agreement for the said Three Contracts in Chennai is the direct consequence of a simple typographical error, which has gone unnoticed. It is also an admitted position of Record that no overt or covert act connected with the said Three Contracts from the end of the either Parties has ever taken place in Chennai till today. Therefore, the Respondent Company cannot be permitted in Law to confer exclusive jurisdiction on the Chennai Courts simply on the ground of a typographical error which alleges the finalization and agreement of the Three Contracts in question at Chennai. Even-otherwise, the jurisdiction cannot be conferred on any Court by the consent of the Parties, which inherently lacks the same. It is further relevant to mention herein that the Judgment of the Hon’ble Apex Court bearing the citation, “A.B.C. Laminart (P) Ltd. vs. A.P. Agencies, 1989 (2) SCC-163” also as alleged do not support the Case of the Respondent Company to the extent that the Hon’ble High Court of Delhi has no jurisdiction for the appointment of an Arbitral Tribunal. Accordingly, the Petitioner Company cannot be restrained by the Respondent Company from enforcing the Legal Right for the purpose of seeking the constitution of an Arbitral Tribunal under Section-11 (6) of the Arbitration and Conciliation Act, 1996 before the Hon’ble High Court of Delhi at New Delhi on the strength of a void agreement.”

In this paragraph the most important portion is the line which reads:

“The mentioning of the finalization and agreement for the said Three Contracts in Chennai is the direct consequence of a simple typographical error, which has gone un-noticed.”

4. Thus, the stand of the petitioner is that the word “Chennai” wherever used in clause 18 of the contract is a typing mistake. The issue is, therefore, what follows if this is a typing mistake. In my opinion, once it is admitted to be a typing mistake and otherwise the Courts at Chennai had no nexus or no cause of action arose at Chennai then, it can be safely inferred by the typing mistake that instead of Tuticorin which was to have territorial jurisdiction, the word Chennai by mistake has come to be typed. If this be the consequence, then the clause consequently would read as under:

“This agreement has been finalized and agreed upon by the parties in Tuticorin and shall be subject to the exclusive jurisdiction of the Tuticorin only.”

5. This Court is inclined to put such an interpretation by reading Tuticorin in the place of Chennai because it furthers the intention of the parties and as per the rejoinder filed by the petitioner, there is admittedly a typing mistake so far as the word Chennai is concerned.

I am supported in the view I am taking for the interpretation of the clause of reading Tuticorin in place of Chennai by Section 95 of the Indian Evidence Act, 1872 which reads as under:-

“95. Evidence as to document unmeaning in reference to existing facts—When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration

A sells to B, by deed, “my house in Calcutta.”

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the Deed.

These facts may be proved to show that the deed related to the house of Howrah.”

A reference to the illustration shows that it was permissible to read Howrah in place of Calcutta and therefore in the facts of the present case it becomes permissible to read Tuticorin in place of Chennai.

6. In view of the above finding and taking into consideration the judgments of the Supreme Court in ***A.B.C. Laminart (P) Ltd. vs. A.P. Agencies***, 1989 (2) SCC-163 and ***Hanil Era Textiles Ltd. Vs. Puromatic Filters (P) Ltd.*** (2004) 4 SCC 671 and since the parties have agreed to confer exclusive jurisdiction on the Courts at Tuticorin(Tamil Nadu), this Court has no territorial jurisdiction to try and determine the present petition. The contention of the counsel for the petitioner

based upon Section 20(c) of the Code of Civil Procedure that payments under the contracts have been made at Delhi, ordinarily may have assisted the petitioner to file the present petition at Delhi, of course provided that the payments were by drafts payable at Delhi. However, in view of the agreed clause that only the Courts at Tuticorin(Tamil Nadu) would have exclusive jurisdiction to try the disputes between the parties, this Court is of the opinion that the present petition cannot lie at Delhi and has to be filed in the concerned Court at Tuticorin(Tamil Nadu).

7. With the above observations, it is directed that the present petition be returned to the petitioner for filing the same in the Court of appropriate jurisdiction at Tuticorin(Tamil Nadu). The petition is disposed off accordingly.

OCTOBER 09, 2009
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VALMIKI J. MEHTA