

**HIGH COURT OF TRIPURA
AGARTALA**

Arb. P. No.07 of 2023

Sri Utpal Datta, Son of Late Upendra Chandra Datta, resident of Lake Road, Haradhan Sangha, Krishnanagar, PO Agartala, PS-West Agartala, District-West Tripura.

..... Petitioner(s)

V E R S U S

1. RailTel Corporation of India Limited (A Government of India Undertaking) represented by its Executive Director having its registered office at 6th Floor, III Block, Delhi Technology Park, Shastri Nagar, Delhi-110053 and its Corporate office at Plot No.143, Institutional Area, Opp. Gold Souk, Section-44, Gurgaon-122003.

2. The Executive Director, RailTel Corporation of India Limited, Eastern Region (3rd Floor), Chatterjee International Centre, 33A, Jawaharlal Nehru Road, Kolkata-700071.

..... Respondent(s)

For Petitioner(s)	:	Mr. Raju Datta, Advocate.
For Respondent(s)	:	Mr. K.K. Pal, Advocate.
Date of hearing & Judgment	:	13th October, 2023.
Whether fit for reporting	:	YES

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

JUDGMENT & ORDER (ORAL)

Heard learned counsel for the parties.

[2] Petitioner has sought appointment of an arbitrator invoking Section 11(6) of the Arbitration and Conciliation Act, 1996 to settle the dispute between the parties. Petitioner had earlier submitted a representation before the respondents vide Annexure-8 dated 04.01.2021. As per the petitioner, the agreement between the parties was entered on 18.06.2014 for excavation of trenches and laying of OFC through ducts, testing, commissioning and maintenance of OFC in 40 blocks of 8 Districts (in the State of Tripura) and 4 blocks of 1 District (in the State of Meghalaya) by RailTel on behalf of BBNL.

The contract value was Rs.47,42,411/-. The date of completion of project was 180 days from the date of issue of Letter of Acceptance (LOA) dated 18.06.2014. The work could be completed successfully on 27.10.2017 and handed over to the authorities who issued a Provisional Acceptance Certificate on the same date. The respondent issued a revised LOA on 03.02.2020 whereby the volume of work was reduced and the amount of GST beyond the scope of original LOA dated 18.06.2014 was communicated for negotiation to which the petitioner did not accede. Petitioner contended that the original cost of LOA dated 18.06.2014 was Rs.44,47,441/- and the cost of subsequent LOA dated 03.02.2020 by way of amendment was Rs.39,86,594/-. Petitioner alleged illegal deduction of Rs.4,60,847/- from his client based on the subsequent LOA. He also stated that GST is not at all applicable in the agreement and as such it cannot be imposed. Petitioner alleged that he is entitled to receive Rs.4,60,847/- . The performance bank guarantee of Rs.2,37,150/-, Earnest Money Deposit of Rs.79,050/- along with statutory interest and remaining 5% of the amount of final bills which remained uncleared. Petitioner contended that he was facing extreme financial crisis due to outbreak of COVID 19 and is being pressurized by the Nationalized Banks from whom he has taken various loans for completion of the work allotted by the respondents. Petitioner, therefore, requested the respondents to pay the aforesaid amounts within a period of 15 days failing which he would be forced to file an appropriate application before the Court of law.

[3] He then approached this Court in WP(C) No.204 of 2022 which was disposed of by order 30.06.2022 granting liberty to the petitioner to make his claim before the respondents in terms of Clause 4.64 providing for the

Settlement of dispute and Arbitration so far as the disputed or unsettled issues are concerned. Thereafter, the petitioner invoked Clause 4.64 of the NIT which forms part of the Agreement by serving the mandatory notice dated 08.02.2023 (Annexure-10). That was replied by the respondents vide Annexure-11 dated 05.05.2023 where the respondents conveyed that since keeping three arbitrators will be a costly affair for both the parties, they proposed that a sole arbitrator be appointed by CMD, RailTel from the panel of arbitrators maintained by RailTel which includes senior retired government officials. That was responded to by the petitioner vide Annexure-12 dated 12.05.2023. Further correspondence took place by the respondent RailTel wherein they suggested three names of arbitrator from RailTel panel in terms of the arbitration clause which are as under:

- (i) Shri Rakesh Kumar Agarwal, Former Director (consumer mobility), BSNL.
- (ii) Shri Din Dayal Singh, Former PCSTE/Con/NFR.
- (iii) Shri Akhil Agarwal, Former DG(S&T)

[4] Thereafter, the petitioner approached this Court in the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996 invoking the Clause 4.64 of the Agreement between the parties. Petitioner took a plea that the proposed Arbitrator is ineligible to act as Independent Arbitrator being a former employee of RailTel Corporation in view of Section 12(5) of the 1996 Act as amended read with Schedule VII thereof.

[5] Respondents have appeared and filed their counter affidavit. They have, inter alia, raised the following grounds to resist the plea:

(i) That, in view of Clause 4.64.1, this Court does not have the jurisdiction to entertain the request for appointment of an arbitrator as the venue

of such arbitration proceedings has been agreed between the parties to be at Delhi. Learned counsel for the respondent has relied upon the decision of the Apex Court in the case of **BGS SGS Soma JV vs. NHPC Limited** reported in **(2020) 4 SCC 234** (paragraphs 81 and 82).

(ii) That a no claim certificate was issued by the petitioner dated 06.08.2020 where the petitioner stated that he will have no other claims outstanding for the work done or for labour or material supplied if any in the work and on any other account, and payment of the bill i.e. Retention-4 the final bill shall be the final settlement of all their claims in respect of the work in the above mentioned contract agreement with RailTel Corporation of India Limited.

(iii) Petitioner has failed to follow the procedure prescribed under the Agreement for appointment of an arbitrator.

(iv) Respondents have also contested the plea of the petitioner that retired Officials of the respondent-Corporation could not be appointed as independent arbitrator as being ineligible in terms of Section 12(5) read with Seventh Schedule of the Arbitration and Conciliation Act, 1996, relying upon the decision of the Apex Court in the case of **Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML(JV) A Joint Venture Company** reported in **(2020) 14 SCC 712**.

[6] The petitioner has filed a rejoinder affidavit and has sought to repel each of the grounds taken by the respondents.

(i) On the point of jurisdiction of the Court, learned counsel for the petitioner has relied upon the decision rendered by the Apex Court in the case of *Mankastu Impex Private Limited vs. Airvisual Limited* reported in *(2020) 5 SCC 399* (paragraphs 11 and 20) where the case of *BGS SGS Soma JV (Supra)* has also been dealt with and explained.

(ii) Petitioner has also placed reliance upon the decision of the Apex Court in the case of *A.B.C. Laminart Pvt. Ltd. and another vs. A.P. Agencies, Salem* reported in *(1989) 2 SCC 163* (paragraph 15). It is submitted that the cause of action determines the seat of arbitration and jurisdiction of the Court to appoint an arbitrator. It is further submitted that the Apex Court in the case of *Mankastu Impex Private Limited (Supra)* (paragraph 20) held that the expressions “venue” and “seat” cannot be used interchangeably. Clause 4.64 does not precisely exclude the jurisdiction of this Court where cause of action has arisen. Therefore, this Court has the jurisdiction to appoint an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 read with Clause 4.64.1 of the Agreement between the parties.

(iii) Learned counsel for the petitioner has sought to rebut the grounds urged by the respondents that since no claim certificate was issued by the petitioner on 06.08.2020, it would amount to full and final settlement of the outstanding dues. He has placed reliance upon the judgment of the Apex Court in the case of *R.L. Kalathia and Company vs. State of Gujarat* reported in *(2011) 2 SCC 400* (paragraph 13) and submitted that merely because contractor has issued no dues certificate, if there is an acceptable claim, the respondents cannot be allowed to shift their liability by raising such a ground.

(iv) Learned counsel for the petitioner has also placed reliance upon the decision of the Apex Court in the case of *Ellora Paper Mills Limited vs. State of Madhya Pradesh* reported in (2022) 3 SCC 1 wherein the Apex Court has held that after coming into force of Section 12(5) by virtue of the amendment in the year 2015 to the Arbitration and Conciliation Act, 1996, the independence and impartiality of an arbitrator being a continuing requirement goes to the root of the credibility of the arbitral proceedings. As such a person like a retired employee of the respondent is ineligible to be appointed as an arbitrator on the facetious plea that the arbitrator would be ineligible if he does not pass muster on the anvil of the Seventh Schedule read in context of Section 12(5) of the Arbitration and Conciliation Act. This position would obtain regardless of whether the arbitral proceedings themselves commenced prior to, or post, coming into force of the Amendment Act, 2015, provided the arbitrator is being, or has been, appointed after the amendment took place. He has also pointed out that the decision in *Central Organisation for Railway Electrification* (supra) has been differed with by a later three Judge Bench of the Apex Court and referred to the Larger Bench vide order dated 11.01.2021 passed in SLP(C) Nos. 12670/2020.

(v) Learned counsel for the petitioner has also sought to repel the third ground urged by the respondents that the petitioner has not followed the procedure prescribed under the Arbitration Clause for invoking the jurisdiction of this Court.

[7] I have considered the submission of learned counsel for the parties and taken note of the pleadings placed on record. I have also gone through the decisions cited by the rival parties in contention urged by them.

[8] Since a plea of jurisdiction has been raised by the respondents that needs to be addressed at the outset before other grounds raised by the parties are to be gone into. Clause 4.64 of the Agreement contains the provisions for settlement of disputes and arbitration. Clause 4.64 is quoted in extenso:

“4.64. SETTLEMENT OF DISPUTE AND ARBITRATION

4.64.1 Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by a sole arbitrator in accordance with provisions contained in Arbitration and Conciliation Act, 1996 as amended and the award made in pursuance thereof shall be binding on the parties. The venue of such arbitration or proceeding thereof shall be New Delhi.

4.64.2. All Arbitration proceedings shall be conducted in English. Resources against any Arbitral award so rendered may be entered into court having jurisdiction or application may be made to such court for the order of enforcement as the case may be.

4.64.3. The Arbitral Tribunal shall consist of the sole Arbitrator if the value of claim is upto Rs.10 Lakhs. The arbitrator will be appointed by the Managing Director of RailTel Corporation of India Ltd. If the value of claim or amount under dispute is more than Rs.10 Lakhs, the matter shall be referred to the adjudication of arbitral council. Chairman cum Managing Director/RailTel shall furnish a pane of three names to the contractor, out of which the contractor will recommend one name to be his nominee and then Chairman cum Managing Director/RailTel shall appoint out of the panel, one name as RailTel’s nominee and these two arbitrators with mutual consent appoint a third arbitrator who shall act as deciding. The award of the sole arbitrator or the Arbitral council, as the case may be, shall be final and binding on both the parties, i.e. Contractor and RailTel Corporation of India Ltd.

4.64.4. Each of the parties agree that no withstanding that the matter may be referred to Arbitrator as provided therein, the parties shall nevertheless pending the resolution of the controversy or disagreement continue to fulfill their obligation under this Agreement so far as they are reasonable able to do so.”

[9] It is this condition “The venue of such arbitration or proceeding thereof shall be New Delhi” under the Arbitration Clause 4.64.1 which has been relied upon by the respondents, to question the jurisdiction of this Court. Upon going through the rival judgments cited by the parties, it appears that the very issue has been dealt with by the Apex Court in the case of **BGS SGS Soma JV (Supra)** from paragraph 22 onwards till paragraph 82 of the report. Paragraphs

81 and 82 which summarizes the conclusion of the Apex Court in the case of

BGS SGS Soma JV (Supra) by a three Judge Bench is extracted hereunder:

“81. Most recently, in *Brahmani River Pellets* [(2020) 5 SCC 462], this Court in a domestic arbitration considered Clause 18 - which was the arbitration agreement between the parties - and which stated that arbitration shall be under Indian Arbitration and Conciliation Act, 1996, and the venue of arbitration shall be Bhubaneswar. After citing several judgments of this Court and then referring to *Indus Mobile Distribution* [(2017) 7 SCC 678], the Court held:

“18. Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the “venue” of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in *Swastik* [(2013) 9 SCC 32], non-use of words like “exclusive jurisdiction”, “only”, “exclusive”, “alone” is not decisive and does not make any material difference.

19. When the parties have agreed to have the “venue” of arbitration at Bhubaneswar, the Madras High Court erred (2018 SCC OnLine Mad 13127) in assuming the jurisdiction under Section 11(6) of the Act. Since only the Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order (2018 SCC OnLine Mad 13127) is liable to be set aside.”

82. On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the “venue” of the arbitration proceedings, the expression “arbitration proceedings” would make it clear that the “venue” is really the “seat” of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as “tribunals are to meet or have witnesses, experts or the parties” where only hearings are to take place in the “venue”, which may lead to the conclusion, other things being equal, that the venue so stated is not the “seat” of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings “shall be held” at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a “venue” and not the “seat” of the arbitral proceedings, would then conclusively show that such a clause designates a “seat” of the arbitral proceedings. In an International context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that “the venue”, so stated, would be the seat of the arbitral proceedings. In a national

context, this would be replaced by the Arbitration Act, 1996 as applying to the “stated venue”, which then becomes the “seat” for the purposes of arbitration.

Correctness of the judgment in Hardy Exploration and Production (India) Ltd [(2019) 13 SCC 472].”

[10] In the present case, the relevant condition under Clause 4.64.1 is similar to the one in *Brahmani River Pellets Ltd. vs. Kamachi Industries Ltd. [(2020) 5 SCC 462]* (paragraphs 18 and 19) which have also been considered by the Apex Court in the case of *BGS SGS Soma JV (Supra)*. In that context, the Apex Court held that since the parties have agreed that the venue of arbitration shall be at Bhubaneswar, the intention of the parties is to exclude all other Courts. As held in *Swastik Gases (P) Ltd. vs. Indian Oil Corpn. Ltd. [(2013) 9 SCC 32]*, non-use of words like “exclusive jurisdiction”, “only”, “exclusive”, “alone” is not decisive and does not make any material difference and since the parties have agreed to have the “venue” of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Accordingly, it was held that the Orissa High Court would only have the jurisdiction to entertain the petition filed under Section 11(6) of the Act and the impugned order was set aside.

The Apex Court in the case of *BGS SGS Soma JV (Supra)* while concluding further held that when the expression “shall be held” at a particular venue has been used in relation to the arbitration proceedings it would indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a “venue” and not the “seat” of the

arbitral proceedings, would then conclusively show that such a clause designates a “seat” of the arbitral proceedings.

Viewed in that light, the relevant condition under Clause 4.64.1 “the venue of such arbitration or proceedings thereof shall be New Delhi” clearly indicates that the parties agreed to conduct the arbitration proceedings at a particular place i.e. New Delhi. Following the ratio rendered by the Apex Court in the case of *Brahmani River Pellets Ltd.(Supra)* and in the case of *BGS SGS Soma JV (Supra)*, this Court is of the considered opinion in the present case that the jurisdiction to invoke the provision under Section 11(6) of the Arbitration and Conciliation Act, 1996 (as amended) does not lie with this Court. Parties are at liberty to approach the appropriate Court/Forum. As such, this Court does not deem it necessary to deal with the other contentions raised by the parties. The instant petition stands dismissed.

Pending application(s), if any, shall also stand disposed of.

(APARESH KUMAR SINGH), CJ

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