

Court No. - 19

Case :- MATTERS UNDER ARTICLE 227 No. - 1834 of 2024

Petitioner :- M/S Amit Engineering, Mainpuri Thru. Prop. Mr. Amit Dixit

Respondent :- Superintending Engineer, Electricity Work
Circle, Raebareilly Zone, M.V.V.N.L. Chinhat Lucknow

Counsel for Petitioner :- Puneet Sahai Bisaria

Counsel for Respondent :- Neera Yadav, Mayank Sinha

Hon'ble Subhash Vidyarthi J.

1. Heard Sri K. K. Arora Advocate, the learned counsel for the petitioner and Sri Mayank Sinha Advocate, the learned counsel for the respondent.
2. By means of the instant petition filed under Article 227 of the Constitution of India, the petitioner has challenged the validity of an order dated 07.03.2024 passed by the Commercial Court No. 2, Lucknow in Arbitration Case No. 126 of 2023, under Section 34 of the Arbitration and Conciliation Act, 1996 (which will hereinafter be referred to as 'the Act').
3. Briefly stated, facts of the case are that the petitioner had entered into a contract with the respondent for construction of 33 KV independent feeders emanating from 132 KV primary sub-station Amawan (Raebareli), 220 KV primary substation Sonik (Unnao) and 33/04 KV substation at District Courts Raebareli/Unnao on turnkey basis within stipulated time in compliance of order passed by Hon'ble High Court, U.P. on 29.06.2019.
4. Clause 16 of the General Requirements of Specification mentioned in the contract entered between the parties provides as follows: -

"16.0- JUDICIAL JURISDICTION:

All the dispute arising out and touching or relating to subject matter of agreement contract shall be subject to jurisdiction of local courts of Lucknow and Lucknow bench of High Court of Judicature at Allahabad only.”

5. Clause 38(A) of the General Conditions for the supply of plant and the execution of works in connection with schemes in Uttar Pradesh Power Corporation Limited (UPPCL) provides that “*any action taken or proceedings initiated on any of the term of this agreement shall be only in the court of competent jurisdiction under the high court of judicature at Allahabad...*”
6. Certain disputes arose between the parties, which led to the petitioner filing an application under Section 11 of the Act before this Court sitting at Allahabad, which was allowed and Justice Ifaqt Ali Khan, a former Judge of this Court was appointed as the sole Arbitrator for adjudicating upon the disputes between the parties.
7. The learned Arbitrator has held the first sitting of the arbitration proceedings on 30.08.2022 at his residence at Aligarh. The Rules of procedure and other incidental matters were decided on the first date and it was recorded in the aforesaid order that: -

*“it is also made clear that till any other suitable arrangement is made, the venue of the arbitral proceeding will be as follows:
“4/4 H1 Aftab Apartment Opposite Ek Minar wali Masjid, Qila Road, Shamshad Market, Civil Lines, Aligarh (U.P.)-202001”*
8. It appears that no further suitable arrangement could be made and the arbitration proceedings continued to be held at the aforesaid place and ultimately an award was declared on 26.08.2023 directing the respondent to pay to the petitioner a sum of Rs.1,20,43,129.00 alongwith interest at the rate of 8% per annum from 06.07.2020 till the date of the award and the rate of interest will be 10% per annum from the date of award.
9. The respondent filed an application under Section 34 of the Act challenging the aforesaid award before the Commercial Court no. 2,

Lucknow, which application has been registered as Arbitration Case No. 126 of 2023.

10. The petitioner filed an application (C-12) raising a preliminary objection regarding the territorial jurisdiction of the Commercial Court at Lucknow, stating that the entire arbitration proceedings took place at Aligarh without any protest of the respondent and the arbitration award was also passed at Aligarh, which falls within the territorial jurisdiction of this Court sitting at Allahabad. Therefore, the Courts sitting at Lucknow have no jurisdiction to entertain the application under Section 34 of the Arbitration Act.
11. The respondent filed objection against the aforesaid application *inter alia* stating that as per Clause 16.0 and 38(A) of the Contract referred to above and also keeping in view the fact that the contract was signed at Lucknow, the contract was for certain works to be carried out in the District Courts at Unnao and Raebareli and the respondent is situated at Lucknow, the Courts at Lucknow have jurisdiction to entertain the application under Section 34 of the Act. The Courts at Aligarh will have no jurisdiction in the matter merely because the Arbitrator held sittings at Aligarh, as per his convenience.
12. The Commercial Court rejected the petitioner's preliminary objection by means of the impugned order dated 07.03.2024 and held that a combined reading of Clause 16 and 38(A) of the Contract makes it clear that all the disputes arising out of and touching or relating to subject matter of agreement contract shall be subject to jurisdiction of local courts at Lucknow. The mere fact that arbitration proceedings took place at Aligarh cannot oust the jurisdiction of the Commercial Court at Lucknow.
13. Assailing the validity of the impugned order, the learned counsel for the petitioner has submitted that in the present case, the seat and venue of the arbitration was at Aligarh and the award was also passed at Aligarh and, therefore, the Courts at Aligarh only will

have jurisdiction to entertain the application under Section 34 of the Act.

14. In support of his contention, the Learned counsel for the petitioner has placed reliance on the decisions of Hon'ble Supreme Court in the cases of **Inox Renewables Ltd. v. Jayesh Electricals Ltd.**, (2023) 3 SCC 733, **BBR (India) (P) Ltd. v. S.P. Singla Constructions (P) Ltd.**, (2023) 1 SCC 693 and judgment rendered by a coordinate Bench of this Court in **Zapdor-Ubc-Abnjv v. Union of India**, 2022 SCC OnLine All 594.
15. Per contra, Sri Mayank Sinha, learned counsel for the respondent has relied upon the judgment of Hon'ble Supreme Court rendered in the case of **Emkay Global Financial Services Ltd. v. Girdhar Sondhi**, (2018) 9 SCC 49, in which it was held whether more than one courts have jurisdiction to decide the dispute and the parties have entered into an agreement to the effect that any dispute will be referred to the courts at a particular place, the courts at that place alone will have jurisdiction over the matter.
16. I have heard learned counsel for the parties and gone through the record. It will be appropriate to look at the relevant statutory provisions, before proceeding to decide the matter.
17. The relevant part of Section 34(1) and 34(2)(a) of the Act provides as follows: -

“34. Application for setting aside arbitral award.—(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b)...”

18. Section 20 of the Act provides that: -

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

(2) Failing any agreement referred to in sub-section (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.”

19. The parties had entered into an agreement providing that “*all the dispute arising out of between the dispute arising out and touching or relating to subject matter of agreement contract shall be subject to jurisdiction of local courts of Lucknow and Lucknow bench of High Court of Judicature at Allahabad only.*” The agreement further provides that any action taken or proceeding initiated in terms of this agreement, shall be only in the court of competent jurisdiction under the High Court of Judicature at Allahabad.

20. In **Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd.**, (2017) 7 SCC 678 the Hon’ble Supreme Court held that: -

“9...We are of the opinion, the term “subject-matter of the arbitration” cannot be confused with “subject-matter of the suit”. The term “subject-matter” in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having

supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place.”

(Emphasis added)

21. The Hon’ble Supreme Court has clearly held in **Indus Mobile Distribution (P) Ltd.** (Supra) that the Court at the place where the cause of action is located, will also have jurisdiction over the matter.
22. **Indus Mobile Distribution (P) Ltd. (Supra)** has been followed in **Emkay Global Financial Services Ltd. v. Girdhar Sondhi**, (2018) 9 SCC 49, wherein it has been held that where the agreement between the parties provided that the courts in Mumbai have exclusive jurisdiction, it is clear that it is the Mumbai courts and the Mumbai courts alone, before which a Section 34 application can be filed. The arbitration that was conducted at Delhi was only at a convenient venue.
23. In **Inox Renewables Ltd.** (Supra) relied by the learned Counsel for the petitioner, a purchase order dated 28-1-2012 was entered into between M/s Gujarat Fluorochemicals Ltd. and the respondent Jayesh for manufacture and supply of power transformers to wind farms. The arbitration clause contained in the purchase order provided that the venue of the arbitration shall be Jaipur. In the event of arbitrators' award being not acceptable to either party, the parties shall be free to seek lawful remedies under the law of India and the jurisdiction for the same shall be courts in the State of Rajasthan. Pursuant thereto, the learned arbitrator passed an award dated 28.07.2018, in which it was *inter alia* stated that “*as per arbitration agreement, the venue of the arbitration was to be Jaipur. However, the parties have mutually agreed, irrespective of a specific clause as to the venue of the*

arbitration would be at Ahmedabad and not at Jaipur”. A Section 34 petition was filed by the appellant in Ahmedabad which was resisted by the respondent referring to the business transfer agreement and stating that the courts at Vadodara alone have jurisdiction.

24. The Hon’ble Supreme Court held in **Inox Renewables Ltd.** (Supra) that the parties had specifically shifted the venue/place of arbitration from Jaipur to Ahmedabad by mutual agreement. The parties may mutually arrive at a seat of arbitration and may change the seat of arbitration by mutual agreement which is recorded by the arbitrator in his award to which no challenge is made by either party.
25. The judgment in **Inox Renewables Ltd.** (Supra) was given in the peculiar factual background of that case and is not applicable to the facts of the present case, where the parties have entered into an agreement that the Courts at Lucknow only will have jurisdiction in the matter and there was no agreement shifting the seat or venue of the arbitration. The arbitrator had held sittings at his residence at Aligarh as an *Ad-hoc* arrangement till some other suitable arrangement was made.
26. In **BBR (India) (P) Ltd.** (Supra) relied by the learned Counsel for the petitioner, the issue before the Hon’ble Supreme Court was “Whether conducting the arbitration proceedings at Delhi, owing to the appointment of a new arbitrator, would shift the “jurisdictional seat of arbitration” from Panchkula in Haryana, the place fixed by the first arbitrator for the arbitration proceedings?” The arbitration clause was silent and did not stipulate the seat or venue of arbitration. The contract and letter of intent were executed at Panchkula in Haryana. The corporate office of the respondent is also located at Panchkula. As disputes arose between the parties, the matter was referred to arbitration, and Mr Justice (Retd.) N.C. Jain was appointed as the sole arbitrator and he held that the venue of the proceedings would be H. No. 292, Sector-6, Panchkula, Haryana. Neither party had objected to the place of arbitration proceedings as fixed by the Arbitral Tribunal.

Subsequently Mr Justice (Retd.) N.C. Jain recused himself from continuing as the arbitrator. Thereupon, Mr Justice (Retd.) T.S. Doabia took over as the sole arbitrator. The first procedural order dated 30.06.2015 stated that the venue of the proceedings would be Delhi. Thereafter, hearings were held and the award was signed and pronounced at Delhi on 29.01.2016. Thereafter, two proceedings were initiated. The respondent filed an application Section 9 of the Act before the Additional District Judge, Panchkula, on 07.05.2016. The appellant filed a petition under Section 34 of the Act before the Delhi High Court on 28.04.2016. The petition filed by the respondent under Section 9 of the Act at Panchkula, was dismissed on the ground of lack of territorial jurisdiction vide order dated 14.12.2016, recording that the jurisdiction to entertain the application vests solely with the Delhi High Court, where a prior petition under Section 34 had been filed, and was pending. The petition under Section 9, being a subsequent petition, would be barred under Section 42 of the Act. This order was set aside by the High Court of Punjab and Haryana vide order dated 14.10.2019.

27. The Hon'ble Supreme Court held in **BBR (India) (P) Ltd.** (Supra) that subsequent hearing of the proceedings at different location other than the place fixed by the arbitrator as 'seat of arbitration should not be regarded and treated as a change for relocation of the jurisdictional seat.' The seat once fixed by the arbitral tribunal under Section 20(2) should remain static and fixed, whereas the venue of arbitration can change and move from the seat to a new location. Venue is not constant and stationary and can move and change in terms of sub Section (3) to Section 20 of the Act. Change of venue does not result in change of relocation of the seat of arbitration.

28. In **BBR (India) (P) Ltd.** (Supra) also, the agreement between the parties did not provide that the Courts at any particular place will have jurisdiction whereas the position is otherwise in the present

matter. Hence, **BBR (India) (P) Ltd.** (Supra) is not relevant for decision of the present case.

29. The learned counsel for the petitioner has also relied upon a judgment rendered by a Co-ordinate Bench of this Court in **Zapdor-Ubc-Abnjv v. Union of India**, 2022 SCC OnLine All 594, in which the petitioner had invoked the Arbitration clause and an Arbitral Tribunal comprising of three officers of the Railways conducted the arbitral proceedings and they signed and delivered an Award at New Delhi. The respondent filed an Application under Section 34 of the Act before the Commercial Court at Lucknow along with an Application for Condonation of Delay. Subsequently the Petitioner preferred an Execution Application under Section 36 of the 1996 Act before the High Court at Delhi. This Court had framed the following four issues to be decided in the case: -

- “a) Whether this petition under Article 227 is maintainable?*
- b) Whether Cause of Action or subject matter of the Suit would determine the Court which could exercise supervisory jurisdiction to decide the Section 34 petition?*
- c) Whether it would be the ‘Venue’ or the ‘Seat’ of Arbitral proceedings which would determine the Court which can exercise supervisory jurisdiction over the Arbitral proceedings?*
- d) Whether in the absence of a specific mention in the contract agreement regarding ‘Seat’ of Arbitration, the conduct of parties would determine the ‘Seat’ and therefore act as an exclusionary clause for Courts at all other places to exercise supervisory control over the Arbitral proceedings?”*

30. Relying on **BGS SGS Soma JV v. NHPC Ltd.**, (2020) 4 SCC 234, this Court held in **Zapdor-Ubc-Abnjv** (Supra) that a petition under Article 227 of the Constitution is maintainable against the order rejecting an application for return of Application under Section 34 of the Act of 1996. On issues no. b, c and d, this Court held that: -

“The contract being governed by the Tender Paper ELCORe, It was open for the parties, more specifically the Railways, to determine the place of arbitration by way of written agreement. Instead of any written agreement or conditions in the Contract or even in the correspondence between the parties, specifying the seat of arbitration, the Railways agreed to participate in the

arbitration proceedings at New Delhi without any protest. The Railways Hence can be said to have waived their right to object and by their conduct determined the venue of arbitration at New Delhi to be also the seat of the arbitration proceedings. Issues b, c, and d consequently are also decided in favour of the petitioner and it is held that failure to specifically mention a Seat of Arbitration and participation in Arbitration proceedings at New Delhi by the Railways without any protest shall be considered as determination of the Venue of arbitration as also the Seat, giving exclusive jurisdiction to the Courts at New Delhi to supervise the Arbitral proceedings including any attack on the Award.”

(Emphasis added)

31. In **Zapdor-Ubc-Abnjv** (Supra) the parties had not entered into any written agreement specifying the seat of arbitration and it appears that there was no agreement regarding restricting the jurisdiction to the Courts situated at any particular place, whereas in the present case, the contract between the parties provides that the Courts at Lucknow only will have jurisdiction over the matter.
32. The Arbitrator appointed by this Court sitting at Allahabad is residing at Aligarh and in the order passed on the first date of hearing, the Arbitrator has mentioned that till any suitable arrangement is made, the venue of the arbitral proceeding will be at Aligarh. Therefore, it is clear that neither the parties had agreed for the seat/venue on the arbitration, nor had Arbitrator passed any order to this effect. The Arbitrator had merely made an *ad-hoc* provision for venue of the arbitration till a suitable arrangement was made. Somehow, it so happened that suitable arrangement contemplated by the Arbitrator could never be made and the arbitration proceedings continued and concluded at Aligarh.
33. Section 20 of the Act provides that the parties are free to agree on the place of arbitration. The parties had agreed that “*all the dispute arising out of between the dispute arising out and touching or relating to subject matter of agreement contract shall be subject to jurisdiction of local courts of Lucknow and Lucknow bench of High Court of Judicature at Allahabad only*, but they did not agree for the venue or the seat of arbitration proceedings. The Arbitrator also did

not determine the place of arbitration and it merely passed an order making an Ad-hoc arrangement stating that till any suitable arrangement is made, the venue of the arbitral proceeding will be at Aligarh. This order for *Ad-hoc* arrangement will not amount to a determination of the place of arbitration and this *Ad-hoc* arrangement will not prevail upon the agreement of the parties regarding jurisdiction of the Courts at Lucknow only.

34. Although, Clause 16 of the contract between the parties provides that the dispute between the parties shall be subject to the jurisdiction of local courts at Lucknow Bench and High Court of Judicature at Allahabad, the petitioner filed an application under Section 11 of the Arbitration and Conciliation Act before this Court sitting at Allahabad. The learned counsel for the petitioner has submitted that the respondent has participated in those proceedings without raising any objection regarding jurisdiction of the Court and, therefore, all subsequent applications have to be filed within the territorial limits of this Court sitting at Allahabad in view the provision contained in Section 42 of the Act.

35. Section 42 of the Act provides as follows: -

*“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.”*

36. The word “Court” used in Section 42 refers to the “Court” as defined under Section 2 (e) of the Act, which reads as follows: -

*“2. **Definitions.**—(1) In this Part, unless the context otherwise requires—*

** * **

*(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;”

37. It would be appropriate to have a look at Section 11 (6) and (6-B) of the Act, which read as follows: -

“(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

*(6-A) * * **

(6-B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.”

38. Appointment of Arbitrator under Section 11 of the Act is made by “*An arbitral institution designated by the High Court*” and not by a “*Court*” as defined in Section 2 (e) of the Act. It is further clarified by Section 11 (6-B) of the Act, which provides that designation of any person or institution by the High Court for the purposes of this section shall not be regarded as a delegation of judicial power by the High Court.
39. When the authority designated by the High Court to make appointment of Arbitration under Section 11 of the Act has not been delegated any judicial powers by the High Court, filing of any application under Section 11(6) of the Act before ‘*An arbitral institution designated by the High Court*’ would not amount to filing any application under Part I of the Act in a Court. Therefore, the filing of an application under Section 11 at Allahabad would not create a bar

under Section 42 of the Act against the exercise of jurisdiction by the Commercial Court at Lucknow.

40. **Indus Mobile Distribution (P) Ltd.** (Supra) lays down that the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place and **Emkay Global Financial Services Ltd.** (Supra) lays down that the Courts at a particular place have exclusive jurisdiction, an application under Section 34 of the Act can be filed before the Courts at the place alone. The arbitration that was conducted at Aligarh only for the same of convenience.

41. As in the present case, the agreement between the parties provides that “*all the dispute arising out of between the dispute arising out and touching or relating to subject matter of agreement contract shall be subject to jurisdiction of local courts of Lucknow and Lucknow bench of High Court of Judicature at Allahabad only*”, as per the law laid down by the Hon’ble Supreme Court in **Indus Mobile Distribution (P) Ltd.** (Supra), **which** has been followed in **Emkay Global Financial Services Ltd.** (Supra), the Courts at Lucknow alone will have the jurisdiction to adjudicate upon an application under Section 34 of the Act and the respondent has rightly filed the application under Section 34 of the Act at Lucknow.

42. In view of the aforesaid discussion, I am of the considered view that there is no illegality in the impugned order dated 07.03.2024 passed by the Commercial Court No. 2, Lucknow in Arbitration Case No. 126 of 2023 rejecting the petitioner’s objection regarding lack of territorial jurisdiction at Lucknow.

43. The petition lacks merits and is hereby **dismissed**.

(Subhash Vidyarthi J)

Order Date: 13.05.2024
kkv/