

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.10.2015

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
21.08.2015	27.10.2015

Coram

The Hon'ble Mr. Justice **T.S. SIVAGNANAM****O.P. No.206 of 2013**

InterGlobe Technology Quotient Pvt., Ltd.,
A Company having its registered office at
Centre Wing, Ground Floor,
Thapar House, 124, Janpath,
New Delahi - 110 001. ... Petitioner

Vs

1.Rasi Travels & Cargo Pvt., Ltd.,
498, Karumuthu Centre, Anna Salai,
Chennai - 600 035.

2.Ind Trust Travels & Cargo Pvt., Ltd.,
10, Thiru.Vi-Ka Road, Royapettah,
Chennai - 600 014. .. Respondents

Prayer :-Petition filed under Section 11 (5) of the Arbitration and Conciliation Act, 1996, to appoint a sole Arbitrator, with the seat of Arbitration being New Delhi, for the purposes of adjudicating upon the disputes and differences that have arisen between the petitioner and respondents, as stipulated under the Subscriber Agreement; award costs of the present proceedings to the petitioner

and pass such further or other order(s) as may be deemed fit upon the facts and circumstances of the case.

For petitioner .. Mr.Abraham Vishal Jacob for
M/s.Chitra Narayanan

For Respondents ... Mr.C.Seethapathy for RR1&2.

O R D E R

The petitioner, a private limited company incorporated under the Companies Act, 1956, having its registered office at New Delhi, has filed this petition under Section 11(5) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'Act') to appoint a sole Arbitrator with the seat of arbitration of the New Delhi for the purpose of adjudicating upon the disputes and differences that have arisen between the petitioner and respondents, as stipulated under the Subscriber Agreement.

2. The respondents are also private limited companies incorporated under the Companies Act and having their registered office at Chennai. The petitioner and the respondents entered into a Subscriber Agreement on 21.09.2007, under which the respondents individually undertook to use Galileo system distributed by the

petitioner, as their sole and exclusive Computerised Reservation System for all reservation operations in India. The petitioner would allege that the respondents neglected and avoided to meet the targets under the Subscriber Agreement and failed to generate the minimum stipulated target segments during the period from October 2007 to March 2009 and that it is in clear breach of the obligations under the agreement. The petitioner issued a legal notice dated 12.05.2009, alleging various contractual breaches committed by the first respondent and called upon them to pay a sum of Rs.30,00,000/-, along with interest. The petitioner filed a petition under Section 9 of the Act before the Additional District Judge, Patiala House Courts, New Delhi for appointment of a local Commissioner for inspection of the premises of the second respondent and the Court appointed a Commissioner vide order dated 07.09.2010, to visit the premises of the second respondent and the Commissioner submitted a report stating that the second respondent has been using other equipments for its computerised reservation system in breach of the Subscriber Agreement. Upon failure on the part of the first respondent to comply with the demand in the legal notice, dated 12.05.2009 and pursuant to the report of the local

Commissioner, who visited the premises of the second respondent, the petitioner invoked the arbitration clause under the Subscriber Agreement by issuing two separate notices to the respondents, dated 21.10.2010. The respondents did not take steps to appoint an Arbitration, consequently, the petitioner issued notices dated 16.09.2011 and 02.11.2011 respectively, to each of the respondents appointing a sole Arbitrator, proposing that the Arbitral proceedings shall be conducted under the aegis of the High Court of Delhi Arbitration Centre. These notices failed to evoke any response from the respondents. Therefore, the petitioner filed an application under Section 11(5) of the Act, before the High Court of Delhi for appointment of a sole Arbitrator in Arbitration Petition No.56 of 2012, to adjudicate the dispute between the petitioner and the second respondent. The petitioner filed another petition under Section 11(5) of the Act before this Court for appointing an Arbitrator with regard to the dispute with the first respondent and the same was numbered as O.P.No.16 of 2012. The petitioner would further state that though it had been agreed under the Subscriber Agreement that the seat of Arbitration shall be New Delhi, since both the respondents had their registered

office at Chennai, within the jurisdiction of this Court, the petitioner withdrew the Arbitration Petition No.56 of 2015, filed before the High Court of Delhi with liberty to file a similar petition before the appropriate Court. Likewise, the petition filed before this Court in O.P.No.16 of 2012, was withdrawn with liberty to file a fresh petition. Pursuant thereto, this petition has been filed as a composite petition against the respondents for appointment of sole Arbitrator to adjudicate the dispute between the parties in accordance with the Subscriber Agreement. The petitioner would state that both the respondents have their registered office at Chennai and in accordance with Section 11(12)(b) of the Act read with Section 2(1)(e) of the Act, this Court has jurisdiction to entertain this petition.

3. Though the respondents have been served and they have entered appears through counsel, no counter affidavit has been filed.

4. Heard Mr.Abraham Vishal Jacob for M/s.Chitra Narayanan, learned counsel appearing for the petitioner and Mr.C.Seethapathy, learned counsel appearing for the respondents.

5. The factual position as regards the Subscriber Agreement, the terms and conditions etc., appears to be not in dispute except the facts as to whether there was any breach of the terms and conditions of the Subscriber Agreement. However, this issue need not be gone into in the present petition, as the same has been filed only for the purpose of appointing an Arbitrator and not to adjudicate the merits of the claim. It is relevant to point out that the petitioner earlier moved the High Court of Delhi as well as this Court for appointment of an Arbitrator under the Subscriber Agreement and those petitions were pending before the High Court of Delhi and this Court and the respondents entered appears through counsel and the petitions were withdrawn with liberty to file a fresh petition and insofar as, the petition filed before the High Court of Delhi in ARB.P.No.56 of 2012, while permitting the petitioner to withdraw the petition, liberty was granted to file a similar petition in the appropriate Court. Therefore, the second respondent herein who was the sole respondent before the High Court of Delhi in ARB.P.No.56 of 2012, did not object to the liberty being granted by the Court to the petitioner to file a similar petition before the appropriate Court.

6. Insofar as the petition before this Court in O.P.No.16 of 2012, the first respondent was the sole respondent and the withdrawal of the petition was not opposed by the first respondent nor any objection raised for liberty being granted to the petitioner to file a similar petition. These facts may be of some relevance, while the petition is being considered on its merits.

7. The only objection raised by the learned counsel for the respondent is on the jurisdiction of this court to entertain this petition. It is submitted by the learned counsel that clause 3 of the Subscriber Agreement deals with Arbitration, and the venue of the arbitration was agreed to be at New Delhi and when the place of arbitration has been specifically mentioned as New Delhi, it is specifically excludes the jurisdiction of other Courts situated elsewhere and therefore, if at all the petitioner has any grievance, they have to move the High Court of Delhi. In support of the above contention, reliance has been placed on the decision of the Hon'ble Supreme court in the case of **M/s.Swastik Gases P., Ltd., vs. Indian Oil Corp., Ltd.**, reported in (2013) 9 SCC 32, and **State of West**

Bengal & Ors., vs. Associated Contractors reported in (2015) 1 SCC 32.

8. Countering the submissions made by the learned counsel for the respondents, the learned counsel for the petitioner would state that the decision rendered by the Hon'ble Supreme Court in the case of **M/s. Swastik Gases P., Ltd.**, (supra), pertains to the jurisdiction clause and seat of arbitration alone is not a determinative factor and the petitioner rightly invoked the jurisdiction of this Court. It is further submitted that there would be no necessity to examine the definition of Court as defined under Section 2(1)(e) of the Act, as Section 11 itself defines "what a court is". It is submitted that the decision of the Hon'ble Supreme Court in the case of **Associated Contractors** (supra), is factually distinguishable, as it is the case arising under Section 42 of the Act. The learned counsel referred to the decision of the Hon'ble Supreme Court in case of **Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc.**, reported in (2012) 9 SCC 552, and in particular paragraphs 96 and 97 of the decision to support his contention.

9. As noticed above, the petitioner withdrew the petition filed before the High Court of Delhi in ARB.P.No.56 of 2012, in which the second respondent herein was the sole respondent. While withdrawing the said petition, the petitioner sought for liberty to file a similar petition before the appropriate Court. This prayer sought for by the petitioner was not opposed by the second respondent herein and the liberty was granted. Therefore, it is highly doubtful as to whether the second respondent would be justified in raising the present issue before this Court, when they were a party to the order passed by the High Court of Delhi in which liberty was granted to the petitioner to file this petition, which was similar to that as filed in the High Court of Delhi and it can be safely presumed that the expression 'appropriate Court' used by the High Court of Delhi in its order dated 27.11.2012, refers to this Court.

10. Be that as it may, the objection raised by the respondents is by contending that clause 3 of the Subscriber Agreement apart from other things states that the venue of Arbitration shall be New Delhi and therefore, it is submitted that the Courts at New Delhi alone would

have exclusive jurisdiction and the venue of Arbitration having been chosen at New Delhi, it is to the exclusion of other Courts.

11. In the case of **M/s.Swastik Gases P., Ltd.**, (supra), various clauses in the agreement which were subject matter of interpretation specified that the agreement shall be subject to the jurisdiction of the Courts at Kolkata. While interpreting the said agreement, the Hon'ble Supreme Court observed that while providing for jurisdiction clause in the agreement, the words "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used, is not decisive and does not make any material difference and the intention of the parties is clear and unambiguous that the Courts at Kolkata shall have jurisdiction which means that the Courts at Kolkata alone shall have jurisdiction.

12. Insofar as the case on hand, the agreement does not provide for a jurisdiction clause neither does clause 3 of the agreement speaks of jurisdiction. For better appreciation, the same is quoted hereunder:-

3.Any disputes arising out of this agreement shall be resolved by binding arbitration by a

sole arbitrator in accordance with the Arbitration and Conciliation Act, 1996. the venue of arbitration shall be New Delhi and the language of arbitration shall be English.

13. The above referred clause only speaks of the venue of Arbitration to be at New Delhi. In the light of the above, the decision of the Hon'ble Supreme Court in **M/s.Swastik Gases P., Ltd.**, (supra), does not render any assistance to the case of the respondents.

14. Insofar as the decision of the Hon'ble Supreme Court in the case of **Associated Contractors** (supra), the question which arose for decision in the said Appeal is as to which Court will have jurisdiction to entertain and decide an application under Section 34 of the Act and the Hon'ble Supreme Court referred to Section 42 of the Act and in paragraph 18 of the said decision, it was pointed out that in contrast with applications moved under Section 8 and 11 of the Act, applications moved under Section 9 are to the "Court" as defined for passing interim orders before or during arbitral proceedings or at any time after the making of the arbitral award, but before its enforcement and in case an application is made, as in the said case,

before a particular Court, Section 42 will apply to preclude the making of all subsequent applications under Part-I to any Court, except the Court to which an application has been made under Section 9 of the Act.

15. The Hon'ble Supreme Court in **Bharat Aluminium Company**, (supra), pointed out 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 this may be necessary as on many occasions, the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. After referring to an example with regard to the venue of Arbitration at Delhi when neither of the parties were at Delhi and the obligation under the contract were to be performed either at Mumbai or Kolkata, and only arbitration is to take place at Delhi, it was held that both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of

which the dispute resolution, i.e., arbitration is located.

16. In the instant case, it is not in dispute that the agreement was signed at Chennai, the respondents have their registered office at Chennai and the cause of action to initiate Arbitration arose at Chennai and the venue of Arbitration though agreed to at New Delhi, would not oust the jurisdiction of this Court to deal with the present petition under Section 11 of the Act. Accordingly, the petitioner is entitled to succeed and the prayer sought for to appoint a sole Arbitrator to adjudicate the disputes and difference that have arisen between the petitioner and the respondents as stipulated under the Subscriber Agreement is allowed.

17. In the result, I appoint

Hon'ble Mr. Justice M. Vijayaraghavan
Former Judge, Madras High Court,
New No.2, Old No.15,
T.V.Naidu Road,
Flat No. 2B, Abirami Foliage,
Chetpet, Chennai 600 031
Mobile No.9003268968

as the Sole Arbitrator to enter upon the reference and after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of

the order. The learned Arbitrator is at liberty to fix the remuneration and other incidental expenses, which shall be borne by the parties equally. In the event of respondents not entering appearance, the same may be borne by the petitioner at the initial stage to form part of the main cause.

The Original Petition is, accordingly, allowed, leaving the parties to bear their own costs.

Sd/- T.S.S.N.J
27.10.2015

//Certified to be a true copy//

Dated this the day of 2015.

R.s/09.12.2015

COURT OFFICER

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