

THE HON'BLE THE CHIEF JUSTICE SRI KALYAN JYOTI SENGUPTA

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ARBITRATION APPLICATION No.72 OF 2013

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Dated: 13.03.2015

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Between:

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Reinforced Earth India Private Limited ... Applicant

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And

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M/s. Jahnvi Granites and Builders (JGB)
and another. ... Respondents

THE HON'BLE THE CHIEF JUSTICE SRI KALYAN JYOTI SENGUPTA

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ARBITRATION APPLICATION No.72 OF 2013

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ORDER:

This is an application filed under sub-section (5) of Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act, 1996') for appointment of arbitrators by me.

2. The fact for maintaining this application is summarized hereunder:

The applicant is wholly owned subsidiary of 'Solentanche-Freyssinet Group', and is dealing in mechanically stabilized Reinforced Earth Retaining Walls/Precast Arch Structures, etc. The 2nd respondent which was formerly known as 'Maytas Infra Limited' was awarded a contract, dated 29th February, 2008, for construction of boundary walls, roads, drains and earth filling, by Bangalore Metro Rail Project at Bayappanhalli Depot, Bangalore. Thereafter, on 28th March, 2008, it, having faced difficulties in completing works of the principal contract as per schedule, entered into a sub-contract with the applicant for the works

of construction of reinforced earth retaining wall of the main contract on back to back basis. The revised scope of work of the applicant under the agreement dated 28.03.2008 obviously was passed on to the 1st respondent. Thereafter, tripartite agreement was executed on 3.6.2009 amongst the applicant on one hand and the respondents 1 & 2 on the other hand. By this tripartite agreement, it was agreed mutually that all the bills, including taxes for materials supplied and services provided by the applicant settled till 28th February, 2009 would be raised and submitted to the 2nd respondent on 1st March, 2009 and to be paid by the 1st respondent. It has been provided further in the tripartite agreement except the rates and time stipulated in the agreement, all other terms and conditions contained in the contract dated 28.03.2008 were to remain valid, binding and effective on the parties. The applicant performed its obligations in terms of the scope of the work as detailed in the contract dated 28.03.2008 read with the tripartite agreement dated 3.6.2009, and the said works were concluded in June, 2010 to the complete satisfaction of both the respondents. On completion of the works in question, the applicant submitted the Pre-Final Bill to the 2nd respondent for a total amount of Rs.4,75,12,090/- on 17.12.2010, which was duly received by the respondents herein. In the Pre-Final Bill, it was clearly mentioned that a sum of Rs.1,30,40,394/- was recoverable on account of balance payment. Despite submission of the bill followed by demand, no reply and no payment have been made. In the contract dated 28.03.2008 the parties thereto by its clause-12 agreed to resolve the disputes arising out thereof by the mechanism of arbitration and the venue of the same would be in Hyderabad only. Since by the tripartite agreement this arbitration clause has also been accepted and incorporated therein, all the parties to the tripartite agreement are bound by it. In spite of making request to both the respondents for invoking arbitration clause, no steps have been taken for appointment of

arbitrators.

3. Counter-affidavits have been filed by both the parties. Both the respondents, apart from denying and disputing the claim and contention in relation to the merit have, raised question of jurisdiction to entertain this application by me. According to them, going by the definition of Section 2 (1) (e) read with clause (b) of sub-section (12) of Section 11 of the Act, 1996, I have no jurisdiction to entertain this application as any of the Court including the principal Civil Court locating in Hyderabad cannot be a Court within the meaning of Section 2 (1) (e) of the aforesaid Act as no part of cause of action has arisen nor the respondents are having place of business within the territorial limit of this State.

4. The learned counsel for the applicant, while responding to the question of jurisdiction, submits that by the arbitration clause containing Hyderabad being venue of arbitration has been accepted by tripartite agreement. So, all the parties herein have agreed that arbitration shall be held exclusively in Hyderabad only, and that apart the parties have agreed to be subjected to jurisdiction of the Hyderabad High Court.

5. In view of the Constitution Bench decision in the case of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*^[1] because of agreed seat of Arbitration being Hyderabad, I have jurisdiction to entertain this application.

6. Per contra, the learned counsel for both the respondents submits that mere adoption of certain clause of any agreement is not binding factor as far as forum selection is concerned. The Chief Justice and/or the designated Judge of this Court, in terms of Section 2 (1) (e) read with clause (b) of sub-section (12) of Section 11 of Act, 1996, is

not in any sense 'natural forum' as no part of cause of action could be said to have arisen within the jurisdiction of Hyderabad nor both the respondents carry on business within territorial limit of this Court. It would appear from said tripartite agreement that the same was executed and entered into at Bangalore. Works in terms of the contract is to be executed at Bangalore. Hence, performance of tripartite agreement has to be done in Bangalore. Nothing has happened in Hyderabad except the 2nd respondent is having his place of business at Hyderabad. Under no stretch of imagination, any Court in Hyderabad can be natural forum under Section 20 of the Civil Procedure Code.

7. The learned counsel for respondents have relied on a decision of a Division Bench of this Court reported in *M/s. Prakash Road Lines (P) Ltd. v. H.M.T. Bearing Limited*^[2] and also that of a three-judge Bench in case of *M/s. East India Transport Agency, Hyderabad v. National Insurance Company Limited and another*^[3]. This apart, the learned counsel did not raise any point as to arbitrability.

8. The learned counsel for the 1st respondent says that he has no liability to make any payment as claimed by the applicant. Hence, there is no arbitrable dispute so far his client is concerned.

9. I have heard them and it appears to me, the following three points have emerged.

- (1) Whether the agreement choosing Hyderabad being seat of arbitration between the applicant and the 2nd respondent by bipartite agreement dated 28.3.2008 is binding upon the 1st respondent by virtue of tripartite agreement dated 3.6.2009?
- (2) Whether the aforesaid agreement choosing Hyderabad being the venue of arbitration is a factor to hold that I have jurisdiction to decide the matter?

(3) Whether there has been any apparent arbitrable dispute between the 2nd respondent and the applicant?

10. As far as the first point is concerned, it appears that there has been no dispute about the tripartite agreement having been entered into. By and under the clause (3) of the tripartite agreement, dated 3.6.2009, all the parties have agreed to adopt and intend all the terms and conditions contained in the said contract dated 28.03.2008 except the rates and time appended in schedules thereto binding upon all the parties.

11. Thus, I am of the view that in view of the aforesaid specific agreement choosing Hyderabad being the seat of arbitration with regard to the subject works contained in bipartite agreement is also incorporated in the tripartite agreement. The tripartite agreement has been signed and executed, and there is no dispute about it. Hence the same is binding upon all the parties herein. The decisions, in my view, cited by the learned lawyer for the respondents are inapplicable on the facts and circumstances of this case.

12. Now, the second question is whether the aforesaid clause is having any relevancy to decide the question of jurisdiction.

Clause 12 of the bipartite agreement reads as follows:

12. ARBITRATION

Disputes, if any between the main-contractor and the sub-contractor in respect of this agreement shall be mutually and amicably settled by discussions between both the parties. Any unresolved disputes that may arise shall be referred to arbitration in accordance with the arbitration Law and Rules in force for the time being. The arbitration shall be held exclusively in Hyderabad only.

13. Undoubtedly and without any dispute, Hyderabad has been chosen exclusively as seat of arbitration. I agree with the legal argument of the learned counsel for the respondent that the clause-13 of

bipartite agreement choosing High Court at Hyderabad as forum is absurd and unnatural by reason of the fact that this High Court has no original jurisdiction to become principal District Court. Hence it is not enforceable. It is settled position of law that by agreement of the parties jurisdiction cannot be conferred upon any Court which does not have under law. In any view of the matter, this forum selection clause is not sought to be enforced by the applicant. Much emphasis has been placed to take benefit of clause-12 quoted above read with judgment of Constitution Bench. The Supreme Court in case of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.* (1 *supra*) in paragraph-96 of the report has settled legal position in this given situation, as claimed by the applicant, which is set out hereunder:

96. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

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

(a)-(d) * * *

(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;”

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. This was 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. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and

the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, 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.

(emphasis supplied)

14. A reading of the aforesaid pronouncements of the Supreme Court, it appears that under the Arbitration and Conciliation Act, 1996 two courts will have jurisdiction to deal with the matter; one is natural forum, which would have jurisdiction under Section 2 (1) (e) of the aforesaid Act, and another one within whose jurisdiction arbitration takes place.

15. In my view, aforesaid pronouncement is applicable to the Court. It can hardly be disputed that Chief Justice or designated Judge in the scheme of the Act is not Court in any sense. Initially the order passed by the Chief Justice or designated Judge of the High Court on this application was not open for judicial review, at present it is amenable to judicial review by way of filing Special Leave Petition before the Hon'ble Apex Court. The Chief Justice or a person or institution designated by him is to ensure arbitral tribunal shall function, whenever such situation arises on approach being made. While doing so, the Chief Justice or designated person or institution does not adjudicate claim and contention of the disputant parties either *prima facie* or final, they examine broadly whether there exist valid arbitration agreement as required under Section 7 of the Act at least apparently and then whether disputes are covered by the arbitration agreement or not. Therefore, no decision with regard to right and obligation of the parties are required. In other words, decision making process on this application does not require skill or mechanism of Civil Court, consequently trappings of Civil

Court is missing. Therefore the aforesaid pronouncement is not applicable in exercise of power and function of Chief Justice. But question arises which Chief Justice of the High Court would entertain the matter; the Legislature mindfully clarified by making a provision in clause (b) of sub-section (12) of Section 11 read with Section 2 (1) (e) of the Act, 1996. It would appear that provision of Section 2 (1) (e) of the Act, 1996 has been adopted by clause (b) of sub-section (12) of

Section 11 by way of reference not by way of incorporation.

Therefore, Chief Justice or designated person or institution has to be construed strictly as being only one of the High Court within whose jurisdiction principal Civil Court is situated and which could have decided the matter, if the same had been the subject matter of a suit, not any other High Court Chief Justice. Logically, jurisdiction of principal Civil Court has to be traced from the provisions of Sections 16 to 20 of the Code of Civil Procedure only. Moreover, even if, for argument's sake, above statement of law in paragraph-96 of the judgment is applied, the Constitution Bench has not ruled out applicability of the concept of *forum conveniens*.

16. I find here, applying this principle, nothing has taken place in Hyderabad. Admittedly, the agreement has been made and entered into at Bangalore, works which are to be performed in terms of bipartite agreement initially, now tripartite one at Bangalore, and performance and non-performance therefore, necessarily will take place at Bangalore. It is however argued that I can entertain this application by virtue of clause (b) of Section 20 of Code of Civil Procedure as one of the respondents carries on business at Hyderabad. This provision cannot be invoked having regard to approach of the application wherein seat of arbitration being Hyderabad is sought to be asserted, and no leave as required under clause (b) of Section 20 of C.P.C. has been asked for. In view of discussion, as above, no answer is called for as far as third question is concerned.

17. In view of discussion above, I dismiss this application with liberty to file before appropriate Hon'ble Chief Justice or designated Judge, as the case may be, of the High Court.

Kalyan Jyoti Sengupta, CJ

Dt. 13.03.2015

Note:- LR copy to be marked.

(B/O)

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[\[1\]](#) (2012) 9 SCC 552

[\[2\]](#) AIR 1999 Andhra Pradesh 106

[\[3\]](#) AIR 1991 Andhra Pradesh 53