

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 24th May, 2016**
Judgment pronounced on: 17th June, 2016

+ **Arb. A. (COMM.) No.14/2016, I.A. Nos.5670/2016 & 5876/2016**

GREEN POWER INTERNATIONAL PVT. LTD. ... Appellant
Through Mrs.V.Mohana, Sr.Adv. with Mr.Atul
Kumar Sinha, Adv.

versus

TRIVENI ENGINEERING & INDUSTRIES LTD. & ANR ...Respondents
Through Mr.Sanjeev Anand, Adv. with
Mr.Arush Khanna, Adv. for R-1.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By way of the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") the appellant has challenged the impugned two orders passed by the sole Arbitrator; (i) order dated 26th April, 2016 by which the appellant's application under Sections 7/11/12/13/16(1)(2) of the Act, challenging the appointment and jurisdiction of the Arbitrator, has been dismissed, and (ii) interim order dated 28th April, 2016 passed in an application under Section 17 of the Act filed by the respondent No.1.

2. It is the contention of the appellant that as the arbitral proceeding is initiated by the respondent No.1 without having any agreement to appoint an Arbitrator in the manner it is appointed and also without any notice to the appellant and on the arbitration clause which is void in law, it may prejudice the case on merits in the said

proceedings, which is oppressive and not impartial from any standard at all, and which is not even initiated as per the rules set by law under the Act. Thus, the appellant is pressing before this Court to stay arbitration proceedings during the pendency of the appeal.

3. It is stated by the learned Senior counsel appearing on behalf of the appellant that in fact, respondent No.1 by this way is forcing the appellant to an invalidly constituted arbitration proceeding where there is no arbitration agreement stating the agreed manner of appointment of Arbitrator.

4. It is argued that the respondent No.1 has raised an unilateral dispute on 19th April, 2016 without having any valid arbitration clause in agreement and without having an agreement over the same by both the parties, and with malafide intention got appointed sole Arbitrator Mr.V.S.Thind, a retired Chief Engineer to resolve an unspecified dispute, for which the appellant had no knowledge. The notice dated 19th April, 2016 appointing the Arbitrator was issued and on the same date i.e. 19th April, 2016, the Arbitrator communicated to the appellant that he has been appointed as an Arbitrator.

5. Learned counsel for the respondents has raised the preliminary objection that this Court does not have territorial jurisdiction to entertain the present appeal. It is argued by Mr.Sanjeev Anand, learned counsel for the respondent, that the parties have by mutual agreement/understanding ousted the jurisdiction of Delhi Courts by virtue of the exclusion clause provided by them in the four purchase orders dated 1st July, 2013, 4th July, 2013, 18th September, 2014 and 4th October, 2015, under which the arbitration proceedings have commenced and the orders impugned in the present appeal have been passed. Counsel further states that the parties by an exclusion clause

can agree to vest jurisdiction only in one Court and oust the jurisdiction of other Civil Courts.

6. The submission of Mr.Sanjeev Anand, learned counsel appearing on behalf of the respondent is that only Noida Courts shall have exclusive jurisdiction to decide the disputes between the parties under the purchase orders. The said fact is also clear from the fact that the appellant filed caveat only in the District Court, Noida apprehending filing of a petition under Section 9 of the Act by respondent No.1 in the said Court and not in this Court or any other Court.

7. It is also urged by Mr.Anand that Section 37 of the Act makes it clear that no appeal lies against any order passed on the application under Section 7 or Section 11 or Section 12 or Section 13 and with respect to Section 16, the appeal under Section 37 lies only against an order accepting the plea under Section 16 that the Arbitral Tribunal does not have jurisdiction or that the Arbitral Tribunal is exceeding the scope of its authority. Against the order rejecting Section 16 application and continuing with the arbitration proceedings, the only remedy is to challenge the arbitral award under Section 34 of the Act.

8. It is submitted that the order dated 28th April, 2016 is only an interim order passed on the application under Section 17 which is still pending and is to be heard and disposed of after the appellant has filed its reply, for which opportunity has been repeatedly given to the appellant. The fact that the order dated 28th April, 2016 is an interim order is also clear from the order dated 6th May, 2016 of the sole Arbitrator noting that the matter was fixed on that date for filing reply by the appellant to the Section 17 application and also from the order dated 16th May, 2016 of the Arbitrator vide which the appellant has been once again directed to file its reply to the Section 17 application

by 23rd May, 2016 and the hearing of the said application was to take place on 25th May, 2016. Section 37 of the Act contemplates appeal only against a final order disposing of the Section 17 application and not against an order passed ad-interim pending the final disposal of the Section 17 application. The present appeal is therefore not maintainable on this ground also.

9. Mr. Sanjeev Anand has also informed to the Court that the sole Arbitrator in the interest of justice between the parties by order dated 28th April, 2016, adjourned the matter to 6th May, 2016 granted the appellant further time to file its reply to the Section 17 application, while keeping the hearing and consideration on the said application pending, passed interim order as prayed in the Section 17 application. He further submits that the sole Arbitrator is not the employee or has any connection with the respondents and it is wrongly alleged by the appellant that he is biased.

10. The Supreme Court in the recent case of **B.E. Simoes Von Staraburg Niedenthal & Another v. Chhattisgarh Investment Limited**, (2015) 12 SCC 225 has dealt with all the earlier decisions and has held that where the agreement between the parties restricted jurisdiction to only one particular Court, that Court alone would have jurisdiction. Any petition preferred to Courts outside the exclusive Court agreed to by the parties would also be without jurisdiction. It was held as under:-

"1. Leave granted. Admittedly, a raising agreement with regard to the mines located in Goa was entered into between the parties at Raipur on 9-4-2007. The first appellant operates mines in Goa. Under the raising agreement, the respondent is an exclusive purchaser of the ore from the mines of the appellants. The disputes having arisen between the parties, the

respondent (hereinafter referred to as "CIL") made an application under Section 9 of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act") for interim protection before the Court of the District Judge, Raipur. The present appellants (hereinafter referred to as "Simoese"), who were the respondents in the application, raised the objection, by way of an application, about the jurisdiction of the District Judge, Raipur. It was submitted by Simoese that the District Judge, Raipur has no jurisdiction for three reasons: (i) the subject mines are located in Goa, (ii) the agreement was also made in Goa, and (iii) the place of residence of Respondent 2 is Goa.

6. Clause 13 of the raising agreement dated 9-4-2007 reads as under:

"The courts at Goa shall have exclusive jurisdiction."

8. On the other hand, Mr Rafiq A. Dada, learned Senior Counsel for Simoese, submits that the parties have agreed that the Goa courts shall have an exclusive jurisdiction and, thus, by their agreement the jurisdiction of the Raipur court has been ousted. He submits that in view of the jurisdiction clause in the agreement, now the Raipur court has no jurisdiction at all. In support of his arguments, the learned Senior Counsel for the appellants, relies upon two judgments of this Court — (i), *Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.* [(2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] and (ii), *State of W.B. v. Associated Contractors* [(2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1] decided on 10-9-2014.

9. In *Swastik Gases (P) Ltd.* [(2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157], the three-Judge Bench of this Court had an occasion to consider the issue as to whether in a contract that specifies the jurisdiction of particular courts at a particular place and such courts have jurisdiction to deal with the matter, whether the parties had intended to exclude the other courts?

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"32. It is a fact that whilst providing for jurisdiction clause in the agreement the words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties—by having Clause 18 in the agreement—is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor is it against the public policy. It does not offend Section 28 of the Contract Act in any manner."

Madan B. Lokur, J., while writing a separate judgment, concurred with the above legal position.

11. In a very recent judgment delivered on 10-9-2014 in *State of W.B. v. Associated Contractors* [*State of W.B. v. Associated Contractors*, (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1] , the three-Judge Bench (speaking through one of us, Rohinton Fali Nariman, J.), noticing the decisions of this Court in *FCI v. A.M. Ahmed & Co.* [*FCI v. A.M. Ahmed & Co.*, (2001) 10 SCC 532] (SCC para 6); *Neycer India Ltd. v. GMB Ceramics Ltd.* [*Neycer India Ltd. v. GMB Ceramics Ltd.*, (2002) 9 SCC 489] (SCC para 3) with reference to Section 31(4) of the Arbitration Act, 1940 and the decisions of this Court in *Jatinder Nath v. Chopra Land Developers (P)*

Ltd. [Jatinder Nath v. Chopra Land Developers (P) Ltd., (2007) 11 SCC 453] (SCC para 9); Rajasthan SEB v. Universal Petrol Chemicals Ltd. [Rajasthan SEB v. Universal Petrol Chemicals Ltd., (2009) 3 SCC 107 : (2009) 1 SCC (Civ) 770] (SCC paras 33 to 36) and Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd. [Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] (SCC para 32), held that where the agreement between the parties restricted jurisdiction to only one particular court, that court alone would have jurisdiction as neither Section 31(4) nor Section 42 (of the 1996 Act) contains a non obstante clause wiping out a contrary agreement between the parties. On the basis of the above decisions, it was further held that applications preferred to courts outside the exclusive court agreed to by parties would also be without jurisdiction."

11. No doubt, during the course of hearing, the learned Senior counsel appearing on behalf of the appellant has raised an important issue and in support of her submissions, she has referred the judgments for the purpose of constituting the arbitration proceedings by a party without the consent of the other. However, I do not want to express any opinion in this regard. In case, this Court will find that it has the territorial jurisdiction, the issues raised by the appellant may become relevant and the same can only be raised before the competent court.

12. It is settled law that once the Court holds that it has no jurisdiction in the matter, it should not consider the merits of the matter. Reliance is placed on **Jagraj Singh v. Birpal Kaur**, (2007) 2 SCC 564 (para 27).

13. The exclusion clause provides that all disputes arising out of the purchase orders shall be subject to the exclusive jurisdiction of Noida

Courts only and that the venue of arbitration proceedings will be Noida only. The relevant clauses have been reproduced herein below:

"Jurisdiction:

All disputes arising out of this Purchase Order shall be subject to the exclusive jurisdiction of Noida Courts only.

Arbitration:

If at any time, any question, dispute or difference whatsoever arises between ourselves and you in relation with this purchase order, the same shall be referred to final adjudication by sole Arbitrator of Triveni Engineering & Industries Ltd. Only, whose decision will be final and binding on both parties. The said arbitration proceedings shall be governed by the provision of arbitration and Conciliation Act, 1996 and rules framed there under to be read with all statutory amendments and modifications from time to time. Venue of arbitration proceedings will be NOIDA only."

14. The decisions of the Supreme Court on the same issue of exclusive jurisdictions are also squarely applicable to the facts of the present case. Reliance is also placed on the following decisions:-

- (i) **Swastik Gases Private Limited v. Indian Oil Corporation Limited**, (2013) 9 SCC 32, paras 7, 28 and 57 reads as under:-

"7. We have heard Mr Uday Gupta, learned counsel for the appellant and Mr Sidharth Luthra, learned Additional Solicitor General for the Company. The learned Additional Solicitor General and the learned counsel for the appellant have cited many decisions of this Court in support of their respective arguments. Before we refer to these decisions, it is apposite that we refer to the two clauses of the agreement which deal with arbitration and jurisdiction. Clause 17 of the agreement is an arbitration clause which reads as under:

17. Arbitration

If any dispute or difference(s) of any kind whatsoever shall arise between the parties hereto in connection with or arising out of this agreement, the parties hereto shall in good faith negotiate with a view to arriving at an amicable resolution and settlement. In the event no settlement is reached within a period of 30 days from the date of arising of the dispute(s)/difference(s), such dispute(s)/difference(s) shall be referred to 2 (two) arbitrators, appointed one each by the parties and the arbitrators, so appointed shall be entitled to appoint a third arbitrator who shall act as a presiding arbitrator and the proceedings thereof shall be in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof in force. The existence of any dispute(s)/difference(s) or initiation/continuation of arbitration proceedings shall not permit the parties to postpone or delay the performance of or to abstain from performing their obligations pursuant to this agreement.

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28. Section 11(12)(b) of the 1996 Act provides that where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an arbitration other than the international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the Principal Civil Court referred to in Section 2(1)(e) is situate, and where the High Court itself is the court referred to in clause (e) of sub-section (1) of Section 2, to the Chief Justice of that High Court. Clause (e) of sub-section (1) of Section 2 defines "court" which means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary 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.

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Conclusion

57. For the reasons mentioned above, I agree with my learned Brother that in the jurisdiction clause of an agreement, the absence of words like "alone", "only", "exclusive" or "exclusive jurisdiction" is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute. In the present case, only the courts in Kolkata had jurisdiction to entertain the disputes between the parties."

(ii) **State of West Bengal and Ors. v. Associated Contractors**, (2015) 1 SCC 32, paras 22 and 25 read as under:

"22. One more question that may arise under Section 42 is whether Section 42 would apply in cases where an application made in a court is found to be without jurisdiction. Under Section 31(4) of the old Act, it has been held in *F.C.I. v. A.M. Ahmed & Co.* [(2001) 10 SCC 532] , SCC at p. 532, para 6 and *Neycer India Ltd. v. GMB Ceramics Ltd.* [(2002) 9 SCC 489] , SCC at pp. 490-91, para 3 that Section 31(4) of the 1940 Act would not be applicable if it were found that an application was to be made before a court which had no jurisdiction. In *Jatinder Nath v. Chopra Land Developers (P) Ltd.* [(2007) 11 SCC 453], SCC at p. 460, para 9 and *Rajasthan SEB v. Universal Petro Chemicals Ltd.* [(2009) 3 SCC

107 : (2009) 1 SCC (Civ) 770] , SCC at p. 116, paras 33 to 36 and *Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.* [(2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] , SCC at pp. 47-48, para 32, it was held that where the agreement between the parties restricted jurisdiction to only one particular court, that court alone would have jurisdiction as neither Section 31(4) nor Section 42 contains a non obstante clause wiping out a contrary agreement between the parties. It has thus been held that applications preferred to courts outside the exclusive court agreed to by parties would also be without jurisdiction.

25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.

The reference is answered accordingly."

15. The judgments of **Swastik Gases**, **Simoese** and **State of West Bengal** (supra) would recognize that if two courts, where both such courts have jurisdiction in law to deal with dispute, only in that case parties can exclude jurisdiction of one court and confer it on the other.

16. In view of the settled law, this Court has no territorial jurisdiction to entertain and try the present appeal. The appeal, under these circumstances, is dismissed. The appellant is however not precluded to file the fresh appeal before the competent Court of jurisdiction if the same is maintainable but the appellant under those circumstances will have to disclose the factum of filing of present appeal and the competent Court will decide the matter as per its own merits.

17. No Costs.

**(MANMOHAN SINGH)
JUDGE**

JUNE 17, 2016

