

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 5TH DAY OF DECEMBER 2017

THE HON'BLE DR. JUSTICE ANITA SUMANTH

A. No.6182 of 2017

AND

O.A. No.958 of 2017

In the matter of Arbitration &
Conciliation Act, 1996

And

In the matter of Disputes between the
M/s.Karaikal Port Pvt. Ltd. Vs. Marg
Limited (Arbitration Agreement dated
23rd August, 2012)

O.A. No.958 of 2017

M/s.Karaikal Port Pvt. Ltd.
Represented by its Deputy Manager
Mr.N.Veehamanikandan
having its registered office
at Kezhavanjur Village
T.R.Pattinam, Karaikal - 609 606

: Applicant

Vs.

1.Marg Limited (formerly Marg Constructions Limited)
represented by its authorized
representative having its registered office at
'Marg Axis'4/318, Rajiv Gandhi Salai,
Kottivakkam, Chennai - 600 041.

2.McNally Bharat Engineering Co.
Represented by its Managing Director
No.4, Mangoe Lane,
Kolkata - 700 001.

: Respondents

Original Application praying that this Hon'ble Court be pleased to pass an interim order restraining the Respondents or its men, agents, servants or anyone else claiming through or under them from in any manner interfering with the mechanization process and/or by removing/alienating the materials/goods/movables supplied by the Respondents lying at the Karaikal Port premises.

A. No.6182 of 2017

McNally Bharat Engineering Co.
Represented by its Managing Director
No.4, Mangoe Lane,
Kolkata - 700 001.

: Applicant / 2nd Respondent

Vs.

1.M/s.Karaikal Port Pvt. Ltd.
Represented by its Deputy Manager
Mr.N.Veehamanikandan
having its registered office
at Kezhavanjur Village
T.R.Pattinam, Karaikal - 609 606

: 1st Respondent / Applicant

2.Marg Limited (formerly Marg Constructions Limited)
represented by its authorized
representative having its registered office at
'Marg Axis' 4/318, Rajiv Gandhi Salai,
Kottivakkam, Chennai - 600 041.

: 2nd Respondent / Respondent

Application praying that this Hon'ble Court be pleased to dismiss and/or reject O.A. No.958 of 2017 and vacate order dated 27.09.2017 obtained by the Applicant.

This Application and Original Application coming on this day before this court for hearing the court made the following order:

O.A.No.958 of 2017 is filed by Karaikal Port Pvt. Ltd. (in short, 'KPPL') arraying Marg Limited (in short 'Marg') and McNally Bharat Engineering Co. (in short, 'McNally') as respondents and praying for an order restraining the respondents from interfering with the mechanization process or removing or alienating the materials and goods supplied by the respondents and lying at the port premises. The interim order granted on 27.9.17 was modified, after hearing both sides to an order of status quo on 10.10.2017.

2. A.No.6182 of 2017 is filed by McNally to dismiss and/or reject O.A.No.958 of 2017 and vacate the interim order granted.

3. Heard Mr. Mr.AR.L.Sundaresan, learned Senior Counsel appearing on behalf of Mr.R.Palaniandavan, learned counsel for KPPL, Mr.Akhil R.Bhansali, learned counsel appearing for Marg and Mr.Menon appearing on behalf of Mr. Menon Karthik Mukundan for McNally.

4. At the outset, serious objection is raised by McNally to the maintainability of O.A.No.958 of 2017 before this court and I proceed therefore to advert to and decide this preliminary question at the threshold. Any reference to the merits of the matter is solely for the purpose of setting the law in context and for the purpose of

arriving at a decision on maintainability.

5. The Government of Puducherry had awarded a contract in favour of Marg in 2006 for a green field project and all-weather deep water port at Karaikal vide Concession Agreement dated 25.01.2006. KPPL was incorporated as a Special Purpose Vehicle (SPV) to undertake the said development and operation and in turn appointed Marg as the contractor to build the Port and provide various facilities for berthing of vessels and movement of cargo. The sub-contracts relating to the supply, erection and commissioning of a stacker-cum-reclaimer and conveying system for mechanising the handling of the cargo were awarded to McNally. Contract agreements dated 14.08.2010 in respect of the stacker-cum-reclaimer, and 01.03.2011 in respect of conveying system were entered into between Marg and McNally.

6. During the execution of the aforesaid agreements, disputes arose between the parties and the work stood interrupted on this account. A tripartite agreement thus came to be executed between KPPL, Marg and McNally on 23.08.2012, which encapsulated all rights and obligations of the parties under the existing agreements. Clause 19 provides for arbitration as the preferred mode of dispute resolution between parties and is extracted hereunder:

'19. All disputes and differences that may arise between any two parties to this Agreement with regard to any obligations of the Parties to this Agreement or with regard to the interpretation of this Agreement shall be referred to a panel of three arbitrators where each disputing Party shall have the right to appoint one arbitrator, the third to be appointed by the two arbitrators so appointed. In the event that the dispute shall be referred to a panel of three arbitrators, one arbitrator to be jointly appointed by the Employer and the Contractor, the second to be appointed the Sub-contractor and the third to be appointed by the two arbitrators so appointed. The arbitration shall be governed and conducted under the provisions of the Arbitration and Conciliation Act, 1996 including its statutory modification or restatement. The place of arbitration shall be Chennai and the proceedings shall be conducted in English.'

7. Certain modifications to the time schedule for settlement of payments as between parties were thought necessary and accordingly a supplementary agreement dated 06.03.2013 was entered into between the three parties as aforesaid for this limited purpose. The following narration in the agreement makes this position clear:

'whereas during the course of the undertaking, execution and partial completion of the sub-contracted Works by the Sub-contractor, certain practical difficulties and

operational bottlenecks caused by the reduced cash flow were witnessed and experienced under the Contractor Principal Agreements whereupon it was mutually felt desirable and necessary by the Contractor and the Sub-contractor to suitably modify some of the terms and conditions particularly the payment terms keeping other terms intact as per the contract of the Contractor Principal Agreements and therefore a Tripartite Agreement was executed on 23rd Aug 2012 (hereinafter, "Tripartite Agreement") for orderly, smooth and timely discharge of all Parties' obligations'

8. The Supplementary Agreement provided, in clause 7 that excepting for those clauses that were expressly modified in agreement dated 6.3.13, all other obligations and duties of the respective parties stood unaltered and would be governed by contract dated 23.8.2012. Clause 7 is extracted hereunder:

' 7. For removal of doubts, it is expressly undertaken, recognized and acknowledged by all the parties that, save and except those explicitly modified by virtue of this supplementary agreement, all other obligations, performance and duties of the respective parties under the Contractor Principal Agreement and the Tripartite Agreement shall remain the same and shall supersede only which has been categorically identified in this Supplementary Agreement

and be accordingly govern the respective parties and be given effect to. The execution, performance and giving effect to this Agreement shall not in any manner affect or prejudice the effect, validity or otherwise of anything already done or agreed to be done or omitted to be done under the Employer Principal Agreements, the Contractor Principal Agreement and the Tripartite Agreement and the parties shall have the right to invoke the same at any time during the period of Contract. In case of any dispute or discrepancy, the terms of Contractor Principal Agreement shall prevail.'

9. Thus the clear understanding between the parties was that agreement dated 23.8.2012 would continue to govern the transactions as between the parties except in those matters where agreement dated 06.03.2013 specifically identified and adopted a position different from that adopted by the earlier agreement. In all such matters alone, agreement dated 23.8.12 shall stand superseded by agreement dated 6.3.13.

10. There is no dispute on the position that the parties continued to adopt alternate dispute resolution as the mode of dispute settlement even under the supplementary agreement. Clause 12 of agreement dated 06.03.2013 provides for arbitration and is

extracted hereunder:

'12. All disputes and differences that may arise between any two parties to this Supplementary Agreement with regard to any obligations of the Parties to this Supplementary Agreement or with regard to the interpretation of this Supplementary Agreement shall be referred to a panel of three arbitrators where each disputing party shall have the right to appoint one arbitrator, the third to be appointed by the two arbitrators so appointed. In the event that the dispute or difference is between all the three Parties, then such dispute shall be referred to a panel of three arbitrators, one arbitrator to be jointly appointed by the Employer and the Contractor, the second to be appointed the Sub-contractor and the third to be appointed by the two arbitrators so appointed. The arbitration shall be governed and conducted under the provisions of the Arbitration and Conciliation Act, 1996 including its statutory modification or restatement. The place of arbitration shall be Kolkata Chennai and the proceedings shall be conducted in English.'

11. A comparison of clause 19 in agreement dated 23.08.2012 and clause 12 in agreement dated 06.03.2013 makes it clear that while the parties intended to retain arbitration as the designated mode of dispute resolution, there was a change effected as far as the place

of arbitration was concerned. The place of arbitration in the earlier agreement as per clause 19 was stated to be 'Chennai', whereas, in the agreement dated 06.03.2013, the parties agreed that the place of arbitration shall be 'Kolkata Chennai'.

12. It appears that McNally approached the High Court of Judicature at Calcutta in September 2017 by way of an Original Application seeking relief under Section 9 of the Act and KPPL has entered appearance therein. The application before the Calcutta High Court has been filed on the strength of the arbitration clause in agreement dated 06.03.2013. During the pendency of the application at Kolkata, the present Original Application has been filed before this court by KPPL on the strength of arbitration agreement dated 23.08.2012. The question that thus arises is which court would have the proper jurisdiction to consider and adjudicate upon the dispute between the parties. In this context, it is relevant to notice the provisions of section 42 of the Act that state 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.

13. Section 42 seeks to ensure exclusivity of jurisdiction in proceedings for arbitration such that all disputes and differences arising from out of an arbitration agreement would lie, and be considered before the same Court. The appropriate court, as per the provisions of section 42 is the court that is first approached to hear a dispute. In the present case, there are two arbitration agreements, one dated 28.3.2012 and the other dated 6.3.2013. While KPPL would maintain that it was the Madras High Court that is the proper Court as per arbitration agreement dated 28.3.12, McNally would argue, invoking arbitration agreement dated 6.3.13, that it was the Calcutta High Court that was the appropriate court. It is thus necessary to first determine which arbitration agreement would govern the parties and consequently, which High Court.

14. The answer lies in a reading of clause 7 of agreement dated 06.03.2013, which clarifies the position that supplementary agreement dated 06.03.2013 would supersede the earlier agreement in all matters specifically identified and modified in the supplementary agreement. Clause 12 dealing with arbitration is one of those matters in so far as the parties have, after application of mind and specifically

referring to the supplementary agreement, decided that the place of arbitration shall be 'Kolkata Chennai'. No doubt the wording of the choice of place is not ideal in so far as there is no conjunction such as 'and' or 'or' in between the two places mentioned nor any punctuation. This is perhaps why McNally has, in its application before the Calcutta High Court taken the stand that the appropriate court should be the Calcutta High Court and reference to Chennai was erroneous.

15. KPPL, while not disputing that the arbitration agreement dated 6.3.13 provided for concurrent jurisdiction of both the Calcutta as well as Madras High Courts, would maintain that it was this court that is the appropriate court, relying on the jurisdiction clause contained in the Contractor Principal Agreement wherein the place of jurisdiction was Chennai. Mr.Sundaresan would draw attention to Annexure I of Agreement dated 23.8.2012 that set out the details of the Employer Principal Agreements. However I find that all agreements referred to therein are between the Applicant and Marg to which McNally is not a party. Admittedly, McNally is a party only to the two tripartite agreements dated 23.8.2012 and 6.3.2013 and thus it is only one or the other of these two agreements that would be

relevant. In this respect one need go no further as KPPL has itself filed the present application solely only on the strength of the arbitration agreement dated 23.8.2012.

16. In the absence of a specific clause relating to the jurisdiction of courts, the clause relating to the choice of place of jurisdiction assumes importance. The place of arbitration is defined in the Act as below:

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.

17. The issue as to whether the 'place' of arbitration may be equated to 'seat' or 'venue' or arbitration is no longer res integra having been considered by the Constitutional Bench of the Supreme Court in the case of BALCO and explained further by a Division Bench of the Supreme Court in *Indus Mobiles Distribution Limited vs Datawind Innovations Private Limited and others* (judgment dated

19.4.2017)). After extracting the Report of the Law Commission in paragraph 17 of Indus (supra) the Bench holds in paragraph 19:

17. It may be mentioned, in passing, that the Arbitration and Conciliation Act, 1996 has been amended in 2015 pursuant to a detailed Law Commission Report. The Law Commission specifically adverted to the difference between seat and venue as follows:

40. The Supreme Court in BALCO decided that Parts I and II of the Act are mutually exclusive of each other. The intention of Parliament that the Act is territorial in nature and sections 9 and 34 will apply only when the seat of arbitration is in India. The seat is the centre of gravity of arbitration, and even where two foreign parties arbitrate in India, Part I would apply and, by virtue of section 2(7), the award would be a domestic award. The Supreme Court recognized the seat of arbitration to be the juridical seat; however, in line with international practice, it was observed that the arbitral hearings may take place at a location other than the seat of arbitration. The distinction between seat and venue was, therefore, recognized. In such a scenario, only if the seat is determined to be India, Part I would be applicable. If the seat was foreign, Part I would be inapplicable. Even if Part I was expressly included it would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the [foreign] Procedural Law/Curial Law. The same cannot be used to confer jurisdiction on an Indian Court. However, the decision in BALCO was expressly given prospective effect and applied to arbitration agreements executed after the date of the judgment.

41. While the decision in BALCO is a step in the

right direction and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.

(i) Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a judgment or decree for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a 25 practical remedy to the party seeking to enforce the interim relief obtained by it. That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company.

(ii) While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration agreement executed pre-BALCO. 4

42. The above issues have been addressed by way of proposed Amendments to sections 2(2), 2(2A), 20, 28 and 31.

18. In amendments to be made to the Act, the Law Commission recommended the following:

Amendment of Section 20 12. In section 20, delete the word Place and add the words Seat and Venue before the words of arbitration. (i) In sub-section (1), after the words agree on the delete the word place and add words seat and venue (ii) In sub-section (3), after the words meet at any delete the word place and add word venue.

[NOTE: The departure from the existing phrase place of arbitration is proposed to make the wording of the Act consistent with the international usage of the concept of a seat of arbitration, to denote the legal home of the arbitration. The amendment further legislatively distinguishes between Amendment of Section 31 17. In section 31 (i) In sub-section (4), after the words its date and the delete the word place and add the word seat.

19. The amended Act, does not, however, contain the aforesaid amendments, presumably because the BALCO judgment in no uncertain terms has referred to place as juridical seat for the purpose of Section 2(2) of the Act. It further made it clear that Section 20(1) and 20 (2) where the word place is used, refers to juridical seat, whereas in Section 20 (3), the word place is equivalent to venue. This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.

18. Thus, as explained by the Apex Court, the use of the word

'place' in section 20(1) and (2) of the Act must be seen to relate to the 'seat' of Arbitration whereas the use of the word 'place' as per sub-section (3) relates only to 'venue'. The use of the word 'place' by the parties in the present case in agreements dated 23.8.12 as well as 6.3.13 would thus, according to the law laid judicially laid down, connote 'seat' of arbitration.

19. Coming to the agreements itself, a conjoint reading of clause 19 of agreement dated 23.8.2012 and clauses 7 and 12 of agreement dated 6.3.2013 leave me in no doubt that clause 12 of arbitration agreement dated 6.3.13 supersedes clause 19 of the earlier agreement. Thus both High Courts would have concurrent jurisdiction and, in view of section 42 of the Act, appropriate jurisdiction would vest in the court approached first by a party to the dispute, in this case, the Calcutta High Court.

20. Mr.Menon would refer to the decisions in *Priya Hiranandani Vandrevale V. Niranjan Hiranandani and another* (2016 (4) ARb.LR 18(Delhi)) and *Priya Hiranandani Vandrevale V. Niranjan Hiranandani & Another* (O.M.P.(I) (Comm.) 164/2016, IAs 5473-5474/2016 wherein the Delhi High Court has, in considering similar questions as in this case, applied the bar under section 42 of the Act.

21. Mr.Menon would also refer to the decision of the Delhi High Court in *PCP International Limited V. LANCO Infratech Limited* (2015 SCC Online Del 10428) to argue that the cause of action in the present case had arisen substantially in Calcutta. The contract had been executed and paid for in Calcutta which is where the defendant resides and it had been performed in Karaikal. Thus even on this score, jurisdiction, according to him, would vest in the courts in Kolkata. Section 2(1)(e) of the Act defines 'Court' as the court having the jurisdiction to decide questions forming the subject matter of Arbitration assuming the same had been the subject matter of a Suit. Thus, the provisions of section 16 to 20 of the Civil Procedure Code 1908 would concurrently apply in deciding the jurisdiction of courts.

22. However, in the light of the conclusion reached by me in paragraphs 18 and 19 above, I see no reason to proceed any further in the matter particularly since the determination of parameters under sections 16 to 20 of the CPC call for an examination of the facts that I refrain from undertaking.

23. O.A.No.958 of 2017 is dismissed as not maintainable. Before parting, I make one observation. KPPL would aver that it is this

Court that has the proper jurisdiction and the application filed by McNally before the Calcutta High Court is merely to confer jurisdiction on that court and bar all others including this Court by virtue of section 42 of the Act. In the light of my conclusion on the appropriate court as between the parties, this is a matter for decision by the Calcutta High Court.

24. There is a difference in the language of section 42 as we have it now and erstwhile section 31(4) of the Arbitration Act 1940, also dealing with Jurisdiction. While section 31(4) of the 1940 Act uses the expression 'has been made in a Court competent to entertain it', the word 'competent' is conspicuous by its absence in Section 42 under the present Act. This distinction has been noticed by the Supreme Court in *State of West Bengal and others vs Associated Contractors* ((2015) 1 SCC 32) in paragraph 11. The Bench however goes on to explain the context in which the difference is to be appreciated stating at paragraph 20 that '*the context of section 42 is merely to see that one court alone shall have jurisdiction over all applications with respect to arbitration agreements which context does not in any manner enable the Supreme Court to become a 'court' within the meaning of section 42*'. In paragraph 24 the Bench

holds:

24. If an application were to be preferred to a Court which is not a Principal Civil Court of original jurisdiction in a district, or a High Court exercising original jurisdiction to decide questions forming the subject matter of an arbitration if the same had been the subject matter of a suit, then obviously such application would be outside the four corners of Section 42. If, for example, an application were to be filed in a court inferior to a Principal Civil Court, or to a High Court which has no original jurisdiction, or if an application were to be made to a court which has no subject matter jurisdiction, such application would be outside Section 42 and would not debar subsequent applications from being filed in a court other than such court.

In conclusion at paragraph 25, the Bench holds thus:

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.

.....

(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.

.....

(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.

25. In the light of the above, if at all the Calcutta High Court comes to the conclusion that the petition filed by McNally is not maintainable before it and has been filed by McNally merely to have the first mover advantage required under section 42, the right of KPPL to approach the appropriate 'Court' in terms of section 2(1)(e) of the Act is preserved.

26. In the light of the dismissal of O.A.958 of 2017, A.No.6182 of 2017 is closed.

Sd./- A.S.M.J.

05.12.2017

//Certified to be true copy//

Dated at Madras this the th day of 2017.

COURT OFFICER (O.S.)

TPY/08.12.2017

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