

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

ARBITRATION APPLICATION Nos.113 of 2016 and 83 of 2018

%29-04-2020

ARBITRATION APPLICATION No.113 of 2016

#Hyderabad Precision Mfg. Co. Pvt. Ltd. Balanagar,
Hyderabad, Rep. by its Director Ms. Pavitra Patodia

.... Applicant

Versus

\$The General Manager, Ordinance Factory,
Badmal, Bolangir, Odisha and another.

..... Respondents

ARBITRATION APPLICATION No.83 of 2018

#Hyderabad Precision Mfg. Co. Pvt. Ltd.
Balanagar, Hyderabad.

.... Applicant

Versus

\$The General Manager, Ammunition Factory,
Khadki, Pune, Maharashtra State and others.

..... Respondents

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> HEAD NOTE:

!Counsel for the Applicant : Ms. K. Mamatha Choudary

^ Counsel for the respondents : Sri N. Rajeswara Rao,
Assistant Solicitor General

? Cases referred

1. (2017) 8 SCC 377
2. 2019 SCC Online SC 929
3. 2019 SCC Online SCC 1585

THE HON'BLE SRI JUSTICE A. RAJASHEKER REDDY**ARBITRATION APPLICATION NO. 113 OF 2016 and 83 of 2018****COMMON ORDER:**

The issue in these applications is one and same therefore they are being heard and disposed of by a common order.

2. These applications are filed under Section 11(6) of the Arbitration Conciliation Act, 1996 (hereinafter, the Act) praying to appoint an arbitrator to adjudicate the disputes and differences between the applicant and the respondents in respect of Supply Order (for short, SO) dated 12-07-2010 and dt.30-11-2010 respectively. These application have raised an interesting question as to where shall be the seat of the arbitration when the agreement between the parties provide for the 'venue' in cases of disputes at Ordnance factories, at Badmal, Bolangir in Orissa and Khadki, Pune in Maharashtra instead of 'seat'?

3. The brief facts which led to the filing of these arbitration applications are as under;

The appellant in AA 113 of 2016 entered into an agreement with respondent no. 1 for the production of 20,000 Nos. of Fin Assembly after procuring the tender that was issued by the respondent no 1 through notice dated 04.05.2010. Subsequently,

the supply order vide no PL0136/D/Unit-10 dated 12-07-2010 was issued to the applicant. Similarly, in AA 83 of 2018, the appellant entered into an agreement with respondent no.1 for the supply of 15500 no. of Time & Percussion for Ammunition factory, Khadki Pune, after procuring the tender that was floated by respondent no 1 vide DA No. 213 MK5 (M1). Subsequently the appellant received Supply order being SO No. SP-A00609 SO/T1/A/D2/DEV/OPT dated 30-11-2010.

The contention raised by the respondents in the counter affidavit regarding territorial jurisdiction needs to be stated, since this Court is dealing with the territorial jurisdiction only. In the counter affidavit, it is stated that Clause Nos.18 and 19 of the Supply Order dt.12.07.2019 states under :

“Supply Order Clause 18 : JURISDICTION OF COURT :
The Civil Court at TITILAGARH (Dist. Balangir) shall only have jurisdiction to try all civil suits, legal proceedings arising out of or in way touching or concerning this agreement.

Supply Order Clause 19, ARBITRATION : All disputes & differences arising out of or in any way touching or concerning this agreement (except those for which specific provisions has been made therein) shall be referred to Sole Arbitrator to be appointed by Director General, Ordnance Factories, Government of India. The

Arbitrator so appointed shall be a Government Servant who had not dealt with matters to which this agreement relates and in course of his duties had not expressed views on all or any of the matter in disputes or differences. The Award of the Sole Arbitrator shall be final and binding on the parties. The venue of the Arbitration shall be Ordnance Factory, Badmal District, Bolangir, Odisha, PIN-7f67070.”

The other contentions in the counter affidavit deal with the merits of the claim.

4. Clause 19 of the SO dated 12-07-2010 and clause 4 (e) of the SO dated 30-11-2010 relate to arbitration. Since these clauses assume relevance for the controversy raised and therefore being reproduced for the ready reference;

19. Arbitration: *All disputes & differences arising out of or in any way touching or concerning this agreement (except those for which specific provision has been made therein) shall be referred to Sole Arbitrator to be appointed by Director General, Ordnance Factories, Government of India. The Arbitrator so appointed shall be a Government Servant who had not dealt with matters to which this agreement relates and in course of his duties had not expressed views on all or any of the matter in disputes or differences. The award of the Sole Arbitrator shall be final and binding bon the parties. The venue of the Arbitration shall be Ordnance Factory Badmal, Dist. Bolangir, Orissa, PIN-767770.*

4(e) Arbitration Clause: *(i) All disputes & differences arising out of or in any way touching or concerning this agreement (except those for which specific provision has been made therein) shall be referred to Sole Arbitrator to be appointed by Director General, Ordnance Factories, Government of India. The Arbitrator so appointed shall be a Government Servant who had not dealt with matters to which this agreement relates and in course of his duties had not expressed views*

on all or any of the matter in disputes or differences. The award of the Sole Arbitrator shall be final and binding bon the parties.

(ii) The venue of the Arbitration shall be: Pune

(iii) For imported Stores please refer website www.ofbindia.gov.in

5. What these two clause of SO lay is the venue and the not seat of arbitration.

6. Learned counsel for the applicant has contended that a part of the cause of action arose within the territorial limits of this court; the applicant carries on business here in Hyderabad and goods have been supplied to Orissa, and Maharashtra from Hyderabad. Therefore territorial jurisdiction of this court has been claimed. The goods, which are subject matter of dispute between the applicant and the respondents, were manufactured in Hyderabad and that all the correspondence between the applicant and respondent No.1 held at Hyderabad, therefore, this Court has territorial jurisdiction to entertain the application. He also submits that respondent No.3 should not have been appointed as an Arbitrator, since respondent Nos.1 and 3 are under the supervision and control of respondent No.2 and the same is hit by Section 12 of the Act r/w. Schedule V (2) and VII (2) of the Act, as such the Award passed by respondent No.2 is *void ab initio* and the Award is *non-est* in law.

Learned counsel for the applicant has placed reliance upon the judgement of the Supreme Court in **TRF LIMITED vs. ENERGO ENGINEERING PROJECTS LIMITED**¹.

7. Per contra, learned counsel for the respondents has vehemently opposed the contention made by the petitioner. As per the averments made in the counter affidavits, it has been argued, on behalf of the respondents, that the clause 18 of the supply order in A.A.No.113 of 2016 provides for jurisdiction of the Courts not in Hyderabad, but the Civil Court at Titilagarh (Dist. Balangir), as such this Court does not have territorial jurisdiction. Clause 19 of the SO specifically provides that the venue for arbitration shall be Ordinance Factory, Orissa that specifically excludes the jurisdiction of this Court. Similarly, A.A.No.83 of 2018, the venue as provided under Clause 4 is Khadki, Pune, Maharashtra. It is the argument of the respondent that in the absence of the term seat in the arbitration clause, venue should be read as seat and therefore the applications are liable to be dismissed as this Court does not have territorial jurisdiction. It is also submitted that respondent No.3 has already passed Award, as such, the applicant has to challenge the said Award in an appropriate application before the appropriate Forum and not in the present application.

¹ (2017) 8 SCC 377

8. In view of rival contentions regarding the territorial jurisdiction to entertain these applications, the issue that arises for consideration is;

- (1) Whether this Court has territorial jurisdiction to entertain these applications?
- (2) Whether in absence of conferment of juridical seat, would the venue amount to seat so designated by the parties in the agreement?

Issue Nos.1 and 2 :

9. This is perhaps a cliché; nevertheless, parties in arbitration are free to choose the forum to settle their dispute by appointing the arbitrator. Section 20, sub section (1) of the Act of 1996, provides that the parties are free to agree on the place of arbitration. The seat of arbitration is a crucial factor. It determines the lex arbitri and the courts with supervisory jurisdiction over the arbitration.

10. The important consequences of the seat require parties to choose the seat carefully. Cases where no seat but venue is chosen by the parties are not uncommon. The reliance has been placed by the learned counsel for the applicant on **TRF LIMITED** (Supra). But a perusal of the judgment would reveal that the controversy before the Supreme Court in the above said judgment was never

about seat or venue of arbitration. The said judgment was cited by learned counsel for the petitioners for disqualifying an Arbitrator and since this Court has come to the conclusion that it does not have territorial jurisdiction to entertain the applications, the said aspect need not be considered.

11. Recently, the Hon'ble Supreme Court addressed an interesting aspect pertaining to the issue, does the selection of a 'venue' for arbitration imply choice of the 'seat'? In **Brahmani River Pellets Limited v. Kamachi Industries Limited**² the apex court has addressed this issue. Against the order of Madras High Court, a SLP was filed before the Apex Court. The Hon'ble Supreme Court first took the cognizance of the arbitration clause, which is similar to in the instant case, which is being reproduced here for ready reference;

4. Clause 18 of the agreement between the parties contains an arbitration clause which reads as under:—

“18. Arbitration shall be under Indian Arbitration and Conciliation Law 1996 and the Venue of Arbitration shall be Bhubaneswar.”

The question that the Apex Court posed to itself was; Whether the Madras High Court could exercise jurisdiction under Section 11(6) of the Arbitration and Conciliation Act, 1996 despite the fact that the agreement contains the clause that venue of arbitration shall be

² 2019 SCC Oline SC 929

at Bhubaneswar. The Apex Court having considered several judgments delivered by it held;

“18. Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the “venue” of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in Swastik, non-use of words like “exclusive jurisdiction”, “only”, “exclusive”, “alone” is not decisive and does not make any material difference.

19. When the parties have agreed to have the “venue” of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Since only the Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order is liable to be set aside.”

12. The judgment in ***Brahmani River*** has also found support in the recent judgment delivered by the Hon’ble Supreme Court in the matter of **BGS SGS SOMA JV vs. NHPC LTD.**³ Speaking for the bench, His Lordship Justice Rohinton Nariman, J. held that;

19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to “seat” is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction — that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been held above, the moment “seat” is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

20. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd. [Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 :

³ 2019 SCC Online SCC 1585

(2013) 4 SCC (Civ) 157] This was followed in a recent judgment in *B.E. Simoes Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.* [B.E. Simoes Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd., (2015) 12 SCC 225 : (2016) 1 SCC (Civ) 427] Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment [Datawind Innovations (P) Ltd. v. Indus Mobile Distribution (P) Ltd., 2016 SCC OnLine Del 3744] is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. The appeals are disposed of accordingly.

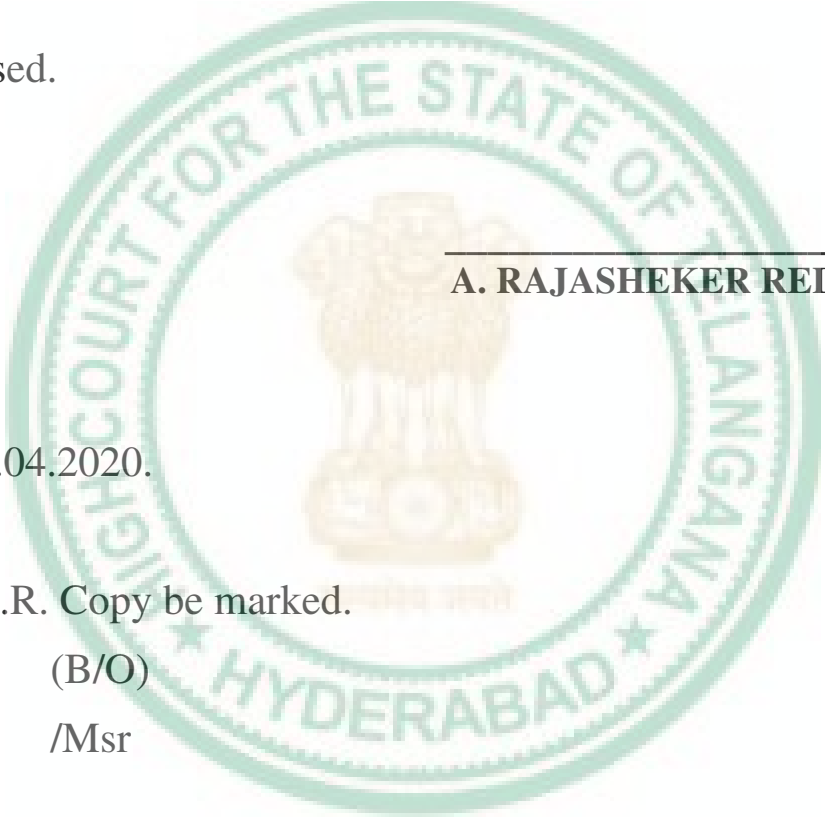
84. Most recently, in *Brahmani River Pellets* (supra), this Court in a domestic arbitration considered clause 18 - which was the arbitration agreement between the parties - and which stated that arbitration shall be under Indian Arbitration and Conciliation Act, 1996, and the venue of arbitration shall be Bhubaneswar. After citing several judgments of this Court and then referring to *Indus Mobile Distribution* (supra), wherein this Court held that:

85. On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the “venue” of the arbitration proceedings, the expression “arbitration proceedings” would make it clear that the “venue” is really the “seat” of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as “tribunals are to meet or have witnesses, experts or the parties” where only hearings are to take place in the “venue”, which may lead to the conclusion, other things being equal, that the venue so stated is not the “seat” of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings “shall be held” at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that the place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a “venue” and not the “seat” of the arbitral proceedings, would then conclusively show that such a clause designates a “seat” of the arbitral proceedings. In an International context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that “the venue”, so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the “stated venue”, which then becomes the “seat” for the purposes of arbitration.

13. Where the contract specifically confers the jurisdiction on a particular Court at a particular place, only such court will have the jurisdiction to deal with the matter as parties intended to exclude all other courts. In the present applications, the parties have agreed that the “venue” of arbitration shall be at Ordnance Factory, Badmal in Orissa and, at Ammunition Factory Pune in Maharashtra. Considering the agreement of the parties having ordnance factory, at Badmal in Orissa and ammunition factory Pune in Maharashtra as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in *Swastik*, non-use of words like “exclusive jurisdiction”, “only”, “exclusive”, “alone” is not decisive and does not make any material difference, the contention of the applicant that this Court also has the jurisdiction is merit-less and therefore deserves to be rejected in view of the law laid down by the Hon’ble Supreme Court.

14. Thus this Court cannot assume territorial jurisdiction for entertaining these applications under Section 11(6) of the Act and, therefore, these applications deserve to be dismissed. Since this Court dealt with the territorial jurisdiction and came to the conclusion that it does not have territorial jurisdiction, other issues raised and the judgements cited on those issues are not required to be considered.

15. In view of the facts and circumstances and the law laid down by the Hon'ble Apex Court in the judgments cited supra, this Court lacks territorial jurisdiction to entertain the application under Section 11(6) of the Act and hence the same is liable to be dismissed and it is accordingly dismissed. However, the parties are at liberty to approach the High Court concerned having territorial jurisdiction seeking appointment of an Arbitrator. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand closed.



A. RAJASHEKER REDDY, J

Date: 29.04.2020.

NOTE: L.R. Copy be marked.

(B/O)

/Msr