

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.04.2018

CORAM

THE HON'BLE MS.INDIRA BANERJEE, CHIEF JUSTICE
and
THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

O.S.A.No.109 of 2018

M/s.NRP Projects Private Limited,
Level-1, Deshbandhu Plaza,
No.47, Whites Road,
Royapettah,
Chennai - 600 014. ... Appellant/Petitioner

vs.

1.M/s.Bharat Petroleum Corporation Limited,
No.1, Ranganathan Gardens,
Off: 11th Main Road, Anna Nagar,
Chennai - 600 040.

2.T.Thangavelu,
Sole Arbitrator,
No.1, Ranganathan Gardens,
Off: 11th Main Road, Anna Nagar,
Chennai - 600 040. .. Respondents/Respondents

Appeal filed under Order XXXVI, Rule 1 of Original Side Rules, 1956 r/w Sec.37 of Arbitration and conciliation Act, 1996 and read with Clause 15 of Letters Patent against the order dated 09.3.2018 passed in O.P.No.737 of 2016 on the file of Original Civil Jurisdiction of this Court.

O.P.No.737 of 2016:-

Petition u/s 34 of the Arbitration and conciliation Act, 1996, To set aside the 2nd Part/2nd sentence of Relief VIII(A) of the Award dated 30.06.2016 passed by the 2nd Respondent directing the Petitioner to furnish an Indemnity Bond supported with reliable security arrangement to be kept valid till and litigation pending before the Honble High Court of Telangana and Andhra Pradesh.

For Appellant	.. Mr.Menon
For Respondents	.. Mr.O.R.Santhanakrishnan for 1 st respondent
R2	.. Arbitrator

JUDGMENT

(Delivered by Ms.Indira Banerjee, Chief Justice)

This appeal is against an order dated 09.03.2018 passed by the learned Single Bench dismissing the application filed by the applicant under Section 34 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the said Act" on the ground that the application was not maintainable in this Court. The learned Single Bench, in effect, held that it was Courts in Mumbai alone which had jurisdiction to entertain all applications in relation to the arbitration agreement to the exclusion of all other Courts.

2. In the context of the contentions of the respective parties with regard to the jurisdiction of this Court to entertain the application, reference may be made to certain admitted facts, of which, the learned Single Bench has taken note of.

3. The appellant and the first respondent entered into an agreement on 02.12.2010 to carry out, construct and complete the work at Gooty Depot in the State of Andhra Pradesh. It is not necessary to set forth the details of the work involved in the contract.

4. As noted by the learned Single Bench, there is no dispute on certain basic facts i.e., the agreement was signed within the jurisdiction of this Court, the work was done within the jurisdiction of the State of Andhra Pradesh and the arbitration proceedings were conducted within the jurisdiction of this Court.

5. From the cause title of the application filed before the learned Single Bench as also the appeal filed before us, it is patently clear that the appellant as also the respondents are located in Chennai within the jurisdiction of this Court.

6. It may be pertinent to refer to the arbitration clause in the agreement executed between the first respondent and the appellant herein, which is extracted herein below for convenience:

"h. The parties agree that the courts in the City of Mumbai alone shall have jurisdiction to entertain any application or other proceedings in respect of anything arising under this agreement and any award or awards made by the Sole Arbitrator here under shall be filed in the concerned courts in the city of Mumbai only."

7. From the above clause, it appears that the parties agreed that Courts in the City of Mumbai alone would have jurisdiction to entertain any application or other proceedings in respect of anything arising under the agreement or any award or awards made by the Sole Arbitrator. An application for setting aside an award could only be filed in the concerned Courts in the City of Mumbai.

8. Save and except the aforesaid clause relating to the jurisdiction of Courts, there is apparently no other provision in the agreement in terms whereof anything specific was required to be done in the City of Mumbai. The agreement was silent with regard to the seat of arbitration and/or venue of arbitration. As observed above and as recorded by the learned Single Bench, the arbitration proceedings actually took place within the jurisdiction of this Court.

9. It is well settled that when two or more Courts have jurisdiction to entertain proceedings, parties may by an agreement agree to the jurisdiction of any one Court to the exclusion of all other Courts. However, parties cannot by consent confer jurisdiction on a Court, which inherently lacks jurisdiction.

10. This Court may usefully refer to certain relevant provisions of the 1996 Act and in particular Section 2(1)(e), which defines "Court" to mean:

"2(1)(e) "Court" means—

- (i) in the case of an arbitration other than international commercial arbitration, 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;
- (ii) in the case of international commercial arbitration, 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, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.

11. Any application under the 1996 Act would necessarily have to be filed in a Court within the meaning of Section 2(1) (e) of the 1996 Act. Only that Court would have jurisdiction in respect of arbitral award other than international commercial arbitration, which is the principal Civil Court of original jurisdiction in a District, including 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 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.

12. Although, ordinarily under the Civil Procedure Code a suit is filed in lowest Court having pecuniary jurisdiction, in the case of arbitration applications the lowest Court would lack jurisdiction. The applications would necessarily have to be filed in the principal Court of original jurisdiction in a District or in the High Court exercising its ordinary original civil jurisdiction. The principal Civil Court or the Original Side of the High Court, as the case might be, should have territorial jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been subject matter of a suit.

13. Although, it is well settled that the 1996 Act is a complete code governing arbitrations and the provisions of the Civil Procedure Code do not apply, principles of Sections 16 to 20 of the Civil Procedure Code would apply to determine whether the Court would have jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but with one difference i.e., the pecuniary jurisdiction would not be relevant, as only the principal Civil Court in the District or the High Court exercising original civil jurisdiction would be a Court within the meaning of Section 2(1)(e) of the 1996 Act.

14. In certain recent judicial pronouncements, the latest being *Balco v. Kaiser Aluminium Technical Services Inc.*, reported in (2012) 9 SCC 552 and *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited* and others, reported in (2017) 7 SCC 678, the Hon'ble Supreme Court has interpreted "Court" to include the Court which has jurisdiction over the seat of arbitration.

15. It may also pertinent to refer to Section 20 of the 1996, which provides as follows:

"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."

16. Section 20 of the 1996 Act enables the parties to agree on the place of arbitration. Failing any agreement, the place of arbitration might be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. Sub-clause (3) of Section 20 of the 1996 Act, which is a non-obstante clause provides that 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. For the purpose of deciding the issues involved in this appeal, it is not necessary to decide the academic question of exactly which place would be the seat or venue of arbitration - the place where arbitral proceedings were argued, the place where witnesses were examined or the place where the arbitral award was pronounced, in case the pronouncement was made at a place other than the place where witnesses were examined or hearings took place, since on the face of records, no part of the arbitral proceedings has taken place beyond the territorial jurisdiction of this Court and as observed above, only the contractual job was performed in the State of Andhra Pradesh. Nothing took place within the jurisdiction of any Court in the City of Mumbai.

18. It is well settled that the parties can by consent confer jurisdiction on a Court which otherwise has inherent jurisdiction under the 1996 Act. Court would include a Court within whose territorial jurisdiction the seat of arbitration was located.

19. The proposition that the parties can by consent confer jurisdiction to the exclusion of all others only to a Court which otherwise has jurisdiction finds support from the following judgments of the Supreme Court:

- (1) Hakkam Singh v. M/s. Gammon (India) Limited, reported in (1971) 1 SCC 286.
- (2) A.B.C. Laminart Pvt. Ltd., and another v. A.P. Agencies, Salem, reported in (1989) 2 SCC 163.
- (3) Angile Insulations v. Davy Ashmore India Ltd., and another, reported in (1995) 4 SCC 153.
- (4) New Moga Transport Co., v. United India Insurance Co. Ltd., and others, reported in (2004) 4 SCC 677.
- (5) Rajasthan State Electricity Board v. Universal Petrol Chemicals Limited, reported in (2009) 3 SCC 107.
- (6) Swastic Gases Private Limited v. Indian Oil Corporation Limited, reported in (2013) 9 SCC 32.

20. In Indus Mobile Distribution Private Limited, supra, the Supreme Court held that a conspectus of all the provisions of the 1996 Act shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. If the seat of arbitration was Mumbai and there was an agreement which exclusively vested jurisdiction in Mumbai Courts, the Mumbai Courts would have exclusive jurisdiction for the purpose of regulating arbitral proceedings out of agreement between the parties.

21. Under the Law of Arbitration, unlike the Civil Procedure Code which applies to suits filed in Courts, a reference to "seat" is a concept by which a neutral venue could be chosen by the parties to an arbitration clause. The neutral venue might not in the classical sense have jurisdiction, in that, no part of the cause of action might have arisen at the neutral venue and none of the provisions of Sections 16 to 21 of the Civil Procedure Code might be attracted.

22. However, the moment the seat which would obviously mean the seat of arbitration was determined, the Court within whose jurisdiction the seat was located would have jurisdiction to regulate the arbitral proceedings. As observed above, the parties did not agree to the seat and the Arbitrator chose to conduct the entire proceedings in Chennai within the jurisdiction of this Court.

23. In view of our finding that the Courts in Mumbai lack jurisdiction, we are constrained to hold that the parties herein could not have by an agreement vested jurisdiction on Courts in Mumbai.

24. The appeal is, therefore, allowed and the judgment and order under appeal is set aside. The application of the appellant for setting aside the Award shall be considered by the appropriate Single Bench of this Court on merits, subject to questions of limitation and the like. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

The Sub Assistant Registrar,
Original Side, High Court, Madras.

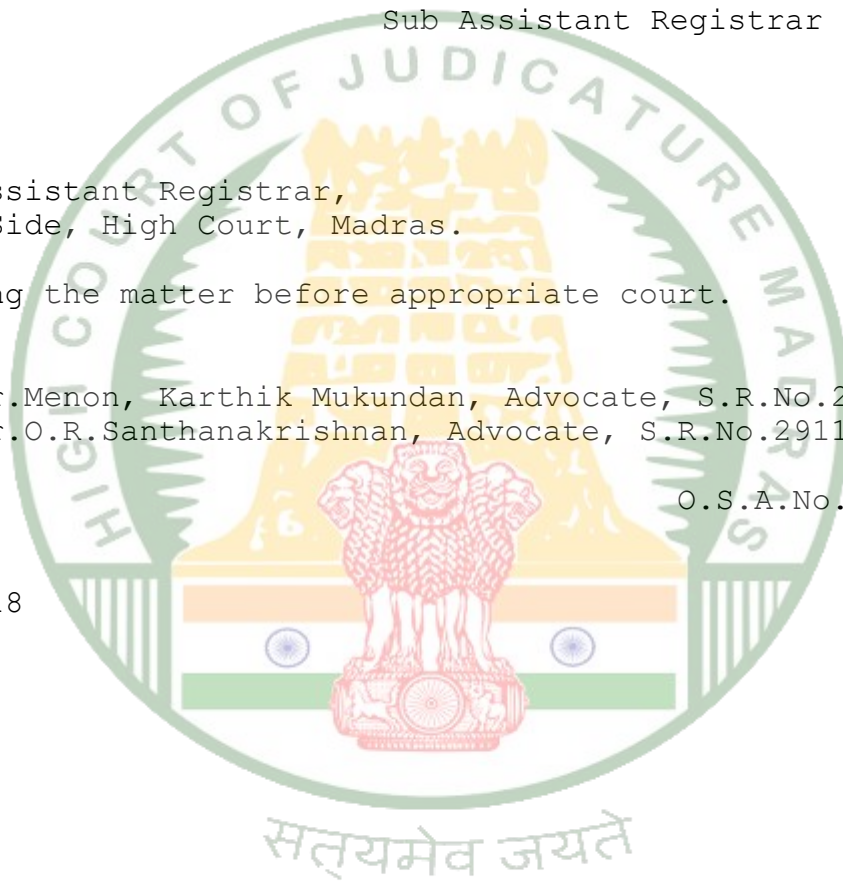
For listing the matter before appropriate court.

+1cc to Mr.Menon, Karthik Mukundan, Advocate, S.R.No.28739

+1cc to Mr.O.R.Santhanakrishnan, Advocate, S.R.No.29111

O.S.A.No.109 of 2018

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