

IN THE HIGH COURT OF JUDICATURE AT MADRAS

|               |            |
|---------------|------------|
| Reserved on   | 27.06.2018 |
| Pronounced on | 06.08.2018 |

Coram  
THE HON'BLE Ms.INDIRA BANERJEE, CHIEF JUSTICE  
and  
THE HON'BLE Ms.JUSTICE P.T.ASHA  
O.S.A.No.346 of 2017  
and  
C.M.P.No.22441 of 2017

M/s.Karaikal Port Pvt. Ltd.,  
Represented by its Deputy Manager  
Mr.N.Veeramanikandan  
having its registered office at Kezha  
Vanjur Village, TR Patinam,  
Karaikal - 609 606.

...Appellant

Versus

1.Marg Limited (formerly Marg Constructions Limited),  
Rep. by its Authorised 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

This Original Side Appeal filed under Order XXXVI Rule 9  
O.S.Rules read with Section 37(1)(b) of the Arbitration and  
Conciliation Act, 1996 praying to set aside the impugned order  
dated 05.12.2017 passed by the learned Judge of this Hon'ble  
Court in O.A.No.958 of 2017 and consequently, allow the same.

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.

For Appellant : Mr.AR.L.Sundaresan,  
Senior Counsel  
for Mr.R.Palaniandavan

For Respondent - 2 : Mr.Menon for M/S.Menon, Karthik  
Mukundan &  
Neelakandan,  
Caveator Counsel

#### J U D G M E N T

P.T.ASHA, J.,

The challenge is to the order dated 05.12.2017 passed by the learned Single Judge in O.A.No.958 of 2017 in and by which, an Application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act") was dismissed on the ground that the said Application was not maintainable in view of the bar under Section 42 of the Act.

2.1. The facts relevant for the issue on hand is narrated hereinbelow:

(i) In the year 2006, the Government of Puducherry awarded a Contract in favour of the first respondent to develop an all-weather deep-water port at Karaikal on a build, operate and transfer (BOT) basis and the Appellant Company was incorporated as a Special Purpose Company for the same. The Appellant appointed the first respondent as an EPC contractor under EPC Agreements (hereinafter referred to as Employer Principal Agreements), to build the port and provide various other facilities. The first respondent in turn subcontracted the supply, erection and commissioning of Stacker cum Reclaimer and Conveyor system for mechanizing the handling of coal cargo at the port to the second respondent.

(ii) The respondents 1 & 2 entered into a Contract Agreement dated 14.08.2010 (for stacker cum reclaimer) and a Contract Agreement dated 01.03.2011 (for conveying system) pursuant to the Employer Principal Agreements. The work under the said Agreements were partially executed when certain disputes arose inter se the respondents and hence the work was stopped. In order to ensure that the work is completed, the Appellant and the respondents 1 & 2 entered into a Tripartite Agreement on 23.08.2012 which summarized and encapsulated the rights and obligations arising under all the existing agreements between the Parties. The outstanding dues payable by the first respondent to the second respondent was crystallised and it was understood that the Appellant will not be responsible for the payment of such dues and would only make payments directly to the second respondent for future work. Subsequently, a Supplementary Agreement was executed between the Parties on 06.03.2013 for a limited purpose as the first respondent failed to meet the payment schedule.

2.2. In order to understand the agreement amongst the parties for the resolution of disputes inter se it is necessary to briefly detail the various Agreements entered into between the Appellant and the first Respondent (Employer Principal Agreement), Agreement between the respondents 1 & 2 (Contractor Principal Agreement) and the Agreement between the Appellant and the Respondent (Tripartite Agreement and Supplementary Agreement). The Contract Agreement dated 01.06.2009 between the appellant and the first respondent provided for a resolution of disputes by Arbitration and the relevant Clause reads as follows:

"20.3. Arbitration

Unless indicated otherwise in the Particular Conditions, any dispute not settled amicably, then such dispute shall be finally settled by arbitration. Unless otherwise agreed by both Parties:

(a) the arbitration shall be governed by the Arbitration and Conciliation Act, 1996.

(b) the place of arbitration shall be Chennai.

(c) the arbitral tribunal shall consist of three persons. Each of the party to nominate its arbitrator and both such arbitrators to nominate a third arbitrator, who shall be the presiding arbitrator of the tribunal.

(d) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language], and

The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Employer, and any decision relevant to the dispute.

Arbitration may be commenced prior to or during or after completion of the Works. The obligations of the Parties, the Employer and the Contractor shall not be altered by reason of any arbitration being conducted during the progress of the Works."

3. The first respondent entered into an Agreement dated 14.08.2010 with the second respondent for the purpose of the installation of two numbers of stacker/reclaimer at the Karaikal port. This agreement between the Respondents was entered into pursuant to the tender bid issued by the first respondent. Further this agreement was a sequel to the Contract Agreement dated 01.06.2009 entered into between the appellant and the first respondent, wherein the first respondent was permitted to engage sub-contractors with the consent of the appellant as per Clause 4.4 of the contract. Some of the salient features of the Contract Agreement dated 14.08.2010 are reproduced hereinbelow:

"1. The following documents, shall form part and

parcel of this Contract Agreement and in the event of any conflict between provisions of these documents the priority thereof shall be in the descending order as follows:

- a) The Contract Agreement
- b) The General Conditions of Contract
- c) The Appendices II & III with confirmations,
- d) The Contractor's offer RA/THE EMPLOYER/2129 dated 02/12/2009, RA/KPPL/6710 dated 6<sup>th</sup> July 2010 and the e-mail communications dated 15<sup>th</sup> July, 2010 & 6<sup>th</sup> August 2010.
- e) The Technical Specifications, Schedules & drawings (Volume II of Tender Documents),
- f) The Purchase Order & Work Order executed in pursuance hereof.

6. In pursuance of this Contract Agreement, for convenience of the Parties, the Employer would issue in conformity herewith, to the Contractor, a Purchase Order towards supply of components forming part of the total scope of Works and a Work Order towards erection, commissioning and testing of two stacker cum reclaimers (the said Purchase Order and Work Order shall conjointly be referred to as "Formal Agreements"). Accordingly, the Total Contract Price shall stand bifurcated as follows:

- a) Purchase Order value - Rs.35,72,89,000/- (Rupees thirty five crores seventy two lakhs and eighty nine thousand only) inclusive of applicable taxes, duties and levies.
- b) Work Order value - Rs.3,27,71,000/- (Rupees three crores twenty seven lakhs seventy one thousand only) inclusive of applicable taxes, duties and levies."

4. Yet another Contract Agreement has been entered into on 01.03.2011 between the respondents 1 & 2 which agreement also had the same Clause as extracted supra. The Purchase Order dated 01.03.2011, bearing No.MARG/EPC-IP/KPPL/PO/2011-03 & the Work Order of the same date bearing No.MARG/EPC-IP/KPPL/WO/2011-03 were executed in pursuance of these two agreements. The first respondent has issued the Purchase Order and the Work Order to the second respondent containing certain terms and conditions. The Purchase Order and the Work Order contained identical Arbitration Clauses which reads as follows:

"Arbitration: If any dispute or difference of any kind whatsoever shall arise between MARG and MBECL in connection with or arising out of this purchase order or the carrying out of the Works (whether during the progress of the Works after the termination, abandonment of or breach of this purchase order) it

shall in the first place be settled through negotiations between MARG and MBECL with the assistance of the Engineer. If such settlement is not reached and either of the parties decides to go for arbitration then the aggrieved party shall give notice of such intention within 90 days from the date of disagreement. Save as hereinafter provided such settlement or decision in respect of every matter so negotiated shall be final and binding upon MARG and MBECL until the completion of the Work and shall forthwith be given effect to by MBECL until the completion of the Work and shall forthwith be given effect to by MBECL who shall proceed with the Works with all due diligence whether he or MARG requires arbitration as hereinafter provided or not.

All disputes or differences remaining unsettled shall be referred to arbitration consisting of three arbitrators, one to be appointed by MARG and one by MBECL and the third/presiding arbitrator to be appointed by both the arbitrators and in all other respects to conform to the provisions of the Arbitration and Conciliation Act, 1996 or any re-enactment or statutory modification thereof for the time being in force. Venue of the arbitration shall be in Chennai. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrators. The arbitrators shall not enter on the reference until after the completion or alleged completion of the Works or termination of Contract unless with the written consent of MARG and MBECL provided always:

(i) That such reference may be opened before such completion or alleged completion in respect of the withholding by the Engineer of any certificate or the exercise of the Engineer's power to give a certificate under Clause 21 and its sub-clauses.

(ii) That the giving of a Taking-over Certificate shall not be a condition precedent to the opening of any such reference.

All matters concerning this purchase order shall be subject to the Jurisdiction of courts in Chennai."

5. By a Letter dated 08.11.2011, the first respondent had issued an amendment to the Purchase Order bearing No.MARG/EPC-IP/KPPL/PO/2011-03, in which amendments were made to the price and scope of the work alone and it was clearly mentioned that all other conditions of the earlier order would remain unchanged. A similar amendment was also made to the Purchase Order bearing No.MARG/EPC-IP/KPPL/PO/2011-03.

6. It appears that in the course of undertaking the execution of the sub contracted work by the second respondent herein, certain practical difficulties and bottle necks were experienced whereupon it was mutually felt desirable that some of the terms and conditions of the contract should be suitably modified. Since the appellant had a beneficial interest in the work, it was decided to have a Tripartite Agreement. As a result of which the Tripartite Agreement dated 23.08.2012, came to be executed between the appellant and the respondents herein. Clause 7 of this agreement made it clear that all other terms and conditions of the agreements between the appellant and the first respondent (Employer Principal Agreement) and the agreement between the respondents (Contractor Principal Agreement) would form an integral part of this agreement. Clause 19 of this agreement dealt with the settlements of disputes through Arbitration and the same is extracted hereinbelow:

"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 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 Chennai and the proceedings shall be conducted in English."

7. Even after entering into the Tripartite Agreement dated 23.08.2012, the first respondent was experiencing some difficulties in meeting the financial targets as contemplated in the Tripartite Agreement. Therefore, the first respondent had proposed a revised time schedule for releasing the outstanding payments due as on 23.08.2012 under the Tripartite Agreement. In consideration of the request of the first respondent, the appellant had undertaken to make payments directly to the second respondent for the sub contracted works satisfactorily carried out, performed and discharged after the date of the Tripartite Agreement. With reference to the payments due for the works completed prior to the date of Tripartite Agreement, the same

continued to be the responsibility of the first respondent. The terms/modalities of the payments was reduced into writing under a Supplementary Agreement dated 06.03.2013. It was made clear in Clause 7 that the agreement entered into between the respondents and the Tripartite Agreement as amended, varied or modified would apply, bind and govern the respective parties to the Supplementary Agreement and the parties had agreed that the Tripartite Agreement would form an integral part of these agreements. Clause 7 further provided that the execution, performance and giving effect to the Supplementary Agreement will not in any manner effect or prejudice things already done or agreed to be done or omitted to be done under the agreements entered into between the appellant and the first respondent (Employer Principal Agreement), between the respondents 1 & 2 (Contractor Principal Agreement) and the Tripartite Agreement and parties shall have the right to invoke the same at any time during the period of the contract. It was further made clear that in case of any dispute or discrepancy, the terms of the Contractor Principal Agreement would prevail. Clause 12 of the Supplementary Agreement provided the Arbitration Clause which reads as follows:

"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."

Though the Clause was a verbatim repetition of Clause 19 of the Tripartite Agreement, there was an addition of the word 'Kolkata' to the place of Arbitration along with the word 'Chennai'. There is no punctuation mark nor a conjunction between the two words.

8. It is seen that disputes arose between the parties regarding the payments to the second respondent herein. By a

Letter dated 15.09.2017, the second respondent had informed the appellant and the respondents that they were referring the disputes to arbitration in terms of Clause 12 of the Supplementary Agreement dated 06.03.2013. The Letter also referred to the Tripartite Agreement under which the payments were agreed to be paid directly by the appellant to the second respondent and which payment the appellant and the first respondent had not honoured.

9. The second respondent had filed the application under Section 9 of the Act before the High Court at Calcutta for various reliefs. Thereafter, the appellant herein has filed an Application on the file of this Court under Section 9 of the Act in O.A.No.958 of 2017 for the following relief:

"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 mechanization process and/or by removing/alienating the materials/goods/movables supplied by the respondents lying at the Karaikal port premises."

10.1. It is also seen that the appellant has raised the issue of jurisdiction before the Kolkata High Court and the same is yet to be decided. On receipt of the summons in the above application, the second respondent herein had filed an Application bearing A.No.6182 of 2017 stating that in view of Section 42 of the Act, the Application filed by the appellant was not maintainable since the Arbitration Clause found in the Tripartite Agreement had been substituted or superseded by the Arbitration Clause found in the agreement dated 06.03.2013. A counter affidavit was filed by the appellant herein inter alia contending that all agreements up to the Supplementary Agreement have all specified that the venue of Arbitration would be Chennai and the word 'Kolkata' has been wrongly inserted into the Supplementary Agreement dated 06.03.2013. They further contended that the entire cause of action in relation to the contract had been entered into at Chennai and therefore, it was only the Courts at Chennai which would have jurisdiction to try the issue. The appellant would also contend that the second respondent who is one of the many sub-contractors of the first respondent herein cannot halt the work at Port. It was also contended that the remedy of the second respondent was only by way of claiming damages. A plea was also made that the Arbitration proceedings are already under way. The second respondent had filed a rejoinder countering the averments made in the reply affidavit, wherein, they have stated that the Supplementary Agreement had been given effect to and various payments had been made by the appellant herein without raising any objection and it is too late in the day for them to allege that the word, 'Kolkata' has been clandestinely added. Since

the second respondent has raised the issue of maintainability, the learned Single Judge had proceeded to decide it as a preliminary issue.

10.2. The learned Single Judge after considering the arguments made on either side held as follows:

"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." Ultimately, the Section 9 Application filed by the appellant was dismissed on the ground that there is a bar under Section 42 of the Act.

10.3. The parties to the proceedings have submitted written submissions in support of their oral arguments. The learned counsel for the appellant would contend that a mere perusal of the various agreements would clearly establish that the intent of the parties was only to confer jurisdiction upon the Courts in Chennai to deal with disputes between the parties and that Supplementary Agreement dated 06.03.2013 was a deviation from the agreed terms. They would also lay emphasis on the fact that had the parties really intended to confer jurisdiction exclusively upon the Courts in Kolkata, then the word 'Chennai' would not have been included in Clause 12. They would further state that the earlier agreements which forms part of this agreement clearly demonstrates that the parties had fixed exclusive jurisdiction upon the Courts at Chennai and this has not been amended or modified or cancelled and therefore, the use of the word 'Kolkata' is a mischief created by the second respondent. He would also argue that the Supplementary Agreement dated 06.03.2013 only seeks to revise the payment schedule and in all other respects, the terms of the original agreement remain intact. In view of the fact that the parties had never envisaged Kolkata as a venue of Arbitration and have restricted jurisdiction with the Courts at Chennai, the bar of Section 42 would not apply to the parties. In support of their arguments, the learned counsel for the appellant would rely on the judgment in the case of M.R.Engineers & Contractors (P) Ltd. Vs. Som Datt Builders Ltd. reported in (2009) 7 SCC 696, to buttress their argument that when there is a reference to a document in the contract, the Court has to consider whether such reference is with an intention of incorporating the contents of the document in entirety into the contract or with an intention of only adopting or borrowing the specific portions of the

documents. In the instant case, the exclusive jurisdiction clause stood automatically incorporated into the agreement dated 06.03.2013 by reason of Clause 7 of the Supplementary Agreement which stipulates that the other agreements would form part and parcel of the Supplementary Agreement and only the terms categorically identified in the Supplementary Agreement superseded the terms of the other agreement and terms in those agreements which were not superseded continued to govern the terms of the Supplementary Agreement. In support of their arguments regarding the seat of Arbitration, the learned counsel for the appellant would rely on the judgments of the Honourable Supreme Court in the cases of Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited and Others reported in (2017) 7 SCC 678 and State of West Bengal and Others Vs. Associated Contractors reported in (2015) 1 SCC 32.

11. They would also submit that a mere filing of the Section 9 Application will not oust the jurisdiction of this Court and have referred to the judgment of this Court in the case of Surya Pharmaceuticals Ltd. Vs. First Leasing Company of India Ltd. reported in 2014 (2) CTC 545.

12. The learned Senior counsel appearing on behalf of the petitioner would also state that the learned Single Judge had totally overlooked the exclusive jurisdiction clause and has therefore fallen into error in contending that the present application is barred under the provisions of Section 42 of the Act and therefore sought to set aside the order of the learned Single Judge.

13.1. Per Contra, the learned counsel appearing for the second respondent would contend that the present petition is filed by the appellant after being fully aware of the fact that Clause 19 of the Tripartite Agreement has been substituted or superseded by the later Arbitration Agreement contained in Clause 12 of the Supplementary Agreement dated 06.03.2013. The learned counsel for the second respondent would argue that taking into account the various agreements that has been entered into between the parties, five Courts have jurisdiction to entertain the dispute under the Supplementary Agreement and Kolkata being one of them (since the Supplementary Agreement has been signed at Kolkata), the respondent was well within its right to approach the Court at Kolkata and the Court at Kolkata having been invoked first the provisions of Section 42 of the Act would step in. They would further contend that the exclusive jurisdiction clause relied on by the appellant would not be applicable as no part of the cause of action has arisen at Chennai and the Supplementary Agreement under which the arbitration proceedings have now been initiated have been executed at Kolkata. In support of the submissions, the learned

counsel for the second respondent would also refer to the judgment of the Honourable Supreme Court in State of West Bengal and Others Vs. Associated Contractors reported in (2015) 1 SCC 32 to state that the parties can restrict the jurisdiction to one Court by agreement but they cannot confer jurisdiction on the Court which otherwise does not have jurisdiction. In Priya Hiranandani Vandervala Vs. Niranjana Hiranandani and Another reported in 2016 SCC Online Del 3435, a Division Bench of the Delhi High Court held that Courts within whose jurisdiction the subject matter was located would have jurisdiction and similarly, if the seat of arbitration is located in some other territory even the Court where the arbitration takes place has jurisdiction. Section 42 took away the right of party to approach a Court in case of concurrent jurisdiction of Court and conferred an exclusive jurisdiction upon the Court in which an application was first filed by party.

13.2. In the case of Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited and Others reported in (2017) 7 SCC 678, the Honourable Supreme Court had observed that the judgment in the case of Bharat Aluminium Company Vs. Kaiser Aluminium Technical Service, Inc., reported in (2012) 9 SCC 552 had held that taking into account the provisions of Section 2(1)(e) and Section 20 of the Act, the intent of the legislature was to confer jurisdiction on two Courts viz., the Court where cause of action arose and the Courts where the Arbitration took place. Taking into account the amendment to Section 20 & 31 of the Act, the Bench observed that the moment the seat is designated it is akin to an exclusive jurisdiction clause. In another case of Anilkumar Phoolchand Sanghvi and Others Vs. Mr. Chandrakant P. Sanghvi and others reported in 2016 SCC Online Bom 1048, the Bombay High Court had held that while dealing with a case where the parties to the dispute had agreed to two venues but had not fixed the seat/place of arbitration, the Division Bench of Bombay High Court held that in such circumstances the arbitration agreement and the circumstances leading to the signing of the agreement have to be borne in mind. In such cases where once an application has been entertained by one Court (in this case Mumbai) it would automatically fix the 'place/seat of arbitration' at the place and so also the 'Court' for all future purposes. The Delhi High Court in its judgment in PCP International Limited Vs. Lanco Infratech Limited reported in 2015 SCC Online Del 10428 held that parties by consent cannot confer jurisdiction upon a Court which does not have any and in contractual matters four Courts would have jurisdiction - the Court where the contract was executed, where the contract is to be performed, where payment under the contract is to be made and where the defendant/respondent resides as laid down in the case of A.B.C Laminart Private Ltd. Vs. A.P. Agencies, Salem reported

in (AIR 1989 SC 1239). The learned Single Judge had therefore held that where none of the above circumstances had arisen at a place parties by consent cannot invoke that jurisdiction.

14. A Division Bench of this Court, in which one of us was a party, held in the judgment dated 18.04.2018 in O.S.A.No.109 of 2018 - NRP Projects Private Ltd. Vs. Bharat Petroleum Corporation Ltd that it is well settled that parties by consent can confer jurisdiction on a Court which otherwise had inherent jurisdiction and this includes the Court within whose territorial jurisdiction the seat of arbitration was located.

15. The issue that is now for consideration before us is whether the inclusion of the word 'Kolkata' along with the word 'Chennai' in the Supplementary Agreement dated 06.03.2013 results in conferring a jurisdiction upon Kolkata. A perusal of the Contract Agreement dated 01.06.2009 entered into between the appellant and the first respondent shows that the venue of arbitration was agreed to be at Chennai [Clause 20.3(b)]. Thereafter, the Purchase order and the Work Order dated 01.03.2011, which is issued pursuant to the contract agreement dated 01.03.2011 entered into between the Respondents, not only fixes the venue of Arbitration at Chennai but also confers exclusive jurisdiction upon the Courts at Chennai. The Purchase Order and Work Order have been entered into in pursuance of the Contract Agreement dated 14.08.2010 and 01.03.2011. Thereafter, the next agreement that has been entered into between the parties is the Tripartite Agreement dated 23.08.2012. This Agreement also fixes the venue of Arbitration at Chennai. Therefore, from a reading of these agreements, it is very clear that the intention of the parties was to confer jurisdiction only upon the Courts at Chennai and to have the venue of Arbitration as Chennai. The confusion arises only on account of the inclusion of the word 'Kolkata' in the Arbitration Clause in Clause 12 of the Supplementary Agreement dated 06.03.2013. If really the parties to the agreement had agreed to confer jurisdiction upon the Courts at Kolkata, then they would have definitely deleted the word 'Chennai' from Clause 12 or if their intention was to confer a concurrent jurisdiction on Kolkata and Chennai then the word 'or' would have been used between the words 'Kolkata' and 'Chennai'. Therefore, there arises a dispute/discrepancy in the terms contained in Clause 12. Clause 7 of the Supplementary Agreement dated 06.03.2013 has itself provided the solution in the event of there being any dispute or discrepancy with reference to the terms contained in the Supplementary Agreement. Clause 7 of this Agreement states that the Contractor Principal Agreement and the Tripartite Agreement would remain the same and would stand superseded only with reference to those terms which have been categorically identified in the Supplementary Agreement. Therefore, a reading

of Clause 12 with reference to the venue does not conform to the term "categorically identified" since there is a confusion as to which place the parties had decided to adapt as a venue, whether it was Kolkata or Chennai, therefore in keeping with the provisions of Clause 7 the terms of the Contractor Principal Agreement would prevail. The Contractor Principal Agreement has been described as the Contract Agreement dated 01.03.2011 which was executed by the respondents 1 & 2 herein. This Agreement has to be read in conjunction with the Purchase Order & Work Order dated 01.03.2011 in view of Clause 1 & 6 of the Contractor Principal Agreement. A reading of the same would indicate that the parties had agreed the venue would be at Chennai and they have also conferred exclusive jurisdiction upon the Courts at Chennai to consider the disputes between the parties.

16. The Arbitration Clause in the above agreement viz., the Contract Agreement dated 01.03.2011 is further reiterated in the Tripartite Agreement dated 23.08.2012. Therefore, from the year 2010, parties have consistently agreed that the venue for Arbitration would be Chennai and it is for this reason that the word 'Chennai' has not been deleted from Clause 12 of the Supplementary Agreement dated 06.03.2013. All the earlier agreements were also entered into only at Chennai and therefore, the second respondent was very much aware about the consensus between the parties with reference to the venue of Arbitration. The learned Single Judge has observed that the second respondent is only a party to the Tripartite Agreement and the Supplementary Agreement without considering the fact that the Contractor Principal Agreement which find reference in the Supplementary Agreement dated 06.03.2013 and the Purchase Order & Work Order which were issued pursuant to the Contractor Agreement were entered into only between the respondents herein and the appellant was not a party to the same.

17. In fact, it is also seen that by a Letter dated 08.11.2011 issued by the first respondent to the second respondent, there was an amendment to the Purchase Order only with reference to the price. This Letter clearly states that all other terms of the Purchase Order dated 01.03.2011 remains unchanged except the price mentioned in the Annexure which clearly shows that the parties continued to agree that the venue of Arbitration would be Chennai and the Courts at Chennai would have exclusive jurisdiction. A similar amendment was also made to the Work Order dated 01.03.2011. The Tripartite Agreement once again has reiterated the fact that except for the specific changes that was made to the terms as detailed in the Tripartite Agreement, all other terms of the Contractor Principal Agreement would remain intact. Such a term is once again reiterated in the Supplementary Agreement dated 06.03.2013 and on a conjoint reading of all these agreements, it is clear that the parties

had only understood and agreed that the venue of arbitration would be at Chennai. Another factor that has to be borne in mind is that the second Respondent is one of the many sub-contractors who had been engaged to execute the work of the Appellant, if each of these sub-contractors were to initiate proceedings in different courts it would cause great prejudice to the Appellant who would have to litigate before different courts.

18. Section 42 of the Arbitration and Conciliation Act reads 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."

It is therefore clear that the mandate of Section 42 would be available only in a case, where the Court in which the earlier suit has been filed had the jurisdiction to adjudicate upon the dispute between parties. The Honourable Supreme Court in its decision *State of West Bengal and Others Vs. Associated Contractors* reported in (2015) 1 SCC 32 has observed as follows:

"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 Vs. A.M.Ahmed & Co.*, SCC at p.532, para 6 and *Neycer India Ltd. Vs. GMB Ceramics Ltd.*, 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 Vs. Chopra Land Developers (P) Ltd.*, SCC at p.460 para 9 and *Rajasthan SEB Vs. Universal Petro Chemicals Ltd.*, SCC at p.116, paras 33 to 36 and *Swastik Gases (P) Ltd., Vs. Indian Oil Corpn. Ltd* SCC at pp.47-48, para 32, it was held that where the agreement between the parties restricted 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."

19. The Honourable Supreme Court in its decision in the

case of Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited and Others reported in (2017) 7 SCC 678 has held that the moment the seat of Arbitration has been designated, it is akin to an Exclusive Jurisdiction Clause. The Honourable Supreme Court after considering the amended provisions of Section 20 & 31 and the definition of 'Court' in Section 2(1)(e) of the Act has observed as follows:

"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. A Division Bench of this Court in the case of Surya Pharmaceuticals Ltd. Vs. First Leasing Company of India Ltd. reported in 2014 (2) CTC 545 while considering Section 42 had observed as follows:

"7.2. .... In other words, by merely filing an Application before any Court, the bar under Section 42 cannot be extended when another Application is filed by a party before another Court, which has got jurisdiction. Therefore, a party, who raises the plea of lack of jurisdiction, will have to establish the fact that the Court, which entertains the first Application at the earliest point of time, has got jurisdiction. Moreover, the Respondent has not accepted the jurisdiction of the District Court, Chandigarh. The object and intend enshrined in the Arbitration and Conciliation Act, 1996, is to avoid multiplicity of proceedings and the Forum shopping at the instance of one of the parties to an Arbitral Agreement. It can only be applied when the first Application filed is before a Court of competent jurisdiction and thereafter, the second Application is

filed by either of parties to avoid the jurisdiction of the Court, which entertain the said earlier Application."

21. Therefore, considering the facts and circumstances of the case, we are of the view that the parties have conferred exclusive jurisdiction upon the Courts at Chennai and had fixed the venue of Arbitration also at Chennai. The mention of the word 'Kolkata' in Clause 12 of the Supplementary Agreement dated 06.03.2013 will not confer jurisdiction upon the Courts at Kolkata, therefore, the order of the learned Single Judge is liable to be set aside. Since the learned Single Judge had only dealt with issue of maintainability, the matter is remanded back to the learned Single Judge for deciding O.A.No.958 of 2017 on merits.

22. In the result, this Original Side Appeal is allowed and remanded back to the learned Single Judge. Consequently, connected Miscellaneous Petition is closed.

Sd/-  
Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

mps

TO

1. THE SUB ASSISTANT REGISTRAR,  
ORIGINAL SIDE, HIGH COURT, MADRAS.

+1cc to Mr.MENON KARTHIK, Advocate, S.R.No.54339

Judgment in  
O.S.A.No.346 of 2017

VG II(CO)  
TR(21/08/2018)

WEB COPY