

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 24TH DAY OF OCTOBER 2018

THE HON'BLE MR.JUSTICE C.SARAVANAN

O.P.No.303 of 2018

In the matter of
Arbitration and
Conciliation Act, 1996.

AND

In the matter of Agreement
Dated 21.5.2009 & In the
matter of disputes between
the parties.

Thirumurthi Hitech Company Ltd.,
rep.by Director
Old No: 56, New No:88, 1st Floor,
Maddox Road, Choolai,
Chennai 600 112.

...Petitioner

Vs

1. Chief Project Engineer
Railway Electrification
Egmore, Chennai 600 008.

2. Central Organisation for
Railway Electrification
1, Nawab Yusuf Road,
Civil Lines, Allahabad.

....Respondents

Original Petition praying that this Hon'ble Court be
pleased to pass an order: a) Appointing a sole arbitrator to
adjudicate on the dispute that has arisen between the
petitioner and the respondents on account levy & recovery of
penalty of Rs.4,000-00 per day totally amounting to
Rs.47,26,310.00 in terms of caluse no: 1.2.54 of the agreement

dated 21.5.2009.

b) For costs.

This original petition coming on this day before this court for hearing the court made the following order:-

The above petition has been filed for appointment of an arbitrator under section 11 (6) Of the Arbitration and Conciliation Act, 1996. The petitioner and the respondent have signed an agreement dated 21.5.2009 to complete a residual work left by the previous contractor. The duration of the contract was for a period of six months for a total value of Rs.4, 49, 48, 448/-.

2. The said agreement was pursuant to a tender floated by the respondent for design, supply, erection, testing and commissioning of 25 KV A.C single phase 50 Hz Traction Overhead Equipments, switching stations, Booster Transformer Station Et cetera between Bangalore-Chennasandra Loop via Yeshwantpur and Yelahanka-Baiyyappanahali Loop via Hebbal (66 TK MS) and Yeshwantpur-Chickbanava sections (19 TK M) etc under RE/Project as per Letter of Acceptance of No.LCORE / 1/OHE/Gr. 126/R&C dated 9.3.2009 as per Annexure-B and agreed deviation from Tender Notice No. EL CORE/1/OHE/Gr.126 R&C dated 5.12.2008 with A and C Slip No.1.

3. The petitioner claims to have completed the work though after obtaining several extension and has now invoked arbitration clause in the Terms and Conditions to the Tender Document and demanded an arbitration. Arbitration clause is enshrined in clause 1.2.54 (b) (i) and (d)(ii) which reads as under:-

(a) Matters Finally Determined by The Railway:

""

b) (i) Demand for Arbitration :

""

b(ii)

b(A)

b(B)

(C)

b(iii)

b(iv)

b(c)

d(i)

d(ii) In cases not covered by clause 1.2.54 (d)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Electrification Officers not below JA Grade, as the arbitrators. For this purpose, the Railway Electrification will send a panel of more than 3 names of Gazetted Railway Officers of one of or more departments, of the Railway Electrification to the contractor who will be asked to suggest to General Manager upto 2 names out of the panel for appointment as contractor's nominee. The General Manager shall appoint at least one out of them as the contractor's nominee and

will also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel duly indicating the presiding arbitrator from amongst the 3 arbitrators so appointed. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. As officer of Selection grade of the Accounts Department shall be considered of equal status to the officers in SA Grade of other departments of the Railways for the purpose of appointment of arbitrators".

4. The venue of the arbitration shall be the place from which the letter of acceptance of tender is issued or such other place as the purchaser at their discretion may determine. Thus, under normal course the venue of arbitrator shall be Allahabad or any other place as the respondent may at their discretion decide.

By letter dated 18th January, 2010, the respondent had informed the petitioner that a sum of Rs. 4,000/- per day subject to a maximum of 10% of the contract value would be recovered for delay in completion of the work after the expiry of 31.12.2009 as per para 1.2.44 of the Conditions of Contract for the extended period notwithstanding the grant of extension. The petitioner was therefore asked to complete the work accordingly.

6. Similar extensions were granted to the petitioner from time to time. The petitioner also submitted a no claim certificate for passing the final bill.

7. By letter dated 31 March 2016 the petitioner has raised a dispute and has requested the respondent to waive liquidated damage and penalty imposed on several counts including blaming the respondent for the delay.

8. The second respondent by letter dated 15.3.2017 informed the first respondent to form an arbitration panel and to send photocopy of the details of the contract and other necessary documents at the earliest for the perusal of the General Manager/CORE - Central Organisation for Railway Electrification, Allahabad, with a copy marked to the petitioner.

9. The second respondent later by letter dated 04.05.2017 however declined for arbitration on the ground that the petitioner has signed a " no claim certificate " by way of an affidavit as per the terms and conditions of the tender document and is therefore not entitled to raise a dispute through arbitration.

10. The petitioner by letter dated 27.05.2017 has replied and submitted that the imposition of penalty was unjustified and a separate letter was sent and that "no claim certificate" was given by them only for the purpose of processing of the final bill and therefore requested the respondent to appoint an arbitrator.

11. By letter dated 19.08.2017, the petitioner requested and reiterated its demand. By letter dated 24.10.2017, the second respondent reiterated that the "no claim certificate" submitted by the petitioner vide Letter No. ELEC/T-2085 dated 27.4.2017 the petitioner has agreed for the following:-

"And Further declared that we shall not trace any objection/dispute regarding any item of work under this Agreement in future and should any claim be raised by us in future under this Agreement, the same shall stand nullified by virtue of this indenture."

12. The petitioner issued a legal notice dated 19.11.2017 wherein letter dated 15.3.2017 of the second respondent was referred to for referring the dispute for arbitration and therefore the present stand of the respondent in refusing to refer the case for arbitration was unjustified.

13. Under these circumstances, the above petition has been filed for referring the dispute for arbitration and for appointment of an arbitrator under section 11 (6) Of the Arbitration and Conciliation Act, 1996.

14. The respondent has filed a counter reiterating the defences taken in their various communication and further submitted that only the second respondent located in Allahabad is the jurisdictional authority to consider the request for appointment of an arbitrator and therefore the present petition before this court is outside the territorial jurisdiction of this court.

15. Heard Mr.S.Raghavan, learned counsel for the petitioner and Mr.P.T. Ram Kumar, learned counsel for the respondent.

16. The Learned Counsel for the petitioner relied on the decisions of the Honourable Supreme Court in following cases:-

- i) **Indus Mobile Distribution Private Limited versus Datawind Innovations Private Limited** (2017) 7 SCC 678.
- ii) **DURO Felguera S.A versus Gangavaram Port Ltd.** (2017) 9 SCC 729.

17. Before deciding whether an arbitrator or arbitrators have to be appointed, the fundamental question to be addressed is whether the High Court of Madras or Allahabad would have the jurisdiction to entertain the petition under section 11 (6) of the Arbitration and Conciliation Act, 1996 in view of the specific clause in the general conditions to the contract wherein it has been stated that:

"The Venue for an Arbitration shall be the place from which Letter of Acceptance of Tender is issued or such other place as the purchaser at his discretion may determine".

18. Section 20 of the Arbitration and Conciliation Act, 1996 deals with the place of arbitration. As per the said provision parties are free to agree upon the place of arbitration. Failing any agreement, 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.

19. The arbitral tribunal can also sit at a place other than the agreed place of arbitration if the arbitral tribunal

considers it appropriate for consultation among its members, for hearing witnesses, experts or the parties or for inspection of documents, goods or other property.

20. In this case, admittedly the venue as per the above clause is Allahabad as the purchase order/letter of acceptance has emanated from the office of the second respondent.

21. Therefore, if the venue of the arbitral tribunal is to be considered as the seat of arbitration, in the light of the decisions of the Hon'ble Supreme Court rendered in the context of international arbitration, only Allahabad High Court would have jurisdiction. The Honourable Supreme Court in **Indus Mobile Distribution Private Limited versus Datawind Innovations Private Limited** supra observed to that effect.

22. The court there has held that there is a distinction between "seat"[20(1) and 20 (21)] and "venue"[Section 20 (3)] and that the distinction is quite crucial in the event, arbitration agreement designates a foreign country as the "seat"/"place" of the arbitration and also selects the Arbitration and Conciliation Act, 1996 as the curial law/law governing the arbitration proceeding.

23. The Court referred to para 98 of its earlier decision in **BALCO v.Kaiser Aluminium Technical Services Inc.**, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] , SCC pp. 606-08)

"98. We now come to Section 20, which is as under:

'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.'

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai, etc. In the absence of the parties' agreement thereto, Section 20(2) authorises the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

99. The fixation of the most convenient "venue" is taken care of by Section 20(3). Section 20 has to be read in the context of Section 2(2) which places a threshold limitation on the applicability of Part I, where the place of arbitration is in India. Therefore, Section 20 would also not support the submission of the extra-territorial applicability of Part I, as

canvassed by the learned counsel for the appellants, so far as purely domestic arbitration is concerned.

100. True, that in an international commercial arbitration, having a seat in India, hearings may be necessitated outside India. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but it would not have the effect of changing the seat of arbitration which would remain in India. The legal position in this regard is summed up by Redfern and Hunter, *The Law and Practice of International Commercial Arbitration* (1986) at p. 69 in the following passage under the heading "The Place of Arbitration":

'The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of the reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an Arbitral Tribunal to hold meetings—or even hearings—in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.... It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country—for instance, for the purpose of taking evidence.... In such circumstances, each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.'

This, in our view, is the correct depiction of

the practical considerations and the distinction between "seat" [Sections 20(1) and 20(2)] and "venue" [Section 20(3)]. We may point out here that the distinction between "seat" and "venue" would be quite crucial in the event, the arbitration agreement designates a foreign country as the "seat"/"place" of the arbitration and also selects the Arbitration Act, 1996 as the curial law/law governing the arbitration proceedings. It would be a matter of construction of the individual agreement to decide whether:

(i) the designated foreign "seat" would be read as in fact only providing for a "venue"/"place" where the hearings would be held, in view of the choice of the Arbitration Act, 1996 as being the curial law, OR

(ii) the specific designation of a foreign seat, necessarily carrying with it the choice of that country's arbitration/curial law, would prevail over and subsume the conflicting selection choice by the parties of the Arbitration Act, 1996."

24. In para 19 the Court held as under:

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".

25. In para 20 it was held as under:-

" 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 : (2013) 4 SCC (Civ) 157] This was followed in a recent judgment in *B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.* [*B.E. Simoese 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."

26. In **UOI Vs Hardy Exploration and Production**, the Hon'ble Supreme Court by its order dated 25th September, 2018 held as follows:

33. The word „determination" has to be

contextually determined. When a „place" is agreed upon, it gets the status of seat which means the juridical seat. We have already noted that the terms „place" and „seat" are used interchangeably. When only the term „place" is stated or mentioned and no other condition is postulated, it is equivalent to „seat" and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term „place", the said condition has to be satisfied so that the place can become equivalent to seat. In the instant case, as there are two distinct and disjunct riders, either of them have to be satisfied to become a place. As is evident, there is no agreement. As far as determination is concerned, there has been no determination.

27. The both above decision and the decisions referred therein are in the context of international arbitration. I am of the view, the ratio cannot be imported and applied for domestic arbitration where such a necessity does not arise.

28. Further, the parties have not conferred jurisdiction on the Allahabad High Court under the agreement. They have merely agreed that the venue of the arbitration can be at Allahabad or at any other place where the 2nd respondent may desire.

29. In my view, the jurisdiction of the court has to be determined with reference to the cause of action as provided

in section 2 (e) read with Section 42 of the Arbitration and Conciliation Act, 1996.

30. To determine whether the Court has jurisdiction, the definition of "court" in Section 2 (e) (i) would be more relevant which reads as under:-

`(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.

31. The above definition is similar to the composite definition as it stood prior to the amendment to the Act in 2015.

32. The Honourable Supreme Court in **Jindal Vijayanagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Co. Ltd.**, (2006) 11 SCC 521 has observed as under:-

" 31. On a plain reading of the definition of "court" under Section 2(1) (e) of the 1996 Act, it is evident that the arbitration petition can be filed before:

(i) A Principal Civil Court of original jurisdiction in district.

(ii) A High Court in exercise of its 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."

33. In 36, the Honourable Supreme Court observed as under:-

"36. It may thus be noted that Section 20 CPC and clause 12 of the Letters Patent lay down the same test for determining the court of appropriate jurisdiction in which to proceed against a non-corporate defendant. It is submitted that in the absence of any reason to believe that there was any intention to apply different tests in CPC and the Letters Patent to determine the appropriate forum to sue a corporate defendant, it cannot be said that the two statutes provide different tests, and that the principles in one cannot be used to interpret the principle in the other."

34. Ultimately the Honourable Supreme Court concluded that Clause 12 of the Letters Patent states that suit may be filed in either Madras, Calcutta or the Bombay High Court in the following circumstances:-

"... if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court,

or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain, within such limits."

35. Therefore, the venue for the arbitration may not be confused with the seat of arbitration for the purpose of jurisdiction of the court particularly under Section 11 of the Act.

36. The parties are also located in Chennai and the work order has been executed within the jurisdiction of the first respondent.

37. In the light of the above, I am of the view that this Court has jurisdiction to entertain the present petition.

38. Having decided to entertain the present petition, question still remains to be examined is whether the petition is liable to be dismissed in the light of the objection raised by the respondents that the petitioner has given a "no claim certificate" by way of affidavit.

39. Secondly, whether the petition is premature as was mentioned by the learned counsel as the petitioner was

required to approach to the 2nd respondent for appointment of arbitration.

40. Secondly, whether the petition is premature as was mentioned by the learned counsel for the respondent as the petitioner was required to approach to the 2nd respondent for appointment of arbitrators.

41. In **Maharshi Dayanand University v. Anand Coop. L/C Society Ltd.**, (2007) 5 SCC 295, the Hon'ble Supreme Court while dealing with the pre-SBP & Co. [(2005) 8 SCC 618], held that the question whether the fact that the parties have not signed the contract containing the detailed specifications as contemplated by the letter of acceptance would preclude the respondent from seeking an arbitration must be left to be decided by the arbitrator, since in terms of Section 16 of the Act the question can be raised before the arbitrator as the case was not governed by the principles recognised by **SBP & Co. V. Patel Engg. Ltd.**, (2005) 8 SCC 618.

42. In **SBP & Co. v. Patel Engg. Ltd.**, (2005) 8 SCC 618, the Hon'ble Supreme Court while dealing with the power under Section 11(6) of the Act, held that "While

exercising the power or performing the duty under Section 11 (6) of the Act, the Chief Justice has to consider whether the conditions laid down by the section for the exercise of that power or the performance of that duty exist. Therefore, unaided by authorities and going by general principles, it appears to us that while functioning under Section 11(6) of the Act, a Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him is a party, whether the conditions for exercise of the power have been fulfilled, and if an arbitrator is to be appointed, who is the fit person, in terms of the provision. Section 11(7) makes his decision on the matters entrusted to him, final".

43. In **Sundaram Finance Ltd. v. NEPC India Ltd.**, (1999) 2 SCC 479 the Hon'ble Supreme Court observed that "But a situation may so demand that a party may choose to apply under Section 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. If an application is so made, the court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so

satisfied, the court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the court while exercising jurisdiction under Section 9 can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the court is not debarred from dealing with an application under Section 9 merely because no notice has been issued under Section 21 of the 1996 Act.

44. However, in view of the amendment to the Arbitration and Conciliation Act, 1996 in 2015, courts are required to merely see whether there is an arbitration clause. If so, the case can be referred for arbitration as long as there is an arbitration clause.

45. As per the decision of Hon'ble the Supreme Court in **DURO Felguera S.A versus Gangavaram Port Ltd**, *supra*, it is clear that once an arbitration clause exists the courts have limited role and have to merely refer the case to the arbitrator.

46. In my view, the respondents having ceded their power to appoint an arbitrator cannot now insist on appointment of arbitrator as per their requirement by treating the venue of arbitration as the seat of arbitration.

47. It is for the arbitrator to decide whether dispute is arbitrable or not. In fact, prior to the amendment to section 11 (6) of the Arbitration and Conciliation Act, 1996, this court may have made a deeper enquiry and could have declined to refer the case for arbitration and decided the case on merits in the light of the decision of the Honourable Supreme Court in **Oriental Insurance Co Ltd versus Narbheram Power and Steel Pvt. Ltd.** (2018) 6 SCC 534. However, this avenue is no longer open in the light of the amendment to section 11 of the Act.

48. The submission of the learned counsel for the respondent that the petition is pre-mature and therefore not open for the petitioner to approach the Court without giving an opportunity to the 2nd respondent to appoint arbitrators cannot be countenanced.

49. The Petitioner sent out several representation and the 2nd respondent also responded and had asked the 1st respondent to constitute a panel by their letter dated 15.3.2017. the 2nd respondent has later taken a stand that the dispute is not arbitrable which has led to the filing of the present case. Therefore, the submission that the petition is premature cannot be accepted.

50. In view of the amendment, the powers of the courts are limited. It has to be merely appoint an arbitrator once there is an arbitration clause. Therefore, question on merits as to whether the dispute is arbitrable or not is to be left to the arbitrator.

51. I am therefore of the firm view that for the purpose of Section 11(6) of the Act, an arbitrator should be appointed in view of the clause for resolution of dispute by way of arbitration. However, whether the dispute is indeed arbitrable or not is something which can be decided as a preliminary issue by the arbitrable tribunal.

52. Under these circumstances, Hon'ble Mr Justice K.Chandru, (Retd.) High Court, Madras residing at No.4-B,

Kanchana, 78, St.Marys Road, Abiramapuram, Chennai 18 is appointed as a sole arbitrator to resolve the dispute between the parties.

53. The learned arbitrator may conduct the proceedings under the aegis of Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

54. Accordingly, this original petition is allowed.

Sd/-C.S.N.J

24/10/2018

//Certified to be a true copy//

Dated this the day of 2018

JJ 30.11.2018

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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