

\$-17 to 19

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 10.10.2018

+ O.M.P. (COMM) 334/2018

(18) O.M.P. (COMM) 335/2018

(19) O.M.P. (COMM) 336/2018

DREDGING CORPORATION OF INDIA Petitioner

Through: Mr.V.Seshagiri, Mr.Siddharth
Sachar, Mr.Varun Loonkar, Advs.

versus

MERCATOR LIMITED Respondent

Through: Mr.Sandeep Sethi, Sr. Adv. with
Mr.A.K.Gupta, Mr.Prashant Bhardwaj,
Mr.Amitava Majumdar, Mr.Arjun Mital,
Ms.Tripti Sharma, Advs. for respondent in
OMP(Comm.) No.334/2018

Mr.Arvind Kumar Gupta, Mr.Amitava
Majumdar, Mr.Prashant Bhardwaj,
Mr.Gajanand Kirodiwar, Mr.Arjun Mittal,
Ms.Tripti Sharma, Advs. for respondent in
OMP (Comm.) Nos.335&336/2018.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. The respondent has challenged the jurisdiction of this Court to entertain these petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act').

2. The ground of challenge is that the seat of arbitration in the present petitions was London and therefore, Part-I and Section 34 of the Act will not be applicable to such arbitration

proceedings.

3. The Arbitration Agreement between the parties is contained in Clause 24 of the Time Charter Party Agreement(s) which is identical in all three cases and is reproduced hereinbelow:

“24. Law and Arbitration:

a) This contract shall be governed by and construed in accordance with Indian Law and any dispute arising out of or in connection with this contract shall be referred to arbitration in London in accordance with the Arbitration Act, 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this clause. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator with 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in

writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counter claim exceeds the sum of USD 50,000 (or such other sum as the parties may agree), the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.”

4. It is not disputed by the counsel for the petitioner that this Agreement would make London as the ‘Seat’ of arbitration. In fact, the learned senior counsel for the respondent has brought my notice to the procedural order passed by the Arbitral Tribunal for the hearing held from 25.03.2017 to 27.03.2017, wherein it is categorically recorded that the ‘Seat’ of arbitration in terms of the Arbitration Agreement is London, though the hearings were being conducted at New Delhi. The relevant extract from the said order is as under:

“Both Parties confirm that the Seat of the Arbitration in terms of the Arbitration Agreement in the Charterparty(s), is London, although the hearings were conducted in New Delhi. It is also confirmed by the Parties that the procedure adopted by the Tribunal was by consent of the Parties.”

5. The petitioner had also filed an application under Section 57(3) of the (English) Arbitration Act, 1996 before the Arbitral Tribunal seeking correction of the Award.

6. It is further brought to my notice that the petitioner itself

has challenged the Impugned Award before the High Court of Justice, Business and Property Courts of England and Wales, Commercial Court (QBD) by way of a petition under Section 68 of the (English) Arbitration Act, 1996. In the said petition also, it has been contended that the ‘Seat’ of arbitration was London. In fact, the petitioner has also filed an affidavit of Mr.Damian Michael Joseph Wilkes, Solicitor of St. Olave’s House, Ironmonger Lane, London EC2V 8EY, wherein the said witness has also contended that the ‘Seat’ of arbitration remained at London while the ‘venue’ was shifted to New Delhi with the consent of the parties.

7. Learned counsel for the petitioner submits that the respondent vide its letter dated 22.12.2010 had sought the change of Seat of arbitration to New Delhi. This request of the respondent had been agreed to by the petitioner, as conveyed in its letter dated 27.12.2010; only a formal document making amendment to the Arbitration Agreement was to be executed thereafter. He further submits that by an e-mail dated 27.12.2010, the petitioner had informed the respondent that the change in the contract conditions will require an approval from the Board of Directors of the petitioner. He submits that such approval was thereafter taken on 11.03.2011 and therefore, the seat of arbitration was shifted from London to New Delhi with the consent of the parties.

8. Learned senior counsel for the respondent, however, brings to my notice the subsequent correspondences

exchanged between the parties starting from the invocation of the Arbitration Agreement by the respondent vide its notice dated 07.03.2011. In response to this notice, the petitioner vide its letter dated 14/17.03.2011, had stated that the parties had mutually agreed that the arbitration shall be in India to avoid unnecessary expenditure. This was immediately refuted by the respondent vide its letter dated 18.03.2011 stating *inter alia* as under:

“We also note from your email that your clients have advised you of an agreement to move the arbitration from London to India. With respect we must bring to your attention that no such agreement was reached as between our clients and yours.”

9. The petitioner vide its letter dated 23.03.2011 informed the respondent that the ‘venue’ of arbitration can be New Delhi and the arbitration be still governed by the (English) Arbitration Act, 1996 and by the procedure as prescribed by the London Maritime Arbitrators Association Rules (LMAA Rules).

10. The respondent, vide its letter dated 25.03.2011 responded to the above in the following words:

“In the circumstances, our clients would be agreeable to amend the venue as stated in the arbitration clause in the captioned charterparty at Clause 24 from London to New Delhi subject to your confirmation by return that save the change of venue from London to New Delhi, Clause 24 of the Charterparty, namely the Arbitration Clause remains un-amended, i.e. the arbitration proceedings, shall be in accordance with the Arbitration

Act 1996 (being the English Arbitration Act 1996) or any statutory modification or re-enactment thereof and the London Maritime Arbitrators Association Terms 2006, while the Charterparty contract being governed by and construed in accordance with Indian Law.

If we do not hear from you with confirmation of the above understanding by today, we shall proceed on the basis that there is no agreement for change of venue and the arbitration to continue with the venue being London as per the Agreement.”

11. The petitioner in turn, agreed to the suggestion of the respondent and by its communication dated 25.03.2011 stated as under:

“Your e-mail dt. 25.3.2011 in respect of all the three contracts we confirm that the arbitration clause will be as contained in the agreement except the so far as the venue is concerned, it will be New Delhi instead of London. Though the arbitration clause mentions that Arbitration Act, 1996 it is agreed that the reference is to the English Arbitration Act, 1996. This is to draw your attention to the fact that the words “Being the English Arbitration Act, 1996” are for the purpose of clarification that the Arbitration Act, 1996 means the English Arbitration Act, 1996. We presume that it is not an amendment to the arbitration clause. This is only for clarification because the only amendment that is suggested is only in regard to the venue. In that view we presume that after the words in accordance with the Arbitration Act, 1996 “being the English Arbitration Act, 1996” is not being suggested as an amendment to the arbitration agreement but only to clarify that for the purpose of understanding of parties that the English Arbitration Act, 1996 that will apply. ”

12. The respondent, vide its letter dated 25.03.2011

confirmed that the (English) Arbitration Act, 1996 would be applicable to the 3 Charter Party Agreement(s) and 'venue' of arbitration shall be shifted from the London to New Delhi.

13. A reading of the above correspondence exchanged between the parties would clearly show that the parties did not arrive at a consensus for change of 'Seat' of arbitration from London to New Delhi though this was the initial request of the respondent.

14. I cannot not agree with the submissions made by the counsel for the petitioner that in the above correspondence the use of word 'venue' by the parties has to be construed as 'seat'. In my opinion, the parties were very well aware of the distinction between the 'seat' and 'venue' and therefore, the respondent insisted that while the 'Seat' of arbitration shall remain at London, it is only the 'venue' which can be shifted to New Delhi. The petitioner also agreed to the same as in its opinion the change of 'venue' would not require any amendment to the Charter Party Agreement, while a change in seat would have required such amendment.

15. Once the Arbitration Agreement was invoked by the respondent, though the petitioner wanted such change, the respondent refused. Thereafter, the parties only agreed to a change of 'venue' of arbitration from London to New Delhi.

16. This was the consistent understanding of the petitioner itself, not only before the Arbitral Tribunal as recorded in its procedural order referred hereinabove, but also by its conduct

of filing a petition under Section 68 of the (English) Arbitration Act, 1996 before the High Court of Justice at London.

17. In *Union of India vs. Hardy Exploration and Production (India) INC* 2018 SCC OnLine SC 1640, the Supreme Court after considering the earlier Judgments passed by that Court, has held as under:

“34. On a perusal of Articles 20 and 31(3) of the UNCITRAL Model Laws, we find that the parties are free to agree on the place of arbitration. Once the said consent is given in the arbitration clause or it is interpretably deduced from the clause and the other concomitant factors like the case of Harmony Innovation Shipping Ltd. which states about the venue and something in addition by which the seat of arbitration is determinable. The other mode, as Article 20 of the UNCITRAL Model Law provides, is that where the parties do not agree on the place of arbitration, the same shall be determined by the Arbitral Tribunal. Such a power of adjudication has been conferred on the Arbitral Tribunal. Article 31(3) clearly stipulates that the Award shall state the date and the place of arbitration as determined in accordance with Article 20(1).

xxxxx

37. In the present case, the place of arbitration was to be agreed upon between the parties. It had not been agreed upon; and in case of failure of agreement, the Arbitral Tribunal is required to determine the same taking into consideration the convenience of the parties. It is also incumbent on the Arbitral Tribunal that the determination shall be clearly stated in the ‘form and contents of award’ that is postulated in Article 31. There has been no determination.

38. Be it noted, the word ‘determination’ requires a positive act to be done. In the case at hand, the only aspect that has been highlighted by Mr. C.U. Singh, learned senior counsel, is that the arbitrator held the meeting at Kuala Lumpur and

signed the award. That, in our considered opinion, does not amount to determination. The clause is categorical. The sittings at various places are relatable to venue. It cannot be equated with the seat of arbitration or place of arbitration which has a different connotation as has been held in Reliance Industries Ltd. (I), (II) (supra), Harmony Innovation Shipping Limited (supra) and in Roger Shashoua (supra).

39. 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. In Ashok Leyland Limited and State of T.N., the Court has reproduced the definition of 'determination' from Law Lexicon, 2nd Edition by Aiyar, P. Ramanatha and Black's Law Dictionary, 6th Edition. The relevant paragraphs read thus:—

“Determination or order.—The expression 'determination' signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal. The expression 'order' must have also a similar meaning, except that it need not operate to end the dispute. Determination or order must be judicial or quasi-judicial. Jaswant Sugar Mills Ltd. v. Lakshmi Chand (Constitution of India, Article 136).”

“A 'determination' is a 'final judgment' for purposes of appeal when the trial court has completed its adjudication of the rights of the parties in the action. Thomas Van Dyken Joint Venture v. Van Dyken

40. The said test clearly means that the expression of determination signifies an expressive opinion. In the instant case, there has been no adjudication and expression of an opinion. Thus, the word 'place' cannot be used as seat. To elaborate, a venue can become a seat if something else is added to it as a concomitant. But a place unlike seat, at least as is seen in the contract, can become a seat if one of the conditions precedent is satisfied. It does not ipso facto assume the status of seat. Thus understood, Kuala Lumpur is not the seat or place of arbitration and the interchangeable use will not apply in stricto sensu."

18. Applying the above Judgment to the facts of the present case, not only clause 24 of the Charter Party Agreement(s) but also the conduct of the parties, gathered from the exchange of correspondence, their conduct before the Arbitral Tribunal as also the conduct subsequent to the passing of the Impugned Award, would lead to a conclusion that the parties agreed on the 'Seat' of arbitration to be at London.

19. In view of the above, this Court would lack jurisdiction to entertain the present petitions under Section 34 of the Act. The same are accordingly dismissed. This shall however, not in any manner, affect the proceedings filed by the petitioner before the Competent Court of jurisdiction.

NAVIN CHAWLA, J

**OCTOBER 10, 2018
RN**