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

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Pronounced on: 25.04.2018

+ ARB.P. 637/2016 and I.A. no. 4326/2017

OK PLAY AUTO PVT. LTD.

..... Petitioner

Through Mr.Abhinandan Banerjee, Mr. Vipul
Kumar and Mr. Akash Chandra
Jauhari, Advs.

versus

INDIAN COMMERCE & INDUSTRIES
CO. PVT. LTD.

..... Respondent

Through Ms.Shalini Kaul and Mr.Anandh K.,
Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed under section 11 of the Arbitration and Conciliation Act, 1996 to secure appointment of an independent and impartial arbitral tribunal for adjudication of the disputes between the parties.

2. The petitioner is a company having its registered office at Delhi. The respondent is also a private limited company but having its registered office at Chennai.

3. The petitioner in the year 2011 floated a tender for the proposed construction of a factory building at Non-SEZ, Phase-III, Mugundarayapuram, Ranipet, Vellore, Tamil Nadu. The proposal of the

respondent dated 20.8.2011 was accepted by the petitioner vide Job Order dated 29.8.2011 for a total consideration of Rs.2,47,28,726/-. The said Job Order is said to have been accepted by the respondent vide its letter dated 2.9.2011.

4. It is the contention of the petitioner that during the course of execution of the work the respondent did not adhere to the terms and conditions of the contract. On 23.8.2012 the respondent raised a final bill for Rs.12,70,109/- and claimed a balance outstanding of Rs.29,15,624/- from the petitioner. It is contended by the petitioner that they have in all paid a sum of Rs.1,67,79,812.40/- and that no further amount is payable to the respondent. It is pleaded that the petitioner has expressly brought to the notice of the respondents major defects in the work done.

5. On 18.8.2015 the respondent filed against the petitioner before the Madras High Court a Civil Suit against the petitioner being CS 735/2015 for recovery of Rs.29,15,623.69/- together with interest. By order dated 3.8.2016 the Madras High Court was pleased to allow the application of the petitioner under Section 8 of the Arbitration Act and gave liberty to the parties to approach the competent court under the provisions of the Arbitration Act. The Court observed that existence of the arbitration clause is not disputed by either of the parties. The present petition has now been filed by the petitioner seeking appointment of an impartial and independent arbitral tribunal.

6. I may note that the pursuant to the liberty granted by the Madras High Court, the respondent also filed a petition under Section 11(6) of the Arbitration Act, before the Madras High Court. However, the Madras High Court vide its order dated 03.03.2017 noted that the petition in the Madras High Court was filed on 15.09.2016 whereas the petition seeking

appointment of an arbitrator was filed by the petitioner before this court on 11.08.2016. The filing of the petition before this court was prior to in time. Hence, in view of Section 11(11) of the Arbitration Act, without expressing any opinion on the controversy raised by the parties on merits, the Madras High Court disposed of the said petition.

7. The respondent admits existence of an Arbitration clause but has refuted the contention of the petitioner regarding territorial jurisdiction of this Court. It is pleaded in the reply that on 08.06.2011, the petitioner issued a tender notice inviting bids. The tender notice contained an arbitration clause which provided that the venue of arbitration would be Chennai and the courts in Chennai would have territorial jurisdiction. It is urged that subsequently, when the petitioner accepted the offer of the respondent and issued the job order dated 29.08.2011, certain modifications were made in the arbitration clause. However, the salient terms of the arbitration clause as contained in the tender, namely, that the disputes are deemed to have arisen in Chennai, the venue of arbitration shall be Chennai and the courts in Chennai shall have the territorial jurisdiction were not changed. It is pleaded that on 02.09.2011 the respondent sent a communication accepting the job order of the petitioner but suggesting a different arbitration clause. It is again pleaded that even in this communication there was no alteration of three salient features of the original arbitration clause. It is pleaded that the respondent's revised offer dated 02.09.2011 was accepted by the petitioner as thereafter, the parties progressed towards performance of the contract without exchanging any further communication. Hence it is pleaded that only the courts in Chennai have the territorial jurisdiction to deal with this case. The venue of arbitration is also to be Chennai.

8. I have heard learned counsel for the parties.

9. Learned counsel for the petitioner has reiterated that the clause as contained in the job order dated 29.08.2011 is what is applicable to the facts of this case. However, as the arbitrator was the Chief Executive of the petitioner, in view of the amendment to the Arbitration Act, this court may appoint an independent arbitrator. It is pleaded that this court would have the territorial jurisdiction to adjudicate the present petition. It has been strongly pleaded that a part of the cause of action arose in Delhi. The job order dated 29.08.2011 was issued from Delhi. Acceptance was sent by the respondent to Delhi. The invoices have also been sent to Delhi by the respondent. Reliance has been placed on the judgment of the Supreme Court in ***ABC Laminart v. AP Agencies, 1989 (2) SCC 163***; on the judgment of this court in ***M/s. Progressive Constructions Ltd. v. Bharat Hydro Power Corporation, AIR 1996 Delhi 92*** and on also on the judgment of this court in ***Degremont Ltd. v. Kolkata Municipal Corporation, MANU /DE /2270 /2013***.

10. Learned counsel appearing for the respondent however has insisted that in terms of the arbitration clause, it is only the courts in Chennai that have territorial jurisdiction. The arbitration proceedings are also to be held in Chennai. The seat of arbitration is Chennai. She reiterates that the three salient features of the arbitration clause as contained in the tender document continue to apply to the parties namely that the venue shall be Chennai and the courts in Chennai shall have jurisdiction. In addition even otherwise, she further pleads that no part of cause of action has arisen in Delhi and hence courts in Delhi would not have territorial jurisdiction in the matter. She has pleaded that the offer was made by the respondent in Chennai. The purchase order was placed by the petitioner on the respondent in Chennai. Invoices

raised were sent to the architect in Chennai. The learned counsel has hence stressed that no part of the cause of action arose in Delhi. Hence, this court would even otherwise have no territorial jurisdiction.

11. I may note the relevant clauses relied upon by learned counsel for the parties. The tender conditions of the contract dated 08.06.2011 has an arbitration clause being clause 40 which reads as follows (hereinafter referred to as the 'First arbitration clause'):-

“40. LAW AND HEADINGS

The Contract and all matters arising from or connected with the Contract including validity thereof shall be subject to laws of India and the parties irrevocably submit to the jurisdiction of Courts in India.

All disputes arising from this Contract shall be deemed to have arisen in Chennai and referred by either party to Arbitration in accordance with the Indian Arbitration Act in force. The venue of Arbitration shall be Chennai

Further disagreement, if any, after the Arbitration Award may be resolved through Courts of Law in Chennai.”

The headings to these conditions are for convenience only and are not to be taken into account in the construction.”

12. In the Job Order dated 29.08.2011 issued by the petitioner accepting the bid of the respondent, certain additional conditions including a fresh arbitration clause were stated. The proposed arbitration clause as stated in the job order reads as follows (this clause is hereinafter referred to as the 'Second arbitration clause'):-

“That all disputes arising out of this contract in its effect or interpretation or other including the matters for which there is no specific provision in this contract but arising out of this

contract, such disputes shall be referred for the arbitration to the Chief Executive/ Plant Director of M/s OK Play India Ltd. who will act as Arbitrator. The decision of the Chief Executive/ Plant Director of M/s OK Play India Ltd shall be final & binding between M/s OK Play India Ltd and the PEB Contractor"

13. On 2.9.2011, the respondent in response to the job order dated 29.08.2011 sent by the petitioner, wrote a communication accepting the job order but suggested a different arbitration clause. Some clarifications on the payment terms were also suggested. The arbitration clause suggested by the respondent was as follows(hereinafter referred to as the 'Third arbitration clause'):-

"2) Clause 10 (Arbitration):.

As you are aware, the Arbitrator has to be a Third Party (not Representative of the parties to the dispute). Hence, this clause may kindly be amended as follows:

That all disputes arising out of this contract in its effect or interpretation or other including the matters for which there is no specific provision in this contract but arising out of this contract, such disputes shall be referred for the arbitration to the Architects M/s.C.R.Narayana Rao, who will act as Arbitrator. The decision of the Architects M/s.C.R.Narayana Rao shall be final and binding between M/s.OK Play India Ltd. and the PEB Contractor."

14. Thereafter, there has been no communication between the parties. Both the parties accept that there is an arbitration clause between the parties. The dispute is as to which of these three clauses would be applicable to the parties.

15. As far as the first arbitration clause is concerned it is contained in the notice inviting tender that was issued by the petitioner. The settled legal position is that under the Indian Contract Act, 1872 the tender is an invitation seeking an offer i.e. invitation to treat. It is not an offer. In this context reference may be had to the judgment of the Supreme Court in the case of ***Bank of India & Ors. vs. O.P. Swaranakar etc., AIR 2003 SC 858*** where the Supreme Court described the position of a tender as follows:-

“52. Chitty on Contract states that law thus:

"Tenders ...A statement that goods are to be sold by tender is not normally an offer to sell to the person making the highest tender; it merely indicates a readiness to receive offers. Similarly, an invitation for tenders for the supply of goods or for the execution of works is, generally, not an offer, even though the preparation of the tender may involve very considerable expense. The offer comes from the person who submits the tender and there is no contract until the person asking for the tenders accepts one of them. These rules, may, however, be excluded by evidence of contrary intention : e.g. where the person who invites the tenders states in the invitation that he binds himself to accept the highest offer to buy (or as the case may be, the lowest offer to sell or to provide the specified services). In such cases, the invitation for tenders may be regarded either as itself an offer or as an invitation to submit offers coupled with an undertaking to accept the highest (or, as the case may be, the lowest) offer; and the contract is concluded as soon as the highest offer to buy (or lowest offer to sell, etc.) is communicated..."

16. In the present case, the arbitration clause (First arbitration clause) as contained in the terms of the tender as noted above stipulates that the venue of arbitration shall be Chennai and the courts in Chennai shall resolve all disputes. The respondent made their bid in response to the tender which was

an offer under the Contract Act. This offer was accepted by the petitioner when it issued the job order dated 29.08.2011. However, as noted above while issuing the job order, the terms of the arbitration agreement were sought to be modified. A perusal of the job order dated 29.08.2011 would show that the scope of work was defined in terms of the tender document however, a new arbitration clause was proposed in effect, i.e. the second arbitration clause. The second arbitration clause under the Contract Act was a counter offer.

17. The Division Bench of this court in ***Gammon India Ltd. vs. Union of India (UOI) & Ors., 2003 (1) ARB.LR 353 (Delhi)*** defined a counter offer as follows:-

“21. The matter can be examined in the context of provisions of Indian Contract Act as well. It is well known that an NIT is invitation to bidder to make offer i.e. it is invitation to offer. An offer or proposal is defined in Section-2(a) of the Indian Contract Act which reads as under:

"2(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

We may point out that there is no concept of "conditional offer" in the law of the Contract. offer has to be on certain terms. The 'acceptance' thereof should be absolute or unconditional (Section 7 of the Contract Act) to make it a concluded contract. A conditional acceptance becomes counter offer and it is for the offerer to accept it or not.
.....”

18. The respondent in response to the said counter offer sent a communication dated 02.09.2011 accepting the job order. Hence, there arose

a binding contract between the parties. However, on the arbitration clause the respondent suggested a different arbitration clause i.e. the third arbitration clause. Thereafter there has been no communication between the parties regarding the arbitration clause.

19. What is the effect of this exchange of proposed arbitration clauses. The petitioner accepted the bid of the respondent and placed the job order on 29.08.2011. However, while placing the job order, the second arbitration clause was proposed, namely, a counter offer was made regarding the arbitration procedure. The respondent accepted the job order but made a counter offer regarding the arbitration clause. Communications thereafter on the contents of the arbitration clause have ceased. Both the parties agree that there is an arbitration agreement between the parties. They are *ad idem* of this aspect. Both the parties have in fact filed petitions under Section 11 of the Act as noted above i.e. the respondent having moved before the Madras High Court and the petitioner having moved before this court.

20. It is true that by conduct it may be possible to conclude that the parties have accepted the last arbitration agreement as a binding agreement between the parties. The Supreme Court in ***Ramji Dayawala and Sons (P) Ltd. vs. Invest Import, 1981(1) SCC 80*** held as follows:-

“17. It was, however, contended that once sub-contract Ext. A was admittedly signed and executed by the Managing Director of the appellant company, subsequent attempt on behalf of the appellant to repudiate a part of the contract would be of no avail and the court cannot give effect to it except if the novatio suggested by the appellant is unreservedly accepted and agreed to by the respondent. In the facts of a given case acceptance of a suggestion may be sub silentio reinforced by the subsequent conduct. True it is that the general rule is that an offer is not accepted by mere silence on the part of the offeree. There may, however, be further facts which

taken' together with the offeree's silence constitute an acceptance. One such case is where a part of the offer was disputed at the negotiation stage and the original offeree communicated that fact to the offerer showing that he understood the offer in a particular sense. This communication will probably amount to a counter offer in which case it may be that mere silence of the original offerer will constitute his acceptance (see Halsbury's Laws of England, 4th Edn., Vol. 9, para 251). Where there is a mistake as to terms of a document as in this case, amendment to the draft was suggested and a counter offer was made, the signatory to the original contract is not estopped by his signature from denying that he intended to make an offer in the terms set out in the document; to wit, the letter and the cable (Ibid. para 295). It can, therefore, be stated that where the contract is in a number of parts it is essential to the validity of the contract that the contracting party should either have assented to or taken to have assented to the same thing in the same sense or as it is sometimes put, there should be consensus ad idem. And from this it follows that a party may be taken to have assented if he has so conducted himself as to be estopped from denying that he has so assented.”

21. However, in the present case neither of the parties have pleaded or shown that the third arbitration agreement as contained in communication dated 02.09.2011 of the Respondent has on account of the conduct of the parties been accepted as binding on the parties. In my opinion, the only consensus ad idem between the parties was that the parties were agreeable to arbitration in case there were disputes between the parties. They have not been able to agree on the mechanism of appointment of an arbitrator as spelt out in the three clauses that were exchanged. There is no unequivocal acceptance.

22. The plea of the respondent that the essential features of the arbitration clause as propounded in the tender document i.e. first arbitration clause,

namely, that the venue of arbitration shall be Chennai and the courts in Chennai shall only have jurisdiction survived this exchange of clauses is an incorrect contention. When the petitioner issued the job order and made the counter offer, he suggested the second arbitration clause. The said counter offer does not anywhere stipulate or hold out that any part of the original conditions stated in the first arbitration agreement shall continue to operate. Same is the position when in response to this job order/second arbitration agreement/counter offer, the respondent made an another counter offer/suggested the third arbitration clause. This offer of the respondent also does not stipulate anywhere that the three alleged essential conditions as stated in the first arbitration agreement will apply. Hence, the first proposed arbitration agreement as contained in the tender cannot be said to have been partly accepted by the parties and cannot said to bind the parties in part as has been claimed by the respondent. The conclusion that follows is that the parties have failed to reach a *consensus ad idem* on the procedure to appoint an arbitrator/seat of arbitration.

23. As far as second plea of the respondent, namely, that the courts in Delhi do not have territorial jurisdiction as no part of the cause of action arose in Delhi is concerned, the same in my opinion is misplaced.

24. In ***A.B.C. Laminart Pvt. Ltd. & Anr. vs. A.P.Agencies, Salem, (1989) 2 SCC 163*** on the territorial jurisdiction and as to where a part of the cause of action may arise, the Supreme Court held as follows:-

“13. Under Section 20(c) of the Code of Civil Procedure subject to the limitation stated theretofore, every suit shall be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or in part arises. It may be remembered that earlier Section 7 of Act 7 of 1888 added Explanation III as under:

“Explanation III.—In suits arising out of contract the cause of action arises within the meaning of this section at any of the following places, namely:

- (1) the place where the contract was made;*
- (2) the place where the contract was to be performed or performance thereof completed;*
- (3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.”*

14. The above Explanation III has now been omitted but nevertheless it may serve as a guide. There must be a connecting factor.

15. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is

the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the court where the suit is filed and that contract is found to be invalid, such part of cause of the action disappears. The above are some of the connecting factors.”

25. Hence, a suit on a contract can be filed at the place where it was made. Determination of the place where the contract was made is a part of the law of contract. In the present case, parties were ad idem regarding the formation of a contract when the petitioner posted its work order dated 29.08.2011 accepting the offer of the respondent. Records show that the work order was issued from Delhi and was sent to the respondent in Chennai. In these facts, which is the place where it can be said that the contract was formed. The Supreme Court in the case of *Bhagwandas Goverdhandas Kedia vs. Girdharilal Parshottamdas and Co. and Ors.*, (1966) 1 SCR 656 on the formation of a contract noted as follows:-

“26. Then come cases of acceptance by post, telegraph, telephone, wireless and so on. In cases of contracts by correspondence or telegram, a different rule prevails and acceptance is complete as soon as a letter of acceptance is posted or a telegram is handed in for despatch. One way to describe it is that acceptance is complete as soon as the acceptor puts his acceptance in the course of transmission to the proposer so as to be beyond his power to recall. Acceptance by post or telegram is considered a usual mode of communication and it certainly is the most often followed. But letters get lost or miscarried and telegrams get garbled. What should happen if the letter got lost in the post or the telegraphic message got mutilated or miscarried? It was held as early as 1813 in *Adams v. Lindsell* [(1813) 106 ER 250] that even in such a contingency acceptance must be taken to be complete as soon as the letter is posted and not when it is delivered. It was observed:

“For if the defendant were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it; and so it might go on *ad infinitum*.”

....

“29. It is hardly necessary to multiply examples. It is sufficient to point out that Lord Denning (then Lord Justice) in the *Entores case* also observes:

“When a contract is made by post it is clear law throughout the Common law countries that the acceptance is complete as soon as the letter is put into the post box, and that is where the contract is made.”

26. A learned Single Judge of this court in ***Progressive Constructions Ltd. vs. Bharat Hydro Power Corporation Ltd. (supra)*** was dealing with a case where the respondent published a notice inviting tender. The respondent was a company having its head office in Calcutta. The petitioner who was having its registered office at Hyderabad submitted its tender to the respondent at Calcutta. This court while noting various judgments of the other High Courts concluded as follows:-

“18. So is the view taken by a Division Bench of Lahore High Court in *Pokhar Mal v. Khanewal Oil Mills*, AIR 1945 Lahore 260 (10), and by Judicial Commissioner's Court of Nagpur in *Mill Stores Trading Co. v. Seth Mathuradas*, AIR 1921 Nagpur 42 (11).

19. It is thus clear that in view of S-4 of the Contract Act when offerer and offeree are not at one place and are exchanging the offer and acceptance through post then the contract would be deemed to have been entered into at the place where the offer was received and the acceptance was posted. The place of

delivery of acceptance is irrelevant and does not provide any cause of action. Merely by placing reliance on the delivery of letter of acceptance of offer, suit by reference to S-20(c) CPC cannot be filed at the place where the letter of acceptance was delivered for delivery of the letter on acceptance is not a part of the cause of action.”

The above view was accepted by Mulla “The Code of Civil Procedure” [18th edition]. The learned authors writes as follows:

An action for breach of contract can be brought, either at the place where the contract was made or at the place where the breach was committed. In deciding the question as to where the contract is made, the court must take into consideration the provision of s 4 of the Contract Act. A contract is made when an offer of one party is accepted by the other party. Where acceptance is conveyed to the plaintiff at C, a part of the cause of action arises there and the civil court has jurisdiction to entertain petition under ss 14 and 17 of the Arbitration Act, 1940. In case of a contract by post or telegram, the contract is complete when acceptance of the offer is put in the cause of transmission of the offeror by the offeree by posting a letter or dispatching a telegram and it is the place where acceptance is posted which is the place where the contract is made. However, in the case of a contract by telephone though the offeror and the offeree may be at different places separated by space, they are in a sense in the presence of each other in as much as they can instantaneously hear each other. Communications by telephone or telex, which are instantaneously heard, stand for that reason on a different footing than those by post or telegram and therefore the rule in regard to contracts by post or telegram does not apply to those by telephone and telex. In the case it is the latter, place where acceptance of the offer is received by the place of the contract.

27. Hence, a contract is made at the place where the letter of acceptance is posted. In the present case, the letter of acceptance that was issued by the

petitioner, namely, communication dated 24.8.2011 shows that it was posted in Delhi. A part of the cause of action has hence clearly arisen in Delhi.

28. Section 2(e)(i) of the Arbitration Act describes the appropriate court as follows:-

“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;”

29. Keeping in view above, the courts in Delhi would have territorial jurisdiction to adjudicate the present arbitration petition.

30. As part of cause of action arisen in Delhi, in my opinion this court would have territorial jurisdiction to adjudicate the disputes between the parties. I allow the present petition and appoint Mrs.Kiran Nath (Retd. District Judge) (Mobile: 9910384659) as the sole arbitrator to adjudicate the dispute between the parties. The arbitration shall be held under the aegis of the Delhi International Arbitration Centre.

31. In view of the above, the present petition stands disposed of. All the pending applications, if any, also stand disposed of.

(JAYANT NATH)
JUDGE

APRIL 25, 2018/n/rb/v