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

Date of decision: 30th November, 2018

\+ ARB.P. 754/2018

\+ ARB.P. 755/2018

VIRGO SOFTECH LTD. ..... Petitioner

Through Mr.Akhil Sacher and Ms.Sunanda Tulayan, Advs.

versus

NATIONAL INSTITUTE OF ELECTRONICS AND INFORMATION TECHNOLOGY. ..... Respondent

Through Mr.Vinod Diwakar, CGSC alongwith Mr.Susheel Kr. Gabgotra, Addl. Director.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. No.16362/2018 (Delay) in ARB.P.754/2018

This is an application seeking condonation of 19 days delay in filing of the rejoinder.

For the reasons stated in the application, the delay is condoned and application stands allowed.

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1. These petitions under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') have been filed by the petitioner seeking appointment of an Arbitrator for adjudicating the disputes that had arisen between the parties in relation to the Agreement(s) executed between the parties. As a common issue arises in these petitions, they are being disposed of by this common order.

2. Counsel for the respondent has raised a preliminary objection on the maintainability of the present petitions before this Court on the ground of lack of territorial jurisdiction. Relying upon the Clause 8.2 of the General Conditions of Contract (GCC), which is identical in both the Agreement(s), he submits that only the High Court of Bombay would have the jurisdiction to entertain the petition(s) under Section 11 of the Act.

3. Clause 8.2 of the GCC is quoted hereinbelow:

> *"8.2* ***Arbitration***
>
> *a) In the case of dispute arising upon or in relation to or in connection with the contract between the Purchaser and MSP-1, which has not been settled amicably, any party can refer the dispute for Arbitration under (Indian) Arbitration and Conciliation Act, 1996. Such disputes shall be referred to the sole arbitrator nominated by DIT.*
>
> *b) Arbitration proceedings shall be held in New Delhi and the language of the arbitration proceedings and*

that of all documents and communications between the parties shall be English.

The decision of the arbitrators shall be final and binding upon both parties. The expenses of the arbitrators as determined by the arbitrators shall be shared equally by the Purchaser and MSP-1. However, the expenses incurred by each party in connection with the preparation, presentation shall be borne by the party itself. All arbitration awards shall be in writing and shall state the reasons for the award. The courts in Aurangabad (MS) only shall have exclusive jurisdiction to try and entertain any dispute arising there from."

(Emphasis supplied)

4. Counsel for the petitioner submits that Clause 8.2(b) of the GCC provides for seat of arbitration to be at New Delhi. Relying upon the judgment of the Supreme Court in ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.***, 2012(8) SCALE 333; ***Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd. and Anr***, AIR 2017 SC 2105 and of this Court in *M/s* ***NJ Construction (Through its Proprietor) v. Ayursundra Health Care Pvt. Ltd***, 2018(168) DRJ 274; *Mr.****Raman Deep Singh Taneja v. Crown Realtech Pvt. Ltd.***, 2017 SCC OnLine Del 11966; and ***Rohit Bhasin and Anr. v. Nandini Hotels***, 2013 SCC OnLine Del 2300, he submits that the seat of the arbitration being at New Delhi, this Court would have exclusive jurisdiction to entertain the present petitions.

5. He also placed reliance of Clause 8.2(b) of the Special Conditions of Contract (SC), which reads as under:

"8.2 (b) The Arbitration proceedings shall take place in New Delhi in India."

6. I have considered the submissions made by the counsel for the petitioner, however, find no merit in the same. Clause 8.2(b) of the GCC which has been reproduced hereinabove, clearly provides that though the arbitration proceedings shall be conducted at New Delhi, the "courts in Aurangabad (MS) only shall have exclusive jurisdiction to try and entertain any disputes arising there from". The Agreement(s) therefore, clearly provides that all disputes, including those arising out of the arbitration proceedings, have to be necessarily tried by the Courts at Aurangabad alone. In view of the above specific Clause, the stipulation that the arbitration proceedings shall be held at New Delhi, would make New Delhi only a 'venue' of the arbitration and not the 'seat' of the arbitration.

7. In ***Union of India v. Hardy Exploration and Production (India) INC***, 2018 SCC OnLine SC 1640, the Supreme Court has again considered the law in relation to the difference between the 'seat' and the 'venue' of arbitration and has held as under:

> *"27. In view of the aforesaid development of law, there is no confusion with regard to what the seat of arbitration and venue of arbitration mean. There is no shadow of doubt that the arbitration clause has to be read in a holistic manner so as to determine the jurisdiction of the Court. That apart, if there is mention of venue and something else is appended thereto, depending on the nature of the prescription, the Court can come to a conclusion that there is implied exclusion of Part I of the Act. The principle laid down in Sumitomo Heavy Industries Ltd. (supra) has been referred to in Reliance Industries Limited (II) and distinguished. In any case, it has no applicability to a controversy under the Act. The said controversy has to be governed by*

the BALCO principle or by the agreement or by the principle of implied exclusion as has been held in Bhatia International.

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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).

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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.

8. The judgments being relied upon by the counsel for the petitioner are clearly distinguishable.

9. In ***Bharat Aluminium Company*** (supra), the Supreme Court has held that the 'seat' of the arbitration shall determine the jurisdiction of the Court. In the present case, as the Agreement(s) only provide for 'venue' of arbitration at New Delhi, the said judgment is not applicable.

10. Similar is the position with respect to the judgments of Supreme Court in ***Indus Mobile Distribution*** (supra) and of this Court in ***M/s Calderys India Refractries Ltd. v. A2Z Powercom Ltd,.*** 2014 SCC OnLine Del 7473.

11. In ***NJ Construction*** (supra) the Court was confronted with two separate Clauses in the Agreement; one conferring the jurisdiction in the Courts at Guwahati, while the other in the addendum to the Agreement stipulating that the seat of the arbitration shall be at New Delhi. It was in these circumstances, the Court found that as the seat of the arbitration has been prescribed to be at New Delhi, for disputes relating to arbitration this Court alone would have jurisdiction.

12. In ***Raman Deep Singh Taneja*** (supra) this Court again found that the jurisdiction conferred on this Court by Clause 24 of the Agreement therein was not for matters relating to arbitration.

13. In the present case, Clause 8.2 (b) of the GCC clearly confers exclusive jurisdiction in the Courts at Aurangabad to entertain all disputes arising out of or in relation to the arbitration proceedings.

14. In view of the above, as Clause 8.2 (b) of the GCC confers exclusive jurisdiction in the Courts at Aurangabad in relation to the

disputes arising out of the arbitration proceedings, this Court would not have the territorial jurisdiction to entertain the present petitions.

15. The petitions are, therefore, dismissed, leaving it open to the petitioner to take appropriate legal remedy as may be available to it in law, before the court of competent jurisdiction.

16. There shall be no order as to cost.

Dasti.

NAVIN CHAWLA, J

NOVEMBER 30, 2018/Arya

HIGH COURT OF DELHI
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