

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.08.2019

CORAM :

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

O.P.No.1115 of 2018

and

Appl. Nos.9660 of 2018 & 2220 of 2019

M/s.Vedanta Limited,
(Formerly M/s.Sesa Sterlite Limited)
Thoothukudi,
Tamil Nadu – 628 002
Rep. by its General Manager - Legal

... Petitioner

Vs.

M/s.SGS India Private Limited
4B, Adi Shankaracharya Marg,
Vikhroli (West),
Mumbai – 400 083.

... Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the impugned Award dated 12.05.2018, passed by Arbitrators to the extent that the award seeks to direct the petitioner to pay a sum of Rs.1,13,79,130/- with interest at 10% p.a. from 10.11.2016, till date of realization and to allow the relief sought for by the petitioner in the Arbitral proceedings including removal of all the materials and goods of the respondent from the petitioner's premises.

For Petitioner : Mr.Rahul Balaji
for M/s.R.Parthasarathy

For Respondent : Mr.Kalyan Jhabakh
for M/s.Surana and Surana

ORDER

This Original Petition has been filed to set aside the impugned Arbitral award dated 12.05.2018, passed by an Arbitration Tribunal, consisting of three Arbitrators.

2.Short facts, which are imperative for appreciating the case of the petitioner are as under :

2.1.The petitioner is primarily engaged in exploring, extracting and processing materials like copper, iron ore, aluminium, etc. The respondent/claimant is involved in the business of conducting inspection, verification, testing and certification of raw materials, components, products, etc. for third parties. The respondent has been rendering service to the petitioner, in respect of determination of moisture content in copper concentrates by manual sampling, for more than 15 years. However, in the course of time, the manual sampling process turned to be troublesome, risky, less efficient and less reliable.

2.2.Under such circumstances, the petitioner decided to implement an automated system for the aforesaid process and approached the respondent in the year 2010 for providing, operating and maintaining a new system called Mechanical Sampling System ('MSS' for brevity). A document called 'scope of work' is said to have been executed between the parties on 30.06.2011, wherein, the technical aspects of the project were specified in

detail. On 09.07.2012, the parties are said to have entered into a contract, valid from 01.09.2012 to 31.08.2022, *inter alia*, for provision, operation, implementation and maintenance of the MSS at the petitioner's premises and the entire cost of the project was agreed to be borne by the respondent. The respondent is to said to have incurred a cost of Rs.2,27,59,260/- towards the MSS.

2.3.The MSS became fully operational from August/September 2012. However, from the month of August 2012, the petitioner started insisting that the MSS should satisfy 'bias testing'. When the MSS was subjected to 'bias test' on various occasions, in the presence of third party surveyors, it did not satisfy the 'bias test', for reasons beyond the control of the respondent. It appears that, there was exchange of letters between the parties regarding this issue. Totally dissatisfied with the MSS, the petitioner ultimately issued a notice of termination dated 20.03.2014, to the respondent, terminating the contract dated 09.07.2012.

3.Aggrieved by the termination notice, the respondent referred the dispute to an Arbitration Tribunal, consisting of three Arbitrators. After hearing both parties and on considering the oral and documentary evidence on record, the Arbitration Tribunal, vide a detailed award dated 12.05.2018, opined that, the respondent had not successfully satisfied its obligations as per the contract, hence, the termination of contract is valid, legal, just and

reasonable.

4.However, the Arbitral Tribunal directed the petitioner to pay Rs.1,13,79,130/-, i.e., 50% of the amount that is said to have been spent by the respondent towards MSS, to the respondent, with interest @ 10%. p.a. from the date of claim, solely on the basis of equity and justice. Assailing the award of the Arbitral Tribunal to that extent, this Original Petition came to be filed by the petitioner.

5.Learned counsel appearing for the petitioner submitted that the learned Arbitrators, having found the termination of contract to be valid, have awarded 50% of the claim amount, only on the basis of equity, which is against the statute and therefore, the entire award is liable to be set aside.

6.Learned counsel appearing for the respondent mainly contended that the cause of action arose at a port in Tuticorin, hence, this Court has no jurisdiction to sort out this dispute. The learned counsel made no submissions with regard to the validity of the award on the grounds of equity.

7.This Court gave its anxious consideration to the rival submissions and carefully perused the award and other materials available on record.

8. Inasmuch as the issue raised by the respondent in this case is only with regard to the jurisdiction, this Court has to first resolve that issue. Thereafter, this Court has to see as to whether the compensation awarded by the Arbitration Tribunal on the basis of equity is valid.

9. It is relevant to extract Clause No.25 of the contract dated 09.07.2012.

"25. GOVERNING LAW & JURISDICTION:

(i) This Contract is executed under the laws of India and shall be governed by and interpreted in all respects in accordance with the laws of India.

(ii) It has been agreed that each party irrevocably submits to the non-exclusive jurisdiction of the Courts at Tuticorin, Tamil Nadu (India), and the Courts competent to determine appeals from those courts, with respect to any legal proceedings for enforcement of any arbitral award or for seeking injunctive relief or in case of appeal against arbitral award passed by an arbitrator(s) pursuant to the Arbitration clause of the Contract.

(iii) Each party irrevocably waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, where that venue falls within Tuticorin at Tamil Nadu (India)."

10. A glance of the above makes it clear that, the parties have not only agreed to submit to the non-exclusive jurisdiction of the Courts at Tuticorin, but, also to that of the Courts competent to determine the appeals from those Courts. Admittedly, the cause of action arose at Tuticorin port, but, the Arbitration process took place at Chennai. This Court has supervisory control over the Arbitration processes, taking place at Chennai. When such being the position, it is useful to refer to judgment of the Hon'ble Apex Court in ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and others [(2017) 7 SCC 678]***. The relevant paragraphs are extracted hereunder :

"8.

31. Form and contents of arbitral award.–

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

....

9.

We are of the opinion, the term "subject-matter of the arbitration" cannot be confused with "subject-matter of the suit". The term "subject-matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the

provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.” (emphasis in original)

...

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 Section 16 to 21 of the 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."

In the light of the above judgment, I am of the view that the contention of the learned counsel for the respondent that this Court does not have jurisdiction to decide this matter cannot be accepted.

11.Learned counsel for the respondent relied upon judgment of the Hon'ble Apex Court in ***Union of India (UOI) v. Hardy Exploration and Production (India) Inc. [MANU/SC/1046/2018]***. The relevant paragraph is extracted hereunder :

*"32. 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)."*

From the above judgment, it is clear that the case therein relates to international Arbitration, wherein, the Hon'ble Apex Court has held that, sittings at various places are relatable to venue and the same cannot be equated with the seat of arbitration or place of arbitration, which has a different connotation. In the present case on hand, the entire Arbitration process had taken place only at Chennai, and therefore, the above judgment cannot be applied to the facts of the present case. Having regard to the above, the contention of the learned counsel appearing for the respondent that this Court has no jurisdiction to decide this issue cannot be sustained.

12. Insofar as the compensation awarded by the Arbitral Tribunal is concerned, it is seen from the award that, the learned Arbitrators, having found the termination of contract to be valid, have awarded a compensation

of Rs.1,13,79,130/- i.e., 50% of the claim amount, with interest @ 10% p.a., only on the grounds of justice and equity. Sub clause (2) of Section 28 of the Arbitration and Conciliation Act, 1996, reads as follows :

"(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so."

However, it is seen that the parties have not authorised the Arbitral Tribunal either to decide *ex aequo et bono* or as *amiable compositeur*.

13. In this regard, it is useful to refer to judgment of a Division Bench of Delhi High Court in the case of ***Prakash Atlanta v. National Highways Authority of India* [2016 SCC Online Del 1648]**. The relevant paragraphs are extracted hereunder :

"19. The learned Single Judge has held that this was a 'Panchayati Solution'. The learned Single Judge is absolutely correct. As per the Arbitration and Conciliation Act, 1996, the mandate of an Arbitral Tribunal is to decide a dispute in terms of a written agreement between the parties, if the dispute relates to the written agreement. If the language of the written agreement is clear, the Arbitral Tribunal has to give effect to the language. If the language is unclear, giving reasons to justify what was held to be unclear, the Arbitral Tribunal would have the mandate to give a meaning to the clause in question. Sub-Section (2) of Section 28 of the Arbitration and Conciliation Act, 1996 reads as under:-

"28.(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so."

20. The phrase Ex aequo et bono (Latin for 'according to the right and good' or 'from equity and conscience') is used as a legal term of art. In the context of arbitration, it refers to the power of arbitrators to dispense with consideration of the law but consider solely what they consider to be fair and equitable in the case at hand. An amiable compositor also known as amiable compositeur under international law refers to an unbiased third party, often a king or an emperor, who suggests solution to a dispute between countries. Amiable compositor acts as a mediator in a dispute between subjects of international law. The concept of amiable compositor has its historical origins in French law. An amiable compositor acts as a conciliator rather than a decision-maker in a dispute. An amiable compositor is also not bound to apply strict rules of civil procedure and substantive law. An amiable compositor is also authorized to modify the effect of certain non-mandatory legal provisions. Traditionally, amiable compositor provided equity correction to strict rules of law. But today, an amiable compositor has the power to depart from the strict application of rules of law and decide a dispute according to justice and fairness.

21. Concededly, while making the reference to the Arbitral Tribunal NHAI and Prakash did not expressly authorise the Arbitral Tribunal to decide ex aequo et bono or as amiable compositeur."

N. SATHISH KUMAR, J.

mkn

In the present case also, none of the parties has authorised the Arbitral Tribunal, either to decide *ex aequo et bono*, or as *amiable compositeur*, notwithstanding which, 50% of the claim amount has been awarded as compensation, merely on the basis of equity and justice, which, in the opinion of this Court, is certainly against the statute and cannot be sustained in the eyes of the law.

Therefore, the impugned Arbitral award dated 12.05.2018, passed by the Arbitral Tribunal, is set aside and as a sequel, this Original Petition is allowed. No costs. Consequently, connected applications are closed.

02.08.2019

mkn

Index : Yes / No

Internet : Yes / No

Speaking Order / Nonspeaking Order

O.P.No.1115 of 2018