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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 10.05.2019

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O.M.P. (COMM) 420/2017

DWARIKA PROJECTS LTD.

..... Petitioner

Through: Mr. Vikas Dhawan, Mr. Satyabrata
Panda, Ms. Kreeti Joshi and
Mr. Ranveer Zaki, Advs

versus

SUPERINTENDING ENGINEER, KARNAL, PWD (B&R),
HARYANA.

..... Respondent

Through: Ms. Noopur Singhal, Advocate with
Mr. Anil Grover, AAG

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as '1996 Act'). Via this petition, a challenge is laid to the Award dated 7.7.2017 passed by the majority members of the Arbitral Tribunal.
2. The respondent having entered an appearance in the matter via its Advocate has taken a preliminary objection to the maintainability of the petition. The objection taken is that this Court has no territorial jurisdiction to entertain the instant petition.
3. Therefore, before I proceed further, it may be relevant to note the broad facts obtaining in the case for the purposes of deciding the preliminary

objection taken by the respondent.

4. The parties appear to have entered into an Agreement dated 21.12.2012 (in short 'Agreement') for construction of approaches of 2 lane ROB at level crossing No. 78-AB in KM 139 on Delhi Ambala Railway line crossing Nilokheri Karsa-Dhand Road in Karnal District and routine maintenance of the work for 3 years (hereafter referred to as the 'subject works').

5. Concededly, the Agreement was executed at Karnal. The value of the Agreement was pegged at Rs. 23,41,91,502/-. The Agreement had a tenure of 24 months with embedded milestone. The date of commencement of the subject works was 5.01.2013.

6. As required under the Agreement, the petitioner furnished performance security in the form of an unconditional Bank Guarantee (in short 'BG'). The BG was furnished by the New Delhi Branch of HDFC Bank at the behest of the petitioner for an amount equivalent to 5% of the Agreement value. Thus, the value of the BG offered by the petitioner was a sum of Rs. 1,17,09,576/-.

7. Evidently, the petitioner had to seek an extension of time for execution of the subject works. These applications were preferred by the petitioner on 03.09.2013 and 07.03.2014. The respondent, however, rejected both applications on 30.03.2014. Resultantly, the respondent terminated the Agreement on 13.05.2014.

8. Thereupon, an Arbitral Tribunal was constituted to adjudicate upon the disputes obtaining between the parties. Amongst the procedural orders passed by the Arbitral Tribunal was an order dated 29.02.2016. Via this order, the Arbitral Tribunal, *inter alia*, indicated that the arbitration

proceedings shall be carried out under the provisions of Arbitration and Conciliation (Amendment) Act, 2015 (in short 'Amendment Act 2015')

9. As noted at the very outset, the impugned Award was passed by the majority members on 07.07.2017. Likewise, the minority decision was also rendered on the same day i.e. 07.07.2017.

10. Evidently, not only was the petitioner dissatisfied with the Award but the respondent was also aggrieved and therefore, it proceeded to institute its petition under Section 34 of the 1996 Act, *albeit*, in the court of Additional District Judge, Karnal, in the State of Haryana.

11. The record shows that insofar as the instant petition is concerned, it was filed with the Registry of this Court by the petitioner on 15.09.2017.

11.1 Interestingly on 16.09.2017 the Registry while processing the petition, *inter alia*, noted the following objections

- (i) Total number of pages filed is 62, *albeit*, without bookmarking and without pagination. No court fee has been paid.
- (ii) Nether assertion is made with respect to pecuniary jurisdiction nor is it asserted as to how the petition is maintainable.
- (iii) No documents filed
- (iv) Matter be scanned in OCR format
- (v) Memo of parties not filed

11.2. Pertinently, as regards territorial jurisdiction all that the petitioner avers in para 31 of the petition is that this Hon'ble Court has territorial jurisdiction to entertain the present petition. As is obvious, no specifics are given as to how the petition would lie in Court.

11.3 The instant petition came up for hearing before this Court only on 27.11.2017 when the notice was issued in the petition and delay in refiling

was condoned.

12. On the other hand, the respondent's petition which was filed, as noted above, before the Additional District Judge, Karnal, was registered and, consequently had notice issued to the petitioner herein on 14.10.2017.

13. The reason I have referred to the dates of registration and issuance of notices in the two cross petitions filed by the parties is that reliance is placed on Section 42 of the 1996 Act by the petitioner to contend that since its petition had been filed prior at a point in time in the usual and normal course, this Court had acquired jurisdiction in the matter and therefore all subsequent applications and petitions can be filed only in this Court.

14. It is in this backdrop that the arguments have been advanced by Mr. Vikas Dhawan, Advocate, on behalf of the petitioner, while submissions on behalf of the respondent were made by Ms Noopur Singhal, Advocate.

15. I had given time to counsel for parties to file their written submissions. I had specifically asked learned counsel for the respondent to also file orders passed in the proceedings of the District Court in which the respondent had filed its petition. Written submissions on behalf of the parties remained under objection till 09.04.2019. It is in these facts and circumstances that I had to renotify the matter for passing orders qua the preliminary objection raised on behalf of the respondent to 10.05.2019.

16. I must indicate that there is on record an ordersheet dated 17.11.2018 of the Additional District Judge-cum-Presiding Judge, Special Commercial Court at Gurugram, which is suggestive of the fact that the respondent's petition preferred under Section 34 of the 1996 Act was transferred to his court from the District Court at Karnal.

16.1 The substantive order, in this behalf, was, though, passed by

Additional District Judge, Karnal, on 02.11.2018.

17. With this preface, let me set forth the arguments advanced by counsel for the parties.

18. Mr. Dhawan, in support of the petitioner's stand that this Court had jurisdiction in the matter, advanced the following arguments:

(i) The cause of action for instituting a petition under Section 34 is the rendering of the Award. Section 34 proceedings are instituted by an aggrieved party to annul the Award to the extent grievance obtains in respect of the Award in issue. Therefore, the cause of action emerges upon rendering of the Award.

(i)(a) A necessary concomitant of this submission is that the cause of action will arise at the place where the Award is rendered. In this particular case, the Award was rendered both by the majority and minority members at New Delhi.

(ii) There is a distinction between the "subject matter of arbitration" and the "subject matter of a suit". Section 2 (1)(e) of the 1996 Act speaks about the "subject matter of the arbitration". The expression "subject matter of the arbitration" has to be given purposive meaning. In other words, the expression "subject matter of the arbitration" takes within its fold the disputes arising out of the underlying contract as well as disputes arising out of appointment, conduct of arbitration, application of rules relating to arbitration by the Arbitrator and, finally, the publication of the Award.

(ii)(a) In a Section 34 proceedings, the Court, *inter alia*, examines not only the process followed by the Arbitral Tribunal but also the manner in which the proceedings are conducted. While

exercising jurisdiction under Section 34 of the 1996 Act, the Court does not exercise appellate power and, instead, examines only procedural irregularity, if any, committed by an Arbitral Tribunal. The fact that the proceedings were conducted within the territorial jurisdiction of this Court, which led to passing of the subject Award, would lend jurisdiction to this Court.

(ii)(b) In support of these submissions, reliance was placed on the following judgments: *Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 @ para 96, *Hinduja Leyland Finance Ltd. vs. Debdas Routh & Anr.*, 2017 SCC OnLine Cal 16379 and *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.*, passed in FAO(OS)(COMM.) 67/2017, dated 30.05.2018.

(iii) It was sought to be emphasized that in this case, except two proceedings, all proceedings had taken place at New Delhi. The submission, therefore, was that Courts in Delhi were the Courts of natural jurisdiction in respect of a Section 34 action.

(iv) It was further submitted that in this case, since the seat of arbitration was not provided in the arbitration agreement, which otherwise forms part of the main agreement, the same must be determined based on the arbitration agreement and the extant provisions of law.

(iv)(a) Under Subsection (1) of Section 20 of the 1996 Act, parties are free to determine the seat of arbitration proceedings. Since, in this case, parties failed to determine the seat under Subsection (2) of Section 20 of the 1996 Act, the Arbitral Tribunal could have determined the seat of arbitration proceedings. The Arbitral Tribunal

has, however, consciously, passed a procedural order dated 29.02.2016, wherein it has observed that “meetings will be held at New Delhi/Chandigarh with the consent of the parties. As far as possible it will be at New Delhi”.

(v) The venue of arbitration would mean seat of arbitration unless seat is additionally mentioned.

(vi) The arbitration agreement, even though incorporated in the main agreement, was separate from the main agreement and parties could provide for a seat of arbitration so as to move away from the “forum Court”. In support of this submission, reliance was placed upon the following judgments: *India Limited and Others Vs. Enercon GMBH and Another*, (2014) 5 SCC 1 and *Hunduja Leyland Finance Ltd. v. Devbdas Routh* (paras 7, 8 to 12 and 20)

(vii) Since the arbitration agreement was separate, the ingredients of the main contract could not form the basis of fixing the jurisdiction of the Court. In this behalf, it was emphasised that Invitation To Bid (in short ‘ITB’) and the Additional Conditions appended to the Agreement could not determine the seat of arbitration.

(viii) The first-mover advantage should go to the petitioner since the instant petition had been filed on 15.09.2017, which was prior to the date of registration of the respondent’s Section 34 petition. The fact that it took time for the Registry of this Court to scrutinize the petition cannot work to the petitioner’s disadvantage. Since the respondent’s petition was registered in the District Court at Karnal only on 14.10.2017, Section 42 of the 1996 Act would come in the respondent’s way. The respondent could have only moved this Court

and none other in view of the petitioner having filed the instant petition prior in point of time.

19. On the other hand, Ms. Noopur Singhal made the following submissions on behalf of the respondent:

19.1 Since the Agreement was executed in Karnal and the subject works were to be carried out at Karnal, in the State of Haryana, this Court would have no jurisdiction in the matter. In order to buttress her submission, learned counsel relied upon Clause 4 of the Agreement to contend that the following documents had to be read and construed as an inseparable part of the Agreement:

- i) Letter of Acceptance
- ii) Notice to proceed with the work
- iii) Contractor's Bid dated 01.10.2012
- iv) Contract Data
- v) Special conditions to contract and general Conditions of contract
- vi) Specifications/drawings
- vii) Forms of bid
- viii) Bill of quantities
- ix) Any other documents listed in the contract date as forming part of the contract

19.2 Ms. Singhal highlighted the fact that the arbitration clause which stood incorporated in the Agreement did not provide for either the seat or the venue or even the place of arbitration.

19.3 Therefore, according to Ms. Singhal, what the Court was, then, required to look at was the various other indicators to determine which

Court would have jurisdiction in the matter. According to the learned counsel, the mere fact that the Award was pronounced and signed in New Delhi would not clothe this court with jurisdiction.

19.4 In support of her submission that the Agreement contained intrinsic evidence with regard to intendment of parties as to which Court should have jurisdiction in case disputes erupted between them, reference was made to the following:

(i) Condition no. 7 of ITB which reads as:-

“7. The jurisdiction of court will be at Karnal.”

(ii) Additional Condition no. 16 of the Agreement which reads as follows:-

“16. The jurisdiction of the court will be the Distt. Court of [the] concerned headquarter.”

(iii) Clause 7 of Additional Conditions for free MTC period and Contract which states the following:-

“7. The jurisdictions of [the] court shall be Karnal (headquarter of concerned Electrical Division).”

19.5 It was emphasized by the learned counsel that hearings were held both in Chandigarh and Delhi. Reliance was placed on the correspondence issued by one of the learned Arbitrator to demonstrate that due to the illness of the concerned Arbitrator, proceedings which were slated to be held at Chandigarh were rescheduled and, therefore, had to be held at New Delhi.

20. I have heard the learned counsel for the parties and perused the record. I may indicate that the arbitration agreement is contained in Clause 25. A careful perusal of Clause 25 would show that the parties have not

agreed to either the seat or the venue or even a place where arbitration proceedings were to be held.

20.1 It is, however, common ground between the parties that arbitration proceedings were held both in Delhi and Chandigarh as per the convenience of the members of the Arbitral Tribunal; though a majority were held in Delhi. That being said, to my mind, the number of proceedings held in one or the other city, in absolute terms, would not be a relevant factor in determining as to whether one or the other city was designated as the seat of arbitration.

20.2 What emerges from the record, though, is that neither did the parties agree to a jurisdictional place/seat as against a geographical location nor was a determination made by the Arbitral Tribunal in that behalf. The Arbitral Tribunal, however, in consultation with the parties and their respective counsel and as per their convenience held the arbitration proceedings both in Delhi and Chandigarh. Therefore, in my opinion, the mere fact that the arbitration proceedings were held, largely, in Delhi would not have me hold that the seat of arbitration was New Delhi.

20.3 The provisions of Section 20 of the 1996 Act, in this behalf, are both instructive and facilitative. While Subsection (1) of Section 20 recognizes the freedom that the parties have to fix a jurisdictional place of their choice, Subsection (2) of the very same Section confers this power on the Arbitral Tribunal where parties have failed to arrive at an agreement in that behalf. The Arbitral Tribunal can thus fix the jurisdictional place for the conduct of arbitration proceedings having regard to the circumstances of the case including the convenience of parties. On the other hand, Subsection (3) of Section 20 gives the leeway to the Arbitral Tribunal to meet at a place other

than the jurisdictional place i.e. the seat of arbitration, for variety of reasons such as a consultation among members, for hearing witnesses, experts or parties or for inspection of documents, goods or other property. This leeway is, however, given, subject to parties agreeing to the contrary. Subsection (3) of Section 20, thus, speaks purely about the venue of arbitration, which, in a given case, can be different from the jurisdictional place or seat of arbitration.

20.4 Since fixing of the jurisdictional place or seat of arbitration has consequences for parties including identification of the Court before which the Award could be challenged, the Arbitral Tribunal, to my mind, would have to take into account the say of the parties before concluding one way or another which should be the jurisdictional place or seat of arbitration. To put it plainly, the fixing of the venue of arbitration by the Arbitral Tribunal would not be the same thing as fixing jurisdictional place or seat of arbitration. The latter will have to have a deliberative component which would involve taking into account the stand of the parties. Parties cannot be taken by surprise and be told that the venue fixed for arbitration had morphed into the jurisdictional place or the seat of arbitration. Fixing of geographical location for conducting arbitration proceedings cannot be equated with an Arbitral Tribunal fixing a jurisdictional place or seat of arbitration. (See: observations made in *M/s HLL Lifecare Ltd. Vs. M/s Happy Electricals*, passed in OMP(COMM) 173/2018, dated 11.07.2018, paragraph 13.3).

“13.3 That being the position, it is clear that the Patna High Court would have jurisdiction in the matter since the contract was performed at Patna. On the other hand, neither the parties nor the Arbitral Tribunal took upon itself the burden of fixing

*the seat of arbitration and, therefore, that attribute in terms of the judgment in **Indus Mobile Distribution Private Limited**, could not be used to suggest that this Court had jurisdiction to entertain the captioned petition. The fact that the learned Arbitrator fixed Delhi as the venue is not [the]same thing as saying that he had zeroed down on Delhi as the seat of Arbitration. Since, with the fixing of the place or seat of Arbitration, several legal consequences follow including that which pertains to identification of the Court that would regulate arbitration proceedings, (act such of an) (SIC; “such an act of an”) Arbitrator has to have an element of deliberation involving the say of the parties at lis.*

20.5 The Supreme Court in the matter **Union of India vs. Hardy Exploration and Production (India) INC.**, 2018 SCC OnLine SC 1640 has taken a somewhat similar view, as is evident from the following observations:-

“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 [the] 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 [a]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[a]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.”

(emphasis is mine)

20.6 Notably, in ***Hardy Exploration and Production***’s case not only were the proceedings held in Kuala Lumpur but the Award was signed in Kuala Lumpur. The Supreme Court notwithstanding the aforesaid factors obtaining in the case ruled that Kuala Lumpur was not the seat or jurisdictional place of arbitration.

20.7 The judgment of the Supreme Court in ***Enercon (India) Limited*** which was considered in ***Hardy Exploration and Production***’s case also establishes this principle. In ***Enercon (India) Limited***’s case, the clause in

issue referred to London as the venue. The Supreme Court was, thus, called upon to determine as to whether the venue, in that case, could be equated with the seat of arbitration. The Court, after having regard to the indicators embedded in the contract including the fact that the parties had agreed that the applicability of the provisions of 1996 Act to the arbitration proceedings, came to the conclusion that the seat of arbitration would be in India and not where the venue was i.e. London. (See: paragraphs 97 to 105 of the judgment). In particular, in the context of the instant case, the observations made in paragraphs 103 to 105, being apposite are extracted hereafter:

“103. Having chosen all the three applicable laws to be Indian laws, in our considered opinion, the parties would not have intended to have created an exceptionally difficult situation, of extreme complexities, by fixing the seat of arbitration in London.

104. In view of the above, we are unable to accept the submissions made by Dr. Singhvi that in this case, the term “venue” ought to be read as [the] seat.

105. We are also unable to accept the submission made by Dr. Singhvi that in this case the venue should be understood as [a]reference to [a]place in the manner it finds mention in Section 20(1), as opposed to the manner it appears in Section 20(3) of the Indian Arbitration Act, 1996. Such a submission cannot be accepted since the parties have agreed that curial law would be the Indian Arbitration Act, 1996.”

21. As noted hereinabove, it is quite evident that the parties had intended that Courts outside New Delhi would have jurisdiction in the matter. The fortuitous circumstance of the award being signed in New Delhi cannot by itself confer jurisdiction on this Court when intrinsic evidence embedded in

the contract establishes the contrary point of view. Given the fact that neither the parties had agreed to a juridical place or seat of arbitration nor was there any determination qua the aspect by the Arbitral Tribunal, therefore, the following indicators attain acute significance to ascertain the intendment of the portion.

- (i) The place of execution of the agreement, which was Karnal.
- (ii) The place of execution of the subject works which was again Karnal.
- (iii) The stipulations and conditions noted in the ITB.
- (iii)(a) In this behalf, I must indicate the argument that ITB would not form part of the contract is belied by Clause 4 of the Agreement which, *inter alia*, refers to the Forms of Bids. Clause 4 of the Agreement subsumes the bid form which was filed in response to ITB and led finally to the execution of the Agreement.
- (iv) The Additional Condition No. 16, which adverts to the fact that the jurisdiction of the Court would be the District Court of concerned headquarter.

22. The aforementioned aspects, to my mind, are indicators that parties never intended to have Delhi as the seat of arbitration. The fortuitous circumstance of having an Award being rendered at a place other than the place which is a seat of arbitration or the Court of natural jurisdiction would not, by itself, lend jurisdiction to the Court in which the Award is passed unless parties agree to the contrary.

23. The argument advanced on behalf of the petitioner that it must have the first-mover advantage would not help its cause in view of my conclusion that this Court had no jurisdiction, to begin with, to entertain the petition.

The argument based on Section 42, in these circumstances, cannot be availed of by the petitioner.

24. Thus, having sustained the preliminary objection raised by the respondent, I am not inclined to entertain the petition. The Registry will, accordingly, return the petition to the petitioner with an appropriate endorsement. The petitioner will be entitled to institute the petition in the appropriate Court, albeit, in accordance with the law.

25. There shall, however, be no order as to costs.

RAJIV SHAKDHER, J

MAY 10, 2019

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