

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
17~03~2020	07~05~2020

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

O.P.No.760 of 2019

M/s. Geo Foundations and Structures Private Limited,
havint its office, amongst other places,
at No.3/2 Rams, 89, 1st Main Road, Gandhi Nagar,
Adyar, Chennai – 600020.

Rep. By its Authorized Signatory
Mr.K.N.Madhusudanan Pillai

... Petitioner

.Vs.

Tata Projects Limited,
Mithona Towers-1,
1-7-80-87, Prederghast Road,
Secunderabad,
Telangana – 500003.

.. Respondent

Prayer: Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint the 2nd Arbitrator, who shall then together with the Arbitrator already appointed by the Petitioner appoint 3rd Arbitrator to resolve the disputes between the parties arising out of the arbitration agreement dated 10/03/2015 with costs.

For Petitioner : Mr. D. Bijesh Thomas
Mr.K.F. Manavalan

For Respondent : Mr.D. Balaraman
Mr.B.Sudarshan

ORDER

This Original Petition has been filed under section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an 2nd Arbitrator.

2. It is the case of the Petitioner that two work orders had been placed on the Petitioner viz., (i) No.SBU T&D/Manipuri-Bara 1B/5383 & (ii) SBU T&D/ Manipuri-Bara 2B/5343. Originally the contract price was Rs.3,86,61,773/-. After the work orders, mid-way through the work, the Petitioner was instructed to abandon work under 'Work Order No.SBU T&D/ Manipuri-Bara 1B/1583' and execute work only under 'Work Order No.SBU T&D/ Manipuri-Bara 1B/1543'.

As the dispute arose between the parties, the Petitioner put the respondent by notice that in the event of its non-payment of the sum demanded within the stipulated time, called upon the Respondent to concur in the appointment of Mr.V. Nataraj, Advocate, Chennai, as independent and impartial arbitrator. As no response came

from the Respondent, this petition has been filed. It is the further contention of the Petitioner that the Contract was signed by the Petitioner in Chennai, and payments for work executed under the 'Work Order' were received by the Petitioner in Chennai and the work was executed at site in Manipuri, Uttar Pradesh. Hence, prayed for appointment of Arbitrator.

3. It is the contention of the Respondent in the counter that the Petition is not maintainable before this Court. As per Clause 41 and 45.1 of the General Conditions of Contract, the venue for arbitration shall be Hyderabad, India and in the event of any litigation, the jurisdiction of the Contract shall be that of the Courts at Hyderabad, India. Hence, it is the contention of the Respondent that this Court has no jurisdiction to appoint arbitrator.

4. The learned counsel appearing for the Petitioner submitted that though the Arbitration clause provides the place of arbitration at Hyderabad or any other place, however no cause of action arose within the jurisdiction of Hyderabad. Further this Court has jurisdiction to entertain the application to appoint the arbitrator. It is his further contention that after amendment what was sought to be seen by the Court is

existence of agreement between the parties. It is his further contention that the 'venue' mentioned in the arbitration agreement cannot be considered as 'seat' of arbitration. On the existence of agreement this Court can very well appoint the Arbitrator. In support of his contention he relied upon the following judgments:

1. *M/s. Mayavti Trading Pvt. Ltd., vs. Pradyut DebBurman* [2019 AIR (SC) 4284]

2. *Duro Felguera,S.A. vs. Gangavaram Port Limited* [(2017)9 Supreme Court Cases 729]

3. *Swastik Gases Private Limited vs. Indian Oil Corporation Limited* [(2013) 9 Supreme Court Cases 32]

4. *India Infoline Finance Limited vs. Harshad Hirji Thakkar* [OMP(I) COMM) No.53 of 2019 dated: 20.2.2019 Delhi High court.]

5. Whereas the learned counsel for the Respondent submitted that the clause contained in the Arbitration Agreement makes it very clear that the seat of the Arbitration proceedings and the courts at Hyderabad shall have the jurisdiction.

Therefore, the parties have agreed for place for arbitration. This Court has no jurisdiction to appoint Arbitrator. Only High Court of Telungana alone have jurisdiction to appoint arbitrator. Hence prayed for dismissal. In support of his contention he relied upon the following judgments:

1. *Brahmani River Pellets Limited vs. Kamachi Industries Limited* [MANU/SC/0968/2019=AIR 2019 SC 3658]

2. *Indus Mobile Distribution Private Limited v. Datawind Innovations Pvt. Ltd.,and others* [(2017) 7 Supreme Court cases 678]

3. *BGS SGS Soma JV vs. NHPC Ltd.*, [2019(17) SCALE 369]

6. In the light of their submissions it is relevant to refer the clause governing the Arbitration in the contract between the parties:

“41. ARBITRATION:

41.1. *TPL and the Contractor shall make every effort to settle all disputes arising from or/in connection*

with the implementation of the Work Order, TPL and the contractor shall try to reach an amicable settlement.

41.2 If after 30 days from the commencement of such informal negotiations, TPL and the Contractor have been unable to resolve amicably a dispute, the same shall be referred to for resolution to a single arbitrator in case the Parties can agree upon one, otherwise to two arbitrators, one to be appointed by each party and an umpire to be appointed by the two arbitrators. The arbitration shall be carried out in accordance with and subject to the provisions of the Indian Arbitration and Resolution Act, 1996, or any statutory modification or re-enactment thereof for the time being in force. The decision of the arbitrator / umpire shall be final and binding upon both Parties.

41.3 The venue for Arbitration shall be Hyderabad, India or any other place that TPL at its sole discretion, may determine and the language of the arbitration shall be in English.”

7. Clause 45.1 of GCC reads as follows:

“45.1 The work order issued by TPL to the Contractor shall be construed in accordance with and governed by the laws of India and in the event of any litigation, the jurisdiction of the Contract shall be that of the courts at Hyderabad, India.”

8. As per the above Clause of the agreement, specific clause agreed between the parties makes it clear the place of the Arbitration would be at Hyderabad and the jurisdiction of the Contract shall be that of the courts at Hyderabad, India.

9. In ***Duro Felguera, S.A.'s case*** (supra) the Honourable Apex Court has held as follows:

*13. The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in **SBP and Co. vs. Patel Engg. Ltd., [(2005) 8 SCC 618]** and **National Insurance Co., Ltd., v. Boghara Polyfab (P) Ltd., [(2009) 1 SCC 267]**. This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6-A) ought to be respected.*

10. In **Swastik Gases Private Limited case** (supra), the Honourable Supreme Court has held that the very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute.

11. The Delhi High Court in **India Infoline Finance Limited case** (supra) has held that the use of the word “place” in Clause 16.2 will only have to be taken as a reference to the 'venue' only, since it is not mentioned in this Clause 16.2 that the seat of arbitration proceedings will be at Delhi, nor is it mentioned that courts at Delhi would have jurisdiction or exclusive jurisdiction. Thus, the words “arbitration proceedings shall take place” in the clause in question will necessarily have to be read as reference to mean only the 'venue' and not the 'seat' of arbitration.

12. In **Indus Mobile Distribution Private Limited Case** (supra) in paras 19 and 20 it is held as follows:

“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.

20. It is well settled that where more than one court has jurisdiction, it is open for parties to exclude all other courts. For an exhaustive analysis of the case law, see **Swastik Gases Private Limited v. Indian Oil Corporation Limited**, (2013) 9 SCC 32. This was followed in a recent judgment in **B.E. Simoes Von Staraburg Niedenthal and Another v. Chhattisgarh Investment Limited**, (2015) 12 SCC 225. Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai.”

13. In ***Brahmani River Pellets Limited case*** (supra) it is held that when the parties have agreed to have the "venue" of arbitration at Bhubaneswar, the Madras High Court erred in assuming jurisdiction under Section 11(6) of the Act.

14. The Three Judges Bench in ***BGS SGS Soma JV case*** (supra) after considering various judgments, the Honourable Supreme Court has held as follows:-

99. *Given the fact that if there were a dispute between NHPC Ltd. and a foreign contractor, clause 67.3(vi) would have to be read as a clause designating the "seat" of arbitration, the same must follow even when sub-clause (vi) is to be read with sub-clause (i) of Clause 67.3, where the dispute between NHPC Ltd. would be with an Indian Contractor. The arbitration clause in the present case states that "Arbitration Proceedings shall be held at New Delhi/Faridabad, India...", thereby signifying that all the hearings, including the making of the award, are to take place at one of the stated places. Negatively speaking, the clause does not state that the venue is so that some, or all, of the hearings take place at the venue; neither does it use language such as "the Tribunal may meet", or "may hear witnesses, experts or parties". The expression "shall be held" also indicates that the so-called "venue" is really the "seat" of the arbitral proceedings. The*

dispute is to be settled in accordance with the [Arbitration Act, 1996](#) which, therefore, applies a national body of rules to the arbitration that is to be held either at New Delhi or Faridabad, given the fact that the present arbitration would be Indian and not international. It is clear, therefore, that even in such a scenario, New Delhi/Faridabad, India has been designated as the “seat” of the arbitration proceedings.

In the above judgment it is also referred the judgment of ***Brahmani River Pellets Limited case*** (supra).

15. From the above judgments it can be seen that if more than one court have jurisdictions, it is open to the parties to exclude all other courts. The parties can determine the seat of arbitration by agreement. Therefore, merely because the contract said to have been signed in Chennai and the part of the cause of action arose at Chennai, when the parties agreed to have arbitration at Hyderabad and also agreed to submit to the jurisdiction of the courts in Hyderabad such clause implies that they have excluded other courts. Such a view of the matter, this Court is of the view that once the parties agreed to have the proceedings at Hyderabad as per Clause 45.3 of General Conditions of Contract, only High Court of Telungana alone has jurisdiction. Accordingly, this Court has no territorial jurisdiction to entertain

the petition. The Petitioner is at liberty to approach High Court of Telungana as per the General Conditions of Contract for appointment of Arbitrator. In such a view of the matter, this petition is dismissed.

16. In the result the Original Petition is dismissed.

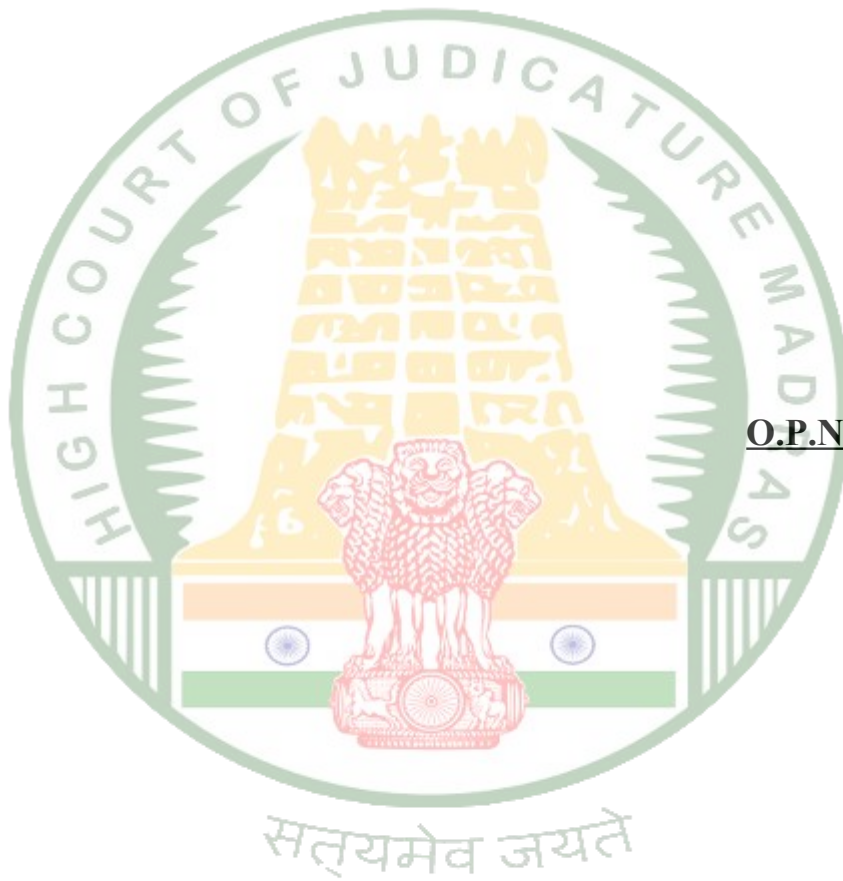
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Index : Yes / No
Internet: Yes
Speaking/non speaking order
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N. SATHISH KUMAR, J.
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order in:
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