

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

ARBITRATION APPLICATION Nos.56 and 61 of 2018

%29-04-2020

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#Mech Components Private Ltd. Balanagar, Hyderabad,
Rep. by its Director Mr. Mudit Patodia

.... Applicant

Versus

\$The Director General, Ordinance Factories,
Govt. of India, Bose Road, Kolkata and others.

..... Respondents

ARBITRATION APPLICATION No.61 of 2018

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\$The Director General, Ordinance Factories,
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..... Respondents

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> HEAD NOTE:

!Counsel for the Applicant : Ms. K. Mamatha Choudary

^ Counsel for the respondents : Sri N. Rajeswara Rao,
Assistant Solicitor General

? Cases referred

1. (2017) 8 SCC 377
2. 2019 SCC Online SC 929
3. 2019 SCC Online SCC 1585

THE HON'BLE SRI JUSTICE A. RAJASHEKER REDDY

ARBITRATION APPLICATION Nos. 56 and 61 of 2018

COMMON ORDER:

The issue in these applications is one and same therefore they are being heard and disposed of by a common order.

2. These applications are filed under Section 11(6) of the Arbitration Conciliation Act, 1996 (hereinafter, the Act) praying to appoint an arbitrator to adjudicate the disputes and differences between the applicant and the respondents in respect of Supply Order (for short, SO) dated 22-11-2012 and dt. 05-01-2013 respectively. These applications have raised an interesting question as to where shall be the seat of the arbitration when the agreements between the parties provide for the 'venue' instead of 'seat' in cases of disputes at ordnance factory, Chanda, Chandrapur in Maharashtra.

3. The brief facts which led to the filing of these arbitration applications are as under;

The applicant in arbitration application 56 of 2018, entered into an agreement with respondent no.1 for the supply of 42,924 no. units of Fuze Percn after procuring the tender dated 19-02-2011 that was floated by respondent no 1 vide DA No. 162 MK-8

(M-2). Subsequently the applicant received supply order being SO No.1121132/A1 dated 22-11-2012.

Similarly in arbitration application 61 of 2018 the applicant entered into an agreement with respondent no. 1 for supply of 49,056 units of Fuze Percn after procuring the tender that was floated by the respondent no 1 through notice dated 15-07-2011. Subsequently, the supply order vide no 1121150/A1 dated 05.01.2013 was issued to the applicant.

Since the respondents in the counter affidavit have raised the issue of lack of territorial jurisdiction of this Court, it is relevant to extract para-27 of the counter affidavit in A.A.No.56 of 2018 filed on behalf of respondent Nos.1 and 2 therein, which reads as under :

“27. In reply to Para No.21 to 24, the contentions of Applicants are false, baseless and untenable. As per the clause, this Hon’ble Court lacks territorial jurisdiction. Moreover as admitted by the applicant as an award was passed on 05.06.2017 itself, therefore, the present application is not maintainable. It is submitted that, as per term and condition No.13 of Annexure OFCH-634 of Tender Documents “All questions, disputes or differences arising under, out of or in connection with the contract, if concluded shall be subject to the exclusive jurisdiction of the Court within the location limits of whose jurisdiction, the place from which the Acceptance

of Tender is issued is situated.” Further, as per clause No.20(3) of DGS&D-68 (Revised) (excluding Clause No.24) – The Courts of the place from where the acceptance of tender has been issued shall alone have jurisdiction to decide any dispute arising out of or in respect of the contract. Hence the matter of jurisdiction is not corresponding/relates to the place of manufacturing of the Item.”

4. It is also stated that respondent No.3 passed Award and they have challenged the said Award before the appropriate Forum. The other contentions in the counter affidavit deal with the merits of the claim.

5. Clause 14 of the SO dated 22-11-2012 and clause 14 of the SO dated 05-01-2013 relate to arbitration. Clause 14 in arbitration application 61 of 2018 is the verbatim of Clause 14 of arbitration application 56 of 2018, therefore for the sake of convenience only clause 14 from arbitration application 56 of 2018 is being reproduced, as the clause assumes relevance for the controversy raised and therefore being reproduced for the ready reference;

14. Arbitration: *All disputes and differences arising out of or in accordance with the present contract including the one connected with the validity of the present contract or any part thereof should be settled by bilateral discussion.*

Any disputes, disagreements of question arising out of or relating to this contract or relating to construction or performance (except as to any matter or decision or determination whereof is provided for by these condition), which can not be settled amicably, to be referred by concerned party to Director general, Ordnance Factories, Govt of India, Ordnance Factories Board, 10ASK Bose Road, Kolkata 700001 for appointment of the sole arbitrator. The Arbitrator so appointed shall be a Government servant who has not dealt with matters to

which this agreement relates and in course of his duties had not expressed views on all or any of the matter in dispute or differences. The Award of Sole Arbitrator shall be final and binding on the parties.

The venue of the Arbitration shall be at place of concerned factory. Further the Arbitration proceedings would be subject to the provision of the Arbitration and Conciliation Act, 1996 and the rules there under.

6. What the clauses of SO lay is the venue and the not seat of arbitration.

7. Learned counsel for the applicant has contended that a part of the cause of action arose within the territorial limits of this court; the applicant carries on business here in Hyderabad and goods have been supplied to Maharashtra from Hyderabad. Therefore territorial jurisdiction of this court has been claimed. The goods, which are subject matter of dispute between the applicant and the respondent, were manufactured in Hyderabad and that all the correspondence between the applicant and respondent No.1 held at Hyderabad, therefore, this Court has territorial jurisdiction to entertain the application. She also submits that respondent No.3 should not have been appointed as an Arbitrator, since respondent Nos.1 and 3 are under the supervision and control of respondent No.2 and the same is hit by Section 12 of the Act r/w. Schedule V (2) and VII (2) of the Act, as such the Award passed by respondent No.2 on 05.06.2016 is *void ab initio* and the Award is *non-est* in law.

Learned counsel for the applicant has placed reliance upon the judgement of the Supreme Court in **TRF LIMITED vs. ENERGO ENGINEERING PROJECTS LIMITED**¹..

8. Per contra, learned counsel for the respondents has vehemently opposed the contention made by the petitioner. As per the averments made in the counter affidavits, it has been argued, on behalf of the respondents, that the clauses 14 of the supply orders in these two arbitration applications specifically provide that the venue for arbitration shall be at place of factory concerned, as such this Court does not have territorial jurisdiction. It is the argument of the respondent that in the absence of the term seat in the arbitration clause, venue should be read as seat and therefore the applications are liable to be dismissed as this Court does not have territorial jurisdiction. It is also submitted that respondent No.3 has already passed Award, as such, the applicant has to challenge the said Award in an appropriate application before the appropriate Forum and not in the present application.

9. In view of rival contentions regarding the territorial jurisdiction to entertain these applications, the issue that arises for consideration is;

- (1) Whether this Court has territorial jurisdiction to entertain these applications? &

¹ (2017) 8 SCC 377

- (2) Whether in absence of conferment of juridical seat, would the venue amount to seat so designated by the parties in the agreement?

Issue Nos.1 and 2 :

10. This is perhaps a cliché; nevertheless, parties in arbitration are free to choose the forum to settle their dispute by appointing the arbitrator. Section 20, sub section (1) of the Act of 1996, provides that the parties are free to agree on the place of arbitration. The seat of arbitration is a crucial factor. It determines the lex arbitri and the courts with supervisory jurisdiction over the arbitration.

11. The important consequences of the seat require parties to choose the seat carefully. Cases where no seat but venue is chosen by the parties are not uncommon. The reliance has been placed by the learned counsel for the applicant on *TRF LIMITED* (Supra). But a perusal of the judgment would reveal that the controversy before the Supreme Court in the above said judgment was never about seat or venue of arbitration. The said judgment was cited by learned counsel for the petitioners for disqualifying an Arbitrator and since this Court has come to the conclusion that it does not have territorial jurisdiction to entertain the applications, the said aspect need not be considered.

12. Recently, the Hon'ble Supreme Court addressed an interesting aspect pertaining to the issue, does the selection of a 'venue' for arbitration imply choice of the 'seat'? In **Brahmani River Pellets Limited v. Kamachi Industries Limited**² the apex court has addressed this issue. Against the order of Madras High Court, a SLP was filed before the Apex Court. The Hon'ble Supreme Court first took the cognizance of the arbitration clause, which is similar to in the instant case, which is being reproduced here for ready reference;

4. Clause 18 of the agreement between the parties contains an arbitration clause which reads as under:—

“18. Arbitration shall be under Indian Arbitration and Conciliation Law 1996 and the Venue of Arbitration shall be Bhubaneswar.”

The question that the Apex Court posed to itself was; Whether the Madras High Court could exercise jurisdiction under Section 11(6) of the Arbitration and Conciliation Act, 1996 despite the fact that the agreement contains the clause that venue of arbitration shall be at Bhubaneswar. The Apex Court having considered several judgments delivered by it held;

“18. Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the “venue” of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in Swastik, non-use of words like

² 2019 SCC Online SC 929

“exclusive jurisdiction”, “only”, “exclusive”, “alone” is not decisive and does not make any material difference.

19. When the parties have agreed to have the “venue” of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Since only the Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order is liable to be set aside.”

13. The judgment in ***Brahmani River*** has also found support in the recent judgment delivered by the Hon’ble Supreme Court in the matter of **BGS SGS SOMA JV vs. NHPC LTD.**³ Speaking for the bench, His Lordship Justice Rohinton Nariman, J. held that;

*84. Most recently, in **Brahmani River Pellets** (supra), this Court in a domestic arbitration considered clause 18 - which was the arbitration agreement between the parties - and which stated that arbitration shall be under Indian Arbitration and Conciliation Act, 1996, and the venue of arbitration shall be Bhubaneswar. After citing several judgments of this Court and then referring to *Indus Mobile Distribution* (supra), wherein this Court held that:*

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 Sections 16 to 21 of 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 the parties to exclude all other courts. For an exhaustive analysis of the case law, see *Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.* [*Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.*, (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] This was followed in a recent judgment in *B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.* [*B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.*,*

³ 2019 SCC Online SCC 1585

(2015) 12 SCC 225 : (2016) 1 SCC (Civ) 427] 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. This being the case, the impugned judgment [Datawind Innovations (P) Ltd. v. Indus Mobile Distribution (P) Ltd., 2016 SCC OnLine Del 3744] is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. The appeals are disposed of accordingly.

85. On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the “venue” of the arbitration proceedings, the expression “arbitration proceedings” would make it clear that the “venue” is really the “seat” of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as “tribunals are to meet or have witnesses, experts or the parties” where only hearings are to take place in the “venue”, which may lead to the conclusion, other things being equal, that the venue so stated is not the “seat” of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings “shall be held” at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that the place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a “venue” and not the “seat” of the arbitral proceedings, would then conclusively show that such a clause designates a “seat” of the arbitral proceedings. In an International context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that “the venue”, so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the “stated venue”, which then becomes the “seat” for the purposes of arbitration.

14. Where the contract specifically confers the jurisdiction on a particular Court at a particular place, only such court will have the jurisdiction to deal with the matter as parties intended to exclude all other courts. In the present applications, the parties have agreed that the “venue” of arbitration shall be at place of concerned

factory i.e., ordnance factory, Chanda, Chandrapur in Maharashtra.

Considering the agreement of the parties having ordnance factory, in Maharashtra as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in *Swastik*, non-use of words like “exclusive jurisdiction”, “only”, “exclusive”, “alone” is not decisive and does not make any material difference, the contention of the applicant that this Court also has the jurisdiction is merit-less and therefore deserves to be rejected in view of the law laid down by the Hon’ble Supreme Court.

15. Thus this Court cannot assume territorial jurisdiction for entertaining these applications under Section 11(6) of the Act and, therefore, these applications deserve to be dismissed. Since this Court dealt with the territorial jurisdiction and came to the conclusion that it does not have territorial jurisdiction, other issues raised and the judgements cited on those issues are not required to be considered.

In view of the facts and circumstances and the law laid down by the Hon’ble Apex Court in the judgments cited supra, this Court lacks territorial jurisdiction to entertain the application under Section 11(6) of the Act and hence the same is liable to be dismissed and it is accordingly dismissed. However, the parties are at liberty to approach the High Court concerned having territorial

jurisdiction seeking appointment of an Arbitrator. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand closed.

A. RAJASHEKER REDDY, J

Date: 29.04.2020.

NOTE: L.R. Copy be marked.

(B/O)

Msr

