

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 01.03.2021

CORAM:

THE HONOURABLE Mr.JUSTICE **M.SUNDAR**

O.P.No.374 of 2016

and

A.No.2426 of 2016

1. Vijayalakshmi
 2. Saravana Kumar
Both at No.21, I Floor
Ragavan Street, George Colony
Thiru-Vi-Ka Nagar, Chennai-600 082.
 3. Vasu
No.21, II Floor
Ragavan Street, George Colony
Thiru-Vi-Ka Nagar, Chennai-600 082.
- ... Petitioners

सत्यमेव जयते
Vs.

1. Mahindra & Mahindra Financial Services Limited
Registered Office at Gateway Building
Apollo Bunder, Mumbai - 400 001.
 2. Ms.Swarna Latha
Sole Arbitrator
No.121/3, Flat-4, Baba Foundation
N.T.R.Street, Rangarajapuram
Kodambakkam, Chennai-600 024.
- ... Respondents

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, praying to set aside the award dated 11.12.2015 passed in A1-NPA-ARB-SL : REF BN6774/XH1104/AGG.No.2750278/2014.

For Petitioners : Mr.B.R.Shankaralingam
For Respondents : Mr.A.Prabhakaran
for R1
R2-Arbitrator

ORDER

Captioned 'Original Petition' [hereinafter 'OP' for the sake of brevity and convenience] is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity. Captioned OP has been filed assailing an 'arbitral award dated 11.12.2015 bearing reference A1-NEA-ARB-SL/S:5/BR:242/REF. BN6774/XH1104/AGG No.2750278 of 2014' [hereinafter 'impugned award' for the sake of convenience, brevity and clarity].

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2. Suffice to say that lis before 'Arbitral Tribunal' [hereinafter 'AT' for the sake of brevity and convenience] is anchored on a 'Loan Agreement dated 24.08.2013 bearing Loan Agreement No.2750278' [hereinafter 'said contract' for the sake of convenience].

3. The said contract has been placed before me. Two clauses in said contract namely, Clauses 15 & 16 serve as Arbitration Agreement between the parties being 'Arbitration Agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act. These clauses 15 & 16 in said contract read as follows:

'15) Arbitration:

All disputes, differences and/or claim arising out of these presents or in any way touching or concerning the same or as to constructions, meaning or effect hereof or as to the right and liabilities of the parties hereunder shall be settled by arbitration to be held in accordance with the provision of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof and shall be referred to the sole arbitrator to be nominated by the Lender. In the event of death, refusal, neglect, inability or incapability of a person so appointed to act as an arbitrator, the Lender may appoint a new arbitrator. The arbitrator shall not be required to give any reasons for the award and the award of the arbitrator shall be final and binding on all parties concerned. The arbitration proceeding shall be held in Mumbai.

16) Jurisdiction:

It is agreed by and between the parties hereto that the Courts at Mumbai alone shall have exclusive jurisdiction in respect of any matter, claims or dispute arising out of or in any way relating to these presents or to anything to be done under and pursuant to these presents or of any clause or provision thereof, notwithstanding that the whole or substantial part of the cause of action may not have arising at

Mumbai.'

4. The impugned award records that arbitral proceedings were held in Mumbai, relevant paragraph is the concluding paragraph in impugned award and the same reads as follows:

'It is recorded on this 11th day of December 2015 that the Arbitral Proceedings were held at Mahindra & Mahindra Financial Services Ltd., Sadhana House, Ground Floor, No.570, P.B.Marg, Worli, Mumbai - 400 018.'

5. Petitioners have made an attempt to say that sole arbitrator who constituted the AT is a resident of Chennai, the parties to lis are also from Chennai and therefore, the conduct of arbitral proceedings in Mumbai is contrary to the obtaining position of law. This is articulated in Ground (e) which reads as follows:

'(e) The petitioners submit the 2nd respondent Arbitrator is a resident of Chennai and how come the arbitral proceedings were conducted at Mumbai and further the arbitral proceedings conducted at Mumbai when the parties to the same are at Chennai itself is contrary to the dictum laid down by our Hon'ble Apex Court and as such the entire proceedings is liable to be set aside by this Hon'ble Court.'

6. The above plea cannot be sustained as the arbitration agreement

between parties being arbitration agreement within Section 2(1)(b) read with Section 7 of A and C Act, which is in the form of clauses 15 & 16 (extracted and reproduced supra) in said contract, makes it clear that parties have agreed on the seat and venue, more importantly, parties have agreed that the seat and venue shall be Mumbai.

7. The juridical seat becomes exclusive jurisdiction qua supervisory Court. This is the obtaining position of law laid down by Hon'ble Supreme Court in ***Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited and Others*** reported in (2017) 7 SCC 678, wherein Hon'ble Supreme Court has made it clear that 'place' occurring in sub sections (1) and (2) of Section 20 of A and C Act is 'Seat' i.e., juridical seat and 'place' occurring in sub section (3) of Section 20 of A and C Act is 'Venue'. Be that as it may, paragraph 6 of ***Indus Mobile case law*** is of significance for the case on hand and the same reads as follows:

"6. The learned counsel on behalf of the appellant has assailed the judgment of the Delhi High Court, stating that even if it were to be conceded that no part of the cause of action arose at Mumbai, yet the seat of the arbitration being at Mumbai, courts in Mumbai would have exclusive jurisdiction in all proceedings over the same. According to

him, therefore, the impugned judgment was erroneous and needs to be set aside.'

8. Further in **BGS SGS SOMA JV Vs. NHPC Limited** reported in (2020) 4 SCC 234, Hon'ble Supreme Court has held that when juridical seat has been agreed upon by parties by exercise of party autonomy, it becomes exclusive jurisdiction qua Supervisory Court. Relevant paragraph in **BGS SGS SOMA case law** is paragraph No.97 to 100 and the same read as follows:

'97. Coming to the impugned judgment in the present appeals, it is clear that the reasoning followed stems from the subject-matter test that flows from the definition of "court" in Section 2(1)(e)(i) of the Act. According to the impugned judgment [NHPC Ltd. v. Jaiparkash Associates Ltd., 2018 SCC OnLine P&H 1304 : (2019) 193 AIC 839] , since the agreement was executed at Faridabad, part of the cause of action would arise at Faridabad, clothing Faridabad courts with jurisdiction for the purposes of filing a Section 34 petition. The second part of the reasoning is that Faridabad is the place where the request for reference to arbitration was received, as a result of which part of the cause of action arose in Faridabad, which ousts the jurisdiction of courts of New Delhi, in which no part of the cause of action arose.

98. We have extracted the arbitration agreement in the present case (as contained in Clause 67.3 of the agreement between the

parties) in para 3 of this judgment. As per the arbitration agreement, in case a dispute was to arise with a foreign contractor, Clause 67.3(ii) would apply. Under this sub-clause, a dispute which would amount to an “international commercial arbitration” within the meaning of Section 2(1)(f) of the Arbitration Act, 1996, would have to be finally settled in accordance with the Arbitration Act, 1996 read with the UNCITRAL Arbitration Rules, and in case of any conflict, the Arbitration Act, 1996 is to prevail (as an award made under Part I is considered a domestic award under Section 2(7) of the Arbitration Act, 1996 notwithstanding the fact that it is an award made in an international commercial arbitration). Applying the Shashoua [Shashoua v. Sharma, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep 376] principle delineated above, it is clear that if the dispute was with a foreign contractor under Clause 67.3 of the agreement, the fact that arbitration proceedings shall be held at New Delhi/Faridabad, India in sub-clause (vi) of Clause 67.3, would amount to the designation of either of these places as the “seat” of arbitration, as a supranational body of law is to be applied, namely, the UNCITRAL Arbitration Rules, in conjunction with the Arbitration Act, 1996. As such arbitration would be an international commercial arbitration which would be decided in India, the Arbitration Act, 1996 is to apply as well. There being no other contra indication in such a situation, either New Delhi or Faridabad, India is the designated “seat” under the agreement, and it is thereafter for the parties to choose as to in which of the two places the arbitration is finally to be held.

'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.

100. However, the fact that in all the three appeals before us the proceedings were finally held at New Delhi, and the awards were signed in New Delhi, and not at Faridabad, would lead to the conclusion that both parties have chosen New Delhi as the “seat” of arbitration under Section 20(1) of the Arbitration Act, 1996. This being the case, both parties have, therefore, chosen that the courts at New Delhi alone would have exclusive jurisdiction over the arbitral

proceedings. Therefore, the fact that a part of the cause of action may have arisen at Faridabad would not be relevant once the “seat” has been chosen, which would then amount to an exclusive jurisdiction clause so far as courts of the “seat” are concerned. '

9. Thereafter, learned counsel for petitioners pointed out that the letter of sole arbitrator dated 14.12.2015 (under cover of which impugned award was delivered to petitioners) gives a Chennai address and therefore, it is highly unlikely that the arbitration proceedings were held in Mumbai.

10. In this regard, Section 31(4) of A and C Act assumes significance and the same reads as follows:

'31. Form and contents of arbitral award.--- (1)

(2)

(3)

(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.'

11. Besides Section 31(4) of A and C Act, this Court also perused the impugned award and it comes to light that the impugned award has been executed in a non-judicial stamp paper issued by the State of Maharashtra. Suffice to scan and reproduce first page of impugned award which is as follows:



12. From the arbitration agreement between parties setting out Mumbai as the seat and venue, the impugned award having made in Mumbai within the meaning of section 31(4) read in the context of obtaining position of law makes it clear that the jurisdictional supervisory Court qua Section 34 of A and C Act is in State of Maharashtra/Mumbai. In other words, supervisory jurisdictional Court to exercise Section 34 jurisdiction is not this Court. On this ground, without expressing any opinion on merits of the matter, the captioned OP is rejected, holding that the above plea regarding arbitral proceedings can also be raised in the Supervisory Court with territorial jurisdiction. To put it differently, even if petitioners were to contend that sole arbitrator is in Chennai (to be noted, impugned award has been sent to petitioners under cover of letter head which shows address of sole arbitrator in Chennai) the same can be raised only in jurisdictional supervisory Court. In other words, argument of learned counsel for petitioner in oral hearing regarding whether arbitral proceedings were held or it is an unbelievable affair itself can be raised (if at all and if that be so) only in the jurisdictional supervisory Court.

M.SUNDAR. J

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13. Though obvious, if petitioners choose to approach jurisdictional supervisory Court (Section 34 of A and C Act) in State of Maharashtra/Mumbai, this order will not come in the way as this Court is not expressing any view or opinion on the merits of challenge to the impugned award owing to lack of territorial jurisdiction. Consequently, A.No.2426 of 2016 is closed. There shall be no order as to costs.

01.03.2021

Speaking/Non-speaking order

Index : Yes / No

Internet : Yes / No

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