

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

FAO-CARB No.2 of 2018 (O & M)
Date of Decision: September 23rd, 2021

Andriz Hydro Private Limited

..... APPELLANT

VERSUS

Ray Construction Limited

..... RESPONDENT

...

CORAM: **HON'BLE MR. JUSTICE JASWANT SINGH**
 HON'BLE MR. JUSTICE SANT PARKASH

...

PRESENT: - Mr. Ashok Aggarwal, Senior Advocate, with Mr. Mukul Aggarwal, Advocate, for the appellant.

Mr. D.S. Patwalia, Senior Advocate, with Mr. Gaurav Rana, Advocate, for the respondent.

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Sant Parkash, J

The aforesaid presence is being recorded through video conferencing since the proceedings were conducted in virtual Court.

The present appeal is preferred against order dated 18.12.2017 passed by the Special Commercial Court, Gurugram, whereby the objection petition in original was returned to the appellant – petitioner against certified copy and proper receipt for presentation to the proper court having jurisdiction in Delhi as the court below had no territorial jurisdiction to entertain the same.

Succinctly, appellant – company is engaged in the business of engineering, procurement and construction (EPC/Turnkey) of Hydro Electric Power Plants and manufacture, supply, erection and commissioning of electro mechanical equipments for hydro power plants. In January 2002, Orissa Power Consortium Limited awarded the appellant a contract for design, manufacture, supply, erection and commissioning of electro mechanical equipment and execution of entire civil works of 54 MW Samal Hydro Electric Power Project at Samal Barrage, Orissa.

The appellant invited bids for sub-contractor in respect of above contract. Pursuant to the said tender, respondent – Ray Construction Limited was short listed for execution of civil works at Samal HEP as per the scope, terms & conditions of the bid documents. Bid negotiations between the appellant and the respondent were held at Faridabad on 11.04.2002 (Annexure A-2) whereby ‘Clause 76.0 of General Conditions of Contract – Arbitration’ was inserted as part of the contract. As per subsequent Minutes of Meetings dated 14.12.2004 and 15.12.2004 (Annexure P-3), held at Faridabad, contract price was agreed to be increased from ₹ 15,11,96,400/- to ₹ 17,80,00,000/-. Pursuant to above, purchase order dated 22.12.2004 (Annexure A-4) was issued by the appellant to the respondent from its office situated at Faridabad, the effective date of contract being 10th day from the issue of purchase and works undertaken were to be completed within 15 months with a grace period of 3 months.

Respondent failed to execute the works as per the construction schedule of civil works submitted by it. The appellant vide its letters/e-mails dated 30.07.2005, 10.08.2005 and 12.08.2005 reminded the respondent of its contractual obligations and insisted the respondent to

initiate remedial measures for speeding up the work. The period of completion of work, as per contract, expired on 31.03.2006. Accordingly, appellant issued notice of default dated 15.05.2006 to the respondent for delay in execution of work. Since the respondent failed to complete the work even despite extension of time, appellant terminated the contract on 25.09.2006 on the ground of enormous and inordinate delay in execution of contract.

Consequently, respondent filed a petition (OMP No.459 of 2006) under Section of the Arbitration & Conciliation Act, 1996 (for short, 'Arbitration Act') before High Court of Delhi, however, no cause of action had arisen in Delhi, wherein vide order dated 06.10.2006 (Annexure A-5), it recorded the statement of parties to the effect that both the parties shall nominate arbitrators, who thereafter shall appoint a Presiding Arbitrator. The aforesaid petition was disposed of by the High Court of Delhi vide order dated 11.10.2006 (Annexure A-6) by appointing an Arbitral Tribunal comprising of three Arbitrators.

The Arbitral Tribunal, vide Award dated 15.03.2013 (Annexure A-7) allowed the claims of the respondent by rejecting the counters claims of appellant. Aggrieved appellant – claimant preferred objections under Section 34 of the Arbitration Act before the District Court, Faridabad. It was contested by the respondent by filing reply and took the objections of territorial jurisdiction of Commercial Court at Faridabad and stated that since the first application under Section 9 of the Arbitration Act was filed by respondent before the High Court of Delhi at New Delhi, whereby Arbitrator was appointed and the parties had agreed to the venue of Arbitration at Delhi, therefore, High Court of Delhi at New Delhi will have

the jurisdiction to entertain and try the matter. Accordingly, the Government of Haryana vide notification dated 27.10.2017 constituted Special Commercial Court at Gurugram and objections filed by the appellant were transferred to the Special Commercial Court, Gurugram, who vide impugned order dated 18.12.2017 held that the court had got no territorial jurisdiction to entertain the objections filed by the appellant under Section 34 of the Arbitration Act.

Now, the appellant has challenged the impugned order passed by the Special Commercial Court, Gurugram, before this Court.

Learned senior counsel for the appellant has contended that the impugned order is patently erroneous, illegal, without jurisdiction and there is liable to be set aside. Cause of action arose within territorial jurisdiction of Faridabad. The agreement was signed in the office of the appellant at Faridabad. Meeting dated 11.04.2002, modifying the agreement, was held at Faridabad. The payments were to be released to the respondent from the address of appellant i.e. 13/1 Milestone, Mathura Road, Prithla and the respondent's letter of acceptance of contract dated 18.10.2004 was received by the appellant at its office in Faridabad. Accordingly, learned counsel has contended that the Court at Faridabad had the territorial jurisdiction to decide the objections filed by the appellant.

Learned senior counsel for the respondent, *per contra*, submitted that present appeal is not maintainable as no appeal is provided under Section 37 of the Arbitration Act. Respondent filed petition under Section 9 of the Arbitration Act before High Court of Delhi and no objection whatsoever was raised by the appellant at that point in time. Neither, the orders dated 06.10.2006 and 11.11.2006 passed by the High Court of Delhi

were challenged by the appellant. Thus, having accepted the jurisdiction at New Delhi, now the appellant cannot argue to the contrary.

We have heard learned counsel for the parties and perused the record.

It would be apt and proper to reproduce Section 2(1)(e) and Section 20 of the Arbitration Act, to adjudicate the matter in controversy and the same read as under:-

“Section 2(1)(e): “Court” means –

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.

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20. Place of Arbitration.- (1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.”

Section 20 CPC is also relevant to be reproduced which is as

under:-

“20. Other suits to be instituted where defendants reside or cause of action arises.—Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-

- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
- (c) the cause of action, wholly or in part, arises.

Explanation.- A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.”

A perusal of above reproduced provisions of the Act reveals that though the parties corresponded both at Faridabad and Delhi, but as per Section 2(1)(e) of the Arbitration Act, the jurisdiction of the court would be where the cause of action arises or where the defendant resides or carries on

business and Section 20 CPC should apply for the purpose of jurisdiction but where the parties by agreement or by exchange of letters or by separate meeting fixed the seat of arbitration, then the seat of arbitration would govern the jurisdiction of the court.

Admittedly, the parties in meeting dated 11.04.2002, held at Faridabad, had fixed the seat/ chosen place of arbitration by inserting *Clause 76.0 of General Conditions of Contract- Arbitration* stating “..... in the event of arbitration, the role and exclusive jurisdiction of the courts stationed in New Delhi shall apply”.

It is also not in dispute that application under Section 9 of the Arbitration Act was preferred by the respondent before High Court of Delhi wherein an Arbitrator was appointed vide order dated 11.10.2006 and parties agreed to the venue of arbitration to be at Delhi. Subsequently, the aforesaid petition/application was disposed of by the High Court of Delhi vide order dated 11.10.2006 (Annexure A-6) by appointing an Arbitral Tribunal comprising of three Arbitrators. Undisputedly, neither any objection whatsoever was raised by the appellant nor orders dated 06.10.2006 and 11.10.2006 were challenged. Thus, having accepted the jurisdiction at New Delhi, now the appellant cannot argue to the contrary. To substantiate this finding, Section 42 of the Arbitration Act can be reproduced which is as under:-

“42. Jurisdiction.—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the

arbitral proceedings shall be made in that Court and in no other Court.”

Besides, the Supreme Court in case **Hindustan Construction Company Limited vs. NHPC Limited and another, (2020) 4 Supreme Court Cases 310**, reiterated the findings delivered in **BGS SGS Soma JV vs. NHPC, (2020) 4 SCC 234**, while deciding similar issue of jurisdiction, where contract between the parties was executed at Faridabad, held jurisdiction at New Delhi as the parties had agreed to courts at Delhi to be the chosen seat of the arbitrator. The relevant part of the aforesaid judgment reads as under:-

“5. Given the finding in this case as New Delhi was the chosen seat of the parties, even if an application was first made to the Faridabad Court, that application would be made to a court without jurisdiction. This being the case, the impugned judgment is set aside following *BGS SGS Soma JV*, as a result of which it is the courts at New Delhi alone which would have jurisdiction for the purpose of challenge to the award.

6. As a result of this judgment, the Section 34 application that has been filed at Faridabad Court, will stand transferred to the High Court of Delhi at New Delhi. Any objections taken on the ground that such objection filed under Section 34 is out of time hence cannot be countenanced. The appeal is disposed of accordingly.”

In view of the aforesaid discussion and the chosen seat by the parties to be at Delhi, we are of the considered opinion that the court below rightly held that it had no territorial jurisdiction to entertain the objections under Section 34 of the Arbitration Act filed by the appellant. Accordingly the order passed by the Special Commercial Court, Gurugram returning the objections for being presented in the courts at Delhi, is upheld

and the appeal stands dismissed with the observation that any objection taken on the ground that such an objection petition filed under Section 34 of the Arbitration Act is out of time, cannot be countenanced. It is further clarified that status quo as on today will operate for 8 weeks from today for taking recourse to present the objection petition before the High Court of Delhi.

Since the aforesaid judgment passed has been in the main appeal, no separate order is required to be passed in all other civil miscellaneous applications and are disposed of accordingly.

(Jaswant Singh)
Judge

(Sant Parkash)
Judge

September 23rd, 2021
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Whether Speaking/ Reasoned:
Whether Reportable:

Yes/ No
Yes/ No