

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 16th July, 2021
Pronounced on: 21st October, 2021

+ ARB.P. 164/2021

ISGEC HEAVY ENGINEERING LTD

..... Petitioner

Through: Mr. Shambu Sharan, Advocate.

versus

INDIAN OIL CORPORATION LIMITED

..... Respondent

Through: Mr. Neelanjan Deka, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J.

1. The present petition under Section 11 (4) and (6) of the Arbitration and Conciliation Act, 1996 [*hereinafter, 'the Act'*] seeks appointment of an Arbitrator in terms of Clause 9.0.0.0 of the General Conditions of Contract [*hereinafter, 'GCC'*], incorporated by way of reference under a Letter of Award dated 22nd September, 2016 [*hereinafter, 'LoA'*], whereunder, a Work Order¹ was issued to the Petitioner for carrying out the works of “Residual Process Design, Engineering, Detailed Engineering (including HAZOP Study), Procurement, Supply, Fabrication, Inspection, Transportation, Storage, Construction, Installation, Testing, Pre-Commissioning, Commissioning, Performance Guarantee Test Run, Operation and Maintenance of 80 TPA (NET) Petcoke Fired CFBC Boiler

¹ Work Order No. 24875185.

at Guwahati Refinery” of the Respondent.

2. The arbitration clause contained in the GCC, reads as under: -

“9.0.0.0 ARBITRATION

9.1.0.0 Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.1.1.0 hereof, any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof, if the CONTRACTOR has not opted for the Alternative Dispute Resolution Machinery referred to in Clause 9.2.0.0 in respect thereof, and any dispute arising out of an amount claimed by the OWNER against the CONTRACTOR shall be referred to the arbitration by an Arbitral Tribunal comprised of 3 (three) arbitrators selected in accordance with the provisions of the Arbitration & Conciliation Act, 1996. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONTRACTOR as counter claim(s). The CONTRACTOR shall not, however, be entitled to raise as a set-off defence or counter-claim any claim which is not a Notified Claim included In the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

9.1.1.0 The provisions of the Indian Arbitration & Conciliation Act, 1996 and any re-enactment(s) and/or modification(s) thereof and of the Rules framed thereunder shall apply to arbitration proceedings pursuant hereto subject to the following conditions:

(a) The Arbitrator shall give his Award separately in respect of each Claim and Counter-Claim; and

(b) The Arbitrator shall take into account any decision, opinion or determination howsoever expressed which is stated to be final and binding to the CONTRACTOR in terms of the contract documents in Judging any issue or dispute.

9.1.2.0 The venue of the arbitration shall be New Delhi, provided that the Arbitrators may with the consent of the OWNER and the CONTRACTOR agree upon any other venue.”

3. Pursuant to the LoA, a ‘Formal Agreement for Work’ dated 26th September, 2016 was executed at Guwahati [*hereinafter*, ‘**Contract**’].

DISPUTES

4. During the pendency of the Contract, the Respondent – i.e., Indian Oil Corporation Ltd. [*hereinafter*, ‘**IOCL**’] issued a suspension order dated 06th August, 2018,² which lead to Petitioner – i.e., ISGEC Heavy Electrical Ltd. [*hereinafter*, ‘**ISGEC**’] exercising its right to terminate the Contract *vide* letter dated 24th December, 2019. Later, ISGEC invoked arbitration on 23rd October 2020, and nominated its Arbitrator. IOCL replied *vide* letter dated 23rd November 2020, contending that the invocation was unsustainable and premature. In these circumstances, ISGEC has filed the present petition.

CONTENTIONS OF THE PARTIES

5. Mr. Neelanjan Deka, counsel for IOCL does not dispute the existence of the Arbitration Agreement, however, he opposes the present petition by making the following submissions: -

5.1 The present petition is not maintainable as this Court does not have the territorial jurisdiction to appoint an Arbitrator. In view of Article 4 of the Contract, the court of competent jurisdiction would be the civil court at Guwahati, and that alone would have jurisdiction to entertain the present petition.

5.2 All activities pertaining to the Contract *viz.* – floating of tender, allotment of work, placing of purchase order, signing and execution of Contract, execution of work, etc. has been carried out in Guwahati; There is no connection with New Delhi so as to confer jurisdiction here.

5.3 Clause 9.1.2.0 of the GCC stipulates that the ‘venue’ of arbitration

² Whereby IOCL suspended performance of the Contract/ work owing to non-receipt of approval/ permission from Pollution Control Board of Assam (PCBA).

shall be at New Delhi and that the Arbitrators may, with the consent of the parties, agree upon any other venue. The aforesaid clause demonstrates that the parties have not agreed that the seat of arbitration would be at New Delhi, instead, it is only a convenient place for conducting arbitration proceedings, which can be changed by agreement.

5.4 Reliance is placed upon Section 20 (3) of the Act to contend that the venue of arbitration can be changed with the consent of the parties. Thus, it cannot be said that parties have agreed to subject themselves to the exclusive jurisdiction of the court(s) at Delhi. The intention of the parties is to confer exclusive jurisdiction on the competent civil courts at Guwahati which is also evident from the afore-noted facts.

6. *Per contra*, Mr. Shambu Sharan, counsel for the Petitioner, submits that the jurisdiction to entertain the present petition is with this Court, as the seat of arbitration, in terms of Clause 9.1.2.0, is at New Delhi. He argued that the law on this issue stands settled by the Supreme Court in **BGS SGS Soma JV v. NHPC Ltd.**³, and the said decision is squarely applicable to the facts of the case. He further argued that ‘venue’ provided in the aforementioned clause is akin to defining the seat of arbitration. Reliance was also placed upon **Inox Renewables Ltd. v. Jayesh Electricals Ltd.**⁴

ANALYSIS

7. The Court has considered the contentions of the counsels. In the

³ (2020) 4 SCC 234.

instant case, Clause 9.1.2.0 of the GCC provides that the ‘venue’ of arbitration shall be New Delhi. The said clause also provides that the Arbitrators may, with the consent of the Owner (IOCL), and the Contractor (IGSEC) agree upon any other venue. Relevant portion of the aforesaid clause reads as under: -

“9.1.2.0. *The venue of arbitration shall be New Delhi, provided that the Arbitrators may with the consent of the OWNER and the CONTRACTOR agree upon any other venue.*”

[Emphasis supplied]

8. There can be no doubt on the proposition that the word ‘seat’ and ‘venue’ have different connotations. They are not synonymous, in so far as the arbitration proceedings are concerned, although, they have often been used interchangeably. The law on ‘seat’ and ‘venue’ of arbitration proceedings is fairly well-defined in view of several judgments of the Supreme Court. The Supreme Court has clearly held that where the parties have determined the ‘seat’ in their agreement, the same is akin to conferring exclusive jurisdiction on the court(s) thereof.⁵ The expression ‘venue’ and ‘seat’ do not find any mention under the Act. The expression used under the Act is ‘place’, which finds mention under Section 20 of the Act. In **BALCO v. Kaiser Aluminium Technical Services Inc.**,⁶ the Apex Court made it clear that sub-sections (1) and (2) of Section 20, where the word ‘place’ is used, refer to juridical ‘seat’; whereas, in sub-section (3) of Section 20, the word ‘place’ is equivalent to ‘venue’, i.e., the location of the meeting of arbitral proceedings.⁷

⁴ 2021 SCC OnLine SC 448.

⁵ See: **Indus Mobile Distribution Private Limited v. Datawind Innovations Private Ltd.**, AIR 2017 SC 2105, and **BGS SGS SOMA** (*supra*).

⁶ (2012) 9 SCC 552.

⁷ See: Para 18 of **Indus Mobile** (*supra*).

9. In **BGS SGS Soma** (*supra*) the Arbitration Agreement therein provided that, “*arbitration proceedings shall be held at New Delhi/Faridabad*”. Consequent to disputes between the parties, the arbitral process was invoked, and the Arbitral Tribunal held proceedings and delivered the award at New Delhi. A Section 34 petition was filed by NHPC at Faridabad. Later, NHPC filed an appeal before the High Court of Punjab and Haryana wherein the same was allowed holding that New Delhi was only the convenient venue for holding arbitral proceedings. Before the Supreme Court, BGS contended that the Arbitral Tribunal conducted the sittings at Delhi and delivered the award at Delhi; thus, the juridical ‘seat’ of arbitral proceedings was New Delhi, not Faridabad. The Supreme Court laid down the test for interpreting the juridical ‘seat’ of arbitration proceedings, in para 61, given as under: -

“61. It will thus be seen that wherever there is an express designation of a ‘venue’, and no designation of any alternative place as the ‘seat’, combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding.”

10. In **BGS SGS Soma** (*supra*), the Supreme Court, after considering the conspectus of judgments therein, also noted that whenever in an arbitration clause, there is a designation of someplace as being the ‘venue’ of the arbitration proceedings, the expression ‘arbitration proceeding’ would make it clear that the venue is really the ‘seat’ of arbitration proceedings.⁸ At the same time, in para 82, the court also touched upon the aspect of ‘contrary

⁸ See: Para 82 of **BGS SGS Soma** (*supra*).

indicia’, that also finds mention in para 61 noted above. Para 82 of the aforesaid judgment is culled out as follows: -

“82. 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 that 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.”

11. In light of the above, the question that arises for consideration is whether the term ‘venue’ provided in Clause 9.1.2.0 of the GCC is equivalent to ‘seat’ of arbitral proceedings or is it merely a ‘venue’/ ‘place’ i.e., a geographical location for the purpose of conducting meetings/ proceedings.

12. To answer the afore-mentioned question – What constitutes the ‘seat’ of arbitral proceedings – the intention of the parties is germane and that can

be gathered from the terms of the Contract. Let's have a closer look at the clause. The clause provides a general stipulation that the 'venue' so designated can be changed by the Arbitrators, with the consent of the parties. This, *prima facie*, suggests that the 'venue' specified is not really envisaged as the 'seat' of the proceedings, which should be specified in certain terms. This interpretation is also in sync with Section 20 (3) of the Act, which provides that notwithstanding anything contained in Section 20 (1) and (2) – the Arbitral Tribunal can meet at any place it considers appropriate for hearing witnesses, experts, etc. In fact, the language used in the present clause seems to be a replication of the language used in Section 20(3). For this reason, as well, the Court is inclined to agree that in the present case, Clause 9.1.2.0 of the GCC specifies New Delhi only as a geographically convenient place where Arbitral Tribunal can hold meetings.

13. The above position gets reinforced upon a plain reading of Article 4 of the Contract. This clause vests exclusive jurisdiction at the civil court(s) at Guwahati for – all actions/proceedings, including arbitration, and reads as under: -

“ARTICLE 4 - JURISDICTION:

4.1 Notwithstanding any other court or courts having jurisdiction to decide the question(s) forming the subject-matter of the reference if the same had been the subject-matter of a suit, any and all actions and proceedings arising out of or relative to the contract (including any arbitration in terms thereof) shall lie only in the Court of Competent Civil Jurisdiction in this behalf at GUWAHATI (where this contract has been signed on behalf of the Owner) and the said Court(s) shall have jurisdiction to entertain and try such actions and/or proceeding(s) to the exclusion of all other Courts.”

[Emphasis supplied]

14. As opposed to the general stipulation in Clause 9.1.2.0, Article 4 is

worded in clear, unambiguous, and directory terms. In fact, it serves as the 'contrary indica', which further demonstrates that the 'venue' in Clause 9.1.2.0 is only a physical place of meeting under Section 20(3) of the Act. Article 4 – leaves no room that all actions and proceedings arising out of the Contract, including arbitration, shall have to necessarily be tried by the civil court(s) at Guwahati exclusively, and does not lead to jurisdiction being vested in the court(s) at Delhi.

15. For the reasons laid out above, this Court is of the view that Clause 9.1.2.0 only provides a 'venue' of arbitration, and the juridical 'seat' shall vest with the civil court(s) at Guwahati.

16. In view of the above, this Court does not have the jurisdiction to entertain the present petition and accordingly, the same is dismissed.

SANJEEV NARULA, J

OCTOBER 21, 2021

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