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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Date of Decision: 22<sup>nd</sup> July, 2021**

+ **ARB.P. 327/2021**

PATIL RAIL INFRASTRUCTURE PVT. LTD. .... Petitioner

Through: Mr. Ishan Sanghi, Advocate.

versus

MINISTRY OF RAILWAY & ANR. .... Respondents

Through: Mr. Jagjit Singh, Senior Counsel for  
Railways with Mr. Preet Singh and  
Mr. Vipin Chaudhary, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE SANJEEV NARULA**

**JUDGMENT**

**[VIA VIDEO CONFERENCING]**

**SANJEEV NARULA, J. (Oral):**

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 [in short '*the Act*'], has been filed seeking appointment of a Sole Arbitrator to adjudicate disputes between the parties arising from the Letter of Acceptance dated 11<sup>th</sup> June 2019 issued by Respondent No. 1 [hereinafter, '*LoA*'].

**Brief facts:**

2. The brief facts necessary for the disposal of the present petition are summarized as follows:

2.1. Respondent No. 1 [Railway Board] issued tender no. CS 172/2018 inviting bids for manufacture and supply of pre-stressed mono-block

concrete sleepers. The Petitioner submitted its offer on 28<sup>th</sup> August, 2018, against which, Respondent No. 1 made a counter-offer on 28<sup>th</sup> May, 2019. The Petitioner acknowledged and gave a conditional acceptance to the same.

2.2. Then on 11<sup>th</sup> June, 2019, Respondent No. 1 issued the LoA for manufacture and supply of 20,000 sleepers at Rs. 2,176/- per sleeper and further informed the Petitioner that a 'contract agreement' would have to be executed between the Petitioner and Respondent No. 2 [North-Western Railway]. Shortly thereafter, on 17<sup>th</sup> June, 2019, Respondent No.2 directed the Petitioner to submit a security deposit of Rs. 30 lakhs and made it clear that the 'contract agreement' would be executed only on receipt of said security. The Petitioner replied on 2<sup>nd</sup> July, 2019 reiterating its earlier response to the counter-offer, and furnished a bank guarantee of Rs. 30 lakhs on 7<sup>th</sup> August, 2019, without prejudice to its rights and contentions.

2.3. This was followed by Respondent No. 2 issuing a letter on 31<sup>st</sup> December, 2019, cautioning the Petitioner that it had neither signed the contract nor commenced production/manufacture of the sleepers, despite a lapse of almost 7 months from the issuance of LoA. The Petitioner was given 10 days to start production/manufacture, sign the contract, and submit plans for production of ordered quantity, failing which, Petitioner was cautioned against action as per agreement. The same grievances, along with a list of other lapses, were reiterated in another letter dated 18<sup>th</sup> August, 2020.

2.4. The Petitioner, *vide* letters dated 27<sup>th</sup> August, 2020 and 16<sup>th</sup> December, 2020, expressed its inability to start production due to the nation-wide lockdown in place since March, 2020, and requested for another 6 months to start production and also for withdrawal of the letter dated 18<sup>th</sup>

August, 2020.

2.5. At that point, Petitioner approached this Court on 29<sup>th</sup> December, 2020, by way of CS(COMM) 584/2020, seeking declaration and mandatory injunction on the ground that there was no concluded contract between the parties. However, the suit was withdrawn on 30<sup>th</sup> December, 2020 with liberty to pursue alternate remedy i.e., arbitration.

2.6. To commence arbitration, the Petitioner issued a notice of invocation to Respondent No. 1 on 31<sup>st</sup> December, 2020 and requested for the appointment of a Sole Arbitrator.

2.7. On 5<sup>th</sup> January, 2021, Respondent No. 2 terminated the alleged agreement on account of failure of the Petitioner to sign the 'contract agreement and commence production of sleepers, and further threatened legal action for forfeiture of security deposit.

2.8. Apprehending coercive action, the Petitioner filed a Section 9 petition before the Commercial Court, Patiala House Courts, New Delhi, where interim protection was granted *vide* order dated 13<sup>th</sup> January, 2021 against invocation of Petitioner's bank guarantee.

2.9. As the Respondent had not agreed for arbitration despite lapse of 30 days since the notice of invocation, present petition was filed on 4<sup>th</sup> February, 2021.

2.10. Subsequent to the filing of the petition, Respondent No. 2, on 25<sup>th</sup> March, 2021 furnished a panel of four arbitrators, calling upon the Petitioner to nominate one out of the said list. Upon non-receipt of any reply within 30 days, it proceeded to unilaterally appoint an arbitrator from its panel, *vide* letter dated 29<sup>th</sup> April, 2021.

**Contentions of the parties:**

3. In their reply to the present petition, while the Respondents do not dispute the arbitration agreement, but they object to the maintainability of the petition on the ground of lack of jurisdiction.

4. Mr. Ishan Sanghi, learned counsel for the Petitioner, states that this court is possessed of the territorial jurisdiction to entertain the present matter, on the following grounds:

4.1 The issuance of the LoA on 11<sup>th</sup> June, 2019, and all the events relating to the agreement have taken place at New Delhi. To support this contention, he relies upon Clauses 23 and 24 of Special Conditions of Contract ('SCC') which forms part of the LoA. The clauses are reproduced below:

*"23. LAWS GOVERNING THE CONTRACT*

*23.1. This Contract shall be governed by the Laws of India being in force.*

*23.2. Irrespective of the place of delivery, the place of performance or the place of payment under the order, the order shall be deemed to have been made at the place from where the acceptance of tender has been issued."*

*24. JURISDICTION OF COURTS*

*The Courts of the place where the contract agreement has been signed shall have the jurisdiction to decide any disputes arising out of or in respect of the order."*

Since the Petitioner has not signed the contract agreement (and the same is an admitted fact), Clause 24 would not be applicable, and thus, the Courts at Delhi would be able to exercise jurisdiction under Clause 23.

4.2. When the Petitioner filed an application under Section 9 of the Act before District Court at Delhi, the Respondent never raised any jurisdictional objection. Thus, by virtue of operation of Section 42 of the Act, Courts at Delhi alone would have jurisdiction over the arbitral proceedings, and all

subsequent applications would be required to be made in Delhi itself.

5. Mr. Sanghi further explains that the counter-offer of Respondent No. 1 dated 28<sup>th</sup> May, 2019 was accepted by Petitioner on a conditional basis, hinging on the shifting of the Petitioner's plant. Prior to Respondent No. 2 sending the LoA dated 11<sup>th</sup> June, 2019, Petitioner had sought for shifting of its plant at CSP Badikhathu vide letter dated 01<sup>st</sup> June, 2019 to Respondent No. 1. However, the same had been kept pending by Respondent No. 2 on the excuse that it falls within the domain of Respondent No. 1. For this reason, all actions of the Petitioner thereafter were without prejudice to its rights and contentions.

6. Lastly, Mr. Sanghi contends that Respondent No. 2 could not have appointed an arbitrator from its panel vide its letter dated 29<sup>th</sup> April, 2021, subsequent to the filing of the instant petition. It is trite law that once a Section 11 petition has been filed, the opposing party forfeits the right to appoint an Arbitrator. In this regard, reliance is placed upon ***Punj Lloyd v. Petronet MHB Ltd.***<sup>1</sup>

7. On the other hand, Mr. Jagjit Singh, learned counsel for the Respondents submits that this Court does not possess the requisite jurisdiction to entertain the present petition, for the following reasons:

7.1. After the issuance of LoA on 11<sup>th</sup> June, 2019, Respondent No. 1 had no role to play, and all correspondence took place between the Petitioner and Respondent No. 2 which is headquartered at Jaipur. It is a matter of record that the supply was to be made at Jaipur, the bank guarantee was furnished in Jaipur and all the communications to the Petitioner were from Jaipur. All the factors when put together lead to the inexorable conclusion that the

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<sup>1</sup> (2006) 2 SCC 638.

Courts at Jaipur would have the jurisdiction.

7.2. There is a concluded contract between the parties. Merely because a formal agreement was not signed, does not mean that the contract was not concluded. Para 4 of the counter-offer clearly states that in case there is an unconditional acceptance to counter-offer, the same would amount to a binding contract. Once it has signed the counter-offer in the space where the contract asks for an unconditional acceptance, the Petitioner cannot, at this stage, turn around and say that acceptance was conditional. Furthermore, Clause 8.1 of the SCC specifically mentions that '*The issue of LOA (letter of acceptance) shall form a binding contract*', meaning thereby that the Petitioner has entered into a binding contract already. The unconditional acceptance is also aided by the act of the Petitioner furnishing a bank guarantee of Rs. 30 lakhs to Respondent No. 2 on 7<sup>th</sup> August, 2019. In these circumstances, since there is a binding contract between the parties, Clause 24 of the SCC would be applicable, and it clearly states that Courts at the place where the contract agreement is signed shall have jurisdiction.

8. Mr. Singh further argues that the Petitioner failed to supply the materials even after 19 months. It also failed to maintain the 6-monthly supply schedules in terms of Para 10.1 of the tender document. Therefore Respondent No. 2 had no option except to terminate the contract as per procedure. Accordingly, a termination letter dated 5<sup>th</sup> January, 2021 was issued by Respondent No.2 after taking administrative approval of the Railway Board.

9. Lastly, he submits that pursuant to Respondent No. 2's appointment of Arbitrator on 29<sup>th</sup> April, 2021, there is an arbitral tribunal already in place. Thus, the Petitioner could not seek appointment of an independent

Arbitrator. In this regard, he places reliance upon the judgment of the Supreme Court in ***Central Organization for Railway Electrification (CORE) v. M/s ECI-SPIC-SMO-MCML (JV)***.<sup>2</sup>

**Analysis and findings:**

10. In a nutshell, the preliminary objection of the Respondent relates to the lack of territorial jurisdiction. To rule on this objection, it needs to be determined as to which court would be competent to entertain the petition, having reference to Section 2(1) (e) of the Act. Let us first take note of the arbitration agreement between the parties. The same forms a part of the IRS Conditions and reads as under:

*“2900. Arbitration.*

*(a) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager in the case of contracts entered into by the Zonal-Railways and Production Units; by any Member of the Railway Board, in the case of contracts entered into by the Railway Board and by the Head of the Organisation in respect of contracts entered into by the other Organisations under the Ministry of Railways. The Gazetted Railway Officer to be appointed as arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.*

*(b) In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.*

*(c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all.*

*(d) The arbitrator may from time-to-time with the consent of all the parties to the contract enlarge the time for making the award.*

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<sup>2</sup> Civil Appeal Nos. 9486-9487 of 2019, Judgment dated 17<sup>th</sup> December, 2019.

*(e) Upon every and any such reference, the assessment of the cost incidental to the reference and award respectively shall be in the discretion of the arbitrator.*

*(f) Subject as aforesaid, the Arbitration Act, 1996 and the rules thereunder and any statutory modification thereof for the time being in force shall be deemed to apply to the arbitration proceeding under this clause.*

*(g) The venue of arbitration shall be the place from which the acceptance note is issued or such other place as the arbitrator at his discretion may determine.*

*(h) In this clause the authority, to appoint the arbitrator includes, if there be no such authority, the officer who is for the time being discharging the functions of that authority, whether in addition to other functions or otherwise.”* [emphasis supplied]

11. There is admittedly no defined seat or place of arbitration agreed upon between the parties. The venue is also not fixed, as can be seen from the wording of the above-quoted clause. In the absence of a clear intention of the parties regarding the ‘seat’ of arbitration to anchor the arbitration proceedings, the court would have to gather the intent from other clauses in the agreement as well as from the conduct of the parties. On this aspect, Clauses 23 and 24 of the LoA are relevant, as extracted earlier.

12. On a plain reading of Clause 24 of the SCC, it is noticed that this clause gives jurisdiction to the Court situated at the place of signing. However, markedly, the parties have not agreed to the exclusive jurisdiction of said court. Be that as it may, the lack of use of words like ‘alone’, ‘only’, ‘exclusive’ or ‘exclusive jurisdiction’ is not decisive, as held in **Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.**<sup>3</sup> Therefore, it is crucial to find the place of signing of contract agreement, to get an indication of the court competent to decide the disputes arising out of or in respect of the contract agreement.

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<sup>3</sup> (2013) 9 SCC 32.

13. In order to determine this question, some key facts need to be analysed. In the instant case, the bid was submitted at New Delhi and tender was also opened at New Delhi. The acceptance of tender was also done at New Delhi. The offer submitted by the Petitioner on 28<sup>th</sup> August, 2018 and the counter-offer of Respondent No. 1 on 28<sup>th</sup> May, 2019 were both made at/from New Delhi. Thereafter, Respondent No. 1 issued the LoA dated 11<sup>th</sup> June, 2019 along with the SCC at/from Delhi. As per the terms of the LoA, the Petitioner and Respondent No. 2 were to enter into a 'contract agreement'. However, that never happened and this becomes conspicuous from the communication dated 5<sup>th</sup> January, 2021 issued by Respondent No. 2 wherein it has been specifically stated, –*“you had not attended this office for signing contract agreement for above referred LoA.”* This fact is not refuted by the Respondents, and rather, it is emphasized by them that the Petitioner repeatedly and deliberately avoided doing so. Thus, concededly, the 'contract agreement' between the parties was not signed. Therefore, Clause 24 of the SCC, which could have pointed us towards the jurisdictional Court, never become operative, and cannot be relied upon in this regard.

14. Since Clause 24 is not attracted, the next question is - how to identify the competent Court? For that we must gather the intent of the parties by scouring through the other terms of the LoA.

15. To begin, with let us deal with Respondents' contentions that the LoA itself is a binding contract and the non-signing of the Contract Agreement is immaterial. As a matter of fact, these aspects that need not be examined at this stage. The same are not germane for deciding the present petition. It is not in dispute that the LoA has been issued by Respondent No. 1 and that

contains an arbitration clause. Since disputes have arisen, and arbitration agreement exists, and this is sufficient for the Court to refer the disputes to arbitration.

16. As the seat of arbitration is not clearly-defined, and the clause defining jurisdiction is inoperative as well, the Court has to undertake the exercise of determining whether any cause of action, wholly or in part, arose at Delhi. This assumes significance because the established principles of arbitration law provide that when there is no clear declaration of a 'seat', then the Court in whose jurisdiction the cause of action arose, whether wholly or in part, shall have the necessary jurisdiction to deal with proceedings under the Act.<sup>4</sup>

17. On this issue, Respondents have also argued that in terms of Indian Railways Act, 1989, the General Manager is the head of the concerned Zonal Railway, and thus it must be issued through him. Reliance is also placed on Section 80(1)(b) of the Code of Civil Procedure, 1908 [in short 'CPC'] in this regard, which provides that notices must be served to the General Manager of the concerned Railway. On the strength of the foregoing, it is argued that the material was to be supplied to Respondent No. 2, and the General Manager of North-Western Railway, Jaipur was the proper authority to appoint an arbitrator and thus, the High Court of Rajasthan at Jaipur would have the requisite territorial jurisdiction.

18. There may be some cause of action at Jaipur on account of the facts noted above. Nevertheless, in the opinion of Court, since disputes have arisen at the stage of LoA, without there being any formal contract

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<sup>4</sup> See: *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Ltd.*, AIR 2017 SC 2105.

agreement between the parties, Clause 23.2 of the SCC would also assume relevance, which provides that *“the order shall be deemed to have been made at the place from where the acceptance of tender has been issued.”*

19. In light of afore-noted clause, one can notice that the acceptance of tender (albeit conditional), on 1<sup>st</sup> June, 2019 by the Respondent No. 1 was at Delhi. Besides, other facts noted above clearly demonstrate that some cause of action has arisen in Delhi. Moreover, jurisdiction of the courts in Delhi has not been specifically ousted. Thus, this Court, within the meaning of Section 2(1)(e) of the Act read with Sections 16 to 21 of the CPC dealing with cause of action, would be competent to entertain the petition under Section 11 of the Act.

20. The other reason why this Court would not shy away from exercising jurisdiction stems from Section 42 of the Act. Petitioner filed Section 9 petition before the Commercial Court, Patiala House Courts, New Delhi wherein an *ex-parte* stay on the forfeiture of the security deposit in respect of the tender furnished by the Petitioner was granted. Thereafter, the Respondent filed a reply to the Section 9 petition on 22<sup>nd</sup> February, 2021. A perusal of the said reply does not show any objection of territorial jurisdiction raised therein. Even in the submissions of the Respondents in the present petition, there is no whisper of the Section 9 petition and the reply thereto. There is no explanation forthcoming as to why the Respondents did not object to the territorial jurisdiction of the Commercial Court, Patiala House Courts, New Delhi. Notwithstanding the apparent waiver of the right to object to the territorial jurisdiction, Section 42 of the Act is of relevance. Under the said provision, the Court before which an application pertaining to arbitration proceedings arising out of an agreement

is made, would be considered the jurisdictional Court for the purposes of subsequent arbitration proceedings arising out of the same agreement. The role of this provision becomes relevant when there is no 'seat' determined as per the agreement or when the proceedings are not at the stage where the Arbitral Tribunal could determine the 'seat' under Section 20(2) of the Act. The findings of the Supreme Court in this regard in the judgement of **BGS SGS Soma JV v. NHPC Ltd.**,<sup>5</sup> would be apposite, and are extracted hereinbelow:

*"Section 42 is meant to avoid conflicts in jurisdiction of Courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one Court exclusively. This is why the Section begins with a non-obstante clause, and then goes on to state "...where with respect to an arbitration agreement any application under this Part has been made in a Court..." It is obvious that the application made under this part to a Court must be a Court which has jurisdiction to decide such application. The subsequent holdings of this Court, that where a seat is designated in an agreement, the Courts of the seat alone have jurisdiction, would require that all applications under Part-I be made only in the Court where the seat is located, and that Court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several Courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal Under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a Court in which a part of the cause of action arises would then be the exclusive Court Under Section 42, which would have control over the arbitral proceedings."*

21. Thus, as per the abovementioned dicta of the Supreme Court, Section 42 of the Act, and the facts of the present case discussed hereinabove, clearly point towards this Court possessing the necessary jurisdiction to deal

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<sup>5</sup> (2020) 4 SCC 234.

with the present petition.

22. The Court also does not find merit in the contentions of the Respondent that the jurisdiction of this Court would be ousted since the work was to be executed within the jurisdiction of Respondent No. 2; and the concerned G.M. who was required to appoint the arbitrator fell within the jurisdiction of the High Court of Rajasthan at Jaipur. As noted above, the issuance of the letter to an addressee, would not be the sole determining factor for deciding the purpose of jurisdiction of this Court. Therefore, there is no merit in this contention of the Respondents.

23. Lastly, there is also no merit in the objection of the Respondents that since Respondent No. 2 has suggested various names in response to the Petitioner's notice of invocation, Respondent's right to appoint an arbitrator should be upheld and the Petitioner cannot seek an independent arbitrator.

24. On the proposition noted above, the Respondents have placed reliance upon the judgment of the Supreme Court in **CORE** (*supra*). However, the above submissions are in the teeth of the prevailing law. The Supreme Court in the case of **Datar Switchgears v. Tata Finance Ltd.**,<sup>6</sup> made it clear that the right of the Respondent to make an appointment gets forfeited in case no appointment is made prior to the filing of the petition under Section 11 of the Act. Similar views have been expressed by the Supreme Court in the case of **Punj Lloyd** (*supra*) and **Deep Trading Company v. Indian Oil Corporation**.<sup>7</sup>

25. It is an admitted fact, the Petitioner had issued the notice of invocation under Section 21 of the Act on 31<sup>st</sup> December, 2020, to

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<sup>6</sup> (2000) 8 SCC 151.

<sup>7</sup> (2013) 4 SCC 35.

Respondent No. 1 as well as General Manager and Deputy Chief Engineer/TS of Respondent No. 2. After receipt of the notice, Respondent No. 2 issued the termination notice dated 5<sup>th</sup> January, 2021 and thereafter, no arbitrator was appointed within statutory period of thirty days from the date of invocation i.e., 31<sup>st</sup> December, 2020. Thereafter the Petitioner filed the instant petition on 4<sup>th</sup> February, 2021 with an advance copy to the Respondents, yet the arbitrator was not appointed. After the filing of the present petition on or about 4<sup>th</sup> February 2021, Respondent No. 2, on 25<sup>th</sup> March, 2021, suggested the names of arbitrators as contractor nominees. Still, no appointment of arbitrator. Subsequently on 29<sup>th</sup> April, 2021, Respondent No. 2 unilaterally appointed Shri Hemant Kumar Singh, ex-employee of the Respondent as a sole arbitrator.

26. On account facts noted above, the judgment relied upon by the Respondents is of no consequence and is distinguished on facts. Besides, the unilateral appointment made by Respondent No. 2 is in the teeth of the view expressed by the Supreme Court in the case of ***Perkins Eastman Architects DPC and Ors. v. HSCC (India) Ltd.***<sup>8</sup>

27. For the forgoing reasons, under Section 2(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Delhi High Court has jurisdiction in the matter. Thus, in view of the fact that existence of the arbitration agreement is not in dispute; the invocation notice is a matter of record; and disputes have arisen between the parties which are required to be adjudicated, the present petition deserves to be allowed.

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<sup>8</sup> AIR 2020 SC 59.

28. Accordingly, Ms. Sangeeta Bharti, Advocate [Contact No.: +91 9811112863] is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

29. The parties are directed to appear before the learned Arbitrator as and when notified. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

30. The learned Arbitrator will be paid their fee in terms of the provisions of the Fourth Schedule appended to the Act.

31. It is clarified that the Court has not examined any of the claims of the parties and all rights and contentions on merits are left open. Both the parties shall be free to raise their claims/counter claims before the learned Arbitrator in accordance with law.

32. The present petition is allowed and stands disposed of.

**SANJEEV NARULA, J**

**JULY 22, 2021**

*as*

*(corrected and released on 07<sup>th</sup> August, 2021)*