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Arb. O.P. No. 493 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2022

CORAM

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

Arb. O.P(Com.Div). No.493 of 2022

M/s.Solaimalai Marketing,
rep. by Mr.S.P.Anand,
Sole Proprietor,
having his office at
no.23, Meenachi Nagar,
Dindugal Main Road,
Vilangudi, Madurai-625 018

,... Petitioner

Vs.

M/s.Exide Industries Limited,
A Company Incorporated
under the Companies Act 1956,
having its registered office at
No.59-E, Jawaharlal Nehru Road,
Kolkatta-700 020.

... Respondent

PRAYER : Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying



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(i) to pass an order of appointing a sole arbitrator in accordance with Clause 13 of the Agreement entered into between the petitioner and the respondent to adjudicate the disputes that have arisen in relation to the agreements.

For Petitioner : Dr.P.Vasudevan
For Respondent : Mr.Bhagavath Krishna

ORDER

This Original Petition has been filed seeking for appointment of Sole Arbitrator in accordance with Clause 13 of the Agreement entered into between the petitioner and the respondent to adjudicate the disputes that have arisen in relation to the agreement.

2.The learned counsel for the petitioner has submitted that the petitioner has been carrying on the business of Clearing and Forwarding (C&F) Agent in different cities/towns of diverse goods and products of the clients of the petitioner having Ware houses, depots and godowns. The respondent company has appointed the petitioner as its C &F Agent in



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respect of its products for the cities/towns at Madurai, Coimbatore, Trichy and Tirunelveli and entered into agreements with the petitioner.

3. According to the petitioner, for the services rendered by the petitioner, a sum of Rs.1.50 crores is liable to be paid by the respondent. However, the respondent has made a counter claim of Rs.3 crores and also sent invoices in respect of the bills, whereupon, the petitioner immediately replied through E-mail by sending details of the pending dues of the said outstanding, i.e. a sum of Rs.1,45,69,787/- with clear descriptions and particulars of the amounts comprising the said total outstanding amount. However, till date the respondent neither replied to the said e-mail of the petitioner nor made any payment to the petitioner in respect of outstanding dues. Finally, the petitioner sent notice on 30.03.2019, suggesting Hon'ble Mr.Justice Narayan Chandra Sil (Former Judge of the Calcutta High Court) as sole arbitrator. However, the respondent sent a reply dated 02.05.2019, whereby, intimated that they were not inclined for appointment of sole arbitrator. The respondent made a counter claim of Rs.3 crores against the petitioner. The petitioner initially filed Section 11 application before the



Culcutta High Court and later the said application was withdrawn with a liberty to file afresh, vide order dated 18.11.2019. Under such circumstances, the present petition has been filed before this Court by the petitioner stating that a substantial part of cause of action arose within the jurisdiction of this Court. Therefore, the counsel submitted that this Court has jurisdiction to entertain the present petition in terms of Clause 13 of the Clearing and Forwarding(C&F) Agent Agreement dated 01.10.2006 entered into between the petitioner and the respondent and the subject dispute can be adjudicated through a sole Arbitrator.

4. Clause 13 of the Clearing and Forwarding (C&F) Agent Agreement dated 01.10.2006 provides for arbitration, which reads as follows:

"13.Any disputes, difference or question which may arise at any time hereafter between the Company and the C&F Agent touching the true construction of this agreement or the rights or liabilities of the parties hereto shall unless otherwise herein expressly provided be referred to the Arbitration of a single Arbitrator to be agreed upon between the parties in accordance with and



subject to the provisions of the Arbitration and Conciliation Act 1996. The venue of arbitration shall be Calcutta."

5. A reading of the above Clause would indicate that the dispute can be referred to the sole Arbitrator to be agreed upon by the parties in accordance with the provisions of the Arbitration and Conciliation Act 1996. However, the above Clause stated that "the venue of arbitration shall be Calcutta." Therefore, while referring to the said provision, the learned counsel for the respondent submitted that since both the parties have agreed that the venue of arbitration is Calcutta, the present petition, seeking appointment of Arbitrator before this Court, is not maintainable as this Court has no jurisdiction to entertain the petition.

6. The learned counsel for respondent would further submit that the registered office of the respondent is situated at Calcutta and manufacturing Unit of Lead Acid Storage Batteries is also located at Kolkata, but they have only availed the services of the petitioner at Chennai. Therefore, he would



contend that the High Court of Calcutta has jurisdiction to entertain the petition for appointment of arbitrator under the Act and not this Court.

7. On the other hand, the learned counsel for the petitioner would submit that this Court is also having jurisdiction in terms of the law laid down by the Hon'ble Apex Court in the judgment rendered in Civil Appeal SLP(C) No.17397-17398 of 2021) in the case of “***M/s.Ravi Ranjan Developers Private Limited Vs. Aditya Kumar Chatterjee***”, wherein, it has been held in paragraphs 46 to 48 as under:

"46. In this case, the Development Agreement provided that the sittings of the Arbitral Tribunal would be conducted in Kolkata. As observed above, the parties never agreed to submit to the jurisdiction of Calcutta High Court in respect of disputes, nor did the parties agree upon Kolkata as the seat of arbitration. Kolkata was only the venue for sittings of the Arbitral Tribunal.

"47.

"48. Neither of the parties to the agreement construed the arbitration clause to designate Kolkata as the seat of arbitration. We are constrained to hold that Calcutta High Court inherently lacks jurisdiction to entertain the



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application of the Respondent under Section 11(6) of the Arbitration Act. The High Court should have decided the objection raised by the Appellant, to the jurisdiction of the Calcutta High Court, to entertain the application under Section 11(6) of A&C Act, before appointing an Arbitrator.

8. A perusal of the above, it is clear that the Hon'ble Apex Court has distinguished with 'seat of arbitration' *vis-a-vis* 'venue for sittings of the Arbitral Tribunal' and since the parties therein, had never agreed to submit to the jurisdiction of Calcutta High Court in respect of disputes, nor did the parties agree upon Kolkata as the seat of arbitration, the Hon'ble Apex Court has held that Calcutta High Court inherently lacks jurisdiction to entertain the application. It is also held that when two or more Courts have jurisdiction to adjudicate disputes arising out of an arbitration agreement, the parties might by agreement decided to refer all disputes to one Court to the exclusion of all other Courts which might otherwise have had jurisdiction to decide the disputes, however, the parties by consent, cannot confer jurisdiction on a Court which inherently lacked jurisdiction. Therefore, this decision would not be applicable to the facts of the present case since in the



present case, the parties are not in agreement with the seat of arbitration and in fact, the petitioner has already approached the High Court of Calcutta and withdrawn the application with liberty to file afresh. It is well settled that 'seat of arbitration and 'venue of arbitration cannot be used interchangeably. It has also been established that mere expression 'place of arbitration' cannot be the basis to determine the intention of the parties that they have intended that place as the 'seat' of arbitration. The intention of the parties as to the 'seat' should be determined from other clauses in the agreement and the conduct of the parties. Since the parties have raised objection as regards the seat of arbitration, this Court has to venture upon to decide the seat/venue of arbitration based on the Clauses contained in the Agreement entered into and the conduct of the parties.

9. It is worthwhile to refer the judgment of the Hon'ble Supreme Court relied upon by the learned counsel for the respondent, in the case of “**BGS SGS SOMA JV Vs. NHPC Limited**” reported in (2020) 4 SCC 234, wherein, it has been held in paragraph nos.82, 97 & 98, which are extracted herein under:



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“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 afore-said 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



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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.

“83. to 96.

97. 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



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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.

98. 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.”

10. On a perusal of the above, it is explicit 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 afore-said 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. In the present case, it is not in dispute that the Agreement contained arbitration Clause, i.e. Clause 13, which specifically denotes that any disputes, difference or question arises pursuant to the agreement, shall be referred to arbitration of a single arbitrator to be agreed upon between the parties and the **venue of arbitration shall be Calcutta**. Therefore, when the parties have agreed to refer the dispute or difference to a single arbitrator and the venue of arbitration shall be Calcutta, the expression 'venue' of arbitration would make it clear that the seat of arbitral proceedings shall be only at Calcutta for all the purposes, including appointment of arbitrator and making the award at that place, i.e. Calcutta. Therefore, the language contained in the arbitration clause is very clear that the arbitral proceedings “shall be at Calcutta” it would indicate that the parties intended to anchor arbitral proceedings to the said place, i.e. Calcutta, signifying thereby, that the place 'Calcutta' is the seat of the arbitral proceedings as far as the dispute between the parties is



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concerned. Merely based upon the partial cause of action arose at Chennai, the petitioner cannot give a go-bye to the agreed terms and launch arbitral proceedings at Chennai contrary to the terms and conditions of the Agreement and compel the other party to agree the place of choice chosen by the petitioner for arbitration.

11. Therefore, in view of the above discussion, this Court is of the considered view that the seat of arbitration is only at Calcutta and hence this petition cannot be entertained by this Court due to lack of jurisdiction.

12. Accordingly, the Petition is dismissed. However, the petitioner is at liberty to approach the High Court of Calcutta, within a period of two months from the date of receipt of a copy of this order and work out their remedy.

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KRISHNAN RAMASAMY.J,

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