



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

% Date of decision: 11 October, 2022

+ ARB.P. 697/2022 & I.A. 9221/2022

MS. BYGGING INDIA LIMITED Petitioner

Through: Ms. Kartika Sharma, Mr. Somesh
Tiwari and Mr. Kaveesh Nair, Advs.

versus

MS BHARAT HEAVY ELECTRICALS LTD Respondent

Through: Ms. Mani Gupta and Mr. Aman
Choudhary, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

I.A. 9221/2022

Allowed, subject to just exceptions.

Application disposed of.

ARB.P. 697/2022

1. The present petition has been filed by the petitioner company under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("Act of 1996") seeking appointment of a sole arbitrator in terms of the Contract No. 495 (530)/2008 dated September 10, 2008 ("Subject Contract") executed between the petitioner company and the respondent company, with the following prayers:

a) Pass an order under Section 11 (6) of the Arbitration & Conciliation Act, 1996 r/w Section 151 of The Civil Procedure Code, 1908 thereby appointing Arbitrator through the designated arbitral institutions or from the



panel of arbitrators maintained by the Hon'ble Chief Justice for discharging the functions and duties of the arbitral institution in terms of the Arbitration and Conciliation Act, 1996 to adjudicate the dispute between the parties;
b) Pass an order, awarding the cost of the proceedings in favour of the Petitioner Company and against the Respondent Company; and
c) Pass such other further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

2. The petitioner, M/s Bygging India Ltd. is a company, incorporated on January 31, 1983, having its registered address at 1206-1210, 12th Floor Modi Tower (98, Hemkunt Tower) Nehru Place, New Delhi 110019. The petitioner company is a fully integrated specialised engineering construction company and pioneers of Slip form technology in India and specialises in concrete chimneys, concrete silos, pilling towers, bridge piers, cooling towers and other specialised tall structures.

3. The respondent company is M/s Bharat Heavy Electrical Limited, a Government of India enterprise, incorporated under the Companies Act, 1956, having its registered office at BHEL house, Siri Fort, New Delhi- 110049. It is engaged in the business of manufacture of power plant equipment and is one of the largest engineering and manufacturing companies of its kind in India engaged in the design, engineering, manufacture, construction, testing, commissioning and servicing of a wide range of products and services for core sectors of the economy, viz. Power,



Transmission, Industry, Transportation (Railways), Renewable Energy & Gas, Water and Defence.

4. That on April 09, 2008, the respondent company invited bids for the Tender No. BHEL: NR (SCT): CHIMNEY: KOSTI: 495 for the construction of two 101 MTR high reinforced concrete twin fuel steel linked chimneys and four sets of induced draught reinforced concrete cooling towers, including supply of all materials except those proposed to be supplied by the respondent company for four 125 MW units at Kosti TPP, Sudan of M/S NEC, SUDAN (“Subject Project”).

5. On April 12, 2008, the petitioner company submitted its offer vide Ref. No. BIL/B/SUDAN/10040801/2008 (Technical bid & Price bid) for the Subject Project which was accepted by the respondent company and accordingly received the Letter of Intent No. BHEL: NR (SCT): Chimney: Kosti: 495(530) dated June 10, 2008 (“LOI”). Thereafter, the petitioner company received a written order to commence the work vide letter dated July 10, 2008, and the work was commenced by the petitioner Company on August 14, 2008.

6. It is stated that the completion date of the work went beyond the stipulated period as per Clause 48 of the Special Conditions of Contract (“SCC”), and the respondent company was to issue Extension of Time (“EOT”) as per Clause 44 of the General Conditions of Contract (“GCC”) for the submission of final bills. In this regard Clause 44 of the Contract is reproduced as under –



“44.1 If in the opinion of the Engineer, the work is delayed

*(a) by reason of abnormally bad weather; or
(b) by reason of serious loss or damage by fire; or
(c) by reason of civil commotion, local combination of workmen, strike, lockout, affecting any of the trades employed on the work,*

or

(d) by delay on the part of the agency or tradesmen employed by BHEL in executing work not forming part of the Contract, or

(e) by reason of any other cause which in the absolute discretion of the Engineer is beyond the Contractor's control, then in any such case, the Engineer (or higher authority) may make fair and reasonable extension in the completion dates of the individual terms of work or the contract as a whole. Such extension shall be communicated to the Contractor and by the Engineer in writing shall be binding on the contractor. No other claim in this respect for compensation or otherwise is admissible. Upon the happening of any such event causing delay, the contractor shall immediately give notice thereof in writing to the Engineer but shall nevertheless use constantly his best endeavour to prevent or make good the delay and shall do all that may reasonably be required to the satisfaction of the Engineer to proceed with the work.”

7. It is the case of the petitioner that the respondent company granted the EOT after six (06) years to petitioner company and the same was finally issued, vide letter dated June 18, 2020, thereby extending the time till April 30, 2014.

8. The Subject Project was successfully completed and handed over to the respondent company on April 28, 2014 at a



Total Contract Price of USD 17,546,522.69, and further Defect Liability period (“DLP”) of 12 months was completed on April 28, 2015 as per the terms of the Subject Contract.

9. The petitioner company finally submitted its final bill on July 01, 2020, after issuance of EOT letter by respondent company on June 18, 2020 and the same was certified on February 15, 2021.

10. Ms Kartika Sharma, learned counsel for the petitioner company stated that it had fulfilled its obligations under the Subject Contract to the satisfaction of the respondent company and demobilised from the Subject Project site in 2015. She also stated that petitioner company ceased to have any supplies or services in Sudan.

11. Furthermore, she stated that due to inordinate delay on the part of the respondent company in issuing the EOT, the petitioner company could not submit its final bill and therefore, could not receive full payment of the Total Contract Price, despite the fact that the petitioner company had completed and handed over the Subject Project to the respondent company as per the specifications provided in the Subject Contract.

12. She submitted that during this period, the petitioner company sent multiple reminders to the respondent company to release the liquidated damages of USD 490,581, withheld by the respondent company, since 2011-12 as well as to release the Performance Bank Guarantees (“PBG”). She also stated that due to the failure on the part of the respondent company to release the



liquidated damages and PBG, the petitioner company was incurring huge losses and costs.

13. She stated that the petitioner has requested the respondent company multiple times to release the Retention Money of USD 873,772/- as per Clause 49 of the GCC and the petitioner company was only paid 95% of the Running Account bills and 5% was retained by the respondent company.

14. She submitted that vide letter dated December 20, 2016, the respondent company informed the petitioner company that the delay analysis was still to be analyzed and ascertained, however, the respondent company thereafter took another four years to finalise the same.

15. She submitted that the respondent company cleared the bills of the petitioner company in instalments, except the balance 15% of the Retention Money amounting to USD 1, 40,702. She stated that the respondent company requested the petitioner company to convert the aforesaid amount to Sudanese Pounds (SDG) as per Clause 49.3 of the GCC. She also stated that, in each of the running bills raised by the petitioner company to the respondent company, 5% was retained as retention money; 15% of the remaining amount therein was paid to the petitioner company in SDG and the rest was paid in USD.

16. She stated that, the Clause 49.3(ii) states that 15% of the amount will be paid in the local currency for the supplies and services carried out in Sudan and at this stage, eight years later, when the petitioner company has been fully demobilised from



Sudan and has no supply or service left therein, it is highly mala fide to force it to accept the balance payment in SDG.

17. She also submitted that the value of SDG has fallen and given the present conversion rate, the amount of USD 1,40,702 to SDG 2,85,132.48 (as per the applicable rate on April 09, 2008), would amount to only USD 637 today. She also stated that the bidding of the petitioner company during tender stage in 2008 was totally based on USD and the petitioner company had agreed for local currency of SDG upto 15% out of total contract value only for local expenditures during the execution period.

18. She submitted that the petitioner company issued a letter dated December 21, 2021 requesting the respondent company to release the balance 15% portion of the retention money in USD and not to convert the said amount of USD 1,40,702 to SDG 2,85,132.48. Thereafter, the petitioner company sent another letter dated February 10, 2022, highlighting the enormous losses that had been caused to the petitioner company due to the delay by the respondent company in granting the EOT, and requesting for release of the balance amount in USD.

19. She submitted that, since no response was received from the respondent company to the aforesaid letter despite reminders dated February 26, 2022 and March 04, 2022, petitioner company sent a Notice invoking arbitration dated March 16, 2022, notifying the respondent company of losses caused to the petitioner company



to the tune of Rs. 26,66,14,243/-, due to the enormous delay on the part of the respondent company.

20. She stated that the respondent company issued a letter dated March 23, 2022, requesting the petitioner company to withdraw the Notice invoking arbitration dated March 16, 2022.

21. She submitted that the petitioner company opted not to pursue the Notice invoking arbitration and decided to meet the officials on March 28, 2022. A meeting was held between representatives of the petitioner company and respondent company, where it was reiterated that it will only release the balance amount in SDG. Aggrieved by this complete refusal of the respondent company to take a reasonable approach to the dispute, the petitioner company invoked arbitration on April 28, 2022 for a claim Rs. 1,29,94,318/-, due to the non-release of the balance amount in USD by the respondent company.

Statement showing amount due and interest accrued till 31.03.2022- CLAIM					
S. No.	Particulars	Due on	Unpaid USD	USD Rate as on 23.03.2022	Claim Amount (In INR.)
1	Balance Amount Due	18.06.2020	1,40,702	76.32	1,07,38,377
2	Interest @ 12% due from 18.06.2020 to 31.03.2020	639 days			22,55,942
	TOTAL CLAIM AS ON 31.03.2022 (IN INR.)				1,29,94,318

22. She submitted that as per Clause 33 of the GCC of the Subject Contract, any dispute arising out of the said contract may be referred to sole arbitration of the General Manager of the



respondent company or his nominee. The said clause reads as under –

“33.0 Arbitration: All disputes between the parties to the contract arising out of or in relation to the contract, other than those for which the decision of the Engineer or any other person is by the Contract to the other party, be referred to sole arbitrator of the General Manager or his nominee. The Arbitration shall be conducted in accordance with the provisions of the Arbitration and Reconciliation Act, 1996. The Parties to the contract understand and agree that it will be no objection that the General Manager or the person nominated as Arbitrator has earlier in his official capacity to deal directly or indirectly with the matters to which the contract related or that in the course of his official duties had expressed views on all or any of the matters is dispute or difference. 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 General Manager or his successor, as the case may be, either to act himself as the Arbitrator in the manner aforesaid. The Arbitrator may, from time to time, with the consent of both the parties to the contract, enlarge the time for making the award. Work under the contract shall be the continued during the arbitration proceedings. The venue of the arbitration shall be the place from which the contract is issued or such other place as the Arbitrator at his discretion may determine.”

23. She submitted that thereafter, the petitioner company proposed a panel of three arbitrators, as shown below, requesting



the respondent company to nominate one of them to be the sole arbitrator.

- (i) Justice Aftab Alam (Retd.) (Former Judge, Supreme Court of India)
- (ii) Justice H.R. Malhotra (Retd.) (Former Judge, High Court of Delhi)
- (iii) Mr. P.K. Malhotra (Former Secretary, Ministry of Law and Justice, Government of India)

24. She stated that there is a warranty period of five (05) years after the completion of DLP and the period ended on May 19, 2021. She also stated that as the petitioner company has completely demobilised from Sudan and has no supplies or services remaining in Sudan, there exists no reason for the respondent company to enforce the requirement of Clause 49.3 and pay the balance amount in SDG.

25. She submitted that the cause of action first arose on December 21, 2021 when the petitioner company requested the respondent to release the 15% portion of the contract value as finally ascertained by the respondent company in USD and not as per clause 49.3 of the Contract to convert the said amount of USD 1,40,702/- to SDG 2,85,132.48/-. She stated that this request was denied by the respondent company. She also stated that the cause of action also arose when the petitioner company sent the letter dated February 10, 2022, the Notice invoking arbitration dated March 16, 2022, during the meeting on March 28, 2022 and the



Notice invoking arbitration dated April 28, 2022, and is subsisting till date.

26. She has relied on the judgments of the Supreme Court in *Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.* 2019 SCC OnLine SC 1517 and *Indian Oil Corporation Ltd. vs. SPS Engineering Ltd., (2011) 3 SCC 507* and of this Court in *Ms Sital Dass Jewellers & Anr. vs Asian Hotels (North) Ltd., 2021 SCC OnLine Del 3914* and *ISGEC Heavy Engineering Ltd. v. Indian Oil Corporation Limited, Arb.P.164/2021* decided on October 21, 2021.

27. She seeks prayers as made in the petition.

28. Ms. Mani Gupta, the learned counsel for the respondent company submitted at the outset that this Court does not have jurisdiction to adjudicate the present petition. She stated that as per clause 33 of the contract, the venue of the arbitration shall be the place from which the contract is issued or such other place as the Arbitrator at his discretion may determine. The said contract was issued from the office of the respondent company situated at Plot No. 25, Sector - 16A, Gautam Buddh Nagar, Noida - 201 301.

29. She also stated that the Contract was stamped at Noida and the communications by the petitioner for the Project were sent to the respondent company from its office situated in Noida. Moreover all the relevant documents including the Contract and communications with respect to the Project were issued to the petitioner company from its office in Noida.



30. She also submitted that the parties' intention is that, any proceedings related to arbitration shall be subject to the jurisdiction of the courts situated at the place from which contract was issued i.e. Noida. She also pointed out the observation of this Court regarding the jurisdiction in its order dated June 02, 2022. Moreover, she emphasised on clause 33 of the Contract and stated that this Court does not have jurisdiction to adjudicate the arbitration petition and accordingly, the present petition ought to be dismissed on this ground only. In support of her submission, she has relied upon the decision of this Court in ***My Preferred Transformation and Hospitality Pvt. Ltd. v. Sumithra Inn, 2021 SCC OnLine Del 1536.***

31. Furthermore, she submitted that as per clause 49.3(ii) of the GCC, the respondent company is under obligation to make payment of 15% of total contract price in SDG and has always been ready and willing to pay the balance amount in SDG as per the terms of Contract and in fact repeatedly requested the petitioner to provide the bank account details for release of payment. The relevant clause is reproduced below:

"(ii) Local Currency Payment Balance 15% of the Total Contract Price will be paid in local currency (i.e. Sudanese Dinar) for the supplies and services carried out in Sudan. Exchange rate from one currency to another applicable for the entire period of contract including extended period if any, shall be the rate prevailing on the date of opening of technical bid (Part-I). For conversion from us-DOLLARS to Sudanese Dinar buying, rate of us



DOLLARS as available on the website of Bank of Sudan (www.bankofsudan.org) on the date of opening of technical bids (Part-I), shall be considered and will be applicable for the entire period of Contract Including extended period, if any. If the date happens to be a holiday, the exchange rate of next working day will be considered.

32. She also stated, clause 49.3 explicitly stipulates that the exchange rate of the currencies for the entire period of contract, including extended period shall be the rate prevailing on the date of opening of the technical bid and therefore, the petitioner company cannot now be allowed to draw an inference contrary to explicit terms of the Contract and force the respondent company to violate the terms of the Contract for making full payment in USD.

33. She submitted that the petitioner company at the time of entering into the Contract was well aware that exchange rates are subject to fluctuations and that the value of SDG might appreciate or depreciate depending on various factors which are not under the control of the parties to the Contract. She also stated that it was the sole responsibility of the petitioner company to take necessary action on his part to mitigate currency exchange rate fluctuations to protect its interest.

34. She has also stated that the respondent has released the balance 85% of the Contract Price in USD as per the Terms of Payment and has absorbed all appreciation in the exchange rate of USD with reference to INR without any demur and petitioner has conveniently ignored the benefit accrued on this account. She also stated that the petitioner company cannot conveniently seek the



variation benefits of USD and a demand for full payment in USD is in contravention to the terms of Contract and would be tantamount to violation of the Contract.

35. She submitted that respondent has always been ready and willing to make balance payment in SDG with the exchange rates prevailing at the time of opening of technical bids, as per the terms of Contract and as such, no dispute exists.

36. She contended that the present petition is barred by limitation, as the work of the Project commenced on August 14, 2008 and the work was completed on April 28, 2014. Furthermore, the defect liability period of 12 months as provided under clause 32 of the Contract expired on April 28, 2015.

37. She stated that the cause of action arose on the date of invoking the arbitration and the limitation for the present petition expired on April 27, 2017 as per the provisions of the Limitation Act, 1963. She also stated that the petitioner company delayed the submission of final bill and submitted the same in 2021. Furthermore, she stated that the delay of seven years is not justifiable in the light of the doctrine of laches.

38. The learned counsel for the respondent submitted that the respondent company vide letter dated August 02, 2022 had proposed a panel of three arbitrators to the petitioner company for selecting one of them as the sole arbitrator for resolving the alleged disputes but the petitioner company refused to agree to such appointment vide letter dated August 09, 2022. She has sought dismissal of the petition.

**ANALYSIS:-**

39. Having heard the learned counsel for the parties and perused the record, the first and foremost issue that arises for consideration is whether the present petition is maintainable when the arbitration clause, as referred to in paragraph 23 stipulates that the venue of arbitration shall be the place from which the contract is issued or such other place as the Arbitrator at his discretion may determine.

40. In the case in hand, the Letter of Intent dated June 10, 2008 was issued from the Power Sector - Northern Regional Office at Noida, U.P. The contract / agreement was also executed at Noida, as is clear from the stamp paper on which the contract/agreement was executed between the parties. It is also clear that the Officer, who has signed the contract on behalf of the respondent, was from PS Northern Region. Even the notice invoking arbitration dated April 28, 2022 was issued to the General Manager, Power Sector - Northern Region of the respondent company. Having said that, it is also noted that there is no jurisdictional clause in the contract conferring jurisdiction to any Court in Delhi. Suffice to state, no cause of action has arisen within the territorial jurisdiction of this Court. No doubt, the respondent had issued a letter dated August 02, 2022 wherein it has, by referring to the notice invoking arbitration, furnished a panel of three Arbitrators for appointing one of them as Sole Arbitrator, the same was issued without prejudice to the present petition filed by the petitioner before this Court. It was also made clear; the same shall not be construed as



the respondent company's admission for appointment of an Arbitrator in the ongoing proceedings. The letter of August 02, 2022 was also issued by PS Northern Region of the respondent company.

41. The question would be, whether the arbitration clause stating that the the venue of arbitration shall be the place from where the contract is issued or such other place as the Arbitrator, at his discretion may determine, can be construed to mean that Noida the place where the contract was issued, was meant to be a juridical seat to oust the jurisdiction of this Court to entertain the present petition. This issue is no more *res-integra* in view of the judgment of the Supreme Court in **BGS SGS SOMA JV v. NHPC Limited, 2020 (4) SCC 234**.

42. The law with regard to whether a place is a seat or a venue is well settled by the Constitutional Bench of the Supreme Court in **BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552**, wherein it is held that in sub sections 1 and 2 of Section 20 of the Act, the word '*place*' refers 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 the arbitral proceedings.

43. In **BGS SGS SOMA JV (supra)**, the arbitration agreement contemplate arbitration proceedings shall be held at New Delhi / Faridabad. The Supreme Court in paragraph 61 of the said judgment has held 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.”

44. Further in paragraph 82, the Supreme Court held as under:-

“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. Correctness of the judgment in Hardy Exploration and Production (India) Ltd.”

(Emphasis Supplied)

45. From the above, it is clear that wherever in the arbitration clause, a reference is made with regard to the venue of arbitration with no other significant *contrary indicia*, then it is clear that the venue is really the seat of arbitration proceedings.

46. Except Clause 33, there is no other stipulation in the contract conferring jurisdiction on Courts at a place other than the place of contract / place where the proceedings can be held. In other words, there is no stipulation in the contract, which confers jurisdiction on the Courts in Delhi. In the absence of any ‘*contrary indicia*’, it must be held that the term ‘*venue*’ in the arbitration clause must be construed to mean that the place from where the contract is issued i.e., NOIDA, is the seat of arbitration and as such, it will be the High Court of Judicature at Allahabad / Lucknow, which shall be competent to entertain a petition under Section 11 of the Arbitration & Conciliation Act, 1996.

47. Similarly, the learned counsel for the petitioner has relied upon the judgment of this Court in the case of **ISGEC Heavy Engineering Ltd. (supra) Arb.P.164/2021** decided on October 21, 2021, more specifically the arbitration clause and also the exclusive jurisdiction clause therein, which contemplate 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.”

“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]

48. Interpreting both the clauses in the said case, this Court held that New Delhi was only the venue of arbitration whereas the juridical seat shall vest with the Civil Court at Guwahati. Suffice to state, in the facts, the said judgment is distinguishable.

49. Insofar as the reliance placed by learned counsel for the respondent on the judgment of a Coordinate Bench of this Court in the case of ***My Preferred Transformation and Hospitality Pvt. Ltd. (supra)***, the clause in the agreement clearly stipulates that the agreement shall be governed and interpreted in accordance with the laws of India and the Courts at New Delhi shall have the exclusive jurisdiction in all matters arising out of the agreement. It was this clause which was interpreted by this Court to mean that New Delhi is the seat of arbitration and accordingly entertained the petition



and appointed an Arbitrator. Suffice to state, in the facts of this case; the said judgment shall not have any applicability.

50. In view of my conclusion above and based on the judgment of the Supreme Court in **BGS SGS SOMA JV (supra)**, this Court is of the view that the present petition is not maintainable in this Court and the same is dismissed. Liberty is with the petitioner to seek such remedy as available in law. No costs.

V. KAMESWAR RAO, J

OCTOBER 11, 2022/aky

