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Arb.O.P.(Com.Div.)No.337 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.10.2023

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.337 of 2023

Tata Capital Financial Services Limited,
Represented herein by its

Authorised Representative/POA

Noyal James. J,

1st Floor, Centennial Square, 6A,

Dr.Ambedkar Salai,

Kodambakkam, Chennai – 600 024.

having its Registered Office at :

11th Floor, Tower A, Peninsula Business Park,

Ganpatrao kadam Marg, Lower Parel,

Mumbai – 400 013.

... Petitioner

Vs.

1.M/s.Har Auto Private Limited,

CIN : U74110KL2000PTC014196,

KL 680A, HAR Avenue Chovva,

Kannur, Kerala – 670 006.

2.Ponnuvalappil Zubair

3.P.V.Mohammed Equbal

... Respondents

Prayer: Original Petition is filed under Section 11(4) of the Arbitration and Conciliation Act, 1996, praying to appoint an Arbitrator to adjudicate the



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disputes between the Petitioner and the Respondents in terms of Loan Cum Guarantee Agreement (Channel Finance) dated 29th January 2022 and to direct the Respondents to pay the costs.

For Petitioner : Mr.Gaurav Chatterjee

For Respondents :
For R1 and R3 : Mr.T.T.Ravichandran
for Mr.M.Balasubramanian

For R2 : No appearance

ORDER

This petition has been filed under Section 11(4) of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator to adjudicate the dispute between the petitioner and the respondents under Loan-cum-Guarantee Agreement (Channel Finance) dated 29.01.2022.

2. The aforesaid Loan-cum-Guarantee Agreement (Channel Finance) contemplates resolution of dispute between the petitioner and the respondents through arbitration. Relevant Clause relating to Arbitration reads as under:-

"12. Arbitration:

If any dispute, difference or claim arises between any of the Obligors and the Lender in connection with the Facility or as to the interpretation, validity, implementation or effect of the Facility Documents or as to the rights and liabilities of the parties under these T&Cs or alleged breach of the Facility Documents or



anything done or omitted to be done pursuant to the Facility Documents, the same shall be settled by arbitration by a sole arbitration to be appointed as per the procedure below and to be held at such place as agreed by the Parties in Serial No.17 of Annexure 1 hereto of the Agreement.

The Party invoking the arbitration ("Claimant") shall address a notice to the other Party ("Respondent") suggesting the names of not more than three arbitrators, all of whom shall be either retired judges of the District Court, High Court or the Supreme Court or a lawyer having minimum 10 years relevant experience. The Respondent shall either:

- (i) Confirm in writing acceptance of one amongst the proposed names as the sole arbitrator to the Claimant within a period of ten (10) days from the date of notice ("Notice Period"); or
- (ii) Convey objection, if any, in writing to the Claimant, against the proposed names of the sole arbitrator within the said Notice Period.

However, if the Claimant does not receive any response from the Respondent within the said Notice Period, the Claimant shall be entitled to nominate any one person from amongst the proposed three names as the sole arbitrator and such arbitrator shall be deemed to be appointed by both the Parties.

In the event, the Respondent conveys its objection as per (ii) above then the sole arbitrator will be appointed by a Court having jurisdiction. The arbitration shall be conducted under the provisions of the Arbitration and Conciliation Act, 1996 together with its amendments, any statutory modifications or re-enactment thereof for the time being in force. The arbitration proceeding shall be conducted in English language. The award of the arbitrator shall be final and binding on all parties concerned. The cost of arbitration shall be borne by the Obligor/s."

3. As far as the jurisdiction is concerned, the parties have mutually agreed to confer jurisdiction on Courts in Chennai. The petitioner is having its Head



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Office in Bombay and Regional Office in Chennai. The respondents are from

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4. The petitioner had sent a Loan Recall Notice dated 13.04.2023 to the respondents and also invoked Arbitration Clause under the aforesaid Loan-Cum-Guarantee Agreement dated 29.01.2022.

5. It is submitted by the learned counsel for the petitioner that the arbitration clause which has been incorporated in the aforesaid Loan-cum-Guarantee Agreement is partly contrary to the provisions of the Arbitration and Conciliation Act, 1996 and the law laid down by the Hon'ble Supreme Court in **Perkins Eastman Architects DPC & Another Vs. HSCC (India) Limited**, 2019 SCC Online SC 1516, the petitioner refrained from naming any Arbitrator in accordance with clause 12 of the aforesaid Loan-cum-Guarantee Agreement dated 29.01.2022.

6. The aforesaid Loan-cum-Guarantee Agreement dated 29.01.2022 also incorporates Master Terms and Conditions registered on 31.12.2018 with the Joint Sub-Registrar at Mumbai under Registration No.BBE-3-10160-2018.



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7. The petition is contested by the respondents on the ground that there is no territorial nexus between the cause of action and business within the jurisdiction of this Court. It is submitted that this petition for appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 was without jurisdiction. It is submitted that the Loan-cum-Guarantee Agreement (Channel Finance) dated 29.01.2022 was signed between the petitioner and the respondents in Kerala and that the respondents are from Kerala.

8. The petitioner is from Mumbai and thus, in respect of the alleged defaults made by the respondents, there is no cause of action for invoking Section 11(6) of the Arbitration and Conciliation Act, 1996 before this Court.

9. In this connection, the learned counsel for the first and third respondents has placed reliance on the decision of the Hon'ble Supreme Court in **M/s.Ravi Ranjan developers Private Limited Vs. Aditya Kumar Chatterjee, 2022 Livelaw (SC) 329** wherein, it has been stated that the parties cannot, by consent, confer jurisdiction on a Court which inherently lacked jurisdiction.



10. The learned counsel for the first and third respondents would submit that for the purpose of Section 11(6) of the Arbitration and Conciliation Act, 1996, also, the definition of Court in Section 2(e) of the Act is relevant. It is submitted that in terms of Section 2(e)(i) of the Act in the case of an arbitration other than international commercial arbitration, it is 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.

11. Therefore, it is submitted that only the Courts having jurisdiction to decide the question forming the subject-matter of the arbitration if the same had been the subject-matter of a suit can entertain petition under Section 11(6) of the Arbitration and Conciliation Act, 1996. In other words, it is submitted that only if this Court had jurisdiction to entertain suit, over the subject-matter of the arbitration, Section 11(6) of the Arbitration and Conciliation Act, 1996 can be invoked in view of the arbitration clause.

12. It is submitted that no part of cause of action has arisen within the



jurisdiction of this Court and therefore, on this count this Original Petition is liable to be dismissed.

13. A specific reference was made to Paragraphs 47 and 48 from the above decision of the Hon'ble Supreme Court in **M/s.Ravi Ranjan developers Private Limited Vs. Aditya Kumar Chatterjee, 2022 Livelaw (SC) 329**. It reads as under:-

"47. It is well settled that, when two or more Courts have jurisdiction to adjudicate disputes arising out of an arbitration agreement, the parties might, by agreement, decide to refer all disputes to any one Court to the exclusion of all other Courts, which might otherwise have had jurisdiction to decide the disputes. The parties cannot, however, by consent, confer jurisdiction on a Court which inherently lacked jurisdiction, as argued by Mr.Sinha.

48. In this case, the parties, as observed above did not agree to refer their disputes to the jurisdiction of the Courts in Kolkata. It was not the intention of the parties that Kolkata should be the seat of arbitration. Kolkata was only intended to be the venue for arbitration sittings. Accordingly, the Respondent himself approached the District Court at Muzaffarpur, and not a Court in Kolkata for interim protection under Section 9 of the A&C Act. The Respondent having himself invoked the jurisdiction of the District Court at Muzaffarpur, is estopped from contending that the parties had agreed to confer exclusive jurisdiction to the Calcutta High Court to the exclusion of other Courts. 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



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jurisdiction to entertain the 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 the A&C Act, before appointing an Arbitrator."

14. The learned counsel for the first and third respondents on the other hand would submit that the issue has been settled by the Hon'ble Supreme Court in **M/s.Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited and others** in Civil Appeal Nos.5370 and 5371 of 2017 dated 19.04.2017.

15. A specific reference is made to Paragraph 21 from the above decision.

It reads as under:-

"21. It is well settled that where more than one court has jurisdiction, it is open for parties to exclude all other courts. For an exhaustive analysis of the case law, see Swastik Gases Private Limited Vs. Indian Oil Corporation Limited, MANU/SC/0654/2013 : (2013) 9 SCC 32. This was followed in a recent judgment in B.E.Simoese Von Staraburg Niedanthal and another Vs. Chhattisgarh Investment Limited MANU/SC/0930/201 : (2015) 12 SCC 225. Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment is set aside. The injunction confirmed by the impugned judgment will continue for a



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period of four weeks from the date of pronouncement of this judgment, so that the Respondents may take necessary steps under Section 9 in the Mumbai Court. Appeals are disposed of accordingly."

16. The learned counsel for the petitioner submits that the decision of the Hon'ble Supreme Court in **M/s.Indus Mobile Distribution Private Limited case** (referred to supra) was also considered by the Hon'ble Supreme Court in **M/s.Ravi Ranjan developers Private Limited case** (referred to supra) referred by the learned counsel for the first and third respondents.

17. It is further submitted that the decision of the Hon'ble Supreme Court in **M/s.Ravi Ranjan developers Private Limited case** (referred to supra) is not applicable to the facts of the case. Hence, prays for allowing this petition.

18. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the first and third respondents.

19. At the outset, I would like to make it clear that the decision of the Hon'ble Supreme Court in **M/s.Ravi Ranjan developers Private Limited case** (referred to supra) was rendered in the context of Clause 37 of the Development Agreement dated 15.06.2015 signed between the parties therein.



WEB COPY 20. Relevant clause in the Development Agreement in the said case read as under:-

"37. That in case of any dispute or difference between the parties arising out of and relating to this development agreement, the same shall be settled by reference of the disputes or differences to the Arbitrators appointed by both the parties and such Arbitration shall be conducted under the provisions of the Indian Arbitration and Conciliation Act, 1996 as amended from time to time and the sitting of the said Arbitral Tribunal shall be at Kolkata."

21. It in this context, the Hon'ble Supreme Court has made the observations in Paragraphs 47 and 48 which have been extracted above.

22. The Hon'ble Supreme Court, there, has concluded that the parties to the Arbitration Agreement agreed that the sittings of the Arbitral Tribunal would be in Kolkata. Court concluded Kolkata was to be the venue for the sittings of the Arbitral Tribunal. Therefore, the respondent having himself invoked the jurisdiction of the District Court at Muzaffarpur was estopped from contending that the parties had agreed to confer exclusive jurisdiction to the Calcutta High Court to the exclusion of other Courts. Further, under Section 42 of Arbitration and Conciliation Act, 1996, where with respect to an arbitration agreement any



application under Part 1 of the Act is made in a Court, then only that Court alone has jurisdiction over the arbitral proceedings. Therefore, the decision of the Hon'ble Supreme Court in **M/s.Ravi Ranjan developers Private Limited case** (referred to supra) cannot be applied to the facts of this case.

23. The decision of the Hon'ble Supreme Court in **M/s.Indus Mobile Distribution Private Limited case** (referred to supra) has answered the issue clearly under a some what similar circumstances, there, although the decision was rendered in the context of Section 9 of the Arbitration and Conciliation Act, 1996. The Court has referred to Sections 2(1)(e), 20 and 31 of the Arbitration and Conciliation Act, 1996.

24. The Hon'ble Supreme Court has followed its earlier decisions rendered in this context and has held that the moment the seat is designated, it is akin to the exclusive jurisdiction clause.

25. The Court observed that under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have



jurisdiction - that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Section 16 to 21 of the Code of Civil Procedure be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai Courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

26. In view of the above, the objection of the respondents is overruled.

27. It is therefore held that this Court has jurisdiction to entertain this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator.

28. Considering the above, Court is inclined to pass the following order:-

(i) **Mr.T.Ramesh, Senior Advocate, (Cell No.9444025854) having Office at "Sri Ram Mathrika", M-6/5, 28th Cross Street, Indira Nagar, Adyar, Chennai - 600 020,** is appointed as an Arbitrator to enter upon reference and adjudicate/resolve the *inter se* dispute between the parties.



(ii) The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, endeavour to complete the arbitral proceedings and pass an award strictly in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as expeditiously as possible, preferably within a period of twelve months after the date of completion of pleadings under Sub-Section 4 to Section 23 as is contemplated in Section 29-A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order.

(iii) The learned Arbitrator appointed herein shall be paid fees and other incidental charges as may be fixed with the consent of parties or in accordance with the provisions of the Arbitration and Conciliation Act, 1996, and the same shall be borne by the parties equally. In case, the respondents remain *ex parte*, the petitioner shall pay the entire fee and other incidental charges to the Arbitrator and later recover the same from the respondents.

29. This Original Petition is allowed accordingly, leaving the parties to bear their own costs.



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30. Since this Court has appointed the Arbitrator, it is open to the petitioner as well as the respondents to seek other reliefs under Section 17 of the Arbitration and Conciliation Act, 1996, before the learned Arbitrator.

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Index : Yes/No

Internet : Yes/No

Speaking Order/Non-Speaking Order

Neutral Citation : Yes/No

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