



Arb.Application Nos.592 to 596 of 2023

Reserved on	23.01.2024
Pronounced on	05.06.2024

C.SARAVANAN, J.

By this common order, all these applications are being disposed of.

2. When these applications came up for admission on 19.10.2023, an order came to be passed calling upon the respondent to show cause as to why the respondent should not furnish security to the applicant.

3. The respondent has filed its counter and has raised a preliminary objection regarding the maintainability of the proceedings under Section 9 of the Arbitration and Conciliation Act, 1996.

4. These applications have been filed by the Applicant under Section 9 of the Arbitration and Conciliation Act, 1996 to direct the first respondent to furnish security to the applicant or in the alternative, to attach the schedule mentioned properties including the land and building situated thereon, towards the outstanding dues payable under respective Construction Agreement signed between the applicant and the first respondent along with interest. The details of the said applications are



Arb.Appln.Nos.592 to 596 of 2023

provided herein below:-

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Arb.Appln.No.	Parties	Amount
592 of 2023	Avigna Private Limited Vs. 1. <u>Evernest Gains Properties Private Limited</u> 2. Strata Property Management Private Limited Construction Agreement dated 23.08.2020	Rs.3,19,41,394 Plus interest
593 of 2023	Avigna Private Limited Vs. 1. <u>Evernest Commercial Properties Private Limited</u> 2. Strata Property Management Private Limited Construction Agreement dated 24.08.2021	Rs.1,57,23,321 Plus interest
594 of 2023	Avigna Private Limited Vs. 1. <u>Avigna Ashwa Private Limited</u> 2. Strata Property Management Private Limited Construction Agreement dated 12.10.2022	Rs.7,23,13,915 Plus interest
595 of 2023	Avigna Private Limited Vs. 1. <u>Evernest Property Holdings Private Limited</u>	Rs.1,91,32,962 Plus interest



Arb.Appln.Nos.592 to 596 of 2023

596 of 2023	2. Strata Property Management Private Limited	
	Construction Agreement dated 10.10.2022	
	Avigna Private Limited Vs. 1. <u>Evernest Parks Private Limited</u> 2. Strata Property Management Private Limited Construction Agreement dated 24.08.2024	Rs.1,44,99,724 Plus interest

5. The dispute between the applicant and the respondents are arbitrable under the respective MOUs and Construction Agreement. The MOUs with the second respondent was signed for securing the lands for building industrial warehouse.

6. The applicant was to secure the land and develop it, whereas, the second respondent was to facilitate capital investment to fund development, construction, ownership, operation and maintenance of the Projects developed by the applicant for the first applicant.

7. For the aforesaid purpose, the second respondent incorporated the respective first respondents as the Special Purpose Vehicle (SPV).

The applicant has signed separate Construction Agreements with the



Arb.Appln.Nos.592 to 596 of 2023

respective first respondents.

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8. The general arrangements between the applicant and the second respondent are dealt with under the respective MOUs.

9. The applicant have signed the respective MOUs with the second respondent and the respective Construction Agreement with the first respondent as detailed below:-

A.No.	Date of MOUs' with the second respondent	Date of Construction Agreement with first respondent
592/2023	18.05.2020	28.08.2020
	19.07.2021	
593/2023	19.07.2021	24.08.2021
	23.07.2021	
594/2023	19.07.2021	12.10.2022
	15.09.2022	
595/2023	19.07.2021	10.10.2022
	26.08.2022	
596/2023	19.07.2021	24.08.2021
	23.07.2021	

10. The respective **MOU's** as also the Construction Agreements contemplate clauses for resolution of the dispute between the applicant and the respective respondents. The Arbitration clauses in the respective MOU's read as under :-

MOU's all dated 19.07.21	Other MOU's
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6.4. Arbitration:

In the event of any difference or dispute between the parties hereto on the construction of this agreement or any clause herewith or the rights, duties and obligation, either party hereunder the dispute shall be referred to Arbitration **The venue of arbitration shall be at Bengaluru.** The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any statutory modification or re-enactment thereof. Each party to the dispute shall appoint one Arbitrator each and the two Arbitrators shall appoint the third or the Presiding Arbitrator (Umpire). The arbitration proceedings shall be conducted in English language. The arbitral award shall be final and binding upon the parties and judgment may be entered thereon, upon the application of either party to a court having jurisdiction. Each party shall bear the cost of preparing and presenting its own case, and the cost of arbitration, including fees and expenses of the arbitrators, shall be shared equally by the parties unless the award otherwise provides.

Dispute Resolution:

This MoU will be governed by the laws of India. Any dispute between the parties that cannot be settled amicably may be referred by either party to arbitration under the Arbitration and Conciliation Act, 1996 and any statutory modification or re-enactment thereof. Each party to the dispute shall appoint one Arbitrator each and the two Arbitrators shall appoint the third or the Presiding Arbitrator.

The venue of arbitration shall be Chennai and the arbitration proceedings shall be conducted in English language. The arbitral award shall be final and binding upon the parties.

Subject to arbitration as aforesaid, all disputes shall be subject to the jurisdiction of the courts at **Krishnagiri District.**

11. The respective **MOU's** have been followed with separate Construction Agreement between the applicant and the first respondent. The respective Arbitration Clauses in all the Construction Agreements are identical which read as under:-

Construction Agreement



21. DISPUTE RESOLUTION-

- a) All disputes, controversies or differences which may arise between parties herein out of or in relation to or in connection with this Agreement, the interpretation thereof, or its breach that have not been resolved between the parties by mutual discussions shall be referred to arbitration. **The venue of the arbitration shall be Chennai.** The Promoter and the Allottee shall appoint one arbitrator each of their choice and the arbitrators so appointed shall appoint a third arbitrator or, if they fail to appoint such third arbitrator, the competent court shall appoint a third arbitrator who shall act as the presiding arbitrator. The Arbitration proceedings shall be conducted in English language and in accordance with and subject to the provisions of the Arbitration & Conciliation Act, 1996 or any modification or re-enactment thereof for the time being in force.
- b) b) Subject to the forgoing, the parties agree that only the Courts at **Krishnagiri** jurisdiction shall have the exclusive jurisdiction to adjudicate upon matters relating to the rights and obligations of the parties under the terms of this Agreement.

12. These applications are contested by the respondent on the ground of jurisdiction. It is submitted that although the venue under the respective Construction Agreement for Arbitration is Chennai, the Courts in Krishnagiri/Hosur alone have jurisdiction as the parties agreed between themselves.

13. On the other hand, the learned Senior Counsel for the applicant would submit that there is final decision between the venue of arbitration and jurisdiction of this Court. It is submitted that merely because the



venue of arbitration is Chennai, it would not cloth this Court within the jurisdiction to pass orders under Section 9 of the Arbitration and Conciliation Act, 1996.

14. The learned Senior Counsel for the applicant has placed reliance on the following decisions of this Court and that of the Delhi High Court:-

- i. **Balapreetham Guest House Pvt.Ltd., vs. Mypreferred Transformation and Hospitality Pvt. Ltd., 2021(3)CTC 421;**
- ii. **BGS SGS SOMA JV vs. NHPC Ltd., (2020) 4 SCC 234;**
- iii. **Bharat Aluminium Company and Ors. Vs. Kaiser Aluminium Technical Service, Inc. and Ors., 2012(9)SCC 552;**
- iv. **Brahmani River Pellets Limited vs. Kamachi Industries Limited, AIR 2019 SC 3658;**
- v. **Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited and Ors , AIR 2017 SC 2105;**
- vi. **Reliance Infrastructure Limited vs. Madhyanchal Vidyut Vitran Nigam Limited, 305(2023)DLT 74;**
- vii. **Vasudev Garg & Ors. Vs. Embassy Commercial Projects (Whitefield) Private Limited & Ors. O.M.P.(I)(Comm.)269/2023 & I.A.No.20370/2023.**

15. The learned Senior Counsel for the applicant submits that the identical issue came up for consideration before the Delhi High Court in

Reliance Infrastructure Limited Vs. Madhyanchal Vidyut Vitran



Arb.Appln.Nos.592 to 596 of 2023

Nigam Limited, 305 (2023) DLT74. It is submitted that similar issue was considered by the Delhi High Court and therefore it is submitted that there is no doubt that this court has got jurisdiction, as the parties contesting have agreed to jurisdiction of this Court by agreeing to Arbitration within the Jurisdiction of this Court in terms of **Clause 21** of the respective construction agreement with the first respondent.

16. The learned Senior Counsel for the applicant submits that in the light of the above decision, the applicant is entitled for the relief sought for.

17. The learned Senior Counsel for the respondent has placed reliance on the following decisions of the Hon'ble Supreme Court:-

- i. **Swastik Gases Private Ltd., vs. Indian Oil Corporation Limited** (2013) 9 SCC 32;
- ii. **Mankastu Impex Private Limited vs. Airvisual Limited**, (2020) 5 SCC 399;
- iii. **BGS SGS SOMA JV vs. NHPC Ltd.**, (2020) 4 SCC 234.

18. I have considered the arguments advanced by Mr.V.Raghavachari, learned Senior Counsel appearing for Mr.S.Eshwar, learned counsel for the applicant and Mr.A.R.L.Sundaresan, learned Senior Counsel appearing for Mr.G.Vivekanand, learned counsel for the



respondent.

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19. In **Bharat Aluminium Company and Ors. Vs. Kaiser Aluminium Technical Service, Inc. and Ors.**, 2012 (9) SCC 552, the Hon'ble Supreme Court held that once the place of arbitration is designated in the agreement, the parties have conferred jurisdiction on that Court. Relevant portion of the decision read as under :-

“96.We are of the opinion, the term “*subject-matter of the arbitration*” cannot be confused with “*subject-matter of the suit*”. The term “*subject-matter*” in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. **Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is**



held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.”

20. In **Indus Mobile Distribution Private Limited Vs. Datawind**

Innovations Private Limited and Ors , AIR 2017 SC 2105, the Hon’ble

Supreme Court has held as under :-

16. It may be mentioned, in passing, that the Arbitration and Conciliation Act, 1996 has been amended in 2015 pursuant to a detailed Law Commission Report. The Law Commission specifically adverted to the difference between “seat” and “venue” as follows:

“40. The Supreme Court in **BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]** decided that Parts I and II of the Act are mutually exclusive of each other. The intention of Parliament that the Act is territorial in nature and Sections 9 and 34



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Arb.Appln.Nos.592 to 596 of 2023

will apply only when the seat of arbitration is in India. The seat is the “centre of gravity” of arbitration, and even where two foreign parties arbitrate in India, Part I would apply and, by virtue of Section 2(7), the award would be a “domestic award”. The Supreme Court recognised the “seat” of arbitration to be the juridical seat; however, in line with international practice, it was observed that the arbitral hearings may take place at a location other than the seat of arbitration. The distinction between “seat” and “venue” was, therefore, recognised. In such a scenario, only if the seat is determined to be India, Part I would be applicable. If the seat was foreign, Part I would be inapplicable. Even if Part I was expressly included ‘it would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the [foreign] Procedural law/Curial law.’ The same cannot be used to confer jurisdiction on an Indian Court. However, the decision in **BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]** was expressly given prospective effect and applied to arbitration agreements executed after the date of the judgment.

41. While the decision in **BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]** is a step in the right direction and would drastically reduce judicial intervention in foreign arbitrations,



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Arb.Appln.Nos.592 to 596 of 2023

the Commission feels that there are still a few areas that are likely to be problematic.

(i) Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign court or the Arbitral Tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a “judgment” or “decree” for the purposes of Sections 13 and 44-A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under Sections 13 and 44-A of the Code of Civil Procedure. Neither of these remedies is likely to provide a practical remedy to the party seeking to enforce the interim relief obtained by it.

That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour



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Arb.Appln.Nos.592 to 596 of 2023

only to realise that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company.

(ii) While the decision in **BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]** was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where courts, despite knowing that the decision in *Bhatia International [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105]* is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration agreement executed pre-BALCO **[BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]**.

42. The above issues have been addressed by way of proposed amendments to Sections 2(2), 2(2-A), 20, 28 and 31.”

21. In **Enercon (India) Ltd. Vs. Enercon GmbH, (2014) 5 SCC 1**

: (2014) 3 SCC (Civ) 59, the Hon’ble Supreme Court held as follows:-

“The location of the seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. It was further held that the seat normally carries with it the choice of that country's arbitration/curial law.”



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22. The Hon'ble Supreme Court in **Mankastu Impex Private Limited Vs. Airvisual Limited**, (2020)5 SCC 399 has answered the issue. The Court followed its views in **Indus Mobile Distribution (P) Ltd. Vs. Datawind Innovations (P) Ltd.**, (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760, wherein, it was held as under:-

“19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. 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 Sections 16 to 21 CPC 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.”

23. In the aforesaid case in **Mankastu Impex Private Limited**, the Clause 17.1 and 17.2 in the aforesaid Memorandum of Understanding dated 19.09.2016 governing the law and dispute resolution read as under:-

17. Governing law and dispute resolution



17.1. This MoU is governed by the laws of India, without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction”.

17.2. Any dispute, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered in Hong Kong.

24. The decision in **Mankastu Impex Private Limited**, referred to *supra*, was rendered in the context of a Memorandum of Understanding dated 19.09.2016 between the Company incorporated in **India** and a Company incorporated in **Hong Kong**. The Hon’ble Supreme Court observed as under :-

“19. The seat of arbitration is a vital aspect of any arbitration proceedings. **Significance of the seat of arbitration is that it determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award. The situs is not just about where an institution is based or where the hearings will be held. But it is all about which court would have the supervisory power over the arbitration proceedings.**

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25. Clause 17.1 of MoU stipulates that MoU is governed by the laws of India and the courts at New



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Arb.Appln.Nos.592 to 596 of 2023

Delhi shall have jurisdiction. The interpretation to Clause 17.1 shows that the substantive law governing the substantive contract are the laws of India. The words in Clause 17.1, “*without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction*” has to be read along with Clause 17.3 of the agreement. As per Clause 17.3, the parties have agreed that the party may seek provisional, injunctive or equitable remedies from a court having jurisdiction before, during or after the pendency of any arbitral proceedings. In *BALCO* [*BALCO v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] , this Court held that : (SCC p. 636, para 157)

“157. ... on a logical and schematic construction of the Arbitration Act, 1996, the Indian courts do not have the power to grant interim measures when the seat of arbitration is outside India.”

If the arbitration agreement is found to have seat of arbitration outside India, then the Indian courts cannot exercise supervisory jurisdiction over the award or pass interim orders. It would have, therefore, been necessary for the parties to incorporate Clause 17.3 that parties have agreed that a party may seek interim relief for which the Delhi courts would have jurisdiction.

26. In this regard, we may usefully refer to the insertion of proviso to Section 2(2) of the Arbitration Act, 1996 by the Amendment Act, 2015. By the Amendment Act, 2015 (w.e.f. 23-10-2015), a proviso has been added to Section 2(2) of the Act as per which, certain provisions of Part I of the Act i.e. Section 9 — interim relief, Section 27 — court's assistance for evidence, Section 37(1)(a) — appeal against the orders and Section 37(3) have been made



applicable to “international commercial arbitrations” even if the place of arbitration is outside India. Proviso to Section 2(2) of the Act reads as under:

“2. Definitions.—(1)* * *

(2) Scope.—This Part shall apply where the place of arbitration is in India:

Provided that subject to an agreement to the contrary, the provisions of Sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.”

It is pertinent to note that Section 11 is not included in the proviso and accordingly, Section 11 has no application to “international commercial arbitrations” seated outside India.

27. The words in Clause 17.1, “*without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction*” do not take away or dilute the intention of the parties in Clause 17.2 that the arbitration be administered in Hong Kong. The words in Clause 17.1 do not suggest that the seat of arbitration is in New Delhi. Since Part I is not applicable to “international commercial arbitrations”, in order to enable the parties to avail the interim relief, Clause 17.3 appears to have been added. The words, “*without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction*” in Clause 17.1 is to be read in conjunction with Clause 17.3. Since the arbitration is seated at Hong Kong, the petition filed by the



Arb.Appln.Nos.592 to 596 of 2023

petitioner under Section 11(6) of the Act is not maintainable and the petition is liable to be dismissed.

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25. It is in the above background, the Hon'ble Supreme Court concluded that arbitration petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, by the petitioner, **Mankastu Impex Private Limited** for appointing an Arbitrator was liable to be dismissed. Therefore, the decision of the Hon'ble Supreme Court in **Mankastu Impex Private Limited** cited by the learned Senior Counsel for the respondent is not relevant to the facts and circumstances of the case. Therefore, the issue on the jurisdiction is answered against the respondent.

26. Thus, in the context of domestic arbitration, once the seat is determined, the jurisdiction court within whose jurisdiction the seat of arbitration is located would have exclusive jurisdiction.

27. As far as the remaining issue as to whether the applicant is entitled for relief sought for in the respective Applications to direct the respondent to provide security or to attach the property is concerned, admittedly, in these cases, the properties have been developed by the



Arb.Appln.Nos.592 to 596 of 2023

applicant under the respective MOUs cited above and the Construction Agreement signed with the respective first respondents, in respect of which, payments are *prima facie* due and payable to the applicant.

28. It appears that the CEO of the second respondent has taken a private loan from the applicant and at default is allegedly attempting to coerce the applicant to waive the aforesaid personal loan to start paying the alleged dues under the respective Construction Agreements.

29. Thus, the applicant has made out a *prima facie* case on merits for grant of interim relief. Therefore, to balance the interest of the parties, schedule properties are attached for a period of 90 days from the date of receipt of a copy of this order. It is open to the parties to approach the Arbitral Tribunal during the interregnum either to vacate/lift this order of attachment or extend it under during the pendency of the arbitral proceedings.

30. These Arbitration Applications stand allowed with the above observations. No costs.



Arb.Appln.Nos.592 to 596 of 2023

05.06.2024

Index : Yes/No

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Arb.Appln.Nos.592 to 596 of 2023

C.SARAVANAN, J.

KKD/JEN

Pre-delivery Common Order in
Arb.Application Nos.592 to 596 of 2023

05.06.2024