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

+ O.M.P.(MISC.)(COMM.) 526/2024

BVSR CONSTRUCTIONS PRIVATE LIMITEDPetitioner

Through: Mr S S Sastry, Adv.

versus

PROJECT DIRECTOR ADB PROJECTSRespondent

Through: Mr Varun Mishra and Mr Chetanya
Kapoor, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

27.08.2024

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1. This is a petition under Section 29A(5) of the Arbitration and Conciliation Act, 1996 seeking extension of mandate of the Arbitral Tribunal by a period of 3 months for concluding the arbitral proceedings and passing the final award.
2. The arbitration clause is contained in the General Conditions of Contract being Clause 20.6 and reads as under:

20.6 Arbitration

Any dispute between the Parties arising out of or in connection with the Contract not settled amicably in accordance with Sub-Clause 20.5 above and in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by arbitration. Arbitration shall be conducted as follows:

(a) if the contract is with foreign contractors,

(i) for contracts financed by all participating Banks except under sub-paragraph (a) (2) below:

international arbitration (1) with proceedings administered by the arbitration institution designated in the Contract Data, and conducted under the rules of arbitration of such institution, or, if so specified in the Contract Data, (2) international arbitration in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), or (3) if neither an arbitration institution nor UNCITRAL arbitration rules are specified in the Contract Data, with proceedings administered by the International Chamber of Commerce (ICC) and conducted under the ICC Rules of Arbitration, by one or more arbitrators appointed in accordance with said arbitration rules.



(ii) for contracts financed by the Asian Development Bank.

international arbitration (1) with proceedings administered by the arbitration institution specified in the Contract Data and conducted under the rules of arbitration of such Institution unless it is specified in the Contract Data that the arbitration shall be conducted under the rules of the United Nations Commission on International Trade Law (UNCITRAL) and if UNCITRAL Rules are so specified then the named arbitration institution shall be the appointing authority and shall administer the arbitration; or (2) if an arbitration institution is not specified in the Contract Data, with proceedings administered by the Singapore International Arbitration Centre (SIAC) and conducted under the SIAC Rules, by one or more arbitrators appointed in accordance with the said arbitration rules.

(b) if the Contract is with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the Employer's country.

The place of arbitration shall be the neutral location specified in the Contract Data; and the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language].

The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DB, relevant to the dispute. Nothing shall disqualify representatives of the Parties and the Engineer from being called as a witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrators to the evidence or arguments previously put before the DB to obtain its decision, or to the reasons for dissatisfaction given in its Notice of Dissatisfaction. Any decision of the DB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

3. The Arbitration clause indicates that the place of arbitration shall be a neutral location and in this regard, the petitioner wrote a letter on 21.02.2022 crystallizing its claim. Para 5 of the letter dated 21.02.2022 reads as under:

"5. The place of arbitration is proposed to be in New Delhi with proceedings in English and governing law being the laws of India under clause 20.6 (d) and (e) of PCC."

4. The respondent replied to the letter dated 21.02.2022 on 08.03.2022 and as far as place of arbitration is concerned, the respondent stated as under:



“5. Your proposal for New Delhi as the proposed place for arbitration is being examined and our consent to the same shall be communicated to you in due course. However please be informed that we reserve our right to propose a place near to the site as provided under Cl 20.6(d) of the PCC.”

5. Pursuantly, the respondent in its letter dated 11.05.2022 with respect to the place of arbitration wrote as under:

“3. Place of arbitration: We are pleased to inform that your proposal for New Delhi as the place of arbitration is acceptable to us.”

6. Subsequently, the Arbitral Tribunal was constituted and the arbitral proceedings are being held in New Delhi. The final arguments have been heard and matter is reserved for Award.

7. Mr Mishra, learned counsel appears for the respondent and states that the reply has been filed. However, the same is not on record.

8. Mr Mishra, learned counsel for the respondent states that in the present case no part of cause of action has arisen at New Delhi and hence it should be the Courts at Sikkim which should have exclusive jurisdiction.

9. I have heard learned counsel for the parties.

10. The Hon’ble Supreme Court in ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited & Ors.*** (2017) 7 SCC 678 *inter alia* held as under:

“1. Leave granted. The present appeals raise an interesting question as to whether, when the seat of arbitration is Mumbai, an exclusive jurisdiction clause stating that the courts at Mumbai alone would have jurisdiction in respect of disputes arising under the agreement would oust all other courts including the High Court of Delhi, whose



judgment [Datawind Innovations (P) Ltd. v. Indus Mobile Distribution (P) Ltd., 2016 SCC OnLine Del 3744] is appealed against.

2. The brief facts necessary to appreciate the controversy are that Respondent 1 is engaged in the manufacture, marketing and distribution of mobile phones, tablets and their accessories. Respondent 1 has its registered office at Amritsar, Punjab. Respondent 1 was supplying goods to the appellant at Chennai from New Delhi. The appellant approached Respondent 1 and expressed an earnest desire to do business with Respondent 1 as its retail chain partner. This being the case, an agreement dated 25-10-2014 was entered into between the parties. Clauses 18 and 19 are relevant for our purpose, and are set out hereinbelow:

“Dispute resolution mechanism:

Arbitration : In case of any dispute or differences arising between parties out of or in relation to the construction, meaning, scope, operation or effect of this agreement or breach of this agreement, parties shall make efforts in good faith to amicably resolve such dispute.

If such dispute or difference cannot be amicably resolved by the parties (dispute) within thirty days of its occurrence, or such longer time as mutually agreed, either party may refer the dispute to the designated senior officers of the parties.

If the dispute cannot be amicably resolved by such officers within thirty (30) days from the date of referral, or within such longer time as mutually agreed, such dispute shall be finally settled by arbitration conducted under the provisions of the Arbitration and Conciliation Act, 1996 by reference to a sole arbitrator which shall be mutually agreed by the parties. Such arbitration shall be conducted at Mumbai, in English language.

The arbitration award shall be final and the judgment thereupon may be entered in any court having jurisdiction over the parties hereto or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be. The arbitrator shall have the power to order specific performance of the agreement. Each party shall bear its own costs of the arbitration.



It is hereby agreed between the parties that they will continue to perform their respective obligations under this agreement during the pendency of the dispute.

19. All disputes and differences of any kind whatever arising out of or in connection with this agreement shall be subject to the exclusive jurisdiction of courts of Mumbai only.”

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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 of 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.”

11. In this regard, the Hon’ble Supreme Court in **BGS SGS SOMA JV v. NHPC**, (2020) 4 SCC 234 and more particular para 82 *inter alia* 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.”

12. A perusal of the aforesaid judgments shows that a place where the seat of arbitration is designated would have jurisdiction for regulating arbitration proceedings. In this regard, Clause 20.6 (d) of Particular Conditions of Contract (‘PCC’) reads as under:

“arbitration proceedings shall be held at New Delhi. India, or at a place near to the Site.”

13. Clause 20.6 (d) of PCC clearly indicates that the venue of the arbitration shall be New Delhi or at a place near to the Site. In addition, in response to the letter dated 21.02.2022, the respondent has agreed to the proposal for New Delhi to be the place of Arbitration.

14. For the said reasons, I am satisfied that this Court has the jurisdiction to entertain the present petition and the mandate of the Arbitral Tribunal is



extended by a period of 3 months from today.

15. The period from 10.06.2024 till today stands regularized.

16. The petition is disposed of accordingly.

JASMEET SINGH, J

AUGUST 27, 2024

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Click here to check corrigendum, if any