HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Arb Petition No. 47/2019

Reserved on : 02.12.2023
Pronounced on : 24.01.2024

Babu Ram **…. Petitioner**

Through: Mr. Bari Abdullah, Advocate.

Vs.

Tata Project Ltd. Residential Manager and Ors. **…. Respondents**

Through: Mr. Raman Sharma, AAG for R-1.
Ms. Garima Gupta, Advocate for R-2, 3, & 4.

CORAM: HON'BLE THE CHIEF JUSTICE

ORDER

01. The present application has been filed under Section 11 (6) of theArbitration and Conciliation Act, 1996**(**for shortthe **'Act of 1996')** for appointment of an arbitrator to settle the dispute between the petitioner and the respondents.

02. The case of the petitioner, in brief, is that the respondent No. l (Tata Project Ltd. Company) was allotted a work for the construction of a transmission line by the respondents no. 2to 4 (Power Grid Corporation of India). Thereafter,the respondent no.1 executed asub-contract in favour of the petitioner for the construction of revetment work LOC No. 167 and 168 vide work orderNo.14998 dated

26.10.2017 for an amount ofRs.24,72,750/- (Rupees twenty-four lacs seventy-two thousand seven hundred and fifty only).

03. According to the petitioner, the petitioner duly executed and completed the said contract to the satisfaction of the respondents. Thereafter, the transmission tower was also erected over the said revetment and now the said transmission line has been commissionedand is functioning.

04. The petitioner contends that after completing the work the petitioner submittedhis bills amounting to Rs.24,72,750/- (Rupees twenty-four lacs seventy-twothousand seven hundred and fifty only). As the respondent no.1 failed to make thepayment in favour of the petitioner, the petitioner served a legal notice on 10.03.2019 requesting for release of the payment. However, despite such notice, the respondents have not made the payment to the petitioner.

05. It is contended by the petitioner that as per Clause 17 of the work order issued by the respondent no.1 in favour of the petitioner on 26.10.2017, the respondent no.1 and the petitioner shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them either under or in connection with the contract and the arbitration shall be carried out in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996 or any other statutory modification or re-enactment thereof for the time being in the force, and the decision of the arbitrator/umpire shall be final and binding upon both the parties.

It has been further provided that the venue of arbitration shall be Hyderabad, Andhra Pradesh, India.

06. According to the petitioner, though the petitioner approached the respondents and requested them to settle his claim for which the petitioner sent legal notice to the respondents on 10.03.2019, the respondentsfailed to accede to the request and hence, his attempt to settle the dispute amicably failed. Consequently, the petitioner wasleft with noalternative but to issue a legal notice to the respondents on 29.05.2019 forinvoking Para 17 of the work order which providesthat in case of any dispute between the parties, on the failure of any amicable settlement, the dispute is to be resolved by arbitration. However, despite this legal notice, the respondents did not respond. Accordingly, the present application has been filed for the appointment of an arbitrator by this Court in terms of Clause 17 of the contract agreement between the petitioner and respondent no.1.

07. The respondents no. 2 to 4 (Power Grid Corporation of India)have rightly objected to their impleadment in this application as they contend that there is no privity of contract between the respondents no.2 to 4 with the petitioner in as much as the contract was between the petitioner and the respondent no.1, to which the respondents no.2 to 4 had no direct role to play. It was submitted that in terms of Clause 15 of General Conditions of Contract executed between the respondents 2 to 4 and respondent no.1, the respondent no. 1 was required to select and employ subcontractors from the "list of Approved Sub Contractors" issued by Power Grid Corporation of

India and in case any other Sub Contractor was required to be engaged, then a permission for the same was required to be obtained in advance from the Power Grid Corporation of India and that the petitioner is neither an approved sub-contractor nor any permission for his engagement had ever been sought from the respondents no. 2 to 4. As such, the respondents no. 2 to 4 did not have any knowledge about the allocation of work by M/s Tata Projects LimitedCompany (respondent no.1) in favour of the petitioner.

08. This Court is also of the opinion that in view of the decision in ***Essar Oil Ltd. v. Hindustan Shipyard Ltd.*, (2015) 10 SCC 642,** as there was no privity of contract between the petitioner and the respondent no. 2 to 4, consequently, there was no arbitration agreement between the petitioner and the respondents no. 2 to 4, the present application would not lie against the respondents no.2 to 4. As also evident from the work order dated 26.10.2017, the contract was between the petitioner and the respondent no.1.

It was held in ***Essar Oil Ltd.***(supra) as follows:

> **"26.** It is also pertinent to note that the arbitration agreement was only between the appellant and the respondent. ONGC was not a party to the arbitration agreement. When a dispute had arisen between the appellant and the respondent in relation to payment of money, the appellant had initiated the arbitration proceedings. As ONGC was not a party to the arbitration agreement, it could not have been represented before the Arbitral Tribunal. If ONGC was not a party before the Arbitral Tribunal, the Tribunal could not have made any award making ONGC liable to make payment to the appellant. In the aforestated factual and legal position, the Arbitral Tribunal could not have made ONGC liable in any respect and rightly, the majority view of the Arbitral Tribunal was to the effect that ONGC, not being

> a party to any contract or arbitration agreement with the appellant, could not have been made liable to make any payment to the appellant."

09. For the above reasons, I hold that the respondent no.2 to 4 are not necessary parties in the present proceedings as the dispute is essentially between the petitioner and the respondent no.1. Accordingly, the names the respondent no.2 to 4are directed to be deleted from the array of parties in this application.

10. This Court would now proceed to examine the claim of the petitioner *vis a vis* the respondent no.l. The respondent no.1 has not seriously questioned the existence of the arbitration clause nor certain disagreement about non-payment of bills arising out of the contractbut contends that this Court does not have the jurisdiction to entertain this application since, as per Clause 17 of the contract/work order dated 26.10.2016, the venue of arbitration shall be Hyderabad, Andhra Pradesh, India which does not come within the jurisdiction of this Court. Accordingly, only the Court having jurisdiction over Hyderabad will have the jurisdiction to entertain this application and not this Court, as this Court does not have jurisdiction over Hyderabad, in support of which, the respondent no.1 has relied on the decision in ***Brahmani River Pellets Ltd. v. Kamachi Industries Ltd.,*** **(2020) 5 SCC.**

11. In this regard, I may refer to Clause No. 17 of the Contract between the petitioner and respondent no.1 which reads as follows:

"17.0 Other Facilities/Requirements

1. All the necessary tools and plants required for works including but notlimited to provision of equipment such as cement mixtures, vibrators etc.with emphasis on mechanization to facilitate faster execution of works are in your scope. TPL shall not provide any tools and plants for the aboveworks. All the tools and plants used at the site shall have valid testcertificates. The TPL and Babu Ram shall make every effort to resolveamicably by direct informal negotiation any disagreement or dispute arisingbetween them either under or in connection with the contract. The Arbitrationshall be carried out in accordance with and subject to the provisions ofIndian Arbitration and Reconciliation Act, 1996 or any other statutorymodification or re-enactment thereof for the time being in force the decisionof the arbitrator/umpire shall be final and binding upon both, the venue ofarbitration shall be Hyderabad, Andhra Pradesh, India."

12. It is thus very clearly stipulated in the aforesaid arbitration clause that the venue ofarbitration shall be Hyderabad. As to what would be the effect of such a clause providing for a specific venue of arbitration has been the subject matter of consideration by the Supreme Court in a catena of decisions.

It was held in ***Brahmani River Pellets Ltd.***(supra) that,

> **"18.** Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the "venue" of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in *Swastik* [*Swastik Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.*, (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] , non-use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference.
>
> **19.** When the parties have agreed to the have the "venue" of arbitration at Bhubaneshwar, the Madras High Court erred [*Kamchi Industries Ltd.* v. *Brahmin River Pellets Ltd.*, 2018 SCC OnLine Mad 13127] in assuming the jurisdiction under Section 11(6) of the Act. Since only the Orissa High

> Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order [*Kamchi Industries Ltd.* v. *Brahmin River Pellets Ltd.*, 2018 SCC OnLine Mad 13127] is liable to be set aside."

13. The aforesaid decision was also referred to and was reaffirmed by the Supreme Court in ***BGSSGS SOMA JV v. NHPC,*** **(2020) 4 SCC 234,** wherein it was held that,

> **"45.** It was not until this Court's judgment in *Indus Mobile Distribution (P) Ltd.* [*Indus Mobile Distribution (P) Ltd.* v. *Datawind Innovations (P) Ltd.*, (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760] that the provisions of Section 20 were properly analysed in the light of the 246th Report of the Law Commission of India titled, "Amendments to the Arbitration and Conciliation Act, 1996" (August, 2014) (hereinafter referred to as "the Law Commission Report, 2014"), under which Sections 20(1) and (2) would refer to the "seat" of the arbitration, and Section 20(3) would refer only to the "venue" of the arbitration. Given the fact that when parties, either by agreement or, in default of there being an agreement, where the Arbitral Tribunal determines a particular place as the seat of the arbitration under Section 31(4) of the Arbitration Act, 1996, it becomes clear that the parties having chosen the seat, or the Arbitral Tribunal having determined the seat, have also chosen the courts at the seat for the purpose of interim orders and challenges to the award.
>
> **46.** This Court in *Indus Mobile Distribution (P) Ltd.* [*Indus Mobile Distribution (P) Ltd.* v. *Datawind Innovations (P) Ltd.*, (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760] , after referring to Sections 2(1)(*e*) and 20 of the Arbitration Act, 1996, and various judgments distinguishing between the "seat" of an arbitral proceeding and "venue" of such proceeding, referred to the Law Commission Report, 2014 and the recommendations made therein as follows : (SCC pp. 692-93, paras 17-20)
>
> > "*17.* In amendments to be made to the Act, the Law Commission recommended the following:
> >
> > '*Amendment of Section 20*
> >
> > **12.** In Section 20, delete the word "place" and add the words "seat and venue" before the words "of arbitration".

(*i*) In sub-section (1), after the words "agree on the" delete the word "place" and add words "seat and venue".

(*ii*) In sub-section (3), after the words "meet at any" delete the word "place" and add word "venue". [*Note*.—The departure from the existing phrase "place" of arbitration is proposed to make the wording of the Act consistent with the international usage of the concept of a "seat" of arbitration, to denote the legal home of the arbitration. The amendment further legislatively distinguishes between the "[legal] seat" from a "[mere] venue" of arbitration.]

***

Amendment of Section 31

17. In Section 31

(*i*) In sub-section (4), after the words "its date and the" delete the word "place" and add the word "seat".'

18. The amended Act, does not, however, contain the aforesaid amendments, presumably because the *Balco* [*Balco* v. *Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] judgment in no uncertain terms has referred to "place" as "juridical seat" for the purpose of Section 2(2) of the Act. It further made it clear that Sections 20(1) and 20(2) where the word "place" is used, refers to "juridical seat", whereas in Section 20(3), the word "place" is equivalent to "venue". This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.

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 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.
>
> *20*. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see *Swastik Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.* [*Swastik Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.*, (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] This was followed in a recent judgment in *B.E. Simoese Von Staraburg Niedenthal* v. *Chhattisgarh Investment Ltd.* [*B.E. Simoese Von Staraburg Niedenthal* v. *Chhattisgarh Investment Ltd.*, (2015) 12 SCC 225 : (2016) 1 SCC (Civ) 427] . 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 [*Datawind Innovations (P) Ltd.* v. *Indus Mobile Distribution (P) Ltd.*, 2016 SCC OnLine Del 3744 : (2016) 158 DRJ 391] is set aside. The injunction confirmed by the impugned judgment will continue for a 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."

This judgment has recently been followed in *Brahmani River Pellets Ltd.* v. *Kamachi Industries Ltd.* [*Brahmani River Pellets Ltd.* v. *Kamachi Industries Ltd.*, (2020) 5 SCC 462 : 2019 SCC OnLine SC 929 at para 15]

****

81. Most recently, in *Brahmani River Pellets* [*Brahmani River Pellets Ltd.* v. *Kamachi Industries Ltd.*, (2020) 5 SCC 462 : 2019 SCC OnLine SC 929 at para 15] , this Court in a domestic arbitration considered Clause 18 — which was the arbitration agreement between the parties — and which stated that arbitration shall be under Indian Arbitration and Conciliation Act, 1996, and the venue of arbitration shall be Bhubaneswar. After citing several judgments of this Court and then referring to *Indus Mobile Distribution* [*Indus Mobile Distribution (P) Ltd.* v. *Datawind Innovations (P) Ltd.*, (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760] , the

> Court held : (*Brahmani River Pellets case* [*Brahmani River Pellets Ltd.* v. *Kamachi Industries Ltd.*, (2020) 5 SCC 462 : 2019 SCC OnLine SC 929 at para 15] , SCC pp. 472-73, paras 18-19)
>
> > "*18*. Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the "venue" of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in *Swastik* [*Swastik Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.*, (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] , non-use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference.
> >
> > *19*. When the parties have agreed to the have the "venue" of arbitration at Bhubaneshwar, the Madras High Court erred [*Kamchi Industries Ltd.* v. *Brahmin River Pellets Ltd.*, 2018 SCC OnLine Mad 13127] in assuming the jurisdiction under Section 11(6) of the Act. Since only the Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order [*Kamchi Industries Ltd.* v. *Brahmin River Pellets Ltd.*, 2018 SCC OnLine Mad 13127] is liable to be set aside."

14. The aforesaid principle has been succinctly put in para 82 of the aforesaid judgment in ***BGSSGS SOMA JV*** (supra) as follows:

> **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."

14. In view of the above decisions, there cannot be any doubt that once the contracting parties have chosen a particular place as the venue of arbitration, only that venue chosen will be the seat for the purpose of arbitration. Consequently, only such a court having jurisdiction over the venue of arbitration will have jurisdiction to entertain an application for the appointment of an arbitrator under the agreement.

This is in tune with the autonomy of the parties as contemplated under Section 20 of the Arbitration and Conciliation Act, 1996 whereunder the parties are free to agree on the place of arbitration.

In the present case, as the parties have chosen Hyderabad to be the venue of arbitration, only courts having jurisdiction over Hyderabad will have jurisdiction to entertain applications pertainingto the said arbitration agreement. As this Court does not

have jurisdiction over Hyderabad, the venue of the arbitration, this Court does not have jurisdiction over matters pertaining to the said arbitration agreement including the appointment of the arbitrator.

15. For the reasons discussed above, the present application filed under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator is not maintainable, and accordingly, the present application is dismissed with liberty to the petitioner to approach the court of competent jurisdiction.

(N. KOTISWAR SINGH)
CHIEF JUSTICE

JAMMU
24.01.2024

Whether the order is speaking. Yes/No
Whether the order is reportable. Yes/No.