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

% ***Reserved on: 17.12.2019***
Pronounced on: 22 .01.2020

\+ ARB.P. 622/2019

KALPATARU POWER TRANSMISSION LIMITED
..... Petitioner

Through: Mr. Shashank Garg, Mr. Tariq Khan, Ms. Aastha Jain, Mr. Sunil Mittal & Mr. Digit Saikia, Advocates

versus

BHARAT PETROLEUM CORPORATION LIMITED
..... Respondent

Through: Mr. Rakesh Kumar & Ms. Anubha Singh, Advocates

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

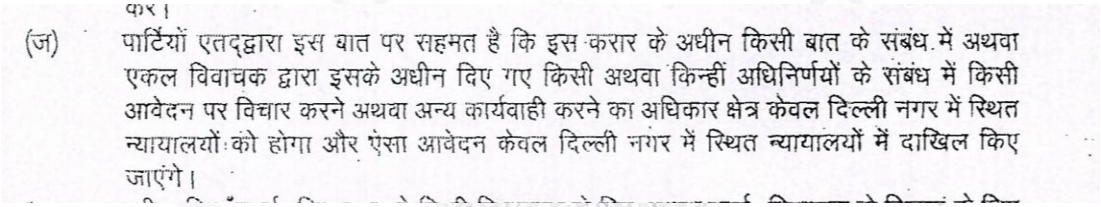
JYOTI SINGH, J.

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act') seeking an appointment of a Sole Arbitrator for adjudicating the disputes between the parties which have arisen on account of an Agreement entered into between the parties on 14.03.2014. The Agreement contains an Arbitration Clause. The relevant portion of the Arbitration Clause reads as under :-

> *"19 (a). Any dispute or difference of any nature whatsoever any claim, gross-claim, or set off the Corporation against the Contractor or regarding any right, liability, act, omission or account or any of the*

parties hereto arising out of or in relation to this agreement shall be referred to the Sole Arbitration of the Director (Marketing) of the Corporation or to an officer of the Corporation who may be nominated by the Director (Marketing)…"

2. The only objection raised by the respondent is with regard to the Territorial jurisdiction of this Court to entertain the present petition. The Agreement between the parties has Clause 19 (h), which is part of the Arbitration Clause and is reproduced hereunder:-

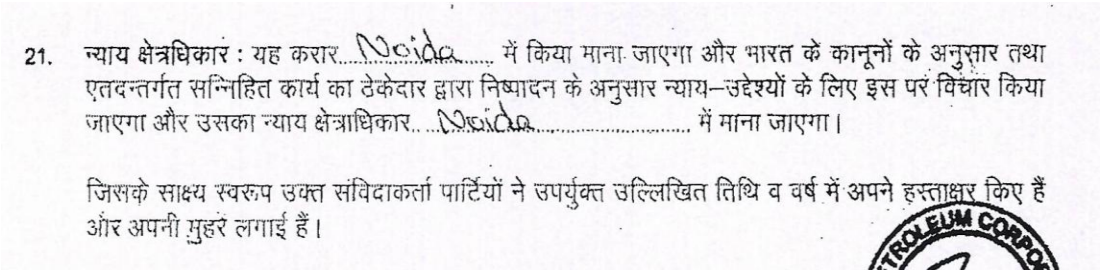


(ज) पार्टियों एतद्द्वारा इस बात पर सहमत है कि इस करार के अधीन किसी बात के संबंध में अथवा एकल विवाचक द्वारा इसके अधीन दिए गए किसी अथवा किन्हीं अधिनिर्णयों के संबंध में किसी आवेदन पर विचार करने अथवा अन्य कार्यवाही करने का अधिकार क्षेत्र केवल दिल्ली नगर में स्थित न्यायालयों को होगा और ऐसा आवेदन केवल दिल्ली नगर में स्थित न्यायालयों में दाखिल किए जाएंगे।

"19(h). The parties hereby agree that the courts in the city of …… alone shall have jurisdiction to entertain any application or other proceedings in respect of anything arising under this agreement and any award or awards made by the sole arbitrator here under shall be filed in the concerned courts in the city of ……..only."

(In the English version there are blanks)

3. There is another clause in the Agreement being Clause 21 which is reproduced hereunder:-



21. न्याय क्षेत्राधिकार : यह करार Noida में किया माना जाएगा और भारत के कानूनों के अनुसार तथा एतदन्तर्गत सन्निहित कार्य का ठेकेदार द्वारा निष्पादन के अनुसार न्याय–उद्देश्यों के लिए इस पर विचार किया जाएगा और उसका न्याय क्षेत्राधिकार Noida में माना जाएगा।

जिसके साक्ष्य स्वरूप उक्त संविदाकर्ता पार्टियों ने उपर्युक्त उल्लिखित तिथि व वर्ष में अपने हस्ताक्षर किए हैं और अपनी मुहरें लगाई हैं।

"21. Jurisdiction : This agreement shall be deemed to have been made in ……. and shall be constructed

according to the laws of India and the performance by the Contractor of and act on his part herein contained shall be considered due in ..... for the purpose of jurisdiction."
(In the English version there are blanks)

4. While the petitioner relies upon Clause 19(h) to invoke the jurisdiction of this Court, the respondent relies on Clause 21.

5. The contention of the petitioner is that the original Agreement entered into between the parties was in Hindi language and the same was translated into English and that also formed a part of the same Agreement with a stamp of the respondent affixed on it. As per Clause 19 (h) of the Contract, the parties had clearly used the words "alone", "shall" and "only" which makes it clear that they intended that Delhi shall have the exclusive jurisdiction to deal with any application with respect to the Arbitration dispute. Moreover, the expression "anything arising under this Agreement and any award or awards" clarifies that any application in respect of the Arbitral Award, including a challenge thereto will also be filed in Delhi only. Thus, the seat of Arbitration is clearly Delhi.

6. It is next contended that the words "any application or other proceedings" in Clause 19 (h) would include application filed under Section 11 of the Act. It is further argued that many Agreements provide a seat of Arbitration which is neutral to both parties and therefore the courts where arbitration takes place would be required to exercise supervisory control over the arbitral process. Seat is the centre of gravity and hence even if no cause of action has arisen at Delhi, the Courts at Delhi will have exclusive jurisdiction.

7. Learned counsel for the petitioner places reliance on the judgment of the Supreme Court in the case of ***Brahamini River Pellets Ltd. Vs. Kamachi Industries Ltd., 2019 SCC Online SC 929*** to contend that there is a difference between the term "subject matter of Arbitration" and "subject matter of the suit". The term "subject matter" has connection with process of dispute resolution and would refer to a Court of the seat of Arbitration process and in view of the judgment of ***Brahamini River Pellets Ltd. (supra)*** this would be irrespective of the fact that the obligations were to be performed at any other place, under the contract.

8. Learned counsel for the respondent per contra submits that this Court will have no territorial jurisdiction to entertain the petition. The Agreement dated 14.03.2014 was executed at Noida, Uttar Pradesh and the requisite stamp duty was also paid as applicable in the State of Uttar Pradesh. None of the parties to the present dispute carry on business within the territorial jurisdiction of this Court and even the Registered Offices are outside Delhi. Even the work under the agreement was executed beyond the territories of Delhi.

9. It is next contended that petitioner has invoked the jurisdiction of this Court on the strength of Clause 19(h), more particularly its English version. He submits that in the Hindi Version of the Agreement, the word 'Delhi' is added in Clause 19 (ज) but in the English version the said portion is blank. He further submits that there is another important clause in the Agreement which is 21 and which clearly states that the Agreement shall be deemed to have been made in Noida and shall be construed according to the laws of India. The performance by the contractor shall be

considered due in Noida for the purpose of jurisdiction. The word Noida is added in the Hindi version of Clause 21 whereas English version of the Agreement is blank. Learned counsel thus argues that the clauses clearly indicate that parties have agreed upon jurisdiction of the Courts in Noida and there is nothing in the agreement to show that the seat of arbitration was at all designated.

10. Learned counsel for the respondent next contends that in terms of Section 2 (e) of the Act, the Courts which have jurisdiction in terms of Section 20 CPC can only exercise jurisdiction under Section 11 of the Act. The Courts within whose jurisdiction, the seat is located shall have exclusive jurisdiction but in the present case, the seat of arbitration is not Delhi. In the absence of any seat having been designated the Courts in whose jurisdiction the cause of action has arisen i.e. execution of the agreement, payment of stamp duty, would have jurisdiction.

11. I have heard the learned counsels for the parties.

12. Reading of clause 21 of the Agreement leads to two conclusions. Firstly, the Agreement is deemed to have been executed in Noida and secondly, any disputes relating to the performance of the Contractor shall be subject to adjudication by the Courts in Noida. In other words, the clause connotes an Agreement between the parties to refer the disputes in connection with the performance of the contractor to the exclusive jurisdiction of the Courts in Noida. In so far as Clause 19(h) extracted above is concerned, the same is a sub-clause of the Arbitration Clause, whereby the parties have agreed that disputes in respect of 'any application or other proceedings' in respect of 'anything arising under the Agreement and any Award or Awards made by the Sole Arbitrator' shall

be entertained by the Courts at Delhi only. Reading of the Clause leaves no doubt that in respect of Arbitration proceedings only the Courts of Delhi would have jurisdiction. The use of words 'alone' and 'only' strengthens this position. The very fact that the parties have carefully chosen to incorporate in para 19(h) "proceedings in relation to Award or Awards made by the Sole Arbitrator", is indicative of the intent that the parties wanted to incorporate two separate covenants, one with respect to the subject matter of a suit and the other subject matter of arbitration and in the latter case, the jurisdiction has been conferred on the Courts at Delhi.

13. The Supreme Court in the case of ***Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 (Balco)***, clearly held that 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 and the purpose is to identify the Courts with supervisory control over the arbitration proceedings. The Supreme Court further held that this therefore, refers to a Court which would essentially be a Court of the seat of the arbitration process. Relevant para is as under:

> *"96. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:*
>
> > *'2. Definitions.—(1) In this Part, unless the context otherwise requires —*
> > *(a)-(d) ****
> > *(e) "Court" means 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;'*

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.

97. The definition of Section 2(1)(e) includes "subject-matter of the arbitration" to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist…."

14. The Supreme Court in the case of ***Balco (supra)*** held that an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause and further that regulation of conduct of arbitration and challenge to an award would have to be done by the Courts in which the arbitration is being conducted. Relevant para reads as under :-

"123. Thus, it is clear that the regulation of conduct of arbitration and challenge to an award would have to be done by the courts of the country in which the arbitration is being conducted. Such a court is then the supervisory court possessed of the power to annul the award. This is in keeping with the scheme of the international instruments, such as the Geneva Convention and the New York Convention as well as the Uncitral Model Law. It also recognises the territorial principle which gives effect to the sovereign right of a country to regulate, through its national courts, an adjudicatory duty being performed in its own country. By way of a comparative example, we may reiterate the observations made by the Court of Appeal,

England in C v. D [2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)] wherein it is observed that:

> *"It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award."*
>
> *(emphasis supplied)*

In the aforesaid case, the Court of Appeal had approved the observations made in A v. B [(2007) 1 All ER (Comm) 591 : (2007) 1 Lloyd's Rep 237] wherein it is observed that:

> *"... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy ... as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration."*
>
> *(emphasis supplied)"*

15. A Co-ordinate Bench of this Court in the case of ***Global Credit Capital Ltd. vs. Krrish Realty Nirman Pvt. Ltd., being ARB. P. 123/2018, decided on 16.05.2018*** was dealing with a petition under Section 11 of the Act. One clause in the Agreement gave jurisdiction to the Courts at Gurgaon over all matters concerning the Agreement while the other clause referred to the venue of arbitration at New Delhi.

16. The Co-ordinate Bench relying on the judgment passed by it earlier in the case of ***Ramandeep Singh Taneja vs. Crown Realtech Private Limited being Arb.P. 444/2017 decided on 23.11.2017*** held that the Court in Delhi will have jurisdiction as the venue of the proceedings was Delhi. In ***Ramandeep Singh Taneja (supra)***, reliance was placed on the

judgment in the case of ***Balco (supra)*** and it was held that for the purposes of identifying the Court, which shall have supervisory control over the Arbitral proceedings, it would be the Court where the 'subject matter of arbitration' is situated and that would take precedence over the Court where the 'subject matter of the suit' is situated. The Court also resolved the conflict between two parts of the clauses by holding that where the disputes are to be adjudicated without reference to arbitration, the Courts at Delhi would have jurisdiction in terms of the exclusive jurisdiction clause. However, when disputes have to be resolved through arbitration, the specific clause of the arbitration, indicating the 'venue' would determine the jurisdiction.

17. Applying the above-mentioned judgments, it is clear that clause 19(h) will determine the jurisdiction for deciding the matters relating to arbitration proceedings for which the jurisdiction has been conferred at Delhi 'alone'. This Court would therefore, have the jurisdiction to decide the present petition.

18. In view of the above, Mr. Justice Swatanter Kumar is appointed as a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in respect of agreement dated 14.03.2014.

19. The address and mobile number of the learned Arbitrator is as under:

Mr. Justice Swatanter Kumar,
Former Judge of the Supreme Court of India,
Address: C-3/5, First Floor,
Safdarjung Development Area,
New Delhi.

20. The learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.

21. Fee of the Arbitrator shall be fixed as per Fourth Schedule of the Act.

22. The petition is allowed in the aforesaid terms with no order as to costs.

JYOTI SINGH, J

JANUARY 22, 2020
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HIGH COURT OF DELHI
सत्यमेव जयते