

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present :

Hon'ble Justice Moushumi Bhattacharya.

A.P. 474 of 2023

Harji Engineering Works Pvt. Ltd.

vs

Bharat Heavy Electricals Limited & Anr.

For the petitioner : Mr. Sirsanya Bandopadhyay, Adv.
Mr. Rahul Kumar Singh, Adv.
Mr. Aditya Kanodia, Adv.
Mr. Sourajit Dasgupta, Adv.
Mr. Nilkanta Basak, Adv.

For the respondents : Mr. Rohit Das, Adv.
Ms. Kishwar Rahman, Adv.
Ms. Sristi Roy, Adv.
Mr. Preetam Majumdar, Adv.

Last heard on : 05.09.2023

Delivered on : 12.09.2023.

Moushumi Bhattacharya, J.

1. The petitioner has filed the present application under section 9 of The Arbitration and Conciliation Act, 1996 for an injunction

restraining the respondent no. 1 Bharat Heavy Electricals Limited (BHEL), from invoking and encashing the performance bank guarantee issued by the respondent no. 2 Punjab and Sind Bank and the modified performance bank guarantee of 7th April, 2021 and 8th March, 2022 respectively.

2. The respondent no. 1 BHEL is represented and learned counsel appearing for BHEL takes a preliminary objection to the maintainability of the application. Counsel submits that the High Court is not the “Court” within the meaning of section 2(1)(e) of the Act for the purposes of the present application as no part of cause of action arose within the original territorial jurisdiction of this Court and the respondent no. 1 as well as the petitioner do not have any office or place of business within the original territorial jurisdiction of this Court. Counsel submits that the Notice Inviting Tender (NIT) was issued by BHEL from its Power Sector Eastern Region (PSER) at Salt Lake City, Kolkata, the Work Order was issued by BHEL from New Delhi and the contract was required to be performed in Jharkhand. Counsel further relies on the amended General Conditions of Contract (GCC) and the Work Order to urge that the seat of arbitration has been designated to be the place from where the contract is issued, which is Salt Lake City, Kolkata.

3. Learned counsel appearing for the petitioner opposes the point of maintainability on the ground of jurisdiction to say that the parties intended that the seat of the arbitral tribunal would be in Kolkata and that the words in Bracket are only meant for the convenience of the

arbitral tribunal or the parties for conducting the proceedings of the arbitration. Counsel submits that the bracketed portion does not change the seat of arbitration from Kolkata to North 24 Parganas. It is submitted that it was the express intention of the parties to vest the jurisdiction of the arbitration in Kolkata and that this Court would therefore have the authority to decide the dispute.

4. The relevant clauses of the GCC and Work Order should be reproduced to understand the competing contentions better.

5. Clause 2.2 of the amended GCC constituting part of the NIT dated 31st October, 2020 contains a general forum selection clause and provides as follows.

“Clause 2.2.- The contract shall be governed by the Law for the time being in force in the Republic of India. Subject to Clause 2.21.1 or 2.21.2 of this Contract, the Civil Court having original Civil Jurisdiction at Delhi for PSNR, at Kolkata for PSEER, at Nagpur for PSWR and at Chennai for PSSR, shall alone have exclusive jurisdiction in regard to all matters in respect of the Contract.”

6. Clause 34.0 of the Work Order also contains a general forum selection clause which is similar to clause 2.2 of the GCC

“Clause 34.0.- The contract shall be governed by the Law for the time being in force in the Republic of India. Subject to Clause 35.1 or 35.2 of this Contract, the Civil Court having original Civil Jurisdiction at Delhi for PSNR, at Kolkata for PSEER shall alone have exclusive jurisdiction in regard to all matters in respect of the Contract.”

7. The amended GCC constituting part of the NIT contains the arbitration agreement between the parties in clause 2.21.1.1.

“Clause 2.21.1.1- The seat of arbitration shall be Kolkata (the place from where the contract is issued). The Contract shall be governed by and be construed as per provisions of the laws of India. Subject to this provision 2.21.1.1 regarding ARBITRATION, the principal civil court exercising ordinary civil jurisdiction over the area where the seat of arbitration is located shall have exclusive jurisdiction over any DISPUTE to the exclusion of any other court.”

8. Clause 35.1.1 of the Work Order also contains an arbitration agreement which is identical to clause 2.21.1.1 of the GCC.

“Clause 35.1.1- The seat of arbitration shall be Kolkata (the place from where the contract is issued). The Contract shall be governed by and be construed as per provisions of the laws of India. Subject to this provision 35.1.1 regarding ARBITRATION, the principal civil court exercising ordinary civil jurisdiction over the area where the seat of arbitration is located shall have exclusive jurisdiction over any DISPUTE to the exclusion of any other court.”

9. The dispute arises out of a contract consisting of the arbitration agreement where the respondent no. 1 BHEL urges that the seat of arbitration will be the place from where the contract is issued, namely, that the bracketed portion will get precedence. The petitioner on the other hand contends that the parties intended to mean the seat of arbitration to be in Kolkata and the bracketed portion was inserted only for the purpose of fixing the venue for the convenience of the parties/arbitrator.

10. The issue which falls for adjudication, on the point of maintainability, is whether the parties intended that the seat of arbitration would be the place where the contract is issued that is the PSER, DJ-9/1, Salt Lake City, Kolkata- 700091 or the Courts in

Kolkata in general. If the respondent is correct, then the High Court would be divested of its jurisdiction to hear the matter and the application must be relegated to the Commercial Court at Rajarhat.

11. The first issue which needs to be clarified in respect of the arbitration agreement is on the generalised term “Kolkata” as used in the arbitration clause both in the amended GCC as well as the Work Order. This is relevant since under the Commercial Courts Act, 2015, there are at least two commercial courts in “Kolkata” and a total four Courts within the territorial jurisdiction of Kolkata. This would be clear from sections 3, 4 and 5 of the 2015 Act which empowers the State Government, in consultation with the concerned High Courts, to constitute such number of Commercial Courts at the District level as may be necessary for the purpose of exercising the powers conferred on those Courts under the Act.

12. Section 3 covers Commercial Courts at the District level, at the level of the District Judge as well as the High Courts having ordinary original civil jurisdiction. Hence, “Kolkata” in the arbitration agreement is found to be used in a vague and generalised manner. This was also noticed by a Coordinate Bench in *Sunil Hi-Tech Engineers Ltd. vs. Bharat Heavy Electricals Limited* in AP No. 966 of 2016 where the Court found such generalised clauses to be flawed for the purpose of designating the Court with jurisdiction. It must however to be mentioned that the comment of vagueness was made on the unamended clause 2.2 before it changed to the present form and made

subject to clause 2.21.1. This Court also took a similar view in *Srei Equipment Finance Limited vs. Seirra Infraventure Private Limited; 2020 SCC OnLine Cal 1790*. This Court is therefore of the view that the arbitration clause must spell out the exclusivity of the identified/designated court for the purpose of conferring jurisdiction.

13. The import of a parenthesis is to clarify the immediate preceding part which falls outside the bracket. In other words, the bracketed portion specifies or explains the part which falls outside the bracket. A similar point arose before a Coordinate Bench in *Golden Edge Engineering Private Limited vs. Bharat Heavy Electricals Limited; AIR 2020 CAL 217* where the Court looked at an identical clause and held that the words contained in the brackets would have to be purposively interpreted to mean that the jurisdiction of the Court in its Original Side will not be attracted as the agreed seat of arbitration lies within the District of North 24 Parganas and not in the original territorial jurisdiction of this Court. The decision in *Golden Edge* was affirmed in appeal by the order of the Division Bench dated 30th June, 2020 : APO 69 of 2020, GA 856 of 2020 with AP 191 of 2020. It is substantially settled that the more specific arbitration clause will prevail over a general forum selection clause.

14. In any event, the amended clause 2.2 of GCC and clause 34.0 of the work order respectively state that the clauses are subject to clauses 2.21.1/2.21.2 of the GCC and clauses 35.1/25.2 of the work order respectively. Clause 43.0 of the NIT provides the order of precedence of

the documents constituting part of the contract between the parties and specifies that amendment/clarification will prevail over technical documents including the NIT, unamended GCC and Special Conditions of Contract.

15. The petitioner has relied on *Dozco India Private Limited v. Doosan Infracore Company Limited*; (2011) 6 SCC 179 to urge the proposition that a bracket should not be allowed to control the main clause. The decision of the Supreme Court should however be explained by the arbitration clause in *Dozco* which is set out below.

“Article 22. Governing Laws – 22.1: This agreement shall be governed by and construed in accordance with the laws of The Republic of Korea.

Article 23. Arbitration – 23.1: All disputes arising in connection with this agreement shall be finally settled by arbitration in Seoul, Korea (or such other place as the parties may agree in writing), pursuant to the rules of agreement then in force of the International Chamber of Commerce.”

16. The parenthesis above would show that the words within the bracket “... (or such other place as the parties may agree in writing)...” cannot be seen as clarificatory as to the part of Seoul, Korea where the arbitration is to take place. The parenthesis simply allowed the parties to select a different venue other than Seoul, Korea. The Supreme Court was of the view in this context that the bracketed part could not be allowed to control the main clause and proceeded to hold that the bracketed portion is only for the purpose of further explanation.

17. In the present case, the bracketed portion in clause 2.21.1.1 of the GCC and clause 35.1.1 of the work order do not detract from the word “Kolkata” by allowing the parties to choose a different seat (as was argued by the petitioner in *Dozco*). The bracketed portion in the present case explains and clarifies as to the specific part of Kolkata which was chosen by the parties as the seat of arbitration. *Dozco* therefore does not apply to the facts of the present case for the above reason.

18. Interpretation of an agreement involves principles of construction of contracts and is a matter of ascertainment of the meaning which the document would convey to a reasonable person having knowledge of the background which would reasonably be available to the parties in the situation in which they were at the time of the contract. The meaning of the documents is what the parties would reasonably have been understood to mean

“The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.; 1997 AC 749.

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The duty of the Court is not to delve deep into the intricacies of human mind to explore the undisclosed intention, but only to take the meaning of words used i.e. to say expressed intentions. If one meaning is more in accord with what the

Court considers to be the underlined purpose and intent of the contract, or part of it, than the other, then the Court will choose the former or rather than the latter.”

Ref: *Bangalore Electricity Supply Company Limited (BESCOM) v. E.S. Solar Power Private Limited; (2021) 6 SCC 718.*

19. In the present case, the arbitration clause in the GCC and in the Work Order specifies that the seat of arbitration shall be Kolkata but clarifies that the seat will be the place from where the contract is issued. The latter part is within brackets. The ordinary and plain meaning of this clause with due weightage given to the intention of the parties while inserting this clause, post-amendment, cannot and would not point to any other construction besides holding that the parties intended to “seat” the arbitration at the place from where the contract is issued. The entire contract documents including the NIT and the correspondence between the parties including the termination letter specifies in a box at the bottom of each of the pages the place of issue of the contract which is

“Power Sector Eastern Region (PSER), DJ-9/1, Salt Lake City, Kolkata – 700091”

This is the place from where the tender has been issued.

20. Therefore, the agreed seat of arbitration lies in that part of the metropolitan area of Kolkata which lies within the District of North 24 Parganas, that falls within the jurisdiction of the Commercial Court at

Rajarhat. The original territorial jurisdiction of the High Court at Calcutta will not be attracted in this case.

21. The argument of the respondent of the non-maintainability of the present application succeeds. The view of the Court is borne out from the above reasons.

22. AP 474 of 2023 is accordingly dismissed as not being maintainable. There shall be no order as to costs.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)