

Zimmer India Pvt Ltd vs Jp Distributor on 24 March, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

\$~1

*

+

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 993/2022

ZIMMER INDIA PVT LTD

Through:

..... Petiti

Mr. R. Jawahar Lal, Mr.

Siddharth Bawa, Mr. Anu

and Mr. Mohit Sharma, A

versus

JP DISTRIBUTOR

Through:

..... Respo

Mr. Satya Prakash Yadav

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

% 24.03.2023

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 [the Act] has been instituted for the constitution of an Arbitral Tribunal in light of the failure on the part of the parties to concur upon its constitution in terms of the arbitration agreement as contained in the Distribution Agreement dated 15 June 2018. Item 10 in that agreement sets out the procedure for constitution of the Arbitral Tribunal in the following terms: -

"Item 10 - Place and Rule of ADR (Clause 22) Arbitration in New Delhi wherein Parties appoint a mutually acceptable sole arbitrator. If Parties fail to mutually agree on a sole arbitrator, then each Party appoints its own arbitrator. The two Party appointed arbitrators shall jointly appoint a third arbitrator within fifteen (15) days to be the president of the arbitral panel. Arbitration to be held in accordance with Arbitration & Conciliation Act 1996 (or any replacement law) and language to be English."

2. The arbitration proceedings themselves were commenced consequent to a notice dated 28 February 2022 having been issued and the same clearly being referable to the provisions made in Section 21 of the Act.

3. In the reply which has been filed in these proceedings, the solitary objection which is taken to the institution of the present proceedings was that the entire cause of action relating to the contract occurred at Agra and thus outside the territorial jurisdiction of this Court. It was in the aforesaid backdrop that learned counsel contended that the present petitioner have been wrongly filed before this High Court.

4. The Court, however, notes that, apart from Item No. 10 which stipulates New Delhi to be the venue of arbitration, there is no other contra indication in the agreement which may tend to establish that the seat of arbitration was contemplated or decided upon by parties to be any other location.

5. The Court, in this connection, bears in mind the following principles as enunciated in BGS SGS SOMA JV v. NHPC, [(2020) 4 SCC 234]:-

"59. Equally incorrect is the finding in Antrix Corpn. Ltd. [Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., 2018 SCC OnLine Del 9338] that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one court exclusively. This is why the section begins with a non obstante clause, and then goes on to state "...where with respect to an arbitration agreement any application under this part has been made in a court..." It is obvious that the application made under this part to a court must be a court which has jurisdiction to decide such application. The subsequent holdings of this court, that where a seat is designated in an agreement, the courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the court where the seat is located, and that court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a court in which a part of the cause of action arises would then be the exclusive court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled.

xxx xxx xxx

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."

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"

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."

6. In view of the aforesaid, the Court finds itself unable to sustain the objection which is taken. The petition is accordingly allowed. The Court hereby appoints Ms. Radhika Bishwajit Dubey [Official

Address: F-18, Third Floor, Geetanjali Enclave, New Delhi-110017] [Mobile No.9810982927] [email: radhika.arora21@gmail.com] as the sole arbitrator for resolution of the disputes which have arisen.

7. The parties are directed to appear before the learned arbitrator, as and when notified. This is subject to the learned arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

8. The fees of the arbitrator shall be decided according to the Fourth Schedule of the Act.

YASHWANT VARMA, J.

MARCH 24, 2023 bh