

Kalpataru Power Transmission Limited vs Santoshi Hyvolt Electricals Pvt Ltd on 18 January, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ ARB.P. 552/2022, I.A. 7161/2022
KALPATARU POWER TRANSMISSION LIMITED

..... Peti
Through: Mr. Vikrant Singh Bloria, Mr.
Sushant Tomar, Mr. Parnav
Saigal, Mr. Sunil Mittal, Ms
Anu Tiwari, Advs.

versus

SANTOSHI HYVOLT ELECTRICALS PVT LTD

..... Respon
Through: Mr. Sidharth Joshi, Mr. Anmo
Mr. Arunpal, Mr. Yogesh
Mittal, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
ORDER

% 18.01.2023

1. These petitions under Section 11 of the Arbitration and Conciliation Act, 1996 ["the Act"] which emanate from separate purchase orders which were placed upon the respondents are with the consent of parties being disposed of by means of the instant common order.

2. The dispute itself emanates from a purchase order which came to be placed by the petitioner upon the respondent for manufacture and supply of copper wires of various descriptions. The purchase order in lead petition being ARB.P. 552/2022 is dated 27 July 2018. According to the disclosures made in that petition, between 2017 and 2019, the petitioner issued various purchase orders in favour of the respondent. Pursuant to the placement of the said orders, goods are also stated to have been supplied by the respondent.

3. Upon disputes arising between the parties, the petitioner invoked arbitration. Clauses 23 and 24 which stand comprised in those purchase orders being of relevance are extracted hereinbelow:-

"23. SETTLEMENT OF DISPUTES/ARBITRATION:

If at any time, any question, disputes or difference whatsoever shall arise between our two companies upon or in relation to or in connection with this Contract, every effort shall be made by both the parties to settle the dispute or difference in a mutually acceptable and amicable manner, failing which only, the same shall be referred to Arbitration. All disputes and differences arising out of in connection with, this order, failing amicable settlement, shall be referred to arbitration under the Indian Arbitration and Conciliation Act 1996 or any statutory modification thereof in force at the time. The venue of such arbitration shall be at Gandhinagar. However, work, as contracted, shall not be suspended during proceedings.

24. Governing Laws and Jurisdiction:

The courts at New Delhi, India shall have exclusive Jurisdiction to determine any question, issue, dispute or claim between the parties including any application to be made under the Arbitration and Conciliation Act, 1996 as amended and re-enacted from time to time."

4. By means of a separate notice dated 19 September 2020, arbitration was invoked. Although the name of a proposed arbitrator was also suggested, the same was not consented to by the respondent. It is, thereafter, that the instant petitions came to be preferred.

5. The prayer for appointment and constitution of an Arbitral Tribunal is refuted by learned counsel appearing for the respondent who contends that as would be evident from clause 23 of the purchase order, the seat of arbitration was clearly designated to be Gandhinagar. In view of the aforesaid, it was his submission that the petitions would not be maintainable before this Court.

6. Additionally, learned counsel for the respondent contended that the General Terms and Conditions of the Contract and which have been placed on the record by the petitioner itself would indicate that in terms of clauses 19 and 20 thereof, the seat of arbitration is described to be Mumbai. Clauses 19 and 20 read as under:-

"19 Disputes Resolution and Arbitration 19.1 Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this Purchase order or the validity or the breach thereof shall be settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996. The arbitration proceedings shall be governed by the rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.

19.2 The arbitration shall be conducted by a sole arbitrator. The Seller will select the sole arbitrator from a panel of three (3) arbitrators provided by the Buyer.

19.3 The seat of arbitration shall be Mumbai, India. Courts in Mumbai shall have exclusive jurisdiction.

19.4 The language to be used in the arbitral proceedings shall be English language.

19.5 Performance under the Contract shall be continued during the arbitration proceedings unless otherwise directed by the Employer in writing or unless the matter is such that the performance cannot be possibly continued until the decision of arbitrator is obtained.

20 Governing Law, Jurisdiction and Language 20.1 This Purchase Order, the construction and enforcement of its terms and the interpretation of the rights and duties of the parties hereto shall be subject to and governed by laws of India without reference to the provisions of conflict of laws. 20.2 All disputes relating to the Purchase Order shall be subject to the Jurisdiction of courts in Mumbai only.

20.3 All literature, correspondence and other documents between the Parties shall be in written and shall be in English."

7. It was then contended that the arbitration agreement which is asserted to be comprised in clauses 23 and 24 cannot be accepted for the purposes of invocation of the jurisdiction of the Court under Section 11 of the Act since the same was not signed by the respondent. The last submission of learned counsel was that the notice of 19 September 2020 is also clearly defective since it was addressed to Mr. Kaushal Mittal and not to the respondent in its corporate capacity. Having considered the submissions which stand addressed, the Court finds itself unable to countenance the same for the following reasons.

8. At the outset it becomes pertinent to note that the purchase order clearly contemplates arbitration being governed by clauses 23 and 24 thereof. The General Terms and Conditions are not shown to be a part of that purchase order. At least the purchase order does not in any specific terms adopt the terms contained in the aforesaid. The said General and Terms and Conditions thus do not appear to constitute an integral part or foundation of the arbitration agreement.

9. Additionally, the Court notes that the General Terms and Conditions of purchase are prefaced by the following recitals:-

"These shall be applicable when Kalpataru Power Transmission Limited (hereinafter referred to as "Buyer") place a Purchase Order /Contract Order on any party in India and/or outside the territory of India (hereinafter referred to as the "Seller"). This Purchase Order shall be governed by the terms and conditions stated hereunder which supersedes all previous negotiations and communications between the Buyer and the Seller (the Parties) and any terms and conditions that are agreed between the Parties. This Purchase Order is the complete and exclusive statement of the terms and conditions of the agreement between Seller and Buyer. No variation, modification or addition to this Purchase Order shall be valid without written consent signed by Buyer's authorized representative."

10. As is evident from a reading of the aforesaid, the Court notes that it had been clearly provided that the purchase order would constitute the complete and exclusive statement of the terms and conditions of the agreement between the seller and the buyer. Even otherwise, if the submission of learned counsel for the respondent were to be accepted, namely, that it would be the General Terms and Conditions which would apply, that would clearly detract from and be contradictory to their principal submission that the seat of arbitration was to be Gandhinagar.

11. While on this issue, it may be additionally noted that the respondent in its reply filed in these proceedings has not disputed the existence of the arbitration agreement. Its principal objection clearly appears to relate to the seat of arbitration. That is an issue which would necessarily have to be dealt with separately.

Turning then to the principal clauses contained in the purchase order and clauses 23 and 24 thereof, the Court is of the considered opinion that Gandhinagar was merely designated to be the venue of arbitration and in any case cannot be construed to be the seat. Clause 24 deals with the subject of "governing laws and jurisdiction". It, in its terms, confers exclusive jurisdiction upon courts at New Delhi. The extent of the aforesaid clause is further evident from the fact that it stipulates that the courts at New Delhi would have "exclusive jurisdiction" to determine any question, issue, dispute or claim between the parties that may arise including those which may extend to the moving of applications under the Act. There thus appears to be a clear intent of parties to constitute Delhi as the seat of arbitration.

13. This Court in two recent decisions in *Inland Waterways Authority of India vs. Reach Dredging Ltd. (RDL)* and *Gayatri Projects (P) Ltd. (JV)* [Neutral Citation Number: 2023/DHC/000324] and *Gujarat JHM Hotels Ltd vs. Rajasthali Resorts and Studios Limited* [Neutral Citation Number: 2023/DHC/000323] had an occasion to deal with the interplay between clauses which designate a venue as well as competing clauses which place venue restrictions in terms thereof. While dealing with the aforesaid, this Court in *Inland Waterways* had held as under: -

"23. As this Court views the two clauses in question, it is apparent that while Noida/Delhi stood designated as the venues where arbitral proceedings could be conducted, the parties had unambiguously resolved to confer exclusive jurisdiction on the Noida courts with respect to the filing of the award and all judicial proceedings. Clause 22 would thus clearly appear to override the provisions of Clause 47.11. It would be pertinent to recall that Clause 22 in unambiguous terms stipulated that Noida courts "only" would be the forum "for filing the award of the arbitration and for any other judicial proceedings". Clause 47.11 on the other hand describes Noida/Delhi to be the "venue of the arbitration proceedings". There thus appears to be a clear and manifest intent to restrict all challenges emanating from the award or for that matter the arbitral proceedings to the courts at Noida only.

24. The Court notes that BGS SOMA in unambiguous terms holds adoption of an exclusive jurisdiction clause. The seat was recognised to be the geographical location to which the arbitration would stand anchored throughout. Their Lordships

described it to be centre of gravity. The Supreme Court had also laid considerable emphasis on the principle of party autonomy and the fact that the fundamental legislative policy underlying the Act had accorded due recognition to that principle. It was thus held that once a seat comes to be designated in the agreement, the courts constituted in that geographical location alone would have jurisdiction to try challenges emanating from the arbitration. In BGS SOMA, their Lordships also had the occasion to consider the question of when a seat could be considered to be merely a venue of the arbitration. While explaining the distinction between the two, it was aptly observed that where an arbitration agreement specifies a venue of arbitration proceedings, it would have to be presumed that the venue is essentially the seat of the arbitration.

25. In BGS SOMA it was further observed that in the absence of any other "significant contrary indicia" which may indicate that the venue had been specified merely to be that, it would have to be understood as the designation of a seat. It becomes relevant to bear in mind that the venue or place of arbitration forms the subject matter of Section 20 of the Act. That provision while dealing with the place of arbitration alludes to activities such as consultation amongst members of the arbitral tribunal, the hearing of witnesses, experts or parties or for inspection of documents that may be conducted at a venue. The venue of arbitration is thus to be merely recognised as a convenient location or place which may be decided upon by parties for the purposes of conduct of arbitral proceedings. Contrary to the above, a seat of arbitration is to be identified from a juridical perspective and thus constituting the situs of the arbitration itself.

26. Viewed in light of the aforesaid principles, this Court comes to the conclusion that Clause 47.11 while speaking of Noida/Delhi intended to merely identify those locations as being the venue of arbitration. In any case the venue restriction clause, and which Clause 22 evidently and indubitably is, would clearly be liable to be accorded primacy and be accepted as being determinative of the seat of arbitration.

31. On an overall conspectus of the principles laid down in the aforementioned decisions, the Court comes to the conclusion that Clause 22 is liable to be read as prescribing the seat of arbitration. Clause 47.11 simply seeks to designate the venue thereof. It merely embodies the intent of parties to conduct arbitral proceedings either at Noida or New Delhi. In any case the language of Clause 22 clearly establishes that all proceedings arising out of or relating to arbitral proceedings were to be anchored to courts at Noida only. The question of seat would thus stand conclusively settled on the basis of the aforesaid provision."

14. In view of the aforesaid principles as enunciated in the decisions aforementioned, the Court finds itself unable to sustain the objection that is raised in this respect.

15. Insofar as the submission of learned counsel for the respondent be that there did not exist any arbitration agreement between parties, suffice it to note that the purchase order was duly accepted and acted upon. In fact and undisputedly, the respondent admits that it supplied goods in terms thereof. It would thus be impermissible for the respondent to now contend that there did not exist an arbitration agreement between parties. The Court deems it apposite to notice the following principles which were enunciated by the Supreme Court in *Govind Rubber Ltd. v. Louids Dreyfus Commodities Asia (P) Ltd.*¹.

"12. There may not be any dispute with regard to the settled proposition of law that an agreement even if not signed by the parties can be spelt out from correspondence exchanged between the parties. However, it is the duty of the court to construe correspondence with a view to arrive at the conclusion whether there was any meeting of mind between the parties which could create a binding contract between them. It is necessary for the court to find out from the correspondence as to whether the parties were *ad idem* to the terms of contract.

13. It is equally well settled that while construing an arbitration agreement or arbitration clause, the courts have to adopt a pragmatic and not a technical approach. In *Rukmanibai Gupta v. Collector* [(1980) 4 SCC 556], this Court held that: (SCC p. 560, para 6) "6. Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement."

15. A perusal of the aforesaid provisions would show that in order to constitute an arbitration agreement, it need not be signed by all the parties. Section 7(3) of the Act provides that the arbitration agreement shall be in writing, which is a mandatory requirement. Section 7(4) states that the arbitration agreement shall be in writing, if it is a document signed by all the parties. But a perusal Digitally Signed (2015) 13 SCC 477 By:NEHA Signing Date:21.01.2023 14:25:07 of clauses (b) and (c) of Section 7(4) would show that a written document which may not be signed by the parties even then it can be arbitration agreement. Section 7(4)(b) provides that an arbitration agreement can be culled out from an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement.

16. On reading the provisions it can safely be concluded that an arbitration agreement even though in writing need not be signed by the parties if the record of agreement is provided by exchange of letters, telex, telegrams or other means of telecommunication. Section 7(4)(c) provides that there can be an arbitration agreement in the exchange of statements of claims and defence in which the existence of the agreement is alleged by one party and not denied by the other. If it can be *prima facie* shown that the parties are at *ad idem*, then the mere fact of one party not signing the agreement cannot absolve him from the liability under the agreement. In the present day of e-commerce, in cases of internet purchases, tele purchases, ticket booking on internet and in standard forms of contract, terms and conditions are agreed upon. In such agreements, if the

identity of the parties is established, and there is a record of agreement it becomes an arbitration agreement if there is an arbitration clause showing ad idem between the parties. Therefore, signature is not a formal requirement under Section 7(4)(b) or 7(4)(c) or under Section 7(5) of the Act.

17. We are also of the opinion that a commercial document having an arbitration clause has to be interpreted in such a manner as to give effect to the agreement rather than invalidate it. On the principle of construction of a commercial agreement, Scrutton on Charter Parties (17th Edn., Sweet & Maxwell, London, 1964) explained that a commercial agreement has to be construed, according to the sense and meaning as collected in the first place from the terms used and understood in the plain, ordinary and popular sense (see Article 6 at p. 16). The learned author also said that the agreement has to be interpreted "in order to effectuate the immediate intention of the parties". Similarly, Russell on Arbitration (21st Edn.) opined, relying on *Astro Vencedor Compania Naviera S.A. v. Mabanft GmbH* [(1970) 2 Lloyd's Rep 267], that the court should, if the circumstances allow, lean in favour of giving effect to the arbitration clause to which the parties have agreed. The learned author has also referred to another judgment in *Paul Smith Ltd. v. H and S International Holdings Inc.* [(1991) 2 Lloyd's Rep 127] in order to emphasise that in construing an arbitration agreement the court should seek to "give effect to the intentions of the parties". (See p. 28 of the book.)"

16. As was noticed hereinbefore, the respondent duly accepted and acted upon the Purchase Order. The correspondence exchanged between the parties clearly establishes that the disputes arose out of those Purchase Orders. In its reply filed in these proceedings, the existence of the arbitration agreement was not questioned. The principal objection that was raised was with respect to whether Gandhinagar would constitute the venue or the seat of arbitration. For all the aforesaid reasons, the objection taken in this respect is consequently negated.

17. The submission of learned counsel that the notice referable to Section 21 was defective is also misconceived since it is manifest that while one of the Directors may have been named specifically, the notice was in fact addressed to the respondent here. The objection taken in this respect is thus clearly specious. For all of the aforesaid reasons, the objections taken stand negated.

18. Accordingly, the instant petitions along with pending applications are allowed. The Court hereby appoints Mr. Satyakam, [Official Address: D-300, Second Floor, Sarvodaya Enclave, New Delhi-110017] [Mobile No. 9868219633] [email:

satyakamassociate@gmail.com] as the sole arbitrator for resolution of the disputes which have arisen.

19. 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.

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

YASHWANT VARMA, J.

JANUARY 18, 2023 neha