

THE HIGH COURT OF JUDICATURE AT MADRAS

Date 14.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

O.P.No.144 of 2021

M/s.Tata Capital Financial Services Limited,
Centennial Square, 1st floor,
6A, Dr.Ambedkar Salai, Kodabakkam,
Chennai – 600 024.
Represented by its Authorized Signatory
Mr.Ramalingam P.

... Petitioner

Versus

1, M/s.Focus Imaging & Research Centre Pvt. Ltd.,
Prashant Sarin [Director],
C-10 to C-14 GF Green Park Extn,
Near Gurdwara, Delhi – 110 016.

2. Mr.Prashant Sarin

3. Mr.Vinod Kumar Sharma

... Respondents

PRAYER : Petition filed under Section 11 [6] of Arbitration and Conciliation Act, 1996 to appoint a Sole Arbitrator as provided under Clause 19 of the Loan Agreement dated 12.04.2018 to adjudicate upon the differences and disputes between the parties under the said agreement dated 12.04.2018.

For petitioner : Mr.M.Arunachalam

For respondents : Mr.K.R.Arun Sabari

ORDER

This petition has been filed for appointment of a sole arbitrator pursuant to the dispute arose between the parties in respect of the loan agreement dated 12.04.2018.

2. The main contention of the respondent is that though the parties have agreed in the loan agreement for reference to the arbitrator, this Court has no jurisdiction to appoint an arbitrator as the entire cause of action arose in New Delhi and even in the agreement no permanent seat is fixed by the parties. What was agreed in the agreement is that the arbitration has to be held as per the Arbitration and Conciliation Act, that means facilitating the parties of both sides for their appearance and the present their case, in other words, convenience of the parties are relevant. Hence, opposed the application.

3. It is relevant to extract the clause 19 of the agreement governing the parties :

19. Dispute resolution, Governing law and jurisdiction :

19.1 If any dispute, difference or claim arises between the obligors and the lender in connection with the facility or the security or as to the interpretation, validity, implementation or affect of the facility documents or as to the rights and liabilities of the parties under the Facility Documents or alleged breach of the facility documents or anything done or omitted to be done pursuant to the facility documents, the same shall be settled by arbitration to be held in Mumbai/Delhi/Kolkatta/Chennai as may be decided by the Lender in accordance with the Arbitration and Conciliation Act, 1996, or any statutory amendments thereto and shall be referred to a sole arbitrator to be appointed by the Lender. The award of the arbitrator shall be final and binding on all parties concerned.

19.2 The facility documents shall be governed by the laws of India

19.3 The borrower agrees that subject to the provisions of Clause 19.1 above, the Courts of Mumbai, or the Courts at the venue of arbitration decided by the Lender in accordance with clause 19.1 above alone shall have the exclusive jurisdiction to entertain and try all matters arising from and out of the facility documents.

Though clause 19.3 indicate that the borrower agrees to have jurisdiction decided by the lender, 19.3 is subject to clause 19.1. In 19.1, there is no fixed seat for arbitration agreed by the parties. What was agreed is that the proceedings shall be held at Mumbai / Delhi/Chennai/Calcutta as per the agreement. Or the matter to be decided in accordance with the Arbitration and Conciliation Act.

4. When a specific seat is not agreed upon by the parties, seat of arbitration has to be fixed only in terms of the provisions of the Arbitration and Conciliation Act. Section 18 of the Arbitration and Conciliation Act deals with equal treatment of the parties and the parties should be treated with equality and each party to be given an opportunity to present their case.

5. Taking note of such provisions, neutral convenience of seat can be fixed by the parties. When the seat or venue is not fixed and fixing the venue or seat at the place where no cause of action arose and driving the parties to face inconvenience to go to an unknown place to present their case, in fact, will defeat the very object of the Arbitration and Conciliation Act. Though the learned counsel for the respondent brought to the notice of this Court a judgment of the Apex court in Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited and others in Civil Appeal Nos.5370-5371 of 2017, dated 19.04.2017, in para 12 of the judgment it is held as follows :

“20. 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 Section 16 to 21 of the CPC 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.”

a perusal of the above judgment, it makes it very clear that in the above case, the parties have agreed for exclusive jurisdiction at Mumbai Courts. When the parties have agreed to have neutral place of their convenience, the Courts at Mumbai have jurisdiction. The above case cannot be pressed into service in the present case. Neutral place of convenience should be fixed in terms of the provisions of the Arbitration and Conciliation Act. Section 20 of the Arbitration and Conciliation Act reads as follows :

20. Place of arbitration.—

(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

6. Admittedly, it is not disputed in this case that the loan agreement has been entered between the parties in Delhi and the entire cause of action has taken place at Delhi and the applicant is having branch Office at Delhi. Therefore, it will be convenient to all the parties to have proceedings at Delhi. When venue or the seat has not been agreed by the parties, the plea of forum conveniens cannot be ignored altogether.

7. In this regard, it is relevant to refer the judgment of this Court in Jothi Ramalingam C Vs. Axis Bank and another in O.P.No.541 of 2018, dated 01.08.2019, it has been held that

“9. Section 20 (2) of the Act deals with the place of arbitration shall be determined by the arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties. The very object of the entire arbitral proceedings is to give full opportunity and also take into consideration of the convenience of the parties. Admittedly, in this case, the entire cause of action arose at Chennai and the parties are at Chennai and also the default committed at Chennai, therefore, claiming a person, the place which is unknown to him and his right in fact taken away from giving full opportunity to present his case. Therefore, I am of the view that merely on Clause 14 of the Act, which is not specified in a particular place and refer to so many places it should be construed that the venue shall be in accordance with the cause of action. In this regard, in the case of **C.R.P.(PD)(MD)No.2034 of 2008 dated 23.07.2009 [THE METAL POWDER COMPANY LIMITED vs. THE GENERAL MANAGER]**, the learned single Judge of this Court, has held as follows;

“10. A reading of Section 20 of the Arbitration and Conciliation Act, 1996, would show that the convenience of both parties will have to be seen. The said convenience of both parties will have to be determined by the arbitral Tribunal in accordance with the clause 20 sub-section (2) of the Act. Sub-section (3) of the said Act provides that “notwithstanding sub-section (1) and sub-section (2), the

arbitral Tribunal may meet at any place as it considers appropriate for consultation among its members for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

10. Similarly, the Hon'ble Division Bench of this Court in **CENTRAL WAREHOUSING CORPORATION vs. A.S.A.TRANSPORT** reported in **2008-1-LW640** has held as follows;

"16. In respect of the other point - venue of the arbitration proceedings, it is not as if the appellant Corporation is having office or officers only at Delhi. When the dispute has arisen at Chennai, there is no valid or acceptable reason for appointment of an arbitrator at Delhi directing the contractor, the respondent herein to appear before him at Delhi or bear the travelling and boarding expenses of the arbitrator, who is stationed at Delhi. It is not only against Section 20(1) of the Act, but against the very purpose of the enactment. The cause of action arose at Chennai. The parties as well as the witness are at Chennai. The appellant is also having office and officers to adjudicate the dispute at Chennai. The appellant would have very well appointed an arbitrator who is stationed at Chennai. That would have given a real opportunity as intended in law to the respondent to have his dispute adjudicated. In this case, the award passed is one against the last limb of Section

34(2)(a)(iii) of the Act. Hence, the award is liable to be set aside on that ground also."

11. The Hon'ble Supreme Court in **SANSHIN CHEMICALS INDUSTRY vs. ORIENTAL CARBONS & CHEMICALS** reported in (2001) 3 SCC 341 has observed as follows;

"8. Besides, bearing in mind the object behind the Arbitration and Conciliation Act, 1996, as has been indicated by this Court in the case of *Konkan Rly. Corpn. Ltd. v. Mehul Construction Co.* (2000) 7 SCC 201 which is in consonance with the UNCITRAL Model Law, it would not be conducive to interpret the decision of the Joint Arbitration Committee with regard to the venue to be an interim award, conferring a right of challenge to an aggrieved person under Section 34 of the Act.

9. Mr.Desai's contention that the question of venue is of utmost importance, since the arbitral proceeding will be conducted in accordance with the rules applicable to the place where the arbitration proceeding is conducted and consequently, denial of a right to appeal against the same is never contemplated of, requires consideration. It is undoubtedly true that if the arbitration is to be held in India, then the proceeding will be conducted in accordance with the rules applicable in India and if the arbitration is to be held in Japan, it has to be conducted in accordance with

the rules of the Japan Commercial Arbitration Association and as such the decision on the question of venue is of utmost importance. But the further contention that an aggrieved party has no right to assail the same, once the said decision is not assailed at this stage, does not appear to be correct. The ultimate arbitral award could be assailed on the grounds indicated in sub-section (2) of Section 34 and an erroneous decision on the question of venue, which ultimately affected the procedure that has been followed in the arbitral proceeding, could come within the sweep of Section 34(2) and as such it cannot be said that an aggrieved party has no remedy at all."

In light of the above judgments, the forum convenience of the parties play a vital role in deciding the jurisdiction.

8. Having regard to the all the above facts, as the loan agreement has been entered in Delhi, the entire cause of action arose at Delhi and no cause of action arose at Chennai and the petitioner is having branch office at Delhi, in fact it will be convenient to all the parties to have the proceedings at Delhi. When the venue or the seat has not been agreed by the parties, the plea of forum conveniens cannot be ignored altogether. In this regard, the judgment in Jothi Ramalingam C Vs.

Axis Bank and another, it has been held that forum convenience of the parties play a vital role in deciding jurisdiction. When the Arbitration and Conciliation Act itself deals with equal opportunity to both sides, this Court is of the view that this Court has no jurisdiction to an appoint arbitrator in this case. As already indicated, Section 20 of the Arbitration and Conciliation Act, deals with place of arbitrator and the same can be determined by the arbitral tribunal based on the circumstances of the case and including convenience of the parties, which cannot be ignored altogether. In such view of the matter, this Original petition filed before this Court is not maintainable and the parties at liberty to move before Delhi High Court.

9. Accordingly, this Original Petition is dismissed.

14.07.2021

Index : Yes / No

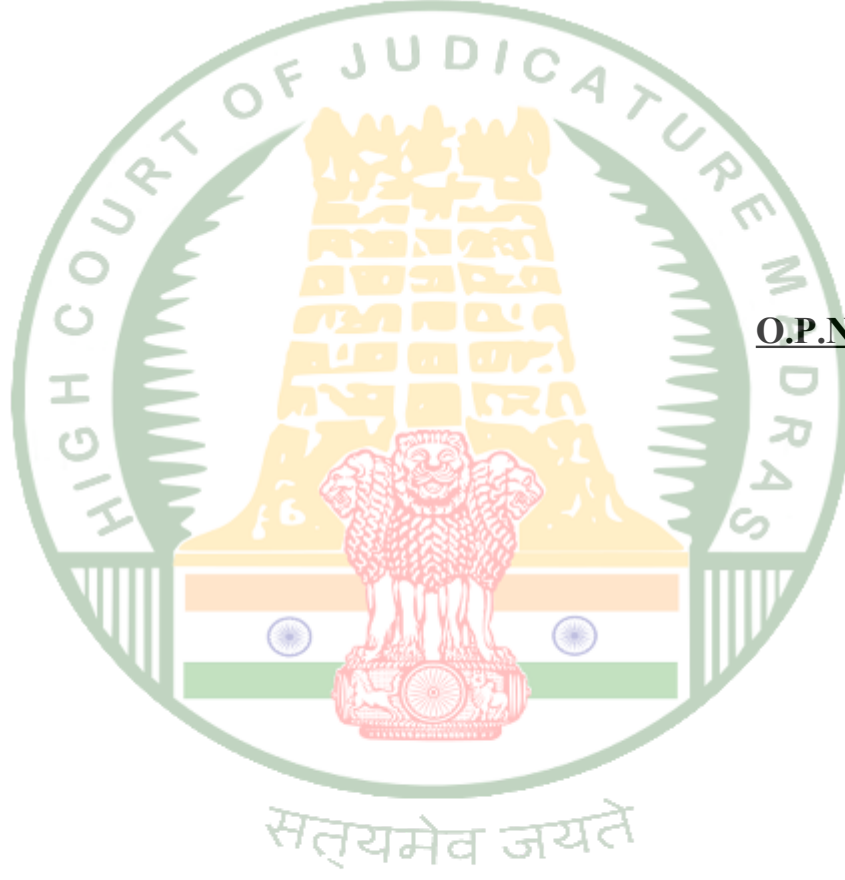
Internet: Yes

Speaking/non speaking order

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N. SATHISH KUMAR, J.
VTC



order in:

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