Serial No.02
Supp. List

HIGH COURT OF MEGHALAYA
AT SHILLONG

CRP. No. 24 of 2022

Date of Order :24.11.2023

North Eastern Electric Power Corporation Ltd. Vs. M/s. Delta Mechcons (India) Ltd.

Coram:

Hon'ble Mr. Justice H.S.Thangkhiew, Chief Justice (Acting)

Appearance:

For the Petitioner/Appellant(s) : Mr. S.Jindal, Adv.
Ms. B.Jyrwa, Adv.
Mr. S.Rana, Adv.

For the Respondent(s) : Mr. K.Paul, Sr. Adv. with
Ms. K.Khanna, Adv.
Mr. S.Panthi, Adv.
Ms. B.Kharsahnoh, Adv.

i) Whether approved for reporting in Law journals etc: Yes/No

ii) Whether approved for publication in press: Yes/No

JUDGMENT AND ORDER

1. The present petition has been filed under Article 227 of the Constitution of India assailing the order dated 13-07-2022, passed by the learned Commercial Court, Shillong in Commercial (Arb.) Case No. 6 of

2019, whereby the learned Court below, held that it had no jurisdiction to adjudicate a petition that had been filed by the petitioner under Section 34 of the Arbitration & Conciliation Act, 1996, to challenge an Arbitral Award dated 27-04-2019. The learned Court below went on to conclude that it was the Hon'ble High Court of Delhi, which had the exclusive jurisdiction to adjudicate the said Section 34 petition filed by the petitioner.

2. The facts necessary are that the parties entered into a contract, which was executed at Shillong on 17-07-1995, for certain works to be undertaken at Dibrugarh, Assam. Thereafter, as disputes arose between the parties, arbitration was invoked which was conducted in New Delhi, and an award was then passed by the Arbitral Tribunal on 27-04-2019. Against the award, the petitioner had filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the A&C Act) before the Commercial Court, Shillong on 25-07-2019, and the same was registered as Commercial (Arb.) Case No. 6 of 2019. Similarly, the respondents herein also filed a Section 34 application before the High Court of Delhi, being OMP (COMM) 351 of 2019 on 23-08-2019. Against the Section 34 application filed by the petitioner, the respondents filed an objection/preliminary written statement raising the issue of jurisdiction of the Commercial Court at Shillong. The learned Commercial Court then by

its judgment dated 13-07-2022, concluded that the High Court of Delhi, had exclusive jurisdiction and that the Courts in Shillong had no jurisdiction to entertain the matter. The petitioner being aggrieved on the ground that the contract agreement did not specify any such seat of arbitration, or that the Arbitral Tribunal had determined any seat, is therefore before this Court by way of this instant revision application.

3. At the outset, it has been contended that the instant revision has been preferred under Article 227 of the Constitution, as the impugned order which has held that the Commercial Court in Shillong does not have the jurisdiction to entertain the Section 34 application filed by the petitioner, is not an appealable order under Order 43 CPC, nor covered by Section 37 of the A&C Act. It is further submitted that the proviso to Section 13 (1A) of the Commercial Courts Act, 2015 provides that an appeal shall lie to the Commercial Appellate Division of a High Court, only against orders listed in Order 43 CPC and Section 37 of the A&C Act. The impugned order, it is submitted, not being covered under appealable orders as aforementioned, only the present revision petition shall lie, and that this Court had territorial jurisdiction, inasmuch as, the challenge in the present petition is not against the contents of the said award, but only against the impugned order. It has also been contended that the execution of the contract agreement was also done in Shillong, and as such, it means that

the Courts in Shillong, including the Commercial Court and High Court, will have territorial jurisdiction to adjudicate the present matter.

4. The most crucial issue in the instant case, is as to whether the Arbitral Tribunal had determined the seat of arbitration, which is seriously disputed by the petitioner, while the respondents seek to maintain that the Arbitral Tribunal had infact, determined the seat and place of arbitration. The parties have been at pains to support their respective stands, by referring to the orders of the Arbitral Tribunal in seeking to interpret the same as to their exact purport and import, which will be examined by this Court while deciding the matter.

5. Mr. S.Jindal, learned counsel for the petitioner has referred to the Contract wherein at Clause 58.2, it has been stipulated that the Courts at Shillong "*will have jurisdiction to entertain civil suits pertaining to the contract*". He submits that Clause 58.2 grants exclusive jurisdiction to the courts at Shillong even though the words 'exclusive' or 'sole' have not been used, and has relied on the judgment rendered in ***Swastik Gases Pvt. Ltd. vs. IOCL, (2013) 9 SCC 32***, where the Supreme Court has held therein that, by making a provision that the agreement is subject to the jurisdiction of the Courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Learned counsel has also pointed out that Clause 58.2, cannot be read divorced from Clause 71, which is the

arbitration clause in the contract agreement. By reading the two clauses together, he submits, it will show that the only civil suit that would be possible, will be the proceedings arising out of the A&C Act, and that by the operation of Section 8, even if a civil suit should be filed by either of the parties, they would be relegated to arbitration, which would in turn ultimately be before the Civil Court in Section 34 proceedings of the A&C Act. It has been contended that the contract agreement in question being executed in 1995, is in the old format based on the old Arbitration Act of 1940, which clearly would mean that civil suits in Clause 58.2 referred to proceedings under the Arbitration Act, wherein an award had to be confirmed as a decree of a civil court, which confirmation would obviously be by way of a civil suit.

6. The learned counsel while elaborating on the same point, has highlighted that Clause 58.2, provides that the Courts in Shillong will have jurisdiction to entertain civil suits pertaining to the contract, and submits that the usage of the words 'pertaining to', reflects that the parties have contemplated that all disputes arising out of, or connected to the contract will be adjudicated by the Courts in Shillong. An examination of the dispute between the parties and the nature of the claim raised before the Arbitral Tribunal it is submitted, will reflect that each and every claim is connected to the underlying contract between the parties, and since the

present dispute between the parties is connected to, and arising from the contract, the same will be governed by Clause 58.2. Learned counsel in support of these arguments has placed reliance on the following judgments:

(i) ***M/s. Doypack Systems Pvt. Ltd. vs. Union of India (1988) 2SCC 299.***

(ii) ***The State Wakf Board, Madras vs. Abdul Azeez Sahib & Ors. AIR 1968 Mad 79.***

7. The learned counsel submits that no seat or venue of arbitration was ever agreed or decided by the Arbitral Tribunal, or by the parties and that the conduct of the proceedings in New Delhi, was purely on account of convenience since the arbitrators were from Delhi. It is also submitted that there is no specific order of the Arbitral Tribunal clearly and unambiguously fixing New Delhi as the 'venue' of the arbitration, and that even if it is assumed that the 'venue' had been decided by the Arbitral Tribunal, it would have no relevance, since it is the 'seat' which has to be chosen or determined to confer jurisdiction. The implications sought to be drawn by the respondents he contends, to the fact that, as the Arbitral Tribunal had held all its sittings in Delhi and that the award was passed in Delhi, the seat of arbitration had been determined is incorrect, inasmuch as, determination requires more than an inference by implication. The

learned counsel has referred to the definition of determination as defined in a Law Lexicon which he submits that determination is given as signifying an effective expression of opinion which ends a controversy or a dispute by some authority, and has placed the judgment of the ***Union of India vs. Hardy Exploration and Production (India) Inc. (2019) 13 SCC 472***, wherein the Supreme Court has held that the word 'determination' requires a positive act to be done.

8. Learned counsel submits that the learned Commercial Court while holding that the seat/place of arbitration had been determined through implication by the Arbitral Tribunal, as also the respondents, had referred to Section 31(4) of the A&C Act to support the point that the seat had been determined by the Arbitral Tribunal through implication. Learned counsel submits that the said provision contemplates a certain chronology of which the first component is that the place of arbitration has to be stated in the award as determined in accordance with Section 20, and that under Section 20(2) of the A&C Act, it is the Arbitral Tribunal which has to determine the seat, should the parties not have decided the same under Section 20(1), which however, is not present as there has been no such determination of seat by the Arbitral Tribunal in the present case. It is further submitted that once the seat has been determined, the other component under Section 31(4) is that the award can be deemed to have been made at that place. It is

contended that the learned Commercial Court by only looking at the award, and noticing that the same had been passed in New Delhi, and deemed that the seat of arbitration had been determined by the Arbitral Tribunal to be in New Delhi, and as such, has misread Section 31(4), by reversing the chronology in holding that, first since there is a place mentioned in the award, it can be deemed that the Arbitral Tribunal had determined the seat. The entire basis of the impugned order therefore he submits, being erroneous, the same is liable to be interfered with by this Court. In this event, it is further submitted, the only guiding factor for locating the seat of arbitration will be Clause 58.2 of the contract agreement which grants exclusive jurisdiction to the Courts in Shillong.

9. The learned counsel has next referred to the Shashoua Principle that states that, in the absence of designation of a seat of arbitration, the venue of the arbitration itself can be considered to be a seat of arbitration, in the absence of any other significant contrary indica. Learned counsel submits that this aspect is relevant for the reason that as there is no designation of the seat, the question therefore would be whether the Shashoua Principle can be applied to hold that the venue, that is Delhi, would also be the seat of arbitration. In this context, learned counsel has referred to para 61 of the BGS SGS Soma judgment, which he submits, it has been laid down that, where there is an express designation of a venue, and no designation of any

alternative place as the seat, and no other significant contrary indica, the conclusion is that the stated venue is actually the seat of the arbitral proceeding. In the present case, he submits, there is no expressed designation of venue and as such, the Shashoua Principle can be applied to hold that Delhi is also the seat of arbitration. He also contends that even if it is to be assumed that the venue has been designated through the action of the parties in holding attending the sittings of the Arbitral Tribunal in Delhi, even then, the Shashoua Principle will not be applicable due to the presence of another significant contrary indica, which is Clause 58.2, whereby the exclusive jurisdiction has been granted to the Courts in Shillong. Learned counsel has also referred to the judgment of the Allahabad High Court in the case of ***Hasmukh Prajapati vs. Jai Prakash Associates, AIR 2022 All 121***, which he submits, the facts of which are almost similar to the present case. Reference has also been made to a case of the Calcutta High Court in the case of ***Homevista Décor & Furnishing Pvt. Ltd. & Anr. vs. Connect Residuary Pvt. Ltd. 2023 SCC Online Cal 1405***, which he submits, a comprehensive analysis of all available judgments on the issue of seat versus venue, including from the Supreme Court and various High Courts have been discussed. Reference has also been made to the following judgments:

(i) ***Torrent Power Ltd. vs. Dakshinanchal Vidyut Vitaran Nigam Ltd., 2022 SCC Online All 883.***

(ii) ***Meenakshi Nehra Bhat vs. Wave Megacity Centre Pvt. Ltd., 2022 SCC Online Del 3744.***

10. Learned counsel then concludes his arguments by submitting that, in no reading of the matter, can venue be considered as granting exclusive jurisdiction, and that the learned Commercial Court itself, by holding the venue of arbitration as the determinative factor in locating jurisdiction, has rendered a majority of the Section 34 applications pending before it, as being bereft of jurisdiction, for the reason that in most of these pending cases, the venue of arbitration is invariably outside Shillong. As such, it is submitted that the impugned order being unsustainable and is liable to be set aside.

11. Mr. K. Paul, learned Senior counsel assisted by Ms. K. Khanna, learned counsel for the respondents apart from raising objections with respect of the maintainability of the instant Revision Application under Article 227 of the Constitution of India, has submitted that the impugned order of the learned Commercial Court, Shillong is a legally tenable and a well-reasoned order passed after due consideration of merits. The learned Senior counsel submits that, though no place, venue or seat has been defined under the arbitration clause in the contract, the petitioner has

conceded to the fact that, all the proceedings of the Arbitral Tribunal were conducted in Delhi, coupled with the fact that the Award was passed and stamped at New Delhi itself. Section 31(4) of the A&C Act, he submits requires that an arbitral award shall state its State and place of arbitration, as determined in accordance with Section 20, and that the award shall be deemed to have been made at that place. He therefore submits that the fact that, the petitioner submitted to jurisdiction of the New Delhi Courts for about 14(fourteen) years and the fact that, the proceedings were conducted within the territorial jurisdiction of the Delhi High Court, since the seat of arbitration was not provided in the contract, the Delhi High Court would naturally have jurisdiction in the proceedings under Section 34 of the A&C Act.

12. The learned Senior counsel has referred to an order dated 02.11.2006, passed by the Arbitral Tribunal, wherein on an oral submission by the petitioner for fixing the next date of hearing at Shillong, the Arbitral Tribunal had observed that such change of venue can only be considered upon the presentation of a proper application, which was never done by the petitioner. This he submits, establishes the fact that Delhi was the venue for the arbitration and as the petitioner never made any such application for change of venue, the proceedings were held throughout for 14(fourteen) years at Delhi. He further submits that subsequent orders

passed by the Tribunal, also reflect this position as it is recorded that on each occasion it is mentioned 'same venue', which means Delhi, and the fact that the petitioner had submitted to the jurisdiction of Delhi Courts. It is contended that the award dated 25.04.2019, being signed at Delhi, stamped at Delhi and published on 27.04.2021, at Delhi, the requirements of law as per Section 31(4) and Section 20 of the A&C Act, have been met.

13. In support of the above noted arguments, the learned Senior counsel on the point that the venue of arbitration would mean the seat of arbitration, unless the seat is mentioned specifically, has placed reliance on the following judgments.

(i) ***BGS SGS SOMA JV vs. NHPC Limited*** reported in ***2020 (4) SCC 234.***

(ii) ***Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.***

(iii) ***Hinduja Leyland Finance Ltd. vs. Debdas Routh & Anr., 2017 SCC OnLine Cal 16379.***

(iv) ***Antrix Corporation Ltd. vs. Devas Multimedia Pvt. Ltd., passed in FAO(OS)(COMM.) 67/2017, dated 30.05.2018.***

Learned Senior counsel has also submitted that, the parties by agreeing that the venue of the arbitral proceedings have agreed that the juridical seat of arbitration is in New Delhi, and therefore, the High Court

at Delhi will have exclusive jurisdiction to decide the instant case. Reference has also been made to the application of the Shashoua Principle, as it has been applied in the case of ***Brahmani River Pellets Ltd. vs. Kamachi Industries Ltd. (2020) 5 SCC 462.***

14. It has been contended by the learned Senior counsel that Clause – 58.2, only expressly provides that Courts at Shillong, would have exclusive jurisdiction to try any civil suit in connection with disputes arising out of the agreement and therefore, there is a clear distinction between the 'subject matter of arbitration' and 'subject matter of a suit'. An examination of Clause 58.2, with regard to jurisdiction in a civil suit as opposed to the arbitration clause at Clause 71, he submits has clearly defined the scope of disputes which are arbitrable and to be referred to an Arbitral Tribunal. Clause 58.2, is contended is not all encompassing and applicable to the entire agreement, as it has been suggested by the petitioner, but rather it would be applicable specifically only to the disputes not covered under Clause 71, and as such, only determines the jurisdiction of Courts while preferring a civil suit and cannot be construed to be seat of arbitration.

15. The learned Senior counsel in concluding his submissions has reiterated that, the Supreme Court as held in ***BGS SGS SOMA JV(supra)***, has made it clear that once the parties designate the seat of arbitration, only

the Courts governing the seat have exclusive jurisdiction to govern such arbitration proceedings, and jurisdiction of all other courts stands ousted, and as such, the Courts of Shillong, in the light of this legal position would not possess any jurisdiction to entertain the petition under Section 34. He therefore submits, the instant Revision Application is not tenable in law and in facts, and the same is liable to be dismissed.

16. Having heard the learned counsel for the parties and on examination of the materials as presented before this Court, it is seen that the only question that is to be determined, is whether on account of the arbitration proceedings being conducted in Delhi, the same is to be considered to be the seat which will therefore decide the jurisdictional issue that has been raised. The learned Commercial Court it is noted, has concluded that the fact that the sittings were conducted and the award passed in Delhi itself, has determined that Delhi be the seat of arbitration and had gone on to rely upon the judgment of the ***BGS SGS Soma JV (supra)*** case to hold that the High Court in Delhi possessed exclusive jurisdiction.

17. Section 20 of the A&C Act, 1996 does not define the terms, 'seat' or 'venue' but only refers to the place of arbitration. Venue more often would mean a convenient location for conduct of the arbitral proceedings whereas the term 'seat' carries much more weight. The use of 'seat' and 'venue' interchangeably has led to much confusion in these matters. In the instant

case, the arbitral proceedings were conducted in Delhi, and the award also was stamped and dated in Delhi. This appears to be the yardstick adopted by the Commercial Court to hold that the 'seat' had been determined by implication, even though there has been no such determination of 'seat' by the Arbitral Tribunal. It is to be noted that the determination of a venue has to be specific and as per Section 20(2) of the A&C Act, 1996 it is the Arbitral Tribunal which is to determine the 'seat' should the parties have not decided on the same. In the instant case, there has been no specific determination, apart from the fact that the Arbitral Tribunal had indicated that the proceedings, as reflected in the order dated 02-11-2006, that the matter would be taken up at the same venue on 23-01-2007. Though it was consistently thereafter indicated that the venue for the next sitting of the Arbitral Tribunal would be in Delhi, there is no order that conclusively designated Delhi as the venue for all time to come. As submitted by learned counsel for the petitioner, which this Court is inclined to accept, the very fact that the Law Officer of the petitioner, had made a prayer for the venue of the next sitting to be at Shillong, would indicate that there was no prior expressed or implied agreement between the parties that the venue would permanently be in New Delhi. It therefore, can be conclusively inferred that there has been no specific determination of venue.

18. The Supreme Court in the case of ***BGS SGS Soma JV (supra)*** had held that whenever there was a designation of a place of arbitration as being the venue of arbitration proceedings, the same would mean that the venue is really the 'seat' of the arbitral proceedings as the expression arbitration proceedings would not just mean an individual or a particular hearing, but would mean that all the proceedings including the making of an award at that place. In the instant case, there has been no express designation of a 'venue' nor any determination of the 'seat' of arbitration under Section 20(2) of the A&C Act by the Arbitral Tribunal, to enable a logical conclusion as to whether Delhi is the juridical seat of the arbitration proceedings. Coupled with this fact, is the presence of Clause 58.2 of the Contract Agreement which has provided that the Courts at Shillong will have jurisdiction to entertain civil suits pertaining to the contract. Though in the same contract, Clause 71 provides for arbitration, in the considered view of this Court both these Clauses cannot be read in isolation, but are to be construed in a harmonious manner as to give an effective meaning to the contract agreement. Another factor which cannot escape consideration in the matter is that the purport of Clause 58.2 has to be seen in the light of its application in the old format based on the old Arbitration Act of 1940, wherein an award had to be confirmed as a decree of the civil court which confirmation obviously would be by way of a civil suit.

19. The Shashoua Principle as has been referred to by the parties is also relevant in this discourse, inasmuch as, Clause 58.2 in this context will have to be taken to be significant contrary indica, which in the considered view of this Court will operate as the reason that Delhi be not considered the 'seat' of arbitration, notwithstanding the other prevailing circumstances, such as the proceedings being conducted and the award passed and stamped in New Delhi. As such, the view taken by the learned Commercial Court that the arbitral proceedings having been conducted in Delhi, by implication the same would amount to the parties having agreed that the juridical seat of arbitration is New Delhi, thereby investing exclusive jurisdiction on the High Court at Delhi does not seem to be correct. The reference therefore to Section 31(4) of the A&C Act in para 38 of the impugned judgment that the 'seat' had been determined by the Arbitral Tribunal by implication cannot be accepted, and this finding is overruled. The situation being such, wherein this Court is satisfied that the Arbitral Tribunal had not determined the 'seat' or 'venue' of arbitration, and the only other indicator available from the contract agreement is Clause 58.2, which grants jurisdiction to the Courts at Shillong, the inescapable conclusion therefore, without further examining or discussing the other judgments placed by the parties, is that the Courts in Shillong where jurisdiction has been granted is to be treated as the 'seat'.

20. In the facts and circumstances of the case therefore, in view of the conclusion arrived at above, the impugned order being flawed, the same is set aside.

21. The instant civil revision petition accordingly stands allowed and is disposed of.

22. There shall be no order as to costs.

Chief Justice (Acting)

Meghalaya
24.11.2023
"Samantha PS"