National Highways Authority of India Vs Sheladia Associates, Inc.

Court: Delhi High Court

Date of Decision: Aug. 21, 2009

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 10, 11, 12, 13, 14

Citation: (2009) ILR Delhi 723 Supp : (2010) 7 RCR(Civil) 1983

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: Sandeep Sethi and Padma Priya, for the Appellant; Janaranjan Das, Swetaketu Mishra and P.P. Nayar, for the Respondent

Final Decision: Allowed

Judgement

Rajiv Sahai Endlaw, J.
This petition u/s 20 r/w Section 2(6) of the Arbitration Act, 1996 is preferred for a direction to be issued to the

arbitrator to hold the arbitration proceedings at Delhi as provided in the written agreement between the parties. This Court, vide ex-parte order

dated 2nd April, 2009 which continues to be in force, has stayed the proceedings before the arbitrator. The respondent has contested the petition,

inter-alia on the ground of maintainability thereof.

2. The parties hereto are parties to a contract dated 31st January, 2001. Though in the said contract, the place of execution thereof has not been

stated but the address therein of the petitioner is of New Delhi and of the respondent of USA. The contract is signed by an official of the petitioner

whose rubber stamp bears the address of New Delhi. From the contract, it is not clear as to where the same has been signed on behalf of the

respondent. However, since it has been signed on behalf of the petitioner as well as the respondent on the same day, it is presumed to have been

executed at New Delhi. In any case, the address given of the petitioner in the said agreement for service of all notices etc. is that of New Delhi and

the address so given of the respondent is of USA. This Court thus is the court within the meaning of Section 2(e) of the Act. The respondent also

has neither in its reply nor its arguments disputed the territorial jurisdiction of this Court.

3. The contract between the parties is for the respondent to provide the construction supervision services to the petitioner for development of the

Golden Quadrilateral Constituting inter-alia the road on NH-5 & NH-60 from Chennai to Calcutta and, particularly four laning and strengthening

of the stretches between Khurda to Bhubaneswar, Chandikhole to Bhadrak and Bhadrak to Balasore all in the State of Orissa.

4. The contract provides for settlement of disputes by arbitration. The arbitration was agreed to be either of a sole arbitrator or of an arbitration

panel composed of three arbitrators; where the parties agreed that the dispute concerns a technical matter, they were given liberty to agree to

appointment of a sole arbitrator and failing such agreement within 30 days, procedure is provided for the President, Indian Roads Congress, New

Delhi to furnish five nominees of which the parties were entitled to select one; if the parties could not select out of the said nominees also, the sole

arbitrator is to be appointed by the President, Indian Roads Congress, New Delhi; however, where the parties do not agree that the dispute

concerns a technical matter, each party was to appoint an arbitrator with the two arbitrators jointly appointing the third arbitrator; if the two

arbitrators are unable to agree on the third arbitrator, the same was agreed to be appointed by the Secretary, Indian Council of Arbitration, New

Delhi (ICA). It is further the agreement that if either parties fails to appoint its arbitrator within 30 days after the other has appointed its arbitrator,

the party which has appointed the arbitrator may apply to the ICA to appoint a sole arbitrator for the matter in dispute. It is further the agreement

in Clause 8.2.5 of the Special Conditions of contract as under:

8.2.5 Miscellaneous In any arbitration proceedings hereunder:

a. Proceedings shall, unless otherwise agreed by the parties, be held in Delhi

b...

5. It is the case of the respondent that disputes and differences having arisen between the parties and the parties having not considered the same as

technical, the respondent appointed its arbitrator and called upon the petitioner to nominate its arbitrator; upon failure of the petitioner to so

appoint the arbitrator, the respondent approached the ICA which vide its letter dated 10th September, 2008 appointed Mr. B.C. Tripathi, retired

Chief Engineer-cum-Member (Technical), Arbitration Tribunal C/8 404 Radhika Tower, Tankapani Road, Bhubaneswar, to act as the sole

arbitrator in the case.

6. The respondent had also filed Writ Petition (C) No. 3765/2008 in High Court of Orissa, inter-alia for directions to the petitioner to stop

deducting amounts towards the damage liability from the bills of the respondent. The petitioner took inter-alia a stand in the said proceeding before

the Orissa High Court that Shri B.C Tripathi aforesaid having been appointed as the arbitrator and the arbitration being underway, the writ was not

maintainable.

7. The controversy which has led to the filing of the present petition is as to the venue of arbitration. The arbitrator appointed by the ICA, being

based at Bhubneshwar issued notice dated 18th October, 2008 for holding the first sitting of arbitration at Bhubaneswar on 4th November, 2008.

The order of the arbitrator of that date shows that though the said notice was served on the petitioner but none on behalf of the petitioner appeared

before the arbitrator. The arbitration proceedings were adjourned by issuing certain directions. At the end of the said order, it is recorded ""till

further decision, the place of arbitration will continue to remain at the Conference Hall of Radhika Tower, Tankapani Road, Bhubaneswar"".

8. The next hearing before the arbitrator was fixed for 4th December, 2008. The Project Director of the petitioner at Bhubaneswar attended the

said hearing. The order of the arbitrator of that date shows that the official of the petitioner raised certain points before the arbitrator on that date.

It is the case of the petitioner that one of the points raised by it before the arbitrator on that date was of the agreement between the parties

providing for the venue of arbitration at New Delhi and the arbitrator was thus requested to hold the arbitration proceedings at New Delhi.

However, the arbitrator at the end of the order of the said date again recorded as aforesaid that till further decision the place of arbitration shall

remain at Bhubaneswar.

9. The petitioner filed an application dated 23rd December, 2008 before the arbitrator in which also it was stated that in the 2nd hearing the

question of venue of arbitration was raised. In the said application, it was also stated that the hearings held at Bhubaneswar were not legal and

valid. The petitioner also requested the arbitrator to treat the pleas taken in the said application as preliminary objections and deal with the same

first. Though in the body of the said application, no provision of law is mentioned but in the letter dated 23rd December, 2008 of the petitioner

under cover of which the said application was forwarded, the application is described to be u/s 16 of the Act.

10. The petitioner besides the said application filed another application dated 1st January, 2009 before the arbitrator to intimate the date and venue

of the arbitration at New Delhi, to enable the petitioner to participate in the proceedings.

11. The third sitting was held by the arbitrator at Bhubaneswar on 3rd January, 2009. None appeared on behalf of the petitioner before the

arbitrator on that date. With respect to the applications aforesaid of the petitioner the arbitrator preserved the same for consideration on

compliance of the directions earlier issued regarding fee etc. and which had not been complied with by the petitioner. The next date of sitting was

peremptorily fixed on 19th January, 2009 again at Bhubaneswar. The copy of the order dated 3rd January, 2009 was forwarded to the petitioner

also.

12. On the next date before the arbitrator i.e. 19th January, 2009 also the petitioner remained unrepresented. The arbitrator thus proceeded ex-

parte against the petitioner. No reference in the proceeding of that date is made to the applications aforesaid of the petitioner. The case was

adjourned to 21st January, 2009 and intimation thereof sent to the petitioner also.

13. The petitioner continued to abstain from appearing before the arbitrator at Bhubaneswar. On 21st January, 2009 it appears that the

respondent filed an objection dated 3rd January, 2009 before the arbitrator to the application dated 23rd December, 2009 of the petitioner. With

respect to the venue of arbitration, it was stated in the said opposition that the petitioner had already taken part in the arbitration proceedings and

had also not raised any question of jurisdiction or competency of the arbitral in the writ petition before the Orissa High Court also, and in fact it

was owing to the plea of the petitioner, of the arbitrator having been appointed that the writ petition was disposed of; it was further contended that

the cause of action for the dispute had arisen within the State of Orissa and as per the law jurisdiction could not be limited merely as per the

condition of agreement; that the venue of arbitration though fixed prior to the disposal of the writ petition had also not been challenged by the

petitioner before the High Court - rather the petitioner had admitted the said venue; that the ICA while appointing the sole arbitrator had taken into

consideration that the arbitrator may be required to inspect documents, place of performance of contract, convenience of parties and all of which

was at Bhubaneswar and in the absence of any compelling reason to insist on Delhi as the venue of arbitration meetings, the petitioner ought to

abide by the decision of the Arbitral Tribunal as to the venue of the meeting of the arbitration. It was further pleaded that both the parties had their

offices at Bhubaneswar, execution of the work was in Orissa and thus the arbitration proceedings should continue at Orissa only.

14. The arbitrator in the 5th sitting held at Bhubaneswar on 21st January, 2009 and from which the petitioner continued to abstain, merely

recorded that ""the objection filed by the respondent stands accepted and the petition filed by the petitioner (apparently of 23rd December, 2008

and 1st January, 2009) without any evidence is dismissed"". It was further held that challenging the arbitrator is equal to challenging the appointing

authority and the party aggrieved on this account is at liberty to move the Competent Authorities for appropriate actions like withdrawal of

appointment of arbitrator/replacement of arbitrator. The case was adjourned to 24,25&26th February, 2009 at Bhubaneswar only.

15. The hearings before the arbitrator continued thereafter in the absence of the petitioner until the same were stayed vide ex-parte order dated

2nd April, 2009 (Supra) of this Court.

16. The senior counsel for the petitioner has drawn attention to Section 20(1) of the Act which gives freedom to the parties to agree on the place

of arbitration; Section 20(2) empowers the Arbitral Tribunal to determine the place of arbitration having regard to the circumstances of the case

including the convenience of the party only ""failing any agreement referred to in Sub-section (1)"". It has further been contended that the arbitrator

being a creature of the agreement between the parties has no jurisdiction to hold hearings at a place other than the place agreed upon by the

parties. It is further highlighted that in the agreement between the parties, while providing for the venue of arbitration at Delhi, Delhi is underlined.

Attention is also invited to para 30 of the judgment of this Court in Alcove Industries Ltd. Vs. Oriental Structural Engineers Ltd., on the basis

whereof it is urged that the courts ought to, where it is so warranted nip any illegality being committed by the Arbitral Tribunal in the bud rather

than allow the arbitration proceedings to go on and to deal with the same at the stage of Section 34 of the Act. It is urged that procedure is the

handmaid of justice and the order sought by the petitioner is in aid of justice and this Court ought not to refrain from exercising jurisdiction to stop

the illegality being committed by the Arbitral Tribunal and the action of the Arbitral Tribunal in contravention of the agreement between the parties.

It is argued that such conduct ought not to be permitted to be perpetuated and powers of the courts cannot be stifled. It is further contended that

the Supreme Court in Sanshin Chemicals Industry Vs. Oriental Carbons and Chemicals Ltd. and Others, has held that a decision regarding the

venue of arbitration could be assailed even in an appeal u/s 34 of the Act. It is further argued that in any case the matter is not res integra in view of

the judgment of the single judge of this Court in Jagson Airlines Ltd. and Another Vs. Bannari Amman Exports (P) Ltd. and Another, where the

order of the Arbitral Tribunal fixing the venue of arbitration proceedings at a place other than that agreed by the parties was set aside. It was

further argued that this Court in Sharma Enterprises v. NBCC Ltd. (2008) IX AD Delhi 571 has also leaned in favour of the court u/s 14 of the

Act being empowered to terminate the mandate of the arbitrator. It was contended that in the present case in-spite of the petitioner having taken

objection to the venue of arbitration on the very first opportunity, the arbitrator has not decided on the same and is continuing to hold the

proceedings at a place not agreed upon by the parties.

17. Per contra, the counsel for the respondent has made submission under four heads. Firstly, it is contended that the petition is not maintainable.

Secondly, it is contended that the petitioner has by its conduct, express and/or implied agreed to the arbitrator holding the proceedings at

Bhubaneswar and has filed the present petition as an after though. Thirdly, it is contended that since the arbitrator is at Bhubaneswar, all the

records are at Bhubaneswar, it is convenient that the arbitration proceedings be held at Bhubaneswar only. Lastly, it is contended that the clause in

the agreement providing for the venue of the arbitration at Delhi does not provide for the said venue exclusively and on the same reasoning as

applied to a clause qua the jurisdiction of the courts, the arbitrator is entitled to hold the proceedings at Bhubaneswar also, in the exercise of his

power u/s 20(2) of the Act.

18. On the aspect of maintainability, it is contended that the judgment of this Court in Jagson Airlines Ltd. (Supra) is no longer good law in view of

subsequent decision of the seven judge bench of the Supreme Court in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, . Attention is

drawn to the summary of conclusions arrived at in the said judgment in para 142, to sub-paras (iv) to (vi) where it has been laid down that the

Arbitral Tribunal has power to rule on its own jurisdiction under Sub-section (1) of Section 16 of the Act; where the Arbitral Tribunal holds that it

has jurisdiction, it shall continue with the arbitral proceedings and make the arbitral award; remedy available to the party aggrieved is to challenge

the award in accordance with Section 34 or Section 37 of the Act. It is argued that the application in which the petitioner raised the plea of the

venue of arbitration was described by the petitioner itself in the covering letter to the said application as u/s 16 of the Act, the arbitrator has already

dealt with the said application in the order dated 21st January, 2009 (Supra) wherein the said objection of the petitioner has been rejected. It is

argued that the remedy, if any, if the petitioner is now only u/s 34 of the Act and the court is not empowered to interfere before that.

19. It is further contended that the reliance by the senior counsel for the petitioner during the hearing on Section 14 of the Act is misconceived in as

much as the said plea was neither taken before the arbitrator nor pleaded and cannot be permitted to be taken orally.

20. On the argument of convenience, the submissions have already been noted herein above.

21. On the petitioner having expressly or impliedly consented to the venue of arbitration at Bhubaneswar, it is contended that the ICA had

appointed the arbitrator prior to the petitioner filing the counter affidavit in the Orissa High Court; in the said counter affidavit no plea was taken

that the arbitrator was at Bhubaneswar while the agreement was for arbitration at Delhi; it is further contended that in fact prior to the disposal of

the said writ petition the arbitrator had already issued a notice for first hearing of arbitration to be held at Bhubaneswar; the petitioner still did not

raise the said aspect in the writ proceedings and allowed the writ petition to be disposed of. In this regard only, it is further pointed out that the

petitioner had vide its letter dated 2nd December, 2008 appointed its Project Director at Bhubaneswar to represent the petitioner in the case and

from the appointment of an officer at Bhubaneswar (and not at Delhi) it is apparent that the petitioner also intended the arbitration proceedings at

Bhubaneswar. It is further contended that the petitioner participated in the second hearing before the arbitrator and thereby also consented to the

arbitration hearings at Bhubaneswar only. It is further argued that this Court ought not to be swayed by the pleas of the conduct of the arbitration

being contrary to the agreement as much as similar questions can arise in a large number of other arbitrations and which if allowed would lead to

courts interfering in arbitral proceedings otherwise than as permitted under the statute.

22. The senior counsel for the petitioner has in rejoinder contended that the agreement provides for the venue of arbitration at Delhi, ""unless

otherwise agreed by the parties"". Such agreement has to be in writing only and cannot be by conduct. It is further contended that there cannot be

question of any acquiescence in as much as the objection was taken to the venue on the very first date. It is also contended that the arbitrator has

not dealt with the said aspect and has not treated the said objection as u/s 16 of the Act. It is also contended that the use of the word ""only"" or

exclusively"" is not essential for vesting exclusive jurisdiction to a certain place. Reliance in this regard is placed on Jatinder Nath Vs. Chopra Land

Developers Pvt. Ltd. and Another, . It is argued that in the present case the intent to hold the arbitration proceedings at Delhi is clear from the

agreement of the parties.

23. The aspect of maintainability of the present petition has obviously to be considered first in as much as if the petition is found to be not

maintainable, even if this Court were to agree with the contention of the petitioner on merits, the court would be unable to grant any relief to the

petitioner.

24. The petition as filed is u/s 20 & Section 2(e) of the Act. Neither of the said provisions is of a nature whereunder any role is attributed to the

court"". The said provisions are not actionable and the petition does not lie thereunder. However, the nomenclature under which the a petition is

filed is irrelevant, if otherwise is found to be maintainable in law.

25. The effect of Section 5 of the Act barring the courts from intervening in arbitral proceedings except where so provided in the Act, need not be

restated. In this case, as will be clear from the above, the respondent is a foreign party. The arbitration u/s 2(f) relating to disputes arising out of

commercial legal relationship where at least one of the parties is a body corporate which is incorporated in any country other than India, is an

international commercial arbitration"". At one stage, it was considered whether the provisions of Section 5 and Section 20 would be applicable to

such arbitration. However, Section 2(2) makes part I of the Act applicable where the place of arbitration is in India. In the present case there is no

dispute that the place of arbitration is in India and hence part I i.e. Sections 2 to 43 apply.

26. Though the counsels have during the hearing referred to Section 14 & Section 16 r/w 37 only whereunder courts can interfere, I had during the

course of hearing, in the light of the judgment of a single judge of the Bombay High Court in Maharashtra State Electricity Board Vs. Datar

Switchgear Ltd., also drawn attention of the counsels to Section 9(ii)(e) of the Act, whereunder the court can be approached for ""such other

interim measure of protection as may appear to be just and convenient"". Question was posed as to whether the said provision can be said to

permit interference by the courts.

27. First the applicability of Section 16 r/w Section 37 will be considered in as much as if it is found that the plea of the petitioner as to the venue

of arbitration was u/s 16 of the Act and/or if the order of the arbitrator thereon is u/s 16 of the Act, then in view of the legislative provisions i.e. of

Sections 16 (5) and (6) of the Act, the remedy, if any, of the petitioner would be at the stage of Section 34 only and not before that. In the face of

the legislative provisions, no inherent powers of the court can also be invoked in such as case.

28. I had during the hearing inquired from the counsel for the respondent as to how the plea of venue of arbitration could be said to be a plea of

the jurisdiction of the arbitrator or with respect to the existence of the arbitration agreement. No arguments were addressed on this aspect. The

petitioner in contending that the arbitration proceedings be held at Delhi in accordance with the agreement cannot be said to be calling upon the

arbitral tribunal to rule on its jurisdiction. Similarly the existence or validity of the arbitration agreement was/is not being questioned by the

petitioner. The petitioner in insisting that the arbitration proceedings be held at Delhi was rather seeking enforcement of the arbitration agreement.

Section 16(3) refers to the Arbitral Tribunal exceeding the scope of its authority. However, the same has to be read in conjunction with Section

16(1) i.e. whether a particular dispute is arbitrable or not and would not include objection as to the venue of arbitration. Thus, in my view Section

16 is not attracted to such a plea and thus even if it were to be said that the arbitrator had rejected the said plea, the provisions of Section 16 (5)

and (6) would not apply.

29. I also do not find any merit in the contention of the counsel for the respondent that the petitioner in the covering letter of the application dated

28th December, 2008 having described the application in which the plea of venue was taken to be u/s 16 of the Act is now estopped from

contending otherwise. Whether a plea falls within the ambit of Section 16 of the Act or not is a question of law and merely because the petitioner

described the same as u/s 16 of the Act would not make the plea if otherwise not falling u/s 16 to fall thereunder to enable the respondent to

contend that the remedy only at the stage of Section 34 is available with respect to the decision rejecting the same.

30. I also do not find that the Arbitral Tribunal has taken any decision on the said plea of the petitioner. The petitioner had in the applications dated

28th December, 2008 and 1st January, 2009 taken several pleas including the plea as to the venue. u/s 28(2) the Arbitral Tribunal is required to

decide ex aequo et bono or as amiable compositeur only if the parties expressly authorize so. Russell on Arbitration 21st Edition at page 163 reads

as under:

The Tribunal has a duty to decide a dispute in accordance with the legal rights of the parties, rather than in what the tribunal considers a fair and

reasonable way, unless there is specific agreement between the parties to the contrary. The tribunal may be specifically instructed by the arbitration

agreement to decide the disputes on some basis other than the law; an agreement to this effect has generally become known as an ''equity clause''.

For example, the parties may agree that the tribunal is to decide the dispute in accordance with concepts variously known as ''honourable

engagement'', ''amiable compositeur'' ''equity'', ''ex aequo et bono'', the ''general principles of law recognized by civilized nations'' or the ''lex

mercatoria''. The expression ''lex mercatoria'' is not found in arbitration clauses, and some commentators have doubted whether it has any meaning.

Those who do assign it a meaning differ as to whether it is a separate body of international commercial law or equivalent to freedom from strict

legal constraint. Various wordings are encountered in arbitration agreements, and each has to be carefully interpreted.

31. Black''s Law Dictionary defines the term ''Ex aequo et bono'' as ''in justice and fairness'' or according to equity and good conscience. The

word, "amiable compositeur" is a French term. It means a person who adopts a flexible approach brimful with fairness and reality. Section 46 (i)

(b) of the English Arbitration Act 1996 permits the arbitrator to decide the dispute in accordance with such other considerations as are agreed or

determined. RUSSELL on ARBITRATION, 21st Edn. at page 164 states as under on the subject.

The courts will interpret the new statutory provisions allowing a tribunal to decide a dispute in accordance with such other considerations as are

agreed or determined as obliging them to uphold equity clauses. In agreeing that a dispute shall be resolved this way, the parties are in effect

excluding any right to appeal to the court, there being no question of law to appeal. Special transitional provisions apply to equity clauses to

prevent retrospective changes to their meaning, Section 46(i)(b) of the Arbitration Act, 1996 does not apply to arbitration agreements that were

made before the Act came into force (on January 31, 1997).

Sir Michael J. Mustill and Stewart C. Boyd in "Commercial Arbitration" IInd Edn. at page 606 state as follows:

A commercial arbitration agreement may contain a stipulation or a clause by which arbitrators are empowered not to apply strict or settled

principles of law in the settlement of a dispute referred to them, but instead to settle such dispute by the application of what they may deem to be

fair and reasonable. In other words, such arbitrators are then meant to act as amiables compositeurs. Considering that an agreement between the

parties to an arbitration reference constitutes an essential basis for the establishment of conduct of a commercial arbitration, one would expect any

such stipulation on clause in an arbitration agreement to be observed by arbitrators without judicial intervention. Obviously commercial arbitrators

cannot be presumed to be entitled to settle a dispute referred to them by applying what they deem to be fair and reasonable, in the absence of a

specific authorization in an arbitration agreement. As an English appellant court Judge had occasion to stress in a recent symposium on international

commercial arbitration. "The arbitrator must not act as amiable compositeur unless authorized to do so.

32. Section 28(3) also mandates the arbitral tribunal to decide in accordance with the terms of the contract. It may be highlighted that Section 28 is

applicable to all stages of proceedings before the arbitral tribunal and not merely to the making of the award. u/s 31 also, though applicable to an

award, the arbitrator is required to state reasons for its decisions. This was a change effected in the 1996 Act from the 1940 Act whereunder the

arbitrator was not required to give any reasons. The requirement of reasons was perhaps introduced so as to give more efficacy and to strengthen

the arbitration and to make it a alternative forum for adjudication of disputes. In my opinion, the requirement of giving reasons also extends to other

stages of arbitral proceedings. Even if it is to be held that the arbitrator has in the year on 21st January, 2009 also dealt with the plea of the

petitioner qua the venue of arbitration, I find that the arbitrator has not given any reasons whatsoever for continuation to hold proceedings at

Bhubaneswar in the face of the agreement between the parties of the place of arbitration being Delhi. This leads me to hold that the arbitrator has

not given any decision whatsoever even if the plea of the petitioner as to venue is treated to have been made u/s 16 of the Act.

33. Having held that the plea aforesaid was not u/s 16, and having also found that Sections 20 and 2(e) whereunder the petition has been filed are

not actionable, the next question is whether Section 14 relied upon at the time of argument can be permitted to be relied and if so to what effect.

34. In my view, again merely because the petition is not titled as u/s 14 of the Act would not bar the petitioner from contending that the same is

maintainable under the said provision or claims the relief permissible thereunder. On a perusal of Section 14, I find nothing therein which would

prohibit the petitioner from without having filed the petition under the said provision, contending that the same to be considered thereunder.

35. The Supreme Court recently in Nawab Shaqafath Ali Khan and Others Vs. Nawab Imdad Jah Bahadur and Others, has held that the High

Court, on appropriate case being made out and subject to fulfillment of other requirements, if any, has jurisdiction to convert a revision application

or a writ petition into an appeal or vice versa, in exercise of its inherent powers.

36. The next question is whether in such a situation it can be said that the arbitrator has become de jure or de facto unable to perform his function

or for other reasons the arbitrator has failed to act without undue delay.

37. As noticed above, u/s 28(3) of the Act the arbitrator is to act in accordance with the terms of the contract. Axiomatically, the de jure or de

facto inability of the arbitrator to perform his functions or failure of the arbitrator to act without undue delay has to be seen in the context of the

agreement between the parties. If the agreement of the parties is for the arbitration proceedings to be held at Delhi and the arbitrator continues to

hold arbitration proceedings at Bhubaneswar, as in the present case, it would, in my opinion, amount to the arbitrator being unable to perform his

functions or for other reasons failing to act in terms of the agreement without undue delay. In the present case, the arbitrator has continued to hold

the proceedings at Bhubaneswar in contravention of the agreement in writing between the parties and in-spite of objections having been taken by

the petitioner. The action of the arbitrator in-spite the plea taken in this regard, of continuing to hold the arbitration proceedings at a place other

than Delhi is thus falling within failure to act in terms of the agreement without undue delay. Thus Section 14 becomes attracted and the mandate of

the arbitrator would stand terminated. However, since the petitioner is persisting that the arbitrator continues, a controversy within the meaning of

Section 14(2) remains on this ground and the petitioner is entitled to apply to the court to decide on the said termination.

38. I also do not find any merit in the contention of the respondent of the petitioner having agreed to the venue of arbitration at Bhubaneswar. The

writ petition preferred by the respondent before the High Court of Orissa was not concerned with the venue of arbitration. It was thus not

necessary for the petitioner to take the said plea therein and from the conduct of the petitioner of not taking the said plea it cannot be said that the

petitioner acquiesced in the venue of arbitration being at Bhubaneswar. Also, merely because the arbitrator appointed by the ICA was resident of

Bhubaneswar did not necessarily mean that the arbitration proceedings in contravention of the written agreement between the parties were to be

also at Bhubaneswar. The petitioner cannot be expected to have known at that time that the arbitrator intended to act in contravention of the

written agreement between the parties and with which he u/s 28(3) of the Act was bound. Also, the mere factum of the arbitrator having given

notice of the first sitting of the arbitration at Bhubaneswar cannot be said to be such a fact which required the petitioner to in the writ proceedings

take up the said cudgels. The petitioner was till then yet to draw the attention of the arbitrator to the clause of the agreement aforesaid providing for

the place of arbitration to be at Delhi.

39. Similarly, I do not find the action of the petitioner authorizing its Project Manager at Bhubaneswar to represent in the said case cannot be said

to be indicative of an intention of the petitioner to arbitrate at Bhubaneswar. Since, admittedly the works subject matter of disputes were executed

within the area of operation of the said Director, the said official only being in the know of the facts would be authorized to act in the said

arbitration irrespective of wherever the place of arbitration may be.

40. I also do not find that the petitioner in any manner participated in the proceedings at Bhubaneswar. Though, the respondent has contended that

the petitioner had in the second hearing, in which it had appeared for the first time, not raised the said plea of venue but in view of the petitioner

having in the application filed immediately thereafter recorded that the said plea was orally taken in the said hearing, I tend to agree with the version

of the petitioner that such plea was taken before the arbitrator. Thus it is found that the petitioner had at the first possible opportunity objected to

the venue of arbitration and requested for the venue at Delhi in terms of the agreement and no case of any express or implied agreement

/acquiescence is made out. The plea of the petitioner having acquiesced is also negatived from the orders passed by the Arbitral Tribunal where the

next proceeding was ordered at Bhubaneswar for the time being only. Had the arbitrator taken any decision on the said plea, such observation

would not have appeared in the successive orders of the arbitrator.

41. The next aspect to be considered is with respect to impact of the words ""only"" and ""exclusively"" missing from the clause providing for the place

of arbitration at Delhi. In my view, the judgments u/s 20 of the CPC on this aspect are not applicable. Section 20 deals with a case where more

than one courts have territorial jurisdiction. What the said judgments have held is that the parties can agree to the jurisdiction of one of such courts.

Section 20 of the 1996 Act is however not dealing with the situation of multifarious venues of arbitration. It gives freedom to the parties to agree on

the place of arbitration. It is not in dispute that in the present case the parties agreed to Delhi. The parties having so agreed, were not required to

use the words ""exclusively"" or ""only"" with agreed place of arbitration in as much as on such agreement being reached, the place of arbitration has to

be that place only and none other. Be that as it may, it may also be noted that even the judgment in Hanil Era Textiles Ltd. Vs. Puromatic Filters

(P) Ltd., relied upon by the respondent also does not come to the rescue of the respondent. In that judgment also, it has been held that even

without such words as ""only"", ""exclusively"", ""alone"", in appropriate cases the maxim expressio unius est exclusio alterius will apply.

42. Similarly, in the face of such an agreement, the question of convenience does not arise. The agreement between the parties is supreme.

43. Though neither counsel drew attention to Section 20(3) of the Act, in my view the same requires consideration. After providing in Sub-section

(1) that the parties are free to agree on the place of arbitration and in Sub-section (2) that failing any agreement, the place of arbitration shall be

determined by the arbitral tribunal, Sub-section (3) is as under:

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.

44. Considerable thought has been expended as to the meaning thereof in as much as the same starts with a non-obstante provision. The effect of

the non-obstante provision is that notwithstanding any agreement between the parties the arbitral tribunal may meet at any place. However the

same is again made subject to ""unless otherwise agreed by the parties"". I have wondered whether the same gives supremacy to the Arbitral

Tribunal in the matter of place of arbitration, notwithstanding agreement between the parties or as to how to reconcile the same with Sub-sections

(1)&(2). It cannot be said that the same is not applicable to arbitration hearings but only to consultations amongst members of the Arbitral Tribunal

in as much as the same is applicable for hearing witnesses, experts and the parties as well. The only harmonious interpretation thereof with sub

Sections (1) & (2) is that if the facts & circumstances so demand that the consultations or recording of statements of witnesses, experts or the

parties has to be at a particular place, owing to the close nexus thereof with the disputes to be adjudicated, then the Arbitral Tribunal,

notwithstanding the agreement between the parties as to the place of arbitration, is entitled to hold the proceedings at such place. However, the

same is again made subject to the agreement between the parties. Such agreement of the parties can only be after the Arbitral Tribunal has

expressed its view to hold the proceedings mentioned therein at a place other than agreed. At that stage also, supremacy has been given to the

agreement of the parties and the parties are permitted to with their agreement overrule the arbitrators at that stage also.

45. However, that stage has not arisen in the present case. The single member of Arbitral Tribunal has not held that notwithstanding the agreement

of arbitration at Delhi, to enable him to return finding on the disputes, he is required to conduct any of the stages mentioned in Sub-section (3) at a

place other than Delhi.

46. Though I had during the hearing drawn the attention of the counsels to Section 9(ii)(e) but it may be noticed that I have recently in Shri Krishna

v. Anand OMP No. 597/2008 decided on 18th August, 2009 held that the same cannot be read as giving a supervisory jurisdiction to the courts

over the proceedings before the Arbitral Tribunal.

47. It is thus found that the Arbitral Tribunal by refusing to hold the arbitration proceedings at Delhi, in spite of attention having been invited to the

agreement providing so, has become de facto unable to perform his functions and/or has failed to act without undue delay. The mandate of the

arbitrator thus has to be declared to have stood terminated.

48. Before parting with the case, I must record that the chain of events as happened herein is what brings bad name to arbitration. In spite of the

arbitrator having been appointed nearly one year ago, nothing has been achieved till date and now the mandate of the arbitrator has to be held to

have terminated. I find the Indian Council of Arbitration, the arbitrator as well as the respondent to be blamed for the same. The Indian Council for

Arbitration being the appointing authority, in spite of clause in the agreement for the place of arbitration to be at Delhi, appointed the arbitrator

based at Bhubaneswar. The arbitrator so appointed also in contravention of the agreement insisted upon holding the arbitration proceedings at

Bhubaneswar and the respondent in contravention of its agreement in writing supported such stand of the Arbitrator. It appears that the respondent

after obtaining the order from the Orissa High Court restraining the petitioner from making deductions from the bills of the respondent was in no

hurry in the arbitration proceedings. It was argued by the respondent before this Court that the petitioner is free to take this objection at the stage

u/s 34 of the Act. When the respondent is aware of the agreement of the place of arbitration being Delhi and further when Section 34(2)(a)(v)

permits the award to be set aside on this ground, such action is not understandable. In the face of the written agreement as to the place of the

arbitration and the same being supreme u/s 20(1), it can reasonably be said that even in the event of the petitioner losing in the arbitration, notice of

a petition u/s 34 on this ground alone is likely to be issued and the arbitral award even, if any, in favour of respondent would remain in abeyance. It

was with this motive only that on one of the earlier dates it was suggested to the counsel for the respondent to, for the sake of expediency agree to

the arbitration proceedings at Delhi in accordance with the agreement. However, the counsel has expressed inability and the matter was fully

argued. It is in these circumstances that finding that the case can be said to be covered u/s 14 of the Act, I was loath to allow the respondent and

the Arbitral Tribunal to continue proceedings in contravention of the agreement and to allow the proceedings to be multiplied in such manner.

49. Arbitration as a mode of settlement of disputes was evolved to lessen the load on the court and to provide for expeditious resolution of

disputes. However, stand of the parties such as has emerged in these proceedings is not allowing the same to happen. Though, undoubtedly the

jurisdiction of the courts is limited but wherever permissible and wherever needed to be exercised for achieving the said purposes, the courts ought

not to fail from exercising their jurisdiction to serve the said objectives.

50. Thus the petition is treated as one u/s 14 of the Act and is allowed. The mandate of Mr. B.C. Tripathi is held to have stood terminated. The

parties in accordance with Section 15(2) of the Act shall be entitled to appointment of a substitute arbitrator, if so deemed necessary. In the facts

aforesaid, the respondent is also burdened with costs of Rs. 50,000/- of the present petition.