

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ARB.P. 431/2014**

% **Date of decision: 17.11.2014**

M/S CALDERYS INDIA REFRACTRIES LTD. Petitioner

Through: Mr.Yash Mishra and Ms.Chandni
Goyal, Advocates

versus

A2Z POWERCOM LTD.

..... Respondent

Through:

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT (ORAL)

1. The present petition has been filed by the petitioner under Section 11 (6) of the Arbitration and Conciliation Act (hereinafter referred to as 'the Act') for appointment of a Sole Arbitrator on the premise that a dispute has arisen between the petitioner and the respondent. Pursuant to the Clause 9 of the Work Order and Clause 14 of the Purchase Order, the petitioner has sent a notice dated 17.07.2012 by registered post invoking the arbitration clause to concur in the appointment of the arbitrator but respondent had not concurred and sent a reply. The petitioner filed a Miscellaneous Civil Application No.912 of 2013 under Section 11 (6) of the Act for appointment of arbitrator before the High Court of Judicature at Bombay, Nagpur Bench on 30.08.2012. The petition was dismissed vide order dated 17.01.2014.

The petitioner had sought a liberty to file the application before the appropriate court and because the respondent had taken an objection as to the territorial jurisdiction. The said liberty was granted to the petitioner and therefore, the present petition. The arbitration clause stipulates that the venue of arbitration is Gurgaon.

2. It is submitted that since the respondent had concluded the contract at New Delhi, the purchase orders were received at New Delhi and all the goods were also supplied from New Delhi, hence, this court has the territorial jurisdiction.

3. Reliance has been placed on the findings of ***GE Countrywide Consumer Financial Services Ltd. vs. Surjit Singh Bhatia & Ms. Jaspal Kaur*** reported in (2006) 129 DLT 393 and ***Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc.*** reported in (2012) 9 SCC 552.

4. I have heard the arguments and perused the documents.

5. Clause 14 of the Purchase Order and Clause 9 of the Work Order are identical which reads as under:

“Dispute Resolution Mechanism:

To the best of their ability, the parties hereto shall endeavour to resolve amicably between themselves all disputes arising in connection with this order. If the same remain unresolved within thirty (30) days of the matter being raised by either party, either party may

refer the dispute for settlement by arbitration. The arbitration to be undertaken by two arbitrators, one each to be appointed by either party. The arbitrators appointed by both the parties shall mutually nominate a person to act as umpire before entering upon the reference in the event of a difference between the two arbitrators and the award of the said umpire in such a contingency shall be final binding upon the parties. The arbitration proceeding shall be conducted in accordance with these provisions of the Indian Arbitration & Conciliation Act, 1996 and the venue of such arbitration shall be city of Gurgaon only.”

6. Thus, the venue for such arbitration chosen by the parties with mutual consent is city of Gurgaon only.

7. It is argued on behalf of the petitioner that since part of the jurisdiction has accrued in Delhi, therefore, this court has the jurisdiction to deal with the application under Section 11 (6) of the Act as the jurisdiction of the court while dealing with the petition under this provision has to be that of Civil Court as defined under Section 2 (1) (e) of the Act. It is further argued that this court has the jurisdiction to decide the subject matter of the Arbitration, hence has the jurisdiction to deal with the present petition under Section 11 (6) of the Act.

8. Section 11 (6) of the Act reads as under:

“11 (6): Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

9. Section 11 (12) (b) is also reproduced as under:

“Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.”

10. Section 2 (1) (e) reads as under:

2 (1) (e) “Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

11. There is no doubt that as per contention of the petitioner since part of the jurisdiction has arisen in Delhi, this court also has the jurisdiction to deal with the subject matter and also since the respondents are situated in Gurgaon and part of cause of action has arisen in Gurgaon and the high court of Punjab and Haryana also has the jurisdiction to deal with the matter. It is also apparent from the arbitration clause that the parties have chosen city of Gurgaon as the venue of arbitration. The question that arises is whether the High court of Punjab and Haryana has the territorial jurisdiction to deal with this matter under Section 11 (6) of the Act in view of the fact that parties have chosen the venue of the arbitration at Gurgaon or this court also has the territorial jurisdiction to deal with the application for appointment of arbitrator.

12. The same question had come up before the Supreme Court in ***Swastik Gases Private Limited vs. Indian Oil Corporation Limited*** reported in (2013) 9 SCC 32, where three judges bench of the Supreme Court has held as under:

31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, the Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the

appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11(12)(b) and Section 2(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of clause 18 of the agreement, the jurisdiction of the Chief Justice of the Rajasthan High Court has been excluded?

*32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties - by having clause 18 in the agreement - is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. 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. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is*

neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.

33. The above view finds support from the decisions of this Court in Hakam Singh, A.B.C. Laminart, R.S.D.V. Finance, Angile Insulations, Shriram City, Hanil Era Textiles and Balaji Coke.

34. In view of the above, we answer the question in the affirmative and hold that the impugned order does not suffer from any error of law. The civil appeal is, accordingly, dismissed with no order as to costs. The appellant shall be at liberty to pursue its remedy under Section 11 of the 1996 Act in the Calcutta High Court.

13. In another case of ***Balaji Coke Industry Pvt. Ltd. vs. Maa Bhagwati Coke (Guj) Pvt. Ltd.*** reported in (2009) 9 SCC 403, the Supreme Court has clearly held as under:

“18. In the instant case, the parties had knowingly and voluntarily agreed that the contract arising out of the High Seas Sale Agreement would be subject to Kolkata jurisdiction and even if the courts in Gujarat also had jurisdiction to entertain any action arising out of the agreement, it has to be held that the agreement to have the disputes decided in Kolkata by an Arbitrator in Kolkata, West Bengal, was valid and the Respondent-Company had wrongly chosen to file its application under Section 9 of the Arbitration and Conciliation Act before the Bhavnagar Court (Gujarat) in violation of such agreement. The decisions of this Court in A.B.C. Laminart (P) Ltd. (supra) as also Hakam Singh (supra) are very clear on the point.”

14. In *Bharat Aluminium Company's* case (supra) on which the petitioner is relying, in para 96 the Supreme Court has clearly held that the court where arbitration takes place would be required to exercise supervisory control over the arbitration process and therefore, where the venue of arbitration is situated, the courts of that jurisdiction alone has the territorial jurisdiction in the matter.

15. In *GE Countrywide Consumer Financial Services Ltd.'s* case (supra) relied upon by the petitioner, on the similar facts the court had dismissed the petition for want of territorial jurisdiction and findings in this case are also of no help to the petitioner.

16. It is settled principle of law that where two or more courts have the jurisdiction, the parties to an agreement are at liberty to chose the jurisdiction any of the court, such an agreement is not illegal and is binding on the parties. In the present case parties have consciously and mutually chosen the jurisdiction of Gurgaon court by choosing the venue of arbitration at Gurgaon where cause of action has also accrued. This court has no territorial jurisdiction to deal with the matter.

17. In view of the above discussion, the petition is hereby dismissed for want of territorial jurisdiction.

DEEPA SHARMA, J

NOVEMBER 17, 2014

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