

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

Judgment reserved on: 05.07.2018

Judgment pronounced on: 11.07.2018

+ O.M.P. (COMM) 173/2018 & I.A. No.5541/2018, 5543/2018

M/S HLL LIFECARE LTD.

.....Petitioner

Through: Mr. Ratan K. Singh with Mr.
Nikhilesh Krishnan, Advs.

Versus

M/S HAPPY ELECTRICALS

....Respondent

Through: Mr. Sanjoy Bhaumik, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

Prefatory Facts:

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "1996 Act").
2. By virtue of this petition, challenge is laid to the award dated 21.9.2017 passed by the learned Arbitrator. Learned Arbitrator against various claims preferred by the respondent, has, in sum, awarded an amount of Rs.16,76,164/- in its favour, inclusive of interest.
3. The petitioner, being aggrieved, as indicated above, has challenged the same, *inter alia*, on the ground of perversity and on the ground that it is contrary to the terms of the contract and hence, violative of Section 28 (3) of the 1996 Act.

4. Notice in this petition was issued on 24.4.2018. On return of notice, on behalf of the respondent, Mr. Sanjoy Bhaumki entered appearance on 4.7.2018. On that date, a preliminary objection was taken by the counsel for the respondent, which is, that this Court would not have jurisdiction to entertain the petition as neither the seat of arbitration nor did any part of cause of action arise within the territorial jurisdiction of this court.

4.1 Furthermore, learned counsel for the respondent also indicated that the respondent had filed a petition under Section 34 of the 1996 Act, *albeit*, in the Patna High Court, which, I was told, is pending adjudication.

4.2 It was submitted by the learned counsel that the said petition had been filed by the respondent prior in point of time to the instant petition. Therefore, it was contended, in terms of Section 42 of the 1996 Act (*dehors* the aforesaid objection taken with regard to the territorial jurisdiction of this Court), that the instant petition, if at all, could only have been preferred in the Patna High Court.

5. Pertinently, the fact that the respondent had filed a petition under Section 34 of the 1996 Act and that the said petition was filed prior in point of time to the present petition was not disputed by the counsel for the petitioner.

6. I was informed that the petition in the Patna High Court was filed on 2.1.2018, while the instant petition was filed on 27.1.2018.

7. Given the aforesaid objection, the matter was heard at length on 4.7.2018. However, after arguments were concluded in the matter, counsel

for the petitioner sought time to obtain instructions as to whether the petitioner would like to withdraw the present petition and move the Patna High Court for appropriate relief. Consequently, the matter was posted on the following day i.e., 5.7.2018. On 5.7.2018, learned counsel for the petitioner said that he would want the Court to rule on the preliminary objection raised by the respondent with regard to the aspect pertaining to territorial jurisdiction.

8. Thus, having regard to the above and in order rule on the preliminary objection raised before me, I intend to touch upon only those broad facts which, in my view, are necessary for dealing with the objection at hand.

8.1 In and about September 2009, the petitioner had floated a tender for setting up a 11 KV Electrical Sub-Station, DG set and external electrical works at the residential complex appurtenant to AIIMS, Patna. The estimated cost of the works in issue was pegged at Rs.2.25 crores. In the bidding process, which ensued thereafter, the respondent was declared successful and consequently, a Letter of Award (LOA) dated 15.1.2010 was issued in its favour.

8.2 As a result of the aforesaid, a contract dated 12.2.2010 was executed between the petitioner and the respondent. The contract, provided that the subject works should be completed by 2.9.2010.

8.3 As required, in terms of the contract, the respondent furnished a performance security in the sum of Rs.8,11, 666/-.

8.4 The record shows that disputes arose between the parties herein, which led to the matter being referred to the Arbitrator, upon the arbitral mechanism being triggered by the respondent.

8.5 As adverted to above, not only the petitioner herein but also the respondent has filed a petition under Section 34 of the 1996 Act to lay a challenge to the award rendered by the learned Arbitrator.

9. Given this backdrop, and especially, in the context of the preliminary objection raised, what is required to be examined by me are the pleadings and the material placed on record, based on which, the petitioner asserts its right to maintain a petition in this Court.

10. A perusal of the pleadings would show that the following assertions have been made in paragraph 5 of the petition:

- (i) The seat of the Arbitration is Delhi, since all proceedings including the initial proceedings, save and except for a couple of hearings were held at Delhi.
- (ii) During the proceedings held on 13.1.2017, the parties agreed that the “venue” for Arbitration would be IBC, Sec-6, R.K. Puram, New Delhi and that thereafter, all proceedings were held in Delhi.
- (iii) The respondent had its office at Delhi.
- (iv) Lastly, that the award was passed and published in Delhi.

Submissions of Counsel:

10.1 Based on the aforesaid, it was contended on behalf of the petitioner that this Court had exclusive jurisdiction in the matter. In support of this submission, reliance was placed by Mr. Ratan K. Singh on the judgment of the Supreme Court rendered in: ***Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited & Ors.***, (2017) 7 SCC 678.

11. On the other hand, counsel for the respondent emphasised the fact that the performance of the contract took place at Patna. It was stressed that the respondent's petition laying a challenge to the award was filed prior in point of time and therefore, the Court that had jurisdiction to entertain, if at all, a fresh petition that may be preferred by the petitioner was the Patna High Court.

11.1 Furthermore, counsel for the respondent sought to highlight the fact that the contract obtaining between the parties unlike that which obtained in ***Indus Mobile Distribution Private Limited*** case, did not advert to either the venue or the seat of arbitration. The argument, in sum, was that, merely because the learned Arbitrator had fixed Delhi as the venue for most of the proceedings, would not, by itself, lead to a situation, as was sought to be contended on behalf of the petitioner, that Delhi was the seat of arbitration and therefore, by implication excluded jurisdiction of the Patna High Court.

11.2 In support of his contention, learned counsel for the respondent relied upon a judgment of a Single Judge of this Court rendered in ***Devas***

Multimedia Private Limited vs. Antrix Corporation Limited, 2017 SCC OnLine Del 7229.

Reasons:

12. Having heard learned counsel for the parties and perused the record, what has emerged and *qua* which there is little or no difference of opinion, is as follows:

- (i) First, that the contract obtaining between the parties does not allude to either the venue or the seat of arbitration.
- (ii) Second, except for two hearings, all other hearings were held by the learned Arbitrator in Delhi.
- (iii) Third, the Arbitrator in none of the proceedings has expressly determined as to what would be the place of arbitration in terms of Section 20(2) of the 1996 Act; an aspect which he is otherwise empowered to ascertain upon failure of the parties to do so.
- (iv) Fourth, the performance of the contract took place in Patna.
- (v) And lastly, the LOA dated 15.1.2010 was served on the respondent at its office in Delhi.

13. Given the foregoing, what cannot be disputed is that a part of cause of action arose within the territorial jurisdiction of the Patna High Court. Having said so, one would have to bear in mind the ratio of the judgment rendered by the Supreme Court in ***Indus Mobile Distribution Private***

Limited case. In this judgment, the Supreme Court has, *inter alia*, ruled that once there is determination with regard to the seat then, only that Court where the seat of arbitration rests will have exclusive jurisdiction for the purpose of regulating arbitral proceedings arising out of the agreement obtaining between the parties. (See paragraph 19, Pg.692 of the *Indus Mobile Distribution Private Limited* case).

13.1 Keeping in mind the aforesaid dicta laid down in ***Indus Mobile Distribution Private Limited***, what is required to be ascertained is: as to whether, in this case, the seat of arbitration stood determined by the learned Arbitrator.

13.2 Appreciation of material on record leads one to conclude that neither did the parties themselves provide for a seat/place of arbitration nor was any such determination made by the learned Arbitrator. All that the learned Arbitrator did was to fix from time to time, in consultation with the parties, the venue for the arbitration proceedings. Admittedly, even according to the counsel for the petitioner on, at least two occasions, the venue for arbitration was Noida, U.P. and not Delhi.

13.3 That being the position, it is clear that the Patna High Court would have jurisdiction in the matter since the contract was performed at Patna. On the other hand, neither the parties nor the Arbitral Tribunal took upon itself the burden of fixing the seat of arbitration and, therefore, that attribute in terms of the judgment in ***Indus Mobile Distribution Private Limited***, could not be used to suggest that this Court had jurisdiction to entertain the captioned petition. The fact that the learned Arbitrator fixed

Delhi as the venue is not same thing as saying that he had zeroed down on Delhi as the seat of Arbitration. Since, with the fixing of the place or seat of Arbitration, several legal consequences follow including that which pertains to identification of the Court that would regulate arbitration proceedings, act such of an Arbitrator has to have an element of deliberation involving the say of the parties at lis.

13.4 Interestingly, the Supreme Court in *Indus Mobile's* case, cited with approval, the judgment of the Constitution Bench in *Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 553 to propound the proposition, which is, that in a given situation, two courts could have jurisdiction in the matter. These two courts could be, according to the learned Judges, the Court chosen by the parties or by the Arbitrator as the seat of the arbitration, and the Court where the cause of action arises in a given case. The observations made in paragraph 96 at pages 605-606 of the judgment in *Bharat Aluminium Company* were adverted to in paragraph 9 of *Indus Mobile's* case. These observations being opposite are extracted hereafter:

“9. The concept of juridical seat has been evolved by the courts in England and has now been firmly embedded in our jurisprudence. Thus, the Constitution Bench in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552, has adverted to “seat” in some detail. Paragraph 96 is instructive and states as under:-

*“Section 2(1)(e) of the Arbitration Act, 1996 reads as under:
“2. Definitions.—(1) In this Part, unless the context otherwise requires—*

(a)-(d)

(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;" We are of the opinion, the term "subject-matter of the arbitration" cannot be confused with "subject-matter of the suit". The term "subject-matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be

irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.”

(emphasis is mine)

13.5 Therefore, the submission made on behalf of the petitioner that Delhi was the seat of arbitration in the facts of this case, in my view, is misconceived and, hence, is rejected. The fact that the respondent is located in Delhi or that the LOA was served in Delhi could have been considered for the purpose of triggering the jurisdiction of this Court had not the respondent moved a petition under Section 34 of the 1996 Act before the Patna High Court, *albeit*, prior in point of time to the instant petition. The provisions of Section 42¹ of the 1996 Act relied upon in this behalf by the respondent will come to its aid.

14. Therefore, for the foregoing reasons, the preliminary objection raised by the respondent is sustained.

14.1 The Registry is directed to return the petition to the petitioner or its counsel with a suitable endorsement made thereon.

¹ 42. Jurisdiction.—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

14.2 Liberty is, though, granted to the petitioner to move the appropriate Court by way of a petition under Section 34 of the 1996 Act. In case the petitioner takes appropriate steps in that behalf within two weeks of the receipt of a copy of the order, the concerned Court could consider, if thought fit, to exclude the time spent between the date when the instant petition was instituted in this Court and the date when it was returned provided the petitioner is otherwise eligible in law to avail of such benefit.

15. Furthermore, in view of the order, which has been passed in O.M.P. (COMM) No.173/2018, I.A. No.5541/2018 & 5543/2018 have been rendered infructuous and therefore, the interlocutory applications stand closed.

RAJIV SHAKDHER
(JUDGE)

JULY 11 , 2018
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