

IN THE HIGH COURT OF DELHI AT NEW DELHI

Arb.P. No. 340/2014

NEXUS DESIGN PROJECT PVT. LTD.

..... Petitioner

Through: Mr. Sacchin Puri with Mr. Khowaja Siddiqui and Mr. Abhinav Dang, Advocates for Petitioner/Applicant in IA No. 3005/2015.

versus

**TRAVEL FOODS SERVICES (DELHI TERMINAL 3)
PVT. LTD.**

..... Respondent

Through: Ms. Surekha Raman and Mr. Anuj Sarma, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
27.02.2015

IA No. 3005/2015 (for restoration of petition)

1. For the reasons stated in the application, the petition is restored to file.
2. The application is disposed of.

Arb. P. No. 340/2014

3. By this petition under Section 11 (6) of the Arbitration and Conciliation Act 1996 ('Act'), Nexus Design Project Pvt. Ltd. ('NDPPL') seeks appointment of an Arbitrator to adjudicate the disputes between it and the Respondent Travel Foods Services (Delhi Terminal 3) Pvt. Ltd. ('TFSPL') arising out of five work orders to be carried out at Terminal 3 of the Indira

Gandhi International Airport, New Delhi. The clause in the work orders regarding settlement of disputes reads as under:

“22. Settlement of Disputes:

The parties shall attempt to amicably settle all dispute concerning this Agreement and the obligations there under (the ‘Dispute’) through negotiations and consultations with each other. In the event, the Dispute is not settled amicably, either party may give written notice of dispute to the other party within ten (10) days of such non-settlement of the dispute

a. Thereupon the parties shall nominate a person mutually agreed, to attempt amicable settlement of the Dispute within five (15) days of such notice and such attempt will be commenced immediately.

b. If such Dispute arising between the parties is not amicably settled as stated above in clause 22a, such Dispute shall be referred to Arbitration. The said Arbitration shall be conducted under the provisions of the Indian Arbitration and Conciliation Act, 1996 and the rules framed there under from time to time. The Parties agree:

(i) That the arbitration proceedings will be conducted in Mumbai and proceedings shall be in English language; and
(ii) the arbitration shall be referred to a sole Arbitrator and in case the parties fail to agree to the name of the sole Arbitrator, the parties may refer to a panel of arbitrators consisting of three (3) members, one each appointed by the parties and the third appointed by the nominee arbitrators by consensus.

c. The decision of the arbitrators on the dispute shall be final and binding on the parties.

d. Notwithstanding the commencement of any dispute resolution, the parties must without delay continue to perform their respective obligations under this Agreement in

accordance with its provisions except, where a party has acted reasonably and bona fide in relation to the dispute or difference, to the extent that the matter, which is the subject of the dispute or difference and matters necessarily dependent on it cannot be proceeded with until the dispute or difference has been determined.

e. The competent courts at Mumbai alone shall have jurisdiction to entertain and try all matters, if any, arising out of the arbitration proceedings.”

4. It is plain from a reading of the above clause that the parties agreed that the arbitration proceedings would be conducted in Mumbai. Further, the parties agreed that the competent Courts at Mumbai alone would have jurisdiction to entertain and try all matters, if any, “arising out of the arbitration proceedings”.

5. It is submitted by Mr. Sacchin Puri, learned counsel appearing for the Petitioner, relying on the decision in *State of West Bengal v. Associated Contractors (2015) 1 SCC 32* that the present petition under Section 11 of the Act is not a judicial proceeding before a Court. He submits that for the purposes of an application under Section 11 of the Act, Section 42 will not apply. In other words, it is submitted that the expression ‘arising out of the arbitration proceedings’ occurring in Clause 22 (e) above would not include the present petition under Section 11 of the Act. He submitted that inasmuch as a part of the cause of action has arisen within the jurisdiction of this Court since work had to be performed at the Airport in Delhi, this Court has jurisdiction to entertain the present petition.

6. On the other hand, Ms. Surekha Raman, learned counsel appearing for the Respondent, relies on the decision in *Swastik Gases P. Ltd. v. Indian Oil Corp. Ltd.* 2013 (8) SCALE 433 to urge that once the parties have agreed that it is the Courts in Mumbai alone that would have jurisdiction then the question of this Court entertaining the present petition does not arise.

7. At the outset, the Court would like to refer to the decision of the Constitutional Bench of the Supreme Court in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552 (hereafter *BALCO*) where in para 96 (SCC) the Supreme Court recognised that the Court which would have supervisory control over the arbitration proceedings would also have jurisdiction to entertain the dispute arising out of the contract containing the arbitration clause. This would be apart from a Court which otherwise would have jurisdiction with reference to the subject-matter of the dispute. Therefore, going by the decision in *BALCO*, the Court in Mumbai would in any event have jurisdiction since the arbitration has to take place in Mumbai. However, in *BALCO*, the Court was not considering a situation where the parties agreed that their disputes would be subject to the jurisdiction of one Court, to the exclusion of other Courts.

8. That question came up for consideration in *Swastik Gases* (supra). There the Supreme Court held that although more than one Court might have jurisdiction, if the parties consciously chose one Court then it would imply that the jurisdiction of all other Courts stood excluded. In paras 30 and 31 (SCALE) the Supreme Court held as under:

“30. When it comes to the question of territorial jurisdiction

relating to the application under Section 11, besides the above legislative provisions, Section 20 of the Code is relevant. Section 20 of the Code states that subject to the limitations provided in Sections 15 to 19, every suit shall be instituted in a Court within the local limits of whose jurisdiction (a) the Defendant, or each of the Defendants where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or (b) any of the Defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the Defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or (c) the cause of action, wholly or in part arises. The explanation appended to Section 20 clarifies that a corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

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, 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 Chief Justice of the Rajasthan High Court has been excluded. 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.”** (emphasis supplied)

9. In the present case too, although it is possible to contend that the Court in Delhi would have jurisdiction since a part of the cause of action has arisen here, but since the parties have agreed under Clause 22 (e) that the Courts in Mumbai alone would have jurisdiction in respect of all matters arising out of the arbitration proceedings, they must be held to have impliedly excluded

the jurisdiction of all other courts.

10. In *State of West Bengal v. Associated Contractors* (supra) one of the questions was whether Section 42 of the Act applied to an application filed under Section 11 of the Act and that was answered in the negative. That case, on facts, did not involve an ‘exclusive jurisdiction’ clause. Nevertheless in para 22 (SCC) of the judgment, the Court contemplated such a situation and held that “where the agreement between the parties restricted jurisdiction to only one particular court, **that court alone would have jurisdiction as neither Section 31 (4) nor Section 42 contains a non obstante clause wiping out a contrary agreement between the parties it has thus been held that applications preferred to courts outside the exclusive court agreed to by parties would also be without jurisdiction.**” (emphasis supplied)

11. In the present case, Clause 22 (e) uses the words “all matters, if any, arising out of the arbitration proceedings” over which the Courts in Mumbai alone would have jurisdiction. The expression “arbitration proceedings” in the above context would include an application under Section 11 of the Act for the appointment of an Arbitrator. Consequently, the Court is of the view

that this Court lacks jurisdiction to entertain the application.

12. The petition is accordingly dismissed with liberty to the Petitioner to move the appropriate Court for relief.

S. MURALIDHAR, J

FEBRUARY 27, 2015
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