

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

13

+

ARB.P. 278/2016

M/S R.B.SAXENA & SONS

..... Petitioner

Through: Mr. Sant Sharan Upadhyaya and Ms.
Sadhna Upadhyaya, Advocates.

versus

MAHINDRA LOGISTICS LTD

..... Respondent

Through: Mr. Nishant Gautam with Mr. Syed
Messam, Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER

04.10.2016

%

1. This is a petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ('Act') filed by the Petitioner, M/s R.B. Saxena & Sons, against the Respondent, Mahindra Logistics Limited, seeking the appointment of an Arbitrator to adjudicate the disputes between the parties arising out of the contract dated 29th November 2014 which contains an arbitration clause (Article 22). The said Clause of the contract reads thus:

“Article 22: Dispute resolution

In the event that any dispute arises between the parties in connection with this Agreement, the construction of any provision of this Agreement or the rights, duties or liabilities of the parties hereto either party may give to the other party written notice of the existence of a dispute or may call a meeting to resolve the same. Such meeting shall be held within (14) fourteen days of the date of such notice (unless otherwise agreed) and will be attended to by the senior management of both the parties (who have the authority to agree on action (s) to

be taken) to resolve the dispute amicably.

If mutual resolution cannot be reached within 30 (thirty) days of such meeting, the parties shall be at liberty to refer the dispute for arbitration to be conducted as per the Arbitration and Conciliation Act, 1996 MLL shall appoint of a sole arbitrator. The venue of arbitration shall be MUMBAI only. The arbitration proceedings shall be conducted in English. Any award made in such arbitration will be final and binding on both parties.

The parties agree that all negotiations connected with the dispute shall be conducted in confidence and shall not be divulged to any unconnected third party.”

2. It is submitted that the dispute between the parties led to the Petitioner invoking Article 22 by its letter dated 16th April 2016 to the Respondents, as follows:

“This is to inform you that we have been waiting for settlements of our payments or appointing of Arbitrator from your side as per contract.

As in spite of our best possible efforts to settle the matter amicably, you have failed in duties and we have waited long enough for you to do the needful but your opportunity of appointing Arbitrator as per the agreement, now stands forfeited.

Now we are left with no other option but to move to the courts for appointing an independent Arbitrator.”

3. A preliminary objection has been raised by the Respondents to the maintainability of the present petition. Apart from pointing out that in view of Article 22 in terms whereof the place of arbitration is Mumbai, Article 23 of the Contract which talks of the Governing laws and reads thus:

“Article 23: Governing Laws

This Agreement shall be governed by and construed in accordance

with the laws of India.

The Courts of Mumbai shall have exclusives jurisdiction in respect of matters arising out this agreement.”

4. He accordingly submits that the parties have consciously decided to exclude the jurisdiction of Courts other than Mumbai Courts.

5. In countering the above preliminary objection learned counsel for the Petitioner sought to place reliance on the decision of the Supreme Court in ***Bharat Aluminium Inc. (BALCO) v. Kaiser Aluminium Technical Service Inc. 2012 (9) SCC 552*** and contended that where more than one Court has jurisdiction then any of them can be approached by the parties for relief under the Act. He also placed reliance on the decision of the learned Single Judge of the Orissa High Court in ***Dhruba Charan Mekap v. ACC Limited 2016 (1) OLR 705***.

6. In the present case the fact matrix is that the registered office of the Respondent is located in Mumbai although it has corporate office in Delhi. The agreement was entered into between them in Delhi. Under Article 19 of the agreement notice was to be served on the Respondent at its registered office in Mumbai. The Respondent states that it has only account in Mumbai and the payments were disbursed to the Petitioner from the said account and the payments were received by the Petitioner from the said account. In the above background, it requires to be examined whether the parties are bound by Article 23 of the contract which confers the exclusive jurisdiction of the Courts in Mumbai in respect of the matters arising out of the contract.

7. In **BALCO** (*supra*) the Supreme Court is dealing with the situation where the parties name a certain place as the seat of arbitration although the cause of action arises in two different places. In para 96 of the decision in **BALCO** (*supra*), it was observed as under:

“96. 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.”

8. What is immediately apparent to the above passage in **BALCO** (*supra*) is that it envisages the situation where the parties may provide for a seat of arbitration at a place which would be neutral to both the parties, they may have the intention to exclude the jurisdiction of any other court that may be approached. An example given by the Court is that under a contract the obligations are to be performed either in Kolkatta or in Mumbai, and the only arbitration is to take place at 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.” However, the situation in the present case is where more than one Court has jurisdiction and the parties have agreed to confer jurisdiction on only one of those Courts to the exclusion of other courts. Such a situation was not contemplated in the above passage in **BALCO** (*supra*).

9. A situation similar to the one in the present case is dealt with by the decision of the Supreme Court in **A.B.C. Laminart v. A.P. Agencies (1989) 2 SCC 163** where it was observed that “Where there may be two or more competent Courts, which can entertain a suit consequent upon a part of the cause of action having arisen there within if the parties to the contract agreed to vest jurisdiction on one such Court to try the dispute which might arise as between themselves the agreement would be valid.” The above decision was reaffirmed in the recent judgment of the three Judges Bench in **Swastik**

Gases P. Limited v. Indian Oil Corporation Limited reported in (2013) 9 SCC 32. After surveying the entire case law it was observed in para 31 *inter alia* that “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.”

10. In a concurring opinion in the above decisions, the legal position summarized and it was observed that “The very fact that the ouster clause is included in the agreement between the parties conveys their clear intention to exclude the jurisdiction of Courts other than those mentioned in the concerned clause. Conversely, if the parties had intended that all Courts where the cause of action or a part thereof had arisen would continue to have jurisdiction over the dispute, the exclusion clause would not have found a place in the agreement between the parties.”

11. In the present case, it is seen that the Courts both in Mumbai and in Delhi would have jurisdiction consequent upon a part of the cause of action having arisen within the jurisdiction of this Court. If the parties have agreed to confer exclusive jurisdiction on one of those Courts, i.e., Courts at Mumbai to the exclusion of other Courts, such clause is not void or hit by Section 23 of the Contract Act as explained in ***A.B.C. Laminart*** (*supra*) and reaffirmed in ***Swastik Gases P. Limited*** (*supra*).

12. In that view of the matter, this Court declines to entertain the present

petition while leaving it open to the Petitioner to approach the Court in Mumbai for appropriate relief in accordance with law.

13. The petition is disposed of in the above terms.

S.MURALIDHAR, J

OCTOBER 4, 2016

Rm

