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

+ **ARB.P. 479/2016**

BYGGING INDIA LTD.

..... Petitioner

Through : Mr S.K. Maniktala and Mr Swetab
Kumar, Advocates.

Versus

LANCO INFRATECH LTD.

..... Respondent

Through : Mr Deepak Khurana and Ms Aditi
Sharma, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **07.10.2016**

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') praying that an arbitrator be appointed for adjudicating the disputes that have arisen between the parties in relation to the "Settlement Agreement" (hereafter 'the Agreement') dated 19.02.2014 entered into between the parties.

2. Clause 6 and 7 of the Agreement are relevant and are set out below:-

"6. Any dispute or claim arising out of this Agreement shall be referred to a sole arbitrator and the arbitration will be conducted under the Arbitration and Conciliation Act, 1996. The venue of Arbitration shall be Delhi and the Courts of Delhi shall have the sole jurisdiction.

7. All Disputes shall be governed exclusively by the Courts of Delhi."

3. The learned counsel for the respondent does not dispute the existence of the Agreement or the arbitration clause. The only objection taken by the respondent is regarding jurisdiction of the court to entertain the present petition; the Agreement was executed in Gurgaon, Haryana and according to respondent, no part of cause of action has arisen in Delhi.

4. The respondent had issued a Work Order No.LITL/NPCL/Civil/CHY/WO/30 and awarded certain works to the petitioner for the purposes of construction of 275M High Twin Flue RCC Chimney, which was to be constructed in Nagarjuna 2 x 507.5 MW Thermal Power Plant at Padubidri, Udupi District, Karnataka. Certain disputes arose between the parties in relation to the said work order which were settled in terms of the Agreement.

5. Mr. Khurana, the learned counsel appearing for the respondent submitted that even though the parties had agreed that the venue of arbitration would be in Delhi and that the Courts in Delhi would have the exclusive jurisdiction, the same did not confer jurisdiction on the courts in Delhi since the agreement was executed in Gurgaon and no part of the cause of action had arisen in Delhi. He further submitted that the decision of the Supreme Court in **Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Services, Inc. and ors**: 2012 (9) SCC 552 would not be applicable since in that case the court was concerned with the supervisory jurisdiction in relation to an International Commercial Arbitration and the decision was in the context of “seat” or “place” of arbitration which is not the same as the "venue" of arbitration. He submits that the word “venue”

only defines where the meetings of the arbitral tribunal are to be held. He also relied upon the decision of the Bombay High Court in Anilkumar Phoolchand Sanghvi and Ors. v. Chandrakant P. Sanghvi and Ors: 2016 (2) ABR 535 in support of his contention that an application under Section 11 would not lie before a court only because meetings of arbitral tribunal are held within the territorial jurisdiction of that Court.

6. He has also relied upon the decision of the Swastik Gases Private Limited v. Indian Oil Corporation Limited: (2013) 9 SCC 32 in support of his contention that the provisions of Section 20 of the Code of Civil Procedure would also be relevant as to the territorial jurisdiction relating to an application under Section 11 of the Act.

7. I have heard the learned counsel for the parties.

8. At the outset, it is relevant to refer to the paragraph 96 of the decision of the Supreme Court in the case of *Bharat Aluminium Company* (*supra*) which is set out below:-

“96. **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.”

9. The aforesaid decision clearly explains that the courts having jurisdiction where the arbitration is located would also have jurisdiction under Part-I of the Act. A Division Bench of this Court has also followed the aforesaid dicta in its decision in **Ion Exchange (India) Ltd. V. Panasonic Electric Works Co. Ltd.**: 208 (2014) DLT 597 (DB). In that case, the Division Bench concurred with a similar view expressed by a Single Judge of this Court in **Sai Consulting Engineers Pvt. Ltd. v. Rail Vikas Nigam**: 198 (2013) DLT 507 and held as under:-

"We agree with the view taken in Sai Consulting (supra) and hold that the Courts at the seat or place of arbitration would have territorial jurisdiction to entertain an application under the said Act subject to the provisions of Section 42 thereof, irrespective of the fact that the cause of action arose elsewhere and/or the respondent resides elsewhere."

10. The distinction sought to be drawn by the petitioner between the "venue" of arbitration and the "seat" of arbitration would only arise in a case where the venue is different from the "seat" of arbitration. In the present case, the parties had expressly agreed that the arbitration shall be in Delhi and further also agreed that "*the Courts of Delhi shall have the sole jurisdiction*". Further, it was also reiterated in clause 7 of the Agreement that

“All Disputes shall be governed exclusively by the Courts of Delhi”. This clearly indicates that the intention of the parties was that not only Delhi would be the place of arbitration but the courts at Delhi would also have exclusive jurisdiction in relation to all disputes including the arbitral process. In the circumstances, I am unable to accept the contention that this court would not have the jurisdiction to entertain the present petition.

11. The decision of the Supreme Court in the case of ***Swastik Gases Private Limited*** (*supra*) reiterates the well settled principle that where two courts have jurisdiction, the parties can agree to the court that would have exclusive jurisdiction. An agreement between parties that courts at a place – in that case - would have jurisdiction, would necessarily imply that parties had agreed to exclude recourse to other courts that would otherwise also have jurisdiction over the subject matter of disputes. This decision is of no assistance to the respondent, since in the present case the parties had agreed that courts at Delhi would have exclusive jurisdiction.

12. The principle that the parties by agreement cannot confer jurisdiction, is also of no application in the facts of the present case. The parties had agreed that the arbitral proceedings will be in Delhi and that by law confers jurisdiction on the Courts at Delhi. Further, the parties had expressly agreed that the Courts at Delhi would have exclusive jurisdiction and, therefore, no other courts except the courts in Delhi can exercise jurisdiction over the disputes. This principle was stated by the Supreme Court in ***Swastik Gases*** (*supra*) in the following words:-

“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.”

13. The controversy can be also viewed from another angle. It is well settled that the Courts where an agreement is to be performed would have jurisdiction. In **ABC Laminart Pvt. Ltd. & Anr. v. A.P. Agencies, Salem:** (1989) 2 SCC 163, the Supreme Court had expressly stated that “*The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have (been) performed or its performance completed.*”

14. It is also well settled that an arbitration agreement is an independent agreement and in terms of Section 20(1) of the Act, the parties are free to agree on the place of arbitration. In one sense, the place of arbitration is where the arbitration agreement is to be performed. Thus, clearly the Court having jurisdiction over the place of arbitration would indisputably have jurisdiction under Part-I of the Act.

15. The decision of the Bombay High Court in **Anilkumar Phoolchand** (*supra*) also does not further the case of the respondent. In that case, the respondents were all residents of Pune. The registered office of the company involved in the disputes was located in Pune. The agreements in question were signed in Pune and various suits had also been filed in the District Court, Pune. More importantly, the parties had not agreed to the venue or the place of arbitration. The Court in its decision had specifically noted that “*Admittedly, there is no express choice of fixed 'venue' of the parties. The cause and real connection, therefore, as per FSA is at Pune*”. The Court further concluded that the process of dispute resolution of family matters, is a subject matter of arbitration which is within the jurisdiction of the Pune Court and, therefore, the Pune Court would have to exercise supervisory jurisdiction over the arbitral process. In that case, the arbitrator had also held preliminary meetings in Mumbai and, therefore, it was contended that Mumbai be treated as seat/situs of arbitration as contemplated under Section 20 of the Act. The aforesaid contention was rejected as the Court found that there was no express choice of fixed venue of arbitration and the arbitrator had certain preliminary meetings which were held in Mumbai as well as at Pune. In the present case, the parties have expressly agreed that the venue

of arbitration would be Delhi.

16. In the circumstances, I am unable to accept the contention that this court does not have jurisdiction.

17. Accordingly, with the consent of parties, it is directed that an Arbitrator be appointed under the Rules of the Delhi International Arbitration Centre (DIAC). The representatives of the parties shall appear before the co-ordinator, DIAC on 02.11.2016 at 11.00 a.m. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules.

18. The petition is disposed of.

OCTOBER 07, 2016
pkv

VIBHU BAKHRU, J

