

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

Arbitration Case No. 33 of 2017
Date of Decision: 07.10.2017

M/s Green Builders & Promoters Pvt. Ltd.

.....Petitioner

versus

Ramesh and others

.....Respondents

CORAM: HON'BLE MR.JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE

Present : Mr. Rupinder Khosla, Senior Advocate with
Mr. Aman Sharma, Advocate, for the petitioner.
Mr. Umesh Kaushik, Advocate, for the respondents.

S.J.VAZIFDAR, CHIEF JUSTICE

This is a petition under section 11 (6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for the appointment of a sole arbitrator to adjudicate upon the disputes and differences between the parties.

2. The parties had entered into a contract dated 09.11.2012 titled "Collaboration/Development Agreement", clause 31 whereof contains an arbitration agreement which is sought to be invoked. Clause 31 reads as under:-

"31. All disputes arising out of or in connection with this agreement shall be resolved by mutual discussions between the owners and developer within 15 (fifteen) days of the said dispute arising, failing which, such disputes shall be referred to conciliation in terms of the Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactments thereof. If the conciliation proceedings fails to resolve the disputes, then the disputes,

will be referred for arbitration to a mutually agreed sole arbitrators, will be a condition precedent to any action under this agreement. This agreement shall be subject to the exclusive jurisdiction of Court of Gurgaon to the specific exclusion of all other courts and the venue for arbitration shall be at New Delhi alone. The arbitrator will be required to give a reasoned award within a period of 4 (four) months of entering the references.” (emphasis supplied).

3. Several objections have been raised by Mr. Kaushik, the learned counsel appearing on behalf of the respondents. It is neither necessary nor permissible for me to express any opinion regarding these contentions as I have come to the conclusion that this Court does not have jurisdiction to entertain the application under section 11 of the Act.

4. Only the Delhi High Court has jurisdiction in view of the last but one sentence of clause 31 which reads:

“This agreement shall be subject to the exclusive jurisdiction of Court of Gurgaon to the specific exclusion of all other courts and the venue for arbitration shall be at New Delhi alone”. (emphasis supplied).

5. I have held that the word ‘venue’ in this sentence refers to the place or the seat/juridical seat of arbitration. I will furnish my reasons for this view shortly. If I am correct in this view, this Court would not have jurisdiction to entertain the application in view of a long line of authorities. It is sufficient to refer to the judgment of the Supreme Court in *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and others* 2017(7) SCC 678. Clause 18 in so far as it is relevant and clause 19 of the agreement in that case read as under:-

“Dispute resolution mechanism:

If the dispute cannot be amicably resolved by such officers within thirty (30) days from the date of referral, or within such longer time as mutually agreed, such dispute shall be finally settled by arbitration conducted under the provisions of the Arbitration and Conciliation Act, 1996 by reference to a sole arbitrator which shall be mutually agreed by the parties. Such arbitration shall be conducted at Mumbai, in English language.

The arbitration award shall be final and the judgment thereupon may be entered in any court having jurisdiction over the parties hereto or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be.

19. All disputes and differences of any kind whatever arising out of or in connection with this agreement shall be subject to the exclusive jurisdiction of courts of Mumbai only.” (emphasis supplied).

The High Court held that as no part of the cause of action arose in Mumbai, only the Courts in three other territories could have the jurisdiction in the matter as the cause of action had arisen within the jurisdiction of those Courts. The High Court held that the exclusive jurisdiction clause would not apply as the Courts in Mumbai would have no jurisdiction at all. It was contended on behalf of the appellant on the other hand that even if it was conceded that no part of the cause of action arose in Mumbai, the seat of arbitration being at Mumbai, the Courts in Mumbai would have the exclusive jurisdiction in all proceedings over the same. To this it was contended on behalf of the respondents that no part of the cause of action having arisen in Mumbai even if the seat of arbitration were at Mumbai, it would make no difference. The Supreme Court after referring to the provisions of the Act and a long line of authorities on the issue held as under:-

“19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is

clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to “seat” is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction — that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been held above, the moment “seat” is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

20. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see *Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.* [*Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.*, (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] This was followed in a recent judgment in *B.E. Simoes Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.* [*B.E. Simoes Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.*, (2015) 12 SCC 225 : (2016) 1 SCC (Civ) 427] Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment [*Datawind Innovations (P) Ltd. v. Indus Mobile Distribution (P) Ltd.*, 2016 SCC OnLine Del 3744] is set aside.

.....(emphasis supplied)”

6. The ratio of the judgment requires no analysis. It must, however, be held that the judgment was not based on clause 19 set out above. It was based on the provisions of clause 18 also quoted above. This is evident from the second sentence in paragraph-19 of the judgment where

it is held that “.....and clause 19 further makes it clear.....”

It may also be noted at this stage that the Supreme Court has used the word “venue” in paragraph-20 to mean the seat of arbitration.

7. Thus if the word ‘venue’ in clause 31 refers to the seat or the place of arbitration, the Delhi High Court would have the exclusive jurisdiction in the matter, even assuming that no part of the cause of action has arisen in New Delhi.

8. This brings me to the reasons for my view that the word ‘venue’ in the last but one sentence of clause 31 infact refers to the seat or the place of arbitration. The words ‘venue’ and ‘place’ are interchangeable. Depending upon the context in which these words are used, they could at once refer to the fixed place of the arbitration i.e. the seat or the place of arbitration or only the place where the proceedings are held by the arbitral tribunal for convenience.

9. That the words ‘place and venue’ are inter-changeable is evident from section 20 of the 1996 Act which reads as under:-

“20. Place of arbitration.—(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.”

In paragraph-19 of the judgment of the Supreme Court, where it is held that under sub sections (1) and (2) the word “place” is used to refer to the ‘juridical seat’, whereas in sub section (3) the word ‘place’ is

equivalent to 'venue'. Thus depending on the context the word 'place' can refer to the 'venue' and vice-versa.

As I observed earlier in paragraph-19 of the judgment the Supreme Court itself used the word 'venue' as a reference to the place of arbitration.

10. The question then is whether the word 'venue' is used in clause 31 to denote the place or the seat/juridical seat or merely a venue where the hearings are held for convenience. In my view the word 'venue' refers to the seat or the place of arbitration and not merely to the location where the arbitral proceedings may be conducted. If the intention of the parties was to merely refer to the powers upon the arbitrator to hold hearings at any particular location, clause 31 would have been worded entirely differently. It would have conferred such a power in those terms. Their not having done so, it follows that the purpose of those words was to fix the seat or place of arbitration.

11. The first part of the last but one sentence in clause 31 refers to the jurisdiction of the Courts at Gurgaon for purposes other than arbitration, whereas the second part of the sentence refers to the juridical seat of the arbitration. Further the last words 'New Delhi alone' emphasize the seat or the place of arbitration to be New Delhi and no other place. If the intention was that only the hearings were to be held at New Delhi, the parties would have stated so in those terms.

12. Mr. Kaushik, relied upon the judgment of a learned Single Judge of Delhi High Court in *PCP International Limited v. LANCO Infratech Limited* 2015 SCC Online Delhi 10428. In that case the learned Judge dealt with a petition under section 9 of the Act. The learned Judge

found that no part of the cause of action had arisen at Delhi and held that merely because a party chooses a contractual clause conferring jurisdiction at Delhi, the court would not have territorial jurisdiction. Mr. Kaushik relied upon the following observations in the judgment:-

“5. Therefore, neither the contract is executed at Delhi nor the contract was to be performed (or is breached) at Delhi and nor is any payment made under the contract at Delhi. Even the respondent does not carry on business or work at Delhi but does so either at Gurgaon in Haryana or at Hyderabad in Telangana. Clearly therefore this Court would have no territorial jurisdiction to try this petition inasmuch as merely because a party chooses a contractual clause to give them jurisdiction at Delhi, this Court would not have territorial jurisdiction once cause of action wholly or in part does not arise within the territorial jurisdiction of this Court.

6(i). Learned senior counsel for the petitioner has sought to argue by placing reliance upon the Constitution Bench judgment of the Supreme Court in the case of *Bharat Aluminium Company v. Kaiser Aluminium Technical Service, Inc.* (2012) 9 SCC 552 that once the venue of arbitration is in Delhi, this Court would have territorial jurisdiction.

(ii) In my opinion, the argument urged on behalf of the petitioner that merely because the venue of arbitration is in Delhi, this Court would have territorial jurisdiction is a misconceived argument because there is a difference between venue of the arbitration and seat of arbitration. It is only the seat of arbitration which will give territorial jurisdiction and not the venue of jurisdiction. I note that ‘seat’ means the place where court is, which has the territorial jurisdiction with respect to the subject matter/cause of action of the matter, and venue is the place, which is a place where the arbitral tribunal sits to hold the arbitration proceedings and which sitting of the arbitral tribunal need not be at the place where the ‘seat’ of arbitration is located. Nowhere the Supreme Court in the judgment in the case of *Bharat Aluminium Company* (supra) lays down the law that even if there is a difference between the seat of arbitration and venue of arbitration, the venue of arbitration (which is not the ‘seat’) will confer territorial jurisdiction to a Court.....

(emphasis supplied).”

11.(A) I am, however, with respect unable to agree with the observations in the judgment emphasized by me. It cannot be said that the ‘seat’ only means the place where the Court, which has territorial

jurisdiction with respect to the subject matter/cause of action of the matter is situated. The seat of arbitration is not necessarily the place where the cause of action relating to the facts of dispute arise. If that is what was meant by the learned Judge it is with respect contrary to the judgment of the Supreme Court in *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited (supra)*.

(B) The learned Judge quoted extensively from the judgment of the Supreme Court in *Enercon (India) Ltd. v. Enercon GmbH (2014) 5 SCC 1*. It is pertinent to note that in the last sentence of paragraph-98, the Supreme Court held that “*in the present case, London is mentioned only as a “venue” of arbitration which, in our opinion, in the facts of this case cannot be read as the “seat” of arbitration.*” Similarly, in paragraph-104, the Supreme Court observed:-

“In view of the above, we are unable to accept the submissions made by Dr.Singhvi that in this case, the term ‘venue’ ought to be read as seat.”

There is certainly a difference between the place of arbitration and the venue where the arbitral tribunal merely holds its proceedings for convenience. The Supreme Court did not hold that the venue of arbitration cannot ever be the seat of arbitration. It is only in the facts of that case that it was held that the words ‘venue of arbitration’ did not mean the ‘seat of arbitration’.

12. The learned Judge then held:-

“7. The aforesaid paragraphs in the judgment in the case of *Enercon (India) Limited (supra)* make it clear as to what is the difference between the venue and the seat of arbitration and that merely because the arbitrator chooses to hold the arbitration at a venue which is

different than the seat of the arbitration does not confer territorial jurisdiction on the court where the venue of the arbitration exists. Therefore merely because the venue of arbitration is in Delhi, this Court would not have territorial jurisdiction because under Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 'Court' is defined as a court having jurisdiction to decide questions forming the subject matter of arbitration if the same had been the subject matter of the suit, i.e, normal proceedings of the Code of Civil Procedure, 1908 (CPC) with respect to territorial jurisdiction being Sections 16 to 20 will apply and hence applying these Sections with the ratios of the judgments of the Supreme Court in the cases of *Patel Roadways Limited, Bombay* (supra) and *A.B.C Laminart Pvt. Ltd.* (supra), this Court would have no territorial jurisdiction.

These observations were on the basis that the venue at which the arbitration proceedings are held was not the seat of arbitration. There is no quarrel with the proposition that merely because an arbitrator chooses to hold the arbitration proceedings at a particular venue, which is not the seat of arbitration, the court where the arbitration proceedings are held, would not have jurisdiction. I have, however, come to the conclusion that clause 31 which falls for my consideration uses the term venue to mean the seat or place of arbitration. However, the provisions of Sections 16 to 20 of the Code of Civil Procedure would not negate the jurisdiction of the Court if the place of seat of arbitration is located within its territorial jurisdiction even if no part of the cause of action arises within the territorial jurisdiction of that Court. A view to the contrary would militate against the observations in paragraph-19 of the judgment of the Supreme Court in *Datawind Innovations (P) Ltd. v. Indus Mobile Distribution (P) Ltd.* 2016 SCC Online Del 3744.

13. Mr. Kaushik, then relied upon the judgment of another learned single judge of Delhi High Court in *Sarvanthi Infratech Private Limited v. Tricolite Electrical Industries Limited* 2016 SCC Online Delhi 6313. The learned Judge held that :-

“12. As rightly observed by the Court in *PCP International Ltd. v. Lanco Infratech Ltd.* (supra), the Supreme Court in *Bharat Aluminium Company v. Kaiser Aluminium Technical Service* (2012) 9 SCC 552 (hereafter ‘*Balco*’) did not use the words ‘seat’ and ‘place’ interchangeably. In other words the Supreme Court in *Balco* did not hold that the venue of the arbitration per se confer territorial jurisdiction on a Court. In fact in *Balco* the Supreme Court held that “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 Supreme Court was not considering an agreement whereby the parties agreed that one particular Court, which otherwise has jurisdiction, would have exclusive jurisdiction.

13. If one has to accept the plea of the Petitioner in the present case by merely choosing the venue of the arbitration at Delhi, the jurisdiction would be conferred on this Court then it would be inconsistent with the other portion of the arbitration clause which reflects the express intention of the parties that “Courts in Gurgaon shall have exclusive jurisdiction in all matters arising under this Purchase Order”. Therefore, even if the choice of venue is taken to be indicative of the jurisdiction of the Court, in the present case that plea cannot be accepted since it would be inconsistent with the express intention of the parties to confer exclusive jurisdiction on the Courts in Gurgaon. Even otherwise in the present case no part of cause of action has arisen within the jurisdiction of this Court. Both the parties are located outside its territorial jurisdiction. As pointed out in *PCP International Ltd.* (supra) even in the context of domestic arbitration the seat will determine the Court that would have “exclusive jurisdiction to oversee the arbitration proceedings”. (emphasis supplied).

14. I have interpreted clause 31 of the agreement in the present case to the effect that the conferment of jurisdiction on the Courts in Gurugram is for matters other than arbitration. What I have observed in relation to the judgment in *PCP International Ltd. v. Lanco Infratech Ltd.*

(supra) applies equally to this case. The judgment, therefore, does not support the respondents’ case.

15. In the circumstances, the petition is dismissed but only on the ground that this Court does not have territorial jurisdiction. The petitioner is always at liberty to file a petition for the same relief in the court of competent jurisdiction, namely, the Delhi High Court.

(S.J. VAZIFDAR)
CHIEF JUSTICE

07.10.2017
ravinder

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No