IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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ARB No.96 of 2016 (O&M)
Date of Decision: 03.05.2017

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Aseva Limited Liability Corporation

….Petitioner

Vs.

Superficial Health and Spa Private Limited and others

….Respondents

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CORAM: HON'BLE MR.JUSTICE RAKESH KUMAR JAIN

Present: Mr.Aashish Aggarwal, Sr. Advocate, with
Mr.Kartik Gupta, Advocate,
for the petitioner.

Mr.Akshay Bhan, Sr. Advocate, with
Mr.Alok Mittal, Advocate,
for respondent No.1.

Mr.Surinder Sharma, Adocate,
for respondent No.3.

Ms.Rupa Pathania, Advocate,
for respondent No.4.

Mr.Rajiv K. Garg, Advocate,
for respondent No.5.

Mr.Anupam Bhanot, Advocate,
for respondent No.6.

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RAKESH KUMAR JAIN, J. (ORAL)

This petition is filed under Section 9 of the Arbitration and Conciliation Act, 1996 [for short 'the Act'] making various prayers before the matter is referred to the Arbitrator in terms of the Sub-Franchise Agreement dated 13.09.2010 entered into between the petitioner and respondents No.1 & 2.

The following order was passed at the time of issuance of notice of motion on 06.05.2016: -

> *“This is a petition filed under Section 9 of the amended Arbitration and Conciliation Act, 1996 (hereinafter referred to as “1996 Act”) by invoking the amended provisions of Section 2(f) owing to the fact that it being International Commercial Agreement having entered into between the petitioner and respondent No.2. Thereafter, vide Annexures P-2 and P-3, tripartite agreement dated 03.09.2010 was entered into between petitioner and respondents. The grouse of the petitioner is that in view of the Franchise Agreement (Annexure P-2) that petitioner is Franchiser and respondent No.1 being Sub-Franchiser. The flagship location as specified in the attachment is Aseva LLC West End Mall, 5th Floor, Plots 2 and 3 Ferozepur Road,*
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> *Opposite Forest Department Office, Ludhiana. As per the terms and conditions of the Agreement dated 08.07.2011 (Annexure P-2) which has been entered into in pursuance to LOI dated 17.6.2010 (Annexure P-1), the petitioner - Franchisee was to open Sub Franchisees in period specified therein and some*

commission/payment was also fixed on opening of such outlets.

Mr. Ashish Aggarwal, learned Senior Counsel assisted by Mr. Kartik Gupta, Advocate appearing on behalf of the petitioner submits that vide Annexures P-17 and P-18, respondent No.1 without the consent of the petitioner had unlawfully expanded rights of the Franchisee by entering into Sub Franchise agreement with certain other persons at Amritsar and Jalandhar by opening the outlet under the name and style Woodhouse Day Spa which consists of providing following facilities:-

i) Spa
ii) Saloon
iii) Bridal
iv) Gourmet Cafe
v) Food and Beverages
vi) Gym

Respondent No.1 was required to complete the project within a period of one year. Now period of 4 years has elapsed but, only 30% of work has been done, in essence, only Gym is running which is evident from the photographs. Tripartite Agreement dated 13.09.2010 (Annexure P-3) contains the arbitration clause which deals with the provisions of 1996 Act shall be applicable for seeking interim *relief and not for the purpose of arbitration proceedings. He further submits that in this regard, a legal notice dated 29.04.2016 (Annexure P-19) has been sent to the respondents pointing the blatant violation of infringement of the terms and condition of the agreement, Annexure P-2. It is in these circumstances had intention has been shown to resolve the dispute by the Arbitrator and accordingly, the petition under Section 9 seeking interim relief has been filed. The aforesaid agreements (Annexures P-17 and P-18) are of 2012. It has been submitted that petitioner is cancer survivor and had to travel from India to America for treatment. Having returned back and acquired knowledge aforesaid, then immediately sent a legal notice.*

Notice of motion for 13.05.2016 to respondent No.1 only.

Dasti also.

Till then, respondents are restrained from interfering the petitioner from Managing the Gym, who, has been appointed as Project Manager on certain terms and conditions of the agreement and further restrained from entering into Sub Franchise

Agreement and creating third party rights.

He further submits that liberty be granted to implead the Sub Franchisees as mentioned in Annexures P-17 and P-18.

Ordered accordingly.

Liberty is granted to serve respondent No.2 being proforma respondent through e-mail, at the moment."

The said order was followed by an interim order dated 13.5.2016, which read as under: -

"CM No.10067-CII of 2016

For the reasons stated in the application, application is allowed.

Applicants as mentioned in the application are ordered to be impleaded as respondent Nos.3 and 4.

Amended Memo of Parties has been placed on record. The same is taken on record.

CM No.10068-CII of 2016

Notice in the application be issued for 18.5.2016.

Learned counsel for the respondents seeks time to file reply.

ARB NO.96 of 2016 (O&M)

Let notice of this appeal be issued to respondent Nos.3 and 4.

Dasti as well.

In the meantime, construction, if any, is raised by the newly added respondents, the same shall be at their risk and cost.

Respondents are directed to render accounts with regard to earnings, receipt of account of allotment of Sub Francisee in defiance to the original agreement before the next date in this Court.

Copy of the order be given under signatures of the Reader attached to the Bench."

It was further followed by another interim order dated 13.06.2016 by which additional prayers were made and on 17.6.2016, following order was passed: -

"<u>C.M. No.12836-CII of 2016</u>

The application has been filed for impleading A.B. Motions Private Limited, Wave Mall, Plot Nos.2 and 3, Ludhiana through its General Manager, Mr. Parth Nayak and XEN, Punjab State Power Corporation Limited as respondent Nos.5 and 6 on the ground that during the interregnum of the aforesaid proceedings under Section 9 Arbitration and Conciliation Act, 1996 this Court had already passed an interim order on 06.05.2016 restraining the respondents from *interfering the petitioner from managing the Gym, who had been appointed as Project Manager of the agreement and further restraint from entering into Sub Franchise Agreement and creating third party rights.*

Accordingly, the application is allowed and the proposed parties i.e. A.B. Motions Private Limited, Wave Mall, Plot Nos.2 and 3, Ludhiana through its General Manager, Mr. Parth Nayak and XEN, Punjab State Power Corporation Limited are ordered to be impleaded as respondent Nos.5 and 6 respectively.

Amended memo of parties is taken on record. Registry is directed to place the amended memo of parties at an appropriate place.

<u>CM No.12837-CII-2016</u>

During the interregnum of the proceedings, an application bearing No.12693-CII of 2016 had been moved on the premise the proposed respondent Nos.5 and 6 have disconnected the electricity and water connections in connivance with respondent No.1 for non-payment of electricity charges. This Court vide order dated 13.06.2016 has issued a direction to restore the electricity and water connection.

The present application in C.M. No.12837-CII of 2016 has been moved by the applicant for compliance of the aforementioned order on the premise that when the order dated 13.06.2016 was brought to the notice of the newly added respondents, the same was not complied with on the ground that respondent No.5 is not a party to the petition and respondent No.6 is to supply the electricity and water connection to the mall. Accordingly, respondent No.5 is directed to restore the electricity and water connection to the gym under the name of style of the Woodhouse Day Spas Corporation.

Apparently, there appears to be a collusion between respondent No.1 and respondent No.5 to circumvent the order passed by this Court on 13.06.2016. In case, even otherwise electricity and water connection is not

restored, the order of the Court, if it is shown to the person not party, has to be respected and regarded. Respondent No.5 through its General Manager, Mr. Parth Nayak is directed to be present in Court on the next date of hearing i.e. 04.07.2016 to show cause as to why contempt proceedings should not be initiated against him.

The application stands disposed of with the above directions."

At the threshold, counsel appearing on behalf of respondent No.1 has challenged the maintainability of this petition before this Court on the ground that the judicial seat is at New Delhi in view of the arbitration agreement dated 13.09.2010 allegedly entered into between the parties.

The relevant portion of the provision regarding arbitration, in the agreement, is reproduced as under: -

"G. ARBITRATION . Except as otherwise specified in this agreement, any dispute, controversy, or claim arising out of or relating to this agreement, or the Making, Breach, Termination, or invalidity thereof, shall be finally settled under the rules of arbitration of the international chamber of commerce (or any similar successor rules thereto) ("Rules") as are in force on the date when a notice of arbitration is received. Each party hereby agrees and confirms that the provisions of the (Indian) Arbitration and Conciliation Act, 1996 are not applicable to the dispute resolution by arbitration as provided in this

agreement. Except to the extent required for seeking interim relief and for enforcement of an award.

(1) The arbitrator(s) shall be appointed in accordance with the rules. The number of arbitrators shall be one unless either party to the arbitration requests otherwise, in which case there shall be three. If the arbitral tribunal shall consist of three arbitrators, each party shall select one arbitrator and the two party-appointed arbitrators shall select the third arbitrator. The language to be used in the proceedings shall be English. The place where arbitration proceedings shall be conducted in New Delhi, India.

(2) The decision of the arbitral tribunal shall be final and binding upon the parties, and such decision shall be enforceable through any courts having jurisdiction. The arbitral tribunal shall have no authority to amend or modify the

> *terms of this agreement. The arbitral tribunal shall have the right to award or include in their award any relief they deem proper in the circumstances, including, money damages (with interest on unpaid amounts from the date due), specific performance and legal fees and costs in accordance with this agreement; however, the arbitral tribunal may not award punitive, consequential or exemplary damages. The costs and expenses of arbitration shall be allocated and paid by the parties as determined by the arbitral tribunal."*

Counsel for respondent No.1 has further submitted that since it is allegedly agreed between the parties that the place where the arbitration proceedings would be conducted shall be New Delhi (India), therefore, the petition filed under Section 9 of the Act before this Court is not maintainable. In this regard, he has relied upon a decision of the Supreme Court rendered in the case of ***"Indus Mobile Distribution Private Limited*** *Vs.* ***Datawind Innovations Private Limited and others" 2017(5) SCALE 60.*** It is submitted that if the seat of the arbitration is agreed to between the parties then the proceedings initiated under Part-I of the Act could only be at that seat and the Courts having the territorial/supervisory jurisdiction over that seat shall have competence to entertain such like petitions.

On the other hand, learned counsel for the petitioner has submitted that the decision in the case of ***Indus Mobile (Supra)*** would not be applicable to the case of the petitioner because the alleged agreement between the parties was of the year 2010 whereas the decision in the case of ***Indus Mobile (Supra)*** is solely based upon the decision rendered by the Supreme Court in the case of ***"Bharat Aluminium Co.*** *Vs.* ***Kaiser Aluminium Techincal Service, Inc."*** *2012(9) SCC 552* in which the Supreme Court has held that the judgment rendered in the case of ***Bharat Aluminium (Supra)*** would be prospective, meaning thereby it would apply to an agreement which would be entered between the parties after the date of decision in that case i.e. 6.9.2012 whereas the agreement entered into between the parties in this case was prior to that date. It is, therefore, submitted that the judgment in the case of ***Indus Mobile (Supra)*** is distinguished on its own facts otherwise there is no dispute about the ratio laid down therein.

I have heard both the learned counsel for the parties and examined the available record with their able assistance.

Although the respondents have denied the existence of the agreement, which has been otherwise relied upon by the petitioner for filing the petition under Section 9 of the Act yet, it is submitted by the respondents that even if the agreement is presumed to be in existence as stated by the petitioner, though not admitted, the application filed before this Court under Section 9 of the Act is not maintainable because the arbitration seat has been decided between the parties at New Delhi. It is, thus, submitted that the Courts at New Delhi shall have the jurisdiction to entertain the application under Section 9 of the Act. In the case of ***Indus Mobile (Supra)***, which is the sole reliance of the respondents, the issue was *"as to whether, when the seat of arbitration is Mumbai, an exclusive jurisdiction clause stating that the courts at Mumbai alone would have jurisdiction in respect of disputes arising under the agreement would oust all other courts including the High Court of Delhi, whose judgment is appealed against?"*

In that case, the Court had referred to the provisions of the 'Dispute Resolution Mechanism' much less the arbitration in which it was specifically provided that *"such arbitration shall be conducted at Mumbai, in English language"*. It was, however, also provided that *"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"*.

In the case of ***Indus Mobile (Supra)***, the Court has found that two petitions were filed under Sections 9 and 11 of the Act before the Delhi High Court. Both the petitions were disposed of by the said Court and those orders were challenged before the Supreme Court on the ground that the jurisdiction of Delhi High Court was specifically excluded because the seat of adjudication was determined by the parties by way of agreement as at Mumbai. In this background, it has been held in the said judgment that *"this Court reiterated that once the seat of arbitration has been fixed, it would be in the nature of an exclusive jurisdiction clause as to the courts which exercise supervisory powers over the arbitration"*. It has further been held therein that *"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 Section 16 to 21 of the 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. It is well settled that where more than one court has jurisdiction, it is open for parties to exclude all other courts. For an exhaustive analysis of the case law, see Swastik Gases Private Limited v. Indian Oil Corporation Limited, (2013) 9 SCC 32. This was followed in a recent judgment in B.E. Simoese Von Staraburg Niedenthal and Another v. Chhattisgarh Investment*

Limited, (2015) 12 SCC 225. 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 is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. Appeals are disposed of accordingly".

Insofar as the decision in the ***Bharat Aluminium (Supra)*** is concerned, the issue in that case was *"as to whether part-I of the Act would apply to the proceedings which take place outside India"?* The conclusion given by the Supreme Court in that matter is as under:-

> *"198. In view of the above discussion, we are of the considered opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the*

Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.

199. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International (supra) and Venture Global Engineering (supra). In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simplicitor would be maintainable in India, on the basis of an international

> *commercial arbitration with a seat outside India.*
>
> *200. We conclude that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which take place within the territory of India.*
>
> *201. The judgment in Bhatia International (supra) was rendered by this Court on 13th March, 2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engineering (supra) has been rendered on 10th January, 2008 in terms of the ratio of the decision in Bhatia International (supra).*
>
> *Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter."*

It was further held that the judgment in the case of ***"Bhatia International Vs. Bulk Trading S.A. and another"*** *2002(2) RCR (Civil) 474* and *"**Venture Global Engineering Vs. Satyam Computer Services Ltd. and another"*** *2008(2) RCR (Civil) 12* were saved and it was ordered that henceforth the law declared in the case of ***Bharat Aluminium (Supra)*** shall be the law declared by the

Supreme Court which would apply prospectively to all the agreements executed thereafter.

The argument raised by learned counsel for the petitioner, thus, is erroneous to the extent that since the agreement was executed between the parties before the decision was rendered in the case of ***Bharat Alumumium (Supra)***, therefore, the decision rendered in the case of ***Bharat Alumumium (Supra)*** would not apply as the law has been declared prospectively which has been allegedly made the basis for taking a decision in the case of ***Indus Mobile (Supra).*** Actually there was no such issue in the case of ***Bharat Alumumium (Supra)***, which has been decided by the Supreme Court in the case of ***Indus Mobile (Supra)*** where the only issue was that if the parties, by way of an agreement, determine the seat for the purpose of arbitration then whether the Court outside the territorial jurisdiction would have the jurisdiction the particular Court shall have the jurisdiction alone or the petition under Section 9 and 11 of the Act etc. can be filed in all other Courts in part or whole.

There is no doubt in my mind that the judgment rendered by the Supreme Court in the case of ***Indus Mobile (Supra)*** would apply with full force insofar as the facts of the present case are concerned *de hors* the fact that the agreement entered into between the parties was prior to the decision in the case of ***Bharat Aluminium (Supra)***.

With these observations, I am of the considered opinion that the application filed under Section 9 of the Act by the petitioner before this Court is not maintainable. However, the petitioner may, if so advised, file an appropriate application, in accordance with law, before the Court of competent jurisdiction.

It is needless to mention that since, I have not touched the merit of the case at all, therefore, all the issues arising in the application, filed by the petitioner or objections raised by the respondents shall remain open for adjudication and since, I have relied upon the decision rendered in the case of ***Indus Mobile (Supra)***, therefore, it is ordered that the injunction granted by this Court to the petitioner shall continue for a period of four weeks from the date of pronouncement of this order.

(RAKESH KUMAR JAIN)
03.05.2017 **JUDGE**
Vivek

Whether speaking/reasoned *Yes/No*
Whether reportable *Yes/No*