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

+ **O.M.P.(I) (COMM.) 442/2016 & IA No. 16058/2016**

ADESH ENTERPRISES LLP & ORS.

..... Petitioners

Through: Mr. Ashish Aggarwal, Ms. Gurkamal Hora
Arora & Mr. Arjun Sehgal, Advocates.

versus

VINOD KUMAR GOSWAMI & ORS.

..... Respondents

Through: Ms. Manmeet Arora, Mr. Sanjay Mani
Tripathi, Mr. Aaditya Vijay Kumar, Ms.
Sanam Tripathi & Mr. Ajay A. Sharma,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

16.03.2017

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1. There is a preliminary objection raised by the learned counsel for the Respondents to the entertaining of the present petition under Section 9 of the Arbitration and Conciliation Act 1996 ('Act') on the ground that the lands in respect of which the interim relief is sought are located in Uttarakhand, outside the territorial jurisdiction of this Court.

2. In particular, reference is made by Ms. Manmeet Arora, learned counsel for the Respondents, to the decision in *Harshad Chiman Lal Modi v. DLF Universal 2005 (7) SCALE 533* to state that it is only the Court within whose jurisdiction the land is located which will have jurisdiction to entertain a suit for specific performance pertaining to such land irrespective

of where the parties are based. Reference is also made to the decisions of the learned Single Judge of this Court in *PCP International Limited v. Lanco Infratech Limited* 2015 SCCOnLine Del 10428 and *Sravanthi Infratech Private Limited v. Tricolite Electrical Industries Limited* 237 (2017) DLT 589.

3. On the other hand, learned counsel for the Petitioner relies on the decisions in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552 (hereafter '*Balco*') and *ION Exchange (India) Ltd. v. Panasonic Electric Works Co. Ltd.* 208 (2014) DLT 597.

4. Having considered the submissions of the learned counsel for the parties, the Court is of the view that the following passage in the decision in *Balco* (*supra*) is a complete answer to the preliminary objection raised by the Respondent:

“96. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

“2. **Definitions** (1) In this Part, unless the context otherwise requires –

.....

(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."

5. It is plain from the above passage that the Supreme Court has recognised the jurisdiction of two courts – (i) the court within whose jurisdiction the cause of action may have arisen; and (ii) within whose jurisdiction the arbitration takes place. This was also noticed by this Court in ***ION Exchange (India) Ltd. v. Panasonic Electric Works Co. Ltd.***

6. In the present case, the arbitration clause in the Memorandum of Understanding ('MoU') dated 21st October, 2015, which is incidentally executed in New Delhi, specifies that the venue of arbitration shall be at New Delhi. The subsequent Partnership deed dated 1st December, 2015 also contains an arbitration clause but does not specify the place of arbitration. Under Section 20 (1) of the Arbitration & Conciliation Act, 1996 ('Act'), parties are free to agree on the place of arbitration. Both, the MoU and the Partnership Deed having been executed in New Delhi, the Court is of the view that neither document excludes the jurisdiction of Delhi.

7. In terms of the decision in **Balco**, in arbitration cases, the issue of jurisdiction cannot be settled by reference only to the place where the cause of action rises. The 'court' for the purposes of Section 2 (1) (e) of the Act is not confined to the Court as understood under Section 20 read with Section 16 of the CPC. In **Balco** the Court negated the narrow construction to the word 'court' in Section 2 (1) (e) of the Act. It, therefore, held: "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." Therefore, the Court rejects the submission of Ms. Arora that in the present case, notwithstanding the express intention of the parties that the venue of arbitration would be Delhi,

the present petition is not maintainable since the lands in respect of which interim relief is sought is located in Uttarakhand.

8. It is then urged by Ms. Arora, that there is a distinction between 'seat of arbitration' and 'venue of arbitration' and merely because the parties have agreed to Delhi as the 'venue' of arbitration, it would not mean that the 'seat' of arbitration is Delhi. According to her, it is only the 'seat' of arbitration that determines jurisdiction.

9. The Court is unable to agree with the above submission. While there may be a distinction between 'seat' and venue', the context in which the said word is used in the arbitration clause will determine the intention of the parties. In the present case Clause 12 of the MoU which is the arbitration clause, reads thus:

"12. Any dispute or difference arising between the Parties out of or in connection with this Agreement shall be settled amicably by mutual discussion and negotiation. Unresolved disputes, if any, shall be resolved by arbitration in accordance with the Arbitration and Conciliation Act, 1996 and the rules framed there under. The matter shall be referred to the sole arbitrator appointed mutually by the first party and Second Party. If both the parties *fail* to decide on a single arbitrator then each party shall appoint one arbitrator each from their side and a third umpire arbitrator shall be appointed to sort out any difference of opinion between the two arbitrators appointed by the parties. The arbitration shall be in English and all orders/Awards passed in the proceedings by the arbitrator shall be binding on the parties. The venue of the arbitration shall be at New Delhi."

10. It is important to note that there is no clause pertaining to jurisdiction in either the MoU or the Partnership Deed which also contains an arbitration clause but does not specify the venue of arbitration. This is what

distinguishes the present case from that in *Sravanthi Infratech Private Limited v. Tricolite Electrical Industries Limited* (*supra*). In the latter case the parties had agreed that the Courts in Gurgaon would have exclusive jurisdiction. Therefore, in that case, although the venue was specified to be Delhi, the Court did not entertain the petition. The following passages in the said judgment bring out the position clearly:

"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.

14. If this Court were to appoint an Arbitrator to hold the proceedings in Delhi then it is inconceivable that the Courts at Gurgaon would have exclusive jurisdiction to oversee such arbitral proceedings. With the parties being clear that it is the Courts at Gurgaon which will have exclusive jurisdiction, the question of this Court exercising jurisdiction merely because the Petitioner has chosen Delhi as the venue of arbitration, does not arise."

11. In the present case since there is no exclusive jurisdiction clause in either the MoU or the Partnership Deed, both of which contain an arbitration clause, the question that will have to be posed is whether the parties intend

to exclude the jurisdiction of the Delhi Court. Apart from the fact that both the MoU and the Partnership Deed containing the arbitration clause were executed in Delhi, the MoU also specifies the venue of arbitration as New Delhi. The parties, therefore, clearly did not intend to exclude the jurisdiction of the Delhi Court. There is no contrary intention either in the MoU or in the Partnership Deed.

12. The expression used in the Act is 'place of arbitration' and not 'seat of arbitration'. In the circumstances, in the absence of any specific indication of the 'seat' of arbitration, the venue of arbitration should be taken to be the 'place of arbitration' as envisaged in Section 20 (1) of the Act. This would confer jurisdiction on the Court within whose jurisdiction the arbitration is held. This is consistent with the legal position explained in *Balco* (*supra*).

13. For the aforementioned reasons, the preliminary objection raised by the Respondent is hereby rejected.

14. On merits, it is urged that the Respondent should be permitted to offer some other security to protect the interests of the Petitioner *qua* its claims against the Respondents. The Court is of the view that with the constitution of the Arbitral Tribunal ('AT') being imminent, the parties should go before the AT for modification of the *status quo* order which continues in the present petition.

15. Accordingly it is ordered that in the event the Respondents wish to alter the status quo of the title and/or possession of the lands in question then prior permission of the AT will be sought. It is however open to the AT to

vacate, modify or vary this order on an application that may be filed by either party under Section 17 of the Act.

16. The petition and application are disposed of in the above terms.

S. MURALIDHAR, J.

MARCH 16, 2017

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