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

Date of decision: 21st February, 2018

+ **Arb. P.418/2017**

AAA LANDMARK PRIVATE LTD. Petitioner

Through: Mr.Sanjeev Saraswat, Mr.Lokesh
Bhola and Ms.Manika Goswamy,
Advs.

versus

M/S AKME PROJECTS LTD. & ANR. Respondents

Through: Mr.Neeraj Malhotra, Sr. Adv. with
Mr.Arjun Syal, Mr.Kartik Nayar,
Mr.Rupal Luthra, Mr.Rishabh Kumar
& Mr.Shreyan Das, Advs. for R-1
Mr.Arun Monga, Ms.Divya Sharma
& Ms.Marcilliva Kalikotey, Advs for
R-2.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner praying for the appointment of a Sole Arbitrator to adjudicate the disputes that have arisen between the parties in relation to the "Agreement to Sell" dated 25.10.2012 (hereinafter referred to as the 'Agreement'). The said Agreement contains an Arbitration Agreement between the parties in form of Clause 7.2 thereof, which is reproduced herein below:

“7.2 That if any dispute arises out of or in connection with this agreement either party may refer the matter in question to arbitration by giving written notice thereof to the other party (“Arbitration Notice”), to be finally resolved in accordance with the provision of Arbitration and Conciliation Act, 1996 for the time being in force. Subject to the foregoing, the parties submit to the exclusive jurisdiction of Courts at New Delhi.”

2. Learned senior counsel for the respondent no.1, at the outset submits that apart from other objections, he has an objection of lack of territorial jurisdiction of this Court to entertain the present petition. He submits that the petitioner had earlier filed a petition under Section 9 of the Act before this Court, being OMP 943/2014, and on an objection being raised by the respondents with respect to the territorial jurisdiction, had withdrawn the same with liberty to file it before the Courts at Gurgaon. He further submits that thereafter, the petitioner had indeed filed a petition under Section 9 of the Act before the District Judge, Gurgaon, Haryana, being Arbitration Petition No.11 of 2014 and the same is still pending adjudication before the said Court. He submits that in view of Section 42 of the Act, the Court at Gurgaon and, for the purpose of Section 11 of the Act, High Court of Punjab and Haryana will have the exclusive jurisdiction and not this Court.

3. Learned counsel for the petitioner submits that as Clause 7.2 of the Agreement provides for the exclusive jurisdiction of Courts at New Delhi, only this Court would have the jurisdiction to entertain the petition under Section 11 of the Act. He submits that the earlier petition under Section 9 of the Act had been withdrawn by the petitioner on a wrong advice received by it, however, the same would not bar the jurisdiction of this Court to entertain the present petition.

4. As far as the pending petition before the Court of District Judge, Gurgaon is concerned, he submits that the petitioner would be withdrawing the same subject to this Court holding that this Court would have the exclusive jurisdiction to entertain the petition. He further places reliance on the order dated 19.05.2017 passed by the High Court of Punjab and Haryana in Arbitration Case No.161/2014 (O & M) by which the High Court of Punjab and Haryana had disposed of the petition under Section 11 of the Act filed by the petitioner holding that the High Court of Punjab and Haryana had no jurisdiction to consider the petition. He further places reliance on the judgment of the Supreme Court in ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and Ors.***, AIR 2017 SC 2105 to contend that the moment the seat is designated for the arbitration, it is akin to exclusive jurisdiction clause. He submits that in the present case, though, the seat itself is not designated however, once the parties provide for exclusive jurisdiction of this Court, it has to be presumed that the seat of the arbitration would be at New Delhi. He also places reliance on the judgment of this Court in ***CVS Insurance and Investments v. Vipul IT Infrastot Pvt. Ltd.***, 2018 (167) DRJ 87 to support the above contention. Relying upon the judgment of ***State of West Bengal v. Associate Contractors***, (2015) 1 SCC 32, he submits that for a petition under Section 11 of the Act, Section 42 of the Act would not be applicable.

5. I have considered the submissions made by the learned counsels for the parties. Clause 7.2 of the Agreement provides for dispute resolution through arbitration. It further states “*subject to the foregoing, the parties submit to the exclusive jurisdiction of Courts at New Delhi*”.

6. A harmonious reading of this Clause leads me to conclude that the

intention of the parties was that the disputes would be resolved through the process of arbitration, however, in case the arbitration is not possible for any unforeseen reason, the Court at New Delhi will have the exclusive jurisdiction. It is for this reason that the sentence starts with word “*subject to the foregoing*”.

7. Even otherwise, the petitioner has chosen to withdraw its earlier petition filed under Section 9 of the Act from this Court on an objection raised by the respondent. The said order is reproduced herein below:

*“Learned counsel for the petitioner has submitted that in view of the objections raised by the respondent in their written statement and also in their arguments that the Delhi Courts has no territorial jurisdiction and the Gurgaon Courts has jurisdiction to entertain any petition under Arbitration & Conciliation Act where the property is situated, without prejudice to his rights, he may be permitted to withdraw the present petition with liberty to file it before the Gurgaon Courts.
The petition stands disposed of.”*

8. Thereafter, the petitioner filed a petition under Section 9 of the Act before the Court at Gurgaon and the said petition is still pending adjudication before that Court. Even if it is held that the parties in the terms of Clause 7.2 of the Agreement had vested exclusive jurisdiction with respect to the Arbitration Proceedings in this Court, by their subsequent conduct, they have clearly waived this condition and submitted themselves to the jurisdiction of Courts at Gurgaon and equally for the purposes of Section 11 of the Act to the High Court of Punjab and Haryana.

9. In ***Bahrein Petroleum Co. Ltd. v. P.J. Pappu and Anr.***, AIR 1966 SC 634, the Supreme Court, relying upon Section 21 of the Code of Civil Procedure, 1980 held that a party may waive the objection to the jurisdiction

of a Court by its conduct. In the present case, the conduct of the petitioner would show that, even if it is assumed that Clause 7.2 of the Agreement confers exclusive jurisdiction in this Court, the petitioner agreed to waive the said condition. It is not denied by the petitioner that the Court at Gurgaon would have jurisdiction otherwise to deal with the subject matter of the disputes. The parties had by themselves, according to the submission of the petitioner agreed to vest exclusive jurisdiction in this Court under the Agreement and equally by their subsequent conduct, have agreed to submit to the jurisdiction in the Court at Gurgaon. Where two or more Courts may have jurisdiction over the subject matter of dispute or parties, the parties may, by agreement, confer exclusive jurisdiction in one of those Courts. Equally by a subsequent agreement they may waive this condition of exclusivity. Such subsequent agreement may also be inferred by their conduct. The present will be a case falling under category of such subsequent agreement evidenced by conduct.

10. Reliance of the petitioner on the judgment of *Indus Mobile (Supra)* is ill-founded. In the said judgment, Supreme Court has held that the moment the seat of arbitration is designated, it is akin to an exclusive jurisdiction clause. In the present case, however, seat of arbitration is not designated in the Agreement.

11. In *CVS Insurance (Supra)* the agreement between the parties provided that the venue of arbitration shall be Noida / New Delhi. Clause 12.3 of the agreement therein further provided that all matters connected to arbitration shall be subject to the exclusive jurisdiction of courts at Noida. Except the fact that the respondent company had its registered office at Delhi, the cause of action arose at Noida. It was in this circumstance that

this Court held that the application under Section 11 of the Act therein shall lie before the High Court exercising jurisdiction over Noida. This judgment is, therefore, clearly distinguishable on facts of its own case.

12. The next facet of this petition is the applicability of Section 42 of the Act on the facts of the present case. Section 42 of the Act is reproduced herein below:-

“42. Jurisdiction.—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.”

13. In ***State of West Bengal (supra)***, the Supreme Court, was answering the following question on a reference:-

“In this appeal, the question that arises for decision is which Court will have the jurisdiction to entertain and decide an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter for short 'the Act').”

14. The Supreme Court after analysing the provisions of Section 2(1)(e) and Section 42 of the Act, held as under:

“17.....It is obvious that Section 11 applications are not to be moved before the “court” as defined but before the Chief Justice either of the High Court or of the Supreme Court, as the case may be, or their delegates. This is despite the fact that the Chief Justice or his delegate have now to decide judicially and not administratively. Again, Section 42 would not apply to applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or his delegate is not “court” as defined by Section 2(1)(e). The said view was

reiterated somewhat differently in **Pandey & Co. Builders (P) Ltd. v. State of Bihar & Anr.**, (2007) 1 SCC 467 at Paras 9, 23-26.

17. That the Chief Justice does not represent the High Court or Supreme Court as the case may be is also clear from Section 11(10):

The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section(5) or sub-section (6) to him.

The scheme referred to in this sub-section is a scheme by which the Chief Justice may provide for the procedure to be followed in cases dealt with by him under Section 11. This again shows that it is not the High Court or the Supreme Court rules that are to be followed but a separate set of rules made by the Chief Justice for the purposes of Section 11.

Sub-section 12 of Section 11 reads as follows:

(a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those subsections shall be construed as a reference to the "Chief Justice of India".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.

It is obvious that Section 11(12)(b) was necessitated in order

that it be clear that the Chief Justice of “the High Court” will only be such Chief Justice within whose local limits the Principal Civil Court referred to in Section 2(1)(e) is situate and the Chief Justice of that High Court which is referred to in the inclusive part of the definition contained in Section 2(1) (e). This sub-section also does not in any manner make the Chief Justice or his designate “court” for the purpose of Section 42. Again, the decision of the Chief Justice or his designate, not being the decision of the Supreme Court or the High Court, as the case may be, has no precedential value being a decision of a judicial authority which is not a Court of Record.

18. In contrast with applications moved under Section 8 and 11 of the Act, applications moved under Section 9 are to the “court” as defined for the passing of interim orders before or during arbitral proceedings or at any time after the making of the arbitral Award but before its enforcement. In case an application is made, as has been made in the present case, before a particular court, Section 42 will apply to preclude the making of all subsequent applications under Part-I to any court except the court to which an application has been made under Section 9 of the Act.

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25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of original jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as “court” for the purpose of Part-I of the Arbitration Act, 1996.

(b) The expression “with respect to an arbitration agreement” makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an Award is pronounced under Part-I of the 1996 Act.

(c) However, Section 42 only applies to applications made

under Part-I if they are made to a court as defined. Since applications made Under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be “court” for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an Arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil court having original jurisdiction in the district as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part-I.

(g) If a first application is made to a court which is neither a Principal Court of original jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject matter jurisdiction would be outside Section 42. The reference is answered accordingly.”

15. The Supreme Court has clearly held that the Section 9 application, being an application made to the Court, is within the ambit of Section 42 of the Act. Therefore, once an application was filed under Section 9 of the Act, in terms of Section 42 of the Act, that Court alone shall have the jurisdiction

over the subsequent arbitral proceedings and all subsequent applications arising out of that Agreement and the arbitration proceedings have to be made to that Court alone and no other Court. The Supreme Court in the above mentioned paragraph concluded that merely because a petition under Section 11 of the Act is filed in a Court, Section 42 of the Act would not get attracted and it would not be mandatory that all subsequent applications arising out of the Agreement must also be filed in that Court alone.

16. In the present case as application under Section 9 is pending before the District Judge at Gurgaon (now Gurugram), Haryana, all subsequent applications arising out of the Agreement have to be made in that Court and in no other Court. The Court at Gurugram shall also be the ‘Court’ as defined in Section 2(1)(e) of the Act for the purposes of the present Agreement and in terms of Section 11(12)(b) of the Act (as it stood prior to its amendment in 2015) High Court of Punjab and Haryana would have exclusive jurisdiction to adjudicate a request under Section 11 of the Act.

17. The above discussion, however, leads to one anomaly, which is that the High Court of Punjab and Haryana, on a petition under Section 11 of the Act filed by the petitioner, has held that the High Court of Delhi would have the exclusive jurisdiction to entertain the said petition. In this regard, I would first quote the order of the High Court of Punjab and Haryana:

“The matter was argued on the previous occasion. Mr. Bhan, learned senior appearing on behalf of the petitioner fairly invited my attention to the last sentence of clause 7.2 of the agreement which states that the parties submit to the exclusive jurisdiction of Courts at New Delhi.

In view of this clause, this Court has no jurisdiction to consider the petition. The petition must be filed in the Courts at New Delhi.

The petition is, therefore, disposed of with liberty to the petitioner to file the petition in the Courts at New Delhi.”

18. A reading of the order does not show that the High Court was apprised of the earlier order of this Court where the petition under Section 9 was withdrawn by the petitioner and the filing of the petition under Section 9 of the Act before the District Court at Gurgaon. Learned counsel for the petitioner submits that a Civil Revision Petition against the order dated 09.02.2015 passed by the Additional District Judge, Gurgaon on the application under Section 9 of the Act filed by the petitioner, was listed before the High Court on the same date and before the same Bench and therefore, it should be presumed that the High Court was aware of the other earlier proceedings between the parties. I am afraid that I am unable to draw any such presumption or inference as there is no mention of the said facts and the effect thereof in the order.

19. Learned counsel for the petitioner further submits that the order dated 19.05.2017 passed by the High Court of Punjab and Haryana was passed in the presence of the respondents and even they did not bring to the notice of the High Court the earlier proceedings or objected to the said order being passed and therefore, they are deemed to have waived their objection as to the jurisdiction of this Court. I cannot agree with the said submission. A reading of the order shows that it was not passed on an objection raised by the respondents regarding the territorial jurisdiction. It was an order on self-invitation. The question of waiver, in fact, cannot arise because the respondents themselves had earlier contested the jurisdiction of this Court

and later on had not objected to the jurisdiction of the Court at Gurgaon. Learned senior counsel for the respondent no.1 even today submits that the Courts at Gurgaon would have the jurisdiction in this matter. Another important aspect on this issue would be that respondent no.2 was not a party to the petition that has been disposed by the High Court of Punjab and Haryana by its order dated 19.05.2017 and cannot be said to have waived its objection on the issue of jurisdiction.

20. In view of the above, I hold that this Court would lack territorial jurisdiction to adjudicate the present petition. The same is accordingly dismissed giving liberty to the petitioner to approach the Court of competent jurisdiction.

21. As the petition is being dismissed on the ground of lack of territorial jurisdiction, other contentions raised by either party are not being considered by me and kept open for adjudication before the Court of competent jurisdiction.

NAVIN CHAWLA, J

FEBRUARY 21, 2018/Arya