

\$~J-

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

%

Pronounced on: 31.07.2018

+ ARB.P. 789/2016

M/S. CABLE CORPORATION OF INDIA LIMITED..... Petitioner

Through Mr. S.Goel and Mr.Shivam Goel,
Advvs.

Versus

M/S. JAY PEE SPORTS INTERNATIONAL LTD.

& ANR.

..... Respondents

Through Mr. Lovkesh Sawhney, Advvs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996(hereinafter referred to as the Arbitration Act) seeking appointment of a sole arbitrator in terms of the arbitration clause being Clause 31 of the General Conditions of the Contract Agreement dated 09.04.2011.

2. The case of the petitioner is that the petitioner is engaged in the manufacturing and sale of power cables. The petitioner also undertakes the work of manufacture, supply, laying of cables, erection, installation and testing and commissioning of cable work/system. It is pleaded that the respondent No.1-Jaypee Sports International Ltd. stands amalgamated/merged with respondent No.2 in terms of Order dated 14.09.2015 of the Allahabad High Court.

3. Respondent No. 1 asked the petitioner for an offer for the work of supply and laying of 1.5 Kms 220 KV underground cable for their 220 KV sub-station in core area of SDZ at Greater Noida i.e. laying Aluminum, XLPE, 800 sq. mtrs., 220 KV Cables, 7 Nos. Single Core in the root. Pursuant to the offer of the petitioner and negotiations between the parties, the parties entered into a formal agreement dated 09.04.2011 for supply, erection, testing and commissioning of 220 KV Cables-GIS Station for Motor Racing Track within SDZ, Sector 25, Yamuna Expressway, District Gautam Budh Nagar, Uttar Pradesh, India.

4. Disputes arose between the parties. It is the case of the petitioner that the respondent failed to pay a sum of Rs. 1,21,77,147/- towards unpaid invoices for supplies, services and the retention money deducted from the invoices. It has been pleaded that after completion of the assigned work by the petitioner, the Motor Racing Track became operational and the first International Event of Motor Race Formula- 1 was held on 30.10.2011. This was followed by another event in October, 2012 and a third event in October 2013. It is pleaded that it is a clear indication that the work of the petitioner was in order.

5. The petitioner also issued a legal notice on 28.06.2014 demanding the said sum of Rs. 1,21,77,147/- along with interest. It is pleaded that for the first time, respondent No. 1 sent an e-mail dated 11.07.2014 stating the amount due has been put on hold on account of the alleged remaining unfinished work. The petitioner thereafter vide notice dated 05.08.2016 approached the respondent for appointment of an arbitrator under Clause 31 of the Agreement invoking the arbitration clause. In terms of the arbitration clause, the petitioner also nominated its arbitrator Ms. Justice Rekha Sharma

(Retd.) and called upon the respondent to also nominate their arbitrator in terms of the arbitration agreement. As the respondent failed to take steps, the present petition has been filed. Two opportunities were granted to the respondent to file their reply, namely, on 14.02.2017 and 18.04.2017. However, reply has not been filed.

6. I have heard learned counsel for the parties.

7. Learned counsel for the respondent has not disputed the arbitration clause. He has however pleaded that under Clause 38.1 of the Agreement between the parties, the courts in Gautam Budh Nagar and the High Court of Allahabad shall have exclusive jurisdiction over all matters arising out of the contract. He pleads that in view of this clause, the seat of arbitration would be Gautam Budh Nagar and this court would not have the territorial jurisdiction to adjudicate the present petition. He has relied upon the judgment of the Supreme Court in the case of *Indus Mobile Distribution Pvt. Ltd. vs. Datawind Innovations Pvt. Ltd. & Ors.*, (2017) 7 SCC 678 to support his contention. He also relies upon judgments of the Supreme Court in the case of *Rajasthan State Electricity Board vs. Universal Petrol Chemicals Ltd.*, (2009) 3 SCC 107 and *Balaji Coke Industry (P) Ltd. vs. Maa Bhagwati Coke Gujarat Pvt. Ltd.*, (2009) 9 SCC 403 to support his contentions.

8. I may look at the terms of the agreement dated 09.04.2011 executed between the parties. The arbitration clause as contained in Clause 31 reads as follows:-

“31. DISPUTE RESOLUTION & ARBITRATION

31.1 Save where the decision of the Employer is final, conclusive and binding on the Contractor under the terms of Contract, any

dispute, difference or controversy of whatsoever nature, however arising under, out of or in relation to this Agreement between the parties and so notified in writing by either under Party to the other (the "Dispute") in the first instance shall be attempted to be resolved amicably.

31.2 If the Dispute is not resolved amicably, it shall be decided by reference to arbitration by three arbitrators. Each Party shall appoint one arbitrator and the third shall be nominated by the said two arbitrators. The arbitration shall be held in accordance with the Indian Arbitration and Conciliation Act, 1996 and amendments thereto. The venue of arbitration shall be New Delhi, India.

xxx”

9. In view of the above clause in the agreement, the venue of the arbitration has to be at Delhi. However, learned counsel for the respondent has relied upon Clause 38 of the Agreement to support his plea which reads as follows:-

“38. GOVERNING LAWS AND JURISDICTION

38.1 This Contract shall be construed and interpreted in accordance with and governed by the laws of India and the district Courts of Gautam Budh Nagar and Hon’ble High Court of Judicature at Allahabad shall have exclusive jurisdiction over all matters arising out of or related to this Contract.”

10. It has been strongly pleaded by the respondent that a clear clause exists in the agreement that the district courts of Gautam Budh Nagar, U.P. and the High Court of Allahabad will have exclusive jurisdiction over all matters relating to the contract and hence, the seat of arbitration would be

Gautam Budh Nagar, and the courts at Gautam Budh Nagar, U.P. would only have territorial jurisdiction to hear this petition.

11. I may look at the judgment of the Supreme Court in ***Indus Mobile Distribution Pvt. Ltd. vs. Datawind Innovations Pvt. Ltd. & Ors.(supra)***. In that case, the arbitration clause being Clause 18 and 19 read as follows:-

“Dispute Resolution Mechanism:

Arbitration: In case of any dispute or differences arising between parties out of or in relation to the construction, meaning, scope, operation or effect of this Agreement or breach of this Agreement, parties shall make efforts in good faith to amicably resolve such dispute.

If such dispute or difference cannot be amicably resolved by the parties (Dispute) within thirty days of its occurrence, or such longer time as mutually agreed, either party may refer the dispute to the designated senior officers of the parties.

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 & 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. The Arbitrator shall have the power to order specific performance of the Agreement. Each Party shall bear its own costs of the Arbitration.

It is hereby 'agreed between the Parties that they will continue to perform their respective obligations under this Agreement during the pendency of the Dispute.

19. All disputes & 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.”

The Supreme Court relied upon its earlier judgment in *Enercon (India) Ltd. vs. Enercon GmbH*, (2014) 5 SCC 1 and observed as follows:-

“14. 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.

Similarly in para 20, the Supreme Court held as follows:-

“20. 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.

12. A careful reading of para 20 of the above judgment shows that the Supreme Court noted the arbitration clause that was being interpreted i.e. the

Clause of the Agreement that provided that “the arbitration shall be conducted in Mumbai.” This clause was interpreted to mean that the seat of arbitration is Mumbai. The court further noted that Clause 19 of the Agreement makes it further clear that the jurisdiction exclusively vests in the Mumbai. Hence, the phrase “such arbitration shall be conducted at Mumbai, in English language” was held to mean that the seat of arbitration is Mumbai. Clause 19 of the Agreement which stated that the courts of Mumbai only shall have exclusive jurisdiction was held to reiterate the fact that the seat of Arbitration is Mumbai.

13. In the present case, the arbitration clause is Clause 31 with the heading “Disputes Resolution and Arbitration”. Clause 31.2 clearly states that the venue of arbitration shall be New Delhi. Clause 38 has a heading “Governing Laws and Jurisdiction”. It is not dealing with arbitration. Clause 31 is a provision dealing only in arbitration and would apply in relation to arbitration proceedings. As the arbitration proceedings are to be held in Delhi, the courts in Delhi would exercise jurisdiction over the arbitration process and the seat of arbitration would be Delhi. Clause 38 being a general provision would be applicable to proceedings that may take place other than the arbitration proceedings. This would be the appropriate harmonious interpretation of the two clauses of the agreement between the parties.

14. Reference may also be had to the judgment of this court in ***Rohit Bhasin & Anr. vs. Nandini Hotels, 2013 (5) AD (DEL.) 710***. That was a case in which the arbitration clause provided that civil courts at Noida and the High Court of Allahabad will have the jurisdiction in all matters relating to the transaction. The arbitration clause however, held that the venue of arbitration shall be New Delhi. This court held as follows:-

“12. No doubt as far as civil disputes between the parties are concerned as per clause 14, the jurisdiction for civil court at Noida and High Court of Uttar Pradesh at Allahabad alone would have jurisdiction concerning this transaction but from Clause 15 (2) and 15(3) is clear that all disputes and differences arising out of this agreement shall be mutually discussed and settled between the parties as far as arbitration is concerned. The venue of arbitration shall be New Delhi or other place as may be mutually agreed between the parties.

13. The Supreme Court in Civil Appeal No.7019 of 2005 titled as Bharat Aluminum Company vs. Kaiser Aluminum Technical Service, Inc. has explained the meaning of the term “court” as has been provided for in Section 2(1)(e) of the Act and as has follows:-

“95. 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.”

96. 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.

97. The definition of Section 2(1)(e) includes “subject matter of the arbitration” to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist.....”

14. From the above, it is clear that the Supreme Court while explaining the meaning of the term “court” as defined in Section 2(1)(e) has held that the subject matter on the basis of which the jurisdiction of a court can be decided is not confined within the barriers of Section 20 CPC but has a wider meaning thereby also concurring jurisdiction upon the Court where the seat of arbitration will be located. It is pertinent to mention here that the meaning of Section 2(1)(e) of the Act was not in dispute before the Supreme Court in the above said judgment and the Supreme Court has not overruled any previous law in relation to the same but has clarified the intent of the legislature in ascribing such broad meaning to the term “court” in Section 2(1)(e).

15. In the present case, undisputedly the venue under Clause 15(3) is agreed to be in New Delhi by mutual consent even the matter also covered within the meaning of Section 2(1)(e) of the Act as part of cause of action has arisen in Delhi.”

15. Reliance of the learned counsel appearing for the respondent on the judgment of the Supreme Court in ***Rajasthan State Electricity Board vs. Universal Petrol Chemicals Ltd.(supra)*** is misplaced. In that case the contract provided that the jurisdiction shall be only of the courts in Jaipur in Rajasthan. The arbitration clause also provided that no other court, other than Jaipur, Rajasthan shall have jurisdiction to entertain and try the same. The respondent in that case filed a petition under Section 20 of the Arbitration Act, 1940 before the High Court of Calcutta. It was in those facts that the Supreme Court had held that in view of the ouster clause only courts at Jaipur would have jurisdiction to entertain such proceedings.

16. Similarly, the reliance of the learned counsel for the respondent on the judgment of the Supreme Court in ***Balaji Coke Industry (P) Ltd. vs. Maa Bhagwati Coke Gujarat Pvt. Ltd.(supra)*** is also misplaced. Clause 11 of the agreement subject matter of these proceedings contained the arbitration

clause and provided that the disputes shall be referred to an arbitrator in Calcutta, West Bengal, India. In those facts, the Supreme Court held that the disputes would have to be decided by an arbitrator in Calcutta, West Bengal. The courts in Bhavnagar (Gujarat) were held to not have the territorial jurisdiction.

17. It is clear that that as per Clause 31 of the Agreement, all arbitration proceedings are to be held in Delhi. Delhi has been fixed as the seat of Arbitration. This would confer exclusive jurisdiction on all courts in Delhi to deal with all issues relating to the arbitration proceedings. For matters other than those relating to arbitration, the courts in Gautam Budh Nagar, U.P. would have exclusive jurisdiction in terms of Clause 38 of the Agreement.

18. Petition is accordingly allowed.

19. I, accordingly, refer the parties to the Delhi International Arbitration Centre. The Arbitration Centre shall nominate a retired judge of a High Court from its panel to conduct the arbitration proceedings in terms of the regulations of the Centre. A copy of this order will be sent to the Delhi International Arbitration Centre.

(JAYANT NATH)
JUDGE

JULY 31, 2018v