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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 05.02. 2018

Pronounced on: 07.02.2018

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ARB.P. 529/2017

M/S NJ CONSTRUCTION (THROUGH ITS PROPRIETOR)

..... Petitioner

Through : Mr.Darpan Wadhwa, Senior
Advocate with MR.Anshum Jain,
Mr.Amol Sinha, Mr.Naveen
Kumar, Advocates.

versus

AYURSUNDRA HEALTH CARE PVT. LTD. & ORS.

..... Respondents

Through : Mr. Manish Goswami, Advocate.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The respondent no. 1 floated a notice inviting Tender inter alia for the civil and electrical work of Super Specialty Hospital, wherein several bids were invited. The hospital was to be constructed at Guwahati. The petitioner also participated and was awarded the said work order on 22.06.2013 at the mutually agreed amount of Rs 33,38,76,000/-. The LOI was issued by respondent no.1 for the said work.

2. On 05.07.2013, an Article of Agreement was entered into containing the special conditions of the Contract, Specifications and Schedules of quantities with the rates entered therein forming part of the agreement/LOI. It is alleged by the petitioner the respondent did not pay the complete advance mobilization money despite request even after five months from the date of the execution of the agreement. The petitioner kept on doing the work and sending the bills but on 11.11.2014 the respondent terminated the major civil contract and entire electrical contract and directed to complete the remaining work in accordance with the schedule sent through the e-mail. There was some dispute for payment of Rs.35,00,000/- to be paid to the petitioner and a meeting on 11.12.2014 was held wherein the petitioner sent a payment plan for adjusting Rs.35,00,000/- which was due on the respondent. On the request of the respondent, the petitioner continued with the work and completed it to the satisfaction of the respondent and submitted its 15th RA final bill. The completion certificate dated 29.02.2016 was issued by the respondent's architect and he recommended the payment of 15th RA bill dated 27.02.2016 amounting to Rs.51,31,959/-.The completion certificate was also issued by the respondent on 31.03.2016. There was some dispute qua payments. Receiving no response, the petitioner sent a legal notice for appointment of arbitrator. Hence the petition.

3. It is not in dispute the proposed hospital was constructed at Guwahati. It is alleged by the respondent the payment were to be

made at Guwahati. The services were provided at Guwahati and contract was terminated at Guwahati. The respondent relied on clause 8 of the agreement dated 05.07.2013 to say only the courts at Guwahati shall have jurisdiction to determine the dispute between the parties. Clause – 8 of the agreement dated 05.07.2013 read as under :

8. "This Agreement and Contract shall be deemed to have been made in Guwahati and any questions or dispute arising out of or in any way connected with this Agreement and Contract shall be deemed to have arisen in Guwahati and only the court in Guwahati shall have jurisdiction to determine the same."

4. However, the respondent refers to addendum to the agreement dated 05.07.2013 which contain clause – 21.1 as under :

21.1 In case any dispute or difference shall arise between the OWNER or the ARCHITECT on his behalf and the CONTRACTOR touching or concerning this contract or the construction, meaning, operation or effect thereof or of any clause herein contained or as to the rights, duties or liabilities of the parties hereto respectively arising out of or in relation thereto (except as to matters left to the sole discretion of the ARCHITECT) the same shall be referred to the arbitration of a sole arbitrator who shall be Shri.----- . The seat of arbitration shall be at New Delhi and shall be final and binding on the parties.

Work under 'the Contract shall, if reasonably possible, continue during the arbitration proceedings and no payments due or payable

by the OWNER shall be with-held on account of such proceedings & payment due to the CONTRACTOR will be made by the OWNER under the advice from ARCHITECT in writing.

5. The main dispute is if arbitrator at Delhi is to be appointed or the courts at Guwahati shall have the jurisdiction. The learned counsel for the respondent alleges per clause – 8 of the agreement dated 05.07.2013 the intention of the parties indicate the cause of action has arisen at Guwahati so the courts at Guwahati shall have exclusive jurisdiction to decide the dispute, but whereas the learned senior counsel for the petitioner says since the seat of arbitration is at Delhi, a neutral place, the Delhi court shall have jurisdiction.

6. The learned counsel for the respondent also relied upon clause – 13 of the agreement to say no proceedings relating to this contract be taken by the contractor in any court of law except in Hisar. It is submitted that the words *Hisar* and *Delhi* wherever coming in the agreement are misplaced and wrongly typed, but however he admits the agreement was entered into on 05.07.2013; the dispute between the parties started on 25.05.2017 and in between neither the petitioner nor the respondent ever sent any communication to each other viz., the words *Hisar* and *Delhi* are wrongly mentioned in the agreement. Hence, this plea seems to be after thought.

7. Now, let us see in the facts of the case. The learned senior counsel for the petitioner has referred to *Indus Mobile Distribution Pvt. Ltd. V. Datawind Innovation Pvt. Ltd.* AIR 2017 SC 2105, wherein it was held as under:

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.

21. 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. Simoes 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.

Then, in *Raman Deep Singh Taneja V. Crown Realtech Private Limited* 2017 SCC Online Del 11966, it was held as under:

9. In the present case we are faced with the situation where one part of the agreement provides for exclusive jurisdiction to Courts of Delhi, while the other, due to the venue of arbitral proceedings, vests exclusive jurisdiction in Courts in Faridabad, State of Haryana. As was held by the Supreme Court in the judgment of Bharat Aluminium Company (Supra), a distinction is to be drawn between "Subject-Matter of the Arbitration" and "Subject-Matter of the Suit". For the purposes of identifying the Court, which shall have supervisory control over the arbitral proceedings, it would be the Court where the 'Subject-Matter of Arbitration' is situated that would have precedence over the Court where the "Subject-Matter of the Suit" is situated. In this case, therefore, the exclusive ARB.P.No.444/2017 Page 5 jurisdiction conferred due to venue of arbitration would

take precedence over the exclusive jurisdiction vested over the Subject-Matter of the suit in the Courts at Delhi. There are various provisions in the Act where the Court has to exercise supervisory jurisdiction over the arbitration proceedings. These include not only Section 11 of the Act but also Sections 14, 27, 29A, 34 and 37 of the Act. It is, therefore, evident that the Court having jurisdiction over the arbitration proceedings would have precedence over the Court which has jurisdiction over the Subject-Matter of the suit or where the cause of action has arisen. The purported conflict between the two parts of Clause 24 quoted above can be resolved by holding that where the disputes are to be adjudicated without reference to the arbitration, Courts at Delhi would have exclusive jurisdiction, however, where they have to be resolved through arbitration, venue being at Faridabad, Haryana, the Courts at Faridabad, State of Haryana, would have exclusive jurisdiction.

In CVS Insurance and Investments v. Vipul IT Infrasoftware Pvt. Ltd.
2017 SCC Online Del 12149, the court held as follows

10. Hence the principles culled out from the above discussions are : (a) there shall be only one seat of arbitration though venues may be different; (b) where the arbitration seat is fixed (may be neutral), only such court shall have an exclusive jurisdiction; (c) where a seat/place of arbitration is fixed it is section 20(1) and section 20(2) of the Act we are referring to; and (d) venue relates to convenience of parties, per section 20(3) of the Act.

8. The learned counsel for the respondent though relied upon *B.E.Simoese Von Staraburg Niedenthal and Anr. V. Chhattisgarh Investment Ltd.* (2015) 12 SCC 225 to say where a court is given an exclusive jurisdiction, no other Court than the said court shall have jurisdiction. This judgment to my mind is not applicable as arbitration clause is nowhere discussed in the entire judgment and hence I cannot make out if the seat of arbitration in this case was at Guwahati or elsewhere. Even otherwise, this judgment is discussed in *Indus Mobile Distribution Pvt. Ltd.* (supra).

9. In these circumstances, since the seat of the arbitration is at New Delhi, a neutral venue, only such court shall have jurisdiction to decide. Hence, petition is allowed and Mr. Justice S. L. Bhayana (Retd. Judge) (Mobile no. 9871300028) is hereby appointed as an Arbitrator to arbitrate the dispute between the parties. The arbitration proceedings shall be conducted under the aegis of DIAC. The fee of the learned Arbitrator is as per the fee schedule of the DIAC. The parties to appear before the learned Arbitrator on 15.02.2018 at 4 PM.

YOGESH KHANNA, J

February 07, 2018
Pallavi/VLD