

\$~3

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ARB.P. 593/2017**

rites ltd.

..... Petitioner

Through: Mr Udit Seth, Advocate.

versus

GOVERNMENT OF NATIONAL CAPITAL TERRITORY
OF DELHI THROUGH PRINCIPAL SECRETARY CUM
COMMISSIONER (TRANSPORT) Respondent

Through: Mr Ramesh Singh, Standing
Counsel, GNCTD with Mr
Aniruddha Deshmukh,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

05.04.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an Arbitrator be appointed to adjudicate the disputes that have arisen between the parties in relation to a contract for "Consulting Services for the Transport Demand Forecast Study" dated 27.07.2007 (hereafter 'the Contract'). The Contract includes an arbitration clause, which is set out below:-

"ARTICLE XIII – Settlement of Disputes

“Section 13.01: Any dispute or difference arising out of this Contract or in connection therewith be amicably settled between the parties shall be finally settled under the Provisions of Rules of Conciliation and Arbitration Act, 1996 of India as amended from time to time, by one or more arbitrators appointed in accordance with the said Rules. The arbitration shall take place in Goa, India. The resulting award be final and binding on the parties and shall be in lieu of any other remedy.”

2. It is apparent from the above that the parties have agreed that the seat of arbitration shall be Goa. Thus, as explained by the Supreme Court in *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*: (2017) 7 SCC 678, the Courts at Goa would have the exclusive jurisdiction in respect of the arbitral proceedings. However, Mr Seth, the learned counsel appearing for the petitioner contends to the contrary.

3. Mr Seth contends that the said decision would not come in the way of this Court in exercising jurisdiction since the entire cause of action has arisen within the National Capital Territory of Delhi and both the parties also have their principal offices located in Delhi. He further states that the Contract was also performed in Delhi. He earnestly contends that the decision of the Supreme Court in *Indus Mobile* (*supra*) would not be applicable in this situation. He submits that there is distinction between the subject matter of the arbitration and the subject disputes between the parties. He states that whilst the Courts at Goa may have the jurisdiction in regard to the subject matter of arbitration, but since the cause of action has arisen within the

National Capital Territory of Delhi, therefore, this Court shall retain the jurisdiction to entertain the present petition. He also relied on the decision of the Calcutta High Court in *Hinduja Leyland Finance Ltd. v. Debdas Routh & Anr.*: 2017 SCC OnLine Cal 16379 and drew the attention of this Court to paragraphs 10 to 14 of the said decision.

4. This Court is not persuaded to accept the contentions advanced on behalf of the petitioner, as the decision in the case of *Indus Mobile (supra)* has authoritatively settled the law on the subject. Paragraphs 19 and 20 of the said decision are relevant and are set out below:-

“19. 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 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.

20. 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.”

5. It is clear from paragraph no. 19 of the aforesaid decision that where the parties have agreed that the arbitration shall be conducted at a neutral venue – that is, where no part of the cause of action has arisen – the courts having jurisdiction in respect of the neutral venue would have “*exclusive jurisdiction for purposes of regulating arbitral proceedings*”. In view of the express language used by the Supreme Court, the contention that the Courts having jurisdiction where the seat of arbitration is located, would not have exclusive jurisdiction and other Courts where cause of action has arisen can also entertain an application under Section 11 of the Act, is unmerited.

6. In ***Hinduja Leyland Finance Ltd. v. Debdas Routh & Anr*** (*supra*), the Calcutta High Court had considered the case where the parties had agreed that the seat of the arbitration would be at Bhubaneswar. However, no cause of action had arisen in that jurisdiction. In the said context, the Court had held as under:-

“10. We have to assume that the seat of the arbitration, agreed to by the parties is in Bhubaneswar. The contract was executed and wholly performed within West Bengal. Nothing in relation to the underlying contract happened in Bhubaneswar or Orissa.

11. When one tries to ascertain the subject-matter of this particular arbitration it is not only the dispute which arises out of the underlying contract. It also involves the dispute of the parties with the arbitrator arising out of the arbitration agreement. The phrase "subject-matter of the arbitration" has to be given a purposive meaning by including within its field of operation disputes arising out of the underlying contract as well as disputes arising out of appointment, conduct of arbitration, application of the Rules relating to arbitration by the arbitrator and finally the publication of the award.

12. If we assume that the arbitrator was challenged regarding his impartiality at the seat of the arbitration where the sittings were held and he ruled on that challenge from this place, it is not difficult to hold that a part of the cause of action arose at the place where the seat of the arbitration is located. Therefore, the Court having jurisdiction over the seat of the arbitration i.e. Bhubaneswar in Orissa may be approached by way of a Section 34 application. Mr. Justice Nijjar has very poignantly observed “in such circumstances both the Courts would have the jurisdiction i.e. Court within whose jurisdiction the subject matter of the suit is situated and the Courts within which the jurisdiction of which the dispute resolution i.e. arbitration is located”.

13. However, the case of Indus Mobile rules that the Court in the place where the seat of arbitration is located, have natural jurisdiction over any dispute.

14. I would very humbly like to say that nomination of a seat does not oust the courts in other places where part of the cause of action has arisen, of their jurisdiction, as such a proposition would be contrary to the five judge bench decision of the Supreme Court in *Balco*. Hence, in choosing a Court under Section 2(1)(e)(i) we have now an additional forum, that is, the courts at the seat of arbitration.”

7. With much respect to the Hon’ble Calcutta High Court, this Court is unable to concur with the said view. In terms of Section 21 of the Act, arbitral proceedings commence with the issue of notice invoking arbitration (unless the parties have agreed otherwise). Thus, the application under Section 11 of the Act also falls within the jurisdiction of the Court, which exercises jurisdiction with regard to the arbitral proceedings.

8. It is important to bear in mind that arbitration is a consensual dispute resolution mechanism, which is founded on the agreement between the parties. The importance of party autonomy in such proceedings cannot be understated. Once the parties have agreed to the seat of arbitration, it would necessarily follow that they have also agreed to the process being subject to jurisdiction of the courts exercising jurisdiction in respect of the seat of arbitration.

9. Even as per the reasoning of the Calcutta High Court, the courts in the place where the arbitral proceedings are to be held, would have the jurisdiction in respect of such proceedings. The view, that the courts where the cause of action has arisen would also exercise jurisdiction notwithstanding that the parties intend otherwise, would

militate against the principle of party autonomy, which is the substantial principle of arbitration as a dispute resolution mechanism.

10. Apart from the above, this Court is also of the view that the decision in *Hinduja Leyland* (*supra*) is contrary to the express authoritative ruling of the Supreme Court in *Indus Mobile* (*supra*).

11. In view of the above, this Court is unable to accept that it has jurisdiction to entertain the present petition.

12. The present petition is, accordingly, dismissed. Needless to state that this would not preclude the petitioner from approaching the appropriate Court for necessary orders.

VIBHU BAKHRU, J

APRIL 05, 2018
MK