

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CR No.1382 of 2019(O&M)
Date of Decision: 09.04.2019**

M/s BWI Educon Venture Pvt. Ltd.Petitioner

Versus

Auto Serve Equipment Pvt. Ltd. and another ... Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. Ashwani Talwar, Advocate and
Mr. Sahej Mahajan, Advocate
for the petitioner.

Mr. Paras Money Goyal, Advocate
for respondent No.1.

RAJ MOHAN SINGH, J.

[1]. Petitioner has preferred this revision petition against the order dated 02.02.2019 passed by District Judge, Gurugram vide which the petition filed by the petitioner for issuance of direction to the Arbitrator to adjudicate the counter claims of the petitioner was returned by holding that the Courts at Gurugram have no jurisdiction. Liberty was granted to the petitioner to approach competent Court at Delhi.

[2]. Petitioner is in occupation of building at Gurugram for which lease deed dated 06.09.2012 was executed between the

respondents and the petitioner. Respondent/Company has its registered office at Delhi. Petitioner/Company is also having registered office at Delhi. Respondent No.1 is a lessor, whereas petitioner is the lessee of property bearing plot No.135, Sector-44, Industrial Area, Gurgaon (Gurugram). Lease deed was registered in the office of Joint Registrar Gurugram. It was executed for a period of 9 years upto 31.07.2021. As per Clause 19.1 of lease agreement, all disputes, differences or disagreements arising out of, in connection with or in relation to the lease deed, including its interpretation, performance or termination, in the first instance shall be settled through mutual discussions between the authorized representatives of the lessor and the lessee. Clause 19.2 of the lease agreement, further provides, if no settlement can be reached through mutual discussions and negotiations between the authorized representatives of the lessor and lessee within 30 days, then all such disputes, differences or disagreements shall be finally decided by arbitration to be held in accordance with the provisions of the Arbitration Act. Any arbitration pursuant hereunder shall be a domestic arbitration under the applicable laws. For this purpose, lessor and lessee shall choose their respective arbitrators. Clause 19.3 of the lease agreement would further provide that the venue of arbitration shall be

Gurgaon or such other place as may be mutually agreed between the parties in writing and the language of arbitration shall be English.

[3]. Perusal of the aforesaid Clause 19.3 of the lease agreement would show that the venue of arbitration shall be at Gurugram or at a place on account of mutual agreement between the parties. The aforesaid clause does not show jurisdiction of the Court at a particular place. The dispute arose between the parties on account of alleged non-payment of lease amount. Respondent No.1 ultimately invoked the arbitration clause. Respondent filed a petition in the Punjab and Haryana High Court for appointment of an independent Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996. During pendency of the aforesaid petition, on 20.09.2017, respondent No.1 agreed that one of the three named persons be appointed as Arbitrator and venue of arbitration be fixed at Delhi, rather than Gurugram.

[4]. Petitioner vide letter dated 20.09.2017 agreed to one Arbitrator and the venue of the arbitration to be at Delhi. The petition filed in the High Court was ultimately withdrawn on the basis of said agreement in respect of appointment of Arbitrator as well as venue of the arbitration at Delhi. Resultantly, Mr. Naresh Thanai, Advocate was appointed as sole Arbitrator in

respect of pending issues between the parties for which both the parties were to provide mutually signed agreement to the sole Arbitrator.

[5]. Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 was allowed to be withdrawn in view of understanding between the parties vide order dated 29.09.2017 by the Chief Justice of Punjab and Haryana High Court. The sole Arbitrator appointed by the parties started with the arbitration proceedings. The claims were submitted by respondent No.1 and counter claims were submitted by the petitioner. The fee of the Arbitrator was not deposited. The Arbitrator passed an interim award on 15.05.2018 deciding the claims as set up by respondent No.1. The objections were filed under Section 34 of the Act against the interim order by the petitioner before the Commercial Court at Gurugram. On 25.08.2018, Arbitrator suspended the proceedings on account of non-payment of fee with regard to the counter claims.

[6]. Petitioner/counter claimant filed an application for revival of proceedings on the ground of financial crunch and also for reduction of fee of the Arbitrator by reducing the counter claims. The Arbitrator passed order dated 11.09.2018 in the aforesaid context by noticing that although no such formal counter claim qua reduction of value of Rs.2 crores was filed by

the counter claimant, but even if , that is done, the arbitration fee to the tune of Rs.5,50,000/- was payable out of which Rs.1,50,000/- was deposited with the Arbitrator and the remaining fee to the tune of Rs.4 lacs was still payable. The arbitration proceedings were terminated vide order dated 11.09.2018.

[7]. Against the aforesaid order dated 11.09.2018 passed by the sole Arbitrator, petitioner filed an application before the District Judge, Gurugram under Sections 39 and 42 of the Arbitration and Conciliation Act, 1996 with a prayer to direct the sole Arbitrator to commence the proceedings on merits as regards the counter claims, the petitioner would deposit the arbitration fee on the first date of hearing before the Arbitrator and further time period of arbitration proceedings be extended for another four months.

[8]. Vide the impugned order dated 02.02.2019, the aforesaid application under Sections 39 and 42 of the Arbitration and Conciliation Act, 1996 has been dismissed by the District Judge, Gurugram on the ground of jurisdiction. Petitioner was granted liberty to approach the competent Court of jurisdiction at Delhi for the remedies available to it in accordance with law.

[9]. Evidently, as per agreement between the parties, the venue of the arbitration was to be fixed at Gurugram or such

other place as may be mutually agreed between the parties in writing. The letter dated 23.09.2017 was issued by the petitioner wherein requirement of signed agreement/MOU was to be submitted to the Arbitrator on the basis of which final award could have been passed. It was so because both the parties had agreed on the matters of common interest. 29.09.2017 was the date fixed before the High Court in the proceedings under Section 11(6) of the Arbitration and Conciliation Act, 1996, therefore, it was communicated by the petitioner that the petition pending in the High Court be withdrawn as all future proceedings were to be held in Delhi thereafter.

[10]. Learned counsel for the petitioner submitted that no such signed agreement/MOU was supplied to the sole Arbitrator and words “all future proceedings” were relatable to the venue at Delhi only. In the absence of any such compliance, jurisdiction of the Court at Gurugram cannot be ousted. Since new agreement was not executed/signed and the consent was only for the seat of Arbitrator, therefore, the Court at Gurugram has the jurisdiction as per Section 42 of the Act.

[11]. Learned counsel relied upon **Emkay Global Financial Services Limited Vs. Girdhar Sondhi, (2018) 9 Supreme Court Cases 49**, wherein following observations were made by the Hon'ble Apex Court in para Nos.8 and 9:-

*“8. The effect of an exclusive jurisdiction clause was dealt with by this Court in several judgments, the most recent of which is the judgment contained in **Indus Mobile Distribution (P) Ltd.** In this case, the arbitration was to be conducted at Mumbai and was subject to the exclusive jurisdiction of courts of Mumbai only. After referring to the definition of “Court” contained in Section 2(1)(e) of the Act, and Section 20 and 31(4) of the Act, this Court referred to the judgment of five learned Judges in **BALCO. Kaiser Aluminium Technical Services Inc.**, (2012) 9 SCC 552, in which, the concept of juridical seat which has been evolved by the courts in England, has now taken root in our jurisdiction. After referring to several judgments and a Law Commission Report, this Court held:*

“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 Sections 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 the parties to exclude all other courts. For an exhaustive analysis of the case law, see Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd. [Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157]. This was followed in a recent judgment in B.E. Simoes Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd. 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 [Datawind Innovations (P) Ltd. v. Indus Mobile Distribution (P) Ltd., 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. The appeals are disposed of accordingly.”*

9. Following this judgment, it is clear that once courts in Mumbai have exclusive jurisdiction thanks to the agreement dated 03.07.2008, read with the National Stock Exchange Bye-laws, it is clear that it is the Mumbai courts

and the Mumbai courts alone, before which a Section 34 application can be filed. The arbitration that was conducted at Delhi was only at a convenient venue earmarked by the National Stock Exchange, which is evident on a reading of Bye-law 4(a)(iv) read with sub clause (xiv) contained in Chapter XI.”

[12]. Learned counsel further submitted that seat of arbitration and venue of arbitration are different. The venue of arbitration will not change the seat of arbitration which will provide jurisdiction of the Court. Learned counsel also referred to **O.M.P. (COMM) 174/2017** titled **Spentex Industires Ltd. Vs. Louis Dreyfus Commodities India Pvt. Ltd.** decided by the Delhi High Court on 22.02.2019.

[13]. As against this, learned counsel for respondent No.1 stated that the aforesaid controversy is covered by the ratio laid down in **Indus Mobile Distribution (P) Ltd. Vs. Datawind Innovations (P) Ltd. and others, (2017) 7 Supreme Court Cases 678**, wherein the question was as to whether, when the seat of arbitration is Mumbai, an exclusive jurisdiction clause stating that the Courts at Mumbai alone would have jurisdiction in respect of disputes arising under the agreement would oust all other Courts including the High Court at Delhi whose judgment is appealed against before the Hon'ble Apex Court. In that case, proceedings were initiated under Section 9 of the Act

in the Delhi High Court and the same was allowed despite objection regarding jurisdiction. The matter went to the Hon'ble Apex Court where question of jurisdiction was raised on the ground that since the seat of arbitration was at Mumbai, therefore, Mumbai Courts would have exclusive jurisdiction in all the proceedings. The Hon'ble Apex Court after relying upon the Constitutional Bench judgment in **BALCO Vs. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552**, reiterated the findings recorded by the Constitutional Bench in the following manner:-

“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.”

[14]. In the instant case, petition under Section 11(6) of the Act was filed in the High Court. The same was got dismissed as withdrawn on the basis of agreement between the parties.

[15]. Concededly, the petitioner/Company has vacated the premises and the possession has already been handed over to the respondent landlord. For the residual claim with regard to payment of outstanding dues/lease money, both the parties agreed to fix the seat of Arbitrator at Gurugram.

[16]. In the instant case, Arbitrator was not appointed under Section 11(6) of the Act. It was appointed as per agreement between the parties and the venue of the arbitration was fixed at Delhi. The venue of arbitration which was earlier fixed at Gurugram was diluted by this fresh understanding between the parties. Perusal of the letter dated 23.09.2017 would also show that in the concluding clause, it was recited by the petitioner itself that the case pending in the High Court on 29.09.2017 be withdrawn “as all future proceedings are to be held in Delhi thereafter”. By way of aforesaid expressed agreement by the

petitioner, venue of arbitration was co-related with the seat of Arbitrator. Even if the petitioner raises non-adherence of letter dated 23.09.2017, but fact remains that it was implemented and petition under Section 11(6) of the Act was withdrawn. The aforesaid factual position coupled with the ratio laid down in **Indus Mobile Distribution (P) Ltd. case (supra)** and **BALCO Vs. Kaiser Aluminium Techninical Services Inc.'s case (supra)** would oust the jurisdiction of the Courts at Gurugram. The case laws cited by learned counsel for the petitioner are distinguishable on facts.

[17]. In view of aforesaid, I find no illegality in the impugned order dated 02.02.2019 passed by District Judge, Gurugram vide which petition has been dismissed for want of jurisdiction with a liberty to the petitioner to approach the competent Court at Delhi for redressal of its grievance. This revision petition is accordingly dismissed.

09.04.2019

Prince

Whether reasoned/speaking**Whether reportable****(RAJ MOHAN SINGH)
JUDGE****Yes/No****Yes/No**