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

Date of Decision: 24th November, 2021

+ ARB.P. 78/2021

ADAVYA PROJECTS PVT LTD

..... Petitioner

Through: Mr. Saurabh Kirpal, Senior Advocate
with Ms. Simran Brar, Mr. Srisatya
Mohanty, Ms. Tanim Gaur and
Ms. Ambika, Advocates.

versus

VISHAL STRUCTURALS PVT LTD

..... Respondent

Through: Mr. Susheel Joseph Cyriac, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

[VIA HYBRID MODE]

SANJEEV NARULA, J (Oral):

1. The present petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 [*hereinafter “the Act”*] has been filed seeking appointment of a Sole Arbitrator for adjudication of disputes pertaining to Limited Liability Agreement dated 01st June, 2012 [*hereinafter “LLP Agreement”*] read with Supplementary LLP Agreement and Memorandum of Understanding both dated 29th January, 2013. The arbitration clause [Clause 40] contained in LLP Agreement, reads as follows: -

“Arbitration

40. *Disputes or differences, if any, that may arise between partners inter se and /or between the partner(s) and LLP hereto or their affiliates, assigns, successors, attorneys, administrators and all those claiming through it touching these presents or the construction thereof or any clause or thing herein contained or otherwise or in any way relating to or concerning these presents or the rights duties or liabilities of any of the partners hereto in connection therewith the matters in such dispute or difference shall be referred to' the arbitration in accordance with and subject to the provisions of Arbitration and Conciliation Act, 1996 or to any statutory modification or re-enactment thereof for the time being in force. The venue of the Arbitration shall be decided by the Arbitrator so appointed by mutual consent of both partners."*

2. Since there is no specified or defined 'seat'/ 'place' of arbitration, a controversy has arisen as to whether this Court has jurisdiction to entertain the present petition.

CONTENTIONS OF THE PARTIES

3. Mr. Susheel Joseph Cyriac, counsel for the Respondent [*hereinafter* "**VSPL**"] while admitting the existence of the arbitration agreement, objects to the maintainability of the present petition by making the following submissions: -

3.1 The present proceedings stem from Clause 40 of LLP Agreement read with the Memorandum of Understanding [*hereinafter* "**MoU**"] dated 29th January, 2013 [*hereinafter* collectively referred to as "**the Agreements**"]. These Agreements were entered into for the purposes of creating a Joint Venture LLP by the name of 'Vishal Capricorn Energy Services LLP' [*hereinafter* "**VCES**"]. The Agreements as well as the Supplementary LLP Agreement were executed in Mumbai. The introductory paragraph of LLP Agreement stipulates that the '*Agreement of Limited Liability Partnership was made at Mumbai*'.

Furthermore, the MoU was stamped on a Maharashtra Non-Judicial Stamp, demonstrating that the execution took place at Mumbai and besides VCES and VSPL have their offices at Navi Mumbai.

- 3.2 Clause 40 of LLP Agreement is silent as to the ‘seat’ and ‘venue’ of the arbitration. The said clause stipulates that ‘venue’ of Arbitration shall be decided by the Arbitrator so appointed by mutual consent of both partners. In order to determine the appropriate forum in absence of any specified ‘venue’, in the instant case, the subject-matter does not fall under Sections 16-19 of the Code of Civil Procedure, 1908 [hereinafter “**CPC**”], instead under Section 20 of CPC.
- 3.3 Reliance is placed upon the recent decision of this Court in *Aarka Sports Management Pvt. Ltd. v. Kalsi Buildcon Pvt. Ltd.*¹, wherein the Court has held that if the parties have not agreed on the ‘seat’ of arbitration, it cannot confer jurisdiction to a place wherein no part of cause of action has arisen – what has to be examined is where substantial part of the cause of action arose and the intention of the parties. Merely because of some miniscule part of cause of action arose in Delhi (as in this instant case, some payment(s) were made from Delhi and some payment(s) were to be received in Delhi) would not confer jurisdiction to the courts at Delhi. Further, it is abundantly clear from a plain reading of the Agreements, that the parties never envisioned that courts in Delhi shall have jurisdiction.
- 3.4 The parties intended to conduct their business in the jurisdiction of Mumbai. Section 2(1)(e) of the Act recognises this principle and highlights that the court would mean a court having jurisdiction to

decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit.

3.5 Since VSPL and VCES have their offices at Navi Mumbai, any application/ petition arising from Clause 40 of LLP Agreement, including one under Section 11 of the Act must lie in Mumbai. Further, jurisdiction should also vest in Mumbai since the defendant(s) [viz. VSPL] resides, carries on business, or personally works for gain in Mumbai. Considering the nature of arrangement and the fact that Agreements between the parties were executed in Mumbai, undoubtedly jurisdiction would lie before the courts of Mumbai.

3.6 By approaching the courts at Delhi, the Petitioner [*hereinafter* “*APL*”] seeks to vest supervisory control over the arbitral process to the courts at Delhi. APL seeks to prevent VSPL from approaching the courts at Mumbai for any relief under Section 42 of the Act. This would be detrimental to VSPL since all its assets and structures of the VCES and VSPL are located in Navi Mumbai.

4. *Per Contra*, Mr. Saurabh Kirpal, Senior Counsel for APL controverts the contentions raised by VSPL and submits that jurisdiction would lie before this Court and not the courts at Mumbai. His submissions are summarized as follows: -

4.1 Clause 40 of LLP Agreement is silent as to the ‘place’ of arbitration and hence, the principles under Sections 16-20 of CPC will apply to determine the court of appropriate jurisdiction.

¹ MANU/DE/1347/2020.

4.2 Cause of action indisputably arose in Delhi on account of the following facts: -

- (i) Discussions between representatives of APL and VSPL leading to execution of the Agreements *viz.* LLP Agreement and MoU took place at the office of the APL that is located at New Delhi.
- (ii) MoU was signed by APL at Delhi, the making and place of acceptance was at Delhi.
- (iii) VSPL was required to make payment to APL on account of the profits accrued to VCES from the ITF Project², the payments were to be received by APL in its bank account *bearing* No. 912020025211331 at Axis Bank, Saket at New Delhi. The payments/ investments by APL were made to VSPL from the aforementioned bank account located at Delhi.
- (iv) APL received payments into its bank account *bearing* No. 912020025211331 at Axis Bank, Saket, New Delhi for another project executed under the same LLP Agreement. APL has no bank account other than the one mentioned above. APL has also never received payments from VSPL into any bank account except the one mentioned above i.e., located at Delhi. Under the other two projects/ MoUs under the same LLP Agreement, payments were made by VSPL to the bank a/c of APL at New Delhi. Payments for the project/ MoU in dispute under LLP Agreement were also to be made at the bank account mentioned above, but VSPL defaulted in making such

² LLP Agreement was executed between the parties for carrying out work of “*Augmentation of Storage capacity of ITF by 40000 cum for creation of additional ullage for crude oil at ITF, Tenughat, Assam*” [“*ITF Project*”].

payments.

- 4.3 Reliance is placed upon the following judgments: *BGS SGS Soma v. NHPC*³, *ABC Laminart Pvt. Ltd. v. A.P. Agencies, Salem*⁴, *Satyapal v. Slick Auto Accessories (P) Ltd. and Ors.*⁵, *Aarka Sports (supra)*, *L&T Finance Ltd. v. Manoj Pathak*⁶, *Swastik Gases Pvt. Ltd. v. Indian Oil Corporation Ltd.*⁷, *State of West Bengal v. Associated Contractors*⁸, *Sreenivasa Pulvarising Industries v. Jai Glass and Chemicals Pvt. Ltd.*⁹, and *Auto Movers v. Luminous Power Technologies Pvt. Ltd.*¹⁰.
- 4.4 Affidavit-in-Reply, VSPL has not denied that payments were made by VSPL in New Delhi, despite the categorical stand of VSPL that the LLP Agreement did not specify where payments were to be made.

ANALYSIS

5. Having heard the counsel and on perusal of material on record, the Court is of the opinion that it is competent to entertain the present petition, for reasons discussed hereinafter.

6. In the normal course, once a 'seat'/ 'place' of arbitration has been specified, the same is akin to conferring exclusive jurisdiction for the purpose of regulating arbitral proceedings arising out of the agreement(s)

³ (2020) 4 SCC 234.

⁴ (1989) 2 SCC 163.

⁵ 2014 SCC OnLine Del 998.

⁶ 2020 SCC OnLine Bom 177.

⁷ (2013) 9 SCC 32.

⁸ AIR 2015 SC 260.

⁹ AIR 1985 Cal 74.

¹⁰ 2021 SCC OnLine Del 4387.

between the parties. In the instant case, Clause 40 of LLP Agreement is silent as to the 'seat' and 'place' of the arbitration. Thus, in absence of the defined 'place/seat' of arbitration, the Court would rely on the principles governing jurisdiction as provided in CPC viz. Sections 16 to 20.¹¹ In fact, on this proposition, the counsels are *ad idem*.

7. Now, the Court has to examine if any cause of action has arisen within the meaning of the provisions referred above. APL has argued that a part of cause of action has arisen in Delhi, in as much as some payments were made from Delhi and some payments were to be received in Delhi. VSPL, does not deny this assertion, but, contends that parties never intended that courts at New Delhi shall have jurisdiction and the subject-matter of the Petition does not fall within the ambit of Sections 16-19 of CPC and therefore, Section 20 of CPC applies. To drive home this point, they refer to various aspects, as noted above and urge that court of competent jurisdiction in Mumbai alone can entertain the present Petition.

8. Section 20 of CPC deals with jurisdiction of the courts for institution of suits on the basis of residence of defendant(s) or where cause of action arises. The phrase 'cause of action' found in sub-clause (c) of Section 20 has not been specifically defined under CPC. However, there are sufficient judicial pronouncements explaining the concept. The Supreme Court has held that the expression 'cause of action' is generally understood to mean situation(s) or state of fact(s) that entitles a party to maintain an action in a

¹¹ See: *BGS SGS Soma (supra)* and *Indus Mobile Distribution (P) Ltd. v. Data wind Innovations (P) Ltd.*, (2017) 7 SCC 678.

court of law. It is sometimes employed to convey the restricted ideas of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts, which plaintiff(s) must prove in order to succeed.¹² In the context of contracts, the concept of ‘cause of action’ has been explained by the Supreme Court in **ABC Laminart** (*supra*). Relevant paragraph is reproduced as under: -

“In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the Law of Contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated...”

9. APL has demonstrated that VSPL was required to make payments to APL on account of the profits accrued to VCES from the ITF Project, in the Bank Account located at New Delhi. Thus, part of cause of action has arisen in Delhi. In **BGS SGS SOMA** (*supra*), the Apex Court held that where it is found on facts of a particular case that either no ‘seat’ is designated under the agreement, or the so-called ‘seat’ is only a convenient ‘venue’, then there may be several courts where a part of the cause of action arises that may have jurisdiction. This is the rationale for the Court to rely upon Sections 16-20 of CPC in such a situation. Here, as noted above, the facts narrated by APL indicate that a part of cause of action has arisen in Delhi,

¹² See: **Om Prakash Srivastava v. Union of India**, 2006 (6) SCC 207.

yet, VSPL wants that to be ignored, by arguing that this is insignificant and a minuscule part of cause of action. This proposition, premised on *forum non conveniens* cannot be accepted. If for contractual disputes, the jurisdiction would lie in courts at Delhi, on the basis of cause of action having arisen at Delhi – the concept cannot be applied selectively. LLP Agreement specifies the place of execution as ‘Mumbai’, and court of competent jurisdiction of such location would certainly have jurisdiction, but that does not oust the jurisdiction of this Court. In fact, as noticed above, parties have chosen to remain silent on the ‘seat’ and ‘place’ of arbitration and agreeing that the arbitrator would fix the venue.

10. Besides, the Court also finds merit in the contention advanced by Mr. Kirpal that it is well-established that where a contract does not specify the place of payment, the ‘*debtor must seek creditor*’, and therefore, a suit for recovery is maintainable at the place where the creditor resides or works for gain, particularly when part of the cause of action has arisen at that place [Section 20(c) of CPC].

11. The judgment of this Court *Aarka Sports (supra)* is not applicable in the facts of the present case. In the said case, although the arbitration clause in the agreement therein provided that the jurisdiction shall vest exclusively in the courts of New Delhi, however, no ‘seat’ or ‘venue’ was provided. Respondent therein raised an objection that Delhi was neither the ‘seat’ of arbitration nor any part of cause of action arose there. The Court held that since the parties had not agreed on the ‘seat’ of the arbitration under Section 20(1) of the Act, the same shall be determined by the Arbitral Tribunal

under Section 20(2) of the Act. The Court held that jurisdiction would be determined within the meaning of Section 2(1)(e) of the Act read with Sections 16-20 of CPC and declined to entertain the Petition holding that no cause of action arose at Delhi. In the instant case, as discussed above, part of cause of action has arisen within the jurisdiction of this Court. Particularly since VSPL does not deny having made payments to APL at Delhi.

CONCLUSION

12. In light of the aforesaid discussion, in absence of a dedicated 'seat' of arbitration, the question of jurisdiction shall have to be determined keeping in mind the provisions of Sections 2(1)(e) of the Act read with Sections 16-20 of CPC. Applying the provision of Sections 20(c) of CPC to the present facts, in view of undisputed fact that the payments were to be made by VSPL to APL at Delhi and certain payments have indeed, been made at New Delhi, . it can be inferred that part of cause of action has arisen in Delhi and thus, this court would be competent to entertain the present petition.

13. In view of the foregoing, the present petition is allowed and accordingly, Hon'ble Mr. Justice R.C. Chopra (Retd.) former Judge of this Court [Contact No.: +91 9818097777] is appointed as the Sole Arbitrator to adjudicate the disputes that are stated to have arisen between the parties out of the LLP Agreement dated 01st June, 2012 read with Supplementary LLP Agreement and MoU both dated 29th January, 2013.

14. The parties are directed to appear before the learned Sole Arbitrator as and when notified. This is subject to the learned Arbitrator making the

necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

15. The learned Arbitrator shall fix his fee in consultation with parties.

16. It is clarified that the Court has not examined any of the claims of the parties and all rights and contentions on merits are left open. Both the parties shall be free to raise their claims/ counter claims before the learned Arbitrator in accordance with law.

17. Accordingly, the present petition is allowed in the above terms.

NOVEMBER 24, 2021
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SANJEEV NARULA, J