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* **IN THE HIGH COURT OF DELHI AT NEW DELHI****Date of decision: 12 April, 2022**

+ ARB.P. 676/2021

MEDELA INDIA PRIVATE LIMITED Petitioner
Through Ms. Richa Singh, Advocate.

versus

WALNUT CORPORATION Respondent
Through Mr. Sandeep Kumar Mahapatra,
Advocate.**CORAM:****HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI****J U D G M E N T****(Judgment released on 20.04.2022)**

By way of the present petition filed under section 11(6) of the Arbitration & Conciliation Act 1996 (A&C Act), the petitioner M/s Medela India Private Limited seeks appointment of an arbitrator for adjudication of disputes that are alleged to have arisen with the respondent M/s Walnut Corporation from Distribution Agreement dated 20.04.2018.

2. Notice in this petition was issued on 06.10.2021; whereupon reply dated 15.12.2021 was filed by the respondent.
3. Ms. Richa Singh, learned counsel for the petitioner, has drawn the attention of this court to clause 20.5 of the Distribution Agreement, which it is submitted, contains the arbitral mechanism and territorial jurisdiction clause as agreed to between the parties. Clause 20.5 reads as under:



“20 General Provisions

*20.5 This Agreement is subject to Indian law. All disputes arising out of or in connection with the present Agreement shall be settled as per the Arbitration and Conciliation Act, 1996. The Tribunal shall consist of sole arbitrator appointed by Medela. **This Agreement** shall be governed by and interpreted in accordance with the laws of India, without regard to the conflicts of law’s provisions thereof and **shall be subject to the exclusive jurisdiction of courts of Delhi.**”*

(emphasis supplied)

4. The petitioner contends that the respondent has defaulted on making certain payments towards invoices raised upon it by the petitioner, aggregating to about Rs. 1.45 crores. It is stated that in view of such default, the petitioner caused to be issued to the respondent a demand notice dated 19.01.2020, calling upon the respondent to pay the outstanding amounts; but to no avail.
5. It is submitted that instead, the respondent sent a reply dated 28.01.2020 through its lawyer, calling upon the petitioner to furnish details about the transactions in relation to which the dues were claimed; thereby failing to pay-up the amounts claimed by the petitioner. Though the record shows that some attempts were made thereafter at reconciliation of accounts; however, it is contended that the demands remain unresolved.
6. Subsequently, *vidé* invocation notice dated 04.08.2020 issued on its behalf, the petitioner reiterated its demands; and invoked the arbitration mechanism, setting-out its itemised claims; and calling upon the respondent to select one of the two retired Hon’ble High Court Judges nominated by the petitioner, as sole arbitrator to adjudicate upon the disputes that had arisen between the parties.



7. In response to invocation notice dated 04.08.2020, the respondent caused to be issued a lawyer's reply dated 02.09.2020, disputing the contentions and demands raised by the petitioner; and also declining to agree upon either of the two names proposed; but instead suggested as follows :

"That my client objects to the panel consisting of two distinguished persons drawn your client to be appointed as Sole Arbitrator as appointment of Retired High Court Judges is not agreeable in view of the quantum of money involved in the dispute and the appointment of any Retired District Judge would be appropriate to act as a Sole Arbitrator in this matter."

(emphasis supplied)

8. It would appear therefore, that *vidé* reply dated 02.09.2020 aforesaid, the respondent had in-effect admitted to the existence of an arbitration agreement between the parties; as also to the existence of arbitrable disputes between them, suggesting only that in view of the quantum of money in dispute, the appointment of a retired District Judge would be more appropriate to act as sole arbitrator, instead of a retired High Court Judge. However, in the reply filed to the present petition the respondent has raised several objections.
9. The principal contention raised by Mr. Sandeep Kumar Mahapatra, learned counsel for the respondent, in the course of his submissions is that the present petition is not maintainable before this court at all, since no part of the alleged cause of action had arisen within the territorial jurisdiction of Delhi courts. To support this contention, counsel for the respondent has cited the following aspects :



- i. That the Distribution Agreement dated 20.04.2018 was signed and executed by the petitioner in Gurgaon and by the respondent in Chennai;
 - ii. That in relation to the transaction between the parties, monies were remitted by the respondent from Chennai to the petitioner in Gurgaon; and
 - iii. That the territory for which the petitioner appointed the respondent as distributor were Andhra Pradesh, Telangana, Karnataka, Tamil Nadu and Kerala.
10. In this behalf, Mr. Mahapatra has drawn the attention of this court to section 2(1)(e) of the A&C Act, which defines ‘court’ to mean:

“2. Definitions.—(1)...

...

(e) “Court means—

(i) in the case of an arbitration other than international commercial arbitration, 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;”

to submit, that from the very definition of ‘court’ in the A&C Act, it is evident that only the principal civil court of original jurisdiction *which has jurisdiction to decide the questions forming the subject matter of the arbitration, if those had been subject matter of a suit*, may entertain a petition for appointment of an arbitrator under section 11 of the A&C Act.



11. In support of his contention Mr. Mahapatra has also cited the decision of a Co-ordinate Bench of this court in ***Aarka Sports Management Pvt. Ltd. vs. Kalsi Buildcon Pvt. Ltd.*** reported as 2020 SCC OnLine Del 2077, in which case the arbitral mechanism provided was the following:

“2. The arbitration agreement between the parties is contained in clause 15 of the operation, maintenance and management agreement dated 16th March, 2018, which is reproduced hereunder:

“15. Governing Law, Jurisdiction & Dispute Resolution

15.1 This Agreement shall be governed by and construed in accordance with the laws of India and subject to clauses 15.2 and 15.3, the jurisdiction of this Agreement shall be exclusively in the courts of New Delhi, India.

15.2 Negotiation : The Parties shall negotiate in good faith and use reasonable efforts to settle any dispute, difference or claim raised, arising out of or in connection with this Agreement including the construction, validity, execution, performance, termination or breach hereof (hereinafter referred to as ‘Dispute’). In the event that the Parties are unable to reach a resolution within 30 (thirty) days of the start of Dispute the same shall be settled by binding arbitration.

15.3 Arbitration : Any Dispute which is not settled by Mediation, shall be determined by Arbitration under the Arbitration and Conciliation Act, 1996, as amended by the Arbitration and Conciliation (Amendment) Act, 2015. The Arbitration shall be conducted before a sole arbitrator appointed with the mutual consent of both Parties. If the Parties are unable to reach an agreement on the choice of an arbitrator within 30 days of the Notice of Arbitration by either Party, the Parties shall approach the court of proper jurisdiction for appointment of arbitrator.”

(Emphasis Supplied)

* * * * *

“6. Learned counsel for the respondent urged at the time of the hearing that clause 15.1 of the agreement is invalid as Delhi is not



the seat of agreement; no cause of action arose at Delhi and the respondent does not work at Delhi. It was submitted that agreement was drawn at Ranchi; the agreement was signed at Lucknow and place of performance/execution was Patna. It was further submitted that the parties cannot confer jurisdiction on a Court which otherwise has no jurisdiction. Reliance was placed on Interglobe Aviation Limited v. N. Satchidanand, (2011) 7 SCC 463. It was further submitted that Clause 15.1 is not absolute and is subject to Clause 15.3 which records that the parties shall approach the “Court of proper jurisdiction”. It was further submitted that the “Court of proper jurisdiction” is the “Court” as per Section 2(1)(e) of the Arbitration and Conciliation Act. It was submitted that this Court is not a competent Court within the meaning of Section 2(1)(e) of the Arbitration and Conciliation Act as neither the cause of action arose at Delhi nor the parties work at Delhi and the agreement does not provide any seat of arbitration. Reliance was placed on GE Countrywide Consumer Financial Services Ltd. v. Surjit Singh Bhatia, (2006) 89 DRJ 73; Apparel Export Promotion Council v. PrabhatiPatni, ILR (2005) 2 Del 1066; and Gulati Construction Co., Jhansi v. Betwa River Board, AIR 1984 Del 299. With respect to Indus Mobile Distribution Private Limited (supra) relied upon by the petitioner, it was submitted that the arbitration clause in that case provided seat of arbitration to be Mumbai whereas the arbitration clause in the present case does not provide for the seat of arbitration.

* * * * *

Summary of Principles

“24. Section 20(1) of the Arbitration and Conciliation Act empowers the parties to determine the seat of arbitration. The parties are at liberty to choose a neutral seat of arbitration where neither the cause of action arose nor the parties reside or work and Sections 16 to 20 of the Code of Civil Procedure would not be attracted.

“25. Once the seat is determined, the Court of that place shall have exclusive jurisdiction to deal with all matters relating to arbitration agreement between the parties.

“26. If the parties have not determined the seat of arbitration, the seat of arbitration shall be determined by the Arbitral Tribunal under Section 20(2) of the Arbitration and Conciliation Act.



“27. If the parties have not agreed on the seat of the arbitration, the Court competent to entertain an application under Section 11 of the Arbitration and Conciliation Act would be the “Court” as defined in Section 2(1) (e) of the Act read with Sections 16 to 20 of the Code of Civil Procedure.

* * * * *

“30. This Court lacks territorial jurisdiction as Delhi is not the seat of arbitration; no cause of action arose at Delhi and the respondent does not work at Delhi. The agreement was drawn at Ranchi, signed at Lucknow and was to be performed at Patna.

“31. The petitioner could have succeeded if the agreement had provided the seat of arbitration to be Delhi. In that case, this Court would have exclusive jurisdiction to entertain this application.

(emphasis in original)

Accordingly, in *Aarka Sports* (supra), a Co-ordinate Bench had held that the Delhi High Court had no territorial jurisdiction to entertain the arbitration petition.

12. On the other hand, Ms. Richa Singh, learned counsel for the petitioner, seeks to distinguish the legal position as laid-down in *Aarka Sports* (supra), submitting that the distinction lies in the text and wording of the ‘arbitration clause’ read in conjunction with the ‘territorial jurisdiction’ provision.
13. To support her contentions, Ms. Singh places reliance on two other subsequent judgments of Co-ordinate Benches of this court on the same issue, submitting that the arbitration clause and the territorial jurisdiction clause that were subject matter of the said two decisions are akin to the corresponding clauses in the present case. Ms. Singh cites *M/s. Hamdard Laboratories (INDIA) vs. M/s. Sterling Electro Enterprises* (*Hamdard Laboratories*) reported as 275 (2020) DLT 75, where the arbitration clause was worded as follows:



“8. Since the rival contentions of the parties revolve around the effect of the arbitration agreement within the dispute resolution clause contained in the Work Order dated 01.03.2018, it would be apposite to note the same which reads as under:-

"DISPUTES:

...

Arbitration: Any dispute between the Parties, which cannot be settled amicably within 30 (thirty) days after receipt by one Party of the other Party's request for such amicable' settlement, may be submitted by either Party through arbitration. The arbitration shall be conducted as per the provision of The Arbitration and Conciliation Act, 1996, and any statutory modification or reenactment thereof. The arbitration proceedings shall be conducted in the English Language. **The courts of law at Delhi alone shall have the jurisdiction.** The arbitration award shall be final and binding upon the Parties. Each Party shall bear the cost of preparing and presenting its case, and the cost of arbitration, including fees and expenses of the arbitrators, shall be shared equally by the Parties unless the award otherwise provides. it is further agreed between the Parties hereto that such arbitration proceedings shall be completed within a period of six calendar months from the date of reference.

All terms and conditions shall be applicable and fully observed by you for successful and timely completion of work."

(emphasis supplied)"

(emphasis in original)

14. Counsel draws attention to the following portions of *Hamdard Laboratories* (supra), which deal with the aforesaid arbitration clause:

“11. Having carefully examined the arbitration clause, I find that the sentence 'The courts of law at Delhi alone shall have the jurisdiction.' ensconced therein contains the key to the riddle, insofar as it is a clear expression of the parties' intent to confer exclusive jurisdiction in all arbitrations arising out of the Work Order, upon the courts at Delhi. The respondent's interpretation of



the arbitration clause and opposition to vesting of jurisdiction in Delhi courts arises from its contention that the arbitration clause never provided for a seat of arbitration. In furtherance of this contention, the respondent has correctly reiterated the settled propositions of law that seat and venue of arbitration cannot be confused with each other and bear distinct meanings, and that only when the contract expressly provides for a seat of arbitration does there arise an automatic vesting of jurisdiction in the courts within which the seat is situated. While there is no dispute with these propositions, they are not applicable in the instant case as the terms of the arbitration clause contained in the Work Order are explicit and it is clear that Delhi has not been designated as a venue, but has been designated as a seat of arbitration. In my view, the absence of the term 'seat' while referring to the courts at Delhi, does not alter the significant fact that the courts of law at Delhi alone have been vested with the jurisdiction upon arbitration proceedings arising out of the subject Work Order. In fact, on this ground alone, if the respondent's plea were to be accepted and this Court were to disregard the entire phrase "The courts of law at Delhi alone shall have the jurisdiction" within the arbitration clause, it would render a vital portion of the clause meaningless and futile.

"12. Ultimately, the law does not prohibit parties from agreeing to confer exclusive jurisdiction in respect of arbitration proceedings, on mutually preferred, neutral seats. Therefore, notwithstanding the fact that no part of the cause of action arose in Delhi, the clear expression of intent within the arbitration clause to confer jurisdiction on the courts at Delhi helps cull out the fact that the parties chose Delhi as a neutral seat of arbitration. In this regard, reference may be made to the decision in Indus Mobile (supra) wherein the Hon'ble Supreme Court has, by referring to its earlier decision in BALCO v. Kaiser Aluminium Technical Services Inc., MANU/SC/0722/2012 : (2012) 9 SCC 552 observed as under:

"9. The concept of juridical seat has been evolved by the courts in England and has now been firmly embedded in our jurisprudence. Thus, the Constitution Bench in BALCO v. Kaiser Aluminium Technical Services Inc. [BALCO v. Kaiser Aluminium Technical Services Inc., MANU/SC/0722/2012 : (2012) 9 SCC 552: (2012) 4 SCC (Civ) 810] has adverted to



"seat" in some detail. Para 96 is instructive and states as under:

"96. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

* * * * *

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.””

(emphasis supplied)

15. Ms. Singh further points-out that in fact *Hamdard Laboratories* (supra) notices and proceeds on the same legal principles as set-out in *Aarka Sports* (supra) and comes to the following conclusion:

“16. A reading of Clause 15.3, which provided for arbitration in the aforesaid decision, makes it clear that the parties, in Aarka Sports (supra), did not provide for exclusive jurisdiction of the Courts at Delhi in respect of arbitration. Rather, the petitioner, in that case, had relied upon the jurisdiction conferred in clause 15.1 of the dispute resolution clause titled Governing Law, Jurisdiction & Dispute Resolution, which was in fact a general stipulation on dispute resolution, not a part of the arbitration clause like the present case. When the parties herein have specifically provided, within the arbitration clause itself, that the Courts at Delhi will have jurisdiction over all arbitration proceedings arising out of the Work Order dated 01.03.2018, I find that the facts of Aarka Sports (supra) cannot be equated to that of the present case in any respect. In view of the aforesaid, it is clear that the parties had envisaged conferment of exclusive jurisdiction upon the courts in Delhi to decide all disputes relating to arbitration, arising out of the Work Order in question. Thus, by necessary implication, the parties also agreed to make Delhi the seat of arbitration, which leaves no merit in the respondent's contention that this Court does not have territorial jurisdiction to adjudicate the present petition.”

(emphasis supplied)

16. Ms. Singh also seeks to draw support for her submissions from another judgment of a Co-ordinate Bench of this court in ***CARS24 Services Pvt. Ltd. vs. Cyber Approach Workspace LLP*** reported as 2020 SCC OnLine Del 1720. However, upon a careful look at the decision in that case, it is found that the arbitration clause in that



matter was very peculiar inasmuch as two separate and distinct ‘places’ were referred to in the context of territorial jurisdiction in the self-same arbitration clause. In the said case the parties had provided that either party may approach the court of competent jurisdiction in the State of Haryana for purposes of appointment of a sole arbitrator; while at the same time in the self-same clause also agreeing that the seat of arbitration proceedings will be at New Delhi. It was in these peculiar circumstances that the Co-ordinate Bench in that case declined to entertain the petition under section 11 seeking appointment of an arbitrator filed at New Delhi.

17. Upon a careful consideration of the arbitral provision comprised in clause 20.5 of the Distribution Agreement in the present case, read in light of the position of law expatiated in *Aarka Sports* (supra) and *Hamdard Laboratories* (supra) this court is of the opinion that:
 - i. In the present case the territorial jurisdiction clause *is embedded* in the arbitration clause, namely in clause 20.5 of the Distribution Agreement;
 - ii. There is no separate provision defining, either the ‘seat’ or the ‘venue’ of arbitration;
 - iii. Since the covenant as to territorial jurisdiction is contained within the arbitration clause itself, it is not necessary to look beyond that provision; and it can be inferred with certainty that parties have agreed to subject the ‘arbitral process’ under the Distribution Agreement to the ‘supervisory jurisdiction’ of the courts in Delhi;
 - iv. The respondent’s contention that the signing, execution and



performance of the Distribution Agreement happened at various places viz. Gurgaon and Chennai; and that the petitioner's distributorship was for the States of Andhra Pradesh, Telangana, Karnataka, Tamil Nadu and Kerala is wholly irrelevant for purposes of deciding as to what court would have supervisory control over the 'subject matter of arbitration' as distinct from the 'subject matter of any civil suit.'

- v. Applying the principles of law as set-out hereinabove to the arbitral mechanism agreed to between the parties in this case, this court is of the view that there is no merit in the objection as to territorial jurisdiction raised on behalf of the respondent.
18. Accordingly, this court holds that the present arbitration petition is maintainable before this court.
19. As observed above, in reply dated 02.09.2020 issued on behalf of the respondent to the petitioner's invocation notice dated 04.08.2020, the respondent has in-effect admitted to the existence of an arbitration agreement, as also to the existence of arbitrable disputes between the parties; whereby, there is now no impediment to the appointment of an arbitrator to decide the disputes that have arisen between the parties.
20. Accordingly this court proposes to appoint Mr. Sanjoy Ghose, Senior Advocate of A-187 (Basement), Defence Colony, New Delhi - 110024 (Cellphone. No. 9811118889) to act as sole arbitrator to adjudicate upon the disputes between the petitioner and the respondent.



21. The arbitrator shall be entitled to fee as stipulated in the Fourth Schedule to the A&C Act; or as may be agreed to by the parties with the learned sole arbitrator.
22. The petitioner is directed to approach the proposed sole arbitrator within 01 week of the date of release of this judgment; seek disclosures in terms of section 12 of the A&C Act; and to file the same on record, before next date of hearing, with a copy to the opposing counsel.
23. Let a copy of this judgment be sent to learned counsel appearing on behalf of the parties.
24. List for further consideration on 29.04.2022.

ANUP JAIRAM BHAMBHANI, J

APRIL 12, 2022

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