

(2020) 07 DEL CK 0028

In the Delhi High Court

Case No : Arbitration Petition No. 662 Of 2019

Aarka Sports Management Pvt. Ltd

APPELLANT

Vs

Kalsi Buildcon Pvt. Ltd

RESPONDENT

Date of Decision : 06-07-2020

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(1)(e), 9, 11, 11(6), 17, 20, 20(2), 20(3), 31(4), 34, 37, 42
Code Of Civil Procedure, 1908 — Section 16, 17, 18, 19, 20, 21
Arbitration Act, 1940 — Section 14

Citation : (2020) 07 DEL CK 0028

Hon'ble Judges : J.R. Midha, J

Bench : Single Bench

Advocate : Kumar Mihir, Shamik Narain, Sharan Thakur, Siddharth Thakur, Gurmehar Sistani, Ketan Paul, Vijay Kumar

Final Decision : Dismissed

Judgement

J.R. Midha, J

1. The petitioner is seeking appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act.

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)

3. The petitioner invoked the arbitration vide notice dated 26th February, 2019 which was replied by the respondent on 20th March, 2019.

4. The arbitration agreement as well as notice of invocation are not disputed. Learned counsel for the respondent however disputes the jurisdiction of

this Court to entertain this petition. According to the respondent, Delhi is neither the seat of arbitration nor any cause of action arose at Delhi. The

agreement was drawn at Ranchi; the agreement was signed at Lucknow and the place of performance/execution of the agreement was Patna, Bihar.

5. Learned counsel for the petitioner urged at the time of the hearing that this Court has exclusive jurisdiction to entertain this petition under clause

15. 1 which specifically provides that the jurisdiction of the agreement shall be exclusively with the Courts at New Delhi. Reliance was placed on

Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited, (2017) 7 SCC 678; Brahmani River Pellets Limited v. Kamachi

Industries Limited, (2019) SCC OnLine SC 929; State of West Bengal v. Associated Contractors, (2015) 1 SCC 32; NJ Construction v. Ayursundra

Health Care Pvt. Ltd., 2018 (168) DRJ 274; Raman Deep Singh Taneja v. Crown Realtech Private Limited, 2017 SCC OnLine Del 11966; Rohit

Bhasin v. Nandini Hotels, 2013 SCC OnLine Del 2300; Spentex Industries Ltd. v. Louis Dreyfus Commodities India Pvt. Ltd., (2019) 258 DLT 138;

and Virgo Softech Ltd. v. National Institute of Electronics and Information Technology, 2018 SCC OnLine Del 12722.

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.

Prabhati Patni, ILR (2005) II Delhi 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.

Legal Position

7. Section 2(1)(e) of the Arbitration and Conciliation Act defines "Court" which is reproduced hereunder:-

"Section 2. Definitions.-(1) In this Part, unless the context otherwise requires-

xxx xxx xxx

(e) "Court" means 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;

xxx xxx xxx

(2) This Part shall apply where the place of arbitration is in India.â??

8. Section 20 of the Arbitration and Conciliation Act defines â??Place of Arbitrationâ?? which is reproduced hereunder:-

â??Section 20. Place of arbitration.- (1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the Arbitral Tribunal having regard

to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it

considers appropriate for consultation among its members, for hearing witness, experts or the parties, or for inspection of documents,

goods or other propertyâ??.

9. Section 31(4) of the Arbitration and Conciliation Act provides that the arbitral award shall state its date and place of arbitration as determined in

accordance with Section 20. Section 31(4) of the Arbitration and Conciliation Act is reproduced hereunder:-

â??Section 31. Form and contents of arbitral award. â?

(1)â?|

(2)â?|

(3)â?|

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with Section 20 and the award shall be

deemed to have been made at that place.â??

Judgments cited by the Petitioner

10. In Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited, (2017) 7 SCC 678, the arbitration agreement provided that

the seat of the arbitration shall be at Mumbai. The agreement also provided for exclusive jurisdiction of Mumbai Courts. An application for

appointment of an arbitrator was filed before Delhi High Court on the ground that part of the cause of action arose at Delhi and, therefore, the clause providing for seat of arbitration at Mumbai was not valid. This Court held that exclusive jurisdiction clause would not apply as no part of the cause of action arose at Mumbai. This Court further held that the Courts of only three territories had jurisdiction, namely, Delhi and Chennai (from and to where goods were supplied), and Amritsar (which is the registered office of the appellant company). This Court appointed an arbitrator which was challenged before the Supreme Court.

The Supreme Court held that Section 20 recognizes autonomy of the parties to choose a neutral seat of arbitration where no part of the cause of action arose. The Supreme Court further held that once the seat is determined, the Court of that place would have exclusive jurisdiction to regulate the arbitration proceedings arising out of the agreement between the parties. The Supreme Court further held that the neutral seat chosen by the parties may not have jurisdiction under any of the provisions of Section 16 to 21 of Code of Civil Procedure. The Supreme Court held that Mumbai Courts alone had exclusive jurisdiction, as Mumbai was the seat of arbitration. The relevant portion of the said judgment is reproduced hereunder:-

“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., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] has adverted to “seat” in some detail. Para 96 is instructive and states 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.â??

(emphasis in original)

10. Paras 98 to 100 have laid down the law as to â??seatâ?? thus:

xxx xxx xxx

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any

â??placeâ? or â??seatâ? within India, be it Delhi, Mumbai, etc. In the absence of the parties' agreement thereto, Section 20(2) authorises

the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings

at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.â??

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13. This Court reiterated that once the seat of arbitration has been fixed, it would

be in the nature of an exclusive jurisdiction clause as to

the courts which exercise supervisory powers over the arbitration. (See para 138.)

xxx xxx xxx

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. Simoese Von Staraburg Niedenthal v. Chhattisgarh*

Investment Ltd. [B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd., (2015) 12 SCC 225 : (2016) 1 SCC (Civ) 427]

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.

(Emphasis Supplied)

11. In *Brahmani River Pellets Limited v. Kamachi Industries Limited*, (2019) SCC OnLine SC 929, the arbitration agreement provided that the venue

of the arbitration shall be at Bhubaneswar. An application for appointment of an arbitrator was filed before the Madras High Court. The respondent

raised an objection to the jurisdiction on the ground that the parties agreed the seat of arbitration to be Bhubaneswar and, therefore, the Orissa High

Court alone had exclusive jurisdiction. The Madras High Court held that in absence of any express clause excluding jurisdiction of other Courts, both

the Madras High Court and the Orissa High Court had jurisdiction. The decision of Madras High Court was challenged before the Supreme Court.

The Supreme Court held that the parties agreed to have the venue of arbitration proceedings at Bhubaneswar and, therefore, Orissa High Court had

exclusive jurisdiction to deal with the matter. The relevant portion of the said judgment is reproduced hereunder:-

18. Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with

the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the "venue" of arbitration

shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the

parties is to exclude all other courts. As held in *Swastik*, non-use of words like "exclusive jurisdiction", "only", "exclusive",

"alone" is not decisive and does not make any material difference.

19. When the parties have agreed to have the "venue" of arbitration at Bhubaneswar, the Madras High Court erred in assuming the

jurisdiction under Section 11(6) of the Act. Since only Orissa High Court will have the jurisdiction to entertain the petition filed under

Section 11(6) of the Act, the impugned order is liable to be set aside."

(Emphasis Supplied)

12. In *State of West Bengal v. Associated Contractors*, (2015) 1 SCC 32, the objections under Section 34 of the Arbitration and Conciliation Act were

filed before the Principal Civil Court of the District Jalpaiguri, West Bengal on the ground that earlier an interim order under Section 9 was passed by

the Calcutta High Court in different proceedings. A writ petition was filed before Calcutta High Court to challenge the jurisdiction in principal civil

Court. The Calcutta High Court held that the parties had submitted to the jurisdiction of the High Court in its ordinary original civil jurisdiction in

connection with different earlier proceedings arising out of the said contract and the jurisdiction of the Court of the District Judge to entertain the said

application for setting aside of the award was excluded under Section 42 of the Act. The decision of High Court was challenged in the Supreme

Court. The Supreme Court rejected the objection to the jurisdiction and laid down the principles relating to Section 2(1)(e) and Section 42 of the

Arbitration and Conciliation Act, which are not relevant for the present case.

13. In *NJ Construction v. Ayursundra Health Care Pvt. Ltd.*, 2018 (168) DRJ 274, the agreement provided the seat of the arbitration at New Delhi

and jurisdiction of Guwahati Courts. An application for appointment of arbitrator was filed before the Delhi High Court in which the objection of

jurisdiction was raised. Following *Indus Mobile Distribution Private Limited (supra)*, this Court held that the Delhi Courts had exclusive jurisdiction as

Delhi was the seat of arbitration.

14. In *Raman Deep Singh Taneja v. Crown Realtech Private Limited*, 2017 SCC OnLine Del 11966, the agreement provided the venue of arbitration

proceedings to be Faridabad and exclusive jurisdiction of Delhi Courts. An application for appointment of an arbitrator was filed before Delhi High

Court. The agreement stipulated that where the disputes have to be adjudicated without reference to the arbitration, Courts at Delhi would have

exclusive jurisdiction, but if the disputes have to be resolved through arbitration, venue being at Faridabad, Haryana, the Courts at Faridabad, Haryana,

would have exclusive jurisdiction. This Court held that the Faridabad Courts had exclusive jurisdiction, since the arbitration clause had been invoked

and the venue of the arbitration proceedings was Faridabad.

15. In *Rohit Bhasin v. Nandini Hotels*, 2013 (5) AD (Del.) 710, the agreement provided the venue of the arbitration to be Delhi in case the disputes

were to be resolved by arbitration and the jurisdiction for civil Court at Noida and Allahabad High Court for civil disputes. An application for

appointment of an arbitrator was filed before Delhi High Court. This Court held that the Delhi Courts had exclusive jurisdiction since the venue of

arbitration was New Delhi and part of cause of action also arose at Delhi.

16. In *Spentex Industries Ltd. v. Louis Dreyfus Commodities India Pvt. Ltd.*, (2019) 258 DLT 138, the objections under Section 34 of the Arbitration

and Conciliation Act were filed before the Delhi High Court on the ground that the agreement provided for exclusive jurisdiction of Delhi Courts to

deal with any matter arising out of the arbitration proceedings or the award. The

respondent raised an objection to the maintainability on the ground that the arbitration was conducted under the rules and bye-laws of Cotton Association of India (CAI) and proceedings were held in Cotton Association of India's office in Mumbai. Rule 32 of the Rules and Bye-laws of CAI provided that place or venue of arbitration shall be India. Considering that Mumbai was not the seat/venue of the arbitration and the arbitration was held in CAI's premises for convenience, this Court held that Delhi High Court had exclusive jurisdiction to consider the objections.

17. In *Virgo Softech Ltd. v. National Institute of Electronics and Information Technology*, 2018 SCC OnLine Del 12722, the arbitration agreement provided that the arbitration proceedings shall be held at New Delhi and the Courts at Chandigarh shall have exclusive jurisdiction to entertain any dispute arising therefrom. An application for appointment for an arbitrator was filed before the Delhi High Court. This Court held that the Court at Chandigarh alone had the territorial jurisdiction as New Delhi was not the seat but only a venue of the arbitration.

Judgements cited by the Respondent

18. In *Interglobe Aviation Limited v. N. Satchidanand*, (2011) 7 SCC 463, the Supreme Court held that any clause which ousts the jurisdiction of all Courts having jurisdiction and confers jurisdiction on a Court not otherwise having jurisdiction, would be invalid. The parties cannot by agreement confer jurisdiction. The ouster of jurisdiction of some Courts is permissible so long as the Court on which exclusive jurisdiction is conferred, had jurisdiction. However, there was no arbitration agreement in that case.

19. In *AAA Landmark Ltd. v. Akme Projects Ltd*, 2018 SCC OnLine Del 7586, the agreement provided for exclusive jurisdiction of Delhi Courts.

The application for appointment of an arbitrator was filed before Delhi High Court in which an objection of jurisdiction was raised on the ground that the previously, a petition under Section 9 of the Arbitration and Conciliation Act was filed before the Gurgaon Court. This Court allowed the objection holding that all subsequent applications arising out of the agreement have to be filed before Gurgaon Court as the petition under Section 9 was previously filed before the Gurgaon Court.

20. In *GE Countrywide Consumer Financial Services Ltd. v. Surjit Singh Bhatia*, 2006 (89) DRJ 73, an application for appointment of an Arbitrator

was filed before Delhi High Court on the ground that the agreement stipulated the place of arbitration to be Delhi. This Court rejected the application

on the ground that the loan was applied and disbursed at Ahmedabad and no part of cause of action arose at Delhi. This judgment is prior to Indus

Mobile Distribution Private Limited (supra) in which the Supreme Court held that the Court at seat of arbitration shall have exclusive jurisdiction.

21. In Apparel Export Promotion Council v. Prabhati Patni, ILR (2005) II Delhi 1066, the objections under Section 34 of the Arbitration and

Conciliation Act were filed before the Delhi High Court in which the objection of territorial jurisdiction was raised on the ground that the agreement

provided for exclusive jurisdiction of Jaipur Courts. This Court dismissed the objections holding that the situs of arbitration or the fact that the award

was made at a particular place, would not be relevant for conferring jurisdiction. This judgment is also prior to Indus Mobile Distribution Private

Limited (supra) in which the Supreme Court held that the Court at seat of the arbitration shall have exclusive jurisdiction.

22. In Gulati Construction Co., Jhansi v. Betwa River Board, AIR 1984 Del 299, the arbitrator filed an award under the Arbitration Act, 1940 before

Delhi High Court on the ground that the arbitration proceedings were conducted at Delhi. The Delhi High Court returned the award holding that the

arbitration proceedings having been conducted and the award having been made in New Delhi, does not give this Court jurisdiction to entertain the

award as neither cause of action arose at Delhi nor the parties reside or work for gain at Delhi. This judgment was in the context of Section 14 of the

Arbitration Act, 1940 and is not relevant for the present case.

Summary of Principles

23. 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.

24. 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.

25. 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.

26. 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.

Findings

27. The arbitration agreement dated 16th March, 2018 does not stipulate any seat of arbitration as the parties had not agreed on the seat of the arbitration under Section 20(1) of the Arbitration and Conciliation Act. In that view of the matter, the seat of the arbitration shall be determined by the Arbitral Tribunal under Section 20(2) of the Arbitration and Conciliation Act.

28. Since the parties have not agreed on the seat of the arbitration, the Court within the meaning of Section 2(1)(e) of Arbitration and Conciliation Act read with Sections 16 to 20 of Code of Civil Procedure would be competent to entertain an application under Section 11 of the Arbitration and Conciliation Act.

29. 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.

30. 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.

31. Clause 15.1 which provides for exclusive jurisdiction of Delhi Courts, is not valid as the parties cannot confer jurisdiction on a Court which otherwise has no jurisdiction. That apart, clause 15.1 is subject to clauses 15. 2 and 15.3.

32. The judgments cited by the petitioner do not support the case of the petitioner. The petitioner has relied upon cases in which the agreements provided the seat of arbitration, which eventually determined the jurisdiction of the Court whereas the agreement dated 16th March, 2018, in the present case, does not determine the seat. In that view of the matter, the jurisdiction, in the present case, has to be determined according to Section

2(1)(e) of the Arbitration and Conciliation Act read with Sections 16 to 20 of the Code of Civil Procedure.

Conclusion

33. This Court holds that it has no territorial jurisdiction to entertain this petition.

34. The petition is dismissed with liberty to the petitioner to approach the Court of competent jurisdiction.