

(2021) 03 DEL CK 0246

In the Delhi High Court

Case No : Arbitration Petition No. 516 Of 2020

Balancehero India Private Limited

APPELLANT

Vs

Arthimpact Finserve Private Limited

RESPONDENT

Date of Decision : 22-03-2021

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(1)(e), 2(2), 2(2A), 2(7), 11, 17, 20, 28, 31, 37

Code Of Civil Procedure, 1908 — Section 13, 44A

Citation : (2021) 03 DEL CK 0246

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Ashish Kumar, Siddharth Khattar, Neeraj Chaudhary, Rakesh Jain

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition, inter alia, praying that a Sole Arbitrator be appointed to adjudicate the disputes that have arisen between the parties.

2. On 01.10.2019, a Loan Agreement was entered into between the parties whereby the petitioner granted an unsecured loan of Rs. 50 lakhs to the respondent for a period of six months.

3. The petitioner alleges that the respondent defaulted in repaying the loan. Accordingly, it issued a legal notice dated 02.07.2020 demanding a sum of Rs. 53,66,250/- as against the aforesaid loan. The petitioner alleges that it did not receive any response to the said legal notice. Thereafter, on 06.08.2020, the petitioner invoked the Arbitration Clause. However, according to the petitioner, this also did not elicit any response from the respondent.

4. The learned counsel appearing for the respondent submits that the present petition is not maintainable as the seat of arbitration is Gurugram, Haryana and

this Court does not have the jurisdiction to entertain the present petition.

5. The said Loan Agreement includes an Arbitration Clause that reads as under:-

"10. GOVERNING LAW AND DISPUTE RESOLUTION

10.1 This Agreement shall be governed by and construed in accordance with the laws of India, without regard to its rules of conflict of law and subject to Clause 12.3, competent courts at New Delhi shall have exclusive jurisdiction to entertain any dispute or suit arising out of or in relation to this Agreement.

10.2. Any dispute, difference relating to interests, controversy or claims arising out of or relating to this Agreement or the breach, termination or invalidity thereof, shall be settled by the parties amicably in the first instance. The attempt to bring about an amicable settlement shall be treated as having failed as soon as one of the Parties hereto, after reasonable attempts, which shall continue for not less than 30 (thirty) days, gives a notice to this effect, to the other party in writing.

10.3 In case of such failure, the dispute shall upon the expiry of the aforesaid period, be referred to arbitration to be adjudicated by sole arbitrator to be appointed and nominated by both parties on mutual basis. In the event the parties are unable to mutually agree on the identity of the sole arbitrator in the manner specified above, then the arbitration proceedings shall be conducted by 3 arbitrators of which one arbitrator shall be appointed by the Borrower, the other arbitrator by the Lender and both such arbitrators appointed shall mutually appoint the third presiding arbitrator. The dispute shall be settled in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (as amended). The seat of Arbitration shall be at Gurugram, Haryana. The arbitral proceedings shall be conducted in the English language. The award of the arbitral tribunal shall be final, conclusive and binding upon the parties."

6. Whilst Clause 10.1 of the Loan Agreement between the parties records that Courts in Delhi would have exclusive jurisdiction to entertain any dispute or suit arising out of or in relation to the Loan Agreement; Clause 10.3 of the Loan Agreement expressly provides that the seat of arbitration shall be at Gurugram, Haryana.

7. The Loan Agreement was executed at Mumbai. The petitioner has its registered office at Mumbai and the respondent has its office in Gurugram, Haryana. It is not disputed that no part of the cause of action has arisen within the territorial jurisdiction of this Court. Notwithstanding the above, the learned counsel appearing for the petitioner submits that this Court would have jurisdiction in view of Clause 10.1 of the Loan Agreement, which expressly provides that the Courts at New Delhi would have jurisdiction in respect of any dispute or suit arising out of or in relation to the Loan Agreement. He relies on the decision of the Supreme Court in *M/s Swastik Gases Pvt. Ltd. v. Indian Oil Corporation Ltd.*: (2013) 9 SCC 32, in support of his contention.

8. The contention that this Court does not have the jurisdiction to entertain the present petition is merited. The Supreme Court in the case of Bharat Aluminum Company & Ors. v. Kaiser Aluminum Technical Services & Ors.: (2012) 9 SCC 552 had observed as under:-

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

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

(a)-(d)***

(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;"

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."

9. In Enercon (India) Ltd. & Ors. v. Enercon GMBH and Ors.: (2014) 5 SCC 1, the

Supreme Court held that "once the seat of arbitration has been fixed in India, it would be in the nature of exclusive jurisdiction to exercise supervisory powers over the arbitration".

10. The said decision was followed by the Supreme Court in *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd. & Ors.*: (2017) 7 SCC 678. The Supreme Court referred to various other decisions rendered by it and reiterated the above principle. The relevant extract of the said decision is set out below:

"15. In a recent judgment in *Eitzen Bulk A/S v. Ashapura Minechem Ltd.* : (2016) 11 SCC 508, all the aforesaid authorities were referred to and followed. Paragraph 34 of the said judgment reads as follows:

"34. As a matter of fact the mere choosing of the juridical seat of arbitration attracts the law applicable to such location. In other words, it would not be necessary to specify which law would apply to the arbitration proceedings, since the law of the particular country would apply ipso jure. The following passage from Redfern and Hunter on International Arbitration contains the following explication of the issue:

"It is also sometimes said that parties have selected the procedural law that will govern their arbitration, by providing for arbitration in a particular country. This is too elliptical and, as an English court itself held more recently in *Breas of Doune Wind Farm* it does not always hold true. What the parties have done is to choose a place of arbitration in a particular country. That choice brings with it submission to the laws of that country, including any mandatory provisions of its law on arbitration. To say that the parties have "chosen" that particular law to govern the arbitration is rather like saying that an English woman who takes her car to France has "chosen" French traffic law, which will oblige her to drive on the right- hand side of the road, to give priority to vehicles approaching from the right, and generally to obey traffic laws to which she may not be accustomed. But it would be an odd use of language to say this notional motorist had opted for "French traffic law". What she has done is to choose to go to France. The applicability of French law then follows automatically. It is not a matter of choice.

Parties may well choose a particular place of arbitration precisely because its *lex arbitri* is one which they find attractive. Nevertheless, once a place of arbitration has been chosen, it brings with it its own law. If that law contains provisions that are mandatory so far as arbitration are concerned, those provisions must be obeyed. It is not a matter of choice any more than the notional motorist is free to choose which local traffic laws to obey and which to disregard.

16. It may be mentioned, in passing, that the Arbitration and Conciliation Act, 1996 has been amended in 2015 pursuant to a detailed Law Commission Report. The Law Commission specifically adverted to the difference between "seat" and "venue" as follows:

"40. The Supreme Court in BALCO decided that Parts I and II of the Act are mutually exclusive of each other. The intention of Parliament that the Act is territorial in nature and sections 9 and 34 will apply only when the seat of arbitration is in India. The seat is the "centre of gravity" of arbitration, and even where two foreign parties arbitrate in India, Part I would apply and, by 24 virtue of section 2(7), the award would be a "domestic award". The Supreme Court recognized the "seat" of arbitration to be the juridical seat; however, in line with international practice, it was observed that the arbitral hearings may take place at a location other than the seat of arbitration. The distinction between "seat" and "venue" was, therefore, recognized. In such a scenario, only if the seat is determined to be India, Part I would be applicable. If the seat was foreign, Part I would be inapplicable. Even if Part I was expressly included "it would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the [foreign] Procedural Law/Curial Law." The same cannot be used to confer jurisdiction on an Indian Court. However, the decision in BALCO was expressly given prospective effect and applied to arbitration agreements executed after the date of the judgment.

41. While the decision in BALCO is a step in the right direction and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.

(i) Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a 25 practical remedy to the party seeking to enforce the interim relief obtained by it. That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company.

(ii) While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are

forced to apply it whenever they are faced with a case arising from an arbitration agreement executed pre-BALCO.

42. The above issues have been addressed by way of proposed Amendments to Sections 2(2), 2(2-A), 20, 28 and 31."

11. In *Cinepolis India Pvt. Ltd. v. Celebration City Projects Pvt. Ltd. & Anr.*: (2020) 2 ArbLR 355 (Del), this Court had examined a controversy arising in respect of an Arbitration Clause which provided that the place of arbitration shall be New Delhi. However, one of the Sub-clauses also provided that the Courts in Ghaziabad would have 'exclusive jurisdiction' on the subject matter of the agreement. This Court following the decision of the Constitution Bench of the Supreme Court in *Bharat Aluminum Company & Ors. v. Kaiser Aluminum Technical Services & Ors.* (supra) and *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd. & Ors.* (supra), rejected the contention that this Court would not have the jurisdiction to entertain the petition. The Court after referring to various other decisions observed that "what emerges therefore by reading of various judgments referred to above is that it is really the seat of arbitration which is akin to an exclusive jurisdiction clause where there are no contrary provisions in the agreement. The place would be the juridical seat which would determine the territorial jurisdiction of a Court. No doubt, it is also clear from the now well settled law that it is the seat or the juridical seat which will be the guiding factor for a Court to determine its jurisdiction while examining a petition under Section 11 of the Act."

12. In view of the above, the Court, where the seat of the arbitration is located, would exercise jurisdiction in respect of the arbitral proceedings.

13. In *Mr. Raman Deep Singh Taneja v. Crown Realtech Private Ltd.*: (2017) SCC OnLine Del 11966, this Court had examined a similar case. In that case, the Agreement provided that the Courts at Delhi would have jurisdiction, however, Faridabad (Haryana) was agreed as the place of arbitration. This Court following the decision of the Supreme Court in *Bharat Aluminum Company & Ors. v. Kaiser Aluminum Technical Services & Ors.* (supra) held that place of the court where the subject matter of arbitration is situated, would have precedence over other courts. Accordingly, this Court held that the Courts at Haryana would have exclusive jurisdiction in respect of the arbitral proceedings.

14. The decision in *M/s Swastik Gases Pvt. Ltd. v. Indian Oil Corporation Ltd.* (supra) has no application in the facts of this case. In that case, the Arbitration Clause did not mention the place of arbitration. However, it did mention that the agreement would be subject to jurisdiction of the courts at Kolkata. It was also not disputed that a part of the cause of action had arisen in Kolkata and that the courts at Kolkata would have jurisdiction in respect of the subject disputes. However, it was contended that the courts at Jaipur would also have jurisdiction over the subject matter as part of the cause of action had arisen within the jurisdiction of the courts at Jaipur. The Supreme Court held that the import of the

clause stipulating that the courts at Kolkata would have jurisdiction was that the jurisdiction of other courts was excluded. The controversy involved in this petition is materially different.

15. In the present case, no part of the cause of action has arisen within the territorial jurisdiction of this Court and it is doubtful whether this Court has any jurisdiction in respect of the disputes that have arisen between the parties.

16. In view of the above, the present petition is dismissed while reserving the rights of the parties to approach the appropriate court.