

(2017) 02 DEL CK 0328

In the Delhi High Court

Case No : 477 of 2014

ORIENT BELL LTD

APPELLANT

Vs

KANERIA GRANITO LTD & ANR

RESPONDENT

Date of Decision : 16-02-2017

Acts Referred:

[Arbitration and Conciliation Act, 1996](#), [Section 2\(1\)](#), [Section 20](#), [Section 11\(6\)](#) -
Definitions - Place of arbitration - Appointment of arbitrators

Citation : (2017) 02 DEL CK 0328

Hon'ble Judges : S.Muralidhar

Bench : SINGLE BENCH

Advocate : Anshuj Dhingra, Dinesh Kumar Garg, Abhishek Garg, Dhananjay Garg, Deepak Mishra

Judgement

1. This is a petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ("Act") filed by the Petitioner, Orient Bell Limited ("OBL") against Respondent No. 1, Kaneria Granito Limited ("KGL") seeking reference of disputes that have arisen between the parties out of two agreements, namely, Manufacturing and Investment Agreement ("MIA") dated 13th August, 2010 and the Production and Quality Agreement ("PQA") of the same date to arbitration.

2. Under the above agreements contract it was inter alia agreed by the parties that tiles would be manufactured by KGL's units in Dahej, Gujarat for OBL. KGL has its registered office at Surat in Gujarat whereas OBL has its registered office at Sikandrabad, Uttar Pradesh. OBL's corporate office is in New Delhi. Significantly, both the MIA and the PQA have been executed in New Delhi.

3. The reference of the disputes between the parties to arbitration is per se not objected to by KGL. However, Mr. Dinesh Kumar Garg, learned counsel for KGL interprets Clause 11 (d) of the MIA to mean that the parties had agreed that only Courts in Ahmedabad (Gujarat) will have jurisdiction. Mr. Garg accordingly, submits that this Court does not have jurisdiction to entertain the present

petition. Mr. Garg seeks to place reliance on the decisions in *Ion Exchange (India) Limited v. Panasonic Electric Works Co. Ltd.* 208 (2014) DLT 597; *NHPC Limited v. Hindustan Construction Company Limited* (2015) 221 DLT 256; *ABB India Limited v. Isolux Corsan India Engineering & Construction* 2016 (3) Arb.LR 388.

4. Mr. Anshuj Dhingra, learned counsel for OBL, on the other hand, points out that no part of cause of action arose in Ahmedabad and, therefore, the Courts at Ahmedabad could not have jurisdiction to entertain any proceedings in terms of Section 2 (1) (e) of the Act. Mr. Dhingra further points out that the parties had agreed that the arbitration proceedings would be held at a place convenient to both the parties and, therefore, there was no intention to exclude the jurisdiction of this Court. With OBL having its corporate office in New Delhi and with the both the agreements i.e., the MIA and the PQA having been entered into in New Delhi, OBL has chosen to have the arbitration in Delhi. Reliance is inter alia placed on the decision of the Supreme Court in *State of West Bengal v. Associated Contractors* 2014 STPL (Web) 594 SC; *Swastik Gases P. Ltd. v. Indian Oil Corporation Limited* (2013) 9 SCC 32 and *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552 (Hereafter "Balco").

5. The arbitration clause in the PQA incorporates by reference the corresponding Clause 11 in the MIA which reads as under: "11. Arbitration and Governing Law:-

a. The parties to the agreement hereby agree that they intend to discharge their obligations in utmost good faith. The parties therefore agree that they shall at all times Act in good faith and make all attempts to resolve all differences of any nature mutually and by mutual discussions, howsoever arising out of or in connection with this agreement by discussion failing which by arbitration.

b. If for any reason such disputes cannot be resolved amicably by the parties, the same shall be referred to and settled by the arbitration by 4 persons from the tile industry, two appointed by KG and 2 by OCIL and generally abide by their unanimous decision and to take their views into account and attempt to solve their disputes. The arbitration proceedings shall be held at a place convenient to both parties and in accordance with the Arbitration and Conciliation Act, 1996, or any subsequent enactment or amendment thereto (the "Arbitration Act").

c. The language to be used in the arbitration proceedings shall be English. The award of the arbitration proceedings will be final and binding on both the parties to the agreement.

d. This agreement shall, in all respects, be governed by and construed in all respects in accordance with the laws of India. The parties agree to submit to the exclusive jurisdiction of the Courts in Ahmedabad in connection with any dispute arising out of or in any connection with this agreement."

6. The above clause read as a whole indicates that there was no particular "place" or "seat" of arbitration that was specified. The parties agreed that the

arbitration proceedings "shall be held at a place convenient to both parties". This is not to be confused with the exclusive jurisdiction clause. Clause 11(d) states that "the parties agree to submit to the exclusive jurisdiction of the Courts in Ahmedabad..." In the circumstances, the first question that arises is whether this Court has jurisdiction to entertain the present petition under Section 11 (6) of the Act seeking the appointment of an arbitrator to adjudicate the disputes between the parties.

7. It requires to be noticed that in terms of the decision in *Balco (supra)*, it is now settled that two courts would have jurisdiction: the Court within whose jurisdiction the arbitration proceedings take place, and the Court within whose jurisdiction the cause of action arises. In *Balco (supra)*, the Supreme Court took note the fact that Section 2 (1) (e) of the Act must be construed with reference to Section 20 of the Act. It observed that "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."

8. An attempt was made by Mr. Garg to argue that the exclusive jurisdiction clause under Clause 11(d) should be taken to mean that the parties wanted the arbitration to take place only in Ahmedabad. He stated that otherwise there was no purpose in such an exclusive jurisdiction clause.

9. In *Ion Exchange (India) Limited v. Panasonic Electric Works Co. Ltd (supra)* Clause 11.6 of the Development Agreement in that case clearly stated that "the seat or legal place of arbitration shall be New Delhi." Therefore, there was no ambiguity in that case as to where the seat of arbitration would be. In the present case, however, the parties have decided to have the arbitration "at a place convenient" to both of them. With the Petitioner having opted to conduct the arbitration in New Delhi, there is no intention to exclude the jurisdiction of the Courts in New Delhi as far as the place of arbitration is concerned. Where the arbitration takes place in Delhi, then the Courts in Delhi would have the supervisory jurisdiction over such arbitration. Consequently, in terms of ratio in *Balco (supra)*, the jurisdiction of the Court in Delhi cannot be said to be excluded.

10. In *ABB India Limited v. Isolux Corsan India Engineering & Construction (supra)*, the Court noticed that Clause 4.2 of the Novation Agreement stated that the arbitration shall be held at New Delhi whereas Article 4.4 thereof stated that the Courts at Gurgaon would have the exclusive jurisdiction. It is in that context that it was held, relying on the decisions in *Swastik Gases (P) Limited v. Indian Oil Corporation Limited (supra)* and *State of West Bengal v. Associated Contractors (supra)*, that "the Court is not competent and has no territorial jurisdiction to entertain the petition further." The Court summarized the legal position emanating from the above decisions as follows: "if two courts, where both such courts have jurisdiction in law to deal with dispute, only in that case parties can exclude jurisdiction of one court and confer it on the other." It must be noted at this stage that in the present case had there been no arbitration agreement, neither of the parties could have gone before the Court in

Ahmedabad to seek any relief against the other since no part of the cause of action has arisen in Ahmedabad. Mr Dhingra is right in his submissions that the Courts that possibly would have jurisdiction to entertain the present petition are in Delhi, Dahej or Surat.

11. The Court does not propose to delve into the merits of the disputes between the parties as that would be examined in the arbitration proceedings. 12. The next question that arises is whether there should be a sole arbitrator as urged by the Petitioner or as urged by Mr. Garg or four arbitrators as contemplated by the arbitration clause. For this purpose, it is necessary to list Section 10 of the Act which reads as under: "10. Number of arbitrators.-

(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

13. Where the Arbitral Tribunal ("AT") is yet to be constituted, the parties have not agreed on an even number of arbitrators, then in terms of Section 10 (2) there has to be a sole Arbitrator. What Clause 11 (b) envisages is a four member AT. This is not permissible under the Act.

14. Mr. Garg sought to place reliance on the decision of the Supreme Court in *Narayan Prasad Lohia v. Nikunj Kumar Lohia* AIR 2002 SC 1139 to urge that where an agreement provided for an even number of arbitrators, the constitution of such an AT was not invalid. The Court finds that in the said decision facts the arbitration was already underway and the question arose whether the challenge to the improper constitution of the AT should be taken before the Court or the AT under Section 16 of the Act. It was in that context that it was held that the parties could go before the AT under Section 16 of the Act to challenge its composition. The Court fails to appreciate as to how the said decision helps KGL's case as far as the present petition is concerned since the AT is yet to be constituted.

15. On the other hand, the Court finds that the decision relied upon by learned counsel for OBL in *National Council of Y.M.C. of India v. Sudhir Chandra Datt* 2013 (2) MPLJ 684 is applicable on the facts of the present case. With the parties not agreed on the number of arbitrators other than an even number, the disputes have to be referred to a sole Arbitrator under Section 10 (2) of the Act.

16. Consequently, the Court appoints a sole arbitrator to adjudicate the disputes between the parties. It is ordered that the arbitration shall take place under the aegis of the Delhi International Arbitration Centre ("DAC"). The fees of the learned Arbitrator will be in terms of the Delhi High Court Arbitration Centre (Arbitrators' Fees) Rules.

17. The parties will appear before the DAC on 14th March, 2017 at 11am for further steps in this regard.

18. The petition and the application are disposed of. Order be given dasti. A copy of this order be sent to the Additional Coordinator DAC forthwith.