

(2016) 12 DEL CK 0034
In the Delhi High Court
Case No : ARB.P. No. 94 of 2016

Sravanthi Infratech Private Limited		APPELLANT
	Vs	
Tricolite Electrical Industries Limited		RESPONDENT

Date of Decision : 15-12-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6)
Companies Act, 1956 — Section 433

Citation : (2017) 2 ADDelhi 236 : (2017) 237 DLT 589

Hon'ble Judges : S. Muralidhar, J.

Bench : Single Bench

Advocate : Mr. Piyush Joshi, Ms. Maulishree Gupta Ms. Preksha Dagar, Advocates, for the Petitioner; Mr. Salil Sagar, Senior Advocate with Mr. Ruchin Midha, Mr. Sankalp Sagar, Mr. IGGU Chittiappa, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J. - This petition under Section 11 (6) of the Arbitration & Conciliation Act, 1996 ("Act") by Sravanthi Infratech Pvt. Ltd. ("SIPL") seeks reference of the dispute it has with the Respondent Tricolite Electrical Industries Ltd. ("TEIL") arising out of the two purchase orders dated 14th September 2011 and 18th October 2011 along with their respective amendments.

2. It is not in dispute that there exists an arbitration clause in the terms and conditions governing the said purchase orders which reads as under:

"Arbitration shall be in accordance with Arbitration and Conciliation Act 1996. Courts in Gurgaon shall have exclusive jurisdiction in all matters arising under this Purchase Order. The venue of arbitration shall be Gurgaon/Delhi as per decision of SIPL."

3. The SIPL invoked the above clause by sending a legal notice to the Respondent calling upon it to agree on the name of the Arbitrator. The Respondent declined to do so.

4. It is stated that in the meanwhile the Respondent has filed a petition under Section 433 of the Companies Act, 1956 against the Petitioner before the High Court of Punjab and Haryana. Although, no Official Liquidator (OL) has yet been appointed by the High Court of Punjab and Haryana in the said case, it appears that the Petitioner has filed an application drawing the attention of that Court to the existence of the above arbitration clause and praying that the parties be referred to arbitration.

5. Mr. Piyush Joshi, learned counsel for the Petitioner states that in terms of the above arbitration clause, the SIPL has opted for Delhi as the venue of arbitration. Relying on the decision in *Rajesh Verma v. Ashwani Kumar Khanna* AIR 2016 SC 1910, it is submitted that in a case like the present one, the Court within whose jurisdiction the arbitration is to take place would have jurisdiction to entertain the present petition. According to him all that has to be examined by the Court in terms of Section 11(6A) of the Act is whether there is an arbitration agreement and, if so, to proceed to appoint an Arbitrator.

6. Mr. Salil Sagar, learned Senior counsel appearing for the Respondent TEIL, on the other hand, draws a distinction between "venue" of arbitration and "seat of arbitration". He relies on the decision of this Court in *Ion Exchange (India) Ltd. v. Panasonic Electric Works Co. Ltd.* 208 (2014) DLT 597, where the distinction was clearly brought out. He also places reliance on the decision in *PCP International Ltd. v. Lanco Infratech Ltd.* 2015 SCC OnLine Del 10428, where the aforementioned decision was followed. Reliance is also placed on the decision in *Jaiprakash Associates Ltd. v. National Hydroelectric Power Corporation Ltd.* 2009 SCC OnLine Del 2964 in which emphasis was placed on the definition in Section 2 (1) (e) of the Act in the context of the Court that would have jurisdiction to entertain a petition under Section 11 of the Act.

7. The above submissions have been considered. The arbitration clause in the present case has two distinct elements, one that evidences the intention of the parties to confer the exclusive jurisdiction on the Court in Gurgaon "in all matters arising under this Purchase Order". This is consistent with the fact that both the parties have their respective offices in Gurgaon and the contract was also to be performed there. In other words no part of cause of action has arisen within the jurisdiction of any other Court but only in the Courts of Gurgaon.

8. The second element of the above clause is that the parties agree that the venue of the arbitration should be either Gurgaon or Delhi or both and the choice in that regard is left to SIPL.

9. The question then arises is whether by virtue of the fact that the SIPL has chosen Delhi to be the venue of Arbitration, this Court would have jurisdiction to entertain the present petition?

10. Mr. Sagar for the Respondent has rightly drawn a distinction between "venue of arbitration" and the legal "seat" of arbitration. In *Enercon (India) Ltd. v. Enercon GmbH* (2014) 5 SCC 1 it was observed that it is important to discern

what the seat of arbitration would be since "location of the seat will determine the Courts that will have exclusive jurisdiction to oversee the arbitration proceedings". It was urged by the Respondent in that case that since the parties had agreed that the venue of arbitration being in London the same place should also be considered to be the seat. This was negated by the Supreme Court by observing as under::

"98. We find much substance in the submissions of Mr. Nariman that there are very strong indicators to suggest that the parties always understood that the seat of arbitration would be in India and London would only be the "venue" to hold the proceedings of arbitration. We find force in the submission made by learned senior Counsel for the Appellants that the facts of the present case would make the ratio of law laid down in *Naviera Amazonica Peruana S.A.* (supra) applicable in the present case. Applying the closest and the intimate connection to arbitration, it would be seen that the parties had agreed that the provisions of Indian Arbitration Act, 1996 would apply to the arbitration proceedings. By making such a choice, the parties have made the curial law provisions contained in Chapters III, IV, V. and VI of the Indian Arbitration Act, 1996 applicable. Even Dr. Singhvi had submitted that Chapters III, IV, V. and VI would apply if the seat of arbitration is in India. By choosing that Part I of the Indian Arbitration Act, 1996 would apply, the parties have made a choice that the seat of arbitration would be in India. Section 2 of the Indian Arbitration Act, 1996 provides that Part I "shall apply where the place of arbitration is in India". In *BALCO* (supra), it has been categorically held that Part I of the Indian Arbitration Act, 1996, will have no application, if the seat of arbitration is not in India. In the present case, London is mentioned only as a "venue" of arbitration which, in our opinion, in the facts of this case cannot be read as the "seat" of arbitration.

99. We are fortified in taking the aforesaid view since all the three laws applicable in arbitration proceedings are Indian laws. The law governing the Contract, the law governing the arbitration agreement and the law of arbitration/ Curial law are all stated to be Indian. In such circumstances, the observation in *Naviera Amazonica Peruana S.A.* (supra) would become fully applicable. In this case, the Court of Appeal in England considered the agreement which contained a clause providing for the jurisdiction of the courts in Lima, Peru in the event of judicial dispute; and at the same time contained a clause providing that the arbitration would be governed by the English law and the procedural law of arbitration shall be the English law. The Court of Appeal summarised the state of the jurisprudence on this topic. Thereafter, the conclusions which arose from the material were summarised as follows:

All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law: (1) the law governing the substantive contract; (2) the law governing the agreement to arbitrate and the performance of that agreement; (3) the law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (1) will often

be different from (2) and (3). And occasionally, but rarely, (2) may also differ from (3)."

It was observed that the problem about all these formulations, including the third, is that they elide the distinction between the legal localisation of arbitration on the one hand and the appropriate or convenient geographical locality for hearings of the arbitration on the other hand.

100. On the facts of the case, it was observed in *Naviera Amazonica* case (supra) that since there was no contest on Law 1 and Law 2, the entire issue turned on Law 3, "the law governing the conduct of the arbitration". This is usually referred to as the curial or procedural law, or the *lex fori*. Thereafter, the Court approvingly quoted the following observation from Dicey and Morris on the Conflict of Laws (11th Edn.): "English Law does not recognise the concept of a delocalised arbitration or of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law". It is further held that "accordingly every arbitration must have a "seat" or "locus arbitri" or "forum" which subjects its procedural rules to the municipal law which is there in force". The Court thereafter culls out the following principle:

"Where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate *prima facie*, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings."

The aforesaid classic statement of the conflict of law rules as quoted in Dicey and Morris on the Conflict of Laws (11th Edn.), Vol. 1, was approved by the House of Lords in *James Miller and Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.*: (1970) 1 Lloyd's Rep 269 Mustill, J. in *Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* (1981) 2 Lloyd's Rep. 446 at p. 453, a little later characterised the same proposition as "the law of the place where the reference is conducted, the *lex fori*". The position of law in India is the same.

101. The Court in *Naviera Amazonica* (supra), also, recognised the proposition that "there is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y". But it points out that in reality parties would hardly make such a decision as it would create enormous unnecessary complexities. Finally it is pointed out that it is necessary not to confuse the legal seat of arbitration with the geographically convenient place or places for holding hearings. In the present case, Dr. Singhvi, it seems to us, is confusing the geographically convenient place, which is London, with the legal seat which, in our opinion, is undoubtedly India.

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104. In view of the above, we are unable to accept the submissions made by Dr.

Singhvi that in this case, the term "venue" ought to be read as seat."

11. In PCP International Ltd. (supra), the parties had agreed that the venue of arbitration would be Delhi. However, neither the contract was executed at Delhi nor it was to be performed in Delhi. The Petitioner was located in Chandigarh and not in Delhi. The Court drew a distinction between the seat of arbitration and the venue and held "It is only the seat of arbitration which will give territorial jurisdiction and not the venue of jurisdiction". The Court also observed "that "seat" means the place where court is, which has the territorial jurisdiction with respect to the subject matter/cause of action of the matter, and venue is the place, which is a place where the arbitral tribunal sits to hold the arbitration proceedings and which sitting of the arbitral tribunal need not be at the place where the "seat" of arbitration is located".

12. As rightly observed by the Court in PCP International Ltd. v. Lanco Infratech Ltd. (supra), the Supreme Court in Bharat Aluminium Company & Ors. v. Kaiser Aluminium Technical Service (2012) 9 SCC 552 (hereafter "Balco") did not use the words "seat" and "place" interchangeably. In other words the Supreme Court in Balco did not hold that the venue of the arbitration per se confer territorial jurisdiction on a Court. In fact in Balco the Supreme Court held that "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". However, the Supreme Court was not considering an agreement whereby the parties agreed that one particular Court, which otherwise has jurisdiction, would have exclusive jurisdiction.

13. If one has to accept the plea of the Petitioner in the present case by merely choosing the venue of the arbitration at Delhi, the jurisdiction would be conferred on this Court then it would be inconsistent with the other portion of the arbitration clause which reflects the express intention of the parties that "Courts in Gurgaon shall have exclusive jurisdiction in all matters arising under this Purchase Order". Therefore, even if the choice of venue is taken to be indicative of the jurisdiction of the Court, in the present case that plea cannot be accepted since it would be inconsistent with the express intention of the parties to confer exclusive jurisdiction on the Courts in Gurgaon. Even otherwise in the present case no part of cause of action has arisen within the jurisdiction of this Court. Both the parties are located outside its territorial jurisdiction. As pointed out in PCP International Ltd. (supra) even in the context of domestic arbitration the seat will determine the Court that would have "exclusive jurisdiction to oversee the arbitration proceedings".

14. If this Court were to appoint an Arbitrator to hold the proceedings in Delhi then it is inconceivable that the Courts at Gurgaon would have exclusive jurisdiction to oversee such arbitral proceedings. With the parties being clear that it is the Courts at Gurgaon which will have exclusive jurisdiction, the question of this Court exercising jurisdiction merely because the Petitioner has chosen

Delhi as the venue of arbitration, does not arise.

15. For the aforementioned reasons the Court holds that the present petition cannot be entertained by this Court. This however, will not preclude the Petitioner from pursuing its application in the winding up petition in the High Court of Punjab & Haryana or seek any other appropriate remedy in accordance with law.

16. The petition is accordingly dismissed.