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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 26th February, 2024

+ ARB.P. 847/2023

MY PREFERRED TRANSFORMATION
AND HOSPITALITY PVT. LTD.

..... Petitioner

Through: Mr. Sagar Kumar Pradhan, Mr.
Diptiman Acharyya & Ms. Shreya
Srivastava, Advocates.

versus

PANCHDEEP CONSTUCTION LIMITED Respondent

Through: Mr. Anirban Kar, Mr. Neeraj
Soodh, Mr. Munshi Ashiq Elahi &
Md. Sahidullah Mridha,
Advocates.

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CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

1. By way of the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner seeks appointment of an arbitrator to adjudicate disputes between the parties under an agreement dated 28.08.2019, entitled “Management Services Agreement” [“Agreement”].

2. Under the Agreement, the parties agreed that the respondent’s hotel in Howrah, West Bengal, would be operated by the petitioner. The Agreement admittedly contained an arbitration clause. Disputes having arisen between the parties, the petitioner invoked arbitration by a legal notice dated 18.07.2022. Although the reply to this invocation notice was not filed with the present petition, in the reply filed by the respondent, a



copy of the counsel's communication dated 18.08.2022 has been placed on record. The petitioner's allegations have been disputed on merits and it has been asserted that Courts in Kolkata would have exclusive jurisdiction in all matters arising out of the said Agreement.

3. The parties having been unable to achieve consensus on the appointment of the arbitrator, the petitioner has approached this Court under Section 11 of the Act.

4. The only point of objection raised by Mr. Anirban Kar, learned counsel for the respondent, is that the jurisdiction to entertain this petition under Section 11 of the Act, vests in the Calcutta High Court and not in this Court. This objection is based upon an interpretation of Clauses 10.1 and 10.2 of the Agreement, which read as follows:-

"10.1 Arbitration: *Any dispute arising out of this Agreement and the obligation thereunder ("Dispute) shall be finally settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force. The Parties agree that the Dispute shall be adjudicated by a mutually appointed single arbitrator. **The arbitration proceedings shall be conducted in English language and seat of arbitration shall be New Delhi.***

10.2 Jurisdiction: *subject to foregoing courts at Kolkata shall have exclusive jurisdiction in all matters arising out of this Agreement."*¹

5. Mr. Kar submits that while the Court having jurisdiction over the seat of arbitration would normally have exclusive jurisdiction over all matters arising from the arbitration proceedings, the jurisdiction for appointment of an arbitrator under Section 11 of the Act is not covered by this principle. He contends that the principle laid down in the judgments of the Supreme Court *inter alia* in *Indus Mobile Distribution (P) Ltd. vs.*

¹ Emphasis supplied.



*Datawind Innovations (P) Ltd.*² and *BGS SGS Soma JV vs. NHPC Limited*³, applies only to petitions for interlocutory relief under Section 9 of the Act, and to challenges to arbitral awards under Section 34 of the Act. Mr. Kar urges that proceedings under Section 11 stand on a different footing, as they deal not with the “*subject matter of the arbitration*” but merely with appointment of the person tasked with resolving the disputes. Mr. Kar also places reliance upon the decision of the Supreme Court in *Ravi Ranjan Developers (P) Ltd. vs. Aditya Kumar Chatterjee*⁴, to submit that the question of exclusive jurisdiction does not arise in the context of Section 11 of the Act. He cites the judgment of the Calcutta High Court in *Commercial Division Bowlopedia Restaurants India Ltd vs. Devyani International Ltd*⁵, to suggest that, in any event, a forum selection clause would prevail over a seat selection clause in the context of a domestic arbitration.

6. Mr. Diptiman Acharyya, learned counsel for the petitioner, on the other hand, submits that the seat of the arbitration is clearly in New Delhi under Clause 10.1 of the Agreement. Clause 10.2, which deals with exclusive jurisdiction, starts with the words “*subject to foregoing*”. He refers me to the decision of the Division Bench of the Bombay High Court in *Aniket SA Investments LLC vs. Janapriya Engineers Syndicate Pvt. Ltd.*⁶, which, according to him, interprets a substantially similar clause, to vest jurisdiction over the seat court as opposed to the Court in which the parties have vested exclusive jurisdiction.

² (2017) 7 SCC 678.

³ (2020) 4 SCC 234.

⁴ 2022 SCC OnLine SC 568.

⁵ (2021) 1 Cal LT 138.

⁶ 2021(4) Mh.L.J.



7. In my view, the question raised in the present case, is not one of great difficulty upon a proper reading of Clause 10.1 and Clause 10.2 of the Agreement. New Delhi has been designated as the seat and, as Mr. Acharyya correctly points out, the jurisdiction clause vesting exclusive jurisdiction in the courts in Kolkata commences with the words “*subject to forgoing*”. There is, therefore, no real conflict between the seat clause and the exclusive jurisdiction clause; the text of the Agreement itself makes the exclusive jurisdiction clause subservient to the seat clause.

8. The question then is: whether the designation of a seat confers jurisdiction over the Section 11 proceedings, in this Court.

9. I am of the view that the settled position of law with regard to exclusive jurisdiction of the seat court in matters arising out of the arbitration agreement, applies as much to the appointment of an arbitrator as it does to proceedings under Section 9 or Section 34 of the Act.

10. In *Indus Mobile*⁷, the Supreme Court was approached against a judgment of this Court by which the petitions under both Section 9 and Section 11 of the Act, were allowed. This Court took the view that although Mumbai had been designated as the seat of arbitration, it would have no jurisdiction over the subject matter of the disputes and that this Court, being the first court that was approached, would therefore have jurisdiction. This reasoning was reversed by the Supreme Court, holding, in no uncertain terms, that the designation of a seat is akin to an exclusive jurisdiction clause. The Supreme Court emphasised that, unlike in ordinary civil proceedings under the Code of Civil Procedure, 1908, the parties to an arbitration agreement may choose a neutral venue to be

⁷ Supra (Note 2).



designated as the seat. Paragraph 19 of the judgment makes this position clear:

*“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 Section 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.**”⁸*

11. It is accepted by Mr. Kar that *BGS Soma*⁹ makes this position equally clear. However, Mr. Kar draws my attention to paragraph 45 of the judgment to submit that the findings in *BGS Soma*¹⁰ are confined to the Court having jurisdiction to grant interim orders and to hear challenges to the award. I am of the view that this is not a proper understanding of the judgment. These observations are to be read in the factual context in which the judgment arose, but the legal principle with regard to exclusive jurisdiction of the seat court over all matters arising out of the arbitration proceedings, is not confined to the two situations mentioned in the paragraph 45. Indeed, in paragraph 31 of the judgment, it is noted that *“pride of place is given to the juridical seat of the arbitral proceedings”*.

12. I am also of the view that this is the proper position, on a point of principle. To exempt Section 11 proceedings from the exclusive

⁸ Emphasis supplied.

⁹ Supra (Note 3).

¹⁰ Supra (Note 3).



jurisdiction of the seat Court, would be inconsistent with the concept of party autonomy and the availability of a neutral venue as the seat of arbitration. To the extent that our jurisprudence recognizes that parties can repose their faith in a seat, which would not otherwise have jurisdiction over the subject matter of the proceedings, it is imperative that the appointment of the tribunal must also be made by such a neutral Court. Any other interpretation would denude the significance of the neutral venue, by permitting a party to approach any Court which answers to the definition of “Court” in terms of Section 2(1)(e) of the Act, for the primary and fundamental task of appointment of the arbitrator.

13. Two other judgments cited on behalf of the respondent are also, in my view, of little assistance. In *Ravi Ranjan Developers*¹¹, the Supreme Court was concerned with the interplay of Section 11(6) and Section 2(1)(e) of the Act. The Court came to the conclusion that the Calcutta High Court would not have had jurisdiction in that case, as it was not the seat of the arbitration¹². The judgment is therefore inapplicable to the present case.

14. In *Commercial Division*¹³, the Calcutta High Court has, in the context of a petition under Section 9 of the Act, come to the conclusion that an exclusive jurisdiction clause in a domestic arbitration would prevail over the clause designating a seat of arbitration. With respect, I entertain some reservation as to the aforesaid conclusion. However, I find the facts of the present case to be distinguishable, so I do not need to enter into that controversy. Clauses 16.6 and 16.7 of the agreement being

¹¹ Supra (Note 4).

¹² Supra (Note 4), Paras 43 and 46.

¹³ Supra (Note 5).



considered in *Commercial Division*¹⁴ have been set out¹⁵ and it is clear therefrom, that neither clause was expressly made subservient to the other. The conclusion in *Commercial Division*¹⁶ would therefore, in any event, not apply to the present case, in the face of the express terms of the clauses in question here.

15. Mr. Acharyya, on the other hand, relied upon the Division Bench decision of the Bombay High Court in *Aniket SA Investments*¹⁷, in which, like the present case, the exclusive jurisdiction clause [vesting jurisdiction in Courts in Hyderabad] was expressly “subject to” provisions of the arbitration clause, which designated Mumbai as the seat of arbitration. The Division Bench held that Mumbai had jurisdiction.¹⁸

16. For the reasons aforesaid, I am of the view that this Court has jurisdiction to entertain the present petition under Section 11 of the Act.

17. Mr. Kar confirms that, other than the issue of territorial jurisdiction decided herein, the respondent has no other objection to appointment of an arbitrator.

18. The petition is therefore allowed, and the disputes between the parties are referred to arbitration of Hon’ble Mr. Justice Jayant Nath, former Judge of this Court [Tel:- 8527959494]. The arbitration will be held under the aegis of Delhi International Arbitration Centre, Shershah Road, New Delhi-110503 [“DIAC”], and will be governed by the Rules

¹⁴ Supra (Note 4).

¹⁵ Supra (Note 4), Para 14.

¹⁶ Supra (Note 4).

¹⁷ Supra (Note 6).

¹⁸ It may be noted that a judgment of the Bombay High Court in “*Aniket Investments LLC*” has been cited by the Court in *Commercial Division* [Supra (Note 5)], but it appears that the judgment referred to therein was that of the Single Judge of the Bombay High Court, which was subsequently reversed by the Division Bench of the Bombay High Court in its judgment in *Aniket SA Investments LLC vs. Janapriya Engineers Syndicate Pvt. Ltd.* [Supra (Note 6)].



of DIAC, including as to the remuneration of the learned arbitrator.

19. The learned Arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

20. It is made clear that all rights and contentions of the parties may be agitated before the learned Arbitrator.

21. The petition stands disposed of with these observations.

PRATEEK JALAN, J

FEBRUARY 26, 2024

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