

M/S. Inox Renewables Ltd. vs Jayesh Electricals Ltd. on 13 April, 2021

Author: R.F. Nariman

Bench: Rohinton Fali Nariman, Hrishikesh Roy

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1556 OF 2021
(Arising out of SLP (C) No.29161 of 2019)

M/S. INOX RENEWABLES LTD.

... Appe

VERSUS

JAYESH ELECTRICALS LTD.

... Respon

JUDGMENT

R.F. Nariman, J.

1. Leave granted.

2. The present appeal arises out of the impugned judgment dated 9 th October, 2019 passed by the High Court of Gujarat at Ahmedabad in which Special Civil Application No. 9536 of 2019 filed by the appellant, Inox Renewables Ltd. [“Appellant”] against the order dated 25th April, 2019 passed by the Commercial Court, Ahmedabad was dismissed, holding that the courts at Jaipur, Rajasthan would be the courts in which the Section 34 petition could be filed.

3. The facts of the case are as follows :

A purchase order dated 28 th January, 2012 was entered into between M/s Gujarat Fluorochemicals Ltd. [“GFL”] and the respondent herein, Jayesh Electricals Ltd. [“Respondent”] for the manufacture and supply of power transformers at wind farms. The arbitration clause is contained in clause 8.5 of the purchase order which reads as follows :-

“8.5 All the dispute[s] and differences if any shall be settled by arbitration in the manner hereinafter provided.

Arbitration shall be conducted by three arbitrators; one each to be nominated by you and the owner and third to be appointed as an umpire by both the [arbitrators] in accordance to the Arbitration and Conciliation Act, 1996. In case either party fails to appoint an arbitrator within sixty days after receipt of notice from the other party invoking the arbitration clause, the arbitrator appointed by the party invoking the arbitration clause shall become the sole arbitrator to conduct the arbitration.

The venue of the arbitration shall be Jaipur.

The decisions of the majority of the arbitrators shall be final and binding on both the parties. The arbitrators may from time to time with the consent of all the parties: extend the time for making the award. In the event of any of the arbitrators dying, neglecting, resigning or being unable to act for any reason, it shall be lawfully binding for the party concerned to nominate another arbitrator in place to the outgoing arbitrator.

The arbitrator shall have full powers to review and/or revise any decision, opinion, direction, certification or valuation in accordance with the agreement and neither party shall be limited in proceedings before such arbitration to the evidence or arguments for the purpose of obtaining the said decision.

During settlement of disputes and arbitration proceedings, both parties shall be obliged to carry out their respective obligations under the agreement.

In the event of arbitrators' award being not acceptable to either party, the parties shall be free to seek lawful remedies under the law of India and the jurisdiction for the same shall be courts in the State of Rajasthan."

4. A slump sale of the entire business of GFL took place in favour of the Appellant. This took place by way of a business transfer agreement dated 30 th March, 2012 executed between the Appellant and GFL to which the Respondent was not a party. Clause 9.11 and 9.12 of this business transfer agreement designated Vadodara as the seat of the arbitration between the parties, vesting the courts at Vadodara with exclusive jurisdiction qua disputes arising out of the agreement.

5. On an application being filed by the Respondent on 5 th September, 2014, under Section 11 of the Arbitration and Conciliation Act, 1996, to appoint an arbitrator under the purchase order, the High Court of Gujarat at Ahmedabad passed the following order :-

"Learned advocate for the parties jointly submitted that matter be referred for arbitration of sole arbitrator. I request Shri C.K. Buch (retired Judge of this Court) to act as a sole arbitrator to resolve the disputes arising between the parties arising out [of a] contract dated 28.01.2012."

6. Pursuant thereto, the learned arbitrator passed an award dated 28 th July, 2018 in which the Respondent was awarded as sum of Rs. 38,97,150/- plus Rs. 31,32,650 as interest on the awarded amount from 10 th March, 2017 till the date of the award plus Rs. 2,81,000/- as quantified costs. Future interest was awarded at 15% from the date of award till the date of payment. A Section 34 petition was filed by the Appellant in Ahmedabad which was resisted by the Respondent referring to the business transfer agreement and stating that the courts at Vadodara alone have jurisdiction. The Commercial Court at Ahmedabad vide judgment and order dated 25 th April, 2019, accepted the case of the Respondent by referring to clauses 9.11 and 9.12 of the business transfer agreement and stated that the courts at Vadodara alone would have exclusive jurisdiction, the Ahmedabad courts not being vested with such jurisdiction.

7. The Appellant filed Special Civil Application No. 9536 of 2019 against the aforesaid order. The High Court referred to the arbitration clause contained in the purchase order as well as what it termed as the “exclusive jurisdiction clause” qua the courts in Rajasthan and then held that even assuming that Ahmedabad would have jurisdiction, if one is to go by clause 8.5 of the purchase order, exclusive jurisdiction being vested in the courts at Rajasthan, the appropriate court would be the court at Jaipur. However, despite this finding, it found no error in the Ahmedabad Court’s decision dated 25th April, 2019 and dismissed the Special Civil Application.

8. Shri Sachin Datta, learned Senior Counsel appearing on behalf of the Appellant, drew our attention to the purchase order and argued that the business transfer agreement not being between the Appellant and the Respondent was irrelevant in the present case as was correctly held by the impugned judgment. However, the impugned judgment failed to consider that the arbitrator had recorded in the arbitral award that the venue/place of arbitration was shifted by mutual consent to Ahmedabad, as a result of which, the place of arbitration or seat of arbitration became Ahmedabad, resulting in courts at Ahmedabad having exclusive jurisdiction and relied heavily upon this Court’s judgment in the case of BSG SGS SOMA JV vs. NHPC Limited, (2020) 4 SCC 234 [“BGS SGS”].

9. Shri Purvish Jitendra Malkan, learned counsel appearing on behalf of the Respondent, argued in support of the impugned judgment. He relied upon the judgment in Videocon Industries Limited vs. Union of India & Anr., (2011) 6 SCC 161 [“Videocon”] and Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited, (2017) 7 SCC 678 [“Indus Mobile”] for the proposition that even if the place of arbitration is shifted by mutual agreement, it cannot be so done without a written agreement between the parties. In any event, he argued that the vesting of exclusive jurisdiction with the courts at Rajasthan, being independent from the arbitration clause stating that the arbitration is to be held at Jaipur, would indicate that the courts at Rajasthan alone would have exclusive jurisdiction. He also argued that the arbitrator’s finding that the venue was shifted by mutual consent from Jaipur to Ahmedabad has reference only to Section 20(3) of the Arbitration and Conciliation Act, 1996 as Ahmedabad was in reality a convenient place for the arbitration to take place, the seat of the arbitration always remaining at Jaipur.

10. Having heard learned counsel for both parties, it is first necessary to set out what the learned arbitrator has held in the award with respect to the venue/place of the arbitration. In para 12.3, the learned arbitrator holds thus :-

“12.3 There is no controversy as to the constitution of the Tribunal between the parties and the parties have agreed to get their dispute resolved by a sole arbitrator. As per arbitration agreement, the venue of the arbitration was to be Jaipur. However, the parties have mutually agreed, irrespective of a specific clause as to the [venue, that the place] of the arbitration would be at Ahmedabad and not at Jaipur. The proceedings, thus, have been conducted at Ahmedabad on constitution of the Tribunal by the learned Nominee Judge of the Hon’ble High Court of Gujarat.”

11. What is clear, therefore, as per this paragraph is that by mutual agreement, parties have specifically shifted the venue/place of arbitration from Jaipur to Ahmedabad. This being so, is it not possible to accede to the argument made by learned counsel for the Respondent that this could only have been done by written agreement and that the arbitrator’s finding would really have reference to a convenient venue and not the seat of arbitration.

12. In BGS SGS (supra), this Court, after an exhaustive review of the entire case law, concluded thus :

“32. It can thus be seen that given the new concept of “juridical seat” of the arbitral proceedings, and the importance given by the Arbitration Act, 1996 to this “seat”, the arbitral award is now not only to state its date, but also the place of arbitration as determined in accordance with Section 20. However, the definition of “court” contained in Section 2(1)(c) of the Arbitration Act, 1940, continued as such in the Arbitration Act, 1996, though narrowed to mean only principal civil court and the High Court in exercise of their original ordinary civil jurisdiction. Thus, the concept of juridical seat of the arbitral proceedings and its relationship to the jurisdiction of courts which are then to look into matters relating to the arbitral proceedings - including challenges to arbitral awards - was unclear, and had to be developed in accordance with international practice on a case by case basis by this Court.

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48. The aforesaid amendment carried out in the definition of “Court” is also a step showing the right direction, namely, that in international commercial arbitrations held in India, the High Court alone is to exercise jurisdiction over such proceedings, even where no part of the cause of action may have arisen within the jurisdiction of such High Court, such High Court not having ordinary original jurisdiction. In such cases, the “place” where the award is delivered alone is looked at, and the High Court given jurisdiction to supervise the arbitration proceedings, on the footing of its jurisdiction to hear appeals from decrees of courts subordinate to it, which is only on the basis of territorial jurisdiction which in turn relates to the “place” where the award is made. In the light of this important change in the law, Section 2(1)(e)(i) of the Arbitration Act, 1996 must also be construed in the manner indicated by this judgment.

49. Take the consequence of the opposite conclusion, in the light of the facts of a given example, as follows. New Delhi is specifically designated to be the seat of the arbitration in the arbitration clause between the parties. Part of the cause of action, however, arises in several places, including where the contract is partially to be performed, let us say, in a remote part of Uttarakhand. If concurrent jurisdiction were to be the order of the day, despite the seat having been located and specifically chosen by the parties, party autonomy would suffer, which BALCO specifically states cannot be the case.

Thus, if an application is made to a District Court in a remote corner of the Uttarakhand hills, which then becomes the court for the purposes of Section 42 of the Arbitration Act, 1996 where even Section 34 applications have then to be made, the result would be contrary to the stated intention of the parties - as even though the parties have contemplated that a neutral place be chosen as the seat so that the courts of that place alone would have jurisdiction, yet, any one of five other courts in which a part of the cause of action arises, including courts in remote corners of the country, would also be clothed with jurisdiction. This obviously cannot be the case. If, therefore, the conflicting portion of the judgment of BALCO in para 96 is kept aside for a moment, the very fact that parties have chosen a place to be the seat would necessarily carry with it the decision of both parties that the courts at the seat would exclusively have jurisdiction over the entire arbitral process.

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53. In *Indus Mobile Distribution (P) Ltd.*, after clearing the air on the meaning of Section 20 of the Arbitration Act, 1996, the Court in para 19 (which has already been set out hereinabove) made it clear that the moment a seat is designated by agreement between the parties, it is akin to an exclusive jurisdiction clause, which would then vest the courts at the “seat” with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

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82. On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the “venue” of the arbitration proceedings, the expression “arbitration proceedings” would make it clear that the “venue” is really the “seat” of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as “tribunals are to meet or have witnesses, experts or the parties” where only hearings are to take place in the “venue”, which may lead to the conclusion, other things being equal, that the venue so stated is not the “seat” of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings “shall be held” at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a “venue” and not the “seat” of the arbitral proceedings, would then

conclusively show that such a clause designates a “seat” of the arbitral proceedings. In an International context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that “the venue”, so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the “stated venue”, which then becomes the “seat” for the purposes of arbitration.

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98. However, the fact that in all the three appeals before us the proceedings were finally held at New Delhi, and the awards were signed in New Delhi, and not at Faridabad, would lead to the conclusion that both parties have chosen New Delhi as the “seat” of arbitration under Section 20(1) of the Arbitration Act, 1996. This being the case, both parties have, therefore, chosen that the courts at New Delhi alone would have exclusive jurisdiction over the arbitral proceedings. Therefore, the fact that a part of the cause of action may have arisen at Faridabad would not be relevant once the “seat” has been chosen, which would then amount to an exclusive jurisdiction clause so far as Courts of the “seat” are concerned.”

13. This case would show that the moment the seat is chosen as Ahmedabad, it is akin to an exclusive jurisdiction clause, thereby vesting the courts at Ahmedabad with exclusive jurisdiction to deal with the arbitration. However, learned counsel for the Respondent referred to and relied upon paragraphs 49 and 71 of the aforesaid judgment. Paragraph 49 only dealt with the aspect of concurrent jurisdiction as dealt with in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 [“BALCO”] which does not arise on the facts of the present case. Paragraph 71 is equally irrelevant, in that, it is clear that the parties have, by mutual agreement, entered into an agreement to substitute the venue at Jaipur with Ahmedabad as the place/seat of arbitration under Section 20(1) of the Arbitration and Conciliation Act, 1996.

14. Learned counsel for the respondent relied heavily upon *Videocon* (supra) for the proposition that any change in seat could only be by a written agreement signed by the parties. A close look at the judgment in *Videocon* (supra) would show that it contained paragraph 34.12 which dealt with “venue and law of arbitration agreement” and paragraph 35.2 which dealt with “amendment”, as follows :

“34.12. Venue and Law of Arbitration Agreement. — The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England.

35.2 Amendment. — This contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the

parties, which shall state the date upon which the amendment or modification shall become effective."

15. Given the above, this Court concluded :-

"20. We shall first consider the question whether Kuala Lumpur was the designated seat or juridical seat of arbitration and the same had been shifted to London. In terms of clause 34.12 of the PSC entered into by 5 parties, the seat of arbitration was Kuala Lumpur, Malaysia. However, due to outbreak of epidemic SARS, the Arbitral Tribunal decided to hold its sittings first at Amsterdam and then at London and the parties did not object to this. In the proceedings held on 14-

10-2003 and 15-10-2003 at London, the Arbitral Tribunal recorded the consent of the parties for shifting the juridical seat of arbitration to London. Whether this amounted to shifting of the physical or juridical seat of arbitration from Kuala Lumpur to London? The decision of this would depend on a holistic consideration of the relevant clauses of the PSC.

21. Though, it may appear repetitive, we deem it necessary to mention that as per the terms of agreement, the seat of arbitration was Kuala Lumpur. If the parties wanted to amend Article 34.12, they could have done so only by a written instrument which was required to be signed by all of them. Admittedly, neither there was any agreement between the parties to the PSC to shift the juridical seat of arbitration from Kuala Lumpur to London nor was any written instrument signed by them for amending Article 34.12. Therefore, the mere fact that the parties to the particular arbitration had agreed for shifting of the seat of arbitration to London cannot be interpreted as anything except physical change of the venue of arbitration from Kuala Lumpur to London."

16. The aforesaid judgment would have no application to the facts of the present case as there is nothing akin to clause 35.2, which is the amendment clause which was applied to the facts in Videocon (supra). This being the case, the parties may mutually arrive at a seat of arbitration and may change the seat of arbitration by mutual agreement which is recorded by the arbitrator in his award to which no challenge is made by either party.

17. The reliance placed by learned counsel for the Respondent on Indus Mobile (supra), and in particular, on paragraphs 18 and 19 thereof, would also support the Appellant's case, inasmuch as the "venue" being shifted from Jaipur to Ahmedabad is really a shifting of the venue/place of arbitration with reference to Section 20(1), and not with reference to Section 20(3) of the Arbitration and Conciliation Act, 1996, as it has been made clear that Jaipur does not continue to be the seat of arbitration and Ahmedabad is now the seat designated by the parties, and not a venue to hold meetings. The learned arbitrator has recorded that by mutual agreement, Jaipur as a "venue" has gone and has been replaced by Ahmedabad. As clause 8.5 of the Purchase Order must be read as a whole, it is not possible to accept the submission of Shri Malkan that the jurisdiction of Courts in Rajasthan is independent of the venue being at Jaipur. The two clauses must be read together as the Courts in Rajasthan have been vested with jurisdiction only because the seat of arbitration was to be at Jaipur. Once the seat of arbitration is replaced by mutual agreement to be at Ahmedabad, the

Courts at Rajasthan are no longer vested with jurisdiction as exclusive jurisdiction is now vested in the Courts at Ahmedabad, given the change in the seat of arbitration.

18. For all these reasons, it is clear that the impugned judgment cannot stand and is set aside. The parties are now referred to the courts at Ahmedabad for the resolution of the Section 34 petition.

19. Vide order dated 12.12.2019, this Court stayed the execution proceedings in Execution Petition No. 117 of 2019 on the condition that the Appellant shall deposit an amount of Rs.40,00,000/- in this Court, which has been so deposited. This deposit will now be transferred to the appropriate forum at Ahmedabad by which the Section 34 petition will be decided. The execution proceedings shall remain stayed till the disposal of the Section 34 petition unless the appropriate forum at Ahmedabad varies this interim order.

20. The appeal is disposed of in the aforesaid terms.

21. Pending applications, if any, stand disposed of accordingly.

.....,J.

(ROHINTON FALI NARIMAN),J.

(HRISHIKESH ROY) New Delhi;

April 13, 2021.

ITEM NO.12 Court 3 (Video Conferencing) SECTION III SUPREME COURT OF INDIA RECORD OF PROCEEDINGS Petition(s) for Special Leave to Appeal (C) No(s). 29161/2019 (Arising out of impugned final judgment and order dated 09-10-2019 in SCA No. 9536/2019 passed by the High Court Of Gujarat At Ahmedabad) M/S. INOX RENEWABLES LTD. Petitioner(s) VERSUS JAYESH ELECTRICALS LTD. Respondent(s) (FOR ADMISSION and I.R.AMOUNT INVOLVED....) Date : 13-04-2021 This petition was called on for hearing today. CORAM : HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN HON'BLE MR. JUSTICE HRISHIKESH ROY For Petitioner(s) Mr. Syed Mehdi Imam, AOR For Respondent(s) Mr. Purvish Jitendra Malkan, AOR UPON hearing the counsel the Court made the following ORDER (GULSHAN KUMAR ARORA) (R.S. NARAYANAN) AR-CUM-PS COURT MASTER