

H. G . Infra Engineering Ltd vs Agra Development Authority on 10 April, 2023

Author: Prateek Jalan

Bench: Prateek Jalan

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ O.M.P. (COMM) 373/2020

H. G . INFRA ENGINEERING LTD

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Through: Mr. Nilava Bandopadhyay & Mr.
Adhip Roy, Advocates.

versus

AGRA DEVELOPMENT AUTHORITY

..... Respondent

Through: Mr. Sudhir Kulshreshtha,
Advocate.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

% 10.04.2023

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner seeks to challenge an award dated 09.11.2019 by which the learned sole arbitrator has adjudicated disputes between the parties under an agreement dated 02.05.2014.

2. At the outset, Mr. Sudhir Kulshreshtha, learned counsel for the respondent, raises an objection as to the territorial jurisdiction of this Court. He submits that the agreement in question was entered into between the parties in Agra, Uttar Pradesh and the project was also to be implemented in Agra, Uttar Pradesh. He states that the petitioner is a company registered in Jodhpur, Rajasthan and the respondent-Agra Development Authority also has its offices in Agra, Uttar Pradesh.

3. Mr. Kulshreshtha relies upon the judgment of a Coordinate Bench of this Court in Dwarika Projects Ltd. vs. Superintending Engineer, Karnal, PWD (B&R), Haryana [2019 SCC OnLine Del 8445].

4. Mr. Nilava Bandopadhyay, learned counsel for the petitioner, on the other hand, disputes this submission on the basis that the seat of arbitration was fixed in New Delhi. He states that the arbitration was conducted in New Delhi and the award was made in New Delhi. He draws my attention to the first procedural order dated 06.07.2018 passed by the learned arbitrator in which paragraphs 12 and 13 read as follows:-

"12. With the consent of parties the venue for the next hearing has been fixed on 03.11.2018 (Saturday) at 12 Noon at B-27 FF Defense Colony, New Delhi.

13. The seat of Arbitration shall be at New Delhi."

[Emphasis supplied.]

5. Mr. Bandopadhyay also draws my attention to the concluding portion of the impugned award in which it is recorded as follows:-

"The parties had agreed that the arbitration proceedings be held, and the Award be delivered at New Delhi."

[Emphasis supplied.]

6. In support of his submission, Mr. Bandopadhyay cites the judgment of the Supreme Court in *Inox Renewables Ltd. vs. Jayesh Electricals Ltd.* [(2023) 3 SCC 733].

7. In rejoinder, Mr. Kulshreshtha submits that the arbitration proceedings were held in Delhi as the learned arbitrator is resident in New Delhi. The contention of Mr. Kulshreshtha is that in such circumstances, the seat is of no relevance.

8. Having heard learned counsel for the parties, I am of the view that the petition is maintainable in this Court. The learned arbitrator by his procedural order dated 06.07.2018 has clearly recorded that the seat of the arbitration is in New Delhi. The aforesaid order has not been assailed in any manner.

9. The following judgments of the Supreme Court, including in *Inox Renewables Ltd.* [Supra] cited by Mr. Bandopadhyay, make it clear that exclusive jurisdiction for the purposes of an application for setting aside an award would lie in the Court having jurisdiction over the seat of the arbitration, regardless of factors which would otherwise govern the determination of jurisdiction:-

a. In *Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited & Ors.* [(2017) 7 SCC 678], the Court considered the Constitution Bench decision in *BALCO vs. Kaiser Aluminium Technical Services Inc.* [(2012) 9 SCC 552] and other precedents to record the following conclusion:-

"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 Sections 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.

20. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see *Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.* This was followed in a recent judgment in *B.E. Simoes Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.* Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. The appeals are disposed of accordingly."

[Emphasis supplied.] b. These principles have been reiterated in *BGS SGS SOMA JV vs. NHPC Ltd.* [(2020) 4 SCC 234], (paragraphs 30 to 59), wherein the Court has thereafter laid down various tests to determine the "seat" of an arbitration.

c. *Inox Renewables Ltd. [Supra]* and *BBR (India) (P) Ltd. vs. S.P. Singla Constructions (P) Ltd.* [(2023) 1 SCC 693], both deal with the circumstances in which the seat of an arbitration can be said to have shifted from one place to another. Paragraph 16 of *Inox Renewables Ltd. [Supra]* and paragraphs 29 to 37 of *BBR (India) (P) Ltd. [Supra]* emphasise that this issue is relevant to determination of jurisdiction over the arbitral process, including for the purposes of Section 34 of the Act. The following observations in *BBR (India) (P) Ltd. [Supra]* are relevant for this purpose:-

"29. Reliance in this regard is placed upon the decision of this Court in *Inox Renewables Ltd. v. Jayesh Electricals Ltd.* in which the "seat of arbitration" fixed by the parties was Jaipur, but the courts at Ahmedabad had entertained the challenge to the award. The appellant submits that the courts at Ahmedabad had exercised jurisdiction, which was upheld on the ground that the arbitration proceedings were conducted in Ahmedabad. Thus the "seat of arbitration" changed and had got relocated from Jaipur to Ahmedabad. This, in the context of the decision in *Inox Renewables*, is undoubtedly correct, but the aforesaid decision cannot be read as a precept in cases governed by sub-section (2) of Section 20 of the Act. *Inox Renewables* was a case governed under sub-section (1) of Section 20 of the Act, that is, where parties by the agreement had fixed the jurisdictional "seat" at Jaipur, Rajasthan, but thereafter, by mutual consent, had decided to change the venue of proceedings to Ahmedabad prior to the commencement of the arbitration. This evidently resulted in the decision of this Court accepting that the jurisdictional "seat of arbitration" was Ahmedabad. This decision would apply in case the parties, by consent, agree mutually that the "seat of arbitration"

would be located at a particular place. The said exercise would be in terms of sub-section (1) of Section 20 of the Act, which endorses and emphasises on party autonomy and choice that determines the "seat of arbitration". It would not apply when the arbitrator fixes "the seat"

in terms of sub-section (2) of Section 20 of the Act. Once the arbitrator fixes "the seat" in terms of sub-section (2) of Section 20 of the Act, the arbitrator cannot change "the seat" of the arbitration, except when and if the parties mutually agree and state that the "seat of arbitration" should be changed to another location, which is not so in the present case.

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31. It is highly desirable in commercial matters, in fact in all cases, that there should be certainty as to the court that should exercise jurisdiction. We do not think the law of arbitration visualises repeated or constant shifting of the "seat of arbitration". In fact, sub-section (3) of Section 20 specifically states and draws a distinction between the venue of arbitration and the "seat of arbitration" by stating that for convenience and other reasons, the arbitration proceedings may be held at a place different than the "seat of arbitration", which location is referred to as the venue of arbitration. If we accept this contention of the appellant, we would, as observed in C v. D, create a recipe for litigation and (what is worse) confusion which was not intended by the Act. The place of jurisdiction or "the seat" must be certain and static and not vague or changeable, as the parties should not be in doubt as to the jurisdiction of the courts for availing of judicial remedies. Further, there would be a risk of parties rushing to the courts to get first hearing or conflicting decisions that the law does not contemplate and is to be avoided.

32. A secondary contention to support the said plea on the ground that the courts where arbitration proceedings are being conducted should be given supervisory powers, on in-depth consideration, must be rejected as feeble when we juxtapose the unacceptable practicable consequences that emerge. Exercise of supervisory jurisdiction by the courts where the arbitration proceedings are being conducted is a relevant consideration, but not a conclusive and determinative factor when the venue is not "the seat". "The seat" determines the jurisdiction of the courts. There would be situations where the venue of arbitration in terms of sub-section (3) of Section 20 would be different from the place of the jurisdictional "seat", and it is equally possible majority or most of the hearing may have taken place at a venue which is different from the "seat of arbitration". Further, on balance, we find that the aspect of certainty as to the court's jurisdiction must be given and accorded priority over the contention that the supervisory courts located at the place akin to the venue where the arbitration proceedings were conducted or substantially conducted should be preferred.

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34. For clarity and certainty, which is required when the question of territorial jurisdiction arises, we would hold that the place or the venue fixed for arbitration proceedings, when sub-section (2) of Section 20 applies, will be the jurisdictional "seat" and the courts having jurisdiction over the jurisdictional "seat" would have exclusive jurisdiction. This principle would have exception that would apply when by mutual consent the parties agree that the jurisdictional "seat" should be changed, and such consent must be express and clearly understood and agreed by the parties.

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38. Section 42 is to no avail as it does not help the case propounded by the appellant, as in the present case the arbitrator had fixed the jurisdictional "seat" under Section 20(2) of the Act before any party had moved the court under the Act, being a court where a part or whole of the cause of action had arisen. The appellant had moved the Delhi High Court under Section 34 of the Act after the Arbitral Tribunal vide the order dated 5-8-2014 had fixed the jurisdictional "seat" at Panchkula in Haryana. Consequently, the appellant cannot, based on the fastest finger first principle, claim that the courts in Delhi get exclusive jurisdiction in view of Section 42 of the Act. The reason is simple that before the application under Section 34 was filed, the jurisdictional "seat" of arbitration had been determined and fixed under sub-section (2) of Section 20 and thereby, the courts having jurisdiction over Panchkula in Haryana, have exclusive jurisdiction. The courts in Delhi would not get jurisdiction as the jurisdictional "seat of arbitration" is Panchkula and not Delhi."

[Emphasis supplied.]

10. The judgment in Dwarika Projects Ltd. [Supra] cited by Mr. Kulshreshtha is clearly distinguishable, as the seat of the arbitration had not been fixed in that case. Paragraph 26 of the judgment is clear in this regard, which reads as follows:-

"26. What emerges from the record, though, is that neither did the parties agree to a jurisdictional place/seat as against a geographical location nor was a determination made by the Arbitral Tribunal in that behalf. The Arbitral Tribunal, however, in consultation with the parties and their respective counsel and as per their convenience held the arbitration proceedings both in Delhi and Chandigarh. Therefore, in my opinion, the mere fact that the arbitration proceedings were held, largely, in Delhi would not have me hold that the seat of arbitration was New Delhi."

[Emphasis supplied.]

11. The Court therefore examined other indicators to determine whether the seat of the arbitration was New Delhi. It came to the conclusion that it was not, and that the parties had intended Courts outside New Delhi to have jurisdiction. It is in such circumstances that this Court declined jurisdiction, despite the fact that some hearings were conducted in New Delhi and that the award

was signed in New Delhi. In the present case, in contrast, the learned arbitrator has determined the seat of the arbitration.

12. In such circumstances, I am of the view that the case falls within Section 20(2) of the Act, and New Delhi was not merely a venue of the arbitration in terms of Section 20(3) of the Act, as suggested by Mr. Kulshrestha.

13. For the aforesaid reasons, the respondent's preliminary objection as to the territorial jurisdiction of this Court is rejected.

14. The parties may file further written submissions on the merits and copies of any documents which were on record before the learned arbitral tribunal within four weeks.

15. List on 29.08.2023.

PRATEEK JALAN, J APRIL 10, 2023/'pv'/