

Axalta Coating Systems India Pvt Ltd vs Austin Hyundai Austin Distributors Pvt on 2 March, 2023

Author: Prateek Jalan

Bench: Prateek Jalan

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 1451/2022

AXALTA COATING SYSTEMS INDIA PVT LTD Petitioner

Through: Mr. Piyush Sharma, Ms. Mili
Verma, Advocates.

versus

AUSTIN HYUNDAI AUSTIN
DISTRIBUTORS PVT

..... Respondent

Through: Mr. Arijit Mazumdar, Ms.
Akanksha Kaushik, Advocates
(Mobile No. 9650831194).

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

% 02.03.2023

1. By way of this petition under Section 11 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner seeks appointment of an arbitrator to adjudicate disputes arising between the parties under an agreement dated 19.07.2019 entitled "Supply Agreement" ["the Agreement"]. The Agreement contains a dispute resolution clause [Clause 12.3] which provides for adjudication of disputes by a sole arbitrator.

2. Disputes having arisen between the parties, the petitioner invoked the arbitration clause by a legal notice dated 16.08.2022, and proposed the name of an arbitrator. By a response dated 21.09.2022, the respondent disputed the petitioner's contentions on merits and also proposed the name of an alternative arbitrator.

3. As the parties have been unable to arrive at a consensus as to the constitution of the arbitral tribunal, the petitioner has approached this Court under Section 11 of the Act.

4. The respondent has filed a reply to the petition on various contentions. Ms. Akanksha Kaushik,

learned counsel for the respondent, only presses the contention relating to the jurisdiction of this Court to entertain this petition under Section 11 of the Act. She submits that the entire cause of action for the present proceedings arose in Kolkata and the petition under Section 11 of the Act, therefore, ought to have been filed in the Calcutta High Court.

5. Mr. Piyush Sharma, learned counsel for the petitioner, draws my attention to Clause 12 of the Agreement, which reads as follows:-

"12 Governing law, Jurisdiction and Dispute Resolution 12.1 This Agreement, its performance and any dispute or claim arising out of or in connection with it shall be governed by and construed in all respects in accordance with the laws of India.

12.2 All Disputes or claims arising out of or relating to this Agreement shall be subject to the exclusive jurisdiction of the courts at New Delhi to which the Parties irrevocably submit.

12.3 All disputes or differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this Agreement or the breach thereof shall be settled amicably. If, however, the Parties are not able to resolve them amicably within a period of thirty days or any longer period as agreed upon by the Parties from the date of commencement of such negotiation the same would be resolved by arbitration . The dispute may be referred to the arbitration by either Party after issuance of thirty days notice in writing to other, clearly mentioning the nature of the dispute/differences. Such arbitration shall be conducted by a Sole Arbitrator to be appointed by Parties hereto by mutual consent. The Arbitration and Conciliation Act, 1996 or any statutory modification thereof shall apply to the arbitration proceedings and the venue for the arbitration proceedings shall be New Delhi (India). All the arbitration proceeding shall be carried out in English language."

6. He submits that the Agreement was, in fact, entered into in Delhi, which is consistent with the fact that the stamp paper purchased in Delhi has been used. Mr. Sharma submits that where Delhi has been specified as the venue in arbitration clause and Courts in Delhi have expressly been vested with exclusive jurisdiction, this Court is the proper Court for the purpose of proceedings under Section 11 of the Act. To support this contention, he relies upon a judgment of the Supreme Court in *Brahmani River Pellets Ltd. vs. Kamachi Industries Ltd.* [(2020) 5 SCC 462], wherein the Court held as follows:-

"17. The interplay between "seat" and "place of arbitration" came up for consideration in *Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd.* After referring to *Balco, Enercon (India) Ltd. v. Enercon GmbH and Reliance Industries Ltd. v. Union of India* and also amendment to the Act pursuant to the Law Commission Report, speaking for the Bench Nariman, J. held as under : [Indus Mobile Distribution (P) Ltd. case, SCC pp. 692-93, paras 18-20] "18. The amended Act, does not, however, contain the aforesaid amendments, presumably because the Balco

judgment in no uncertain terms has referred to "place" as "juridical seat" for the purpose of Section 2(2) of the Act. It further made it clear that Sections 20(1) and 20(2) where the word "place" is used, refers to "juridical seat", whereas in Section 20(3), the word "place" is equivalent to "venue".

This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.

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 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."

18. Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the "venue" of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in *Swastik*, non-use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference.

19. When the parties have agreed to have the "venue" of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Since only the Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order is liable to be set aside."

Mr. Sharma also place reliance upon a judgment of this Court in *Sikka Motors Pvt. Ltd. vs. Hyundai Motor India Ltd.* HMIL [2022 SCC OnLine Del 1187], where the Court observed:-

"12. Perusal of the arbitration Clause 11 shows that the parties have agreed that the venue of arbitration shall be Chennai and Clause 12 dealing with jurisdiction and governing law stipulates that the said clause is subject to the clause of the arbitration and parties have unconditionally and irrevocably agreed to submit to the exclusive jurisdiction of the competent courts in Chennai.

13. Perusal of Clauses 11 and 12, clearly show that parties had agreed that the venue of arbitration shall be Chennai and the courts at Chennai shall have exclusive jurisdiction over the subject disputes emanating out of the said agreement."

7. Clauses 12.2 and 12.3 of the Agreement in the present case clearly vest jurisdiction in the Courts in Delhi exclusively, and also designate Delhi as the venue of the arbitration. In light of the judgment of the Supreme Court in Brahmani River Pellets Ltd (supra) and judgment of this Court in Sikka Motors Pvt. Ltd. (supra), I am, therefore, of the view that the jurisdiction in the present case vests in this Court.

8. No other objection to the reference to arbitration has been raised by Ms. Kaushik.

9. In view of the above, I am of the view that petitioner has made out a prima facie case with regard to the existence of an arbitration agreement and invocation thereof in respect of disputes between the parties.

10. The petition is, therefore, allowed and disposed of with the following directions:-

A. The parties are referred to arbitration of Mr. Rajdeep Chowdhary, Advocate [Tel: - 8130624052]. The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi ["DIAC"].

B. The arbitration proceedings will be governed by the rules of the DIAC, including as to the remuneration of the learned arbitrator.

C. The learned arbitrator is request to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

11. It is also made clear that all rights and contentions of the parties, including on arbitrability of claims and merits, are left open for consideration by the learned arbitrator.

12. The petition is disposed of in terms of the aforesaid directions.

PRATEEK JALAN, J MARCH 2, 2023 'vp'/'