2020 INSC 284

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO. 32 OF 2018

MANKASTU IMPEX PRIVATE LIMITED ...Petitioner

VERSUS

AIRVISUAL LIMITED …Respondent

J U D G M E N T

R. BANUMATHI, J.

This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 read with Arbitration and Conciliation (Amendment) Act, 2015 read with the Appointment of Arbitrator by the Chief Justice of India Scheme, 1996 seeking appointment of a sole arbitrator under Clause 17.2 of the Memorandum of Understanding dated 12.09.2016 between petitioner-Company incorporated in India and respondent-incorporated under the laws of Hong Kong.

2. Brief facts of the case relevant for the purposes of this petition are as under:-

The petitioner-company incorporated in India conducts business under the brand name “Atlanta Healthcare” and is in the

business of air quality management and supply of air purifiers, car purifiers, anti-pollution masks and air quality monitors. The respondent is a company incorporated under the laws of Hong Kong and is in the business of manufacture and sale of air quality monitors as well as air quality information. A Memorandum of Understanding (MoU) dated 12.09.2016 was entered into between the parties under which the respondent agreed to sell to the petitioner the complete line of the respondent's air quality monitors products for onward sale. As per the terms of the agreement, the petitioner was appointed as an exclusive distributor for the products for sale within India. Additionally, non-exclusive rights were given to the petitioner qua distribution for sales in Sri Lanka, Bangladesh and Nepal. This agreement was to continue for a period of five years from the starting date, which date was to commence from the date of delivery of the first lot of Air Quality monitors in India, i.e. 03.10.2016 or 01.11.2016, whichever was later. As per the petitioner, it has spent approximately Rs.17,00,000/- in promoting and creating a brand value for the products in India. Further the petitioner spent Rs.9,00,000/- towards promoting the products at over fifteen business events such as Indo-German Natural Health Fair, India International Trade Fair, etc.

3. On 14.10.2017, the petitioner received an e-mail from one Mr. Charl Cater of IQAir AG (Proposed respondent No.2) informing the petitioner that the respondent is a part of IQAir AG. Attached to the e-mail was a letter dated 13.10.2017 by the CEO of IQAir AG stating that IQAir AG has acquired all technology and the associated assets of the respondent. Further, the product of AirVisual Node has been discontinued and the IQAir AG is in the process of relaunching a new and improved version which will be rebranded as IQAir AirVisual Pro. The letter also stated that IQAir AG will not assume any contracts or legal obligations of the respondent and will work on a case to case basis with resellers to negotiate new contracts and that the IQAir AirVisual products will be made available under separate dealer agreements.

4. The petitioner sent reply dated 15.10.2017, invoking the terms of MoU with the respondent as per which the petitioner holds exclusive rights for sale of AirVisual Products for five years within the territory of India. Further the petitioner stated as per the terms of the MoU, in the event of any take out/buy out or change in shareholding of the entity, it was obligatory on the part of the respondent to ensure that the party taking over the business/assets shall honour the contract on the same terms and conditions and it is

a deemed presumption that the acquisition of business/assets of the respondent has been done keeping in view the existing liabilities and obligations.

5. On 31.10.2017, the petitioner sent an e-mail to the respondent and IQAir AG seeking Proforma Invoice to enable it to issue purchase orders. In reply, it was reiterated by IQAir AG that they have not assumed any legal obligations of the respondent. However, they offered to supply IQAir branded AirVisual Pro to the petitioner under a new non-exclusive arrangement with a new wholesale price of USD 172 per unit as against the original price of USD 110 per unit agreed upon between the petitioner and the respondent. The petitioner thereafter sent several e-mails but no response was received. On 08.12.2017, the petitioner issued a notice invoking the arbitration clause provided in Clause 17 the MoU. The petitioner also proposed the name of Hon'ble Justice RC Chopra as the arbitrator, subject to consent of the respondent and IQAir AG.

6. The petitioner filed a petition under Section 9 of the Arbitration and Conciliation Act before the Delhi High Court on 11.12.2017 seeking directions against the respondent and IQAir AG to honour the terms and conditions of the MoU dated 12.09.2016 and to allow

the petitioner to continue acting as the authorised distributor for the sale of all products in terms of the MoU and to injunct the respondent and IQAir AG from terminating the MoU and from entering into any contract with third parties for products which are the subject matter of the MoU. Vide interim order dated 28.02.2018, the High Court restrained the respondent from selling any of its products in India. The petition filed under Section 9 of the Act by the petitioner is still pending before the High Court.

7. In response to the petitioner's notice dated 08.12.2017, invoking the arbitration clause, IQAir vide its letter dated 15.12.2017, under its asset purchase agreement with the respondent, it has not assumed any contractual and legal obligations and that the terms of the MoU were not enforceable against IQAir AG. The respondent also sent its reply dated 05.01.2018 to the notice dated 08.12.2017 stating that Clause 17 of the MoU provides for arbitration administered and seated in Hong Kong. The respondent averred that should the petitioner wish to resolve the dispute by arbitration, they should refer the dispute to an arbitration institution in Hong Kong. Further, it was stated that the respondent did not agree to ad hoc arbitration but clearly agreed to administered arbitration in Hong Kong. It was in this backdrop, the petitioner filed petition under Section 11(6) of the Arbitration and

Conciliation Act seeking appointment of Sole Arbitrator under Clause 17 of the MoU.

8. According to the petitioner, the proposed arbitration between the Petitioner and the respondent being an arbitration between a company registered in India under the Companies Act, 1956 and the respondent – a body corporate which is incorporated under the laws of Hong Kong, is an "International Commercial Arbitration" as per Section 2(1)(f) of the Arbitration and Conciliation Act, 1996 having seat of arbitration in Delhi. In terms of Section 11(6) read with Section 11(9), the petitioner therefore seeks appointment of arbitrator.

9. Mr. Vikas Dutta, learned counsel for the petitioner submitted that Clause 17.1 of the MoU clearly stipulates that the MoU is governed by the laws of India and the courts at New Delhi have the jurisdiction. It was submitted that the petitioner and the respondent have only agreed Hong Kong as the "Venue" of arbitration and Hong Kong is not the juridical seat of the arbitration. As to the decision in the case of *Union of India v. Hardy Exploration and Production (India) INC* **(2018) 7 SCC 374**, the learned counsel for the petitioner has contended that the ratio of the judgment clearly postulates that a "venue" can become a "seat" only if – (i) no other

condition is postulated; (ii) if a condition precedent is attached to the term “place”, the said condition/*indicia* has to be satisfied first for “venue” to be equivalent to “seat”. It was submitted that in view of clear Clause 17.1 where the parties have clearly agreed that the MoU has to be governed by the laws of India and the courts at New Delhi would have the jurisdiction, Part-I of the Act is applicable and hence, prayed for appointment of sole arbitrator.

10. Mr. Ritin Rai, learned Senior counsel for the respondent has submitted that as per Clause 17.2 of the MoU entered into between the parties, the place of arbitration shall be Hong Kong. Since the place of arbitration is outside India, Section 11 of the Arbitration and Conciliation Act has no application to the present dispute. The learned Senior counsel submitted that the expression used in Clause 17.2 which provides “the place of arbitration shall be Hong Kong”, in addition to also providing that “all disputes arising out of the MoU shall be referred to and finally resolved and administered in Hong Kong” clearly shows that the parties have agreed that the arbitration between the parties would be seated in Hong Kong and therefore, Part-I is not applicable and Section 11 has no application to the present dispute. The learned Senior counsel submitted that the petitioner is required to approach the Hong Kong International

Arbitration Centre and the Indian Courts have no jurisdiction to entertain the petition for appointment of arbitrator.

11. On behalf of the respondent, much reliance was placed upon *BGS SGS SOMA JV v. NHPC Ltd.* **2019 (17) SCALE 369** to contend that the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat of arbitration proceedings" as the aforesaid expression does not include just one or more single or part hearing but the arbitration proceedings as a whole including making of the award at that place. It was submitted that in the present case, the word "administered" used in Clause 17.2 of the MoU between the parties clearly shows that the parties have agreed that the arbitration between the parties would be seated in Hong Kong.

12. In *BGS Soma*, the expression used was *"….arbitration proceedings shall be held at New Delhi/Faridabad*". In *BGS Soma*, the three-Judges Bench of the Supreme Court held that in all the three appeals by the parties, proceedings were held at New Delhi and the awards were also signed at New Delhi and not in Faridabad. The learned Bench held that in the absence of contrary expression expressed by the parties, it leads to the conclusion that the parties have chosen New Delhi as the seat of arbitration under

Section 20(1) of the Arbitration Act. In *BGS Soma*, the Bench held that the judgment in *Hardy Exploration* is contrary to the decision of the Constitution Bench judgment of this Court in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.* **(2012) 9 SCC 552** (BALCO) and therefore, cannot be considered good law.

13. Learned counsel for the petitioner has contended that *Hardy Exploration* and *BGS Soma*, both being by the three-Judges Bench, declaration by the later Bench that *Hardy Exploration* is not a god law, may not tantamount to an overriding of *Hardy Exploration*. It was submitted that when both the judgments were by Bench of equal strength, it was not open to the Bench rendering the decision in *BGS Soma* to hold that the decision in *Hardy Exploration* was incorrect and the learned Bench in *BGS Soma* ought to have referred the matter to larger Bench. To substantiate the contention, the learned counsel for the petitioner has referred to *Chandra Prakash and others v. State of U.P and another* **(2002) 4 SCC 234** wherein this Court held that the doctrine of binding precedent is of utmost importance in the administration of judicial system as it promotes certainty and consistency in judicial decisions. However, considering Clause 17 of the MoU in the present case and the definite clauses therein and in the facts and circumstances of the

case, we are not inclined to go into the question on the correctness of *BGS Soma* or otherwise.

14. The question falling for consideration in the present case is, in view of Clause 17.2 of the MoU whether the parties have agreed that the seat of arbitration is at Hong Kong and whether this Court lacks jurisdiction to entertain the present petition filed under Section 11 of the Arbitration and Conciliation Act, 1996.

15. The petitioner is a company incorporated in India; whereas the respondent is a company incorporated under the laws of Hong Kong. Section 2(1)(f) of the Act defines “International Commercial Arbitration”. As per Section 2(1)(f), to be an “International Commercial Arbitration”, three factors ought to be fulfilled – (i) arbitration; (ii) considered as commercial under the laws in force in India; and (iii) at least one of the parties is national or habitual resident in any country other than India. In the present case, since the respondent is a company incorporated under the laws of Hong Kong, we are concerned with “International Commercial Arbitration”.

16. As per Section 2(2), Part-I shall apply where the place of arbitration is in India. If the “International Commercial Arbitration” is seated in India, then Part-I of the Act shall apply. The interpretation of Section 2(2) of the Act was considered by the Constitution Bench

in *BALCO*, wherein it was held that Part-I of the Act would have no application to "International Commercial Arbitrations" held outside India. In para (194) of the judgment, it was held as under:-

> "**194.** …..Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to international commercial arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. ……"

17. In the present case, Clause 17 of the MoU is a relevant clause governing the law and dispute resolution. Clause 17 reads as under:-

> **17. Governing Law and Dispute Resolution**
>
> **17.1** This MoU is governed by the laws of India, without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction.
>
> **17.2** Any dispute, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered in Hong Kong.
>
> **The place of arbitration shall be Hong Kong.**
>
> The number of arbitrators shall be one. The arbitration proceedings shall be conducted in English language.
>
> **17.3** It is agreed that a party may seek provisional, injunctive, or equitable remedies, including but not limited to preliminary injunctive

relief, from a court having jurisdiction, before, during or after the pendency of any arbitration proceeding.

18. The learned counsel for the petitioner has submitted that a perusal of Clause 17.1 of the MoU makes it clear that the petitioner and the respondent have only agreed that the proper law of the contract to be laws of India and the MoU is clearly silent on the proper law and the curial law of the arbitration and therefore, Clause 17.1 would govern the proper law and the curial law. According to the petitioner, there is no express or implied exclusion either in Clause 17 or under the entire MoU of the non-applicability of the laws of India and/or the applicability of the laws of Hong Kong or any other country. Contention of the petitioner is that in the absence of the clear stipulation as to the proper law and curial law of the arbitration, laws of India should be taken as the proper law and curial law under the MoU and under no circumstances, the terms in Clause 17.1 of the MoU be undermined or diluted.

19. The seat of arbitration is a vital aspect of any arbitration proceedings. Significance of the seat of arbitration is that it determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award. The situs is not just about where an institution is based or where the hearings will be held. But it is all

about which court would have the supervisory power over the arbitration proceedings. In *Enercon (India) Limited and others v. Enercon GMBH and another* **(2014) 5 SCC 1,** the Supreme Court held that "*the location of the Seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. It was further held that the Seat normally carries with it the choice of that country's arbitration/curial law*".

20. It is well-settled that "seat of arbitration" and "venue of arbitration" cannot be used inter-changeably. It has also been established that mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties.

21. In the present case, the arbitration agreement entered into between the parties provides Hong Kong as the place of arbitration. The agreement between the parties choosing "Hong Kong" as the place of arbitration by itself will not lead to the conclusion that parties have chosen Hong Kong as the seat of arbitration. The words, "the place of arbitration" shall be "Hong Kong", have to be read along with Clause 17.2. Clause 17.2 provides that "*….any*

dispute, controversy, difference arising out of or relating to the MoU "shall be referred to and finally resolved by arbitration administered in Hong Kong…..". On a plain reading of the arbitration agreement, it is clear that the reference to Hong Kong as "place of arbitration" is not a simple reference as the "venue" for the arbitral proceedings; but a reference to Hong Kong is for final resolution by arbitration administered in Hong Kong. The agreement between the parties that the dispute "*shall be referred to and finally resolved by arbitration administered in Hong Kong*" clearly suggests that the parties have agreed that the arbitration be seated at Hong Kong and that laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award.

22. As pointed out earlier, Clause 17.2 of the MoU stipulates that the dispute arising out of or relating to MoU including the existence, validity, interpretation, breach or termination thereof or any dispute arising out of or relating to it shall be referred to and finally resolved by the arbitration administered in Hong Kong. The words in Clause 17.2 that "arbitration administered in Hong Kong" is an *indicia* that the seat of arbitration is at Hong Kong. Once the parties have chosen "Hong Kong" as the place of arbitration to be administered in Hong Kong, laws of Hong Kong would govern the arbitration. The Indian courts have no jurisdiction for appointment of the arbitrator.

23. Observing that when the parties have chosen a place of arbitration in a particular country, that choice brings with it submission to the laws of that country, in *Eitzen Bulk A/S v. Ashapura Minechem Ltd. and another* **(2016) 11 SCC 508**, it was held as under:-

> **"34.** As a matter of fact the mere choosing of the juridical seat of arbitration attracts the law applicable to such location. In other words, it would not be necessary to specify which law would apply to the arbitration proceedings, since the law of the particular country would apply ipso jure. The following passage from *Redfern and Hunter on International Arbitration* contains the following explication of the issue:
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> > "It is also sometimes said that parties have selected the procedural law that will govern their arbitration, by providing for arbitration in a particular country. This is too elliptical and, as an English court itself held more recently in Breas of Doune Wind Farm it does not always hold true. What the parties have done is to choose a place of arbitration in a particular country. That choice brings with it submission to the laws of that country, including any mandatory provisions of its law on arbitration. To say that the parties have "chosen" that particular law to govern the arbitration is rather like saying that an English woman who takes her car to France has "chosen" French traffic law, which will oblige her to drive on the right-hand side of the road, to give priority to vehicles approaching from the right, and generally to obey traffic laws to which she may not be accustomed. But it would be an odd use of language to say this notional motorist had opted for "French traffic law". What she has done is to choose to go to France. The applicability of French law then follows automatically. It is not a matter of choice.
> >
> > Parties may well choose a particular place of arbitration precisely because its lex arbitri is one which they find attractive.

> Nevertheless, once a place of arbitration has been chosen, it brings with it its own law. If that law contains provisions that are mandatory so far as arbitration are concerned, those provisions must be obeyed. It is not a matter of choice any more than the notional motorist is free to choose which local traffic laws to obey and which to disregard."" [**Underlining added**]

24. In the context of domestic arbitration, holding that once the "Seat" is determined, only that jurisdictional court would have exclusive jurisdiction, in *Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd. and others* **(2017) 7 SCC 678**, it was held as under:-

> **"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." [**Underlining added**]

25. Clause 17.1 of the MoU stipulates that the MoU is governed by the laws of India and the courts at New Delhi shall have

jurisdiction. The interpretation to Clause 17.1 shows that the substantive law governing the substantive contract are the laws of India. The words in Clause 17.1 *"without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction"* has to be read along with Clause 17.3 of the agreement. As per Clause 17.3, the parties have agreed that the party may seek provisional, injunctive or equitable remedies from a court having jurisdiction before, during or after the pendency of any arbitral proceedings. In para (161) in *BALCO* **(2012) 9 SCC 552**, this Court held that "*…..on a logical and schematic construction of Arbitration Act, 1996, the Indian Courts do not have the power to grant interim measures when the seat of arbitration is outside India…*". If the arbitration agreement is found to have seat of arbitration outside India, then the Indian Courts cannot exercise supervisory jurisdiction over the award or pass interim orders. It would have therefore been necessary for the parties to incorporate Clause 17.3 that parties have agreed that a party may seek interim relief for which Delhi Courts would have jurisdiction. In this regard, we may usefully refer to the insertion of proviso to Section 2(2) of the Arbitration Act, 1996 by Amendment Act, 2015. By the Amendment Act, 2015 (w.e.f. 23.10.2015), a proviso has been added to Section 2(2) of the Act as per which, certain provisions of Part-I of the Act

i.e. Sections 9 – interim relief, 27 – court's assistance for evidence, 37(1)(a) – appeal against the orders and Section 37(3) have been made applicable to "International Commercial Arbitrations" even if the place of arbitration is outside India. Proviso to Section 2(2) of the Act reads as under:-

> "**2. Definitions**.-
>
> ……..
>
> **(2)** This Part shall apply where the place of arbitration is in India:
>
> Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause *(a)* of sub-section *(1)* and sub-section *(3)* of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."

It is pertinent to note that Section 11 is not included in the proviso and accordingly, Section 11 has no application to "International Commercial Arbitrations" seated outside India.

26. The words in Clause 17.1 *"without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction"* do not take away or dilute the intention of the parties in Clause 17.2 that the arbitration be administered in Hong Kong. The words in Clause 17.1 do not suggest that the seat of arbitration is in New Delhi. Since Part-I is not applicable to "International Commercial Arbitrations", in order to enable the parties to avail the interim relief, Clause 17.3 appears to have been added. The words *"without*

regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction" in Clause 17.1 is to be read in conjunction with Clause 17.3. Since the arbitration is seated at Hong Kong, the petition filed by the petitioner under Section 11(6) of the Act is not maintainable and the petition is liable to be dismissed.

27. In the result, Arbitration Petition No.32 of 2018 filed by the petitioner seeking appointment of an arbitrator under Section 11(6) of the Act is dismissed. It is however open to the petitioner to approach Hong Kong International Arbitration Centre for appointment of the arbitrator, if they so desire.

……..J.
[R. BANUMATHI]

……..J.
[A.S. BOPANNA]

……..J.
[HRISHIKESH ROY]

New Delhi;
March 05, 2020.