

HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT
AT JABALPUR

Case No.	A.C. No.107/2017
Parties Name	<i>Cobra CIPL</i> <i>Vs.</i> <i>Chief Project Manager</i>
Date of Judgment	04.02.2019
Bench Constituted	Single
Judgment delivered by	Shri Justice Sujoy Paul
Whether approved for reporting	Yes
Name of counsels for parties	Petitioner: Shri Shashank Verma, Advocate Respondents: Shri Atul Choudhary, Advocate
Law laid down	1.Section 2(e)-"Court" and Section 20 "Place of Arbitration" in Arbitration and Conciliation Act, 1996-"venue" and "seat" are not synonymous. Two Courts have jurisdiction as per Section 20 of the Act-(i) the Court where cause of action is located and (ii) the Court where arbitration takes place. The "seat" of arbitration is center of gravity. Where no "seat" is prescribed in the agreement, the Court on the basis of cause of action can exercise jurisdiction. In the context, the word "venue" is used in the agreement, it cannot be equated with "seat". The intention of of the parties is clear that "venue" can be changed as per the convenience of purchaser. Thus, "venue" cannot be treated as "seat".
Significant paragraph numbers	12,13

(Order)
04.02.2019

In this application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, the applicant has prayed for appointment of arbitrator for adjudication of the dispute between the parties which as per the applicant has arisen within the territorial jurisdiction of this bench. The

interesting conundrum in this case is based on Clause 1.2.54 (k) of the Agreement entered into between the parties. Since, the said clause talks about ‘venue’ and makes it clear that venue for an arbitrator shall be the place from which the letter of acceptance of tender is issued (Allahabad) or such other place as the purchaser (Railways) at his discretion may determine, the stand of respondents is that this Court does not have territorial jurisdiction to entertain present application.

2. Learned counsel for the applicant submits that tender was floated in February, 2013. The applicants original offer dated 30.4.2013 was followed by negotiated offer dated 13.11.2013. On 15.11.2014, Annexure A-4, the ‘letter of acceptance’ was issued by the respondent from Allahabad. The document dated 30.4.2014 shows that contract was entered into between the parties at Jabalpur. The work was required to be performed at Jabalpur. The CBI conducted a surprise check at the site which falls within the jurisdiction of this Court where allegedly certain discrepancies were found by the CBI. On 17.12.2016 Annexure A-7, a joint meeting was convened between applicant and respondent at Jabalpur. It was agreed that applicant will recast the poles and requested for release of pending bills by letter dated 4.3.2017 Annexure 9. the respondent agreed to release the payments. They also agreed that work shall be completed by 31.12.2017.

3. Shri Verma, learned counsel for the applicant submits that entire cause of action has arisen within the territorial jurisdiction of this bench except the event of issuance of ‘letter of acceptance’. All the aforesaid events have taken place within the territory of this bench followed by termination notice dated 6.6.2017 Annexure A-10 issued from Jabalpur and followed by another termination notice of 48 hours issued from Jabalpur on 27.6.2017. The contract was terminated by order dated 17.9.2017 Annexure A-14 issued from Jabalpur. Thus, almost entire cause of action has arisen within the territory of this Bench.

4. The parties are at loggerheads on the question of jurisdiction of this Court. The serious objection raised by respondent is that jurisdiction of this Court is to be traced on the basis of Clause 1.2.54 (k). Since, prescribed 'venue' is admittedly at Allahabad, the jurisdiction of this Court is automatically ousted. Thus, the conundrum is whether this clause (k) will oust the jurisdiction of this Court for the purpose of exercising power under sub section 6 of Section 11 of the Arbitration and Conciliation Act, 1996 (Act).

5. Shri Verma, learned counsel for the applicant relied on *(2012) 9 SCC 552 (Bharat Aluminium Co. Vs. Kaiser Allminium Technical Services INC.)* (in short "Balco") and made an attempt to establish the dichotomy between 'venue' and 'seat'. By placing reliance on *(2014) 5 SCC 1 [Enercon (India) Ltd. & Ors. Vs. Enercon GMBH & Another]*, learned counsel for the applicant submits that there is a difference between the 'seat' and 'venue'. Sub section 1 and 2 of Section 20 of the Act deals with 'place' whereas sub section 3 of Section 20 talks about 'venue'. The 'venue' is to be fixed as per the convenience and discretion of the arbitrator during the conduct of arbitration proceedings whereas 'seat' is the gravitational point on the strength of which jurisdiction of this Court can be determined. In the instant agreement, no 'seat' is defined therefore, 'cause of action' will determine the question of jurisdiction of this Court. In support of this argument, he has also placed reliance on *(2017) 7 SCC 678 (Indus Mobile Distribution Pvt. Ltd. Vs. Datawind innovations Pvt. Ltd. & Ors)*. By taking this Court to various paragraphs of aforesaid judgment, Shri Verma, learned counsel contends that in absence of prescribing any particular 'seat' in the arbitration clause, jurisdiction of this Court is not taken away. Since there exists a dispute, an enabling arbitration clause, it is a fit case to exercise the power under sub section 6 of Section 11 of the Act.

6. Sounding a contra note, Shri Atul Choudhary, learned counsel for the respondent submits that the aforesaid aspect was considered in the case of

Balco (supra) which was followed in the case of *Indus Mobile* (supra). Interestingly, both learned counsel for the parties relied upon almost same set of judgments to support their contentions.

7. The last reliance is placed on the Delhi High Court judgment reported in *2017 SCC online Delhi High Court 11966 (Mr. Raman Deep Singh Taneja Vs. Crown Realtech Pvt. Ltd.)*.

8. Learned counsel for the respondent submits that judgment of *Balco* and *Indus Mobile* (supra) were considered by the Delhi High Court and it was made clear that ‘subject matter of arbitration’ and ‘subject matter of suit’ are two different things. In case of ‘subject matter of suit’, this Court may have jurisdiction but it is ousted in case of ‘subject matter of arbitration’. Since it is a case of ‘subject matter of arbitration’ based on clause (k), the jurisdiction of this Court is automatically ousted in the light of finding given by Delhi High Court in the case of *Mr. Raman Deep Singh Taneja*(supra). Shri Choudhary further argued that the applicant has not fulfilled the requirement of Clause 1.2.54 (d)(ii) of the Agreement and in absence thereto, the present application is premature.

9. No other point is pressed by learned counsel for the parties.

10. I have bestowed my anxious consideration on rival contentions and perused the record.

11. Before dealing with rival contentions, it is condign to refer Clause 1.2.54 (k) which reads as under:-

“(k) VENUE- The Venue for an arbitration shall be the place from which the letter of acceptance of tender is issued or such other place as the purchaser at his discretion may determine.”

(Emphasis supplied)

12. Indisputably, the "letter of acceptance" dated 15-01-2014 (Annexure A/4) was issued from Allahabad. In the agreement no "Seat" or "Place" of arbitration is prescribed. As noticed, the parties are have taken diametrically opposite stand on the question of jurisdiction of this Court to entertain the present application. The quagmire needs decision is whether "Venue" will determine the jurisdiction of this Court and whether "venue" and "seat" are synonymous? Ancillary question is that in absence of prescription of any "seat" in the agreement, how jurisdiction of Court can be traced?

13. The Constitution Bench in the case of **Balco** (supra) after considering the definition of "Court" mentioned in Section 2(e) and "Place of Arbitration" mentioned in Section 20 opined that the legislature has intentionally given jurisdiction to *two Courts* i.e. the Court which would have jurisdiction *where the cause of action is located* and the Court *where arbitration takes place*. It was further held that as per Section 20, where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India. In absence thereto, Section 20(2) authorizes the Tribunal to determine the place/seat of such arbitration. The fixation of most convenient "Venue" is taken care of by Section 20 (3). Following the *dicta* of **Balco** (supra), in **Indus Mobile** (supra), it was poignantly held that seat of arbitration is analogous to an exclusive jurisdiction clause. "The seat of arbitration is intended to be its center of gravity." The seat of arbitration is treated to be the juridical seat, in the line with international practice. It was observed that the arbitral hearings may take place at a location other than the seat of arbitration. Thus, distinction between "seat" and "venue" was clearly recognized. It was further made clear that Section 20(1) and 20 (2) where the word "place" is used, refers to "juridical seat" whereas Section 20(3) the word "place" is equivalent to "venue". If the definition of "venue" mentioned hereinabove is tested on the anvil of principles laid down in **Balco and Indus Mobile** (supra), it will be clear that "venue" and "seat" cannot be treated as synonymous. The definition in Clause (k) makes it clear that a "venue" is initially fixed to be at the place from where letter of

acceptance was issued by leaving its further fixation/change as per discretion of the purchaser. The "venue" can be altered and fixed as per the convenience of the parties in terms of enabling clause in the agreement. This can be done for various reasons/purposes such as recording of evidence, facilitating the hearing at a particular place etc. Thus, "venue" cannot be read as a "seat" in the present case.

14. In the instant case, the parties have not pointed out any clause of agreement which prescribes the "seat" of arbitration. Hence, as per the judgment of *Balco* (supra), it can be safely concluded that since the act intends to give jurisdiction to two Courts which includes the Court which would have jurisdiction based upon cause of action, this Court will have jurisdiction because accept issuance of letter of acceptance, other necessary events which gives cause of action have taken place within the territorial jurisdiction of this Court. So far judgment of Delhi High Court in the case of *Ramandeep Singh Taneja* (supra) is concerned; it is relevant to note that the Delhi High Court treated the "venue" as "seat" by referring the judgment of *Indus Mobile* (supra) whereas in *Indus Mobile* (supra), it was made clear that there is a clear distinction between "seat" and "venue". In the context "venue" is used in the present agreement, I am unable to hold that it can be equated with "seat" or can be the basis for determining the question of jurisdiction of this Court. I find support in my view from Para 152 of judgment of *Anercon (India) Ltd.* (supra) wherein it was held *as under:-*

"152..... in view of the above, we are of the considered opinion that the objection raised by the appellants to the continuance of the parallel proceedings in England is not wholly without jurisdiction. The only single factor which prompted respondent No.1 to pursue the action in England was the "venue" of arbitration has been fixed in London. The considerations for designating a convenient "venue" for arbitration cannot be understood as conferring concurrent jurisdiction on the English Courts over the arbitration proceedings or disputes in general. Keeping in view, the

aforesaid, we are inclined to restore the anti suit injunction granted by the Daman Trial Court".

(Emphasis supplied)

15. In (2013) SCC Online BOM 476 (Konkola Copper Mines vs. Stewarts and Lloyds of India Ltd.), it was held that merely because before commencement of arbitral proceedings, both parties agreed that "venue" place of arbitration shall be at Mumbai for the sake of convenience, that would not confer jurisdiction on this Court to entertain application under Section 9 of Arbitration and Conciliation Act. It is apposite to remember that as per Section 2(1)(e) of the Act, the purpose is to identify the Courts having supervisory control over the arbitration proceedings. The "venue" cannot determine the jurisdiction of such Courts. Precisely for this reason, in the case of **Konkola Copper** (supra), the Court expressed its inability to trace jurisdiction from the place of "venue". The "seat" of arbitration constitutes the center of gravity of the arbitration whereas the "venue" of the arbitration may be at one or more convenient locations. *[See (2013) SCC Online BOM 777 (Konkola Copper Mines vs. Stewarts and Lloyds of India Ltd.)]*. In the case of **(2015) SCC Online DEL 10428 (P.C.P. International Ltd. vs. LANCO Infratech Ltd.)**, the Court opined that the argument of petitioner that merely because "venue" of arbitration is in Delhi, this Court would have territorial jurisdiction is a misconceived argument because there is a difference between "venue" of arbitration and "seat" of arbitration. It was further clarified that it is only the "seat" of arbitration which will give territorial jurisdiction and not the "venue" of jurisdiction. "Seat" means the place where Court is, which has the territorial jurisdiction with respect to the subject matter/cause of action of the matter, and "venue" is the place where the Tribunal sits to hold the arbitration proceedings and sitting of Tribunal need not be at the place where the "seat" of arbitration is located. **In (2018) SCC Online SC 1640 (Union of India vs. Hardi Exploration and Production (India) INC)**, the Apex Court held that a "venue" can become a "seat" if something is added to it as a concomitant. The definition of "venue" in the present case does not fulfill

this requirement. Indeed, the definition clearly shows that parties never intended to treat the "venue" as a "seat". For this reason, "venue" was left open to be changed at the discretion of the purchaser. In view of foregoing analysis, the judgment passed in the case of *Ramandeep* (supra) cannot be pressed into service.

16. So far argument of Shri Choudhari regarding non fulfillment of requirement of Clause 1.2.54 (d)(ii) is concerned, suffice it to say that in the light of Section 12(5) of the Act, the departmental arbitrators now cannot be appointed as Arbitrators. Thus, this argument pales into insignificance. In other words, the technical defect pointed out by the respondent will not cause any dent on the claim of applicant for appointment of a suitable arbitrator by this Court.

17. In view of foregoing analysis, this Court is unable to hold that "venue" will determine the question of jurisdiction of this Court or despite availability of cause of action, which has arisen within the territory of this Court, this Court will have no jurisdiction to entertain this application. Indisputably, there exists an arbitration clause, a live dispute between the parties and inaction on the part of respondents to appoint the Arbitrators. Thus, necessary ingredients for invoking Section 11(6) of the Act are satisfied. Resultantly, I deem it proper to provisionally appoint Hon'ble Shri Justice D.M. Dharmadhikari, Former Judge of Supreme Court of India as a Provisional Arbitrator in the present case. The Registry of this Court shall seek his consent/willingness in terms of Section 11(8) of the Act.

18. List this matter on **18-02-2019**.

(Sujoy Paul)
Judge