Via Video Conferencing

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision:-21.07.2020

\+ **ARB. P. 218/2020**

M/S. HAMDARD LABORATORIES(INDIA) .....Petitioner

Through Mr.S.Gowthaman with Mr.Revathy C, Advs & Mr.Aslam Khan, Chief Legal Officer.

versus

M/S. STERLING ELECTRO ENTERPRISES .....Respondent

Through Mr.Rajeev M Roy, Adv. with Mr.P.Srinivasan, Adv.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J(ORAL)

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') seeking appointment of a sole arbitrator to adjudicate the disputes between the parties arising out of the Work Order dated 01.03.2018.

2. At the outset, learned counsel for the petitioner submits that the respondent has been incorrectly impleaded as 'M/s Sterling Electro Enterprises' when it is, in fact, 'M/s Sterling Electro Enterprises Pvt. Ltd.'. He, therefore, makes an oral request to have the respondent's name corrected in the cause title of the petition. Since learned counsel for the respondent concedes that he is appearing for M/s Sterling Electro Enterprises Pvt. Ltd., the name of the respondent herein would now be read as 'M/s Sterling Electro Enterprises Pvt. Ltd.'. The amended memo of parties be filed during the course of the day.

3. While the petitioner/ Hamdard Laboratories India is a business entity engaged in the manufacture of Unani and Ayurvedic pharmaceutical products with its head office at Delhi, the respondent/Sterling Electro Enterprises Pvt. Ltd. is an electrical instrument contracting company with its head office at Mumbai.

4. On 22.11.2017, the petitioner issued a tender inviting bids for carrying out electrical installation works at its new manufacturing unit in Aurangabad, Maharashtra. The respondent's bid was accepted and a contract, being a Work Order, was executed between the parties on 01.03.2018 for a total value of INR 6,67,00,061.18/. On 03.03.2018, the petitioner paid an advance sum of INR 1,66,75,015/- to the respondent against an advance bank guarantee furnished by the latter, which was valid only till 31.05.2018. As per the terms of the Work Order, the respondent was supposed to complete the electrical work in 10 months and ensure supply of the electrical fittings as also their installation. In discharge of its obligations under the contract, in December 2018, the respondent purchased electrical fittings to be utilised at the project site against invoices for a sum of INR 47,06,00,000/-, however these fittings could not be installed at that stage as certain civil engineering work was left pending at the project site and assumed precedence over electrical installations. Thus, the respondent had to cease its activities at the project site, on the instructions of the petitioner. Admittedly, the petitioner requested the respondent to resume work only on 10.05.2019, in response whereto the respondent informed the petitioner of its unwillingness to work for the same rate as provided in the Work Order dated 01.03.2018. Instead, the respondent requested the petitioner to revisit the agreement

and sought a cost escalation of 19% on the prices provided in the Work Order, but the petitioner was only willing to offer 5% escalation. When the respondent did not accede to this counter offer, the petitioner terminated the Work Order on 28.08.2019 and requested the respondent to take back the electrical fittings which were lying at the project site under the lock and key of the respondent. The petitioner also invited the respondent to amicably settle the dispute and requested refund of the advance amount of INR 1,66,75,015/- given by the petitioner, neither of which materialized as both parties remained adamant on their respective stance.

5. In support of the petition, learned counsel for the petitioner submits that when disputes arose between the parties, the petitioner repeatedly attempted to have the matter amicably resolved, but to no avail. This culminated in the petitioner invoking arbitration, but the respondent's failure to accept the petitioner's request has compelled the petitioner to approach this Court. By drawing my attention to the correspondence exchanged between the parties, he submits that once no amicable settlement was arrived at, within thirty days from the date on which the petitioner requested amicable resolution of the dispute, the petitioner is justified in invoking arbitration in terms of the arbitration clause contained in the Work Order dated 01.03.2018. He further submits that since the arbitration clause specifically stipulates that the 'the Courts of law at Delhi' alone shall have the jurisdiction, a necessary corollary thereof is that the parties agreed to designate the seat of arbitration in Delhi and that this Court has exclusive jurisdiction to entertain the present petition under Sections 7 and 11 of the Act. In support of his contentions, he places reliance on the decision of the

Supreme Court in ***Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited & Ors.*** *(2017) 7 SCC 678* and the decisions of this Court in ***Aarka Sports Management Pvt. Ltd. V. Kalsi Buildcon Pvt. Ltd.*** *(Arb P. 662/2019)* and ***Virgo Softech Ltd. V. National Institute of Electronics and Information Technology*** *(Arb.P. 749/2018)*.

6. On the other hand, Mr. Roy, learned counsel for the respondent submits that, contrary to the petitioner's submissions, the respondent is still agreeable for an amicable settlement and, therefore, the present petition is premature. He further submits that this Court does not have territorial jurisdiction to entertain the present petition, since neither did the cause of action arise in Delhi nor did the parties ever agree to designate Delhi as the seat of arbitration. He submits that once the agreement does not provide for any seat of arbitration, much less designate Delhi as one, the petitioner was required to approach the Court within whose jurisdiction the cause of action had arisen, in accordance with Section 2 (1)(e) of the Act read with Sections 16 to 20 of the Code of Civil Procedure, 1908. He also submits, by relying on the decision of the Hon'ble Supreme Court in ***ABC Laminart Pvt. Ltd. & Anr. V. A.P.Agencies, Salem*** *(1989)2 SCC 163*, that in cases like the present, where the parties have not agreed upon a seat of arbitration, the general legal position which proscribes parties from conferring jurisdiction on a Court with no jurisdiction merely by consent, is applicable. He further places reliance on the decisions in ***AAA Landmark Private Limited Vs. AKME Projects Ltd. & Ors.*** *(Arb. P. 418/2017)* and ***Aarka Sports*** *(supra)* to submit that since the parties had not agreed upon a seat of arbitration, any petition under

Section 11 of the Act could be filed only at Aurangabad where the entire cause of action arose, considering the work order was issued there and the contractual work was required to be executed there. Even the respondent's address in the Work Order, for the purpose of all notices, is that of Aurangabad. He, therefore, prays that this petition be dismissed for want of jurisdiction.

7. I have considered the submissions of the parties and with their assistance perused the record.

8. Since the rival contentions of the parties revolve around the effect of the arbitration agreement within the dispute resolution clause contained in the Work Order dated 01.03.2018, it would be apposite to note the same which reads as under:-

> *"DISPUTES:*
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> *Amicable Settlement: The Parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this Agreement in the manner specified in this Article, Including any unresolved controversy or dispute arising out of or in connection this Agreement's existence, interpretation, performance, or termination:*
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> *i) The Party raising the dispute shall address to the other party a notice requesting an amicable settlement of the dispute within 10 (ten) days of notification.*
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> *(ii) The matter will be referred for resolution between M/s Sterling Electro Enterprises Pvt. Ltd. and Hamdard Laboratories India. They shall then resolve the matter and the agreed course of action documented within a further period of 10 (ten) days.*
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> ***Arbitration:*** *Any dispute between the Parties, which cannot be settled amicably within 30 (thirty) days after receipt by one Party of the other Party's request for such amicable' settlement, may be*

submitted by either Party through arbitration. The arbitration shall be conducted as per the provision of The Arbitration and Conciliation Act, 1996, and any statutory modification or reenactment thereof. The arbitration proceedings shall be conducted in the English Language. ***The courts of law at Delhi alone shall have the jurisdiction.*** *The arbitration award shall be final and binding upon the Parties. Each Party shall bear the cost of preparing and presenting its case, and the cost of arbitration, including fees and expenses of the arbitrators, shall be shared equally by the Parties unless the award otherwise provides. it is further agreed between the Parties hereto that such arbitration proceedings shall be completed within a period of six calendar months from the date of reference.*

All terms and conditions shall be applicable and fully observed by you for successful and timely completion of work." (emphasis supplied)

9. A perusal of the aforesaid clause, which governs all disputes arising out of the Work Order dated 01.03.2018, reveals that the parties had, at the first instance, mandated resort to amicable resolution of disputes prior to invocation of arbitration. Therefore, once a party raised a dispute and requested to have the same settled amicably and then found out that amicable resolution was unlikely, then, regardless of who is at fault for the failure in the settlement talks, either party could invoke arbitration within 30 days from the date on which the request for amicable settlement was made. The correspondences exchanged between the parties during the months of July-August 2019 show that the parties had attempted to amicably settle the matter, to no avail. The petitioner's invocation of arbitration on 13.09.2019 took place subsequently, after the parties' attempt to amicably settle the matter had failed. Therefore, considering the fact that the petitioner's

invocation of arbitration adhered to the procedural requirements set out in the dispute resolution clause of the Work Order dated 01.03.2018, there is no merit in the respondent's plea that the present petition is premature.

10. Now, coming to the primary bone of contention between the parties, i.e., whether this Court has the territorial jurisdiction to entertain the present petition. The parties are ad idem that although the cause of action arose at Aurangabad, Maharashtra, this Court would have jurisdiction to entertain the present petition if it is found that Delhi was designated as the seat of arbitration by the parties. On this aspect, the petitioner contends that the Delhi was indeed designated as the seat of arbitration as the parties had specifically agreed to confer exclusive jurisdiction upon the courts at Delhi in all arbitration proceedings. On the other hand, it is the respondent's stand that the parties never agreed upon a seat of arbitration in the Work Order and that, therefore, only the Court, within whose jurisdiction the cause of action arose, would be a 'Court' within the meaning of Section 2(1)(e) read with Sections 16-20 of the Act, thereby rendering it competent to decide the present petition.

11. Having carefully examined the arbitration clause, I find that the sentence 'The courts of law at Delhi alone shall have the jurisdiction.' ensconced therein contains the key to the riddle, insofar as it is a clear expression of the parties' intent to confer exclusive jurisdiction in all arbitrations arising out of the Work Order, upon the courts at Delhi. The respondent's interpretation of the arbitration clause and opposition to vesting of jurisdiction in Delhi courts arises from its contention that the arbitration clause never provided for a seat of arbitration. In

furtherance of this contention, the respondent has correctly reiterated the settled propositions of law that seat and venue of arbitration cannot be confused with each other and bear distinct meanings, and that only when the contract expressly provides for a seat of arbitration does there arise an automatic vesting of jurisdiction in the courts within which the seat is situated. While there is no dispute with these propositions, they are not applicable in the instant case as the terms of the arbitration clause contained in the Work Order are explicit and it is clear that Delhi has not been designated as a venue, but has been designated as a seat of arbitration. In my view, the absence of the term 'seat' while referring to the courts at Delhi, does not alter the significant fact that the courts of law at Delhi alone have been vested with the jurisdiction upon arbitration proceedings arising out of the subject Work Order. In fact, on this ground alone, if the respondent's plea were to be accepted and this Court were to disregard the entire phrase "The courts of law at Delhi alone shall have the jurisdiction" within the arbitration clause, it would render a vital portion of the clause meaningless and futile.

12. Ultimately, the law does not prohibit parties from agreeing to confer exclusive jurisdiction in respect of arbitration proceedings, on mutually preferred, neutral seats. Therefore, notwithstanding the fact that no part of the cause of action arose in Delhi, the clear expression of intent within the arbitration clause to confer jurisdiction on the courts at Delhi helps cull out the fact that the parties chose Delhi as a neutral seat of arbitration. In this regard, reference may be made to the decision in ***Indus Mobile*** *(supra)* wherein the Hon'ble Supreme Court has, by referring to its earlier decision in ***BALCO v. Kaiser***

Aluminium Technical Services Inc., *(2012) 9 SCC 552* observed as under:

> *"**9.** The concept of juridical seat has been evolved by the courts in England and has now been firmly embedded in our jurisprudence. Thus, the Constitution Bench in BALCO v. Kaiser Aluminium Technical Services Inc. [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] has adverted to "seat" in some detail. Para 96 is instructive and states as under:*
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> *"96. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:*
> *'**2. Definitions**.—(1) In this Part, unless the context otherwise requires —*
> *(a)-(d) ****
> *(e) "**Court**" means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes;'*
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> *We are of the opinion, the term "subject-matter of the arbitration" cannot be confused with "subject-matter of the suit". The term "subject-matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, 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 courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the*

courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located."

13. Further reference may also be made to the decision of a Coordinate Bench of this Court in ***Virgo Softech*** *(supra)* wherein the learned Single Judge was examining an arbitration clause which provided that arbitration would be held in New Delhi but the courts in Chandigarh would have exclusive jurisdiction over disputes arising out of arbitration. Ultimately, the Court held that once, as per the express provisions of the arbitration agreement, the parties had conferred exclusive jurisdiction on the courts in Chandigarh on all arbitration proceedings, then only the courts at Chandigarh would have exclusive jurisdiction to entertain a petition under Section 11. The relevant extract of the decision in ***Virgo Softech*** *(supra)* reads as under:

"6. I have considered the submissions made by the counsel for the petitioner, however, find no merit in the same. Clause 8.2(b) of the GCC which has been reproduced hereinabove, clearly provides that though the arbitration proceedings shall be conducted at New Delhi, the "courts in Chandigarh only shall have exclusive jurisdiction to try and entertain any disputes arising there from".

The Agreement(s) therefore, clearly provides that all disputes, including those arising out of the arbitration proceedings, have to be necessarily tried by the Court at Chandigarh alone. In view of the above specific Clause, the stipulation that the arbitration proceedings shall be held at New Delhi, would make New Delhi only a "venue" of the arbitration and not the „seat" of the arbitration.

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13. In the present case, Clause 8.2 (b) of the GCC clearly confers exclusive jurisdiction in the Court at Chandigarh to entertain all disputes arising out of or in relation to the arbitration proceedings.

14. In view of the above, as Clause 8.2 (b) of the GCC confers exclusive jurisdiction in the Courts at Chandigarh in relation to the disputes arising out of the arbitration proceedings, this Court would not have the territorial jurisdiction to entertain the present petitions."

14. Both the parties have heavily relied on the decision in ***Aarka Sports*** *(supra)* and, therefore, it would be appropriate to refer to the summary of principles laid down therein by the Coordinate Bench of this Court:

*"**Summary of Principles***

23. Section 20 (1) of the Arbitration and Conciliation Act empowers the parties to determine the seat of arbitration. The parties are at liberty to choose a neutral seat of arbitration where neither the cause of action arose nor the parties reside or work and Sections 16 to 20 of the Code of Civil Procedure would not be attracted.

24. Once the seat is determined, the Court of that place shall have exclusive jurisdiction to deal with all matters relating to arbitration agreement between the parties. (emphasis supplied)

25. If the parties have not determined the seat of arbitration, the seat of arbitration shall be determined by the Arbitral Tribunal under Section 20(2) of the Arbitration and Conciliation Act.

26. If the parties have not agreed on the seat of the arbitration, the Court competent to entertain an application under Section 11 of the Arbitration and Conciliation Act would be the "Court‖ as defined in Section 2(1) (e) of the Act read with Sections 16 to 20 of the Code of Civil Procedure."

15. By relying on these principles, the respondent contends that the facts of the present case are identical to ***Aarka Sports*** *(supra)* wherein the Coordinate Bench had found merit in the respondent's opposition to the petition, which are on the same grounds as the respondent herein. In order to appreciate this plea, it is necessary to refer to the arbitration clause which was under consideration in ***Aarka Sports*** as also the finding of the learned Single Judge, which reads as under:

"15. Governing Law, Jurisdiction & Dispute Resolution

15.1 This Agreement shall be governed by and construed in accordance with the laws of India and subject to clauses 15.2 and 15.3, ***the jurisdiction of this Agreement shall be exclusively in the courts of New Delhi, India.***

15.2 Negotiation: The Parties shall negotiate in good faith and use reasonable efforts to settle any dispute, difference or claim raised, arising out of or in connection with this Agreement including the construction, validity, execution, performance, termination or breach hereof (hereinafter referred to as _Dispute'). In the event that the Parties are unable to reach a resolution within 30 (thirty) days of the start of Dispute the same shall be settled by binding arbitration.

15.3 Arbitration*: Any Dispute which is not settled by Mediation, shall be determined by Arbitration under the*

Arbitration and Conciliation Act, 1996, as amended by the Arbitration and Conciliation (Amendment) Act, 2015. The Arbitration shall be conducted before a sole arbitrator appointed with the mutual consent of both Parties. If the Parties are unable to reach an agreement on the choice of an arbitrator within 30 days of the Notice of Arbitration by either Party, the Parties shall approach the court of proper jurisdiction for appointment of arbitrator. (Emphasis Supplied)

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Findings

27. The arbitration agreement dated 16th March, 2018 does not stipulate any seat of arbitration as the parties had not agreed on the seat of the arbitration under Section 20(1) of the Arbitration and Conciliation Act. In that view of the matter, the seat of the arbitration shall be determined by the Arbitral Tribunal under Section 20(2) of the Arbitration and Conciliation Act.

28. Since the parties have not agreed on the seat of the arbitration, the Court within the meaning of Section 2(1)(e) of Arbitration and Conciliation Act read with Sections 16 to 20 of Code of Civil Procedure would be competent to entertain an application under Section 11 of the Arbitration and Conciliation Act."

16. A reading of Clause 15.3, which provided for arbitration in the aforesaid decision, makes it clear that the parties, in ***Aarka Sports*** *(supra)*, did not provide for exclusive jurisdiction of the Courts at Delhi in respect of arbitration. Rather, the petitioner, in that case, had relied upon the jurisdiction conferred in clause 15.1 of the dispute resolution clause titled Governing Law, Jurisdiction & Dispute Resolution, which was in fact a general stipulation on dispute resolution, not a part of the arbitration clause like the present case. When the parties herein have specifically

provided, within the arbitration clause itself, that the Courts at Delhi will have jurisdiction over all arbitration proceedings arising out of the Work Order dated 01.03.2018, I find that the facts of ***Aarka Sports*** *(supra)* cannot be equated to that of the present case in any respect. In view of the aforesaid, it is clear that the parties had envisaged conferment of exclusive jurisdiction upon the courts in Delhi to decide all disputes relating to arbitration, arising out of the Work Order in question. Thus, by necessary implication, the parties also agreed to make Delhi the seat of arbitration, which leaves no merit in the respondent's contention that this Court does not have territorial jurisdiction to adjudicate the present petition.

17. In view of my aforesaid conclusion, the respondent's reliance on the decisions in ***AAA Landmark*** *(supra)* and ***ABC Laminart*** *(supra)* is also inapplicable. The petition, therefore, is entitled to succeed.

18. Accordingly, in the light of the admitted position that the disputes between the parties are required to be adjudicated through arbitration, Hon'ble Ms. Justice Rekha Sharma, former Judge of this Court (Mobile No. 9871300025) is appointed as the sole Arbitrator for adjudication of the disputes and differences which have arisen between the parties in relation to the Work Order dated 01.03.2018.

19. Before commencing arbitration proceedings, the learned Arbitrator will ensure compliance with Section 12 of the Act. The fee of the learned Arbitrator shall be fixed as per Schedule IV appended to the Act. It is, however, made clear that this Court has not considered the rival claims of the parties on merits and it will, therefore, be open for them to file claims/counter claims and raise all pleas permissible in law, before the learned Arbitrator, which will be decided in accordance with law.

20. A copy of this order be sent to the learned Arbitrator through electronic means.

21. Accordingly, the petition is allowed in the aforesaid terms.

REKHA PALLI, J

JULY 21, 2020/*sr*