Bbr (India) Pvt. Ltd. vs S.P. Singhla Constructions Private ... on 18 May, 2022

Author: Ajay Rastogi

Bench: Ajay Rastogi

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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 4130-4131 OF 2022
(ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NOS. 30019-

BBR (INDIA) PRIVATE LIMITED .....

VERSUS

S.P. SINGLA CONSTRUCTIONS
PRIVATE LIMITED ..... RE

JUDGMENT

SANJIV KHANNA, J.

Leave granted.

2. The short and interesting issue which arises in the present appeals is – whether conducting the arbitration proceedings at Delhi, owing to the appointment of a new arbitrator, 1 would shift the 'jurisdictional seat of arbitration' from Panchkula in Haryana, the place fixed by the first arbitrator 2 for the arbitration proceedings?

3. Before we refer to the statutory provisions and the case law precedents, facts in brief, relevant to decide the aforesaid 1 Mr. Justice (Retd) T.S. Doabia 2 Mr. Justice (Retd.) N.C. Jain question, are required to be stated. The appellant – BBR (India) Private Limited, and the respondent – S.P. Singla Constructions Private Limited, had entered into a contract dated 30 th June 2011, under which the appellant was required to supply, install and undertake stressing of cable strays for the 592 metre long cable stay bridge being constructed by the respondent over the river Ravi at Basouli, Jammu and Kashmir. Letter of intent dated 30 th June 2011 issued under the contract had an arbitration clause for resolution of disputes by a sole arbitrator, which reads thus:

> "Dispute Resolution and Arbitration Save where the decision of the contractor is final and binding on the subcontract any dispute difference arising between the contractor and sub-contractor relating to any matter. In first instance shall be attempted to be resolved by the arbitration of the sole arbitrator to be appointed by the managing director of S.P. Singla Constructions Pvt. Ltd.
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> This letter of intent is being issued to you in two original you are requested return one original duty signed in token of your acceptance, which shall constitute a valid agreement for the work till such time a formal agreement is signed between you and us."
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> 4. The arbitration clause is silent and does not stipulate the seat or venue of arbitration. The contract and letter of intent were executed at Panchkula in Haryana. The corporate office of the respondent is also located at Panchkula. However, the registered office of the appellant is located in Bengaluru, Karnataka.
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> 5. As disputes arose between the parties, the matter was referred to arbitration, and Mr. Justice (Retd.) N.C. Jain was appointed as the sole arbitrator. In the first sitting held on 5 th August 2014, the arbitral tribunal held that the venue of the proceedings would be H.No. 292, Sector-6, Panchkula, Haryana. The respondent was not present at the proceedings and had submitted a written request for an adjournment, which request was accepted. Neither party had objected to the place of arbitration proceedings as fixed by the arbitral tribunal. Arbitration proceedings were thereafter held at H.No. 52, Sector-8A, Chandigarh, on 16 th December 2014, where the parties were directed to complete the pleadings, and the matter was adjourned for the framing of issues on 22 nd February 2015. In the proceedings held on 29 th May 2015, Mr. Justice (Retd.) N.C. Jain recused recording that he did not want to continue as the arbitrator for personal reasons. The records received thus far would be handed over to the new arbitrator.

Pleadings were completed by then.

6. Thereupon, Mr. Justice (Retd.) T.S. Doabia took over as the sole arbitrator and recorded his consent in this regard in the first procedural order dated 30th June 2015. The order stated that the venue of the proceedings would be Delhi. Apparently, the appellant was not present and accordingly, the respondent was directed by the arbitral tribunal to take steps to intimate the appellant.

7. The next order dated 18th July 2015 mentions that the parties had filed the claim petition and the statement of defence along with the counterclaim before Mr. Justice (Retd.) N.C. Jain. Rejoinder had also been filed before the previous arbitrator. The parties were directed to file their evidence by way of affidavits for which timelines were fixed. The records from the previous arbitrator were required to be collected by the respondent and placed before the new arbitrator.

8. Thereafter, hearings were held, witnesses were cross-examined, and the arguments were addressed by the parties at Delhi. The order dated 22nd January 2016, states that the award would be pronounced on 29th January 2016 at the address at New Delhi and that the parties should send their representatives, failing which, the award would be sent by email followed by a signed copy through post.

9. The award was signed and pronounced at Delhi on 29 th January 2016, whereunder the respondent was awarded a sum of Rs.3,35,86,577/- with interest at the rate of 15% per annum.

10. Thereafter, two proceedings were initiated. The respondent filed an application for interim orders under Section 9 3 of the Arbitration and Conciliation Act, 19964 before the Additional District Judge, Panchkula, on 7th May 2016. The appellant filed a petition under Section 345 of the Act before the Delhi High Court on 28 th April 3 9. Interim measures, etc., by Court.— (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject- matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious. 4 For short, "the Act".

5 34. Application for setting aside arbitral award.— (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part 2016. Thus, the appellant and respondent invoked the jurisdiction of two different courts. Resultantly, the question of the 'jurisdictional seat of arbitration' assumes importance, which must be appropriately answered.

11. The petition filed by the respondent under Section 9 of the Act before the Additional District Judge, Panchkula, was dismissed vide order dated 14th December 2016, on the ground of lack of territorial jurisdiction, inter alia, recording that the jurisdiction to from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India. Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice. Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award (5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

entertain the application vests solely with the Delhi High Court, where a prior petition under Section 34 had been filed, and was pending. The petition under Section 9, being a subsequent petition, would be barred under Section 42 of the Act.

12. However, this order has been set aside by the High Court of Punjab and Haryana vide order dated 14th October 2019, with the finding that the courts of Delhi do not have the jurisdiction to entertain the objections under Section 34 of the Act. To this effect, the High Court of Punjab and Haryana has recorded that the agreement between the parties was silent as to 'the seat' of the arbitration proceedings, and the second arbitrator Mr. Justice (Retd.) T.S. Doabia, vide his first order dated 30th June 2015, had not determined Delhi to be the 'seat of arbitration'. Relying on the decision of this Court in State of West Bengal and Others v. Associated Contractors,6 the High Court

held that the courts at Panchkula had jurisdiction to deal with the case. The review application filed by the appellant was dismissed vide order dated 8th November 2019.

13. These orders, passed by the High Court of Punjab and Haryana, have been assailed before us by the appellant in these appeals. 6 (2015) 1 SCC 32 By order dated 9th January 2020, notice was issued in the present appeals.

14. Section 2 (1) (e) of the Act, which defines the term 'court'; Section 20 on the 'place of arbitration'; as well as Section 42 read thus:

> "2. Definitions.—(1) In this Part, unless the context otherwise requires,— xx xx xx
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> (e) "Court" means— (i) in the case of an arbitration other than international commercial arbitration, 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;" xx xx xx "20. (1) The parties are free to agree on the place of arbitration.
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> (2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
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> (3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.
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> xx xx xx
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> 42. Jurisdiction.— Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

15. Interpretation of the term 'court', as defined in sub-clause (e) to sub-section (1) of Section 2 of the Act, had come up for consideration before a Constitutional Bench of five Judges in the case of Bhartiya Aluminium Company v. Kaiser Aluminium Technical Services Inc,7 which decision had examined the distinction between 'jurisdictional seat' and 'venue' in the context of international arbitration, to hold that the expression 'seat of arbitration' is the centre of gravity in arbitration. However,

this does not mean that all arbitration proceedings must take place at 'the seat'. The arbitrators at times hold meetings at more convenient locations. Regarding the expression 'court', it was observed that Section 2(2) of the Act does not make Part-I applicable to arbitrations seated outside India. The expressions used in Section 2(2)8 of the Act do not permit an interpretation to hold that Part-I would also apply to arbitrations held outside the 7 (2012) 9 SCC 552; BALCO case, for short.

8 See paragraph 20 below. By Act 3 of 2016 proviso to Section 2(2) of the Act has been inserted with retrospective effect from 23rd October 2015, and the provision as substituted/ameded by Act 33 of 2019 for clause(a), now reads-

"(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 (b) 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." territory of India. Noticing the above interpretation, a three Judges Bench of this Court in BGS SGS Soma JV v. NHPC Limited9 has observed that the expression 'subject to arbitration' used in clause

(e) to sub-section (1) of Section 2 of the Act cannot be confused with the 'subject matter of the suit'. The term 'subject matter of the suit' in the said provision is confined to Part-I. The purpose of the clause is to identify the courts having supervisory control over the judicial proceedings. Hence, the clause refers to a court which would be essentially a court of 'the seat' of the arbitration process.

Accordingly, clause (e) to sub-section (1) of Section 2 has to be construed keeping in view the provisions of Section 20 of the Act, which are, in fact, determinative and relevant when we decide the question of 'the seat of an arbitration'. This interpretation recognises the principle of 'party autonomy', which is the edifice of arbitration. In other words, the term 'court' as defined in clause (e) to sub-section (1) of Section 2, which refers to the 'subject matter of arbitration', is not necessarily used as finally determinative of the court's territorial jurisdiction to entertain proceedings under the Act. In BGS SGS Soma (supra), this Court observed that any other construction of the provisions would render Section 20 of the Act nugatory. In view of the Court, the legislature had given 9 (2020) 4 SCC 224 jurisdiction to two courts: the court which should have jurisdiction where the cause of action is located; and the court where the arbitration takes place. This is necessary as, on some occasions, the agreement may provide the 'seat of arbitration' that would be neutral to both the parties. The courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. The 'seat of arbitration' need not be the place where any cause of action has arisen, in the sense that the 'seat of arbitration may be different from the place where obligations are/had to be performed under the contract. In such circumstances, both the courts should have jurisdiction, viz., the courts within whose jurisdiction 'the subject matter of the suit' is situated and the courts within whose jurisdiction the dispute

resolution forum, that is, where the arbitral tribunal is located.

16. Turning to Section 20 of the Act, sub-section (1) in clear terms states that the parties can agree on the place of arbitration. The word 'free' has been used to emphasise the autonomy and flexibility that the parties enjoy to agree on a place of arbitration which is unrestricted and need not be confined to the place where the 'subject matter of the suit' is situated. Sub-section (1) to Section 20 gives primacy to the agreement of the parties by which they are entitled to fix and specify 'the seat of arbitration', which then, by operation of law, determines the jurisdictional court that will, in the said case, exercise territorial jurisdiction. Sub-section (2) comes into the picture only when the parties have not agreed on the place of arbitration as 'the seat'. 10 In terms of sub-section (2) of Section 20 the arbitral tribunal determines the place of arbitration. The arbitral tribunal, while doing so, can take into regard the circumstances of the case, including the convenience of the parties. Sub-section (3) of Section 20 of the Act enables the arbitral tribunal, unless the parties have agreed to the contrary, to meet at any place to conduct hearing at a place of convenience in matters, such as consultation among its members, for the recording of witnesses, experts or hearing parties, inspection of documents, goods, or property.

17. Relying upon the Constitutional Bench decision in BALCO (supra), in BGS SGS Soma (supra), it has been held that sub- section (3) of Section 20 refers to 'venue' whereas the 'place' mentioned in sub-section (1) and sub-section (2) refers to the 'jurisdictional seat'. To explain the difference, in BALCO (supra), a case relating to international arbitration, reference was made to several judgments, albeit the judgment in Shashoua v. Sharma11 10 Section 20(2) also applies when 'the seat' as mentioned in the agreement is only a convenient venue.

11 (2009) EWHC 957 (Comm.) was extensively quoted to observe that an agreement as to the 'seat of arbitration' draws in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause. 12 The parties that have agreed to 'the seat' must challenge an interim or final award only in the courts of the place designated as the 'seat of arbitration'. In other words, the choice of the 'seat of arbitration' must be the choice of a forum/court for remedies seeking to attack the award.

18. The aforesaid principles relating to international arbitration have been applied to domestic arbitrations. In this regard, we may refer to paragraph 38 of BGS SGS Soma (supra), which reads as under:

> "38. A reading of paras 75, 76, 96, 110, 116, 123 and 194 of BALCO would show that where parties have selected the seat of arbitration in their agreement, such selection would then amount to an exclusive jurisdiction clause, as the parties have now indicated that the courts at the "seat" would alone have jurisdiction to entertain challenges against the arbitral award which have been made at the seat. The example given in para 96 buttresses this proposition, and is supported by the previous and subsequent paragraphs pointed out hereinabove.

The BALCO judgment, when read as a whole, applies the concept of "seat" as laid down by the English judgments (and which is in Section 20 of the Arbitration Act, 1996), by harmoniously construing Section 20 with Section 2(1)(e), so as to broaden the definition of "court", and bring within its ken courts of the "seat" of the arbitration." 12 Court of appeal decision in C v. D, 2007 EWCA Civ 1282 (CA).

19. The Court in BGS SGS Soma (supra), then proceeded to examine the contention whether paragraph 96 of BALCO (supra), which speaks of concurrent jurisdiction of the courts, that is, the jurisdiction of courts where the cause of action has arisen wholly or partly, and the courts within the jurisdiction in which the dispute resolution forum – arbitration is located, to observe and elucidate the legal position:

> "40. Para 96 of BALCO case is in several parts. First and foremost, Section 2(1)(e), which is the definition of "court" under the Arbitration Act, 1996 was referred to, and was construed keeping in view the provisions in Section 20 of the Arbitration Act, 1996, which give recognition to party autonomy in choosing the seat of the arbitration proceedings. Secondly, the Court went on to state in two places in the said paragraph that jurisdiction is given to two sets of courts, namely, those courts which would have jurisdiction where the cause of action is located; and those courts where the arbitration takes place. However, when it came to providing a neutral place as the "seat" of arbitration proceedings, the example given by the five-Judge Bench made it clear that appeals under Section 37 of the Arbitration Act, 1996 against interim orders passed under Section 17 of the Arbitration Act, 1996 would lie only to the courts of the seat — which is Delhi in that example — which are the courts having supervisory control, or jurisdiction, over the arbitration proceedings. The example then goes on to state that this would be irrespective of the fact that the obligations to be performed under the contract, that is the cause of action, may arise in part either at Mumbai or Kolkata. The fact that the arbitration is to take place in Delhi is of importance. However, the next sentence in the said paragraph reiterates the concurrent jurisdiction of both courts".

20. BGS SGS Soma (supra) extensively refers to the judgment of this Court in Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and Others,13 which decision refers to the legislative history of Section 2(1)(e) and Section 20 of the Act and the recommendations of the 246 th Law Commission Report, 2014. These recommendations, it is observed, were not implemented in consonance with the decision in BALCO (supra), which, in no uncertain terms, refers to the 'place' as the 'jurisdictional seat' for the purpose of clause (e) to sub-section (2) of Section 2 of the Act. This judgment was subsequently followed in Brahmani River Pellets Limited v. Kamachi Industries Limited.14 It may, however, be noted that clause (e) to sub-section (1) of Section 2 was amended by inserting sub-clause (ii) 15 with the specific objective to solve the problem of conflict of jurisdiction that would arise in cases where interim measures are sought in India in cases of arbitration seated outside India. In the context of domestic arbitrations it must be held that once the 'seat of arbitration' has been fixed, then the courts at the said location alone will have exclusive jurisdiction to exercise the supervisory powers over the arbitration. The courts at other locations

would not have jurisdiction, including the courts where cause of action 13 (2017) 7 SCC 678 14 (2020) 5 SCC 462 15 (ii) in the case of international commercial arbitration, 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, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court; has arisen. As observed above and held in BGS SGS Soma (supra), and Indus Mobile (supra),16 the moment the parties by agreement designate 'the seat', it becomes akin to an exclusive jurisdiction clause. It would then vest the courts at 'the seat' with exclusive jurisdiction to regulate arbitration proceedings arising out of the agreement between the parties.

21. The Court in BGS SGS Soma (supra) has also dealt with the situation where the parties have not agreed on or have not fixed the jurisdictional 'seat of arbitration', and has laid down the following test to determine the 'seat of arbitration' which would determine the location of the court that would exercise supervisory jurisdiction. The test is simple and reads:

> "61. It will thus be seen that wherever there is an express designation of a "venue", and no designation of any alternative place as the "seat", combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding." For formulating the test reference was made to several Indian and foreign judgments to emphasise that where the parties had failed to choose the 'jurisdictional seat' 17 which would be 16 In Indus Mobile Distribution (P) Ltd., the Court after clearing the air on the meaning of Section 20 of the Arbitration Act, 1996 made it clear that the moment a seat is designated by agreement between the parties, it is akin to an exclusive jurisdiction clause, which would then vest the courts at the "seat" with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.
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> 17 BGS SGS Soma (supra) case also examines and explains case law where the courts have held that so called 'seat' mentioned in the agreement is convenient 'venue' an aspect with which we are not concerned in the present case.

governing the arbitral proceedings, the proceedings must be considered at any rate prima facie as being governed and subject to jurisdiction of the court where the arbitration is being held, on the ground that the said court is most likely to be connected with the proceedings.18 Accordingly, in BGS SGS Soma (supra), the law as applicable, where the parties by agreement have not fixed the jurisdictional 'seat', is crystallised as under:

> "82. On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award

> at that place. This language has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a clause designates a "seat" of the arbitral proceedings. In an international context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be 18 See the principle culled out by Dicey and Morris on the Conflict of Laws, 11 th Edition.

replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration."

22. BGS SGS Soma (supra) also refers to decision of this Court in Union of India v. Hardy Exploration and Production (India) Inc.,19 which had held that the choice of the venue of arbitration did not imply that it had become the 'seat of arbitration' and that the venue could not by itself assume the status of 'the seat'; instead a venue could become 'the seat' only if "something else is added to it as a concomitant". According to BGS SGS Soma (supra), the reasoning given in Hardy Exploration (supra) is per incuriam as it contradicts the ratio and law laid down in BALCO (supra). Hence, BGS SGS Soma (supra) holds that it would be correct to hold that while exercising jurisdiction under sub-section (2) of Section 20 of the Act, an arbitrator is not to pass a detailed or a considered decision. The place where the arbitral tribunal holds the arbitration proceedings would, by default, be the venue of arbitration and consequently the 'seat of arbitration'.

23. When we turn to the facts of the present case, if the arbitration proceedings were held throughout in Panchkula, there would have been no difficulty in holding that Delhi is not the jurisdictional 'seat'. 19 (2019) 13 SCC 472 – In this case the parties had not chosen the seat of arbitration and the arbitral tribunal had also not determined the seat of arbitration. Therefore it was held that the choice of Kuala Lumpur as the venue of arbitration did not imply that Kuala Lumpur had become the seat of arbitration.

But that was not to be, as on recusal of Mr. Justice (Retd.) N.C. Jain and post the appointment of Mr. Justice (Retd.) T.S.Doabia arbitration proceedings were held at Delhi. In the context of the present case and noticing the first order passed by the arbitral tribunal on 5th August 2014 stipulating that the place of the proceedings would be Panchkula in Haryana and in the absence of other significant indica on application of Section 20(2) of the Act, the city of Panchkula in Haryana would be the jurisdictional 'seat' of arbitration. As 'the seat' was fixed vide the order dated 5 th August, 2014, the courts in Delhi would not have jurisdiction.

24. The appellant, however, contends that on the appointment of the new arbitrator, namely, Mr. Justice (Retd.) T.S. Doabia, and thereupon the venue being fixed at Delhi, the jurisdictional 'seat of arbitration' had changed from Panchkula in Haryana to Delhi. Reliance in this regard is placed upon the decision of this Court in Inox Renewables Ltd v. Jayesh Electricals Ltd.,20 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 20 (2019) SCC OnLine SC 2036 arbitration' changed and had got relocated from Jaipur to Ahmedabad. This, in the context of the decision in Inox Renewables Ltd (supra), 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 (supra) 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.

25. There are good reasons why we feel that subsequent hearings or proceedings at a different location other than the place fixed by the arbitrator as the 'seat of arbitration' should not be regarded and treated as a change or relocation of jurisdictional 'seat'. This would, in our opinion, lead to uncertainty and confusion resulting in avoidable esoteric and hermetic litigation as to the jurisdictional 'seat of arbitration'. 'The seat' once fixed by the arbitral tribunal under Section 20(2), should remain static and fixed, whereas the 'venue' of arbitration can change and move from 'the seat' to a new location. Venue is not constant and stationary and can move and change in terms of sub-section (3) to Section 20 of the Act. Change of venue does not result in change or relocation of the 'seat of arbitration'.

26. 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 the venue of arbitration. If we accept this contention of the appellant, we would, as observed in the case of C v. D (supra), 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.

27. 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.

28. At this stage, we must also deal with the appellant's argument that substantive proceedings were held in Delhi and, therefore, it would be the 'seat of arbitration'. The proceedings before the first arbitration at Panchkula, Haryana, were restricted to filing of pleadings and documents. On deeper consideration, this argument should be rejected for the reasons recorded above, as it will lead to confusion and uncertainty. The legal question raised in the present case must be answered objectively and not subjectively with reference to the facts of a particular case. Otherwise, there would be a lack of clarity and consequent mix-up about the courts that would exercise jurisdiction. There could be cases where the arbitration proceedings are held at different locations, but the 'seat of arbitration', as agreed by the parties or as determined by the arbitrator, may be different, and at that place – 'the seat', only a few hearings or initial proceedings may have been held. This would not matter and would not result in shifting of the jurisdictional 'seat'. Arbitrators can fix the place of residence, place of work, or in case of recusal, arbitration proceedings may be held at two different places, as in the present case. 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.

29. We have quoted Section 42 of the Act. Section 42 was also examined in BGS SGS Soma (supra) and the view expressed by the Delhi High Court in Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd.21 was overruled observing that the Section 42 is meant to avoid conflicts of jurisdiction of courts by placing the supervisory jurisdiction over all arbitration proceedings in connection with the 21 (2018) SCC OnLine Del 9338 arbitration proceedings with one court exclusively. The aforesaid observation supports our reasoning that once the jurisdictional 'seat' of arbitration is fixed in terms of sub-section (2) of Section 20 of the Act, then, without the express mutual consent of the parties to the arbitration, 'the seat' cannot be changed. Therefore, the appointment of a new arbitrator who

holds the arbitration proceedings at a different location would not change the jurisdictional 'seat' already fixed by the earlier or first arbitrator. The place of arbitration in such an event should be treated as a venue where arbitration proceedings are held.

30. We would now reproduce paragraph 59 of the judgment in BGS SGS Soma (supra), which examines Section 42 of the Act and reads as under:

> "59. Equally incorrect is the finding in Antrix Corpn. Ltd. that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one court exclusively. This is why the section begins with a non obstante clause, and then goes on to state "... where with respect to an arbitration agreement any application under this part has been made in a court..." It is obvious that the application made under this part to a court must be a court which has jurisdiction to decide such application. The subsequent holdings of this court, that where a seat is designated in an agreement, the courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the court where the seat is located, and that court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a court in which a part of the cause of action arises would then be the exclusive court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled."

31. We have already referred to the first few sentences of the aforementioned paragraph and explained the reasoning in the context of the present case. The paragraph BGS SGS Soma (supra) also explains the non-obstante effect as incorporated in Section 42 to hold that it is evident that the application made under Part-I must be to a court which has a jurisdiction to decide such application. Where 'the seat' is designated in the agreement, the courts of 'the seat' alone will have the jurisdiction. Thus, all applications under Part-I will be made in the court where 'the seat' is located as that court would alone have jurisdiction over the arbitration proceedings and all subsequent proceedings arising out of the arbitration proceedings. The quotation also clarifies that when either no 'seat' is designated by an agreement, or the so- called 'seat' is only a convenient venue, then there may be several courts where a part of the cause of action arises that may have jurisdiction. An application under Section 9 of the Act may be preferred before the court in which a part of cause of

action arises in the case where parties had not agreed on the 'seat of arbitration'. This is possible in the absence of an agreement fixing 'the seat', as an application under Section 9 may be filed before 'the seat' is determined by the arbitral tribunal under Section 20(2) of the Act. Consequently, in such situations, the court where the earliest application has been made, being the court in which a part or entire of the cause of action arises, would then be the exclusive court under Section 42 of the Act. Accordingly, such a court would have control over the arbitration proceedings. 22

32. 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 22 We are not examining and are not required to decide the question- whether there is a difference between the expression 'court' and the 'Chief Justice or his nominee' in the present case. tribunal vide the order dated 5th August 2014 had fixed the jurisdictional 'seat' at Panchkula in Haryana. Consequently, the appellant cannot, based on 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) to 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.

33. In view of the aforesaid discussion and reasons, we do not find any merit in the present appeals, and the same are dismissed without any order as to costs.

.....J. (AJAY RASTOGI) .....J. (SANJIV KHANNA) NEW DELHI;

MAY 18, 2022.