

M/s RAVI RANJAN DEVELOPERS PVT. LTD

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v.

ADITYA KUMAR CHATTERJEE

(Civil Appeal Nos. 2394-2395 of 2022)

MARCH 24, 2022

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[INDIRA BANERJEE AND A. S. BOPANNA, JJ.]

Arbitration and Conciliation Act, 1996 – ss. 2(1)(e), 9, 11(6) & 42 - Arbitration Agreement - Seat of Arbitration - Jurisdiction of High Court - Appellant and respondent entered into a Development agreement for development of property situated at Muzaffarpur in Bihar - The agreement contains Arbitration clause which provides Kolkata as the place of Arbitral Tribunal - As the dispute arose, respondent terminated the said Development Agreement - Respondent moved an arbitration petition in the Calcutta High Court u/s 11(6) of the Act for appointment of Arbitrator - The appellant objected the territorial jurisdiction of the Calcutta High Court - High Court allowed the Arbitration Petition and appointed a retired judge as Sole Arbitrator - There was no finding by the High Court with regard to its jurisdiction - On appeal, held: The Development Agreement was admittedly executed and registered outside the jurisdiction of the Calcutta High Court – The suit pertains to immovable property situated in Bihar - No part of the cause of action had arisen within the territorial jurisdiction of the Calcutta High Court - Section 11(6) of the Act has to be harmoniously read with Section 2(1)(e) of the A&C Act - An application under Section 11(6) of the Act for appointment of an Arbitrator/Arbitral Tribunal cannot be moved in any High Court in India, irrespective of its territorial jurisdiction - The parties cannot, by consent, confer jurisdiction on a Court which inherently lacked jurisdiction - The parties never agreed to submit to the jurisdiction of Calcutta High Court in respect of disputes, nor did the parties agree upon Kolkata as the seat of arbitration – Parties to the arbitration agreement only agreed that the sittings of the Arbitral Tribunal would be in Kolkata – Kolkata was only the venue for sittings of the Arbitral Tribunal – Calcutta High Court inherently lacks jurisdiction to entertain the application of the Respondent under Section 11(6) of the Arbitration Act.

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A **Allowing the appeals, the Court**

- HELD: 1.1 In the present case, no suit could have been filed in any Court over which the Calcutta High Court exercises jurisdiction, since as stated above, the suit admittedly pertains to immovable property situated at Muzaffarpur in Bihar, outside the territorial jurisdiction of the Calcutta High Court and admittedly, no part of the cause of action had arisen within the territorial jurisdiction of the Calcutta High Court. The Appellant who would be in the position of Defendant in a suit, neither resides nor carries on any business within the jurisdiction of the Calcutta High Court. [Para 25][1129-E-G]
- C 1.2 Of course, under Section 11(6), an application for appointment of an Arbitrator necessarily has to be moved in the High Court, irrespective of whether the High Court has the jurisdiction to decide a suit in respect of the subject matter of arbitration and irrespective of whether the High Court at all has original jurisdiction to entertain and decide suits. As such, the definition of Court in Section 2(1)(e) of the A&C Act would not be applicable in the case of a High Court exercising jurisdiction under Section 11(6) of the A&C Act to appoint an Arbitrator/Arbitral Tribunal. At the same time, an application under Section 11(6) of the A&C Act for appointment of an Arbitrator/Arbitral Tribunal cannot be moved in any High Court in India, irrespective of its territorial jurisdiction. Section 11(6) of the A&C Act has to be harmoniously read with Section 2(1)(e) of the A&C Act and construed to mean, a High Court which exercises superintendence/supervisory jurisdiction over a Court within the meaning of Section 2(1)(e) of the A&C Act. It could never have been the intention of Section 11(6) of the A&C Act that arbitration proceedings should be initiated in any High Court in India, irrespective of whether the Respondent resided or carried on business within the jurisdiction of that High Court, and irrespective of whether any part of the cause of action arose within the jurisdiction of that Court, to put an opponent at a disadvantage and steal a march over the opponent. [Para 26-28][1129-G-H; 1130-A-D]
- H 1.3. Section 42 cannot possibly have any application to an application under Section 11(6), which necessarily has to be made

before a High Court, unless the earlier application was also made in a High Court. In the instant case, the earlier application under Section 9 was made in the District Court at Muzaffarpur and not in the High Court of Judicature at Patna. An application under Section 11(6) of the A&C Act for appointment of Arbitrator, could not have been made in the District Court of Muzaffarpur. Therefore, Section 42 is not attracted. [Para 32][1131-C-D] A B

1.4 It can never be an absolute general proposition of law, that where an arbitration agreement says that the place of arbitration is Faridabad/Delhi and proceedings under Part I of the A&C Act are also validly initiated in Faridabad, the Court in Faridabad would, notwithstanding Section 42 of the A&C Act, lose its jurisdiction, just because arbitration is later conducted in Delhi and Award is made in Delhi. This Court has perused the Development Agreement. The contention of the Respondent in the Affidavit in Opposition, that the parties to the arbitration agreement had agreed to submit to the jurisdiction of Calcutta High Court, is not correct. The parties to the arbitration agreement only agreed that the sittings of the Arbitral Tribunal would be in Kolkata. Kolkata was the venue for holding the sittings of the Arbitral Tribunal. [Paras 42 & 43][1133-E-H] C D

2. It is well settled that, when two or more Courts have jurisdiction to adjudicate disputes arising out of an arbitration agreement, the parties might, by agreement, decide to refer all disputes to any one Court to the exclusion of all other Courts, which might otherwise have had jurisdiction to decide the disputes. The parties cannot, however, by consent, confer jurisdiction on a Court which inherently lacked jurisdiction. In this case, the parties, as observed above did not agree to refer their disputes to the jurisdiction of the Courts in Kolkata. It was not the intention of the parties that Kolkata should be the seat of arbitration. Kolkata was only intended to be the venue for arbitration sittings. Accordingly, the Respondent himself approached the District Court at Muzaffarpur, and not a Court in Kolkata for interim protection under Section 9 of the A&C Act. The Respondent having himself invoked the jurisdiction of the District Court at Muzaffarpur, is estopped from contending that E F G H

- A the parties had agreed to confer exclusive jurisdiction to the Calcutta High Court to the exclusion of other Courts. Neither of the parties to the agreement construed the arbitration clause to designate Kolkata as the seat of arbitration. We are constrained to hold that Calcutta High Court inherently lacks jurisdiction to entertain the application of the Respondent under Section 11(6) of the Arbitration Act. The High Court should have decided the objection raised by the Appellant, to the jurisdiction of the Calcutta High Court, to entertain the application under Section 11(6) of A&C Act, before appointing an Arbitrator. [Paras 47 & 48][1135-B-F]
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- C *Bharat Aluminium Company v. Kaiser Aluminium (2012) 9 SCC 552 : [2012] 12 SCR 327 - followed.*
Kiran Singh and Ors. v. Chaman Paswan and Ors. [1955] SCR 117; Union of India v. Hardy Exploration and Production (India) Inc. (2019) 13 SCC 472 : [2018] 13 SCR 379; Mankastu Impex Private Limited v. Airvisual Limited (2020) 5 SCC 399 : [2020] 4 SCR 565 - relied on.
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- E *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and Ors. (2017) 7 SCC 678 : [2017] 4 SCR 744; Hindustan Construction Company Limited v. NHPC Limited and Anr. (2020) 4 SCC 310; BGS SGS Soma JV v. NHPC Limited (2020) 4 SCC 234 : [2019] 17 SCR 742 - referred to.*

Case Law Reference

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| F | [1955] SCR 117 | relied on | Para 19 |
| | [2017] 4 SCR 744 | referred to | Para 35 |
| | (2020) 4 SCC 310 | referred to | Para 35 |
| G | [2019] 17 SCR 742 | referred to | Para 35 |
| | [2012] 12 SCR 327 | followed | Para 36 |
| | [2018] 13 SCR 379 | relied on | Para 44 |
| | [2020] 4 SCR 565 | relied on | Para 45 |

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CIVIL APPELLATE JURISDICTION: Civil Appeal Nos.2394- A
2395 of 2022.

From the Judgment and Order dated 13.08.2021 of the High Court at Calcutta in A.P. No.46 of 2021/Order dated 04.10.2021 in R.V.W. No.14 of 2021 in A.P. No.46 of 2021 and G.A. No.1 in R.V.W. No.14 of 2021 in Arb. P. No.46 of 2021.

Ajit Kumar Sinha, Sr. Adv., Dr. Maurya Vijay Chandra, Abhishek Ritabh Shukla, Naveen Soni, Prem Prakash, Advs. for the Appellant.

Sanjay Ghosh, Sr. Adv., Rajiv Ranjan Mishra, Partho Ganguly, Saurabh, Naman Jain, Narendra Kumar Verma, Advs. for the Respondent.

The Judgment of the Court was delivered by

INDIRA BANERJEE, J.

Leave granted.

2. These appeals are against an order dated 13th August 2021 passed by the Calcutta High Court, allowing the Arbitration Petition No.46/ 2021 filed by the Respondent under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the ‘A&C Act’), for appointment of an Arbitrator and also an order dated 4th October 2021 passed by the High Court, rejecting an application made by the Appellant for review of the said order dated 13th August 2021, being R.V.W.O. No.14/2021.

3. The Appellant and the Respondent entered into a Development Agreement dated 15th June 2015 for development of property situated at Muzaffarpur in Bihar measuring about 12 Kaithas and 11 Dhurs, more fully described in the said Development Agreement, outside the jurisdiction of Calcutta High Court. The said Development Agreement executed and registered in Muzaffarpur in Bihar, contains an arbitration clause, which is set out hereinbelow for convenience:

“37. That in case of any dispute or difference between the parties arising out of and relating to this development agreement, the same shall be settled by reference of the disputes or differences to the Arbitrators appointed by both the parties and such Arbitration shall be conducted under the provisions of the Indian Arbitration and Conciliation Act, 1996 as amended from time to time and the sitting of the said Arbitral Tribunal shall be at Kolkata.”

- A 4. Differences and disputes arose in relation to the said Development Agreement, giving rise to various proceedings between the parties. On 24th April 2019, the Respondent terminated the said Development Agreement. The Appellant has not accepted the termination of the said Development Agreement.
- B 5. On 15th May 2019, the Appellant filed a petition before the Real Estate Regulatory Authority, (referred to in short as ‘RERA’) at Patna, which was registered as RERA Case No.56/377/2019. Soon thereafter, on 17th August 2019, the Respondent filed a petition under Section 9 of the A&C Act in the Court of the District Judge, Muzaffarpur seeking interim protection in respect of the property in question.
- C 6. On 1st October 2019, the Respondent filed a complaint before the Muzaffarpur Municipal Corporation alleging that the building being constructed by the Appellant was in violation of the sanctioned building plan and seeking stoppage of construction. The Muzaffarpur Municipal Corporation dismissed the complaint on 22nd January 2020.
- D 7. The Respondent appealed to the Bihar Building Municipal Tribunal. The appeal is stated to be pending. Soon thereafter, the Respondent sent notice to the Appellant invoking the arbitration clause under the Development Agreement. The notice was sent to the registered office of the Appellant at Patna in Bihar, outside the jurisdiction of the
- E Calcutta High Court. In November, 2020, the Respondent moved an arbitration petition being A.P. No.2020 in the Calcutta High Court under Section 11 sub-section (6) of the A&C Act for appointment of Arbitrator. The application was, however, withdrawn for technical reasons.
- F 8. On 15th January 2021, the Respondent filed a second arbitration petition under Section 11 sub-section (6) of the A&C Act being A.P. No.46/2021 in the Calcutta High Court. The Appellant filed an Affidavit in Opposition questioning the territorial jurisdiction of the Calcutta High Court to decide the application under Section 11(6) of the Arbitration Act.
- G 9. In the Affidavit in Opposition, the Appellant contended :
- “a) *There is no valid or enforceable or existing Arbitration clause between the parties for reference of the disputes to Arbitration in terms of the said clause.*
- b) ...
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- c) *This Hon'ble Court has no territorial jurisdiction to try entertain and determine the instant application as the agreement between the Petitioner and the Respondent has been executed and registered in the office of the District Registrar, Muzaffarpur, in the district of Bihar.* A
- d) *The subject matter of the agreement is for development and construction to be carried out of all that piece and parcel of land situated within the limits of Muzaffarpur Municipal Corporation, Bihar, outside the jurisdiction of this Hon'ble Court.* B
- e) *No part of the cause of action for filing the present application has arisen within the jurisdiction of this Hon'ble Court and by reasons whereof the this Hon'ble Court has no territorial jurisdiction to try entertain and determine the present application.* C
- f) *The building plan of the property in question has been duly sanctioned by the Muzaffarpur Municipal Corporation for construction of a property at Muzaffarpur. The disputes covered by the present reference relates to an immoveable construction of an immovable property in Muzaffarpur. This Hon'ble Court has no territorial jurisdiction to try entertain or determine the present application as this Hon'ble Court is not a court within the meaning of Section 2(i)(e) of the Arbitration and Conciliation Act, 1996. This Hon'ble Court is not the designated High Court for appointing an arbitrator in accordance with and in true scope and ambit of Section 11 of the Act of 1996.* D E F
- g) ...
- h) *The subject matter of the present application is sub-judice before the Real Estate Regulatory Authority, Muzaffarpur under RERA Case No.56/377/2019 and the same is pending adjudication and by reasons whereof this Hon'ble Court has no jurisdiction to try entertain or determine the present application.* G
- i) *It is submitted that mere place of sitting mentioned in an Arbitration agreement stating that the Arbitration* H

- A *will be held in Kolkata does not confer any jurisdiction on this Hon'ble Court to try entertain and determine the instant application. No part of the cause of action has arisen within the jurisdiction of this Hon'ble Court and by reasons whereof this Hon'ble Court has no jurisdiction to try entertain and determine the present application."*
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- C 10. The Respondent duly filed an Affidavit in Reply. In the Affidavit in Reply, the Respondent has merely denied that the Calcutta High Court lacks territorial jurisdiction to entertain or decide the application under Section 11(6) of the A&C Act. It is admitted that the Development Agreement is in respect of property situated at Muzaffarpur in Bihar, outside the jurisdiction of Calcutta High Court. It is also admitted that the Development Agreement was executed and registered in the State of Bihar, outside the jurisdiction of Calcutta High Court. It was contended that the Calcutta High Court exercises jurisdiction over the place agreed upon as the seat of arbitration, and would thus have jurisdiction to entertain the Arbitration proceedings. Paragraph 5-E of the Affidavit in Reply is set out hereinbelow for convenience :-
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- E *"5-E It is submitted that though the agreement was executed outside the jurisdiction of this Hon'ble Court and the property in question is also located outside the Jurisdiction of this Hon'ble Court but as the Arbitration agreement contained in the said development agreement where parties have agreed to submit to the Jurisdiction of this Hon'ble Court thereby, fixing it at Kolkata, then this Hon'ble Court has jurisdiction to try and entertain the instant lis. It is submitted that where a seat is designated in an agreement, the courts of the seat alone have jurisdiction which would require that all applications arising out of the arbitral agreement needs to be filed in the Court having jurisdiction over the seat of Arbitration, and that Court also will have jurisdiction to try the Arbitration petition. The Hon'ble Courts of this country have 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 the purposes of regulating arbitral proceedings arising out of the agreement between the parties.*
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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. In view of the aforesaid development of law, there is no confusion with regard to what the seat of Arbitration and venue of Arbitration mean. There is no shadow of doubt that the Arbitration clause has to be read in a holistic manner so as to determine the jurisdiction of the Court. That apart, if there is mention of venue and something else is appended thereto, depending on the nature of the prescription, the Court can come to a conclusion that there is implied exclusion.”

11. On 13th August 2021, the Calcutta High Court allowed the Arbitration Petition and appointed a retired judge of the Calcutta High Court as Sole Arbitrator. Mr. Ajit Kumar Sinha, learned Senior Counsel appearing on behalf of the Appellant submitted that even though the Appellant had opposed the application under Section 11(6) of the A&C Act, objecting to the territorial jurisdiction of the Calcutta High Court, the Calcutta High Court did not decide the objection. There is no finding by the Calcutta High Court with regard to its jurisdiction. The order of the High Court reads:-

“1. The present application has been filed under Section 11(6)(a) of the Arbitration and Conciliation Act, 1996 for appointment of the arbitrator for settlement of the disputes between the parties.

2. At the time of hearing it was not disputed by the learned Counsel appearing for the parties that there is a valid arbitration clause in the development agreement.

3. Learned counsel for both the parties have agreed to appoint ... to resolve the disputes sought to be raised by both the parties. Accordingly, ... is appointed as arbitrator to settle the disputes between the parties.

4. The present application is accordingly disposed of.”

12. Mr. Sinha submitted that Counsel appearing on behalf of the Appellant in the Calcutta High Court gave consent without instructions

- A from the Appellant. Be that as it may, the Calcutta High Court did not adjudicate the issue of territorial jurisdiction raised by the Appellant in its Affidavit in Opposition filed in the High Court.

13. On or about 30th September 2021, the Appellant filed an application for review of the final order dated 13th August 2021. In the B application for review, the Appellant took the following grounds:

"I FOR THAT the order dated 13th August, 2021 discloses error apparent on the face of records and mistake inasmuch as the objections of the petitioner pertaining to the Hon'ble Court not having jurisdiction in the matter and the objections C regarding non-arbitrability of the disputes involved, have not been considered by this Hon'ble Court.

II. For THAT the order dated 13th August, 2021 discloses error apparent on the face of records, mistake inasmuch as the Hon'ble Court lacked jurisdiction to entertain the petitioner D since the Hon'ble High Court at Patna had to be approached under section 11 of the Arbitration and Conciliation Act, 1996.

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VII. FOR THAT the order dated 13th August, 2021 proceeding E on concession of counsel which is contrary to the petitioners instructions discloses error apparent on the face of record.

VIII. FOR THAT the petitioner has not instructed counsel to concede and has to the contrary instructed counsel to oppose the petition and therefore consent, if any, counsel is without jurisdiction and void and the order dated 13th August, 2021 F proceeding on the basis of the same, discloses error apparent on the face of record.

IX. FOR THAT there has no consent given by the petitioner and the order dated 13th August, 2021 proceeding on the basis G of the consent, discloses error apparent on the face of records."

14. By the order dated 4th October 2021, the High Court dismissed the review application, which is also impugned in this Court. The High Court held that consent given by learned Counsel could not be permitted to be withdrawn.

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15. The question before this Court is, whether the Calcutta High Court at all had jurisdiction to entertain the application filed by the Respondent and appoint an Arbitrator. Mr. Sanjay Ghosh, learned Senior Counsel appearing on behalf of the Respondent, argued with force, that the initial order of appointment of Arbitrator was passed by the Court by consent. The Appellant appeared in the arbitration proceedings. In other words, the Appellant acquiesced to the reference of the disputes to the Arbitrator appointed by the High Court.

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16. The Appellant did not accept the order of the Calcutta High Court. After the High Court appointed the Arbitrator, the Appellant filed a review application, taking objection to the jurisdiction of the High Court, which was rejected. On the same day i.e. 4th October 2021, the Arbitrator passed an interim order restraining the Appellant from creating any third party interest in the property.

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17. The minutes of the proceedings before the learned Arbitrator appointed by the Calcutta High Court does not indicate that the Appellant willingly submitted to arbitration by the learned Arbitrator. The Appellant only agreed to the fees of the Arbitrator appointed by the High Court. This Court cannot be oblivious to practical realities, such as embarrassment of Counsel to oppose the fees of an Arbitrator who happens to be a former Judge of the High Court.

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18. Mr. Sinha rightly argued that an order without jurisdiction can be questioned at any time at any stage irrespective of any consent that may have been given by the Counsel, which the Appellant asserts, was without instructions of the Appellant.

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19. In *Kiran Singh and Ors. v. Chaman Paswan and Ors.*¹, a four Judge Bench of this Court held that it is a fundamental principle, well-established, that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree, **and such a defect cannot be cured even by consent of the parties.**

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¹(1955) SCR 117 : AIR 1954 SC 340

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- A 20. The question in this case is, whether the Calcutta High Court had territorial jurisdiction to pass the impugned orders. The answer to the question has to be in the negative for the reason that the Development Agreement was admittedly executed and registered outside the jurisdiction of the High Court of Calcutta, the agreement pertains to development of property located in Muzaffarpur outside jurisdiction of the Calcutta High Court. The Appellant has its registered office in Patna outside the jurisdiction of Calcutta High Court. The Appellant has no establishment and does not carry on any business within the jurisdiction of the Calcutta High Court. As admitted by the Respondent, no part of the cause of action had arisen within the jurisdiction of Calcutta High Court.

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C 21. Mr. Sinha referred to the definition of Court in Section 2(1)(e) of the A&C Act, set out hereinbelow for convenience:

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E *"2. Definitions.—(1) In this Part, unless the context otherwise requires,*

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G *(a) to (d)* ...

H *(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; (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;*

I 22. As argued by Mr. Sinha, the word 'Court' has been defined, in case of an arbitration other than international commercial arbitration, to

mean the principal Civil Court of original jurisdiction in a district and would include the High Court in exercise of its ordinary original jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration, if the same had been the subject matter of the suit, but it 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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23. Subject to the pecuniary or other limitations prescribed by any law, suits for recovery of immovable property or determination of any other right to or interest in an immovable property or compensation for wrong to immovable property, is to be instituted in the Court, within the local limits of whose jurisdiction, the property is situated. Certain specific suits relating to immovable property can be instituted either in the Court within the limits of whose jurisdiction the property is situated, or in the Court within the local limits of whose jurisdiction the Defendant actually or voluntarily resides or carries on business.

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24. All other suits are to be instituted in a Court, within the local limits of whose jurisdiction the Defendant voluntarily resides or carries on business. Where there is more than one Defendant, a suit may be instituted in the Court within whose jurisdiction any of the Defendants voluntarily resides or carries on business. A suit may also be instituted in a Court within whose jurisdiction the cause of action arises either wholly or in part.

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25. In the present case, no suit could have been filed in any Court over which the Calcutta High Court exercises jurisdiction, since as stated above, the suit admittedly pertains to immovable property situated at Muzaffarpur in Bihar, outside the territorial jurisdiction of the Calcutta High Court and admittedly, no part of the cause of action had arisen within the territorial jurisdiction of the Calcutta High Court. The Appellant who would be in the position of Defendant in a suit, neither resides nor carries on any business within the jurisdiction of the Calcutta High Court.

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26. Of course, under Section 11(6), an application for appointment of an Arbitrator necessarily has to be moved in the High Court, irrespective of whether the High Court has the jurisdiction to decide a suit in respect of the subject matter of arbitration and irrespective of whether the High Court at all has original jurisdiction to entertain and decide suits. As such, the definition of Court in Section 2(1)(e) of the

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- A A&C Act would not be applicable in the case of a High Court exercising jurisdiction under Section 11(6) of the A&C Act to appoint an Arbitrator/Arbitral Tribunal.

- B 27. At the same time, an application under Section 11(6) of the A&C Act for appointment of an Arbitrator/Arbitral Tribunal cannot be moved in any High Court in India, irrespective of its territorial jurisdiction. Section 11(6) of the A&C Act has to be harmoniously read with Section 2(1)(e) of the A&C Act and construed to mean, a High Court which exercises superintendence/supervisory jurisdiction over a Court within the meaning of Section 2(1)(e) of the A&C Act.
- C 28. It could never have been the intention of Section 11(6) of the A&C Act that arbitration proceedings should be initiated in any High Court in India, irrespective of whether the Respondent resided or carried on business within the jurisdiction of that High Court, and irrespective of whether any part of the cause of action arose within the jurisdiction of that Court, to put an opponent at a disadvantage and steal a march over the opponent.
- D 29. Mr. Sinha also relied on Section 42 of the A&C Act set out hereinbelow:

- E “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.”*
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- G 30. Mr. Sinha emphasized on Section 42 of the A&C Act to argue that an earlier application for interim protection having been moved at the District Court at Muzaffarpur, the Respondent could not have invoked the jurisdiction of the Calcutta High Court.

- H 31. There could be no doubt, as argued by Mr. Sinha, that Section 42 of the A&C Act is mandatory. The Section has obviously been enacted to prevent the parties from being dragged into proceedings in different Courts, when more than one Court has jurisdiction. Where with respect

to any arbitration agreement, any application under Part I of the A&C Act has been made in a Court, that Court alone would have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement, and the arbitral proceedings, would have to be made in that Court and in no other Court, unless, of course, the Court in which the first application had been instituted, inherently lacked jurisdiction to entertain that application. The Section which starts with a *non obstante* clause, is binding irrespective of any other law for the time being in force, and irrespective of any other provision in Part I of the A&C Act.

32. However, Section 42 cannot possibly have any application to an application under Section 11(6), which necessarily has to be made before a High Court, unless the earlier application was also made in a High Court. In the instant case, the earlier application under Section 9 was made in the District Court at Muzaffarpur and not in the High Court of Judicature at Patna. An application under Section 11(6) of the A&C Act for appointment of Arbitrator, could not have been made in the District Court of Muzaffarpur. Therefore, Section 42 is not attracted.

33. In the Affidavit in Reply filed in the High Court, the Respondent contended that the parties to the Arbitration Agreement had agreed to submit to the jurisdiction of Calcutta High Court. The Arbitration Agreement entered into by the parties clearly states that the seat and/or the place of the Arbitral Tribunal shall be Kolkata.

34. Mr. Sanjay Ghosh, learned Senior Counsel appearing on behalf of the Respondents submitted that the Calcutta High Court had the territorial jurisdiction to entertain the application under Section 11(6) of the A&C Act as the seat of arbitration was Kolkata.

35. In support of his argument that the Calcutta High Court had exclusive jurisdiction to entertain and decide the application under Section 11(6) filed by the Respondent, Mr. Ghosh cited ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and Ors.***², ***Hindustan Construction Company Limited v. NHPC Limited and Anr.***³ and ***BGS SGS Soma JV v. NHPC Limited***⁴ and argued that once a seat of arbitration is designated, the clause designating the seat

² (2017) 7 SCC 678

³ (2020) 4 SCC 310

⁴ (2020) 4 SCC 234

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- A of arbitration becomes an exclusive jurisdiction clause, as a result of which, only the Courts within whose territorial limits, the seat is located would have jurisdiction to the exclusion of all other Courts.

- B 36. In *Indus Mobile Distribution Private Limited* (supra), this Court referred to and relied upon the dictum of a Constitution Bench of this Court in *Bharat Aluminium Company v. Kaiser Aluminium*⁵ and held that once the seat of arbitration had been fixed, that would be in the nature of an exclusive jurisdiction clause, binding the parties to specific Courts which alone could exercise supervisory powers over the arbitration. In *Bharat Aluminium Company* (supra) what was in issue C before the Constitution Bench was the meaning of the expression “place of arbitration” in the context of Section 2(2) of the A&C Act, which as amended by Act 33 of 2019 is set out hereinbelow:

“(2) This Part shall apply where the place of arbitration is in India.

- D 3/[Provided that subject to an agreement to the contrary, the provisions of Sections 9, 27 and 4/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 E to be made in such place is enforceable and recognised under the provisions of Part II of this Act.]”

- F 37. The question before the Constitution Bench was whether of Part-I of the A&C Act applied to arbitrations, where the place of arbitration was outside India.

- G F 38. As observed by the Constitution Bench, Section 2(2) of the A&C Act places a threshold limitation on the applicability of Part-I, where the place of arbitration is not in India. The Constitution Bench in effect and substance drew a distinction between venue and place of arbitration, as contemplated in Section 20 and held that only if the agreement of the parties was construed to provide for seat/place of arbitration in India, would Part-I of the 1996 Act be applicable. If the seat/place were outside India, Part-I would not apply, even though the venue of a few sittings may have been in India, or the cause of action may have arisen in India.

H ⁵(2012) 9 SCC 552

39. The judgment of this Court in **BGS SGS Soma JV** (supra) cited by Mr. Sanjay Ghosh, was also rendered in the context of Section 2(2) of the A&C Act and the applicability of Part I of the A&C Act to an international commercial arbitration, where the seat of arbitration was not in India. A

40. In **Hindustan Construction Company Limited** (supra), this Court held that once the seat of arbitration is designated, the same operates as an exclusive jurisdiction clause and only Courts within whose jurisdiction the seat was located, would have jurisdiction to the exclusion of all other Courts. In the facts and circumstances of that case this Court found that Courts at New Delhi alone would have jurisdiction for the purpose of challenge to the Award. B C

41. It is well settled that a judgment is a precedent for the issue of law that is raised and decided. The judgment has to be construed in the backdrop of the facts and circumstances in which the judgment has been rendered. Words, phrases and sentences in a judgment, cannot be read out of context. Nor is a judgment to be read and interpreted in the manner of a statute. It is only the law as interpreted by in an earlier judgment, which constitutes a binding precedent, and not everything that the Judges say. D E

42. It can never be an absolute general proposition of law, that where an arbitration agreement says that the place of arbitration is Faridabad/Delhi and proceedings under Part I of the A&C Act are also validly initiated in Faridabad, the Court in Faridabad would, notwithstanding Section 42 of the A&C Act, lose its jurisdiction, just because arbitration is later conducted in Delhi and Award is made in Delhi. F

43. This Court has perused the Development Agreement. The contention of the Respondent in the Affidavit in Opposition, that the parties to the arbitration agreement had agreed to submit to the jurisdiction of Calcutta High Court, is not correct. The parties to the arbitration agreement only agreed that the sittings of the Arbitral Tribunal would be in Kolkata. Kolkata was the venue for holding the sittings of the Arbitral Tribunal. G

H

- A 44. In ***Union of India v. Hardy Exploration and Production (India) Inc.***⁶ a three Judge Bench of this Court held that the sittings at various places are relatable to venue. It cannot be equated with the seat of arbitration or place of arbitration, which has a different connotation.
- B 45. In ***Mankastu Impex Private Limited v. Airvisual Limited***⁷ a three Judge Bench of which one of us (Hon. A.S. Bopanna, J) was a member, held:
- “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) Ltd. v. Enercon GmbH [Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59], the Supreme Court held that : (SCC pp. 43 & 46, paras 97 & 107)*
- “[T]he 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.”
- F 20. *It is well settled that “seat of arbitration” and “venue of arbitration” cannot be used interchangeably. 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.”*
- G 46. In this case, the Development Agreement provided that the sittings of the Arbitral Tribunal would be conducted in Kolkata. As observed above, the parties never agreed to submit to the jurisdiction of
- H ⁶(2019) 13 SCC 472
⁷(2020) 5 SCC 399

Calcutta High Court in respect of disputes, nor did the parties agree A upon Kolkata as the seat of arbitration. Kolkata was only the venue for sittings of the Arbitral Tribunal.

47. It is well settled that, when two or more Courts have jurisdiction to adjudicate disputes arising out of an arbitration agreement, the parties might, by agreement, decide to refer all disputes to any one Court to the exclusion of all other Courts, which might otherwise have had jurisdiction to decide the disputes. The parties cannot, however, by consent, confer jurisdiction on a Court which inherently lacked jurisdiction, as argued by Mr. Sinha. B

48. In this case, the parties, as observed above did not agree to refer their disputes to the jurisdiction of the Courts in Kolkata. It was not the intention of the parties that Kolkata should be the seat of arbitration. Kolkata was only intended to be the venue for arbitration sittings. Accordingly, the Respondent himself approached the District Court at Muzaffarpur, and not a Court in Kolkata for interim protection under Section 9 of the A&C Act. The Respondent having himself invoked the jurisdiction of the District Court at Muzaffarpur, is estopped from contending that the parties had agreed to confer exclusive jurisdiction to the Calcutta High Court to the exclusion of other Courts. Neither of the parties to the agreement construed the arbitration clause to designate Kolkata as the seat of arbitration. We are constrained to hold that Calcutta High Court inherently lacks jurisdiction to entertain the application of the Respondent under Section 11(6) of the Arbitration Act. The High Court should have decided the objection raised by the Appellant, to the jurisdiction of the Calcutta High Court, to entertain the application under Section 11(6) of A&C Act, before appointing an Arbitrator. C D E F

49. These appeals are therefore, allowed and the impugned orders of appointment of Arbitrator and dismissal of the review application are set aside. The appointment of the learned Arbitrator is set aside on the ground that the order of his appointment is without jurisdiction and in view of the objection to his appointment raised by the Appellant. It is made absolutely clear that this order is not to be construed as any aspersion on the learned Arbitrator appointed by the Calcutta High Court, or the manner in which he has conducted the proceedings so far. G

50. Since the meetings of the Arbitral Tribunal are to be held in Kolkata, this Court deems it appropriate to appoint Justice Bhaskar H

- A Bhattacharya, Former Chief Justice of the High Court of Gujarat as Sole Arbitrator, to decide the disputes between the parties. The parties have consented to the appointment of Justice Bhaskar Bhattacharya.
 - 51. The *status quo* with regard to the property in question shall be maintained for a period of 15 days from today to enable the respective parties to approach the learned Arbitrator under Section 17 of the A&C Act, for interim relief in accordance with law.
- B

Ankit Gyan
(Assisted by : Rahul Rathi, LCRA)

Appeals allowed.