Unity Aurum Construction Private ... vs Lok Sabha Employees Cooperative ... on 12 April, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ARB.P. 244/2023

UNITY AURUM CONSTRUCTION PRIVATE LIMITED
..... Petitioner
Through: Mr. Utsav Saxena, Mr. Somesh Tiwari, Mr. Amit Dubey, Mr. Kavish Nair and Pranav Gupta, Advocates
versus

LOK SABHA EMPLOYEES COOPERATIVE HOUSING SOCIETY LIMITED ..... Respondent
Through: Mr. Sanjeev Kumar Dubey, Sr. Adv. with Mr. Venus Anand, Mr. Asif Inam and Ms. Niharika Dubey, Advocates

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
ORDER

% 12.04.2023

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 [the Act] has been instituted consequent to disputes having arisen inter partes.

2. According to the petitioners since the respondent has failed to respond to the notice invoking arbitration and has also failed to resolve disputes which exist, the Court should constitute the Arbitral Tribunal.

3. Mr. Dubey, learned senior counsel who has appeared on behalf of the respondent however takes a preliminary objection to the maintainability of the petition and draws the attention of the Court to the venue restriction clause as contained in the agreement and which reads as follows:

> □22. Governing Law and Jurisdiction This Agreement shall be governed by and interpreted in accordance with laws in India and state laws of State of Uttar Pradesh. All disputes arising out of or in any way connected with this agreement/contract shall

be deemed to have arisen in Ghaziabad and only the Courts at Ghaziabad, UP shall have jurisdiction to determine the same.

4. Undisputedly, it is the aforesaid agreement which also contains the arbitration clause. According to Mr. Dubey the exclusive jurisdiction which stood conferred on Ghaziabad would necessarily result in Ghaziabad being construed as the seat of the arbitration and in the absence of any contra indication thereto.

5. Learned counsel for the petitioner on the other hand would submit that in connection with the working of the contract, tax invoices came to be issued from time to time which were duly honoured by the respondent and payments also effected. According to learned counsel those tax invoices clearly specify New Delhi to be the seat of arbitration.

6. It becomes pertinent to note that the tax invoices were undisputedly raised post the execution of the principal agreement, parts whereof have been extracted hereinabove. According to learned counsel since the original agreement did not specify a seat, it is the stipulations contained in the tax invoice which would apply.

7. The Court finds itself unable to sustain the aforesaid submission bearing in mind the following pertinent observations as were entered in BGS SGS SOMA JV v. NHPC [(2020) 4 SCC 234]:-

> □32. It can thus be seen that given the new concept of □juridical seat of the arbitral proceedings, and the importance given by the Arbitration Act, 1996 to this □seat , the arbitral award is now not only to state its date, but also the place of arbitration as determined in accordance with Section 20. However, the definition of □court contained in Section 2(1)(c) of the Arbitration Act, 1940, continued as such in the Arbitration Act, 1996, though narrowed to mean only principal civil court and the High Court in exercise of their original ordinary civil jurisdiction. Thus, the concept of juridical seat of the arbitral proceedings and its relationship to the jurisdiction of courts which are then to look into matters relating to the arbitral proceedings -- including challenges to arbitral awards -- was unclear, and had to be developed in accordance with international practice on a case by case basis by this Court.
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> 33. Some of the early decisions of this Court did not properly distinguish between □seat and □venue of an arbitral proceeding.

The five-Judge Bench in Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] dealt with this problem as follows: (SCC pp. 597-99, 605- 607, paras 75-76, 95-96, 98-99) □75. We are also unable to accept the submission of the learned counsel for the appellants that the Arbitration Act, 1996 does not make seat of the arbitration as the centre of gravity of the arbitration. On the contrary, it is accepted by most of the experts that in most of the national laws, arbitrations are anchored to the seat/place/situs of arbitration. Redfern in Para 3.54 concludes that □the seat of the arbitration is thus intended to be its centre of gravity.' [Blackaby, Partasides, Redfern and Hunter (Eds.), Redfern and Hunter on International Arbitration (5th Edn.,

Oxford University Press, Oxford/New York 2009)] This, however, does not mean that all the proceedings of the arbitration have to take place at the seat of the arbitration. The arbitrators at times hold meetings at more convenient locations. This is necessary as arbitrators often come from different countries. It may, therefore, on occasions be convenient to hold some of the meetings in a location which may be convenient to all. Such a situation was examined by the Court of Appeal in England in Naviera Amazonica Peruana SA v. Compania International de Seguros del Peru [NavieraAmazonica Peruana SA v. Compania International de Seguros del Peru, (1988) 1 Lloyd's Rep 116 (CA)] wherein at p. 121 it is observed as follows:

> □The preceding discussion has been on the basis that there is only one □place of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or □seat of the arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an Arbitral Tribunal to hold meetings--or even hearings --in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.... It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country -- for instance, for the purpose of taking evidence.... In such circumstances each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of arbitration remains the place initially agreed by or on behalf of the parties.' These observations were subsequently followed in Union of India v. McDonnell Douglas Corpn. [Union of India v. McDonnell Douglas Corpn., (1993) 2 Lloyd's Rep 48]
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> 76. It must be pointed out that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments, namely, the New York Convention of 1958 and the UNCITRAL Model Law of 1985. It is true that the terms □seat and □place are often used interchangeably. In Redfern and Hunter on International Arbitration [Blackaby, Partasides, Redfern and Hunter (Eds.), Redfern and Hunter on International Arbitration (5th Edn., Oxford University Press, Oxford/New York 2009)] (Para 3.51), the seat theory is defined thus: □The concept that an arbitration is governed by the law of the place in which it is held, which is the □seat (or □forum or locus arbitri) of the arbitration, is well established in both the theory and practice of international arbitration. In fact, the Geneva Protocol, 1923 states:
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> □2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.' The New York Convention maintains the reference to □the law of the country where the arbitration took place' [Article V(1)(d)] and,

synonymously to □the law of the country where the award is made' [Articles V(1)(a) and (e)]. The aforesaid observations clearly show that the New York Convention continues the clear territorial link between the place of arbitration and the law governing that arbitration. The author further points out that this territorial link is again maintained in the Model Law which provides in Article 1(2) that:

□1. (2) the provision of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of the State.' Just as the Arbitration Act, 1996 maintains the territorial link between the place of arbitration and its law of arbitration, the law in Switzerland and England also maintain a clear link between the seat of □176(I). (1) The provision of this chapter shall apply to any arbitration if the seat of the Arbitral Tribunal is in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.' [See the Swiss Private International Law Act, 1987, Ch. 12, Article 176 (I)(1).] ***

95. The learned counsel for the appellants have submitted that Section 2(1)(e), Section 20 and Section 28 read with Section 45 and Section 48(1)(e) make it clear that Part I is not limited only to arbitrations which take place in India. These provisions indicate that the Arbitration Act, 1996 is subject-matter centric and not exclusively seat-centric. Therefore, □seat is not the □centre of gravity so far as the Arbitration Act, 1996 is concerned. We are of the considered opinion that the aforesaid provisions have to be interpreted by keeping the principle of territoriality at the forefront. We have earlier observed that Section 2(2) does not make Part I applicable to arbitrations seated or held outside India. In view of the expression used in Section 2(2), the maxim expressum facit cessare tacitum, would not permit by interpretation to hold that Part I would also apply to arbitrations held outside the territory of India.

The expression □this Part shall apply where the place of arbitration is in India necessarily excludes application of Part I to arbitration seated or held outside India. It appears to us that neither of the provisions relied upon by the learned counsel for the appellants would make any section of Part I applicable to arbitration seated outside India. It will be apposite now to consider each of the aforesaid provisions in turn.

96. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

□2. Definitions.--(1) In this Part, unless the context otherwise requires.--

(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.' 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 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.

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98. We now come to Section 20, which is as under:

□20. Place of arbitration.--(1) The parties are free to agree on the place of arbitration.

(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.

(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, good or other property.' A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any □place or □seat within India, be it Delhi, Mumbai, etc. In the absence of the parties' agreement thereto, Section 20(2) authorises the tribunal to

> determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

99. The fixation of the most convenient ☐venue is taken care of by Section 20(3). Section 20, has to be read in the context of Section 2(2), which places a threshold limitation on the applicability of Part I, where the place of arbitration is in India. Therefore, Section 20 would also not support the submission of the extra-territorial applicability of Part I, as canvassed by the learned counsel for the appellants, so far as purely domestic arbitration is concerned. (emphasis in original and supplied)

34. The Court in Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] then went on to refer to several English judgments and specifically italicised several parts of the judgment in Shashoua v. Sharma [Shashoua v. Sharma, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep 376] as follows :

> (Balco case [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] , SCC p. 614, para
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> 110) ☐10. Examining the fact situation in the case, the Court observed as follows:
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> ☐The basis for the court's grant of an anti-suit injunction of the kind sought depended upon the seat of the arbitration. An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause. Not only was there agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration. Although, ☐venue was not synonymous with ☐seat , in an arbitration clause which provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that ☐the venue of arbitration shall be London, United Kingdom did amount to the designation of a juridical seat....' In para 54, it is further observed as follows:
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> ☐There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that court, because it was best fitted to determine such issues under the Indian Law. Whilst I found this idea attractive initially, we are persuaded that it would be wrong in principle to allow this and that it would create undue practical problems in any event. On the basis of what I have already decided, England is the seat of the arbitration and since this carries with it something akin to an exclusive jurisdiction clause, as a matter of principle the foreign court should not decide matters which are for this Court to decide in the context of an anti-suit injunction.' In making the aforesaid observations in Shashoua case [Shashoua v. Sharma, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep 376] , the Court relied on the

judgments of the Court of Appeal in C v. D [C v. D, 2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)] . (emphasis in original)

38. A reading of paras 75, 76, 96, 110, 116, 123 and 194 of Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] 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 [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] 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 [Section 3 of the English Arbitration Act, 1996 defines □seat as follows:

□3. The seat of the arbitration.-- In this Part □the seat of the arbitration means the juridical seat of the arbitration designated--

(a) by the parties to the arbitration agreement, or

(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or

(c) by the Arbitral Tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.

It will be noticed that this section closely approximates with Section 20 of the Indian Arbitration Act, 1996. The meaning of □Court is laid down in Section 105 of the English Arbitration Act, 1996 whereby the Lord Chancellor may, by order, make provision allocating and specifying proceedings under the Act which may go to the High Court or to county courts.].

44. If paras 75, 76, 96, 110, 116, 123 and 194 of Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] are to be read together, what becomes clear is that Section 2(1)(e) has to be construed keeping in view Section 20 of the Arbitration Act, 1996, which gives recognition to party autonomy -- the Arbitration Act, 1996 having accepted the territoriality principle in Section 2(2), following 2(1)(e) was expressly rejected by the five-Judge Bench in Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] . This being so, what has then to be seen is what is the effect Section 20 would have on Section 2(1)(e) of the Arbitration Act, 1996.

46. This Court in Indus Mobile Distribution (P) Ltd. [Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760] , after referring to Sections 2(1)(e) and 20 of the Arbitration Act, 1996, and various judgments distinguishing between the □seat of an arbitral proceeding and □venue of such proceeding, referred to the Law Commission Report, 2014 and the recommendations made therein as follows :

> (SCC pp. 692-93, paras 17-20) □17. In amendments to be made to the Act, the Law Commission recommended the following:
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> □Amendment of Section 20
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> 12. In Section 20, delete the word □place and add the words □seat and venue before the words □of arbitration .

(i) In sub-section (1), after the words □agree on the delete the word □place and add words □seat and venue .

(ii) In sub-section (3), after the words □meet at any delete the word □place and add word □venue . [Note.--The departure from the existing phrase □place of arbitration is proposed to make the wording of the Act consistent with the international usage of the concept of a □seat of arbitration, to denote the legal home of the arbitration. The amendment further legislatively distinguishes between the □[legal] seat from a □[mere] venue of arbitration.] *** Amendment of Section 31

17. In Section 31

(i) In sub-section (4), after the words □its date and the delete the word □place and add the word □seat .'

18. The amended Act, does not, however, contain the aforesaid amendments, presumably because the Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] judgment in no uncertain terms has referred to □place as □juridical seat for the purpose of Section 2(2) of the Act. It further made it clear that Sections 20(1) and 20(2) where the word □place is used, refers to □juridical seat , whereas in Section 20(3), the word □place is equivalent to □venue . This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.

19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the law of arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to □seat is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction -- that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of the Code of Civil

Procedure be attracted. In arbitration law however, as has been held above, the moment □seat is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

20. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd. [Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] This was followed in a recent judgment in B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd. [B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd., (2015) 12 SCC 225 : (2016) 1 SCC (Civ) 427] . Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment [Datawind Innovations (P) Ltd. v. Indus Mobile Distribution (P) Ltd., 2016 SCC OnLine Del 3744 : (2016) 158 DRJ 391] is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. Appeals are disposed of accordingly. This judgment has recently been followed in Brahmani River Pellets Ltd. v. Kamachi Industries Ltd. [Brahmani River Pellets Ltd. v. Kamachi Industries Ltd., (2020) 5 SCC 462 : 2019 SCC OnLine SC 929 at para 15]

49. Take the consequence of the opposite conclusion, in the light of the facts of a given example, as follows. New Delhi is specifically designated to be the seat of the arbitration in the arbitration clause between the parties. Part of the cause of action, however, arises in several places, including where the contract is partially to be performed, let us say, in a remote part of Uttarakhand. If concurrent jurisdiction were to be the order of the day, despite the seat having been located and specifically chosen by the parties, party autonomy would suffer, which Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] specifically states cannot be the case. Thus, if an application is made to a District Court in a remote corner of the Uttarakhand hills, which then becomes the court for the purposes By:NEHA Signing Date:16.04.2023 05:44:05 of Section 42 of the Arbitration Act, 1996 where even Section 34 applications have then to be made, the result would be contrary to the stated intention of the parties -- as even though the parties have contemplated that a neutral place be chosen as the seat so that the courts of that place alone would have jurisdiction, yet, any one of five other courts in which a part of the cause of action arises, including courts in remote corners of the country, would also be clothed with jurisdiction. This obviously cannot be the case. If, therefore, the conflicting portion of the judgment of Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] in para 96 is kept aside for a moment, the very fact that parties have chosen a place to be the seat would necessarily carry with it the decision of both parties that the courts at the seat would exclusively have jurisdiction over the entire arbitral process.

50. In fact, subsequent Division Benches of this Court have understood the law to be that once the seat of arbitration is chosen, it amounts to an exclusive jurisdiction clause, insofar as the courts at that seat are concerned. In Enercon (India) Ltd. v. Enercon GmbH [Enercon (India) Ltd. v. Enercon

GmbH, (2014) 5 SCC 1 :

(2014) 3 SCC (Civ) 59] , this Court approved the dictum in Shashoua [Shashoua v. Sharma, 2009 EWHC 957 (Comm) :

(2009) 2 Lloyd's Law Rep 376] as follows : (Enercon case [Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , SCC p. 55, para 126) ☐126. Examining the fact situation in the case, the Court in Shashoua case [Shashoua v. Sharma, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep 376] observed as follows:

☐The basis for the court's grant of an anti-suit injunction of the kind sought depended upon the seat of the arbitration. An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause. Not only was there agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration.

Although, ☐venue was not synonymous with ☐seat , in an arbitration clause which provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that ☐the venue of arbitration shall be London, United Kingdom did amount to the designation of a juridical seat....' In para 54, it is further observed as follows:

☐There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that Court, because it was best fitted to determine such issues under the Indian law. Whilst I found this idea attractive initially, we are persuaded that it would be wrong in principle to allow this and that it would create undue practical problems in any event. On the basis of what I have already decided, England is the seat of the arbitration and since this carries with it something akin to an exclusive jurisdiction clause, as a matter of principle the foreign court should not decide matters which are for this Court to decide in the context of an anti-suit injunction.' (emphasis in original)

59. Equally incorrect is the finding in Antrix Corpn. Ltd. [Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., 2018 SCC OnLine Del 9338] 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.

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

8. As was duly recognized by the Supreme Court in the aforesaid decision, an exclusive jurisdiction clause would itself be indicative of the stipulation of a seat of arbitration in the absence of any indication to the contrary. As this Court reads the

principal agreement it is manifest that there was an exclusive jurisdiction clause which stood incorporated, was accepted by the parties and which clearly designated Ghaziabad as the particular place to which all arbitral and legal proceedings connected therewith would stand centred. In that view of the matter, the Court finds itself unable to sustain the submission that the principal agreement did not indicate a seat.

9. Insofar as the submission seeking to draw sustenance from the tax invoices is concerned, it may only be noted that merely because the same were acknowledged or payments were made in connection therewith that would not really constitute an agreement between the parties to consciously modify the seat of arbitration. In any case, a seat could not have been unilaterally designated nor could it be said to have been modified by issuance of the invoices.

10. Accordingly and for all the aforesaid reasons, the instant petition preferred before this Court shall stand dismissed with liberty reserved to the petitioner to approach the Allahabad High Court, if so chosen and advised.

YASHWANT VARMA, J.

APRIL 12, 2023 rsk