Millennium City Expressways Private ... vs The State Of Haryana & Anr on 2 March, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ARB.P. 495/2022, I.A. 4228/2023(Direction)

MILLENNIUM CITY EXPRESSWAYS PRIVATE LIMITED

..... Petitio

Through: Mr. Arun Kathpalia, Sr. Adv with Mr. Pradyuman Dubey, Mr. Rajat Pradhan, Ms. Jasm Sokhi, Ms. Diksha Gupta, Advs.

versus

THE STATE OF HARYANA & ANR. ..... Responden

Through: Mr. D.N. Goburdhun, Sr. Adv with Mr. Anil Yadav, Addt. AG, Ms. Nupur, Adv. with Mr Charandeep Rana, Executive Engineer.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

% 02.03.2023

1. The instant petition had been heard on 28 February 2023 when orders had been pronounced in open Court. As would be evident from the order passed on that date ultimately, the Respondents, who had appeared through Mr. Goburdhan, learned Senior Counsel, had prayed for an opportunity to address submissions since they could not attend to the proceedings when the petition was originally called.

2. Acceding to that request, the matter was taken up for hearing today.

3. The instant petition has been instituted under Section 11 of the Arbitration and Conciliation Act, 1996 [the Act] for the constitution of an Arbitral Tribunal consequent to disputes having arisen inter partes and being liable to be referred to arbitration in terms of the State Support Agreement dated 22 February 2005.

4. As is evident from the notice issued under Section 21 of the Arbitration and Conciliation Act, 1996, the entire dispute emanates from an incident which is stated to have occurred on 23 January 2019 when a boundary wall which had been set up by the Petitioner was illegally demolished by the Haryana Shehri Vikas Pradhikaran [HSVP]. The Respondents in their reply do not deny the existence of the arbitration clause. Their contention, however, is that since the action was taken by HSVP, no liability can be fastened on the Respondents and that the dispute thus is not arbitrable.

5. Additionally, Mr. Goburdhan, learned Senior Counsel, contended that since the State Support Agreement dated 22 February 20051 lacks any consideration, the same is unenforceable in law and consequently no reference to arbitration is merited. Learned Senior Counsel has also asserted that since both the Concession Agreement as well as the SSA are insufficiently stamped, the Respondents must be called upon to produce the original so that the same may be impounded and appropriate action taken under the Indian Stamp Act, 18992.

6. Learned Senior Counsel has also drawn the attention of the Court to the provisions contained in Clause 7 titled "Breach and Compensation" to submit that since the Petitioner had failed to adhere to the procedure as prescribed therein, the reference to arbitration as sought is clearly premature and unmerited. An objection was also taken to the institution of proceedings before this Court with learned SSA The 1899 Act Senior Counsel contending that since no part of the cause of action arose within the territorial jurisdiction of this Court, the petition is liable to be dismissed on this score alone.

7. Insofar as the question of the Concession Agreement and SSAs being insufficiently stamped is concerned, the Court notes that in Intercontinental Hotels Group (India) Pvt. Ltd. & Anr. vs. Waterline Hotels Pvt. Ltd.3, the Supreme Court had taken note of the flux in the legal position which had come into existence in light of a conflict arising out of two decisions rendered. The question itself arose in the context of whether the arbitration agreement forming part of an unstamped document is liable to be impounded at the stage of filing of the petition under Section 11 of the Arbitration and Conciliation Act, 19964 or whether that is an issue which could be left for the consideration of the Arbitral Tribunal itself. The uncertainty in the legal position arose in the context of the decision rendered by the Supreme Court in Garware Wall Ropes Ltd. vs. Coastal Marine Constructions & Engineering Ltd.5 which came to be affirmed in Vidya Drolia vs. Durga Trading Corporation6 and a subsequent decision rendered by three learned Judges of that Court in N.N. Global Mercantile Private Limited vs. Indo Unique Flame Limited and Ors.7.,

8. In N.N. Global, the question of whether an insufficiently stamped agreement which also contains an arbitration clause would be hit by Section 35 of the 1899 Act and whether the arbitration agreement itself would become non-existent and invalid was referred (2022) 7 SCC 662 The Act (2019) 9 SCC 209 (2021) 2 SCC 1 [(2021) 4 SCC 379 for the consideration of a larger Bench. In Intercontinental Hotels, the Supreme Court spelt out the procedure that is liable to be followed till such time as the larger Bench settles the issue in the following terms:-

> "25. Although we agree that there is a need to constitute a larger Bench to settle the jurisprudence, we are also cognizant of time- sensitivity when dealing with

> arbitration issues. All these matters are still at a pre-appointment stage, and we cannot leave them hanging until the larger Bench settles the issue. In view of the same, this Court--until the larger Bench decides on the interplay between Sections 11(6) and 16--should ensure that arbitrations are carried on, unless the issue before the Court patently indicates existence of deadwood."

9. Following Intercontinental Hotels, this Court in Relan infracon Pvt. Ltd. vs. Jasvinder Kaur8 had held as follows:-

> "4. It becomes further pertinent to note that the judgment of Garware Wall Ropes had come to be affirmed by three learned Judges in Vidya Drolia vs. Durga Trading Corporation9. Bearing in mind the conclusions which were arrived at by the Supreme Court in N.N. Global, the matter, thereafter, has come to be referred for the consideration of a larger Bench. That reference is yet to be answered.
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> 5. The issue of the fate of applications that may come to be preferred under Section 11 of the Act pending that reference being answered, came to be noticed by the Supreme Court again in Intercontinental Hotels Group (India) Pvt. Ltd. & Anr. vs. Waterline Hotels Pvt. Ltd.10
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> 6. While dealing with the said issue and the impasse which was likely to crop up, the Supreme Court held as follows:-
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> 19. At the outset, we need to state that this Court's jurisdiction to adjudicate issues at the pre-appointment stage has been the subject-matter of numerous cases before this Court as well as the High Courts. The initial interpretation provided by this Court to examine issues extensively, was recognised as being against the pro-arbitration stance envisaged by the 1996 Act. Case by case, Courts restricted themselves in occupying the space provided for the arbitrators, in line with party autonomy that has been reiterated by this Court in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 :
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> (2021) 1 SCC (Civ) 549] , which clearly expounds that Courts had very limited jurisdiction under Section 11(6) of the Act.
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> (2021) 2 SCC 1 (2022) 7 SCC 662 Courts are to take a "prima facie" view, as explained therein, on issues relating to existence of the arbitration agreement. Usually, issues of arbitrability/validity are matters to be adjudicated upon by arbitrators. The only narrow exception carved out was that Courts could adjudicate to "cut the deadwood". Ultimately the Court held that the watchword for the Courts is "when in doubt, do refer".

21. While holding as above, this Court by majority opinion speaking through Sanjiv Khanna, J. held as under: (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 :

(2021) 1 SCC (Civ) 549] , SCC pp. 115-16, para 147) "147.1. In Garware Wall Ropes Ltd. [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to "existence" and "validity" of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing para 29 thereof: (SCC p. 238) "29. This judgment in Hyundai Engg. case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-

contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in Hyundai Engg.

case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 :

(2019) 2 SCC (Civ) 530] , as followed by us."

Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement."

23. The relevant observations made in N.N. Global [N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379 : (2021) 2 SCC (Civ) 555] read as under: (N.N. Global case [N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379 : (2021) 2 SCC (Civ) 555] , SCC p. 434, paras 56-59) "56. We are of the considered view that the finding in SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 : (2012) 4 SCC (Civ) 777] and Garware [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] that the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement, and render it non-existent in law, and unenforceable, is not the correct position in law.

57. In view of the finding in paras 146 and 147 of the judgment in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] by a coordinate Bench, which has affirmed the judgment in Garware [Garware Wall Ropes Ltd. v. Coastal Marine Constructions &

Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , the aforesaid issue is required to be authoritatively settled by a Constitution Bench of this Court.

58. We consider it appropriate to refer the following issue, to be authoritatively settled by a Constitution Bench of five Judges of this Court:

> „Whether the statutory bar contained in Section 35 of the Stamp Act, 1899 applicable to instruments chargeable to stamp duty under Section 3 read with the Schedule to the Act, would also render the arbitration agreement contained in such an instrument, which is not chargeable to payment of stamp duty, as being non-existent, unenforceable, or invalid, pending payment of stamp duty on the substantive contract/instrument?

59. In light of the same, the Registry may place this matter before the Hon'ble Chief Justice of India for appropriate orders/directions."

25. Although we agree that there is a need to constitute a larger Bench to settle the jurisprudence, we are also cognizant of time-

sensitivity when dealing with arbitration issues. All these matters are still at a pre-appointment stage, and we cannot leave them hanging until the larger Bench settles the issue. In view of the same, this Court--until the larger Bench decides on the interplay between Sections 11(6) and 16--should ensure that arbitrations are carried on, unless the issue before the Court patently indicates existence of deadwood.

26. This brings us to the only issue at hand: whether the issue of insufficient stamping raised by the respondent is deadwood and clearly indicative of an unworkable arbitration agreement, or there are deeper issues which can be resolved at a later stage. The counsel for the petitioners has sought to draw our attention to Clause 22(1)(b) of the HMA, to contend that the respondent has presented a warranty to ensure the said HMA would be valid and legally enforceable. Clause 22.1(b) of the HMA reads as follows:

> "22.1. Owner represents and warrants to Manager upon execution of this Agreement and again on the Commencement Date that:
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> ...
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> (b) it has obtained or shall obtain (with Manager's assistance as it is reasonably able to provide) all necessary governmental permissions, licences and permits (including but not limited to construction, occupancy, liquor, bar, restaurant, sign and hotel accommodation licences) to enable Manager to operate the Hotel in accordance with the Brand Standards and to ensure this Agreement is fully valid and enforceable in the country."

27. Having perused Clause 22.1, it is necessary to note that the respondent is under an obligation to ensure that the agreement would be legally valid in India. If such an obligation was undertaken by the respondent, the extent to which the petitioners can rely on the respondent's warranty, is clearly a debatable issue. Further, it is also a matter of adjudication whether the respondent could have raised the issue of validity of the arbitration agreement/substantive contract in view of the warranty. This aspect clearly mandates that the aforesaid issue is not deadwood. The issues whether the respondent is estopped from raising the contention of unenforceability of the HMA or the issue whether the HMA is insufficiently or incorrectly stamped, can be finally decided at a later stage.

28. Moreover, the petitioners have reiterated that without prejudice, they have paid the required stamp duty, including the penalty that may be accruable and sought appointment of a sole arbitrator in light of the same. On the contrary, the respondent, in rebuttal to the payment of stamp duty, has challenged the same, contending that payment of stamp duty has been wrongly classified and stamp duty has been paid against Article 5(j) under the Schedule of the Karnataka Stamp Act, 1957, which is erroneous. Therefore, the respondent contends that the HMA has not been properly stamped.

30. It may be noted that the petitioners have themselves attempted to self-adjudicate the required stamp duty and have paid, on 29-7- 2019, a stamp duty of Rs 2200, describing the HMA as a "bond". On 10-6-2020, the petitioners further purchased 11 e-stamps for Rs 200 each, describing the HMA as an "agreement" under Article 5(j). Therefore, it falls upon the Court, under the Stamp Act to review the nature of the agreement in order to ascertain the stamp duty payable. From the above it is clear, that stamp duty has been paid, whether it be insufficient or appropriate is a question that may be answered at a later stage as this Court cannot review or go into this aspect under Section 11(6). If it was a question of complete non-stamping, then this Court, might have had an occasion to examine the concern raised in N.N. Global case [N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379 : (2021) 2 SCC (Civ) 555] , however, this case, is not one such scenario.

31. Therefore, we deem it appropriate for this matter to be referred to arbitration, in terms of Clause 18.2 of the arbitration agreement. Accordingly, we appoint Mr Justice A.V. Chandrashekara, a former Judge of the High Court of Karnataka as a sole arbitrator to adjudicate the issues. The parties are directed to take steps to convey this order to the SIAC to proceed in terms of the SIAC Rules.

7. In view of the principles which stand laid down in Intercontinental Hotels Group, this Court is of the opinion that in order to resolve all disputes with due expedition, the ends of justice would warrant a sole arbitrator being appointed. It shall be open for the Arbitral Tribunal to examine the issue of stamp duty payable on the Agreement in question and if found to be insufficiently stamped to take such further steps as are permissible under the Indian Stamp Act, 1899. "

> 10. Turning then to the question of the SSA lacking consideration, the Court deems it apposite to note that the same is clearly an issue which must be left to be addressed before the Arbitral Tribunal and should not detain this Court at pre reference stage and where the Court is obliged to undertake only a prima facie review. The Court also bears in mind the submission of Mr. Kathpalia, Learned Senior Counsel who

appeared for the Petitioner, and contended that since the construction of the Delhi-Gurgaon section of National Highway-8 into an access controlled expressway is an asset which is duly accessed and utilised by the said State, it would be wholly incorrect for the Respondents to assert that the agreement lacks consideration. Thus the contentions which are addressed by rival sides on this aspect must, in the considered opinion of this Court, be left open for the consideration of the Arbitral Tribunal.

11. Turning then to the question of territorial jurisdiction, it is relevant to note that this Court in Inland Waterways Authority of India VS. Reach Dredging LTD. (RDL) and Gayatri Projects (P) LTD. (JV)11 has clearly held that the cause of action principles which otherwise govern ordinary civil actions that may be instituted have no relevance or role to play when it comes to arbitration proceedings.

12. It becomes pertinent to note that while Clause 9.2 refers to New Delhi being the venue of arbitration, the agreement does not carry any contra-indication which may have tended to establish that the seat of arbitration was envisaged to be a place other than New Delhi. The Court refers to the following principles as enunciated in Inland Waterways: -

"15. Highlighting the principle of party autonomy which finds statutory recognition in Section 20 of the Act, the Supreme Court in BGS Soma observed:--

"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 NCN: 2023/DHC/000324 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 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)"

16. The Court then proceeded to also notice the decisions rendered in Indus Mobile Distribution Private Ltd. v. Datawind Innovations Private Ltd. and Brahmani River Pellets Ltd. v. Kamachi Industries Ltd. which dealt with exclusive jurisdiction clauses

and held as follows:--

"58. Equally, the ratio of the judgment 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], is contained in paras 19 and

20. Two separate and distinct reasons are given 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] for arriving at the conclusion that the courts at Mumbai alone would have jurisdiction. The first reason, which is independent of the second, is that as the seat of the arbitration was designated as Mumbai, it would carry with it the fact that courts at Mumbai alone would have jurisdiction over the arbitration process. The second reason given was that in any case, following the Hakam Singh [Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286] principle, where more than one court can be said to have jurisdiction, the agreement itself designated the Mumbai courts as having exclusive jurisdiction. It is thus wholly incorrect to state that Indus Mobile Distribution (P) Ltd. [Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760] has a limited ratio decidendi contained in para 20 alone, and that para 19, if read by itself, would run contrary to the 5-

Judge Bench decision in BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]

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."

17. Proceeding then to enunciate the tests for determination of the seat of arbitration and upon due consideration of the line of precedents rendered on the subject, it held:--

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

18. On facts in BGS SOMA, the Supreme Court ultimately held New Delhi to be the seat of arbitration since all proceedings had been held there and the award itself had come to be pronounced and published at New Delhi.

19. Learned counsel for the petitioners argued that the principles laid down in Inox Renewables would lend credence to their contention that the present petitions have been correctly instituted before this Court. Inox Renewables was dealing with the correctness of a judgment rendered by the Gujarat High Court which had upheld the order of 25 April 2019 passed by the Commercial Court, Ahmedabad holding that the courts at Rajasthan would be the competent court where the Section 34 petition could be filed. Clause 8.5 of the agreement which comprised the arbitration clause had stipulated that the venue of arbitration shall be Jaipur. On facts, the Supreme Court found that while the agreement as originally drawn had prescribed and stipulated Jaipur to be the venue of arbitration, the venue/place of arbitration was by mutual consent shifted to Ahmedabad. It was in the aforesaid backdrop that it was contended before it that since the seat of arbitration became Ahmedabad, it would be the courts situate there which would have the jurisdiction to try the Section 34 petition.

20. Dealing with the aforesaid issue, the Supreme Court observed as under:--

> "13. This case would show that the moment the seat is chosen as Ahmedabad, it is akin to an exclusive jurisdiction clause, thereby vesting the courts at Ahmedabad with exclusive jurisdiction to deal with the arbitration. However, learned counsel for the Respondent referred to and relied upon paragraphs 49 and 71 of the aforesaid judgment. Paragraph 49 only dealt with the aspect of concurrent jurisdiction as dealt with in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 [- BALCO"] which does not arise on the facts of the present case. Paragraph 71 is equally irrelevant, in that, it is clear that the parties have, by mutual agreement, entered into an agreement to substitute the venue at Jaipur with Ahmedabad as the place/seat of arbitration under Section 20(1) of the Arbitration and Conciliation Act, 1996.
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> 17. The reliance placed by learned counsel for the Respondent on Indus Mobile (supra), and in particular, on paragraphs 18 and 19 thereof, would also support the Appellant's case, inasmuch as the "venue" being shifted from Jaipur to Ahmedabad is really a shifting of the venue/place of arbitration with reference to Section 20(1), and not with reference to Section 20(3) of the Arbitration and Conciliation Act, 1996, as it has been made clear that Jaipur does not continue to be the seat of arbitration and Ahmedabad is now the seat designated by the parties, and not a venue to hold meetings. The learned arbitrator has recorded that by mutual agreement, Jaipur as a "venue" has gone and has been replaced by Ahmedabad. As clause 8.5 of the Purchase Order must be read as a whole, it is not possible to accept the submission of Shri. Malkan that the jurisdiction of Courts in Rajasthan is independent of the venue being at Jaipur. The two clauses must be read together as the Courts in Rajasthan have been vested with jurisdiction only because the seat of arbitration was to be at Jaipur. Once the seat of arbitration is replaced by mutual agreement to be at Ahmedabad, the Courts at Rajasthan are no longer vested with jurisdiction as exclusive jurisdiction is now vested in the Courts at Ahmedabad, given the change in the seat of arbitration."

21. The Court finds that the decision in Inox Renewables essentially turned on the fact that parties had subsequent to the execution of the original agreement mutually consented to the place of arbitration being shifted to Ahmedabad. Viewed in that light and recognising the precepts which were laid down in BGS SOMA, the Supreme Court observed that once Ahmedabad came to be chosen as the seat, it would be the courts situate there which could have tried the Section 34 petitions and that consequently the courts at Rajasthan stood divested of jurisdiction.

22. In the considered opinion of this Court, the decision in Inox Renewables, would not come to the aid of the petitioners for reasons which follow. Firstly, in Inox Renewables it was found on facts that the parties had mutually proceeded to designate Ahmedabad as the seat of arbitration. The parties had thus virtually amended the original clause in the agreement. It was in the aforesaid light that the Supreme Court came to hold that Ahmedabad was liable to be recognised as being the juridical seat

of arbitration. Secondly, the Court in the present batch is additionally faced with a venue restriction clause which stands encompassed in Clause 22. The seat of arbitration is thus to be found on a conjoint reading of Clauses 22 and 47.11.

23. As this Court views the two clauses in question, it is apparent that while Noida/Delhi stood designated as the venues where arbitral proceedings could be conducted, the parties had unambiguously resolved to confer exclusive jurisdiction on the Noida courts with respect to the filing of the award and all judicial proceedings. Clause 22 would thus clearly appear to override the provisions of Clause 47.11. It would be pertinent to recall that Clause 22 in unambiguous terms stipulated that Noida courts "only" would be the forum "for filing the award of the arbitration and for any other judicial proceedings". Clause 47.11 on the other hand describes Noida/Delhi to be the "venue of the arbitration proceedings". There thus appears to be a clear and manifest intent to restrict all challenges emanating from the award or for that matter the arbitral proceedings to the courts at Noida only.

24. The Court notes that BGS SOMA in unambiguous terms holds that once parties designate a seat of arbitration, it amounts to the adoption of an exclusive jurisdiction clause. The seat was recognised to be the geographical location to which the arbitration would stand anchored throughout. Their Lordships described it to be centre of gravity. The Supreme Court had also laid considerable emphasis on the principle of party autonomy and the fact that the fundamental legislative policy underlying the Act had accorded due recognition to that principle. It was thus held that once a seat comes to be designated in the agreement, the courts constituted in that geographical location alone would have jurisdiction to try challenges emanating from the arbitration. In BGS SOMA, their Lordships also had the occasion to consider the question of when a seat could be considered to be merely a venue of the arbitration. While explaining the distinction between the two, it was aptly observed that where an arbitration agreement specifies a venue of arbitration proceedings, it would have to be presumed that the venue is essentially the seat of the arbitration.

25. In BGS SOMA it was further observed that in the absence of any other "significant contrary indicia" which may indicate that the venue had been specified merely to be that, it would have to be understood as the designation of a seat. It becomes relevant to bear in mind that the venue or place of arbitration forms the subject matter of Section 20 of the Act. That provision while dealing with the place of arbitration alludes to activities such as consultation amongst members of the arbitral tribunal, the hearing of witnesses, experts or parties or for inspection of documents that may be conducted at a venue. The venue of arbitration is thus to be merely recognised as a convenient location or place which may be decided upon by parties for the purposes of conduct of arbitral proceedings. Contrary to the above, a seat of arbitration is to be identified from a juridical perspective and thus constituting the situs of the arbitration itself.

26. Viewed in light of the aforesaid principles, this Court comes to the conclusion that Clause 47.11 while speaking of Noida/Delhi intended to merely identify those locations as being the venue of arbitration. In any case the venue restriction clause, and which Clause 22 evidently and indubitably is, would clearly be liable to be accorded primacy and be accepted as being determinative of the seat of arbitration."

13. Insofar as the submission revolving around Clause 7 is concerned, the Court notes that the Petitioner had while invoking arbitration had clearly referred to a failure on the part of parties to arrive at a settlement. It was in the aforesaid backdrop that the instant petition had thereafter come to be preferred. Regard must also be had to the fact that Clause 7.1 refers to a situation where either the GNCTD or the Government of Haryana is asserted to be in breach of any of its obligations flowing from the SSA and the compensation in such a situation is to be determined by the Government of India.

Clause 7.2 contemplates that if a dispute is raised by GNTCD or Government of Haryana with respect to the admissibility of the claim or extent of compensation determined by the Government of India, the matter would then be liable to be resolved as per the dispute settlement mechanism provided in Article IX of that Agreement.

14. The Court is of the considered opinion that since the Respondents accept no part of the liability and attribute the action to HSVP, there exists no justification for the Tribunal not being constituted on this score.

15. Accordingly, and for all the aforesaid reasons, since there has been an admitted failure on the part of the Respondents to abide by the rules laid down by the Indian Council of Arbitration12 and its failure to nominate its arbitrator despite the various communications addressed to it by the Council is evident, the instant petition shall stand allowed.

16. The Council shall now proceed to take further steps for constitution of the Arbitral Tribunal in accordance with the Council Rules.

YASHWANT VARMA, J.

MARCH 02, 2023 neha Council