Bharat Heavy Electricals Limited vs Rajasthan Rajya Vidyut Utpadan Nigam ... on 26 April, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
\+ ARB.P. 471/2022
BHARAT HEAVY ELECTRICALS LIMITED ..... Petitioner
Through: Mr. Himanshu Gupta, Mr. Aditya Sikka, Ms. Padamja Sharma, Advs.
versus
RAJASTHAN RAJYA VIDYUT UTPADAN NIGAM LIMITED ..... Respondent
Through: Mr. Kartik Seth, Ms. Shriya Gilhotra, Mr. Tarun Mehra, Ms. Aakriti Vikas, Advs.
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\+ ARB.P. 488/2022
BHARAT HEAVY ELECTRICALS LIMITED ..... Petitioner
Through: Mr. Himanshu Gupta, Mr. Aditya Sikka, Ms. Padamja Sharma, Advs.
versus
RAJASTHAN RAJYA VIDYUT UTPADAN NIGAM LIMITED ..... Respondent
Through: Mr. Kartik Seth, Ms. Shriya Gilhotra, Mr. Tarun Mehra, Ms. Aakriti Vikas, Advs.
3
\+ ARB.P. 489/2022
BHARAT HEAVY ELECTRICALS LIMITED ..... Petitioner
Through: Mr. Himanshu Gupta, Mr. Aditya Sikka, Ms. Padamja Sharma, Advs.
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Through: Mr. Kartik Seth, Ms. Shriya Gilhotra, Mr. Tarun Mehra, Ms. Aakriti Vikas, Advs.
CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
ORDER

% 26.04.2023 I.A. 6112/2022 (Ex. Filing Original Document) in ARB.P. 471/2022, I.A. 6476/2022 (Ex. Filing Original Document) in ARB.P. 488/2022 and I.A. 6477/2022 (Ex. Filing Original

Allowed, subject to all just exceptions. The applications shall stand disposed of. ARB.P. 471/2022, ARB.P. 488/2022, ARB.P. 489/2022

1. These three petitions under Section 11 of the Arbitration and Conciliation Act, 1996 [the Act] have been preferred for constitution of an Arbitral Tribunal. The respondents on notice have taken a preliminary objection to the maintainability of these petitions and contend that in light of Clause 20.01 of the Agreement courts at Jaipur have been accorded exclusive jurisdiction. According to learned counsel appearing for the respondent, the aforesaid clause would thus also be liable to be construed as designating the seat of arbitration. Learned counsel has rested his submissions on the decision of the Supreme Court in BGS SGS SOMA JV v. NHPC1.

2. Refuting the aforesaid, learned counsel for the petitioner contends that the Arbitration Agreement as comprised in the aforesaid document, and more particularly Clause 16 thereof, contains no indication of Jaipur being the seat of arbitration. It was his submission that as one reads Clause 16, it is manifest that there was no stated intent of parties to indicate Jaipur to be the seat of arbitration. Reliance was placed on the decisions rendered by the Court in Aarka Sports Management Pvt. Ltd. v. Kalsi Buildcon Pvt. Ltd.2 and Hamdard Laboratories (India) v. Sterling Electro Enterprises3 to submit that unless the arbitration clause itself indicates a seat, the exclusive jurisdiction clause as may be additionally or parallelly (2020) 4 SCC 234 2020 SCC Online Del 2077 Neutral Citation No.- 2020:DHC:2323 By:NEHA Signing Date:29.04.2023 11:24:47 contained in the agreement would not be decisive. The submission in essence was that the arbitration clause must be construed and accepted as an independent agreement and not dependent upon the exclusive jurisdiction clause. Learned counsel submitted that while the exclusive jurisdiction clause may have relevance so far as the filing of a suit or other civil action is concerned, in the absence of the adoption of its provision in the arbitration clause, the restriction with respect to venue would not be applicable.

3. In order to appreciate the submissions addressed it would be relevant to extract the two competing clauses in the Agreement and the same are reproduced hereinbelow:-

> 16.0 ARBITRATION 16.01 If at any time any question, dispute or difference whatsoever shall arise between the Purchaser and the Contractor upon or in relation to or in connection with the Contract either party may forthwith give to the other notice in writing of the existing of such question, dispute or difference and the same shall be referred to the adjudication of two arbitrators one to be nominated by the Purchaser and the other to be nominated by the Contractor or in the case of the said arbitrators not agreeing them to the adjudicating of an umpire to be appointed by the arbitrators in writing, before the proceedings with the reference and the award of the arbitrators or in the event of their not agreeing of the umpire appointed by them, shall be final and binding on the parties and the provisions of the Indian Arbitration Act, 1940 and of the rules thereunder and any statutory modification thereof shall be deemed to apply to and incorporated under the contract.
>
> 20.0 CONTRACT AND JURISDICTION 20.01 A contract or an order will be considered as having been accepted only when the Contractor has confirmed it in

writing. Telegraphic and telephonic alterations regarding quantities or specifications require written confirmation before execution and are deemed to be entered into. No legal proceedings to enforce any claim and no suit arising out of any contract shall be instituted except in a court of competent jurisdiction located within the jurisdiction at Jaipur."

4. Dealing with the issue of a seat and venue of arbitration, this Court in Gujarat JHM Hotels Ltd. v. Rajasthali Resorts and Studios Limited4 had observed as under:-

"33. It becomes apposite to note that Section 2(1)(e) defines the word „Court to mean the principal civil court of original jurisdiction in a district and includes High Courts in exercise of their ordinary original civil jurisdiction having jurisdiction to decide questions forming the subject matter of arbitration as if the same had been the subject matter of a suit. Section 20 confers a right on parties to mutually agree upon a place of arbitration. Sub- Section (3) thereof enables the Arbitral Tribunal to meet at any place it considers appropriate for consultation amongst its members or hearing witnesses, experts, parties or for inspection of documents, goods or other property. The discretion so conferred on the Arbitral Tribunal is subject to parties otherwise agreeing to the venue that may be chosen by the Arbitral Tribunal. It becomes significant to note that subsection (1) of Section 20 resonates the right of parties to an arbitration agreement to agree on a seat. It is the concept of the juridical seat of arbitral proceedings as promulgated and recognised by the UNCITRAL Model Law and which has been adopted by the Act which was recognised to be of seminal importance in BGS Soma. The Supreme Court noticed that a distinction must be recognized to exist between a seat and a venue of arbitration. This was explained since for the convenience of parties as well as members constituting the tribunal, seating and hearings may possibly be held and conducted at a mutually acceptable place. However, and as was noticed in the BGS Soma, the arbitral award that comes to be rendered under the Act is to not only incorporate a date when it is rendered but also the place where it is pronounced. The confusion appears to have arisen with respect to the issue of seat of arbitration in light of Section 2(1)(e) continuing to incorporate and define the word „court in terms similar and identical to that carried in the Arbitration Act, 1940. As was noticed in BGS Soma, it was this inconsistency between the original understanding of a court under the 1940 Act and the modern concept of arbitration as incorporated in the Act which had constrained courts to undertake the task of a judicial enunciation of the concept of seat and venue. In BGS Soma, the legal position as enunciated by the Constitution Bench in Balco v. Kaiser Aluminium Technical Services Inc. came to be reiterated and affirmed with the seat of arbitration being liable to be recognized as the center of gravity or in one sense acting as the anchor and situs of the arbitration. It was also significantly observed that the term subject matter as appearing in Section 2(1)(e) is no longer connected to the cause of action principles which may be relevant under the Code but to the subject matter of arbitration. It was thus explained that the court as defined in Section 2(1)(e) would be that which would be recognized to have supervisory control

over all arbitral proceedings. While explaining the concept of party autonomy which now finds recognition in modern day arbitration, the Supreme Court noted the right inhering in parties to make a 2023 SCC OnLine Del 161 By:NEHA Signing Date:29.04.2023 11:24:47 conscious decision of designating a seat, primacy being accorded to the choice of parties and the said choice extending to the designation of a seat to which the cause of action principles may have no application. It thus recognizes the right of parties to select a seat of arbitration which could be one where no obligations under the contract may have been performed or to which the classical concept of a cause of action may have no application.

34. It was further held that once parties agree to designate a seat of arbitration, that constitutes and is liable to be recognized as an exclusive jurisdiction clause. It was observed that once a neutral place of arbitration comes to be designated by parties, it would be liable to be understood to be the seat of all arbitral proceedings and would thus restrict parties to initiate actions arising out of the arbitration only before competent courts situate within the territorial limits of the seat. It was further observed that merely because the venue of arbitration may be different from the designated seat that would clearly not be determinative and it would be the juridical seat which would be entitled to be recognized as governing all conflicts relating to the jurisdiction of courts in respect of the arbitration. It was consequently held that once a seat is designated in an agreement, the courts of that seat alone would have jurisdiction to entertain and rule upon all applications that may be made under Part-I of the Act. While expounding upon the tests for determination of the seat, the Supreme Court in BGS SOMA held that even where the arbitration agreement refers to a venue of proceedings, in the absence of any contrary intention, the stated venue would for all purposes be liable to be understood as being the seat of arbitral proceedings.

43. ... The Court also notes that BGS SOMA had also noted that the venue as specified in an arbitration agreement may not always be synonymous with the seat of arbitral proceedings. It had, however, pertinently observed that where the agreement prescribes a particular place as the venue, in the absence of any indication that may detract from the said geographical place being treated as a seat also, parties would be bound by the terms thereof."

5. The Court notes that while ruling on the issue of seat and venue, the Supreme Court in its elaborate decision rendered in BGS SOMA had also noticed the principles culled out in Brahmani River Pellets Ltd. v. Kamachi Industries Ltd.,5 which too had referred to the exclusive jurisdiction clause governing the issue of seat of arbitration. This aspect was duly noticed by the Court in Inland Waterways Authority of India v. Reach Dredging Ltd. (RDL) and Gayatri (2020) 5 SCC 462 By:NEHA Signing Date:29.04.2023 11:24:47 Projects (P) Ltd. (JV)6 where it was held that in the absence of any indication to the contrary, where a seat is not specifically or independently identified, the exclusive or the venue restriction clause would be decisive of the issue. This would be evident from the following passages as appearing in Inland:-

"27. The significance of venue restriction clauses in contracts and agreements and their correlation with the issue of seat of arbitration fell for consideration in a few decisions of our Supreme Court which would merit notice. In Swastik Gases Private Ltd. vs. Indian Oil Corporation Ltd.7, the question arose in the context of a Section 11 petition which came to be filed before the Rajasthan High Court. It was the orders passed on the aforesaid petition and upon which the Rajasthan High Court had come to appoint an arbitrator which was assailed before the Supreme Court. Clause 18 of the agreement which governed and dealt with the issue of jurisdiction had provided that the agreement would be subject to the jurisdiction of the courts at Kolkata, West Bengal.

28. Taking note of the aforesaid position, the Supreme Court proceeded to answer the challenge as follows: -

"11. Hakam Singh [Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286] is one of the earlier cases of this Court wherein this Court highlighted that where two courts have territorial jurisdiction to try the dispute between the parties and the parties have agreed that dispute should be tried by only one of them, the court mentioned in the agreement shall have jurisdiction. This principle has been followed in many subsequent decisions.

12. In Globe Transport [Globe Transport Corpn. v. Triveni Engg. Works, (1983) 4 SCC 707] while dealing with the jurisdiction clause which read, "the court in Jaipur City alone shall have jurisdiction in respect of all claims and matters arising (sic) under the consignment or of the goods entrusted for transportation", this Court held that the jurisdiction clause in the agreement was valid and effective and the courts at Jaipur only had jurisdiction and not the courts at Allahabad which had jurisdiction over Naini where goods were to be delivered and were in fact delivered.

13. In A.B.C. Laminart [A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163] , this Court was concerned with Clause 11 in the agreement which read, "any dispute arising out of this sale shall be subject to Kaira jurisdiction". The disputes having arisen out of the contract between the parties, the respondents therein filed a suit for recovery of amount against the appellants therein Neutral Citation Number: 2023/DHC/000324 (2013) 9 SCC 32 By:NEHA Signing Date:29.04.2023 11:24:47 and also claimed damages in the Court of the Subordinate Judge at Salem. The appellants, inter alia, raised the preliminary objection that the Subordinate Judge at Salem had no jurisdiction to entertain the suit as parties by express contract had agreed to confer exclusive jurisdiction in regard to all disputes arising out of the contract on the Civil Court at Kaira. When the matter reached this Court, one of the questions for consideration was whether the Court at Salem had jurisdiction to entertain or try the suit. While dealing with this question, it was stated by this Court that the jurisdiction of the court in the matter of contract would depend on the situs of the contract and the cause of action arising through connecting factors. The Court

> referred to Sections 23 and 28 of the Contract Act, 1872 (for short "the Contract Act") and Section 20(c) of the Civil Procedure Code (for short "the Code") and also referred to Hakam Singh [Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286] and in para 21 of the Report held as under: (A.B.C. Laminart case [A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163] , SCC pp. 175-76) "21. ... When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like „alone , „only , „exclusive and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim expression uniusest exclusion alterius--expression of one is the exclusion of another--may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed."

22. In Rajasthan SEB [Rajasthan SEB v. Universal Petrol Chemicals Ltd., (2009) 3 SCC 107 : (2009) 1 SCC (Civ) 770] , two clauses under consideration were Clause 30 of the general conditions of the contract and Clause 7 of the bank guarantee. Clause 30 of the general conditions of the contract stipulated, "the contract shall for all purposes be construed according to the laws of India and subject to jurisdiction only at Jaipur in Rajasthan courts only..." and Clause 7 of the bank guarantee read, "all disputes arising in the said bank guarantee between the Bank and the Board or between the supplier or the Board pertaining to this guarantee shall be subject to the courts only at Jaipur in Rajasthan". In the light of the above clauses, the question under consideration before this Court was whether Calcutta High Court where an application under Section 20 of the Arbitration Act, 1940 was made had territorial jurisdiction to entertain the petition or not. Following Hakam Singh [Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286] , A.B.C. Laminart [A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163] and Hanil Era Textiles [Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd., (2004) 4 SCC 671] , this Court in paras 27 and 28 of the Report held as under:

> (Rajasthan SEB case [Rajasthan SEB v. Universal Petrol Chemicals Ltd., (2009) 3 SCC 107 : (2009) 1 SCC (Civ) 770] , SCC pp. 114-15) "27. The aforesaid legal proposition settled by this Court in respect of territorial jurisdiction and applicability of Section 20 of the Code to the Arbitration Act is clear, unambiguous and explicit.

The said position is binding on both the parties who were contesting the present proceeding. Both the parties with their open eyes entered into the aforesaid purchase order and agreements thereon which categorically provide that all disputes arising between the parties out of the agreements would be adjudicated upon and decided through the process of arbitration and that no court other than the court at Jaipur shall have jurisdiction to entertain or try the same. In both the agreements in Clause 30 of the general conditions of the contract it was specifically mentioned that the contract shall for all purposes be construed according to the laws of India and subject to jurisdiction only at Jaipur in Rajasthan courts only and in addition in one of the purchase order the expression used was that the court at Jaipur only would have jurisdiction to entertain or try the same.

28. In the light of the aforesaid facts of the present case, the ratio of all the aforesaid decisions which are referred to hereinbefore would squarely govern and apply to the present case also. There is indeed an ouster clause used in the aforesaid stipulations stating that the courts at Jaipur alone would have jurisdiction to try and decide the said proceedings which could be initiated for adjudication and deciding the disputes arising between the parties with or in relation to the aforesaid agreements through the process of arbitration. In other words, even though otherwise the courts at Calcutta would have territorial jurisdiction to try and decide such disputes, but in view of the ouster clause it is only the courts at Jaipur which would have jurisdiction to entertain such proceeding."

23. Then, in para 35 of the Report, the Court held as under: (Rajasthan SEB case [Rajasthan SEB v. Universal Petrol Chemicals Ltd., (2009) 3 SCC 107 : (2009) 1 SCC (Civ) 770] , SCC p. 116) "35. The parties have clearly stipulated and agreed that no other court, but only the court at Jaipur will have jurisdiction to try and decide the proceedings arising out of the said agreements, and therefore, it is the civil court at Jaipur which would alone have jurisdiction to try and decide such issue and that is the court which is competent to entertain such proceedings. The said court being competent to entertain such proceedings, the said court at Jaipur alone would have jurisdiction over the arbitration proceedings and all subsequent applications arising out of the reference. The arbitration proceedings have to be made at Jaipur Court and in no other court."

28. Section 11(12)(b) of the 1996 Act provides that where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an arbitration other than the international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the Principal Civil Court referred to in Section 2(1)(e) is situate, and where the High Court itself is the court referred to in clause (e) of sub-section (1) of Section 2, to the Chief Justice of that High Court. Clause (e) of sub- section (1) of Section 2 defines "court" which means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary 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.

29. When it comes to the question of territorial jurisdiction relating to the application under Section 11, besides the above legislative provisions, Section 20 of the Code is relevant. Section 20 of the Code states that subject to the limitations provided in Sections 15 to 19, every suit shall be instituted in a court within the local limits of whose jurisdiction:

> (a) the defendant, or each of the defendants where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
>
> (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that By:NEHA Signing Date:29.04.2023 11:24:47

> in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
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> (c) the cause of action, wholly or in part arises.

32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction"

> have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties--by having Clause 18 in the agreement--is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim expression unius est exclusion alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.
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> 34. In view of the above, we answer the question in the affirmative and hold that the impugned order [Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., Civil Arbitration Application No. 49 of 2008, order dated 13-10-2011 (Raj)] does not suffer from any error of law. The civil appeal is, accordingly, dismissed with no order as to costs. The appellant shall be at liberty to pursue its remedy under Section 11 of the 1996 Act in the Calcutta High Court."

29. In Indus Mobile, a similar question arose in the context of a judgment rendered on a Section 11 petition by this Court. The challenge which came to be laid before the Supreme Court was addressed in the context of Clause 19 which had stipulated that all disputes and differences shall be subject to the exclusive jurisdiction of courts at Mumbai only. Upon noticing the principles which had been laid down by the Constitution Bench in BALCO, the Supreme Court while upholding the challenge observed as under:-

> "10. Paras 98 to 100 have laid down the law as to "seat"

thus : (Bharat Aluminium case [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 :

> (2012) 4 SCC (Civ) 810] , SCC pp. 606-08) "98. We now come to Section 20, which is as under:
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> „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, goods 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.

100. True, that in an international commercial arbitration, having a seat in India, hearings may be necessitated outside India. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but it would not have the effect of changing the seat of arbitration which would remain in India. The legal position in this regard is summed up by Redfern and Hunter, The Law and Practice of International Commercial Arbitration (1986) at p. 69 in the following passage under the heading "The Place of Arbitration":

> „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 the 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 the arbitration remains the place initially agreed by or on behalf of the parties. This, in our view, is the correct depiction of the practical considerations and the distinction between "seat" [Sections 20(1) and 20(2)] and "venue" [Section 20(3)]. We may point out here that the distinction between "seat" and "venue" would be quite crucial in the event, the arbitration agreement designates a foreign country as the "seat"/"place" of the arbitration and also selects the Arbitration Act, 1996 as the curial law/law governing the arbitration proceedings. It would be a matter of construction of the individual agreement to decide whether:
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> (i) the designated foreign "seat" would be read as in fact only providing for a "venue"/"place"

where the hearings would be held, in view of the choice of the Arbitration Act, 1996 as being the curial law, OR

(ii) the specific designation of a foreign seat, necessarily carrying with it the choice of that country's arbitration/curial law, would prevail over and subsume the conflicting selection choice by the parties of the Arbitration Act, (emphasis in original)

11. In an instructive passage, this Court stated that an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause as follows: (Bharat Aluminium case [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] , SCC p. 621, para 123) "123. Thus, it is clear that the regulation of conduct of arbitration and challenge to an award would have to be done by the courts of the country in which the arbitration is being conducted. Such a court is then the supervisory court possessed of the power to annul the award. This is in keeping with the scheme of the international instruments, such as the Geneva Convention and the New York Convention as well as the UNCITRAL Model Law. It also recognises the territorial principle which gives effect to the sovereign right of a country to regulate, through its national courts, an adjudicatory duty being performed in its own country. By way of a comparative example, we may reiterate the observations made by the Court of Appeal, England in C v. D [C v. D, 2008 Bus LR 843 : 2007 EWCA Civ 1282] wherein it is observed that: (Bus LR p. 851G, para 17) „17. It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award. In the aforesaid case, the Court of Appeal had approved the observations made in A v. B [A v. B, (2007) 1 All ER (Comm) 591 : (2007) 1 Lloyd's Rep 237] wherein it is observed that:

> „... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy ... as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration. "

(emphasis in original)

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 that the seat of arbitration is Mumbai and Clause 19 further 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 CPC 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] 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. The appeals are disposed of accordingly."

30. Brahmani River Pellets is again a decision which dealt with the issue of venue and seat with Clause 18 of the agreement forming subject matter of that decision providing that the venue of arbitration would be Bhubaneswar. The challenge which came to be raised before the Supreme Court was with respect to the Madras High Court appointing an arbitrator by invoking its powers conferred by Section 11 of the Act. While proceeding to set aside the aforesaid order and recognising the significance to be accorded to a venue prescription in the agreement, the Court observed as follows: -

"15. As per Section 20 of the Act, parties are free to agree on the place of arbitration. Party autonomy has to be construed in the context of parties choosing a court which has jurisdiction out of two or more competent courts having jurisdiction. This has been made clear in the three- Judge Bench decision in 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] 15.1. In the said case, respondent Indian Oil Corporation Ltd. appointed M/s Swastik Gases (P) Ltd. situated at Jaipur, Rajasthan as their consignment agent. The dispute arose between the parties as huge quantity of stock of lubricants could not be sold by the applicant and they could not be resolved amicably. In the said matter, Clause 18 of the agreement between the parties provided that the agreement shall be subject to the jurisdiction of the courts at Kolkata.
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> 15.2. The appellant Swastik invoked Clause 18 -- arbitration clause and filed application under Section 11(6) of the Act before the Rajasthan High Court for appointment of arbitrator. The respondent contested the application made by Swastik inter alia by raising the plea of lack of territorial jurisdiction of the Rajasthan High Court in the matter. The plea of Indian Oil Corporation was that the agreement has been made subject to jurisdiction of the courts at Kolkata and the Rajasthan High Court lacks the territorial jurisdiction in dealing with the application under Section 11(6) of the Act.
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> 15.3. The Designated Judge held [Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., 2011 SCC OnLine Raj 2758 : (2012) 3 RLW 2241] that the Rajasthan High Court did not have territorial jurisdiction to entertain the application under Section 11(6) of the Act and gave liberty to Swastik to file the arbitration application in the Calcutta High Court which order came to be challenged before the Supreme Court.

18. Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the "venue" of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in Swastik [Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] , non-use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference.

19. When the parties have agreed to have the "venue" of arbitration at Bhubaneswar, the Madras High Court erred [Kamchi Industries Ltd. v. Brahmin River Pellets Ltd., 2018 SCC OnLine Mad 13127] in assuming the jurisdiction under Section 11(6) of the Act. Since only the By:NEHA Signing Date:29.04.2023 11:24:47 Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order [Kamchi Industries Ltd. v. Brahmin River Pellets Ltd., 2018 SCC OnLine Mad 13127] is liable to be set aside."

31. On an overall conspectus of the principles laid down in the aforenoted decisions, the Court comes to the conclusion that Clause 22 is liable to be read as prescribing the seat of arbitration. Clause 47.11 simply seeks to designate the venue thereof. It merely embodies the intent of parties to conduct arbitral proceedings either at Noida or New Delhi. In any case the language of Clause 22 clearly establishes that all proceedings arising out of or relating to arbitral proceedings were to be

anchored to courts at Noida only. The question of seat would thus stand conclusively settled on the basis of the aforesaid provision."

6. The Court notes upon a reading of Clauses 16 and 20.01 which are relied upon, there is no contra indication of the intent of parties to accept the jurisdiction of any other court for the purposes of resolution of disputes that may arise out of the agreement. While Clause 16 may not have particularised a seat for arbitration, in light of the silence in that clause, it would be the exclusive jurisdiction clause which would govern. The Court also finds that the aforesaid conclusion would flow also upon a harmonious interpretation of the aforenoted two clauses. Taking any other view would clearly lead to incongruous results. In any case, the Court finds itself unable to accept the contention of the petitioner that Clause 20.01 would stand restricted to civil actions and not be applicable to arbitration at all.

7. In Aarka Sports Management, the learned Judge had held as follows:-

> "28. The arbitration agreement dated 16th March, 2018 does not stipulate any seat of arbitration as the parties had not agreed on the seat of the arbitration under Section 20(1) of the Arbitration and Conciliation Act. In that view of the matter, the seat of the arbitration shall be determined by the Arbitral Tribunal under Section 20(2) of the Arbitration and Conciliation Act.
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> 29. Since the parties have not agreed on the seat of the arbitration, the Court within the meaning of Section 2(1)(e) of Arbitration and Conciliation Act read with Sections 16 to 20 of Code of Civil Procedure would be competent to entertain an application under Section 11 of the Arbitration and Conciliation Act.
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> 30. This Court lacks territorial jurisdiction as Delhi is not the seat of arbitration; no cause of action arose at Delhi and the respondent does not work at Delhi. The agreement was drawn at Ranchi, signed at Lucknow and was to be performed at Patna."

8. However and with due respect, it must be noted that the aforesaid conclusions would clearly fly in the face of the principles that were ultimately enunciated by the Supreme Court in BGS SOMA. It is pertinent to note and observe that while deciding the question of seat or venue of arbitration, the cause of action principles as would otherwise and ordinarily apply to civil litigation cannot be imputed.

9. The judgment of the Court in Hamdard Laboratories also does not sustain the contention which stands addressed on behalf of the petitioners as would be evident from the following observations entered therein.

> "11. Having carefully examined the arbitration clause, I find that the sentence 'The courts of law at Delhi alone shall have the jurisdiction.' ensconced therein contains the key to the riddle, insofar as it is a clear expression of the parties' intent to confer

> exclusive jurisdiction in all arbitrations arising out of the Work Order, upon the courts at Delhi. The respondent's interpretation of the arbitration clause and opposition to vesting of jurisdiction in Delhi courts arises from its contention that the arbitration clause never provided for a seat of arbitration. In furtherance of this contention, the respondent has correctly reiterated the settled propositions of law that seat and venue of arbitration cannot be confused with each other and bear distinct meanings, and that only when the contract expressly provides for a seat of arbitration does there arise an automatic vesting of jurisdiction in the courts within which the seat is situated. While there is no dispute with these propositions, they are not applicable in the instant case as the terms of the arbitration clause contained in the Work Order are explicit and it is clear that Delhi has not been designated as a venue, but has been designated as a seat of arbitration. In my view, the absence of the term 'seat' while referring to the courts at Delhi, does not alter the significant fact that the courts of law at Delhi alone have been vested with the jurisdiction upon arbitration proceedings arising out of the subject Work Order. In fact, on this ground alone, if the respondent's plea were to be accepted and this Court were to disregard the entire phrase "The courts of law at Delhi alone shall have the jurisdiction" within the arbitration clause, it would render

10. Insofar as the decision of the Supreme Court in Aniket SA Investments LLC, Mauritius v. Janapriya Engineers Syndicate Pvt. Ltd., Hyderabad &Ors.,8 is concerned, the Court notes that the same was a judgment rendered in the backdrop of an agreement which had specifically referred to a seat.

11. Clause 20.01 carries the stated intent of parties to confer exclusive jurisdiction on courts at Jaipur. While it is true that Clause 16 does not specifically refer to either a seat or venue, in light of Clause 20.01, the Court is of the firm opinion that in the absence of any contra indication, Jaipur would also be liable to be treated as seat for arbitration.

12. In view of the aforesaid, the instant petitions shall stand dismissed with liberty reserved to the petitioner to approach the Rajasthan High Court, if so chosen and advised.

YASHWANT VARMA, J APRIL 26, 2023 SU 2021 SCC Online Bom919 By:NEHA Signing Date:29.04.2023 11:24:47