Cnh Industrial Capital (India) Private ... vs National Win Agencies Through Its ... on 14 February, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
\+ ARB.P. 617/2022
CNH INDUSTRIAL CAPITAL (INDIA) PRIVATE LIMITED
..... Petitioner
Through: Mr. Mahesh Kumar, Mr. Shubham Gupta and Ms. Simran Soni, Advs.

versus

NATIONAL WIN AGENCIES THROUGH ITS PROPRIETOR MR NASYAM MOHAMAD ZAHEER BASHA ..... Respondent
Through: Mr. R.S. Raju and Mr. Saurabh Kaushik, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
ORDER

% 14.02.2023

1. This petition seeks to invoke the jurisdiction of the Court under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator consequent to disputes having arisen between the parties.

2. The petitioner is stated to have issued a Loan Recall Notice on 03 March 2021. Consequent to a failure on the part of the respondent to abide by the demands made therein, arbitration was commenced by the issuance of a notice dated 27 October 2021. The said notice is stated to have been consigned through speed post as well as by courier service. The documents which have been placed on the record establish that the said notice was duly served upon the respondent through courier service. However, no reply to the said notice was submitted by the respondent.

3. Before this Court and in terms of the objections which are raised, it is contended that the petition under Section 11 of the Act has been wrongly preferred before this Court since no part of the cause of action arose within its territorial jurisdiction.

4. For the purposes of examining the correctness of the aforesaid submissions, it would be apposite

to firstly extract Sections 24 and 25 of the Agreement hereinbelow: -

" SECTION 24
ARBITRATION

Any dispute, controversy or claim arising out of or relating to this Loan Agreement or any related agreement or other documents or the validity, interpretation, breach or termination thereof ("Dispute"), including claims seeking redress or asserting rights under applicable law, shall be resolved and finally settled in accordance with the provisions of the Arbitration and Conciliation Act, 1996 as amended from time to time (the "Arbitration Act"). The Parties consent to a single, consolidated arbitration for all Disputes that may at the time exist. The arbitral tribunal shall comprise of a sole arbitrator to be appointed by the Lender. The arbitration proceedings shall be conducted in English. The arbitration shall be conducted in Delhi. The arbitral tribunal shall determine the Dispute in accordance the law of India and the award passed by the Arbitral Tribunal shall be final and binding on the Parties.

SECTION 25 GOVERNING LAW The Loan Agreement is governed by Indian law and all the terms and conditions contained herein are legal, valid and binding on the Borrower under Indian law. The Borrower irrevocably submits to the exclusive jurisdiction of the courts in India at New Delhi. This shall not however limit the rights of the Lender to take proceedings in any court of competent jurisdiction."

5. As is evident from a reading of Section 24, the parties had agreed that the arbitral proceedings shall be conducted at Delhi. More importantly Section 25 which dealt with the governing law provided that courts at New Delhi would have exclusive jurisdiction in respect of all issues that may arise. It is thus manifest from a reading of Section 25 that New Delhi was constituted as the seat of arbitration.

6. Principles governing the concepts of seat and venue were elucidated in Inland Waterways Authority of India vs. Reach Dredging LTD. (RDL) And Gayatri Projects (P) LTD. (JV), [NCN:2023/DHC/000324] where the Court proceeded to make the following pertinent observations:-

> "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.

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 vs. Indian Oil Corporation Ltd.1, 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 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 (2013) 9 SCC 32 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
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> (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 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, By:NEHA Signing Date:16.02.2023 15:29:07 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.

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.
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> (2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties. (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 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 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
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> (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, 1996."

(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:
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> „... 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. "
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> (emphasis in original)
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> 19. A conspectus of all the aforesaid provisions shows that 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 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.
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> 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 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."

7. Consequently, the Court finds itself unable to sustain the objection which is raised. Since no other objection was raised, the Court is of the opinion that the disputes merit being referred for resolution before an Arbitral Tribunal.

8. Accordingly, the instant petition is allowed. The Court hereby appoints Mr. Ashim Sood [Official Address: A-329, Second Floor, Defence Colony, New Delhi] [Mobile No.9810255558] [email:

> ashim.sood@asood.in] as the sole arbitrator for resolution of the disputes which have arisen.

9. The parties are directed to appear before the learned arbitrator, as and when notified. This is subject to the learned arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

10. The fees of the arbitrator shall be decided according to the Fourth Schedule of the Act.

YASHWANT VARMA, J.

FEBRUARY 14, 2023 bh