Brahmani River Pellets Ltd. vs Kamachi Industries Ltd. on 25 July, 2019

Equivalent citations: AIR 2019 SUPREME COURT 3658, AIRONLINE 2019 SC 711, (2019) 204 ALLINDCAS 139, (2019) 6 ANDHLD 13, (2019) 9 SCALE 818, AIR 2019 SC (CIV) 2574, (2019) 6 MAD LJ 336, (2019) 2 CLR 573 (SC), (2019) 3 RECCIVR 868, 2020 (139) ALR SOC 16 (SC)

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Bench: A.S. Bopanna, R. Banumathi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5850 2019
(Arising out of SLP(C) No.15672 of 2019)

BRAHMANI RIVER PELLETS LIMITED ...Appellant

VERSUS

KAMACHI INDUSTRIES LIMITED …Respondent

JUDGMENT

R. BANUMATHI, J.

Leave granted.

2. Whether the Madras High Court could exercise jurisdiction under Section 11(6) of the Arbitration and Conciliation Act, 1996 despite the fact that the agreement contains the clause that venue of arbitration shall be Bhubaneswar, is the question falling for consideration in this appeal.

3. Brief facts which led to filing of this appeal are as under:-

> The appellant entered into an agreement with the respondent for sale of 40,000 WMT (Wet Metric Tonne) of Iron Ore Pellets on FOB terms and payment was to be made by Letter of Credit in Bhubaneswar. The loading port was Dhamra Port,

> Bhadrak, Odisha and destination was Chennai/Ennore Ports, Tamil Nadu. Dispute arose between the parties regarding the price and payment terms and the appellant did not deliver the goods to the respondent. The respondent claimed for damages alleging that it had to procure the Iron Ore Pellets from other sources at higher rates. The appellant denied any liability to pay damages on the ground that contract was later modified and that the respondent breached the material terms of the contract and this led to the dispute between the parties.

4. Clause 18 of the agreement between the parties contains an arbitration clause which reads as under:-

> "18. Arbitration shall be under Indian Arbitration and Conciliation Law 1996 and the Venue of Arbitration shall be Bhubaneswar."

5. The respondent on 07.10.2016 invoked arbitration clause. The appellant did not agree for the appointment of the arbitrator. Hence, the respondent filed petition being OP No.398 of 2018 under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') before the Madras High Court on 24.01.2018 for appointment of sole arbitrator. The appellant contested the petition challenging the jurisdiction of the Madras High Court on the ground that the parties have agreed that Seat of arbitration be Bhubaneswar and therefore, only the Orissa High Court has exclusive jurisdiction to appoint the arbitrator. The Madras High Court vide impugned order appointed a former judge of the Madras High Court as the sole arbitrator by holding that mere designation of "Seat" by parties does not oust the jurisdiction of other courts other than at the Seat of arbitration. The High Court held that in absence of any express clause excluding jurisdiction of other courts, both the Madras High Court and the Orissa High Court will have jurisdiction over the arbitration proceedings. Challenging the impugned order, the appellant has preferred this appeal.

6. The learned counsel for the appellant submitted that when the parties have agreed for a place/venue for arbitration, it gets the status of Seat which is the juridical Seat and therefore only, the Orissa High Court will have the jurisdiction under the Act. The learned counsel submitted that the Madras High Court erred in assuming jurisdiction under Section 11(6) of the Act despite Bhubaneswar being the Seat of arbitration. In this regard, reliance was placed upon Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and others (2017) 7 SCC 678, Union of India v. Hardy Exploration and Production (India) Inc. (2018) 7 SCC 374 and other judgments. It was contended that the High Court erred in holding that clause (18) of the agreement does not outst the jurisdiction of the courts other than the courts at the Seat of arbitration at Bhubaneswar. The learned counsel submitted that the High Court erred in not applying the ratio of Indus Mobile wherein the Supreme Court held that in case of domestic arbitration where the parties have agreed at the Seat of arbitration, the said court will have exclusive jurisdiction.

7. Per contra, the learned counsel for the respondent submitted that since cause of action arose at both the places i.e. Bhubaneswar and Chennai, both Madras High Court as well as Orissa High Court will have supervisory jurisdiction. Reliance was placed upon para No. (96) of Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC

552. It was submitted that in domestic arbitration, unless the parties tie themselves to an exclusive jurisdiction of the court in the agreement, mere mention of "venue" as a place of arbitration will not confer exclusive jurisdiction upon that court. It was urged that apart from mere mention of "venue" as place of arbitration, there should be other concomitant circumstances like use of words "alone", "exclusive", "only" etc. or other circumstances, then only the jurisdiction of the other court which otherwise would have had jurisdiction would stand excluded. Taking us through the impugned order, the learned counsel for the respondent submitted that mere expression "venue of arbitration shall be Bhubaneswar will have no special significance" and the High Court rightly exercised its jurisdiction under Section 11 (6) of the Act in appointing the arbitrator.

8. We have carefully considered the submissions of both the parties and perused the impugned order and the judgments relied upon by the parties.

9. As per Section 2(2) of the Act, arbitrations which take place in India are governed by Part-I of the Act. The "court" which will have jurisdiction to decide the questions forming the subject matter of arbitration is the "court" as defined by Section 2(1)(e) of the Act which reads as under:-

> 2. Definitions. – (1) In this Part, unless the context otherwise requires,-
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> .....
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> (e) "Court" means –
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> (i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject- matter of the arbitration if the same had been the subject- matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;
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> (ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decree or courts subordinate to that High Court. As per Section 2(2) of the Act, Part-I would apply to all arbitration where the place of arbitration is in India. Section 2(1)
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> (e) of the Act defines "court" with reference to Part-I of the Act and would govern the place of arbitration.

10. In BALCO, the issue arose before the Constitution Bench was as to whether in international commercial arbitrations whose juridical or legal Seat of arbitration was outside India whether the provisions of Part-I of the Act would be applicable for grant of relief as held in Bhatia International v. Bulk Trading S.A. and another (2002) 4 SCC 105. The Constitution Bench in BALCO held that "if the legal or juridical seat of arbitration is outside India, then Part-I of the Arbitration and

Conciliation Act, 1996 shall be inapplicable to such arbitrations; and even in case a clause in the arbitration agreement purports to apply Part-I of the 1996 Act to an arbitration where the juridical seat of arbitration is outside India, Part-I shall be inapplicable to the extent inconsistent with the arbitration law of the seat of arbitration."1

11. In BALCO, the court highlighted the distinction between the "Seat" and "Venue" in the context of Section 20(3) of the Act. Section 20(3) of the Act allows the parties to hold 1 Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552 meetings, proceedings and hearings at any place agreed by the parties. In BALCO, the court has held that in an international commercial arbitration "seated" in India, parties may by mutual agreement, hold arbitral proceedings outside India. This, however, would not have the effect of changing the Seat of arbitration which would continue to remain in India. The court then envisages a situation where the arbitration agreement designates a foreign Seat and also selects Arbitration Act, 1996 as the law applicable to the conduct of arbitration proceedings and in such circumstances, hearing of the arbitration conducted at the venue fixed by the parties would not have the effect of changing the Seat of arbitration which would remain in India. In para (100), the Supreme Court held as under:-

> "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":
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> .....
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> 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
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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.

Only if the agreement of the parties is construed to provide for the "seat"/"place" of arbitration being in India — would Part I of the Arbitration Act, 1996 be applicable. If the agreement is held to provide for a "seat"/"place" outside India, Part I would be inapplicable to the extent inconsistent with the arbitration law of the seat, even if the agreement purports to provide that the Arbitration Act, 1996 shall govern the arbitration proceedings."

12. As pointed out earlier, Section 2(1)(e) of the Act defines the "Court" with reference to the term "subject-matter of the suit". As per Section 2(1)(e) of the Act, if the "subject-matter of the suit" is situated within the arbitral jurisdiction of two or more courts, the parties can agree to confine the jurisdiction in one of the competent courts. In para (96) of BALCO, the Supreme Court held that the term "subject-matter" in Section 2(1)(e) of the Act is to identify the court having supervisory control over the arbitral proceedings. The Supreme Court held that the provisions in Section 2(1)(e) of the Act has to be read in conjunction with Section 20 of the Act which give recognition to the autonomy of the parties as to "place of arbitration". The observations in para No. (96) in BALCO pertaining to arbitrations governed by Part-I of the Act i.e. where the "place of arbitration" in India read as under:-

> "96. .....We are of the opinion, the term "subject-matter of the arbitration" cannot be confused with "subject-matter of the suit". The term "subject-matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)
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> (e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the

> jurisdiction of which the dispute resolution i.e. arbitration is located." The above observations in para No. (96) is in the context that on many occasions, agreement may provide for a seat of arbitration at a place which would be neutral to both the parties.

In such circumstances, it was observed that the two courts would have jurisdiction that is the court within whose jurisdiction "subject-matter" of the suit is situated and the court within the jurisdiction of which the dispute resolution i.e. the "venue" of arbitration is located.

13. 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-Judges Bench decision in Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd. (2013) 9 SCC

32. In the said case, respondent-Indian Oil Corporation Limited 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. 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 Rajasthan High Court lacks the territorial jurisdiction in dealing with the application under Section 11(6) of the Act. The designated judge held that 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 Calcutta High Court which order came to be challenged before the Supreme Court. Pointing out that the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used in the agreement and use of such words is not decisive and non-use of such words does not make any material difference as to the intention of the parties by having clause 18 of the agreement that the courts at Kolkata shall have the jurisdiction, the Supreme Court held as under:-

> "31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, the Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11(12)(b) and Section 2(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of Clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of Clause 18 of the agreement, the jurisdiction of the Chief Justice of the Rajasthan High Court has been excluded?

> 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 expressio unius est exclusio 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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> 33. The above view finds support from the decisions of this Court in Hakam Singh v. Gammon India Limited (1971) 1 SCC 286, A.B.C. Laminart Private Limited v. A.B.C. Agencies (1989) 2 SCC 163, R.S.D.V. Finance Corporation Private Limited v. Shree Vallabh Glass Works Limited (1993) 2 SCC 130, Angile Insulations v. Davy Ashomore India Limited (1995) 4 SCC 153, Shriram City Union Finance Corporation Limited v. Rama Mishra (2002) 9 SCC 613, Hanil Era Textiles Limited v. Puromatic Filters Private Limited (2004) 4 SCC 671 and Balaji Coke Industry Private Limited v. Maa Bhagwati Coke Gujarat Private Limited (2009) 9 SCC 403." [underlining added]
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> 14. In Swastik, the Supreme Court held that clause like (18) of the agreement will not be hit by Section 23 of the Contract Act and it is not forbidden by law nor it is against public policy.

It was so held that as per Section 20 of the Act, parties are free to choose the place of arbitration. This "party autonomy" has to be construed in the context of choosing a court out of two or more courts having competent jurisdiction under Section 2(1)

(e) of the Act.

15. The inter-play between "Seat" and "place of arbitration" came up for consideration in the case of Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd. and others (2017) 7 SCC 678. After referring to BALCO, Enercon (India) Limited and others v. Enercon GMBH and another (2014) 5 SCC 1 and Reliance Industries Limited and another v. Union of India (2014) 7 SCC 603 and also amendment to the Act pursuant to the Law Commission Report, speaking for the Bench Justice

Nariman held as under:-

> "18. The amended Act, does not, however, contain the aforesaid amendments, presumably because the BALCO (2012) 9 SCC 552 judgment in no uncertain terms has referred to "place" as "juridical seat" for the purpose of Section 2(2) of the Act. It further made it clear that Sections 20(1) and 20(2) where the word "place" is used, refers to "juridical seat", whereas in Section 20(3), the word "place" is equivalent to "venue". This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.
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> 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.
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> 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. (2013) 9 SCC 32 This was followed in a recent judgment in B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd. (2015) 12 SCC 225 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 is set aside. ....." [underlining added]

16. 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, non-use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference.

17. When the parties have agreed to have the "venue" of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Since only Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order is liable to be set aside.

18. In the result, the impugned order of the Madras High Court in OP No.398 of 2018 dated 02.11.2018 is set aside and this appeal is allowed. The parties are at liberty to approach the Orissa High Court seeking for appointment of the arbitrator.

.....J. [R. BANUMATHI] .....J. [A.S. BOPANNA] New Delhi;

July 25, 2019