* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Order reserved on: 09 January 2023**
Order pronounced on: 17 January 2023

\+ O.M.P. (COMM) 487/2022 & I.A. 20823/2022(Stay), I.A. 20825/2022(Delay in Re-filing Pet.)

INLAND WATERWAYS AUTHORITY OF INDIA
..... Petitioner

Through: Mr. Naveen Chawla and Ms. Monica Madaan, Advs.

versus

REACH DREDGING LTD. (RDL) AND GAYATRI PROJECTS (P) LTD. (JV) ..... Respondent

Through: Mr. Shatardu Chakraborty, Mr. Sanjay Mukherjee, Ms. Sonia Dube and Ms. Surbhi Anand, Advs.

AND

\+ O.M.P. (COMM) 488/2022 & I.A. 20839/2022(Stay), I.A. 20841/2022(Delay in Re-filing Pet.)

INLAND WATERWAYS AUTHORITY OF INDIA
..... Petitioner

Through: Mr. Naveen Chawla and Ms. Monica Madaan, Advs.

versus

REACH DREDGING LTD. AND M/S RASHMI METALIKS LTD. AND M/S SS ELECTROGRIP PRODUCTS PVT. LTD. (JV) ..... Respondent

Through: Mr. Shatardu Chakraborty, Mr. Sanjay Mukherjee, Ms. Sonia Dube and Ms. Surbhi Anand, Advs.

AND

\+ O.M.P. (COMM) 489/2022 & I.A. 20845/2022(Stay), I.A. 20847/2022(Delay in Re-filing Pet.)

INLAND WATERWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. Naveen Chawla and Ms. Monica Madaan, Advs.

versus

REACH DREDGING LTD. AND GAYATRI PROJECTS (P) LTD. (JV) ..... Respondent

Through: Mr. Shatardu Chakraborty, Mr. Sanjay Mukherjee, Ms. Sonia Dube and Ms. Surbhi Anand, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

1. These three petitions under Section 34 of the **Arbitration and Conciliation Act, 1996**[1] assail the validity of the awards dated 28 July 2022. On 09 December 2022 when the petitions were called, a preliminary objection was taken on behalf of the respondents with it being contended that this Court would not have the jurisdiction to entertain the challenge under Section 34 of the Act since Delhi could not be understood as constituting the seat of arbitration. Noticing the preliminary objection which was urged, the Court had on that date passed the following order: -

> "1. A preliminary objection is taken to the institution of the present petitions under Section 34 of the Arbitration and Conciliation Act, 1996 [the 1996 Act] with learned counsel for the respondent asserting that as per Clause 47.1.1 of the Contract, and which comprises the arbitration clause, two competing venues were indicated as being the venue for arbitration, namely, Noida/ Delhi. According to learned counsel, no part of the cause of action as may be generally

[1] the Act

> understood arose within the territorial jurisdiction of this Court. It is pointed out that the work of dredging was carried out in Orissa and that the respondent is situate in the State of West Bengal. In view of the aforesaid, it was his submission that the petition under Section 34 of the 1996 Act had been wrongly instituted before this Court.
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> 2. Learned counsel appearing for the petitioner, on the other hand, would contend that since all proceedings relating to arbitration were conducted in New Delhi, the present Court would have the requisite jurisdiction to entertain these petitions under Section 34.
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> 3. The question which, consequently, arises is whether Delhi was understood to be merely the "venue" for arbitration as opposed to being the "seat".
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> 4. In order to enable learned counsels to address further submissions on this question, let these petitions be called again on 09.01.2023."

2. The arbitral proceedings emanate from a Notice Inviting Tenders which was issued by the Inland Waterways Authority of India, the respondent herein, for dredging operations in the Tantighai-Kani river system of NW-5 in the stretch between Erada – Padanipal falling in the State of Odisha.

3. For the purposes of evaluating the correctness of the preliminary objection which stands raised, it would be apposite to extract the two competing clauses in the backdrop of which the question itself stands raised. Under the **General Conditions of Contract**[2], Clause 22 while dealing with the laws governing the contract made the following provisions: -

> "**CLAUSE – 22: LAWS GOVERNING THE CONTRACT**
> The Courts **at Noida** only shall have the jurisdiction for filing the award of the arbitration and for any other judicial proceedings."

[2] GCC

4. The arbitration agreement stood comprised in Clause 47 titled "Settlement of Disputes and Arbitration". Clause 47.11 which alone would have some bearing is extracted hereinbelow: -

> "47.11 The parties to the agreement hereby undertake to have recourse only to arbitration proceedings under for Arbitration Act 1996 and the venue of the arbitration proceeding shall be Noida/ New Delhi and the parties will not have recourse to Civil Court to settle any of their disputes arising out of this agreement except through arbitration."

5. On facts it was admitted that the hearings in connection with the arbitral proceedings took place in Delhi. The award dated 28 July 2022 is stated to have been drawn and published at Noida, District Gautambudh Nagar falling in the State of Uttar Pradesh. It is also stated to have been duly stamped in that State.

6. Learned counsel appearing for the respondent contended that Clause 47.11 of the GCC merely designates the venue of arbitration to be either Noida or New Delhi. However, according to learned counsel, the venue restriction clause as comprised in Clause 22 would clearly establish that the seat of arbitration must be understood to be Noida only. Apart from the above, learned counsel would urge that since the award itself had been declared, published and dated at Noida, it is that place which must be recognised as being the seat of arbitration. Learned counsel also sought to draw sustenance from the fact that the respondent had invited tenders which were to be submitted at Noida. In view of the aforesaid and in light of Clause 22, it was urged that the present petitions are liable to be dismissed with the Court leaving it open to the petitioner to approach the competent court in District Gautambudh Nagar.

7. Countering the aforesaid submissions, learned counsel for the petitioner contended that Clause 47.11 is irrefutable evidence of both Noida or New Delhi constituting the seat where proceedings pertaining to the award could be initiated. It was further contended that the fact that all the proceedings of the Arbitral Tribunal were held at Delhi would further buttress the submission that it was that location which was ultimately chosen to be the seat of arbitration.

8. While learned counsel for the respondent contended that the issue that arises stands conclusively settled in light of the judgment rendered by the Supreme Court in **BGS SGS SOMA JV v. NHPC**[3]**, l**earned counsel for the petitioner relied upon the judgment rendered by the Supreme Court in **Inox Renewables Ltd. vs. Jayesh Electricals Ltd.**[4] to contend that the Section 34 petitions had been correctly filed and presented before this Court.

9. The answer to the question which stands posited would revolve upon the construction liable to be placed upon Clause 22 read with Clause 47.11. The Court notes that Clause 47.11 specifies Noida/New Delhi to be the venue of the arbitration proceedings. Clause 22, on the other hand, in categorical terms prescribes that the courts at Noida alone would be liable to be recognised for the purposes of filing of the award and for any other judicial proceedings. It is the perceived conflict between the aforenoted two clauses that has given rise to the controversy which stands raised.

10. On a plain reading of Clause 47.11, the Court notes that while

[3] (2020) 4 SCC 234
[4] 2021 SCC OnLine SC 448

stipulating Noida/New Delhi as the place for arbitration proceedings, parties appear to have essentially agreed to either of those two locations as being the acceptable venues for the holding of arbitral proceedings. Clause 47.11 thus appears to have granted the option to parties to convene arbitration proceedings either at Noida or New Delhi. Viewed in that light it would be manifest that Noida and New Delhi could have been interchangeably utilised as venues for the arbitration proceedings.

11. The Court, however, must also necessarily bear in mind the command of Clause 22 which prescribed that courts at Noida "only" would have jurisdiction for the purposes of filing of the award and for any other judicial proceedings. It is the language employed in the venue restriction clause which would necessarily have to be borne in mind while considering whether once parties had decided to confer exclusive jurisdiction on courts at Noida, the mere prescription of Delhi as a venue of arbitration proceedings would be sufficient to hold in favour of the petitioner and uphold the institution of proceedings before this Court.

12. **BGS SOMA** undisputedly constitutes the locus classicus on the subject. It would be pertinent to note that the Supreme Court in **BGS SOMA** was dealing with the issue of maintainability of petitions preferred under Section 34 of the Act which had been instituted before the Faridabad courts. The issue which arose was whether New Delhi or Faridabad was liable to be construed to be the seat of the arbitration proceedings. It becomes pertinent to note that Clause 67.3 of the arbitration agreement which formed the subject matter of **BGS**

SOMA, had also provided that arbitration proceedings shall be held at "New Delhi / Faridabad". On facts it was found that all proceedings of the Arbitral Tribunal had taken place at New Delhi and that a unanimous award was also pronounced there. The Section 34 petitions, however, came to be originally placed before the District and Sessions Judge, Faridabad in the State of Haryana. They were ultimately transferred to the Special Commercial Court Gurugram which had proceeded to return the petitions to be presented before the competent court in New Delhi. The challenge which was addressed was that the Faridabad courts had wrongly construed New Delhi as being the seat of arbitration.

13. While dealing with the aforesaid challenge, the Supreme Court took note of the provisions made in Sections 2(c), 20 and 31 of the Act. It also highlighted the fact that Sections 20 and 31 were essentially an adoption of the provisions made in the UNCITRAL Model Law on International Commercial Arbitration [1985]. Explaining the concept of the "juridical seat" of arbitration, the Supreme Court in **BGS Soma** observed as follows: -

> "**32.** It can thus be seen that given the new concept of "juridical seat" of the arbitral proceedings, and the importance given by the Arbitration Act, 1996 to this "seat", the arbitral award is now not only to state its date, but also the place of arbitration as determined in accordance with Section 20. However, the definition of "court" contained in Section 2(1)(*c*) of the Arbitration Act, 1940, continued as such in the Arbitration Act, 1996, though narrowed to mean only principal civil court and the High Court in exercise of their original ordinary civil jurisdiction. Thus, the concept of juridical seat of the arbitral proceedings and its relationship to the jurisdiction of courts which are then to look into matters relating to the arbitral proceedings — including challenges to arbitral awards

— was unclear, and had to be developed in accordance with international practice on a case by case basis by this Court.

33. Some of the early decisions of this Court did not properly distinguish between "seat" and "venue" of an arbitral proceeding. The five-Judge Bench in *BALCO* [*BALCO* v. *Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] dealt with this problem as follows : (SCC pp. 597-99, 605-607, paras 75-76, 95-96, 98-99)

> "*75*. We are also unable to accept the submission of the learned counsel for the appellants that the Arbitration Act, 1996 does not make seat of the arbitration as the *centre of gravity* of the arbitration. *On the contrary, it is accepted by most of the experts that in most of the national laws, arbitrations are anchored to the seat/place/situs of arbitration*. Redfern in Para 3.54 concludes that '*the seat of the arbitration is thus intended to be its centre of gravity.*' [Blackaby, Partasides, Redfern and Hunter (Eds.), *Redfern and Hunter on International Arbitration* (5th Edn., Oxford University Press, Oxford/New York 2009)] This, however, does not mean that all the proceedings of the arbitration have to take place at the seat of the arbitration. The arbitrators at times hold meetings at more convenient locations. This is necessary as arbitrators often come from different countries. It may, therefore, on occasions be convenient to hold some of the meetings in a location which may be convenient to all. Such a situation was examined by the Court of Appeal in England in *Naviera Amazonica Peruana SA* v. *Compania International de Seguros del Peru* [*Naviera Amazonica Peruana SA* v. *Compania International de Seguros del Peru*, (1988) 1 Lloyd's Rep 116 (CA)] wherein at p. 121 it is observed as follows:
>
> > 'The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the Arbitral Tribunal *must* hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an Arbitral Tribunal to hold meetings—or even hearings —in a

> place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses…. It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country — for instance, for the purpose of taking evidence…. In such circumstances each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of arbitration remains the place initially agreed by or on behalf of the parties.'

These observations were subsequently followed in *Union of India* v. *McDonnell Douglas Corpn.* [*Union of India* v. *McDonnell Douglas Corpn.*, (1993) 2 Lloyd's Rep 48]

76. It must be pointed out that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments, namely, the New York Convention of 1958 and the UNCITRAL Model Law of 1985. It is true that the terms "seat" and "place" are often used interchangeably. In *Redfern and Hunter on International Arbitration* [Blackaby, Partasides, Redfern and Hunter (Eds.), *Redfern and Hunter on International Arbitration* (5th Edn., Oxford University Press, Oxford/New York 2009)] (Para 3.51), the seat theory is defined thus:'The concept that an arbitration is governed by the law of the place in which it is held, which is the "seat" (or "forum" or *locus arbitri*) of the arbitration, is well established in both the theory and practice of international arbitration. In fact, the Geneva Protocol, 1923 states:

> '**2**. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.'

The New York Convention maintains the reference to 'the law of the country where the arbitration took place' [Article V(1)(*d*)] and, synonymously to 'the law of the country where the award is made' [Articles V(1)(*a*) and (*e*)]. The aforesaid observations clearly show that the New York Convention continues the clear territorial link between the place of arbitration and the law governing that arbitration.

The author further points out that this territorial link is again maintained in the Model Law which provides in Article 1(2) that:

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

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95. The learned counsel for the appellants have submitted that Section 2(1)(*e*), Section 20 and Section 28 read with Section 45 and Section 48(1)(*e*) make it clear that Part I is not limited only to arbitrations which take place in India. These provisions indicate that the Arbitration Act, 1996 is *subject-matter centric* and not exclusively *seat-centric*. Therefore, "*seat*" is not the "*centre of gravity*" so far as the Arbitration Act, 1996 is concerned. We are of the considered opinion that the aforesaid provisions have to be interpreted by keeping the principle of territoriality at the forefront. We have earlier observed that Section 2(2) does not make Part I applicable to arbitrations seated or held outside India. In view of the expression used in Section 2(2), the maxim *expressum facit cessare tacitum*, would not permit by interpretation to hold that Part I would also apply to arbitrations held outside the territory of India. The expression "*this Part shall apply where the place of arbitration is in India*" necessarily excludes application of Part I to arbitration seated or held outside India. It appears to us that neither of the provisions relied upon by the learned counsel for the appellants would make any section of Part I applicable to arbitration seated outside India. It will be

apposite now to consider each of the aforesaid provisions in turn.

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

> '**2. *Definitions***.—(1) In this Part, unless the context otherwise requires.—
>
> (*e*) "**Court**" means the Principal civil court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal civil court, or any Court of Small Causes.'

We are of the opinion, the term "*subject-matter of the arbitration*" cannot be confused with "*subject-matter of the suit*". The term "*subject-matter*" in Section 2(1)(*e*) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(*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.

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

> '**20. *Place of arbitration***.—(1) The parties are free to agree on the place of arbitration.
>
> (2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties.
>
> (3) Notwithstanding sub-section (1) or sub-section (2), the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, good or other property.'
>
> A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai, etc. In the absence of the parties' agreement thereto, Section 20(2) authorises the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.
>
> *99*. The fixation of the most convenient "venue" is taken care of by Section 20(3). Section 20, has to be read in the context of Section 2(2), which places a threshold limitation on the applicability of Part I, where the place of arbitration is in India. Therefore, Section 20 would also not support the submission of the extra-territorial applicability of Part I, as canvassed by the learned counsel for the appellants, so far as purely domestic arbitration is concerned."
>
> (emphasis in original and supplied)"

14. Noticing the salient principles which were enunciated by the

Constitution Bench in **BALCO v. Kaiser Aluminium Technical Services Inc.**[5] , the Court proceeded to observe and hold as follows:-

> **"34.** This was the arena of domestic arbitration and domestic awards.
>
> ***International scenario***
>
> **35.** Difficulties were also being faced in the international sphere of trade and commerce. With the growth of international trade and commerce, there was an increase in disputes arising out of such transactions being adjudicated through arbitration. One of the problems faced in such arbitration, related to recognition and enforcement of an arbitral award made in one country by the courts of other countries. This difficulty was sought to be removed through various international conventions. The first such international convention was the Geneva Protocol on Arbitration Clauses, 1923, popularly referred to as "the 1923 Protocol". It was implemented w.e.f. 28-7-1924. This Protocol was the product of the initiative taken by the International Chamber of Commerce (ICC) under the auspices of the League of Nations. The 1923 Protocol sought to make arbitration agreements and arbitration clauses in particular, enforceable internationally. It was also sought to ensure that awards made pursuant to such arbitration agreements would be enforced in the territory other than the State in which they were made.
>
> **36**. The 1923 Protocol proved to be inadequate. It was followed by the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 and is popularly known as "the Geneva Convention of 1927". This Convention was made effective on 25-7-1929. India became a signatory to both the 1923 Protocol and the 1927 Convention on 23-10-1937. It was to give effect to both the 1923 Protocol and the 1927 Convention that the Arbitration (Protocol and Convention) Act, 1937 was enacted in India. Again a number of problems were encountered in the operation of the 1923 Protocol and the 1927 Geneva Convention. It was felt that there were limitations in relation to their fields of application. Under the 1927 Geneva Convention a party in order to enforce the award in the country of an origin was obliged to seek a declaration in the country where the arbitration took place to the effect that the award was enforceable. Only then could the successful party go ahead and enforce the award in the country of origin. This led to the problem

[5] (2012) 9 SCC 552

of "*double exequatur*", making the enforcement of arbitral awards much more complicated."

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

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

50. In fact, subsequent Division Benches of this Court have understood the law to be that once the seat of arbitration is chosen, it amounts to an exclusive jurisdiction clause, insofar as the courts at that seat are concerned. In *Enercon (India) Ltd.* v. *Enercon GmbH* [*Enercon (India) Ltd.* v. *Enercon GmbH*, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , this Court approved the dictum in *Shashoua* [*Shashoua* v. *Sharma*, 2009 EWHC 957 (Comm) :

(2009) 2 Lloyd's Law Rep 376] as follows : (*Enercon case* [*Enercon (India) Ltd.* v. *Enercon GmbH*, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , SCC p. 55, para 126)

"*126*. Examining the fact situation in the case, the Court in *Shashoua case* [*Shashoua* v. *Sharma*, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep 376] observed as follows:

> 'The basis for the court's grant of an anti-suit injunction of the kind sought depended upon the *seat* of the arbitration. *An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause*. Not only was there agreement to the curial law of the *seat*, but also to the courts of the *seat* having supervisory jurisdiction over the arbitration, so that, by agreeing to the *seat, the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration*.
>
> Although, "*venue*" was not synonymous with "*seat*", in an arbitration clause which provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that "the *venue* of arbitration shall be London, United Kingdom" did amount to the designation of a juridical seat.…'

In para 54, it is further observed as follows:

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

16. The Court then proceeded to also notice the decisions rendered in **Indus Mobile Distribution Private Ltd. vs. Datawind**

Innovations Private Ltd. & Ors.[6] and **Brahmani River Pellets Ltd. vs Kamachi Industries Ltd.**[7] which dealt with exclusive jurisdiction clauses and held as follows: -

> "**58.** Equally, the ratio of the judgment in *Indus Mobile Distribution (P) Ltd.* [*Indus Mobile Distribution (P) Ltd.* v. *Datawind Innovations (P) Ltd.*, (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760] , is contained in paras 19 and 20. Two separate and distinct reasons are given in *Indus Mobile Distribution (P) Ltd.* [*Indus Mobile Distribution (P) Ltd.* v. *Datawind Innovations (P) Ltd.*, (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760] for arriving at the conclusion that the courts at Mumbai alone would have jurisdiction. The first reason, which is independent of the second, is that as the seat of the arbitration was designated as Mumbai, it would carry with it the fact that courts at Mumbai alone would have jurisdiction over the arbitration process. The second reason given was that in any case, following the *Hakam Singh* [*Hakam Singh* v. *Gammon (India) Ltd.*, (1971) 1 SCC 286] principle, where more than one court can be said to have jurisdiction, the agreement itself designated the Mumbai courts as having exclusive jurisdiction. It is thus wholly incorrect to state that *Indus Mobile Distribution (P) Ltd.* [*Indus Mobile Distribution (P) Ltd.* v. *Datawind Innovations (P) Ltd.*, (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760] has a limited *ratio decidendi* contained in para 20 alone, and that para 19, if read by itself, would run contrary to the 5-Judge Bench decision in *BALCO* [*BALCO* v. *Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]
>
> **59.** Equally incorrect is the finding in *Antrix Corpn. Ltd.* [*Antrix Corpn. Ltd.* v. *Devas Multimedia (P) Ltd.*, 2018 SCC OnLine Del 9338] that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one court exclusively. This is why the section begins with a *non obstante* clause, and then goes on to state "…*where with respect to an arbitration agreement any application under this part has been made in a court*…" It is obvious that the application made under this part to a court must be a court which has

[6] (2017) 7 SCC 678

[7] (2020) 5 SCC 462

> jurisdiction to decide such application. The subsequent holdings of this court, that where a seat is designated in an agreement, the courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the court where the seat is located, and that court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a court in which a part of the cause of action arises would then be the exclusive court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled."

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

> "**82.** On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings "shall be held" at a particular venue would also

> indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a clause designates a "seat" of the arbitral proceedings. In an international context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration."

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

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

before it that since the seat of arbitration became Ahmedabad, it would be the courts situate there which would have the jurisdiction to try the Section 34 petition.

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

> "**13.** This case would show that the moment the seat is chosen as Ahmedabad, it is akin to an exclusive jurisdiction clause, thereby vesting the courts at Ahmedabad with exclusive jurisdiction to deal with the arbitration. However, learned counsel for the Respondent referred to and relied upon paragraphs 49 and 71 of the aforesaid judgment. Paragraph 49 only dealt with the aspect of concurrent jurisdiction as dealt with in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 ["*BALCO*"] which does not arise on the facts of the present case. Paragraph 71 is equally irrelevant, in that, it is clear that the parties have, by mutual agreement, entered into an agreement to substitute the venue at Jaipur with Ahmedabad as the place/seat of arbitration under Section 20(1) of the Arbitration and Conciliation Act, 1996.
>
> **17.** The reliance placed by learned counsel for the Respondent on *Indus Mobile* (supra), and in particular, on paragraphs 18 and 19 thereof, would also support the Appellant's case, inasmuch as the "venue" being shifted from Jaipur to Ahmedabad is really a shifting of the venue/place of arbitration with reference to Section 20(1), and not with reference to Section 20(3) of the Arbitration and Conciliation Act, 1996, as it has been made clear that Jaipur does not continue to be the seat of arbitration and Ahmedabad is now the seat designated by the parties, and not a venue to hold meetings. The learned arbitrator has recorded that by mutual agreement, Jaipur as a "venue" has gone and has been replaced by Ahmedabad. As clause 8.5 of the Purchase Order must be read as a whole, it is not possible to accept the submission of Shri Malkan that the jurisdiction of Courts in Rajasthan is independent of the venue being at Jaipur. The two clauses must be read together as the Courts in Rajasthan have been vested with jurisdiction only because the seat of arbitration was to be at Jaipur. Once the seat of arbitration is replaced by mutual agreement to be at Ahmedabad,

> the Courts at Rajasthan are no longer vested with jurisdiction as exclusive jurisdiction is now vested in the Courts at Ahmedabad, given the change in the seat of arbitration."

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

22. In the considered opinion of this Court, the decision in **Inox Renewables**, would not come to the aid of the petitioners for reasons which follow. Firstly, in **Inox Renewables** it was found on facts that the parties had mutually proceeded to designate Ahmedabad as the seat of arbitration. The parties had thus virtually amended the original clause in the agreement. It was in the aforesaid light that the Supreme Court came to hold that Ahmedabad was liable to be recognised as being the juridical seat of arbitration. Secondly, the Court in the present batch is additionally faced with a venue restriction clause which stands encompassed in Clause 22. The seat of arbitration is thus to be found on a conjoint reading of Clauses 22 and 47.11.

23. As this Court views the two clauses in question, it is apparent that while Noida/Delhi stood designated as the venues where arbitral proceedings could be conducted, the parties had unambiguously

resolved to confer exclusive jurisdiction on the Noida courts with respect to the filing of the award and all judicial proceedings. Clause 22 would thus clearly appear to override the provisions of Clause 47.11. It would be pertinent to recall that Clause 22 in unambiguous terms stipulated that Noida courts *"only"* would be the forum *"for filing the award of the arbitration and for any other judicial proceedings"*. Clause 47.11 on the other hand describes Noida/Delhi to be the *"venue of the arbitration proceedings"*. There thus appears to be a clear and manifest intent to restrict all challenges emanating from the award or for that matter the arbitral proceedings to the courts at Noida only.

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

specifies a venue of arbitration proceedings, it would have to be presumed that the venue is essentially the seat of the arbitration.

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

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

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.**[8], 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

[8] (2013) 9 SCC 32

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 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 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
>
> (*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.
>
> **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:
>
> '**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:

> (*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, 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:

'*… 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.
>
> **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.
>
> **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 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.

32. Accordingly, and for all the aforesaid reasons, these petitions are held to be not maintainable before this Court. They shall consequently stand dismissed and returned with liberty and right reserved to the petitioners to approach the competent court at Gautumbudh Nagar in the State of Uttar Pradesh.

YASHWANT VARMA, J.

JANUARY 17, 2023
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