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

\+ O.M.P. (COMM) 122/2023

BCC DEVELOPERS AND PROMOTERS PVT. LTD.
.....Petitioner

Through: Mr. Rahul Malhotra, Adv.

versus

UNION OF INDIA .....Respondent

Through: Mr. Mukul Singh, CGSC with Ms. Ira Singh, Adv

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER (ORAL)

% 02.09.2024

1. This order decides an objection, by the respondent, recorded in para 12 of the order dated 26 April 2024 passed in the present proceedings, that this Court lacks the territorial jurisdiction to entertain the present petition.

2. Learned Counsel for the respondent contends that, as Case No. 210/2022 has been filed by the respondent under Section 34 of the Arbitration and Conciliation Act 1996[1] before the Commercial Court at Bhopal, challenging the impugned award, the present petition would have to be preferred before that court in view of Section 42[2] of the 1996 Act.

[1] "the 1996 Act", hereinafter

[2] **42. Jurisdiction**. – Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no

3. Mr. Malhotra, learned Counsel for the petitioner, contests this stand. He places reliance on para 1.12 of the order dated 5 February 2020 passed by the arbitral tribunal which records as under:

> "1.12 The both Claimant and the Respondent agreed-
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> (i) Procedure to be followed - the arbitrator may conduct the proceedings in the manner it considered appropriate.
>
> (ii) *Place of Arbitration is decided at Delhi and the Venue of Arbitration shall be Delhi/Bhopal*."

4. Mr. Malhotra cites the judgment of the Supreme Court in ***BBR (India) Pvt Ltd v S P Singla Constructions Pvt Ltd***[3], in the context of Section 20[4] of the 1996 Act, to contend that, once the place of arbitration was fixed at Delhi, Delhi became the arbitral seat and, therefore, supervisory jurisdiction over the arbitral proceedings could be exercised only by this Court. The fact that Bhopal was also fixed as one of the venues of arbitration is, he submits, immaterial.

5. He has drawn my attention to paras 15 to 19 and paras 35 to 38 of ***BBR (India) Pvt Ltd***, which read thus:

> "15. Interpretation of the term "court", as defined in clause (e) to sub-section (1) of Section 2[5] of the Act, had come up for

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other Court.

[3] **(2023) 1 SCC 693**

[4] **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.

[5] (e) "Court" means—
(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;

consideration before a Constitutional Bench of five Judges in ***Balco v Kaiser Aluminium Technical Services Inc***[6], (for short "***Balco case***") which decision had examined the distinction between "jurisdictional seat" and "venue" in the context of international arbitration, to hold that *the expression "seat of arbitration" is the centre of gravity in arbitration.* However, this does not mean that all arbitration proceedings must take place at "the seat". The arbitrators at times hold meetings at more convenient locations. Regarding the expression "court", it was observed that Section 2(2) of the Act does not make Part I applicable to arbitrations seated outside India. The expressions used in Section 2(2) of the Act do not permit an interpretation to hold that Part I would also apply to arbitrations held outside the territory of India.

16. Noticing the above interpretation, a three-Judge Bench of this Court in ***BGS SGS Soma JV v NHPC Ltd***[7], has observed that the expression "subject to arbitration" used in clause (e) to sub-section (1) of Section 2 of the Act cannot be confused with the "subject-matter of the suit". The term "subject-matter of the suit" in the said provision is confined to Part I. The purpose of the clause is to identify the courts having supervisory control over the judicial proceedings. Hence, the clause refers to a court which would be essentially a court of "the seat" of the arbitration process. Accordingly, clause (e) to sub-section (1) of Section 2 has to be construed keeping in view the provisions of Section 20 of the Act, which are, in fact, determinative and relevant when we decide the question of "the seat of an arbitration". This interpretation recognises the principle of "party autonomy", which is the edifice of arbitration. In other words, the term "court" as defined in clause (e) to sub-section (1) of Section 2, which refers to the "subject-matter of arbitration", is not necessarily used as finally determinative of the court's territorial jurisdiction to entertain proceedings under the Act.

17. In ***BGS SGS Soma***, this Court observed that any other construction of the provisions would render Section 20 of the Act nugatory. In view of the Court, the legislature had given jurisdiction to two courts: the court which should have jurisdiction where the cause of action is located; and the court where the arbitration takes place. This is necessary as, on some occasions, the agreement may provide the "seat of arbitration" that would be neutral to both the parties. The courts where the arbitration takes

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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 decrees of courts subordinate to that High Court;

[6] **(2012) 9 SCC 552**

[7] **(2020) 4 SCC 234: (2020) 2 SCC (Civ) 606**

place would be required to exercise supervisory control over the arbitral process. The "seat of arbitration" need not be the place where any cause of action has arisen, in the sense that the "seat of arbitration" may be different from the place where obligations are/had to be performed under the contract. In such circumstances, both the courts should have jurisdiction viz. the courts within whose jurisdiction "the subject-matter of the suit" is situated and the courts within whose jurisdiction the dispute resolution forum, that is, where the Arbitral Tribunal is located.

18. Turning to Section 20 of the Act, sub-section (1) in clear terms states that the parties can agree on the place of arbitration. The word "free" has been used to emphasise the autonomy and flexibility that the parties enjoy to agree on a place of arbitration which is unrestricted and need not be confined to the place where the "subject-matter of the suit" is situated. *Sub-section (1) to Section 20 gives primacy to the agreement of the parties by which they are entitled to fix and specify "the seat of arbitration", which then, by operation of law, determines the jurisdictional court that will, in the said case, exercise territorial jurisdiction. Sub-section (2) comes into the picture only when the parties have not agreed on the place of arbitration as "the seat"*. In terms of sub-section (2) of Section 20 the Arbitral Tribunal determines the place of arbitration. The Arbitral Tribunal, while doing so, can take into regard the circumstances of the case, including the convenience of the parties. *Sub-section (3) of Section 20 of the Act enables the Arbitral Tribunal, unless the parties have agreed to the contrary, to meet at any place to conduct hearing at a place of convenience in matters, such as consultation among its members, for the recording of witnesses, experts or hearing parties, inspection of documents, goods, or property.*

19. Relying upon the Constitutional Bench decision in ***Balco***, in ***BGS SGS Soma*** *it has been held that sub-section (3) of Section 20 refers to "venue" whereas the "place" mentioned in sub-section (1) and sub-section (2) refers to the "jurisdictional seat"*. To explain the difference, in ***Balco***, a case relating to international arbitration, reference was made to several judgments, albeit the judgment in ***Shashoua v. Sharma***[8] was extensively quoted to observe that an agreement as to the "seat of arbitration" draws in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause[9]. The parties that have agreed to "the seat" must challenge an interim or final award only in the courts of the place designated as the "seat of arbitration". In other words, the choice of the "seat of arbitration" must be the choice of a forum/court for remedies seeking to attack the award.

[8] **2009 EWHC 957 [Comm]**

[9] ***C v. D*, 2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)**

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35. We have quoted Section 42 of the Act. Section 42 was also examined in ***BGS SGS Soma*** and the view expressed by the Delhi High Court in ***Antrix Corpn Ltd v Devas Multimedia (P) Ltd***[10] was overruled observing that the Section 42 is meant to avoid conflicts of jurisdiction of courts by placing the supervisory jurisdiction over all arbitration proceedings in connection with the arbitration proceedings with one court exclusively. The aforesaid observation supports our reasoning that once the jurisdictional "seat" of arbitration is fixed in terms of sub-section (2) of Section 20 of the Act, then, without the express mutual consent of the parties to the arbitration, "the seat" cannot be changed. Therefore, the appointment of a new arbitrator who holds the arbitration proceedings at a different location would not change the jurisdictional "seat" already fixed by the earlier or first arbitrator. The place of arbitration in such an event should be treated as a venue where arbitration proceedings are held.

36. We would now reproduce para 59 of the judgment in ***BGS SGS Soma***, which examines Section 42 of the Act and reads as under:

> "59. Equally incorrect is the finding in ***Antrix Corpn*** that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one court exclusively. This is why the section begins with a non obstante clause, and then goes on to state '… *where with respect to an arbitration agreement any application under this Part has been made in a court*…'. *It is obvious that the application made under this Part to a court must be a court which has jurisdiction to decide such application. The subsequent holdings of this court, that where a seat is designated in an agreement, the courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the court where the seat is located, and that court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless.* Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several courts where a part of

[10] **2018 SCC OnLine Del 9338**

> 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[11] and Delhi[12] High Courts in this regard is incorrect and is overruled."

37. We have already referred to the first few sentences of the aforementioned paragraph and explained the reasoning in the context of the present case. The paragraph in ***BGS SGS Soma*** also explains the non obstante effect as incorporated in Section 42 to hold that *it is evident that the application made under Part I must be to a court which has a jurisdiction to decide such application. Where "the seat" is designated in the agreement, the courts of "the seat" alone will have the jurisdiction. Thus, all applications under Part I will be made in the court where "the seat" is located as that court would alone have jurisdiction over the arbitration proceedings and all subsequent proceedings arising out of the arbitration proceedings.* The quotation also clarifies that when either no "seat" is designated by an 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. An application under Section 9 of the Act may be preferred before the court in which a part of cause of action arises in the case where parties had not agreed on the "seat of arbitration". This is possible in the absence of an agreement fixing "the seat", as an application under Section 9 may be filed before "the seat" is determined by the Arbitral Tribunal under Section 20(2) of the Act. Consequently, in such situations, the court where the earliest application has been made, being the court in which a part or entire of the cause of action arises, would then be the exclusive court under Section 42 of the Act. Accordingly, such a court would have control over the arbitration proceedings.

38. Section 42 is to no avail as it does not help the case propounded by the appellant, as in the present case the arbitrator had fixed the jurisdictional "seat" under Section 20(2) of the Act

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[11] ***Nivaran Solutions v Aura Thia Spa Services (P) Ltd, 2016 SCC OnLine Bom 5062, Konkola Copper Mines v Stewarts & Lloyds of India Ltd, 2013 SCC OnLine Bom 777***

[12] **Antrix Corpn**

> before any party had moved the court under the Act, being a court where a part or whole of the cause of action had arisen. The appellant had moved the Delhi High Court under Section 34 of the Act after the Arbitral Tribunal vide the order dated 5-8-2014 had fixed the jurisdictional "seat" at Panchkula in Haryana. Consequently, the appellant cannot, based on the fastest finger first principle, claim that the courts in Delhi get exclusive jurisdiction in view of Section 42 of the Act. The reason is simple that before the application under Section 34 was filed, the jurisdictional "seat" of arbitration had been determined and fixed under sub-section (2) of Section 20 and thereby, the courts having jurisdiction over Panchkula in Haryana, have exclusive jurisdiction. The courts in Delhi would not get jurisdiction as the jurisdictional "seat of arbitration" is Panchkula and not Delhi."

6. The position of law that emerges from paras 15 to 19 and 35 to 38 of ***BBR (India) Pvt Ltd***, which in turn relies on the well known decision of the Supreme Court in ***BGS SGS Soma JV***, is clear. Sub-sections (1) and (2) of Section 20 refer to the "seat" of arbitration, whereas sub-section (3) refers to the "venue". Where a particular place is fixed as the place of arbitration, it becomes the arbitral seat, as the reference to place of arbitration is to be found only in sub-sections (1) and (2) of Section 20 and not in sub-section (3).

7. Thus, even if any place is fixed as venue of arbitration, that would be relatable to Section 20(3) and would not determine the arbitral seat. It is only if no place or seat of arbitration is fixed that the venue of arbitration could be treated as the seat of arbitration. Para 1.12 of the order dated 5 February 2020 of the arbitral tribunal clearly fixes the seat of arbitration as Delhi. By application of the judgment of the Supreme Court in ***BBR (India) Pvt Ltd***, therefore, Delhi becomes the arbitration seat.

8. This Court, therefore, has the territorial jurisdiction to entertain

the present petition, whereas the commercial court at Bhopal would not possess such jurisdiction, as Bhopal is merely an alternate venue of arbitration.

9. Once Delhi has been fixed as venue of arbitration and, therefore, is the arbitral seat, the fact that Bhopal is one of the venues of the arbitration is not material to the aspect of determination of the court which could exercise supervisory jurisdiction over the arbitral proceedings.

10. The above extracted passages from ***BBR (India) Pvt Ltd*** also answer the respondent's contention regarding Section 42 of the 1996 Act. Section 42 applies only where the Court which is first approached *is a Court having jurisdiction.* In that event, even if other Courts also have jurisdiction, further proceedings would have to be before the first Court. At the same time, if the arbitral seat has been fixed or determined, all proceedings, including the first, have thereafter only to be preferred before the Court having jurisdiction over the arbitral seat. No other Court can be approached for any orders in respect of the arbitral proceedings.

11. If a party approaches a court which does not possess territorial jurisdiction, such a misdirected approach cannot be used as a basis to invoke Section 42 and plead that all further proceedings should take place before that court, which is *coram non judice.* Where, however, there are two or more courts which possess territorial jurisdiction, and one of the courts is approached in the first instance in respect of the arbitral proceedings, Section 42 requires all further proceedings to be

instituted before that Court – subject to the condition that, where there is a determined arbitral seat, that Court must be the Court within whose territorial jurisdiction that arbitral seat is located.

12. In the present case, Delhi was fixed as the "place of arbitration" which, in the absence of any other stipulation regarding the arbitral seat, determines Delhi as the seat of arbitration. Courts at Delhi, and courts at Delhi alone would, therefore, be competent to deal with matters relating to the arbitral proceedings.

13. Inasmuch as the Commercial Court at Bhopal would have no supervisory territorial jurisdiction over the arbitral proceedings, the fact that respondent has filed a Section 34 petition before the commercial courts at Bhopal cannot denude this Court of territorial jurisdiction in the matter.

14. Accordingly, the objection regarding territorial jurisdiction is rejected.

15. List for disposal at the end of the Board on 18 November 2024.

16. Both sides are directed to place on record short notes of their respective submissions not exceeding six pages each after exchanging copies with each other, at least a week in advance of the next date of hearing.

17. The submissions of the petitioner should precisely set out

(i) the exact nature of the dispute in controversy,

(ii) the findings of the learned arbitrator, claim/counter claim wise, with which the petitioner is aggrieved,

(iii) and the reasoning of the learned Arbitral Tribunal in arriving at the said decision and

(iv) why this Court should interfere with the decision given the parameters of Section 34 of the 1996 Act.

C. HARI SHANKAR, J

SEPTEMBER 2, 2024
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Click here to check corrigendum, if any