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

\+ O.M.P. (COMM) 248/2023, I.A. 12798/2023 & I.A.12801/2023

M/S GRAND MOTORS SALES AND SERVICES PVT LTD .....Petitioner

Through: Mr. Kuriakose Varghese, Mr. V. Shyamohan, Mr. Abir Phukan and Mr. Akshat Gogna, Advs.

versus

M/S VE COMMERCIAL VEHICLES LTD. .....Respondent

Through: Ms. Gunjan Sinha Jain, Ms. Mann Bajaj and Ms. Aparna Gupta, Advs.

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

ORDER (ORAL)

% 09.09.2024

1. In earlier orders passed in this matter, the Court has flagged the objection of territorial jurisdiction raised by Ms. Gunjan Sinha Jain, learned Counsel for the respondent.

2. Accordingly, I have heard the learned Counsel for both sides on the aspect of territorial jurisdiction, which I propose to decide by the present order.

3. The present petition has been preferred under Section 34 of the Arbitration and Conciliation Act, 1996[1]. It challenges an arbitral award dated 31 December 2022.

4. The dispute between the parties, which stands decided by the impugned award, arose in the contest of a Dealership Agreement dated 1 April 2017, which, in clause 32, envisaged resolution of dispute by arbitration:

> "32) DISPUTE RESOLUTION AND JURISDICTION
>
> The parties hereto shall endeavour to settle by mutual conciliation any claim, dispute, or controversy ("Dispute") arising out of, or in relation to, this Agreement, including any Dispute with respect to the existence or validity hereof, the interpretation hereof, the activities performed hereunder, or the breach hereof. Any Dispute which cannot be so resolved through such conciliation within 30 days or such extended period as the parties may agree, shall be finally settled under the provisions of the Indian Arbitration and Conciliation Act, 1996 and Rules made there under and any statutory amendments/modifications thereof, in Delhi. *The seat of arbitration shall always be at Delhi. The courts of Indore shall have exclusive jurisdiction in all matters arising under this Agreement*."
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> (Emphasis supplied)

5. Plainly, Section 32 fixes the seat of arbitration as Delhi, even while granting exclusive jurisdiction to courts at Indore "in all matters arising under" the Dealership Agreement.

6. The issue that arises for consideration is as to which court would, in the circumstances, exercise supervisory jurisdiction over the arbitral proceedings.

7. Ms. Jain points out that the arbitral tribunal, in the present case, was constituted by an order dated 13 May 2020 passed by the Indore Bench of the High Court of Madhya Pradesh, which examined the aspect of territorial jurisdiction. She seeks to submit that, before the High Court of Madhya Pradesh, the petitioner had specifically

[1] "the 1996 Act", hereinafter

asserted that, as the arbitration agreement between the parties fixed the seat of arbitration as Delhi, the High Court of Madhya Pradesh would have no territorial jurisdiction to deal with the matter. This submission has been noted by the High Court of Madhya Pradesh in paragraph 3 of its judgment, thus:

> "3/ The respondents have filed their reply taking the stand that the notice dated 25.5.2018 for terminating the dealership agreement was duly replied and detailed response was sent by email dated 15.6.2018 and since there was no response to the said reply, therefore, it can be inferred that the allegation made therein stood withdrawn. A further stand has been taken that the applicant has not adhered to the terms of the agreement and that this Court has no jurisdiction to entertain the application under Section 11 (5) of the Act, as by the agreement the seat of arbitration has been fixed by the parties at Delhi. An objection has also been raised that no cause of action has arisen within the territorial jurisdiction of this Court and no case for appointment of arbitrator is made out."

8. The High Court of Madhya Pradesh deals with the aspect of territorial jurisdiction thus:

> "8/ It is not in dispute that the dealership agreement dated 1.4.2017 containing the arbitration clause was executed between the parties. Clause 32 of the agreement relating to resolution of dispute through arbitration as also jurisdiction reads as under:-
>
> > "32. Dispute Resolution and Jurisdiction
> > The parties hereto shall endeavor to settle by mutual conciliation any claim, dispute, or controversy ("Dispute") arising out of, or in relation to, this Agreement, including any Dispute with respect to the existence or validity hereof, the interpretation hereof, the activities performed hereunder, or the breach hereof. Any Dispute which cannot be so resolved through such conciliation within 30 days or such extended period as the parties may agree, shall be finally settled under the provisions of the Indian Arbitration and Conciliation Act, 1996 and Rules made thereunder and any statutory amendments/modifications thereof, in Delhi. The seat of arbitration shall always be at Delhi. The Courts of Indore shall have exclusive jurisdiction in all matters arising under the Agreement."
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> 9/ A bare reading of the aforesaid clause reveals that the parties

had mutually agreed that the courts of Indore shall have exclusive jurisdiction in all matters arising under the agreement. So far as the mention that "the seat of arbitration shall always be at Delhi" in the arbitration clause is concerned, the word "seat" has been used in this clause in reference to the place of holding the sitting of the arbitration tribunal and not for determining the jurisdiction of the Court.

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13/ The Supreme Court in the matter of ***Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Inc.***[2] has taken note of the judgment in the case of ***NAVIERA***[3] and ***ALFRED***[4] in this regard as under:-

> "104.The Court in ***NAVIERA*** case also recognized the proposition that "there is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y". But it points out that in reality parties would hardly make such a decision as it would create enormous unnecessary complexities. Finally it is pointed out that it is necessary not to confuse the legal "seat" of an arbitration with the geographically convenient place or places for holding hearings.
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> 105. On examination of the facts in that case, the Court of Appeal observed that there is nothing surprising in concluding that these parties intended that any dispute under this policy, should be arbitrated in London. But it would always be open to the Arbitral Tribunal to hold hearings in Lima Peru if this were thought to be convenient, even though the seat or forum of the arbitration would remain in London.
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> 106. A similar situation was considered by the High Court of Justice Queen's Bench Division Technology and Construction Court in ***ALFRED*** *(supra).* In this case the Court considered two applications relating to the First Award of an arbitrator. The award related to an EPC (Engineering, Procurement and Construction) Contract dated 4th November, 2005 ("the EPC Contract") between the Claimant ("the Employer") and the Defendant ("the Contractor") whereby the Contractor undertook to carry out works in connection with the provision of 36 wind turbine generators (the "WTGs") at a site some 18 kilometres from Stirling in Scotland. This award dealt with enforceability of the clauses of the EPC Contract which provided for

[2] **(2012) 9 SCC 552**

[3] **Naviera Amazonica Peruana S.A. v Compania Internacional de Seguros del Peru, [1988] 1 Lloyd's Rep.116**

[4] **Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd, [2008] 2 All ER (Comm) 493 : [2008] 1 Lloyd's Rep 608**

liquidated damages for delay. The claimant applied for leave to appeal against this award upon a question of law whilst the Defendant sought, in effect, a declaration that the Court had no jurisdiction to entertain such an application and for leave to enforce the award. The Court considered the issue of jurisdiction which arose out of application of Section 2 of the (English) Arbitration Act, 1996 which provides that - "2. Scope of application of provisions.-(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland."
106.1. The Court notices the singular importance of determining the location of "juridical seat" in terms of Section 3, for the purposes of Section 2, in the following words:-

"I must determine what the parties agreed was the "seat" of the arbitration for the purposes of Section 2 of the Arbitration Act 1996. This means by Section 3 what the parties agreed was the "juridical" seat. The word "juridical" is not an irrelevant word or a word to be ignored in ascertaining what the "seat" is. It means and connotes the administration of justice so far as the arbitration is concerned. It implies that there must be a country whose job it is to administer, control or decide what control there is to be over an arbitration." 106.2. Thus, it would be evident that if the "juridical seat" of the arbitration was in Scotland, the English Courts would have no jurisdiction to entertain an application for leave to appeal. The Contractor argued that the seat of the arbitration was Scotland whilst the Employer argued that it was England. There were to be two contractors involved with the project.
106.3. The material Clauses of the EPC Contract were:
1.4.1. The Contract shall be governed by and construed in accordance with the laws of England and Wales and, subject to Clause 20.2 (Dispute Resolution), the Parties agree that the courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with the contract.
a) ... any dispute or difference between the Parties to this Agreement arising out of or in connection with this Agreement shall be referred to arbitration.
b) Any reference to arbitration shall be to a single arbitrator... and conducted in accordance with the Construction Industry Model Arbitration Rules February 1998 Edition, subject to this Clause (Arbitration Procedure)...
c) This arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow, Scotland. Any

such reference to arbitration shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act, 1996 or any statutory re-enactment."

106.4. The Arbitration was to be conducted under the Arbitration Rules known colloquially as the "CIMAR Rules". Rule 1.1 of the Rules provided that:

"These Rules are to be read consistently with the Arbitration Act 1996 (the Act), with common expressions having the same meaning." Rule 1.6 applied:

a) a single arbitrator is to be appointed, and

b) the seat of the arbitration is in England and Wales or Northern Ireland.

106.5. The court was informed by the parties in arguments that Scottish Court's powers of control or intervention would be, at the very least, seriously circumscribed by the parties' agreement in terms as set out in paragraph 6 of the judgment. It was further indicated by the counsel that the Scottish Court's powers of intervention might well be limited to cases involving such extreme circumstances as the dishonest procurement of an award.

106.6. In construing the EPC, the court relied upon the principles stated by the Court of Appeal in ***NAVIERA*** *(supra).*

106.7. Upon consideration of the entire material, the Court formed the view that it does have jurisdiction to entertain an application by either party to the contract in question under Section 69 of the (English) Arbitration Act, 1996. The court gave the following reasons for the decision:-

(a) One needs to consider what, in substance, the parties agreed was the law of the country which would juridically control the arbitration.

(b) I attach particular importance to Clause 1.4.1. The parties agreed that essentially the English (and Welsh) Courts have "exclusive jurisdiction" to settle disputes. Although this is "subject to" arbitration, it must and does mean something other than being mere verbiage. It is a jurisdiction over disputes and not simply a court in which a foreign award may be enforced. If it is in arbitration alone that disputes are to be settled and the English Courts have no residual involvement in that process, this part of Clause 1.4.1 is meaningless in practice. The use of the word "jurisdiction" suggests some form of control.

(c) The second part of Clause 1.4.1 has some real meaning if the parties were agreeing by it that, although the agreed disputes resolution process is arbitration, the parties agree that the English Court retains such jurisdiction to address those disputes as the law of England and Wales permits. The Arbitration Act, 1996 permits and requires the Court to

entertain applications under Section 69 for leave to appeal against awards which address disputes which have been referred to arbitration. By allowing such applications and then addressing the relevant questions of law, the Court will settle such disputes; even if the application is refused, the court will be applying its jurisdiction under the Arbitration Act, 1996 and providing resolution in relation to such disputes.

(d) This reading of Clause 1.4.1 is consistent with Clause 20.2.2 (c) which confirms that the arbitration agreement is subject to English Law and that the "reference" is "deemed to be a reference to arbitration within the meaning of the Arbitration Act, 1996." This latter expression is extremely odd unless the parties were agreeing that any reference to arbitration was to be treated as a reference to which the Arbitration Act, 1996 was to apply. There is no definition in the Arbitration Act, 1996 of a "reference to arbitration", which is not a statutory term of art. The parties presumably meant something in using the expression and the most obvious meaning is that the parties were agreeing that the Arbitration Act, 1996 should apply to the reference without qualification.

(e) Looked at in this light, the parties' express agreement that the "seat" of arbitration was to be Glasgow, Scotland must relate to the place in which the parties agreed that the hearings should take place. However, by all the other references the parties were agreeing that the curial law or law which governed the arbitral proceedings establish that, prima facie and in the absence of agreement otherwise, the selection of a place or seat for an arbitration will determine what the curial law or "lex fori" or "lex arbitri" will be, we consider that, where in substance the parties agree that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing or controlling law will be.

(f) In the context of this particular case, the fact that, as both parties seemed to accept in front of me, the Scottish Courts would have no real control or interest in the arbitral proceedings other than in a criminal context, suggests that they can not have intended that the arbitral proceedings were to be conducted as an effectively "delocalized" arbitration or in a "transnational firmament", to borrow Lord Justice Kerr's words in the ***NAVIERA*** case.

(g) The CIMAR Rules are not inconsistent with my view. Their constant references to the Arbitration Act, 1996 suggest that the parties at least envisaged the possibility that the Courts of England and Wales might play some part in

policing any arbitration. For instance, Rule 11.5 envisages something called "the Court" becoming involved in securing compliance with a peremptory order of the arbitrator. That would have to be the English Court, in practice."

114. These observations clearly demonstrate the detailed examination which is required to be undertaken by the court to discern from the agreement and the surrounding circumstances the intention of the parties as to whether a particular place mentioned refers to the "venue" or "seat" of the arbitration. In that case, the Court, upon consideration of the entire material, concluded that Glasgow was a reference to the "venue" and the "seat" of the arbitration was held to be in England. Therefore, there was no supplanting of the Scottish Law by the English Law, as both the seat under Section 2 and the "juridical seat" under Section 3, were held to be in England. Glasgow being only the venue for holding the hearings of the arbitration proceedings. The Court rather reiterated the principle that the selection of a place or seat for an arbitration will determine what the "curial law" or "lex fori" or "lex arbitri" will be. It was further concluded that where in substance the parties agreed that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing law or controlling law will be. In view of the above, we are of the opinion that the reliance placed upon this judgment by Mr.Sundaram is wholly misplaced."

14/ In the case of ***BE Simoese Von Staraburg, Niendenthal Vs. Chattisgarh Investment Ltd.***[5] the clause in the agreement was "the Court at Goa shall have exclusive jurisdiction". The Hon'ble Supreme Court considering the aforesaid clause held that jurisdiction of all other courts is excluded and the Court at Goa will have the exclusive jurisdiction.

15/ In the case of ***Indus Mobile Distribution Private Limited Vs. Datawind Innovations Pvt. Ltd. and others***[6] though the Court has taken the view that an agreement as to the Seat of an Arbitration is analogous to an exclusive jurisdiction clause but for the purpose of determining the Seat of Arbitration entire arbitration clause is required to be read as a whole.

16/ In the case of ***Emkay Global Financial Services Ltd. Vs.***

[5] **(2015) 12 SCC 225**
[6] **(2017) 7 SCC 678**

Girdhar Sondhi[7] though the sitting of the arbitration proceedings were held at Delhi, but in the arbitration clause exclusive jurisdiction was given to the courts in Mumbai, therefore, the Hon'ble Supreme court taking note of the exclusive jurisdiction clause has held that the Court at Mumbai alone will have the jurisdiction.

17/ Same issue as involved in the present case came up for consideration before the Bombay High Court in the matter of ***Aniket SA Investments LLC Vs. Janapriya Engineers Syndicate Pvt. Ltd.***[8] wherein the arbitration clause provided that the Courts of Hyderabad will have exclusive jurisdiction to try and entertain the dispute arising out of the agreement and at the same time it has provided that the Seat of Arbitration proceeding will be Mumbai. The Bombay High Court considering the principle of Party Autonomy and also taking note of the words "Seat" and "Venue" are interchangeably used and true intention of the Party is required to be derived from the combined reading of the clauses and inferring the real meaning of the parties intended to attribute from a holistic reading of these clauses. Applying the above principle, Mumbai High Court held that the Courts at Hyderabad would have exclusive jurisdiction to entertain the petition and the parties agreeing to the Seat of Arbitration to be at Mumbai would be required to be accepted as Venue of the arbitration and the said Clause cannot be held to be a clause conferring jurisdiction on the Court at Mumbai.

18/ Similar issue also came up before the Delhi High Court in the case of ***Virgo Softech Ltd. Vs. National Institute of Electronics and Information Technology***[9] wherein the Arbitration clause provided that the arbitration proceedings shall be held in New Delhi and it also contain a Clause that the Court in Aurangabad only shall have exclusive jurisdiction to try and entertain any dispute arising there from. The Clause relating to holding the proceedings in New Delhi is held to be a Clause providing for Venue of arbitration at New Delhi and it has been held that the Court at Aurangabad were conferred exclusive jurisdiction. Against this judgment of the Delhi High Court SLP(Civil) No.5063-5064/19 was dismissed by the Hon'ble Supreme Court by order dated 25/3/2019.

19/ Having examined the arbitration clause in the light of the aforesaid pronouncements and considering the Arbitration Clause as a whole, it is clear that the parties has conferred exclusive jurisdiction to the Indore Court and the intention of the parties was

[7] **(2018) 9 SCC 49**
[8] **2019 SCC Online Bombay 3187**
[9] **2018 SCC Online Delhi 12723**

to have venue or place of sitting at Delhi without conferring any jurisdiction to the Court at Delhi.

20/ The material on record also reveals that part of cause of action arose within the territorial jurisdiction of this Court. The uncontroverted plea of the applicant in the rejoinder is that as per the dealership agreement, the ETB products were to be delivered from the workshop of the applicant at Pithampur, District Dhar. The invoices for supply of ETB products were also raised from Pithampur by the applicant to the respondent. Upon the delivery of the consignment, the respondent was required to make payment in advance for the ETB products, either by cheque or cash or by bank draft or by an irrevocable bank guarantee payable at Pithampur. Therefore, the place of payment due and payable was fixed which is within the territorial jurisdiction of this Court. The respondent in way bill/e-consignment declaration filed before the Kerala Commercial Taxes Department had mentioned that the name and address of supplier was VE Commercial Vehicles Limited and 102, Industrial Area, Plot No.1, Pithampur. The invoices delivery and payment with respect to ETB product was required to be done from Pithampur. The price was also payable within the jurisdiction of this Court. The aforesaid facts also reveal that part of cause of action had arisen within the territorial jurisdiction of this Court, hence this Court has territorial jurisdiction."

9. There can be no manner of doubt that the High Court of Madhya Pradesh negated the petitioner's objection on the ground of territorial jurisdiction and held that it possessed the requisite jurisdiction to deal with the matter and appoint an arbitrator.

10. Ms. Jain points out that the petitioner challenged the judgment of the High Court of Madhya Pradesh before the Supreme Court, which, by the following order passed on 5 August 2020, dismissed the SLP:

"The special leave petitions are dismissed.

Pending applications stand disposed of."

11. Ms. Jain submits that, thus, once the High Court of Madhya

Pradesh had exercised jurisdiction, albeit at the Section 11 stage, and the exercise of jurisdiction by the High Court stands upheld by the Supreme Court, the present petition would have to be preferred before the High Court of Madhya Pradesh and nowhere else.

12. On the attention of Ms. Jain being invited to the judgments of the Supreme Court in ***BGS SGS Soma JV v NHPC Ltd***[10] and ***BBR (India) Pvt Ltd v S P Singla Constructions Pvt Ltd***[11]**,** which hold that the court which could exercise curial or supervisory jurisdiction over the arbitral proceedings would have to be determined on the basis of the arbitral seat, Ms. Jain submits that these decisions changed the legal position which was in existence at the time of rendition of the judgment of High Court of Madhya Pradesh, and that the High Court of Madhya Pradesh did possess jurisdiction to decide the matter, as per the position of law as it existed at that date.

13. Ms. Jain submits that, even applying the principle of *res judicata*, the petitioner cannot seek to contend, in the present petition, that this Court would have territorial jurisdiction to deal with the matter.

14. I have heard learned Counsel for both sides and applied myself to the issue.

15. I am constrained to state, with greatest respect to the High Court of Madhya Pradesh, that the decision rendered by it on 13 May 2020

[10] **(2020) 4 SCC 234**
[11] **(2023) 1 SCC 693**

cannot be treated as laying down the correct principle in law, or even on facts.

16. The High Court of Madhya Pradesh has, in paragraph 19 of its judgment, observed that it was "clear that the parties has conferred exclusive jurisdiction to the Indore Court and the intention of the parties *was to have venue or place of sitting at Delhi* without conferring any jurisdiction to the Court at Delhi".

17. The observation that the parties had, in the arbitration agreement, fixed the venue or place of sitting at Delhi is clearly incorrect and contrary to the express terms of the Dealership Agreement, Clause 32 of which clearly and unequivocally states that "*the seat of arbitration* shall always be at Delhi".

18. The High Court of Madhya Pradesh, therefore, proceeded on an erroneous premise that the arbitration agreement between the petitioner and respondent fixed the *venue or place of sitting* at Delhi, whereas, in fact, it fixed *the seat of arbitration* at Delhi.

19. The distinction between the venue of arbitration and the seat of arbitration, and the *situs* of the court which could exercise curial jurisdiction over the arbitral proceedings where the venue and seat of arbitration, fixed by the contract, fall within the territorial jurisdiction of different Courts, is no longer *res integra*.

20. The Supreme Court has, in its decisions in ***BGS SGS Soma*** and ***BBR (India)*** authoritatively laid down the law with respect to the

court which would have curial territorial jurisdiction over arbitral proceedings. The Supreme Court has, in the said decisions, distinguished between sub-sections (1) and (2), on the one hand, and sub-section (3) of Section 20[12] of the 1996 Act, on the other. It has been held that, while sub-sections (1) and (2) of Section 20 deal with the seat of arbitration, sub-section (3) of Section 20 deals with the venue of arbitration. There is, thus, a well recognised distinction between the seat of arbitration and the venue of arbitration. ***BGS SGS Soma*** also holds that, where there is no other contractually fixed seat of arbitration, and the contract refers to a venue of arbitration, the venue may be treated as the seat.

21. In a recent decision in ***BCC Developers & Promoters Pvt Ltd v UOI***[13], I had the occasion to hold thus, following the judgment in ***BBR (India)*** which, in turn, cited ***BGS SGS Soma***:

> 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 of the Act, had come up for consideration before a Constitutional Bench of five Judges in ***Balco v. Kaiser Aluminium Technical Services Inc***[14], (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*

[12] **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.

[13] **2024 SCC OnLine Del 6181**

[14] **(2012) 9 SCC 552**

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***, has observed that the expression "subject to arbitration" used in clause (e) to subsection (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 "subjectmatter 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 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 subsection (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***[15] 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.

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[15] **2009 EWHC 957**

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.***[16] 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*

[16] **2018 SCC OnLine Del 9338**

> *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[17] and Delhi[18] 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

[17] **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**
[18] **Antrix Corporation**

> 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 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)***, which in turn relies on the well known decision of the Supreme Court in ***BGS SGS Soma***, is clear. Subsections (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)***, therefore, Delhi becomes the arbitration seat.

22. In the present case, there is a contractually fixed seat of arbitration, which is Delhi. Where there is such a contractually fixed seat of arbitration, the exclusive jurisdiction clause, which confers jurisdiction to courts at Indore would obviously not apply while determining the court which would have curial jurisdiction over the arbitral proceedings. In this connection, the Supreme Court has also distinguished between the court which would have jurisdiction over the subject matter of dispute in arbitration and the court which would have curial jurisdiction over the arbitral proceedings. The court having curial jurisdiction over the arbitral proceedings, which can exercise supervisory jurisdiction over the arbitral proceedings, which would include jurisdiction under Section 34 of the 1996 Act, is only the court which has territorial jurisdiction over the set of arbitration, where such seat is contractually fixed.

23. This position is by now fossilized in the law.

24. In that view of the matter, it is not possible for this Court to accept Ms. Jain's contention and hold that this court has no jurisdiction because the Indore Bench of High Court of Madhya Pradesh chose to exercise Section 11 jurisdiction in the matter. That exercise of jurisdiction, in the respectful opinion of this Court, was erroneous.

25. Insofar as the dismissal of the SLP preferred against the decision of the High Court of Madhya Pradesh is concerned, it is now settled that a mere dismissal of an SLP, especially where a dismissal is in *limine*, does not even amount to an approval of the decision of the

High Court. Neither does the Supreme Court, thereby, lend its imprimatur to the correctness of the decision of the High Court under challenge, nor does the decision of the High Court merge in the order passed by the Supreme Court. Suffice it to say that these principles are by now too well settled to merit reiteration; one may only, if one so desires, refer, for the purpose, to ***Kunhayammed v State of Kerala***[19], which is by now regarded as the authority on the point.

26. The dismissal of the SLP against the decision of the High Court of Madhya Pradesh is clearly a dismissal in *limine* with no expression of opinion on merits. It cannot, therefore, amount to a vindication of the decision of the High Court of Madhya Pradesh, so as to non-suit the petitioner from approaching this Court on the principle of *res judicata*.

27. In such circumstances, even Section 42 of the 1996 Act, cannot apply. The Supreme Court has held in ***BGS SGS Soma*** that, in order for Section 42 to apply, the court which is initially approached in the matter must possess jurisdiction. Section 42 cannot apply to perpetuate the erroneous exercise of jurisdiction by a forum which is *coram non judice*. If the court which is initially approached in connection with the arbitral proceedings does not possess the jurisdiction to deal with them, Section 42 cannot be pressed into service so as to confer that court with jurisdiction to deal with further matters relating to the said proceedings. Section 42, in other words, applies only where the court which is initially approached is a court having jurisdiction.

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[19] **(2000) 6 SCC 359**

28. In the present case, the order passed by the High Court of Madhya Pradesh cannot be treated as an order passed within lawful exercise of jurisdiction, in view of the law declared in ***BGS SGS Soma*** and ***BBR (India).***

29. Ms. Jain also sought to submit that ***BGS SGS Soma*** and ***BBR (India)*** and other decisions which followed, altered the legal position. This is again a fundamentally erroneous submission. Article 141 of the Constitution of India teaches us that judgments of the Supreme Court declare the law. They, therefore, are to be understood as reflecting the correct position in law as it always stood. Where the Supreme Court intends to overrule prospectively, it says so. For instance, in ***BALCO***, while overruling the earlier view held by it in ***Bhatia International v Bulk Trading SA***[20], the Supreme Court specifically observed, in para 197 of the report, thus:

> "Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter."

No such clarificatory caveat is to be found in the judgment in ***BGS SGS Soma*** or ***BBR (India)***. These decisions, therefore, declare the law, as envisaged by Article 141 of the Constitution of India.

30. As such, it cannot be said that the judgment in ***BGS SGS Soma JV*** and ***BBR (India)*** altered the legal position.

31. It is not possible for me to deny the jurisdiction of this Court to

[20] **(2002) 4 SCC 105**

the petitioner on the basis of the decision of the High Court of Madhya Pradesh when, applying the law laid down in ***BGS SGS Soma JV*** and ***BBR (India),*** this Court is the only Court which can exercise jurisdiction in the matter.

32. Ms. Jain has also placed reliance on the judgment of this Bench in ***Hunch Circle Pvt Ltd v Futuretimes Technology India Pvt Ltd***[21]**,** to contend that the exercise of jurisdiction by the High Court of Madhya Pradesh was correct in law.

33. The facts obtaining in ***Hunch Circle*** are completely distinct from the facts that obtain here. Clause 8.1, which was the subject matter of agreement between the parties and which was the subject matter of consideration in ***Hunch Circle*** was peculiarly worded. It conferred exclusive jurisdiction over matters arising out of the agreement, "especially for granting interim relief and enforcing arbitral awards" on "the place where the main premises of the petitioner" were located. The main premises of the petitioner were undisputedly located at Gurgaon. Thus, as the arbitral agreement between the parties specifically conferred exclusive jurisdiction, even in the aspect of enforcement of interim relief and enforcement of arbitral awards, on Courts in Gurgaon, I held that this Court could not exercise jurisdiction in the matter.

34. As against this, the exclusive jurisdiction dispensation in clause 32 of the Dealership Agreement in the present case does not make any reference to arbitration. It merely clothes the courts at Indore with

"exclusive jurisdiction in all matters arising under this agreement". Simultaneously, the very same clause states that the seat of arbitration shall always be at Delhi.

35. The legal sequitur is obvious. The fixation of the seat of arbitration at Delhi necessarily clothes curial and supervisory jurisdiction over the arbitration only on courts at Delhi. The exclusive jurisdiction clause, which generally applies, cannot override or supersede the clause fixing the seat of arbitration.

36. In that view of the matter, the objection of Ms. Jain, apropos territorial jurisdiction, is rejected. It is held that this Court has territorial jurisdiction to deal with the present petition.

37. Ms. Jain has also sought to submit that the present petition is barred by time.

38. Mr. Varghese, learned counsel for the petitioner submitted that the impugned award was received by the petitioner on 31 December 2022 and that the present petition was first filed on 30 March 2023. Ms. Jain disputes this position.

39. Nonetheless, in order to verify the actual position, the Registry is directed to place on record a report specifically setting out the various dates when this petition was first filed and re-filed as well as the documents which were filed on each occasion and the objections raised by the Registry.

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[21] **2022 SCC OnLine Del 361**

40. Let a report in that regard be placed on record by the Registry within two weeks from today. On the said report being placed on record, immediately, copies thereof would be forwarded by email to learned Counsel for both sides.

41. Re-notify to examine this aspect on 3 October 2024.

C.HARI SHANKAR, J

SEPTEMBER 9, 2024*/aky*

Click here to check corrigendum, if any