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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

ARB-118-2024
Reserved on: 24.07.2024
Date of Pronouncement:06.08.2024

NAVEEN GARG Applicant

Versus

SANJAY AGGARWAL Respondent

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present : Mr. Rajnikant Upadhyay, Advocate
for the applicant.

Mr. Vinayak Goel, Advocate and
Ms. Molly A. Lakhanpal, Advocate
for the respondent.

JAGMOHAN BANSAL, J.

1. The applicant through instant application under section 11(6) of the arbitration and Conciliation Act, 1996 is seeking appointment of an arbitrator.
2. The applicant is a builder/developer who develops land in and around the territory of Gurugram (Haryana).
3. The applicant in his normal course of business entered into an agreement dated 10.01.2019 with respondent for rendering his services. As per said agreement, the job of the applicant was to develop/construct respondent's property bearing No. 9103 DLF Phase 4, Gurugram (Haryana). There is an arbitration clause i.e. Clause 44 in the aforesaid agreement which provides for resolution of dispute between the parties through the mode of arbitration. It provides that arbitration will be



conducted in accordance with Arbitration and Conciliation Act, 1996 (for short '1996 Act') and decision of arbitrator shall be final and binding on both parties. It also provides that seat of arbitration shall be 'New Delhi'.

4. A dispute erupted between the parties. The applicant filed an arbitration petition No.141 of 2021 under Section 9 of 1996 Act before Ld. District Judge, Gurugram seeking interim relief. Ld. Additional District Judge, Gurugram passed interim order dated 13.01.2022 and the respondent filed an appeal against aforesaid order under Section 37 of 1996 Act before this Court. They entered into a Settlement Agreement/Memorandum of Understanding (for short 'MOU') dated 28.10.2022 to amicably settle the dispute. In view of MOU, they withdrew their cases from different courts. The applicant served legal notice dated 19.10.2023 demanding the execution of MOU. The said notice was followed by notice dated 28.11.2023 whereby applicant asked the respondent to make appointment of arbitrator through mutual consent. A period of 30 days expired, however, respondent neither amicably resolved the issue nor appointed an arbitrator which forced the applicant to approach this Court in terms of Section 11 (6) of 1996 Act.

5. Mr. Vinayak Goel, counsel for the respondent submitted that this Court, in exercise of power conferred by Section 11 (6) of 1996 Act, has no power to appoint an arbitrator because as per agreement seat of arbitrator is 'New Delhi'. The parties were free to select venue/seat of arbitrator and they had consciously selected New Delhi. It is a settled proposition of law that parties are free to select any place of arbitration including neutral place. The seat of arbitrator cannot be controlled or governed by provisions of Civil Procedure Code.



6. Mr. Rajnikant Upadhyay, counsel for the applicant submits that a Coordinate Bench of this Court relying upon judgment of Supreme Court in '*Ravi Ranjan Developers Pvt. Ltd. Vs. Aditya Kumar Chatterjee*', 2022 SCC OnLine SC 568 has held that High Court is not empowered to appoint an arbitrator merely because venue notified in the agreement falls within its jurisdiction. The principle of cause of action cannot be ignored. In the present case, cause of action has arisen within jurisdiction of this Court, thus, this Court has power to appoint arbitrator under Section 11 (6) of 1996 Act.

7. I have heard the arguments and perused the record.

8. From the agreement and arguments of both sides, it comes out that an agreement dated 10.01.2019 was executed between applicant and respondent. There is an arbitration clause in the agreement. As per said agreement, the seat of arbitration shall be New Delhi. The agreement was executed at Gurugram (Haryana). The residence/office of respondent as well as applicant is in Gurugram (Haryana). The work pursuant to agreement was to be executed within jurisdiction of this Court. The cause of action has arisen within jurisdiction of this Court.

9. The respondent is not disputing the fact that cause of action has arisen within jurisdiction of this Court. He is not disputing existence of agreement dated 10.01.2019 and existence of arbitration clause. The respondent is also not disputing that a dispute has arisen between the parties. The respondent is objecting appointment of arbitrator by this Court on the only and one ground that as per agreement seat of arbitrator is New Delhi. Clause 44 of the agreement provides for resolution of disputes through arbitrator which is reproduced as below:



“44. If any disputes, differences, etc. between the Parties arising out of or in relation or connection to this Agreement or rights, duties or liabilities of the Parties under this Agreement or related to construction and development over the Said Plot of Land, the affected Party shall issue a notice ("Notice of Dispute") to the other Party stating the nature of dispute or differences ("dispute") and call upon the other Party to resolve the Dispute. The Parties shall use all reasonable efforts to resolve the Dispute through negotiation and conciliation. If the Dispute cannot be settled through negotiation and conciliation within (fifteen) 15 days from the date of service of the Notice of Dispute, the Dispute shall be settled by arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996 and/or any subsequent statutory modifications or amendment thereto by a sole arbitrator to be appointed by the Owner. The Builder/Developer shall have no objection to the appointment of the said sole Arbitrator. In the event of non-availability of the sole arbitrator so appointed by the Owner, to conduct the proceeding, due to any reasons like resignation, death or any other reason whatsoever, the Owner shall retain the right to appoint an alternate sole arbitrator and the Builder/Developer shall have no objection to the appointment of the sole arbitrator or the alternate sole arbitrator so appointed by the Owner. The decision of the sole arbitrator shall be final and binding on both the Parties The seat of the Arbitration shall be at New Delhi and the language of arbitration proceeding shall be English. Each Party shall bear its own cost for arbitration.”

10. The applicant is seeking appointment of arbitrator in terms of Section 11 (6) of 1996 Act. The respondent is opposing appointment of arbitrator on the ground of jurisdiction. Section 2 (1) (e), 20, 31(4) and 42 which are relevant for the adjudication of issue in hand, are reproduced as below:



“Section 2 (1) (e)

2. *Definitions.—(1) In this Part, unless the context otherwise requires,—*

(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;

(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;

(2) This Part shall apply where the place of arbitration is in India: Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.

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Section 20



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 anyplace it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.*

Section 31

31. Form and contents of arbitral award.—(1) *An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.*

(2) & (3) XXXX XXXX
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(4) *The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.*

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Section 42

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 other Court.”*

11. As per Section 2 (1) (e), ‘Court’ includes principal Civil



Court of original jurisdiction and High Court which in exercise of its ordinary original civil jurisdiction, has jurisdiction to decide the question forming the subject matter of arbitration if the same had been the subject matter of a suit.

This Court, indubitably, has no ordinary original civil jurisdiction to decide the questions forming the subject matter of arbitration if the same had been the subject matter of a suit. All civil suits arising within territorial jurisdiction of this Court are filed before District Court. This Court cannot entertain civil suit on the original side. This Court has only appellate jurisdiction, thus, this Court does not fall within definition of Court as defined under Section 2 (1) (e) of 1996 Act. Undisputedly, the cause of action has arisen within territorial jurisdiction of this Court and as per Rules and Regulations governing the jurisdiction of this Court and District Courts functioning within its jurisdiction, the parties, in the absence of Arbitration clause, could file civil suit at Gurugram (Haryana) which is place of agreement as well as cause of action. Thus, Civil Court at Gurugram (Haryana) falls within definition of 'Court' as defined under Section 2(1) (e) of 1996 Act.

12. Section 42 provides that where with respect to an arbitration agreement, any application under Part-I of the Act, 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 other Court. In Section 42, the expression 'Court' has been used and as discussed above, this Court does not fall within definition of Court as defined under Section 2 (1) (e) of 1996 Act. Even otherwise as held by



Supreme Court in *Ravi Ranjan Developers Pvt. Ltd.* (supra), Section 42 does not apply to an application under Section 11 (6) which necessarily has to be made before a High Court.

13. Section 20 of the Act provides that parties are free to agree on the place of arbitration. Section 31 (4) provides that arbitral award shall state 'date' and 'place' of arbitration, as determined in accordance with Section 20 and award shall be deemed to have been made at that place.

Conjoint reading of Section 20 and Section 31 reveals that place of arbitration is determined as per Section 20 and award is deemed to have been made at that place. As per sub-section (1) of Section 20, the parties are free to fix place of arbitration. In the absence of place determined in the agreement, as per sub-section (2) of Section 20, the place is determined by arbitral Tribunal, having regard to the circumstances of the case including convenience of the parties. It means if the parties do not fix place of arbitration, the arbitrator may fix any place of arbitration. The arbitrator may be appointed by mutual consent of parties or by High Court/Supreme Court or in the manner prescribed in the agreement. If place of arbitration is not determined in the agreement and an arbitrator is appointed by High Court or in any other manner, the arbitrator would fix place of arbitration. In a given situation, an arbitrator may be appointed by a High Court who may fix 'place of arbitration' beyond the jurisdiction of High Court which had appointed him. For example this Court at Chandigarh makes appointment of an arbitrator. Both the parties are having their offices at Delhi, though, the cause of action arose within jurisdiction of this Court. The arbitrator, after his



appointment by this Court, may fix place of arbitration at New Delhi because said place may be convenient to both the parties. In this situation, despite appointment of arbitrator by this Court, the place of arbitration would be 'New Delhi'.

14. Section 11 comprising of 14 sub-sections prescribes complete mode, manner and procedure of appointment of an arbitral Tribunal. Section 11 of the Act is reproduced as below:

“11. Appointment of arbitrators.—(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. (4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court;

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the



appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such



decision.

(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Supreme Court or the person or institution designated by that Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Supreme Court or, as the case may be, the High Court, may make such scheme as the said Court may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6), to it.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, different High Courts or their designates, the High Court or its designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in an international commercial arbitration, the reference to the “Supreme Court or, as the case may be, the High Court” in those sub-sections shall be construed as a reference to the



“Supreme Court”; and

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to “the Supreme Court or, as the case may be, the High Court” in those sub-sections shall be construed as a reference to the “High Court” within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

(14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

Explanation.—For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.”

As per sub-section (2), the parties are free to agree on a procedure for appointing arbitral Tribunal. If the procedure is not prescribed for appointing the arbitrator and there is provision for three arbitrators, as per sub-section (3), each party gets right to appoint one arbitrator and two



appointed arbitrators make appointment of third arbitrator. As per sub-section (5), if procedure for appointing arbitrator is not prescribed and there is provision for a sole arbitrator, the parties may agree on the arbitrator within 30 days from the receipt of a request by one party to another party.

As per sub-sections (4), (5) and (6) read with sub-section (12) (b), High Court makes appointment of arbitral Tribunal in the following circumstances:

(i) If there is no procedure for appointing the arbitrator but there is provision for three arbitrators and:

(a) a party fails to appoint an arbitrator within 30 days from the receipt of request from other party or,

(b) two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment.

(ii) Where there is no procedure for appointing the arbitrator but there is provision for a sole arbitrator and one party within 30 days from the asking of other party fails to agree on the arbitrator.

(iii) Where there is an appointment procedure agreed upon by the parties but:

(a) a party fails to act as required under that procedure or,

(b) the parties fail to reach an agreement expected of them under that procedure or,



(c) the two appointed arbitrators fail to reach an agreement expected of them under that procedure

(d) a person including an institution fails to perform any function entrusted to it.

15. A two judge bench of Supreme Court in ***Brahmani River Pellets Ltd. v. Kamachi Industries Ltd., (2020) 5 SCC 462*** considered the question whether the Madras High Court could exercise jurisdiction under Section 11(6) of Arbitration Act despite the fact that the agreement contains the clause that venue of arbitration shall be Bhubaneswar. The Court noticing Section 20 and 2(1)(e) of 1996 Act held that 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. The court has held:

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 , 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 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 is liable to be set aside.



16. A two judge bench of Supreme Court in ***Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd.***, (2017) 7 SCC 678 had occasion to consider whether determination of ‘seat’ in the arbitration agreement would oust jurisdiction of all other courts. The court has held that as soon as ‘seat’ of the arbitrator is determined in the agreement, no other court would have jurisdiction. The relevant extracts of the judgment read as:

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.

17. The afore-cited judgments are based upon a Constitution Bench judgment in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552*** (hereinafter referred as ‘BALCO’). In the said case, a constitution bench speaking through Justice S.S. Nijjar, while considering question of applicability of Part 1 of the Arbitration Act where seat of the arbitral Tribunal is outside the country, observed that legislature has given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the court where the arbitration takes place. Where seat of arbitrator is at a place different from the place where obligation under the contract has to be performed, both the courts would have jurisdiction. The distinction between ‘venue’ and ‘seat’ 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. The relevant extracts of the judgment are reproduced as below:



Party autonomy:

“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. That these provisions indicate that the Arbitration Act, 1996 is subject-matter centric and not exclusively seat-centric. That 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 expressumfacitcessaretacitum, 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—

(a)-(d)***

(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.

[Emphasis Supplied]

97. The definition of Section 2(1)(e) includes “subject-matter of the arbitration” to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist. On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term “court” as a court having jurisdiction over the subject-matter of the award. This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India.

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:

[Emphasis Supplied]

- (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.

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116. The legal position that emerges from a conspectus of all the decisions, seems to be, that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings.

117. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat/place of arbitration outside India, then the provision that the Arbitration Act, 1996 would govern the arbitration proceedings, would not make Part I of the Arbitration Act, 1996 applicable or enable the Indian courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the English procedural law/curial law. This necessarily follows from the fact that Part I applies only to arbitrations having their seat/place in India.

Section 28

118. It was submitted by the learned counsel for the appellants that Section 28 is another indication of the intention of Parliament that Part I of the Arbitration Act, 1996 was not confined to arbitrations which take place in India. We are unable to accept the submissions made by the learned counsel for the parties.”

18. In **Ravi Ranjan Developers Pvt. Ltd.** (supra) a two Judge Bench of Supreme Court considered a question which was posed in



afore-cited judgments. In the agreement, it was provided that sitting of the Tribunal shall be at Kolkata. Despite being provided in the agreement that sitting of the Tribunal shall be at Kolkata, the Apex Court held that High Court at Kolkata had no jurisdiction to entertain application under Section 11(6) of 1996 Act. Neither cause of action took place within jurisdiction of said High Court nor defendant resided or carried out business in the said jurisdiction. An application under Section 11(6) of the Act cannot be moved in any High Court, irrespective of territorial jurisdiction. Section 11(6) has to be harmoniously read with Section 2(1)(e) and construed to mean, a High Court which exercises superintendence/supervisory jurisdiction over a court within the meaning of Section 2(1)(e) of 1996 Act. The relevant extracts of the judgment read as:

25. In the present case, no suit could have been filed in any Court over which the Calcutta High Court exercises jurisdiction, since as stated above, the suit admittedly pertains to immovable property situated at Muzaffarpur in Bihar, outside the territorial jurisdiction of the Calcutta High Court and admittedly, no part of the cause of action had arisen within the territorial jurisdiction of the Calcutta High Court. The Appellant who would be in the position of Defendant in a suit, neither resides nor carries on any business within the jurisdiction of the Calcutta High Court.

26. Of course, under Section 11(6), an application for appointment of an Arbitrator necessarily has to be moved in the High Court, irrespective of whether the High Court has the jurisdiction to decide a suit in respect of the subject matter of arbitration and irrespective of whether the High Court at all has original jurisdiction to entertain and decide suits. As such, the definition of Court in Section 2(1)(e) of



the A&C Act would not be applicable in the case of a High Court exercising jurisdiction under Section 11(6) of the A&C Act to appoint an Arbitrator/Arbitral Tribunal.

27. At the same time, an application under Section 11(6) of the A&C Act for appointment of an Arbitrator/Arbitral Tribunal cannot be moved in any High Court in India, irrespective of its territorial jurisdiction. Section 11(6) of the A&C Act has to be harmoniously read with Section 2(1)(e) of the A&C Act and construed to mean, a High Court which exercises superintendence/supervisory jurisdiction over a Court within the meaning of Section 2(1)(e) of the A&C Act.

19. The judgment in the case of **BALCO** (supra) was delivered in 2012 and w.e.f. 23.10.2015, section 2(1)(e) of 1996 Act came to be substituted. The existing section was silent qua international commercial arbitration. The substituted Section 2(1)(e) stands reproduced hereinabove.

20. Constitution Bench in **BALCO** (supra) had occasion to consider jurisdiction of Courts in India and applicability of provisions of Arbitration Act, 1996 where place/seat of arbitral Tribunal is outside the country. The court has held that where seat of arbitrator is outside the country, Part-I of the 1996 Act would not be applicable. Section 2(2) of the Act candidly provides that Part-I shall apply where the place of arbitration is in India meaning thereby if place of arbitration is outside the country, Part-I would not be applicable. In para 96, Supreme Court categorically held that Court within whose jurisdiction the subject matter of the suit is situated and the court within jurisdiction of which the dispute resolution i.e. arbitration is located would have jurisdiction. The Court clarified its opinion by way of an example. At the cost of repetition, the relevant part of para 96 of the judgment is reproduced as



below:

“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.”

[Emphasis Supplied]

21. Section 11(12) provided that in case of international commercial arbitration, the reference to the Supreme Court or High Court shall be construed as Supreme Court and in cases other than international commercial arbitration, the reference to Supreme Court or High Court shall be construed as High Court. It further provides that High Court means a High Court within whose local limits, the principal Civil Court is situated. Section 11 (12) at the cost of repetition is reproduced as below:

“(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in an international commercial arbitration, the reference to the “Supreme Court or, as the case may be, the High Court” in those sub-sections shall be construed as a reference to the “Supreme Court”; and



(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to “the Supreme Court or, as the case may be, the High Court” in those sub-sections shall be construed as a reference to the “High Court” within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.”

[Emphasis Supplied]

22. This Court as discussed hereinabove, does not fall within definition of Civil Court as defined under Section 2 (1) (e) of 1996 Act, thus, this Court gets jurisdiction under Section 11(6) where principal Civil Court of original jurisdiction has jurisdiction to decide the questions forming the subject matter of arbitration, had the same been the subject matter of suit. The cause of action has arisen within jurisdiction of principal Civil Court at Gurugram (Haryana). The said Court has jurisdiction to entertain civil suit arising out of aforesaid agreement. The contention of respondent is that as per arbitration agreement, New Delhi Court has exclusive jurisdiction whereas as per judgment of Supreme Court in **BALCO** (supra), Court at Gurugram (Haryana) as well as New Delhi has jurisdiction in term of Section 2(1)(e) read with Section 20 of 1996 Act. As Civil Court at Gurugram (Haryana) has jurisdiction to entertain dispute in question, this Court has jurisdiction to entertain application under Section 11 (6) of 1996 Act.

The respondent while opposing the prayer of applicant has ignored the fact that applicant, with respect to same agreement, prior to execution of MOU, filed an application under Section 9 of 1996 Act



before District Judge, Gurugram. An interim order was passed which was challenged before this Court. As per Section 42, once jurisdiction of a Court is invoked, the said Court shall have exclusive jurisdiction for subsequent applications. The applicant had invoked jurisdiction of Court at Gurugram in terms of Section 9 of 1996 Act, thus, said Court, as per Section 42, has exclusive jurisdiction.

23. A Coordinate Bench of this Court *M/s Green Global Energy Vs. G.R. Infra Projects Ltd, Arbitration Case No.256 of 2019*, vide order dated 10.05.2024 has held that this Court has jurisdiction to entertain an application under Section 11 (6) though in the agreement, it was provided that courts in Udaipur shall have exclusive jurisdiction. In the said case, agreement between the parties was executed at Gurugram and work order pertained to Uttar Pradesh. No cause of action arose at Udaipur, however, in the agreement, Udaipur was notified venue of the arbitration. This Court while passing said order noticed judgment of Supreme Court in *Indus Mobile Distribution (P) Ltd.* (supra) & *Ravi Ranjan Developers Pvt. Ltd.* (supra) and appointed a sole arbitrator.

The aforesaid order of this Court has been assailed before Supreme Court by way of petition for Special Leave to Appeal (C) No.13409 of 2024. Supreme Court has issued notice of motion which is confined to following contentions:

- (i) the respondent did not invoke arbitration clause before invoking Section 11 of Arbitration Act.
- (ii) Arbitration clause provides for appointment of arbitral Tribunal consisting of three arbitrators.

24. In the wake of above discussion and findings, it is hereby



held that this Court has jurisdiction to entertain present application under Section 11 (6) of 1996 Act. The objection raised by respondent is rejected.

25. From the perusal of record and arguments of both sides, it is evident that there is no dispute qua existence of contract between the parties as well as arbitration clause. The applicant and respondent are conceding that there is dispute and in terms of arbitration clause in the agreement, it needs to be resolved through Arbitrator.

26. In the backdrop, instant petition deserves to be allowed and accordingly allowed.

27. Considering the location of parties and place of cause of action, Hon'ble Mr. Justice Vinod Goel (retd.), Resident of H. No. C-146, First Floor South City-2, Sohna Road, Sector 49, Gurugram Haryana, Pin Code-122018 (Mb. No. 9910384637) (justicevinodgoel@gmail.com) is hereby appointed as a sole Arbitrator to adjudicate the dispute between the parties. The learned Arbitrator is requested to comply with mandate of Section 12 of 1996 Act before proceeding further.

28. The Arbitrator shall be paid fee in accordance with the Fourth Schedule of the Act, as amended.

29. Parties are directed to appear before the learned Arbitrator on the date, time and place to be fixed by the Arbitrator at his convenience.

30. Needless to mention, parties will be at liberty to raise all the claims/defences/counter claims/pleas including that of limitation before the Arbitrator. Any observation made hereinabove will not be binding on the learned Arbitrator.

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31. A copy of this order be sent to Hon'ble Mr. Justice Vinod Goel (retd.).

**(JAGMOHAN BANSAL)
JUDGE**

06.08.2024*Ali*

Whether speaking/reasoned	Yes/No
<i>Whether Reportable</i>	<i>Yes/No</i>