BGS SGS SOMA JV V. NHPC LTD.

(Civil Appeal No. 9307/ 9308/ 9309 of 2019)

(Decided on December 10, 2019)

*** GAURANG MANSINGHKA**

- **Introduction-**

The Arbitration and Conciliation Act, 1996 (Act) is the law which governs domestic arbitration, international commercial arbitration, enforcement of the arbitral awards and conciliation proceedings. The Act defines an arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not and shall be in writing.[1] The arbitration proceedings are to be held at a place which is agreed by the parties. However, if the parties to an arbitration are unable to agree on one place, the place of arbitration shall be determined by the arbitral tribunal. Section 20(3) of the Act also empowers the arbitral tribunal to meet at any place it considers fit for consultation among its members, notwithstanding the place decided as per Section 20(1) and 20(2), unless it is otherwise agreed by the parties. The Act has defined the place of arbitration but does not clearly define the terms 'seat' and 'venue' of arbitration and there exists a huge ambiguity surrounding the determination of 'seat' of arbitration, in case of failure in designating the same. The Supreme Court (SC) has dealt with the scope of these terms in a catena of cases but it was lately dealt with by a three-judge bench in the case of BGS SGS Soma JV v. NHPC Ltd.[2] (NHPC judgment) wherein it *interalia* held that the designation of a seat confers exclusive jurisdiction on the courts of the said seat. The place of arbitration, irrespective of its designation as a seat, venue or place, will be the juridical seat unless there exists an indication to the contrary. The SC through this judgment has declared that its earlier judgment in Union of India v. Hardy Exploration and Production (India) Inc.[3] (Hardy Exploration judgment) and the Delhi High Court's decision in Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.[4] (Antrix judgment) are incorrect.

[1] Section 7, The Arbitration and Conciliation Act, 1996
[2] Civil Appeal No. 9307/ 9308/ 9309 of 2019
[3] AIR 2018 SC 4871
[4] 2018 (4) ArbLR 66 (Delhi)

- **Facts of the Case-**

  BGS SGS Soma JV (Petitioner) was awarded a contract by NHPC Ltd. (Respondent) for works in relation to a hydropower project in Assam. The contract consisted of a dispute resolution clause through arbitration which stated that, "*arbitration proceedings shall be held at New Delhi/ Faridabad.*"

  Disputes having arisen between the parties, the Petitioner invoked the arbitration clause with the proceedings taking place in New Delhi. Subsequently, a unanimous award was signed in favour of the Petitioner. Aggrieved, the Respondent filed an application under Section 34 of the Act before the District Court in Faridabad. The Petitioner contended that the appropriate court should either be in New Delhi since the arbitral proceedings had taken place there or in Assam as the cause of action had arisen in Assam. Consequently, the Section 34 application was transferred to New Delhi. This led the Respondent to appeal under Section 37 before the Punjab and Haryana High Court which found the appeal to be maintainable and held that New Delhi is not the seat but a convenient venue for the proceedings and the courts in Faridabad would have jurisdiction over the matter as the cause of action arose there (Impugned Order). The Petitioner subsequently filed a Special Leave Petition before the SC challenging the Impugned Order.

- **Jurisprudential analysis prior to the NHPC judgment-**

  The courts in a number of cases have dealt with this issue and formed some principles which have evolved over a period of time. Some of the cases in which the issue was extensively dealt with are-

  1. **National Thermal Power Corporation v. The Singer and Company and Ors.[5]-**

     The SC in this case applied the 'closest and most real connection' test to the entire contract. It was held that where the *lex arbitri* (law governing the arbitration agreement) was not expressly chosen by the parties, then *lex arbitri* will be the same as *lex contractus* (law governing the contract) provided that the arbitration agreement is contained in one of the clauses of the contract and not in a separate agreement. In the absence of any indication to the contrary, the governing law of the contract is that system of law which must necessarily govern matters concerning arbitration, although in certain respects the law of the place of the arbitration may have its relevance in regard to procedural matters. The courts would give effect to the choice of a procedural law other than the proper law of the contract only where the parties had

[5] AIR 1993 SC 998

agreed that matters of procedure should be governed by a different system of law. If the parties had agreed that the proper law of the contract should be the law in force in India, but had also provided for arbitration in a foreign country, the laws of India would undoubtedly govern the validity, interpretation and effect of all clauses including the arbitration clause in the contract as well as the scope of the arbitrators' jurisdiction.

2. **Bhatia International v. Bulk Trading S.A.**[6]**-**

It was held that Part-I of the Act will apply to all arbitrations and all proceedings. When the arbitration is held in India the provisions of Part-I would compulsorily apply and parties can deviate only to the extent permitted by the provisions of Part-I. In cases of international commercial arbitrations held out of India, Part-I of the Act will still apply unless the parties by agreement, express or implied, have excluded all or any of its provisions. Thus, to avoid the jurisdiction of Indian courts *lex arbitri* of India necessarily needs to be excluded.

3. **Dozco India Pvt. Ltd. v. Doosan Infracore Co. Ltd.**[7]**-**

The court emphasized that in the absence of a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration, i.e. the place at which arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings. So, in the absence of an express choice by the parties it is first necessary to determine the seat of the arbitration. If the parties have chosen the 'place' of arbitration, this however does not mean that the arbitral tribunal must hold all its proceedings at that designated 'place' only. As international commercial arbitration often involves people of different nationalities, 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. It may be more convenient for an arbitral tribunal in one country to conduct a hearing in another country, in such circumstances the 'seat' of arbitration does not change with each move of the arbitral tribunal. The 'seat' of the arbitration remains the 'place' initially agreed by or on behalf of the parties.

[6] AIR 2002 SC 1432
[7] 2010 (83) ALR 488

4. **Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Service Inc.[8]-**

The SC in its judgment in 2012 held that the dispute had to be resolved in accordance with the law laid down in Bhatia International v. Bulk Trading S.A. (Bhatia judgment) wherein all the provisions of Part-I of the Act were applicable to all arbitrations whether domestic or foreign seated unless the parties by agreement, express or implied have excluded the provisions of Part-I of the Act. However, after an appeal was preferred, in 2016 the Constitution Bench of the SC overruled the Bhatia judgment and read the arbitration clause laying emphasis on 'party autonomy' as the 'ground norm' of international commercial arbitration and stated that interpretation of such an agreement should be done keeping in mind that the parties would have intended to avoid impracticable procedures. So, 'seat' or *locus arbitri* became the determining factor to decide whether India had supervisory jurisdiction over an arbitration in case of international commercial arbitration and Part-I of the Act will be considered impliedly excluded when the juridical 'seat' is outside India or when a foreign law is selected as the law governing the arbitration agreement. Thus, the jurisdiction of courts became 'seat centric'.

5. **Konkola Copper Mines v. Stewarts and Lloyds of India Ltd.[9] -**

The Bombay High Court held that the parties are at liberty to change the 'place' of arbitration even after the arbitration commences. The court also dealt with the issue that whether the courts situated in the 'place' of arbitration have jurisdiction to entertain a Section 9 application notwithstanding that the cause of action may have accrued somewhere else, dealing with the issue the court held that, applying the SC's interpretation of Section 2(1)(e) in Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Service Inc.[10] (BALCO judgment), the section provided jurisdiction to two courts i.e. the courts where the cause of action arose and the court at the 'place' of arbitration.

6. **Enercon (India) Ltd. v. Enercon GMBH[11]-**

The SC tried to apply the 'closest connection test' inversely. The arbitration clause designated Indian law as the substantive law and also made the Act applicable but the

[8] (2012) 9 SCC 552
[9] 2013 (5) BOM CR 29
[10] Supra at 8
[11] AIR 2014 SC 3152

clause stated venue of the arbitration as London. The issue at hand was whether the 'venue' was intended to be used as 'seat' or 'place' of arbitration. The court came to a conclusion that since the governing law was Indian and the Act was expressly made applicable, it was only reasonable that the parties intended New Delhi as the seat of arbitration and vested the Indian courts with the jurisdiction. The parties by expressly making the Act applicable designated Indian law both as the curial law as well as the governing law. The court also state that the parties would not have intended to create an exceptionally difficult situation by designating London as the 'seat' of the arbitration. (Enercon judgment)

7. Roger Shashoua v. Mukesh Sharma[12]-

The court observed that the shareholders agreement was executed prior to the BALCO judgment and thus the principle laid down in Bhatia judgment will apply. The court relied on its decision in Videocon Industries Ltd v. Union of India [13] and held that the stipulations in the agreement are required to be analysed for the purpose of arriving at whether there is an express or an implied exclusion. The SC relied on the judgment of the London Commercial Court in Roger Shashoua v. Mukesh Sharma[14] (English judgment in Roger Shashoua) and opined that the shareholders agreement provided the 'venue' of the arbitration as London and that the proceedings will be held in English in accordance with the ICC rules. The concept of 'seat' is fundamental to the operation of the Arbitration and that the 'seat' can be different from the 'venue' in which arbitration hearings take place. The London court also held that-

> *"When therefore there is an express designation of the arbitration 'venue' as London and no designation of any alternative 'place' as the 'seat', combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is that London is the juridical seat and English law is the curial law."*

So, it was laid down that in the absence of an explicit mention of a 'seat' in the arbitration agreement, other factors shall be considered. If the intention of the parties was to adopt the particular laws of a 'place' to govern their arbitration then that

[12] AIR 2017 SC 3166
[13] AIR 2011 SC 2040
[14] 2009 EWHC 957 (Comm)

'place' will be construed as the 'seat' despite the fact that the word 'venue' has been employed in the arbitration agreement. (Roger Shashoua judgments)

8. **Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.**[15]-

The SC relied on the BALCO judgment and the Enercon judgment to reiterate that once a seat of arbitration has been decided upon it is akin to an exclusive jurisdiction clause. Therefore, the courts having territorial jurisdiction over the seat will exercise supervisory powers over the arbitration. It went on to observe that the juridical seat is the 'legal place' of arbitration.

9. **Antrix Corporation v. Devas Multimedia Pvt. Ltd.**[16]-

The Delhi High Court, in this case, held that only if the parties confer exclusive jurisdiction as well as the 'seat' of arbitration to the specified place, the territorial court of that specified place would have exclusive jurisdiction otherwise the jurisdiction will have to be determined basis the subject matter and seat of arbitration.

10. **Union of India v. Hardy Exploration and Production (India) Inc.**[17]-

The SC in its judgment has held that where a contract does not specify the 'seat' but specifies a 'place' or a 'venue', such 'place' or 'venue' cannot *ipso facto* be treated as the 'seat'. Whether the 'place' or a 'venue' is the seat depends on the facts and circumstances of a case. In paragraph 33 of the judgment, the court has observed that when a place is agreed upon, it gets the status of a seat which means the juridical seat.

> *"When only the term place is stated or mentioned and no other condition is postulated, it is equivalent to 'seat' and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term 'place', the said condition has to be satisfied so that the 'place' can become equivalent to 'seat'."*

The court has not conclusively determined whether the 'place' or 'venue' can be read as the 'seat' of arbitration and fails to provide a comprehensive test by which determination of the 'seat' can be made. The final result of the judgment was that

[15] (2017) 7 SCC 678
[16] Supra at 4
[17] Supra at 3

Delhi and not Kuala Lumpur (specified as venue) was the 'seat' of the arbitration and mere mention of the 'venue' or 'place' without something else cannot be evidence of parties excluding Part-I of the Act by implication.

11. **Brahmani River Pellets Limited v. Kamachi Industries Limited [18]-**

The SC in the said judgment opined on the issue that whether an arbitration agreement between two Indian parties wherein the 'venue' has expressly been stated will amount to an exclusive jurisdiction clause for disputes under the said agreement. It was held that the parties by choosing Bhubaneshwar as the 'venue' of the arbitration have intended to exclude the jurisdiction of other courts. The SC in this decision has moved on or departed from its earlier stance where a conscious distinction between 'venue' and 'seat' of arbitration had been created. In essence, in cases of domestic arbitration, the venue may also be the seat of arbitration.

- **Decision and Analysis-**

The SC while deciding whether designating a place of arbitration confers exclusive jurisdiction on the territorial courts of the specified place relied on paragraph 96 of the BALCO judgment which states that courts of the 'seat' of arbitration and the courts where the cause of action arose will have jurisdiction over arbitration applications. However, the BALCO judgment considered the English judgment in Roger Shashoua which states that the courts of the 'seat' of arbitration will have exclusive jurisdiction over all proceedings and the allowance of multiple venue is only for the sake of convenience. The BALCO judgment also acknowledges that the term 'seat' and 'place' are used interchangeably. In light of the discussion of the English judgment in Roger Shashoua along with every other portion of the BALCO judgment which speaks of exclusive jurisdiction on the court of the 'seat' of arbitration. The SC held that despite what is stated in paragraph 96 of the BALCO judgment it must be read along with other parts of the judgment. The Delhi High Court's view in Antrix judgment was incorrect as it read paragraph 96 of the BALCO judgment in isolation. Accordingly, in the present dispute, the courts of the place of arbitration had exclusive jurisdiction to hear the Section 34 application.The SC, after establishing the exclusive jurisdiction of the courts in the 'place' of arbitration, had to determine whether the place of arbitration referred to in the arbitration clause was a juridical seat or merely a venue and which of the two places i.e. New Delhi or Faridabad is the 'seat' of arbitration.

[18] AIR 2019 SC 3658

The SC held that the reference to a 'place' of arbitration will be the 'seat' of arbitration and consequently determine *lex fori*. The SC, to elucidate, relied on the 'significant contrary indicia' test discussed in the English judgment in Roger Shashoua which propounded that the venue of arbitration is the juridical seat provided there is no indicator that the parties intended otherwise. Thus, the SC held that in the absence of any contrary indicators the courts in New Delhi/ Faridabad will be the juridical seat. The court observed that the expression "shall be held" contained in the arbitration clause between the parties indicated that the venue was in fact, the seat of the arbitral proceedings. In addition to this, the SC also held that the Hardy Exploration judgment[19] is incorrect because it ignored the ratio laid down in the Roger Shashoua judgments and BALCO judgment's reliance thereon all of which upheld that the venue of an arbitration is the juridical seat in the absence of any significant contrary indicia. Since the parties had elected for all the arbitral proceedings to be held in New Delhi and that the award had been signed in New Delhi. The SC, taking these facts into consideration, overruled the Impugned Order and reached the conclusion that New Delhi is the 'seat' of arbitration. Moreover, the SC, noting that New Delhi was designated as the 'seat' of the arbitration, it observed that if concurrent jurisdiction were to be upheld, in spite of the 'seat' having been specifically agreed to by the parties, party autonomy would be compromised.

- **Conclusion-**

This is a breakthrough judgment as it addresses the dichotomy created by the Antrix judgment due to an erroneous reliance on the BALCO judgment. The SC has also given a much needed clarity on what constitutes the juridical seat of arbitration and whether designating a 'place' of arbitration vests sole jurisdiction on the courts of the said place to settle disputes arising out of the arbitration agreement. The present judgment along with the Roger Shashoua judgments have conclusively stated that a 'place' or 'venue' is effectively the juridical seat unless there is any indicator of a contrary intention of the parties. All in all, the judgment has aptly addressed the ambiguities surrounding the issue of exclusive jurisdiction where the 'seat' of arbitration is situated. Even though, the SC has termed its decision in Hardy Exploration judgment as bad in law but it may not tantamount to an overruling because both the judgments were passed by three- judge benches. Therefore, the issue may be laid to rest if it is referred to a larger bench but till then the saga of seat/ venue/ place continues.

[19] Supra at 3