

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present :

Hon'ble Justice Moushumi Bhattacharya

AP 473 of 2021

IA No: GA 1 of 2021

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GA 2 of 2022

Damodar Valley Corporation

vs

BLA Projects Private Limited

For the petitioner	:	Mr. Ratnanko Banerji, Sr. Adv. Mr. Kanishk Kejriwal, Adv. Mr. Amit Meharia, Adv. Ms. Paramita Banerjee, Adv.
For the respondent	:	Mr. Jaydip Kar, Sr. Adv. Mr. Debdeep Sinha, Adv.
Last heard on	:	19.09.2023
Delivered on	:	18.10.2023

Moushumi Bhattacharya, J.

1. AP 473 of 2021 is an application filed by the award-debtor Damodar Valley Corporation (DVC) for setting aside of an Award dated 14.08.2021. DVC has also applied for stay of the impugned Award in GA 1 of 2022.

2. The award-holder BLA Projects has filed GA 2 of 2022 for return of the petition filed by DVC, under section 34 of The Arbitration and Conciliation Act, 1996, for being presented before an appropriate Court. BLA has sought return of the application on the ground that this Court does not have jurisdiction to entertain the Arbitration Petition (AP) filed by DVC for setting aside of the impugned Award.

3. The Court has been invited to decide on GA 2 of 2022. The question is whether the Court has jurisdiction to entertain the application of DVC for setting aside the impugned Award dated 14.08.2021.

4. According to learned Counsel appearing for the award-holder BLA, the High Court at Calcutta is not the "Court" within the meaning of section 2(1)(e) of the 1996 Act. The primary contention is that Clause 32 of the Annual Rate Contract executed between the parties on 23.03.2018 stipulates the designated Court to be the New Alipore Court, South 24 Parganas in the city of Kolkata. Counsel submits that parties have agreed that Alipore Court shall have exclusive jurisdiction for all proceedings arising out of the contract including arbitration. Counsel submits that by agreeing to the venue of arbitration to be in Kolkata, the parties merely agreed on the place where the tribunal would meet or schedule its hearings. According to counsel, the sittings of the arbitration were held at different places according to the convenience of the parties.

5. The award-debtor DVC opposes the prayer for return of the AP to the Court in South 24 Parganas on the ground that the Contract Agreement between DVC and BLA dated 30.04.2018 contains the final Arbitration Agreement between the parties at Clause 16 thereof. Learned counsel appearing for DVC submits that the forum selection clause contained in the Arbitration Agreement at Clause 18(g) provides that the Court in the City of Kolkata shall have exclusive jurisdiction. It is submitted that the clause relied on by BLA in the Annual Rate Contract dated 23.03.2018 does not designate either the seat or the venue of the arbitration. Counsel further submits that BLA had accepted the Contract Agreement dated 30.04.2018 to be the final contract between the parties in an application filed by BLA for appointment of arbitrator; AP 595 of 2018. Counsel urges that the agreements between the parties do not contain any significant contrary indicia to suggest that the venue decided in the Arbitration Agreement was only meant to be a convenient place for the sitting of the tribunal and this Court would have exclusive jurisdiction to entertain, try and adjudicate the present matter since the seat of the arbitral proceedings was agreed to be in Kolkata.

6. The controversy in the present application filed by the award-holder BLA rests on the Contract Agreement executed between BLA and DVC. By its own admission, BLA referred to the Contract Agreement of 30.4.2018 to be the final arbitration agreement between the parties. This would be evident from the order passed by a learned Single Judge of this Court, as His Lordship then was, on 6.9.2018 in AP No. 595 of 2018 which was an application filed by BLA

under section 11(6) of the 1996 Act for appointment of Arbitrator. The order reflects that BLA had relied on this Agreement as the arbitration agreement for adjudication of disputes between the parties.

7. Apart from this, the Contract Agreement of 30.4.2018 is subsequent to the Annual Rate Contract dated 23.3.2018 relied on by BLA as containing the arbitration agreement. Clause 33 of the Annual Rate Contract of 23.3.2018, which is for “Settlement of Disputes & Arbitration”, significantly does not indicate either a seat or a venue. Considering the aforesaid factors, it is evident that the Contract Agreement of 30.4.2018 with clause 16 thereof providing for settlement of disputes and arbitration constitutes the arbitration agreement between the parties.

8. Upon settling the issue of the Contract Agreement dated 30.4.2018 being the arbitration agreement which forms the base for the dispute, the next question is whether the terms of the said agreement would divest this Court of jurisdiction to entertain, try and adjudicate DVC’s application under section 34 of the Act for setting aside the impugned Award of 14.8.2021.

The Relevant Clauses in the Arbitration Agreement dated 30.4.2018

9. The clauses of the Contract Agreement which would be relevant for the adjudication are reproduced below:

“16. SETTLEMENT OF DISPUTES AND ARBITRATION:

Any dispute(s) or difference(s) arising out of or in connection with this Agreement/ Annual Rate Contract shall to the extent possible, be settled amicably between the Party of the First Part & Party of the Second Part.

In the event of any dispute or difference whatsoever arising under this agreement or in connection therewith including any question relating to existence, meaning and interpretation of the terms of the agreement or any alleged breach thereof, the same shall be referred to the Chairman, the CEO of Damodar Valley Corporation, Kolkata-54 or to a person nominated by him for arbitration. The Arbitration shall be conducted in accordance with the provisions of Arbitration and Conciliation Act, 1996 supplemented by any other latest enactment and the decision/judgment of Arbitrator/Arbitrators shall be final and binding on both the parties. The venue of arbitration shall be at Kolkata.

All suits arising out of the Annual Rate Contract and agreement, if any, are subject to jurisdiction of Court in the City of Kolkata only and no other Court, when resolution / settlement through mutual discussion and arbitration falls.”

“18.

g) Legal suits arising out of the Agreement, if any, are subject to the jurisdiction in the Court of the city of Kolkata and no other Court elsewhere.

10. First, Clause 18(g) confers exclusive jurisdiction on the Court in Kolkata for adjudication of all legal suits arising out of the agreement. The exclusive conferment of jurisdiction on a court in the city of Kolkata is contrary to Clauses 32 and 33 of the Annual Rate Contract of 23.3.2018 which are set out below:

“32.0 Governing Laws:

The Contract shall be governed and interpreted in accordance with laws in force in India. The Court in the city of Kolkata {South 24 - Parganas, New Alipore Court (India)} only shall have exclusive jurisdiction in all matters arising under the contract.”

33.0 Settlement of Disputes & Arbitration :

Any dispute(s) or difference(s) arising out of this Annual Rate Contract shall, to the extent possible, be settled amicably between DVC and you.

.....

All suits arising out of the Annual Rate Contract, if any, are subject jurisdiction of Court in the City of Kolkata {South 24- Parganas, New Alipore Court (India)} only and no other Court, when resolution/settlement through mutual discussion and arbitration fails.”

11. Therefore, the exclusive jurisdiction on the Court in Kolkata, as provided in the final arbitration agreement between the parties of 30.4.2018, would have primacy over the New Alipore Court as provided in the earlier Contract of 23.3.2018. Further, as stated above, Clause 33 of the earlier Contract, which aspires to be the arbitration clause, does not designate either the seat or the venue of the arbitration.

12. Second, Clause 16 of the final agreement of 30.4.2018, which has been set out above, provides for a 2-tier mechanism for resolution of disputes. The third and final part of Clause 16 provides for adjudication of suits arising out of the Annual Rate Contract in the Court in the city of Kolkata but only after the resolution through mutual discussion and arbitration fails.

13. The second part of Clause 16 provides for arbitration to be conducted under the provisions of the 1996 Act as amended and the “venue” of arbitration to be at Kolkata. DVC/award-debtor says that the parties agreeing to the venue of arbitration to be in Kolkata would amount to designation of the seat also to be at Kolkata.

14. The proposition put forward should be tested on the case law relied upon on behalf of the parties.

Seat and Venue – not antithetical to one another

The law as pronounced by the Supreme Court

15. The Supreme Court in *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited*; (2017) 7 SCC 678 relied on *BALCO v. Kaiser Aluminium*; (2012) 9 SCC 552 to hold that the word “place” would designate the “juridical seat” for the purpose of section 2(2) of the 1996 Act and further that sections 20(1) and (2) of the said Act refers to “juridical seat” interchangeably with “place”. *Indus Mobile* further held that designating the “seat” of arbitration would amount to conferring exclusive jurisdiction to the Courts at the Seat.

16. This view was reiterated by the Supreme Court in *BGS SGS Soma JV v. NHPC Limited*; (2020) 4 SCC 234. The Supreme Court however proceeded further to hold that wherever there is an express designation of a “venue” without specifying any alternative place as the “seat”, taken with the

supranational body of rules governing the arbitration and without any contrary indication in the arbitration agreement or in the conduct of the parties, the stated venue would be construed as the juridical seat of the arbitral proceeding. The supranational body of rules referred to in *BGS SGS Soma* was referred to in the context of an international context under which the arbitral proceedings was to be governed in relation to the seat of arbitration. In a national / domestic context, the 1996 Act would be the governing statute in relation to the law applicable to the seat of arbitration. The dictum of the Supreme Court with regard to seat and venue was carried forward in *Hindustan Construction Company Limited v. NHPC Limited; (2020) 4 SCC 310*.

17. *BBR (India) Private Limited v. S.P. Singla Constructions Private Limited; (2023) 1 SCC 693* is the most recent judgment on this issue. The Supreme Court relied on *BGS SGS Soma* to hold that parties designating the seat of arbitration amounts to declaring an exclusive jurisdiction clause and the Courts at the seat would be conferred with the jurisdiction to regulate arbitration proceedings arising out of the arbitration between the parties. It was also held that the place where the arbitral tribunal holds the arbitral proceedings would, by default, become the venue of arbitration and consequently the seat of arbitration.

18. The dictum of *BGS SGS Soma* has been followed by the High Courts including Co-ordinate benches of this Court; : *Height Insurance Services Limited v. Reliance Nippon Life Insurance Company Limited; 2023 SCC OnLine*

Cal 912, Manmohan Kapani v. Kapani Resorts Pvt. Ltd.; 2023 SCC OnLine Del 1618 and *Mr. Raman Deep Singh Taneja v. Crown Realtech Private Limited; 2017 SCC OnLine Del 11966*. In all these cases, either the venue of the arbitration or the seat of the arbitration, or sometimes both; were designated in the arbitration agreements. In *Height Insurance*, the clause stated that the arbitration shall be held at Kolkata although the courts of Mumbai were to have exclusive jurisdiction in all matters concerning the agreement.

19. The respective High Courts came to the conclusion that the designated seat would confer exclusive jurisdiction on the Courts at the seat and that the venue would become the seat where the latter was not specified. The Courts also made a distinction between the “subject matter of the arbitration” and the “subject matter of the suit” for the purpose of identifying the Court which would have supervisory control over the arbitral proceedings. The unanimous view was that the Court at the *situs* of the subject-matter of arbitration would have exclusive jurisdiction - as opposed to the designated Court with regard to the subject matter of the suit.

Resolution of the Present Controversy

20. The decisions of the Supreme Court and the High Courts resolve the conflict in the present context at two levels.

21. The first is on the issue whether designation of place/venue of the “Court in the City of Kolkata” would be construed also as the “Seat” in the arbitration

agreement dated 30.04.2018. The arbitration/Contract Agreement does not designate the Seat of arbitration. However, relying on the law as pronounced by the Supreme Court in *BGS SGS Soma*, “the Court in the City of Kolkata” would also be read as the “juridical seat” of arbitration. In other words, the Court at the City of Kolkata would have exclusive jurisdiction with regard to the subject matter of arbitration. For further clarification, the expression “City of Calcutta” has been defined in section 2(3) of The City Civil Court Act, 1953, to mean the area comprised within the local limits of the ordinary original civil jurisdiction of the High Court at Calcutta.

22. Therefore, the Calcutta High Court would be the designated seat of the arbitration agreement which consequently would confer exclusive jurisdiction on this Court to determine and adjudicate all disputes arising out of the arbitration agreement. Significantly, the settlement of disputes and arbitration clause in the Contract Agreement of 30.04.2018 covers any dispute or difference arising out of the said agreement and also the Annual Rate Contract dated 23.03.2018 (which has been relied upon by the award-holder BLA).

23. The second issue which is clarified by the decisions referred to above, pertains to the award-holder’s argument that the Calcutta High Court would be divested of jurisdiction since no part of cause of action arose within the territorial jurisdiction of this Court. Counsel for the award-holder has relied on the majority of the sittings being held outside the territorial jurisdiction of this

Court. It was also emphasized that the forum selection clause will have primacy over the seat of arbitration in the event of a conflict between the two.

24. The award-holder's contention cannot be accepted for the reason which follows.

25. In *Indus Mobile*, the Supreme Court clarified that the 'subject matter of the arbitration' should not be confused with the 'subject matter of the suit' since the purpose of the former is to identify the Court having supervisory control over the arbitration proceedings. This means that 'subject matter of the arbitration' would essentially mean the Court at the seat of the arbitral proceeding. The arbitral process must be fixed/anchored to the seat which becomes the fulcrum or the legal home of the arbitration. The seat would govern the law and procedure of the arbitration. Reference in this context may be made to *Enercon (India) Ltd. v. Enercon GmbH; (2014) 5 SCC 1*, where the seat of arbitration was described as its center of gravity. *Indus* went on to say that the 'seat' would necessarily be a neutral venue chosen by the parties and be indifferent to the cause of action which may have arisen thereby making sections 16-21 of The Code of Civil Procedure, 1908 irrelevant for the purpose of conferring jurisdiction on the Court at the "Seat".

The law does not support return of the present Arbitration Petition

26. The respondent BLA's argument of the New Alipore Court having exclusive jurisdiction to try all disputes between the parties by reason of the

cause of action being centered at New Alipore has also been negated by the recent decision of the Supreme Court in *BBR (India)*. In that decision, the Supreme Court reiterated the view taken in *BGS SGS Soma* - which in turn had relied on *BALCO* - to hold that selection of the seat of arbitration would be akin to an exclusive jurisdiction clause and the courts at the “seat” alone would have jurisdiction to entertain challenges against arbitral awards. The Supreme Court in fact opined that the definition of “Court” under section 2(1)(e) of the Act would be the courts at the seat of arbitration. *BGS SGS Soma* also drew a distinction between courts which would have jurisdiction where the cause of action is located and those courts where the arbitration takes place. *BBR* further relied upon the earlier decision of the Supreme Court in *Brahmani River Pellets Limited v. Kamachi Industries Limited; (2020) 5 SCC 462* to say that the moment the parties designate the seat, the courts at the seat would be vested with exclusive jurisdiction to regulate arbitration proceedings as opposed to the courts where the cause of action may have arisen.

27. Therefore, BLA’s contention, that the High Court at Calcutta will be denuded of jurisdiction to try the present application in the absence of any cause of action having arisen or accrued within the territorial jurisdiction of this Court, must be negated. As conclusively held by the Supreme Court in the decisions stated above, the juridical seat of arbitration may be a neutral place without any nexus with the cause of action. *BALCO*, *BGS SGS Soma* and *BBR* along with the other decisions cited above also resolve the conflict between the governing law clause and the arbitration clause with precedence given to the

latter in matters of supervision and control of the arbitration proceedings including any challenges made to the arbitral award.

There is no “*Contra Indicia*” to un-Seat the Venue in this case

28. Section 20 of the 1996 Act defines “Place” of arbitration. It has now judicially been settled that section 20(1) and (2) refers to juridical seat of arbitration whereas section 20(3) points to the venue; Ref: *BGS SGS Soma*. The effect of section 20 is that parties are given free rein to choose the place where the arbitration will be anchored coupled with the freedom to decide where to hold the sittings as a matter of convenience. In cases where there is no specific designation of the seat of arbitration, the Courts have made an attempt to locate the seat based on indicia apparent from the conduct of the parties to fix the seat at a particular place – or alternatively, to dislocate the seat elsewhere based on any contrary indication shown by the parties.

29. In the present case, Clause 16 of the Contract Agreement dated 30.04.2018 designates Kolkata to be the venue of arbitration and the Court in the City of Kolkata to have exclusive jurisdiction. Clause 18(g) also gives the Court at the City of Kolkata exclusive jurisdiction for legal suits arising out of the Agreement. As discussed in the earlier part of this judgment, the parties accepted this agreement to be the final agreement. The fact that venue would be construed as the juridical seat of the arbitration has also been judicially settled where the seat is not specified. There is hence no contra indicia to un-

seat the arbitration from the Court in the city of Kolkata which is the High Court at Calcutta.

30. Even if the Annual Rate Contract dated 23.03.2018 is taken into consideration, the fact of 17 sittings being held at Floatel, Jetty at 10 Strand Road, 5 sittings being held at the Bar Library Club in the High Court and 5 sittings being held at the Racket Club at 5 Jawaharlal Nehru Road, Kolkata – 700071 would conclusively settle the issue in favour of the High Court at Calcutta having exclusive jurisdiction to try the present dispute. The respondent BLA has not presented any contrary indicia to show that the cause of action has arisen elsewhere and would consequently divest this Court of jurisdiction to hear the matter. This would be relevant if cause of action is taken as the determinative factor, which it is not in light of the case-law discussed above.

Conclusion

31. The decisions relied upon by BLA (applicant and respondent in the arbitration petition) are distinguishable both on facts as well as on the legal premise on which the decisions cited were pronounced. In *Ravi Ranjan Developers Pvt. Ltd. v. Aditya Kumar Chatterjee*; 2022 SCC OnLine SC 568, Kolkata was only intended to be a convenient venue for the arbitration sittings and the petitioner had itself approached the Court at Muzaffarpur, Bihar for interim protection. The judgment of the Supreme Court in *Mankastu Impex Private Limited v. Airvisual Limited*; (2020) 5 SCC 399 was pronounced prior to

the Amendment Act of 2016 and in any event declared that venue should also be accepted as the seat of arbitration. *Union of India v. Hardy Exploration and Production (India) INC.*; (2019) 13 SCC 472 was held to be *per incuriam*. The judgment of the Supreme Court in *Inox Renewables Ltd. v. Jayesh Electricals Ltd.*; 2021 SCC OnLine SC 448 was based on the finding that the seat of the arbitration had shifted from the Courts in Rajasthan to Ahmedabad. *Commercial Division Bowlopedia Restaurants India Limited v. Devyani International Limited*; 2021 SCC OnLine Cal 103 related to an application under section 9 of the Act but proceeded to conclude that parties cannot select a neutral venue and vest jurisdiction upon a Court which does not have jurisdiction otherwise. The Court also made section 20 of the CPC relevant to the proceedings which is inconsistent with the law laid down by the Supreme Court in *Indus Mobile, BGS SGS Soma, Hindustan Construction and BBR. Homevista Décor and Furnishing Pvt. Ltd. v. Connect Residuary Private Limited*; 2023 SCC OnLine Cal 1405 was in the context of an application under section 11 of the 1996 Act and agreed with the proposition that a venue is a matter of convenience only for holding of the arbitration sittings as opposed to the Seat. The decision however refrained from considering the judgment of the Coordinate Bench in *Height Insurance* on the ground that the judgment had been stayed by the same Court. Factually however it appears that the stay had ceased to operate at the time when *Homevista* was pronounced.

32. This Court is persuaded to reject the jurisdiction - objection and hold that the High Court at Calcutta is competent to try and entertain the

application under section 34 of the 1996 Act for setting aside of the award in view of the above reasons.

33. AP 473 of 2021 will be heard by this Court. GA 2 of 2022 is accordingly dismissed without any order as to costs.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)