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

% **Reserved on: 19th October, 2023**
Pronounced on: 31st October, 2023

\+ **O.M.P.(I) (COMM.) 269/2023 & IA No.20370/2023**

VASUDEV GARG & ORS. ..... Petitioner

Through: Dr.Abhishek Manu Singhvi, Mr.Rajshekhar Rao, Mr.Sunil Dalal, Senior Advocates with Mr.Manohar Malik, Mr.Deepak Biswas, Mr.Neeraj Matta, Mr.Devashish Bhadauria, Ms.Manisha Saroha, Mr.Navish Bhati, Ms.Astha Gumber, Mr.Nikhil Beniwal, Mr.Harshit Gupta, Advocates.

versus

EMBASSY COMMERCIAL PROJECTS (WHITEFIELD) PRIVATE LIMITED & ORS. ..... Respondent

Through: Mr.Sanjay Jain, Senior Advocate with Mr.Gyanendra Kumar, Ms.Shreya Som, Ms.Shree Sinha, Mr.Shivam Tiwari and Ms.Harshita Sukhija, Advocates for R-1.

Mr.Rajiv Nayar, Senior Advocate with Mr.Mahesh Aggarwal,Mr.Rishi Aggarwala, Mr.Ankit Banati Mr.Prabhav Bahuguna, Mr.Vikram Choudhary, Ms.Tarini Khurana, Advocates for R2 to R5.

Mr.Tejas Karia and Ms.Devika Bansal, Ms.Shruti Sabharwal, Advocates for R-6.

Mr.Jyoti Chaudhary and Mr.Sumit Malhotra, Advocates for R-7.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition is filed by the petitioner under Section *9* of the Arbitration and Conciliation Act seeking interim relief from this Court to restrain the respondents from carrying out any construction/development activity based on the illegal Modified Development Plan dated 27.10.2022; unilateral appointment of M/s.Alotech as Co-developer; unilateral amendment of development schedule and budget of Whitefield project and doing anything which shall be detrimental to the interests of both the petitioners and the project.

2. The learned senior counsel for the respondents appearing on advance notice raises an objection qua territorial jurisdiction of this Court. It is submitted the seat of arbitration in the present matter is at Mumbai and as such only the Courts at Mumbai shall have jurisdiction to pass an order in this petition under Section *9* of the Arbitration and Conciliation Act. Clauses *17.1* and *21.3* of the shareholders agreement dated 15.10.2020, are relevant for the purpose. Those are as under:

> *"**17.** DISPUTE RESOLUTION*
> ***17.1** All disputes or differences regarding this Agreement shall be submitted to final and binding arbitration at the request of any of the disputing Parties upon written notice to that effect to the other Parties. In the event of such arbitration:*
> *(i) xxxxx*
> *(ii) All proceedings of such arbitration shall be in the English language.* ***The place of the arbitration shall be Mumbai;***
> *xxxxx*
> ***21.** MISCELLANEOUS.*
> ***21.2** Entire Agreement*
> *This Agreement, together with all the Schedules herein, shall be read in conjunction with the Settlement Deed, and together they shall constitute and contain the entire agreement and understanding between the Patties with respect to the subject matter hereof and thereof and supersedes all previous communications, negotiations, commitments, agreements and understandings, either oral or written between the Parties in respect of the*

subject matter hereof.
***21.3** Governing Law and Jurisdiction*
*This Agreement shall be governed in all respects by the Laws of India (without reference to its conflict of Laws provisions) and, **subject to the provisions of Clause 17 (Dispute Resolution)**, only the courts at Mumbai and New Delhi shall have jurisdiction over the subject matters hereof."*

3. It is the submission of the learned senior counsel for the petitioner Mumbai is only a *venue* of arbitration but the *seat* of arbitration is at New Delhi, hence Courts at New Delhi has jurisdiction to entertain this petition. He relies upon *Mankastu Impex Private Limited vs. Airvisual Limited* AIR 2020 SC 1297, which says:

> *"**19**. The seat of arbitration is a vital aspect of any arbitration proceedings. Significance of the seat of arbitration is that it determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award. The situs is not just about where an institution is based or where the hearings will be held. But it is all about which court would have the supervisory power over the arbitration proceedings. In Enercon (India) Limited and others v. Enercon GMBH and another (2014) 5 SCC 1, the Supreme Court held that **"the location of the Seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings.** It was further held that the Seat normally carries with it the choice of that country's arbitration/curial law".*
> ***20**. It is well-settled that "seat of arbitration" and "venue of arbitration" cannot be used inter-changeably. It has also been established that mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. The intention of the parties as to the "seat" should be determined **from other clauses in the agreement and the conduct of the parties.**"*

4. He also referred to *Meenakshi Nehra Bhat and Another vs. Wave Megacity Centre Private Limited* 2022 SCC OnLine Del 3744, which held:

> *"14. Upon a conspectus of the averments contained in the petition and in the reply; and based upon the submissions made, in the opinion of this court, the following inferences arise:*
> *14.1 The evident discordance in the arbitration clause as regards territorial jurisdiction for purposes of arbitration and for purposes of general civil proceedings, is resolved by de- constructing the clause itself.*

> *It is noticed that nowhere in the arbitration clause are the words 'venue' or 'seat' used at all. What the parties have said, and agreed to in the arbitration clause, is that the arbitration proceedings shall be "**held**" at the corporate office of the respondent at New Delhi.* ***The agreement to hold arbitral proceedings at a given office is an indication only of the location where such arbitration sittings shall be conducted****;*
> *14.2 xxx;*
> *14.3 xxx*
> *14.4 The arbitration clause in the present case is similarly worded, and therefore, in the opinion of this court,* ***New Delhi is referred to in that clause only as the location for conducting arbitral proceedings.*** *However, from the jurisdictional perspective, the par- ties have expressly agreed to territorial jurisdiction vesting in the courts at Gautam Buddh Nagar, Uttar Pradesh and the Allahabad High Court, as may be applicable, depending on the proceedings in question."*

5. It was submitted the board meetings were held at New Delhi, hence this Court has jurisdiction *per* Section *20(c)* of CPC. The learned senior counsel for petitioner referred to para No.*16* of the petition in this regard.

6. It is argued if the agreement have specifically provided for a seat of arbitration then there is no place for discussion but if the jurisdiction clause says only the Courts at Mumbai and New Delhi shall have the jurisdiction and the Mumbai shall be the *place* of arbitration then it would mean the petition under Section *11* or under Section *9* of the Act can be filed at New Delhi.

7. The learned senior counsel for the petitioner had also taken me to emails shared between the parties to say the draft of SHA was sent by the petitioner to the respondent wherein the petitioner had asked for the seat of arbitration at Delhi and whereas a revised draft was sent by the respondent asking for the seat of arbitration at Mumbai. Lastly, vide communication at page *140* of the additional documents filed on 07.10.2023 it transpired the venue of the arbitration shall be at Mumbai but whereas the Courts at Delhi and Mumbai shall have the jurisdiction and then ultimately, SHA was signed

with clauses *17* and *21.3*.

8. It is submitted by the learned senior counsel for the petitioner to find *contrary indicia*, this Court may look into the *conduct* of the parties, *viz.* the previous correspondences.

9. Heard.

10. Section *20(1)* of Arbitration and Conciliation Act read as under:

> *"20. Place of arbitration.—(1) The parties are* ***free to agree*** *on the* ***place*** *of arbitration"*

11. Admittedly, there is no pleading in the entire petition *qua the seat* of arbitration being at New Delhi.

12. The facts show Mumbai is indicated as a *place* of arbitration in clause *17.1*. It does not say Mumbai and Delhi, both shall be the places of arbitration, hence there is no confusion *qua* the place of arbitration. Further there is *no contrary indicator* in the agreement that any other place other than Mumbai shall have the jurisdiction in case of arbitration. Interestingly clause *21.3* is made *subject to clause 17.1*. Thus, even if there is conflict amongst clauses *17.1* and *21.3*; then *clause 17.1 shall prevail*.

13. Clause *17.1* is in line with Section *20(1)* of the Arbitration and Conciliation Act, hence there is no chance of any misunderstanding.

14. The crux is when *per* clause *17.1* the parties have agreed to conduct arbitration as *per* SIAC at Mumbai, then their intention to designate Mumbai as a *seat of arbitration* is evident from clause *17.1*; reinforced *per* clause *21.3*. There exist *no contrary indication* to designate any other seat of arbitration. The cause of action has no relevance in the facts and circumstances and hence only the Courts at Mumbai shall have supervisory jurisdiction.

15. In *M/s. Talwar Auto Garages Private Limited vs. M/s. VE Commercial Vehicles Limited* 2023 SCC OnLine Del 4940 it was held only such Courts shall have the jurisdiction under Section *11* of Arbitration and Conciliation Act *where the seat of arbitration is located*. Even *Mankastu* (supra) read as under:

> *"17. In the present case, Clause 17 of the MoU is a relevant clause governing the law and dispute resolution. Clause 17 reads as under:-*
> *17. Governing Law and Dispute Resolution 17.1 This MoU is governed by the laws of India, without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction.*
> *17.2 Any dispute, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by* ***arbitration administered in Hong Kong. The place of arbitration shall be Hong Kong****. The number of arbitrators shall be one. The arbitration proceedings shall be conducted in English language.*
> *22. As pointed out earlier, Clause 17.2 of the MoU stipulates that the dispute arising out of or relating to MoU including the existence, validity, interpretation, breach or termination thereof or any dispute arising out of or relating to it shall be referred to and finally resolved by the arbitration administered in Hong Kong.* ***The words in Clause 17.2 that "arbitration administered in Hong Kong" is an indicia that the seat of arbitration is at Hong Kong****. Once the parties have chosen "Hong Kong" as the place of arbitration to be administered in Hong Kong, laws of Hong Kong would govern the arbitration. The Indian courts have no jurisdiction for appointment of the arbitrator."*

16. In *BGS SGS Soma JV vs. NHPC Limited* (2020) 4 SCC 234, wherein the *venue* of arbitration was at New Delhi/Faridabad and there being no exclusive jurisdictional clause, the Supreme Court held:

> *"82. On a conspectus of the aforesaid judgments, it may be concluded that* ***whenever there is the designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings,*** *as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making*

> *of an award at that place. This language has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings* ***"shall be held"*** *at* ***a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a clause designates a "seat" of the arbitral proceedings.*** *In an International context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration."*

17. The test of *no other significant contrary indicia* has been crystallised in SOMA (supra), adopting the *"Shashoua Principle"*, a principle which was laid down by the England and Wales High Court in *Roger Shashoua vs. Mukesh Sharma* [2009] EWHC 957(Comm). In Roger Shahsoua, it was held the chosen venue i.e. London was the seat of arbitration because the parties had: ***(a)*** chosen London as the venue of arbitration; ***(b)*** not designated any other place as the seat of arbitration; ***(c)*** chosen a supranational body of rules to govern the arbitration, and ***(d)*** there were no contrary indicia. Relying upon the above, the Hon'ble Supreme Court in SOMA laid down the following test: ***a)*** if a named place is identified in the arbitration agreement as the "venue" of "arbitration proceedings", the use of the expression "arbitration proceedings" signifies the *entire arbitration proceedings (including the making of the award)* is to be conducted at such place, as opposed to certain hearings. In such a case, the choice of venue is actually a choice of the seat of arbitration; ***b)*** in contrast, if the arbitration agreement

contains language such as "tribunals are to *meet* or *have witnesses, experts or the parties"* at a *particular venue*, this suggests that *only hearings are to be conducted at such venue*. In this case, with other factors remaining consistent, the chosen venue cannot be treated as the seat of arbitration; ***c)*** if the arbitration agreement provides that arbitration proceedings shall be held at a particular venue, then that indicates arbitration proceedings would be anchored at such venue, and therefore, the choice of venue is also a choice of the seat of arbitration; ***d)*** The above tests remain subject to there being no other "significant contrary indicia" which suggest the named place would be merely the venue for certain proceedings and not the seat of arbitration; ***e)*** In the context of international arbitration, the choice of a supranational body of rules to govern the arbitration (for example, the ICC Rules) would further indicate that the chosen venue is actually the seat of arbitration.

18. Applying the test laid down in the SOMA to the facts of the present case, the following emerges:- ***a)*** Clause 17.1(ii) clearly states - "The *place* of the arbitration shall be Mumbai", indicating that the parties *intend to anchor the entire arbitration proceedings* in Mumbai; ***b)*** the parties have *not designated any other place as seat of arbitration*; ***c)*** the said Clause does not use the expressions "meet" or "hear witnesses or experts or parties" at Mumbai nor it says the hearings should "take place" in Mumbai; ***d)*** the parties have agreed to conduct the arbitration as per the supranational body of rules i.e. SIAC Rules; and ***e)*** there is no significant contrary indicia to show the parties intended Mumbai to be merely a venue of arbitration.

19. Therefore, from the above, the only inevitable conclusion that can be drawn is Mumbai is the *"seat"* of arbitration.

20. In *Aniket SA Investments LLC, Mauritius vs. Janapriya Engineers*

Sundicate Private Limited 2021 (4)Mah LJ 123, wherein clause *20.4.2(c)* stated the seat of arbitration proceedings shall be Mumbai; and clause *20.3* stated *subject to the provisions of Article 20.4*, the Courts at Hyderabad shall have the exclusive jurisdiction; the Court in its judgment held the plain meaning of these clauses is of expression *"subject to "* is that the choice of courts at Hyderabad are made *subject to the seat at Mumbai*. Clause 20.3 would apply in a situation not covered by a dispute that is governed by the arbitration agreement. In other words, we can say *non-arbtirable disputes would be governed by clause 20.3, while arbitrable disputes by clause 20.4.2(c)*.

21. Thus, the occurrence of board meeting of the respondent no.1 company does not vest the jurisdiction of Section *20* CPC to the arbitration proceedings.

22. Moreso, there exist no conflict between Mankatsu and Soma. The Hon'ble Supreme Court in *Mankatsu Impex (P) Ltd. vs. Airvisual Ltd.*, (2020) 5 SCC 399 has held mere use of expression "place of arbitration" would not automatically mean "seat of arbitration", but has to be determined from other clauses in the agreement and the conduct of the parties. Although Mankatsu did not comment on SOMA which is four months prior in time and proceeds on Shashaou Principle, accepted with approval in BALCO (Constitution Bench), nonetheless, reading carefully it emerges Mankatsu articulates the same opinion as that in SOMA, for the reason the principle of "no significant contrary indicia", as laid down in SOMA, is accepted in Mankatsu also. Mankatsu also holds the determination of whether "place" means "seat" in a particular arbitration clause would require an examination of the other clauses of the agreement. This observation of Mankatsu is

essentially relatable to principle of "no significant contrary indicia", is to say, if the Clause refers to "place" in all pervasive sense indicating the arbitration proceedings would be anchored from that place, then in the absence of any other contrary indicia in the Agreement, the place would mean seat. However, if the contrary indicia suggests the place has been used in a limited sense of confining it to be the "place of meetings" only, that is to say, the venue only then any other interpretation would emerge.

23. In this context, if we examine the clauses of the SHA, there is nothing to show the parties intended to confine Mumbai as a place of meetings only, reducing it to a mere "venue", On the other hand, Clause *17.1* read with Clause *21.3* lays down a clear-cut regime, whereby Mumbai emerges as the seat from where the entire arbitration proceedings would be anchored. This aspect is clearly established from the expression "subject to the provisions of Clause *17* (Dispute Resolution)" used in Clause *21.3*, which relegates the anchoring of entire arbitration proceedings to the place, as contemplated in Clause *17.1*, which is Mumbai. It needs to be noted that once arbitration proceedings stand relegated to Clause *17.1*, reference to courts of exclusive jurisdiction is reduced to the adjudication of disputes other than those covered by Clause *17.1*, i.e. other than those covered in arbitration agreement.

24. Therefore, to conclude, clause *21.3*, cannot be construed to infer any intention that Delhi also, apart from Mumbai, was meant to be seat of arbitration. It is now a settled law that principles of Section *20* of CPC do not apply to the arbitration proceedings, hence accrual of cause of action, howsoever trivial or significant, would not make Delhi a seat of arbitration and it is for this reason that the draftsman who drafted the arbitration

agreement contradistinguished the scope of clause *21.3* from of clause *17.1* by excluding arbitration proceedings from the scope of clause *21.3* and restricting the scope of clause *21.3* to those matters which are required to be adjudicated in court only being excepted from arbitration. Furthermore, to say it is clause *21.3* of SHA which provides for "seat" of arbitration, would lead to a situation of dual seats of arbitration, giving courts in both Mumbai and Delhi supervisory jurisdiction, which is clearly contrary to the rationale for providing "seat" of arbitration.

25. Qua the contention of petitioner that previous communication between the parties be seen to find out *contrary indicia*, I may here refer to clause *22.2* of the contract as under:

> *"**22.2** Entire Agreement*
> *This Agreement, together with all the Schedules herein, shall be read in conjunction with the Settlement Deed and together they shall constitute and contain the entire agreement and understanding between the Parties with respect to the subject matter hereof and thereof and supersedes all previous communications, negotiations, commitments, agreements and understandings, either oral or written between the Parties in respect of the subject matter hereof."*

26. All previous correspondences in view of Clause *22.2* need to be ignored and hence cannot be looked into. *Joshi Technologies International Inc. vs. Union of India and Others* (2015) 7 SCC 728, may be seen in this context. (*more specifically paras 41* and *42*).

27. The petition lacks Delhi jurisdiction and is thus liable to be dismissed. Pending application, if any, also stands disposed of.

YOGESH KHANNA, J.

OCTOBER 31, 2023
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