

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

% *Date of decision: 18th November, 2020*

+ OMP (COMM) 536/2020

GOYAL MG GASES PRIVATE LIMITEDPetitioner

Through: Mr. Simran Mehta, Adv.

Versus

STEEL AUTHORITY OF INDIARespondent

Through: Mr. Sandeep Sethi, Sr. Adv. with
Ms. Veronica Mohan and Ms. Deepa
Chansoliya Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. This petition has been filed under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act of 1996', for short) challenging the Award dated May 05, 2020.

2. A preliminary objection has been taken by Mr. Sandeep Sethi, Ld. Sr. Counsel appearing for the respondent that this petition is not maintainable in this Court. In this regard, he stated that the Agreement dated July 20, 2005 ('Agreement', for short) between the parties contains an arbitration clause in Article 25.4 ('arbitration clause', for short) which clearly states that (i) the arbitration proceedings shall be held in Durgapur, West Bengal and (ii) the Courts of Durgapur, West Bengal shall have exclusive jurisdiction over all matters of dispute. The parties have expressed their clear and unmistakable intent in writing that the juridical seat of the arbitration shall be at Durgapur, West Bengal with vesting of exclusive jurisdiction on the courts at Durgapur, West Bengal.

3. In the present case while for convenience sake, the hearing of arbitration was held at New Delhi, the juridical seat remained to be Durgapur, West Bengal as per the arbitration clause. The petitioner has failed to disclose any circumstances or any instrument in writing denoting any change in the choice of *seat* of the arbitration. Further, there was no agreement between the parties to alter the seat of the arbitration. The parties only chose to hold the proceedings in New Delhi for the sake of convenience. He draws the attention of the Court to Article 28.3 of the Agreement, which clearly stipulates that any amendment to the Agreement has to be in writing signed by the representatives of the parties. In the absence of any such agreement in writing, the exclusive jurisdiction and choice of *seat* clause contained in Article 25.4 is binding on both the parties. Hence, this Court does not have any jurisdiction to entertain the present petition. Mr. Sethi stated that the petitioner has suppressed the fact that the respondent had already invoked the jurisdiction of Commercial Court at Asansol in accordance with Article 25.4 of the Agreement, which was duly served on the petitioner on October 01, 2020.

4. It is the submission of Mr. Sethi that the Courts of the *seat* of arbitration shall have exclusive jurisdiction to decide petition under Section 34 of the Act of 1996. In this regard, he has relied upon the judgment of the Supreme Court in the case of **BGS SGS SOMA JV vs. NHPC, (2020) 4 SCC 234**. According to Mr. Sethi, change of *venue* does not override choice of *seat* under arbitration agreement. He also relied upon the judgment of the Supreme Court in the case of **Bharat Aluminium Co. v. Kaiser Aluminium**

Technical Services Inc., (2012) 9 SCC 552, to contend that the fixation of a *venue* for arbitration for the sake of convenience cannot override a clear and unambiguous choice of the *seat* under the arbitration agreement itself. He stated that the clear intent of the parties as stated in the arbitration clause in the absence of any ambiguity shall be the determinative test of the *seat* of arbitration. Mr. Sethi has drawn the attention of the Court to Section 20 of the Act of 1996 which incorporates the principle of party autonomy as the only determinant of the juridical seat of an arbitration. Section 20(3) provides the Tribunal choice of *venue* for convenience and expeditious conduct of the arbitration. This clearly denotes the legislative intent that changes in *venue* by the Tribunal for convenience under sub-section (3) does not change the juridical seat of the arbitration determined by parties under sub-section (1). He also relied upon the judgment of the Supreme Court in the case of ***Videocon Industries Ltd. vs. Union of India, (2011) 6 SCC 161***, to contend that in similar circumstances, the shift of proceedings from Kuala Lumpur to London by parties therein was held to be a change of *venue* and not of *seat* of the arbitration. Same principle was applied in ***Indus Mobile Distributino (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678***.

5. Mr. Sethi has also relied upon the judgment of the Supreme Court in the case of ***Enercon (India) ltd. vs. Enercon GmbH (2014) 5 SCC 1***. In the said case, the parties chose Indian law as the law of the arbitration agreement while the *venue* was stated to be London. The Supreme Court; held that in such circumstances, in choosing Indian law as the law of the arbitration the parties chose India to be

the *seat* of the arbitration as distinguished from London being the *venue* of arbitration under the agreement. He also relied upon paras 33, 71 and 82 of **BGS SGS SOMA JV (supra)** to contend that change in *venue* cannot be held to be a change in the *seat* of the arbitration. It was held that *venue* and *seat* are not interchangeable concepts in law. Accordingly, a mere change in *venue* of the proceedings does not alter the *seat* clearly prescribed in the arbitration agreement. The Court *inter alia* applied the ratio in **Dozco India (P) Ltd. vs. Doosan Infracore Co. Ltd., (2011) 6 SCC 179**. He also relied upon the judgment of the Supreme Court in the case of **Harmony Innovation Shipping Ltd. vs. Gupta Coal India Ltd., (2015) 9 SCC 172** wherein the ratio in **BALCO (supra)** and **Videocon Industries Ltd. (supra)** was applied. This principle was further reiterated in the decision in **Brahmani River Pellets Ltd. vs. Kamachi Industries Ltd., (2020) 5 SCC 462**, that intention of the parties as per the arbitration agreement must be accorded with deference in accord with the principles of party autonomy. He also relied upon the judgment of the Supreme Court in the case of **Emkay Global Financial Services Ltd. vs. Girdhar Sondhi, (2018) 9 SCC 49**.

6. Mr. Sethi further submitted that in the present case, the Agreement between the parties *qua* Article 28.3 also requires any amendment to be in writing and signed by both the parties. According to Mr. Sethi, there is no such amended to the Agreement in writing signed by the parties in compliance with Section 7(4) of the Act of 1996 and / or Article 28.3 of the Agreement altering the choice of the juridical seat of the arbitration or the exclusive

jurisdiction vested in the Court of Durgapur, West Bengal. A bare perusal of the Award clearly records New Delhi being only the *venue* where Arbitral proceedings were held for convenience of all concerned. In absence of such an amendment to the Agreement in writing and signed by parties, the exclusive jurisdiction clause contained in Article 25.4 remains final, binding and determinative.

7. It is the submission of Mr. Sethi that the place of making the Award cannot alter the choice of juridical seat of the parties. In this regard, he has relied upon the judgment of the Supreme Court in the case of *State of W.B. v. Associated Contractors, (2015) 1 SCC 32*, which was also followed by the Apex Court in *Bhandari Udyog Ltd. vs. Industrial Faciliation Council, (2015) 14 SCC 515*.

8. Mr. Sethi stated that Section 31(4) require that the Tribunal determines and records the *seat* of the arbitration in accordance with Section 20 of the Act of 1996. The Award in the present case has not made any such determination of the juridical seat being at New Delhi. The clear and unambiguous exclusive jurisdiction clause as aforesaid is final and determinative as per the requirement of Section 20(1). The mere making of the Award at New Delhi does not in law override the express choice of *seat* between the parties and the exclusive jurisdiction clause which is valid and binding between the parties. In the end, it is the submission of Mr. Sethi that the Courts of Durgapur, West Bengal alone have the jurisdiction to entertain any challenge to the Award.

9. On the other hand, Mr. Simran Mehta, learned counsel for the petitioner would submit the parties had entered into the

Agreement, whereby the petitioner was to supply Oxygen, Nitrogen and Argon Gases to the respondent, by installation of Cryogenic Air Separation Plant (CASP) of 100 Tonnes Per Day capacity on Build Own Operate (BOO) basis. The working of the Agreement led to certain disputes between the parties, which resulted in the commencement of arbitral proceedings, which were held entirely at New Delhi. On May 05, 2020, the arbitral tribunal rendered the final Award at New Delhi. The proceedings were held under the aegis of the Scope Forum of Conciliation & Arbitration, which is based in New Delhi. Aggrieved by the rejection of Claim no. 3 and non-consideration of Claim no. 4, the petitioner herein has filed the present petition under Section 34 of the Act of 1996 before this Court.

10. He stated that the respondent, herein, has raised a preliminary objection *qua* the territorial jurisdiction of this Court to entertain the present petition, on the ground that the relevant part of the Agreement to arbitrate, which is contained in Article 25.4 of the Agreement, states that the Arbitration shall be held at Durgapur, WB, India. The language of the arbitration shall be English. The court of Durgapur, WB, India with the exclusion of all other courts, shall have the jurisdiction over all matter of disputes. He draws the attention of the Court to the order dated June 06, 2019 passed by the Tribunal. According to him, it is now being contended by the respondent that the aforesaid order dated June 06, 2019 does not amend/novate the original arbitration clause and that despite this order the Courts at Durgapur, alone, will have jurisdiction over all matters of dispute, including the present petition and has relied upon

Clause 28.3 of the Agreement. He stated that *Videocon (supra)* has no application to the facts of the present case. In *Videocon (supra)* the Court declined to treat the consent, given in the proceedings, as an amendment to the agreement, because the consent, in question, was given by only two of the five parties to the agreement and not all of them. From the aforesaid observations in the *Videocon (supra)*, it is evident that only two of the five parties to the agreement had gone to arbitration and had consented to shift the venue of that particular arbitration from London to Kuala Lumpur. *Ex-facie*, such a consent could not have resulted in a modification of the agreement, so as to shift the *seat* of arbitration and bind the other three parties. According to him, also from the use of the words ‘*neither*’ or ‘*nor*’ in the para 21 of the judgment, it is apparent that the Court was open to the idea that even an agreement/consent between all the parties to the PSC, without the execution of a written instrument (as contemplated in Article 34.12), would have been sufficient to amend the agreement and thus shift the seat of the arbitration. He stated in the present case, unlike *Videocon (supra)*, all the parties to the agreement have consented to designate New Delhi as the *place* and *venue* of the arbitration, which agreement has been recorded, in writing, by the Tribunal, in its order, without any objection by any party as to the mode and manner of this exercise.

11. He further stated, moreover, unlike the case of *Videocon (supra)*, wherein the amendment clause was couched in negative, exclusionary language [given the use, therein, of the words ‘not’ and ‘except’], expressly requiring the execution of an instrument in

writing; in the present case; the amendments are merely required to be in writing and signed by the parties. He stated that the order dated June 06, 2019 records, in writing, an agreement between the parties, whereby, clearly, New Delhi has been designated, by the parties, as the *place of Arbitration* and the *venue* thereof. It is also apparent from a reading of the order that the same has been passed '*on the submission put forth by the parties and with consent*'. Further, notably, the order dated June 06, 2019, has been passed in the presence of Mr. K.K. Dhar (who signed Agreement, on behalf of the petitioner) and four officials of the respondent, including; *inter alia*; the DGM(MM). The DGM(MM) is one of the authorities of the respondent, which was a signatory to the original Agreement. According to him, a signature is only a token of the party's consent to a document. Many a time, in Court, the consent/ agreement of parties is recorded, in judicial orders, in the presence of counsel and the parties, without the same being signed by the parties. He stated, if this contention of the respondent were to be accepted then all such agreements, recorded in solemn judicial orders, can be set at nought, by simply resiling from them, on hyper-technical grounds. For all intents & purposes Clause 28.3 of the Agreement stands complied with. He states even if there was a departure from the agreement, while passing the order dated June 06, 2019, the respondent was required to rake up this issue, at the earliest, instead of waiting till November 10, 2020. In the interregnum, the entire arbitration proceedings have been conducted at New Delhi and the Award has been rendered at New Delhi, without any demur or protest by the respondent.

12. He submitted that the plea taken by the respondent is barred by Section 4 of the Act of 1996. He stated that it is also the respondent's case that given the opening words of Section 20(2) of the Act, the Tribunal had no power to determine the *place of arbitration*, once the parties had already agreed on the same. According to him, this submission is equally fallacious, for the reason that the Tribunal, in the order dated June 06, 2019, has only recorded in writing, what the parties themselves agreed to and that too on the submissions of the parties. This is a manifestation of Section 20(1) of the Act and not Section 20(2), thereof. If the parties were at liberty to agree to Durgapur (W.B), initially, they were equally free to change that choice and shift the place and venue of the proceedings to New Delhi. In this regard, he has relied upon para 82 of the judgment of the Apex Court in **BGS SGS SOMA** (*supra*). In the present case, both the parties have by consent designated New Delhi as the *place* as also the *venue* of arbitration; with the entirety of the arbitration proceedings being held at New Delhi, under the aegis of the SFCA, New Delhi with the final Award being rendered at New Delhi. All the requirements which are relevant and necessary to treat New Delhi as the *seat* of arbitration, in terms of the law laid down in **BGS SGS SOMA JV** (*supra*) are satisfied in the present case. He further stated, after the passing of the order dated June 06, 2019, Durgapur was neither the *place* nor the *venue* of the arbitral proceedings. Even factually, no part of the proceedings was held at Durgapur nor was the arbitral Award rendered there. As such, there is no legal or factual justification to treat Durgapur as the *seat* of the arbitration, in the

facts of the present case. The only question which begs consideration now is the apparent conflict between New Delhi as the *seat* of arbitration and *exclusive jurisdiction* of the Durgapur Court. This issue is no longer res-integra. It has been held in a catena of recent judgments that designation of a particular place as the *seat* of arbitration is analogous to an exclusive jurisdiction clause and any remedy against an interim or final award can only be sought in the Courts of the place designated at the *seat* of the arbitration.

13. He has relied upon paragraph 38 of the judgment in **BGS SGS SOMA JV (supra)**. He stated, a Bench of Co-ordinate jurisdiction of this Court in its judgment dated January 21, 2020, in **Cinepolis India Pvt. Ltd. Celebration City Projects Pvt. Ltd. Arb. P. 554/2019**, in paragraphs 50-52, has upon consideration of various authorities, including **Balco (supra)** and **BGS SGS Soma JV (supra)** held that in the event of a conflict between the *seat* of the arbitration and an *exclusive jurisdiction of Courts* clause, the *place* where the *venue* of arbitration is located would take precedence over the *exclusive jurisdiction* vested in the Courts, in so far as issues relating to the arbitration are concerned. In paragraph 32, this Court has, further held that in the event of such a conflict, both clauses can be given effect to, by holding that in matters where the disputes are to be decided without reference to arbitration the *exclusive jurisdiction of Courts* clause would prevail and in matters which are to be resolved through arbitration the Courts at *seat* of arbitration would have *exclusive jurisdiction*.

14. He further stated, the mere passing of the award at New Delhi, pursuant to proceedings held at New Delhi, would be sufficient to confer jurisdiction on this Court to exercise supervisory jurisdiction over the proceedings. In this regard, he relied in *Balco (supra)*. He stated that the respondent has also cited paragraph 81 of *BGS SGS Soma JV (supra)*, which in turn refers to *Brahmani River Pellets (supra)* and *Indus Mobile Distribution (P) Ltd. (supra)*. The extracted portion in paragraph 81 only says that where the *venue* of the arbitration was in Bhubaneswar, the Courts at Bhubaneswar alone would have jurisdiction to entertain the petition under Section 11(6). Further, in the aforesaid case there was no change in the original venue as mentioned in the agreement, unlike in the case at hand, and also the observation militates against the very case being set up by the respondent. The aforesaid observations in para 81 of *BGS SGS Soma JV (supra)* make it clear that the *venue* of the proceedings will be determinative of the supervisory jurisdiction of the Court. In the facts of the present case, especially in the light of the order dated June 06, 2019 and the subsequent conduct of the entire arbitral proceedings in Delhi, under the aegis of the SFCA, Delhi and the passing of the final Award at Delhi, it cannot be said, by any stretch of imagination, that the venue of the arbitral proceedings was at Durgapur, West Bengal

15. In so far as Section 42 of the Act of 1996 is concerned, the petitioner has filed the present petition in this Court on October 05, 2020. As per the affidavit filed by the respondent, its petition in the Durgapur Court was filed on October 17, 2020. Thus, the petition filed by the petitioner is prior in time. Even otherwise, if this Court

were to hold that it has the exclusive jurisdiction to entertain any challenge to the Award, the issue of Section 42 will be rendered otiose.

16. Having heard the learned counsel for the parties on the maintainability of the petition, at the outset, I may reproduce arbitration clause being Article 25.4 of the Agreement as under:

“25.4 Any dispute or difference whatsoever arising between the parties and of or relating to the construction, interpretation, application, meaning, scope, operation or effect of this contract or the validity or the breach thereof, shall be settled by arbitration in accordance with the Rules of Arbitration of the “SFCA” and the award made in pursuance thereof shall be final and binding on the parties.

During the pendency of conciliation/arbitration, the SELLER shall continue to perform its obligations to deliver the Gases to BUYER and BUYER shall continue to pay all amounts due hereunder and not in dispute, without setoff.

The Arbitration shall be held at Durgapur, WB, India. The language of the arbitration shall be English.

The court of Durgapur, WB India with the exclusion of all other courts, shall have jurisdiction over all matter of disputes.”

17. From the above, it is clear that the parties have decided that the arbitration proceedings shall be held at Durgapur, West Bengal and the courts of Durgapur shall have the jurisdiction to the exclusion of other courts. So, it follows that Durgapur was agreed to be the juridical seat.

18. Mr.Simran Mehta, opposing the plea of Mr.Sethi, has relied upon an order dated June 6th, 2019 of the Arbitral Tribunal to

contend that on a consent given by the parties, the place of arbitration has been designated as New Delhi and the award having been rendered in New Delhi and in view of the judgment of the Supreme Court in the case of **BGS SGS Soma (supra)** and the judgment of a co-ordinate bench of this Court in **Cinepolis India (P) Ltd. (supra)** which have held that in the event of a conflict between the *seat* of the arbitration and the *exclusive jurisdiction of court* clause, the place where the *venue* of arbitration is located would take precedence over the *exclusive jurisdiction* vested in the courts.

19. On this plea of Mr. Mehta, the submission of Mr. Sethi was two-fold, that is (i) what was agreed vide order dated June 06, 2019 is that for convenience the *venue* of the arbitration shall be at New Delhi and (ii) the order dated June 06, 2019 cannot have the effect of amending Article 25.4 of the Agreement as in terms of Section 7 (4) of the Act of 1996 and / or Article 28.3 of the Agreement, requires amendment to be in writing and signed by both the parties and admittedly no such amendment has been signed by the parties.

20. In support of this submission, Mr. Sethi had relied upon the judgment of the Supreme Court in **Videocon (supra)**.

21. So, it has to be decided, at the first instance, whether order dated June 06, 2019 has the effect of amending Article 25.4 of the Agreement. For this purpose, it is necessary to reproduce the order dated June 06, 2019 passed by the Arbitral Tribunal:

“Pursuant to our Notice dated 24th May, 2019, the Tribunal held its first meeting at SCOPE Complex, today,

on 6th June, 2019. On consideration of submission put forth by the parties and with consent, it is decided that the place of Arbitration shall be at New Delhi, preferably, venue shall be SCOPE Complex.

The members of the Tribunal do hereby state and make declaration as per Section 12(1)(b) read with Sixth Schedule of the Arbitration and Conciliation Act, 1996:

- i) that there are no circumstances by reference to any of the parties such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to our independence or impartiality: and*
- ii) which are likely to affect our ability to develop sufficient time to the arbitration and in particular our ability to complete the entire arbitration within a period of twelve months.*

Mr. Mehta assisted by Mr. Gupta, learned Advocates with other officers of the Claimant seeks permission of the Tribunal to withdraw the Statement of claim as filed on account of certain discrepancies in the matter, with permission to file fresh statement of claim. No objection from other side. Accordingly, the Claimant is permitted to file fresh statement of claim with necessary documents within two weeks from today. The documents be marked as Annexure CD-1 onwards. The Respondent thereafter is granted three weeks time to file defence statement with documents along with Counter claims, if any, within three weeks. The documents of the Respondent be marked as Annexure RD-1 onwards. It is further clarified that the statement of claim with documents be supplied to the Respondent by e-mail followed by hard copies. Needless to state that the first copy be filed with Secretary, SCOPE Forum of Conciliation and Arbitration (SFCA). The other copies be directly supplied to the Arbitration as well as to other party.

The Arbitrators' fee as well as administrative fee shall be determined by SFCA after filing of pleadings by the parties and necessary deposits be made with SFCA before the next sitting. Each of the parties are directed to deposit conference hall and secretarial assistance charges for five sittings fee separately in advance with SFCA before the next date of hearing. Each of the parties are further directed to deposit Rupees ten thousand with each member of the Tribunal towards conveyance charges as contemplated in Rule 30 of SFCA Arbitration Rules, 2003 (as amended upto 2017), before the next date of hearing.

The next sitting of the Arbitration shall be held on 10th July, 2019 at 2.30 PM at the same venue."

22. In the judgment of ***Videocon (supra)***, the Supreme Court was considering identical fact situation in as much as in terms of the agreement therein, the *seat* of arbitration was Kuala Lumpur, however, due to outbreak of epidemic SARS, the Arbitral Tribunal decided to hold its seating first in Amsterdam and then at London, which the parties did not object to rather they consented for shifting of the seat of arbitration to London.

23. The Supreme Court has in paras 21 and 22 held as under:

"21. Though, it may appear repetitive, we deem it necessary to mention that as per the terms of agreement, the seat of arbitration was Kuala Lumpur. If the parties wanted to amend Article 34.12, they could have done so only by a written instrument which was required to be signed by all of them. Admittedly, neither was there any agreement between the parties to the PSC to shift the juridical seat of arbitration from Kuala Lumpur to London nor was any written instrument signed by them for amending Article 34.12. Therefore, the mere fact that the parties to the particular arbitration had agreed for shifting of the seat of arbitration to London cannot be

interpreted as anything except physical change of the venue of arbitration from Kuala Lumpur to London.

(Emphasis supplied)

22. In this connection, reference can usefully be made to Section 3 of the English Arbitration Act, 1996, which reads as follows:

“3.The seat of the arbitration.—In this Part ‘the seat of the arbitration’ means the juridical seat of the arbitration designated—

(a) by the parties to the arbitration agreement, or

(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or

(c) by the Arbitral Tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.”

(emphasis supplied)

A reading of the above reproduced provision shows that under the English law the seat of arbitration means juridical seat of arbitration, which can be designated by the parties to the arbitration agreement or by any arbitral or other institution or person empowered by the parties to do so or by the Arbitral Tribunal, if so authorised by the parties. In contrast, there is no provision in the Act under which the Arbitral Tribunal could change the juridical seat of arbitration which, as per the agreement of the parties, was Kuala Lumpur. Therefore, mere change in the physical venue of the hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration. This is expressly indicated in Section 53 of the English Arbitration Act, 1996, which reads as under:

(emphasis supplied)

“53.Place where award treated as made.—Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or

Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, dispatched or delivered to any of the parties.”

24. The plea of Mr. Simran Mehta was primarily on the non-applicability of the ***Videocon (supra)*** judgment, on the ground that the amendment clause therein is couched in negative exclusionary language (because of usage of the words “not” and “except”) expressly requiring the execution of an instrument in writing whereas in the present case the amendments are merely required to be in writing and signed by the parties.

25. This submission of Mr. Mehta is not appealing for the following reasons:

(i) Firstly, if the parties wanted to amend Article 25.4 of the Agreement, they could have done it by way of writing and duly signed by the authorised representatives of the parties. The order made by Arbitral Tribunal in writing on June 09, 2019 cannot be construed as an amendment in writing by the parties, and the authorised representative of the respondent who signed the initial agreement was General Manager (M & P), was not even present when the proceedings were held on June 09, 2019. In other words, the authorised representative who was competent to sign the amendment has not consented for the *seat* of arbitration to be at New Delhi.

(ii) Secondly, Article 28.3 of the Agreement in this case, is parimateria to Article 34.12 in ***Videocon case (supra)*** inasmuch as amendment to the Agreement can be effected in writing to be

signed by the authorized representatives of the party. Once the parties have agreed, Durgapur (WB) to be the *seat* of arbitration, there is nothing in the Act of 1996 that empowers the Tribunal to change the *seat*. Further Section 20(2) stipulates, the Tribunal in the absence of any agreement between the parties, to determine the place of arbitration. Section 20(2) has no applicability as parties have in the agreement agreed to Durgapur to be the *seat*. Even Section 20 (3) contemplates the Tribunal for convenience, to hold proceedings at venue other than the *seat* of arbitration. During the course of arguments, Ms. Veronica Mohan, learned briefing counsel of Mr. Sethi, has stated, it was primarily for the reason that New Delhi was convenient to the members of the Arbitral Tribunal that New Delhi was agreed to be *venue* for holding proceedings. Be that as it may, in this case as well as held in *Videocon (supra)* there is no provision in the Agreement for the Tribunal to change the seat of arbitration from Durgapur to New Delhi.

26. So, it follows New Delhi was agreed to, as a *venue* primarily in view of Section 20 (3) of the Act of 1996.

27. Additionally, it is also noted that the parties having expressly agreed to the jurisdiction of Durgapur courts, coinciding with the *seat* of arbitration at Durgapur, which has not undergone a change.

28. Mr. Sethi, therefore, is justified in relying upon paragraph 82 of the judgment in *BGS SGS SOMA JV (supra)* which is reproduced as under:

“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.”

(Emphasis supplied)

29. It is clear from the above, the Supreme Court has clearly held that *venue* is really the *seat* if there is no other intention available from the contract. Therefore, the stipulation in the Agreement, in the case in hand, clearly holds Durgapur to be the *seat* and the usage ‘*The court of Durgapur WB India with the exclusion of all other courts, shall have*

jurisdiction over all matters of disputes’, surely suggests the plea raised by Mr. Mehta is without any merit.

30. The reliance placed by Mr. Mehta on para 38 of the judgment in **BGS SGS SOMA JV (supra)** shall not help the case of the petitioner, which is reproduced as under:

*“38. A reading of paras 75, 76, 96, 110, 116, 123 and 194 of Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] would show that where parties have selected the seat of arbitration in their agreement, such selection would then amount to an exclusive jurisdiction clause, as the parties have now indicated that the courts at the “seat” would alone have jurisdiction to entertain challenges against the arbitral award which have been made at the seat. The example given in para 96 buttresses this proposition, and is supported by the previous and subsequent paragraphs pointed out hereinabove. The Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] judgment, when read as a whole, applies the concept of “seat” as laid down by the English judgments (and which is in Section 20 of the Arbitration Act, 1996), by harmoniously construing Section 20 with Section 2(1)(e), so as to broaden the definition of “court”, and bring within its ken courts of the “seat” of the arbitration [Section 3 of the English Arbitration Act, 1996 defines “seat” as follows: “3. **The seat of the arbitration.**— In this Part “**the seat of the arbitration**” means the juridical seat of the arbitration designated—(a) by the parties to the arbitration agreement, or(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or(c) by the Arbitral Tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.”It will be noticed that this section closely approximates with Section 20 of the Indian Arbitration Act, 1996. The meaning of “Court” is laid*

down in Section 105 of the English Arbitration Act, 1996 whereby the Lord Chancellor may, by order, make provision allocating and specifying proceedings under the Act which may go to the High Court or to county courts.].”

31. Even the plea of Mr. Mehta by relying on the judgment of this Court in the case of **Cinepolis (supra)** that, in the event of conflict between the *seat* of the arbitration and an exclusive jurisdiction of Courts clause, is also without any merit in view of my conclusion above.

32. The plea of Mr. Mehta is that the award having been rendered in New Delhi shall also conclusively prove that New Delhi was the seat of arbitration and hence exclusive jurisdiction of this Court is also not appealing for the reasons stated above and also for the reason that rendering an award has no bearing on the *seat* of arbitration as agreed between the parties. A similar question arose for consideration before this Court in the case of **Raj Kumar Brothers vs. Life Essentials Personal Care (P) Ltd.** being **OMP (COMM) 435/2019** decided on October 31, 2019 wherein in paras 6 to 11 and 16, this Court has held as under:

“6. Having heard the learned counsel for the parties, a perusal of clause 36 of the agreement executed between the parties, show that the parties have decided to hold the arbitration proceedings at Gurugram as the contract was executed in Gurugram and moreover, the respondent is also based in Gurugram. It is precisely for this reason that even the respondent had invoked jurisdiction of Punjab and Haryana High Court for appointment of an Arbitrator. 7. That apart, the parties have also limited all the disputes to jurisdiction of Gurugram. The plea of the learned counsel for the petitioner that Delhi being the “venue” of arbitration and as such, jurisdictional place /

seat, is not appealing for the reason (i) that the Punjab and Haryana High Court was the Competent Court for a petition under Section 11 of the Arbitration & Conciliation Act as Gurugram falls under its jurisdiction; (ii) the provisions of Section 20 of the Arbitration and Conciliation Act, 1996, inasmuch as sub-section 1 of Section 20 recognizes the freedom of the parties to fix the juridical place / seat of their choice. Sub-section 2 of the same section confers the power on the arbitral tribunal where the parties have failed to arrive at an agreement in that regard to fix a juridical place for the conduct of the proceedings. The Sub-section 3 of Section 20 give a discretion to the arbitral tribunal to meet at a place other than the jurisdictional place / seat of arbitration for variety of reasons such as recording of evidence, inspection of documents, goods or other property being at that place etc.

8. The Supreme Court in **Reliance Industries v. Union of India**, (2014) 7 SCC 603 has held as under:

“18. The amended Act, does not, however, contain the aforesaid amendments, presumably because the BALCO (2012) 9 SCC 552 judgment in no uncertain terms has referred to “place” as “juridical seat” for the purpose of Section 2(2) of the Act. It further made it clear that Sections 20(1) and 20(2) where the word “place” is used, refers to “juridical seat”, whereas in Section 20(3), the word “place” is equivalent to “venue”. This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.”

9. From the above, it is clear that in Sections 20(1) and 20(2) the word “place” is used to refer to juridical seat where as in Section 20(3), the word “place” is equivalent to “venue”. The case in hand, wherein the parties have agreed to Gurugram to be the “venue”, it is a case which falls under Section 20(1) [not under Section 20 (2) or Section 20(3)] of the Arbitration and

Conciliation Act and the word “venue” must read to mean “place” i.e. juridical seat.

10. *During the course of submissions, Mr. Popli has laid stress on the fact that the DIAC was selected only for the reason that the one of the parties is based in Kolkata and other being in Gurugram, Delhi would be a convenient place. The same is appealing. That apart, I find the High Court regulated the fee of the learned Arbitrator not under the DIAC, but under the Chandigarh Arbitration Centre Rules, 2014 which also give an indication in that regard that Delhi shall be “venue” as different from juridical seat.*

11. *The aforesaid issue is no more res-integra in view of the latest judgment of the Supreme Court in **Brahmani River Pellets Limited v. Kamachi Industries Limited**, (2019) SCC OnLine SC 929, wherein in paras 17 and 18, the Supreme Court has held as under:*

“17. The inter-play between “Seat” and “place of arbitration” came up for consideration in the case of Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd. and others (2017) 7 SCC 678. After referring to BALCO, Enercon (India) Limited and others v. Enercon GMBH and another (2014) 5 SCC 1 and Reliance Industries Limited and another v. Union of India (2014) 7 SCC 603 and also amendment to the Act pursuant to the Law Commission Report, speaking for the Bench Justice Nariman held as under:-

“18. The amended Act, does not, however, contain the aforesaid amendments, presumably because the BALCO (2012) 9 SCC 552 judgment in no uncertain terms has referred to “place” as “juridical seat” for the purpose of Section 2(2) of the Act. It further made it clear that Sections 20(1) and 20(2) where the word “place” is used, refers to “juridical seat”, whereas in Section 20(3), the word “place” is equivalent to “venue”. This being the settled law, it was found unnecessary to expressly

incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.

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. (2013) 9 SCC 32 This was followed in a recent judgment in B.E. Simoes Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd. (2015) 12 SCC 225 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 is set aside.

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.”

(emphasis supplied by this Court)

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16. In view of my above discussion, I hold that this Court does not have jurisdiction to entertain the present petition. The Registry is accordingly directed to return the petition and the applications to the petitioner with an appropriate endorsement. The petitioner will be entitled to institute the proceeding in an appropriate Court in accordance with. No costs.”

(Emphasis supplied)

33. A plea with regard to Section 42 of the Act of 1996 has been raised by Mr. Mehta inasmuch as this petition filed by the petitioner being prior in time needs to be entertained in this Court. This submission of Mr. Mehta is liable to be rejected in view of my conclusion above.

34. Thus, this Court in **Raj Kumar (supra)**, held that the *seat* being stipulated under the agreement therein as Gurugram and even the Section 11 application for appointment of arbitrator having been filed before the Punjab and Haryana High Court, DIAC (Delhi) was just the

venue for the arbitration proceedings in terms of Section 20(3) and the challenge to the arbitral award under Section 34 to be not maintainable.

35. In view of my above discussion, the objection raised by Mr. Sethi on the maintainability of the petition needs to be accepted. It is held that this Court has no jurisdiction to entertain the petition.

36. The Registry is directed return the petition / application(s) / document(s) to the petitioner to enable the petitioner present the same before the appropriate court of jurisdiction in accordance with law. No costs.

I.A. 10332/2020

Dismissed as infructuous.

V. KAMESWAR RAO, J

NOVEMBER 18, 2020/ak/bh