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

Reserved on: 3rd December, 2020
Pronounced on: 5th January, 2021

\+ ARB.P. 269/2020

MY PREFERRED TRANSFORMATION
AND HOSPITALITY PVT LTD ..... Petitioner

Through: Mr. Jayant Mehta, Mr. Jeevan Ballav Panda, Ms. Shalini Sati Prasad, Mr. Satish Padhi, Ms. Meher Tandon and Mr. Gaurav Sharma, Advs.

versus

SUMITHRA INN ..... Respondent

Through: Mr. V. Prabhakar, Ms. Jyoti Prasher, Mr. N.J. Ramchandar and Ms. Krithika Sridhar, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **JUDGMENT**
(Video-Conferencing)

1. By the present petition, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"), the petitioner seeks appointment of an arbitrator, to arbitrate on the dispute between the parties.

2. Mr. V. Prabhakar, learned counsel appearing for the respondent, has not seriously contested the existence of an arbitrable dispute. He has raised, essentially, two objections to the grant of the reliefs sought by the petitioner. The first is that this Court does not possess the territorial jurisdiction to adjudicate on the petition. The second is that the petitioner is a stranger to the contract containing the arbitration clause, which is between the respondent and M/s. Alcott Town Planners Private Limited (hereinafter referred to as "Alcott"), which came to be known, later, as "OYO Hotels and Homes Private Limited") (hereinafter referred to as "OYO").

3. In order to appreciate these objections of Mr. Prabhakar, it is necessary to refer, to some extent, to the relevant facts, as urged by the petitioner in the petition.

Facts as urged by the petitioner

4. The facts of the case, as urged by the petitioner, may be enumerated thus:

> **(i)** The petitioner is a hospitality company, which claims to be part of the "OYO group of companies", which is engaged, essentially, in the hospitality industry.
>
> **(ii)** On 29th October, 2018, a Management Services Agreement (MSA) was executed between the respondent and Alcott. Article 10 of the MSA, which dealt with resolution of disputes arising thereunder, read thus:

"**Article 10 - Governing Laws and Dispute Resolution:**

10.1 This Agreement shall be governed and interpreted in accordance to the laws of India and the courts at New Delhi shall have exclusive jurisdiction in all matters arising out of this Agreement.

10.2 In the event any dispute arises between the Parties out of or in connection with this Agreement, the Parties hereto shall endeavor to settle such dispute amicably in the first instance. The attempt to bring about an amicable settlement shall be treated as having failed as soon as one of the Parties hereto, after reasonable attempts, which shall continue for not less than thirty (30) days, gives a notice to this effect, to the other Party in writing.

10.3 In case of such failure, the dispute shall, upon the expiry of the aforesaid period, be referred to arbitration to be conducted by a sole arbitrator, who shall be jointly appointed by the Parties. The language of arbitration shall be English, and the place of arbitration shall be New Delhi. The decision of the arbitrators shall be final and binding on the parties."

(iii) As is apparent from Articles 10.1 and 10.3 of the MSA, the place of arbitration was fixed at New Delhi, and courts at New Delhi were conferred exclusive jurisdiction in all matters arising out of the MSA. This position, however, underwent a change by an Addendum, dated 7th March, 2019, to the MSA, which replaced Article 10.1 to read thus:

"**10.1** This Agreement shall be governed and interpreted in accordance to the laws of India and the courts at Bengaluru shall have exclusive jurisdiction in all matters arising out of this Agreement."

(iv) With the execution of the aforesaid Addendum, dated 7th March, 2019, therefore, while the place of arbitration continued to be New Delhi, the Courts at Bengaluru were conferred exclusive jurisdiction in all matters arising out of the MSA.

(v) A second Addendum, dated 22nd April, 2019, was also executed between the parties, amending, *inter alia,* Article 5.2.11 of the MSA. This Addendum is not, however, of particular relevance to the present controversy.

(vi) On 30th April, 2019, Alcott addressed the following communication to Mr. S. A. Ramesh Babu, at the e-mail id gururaju.18@gmail.com:

> "**ALCOTT TOWN PLANNERS PRIVATE LIMITED**
>
> Reg.Office:408, Ashirwad, Paras 100 Feet, Corporate Road, Prahlad Nagar Ahmedabad Gujarat -380015, India.
> Email: legal@alcotthospitality.com,
> Contact No.:+91 9654247699
> CIN: U74900GJ2015PTCI07035
>
> April 30, 2019
>
> To:
>
> S A Ramesh Babu
> gururaju.18@gmail.com
>
> **Ref: Lease deed/Management Services Agreement/Letter of Acceptance executed ("Agreement") by and between Alcott Town Planners Private Limited ("Alcott") and yourself**
>
> Dear S A Ramesh Babu,

It is a pleasure being associated with you as a valued partner. With your trust, faith and overwhelming support, we at OYO, work tirelessly to achieve our common goal of providing safe, affordable, secure and reliable quality living spaces to millions of our valued customers across the globe and are privileged to have you as a part of this mission.

In synchronisation with our common goal of creating affordable quality living spaces for our customers and as a part of imperative business conduct, some restructuring may be required to be performed by us to bring us closer to the objective. It is through our collective efforts and cooperation that we shall continue to achieve new heights in the hospitality industry.

Accordingly, as a part of our ongoing restructuring, we wish to share with you that Alcott is transferring its rights and obligations under the aforementioned Agreement to its group company, My preferred Transformation and Hospitality Private Limited (**"MTH"**) with effect from June 1, 2019

Please note that this does not impact your rights and obligations under this Agreement in any way and your property will continue to be managed under the OYO Brand.

Consequently, all payments due to you under the Agreement shall now be made by MTH in accordance with the existing payment terms of the Agreement.

We thank you for your continuous support and as always, look forward to a long term association with you.

Yours sincerely,

For **Alcott Town Planners Private Limited**

Sd/"

(vii) According to the petitioner, with the issuance of this communication, Alcott had assigned the MSA to the petitioner, who, consequently, stepped into the shoes of Alcott/OYO.

(viii) The petition alleges that the property, on which the petitioner was to execute the contract, was not handed over, to it, by the respondent, within the time stipulated in the MSA. This, it is alleged, constituted a fundamental breach of the MSA. The petitioner, therefore, addressed the following communication, on 7th November, 2019, to the respondent:

> "**WITHOUT PREJUDICE**
>
> Date: 07.11.2019
>
> To,
>
> **SA Ramesh Babu** authorized Partner for **Sumitra Inn**.
>
> Registered office at No – 2651, 8th, B Main Road, B.S.K, 2nd stage, Bengaluru, Karnataka
>
> **SUBJECT: Delay in Handover of property, site bearing no-21, Kattigaenahalli Grampanchayat, Khata no-101, Jala Hobli, Bangalore North taluk, Karnataka, pursuant to the Management Service Agreement dated 29.10.2018 and Addendum to the Management Service Agreement dated 22/14/2019.**
>
> Dear Sir,
>
> As per the terms of Management Service Agreement dated 29.10.2018 ("MSA") executed between us, the Handover of the Property was scheduled on 12th May 2019 as specified under Schedule F and Addendum but due to delay caused by you, you have not formally

handed over the Property to us with all the amenities/utilities and have not even completed the conditions precedent for Handover as per schedule including provision of commercial electricity for the said Hotel, as agreed under Management Service Agreement dated 29.10.2018 despite our regular follow up and requests from time to time. Please note that you are in Material breach of the terms and conditions of the MSA and have rendered yourself liable under the MSA.

Further, in terms of Clause 5.1.16 of the MSA as well as under Clause 5.2.11 added under the MSA vide under Addendum to the Management Service Agreement dated 22/14/2019, you are liable to pay penalties as envisaged thereunder for delay in Handover. Please note that the amount of penalties payable/deductable/recoverable from you are accruing against you with each passing day of delay in completing the conditions precedents and Handover process.

In view of applicability of, inter alia, the foregoing provisions, it is requested that you pay all the penalties accrued till date of actual handover, complete all conditions precedent to Handover, provide commercial electricity for the said Hotel as the amount for maintenance of DG Set is accumulating to be paid by you with each passing day and handover the Property at the earliest. In the event of your failure to do so on or before 15th November 2019, we shall be entitled to exercise all our rights, remedies and entitlements as envisaged under the MSA including but not limited to recovery of penalties and other amounts. It is clarified that grant of any time for you to complete the Handover process hereunder does not and shall not amount to waiver of any of our rights or remedies including any penalties payable by you.

Please take urgent and immediate steps to resolve the situation otherwise this will be entirely at your costs and consequences.

Truly yours,

sd./seal
My preferred Transformation and Hospitality Pvt. Ltd.
Through its City Head & Authorized signatory

Oravel Stays Private Limited

Registered Office: Delhi Rectangle Regus, Level 4, Rectangle 1, Commercial Complex D-4, Saket, New Delhi – 110017
Corporate Office: 9th Floor, Spaze Palazo, Southern Peripheral Road, Sector 69, Gurgaon-122001 | Phone: 080 100 444 66 | Email contactus@oyorooms.com
CIN: U63090DL2012PTC231770"

(ix) Instead of complying with the request contained in the aforesaid letter, the respondent wrote, on 3rd December, 2019, to Mr. Aniket Jain of OYO, terminating the MSA and directing the petitioner to immediately stop all business activity at the hotel premises. The petitioner was also directed to remove its belongings within four days. It was also stated, in the said communication, that the respondent would be claiming ₹ 3 crores from the petitioner, in addition to ₹ 1.15 crores, which was already due.

(x) The petitioner responded *vide* a legal notice, dated 5th December, 2019, addressed by M/s. Chestlaw, Advocates and Solicitors. The letter was written on behalf of and under instructions from OYO Homes and Hotels Private Limited (earlier known as "Alcott Town Planners Pvt. Ltd."). (Mr. Prabhakar has emphasised the fact that name of the petitioner does not figure in this communication.) The legal notice alleged breach, by the respondent of the MSA, and also castigated the termination thereof, by the respondent, as illegal. By the said legal notice, the petitioner claimed ₹ 7.20 crores towards compensation and damages along with additional claims of ₹ 43,96,449/-, ₹ 20 lakhs and ₹ 1,34,08,524/-.

(xi) It is further alleged that around mid December, 2019, the respondent illegally dispossessed the petitioner and locked the property.

(xii) On 27th December, 2019, the respondent addressed a communication to Mr. Aniket Jain of OYO, invoking the arbitration clause in the MSA and stating that the name of the sole arbitrator would be intimated to the petitioner within seven days. It was further stated that jurisdiction, in the matter, vested in Bengaluru.

(xiii) The petitioner responded, through counsel, on 31st December, 2019, nominating Hon'ble Mr. Justice Kurian Joseph, a retired Judge of the Supreme Court, to be the sole arbitrator, to arbitrate on the dispute with the respondent.

(xiv) Further communications were exchanged, between the respondent and OYO and the petitioner and the respondent. (Mr. Prabhakar disputes this contention, emphasizing the fact that there was no communication from the respondent to the petitioner, and that the respondent always communicated with OYO and, earlier, with Alcott.)

(xv) *Vide* letter dated 9th January, 2020, addressed to the counsel for the petitioner, the respondent suggested the name of Sri P. Ravindranath, a retired Additional Director General, CPWD, to be the sole arbitrator to arbitrate on the dispute between the parties. It was reiterated, in the said communication, that courts at Bengaluru would have exclusive jurisdiction in the matter.

(xvi) At this stage, the petitioner moved this Court by way of OMP(I)(COMM) 7/2020, under Section 9 of the 1996 Act, seeking certain interim reliefs. *Vide* order dated 10th January, 2020, the respondent was restrained from creating any third party interest in respect of the hotel property. Various orders were, subsequently, passed in the said petition, with the aforesaid interim order continuing to remain in operation till date.

(xvii) Apparently, the respondent has filed a petition before the High Court of Karnataka, under Section 11(6) of the 1996 Act, for appointment of an arbitrator. The said petition, Mr. Prabhakar acknowledged, is yet to be listed.

5. In these circumstances, the petitioner contends that, as arbitrable disputes have arisen between the petitioner and the respondent, and as they have not been able to agree on the person to be nominated as arbitrator, this Court has, necessarily, to intervene and appoint the arbitrator, in exercise of its jurisdiction under Section 11(6) of the 1996 Act.

<u>Rival submissions</u>

6. I have heard Mr. Jayant Mehta, learned Counsel for the petitioner and Mr. V. Prabhakar, learned counsel for the respondent, at exhaustive length.

7. As already noted hereinabove, Mr. Prabhakar restricted his submissions to questioning the maintainability of the present petition on two grounds. His first submission was that this Court does not possess the territorial jurisdiction to decide the petition, in view of Article 10.1 of the MSA, which conferred exclusive jurisdiction, in all matters arising out of the MSA, on Courts at Bengaluru. According to Mr. Prabhakar, the fixing of the seat of arbitration at New Delhi makes no difference to this position. The second is that there is no privity of contract between the petitioner and the respondent, the contractual relationship of the petitioner having, at all times, been with Alcott, which later came to the rechristened as OYO. As such, Mr. Prabhakar questions the *locus standi* of the petitioner to maintain the present petition. It would be appropriate to note, and deal with, the submissions of both parties, on each of these issues, seriatim.

<u>Re. Territorial jurisdiction</u>

8. Mr. Prabhakar submits that, while amending the MSA *vide*

Addendum dated 7th March, 2019, the intention of the parties was to amend Article 10.3 as well as Article 10.1. In other words, according to him, the parties intended not only to confer exclusive jurisdiction, in all matters, arising out of MSA, on courts at Bengaluru, but also to change the place of arbitration to Bengaluru. Inadvertently, however, according to him, the first amendment was executed, but not the second. The fact that the first amendment was executed, i.e. that Article 10.1 was amended to change the court having exclusive jurisdiction in all matters arising out of the agreement from Courts at New Delhi to Courts at Bengaluru, according to Mr. Prabhakar, indicates that the retention of the place of arbitration at New Delhi in Article 10.3 was a mere inadvertent error. Mr. Prabhakar has impressed, on me, the fact that the intention of the parties is pre-eminent in contractual instruments. The petitioner, according to Mr. Prabhakar, ought not to be permitted to take advantage of this inadvertent omission. Once the court accepted the fact that the failure to amend Article 10.3 was an inadvertent omission, Mr. Prabhakar would submit that the place of arbitration would also have to be treated as Bengaluru and not New Delhi. This, then, he points out would set the controversy at rest, as this Court would be completely divested of jurisdiction in the matter.

9. It is not necessary to record the response of Mr. Jayant Mehta, to this submission of Mr. Prabhakar as, in my opinion, the submission merits rejection outright. This court does not possess the talents either of a psychoanalyst or of a clairvoyant. I do not know what the gentlemen who signed the Addendum dated 7th March, 2019 had in their minds, when they did so. Nor does the law require me to divine, from the actual amendment, as executed, on 7th March, 2019, something which is not contained therein. On its plain terms, the parties only amended Article 10.1 and did not choose to amend Article 10.3. This may have been inadvertent; equally, it may have been advertent. There is no justification for this Court presuming that the parties intended to amend Article 10.3 and did not do so, inadvertently. It may equally be possible that the parties retained the seat of arbitration as New Delhi so as to confer jurisdiction on this court, even while amending Article 10.1. Contractual instruments are required to be interpreted as they stand. No doubt, if there is any ambiguity in any contractual covenant, the Court may attempt to examine the intention of the parties while executing the covenant. That exercise cannot, however, extrapolate to presuming that the parties intended to execute a covenant which does not find place in the contract, or, on that basis, to read, into the contract, a stipulation which finds no place therein.

10. The submission, of Mr. Prabhakar, that this court should proceed on a premise that the retention of the place of arbitration as New Delhi in Article 10.3, while executing the amendment dated 7th March, 2019, was an inadvertent error, and should proceed by treating Article 10.3 to have been amended to change the place of arbitration as Bengaluru, therefore, is rejected.

11. Mr. Prabhakar went on to contend that even if the place of arbitration was to be treated as Delhi, the conferment of exclusive jurisdiction, in all matters arising out of the agreement, on courts at Bengaluru, by Article 10.1 (as amended) divested this Court of jurisdiction in the present matter. He has referred to the judgments of the Supreme Court in ***Swastik Gases Pvt. Ltd. v. Indian Oil Corporation Ltd.***[1], ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi***[2], ***B. E. Simoese Von Staraburg Niedenthal v. Chhatisgarh Investment Ltd.***[3], ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.***[4] (hereinafter referred to as "***BALCO***"), ***Indus Mobile Distribution Pvt Ltd v. Datawind Innovations Pvt Ltd.***[5], ***BGS SGS Soma JV v. NHPC Ltd.***[6] and ***Mankastu Impex Pvt. Ltd.v. Airvisual Ltd.***[7], as well as the judgments of this Court in ***Big Charter Pvt. Ltd. v. Ezen Aviation Pvt. Ltd.***[8] and ***Cars24 Services Pvt. Ltd. v. Cyber Approach Workspace LLP***.[9] Mr. Prabhakar has pointed out, correctly, that there are four categories of decisions, on this aspect, i.e. cases in which (i) the contract only contained a "seat of arbitration" clause, (ii) the contract contained only an "exclusive jurisdiction" clause, (iii) the contract contained a seat of arbitration clause as well as an exclusive jurisdiction clause, and both clauses conferred jurisdiction on the same court, and (iv) the contract contained a seat of arbitration clause and an exclusive jurisdiction clause with the clauses conferring jurisdiction on different courts. The present case, clearly, falls within the fourth category.

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[1] **(2013) 9 SCC 32**
[2] **(2018) 9 SCC 49**
[3] **(2015) 12 SCC 225**
[4] **(2012) 9 SCC 648**
[5] **(2017) 7 SCC 678**
[6] **(2020) 4 SCC 234**
[7] **(2020) 5 SCC 399**
[8] **MANU/DE/1916/2020**
[9] **MANU/DE/2071/2020**

12. Mr. Prabhakar submits that cases in which the contract contained only a seat of arbitration clause, without an exclusive jurisdiction clause, are of no avail, as the jurisdiction, in such cases, would naturally go by the fixation of the seat of arbitration. Similarly, in cases having only an exclusive jurisdiction clause, Mr. Prabhakar, even while accepting that in such cases, too, the court was not required to deal with a dissonance between the seat of arbitration and the exclusive jurisdiction, sought to highlight the pre-eminence accorded by the Supreme Court on the exclusive jurisdiction clause. Similarly, where the contract contained separate clauses fixing the seat of arbitration and conferring exclusive jurisdiction, but the courts conferred with jurisdiction under the said clauses were the same, Mr. Prabhakar points out that the dispute as arising in the present case would not come up for consideration. According to Mr. Prabhakar, if one were to properly analyse the judgments of the Supreme Court on the point, in cases in which where there is an exclusive jurisdiction clause, there is no escaping the effect thereof. Fixing of seat of arbitration elsewhere according to Mr. Prabhakar, would make no difference.

13. It would be profitable to examine the aspect with respect to the four individual categories of cases, as enumerated in para 12 hereinabove, noting the submissions of Mr. Prabhakar in each case.

A. Cases in which the contract only contained an "exclusive jurisdiction" clause, but no "seat of arbitration" clause

14. Into this category fall the decisions in ***Swastik Gases***[1], ***B. E.***

Simoese Von Staraburg Niedenthal[3] and ***Emkay Global Financial Services***[2].

15. In ***Swastik Gases***[1], Clause 18 of the agreement, between the parties, postulated that "the agreement shall be subject to jurisdiction of the courts at Kolkata". Swastik Gases sought to contend that, as a major part of the cause of action had arisen at Jaipur, a petition, under Section 11 of the 1996 Act, would be maintainable before the High Court of Rajasthan at Jaipur as well. The Supreme Court held that, once Clause 18 stipulated that courts at Kolkata would have jurisdiction, it meant that courts at Kolkata *alone* would have jurisdiction. Mr. Prabhakar, predictably, relies on this statement of the law, to emphasise that, once there is an exclusive jurisdiction clause in the agreement – such as Clause 10.1 of the MSA in the present case – the courts, conferred jurisdiction by the said clause, alone would have jurisdiction to entertain petitions under the 1996 Act, especially Section 11 petitions.

16. The submission of Mr. Prabhakar cannot be accepted, in view of the observation that immediately follows the aforesaid statement of the law, on which Mr. Prabhakar relies, as contained in ***Swastik Gases***[1]. Para 32 of the report in ***Swastik Gases***[1] reads thus:

> "32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties—by

> having Clause 18 in the agreement—is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play *as there is nothing to indicate to the contrary*. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts."
>
> (Emphasis supplied)

The Supreme Court makes it abundantly clear, in the afore extracted passage, that it was interpreting the exclusive jurisdiction clause, by applying the *expressio unius est exclusio alterius* maxim "as there (was) nothing to indicate to the contrary". It is not possible, therefore, to apply this judgment, as a precedent, where there is a "seat of arbitration" clause, indicating to the contrary. The reliance, by Mr. Prabhakar, on this judgment is, therefore, misplaced.

17. ***B. E. Simoese Von Staraburg Niedenthal***[3], similarly, contained an exclusive jurisdiction clause, but no seat of arbitration clause. The agreement, forming subject matter of consideration in the said case, stipulated that "the courts at Goa shall have exclusive jurisdiction". Jurisdiction of courts at Raipur was sought to be invoked on the ground that the cause of action had arisen within their jurisdiction, citing Section 2(1)(e) of the 1996 Act. The Supreme Court rejected the contention, relying on ***Swastik Gases***[1]. The paragraphs, from the said decision, on which Mr. Prabhakar places reliance, merely reiterate ***Swastik Gases***[1]. This judgment, too, therefore, cannot help Mr. Prabhakar, in the stand that he seeks to canvass.

18. In ***Emkay Global Financial Services***[2] – on which Mr. Prabhakar places extensive reliance – the contract, between the parties, conferred exclusive jurisdiction on civil courts at Mumbai, to entertain claims arising out of disputes relating to the said contract. There was no contractual "seat of arbitration" clause. However, the National Stock Exchange referred the dispute to a Sole Arbitrator, who held sittings in Delhi and delivered the award at Delhi. The issue before the Supreme Court was whether, in such circumstances, this court could entertain a challenge to the award under Section 34 of the 1996 Act. The appellant before the Supreme Court relied on the judgment in ***Indus Mobile Distribution Pvt Ltd***[5] to contend that, as the seat of arbitration was Delhi, the Section 34 challenge, to the award, was maintainable before courts at Delhi. The Supreme Court took note of the fact that, in ***Indus Mobile Distribution Pvt Ltd***[5], it had been held that a "seat of arbitration" clause was akin to an exclusive jurisdiction clause and that, therefore, once the "seat" was determined, the courts having jurisdiction over the said seat would have exclusive jurisdiction to regulate the arbitral proceedings. Even so, in para 9 of the report, it was held thus:

> "9. Following this judgment, it is clear that once courts in Mumbai have exclusive jurisdiction thanks to the agreement dated 3-7-2008, read with the National Stock Exchange Bye-laws, it is clear that it is the Mumbai courts and the Mumbai courts alone, before which a Section 34 application can be filed. *The arbitration that was conducted at Delhi was only at a convenient venue earmarked by the National Stock Exchange, which is evident on a reading of Bye-law 4(a)(iv)*

read with sub-clause (xiv) contained in Chapter XI."

(Emphasis supplied)

Though Bye-law 4(a)(iv), and sub- clause (xiv), in Chapter XI of the Bye-laws, on which the Supreme Court relied, are not reproduced in the judgment, the contents thereof have been distilled thus, in the opening sentence in para 4 of the report:

> "4. The Bye-laws go on to describe the relevant authority prescribing regulations for creation of seats of arbitration for different regions, or prescribing geographical locations for conducting arbitrations, and prescribing the courts which shall have jurisdiction for the purpose of the Act – see Chapter XI dealing with Arbitration – Clause 4(a)(iv). Equally, under sub- clause (xiv), the place of arbitration for each reference and the places where the arbitrator can hold meetings have also to be designated."

Clearly, therefore, in this case, no contractual "seat of arbitration" was fixed, and Delhi was only a convenient venue for holding of the arbitral proceedings. In view thereof, the Supreme Court held that the exclusive jurisdiction clause, conferring exclusive jurisdiction on courts in Mumbai, would hold sway. This judgment, too, therefore, cannot assist in appreciating the legal position which would apply, in a case where the contract contained both an exclusive jurisdiction clause as well as a seat of arbitration clause.

<u>B. Cases in which the contract contained a "seat of arbitration" clause but no "exclusive jurisdiction" clause</u>

19. ***BALCO*[4]**, ***BGS SGS Soma JV*[6]** and ***Brahmani River Pellets v.***

Kamachi Industries Ltd[10] fall in this category.

20. ***BALCO***[4], though rendered by a Constitution Bench, is not strictly relevant. That case dealt with a foreign seated arbitration, with the seat of arbitration at London. The application, forming the subject matter of the proceedings before the Supreme Court, was preferred under Section 9 of the 1996 Act. Section 2 (2) of the 1996 Act, as it stood at that time, clearly stated that the provisions of Part I (which included Section 9) "shall apply where the place of arbitration is in India". It was sought to be contended, before the Supreme Court, that, as Section 2(2) did not use the word "only", applications under Section 9, even in respect of foreign-seated arbitrations, were maintainable in India. The Supreme Court negatived the contention, and held that a plain reading of Section 2 (2) clearly indicated that Part I of the 1996 Act applies only to arbitrations which took place in India, and did not apply to foreign-seated arbitrations. This judgement, in fact, led to the amendment of Section 2 (2), with the addition of the proviso thereto, extending the application of Part I of the 1996 Act even to arbitrations where the seat of arbitration was located outside India. The issue in controversy in ***BALCO***[4] was, therefore, entirely distinct from that involved in the present case.

21. ***BGS SGS Soma JV***[6] involved a domestic arbitration, and the controversy before the Supreme Court was as to whether the "seat" of arbitration was Delhi or Faridabad. Clause 67.3(vi) of the agreement between the parties, in that case, provided that arbitration proceedings

[10] **(2020) 5 SCC 462**

would be held in New Delhi/Faridabad. Consequent to disputes arising between BGS SGS Soma JV (hereinafter referred to as "BGS") and NHPC, the respondent before the Supreme Court stated, a three-member Arbitral Tribunal was constituted, in accordance with Clause 67.3 of the contract. The Arbitral Tribunal delivered its award at New Delhi. NHPC challenged the award before the Court of the learned District and Sessions Judge, Faridabad, under Section 34 of the 1996 Act. The case was, subsequently, transferred to the Special Commercial Court, Gurugram. *Vide* order dated 21st December, 2017, the Court returned the Section 34 petition to NHPC, for presentation before the court having jurisdiction in New Delhi. NHPC filed an appeal, against this decision, to the High Court of Punjab and Haryana. The appeal was allowed by the High Court, on the ground that Delhi was only a convenient venue for holding of the arbitral proceedings, and was not the "seat of arbitration". Part of the cause of action having arisen at Faridabad, the High Court held that the Section 34 petition had competently been filed by NHPC before the court at Faridabad. Before the Supreme Court, BGS contended that, as the Arbitral Tribunal had conducted its sittings, and delivered its award, at New Delhi, Delhi was the "seat" of the arbitral proceedings. Once the venue of the arbitral proceedings had been selected by the parties as New Delhi, it was contended that this venue was liable to be regarded as the "seat" of arbitration. NHPC contended, *per contra*, that New Delhi was merely a convenient venue for conducting of the arbitral proceedings, and was not the "seat" of arbitration. According to NHPC, the agreement between the parties did not fix any "seat" of arbitration and, therefore, a substantial part of the cause of action having arisen at Faridabad, the Section 34 petition was competently instituted before the Faridabad court.

22. The Supreme Court held that there was no distinction between the "place" and the "seat" of arbitration and relied, for the purpose, on the earlier decision in ***BALCO***[4], as well as on Sections 20 and 31(4) of the 1996 Act. The Supreme Court went on to hold that "where the parties had selected the seat of arbitration in their agreement, such election would amount to an exclusive jurisdiction clause, as the parties have now indicated that the courts at the "seat" would alone have the jurisdiction to entertain the challenges against the arbitral award which had been made at the "seat". Reliance was placed, *inter alia*, on the judgment in ***Indus Mobile Distribution Pvt Ltd***[5], especially with the observation, therein, that "the moment a seat is designated by agreement between the parties, it is akin to an exclusive jurisdiction clause, which would then vest the courts at the "seat" with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties". The Supreme Court went on, therefore, to hold that New Delhi and Faridabad were both "seats" of arbitration, but relegated the respondent, before it, to challenge the award at New Delhi, as the award was signed at New Delhi and both parties had, therefore, chosen New Delhi as the "seat" of arbitration under Section 20(1) of the 1996 Act. Clearly, therefore, the Supreme Court has, in ***BGS SGS Soma JV***[6], accorded pre-eminence to the seat of arbitration, as determined between the parties.

23. Mr. Prabhakar sought to distinguish the judgment in ***BGS SGS***

Soma JV[6]. He drew my attention to various paragraphs from the said decision, specifically para 32, 38, 41, 49, 53 and 61 (as reported in the SCC). He sought to submit that (i) the Supreme Court had, in para 32 of the report, noted the fact that, even while the 1996 Act accorded importance to the "juridical seat" of the arbitral proceedings, the definition of "court", as contained in Section 2(1)(c) of the Arbitration Act, 1940, continued in the 1996 Act, (ii) in para 88 of the report, the Supreme Court had observed that ***BALCO***[4] had harmoniously construed Sections 2(1)(e) and 20 of the 1996 Act, (iii) the Supreme Court had also cautioned that the judgments of Courts are not to be read as akin to theorems of Euclid, and observations in the judgments were required to be seen in the context in which they appeared and (iv) in para 61 of the report, the Supreme Court clarified that "wherever there is an express designation of a "venue", 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 the stated venue is actually the juridical seat of the arbitral proceeding". In the present case, contends Mr. Prabhakar, the conferment of exclusive jurisdiction on courts at Bengaluru to decide disputes relating to the agreement between the parties, constitutes "significant contrary indicia", within the meaning of para 61 of ***BGS SGS Soma JV***[6].

24. I am unable to agree with Mr. Prabhakar that ***BGS SGS Soma JV***[6] can be distinguished on the grounds suggested by him. The Supreme Court, in ***BGS SGS Soma JV***[6], was essentially concerned with identifying the "seat" of arbitration in that case. No issue of the conjoint interpretation of a "seat of arbitration clause" and an "exclusive jurisdiction clause" arose. It is clear, from a reading of the judgment, that the Supreme Court accorded pre-eminence to the "seat" of arbitration, as determined between the parties. This position, as it emanates from the decision, cannot be gainsaid.

25. The emphasis placed by Mr. Prabhakar on the words "and no other significant contrary indicia", as they figure in para 61 of the report in ***BGS SGS Soma JV***[6], is obviously misplaced. For one, it is a trite principle of interpretation of judicial authorities that one must not pick out, from a judgment, a stray phrase and, unmindful of the context and the circumstances in which that phrase has been used in the decision, seek to place reliance thereon. Even otherwise, the expression "and no other significant contrary indicia", as employed by the Supreme Court in para 61 of the report in ***BGS SGS Soma JV***[6], is obviously in the context of the treating of the "venue" of the arbitral proceedings, as designated in the agreement, as the "seat" of arbitration. The Supreme Court has held that, in the absence of any "other significant contrary indicia", the designation of a particular place as the venue of arbitration, in the contract between the parties, would amount to designating such place as the "seat" of the arbitral proceedings. If, on the other hand, there are other significant contrary indicia, which indicates that the "seat" of arbitration is not the "venue" as specified in the contract, the presumption of the venue being the seat would not apply. It is in this context that the Supreme Court has used the expression "and no other significant indicia", and not to denote an exception to the principle that the seat of arbitration, as fixed in the contract, would confer supervisory jurisdiction of the Court. The meaning that Mr. Prabhakar seeks to place on the expression "and no other significant contrary indicia" is, in my view, totally out of sync with the decision in ***BGS SGS Soma JV***[6]. To reiterate, if anything, ***BGS SGS Soma JV***[6] underscores the significance of the "seat" of the arbitration, as designated in the agreement between the parties, and as mutually determined between them, as an indicator of the Court which would enjoy supervisory jurisdiction over the arbitral proceedings.

26. The third decision, dealing with a contract which specified the "seat" of arbitration, but did not contain any "exclusive jurisdiction" clause, is ***Brahmani River Pellets***[10]. Here, again, there was no provision conferring exclusive jurisdiction, to deal with matters concerning the arbitral proceedings, on courts in any particular territorial location, but the agreement, between the parties, fixed Bhubaneswar as the venue of the arbitral proceedings. The consignment, relating to which the agreement entered into, between the parties, was to be loaded at Bhubaneswar and unloaded at Chennai. Kamachi Industries Ltd (the respondent before the Supreme Court and referred to, hereinafter, as "Kamachi") filed an application, under Section 11 (6) of the 1996 Act, for appointment of an arbitrator, as disputes arose between Brahmani River Pellets (the appellant before the Supreme Court and referred to, hereinafter, as "Brahmani") and Kamachi. Brahmani opposed the application on the ground of want of territorial jurisdiction, submitting that, as Bhubaneswar was the designated seat of arbitration, the High Court of Odisha alone would have jurisdiction to entertain the Section 11 petition. The High Court of Madras rejected the submission, holding that the mere designation of a "seat" of arbitration did not oust the jurisdiction of all other courts to deal with the matter, and appointed a sole arbitrator to arbitrate on the dispute. Brahmani challenged the judgment before the Supreme Court. The Supreme Court held that the fixing of the "venue" of arbitration at Bhubaneswar evidenced the intention, of the parties to exclude the jurisdiction of other courts and that, therefore, Bhubaneswar was not only the "venue", but also the "seat" of arbitration. In view thereof, the Supreme Court held that the High Court of Madras erred in assuming jurisdiction. Here, again, the Supreme Court was concerned more with the issue of whether the "venue" of arbitration could be treated as the "seat" thereof, and whether, once such seat is designated, other High Courts could entertain the Section 11 petition. No conflict, between clauses specifying the seat of arbitration and conferring exclusive jurisdiction on courts to entertain proceedings relating to the dispute, existed, in the said case.

27. While, therefore, the aforesaid three decisions, dealing with agreements in which there was no "exclusive jurisdiction" clause, but which contained clauses fixing the venue, or the seat, of arbitration, may not be strictly useful for adjudicating the controversy in issue before me, the judgement in ***BGS SGS Soma JV***[6] does underscore, in no uncertain terms, the importance and pre-eminence of a "seat of arbitration" clause, if contained in the agreement between the parties.

C. Cases in which the contract contained a "seat of arbitration" and an "exclusive jurisdiction" clause, and both clauses vested jurisdiction in the same court, or courts at the same territorial location

28. Into this category falls the decision in ***Indus Mobile Distribution Pvt Ltd***[5]. In this case, Clause 18 of the agreement between Indus Mobile Distribution Pvt Ltd (referred to, hereinafter, as "Indus") and Datawind Innovations Pvt Ltd (hereinafter referred to as "DIPL") provided for resolution of disputes by arbitration to be conducted at Mumbai, in accordance with the 1996 Act. Clause 19 conferred exclusive jurisdiction, by stipulating that "all disputes and differences of any kind whatsoever arising out of or in connection with (the) agreement shall be subject to the exclusive jurisdiction of courts of Mumbai only". As such, here, the contract between the parties, clearly and unambiguously, conferred exclusive jurisdiction, in all matters, on courts at Mumbai, which was also the seat of arbitration. Despite this, petitions, under Section 9 and Section 11 of the 1996 Act were preferred, by DIPL, before this Court. Indus contested the jurisdiction of this Court to entertain the petitions, stating that the agreement, between DIPL and Indus, clearly conferred exclusive jurisdiction on courts at Mumbai. This Court repelled the objection, on the ground that no part of the cause of action arose within the jurisdiction of Mumbai and that, by consent and agreement, parties could not confer jurisdiction of the court which otherwise had no jurisdiction to deal with the matter. The Supreme Court, in appeal, reversed the decision. Para 19 of the report (in SCC) is of significance, and maybe reproduced thus:

"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.*"
>
> (Italics and underscoring supplied)

29. The Supreme Court, therefore, held that the very fixation of the seat of arbitration at Mumbai resulted in courts at Mumbai being conferred with exclusive jurisdiction to entertain the petitions. The "exclusive jurisdiction clause", i.e. Clause 19 in the agreement was held only to "further to make it clear". The manner in which the Supreme Court has phrased its findings, in the afore-extracted passage, is important because, though conferment of exclusive jurisdiction on courts at Mumbai, to deal with the petitions initiated under Sections 9 and 11 of the 1996 Act, could be justified both under the "seat of arbitration" clause, as well as under the "exclusive jurisdiction" clause, the Supreme Court chose to decide the issue on the basis of the "seat of arbitration" clause, rather than the "exclusive jurisdiction" clause, observing, in the process, that the "exclusive jurisdiction" clause merely underscored the legal position that emanated from the "seat of arbitration" clause. In other words, the

Supreme Court held that the designation of Mumbai as the "seat of arbitration", *ipso facto*, conferred exclusive Section 9 and Section 11 jurisdiction on courts at Mumbai, and that the "exclusive jurisdiction" clause merely fortified this legal position. The pre-eminence of the fixing of the seat of arbitration, in the agreement, therefore, stands emphasized in this decision as well.

D. Cases in which the contract contained a "seat of arbitration" and an "exclusive jurisdiction" clause, vesting jurisdiction in courts at different territorial locations

30. The only decision of the Supreme Court, cited before me, in which the "seat of arbitration" clause and the "exclusive jurisdiction" clause vested jurisdiction in courts at different territorial locations, was ***Mankastu Impex Pvt. Ltd.***[7], and this case is of considerable importance in deciding the issue at hand. I refer to the petitioner and the respondent, before the Supreme Court, for the sake of convenience, as "Mankastu" and "Airvisual" respectively. Clauses 17.1 to 17.3 of the agreement between Mankastu and Airvisual read as under:

> "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 proceedings shall be conducted in English language.
>
> 17.3 It is agreed that a party may seek provisional, injunctive or equitable remedies, including but not limited to preliminary injunctive relief, from a court having jurisdiction, before, during or after the pendency of arbitration proceeding."

The contractual position, as it obtained in Mankastu was, therefore, that (i) courts at New Delhi were conferred with "the jurisdiction", (ii) the contract permitted the parties to seek provisional, injunctive or equitable remedies, including preliminary injunctive relief, from a "court having jurisdiction", i.e. from courts at New Delhi and (iii) the "place of arbitration" was Hong Kong.

31. Paras 25 to 27 of the SCC report in ***Mankastu Impex Pvt. Ltd.***[7] exposited the law thus:

> "**25.** Clause 17.1 of MoU stipulates that MoU is governed by the laws of India and the courts at New Delhi shall have jurisdiction. The interpretation to Clause 17.1 shows that the substantive law governing the substantive contract are the laws of India. The words in Clause 17.1, *"without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction"* has to be read along with Clause 17.3 of the agreement. As per Clause 17.3, the parties have agreed that the party may seek provisional, injunctive or equitable remedies from a court having jurisdiction before, during or after the pendency of any arbitral proceedings. In ***BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810***, this Court held that : (SCC p. 636, para 157)
>
>> "*157.* … on a logical and schematic construction of the Arbitration Act, 1996, the Indian courts do not have the power to grant interim measures when the seat of arbitration is outside India."

If the arbitration agreement is found to have seat of arbitration outside India, then the Indian courts cannot exercise supervisory jurisdiction over the award or pass interim orders. It would have, therefore, been necessary for the parties to incorporate Clause 17.3 that parties have agreed that a party may seek interim relief for which the Delhi courts would have jurisdiction.

26. In this regard, we may usefully refer to the insertion of proviso to Section 2(2) of the Arbitration Act, 1996 by the Amendment Act, 2015. By the Amendment Act, 2015 (w.e.f. 23-10-2015), a proviso has been added to Section 2(2) of the Act as per which, certain provisions of Part I of the Act i.e. Section 9 – interim relief, Section 27 – court's assistance for evidence, Section 37(1)(*a*) – appeal against the orders and Section 37(3) have been made applicable to "international commercial arbitrations" even if the place of arbitration is outside India. Proviso to Section 2(2) of the Act reads as under:

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

It is pertinent to note that Section 11 is not included in the proviso and accordingly, Section 11 has no application to "international commercial arbitrations" seated outside India.

27. The words in Clause 17.1, "*without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction*" do not take away or dilute the intention of the parties in Clause 17.2 that the arbitration be administered in Hong Kong. The words in Clause 17.1 do not suggest that the seat of arbitration is in New Delhi. <u>Since Part I is not applicable to "international commercial arbitrations", in order to enable the parties to avail the interim relief, Clause 17.3 appears to have been added.</u> The words, "*without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction*" in Clause 17.1 is to be read in conjunction with Clause 17.3. Since the arbitration is seated at Hong Kong, the petition filed by the petitioner under Section 11(6) of the Act is not maintainable and the petition is liable to be dismissed."

(Underscoring supplied; italics in original)

32. This decision is of particular relevance in the present case, as the Supreme Court was dealing with a contract in which there were separate "exclusive jurisdiction" and "seat of arbitration" clauses, vesting jurisdiction in courts situated at different territorial locations. The "seat of arbitration" clause vested jurisdiction in courts at Hong Kong. As in the present case, the Supreme Court was concerned with a Section 11 petition. The case before the Supreme Court was relating to an international commercial arbitration. The Supreme Court noticed the fact that the proviso to Section 2(2) of the 1996 Act made the provisions of Sections 9, 27 and 37(1)(a) and (3) applicable even to foreign seated arbitrations. Mankastu, who had filed the Section 11 petition before this Court, it was held, could not derive any capital from the proviso to Section 2(2), as the petition had not been preferred under Sections 9, 27, 37(1)(a) or 37(3), but under Section 11, which was not covered by the proviso to Section 2(2). The issue of territorial jurisdiction had, therefore, to be decided *de hors* Section 2(2) – to that extent, the fact that the Supreme Court was concerned with international commercial arbitration would not be a factor to distinguish ***Mankastu Impex Pvt. Ltd.***[7] from the present case.

33. This brings the present case, to a large extent, at par with ***Mankastu Impex Pvt. Ltd.***[7], insofar as the issue in controversy was concerned. As in the present case, the "seat of arbitration" clause, in the contract, vested jurisdiction in courts at Place A (in ***Mankastu Impex Pvt. Ltd.***[7], Hong Kong; in the present case, New Delhi), whereas the "exclusive jurisdiction" clause vested jurisdiction in courts at Place B (in ***Mankastu Impex Pvt. Ltd.***[7], New Delhi; in the present case, Bengaluru). Mankastu contended that, by virtue of the "exclusive jurisdiction" clause, that courts at New Delhi were exclusively invested with jurisdiction to decide the Section 11 petition; parallelly, the respondent before me contends, through Mr. Prabhakar, that, by virtue of the "exclusive jurisdiction" clause in the MSA, courts at Bengaluru were exclusively invested with Section 11 jurisdiction. Airvisual contended, before the Supreme Court, per contra, that, as the seat of arbitration was Hong Kong, courts at Hong Kong would possess exclusive jurisdiction to appoint the arbitrator; parallelly, the petitioner before me contends, through Mr. Mehta, that, by virtue of the seat of arbitration, in the present case, being New Delhi, this Court would possess exclusive jurisdiction to appoint the arbitrator. At a plain glance, therefore, the issue in controversy in the present case bears stark similarity to that in ***Mankastu Impex Pvt. Ltd.***[7].

34. The Supreme Court upheld the contention of Airvisual, and repelled the contention of Mankastu. The fixation of the seat of arbitration as Hong Kong, held the Supreme Court, resulted in the vesting of exclusive jurisdiction, to entertain the petition for appointment of the arbitrator, with courts at Hong Kong, and divested all other courts of jurisdiction in the matter. By analogy, in the present case, the fixation of the seat of arbitration as New Delhi would result in vesting of exclusive jurisdiction, to entertain the present petition for appointment of the arbitrator, with this Court, and in the divestiture, of all other courts in the country, of the said jurisdiction.

35. Adverting to the "exclusive jurisdiction" clause, on which Mankastu relied (as does Mr. Prabhakar before me), the Supreme Court held that, in order for Section 11 jurisdiction to be conferred, on this Court by such an "exclusive jurisdiction" clause, the clause had to *specifically* confer exclusive Section 11 jurisdiction on this Court. A generalised "exclusive jurisdiction" clause, in the opinion of the Supreme Court, would not suffice. Rather, pointed out the Supreme Court, Clause 17.3 in the agreement between Mankastu and Airvisual specifically conferred Section 9 jurisdiction on "the court having jurisdiction", i.e. courts at New Delhi. No such conferment, of Section 11 jurisdiction, on courts at New Delhi was, it was observed, forthcoming from the agreement. Parallelly, in the present case, the mere vesting of "exclusive jurisdiction in all matters arising out of the MSA", on courts at Bengaluru, would not result in conferment of Section 11 jurisdiction on the High Court of Karnataka at Bengaluru, where no such specific conferment of Section 11 jurisdiction is to be found in the MSA. Had the "exclusive jurisdiction" clause specifically conferred Section 11 jurisdiction on the High Court at

Bengaluru, the situation would have been different – as was the position which obtained in ***Cars24 Services Pvt. Ltd.***[9]. Where, however, the "exclusive jurisdiction" clause does not specifically confer Section 11 jurisdiction on the High Court at Bengaluru and, on the other hand, the separate "seat of arbitration" clause fixes the seat of arbitration at New Delhi, applying the law laid down in ***Mankastu Impex Pvt. Ltd.***[7], Section 11 jurisdiction would vested in this Court, and not in the High Court of Karnataka at Bengaluru.

36. ***Big Charter Pvt. Ltd.***[8], which was decided by me and which was cited by both sides, I may note, does not really apply to the case at hand as, in that case, this Court was dealing with an international commercial arbitration, and with a petition preferred under Section 9 of the 1996 Act. The proviso to Section 2(2), therefore, directly came in for application, and the issue addressed by the Court was whether there was any "agreement to the contrary", as would derogate from the applicability of the said proviso. The controversy in that case, and in the case before me today are, therefore, as alike as chalk and cheese.

37. In the case of a domestic arbitration, therefore, I am of the opinion that the Court, having jurisdiction over the seat of arbitration, would be exclusively competent to entertain petitions under the 1996 Act, in exercise of its supervisory jurisdiction over the arbitral process, unless there is a separate clause conferring exclusive jurisdiction on a court in another territorial location, *qua the particular provision which is in issue*. If, in other words, in the present case, the MSA were to contain an exclusive jurisdiction clause, conferring exclusive section 11 jurisdiction on a court located elsewhere than at New Delhi, the situation may have been different. There is, however, no such *specific* exclusive jurisdiction clause; ergo, territorial jurisdiction, to entertain the present petition under Section 11 of the 1996 Act, thus, has to abide by the seat of arbitration which is, undisputedly, New Delhi.

38. I am, therefore, of the view that the objection, of Mr. Prabhakar, regarding the territorial jurisdiction of this Court, to entertain the present petition, is without merit. It is accordingly rejected.

Re. Absence of privity of contract between the petitioner and the respondent

39. Mr. Prabhakar advanced, as the second limb of his submissions, the contention that there was no privity of contract between the petitioner and respondent and that, therefore, the present petition was fundamentally not maintainable. This allegation is premised on the following factual contentions:

(i) The MSA, dated 29th October, 2018, was between the respondent and Alcott. The subsequent Addenda, dated 7 March, 2019 and 22nd April, 2019, to the MSA, were also between the respondent and Alcott. The registered office of Alcott, as reflected in the Addendum dated 22nd April, 2019, was different from its registered office in the Addendum dated 7th March, 2019. Till then, the petitioner was nowhere in the picture.

(ii) Clause 5.1.18 of the MSA permitted assignment of the MSA only after the respondent was informed in writing. Any notice of such assignment had, under Clause 11.7, to be in writing and delivered by hand or sent by email or by post or by a delivery service which maintains the records of delivery.

(iii) The communication, dated 30th April, 2019, whereby Alcott supposedly informed the respondent regarding assignment of the rights and obligations of Alcott, under the MSA, to the petitioner with effect from 1st June, 2019, reflected yet another address, as the registered office of Alcott. Moreover, this communication was addressed to S. A. Ramesh Babu, at his purported email ID gururaju.18@gmail.com. Mr. Prabhakar submitted that this email ID does not belong to his client. As such, he submitted that there was no intimation regarding assignment of the MSA to the petitioner, in the manner contemplated by the MSA.

(iv) The communication dated 30th April, 2019 stated that the assignment was to take effect from 1st June, 2019. Yet, in the legal notice dated 5th December, 2019, addressed by Chestlaw, Advocates and Solicitors to the respondent, M/s OYO Homes and Hotels Pvt Ltd (earlier known as Alcott Town Planners Pvt Ltd) was shown as the client, with no reference to the petitioner. This, again, threw into doubt the validity and veracity of the communication dated 30th April, 2019.

(v) The respondent addressed a communication, dated 27th December, 2019, to Aniket Jain, of OYO, with respect to the termination of the MSA on 29th October, 2018. In its reply, dated 31st December, 2019, addressed, through counsel, by email to the respondent, the name of the petitioner was shown, for the first time, as the "client". The respondent, in its reply dated 4th January, 2020, sought to know whether the aforesaid email communication dated 31st December, 2019, had been written by an OYO authorised person. The reply to this communication, as issued by Counsel on 6th January, 2020, again referred to the petitioner as the "client", but did not confirm whether the notice dated 31st December, 2019, was issued by an authorised person of OYO.

(vi) In the pleadings, the registered office of Alcott was shown as E-43/1, Okhla Industrial Area, Phase 2 Delhi, 110020 whereas the registered office of OYO was Ahmedabad. The Company Master Data relating to the petitioner, with the Registrar of Companies, reflected its registered address to be at Gurgaon, with no address at Gujarat.

(vii) The registered address of Alcott, as contained at the head of the communication dated 30th April, 2019, was different from the address of Alcott as reflected in the Addendum dated 22nd April, 2019. The formalities prescribed by Section 12(4) of the Companies Act, 2013, for change of address of the Company, in such a short span of time, could not have been complied with.

(viii) The Directors of the petitioner were different from the Directors of Alcott and the Directors of OYO, whereas two of the Directors of OYO were also Directors of Alcott.

(ix) All these facts, according to Mr. Prabhakar, seen in conjunction, indicated that the petitioner was an entirely different entity, from Alcott and OYO. As such, there was no privity of contract between the respondent and the petitioner.

Mr. Prabhakar invited my attention to the further communications, issued after the transfer of the affairs of Alcott to the petitioner, in which OYO was still being referred to. He submitted that, even after 1st June, 2019, the respondent had been corresponding with OYO, which would not have been the position, had the communication dated 30th April, 2019, in fact been sent to the respondent.

40. The only other document, in which the name of the petitioner figured, submitted Mr. Prabhakar, was a communication dated 7th November, 2019, from the petitioner to the respondent. This communication, Mr. Prabhakar acknowledges, was sent by the petitioner, and not by Alcott or OYO. Mr. Prabhakar sought to explain the respondent acquiescing to this communication on the ground that the signature, over the name of the petitioner at the foot of the communication, was of Aniket Jain, who had always been issuing the communications on behalf of Alcott and OYO. As such, Mr. Prabhakar submits that his client, on seeing the signature of Aniket Jain at the foot of the communication dated 7th November, 2019, assumed that Mr. Jain was signing for Alcott.

41. Mr. Prabhakar submits that the petitioner, therefore, having no privity of contract with the respondent, could not maintain the present petition under Section 11 of the 1996 Act.

42. Mr. Jayant Mehta, learned Counsel for the petitioner responds to these submissions by reading, in juxtaposition, the communication dated 31st December, 2019, from the petitioner's counsel to the respondent, with the response, dated 4th January, 2020 of the respondent thereto, the petitioner's further communication dated 6th January, 2020 and the respondent's response, dated 7th January, 2020, thereto. He submits that these communications, read in conjunction, would indicate that the respondent acquiesced to the petitioner's locus in the matter. He submits that if all the communications exchanged between the petitioner and the respondent were seen as a whole, the right of the petitioner to maintain the present petition became apparent. The communication, dated 30th April, 2019 *supra*, submits Mr. Mehta, was a valid conveying of information regarding assignment of the MSA by Alcott to the petitioner. The plea of the respondent, that the said communication had not been received by it, he submits, would have to be determined in arbitration, and could not be decided in a petition under Section 11 of the 1996 Act. Similarly, the plea that gururaju.18@gmail.com was not the email ID of the respondent, submits Mr. Mehta, was a disputed issue of fact, which had to be tested in arbitration. Drawing my attention to Clause 5.1.18 of the MSA, Mr. Mehta submits that assignment of the MSA merely required conveying of information to the respondent in writing, and did not require prior obtaining of his consent. Apropos the reliance, by Mr. Prabhakar on the Master Data of the petitioner, Mr. Mehta submits that these arguments essentially seek to challenge the correctness of the assignment of the MSA by Alcott to the petitioner, which, too, had to be examined in the arbitral proceedings. In any event, he submits that, if the entirety of the correspondence between the petitioner and the respondent was seen, the communication, dated 30th April, 2019 *supra*, whereby Alcott informed the respondent regarding assignment of the MSA to the petitioner, could not be blindly wished away. No issue of compliance with Sections 12 and 13 of the Companies Act, 2013, submits Mr. Mehta, arises in the present case.

43. I am in agreement with Mr. Mehta. On the submissions advanced by him, Mr. Prabhakar cannot be heard to contend that the present petition is not maintainable for want of *locus standi* on the part of the petitioner. The genuineness of the communication dated 30th April, 2019, seen in the backdrop of the other communications on record, as well as the issue of whether gururaju.18@gmail.com was, or was not, the email ID of the respondent, cannot constitute grounds to discountenance the petitioner from maintaining the present petition under Section 11 of the 1996 Act. Section 16 of the 1996 Act empowers the Arbitral Tribunal to rule on its own jurisdiction, and to deal with any objections with respect to the existence or the validity of the arbitration agreement. The contentions regarding want of *locus standi* of the petitioner, as advanced by Mr. Prabhakar, if accepted, would impinge on the jurisdiction of the arbitrator to arbitrate on the present dispute. Besides, the contention of Mr. Prabhakar is, essentially, that there is no valid arbitration agreement in existence between the petitioner and the respondent. "Existence of the arbitration agreement" has, by specific statutory mandate, being made amenable to decision by the Arbitral Tribunal. The submissions of Mr. Mehta, in response to these objections of Mr. Prabhakar cannot be regarded as frivolous or moonshine, as would serve to justify dismissal of the present petition as not maintainable for want of *locus standi*.

44. Leaving this issue open for decision by the learned Arbitral Tribunal, which I propose to constitute by the present judgment, I reject the contention of Mr. Prabhakar, to the effect that the present petition, under Section 11 of the 1996 Act, deserves to be dismissed for want of *locus standi* on the part of the petitioner.

45. No other objection was advanced by Mr. Prabhakar.

Conclusion

46. As a result, the petition is allowed. This Court appoints G. S. Sistani, J., a retired Judge of this Court, as the learned Sole Arbitrator, to arbitrate on the disputes between the parties. The fees of the learned Sole Arbitrator would be fixed by him in consultation with the parties. The details of the learned Sole Arbitrator are as under:

Hon'ble Mr. Justice G. S. Sistani (Retd.),
AB-85, Shahjahan Road,
New Delhi-110011
Mobile No.9871300034

47. The learned Sole Arbitrator would file the requisite disclosure, under Section 12(2) of the 1996 Act, within a week of entering on the reference.

48. The petition stands allowed in the aforesaid terms, with no orders as to costs.

C. HARI SHANKAR, J.

JANUARY 05, 2021
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