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

Date of decision: 05th August, 2022

+ ARB.P. 802/2021

+ ARB.P. 804/2021

VIRGO SOFTECH LTD

..... Petitioner

Through: Ms. Sunanda Tulsyan, Mr. Akhil &
Mr. Sangram Singh, Advocates.

versus

**NATIONAL INSTITUTE OF ELECTRONICS AND
INFORMATION TECHNOLOGY**

..... Respondent

Through: Ms. Bharathi Raju, Senior Panel
Counsel.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

(Judgment released on 16.08.2022)

ANUP JAIRAM BHAMBHANI, J. (ORAL)

Arb. P. 802/2021

By way of the present petition under section 11 of the Arbitration & Conciliation Act 1996 ('A&C Act' for short), the petitioner seeks appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondent from Contract dated 09.01.2012 ('contract' for short).

2. Notice on this petition was issued on 24.08.2021; consequent to which the respondent has filed its counter-affidavit dated 21.04.2022.



3. Ms. Sunanda Tulsyan, learned counsel for the petitioner has invited the attention of this court to clause 8.2 of the General Conditions of Contract ('GCCs' for short) annexed to the contract which comprises the arbitration agreement between the parties. Clause 8.2(a) contemplates reference of disputes between the parties to arbitration in accordance with the A&C Act; and clause 8.2(b) provides that arbitration proceedings shall be held in New Delhi.
4. At this point, it would be relevant to extract the relevant clauses of the contract, including the GCCs and the Special Conditions of Contract ('SCCs' for short), which read as follows :

General Conditions of Contract

'8. SETTLEMENT OF DISPUTES

8.2 Arbitration	<i>a) In the case of dispute arising upon or in relation to or in connection with the contract between the Purchaser and MSP-1, which has not been settled amicably, any party can refer the dispute for Arbitration under (Indian) Arbitration and Conciliation Act, 1996. Such disputes shall be referred to the sole arbitrator nominated by DIT.</i> <i>b) <u>Arbitration proceedings shall be held in New Delhi</u> and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.</i> <i>The decision of the arbitrators shall be final and binding upon both parties. The expenses of the arbitrators as determined by the arbitrators shall be shared equally by the Purchaser and MSP-1. However, the expenses incurred by each party in connection with the preparation, presentation shall be borne by the party itself. All arbitration awards shall be in writing and shall state the reasons for the award. <u>The courts in Aurangabad (M.S.) only shall have the exclusive jurisdiction to try and entertain any dispute arising therefrom.</u></i>
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Special Conditions of Contract

*"The following Special Conditions of Contract (SC) shall supplement the General Conditions of Contract (GC). **Whenever there is a conflict, the provisions herein shall prevail over those in the GC.**"*

<i>Number of GC Clause</i>	<i>Amendments of, and supplements to, Clauses in the General Conditions of Contract</i>
2.4	<i>09th January 2012 : The date of signing of the contract. The contract period shall be a period of 2 years from the date of the contract.</i>
8.2 (b)	<u>The Arbitration proceedings shall take place in New Delhi in India.</u>

5. It is submitted that the petitioner had invoked arbitration *vide* Notice dated 16.08.2018; but to no avail.
6. Subsequent thereto, the petitioner instituted proceedings under section 11 of the A&C Act in case bearing Arb P. No. 754/2018 and Arb P. No. 755/2018, both titled ***"Virgo Softech Ltd. vs. National Institute of Electronics and Information Technology"***; which petitions were however dismissed by a co-ordinate Bench of this court by order/judgment dated 30.11.2018 on the ground that this court lacked territorial jurisdiction. The said decision was assailed by the petitioner before the Hon'ble Supreme Court in SLP(C) Nos. 5063-5064/2019, which SLPs were however dismissed *in-limine* by order dated 25.03.2019. It is argued on behalf of the petitioner however that the filing of the earlier arbitration petition does not stand in the way of this court entertaining the present petition, since the position of law prevailing at that time has changed by reason of a subsequent decision



of the Hon'ble Supreme Court in **BGS SGS SOMA JV vs. NHPC Limited**^I (hereinafter referred to as '**BGS SGS SOMA**'), which entitles the petitioner to file a fresh petition for seeking appointment of an arbitrator.

7. By way of counter-affidavit dated 21.04.2022 filed in the present petition, the respondent has raised the following principal objections to the appointment of an arbitrator in the matter :

- (i) That the present petition is hit by the doctrine of *res-judicata* inasmuch as an earlier petition bearing Arb. P. No. 754/2018 filed by the same petitioner in respect of same subject matter was dismissed by a co-ordinate Bench of this court *vide* order/ judgment dated 30.11.2018 on the ground that this court had no territorial jurisdiction to entertain the petition; and a challenge to that dismissal order was also rejected *in-limine* by the Hon'ble Supreme Court *vide* order dated 25.03.2019;
- (ii) That contract dated 09.01.2012 was entered-into by the petitioner with the respondent's Aurangabad Centre for providing demographic data digitization services in Jabalpur, Madhya Pradesh. It was for this reason that clause 8.2 of the contract, which comprised the arbitration agreement between the parties, stipulated the exclusive jurisdiction of courts in Aurangabad in Maharashtra. It is argued that since the contract provided for territorial jurisdiction of courts in Aurangabad, this court has no territorial jurisdiction to entertain the petition;

^I (2020) 4 SCC 234



- (iii) That there is no surviving dispute between the parties since by way of Addendum dated 11.01.2018 ('addendum' for short), the petitioner received money in full-and-final settlement of all dues in relation to the contract. Apart therefrom, it is contended that upon signing of Addendum dated 11.01.2018 and the contract having ended upon completion of the work on 31.03.2013, the claims sought to be referred to arbitration are time-barred. The relevant portion of the addendum reads as under :

Addendum dated 11.01.2018

”

* * * * *

The Addendum is part of the Agreement dated 09.01.2012 Between, the parties, entered into, for Demographic Data Digitization for the creation of National Population Register (NPR) for usual residents of Urban areas of Zone 12 of Jabalpur (Madhya Pradesh State).

* * * * *

The Addendum, is being drawn between the parties on the basis of Clause 2.6 of the Original Agreement, which contains provision for the Modification or Variations of the Terms and Conditions of the Contract. As per the clause, any Modification or Variation has to be by way of written Agreement, hence this Addendum.

* * * * *

The Terms and Conditions of this Addendum are as below:

i)

* * * * *

vi) The Purchaser's liability for payment to the MSP-1 is strictly as per the terms of this addendum, nothing will remain payable to the MSP-1, thereafter. The payments made under the terms would be Full and Final settlement between the parties. The MSP-1 will not have any other claim (s) to the payments thereafter.



*vii) The MSP-1, will withdraw any Legal matter pending before any Court/any other forum in India and will give a written undertaking of the same at the time of, or before signing of this Addendum. **The MSP-1 shall initiate any Legal Proceedings as per the Arbitration Clause of the original Agreement.***

* * * * *

- (iv) Reference is also made to Minutes of Meeting dated 26.02.2013, to point-out that it was agreed, as recorded in those minutes, that Phase-I of the work would be completed in all aspects by 15.03.2013.
- (v) Lastly, that the recent decision of the Hon'ble Supreme Court in ***Ravi Ranjan Developers Pvt. Ltd vs. Aditya Kumar Chatterjee***² holds that :
 - (a) The mention of a place in an arbitration clause does not *ipso-facto* result in that place becoming the 'seat' of arbitration; while on the other hand, when the contract says that courts at Aurangabad will have 'exclusive jurisdiction', that would amount to the designation of Aurangabad as the 'seat' to the exclusion of other words;
 - (b) The narration in the contract that "*Arbitration proceedings shall be held in New Delhi ...*", would only amount to referring to a 'place' as contemplated in section 20(3) of the A&C Act and not to a 'place' as in section 20(1) of the A&C Act and therefore, Delhi would merely be the geographical location where the arbitral

² 2022 SCC OnLine SC 568



tribunal would hold its sittings, and not the *situs* or the *juridical seat* of the arbitral proceedings;

- (c) Though parties can refer disputes to any one court which might otherwise have jurisdiction to decide their disputes to the exclusion of others; parties cannot, by consent, ‘confer’ jurisdiction on a court which inherently lacks territorial jurisdiction; and
- (d) A judgment is a precedent for the issues of law that are raised and decided, and has to be construed in the backdrop of the facts and circumstances in which the judgment has been rendered; and words, phrases and sentences in a judgment, cannot be read out of context or be read and interpreted as if it were a statute.

8. In rejoinder, the petitioner answers the objections taken by the respondent in the following manner :

- (i) Clause 8.2(b) of the GCCs, which comprises the arbitration agreement between the parties, specifically states that arbitration proceedings shall be held in New Delhi; and the reference to courts of Aurangabad is in the context of general civil disputes and not in relation to the supervisory jurisdiction of courts in relation to arbitral proceedings;
- (ii) Clause 8.2(b) of the Specific Conditions of the Contract annexed to the contract (‘SCCs’ for short) reiterates that arbitration proceedings shall take place in New Delhi. It is therefore contended that the arbitration agreement is clear and consistent specifying that the *venue* of arbitration shall be at



New Delhi; and since there is no specific contrary provision as to the *venue*, it must be deemed also to be the ‘seat’ of the arbitral proceedings;

- (iii) Insofar as the question of full-and-final settlement is concerned, the petitioner disputes and denies that the money received was towards such settlement; and asseverates that the petitioner’s claims against the respondent survive;
- (iv) As regards the allegation that the claims are time-barred, it is submitted that as detailed in the petition, more particularly in para 13 thereof, the respondent paid to the petitioner a sum of Rs.85,77,534/- on 26.03.2018 and also made a deduction towards TDS of Rs.22,39,931/- on 08.06.2018; whereupon, the petitioner invoked arbitration *vide* notice dated 16.08.2018. It is contended that accordingly, the arbitral remedy was invoked well within the 03-year limitation period, as computed from the date of the last part-payment made by the respondent to the petitioner on 26.03.2018, apart from the fact that deduction of tax at source on 08.06.2018 also amounts to acknowledgement by the respondent of the debt owed to the petitioner. It is pointed-out that the last part-payment was also within the specified limitation period and is therefore saved by section 19 of Limitation Act, 1963 (‘Limitation Act’ for short). Upon being queried, it is also clarified that the present petition under section 11 was also filed on 15.08.2021, that is within the 03-year period of limitation for filing such petition; and that the previous arbitration petition was in any case filed on



24.09.2018, immediately upon expiry of the 30-day period of the invocation notice;

- (v) In answer to the main objection, that the present petition is not maintainable since an earlier petition on the same cause of action already stands dismissed for lack of territorial jurisdiction, which dismissal was not interfered-with by the Hon'ble Supreme Court, it is submitted on behalf of the petitioner, that the earlier round of litigation, viz. the dismissal of the arbitration petition filed before this court on 30.11.2018 and the subsequent dismissal of the SLPs by the Hon'ble Supreme Court on 25.03.2019 proceeded on the basis of the judgment in *Union of India vs. Hardy Exploration & Production (India) Inc.*³, (hereinafter referred to as '*Hardy Exploration*') before the Hon'ble Supreme Court rendered its clarificatory judgment in *BGS SGS SOMA* (supra) holding that the decision in *Hardy Exploration* was not good law. It is argued that since the position of law laid down by the Hon'ble Supreme Court with respect to determination of territorial jurisdiction changed and since the decision of the co-ordinate Bench of this court, though on the same cause of action and between the same parties, proceeded on the earlier position of law, it does not constitute *res-judicata*. In this regard, attention is drawn to the decision of the Hon'ble Supreme Court in

³ (2018) 7 SCC 374



Mathura Prasad Bajoo Jaiswal & Ors vs. Dossibai N.B. Jeejeebhoy⁴ (paras 7 and 10 thereof).

9. Based on the averments contained in the petition and in the counter-affidavit and the submissions made by counsel, there are essentially three queries that are required to be answered in the present matter :
- A. Whether the present petition is hit by the principle of *res-judicata* ?
 - B. Whether this court has territorial jurisdiction to entertain the present petition ? and
 - C. Whether the present petition and/or the petitioner's claims are *ex-facie* barred by limitation ?

Query 'A' : Whether the present petition is hit by the principle of *res-judicata* ?

10. The answer to Query 'A' is quite straight forward. In *Mathura Prasad Bajoo Jaiswal* (supra), the Hon'ble Supreme Court has said :

"7. Where the law is altered since the earlier decision, the earlier decision will not operate as res judicata between the same parties: Tarini Charan Bhattacharjee case. (supra) It is obvious that the matter in issue in a subsequent proceeding is not the same as in the previous proceeding, because the law interpreted is different.

* * * * *

"10. A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly by an erroneous

⁴ (1970) 1 SCC 613



decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.”

(emphasis supplied)

11. Furthermore, in *BGS SGS SOMA* (supra) the Hon’ble Supreme Court held that the law laid down in *Hardy Exploration* (supra) was not good law in the following words :

’94. The decision in Hardy Exploration & Production (India) Inc. [Union of India v. Hardy Exploration & Production (India) Inc., (2019) 13 SCC 472 : (2018) 5 SCC (Civ) 790] is therefore contrary to the five-Judge Bench in Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810], in that it failed to apply the Shashoua [Shashoua v. Sharma, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep 376] principle to the arbitration clause in question. The Hardy Exploration & Production (India) Inc. [Union of India v. Hardy Exploration & Production (India) Inc., (2019) 13 SCC 472 : (2018) 5 SCC (Civ) 790] decision would lead to the result that a foreign award would not only be subject to challenge in the country in which it was made, but also subject to challenge under Section 34 of Part I of the Arbitration Act, 1996, which would lead to the chaos spoken of in para 143 of Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810], with the concomitant risk of conflicting decisions, as held in Venture Global Engg. [Venture Global Engg. v. Satyam Computer Services Ltd., (2008) 4 SCC 190] [overruled in Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]], which would add to problems relating to enforcement, and undermine the policy underlying the New York Convention and the Uncitral Model Law. We, therefore, declare that the judgment in Hardy Exploration & Production (India) Inc. [Union of India v. Hardy Exploration & Production (India) Inc., (2019) 13 SCC 472 : (2018) 5 SCC (Civ) 790] , being contrary to the five-Judge Bench in



Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810], cannot be considered to be good law

12. Therefore, the principle reiterated in *Mathura Prasad Bajoo Jaiswal* (supra) is that where the law is changed after an earlier decision, the earlier decision will not operate as *res-judicata* between the same parties. This principle has been followed subsequently in *Canara Bank vs. NG Subbaraya Setty & Anr.*,⁵ where the exceptions to the general proposition of *res-judicata* have been spelt-out in some detail. One of these exceptions is when the earlier proceedings was decided by a court which did not have jurisdiction to do so and was therefore not the 'competent court' for the purpose. In the opinion of this court, the jurisdictional competence of a court would include its territorial competence; and that therefore, when the earlier arbitration petition filed by the petitioner against the respondent was rejected for lack of territorial jurisdiction, which turned-out to be an incorrect rejection by reason of a subsequent judgment of the Hon'ble Supreme Court, the principle laid down *inter-alia* in para 34.2.1 of *Canara Bank* would apply to the present circumstances. Para 34.2.1 of *Canara Bank* reads as under:

"34.2.1. Where an issue of law decided between the same parties in a former suit or proceeding relates to the jurisdiction of the court, an erroneous decision in the former suit or proceeding is not res judicata in a subsequent suit or proceeding between the same

⁵ (2018) 16 SCC 228



parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding. This follows from a reading of Section 11 of the Code of Civil Procedure itself, for the Court which decides the suit has to be a court competent to try such suit. When read with Explanation I to Section 11, it is obvious that both the former as well as the subsequent suit need to be decided in courts competent to try such suits, for the "former suit" can be a suit instituted after the first suit, but which has been decided prior to the suit which was instituted earlier. An erroneous decision as to the jurisdiction of a court cannot clothe that court with jurisdiction where it has none.

* * * * *

(emphasis supplied)

13. The earlier decision of a co-ordinate Bench of this court, *vide* order/judgment dated 30.11.2018 in Arb. P. No. 754/2018 and Arb. P. No. 755/2018, from which SLP(C) Nos. 5063-5064/2019 was dismissed *in-limine* by order dated 25.03.2019, was based on the decision of the Hon'ble Supreme Court in *Hardy Exploration* (supra). *Hardy Exploration* essentially said that without an express opinion or determination signifying a 'place' as a 'seat', the 'place' referred to in an arbitration agreement does not "*ipso facto assume the status of seat*". *Hardy Exploration* was overruled in *BGS SGS SOMA* (supra), since the test in *Hardy Exploration* was considered to be contrary to the decision of the Constitution Bench in ***Bharat Aluminium Co. vs. Kaiser Aluminium Technical Service, Inc.***⁶ (hereinafter referred to as '*BALCO*'). The test for determination of a 'place' as a 'seat' was

⁶ (2012) 9 SCC 552



accordingly re-stated to be that *unless* there is significant contrary indicia ”*the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding.*”.

14. Evidently therefore, the position of law as to territorial jurisdiction in relation to the supervisory role of courts over arbitration, changed post the decision in *BGS SGS SOMA* (supra); and this happened subsequent to the previous round of litigation between the parties to the present proceedings.
15. In view of the subsequent change in law as laid down by the Hon’ble Supreme Court, this court is of the opinion that the decision in the earlier arbitration petition is not *res-judicata* and the present petition is therefore maintainable.

Query ‘B’ : Whether this court has territorial jurisdiction to entertain the present petition ?

16. To answer Query ‘B’ the court must consider the verdicts of the Hon’ble Supreme Court in *BGS SGS SOMA* (supra) and a subsequent decision in *Mankastu Impex Pvt. Ltd. Vs. Airvisual Ltd.*⁷
17. A reference to the arbitration clauses that were under consideration in the aforesaid cases, by way of a tabulated summary, is also useful :

⁷ (2020) 5 SCC 399



**BGS SGS SOMA
JV vs. NHPC
Limited**

“ * * * * *

(i) A dispute with an Indian contractor shall be finally settled in accordance with the Indian Arbitration and Conciliation Act, 1996, or any statutory amendment thereof. ...

(ii) In the case of a dispute with a foreign contractor, the dispute shall be finally settled in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 and read with Uncitral Arbitration Rules. ... In case of any contradiction between Indian Arbitration and Conciliation Act, 1996 and Uncitral Arbitration Rules, the provisions in the Indian Arbitration and Conciliation Act, 1996 shall prevail.

Courts at New Delhi held to have territorial jurisdiction.

* * * * *

(vi) **Arbitration proceedings shall be held at New Delhi/Faridabad, India** and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

... ”

**Mankastu Impex
Private Limited vs.
Airvisual Limited**

17. Governing law and dispute resolution

17.1. This MoU is governed by the laws of India, without regard to its conflicts of laws provisions and **courts at New Delhi** shall have the jurisdiction.

17.2. Any dispute, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally **resolved by arbitration administered in Hong Kong.**

The place of arbitration shall be Hong Kong.

Courts at Hong Kong held to have territorial jurisdiction.

* * * * *

18. A reading of the aforesaid verdicts of the Hon‘ble Supreme Court will show that :



- (i) In *BGS SGS SOMA* (supra), the Hon'ble Supreme Court has said that in the absence of any contrary signifying/significant indicia, the 'venue' mentioned in an arbitration clause would amount to the 'seat' of arbitral proceedings;

*"61. It will thus be seen 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.***

* * * * *

"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)

- (ii) In *Mankastu Impex* (supra), the Hon'ble Supreme Court has held that the 'place of arbitration' by itself does not mean that it is the 'seat' of arbitration; but that the determination of what the parties intended to be the 'seat' should be made "from other clauses in the agreement and the conduct of the parties". The relevant paras of *Mankastu Impex* may be seen :

*"20. It is well settled that "seat of arbitration" and "venue of arbitration" cannot be used interchangeably. It has also been established that mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. **The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties.***

"21. In the present case, the arbitration agreement entered into between the parties provides Hong Kong as the place of arbitration. The agreement between the parties choosing "Hong Kong" as the place of arbitration by itself will not lead to the conclusion that the parties have chosen Hong Kong as the seat of arbitration. The words, "the place of arbitration" shall be "Hong Kong", have to be read along with Clause 17.2. Clause 17.2 provides that "... any dispute, controversy, difference arising out of or relating to MoU shall be referred to and finally resolved by arbitration administered in Hong Kong....". On a plain reading of the arbitration agreement, it is clear that the reference to Hong



Kong as "place of arbitration" is not a simple reference as the "venue" for the arbitral proceedings; but a reference to Hong Kong is for final resolution by arbitration administered in Hong Kong. The agreement between the parties that the dispute "shall be referred to and finally resolved by arbitration administered in Hong Kong" clearly suggests that the parties have agreed that the arbitration be seated at Hong Kong and that laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award."

(emphasis supplied)

19. On a combined reading of *BGS SGS SOMA* (supra) and *Mankastu Impex* (supra) therefore, it is clear that though the mere mention of a 'place' in an arbitration clause may not be sufficient to infer that to be the 'seat' of arbitral proceedings, this may yet be so *if* upon a consideration of the *other clauses in the agreement*, the court comes to the conclusion that the parties *intended* the 'place' mentioned in the arbitration clause to also be the juridical 'seat' of arbitral proceedings.
20. In the present case, the GCCs state that arbitration proceedings "... *shall be held in New Delhi*.". Again, the SCCs also state that arbitration proceedings "... *shall take place in New Delhi ...* ". The parties have also agreed and clearly said in the SCCs that "*Whenever there is a conflict, the provisions herein shall prevail over those in the GC.*", reference being to the terms contained in the SCCs. In view of this express agreement in the SCCs, the reference in the GCCs to courts in Aurangabad, Maharashtra having jurisdiction, becomes immaterial and irrelevant.



21. In coming to the aforesaid conclusion this court is also guided by the sheet-anchor of the law of arbitration, viz. that primacy is to be given to the intention of the parties, which is also contemplated in various provisions of the A&C Act, including sections 2(2)(proviso), 3(1), 4, 7, 8, 10(1), 11(2), 19(2), 20, 21, 22, 23, 24, 25, 26, 28(2), 29, 30(1) and 33.
22. To answer the respondent's contention that parties cannot confer jurisdiction on a court by consent, if no jurisdiction otherwise vests in such court by law, one need only refer to the decision of the Constitution Bench of the Hon'ble Supreme Court in *BALCO* (supra) which recognises that an arbitration agreement may "...provide for a seat of arbitration at a place which would be neutral to both the parties...", giving primacy to party autonomy. This principle has been further expatiated and affirmed in *BBR (India) Pvt Ltd vs SP Singla Constructions Pvt Ltd*,⁸ in the following words :

"15.

* * * * *

Noticing the above interpretation, a three Judges Bench of this Court in BGS SGS Soma JV v. NHPC Limited⁹ has observed that the expression 'subject to arbitration' used in clause (e) to sub-section (1) of Section 2 of the Act cannot be confused with the 'subject matter of the suit'. The term 'subject matter of the suit' in the said provision is confined to Part-I. The purpose of the clause is to identify the courts having supervisory control over the judicial proceedings. Hence, the clause refers to a court which would be essentially a court of 'the seat' of the arbitration process. Accordingly, clause (e) to sub-section (1) of Section 2 has to be

⁸ (2022) SCC OnLine SC 642

⁹ (2020) 4 SCC 234



construed keeping in view the provisions of Section 20 of the Act, which are, in fact, determinative and relevant when we decide the question of 'the seat of an arbitration'. This interpretation recognises the principle of 'party autonomy', which is the edifice of arbitration. In other words, the term 'court' as defined in clause (e) to sub-section (1) of Section 2, which refers to the 'subject matter of arbitration', is not necessarily used as finally determinative of the court's territorial jurisdiction to entertain proceedings under the Act. In BGS SGS Soma (supra), this Court observed that any other construction of the provisions would render Section 20 of the Act nugatory. In view of the Court, the legislature had given jurisdiction to two courts : the court which should have jurisdiction where the cause of action is located; and the court where the arbitration takes place. This is necessary as, on some occasions, the agreement may provide the 'seat of arbitration' that would be neutral to both the parties. The courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. The 'seat of arbitration' need not be the place where any cause of action has arisen, in the sense that the 'seat of arbitration may be different from the place where obligations are/had to be performed under the contract. In such circumstances, both the courts should have jurisdiction, viz., the courts within whose jurisdiction 'the subject matter of the suit' is situated and the courts within whose jurisdiction the dispute resolution forum, that is, where the arbitral tribunal is located."

(emphasis supplied)

23. In view of the above discussion, this court is of the view that it does have territorial jurisdiction to entertain the present petition.

Query 'C' : Whether the present petition and/or the petitioner's claims are *ex-facie* barred by limitation ?

24. The approach that a court is required to take in referral proceedings on the question of limitation, was recently explained by the Hon'ble Supreme Court in ***Bharat Sanchar Nigam Ltd & Anr vs. Nortel***



*Networks India Pvt Ltd*¹⁰, (hereinafter referred to as 'BSNL') where it was clarified that there is a difference between the period of limitation for filing a petition seeking appointment of arbitrator *and* the period of limitation with respect to the claims made for reference to arbitration. The Hon'ble Supreme Court has mandated that the period of limitation for filing a petition under section 11 of the A&C Act for appointment of arbitrator is covered by Article 137 of the Schedule to the Limitation Act; and that the time would run “ ... *from the date when there is failure to appoint the arbitrator...*”¹¹. As for the period of limitation for the claims made by one party against the other, for which arbitration is sought, the general provisions of the Limitation Act would apply. It has further been held that only in “... *rare and exceptional cases, where the claims are ex facie time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.*”¹²

25. Now, it is seen that the invocation notice was sent by the petitioner on 16.08.2018; and both the previous arbitration petition and the present petition are within the timeline of 3 years as envisaged in section 43 of the A&C Act read with Article 137 of the Schedule to the Limitation Act.
26. As for the allegation that the claims are time-barred, this court is conscious that if such allegation requires a decision on mixed

¹⁰ (2021) 5 SCC 738

¹¹ cf. para 53.1 of *BSNL* (ibid)

¹² cf. para 53.2 of *BSNL* (ibid)



questions of fact and law, then that is not the remit of the court in the present proceedings, since that would be for the arbitrator to decide. However, if the petitioner's claims are *ex-facie* time-barred, in that they are 'deadwood', then such claims would not be referred to arbitration.

27. It is the respondent's case that the claims are time-barred since the contract was completed on 31.03.2013.
28. However, as per the documents on record, the contract period was for two years from the date of signing of the contract, *i.e.* from 09.12.2012¹³, which would make the end-date for the contract to be 08.12.2014. But an addendum to the contract was signed by the respondent on 11.01.2018; the last 'part-payment' to the petitioner was made on 26.03.2018; and further, a tax-deduction was made by the respondent on the petitioner's account on 08.06.2018.
29. As recorded above, the invocation notice was sent by the petitioner on 16.08.2018.
30. In *BSNL* (supra), on the question of claims being time-barred, the Hon'ble Supreme Court has also said that : "*It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is*

¹³ cf. clause 2.4 of SCCs



essentially a matter to be determined by the tribunal.”¹⁴ This is especially so since the issue of limitation is normally a mixed question of fact and law, the decision of which would ordinarily lie within the arbitrator’s domain.

31. In light of the above chronology of events, in the opinion of this court, this is not a case where the claims can be said to be *ex-facie* time-barred; nor can it be said that there is no subsisting dispute; or, that this is a case of ‘deadwood’.
32. Upon a conspectus of the foregoing, this court is satisfied that there is a valid and subsisting arbitration agreement between the parties; that this court has territorial jurisdiction to entertain and decide the present petition; and also that the disputes that are stated to have arisen between the parties as set-out *inter-alia* in demand notice dated 21.04.2018 and invocation notice dated 16.08.2018 do not appear *ex-facie* to be non-arbitrable.
33. Accordingly, the present petition is allowed and Ms. Ravinder Kaur, learned former District Judge, Delhi (Cellphone No.: +91 9910384660) is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.
34. The learned Sole Arbitrator may proceed with the arbitral proceedings, subject to furnishing to the parties requisite disclosures as are required under section 12 of the A&C Act; and if there is any impediment to the appointment on that count, parties are given liberty to approach this court by way of an appropriate application.

¹⁴ cf. para 47 of *BSNL* (supra)



35. The learned Sole Arbitrator shall be entitled to fee in accordance with the Fourth Schedule to the A&C Act; or as may otherwise be agreed to by the parties with the learned Sole Arbitrator.
36. Parties shall share the arbitrator's fee and arbitral costs, equally.
37. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.
38. Parties are directed to approach the learned Sole Arbitrator appointed within 10 days.
39. The petition stands disposed of in the above terms.
40. Other pending applications, if any, also stand disposed of.

Arb. P. 804/2021

41. This petition has been filed by the same petitioner against the same respondent as in Arb. P. No. 802/2021 arising from an identical contract dated 09.01.2012, with the only difference being that the work for which the respondent engaged the petitioner in the present case was to be performed at Bhopal, Madhya Pradesh, whereas in Arb. P. No. 802/2021 the work was to be performed at Jabalpur, Madhya Pradesh.
42. All other factual aspects being identical as between the two matters, the present petition is also allowed and disposed of in line with what has been held in Arb. P. No. 802/2021 above.
43. For abundant clarity, Ms. Ravinder Kaur, learned former District Judge, Delhi is appointed as the learned Sole Arbitrator in the present case also.



44. While all other terms of appointment shall remain the same, since the disputes in the present case arise from a separate contract, the reference in Arb. P. No. 804/2021 shall be treated as a separate reference; and the learned Sole Arbitrator shall be entitled to a separate set of fee in the present matter.
45. The petition stands disposed of.
46. Other pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J.

AUGUST 5, 2022

uj/Ne