

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

FAO-4221-2022 (O&M)
Date of Decision:- 31.8.2023

M/s Vimal Alloys Pvt Ltd ...Appellant

Versus

Uttam Sucrotech International Pvt. Ltd. ...Respondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present: Mr. R. Kartikeya, Advocate for the appellant.

Mr. Satyaketu Singh and Mr. Hardik Ahluwalia,
Advocates for the respondent-Caveator.

GURVINDER SINGH GILL, J.

1. The appellant assails judgment dated 5.7.2022 passed by learned Additional District Judge, Fatehgarh Sahib vide which objections filed by the appellant in terms of Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') against award dated 11.8.2021 (Annexure A-10) passed by the sole Arbitrator, have been dismissed, being not maintainable for want of territorial jurisdiction.
2. A few facts necessary to notice for disposal of this petition are that the respondent-company is a manufacturer, supplier and exporter of sugar-mill plants and its machineries. The respondent, in respect of some export obligation, was in need of machinery parts i.e. 'Mill Crown Pinions' and had placed an order for purchasing the same from the appellant vide purchase order dated 26.6.2017. Subsequently, the order was amended as regards the

time frame during which the said parts were to be delivered and price was further negotiated. However, upon delivery of the said machinery parts, the same were not found to be of the agreed specifications which led to a dispute and keeping in view the arbitration clause in the purchase order, arbitration was invoked by respondent and the respondent-company filed an application under Section 11 of the Act for appointment of Arbitrator before the High Court at Allahabad, which was accepted vide order dated 23.9.2019 (Annexure A-7) and a retired Hon'ble Judge of Allahabad High Court was appointed as sole Arbitrator. The Arbitrator passed its award dated 11.8.2021 (Annexure A-10) directing the appellant to pay an amount of Rs.50,94,732/- alongwith interest @ 12% per annum from the date of filing of application under Section 11 of the Act. The appellant filed a petition under Section 34 of the Act in the Court of Additional District Judge, Fatehgarh Sahib, which was dismissed vide impugned order dated 5.7.2022 holding therein that the Court at Fatehgarh Sahib does not have jurisdiction to try and entertain the petition and that it was only the Courts at NOIDA (Uttar Pradesh) which has the jurisdiction to entertain the objections.

3. The learned counsel for the appellant, while assailing the impugned order dated 5.7.2022 submitted that the learned Court of Additional District Judge, Fatehgarh Sahib fell in error in holding that since the respondent had approached Hon'ble Allahabad High Court for appointment of an Arbitrator and no objection was raised before Hon'ble High Court by the appellant as regards jurisdiction, therefore, the appellant had virtually subjected himself to the said arbitration proceedings which were conducted at Noida and that as such, it was only the Courts at Noida, which would have jurisdiction. It has further been submitted that the lower Court also erroneously observed

that since the '*General Conditions of Sale VAPL-103*' had not been accepted by the respondent, same were not binding upon the respondent. The learned counsel has drawn the attention of this Court to Annexure A-1, which is a purchase order dated 26.6.2017 placed by the respondent with the appellant for supply of '*Mill Crown Pinion*' alongwith which '*General Purchase Conditions*' had been annexed. Condition No. 15 pertaining to arbitration reads as under :-

“If at any time there should be any dispute or difference between the parties in respect of any matter arising out of or in relation to this Agreement, either party may give to the other party notice in writing of the existence of such question, dispute or difference and the same shall be referred to the arbitration of a single arbitrator when the parties may agree upon, otherwise two arbitrators one to be nominated by each party. The arbitrators shall before proceeding with the reference, nominate an umpire to act in case of disagreement. The award of the Arbitrators shall be final and binding on the parties and be accepted by them.

This reference to the arbitrators shall be deemed to be a reference, under the provisions of the Indian Arbitration and Conciliation Act, 1996 and the rules made there under and any statutory modifications or re-enactments thereof that may be made from time to time and actually in force at the time of the reference.”

4. The learned counsel, while referring to the aforesaid arbitration clause, has pointed out that the same does not has any mention of the seat or venue of arbitration. It has further been submitted that the appellant had also conveyed his '*General Conditions of Sale VAPL-103*' (Annexure A-2) wherein condition No. 8 specifically refers that all contracts and orders would be deemed to have been entered at Amloh and that any action arising

thereof shall take place at Amloh. The said condition No. 8 is reproduced herein-under :-

“8. All contracts and orders are deemed to be entered into, at Amloh and action arising there from shall take place at Amloh.”

5. The learned counsel has further drawn the attention of this Court to e-mail dated 29.6.2017 (Annexure A-3) sent by the appellant to the respondent confirming the receipt of purchase order. The printout of the e-mail also shows that there were some attachments annexed with the e-mail and one such attachment was 'Order Confirmation PDF'. The learned counsel has drawn the attention of this Court to a print-out of the said attachment i.e. order confirmation dated 29.6.2017 (Annexure A-4), wherein one of the terms and conditions is as under :-

“General Condition- As per General Conditions of Sale No. VAPL-103 enclosed.”

6. The learned counsel for the appellant has next referred to copy of e-mail dated 30.6.2017 (Annexure A-5) sent by respondent to the appellant wherein the respondent has expressed his acceptance to certain conditions while the conditions not acceptable have also been mentioned therein. However, there is nothing with regard to the seat of arbitration.
7. The learned counsel has next referred to a copy of bill dated 15.1.2017 (Annexure A-6) in respect of the material supplied by the appellant to the respondent and at the bottom of which it is mentioned “Subject to FATEHGARH SAHIB Jurisdiction Only”. It has, thus, been submitted that the appellant right from day one had made it clear to the respondent that it was the Courts at Amloh/Fatehgarh Sahib, which would have the jurisdiction

in respect of the disputes, if any, amongst the parties. The learned counsel has vehemently argued that since in the order confirmation, it was specifically mentioned that the same was as per 'General Conditions of Sale No. VAPL-103', the respondent was bound by the same particularly when the general purchase conditions supplied by the respondent did not contain anything as regards the seat of arbitration.

8. Opposing the petition, the learned counsel for the respondent-Caveator has vehemently argued that there is nothing on record to show that the respondent had ever expressed its acceptance to the so called 'General Conditions of Sale No. VAPL-103' and that as a matter of fact even the e-mail dated 3.6.2017 (Annexure A-5) shows that there is nothing to suggest that respondent had agreed for the seat of arbitration to be Amloh or Fatehgarh Sahib. The learned counsel for the respondent has further drawn the attention of this Court to order dated 23.9.2017 (Annexure A-7) wherein the High Court at Allahabad had made observations to the effect that condition nos. 8 and 9 of the 'General Conditions of Sale No. VAPL-103' had never been accepted by the respondent.
9. This Court has considered rival submissions addressed before this Court.
10. There is no dispute that the General Purchase Conditions (of respondent) provides for settlement of disputes through arbitration. However, the arbitration clause, as contained in the General Purchase Conditions (of respondent) i.e. clause no. 15 does not specify either the venue or the seat of arbitration. As against the General Purchase Conditions of the respondent, the General Conditions of Sale of the petitioner i.e.

VAPL-103 (Annexure A-2) does specify that any action arising out of the contracts/orders shall take place at Amlah.

11. The question before this Court is as to whether it can be said that the said condition No. 8 of VAPL-103 had been accepted by the respondent or not. No doubt, High Court of Allahabad in its order dated vide order dated 23.9.2019 (Annexure A-7) mentioned that the same were not accepted but in paragraph 11, it has clarified that no final conclusion is being drawn in respect of the same. Para 11 of the said judgment dated 23.9.2019 (Annexure A-7) is reproduced herein-under :-

“11. At the same time, no final conclusion is being drawn on any of the objections that have been raised by the opposite parties in the present proceedings. In view of the law noted above. Those matters would remain to be considered by the appropriate forum at the appropriate stage, upon claim, objection, challenge or appeal being filed. Thus, amongst others it would remain open to the opposite parties to raise objections as to the competence of the arbitrable tribunal and all other pleas as the Act permits.”

12. It is also worth mentioning that PW-Pradosh Nair, while appearing before the Arbitrator had admitted that the General Conditions of Sale number VAPL-103 were enclosed alongwith the quotation. The relevant extract from the said cross-examination of the said witness is reproduced herein-under:-

“36. I do not recall the date of the confirmation email. Annexure D7 to the statement of defense was shown to the witness and he confirmed this document to be the confirmation mail by the OP. Along with the witness after perusal of Annexure D6 to the statement of defense stated it to be the mail sent by the OP confirming the order. Annexure D2 to the statement of defense has been shown to the defense. This is the quotation sent by the OP to the claimant. It is

correct to suggest that the general conditions of sale number VAPL-103 were enclosed along with the quotation. Witness was confronted with the general conditions (at page 46 of the statement of defense) and accedes that the same are the ones that were enclosed.”

13. It is pertinent to notice that e-mail dated 29.6.2017 (Annexure A-3) sent by petitioner to respondent was accompanied by an attachment in the shape of “order confirmation” which clearly states that the General Conditions of Sale would be as per VAPL-103. Although, the respondent had responded to the aforesaid e-mail by sending reply through e-mail dated 30.6.2017 (Annexure A-3) but there is no reference to VAPL-103 as regards the venue or seat of arbitration. The bill issued at the time of dispatch of the machinery parts also contains a specific statement to the effect that the same is subject to Fatehgarh Sahib jurisdiction only. In the absence of any specific objection or denial or non-acceptance of such like condition, the acceptance on part of the respondent-company can safely be inferred particularly when some other conditions have been objected to by respondent in e-mail dated 30.6.2017 (Annexure A-5) sent in response by respondent to petitioner. In other words, it is a case of deemed acceptance on part of the respondent, particularly when there is nothing on record to suggest that the respondent had suggested any other place for the resolution of disputes. The respondent cannot get any advantage from the fact that the High Court at Allahabad had ordered for appointment of an Arbitrator and who conducted the arbitral proceedings at NOIDA as a perusal of judgment dated 23.9.2019 (Annexure A-7) passed by Allahabad High Court clearly shows that although objection had been raised as regards the jurisdiction of Allahabad High Court but the said issue had been kept left open, as is

particularly evident upon perusal of Para 11 of the said judgment dated 23.9.2019 (Annexure A-7), as already reproduced in preceding part of this judgment.

14. The mere fact that the arbitration proceedings were conducted at NOIDA will not confer any jurisdiction upon Courts at NOIDA as the said venue had been agreed upon only for the purpose of conduct of proceedings, once Allahabad High Court had nominated Justice Sanjay Harkauli, retired Judge of Allahabad High Court, resident of NOIDA as Arbitrator. Para 13 of the said judgment is reproduced herein-under :-

“13. Accordingly, Mr. Justice Sanjay Harkauli, a retired Judge of this Court, residing at Flat No. 912, F-8, Sagar Presidency, Sector 50, NOIDA, Uttar Pradesh (Mob Nos. 8004915450, 9821364609) be appointed the sole arbitrator for resolution of the disputes between the parties. Subject to the consent under Section 11(8) of the Act, the parties agree to request the learned arbitrator to conduct the proceedings at NOIDA.”

15. Section 2 (1) (e) of the Act, which defines the term 'Court'; Section 20 on the 'place of arbitration'; and Section 42 read as under:

"2. Definitions.-(1) In this Part, unless the context otherwise requires,-

xx xx xx

- (e) "Court" means- (i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;"

xx xx xx

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

- (2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

- (3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

xx xx xx

42. Jurisdiction.- Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."
16. A perusal of the aforesaid sections shows that the term 'seat' or 'venue' are nowhere mentioned therein. As a matter of fact, the term 'Seat' and 'Venue' has not been defined either anywhere under the Arbitration Act, 1940 or under the Arbitration and Conciliation Act, 1996 ("Act"). Section 20 of the Act defines 'Place of Arbitration' which is used interchangeably for both seat and venue. In the absence of any definition in statute, the law has been settled through various judicial pronouncements.
17. A landmark judgment of Constitution Bench of Hon'ble Supreme Court in Bhartiya Aluminum Company Ltd. v. Kaiser Aluminum Technical Services 2012 (9) SCC 552 (in short BALCO's case) explained the usage of the words "place", "seat", "situs", and "venue" in the context of arbitration. The Supreme Court observed that the seat of arbitration or the situs of arbitration or the place of arbitration indicates the jurisdiction or legal seat of arbitration which determines the Curial law i.e. the law that shall govern the arbitration proceedings.
18. Hon'ble Apex Court in BGS SGS Soma JV v. NHPC Limited, (2020) 4 SCC 234, while relying upon the Constitutional Bench decision in BALCO's case (supra), held that sub-section (3) of Section 20 refers to 'venue' whereas the 'place' mentioned in sub-section (1) and sub-section (2) refers to the

`jurisdictional seat'. Hon'ble Apex Court in BGS SGS Soma's case (supra) also dealt with the situation where the parties have not agreed on or have not fixed the jurisdictional `seat of arbitration', and has laid down the following test to determine the `seat of arbitration' which would determine the location of the court that would exercise supervisory jurisdiction. Para 59 and 61 of the judgment reads as under:

"59. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several courts where a part of the cause of action arises that may have jurisdiction. Again, an application under section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a court in which a part of the cause of action arises would then be the exclusive court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled."

"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."

19. Hon'ble Apex Court in BGS SGS Soma's case (supra), crystallised the law as applicable, where the parties by agreement have not fixed jurisdictional seat, as under:

"82. On a conspectus of the aforesaid judgements 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. - - - further the fact that 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 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 purpose of arbitration.."

20. In a recent judgment, in *BBR (India) Private Limited v. S.P. Singla Constructions Private Limited*, (2023) 1 SCC 693, the Hon'ble Supreme Court while taking note of the above referred judgments, expounded on 'seat of arbitration' in the following words:

"15. Interpretation of the term 'court', as defined in sub-clause (e) to sub-section (1) of Section 2 of the Act, had come up for consideration before a Constitutional Bench of five Judges in the case of *Bhartiya Aluminium Company v. Kaiser Aluminium Technical Services Inc*, (2012) 9 SCC 552 which decision had examined the distinction between 'jurisdictional seat' and 'venue' in the context of international arbitration, to hold that the expression 'seat of arbitration' is the centre of gravity in arbitration. However, this does not mean that all arbitration proceedings must take place at 'the seat'. The arbitrators at times hold meetings at more convenient locations. Regarding the expression 'court', it was observed that Section 2(2) of the Act does not make Part-I applicable to arbitrations seated outside India. The expressions used in Section 2(2)^[8*] of the Act do not permit an interpretation to hold that Part-I would also apply to arbitrations held outside the territory of India. Noticing the above interpretation, a three Judges Bench of this Court in *BGS SGS Soma JV v. NHPC Limited*, (2020) 4 SCC 234 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 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.”

21. In BBR's case (supra), it was further held that once the jurisdictional 'seat' of arbitration is fixed in terms of sub-section (2) of Section 20 of the Act, then, without the express mutual consent of the parties to the arbitration, 'the seat' cannot be changed. Therefore, the appointment of a new arbitrator who holds the arbitration proceedings at a different location would not change the jurisdictional 'seat' already fixed by the earlier or first arbitrator. The place of arbitration in such an event should be treated as a venue where arbitration proceedings are held.
22. The following broad principles as regards issues of seat/venue/place of an arbitration, may be culled out from the ratio of the judgments referred to above:

- (i) The seat of an arbitration will decide the law applicable to the proceedings and the courts having supervisory jurisdiction over the award delivered. Expressly defining the seat of an arbitration proceedings will also automatically mean that choice of 'seat' amounts to choice of the exclusive jurisdiction of the courts at which the 'seat' is located.
- (ii) The venue/place is only the geographical location where the arbitration proceedings will be physically conducted whereas the seat will be the decisive factor of curial law applicable to the proceedings.
- (iii) In absence of specific mention/agreement with regards to the seat of the arbitration, the venue/place shall be considered as the seat of arbitration subject to a combined reading of the entire agreement/clause and absence of any other significant contrary indicia.
- (iv) The terms seat/venue/place of an arbitration cannot be interchangeably used.
- (v) Once the jurisdictional 'seat' of arbitration is fixed in terms of subsection (2) of Section 20 of the Act, then, without the express mutual consent of the parties to the arbitration, 'the seat' cannot be changed.
- (vi) Even in case of appointment of a new arbitrator who holds the arbitration proceedings at a different location, the same would not change the jurisdictional 'seat' already fixed by the earlier or first arbitrator. The place of arbitration in such an event should be treated as a venue where arbitration proceedings are held.

23. As already stated above, in the present case, the General Purchase Conditions (of respondent No. 1) [Annexure A-1] is absolutely silent as regards the venue or seat of arbitration. On the other hand, the General Conditions of Sales VAPL-103 (Annexure A-2) of the petitioner which had been duly conveyed to the respondent and finds specifically referred to in "order confirmation" which had been sent as annexures through e-mail to

the respondent and also find mentioned in the order passed by Allahabad High Court does contain a condition that in case of dispute all the contracts and orders shall be deemed to be entered at Amloh and the action arising therefrom shall be taken at Amloh. The contention of the respondent that the said term was not accepted does not hold ground inasmuch as the respondent in its e-mail dated 30.6.2017 (Annexure A-5) has conveyed its acceptance and rejection of certain conditions but there is no reference to the aforesaid condition regarding the contracts being entered at Amloh and action in respect of the same to be taken at Amloh. The said condition had not been rejected. As such, in the absence of any other indicia, this Court can safely accept that the seat of arbitration would be at Amloh i.e. in District Fatehgarh Sahib.

24. The findings of the learned Additional District Judge, Fatehgarh Sahib to the effect that the '*General Conditions of Sale VAPL-103*' was not accepted and was not binding on the respondent or that the respondent having approached Allahabad High Court and not having raised any objection as regards jurisdiction, cannot claim the jurisdiction to be at Fatehgarh Sahib are not factually correct. As already discussed above, the respondent was very much in the knowledge of the Conditions of Sale VAPL-103, which contained a specific clause regarding the action to be taken at Amloh which has never been objected to or rejected, although some other conditions have been rejected by the respondent. Further, the order appointing the Arbitrator passed by Allahabad High Court had clarified that the objections with respect to the competence of the Arbitrator or otherwise are being kept open.
25. Having regard to the aforesaid factual position, it is held that the Courts at Fatehgarh Sahib which would be competent, which would have jurisdiction

to entertain objections under Section 34 of the Act and not the Courts at NOIDA. The findings to the contrary, as recorded by the learned Additional District Judge, Fatehgarh Sahib cannot prevail. The impugned order, as such, is set aside. The matter is remanded back to the Court of Additional District Judge concerned for deciding the matter afresh. The parties are directed to appear before the said Court on 29.9.2023.

26. The petition stands disposed of accordingly.

31.8.2023

kamal

(Gurvinder Singh Gill)
Judge

Whether speaking /reasoned	Yes / No
Whether Reportable	Yes / No