

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

% **Order reserved on: 09 January 2023**
Order pronounced on: 17 January 2023

+ **OMP (ENF.) (COMM.) 227/2022 & EX.APPL.(OS) 3699/2022**
(Transfer of Arbitral Award)

GUJARAT JHM HOTELS LTD Decree Holder
Through: **Mr. Tejas Karia, Ms. Ananya**
Aggarwal, Mr. Ujval Mohan,
Advs.

versus

RAJASTHALI RESORTS AND STUDIOS LIMITED
..... Judgement Debtor
Through: **Mr. Kuriakose Varghese, Ms.**
Aishwarya Hariharan, Mr.
Akshat Gogna, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

1. The present execution petition preferred under Section 36 of the **Arbitration and Conciliation Act, 1996¹** seeks the issuance of appropriate directions for execution of the award dated 26 May 2017 as a decree of this Court. The petitioner further seeks the grant of consequential release of Rs. 23,46,451/- along with interest on the aforesaid amount with effect from 01 July 2016 till 26 May 2017 together with interest on the principal sum for the period post award

¹ the Act

till the date of realisation. Additionally, it seeks the recovery of costs of arbitration which have been calculated at Rs. 33,44,717.12/-.

2. For the purposes of consideration of the issues which arise, it would be apposite to notice the following essential facts. The petitioner decree holder and the respondent judgment debtor are stated to have entered into a Hotel Management Agreement dated 10 March 2010. Pursuant to disputes arising between the parties, the petitioner invoked arbitration. The Arbitral Tribunal comprising of a sole arbitrator was appointed by this Court. On conclusion of proceedings, an award came to be rendered on 26 May 2017.

3. A petition under Section 34 of the Act numbered as OMP (COMM.) 389/2017 came to be preferred by the respondent before this Court and which remains pending as on date. During the pendency of the aforesaid proceedings, the petitioner filed an application under Section 9 of the Act seeking various interim reliefs against the respondent. On 09 July 2018 while dealing with the said application, a learned Judge of the Court passed the following order: -

“1. Pursuant to the last order dated 18.04.2019 passed by me, Mr. Girish Chandra Agarwal, Managing Director of the respondent company, is present in court. On 18.04.2019, I had issued notice to Mr. Girish Chandra Agarwal to show cause as to why contempt proceedings ought not to be initiated against him. This notice was issued in the background of the proceedings held on 28.11.2018 whereat an undertaking was furnished on behalf of the respondent company that a sum of Rs.2,34,60,541/- would be deposited with this Court within a period of three weeks.

2. To be noted, this order was carried in appeal by the respondent company. The Division Bench, while sustaining the direction to deposit vide order dated 23.1.2019 passed in

FAO(COMM) No.18/2019, gave time to the respondent company till 01.03.2019 for making the deposit. Furthermore, the Division Bench had also directed the respondent company to file an affidavit of undertaking in that behalf.

3. Concededly, pursuant to the order of the Division Bench dated 23.01.2019, an affidavit dated 24.01.2019 was filed by Mr. Girish Chandra Agarwal wherein he, *inter alia*, undertook to deposit the amount as directed by the court.

3.1. Admittedly, the amount has not been deposited.

4. Mr. Sudhir Nandrajog, learned Senior Counsel, who appears on behalf of the respondent company, has placed before me a copy of the reply (which is accompanied with an affidavit dated 06.07.2019) in response to the notice issued by me on 08.04.2019.

4.1 The reply, Mr. Nandrajog, says was filed with the Registry of this court on 08.07.2019 vide Diary No.E-584781/2019.

5. Based on the reply, Mr. Nandrajog says that the efforts were made by the respondent company to garner funds in order to comply with the undertaking given to this court.

6. I have perused the reply with some care. The perusal of the reply shows that apart from the bald averment made in paragraph 6 of the reply that due to "business exigency", the respondent was unable to discharge its obligations, nothing else has been stated.

6.1 Mr. Nandrajog's submission that efforts made to sell immovable properties did not bear fruit as there were no buyers due to a general slump in the market, is an aspect which does not find any mention in the reply.

7. The respondent has not made any averment which would show that advertisements for sale of immovable properties were issued or real estate brokers were contacted to effectuate sale of immovable properties or that banks were approached to generate funds.

7.1 Therefore, quite clearly, Mr. Girish Chandra Agarwal's assertion made in paragraph 6 of the reply being bereft of averments and unaccompanied by any requisite documents cannot be accepted.

8. Mr. Nandrajog, however, submits that the only consequences of non-compliance of directions contained in the order dated

28.11.2018 would be that the interim order passed by this court on 28.05.2018 would revive.

8.1 In a nutshell, Mr. Nandrajog says that since the interest of the petitioner stands protected and given the fact that the respondent has a genuine difficulty in garnering funds, the notice issue to Mr. Girish Chandra Agarwal should be discharged.

9. In my view, while Mr. Nandrajog is right that failure to comply with the undertaking will lead to a revival of the interim order dated 28.05.2018, it requires to be noticed that in view of the undertaking given to this court and Division Bench, a lot of valuable time was wasted.

9.1 Furthermore, an undertaking to the court (and in this case, not once but twice) needs to be enforced to uphold the majesty of the law. A litigant cannot be permitted to treat an undertaking given to a court in a cavalier fashion. The beneficiary of the undertaking holds his peace as he has implicit faith that the court would take all measures available in law to ensure compliance.

9.2 Therefore, I am unable to accept the submission of learned Senior Counsel that because the interim orders will revive, the notice issued should stand closed.

9.3 At this stage, Mr. Girish Chandra Agarwal says that he would make efforts to shore up requisite funds and attempt to discharge his obligations, as reflected in the affidavit of undertaking, filed with this court.

9.4 Mr. Nandrajog, in this behalf says that a sum of Rs.19,00,000/- which is, presently available in the following bank account, maintained by the respondent could be requisitioned by the Court:

"ICICI Bank - C-Scheme Wealth Branch, A/c No.167605000288 Paradise Regency, C-69, Sarojini Marg, C Scheme, Jaipur, Rajasthan 302001".

10. It is not in dispute that the petitioner has instituted execution proceedings being Ex.P.No.50/2018 in the District Court at Jaipur.

11. I am informed by Mr. Nandrajog that the executing court has issued an order of attachment. On the other hand, Ms. Ila Kapoor, learned counsel for the petitioner says that since the concerned bank had reported to the executing court that there is no account of respondent company of the description referred to

in the attachment order, the said order had been rendered ineffectual.

12. Given these circumstances, it is directed that unless the amount available in the aforementioned account maintained with ICICI Bank, C-Scheme Branch is covered by the attachment order, the concerned bank will remit the amount to this court.

13. The petitioner is given liberty to place the copy of the order passed today before the executing court.

14. In the meanwhile, as indicated by Mr. Girish Chandra Agarwal, he will take steps for garnering funds, by selling 17 bighas of land which he says is located in Chaksu in the State of Rajasthan.

15. In view of the foregoing discussion, interim order dated 28.05.2018 shall stand revived. The respondent will maintain status quo as to the title in respect of the following properties:

“(i) Rajasthali Resorts & Studios Ltd.

(ii) The Hotel, i.e., Rajasthali Resort & Spa, Jaipur, located at National Highway 8 (near Shiv Vilas), Jaipur, Rajasthan, India.”

16. Furthermore, the operation of the subject award which was stayed via order dated 28.11.2018, passed in O.M.P. (COMM) 389/2017, shall stand vacated. The petitioner will be free to execute the award.

17. List the captioned petition on 18.10.2019.”

4. As would be evident from the aforesaid order, the learned Judge firstly directed that the order of status quo which had been passed on the Section 9 petition would stand revived. It was further provided that the order dated 28 November 2018 which had been passed on the Section 34 petition and in terms of which the operation of the subject award had been stayed would also stand vacated. The Court further accorded liberty to the petitioner to initiate further proceedings for execution of the award. It is pursuant to the aforesaid order and during the pendency of the Section 34 and Section 9 petitions before this

Court, that the petitioner moved the Commercial Court at Jaipur, Rajasthan for execution. That petition came to be registered as Ex. P. No. 50/2018.

5. On 02 September 2022 when the execution petition came up for consideration before the Commercial Court at Jaipur, an order was passed in terms of which the following operative directions were framed: -

“14. It is not the dispute that, the decree is executable as per the provisions of the Code of Civil Procedure, 1908 and Section 38 of the Code of Civil Procedure, 1908, is as under;

"38. Court by which decree may be executed- A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution."

Which makes it clear that decree will either be executed by the court, who has passed the decree or by the court to whom it is sent for execution. There is also not a dispute that so for the court under Section 2(1) (e) of the Arbitration and Conciliation Act, 1996, specifies it as the principle Civil Court of original jurisdiction in a district and the Hon'ble Rajasthan High Court in the matter of "**Ess Kay Fincorp Ltd. Vs Suresh Choudhary, AIR 2020 Rajasthan 56**", is specified the court in relation to execution of the decree is 'the Commercial Court'. With due respect to the arguments and authorities submitted, this court in its humble opinion taken a view and as per the learned counsel Shri Anil Gupta that view has been challenged before the Hon'ble High Court of Rajasthan and when the matter is under challenge, now this court is of the view that till any order is being passed by the Hon'ble High Court, this court should refrain from taking other view.

15. As discussed above, the objection raised by the learned counsel is not sustainable. However, keeping in view that the learned counsel requested that there file not to be returned, but to be kept 'Sine die' because the order of this court dated 12.07.2022, in the matter of "M/ s India Infoline Finance Limited. Vs Siddharth CT Scan and Imaging Centre, etc. **Execution Application NO. 2004/2021 CIS NO. 2116/2021,**

and in the matter of, "(1) Siddharth CT Scan and Imaging Centre, Etc. Vs M/s India Infoline Finance Limited, Etc. CMNC NO. 226/2022, CIS NO.- 230/2022, has been challenged before the Hon'ble High Court of Rajasthan and is pending consideration. All the files which are covered by the judgment dated 12.07.2022 to be kept adjourned 'Sine Die' till the disposal of the appeal by the Hon'ble High Court of Rajasthan in respect of view taken by this court.

16. However, it is made clear that if any party want to take back its file and want to file before the appropriate court, that party is free to do so. Any execution petition of supervisory jurisdiction of other court if being filed in future that proceedings also to be adjourned 'sine die' and sent to record, or to be returned as per the request of the party. This order will not effect the execution petitions received with the transfer certificate of executing court. The objections of the advocates considered accordingly."

6. It appears that the Commercial Court in **India Infoline Finance Limited v. Siddharth CT Scan**² had taken the position that in light of the view taken by the Supreme Court in **State of W.B. v. Associated Contractors**³, applications for execution of awards would have to be instituted and pursued before the seat court. It further transpires from the order passed by the Jaipur Commercial Court that pending disposal of an appeal preferred against the order passed in **India Infoline** before the Rajasthan High Court, the executing court had adjourned further proceedings on all execution petitions awaiting a final view being expressed by the said High Court. It had however granted liberty to any party which wanted to withdraw its pending execution petition to do so and file the same before the appropriate court. The Commercial Court further observed that the aforesaid order would not affect an execution petition which may have been received

² Execution Application No. 2004 of 2022

³ (2015) 1 SCC 32

by it under a transfer certificate. The petitioner had pursuant to the said order ultimately withdrawn the execution petition and thereafter instituted the present petition before this Court.

7. For the purposes of appreciating the questions which arise, it would be pertinent to firstly refer to the arbitration clause which stands comprised in Article XXIII of the Hotel Management Agreement. Article XXIII is extracted hereinbelow: -

“XXIII.11.A. Any dispute or difference arising between Owner Operator and arising out of or in relation to this Agreement including regarding the construction, meaning or effect or obligation of the parties hereto under this Agreement or any clause thereof or matter or thing herein contained or as to the rights and liabilities of the parties hereto shall be referred to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996, or any statutory modifications or re-enactment for the time being in force. The reference shall be to single arbitrator if the parties agree upon one, otherwise the reference shall be to three arbitrators with Owner appointing one, Operator appointing the second arbitrator and both such appointed arbitrators appointing the third presiding arbitrator. The arbitrators shall have summary powers and powers to issue interim and ad interim awards and directions. The existence of any dispute, difference or claim shall not relieve either party of its respective obligations under this agreement. Further, the Agreement shall remain in full force and effect pending the award in such arbitration proceeding and till such time as award is upheld determining whether and when termination shall become effective by a final court of appeal. The venue for the arbitration shall be New Delhi, India and all legal proceedings shall be conducted in English. The award shall be final and binding on Owner and Operator.”

8. According to Mr. Karia, learned counsel for the petitioner/decreed holder since the matter had been adjourned sine die by the Jaipur Commercial Court, the petitioner was left remediless and had no option but to approach this Court for the purposes of execution

of the award which had been passed way back in 2017. Mr. Karia submitted that in light of the uncertainty as to when the Rajasthan High Court would ultimately decide the appeal taken against the judgment of the Jaipur Commercial Court in **India Infoline**, the petitioner had in terms of the liberty granted instituted the present proceedings.

9. Insofar as the legal questions which arise, it was common ground between the parties that there presently appears to be a lack of clarity as to where execution petitions should be instituted in light of the perceived conflict between the judgments of the Supreme Court in **Associated Contractors** and **Sundaram Finance Ltd. vs. Abdul Samad**⁴. The aforesaid question appears to arise in light of certain observations which appear in **Associated Contractors** where **Nariman, J.** while speaking for the Bench had in paragraph 21 of the report observed as follows: -

“21. One other question that may arise is as to whether Section 42 applies after the arbitral proceedings come to an end. It has already been held by us that the expression "with respect to an arbitration agreement" are words of wide import and would take in all applications made before during or after the arbitral proceedings are over. In an earlier judgment, *Kumbha Mawjiv. Dominion of India* 16, the question which arose before the Supreme Court was whether the expression used in Section 31(4) of the 1940 Act "in any reference" would include matters that are after the arbitral proceedings are over and have culminated in an award. It was held that the words "in any reference" cannot be taken to mean "in the course of a reference", but mean "in the matter of a reference" and that such phrase is wide enough and comprehensive enough to cover an application made after the arbitration is completed and the final

⁴ (2018) 3 SCC 622

award is made (see SCR pp. 891-93; AIR pp. 317- 18, paras 13-16). As has been noticed above, the expression used in Section 42 is wider being "with respect to an arbitration agreement" and would certainly include such applications."

10. Learned counsels for respective parties have submitted that in view of the aforesaid observations and, more particularly, where the Supreme Court observed that the expression "*with respect to an arbitration agreement*" would include all applications made before, during, or even after the arbitral proceedings are over has led to an impasse with parties being unable to ascertain the competent court before which an execution petition may be instituted.

11. Learned counsels had also drawn the attention of the Court to the judgment of the Supreme Court in **Sundaram Finance** where it was held that a petition for enforcement of an award could be filed anywhere in the country where such decree could be executed and that there would be no necessity for obtaining a transfer from the court which would otherwise have jurisdiction over the arbitral proceedings.

12. It becomes pertinent to note that **Associated Contractors** was principally dealing with the question as to which would be the competent court to entertain and decide a petition under Section 34 of the Act. The Section 34 petition in the facts which obtained in **Associated Contractors** had come to be instituted in the State of West Bengal. It was contended that since the Calcutta High Court had passed an interim order under Section 9 of the Act, by virtue of Section 42 of the Act it would be that court alone which could have

entertained the petition under Section 34. When the Section 34 petition came to be filed before the District Judge at Jalpaiguri in West Bengal, a question with respect to the power of that court to entertain the same came to be raised before the Calcutta High Court. The said challenge came to be accepted with the learned Judge holding that since the application under Section 9 had been entertained by the Calcutta High Court, the District Judge at Jalpaiguri would have no jurisdiction to entertain the Section 34 petition and that it would stand denuded of authority by virtue of Section 42 of the Act. While dealing with the correctness of the view so taken, the Supreme Court in **Associated Contractors** observed as follows: -

“11. It will be noticed that Section 42 is in almost the same terms as its predecessor section except that the words “in any reference” are substituted with the wider expression “with respect to an arbitration agreement”. It will also be noticed that the expression “has been made in a court competent to entertain it”, is no longer there in Section 42. These two changes are of some significance as will be pointed out later. Section 42 starts with a non obstante clause which does away with anything which may be inconsistent with the section either in Part I of the Arbitration Act, 1996 or in any other law for the time being in force. The expression “with respect to an arbitration agreement” widens the scope of Section 42 to include all matters which directly or indirectly pertain to an arbitration agreement. Applications made to courts which are before, during or after arbitral proceedings made under Part I of the Act are all covered by Section 42. But an essential ingredient of the section is that an application under Part I must be made in a court.

12. Part I of the Arbitration Act, 1996, contemplates various applications being made with respect to arbitration agreements. For example, an application under Section 8 can be made before a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement. It is obvious that applications made under Section 8 need not be to courts, and for that reason alone, such applications would be outside the

scope of Section 42. It was held in *P. Anand Gajapathi Raju v. P.V.G. Raju* [(2000) 4 SCC 539], SCC at pp. 542-43, para 8 that applications under Section 8 would be outside the ken of Section 42. We respectfully agree, but for the reason that such applications are made before “judicial authorities” and not “courts” as defined. Also, a party who applies under Section 8 does not apply as *dominus litis*, but has to go wherever the ‘action’ may have been filed. Thus, an application under Section 8 is parasitical in nature—it has to be filed only before the judicial authority before whom a proceeding is filed by someone else. Further, the “judicial authority” may or may not be a court. And a court before which an action may be brought may not be a Principal Civil Court of Original Jurisdiction or a High Court exercising original jurisdiction. This brings us then to the definition of “court” under Section 2(1)(e) of the Act.

13. It will be noticed that whereas the earlier definition contained in the 1940 Act spoke of any civil court, the definition in the 1996 Act fixes “court” to be the Principal Civil Court of Original Jurisdiction in a district or the High Court in exercise of its ordinary original civil jurisdiction. Section 2(1)(e) further goes on to say that a court would not include any civil court of a grade inferior to such Principal Civil Court, or a Small Cause Court.

14. It will be noticed that the definition is an exhaustive one as it uses the expression “means and includes”. It is settled law that such definitions are meant to be exhaustive in nature—see *P. Kasilingam v. P.S.G. College of Technology* [1995 Supp (2) SCC 348] , SCC at p. 356, para 19.

17. That the Chief Justice does not represent the High Court or Supreme Court as the case may be is also clear from Section 11(10):

“**11. (10)** The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.”

The scheme referred to in this sub-section is a scheme by which the Chief Justice may provide for the procedure to be followed in cases dealt with by him under Section 11. This again shows that it is not the High Court or the Supreme Court Rules that are to be followed but a separate set of rules made by the Chief Justice for the purposes of Section 11. Sub-section (12) of Section 11 reads as follows:

“11. (12)(a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to ‘Chief Justice’ in those sub-sections shall be construed as a reference to the ‘Chief Justice of India’.

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to ‘Chief Justice’ in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the Principal Civil Court referred to in clause (e) of sub-section (1) of Section 2 is situate and, where the High Court itself is the court referred to in that clause, to the Chief Justice of that High Court.”

It is obvious that Section 11(12)(b) was necessitated in order that it be clear that the Chief Justice of “the High Court” will only be such Chief Justice within whose local limits the Principal Civil Court referred to in Section 2(1)(e) is situate and the Chief Justice of that High Court which is referred to in the inclusive part of the definition contained in Section 2(1)(e). This sub-section also does not in any manner make the Chief Justice or his designate “court” for the purpose of Section 42. Again, the decision of the Chief Justice or his designate, not being the decision of the Supreme Court or the High Court, as the case may be, has no precedential value being a decision of a judicial authority which is not a Court of Record.

18. In contrast with applications moved under Section 8 and 11 of the Act, applications moved under Section 9 are to the “court” as defined for the passing of interim orders before or during arbitral proceedings or at any time after the making of the arbitral award but before its enforcement. In case an application is made, as has been made in the present case, before a particular court, Section 42 will apply to preclude the making of all subsequent applications under Part I to any court except the court to which an application has been made under Section 9 of the Act.

19. One of the questions that arises in the reference order is whether the Supreme Court is a “court” within the meaning of Section 2(1)(e) of the Act. In two judgments under the 1940 Act, namely, *State of M.P. v. Saith and Skelton (P) Ltd.* [(1972) 1 SCC 702] and *Guru Nanak Foundation v. Rattan Singh & Sons* [(1981) 4 SCC 634], the Supreme Court took the view that

where an arbitrator was appointed by the Supreme Court itself and the Supreme Court retained seisin over the arbitration proceedings, the Supreme Court would be “court” for the purpose of Section 2(c) of the 1940 Act. These judgments were distinguished in *National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd.* [(2004) 1 SCC 540], *Bharat Coking Coal Ltd. v. Annapurna Construction* [(2008) 6 SCC 732] and *Garhwal Mandal Vikas Nigam Ltd. v. Krishna Travel Agency* [(2008) 6 SCC 741]. The first of these judgments was a judgment under the 1996 Act wherein it was held that when the Supreme Court appoints an arbitrator but does not retain seisin over the proceedings, the Supreme Court will not be “court” within the meaning of Section 2(1)(e) of the Act. Similar is the position in the third judgment, *Garhwal case* [(2008) 6 SCC 741]. Even under the 1940 Act, in *Bharat Coking Coal* [(2008) 6 SCC 732], the same distinction was made and it was held that as the Supreme Court did not retain seisin over the proceedings after appointing an arbitrator, the Supreme Court would not be “court” within the meaning of the Arbitration Act, 1940.

20. As noted above, the definition of “court” in Section 2(1)(e) is materially different from its predecessor contained in Section 2(c) of the 1940 Act. There are a variety of reasons as to why the Supreme Court cannot possibly be considered to be “court” within the meaning of Section 2(1)(e) even if it retains seisin over the arbitral proceedings. Firstly, as noted above, the definition is exhaustive and recognizes only one of two possible courts that could be “court” for the purpose of Section 2(1)(e). Secondly, under the 1940 Act, the expression “civil court” has been held to be wide enough to include an appellate court and, therefore would include the Supreme Court as was held in the two judgments aforementioned under the 1940 Act. Even though this proposition itself is open to doubt, as the Supreme Court exercising jurisdiction under Article 136 is not an ordinary appellate court, suffice it to say that even this reason does not obtain under the present definition, which speaks of either the Principal Civil Court or the High Court exercising original jurisdiction. Thirdly, if an application would have to be preferred to the Supreme Court directly, the appeal that is available so far as applications under Sections 9 and 34 are concerned, provided for under Section 37 of the Act, would not be available. Any further appeal to the Supreme Court under Article 136 would also not be available. The only other argument that could possibly be made is that all definition sections are subject to context to the contrary. The context of

Section 42 does not in any manner lead to a conclusion that the word “court” in Section 42 should be construed otherwise than as defined. The context of Section 42 is merely to see that one court alone shall have jurisdiction over all applications with respect to arbitration agreements which context does not in any manner enable the Supreme Court to become a “court” within the meaning of Section 42. It has aptly been stated that the rule of forum conveniens is expressly excluded by Section 42 see JSW Steel Ltd. v. Jindal Praxair Oxygen Co. Ltd. [Jindal Vijayanagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Co. Ltd., (2006) 11 SCC 521], SCC at p. 542, para 59). Section 42 is also markedly different from Section 31(4) of the 1940 Act in that the expression “has been made in a court competent to entertain it” does not find place in Section 42. This is for the reason that, under Section 2(1)(e), the competent court is fixed as the Principal Civil Court exercising original jurisdiction or a High Court exercising original civil jurisdiction, and no other court. For all these reasons, we hold that the decisions under the 1940 Act would not obtain under the 1996 Act, and the Supreme Court cannot be “court” for the purposes of Section 42.”

13. The Supreme Court proceeded to record its conclusions in paragraph 25 of the report which is extracted hereinbelow: -

“25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as “court” for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression “with respect to an arbitration agreement” makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and

the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be “court” for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.

The reference is answered accordingly.”

It was accordingly held that the view as taken by the Calcutta High Court did not merit interference. While arriving at the said conclusion, the Supreme Court had essentially borne in mind that a Section 9 application is an application made to a court. It was accordingly held that in light of Section 42, all subsequent applications with respect to the arbitration agreement and which would include a petition under Section 34 would have to be necessarily preferred before the Calcutta High Court only.

14. **Sundaram Finance**, on the other hand, dealt with the question of where a petition for execution could be instituted. The Court was

essentially called upon to consider whether it was imperative for the execution petition to be firstly filed before the court which had jurisdiction over the arbitration proceedings and to then obtain a transfer or whether the award could be directly executed in a court where the assets of the judgment debtor were located. It also took note of the conflicting views which had been expressed by various High Courts on the subject. In **Sundaram Finance**, the Supreme Court also had an occasion to deal with the judgment rendered by this Court in **Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.**⁵ and which had taken the position that Section 42 would not cover petitions under Section 36 since such an application would not fall within the ambit of the expression “arbitral proceedings” as appearing in Section 42 of the Act. After noticing the various provisions contained in the **Code of Civil Procedure, 1908**⁶ as well as the Act, the Supreme Court in **Sundaram Finance** held thus: -

“16. The line of reasoning supporting the award to be filed in a so-called court of competent jurisdiction and then to obtain a transfer of the decree is primarily based on the jurisdiction clause found in Section 42, which reads as under:

“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.”

The aforesaid provision, however, applies with respect to an application being filed in court under Part I. The jurisdiction is

⁵ 2009 SCC OnLine Del 511

⁶ Code

over the arbitral proceedings. The subsequent application arising from that agreement and the arbitral proceedings are to be made in that court alone.

17. However, what has been lost sight of is Section 32 of the said Act, which reads as under:

“32. Termination of proceedings.—(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2).

(2) The Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings where—

(a) the claimant withdraws his claim, unless the respondent objects to the order and the Arbitral Tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings; or

(c) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to Section 33 and sub-section (4) of Section 34, the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings.”

The aforesaid provision provides for arbitral proceedings to be terminated by the final arbitral award. Thus, when an award is already made, of which execution is sought, the arbitral proceedings already stand terminated on the making of the final award. Thus, it is not appreciated how Section 42 of the said Act, which deals with the jurisdiction issue in respect of arbitral proceedings, would have any relevance. It does appear that the provisions of the said Code and the said Act have been mixed up.

18. It is in the aforesaid context that the view adopted by the Delhi High Court in *Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.* [*Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.*, 2009 SCC OnLine Del 511 : (2009) 159 DLT 579] records that Section 42 of the Act would not apply to an execution application, which is not an arbitral proceeding and that Section 38 of the Code would apply to a decree passed by

the court, while in the case of an award no court has passed the decree.

19. The Madras High Court in *Kotak Mahindra Bank Ltd. v. SivakamaSundari* [Kotak Mahindra Bank Ltd. v. SivakamaSundari, 2011 SCC OnLine Mad 1290 : (2011) 4 LW 745] referred to Section 46 of the said Code, which spoke of precepts but stopped at that. In the context of the Code, thus, the view adopted is that the decree of a civil court is liable to be executed primarily by the court, which passes the decree where an execution application has to be filed at the first instance. An award under Section 36 of the said Act, is equated to a decree of the court for the purposes of execution and only for that purpose. Thus, it was rightly observed that while an award passed by the Arbitral Tribunal is deemed to be a decree under Section 36 of the said Act, there was no deeming fiction anywhere to hold that the court within whose jurisdiction the arbitral award was passed should be taken to be the court, which passed the decree. The said Act actually transcends all territorial barriers.

Conclusion

20. We are, thus, unhesitatingly of the view that the enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the court, which would have jurisdiction over the arbitral proceedings.”

15. As would be manifest from the above, the view as was taken in **Daelim** by this Court was affirmed. In **Daelim** objections with respect to the assumption of jurisdiction by the Court on the ground of territoriality came to be raised. The execution petition itself had come to be preferred since some of the movable and immovable assets of the judgment debtor were situate in New Delhi. While dealing with the question of the extent to which Section 42 would apply and impact petitions for execution, the learned Judge had held as under: -

“16. Applying the same reasoning, Section 42 would also not apply to execution applications. The execution application is not

“arbitral proceedings” within the meaning of Section 42 of the Act and is not a subsequent application arising out of the agreement and the arbitral proceedings. In fact the arbitral proceedings come to an end when the time for making an application to set aside the arbitral award expires and the execution application is an enforcement of the award. Thus the place of filing of the execution application need not be the place of the filing of the application under Section 34 of the Act for the reason of Section 42 of the Act.

17. Once, Section 42 is out of the way, the question arises as to whether “Court” in Section 36 is to take its colour from Section 2(1)(e). If that were to be so then it will have to be seen which was the Court which was competent to pass the decree had the subject matter of the arbitration been the subject matter of the suit. On such reasoning, the Court would be the Court at Guwahati to whose jurisdiction the parties had agreed in matters other than the arbitration.

18. However, in my view the expression “Court” in Section 36 is not meant to be the Court within the meaning of Section 2(1)(e). The definitions in Section 2(1)(e) are, “unless the context otherwise requires”. The word “Court” is used in Section 36 only in the context of, by a legal fiction, making the award executable as a decree of the Court within the meaning of CPC. The word “Court” therein is used to describe the manner of enforcement *i.e.* as a “decree of the Court” and not in the context of providing for the Court which will have territorial jurisdiction to execute/enforce the award. In this context, the contention of the Counsel for the decree holder of the difference in language in Section 36 and in Section 49 is significant. The Legislature has in Section 49 provided for the enforcement of foreign awards by deeming the said awards to be a decree of “that Court” which would mean the decree of the Court which has adjudicated on the enforcement of the award. However, the Legislature in Section 36 did not use the expression “that” and which is indicative of the reference to Court therein being only to describe the manner of enforcement of the award as a decree of the Court. There does not appear to be a legislative mandate to the effect that arbitral award has to be treated as a decree of that Court only which would have had the jurisdiction to entertain the suit.

19. Section 38 of the CPC applies only to a decree passed by the Court. In the present case no Court has passed the decree. What

is to be the position in such cases? which Court is empowered to execute the award, which is a decree by a legal fiction and which has not been passed by any Court?

24. Thus it will be seen that where under other enactments, orders are made executable as a decree of the Court, insistence has not been on following Section 38 of CPC. However, the judgments (supra) in relation to Section 635 of the Companies Act cannot be blindly followed, inasmuch as Section 635 itself provides a procedure and which is missing in Section 36 of the Arbitration Act.

25. In this regard the addition of Sub-section (4) to Section 39 vide CPC Amendment Act, 2002 is relevant. It provides that nothing in Section 39 shall be deemed to authorize the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction. The legislative intent appears to be that the decree should be executed by the Court within whose territorial jurisdiction the person or the property of the judgment debtor is situated. That is logical also. The purpose of execution is realization of money from the property or the property of the judgment debtor. Thus while territorial jurisdiction for suits is determined by place of occurrence of cause of action, residence of defendant, locus of property, etc., the territorial jurisdiction for execution is determined only by locus of judgment debtor or the property. The agreement between the parties restricting jurisdiction of one, amongst many Courts also does not extend to execution and is applicable to the Court which will adjudicate the *lis*. I do not see any reason, why where an award has been made executable as a decree, the execution cannot lie at a place where the property against which the decree is sought to be enforced is situated. That Court in my view would have inherent jurisdiction to execute the decree and in the absence of applicability of mandate of Section 38 of CPC, pedantic insistence on first applying for execution to one Court, merely to obtain transfer would be also contrary to intent of expedition in the 1996 Act."

16. It becomes relevant to note that insofar as jurisdictional courts in Rajasthan are concerned, the Court finds that a learned Judge of the High Court of that State in **Kotak Mahindra Bank Ltd. vs. Ram**

Sharan Gurjar⁷ had followed **Daelim**. However, a Division Bench of that High Court in **Ess Kay Fincorp Limited vs. Suresh Chaudhry**⁸ had noticed that **Sundaram Finance** had failed to notice the decision of a larger Bench in **Associated Contractors**. It is the decision in **Ess Kay Fincorp** which was ultimately followed by the Jaipur Commercial Court. The record would further indicate that while the decision in Kotak Mahindra was cited for the consideration of the Jaipur Commercial Court, it ultimately chose not to deal with the same since counsels failed to address submissions in its light. Insofar as **Ess Kay Fincorp** is concerned, it may be noted that the aforesaid decision was principally concerned with whether execution petitions could be preferred only before a commercial court in light of Sections 10(3) and 15 (2) of the Commercial Courts Act, 2015 or could they also be entertained by District Courts. However, the flux in the legal position as it prevails in Rajasthan need not detain the enunciation of the correct position in law by this Court.

17. Mr. Karia, learned counsel appearing for the execution petitioner, submitted that a comprehensive review of the judgments of the Supreme Court in **Associated Contractors** and **Sundaram Finance** would establish that they cannot be understood as being in conflict with each other. It was contended that in **Associated Contractors** while observing that Section 42 would extend to even those applications which may come to be preferred after an award had been rendered, the Supreme Court had taken into consideration the

⁷ 2011 SCC OnLine Raj 2748

⁸ AIR 2020 Raj 56

language of the said provision and which would necessarily extend to all subsequent applications that may be made with respect to an arbitration agreement. **Sundaram Finance**, according to Mr. Karia, merely recognises the option available to the decree holder to move for execution either before the court which had jurisdiction over the arbitration proceedings and thereafter obtain a transfer to a court within whose jurisdiction the assets of the judgment debtor may be situate or to proceed for execution without obtaining a certificate of transfer from the juridical court. It was his submission that if the two decisions are understood in that light it would be manifest that no irreconcilable conflict in fact exists between **Associated Contractors** and **Sundaram Finance**.

18. Mr. Varghese, learned counsel appearing for the respondent contended that it would be expedient if the legal position in respect of the issue which arises is duly clarified by this Court. It was submitted that in **Daelim** the Court had noticed the legal fiction which stood incorporated in Section 36 of the Act and which extended to an award being executable as a decree of the court. **Daelim** had essentially found that the wording of Section 36 was to be understood as merely prescribing that the procedure for enforcement of the award would be the same as prescribed for execution of a decree by law and thus being distinct from the award being treated as a decree drawn up by a court itself. Mr. Varghese, however, did submit that in light of the fact that **Associated Contractors** was a judgment rendered by a Bench of three learned Judges and had been rendered prior in point of time, it could

be argued and urged that it would overshadow what was ultimately held in **Sundaram Finance**. According to Mr. Varghese, the judgment in **Sundaram Finance** though pronounced in 2018 fails to notice the earlier decision of a larger Bench in **Associated Contractors**. It was further submitted that the problem is further compounded in light of the judgment rendered by the Supreme Court in **Union of India v. Hardy Exploration and Production (India) Inc.**⁹ and which had while expounding upon the law with reference to the seat and venue of arbitration struck a position which could be viewed as being at variance with what was held in **Sundaram Finance**. According to Mr. Varghese, this Court would thus have to consider the question of whether the seat of arbitration would be determinative of the issue that arises. Learned counsels had consequently submitted that the ends of justice would warrant this Court enunciating the legal position and rendering a final determination so as to lend a quietus to the controversy which stands raised.

19. The Court in the preceding parts of this decision had the occasion to notice the judgments of the Supreme Court in **Associated Contractors** and **Sundaram Finance**, as well as the admitted position that **Sundaram Finance** does not notice the judgment in **Associated Contractors**. Learned counsels had, in the aforesaid backdrop, contended that perhaps one of the reasons which appears to have weighed with the Jaipur Commercial Court was the aforesaid facet of

⁹ (2019) 13 SCC 472

the issue which arises. However, it would be pertinent to note that both the aforementioned judgments were considered by the Supreme Court in **Cheran Properties Ltd. v. Kasturi & Sons Ltd.**¹⁰ albeit in a different context. One of the issues which arose in **Cheran Properties** was whether the jurisdiction of the **National Company Law Tribunal**¹¹ had been correctly invoked since it was asserted that the NCLT would have no jurisdiction to execute an arbitral award. The arbitral award in question had contemplated the transfer of certain shares. It was in the aforesaid context that the ambit of Section 42 as well as the decisions in **Associated Contractors** and **Sundaram Finance** fell for consideration. Their Lordships ultimately came to conclude that since the arbitral award itself stipulated the transmission of shares and the only remedy available for effectuating that transfer was to follow the route stipulated by Section 111 of the Companies Act, 2013, it could not be said that NCLT did not have the jurisdiction to entertain the application seeking effectuation of the terms of the award or that Section 42 would come in the way. It may only be observed that even in **Cheran Properties**, the Supreme Court did not notice any inherent discord between **Associated Contractors** and **Sundaram Finance**.

20. Insofar as our Court is concerned, the issue directly fell for consideration in **Daelim** and which decision has been specifically affirmed by the Supreme Court in **Sundaram Finance**. The position of it being legally permissible for execution to be instituted before a

¹⁰ (2018) 16 SCC 413

¹¹ NCLT

court within whose jurisdiction the assets of the judgment debtor may lie as propounded in **Daelim** was also affirmed by a Division Bench of our Court in **Union of India v. Atlanta Ltd.**¹².

21. In **Atlanta** the Division Bench was called upon to consider the correctness of the objection taken by the appellant which had asserted that the enforcement petition could not have been preferred before this Court without obtaining a transfer certificate from the courts at Rajasthan. The Court while rejecting the said objection, observed as follows: -

“7. The ASG, after again going through *Sundaram Finance Ltd.* supra, confirms that the view taken by this Court in *Daelim Industrial Co. Ltd.* supra has been approved. The said view has since also been consistently followed in other dicta of this Court. Reference may be made to *Religare Finvest Ltd. v. Ranjit Singh Chouhan* 2012 SCC OnLine Del 1224, *The State Trading Corporation of India Ltd. v. Global Steel Holdings Ltd.* AIR 2015 Del 100, *ICI-SOMA JV v. Simplex Infrastructures Ltd.* 2016 SCC OnLine Del 5315, *Mukesh Sharma v. Roger Shashoua* (2016) 231 DLT 14 and *Dr. S.C. Jain v. Sahny Securities Pvt. Ltd.* 2018 SCC OnLine Del 13202.

10. Though the ASG has also contended that the respondent No. 1 cannot prefer execution, both before the Courts at Rajasthan as well as this Court, but the Single Judge in the impugned order has recorded the statement of the counsel for the respondent No. 1 that the Execution Petition preferred against the appellant UOI before the Rajasthan High Court was being withdrawn and the counsel for the respondent No. 1 today also states that an application in that regard has already been filed.

11. In our view, the respondent No. 1 is entitled to seek execution, simultaneously against more than one judgment debtors, even in different Courts as long as the decretal amount is not recovered twice over. Reference if any required, can be made to *Prem Lata Agarwal v. Laxman Prasad Gupta* (1970) 3 SCC 440, *State Bank of India v. Indexport Registered* (1992) 3 SCC 159, *Shyam*

¹² 2021 SCC OnLine Del 3500

Singh v. Collector, District Hamir Pur 1993 Supp (1) SCC 693 and *Cholamandalam Investment & Finance Co. Ltd. v. CEC Limited* 1995 SCC OnLine Del 240.”

22. Having noticed the principal decisions in the backdrop of which the issue which stands raised before this Court would be liable to be considered, it may only be observed that the Court would be failing in its pursuit to articulate the correct legal position if it were to not notice the judgment rendered by the Supreme Court in **BGS SGS SOMA JV v. NHPC**¹³. The said decision carries an elaborate and lucid enunciation of the concept of juridical seat of arbitration. In **BGS SOMA** the issue itself fell for consideration before the Supreme Court in light of a petition preferred under Section 34 of the Act which had come to be filed before the District and Sessions Judge, Faridabad, Haryana. Clause 67.3 of the Agreement, and which embodied the arbitration clause, had provided that arbitration proceedings could be held in New Delhi / Faridabad. In **BGS Soma**, on facts, it was found that the entire arbitral proceedings had been held at New Delhi and that a unanimous award was also pronounced there. The petition which came to be preferred before the Faridabad Court was, however, questioned on the ground of territorial jurisdiction. Parties had essentially laid a challenge to the order passed by the Special Commercial Court, Gurugram to which the Section 34 had been transferred and which had returned the petition for presentation before the proper court in New Delhi. While upholding the order passed by

¹³ (2020) 4 SCC 234

the Special Commercial Court and the transfer of proceedings to New Delhi, the Supreme Court held that from the conduct of the arbitral proceedings it would be evident that New Delhi was chosen to be the seat of arbitration. In view of the above and since it constituted the seat, the Supreme Court held that notwithstanding a part of the cause of action having arisen at Faridabad, the petition preferred under Section 34 of the Act would be maintainable at New Delhi.

23. The decision in **BGS SOMA** assumes significance in light of the elaborate enunciation of the legal position relating to the juridical seat of arbitration, the distinction which was drawn between the seat and venue of arbitral proceedings and the seminal importance which is to be accorded to party autonomy and the right to designate a seat for arbitration proceedings. For our purposes the following observations as entered in **BGS SOMA** would be of relevance: -

“32. It can thus be seen that given the new concept of “juridical seat” of the arbitral proceedings, and the importance given by the Arbitration Act, 1996 to this “seat”, the arbitral award is now not only to state its date, but also the place of arbitration as determined in accordance with Section 20. However, the definition of “court” contained in Section 2(1)(c) of the Arbitration Act, 1940, continued as such in the Arbitration Act, 1996, though narrowed to mean only principal civil court and the High Court in exercise of their original ordinary civil jurisdiction. Thus, the concept of juridical seat of the arbitral proceedings and its relationship to the jurisdiction of courts which are then to look into matters relating to the arbitral proceedings — including challenges to arbitral awards — was unclear, and had to be developed in accordance with international practice on a case by case basis by this Court.

33. Some of the early decisions of this Court did not properly distinguish between “seat” and “venue” of an arbitral proceeding. The five-Judge Bench in *Balco* [*Balco v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ)

810] dealt with this problem as follows: (SCC pp. 597-99, 605-607, paras 75-76, 95-96, 98-99)

“75. We are also unable to accept the submission of the learned counsel for the appellants that the Arbitration Act, 1996 does not make seat of the arbitration as the *centre of gravity* of the arbitration. *On the contrary, it is accepted by most of the experts that in most of the national laws, arbitrations are anchored to the seat/place/situs of arbitration.* Redfern in Para 3.54 concludes that ‘*the seat of the arbitration is thus intended to be its centre of gravity.*’ [Blackaby, Partasides, Redfern and Hunter (Eds.), *Redfern and Hunter on International Arbitration* (5th Edn., Oxford University Press, Oxford/New York 2009)] This, however, does not mean that all the proceedings of the arbitration have to take place at the seat of the arbitration. The arbitrators at times hold meetings at more convenient locations. This is necessary as arbitrators often come from different countries. It may, therefore, on occasions be convenient to hold some of the meetings in a location which may be convenient to all. Such a situation was examined by the Court of Appeal in England in *Naviera Amazonica Peruana SA v. Compania Internacional de Seguros del Peru* [*NavieraAmazonica Peruana SA v. Compania Internacional de Seguros del Peru*, (1988) 1 Lloyd's Rep 116 (CA)] wherein at p. 121 it is observed as follows:

‘The preceding discussion has been on the basis that there is only one “place” of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or “seat” of the arbitration. This does not mean, however, that the Arbitral Tribunal *must* hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an Arbitral Tribunal to hold meetings—or even hearings—in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.... It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country — for

instance, for the purpose of taking evidence.... In such circumstances each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of arbitration remains the place initially agreed by or on behalf of the parties.'

These observations were subsequently followed in *Union of India v. McDonnell Douglas Corpn.* [*Union of India v. McDonnell Douglas Corpn.*, (1993) 2 Lloyd's Rep 48]

76. It must be pointed out that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments, namely, the New York Convention of 1958 and the UNCITRAL Model Law of 1985. It is true that the terms "seat" and "place" are often used interchangeably. In *Redfern and Hunter on International Arbitration* [Blackaby, Partasides, Redfern and Hunter (Eds.), *Redfern and Hunter on International Arbitration* (5th Edn., Oxford University Press, Oxford/New York 2009)] (Para 3.51), the seat theory is defined thus: 'The concept that an arbitration is governed by the law of the place in which it is held, which is the "seat" (or "forum" or *locus arbitri*) of the arbitration, is well established in both the theory and practice of international arbitration. In fact, the Geneva Protocol, 1923 states:

'2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.'

The New York Convention maintains the reference to 'the law of the country where the arbitration took place' [Article V(1)(d)] and, synonymously to 'the law of the country where the award is made' [Articles V(1)(a) and (e)]. The aforesaid observations clearly show that the New York Convention continues the clear territorial link between the place of arbitration and the law governing that arbitration. The author further points out that this territorial link is again maintained in the Model Law which provides in Article 1(2) that:

'1. (2) the provision of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of the State.'

Just as the Arbitration Act, 1996 maintains the

territorial link between the place of arbitration and its law of arbitration, the law in Switzerland and England also maintain a clear link between the seat of arbitration and the *lex arbitri*. The Swiss Law states:

‘176(I). (1) The provision of this chapter shall apply to any arbitration *if the seat of the Arbitral Tribunal is in Switzerland* and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.’ [See the Swiss Private International Law Act, 1987, Ch. 12, Article 176 (I)(1).]

95. The learned counsel for the appellants have submitted that Section 2(1)(e), Section 20 and Section 28 read with Section 45 and Section 48(1)(e) make it clear that Part I is not limited only to arbitrations which take place in India. These provisions indicate that the Arbitration Act, 1996 is *subject-matter centric* and not exclusively *seat-centric*. Therefore, “seat” is not the “centre of gravity” so far as the Arbitration Act, 1996 is concerned. We are of the considered opinion that the aforesaid provisions have to be interpreted by keeping the principle of territoriality at the forefront. We have earlier observed that Section 2(2) does not make Part I applicable to arbitrations seated or held outside India. In view of the expression used in Section 2(2), the maxim *expressum facit cessare tacitum*, would not permit by interpretation to hold that Part I would also apply to arbitrations held outside the territory of India. The expression “*this Part shall apply where the place of arbitration is in India*” necessarily excludes application of Part I to arbitration seated or held outside India. It appears to us that neither of the provisions relied upon by the learned counsel for the appellants would make any section of Part I applicable to arbitration seated outside India. It will be apposite now to consider each of the aforesaid provisions in turn.

96. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

‘2. **Definitions.**—(1) In this Part, unless the context otherwise requires.—

(e) “**Court**” means 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.’

We are of the opinion, the term “subject-matter of the arbitration” cannot be confused with “subject-matter of the suit”. The term “subject-matter” in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order Under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.

98. We now come to Section 20, which is as under:

‘20. Place of arbitration.—(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, good or other property.’

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any “place” or “seat” within India, be it Delhi, Mumbai, etc. In the absence of the parties' agreement thereto, Section 20(2) authorises the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

99. The fixation of the most convenient “venue” is taken care of by Section 20(3). Section 20, has to be read in the context of Section 2(2), which places a threshold limitation on the applicability of Part I, where the place of arbitration is in India. Therefore, Section 20 would also not support the submission of the extra-territorial applicability of Part I, as canvassed by the learned counsel for the appellants, so far as purely domestic arbitration is concerned.”

(emphasis in original and supplied)

34. The Court in *Balco* [*Balco v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] then went on to refer to several English judgments and specifically italicised several parts of the judgment in *Shashoua v. Sharma* [*Shashoua v. Sharma*, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep 376] as follows : (*Balco case* [*Balco v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] , SCC p. 614, para 110)

“110. Examining the fact situation in the case, the Court observed as follows:

‘The basis for the court's grant of an anti-suit injunction of

the kind sought depended upon the seat of the arbitration. *An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause.* Not only was there agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, *the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration.*

Although, “venue” was not synonymous with “seat”, in an arbitration clause which provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that “the venue of arbitration shall be London, United Kingdom” did amount to the designation of a juridical seat....’

In para 54, it is further observed as follows:

‘There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that court, because it was best fitted to determine such issues under the Indian Law. Whilst I found this idea attractive initially, we are persuaded that it would be wrong in principle to allow this and that *it would create undue practical problems in any event. On the basis of what I have already decided, England is the seat of the arbitration and since this carries with it something akin to an exclusive jurisdiction clause, as a matter of principle the foreign court should not decide matters which are for this Court to decide in the context of an anti-suit injunction.*’

In making the aforesaid observations in *Shashoua case* [*Shashoua v. Sharma*, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep 376] , the Court relied on the judgments of the Court of Appeal in *C v. D* [*C v. D*, 2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)] .”

(emphasis in original)

38. A reading of paras 75, 76, 96, 110, 116, 123 and 194 of *Balco* [*Balco v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] would show that where parties have selected the seat of arbitration in their agreement, such selection would then amount to an exclusive jurisdiction clause, as the parties have now indicated that the courts

at the “seat” would alone have jurisdiction to entertain challenges against the arbitral award which have been made at the seat. The example given in para 96 buttresses this proposition, and is supported by the previous and subsequent paragraphs pointed out hereinabove. The *Balco* [*Balco v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] judgment, when read as a whole, applies the concept of “seat” as laid down by the English judgments (and which is in Section 20 of the Arbitration Act, 1996), by harmoniously construing Section 20 with Section 2(1)(e), so as to broaden the definition of “court”, and bring within its ken courts of the “seat” of the arbitration [Section 3 of the English Arbitration Act, 1996 defines “seat” as follows:

“3. The seat of the arbitration.— In this Part **“the seat of the arbitration”** means the juridical seat of the arbitration designated—

- (a) by the parties to the arbitration agreement, or
- (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
- (c) by the Arbitral Tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.

”It will be noticed that this section closely approximates with Section 20 of the Indian Arbitration Act, 1996. The meaning of “Court” is laid down in Section 105 of the English Arbitration Act, 1996 whereby the Lord Chancellor may, by order, make provision allocating and specifying proceedings under the Act which may go to the High Court or to county courts.]

44. If paras 75, 76, 96, 110, 116, 123 and 194 of *Balco* [*Balco v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] are to be read together, what becomes clear is that Section 2(1)(e) has to be construed keeping in view Section 20 of the Arbitration Act, 1996, which gives recognition to party autonomy — the Arbitration Act, 1996 having accepted the territoriality principle in Section 2(2), following the UNCITRAL Model Law. The narrow construction of Section 2(1)(e) was expressly rejected by the five-Judge Bench in *Balco* [*Balco v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] . This being so, what has then to be seen is what is the effect Section 20 would have on Section 2(1)(e) of the Arbitration Act, 1996.

46. This Court in *Indus Mobile Distribution (P) Ltd.* [*Indus Mobile*

Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760] , after referring to Sections 2(1)(e) and 20 of the Arbitration Act, 1996, and various judgments distinguishing between the “seat” of an arbitral proceeding and “venue” of such proceeding, referred to the Law Commission Report, 2014 and the recommendations made therein as follows : (SCC pp. 692-93, paras 17-20)

“17. In amendments to be made to the Act, the Law Commission recommended the following:

Amendment of Section 20

12. In Section 20, delete the word “place” and add the words “seat and venue” before the words “of arbitration”.

(i) In sub-section (1), after the words “agree on the” delete the word “place” and add words “seat and venue”.

(ii) In sub-section (3), after the words “meet at any” delete the word “place” and add word “venue”. [Note.—The departure from the existing phrase “place” of arbitration is proposed to make the wording of the Act consistent with the international usage of the concept of a “seat” of arbitration, to denote the legal home of the arbitration. The amendment further legislatively distinguishes between the “[legal] seat” from a “[mere] venue” of arbitration.]

Amendment of Section 31

17. In Section 31

(i) In sub-section (4), after the words “its date and the” delete the word “place” and add the word “seat”.

18. The amended Act, does not, however, contain the aforesaid amendments, presumably because the *Balco* [*Balco v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] judgment in no uncertain terms has referred to “place” as “juridical seat” for the purpose of Section 2(2) of the Act. It further made it clear that Sections 20(1) and 20(2) where the word “place” is used, refers to “juridical seat”, whereas in Section 20(3), the word “place” is equivalent to “venue”. This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.

19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear

that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the law of arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to “seat” is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction — that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of the Code of Civil Procedure be attracted. In arbitration law however, as has been held above, the moment “seat” is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

20. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see *Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.* [*Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.*, (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] This was followed in a recent judgment in *B.E. Simoes Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.* [*B.E. Simoes Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.*, (2015) 12 SCC 225 : (2016) 1 SCC (Civ) 427] . Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment [*Datawind Innovations (P) Ltd. v. Indus Mobile Distribution (P) Ltd.*, 2016 SCC OnLine Del 3744 : (2016) 158 DRJ 391] is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. Appeals are disposed of accordingly.”

This judgment has recently been followed in *Brahmani River Pellets Ltd. v. Kamachi Industries Ltd.* [*Brahmani River Pellets Ltd. v. Kamachi Industries Ltd.*, (2020) 5 SCC 462 : 2019 SCC OnLine SC 929 at para 15]

49. Take the consequence of the opposite conclusion, in the light of the facts of a given example, as follows. New Delhi is specifically designated to be the seat of the arbitration in the arbitration clause between the parties. Part of the cause of action, however, arises in

several places, including where the contract is partially to be performed, let us say, in a remote part of Uttarakhand. If concurrent jurisdiction were to be the order of the day, despite the seat having been located and specifically chosen by the parties, party autonomy would suffer, which *Balco* [*Balco v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] specifically states cannot be the case. Thus, if an application is made to a District Court in a remote corner of the Uttarakhand hills, which then becomes the court for the purposes of Section 42 of the Arbitration Act, 1996 where even Section 34 applications have then to be made, the result would be contrary to the stated intention of the parties — as even though the parties have contemplated that a neutral place be chosen as the seat so that the courts of that place alone would have jurisdiction, yet, any one of five other courts in which a part of the cause of action arises, including courts in remote corners of the country, would also be clothed with jurisdiction. This obviously cannot be the case. If, therefore, the conflicting portion of the judgment of *Balco* [*Balco v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] in para 96 is kept aside for a moment, the very fact that parties have chosen a place to be the seat would necessarily carry with it the decision of both parties that the courts at the seat would exclusively have jurisdiction over the entire arbitral process.

50. In fact, subsequent Division Benches of this Court have understood the law to be that once the seat of arbitration is chosen, it amounts to an exclusive jurisdiction clause, insofar as the courts at that seat are concerned. In *Enercon (India) Ltd. v. Enercon GmbH* [*Enercon (India) Ltd. v. Enercon GmbH*, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , this Court approved the dictum in *Shashoua* [*Shashoua v. Sharma*, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep 376] as follows : (*Enercon case* [*Enercon (India) Ltd. v. Enercon GmbH*, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , SCC p. 55, para 126)

“126. Examining the fact situation in the case, the Court in *Shashoua case* [*Shashoua v. Sharma*, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep 376] observed as follows:

‘The basis for the court's grant of an anti-suit injunction of the kind sought depended upon the *seat* of the arbitration. *An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause.* Not only was there agreement to the curial law of the *seat*, but also to the

courts of the *seat* having supervisory jurisdiction over the arbitration, so that, by agreeing to the *seat*, *the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration.*

Although, “venue” was not synonymous with “seat”, in an arbitration clause which provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that “the *venue* of arbitration shall be London, United Kingdom” did amount to the designation of a juridical seat....’

In para 54, it is further observed as follows:

‘There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that Court, because it was best fitted to determine such issues under the Indian law. Whilst I found this idea attractive initially, we are persuaded that it would be wrong in principle to allow this and that *it would create undue practical problems in any event. On the basis of what I have already decided, England is the seat of the arbitration and since this carries with it something akin to an exclusive jurisdiction clause, as a matter of principle the foreign court should not decide matters which are for this Court to decide in the context of an anti-suit injunction.*’ ”

(emphasis in original)

59. Equally incorrect is the finding in *Antrix Corpn. Ltd. [Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., 2018 SCC OnLine Del 9338]* that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one court exclusively. This is why the section begins with a *non obstante* clause, and then goes on to state “...where with respect to an arbitration agreement any application under this part has been made in a court...” It is obvious that the application made under this part to a court must be a court which has jurisdiction to decide such application. The subsequent holdings of this court, that where a seat is designated in an agreement, the courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the court where the seat is located, and that court alone then has jurisdiction over the

arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. 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.

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.”

24. It would also be pertinent to note at this juncture itself that the correctness of **Hardy Exploration** also arose for consideration of the Supreme Court in **BGS Soma**. The aforesaid decision was upon due consideration held to have been rendered *per incuriam* having failed to apply the tests which had been laid down in **Shashoua v. Sharma**¹⁴. The Court thus does not deem it apposite to deal with **Hardy Exploration**, a decision which was commended for consideration by Mr. Varghese.

25. The significance of a seat in modern day arbitration proceedings was succinctly explained by **Russel on Arbitration** [Twenty Third Edition] in the following terms: -

“2-100 **The "seat" or place of arbitration.** In England it is essential for an arbitration to have a "seat", which is the geographical location to which the arbitration is ultimately tied. English law does not recognise the concept of "delocalised" arbitral procedures which are "floating in the transnational firmament", unconnected with any national system of law.” Section 3 of the Arbitration Act 1996 defines the seat of an arbitration as its "juridical seat", which is the place to which it is legally attached. As the seat is the legal, rather than the physical, place of arbitration proceedings, hearings can be held in other jurisdictions. The seat of the arbitration is often specified in the arbitration agreement by the selection of a particular place or country in which the arbitration is to be held. In the absence of a clear indication to the contrary, there is a strong presumption that the place where the arbitration is to take place will constitute its seat. The expression "seat" is often used to refer to the particular city chosen, rather than the country (for example, "arbitration in London") and while the parties' agreement is on a city, the crucial choice is of the jurisdiction in which the city is located.”

¹⁴ 2009 EWHC 957 (Comm)

26. A more elaborate discussion on the subject is found in **Redfern and Hunter on International Arbitration [Sixth Edition]**, the relevant parts whereof are extracted hereinbelow: -

“(e) Seat theory

3.53 The concept that an arbitration is governed by the law of the place in which it is held, which is the 'seat' (or 'forum', or locus arbitri) of the arbitration, is well established in both the theory and practice of international arbitration. It has influenced wording of international conventions from the 1923 Geneva Protocol to the New York Convention. Article 2 of the 1923 Geneva Protocol states: "The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place."

3.54 The New York Conventions maintains the reference to the law of the country where the arbitration took place and, synonymously, to 'the law of the country where the award is made. This continues the clear territorial link between the place of arbitration and the law governing that arbitration: the lex arbitri. This territorial link is again maintained in Article 1(2) of the Model Law: "The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State."

3.55 Amongst modern laws on arbitration, those of Switzerland and of England are perhaps particularly clear on the link between the seat of the arbitration and the lex arbitri. Swiss law states:

The provisions of this chapter shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

In English law, certain provisions of the Arbitration Act 1996 apply only where the seat of the arbitration is in England, Wales, or Northern Ireland, whereas other provisions (for example for the stay of court proceedings commenced in breach of an arbitration agreement) apply even if the seat of the arbitration is not in those countries or if no seat has been designated. The 'seat of the arbitration' is defined as 'the juridical seat of the arbitration' designated by the parties, or by an arbitral institution or the arbitrators themselves, as the case may be. Unless the parties agree otherwise, the seat of the arbitration must be stated in the award of the arbitrators.

3.56. As this introduction tries to make clear, the place, or seat, of the arbitration is not merely a matter of geography. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated:

When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and the arbitrators.

The seat of an arbitration is thus often intended to be its legal centre of gravity. This does not mean that all of the proceedings of the arbitration have to take place there, although preferably some should do so:

Although the choice of a seat also indicates the geographical place for the arbitration, this does not mean that the parties have limited themselves to that place. As is pointed out...in a passage approved by the Court of Appeal in *Naviera Amazonia Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 at 121, it may often be convenient to hold meetings or even hearings in other countries. This does not mean that the 'seat' of the arbitration changes with each change of country. The legal place of the arbitration remains the same even if the physical place changes from time to time, unless of course the parties agree to change it.

3.57 Arbitrators and the parties to an international arbitration often come from different countries. It may not always be convenient for everyone concerned to travel to the country that is the seat of the arbitration for the purpose of a meeting or a hearing. Alternatively, it may simply be easier and less expensive to meet elsewhere. In recognition of this reality, the ICC Rules allow hearings and meetings to be held elsewhere than at the place (or seat) of the arbitration. The relevant rule, Article 18, reads as follows:

- 1) The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.
- 2) The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties
- 3) The arbitral tribunal may deliberate at any location it considers appropriate,

3.58 The LCIA has a similar rule. Article 16(3) of the LCIA Rules provides that:

The Arbitral Tribunal may hold any hearing at any convenient geographical place in consultation with the parties and hold its deliberations at any geographical place of its own choice, and if such place(s) should be elsewhere than the seat of the arbitration, the arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the arbitral seat and any order or award as having been made at that seat.

Article 20(2) of the Model Law also allows the arbitral tribunal to meet at any place it considers appropriate for its deliberations or to hear witnesses, unless the object.

3.59 These are sensible provisions. They recognise the realities of international arbitration, with parties, lawyers, and arbitrators likely to be based in different parts of the world. They give flexibility to the tribunal and to the parties in selecting a convenient location for procedural meetings, hearings, and deliberations. It may be, for example, that although the seat of the arbitration is Jakarta, the arbitral tribunal finds it convenient to meet to hold hearings in Singapore. In international construction disputes, it is often necessary for an arbitral tribunal sitting in one country to visit the site of the project in another country to carry out an inspection. Equally, it may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country or continent, for example for the purpose of taking evidence.”

27. Having set out the essential milieu in which the issue would be liable to be resolved, it would be apposite to advert to some of the salient provisions of the Act. Section 2(1)(e) which falls in Chapter-I defines “Court” as follows: -

“Section 2 (1)(e)

(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;

(ii) in the case of international commercial arbitration, 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, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.”

28. Section 20 confers statutory recognition upon the principle of party autonomy which forms a foundational theme of the UNCITRAL Model Law. The aforesaid provision reads as under: -

“20. Place of arbitration.—(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.”

29. The issue of enforcement is governed by Section 36 which reads thus: -

“36. Enforcement.—(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

Provided further that where the Court is satisfied that a *Prima facie* case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation.—For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016).”

30. Section 42 reads as follows: -

“**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.”

31. Part-1, undisputedly relates to proceedings pertaining to domestic arbitral proceedings and awards that may be rendered in relation thereto. The subject matter of enforcement of foreign awards is governed by the provisions contained in Part-II of the Act. The

enforcement of foreign awards is provisioned for in Sections 48 and 49 which are reproduced hereinbelow: -

“48. Conditions for enforcement of foreign awards.—(1)

Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration maybe enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the

public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
- (ii) it is in contravention with the fundamental policy of Indian law; or
- (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

49. Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.”

32. It becomes apposite to note that Section 2(1)(e) defines the word ‘Court’ to mean the principal civil court of original jurisdiction in a district and includes High Courts in exercise of their ordinary original civil jurisdiction having jurisdiction to decide questions forming the subject matter of arbitration as if the same had been the subject matter of a suit. Section 20 confers a right on parties to mutually agree upon a place of arbitration. Sub-Section (3) thereof enables the Arbitral Tribunal to meet at any place it considers appropriate for consultation amongst its members or hearing witnesses, experts, parties or for inspection of documents, goods or

other property. The discretion so conferred on the Arbitral Tribunal is subject to parties otherwise agreeing to the venue that may be chosen by the Arbitral Tribunal. It becomes significant to note that sub-section (1) of Section 20 resonates the right of parties to an arbitration agreement to agree on a seat. It is the concept of the juridical seat of arbitral proceedings as promulgated and recognised by the UNCITRAL Model Law and which has been adopted by the Act which was recognised to be of seminal importance in **BGS Soma**. The Supreme Court noticed that a distinction must be recognized to exist between a seat and a venue of arbitration. This was explained since for the convenience of parties as well as members constituting the tribunal, seating and hearings may possibly be held and conducted at a mutually acceptable place. However, and as was noticed in the **BGS Soma**, the arbitral award that comes to be rendered under the Act is to not only incorporate a date when it is rendered but also the place where it is pronounced. The confusion appears to have arisen with respect to the issue of seat of arbitration in light of Section 2(1)(e) continuing to incorporate and define the word ‘court’ in terms similar and identical to that carried in the **Arbitration Act, 1940**¹⁵. As was noticed in **BGS Soma**, it was this inconsistency between the original understanding of a court under the 1940 Act and the modern concept of arbitration as incorporated in the Act which had constrained courts to undertake the task of a judicial enunciation of the concept of seat and venue. In **BGS Soma**, the legal position as

¹⁵ The 1940 Act

enunciated by the Constitution Bench in **Balco v. Kaiser Aluminium Technical Services Inc.**¹⁶ came to be reiterated and affirmed with the seat of arbitration being liable to be recognized as the center of gravity or in one sense acting as the anchor and situs of the arbitration. It was also significantly observed that the term subject matter as appearing in Section 2(1)(e) is no longer connected to the cause of action principles which may be relevant under the Code but to the subject matter of arbitration. It was thus explained that the court as defined in Section 2(1)(e) would be that which would be recognized to have supervisory control over all arbitral proceedings. While explaining the concept of party autonomy which now finds recognition in modern day arbitration, the Supreme Court noted the right inhering in parties to make a conscious decision of designating a seat, primacy being accorded to the choice of parties and the said choice extending to the designation of a seat to which the cause of action principles may have no application. It thus recognizes the right of parties to select a seat of arbitration which could be one where no obligations under the contract may have been performed or to which the classical concept of a cause of action may have no application.

33. It was further held that once parties agree to designate a seat of arbitration, that constitutes and is liable to be recognized as an exclusive jurisdiction clause. It was observed that once a neutral place of arbitration comes to be designated by parties, it would be liable to be understood to be the seat of all arbitral proceedings and would thus

¹⁶ (2012) 9 SCC 552

restrict parties to initiate actions arising out of the arbitration only before competent courts situate within the territorial limits of the seat. It was further observed that merely because the venue of arbitration may be different from the designated seat that would clearly not be determinative and it would be the juridical seat which would be entitled to be recognized as governing all conflicts relating to the jurisdiction of courts in respect of the arbitration. It was consequently held that once a seat is designated in an agreement, the courts of that seat alone would have jurisdiction to entertain and rule upon all applications that may be made under Part-I of the Act. While expounding upon the tests for determination of the seat, the Supreme Court in **BGS SOMA** held that even where the arbitration agreement refers to a venue of proceedings, in the absence of any contrary intention, the stated venue would for all purposes be liable to be understood as being the seat of arbitral proceedings.

34. In light of the aforesaid principles as laid down in **BGS SOMA**, the Court comes to the irrefutable conclusion that for the purposes of all applications that may be preferred under Part-I, the seat court would continue to be entitled to entertain petitions or applications that may be referable to Part-I of the Act.

35. While dealing with the provisions of Section 42, the Supreme Court in **BGS SOMA** had explained the legislative policy underlying the said provision by observing that it is essentially meant to avoid conflicts with different courts seeking to assume supervisory control over arbitral proceedings. Their Lordships explained that once an

application arising out of an arbitration agreement comes to be made before a particular court, all subsequent applications arising therefrom would necessarily have to be preferred before that court alone. Reference in this context was made to applications that may be made before or during the course of arbitration and for that matter even thereafter as envisaged in Sections 9, 14, 15, 29A, 34, 36 and 37 enshrined in Part-I of the Act. It would be pertinent to bear in mind that out of all the provisions noticed above, petitions preferred under Section 34, 36 or for that matter one referable to Section 37(c) would obviously be applications which would come to be preferred upon conclusion and termination of arbitral proceedings since by that time the award itself would have come to be rendered. The observation of the Supreme Court in **Associated Contractors** and where their Lordships had an occasion to observe and hold that the phrase “with respect to an arbitration agreement” would cover even applications made after conclusion of arbitration proceedings is to be thus understood and appreciated in the aforesaid light.

36. As this Court considers the decisions in **Associated Contractors** and **Sundaram Finance**, it fails to find any irreconcilable or discordant note between the two. **Sundaram Finance** cannot possibly be read as being an authority for the proposition that a petition for execution of the arbitral award cannot be instituted before the seat court. All that the Supreme Court in **Sundaram Finance** held was that notwithstanding the right of a party to petition the seat court for execution of the award, it would

additionally have the choice to initiate execution in a court within whose jurisdiction the assets of the judgment debtor may be situate.

37. It was significantly observed that Section 36 only provided for an award being liable to be executed as a decree. This obviously since that award is not one which has come to be rendered by a court as understood in the strict legal sense. **Sundaram Finance** thus appears to recognise the limited extent to which the legal fiction enshrined in Section 36 would extend. The limited extent of the legal fiction which stands engrafted in Section 36 of the Arbitration and Conciliation Act, 1996 was also highlighted by the Supreme Court in **Union of India v. Vedanta Ltd.**¹⁷ in the following terms:

“69. Section 36 of the Arbitration Act, 1996 creates a statutory fiction for the limited purpose of enforcement of a “domestic award” as a decree of the court, even though it is otherwise an award in an arbitral proceeding [Umesh Goel v. H.P. Coop. Group Housing Society Ltd., (2016) 11 SCC 313 : (2016) 3 SCC (Civ) 795] . By this deeming fiction, a domestic award is deemed to be a decree of the court [Sundaram Finance Ltd. v. Abdul Samad, (2018) 3 SCC 622 : (2018) 2 SCC (Civ) 593] , even though it is as such not a decree passed by a civil court. The Arbitral Tribunal cannot be considered to be a “court”, and the arbitral proceedings are not civil proceedings. The deeming fiction is restricted to treat the award as a decree of the court for the purposes of execution, even though it is, as a matter of fact, only an award in an arbitral proceeding. In Paramjeet Singh Patheja v. ICDS Ltd. [Paramjeet Singh Patheja v. ICDS Ltd., (2006) 13 SCC 322] , this Court in the context of a domestic award, held that the fiction is not intended to make an award a decree for all purposes, or under all statutes, whether State or Central. It is a legal fiction which must be limited to the purpose for which it was created. Paras 39 and 42 of the judgment in Paramjeet Singh Patheja [Paramjeet Singh Patheja v. ICDS Ltd., (2006) 13 SCC 322] read as : (SCC pp. 345-46)

¹⁷ (2020) 10 SCC 1

“39. Section 15 of the Arbitration Act, 1899 provides for “enforcing” the award as if it were a decree. Thus a *final award, without actually being followed by a decree* (as was later provided by Section 17 of the Arbitration Act of 1940), *could be enforced i.e. executed in the same manner as a decree. For this limited purpose of enforcement, the provisions of CPC were made available for realising the money awarded. However, the award remained an award and did not become a decree either as defined in CPC and much less so far the purposes of an entirely different statute such as the Insolvency Act are concerned.*

42. The words “as if [Ed.: The words “as if” have been emphasised in original as well.] ” demonstrate that award and decree or order are two different things. The legal fiction created is for the limited purpose of enforcement as a decree. The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central.”

(emphasis supplied)”

38. The limited extent of the legal fiction enshrined in Section 36 as noticed in **Vedanta** was reiterated by the Supreme Court in its recent decision in **Amazon.Com NV Investment Holdings LLC v. Future Retail Limited**.¹⁸ as would be evident from the following passage:-

“77. This judgment in *Vedanta* [*Union of India v. Vedanta Ltd.*, (2020) 10 SCC 1] is, therefore, authority for the proposition that the fiction created by Section 49 of the Arbitration Act is limited to enforcement of a foreign award, with the important corollary that an application to enforce an award is an application under the Arbitration Act and not an application under Order 21 of the Code of Civil Procedure (in which case, such application would have been governed by Article 136 of the Limitation Act as an execution application under Order 21, and not an application under the residuary Article 137 of the Limitation Act). Mr Salve's attempt to distinguish this judgment on the ground that Section 49 lays down an entirely different procedure from the procedure to be followed

¹⁸ (2022) 1 SCC 209

for a domestic award qua enforceability does not, in any manner, distinguish the ratio of this judgment which is that an application to enforce a foreign award is not under Order 21 of the Code of Civil Procedure but under the Arbitration Act. Also, the deeming provision in Section 49, having reference to a decree of “that Court”, which refers to the court which is satisfied that the foreign award is enforceable, again, makes no difference to the aforesaid ratio of the judgment.”

39. The Court further notes that arbitration itself evolved as a dispute resolution mechanism which would stand freed from the restrictions and disadvantages of an already overburdened court system. It was also designed to become an informal resolution process thus freeing parties from the rigors of technical rules of procedure which otherwise govern litigation before courts. While proceeding to recognise a right inhering in the decree holder to initiate proceedings for execution before a court within whose territorial jurisdiction the assets of the judgment debtor may be situate, the Supreme Court in **Sundaram Finance** appears to have borne in mind the underlying principles of expedition which must necessarily imbue arbitration proceedings. The evolution of arbitration as an alternate dispute resolution mechanism is itself based on the objective of a speedy, inexpensive and a fair trial of disputes by an impartial tribunal and the process itself being visited by minimum intervention of courts. These aspects were duly highlighted by the Supreme Court in **ICOMM Tele Ltd. v. Punjab State Water Supply and Sewerage Board**¹⁹ in the following terms: -

“25. Several judgments of this Court have also reiterated that the primary object of arbitration is to reach a final disposal of disputes

¹⁹ (2019) 4 SCC 401

in a speedy, effective, inexpensive and expeditious manner. Thus, in *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.* [*Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228 : (2017) 1 SCC (Civ) 593] , this Court held: (SCC p. 250, para 39)

“39. In *Union of India v. U.P. State Bridge Corpn. Ltd.* [*Union of India v. U.P. State Bridge Corpn. Ltd.*, (2015) 2 SCC 52 : (2015) 1 SCC (Civ) 732] this Court accepted the view [*Indu Malhotra, O.P. Malhotra on the Law and Practice of Arbitration and Conciliation* (3rd Edn., Thomson Reuters, 2014).] that the A&C Act has four foundational pillars and then observed in para 16 of the Report that: (SCC p. 64)

‘16. First and paramount principle of the first pillar is ‘fair, speedy and inexpensive trial by an Arbitral Tribunal’. Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to.’”

(emphasis in original)

26. Similarly, in *Union of India v. Varindera Constructions Ltd.* [*Union of India v. Varindera Constructions Ltd.*, (2018) 7 SCC 794] , this Court held: (SCC p. 797, para 12)

“12. The primary object of the arbitration is to reach a final disposition in a speedy, effective, inexpensive and expeditious manner. In order to regulate the law regarding arbitration, legislature came up with legislation which is known as the Arbitration and Conciliation Act, 1996. In order to make arbitration process more effective, the legislature restricted the role of courts in case where matter is subject to the arbitration. Section 5 of the Act specifically restricted the interference of the courts to some extent. In other words, it is only in exceptional circumstances, as provided by this Act, the court is entitled to intervene in the dispute which is the subject-matter of arbitration. Such intervention may be before, at or after the arbitration proceeding, as the case may be. In short, court shall not intervene with the subject-matter of arbitration unless injustice is caused to either of the parties.”

40. While in light of the principles that were enunciated by the Supreme Court in **BGS Soma**, the Court must necessarily recognize the importance and significance that stands attached to the designation of a seat of arbitration, in the considered opinion of this Court the said principles do not conflict with what was ultimately held by the Supreme Court in **Sundaram Finance**. As was noticed hereinbefore, all that **Sundaram Finance** seeks to expound is of the option that is available to a decree holder to initiate proceedings for enforcement before any court which may be in a position to proceed against the properties of the debtor with due expedition and without being bound by the rigidity or inflexibility of rules of procedure.

41. Before proceeding further to notice the provisions for execution contained in the Code, the Court also deems it apposite to reiterate that the designation of a seat of arbitration is wholly unrelated to the cause of action principles which flow from the Code. This is as a necessary corollary to the party autonomy principle as well as the emphasis laid upon the phrase “subject matter” of arbitration in **BGS SOMA** itself. It would be important to recall that in the said decision it was pertinently observed that the term “subject matter” in Section 2(1)(e) refers and is connected to the process of dispute resolution and identifying the court which would have supervisory control over the arbitration. Turning then to the provisions contained in the Code and which relate to execution of decrees, it would be apposite to notice Sections 36 to 46 of the Code which deal with the subject of execution and stand placed in Part II of the Code. A reading of those provisions

would establish that they principally deal with execution of decrees passed by courts. It is for the said reason that Section 37 of the Code proceeds to define the expression “*Court which passed a decree*”. In terms of Section 38 of the Code, a decree may be executed either by the Court which passed it or by one to which it may be sent for the purposes of execution. Section 39 of the Code then proceeds to deal with the concept of the transfer of a decree in a situation where the person against whom the decree is passed resides within the local limits of the jurisdiction of a court other than one before whom execution may have commenced or if the property against which the decree is to be satisfied falls within the local limits of the jurisdiction of any another court. It also contemplates the transfer of a decree where in the course of execution, the court considers it proper to affect the sale or delivery of immovable property situate outside the local limits of its own jurisdiction. Similarly, the concept of issuance of precepts and which is governed by Section 46 of the Code empowers and enables the Courts which passed the decree to issue a precept to any other Court which would be competent to proceed against property belonging to the judgment debtor and is specified therein.

42. The aforesaid provisions as contained in Part II of the Code thus essentially deal with the execution of decrees that are passed by courts constituted under the normal hierarchy of the justice system. The award rendered by an Arbitral Tribunal cannot possibly be equated with a decree passed by a competent court. All that Section 36 of the Act achieves is to enable the party in favour of whom the award may

be ultimately rendered to enforce the same as if it were a decree. The Court also notes that **BGS SOMA** had also noted that the venue as specified in an arbitration agreement may not always be synonymous with the seat of arbitral proceedings. It had, however, pertinently observed that where the agreement prescribes a particular place as the venue, in the absence of any indication that may detract from the said geographical place being treated as a seat also, parties would be bound by the terms thereof.

43. This Court is further of the opinion that the provisions of Section 39(4) of the Code would also not detract from the conclusions recorded hereinabove. The statutory injunct which stands placed in terms of that provision relates to the “*Court which passed a decree*” and its power to execute the same against a person or decree against a person or property outside the local limits of its jurisdiction. On a clear and ex facie reading of that provision, it is evident that the same would amount to a restriction operating upon a principal civil court which may have drawn the decree. The said provision cannot possibly be read as either constricting or impeding the powers of a court recognised by **Sundaram Finance** as being entitled to entertain or proceed with an enforcement action. This since that court was clearly not one which had passed the decree. It must be recognised and understood that while the provisions of the Code may act as a guide or a pointer towards a procedure liable to be adopted for the purposes of effectuating the purposes of the Act, they cannot be acknowledged as either shackling or retarding the principal objectives of the statute

itself. Section 39(4) of the Code thus cannot be construed as frustrating the process enunciated in **Sundaram Finance**.

44. The principles which stand enunciated in **Associated Contractors, Sundaram Finance** and **BGS SOMA** thus clearly lead one to conclude that it would clearly be permissible for a party to initiate enforcement proceedings before the competent court situate in the seat of arbitration. **Sundaram Finance** further expands the aforesaid position by conferring a choice on a party to initiate proceedings for execution directly before the court within whose territorial jurisdiction the judgment debtor may reside or its assets be situate and thus not be bound by the rigors of first approaching the seat court and thereafter seeking the issuance of a certificate of transfer or precept. It thus reemphasizes the imperative of the party to the arbitration agreement being freed from the rigors of procedure which would otherwise apply.

45. The Court for the completeness of the discussion on the subject also deems it apposite to notice a decision rendered by a learned Judge of the Bombay High Court in **Global Asia Venture Company versus Arup Parimal Deb and Others**²⁰. In the said decision the Bombay High Court was called upon to consider objections which had been raised to the maintainability of execution applications preferred before it on the ground that the assets against which steps would ultimately have to be drawn and taken were located outside its local limits.

²⁰ 2018 SCC OnLine Bom 13061

While dealing with the aforesaid objection, the learned Judge on noticing the judgment in **Sundaram Finance** observed as follows:

“13. I do not believe this interpretation is warranted or supported by *Sundaram Finance* at all. There is, of course, the discussion in *Sundaram Finance* of Section 42 of the Arbitration Act. The Supreme Court said that this applies to an application under Part I, i.e. jurisdiction over arbitral proceedings, and therefore subsequent applications are to be made to that Court alone. In paragraph 19, the *Sundaram Finance* Court said that an award under Section 36 is equated to a decree of a court for the limited extent of execution⁴. An arbitral award is deemed to be a decree under Section 36 but — and this is crucial — there is no deeming fiction anywhere that says that the Court within whose jurisdiction the award was passed should be taken to be the court that passed the decree. Then comes the all-important explanation that, in my view, puts the matter beyond all controversy. *Sundaram Finance* says the Arbitration Act transcends all territorial barriers. This is fundamental. Section 39(4) is a limitation of territoriality. *Sundaram Finance* tells us that arbitration law transcends territoriality. The matter must end at that. If there was any doubt about this, it is put to rest, I think, by paragraph 20 of *Sundaram Finance* which has not the slightest ambiguity in its wording. The Court was unhesitant in its view that enforcement of an award (through execution) can be filed wherever in the country a decree can be executed. The claimant need not obtain a transfer of the decree from the 2(1)(e) court, that is to say, the one with jurisdiction over the arbitration proceedings.

14. *Sundaram Finance* therefore says that an Award Holder has a choice. Its ratio does not operate to strip the 2(1)(e) Court of its jurisdiction. It only says that a successful claimant is not compelled to come to the 2(1)(e) Court only to then have to detour to a local court for enforcement. He may go to that local court directly to execute his award.

15. Conceptually this is significant because I suspect the arguments from the Respondents before me tend to obliterate a fundamental distinction between a civil decree in execution and an arbitral award in enforcement. Arbitration is not a distinct judicial forum like a subordinate Court. It is an alternative dispute resolution mechanism with a standalone statute. It is intended to provide for the speedy resolution of disputes and enforcement with a minimal level of judicial intervention. The essence of arbitration is an agreement unlike a civil proceeding in a law Court. The fact that

Section 36 uses a phraseology which equates an award with a decree cannot be divorced from the legislative intent. Section 36(1) is enabling. It was meant to allow for the smooth enforcement of arbitral awards and it, therefore, allows these to be enforced ‘as’ decrees. Read as the Respondents would have it Section 36(1), far from being enabling, suddenly becomes *disabling*, and itself becomes a restriction, wholly contrary to the statutory intent of arbitration law, for rapid and quick enforcement. When, therefore, Section 36(1) says that an award shall be enforced in accordance with the Code in the same manner as if it was a decree of a Court, what this really tells us is not that limitations and ousters of jurisdiction will apply but that the enabling provisions of the Code must apply to arbitral award as well. Section 36(1) has to be read not in isolation but also as part of the framework of the Arbitration Act. Mr. Jagtiani is correct in pointing out that if this is read in isolation, then Section 9 and its post-award provisions are rendered entirely otiose. That Section allows the Court to take interim steps before the award is enforced. These include several steps in aid of enforcement, such as orders of receivership, injunction, deposit, disclosure and so on.

16. The correct view is, therefore, that while there may be certain restrictions on the enforcement of a decree of a Civil Court, since the Arbitration Act ‘actually transcends all territorial barriers’ as *Sundaram Finance* said, those restrictions cannot be made to apply to the enforcement of arbitral awards without resulting in a completely incongruous situation. Award holders have a jurisdictional choice that decree holders do not. The source or provenance of that jurisdictional choice is the fundamental nature of the dispute resolution process. A decree results in a lawsuit brought in a causal court governed by Section 20 of the Code. An award emanates from an arbitration. Arbitral proceeding jurisdiction is wholly independent of Section 20 of the Code, as *BALCO* tells us. That arbitral proceeding jurisdiction is created by Section 2(1)(e) of the Arbitration Act, not Section 20 of the Code. Therefore the result returned in *Sundaram Finance* that arbitral proceeding jurisdiction transcends territoriality. There is no warrant at all to drag a now firmly defenestrated territoriality back into arbitration only at the time of enforcement.”

46. As was eloquently observed by the Bombay High Court in **Global Asia, Sundaram Finance** is to be understood as holding that

the Act transcends territorial barriers and conferring a choice on the party in favour of which the Award may have been rendered to institute proceedings for enforcement in accordance with the choice which was recognized to exist in **Sundaram Finance**. The learned Judge also held that such a party cannot be compelled to first approach the “2(1)(e) Court” and thereafter be forced to approach the local court for execution of the award. In summation, it may thus be held that the party which seeks to initiate enforcement action could institute proceedings either before the seat court or to proceed further and directly to the court within the territorial limit of which the assets of the judgment debtor may be located. It essentially frees the decree holder from being compelled to first approach the seat court, obtain a certificate of transfer and then initiate proceedings before the court which may by virtue of its geographical location be entitled to take appropriate action against the properties of the judgment debtor.

47. The Court further finds that the decision of the Supreme Court in **Associated Contractors** cannot be read or understood *de hors* the context in which it came to be rendered. As was noticed hereinabove, the question which stood raised was itself relating to the correctness of petitions under Section 34 of the Act being preferred and instituted before a particular court. The Supreme Court had found that undisputedly prior to the award coming to be delivered, proceedings under Section 9 of the Act had been instituted before the Calcutta High Court. It was in the aforesaid context that it was held that Section 42 of the Act would apply and consequently the Calcutta High

Court would have the requisite jurisdiction and authority to entertain the petition under Section 34 of the Act. As was noted hereinabove, a petition under Section 9 of the Act as also certain others which fall in Part I are those which are made before a court. It is in that backdrop that Section 42 assumes significance and was so recognized to be an answer to the question which stood posited. The Supreme Court then went on to observe that the phrase “*with respect to arbitration agreement*” widens the scope of Section 42 of the Act to bring within its ambit all matters directly or indirectly relating to an arbitration agreement. It was thus held that all applications which are made to a Court either before, during or after arbitral proceedings and referable to Part I of the Act would stand covered by Section 42 of the Act.

48. In this connection it is important to bear in mind that a petition under Section 34 of the Act would necessarily be dealing with issues and disputes which are asserted to arise out of the arbitration agreement. Since Section 42 of the Act is itself concerned with conferring a centrality with respect to all challenges that may arise either out of the arbitration agreement or the award that ultimately may come to be rendered, it would perhaps be correct to recognize the said provision as thus extending to applications made to a court before, during, or after arbitral proceedings. It may be legitimately argued that a petition for enforcement transcends the arbitration agreement in the sense of those proceedings having travelled beyond the pale of the contract and the rights and obligations of parties flowing therefrom. By the time a petition for enforcement comes to be

instituted, the rights and liabilities of parties would be governed by the award which would have come into existence. It is in that context that **Daelim** as well as **Sundaram Finance** perhaps referred to the concept of termination of proceedings upon the award being pronounced.

49. However, the Court in the present is called upon to discern the true ratio decidendi of the aforementioned decisions and reconcile the principles that stand enunciated therein. On a careful consideration of the issue that arises and the precedents which govern, the Court is of the considered opinion that the position in law can be safely recognised to be the seat court being the focal point for all challenges that may arise before, during or after the conclusion of arbitral proceedings. The seat court would always be the central pivot in terms of the provisions that may be contained in the arbitration agreement. It would thus clearly be a court which would fall within the ambit and scope of Section 42 of the Act. However, insofar as petitions for enforcement are concerned and as per **Sundaram Finance**, the decree holder need not and invariably be compelled to institute proceedings before the seat court and thereafter seek a transfer of those proceedings for the purposes of effecting execution of the award. The decree holder stands conferred with the right to exercise an option of either petitioning the seat court or moving directly to the court within whose jurisdiction the judgment debtor or its properties may be situate.

50. In light of the aforesaid discussion, the Court comes to ultimately conclude that there does not appear to be an irreconcilable

element or conflict between the principles laid down in **Associated Contractors** and **Sundaram Finance**. The ratio of **Associated Contractors** and **Sundaram Finance** when harmoniously construed lends credence to the aforesaid conclusion. The perception of the Jaipur Commercial Court that it was imperative for the petitioner here to have first approached the court situate in the juridical seat of arbitration may not, strictly speaking, be a correct reading or understanding of the aforementioned decisions.

51. However, and in order to obviate any controversy that may continue to fester and disable the petitioner here from seeking expeditious execution of the award, the ends of justice would warrant the instant order being treated as a certificate of transfer enabling it to reinitiate proceedings for execution before the Jaipur Commercial Court. This would also be in accord with the liberty and the ultimate directions framed by that Court itself.

52. Accordingly, and in the terms of the present order, the award in question be transferred to the appropriate Court at Rajasthan to be duly enforced and executed as a decree in accordance with law.

53. Ex. Appl. (OS) 3699/2022 stands disposed of in the above terms.

YASHWANT VARMA, J.

JANUARY 17, 2023
SU/bh/rsk