

**In the High Court for the States of Punjab and Haryana
At Chandigarh**

CR-6898-2023 (O&M)
Date of Decision:- 5.1.2024

Aditya Birla Retail Ltd. now known as More Retail Pvt. Ltd. ... Petitioner

Versus

Biren Sahni ... Respondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Mr. Chetan Mittal, Senior Advocate with
Mr. Hrithik Chaudhary, Advocate;
Mr. Pawan K. Pahwa, Advocate and
Mr. Himanshu Gupta, Advocate for the petitioner.

Mr. Anand Chhibbar, Senior Advocate with
Mr. Vaibhav Sehgal, Advocate and
Ms. Ateevraj Sandhu, Advocate for the respondent.

GURVINDER SINGH GILL, J.

1. The petitioner assails order dated 15.5.2023, passed by learned Commercial Court, Ludhiana, vide which a petition filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to, in short, as '*the Act*'), has been returned back to the petitioner, after 5 years of its institution on the ground that the Court at Ludhiana has no territorial jurisdiction and that the same is to filed in the Courts at Delhi.
2. A few facts, necessary to notice are that the respondent is owner of a plot situated in Ludhiana which he had leased out in favour of the petitioner. A 'Memorandum of Agreed Terms' (MOAT) dated 28.2.2008 (Annexure P-1)

with regard to said lease was executed at Ludhiana. The said MOAT provided for resolution of disputes by way of arbitration. The relevant extract from MOAT, pertaining to arbitration reads as under:

ARBITRATION:

In case of any disputes and differences arising out of the Lease, between the Lessor and the Lessee shall be settled mutually between the PARTIES, failing which the same shall be settled by arbitration under the Arbitration and Conciliation Act, 1996 or the then prevailing Arbitration laws.

The venue for arbitration shall be at Delhi and the proceedings shall be conducted in English only.

3. A perusal of aforesaid arbitration clause reveals that it is only the 'venue' of arbitration which had been agreed upon by the parties in the MOAT (Annexure P-1) and no 'seat' of arbitration was specifically or impliedly designated by the parties.

4. Some relevant development which took place ever since a dispute arose amongst the parties are stated herein-under, chronologically:

11.09.2009 : Respondent filed a petition under Section 11 of the Act in this Court (Annexure P-8).

16.11.2010 : High Court ordered for appointment of an Arbitrator (Annexure P-10).

27.03.2017 : A 'Majority Award' (Annexure P-11) was passed by two arbitrators against the petitioner whereas 'Minority Award' (Annexure P-12) by one arbitrator was passed in favour of the petitioner. However, there was no determination of seat by the Arbitral Tribunal under Section 20 (2) of the Act.

- 30.5.2017 : Although, the Majority Award was in favour of the respondent, yet the respondent filed a petition under Section 34 of the Act before the Commercial Court at Ludhiana, i.e. Arbitration Case No. 1855 of 30.5.2017 (Annexure P-13) so as to seek some enhancement by way of modification of majority award.
- 3.7.2017 : The petitioner also filed a petition under Section 34 of the Act before the Commercial Court at Ludhiana, i.e. Arbitration Case No. 1859 of 3.7.2017 (Annexure P-14) seeking setting aside of the Majority Award. Petitioner categorically mentioned therein that Ludhiana Court has the jurisdiction.
- 11.07.2018 : Respondent filed his reply dated 11.7.2018 (Annexure P-16) to the petition under Section 34 of the Act filed by petitioner at Ludhiana. In reply to para 19 of the petition regarding jurisdiction at Ludhiana, the respondent did not specifically deny the averments regarding jurisdiction but simply replied that the same is a matter of record.
- 12.03.2022 : The respondent filed an application for execution of the Majority Award vide Execution Application No. 501 of 2022 (Annexure P-17) in the Court at Ludhiana.
- 14.05.2022 : Respondent unconditionally withdrew 'Arbitration Case No. 1855 of 2017' by simply stating that he does not wish to pursue 'modification' of the award, as is evident from order dated 14.5.2022 (Annexure P-18).
- 28.09.2022 : Subsequently, an application dated 28.9.2022 (Annexure P-19) under Section 151 CPC was filed by respondent seeking dismissal of objection petition filed by the petitioner under Section 34 of the Act, on the ground that the Court at Ludhiana does not have jurisdiction to entertain the matter.

15.05.2023 : The aforesaid application (Annexure P-19) filed by respondent was allowed vide order dated 15.5.2023 (Annexure P-23) by the Commercial Court, Ludhiana, while holding that the Court at Ludhiana does not have jurisdiction and that the Courts at Delhi have the exclusive jurisdiction. The petition was accordingly returned back.

5. The learned counsel for the petitioner, while assailing the impugned order dated 15.5.2023, made the following submissions:

- (i) that the Commercial Court, Ludhiana fell in error in relying upon the view taken by Hon'ble Supreme Court in BGS SGS Soma JV v. NHPC Limited, (2020) 4 SCC 234, so as to hold that the venue of arbitration as designated in agreement defines absolutely the seat as well whereas the said judgment has been read down in a subsequent judgment by a Bench of equal strength of Hon'ble Supreme Court in Mankastu Impex Private Limited Vs. Airvisual Limited (2020) 5 SCC 399;
- (ii) that Mankastu's case (supra) virtually reiterates the view taken earlier by a three Judges Bench of Hon'ble Supreme Court in Union of India vs. Hardy Exploration and Production (2019) 13 SCC 472 to the effect that venue of arbitration cannot be treated as seat;
- (iii) that the respondent is estopped from raising the plea that Court at Ludhiana lacks jurisdiction as he himself has admitted in his pleadings that Court at Ludhiana does have jurisdiction and which otherwise also stands established by his conduct. The learned counsel, in order to hammer forth his aforesaid submission placed

reliance upon Mankastu's case (supra) to contend that conduct of the parties is a defining factor in determining seat of arbitration;

- (iv) that the Commercial Court, Ludhiana also fell in error in relying upon BBR (India) Private Limited v. S.P. Singla Constructions Private Limited, (2023) 1 SCC 693, as the facts of the said case were entirely different and the issue involved was mainly with regard to a situation wherein the venue of arbitration is shifted pursuant to recusal of previous arbitrator and that it was under these circumstances it was held therein that the 'seat' which stood fixed previously could not be changed upon shifting of venue of arbitration.

6. On the other, the learned counsel for the respondent, while opposing the petition, made the following submissions :

- (i) that since the arbitration clause specifically provides for the venue of arbitration to be at Delhi, without there being any reference to seat of arbitration, the venue as agreed amongst the parties has to be treated as seat of arbitration as well in view of ratio of Bharat Aluminium Company Ltd. v. Kaiser Aluminum Technical Services 2012 (9) SCC 552 (in short BALCO's case);
- (ii) that the impugned order, holding that it is the Court at Delhi which is the seat of arbitration, is a well reasoned order, wherein the Commercial Court, Ludhiana has duly taken into account the well settled position of law, as settled in BGS Soma's case (supra) and which has been followed consistently by all the High Courts;
- (iii) that judgment in Mankastu's case (supra) has not set aside the earlier judgment rendered in BGS Soma's case (supra);

- (iv) that the High Court, while exercising powers under Section 11 of the Act cannot be termed as 'Court' within the meaning of Section 2(1)(e) of the Act so as to attract provisions of Section 42 of the Act;
 - (v) that the respondent had approached this Court under section 11 of the Act and also the Court at Ludhiana for filing a petition under Section 34 of the Act at Ludhiana under a mistaken belief that Court at Ludhiana has jurisdiction and that when the respondent realized his mistake, he immediately withdrew his petition under Section 34 of the Act and as such the factum of filing such petitions cannot operate as any kind of estoppel upon the respondent from raising plea of jurisdiction;
 - (vi) that in case the factum of respondent having approached this Court or the Court at Ludhiana is taken into account so as to confer jurisdiction upon Courts at Ludhiana, the same will encourage a dangerous trend and the litigating parties will approach different or far-off Courts in the first instance so as to assert jurisdiction of such Court. The learned counsel cites BBR (India) Private Limited v. S.P. Singla Constructions Private Limited, (2023) 1 SCC 693, to contend that the concept of '*fastest fingers first*' has been deprecated by Hon'ble Supreme Court.
7. The contentions made by both the learned counsel would show that it is mainly the applicability of BGS Soma's case (supra), particularly in light of ratio of subsequent judgment in Mankatsu's case (supra) which is in question in the instant case. The controversy may be addressed by finding answers to the following questions:
- (i) Whether Mankatsu's case is to be interpreted in a manner so as to mean that the judgment rendered in BGS Soma's case stands set aside?

- (ii) Whether the view taken in Mankastu's case is in absolute conflict with the view taken in BGS Soma's case ?
- (iii) Whether the judgment in Mankastu's case dilutes the ratio of BGS Soma's case ?
- (iv) Whether, the *factum* of a party having approached a certain High Court under Section 11 of the Act, is a decisive factor for determining jurisdiction of the Court where petition under Section 34 of the Act is to be instituted?
- (v) Whether the conduct of the parties can be taken into account and can be said to furnish some indication as regards intention of parties with regard to 'seat' of arbitration particularly in a case where 'seat' of arbitration is not defined in agreement amongst parties and only the 'venue' of arbitration is defined?

8. Before proceeding to find answers to the aforesaid questions, it is apposite to bear in mind the relevant provisions of the Act :

Section 2 (1)(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 Cause;
- (ii) x x x

Section 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 (I), the place of arbitration shall be determined by the 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.

Section 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.

9. A perusal of the aforesaid sections shows that the term 'seat' or 'venue' are nowhere mentioned or defined therein. As a matter of fact, the term 'seat' and 'venue' has not been defined anywhere either under the Arbitration Act, 1940 or under the Arbitration and Conciliation Act, 1996. Section 20 of the Act defines 'place of arbitration' which is used interchangeably for both seat and venue. However, the concept of 'seat' and 'venue', as expounded in various judgments, has assumed humongous significance in arbitration proceedings as it not only determines where the arbitration proceedings are to be conducted but is also crucial in ascertaining the supervisory jurisdiction of Court and the curial law (*lex arbitri*) which governs such arbitration. While the 'seat' of arbitration defines the curial law or procedural law governing the arbitration and also determines which Court will exercise supervisory jurisdiction over such arbitration, the term 'venue' of arbitration defines the geographical place where such arbitration is conducted.
10. Interestingly, unlike the civil suits where the jurisdiction is determined strictly in accordance with provisions of Sections 16 to 20 of CPC and the parties

have no choice in the matter of jurisdiction, the scheme of the Arbitration Act does give an option to the parties to mutually designate place where arbitration proceedings are to be conducted and the Court which is to exercise supervisory jurisdiction, irrespective of the place where cause of action had arisen or where property is situated.

11. The following three modes for determination of jurisdictional seat can be discerned from the scheme of the Act, particularly upon perusal of Section 20 and 42 of the Act:

- (a) The seat is decided by the parties.
- (b) If the seat is not agreed by the parties then the seat shall be determined by the Arbitral Tribunal.
- (c) If the seat has not been decided by the parties or by Arbitral Tribunal then the 'Court' in which an application under Part-I of the Act is made, would have jurisdiction.

12. In the absence of any definition in statute as regards 'seat' or 'venue' of arbitration, the law has been settled through various judicial pronouncements. The development of law with regard to determination of 'seat' of arbitration, as discussed in various judgments may be chronologically traced briefly as under:

2009 : **'SHASHOUA's principle'** – (English Law) :

The famous English principle popularly known as '*Shashoua's principle*' was propounded by Justice Cooke in a case titled *Roger Shashoua v Mukesh Sharma*. The Shashoua principle states that when an agreement expressly designates the venue without any express reference to seat, combined with a supranational body of

laws and no significant contrary indicia, the inexorable conclusion is that the venue is actually the seat of arbitration.

2012 : **BALCO's case** – (Constitution Bench) :

The landmark judgement which distinguished between the concept of "seat" and "venue" of the arbitration was a judgement delivered by a five judges Constitution Bench of Hon'ble Supreme Court in BALCO's case (supra). The Hon'ble Supreme Court analysed the concept of "seat" and "venue" at length and held that both the concepts are different. The Court clarified that the "seat" of arbitration is the center of gravity of the arbitration i.e. the place where the arbitration is anchored whereas the "venue" is merely the geographical location where such arbitration meetings are conducted. The Court further clarified that the term "place of arbitration" is used interchangeably under Section 20 of the Act and that while it denotes "seat" in context of Section 20 (1) of the Act, it would denote "venue" under Section 20 (3) of the Act. However, the Hon'ble Supreme Court, while emphasizing on party autonomy, granted concurrent jurisdiction to two different courts to exercise powers under the Act i.e. the Court with supervisory jurisdiction over the seat of arbitration and the court in whose jurisdiction the cause of action arose. This observation of the Hon'ble Supreme Court in para 96 created confusion and led to conflicting decisions by different High Courts. The relevant extracts from BALCO'S case (supra) are reproduced herein-under:

"96. 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.

2018 : **HARDY's case** – (Three Judges Bench) :

The first judgment on domestic arbitration for the purpose of determination of jurisdictional seat is Union of India vs. Hardy Exploration and Production (India) INC. (2019) 13 SCC 472 by three Judge bench. Hon'ble Supreme Court deviated from the landmark BALCO's case and the Shashoua principle and held that 'venue' can be 'seat' only if there exists some other concomitant factor to support the same. The relevant extracts are reproduced hereinunder:

“30. On a perusal of Articles 20 and 31(3) of the Uncitral Model Law, we find that the parties are free to agree on the place of arbitration. Once the said consent is given in the arbitration clause or it is interpretably deduced from the clause and the other concomitant factors like the case of Harmony Innovation Shipping Ltd. [Harmony Innovation Shipping Ltd. v. Gupta Coal (India) Ltd., (2015) 9 SCC 172 : (2015) 4 SCC (Civ) 341] which states about the venue and something in addition by which the seat of arbitration is determinable. The other mode, as Article 20 of the Uncitral Model Law provides, is that where the parties do not agree on the place of arbitration, the same shall be determined by the Arbitral Tribunal. Such a power of adjudication has been conferred on the Arbitral Tribunal. Article 31(3) clearly stipulates that the award shall state the date and the place of arbitration as determined in accordance with Article 20(1).

35. In the instant case, there has been no adjudication and expression of an opinion. Thus, the word “place” cannot be used as seat. **To**

***elaborate, a venue can become a seat if something else is added to it as a concomitant.** But a place unlike seat, at least as is seen in the contract, can become a seat if one of the conditions precedent is satisfied. It does not ipso facto assume the status of seat. Thus understood, Kuala Lumpur is not the seat or place of arbitration and the interchangeable use will not apply in strict sensu.”*

2019 : **SOMA’s case** – (Three Judges Bench) :

Subsequently, another three Judges bench of Hon’ble Supreme Court in *BGS SGS SOMA JV v. NHPC Ltd. (2020) 4 SCC 234* held that *Hardy’s case* (supra) did not lay correct law. It reiterated *Shashoua’s* principle and while relying upon the Constitutional Bench decision in *BALCO’s case* (supra), held that sub-section (3) of Section 20 refers to ‘venue’ whereas the ‘place’ mentioned in sub-section (1) and sub-section (2) refers to the ‘jurisdictional seat’. Hon’ble Apex Court in *BGS SGS Soma’s case* (supra) also dealt with the situation where the parties have not agreed on or have not fixed the jurisdictional ‘seat of arbitration’, and has laid down a broad principle to determine the ‘seat of arbitration’ which would determine the location of the Court that would exercise supervisory jurisdiction. It has broadly been held that when ‘venue’ of arbitration is defined, the same should be treated as ‘seat’ of arbitration unless there is any indication to the contrary. Para 61 of the judgment reads as under:

“61. It will thus be seen that wherever there is an express designation of a “venue”, and no designation of any alternative place as the “seat”, combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding.

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

"82. On a conspectus of the aforesaid judgements it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the venue of the arbitration proceedings, the expression arbitration proceedings would make it clear that the venue is really the seat of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place.

..... further the fact that arbitral proceedings shall be held at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. **This, coupled with there being no other significant contrary Indicia**, that the stated venue is merely a venue and not the seat of the arbitral proceedings, would then conclusively show that such a clause designates a seat of the arbitral proceedings.

..... in a national context, this would be replaced by the Arbitration Act 1996 as applying to the stated venue which then becomes the seat for the purpose of arbitration.."

Hon'ble Apex Court in *BGS SGS Soma's case (supra)*, in concluding paragraphs clearly held that Hardy's case did not lay correct law. Para 96 is reproduced herein-under:

"96. The decision in Hardy Exploration and Production (India) Inc. (supra) is therefore contrary to the Five Judge Bench in BALCO (supra), in that it failed to apply the Shashoua principle to the arbitration clause in question. The Hardy Exploration and Production (India) Inc. (supra) decision would lead to the result that a foreign award would not only be subject to challenge in the country in which it was made, but also subject to challenge under Section 34 of Part I of the Arbitration Act, 1996, which would lead to the chaos spoken of in paragraph 143 of BALCO (supra), with the concomitant risk of conflicting decisions, as held in Venture Global Engineering (supra) [overruled in BALCO (supra)], which would add to problems relating

to enforcement, and undermine the policy underlying the New York Convention and the UNCITRAL Model Law. We, therefore, declare that the judgment in Hardy Exploration and Production (India) Inc. (supra), being contrary to the Five Judge Bench in BALCO (supra), cannot be considered to be good law.”

2020 : **Mankastu’s case** : (Three Judges Bench) :

Another three Judges bench of Hon’ble Supreme Court in *Mankastu Inpex Private Ltd. v. Airvisual Ltd. (2020) 5 SCC 399* observed that judgment in *Soma’s case* being a judgment delivered by a three Judges Bench could not have overruled *Hardy’s* judgment being a judgment delivered by a bench of equal strength. It determined the seat as per the ‘venue’ of arbitration. In the said case the agreement provided that the arbitration would be administered in Hong Kong and the place of arbitration shall be Hongkong. However, the agreement also stated that the Courts at Delhi will have jurisdiction over the matter. It was held therein that Hongkong is the seat of Arbitration since there was additional ‘*indicia*’ in favour of Hong Kong. The relevant paras are as under:

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

21. In the present case, the arbitration agreement entered into between the parties provides Hong Kong as the place of arbitration. The agreement between the parties choosing “Hong Kong” as the place of arbitration by itself will not lead to the conclusion that the parties have chosen Hong Kong as the seat of arbitration. The words, “the place of arbitration” shall be “Hong Kong”, have to be read along

with Clause 17.2. Clause 17.2 provides that "... any dispute, controversy, difference arising out of or relating to MoU shall be referred to and finally resolved by arbitration administered in Hong Kong....". On a plain reading of the arbitration agreement, it is clear that the reference to Hong Kong as "place of arbitration" is not a simple reference as the "venue" for the arbitral proceedings; but a reference to Hong Kong is for final resolution by arbitration administered in Hong Kong. The agreement between the parties that the dispute "shall be referred to and finally resolved by arbitration administered in Hong Kong" clearly suggests that the parties have agreed that the arbitration be seated at Hong Kong and that laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award.

22. As pointed out earlier, Clause 17.2 of MoU stipulates that the dispute arising out of or relating to MoU including the existence, validity, interpretation, breach or termination thereof or any dispute arising out of or relating to it shall be referred to and finally resolved by the arbitration administered in Hong Kong. The words in Clause 17.2 that "arbitration administered in Hong Kong" is an indicia that the seat of arbitration is at Hong Kong. Once the parties have chosen "Hong Kong" as the place of arbitration to be administered in Hong Kong, the laws of Hong Kong would govern the arbitration. The Indian courts have no jurisdiction for appointment of the arbitrator."

2022 : BBR Vs. S.P. Singla's case – (Two Judges Bench)

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

- "15. In other words, the term 'court' as defined in clause (e) to sub-section (1) of Section 2, which refers to the 'subject matter of arbitration', is not necessarily used as finally determinative of the court's territorial jurisdiction to entertain proceedings under the Act. In *BGS SGS Soma* (supra), this Court observed that any other construction of the provisions would render Section 20 of the Act nugatory. In view of the Court, the legislature had given jurisdiction to two courts: the court which should have jurisdiction

where the cause of action is located; and the court where the arbitration takes place. This is necessary as, on some occasions, the agreement may provide the 'seat of arbitration' that would be neutral to both the parties. The courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. The 'seat of arbitration' need not be the place where any cause of action has arisen, in the sense that the 'seat of arbitration' may be different from the place where obligations are/had to be performed under the contract. In such circumstances, both the courts should have jurisdiction, viz., the courts within whose jurisdiction 'the subject matter of the suit' is situated and the courts within whose jurisdiction the dispute resolution forum, that is, where the arbitral tribunal is located."

In BBR's case (supra), it was further held that once the jurisdictional 'seat' of arbitration is fixed in terms of sub-section (2) of Section 20 of the Act, then, without the express mutual consent of the parties to the arbitration, 'the seat' cannot be changed. However, the said observations are in a different context where upon recusal of the earlier arbitrator, the subsequently appointed arbitrator chose to hold arbitration proceedings at a different place. The question as regards significance of intention of parties was never in issue.

13. **Question no. (i), (ii) and (iii) :**

- (i) Whether Mankastu's case is to be interpreted in a manner so as to mean that the judgment rendered in BGS Soma's case stands set aside?
- (ii) Whether the view taken in Mankastu's case is in absolute conflict with the view taken in BGS Soma's case ?
- (iii) Whether the judgment in Mankastu's case dilutes the ratio of BGS Soma's case ?

The aforesaid three questions, being inter-related are being taken up together. As already noticed above, almost all the judgments delivered by Hon'ble Apex Court have duly acknowledged the significance of existence of special circumstances, which could be an indicator as regards the intention of the parties. Though, in BBR's case, a judgment by a two Judges Bench, it has been observed that a seat once fixed cannot be changed but said observations are in a different context where upon recusal of earlier arbitrator, the subsequently appointed arbitrator chose to hold arbitration proceedings at a different place. The question as regards significance of intention of parties was never in issue. It is well settled that a judgment has to be construed in the backdrop of the facts and circumstances in which the judgment has been delivered and that a few phrases or sentences in a judgment, cannot be read out of context. As evident upon perusal of the judgments noticed above, Hardy's case and Soma's case are at variance with each other inasmuch as while Hardy's case states that 'venue' *ipso-facto* will not be a seat unless some '*indicia*' in favour of the 'venue' being 'seat' is shown to exist, whereas Soma's case states that 'venue' will be 'seat' unless some contrary *indicia* shows otherwise. In none of the aforesaid two contrary views, has any absolute principle been laid and in both the views, there is room for exception whenever there is any *indicia* suggestive of any intention or manner. The relevant lines from para 35 of Hardy's case read as under:

35. Thus, the word "place" cannot be used as seat. To elaborate, a venue can become a seat if something else is added to it as a concomitant.

14. Similarly Soma's case also draws exceptions in para 61, the relevant extract of which is reproduced herein-under:

“61. It will thus be seen that wherever there is an express designation of a “venue”, and no designation of any alternative place as the “seat”, combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding.

15. While the judgments in Hardy's case and in Soma's case do refer to a certain *indicia* but apparently it refers to the *indicia* discerned from various clauses in the agreement between the parties. Thus, the subsequent judgment in Mankatsu's case wherein conduct of the parties has also been held to be a determining factor to infer intention of the parties can only said to have added a new dimension to the term '*indicia*' as referred in Soma's case so as not just to be confined to clauses in the agreement but even to look into definite and consistent conduct of the parties indicative of intention of the parties. In other words, the '*indicia*' may even be gathered from conduct of the parties. The relevant extract from para 20 of Mankatsu's judgment is reproduced herein-under:

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

16. Thus, Mankatsu's case has merely reiterated that '*indicia*' in an acknowledged exception to the general rule as regards jurisdiction, when sought to be conferred on the basis of 'venue' agreed upon by the parties. It will not be appropriate to hold that Mankatsu's case has over-ruled Soma's case. Nor can it be said that Mankatsu's case is in conflict with ratio of Soma's case. When Soma's case itself leaves room for exceptions, Mankatsu's

case has just added another dimension to the term '*indicia*'. Questions no. (i), (ii) and (iii) stand answered accordingly.

17. ***Question no. (iv) :***

- (iv) Whether, the *factum* of a party having approached a certain High Court under Section 11 of the Act, is a decisive factor for determining jurisdiction of the Court where petition under Section 34 of the Act is to be instituted?

The said question essentially pertains to scope of Section 42 of the Act and as to how the term 'Court' existing therein is to be interpreted. Section 2(1)(e) of the Act, which defines the term 'Court' and Section 42 of the Act read as under:

"2. Definitions.-

- (1) In this Part, unless the context otherwise requires,-

(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;"

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."

18. The question as to whether term ‘Court’ as existing in Section 42 of the Act is to be interpreted in the same manner as defined in Section 2(i)(e) of the Act, came to be considered specifically by a three Judges bench of Hon’ble Apex Court in State of West Bengal and others Vs. Associated Contractors 2015(1) SCC 32, upon a specific reference made for settling the said issue. The controversy involved therein was also with respect to the ‘Court’ which would have jurisdiction to entertain a petition under Section 34 of the Act. The Division Bench, upon noticing certain conflict in earlier judgments on the issue involved, had referred the matter to a larger Bench. The referral order is reproduced reads as under:

“4. We have perused the decisions cited by learned counsel for the parties, which are all decisions of two Judges Bench. In our opinion, the law has to be clarified beyond doubt as to which Court will have the jurisdiction to entertain and decide an application for setting aside the Award under Section 34 of the Act read with Section 2(e) of the Act and other provisions, including Section 42 of the Act. We, therefore, refer the matter to a larger Bench to decide this question of law.”

19. The three Judges Bench, upon consideration, held as under:

“16.It is obvious that Section 11 applications are not to be moved before the "court" as defined but before the Chief Justice either of the High Court or of the Supreme Court, as the case may be, or their delegates. This is despite the fact that the Chief Justice or his delegate have now to decide judicially and not administratively. Again, Section 42 would not apply to applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or his delegate is not "court" as defined by Section 2(1)(e). The said view was reiterated somewhat differently in **Pandey & Co. Builders (P) Ltd. v. State of Bihar & Anr., 2007(2) RCR (Civil) 457 : (2007) 1 SCC 467** at Paras 9, 23-26.

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):

"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:

- "(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."

20. Hon'ble Apex Court, while answering the reference, summed up its conclusions as under:

"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.”

21. It, thus, stands well settled that High Court while dealing with an application under Section 11 of the Act would not be acting as a ‘Court of principal jurisdiction’ so as to fall within the meaning of ‘*Court*’ as defined in Section 2(1)(e) of the Act. Consequently, Section 42 of the Act will not get attracted merely upon filing of a petition under Section 11 of the Act. In other words, filing of a petition in a particular High Court will not *ipso-facto* confer jurisdiction upon any Court to for entertaining petition under Section 34 of the Act. However, such fact, cannot be absolutely washed off the record and, if such fact coupled with other similar acts, is found to be suggestive of any

other relevant fact, the same could assume some significance. Question no (iv) is answered accordingly.

22. **Question no. (v) :**

- (v) Whether the conduct of the parties can be taken into account and can be said to furnish some indication as regards intention of parties with regard to 'seat' of arbitration particularly in a case where 'seat' of arbitration is not defined in agreement amongst parties and only the 'venue' of arbitration is defined?

While answering question no. (i), (ii), and (iii), it has been opined that Mankatsu's case does not over-rule Soma's case but has just added another dimension to the scope of exception carved out in the earlier judgments in the nature of 'contrary indicia' concept. The judgment in Mankatsu's case has the effect of enlarging the scope of exception so as to include the conduct of the parties as a relevant fact for determining existence of any 'contrary indicia' as regards seat of arbitration. In other words, the 'contrary indicia' is not only to be inferred from the agreement but can well be gathered from conduct of the parties.

23. In this context, a reference also needs to be made to a recent judgment of Hon'ble the Apex Court delivered in the case titled as M/s Ravi Ranjan Developers Private Limited Versus Aditya Kumar Chatterji, 2022 SCC Online 568. In the said case, the issue before Hon'ble the Apex Court was as regards the maintainability of a petition under Section 11(6) of the Act for appointment of an Arbitrator, which had been filed in the Court at Calcutta. The parties in the said case had agreed that the "sitting of arbitral tribunal" shall be at Calcutta. In other words the 'venue' was defined as Calcutta. The property in question, however, was situated in Muzaffarpur i.e. within the

State of Bihar and the office of the appellant was also situated in Patna (Bihar). The respondent approached the Courts at Muzzarpur under Section 9 of the Act seeking interim relief. The respondent also approached the Municipal Corporatuin at Muzzarpur seeking stoppage of construction, but said application was dismissed. Although, the appellant, while opposing the petition under Section 11(6) of the Act filed in Calcutta High Court by respondent had specifically raised objections as regards jurisdiction at Calcutta but Calcutta High Court accepted the petition under Section 11(6) of the Act. A Review petition filed by appellant was also dismissed. The order of appointment of Arbitrator by the Calcutta High Court was challenged by the appellant. The respondent therein raised a plea in defence to the effect that impugned order was passed upon 'consent' of the appellant and also cited case-law to contend that once venue is designated, the same has to be construed as 'seat as well. Para 15 and para 35, wherein such contentions have been noticed are reproduced herein-under:

“15. The question before this Court is, whether the Calcutta High Court at all had jurisdiction to entertain the application filed by the Respondent and appoint an Arbitrator. Mr. Sanjay Ghosh, learned Senior Counsel appearing on behalf of the Respondent, argued with force, that the initial order of appointment of Arbitrator was passed by the Court by consent. The Appellant appeared in the arbitration proceedings. In other words, the Appellant acquiesced to the reference of the disputes to the Arbitrator appointed by the High Court.”

x x x

“35. In support of his argument that the Calcutta High Court had exclusive jurisdiction to entertain and decide the application under Section [11](#)(6) filed by the Respondent, Mr. Ghosh cited Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and Ors., (2017) 7 SCC 678, Hindustan Construction Company Limited v. NHPC Limited and Anr., (2020) 4 SCC 310 and BGS SGS Soma JV v. NHPC Limited, (2020) 4 SCC 234 and argued that once a seat of arbitration is designated, the clause

designating the seat of arbitration becomes an exclusive jurisdiction clause, as a result of which, only the Courts within whose territorial limits, the seat is located would have jurisdiction to the exclusion of all other Courts.”

24. Hon’ble Apex Court, while turning down the aforesaid contentions made by respondent therein held as under:

“ 41. It is well settled that a judgment is a precedent for the issue of law that is raised and decided. The judgment has to be construed in the backdrop of the facts and circumstances in which the judgment has been rendered. Words, phrases and sentences in a judgment, cannot be read out of context. Nor is a judgment to be read and interpreted in the manner of a statute. It is only the law as interpreted by in an earlier judgment, which constitutes a binding precedent, and not everything that the Judges say.”

x x x

“48. In this case, the parties, as observed above did not agree to refer their disputes to the jurisdiction of the Courts in Kolkata. It was not the intention of the parties that Kolkata should be the seat of arbitration. Kolkata was only intended to be the venue for arbitration sittings. Accordingly, the Respondent himself approached the District Court at Muzaffarpur, and not a Court in Kolkata for interim protection under Section 9 of the A&C Act. The Respondent having himself invoked the jurisdiction of the District Court at Muzaffarpur, is estopped from contending that the parties had agreed to confer exclusive jurisdiction to the Calcutta High Court to the exclusion of other Courts. Neither of the parties to the agreement construed the arbitration clause to designate Kolkata as the seat of arbitration. We are constrained to hold that Calcutta High Court inherently lacks jurisdiction to entertain the application of the Respondent under Section 11 (6) of the Arbitration Act. The High Court should have decided the objection raised by the Appellant, to the jurisdiction of the Calcutta High Court, to entertain the application under Section 11 (6) of A&C Act, before appointing an Arbitrator.”

25. The judgment in Ravi Ranjan’s case (supra), cannot, however be interpreted to mean that a view different from BGS Soma’s case has been

taken. Rather an exception in the nature of ‘*contrary indicia*’ as carved out in earlier judgments by three Judges Bench has been drawn on the basis of conduct of the respondent therein particularly the fact that the respondent therein had himself approached District Courts at Muzzarpur (Bihar) by way of filing an application under Section 9 of the Act.

26. The view taken in Ravi Ranjan’s case (supra) would also be justified by application of provisions of section 42 of the Act. Para 31 of the said judgment would be indicative of the mandatory nature of Section 42 of the Act, which is reproduced herein under:

“31. There could be no doubt, as argued by Mr. Sinha, that Section 42 of the A&C Act is mandatory. The Section has obviously been enacted to prevent the parties from being dragged into proceedings in different Courts, when more than one Court has jurisdiction. Where with respect to any arbitration agreement, any application under Part I of the A&C Act has been made in a Court, that Court alone would have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement, and the arbitral proceedings, would have to be made in that Court and in no other Court, unless, of course, the Court in which the first application had been instituted, inherently lacked jurisdiction to entertain that application. The Section which starts with a non obstante clause, is binding irrespective of any other law for the time being in force, and irrespective of any other provision in Part I of the A&C Act.”

27. While the present case can safely be decided on the basis of application of section 42 of the Act, similar to the facts in Mankastu’s case (supra) but since question as regards relevance of conduct has been raised, it is necessary to observe that before drawing any inference of contrariety from conduct of either of the parties, it would be expected that such conduct is scrutinized minutely so as to be assured that the act in question is not just a stray act committed with *malafide* intention by a party in an

attempt to oust or confer jurisdiction upon a certain Court. In case such a practice is encouraged, the same could lead to bench hunting. Any party could conveniently choose to institute any kind of frivolous application before a Court of his choice and later claim that jurisdiction stands conferred upon such Court in terms of Section 42 of the Act.

28. The special circumstance in the present case impelling this Court to look into conduct of the respondent is that it is now the respondent himself who is asserting jurisdiction to be of Court at Delhi as against his consistent conduct during the last five years to the contrary. He is trying to wriggle out of his admissions in pleadings which are indicative of the jurisdiction being at Ludhiana. Here is a case where the respondent never chose to raise any objection as regards jurisdiction while filing reply to petition under Section 34 of the Act filed by appellant and had infact himself filed a petition under Section 34 of the Act at Ludhiana even before the petitioner filed his petition under Section 34 of the Act.
29. Taking into account any recent stray act to infer contrariety as against settled position of law will defeat the very purpose of relevant provisions. Before considering any conduct as an indicator of intention, the existence of *malafides* has also to be ruled out. Question no. (v) is answered accordingly in affirmative but with the cautions indicated above.
30. Having answered the questions framed above, the facts need to be adverted to. While in the instant case, the agreement is silent as regards the 'seat' of arbitration but it does provide that the arbitration proceedings were to be conducted in Delhi. If broad principle that 'venue' is 'seat', was simply was to be applied then certainly there would have been no

controversy. However, while applying the said principle, the existence of 'contrary indicia' is to be ruled out, as has been held by BGS Soma's case itself. In the present case, though 'venue' of arbitration was agreed to be Delhi but as regards the 'seat', the conduct of the respondent shows something to the contrary. The said conduct is delineated herein-under:

- (i) the respondent had instituted a petition in this Court under Section 11(6) of the Act. Though, as already discussed above, it is well settled that the High Court while dealing with a petition under Section 11(6) of the Act would not fall within the meaning and ambit of 'Court' as defined by Section 2(i)(e) of the Act, but filing of such petition is indeed a circumstance, which cannot be absolutely overlooked and may be taken into account particularly if some admissions made therein throw light on intention or conduct of any of the parties. In the present case, the respondent, in his aforesaid petition admitted that the cause of action has accrued within the territorial jurisdiction of this Hon'ble Court. Para 10 is reproduced herein below:

"10. In view of the above, it is evident that disputed has arisen between the parties which can be adjudicated by the Arbitral Tribunal under the provisions of the Arbitration and Conciliation Act, 1996. That the cause of action has accrued within the territorial jurisdiction of this Hon'ble Court. Therefore, this Hon'ble Court has jurisdiction to try and entertain the present dispute."

- (ii) it is the respondent himself who approached the Court at Ludhiana in the first instance and filed a petition under Section 34 of the Act on 30.5.2017 (Annexure P-13), wherein a specific pleading regarding

jurisdiction was made in paragraph No. 4, which is reproduced herein-under:

“4. That this Court has the jurisdiction as MOAT was executed at Ludhiana. The property which was leased is situated at Ludhiana. The application under Section 11 of the Arbitration Act, 1996 was filed in the Punjab and Haryana High court as District Ludhiana falls within the jurisdiction of Hon’ble Punjab and Haryana High Court. Otherwise also, when the dispute relate to immovable property, the Lis is to be filed in the Court within whose jurisdiction the said property is situated. Therefore, this Hon’ble Court has the jurisdiction to entertain and try the present petition.”

(iii) subsequently, on 3.7.2017, the petitioner also filed a petition (Annexure P-14) under Section 34 of the Act in the Court at Ludhiana, wherein the petitioner in para No. 19 of the petition asserted that the Court at Ludhiana has jurisdiction and there was no specific denial to the said assertion in the reply filed by the respondent, which was merely to the effect that the same is a matter of record. Para 19 and its reply are reproduced herein-under:

Para 19: *“That this Court has got the jurisdiction to try and entertain the present petition as MOAT was executed at Ludhiana and the property which was to be leased is situated at Ludhiana and the Application U/s 11 of the Arbitration and conciliation Act, was filed within the jurisdiction of Hon’ble Punjab and Haryana High Court. Otherwise also the dispute relates to immovable property which is within jurisdiction of this Hon’ble Court and as such this Hon’ble Court is competent to entertain the present petition.”*

Reply : *“That the contents of Para No. 19 of the objection petition are matter of record.”*

(iv) that the respondent himself chose to file an execution petition (Annexure P-17) in the Court at Ludhiana on 12.3.2022;

- (v) that after about 5 years of filing petition under Section 34 of the Act, the respondent chose to unconditionally withdraw his petition under Section 34 by stating that he does not wish to pursue for modification of award;

31. The aforesaid conduct shows that it is a case where the respondent has consistently been asserting that the Court at Ludhiana has jurisdiction. It is not a case of any isolated application filed at Ludhiana but is a case where the respondent has consciously been instituting and pursuing the petitions at Ludhiana, whether filed by him or against him and never objected to jurisdiction at Ludhiana. The venue which had been as agreed upon amongst the parties for the purpose of conduct of proceedings of arbitration i.e. Delhi, could have been treated as 'seat' as well provided there was no '*indicia*' to the contrary. The factum of the respondent having approached the Court at Ludhiana in the first instance for filing petition under Section 34 of the Act coupled with his specific averments as regards Ludhiana having jurisdiction, as noticed above and having regularly pursued the petitions in Ludhiana without ever having raised any doubt regarding jurisdiction for a good 5 years while specifically asserting that Ludhiana has jurisdiction cannot be said to be a stray act on the part of the respondent but is a consistent conduct on his part admitting the jurisdiction at Ludhiana. The respondent himself having chosen to approach the Court at Ludhiana is rather estopped from raising such an argument at this stage with regard to lack of jurisdiction at Ludhiana. Such like consistent conduct, would certainly constitute '*contrary indicia*' so as to be excepted from the general principle that '*venue*' of arbitration

is to be deemed as 'seat' of arbitration in case seat is not defined in agreement.

32. The Commercial Court, Ludhiana has, however, overlooked the said aspect and applied only the broad principle laid down in BGS Soma's case whereas the instant case is a case falling under exception carved out in BGS Soma's case itself. Keeping in view the existence of 'indicia' contrary to the inference which could normally have been drawn regarding the seat being at Delhi on the basis of agreed 'venue' being at Delhi, it is held that it is the Courts at Ludhiana and not at Delhi which is the 'seat' of arbitration.
33. In view of the discussion made above, the petition merits acceptance and is hereby accepted. The impugned order dated 15.5.2023 passed by the Commercial Court, Ludhiana is hereby set aside.
34. The parties are directed to appear before the Commercial Court of Ludhiana where the matter was pending before passing of impugned order on 31.1.2024.

5.1.2024
kamal

(GURVINDER SINGH GILL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No