

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL Division

BEFORE :-

THE HON'BLE JUSTICE SHAMPA SARKAR

AP-COM -910 of 2024

Chittaranjan Locomotive Works
Vs.
Arihant Electricals

For the Petitioner : Mr. Swatarup Banerjee, Adv.
Ms. Amrita Pandey, Adv.

For the Respondent : Mr. Amit Dubey, Adv.
Mr. Subhradip Roy, Adv.
Ms. Sananda Ganguli, Adv.

Judgment Reserved on : 11.11.2025

Judgment Delivered on : 02.12.2025

Shampa Sarkar, J.

1. This is an application for unconditional stay of the award dated March 14, 2024, passed by the learned sole arbitrator in an arbitration proceeding being AP No. 09 of 2022, without securing the awarded sum.

2. By an order dated March 15, 2022, the Learned arbitrator was appointed by the High Court at Calcutta. According to the petitioner, the award was liable to be set aside and or quashed as the same was opposed to the public policy of India, being unreasonable, unconscionable and perverse.

3. Mr. Swatarup Banerjee, learned advocate for the petitioner submitted that the parties appeared before the learned arbitrator and filed their respective pleadings. A preliminary issue on limitation was raised on the ground that the respondent had sought to invoke arbitration at a belated

stage and had waived such right. The claims were time barred. The said issue was disposed of by the Learned arbitrator by an order dated May 3, 2023. It was held that limitation will be decided at the final hearing as mixed questions of law and fact were involved.

4. The parties did not adduce any oral evidence and made their respective submissions on the basis of the documents disclosed in support of their pleadings.

5. The facts were that, sometime in 2009, the Railway Administration had floated a tender for design, developing, manufacturing, testing, supply and commissioning of "Driving Gear Systems for WAP-5 Loco of Indian Railways as per RDSO specification No. RDSO/2009/EL/SPEC/0089 REV-1 of April, 2009, Item Code- Driving Gear- SPCN No. CLW/EZ/3/0496.

6. The respondent participated in the tender and submitted a bid sometime in July 2009. The respondent was the highest bidder.

7. According to the petitioner, time was the essence of the contract. As per the Indian Railway Standard, (in short IRS), conditions of contract provided for remedy in liquidated damages and not by way of penalty, in the event of any breach of the terms and conditions. The contract provided that, if the contractor failed to deliver the stores or any instalment thereof within the period fixed for such delivery or within the period extended, or if the supplier repudiated the contract before the expiry of such period, the purchaser, without prejudice to its other rights, could recover from the contractor agreed liquidated damages or a sum equivalent to 2% of the price of any store which the contractor had failed to deliver within the period fixed or the extended period, for each month or part of a month during which the

delivery of such store would be in arrears, where delivery thereof was accepted after the aforementioned period. Purchase order number 91/10/0943/00096 dated March 12, 2010 was placed on the respondent for supply of driving gear system for WAP 5 Loco, 20 in number. with prototype inspection clause. The delivery schedule in the purchase order was that five numbers would be delivered within six months from the date of the purchase order and the balance supply was to commence 18 months thereafter, that is, after clearance of successful trial and satisfactory performance of the five numbers so supplied for a period of 18 months. The balance supply was to be completed by three months thereafter.

8. According to the petitioner, the respondent failed to supply within the delivery period and on the request of the respondent, three modification advices were issued, with imposition of liquidated damages. The petitioner contended that under the provisions of the IRS, COC, liquidated damages on the stores which the contractor had failed to deliver within the fixed period, could be recovered by the purchaser. Thus, liquidated damages were imposed as per the terms and conditions of the purchase order due to non-supply of the materials within the stipulated delivery period. Such imposition was not a penalty. The respondent caused severe delay. The petitioner determined the contract and made a final payment by imposing liquidated damages to the tune of Rs. 2,40,85,873/-. Thus, disputes arose and the respondent invoked arbitration.

9. The learned arbitrator passed the award, thereby, allowing all the claims of the respondent and rejecting the claims of the petitioner. According to Mr. Swatarup Banerjee, learned advocate for the petitioner, the

learned arbitrator failed to assign reasons and mechanically relied upon documents which were neither part of the statement of claim nor disclosed before him. Thus, the award was a nullity. Moreover, the appointment of the learned arbitrator was alleged to be without any authority of law and all consequential orders passed by him were non-est and void ab initio. Thus, prayer for stay of enforcement of the award was made.

10. It was urged that the award was in conflict with the public policy of India as envisaged in Section 34(2)(b) and specifically Explanation 1 (ii) and (iii) and Section 34 (2-A) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act). The relevant provisions of which are quoted below :-

“Section 34(2)(b):- The Court finds that-

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
 - (ii) the arbitral award is in conflict with 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.

[(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]”

11. Mr. Banerjee further submitted that the award did not deal with the dispute which was referred. The learned arbitrator travelled beyond the subject matter of the arbitration. The said award had been challenged by

filing AP-COM 683 of 2024. It was urged that, the application for unconditional stay be allowed or in alternative, the petitioner may be directed to secure the awarded sum. The petitioner was a government entity and the award holder would never be deprived, in the event the award was finally upheld. It was further urged that, if the petitioner was directed to deposit the amount awarded, money would be blocked and the upkeep of infrastructural facilities would suffer. Moreover, the Government of India would face financial hardship. Thus, the prayer for stay should be allowed to prevent irreparable loss and injury which the petitioner would sustain on account of such a perverse award.

12. A preliminary issue with regard to maintainability of this application was raised by Mr. Amit Dubey learned Advocate for the claimant /respondent. It was urged that this court lacked jurisdiction to entertain this application. As the application under Section 34 of the said Act was not maintainable before the High Court at Calcutta, consequentially, the application under Section 36(2) of the said Act was also not maintainable. The court could not pass any order directing stay of enforcement of the award and/or stay of the execution proceeding, as it lacked territorial jurisdiction to entertain the application. By virtue of clause 2900 (g) of IRS, the seat of arbitration was Chittaranjan. The seat was agreed by the parties in terms of Section 20 of the said Act. The clause provided that the seat of arbitration would be the place from which the letter of acceptance was issued and in the present case, the letter of acceptance of the respondent's bid was issued from Chittaranjan. The seat of arbitration would be the determinative factor as to which court would have supervisory jurisdiction

over the arbitral proceeding and to entertain the application for setting aside the award. Mr. Dubey urged that principal Civil Court at the seat of arbitration alone, would be competent to decide this application. Reliance was placed on the decision of the Hon'ble Apex court in **BGS SGS SOMA JV vs NHPC Ltd.** decided in **Civil Appeal No. 9307 of 2019, (reported in MANU/SC/1715/2019).**

13. Learned advocate contended that the competent court at Chittaranjan, i.e. Commercial Court at Asansol would have jurisdiction to entertain a challenge to the arbitral award. When the parties chose the seat, such act amounted to choosing the exclusive jurisdiction of the court. It was further submitted that in the present case, there was an express designation of a venue and no designation of an alternative place as a seat. Thus, in the absence of any significant contrary indicia, the logical conclusion would be that the venue (Chittaranjan) should actually be the juridical seat of the arbitral proceeding. Referring to **BGS SGS SOMA (supra)**, it was submitted that, if a place was designated as a venue of arbitration, such place also would be the seat. The parties had intended to anchor the arbitral proceeding at Chittaranjan.

14. Mr. Dubey contended that, the Hon'ble Apex Court had declared the law on the seat centric jurisdiction, insofar as, supervisory jurisdiction of courts over the arbitral proceedings was concerned. The law declared by the Hon'ble Apex Court in **BGS SGS SOMA (supra)**, was also followed by a three Judges bench of the Hon'ble Apex Court in **Hindustan Construction Company Ltd. vs NHPC Ltd. and Ors.** decided in **Civil Appeal No. 1987 of 2020.** It was urged that the decision of **Bharat Aluminium Co. (BALCO)**

vs. Kaiser Aluminium Technical Service Inc. reported in (2012) 9 SCC 552 was clarified and interpreted in **BGS SGS SOMA (supra)**. Thus, the ratio of **BALCO (supra)** should be understood to mean that, in the event a party had agreed to a seat of arbitration in their contract, such selection would tantamount to an exclusive jurisdiction clause and the court within the seat would have jurisdiction to entertain challenges against the arbitral award. The Apex Court in the said decision did not accept the finding that two courts would have concurrent jurisdiction either on the basis of the seat or by accrual of cause of action.

15. Relying on the decision of this court in **Versatile Construction vs Tata Motors Finance Ltd.** decided in **APOT 389 of 2024 wit AP Com No. 822 of 2024**, Mr. Dubey contended that the Division Bench approved the finding of a learned single judge to the effect that, once a seat of arbitration was decided by the parties, the provisions of Sections 16 to 20 of the Code of Civil Procedure would not be the determinant factor as to the jurisdiction of the supervisory court. The clarification given in **BGS SGS SOMA (supra)**, as regards the ratio in **BALCO (supra)** was followed by the Division Bench.

16. The Hon'ble Apex Court in **BBR (India) Private Ltd. vs S.P. Singla Construction Private Limited** decided in **Civil Appeal No. 4130-4131 of 2022**, again followed the decision laid down in **BGS SGS SOMA (supra)**, in respect of exclusive juridical authority of the court within whose jurisdiction the seat of arbitration was determined. The two-court theory in **BALCO (supra)** was not accepted. Such decision was further followed by this court in **Damodar Valley Corporation v. BLA Projects Private Ltd.** decided in **AP 473 of 2021**, and a co-ordinate bench held that, the designated seat

would confer exclusive jurisdiction on the court at the seat and, venue would be the seat if the seat was not specified. A similar proposition was laid down in the decision of ***Adhunik Corporation Ltd. v. Gauri Sanker Choubey*** decided in ***AP COM No. 693 of 2024***. Mr. Dubey submitted that, admittedly the parties to the contract had entered into the agreement, thereby determining the place of issuance of the letter of acceptance, that is, Chittaranjan, as the place of arbitration vide clause 2900(g) of the IRS. Such agreement was neither varied nor modified by the parties. The learned arbitrator also did not pass any order determining the seat of arbitration as Kolkata. Arbitration was conducted through video conference. The claimant attended the hearing from New Delhi and the respondent from Chittaranjan. The learned arbitrator was in Kolkata. Only two physical hearings were conducted at Kolkata. Therefore, it could be concluded with certainty that the hearings were held at Kolkata for convenience, but Kolkata was not the seat of arbitration. Kolkata was merely a geographical location. The seat and venue of arbitration was Chittaranjan. The execution proceedings had been filed at Asansol.

17. Mr. Dubey submitted that the decision of ***Ravi Rajan Developers Pvt. Ltd. vs Aditya Kumar Chatterjee*** decided in ***Civil Appeal Nos. 2394-2395 of 2022***, was not good law and was contrary to the decision laid down in ***BGS SGS SOMA (supra)***. According to Mr. Dubey, the question before the Apex Court in ***Ravi Rajan (supra)*** was with regard to appointment of an arbitrator and not with regard to determination of the jurisdictional court. Moreover, the agreement before the Hon'ble Apex Court provided that sitting of the tribunal would be at Kolkata, therefore, positively indicating that

Kolkata would be the venue. The decision of **Ravi Rajan (supra)**, according to Mr. Dubey, was *per incuriam*. The Hon'ble High Court of Allahabad disagreed with the finding of the Apex Court in **Ravi Rajan (supra)** by relying upon **BGS SGS SOMA (supra)**, and the other judgments on the said issue. Thus, it was submitted that this court lacked jurisdiction in view of Section 2(1)(e) read with Section 20 of the said Act, and Section 10 of the Commercial Courts Act, 2015.

18. Mr. Swatarup Banerjee, Learned Advocate for the petitioner, submitted that the cause of action arose within the jurisdiction of this Court. All the correspondence was received by the respondent within the jurisdiction of this court. The venue chosen by the learned arbitrator to conduct the physical hearing was 7B Kiran Shankar Roy Road. Paragraph 96 of the decision in BALCO (supra) clarified the position of law that, not only the court at the seat, but also the court within whose jurisdiction part of cause of action had arisen, could entertain an application for setting aside the award and consequently also entertain the application for stay of the award.

19. Mr. Banerjee submitted that, all the communication, correspondence, offer etc. took place from the office of the respondent, situated at Diamond Chambers, 4, Chowringee Lane, Kolkata – 700016, which was within the jurisdiction of this court. Moreover, the arbitration proceeding was held in physical form at Punwani Chambers, 7B Kiran Shankar Roy Road, Kolkata - 700001, also within the jurisdiction of this court. Thus, this court would always have jurisdiction to receive, try, entertain and adjudicate the

application for stay of the award and the application for setting aside the award.

20. According to Mr. Banerjee, the arbitration clause provided that the venue of arbitration shall be the place from which the acceptance note was issued or any other place as the arbitrator at his discretion may determine. As the physical sittings were held at 7B Kiran Sankar Roy Road, Kolkata, which was within the jurisdiction of this court, and in view of the fact that the award was signed and published in Kolkata, this court would alone have jurisdiction to entertain the applications. Relying on paragraph 96 of *BALCO* (supra) it was submitted that, the full Bench had categorically recorded that, in any arbitration proceeding, two courts would have jurisdiction to adjudicate the dispute between the parties under Part I of the said Act, that is, the court within whose jurisdiction part of cause of action had arisen and the court within whose jurisdiction the seat of arbitration was situated.

21. Therefore, in view of the law laid down in the ***BALCO (supra)***, objection with regard to the jurisdiction of this court to entertain the application for setting aside the award and for stay of the award, could not be raised. Mr. Banerjee distinguished the decisions relied upon by Mr. Dubey and submitted that this was a fit case for stay of the operation of the award.

22. Considered the rival contentions of the parties.

23. The arbitration clause is quoted below. It provides that, the venue of arbitration shall be the place from which the acceptance noted was issued or such other place as the arbitrator, at his discretion, may determine :-

“2900. Arbitration:

(a) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager in the case of contracts entered into by the Zonal Railways and Production Units; by any Member of the Railway Board. In the case of contracts entered into by the Railway Board and by the Head of the Organisation in respect of contracts entered into by the other Organisations under the Ministry of Railways. The Gazetted Railway Officer to be appointed as arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

(b) In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

(c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to 'arbitration at all.

(d) The arbitrator may from time-to-time with the consent of all the parties to the contract enlarge the time for making the award.

(e) Upon every and any such reference, the assessment of the cost incidental to the reference and award respectively shall be in the discretion of the arbitrator.

(f) Subject as aforesaid, the Arbitration Act, 1940 and the rules thereunder and any statutory modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.

(g) The venue of arbitration shall be the place from which the acceptance note is issued or such other place as the arbitrator at his discretion may determine.

(h) In this clause the authority, to appoint the arbitrator includes, if there be no such authority, the officer who is for the time being discharging the functions of that authority, whether in addition to other functions or otherwise.”

24. Section 2(1)(e) and Section 20 of the said Act, are quoted below :-

“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 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;]

“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.”

25. Section 10 of the Commercial Courts Act, 2015

“10. Jurisdiction in respect of arbitration matters.—Where the subject-matter of an arbitration is a commercial dispute of a Specified Value and—

(1) If such arbitration is an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

(2) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

(3) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed

in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted.”

26. The proceedings were substantially conducted through virtual hearing, and the arbitrator participated from his residence at Kolkata. The petitioner’s counsel appeared from Kolkata and it is alleged that the respondent’s counsel appeared from New Delhi. The records show that no physical meeting ever took place at Chittaranjan. Two physical hearings were conducted at Punwani Chambers, 7B, Kiran Shankar Roy Road, Kolkata- 700001, which is within the jurisdiction of this court. The award was signed and published at Kolkata and such has been recorded in the award itself. It is clear that, even if there was no particular order determining the venue by the arbitrator, the physical hearings were held within the jurisdiction of this court, i.e. at 7B Kiran Shankar Roy Road and both the parties accepted such venue for the arbitral proceeding. The arbitrator, at his discretion, also accepted such venue. In this case, venue cannot automatically be read as seat. The intention of the parties and the conduct of the proceedings are relevant. The learned arbitrator held two physical meetings within the jurisdiction of this court and signed and delivered the award within the jurisdiction of this court at Kolkata. Hence, the venue was accepted to be Kolkata by the parties and also by the learned arbitrator. Seat of arbitration is the juridical seat which determines the court which has supervisory jurisdiction under Sections 34 and 37 of the Act. Venue can merely be the location where the hearings are conducted, unless the parties intend that the venue to be also the seat. In this case, the parties consciously used the term venue in the arbitration clause and not

seat. The parties consciously chose the venue and the arbitrator accepted the same. The physical hearings were conducted within the jurisdiction of this court. Both the parties participated and no one raised any objection with regard to the selection of the venue at 7B Kiran Shankar Roy Road, Kolkata - 700001. The conduct of the parties and of the arbitrator indicate that the proceedings were administered and controlled from Kolkata. In **BGS SGS SOMA (*supra*)**, the Apex Court held that, in the event the arbitration agreement mentioned a venue, such venue would become the seat only when no contrary indication would appear. Conversely, if the arbitral proceedings and the award clearly indicated another place as the centre of arbitration, the juridical seat would shift automatically. The arbitrator's office was in Kolkata. The physical hearings and the signing of the award took place within the jurisdiction of this court. Mere mention of Chittaranjan as venue, without any factual nexus linking the proceedings thereto, cannot oust the jurisdiction of this court. Upon a combined reading of clause 2900(g) of the COC, Section 20(2) of the said Act and Section 10 of the Commercial Courts Act, 2015, this court has the jurisdiction to entertain the application. The fact that not a single proceeding was held from Chittaranjan will clearly indicate that the arbitrator and the parties chose 7B Kiran Shankar Roy Road as the place of the arbitral proceedings and had anchored the proceedings to the said venue, which was permissible as per the terms of the contract. Parties deviated and derogated from the agreed venue.

27. In **BGS SGS SOMA (*supra*)**, the arbitration agreement provided that, the arbitration proceedings shall be held at New Delhi, although the work

was to be executed in Faridabad. After the award was passed, the award debtor filed an application under Section 34 of the said Act in the Faridabad court. Award holder objected, arguing that, only the Delhi court would have jurisdiction. It was held that Delhi was the juridical seat. As per the clause, the seat was fixed and no concurrent jurisdiction existed elsewhere. Venue would be treated as seat only if no seat was mentioned and there was no contrary indicia. In the present case, the contrary indicia was that, the arbitrator and the parties, by their conduct and action accepted that physical hearings would be held from 7B Kiran Shankar Roy Road and the parties participated without raising any objection to the venue. Here, the learned arbitrator also had a discretion to choose the venue/ place of arbitration and it can be gathered from the conduct of the parties and the conduct of the arbitrator that, the learned arbitrator had chosen 7B Kiran Shankar Roy Road as the place for physical hearings. It was also the venue for passing of the award, irrespective of the fact that no specific order was passed determining the venue. The occasion for determination of the venue by the learned arbitrator did not arise in this case, inasmuch as, not only did the agreement permit the arbitrator to exercise discretion while selecting a venue, but also because the parties did not ask for determination of venue by the arbitrator, as they agreed to participate in the proceedings held at 7B Kiran Shankar Roy Road. Thus, the decision in **BGS SGS SOMA (supra)**, is distinguishable on facts.

28. In **Hindustan Construction (supra)**, it was confirmed that the court at the seat alone would have supervisory jurisdiction. In this case, no seat was prescribed and this court has already analyzed why the venue will not

be read as a seat in the peculiar circumstances of this case. The decision does not apply

29. In **Bharat Broadband Network Limited**, the agreement named New Delhi as the place of arbitration. The arbitrator was appointed by the Delhi High Court. Later, when the question arose whether Delhi or Bengaluru would have jurisdiction to entertain an application under Section 34, it was held that once the court appoints an arbitrator under Section 11 of the said Act, that court had jurisdiction as the seat court, unless the agreement clearly indicated otherwise. The place of arbitration was New Delhi, so the seat was Delhi. It was held that seat and jurisdiction were interconnected. The designation of a place of arbitration conferred exclusive jurisdiction on the court at that place, even if the cause of action arose elsewhere. This judgment is also distinguishable on facts.

30. In **INOX Renewables Limited v. Jayesh Electricals Ltd.** reported in **(2023) 3 SCC 733**, it was held that, when parties by mutual consent shifted the venue of arbitration proceedings from the place initially mentioned in the contract to another place and all hearings were held at such place, the juridical seat of arbitration must be treated as having shifted to the new venue. Such principle is applicable in the present case. Relevant paragraphs are quoted below:-

“***

12. This case would show that the moment the seat is chosen as Ahmedabad, it is akin to an exclusive jurisdiction clause, thereby vesting the courts at Ahmedabad with exclusive jurisdiction to deal with the arbitration. However, the learned counsel for the respondent referred to and relied upon paras 49 and 71 of the aforesaid judgment. Para 49 only dealt with the aspect of concurrent jurisdiction as dealt with in *BALCO v. Kaiser Aluminium Technical Services Inc.* [*BALCO v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC

552 : (2012) 4 SCC (Civ) 810] [*BALCO*] which does not arise on the facts of the present case. Para 71 is equally irrelevant, in that, it is clear that the parties have, by mutual agreement, entered into an agreement to substitute the venue at Jaipur with Ahmedabad as the place/seat of arbitration under Section 20(1) of the Arbitration and Conciliation Act, 1996.

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15. The aforesaid judgment would have no application to the facts of the present case as there is nothing akin to Clause 35.2, which is the amendment clause which was applied to the facts in *Videocon case* [*Videocon Industries Ltd. v. Union of India*, (2011) 6 SCC 161 : (2011) 3 SCC (Civ) 257] . This being the case, the parties may mutually arrive at a seat of arbitration and may change the seat of arbitration by mutual agreement which is recorded by the arbitrator in his award to which no challenge is made by either party.”

31. Ordinarily, the seat mentioned in the contract governs jurisdiction. However, the parties enjoy autonomy to hold proceedings elsewhere by showing their intention to change the seat or the venue. This is in consonance with Section 20 (3) of the said Act. Here, the arbitration was anchored physically within the jurisdiction of this court at 7B, Kiran Shankar Roy Road. The office of the arbitrator was situated in Kolkata and virtual hearings were held initially. Upon the physical hearings being held at the venue shifted. The venue cannot be read as the seat in view of the contrary indicia, that is, the parties by their conduct participated in the virtual hearings held at 7B, Kiran Shankar Roy Road, which is within the jurisdiction of this court. When the parties consciously permitted the physical sittings to be held at 7B, Kiran Shankar Roy Road, the said place became the venue and as such this court has jurisdiction to entertain the application under Section 34 and 36 of the said Act. The arbitration proceedings were administered and controlled from such venue and the award was signed there. Primacy of the parties, their intention and conduct

overrules the clause with regard to the venue as Chittaranjan, that is, the place from where the letter of acceptance was issued.

32. Relevant portions of the decision in **BGS SGS SOMA (*supra*)**, are quoted below:-

“ ***

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.

98. However, the fact that in all the three appeals before us the proceedings were finally held at New Delhi, and the awards were signed in New Delhi, and not at Faridabad, would lead to the conclusion that both parties have chosen New Delhi as the “seat” of arbitration under Section 20(1) of the Arbitration Act, 1996. This being the case, both parties have, therefore, chosen that the courts at New Delhi alone would have exclusive jurisdiction over the arbitral proceedings. Therefore, the fact that a part of the cause of action may have arisen at Faridabad would not be relevant once the “seat” has been chosen, which would then amount to an exclusive jurisdiction clause so far as Courts of the “seat” are concerned.”

33. In the decision of **Versatile Construction (supra)**, the ratio was that, once a seat of arbitration had been decided by the parties, the provisions of Section 16 to 20 of the Code of Civil Procedure, 1908 would not be the determinant factor as to the jurisdiction of the court to entertain an arbitration under Section 34 of the Act. In that case, the clause provided that arbitration would be held in Mumbai and there was no contrary indication that any other place could be designated as the seat of arbitration. Mumbai had to be construed as not only the venue, but also the seat of arbitration.

34. In **BBR (India) Private Ltd. (supra)**, the Hon'ble Apex Court held that where the arbitral tribunal holds the arbitration proceedings, that place, would by default be the venue and consequently the seat. Paragraphs 22 to 29 are quoted below:-

“22. BGS SGS Soma (supra) also refers to decision of this Court in Union of India v. Hardy Exploration and Production (India) Inc., 19 which had held that the choice of the venue of arbitration did not imply that it had become the ‘seat of arbitration’ and that the venue could not by itself assume the status of ‘the seat’; instead a venue could become ‘the seat’ only if “something else is added to it as a concomitant”. According to BGS SGS Soma (supra), the reasoning given in Hardy Exploration (supra) is per incuriam as it contradicts the ratio and law laid down in BALCO (supra). Hence, BGS SGS Soma (supra) holds that it would be correct to hold that while exercising jurisdiction under sub-section (2) of Section 20 of the Act, an arbitrator is not to pass a detailed or a considered decision. The place where the arbitral tribunal holds the arbitration proceedings would, by default, be the venue of arbitration and consequently the ‘seat of arbitration’.

23. When we turn to the facts of the present case, if the arbitration proceedings were held throughout in Panchkula, there would have been no difficulty in holding that Delhi is not the jurisdictional ‘seat’. But that was not to be, as on recusal of Mr. Justice (Retd.) N.C. Jain and post the appointment of Mr. Justice (Retd.) T.S.Doabia arbitration proceedings were held at Delhi. In the context of the present case and noticing the first order passed by the arbitral tribunal on 5th August 2014 stipulating that the place

of the proceedings would be Panchkula in Haryana and in the absence of other significant indica on application of Section 20(2) of the Act, the city of Panchkula in Haryana would be the jurisdictional 'seat' of arbitration. As 'the seat' was fixed vide the order dated 5th August, 2014, the courts in Delhi would not have jurisdiction."

35. In the decision of ***Damodar Valley Corporation (supra)*** the venue of arbitration was agreed to be Kolkata and the courts at Kolkata were conferred to have exclusive jurisdiction. The jurisdiction clause provided conferment of exclusive jurisdiction in the court, within the city of Kolkata.

36. In ***Adhunik Corporation Ltd. (supra)*** also, it was provided that arbitration would be held within Kolkata, West Bengal although the expression seat had not been specifically mentioned. The court held that throughout the agreement, there was nothing to connote that any other alternative venue had been either proposed or accepted by the parties. As the arbitration clause provided that the arbitration would be within the jurisdiction of Kolkata, it was held that courts at Kolkata, would have supervisory jurisdiction.

37. The preliminary objection with regard to the jurisdiction of this court to entertain the application under Section 34 and 36 of the said Act is rejected.

38. Now comes the issue of unconditional stay. When the Court considers a prayer for unconditional stay of the award, a cursory look at the award should indicate that either the making of the award was perpetuated by fraud or corruption, or that the award was passed in violation of a prevailing law, or the award was based on forged documents which were used in evidence, or that the award was vitiated due to violation of the principles of

natural justice. Here, the learned arbitrator recorded the submissions, the claims and counterclaims of the parties and considered the documents submitted. Reasons have been assigned. Thus, at this stage it cannot be prima facie held that the award is either perverse or a nullity. Unconditional stay of an arbitral award is a very narrow exception to the general rule that, when an award is for a money decree, stay can only be granted when the 'sum' awarded (principal + interest) is secured. Before the amendment of 2015, mere filing of a petition under Section 34, would automatically stay its enforcement. After the amendment of 2015, which came into effect from October 23, 2015, filing of an application under Section 34 of the said Act, will not by itself operate as a stay of the award. The award debtor has to apply separately for a stay and the Court has the discretion to impose conditions for grant of stay. In case of an award for payment of money, the law mandates that the principles of the Civil Procedure Code, shall be taken into consideration. Thus, the principles of Order 41 Rule 5 of the Code of Civil Procedure have been made applicable by law. Order 41 Rule 5 of the Code is quoted below :-

“5. Stay by Appellate Court.—(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

(2) Stay by Court which passed the decree.—Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) 1 [Subject to the provision of sub-rule (3),] the Court may make an ex parte order for stay of execution pending the hearing of the application.

[(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree.]”

39. For unconditional stay, a special case has to be made out. Such provision was brought in by the amendment of 2021, which is the second proviso to Section 36(3). The petitioner has failed to prove that the making of the award was induced by fraud and corruption.

40. Fraud means a deliberate deception in the arbitral process, which affects the award as a whole. It must be, prima facie, shown that the arbitrator’s decision is tainted on account of either suppression or deliberate concealment of material facts or misrepresentation. The arbitrator must be misled into making an award, being influenced by false statements or misrepresentation. It must be shown that the decision is an outcome of collusion between the arbitrator and one of the parties, or that there is witness tampering. None of these instances has been prima facie, established.

41. Meaning of the expression ‘corruption in the making of the award’ is that, the decision of the arbitrator is influenced by illegal gratification or by

abuse of power. There are no such allegations of corruption against the arbitrator.

42. In ***Venture Global Engineering vs. Stayam Computer Services Limited and Anr.*** reported in **(2010) 8 SCC 660**, fraud was defined in terms of concealment of material fact and misrepresentation. In ***Avitel Post Studioz Limited and Ors. vs. HSBC PI Holdings (Mauritius) Limited.*** reported in **(2021) 4 SCC 713**, the Hon'ble Apex Court defined fraud as trickery and concealment of material facts.

43. This Court does not find that the arbitral award was induced by fraud. The award is not vitiated on account of deliberate act of deception by the respondent. The respondent has not secured any unfair and unlawful gain.

44. In the decision of ***Karur Vysya Bank vs Srei Equipment Finance Limited*** decided in **AP-COM 947 of 2024**, this Court held as follows:-

“25. The parties made elaborate submissions both for and against the award. The second proviso to Section 36(3) required a primary satisfaction on the part of the court that the making of the award as alleged by the petitioner was induced or affected by fraud or corruption. The award-debtor could seek stay of operation of the award upon discharging the burden of at least, prima facie, showing that the award was induced by fraud or corruption. Fraud and corruption have not been defined in the said Act.

45. In the decision of ***Union of India and Ors. vs Rahul Kumar Thakur*** decided in **AP-COM 657 of 2024**, this Court held as follows:-

“20. Ventura Global Engineering (supra) also propounded that, that concealment of material circumstances on the part of one of the parties to an arbitration agreement, thereby, leading the arbitrator to pass an award, was fraud. Therefore, if the party which ought to have disclosed material, wilfully withheld the same in order to deceive the arbitrator, such award should be set aside on the ground of fraud. These aspects are not available from the

documents relied upon by the petitioners. The circumstances which led to the making of the award, prima facie, do not appear to be fraudulent. The definition of law as per the Indian law, does not apply to this case.

21. Section 17 of the Indian Contract Act, defines fraud as follows:-

17. 'Fraud' defined.—

“Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent', with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent. Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech. Illustrations (a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A. (b) B is A's daughter and has just come of age. Here the relation between the parties would make it A's duty to tell B if the horse is unsound. (c) B says to A— "If you do not deny it, I shall assume that the horse is sound". A says nothing. Here, A's silence is equivalent to speech. (d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.”

22. The expression “making of the award” would mean that, the award must have been obtained by a party to the arbitration upon suppressing material evidence or by making false statements before the learned arbitrator in order to take an unfair advantage over the other party. The petitioners have not been able to, prima facie, establish that any of these situations had arisen in the making of the award. There is nothing on record to show that vital documents had been either concealed or false statements had been made before the learned Arbitrator, which had a causative link with the facts constituting and culminating in the award.

* * *

24. *Corruption of the learned Arbitrator should be such, that it would be, prima facie, evident from the award itself that the learned Arbitrator had tried to curb or prevent the course of justice. The burden of proof is rather high. The petitioners were required to discharge the burden by at least bringing to the notice of this court from the records and from the award that, either the respondent had concealed relevant materials or had made false statements, which led the arbitrator to pass the award in their favour. The petitioners would have to show, prima facie, that the learned Arbitrator deliberately passed the award in abuse of the process of law and had illegally obstructed the course of justice. ”*

46. The challenge to the award is primarily on the merits. It was submitted that the award travelled beyond the disputes referred and the learned arbitrator relied on materials which were not part of the evidence in the arbitral proceeding. Further challenge is on the ground of limitation and waiver of the right to invoke arbitration.

47. Upon perusal of the award, this court finds that the learned arbitrator recorded the submissions of the parties, the claims and counterclaims of the parties and considered the documents submitted. The issue of waiver of the claimant's right to seek reference, was rejected on merits. The issue of limitation was decided as a preliminary issue and it was found that some of the claims could not be held to be time-barred, but without proper trial. The relevant clauses were discussed. The nature of the contract was discussed. Whether time was the essence was also dealt with. This award cannot be stayed unconditionally. The pleadings have been considered, the documents and the conditions of the IRS were discussed. As such, this is not the stage to decide whether the award suffers from perversity or is opposed to the public policy of India. These issues will have to be decided upon a detailed hearing of the application under Section 34.

48. The prayer for unconditional stay is thus rejected.

49. At the conclusion of the hearing, the respondent was permitted to file a calculation with regard to the sum awarded. The same has been filed. There shall be unconditional stay of the award for a period of 8 weeks. Within such time, the petitioner will furnish security to the tune of Rs 3,08,00,000 /-, which shall be deposited by way of a demand draft before the learned Registrar Original Side. The demand draft shall be encashed and deposited in an interest bearing auto renewable fixed deposit with any nationalized bank, until further orders.

50. In the event the deposit is made as directed hereinabove, the unconditional stay will continue till disposal of the application under Section 34 of the Arbitration and Conciliation Act, 1996. In case of default, the execution case will proceed and the stay will stand automatically vacated, without further reference to this Court.

51. Urgent Photostat certified copies of this judgment, if applied for, be supplied to the respective parties upon fulfilment of requisite formalities.

(Shampa Sarkar, J.)