UNPACKING THE COURT'S DECISION IN BGS SGS SOMA JV V. NHPC LTD: DISTINGUISHING BETWEEN 'SEAT' AND 'VENUE'

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FACTS AND SUBMISSIONS

BGS SGS Soma JV (Petitioner) was awarded a contract by NHPC Ltd. (Respondent) for certain construction works to be carried out in Assam and Arunachal Pradesh. The agreement between the parties contained an arbitration clause which read '*Arbitration Proceedings shall be held at New Delhi/Faridabad, India*'. When disputes arose between the parties, they agreed to arbitrate in accordance with the Arbitration Clause in the agreement. In 2016, after several arbitral proceedings in New Delhi, the arbitral award was delivered by the tribunal in favour of the Petitioner. The Respondent filed a Section 34 application the Arbitration and Conciliation Act, 1996 before the District and Sessions Court at Faridabad, Haryana. The Petitioner contested the jurisdiction of the Court and filed an application before Special Commercial Court, Gurugram, arguing that the appropriate court would be either at New Delhi, which the was the seat of the arbitration; or at Assam where the cause of action partly arose. The Court agreed with the Petitioner, and returned the Section 34 Petition to the Respondent, to be filed before the proper court in New Delhi. Aggrieved by the order, Respondent filed an appeal before the Punjab and Haryana High Court, under Section 37 of the Arbitration and Conciliation Act, 1996. The High Court adjudged in favour of the Respondents, returning the case back to Commercial Court in Gurugram. The Petitioner filed an appeal before the Supreme Court.

The Respondents reasoned that the order passed by the Court amounted to a refusal to set aside an arbitral award, and therefore appealable under Section 37. It was further argued that the arbitration clause did not expressly state that either New Delhi or Faridabad was to be the seat of the Arbitral Tribunal. Therefore, the arbitration clause only referred to a convenient venue, and the simple fact that the sittings were held at New Delhi, would not make New Delhi the seat of the arbitration under Section 20(1).

The Petitioner argued that the right to appeal was constrained under the categories laid down in Section 37, and the High Courts have incorrectly stated that the present matter is appealable under Section 37(1)(c). Furthermore, the argument that New Delhi was only a 'venue' and not a 'seat' of arbitration is also incorrect, as the parties have chosen to have sittings at New Delhi, as a result of which it is clear that the Arbitral Tribunal considered that the award made at New Delhi would be made at 'the seat' of the arbitral proceedings between the parties.

ISSUES

The issues before the Court are

i) Whether Section 37 Appeal before the High Court is maintainable?

ii) What should be the judicial seat of arbitration proceedings?

JUDGEMENT

Firstly, the Court held that the High Court had erred in holding that it has jurisdiction to hear the appeal under Section 37(1)(c). The right to appeal is not an inherent right and Section 13 of the Commercial Courts merely provides for a forum to file an appeal. Therefore, the categories under which an appeal may be filed against an order of a Court must be strictly adhered to. Relying on the judgement of *Kandla Export Corporation & Anr. v. M/s OCI Corporation & Anr*.[1] the Supreme Court noted that the order passed by the Commercial Court, Gurugram did not amount to a refusal to set aside an arbitral award as envisaged under Section 37(1)(c), but merely provided that that the Commercial Court did not have the competent jurisdiction to hear any challenge to the Award passed by the Tribunal. Hence, the appeal was not maintainable before the High Court.

Secondly, in determining the judicial seat of arbitral proceedings in the present case, the Court deconstructed and clarified the precedent established in the case *Bharat Aluminium Co v Kaiser Aluminium Technical Service, Inc*[2]. (BALCO). The Court stated it was incorrect to infer from that judgement that two or more Courts can have concurrent jurisdiction, either by being a Court of seat or through a part of the cause of action arising from there. Read harmoniously, the judgement states that designating a seat in the agreement, would amount to the parties

[1]Kandla Export Corporation & Anr. v. M/s OCI Corporation & Anr. (2018) 14 SCC 715.
[2] Bharat Aluminium Co v Kaiser Aluminium Technical Service, Inc. [2012] 9 SCC 552.

conferring exclusive jurisdiction upon the courts at the seat. It is however pertinent to differentiate between a seat and a venue, as venue could refer only to the place or geographic location of arbitration without explicitly conferring jurisdiction to any Court. When a seat has not been designated by the arbitration agreement, and only a convenient venue has been designated, there may be several courts where a part of cause of action may have arisen. In such instances, the earliest court before which an application under Section 9 has been preferred, would be deemed the Court having exclusive jurisdiction; and all further applications must lie before this Court by virtue of Section 42.

In realising whether the parties in the arbitration agreement have designated a seat or a venue, the Court relied on the tests laid down in the English Court judgement *Roger Shashoua & Ors. v. Mukesh Sharma*[3] which held that when there is an express designation of venue and no alternative place as the seat, the venue of the arbitration is the juridical seat, in the absence of any significant contrary indicia. The Court stated that this test which has been confirmed and applied in the BALCO judgement as well, is to be applied uniformly, and in doing so ruled that the case of *Union of India v. Hardy Exploration and Production*[4] is not good law for not following the Shashou principle. The Court further elaborated upon the use of language and phraseology in the arbitration agreement in determining whether a venue or a seat has been designated. When there is a designation of a venue for 'arbitration proceedings', the expression 'arbitration proceedings' makes it clear that the venue should be considered the 'seat' of such proceedings. In addition, the expression 'shall be held' at a particular venue would be further indicative that such place is the seat of arbitral proceedings. However, use of language such as 'tribunals are to meet or have witnesses, experts or the parties' may signify that such a place is only the 'venue' of the arbitral proceedings.

In the present factual matrix, the Supreme Court noted that the venue of the arbitration in the contract has been designated as New Delhi/Faridabad. However, as there was no other contrary indication, applying the Shashoua Principle, it must be that either New Delhi or Faridabad is the designated seat under the arbitration agreement, allowing the parties the freedom to choose which place the arbitration is to be held. The Court noted that all the arbitral proceedings were held in New Delhi and the final award was also signed in New Delhi. Thus, the parties have

[3] Roger Shashoua & Others v Mukesh Sharma & Others [2017] (Civ Appeal No.2841–2843).
[4] Union of India v. Hardy Exploration and Production Civil Appeal no. 4628 of 2018.

chosen New Delhi and not Faridabad as the 'seat' of the arbitration and thus the seat of exclusive jurisdiction over all matters would be New Delhi.

Even if some part of the cause of action did arise in Faridabad, it is irrelevant as the 'seat' has been designated by the parties at New Delhi and exclusive jurisdiction vests in the courts of New Delhi. Accordingly, the judgment of the High Court was set aside and the Supreme Court ordered that the Section 34 petition be presented before the courts in New Delhi.

CRITICAL COMMENTS/ LATEST DEVELOPMENTS

The judgement has managed to provide much needed clarity to the issue of exclusive jurisdiction and when a designated venue may be understood as a juridical seat. On relying on the Shashou principle the Courts have explicitly laid down the test for determining the seat for arbitration, and have also harmoniously interpreted the BALCO judgement, which is extremely desirable considering many had misinterpreted the Courts stance. Such lucidity and unambiguity is necessary especially in arbitration, where parties can draft and enter into an arbitration agreement, knowing the exact consequences and possible outcome of their decision, without having to worry about a lacuna or misinterpretation of the law. This is a positive step for commercial arbitration in India.

The recent judgement of the Bombay High Court in the case *L&T Finance Ltd. v. Manoj Pathak & Ors*.[5] relied upon Supreme Court decision, and further stated that three explicit conditions need to be met in determining the seat of arbitration: i) A stated venue is the seat of the arbitration unless there are clear indicators that the place named is a mere venue, a meeting place of convenience, and not the seat ii) Where there is an unqualified nomination of a seat the courts at the seat would have exclusive jurisdiction; and iii) Where no venue/seat is named any other consideration of jurisdiction may arise, such as cause of action. This judgement further enhances the jurisprudence on this issue, and creates uniformity in the law.

[5] L&T Finance Ltd. v. Manoj Pathak & Ors. Com. Arb. Petition No. 1315 of 2019.