IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION APPLICATION (L.) NO. 3094 OF 2022

PRIYA MALAY SHETH … APPLICANT.

Vs.

VLCC HEALTH CARE LTD. … RESPONDENT.

Mr. Advait Sethna, Advocate a/w. Mrs. Ruju R. Thakkar & Mr. Tanay M.Mandot, for the Applicant.

Mr. Zal Andhyarujina, Sr. Advocate a/w. Mr. Raghavendra Mehrotra, Mr. Shrey Sancheti, Ms. Riya Sayed i/by Lawkhart Legal for the Respondent.

CORAM : G.S. KULKARNI, J.
RESERVED ON: MARCH 14, 2022.
PRONOUNCED ON: JUNE 6, 2022.

JUDGMENT:

1. This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short “the Act”) whereby the applicant has prayed for appointment of an arbitral tribunal for adjudication of the disputes and differences which have arisen between the parties under an agreement titled as the ‘Infrastructure and Facility Management Agreement’ dated 14 July 2018 (for short ‘**the said agreement**”).

2. The respondent is a company incorporated under the Companies Act, 1956 and is stated to be engaged interalia in the business of 'slimming, skin and hair services' it possesses the right to use its trade mark, trade names, copyrights, designs, logos, slogans, commercial symbols and operates under the trade mark VLCC.

3. It is the case of the applicant that the respondent being an infrastructure provider, had persuaded the applicant to become a collaborator and infrastructure provider for running of what is described as "VLCC slimming, skin and hair services Centre" (for short "**the centre**") for its business activities in Mumbai. Accordingly the agreement in question came to be entered between the applicant and the respondents for running of such centre at Unit No.3, Kailas Business Park, Village Ghatkopar, Veer Savarkar Road, Vikhroli (West), Mumbai-400079, under the name and style of "VLCC". Under the said agreement, the applicant was described as an "Infrastructure Provider". The purpose of the agreement was to *interalia* enable the respondent to carry out business activities at the premises/centre which would be developed by the applicant (the Infrastructure Provider) as per Clause 3 of the said agreement, by using the mark and know-how of VLCC. The applicant was to aid the respondent to have the premises on lease for a minimum period of five years for establishing its centre, and thereafter the respondent was to enter into a lease deed with the owner of the

premises (landlord). The applicant as an infrastructure provider was to undertake the development of the premises by incurring all expenses through its own resources as per the approval of the respondent. Under the said agreement, it was also agreed that the respondent shall have exclusive rights over the products, equipments etc. for carrying out activities of the centre. The term of the agreement was for five years from the date of commencement of the operations of the centre. Clause 6 of the said agreement provided for the financial consideration, to include that the applicant was to invest amounts to set up such VLCC, centre at the agreed premises. It was agreed that the total investment by the applicant shall be limited to Rs.1.25 crores excluding taxes. Clause 6.3 of the agreement provided for the entitlement of the applicant to receive amounts from the respondent. Under Clause 12 the parties agreed that the governing law for the purposes of the said agreement, would be the laws of India. Clause 13 was the dispute resolution and the arbitration clause. Clauses 12 and 13 are required to be noted, which read thus:-

> "12. GOVERNING LAW
>
> This Agreement shall be governed by, construed and enforced pursuant to the laws of India.
>
> 13. DISPUTES RESOLUTION & ARBITRATION
>
> 13.1 If any dispute or difference of any kind whatsoever arises between the Parties in connection with the Agreement including any question regarding its existence, validity or termination, the Parties shall seek to resolve any such dispute or difference by mutual consultation. If the Parties fail to resolve such dispute or difference

> by mutual consultation, then either Party may give to the other Party formal notice in writing that the dispute of difference exists, specifying its nature, the point(s) in issue and its intention to refer the dispute to arbitration by a Sole Arbitrator appointed by VLCC.
>
> **13.2 It is agreed between the parties that in such event the arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The venue of the Arbitration shall be Delhi and the language of Arbitration proceeding shall be English. The award of the arbitrator(s) shall be final and binding on the Parties."**
>
> (emphasis supplied)

4. The case of the applicant is that in pursuance of such agreement, she invested an amount of Rs.1.30 crores including the payment of sign up fees of Rs.15 lakhs which was paid to the respondent as per Clause 6.2 of the agreement. As set out in the memo of the application, disputes and differences arose between the parties sometime in September 2019, *interalia* on issues that the centre was not functioning as per the expectations of the respondent, in respect of which prolonged correspondence was entered between the parties.

5. On the backdrop that disputes had arisen between the parties, the applicant by its advocates notice dated 20 December, 2021 *interalia* set out all her grievances and pointed out the losses which were caused to the applicant under the agreement in question. The respondent was called upon to refund and pay the applicant her principal undisputed investment of Rs.1.30 crores along with the interest at the rate of of 24%. The applicant also demanded compensation from the respondent

to the tune of Rs.50 lakhs for mental harassment and trauma. The applicant recorded that if her demands were not complied by the respondent, in that event she invokes the arbitration agreement for a sole arbitrator be appointed. Accordingly, the applicant named a former Judge of this Court who could act as an Arbitrator to adjudicate the disputes. The applicant called upon the respondent to accept and convey its agreement to refer the disputes to arbitration within thirty days of the receipt of the said notice, failing which the applicant would move the Court under section 11 of the Act.

6. The respondent by its advocates letter dated 3 January, 2022 replied to the said legal notice of the applicant wherein at the outset the respondent stated that as per the agreement executed between the parties, the arbitrator could be appointed solely by the respondent, and the proceedings were required to be held in Delhi, hence, the applicant's request for arbitration to be held at Mumbai, and to appoint an arbitrator named by the applicant, was not acceptable to the respondent. The other contents of the applicant's notice on merits of the dispute were not dealt by the respondent.

7. The applicant faced with the refusal from the respondent, of an arbitral tribunal being appointed has filed the present application under

Section 11 by the applicant praying that this Court appoint a sole arbitrator to adjudicate the disputes between the parties.

8. Mr.Andhyarujina, learned Senior Counsel for the respondent, at the outset, has raised an objection to the jurisdiction of this Court to entertain this application. It is his submission that it is clear from the arbitration agreement that the arbitral proceedings are to be held at Delhi. He submits that the seat of the arbitration is thus at Delhi, hence, this Court would not have jurisdiction to entertain this application. In supporting such objection, Mr.Andhyarujina has placed reliance on the decisions of the Supreme Court in "**Brahmani River Pellets Ltd. Vs. Kamachi Industries Ltd.**"[1], "**BGS SGS SOMA JV Vs. NHPC Ltd.**"[2] , **Mankastu Impex Pvt. Ltd. vs. Airvisual Ltd**[3] and a decision of the Madras High Court in **Balapreetham Guest House Pvt. Ltd. vs. Mypreferred Transformation and Hospitality Pvt. Ltd**[4].

9. Mr. Sethna, learned Counsel for the applicant, in responding to Mr. Andhyarujina's objection has drawn the Court's attention to the arbitration agreement as contained in Clause 13 of the agreement, to contend that under such clause the parties have clearly agreed, that if the parties fail to resolve the disputes or differences by mutual

1 (2020)5 SCC 462
2 (2020)4 SCC 234
3 (2020)5 SCC 399

consultation, then either party may give to the other party a formal notice in writing, that a dispute or difference exists by specifying its nature, the points in issue, and the party's intention to refer the dispute to arbitration, by appointing a sole arbitrator, which the clause provided was to be appointed by VLCC. It is his submission that the applicant accordingly had invoked the arbitration agreement by a notice of the applicant's Advocate dated 20 December 2021 and as there was failure on the part of the respondent to agree to the appointment of an arbitrator, Clause 13.2 (supra) was rendered inconsequential, in regard to what was agreed between the parties under the said clause. It is Mr.Sethna's submission that Clause 13.2 is required to be considered completely interlinked to Clause 13.1 for its effect and operation as seen from the following words as contained in Clause 13.2:

> "13.2 It is agreed between the parties that **in such event** the arbitration shall be conducted … … … …"

Thus, Mr.Sethna's contention is that only in the event if an arbitral tribunal as agreed under Clause 13.1 was to be appointed, only then the procedure contemplated under Clause 13.2 would take effect, so that the arbitration can be as per ICC Rules, as also the venue of the arbitration could be at Delhi.

10. Mr.Sethna's next contention is that even otherwise, Clause 13.1 under which the respondent assumes a unilateral authority to appoint

an arbitral tribunal, is a clause which in law is inconsequential in view of the settled principles of law as laid down by the Supreme Court that a party to a contract does not have an authority to unilaterally appoint an arbitral tribunal, as it would be *interalia* opposed to the provisions of Sections 11(8) and 12(1) of the Act. In support of his submission, Mr.Sethna would placed relaince on the decisions of the Supreme Court in **TRF Ltd. Vs. Energo Engineering Projects Ltd.**[4] and **Perkins Eastman Architects DPC. Vs. HSCC (India) Ltd.**[5] and a decision of this Court in **ITD Cementation India Ltd. vs. Konkan Railway Corp. Ltd.** [6].

11. Mr.Sethna has contended that it is in these facts the respondent having not acted upon and having failed to act on the arbitration agreement, the authority and the right of the respondent to take recourse to what has been agreed between the parties under clause 13.2 is not available to the respondent. It is Mr.Sethna's submission that once clause 13.2 is not available to the respondent, then necessarily applying the general principles of law in regard to the jurisdiction of the "Court" to appoint an arbitral tribunal as contained in Section 2(1)(e) of the Act, this Court needs to exercise jurisdiction under Section 11 and grant relief to the applicant by appointing an arbitral tribunal.

4 (2017)8 SCC 377
5 2019 SCC OnLine SC 1517
6 Commercial Arbitration Petition Nos. 1106 & 1107 of 2018 decided on 12.12.2019

12. Mr.Andhyarujina would not dispute Mr.Sethna's contention that in view of the principles of law laid down by the Supreme Court in the decisions of **TRF Ltd. Vs. Energo Engineering Projects Ltd.** (supra) and **Perkins Eastman Architechts DPC.** (supra) the respondent would have an authority to unilaterally appoint an arbitral tribunal.

13. I have heard learned counsel for the parties and with their assistance I have also perused the pleadings on record.

14. The arbitration agreement between the parties as noted above is not in dispute. Firstly considering Mr. Sethna's second contention that Clause 13.1 when it confers an authority on the respondent to appoint an arbitrator, it would be rendered bad in law in view of the principles of law as laid down by the Supreme Court in **Perkins Eastman Architects DPC** *(supra)* and **TRF Ltd. Vs. Energo Engineering Projects Ltd.** (supra) needs acceptance adverting to the principles of law as laid down in these decisions. Applying these principles the respondent cannot have a unilateral authority to appoint an arbitral tribunal. In fact, the respondent in its reply to the notice of the applicant invoking arbitration has justified such right and authority conferred on the respondent in Clause 13.1 and on such count has disputed the applicant's contention to appoint an independent tribunal. Moreover,

the respondent in its reply to the applicant's invocation notice appears to have not denied the reference of the disputes to arbitration, however, the respondent has denied the applicant's request for arbitration on the ground that the invocation itself was not legal on two grounds, firstly that the arbitration agreement confers unilateral authority on the respondent to appoint an arbitrator, and secondly, on the ground that the proceedings were to be held at Delhi, and hence, the call for arbitration at Mumbai was not maintainable.

15. In **Perkins Eastman Architects DPC** *(supra)*, the Supreme Court has held that the party interested in the outcome of the arbitral proceedings does not have any unilateral power to appoint an arbitrator, however, while holding so it was observed that this would not invalidate the arbitration agreement. The Supreme Court accordingly appointed an independent arbitrator.

16. This Court in **ITD Cementation India Ltd. vs. Konkan Railway Corporation Ltd.**[7] was considering a similar clause wherein the authority was conferred on the respondent-Konkan Railway to appoint a standing arbitral tribunal. In such context, referring to the decision of the Supreme Court in **TRF Ltd. Vs. Energo Engineering Projects Ltd.** (supra), the Court observed that the standing arbitral tribunal as

7 Commercial Arbitration Petition Nos. 1106 & 1107 of 2018 decided on 12.12.2019

constituted by the respondent had lost its validity and would stand wiped out, considering the provisions as as laid down by the Supreme Court in the decisions in ***Voestalpine Schienen GmbH Vs. Delhi Metro Rail Corporation Ltd.***[8]**,** **TRF Ltd vs. Energo Engineering Projects Ltd.** *(supra)*; **Bharat Broadband Network Ltd. Vs. United Telecoms Ltd.**[9] and the decision in **Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.** *(supra)*. The Court in paragraph 53 and 54 observes thus:

> "53. The standing arbitral tribunal as constituted by the respondent in the present case had lost its validity and would stand wiped out, considering the clear position in law as laid down by the Supreme Court in the decisions in ***Voestalpine Schienen GmbH Vs. Delhi Metro Rail Corporation Ltd.*** (supra), **TRF Ltd vs. Energo Engineering Projects Ltd.** (supra); **Bharat Broadband Network Ltd. Vs. United Telecoms Ltd.** (supra) and **Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.** (supra).
>
> 54. In my opinion, the respondent had no authority to reject the request of the petitioner to have an appointment of an independent and neutral arbitral tribunal and more particularly when the standing arbitral tribunal as constituted by the respondent, by operation of law had become invalid as clearly held by the Supreme Court in Bharat Broadband Network Ltd. Vs. United Telecoms Ltd. (supra) and Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd. (supra). The inevitable consequence would be that an independent arbitral tribunal is required to be constituted and the respondent having failed to do so, this Court necessarily would have to exercise jurisdiction under Section 11(6) read with Sections 14 and 15 of the Arbitration Act."

17. Thus, Mr. Sethna would be correct in his contention that the respondent would not have any unilateral authority to appoint an arbitral tribunal.

18. In so far as the first contention as urged by Mr.Andhyarujina is concerned, the primal question which would arise for consideration is

8 (2017) 4 SCC 665
9 2019 SCC Online SC 547

as to whether this Court has jurisdiction to entertain this application, as the parties in Clause 13.2 (supra) have agreed that the venue of the arbitration shall be at Delhi. Before discussing the legal position it needs to be observed that Clauses 13.1 and 13.2 as extracted above form part of the "Disputes Resolution and Arbitration" mechanism as agreed between the parties. Under Clause 13.1, the parties have agreed to the modalities of appointing an arbitral tribunal of a sole arbitrator in the event disputes or differences arise between the parties, after making a prior attempt to resolve the disputes. In so far as Clause 13.2 is concerned, the parties have agreed of the manner in which the arbitral proceeding shall be conducted, namely, by following the rules of the International Chamber of Commerce (ICC Rules). In such clause, the parties have also agreed that the venue of the arbitration shall be at Delhi. Thus, Mr. Sethna's contention that Clause 13.1 and 13.2 are interlinked, cannot be accepted as they are seen to be quite distinct having an independent purport.

19. Mr. Andhyarujina has submitted that once the parties have agreed that the venue of the arbitration shall be at Delhi, then necessarily the seat of the arbitration would be at Delhi, as a consequence of which the Courts at Mumbai would not have jurisdiction, as the venue in the present context would be required to be

taken as the seat of arbitration. There appears to be much substance in Mr.Andhyarujina's contention. Considering the clauses of the arbitration agreement in question, the intention of the parties appears to be clear, namely, to have the seat of arbitration at Delhi. Such intention is clearly borne out by Clause 13.2 when the parties categorically agree that the venue of the arbitration "shall be" at Delhi. As noted above, such part of the arbitration agreement wherein the parties agree that the venue of the arbitration shall be at Delhi would be required to be read as distinct and independent, from the arbitral mechanism as agreed between the parties, setting out the other modalities in the dispute resolution clause. There is no room for any doubt that once the parties have agreed that the seat of the arbitration was to be at Delhi, then necessarily the supervisory jurisdiction over the arbitral proceedings would be with the Courts at Delhi. The legal position in regard to the "venue" and "seat" of the arbitration as emerging from the different pronouncements of the Supreme Court would aid the discussion.

20. A Constitution Bench of the Supreme Court in **Bharat Aluminium Company & Ors. vs. Kaiser Aluminium Technical Service, Inc. & Ors.**[10] considered as to what would be the purport of the words "subject matter of the arbitration" as used in Section 2(1)(e) of the Act, defining "Court". The Supreme Court observed that the "subject

10 (2012) 9 SCC 552

matter of the arbitration" cannot be confused with the "subject matter of the suit", as the intention of the legislature in defining "Court" was to identify the "Court" having supervisory control over the arbitration proceedings. It was held that such definition thus refers to a Court which would essentially be a Court of the seat of the arbitration process. The Supreme Court observed that the definition of "Court" has to be construed keeping in view the provisions of Section 20 of the Act, which gives recognition to party autonomy. It would be relevant to note the observations of the Supreme Court in paragraphs 96, 97 and 98 of the report:

> "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.
>
> 97. The definition of Section 2(1)(e) includes "*subject matter of the arbitration*" to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist. On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term "*court*" as a court having jurisdiction *over the subject-matter of the award*. This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India.
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> 98. We now come to Section 20, which is as under:
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> > 20. Place of arbitration
> >
> > (1) The parties are free to agree on the place of arbitration.
> >
> > (2) Failing any agreement referred to in Sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
> >
> > (3) Notwithstanding Sub-section (1) or Sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, good or other property."
>
> A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai etc. In the absence of the parties' agreement thereto, Section 20(2) authorizes the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties."

21. In a recent judgment of the Supreme Court in **BGS SGS Soma JV vs. NHPC Ltd.** (supra), the Supreme Court taking a review of the legal position on the concept of 'seat' and 'venue' and the test for determination of the 'seat' of arbitration, has held that whenever there is a designation of a place of arbitration in an arbitration clause as 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 expression "arbitration proceedings" 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. In such decision, the Supreme Court also referred to an earlier decision in Brahmani River Pellets *(supra)* wherein the Supreme Court in the context of a domestic arbitration held that when the arbitration agreement between the parties (in the facts of the said case) stated that arbitration shall be under Indian Arbitration and Conciliation Act, 1996 and the venue of arbitration shall be Bhubaneshwar, only the Orissa High Court would have jurisdiction as the parties intended to exclude all other Courts when they agreed that the "venue" of arbitration shall be Bhubaneswar. The observations of the Supreme Court in BGS Soma (supra) in the present context needs to be noted, which read thus:

> "81. Most recently, in *Brahmani River Pellets vs. Kamachi Industries Ltd. (2020) 5 SCC 462*, this Court in a domestic arbitration considered Clause 18 – which was the arbitration agreement between the parties – and which stated that arbitration shall be under Indian Arbitration and Conciliation Act,1996, and the venue of arbitration shall be Bhubaneswar. After citing several judgments of this Court and then referring to *Indus Mobile Distribution (P) Ltd. vs. Datawind Innovations (P) Ltd., (2017)7 SCC 678*, the Court held : (Brahmani River Pellets Case, SCC pp.472-73, paras 18-19)
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> > "18. Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to

> exclude all other courts. In the present case, the parties have agreed that the "venue" of arbitration shall be Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in Swastik Gases (P) Ltd. vs. Indian Oil Corpn. Ltd. (2013)9 SCC 32, non-use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference.
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> 19. When the parties have agreed to have the "venue" of arbitraiton at Bhubaneshwar, the Madras High Court erred (Kamchi Industries Ltd. Vs. Brahmin River Pellets Ltd.; 2018 SCC OnLine Mad 13127) in assuming the jurisdiction under Section 11(6) of the Act. Since only the Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order is liable to be set aside."

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.**

… … … …

97. Given the fact that if there were a dispute between NHPC Ltd. and a foreign contractor, Clause 67.3(vi) would have to be read as a clause designating the "seat" of arbitration, the same must follow even when sub-clause (vi) is to be read with sub-clause (i) of Clause 67.3,

> where the dispute between NHPC Ltd. would be with an Indian contractor. The arbitration clause in the present case states that "Arbitration proceedings shall be held at New Delhi/Faridabad, India….", thereby signifying that all the hearings, including the making of the award, are to take place at one of the stated places. Negatively speaking, the clause does not state that the venue is so that some, or all, of the hearings take place at the venue; neither does it use language such as "the Tribunal may meet", or "may hear witnesses, experts or parties". **The expression "shall be held" also indicates that the so-called "venue" is really the "seat" of the arbitral proceedings**. The dispute is to be settled in accordance with the Arbitration Act,1996 which, therefore, applies a national body of rules to the arbitration that is to be held either at New Delhi or Faridabad, given the fact that the present arbitration would be Indian and not international. **It is clear, therefore, that even in such scenario, New Delhi/Faridabad, India has been designated as the "seat" of the arbitration proceedings.**
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> 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."
>
> (emphasis supplied).

22. Also in a recent decision of the Supreme Court in **Mankastu Impex Pvt. Ltd. vs. Airvisual Ltd.** (supra), the Supreme Court again had the occasion to consider the question in regard to the 'seat' and 'venue' of the arbitration. In such case, the parties had agreed in Clause 17 of the MOU in question that the arbitration would be governed by the laws of India without regard to its conflicts of laws provisions, and had agreed that the Courts at New Delhi shall have the jurisdiction.

However, in Clause 17.2, the parties agreed that any dispute, controversy, difference or claim arising under the MoU, including its existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to the MoU shall be referred to and finally resolved by arbitration administered in Hong Kong. The parties also agreed that the place of arbitration shall be at Hong Kong. In such context, applying the principles in relation to the determination of the seat and the venue of arbitration, the Supreme Court observed that the seat of arbitration is a vital aspect to any arbitration proceedings, which would determine the applicable law, when deciding the arbitration proceedings and the arbitration procedure, as well as the judicial review and supervisory control over the arbitration award. It was observed that situs is not just about where an institution is based or where the hearings would be held, but, it is all about which Court would have the supervisory power over the arbitration proceedings. The Supreme Court also referring to the decision of **Enercon (India) Ltd. vs. Enercon GmbH**[11] observed that it is well settled that the "seat of arbitration" and "venue of arbitration" cannot be used interchangeably as the mere expression "place of arbitration" cannot be the basis to determine the intention of the parties, that they have intended that place to be the "seat" of arbitration. The Court held that the intention

11 (2014) 5 SCC 1

of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties. It was observed that the arbitration agreement entered between the parties in the said case provided Hong Kong as the place of arbitration, which by itself would not lead to the conclusion that the parties have chosen Hong Kong as the seat of arbitration. However, in the facts of the case, the Supreme Court considering the words in Clause 17.2, which provided that the place of arbitration shall be Hong Kong and further the parties providing that any dispute, controversy, difference arising out of or relating to the MoU shall be referred to and finally resolved by arbitration administered in 'Hong Kong', observed that such clause made it clear that the reference to Hong Kong as the "place of arbitration" was not a simple reference to the "venue" for the arbitral proceedings, but a reference for final resolution by arbitration administered in Hong Kong. It was hence held that the Indian Courts would not have any jurisdiction to appoint an arbitrator. The relevant observations in paragraphs 17 to 22 can be noted, which reads thus:

> "17. In the present case, Clause 17 of MoU is a relevant clause governing the law and dispute resolution. Clause 17 reads as under:
>
> 17. Governing law and dispute resolution.
>
> 17.1 This MoU is governed by the laws of India, without regard to its conflicts of laws provisions and Courts at New Delhi shall have the jurisdiction.
>
> **17.2 Any dispute, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity,**

interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered in Hong Kong.

The place of arbitration shall be Hong Kong.

The number of arbitrators shall be one. The arbitration proceedings shall be conducted in English language.

17.3 It is agreed that a party may seek provisional, injunctive or equitable remedies, including but not limited to preliminary injunctive relief, from a Court having jurisdiction, before, during or after the pendency of any arbitration proceeding.

19. **The seat of arbitration is a vital aspect of any arbitration proceedings. Significance of the seat of arbitration is that it determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award. The situs is not just about where an institution is based or where the hearings will be held. But it is all about which Court would have the supervisory power over the arbitration proceedings**. In **Enercon (India) Ltd. vs. Enercon GmbH[12],** the Supreme Court held that :

> "The location of the seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. It was further held that the seat normally carries with it the choice of that country's arbitration/curial law."

20. **It is well settled that the "seat of arbitration" and "venue of arbitration" cannot be used interchangeably. It has 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,

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> 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 an 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 or relating to MoU including the existence, validity, interpretation, breach or termination thereof or any dispute arising out of or relating to its shall be referred to and finally resolved by 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."
>
> (emphasis supplied).

23. Mr. Andhyarujina has also referred to the decision of the learned Single Judge of the Madras High Court in **Balapreetham Guest House Pvt. Ltd. vs. Mypreferred Transformation and Hospitality Pvt. Ltd.** (supra). In such case, the Court was considering the dispute resolution mechanism wherein the parties had agreed that the Agreement shall be governed and interpreted in accordance with the laws of India and the Courts at Chennai shall have exclusive jurisdiction in all matters arising out of the agreement. The parties also agreed that the disputes if any arising between the parties shall be referred to arbitration to be conducted by a sole arbitrator and the place of arbitration shall be at New Delhi. Noticing the conflict between these two clauses of the dispute resolution mechanism, as agreed between the parties, the Court referring to the decision of the Supreme Court in **BGS Soma** (supra) has

held that once the parties agreed that the place of arbitration is at New Delhi, it will be required to be regarded as the seat of arbitration and only the Court at Delhi shall have jurisdiction. The Court in paragraphs 29 to 33 observed thus:

> 29. In the case on hand there are two inconsistent and conflicting clauses. They are:
>
> > i) This agreement shall be governed and interpreted in accordance with the laws of India and the Courts at Chennai shall have exclusive jurisdiction in all matters arising out of this agreement.
> >
> > ii) Where any disputes arise between parties in respect of or in connection with the agreement then parties shall first endeavour to conciliate the disputes falling which the same shall be referred to arbitration to be conducted by a sole arbitrator. The place of arbitration is at New Delhi.
>
> 30. Considering the apparent conflict in respect of these 2 clauses the two have to be harmoniously constructed to give meaning to both. The rule of harmonious construction is to harmonize and not to destroy and while interpreting the clauses Courts have to presume that the parties had inserted every clause thereof for a purpose and therefore attempt to give effect to both. The reading of the 2 clauses would indicate that the parties had agreed that in case of a cause of action arising from out of the agreement then the Courts at Chennai alone will have jurisdiction, if parties abandon their right to arbitrate the dispute and file a civil suit.
>
> 31. However, the latter clause viz; 10.2 and 10.3 relates to disputes between the parties arising out of or in connection with the agreement and parties have agreed to resolve their disputes through Arbitration and have agreed that the seat of such Arbitral proceedings will be New Delhi. Therefore, the two clauses can be harmoniously constructed without one doing violence to the other.
>
> 32. Even if we were to assume that the two clauses are in conflict with each other the same can be resolved by considering the law laid down by the Supreme Court. The Hon'ble Supreme Court has in the judgments referred above placed importance on the juridical seat to confer jurisdiction on Courts in the case of Arbitration Proceedings. In the Judgment in *BGS Soma* the learned Judges had held that the very fact that parties have chosen a place to be the seat necessarily implies that both parties have agreed that the Courts at the seat would have jurisdiction over the entire arbitral process. Therefore, on account of a conspectus of the above judgments of the Hon'ble Supreme Court, wherein emphasis and importance has been given to the juridical seat, in the instant case the Court having supervisory jurisdiction is the Courts where parties have agreed would be the place of arbitration.

> 33. Therefore, relying upon the judgment *BGS Soma* in the case on hand since parties herein have agreed to have the arbitration proceedings at New Delhi, the "seat" is at New Delhi. Consequently only the High Court at Delhi would have the jurisdiction over the arbitral proceedings. Therefore, the proceedings before this Court is without jurisdiction and therefore, stands dismissed."

24. Thus, adverting to the enunciation of law as laid down in the above decisions of the Supreme Court, it is explicit that once the parties in the present case have agreed that the venue of the arbitration in its entirety shall be at Delhi, the seat of arbitration necessarily is at Delhi. Hence, the jurisdiction to entertain the proceedings for appointment of an arbitral tribunal would lie with the Courts at Delhi. This Court, thus, would not have jurisdiction to entertain the present application. It is, accordingly, disposed of, with liberty to the applicant to file appropriate proceedings before the Court at Delhi. All contentions of the parties are expressly kept open.

25. No costs.

[G.S. KULKARNI, J.]