

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.43 of 2022

The State of Bihar through the Executive Engineer, Road Construction Department, (New Capital Division, Patna) Bihar.

... .. Petitioner

Versus

M/s Tantia Construction Ltd. Registered Office at 25/27 Netaji Subhash Road, Kolkata - 700001.

... .. Respondent

Appearance :

For the Petitioner	:	Mr. P.K. Shahi, Advocate General Mr. Amit Prakash, G.A.-13 Mr. Rajeev Shekhar, Advocate Mr. Sanjiv Kumar, Advocate Mr. Amish Kumar, A.C. to A.G. Mr. Vipin Kumar, A.C. to A.G.
For the Respondent	:	Mr. Prafull Chandra Jha, Advocate Mr. Avinash Chandra, Advocate

CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL JUDGMENT
Date : 29-11-2024

Heard Mr. P.K. Shahi, learned Advocate General for the petitioner and Mr. Prafull Chandra Jha, learned counsel for the respondent.

2. The petitioner-State of Bihar has challenged the judgment and order dated 20.09.2021 passed by the learned District Judge, Patna, in Miscellaneous (Arbitration) Case No.198 of 2017, by which the learned District Judge has not entertained the Misc. (Arbitration) Case and disposed of the same with liberty to the petitioner-State to approach the Calcutta High Court where the proceedings under section 9 of the Arbitration and Conciliation Act, 1996 (for short “1996 Act”)



has already been entertained and disposed of.

3. The entire controversy emanates from a work agreement dated 15.12.2006 bearing No.01/SB/2006-07, under which the work for the Patna Town Road Project was allotted to the respondent-company namely M/s. Tania Construction Limited having its registered office at 25/27 Netaji Subash Road, Kolkata-700001. The date of completion of the project was fixed as 14.08.2008 and the cost of the project was Rs.1,57,74,57,222/-. The petitioner-State alleged infractions and violations on several counts and therefore show cause notices were issued to the respondent-company vide letters dated 24.01.2008 and 28.02.2008. Subsequently, the said agreement was terminated on 30.04.2008 at the risk and cost of the respondent-company. By a subsequent order, the registration of the respondent-company was also cancelled and the company was blacklisted. Against the order of termination of contract, the respondent-company filed a writ petition viz. C.W.J.C. No.7403 of 2008 on 05.05.2008 before this Court. While the aforesaid writ petition was pending before this Court, the respondent-company also preferred an application under Section 9 of the 1996 Act before the Calcutta High Court on 13.05.2008 seeking injunction on invocation of bank guarantee of performance



security, which was registered as A.P. No.245 of 2008 and vide order dated 14.05.2008 interim stay was granted on the invocation of bank guarantee of performance security. Thereafter, interim order was extended till 29.08.2008 vide order dated 15.05.2008.

4. During the pendency of C.W.J.C. No.7403 of 2008, the respondent-company filed another petition viz. A.P. No. 379 of 2008 before the Calcutta High Court for appointment of an Arbitrator, which came to be allowed vide order dated 21.08.2008 and Hon'ble Mr. Justice N.N. Singh (Retired) was appointed as Arbitrator to adjudicate the contractual dispute.

5. This Court vide order dated 18.09.2009, dismissed the writ petition i.e. C.W.J.C No.7403 of 2008 as withdrawn but strong displeasure was recorded against the conduct of learned counsel for the respondent-company for suppression of material fact i.e. regarding the cases filed before the Calcutta High Court during the pendency of the aforesaid writ petition before this Court.

6. During the pendency of aforesaid C.W.J.C No.7403 of 2008 before this Court, the respondent-company filed yet another petition being A.P. No.470 of 2008 before the Calcutta High Court assailing the order of blacklisting. By an



order dated 16.09.2008 interim stay on the order of blacklisting was granted, however, vide order dated 27.11.2008 the said writ petition was disposed with a direction that the stay on the order of blacklisting would remain operative till the disposal of the arbitration proceeding.

7. Another petition vide A.P. No.523 of 2008 was also filed by the respondent-company before the Calcutta High Court with a prayer to restrain the State of Bihar from using plant and machinery as no hire-charge is being paid for the said usage. In the said case, initially the interim stay was granted and a Receiver was also appointed but, subsequently the said case was disposed vide order dated 27.11.2008 with a direction that the interim order of stay shall continue till the disposal of the arbitration proceedings.

8. Before the learned Arbitrator the respondent-company had claimed an amount of Rs.222.4301 crores with interest at the rate of 18% per annum from 30.04.2008 and the petitioner-State had put forth a counter claim amounting to Rs.334.79 crores. Both the parties had advanced their arguments. Before the learned Arbitrator the respondent-company had challenged the order of termination of contract and the order of blacklisting. It was also prayed by the



respondent-company to return the forfeited security deposit, earnest money and performance guarantee, release of the amount of penalty, payments for the work done and the payments for the work of non-scheduled items and the amount towards the misuse of the machineries and plants, etc. The learned Arbitrator framed 12 issues for determination of dispute. Out of the 12 issues so framed, 06 issues were decided against the respondent-company under the award 27.01.2012.

9. By the award dated 27.01.2012, the learned Arbitrator directed the petitioner-State to return the plant and machineries of the respondent-company and to pay hire-charges of the seized machineries and plants with interest. The learned Arbitrator also held that the petitioner-State is not entitled to impose penalty for the slow progress of work prior to the completion period of 1st milestone. Further, the claim of the petitioner-State towards the amount of counter claim pertaining to 'at risk and cost' was also rejected by the learned Arbitrator.

10. After issuance of the Award dated 27.01.2012, the respondent-company filed a petition under section-9 of the 1996 Act before the Calcutta High Court, which was registered as A.P. No. 219 of 2012 wherein the respondent-company challenged the findings of the leaned Arbitrator on the



point of blacklisting and therefore, in the aforesaid writ petition the part of the award was challenged. The Calcutta High Court vide order dated 05.04.2012 granted interim stay till next date of hearing, however, vide order dated 27.04.2012 the said petition viz. A.P. No. 219 of 2012 was disposed with a direction that the stay shall continue till it is reversed by the competent court or authority. The respondent-company has also challenged the remaining award under section-34 of the 1996 Act by way of filing A.P. No.344 of 2012, which was dismissed vide order dated 16.08.2013 for non-prosecution.

11. The petitioner-State also preferred a petition under section 34 of the 1996 Act before the Court of Subordinate Judge-1, Patna, which was registered as Miscellaneous Case No. 14 of 2012 wherein the petitioner-State challenged the part of the award so far it relates to grant of hire-charges for the seized plants and machineries and also the damages to the plant and machineries, rejection of imposition of penalty for slow progress of work prior to completion of 1st milestone and dismissal of counter claim with regard to completion of the remaining left over work at the risk and cost of the respondent-company. The aforementioned miscellaneous case was admitted vide order dated 23.05.2012. The respondent-



company objected the petition by filing a petition under section 42 of the 1996 Act read with Order-VII Rule-11 and section 151 of the Code of Civil Procedure on 18.07.2012.

12. As per the law prevailing, the aforesaid miscellaneous case was filed in the Court of learned Subordinate Judge-1, Patna. However, after the judgment of this Court all pending cases relating to section 34 of the 1996 Act, were transferred to the Court of learned District Judge, Patna. As a consequence thereof, the case was transferred before the Court of learned District Judge, Patna and re-numbered as Misc. (Arbitration) Case No.198 of 2017. The respondent-company challenged the maintainability of the petition under section 34 of the Act by filing a petition under section 42 of the 1996 Act read with Order VII Rule 11 of the Code of Civil Procedure on the ground that various Arbitration applications in connection with the same arbitration agreement was filed on the original side of the Calcutta High Court and the said Court therefore assumed jurisdiction to entertain all subsequent petitions filed in connection with the said agreement.

13. After the enactment of the Arbitration and Conciliation (Amendment) Act 2016, the respondent-company filed an execution petition under section 36 of the 1996 Act,



before the Calcutta High Court which was registered as E.C. No.358 of 2016. Thereafter, the petitioner-State also filed a petition before the learned District Judge, Patna for stay of further proceeding of E.C. No.358 of 2016 pending before the Calcutta High Court. The aforesaid E.C. No.358 of 2016 is still pending before the Calcutta High Court. The petitioner-State has also filed interlocutory applications as well as review petition in the aforesaid case to review the interim order passed in the said E.C. No.358 of 2016.

14. The petitioner-State has also filed an execution case at Patna to execute the part of the award. However, a petition has been filed by the respondent-company seeking stay till the disposal of G.A. No.3499 of 2017 filed in E.C. No. 358 of 2016.

15. Before the learned District Judge, the respondent-company while opposing the petition preferred by the petitioner-State has submitted that the Court of District Judge, Patna has no jurisdiction to entertain petition under section 34 of the 1996 Act in connection with the award in view of the fact that earlier application under section 9 of the 1996 Act had been filed by the respondent-company before the Calcutta High Court with respect to the very same agreement



and therefore by virtue of operation of section 42 of the 1996 Act, the Calcutta High Court alone has jurisdiction over the arbitral proceedings and all subsequent applications including the application preferred by the State before the learned District Judge, Patna. It was further submitted by the respondent-company that against the order dated 15.05.2008 passed in G.A. No.1602 of 2008 filed in A.P. No.245 of 2008 by which interim stay was extended, the petitioner-State had moved before Hon'ble Supreme Court in SLP (C) No.17036 of 2008, which was dismissed vide order dated 13.02.2009 as having become infructuous.

16. The entire order dated 13.02.2009 passed by the Hon'ble Supreme Court in S.L.P. (C) No.17036 of 2008, which reads as under :-

“The Special Leave Petition has been filed against an interim order dated 15.05.2008 of the High Court of Calcutta.

We are informed that the High court has decided the main matter on 22nd November, 2008. Hence, in our opinion, this special leave petition, has become infructuous and is dismissed as such. However, petitioner, if so advised, can challenge the order passed in the main matter before appropriate Court for appropriate relief.”

17. According to the respondent-company by the



aforesaid order, the jurisdiction of Calcutta High Court was affirmed by the Hon'ble Supreme Court and therefore, in view of the bar created by section 42 of the 1996 Act, the application under section 34 of the 1996 Act should also have been filed before the Calcutta Court only and not before this Court and hence the miscellaneous case is liable to be rejected.

18. Before the learned District Judge, the petitioner-State has submitted that in Clause-16 of the work-agreement between the parties, the Court of jurisdiction has been crystalized as Patna and therefore, the jurisdiction is of the Courts at Patna only. In the last sentence of clause-25 of the agreement, it is stated that 'all arbitration shall be held at Patna and at no other place' hence, filing petitions before the Calcutta High Court was against the terms of the agreement and accordingly, such actions were illegal and without jurisdiction. Therefore, the petitioner-State has submitted that as per the agreement, the Courts at Calcutta has no jurisdiction to entertain any application and even if an application is entertained that in itself would not confer jurisdiction on that Court.

19. The learned District Judge, Patna vide impugned judgment and order dated 20.09.2021 has not entertained the Miscellaneous Case and disposed of the same on



the sole question of maintainability with liberty to the petitioner-State of Bihar to approach the High Court of Calcutta where the proceedings under section 9 of the 1996 Act has already been entertained and disposed of.

20. Learned Advocate General appearing for the petitioner-State submits that the order of the Calcutta High Court was challenged before the Hon'ble Supreme Court, however, the Hon'ble Supreme Court had not expressed any opinion on the merits of the case nor ever expressly decided that Calcutta Court possesses the jurisdiction. It has also been submitted that if an order of the High Court is challenged before Supreme Court and if not affirmed by a speaking and reasoned order, then the order of High Court shall not merge in the order of the Hon'ble Supreme Court. The dismissal of the case *in limine* does not attract the principle of merger.

21. Learned Advocate General for the petitioner-State also submits that even if an application under section 9 is filed in a Court against the jurisdiction Clause of the agreement, the court having jurisdiction, as per the agreement, shall not be deprived from entertaining an application since the jurisdiction will not be taken away by section 42 of the 1996 Act. Furthermore, the jurisdiction clause, mentioning the place of



jurisdiction is not required to be emphasised with words “sole jurisdiction, exclusive jurisdiction or only jurisdiction” rather mentioning of the Court of a particular place shall automatically exclude the jurisdiction of all other courts. He further submits that it is settled law that the seat of arbitration is to be seen by reading the arbitration clause in a holistic manner so as to determine jurisdiction of the Court which has been agreed upon.

22. Learned Advocate General has submitted that even in absence of jurisdiction clause, if the seat of arbitration is given in the agreement then that Court itself will have jurisdiction and could entertain an objection to the award under Section 34 of the 1996 Act. Therefore, from every angle, the contention of the respondent-company, based on Section 42 of the 1996 Act read with Order-7 Rule-11 of the Code of Civil Procedure, carries no substance at all. It has also been submitted that the aforesaid miscellaneous case has already been admitted vide order dated 23.05.2012 and the respondent-company had not challenged the order of admission, now the respondent is estopped under the principle of estoppel from contending that the aforesaid miscellaneous case is barred and liable to be rejected.

23. In support of this submission, learned



Advocate General has relied upon the decision of the Hon'ble Supreme Court in the case of ***Indus Mobile Distribution Private Limited vs. Datawind Innovation Private Limited and Ors.*** reported as ***(2017) 7 SCC 678*** and has submitted that in the aforesaid decision it has been held that where the parties have agreed under the agreement for the seat of arbitration then the court of that place only have exclusive jurisdiction, excluding jurisdiction of all other courts. In that case, a party had filed an application under section 9 and also under section 11 of the 1996 Act before Delhi Court although the jurisdiction clause contains jurisdiction of Mumbai Court and Supreme Court held that Mumbai Court alone shall have jurisdiction to entertain any application. Paragraph nos. 9 to 14 and 19 to 20 of the aforesaid decision are reproduced herein below :-

*“9. The concept of juridical seat has been evolved by the courts in England and has now been firmly embedded in our jurisprudence. Thus, the Constitution Bench in **Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.**, (2012) 9 SCC 552, has adverted to “seat” in some detail. Paragraph 96 is instructive and states as under:-*

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

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



(a)-(d)***

(e) 'Court' means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes;"

We are of the opinion, the term "subject-matter of the arbitration" cannot be confused with "subject-matter of the suit". The term "subject-matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be



neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.”

10. Paras 98 to 100 have laid down the law as to “seat” thus:

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

“20. Place of arbitration.—(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by



the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.”

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

99. The fixation of the most convenient “venue” is taken care of by Section 20(3). Section 20 has to be read in the context of Section 2(2), which places a threshold limitation on the applicability of Part I, where the place



of arbitration is in India. Therefore, Section 20 would also not support the submission of the extra-territorial applicability of Part I, as canvassed by the learned counsel for the appellants, so far as purely domestic arbitration is concerned.

100. True, that in an international commercial arbitration, having a seat in India, hearings may be necessitated outside India. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but it would not have the effect of changing the seat of arbitration which would remain in India. The legal position in this regard is summed up by Redfern and Hunter, The Law and Practice of International Commercial Arbitration (1986) at p. 69 in the following passage under the heading “The Place of Arbitration”:

“The preceding discussion has been on the basis that there is only one ‘place’ of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of the reference or the minutes of proceedings or in some other way as the place or ‘seat’ of the arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different



nationalities, from many different countries. In these circumstances, it is by no means unusual for an Arbitral Tribunal to hold meetings—or even hearings—in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.... It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country—for instance, for the purpose of taking evidence.... In such circumstances, each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.”

This, in our view, is the correct depiction of the practical considerations and the distinction between “seat” [Sections 20(1) and 20(2)] and “venue” [Section 20(3)]. We may point out here that the distinction between “seat” and “venue” would be quite crucial in the event, the arbitration agreement designates a foreign country as the “seat”/“place” of the arbitration and also selects the Arbitration Act, 1996 as the curial law/law governing the arbitration proceedings. It would be a matter of construction of the individual agreement to decide whether:

- (i) the designated foreign “seat” would be read as in fact only providing for a “venue”/“place” where the hearings would be held, in view of the choice of the Arbitration*



Act, 1996 as being the curial law,

OR

(ii) the specific designation of a foreign seat, necessarily carrying with it the choice of that country's arbitration/curial law, would prevail over and subsume the conflicting selection choice by the parties of the Arbitration Act, 1996.”
[paras 98 – 100]

11. In an instructive passage, this Court stated that an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause as follows: (Bharat Aluminium Case, 2012 (9) SCC 552, para -123)

“123. Thus, it is clear that the regulation of conduct of arbitration and challenge to an award would have to be done by the courts of the country in which the arbitration is being conducted. Such a court is then the supervisory court possessed of the power to annul the award. This is in keeping with the scheme of the international instruments, such as the Geneva Convention and the New York Convention as well as the UNCITRAL Model Law. It also recognises the territorial principle which gives effect to the sovereign right of a country to regulate, through its national courts, an adjudicatory duty being performed in its own country. By way of a comparative example, we may reiterate the observations made by the Court of Appeal, England in C v. D [2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)] wherein it is observed that:

“It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the



award.”

In the aforesaid case, the Court of Appeal had approved the observations made in A v. B [(2007) 1 All ER (Comm) 591 : (2007) 1 Lloyd's Rep 237] wherein it is observed that:

“... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy ... as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration.”

12. The Constitution Bench's statement of the law was further expanded in **Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1**. After referring to various English authorities in great detail, this Court held, following the Constitution Bench, as follows:

“134. It is accepted by most of the experts in the law relating to international arbitration that in almost all the national laws, arbitrations are anchored to the seat/place/situs of arbitration. Redfern and Hunter on International Arbitration (5th Edn., Oxford University Press, Oxford/New York 2009), in Para 3.54 concludes that “the seat of the arbitration is thus intended to be its centre of gravity”. In BALCO [Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810], it is further noticed that this does not mean that all proceedings of the arbitration are to be



held at the seat of arbitration. The arbitrators are at liberty to hold meetings at a place which is of convenience to all concerned. This may become necessary as arbitrators often come from different countries. Therefore, it may be convenient to hold all or some of the meetings of the arbitration in a location other than where the seat of arbitration is located. In BALCO, the relevant passage from Redfern and Hunter has been quoted which is as under: (SCC p. 598, para 75)

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



than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.... It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country — for instance, for the purpose of taking evidence.... In such circumstances each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of arbitration remains the place initially agreed by or on behalf of the parties.’ (Naviera case [Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru, (1988) 1 Lloyd’s Rep 116 (CA)] , Lloyd’s Rep p. 121)” (emphasis in original).

These observations have also been noticed in Union of India v. McDonnell Douglas Corpn. [(1993) 2 Lloyd’s Rep 48]” [para 134]

13. **This Court reiterated that once the seat of arbitration has been fixed, it would be in the nature of an exclusive jurisdiction clause as to the courts which exercise supervisory powers over the arbitration. (See: paragraph 138).**
14. *In Reliance Industries Ltd. v. Union of India, (2014) 7 SCC, 603, this statement of the law was echoed in several paragraphs. This judgment*



makes it clear that “juridical seat” is nothing but the “legal place” of arbitration. It was held that since the juridical seat or legal place of arbitration was London, English courts alone would have jurisdiction over the arbitration thus excluding Part I of the Indian Act. (See: paragraphs 36, 41, 45 to 60 and 76.1 and 76.2). This judgment was relied upon and followed by Harmony Innovation Shipping Limited v. Gupta Coal India Limited and Another, (2015) 9 SCC 172 (See: paragraphs 45 and 48). In Union of India v. Reliance Industries Limited and Others, (2015) 10 SCC 213, this Court referred to all the earlier judgments and held that in cases where the seat of arbitration is London, by necessary implication Part I of the Arbitration and Conciliation Act, 1996 is excluded as the supervisory jurisdiction of courts over the arbitration goes along with “seat”.

19. *A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to “seat” is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction – that is, no part of the cause of action may have*



arisen at the neutral venue and neither would any of the provisions of Section 16 to 21 of the CPC be attracted. In arbitration law however, as has been held above, the moment “seat” is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

20. It is well settled that where more than one court has jurisdiction, it is open for parties to exclude all other courts. For an exhaustive analysis of the case law, see *Swastik Gases Private Limited v. Indian Oil Corporation Limited*, (2013) 9 SCC 32. This was followed in a recent judgment in *B.E. Simoes Von Staraburg Niedenthal and Another v. Chhattisgarh Investment Limited*, (2015) 12 SCC 225. Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. Appeals are disposed of accordingly.” (emphasis supplied)

24. Learned Advocate General for the petitioner-State has also relied upon the decision of the Hon’ble Supreme Court rendered in the case of ***Brahmani River Pellets Limited***



vs. Kamachi Industries Limited reported as **(2019) 5 BLJ 92 (SC) : 2020 (5) SCC 462** and has submitted that in the aforesaid case it has been held that there is no necessity of use of words like “exclusive jurisdiction only, exclusive alone” and non-mentioning of such words does not make any material difference as intention of the parties to have jurisdiction of the particular Court is the intention of the parties to exclude all other Courts. In that case also, the jurisdiction of Orissa Court was agreed by the parties whereas petition under Section 11 of the Act was moved before Madras High Court. It was decided that the Madras High Court erred in assuming jurisdiction rather only the Orissa High Court will have jurisdiction to entertain all applications.

25. The next decision relied upon by learned Advocate General is in the case of ***Emkay Global Financial Services Ltd. vs. Giridhar Sondhi AIR 2018 SC 3894***, wherein it has been held that jurisdiction clause contained in the agreement vesting jurisdiction in Courts at Mumbai, application under section 34 of Act shall be filed before Mumbai Courts alone. In the aforesaid case, one party had moved before the Court at Delhi and while the matter travelled up to Supreme Court it was decided that Mumbai Court alone shall have



exclusive jurisdiction to entertain the application under section 34 of the Act.

26. He also placed reliance on the decision rendered in the case of *State of West Bengal vs. Associated Contractors* reported as (2015) 1 SCC 32, wherein it has been held that unless the Court before whom the application is moved possesses the jurisdiction, the bar of Section 42 of the Act would not be applicable if subsequent application is made before the court having jurisdiction and hence the subsequent application filed in appropriate Court shall not be barred by Section 42 despite earlier application having been filed in a court having no jurisdiction. Paragraph nos. 24 to 26 of the aforesaid decision read as under :-

“24. If an application were to be preferred to a Court which is not a Principal Civil Court of original jurisdiction in a district, or a High Court exercising original jurisdiction to decide questions forming the subject matter of an arbitration if the same had been the subject matter of a suit, then obviously such application would be outside the four corners of Section 42. If, for example, an application were to be filed in a court inferior to a Principal Civil Court, or to a High Court which has no original jurisdiction, or if an application were to be made to a court which has no subject matter jurisdiction, such application would be outside Section 42 and would not debar



subsequent applications from being filed in a court other than such court.

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

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

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

(c) However, Section 42 only applies to applications made under Part-I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

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



42.

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

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

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

The reference is answered accordingly.

26. On the facts of the present case, nothing has been shown as to how the High Court of Calcutta does not possess jurisdiction. It has been mentioned above that leave under Clause 12 has been granted. In the circumstances of the present case, therefore, the judgment dated 11.04.2005 passed by the High Court of Calcutta is correct and does not need any interference. Civil Appeal



No.6691 of 2005 and Civil Appeal No.4808 of 2013 are hereby dismissed.”

27. The petitioner-State also submits that since the respondent-company had approached the Calcutta High Court by suppressing the fact regarding the jurisdiction clause and the seat of arbitration and also by making false statements regarding the payments being made at Calcutta, it amounts to committing fraud upon the Court and any order obtained by committing fraud is nullity in the eye of the law. Therefore, the said objection can be raised before the competent Court at any stage.

28. In support of this submission, the petitioner-State has placed reliance upon the decisions rendered in the case of *S.P. Chengalvaraya Naidu (Dead) by Lrs. vs. Jagannath (Dead) by Lrs and Ors.* reported in *1994(1) SCC 1* and *Rajasthan State Road Transport Corporation & Ors. vs. Zakir Hussain* reported as *(2005) 7 SCC 447*.

29. Paragraph no.21 of the decision rendered in the case of *Rajasthan State Road Transport Corporation and Ors.* (supra) reads as under:-

“21. It is a well-settled principle of law as laid down by this Court that if the Court has no jurisdiction, the jurisdiction cannot be conferred by any order of court. This Court in the case of



A.R. Antulay v. R.S. Nayak, 1988 (2) SCC 602 AIR paras 40 to 42, wherein it is, inter alia, held and observed as under: (SCC pp. 650-51, paras 38-40)

"38[40]. ... This Court, by its directions could not confer jurisdiction on the High Court of Bombay to try any case which it did not possess such jurisdiction.....

39[41]. ... The power to create or enlarge jurisdiction is legislative in character.... Parliament alone can do it by law and no court, whether superior or inferior or both combined can enlarge the Jurisdiction of a court or divest a person of his rights of revision and appeal

40[42].... But the superior court can always correct its own error brought to its notice either by way of petition or ex debito justitiae. See Rubinstein's Jurisdiction and Illegality."

30. It has been argued by learned Advocate General that the respondent-company has heavily relied on the fact that the SLP (C) No. 17036 of 2008 was dismissed and hence on the principle of merger the order of the Calcutta High Court stood affirmed and thereby confers jurisdiction to that Court. In this regard, he has relied upon two judgments of the Hon'ble Supreme Court rendered in the case of ***Kunhayammed and Ors. vs. State of Kerela and Anr.*** reported as **2000 (6) SCC 359** and ***Khoday Distilleries Limited (Khoday India Limited)***



and Ors. vs. Sri Mahadeshwara Sahakara Karkhane Limited, Kollegal reported as *(2019) 4 SCC 376* and has submitted that unless leave in SLP is granted and the matter is considered on merit any order passed in S.L.P. would not merge.

31. It has further been argued that while the petitioner-State had filed Misc. Case under Section 34 of the 1996 Act, the applicable provisions of section 36 was that once a petition under Section 34 of the 1996 Act has been filed, the award shall go in abeyance and hence would not be liable to be executed. The said position of law was amended in 2015 whereby the principle of “award having gone in abeyance” was removed from the Act. In that situation, the petitioner-company had filed the petition for a stay of execution case, filed by respondent at Calcutta.

32. Learned Advocate General for the petitioner-State points out that there had again been amendment in the year 2019 whereby Section 87 was introduced and effect of Section 26 of the Act was taken away. By virtue of which the award given in all the arbitration proceedings, commenced before 2015 Amendment Act was to be treated in abeyance. The Hon'ble Supreme Court considered the effect of the proposed Section 87 in view of Government press release dated 07.03.2018 whereby



Section 87 was going to be introduced and in its judgment reported in *Board of Control of Cricket in India vs. Kochhi Cricket Private Limited and Ors. (2018) 6 SCC 287* it was held that on introduction of Section 87, the effect would be that not only the application under Section 34, filed after 23.10.2015 rather the proceeding of arbitration commenced after 23/10/2015 will only be covered by 2015 Amendment Act and not the earlier one. In spite of said judgment, Section 87 was introduced by the Government which has been declared ultra-virus by judgment of the Hon'ble Supreme Court in ***Hindustan Construction Co. Ltd. Vs. Union of India and Ors (2019) SCC online SC 1520***, wherein it has been held that only those awards will go in abeyance against which court proceeding has been initiated prior to 23.10.2015 but if the court proceeding was initiated after that date the award shall not go in abeyance. In the instant case, the court proceeding by filing Misc. Case under Section 34 of the Act to challenge the award was initiated in the year 2012 i.e. much prior to 23.10.2015, hence the award in question in the present case has automatically gone in abeyance and accordingly the petition for stay of award was fit to be disposed of in view of principle laid by the Hon'ble Supreme Court in the aforesaid judgment.



33. It is submitted that in view of the Hon'ble Supreme Court judgments, as discussed above, the petition filed by the respondent under section 42 of the 1996 Act read with Order- VII Rule-11 of the Code of Civil Procedure was liable to be rejected and Misc. Case, filed by the petitioner-State was fit to be allowed but contrary to that the learned District Judge, Patna had held that the case of the petitioner-state can not be entertained and returned the case contrary to the findings of the Hon'ble Supreme Court.

34. On behalf of the respondent-company a counter affidavit has been filed wherein it has been stated that when the dispute arose then the respondent-company approached the Calcutta High Court for appointment of Arbitrator through case bearing A.P. No.379 of 2008 and the Calcutta High Court had appointed Hon'ble Mr. Justice N.N. Singh, Retired Judge of Patna High Court as Arbitrator. The name of the Arbitrator was suggested by the petitioner-State of Bihar and the respondent-company has assented to the same and thereafter the Calcutta High Court has passed the order dated 21.08.2008. The learned Arbitrator had passed the arbitral award on 27.01.2012, which was challenged by the petitioner-State under section 34 of the 1996 Act before Subordinate Judge-1,



Patna in Misc. Case No.14 of 2012, which was later renumbered as Miscellaneous (Arbitration) Case No. 198 of 2017 and transferred to the Court of District Judge, Patna. Upon receiving the notice in the aforementioned case, the respondent-company appeared on 18.07.2012 and filed a petition under section 42 of the 1996 Act.

35. The respondent-company submits that section 42 of the 1996 Act, *inter alia* provides that where with respect to an arbitration agreement any application under this part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court. Section 42 of the 1996 Act is mandatory, express and explicit and it cannot be circumvented or waived. The aforesaid provision has an overriding effect over all other provisions of Part-1 of the 1996 Act. It is vehemently argued that section 42 of the 1996 Act categorically excludes the jurisdiction of all other Courts except the Court where with respect to an arbitration agreement any application under Part-1 has been made.

36. The respondent-company in its counter



affidavit has brought on record certain case details in order to show that they have earlier preferred applications before the Calcutta High Court in original side and therefore, section 42 would be attracted in the present case. All the aforementioned applications were made under Part-1 of the 1996 Act with respect to the very same arbitration agreement dated 15.12.2006 and therefore relates to the same arbitral proceeding.

37. The respondent-company further states that the question of jurisdiction was specifically raised by the State of Bihar before the Calcutta High Court in A.P. No. 245 of 2008 and the Calcutta High Court vide order dated 27.11.2008 had considered Clause-16 of the agreement which has also been quoted in the said order and thereafter after assigning proper reasons the Calcutta High Court had rejected the arguments advanced and objections raised by the State of Bihar regarding jurisdiction of the Calcutta High Court.

38. The respondent-company emphasises that the petitioner-State has not opted to file a review petition before the Hon'ble Supreme Court against the order dated 13.02.2009 which shows that the matter of jurisdiction has now attained finality. It is the submission of the respondent company that by filing the Misc. (Arbitration) Case No.198 of 2017 the



petitioner-State has indulged in forum shopping. However, considering every aspect of the case on the issue of jurisdiction, the learned District Judge, Patna has disposed of the matter and held that the Miscellaneous Case can not be entertained and returned the same with a liberty to approach the Calcutta High Court where earlier proceedings under section 9 of the 1996 Act was instituted and disposed of.

39. The respondent-company has also stated in the counter affidavit that before the Calcutta High Court the petitioner-State requested to settle the matter amicably and therefore the Calcutta High Court vide order dated 16.02.2022 passed in G.A. No. 3499 of 2017 filed in E.C. No. 358 of 2016, recorded the submission of the petitioner-State that serious consideration being undertaken to amicably settle the dispute at the highest levels of both disputants. In this regard, the Executive Engineer, New Capital Road Division, R.C.D on 15.03.2022 wrote a letter to the respondent-company and requested to arrange a meeting at Patna on 21.03.2022 and come with all relevant documents in support of the claim. In compliance thereof, the respondent-company through its counsel and representatives attended the meeting held on 21.03.2022 at Patna and after a fruitful discussion impression



was given to the respondent-company that the petitioner-State is ready and willing to pay off the principal amount under the award but was not in position to do so since the break-up of the calculation in terms of which the award was passed and the respondent-company was awarded a sum of Rs.1,27,79,15,004.25/- was not available. Accordingly, the respondent-company through an e-mail dated 23.03.2022 forwarded the details of award along with the heads under which such amount has been awarded in favour of the respondent-company.

40. It is the submission of the respondent-company that on the one hand the petitioner-State is submitting before the Calcutta High Court to settle the dispute amicably but on the other hand, the State of Bihar is lingering the matter by writing unnecessary letters and at the same time the petitioner-State has filed this case before this Court, which is enough to show the *mala-fide* intention of the petitioner-State. The respondent-company submits that the award was passed on 27.01.2012 and since then the petitioner-State has opted to harass the respondent-company through different legal proceedings, out of which many were initiated only to linger the matter, which has aggravated financial crisis of the respondent-



company.

41. The respondent-company has raised the objection that the present petition is filed under Article 227 of the Constitution of India, which is not sustainable. Instead of filing this petition, the petitioner-State should have been filed a petition under section 37 of the 1996 Act.

42. The respondent-company draws attention to the decision of the Hon'ble Supreme Court in ***M/s Kelkar and Kelkar vs. M/s Hotel Pride Executive Pvt. Ltd*** reported as ***(2022) 18 SCC 348*** wherein the Hon'ble Court had held as under :-

“2. Having heard learned counsel appearing on behalf of the respective parties and considering the impugned judgment and order passed by the High Court, we are of the opinion that against the award made by the learned Arbitrator made under the Act and against an order passed by the learned trial Court making the award a decree and without availing the alternative statutory remedy available by way of appeal under the provisions of the Act, the High Court ought not to have entertained the writ petition under Articles 226 and 227 of the Constitution of India. When the statute provides a further remedy by way of appeal against the award and even against the order passed by the learned trial Court making the award a decree of the court, the High Court ought not to have entertained the writ petition and



ought not to have set aside the award, in a writ petition under Articles 226 and 227 of the Constitution of India. In that view of the matter the impugned judgment and order passed by the High Court is unsustainable and the same deserves to be quashed and set aside.”

43. The respondent-company has also relied upon the following decisions in support of his case:-

(i) ***National Highways Authority of India vs. SPCL-IVRCL (JV)*** reported as **2008 SCC OnLine Del 627 : (2008) 2 Arb LR 404;**

(ii) ***State of Maharashtra and Anr. vs. Atlanta Limited*** reported as **AIR 2014 SC 1093 : 2014 (11) SCC 619;**

(iii) ***M/s. Jyothi Turbopower Services Pvt. Ltd. vs. M/s. Shenzhen Shandong Nuclear Power Construction Company Ltd. & Anr.*** reported as **2011 SCC OnLine AP 163 : 2011 (3) Arb. LR 442 AP High Court;**

(iv) ***Gammon India Ltd. vs. Sankaranarayana Construction (Bangalore) Pvt. Ltd.,*** reported as **2008 SCC OnLine Mad 662 : 2008 Supp (2) Arb LR 214**

(v) ***Shiva Carriers vs. Royal Projects Ltd. and***



others reported as *AIR 2000 Cal 138*.

44. In reply to the counter affidavit, the petitioner-State submits that vide order dated 30.04.2008 the agreement dated 15.12.2006 was rescinded, which gave rise to the dispute and for quashing the said order rescinding the contract the respondent-company for the very first time had moved before this Court on 05.05.2008 by filing C.W.J.C. No.7403 of 2008. During the pendency of the aforesaid writ petition, the respondent- company moved before the Calcutta High Court on 13.05.2008 by filing A.P. No. 245 of 2008 and by suppressing the fact that a writ petition is pending before this Court and playing fraud obtained the interim order on 15.05.2008. The petitioner-State advertng to the order passed by this Court in C.W.J.C. No. 7403 of 2008 tries to establish the *mala fides* of the respondent-company as similar and identical reliefs were made in C.W.J.C. No.7403 of 2008 filed before this Court as well as in A.P. No. 245 of 2008 filed before the Calcutta High Court and therefore, it is a clear case of suppression of fact as well as misleading both the Courts. Therefore, in view of the evidence adduced and brought on record by way of Annexure-11, it is clear that the first petition was filed before this Court and not before the Calcutta High



Court.

45. In response to the breakup of the amount awarded to the respondent-company, the petitioner-State submits that in course of the meeting, the representatives of the respondent-company was requested to submit the details/breakup of the calculation of the heads of the award which were not quantified by the learned Arbitrator and in reply to which the respondent-company forwarded one page tabular chart which is contained at Annexure-G to the counter affidavit without details of breakup of calculation and hence, a fresh tabular chart was demanded from the respondent-company. Instead of providing the same, the respondent-company has chosen not to negotiate and unilaterally declared the settlement to have failed.

46. It has been stated that under the award dated 27.01.2012 multiple heads were not quantified by the learned Arbitrator and hence the petitioner-State requested the respondent-company to submit relevant documents on the basis of which the calculations or particular amount were arrived at but the respondent-company squarely denied to submit those documents.

47. On the objection raised by the respondent-



company for instituting the present application under Article 227 instead of section 37 of the 1996 Act, the petitioner-State submits that the provisions of section 37 could not be attracted in the present case as by the impugned order the learned District Judge, Patna had neither set aside the award nor refused to set aside the said award, rather the same was returned with a liberty to approach the Calcutta High Court. Therefore, the decision rendered in the case of *M/s. Kelkar and Kelkar vs. Hotel Pride Executive Pvt. Ltd. (supra)* would not apply in the present case.

48. I have considered the submissions of the parties and perused the materials on record including the impugned judgment and order passed by the learned District Judge.

49. The moot question that arises in this case is whether in the facts and circumstances of the case, the application under section 34 of the 1996 Act challenging the award dated 27.01.2012 passed by the learned Arbitrator is to be filed and adjudicated before the Calcutta High Court where earlier applications under section 9 of the 1996 Act were filed and entertained and therefore by operation of section 42 of the 1996 Act, the jurisdiction of all other Courts except the Calcutta High Court is ousted or before the learned District Judge, Patna



being the Principal Civil Court in Patna having jurisdiction since the jurisdiction was mutually decided in the agreement to be Patna together with the fact that the said award was passed in Patna.

50. It is not in dispute that the petitioner-State had entered into a work agreement with the respondent-company, whereby the work of Patna Town Road Project was allotted to the respondent-company and the date of completion under the aforesaid agreement was fixed for 14.08.2008 at the cost of Rs. 157,74,57,222/-. The petitioner-State thereafter noticed certain infractions and violations and show cause notices were issued to the respondent-company. The work agreement was finally terminated on 30.04.2008 at the risk and cost of the respondent-company and further by a subsequent order, the registration was also cancelled and the respondent-company was blacklisted. The respondent-company assailed the order of termination of contract before this Court in C.W.J.C No.7403 of 2008 filed on 05.05.2008, which was dismissed as withdrawn with a detailed order dated 18.09.2009. During the pendency of the aforementioned writ petition before this Court, the respondent-company had filed an application under section 9 of the 1996 Act before the Calcutta High Court seeking



injunction on invocation of bank guarantee of performance security which was registered as A.P. No.248 of 2008. Vide order dated 14.05.2008, the Calcutta High Court had granted interim stay on invocation of bank guarantee of performance security and further vide order dated 15.05.2008 the same was extended till 29.08.2008. The objection raised by the State of Bihar on account of jurisdictional maintainability was also recorded by the Calcutta High Court in its order. Again, during the pendency of the aforementioned writ petition i.e. C.W.J.C No.7403 of 2008, the respondent-company also filed a petition viz. A.P. No. 379 of 2008 before the Calcutta High Court praying for appointment of an Arbitrator which came to be disposed vide order dated 21.08.2008 since Hon'ble Mr. Justice N.N. Singh (retired) was appointed as an Arbitrator by the State of Bihar to adjudicate the dispute. It may be relevant to mention that both the parties had duly consented for the appointment of the Arbitrator, which was recorded by the Calcutta High Court in its order. The learned Arbitrator passed an award on 27.01.2012 at Patna.

51. The petitioner-State challenged the part of the award by way of filing a petition under section 34 of the 1996 Act, before the Court of Subordinate Judge-1, Patna,



which was subsequently transferred to the Court of learned District Judge, Patna, and the case was re-numbered as Misc. (Arbitration) Case No. 198 of 2017. The respondent-company had challenged the maintainability of this petition filed under section 34 of the 1996 Act by filing a petition under section 42 of the 1996 Act, read with Order -VII, Rule -11 of the Civil Procedure Code on 18.07.2012 on the ground that earlier arbitration application under section 9 of the 1996 Act in connection with the same arbitration agreement was filed by the present respondent-company on the original side of the Calcutta High Court and the Calcutta High Court having entertained the applications had assumed jurisdiction and therefore by operation of section 42 of the 1996 Act, only the Calcutta High Court could adjudicate the dispute between the parties.

52. It appears that under clause-16 of the work agreement dated 15.12.2006, the jurisdiction has been provided. The arbitration clause is contained under clause 25. Relevant portion of the arbitration clause reads as under :-

“Clause-25

- 1.*
- 2. It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of*



*claims and counter statement of claims. **The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion.** The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.*

3. **All arbitration shall be held at PATNA and at no other place.**” (Emphasis Supplied)

53. From the above quoted relevant portion of the arbitration clause, it appears that the parties had mutually agreed that the venue of arbitration shall be decided by the learned Arbitrator at his sole discretion, however the clause also mentioned that ‘**All arbitration shall be held at Patna and at no other place.**’. The words ‘venue’ and ‘seat’ could not have been used interchangeably owing to the two different stipulations under the aforesaid clause. If under a clause the parties had given a broad discretion to the Arbitrator for deciding the venue of arbitration then the latter stipulation regarding holding the arbitration only at Patna to the absolute exclusion of all other places, would render the discretion of the Arbitrator as moot and nugatory and consequently, it appears that the latter stipulation



might be construed as the seat of the arbitration decided by the parties under section 20(1) of the Act. This also draws strength from the unequivocal phraseology of the stipulation that the arbitration shall be held at Patna alone and at no other place. Further under clause-16 of the work agreement, the parties were subjected to the jurisdiction of Courts at Patna.

54. The agreement was entered into by and between the parties at Patna wherein expressly jurisdiction was mutually decided for Patna. The appointment of learned Arbitrator was effected by a notification No.3680 (8) dated 05.09.2008 issued by the petitioner-State. The learned Arbitrator, a retired judge of the Patna High Court has also passed the award in Patna.

55. The learned District Judge, Patna in the impugned order dated 20.09.2021 has concluded as under:-

“Now it is clear from the perusal of aforesaid orders of the Hon'ble High Court at Calcutta passed in the said Arbitration petitions filed on behalf of respondent (TCL) that Hon'ble High Court at Calcutta considered the argument on behalf of the State of Bihar that Hon'ble High Court at Calcutta has no jurisdiction on the ground that arbitration clause provides that arbitration is to be held in Patna and no other place so far as the jurisdiction is concerned and on analyzing the Law on this point held that the



objection of the jurisdiction of Hon'ble High Court at Calcutta cannot be sustained and further held that the clause relied upon by the respondent (State of Bihar) does not oust the jurisdiction of Hon'ble High Court at Calcutta to entertain or decide the application. The said order has attained the finality and binding on both the parties.

Moreover, the objection with regard to jurisdiction of Hon'ble High Court at Calcutta to entertain application under Section 9 of the 1996 Act was also raised before the Hon'ble Supreme Court in the aforesaid SLP (Civil) No. 17036 of 2008 but the same was dismissed vide order dated 13.02.2009. The question of applicability of the doctrine of merger is not relevant for consideration in this petition as the order of Hon'ble High Court at Calcutta became final and binding and the ground raised before the Hon'ble High Court at Calcutta which was decided considering all the objection of petitioner-State of Bihar and the same cannot be agitated herein. Similarly, the argument on behalf of petitioner that all the orders of Hon'ble High Court at Calcutta passed in Arbitration Petition No.245 of 2008, Arbitration Petition No. 523 of 2008, Arbitration Petition No.470. of 2008 as stated above are nullity as Hon'ble High Court at Calcutta has no jurisdiction as to entertain those applications cannot be decided by this court in this case.

This court has no jurisdiction to review the decision of the Hon'ble High Court at Calcutta



and cannot decide the objection of the petitioner that the said orders of Hon'ble High Court at Calcutta is illegal and without jurisdiction. The Hon'ble High Court at Calcutta in its orders has already explained the reasons for entertaining petition under Section 9 of the 1996 Act after consideration of all the points raised by the State of Bihar with respect to its jurisdiction, then filing of this application under Section 34 of the 1996 Act by the State of Bihar without disclosing the said facts and now argument that this court had admitted this case hence to decide on merit the petition under Section 34 of the 1996 Act is not tenable and liable to be rejected. Raising the same ground by the petitioner in different forum without disclosing the material fact that the said issue has already been decided or pending or kept open for adjudication in the Hon'ble High Court at Calcutta cannot be entertained by this court. Even the objection petition under Section 34 of the 1996 Act of the impugned award has been filed on behalf of respondent (TCL) before the Hon'ble High Court at Calcutta as stated by respondent. The Hon'ble High Court at Calcutta has entertained A.P. No.470 of 2008 (Tantia Construction Limited Vs. State of Bihar) by observing in order dated 16.09.2008 that in view of Section 42 of the 1996 Act, the Hon'ble High Court at Calcutta has jurisdiction to take up the said application. The Hon'ble High Court at Calcutta gave reason for entertaining the Arbitration Applications under Section 9 of the 1996 Act filed on behalf of respondent.



Hence, I am of the view that the present petition under Section 34 of the 1996 Act is absolutely hit by the provision of Section 42 of the said Act. So, I hold that jurisdiction of this court has been ousted by operation of Section 42 of the 1996 Act in view of initiation of the proceedings under Section 9 of the said Act by respondent before the Hon'ble High Court at Calcutta."

56. The learned District Judge, Patna in the impugned judgment and order under challenge has recorded that the question relating to jurisdiction of that Court i.e. the Court of District Judge, Patna being the Principal Civil Court in Patna to be treated as the preliminary issue and on that point alone the parties were heard and the case was disposed. The learned District Judge after analysing the decisions of the Hon'ble Supreme Court and High Courts has concluded that it is well settled that the jurisdiction for raising a challenge to the same arbitration agreement, arbitral proceeding or arbitral award could definitely arise in more than one court simultaneously and to remedy such a situation section 42 of the 1996 Act mandates that the Court wherein the first application arising out of such a challenge is filed shall alone have the jurisdiction to adjudicate upon the dispute(s), which the learned District Judge emphasises is a mandatory provision.



57. The learned District Judge in the impugned order had quoted the order dated 27.11.2008 passed in A.P. 523 of 2008, A.P. No. 470 of 2008 and A.P. No. 245 of 2008 wherein it was held that the objection to the territorial jurisdiction of the Calcutta High Court to entertain the application can not be sustained. In the impugned order, it has also been recorded that the Calcutta High Court was of the view that it had jurisdiction to entertain and decide the application in view of the contours of section 42 of the 1996 Act. Further, the Calcutta High Court has held that even otherwise the Court assumes jurisdiction on the basis of the pleadings in the petition since there is an averment to the fact that the agreement had been entered into within the jurisdiction of the Calcutta High Court. The Calcutta High Court had also recorded that the payments in part had been received within its jurisdiction and furthermore the notice of termination and other notices had been issued to and received by the respondent-company at its offices which is within the jurisdiction of Calcutta High Court. The Calcutta High Court had also placed reliance on the judgment of the Hon'ble Supreme Court in the case of *A.B.C Laminart Pvt. Ltd. vs. A.P. Agencies, Salem* reported in *AIR 1989 SC 1239*; and *R.S.D.V. Finance Co. Pvt. Ltd vs. Shree Vallabh Glass Works Ltd.*



reported in ***AIR 1993 SC 2094*** to conclude that it was well settled that clauses in an agreement which provide for ouster of jurisdiction are to be strictly construed. Clauses should unambiguously and clearly exclude jurisdiction of all other Courts. It was noted by the Calcutta High Court that in the arbitration clause which provided that arbitration is to be held in Patna and no other place so far as jurisdiction of Courts is concerned, the jurisdiction of other Courts has not been excluded. The maxim *expressio unis est exclusion alterius* can not be applied.

58. A Three-judge bench of the Hon'ble Supreme Court in the case of ***BGS SGS Soma JV v. NHPC Limited*** reported as ***(2020) 4 SCC 224*** has held as under:-

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

59. Further the Hon'ble Supreme Court had laid down the law where parties by agreement have not expressly fixed the jurisdictional seat and held as under :-

“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."

60. The Hon'ble Supreme Court in the case of ***BBR (INDIA) Pvt. Ltd. v. S.P. Singla Constructions Pvt Ltd.*** reported as ***(2023) 1 SCC 693 (3)*** has held as follows:-

"34. For clarity and certainty, which is required when the question of territorial jurisdiction arises, we would hold that the place or the venue fixed for arbitration proceedings, when sub-section (2) of Section 20 applies, will be the jurisdictional "seat" and the courts having jurisdiction over the jurisdictional "seat" would have exclusive jurisdiction. This principle would have exception that would apply when by mutual consent the parties agree that the jurisdictional "seat" should be changed, and such consent must be express and clearly understood and agreed by the parties.

...

37. We have already referred to the first few sentences of the aforementioned paragraph and explained the reasoning in the context of the present case. The paragraph in BGS SGS Soma also explains the non obstante effect as incorporated in Section 42 to hold that it is evident that the application made under Part I must be to a court which has a jurisdiction to decide such application. Where "the seat" is designated in the agreement, the courts of "the seat" alone will have the jurisdiction. Thus, all applications under Part I will be made in the



court where "the seat" is located as that court would alone have jurisdiction over the arbitration proceedings and all subsequent proceedings arising out of the arbitration proceedings. The quotation also clarifies that when either no "seat" is designated by an agreement, or the so-called "seat" is only a convenient venue, then there may be several courts where a part of the cause of action arises that may have jurisdiction. An application under Section 9 of the Act may be preferred before the court in which a part of cause of action arises in the case where parties had not agreed on the "seat of arbitration". This is possible in the absence of an agreement fixing "the seat", as an application under Section 9 may be filed before "the seat" is determined by the Arbitral Tribunal under Section 20(2) of the Act. Consequently, in such situations, the court where the earliest application has been made, being the court in which a part or entire of the cause of action arises, would then be the exclusive court under court in which a part or entire of the cause of action arises, would then be the exclusive court under Section 42 of the Act. Accordingly, such a court would have control over the arbitration proceedings.

38. *Section 42 is to no avail as it does not help the case propounded by the appellant, as in the present case the arbitrator had fixed the jurisdictional "seat" under Section 20(2) of the Act before any party had moved the court under the Act, being a court where a part or whole of the cause of action had arisen. The appellant had*



moved the Delhi High Court under Section 34 of the Act after the Arbitral Tribunal vide the order dated 5-8-2014 had fixed the jurisdictional "seat" at Panchkula in Haryana. Consequently, the appellant cannot, based on the fastest finger first principle, claim that the courts in Delhi get exclusive jurisdiction in view of Section 42 of the Act. The reason is simple that before the application under Section 34 was filed, the jurisdictional "seat" of arbitration had been determined and fixed under sub-section (2) of Section 20 and thereby, the courts having jurisdiction over Panchkula in Haryana, have exclusive jurisdiction. The courts in Delhi would not get jurisdiction as the jurisdictional "seat of arbitration" is Panchkula and not Delhi."

61. It therefore follows that if the parties fail to determinatively and expressly agree for a seat of arbitration under section 20(1) then the place where the arbitral tribunal holds the arbitration proceedings would, by default, be the venue of arbitration and consequently the 'seat of arbitration'. Section 20(2) in such cases would assume significance. It is worth reiterating that the award in question was passed and delivered at Patna. From the records of the case, it appears that no subsequent mutual consent was reached between the parties subsequent to entering the work agreement and before the award was finally passed to change the seat of arbitration. Applying the law laid down by the Hon'ble Supreme Court it would be



clear that the jurisdictional seat would be Patna since even assuming the work agreement did not expressly designate Patna as seat of arbitration, yet the arbitration was held at Patna and the award was also delivered at Patna.

62. The Calcutta High Court vide order dated 27.11.2008 passed in A.P. No.245 of 2008 after considering clause-16 of the work agreement as well as the submissions raised by the State of Bihar had held as follows :-

"It appears that when the application was moved, Her Ladyship the Hon'ble Justice Patherya on considering the pleadings granted leave to the petitioner to file this application in this Court. There is no application for revocation of the leave granted by this Court.

Ever otherwise, the Court assumes jurisdiction on the basis of the pleadings in the petition. There is an averment to the fact that the agreement had been entered into within the jurisdiction of this Court. Payments in part had been received within the jurisdiction. The respondent was invading the right of the petitioner within the jurisdiction of this Court. The notice of termination and other notices had been issued to and received by the petitioner at its office and within jurisdiction of this Court.

The Court might on the basis of the pleadings this Court might exercise jurisdiction in respect of the application. Reliance has also been placed on the jurisdiction clause.



*It is well settled that clauses in an agreement which provide for ouster of jurisdiction are to be strictly construed. Clause should unambiguous and should clearly exclude jurisdiction of all other Courts. Be it noted that it is the arbitration clause which provides that the arbitration is to be held in Patna and at no other place so far as jurisdiction of Courts is concerned. The jurisdiction of other Courts has not been excluded. In this context reference may be made to the judgment of the Supreme Court in **A.B.C. Laminart Pvt. Ltd. vs. A.P. Agencies, Salem** reported in **AIR 1989 SC 1239**. The relevant paragraph is extracted hereinbelow for convenience:*

"21. From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad-idem can be shown, the other Courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like 'alone', 'only', 'exclusive', and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim 'expressio unius est exclusio alterius'- expression of one is the exclusion of another may be applied. What is an appropriate case shall



depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed."

*The judgment in **R.S.D.V. Finance Co. Pvt. Ltd. v. Shree Vallabh Glass Works Ltd.** reported in **AIR 1993 SC 2094**. The relevant paragraph is extracted hereinbelow for convenience:*

"9. We may also consider the effect of the endorsement 'Subject to Anand Jurisdiction' made on the deposit receipt issued by the defendant. In the facts and circumstances of this case it cannot be disputed that the cause of action had arisen at Bombay as the amount of Rs.10,00,000/- itself was paid through a cheque of the Bank at Bombay and the same was deposited in the bank account of the defendant in the Bank of Baroda at Nariman Point Bombay. The five postdated cheques were also issued by the defendant being payable to the plaintiff at Bombay. The endorsement 'Subject to Anand jurisdiction' has been made unilaterally by the defendant while issuing the deposit receipt. The endorsement 'Subject to Anand jurisdiction' does not contain the ouster clause using the words like 'alone', 'only', 'exclusive' and the like. Thus, the maxim 'expressio unius est exclusio alterius'



cannot be applied under the facts and circumstances of the case and it cannot be held that merely because the deposit receipt contained the endorsement 'Subject to Anand jurisdiction' it excluded the jurisdiction of all other courts who were otherwise competent to entertain the suit.

*The view taken by us finds support from a decision of this Court in **A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, Salem, (1989) 2 SCR 1: (AIR 1989 SC 1239).***

The Supreme Court held as follows:

*"Thus the maxim 'expressio unius est exclusio alterius' cannot be applied under the facts and circumstances of the case and it cannot be held that merely because the deposit receipt contained the endorsement 'Subject to Anand Jurisdiction' it excluded the jurisdiction of all other courts who were otherwise competent to entertain the suit. The view taken by us finds support from a decision of this Court in **A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, Salem, (1989)2 SCR (AIR 1989 SC 1239).***

*In view of the law propounded by the Supreme Court, **I am constrained to take the view that the clause relied upon by the respondent does not oust the jurisdiction of this Court to entertain or decide the application.***

Since the averments in the petition have not been dealt with, I have no option but to confirm the interim order passed by this Court by Hon'ble Justice Patherya on 14.05.2008. The



interim order shall continue till disposal of the arbitration proceedings.

The application is disposed of.

It is, however, made clear that the petitioner shall keep the bank guarantee in question renewed. The bank guarantees shall be renewed atleast one month prior to the date of expiry thereof, upon notice shall be given to the respondent authorities.”

63. It is patently clear, as has also been recorded by the learned District Judge Patna in the impugned order, that the Calcutta High Court had considered the issue of jurisdictional maintainability of the petition and for reasons recorded in the order had assumed jurisdiction. Once the Calcutta High Court has assumed jurisdiction by which the petitioner-State is aggrieved, the relief sought cannot merely be camouflaged by the prayer made by the petitioner-State invoking supervisory jurisdiction of this Court to quash and set aside the impugned order of the learned District Judge, Patna. The findings of the Calcutta High Court cannot be challenged in the Courts at Patna. Therefore, it has rightly been held by the learned District Judge that the Court of the District Judge, Patna lacks jurisdiction to review the orders passed by the Calcutta High Court. It is essential that the Courts are conscious of their jurisdictional limits. The petitioner-State by way of the present



petition is in-effect challenging the order of the Calcutta High Court on maintainability, which is impermissible and improper. The definite findings on jurisdiction arrived at by the Calcutta High Court while considering the petitions emanating from the very same work agreement, arbitral proceeding and the award cannot subsequently be challenged before this Court. The order of the Calcutta High Court has become final. Moreover, the findings of the Calcutta High Court have been arrived at after considering the contentions of the petitioner-State (respondent therein) and therefore, the reasons recorded cannot be reviewed by this Court nor can this Court sit in appeal over the findings of the Calcutta High Court.

64. It is a settled proposition of law that *Quando aliquid prohibetur ex directo, prohibetur et per obliquum* i.e. one cannot do indirectly, what one cannot do directly, in other words what cannot be done directly, is also not permissible to be done by employing oblique means. It would create judicial anarchy if this Court would in effect sit in review/appeal over the order passed by the Calcutta High Court, which has attained finality. It is not in dispute that the order passed by the Calcutta High Court assuming jurisdiction is still in force and has not been set aside or modified either in intra-court appeal or by the



Hon'ble Supreme Court. Given that the respondent-company had moved first before the Calcutta High Court by preferring an application under section 9 of the 1996 Act, which is under Part-1 of the Act, therefore the provisions of the section-42 of the 1996 Act would be attracted and subsequent applications would not be maintainable before the Courts at Patna. It would be appropriate to note that on the question of jurisdiction the Calcutta High Court has already given categorical finding rejecting the objections raised of the petitioner-State and so by operation of section 42 of the Act, the Courts at Patna could not exercise jurisdiction.

65. The contention of the petitioner-State that the judicial orders passed by the Calcutta High Court are without jurisdiction as *coram non-judice* and consequently are *non-est* in the eyes of the law and therefore Courts at Patna would assume jurisdiction cannot be entertained since such a declaration cannot be made by this Court for want of jurisdiction and more so under Article 227 of the Constitution of India. It is also required to be noted that the Calcutta High Court is currently considering an enforcement case filed by the instant respondent-company as well as a review application preferred by the petitioner-State. Mere pendency of review petition will not change the effect of



the order passed by the Calcutta High Court.

66. In view of the aforesaid facts, as discussed hereinabove, this Court has no hesitation in affirming the impugned judgment and order dated 20.09.2021 passed by the learned District Judge, Patna, in Miscellaneous (Arbitration) Case No.198 of 2017. Accordingly, the present application is dismissed.

67. Let the original records of Miscellaneous (Arbitration) Case No.198 of 2017 be sent back to the concerned Court below forthwith.

(Sandeep Kumar, J)

pawan/-

AFR/NAFR	N.A.F.R.
CAV DATE	N/A
Uploading Date	03.12.2024
Transmission Date	

