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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 17th November, 2020

\+ ARB.P. 328/2020

CARS24 SERVICES PVT. LTD. ..... Petitioner
Through: Mr. Yash Srivastava, Adv.

versus

CYBER APPROACH WORKSPACE LLP ..... Respondent
Through: Mr. Praveen Kumar Sharma, Adv. with Mr. Sahil Nagpal, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (ORAL)

% (Video-Conferencing)

1. I am faced, here, with a peculiar and, quite frankly, somewhat unenviable, situation in which, though learned counsel for both the parties submit that this Court has jurisdiction to entertain the present petition, I am unable to convince myself to agree.

2. In view of the limited controversy involved, it is not necessary to dwell deep into the disputes between the petitioner and the respondent. A brief recital would suffice.

3. The respondent has its registered office in Gurgaon, Haryana. On 27th December, 2018, a lease deed was executed, whereby the respondent leased the premises, admeasuring 10,000 square feet, for

running an office. Interest free refundable security deposit of ₹ 52,80,000/- was paid, by the petitioner, to the respondent, and the monthly lease rental, as per the lease deed, was ₹ 7,30,000/-. Additionally, the petitioner was required to pay maintenance charges of ₹ 1,50,000/-, apart from electricity and water charges.

4. It is asserted, in the petition, that the petitioner was meeting all these liabilities, without default.

5. Owing to the intervention of the COVID-2019 pandemic, the petitioner claims that it had to suspend its operations, completely, with effect from 23rd March, 2020. This, according to the petitioner, constituted *force majeure*, for which there was a separate dispensation in the lease deed.

6. The petitioner, on 23rd March, 2020, wrote to the respondent, informing the respondent that it was not in a position to continue operating from the premises and requesting the respondent, therefore, to switch off the power supply.

7. *Vide* notice dated 23rd May, 2020, addressed to the respondent, the petitioner purported to terminate the lease deed, invoking Clause 13.2 thereof (which dealt with *force majeure*). Correspondingly, the petitioner requested the respondent to refund the interest free refundable security deposit of ₹ 52,80,000/- paid by it

8. The respondent replied, on 27th May, 2020, denying any

liability towards the petitioner.

9. A dispute having thus arisen between the petitioner and the respondent, the petitioner issued a separate notice, dated 8th June, 2020, invoking arbitration, for the resolution of the dispute, in accordance with Clauses 25.2 to 25.4 of the lease deed, which reads thus:

> "25.2 That if any disputes controversies or difference arise between the Parties, regarding the construction or interpretation of any of the terms and conditions herein contained or touching these presents or determination of any liability or breach thereof (Dispute), the Parties shall try and resolve the same amicably, failing which the Disputes shall be referred to Arbitration.
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> 25.3 That if the Parties fail to resolve such dispute then, either Party may serve a notice to the other Party of its intention to commence arbitration. All such disputes shall then be finally settled through arbitration in accordance with the provisions of this Clause.
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> 25.4 Parties have agreed that all the Disputes arising out of this Deed shall be referred to a Sole Arbitrator who shall be mutually appointed by the parties, failing which *either Party may approach a court of competent jurisdiction at Haryana for appointment of the Sole Arbitrator* in terms of the Arbitration and Conciliation Act, 1996 (Act) as amended from time to time. The arbitration proceedings shall be conducted in terms of the Act. The award of the Sole Arbitrator shall be reasoned and in written, which shall be final and binding upon the Parties. It has been further agreed between the Parties that Arbitration proceedings shall be conducted in English Language and *the seat of Arbitration will be at New Delhi, India*."

(Emphasis supplied)

The communication also suggested the name of an advocate, as the sole arbitrator to adjudicate on the aforesaid disputes.

10. *Vide* response dated 27th June, 2020, the respondent again denied any liability towards the petitioner and also rejected the suggestion, of the petitioner, to appoint the advocate, whose name was suggested by the petitioner, to act as the sole arbitrator. The respondent, instead, recommended the name of Hon'ble Mr. Justice Badar Durrez Ahmed, former Chief Justice of the High Court of Jammu & Kashmir and an eminent retired Judge of this Court, as the sole arbitrator to arbitrate on the aforesaid disputes.

11. There being no consensus, *ad idem*, regarding the identity of the arbitrator to arbitrate on the disputes between the parties, the petitioner has approached this Court, by means of the present petition, preferred under Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act").

12. A reading of Clause 25.4 of the lease deed reveals that the jurisdiction, for appointment of the sole arbitrator in terms of the 1996 Act, has been specifically conferred, by agreement between the parties, on "a court of competent jurisdiction at Haryana ... in terms of the Arbitration and Conciliation Act, 1996".

13. I have queried, of learned counsel, as to how, in view thereof, this Court could exercise jurisdiction to appoint the arbitrator under Section 11.

14. The submission, of both the learned counsel, has been that, as

the seat of arbitration has been fixed as New Delhi, this Court has exclusive jurisdiction to appoint the sole arbitrator. It is emphatically submitted, at the Bar, that there is a long line of authorities, of the Supreme Court, underscoring the position that a clause fixing the seat of arbitration is akin to an exclusive jurisdiction clause and that, once such a clause exists, the court having jurisdiction over the seat thus fixed, would, *ex facie*, also have jurisdiction in all matters relating to the arbitral proceedings, including Sections 9, 11 and 34 of the 1996 Act.

15. Mr. Yash Srivastava, learned counsel for the petitioner, has placed especial reliance, in this context, on the judgment of the Supreme Court in ***Bhandari Udyog Limited v. Industrial Facilitation Council***[1] and of this Court in ***Devyani International Ltd v. Siddhivinayak Builders and Developers***[2], ***N.J. Construction v. Ayursundra Healthcare Pvt. Ltd.***[3] and ***Aarka Sports Management Pvt. Ltd. v. Kalsi Buildcon Pvt. Ltd***[4].

16. Mr. Praveen Kumar Sharma, learned counsel for the respondent, supporting the stand of the petitioner, has cited a judgment of a coordinate Single Bench of this Court in ***Ramandeep Singh Taneja v. Crown Realtech Pvt. Ltd***[5].

17. Before proceeding to examine the controversy, two factors, in

[1] **(2015) 14 SCC 515**
[2] **(2017)SCC OnLine Del 11156**
[3] **(2018) SCC OnLine Del 7009**
[4] **(2020) III AD(Delhi) 486**
[5] **(2017) SCC OnLine Del 11966**

my opinion, are required to be noticed at the outset.

18. Firstly, while it is true that the Supreme Court has, in various decisions commencing from the judgment of the Constitution Bench in ***BALCO* v. *Kaiser Aluminium Technical Services*** [6], held that a clause fixing the seat of arbitration is akin to an exclusive jurisdiction clause and that, therefore, courts having jurisdiction over the seat so fixed, would possess jurisdiction over the arbitral proceedings in their entirety, none of the said decisions pertain to a situation in which the contract contained a separate exclusive jurisdiction clause, conferring jurisdiction on a court in another territorial location.

19. Secondly, there is no decision, either of the Supreme Court, or of this Court, to which my attention has been invited, or on which I have been able to lay my hands, in which the arbitration agreement specifically confers the jurisdiction to appoint the arbitrator, i.e. Section 11 jurisdiction, on courts in a particular territorial location. This, factor, in my view, makes a world of difference to the present case, and its outcome.

20. Learned counsel for the parties are correct in their submission that there is a long line of decisions of the Supreme Court, which have examined the aspect of territorial jurisdiction, *qua* the proceedings under Section 9, 11 and 34 of the 1996 Act. These decisions have dealt with the scope of the "seat of arbitration clause" as well as of the "exclusive jurisdiction clause", and the effect of Section 2(1)(e) of the 1996 Act, juxtaposed therewith.

21. In fact, the three factors, the interplay of which would fall for consideration in all such cases, are (i) the seat of arbitration clause, if any, (ii) the exclusive jurisdiction clause, if any and (iii) Section 2(1)(e) of the 1996 Act.

22. One may, profitably, commence a glance at these authorities, from the decision in ***BALCO***[6].

23. ***BALCO***[6], a decision of the Constitution Bench, did not involve any exclusive jurisdiction clause. It involved an international commercial arbitration and the Supreme Court was principally concerned, in the said case, with Section 2(2) of the 1996 Act, and its effect on the controversy before it. The Supreme Court observed that Section 2(2) operated to make Part I of the 1996 Act applicable only to arbitrations which took place in India. It was further held, in the said decision, that, the "seat of arbitration" as contractually determined, was the centre of gravity of the arbitral proceedings. Section 2(1)(e), the Constitution Bench held, was not relevant to the issue of whether Part I of the 1996 Act applied to arbitrations which took place outside India.

24. In any case, as already noted, this decision involved an international commercial arbitration, and the contract forming the subject matter of consideration therein did not contain any exclusive jurisdiction clause.

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[6] **(2012) 9 SCC 552**

25. The next decision of consequence, rendered by three Hon'ble Judges of the Supreme Court, is ***Swastik Gases Pvt. Ltd. v. Indian Oil Corporation Ltd.***[7].

26. Here, the contract between the parties did not fix the seat of arbitration at any particular location. It did, however, contain an exclusive jurisdiction clause, subjecting the contract to the jurisdiction of courts at Kolkata. In view of the existence of such an exclusive jurisdiction clause, the Supreme Court held that, though the cause of action arose entirely within Rajasthan, as courts at Kolkata had been conferred exclusive jurisdiction, by the contract between the parties, the jurisdiction to deal with all the matters pertaining to the arbitration agreement would vest with the courts at Kolkata and the jurisdiction of courts in Rajasthan would be completely excluded.

27. Though Mr. Srivastava has chosen to dispute the applicability of this decision, on the ground that there was, in that case, no contractual covenant fixing the seat of arbitration, I deem it appropriate, nevertheless, to reproduce para 22 of the report, thus:

> "**22.** In ***Rajasthan State Electricity Board***[8], two clauses under consideration were clause 30 of the general conditions of the contract and clause 7 of the bank guarantee. Clause 30 of the general conditions of the contract stipulated, "the contract shall for all purposes be construed according to the laws of India and subject to jurisdiction only at Jaipur in Rajasthan courts only……" and clause 7 of the bank guarantee read, "all disputes arising in the said bank guarantee between the Bank and the Board or between the supplier or the Board pertaining to this guarantee shall be subject to the courts only at Jaipur in Rajasthan". In light of the above

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[7] **(2013) 9 SCC 32**

[8] **(2009) 3 SCC 107**

clauses, the question under consideration before this Court was whether Calcutta High Court where an application under Section 20 of the Arbitration Act, 1940 was made had territorial jurisdiction to entertain the petition or not. Following ***Hakam Singh***[9], ***A.B.C. Laminart***[10] and ***Hanil Era Textiles***[11] , this Court in paragraphs 27 and 28 (pgs. 114-115) of the Report held as under:

> "27. *The aforesaid legal proposition settled by this Court in respect of territorial jurisdiction and applicability of Section 20 of the Code to the Arbitration Act is clear, unambiguous and explicit. The said position is binding on both the parties who were contesting the present proceeding. Both the parties with their open eyes entered into the aforesaid purchase order and agreements thereon which categorically provide that all disputes arising between the parties out of the agreements would be adjudicated upon and decided through the process of arbitration and that no court other than the court at Jaipur shall have jurisdiction to entertain or try the same.* In both the agreements in Clause 30 of the general conditions of the contract it was specifically mentioned that the contract shall for all purposes be construed according to the laws of India and *subject to jurisdiction only at Jaipur in Rajasthan courts only* and in addition in one of the purchase order the expression used was that the court at Jaipur only would have jurisdiction to entertain or try the same.
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> 28. In the light of the aforesaid facts of the present case, the ratio of all the aforesaid decisions which are referred to hereinbefore would squarely govern and apply to the present case also. *There is indeed an ouster clause used in the aforesaid stipulations stating that the courts at Jaipur alone would have jurisdiction to try and decide the said proceedings which could be initiated for adjudication and deciding the disputes arising between the parties with or in relation to the aforesaid agreements through the process of arbitration. In other words, even though otherwise the*

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[9] (1971) 1 SCC 286
[10] (1989) 2 SCC 163
[11] (2004) 4 SCC 671

> *courts at Calcutta would have territorial jurisdiction to try and decide such disputes, but in view of the ouster clause it is only the courts at Jaipur which would have jurisdiction to entertain such proceeding*."
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> (Emphasis supplied)

28. Yet another decision, which dealt with a contract involving an exclusive jurisdiction clause with no other clause fixing seat of arbitration elsewhere, was ***B. E. Simoes Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd***[12]. The agreement between the parties, in the said case, for raising mines located in Goa, expressly stipulated that "the courts at Goa shall have exclusive jurisdiction". A Section 9 petition was filed, by the respondent (before the Supreme Court) in the court of the District Judge, Raipur. Relying on the afore-extracted passages from ***Swastik Gases***[7], the Supreme Court held that Clause 13 of the agreement (which contained the afore-extracted exclusive jurisdiction dispensation) operated to oust the jurisdiction of the District Judge, Raipur, and conferred exclusive jurisdiction, to entertain all petitions relating to the arbitration, as on courts at Goa.

29. ***Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd***[13] dealt with a situation in which there was a clause fixing the seat of arbitration as well as a clause conferring exclusive jurisdiction, but the courts conferred jurisdiction, under either clause, were the courts in Bombay. The agreement stipulated that the arbitration would be conducted at Bombay, which, according to the Supreme Court, fixed Bombay as the "seat of arbitration" and conferred exclusive jurisdiction, *qua* disputes under the agreement, on courts in Bombay.

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[12] **(2015)12 SCC 225**

The jurisdiction of courts at Bombay to entertain the petition was, nevertheless, sought to be questioned by placing reliance on Section 2(1)(e) of the 1996 Act, as the cause of action had arisen outside the jurisdiction of courts at Bombay. The Supreme Court held that, once the agreement fixed the seat of arbitration at Bombay, the place where the cause of action arose, and Section 2(1)(e)of the 1996 Act, lost their relevance altogether.

30. In this case, however, it merits reiteration that there was no conflict between the seat of arbitration clause and the clause fixing the exclusive jurisdiction, as both conferred jurisdiction on courts at Bombay.

31. The next decision, in the precedential queue, is ***Brahmani River Pellets Ltd. v. Kamachi Industries Ltd***[14]. In this case, the cause of action, pertaining to the disputes between the parties, arose partly at Bhubaneswar and partly at Chennai. The agreement between the parties, however, provided for Bhubaneswar as the venue of arbitration. The Supreme Court held that though the agreement used the word "venue", a proper reading of the agreement indicated that Bhubaneswar was the seat of arbitration. In view thereof, it was held that the jurisdiction of Chennai courts, to entertain the petition, stood ousted and that courts at Bhubaneswar alone had jurisdiction to deal with the matter. Here, again, there was no exclusive jurisdiction clause, in the agreement between the parties.

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[13] **(2017) 7 SCC 678**
[14] **2019 SCC OnLine SC 929**

32. We proceed, next, to ***BGS SGS Soma JV v. NHPC Ltd*** [15].

33. This case dealt with a project, located in the State of Assam and Arunachal Pradesh. The agreement provided for reference of any dispute, to arbitration to be held at New Delhi/Faridabad. The arbitral proceedings took place at New Delhi, and the award was also delivered at New Delhi.

34. The award was sought to be challenged under Section 34 of the 1996 Act, before the learned District and Sessions Judge, Faridabad, from whom it was later transferred to the Special Commercial Court, Gurugram. The Gurugram court returned the application to the petitioner for presentation before the appropriate court having jurisdiction in New Delhi.

35. NHPC, i.e. the respondent before the Supreme Court, challenged the decision by way of an appeal under Section 34 of the 1996 Act, before the High Court of Punjab and Haryana. The High Court held that Delhi was only a convenient venue, for holding of the arbitral proceedings and could not be regarded as the "seat" of the arbitration. Part of the cause of action having, therefore, arisen in Faridabad, the High Court invoked Section 2(1)(e) of the 1996 Act, to hold that the District Judge at Faridabad possessed jurisdiction to decide the petition of NHPC.

36. BGS SGS Soma appealed to the Supreme Court. Relying on its earlier decisions, the Supreme Court held that, as the arbitral

[15] **(2020) 4 SCC 234**

proceedings, per contract, were conducted at New Delhi and Faridabad, both New Delhi and Faridabad constituted "seats" of arbitration. Nevertheless, it was held, towards the conclusion of the judgment that, as the proceedings had been held at New Delhi and the award had also been thus signed at New Delhi, the parties had consciously chosen New Delhi as the "seat" of arbitration under Section 20(1) of the 1996 Act. In view thereof, it was held that courts at New Delhi alone would have exclusive jurisdiction to deal with the challenge to the award and, consequently, the Section 34 petition was directed to be presented before the competent courts at New Delhi.

37. A detailed analysis of all the above decisions is to be found in the recent judgment of this Court in ***Big Charter Pvt. Ltd. v. Ezen Aviation Pty. Ltd***[16]**.**

38. A reading of the aforesaid decisions, no doubt, reveals that pre-eminence has been accorded by the Supreme Court to the contractually determined "seat of arbitration", while deciding the issue of the court which would be possessed of territorial jurisdiction to deal with petitions relating to the arbitral proceedings, whether preferred under Section 9, 11 or 34. As already noticed hereinabove, however, none of these decisions involved a case in which the contract contained an exclusive jurisdiction clause and a separate seat of arbitration clause, *and the two clauses conferred jurisdiction on courts located at different territorial locations*.

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[16] MANU/DE/1916/2020

39. In the present case, the situation is more involved , as the exclusive jurisdiction clause specifically confers *Section 11 jurisdiction* on courts of competent jurisdiction at Haryana, as per the 1996 Act – which, therefore, would mean the High Court of Punjab and Haryana.

40. Mr. Yash Srivastava, learned Counsel for the petitioner, besides emphasising the fact that pre-eminence has been accorded by the Supreme Court, to the seat of arbitration, as fixed by the contract between the parties, and on Courts having territorial jurisdiction over such seat, also places particular reliance on Section 42 of the 1996 Act, which reads as under :

> "**42. Jurisdiction. –** Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

Mr. Srivastava devises, from this provision, an involved argument. He contends that, in view of Section 42, all proceedings, relating to the arbitration agreement, would have to be preferred before one Court. If Section 11 jurisdiction, in the present case, is to be conferred on the High Court of Punjab and Haryana, he submits a peculiar and anomalous situation would result, as Section 42 would then come into play, and require all subsequent proceedings, relating to the arbitration, to be preferred before the competent Courts at Haryana. This, then, he submits would directly be in conflict with the fixation of

the seat of arbitration, by the present contract, at New Delhi. As such, he submits there is an apparent conflict between the exclusive jurisdiction clause and the seat of arbitration clause, in the present case. This conflict according to Mr. Srivastava, has to be reconciled by harmonising the two clauses keeping in view Section 42 of the 1996 Act. The only way of doing this, he submits, would be to confer Section 11 jurisdiction on this Court. Conferment of such jurisdiction, he points out, would result in Section 34 jurisdiction also vesting with this Court (by operation of Section 42), which would be entirely in accord with the fixing of the seat of arbitration at New Delhi.

41. I may, immediately, deal with this argument, before proceeding further. The argument, though undoubtedly attractive at first blush, fails, on a deeper analysis, to pass muster. The submission of Mr. Srivastava proceeds on the premise that, were an arbitral award to be passed, and were such award to be challenged, that challenge would also have to be preferred before the Courts at Haryana, in view of Section 42 of the 1996 Act – if Section 11 jurisdiction is to be conferred, by this Court, on the High Court of Punjab and Haryana. According to Mr. Srivastava, this would conflict with the seat of arbitration clause in the agreement.

42. In the first place, it would be premature for me to enter into such a controversy, seized, as I am, with the issue of fixation of determining the situs of the Court which could exercise Section 11 jurisdiction and appoint the arbitrator. *Stricto sensu*, therefore, I am not required to consider which Court would have jurisdiction to

entertain a Section 34 challenge, assuming an arbitral award is passed, with which one, or the other, party is aggrieved.

43. Be that as it may, the submission, of Mr. Srivastava, that, if Section 34 jurisdiction is to be conferred on Courts at Haryana (which, according to him would be the inevitable consequence of granting Section 11 jurisdiction to courts at Haryana, in view of the mandate of Section 42), an anomalous situation would arise, in view of the fixation of the seat of arbitration at New Delhi, may not be entirely correct. As already noted hereinabove, the decisions of the Supreme Court, conferring jurisdiction over the arbitral proceedings, on courts having territorial jurisdiction over the contractually fixed seat of arbitration, do not deal with situations in which there was a separate exclusive jurisdiction clause, conferring jurisdiction on courts located elsewhere. Even if Section 34 jurisdiction were, therefore, to be conferred on courts at Haryana, that may not necessarily conflict with the legal position as enunciated in the decisions cited hereinabove. Hypothetically, it may be possible to argue that, as Section 11 jurisdiction has been conferred on the High Court of Punjab and Haryana, the mandate of Section 42 would necessarily require any challenge to the award, under Section 34, to be also preferred before Courts at Haryana.

44. The submission, of Mr. Srivastava, that this would conflict with the seat of arbitration dispensation in the lease deed, may not be correct, in view of the separate exclusive jurisdiction clause, conferring jurisdiction on Courts located elsewhere than at the seat of arbitration.

45. At the cost of reiteration, it may be mentioned that none of the decisions cited hereinabove, deal with the situation in which the seat of arbitration is fixed at place A, and courts at place B are conferred exclusive jurisdiction to deal with disputes under the contract. The view that the "seat of arbitration clause" has to be treated as akin to an exclusive jurisdiction clause, has been expressed, by the Supreme Court, in cases in which there is no separate exclusive jurisdiction clause, conferring exclusive jurisdiction on courts located elsewhere. Where such a separate exclusive jurisdiction clause, conferring exclusive jurisdiction on courts other than the court having jurisdiction over the contractual seat of arbitration, exists, it may not be proper, in my view, to grant pride of place, to the seat of arbitration clause, over the exclusive jurisdiction clause. None of the decisions of the Supreme Court, cited hereinabove and to which my attention was invited, so directs. This position would stand underscored in a situation, such as the present – which appears to be *sui generis* – in which the exclusive jurisdiction clause is not generally worded, qua all disputes under the agreement, but is specific with respect to appointment of the arbitrator, i.e. specific with respect to Section 11 jurisdiction. Adhering to the said contractual dispensation would not, therefore, in my view, militate against the opinion expressed by the Supreme Court in the aforesaid decisions, as was sought to be suggested by Mr. Srivastava.

46. Having so observed, I hasten to clarify that I am not proposing to venture any final opinion on the appropriate forum, before which

any challenge, to the arbitral award that would come to be passed, under Section 34 of the 1996 Act, would have to be laid. This aspect, strictly speaking, does not arise for consideration before me and would have to be examined by the courts which is seized with the Section 34 challenge, if and when such a challenge is laid.

47. There is, however, one decision of the Supreme Court, in which the seat of arbitration was fixed at one location, and exclusive jurisdiction was conferred on courts at another, which did not have territorial jurisdiction over the seat of arbitration. This decision, properly read, in my view, does throw some light on the approach to be adopted in a case such as the present. The decision in question is ***Mankastu Impex Pvt. Ltd. v. Airvisual Ltd***[17]**.**

48. In ***Mankastu Impex Pvt. Ltd.***[17], the place of arbitration, was contractually fixed at Hong Kong. In that case, Clause 17 of the Memorandum of Understanding (MOU) between the parties which provided for arbitration for resolution of the disputes between them, read thus :

> "**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.

[17] 2020 SCC OnLine SC 301

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."

49. The issue before the Supreme Court was with respect to the courts having jurisdiction to entertain a Section 11 petition, as in the present case. The Supreme Court held that the fixing of Hong Kong as the "place of arbitration" resulted *ipso facto* in Hong Kong becoming the "seat of arbitration". On the attention of the Supreme Court being invited to Clause 17.1, which conferred jurisdiction on courts at New Delhi, in respect of the MOU, the Supreme Court observed, in paras 25 and 27 of the report, thus :

> "**25.** Clause 17.1 of MoU stipulates that MoU is governed by the laws of India and the courts at New Delhi shall have jurisdiction. The interpretation to Clause 17.1 shows that the substantive law governing the substantive contract are the laws of India. The words in Clause 17.1, "*without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction*" has to be read along with Clause 17.3 of the agreement. As per Clause 17.3, the parties have agreed that the party may seek provisional, injunctive or equitable remedies from a court having jurisdiction before, during or after the pendency of any arbitral proceedings. In ***BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810***, this Court held that : (SCC p. 636, para 157)
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> > "157. … on a logical and schematic construction of the Arbitration Act, 1996, the Indian courts do not have the power to grant interim measures when the seat of arbitration is outside India."

If the arbitration agreement is found to have seat of arbitration outside India, then the Indian courts cannot exercise supervisory jurisdiction over the award or pass interim orders. *It would have, therefore, been necessary for the parties to incorporate Clause 17.3 that parties have agreed that a party may seek interim relief for which the Delhi courts would have jurisdiction.*

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27. The words in Clause 17.1, "*without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction*" do not take away or dilute the intention of the parties in Clause 17.2 that the arbitration be administered in Hong Kong. The words in Clause 17.1 do not suggest that the seat of arbitration is in New Delhi. Since Part I is not applicable to "international commercial arbitrations", *in order to enable the parties to avail the interim relief, Clause 17.3 appears to have been added.* The words, "*without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction*" in Clause 17.1 is to be read in conjunction with Clause 17.3. Since the arbitration is seated at Hong Kong, the petition filed by the petitioner under Section 11(6) of the Act is not maintainable and the petition is liable to be dismissed."

50. As such, the Supreme Court held that once the seat of arbitration has been fixed as Hong Kong, *if exclusive jurisdiction, for obtaining interim relief, was required to be vested in courts at New Delhi, the agreement had necessarily to specifically so state*. It was for this reason, opined the Supreme Court, that Clause 7.3 had been particularly inserted in the agreement which, apart from the exclusive jurisdiction clause i.e. Clause 7.1, *specifically provided for recourse to courts at New Delhi, for obtaining interim relief.* That clause, according to the Supreme Court, however, could be of no assistance in determining the controversy before it, as the Supreme Court was

concerned not with an application under Section 9, but with an application for appointment of an arbitrator under Section 11. *Exclusive jurisdiction to seek recourse to courts at New Delhi having been contractually restricted to applications for obtaining interim relief, the Supreme Court held that the locus of the court possessing Section 11 jurisdiction would have to be determined on the basis of the contractually fixed seat of arbitration i.e. Hong Kong*.

51. Extrapolating this reasoning to the facts of the present case, the agreement between the parties has contractually conferred jurisdiction, *for appointment of the arbitrator*, on competent courts in the State of Haryana. In other words, Section 11 jurisdiction has, contractually been specifically conferred on the High Court of Punjab and Haryana. Once such a specific conferral takes place, by the exclusive jurisdiction clause framed by the parties themselves, in my view the principles enunciated in ***Mankastu Impex Pvt. Ltd.***[12] would operate to vest such exclusive jurisdiction, to that extent, only on such courts and on no other. In other words, once exclusive jurisdiction, qua appointment of arbitrator under Section 11 has been vested in courts at Haryana, by agreement between the parties, that clause has to be accorded due respect, and this court would not, therefore, be entitled to exercise Section 11 jurisdiction in the matter.

52. In view thereof, I specifically queried, learned Counsel for the parties, as to whether acceptance of the stand pleaded by them would not result in this Court effectively nullifying the exclusive jurisdiction clause contained in the lease deed, and arriving at a decision contrary

to such clause. Learned Counsel candidly accepted that this may be the result, if their arguments were accepted, but submitted that there was no option but to so hold, in view of the fixation of the seat of arbitration at New Delhi, read with Section 42 of the 1996 Act.

53. As already observed hereinabove, I am not inclined to agree with this submission. Once the agreement between the parties specifically confers Section 11 jurisdiction, for appointment of an arbitrator, on courts at Haryana, this Court, in my view, would be doing violence to the contractual covenant, if it were to exercise such jurisdiction. There is no judgment of the Supreme Court, to which my attention has been invited, which permits a Court to exercise jurisdiction contrary to the exclusive jurisdiction clause in the agreement between the parties. Rather, the decisions in ***Swastik Gases Pvt. Ltd.***[7] and ***Brahmani River Pellets Ltd.***[14] – both of which have been approvingly cited in ***BGS SGS Soma JV***[15] – emphasised the need to adhere to the exclusive jurisdiction clause. At the cost of repetition yet again, all decisions, which decide the question of territorial jurisdiction on the basis of the seat of arbitration as delineated in the agreement, deal with contracts in which there is no separate exclusive jurisdiction clause, fixing jurisdiction elsewhere. Where such a clause exists, and, especially, where such a clause fixes Section 11 jurisdiction with courts located elsewhere, I am not inclined to hold that this Court can, contrary to the explicit words and intent of said clause, exercise Section 11 jurisdiction and appoint an arbitrator.

54. In this context, the judgment which was cited by Mr. Sharma, i.e. ***Ramandeep Singh Taneja***[5], is useful. The arbitration agreement between the parties, in that case, read thus:

> "In the event of any dispute/differences between the Company and/or the intending Allottee(s)/ buyer in ARB.P.No.444/2017 Page 1 respect of any of the terms and or interpretation thereof or otherwise the same shall be referred to for adjudication to the sole arbitrator to be appointed by the Company. The said arbitrator shall decide the issue(s) as per the Arbitration and Conciliation Act, 1996 or any amendments thereto. The venue of the arbitration for the convenience shall be the office of the Company. The decision of the Arbitrator shall be final and binding on the parties to the arbitration. The jurisdiction of all disputes will be Delhi only. The venue for arbitration proceedings will be at Faridabad, Haryana."

Mr. Sharma invited my attention to para 9 of the judgment, which reads as under:

> "**9.** In the present case we are faced with the situation where one part of the agreement provides for exclusive jurisdiction to Courts of Delhi, while the other, due to the venue of arbitral proceedings, vests exclusive jurisdiction in Courts in Faridabad, State of Haryana. As was held by the Supreme Court in the judgment of ***Bharat Aluminium Company (Supra)***, a distinction is to be drawn between "Subject-Matter of the Arbitration" and "Subject-Matter of the Suit". For the purposes of identifying the Court, which shall have supervisory control over the arbitral proceedings, it would be the Court where the 'Subject-Matter of Arbitration' is situated that would have precedence over the Court where the "Subject-Matter of the Suit" is situated. *In this case, therefore, the exclusive jurisdiction conferred due to venue of arbitration would take precedence over the exclusive jurisdiction vested over the Subject-Matter of the suit in the Courts at Delhi*. There are various provisions in the Act where the Court has to exercise supervisory jurisdiction over the arbitration proceedings. These include not only Section 11 of the Act but also Sections 14, 27, 29A, 34 and 37 of the Act. It is, therefore, evident that the Court having jurisdiction over the arbitration proceedings would have precedence over the

> Court which has jurisdiction over the Subject-Matter of the suit or where the cause of action has arisen. The purported conflict between the two parts of Clause 24 quoted above can be resolved by holding that where the disputes are to be adjudicated without reference to the arbitration, Courts at Delhi would have exclusive jurisdiction, however, where they have to be resolved through arbitration, venue being at Faridabad, Haryana, the Courts at Faridabad, State of Haryana, would have exclusive jurisdiction."
>
> (Italics and underscoring supplied)

55. Where, therefore, the seat of arbitration is at place X, and exclusive jurisdiction *over the subject matter of the suit* is conferred on courts at place Y, a petition under Section 11 would unquestionably lie before the courts at place X. The present case, however, is different, as the exclusive jurisdiction conferred by the arbitration agreement *is not in respect of the subject matter of the suit but specifically for appointment of an arbitrator*. It would be doing violence to the said clause, therefore, if this Court were to treat the exclusive jurisdiction clause as limited to the subject matter of the suit, and exercise Section 11 jurisdiction contrary to the mandate thereof.

56. It is trite that a court cannot re-write a contract between the parties. Where the contract between the parties, as in the present case, confers exclusive jurisdiction, for appointment of an arbitrator, on courts at Haryana, any petition, under Section 11, would have to be preferred before the High Court of Punjab and Haryana, and not before this Court. There is no decision, to which my attention has been invited, which persuades me to take a different view.

57. Mr. Srivastava points out that the judgements of this Court

namely ***Devyani International Ltd.***[2] and ***N.J. Construction***[3] (rendered by a learned Single Judge in each case), however, did deal with situations in which exclusive jurisdiction was vested with Courts situated elsewhere than the contractually fixed seat of arbitration. However, the wording of the exclusive jurisdiction clause, in these cases, was conspicuously different from that in the present case. In ***Devyani International Ltd***[2] it was ordained, in the contract that "Courts at Mumbai shall have the exclusive jurisdiction *to entertain the dispute or suit arising out of or in relation to this agreement.*" Similarly, in ***N.J. Construction***[3], it was stipulated, in the arbitration agreement, that "a question or dispute arising out of or in anyway *connected with this agreement and contract* <u>*shall be deemed to have arisen*</u> in Guwahati and only the Guwahati courts shall have the jurisdiction to determine the same". As such, neither of these cases dealt with a situation in which the contract specifically conferred jurisdiction, for appointment of the arbitrator, on courts at a particular location, as in the present case. Further, ***N.J. Construction***[3]***,*** in fact, created a legal fiction, by deeming disputes to have arisen at Guwahati and, as a result thereof, conferring jurisdiction on Courts at Guwahati, to deal therewith. These decisions, cannot, therefore, be of assistance in the present case.

58. ***Aarka Sports Management Pvt. Ltd***[4] – on which, too, Mr. Srivastava relied – did not deal with any conflict between the exclusive jurisdiction clause and the seat of arbitration clause, for the simple reason that there was no seat of arbitration clause. The contract, however, stipulated that the jurisdiction of the agreement

would be exclusively "in the Courts of New Delhi, India". In this background, this Court held that, as Delhi was not the seat of arbitration, and no cause of action arose at Delhi, this Court would not have jurisdiction to deal with the matter. Though Mr. Srivastava places reliance on the general principle, enunciated in para 24 of the report in the said case, to the effect that "once the seat is determined, the Court of that place shall have exclusive jurisdiction to deal with all matters relating to the arbitration agreement between the parties", that principle, in my view, would necessarily be required to be applied with caution in a case such as the present, where exclusive jurisdiction, *qua a particular relief – specifically, appointment of the arbitrator – available under the 1996 Act*, is contractually conferred on courts located elsewhere than at the seat of arbitration.

59. This is the position which, according to me, emanates from ***Mankastu Impex Pvt. Ltd.***[12] and which, necessarily, must follow in the present case as well. Once the contract between the parties has fixed Courts at Haryana, *as having jurisdiction to appoint the arbitrator,* any such application under Section 11 of the 1996 Act, has necessarily to be preferred before the High Court of Punjab and Haryana and not before this Court. In view of such a particular and specific contractual dispensation, which reflects the intent of the parties and which the court cannot rewrite[18], I am of the opinion that the stipulation, in the Lease Deed, that the place of arbitration is New Delhi, cannot confer Section 11 jurisdiction on this Court.

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[18] First Flight Courier Ltd v. Indian Express Newspapers (Bombay) Ltd, MANU/MH/0594/2001 authored by Dr D.Y. Chandrachud, J. (as he then was)

60. Mr. Srivastava seeks to distinguish the decision in ***Mankastu Impex Pvt. Ltd.***[12] on the ground that it dealt with international commercial arbitration, and proceeded on the basis that the curial law governing the arbitration, would be the law applicable in India. I have relied on the decision in ***Mankastu Impex Pvt. Ltd.***[12] only for the proposition that, if jurisdiction, *qua* any particular provision or relief available under the 1996 Act, is to be exercised by Courts located elsewhere than at the seat of arbitration, such jurisdiction has to be specifically contractually conferred. The Supreme Court noticed, in that case, that para 7.3 of the contract between the parties conferred specific jurisdiction, for obtaining interim relief, on courts at New Delhi. Notably, the Supreme Court did not find this stipulation to be illegal, or conflicting with Section 42 of the 1996 Act. Neither did the Supreme Court find this contractual dispensation 2 conflict with the seat of arbitration clause, fixing the seat of arbitration at Hong Kong. Rather, the Supreme Court held that, as jurisdiction of Courts at New Delhi was specifically conferred only with respect to obtaining of interim relief, it would not extend to a petition under Section 11 for appointment of an arbitrator. In the present case, however, the exclusive jurisdiction clause is specifically with respect to appointment of an arbitrator and relates therefore, directly to Section 11 of the 1996 Act. As such, the fact that ***Mankastu Impex Pvt. Ltd.***[12] may have been dealing with an international commercial arbitration, or that the curial law, in that case was the law applicable in India, cannot affect the applicability of the said decision to the controversy in issue before me.

61. In view thereof, I am constrained to express my disagreement with the submission, advanced by both learned Counsel at the Bar, that this Court would be possessed of territorial jurisdiction to entertain the present petition.

62. I am conscious of the fact that Clause 25.4 of the lease deed, in the present case, stipulates that "either Party *may* approach a court of competent jurisdiction at Haryana for appointment of the Sole Arbitrator". The use of the word "may", in my view, cannot, however, confer the discretion, on the petitioner, to choose the court, before which to file the Section 11 petition. Conferment of such discretion would, clearly, reduce the contractual stipulation to a redundancy, and render it otiose. One may also refer, usefully, in this context, to the *expressio unius est exclusio alterius* principle as, once "courts and Haryana" were conferred, contractually, with the jurisdiction to decide the petitions for appointment of the arbitrator, the jurisdiction of courts, elsewhere, stood excluded by implication. For an instance of the application of this principle, one need look no further than the judgement of the Constitution bench in ***BALCO***[6], and the manner in which the said decision interpreted Section 2(2) of the 1996 Act. It was sought to be contended, before the Supreme Court, in that case, that, as Section 2(2) merely stated that Part I of the 1996 Act would apply to arbitration is held in India, without using the word "only", before the word "held", it did not exclude the applicability of Part I to foreign arbitrations. This argument was negatived, by the Supreme Court, applying the *expressio unius est exclusio alterius* principle, and holding, consequently, that the absence of the word "only", in Section

2(2) would make no difference. It was held that, once it was stipulated that Part I applied to arbitrations held in India, by implication, the applicability of the said Part stood excluded, in the case of foreign arbitrations. By analogy, once Clause 25.4 permitted the parties, to the lease deed, to approach courts of competent jurisdiction, in Haryana, to appoint the arbitrator, the discretion, to approach courts outside Haryana, for the said purpose, stood excluded by implication. The present petition, having been filed before this Court, for the said purpose is, therefore, in my view, incompetent.

63. For want of territorial jurisdiction, and without entering into the merits of the relief sought in the petition, this petition is, therefore, dismissed. Needless to say, this order would not prevent the petitioner from moving the appropriate court, for appointment of an arbitrator, as this Court has not expressed any opinion on the merits of the petition.

64. At this stage, Mr. Sharma, for the respondent, submits that he has instructions to refute the claims of the petitioner, and to contend that termination of the lease, by the petitioner, was illegal. As I am not entering into the merits of the petition, this submission is merely recorded and no finding is returned thereon.

65. There shall be no orders as to costs.

C. HARI SHANKAR, J.

NOVEMBER 17, 2020
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