M/s MECON Limited Vs M/s K.C.S. Pvt. Ltd

Court: Jharkhand High Court

Date of Decision: Feb. 4, 2025

Acts Referred: Constitution of India, 1950 â€" Article 226, 227
Code of Civil Procedure, 1908 â€" Section 151, Order 7 Rule 10
Commercial Courts Act, 2015 â€" Section 8
Arbitration and Conciliation Act, 1996 â€" Section 2(1)(e). 2(6), 11, 11(6), 16, 17, 18, 19, 20, 21, 34, 37, 42

Hon'ble Judges: Sanjay Kumar Dwivedi, J

Bench: Single Bench

Advocate: Shresth Gautam, Yogendra Yadav, Suvendu Kumar Ray, Bhaskar Kumar

Final Decision: Allowed

Judgement

Sanjay Kumar Dwivedi, J

1. Heard Mr. Shresth Gautam, learned counsel for the petitioner and Mr. Suvendu Kumar Ray, learned counsel for the opposite party.

2. The petition has been filed under Article 227 of the Constitution of India praying therein to quash the order dated 30.11.2023, contained in

Annexure-4 of the petition passed in Commercial Arbitration Case No.13 of 2023 by the learned Additional Judicial Commissioner-III cum Presiding

Officer, Commercial Court, Ranchi, by which, the learned Commercial Court, Ranchi has dismissed the application filed by the petitioner under

Section 34 of the Arbitration and Conciliation Act, 1996 (for the sake of brevity hereinafter to be referred to as Ã¢â‚¬Ëœthe Act, 1996Ã¢â‚¬) on the ground that

since in the present case, the learned Sole Arbitrator was appointed by the HonÃ¢â‚¬â„¢ble Orissa High Court, therefore, the learned Commercial Court,

Ranchi does not have the jurisdiction to proceed with the application for setting aside the award. The further prayer is made to hold and declare that in

the present case, in light of the exclusive jurisdiction clause contained in the contract entered into between the parties and the clear intention of the

parties to subject the arbitration proceedings to the courts in Ranchi, only the courts in Ranchi, Jharkhand shall have jurisdiction to entertain any

application arising out of and in connection with the instant arbitration proceedings. The prayer is also made to stay the further proceedings in

connection with Execution Case No.186 of 2023, pending in the Court of the learned Civil Judge, S.D. Commercial Court, Cuttack, during pendency of

this petition.

3. Mr. Shresth Gautam, learned counsel for the petitioner submitted that the petitioner is a Central Public Sector Undertaking, operating under the

aegis of Ministry of Steel, Government of India and is engaged in the business of providing consultancy and engineering services. He submitted that

the opposite party is a private limited company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of

manufacturing, construction and civil/mechanical engineering. He further submitted that certain disputes had arisen between the petitioner and

opposite party with regard to the contract that was entered into between the parties.

4. He then submitted that a notice inviting tender was floated by the petitioner bearing Invitation to Tender No.11.41.A22P/ERN-R/Pkg No.

SE752/047 dated 09.10.2009 for execution of works pertaining to erection, testing and commissioning of Mechanical Plant and Equipment, Refractory,

Building and Technological Structures, Piping etc. including unloading, storage, transportation of material at site and supply of auxiliary materials and

CGI Sheeting required for 7M tall new Coke Oven Battery No.6 at Rourkela Steel Plant, Rourkela as per Technical Specifications. He submitted that

the opposite party formed a consortium with one M/s Rosy Enterprises and submitted its bid before the concerned authorities of the petitioner and

after due process of completing the tendering, the work order was placed upon the Consortium on 14.01.2010. The work order was issued in the

nature of item rate contract and the tentative quantities were furnished in the tender document itself. He also submitted that the opposite party

furnished erection rates of their own in their offer against those quantities. He submitted that as per the agreed terms of the tender, the work front

was to be made available to the opposite party progressively for completion of erection work, during the currency of the said work order. He then

submitted that as per Clause 4.0 of the work order, the completion schedule for works under the tender was based on fulfillment of different

milestones and starting date was to commence only after handing over of Nozzle Deck to the contractor i.e. the consortium. He submitted that

however in the midst of process of completion of the work, the dispute arose between the parties and opposite party addressed a letter dated

29.12.2011 to M/s Rosy Enterprises by which the opposite party advised its own consortium partner to stop completion of the balance work. He

submitted that another letter dated 23.02.2012 was issued by the opposite party by which it was informed that it had decided to withdraw from its

earlier commitment made vide letter dated 11.02.2012. He submitted that in view of that, the opposite party completely failed in executing the works.

He submitted that the petitioner tried to resolve the matter and a meeting was called on 30.04.2012, whereunder the modality of payment was agreed

upon the petitioner and opposite party and other consortium partner and it was decided that the dispute will be settled amicably between the parties.

He referred to the other communications and submitted that the dispute arose between the parties and the opposite party being aggrieved by the

decision of the petitioner and in the interest of project, the work was entrusted to M/s Rosy Enterprises, which was jointly liable with the opposite

party under the consortium, initiated arbitration proceeding under the work order.

5. Learned counsel for the petitioner submitted that the opposite party approached the HonÃ¢â‚¬â„¢ble Orissa High Court by way of filing an application

for appointment of the Arbitrator under Section 11(6) of the Act, 1996, which was registered as ARBP No.20 of 2015. In the said proceeding, the

HonÃ¢â‚¬â„¢ble Orissa High Court vide order dated 11.01.2019 appointed HonÃ¢â‚¬â„¢ble Mr. Justice (Retired) Sri Tapen Sen as the learned Sole Arbitrator

in the instant case, thereafter, the learned Arbitrator proceeded with the arbitral proceedings and rendered his award on 26.03.2023, which was

impugned under Section 34 of the Act, 1996 before the learned Commercial Court, Ranchi. He submitted that the opposite party appeared before the

learned Commercial Court, Ranchi in Commercial Arbitration Case No.13 of 2023 and consequently the opposite party filed an application dated

13.09.2023 under Section 151 of the Code of Civil Procedure, 1908 challenging the maintainability of application under Section 34 of the Act, 1996 on

the ground that since the application for appointment of the Arbitrator under Section 11(6) of the Act, 1996 was filed before the HonÃ¢â‚¬â„¢ble Orissa

High Court, therefore, in light of Section 42 of the Act, 1996, courts in Orissa shall have jurisdiction to hear the matter and secondly since the

extension of time for completion of arbitration proceeding was granted by the Hon'ble Orissa High Court, thus the courts in Orissa shall have the

jurisdiction to hear any application under Section 34 of the Act, 1996. He submitted that the learned Commercial Court, Ranchi after hearing the

parties vide order dated 30.11.2023 has been pleased to dismiss the application filed under Section 34 of the Act, 1996 on the ground that the same is

not maintainable as initial appointment of the learned Sole Arbitrator and the consequent extension of mandate was made by the Hon'ble Orissa High

Court. He submitted that the said order was challenged by the petitioner before the Division Bench of this Court in Commercial Appeal No.01 of

2024, however, the said appeal was withdrawn by the petitioner with liberty to pursue the remedy available under the law vide order dated 12.04.2024

passed by the Division Bench of this Court, contained in Annexure-1A. He submitted that after withdrawal of the said appeal, the present C.M.P. has

been filed. He then submitted that the said appeal was withdrawn in light of the judgment of the Hon'ble Supreme Court in the case of BGS SGS

SOMA JV v. NHPC Limited, reported in (2020) 4 SCC 234 as in light of Section 13(1-A) of the Commercial Courts Act, 2015, the appeal shall lie

under Order XLIII of the CPC and under Section 37 of the Act, 1996. He then submitted that Section 11 of the Act, 1996 is independent and beyond

the purport of Section 2(1)(e) of the Act, 1996, which defines Court for the purpose of moving application under the provisions of the said Act.

6. Learned counsel for the petitioner submitted that the nature of power exercised under Section 11 of the Act, 1996 has been explained by the

Hon'ble Supreme Court in its decision in S.B.P. & Co. v. Patel Engineering Ltd., reported in (2005) 8 SCC 618 wherein it has been held that the

legislature intended to vest the power of appointment, separately and distinctly, upon the High Court in order to add the greatest credibility to the

arbitral process. By way of referring Section 42 of the Act, 1996, he submitted that with respect to an arbitration agreement, if any application under

this Part has been made in a Court, the Court alone shall have the jurisdiction over the arbitral proceedings. By way of referring Section 2(1)(e) of the

Act, 1996, he submitted that the Court means to exercise its ordinary original civil jurisdiction and having jurisdiction to decide the question forming the

subject-matter of the arbitration. He submitted that neither the Jharkhand High Court nor the Orissa High Court is having original civil jurisdiction. He

further submitted that the Court exercising power under Section 11 of the Act, 1996 cannot be termed as a Court for the purpose of provision of

Section 42. He then submitted that the Hon'ble Supreme Court has laid down that the scheme of appointment of Arbitrator under the Act, 1996 is to

be treated separately and distinct from the procedure governing arbitration under the said Act. He further submitted that it is no more res integra that

Section 42 of the Act, 1996 shall have no bearing upon the applications filed under Section 11(6) of the Act, 1996. He submitted that in view of that

only because Section 11(6) of the Act was applied by the Orissa High Court, that cannot be a ground that the jurisdiction is shifted to Orissa court.

7. Learned counsel for the petitioner then submitted that the seat of arbitration in the present case, as is expressly envisaged under the contract, is at

Ranchi and in view of that under the Act, 1996, an application for setting aside the arbitral award is maintainable only before the Courts at Ranchi. He

referred Clause 37.3 of the work order and submitted that the said clause clearly stipulates that the place of arbitration shall be at Ranchi. He

submitted that Clause 37.3 of the work order was taken note of by the Orissa High Court in the order dated 30.11.2018 while directing the parties to

appoint any retired Judge of the Jharkhand High Court as Arbitrator. By way of referring Clause 40, he submitted that the work order which also

incorporates the exclusive jurisdiction provision, clearly provides that the arbitration proceedings shall be subject to the exclusive jurisdiction of the

courts of Ranchi. He submitted that in view of above clause, in terms of the work order, it clearly postulates that the arbitration proceeding under the

said contract shall be subject to the exclusive jurisdiction of the courts of Ranchi and submitted that once the parties intended that the seat of

arbitration shall be at Ranchi, the contention of the opposite party that Ranchi court is not vested with the jurisdiction to adjudicate Section 34

application, is completely baseless, de hors the agreed terms of the contract and devoid of merit. He submitted that this aspect has been reiterated by

the Hon'ble Supreme Court in several judgments.

8. Learned counsel for the petitioner relied upon the judgment passed by the Hon'ble Supreme Court in the case of State of West Bengal v.

Associated Contractors, reported in (2015) 1 SCC 32 and submitted that Section 2(1)(e) of the Act, 1996 was considered in that judgment, wherein,

it has been held that Section 11 applications are not to be moved before the court as defined but before the Chief Justice either of the High Court or of

the Supreme Court, as the case may be, or their delegates. He submitted that in that case, it has been further held that Section 42 would not apply to

the applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or his delegate is not a Court as defined

under Section 2(1)(e) of the Act, 1996.

9. Learned counsel for the petitioner further relied upon the judgment passed by the Hon'ble Supreme Court in the case of Hindustan Construction

Company Limited v. NHPC Limited & another, reported in (2020) 4 SCC 310 and submitted that once the seat of arbitration is designated, such

clause then becomes an exclusive jurisdiction clause as a result of which only the courts where the seat is located would then have jurisdiction.

10. Learned counsel for the petitioner also relied upon the judgment passed by the Hon'ble Supreme Court in the case of Indus Mobile Distribution

Private Limited v. Datawind Innovations Pvt. Limited, reported in (2017) 7 SCC 678 and submitted that in that case also, it has been held that all

the disputes and differences are required to be made before the Court where the seat is defined under the agreement.

11. Learned counsel for the petitioner further relied upon the judgment passed by the Hon'ble Supreme Court in the case of Ravi Ranjan Developers

Pvt. Ltd. v. Aditya Kumar Chatterjee, reported in 2022 SCC OnLine SC 568 and submitted that even if the application under Section 11(6) of the

Act, 1996 is referred at Orissa, that cannot be a ground to go there as Section 42 is not attracted, as has been held in that case.

12. Learned counsel for the petitioner referred Section 20 of the Act, 1996 and submitted that the place of arbitration is defined there, wherein, it has

been said that 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. He submitted that in the agreement, the place of arbitration is at Ranchi and the seat is also defined at Ranchi as well as at

the jurisdiction of Ranchi. On these grounds, he submitted that the learned Commercial Court, Ranchi has wrongly held that Ranchi court has got no

jurisdiction only on the ground that Section 11(6) application was allowed by the Hon'ble Orissa High Court. He submitted that in view of that, the

impugned order may kindly be set aside and Section 34 petition may kindly be restored.

13. On the other hand, Mr. Suvendu Kumar Ray, learned counsel for the sole opposite party submitted that this C.M.P. itself is not maintainable. He

submitted that since the Commercial Appeal was withdrawn before the Division Bench of this Court and in view of that, the said order has attained

finality and, as such, the petitioner's remedy is elsewhere not under Article 227 of the Constitution of India. He has gone to the extent to submit that in

light of Section 11 of CPC, resjudicata will also apply. By way of referring Section 21 of the Act, 1996, he submitted that the dispute commenced on

the date on which a request for the dispute to be referred to arbitration is received by the opposite party. He submitted that in view of that, the

arbitration proceeding started on that occasion on the date the request was made to appoint the Arbitrator. He submitted that in light of Section 21 of

the Act, 1996, proceeding starts on the date of making an application and in view of that, in light of Section 42 of the Act, 1996, the jurisdiction of that

court is attracted.

14. Learned counsel for the opposite party further submitted that the impugned award was passed on 26.03.2023 and, thereafter, the petitioner filed

Commercial Arbitration Case No.13/2023 and on 13.09.2023, the present opposite party appeared and filed objection and on 30.11.2023, the Presiding

Officer of Commercial Court, Ranchi held that Ranchi court has got no jurisdiction and the same was challenged before this Court in Commercial

Appeal No.01 of 2024, which was dismissed as withdrawn vide order dated 12.04.2024. He submitted that on 28.06.2024, notice was issued in the

present case and the opposite party has appeared. He submitted that if the refusal is there on Section 34 of the Act, 1996, in light of Section 37 of the

Act, 1996, that is appealable order and revision will lie or the petitioner will have go to the higher Court and, as such, the petition under Article 227 of

the Constitution of India is not maintainable. He submitted that Section 2(1)(e) of the Act, 1996 defines the term 'court' and in view of the fact that in

light of Section 42, once the application is made under this Part, that Court is having exclusive jurisdiction of arbitral proceeding and in view of that, the

learned Commercial Court has rightly passed the said order. He submitted that since the petition under Section 11(6) of the Act, 1996 was decided by

the Hon'ble Orissa High Court, that court is only having jurisdiction. To buttress this argument, he relied upon paragraphs 96 to 99 of the judgment

passed in the case of BGS SGS SOMA JV (supra), which read as under:

Ã¢â‚¬Å“96. We have extracted the arbitration agreement in the present case (as contained in Clause 67.3 of the agreement between the parties) in para 3 of this

judgment. As per the arbitration agreement, in case a dispute was to arise with a foreign contractor, Clause 67.3(ii) would apply. Under this sub-clause, a dispute

which would amount to an Ã¢â‚¬Å“international commercial arbitrationÃ¢â‚¬ within the meaning of Section 2(1)(f) of the Arbitration Act, 1996, would have to be

finally settled in accordance with the Arbitration Act, 1996 read with the UNCITRAL Arbitration Rules, and in case of any conflict, the Arbitration Act, 1996 is to

prevail (as an award made under Part I is considered a domestic award under Section 2(7) of the Arbitration Act, 1996 notwithstanding the fact that it is an

award made in an international commercial arbitration). Applying the Shashoua [Shashoua v. Sharma, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep

376] principle delineated above, it is clear that if the dispute was with a foreign contractor under Clause 67.3 of the agreement, the fact that arbitration

proceedings shall be held at New Delhi/Faridabad, India in sub-clause (vi) of Clause 67.3, would amount to the designation of either of these places as the

Ã¢â‚¬Å“seatÃ¢â‚¬ of arbitration, as a supranational body of law is to be applied, namely, the UNCITRAL Arbitration Rules, in conjunction with the Arbitration Act,

1996. As such arbitration would be an international commercial arbitration which would be decided in India, the Arbitration Act, 1996 is to apply as well. There

being no other contra indication in such a situation, either New Delhi or Faridabad, India is the designated Ã¢â‚¬Å“seatÃ¢â‚¬ under the agreement, and it is thereafter

for the parties to choose as to in which of the two places the arbitration is finally to be held.

97. Given the fact that if there were a dispute between NHPC Ltd. and a foreign contractor, Clause 67.3(vi) would have to be read as a clause designating the

Ã¢â‚¬Å“seatÃ¢â‚¬ of arbitration, the same must follow even when sub-clause (vi) is to be read with sub-clause (i) of Clause 67.3, where the dispute between NHPC Ltd.

would be with an Indian contractor. The arbitration clause in the present case states that Ã¢â‚¬Å“Arbitration proceedings shall be held at New Delhi/Faridabad,

IndiaÃ¢â‚¬Â¦Ã¢â‚¬, thereby signifying that all the hearings, including the making of the award, are to take place at one of the stated places. Negatively speaking, the

clause does not state that the venue is so that some, or all, of the hearings take place at the venue; neither does it use language such as Ã¢â‚¬Å“the Tribunal may

meetÃ¢â‚¬, or Ã¢â‚¬Å“may hear witnesses, experts or partiesÃ¢â‚¬. The expression Ã¢â‚¬Å“shall be heldÃ¢â‚¬ also indicates that the so-called Ã¢â‚¬Å“venueÃ¢â‚¬ is really the Ã¢â‚¬Å“seatÃ¢â‚¬

of the arbitral proceedings. The dispute is to be settled in accordance with the Arbitration Act, 1996 which, therefore, applies a national body of rules to the

arbitration that is to be held either at New Delhi or Faridabad, given the fact that the present arbitration would be Indian and not international. It is clear,

therefore, that even in such a scenario, New Delhi/Faridabad, India has been designated as the Ã¢â‚¬Å“seatÃ¢â‚¬â€‹ of the arbitration proceedings.

98. However, the fact that in all the three appeals before us the proceedings were finally held at New Delhi, and the awards were signed in New Delhi, and not at

Faridabad, would lead to the conclusion that both parties have chosen New Delhi as the Ã¢â‚¬Å“seatÃ¢â‚¬ of arbitration under Section 20(1) of the Arbitration Act,

1996. This being the case, both parties have, therefore, chosen that the courts at New Delhi alone would have exclusive jurisdiction over the arbitral proceedings.

Therefore, the fact that a part of the cause of action may have arisen at Faridabad would not be relevant once the Ã¢â‚¬Å“seatÃ¢â‚¬ has been chosen, which would then

amount to an exclusive jurisdiction clause so far as courts of the Ã¢â‚¬Å“seatÃ¢â‚¬â€‹ are concerned.

99. Consequently, the impugned judgment [NHPC Ltd. v. Jaiparkash Associates Ltd., 2018 SCC OnLine P&H 1304 : (2019) 193 AIC 839] is set aside, and the

Section 34 petition is ordered to be presented in the courts in New Delhi, as was held by the learned Single Judge of the Special Commercial Court at Gurugram.

The appeals are allowed in the aforesaid terms.Ã¢â‚¬â€‹

15. Learned counsel for the opposite party further relied the order passed in ARBP No.20 of 2015 and submitted that the Hon'ble Orissa High Court

has held that the venue of arbitration shall be before the High Court of Orissa Arbitration and Mediation Center, Cuttack or at the choice of Arbitrator

and in view of that, Orissa court is having the jurisdiction.

16. Learned counsel for the opposite party further relied upon the judgment passed by the Hon'ble Madras High Court in the case ofA ndal Dorairaj

& others v. M/s. Rithwik Infor Park Pvt. Ltd. & others in C.R.P. (PD) Nos. 1641, 1647 & 1648 of 2022 and C.M.P. Nos. 8183, 8220 & 8208 of

2022 and submitted that in light of that judgment also, Orissa court is having jurisdiction. By way of referring the request of the learned Arbitrator, he

submitted that since the Arbitrator was unable to hold the arbitration at Orissa and in view of the request was made by him, the Hon'ble Orissa High

Court allowed the proceeding to be conducted at Ranchi.

17. Learned counsel for the opposite party further relied upon paragraph 16 of the judgment passed by the Hon'ble Supreme Court in the case of

Visakhapatnam Port Trust v. M/s Continental Construction Company in Civil Appeal No.5849-5850 of 2002 and submitted that in light of Section 37,

law of limitation is applicable to the proceedings before the Arbitrator and the arbitration proceedings are to be deemed to have commenced when

notice is served by one party for appointment of the Arbitrator, which reads as under:

Ã¢â‚¬Å“16. It is apparent from the bare reading of Section 37 that the law of limitation is applicable to the proceedings before the arbitrators as it applies to

proceedings before the Courts. Under Sub-section (3), arbitration proceedings are to be deemed to have commenced when notice is served by one party upon the

other - (i) requiring him to appoint an arbitrator, or (ii) if the arbitrator was named or designated in the arbitration agreement, requiring him to submit the

difference to arbitrator named or designated.Ã¢â‚¬â€‹

18. Learned counsel for the opposite party further relied upon the judgment passed by the Hon'ble Supreme Court in the case of Bharat Aluminium

Company v. Kaiser Aluminium Technical Service, reported in (2012) 9 SCC 552 and submitted that in order to ascertain the scope of jurisdiction of

seat as against venue, the Hon'ble Supreme Court held that Section 21 of the Act, 1996 gives autonomy to the parties of the dispute to choose a seat

of arbitration, failing which, Section 20(2) empowers of Arbitration Tribunal to decide the same taking into consideration the convenience of the parties

as well as facts and circumstances of the dispute.

19. Learned counsel for the opposite party then submitted that in view of the direction of the Division Bench of the Hon'ble Orissa High Court, the

arbitration proceeding will take place at the Mediation Centre at Cuttack and in view of inability of the learned Arbitrator to conduct the proceeding in

Orissa, the proceeding took place at Ranchi and in view of that, Orissa court is only having jurisdiction.

20. Learned counsel for the opposite party also submitted that the Execution Case No.186 of 2023 is pending before the Commercial Court, Cuttack,

which was set for ex-parte. On the above grounds, he submitted that this C.M.P. may kindly be dismissed.

21. In reply, Mr. Shresth Gautam, learned counsel for the petitioner submitted that in light of Section 20 of the Act, 1996, the place of arbitration can

be at the convenience of the parties. He then submitted that Section 11(6) of the Act, 1996 cannot be read with Section 42 of the said Act. He also

submitted that Section 8 of the Commercial Courts Act, 2015 bars revision against any interlocutory order and, as such, only remedy is Article 227 of

the Constitution of India.

22. In light of the above submissions of the learned counsel for the parties, the Court is taking up the first point with regard to maintainability under

Article 227 of the Constitution of India as argued by the learned counsel for the sole opposite party. It is an admitted position that the arbitration

proceeding took place between the parties and the facts of dispute and how the arbitration proceeding has started, that has been narrated in the

arguments of the learned counsel for the petitioner and opposite party. The arbitration proceeding took place at Ranchi. The petition was filed under

Section 34 of the Act, 1996 before the Commercial Court, which was rejected on the ground of jurisdiction. Against that order, the petitioner herein

moved before this Court in Commercial Appeal No.01 of 2024 before the Division Bench of this Court and on 12.04.2024, the Division Bench of this

Court passed the following order:

Ã¢â‚¬Å“Order No.03/Dated 12th April, 2024 Challenging the judgment dated 30th November 2023 passed in Commercial Arbitration Case No. 13 of 2023, the

present Commercial Appeal No. 1 of 2024 has been filed under Section 13(1A) of the Commercial Courts Act 2015.

2. At the outset Mr. Shresth Gautam, the learned counsel for the appellant tenders a copy of the judgment Ã¢â‚¬Å“BSG SGS SOMA JV v NHPC LimitedÃ¢â‚¬ (2020) 4

SCC 234 to seek permission to withdraw the present Commercial Appeal with a liberty to the appellant to work out its remedy as available in law.

3. Without going into the merits of the matter, we accept the prayer for withdrawal of this Commercial Appeal which is dismissed as withdrawn, as such.Ã¢â‚¬â€‹

23. In view of the above, it transpires that the said appeal was withdrawn in light of the judgment of the Hon'ble Supreme Court in the case of BSG

SGS SOMA JV (supra), with liberty to work out its remedy as available in law and the Division Bench of this Court dismissed the said appeal as such.

Thus, on the submission, it was dismissed as withdrawn with liberty as the words Ã¢â‚¬Å“as suchÃ¢â‚¬â€‹ are also noted in paragraph 3 of the said order.

24. The appeal under Section 37(1)(c) of the Act, 1996 can be filed against the order of refusing to set aside the arbitral award under Section 34 of

the Act, 1996 and this aspect has been considered by the Hon'ble Supreme Court in the case of BSG SGS SOMA JV (supra) in paragraphs 4 and 5 of

the judgment, which read as under:

Ã¢â‚¬Å“4. On 21-12-2017, the Special Commercial Court, Gurugram allowed the application of the petitioner, and returned the Section 34 petition for presentation

to the proper court having jurisdiction in New Delhi. On 15-2-2018, the respondent filed an appeal under Section 37 of the Arbitration Act, 1996 read with

Section 13(1) of the Commercial Courts Act, 2015 before the High Court of Punjab and Haryana at Chandigarh. On 12-9-2018 [NHPC Ltd. v. Jaiparkash

Associates Ltd., 2018 SCC OnLine P&H 1304 : (2019) 193 AIC 839] , the impugned judgment was delivered by the Punjab and Haryana High Court, in which it

was held that the appeal filed under Section 37 of the Arbitration Act, 1996 was maintainable, and that Delhi being only a convenient venue where arbitral

proceedings were held and not the seat of the arbitration proceedings, Faridabad would have jurisdiction on the basis of the cause of action having arisen in

part in Faridabad. As a result, the appeal was allowed and the judgment of the Special Commercial Court, Gurugram was set aside.

5. Dr Abhishek Manu Singhvi, learned Senior Advocate appearing on behalf of the petitioner in SLP (C) No. 25618 of 2018, has assailed the impugned High

Court judgment [NHPC Ltd. v. Jaiparkash Associates Ltd., 2018 SCC OnLine P&H 1304 : (2019) 193 AIC 839] on both counts. According to him, on a combined

reading of Section 13 of the Commercial Courts Act, 2015 and Section 37 of the Arbitration Act, 1996, it becomes clear that Section 13 of the Commercial Courts

Act, 2015 only provides the forum for challenge, whereas Section 37 of the Arbitration Act, 1996 Ã¢â‚¬" which is expressly referred to in the proviso to Section 13(1)

of the Commercial Courts Act, 2015 Ã¢â‚¬" circumscribes the right of appeal. He contended that this when read with Section 5 of the Arbitration Act, 1996, makes it

clear that only certain judgments and orders are appealable, and no appeal lies under any provision outside Section 37 of the Arbitration Act, 1996. He

contended that the High Court was manifestly wrong when it said that the present appeal was appealable under Section 37(1)(c) of the Arbitration Act, 1996 as

being an appeal against an order refusing to set aside an arbitral award under Section 34 of the Arbitration Act, 1996. According to Dr Singhvi, an order which

allows an application under Section 151 read with Order 7 Rule 10 CPC can by no stretch of the imagination amount to an order refusing to set aside an arbitral

award under Section 34 of the Arbitration Act, 1996. For this proposition, he strongly relied upon on our judgment in Kandla Export Corpn. v. OCI Corpn.

[Kandla Export Corpn. v. OCI Corpn., (2018) 14 SCC 715 : (2018) 4 SCC (Civ) 664] On the second point, he read out the impugned judgment in detail, and

stated that the ultimate conclusion that New Delhi was only a Ã¢â‚¬Å“venueÃ¢â‚¬ and not the Ã¢â‚¬Å“seatÃ¢â‚¬ of the arbitration was incorrect, as the parties have chosen to

have sittings at New Delhi, as a result of which it is clear that the Arbitral Tribunal considered that the award made at New Delhi would be made at Ã¢â‚¬Å“the

seatÃ¢â‚¬ of the arbitral proceedings between the parties. He further added that it was clear that even if both New Delhi and Faridabad had jurisdiction, New Delhi

being the choice of the parties, the principle contained in Hakam Singh v. Gammon (India) Ltd. [Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286] ,

would govern. He referred in copious detail to many judgments of this Court, including the five-Judge Bench in Balco v. Kaiser Aluminium Technical Services Inc.

[Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] , Indus Mobile Distribution (P) Ltd. v. Datawind Innovations

(P) Ltd. [Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760] , and various other judgments to

buttress his submissions. According to him, the recent judgment delivered in Union of India v. Hardy Exploration & Production (India) Inc. [Union of India v.

Hardy Exploration & Production (India) Inc., (2019) 13 SCC 472 : (2018) 5 SCC (Civ) 790] queers the pitch, in that it is directly contrary to the five-Judge

Bench decision in Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] . It is only as a result of the confusion

caused by judgments such as Hardy Exploration & Production (India) Inc. [Union of India v. Hardy Exploration & Production (India) Inc., (2019) 13 SCC 472 :

(2018) 5 SCC (Civ) 790] that the impugned judgment has arrived at the wrong conclusion that New Delhi is not the Ã¢â‚¬Å“seatÃ¢â‚¬, but only the Ã¢â‚¬Å“venueÃ¢â‚¬ of the

present arbitral proceedings. He, therefore, in the course of his submissions argued that this confusion should be removed, and exhorted us to declare that Hardy

Exploration & Production (India) Inc. [Union of India v. Hardy Exploration & Production (India) Inc., (2019) 13 SCC 472 : (2018) 5 SCC (Civ) 790] was not

correctly decided, being contrary to the larger Bench in Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ)

810].Ã¢â‚¬â€‹

In view of the above judgment of the Hon'ble Supreme Court, leave was taken to withdraw the said appeal to work out the remedy and, thereafter,

the present C.M.P. has been filed.

25. Section 8 of the Commercial Courts Act, 2015 stipulates as under:

Ã¢â‚¬Å“8. Bar against revision application or petition against an interlocutory order.Ã¢â‚¬"Notwithstanding anything contained in any other law for the time being in

force, no civil revision application or petition shall be entertained against any interlocutory order of a Commercial Court, including an order on the issue of

jurisdiction, and any such challenge, subject to the provisions of section 13, shall be raised only in an appeal against the decree of the Commercial Court.Ã¢â‚¬â€‹

In view of the above provision, no revision can be maintained against any interlocutory order of the Commercial Court.

26. A reference may be made to the judgment passed in the case of Shalini Shyam Shetty v. Rajendra Shankar Patil,r eported in (2010) 8 SCC

329. Paragraphs 47 and 48 of the said judgment read as under:

Ã¢â‚¬Å“47. The jurisdiction under Article 227 on the other hand is not original nor is it appellate. This jurisdiction of superintendence under Article 227 is for both

administrative and judicial superintendence. Therefore, the powers conferred under Articles 226 and 227 are separate and distinct and operate in different fields.

Another distinction between these two jurisdictions is that under Article 226, the High Court normally annuls or quashes an order or proceeding but in exercise

of its jurisdiction under Article 227, the High Court, apart from annulling the proceeding, can also substitute the impugned order by the order which the inferior

tribunal should have made. (See Surya Dev Rai [(2003) 6 SCC 675] , SCC p. 690, para 25 and also the decision of the Constitution Bench of this Court in Hari

Vishnu Kamath v. Ahmad Ishaque [AIR 1955 SC 233] , AIR p. 243, para 20.)

48. The jurisdiction under Article 226 normally is exercised where a party is affected but power under Article 227 can be exercised by the High Court suo motu as

a custodian of justice. In fact, the power under Article 226 is exercised in favour of persons or citizens for vindication of their fundamental rights or other statutory

rights. The jurisdiction under Article 227 is exercised by the High Court for vindication of its position as the highest judicial authority in the State. In certain

cases where there is infringement of fundamental right, the relief under Article 226 of the Constitution can be claimed ex debito justitiae or as a matter of right.

But in cases where the High Court exercises its jurisdiction under Article 227, such exercise is entirely discretionary and no person can claim it as a matter of

right. From an order of a Single Judge passed under Article 226, a letters patent appeal or an intra-court appeal is maintainable. But no such appeal is

maintainable from an order passed by a Single Judge of a High Court in exercise of power under Article 227. In almost all the High Courts, rules have been

framed for regulating the exercise of jurisdiction under Article 226. No such rule appears to have been framed for exercise of High Court's power under Article

227 possibly to keep such exercise entirely in the domain of the discretion of High Court.

27. There is no doubt that it is prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the

enactment. This power needs to be exercised in exceptional rarity, wherein, one party is left remediless under the statute or a clear 'bad faith' shown

by one of the parties. This high standard set by the Hon'ble Supreme Court is in terms of the legislative intention to make the arbitration fair and

efficient. The High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals

and courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of nature justice have been flouted.

The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction

which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction

though available is being exercised in a manner which tantamount to overstepping the limits of jurisdiction. However, when there is a remedy of appeal

before a civil court available to an aggrieved person and such remedy is not availed of by the petitioner, it would deter the High Court, not merely as a

measure of self-imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under Article 227 of the

Constitution of India. Since the petitioner has earlier moved an appeal and the same is dismissed as withdrawn, there is no finality in the appeal and the

petitioner has found out remedy under Article 227 of the Constitution of India. The party cannot be allowed to be remediless in the aforesaid

circumstances and, therefore, the petition under Article 227 of the Constitution of India is maintainable and thus the argument of learned counsel for

the opposite party to that regard is, hereby, negated. This aspect of the matter has been considered by the Hon'ble Supreme Court in the case of

Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., reported in (2022) 1 SCC 75.

28. Clause 37.0 of the work order speaks of arbitration. Clause 37.3 of the work order stipulates as under:

Ã¢â‚¬Å“37.3 The venue of arbitration proceeding shall be Ranchi.Ã¢â‚¬â€‹

29. Clause 40.0 of the work order speaks of Governing Law, which stipulates as under:

Ã¢â‚¬Å“40.0 GOVERNING LAW

This order including the Arbitration proceeding shall be governed by and interpreted in accordance with the laws of India and shall be subject to the exclusive

jurisdiction of the courts of Ranchi.Ã¢â‚¬â€‹

Thus, in view of the above provisions in work order, the seat of arbitration is chosen by the parties at Ranchi.

30. When the dispute arose, a petition under Section 11(6) of the Act, 1996 was preferred by the opposite party before the Hon'ble High Court of

Orissa, which was numbered as ARBP No.20 of 2015 and Hon'ble the Chief Justice of that Court vide order dated 30.11.2018 adjourned the matter

for taking instruction by the parties on the point whether they are agreeable to appoint any retired Judge of Jharkhand High Court to be an Arbitrator

or not and the matter was posted for 21.12.2018 and with consent of the parties, the retired Judge of the Hon'ble Jharkhand High Court was appointed

as an Arbitrator vide order dated 11.01.2019. The order dated 11.01.2019 reads as under:

Ã¢â‚¬Å“21. 11.01.2019 Heard learned counsel for the parties. This application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996, for

appointment of Arbitrator.

There is an Arbitration Clause in the Agreement between the parties and it appears that there are certain disputes between the parties, which require to be

adjudicated by an Arbitrator.

Learned counsel for the opposite party by filing a memo in Court today suggested the names of three retired Judges of Jharkhand High Court and submits that as

per the choice of learned counsel for the petitioner, learned Arbitrator may be appointed to adjudicate the dispute between the parties. The said memo is taken on

record.

Learned counsel for the petitioner has no serious objection to the same and learned counsel for both the parties jointly suggested the name of Shri Justice Tapan

Sen, former judge of Jharkhand High Court to be appointed as an Arbitrator to adjudicate the dispute between the parties.

Considering the submissions made and as agreed to by the learned counsel for the parties, I hereby appoint Shri Justice Tapan Sen, former judge of Jharkhand

High Court, as the sole Arbitrator to adjudicate the dispute between the parties. The venue of the arbitration shall be at High Court of Orissa Arbitration &

Mediation Centre, Cuttack or at the choice of the Arbitrator. The learned Arbitrator shall conclude the proceeding within six months from the date of entering

into the reference.

It is needless to say that the fees of the Arbitrator shall be as per the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015.

ARBP is accordingly disposed of.

Issue urgent certified copy as per rules.

This order be communicated to Shri Justice Tapan Sen, former judge of Jharkhand High Court at the address mentioned in the memo forthwith.Ã¢â‚¬â€‹

31. From the aforesaid order, it is crystal clear that the High Court has said that the venue of arbitration shall be at the High Court of Orissa

Arbitration & Mediation Centre, Cuttack or at the choice of the Arbitrator. The learned Arbitrator vide letter dated 04.02.2019, contained in

Annexure-7 informed the parties that it will not be possible for him to conduct the arbitration proceeding at the Arbitration & Mediation Centre,

Cuttack, but, he will be willing to conduct the arbitration proceeding provided both the parties agree to have the sittings at Ranchi on Saturdays and

Sundays and further request was also made if the parties are not agree, they may approach the Hon'ble Orissa High Court to get another Arbitrator

appointed. By other letters also, same request was made. The opposite party moved an interlocutory application being I.A. No.22 of 2022 for

extension of time for completion of arbitration proceedings and HonÃ¢â‚¬â„¢ble the Chief Justice of the Orissa High Court has allowed the said I.A. and

further six monthsÃ¢â‚¬â„¢ time was extended vide order dated 14.10.2022. The Hon'ble Orissa High Court has allowed the proceeding to be conducted

at Ranchi and both the parties have agreed to proceed with the arbitration proceeding at Ranchi and pursuant to that, the learned Arbitrator has

pronounced the award dated 26.03.2023. It clearly transpires that in terms of the arbitration clause, the seat in the contract is said to be at Ranchi and

the proceeding was also conducted at Ranchi.

32. Section 2(1)(e) of the Act, 1996 defines the Court, which reads as under:

Ã¢â‚¬Å“2(1)(e) Ã¢â‚¬Å“CourtÃ¢â‚¬â€‹ meansÃ¢â‚¬

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the

High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the

same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the

questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to

hear appeals from decrees of courts subordinate to that High Court.Ã¢â‚¬‹

33. Further, Sub-section (6) of Section 2 of the Act, 1996 reads as under:

Ã¢â‚¬Å“2(6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any

person including an institution, to determine that issue.Ã¢â‚¬‹

34. Section 42 of the Act, 1996 speaks of jurisdiction, which reads as under:

Ã¢â‚¬Å“42. Jurisdiction.Ã¢â‚¬"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.Ã¢â‚¬‹

35. Section 20 of the Act, 1996 speaks of place of arbitraton, which stipulates as under:

Ã¢â‚¬Å“20. Place of arbitration.Ã¢â‚¬"(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 anyplace it considers

appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.Ã¢â‚¬‹

36. A conjoint reading of Sections 2(6) and 20 of the Act, 1996 leads to the conclusion that in the event parties do not agree with regard to the place

of arbitration, though they were free to determine the same, then they had the right to authorise any person including an institution for deciding the

venue of the arbitration and such decision would not partake the character of adjudication of a dispute arising out of the agreement, so as to clothe it

with the character of an award. A reference may be made to the judgment passed by the Hon'ble Supreme Court in the case of Sanshin Chemicals

Industry v. Oriental Carbons & Chemicals, reported in AIR 2001 SC 1219.

37. Section 21 of the Act, 1996 speaks of commencement of arbitral proceedings, which stipulates as under:

Ã¢â‚¬Å“21. Commencement of arbitral proceedings.Ã¢â‚¬" Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence

on the date on which a request for that dispute to be referred to arbitration is received by the respondent.Ã¢â‚¬â€‹

38. The aforesaid provisions have been considered by the Hon'ble Supreme Court in State of West Bengal (supra), wherein, at paragraphs 15 and 16,

it has been held as under:

Ã¢â‚¬Å“15. A recent judgment of this Hon'ble Court in State of Maharashtra v. Atlanta Ltd. [(2014) 11 SCC 619 : (2014) 4 SCC (Civ) 206 : AIR 2014 SC 1093] , has

taken the view that Section 2(1)(e) contains a scheme different from that contained in Section 15 of the Code of Civil Procedure. Section 15 requires all suits to

be filed in the lowest grade of court. This Hon'ble Court has construed Section 2(1)(e) and said that where a High Court exercises ordinary original civil

jurisdiction over a district, the High Court will have preference to the Principal Civil Court of Original Jurisdiction in that district. In that case, one of the parties

moved an application under Section 34 before the District Judge, Thane. On the same day, the opposite party moved an application before the High Court of

Bombay for setting aside some of the directions contained in the award. In the circumstances, it was decided that the Ã¢â‚¬Å“courtÃ¢â‚¬ for the purpose of Section 42

would be the High Court and not the District Court. Several reasons were given for this. Firstly, the very inclusion of the High Court in the definition would be

rendered nugatory if the above conclusion was not to be accepted, because the Principal Civil Court of Original Jurisdiction in a district is always a court lower

in grade than the High Court, and such District Judge being lower in grade than the High Court would always exclude the High Court from adjudicating upon

the matter. Secondly, the provisions of the Arbitration Act leave no room for any doubt that it is the superiormost court exercising original jurisdiction which has

been chosen to adjudicate disputes arising out of arbitration agreements. We respectfully concur with the reasoning contained in this judgment.

16. Similar is the position with regard to applications madeÃ, underÃ, SectionÃ, 11Ã, ofÃ, theÃ, ArbitrationÃ, Act. In Rodemadan India Ltd. v. International

Trade Expo Centre Ltd. [(2006) 11 SCC 651] , a Designated Judge of this Hon'ble Court following the seven-Judge Bench in SBP and Co. v. Patel Engg. Ltd.

[(2005) 8 SCC 618] , held that instead of the court, the power to appoint arbitrators contained in Section 11 is conferred on the Chief Justice or his delegate. In

fact, the seven-Judge Bench held : (SBP and Co. case [(2005) 8 SCC 618] , SCC pp. 644-45 & 648, paras 13 & 18)

Ã¢â‚¬Å“13. It is common ground that the Act has adopted the UNCITRAL Model Law on International Commercial Arbitration. But at the same time, it has made some

departures from the Model Law. Section 11 is in the place of Article 11 of the Model Law. The Model Law provides for the making of a request under Article 11 to

Ã¢â‚¬Ëœthe court or other authority specified in Article 6 to take the necessary measureÃ¢â‚¬â„¢. The words in Section 11 of the Act are Ã¢â‚¬Ëœthe Chief Justice or the person

or institution designated by himÃ¢â‚¬â„¢. The fact that instead of the court, the powers are conferred on the Chief Justice, has to be appreciated in the context of the

statute. Ã¢â‚¬ËœCourtÃ¢â‚¬â„¢ is defined in the Act to be the Principal Civil Court of Original Jurisdiction of the district and includes the High Court in exercise of its

ordinary original civil jurisdiction. The Principal Civil Court of Original Jurisdiction is normally the District Court. The High Courts in India exercising

ordinary original civil jurisdiction are not too many. So in most of the States the court concerned would be the District Court. Obviously, Parliament did not want

to confer the power on the District Court, to entertain a request for appointing an arbitrator or for constituting an Arbitral Tribunal under Section 11 of the Act.

It has to be noted that under Section 9 of the Act, the District Court or the High Court exercising original jurisdiction, has the power to make interim orders prior

to, during or even post arbitration. It has also the power to entertain a challenge to the award that may ultimately be made.

The framers of the statute must certainly be taken to have been conscious of the definition of Ã¢â‚¬Ëœcourtâ€™ in the Act. It is easily possible to contemplate that they

did not want the power under Section 11 to be conferred on the District Court or the High Court exercising original jurisdiction. The intention apparently was to

confer the power on the highest judicial authority in the State and in the country, on the Chief Justices of High Courts and on the Chief Justice of India. Such a

provision is necessarily intended to add the greatest credibility to the arbitral process. The argument that the power thus conferred on the Chief Justice could not

even be delegated to any other Judge of the High Court or of the Supreme Court, stands negatived only because of the power given to designate another. The

intention of the legislature appears to be clear that it wanted to ensure that the power under Section 11(6) of the Act was exercised by the highest judicial

authority in the State or in the country concerned. This is to ensure the utmost authority to the process of constituting the Arbitral Tribunal.

* * *

18. It is true that the power under Section 11(6) of the Act is not conferred on the Supreme Court or on the High Court, but it is conferred on the Chief Justice of

India or the Chief Justice of the High Court. One possible reason for specifying the authority as the Chief Justice, could be that if it were merely the conferment of

the power on the High Court, or the Supreme Court, the matter would be governed by the normal procedure of that Court, including the right of appeal and

Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by courts in the arbitral process. Therefore, the power

was conferred on the highest judicial authority in the country and in the State in their capacities as Chief Justices. They have been conferred the power or the

right to pass an order contemplated by Section 11 of the Act. We have already seen that it is not possible to envisage that the power is conferred on the Chief

Justice as persona designata. Therefore, the fact that the power is conferred on the Chief Justice, and not on the court presided over by him is not sufficient to hold

that the power thus conferred is merely an administrative power and is not a judicial power.Ã¢â‚¬â€‹

It is obvious that Section 11 applications are not to be moved before the Ã¢â‚¬Å“courtÃ¢â‚¬ as defined but before the Chief Justice either of the High Court or of the

Supreme Court, as the case may be, or their delegates. This is despite the fact that the Chief Justice or his delegate have now to decide judicially and not

administratively. Again, Section 42 would not apply to applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or

his delegate is not Ã¢â‚¬Å“courtÃ¢â‚¬â€‹ as defined by Section 2(1)(e).

The said view was reiterated somewhat differently in Pandey & Co. Builders (P) Ltd. v. State of Bihar [(2007) 1 SCC 467], SCC at pp. 470 & 473, Paras 9 & 23-

26.Ã¢â‚¬â€‹

In view of the above judgment, the Hon'ble Supreme Court in clear terms has held that the purpose of the Court in light of Section 2(1)(e), an

application under Section 11 is not a Court as defined under Section 2(1)(e).

39. That view was further reiterated by the Hon'ble Supreme Court in the case of Ravi Ranjan Developers Pvt. Ltd. (supra), on which, much reliance

has been placed by the learned counsel for the petitioner. Paragraph 32 of the said judgment reads as under:

Ã¢â‚¬Å“32. However, Section 42 cannot possibly have any application to an application under Section 11(6), which necessarily has to be made before a High Court,

unless the earlier application was also made in a High Court. In the instant case, the earlier application under Section 9 was made in the District Court at

Muzaffarpur and not in the High Court of Judicature at Patna. An application under Section 11(6) of the A&C Act for appointment of Arbitrator, could not have

been made in the District Court of Muzaffarpur. Therefore, Section 42 is not attracted.Ã¢â‚¬â€‹

Thus, it cannot be said that before the court of jurisdiction of Orissa the parties have surrendered.

40. Further in view of Clause 37.3, venue and seat has been fixed by the parties at Ranchi. This has been considered by the Hon'ble Supreme Court in

the case of Indus Mobile Distribution Private Limited (supra). Paragraph 19 of the said judgment reads as under:

Ã¢â‚¬Å“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 Ã¢â‚¬Å“seatÃ¢â‚¬ 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 Ã¢â‚¬" that is, no part of the cause of action

may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been

held above, the moment Ã¢â‚¬Å“seatÃ¢â‚¬ 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.Ã¢â‚¬â€‹

41. Admittedly in the present case, the parties with consent have chosen further venue at Ranchi and at the moment the seat is determined, the Court

is having jurisdiction of that seat and it will regulate the arbitration proceeding. The seat has been further considered by the Hon'ble Supreme Court in

the case of BALCO v. Kaiser Aluminum Technical Services Inc., reported in (2012) 9 SCC 552a nd the said case was further considered by the

Hon'ble Supreme Court in the case of Hindustan Construction Company Limited (supra), wherein, at paragraphs 4 and 5, it has been held as under:

Ã¢â‚¬Å“4. This was made in the backdrop of explaining para 96 of BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC

(Civ) 810] , which judgment read as a whole declares that once the seat of arbitration is designated, such clause then becomes an exclusive jurisdiction clause as

a result of which only the courts where the seat is located would then have jurisdiction to the exclusion of all other courts.

5. Given the finding in this case that New Delhi was the chosen seat of the parties, even if an application was first made to the Faridabad Court, that application

would be made to a court without jurisdiction. This being the case, the impugned judgment is set aside following BGS SGS Soma JV [BGS SGS Soma JV v. NHPC,

(2020) 4 SCC 234] , as a result of which it is the courts at New Delhi alone which would have jurisdiction for the purposes of challenge to the award.Ã¢â‚¬â€‹

42. Thus, it is well settled that once the seat is chosen by the parties in terms of the contract/agreement, the place of that Court is having jurisdiction.

Merely because with consent of the parties, the Arbitrator has been appointed by the Hon'ble Orissa High Court, that cannot be a ground that Ranchi

court is not having jurisdiction as Section 11 application is not decided by the Court, as has been held in the aforesaid judgments. Admittedly, the

arbitration is held at Ranchi. The intention of both the parties where to go for arbitration, that is at Ranchi and the proceeding after permission of the

High Court was also conducted at Ranchi and in the agreement, the seat is also said to be at Ranchi. Thus, Ranchi court is having jurisdiction.

43. Admittedly, the venue was also decided at Ranchi by the Hon'ble Orissa High Court and in light of the contract, the venue is also at Ranchi.

Section 21 of the Act, 1996 speaks of commencement of arbitral proceedings on the date on which a request for that dispute to be referred to

arbitration is received by the respondent. This section only suggests Ã¢â‚¬Å“when the arbitration proceeding startsÃ¢â‚¬ and that is not in dispute. In view of

that only because commencement is made from the date of making request of arbitration, that does not mean that the jurisdiction of another court will

come into effect. The law is well settled that once the parties intend to commence the arbitration proceeding at a particular place in terms of the

agreement, that court is having the jurisdiction.

44. In the case of BGS SGS SOMA J V(supra), the issue of venue and seat has been considered by taking into consideration the judgment passed in

the case of Swastik Gases Private Limited v. Indian Oil Corporation Limited,r eported in (2013) 9 SCC 32 wherein, it has been held that the

words like Ã¢â‚¬Å“aloneÃ¢â‚¬, Ã¢â‚¬Å“onlyÃ¢â‚¬, Ã¢â‚¬Å“exclusiveÃ¢â‚¬ or Ã¢â‚¬exclusive jurisdictionÃ¢â‚¬ are not decisive and does not make any material difference and it

has been held in paragraph 82 of that judgment that whenever any designation of a place of arbitration is mentioned in the agreement as an arbitration

clause being the Ã¢â‚¬Å“venueÃ¢â‚¬ of the arbitration proceedings, the expression Ã¢â‚¬Å“arbitration proceedingsÃ¢â‚¬ would make it clear that the Ã¢â‚¬Å“venueÃ¢â‚¬ is

really the Ã¢â‚¬Å“seatÃ¢â‚¬ 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. However, the said principle will be coupled with there being no

other significant contrary indicia that the stated venue is merely a Ã¢â‚¬Å“venueÃ¢â‚¬ and not the Ã¢â‚¬Å“seatÃ¢â‚¬ of the arbitral proceedings, would then

conclusively show that such a clause designates a Ã¢â‚¬Å“seatÃ¢â‚¬ of the arbitral proceedings. Paragraph 82 of the judgment passed in the case of BGS

SGS SOMA JV (supra) reads as under:

Ã¢â‚¬Å“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 Ã¢â‚¬Å“venueÃ¢â‚¬ of the arbitration proceedings, the expression Ã¢â‚¬Å“arbitration proceedingsÃ¢â‚¬ would make it clear that the Ã¢â‚¬Å“venueÃ¢â‚¬ is really the

Ã¢â‚¬Å“seatÃ¢â‚¬ 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 Ã¢â‚¬Å“tribunals are to meet or

have witnesses, experts or the partiesÃ¢â‚¬ where only hearings are to take place in the Ã¢â‚¬Å“venueÃ¢â‚¬, which may lead to the conclusion, other things being equal,

that the venue so stated is not the Ã¢â‚¬Å“seatÃ¢â‚¬ of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings

Ã¢â‚¬Å“shall be heldÃ¢â‚¬ 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

Ã¢â‚¬Å“venueÃ¢â‚¬ and not the Ã¢â‚¬Å“seatÃ¢â‚¬ of the arbitral proceedings, would then conclusively show that such a clause designates a Ã¢â‚¬Å“seatÃ¢â‚¬ 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 Ã¢â‚¬Å“the venueÃ¢â‚¬, 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 Ã¢â‚¬Å“stated

venueÃ¢â‚¬â€, which then becomes the Ã¢â‚¬Å“seatÃ¢â‚¬â€ for the purposes of arbitration.Ã¢â‚¬â€

In view of the above judgment, it is clear that it can be said that whenever designation of the place of arbitration in an arbitration clause as being the

Ã¢â‚¬Å“venueÃ¢â‚¬ of the arbitration proceeding is there, the expression Ã¢â‚¬Å“arbitration proceedingÃ¢â‚¬ would make it clear that Ã¢â‚¬Å“venueÃ¢â‚¬ is really the seat

of arbitral proceeding as the aforesaid expression does not include just one or more individual or particular hearing. However, the same will have

different impact if there is contrary indicia and in that context, the stated venue is merely a venue and not a seat of the arbitration proceeding.

45. So far as the judgment relied by the learned counsel for the opposite party in the case of Andal Dorairaj (supra) is concerned, that is on the

different footing. In that case, the learned Sole Arbitrator failed to complete the proceeding within the stipulated time and his mandate got terminated

and thus the respondents in that case have filed the petition under Section 11 of the Act, 1996 for appointment of a new Arbitrator. In the case in

hand, no such dispute is there and, as such, that judgment is not helping the opposite party.

46. So far as the judgment relied by the learned counsel for the opposite party in the case of Visakhapatnam Port Trust (supra) is concerned, it is not

in dispute that the arbitration proceedings are deemed to have commenced when notice is served by one party upon the other party and the point of

limitation began to run from that date. In the case in hand, the arbitration proceeding was initiated with the consent of both the parties and both the

parties have also participated in the arbitration proceeding at Ranchi and after the Award, the dispute regarding the jurisdiction arose and, as such, the

facts of the present case is different to the facts of the case as relied by the learned counsel for opposite party and thus, that judgment is also not

helping the opposite party.

47. In the judgment relied by the learned counsel for the opposite party in the case of Bharat Aluminium Company (supra), the discussion was

relating to Part-I and Part-II of the Act, 1996 and the dispute was relating to the international commercial arbitration whose juridical or legal seat of

arbitration is outside India. Further, in that case the HonÃ¢â‚¬â„¢ble Supreme Court held that the Court has to undertake the detailed examination to

discern from arbitration agreement and surrounding circumstances and intention of the parties as to whether a particular place mentioned refers

merely to venue or does it refer to juridical seat of arbitration. In the case in hand, the arbitration agreement itself says that the place of arbitration

shall be at Ranchi, Jharkhand and other surrounding circumstances also favours the Ranchi jurisdiction for the place of arbitration, as such, that case is

also not much helping the opposite party.

48. In the judgment relied by the learned counsel for the opposite party in the case of BGS SGS SOMA J V(supra), in paragraphs 98 and 99 the

HonÃ¢â‚¬â„¢ble Supreme Court has held that it is for the freedom of parties to agree on place or seat of arbitration within India when juridical place of

arbitration is in India and there are no restrictions on the same. In the case in hand, at the time of entering into the arbitration agreement, the parties

choose to have the arbitration at Ranchi as per Clause 37.3 of the agreement. It is well settled that at the moment the seat is designated, it is akin to

an exclusive jurisdiction clause and, as such, paragraphs 96 to 99 of the judgment, as relied by the learned counsel for opposite party is not helping the

opposite party.

49. In view of the above, the court at Ranchi is having jurisdiction as the arbitration proceeding took place at Ranchi with the permission of the

Hon'ble Orissa High Court and the seat and venue in the agreement is also at Ranchi and both the parties had agreed to go for arbitration at Ranchi,

which clearly suggests that intention was there that the proceeding will be conducted at Ranchi and the law in this regard is well settled in view of the

above discussions and, as such, the order dated 30.11.2023, contained in Annexure-4 of the petition passed in Commercial Arbitration Case No.13 of

2023 by the learned Additional Judicial Commissioner-III cum Presiding Officer, Commercial Court, Ranchi is, hereby, set aside and it is held that

Ranchi court is having jurisdiction. The petition filed by the petitioner under Section 34 of the Act, 1996 is restored to the concerned court, who will

proceed and decide the same, in accordance with law.

50. Accordingly, this petition is allowed in above terms and disposed of.