

AP 399 of 2020
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Commercial Division
BOWLOPEDIA RESTAURANTS INDIA LIMITED
Vs.
DEVYANI INTERNATIONAL LIMITED

For the Petitioners : Mr. Sabyasachi Chowdhury, Advocate
Mr. Sayan Ganguly, Advocate
Mr. Tirthankar Das, Advocate
Mr. Arjun Mookerjee, Advocate
Ms. Khushboo Choudhary, Advocate
Ms. Rituparna Saha, Advocate

For the Respondent : Mr. Raunak Satpathy, Advocate

Hearing concluded on : January 12, 2021

Judgment on : January 21, 2021

DEBANGSU BASAK, J. :-

1. The petitioner has applied under Section 9 of the Arbitration and Conciliation Act, 1996 for interim protection.
2. Learned Advocate appearing for the respondent has raised objections of lack of jurisdiction. Since the respondent has raised the

issue of jurisdiction, the respondent has been allowed to address the Court first.

3. Learned Advocate appearing for the respondent has submitted that, the parties entered into a leave and license agreement dated July 11, 2019. He has referred to Clause 16.7 of the leave and license agreement dated July 11, 2019. He has submitted that, since the parties agreed that the seat of arbitration shall be at New Delhi, the Courts at New Delhi has exclusive jurisdiction to try, entertain and determine any proceeding under the Act of 1996. In support of his contentions, he has relied upon the **order dated November 23, 2017 passed by the Delhi High Court in Arbitration Petition No. 444 of 2017 (Ramandeep Singh Taneja v. Crown Realty), 2017 SCC Online 11156 (M/s. Devyani International Ltd. v. Siddhivinayak Developers & Builders)**, the **order dated February 7, 2018 passed in Arbitration Petition No. 529 of 2017 (M/s. N J Construction v. Ayursundra Healthcare Pvt. Ltd.)**, the **order dated January 21, 2020 passed in Arbitration Petition No. 334 of 2019 (Cinapolis India Pvt. Ltd. v. City Projects Pvt. Ltd.)**, the **order dated March 4, 2020 passed in Transfer Petition No. 3053 of 2019 (HCC v.**

NHPC), the order dated July 6, 2020 passed in Arbitration Petition No. 662 of 2019 (Aarka Sports Management Pvt. Ltd. v. Kalsi Buildcon Pvt. Ltd.) and the order dated December 10, 2012 passed in Civil Appeal 9307 of 2019 (BGS SGS Soma v. NHPC Ltd.).

4. Learned Advocate appearing for the respondent has submitted that, Clause 16.6 of the leave and licence agreement dated July 11, 2019 does not affect the choice of jurisdiction of the parties. He has submitted that, since the parties agreed to the seat of arbitration to be at New Delhi, Clause 16.6 will not have overriding effect on Clause 16.7.

5. Learned Advocate appearing for the respondent has taken the point of pecuniary jurisdiction of this Hon'ble Court. He has submitted that, the Courts at Alipore will have jurisdiction over the subject matter of the present petition.

6. Learned Advocate appearing for the petitioner has submitted that, this Hon'ble Court has the jurisdiction to try, entertain and

determine the instant proceedings. He has submitted that, the leave and licence agreement dated July 11, 2011 was entered into by the parties at Kolkata and in fact, at the registered office of the petitioner at Kolkata which is within the ordinary original civil jurisdiction of this Hon'ble Court.

7. Learned Advocate appearing for the petitioner has referred to Clauses 16.6 and 16.7 of the leave and licence agreement dated July 11, 2019 and submitted that, when the parties selected the forum for adjudication, then, such selected forum will have precedence notwithstanding the parties have agreed that the seat of arbitration will be at a different place. He has submitted that, when there is a conflict between the forum selected by the parties and the seat of arbitration, in the case of a domestic arbitration, then, the forum selection clause will prevail. In support of his contentions, learned Advocate appearing for the petitioner has relied upon Section 2(2) and Section 9 of the Act of 1996. He has submitted that, the seat of arbitration and the venue of the arbitration are concepts borrowed from International Arbitration Law. He has referred to and relied upon **2013 Volume 9 Supreme Court Cases 32 (M/s. Swastik Gases P.**

Ltd. v. Indian Oil Corp. Ltd.), 2017 Volume 7 Supreme Court Cases 678 (Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited), 2020 Volume 5 Supreme Court Cases 399 (Mankastu Impex Private Limited v. Airvisual Limited), 2020 Volume 5 Supreme Court Cases 462 (Brahmani River Pellets Limited v. Kamachi Industries Limited) and the order dated November 17, 2020 passed by the Delhi High Court in Arbitration Petition No. 328 of 2020 (Cars 24 Services Pvt. Ltd. v. Cyber Approach Workspace LLP) in support of his contentions.

8. Learned Advocate appearing for the petitioner has relied upon ***All India Reporter 1959 Supreme Court 24 (Radha Sundar Dutta v. Mohd. Jahadur Rahim & Ors.)*** and submitted that, in a commercial document such as the leave and licence agreement as concerned herein, the previous clause will have precedence than the latter clause. According to him, since the parties had chosen a forum for adjudication of the disputes in Clause 16.6, the same will have precedence over the seat of arbitration as provided in Clause 16.7.

9. Relying upon ***All India Reporter 1989 Supreme Court 1834 (Provash Chandra Dalui & Anr. v. Biswanath Banerjee & Anr.)***

learned Advocate appearing for the petitioner has submitted that, when, the Court is interpreting a commercial document, then, the Court should lean in favour of such interpretation which allows all the clauses to remain. In the event, the contention of the respondent is accepted, according to him, then, one of the clauses namely clause 16.6 will be rendered otiose.

10. Therefore, according to him, the interpretation as has been forwarded by the petitioner on the point of jurisdiction should be accepted.

11. Referring to the facts of the present case, learned Advocate for the petitioner has submitted that, the issue as to whether, the Force Majeure clauses will have applicability or not is an issue which ought to be decided at the arbitration. He has submitted that, pending such decision, it would be appropriate that the Court allows the petitioner to dispose of the assets belonging to the petitioner. The respondent cannot claim any right over the same.

12. In response, learned Advocate appearing for the respondent, on merits has submitted that, the agreement between the parties, allows exercise of right of lien by the respondent on assets belonging to the petitioner, for unpaid licence fees. He has submitted that, since, the petitioner admittedly did not pay the licence fees, the respondent is entitled to exercise such lien over the assets belonging to the petitioner. In any event, he has submitted that, there is a small space available at the building concerned where, the petitioner can store his assets. He has submitted that, the petitioner did not make over vacant possession of the area and therefore, the respondent is suffering loss and damages.

13. The parties have relied upon Section 2(2)(e), and Section 20 of the Act of 1996 which are as follows :-

“2. Definitions. –

(e) “Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having, jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a

suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

.....

20. Place of arbitration. –

(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

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

14. The parties have entered into a leave and licence agreement dated July 11, 2019. The parties have referred to the following clauses of the leave and licence agreement dated July 11, 2019 :-

“13. Lien on Licensee’s Goods

13.1 *In the event of non-payment of the License Fee and/or any other charges specified in this Agreement, anytime during the License Term or in case of termination of this*

Agreement during the Lock-in Period, the Licensor shall have an automatic lien and right of sale over all the stocks, goods and merchandise, equipment, furniture & fixtures, other movable properties etc. of the Licensee in the Premises, in addition to its right to recover such due/payable License Fee and all other charges. Further, in the event of expiry of this Agreement, in case the Licensee fails to vacate the Premises, then Licensor shall have an automatic lien and right of sale over all the stocks, goods and merchandise, equipment, furniture & fixtures, other movable properties etc. of the Licensee in the Premises, in addition to its right to charge the penalty for overstaying in the property from the Licensee.

14. Force Majeure

14.1 *Upon the occurrence of any of the Force Majeure events like fire, accident, riots, flood, earthquake, storm, terrorist activities, war, act of god, which results in closure of business of the Licensee in the Premises, it shall be declared an event of Force Majeure. Provided, however, that if such an event lasts for more than 60 days, Either Party shall have an option to terminate this Agreement at the expiry of aforesaid 60 days (even during the Lock-in Period without any liability for payments towards unexpired Lock-in Period by the Licensee).*

16. Miscellaneous

16.6 *This Agreement shall be construed, interpreted and applied in accordance with, and shall be governed by, the laws applicable in India. The courts of Kolkata shall have exclusive jurisdiction to try dispute, if any, arising out of or in relation to this Agreement.*

16.7 *Any dispute or difference arising between the parties shall be resolved amicably at the first instance. Unresolved disputes, controversies, contests, disputes, if any shall be submitted to arbitration to a sole arbitrator appointed by the Licensor. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act 1996 along with the Rules there under and any amendments thereto. The arbitration shall be conducted in English. The decision/award of the arbitrator shall be final/conclusive and binding on the Parties. The seat of the arbitration shall be at New Delhi.”*

15. The parties have not disputed the existence of the arbitration agreement. According to the petitioner, the Courts at Kolkata shall have exclusive jurisdiction to try the disputes, if any arising out of or in relation to the leave and licence agreement dated July 11, 2019 in view of Clause 16.6 thereof. On the other hand, the respondent has contended that, since the seat of arbitration has been prescribed in

Clause 16.7 to be at New Delhi, the Courts at New Delhi shall have exclusive jurisdiction.

16. In ***M/s. Swastik Gases P. Ltd. (supra)***, the Supreme Court has considered the question of exclusive jurisdiction in respect of an application under Section 11 of the Act of 1996 in view of a particular clause in the consignment agency agreement. The arbitration agreement between the parties in that case was a domestic arbitration. The Hon'ble Supreme Court has considered the forum selection clause in the agreement. It has considered the authorities on the forum selection clause. It has held as follows :-

31. *In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, the Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11(12)(b) and Section 2(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of Clause 18 of the agreement have agreed*

to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of Clause 18 of the agreement, the jurisdiction of the Chief Justice of the Rajasthan High Court has been excluded?

32. *For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like “alone”, “only”, “exclusive” or “exclusive jurisdiction” have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties—by having Clause 18 in the agreement—is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the*

matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.

17. The Supreme Court in ***Indus Mobile Distribution Private Limited (supra)*** has considered the issue whether, when the seat of arbitration is Mumbai, an exclusive jurisdiction clause stating that the Courts at Mumbai alone would have jurisdiction in respect of disputes arising under the agreement would oust all other courts so considered. It has held as follows :-

“19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to “seat” is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction — that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of

Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been held above, the moment “seat” is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

20. *It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd. [Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] This was followed in a recent judgment in B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd. [B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd., (2015) 12 SCC 225 : (2016) 1 SCC (Civ) 427] Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment [Datawind Innovations (P) Ltd. v. Indus Mobile Distribution (P) Ltd., 2016 SCC OnLine Del 3744] is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. The appeals are disposed of accordingly.”*

18. In ***Mankastu Impex Private Limited (supra)***, the Supreme Court has considered the issue of seat of arbitration, in a proceeding under Section 11(6) of the Act of 1996, in respect of an international arbitration. It has held as follows :-

“19. The seat of arbitration is a vital aspect of any arbitration proceedings. Significance of the seat of arbitration is that it determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award. The situs is not just about where an institution is based or where the hearings will be held. But it is all about which court would have the supervisory power over the arbitration proceedings. In Enercon (India) Ltd. v. Enercon GmbH [Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , the Supreme Court held that : (SCC pp. 43 & 46, paras 97 & 107)

“[T]he location of the seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. It was further held that the seat normally carries with it the choice of that country's arbitration/curial law.”

(emphasis supplied)

20. *It is well settled that “seat of arbitration” and “venue of arbitration” cannot be used interchangeably. It has also been established that mere expression “place of arbitration” cannot be the basis to determine the intention of the parties that they have intended that place as the “seat” of arbitration. The intention of the parties as to the “seat” should be determined from other clauses in the agreement and the conduct of the parties.*

.....

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.”*

19. The Supreme Court has considered the issue of seat of arbitration in ***Brahmani River Pellets Limited (supra)***. The arbitration agreement was in respect with a domestic arbitration and that Clause 18 of the agreement between the parties specified with the arbitration shall be under Indian Arbitration and Conciliation Law, 1996 and the venue of arbitration shall be Bhubaneswar. It has held as follows :-

“18. Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the “venue” of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in Swastik [Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] , non-use of words like “exclusive jurisdiction”, “only”, “exclusive”, “alone” is not decisive and does not make any material difference.”

20. In ***Aniket Investments LLC (supra)*** the Bombay High Court has considered a petition under Section 9 of the Act of 1996. In the

facts of that case, in an arbitration agreement, governing a domestic arbitration, the parties had agreed that the Courts of Hyderabad shall have exclusive jurisdiction to try and entertain disputes arising out of the agreement and at the same time, it had provided that the seat of arbitration of the proceeding shall be at Mumbai. Construing the two clauses, it has held that, the Courts at Hyderabad would have exclusive jurisdiction to entertain the petition under Section 9 of the Act of 1996. The Court had construed the agreement of the parties for the seat of arbitration to be at Mumbai as one of prescribing a venue of the arbitration. The Court had accepted the party autonomy recognised under Section 20(1) of the Act of 1996. While considering a petition under Section 11 of the Act of 1996, the Delhi High Court in **Cars 24 Services Pvt. Ltd. (supra)**, has construed a forum selection clause permitting the parties to approach a Court of competent jurisdiction at Haryana for appointment of arbitrator and a clause prescribing the seat of arbitration to be at New Delhi to mean that, the Section 11 petition was required to be moved before an appropriate court having territorial jurisdiction at Haryana. The authorities noted above, have referred to **2012 Volume 9 SCC 552 (Bharat Aluminium Company v. Kaiser Aluminium Technical Services INC)**.

21. ***Bharat Aluminium Company (supra)*** has held that Part I of the Act of 1996 applies to arbitrations both domestic as well as international, having their juridical or legal seat within the territory of India. If, the seat of arbitration is outside India, then, Part I of the Act of 1996 is inapplicable to the extent of it being inconsistent with the arbitration law of the seat of arbitration even if, the arbitration agreement provides that the Act of 1996 shall govern the arbitration proceedings.

22. In ***Hindustan Construction Company (supra)***, the Supreme Court has held that in view of the seat of arbitration being at New Delhi the Courts at New Delhi alone would have jurisdiction for the purpose of challenge to the award. In that case, the conflict between a forum selection clause and the seat of arbitration was not there.

23. In ***BGS SGS Soma (supra)*** the Supreme Court has held, once juridical or legal seat of arbitration is designated or determined, then, it exclusively determines which courts will have jurisdiction over the arbitration as opposed to the place where whole or part of the cause of

action arose. Once the seat of arbitration is designated or determined, the same operates as an exclusive jurisdiction clause as a result of which only the courts where the seat is located would have jurisdiction over the arbitration, to the exclusion of all other courts, within courts where part of cause of action may have arisen. It has laid down the test for determination of the seat for arbitration. It has made such observations, in the context of an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 and in respect of a domestic arbitration.

24. In ***Ramandeep Singh Taneja (supra)***, the Delhi High Court has while considering an application under Section 11 of the Act of 1996 and noticing that, there was a conflict between the venue of arbitration and the forum selected for resolution of all disputes dismissed the petition on the ground of want of territorial jurisdiction. It has held that, the conflict between the forum selection clause and the seat of arbitration, can be resolved by holding that the disputes that had to be adjudicated without reference to arbitration, the forum selection clause would apply, and where they have to be resolved

through arbitration, the seat of arbitration would have exclusive jurisdiction.

25. In the ***M/s. Devyani International Ltd. (supra)***, the Delhi High Court has considered a petition under Section 9 of the Act of 1996. It has considered a conflict between the seat of arbitration and the forum selection clause. It has granted interim protection when, the seat of arbitration was prescribed to be at New Delhi and the forum selected by the parties specified courts at Mumbai. In ***M/s. N J Construction (supra)***, the Delhi High Court has considered a petition under Section 11 of the Act of 1996. In the facts of that case, the selected forum was Court in Guwahati while the seat of arbitration was at New Delhi. It has considered the conflict between the forum selection clause as also the seat of arbitration and allowed the application under Section 11 of the Act of 1996. Similarly, in ***Cinepolis India Pvt. Ltd. (supra)***, the Delhi High Court has allowed an application under Section 11 of the Act of 1996. In the facts of that case, the parties had agreed that Courts in Ghaziabad shall have exclusive jurisdiction while the place of Arbitration shall be at New Delhi.

26. In ***Aarka Sports Management Pvt. Ltd. (supra)***, the Delhi High Court has considered an application under Section 11 of the Act of 1996 and refused to entertain the same as, New Delhi was not specified to be the seat of arbitration; no cause of action arose at New Delhi and the respondent did not work at New Delhi. It has held that the agreement was drawn at Ranchi, signed at Lucknow and was to be performed at Patna. It has construed the forum selection clause and held that, since no part of the cause of action arose within the territorial jurisdiction, the parties could not confer jurisdiction on a Court which otherwise had no jurisdiction. The situation would have been different, according to it, had the parties, prescribed the seat for arbitration to be at New Delhi.

27. The facts and circumstances of the instant case have given rise to the following issue :-

(1) When there is a forum selection clause conferring exclusive jurisdiction to a Court which is different to the Court having jurisdiction over the seat of arbitration, in a domestic arbitration, which Court will have jurisdiction over the arbitration proceedings?

28. The authorities of the Supreme Court, that the parties have cited, has not dealt with the above issue. The authorities of the High Court, which the parties have cited, however, as answered the above issue differently. The Delhi High Court, in ***Cars 24 Services Pvt. Ltd. (supra)*** has construed the forum selection clause permitting the parties to approach a Court of competent jurisdiction at Haryana for appointment of arbitrator and a clause prescribing the seat of arbitration to be at New Delhi to mean that, the Section 11 petition was required to be moved before the appropriate Court having territorial jurisdiction at Haryana. The Delhi High Court, however, in ***Ramandeep Singh Taneja (supra), M/s. Devyani International Ltd. (supra), M/s. N J Construction (supra)*** and ***Cinopolis India Pvt. Ltd. (supra)*** entertained petitions when the seat of arbitration prescribed was at Courts at New Delhi while the forum selection clause had prescribed different courts.

29. The Act of 1996, has recognised party autonomy. It has recognised the power of the parties to choose the law that will govern the contract and the arbitration. It has recognised the power of the party to select the applicable procedure for arbitration between

themselves, to select the arbitrators to adjudicate the disputes, and the seat of arbitration. The seat of arbitration, so far as international commercial arbitrations are concerned, has importance. The seat of arbitration, as has been held in ***Mankastu Impex Private Limited (supra)*** is a vital aspect of any arbitration proceedings. It determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award. The situs is not just about where an institution is based or where the hearings will be held. But it is all about which court would have supervisory power over the arbitration proceedings.

30. There is a distinction between the seat of arbitration and the venue of arbitration. This distinction has been noted and explained in ***Mankastu Impex Private Limited (supra)***. ***Mankastu Impex Private Limited (supra)*** has however dealt with the question of seat of arbitration and a conflict between the seat of arbitration and the Court selected under the forum selection clause, in the context of an international commercial arbitration.

31. In the facts of the present case, Clause 16.6 of the agreement vest the courts of Kolkata exclusive jurisdiction to try dispute if any, arising out of or in relation to the contract. Clause 16.7 of the agreement however prescribes that the seat of arbitration shall be at New Delhi. There is therefore an apparent conflict between the two clauses so far as the question of the Court having jurisdiction over the arbitration proceedings is concerned.

32. In the facts of the present case, a part of the cause of action has arisen within the territorial jurisdiction of this Hon'ble Court. The petitioner has claimed that the agreement was signed at the office of the petitioner within the territorial jurisdiction of this Hon'ble Court. The petitioner has claimed that a part of the cause of action has arisen within the territorial jurisdiction of this Hon'ble Court. The pecuniary value of the claim of the parties is above the specified value. In absence of Clause 16.7, by virtue of, the ratio laid down in ***M/s. Swastik Gases P. Ltd. (supra)*** this Hon'ble Court has the jurisdiction to try, entertain and determine the present petition. The question is, whether, Clause 16.7 of the agreement, which has prescribed that the seat of arbitration shall be at New Delhi, alters the situation or not.

33. While party autonomy allows the parties to choose the seat of arbitration, the courts are required, to discern from the agreement, the intention of the parties so as to find out the seat of arbitration in order to assess the applicable laws to the arbitration proceedings. This exercise has relevance in the case of an international commercial arbitration where, there may be different laws governing the contesting parties. It is therefore essential in an international commercial arbitration that, the laws applicable to the arbitration proceedings are identified by identifying the seat of the arbitration. The seat of arbitration then determines the law governing the arbitration proceedings. Such a situation, does not arise in the case of a domestic arbitration. In the case of a domestic arbitration, the Indian Laws applies notwithstanding the seat of arbitration being located anywhere in the country. Where, the parties in a contract, have not selected a forum, which such forum otherwise satisfies the test of being a competent court to try dispute, then, such court should have jurisdiction over the subject matter of the arbitration proceeding. In absence of the parties in a domestic arbitration, specifying the forum, however, proceeding to specify the seat of the arbitration, then, by

virtue of the ratio of ***Indus Mobile Distribution Private Limited (supra)***, ***Mankastu Impex Private Limited (supra)***, ***Brahmani River Pellets Limited (supra)*** and ***BGS SGS Soma (supra)***, the Courts having jurisdiction over the seat of arbitration, will have jurisdiction over the arbitration proceeding. In such a scenario, the seat of arbitration will be construed as the chosen forum by the parties. However, when, although the parties have specified a seat of arbitration, which is different to the Court which the parties have selected, then, in my view, the selected Court, which otherwise have jurisdiction to try the disputes, will have jurisdiction over the subject arbitration in the case of a domestic arbitration.

34. Learned Advocate appearing for the petitioner has contended that, since, the forum selection clause appears in Clause 16.6 which is prior to clause prescribing the seat of arbitration at Clause 16.7, by virtue of ***Radha Sundar Dutta (supra)*** the forum selection clause will prevail.

35. In ***Radha Sundar Dutta (supra)***, the Supreme Court has held that the settled rule of interpretation is that, if there be admissible two

constructions of a document, one of which gives effect to all the clauses therein while the other renders one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim " *ut res magis valeat quam per-eat* ". It has held that, if there is a conflict between the earlier clause and the latter clauses, and it is not possible to give effect to all of them, then the rule of construction is well-established that it is the earlier clause that must override the later clauses and not vice versa.

36. Although in the facts of the present case, the forum selection clause is prior to the clause prescribing the seat of arbitration, in my view, in a domestic arbitration, the issue as to whether, the forum selection clause is prior to the clause prescribing the seat of arbitration or vice versa, is of no consequence. The seat of arbitration, in the case of a domestic arbitration, assume significance, in the absence of a valid forum selection clause. In other words, if the parties have by agreement, chosen a specified court, and which such court otherwise have jurisdiction over the subject matter of the arbitration, then, notwithstanding a seat of arbitration being prescribed which is different

to the forum selection clause, the court selected by the parties will have jurisdiction, in the case of a domestic arbitration.

37. The authorities of the Supreme Court, as have been cited herein, have recognised the principle that, the parties by consent cannot vest jurisdiction upon a court, which has none. However, in the case of arbitration, the courts have recognised that, when the parties have prescribed a seat of arbitration and such seat of arbitration may not otherwise have jurisdiction in the sense that, it does not fulfil any of the conditions of Section 20 of the Code of Civil Procedure, 1908, then, also since the parties have specified the seat to be at a particular place, such court will have jurisdiction;

38. Party autonomy in an arbitration being imperative, it is just and proper that, in a domestic arbitration when the parties agree to a selected forum, which otherwise has jurisdiction, then, such selected forum should have precedence over the seat of arbitration. It is so in order to give primacy to party autonomy. Such view is permissible on a harmonious construction of the contract between the parties. Such a construction will not vitiate the forum selection clause or render it

otiose. Any other construction will render the forum selection clause otiose.

39. In the case of a domestic arbitration :

(i) Where the agreement has not prescribed the seat of arbitration and the parties have not selected any Court to try the disputes, then, the Court having jurisdiction over the subject matter of the arbitration will exercise jurisdiction;

(ii) Where the parties to the arbitration agreement have prescribed a seat of arbitration and such agreement does not have a forum selection clause, then, the Court having jurisdiction over the seat of arbitration, will have jurisdiction to try the arbitration petition;

(iii) Where the parties have prescribed the seat of arbitration as well as selected a forum, and there is no conflict between the two, then the Court having jurisdiction on the seat of arbitration, will exercise jurisdiction as there is no conflict;

(iv) Where the parties have selected a seat of arbitration which is in conflict with the jurisdiction of the Court selected under the forum

selection clause, then, the Court selected under the forum selection clause will have jurisdiction provided such Court otherwise has jurisdiction akin to Section 20 of the Code of Civil Procedure, 1908. The issue framed in paragraph 27 is answered accordingly.

40. In ***Probhas Chandra Dalui & Anr. (supra)***, the Supreme Court has held that, the best interpretation of a contract is made from the context. It has held that, an accepted principle of construction is that the sense and meaning in any particular part of the instrument may be collected so that every part of it may be brought into action.

41. In view of the discussions above, I am of the view that, this Hon'ble Court has the jurisdiction to try and determine the present petition.

42. The relief that can be granted at the ad interim stage has to be considered. The petitioner has claimed that, the petitioner admitted to offer vacant possession of the premises to the respondent which the respondent did not accept. The respondent has also been blocking the petitioner from removing its assets and equipments from the premises.

43. The agreement between the parties has a clause with regard to lien. Clause 13.1, has allowed the respondent to have automatic lien and the right of sale over the goods and equipments, furniture and fixtures other movable properties of the petitioner in addition to its right to charge for penalty in the property.

44. Sections 170 and 171 of the Contract Act, 1872 has dealt with right of lien. Under Section 171 of the Act of 1872, a person has a right to retain, as a security for its claim, goods bailed with it, in the event there is an express contract of that effect. The legality, validity and sufficiency of the right of lien as has been claimed by the respondents, over the goods belonging to the petitioner, has to be decided in arbitration, if raised.

45. At the ad interim stage, in my view, interest of justice would be subserved by permitting the petitioner to remove its goods, sale the same, and keep the sale proceeds in a separate account pending decision in this application and the arbitration. The sale be conducted upon notice to the respondent. The respondent is at liberty to depute a

person at the sale. The petitioner will inform the respondent as to the quantum of the sale proceeds.

46. Let affidavit-in-opposition be filed within three weeks from date reply thereto if any within one week thereafter.

47. List the application in Adjourned Motion four weeks hence.

[DEBANGSU BASAK, J.]