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Case Commentary on Inox Renewables Limited V. Jayesh Electricals Limited

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ABSTRACT

Arbitration is agreed upon and formed by agreement of the parties for a private resolution of disputes instead of filing at the court.[2] The independence of parties to operate in furtherance of their legal necessities is a foundational requirement of any successful procedure of arbitration. It forms part and is embodied in any basic arbitration agreement. This independence provides the parties the sole authority to choose and determine either to adopt institutional arbitration or ad hoc arbitration, choose the place of arbitration, whether to appoint a sole arbitrator of more than one arbitrator, arbitration procedure, the extend of the authority of arbitrators, and the governing law.[3] Of the above, the seat and venue of the arbitration play a decisive factor while passing and upholding the validity of an arbitral award. Seat of arbitration is a location selected by the parties as to the legal place of arbitration, which consequently determines the procedural framework of the arbitration. The parties are generally free to agree on the seat of arbitration.[4]

The following content aims to contribute a gist of a recently decided matter in the Apex Court of India, revolving around the question of the validity of seat of arbitration chosen by mutual consent and the difference between a seat and a venue. Through this judgment, the hon'ble division bench of the hon'ble court has provided an impetus to the autonomous element of 'consent' applied during an arbitration procedure, that parties to an arbitration agreement own, in the matter of selection of the seat of arbitration.

Keywords: *Mutual consent, seat of arbitration, exclusive jurisdiction, venue, party autonomy.*

I. GENERAL BACKGROUND

Whether The judgment passed by Justice R F Nariman and heard by Justice R F Nariman and Justice H Roy has provided yet another point of clarification with respect to the position of law while dealing with the change in the seat and venue of arbitration, wherein the seat determines

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[2] OKUMA Kazutake, *Arbitration and Party Autonomy*, Vol. 38 The Seinan Law Review 1, 1 (2005).
[3] *Id.* at 2.
[4] Milica Savic, *Seat of Arbitration*, JUS MUNDI (Aug. 16, 2021, 09:41 PM), https://jusmundi.com/en/document/wiki/en-seat-of-arbitration.

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the jurisdiction of the court that would have the sole authority of presiding over any disputes brought before it by any party or parties, arising out of an arbitration agreement. Mutual consent being the core of an arbitration agreement, the same has been the primary focus of the bench while declaring that the change in seat of arbitration by mutual consent of the parties, in absence of an expressed amendment clause, would not refer to the venue of the arbitration, as a matter of convenience, but as the official seat of arbitration. The Apex Court has again preserved the legal significance of a seat of arbitration wherein it plays a settling role for preferring and choosing the court of the seat for all purposes under the Arbitration Act, including for the purpose of interim orders and challenges to the award.[5]

An appeal through a Special Leave Petition was filed by the Appellant, Inox Renewables Ltd, that came up before the hon'ble division bench of the Apex Court in April 2021. The Appellant, through the appeal, had challenged the judgment passed by the High Court of Gujrat at Ahmedabad wherein the HC had dismissed the Special Civil Application filed by Inox (Appellant) challenging the order passed by Commercial Court of Ahmedabad in 2019 holding that the courts at Jaipur, Rajasthan alone would be exercising exclusive jurisdiction over the disputable matters arising because of an arbitration agreement entered into by Inox Renewables Ltd. (Appellant) and Jayesh Electricals Ltd (Respondent) and therefore, a petition challenging and requesting to set aside the arbitral award passed by the arbitrator or a tribunal under section 34 of the Arbitration and Conciliation Act, 1996 would lie only before the courts at Jaipur, giving rise to the present appeal by the appellant.

II. BRIEF FACTS OF THE CASE

The Appellant company Inox Renewables Limited, is a renewables & environment company based out of Satellite Road, Ahmedabad, Gujarat, India. The Respondent company, Jayesh Electricals Ltd, is registered under the provisions of the Companies Act, 1956. The company is engaged in the business of manufacturing and marketing transformers and allied products.[6] The Appellants, Inox Renewables Ltd, hereinafter referred to as IRL bought and took over the entire business of GFL (Gujarat Fluorochemicals Ltd) through a Slump Sale on 30th March 2012, by way of a business transfer agreement. Earlier on 28th January 2012, GFL and the Respondent, Jayesh Electricals Ltd, hereinafter referred to as JEL, had entered into a purchase

[5] SAMVAD Partners, *The effect of change in Venue/Place of Arbitration*, Axfait Technologies (Aug. 16, 2021, 12:54 PM), https://www.axfait.com/post/the-effect-of-change-in-venue-place-of-arbitration.

[6] Inox Renewable Ltd v. Jayesh Electricals Ltd, https://www.casemine.com/judgement/in/5ffe57959fca1917ab0eba97 (last visited 20th, Aug. 2021).

order for the manufacture and supply of power of transformers at wind farms. The arbitration clause 8.5 of their purchase order provided that in case of dispute or anchoring any other arbitral proceedings the venue of arbitration for the above to be Jaipur, Rajasthan and any party shall be free to file a petition under section 34 of the act of 1996 within the jurisdiction of courts in the State of Rajasthan. However, when the business of GFL was bought by IRL, to which the respondent was not a party, the appellant and GFL through clauses 9.11 and 9.12 of the business transfer agreement, chose and decided Vadodara, Gujarat to be the seat of arbitration for resolving any dispute arising out of the business transfer agreement, thereby, vesting the courts at Vadodara with the exclusive jurisdiction.

Thereafter in 2014, the High Court of Gujarat at Ahmedabad, on the application filed by JEL the respondents, under section 11 of the act of 1996 and joint submission made by both parties for the appointment of a sole arbitrator to resolve the dispute between them concerning the purchase order of January 2012, requested Shri C.K. Buch (retired Judge of the HC) to act as a sole arbitrator for the dispute. The learned arbitrator then passed an award on 28th July 2018, awarding the respondent JEL a sum of Rs 38,97,150/- plus as interest on the arbitral award, from 10th March 2017 till the date of passing of arbitral award, a sum of Rs. 31,32,650 was also awarded to JEL, along with quantified costs amounting to Rs. 2,81,000. Further, 15% future interest was awarded from the date of award till the date of payment. Aggrieved by the order, the appellant, IRL filed an application under section 34 of the act of 1996 in the commercial court of Ahmedabad, which JEL opposed on the grounds of lack of jurisdiction of the court of Ahmedabad to hear the arbitral dispute. It argued that in accordance with clauses 9.11 and 9.12 of the business transfer agreement, only the courts at Vadodara have the exclusive jurisdiction to decide over the disputes between the parties and not courts at Ahmedabad. The same was held by the commercial court of Ahmedabad in its order dated 25th April 2019 and the appeal filed by the appellant challenging the arbitral award was dismissed.

III. CAUSE OF ACTION

The cause of action for the appeal on behalf of the appellant before the hon'ble bench of Supreme Court arose when the application was filed in the court at Ahmedabad on behalf of the appellant under section 34 of the act of 1996, challenging the arbitral award passed in July 2018 by the sole arbitrator was dismissed by the HC of Gujarat at Ahmedabad on account that the courts at Vadodara alone hold the authority to exercise exclusive jurisdiction to hear matters relating to disputes arising out of the arbitration agreement between IRL and JEL. The appellant, IRL, had filed a Special Civil Application against the order dated 25th April 2019

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passed by the commercial court at Ahmedabad before the HC of Gujarat at Ahmedabad, that was rejected by the court by siding with the contentions of the respondent that the seat of arbitration is Vadodara therefore, the courts at Ahmedabad would not possess the juridical seat of arbitration. Even though the High Court referred to the arbitration clause 8.5 of the purchase order entered into between Gujarat Fluorochemicals Ltd and JEL, the respondent, wherein the venue of the arbitration was agreed upon to be Jaipur and also that the appropriate court for resolving disputes of the purchase order to be the same, it still found no error in the findings and order passed by the commercial court of Ahmedabad in maintaining Vadodara as the seat of arbitration having exclusive jurisdiction and dismissed the civil application filed by the appellant.

IV. FACTUAL MATRIX ON BEHALF OF THE APPELLANT

Senior Counsel Shri Sachin Dutta, appeared and argued on behalf of the Appellant. The counsel threw light on the fact that the business transfer agreement of the purchase order was not between appellant IRL and respondent JEL but between JEL and Gujrat Fluorochemicals Ltd and that is why the seat of arbitration earlier decided between JEL and GFL as Jaipur, should not to be taken as the seat or venue of arbitration between the appellant and respondent in the present case. Since there is a change in parties to the business transfer agreement, the earlier chosen seat becomes immaterial. The counsel further argued that although, the same view was agreed upon and held by the hon'ble high court, yet, it failed to take into account that the sole arbitrator, Shri C.K. Buch, had recorded while passing the arbitral award that by mutual consent of the parties, the place or seat of arbitration was shifted to Ahmedabad. The aforesaid clause is 12.3 that reads, "..There is no controversy as to the constitution of the Tribunal between the parties and the parties have agreed to get their dispute resolved by a sole arbitrator. As per the arbitration agreement, the venue of the arbitration was to be Jaipur. However, the parties have mutually agreed, irrespective of a specific clause as to the [venue, that the place] of the arbitration would be at Ahmedabad and not at Jaipur." Thereby, indicating that the courts at Ahmedabad would have jurisdiction when the disputable matter, which couldn't be decided through the process of arbitration, has to be decided by litigation.

The counsel proceeded in its arguments by strongly placing reliance on the judgment passed by the Hon'ble SC in **BSG SGS SOMA JV vs. NHPC Limited[7].**

The Hon'ble SC in BSG (supra) had held that if in an arbitration agreement a particular geographical place has been referred to as the 'venue' of the arbitration proceedings, it is to be

[7] BSG SGS SOMA JV vs. NHPC Limited, (2020) 4 SCC 234.

derived from the expression 'arbitration proceedings' that 'venue' should be treated as the seat of arbitration because the expression 'arbitration proceedings' encompasses the entire process of reaching to an acceptable solution through arbitration, including the passing of an arbitral award. The same has to be compared and differentiated with the language that reads, "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", that is interpreted to mean that the venue in such case only conforms to a convenient place of meeting and not the actual seat of the arbitration. The further language that the arbitral proceedings "shall be held" at a particular venue would also indicate intention and consent of the parties to carry out the arbitral proceedings at that particular place, making it apparent that the place should be considered as the seat of the arbitration. However, these tests won't apply in matters where there is a presence of other *significant contrary indicia* that the stated venue is not the seat but merely the geographical place of arbitral proceedings.[8]

The counsel on behalf of IRL argued that the judgment passed in BSG read with clause 12.3 of the arbitral award passed by the sole arbitrator in the dispute relating to the purchase order in the present case provides that the *significant contrary indicia* here is the following part of the clause: '…However, the parties have mutually agreed, irrespective of a specific clause as to the [venue, that the place] of the arbitration would be at Ahmedabad and not at Jaipur'. Therefore, the appropriate seat of arbitration between appellant and respondent should be considered as Ahmedabad, and not Jaipur.

V. FACTUAL MATRIX ON BEHALF OF THE RESPONDENT

Shri Purvish Jitendra Malkan, AOR, appeared and argued on behalf of the Respondent, JEL in support of the judgment passed by the commercial court at Ahmedabad. In furtherance of his argument that the mutual agreement or consent between the parties to change the seat of arbitration should be treated incomplete without an expressed written agreement, he put forth two judgments before the hon'ble division bench of the SC namely, **Videocon Industries Limited v. Union of India[9] and Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited[10].** The counsel argued that the agreement to change the seat of arbitration to Ahmedabad was merely with reference with section 20(3) of the act of 1996, that provides for the arbitral tribunal to call for the parties to meet at any appropriate place of its choice for hearing witnesses, experts or the parties, or for inspection of documents, goods or

[8] M/S. Inox Renewables Ltd v. Jayesh Electricals Ltd, (Civil Appeal No. 1556 of 2021).

[9] Videocon Industries Limited v. Union of India (2011) 6 SCC 161

[10] Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited, (2017) 7 SCC 678.

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other property,[11] and not in reference to section 20(1)[12] of the same act. Therefore, by taking the above defence, the respondent argued that the seat of arbitration was always Jaipur and the change in the seat of arbitration to Ahmedabad was only as a matter of convenience.

The counsel also referred to Clause 35.2 of the Venue and Law of Arbitration Agreement in the case of Videocon Industries (supra), which provides for an amendment clause. It stated that the contract between the parties shall not be amended or modified except unless an instrument in writing has been signed by all the parties to the arbitration agreement. The facts were that the seat of Arbitration was Kuala Lumpur, however, due to the epidemic of SARS, the arbitral tribunal decided to shift the seat from Kuala Lumpur to London, with no objection from the parties. The court settled the dispute of whether Kuala Lumpur remains as the seat of arbitration or it has been shifted to London by holding that because of the presence of an amendment clause 35.2 where any change has to be made with an expressed written agreement, the change in the seat from Kuala Lumpur to London was only to be treated as a physical change and the parties merely agreeing to this change, without signing an agreement to the effect of change in the seat of arbitration, does not amount to the designation of London from Kuala Lumpur as the seat of arbitration.

VI. MAJOR FINDINGS OF THE COURT

After due consideration of arguments from both sides, the hon'ble division bench consisting of Justice R H Nariman and Justice H Roy held that the following:

1. From the reading of the judgment passed by the Hon'ble SC in BSG (supra), the division bench is of the clear view that the element of significant contrary indicia, in this case, is the arbitral award where the respected arbitrator recorded the change in the seat of arbitration from Jaipur to Ahmedabad and it would not be feasible to accede with the arguments of the respondent that mutual agreement between parties is not sufficient to hold a change in the seat of arbitration valid without a signed written agreement between the parties and therefore the respondent cannot contest the case on the grounds of lack of jurisdiction.

2. Per clause 12.3 of the arbitral award passed by the arbitrator with respect to the venue/place of the arbitration it is clear that there was a consensus between the parties to change the seat of

[11] 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.
[12] *Ibid.*

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arbitration from Jaipur to Ahmedabad, and not Jaipur anymore and therefore, the courts at Ahmedabad have the full capacity to act as the juridical seat of the arbitration, exercising exclusive jurisdiction.

3. The amendment clause 35.2 stating the necessity of an expressed written agreement concerning the change in the seat of arbitration, present in the Venue and Law of Arbitration agreement in the case of Videocon Industries (supra) does not apply to the present case as there was no amendment clause, or otherwise any legal requirement of producing a signed written agreement for changing the seat, therefore, the change in the seat of arbitration by mutual consent holds valid in the eyes of law.

4. It was not fruitful for the Respondent JEL to refer to the judgment in Indus Mobile (supra) as the same only built up the arguments of the Appellant that provided in para 19 that the moment there is a change in the seat of arbitration by agreement between the parties, it is akin to an exclusive jurisdiction clause, which would then vest the courts at the "seat" with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.[13] Therefore, to further negate the arguments made by the respondent, the shift in the seat of arbitration, in this case, has taken place by mutual agreement between the parties as recorded in the arbitral award, and the same was not disputed by the respondent as well.

5. The process of shifting the venue/place of the arbitration has also been in agreement with the change in the 'place' of arbitration referred to in section 20(1) and not section 20(3) of the Arbitration and Conciliation Act, 1996 as it was made extremely clear that Jaipur does not continue to hold the position of the seat of arbitration and it has now been shifted to Ahmedabad by mutual agreement from both sides and the respondent also did not raise any objection to clause 12.3 of the arbitral award passed by Shri C.K. Buch, confirming the mutual consent and change in the seat of arbitration.

6. The contention of the counsel of respondent that the language of clause 8.5 of the business transfer agreement provides that the jurisdiction of courts in Rajasthan being independent of the venue at Jaipur, does not hold any water. Once the seat of arbitration has been changed by mutual agreement from Jaipur to Ahmedabad, the courts in Ahmedabad and not in Rajasthan would exercise exclusive jurisdiction.

[13] M/S. Inox Renewables Ltd v. Jayesh Electricals Ltd, (Civil Appeal No. 1556 of 2021).

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VII. CASE COMMENT

The present judgment clarifies that in case there is an absence of any specific written clause in the arbitration agreement between the parties, the venue of the arbitration, as mentioned in the agreements, would connote the seat of the arbitration. It sets a precedent for such future arbitration matters where there exists no written amendment clause similar to the one present in Videocon Industries (supra) or such clauses that have not provided any point of difference between the words 'seat' and 'venue'. It attempts to resolve such disputes with respect to the change in the seat of arbitration wherein the arbitration agreement there is no requirement of change in the entire or a few clauses of contract for accepting a different seat of arbitration and thereby, accepting the jurisdiction of courts of such seat by mutual consent between the parties to the arbitration.

The Seat of Arbitration, being conclusive of determining the courts that would have supervisory jurisdiction once the arbitration matter has to be decided through litigation, plays a pivotal role in the dispute resolution process. The selection of the Seat determines the law governing the Arbitration procedure and often, more importantly, the process and rights relating to the enforcement of the arbitration award.[14] Here, even though the hon'ble court has upheld the sanctity of an arbitration agreement by strengthening the autonomy of carrying on with the consent of the parties in the out-of-court settlement of the dispute through arbitration, yet, the judgment has seemingly provided precedence to consent over written agreements. Notwithstanding the fact that the present judgment upheld mutual consent to be sufficient legal necessity in order to change the seat of arbitration and to decide the jurisdiction of the courts in accordance to the seat relating to the international practices of the courts while declaring the appropriate juridical seat of arbitration on a case-by-case basis, it has seemingly continued the dichotomy of the Seat v. Venue of Arbitration.

Further, declaring a written agreement to play a non-essential part in determining whether or not the change in the seat of arbitration should be considered valid and placing mutual consent of the parties as a sufficient precondition for justifying the change in the seat, causes damage to the spirit and purpose of an expressed, signed and verified written clause in an agreement. This could result in the party or parties practicing the same culture while demanding the amendment of other such clauses in the agreement that they do not see an eye to eye and gradually taking place of a matter of convenience for the parties resisting arbitral awards.

[14] Devesh Juvekar & Dikshat Mehra, *Seat of Arbitration*, RSP India Legal Update (Aug. 15, 2021, 02:43 PM), https://www.manupatrafast.in/NewsletterArchives/listing/ILU%20RSP/2015/Sep/SEAT-OF-ARBITRATION.pdf.

It will further allow the party with some malevolence to make the entire case and the other party to dance to their tunes by hiding behind the sheet of implied consent in the absence of an expressed written agreement. The judgment has opened doors for the parties to the arbitration to interpret the clauses at their own will, giving them the independence to ignore the discipline and accuracy provided by an expressed written agreement in disputes, signed by themselves in the first place. It allows them to disrespect the terms of the agreement which were placed by them in consensus with the other party.

It is probable that the judgement will be used as a weapon by the parties who want to get their way and since they might be unable to find enough unreasonable grounds in the arbitral award to file a petition against it, they might resort to the decision taken in the present case while attempting to convert an unreasonable ground into a reasonable one. Resting the entire power and option of changing a seat based on consent and not consent along with a written agreement diminishes the worth of a carefully constructed contract and requires the drafters to exercise extra scrutiny while drafting the arbitration agreements and also weighs down on the arbitrator and judges to be more than cautious while interpreting the intentions of the parties from the clauses that whether the change in the venue or the seat was unavoidable owing to the happening of an exceptional circumstance like in case of Video Industries (supra), where they held their meeting in a different place than the venue because of an outbreak of SARS or whether it is about change in the juridical seat.

The judgment seems to drive the entire process of determining the seat of arbitration solely on mutual consent. The purpose of a written agreement is to provide a safety net to the parties against any act or attempted act of misdemeanour by one of the other parties. It provides peace of mind to both the parties and a sense of security that the entire arbitration proceedings would be conducted by sticking to the black and white agreement and neither the parties nor the arbitrator would be taken aback by any unwarranted action.

There is a dire need for express provisions in the arbitration agreements that distinguishes between a seat and venue of arbitration. It should be clarified to the effect that it delivers a specific meaning to seat and venue, separately, assisting the judiciary, the litigators, and the parties to interpret it in the same way it is meant to be, not extending the issue for further deliberations. Such indefinite interpretations invite pathological clauses into commercial contracts that would result in disruption of an otherwise smooth road of receiving justice. It is likely to generate hurdles. An example of such a hurdle can be observed in the present issue between Inox and Jayesh Electricals. Even though the arbitrator had recorded the change in the seat of arbitration by mutual consent, it still led to a rise in confusion between the parties to

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whether the change was a mere geographical change, a change as a matter of convenience for the arbitral tribunal, or a change in the juridical seat of arbitration for hearing of matters in a court of law. Thereafter, the matter was deviated from addressing the challenge made to the arbitral award to first sorting out the seat of arbitration, which is supposed to be reflected upon by the parties while forming the arbitration agreement in the earlier stages of entering into a contract.

It is acceptable to maintain and not dismiss completely the significance of mutual consent and proceed with the arbitration on that basis however, the same should be followed by a written change in the arbitration agreement in order to bring and set the minds of all the parties on the same platform finalising the change in the seat of arbitration, leaving no space for unnecessary rounds of meetings, and pulling away all attention, efforts, and dedication from reaching for an amicable arbitral award to first deciding the correct seat of arbitration. It should not blatantly provide one of the parties to use the defence of an 'underlying understanding'. It should convey the understanding of the parties as to when the 'venue' of arbitration would mean a mere geographical location and when 'seat' will mean conferring jurisdiction to the court of which procedural laws would be followed in the arbitration proceedings.

Thus, the difference between seat and venue of arbitration and the procedure to be abided by for choosing a seat of arbitration needs to be carefully put in a transparent and unequivocal language within the agreement itself instead of forcing the parties to invest a major portion of their resources and time into needless litigation the cost of which turns out be more than the amount of compensation prayed for.

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