
(2019) 10 BOM CK 0085

In the Bombay High Court

Case No : Commercial Arbitration Petition No. 1244 Of 2019

Aniket SA Investments LLC

APPELLANT

Vs

Janapriya Engineers Syndicate Pvt. Ltd. & Ors

RESPONDENT

Date of Decision : 22-10-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(e), 2(1)(e), 9, 11, 11(6), 11(12) (b), 17, 20, 20(1), 20(2), 20(3), 20(c), 31(4), 34, 37, 47
Indian Contract Act, 1872 — Section 20, 23, 28
Code Of Civil Procedure, 1908 — Section 16, 17, 18, 19, 20, 21

Citation : (2019) 10 BOM CK 0085

Hon'ble Judges : G.S. Kulkarni, J

Bench : Single Bench

Advocate : Sharan Jagtiani, Vyapak Desai, Bhavana Sunder, Nishith Desai, Mustafa Doctor, Rishikesh Soni, Karthik Somsundram, Pawan Kumar, Meera Valia, Bharucha, Pawan Kumar, Rohan Bangar

Final Decision : Disposed Of

Judgement

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996, whereby the petitioner has prayed for interim measures pending the arbitral proceedings.

2. When the petition was taken up for hearing, learned Senior Counsel for Respondent Nos.1 and 2 has raised a preliminary objection to the jurisdiction of this Court in entertaining this petition to contend that the parties have agreed to confer exclusive jurisdiction to try and entertain the disputes, arising under the Security Subscription and Shareholder Agreement (for short "the Agreement") dated 21 August 2008. Considering the objection as raised on behalf of Respondent Nos.1 and 2, the relevant clause in the agreement would be required to be noted which read thus:

"20.3 Governing Law and Jurisdiction This Agreement and the rights and obligation of the Parties hereunder shall be construed in accordance with and be

governed by the Laws of India.

Subject to the provisions of Article 20.4, the courts of Hyderabad shall have exclusive jurisdiction to try and entertain and disputes arising out of this Agreement.

20.4 Arbitration

20.4.1 Any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement or the consequences of its nullity) shall be sought to be resolved and settled amicably within 30 days of such dispute arising, failing which it shall be referred to and finally resolved by arbitration under the Arbitration and Conciliation Act, 1996.

20.4.2 The arbitration shall be conducted as follows:

(a) The parties shall mutually appoint a sole arbitrator to resolve the aforesaid disputes or differences. In the event that the parties fail to mutually appoint a sole arbitrator within 15 days, the Promoter and the Investor shall appoint one arbitrator each and the two arbitrators so appointed shall appoint the presiding arbitrator.

(b) All proceedings in any such arbitration shall be conducted in English.

(c). The seat of the arbitration proceedings shall be Mumbai.

20.4.3. The arbitration award shall be final and binding on the parties, and the parties agree to be bound thereby and to act accordingly."

3. Mr. Doctor learned Senior Counsel for Respondent Nos.1 and 2 in contending that this Court would not have jurisdiction, has relied on the decisions of Supreme Court in *Bharat Alimunium Company Vs. Kaiser Alimunium Technical Services*; INC 2012 (9) SCC 552 *Indus Mobile Distribution Pvt. Ltd. Vs. Dataways and others* 2017 (7) SCC 768 and in *Bhahmani River Pvt. Limited Vs. Kamachi Industries Pvt. Ltd.* 2019 SCC Online SC 949. Referring to these decisions Mr. Doctor would contend that the law is well settled that once the parties agree to confer exclusive jurisdiction on one court the jurisdiction of other courts would stand excluded.

4. Mr. Doctor learned Senior Counsel for Respondent Nos.1 and 2 has also placed reliance on the decision of the learned single Judge of the Delhi High Court in *Devas Multimedia Pvt. Ltd. Vs. Antrix Corporation Ltd.* 2017 SCC online Del 7229 : (2017) 238 DLT 103, whereby in appeal the Division Bench has upheld the observations of the learned Single Judge who held that the mere fact that the seat is mentioned, would not automatically confer exclusivity on the seat, as far as jurisdiction is concerned. Mr. Doctor has also relied on the decision of the Supreme Court in *Shriram City Union Finance Corporation Ltd. Vs. Rama Mistra* (2002) 9 SCC 613 and the decision of the Division Bench of this Court in *Reliance Infrastructure Pvt. Ltd. Vs. Roadway Solution India Pvt. Ltd.* 2016 (3) Mh.L.J.

5. Per contra, Mr. Desai learned Counsel for the Petitioner referring to the decision of Supreme Court in *Bharat Alimunium Company Vs. Kaiser Alimunium Technical Services (supra)* would contend that once the seat of the arbitration is agreed between the parties to be at Mumbai, being the juridical seat, then the exclusive jurisdiction would be at to the courts at Mumbai. Mr. Desai has also referred to the decision of the learned Single Judge of the Delhi High Court in (i) *Mr. Raman Deep Singh Taneja Vs. Crown Realtech Pvt. Ltd* 2017 SCC online Del 11966; (ii) *Mrs. Devyani International Ltd. Vs. Siddhivinayak Builders and Developers* 2017 SCC Online 11156; (iii) *M/s. N.J. Construction (through its proprietor) Vs. Ayursundra Health Care Pvt. Ltd. and others* 2018 SCC Online Del 7009, to support his contention that it is the seat of the arbitration which is required to be recognized for the purpose of the jurisdiction, and which in the present case is at Mumbai as agreed in clause 20.4.2(c).

6. Mr.Desai next submits that when the parties in clause 20.3 by use of the words "subject to the provisions of Article 20.4 of Courts of Hyderabad shall have exclusive jurisdiction to try and entertain disputes arising out of the agreement", the parties mean that they have made an exception to clause 20.3 which would be secondary to clause 20.4.2(c), whereby the parties are agreeing to confer exclusive jurisdiction on courts at Mumbai by having the seat of arbitration at Mumbai. It is submitted that the words "subject to as used in clause 20.3 can have no other meaning. Mr. Desai has submitted that the sequence / hierarchy of the clauses (Clause 20.3 and 20.4) are also required to be seen. He contends that these clauses as they stand, imply that the parties by agreeing in Clause 20.4.2(c) namely that the seat of Arbitration to be at Mumbai, would clearly mean that exclusivity is required to be attributed to the seat of arbitration at Mumbai and the Courts Act Mumbai alone would have jurisdiction. This is how the words "subject to" as used in the said clauses of the agreement would required to be understood. In supporting this contentions Mr. Desai had referred the decision in *United Rentals, INC Vs. Ram Holdings, INC* 937 A.2d 810 of the Court of Chancery of Delaware, *The Penn Mutual Life Insurance Company Vs. John T. Oglesby II* 695 A.2d 1146 (1997), *Supremex Trading Company Ltd. Vs. Strategic Solutions Group* 24 Del. J.Corp.L.315, *Jawahar Sons Enterprises Pvt. Vs. State and Ors.* 2002(2) WLC 627, *South India Corpn. (P) Ltd. V. Secy,. Board of Revenue* AIR 1964 SC 207.

7. In the light of the above rival contentions the question which arises for consideration is whether this court would have the jurisdiction to entertain this petition under Section 9, considering clause 20.3 and 20.4 of the agreement.

8. At the outset, it needs to be observed that by now the law is well settled that party autonomy in arbitral agreements is required to be recognized and would be paramount. It is well settled that where two or more courts have jurisdiction to entertain a suit, parties may by agreement submit to the jurisdiction of one Court to the exclusion of the other Court or Courts. Such agreement is not hit by Section 28 of the Contract Act and such a contract would not be against public

policy and becomes legal and enforceable. (See: Harshad Chimanlal Modi vs Dlf Universal Ltd. & Anr (2005) 7 SCC 791). This is the position which was initially recognised in Hakam Singh Vs. Gammon India Ltd. 1971 SCR (3) 314 This legal position is also recognized even in the context of the arbitration law as can be seen from the decision of the Constitution Bench of the Supreme Court in BALCO (supra).

9. The legislative recognition of party autonomy which enables the party to agree to a place of arbitration or for the arbitral tribunal to decide the place of arbitration can be seen from the provisions of Section 20 of the Act read thus:

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, good or other property."

10. In BALCO the Supreme Court considered the position which would emerge on the parties voluntarily choosing the seat of arbitration and what would be the legal effect of such agreement on the jurisdiction of the Courts as defined under Section 2(1)(e) of the Act. The Supreme Court considering the jurisdiction clause and the provisions of Section 20 of the Act in no uncertain terms held that the legislature has intentionally given jurisdiction to two courts i.e. the Court which would have jurisdiction, where the cause of action is located and the court where the arbitration takes place. It was held that both the courts would have jurisdiction. The relevant observation in paras 96 to 98 are noted and read thus;

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

"2. Definitions (1) In this Part, unless the context otherwise requires -

.....

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

We are of the opinion, the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory

control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.

97. The definition of Section 2(1)(e) includes "subject matter of the arbitration" to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist. On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term "court" as a court having jurisdiction over the subject-matter of the award. This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India.

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

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

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

(3). Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers

appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, good or other property."

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

11. In *Indus Mobile Distribution Pvt. Ltd. Vs. Dataways and others* (supra) which was a case where the parties had agreed that the courts of Mumbai only will have an exclusive jurisdiction in case disputes and differences of any kind arise under the agreement. The parties also agreed in the arbitration agreement that the arbitration shall be conducted in Mumbai. This was not a case where the parties had conferred jurisdiction of one court and the seat of arbitration was agreed to be at another place. It is in this context the Supreme Court referring to the BALCO principle in paragraph 18 to 20 of the report held as under:-

"18. The amended Act, does not, however, contain the aforesaid amendments, presumably because the BALCO judgment in no uncertain terms has referred to "place" as "juridical seat" for the purpose of Section 2(2) of the Act. It further made it clear that Section 20(1) and 20 (2) where the word "place" is used, refers to "juridical seat", whereas in Section 20 (3), the word "place" is equivalent to "venue". This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.

19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction - that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Section 16 to 21 of the CPC be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

20. It is well settled that where more than one court has jurisdiction, it is open for parties to exclude all other courts. For an exhaustive analysis of the case law, see *Swastik Gases Private Limited v. Indian Oil Corporation Limited*, (2013) 9 SCC 32. This was followed in a recent judgment in *B.E. Simoes Von Staraburg*

Niedenthal and Another v. Chhattisgarh Investment Limited, (2015) 12 SCC 225. Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. Appeals are disposed of accordingly.

12. In a recent decision of the Supreme Court in Bhahmani River River Pellates Ltd. Vs. Kamachi Industries Ltd. 2019 SCC Online SC 929 the Supreme Court following the law as laid down in BALCO as also referring to the decision in Swastik Gases Pvt. Ltd. Vs. Industries Oil Corporation Ltd. 2013 (9) SCC page 32 reiterated and recognized party autonomy and the intention of the parties to confer jurisdiction on the courts as agreed. In this case, the parties had agreed that the venue of the arbitration shall be at Bhuwaneshwar. In the facts of the case, the Court in the absence of any other intention of the parties, the Supreme Court recognized the exclusivity of jurisdiction as agreed between the parties namely to confer jurisdiction on the courts at Bhuwaneshwar. The Supreme Court in this context made the following observations:-

"(15). As per Section 20 of the Act, parties are free to agree on the place of arbitration. Party autonomy has to be construed in the context of parties choosing a court which has jurisdiction out of two or more competent courts having jurisdiction. This has been made clear in the three Judges Bench decision in Swastik Gases (P) Ltd. Vs. India Oil Corporation Ltd. (2013) 9 SCC 32. In the said case, respondent Indian Oil Corporation Ltd. Appointed M/s. Swastik Gases Pvt. Ltd. Situated at Jaipur, Rajasthan as their consignment agent. The dispute arose between the parties as huge quantity of stock of lubricants could not be sold by the applicant and they could not be resolved amicably. In the said matter, clause 18 of the agreement between the parties provided that the agreement shall be subject to the jurisdiction of the courts at Kolkata. The appellant - Swastik invoked clause 18 - arbitration clause and filed application under Section 11(6) of the Act before the Rajasthan High Court for appointment of arbitrator. The respondent contested the application made by Swastik inter alia by raising the plea of lack of territorial jurisdiction of the Rajasthan High Court in the matter. The plea of Indian Oil Corporation was that the agreement has been made subject to jurisdiction of the courts at Kolkata and Rajasthan High Court lacks the territorial jurisdiction in dealing with the application under Section 11(6) of the Act. The designated judge held that Rajasthan High Court did not have territorial jurisdiction to entertain the application under Section 11(6) of the Act and gave liberty to Swastik to file the arbitration application in Calcutta High Court which order came to be challenged before the Supreme Court. Pointing out that the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used in the agreement and use of such words is not decisive and non-use of such words does not make any material difference as to the intention of the parties by

having clause 18 of the agreement that the courts at Kolkata shall have the jurisdiction, the Supreme Court held as under:

"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.

33. The above view finds support from the decisions of this Court in *Hakam Singh v. Gammon India Limited* (1971) 1 SCC 286, *A.B.C. Laminart Private Limited v. A.B.C. Agencies* (1989) 2 SCC 163, *R.S.D.V. Finance Corporation Private Limited v. Shree Vallabh Glass Works Limited* (1993) 2 SCC 130, *Angile Insulations v. Davy Ashmore India Limited* (1995) 4 SCC 153, *Shriram City Union Finance Corporation Limited v. Rama Mishra* (2002) 9 SCC 613, *Hanil Era Textiles Limited v. Puromatic Filters Private Limited* (2004) 4 SCC 671 and *Balaji Coke Industry Private Limited v. Maa Bhagwati Coke Gujarat Private Limited* (2009) 9 SCC 403."

16. In *Swastik*, the Supreme Court held that clause like (18) of the agreement will not be hit by Section 23 of the Contract Act and it is not forbidden by law nor it is against public policy. It was so held that as per Section 20 of the Act, parties are free to choose the place of arbitration. This "party autonomy" has to be construed in the context of choosing a court out of two or more courts having competent jurisdiction under Section 2(1) (e) of the Act.

17. The inter-play between "Seat" and "place of arbitration" came up for consideration in the case of *Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd. and others* (2017) 7 SCC 678. After referring to *BALCO, Enercon (India) Limited and others v. Enercon GMBH and another* (2014) 5 SCC 1 and *Reliance Industries Limited and another v. Union of India* (2014) 7 SCC 603 and also amendment to the Act pursuant to the Law Commission Report, speaking for the Bench Justice Nariman held as under:-

"18. The amended Act, does not, however, contain the aforesaid amendments, presumably because the *BALCO* (2012) 9 SCC 552 judgment in no uncertain terms has referred to "place" as "juridical seat" for the purpose of Section 2(2) of the Act. It further made it clear that Sections 20(1) and 20(2) where the word "place" is used, refers to "juridical seat", whereas in Section 20(3), the word "place" is equivalent to "venue". This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.

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.* (2013) 9 SCC 32 This was followed in a recent judgment in *B.E. Simoes Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.* (2015) 12 SCC 225 Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment is set aside." [underlining added]

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*, non-use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference."

13. The learned Senior Counsel for Respondent Nos.1 and 2 is also be correct in referring to the decision of the *Devas Multimedia Pvt. Ltd. Vs. Antrix Corporation Ltd.* 2017 SCC online Del 7229, where the Division Bench of the Delhi High Court has confirmed the view has taken by the learned Single Judge that mere fact that the seat is mentioned would not automatically confer exclusive on the seat. In *Reliance Infrastructure Limited Mumbai Vs. Roadway Solution India Pvt. Ltd.*, Pune 2016 (3) SCC 530 a Division Bench of this Court, considering that the parties had agreed to the place of arbitration to be in Mumbai, and that the courts in Mumbai shall have the exclusive jurisdiction, in paragraph 14 to 17 referring to the decision in *BALCO* (supra) and *Swastik Gases Pvt. Ltd.* (supra) held as under:-

"14. These are commercial contracts and the nature and consequence of which is well within the knowledge of the parties when Rng 13 arst.154.16.car7.16.doc these agreements were entered into. The reason for filing the section 9 application at Pune in view of the averments so made in an application could not have prevailed over the specific agreement between the parties in the clauses so referred above.

15. Having once agreed in terms of the above clauses, even the respondent's application under section 9 of the Arbitration Act, ought not to have been entertained even on merit by the learned District Judge, on the basis of the averments so made in para 29 and 30 of the application. The learned District Judge could not have overlooked these clauses before passing the impugned order of status quo in such Bank Guarantees matter. The law of injunction on such Bank Guarantees is quite settled.

16. In the present case both clauses make the position clear about jurisdiction for all the disputes, as per agreement which shall be at Mumbai. No question of proving otherwise at this stage of arbitration proceedings in view of clear written commercial contracts terms between the parties, specifically when there is no challenge to these clauses and the terms. Such terms/clauses bind all.

17. In view of the enunciation of law in the decisions of the Supreme Court in the case of *Swastik Gases Private Limited* (supra) and *Bharat Aluminium Company* (supra), it is clear that the provisions of section 2 (1) (e) of the Arbitration and Conciliation Act are required to be read so as to give recognition to the intention of the parties. In such case it would therefore be the Court where the arbitration

would take place which would have jurisdiction to exercise a supervisory control over the arbitral process. We have therefore, no hesitation to hold that the learned District Judge lacked jurisdiction to entertain the application of the respondents filed under section 9 of the Arbitration Act."

(emphasis supplied)

14. The Division Bench of the Kolkata High Court in *Debdas Routh Vs. Hinduja Leyland Finance Ltd. & Anr.* taking a review of the entire law in the context held that once the parties agree to confer the exclusive jurisdiction on one court the same is required to be recognized.

15. Per contra Mr. Desai learned Counsel for the petitioner has referred to the decision of the learned Single Judge of the Delhi High Court in *Mr. Raman Deep Singh Taneja Vs. Crown Realtech Pvt. Ltd.* (Supra). This was a case where the parties had agreed for the venue of arbitration to be at Faridabad and the jurisdiction was agreed to be at the Court in Delhi. The learned Single Judge of the Delhi High Court in this context held that the parties having agreed to have the arbitration proceedings at Faridabad in Haryana. The Faridabad Court would have exclusive jurisdiction and not the Delhi Court.

16. *Devyani International Ltd. Vs. Siddhivinayak Builders & Developers* 2017 SCC Online Del 11156 is a decision of the learned Single Judge of the Delhi High Court. This was the case where the parties had agreed to the seat of the arbitration to be at New Delhi in the arbitration clause (Clause 11) and further agreed in Clause 12 (Governing law) that the Courts at Mumbai would have exclusive jurisdiction to entertain the dispute or suit arising out of or in relation to the agreement. It is in this context, the Court held that the Courts at Delhi would have exclusive jurisdiction.

17. Again *N.J. Construction (through its proprietor) Vs. Ayursundra Health Care Pvt. Ltd. and others* (Supra) is the decision of the learned Single Judge of the Delhi High Court which follows the earlier decision in *Raman Deep Singh Taneja*. In this case in Clause 8 of the agreement in question, the parties had agreed that any question or dispute arising out of or in any way connected with the agreement or contract shall be deemed to have arisen in Guwahati and only the Courts at Guwahati would have jurisdiction to determine the same. However in the addendum to the agreement in Clause 21.1 the parties agreed that the seat of the arbitration shall be at New Delhi and shall be final and binding on the parties. It is in this context the learned Single Judge of the Delhi High Court referring to the decision in *Indus Mobile Distribution Pvt. Ltd.* (supra) as also following the earlier decision in *Raman Deep Singh Taneja* (supra) held that since the seat of arbitration is at New Delhi, the Court at New Delhi shall have jurisdiction to appoint an arbitrator.

18. I am not persuaded to subscribe to the view rendered by the learned Single Judge of the Delhi High Court in the above three decisions, as in my opinion the law as laid down by the Supreme Court in *BALCO* has not been appreciated in the

correct perspective in arriving at the conclusion to disregard exclusivity of jurisdiction as agreed between the parties. In BALCO the Constitution Bench in no uncertain terms has held that the legislature has recognized that two courts would have jurisdiction which would be where the cause of action is located and secondly the court where the arbitration takes place and once out of these two courts the parties confer jurisdiction on one court, such agreement conferring the jurisdiction on one of the Courts would be required to be recognized in terms of Section 20 of the one of the Act. These decisions also do not appreciate in the correct perspective the decision of the Supreme Court in Indus Mobile Distribution Pvt.Ltd. (supra). Mr.Doctor would be correct in his contention that these decisions of the learned Single Judge of the Delhi High Court as referred on behalf of the petitioners, do not consider the binding mandate of the decisions of the Supreme Court in BALCO (supra) and Indus Mobile Distribution Pvt.Ltd. (supra).

19. Mr.Jagtiani, learned Counsel for the petitioner referring to paragraphs 18 and 19 of the decision of the Supreme Court in Indus Mobile Distribution Pvt.Ltd. vs. Datawind Innovations Pvt.Ltd. & Ors. (supra) would submit that if the hierarchy of the contractual clauses namely 20.4 and 20.5 are taken into consideration the party autonomy is required to be understood in the context of what the Supreme Court has observed namely that the moment 'seat' is determined, the exclusive jurisdiction for the purposes of regulating arbitral proceedings would be the place where the seat of arbitration is agreed between the parties. He submits that there can be no other reading of paragraphs 18 and 19 of the judgment in Indus Mobile Distribution Pvt.Ltd. (supra). He submits that these are the observations which are in consonance with the law laid down by the Supreme Court also in Balco (supra). Mr.Doctor, learned Senior Counsel for respondent nos.1 and 2 would however, rightly dispute this contention of Mr.Jagtiani. Referring to the decisions in Balco (supra) and the other decisions so referred, Mr.Doctor would submit that there is no decision which can support the contention that once the parties agree to an arbitral seat, the exclusive jurisdiction as conferred by the parties on a particular court (which otherwise would have jurisdiction) would stand taken away.

20. In my opinion the contention as urged by Mr.Jagtiani referring to paragraphs 18 and 19 that once the parties have determined the seat of arbitration at Mumbai, the supervisory jurisdiction in the facts of the case vests only with the Mumbai Court, cannot be accepted. The observations of the Supreme Court in Indus Mobile Distribution Pvt.Ltd. (supra) in paragraph 19 are required to be understood in the context and in the facts of the said case with which the Supreme was concerned in Indus Mobile Distribution Pvt.Ltd. (supra). As clearly seen from the observations in paragraph 2 of the said decision, in the arbitration agreement, as also in Clause 19 the parties had agreed that not only the arbitration shall be conducted at Mumbai but the jurisdiction shall vest with the Mumbai Court, whereby the parties had excluded jurisdiction of the other Courts. In this context, the parties having conferred exclusive jurisdiction on the Mumbai

Court, the Supreme Court has observed that no other Court would have jurisdiction. The party autonomy was accordingly recognized by the Supreme Court and it is not different from how it was recognized in BALCO. I am thus not persuaded to accept the submissions Mr.Jagtiani even referring to the decisions in Mr.Raman Deep Singh Taneja Vs. Crown Realtech Pvt.Ltd. (supra), Mrs.Devyani International Ltd. Vs. Siddhivinayak Builders and Developers (supra), and M/s.N.J.Construction (through its proprietor) Vs. Ayursundra Health Care Pvt.Ltd. & Ors. (supra).

21. Mr. Desai's contention referring to the the decisions in United Rentals, INC Vs. Ram Holdings, INC(supra) of the Court of Chancery of Delaware, The Penn Mutual Life Insurance Company Vs. John T. Oglesby II (supra), Supremex Trading Company Ltd. Vs. Strategic Solutions Group (supra), Jawahar Sons Enterprises Pvt. Vs. State and Ors. (supra), South India Corpn. (P) Ltd. V. Secy,. Board of Revenue (Supra) that the words 'subject to' as used in clause 20.3 need to be read to mean that the parties for the purpose of jurisdiction in regard to arbitration have excluded the applicability of clause 20.4.1(c), cannot be accepted. There can be no dispute about the propositions as laid down in the said decisions when in the facts of these cases the Court considered the words 'subject to'. However, in the present case, in my opinion, the words 'subject to' as used in clause 20.3 are required to be understood to mean "notwithstanding". The plain reading of these clauses would accordingly be, notwithstanding the agreement in Article 20.4, the Courts of Hyderabad shall have exclusive jurisdiction to try and entertain the disputes arising out of the agreement. In other words on a cumulative reading of these two clauses the parties although agree that the seat of the arbitration would be at Mumbai, however, the exclusive jurisdiction shall be conferred on the Courts at Hyderabad.

22. It would be profitable to refer to the decision of the Supreme Court in "Emkay Global Financial Services Ltd. Vs. Girdhar Sondhi" 2018 (9) SCC 49 in which the Supreme Court was again considering the issues arising on venue and seat of the arbitration, in considering proceedings arising out of a decision on a petition filed under Section 34 of the Act. This was a case whereby an award was rendered between the parties in an arbitration which was held at Delhi, when the parties had agreed that the exclusive jurisdiction of the Courts would be on the Courts at Mumbai. The respondent had filed a Section 34 petition before the District Court Karkardoma, Delhi. The Additional District Judge referring to the exclusive jurisdiction clause held that he would have no jurisdiction as the parties had agreed to the exclusive jurisdiction to be on the Mumbai Courts and accordingly, rejected the Section 34 application. On a challenge before the Delhi High Court, the learned Single Judge of the Delhi High Court held that the Court at Delhi would have jurisdiction as the arbitration was held at Delhi. In this context, the Supreme Court considering the decision in Indus Mobile (supra) held that the High Court was not correct to overlook the exclusive jurisdiction being conferred by the parties to the Courts at Mumbai. In paragraphs 8 and 9 the Supreme Court held as under:-

"8. The effect of an exclusive jurisdiction clause was dealt with by this Court in several judgments, the most recent of which is the judgment contained in Indus Mobile Distribution Pvt. Ltd. In this case, the arbitration was to be conducted at Mumbai and was subject to the exclusive jurisdiction of courts of Mumbai only. After referring to the definition of "Court" contained in Section 2(1)(e) of the Act, and Sections 20 and 31(4) of the Act, this Court referred to the judgment of five learned Judges in BALCO Vs. Kaiser Aluminum Technical Services Inc. In which, the concept of juridical seat which has been evolved by the courts in England, has now taken root in our jurisdiction. After referring to several judgments and Law Commission Report, this Court held: (Indus Mobile Distribution case, SCC pp.692-93, para 19 & 20).

"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 Court. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in Courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction - that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Section 16 to 21 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 Pvt. Ltd. Vs. Indian Oil Corporation Ltd. This was followed in a recent judgment in B.E. Simoes Von Staraburg Niedenthal Vs. Chhattisgarh Investment Ltd. 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 Pvt. Ltd. Vs. Indus Mobile Distribution Pvt. Ltd.] 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, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. The appeals are disposed of accordingly."

9. Following this judgment, it is clear that once courts in Mumbai have exclusive jurisdiction thanks to the agreement dated 03 July 2008, read with the National Stock Exchange Bye Laws, it is clear that it is the Mumbai Courts and the Mumbai courts alone, before which Section 34 application can be filed. The arbitration that was conducted at Delhi was only at a convenient venue earmarked by the National Stock Exchange, which is evident on a ready of Bye-

law 4(a)(iv) read with sub-clause (xiv) contained in Chapter xi."

23. The decision of the three Judge Bench of the Supreme Court in Union of India Vs. Hardy Exploration and Production (India)INC 2018 SCC OnLine SC 1640 is also required to be noted. The Supreme Court taking a review of the law held that when a place is agreed upon, it gets the status of seat. It was also held that the terms, "place" and seat are used interchangeably and when only the term, "place" is stated or mentioned and no other condition is postulated it is equivalent to a seat and that finalizes the facet of jurisdiction. In paragraph 27 and 39 the Court observed as under:-

27. In view of the aforesaid development of law, there is no confusion with regard to what the seat of arbitration and venue of arbitration mean. There is no shadow of doubt that the arbitration clause has to be read in a holistic manner so as to determine the jurisdiction of the Court.

.....

39. The word 'determination' has to be contextually determined. When a 'place' is agreed upon, it gets the status of seat which means the juridical seat. We have already noted that the terms 'place' and 'seat' are used interchangeably. When only the term 'place' is stated or mentioned and no other condition is postulated, it is equivalent to 'seat' and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term "place", the said condition has to be satisfied so that the place can become equivalent to seat. In the instant case, as there are two distinct and disjunct riders, either of them have to be satisfied to become a place. As is evident, there is no agreement. As far as determination is concerned, there has been no determination. ... "

24. The upshot of the above discussion is that on a conjoint reading of clauses 20.3 and 20.4 of the agreement in question, it would be required to be held that the Court at Hyderabad would have exclusive jurisdiction to entertain this petition. The parties having agreed to the seat of arbitration to be at Mumbai, would be required to be accepted as venue of the arbitration and the said clause cannot be held to be a clause conferring jurisdiction on the Courts at Mumbai. Such a reading of the clause is contrary to the intention of the parties as contained in Clause 20.3 to confer exclusive jurisdiction on the Courts at Hyderabad and the party autonomy as recognized under Section 20(1) of the Act.

25. For the above reasons, it is held that this petition would not be maintainable before this Court. It is accordingly disposed of with liberty to the petitioner to approach the appropriate Court at Hyderabad. All the contentions of the parties are expressly kept open. No costs.