

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

% **Judgment reserved on: 20th May, 2016**
Judgment pronounced on: 30th May, 2016

+ **O.M.P.(I) (COMM.) 192/2016**

ABB INDIA LIMITED Petitioner
Through Mr.A.S.Chandhiok, Sr.Adv. with
Mr.Ananya Kumar, Mr.Kunal
Mimani & Ms.Vandana Anand,
Advs.

versus

ISOLUX CORSAN INDIA ENGINEERING & CONSTRUCTION &
ORS Respondents
Through Mr.Akhil Sibal, Adv. with Mr.Jatin
Mongia, Mr.Nikhil Chawla &
Mr.Utkarsh, Advs. for R-1.
Mr.Sanjay Jain, ASG with
Mr.Deepak, Mr.Shreshth Jain,
Ms.Aastha Jain, Mr.Sumit Misra &
Ms.Aditi Sharma, Advs. for R-2.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. M/s. ABB India Limited, the petitioner, having its registered office at Bengaluru has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') against the three respondents, namely, (i) Isolux Corsan India Engineering & Construction Private Limited, 2nd Floor, Block Two, Vatika Business Park, Sector 49, Sohna Road, Gurgaon-122101; (ii) Power Finance Corporation Limited, Urjanidhi, 1, Barakhamba Lane, Connaught Place, New Delhi 110001; and (iii)

Hongkong and Shanghai Banking Corporation Limited, 25, Barakhamba Road, New Delhi 110001.

2. The respondent No.1 is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at 2nd Floor, Block Two, Vatika Business Park, Sector 49, Sohna Road, Gurgaon-122101.

The respondent No.2 is a Government of India undertaking engaged in the business of financing projects. The respondent No.2 is a purported creditor to the respondent No.1 and is re-assignee of a bank guarantee issued by the petitioner to respondent No.1 under the agreements entered into between the petitioner and the respondent No.1.

The respondent No.3 is a banking company which has issued the bank guarantees referred to above.

3. The present dispute arise out of the supply, service and civil works agreements, executed between the petitioner and the respondent No.1 in relation to the Project of the respondent No.1 at Uttar Pradesh, where under the parties have agreed to resolve all disputes arising thereunder through arbitration with the venue at New Delhi.

4. The petition was listed before Court first time on 17th May, 2016. While issuing the notice for 20th May, 2016, the interim order was passed, in the meanwhile, directing the respondents to maintain the status quo in respect of the bank guarantees as per details mentioned in Annexure P-11 filed along with the petition.

5. When the matter was taken up on 20th May, 2016, Mr.Sanjay Jain, ASG appeared on behalf of respondent No.2, Government of India and Mr.Akhil Sibal, Advocate appeared on behalf of respondent

No.1. Both counsel raised the preliminary objections that the present petition is not maintainable thus no reply is required. They addressed their submissions without reply. The respondent No.3 is a formal party. The learned Senior counsel for the petitioner has also made his submissions replying the objection of the respondent No.1 and 2 and the order was reserved.

6. The main submissions of Mr.Sanjay Jain, learned ASG are outlined as under:

- (i) The bank guarantees are unconditional. Every bank guarantee is an independent contract. The respondent No.2 has nothing to do with the disputes between the petitioner and the respondent No.1. The respondent No.2 is assignee of the bank guarantees in question. The respondent No.1, in written documents has acknowledged the same. Being an assignee, the respondent No.2 (Government of India) is entitled to invoke the bank guarantees. The present petition is otherwise not maintainable.
- (ii) Mr.Jain also submits that the petitioner before filing of the petition was supposed to serve the advance copy of the petition to the respondent No.2 who is the statutory authority, which is required as per the practice direction dated 16th January, 2015 of this Court vide No.31/Rules/DHC but the same was not served, for the reasons best known to the petitioner. The clause referred by Mr. Jain, learned ASG in this regard is as under:

"1. In a Petition filed under Section 9 of the Arbitration and Conciliation Act, 1996, where the arbitration proceedings have commenced, an advance copy of petition shall be supplied to private parties and in all the petitions under

Section 9 of the Act whether before, during or after passing of the award in cases where the opposite party is Union of India, State Government, Statutory Authority, Public Sector Undertaking or Govt. Department, advance copy shall be served through the respective standing/ nominate/ empanelled counsel."

Mr.Jain submits that had the copy of the petition was served in advance, the respondent No.2 (Government of India) would have made their submission at the interim stage itself and the interim order may not have been passed. He submits that despite of admission made by the petitioner in para 3 of the petition that the respondent No.2 is Government of India, yet it was mentioned to the Registry in the letter at the time of listing of the petition that the service is not necessary as the respondents are private parties. Mr.Jain says that it should not have been done.

7. Mr.A.S. Chandhiok, learned Senior counsel appearing on behalf of the petitioner has referred the para 96 of the decision of **Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.** reported in (2012) 9 SCC 552 as well as the judgement of the Division Bench in **Rohit Bhasin & Anr. v. Nandini Hotels** in Arb.P. No. 70/2012 decided on 1st July, 2013. Mr. Chandhiok has also referred Section 126 of the Contract Act, 1872, and stated that in view of the settlement agreement between the petitioner and the respondent No.1, it was agreed by respondent No.1 that the respondent No.2 would not take any steps to invoke the bank guarantees, although it was an admitted position that respondent No.2 was not a party to the said agreement.

8. Mr.Akhil Sibal, learned counsel appearing on behalf of respondent No.1, in addition has made his submissions as under:

- (i) In his first submission, Mr.Sibal says that it is admitted by the petitioner that out of Rs.745 crores the only outstanding i.e. the default as per petitioner is for a sum of Rs.69.12 crores. The rest of the amount has already been received by the petitioner from the respondent No.1. His clients disputes the said amount claimed by the petitioner. The assignment of bank guarantees in favour of the respondent No.2 is not denied. The petitioner is a party to the assignment deed and was fully aware about the consequences. He referred to the Clause 6 of the bank guarantee dated 20th June, 2014 which reads as under:

"6. This Bank Guarantee ("BG") may be assigned by the Beneficiary in favour of South East UP Power Transmission Company Limited ("SEUPPTCL" or assignee) having its registered office at Shalimar Titanium 601-602, 6th Floor Plot No.TC/G-1/1, Vibhuti Khand, Gomati Nagar, Lucknow - 226 010, Uttar Pradesh, who are in turn permitted to reassign this guarantee in favour of Power Finance Corporation Ltd., ("PEC" or "reassignee"), the lender /security Agent having its registered office at Urjanidhi Building, 1 Barakhamba Lane, Connaught Place, New Delhi - 110001 only after obtaining prior written consent of the Bank. The Bank shall be informed of such reassignment in favour of PFC (Security Agent for consortium lenders) jointly by the Beneficiary and the Assignee as the beneficiary of this Guarantee."

- (ii) Mr.Sibal has also referred the letter dated 23rd June, 2014, issued by the bank acknowledging the assignment of bank guarantees in favour of the respondent No.2. The content of the said letter reads as under:-

"Date: 23rd June 2014

To,

ICI C&C MAINPURI JV
2nd Floor, Block Two, Vatika Business Park, Sector-49,
Sohna Road, Gurgaon – 122 001, Haryana.

&

To

SOUTH EAST U.P. POWER TRANSMISSION COMPANY
LIMITED

Shalimar Titanium, 601-602, 6th Floor, Plot No.TC/G-
1/1, Vibhut Khand, Gomati Nagar, Lucknow – 226010,
Uttar Pradesh.

Sub: Consent of Reassignment of the below 17
Advance Payment Guarantees in favour of Power
Finance Corporation.

We refer to your letter dated 20th June 2014 to accord
our consent/agreement for the assignment of the
below mentioned guarantees in favour of Power
Finance Corporation having its registered office at
Urganidhi, 1, Barakhamba Lane, Connaught Place,
New Delhi 110001 as per the Clause No.6 present in
the text of all these guarantees issued by us.

Any claim for payment will now be received from
Power Finance Corporation having its registered office
at Urganidhi, 1, Barakhamba Lane, Connaught Place,
New Delhi 110001 and we confirm that the same shall
be honoured as per the terms and conditions of these
respective guarantees."

Mr.Sibal submits that the bank guarantee is an
independent contract. Underlined disputes cannot be looked
into at the time of deciding the disputes pertaining to
invoking of bank guarantee matters. The petitioner has no
case on merit. No case of fraud and special equity is made
out by the petitioner. The petitioner was aware about the

assignment of bank guarantees in favour of respondent No.2. There is no application of Section 173 of the Contract Act, 1872, thus the entire petition is misconceived.

- (iii) Second and main objection of Mr.Sibal is that this Court has no territorial jurisdiction to entertain and try the present petition as the original agreement was novated in December, 2014 between the petitioner and the respondent No.2 and the earlier company ICI C&C MAINPURI JV. He referred the agreement of novation, wherein as per Article 4 it has been agreed that the novation of agreement shall be governed by and construed in accordance with the laws of India and the Court at Gurgaon shall have the exclusive jurisdiction in all matters arising out of the Novation Agreement. He says that when exclusive jurisdiction of Gurgaon has been agreed, then the venue of arbitration in New Delhi does not help the case of the petitioner once it is the exclusive jurisdiction of all the matters as per agreement to be decided outside the jurisdiction.
- (iv) Mr.Akhil Sibal has also referred the arbitration clause mentioned in the original agreement between the petitioner and ICI C&C MAINPURI JV, who is also a party in agreement of Novation, wherein exclusive jurisdiction was mentioned as Haryana. He referred many judgements in support of his submission.

Mr.Sibal argues that the present petition ought to have been filed in Gurgaon (Haryana). As this court has no jurisdiction, the Court would also have no jurisdiction to extend the interim order.

9. It is settled law that once the Court holds that it has no jurisdiction in the matter, it should not consider the merits of the matter. Reliance is placed on **Jagraj Singh v. Birpal Kaur**, (2007) 2 SCC 564 (para 27).

10. There is also no longer res integra that an exclusive jurisdictional clause cannot be allowed to be circumvented by clever verbal jugglery and recycled cause of action if the clause is in simple language, no different meaning can be given. Even where courts in two places may have jurisdiction, an exclusive jurisdiction clause in favour of one of the two places ousts the jurisdiction of the other. An ouster clause (exclusive jurisdiction clause) will continue to be applicable for interpretation of the rights of the parties flowing from an agreement and if there is a dispute regarding the application of general clause and ouster clause of territorial jurisdiction.

Thus, it is necessary to first decide the objection about the territorial jurisdiction raised by Mr. Akhil Sibal, learned counsel appearing on behalf of respondent No.1.

11. The arbitration clause in the agreement of novation i.e. Article 4 in the present case reads as under :-

"4.1 Any dispute arising under or in connection with this Novation Agreement shall be resolved at the request in writing of any Party to the dispute by way of a binding arbitration through a sole arbitrator which shall be appointed mutually by Parties.

4.2 Such arbitration shall be under and in terms of the Arbitration and Conciliation Act, 1996 or any amendment thereof ("**Arbitration Act**") and shall be held in New Delhi. All the proceedings of such arbitration including the award shall be final and binding on the Parties and shall be in the English language and be kept confidential by the Parties to this Novation Agreement.

4.3 The arbitration award shall be final and binding on the Parties to the dispute and shall also be entered and enforceable in any court of competent jurisdiction under the Arbitration Act.

4.4 This Novation Agreement shall be governed by and construed in accordance with the laws of India and the courts at Gurgaon shall have exclusive jurisdiction in all matters arising out of this Novation Agreement."

12. It is apparent from the said clause that the venue of the arbitration shall be in Delhi, however, as agreed between the parties, an exclusive jurisdiction of all the matters of disputes arising out of Novation Agreement shall be in Gurgaon.

13. The ratio of **Balco** judgment in para 96 reads as under:

"In our opinion, the provision is 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".

Thus, the Supreme Court was of the view that in a situation like present 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. The aforesaid position is also clear by Division Bench of this Court wherein by way of an example at para 13 it was cited that two Courts would have jurisdiction. Reference is drawn to **ION Exchange (India) Ltd. V Panasonic Electric Works Co. Ltd.**, in OMP No.150/2014 decided on 4th March, 2014.

14. In the very recent matter, my esteemed brother Shri V.Kameswar Rao, J., in case of **Priya Hiranandani Vandrevale v.**

Niranjan Hiranandani & Anr. in OMP(I)(Comm)No.164/2016 delivered on 12th May, 2016 to some extent has dealt with the similar issue in detail wherein the interpretation of Balco case has been given in para 22 and 23 of the judgement, the same reads as under:-

"22. On the other hand, it is the submission of Mr.Dushyant Dave, learned Senior Counsel for the respondents that the prayer in the petition is in respect of property at Powai, Mumbai and Section 9 can only be invoked in respect of "subject-matter of arbitration", this Court has no jurisdiction.

23. The issue of territorial jurisdiction is no more res-integra in view of the judgment of the Supreme Court in Balco's case (supra). In para 96, the Supreme Court has 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 courts where the arbitration takes place. The Court held, that it 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. The Court has given an example, if the arbitration is held in Delhi, where neither of the parties are from Delhi and the Tribunal sitting in Delhi passes an interim order under Section 17 of the Act, 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. The question is whether the cause of action has arisen in Mumbai so as to confer jurisdiction on Mumbai Court. The petition filed by the

petitioner is, inter-alia seeking a restraint order with regard to the Powai property in Mumbai. The claim before the Tribunal was for damages on the ground that projects being developed outside BAA. Out of these projects, two projects in Kandivali and Maitri Park are in Mumbai. The development of these two projects outside BAA gave a cause to the petitioner to raise a dispute, which led to arbitration. If the relief, as prayed for in the petition, is granted, the effect thereof would be on the land situated at Mumbai. It is a case where, at least a part of cause of action has arisen in Mumbai, for the purpose of initiating the arbitration proceedings or filing this application. In view of the aforesaid position, suffice to state, that in the absence of any stipulation conferring exclusive jurisdiction to the Courts in Delhi or Mumbai, the Courts at Delhi and Mumbai would have the jurisdiction. Insofar as the judgments relied upon by Dr. Singhvi in Reliance Industries (supra), Prima Buildwell Pvt. Ltd. and ORs.(supra) and Enercon India Ltd. (supra) to contend the exclusive jurisdiction of Delhi, are concerned, suffice to state, those judgments were in the context of an arbitration wherein, the arbitration clause stipulated, the seat of arbitration as London and arbitration agreement to be governed by laws of England and the Courts of which country would have the jurisdiction. It is not the case here. Further, it may not be necessary for me to consider the other judgments as referred to by Dr. Singhvi and Mr.Dave on the jurisdiction issue in view of my conclusion above, relying upon para 96 of the judgment in Balco's case (supra)."

It is clear from the decision of **Priya Hiranandani** (supra) that this Court in para 23 has held that in the absence of any stipulation conferring exclusive jurisdiction to the courts in Delhi or Mumbai, both courts at Delhi and Mumbai would have the jurisdiction in view of the case made out by the petitioner in the said matter with regard to cause of action made out.

15. Situation in the present case is that the venue of the arbitration proceedings to be held in Delhi and it was agreed by the parties that the novation-agreement shall be governed by and

construed in accordance with the laws of India and the courts at Gurgaon shall have exclusive jurisdiction in all matters arising out of the agreement.

16. In the same situation, Supreme Court in the recent case of ***B.E. Simoese Von Staraburg Niedenthal & Another v. Chhattisgarh Investment Limited***, (2015) 12 SCC 225 has dealt with all the earlier decisions and has held that where the agreement between the parties restricted jurisdiction to only one particular court, that court alone would have jurisdiction. Any petition preferred to courts outside the exclusive court agreed to by the parties would also be without jurisdiction. It was held as under:-

"1. Leave granted. Admittedly, a raising agreement with regard to the mines located in Goa was entered into between the parties at Raipur on 9-4-2007. The first appellant operates mines in Goa. Under the raising agreement, the respondent is an exclusive purchaser of the ore from the mines of the appellants. The disputes having arisen between the parties, the respondent (hereinafter referred to as "CIL") made an application under Section 9 of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act") for interim protection before the Court of the District Judge, Raipur. The present appellants (hereinafter referred to as "Simoese"), who were the respondents in the application, raised the objection, by way of an application, about the jurisdiction of the District Judge, Raipur. It was submitted by Simoese that the District Judge, Raipur has no jurisdiction for three reasons: (i) the subject mines are located in Goa, (ii) the agreement was also made in Goa, and (iii) the place of residence of Respondent 2 is Goa.

6. Clause 13 of the raising agreement dated 9-4-2007 reads as under:

"The courts at Goa shall have exclusive jurisdiction."

8. On the other hand, Mr Rafiq A. Dada, learned Senior Counsel for Simoese, submits that the parties have agreed that the Goa courts shall have an exclusive jurisdiction and,

thus, by their agreement the jurisdiction of the Raipur court has been ousted. He submits that in view of the jurisdiction clause in the agreement, now the Raipur court has no jurisdiction at all. In support of his arguments, the learned Senior Counsel for the appellants, relies upon two judgments of this Court — (i), *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] and (ii), *State of W.B. v. Associated Contractors* [State of W.B. v. Associated Contractors, (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1] decided on 10-9-2014.

9. In *Swastik Gases (P) Ltd.* [Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157], the three-Judge Bench of this Court had an occasion to consider the issue as to whether in a contract that specifies the jurisdiction of particular courts at a particular place and such courts have jurisdiction to deal with the matter, whether the parties had intended to exclude the other courts?

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“32. ... 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 is it against the public policy. It does not offend Section 28 of the Contract Act in any manner.”

Madan B. Lokur, J., while writing a separate judgment, concurred with the above legal position.

11. In a very recent judgment delivered on 10-9-2014 in *State of W.B. v. Associated Contractors* [State of W.B. v. Associated Contractors, (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1] , the three-Judge Bench (speaking through one of us, Rohinton Fali Nariman, J.), noticing the decisions of this Court in *FCI v. A.M. Ahmed & Co.* [FCI v. A.M. Ahmed & Co., (2001) 10 SCC 532] (SCC para 6); *Neycer India Ltd. v. GMB Ceramics Ltd.* [Neycer India Ltd. v. GMB Ceramics Ltd., (2002) 9 SCC 489] (SCC para 3) with reference to Section 31(4) of the Arbitration Act, 1940 and the decisions of this Court in *Jatinder Nath v. Chopra Land Developers (P) Ltd.* [Jatinder Nath v. Chopra Land Developers (P) Ltd., (2007) 11 SCC 453] (SCC para 9); *Rajasthan SEB v. Universal Petrol Chemicals Ltd.* [Rajasthan SEB v. Universal Petrol Chemicals Ltd., (2009) 3 SCC 107 : (2009) 1 SCC (Civ) 770] (SCC paras 33 to 36) and *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] (SCC para 32), held that where the agreement between the parties restricted jurisdiction to only one particular court, that court alone would have jurisdiction as neither Section 31(4) nor Section 42 (of the 1996 Act) contains a non obstante clause wiping out a contrary agreement between the parties. On the basis of the above decisions, it was further held that applications preferred to courts outside the exclusive court agreed to by parties would also be without jurisdiction.”

17. Two decisions of the Supreme Court on the same issue of exclusive jurisdictions are also squarely applicable to the facts of the present case. Reliance is placed on the following decisions :-

- (i) **Swastik Gases Private Limited v. Indian Oil Corporation Limited**, (2013) 9 SCC 32, paras 7, 28 and 57 reads as under:-

"7. We have heard Mr Uday Gupta, learned counsel for the appellant and Mr Sidharth Luthra, learned Additional Solicitor General for the Company. The learned Additional Solicitor General and the learned counsel for the appellant have cited many decisions of this Court in support of their respective arguments. Before we refer to these decisions, it is apposite that we refer to the two clauses of the agreement which deal with arbitration and jurisdiction. Clause 17 of the agreement is an arbitration clause which reads as under:

17. Arbitration

If any dispute or difference(s) of any kind whatsoever shall arise between the parties hereto in connection with or arising out of this agreement, the parties hereto shall in good faith negotiate with a view to arriving at an amicable resolution and settlement. In the event no settlement is reached within a period of 30 days from the date of arising of the dispute(s)/difference(s), such dispute(s)/difference(s) shall be referred to 2 (two) arbitrators, appointed one each by the parties and the arbitrators, so appointed shall be entitled to appoint a third arbitrator who shall act as a presiding arbitrator and the proceedings thereof shall be in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof in force. The existence of any dispute(s)/ difference(s) or initiation/continuation of arbitration proceedings shall not permit the parties to postpone or delay the performance of or to abstain from performing their obligations pursuant to this agreement.

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28. Section 11(12)(b) of the 1996 Act provides that where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an arbitration other than the international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the Principal Civil Court referred to in Section 2(1)(e) is situate, and where the High Court itself is the court referred to in clause (e) of sub-section (1) of Section 2, to the Chief Justice of that High Court. Clause (e) of sub-section (1) of Section 2 defines "court" which means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary 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.

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Conclusion

57. For the reasons mentioned above, I agree with my learned Brother that in the jurisdiction clause of an agreement, the absence of words like "alone", "only", "exclusive" or "exclusive jurisdiction" is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute. In the present case, only the courts in Kolkata had jurisdiction to entertain the disputes between the parties."

(ii) ***State of West Bengal and ORs.v. Associated Contractors.***, (2015) 1 SCC 32, para 22 and 25 reads as under:-

"22. One more question that may arise under Section 42 is whether Section 42 would apply in cases where an application made in a court is found to be without jurisdiction. Under Section 31(4) of the old Act, it has been held in *F.C.I. v. A.M. Ahmed & Co.* [(2001) 10 SCC 532] , SCC at p. 532, para 6 and *Neycer India Ltd. v. GMB Ceramics Ltd.* [(2002) 9 SCC 489] , SCC at pp. 490-91, para 3 that Section 31(4) of the 1940 Act would not be applicable if it were found that an application was to be made before a court which had no jurisdiction. In *Jatinder Nath v. Chopra Land Developers (P) Ltd.* [(2007) 11 SCC 453] , SCC at p. 460, para 9 and *Rajasthan SEB v. Universal Petro Chemicals Ltd.* [(2009) 3 SCC 107 : (2009) 1 SCC (Civ) 770] , SCC at p. 116, paras 33 to 36 and *Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.* [(2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] , SCC at pp. 47-48, para 32, it was held that where the agreement between the parties restricted jurisdiction to only one particular court, that court alone would have jurisdiction as neither Section 31(4) nor Section 42 contains a non obstante clause wiping out a contrary agreement between the parties. It has thus been held that applications preferred to courts outside the exclusive court agreed to by parties would also be without jurisdiction.

25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.

The reference is answered accordingly."

18. The judgment of **Swastik Gases, Simoese** and **State of West Bengal** (supra) would recognize that if two courts, where both such courts have jurisdiction in law to deal with dispute, only in that case parties can exclude jurisdiction of one court and confer it on the other. The ratio of **Balco** (supra) and **ION Exchange** (supra) does not apply to the case in hand due to the reason that the parties in the present case have restricted jurisdiction only to particular Court and thus that Court alone would have jurisdiction as neither Section 31 (4) nor 42 of the Act contain a non obstante clause wiping out a contrary agreement between the parties as agreed in the present case is Gurgaon Court.

19. The facts of the present case are almost similar to the cases referred above. All the above referred judgements are directly applicable to the facts of the present case. The contrary view cannot be taken. Therefore, this court is not competent and has no territorial jurisdiction to entertain the petition further.

20. The petition under these circumstances is dismissed. The petitioner under the law is not precluded to file the fresh petition but the petitioner under those circumstances will have to disclose the factum of filing of present petition and the competent court will decide the matter on merit. The ex-parte order passed on 17th May, 2016 is vacated.

21. No Costs.

22. Copy of this order be given *Dasti* to both the parties under the signatures of the Court Master.

(MANMOHAN SINGH)
JUDGE

MAY 30, 2016