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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO.444 OF 2019

United India Insurance Company Limited)
under the Companies Act, 1956 having its)
Registered office at 24, Whites Road,)
Chennai-14 and carrying on business)
from 38-B Jawarharlal Nehru Road,)
Himalayan House, 2nd Floor, Kolkata-71) ...Petitioner

....Versus....

Eastern Bulk Company Limited)
under the Companies Act, 1956 having its)
Registered office at 8, Lyons Range,)
Kolkata-01.) ...Respondent

Mr.Karl Tamboly with Ms.Mansi Patel, Mr.S.R. Singh, Mr.Manoj Khatri, Ms.Alvia Crasto and Ms.Riddhi Doshi I/b S.R. Singh & Co. for the Petitioner.

Mr.Akshay Kolse Patil with Mr.Pabitra Dutta I/b M/s.Bose & Mitra & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 4th JULY, 2019.
PRONOUNCED ON : 31st JULY, 2019.

P.C. :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short "Arbitration Act"), the petitioner has impugned the interim award dated 30th November, 2018 passed by the learned arbitrator holding that the claims made by the respondent (original claimant) are not barred by law of limitation considering the

date when the cause of action arose.

2. Learned counsel appearing for the respondent raises a preliminary issue of jurisdiction of this Court to entertain, try and dispose of this arbitration petition on various grounds. This Court has thus heard both the parties on the preliminary issue of jurisdiction raised by the respondent. Some of relevant facts for the purpose of deciding the preliminary issue of jurisdiction are as under :

3. The petitioner is having its office at Kolkata. The respondent company is incorporated and also having its registered office at Kolkata. Some time in the month of July, 2009, the respondent purchased a vessel M.V. Yue Cheng and renamed it M.V. Pallavi. On 29th July, 2009 the respondent got such vessel insured with the petitioner by obtaining Marine Hull Time Policy valid until 28th July, 2010. The said policy was issued in Kolkata by the Kolkata office of the petitioner. It is the case of the respondent that the said policy was accepted by the respondent in Kolkata at its office and place of business.

4. During the period between 16th December, 2009 to 20th December, 2009, the engine of the vessel stopped working. The respondent reported the incidence of loss of vessel to the petitioner. The petitioner appointed Marine Surveyors J.B. Boda Private Limited who inspected the said vessel and appointed Richard Hogg Lindley as Average Adjuster on 13th February, 2010. On 25th April, 2010, the repairs of the said vessel were completed. On 23rd July, 2010, the petitioner made payment of Rs.32.00 lacs to the respondent in Kolkata. On 30th August, 2010, the respondent made a claim of

Rs.3.89 crores upon the petitioner. On 14th March, 2012, the Average Adjuster appointed by the petitioner submitted its report. On 15th February, 2013, the Average Adjuster issued their final report holding the petitioner liable for an amount of Rs.1,27,31,276/- and recommended a payment of Rs.85,31,276/- after taking into account previous payment. On 28th August, 2013, the petitioner informed the respondent that the petitioner had forwarded the claim to the regional office of the petitioner with the recommendation of the Average Adjuster.

5. On 30th October, 2013, the petitioner informed the respondent that the petitioner had proposed to appoint Mr.Tony Fernandez of M/s.Creative Marine Insurance Consultants Private Limited, Mumbai as a sole arbitrator. It was further stated in the said letter that the decision of the sole arbitrator shall be final and binding and to that effect required the respondent to give its consent in writing. The said letter was addressed by the petitioner from its Kolkata office and was received by the respondent at its Kolkata office. The respondent in response to the said letter dated 30th October, 2013, by its letter dated 31st October, 2013 informed the petitioner about its consent to proceed accordingly. The said letter was addressed by the respondent from its Kolkata office to the petitioner at its Kolkata office.

6. It is the case of the respondent that the arbitral hearings were thereafter held during the period between 16th December, 2013 to 18th December, 2013 in Kolkata. On 16th June, 2015, learned arbitrator addressed a letter to both the parties stating that he would not proceed unless the parties would sign the agreement on

procedure and would pay advance fees. Some time in the year 2015, the respondent filed an application under section 11 of the Arbitration Act before the High Court at Kolkata against the petitioner herein *inter-alia* praying for an order and direction against the learned arbitrator to proceed with the arbitration in terms of the arbitration agreement contained in the letters dated 30th October, 2013 and 31st October, 2013.

7. On 7th September, 2016, the Kolkata High Court made various observations about the conduct of the petitioner. It was made clear in the said order that failing any agreement as to the procedure, arbitral tribunal shall conduct the proceedings in the manner it considers appropriate. The said order passed by the Kolkata High Court is not challenged by the petitioner.

8. On 19th October, 2016, the petitioner requested the learned arbitrator to hold a hearing in Kolkata. On 19th October, 2016, the petitioner sent an email to the learned arbitrator with a request to conduct the arbitral proceedings in Kolkata since both the parties were based in Kolkata. Learned arbitrator by his email dated 19th October, 2016 informed the parties that the meetings would have to be held in Mumbai due to his ill-health. On 11th November, 2016, a meeting came to be held in the office of the learned arbitrator at Mumbai. It was agreed by the parties that the next meeting would be held on 15th February, 2017. The parties and the learned arbitrator mutually agreed that future hearings may take place at the office of the claimant i.e. the respondent herein at the address at 72, Sakhar Bhavan, Behind Oberoi Hotel, Nariman Point, Mumbai – 400 002.

9. On 22nd June, 2017, the respondent informed the learned arbitrator that it was never agreed that the venue would be in Mumbai. It was stated that considering the fact that both the parties are situated in Kolkata and carrying business from Kolkata itself, Kolkata should be the place of arbitration. On 23rd June, 2013, the petitioner through its advocate addressed to the advocate for the respondent contended that the learned arbitrator had determined that the place of arbitration / seat of arbitration at Mumbai under section 20(2) of the Arbitration Act. On 30th November, 2018, learned arbitrator made interim award holding that the claim filed by the respondent was not barred and that the seat of arbitration was in Kolkata. Being aggrieved by the said interim award dated 30th November, 2018 the petitioner filed this arbitration petition in this Court.

10. Mr. Tamboly, learned counsel appearing for the petitioner upon raising a query whether section 42 of the Arbitration Act would attract in the facts and circumstances of this case in view of the respondents having filed an application under section 11 of the Arbitration Act before the Kolkata High Court and thus whether this petition under section 34 of the Arbitration Act also will have to be filed before the Kolkata High Court only, learned counsel for the petitioner invited my attention to the definition of Court under section 2(1)(e) of the Arbitration Act. He submits that the said definition is inclusive definition and the Court defined under the said provision includes High Court, whereas under section 11 of the Arbitration Act, an application for appointment of an arbitrator can be filed only before the High Court or the Supreme Court as the case may be. He submits that since the application under section 11(6) of the

Arbitration Act in case of domestic arbitration can be filed only before the High Court either on the original side or the appellate side and various proceedings prescribed in the Act can be filed before the District Court depending upon the cause of action and pecuniary jurisdiction, section 42 of the Arbitration Act would not apply in this situation.

11. Learned counsel gave an illustration that if the cause of action has arisen outside Greater Mumbai and within any part of the State of Maharashtra, an application under section 11(6) of the Arbitration Act can be filed only before the High Court, whereas any application filed under section 9, 14, 27, 29A, 34, 37 etc. of the Arbitration Act can be filed only before the Court defined under section 2(1)(e) depending upon the place of cause of action. He submits that the Court for the purpose of entertaining an application under section 11(6) of the Arbitration Act may be different than the Court defined under section 2(1)(e) of the Arbitration Act. He submits that merely because the respondent has filed an application under section 11(6) of the Arbitration Act before the Kolkata High Court, that would not make section 42 attracted in the facts and circumstances of this case.

12. Learned counsel for the petitioner placed reliance on Law Commission Report in support of the submission that the “Court” for the purposes of filing an application under section 11(6) of the Arbitration Act for appointment of an arbitrator is different than the “Court” defined under section 2(1)(e) of the Arbitration Act for the purpose of filing an application under section 34 of the Arbitration Act.

13. It is submitted by the learned counsel for the petitioner that

in this case, the arbitration agreement between the parties was not recorded in the insurance policy issued by the petitioner in favour of the respondent, but was recorded separately by correspondence. In support of this submission, learned counsel invited my attention to the correspondence exchanged between the parties recording the arbitration agreement and more particularly the letter dated 30th October, 2013 from the petitioner to the respondent proposing to appoint Mr. Tony Fernandez as a sole Adjudicator, letter dated 31st October, 2013 from the respondent to the petitioner giving its consent to the appointment of Mr. Tony Fernandez in response to a letter dated 30th October, 2013.

14. It is submitted by the learned counsel that though three meetings were initially held by the learned arbitrator at Kolkata and the application under section 11(6) of the Arbitration Act was filed by the respondent before the Kolkata High Court, the Kolkata High Court in its order dated 7th September, 2016, made it clear that failing any agreement as to procedure, the arbitral tribunal shall conduct the proceedings in the manner it considers appropriate.

15. Learned counsel for the petitioner placed reliance on the minutes of the meeting dated 11th November, 2016 of the learned arbitrator making it clear that future hearings may take place at the office of the respondent (original claimant) at Mumbai. He also placed reliance on the minutes of the meeting dated 22nd March, 2017 which meeting was conducted by the learned arbitrator at Mumbai. He placed reliance on section 20(1) of the Arbitration Act in support of his submission that the learned arbitrator had decided the place of arbitration at Mumbai.

16. It is submitted by the learned counsel that since the place of arbitration was admittedly at Mumbai and the impugned interim award dated 30th November, 2018 was also made and published by the learned arbitrator at Mumbai, this Court would have exclusive jurisdiction to entertain this petition under section 34 of the Arbitration Act. In support of this submission Mr. Tamboly, learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in case of **Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited & Ors., (2017) 7 SCC 678** and in particular paragraphs 9, 10, 13, 16 and 18 to 20. He also placed reliance on the judgment of the Supreme Court in case of **Emkay Global Financial Services Limited vs. Girdhar Sondhi, (2018) 9 SCC 49** and in particular paragraphs 4, 8, 9 and 21.

17. Learned counsel for the petitioner also placed reliance on the judgment of the Kolkata High Court in case of **Tapas Kumar Bhunia vs. Jagadish Patra** delivered on 26th September, 2018 in GA No.2252 of 2018 in AP No.379 of 2018 and in particular the relevant paragraphs on pages 2 to 4.

18. Mr. Akshay Kolse Patil, learned counsel for the respondent on the other hand submits that admittedly the petitioner as well as the respondent both are incorporated and have their office at Kolkata. The insurance policy was issued by the petitioner in the year 2009 also at Kolkata. He invited my attention to ground no.(xxi) raised by the petitioner in the arbitration petition and submits that the only ground for filing this arbitration petition in this High Court mentioned by the petitioner in the arbitration petition is that the

arbitral proceedings had been held at Mumbai and the interim award has been passed in Mumbai and thus this Court has jurisdiction to try and entertain the petition. It is not the case of the petitioner that any part of the cause of action had arisen at Mumbai.

19. Learned counsel for the respondent invited my attention to some of the averments made in the arbitration petition and also in the reply and rejoinder to the notice of motion. He submits that the petitioner did not dispute that the petition under section 11(6) of the Arbitration Act was filed by the respondent before the Kolkata High Court. First three meetings were held by the learned arbitrator at Kolkata. It was only because of the ill-health of the learned arbitrator, the learned arbitrator in the meeting held on 11th November, 2016 made it clear that all the venue hearing of the arbitration would be conducted by the learned arbitrator at the office of the learned advocate appearing for the respondent at Mumbai. Both the parties accordingly agreed that the venue hearing may take place at the representative office of the respondent situated at 72, Sakhar Bhavan, Behind Oberoi Hotel, Nariman Point, Mumbai – 400 002.

20. Learned counsel for the respondent also invited my attention to an email dated 22nd June, 2017 from the respondent to the learned arbitrator with C.C. to the petitioner stating that it was never agreed that the arbitration venue would be in Mumbai. It was stated in the said email that considering the fact that both the parties are situated in Kolkata and were carrying on business from Kolkata itself, Kolkata should be the place of arbitration. He invited my attention to an email dated 19th June, 2017 from the learned arbitrator informing the parties that the views of the respondent

would be decided after mutual discussions with the parties and their advocates.

21. Learned counsel for the respondent invited my attention to a letter dated 23rd June, 2017 from the petitioner's advocate to the respondent's advocate alleging that the venue / seat of the arbitration has been determined by the learned arbitrator under Section 20(2) of the Arbitration Act, therefore the same cannot be changed now as the seat of arbitration desired to be shifted is Kolkata in a different state i.e. West Bengal. The petitioner also contended that there was no provision under the law to enable the arbitral tribunal to recall and/or review the earlier decision for determining the place of arbitration.

22. It is submitted by the learned Counsel for the respondent that the entire cause of action had arisen in Kolkata. The petitioner did not raise any objection about the territorial jurisdiction of the Kolkata High Court while opposing the application filed by the respondent under Section 11(6) of the Arbitration Act and did not controvert the averments made in the said application filed by the respondent to the effect that the Kolkata High Court has jurisdiction to entertain the said application filed under Section 11(6) of the Arbitration Act. The petitioner also did not raise any objection when the learned Arbitrator fixed the seat of the arbitration in Kolkata. Learned Counsel for the respondent distinguished the judgment of the Supreme Court in case of **Indus Mobile Distribution Pvt. Ltd.** (supra) relied upon by the learned Counsel for the petitioner on the ground that in the said Judgment the Supreme Court has considered the arbitration agreement clearly providing that the Mumbai Courts shall have exclusive jurisdiction. The parties had also agreed that the

seat of arbitration also would be at Mumbai.

23. It is submitted that in this case not only the entire cause of action has arisen in Kolkata but the initial arbitration hearings were also held in Kolkata. The learned Arbitrator however found that it was not possible to fix the venue of arbitral meetings at Kolkata subsequently due to his health reasons. The parties and the learned Arbitrator had accordingly mutually agreed in the meeting held on 11th November 2016 that all future hearing may take place at the office of the claimant at Mumbai. Similarly, in that meeting held on 22nd March 2017, the learned Arbitrator merely recorded that as agreed earlier “future hearing” may take place at Mumbai. He submits that as per Section 20(3) of the Arbitration Act, the Arbitrator only recorded the understanding of the parties that hearing would take place at Mumbai.

24. In so far as the Judgment of the Supreme Court in case of **Emkay Global Financial Services Limited** (supra) relied upon by the learned Counsel for the petitioner is concerned, learned Counsel for the respondent distinguished the said judgment on the ground that in that case the petition filed under Section 34 before the District Court in Delhi was dismissed. The Delhi High Court has set aside the order of District Court and remanded the matter back. The Supreme Court after adverting to the earlier Judgment in case of **Indus Mobile Distribution Pvt. Ltd.** (supra) held that Mumbai courts had exclusive jurisdiction as per the agreement and Delhi is merely a convenient place to hold the meetings. It is submitted that on the contrary both these judgments relied upon by the petitioner would assist the case of the respondent.

25. Learned Counsel for the respondent placed reliance on the Judgment in case of **Chandrakant P. Sanghvi & Ors. v/s. Anilkumar Phoolchand Sanghvi & Ors. 2016(3) Bom.C.R. 595** and in particular paragraph nos. 58 to 60, 69 to 75 and 81 in support of the submission that the seat of arbitration in this case was already fixed by the party at Kolkata. The venue was thereafter fixed by the learned Arbitrator and accepted by both the parties at Mumbai under Section 20(3) as the convenient place of hearing of the arbitral proceedings and thus this Court does not have jurisdiction to entertain this petition on the basis of such convenient place of arbitration decided by the learned Arbitrator under Section 20(3) of the Arbitration Act.

26. Learned Counsel for the respondent placed reliance on the Judgment of this Court in case of **Unitech Texmech Pvt. Ltd., Pune v/s. ATE Enterprises Pvt. Ltd., Mumbai 2016 (5) Mh. L.J. 580** and in particular paragraphs nos. 7, 8, 12, 16, 199, 22, 24, 25 and 32 in support of submission that there is difference in “seat” and “venue” in this case. The learned Arbitrator himself in the impugned award has clearly mentioned the seat of arbitration as Kolkata. Learned Counsel for the respondents strongly placed reliance on the averments made in paragraph no. 41 of the application filed by his client before the Kolkata High Court under Section 11(6) stating that the petitioner herein was carrying on business within the jurisdiction of Kolkata High Court. The entire cause of action has arisen within the jurisdiction of Kolkata High Court and thus Kolkata High Court had the jurisdiction to try and entertain the said petition.

27. Learned Counsel for the respondents placed reliance on the Judgment of this Court in case of **Videocon Industries Ltd. v/s. JMC Projects (India) Ltd. 2013 (7) Bom. CR 238** and in particular paragraph nos. 2 and 4 in support of the submission in that case since the entire cause of action had arisen at Mumbai, the seat of arbitration or that the award was made at particular place would not be relevant for conferring the jurisdiction.

28. Mr. Tamboly, learned Counsel for the petitioner in rejoinder submits that the Supreme Court in case of **Emkay Global Financial Services Limited** (supra) has followed the principles of law laid down by the Supreme Court in its earlier Judgment in case of **Indus Mobile Distribution Pvt. Ltd.** (supra). In so far as the Judgment of this Court in case of **Chandrakant P. Sanghvi & Ors.** (supra) relied upon by the learned Counsel for the respondent is concerned, it is submitted by the learned Counsel for the petitioner that in this case the parties did not agree that the seat of arbitration would be at Kolkata. The facts before this Court in case of **Chandrakant P. Sanghvi & Ors.** (supra) are different and are distinguishable in the facts of this case. It is submitted that initially three meetings were held at Kolkata by agreement of parties. Subsequent meetings were admittedly held in Mumbai and thus only this Court has territorial jurisdiction to entertain and try this petition and more particularly in view of the fact that the arbitral award is rendered at Mumbai.

REASONS AND CONCLUSION :

29. This Court shall decide the issue as to whether seat of arbitration in this case was at Kolkata and whether venue of

arbitration was decided by the learned Arbitrator at Mumbai under Section 20(3) of the Arbitration Act as the convenient place for holding the arbitral meetings and whether this Court has thus territorial jurisdiction to entertain, try and dispose of this arbitration petition filed under Section 34 of the Arbitration Act or not.

30. A perusal of the averments made in paragraph no.2 of the arbitration petition clearly indicates that it is the case of the petitioner itself that the registered office of the petitioner is at 24, Whites Road, Chennai 600 014 and their divisional office is at 38-B Jawaharlal Nehru Road, Himalayan House, 2nd Floor, Kolkata 700 071. In paragraph no.3 of the petition, it is averred that the respondent is carrying on business of Eastern Bulk Company Limited and having its office at 8, Lyons Range, Kolkata 700 001.

31. It is an admitted possession that the respondent had obtained a Marine Hull Insurance Policy being Policy No.031100/22/09/01/00000015 from the division office of the petitioner situated in Kolkata in respect of the vessel owned by the respondent. In the said policy, there was no arbitration agreement recorded between the parties. The petitioner had appointed a surveyor in respect of the survey to assess loss and damages caused to the main engine of the said vessel in Kolkata. The respondent had lodged a claim of Rs.3.89 crores upon the petitioner on 30th August 2010 in Kolkata. All the correspondence were exchanged between the parties from their respective offices in Kolkata. The dispute arose between the parties in Kolkata.

32. On 30th October 2013, the petitioner addressed a letter to

the respondent from its Kolkata office to the respondent at his Kolkata office thereby proposing to appoint Mr. Tony Fernandez of Creative Marine Insurance Consultant Private Limited, Mumbai as a Sole Adjudicator. It was stated in the said letter that the learned Sole Adjudicator would conclude the issues on merits relates to the policy issue and drawing reference to the Marine Insurance Act 1906 and Indian Marines Insurance Act, 1963. The decision of the Sole Arbitrator shall be final and binding. The petitioner called upon the respondent to give its consent in writing. In response to the said letter dated 30th October 2013, the respondent gave reply by letter dated 31st October 2013 informing the petitioner about its consent for appointment of Mr. Tony Fernandez as the Sole Arbitrator. It is not in dispute that the said letter was also addressed by the respondent from its Kolkata office to the petitioner at its Kolkata office.

33. It is not in dispute that during the period between 16th and 18th December 2013, the arbitral meetings were held in Kolkata. However, there was some dispute about fees of the arbitrator and about a signed agreement on the aspect of the procedure. The learned Arbitrator therefore addressed a letter on 16th June 2015 to both the parties that he may not proceed unless parties has signed the agreement procedure and had paid the advance fees. The respondent therefore filed an arbitration petition before the Kolkata High Court under Section 11(6) of the Arbitration Act. It was averred by the respondent in the said arbitration petition that the registered office and head office of the petitioner was at Chennai and it was carrying on business from its branch office at Kolkata as well as its Kolkota region office at 38-B Jawaharlal Nehru Road, Himalayan House, 2nd Floor, Kolkata 700 071, both the offices being within the

original jurisdiction of the Kolkata High Court. All correspondence in regard to the subject matter of the arbitration had been addressed to the Kolkata offices of the petitioner.

34. A perusal of the order passed by the Kolkata High Court in the said application filed by the respondent under section 11(6) of the Arbitration Act clearly indicates that the Kolkata High Court issued various directions to the learned arbitrator for conducting the proceedings. The petitioner neither disputed any averments made by the respondent in the said application filed under section 11(6) nor impugned the order passed by the Kolkata High Court. In the meeting held by the learned arbitrator on 30th November, 2018, in the order passed by the learned arbitrator, it was made clear that the seat of the arbitration was Kolkata and not Mumbai as the parties had their respective offices in Kolkata. The policy was issued at Kolkata and the directions for arbitration was given by the High Court of Kolkata.

35. In paragraph (2) of the order dated 30th November, 2018, the learned arbitrator made it clear that as far as the venue of the next meeting was concerned, the same shall be in Mumbai at the usual place where the previous arbitral meeting was held. The learned arbitrator thereafter made it clear that in view of his ill health, all the arbitral meetings would be conducted at Mumbai. The order passed by the learned arbitrator holding that the seat of the arbitration was at Kolkata and the venue of the arbitration was of Mumbai has not been challenged by the petitioner at any point of time.

36. Insofar as the judgment of Supreme Court in case of **Indus Mobile Distribution Private Limited** (supra) relied upon by Mr. Tamboly, learned counsel for the petitioner is concerned, in the said judgment Supreme Court considered the situation where the parties in the arbitration agreement had clearly provided that the dispute shall be finally settled by arbitration conducted under the provisions of the Arbitration & Conciliation Act 1996, by reference to a sole arbitrator which shall be mutually agreed by the parties and such arbitration shall be conducted at Mumbai, in English language. The said arbitration agreement further provided that all disputes & differences of any kind whatever arising out of or in connection with the said agreement shall be subject to the exclusive jurisdiction of Courts of Mumbai only. Considering such provisions in the arbitration agreement between the parties and the fact that the arbitral proceedings were conducted in Mumbai in view of the seat of the arbitration having been fixed, Supreme Court held that it would be in the nature of an exclusive jurisdiction clause as to the Courts which exercise supervisory powers over the arbitration.

37. Supreme Court held that the the moment the seat is designated, it is akin to an exclusive jurisdiction clause. Supreme Court also held that it was clear that the seat of arbitration was Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai Courts. However, in this case, there was no such agreement that this Court will have jurisdiction to resolve the dispute and differences arising out of or in connection with the agreement entered into between the parties. The entire cause of action in this case has arisen at Kolkata. The learned arbitrator held initial three meetings at Kolkata and had chosen

Kolkata as the seat of arbitration. Further meetings were held at Mumbai only because of the convenience of the learned arbitrator by deciding the venue of the arbitration under section 20(3) of the Arbitration Act.

38. In my view, the petitioner cannot be allowed to mix up the concept of seat of arbitration with the venue of arbitration which in this case are different. The judgment of Supreme Court in case of ***Indus Mobile Distribution Private Limited*** (supra) will not assist the case of the petitioner but will assist the case of the respondent and more particularly on the issue that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. The learned arbitrator himself has rightly understood and has passed a specific order in this regard that the seat of the arbitration was Kolkata whereas the venue of the arbitration was at Mumbai.

39. Insofar as judgment of Supreme Court in case of ***Emkay Global Financial Services Limited*** (supra) relied upon by Mr. Tamboly, learned counsel for the petitioner is concerned, in the said judgment the Supreme Court considered the situation where the parties were governed by the bye-laws of Stock Exchange which provided that the parties had agreed to submit to the exclusive jurisdiction of the Courts in Mumbai in Maharashtra. Chapter VII of the bye-laws provided that trading members of the Exchange shall expressly record on their contract note that they have excluded the jurisdiction of all other Courts save and except, Civil Courts in Mumbai in relation to any dispute arising out of or in connection with or in relation to the contract notes, and that only the Civil Courts at Mumbai have exclusive jurisdiction in claims arising out of such

dispute. In that matter, the National Stock Exchange referred the dispute to the learned arbitrator who held sitting in Delhi to deliver an award in Delhi.

40. Supreme Court adverted to its earlier judgment in case of **Indus Mobile Distribution Private Limited** (supra) and held that once Courts in Mumbai have exclusive jurisdiction in view of the agreement between the parties read with the National Stock Exchange bye-laws, it was clear that it was the Mumbai Courts and the Mumbai Courts alone, before which a section 34 application should 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 reading of bye-law 4(a)(iv) read with (xiv) contained in Chapter XI of the National Stock Exchange bye-laws. Supreme Court accordingly held that the Bombay High Court alone will have jurisdiction in the matter.

41. In the facts of this case, subsequent meetings were held by the learned arbitrator at convenient venue at Mumbai. The said venue thus fixed by the learned arbitrator only for the purpose of conducting some of the arbitral proceedings could not be considered as seat of arbitration for the purpose of conferring jurisdiction on the Courts in Mumbai. The judgment of Supreme Court in case of **Emkay Global Financial Services Limited** (supra) would not assist the case of the petitioner but would assist the case of the respondent.

42. This Court in case of **Chandrakant P.Sanghvi & Ors.**, (supra) has considered similar situation where the learned arbitrator

had decided the venue of the proceedings after hearing both the parties and directed that the arbitral proceedings shall be held alternatively at Pune and Mumbai till further directions. It was accordingly held by this Court that the parties had not agreed that seat of arbitration and the place of arbitration would be in Mumbai. This Court held that even otherwise this Court could not have exercised ordinary original civil jurisdiction since this Court had no jurisdiction to entertain, try and dispose of the arbitration petition forming the subject matter of the arbitration since the material part of cause of action had arisen in Pune. In my view, the judgment of this Court in case of **Chandrakant P.Sanghvi & Ors.**, (supra) applies to the facts of this case. I am respectfully bound by the said judgment.

43. This Court in case of **Unitech Texmech Pvt. Ltd.,Pune** (supra) has considered the situation where the parties had informed the Indian Merchants' Chamber that the location of arbitration would be Pune however the parties wish to mutually modify the place of arbitration and give consent to change the location of arbitration to Mumbai. Accordingly the learned arbitrator had entered upon a reference. This Court after considering the correspondence exchanged between the parties held that both the parties had agreed to change the venue from Pune to Mumbai being convenient to both the parties in view of various suggestions given by the Indian Merchants' Chamber. Indian Merchants' Chamber had also made it clear that the suggestion of the Indian Merchants' Chamber was only to choose the venue from Pune to Mumbai and to modify the clause of the selling agreement to the effect that all proceedings in such arbitration shall be held in Mumbai instead in Pune and not elsewhere.

44. Both the parties were ad-idem that the venue of the arbitral proceedings which was fixed under clause 8.3 of the Selling Agency Agreement in Pune was changed to Mumbai. This Court accordingly held that there was no dispute that the part of cause of action had arisen at Pune and the party had agreed to confer jurisdiction of Court in Pune. This Court accordingly held that the place of arbitration was changed from Pune to Mumbai and not venue of arbitration from Pune to Mumbai. This Court accordingly held that this Court had no territorial jurisdiction to entertain, try and dispose of the said arbitration petition filed by the petitioner under section 34 of the Arbitration and Conciliation Act, 1996. The judgment of this Court in case of **Unitech Texmech Pvt. Ltd., Pune** (supra) applies to the facts of this case. I am respectfully bound by the said judgment.

45. The learned counsel appearing for both the parties relied upon various judgments on the issue of seat or venue decided by the Supreme Court and this Court under Part II of the Arbitration Act. I do not propose to deal with those judgments while dealing with the issues in this matter under Part I.

46. In this case, the initial arbitral proceedings were held at Kolkata. There is also no dispute that no part of the cause of action had arisen at Mumbai. There cannot be two or more seats of arbitration whereas the venue of arbitration may be more than one and may be fixed by the parties as well as the learned arbitrator considering the convenience of the learned arbitrator and the parties. The venue decided by the learned arbitrator to suit his convenience

or convenience of the parties for the purpose of hearing of the arbitration proceedings cannot confer the supervisory jurisdiction of such Court within whose territorial jurisdiction such arbitral tribunal were held at the venue decided under section 20(3) of the Arbitration Act. Under section 20(3) of the Arbitration Act, in the absence of the agreement between the parties, the arbitral tribunal has to meet at any place for conducting the hearing at the place of convenience in the matter. In my view, since the entire cause of action had arisen at Kolkata and even otherwise the seat of arbitration was fixed as Kolkata, only appropriate Court in Kolkata would have exclusive jurisdiction to entertain, try and dispose of this petition under section 34 of the Arbitration Act and not this Court.

47. I will not consider the submission made by the learned counsel for the petitioner on the issue raised by this Court whether section 42 of the Arbitration Act would be attracted in this case or not. A perusal of section 11(6) of the Arbitration Act clearly indicates that a request has to be made for the appointment of arbitrator to the High Court or Supreme Court or any person or institution designated by such Court unless the agreement on the appointment procedure provides other means for securing the appointment. The amendment inserted by Act 3 of 2016 w.e.f. 23rd October, 2015 in section 11 clearly indicates that an application under section 11(6) has to be filed only before the High Court or any person or institution designated by the High Court in case of domestic arbitration and under section 11(9) before the Supreme Court or the person or institution designated by the Supreme Court in case of international commercial arbitration. An application for appointment of arbitrator under section 11(6) and 11(9) as the case may be cannot be made

before any Court lower in rank to the High Court in case of domestic arbitration and lower in rank to Supreme Court in case of international commercial arbitration.

48. A perusal of section 2(1)(e) i.e. the definition of Court under section 2(1) (e) however clearly indicates that in case of an arbitration other than the international commercial arbitration, the principal Civil Court of original jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes. It is thus clear that if there was no arbitration agreement, a Court which could decide a question forming subject matter of the arbitration will have jurisdiction however excluding civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes. It is thus clear that in a given case, the Courts subordinate to High Court excluding a civil Court or a grade inferior to principal civil Court of original jurisdiction in a district and excluding the Court of Small Causes Court may have jurisdiction to decide the question forming the subject matter of arbitration. It is also possible that in a given case, if the cause of action had arisen within the territorial and pecuniary jurisdiction of High Court exercising ordinary original civil jurisdiction, the jurisdiction of such High Court hearing application under section 11(6) and other applications permissible under the provisions of the Arbitration and Conciliation Act, 1996 in Part I would be the same.

49. In case of an international commercial arbitration defined

under section 2(1)(f), an application for appointment of an arbitrator can be filed only before the Supreme Court under section 11(9) or before a person or institution designated by Supreme Court. The Supreme Court described as a Court having jurisdiction to entertain an application under section 11(9) cannot be a Court under section 2(1)(e) of the Arbitration Act having jurisdiction to decide the question forming subject matter of the arbitration if the same had been the subject matter of the suit. In my view Mr. Tamboly, learned counsel for the petitioner is thus right in his submission that merely because an application under section 11(6) of the Arbitration Act was filed by the respondent arising out of the said arbitration agreement which was first in point of time before Kolkata High Court, in view of section 42 of the Arbitration Act, this petition filed under section 34 also was required to be filed only before the Kolkata High Court on that ground. In my considered opinion, section 42 of the Arbitration Act cannot be attracted based on the application filed under section 11(6) in a particular High Court having jurisdiction to entertain such application.

50. In my view, the judgment of Kolkata High Court in case of **Tapas Kumar Bhunia** (supra) strongly relied upon by Mr. Tamboly, learned counsel appearing for the petitioner on the issue that section 42 of the Arbitration Act will have no manner of operation in view of the earlier application under section 11(6) filed by the respondent before the Kolkata High Court would apply to the facts of this case. I am in agreement with the views expressed by the Kolkata High Court in case of **Tapas Kumar Bhunia** (supra).

51. I, therefore, pass the following order :-

a). It is declared that this Court has no jurisdiction to entertain, try and dispose of the Commercial Arbitration Petition No.444 of 2019 filed under section 34 of the Arbitration and Conciliation Act, 1996 filed by the petitioner. Commercial Arbitration Petition No.444 of 2019 is accordingly dismissed for want of jurisdiction of this Court.

b). There shall be no order as to costs.

(R.D. DHANUKA, J.)

52. At this stage learned counsel appearing for the petitioner seeks stay of the order passed by this Court today. This Court has rejected the petition on the ground of want of jurisdiction of this Court.

53. No stay of the arbitral award was granted by this Court in this petition. Application for stay is accordingly rejected.

(R.D. DHANUKA, J.)