

Vidya Amin

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMMERCIAL ARBITRATION APPLICATION NO. 115 OF 2022

Phthalo Colours and Chemicals (I) Ltd.	.. Applicant
Vs.	
UPL Ltd.	.. Respondent

Mr. Manav Nagpal a/w. Ms. Surbhi Ahuja i/b. Advani & Co. for the applicant.

Mr. Zerick Dastur a/w. Ms. Smriti Singh i/v. Zerick Dastur Advocate & Solicitors for the respondent.

CORAM : G.S. KULKARNI, J.

DATE : JULY 6, 2022.

ORAL ORDER

1. This is an application filed under section 11 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) whereby the applicant has prayed for appointment of an arbitral tribunal to adjudicate the disputes and differences between the parties, which have arisen under the Deed of Assignment dated 22 July, 2020.

2. Briefly the applicant’s case is: that the applicant is a company incorporated under the Companies Act, 1956 engaged in the business of manufacturing and selling of pigments. The Gujarat Industrial Development Corporation (for short “GIDC”) by an order dated 9 March, 2006 granted its consent for assignment and transfer of the leasehold interest of one M/s. Jaysynth Dyestuff (India) Ltd. in favour of the applicant in an immovable property at Vapi Industrial Area (for short

“the plot”). On 20 March, 2006, a Deed of Assignment was executed between Jaysynth Dyestuff and the applicant, which was registered with the Sub-Registrar of Assurances at Sr. No. 1913/2006. By an order dated 16 June, 2020, the GIDC granted its approval for the applicant’s request for further sub-division of the said plot. Thereafter on 4 July, 2020, the request for transfer of the plot from the applicant to the respondent was approved by the GIDC under a provisional transfer order issued by it. On 22 July, 2020, the applicant assigned the leasehold rights in respect of the plot in favour of the respondent by executing another Deed of Assignment. On 29 January, 2022, the applicant notified that the respondent was to pay amounts due towards the Goods and Service Tax (GST) as accrued under the Deed of Assignment dated 22 July, 2020.

3. It is the applicant’s case that the respondent did not make payment of the GST amounts despite the fact that three summons were issued by GST authorities to the applicant. The applicant has contended that it was the liability of the respondent to clear the GST amounts and having not cleared such amounts, a show cause notice was issued by the GST authorities against the applicant. The applicant states that in such situation part of the GST amount being an amount of Rupees one crore was paid by the applicant under protest. Consequent thereto on 25 February, 2022, the applicant issued a notice to the respondent invoking arbitration. The applicant also suggested the name of the proposed

arbitrator. Such notice was replied by the advocate for the respondent by his letter dated 28 March, 2022 whereby the nominee arbitrator as suggested by the applicant was not accepted. As there was no consensus between the parties to appoint an arbitral tribunal, the present application was filed.

4. There appears to be no dispute between the parties in regard to the existence of an arbitration agreement, which has been incorporated under a clause titled as “Arbitration and Jurisdiction”. The ‘Governing Law and Jurisdiction’ as also the Arbitration and Jurisdiction clauses are required to be noted, which reads thus:

“Governing Law and Jurisdiction

This Deed shall be governed by the laws of India and **the Courts of Gujarat** will have jurisdiction to settle any disputes that may arise out of or in connection with this Deed.

Arbitration and Jurisdiction

In the event of any dispute or difference arising out of or in connection with this Deed or in the interpretation, construction or meaning thereof or any of the terms and conditions of this Deed, which the parties are unable to settle within 30 (thirty) days, shall be referred to and finally resolved by a mutually appointed sole arbitrator in accordance with the Arbitration Rules of the Mumbai Centre for International Arbitration, which rules are deemed to be incorporated by reference in this clause. Each party to arbitration, unless otherwise directed by the arbitral tribunal shall bear its own legal fees and expenses incurred in connection with the arbitration. Any award in connection with any arbitration proceeding hereunder shall be reasoned award and shall be final and binding on the parties. **The arbitration shall be conducted in English language and the seat and venue of arbitration shall be Mumbai.** The arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996 or any re-enactment or modification thereto.”

(emphasis supplied)

5. The applicant has contended that the arbitration and jurisdiction

clause is clear wherein the parties have agreed to appoint a sole arbitrator in accordance with the Arbitration Rules of the Mumbai Centre for International Arbitration, as also, that the “seat” and “venue” of the arbitration shall be Mumbai. It is hence the applicant’s contention that this Court has jurisdiction to entertain the present application and exercise its jurisdiction under section 11(6) of the Act.

6. Mr. Dastur, learned counsel for the respondent, at the outset, has raised an objection to the maintainability of the present application before this Court, contending that the parties under the “Governing Law and Jurisdiction” clause have agreed that the Agreement in question shall be governed by the laws of India and the Courts of Gujarat will have jurisdiction, to settle any disputes that may arise out of or in connection with the Deed. The submission is that once the parties have agreed that the Courts of Gujarat will have jurisdiction, then the Arbitration and Jurisdiction clause is required to be read in conjunction and in context of the Governing Law and Jurisdiction clause. Mr. Dastur has submitted the parties having agreed that the Courts in Gujarat would have jurisdiction to entertain the present application, this Court would lack jurisdiction to entertain this application. In support of his contention, Mr. Dastur would make the following submissions:

- (i) When a contract specifies an exclusive jurisdiction clause conferring jurisdiction on a specified Court (which even

otherwise it would have), only such Court would have jurisdiction. Mr. Dastur submits that all aspects related to the transaction between the parties have taken place in Gujarat. The entire cause of action in relation to the dispute has arisen in Gujarat. Thus, the Courts in Gujarat have jurisdiction in respect of the disputes between the parties.

- (ii) As a sequel to the first submission, it is submitted that the parties although have agreed in the “Arbitration and Jurisdiction” clause that the seat and venue of arbitration shall be Mumbai, such intention would not override the parties agreeing in conferring jurisdiction to the Courts at Gujarat. Mr. Dastur submits that no part of the cause of action having arisen in Mumbai; at the most, Mumbai can only be considered as the venue for the arbitration proceedings and not the “seat” as urged by the applicant.
- (iii) It is submitted that once the parties agree to an independent jurisdiction clause conferring jurisdiction on the Courts at Gujarat, such a clause cannot be rendered meaningless even if the parties in the Arbitration and Jurisdiction clause agree to have the seat and venue of arbitration at Mumbai. In other words, the parties agreeing to have seat and venue of

arbitration at Mumbai would not in any manner displace and render meaningless the intention of the parties to confer jurisdiction on the Courts of Gujarat for the purpose of settling any disputes that may arise out of or in connection with the Deed. In support of such contention, Mr. Dastur has referred to the decisions of the Supreme Court in **Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc.**¹, **Brahmani River Pellets Ltd. vs. Kamachi Industries Ltd.**² as also the decision of this Court in **Aniket SA Investments LLC vs. Janapriya Engineers Syndicate Pvt. Ltd. & Ors.**³. Placing reliance on these decisions, it is submitted by Mr. Dastur that these are decisions which are decided not in the context of an exclusive jurisdiction clause where the parties have agreed to confer jurisdiction by an independent jurisdiction clause, on a particular Court, but these are all decisions basically interpreting as to what the arbitration clause would contain and how such an arbitration clause was to be interpreted.

- (iv) It is submitted that this is a case which would be akin to the case which had fallen for consideration before the Supreme Court in **Swastik Gases (P) Ltd. vs. Indian Oil Corporation**

1 (2012) 9 scc 552

2 (2020) 5 SCC 462

3 Commercial Appeal No. 504 of 2019 in Commercial Arbitration Petition (L) No. 1244 of 2019

Ltd.⁴, in which the Supreme Court was considering an exclusive jurisdiction clause and as to in what manner the exclusive jurisdiction clause would be required to be interpreted. His submission is to the effect that in such decision, the Supreme Court held that a clause in the agreement conferring exclusive jurisdiction on the Courts at Kolkata cannot be rendered meaningless and due effect should be given to such clause. Thus, it is Mr. Dastur's submission that the petition is not maintainable for want of jurisdiction, as the Courts of Gujarat would have exclusive jurisdiction applying the *Swastik Gases (P) Ltd.* (supra) principle.

7. Mr. Nagpal, learned counsel for the petitioner, however, would seriously dispute the contentions as urged by Mr. Dastur. He would submit that when the parties agree to the venue and seat of the arbitration at a particular place, the law in this regard is well settled as seen from the decision of the Supreme Court in **BGS SGS Soma JV vs. NHPC Ltd.**⁵ wherein the Supreme Court has held that once the parties agree to designate a 'venue' or 'seat' of arbitration at a particular place, only such Court would have jurisdiction. Mr. Nagpal has drawn the Court's attention to the relevant paragraphs of the decision in *BGS SGS*

4 (2013) 9 SCC 32

5 (2020) 4 SCC 234

Soma (supra) and also the decision of the Division Bench of this Court in *Aniket SA Investments LLC* (supra), which also follows what has been held by the Supreme Court in *BGS SGS Soma* (supra) wherein the Court in the context of an exclusive jurisdiction clause along with a clause providing for the ‘seat’ of arbitration at Hyderabad and Mumbai respectively, held that the Courts at Mumbai would have jurisdiction, the parties having agreed to have the seat of arbitration to be at Mumbai.

8. It is on the above conspectus, the present proceedings are required to be decided by this Court.

9. I have heard learned counsel for the parties and with their assistance I have perused the record. At the outset, it needs to be observed that as there is no dispute on the arbitration agreement between the parties, the Court in exercising the jurisdiction under section 11(6) of the Act in the present context, would be required to confine its enquiry to ascertain whether this Court has jurisdiction to entertain the present application. For such purpose, the Court would be required to examine the nature of the arbitration agreement and as to what has been agreed by the parties in respect of “seat and venue” of the arbitration, as revealed from such arbitration agreement. Even if the parties have agreed to an independent jurisdiction clause, namely, the “Governing Law and Jurisdiction” clause to the effect that the Deed shall

be governed by the laws of India and the Courts at Gujarat will have jurisdiction to settle any disputes that may arise out of or in connection with this Deed, the question is, whether such clause would in any manner influence the agreement between the parties in the “Arbitration and Jurisdiction” clause, whereby the parties categorically agree that the seat and venue of arbitration shall be at Mumbai. Considering the principles of law as laid down in the decisions of *Brahmani River Pellets Ltd.* (supra), *BGS SGS Soma* (supra), can it be held that, despite the parties agreeing that the Courts of Gujarat would have jurisdiction, nonetheless, this Court would have jurisdiction to entertain this petition.

10. A discussion on the legal position on such issue would aid the conclusion. At the outset, it would be necessary to refer Section 20 of the Arbitration and Conciliation Act, which provides for “place of arbitration”. Section 20 reads thus:

Section 20: Place of arbitration.

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

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

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

11. In **Bharat Aluminium Company** (supra), a Constitution Bench of

the Supreme Court in the context of the principle of “party autonomy” examined the provisions of the Act and more particularly, the definition of “Court” and held that in the context of Section 2(1)(e) of the Act what would be the “subject matter of arbitration” which cannot be confused with the “subject matter of the suit”. The Supreme Court considering the provisions of section 2(1)(e) vis-a-vis the provisions of Section 20 of the Act, held that the provisions of Section 2(1)(e) are required to be construed keeping in view the provisions of Section 20 which give recognition to party autonomy. It was observed that a narrow construction of such provision cannot be accepted and would result in Section 20 being rendered nugatory. In paragraph 96 of the decision, the Court observed that on many occasions, the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Hence, the Courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. Explaining the concept of the parties agreeing to a seat of arbitration at a neutral place, the Court observed that the arbitral tribunal holding its seat at a neutral place, the Courts at such seat of arbitration, will have supervisory jurisdiction over the arbitration proceedings as also the arbitral tribunal. This was *de hors* the obligations to be performed under the contract which were to be performed at different place and only arbitration was to take place at a neutral place. The Constitution

Bench also examined the effect of Section 20 of the Act to hold that Section 20 leaves no room for doubt that where the place of arbitration is within the country, the parties are free to agree to any “place” or “seat” within the country and in the absence of the parties not so agreeing, Section 20(2) authorizes the tribunal to determine the place/seat of such arbitration and further, Section 20(3) enables the tribunal to “meet at any place” to conduct hearings at a place of convenience in matters, such as consultations among its members, for hearing witnesses, experts or the parties. The relevant observations of the Supreme Court in this context are required to be noted, which are found in paragraphs 96, 97, 98 and 99, which reads 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

(a) - (d)

(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.

99. The fixation of the most convenient “venue” is taken care of by Section 20(3). Section 20, has to be read in the context of Section 2(2), which places a threshold limitation on the applicability of Part I, where the place of arbitration is in India. Therefore, Section 20 would also not support the submission of the extra-territorial applicability of Part I, as canvassed by the learned counsel for the appellants, so far as purely domestic arbitration is concerned.”

(emphasis added)

12. In *Brahmani River Pellets Ltd.* (supra), the parties, in Clause 18 of the Agreement, had agreed that the venue of arbitration shall be Bhubaneswar. There was no exclusive jurisdiction clause in such agreement. Clause 18 of the agreement contained an arbitration clause, which fell for consideration of the Court, which read thus:

“18. Arbitration shall be under Indian Arbitration and Conciliation Law, 1996 and the venue of arbitration shall be Bhubaneswar.”

13. Interpreting Section 20 of the Act and also considering its decision in *Swastik Gases Pvt. Ltd.* (supra), the Supreme Court observed that as the contract between the parties specifies jurisdiction of the Court at a particular place, only such Court would have jurisdiction to deal with the matter as the parties intended to exclude all other Courts. Considering the contract in question, the parties having agreed that the venue of arbitration shall be at Bhubaneswar, the Court held that the intention of the parties was to exclude all other Courts. The Supreme Court accordingly held that the proceedings which were filed before the

Madras High Court were not maintainable.

14. Recently in **BGS SGS Soma JV (supra)**, a three Judges Bench of the Supreme Court taking a review of the entire law on the doctrine of “seat” and “venue” of arbitration, and also considering the principles in that regard under the common law, held that when the parties select the seat of arbitration in their agreement, such selection would amount to an exclusive jurisdiction clause, as the parties have agreed that the courts at the “seat” would alone have jurisdiction to entertain challenges against the arbitral award which have been made at the seat. The relevant paragraphs of the decision are required to be noted:

33. Some of the early decisions of this Court did not properly distinguish between “seat” and “venue” of an arbitral proceeding. The Five Judge Bench in BALCO (supra) dealt with this problem as follows:

“75. We are also unable to accept the submission of the learned counsel for the appellants that the Arbitration Act, 1996 does not make seat of the arbitration as the centre of gravity of the arbitration. On the contrary, it is accepted by most of the experts that in most of the national laws, arbitrations are anchored to the seat/place/situs of arbitration. Redfern in Para 3.54 concludes that “the seat of the arbitration is thus intended to be its centre of gravity.” [Blackaby, Partasides, Redfern and Hunter (Eds.), Redfern and Hunter on International Arbitration (5th Edn., Oxford University Press, Oxford/New York 2009).] This, however, does not mean that all the proceedings of the arbitration have to take place at the seat of the arbitration. The arbitrators at times hold meetings at more convenient locations. This is necessary as arbitrators often come from different countries. It may, therefore, on occasions be convenient to hold some of the meetings in a location which may be convenient to all. Such a situation was examined by the Court of Appeal in England in Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru [(1988) 1 Lloyd’s Rep 116 (CA)] wherein at p. 121 it is observed as follows:

“The preceding discussion has been on the basis that there is only one ‘place’ of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or ‘seat’ of the arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the place of

arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an Arbitral Tribunal to hold meetings—or even hearings—in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.... It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country—for instance, for the purpose of taking evidence.... In such circumstances each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of arbitration remains the place initially agreed by or on behalf of the parties.”

These observations were subsequently followed in Union of India vs. McDonnell Douglas Corpn. (1993) 2 Lloyd’s Rep 48

76. It must be pointed out that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments, namely, the New York Convention of 1958 and the UNCITRAL Model Law of 1985. It is true that the terms “seat” and “place” are often used interchangeably. In Redfern and Hunter on International Arbitration [Blackaby, Partasides, Redfern and Hunter (Eds.), Redfern and Hunter on International Arbitration (5th Edn., Oxford University Press, Oxford/New York 2009).], the seat theory is defined thus: “The concept that an arbitration is governed by the law of the place in which it is held, which is the ‘seat’ (or ‘forum’ or locus arbitri) of the arbitration, is well established in both the theory and practice of international arbitration. In fact, the Geneva Protocol, 1923 states:

“2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.”

The New York Convention maintains the reference to “the law of the country where the arbitration took place” [Article V(1)(d)] and, synonymously to “the law of the country where the award is made” [Articles V(1)(a) and (e)]. The aforesaid observations clearly show that the New York Convention continues the clear territorial link between the place of arbitration and the law governing that arbitration. The author further points out that this territorial link is again maintained in the Model Law which provides in Article 1(2) that:

“1. (2) the provision of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of the State.”

Just as the Arbitration Act, 1996 maintains the territorial link between the place of arbitration and its law of arbitration, the law in Switzerland and England also maintain a clear link between the seat of arbitration and the lex arbitri. The Swiss Law states:

“176(I). (1) The provision of this chapter shall apply to any arbitration if the seat of the Arbitral Tribunal is in

Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.” [See the Swiss Private International Law Act, 1987, Ch. 12, Article 176(I)(1).

95. Learned Counsel for the Appellants have submitted that Section 2(1)(e), Section 20 and Section 28 read with Section 45 and Section 48(1)(e) make it clear that Part I is not limited only to arbitrations which take place in India. These provisions indicate that Arbitration Act, 1996 is subject matter centric and not exclusively seat centric. Therefore, "seat" is not the "centre of gravity" so far as the Arbitration Act, 1996 is concerned. We are of the considered opinion that the aforesaid provisions have to be interpreted by keeping the principle of territoriality at the forefront. We have earlier observed that Section 2(2) does not make Part I applicable to arbitrations seated or held outside India. In view of the expression used in Section 2(2), the maxim *expressum facit cessare tacitum*, would not permit by interpretation to hold that Part I would also apply to arbitrations held outside the territory of India. The expression "this Part shall apply where the place of arbitration is in India" necessarily excludes application of Part I to arbitration seated or held outside India. It appears to us that neither of the provisions relied upon by the Learned Counsel for the Appellants would make any section of Part I applicable to arbitration seated outside India. It will be apposite now to consider each of the aforesaid provisions in turn.

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.

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.

99. The fixation of the most convenient "venue" is taken care of by Section 20(3). Section 20, has to be read in the context of Section 2(2), which places a threshold limitation on the applicability of Part I, where the place of arbitration is in India. Therefore, Section 20 would also not support the submission of the extra-territorial applicability of Part I, as canvassed by the Learned Counsel for the Appellants, so far as purely domestic arbitration is concerned."

38. A reading of paragraphs 75, 76, 96, 110, 116, 123 and 194 of BALCO (supra) would show that where parties have selected the seat of arbitration in their agreement, such selection would then amount to an exclusive jurisdiction clause, as the parties have now indicated that the Courts at the "seat" would alone have jurisdiction to entertain challenges against the arbitral award which have been made at the

seat. The example given in paragraph 96 buttresses this proposition, and is supported by the previous and subsequent paragraphs pointed out hereinabove. The BALCO judgment (*supra*), when read as a whole, applies the concept of “seat” as laid down by the English judgments (and which is in Section 20 of the Arbitration Act, 1996), by harmoniously construing Section 20 with Section 2(1)(e), so as to broaden the definition of “court”, and bring within its ken courts of the “seat” of the arbitration.

39. However, this proposition is contradicted when paragraph 96 speaks of the concurrent jurisdiction of Courts within whose jurisdiction the cause of action arises wholly or in part, and Courts within the jurisdiction of which the dispute resolution i.e. arbitration, is located.

40. Paragraph 96 is in several parts. First and foremost, [Section 2\(1\)\(e\)](#), which is the definition of “Court” under the [Arbitration Act, 1996](#) was referred to, and was construed keeping in view the provisions in Section 20 of the Arbitration Act, 1996, which give recognition to party autonomy in choosing the seat of the arbitration proceedings. Secondly, the Court went on to state in two places in the said paragraph that jurisdiction is given to two sets of Courts, namely, those Courts which would have jurisdiction where the cause of action is located; and those Courts where the arbitration takes place. However, when it came to providing a neutral place as the “seat” of arbitration proceedings, the example given by the Five Judge Bench made it clear that appeals under Section 37 of the Arbitration Act, 1996 against interim orders passed under Section 17 of the Arbitration Act, 1996 would lie only to the Courts of the seat - which is Delhi in that example - which are the Courts having supervisory control, or jurisdiction, over the arbitration proceedings. The example then goes on to state that this would be irrespective of the fact that the obligations to be performed under the contract, that is the cause of action, may arise in part either at Mumbai or Kolkata. The fact that the arbitration is to take place in Delhi is of importance. However, the next sentence in the said paragraph reiterates the concurrent jurisdiction of both Courts.

48. The aforesaid amendment carried out in the definition of “Court” is also a step showing the right direction, namely, that in international commercial arbitrations held in India, the High Court alone is to exercise jurisdiction over such proceedings, even where no part of the cause of action may have arisen within the jurisdiction of such High Court, such High Court not having ordinary original jurisdiction. In such cases, the “place” where the award is delivered alone is looked at, and the High Court given jurisdiction to supervise the arbitration proceedings, on the footing of its jurisdiction to hear appeals from decrees of courts subordinate to it, which is only on the basis of territorial jurisdiction which in turn relates to the “place” where the award is made. In the light of this important change in the law, Section 2(1)(e)(i) of the Arbitration Act, 1996 must also be construed in the manner indicated by this judgment.

49. Take the consequence of the opposite conclusion, in the light of the facts of a given example, as follows. New Delhi is specifically designated to be the seat of the arbitration in the arbitration clause between the parties. Part of the cause of action, however, arises in several places, including where the contract is partially to be performed, let us say, in a remote part of Uttarakhand. If concurrent jurisdiction were to be the order of the day, despite the seat having been located and specifically chosen by the parties, party autonomy would suffer, which BALCO (supra) specifically states cannot be the case. Thus, if an application is made to a District Court in a remote corner of the Uttarakhand hills, which then becomes the Court for the purposes of Section 42 of the Arbitration Act, 1996 where even Section 34 applications have then to be made, the result would be contrary to the stated intention of the parties - as even though the parties have contemplated that a neutral place be chosen as the seat so that the Courts of that place alone would have jurisdiction, yet, any one of five other Courts in which a part of the cause of action arises, including Courts in remote corners of the country, would also be clothed with jurisdiction. This obviously cannot be the case. **If, therefore, the conflicting portion of the judgment of BALCO (supra) in paragraph 96 is kept aside for a moment, the very fact that parties have chosen a place to be the seat would necessarily carry with it the decision of both parties that the Courts at the seat would exclusively have jurisdiction over the entire arbitral process."**

(emphasis supplied)

15. The Division Bench of this Court in *Aniket SA Investments LLC* (supra) following the decision of the Supreme Court in *BGS SGS Soma JV* (supra) in a situation which was akin to the situation in the present case wherein the parties had agreed to confer jurisdiction on Courts at Hyderabad, however, which was made subject to the arbitration agreement which was contained in clause 20.4 observed that the intention of the parties was clear to render exclusive jurisdiction clause subject to the arbitration agreement contained in Clause 20.4, and hence once under the arbitration agreement the parties had chosen that the seat of arbitration will be at Mumbai, then the Courts at Mumbai will have jurisdiction, following the principles as laid down by the Supreme

Court in *BGS SGS Soma JV*. It was held that in such context the principles of law in the decision of the Supreme Court in *Swastik Gases Private Ltd.* (supra) would not be applicable. The Division bench in paragraphs 19, 21, 22 and 23 has observed thus:

“19. We are also of the opinion that in view of the Supreme Courts reading and understanding of Indus Mobile, in the case of BGS SGS, the Impugned Order was not correct in distinguishing Indus Mobile only because of the clauses in the agreement in Indus Mobile conferring exclusive jurisdiction on the same Court as that of the seat. As the Supreme Court clearly notes, Indus Mobile gives two separate reasons for its conclusion and the first of them is that a choice of seat has the effect of conferring exclusive jurisdiction on the Court of the seat.

21. The next issue that we are required to consider is as to the interpretation of the Agreement and ascertaining the intention of parties from a combined reading of Clause 20.3 and 20.4. The two important findings in the Impugned Order in this regard are that the expression ‘subject to’ in Clause 20.3 must be read as ‘notwithstanding’; and that the expression ‘seat’ in Clause 20.4.2(c) must be understood as a ‘venue’. These findings and conclusions were arrived at to give effect to the choice of Court in Clause 20.3 of the Agreement.

22. We are also not able to agree with either of these findings and conclusions in the Impugned Order. It is a well settled rule of interpretation of agreements that the Courts must give effect to the plain language used by the parties and that the intention of the parties must be gathered from the plain meaning of words used. Clause 20.3, which confers exclusive jurisdiction on the Courts at Hyderabad is not a part of the arbitration agreement clause which is Clause 20.4 of the Agreement with a heading “Arbitration”. The choice of Court at Hyderabad is made clearly ‘subject to’ Clause 20.4. Therefore, the plain language used in Clause 20.4.2 (c) of the Agreement, which is part of the arbitration clause, is that Mumbai is chosen as the seat of the arbitration proceedings. For the reasons stated above this would have the effect of conferring exclusive jurisdiction on the Courts at Mumbai. It cannot be said, as contended by Respondent Nos. 3 to 6 in this Appeal, that the choice of ‘seat’ in the year 2008 when the Agreement was entered into was not understood as a choice of Courts of the ‘seat’ and that this cannot be the intention attributed to parties. The law as laid down by the Supreme Court in BGS SGS as to the effect of choice of ‘seat’ as conferring exclusive jurisdiction is by no means prospective or applicable only after a particular date. Even the judgment in BALCO, as explained in BGS SGS, must be understood as stating the legal position under the Act and which must be given effect to even if the

Agreement in question was of a date prior to the judgment. We therefore, see no merit in this submission.

23. Even if one were to accept that concurrent jurisdiction of two courts is possible, the choice of Mumbai as the seat of arbitration would in any view of the matter mean that the Courts at Mumbai have concurrent jurisdiction to entertain disputes under the arbitration agreement. Again, it is also important to note that Clause 20.3 is made expressly 'subject to' Clause 20.4, of which Clause 20.4.2(c) is a part. In other words, the choice of Courts at Hyderabad is made 'subject to' the seat at Mumbai, which amounts to a choice of Courts at Mumbai, and therefore in the event of any conflict the later clause should prevail. This is clear beyond any doubt from the plain meaning of the words 'subject to' and 'seat'."

16. Thus, the common thread which is running through all the above decisions is to the effect that when the parties have expressly decided the venue and seat of arbitration to be at a particular place, it would be required to be regarded to be the seat of arbitration and the Court where the venue/seat has been agreed by the parties, would have jurisdiction to entertain all proceedings, arising under the arbitration agreement.

17. However, as urged on behalf of the respondent, the question posed is as to what would be the situation when the parties have agreed to have a specific/exclusive jurisdiction clause conferring jurisdiction on a particular Court, namely, the Courts at Gujarat, then whether ipso facto applying the *Swastik Gases* principle which recognizes party autonomy, when the parties are conferring on a Court with exclusive jurisdiction, can such clause, can be given effect by the Section 11 Court, by coming to a conclusion that the jurisdiction clause needs to be recognised. In my opinion, Mr. Dastur's reliance on the *Swastik*

Gases (supra) principle is not well founded for more than one reason. Firstly, the decision is distinguishable on facts, as in the present case, the parties have agreed to a specific seat and venue (Mumbai) alongwith an exclusive jurisdiction clause (Gujarat). It needs to be observed that *Swastik Gases Private Limited* (supra) was a case wherein the parties had agreed on a exclusive jurisdiction clause, which reads thus:

“18. Jurisdiction

The Agreement shall be subject to jurisdiction of the Courts at Kolkata.”

18. However, the preceding clause, namely, in the Arbitration Clause, the parties had not agreed to a specific seat or venue of arbitration, which can be seen from Clause 17, which reads thus:

“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.”

19. It is in such context, the Supreme Court held that once the parties have agreed to an exclusive jurisdiction, then the intention is clear to

exclude all other Courts and to confer jurisdiction on the Court as named in the jurisdiction clause. The observations to that effect are seen in paragraphs 32 and 37, which reads thus:

“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.

37. In my opinion, the very existence of the exclusion of jurisdiction clause in the agreement would be rendered meaningless were it not given its natural and plain meaning. The use of words like only, exclusively, alone and so on are not necessary to convey the intention of the parties in an exclusion of jurisdiction clause of an agreement. Therefore, I agree with the conclusion that jurisdiction in the subject matter of the proceedings vested, by agreement, only in the Courts in Kolkata.”

20. It needs to be observed that in the present case, it is not a case absolutely akin to the case of the parties before the Supreme Court in *Swastik Gases Private Limited* (supra). It is the case where there are two clauses as noted above, namely, “Governing Law and Jurisdiction” Clause and “Arbitration and Jurisdiction” Clause whereunder the parties

agreed to two different places, one in regard to jurisdiction of the Courts and other as to arbitration. In the present context, it would be required to be held that the two clauses are exclusive and they are required to be compartmentalized. A general jurisdiction clause cannot be mixed when the arbitration clause is completely independent from what the Governing Law and Jurisdiction clause would provide. It is also quite clear that the intention of the parties should be gathered from the manner in which the clauses are framed and agreed between the parties. There is no inter-dependency whatsoever between the two clauses and they are seen to be absolutely compartmentalized. In such a situation, the Arbitration and Jurisdiction clause is required to be held as independent and standing on its own legs insofar as the parties agree with the arbitration mechanism including the specific agreement in regard to the “seat” and “venue” of arbitration.

21. In *Aniket SA Investment LLC* (supra), the parties had categorically subjected their jurisdiction clause to arbitration clause and therefore, there was an inter-connection between both the clauses, and interpreting such clauses, the Division Bench applying the principle in *BGS SGS Soma JV* had held that the decision of the parties to have the seat of arbitration only at Mumbai, the Courts at Mumbai will have jurisdiction.

22. Thus, applying the principles of law in the consistent view taken by the Supreme Court right from its decision in **BALCO, Indus Mobile Distribution Pvt. Ltd. Vs. Dataways & Ors., 2017(7) SCC 768, Brahmani River Pellets Ltd., BGS SGS Soma JV**, it is difficult to accept the proposition as canvassed on behalf of the applicant that the Governing Law and Jurisdiction clause be interpreted to override and have a precedence insofar as the jurisdiction of the Court is concerned qua what has been decided between the parties under the Arbitration and Jurisdiction clause. In my opinion, such an interpretation as canvassed on behalf of the respondent would be contrary to the settled position in law as laid down in the said decisions of the Supreme Court.

23. In a recent decision of this Court of this Court in **Priya Malay Sheth vs. VLCC Health Care Ltd., 2022 SCC Online Bom 1137**, this Court had an occasion to consider the law in this regard as also the decisions as rendered by some of the High Courts in which interpreting the “Dispute Resolution and Arbitration” clause, it was held that the Courts at Mumbai will not have jurisdiction and the Courts at Delhi will have jurisdiction considering the arbitration agreement where the parties have decided to have the ‘venue’ of the arbitration proceedings at Delhi.

24. Mr. Nagpal’s reliance on **Balapreethan Guest House Pvt. Ltd. (supra)** is well founded to the facts at hand. In the facts of the said case,

there were two inconsistent and conflicting clauses whereunder on one hand the parties had agreed that the Courts at Chennai shall have exclusive jurisdiction in all matters arising out of the agreement and on the other hand, they agreed that the place of arbitration shall be at New Delhi. The learned Judge of the Madras High Court after relying on the decisions of the Supreme Court as noted above and the conflicting clauses of the agreement, held that by applying the principles of law in BGS SGS Soma JV (supra) since the parties agreed that New Delhi shall be the place of arbitration, it shall be the “seat” of arbitration. It was held that therefore, the Courts at Madras would have no jurisdiction to entertain the Section 11 application. The relevant paragraphs of the decision need to be noted, which read thus:

“29. In the case on hand there are two inconsistent and conflicting clauses. They are:

- i) This agreement shall be governed and interpreted in accordance with the laws of India and the Courts at Chennai shall have exclusive jurisdiction in all matters arising out of this agreement.
- ii) Where any disputes arise between parties in respect of or in connection with the agreement then parties shall first endeavour to conciliate the disputes failing which the same shall be referred to arbitration to be conducted by a sole arbitrator. The place of arbitration is at New Delhi.

30. Considering the apparent conflict in respect of these 2 clauses the two have to be harmoniously constructed to give meaning to both. The rule of harmonious construction is to harmonise and not to destroy and while interpreting the clauses Courts have to presume that the parties had inserted every clause thereof for a purpose and therefore attempt to give effect to both. A reading of the 2 clauses would indicate that the parties had agreed that in case of a cause of action arising from out of the agreement then the Courts at Chennai alone will have jurisdiction, if parties abandon their right to arbitrate the dispute and file a civil suit.

31. However, the latter clause viz; 10.2 and 10.3 relates to disputes between the parties arising out of or in connection with the agreement and parties have agreed to resolve their disputes through Arbitration and have agreed that the seat of such Arbitral proceedings will be New Delhi. Therefore, the two clauses can be harmoniously constructed without one doing violence to the other.

32. Even if we were to assume that the two clauses are in conflict with each other the same can be resolved by considering the law laid down by the Supreme Court. The Hon'ble Supreme Court has in the judgements referred above placed importance on the juridical seat to confer jurisdiction on Courts in the case of Arbitration Proceedings. In the Judgement in *BGS Soma* the learned Judges had held that the very fact that parties have chosen a place to be the seat necessarily implies that both parties have agreed that the Courts at the seat would have jurisdiction over the entire arbitral process. Therefore, on account of a conspectus of the above judgements of the Hon'ble Supreme Court, wherein emphasis and importance has been given to the juridical seat, in the instant case the Court having supervisory jurisdiction is the Courts where parties have agreed would be the place of arbitration.

33. Therefore, relying upon the judgement *BGS Soma* in the case on hand since parties herein have agreed to have the arbitration proceedings at New Delhi, the "seat" is at New Delhi. Consequently only the High Court at Delhi would have the jurisdiction over the arbitral proceedings. Therefore, the proceedings before this Court is without jurisdiction and therefore stands dismissed."

25. As a result of the above discussion, it would be required to be held that this Court would have the jurisdiction and not the Courts at Gujarat to entertain the present proceedings, to appoint an arbitral tribunal. The application is accordingly allowed by the following order:

ORDER

(i) Mr. Justice M.S. Sanklecha, Former Judge of this Court is appointed as a sole arbitrator to adjudicate the disputes between the parties which have arisen under the the Deed of Assignment dated 22 July, 2020.

- (ii) The learned sole arbitrator, before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to both the parties;
- (iii) At the first instance, the parties shall appear before the prospective arbitrator within 20 days from the day a copy of this order is made available to the parties on a date which may be mutually fixed by the learned sole arbitrator;
- (iv) The fees payable to the arbitral tribunal shall be as prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018.
- (v) All contentions of the parties are expressly kept open;
- (vi) The application is disposed of in the above terms. No costs.
- (vii) Office to forward a copy of this order to the learned Arbitrator on the following address:

Mr. M.S. Sanklecha, Former Judge of this Court,
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Thakersey Road, New Marine Lines,
Behind Aayakar Bhavan,
Mumbai – 400 020.
Mob.: 9820065338
Email " manojssanklecha@gmail.com

[G.S. KULKARNI, J.]