IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMMERCIAL APPEAL NO. 504 OF 2019

IN

COMMERCIAL ARBITRATION PETITION (L) NO. 1244 OF 2019

Aniket SA Investments LLC)
1st Floor, Wing A, Cyber Tower I,)
Ebene Cybercity, Mauritius.)… Appellant / Original Petitioner

Versus

1. Janapriya Engineers Syndicate Private Limited,)
8-2-120/86/1, Plot Nos.11 and 12,)
Keerthi and Pride Towers,)
New Road No.2, Banjara Hills,)
Hyderabad – 500 034.)
2. Janapriya Townships Private Limited,)
8-2-120/86/1, Plot Nos.11 and 12,)
Keerthi and Pride Towers,)
New Road No.2, Banjara Hills,)
Hyderabad – 500 034.)
3. K. Ravinder Reddy,)
8-2-293/82/F/A/35-B, Plot No.35,)
Road No.6, Beside FNCC,)
Film Nagar, Hyderabad – 500 033, India.)
4. K. Priyamvada Reddy,)
8-2-293/82/F/A/35-B, Plot No.35,)
Road No.6, Beside FNCC,)
Film Nagar, Hyderabad – 500 033, India.)

5. Kranti Kiran Reddy,)
8-2-293/82/F/A/35-B, Plot No.35,)
Road No.6, Beside FNCC,)
Film Nagar, Hyderabad – 500 033, India.)
6. K. Ravi Kiran Reddy,)
8-2-293/82/F/A/35-B, Plot No.35,)
Road No.6, Beside FNCC,)
Film Nagar, Hyderabad – 500 033, India.)… Respondents

Mr. Sharan Jagtiani, Senior Advocate alongwith Ms. Surabhi Agarwal, Mr. Vyapak Desai, Mr. Alipak Banerjee, Ms. Bhavana Sunder instructed by Nishith Desai Associates for the Appellant/Original Petitioner.

Mr. Mustafa Doctor, Senior Advocate alongwith Mr. Karthik Somasundaram instructed by Bharucha & Partners for Respondent Nos.1 and 2.

Mr. Pavan Kumar, Mrs. Shraddha Gupta instructed by Bharucha & Partners for Respondent Nos.3 and 6.

CORAM : S.J. KATHAWALLA &
R.I. CHAGLA, JJ.
RESERVED ON : 18TH SEPTEMBER, 2019
PRONOUNCED ON :29TH JANUARY, 2021

ORAL JUDGMENT (PER : S.J. KATHAWALLA, J) :

BRIEF FACTS :

1. By this Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 ("***the Act***"), the Appellant – Aniket SA Investments LLC (original Petitioner) has challenged an Order of the Learned Single Judge dated 22nd

October 2019 ("***the Impugned Order***"). The Appellant has filed a Section 9 Petition under the Arbitration and Conciliation Act, 1996, seeking urgent interim reliefs in relation to a dispute arising out of a Securities Subscription and Shareholders Agreement. The Appellant is a foreign investor and shareholder of Respondent No. 2 – Janapriya Townships Private Limited, a Special Purpose Vehicle or Joint Venture Company that is carrying out a real estate development project in Ameenpur Village, Medak District in Telangana. The other shareholder of Respondent No. 2 is Respondent No. 1 – Janapriya Engineers and Syndicate Private Limited. The Appellant, Respondent No. 1 and Respondent No. 2 have entered into a Share Subscription and Shareholders Agreement dated 21st August 2008 ("***the Agreement***"). The Agreement appears to have been subsequently modified. The Appellant, Respondent No. 1 and Respondent No. 2 have also entered into a Development Management Agreement on 2nd March 2009. According to Respondent Nos. 3 to 6, they are the promoters of Respondent No. 1.

2. Since disputes arose between the Appellant and the Respondents in relation to the implementation and execution of the real estate project, the Appellant issued a Notice of Default dated 19th March 2019 followed by a Notice to Respondent No. 1 exercising a Put Option under the Shareholders Agreement dated 8th July 2019, and finally a Dispute Notice invoking arbitration dated 22nd August 2019.

3. It is in this background that the Appellant filed the Petition under Section 9 of the Act ("***Section 9 Petition***") in this Court.

BRIEF SUBMISSIONS BEFORE THE LEARNED SINGLE JUDGE :

4. Relying on Clause 20.4 of the Agreement, which is an Arbitration Clause wherein the parties agreed that "the seat of the arbitration proceedings shall be Mumbai", the Appellant submitted that this Court has jurisdiction to entertain the Section 9 Petition although the dispute pertains to a cause of action that has arisen at the site of the project i.e. within the territorial jurisdiction of the Courts at Hyderabad. The Respondents submitted that this Court cannot entertain the Section 9 Petition for lack of territorial jurisdiction. Respondent Nos.1 and 2 contended that a "Court" under Section 2(1)(e) of the Act, would, in light of paragraph 96 of the decision of the Supreme Court in ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. ("BALCO")***[1], also be the Court within whose territorial jurisdiction the cause of action has arisen. It was further submitted that in the Agreement between the parties there is an express clause (Clause 20.3), which states that the Courts at Hyderabad shall have exclusive jurisdiction to try and entertain the disputes arising out of this Agreement. In response to this, the Appellant contended before the Learned Single Judge, that the judgment of BALCO has been considered by later decisions especially of the Supreme Court in ***Indus Mobile Distribution (P) Ltd. V. Datawind Innovatoion (P) Ltd. ("Indus Mobile")***[2] and in that case the Supreme Court has clearly held that a clause identifying the seat of an arbitration would have the effect of conferring exclusive jurisdiction on Courts where the seat of the arbitration is located. Thus, it

1 (2012) 9 SCC 552
2 (2017) 7 SCC 678

was contended that the Courts at Mumbai have exclusive jurisdiction by virtue of the seat being at Mumbai. It was also contended by the Appellant that the clause conferring jurisdiction on Courts at Hyderabad is 'subject to' clause 20.4, which is the arbitration clause that contains the provision of seat at Mumbai. Therefore, the former clause must yield to the latter clause and this Court has jurisdiction to entertain the Section 9 Petition.

5. In the background of these rival contentions, the Learned Single Judge upheld the objection as to jurisdiction and dismissed the Section 9 Petition. There has been no adjudication on the merits of the matter by the learned Single Judge and even in this Appeal, no submissions are made on the merits of the matter. The only question, as regards which we have heard submissions, is as to the correctness of the Impugned Order in upholding the objection that this Court does not have jurisdiction.

6. Before we set out the relevant reasoning of the Impugned Order and consider the submissions made before us, it would be relevant to set out the relevant **clauses of the Agreement** i.e. Clauses 20.3 and 20.4 which reads thus :

> *"**20.3** Governing Law and Jurisdiction*
> *This Agreement and the rights and obligations of the Parties hereunder shall be construed in accordance with and be governed by the Laws of India.*
> *Subject to the provisions of Article 20.4, the courts of Hyderabad shall have exclusive jurisdiction to try and entertain any disputes arising out of this Agreement."*

> ***20.4*** *Arbitration*
>
> ***20.4.1*** *Any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement or the consequences of its nullity) shall be sought to be resolved and settled amicably within 30 days of such dispute arising, failing which it shall be referred to and finally resolved by arbitration under the Arbitration & Conciliation Act, 1996.*
>
> ***20.4.2*** *The arbitration shall be conducted as follows:*
>
> *(a) The parties shall mutually appoint a sole arbitrator to resolve the aforesaid disputes or differences. In the event that the parties fail to mutually appoint a sole arbitrator within 15 days, the Promoter and the Investor shall appoint one arbitrator each and the two arbitrators so appointed shall appoint the presiding arbitrator.*
>
> *(b) All proceedings in any such arbitration shall be conducted in English.*
>
> *(c) The seat of the arbitration proceedings shall be Mumbai.*
>
> ***20.4.3*** *The arbitration award shall be final and binding on the parties, and the Parties agree to be bound thereby and act accordingly."*

THE ORDER DATED 22ND OCTOBER, 2019 PASSED BY THE LEARNED SINGLE JUDGE, WHICH IS IMPUGNED IN THE ABOVE APPEAL :

7. The main finding and observation of the learned Single Judge, in the Impugned Order is that the parties to the Agreement have as a matter of party autonomy, which is recognized by Section 20 of the Act, chosen/agreed in Clause 20.3

of the Agreement that the Courts at Hyderabad shall have exclusive jurisdiction to decide the disputes arising between them under the Agreement. The learned Single Judge has in the Impugned Order held that such an agreement is not hit by Section 28 of the Indian Contract Act, 1872, ("***the Contract Act***") since, where two or more courts have jurisdiction to entertain a suit, parties may by agreement submit to the jurisdiction of one Court to the exclusion of the other Court or Courts. It is observed in the Impugned Order that this legal position is also recognized even in the context of the arbitration law as can be seen from the decision of the Constitution Bench of the Supreme Court in BALCO.

7.1 The learned Single Judge has then considered the aforesaid decision in the case of *BALCO* and after noting paragraph 96 thereof held that, according to the Supreme Court, the legislature has given jurisdiction to two or more courts, where the cause of action is located and the court where the arbitration takes place. As regards the judgment of the Supreme Court in *Indus Mobile*, the learned Single Judge has distinguished the same by observing that *Indus Mobile* was a case where the agreement conferred exclusive jurisdiction on the Courts at Mumbai and where the parties also agreed that the arbitration would take place in Mumbai, and was not a case, like the present one, where the parties had conferred exclusive jurisdiction on one court and the seat of arbitration was another place.

7.2 In support of these findings and observations, the learned Single Judge has in the Impugned Order referred to various decisions of the Supreme Court and High Courts, relied upon by the parties. The Learned Single Judge has agreed with the

decisions in those cases such as ***Devas Multimedia (P) Ltd. V. Antrix Corporation Limited***[3] wherein the Division Bench of the Delhi High Court confirmed the view of the Single Judge of the Delhi High Court, that held that the mere fact that the seat is mentioned in an agreement would not automatically confer exclusive jurisdiction on the Courts of the seat. The learned Single Judge has then expressed disagreement with other decisions of the Delhi High Court[4], wherein it is held that a choice of seat would confer exclusive jurisdiction on the Courts of that place.

7.3 In reiteration of his earlier observations and findings on party autonomy, the learned Single Judge relying on the Supreme Court decisions in *BALCO* , *Indus Mobile*, ***Swastik Gases (P) Ltd. v. Indian Oil Corporation Ltd.***[5], amongst others, held that the common thread is that the law acknowledges that two courts have jurisdiction, namely, where the cause of action is located and the court where the arbitration takes place. The learned Single Judge further held that it would therefore be permissible for parties to confer jurisdiction on one of these courts. Once the parties have conferred jurisdiction on one of these courts, such agreement conferring jurisdiction would have to be recognized in terms of Section 20 of the Act.

7.4 In the context of the above findings and observations, the learned Single Judge then proceeded to consider the Agreement and held that the plain commercial meaning is to be attributed to the clauses where the parties agree to confer jurisdiction

3 2017 SCC Online Del 7229

4 Mr. Raman Deep Singh Taneja v. Crown Realtech Pvt. Ltd. – 2017 SCC Online Del 11966; Devyani International Ltd. v. Siddhivinayak Builders & Developers – 2017 SCC Online Delhi 11156; NJ Construction (through its proprietor) v. Ayursundra Health Care Pvt. Ltd. and Ors. – 2018 SCC Online Del 7009

5 2013 (9) SCC 32

on the Courts at Hyderabad, applying the principle of party autonomy.

7.5 As regards Clause 20.4 of the Agreement, which stipulated that the "seat" of the arbitration shall be in Mumbai, the learned Single Judge has held that it is well settled that "seat" and "venue" are used interchangeable and the true intention of the parties in agreeing to the clauses of the agreement would have to be derived from the combination of these clauses and the real meaning which the parties intended to attribute from a holistic reading of the clauses. The learned Single Judge has further held that clauses cannot be read in a manner that would render the plain commercial meaning nugatory. Accordingly, in light of these observations on the Agreement, the learned Single Judge has held that the plain commercial meaning to be gathered from the Agreement was to confer exclusive jurisdiction on the Courts at Hyderabad.

7.6 In relation to interpretation of the Agreement, the learned Single Judge has then dealt with the Appellant/ Original Petitioners submission on Clause 20.3 (exclusive jurisdiction on Court at Hyderabad) being *subject to* Clause 20.4 (which says seat at Mumbai) by observing in paragraph 23 as follows:

> *"23. … There can be no dispute about the propositions as laid down in the said decisions, when in the facts of these cases, the Court considered the words 'subject to'. However, in the present case, in my opinion, the words 'subject to' as used in clause 20.3 are required to be understood to mean "notwithstanding". The plain reading of these clauses would accordingly be, notwithstanding the agreement in Article 20.4 that the seat/venue of the arbitration would be at Mumbai, the Courts of Hyderabad shall have exclusive jurisdiction to try and*

> *entertain the disputes arising out of the agreement. In other words, on a cumulative reading of these two clauses the parties although agree that the seat of the arbitration would be at Mumbai, however, the exclusive jurisdiction shall be conferred on the Courts at Hyderabad. If such a meaning is not attributed to a conjoint reading of both these clauses, clause 20.3 is rendered meaningless."*

7.7 The learned Single Judge has then considered various decisions of the Supreme Court to also conclude that in some cases "seat" and "place" or "venue" are used interchangeably and observed in paragraph 26 as follows :

> *"26. … on a conjoint reading of clauses 20.3 and 20.4 of the agreement in question, it would be required to be held that the Court at Hyderabad would have exclusive jurisdiction to entertain this petition. The parties agreeing to the seat of arbitration to be at Mumbai, would be required to be accepted as venue of the arbitration and the said clause cannot be held to be a clause conferring jurisdiction on the Court at Mumbai. Such a reading of the clause is contrary to the intention of the parties as contained in Clause 20.3 to confer exclusive jurisdiction on the Courts at Hyderabad and the party autonomy as recognized under Section 20(1) of the Act."*

ISSUES THAT ARISE FOR CONSIDERATION :

8. We have heard the Learned Advocates for the parties and have also perused the written submissions submitted by them. Having considered the Impugned Order and rival contentions of the parties, in our view there are two main issues that

require adjudication. The same are as follows :

The first issue is: Whether the Impugned Order is correct in accepting the Respondents primary submission that paragraph 96 of BALCO, recognizes two courts as having concurrent jurisdiction under Section 2(1)(e) of the Act, namely, the court where the cause of action accrues and the court of the seat of arbitration?; or, whether a choice of seat of arbitration has the legal effect of conferring exclusive jurisdiction on the courts of that seat and no other court would have jurisdiction under the arbitration agreement?

The second issue is: If there is concurrent jurisdiction of two courts, is the Impugned Order correct in holding that as a matter of party autonomy the parties herein have made an express choice in conferring jurisdiction on the Courts at Hyderabad and that to give effect to this plain commercial term of the Agreement, the expression 'subject to' must be read as 'notwithstanding' and that expression 'seat' must be read as 'venue'?

SUBMISSIONS OF THE APPELLANT :

9. As regard the first issue, Mr. Jagtiani, learned Senior Counsel appearing for the Appellant, contended that after the Impugned Order was pronounced by the Learned Single Judge, the Supreme Court in the judgment of ***BGS SGS SOMA JV v. NHPC LIMITED*** ("***BGS SGS***")[6], had an occasion to consider and deal with an identical issue that arises herein. Mr.Jagtiani placed extensive reliance on this judgment as, according to him, it conclusively and categorically covers the first issue in

6 (2020) 4 SCC 234

favour of the Appellant. Mr.Jagtiani submitted that the Supreme Court decision considers all the relevant prior decisions including the decisions in *BALCO* and *Indus Mobile* and essentially holds that paragraph 96 of *BALCO* must be read consistently with the rest of that judgment and properly construed, *BALCO* holds that the Courts of the seat of the arbitration would have exclusive jurisdiction in relation to disputes arising in relation to the arbitration. He further submitted that in fact the Supreme Court in *BGS SGS* has considered the judgment in *Indus Mobile* and held that *Indus Mobile* also confirms this view of exclusive jurisdiction on the Court of the seat. Further, as held in *BGS SGS*, *Indus Mobile* cannot be distinguished only because in that case the courts of the seat and the courts of the express choice of parties was the same. He also pointed out that the very judgment of the Division Bench of the Delhi High Court that was relied upon by the Respondent and with which the Learned Single Judge agreed, in the case of *Antrix* , has been found to be an incorrect view by the Supreme Court in *BGS SGS*. It was submitted that the judgment of *BGS SGS* holds that the decision of the Supreme Court in ***Union of India V. Hardy Exploration and Production (India) Inc. (Hardy Exploration)***[7] (relied upon in the Impugned Order) is contrary to the Five Judge Bench in *BALCO*. It is further submitted that the Supreme Court in *BGS SGS* has also considered and stated the legal position to the effect that a reference to a 'place' or 'venue' in an arbitration agreement will generally be understood as being a reference to a 'seat' of the arbitration unless there is a clear indication to the contrary. It is therefore, submitted that the learned Single Judge

7 2016 SCC OnLine Del 4098

ought not to have disregarded the clear choice of Mumbai as a 'seat' and proceeded to hold that it was to be understood only as a 'venue' chosen by the parties.

9.1 With regard to the findings on the interpretation of the Agreement in the Impugned Order, Mr. Jagtiani submitted that even if it is to be assumed that by law, two courts have concurrent jurisdiction under the Act, the clear intent of the parties as gathered by the plain meaning of the relevant clauses is that choice of Courts at Hyderabad in Clause 20.3 is made "subject to" Clause 23.4 which is the arbitration clause and which provides for the seat at Mumbai. Therefore, in the event of any conflict the latter must prevail because that is the well settled meaning of the expression "subject to". One way of reconciling both these clauses is that the former clause, which is not under the arbitration agreement of Clause 20.4, will apply in relation to a dispute that is not covered by the arbitration, and in relation to all disputes under the arbitration agreement the choice of seat being at Mumbai, the choice of Court will also be at Mumbai even in a situation of concurrent jurisdiction with two Courts. Mr. Jagtiani submits that therefore, there was no warrant for reading "subject to" as "notwithstanding" and giving it the very opposite meaning to the clear words chosen by the parties. Similarly, the expression "seat" in Clause 20.4 could never have been read as a mere venue. It is submitted that the law in fact leans in favour of reading a reference to 'venue' as 'seat' and when parties make an express reference to a place as being the 'seat' that choice under the very same principles of party autonomy must be given full effect to.

SUBMISSIONS OF RESPONDENTS 1 AND 2 :

10. In response, Mr. Doctor, learned Senior Counsel for the Respondent Nos.1 and 2, did not, in fairness, contest that the Supreme Court decision in *BGS SGS* does have a direct bearing on the first issue that arises herein. In light of the law laid down and recognized by this judgment, the main submission of the Respondent Nos.1 and 2 before us is that Clause 20.4 should not be read as being a choice of 'seat' so as to displace the clear words and choice in Clause 20.3 of jurisdiction being conferred on the Courts at Hyderabad. It was therefore submitted that if Clause 20.4.2(c) is not understood to mean a choice of 'seat', on a proper interpretation of the Agreement, then the principles laid down in *BGS SGS* would have no application to the present case. Mr. Doctor also submitted that given the express choice of words in Clause 20.3 of the Agreement in conferring exclusive jurisdiction on the Courts at Hyderabad, the Impugned Order was correct in reading the expression 'subject to' as 'notwithstanding' so as to give effect to the clear intent of the parties as is apparent from Clause 20.3 of the Agreement.

SUBMISSIONS OF THE RESPONDENTS 3 TO 6 :

11. Respondent Nos. 3 to 6 have in their written submissions contended that in the year 2008, when the Agreement was entered into between the parties, the expression 'seat' was understood to mean 'venue' and that the expression 'seat' as it is now understood was unknown to the parties at that time. Therefore, for the purpose of vesting jurisdiction on courts, the phrase 'exclusive jurisdiction' was stipulated in Clause 20.3 of the Agreement. It is submitted that disregarding common usage at the

relevant time will amount to disregarding the intent of parties. As regards the judgment in *BGS SGS*, the written submissions at paragraph 11 contends that the judgment is being incorrectly understood by the Appellant. It is submitted that the concept of 'seat' is relevant only to International Commercial Arbitration involving multi-national parties and that in domestic arbitrations or international commercial arbitrations seated in India, parties would retain the right to vest exclusive jurisdiction with a Court from amongst multiple courts which would naturally have jurisdiction over the subject matter or cause of action. It is submitted that reference to "seat" in domestic arbitrations or international commercial arbitrations seated in India would not subsume within it an exclusive jurisdiction of courts of that seat.

11.1 Without prejudice, it is submitted by Respondent Nos. 3 to 6, that the judgment in *BGS SGS* while considering 'seat' as being akin to exclusive jurisdiction did not consider possibility of an agreement stipulating different places being mentioned in respect of 'seat' and exclusive jurisdiction. In none of the judgments considered by the Supreme Court in *BGS SGS* is there a situation like the present one. Therefore, it is submitted that the judgment in *BGS SGS* does not apply to the present situation and that the present situation is governed by the latter part of paragraph 59 of the judgment as on a proper interpretation of the Agreement this is a case where no 'seat' is designated by the parties.

THE SUPREME COURT JUDGMENT IN BGS SGS :

12. *BGS SGS* was a case where the arbitration agreement provided that the arbitration proceedings shall be held at New Delhi/Faridabad. The arbitration

proceedings were in fact held at New Delhi where 71 sittings took place, and the award was rendered at New Delhi. A petition under Section 34 of the Act came to be filed in Faridabad and the Respondent thereto filed an application seeking a return of the petition to the appropriate court at New Delhi. That application was allowed by the Special Commercial Court at Gurugram. That order was challenged under Section 37 of the Act before the High Court of Punjab and Haryana, which delivered the judgment under challenge and held that the Petition under Section 34 of the Act was maintainable at Faridabad and Delhi was only a convenient venue where arbitral proceedings were held and not the seat. Therefore, it was held that Faridabad would have jurisdiction on the basis of the cause of action having arisen in part in Faridabad. It was in this context that the issue of jurisdiction of courts and choice of seat arose before the Supreme Court.

13. Since many parts of the judgment are relevant, the same are for the sake of convenience reproduced as follows :

> *"**38.** A reading of paras 75, 76, 96, 110, 116, 123 and 194 of BALCO[4] 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 para 96 buttresses this proposition, and is supported by the previous and subsequent paragraphs pointed out hereinabove. The BALCO*

[4.Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]

judgment, 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[27].

39. *However, this proposition is contradicted when para 96 of BALCO[4] 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. *Para 96 of BALCO[4] case 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*

[27. Section 3 of the English Arbitration Act, 1996 defines "seat" as follows :
*"3. The seat of the arbitration. - In this Part "**the seat of the arbitration**" means the juridical seat of the arbitration designated -*
(a) by the parties to the arbitration agreement, or
(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
(c) by the Arbitral Tribunal if so authorized by the parties,
or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."
It will be noticed that this section closely approximate with Section 20 of the Indian Arbitration Act, 1996. The meaning of "Court" is laid down in Section 105 of the English Arbitration Act, 1996 whereby the Lord Chancellor may, by order, make provision allocating and specifying proceedings under the Act which may go to the High Court or to county courts."]
[4.Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]

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.

41. *This Court has held that judgments of Courts are not to be construed as statutes, neither are they to be read as Euclid's theorems. All observations made must be read in the context in which they appear….."*

45. *It was not until this Court's judgment in Indus Mobile Distribution (P) Ltd.[5] that the provisions of Section 20 were properly analysed in the light of the 246th Report of the Law Commission of India titled, "Amendments to the Arbitration and Conciliation Act, 1996" (August, 2014) (hereinafter referred to as "the Law Commission Report, 2014"), under which Sections 20(1) and (2) would refer to the "seat" of the arbitration, and Section 20(3) would refer only to the "venue" of the arbitration. Given the fact that when parties, either by agreement or, in default of there being an*

[5. Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760]

agreement, where the Arbitral Tribunal determines a particular place as the seat of the arbitration under Section 31(4) of the Arbitration Act, 1996, it becomes clear that the parties having chosen the seat, or the Arbitral Tribunal having determined the seat, have also chosen the courts at the seat for the purpose of interim orders and challenges to the award.

46. *This Court in Indus Mobile Distribution (P) Ltd.[5], after referring to Sections 2(1)(e) and 20 of the Arbitration Act, 1996, and various judgments distinguishing between the "seat" of an arbitral proceeding and "venue" of such proceeding, referred to the Law Commission Report, 2014 and the recommendations made therein as follows : (SCC pp. 692-93, paras 17-20)*

> *"17. In amendments to be made to the Act, the Law Commission recommended the following:*
> *'Amendment of Section 20*
> ***12.*** *In Section 20, delete the word "place" and add the words "seat and venue" before the words "of arbitration".*
> *(i) In sub-section (1), after the words "agree on the" delete the word "place" and add words "seat and venue".*
> *(ii) In sub-section (3), after the words "meet at any" delete the word "place" and add word "venue". [Note.—The departure from the existing phrase "place" of arbitration is proposed to make the wording of the Act consistent with the international usage of the concept of a "seat" of arbitration, to denote the legal home of the arbitration. The amendment further legislatively distinguishes between the "[legal] seat" from a "[mere] venue" of arbitration.]*
> * * *

[5. Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760]

Amendment of Section 31

17. *In Section 31*

(i) In sub-section (4), after the words "its date and the" delete the word "place" and add the word "seat".'

18. The amended Act, does not, however, contain the aforesaid amendments, presumably because the BALCO[4] judgment in no uncertain terms has referred to "place" as "juridical seat" for the purpose of Section 2(2) of the Act. It further made it clear that Sections 20(1) and 20(2) where the word "place" is used, refers to "juridical seat", whereas in Section 20(3), the word "place" is equivalent to "venue". This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.

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

20. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.[38]This was followed in a recent judgment in B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.[39] Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai.

[4. BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]
[38. (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157]
[39. (2015) 12 SCC 225 : (2016) 1 SCC (Civ) 427]

> *This being the case, the impugned judgment[40] is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. Appeals are disposed of accordingly."*

This judgment has recently been followed in Brahmani River Pellets Ltd. v. Kamachi Industries Ltd.[41]

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*

[40. Datawind Innovations (P) Ltd.v. Indus Mobile Distribution (P) Ltd., 2016 SCC OnLine Del 3744 : (2016) 158 DRJ 391]
[41. (2020) 5 SCC 462 : 2019 SCC OnLine SC 929 at para 15]

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[4] *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 in para 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)

50. *In fact, subsequent Division Benches of this Court have understood the law to be that once the seat of arbitration is chosen, it amounts to an exclusive jurisdiction clause, insofar as*

[4. BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]

the courts at that seat are concerned. In Enercon (India) Ltd. v. Enercon GmbH[42], this Court approved the dictum in Shashoua[24] as follows : (Enercon case[42], SCC p. 55, para 126)

> *"126. Examining the fact situation in the case, the Court in Shashoua case[24] observed as follows:*
>
> > *'The basis for the court's grant of an anti-suit injunction of the kind sought depended upon the seat of the arbitration. An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause. Not only was there agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat,the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration.*
> >
> > *Although, "venue" was not synonymous with "seat", in an arbitration clause which provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that "the venue of arbitration shall be London, United Kingdom" did amount to the designation of a juridical seat.…'*
>
> *In para 54, it is further observed as follows:*
>
> > *'There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that Court, because it was best fitted to determine such issues under the Indian law. Whilst I found this idea attractive initially, we are persuaded that it would be wrong in principle to allow this and that it would create undue practical problems in any event. On the basis of what I have already decided, England is the seat of the arbitration and since this carries with it something akin to an exclusive jurisdiction clause, as a matter of principle the foreign court should not decide matters which are for this Court to decide in the context of an anti-suit injunction.'"*
>
> *(emphasis in original)*

[42. (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59]

[24.Shashoua v. Sharma, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep 376]

51. *The Court in Enercon[42] then concluded : (SCC p. 60, para 138)*

> *"138. Once the seat of arbitration has been fixed in India, it would be in the nature of exclusive jurisdiction to exercise the supervisory powers over the arbitration."*
>
> *(emphasis in original)*

52. *In Reliance Industries Ltd.[7] this Court held : (SCC pp. 627, 630-31, paras 45, 55-56)*

> *"45. In our opinion, it is too late in the day to contend that the seat of arbitration is not analogous to an exclusive jurisdiction clause. This view of ours will find support from numerous judgments of this Court. Once the parties had consciously agreed that the juridical seat of the arbitration would be London and that the arbitration agreement will be governed by the laws of England, it was no longer open to them to contend that the provisions of Part I of the Arbitration Act would also be applicable to the arbitration agreement. This Court in Videocon Industries Ltd. v. Union of India[43] has clearly held as follows : (SCC p. 178, para 33)*
>
> > *'33. In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents.'*
> >
> > * * *
> >
> > *55. The effect of choice of seat of arbitration was considered by the Court of Appeal in C v. D[25]. This judgment has been specifically approved by this Court in Balco[4] and reiterated in Enercon (India) Ltd. v. Enercon Gmbh[42]. In C v. D[25], the Court of Appeal has observed : (C case[25] , Bus LR p. 851, para 16)*

[42. (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59]
[7. Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737]
[43. (2011) 6 SCC 161 : (2011) 3 SCC (Civ) 257]
[25. 2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)]
[4. BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]

'Primary conclusion

16. I shall deal with Mr Hirst's arguments in due course but, in my judgment, they fail to grapple with the central point at issue which is whether or not, by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law. In my view they must be taken to have so agreed for the reasons given by the Judge. The whole purpose of the balance achieved by the Bermuda form (English arbitration but applying New York law to issues arising under the policy) is that judicial remedies in respect of the award should be those permitted by English law and only those so permitted. Mr Hirst could not say (and did not say) that English judicial remedies for lack of jurisdiction on procedural irregularities under Sections 67 and 68 of the 1996 Act were not permitted; he was reduced to saying that New York judicial remedies were also permitted. That, however, would be a recipe for litigation and (what is worse) confusion which cannot have been intended by the parties. No doubt New York Law has its own judicial remedies for want of jurisdiction and serious irregularity but it could scarcely be supposed that a party aggrieved by one part of an award could proceed in one jurisdiction and a party aggrieved by another part of an award could proceed in another jurisdiction. Similarly, in the case of a single complaint about an award, it could not be supposed that the aggrieved party could complain in one jurisdiction and the satisfied party be entitled to ask the other jurisdiction to declare its satisfaction with the award. There would be a serious risk of parties rushing to get the first judgment or of conflicting decisions which the parties cannot have contemplated.'

56. The aforesaid observations in C v. D[25] were subsequently followed by the High Court of Justice, Queen's Bench Division, Commercial Court (England) in Sulamérica Cia Nacional de Seguros SA v. Enesa Engelharia SA[44] . In laying down the same proposition,

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[25. 2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)]
[44. (2013) 1 WLR 102 : 2012 EWCA Civ 638 : 2012 WL 14764 (CA)]

the High Court noticed that the issue in that case depended upon the weight to be given to the provision in Condition 12 of the insurance policy that "the seat of the arbitration shall be London, England". It was observed that this necessarily carried with it the English Court's supervisory jurisdiction over the arbitration process. It was observed that:

> *'this follows from the express terms of the Arbitration Act, 1996 and, in particular, the provisions of Section 2 which provide that Part I of the Arbitration Act, 1996 applies where the seat of the arbitration is in England and Wales or Northern Ireland. This immediately establishes a strong connection between the arbitration agreement itself and the law of England. It is for this reason that recent authorities have laid stress upon the locations of the seat of the arbitration as an important factor in determining the proper law of the arbitration agreement.'"*

(emphasis in original)

53. *In Indus Mobile Distribution (P) Ltd.[5], after clearing the air on the meaning of Section 20 of the Arbitration Act, 1996, the Court in para 19 (which has already been set out hereinabove)* ***made it clear that the moment a seat is designated by agreement between the parties, it is akin to an exclusive jurisdiction clause, which would then vest the courts at the "seat" with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.***

(Emphasis supplied)

[5.Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760]

54.*Despite the aforesaid judgments of this Court, discordant notes have been struck by some of the High Courts. In Antrix Corpn. Ltd.[8], a Division Bench of the Delhi High Court, after setting out para 96 of BALCO[4] , then followed the reasoning of judgments[45, 46] of the Bombay High Court, in stating that the ratio decidendi of the 5-Judge Bench in BALCO[4] is that courts would have concurrent jurisdiction, notwithstanding the designation of the seat of arbitration by agreement between the parties. The Delhi High Court stated : (Antrix Corpn. Ltd. case[8], SCC OnLine Del para 52)*

> *"52. Having held that the statement in para 96 of BALCO[4] would apply to the present case as well, this Court has to examine its legal consequence in light of the law declared in BALCO[4]. It is important to note that in the said paragraph (extracted above), the Supreme Court has noted that Section 2(1) (e) of the Arbitration Act confers jurisdiction to two courts over the arbitral process — the courts having subject-matter jurisdiction and the courts of the seat. This is evident both from the substantive holding of the paragraph as well as the example given by the Court. The Court notes that : (SCC p. 606)*
>
> > *"96. … 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 is further reinforced by the example that the Court gave later in the same paragraph. In the example where the parties are from Mumbai and Kolkata and the obligations under the contract are to be performed at either Mumbai or Kolkata, and the parties have designated Delhi as the seat of the arbitration, in such a situation, both courts would have jurisdiction i.e. within whose jurisdiction the subject-matter of the suit is

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[8. Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., 2018 SCC OnLine Del 9338]
[4. BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]
[45. Nivaran Solutions v. Aura Thia Spa Services (P) Ltd., 2016 SCC OnLine Bom 5062 : (2016) 5 Mah LJ 234],
[46. Konkola Copper Mines v. Stewarts & Lloyds of India Ltd., 2013 SCC OnLine Bom 476 : (2013) 4 Bom CR 619]

situated (either Mumbai or Kolkata) and the court within the jurisdiction of which the dispute resolution i.e. arbitration is located (which is Delhi). Moreover, the fact that the court interpreted the term "subject-matter of the suit" in the paragraph, also gives credence to the interpretation that the court recognised that Section 2(1)(e) gives jurisdiction to both the cause of action courts, and the court at the seat of the arbitration. If the Court were of the opinion that only the courts at the seat would have jurisdiction under Section 2(1)(e) and no other court, then it would be wholly unnecessary for the court to interpret the term "subject-matter of the suit", since that court would anyway not have jurisdiction. In sum therefore, para 96 of BALCO[4] gives jurisdiction to both courts at the seat and the courts within whose jurisdiction the cause of action arises, if the dispute were the subject-matter of a suit. This is what the Bombay High Court in Konkola Copper Mines[46] also interpreted BALCO[4] as holding :

> *'The Supreme Court held that the provisions of Section 2(1)(e) are purely jurisdictional in nature and can have no relevance to the question whether any part of the cause of action has taken place outside India. The observations which have been extracted above, clearly establish that the Court where the arbitration takes place would be required to exercise supervisory control over the arbitral process. The Supreme Court has held that Parliament has given jurisdiction to two courts — the Court which would have jurisdiction where the cause of action is located and the Court where the arbitration takes place. This is evident from the example which is contained in the above quoted extract from the decision.'"*
>
> *(emphasis in original)*

[4. BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]
[46. Konkola Copper Mines v. Stewarts & Lloyds of India Ltd., 2013 SCC OnLine Bom 476 : (2013) 4 Bom CR 619]

55. *Having so stated, the Division Bench then went on to give a restricted meaning to Indus Mobile Distribution (P) Ltd.[5] in para 56 as follows : (Antrix Corpn. Ltd. case[8] , SCC OnLine Del)*

> *"56. In Datawind[40] , as the facts and the question framed by the Court in the second paragraph of its decision suggest, the Court was faced with a situation where the parties had designated both the seat and specified an exclusive forum selection clause. Therefore, its findings have to be interpreted in that light. In fact, were this Court to find otherwise, and interpret Datawind[40] as holding that the designation of seat alone would amount to an exclusive forum selection clause in domestic arbitrations, then this would run contrary to the five-Judge decision in BALCO[4], which as noticed above, gave jurisdiction under Section 2(1)(e) to two courts — one of which was the court of the seat, thereby clearly implying that the designation of a seat would not amount to an exclusive forum selection clause."*
>
> *(emphasis in original)*

56. *The Court then went on to state : (Antrix Corpn. Ltd. case[8], SCC OnLine Del paras 58-59)*

> *"58. The Court is of the opinion that in this case, only if the parties had designated the seat as New Delhi and also provided an exclusive forum selection clause in favour of the courts at New Delhi, could it be said that this Court would have exclusive jurisdiction over all applications filed under the Arbitration Act. Indeed, it is open to parties to an arbitration to designate a particular forum as the exclusive forum to which all applications under the Act would lie. This would merely be an exercise of the right of the parties to choose one among multiple competent forums as the exclusive forum. This is a clearly permissible exercise of the right of party autonomy as held by the Supreme Court in Swastik Gases (P) Ltd.v. Indian Oil Corpn. Ltd.[38]. Conversely, merely choosing a seat, cannot amount to exercising such a right of exclusive forum selection.*
>
> *59. This court is of opinion that, holding otherwise would*

[5. Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760]
[8. Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., 2018 SCC OnLine Del 9338]
[40. Datawind Innovations (P) Ltd. v. Indus Mobile Distribution (P) Ltd., 2016 SCC OnLine Del 3744 : (2016) 158 DRJ 391]
[4. BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]
[38. Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157]

> *in effect render Section 42 of the Arbitration Act ineffective and useless. Section 42 of the Act presupposes that there is more than one competent forum to hear applications under the Arbitration Act, and hence to ensure efficacy of dispute resolution, this provision enacts that the court, which is first seized of any such application under the Act, would be the only court possessing jurisdiction to hear all subsequent applications. If seat were equivalent to an exclusive forum selection clause in Part-I arbitrations, then every time parties would designate a seat, that would in effect mean that Section 42 would have no application. Thus, only those few situations where parties do not actually designate any seat (and thus no exclusive competence is conferred on one forum) would Section 42 have any role. In fact, often, when parties do not agree upon a seat in the arbitration agreement, for convenience, the Arbitral Tribunal designates a particular seat of the arbitration, or the agreement vests the discretion in the tribunal to decide the seat (and not just the "venue"). In all those circumstances then as well, the decision of the tribunal to agree upon a "seat" would amount to an exclusive jurisdiction clause and Section 42 would have no application. This would dilute Section 42 and would accordingly, be contrary to Parliamentary intent. Undoubtedly, in the present case, the parties have only chosen the seat as New Delhi and have not specified an exclusive forum selection clause. Therefore, it cannot be said that the courts in Delhi have exclusive competence to entertain applications under the Arbitration Act in the present dispute. The jurisdiction of the courts where the cause of action arises, which in this case, is the Bangalore City civil court, cannot be said to have been excluded therefore. Accordingly, question (ii) is also answered in favour of Antrix."*
>
> *(emphasis in original)*

57. *The view of the Delhi High Court in Antrix Corpn. Ltd.[8], which followed judgments[45, 46] of the Bombay High Court, does not commend itself to us. First and foremost, it is incorrect to state that the example given by the Court in para 96 of BALCO[4] reinforces the concurrent jurisdiction aspect of the said*

[8. Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., 2018 SCC OnLine Del 9338]
[45. Nivaran Solutions v. Aura Thia Spa Services (P) Ltd., 2016 SCC OnLine Bom 5062 : (2016) 5 Mah LJ 234],
[46. Konkola Copper Mines v. Stewarts & Lloyds of India Ltd., 2013 SCC OnLine Bom 476 : (2013) 4 Bom CR 619]
[4. BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]

paragraph. As has been pointed out by us, the conclusion that the Delhi as well as the Mumbai or Kolkata courts would have jurisdiction in the example given in the said paragraph is wholly incorrect, given the sentence, "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". The sentence which follows this is out of sync with this sentence, and the other paragraphs of the judgment. ***Thus, BALCO[4] does not "unmistakably" hold that two courts have concurrent jurisdiction i.e. the seat court and the court within whose jurisdiction the cause of action arises. What is missed by these High Court judgments is the subsequent paragraphs in BALCO[4], which clearly and unmistakably state that the choosing of a "seat" amounts to the choosing of the exclusive jurisdiction of the courts at which the "seat" is located. What is also missed are the judgments of this Court in Enercon (India) Ltd.[42] and Reliance Industries Ltd.[7]*** *(Emphasis supplied)*

58. *Equally, the ratio of the judgment in Indus Mobile Distribution (P) Ltd.[5], is contained in paras 19 and 20. Two separate and distinct reasons are given in Indus Mobile Distribution (P) Ltd.[5] for arriving at the conclusion that the courts at Mumbai alone would have jurisdiction. The first reason, which is independent of the second, is that as the seat of*

[4. BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]
[42. Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59]
[7. Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737]
[5.Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760]

the arbitration was designated as Mumbai, it would carry with it the fact that courts at Mumbai alone would have jurisdiction over the arbitration process. The second reason given was that in any case, following the Hakam Singh[3] principle, where more than one court can be said to have jurisdiction, the agreement itself designated the Mumbai courts as having exclusive jurisdiction. It is thus wholly incorrect to state that Indus Mobile Distribution (P) Ltd.[5] has a limited ratio decidendi contained in para 20 alone, and that para 19, if read by itself, would run contrary to the 5-Judge Bench decision in BALCO[4].

59. *Equally incorrect is the finding in Antrix Corpn. Ltd.[8]that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one court exclusively. This is why the section begins with a non obstante clause, and then goes on to state "… where with respect to an arbitration agreement any application under this part has been made in a court…" It is obvious that the application made under this part to a court must be a court which has jurisdiction to decide such application. The subsequent holdings of this court, that where a seat is designated in an agreement, the courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the court where the seat is located, and that court alone then has jurisdiction over the arbitral proceedings and all subsequent*

[3 Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286
[5.Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760]
[4. BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]
[8. Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., 2018 SCC OnLine Del 9338]

applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a court in which a part of the cause of action arises would then be the exclusive court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled.

Tests for determination of "seat"

60. *The judgments of the English courts have examined the concept of the "juridical seat" of the arbitral proceedings, and have laid down several important tests in order to determine whether the "seat" of the arbitral proceedings has, in fact, been indicated in the agreement between the parties. The judgment of Cooke, J., in Shashoua[24], states:*

> *"34. London arbitration is a well-known phenomenon which is often chosen by foreign nationals with a different law, such as the law of New York, governing the substantive rights of the*

[24. Shashoua v. Sharma, 2009 (EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep 376

> *parties. This is because of the legislative framework and supervisory powers of the courts here which many parties are keen to adopt. When therefore there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is, to my mind, that London is the juridical seat and English Law the curial law. In my judgment it is clear that either London has been designated by the parties to the arbitration agreement as the seat of the arbitration, or, having regard to the parties' agreement and all the relevant circumstances, it is the seat to be determined in accordance with the final fall back provision of Section 3 of the Arbitration Act."*

> ***61.*** *It will thus be seen that wherever there is an express designation of a "venue", and no designation of any alternative place as the "seat", combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding."*

14. As regard the reference to a place as a venue of arbitration which is generally understood to be a seat of arbitration, the judgment noted as follows :

> ***"82.*** *On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may*

lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a clause designates a "seat" of the arbitral proceedings. In an International context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration."

REASONS AND FINDINGS :

15. As stated above, the expression "Court" is defined in Section 2(1)(e) of the Act. The judgment in *BALCO* was previously understood by some High Courts (including the Impugned Order) to recognize concurrent jurisdiction of the 'cause of action' court and the 'seat' court. However, the judgment in *BALCO*, on this point, has been fully explained by the Supreme Court in its decision in *BGS SGS*. As pointed out earlier, even in the case of *Indus Mobile,* the Supreme Court had taken a view that a choice of seat amounts to conferment of exclusive jurisdiction on the Courts of the seat of arbitration. This understanding of *Indus Mobile* has been confirmed by the

Supreme Court in *BGS SGS*.

16. The relevant observations and conclusions that emerge from the judgment in BGS SGS, to the extent they are relevant to the determination of the aforestated two issues that arise in this Appeal, are in brief set out hereunder :

16.1 In paragraph 32 the Court explained the concept of "juridical seat" of the arbitral proceedings and its relationship to the jurisdiction of courts. The Court observed that the legal principles relating to juridical seat, arbitral proceedings and challenges to arbitral awards was unclear and had to be developed in accordance with international practice on a case-by-case basis by the Supreme Court.

16.2 After a lengthy discussion and after exhaustively referring to the judgment in *BALCO* and in particular paragraphs 75, 76, 96, 116, 123 and 194 of *BALCO*, the Court in paragraph 38 observed that once parties select the 'seat' of arbitration in their agreement, such selection amounts to an exclusive jurisdiction clause. This, it is stated, would mean that the "seat" would alone have jurisdiction to entertain the challenges to the Award.

16.3 It was further held in paragraph 38 of *BGS SGS* that the judgment in *BALCO* when read as a whole, applies the concept of "seat" as laid down by English judgments and by harmoniously construing Section 20 with Section 2(1)(e) of the Act. The effect of this is to broaden the definition of "Court" and bring within its ken the courts of the "seat" of the arbitration.

16.4 The Court observed, in paragraph 39, that the above propositions as derived from *BALCO* were then seen to be seemingly contradicted by paragraph 96 of

BALCO itself, which speaks of concurrent jurisdiction of the 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.

16.5. The Supreme Court, in paragraph 42, then examined the *BALCO* judgment, as a whole, to see if these seemingly conflicting portions could be reconciled to cull out the ratio of the judgement as a whole.

16.6 After this analysis of *BALCO*, the Court in paragraph 44, held that if all the important paragraphs of *BALCO* (including paragraph 96) are to be read together, what becomes clear is that Section 2(1)(e) must be construed keeping in view Section 20 of the Act which gives recognition to party autonomy, the Act having accepted the territoriality principle in Section 2(2) following the UNCITRAL Model Law. It was observed that the narrow construction of Section 2(1)(e) was expressly rejected by the Five Judge Bench in BALCO and that this being so, what is then to be seen is the effect Section 20 would have on Section 2(1)(e) of the Act.

16.7 In paragraphs 45 and 46, the Court then considered other judgments which deal with the effect of a choice of 'seat' in an arbitration agreement and its effect on the jurisdiction of Courts. In particular, the Court then analysed *Indus Mobile,* which was followed by ***Bhahmani River Pvt. Limited Vs. Kamachi Industries Pvt. Ltd. 2019***[8] .

16.8 In paragraph 49, the Supreme Court also analysed the effect of reading paragraph 96 of BALCO to mean that there is concurrent jurisdiction between the

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cause of action court and the 'seat' court. After this analysis the Supreme Court concluded that if the conflicting portion of the judgment of *BALCO* 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. The judgment then observed that paragraph 96 of *BALCO* is not in consonance with other observations as made therein and stated that the very fact that the 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. The Supreme Court further observed that if, as laid down in paragraph 96 of *BALCO*, the concurrent jurisdiction was to be the order of the day, despite seat having been located and specifically chosen by the parties, party autonomy would suffer. This, the Court stated, was also held to be the view taken in *BALCO*.

16.9 In paragraph 50, the judgment in *BGS SGS* also relied on other decisions of the Supreme Court, which have understood the law to be that once the 'seat' of arbitration is chosen it amounts to exclusive jurisdiction clause. In particular, the Supreme Court also considered the principle of exclusivity of jurisdiction as held in paragraphs 19 and 20 of *Indus Mobile*. The Court, in paragraphs 57 and 60, noted that in *Indus Mobile*, the Supreme Court gives two *separate* reasons while arriving at conclusion that the seat Court would alone have jurisdiction. First, that the designated seat of arbitration would carry with it the fact that Courts of seat alone would have jurisdiction. Secondly, it follows the principle as laid down in ***Hakam Singh v.***

***Gammon (India) Ltd.* (*Hakam Singh*)**[9] where more than one court can be said to have jurisdiction, the arbitration agreement itself designated the 'seat' court as having exclusive jurisdiction.

16.10 In paragraph 57, the Supreme Court then held that the decision of the Division Bench of the Delhi High Court in *Antrix Corporation vs. Devas Multimedia Pvt. Ltd.*, which the Impugned Order relies upon and agrees with, is no longer good law as it does not follow *BALCO*. The Court categorically observed that it is incorrect to state that the example given in paragraph 96 of BALCO reinforces the concurrent jurisdiction aspect of the said paragraph. In commenting upon the judgment in *Antrix Corporation*, the Supreme Court said that the BALCO judgment does not *"unmistakably"* hold that two Courts have concurrent jurisdiction, i.e., the seat Court and the Court within whose jurisdiction the cause of action arises and that what was missed by the High Court judgment is the subsequent paragraphs in BALCO, which clearly and unmistakably state that choosing of a 'seat' amounts to choosing of exclusive jurisdiction of the Courts at which the 'seat' is located.

16.11 In paragraph 59, the Court further observed that an application under Section 9 of the Act may be preferred before a court in which part of cause of action arises in a case where parties have *not agreed* on the "seat" of arbitration, and before such 'seat' may have been determined on the facts of a particular case by the Arbitral Tribunal under Section 20 (2) of the Act. In both these situations, the earliest application having been made to a Court in which a part of the cause of action arises

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would then be the exclusive Court under Section 42, which would have control over the arbitral proceedings.

17. In view of the law as clearly explained in *BGS SGS*, we are of the opinion that the Impugned Order in so far as it holds that paragraph 96 of BALCO recognizes concurrent jurisdiction of the 'cause of action' Court and the 'seat' Court cannot be sustained as it is not consistent with the judgment in *BGS SGS*. We are also unable to agree with the contentions of Respondent Nos. 3 to 6 in their written submissions that the judgment of *BGS SGS* does not apply to a situation such as the present case because it is an international commercial arbitration seated in India. The law as laid down in *BGS SGS* was in a situation where it was a domestic arbitration, and the 'seat' was held to be in Delhi and the cause of action in Faridabad. Therefore, it would be incorrect and contrary to the reading of the judgment itself to restrict the application of the law it lays down only to some situations and not others as has been contended by Respondent Nos.3 to 6. On a reading of the entire judgment, we have no doubt that it clearly applies to the issue of whether there is concurrent jurisdiction of courts in a situation where the parties have chosen a 'seat' of arbitration irrespective of whether if it is a domestic arbitration or an international commercial arbitration seated in India such as in the present case.

18. Given that, *BGS SGS* has held that there is no concurrent jurisdiction of two Courts under Section 2(1)(e) of the Act, the principles applied by the Learned Single Judge that as a matter of party autonomy the parties can choose one of the two courts and confer exclusive jurisdiction on one of those Courts, by relying *inter alia*

upon paragraph 96 of BALCO and the judgment in *Swastik Gases*, would have no application in a situation where the parties have chosen a seat of arbitration. A choice of seat, as the Supreme Court has explained, is itself an expression of party autonomy and carries with it the effect of conferring exclusive jurisdiction on the Courts of the seat.

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.

20. In light of the clear observations, findings, and conclusions in the case of BGS SGS, we answer the first part of the first issue, as framed by us above, in the negative; and the second part of the first issue in the affirmative.

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'.

24. We also see merit in the submission of the Appellant, relying upon the judgments in ***Jawahar Sons Enterprises Pvt. vs State and Ors.***[10], and ***South India Corpn. (P) Ltd. v. Secy., Board of Revenue***[11], that the meaning of the expression 'subject to' is the opposite of 'notwithstanding' and therefore 'subject to' could never have been interpreted as 'notwithstanding' as has been done in the Impugned Order.

25. The Supreme Court in *BGS SGS,* has, in paragraph 82, observed that even when parties use the expression '*venue of arbitration proceedings*' with reference to a particular place, the expression 'arbitration proceedings' would make it clear that the 'venue' should be read as 'seat'. In the present case the language of the Agreement in Clause 20.4.2(c) is clear and specifically refers to Mumbai as being the '*seat*' of the arbitration proceedings. Thus, we are of the opinion that there is no basis for reading Mumbai as a 'venue', only because effect has to be given to the choice of Courts at Hyderabad, which is itself 'subject to' the later Clause 20.4. On this aspect, we are also of the opinion that the judgment of the Supreme Court in *Hardy Exploration* does

10 AIR 2002 Raj 206
11 AIR 1964 SC 207

not support the conclusion arrived at in the Impugned Order that Mumbai must not be regarded as a 'seat' but as a 'venue'. In any event, as noted above, the Supreme Court in paragraphs 92 and 94 of *BGS SGS*, has observed that the law laid down in *Hardy Exploration* cannot be considered to be good law as it is contrary to the judgment of the Five Judge Bench in *BALCO*.

26. The meaning to be attributed to Clause 20.3 vis-à-vis Clause 20.4.2(c) must be gathered by giving plain meaning and effect to the important expressions 'subject to' and 'seat' and not by altering their meaning only to conclude that the true intention of the parties is to be gathered by giving effect to Clause 20.3. In our view, Clause 20.3 and the choice of Courts expressed therein would apply in a situation not covered by a dispute that is governed by the arbitration agreement in Clause 20.4. In any view of the matter, even if Clause 20.3 does overlap with Clause 20.4 in determining which Court would have jurisdiction to entertain applications made under the Act, since Clause 20.3 is made 'subject to' Clause 20.4 (which would include Clause 20.4.2(c)), we are of the opinion that the Court of the 'seat' would even under the Agreement have exclusive jurisdiction to entertain applications made under the Act. For these reasons we are of the opinion that the findings and conclusions in the Impugned Order in so far as they relate to the interpretation of the Agreement, cannot be sustained and we do not find any merit in the submissions made by the Respondents before us as set out above.

27. In light of the discussion above, we answer the second issue, as framed by us, in the negative.

28. The Impugned Order is accordingly set aside and the Appeal is allowed. The Section 9 Petition is to proceed on merits before this Court and is accordingly restored. There shall, however, be no order as to costs.

(R.I.CHAGLA, J.) **(S.J. KATHAWALLA, J.)**