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

% Reserved on: 24th September, 2020
Decided on: 24th November, 2020

\+ **CS(COMM) 286/2020**

DHOLI SPINTEX PVT. LTD. ..... Plaintiff
Represented by: Mr.Nakul Dewan and Mr.Devang Nanavati, Sr. Advocates with Mr.Rishi Agrawala, Mr.Karan Luthra, Ms.Prachiti Shah, Ms.Aarushi Tiku, Ms.Anushka Shah, Mr.Sambit Nanda and Mr.Dev Shah, Advocates.

versus

LOUIS DREYFUS COMPANY INDIA PVT. LTD..... Defendant
Represented by: Mr.Jayant K. Mehta, Mr.Rakesh K. Ojha, Mr.Sanjeev Sarawast, Mr.Achintya Dwivedi and Mr.Ankush Chattopadhyay, Advocates.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

CS(COMM) 286/2020
I.A. 6298/2020 (under Order XXXIX Rule 1 and 2 CPC)
I.A. 6299/2020 (under Order II Rule 2 CPC)
I.A. 6701/2020 (under Section 45 of the Arbitration and Conciliation Act-by defendant)

1. The plaintiff-Dholi Spintex Pvt. Ltd. (in short 'Dholi Spintex') has instituted the present suit, inter alia, seeking a decree of declaration, declaring Clause 6 of the contract dated 30th May, 2019 being a sale contract between the Dholi Spintex and defendant-Louis Dreyfus Company India Pvt. Ltd. (in short 'Louis Dreyfus') providing for reference of dispute

between the parties through arbitration under the rules and arbitration procedures of International Cotton Association (in short, the 'ICA') as invalid, null & void and consequentially, a declaration of the letter dated 29th April, 2020 issued by the ICA and the reference through arbitration being ICA Reference LOU005.0004/AO1 2020 24 initiated by the defendant as null and void besides permanent injunction restraining the defendant from proceeding/continuing with the arbitration proceedings against the plaintiff.

2. After the summons in the suit and notice in the application were issued on 30th July, 2020 to the defendant, defendant filed the written statement as also an application under Section 45 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') to which reply has been filed by the plaintiff and rejoinder thereto by the defendant.

3. Case of the plaintiff-Dholi Spintex is that it entered into a contract with the defendant-Louis Dreyfus for supply of 600 Metric Tons of American imported raw Cotton in Bales to Dholi Spintex on 30th May, 2019. Since the shipment and delivery of the raw Cotton Bales was delayed, Dholi Spintex refused to take delivery of the goods. Pursuant to the rejection of the goods by Dholi Spintex in India defendant-Louis Dreyfus initiated arbitration proceedings against Dholi Spintex before ICA on 29th April, 2020 under Clause-6 of the contract. Dholi Spintex thereafter received a communication dated 29th April, 2020 from the ICA forwarding the request for appointment of a Technical Arbitrator made by the defendant-Louis Dreyfus and calling upon Dholi Spintex to appoint its nominee Arbitrator within 14 days from the receipt of request of arbitration clearly advising that the arbitration under ICA Bylaws is conducted under the English Arbitration Act, 1996. Dholi Spintex was unable to respond to ICA's mail dated 29th

April, 2020 due to nationwide lockdown in India. On 2nd June, 2020, Dholi Spintex received another letter informing appointment of Mr.David Adcroft as an Arbitrator on behalf of Dholi Spintex since it failed to do so within the stipulated time stated by ICA. As per the Dholi Spintex, Mr.David Adcroft has given a declaration that he had been employed with one of the group companies of Louis Dreyfus namely LDCS, Switzerland until June, 2015. On 10th June, 2020 Louis Dreyfus submitted its claim for a sum of ₹2,44,85,796/-. Dholi Spintex wrote an email to ICA seeking extension of time for taking necessary action on 6th July, 2020 without prejudice to its contentions and submissions to the arbitration, however, in disregard thereof, ICA issued an email to the parties dated 9th July, 2020 quoting the Tribunal's communication to the ICA. On 16th July, 2020, Louis Dreyfus submitted its rejoinder/additional comments as directed by the ICA pursuant whereto, on 20th July, 2020, the ICA issued an email to Dholi Spintex directing it to reply to Louis Dreyfus's comments within 7 days, resulting in Dholi Spintex seeking the anti-arbitration injunction in the present suit. In the response dated 6th July, 2020 Dholi Spintex objected to the arbitration on the following grounds:

a. The Contract was executed between two Indian companies in India and was to be performed in India. Therefore, the proper law/ substantive law governing the parties' obligations under the Contract can only be Indian law

b. Clauses of 6 and 7 made it clear that by conferring exclusive jurisdiction upon the courts of New Delhi, the parties intended for Indian law to govern the arbitration proceedings

c. Bylaw 200 of the ICA Bylaws is opposed to and directly

contravenes Indian public policy which envisages that Indian parties cannot contract out of Indian law.

4. The dispute raised by the plaintiff- Dholi Spintex in the present suit relates to the interpretation of Clauses 6 and 7 of the contract dated 30th May, 2019 between the parties which read as under:-

> *"6. Any dispute arising out of this contract shall be resolved through arbitration in accordance with ICA (International Cotton Association) rules & arbitration procedure. Venue of arbitration shall be London.*
> *7. Only the courts in New Delhi will have jurisdiction."*

5. Case of the defendant is that it is, inter alia, engaged in trading of imported cotton, procures the said cotton from overseas suppliers and sells the same to buyers in India on 'High Sea Sales' basis. Thus, the ownership of the goods is transferred when the items are in transit and not in the territorial waters of India, therefore, outside the territorial jurisdiction of India. It is the case of the defendant that it entered into a supply contract No. SO/IMP/2018-19/157 with the plaintiff to sell the American cotton and consistent with the practice, the contract was entered into on high sea sales basis. Plaintiff refused to accept the assignment, breached the contract, and has filed the present suit to avoid legal consequences and defendant's contractual remedies. The contract between the parties clearly notes that it is a high seas sale agreement and the invoices would be high seas sale invoices. Besides clauses 6 and 7 of the contract between the parties as noted above, it is further provided in the contract that goods being sold on high seas, the recipient shall make its own arrangements for custom and port clearance at its own responsibility. Since the plaintiff refused to accept the goods and sought change in the payment of terms on 10th September, 2019, a

price revision email was also sent by the defendant. The market price of the cotton falling by 13%, the plaintiff was liable to pay the said additional margins as per the contract, industrial practice and law.

6. Despite reminder when the plaintiff did not perform its part of the contract, a breach note dated 17th January, 2020 was issued followed by a debit note. However, no payment was received, whereafter on 13th April, 2020, the defendant invoked the technical arbitration before the ICA and appointed its nominee Arbitrator in terms of the arbitration agreement between the parties. On 29th April, 2020, ICA wrote to the plaintiff informing it about request for arbitration and asking plaintiff to nominate its Arbitrator in 14 days. Since the plaintiff failed to nominate its Arbitrator, on 2nd June, 2020, ICA appointed nominee Arbitrator for the plaintiff being Mr. David Adcroft. On 11th June, 2020, the defendant filed its claim before the ICA which was responded by the plaintiff on 6th July, 2020 requesting for 30 days for necessary action citing Covid-19 situation. On 16th July, 2020, defendant submitted its reply to the plaintiff's jurisdictional objections to the Arbitral Tribunal and on 20th July, 2020, ICA wrote to the plaintiff to reply to/provide additional comments received from the defendant. Instead of submitting the reply to the Tribunal, the plaintiff instituted the present suit. It is the case of the defendant that international trade in American cotton is generally conducted under the International Cotton Association (ICA) Rules and Procedures, and thus, in the contract dated 30th May, 2019, it was agreed that the parties will submit to the arbitration conducted by ICA.

7. According to learned counsel for Dholi Spintex, in view of the arbitration agreement in the contract dated 30th May, 2019, two issues required to be determined by this Court are:

(1) Whether two Indian parties can choose a foreign system of law as the substantive law of the contract?

(2) Whether the express designation of a court under Clause 7 of the Contract providing for exclusive jurisdiction at New Delhi is determinative of the Seat of Arbitration?

8. Learned counsel for the Dholi Spintex contends that the impugned contract has been executed between two Indian parties as the plaintiff company is incorporated in India under the Companies Act, 1956 with its registered office at Ahmadabad, Gujarat and the defendant- Louis Dreyfus is also a company incorporated in India with its registered office in New Delhi. The impugned contract between the parties dated 30th May, 2019 was executed in India with performance in India with Dholi Spintex as the buyer and Louis Dreyfus as the supplier for sale of 600 MT of American Raw Cotton. The contract was executed at New Delhi, India. The contract was also required to be performed in India for the reason the American Raw Cotton was to be delivered by Louis Dreyfus from Mundra Port, India to Dholi Spintex in Ahmadabad, the payment was to be made in India, an advance payment of ₹75 lakhs was made to Louis Dreyfus in terms of the contract through RTGS from Dholi Spintex's bank account to Louis Dreyfus's bank account, both being in India. The delay in delivery of the goods was in India and the goods were rejected in India due to delay. The contract applies INCO Term "CIF CY Mundra" choosing Container Yard (CY) at Mundra, Gujarat, India as the place of origin of goods. Though the contract mentions sale on High Seas Sales Basis but the contract is not a High Seas Sale Agreement nor was any High Seas Sale Agreement entered into between the parties.

9. Learned counsel for the Dholi Spintex further states that by virtue of

the Bylaws 102, 200 and 300 of the International Cotton Association, the governing law of the contract is the English law mandatorily, the seat of arbitration had also to be in England and disputes have to be settled according to the law of English and Wales irrespective of domicile, residence or place of business of the parties to the contract.

10. It is contended that two Indian parties cannot contract out of Indian law as the substantive law of their contract, however, in terms of Clause-6 of the contract and the Bylaws of ICA, since the English law would govern the substantive rights and obligations of two Indian parties entering into a contract which is to be performed in India, the same is clearly impermissible and against the very fundamentals of nationality and sovereignty. As per Section 23 of the Contract Act any attempt to exclude the application of Indian laws is void. When sale and purchase of commodities is made by two Indian parties within India, the same should be governed by the laws of India and the parties cannot choose to exit out of the applicability of the Indian laws.

11. Referring to the decision reported as 2018 SCC OnLine Del 8842 *Union of India vs. Vodafone Group PLC, UK*, it is contended that the Supreme Court in the said decision in a converse situation held that since the two entities entered into an offshore sale and purchase of shares and not the sale of assets which were within India, Vodafone was not liable to pay income tax as per Indian Law. Merely because the plaintiff-Dholi Spintex agrees to purchase American raw cotton from Louis Dreyfus, the contract between two Indian parties cannot be subjected to foreign law. It is not the nature of the goods which govern the applicability of the law but the parties who are entering into the contract, where the contract is entered into and

where it is required to be performed which govern the applicability of the law. Relying upon the decision of the Supreme Court reported as 1983 (3) SCC 61 *M.G. Brothers Lorry Services vs. Prasad Textiles* it is contended that a contractual provision which has the effect of defeating the provisions of law is void under Section 23 of the Contract Act. The decision in *M.G.Brothers* (supra) has been followed by this Court in the decision reported as ILR (2010) 2 Del. 699 *Simplex Concrete Piles (India) Ltd. vs. Union of India* wherein it was also held that a contractual provision which resulted in exclusion of Section 55 and 72 of the Indian Contract Act would be contrary to the public policy of India.

12. It is contended that where performance of a contract is in India, the parties to a contract can choose a foreign system of law only in two conditions, that is, where the conflict of law rules apply which give precedence to the choice of law made by the parties and/or in case of an International commercial arbitration seated in India as set out in Section 28(1) (b) of the Act. Merely because the products originated from a country outside India would not mean that a foreign system of law would apply to the two parties who are Indians and have agreed to the performance of the contract in India and the same would be a domestic contract between domestic parties only. In the present case no conflict of law rules are applicable and thus no precedence to party autonomy can be given. For a domestic contract, parties have no option to choose a foreign law as has been held by Supreme Court in the decision reported as 1992 (3) SCC 551 *NTPC vs. Singer Co.* and by the Full Bench of Bombay High Court in the decision reported as 1957 SCC OnLine Bom 87 *The State vs. Narayandas Mangilal Dayame*. This principle of law has been further upheld by the

Supreme Court in 1990 (3) SCC 481 *British India Steam Navigation Co. Ltd. vs. Shanmughavilas Cashew Industries* and 2001 (4) SCC 713 *Syndicate Bank vs. Prabha D. Naik*.

13. Referring to Section 28 of the Act it is contended that provision makes it clear that only if the nationality of one of the parties is non-Indian can a choice be made to have a foreign governing law, thus if the nationality of both the parties is Indian then Indian law would be the substantive law applicable to the parties. The imperative character of Section 28 of the Act has been emphasised by the Supreme Court in the decision reported as 2008 (14) SCC 271 *TDM Infrastructure (P) Ltd. vs. UE Development India (P) Ltd.* and also by the Constitution Bench in the decision reported as 2012 (9) SCC 552 *Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc.* (BALCO). It is contended that the decisions in *BALCO* (supra) and in *TDM Infrastructure* (supra) have laid down the broad policy principle that the Indian Contract Act applies to Indian parties and the applicability this law cannot be circumvented by Indian parties by choosing a foreign seat of arbitration. Learned counsel for Dholi Spintex illustrates by examples of the mischief that can be committed if two Indian parties are permitted to choose a foreign governing law. It is stated for instance in the present case itself if the parties are not governed by the Indian law but by the English law, the period of limitation for breach of contract would be six years as opposed to three years which is prescribed under the Indian law.

14. Rebutting the contention of learned counsel for Louis Dreyfus that an exception has been provided under Section 28 of the Contract Act in respect of arbitrations, it is contended that the exception to Section 28 of the Contract Act is not intended to permit Indian parties to circumvent Indian

laws by resorting to arbitration. The exception to Section 28 of the Contract Act simply allows the parties to have their disputes resolved by arbitration instead of litigation. However, the said exception does not imply that the parties can resort to foreign arbitration to escape from India law. Since the terms of clause-6 of the contract between Dholi Spintex and Louis Dreyfus are contrary to the Indian law and the ICA Bylaws 102, 200, 300 mandatorily provide for application of substantive law of contract as English law, Clasue-6 of the contract is liable to be declared null and void. In the alternative it is contended that even if this Court holds that Clause-6 cannot be declared as null and void, illegal portions of Clause-6 of the contract may be struck down by applying the 'Blue Pencil Test' laid down by the Supreme Court in the decision reported as 2006 (2) SCC 628 *Shin Satellite Public Co. Ltd. vs. Jain Studios Ltd.* By reading Clauses 6 and 7 harmoniously in terms of the Indian Law it would be aptly clear that the arbitration would be governed by the Act with its seat in New Delhi and venue in London.

15. Rebutting the assertion on behalf of Louis Dreyfus that Clause-7 of the contract has to be read down as the same applies to ancillary issues only, it is contended that under Indian law conferment of exclusive jurisdiction on a particular Court has a definite meaning. Relying upon the decision reported as 2019 (17) SCALE 369: 2019 SCC OnLine SC 1585 *BGS SGS Soma JV vs. NHPC Ltd*. it is contended that where parties have selected the seat of arbitration in their agreement, such selection would then amount to an exclusive jurisdiction clause and as a corollary the parties' intention to confer exclusive jurisdiction on Courts of New Delhi as per Clause-7 necessarily indicates their intention to select the seat of arbitration as New

Delhi.

16. Referring to the decision of the Supreme Court reported as 1983 (3) SCR 662 *Dhula Bhai vs. State of Madhya Pradesh* it is contended that a suit filed under Section 9 of CPC is maintainable unless expressly barred. There being no bar to entertain the present anti arbitration injunction suit, the same is maintainable. Reliance is further placed on the decision of the Division Bench of this Court reported as 2016 SCC OnLine Del. 3949 *Mcdonald's India Pvt. Limited vs. Vikram Bakshi* wherein this Court following the decision of the Calcutta High Court in *Board of Trustees of the Port of Kolkata vs. Louis Dreyfus Armatures SAS*, G.A. 1997/2014, CS No.220/2014 held that an anti arbitration injunction can be granted (i) if an issue is raised whether there is any valid arbitration agreement between the parties and the Court is of the view that no agreement exists between the parties; (ii) If the arbitration agreement is null and void, inoperative or incapable of being performed; and (iii) Continuation of foreign arbitration proceeding might be oppressive or vexatious or unconscionable. It is further contended that the present Court is the only forum with jurisdiction to decide the issues set out in the present suit.

17. Reliance is also placed on the decision reported as 2011 SCC OnLine Del 3050 *Devender Kumar Gupta vs. Reaology Corporation* to contend that in an application under Section 45 of the Act, the validity of the arbitration clause has to be decided by the Court and in case the Court skirts the issue the same would run counter to the decisions of the Supreme Court in 2012 (5) SCC 214 *Kvaerner Cementation India Ltd. vs. Bajranflal Agarwal*, (2005 (8) SCC 618 *SBP & Co. vs. Patel Engineering* and 2003 (5) SCC 531 *Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya*. Even in the decision

reported as 2014 (11) SCC 639 *World Sport Group (Mauritius) Ltd. vs. MSM Satellite (Singapore) PTE Ltd.* Supreme Court reiterated that the principles as laid down in Section 45 of the Act would be applicable to a suit seeking declaration and injunction.

18. Referring to the English decisions on the issues, that is, 1993 (1) QB 701 *Harbour Assurance Co. (UK) Ltd. vs. Kansa General Insurance Co. Ltd*. and 2007 (4) All ER 951 *Fiona Trust & Holding Corporation vs. Privalov* wherein it was held that the question of initial illegality is incapable of being referred to arbitration, it is contended that in terms of Sections 8 and 45 of the Act, this Court is obligated to refer the parties to arbitration only if it is prima facie of the view that there exists a valid arbitration agreement which is capable of being performed. Relying upon the decision of the English Court of Appeals reported as (2019) EWCA Civ 129 *Sabbagh Vs. Khoury & Ors.*, it is submitted that the present anti-arbitration suit is maintainable. Reliance is also placed on the decision reported as *2005 (8) SCC 618 SBP & Co. vs. Patel Engineering*.

19. The ICA Arbitral Tribunal is not competent to determine the validity of Clause -6 under the Indian law for the reason the Tribunal is a creation of the contract between the parties as also the Arbitral Tribunal appointed by the ICA cannot apply Indian law, even if Indian law is considered to be mandatory and non-derogable. Further, though Bylaw 306 provides that the Tribunal may rule on its own jurisdiction, that is, whether there is a valid arbitration agreement, whether the Tribunal is properly constituted and what matters can be submitted to arbitration in accordance with the arbitration agreement, however, Byelaw 306 is subject to Bylaw 302 which states that all Bylaws are mandatory and Bylaw 200 and 300 mandate the application

of English Law as the substantive law. It is contended that not only Dholi Spintex has prima facie case in its favour and in case the plaintiff is subjected to arbitration contrary to the law of this country, the plaintiff would suffer irreparable loss. Balance of convenience also lies in favour of the plaintiff. Consequently, a decree of declaration and injunction as sought for be granted.

20. Contention of learned counsel for the defendant is that the present suit is not maintainable. An anti-arbitration injunction ought not to be granted against foreign seated arbitration. The parties have agreed that the arbitration would be conducted under the ICA Arbitration Bylaws and seated at London. The plaintiff having agreed to these terms cannot now wriggle out of the same contending that Clause-6 of the Agreement between the parties is null and void. Relying upon *Russell on Arbitration, 24th Edition*, learned counsel for the defendant contends that the discretion to grant an injunction to restrain an arbitration, should be exercised very sparingly where the seat of arbitration is in a foreign country. Reliance is placed on the decision of the Division Bench of this Court reported as 2016 SCC Online Delhi 3949: 232 (2016) DLT394 *McDonalds India Pvt. Ltd. vs. Vikram Bakshi & Ors*. wherein the Division Bench cautioned that the trend is to minimize the interference with the arbitration process as that is the forum of choice. It was held that while the Courts in India may have the jurisdiction to injunct arbitration proceedings, the said power is required to be exercised rarely and only on principles analogous to those found in Sections 8 and 45 of the Act. This rule of anti-arbitration injunction is reaffirmed in *Chitty on Contracts, Thirty Third Edition, published by Sweet and Maxwell* wherein it is stated that it is the Arbitral Tribunal which

generally deals with the issue of its jurisdiction. Bylaw-306 of the ICA Bylaws empowers and obliges the Arbitral Tribunal to decide matters of jurisdiction and the validity of underlying arbitration agreement. Reliance is placed on the decision reported as 2019 (11) Scale 440: MANU/SC/1153/2019 *National Aluminium Company Limited vs. Subhash Infra Engineers Pvt. Ltd. & Anr.* wherein the Supreme Court held that any objection with respect to existence or validity of the arbitration agreement can be raised only by way of an application under Section 16 of the Act and the Civil Court cannot have jurisdiction to go into such question. Reliance is also placed on the decision reported as 2012 (5) SCC 215 *Kvaerner Cementation India Ltd. vs. Bajranglal Agarwal & Anr.* Referring to the decision reported as 2018 SCC OnLine Delhi 8842 *Union of India vs. Vodafone Group LC United Kingdom & Anr.* it is contended that the principle of kompetenz-kompetenz, is recognized in Article-21 of the UNCITRAL Arbitration Rules, 1976 and thus, the arbitrators have jurisdiction to consider and decide the existence and extent of their own jurisdiction. The Competence-Competence principle is almost universally accepted. Bylaw-306 of the ICA Arbitration Bylaws constitutes a sufficient and efficacious remedy for deciding the issues raised in the present suit as regards the validity of Clause-6 of the Act.

21. The present suit is specifically barred under Section 45 of the Act as the said provision mandates rejection of the suit and referring to arbitration with no discretion with this Court. Only if the agreement between the parties is null and void, inoperative or incapable of being performed, this Court will have jurisdiction to entertain the suit, which on facts of this case is not made out. The term 'null and void' permits defences based on

unconscionability, fraud, mistake, lack of capacity and illegality. The term 'inoperative' permits defences based on termination, waiver, changed circumstances and repudiation and the term 'incapable of being performed' refers to impossibility and similar defences. Supreme Court in the decision reported as 2014 (11) SCC 639 *World Sport Group (Mauritius) Ltd. vs. MSM Satellite (Singapore), Pte Limited*. explained the meaning of words 'inoperative' or 'incapable of being performed' to mean that where parties, by way of conduct, impliedly revoke the arbitration agreement and/or would be a situation where for some reason it is impossible to establish Arbitral Tribunal. Since in the present case a valid arbitration agreement exists and the disputes between the parties are within the ambit of arbitration agreement, any other aspect is irrelevant and alien to Section 45 of the Act, hence, the suit be dismissed and the application of the defendant be allowed.

22. It is contended that the seat of arbitration being London, English courts have exclusive jurisdiction in matters concerning arbitration and New Delhi is not the seat of arbitration. Reliance of learned counsel for the plaintiff on Clause-7 of the Contract to argue that the seat of arbitration is New Delhi is erroneous. It is well settled that once the arbitration agreement determines the seat, the exclusive jurisdiction clause cannot change/override it. The arbitral seat is a nation where the International Arbitration has its legal domicile or juridical home. The intricate connection between the seat of arbitration and the jurisdiction of the Courts attached has been laid down by the Supreme Court in the decision reported as 2012 (9) SCC 552 *Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc*. *(in short 'BALCO')*. It was held that the arbitral procedure, including the constitution of 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. An agreement as to the seat of arbitration is analogous to the exclusive jurisdiction clause and any claim for a remedy as to the validity of an existing interim or final award can be made only in the Courts of the place designated as the seat of arbitration. Reliance is placed on the decisions reported as (2020) 4 SCC 234: 2019 SCC OnLine SC 1585 *BGS SGS Soma JV vs. NHPC Limited* and 2017 (7) SCC 678 *Indus Mobile Distribution Pvt. Ltd. vs. Datawind Innovations Pvt. Ltd. & Ors.*

23. As the contract between the plaintiff and defendant related to sale of imported American cotton and is on "High Seas Sale" basis and the rights, title and interest of the goods having passed outside the territorial jurisdiction of India, in such a situation, two Indian parties have agreed to an International Arbitration. Since at the point of actual sale, as envisioned under the contract, the goods were located in the international waters, there existed potential conflict of laws situation and therefore, the parties in their wisdom and with open eyes decided to obviate by agreeing to resolve all disputes by way of arbitration under the ICA Bylaws and Rules. Reliance is placed on the decision reported as 1990 (3) SCC 481 *British India Steam Navigation Company ltd. vs. Shanmughavilas Cashew Industries & Ors.*

24. Contention of learned counsel for the plaintiff that no high seas sale agreement was arrived at between the parties and the contract agreed was clearly domestic transaction, is untenable as subsequent events concerning the manner in which there was breach of contract is completely irrelevant to interpretation of the contract and underlying intention of the parties. Reliance is placed on the decisions reported as 1961 (1) AC 281 *Union*

Insurance Society of Canton Ltd. vs. George Wills & Co. and 1975 (1) SCC 199 *Godhra Electricity Co. Ltd. vs. State of Gujarat*.

25. Two Indian parties can agree to arbitrate abroad and there is no legal bar to this extent especially where transactions involved foreign elements. One of the central objectives of the international arbitration agreements is to provide neutral forum of dispute resolution. The principle of Party Autonomy is well recognized by the Supreme Court in the decisions reported as 1992 (3) SCC 551 *National Thermal Power Corporation vs. Singer Company & Ors.* and *British India Steam Navigation Company* (supra).

26. The Bombay High Court in the decision reported as 2012 (3) Mh. L.J. 94 *Sakuma Exports Ltd. vs. Louis Dreyfus Commodities Suisse SA*, held that the parties can agree and decide to which law would govern the contract in principal and/or the arbitration proceedings and the parties may decide to have different laws applicable to the contract and arbitration proceedings.

27. It is contended that Section 28 (1) (a) of the Act does not apply to foreign seated arbitration and is applicable only to Part-I of the Act. Applicability of Part-I and Part-II of the Act is not based on the nationality of the parties but solely on the territoriality as to whether the seat of arbitration is in India or not. Since as per the agreement between the parties, seat of arbitration is outside the territorial limits of India, Part-I of the Act would not be applicable. Contention on behalf of the plaintiff that Indian law must govern contract between the two Indian parties, irrespective of the seat of arbitration, would render the opening words of the Section 28 of the Act, that is, '*where the place of arbitration is situate in India*' as otiose, redundant and superfluous. This has been clarified in the decision in para-

118 of *BALCO* (supra). The two mandatory requirements of Section 28 are that both the parties should be Indian and the seat of arbitration should be in India. Even if one condition is not met, parties will not be bound to apply Indian law as the substantive law. Reliance is placed on the decisions reported as 1999 (7) SCC 61 *Atlas Export Industries vs. Kotak & Company* which was followed by the Madhya Pradesh High Court in the decision reported as 2015 SCC OnLine MP 7417 *Sasan Power Limited vs. North American Coal Corporation (India) Pvt. Ltd.* and of this Court reported as 2017 SCC OnLine Del. 11625: MANU/DE/3689/2017 *GMR Energy Ltd. vs. Doosan Power Systems India Pvt. Ltd*. The applicability of the Indian law cannot be decided merely on the basis of nationality of two contracting parties and would depend entirely on the contractual transaction which in the present case is the 'high seas sale'.

28. Under the contract between the parties, the seat of arbitration is not and cannot be at New Delhi. Clause-6 of the Contract explicitly provides that the venue of the arbitration would be London and Bylaw 300 (3) mandates that the seat of the arbitration shall be England and the exclusive jurisdiction on the arbitral process would vest in the Courts in England. Any interpretation based on Clause-7 of the agreement between the parties to contend that seat of arbitration is New Delhi would run counter to Clause-6 of the contract and would make the same redundant and nugatory and would be contrary to the clear intention of the parties as regards the seat of arbitration. Supreme Court in the decision reported as 2020 SCC OnLine SC 301 *Mankatsu Impex Pvt. Ltd. vs. Airvisual Limited* dealing with similar situation held that the words in Clause-17.1 of the contract therein do not suggest that the seat of arbitration is in New Delhi and that since the

arbitration was seated at Hong Kong in the said case, the petition filed under Section 11 (6) of the Act was not maintainable and dismissed. A harmonious construction of Clauses-6 and 7 of the agreement between the parties is required to be adopted for a meaningful construction of the two Clauses and the Clauses are required to be read as a whole and not in parts.

29. Heard learned counsels for the parties. Thus contention of learned counsel for the plaintiff in nutshell is that on reading clauses 6 and 7 of the agreement between the parties it is evident that though the venue of arbitration is in London but the seat of arbitration is India and since the ICA byelaws provide for the mandatory application of the Law of England thereby ousting the Indian Law, clause 6 of the agreement be either declared null and void or read meaningfully by striking the otiose portions of clause 6 by applying the blue pencil test. However, broadly the contention of learned counsel for the defendant is that there is no ambiguity in clause 6 and 7 of the agreement between the parties and the present suit is not maintainable as the determination sought by the plaintiff is not within the scope of Section 45 of the Act. Therefore, besides the two issues raised by the plaintiff, one more issue which needs determination on the pleadings and submissions as also for application under Section 45 of the Act filed by the defendant, is "Whether the present suit is maintainable or not in terms of Section 45 of the Arbitration and Conciliation Act, 1996, 1996? ".

30. ICA's Rules and Bylaws which are relevant for the decision of the present suit i.e. Bylaws 200,300 and 306 are as under:

> ***"Bylaw 200***
> *Every contract made under our Bylaws and Rules will be deemed to be a contract made in England and governed by English law.*

Bylaw 300

1. We will conduct arbitration in one of two ways:

- *Quality arbitrations will deal with disputes arising from the manual examination of the quality of cotton and/or the quality characteristics which can only be determined by instrument testing. Bylaws especially applicable to quality arbitrations and appeals are set out herein.*
- *Technical arbitrations will deal with all other disputes. Bylaws especially applicable to technical arbitrations are set in.*

2. The law of England and Wales and the mandatory provisions of the Arbitration Act 1996 (Act) shall apply to every arbitration and/or appeal under these Bylaws. The non-mandatory provisions of the Act shall apply save insofar as such provisions are modified by, or are inconsistent with, these Bylaws.

3. The seat of our arbitrations is in England. No one can decide or agree otherwise.

4. Disputes shall be settled according to the law of England and Wales wherever domicile, residence, or place of business of the parties to the contract may.

5. If parties have agreed to arbitration under our Bylaws, then subject to paragraph (6) below, they must not use any court at all unless we have no further power to do what is required, or the Act allows, in which case they must apply to the courts in England or Wales.

6. A party can apply to a court anywhere to obtain security for its claim while arbitration or an appeal is taking place.

7. If a party is prevented from proceeding with an arbitration as a result of the application of the provisions of Bylaw 302 (4) or Bylaw 330 (1), it is free to apply to any court which is willing to accept jurisdiction.

8. Any contract in dispute referred to us for arbitration that has not been, or will not be, performed, will not be treated as cancelled. It will be closed by being invoiced back to the seller under our Rules in force at the date of the contract.

9. After eight weeks has passed from the receipt by the Tribunal or Technical Appeal Committee of final written submissions from the parties, the Tribunal or Technical Appeal Committee will send a message to the parties providing them with an update on the status of the Award.

Bylaw 306

Without prejudice to the provisions of the Act relating to jurisdiction, the tribunal may rule on its own jurisdiction, that is, as to whether there is a valid arbitration agreement, whether the tribunal is properly constituted and what matters have been submitted to arbitration in accordance with the arbitration agreement".

Issue No.1:-

31.1 Learned counsel for the plaintiff has strenuously argued that in terms of Section 23 of the Indian Contract Act, if the contract is of such a nature that if permitted, it would defeat the provisions of law or is opposed to public policy, then, such an agreement is unlawful and void. Case of the plaintiff is that since the parties are Indian, contract was entered into in India and the performance was also in India, the two Indian parties could not have avoided the Indian law by choosing a foreign seat of arbitration and a specific foreign system of law. Such term in the contract which allows the two Indians to escape the rigors of Indian law would be directly contrary to Section 23 of the Indian Contract Act. It is stated that the parties can choose a foreign system of law to govern their contractual relationship, where performance of a contract is in India, only in two instances, firstly, cases where conflict of law rules apply which gives precedence to the choice of

law made by the parties and/or in case of an International Commercial Arbitration seated in India as set out in Section 28(1)(b) of the Act. It is submitted that the parties have the ability to choose a law of contract only when there are foreign or transnational elements in the transaction, where several laws could potentially apply to the rights and obligations of the parties.

31.2 Case of the defendant in this regard is that there is a foreign element in the contract between the parties as it is a high seas sale agreement and it was agreed to be performed on high seas, that is, outside the territorial jurisdiction of India. Therefore, there can be no derogation of the laws of India. Since at the point of actual sale as envisaged in the contract, the goods were located in international waters, there existed potential conflict of laws situation, therefore, the two Indian parties voluntarily chose to resolve all disputes by having English law as the governing law of arbitration under the ICA Bylaws and Rules.

31.3 Countering these arguments, learned counsel for the plaintiff has submitted that the argument of the defendant, thus, accepts the proposition that two Indian parties cannot agree to application of a foreign system of law unless the transaction involves a foreign element. To counter the argument of the defendant that there is a foreign element in the transaction between the parties as it is a high seas sale agreement and the property in the goods passed on to the plaintiff in international waters, plaintiff relied upon the delivery terms mentioned in the contract which states *"CIF CY Mundra, India on High-Seas Sale Basis, final place of delivery ICD Ahmedabad on cost and risk of Recipient. Risk and title of goods passes from Supplier to Recipient upon signing of high-seas sales agreement".*

31.4 According to the plaintiff, reference to High Seas sale agreement is only in the perspective as to the party which would bear the incidence of tax when the goods are imported and delivered at Mundra, India. Referring to the decision of the Constitution Bench in (1960) 2 SCR 852 *J.V.Gokal Vs. Assistant Collector of Sales Tax (Inspection) and Others*, it is stated that the import and export of goods can have an international element only when one of the party is a foreign party.

31.5 The issue raised by learned counsel for the plaintiff that *whether two Indian parties can choose a foreign system of law as the substantive law of the contract* i.e. whether two Indian parties can agree to contract out of substantive Indian law is no more res-integra having been decided by the Supreme Court, Madhya Pradesh High Court and this Court as well. In the decision reported as 1999 (7) SCC 61 *Atlas Export Industries vs. Kotak & Company* Supreme Court dealing with this issue, referring to Exception 1 to Section 28 of the Indian Contract Act held that an agreement to refer the disputes to arbitration does not imply that there is an exclusion by the agreement to have recourse to legal proceedings. It was further held that merely because arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement.

31.6 Following the decision of the Hon'ble Supreme Court in *Atlas Export* (supra) the Division Bench of the Madhya Pradesh High Court in the decision reported as 2015 SCC OnLine MP 7417 *Sasan Power Limited vs. North American Coal Corporation (India) Pvt. Ltd.* dealt with the issue raised in the present suit at length. Noting para-118 of the decision in *BALCO* (supra) it was held:

"46. Finally, in paragraph 118, the crucial part heavily relied upon by Shri. V.K. Tankha, learned Senior Advocate, reference is made to section 28, and it is held as under:

'118. It was submitted by the learned counsel for the appellants that Section 28 is another indication of the intention of Parliament that Part I of the Arbitration Act, 1996 was not confined to arbitrations which take place in India. We are unable to accept the submissions made by the learned counsel for the parties. As the heading of Section 28 indicates, its only purpose is to identify the rules that would be applicable to 'substance of dispute'. In other words, it deals with the applicable conflict of law rules. This section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide 'the dispute' by applying the Indian 'substantive law applicable to the contract'. This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations. The provision would have an overriding effect over any other contrary provision in such contract. On the other hand, where an arbitration under Part I is an international commercial arbitration within Section 2(1)(f), the parties would be free to agree to any other 'substantive law' and if not so agreed, the 'substantive law' applicable would be as determined by the Tribunal. The section merely shows that the legislature has segregated the domestic and international arbitration. Therefore, to suit India, conflict of law rules have been suitably modified, where the arbitration is in India. This will not apply where the seat is outside India. In that event, the conflict of law rules of the country in which the arbitration takes place would have to be applied. Therefore, in our opinion, the emphasis placed on the express 'where the place of arbitration is situated in India', by the learned Senior Counsel for the appellants, is not indicative of the fact that the intention of Parliament was to give an extra-territorial

operation to Part I of the Arbitration Act, 1996.' (Emphasis supplied)

47. Hon'ble Supreme Court holds that section 28 makes a clear distinction between purely domestic arbitration and international arbitration with a seat in India, and it is indicated that section 28(1)(a) makes it clear that in an arbitration under Part I to which section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide the dispute by applying the Indian substantive law applicable to the Contract. It is this part of the judgment which was heavily relied upon by Shri. V.K. Tankha, learned Senior Advocate further refers to the next sentence which says that two or more Indian parties cannot circumvent the substantive Indian Law by resorting to arbitration. By placing much emphasis on this part, learned Senior Advocate tried to indicate that the order of the learned District Judge is unsustainable.

48. However, if we further read the findings recorded by the Supreme Court in the same paragraph 118, as reproduced hereinabove, it is held by the Supreme Court that when the seat is outside India, the conflict of law rule of the country in which the arbitration takes place would have to be applied, and thereafter it is held that the expression 'whether the place of arbitration is situated in India' does not indicate the intention of the Parliament to give extra territorial operation to Part I, of the Arbitration Act of 1996. In paragraph 123 also, the matter has been considered in the backdrop of the provisions contemplated under section 28, this also makes us to come to the inevitable conclusion that the provisions of Part I will not apply where the seat of arbitration is outside India.

49. On consideration of the law laid down in the case of TDM Infrastructure (supra), we find, that the proceeding before the Hon'ble Supreme Court was with regard to appointing an arbitrator under section 11(6) and after taking note of the definition of International Commercial Arbitration as provided in section 2(1)(f), the procedure for appointment of arbitrator and the provision of section 28, it was held that Part I of the Act of 1996 deals with domestic arbitration and Part II deals with 'foreign award', and by specifically taking note of

the provisions of section 28, has held that companies incorporated in India and when both the parties have Indian nationality, then such arbitration cannot be said to be an international commercial arbitration. However, after having said so, in paragraph 23 reference is made to section 28, the intention of the legislature, to hold that two Indian nationals should not be permitted to derogate Indian Law.

50. Finally, in para 23 the following observations are made by the Supreme Court in the aforesaid case:-

> *'23. Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excluded the same from those provisions which parties derogate from (if so provided by the Act). The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian Law. This is part of the public policy of the country.*
>
> *36. It is, however, made clear that any findings/observations made hereinbefore were only for the purpose of determining the jurisdiction of this Court as envisaged under Section 11 of the 1996 Act and not for any other purpose.'*
>
> *(Emphasis Supplied)*

51. If we analyse this judgment, we find, that apart from being one rendered in a proceeding held under section 11(6), is based on the consideration made with reference to section 28(1), as is evident from paragraph 23 relied upon by Shri. V.K. Tankha and thereafter in paragraph 36, a caution is indicated with regard to applicability of this judgment. Whereas in the case of Atlas Exports (supra), we find that in Atlas Exports, in paragraphs 10 and 11, the following principles have been laid down:-

> *'10. It was however contended by the learned counsel for the appellant that the award should have been held to be unenforceable in as much as the very contract between the parties relating to arbitration was opposed to public policy under Section 23 read with Section 28 of the Contract Act.*

It was submitted that Atlas and Kotak, the parties between whom the dispute arose, are both Indian parties and the contract which had the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India should be held to be opposed to public policy. Under section 23 of the Indian Contract Act the consideration or object or an agreement is unlawful if it is opposed to public policy. Section 28 and Exception 1 to it, (which only is relevant for the purpose of this case) are extracted and reproduced hereunder:

'28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1 - This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.'

11. The case at hand is clearly covered by Exception 1 to Section 28. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute/s adjudicated by having the same referred to arbitration. Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement. Moreover, in the case at hand the parties have willing initiated the arbitration proceedings on the disputes having arisen between them. They have appointed arbitrators, participated in arbitration proceedings and

suffered an award. The plea raised before us was not raised either before or during the arbitration proceedings, nor before the learned Single Judge of the High Court in the objections filed before him, nor in the letters patent appeal filed before the Division Bench. Such a plea is not available to be raised by the appellant Atlas before this Court for the first time.' *(Emphasis supplied)*

52. In this case i.e. Atlas Exports (supra), Sections 23 and 28 of the Contract Act are considered and it is held that when a dispute arises where both the parties are Indian, and if the contract has the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India, the same is not opposed to public policy. Section 28 exception (1) of the Contract Act is taken note of and it is held that merely because the arbitrators are situated in a foreign country that by itself cannot be enough to nullify the arbitration agreement, when the parties have with their eyes open, willingly entered into an agreement. If this observation made by the Supreme Court is taken note of, we find that merely because two Indian companies have entered into an arbitration agreement to be held in a foreign country by agreed arbitrators, that by itself is not enough to nullify the arbitration agreement.

53. Shri. V.K. Tankha, learned Senior Advocate, tried to indicate that Atlas Exports (supra) case was rendered in a proceeding held under the Arbitration Act, 1940 which is entirely different from the Act of 1996 and, therefore, the said judgment will not apply in the present case. Instead, the judgment in the case of TDM Infrastructure (supra) would be applicable.

54. We cannot accept the aforesaid proposition. Shri. Anirudh Krishnan, learned counsel, had taken us through the provisions of both the Act of 1940 and the Act of 1996, and thereafter he had referred to the judgment of the Supreme Court in the case of Fuerst Day Lawson Limited (supra), where after a detailed comparison of various sections of both the Acts, from paragraphs 65 onwards, Hon'ble Supreme Court

discussed the provisions of both Acts, and finally has observed that there is not much of a difference between them. If the aforesaid judgment in the case of Fuerst Day Lawson Limited (supra) is considered, the same holds that both, the Act of 1980 and 1996 are identical and the Hon'ble Court has also indicated the similarity in both the Acts. That being so, we see no reason as to why the principle laid down of Atlas Exports (supra), which is by a Larger Bench i.e.. Division Bench, should not be applied particularly in the light of the law of precedent as laid down in the case of A.R. Antulay (supra). The contention of Shri. V.K. Tankha, learned Senior Advocate, that the learned District Judge relied upon the judgment in the case of Atlas Exports (supra) and refused to rely upon the case of TDM Infrastructure (supra) only because it is by a Single Bench is not convincing or acceptable, as the Division Bench Judgment in the case of Atlas Exports (supra) is a binding precedent and once it is held in the aforesaid case that two Indian companies can agree to arbitrate in a foreign country and the same is not hit by public policy, we see no error in the order passed by the learned District Judge.

55. That apart, we also find that in the case of TDM Infrastructure (supra), a note of caution is indicated in paragraph 36, which was added by a corrigendum subsequent to pronouncement of judgment, this clearly indicates the principle laid down by the Supreme Court was only for determining the jurisdiction under section 11 and nothing more. We need not go into the questions any further now, as we find that the judgment in the case of Atlas Exports (supra) is a binding precedent.

56. xxx

57. On going through the scheme of the Arbitration and Conciliation Act, 1996, we find that based on the seat of arbitration so also the nationality of parties, an arbitration is classified to be an 'International Arbitration', and the governing law is also determined on the basis of the seat of arbitration. Therefore, it is clear that based on the seat of arbitration, the question of permitting two Indian companies/parties to arbitrate out of India is permissible. In the

> *case of Atlas Exports (supra) itself, the principle has been settled that two Indians can agree to have a seat of arbitration outside India. Now, if two Indian Companies agree to have their seat of arbitration in a foreign country, the question would be as to whether the provisions of Part I or Part II would apply. Section 44, of the Act of 1996, contemplates a foreign award to be one pertaining to difference between persons arising out of legal relationship, whether contractual or not, which is in pursuance to an agreement in writing for arbitration, to which the convention set forth in the first schedule applies."*

31.7 The decision in *Sasan Power Limited* (supra) was taken in appeal to Supreme Court, however, the Supreme Court did not deal with the said issue as the same was given up by learned counsel for Sasan Power Limited.

31.8 This Court dealing with the same proposition i.e. whether two Indians can agree to arbitrate out of Indian law in the decision reported as 2017 (6) ArbLR 447 (Delhi): 2017 SCC OnLine Del 11625 *GMR Energy Limited vs. Doosan Power System India Ltd. & Ors.* following the decision of the Supreme Court in *Atlas Exports* (supra) and in *Sasan Power Limited* (supra) held that two Indians can agree to a foreign seated arbitration.

31.9 It is trite law as laid down by the Hon'ble Supreme Court in the decision reported as 2014 (7) SCC 603 *Reliance Industries & Anr. vs. Union of India* that when there is a foreign element to the arbitration three sets of law may apply to an arbitration, that is, proper law of the contract; proper law of the arbitration agreement/*lex arbitri*; and proper law of the conduct of arbitration/*lex fori*/curial law. It was held:

> *69. Mr Ganguli has next sought to persuade us that the seat of arbitration shall be in India as the PSC is governed by the law of India. According to Mr Ganguli, laws of India would*

include the Arbitration Act, 1996. Therefore, irrespective of the provisions contained in Article 33.12 of the Arbitration Act, 1996 would be applicable to arbitration proceedings. The English law would be applicable only in relation to the conduct of the arbitration up to the passing of the partial final award. We are unable to accept the aforesaid submissions of Mr Ganguli. As noticed earlier, Article 32.1 itself provides that it shall be subject to the provision of Article 33.12. Article 33.12 provides that the arbitration agreement contained in this article shall be governed by the laws of England. The term "laws of England" cannot be given a restricted meaning confined to only curial law. It is permissible under law for the parties to provide for different laws of the contract and the arbitration agreement and the curial law. In Naviera Amazonica SA [Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru, (1988) 1 Lloyd's Rep 116 (CA)] , the Court of Appeal in England considered an agreement which contained a clause providing for the jurisdiction of the courts in Lima, Peru in the event of judicial dispute and at the same time contained a clause providing that the arbitration would be governed by the English law and the procedural law of arbitration shall be the English law. The Court of Appeal observed as follows:

> *"All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law: (1) the law governing the substantive contract; (2) the law governing the agreement to arbitrate and the performance of that agreement; (3) the law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely (2) may also differ from (3)."*

70. From the above, it is evident that it was open to the parties to agree that the law governing the substantive contract (PSC) would be different from the law governing the arbitration agreement. This is precisely the situation in the present case. Article 32.1 specifically provides that the

performance of the contractual obligations under the PSC would be governed and interpreted under the laws of India. So far as the alternative dispute redressal agreement i.e. the arbitration agreement is concerned, it would be governed by the laws of England. There is no basis on which the respondents can be heard to say that the applicability of laws of England related only to the conduct of arbitration reference. The law governing the conduct of the arbitration is interchangeably referred to as the curial law or procedural law or the lex fori. The delineation of the three operative laws as given in Naviera Amazonica [Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru, (1988) 1 Lloyd's Rep 116 (CA)] has been specifically followed by this Court in Sumitomo [Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (1998) 1 SCC 305] . The Court also, upon a survey, of a number of decisions rendered by the English courts and after referring to the views expressed by learned commentators on international commercial arbitration concluded that: (Sumitomo Heavy Industries Ltd. case [Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (1998) 1 SCC 305] , SCC p. 315, para 16)

> *"16. The law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement."*

71. In coming to the aforesaid conclusion, this Court relied on a passage from Law and Practice of Commercial Arbitration in England, 2nd Edn., by Mustill and Boyd which is as under:

> *"An agreed reference to arbitration involves two groups of obligations. The first concerns the mutual obligations of the parties to submit future disputes, or an existing dispute to arbitration, and to abide by the award of a tribunal constituted in accordance with the agreement. It is now firmly established that the arbitration agreement which creates these obligations is a separate contract, distinct from the substantive agreement in which it is usually embedded, capable of surviving the termination of the substantive agreement and susceptible of*

premature termination by express or implied consent, or by repudiation or frustration, in much the same manner as in more ordinary forms of contract. Since this agreement has a distinct life of its own, it may in principle be governed by a proper law of its own, which need not be the same as the law governing the substantive contract.

The second group of obligations, consisting of what is generally referred to as the 'curial law' of the arbitration, concerns the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute. According to the English theory of arbitration, these rules are to be ascertained by reference to the express or implied terms of the agreement to arbitrate. This being so, it will be found in the great majority of cases that the curial law i.e. the law governing the conduct of the reference, is the same as the law governing the obligation to arbitrate. It is, however, open to the parties to submit, expressly or by implication, the conduct of the reference to a different law from the one governing the underlying arbitration agreement. In such a case, the court looks first at the arbitration agreement to see whether the dispute is one which should be arbitrated, and which has validly been made the subject of the reference, it then looks to the curial law to see how that reference should be conducted and then returns to the first law in order to give effect to the resulting award.

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It may therefore be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws:

1. The proper law of the contract i.e. the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.

2. The proper law of the arbitration agreement i.e. the law governing the obligation of the parties to

submit the disputes to arbitration, and to honour an award.

3. The curial law i.e. the law governing the conduct of the individual reference.

***

1. The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes.

2. The curial law governs the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract.

3. The proper law of the reference governs the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute.

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In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration i.e. the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings. So in order to determine the curial law in the absence of an express choice by the parties it is first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate."

(emphasis supplied)

31.10 In the decision titled *Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited and Ors. (supra)*,

the Supreme Court referring to the decision in *Eitzen Bulk A/S* v. *Ashapura Minechem Ltd.* has held as under:-

> *"15. … The following passage from Redfern and Hunter on International Arbitration contains the following explication of the issue:*
>
> > *'It is also sometimes said that parties have selected the procedural law that will govern their arbitration, by providing for arbitration in a particular country. This is too elliptical and, as an English court itself held more recently in Breas of Doune Wind Farm it does not always hold true. What the parties have done is to choose a place of arbitration in a particular country. That choice brings with it submission to the laws of that country, including any mandatory provisions of its law on arbitration. To say that the parties have "chosen" that particular law to govern the arbitration is rather like saying that an English woman who takes her car to France has "chosen" French traffic law, which will oblige her to drive on the right-hand side of the road, to give priority to vehicles approaching from the right, and generally to obey traffic laws to which she may not be accustomed. But it would be an odd use of language to say this notional motorist had opted for "French traffic law". What she has done is to choose to go to France. The applicability of French law then follows automatically. It is not a matter of choice.*
>
> *Parties may well choose a particular place of arbitration precisely because its lex arbitri is one which they find attractive. Nevertheless, once a place of arbitration has been chosen, it brings with it its own law. If that law contains provisions that are mandatory so far as arbitration is concerned, those provisions must be obeyed. It is not a matter of choice any more than the notional motorist is free to choose which local traffic laws to obey and which to disregard."*

31.11 It is thus well settled that even though an agreement to refer disputes to arbitration may be a part of the substantive contract, however, the said agreement is independent of the substantive contract and survives despite termination or repudiation or frustration of the substantive contract. Thus an arbitration agreement/clause does not govern the rights and obligations arising out of the substantive contract and only governs the manner of settling disputes between the parties. Since the arbitration agreement is an independent agreement, it may be governed by a proper law of its own which need not be the same law as governing the substantive contract.

31.12 Though learned counsel for the plaintiff strongly refutes that there is no foreign element in the present contract and thus two Indian parties cannot contract out of Indian law however, the relationship between the parties has to be seen on the basis of the terms of agreement executed between the parties and not the breach thereof. The contract dated 30th May, 2019 executed between the plaintiff and defendant notes supplier as the defendant and recipient as the plaintiff. The delivery terms clearly note CIF CY Mundra, India on High-Seas Sales Basis, final place of delivery ICD Ahmedabad on cost and risk of recipient, risk and title of goods passes from supplier to recipient upon signing of high-seas sales agreement. The terms of the payment provide (a) 10% of the contract value shall be paid by the recipient to supplier within three days from contract date on the mean contract quantity, as initial margin money towards performance of this contract; (b) balance payment to be remitted by way of Bank Transfer/RTGS 10 days prior to arrival of the carrying vessel at the discharge port and prior

to signing of high seas sale agreement. Other terms and conditions of the contract dated 30th May, 2019 are:

1. *All duties, taxes, market cess/fees or any other statutory levies and expenses at the destination port whether present or future will be on Recipient's account*
2. *USDA government class final as per recap(s). No quality claim.*
3. *All Shipping line charges such as THC charges, Delivery order charges, Container cleaning & repair charges, etc. at destination port will be on recipient's account.*
4. *Goods being sold on high seas, recipient shall make their own arrangements for customs & port clearance of the goods at their own cost & responsibility, recipient shall provide to SUPPLIER the original Exchange Control Copy of Bill of Entry within 15 days of clearance of the goods from Customs/Ports.*
5. *In the event of non-payment for the goods by the recipient to supplier either in full or part as per terms of this contracts supplier may take steps at their own discretion as appropriate to protect their interests including but not limited to sale of the goods covered under this contract in the market and recover the market price difference, other costs in doing so from the margin money deposit.*
6. *Any dispute arising out of this contract shall be resolved through arbitration in accordance with ICA (International Cotton Association) rules & arbitration procedure. Venue of arbitration shall be London.*
7. *Only the courts in New Delhi will have jurisdiction.*

31.13 It is thus evident that the complete payment was to be made when the goods were in transit and 10 days prior to the arrival of the vessel carrying at the discharge port and thus not in the territorial waters of India. The plaintiff having breached the contract at that stage and not having paid the balance consideration, consequently, no high seas sales agreement was

entered into. However, a subsequent breach will not modify the terms and conditions of the agreement between the parties. Further, if the general practice for trading in American Cotton is that parties subject themselves to arbitration under the ICA byelaws, it cannot be held that the two Indian parties, were precluded from entering into an agreement for a foreign seated arbitration under the ICA byelaws.

31.14 Learned counsel for the plaintiff has heavily relied upon Section 23 of the Contract Act which provides for considerations and object which are lawful and which are not, thus emphasizing that two Indian parties contracting out of Indian law would defeat the provisions of the law and would be opposed to public policy. Learned counsel for the plaintiff seeks either declaration of Clause 6 of the agreement between the parties as null and void or by applying the Blue Pencil Test give meaningful interpretation to clause-6 whereby the parties can then subject themselves to the jurisdiction of Indian Cotton Association. Three Judge Bench of the Hon'ble Supreme Court in 2017 (2) SCC 228 *Centrotrade Minerals and Metal Inc.vs. Hindustan Copper Ltd.* emphasized the principle of party autonomy in arbitration and held that the same is virtually the backbone which permit parties to adopt the foreign law as the proper law of arbitration. In (2005) 5 SCC 465 *Technip SA vs. SMS Holding Pvt. Limited & Ors.*, a three Judge Bench of the Hon'ble Supreme Court dealing with the conflicts of law held that disregard of applicability of foreign law must relate to basic principles of morality and justice and only when the foreign law amounts to a flagrant or gross breach of such principle that power should be exercised to hold inapplicability of foreign law that too, exceptionally and with great circumspection. It was held that in a sense all statutes enacted by Parliament

or the States can be said to be part of Indian public policy, but to discard a foreign law only because it is contrary to an Indian statute would defeat the basis of private international law to which India undisputedly subscribes.

31.15 Contention of learned counsel for the plaintiff is that the reference to high seas sales agreement in the contract is only there from the perspective of determining under Indian Law which party bears the incidence of tax when the goods are imported and delivered at Mundra, India and this mechanism is simply a trade facilitative mechanism recognized under Indian law. The plaintiff has relied upon the decision of the Constitution Bench reported as 1960 (2) SCR 852 *J.V. Gokal vs. Assistant Collector of Sales Tax (Inspection) & Ors.* in this regard. In *J.V. Gokal* (supra) Supreme Court dealing with the question as to when it can be said that sales take place in the course of import journey, noted the distinction when the goods were sold through agents viz-a-viz goods sold directly. It was held that in the case of goods purchased when they are on the high seas and shift from foreign country to India and a commission agent takes delivery of the shipping documents, the commission agent merely acted as agent of the respondents therein and the said purchases occasioned the import. However, this principle would not apply to a case where the goods were sold by an importer in India to a third party when the goods were on the high seas. In the present case, the parties in the contract dated 30th May, 2019 clearly noted the place beyond the territorial waters of Indian where the property in goods would pass from the defendant to the plaintiff. In view of the express terms stipulated, no further interpretation as to when the property in the goods was to pass on the plaintiff is required to be adverted to.

31.16 Learned counsel for the plaintiff rebutting the arguments of the learned counsel for the defendant relying upon the decision of the Calcutta High Court in the decision reported as 1997 SCC OnLine Cal 240 *Punit Beriwala vs. Suva Sanyal & Anr.* has canvassed that a mere agreement to agree is not enforceable in a Court of Law. He thus contends that since there was merely an agreement to enter into a high seas sales agreement, which was never entered into, the same was akin to an agreement to agree which is unenforceable in the Court of law. Hence the reliance of the defendant that the agreement between the parties was a high seas sales agreement is erroneous. This contention of the learned counsel for the plaintiff ignores the fact that pursuant to the contract dated 30th May, 2019 between the parties, the plaintiff had paid the advance payment in terms of sub-clause (a) and pursuant thereto the goods had been shipped by the defendant. The property in the goods was to pass within ten days prior to the arrival of the goods at Mundra Port in India and the defendant having complied with his terms of the contract by shipping the goods to the plaintiff, the agreement to enter into a high seas sales agreement pursuant thereto was one of the obligations under the contract and not merely an agreement to agree and thus unenforceable.

31.17 Learned counsel for the plaintiff further relies upon the so called admission as also a *sub-silencio* novation of the contract, for the reason the custom clearance was done by the defendant who was storing the goods in its warehouse as also the bill of lading was in the name of the defendant. As per the agreement between the parties the goods were then to be transferred to the plaintiff. The plaintiff further contends that the sale of transfer of goods from original importer, that is, the one whose name was on

the bill of lading, to another is an inter-state sale/local sale and not a high seas sale. The fact whether the plaintiff and defendant performed a high seas sales agreement or not would not determine the ambit of Clause-6 of the agreement between the parties. Intention of the parties as on the date when they entered into the contract dated 30th May, 2019 has to be deciphered from which it is evident that the parties were performing a high seas sales agreement. The plaintiff having not fulfilled its obligation of making payments ten days prior to the reaching of the goods at the Mundra Port, the fact that subsequently custom duty was paid by the defendant or that the bill of lading was entered into in the name of the defendant would not furnish a contrary intention to the terms of agreement between the parties that the agreement was for a high seas sales agreement. The plaintiff having committed breach of contract, the plaintiff cannot take the plea of subsequent novation of the contract and thereby contend that the agreement between the parties was not a high seas sales agreement.

31.18 Therefore, an arbitration agreement between the parties being an agreement independent of the substantive contract and the parties can choose a different governing law for the arbitration, two Indian parties can choose a foreign law as the law governing arbitration. Further there being clearly a foreign element to the agreement between the parties, the two Indian parties, that is the plaintiff and defendant could have agreed to an international commercial arbitration governed by the laws of England. Hence Clause 6 of the contract dated 30th May, 2019 between the parties is not null or void.

Issue No.2:-

32.1 Learned counsel for the plaintiff further contends that in terms of Clause 7 of the contract "only the Courts in New Delhi will have the jurisdiction". Thus the Courts at New Delhi being vested with the exclusive jurisdiction, the same amounts to the parties agreeing to have the seat of arbitration at New Delhi with venue at London. According to learned counsel for the plaintiff this is the only harmonious and logical construction of Clause 6 and 7 of the contract dated 30th May, 2019 between the parties and to give a harmonious interpretation to Clause 7 of the contract, this Court will strike down the illegal portion of Clause 6 of the contract by applying the Blue Pencil Test laid down by the Supreme Court in 2006 (2) SCC 628 *Shin Satellite Public Co. Ltd. vs. Jain Studios Ltd.*

32.2 Rebutting the contentions of learned counsel for the defendant that there is no reason to read down Clause 7 as the same covered only ancillary issues which were not covered by the scope of Clause 6, learned counsel for the plaintiff relies upon the decision in *BGS SGS Soma JV* (supra) wherein the Hon'ble Supreme Court referring to the Constitution Bench decision in BALCO in respect of seat of arbitration, held in para 38 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 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. However, in the decision Hon'ble Supreme Court further held:

> *"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)] (Para 3.51), 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).]

These observations were subsequently followed in Union of India v. McDonnell Douglas Corpn. [(1993) 2 Lloyd's Rep 48]

xxx

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.

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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.

32.3 However, in *BGS SGS Soma JV* (supra) Supreme Court further reiterated the law that the judgements of the Court are not to be construed as statutes nor are they to be read as *Euclid's theorems*. On reading paras 75, 75, 96, 110, 116, 123 and 194 of BALCO, Supreme Court held that Section 2(1)(e) has to be construed keeping in view Section 20 of the Arbitration Act, 1996 which gives recognition to party autonomy, the Arbitration Act, 1996 having accepted the territoriality principle in Section 2(2) following UNCITRAL Model Law and that a narrow construction of Section 2(1)(e) was expressly rejected by the Constitution Bench in *BALCO*. Noting the distinction between 'venue' and 'seat', Supreme Court in para 60 and 61 finally held as under:-

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

32.4 In *Mankatsu Impex Private Limited* (supra), clause 17.1 of the MoU between the parties stipulated that the MoU was governed by the laws of India and the Courts at New Delhi have the jurisdiction. Contention of learned counsel for the petitioner therein was that the parties agreed to Hong Kong as the venue of arbitration only and not the juridical seat of arbitration. Supreme Court thus noted the question of law before the Court in the said decision as under:-

"*15. The question falling for consideration in the present case is, in view of Clause 17.2 of the MoU whether the parties have agreed that the seat of arbitration is at Hong Kong and whether this Court lacks jurisdiction to entertain the present petition filed under Section 11 of the Arbitration and Conciliation Act, 1996*."

32.5 Noting clause 17 of the MoU which was relevant for the decision, Hon'ble Supreme Court in *Mankatsu Impex Private Limited* (supra) held that the words "place of arbitration shall be Hong Kong" have to be read with Clause 17.2 which provides that any dispute transferred, difference arising out of or relating to the MoU shall be referred to and finally resolved by arbitration administered in Hong Kong. It was thus held:

"17. In the present case, Clause 17 of MoU is a relevant clause governing the law and dispute resolution. Clause 17 reads as under:

17. Governing law and dispute resolution

17.1. This MoU is governed by the laws of India, without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction.

17.2. Any dispute, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered in Hong Kong.

The place of arbitration shall be Hong Kong.

The number of arbitrators shall be one. The arbitration proceedings shall be conducted in English language.

17.3. It is agreed that a party may seek provisional, injunctive, or equitable remedies, including but not limited to preliminary injunctive relief, from a court having jurisdiction, before, during or after the pendency of any arbitration proceeding.

x x x

19. The seat of arbitration is a vital aspect of any arbitration proceedings. Significance of the seat of arbitration is that it determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award. The situs is not just about where an institution is based or where the hearings will be held. But it is all about which court would have the supervisory power over the arbitration proceedings. In Enercon (India) Ltd. v. Enercon GmbH [Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , the Supreme Court held that : (SCC pp. 43 & 46, paras 97 & 107)

> *"[T]he location of the seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. It was further held that the seat normally carries with it the choice of that country's arbitration/curial law."*

(emphasis supplied)

x x x

21. In the present case, the arbitration agreement entered into between the parties provides Hong Kong as the place of arbitration. The agreement between the parties choosing "Hong Kong" as the place of arbitration by itself will not lead to the conclusion that the parties have chosen Hong Kong as the seat of arbitration. The words, "the place of arbitration" shall be "Hong Kong", have to be read along with Clause 17.2. Clause 17.2 provides that "... any dispute, controversy, difference arising out of or relating to MoU shall be referred to and finally resolved by arbitration administered in Hong Kong….". On a plain reading of the arbitration agreement, it is clear that the reference to Hong Kong as "place of arbitration" is not a simple reference as the "venue" for the arbitral proceedings; but a reference to Hong Kong is for final resolution by arbitration administered in Hong Kong. The agreement between the parties that the dispute "shall be referred to and finally resolved by arbitration administered in Hong Kong" clearly suggests that the parties have agreed that the arbitration be seated at Hong Kong and that laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award.

22. As pointed out earlier, Clause 17.2 of MoU stipulates that the dispute arising out of or relating to MoU including the existence, validity, interpretation, breach or termination thereof or any dispute arising out of or relating to it shall be referred to and finally resolved by the arbitration administered in Hong Kong. The words in Clause 17.2 that "arbitration administered in Hong Kong" is an indicia that the seat of arbitration is at Hong Kong. Once the parties have chosen "Hong Kong" as the place of arbitration to be administered in Hong Kong, the laws of Hong Kong would govern the arbitration. The Indian courts have no jurisdiction for appointment of the arbitrator.

x x x

25. Clause 17.1 of MoU stipulates that MoU is governed by the laws of India and the courts at New Delhi shall have jurisdiction. The interpretation to Clause 17.1 shows that the

substantive law governing the substantive contract are the laws of India. The words in Clause 17.1, "without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction" has to be read along with Clause 17.3 of the agreement. As per Clause 17.3, the parties have agreed that the party may seek provisional, injunctive or equitable remedies from a court having jurisdiction before, during or after the pendency of any arbitral proceedings.
In BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] , this Court held that : (SCC p. 636, para 157)

> *"157. ... on a logical and schematic construction of the Arbitration Act, 1996, the Indian courts do not have the power to grant interim measures when the seat of arbitration is outside India."*

If the arbitration agreement is found to have seat of arbitration outside India, then the Indian courts cannot exercise supervisory jurisdiction over the award or pass interim orders. It would have, therefore, been necessary for the parties to incorporate Clause 17.3 that parties have agreed that a party may seek interim relief for which the Delhi courts would have jurisdiction.

26. In this regard, we may usefully refer to the insertion of proviso to Section 2(2) of the Arbitration Act, 1996 by the Amendment Act, 2015. By the Amendment Act, 2015 (w.e.f. 23-10-2015), a proviso has been added to Section 2(2) of the Act as per which, certain provisions of Part I of the Act i.e. Section 9 — interim relief, Section 27 — court's assistance for evidence, Section 37(1)(a) — appeal against the orders and Section 37(3) have been made applicable to "international commercial arbitrations" even if the place of arbitration is outside India. Proviso to Section 2(2) of the Act reads as under:

*"2. Definitions.—(1) * * **

(2) Scope.—This Part shall apply where the place of arbitration is in India:

Provided that subject to an agreement to the contrary, the provisions of Sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 shall also apply to

international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."

It is pertinent to note that Section 11 is not included in the proviso and accordingly, Section 11 has no application to "international commercial arbitrations" seated outside India."

32.6 In *IMAX Corporation* (supra) Supreme Court further held:

35. The relationship between the seat of arbitration and the law governing arbitration is an integral one. The seat of arbitration is defined as the juridical seat of arbitration designated by the parties, or by the arbitral institution or by the arbitrators themselves, as the case may be. It is pertinent to refer to the following passage from Redfern and Hunter on International Arbitration [Redfern and Hunter on International Arbitration, 5th Edn. (Oxford University Press, 2009)]:

> *"This introduction tries to make clear, the place or seat of the arbitration is not merely a matter of geography. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated:*
>
> *When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and the arbitrators.*
>
> *The seat of arbitration is thus intended to be its centre of gravity."*

32.7 Thus even if in Clause 6 of the agreement between the parties the

term 'Venue' has been used, by agreeing to conduct the arbitration through ICA the parties have agreed that the seat of arbitration would be London and not Delhi even though by Clause 7 the Substantive Law of the contract is Indian Law and parties have agreed to exclusive jurisdiction of the Courts at Delhi. Since as per clause 6 of the contract between the parties it has been specifically agreed that any dispute arising out of this contract shall be resolved through arbitration in accordance with International Cotton Association Rules and arbitration procedure, the parties have thus agreed to abide by the rules and byelaws of the ICA which provide that the seat of arbitration is in London and the law of England and Wales shall apply to every arbitration and/or appeal under these byelaws. Clause 7 entered into between the parties would be relevant if by an agreement both parties decide not to settle their disputes through arbitration but by approaching the Court of law, in which case the exclusive jurisdiction would be of the Courts at New Delhi.

32.8 Therefore, in view of the above discussion, express designation of jurisdiction of a Court at New Delhi under Clause 7 of the contract dated 30th May, 2019 is not determinative of the seat of arbitration.

Issue No.3:-

33.1 Having held that two Indian parties can agree to submit to foreign jurisdiction for arbitration and in terms of Clause 6 of the contract between the parties, the seat of arbitration and not merely the venue is at London, the issue which would thus arise is whether the present suit is maintainable in terms of requirement of Section 45 of the Act i.e. whether it is for this Court or the Arbitrator to determine whether the agreement between the plaintiff and defendant is a high seas sale agreement or not or

whether any foreign element is involved or not in the agreement between parties.

33.2 To contend that the validity of the arbitration agreement has to be gone into by this Court, learned counsel for the plaintiff relies upon the decision in *SBP & Co. Vs. Patel Engineering (supra),* wherein, in para 19, it was held as under:-

> *"19. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the Arbitral Tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (see Fair Air Engineers (P) Ltd. v. N.K. Modi [(1996) 6 SCC 385] When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. ...".*

33.3 Learned counsel for the plaintiff also relies upon the decision in *Sabbagh Vs. Khoury & Others (supra),* wherein, it was held:-

> *"1. This is an appeal against the grant of an injunction to restrain the appellants from pursuing an arbitration in Lebanon. The judge held that the claims made in the arbitration were not within the arbitration agreement relied upon by the appellants and duplicated claims made in proceedings properly brought by the respondent in England. The injunction was granted on the basis that continuation of the arbitration would thus be vexatious and oppressive. The issues raised on the appeal include whether the court has jurisdiction on these grounds to grant an injunction to restrain an arbitration with a foreign seat and, if so, whether the jurisdiction is limited to cases where England is the natural forum for the underlying dispute.*
>
> *XXX XXX XXX*
>
> *115. For the reasons given above, I reject the submissions, first, that the English court has no jurisdiction to grant an anti-arbitration injunction on grounds that the arbitration is or would be vexatious and oppressive and, second, that any such jurisdiction is exercisable only if England is the natural forum for the dispute."*

33.4 Even if the contentions of the plaintiff is accepted that the contract stood novated by the parties whereby instead of a high seas sale, the contract can be considered as a local sale as the defendant by its e-mail dated 10th September, 2019 admitted that the sale was local sale and the plaintiff was to pay defendant price of the goods along with the custom duty and 5% GST, the issue before this Court is not whether it is a high seas sale or local sale, but, whether the Arbitral Tribunal has jurisdiction to decide the issue or not. In this regard, it would be appropriate to note Section 45 of the Arbitration and Conciliation Act, which reads as under:

> *"45. Power of judicial authority to refer parties to arbitration. —Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in*

respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

33.5 In *Sasan Power Limited* (supra) Hon'ble Supreme Court dealing with scope of consideration under Section 45 of the Act held:

49. In our opinion, the scope of enquiry (even) under Section 45 is confined only to the question whether the arbitration agreement is "null and void, inoperative or incapable of being performed" but not the legality and validity of the substantive contract.

50. The case of the appellant as disclosed from the plaint is that Article X Section 10.2 is inconsistent with some provisions of the Indian Contract Act, 1872, and hit by Section 23 of the Indian Contract Act (as being contrary to public policy). It is a submission regarding the legality of the substantive contract. Even if the said submission is to be accepted, it does not invalidate the arbitration agreement because the arbitration agreement is independent and apart from the substantive contract. All that we hold is that the scope of enquiry under Section 45 does not extend to the examination of the legality of the substantive contract. The language of the section is plain and does not admit of any other construction. For the purpose of deciding whether the suit filed by the appellant herein is maintainable or impliedly barred by Section 45 of the 1996 Act, the Court is required to examine only the validity of the arbitration agreement within the parameters set out in Section 45, but not the substantive contract of which the arbitration agreement is a part.

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52. The stipulation regarding the governing law contained in Article XII Section 12.1 is an independent stipulation applicable to both the substantive agreement and the arbitration agreement. Either of the agreements can survive in an appropriate case without the other. For example, if in a

given case, (of a cross-border contract) parties can agree upon for the governing law but do not have any agreement for settlement of dispute through arbitration, it would not make any legal difference to the governing law clause (if otherwise valid) and bind the parties. The judicial forum before which the dispute (if any arises) falls for adjudication is normally obliged to apply such chosen governing law—a principle of international law recognised by this Court [Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737"76.4. ... Therefore, the remedy against the award will have to be sought in England, where the juridical seat is located. However, we accept the submission of the appellant that since the substantive law governing the contract is Indian law, even the courts in England, in case the arbitrability is challenged, will have to decide the issue by applying Indian law viz. the principle of public policy, etc. as it prevails in Indian law." (SCC p. 639, para 76.4)] . Similarly, it is possible in a given case, parties to a substantive contract in a cross-border transaction agree for the resolution of the disputes, if any, to arise out of such contract through arbitration without specifying the governing law. In such case, it would be the duty of the arbitrator to ascertain the "proper law" applicable to the case in terms of the established principles of international law. It is also possible that in a given case parties agree that the governing law of the substantive contract be that of one country and the governing law of the arbitration agreement be of another country [In fact, the transaction which was the subject-matter of dispute in Union of India v. Reliance Industries Ltd., (2015) 10 SCC 213 is one such. The substantive agreement is governed by the Indian law and the arbitration agreement by the law of England. See para 2 of the said judgment.] . The principles of law in this regard are well settled. In all of the cases, the validity of either of the clauses/agreements does not depend upon the existence of the other.

53. Therefore, the examination of the question of consistency of Article X Section 10.2 (part of the substantive contract) with Section 23 of the Contract Act is beyond the scope of the

enquiry while adjudicating the validity of the arbitration agreement either under Section 45 or Section 8 (amended or original) of the 1996 Act. Therefore, the submissions of the appellant in this regard are required to be rejected.

33.6 This Court in the decision reported 2009 (108) DRJ 404 *W.P.I.L Vs. NTPC Ltd. and Ors*. dealing with Section 45 of the Act, held as under:-

> *"26. ... Now, Section 45 obligates every judicial authority in India (which, concededly this court is) to refer the parties to arbitration, if they have agreed to be governed by arbitration agreements, which would be covered by Section 44. The obligation is an overriding one, apparent from the non-obstante clause, and the mandatory "shall" occurring in the provision. The only qualifications, relieving the court from its duty to refer the parties to arbitration, is if it is convinced that the agreement is "null and void, inoperative or incapable of being performed (Section 45). Shinetsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. & Anr., 2005 (7) SCC 234 is a three judge decision on the overriding nature of the court's obligation; though there is a plurality of views in the Bench decision on other issues, on this question, the judges were unanimous."*

33.7 The Division Bench of this Court *McDonalds India Pvt. Ltd. vs. Vikram Bakshi & Ors*. (supra) held:

> *44. In another decision referred to by the respondents, which was of a learned single Judge of the High Court in Calcutta in the case of the Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS: G.A. No. 1997/2014 in CS No. 220/2014, the circumstances under which an anti-arbitration injunction could be granted were summarised as under:-*
>
> *"(i) If an issue is raised whether there is any valid arbitration agreement between the parties and the Court is of the view that no agreement exists between the parties.*
>
> *(ii) If the arbitration agreement is null and void, inoperative or incapable of being performed.*
>
> *(iii) Continuation of foreign arbitration proceeding might be oppressive or vexatious or unconscionable."*

45. It would be noticed straightaway that the points (i) and (ii) extracted above are essentially taken from Section 45 of the 1996 Act. The only addition being point No. (iii) where it was submitted that an anti-arbitration injunction could be granted if the continuation of 'foreign' arbitration proceedings were to be oppressive, vexatious or unconscionable.

52. It is also important to note that although the competence-competence principle was applicable and the arbitral tribunal had the requisite competence to determine its own jurisdiction, the courts in England retained the jurisdiction to determine the issue as to whether there was ever an agreement to arbitrate. In our view, the same principle would apply insofar as the courts in India are concerned. The courts in India would certainly have the jurisdiction to determine the question as to whether an arbitration agreement was void or a nullity. But, that is not the case here.

33.8 In the decision reported as 2011 SCC OnLine Del. 3050 <u>*Devender Kumar Gupta vs. Reaology Corporation*</u> the Division Bench of this Court held:

"13. In the impugned Judgment, the learned Single Judge has applied the Division Bench Judgment in Spentex as also the Single Judge decision in Roshan Lal Gupta v. Parasram Holdings Pvt. Ltd., 2009 (157) DLT 712. The first feature to be noted is that Roshan Lal deals with a domestic arbitration and, therefore, Section 45 of the A & C Act was not in contemplation. The learned Single Judge, inter alia, concluded that the word 'party' in Section 8 of the A & C Act refers to a party to the suit in contradistinction to a party to the arbitration agreement. The learned Single Judge, in the impugned Judgment, has dismissed the applications seeking interim relief but inexplicably has kept the Suit alive for further consideration. The learned Single Judge was statutorily bound to return a finding with regard to whether or not the action or suit was the subject, matter of an arbitration agreement. In the facts of the case before us, since we are dealing with an international commercial arbitration, Section 45 of the A & C

Act comes into play. After considering all the complexities in the case, one of us had concluded in Bharti that a formal application under Section 45 of the A & C Act was not necessary, since it is incumbent for a Court seised of an action in a matter in respect of which the parties have made an arbitration agreement as envisaged in Section 44, to refer the parties to arbitration except if the Court finds that the said agreement is null and void, inoperative and incapable of being performed. The dismissal of the Suit or the rejection of the application for interim relief under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC) has the effect of referring the parties to arbitration. By sagaciously not making a statement under Section 8 of the A & C Act, the Defendant has achieved indirectly what he could not have achieved directly, namely, making it inevitable for the Plaintiff to join arbitral proceedings without any consideration or adjudication of its plea that no arbitration agreement exists between the parties. It is for this reason that it seems to us essential that the Court should have proceeded under Section 8 or Section 45 of the A & C Act, as the case may be and with a view to return a finding on the existence of an arbitration agreement between the parties. If the prima facie finding is in favour of the existence of an arbitration agreement, the Court would rightly leave it to the Arbitral Tribunal to go into and determine the details and the minute objections raised by the Plaintiff. The Court ought not to skirt this issue, as it would tantamount to running counter to the decisions of the Supreme Court in I vaerner, SBP and Sukanya."

33.9 As noted above, the scope of interference by the Court in an International Arbitration is limited to the Court determining, whether a valid arbitration agreement exists between the parties and that the agreement is null and void, inoperative or incapable of being performed and the Court cannot, at this stage, enter into a full-fledged inquiry on merits of the matter as only a prima facie finding is required to be arrived at. Indubitably, an arbitration agreement exists between the parties and this Court has already

held that Clause 6 of the Contract between the plaintiff and defendant is neither null nor void nor inoperative nor incapable of being performed, thus this Court cannot go into any further inquiry.

34. The plaintiff and the defendant, thus, having chosen a foreign system of arbitration with open eyes, the agreement between the parties for resolution of the disputes through arbitration in accordance with ICA rules and arbitration proceedings cannot be held to be null and void or inoperative, warranting this Court to grant an anti-arbitration injunction to the plaintiff.

35. Hence, the suit and I.A. 6298/2020 under Order XXXIX Rule 1 and 2 CPC and I.A. 6299/2020 under Order II Rule 2 CPC are dismissed as not maintainable and I.A. 6701/2020 under Section 45 of the Arbitration and Conciliation Act is disposed of.

(MUKTA GUPTA)
JUDGE

NOVEMBER 24, 2020
'vn/akb'