A.F.R.

Reserved on 04.03.2022
Delivered on 01.09.2022

Case :- MATTERS UNDER ARTICLE 227 No. - 24693 of 2020
Petitioner :- M/S Zapdor-Ubc-Abnjv Delhi
Respondent :- U.O.I. Thru.General Manager Northern Railway New Delhi And Ors
Counsel for Petitioner :- Anil Srivastava,Divyam Krishna,Utkarsh Srivastava
Counsel for Respondent :- Mrs.Suniti Sachan,Brijesh Kumar Shukla,Pratyush Chaube

Hon'ble Mrs. Sangeeta Chandra,J.

1. Heard Sri Divyam Krishna and Sri Utkarsh Srivastava for the Petitioners and Sri Brajesh Kumar Shukla along with Pratyush Chaubey for the Respondents. The Petitioners have challenged the order passed by the Learned District Judge/Commercial Court, Lucknow dated 12.12.2019 rejecting the Petitioners Application for Return of Arbitration Application filled under Section 34 by the Railways against Award of the Arbitral Tribunal dated 06.03.2019 , and allowing the Application for Condonation of Delay moved by the Respondents.

2. The facts as mentioned in the petition briefly are that on 30.10.2015 the Respondents floated a Tender Notice entitled "Design, Supply, Erection, Testing and Commissioning of 25 KV, 50 Hz Single Phase, Electrification works including OHE And TSS composite Electrical Works (hereinafter referred to as the Tender Paper ELCORE) The Petitioner's bid was adjudged viable and a Letter of Acceptance awarding the contract for a total value of more than Rs.30 crores 27 lakhs was

issued by the Chief Electrical Engineer/P&D Central Organisation for Railway Electrification (CORE) at Allahabad 19.04.2016. An Agreement was executed on 14.7.2016 between the Petitioner and Chief Project Director Railway Electrification Lucknow, as the contract was to be operated for the composite electrification works in Jafrabad – Akbar Pur – Tanda Section under the supervision and control of Divisional Headquarters at Lucknow.

3. The contract was terminated by the Respondents because of slow progress as only 8 % of the work was completed in seven and a half months as opposed to hundred percent target for fifteen months.

4. The Petitioner invoked the Arbitration clause and Arbitral Tribunal was constituted through letter dated 01.12.2017 comprising of Three senior officers of the Railways. The entire arbitral proceedings were conducted in New Delhi at the CORE office. The Arbitral Tribunal rendered an Award of more than three crore rupees along with interest at the rate of 10% in favour of the Petitioner which was signed and delivered at New Delhi on 6 March 2019. Arbitration Application No. 925 of 2019 was filed on 30 August 2019 under Section 34 of the Arbitration and Conciliation Act 1996 (hereinafter referred to as "the 1996 Act") by the Respondents against the Arbitral Award before the Commercial Court at Lucknow along with an Application for Condonation of Delay duly supported by an affidavit. Subsequently the Petitioner preferred an Execution petition/Enforcement Application under Section 36 of the 1996 Act before the High Court at Delhi on 17.09.2019. The Petitioner filed an Application for Return of Arbitration Application on 19.11.2019. It also moved an Application containing objections to the

Application for Condonation of Delay in the Section 34 Application. A Reply to both the Applications was filed by the Respondents on 04.12.2019. The Learned Commercial Court by its order dated 12.12.2019 rejected the Petitioner's Application for Return of Arbitration Application, and allowed the Application for Condonation of Delay moved by the Respondents by a composite order.

5. It is the case of the Petitioners that such order has been passed by the Commercial Court at Lucknow exercising a jurisdiction not vested in it by law, causing grave injustice to the Petitioner and no Appeal under Section 37 of the Act of 1996 lies against the impugned order so far as return of plaint (Arbitation Application) under Section 34 of the Act read with Order VII Rule 10 CPC is concerned. Hence, a petition under Article 227 of the Constitution of India has been filed before this Court. It is the case of the Petitioners that Clause 4.0 of the Letter of Acceptance dated 19.04.2016 specifically mentioned "the contract shall be governed by the terms and conditions given in the Tender Paper Number ELCORE/OHE and TSS/group 199 with ANC slip number 1".

The agreement executed between the parties after Letter of Acceptance also referred to the said Tender Paper as governing the contract. The Tender Paper ELCORE contains the subclause 1.2 .54 which provides under subclause (k) the "*Venue for Arbitration shall be the place from which the Letter of Acceptance of Tender is issued or such other place as the purchaser at his discretion may determine.*"

6. The learned counsel for the Petitioners argued that the arbitral proceedings were held exclusively at New Delhi and the Arbitral Award was signed and delivered

at New Delhi hence the Commercial Court at Lucknow lacked territorial jurisdiction to entertain the Application under Section 34 of the Act of 1996. The supervisory territorial jurisdiction for the purposes of Section 34 cannot be determined on the basis of location of cause of action. As per clause 1.2 .54 (K) the place of Arbitration can be either at Prayagraj where the Letter of Acceptance was issued or at New Delhi where the Arbitration was actually held and Award delivered. In so far as Section 34 of the Act of 1996 is concerned no part of cause of action arose within the territorial jurisdiction of the Commercial Court at Lucknow. The Learned Commercial Court has relied upon General Conditions of Contract and Clause 64 (i) (iii) (d) which provides- *"The place of Arbitration "would be within the geographical limits of the Division of the Railway where the cause of action arose, or the headquarters of the concerned, or any other place with the written consent of both the parties."*

7. It has been argued that the Learned Commercial Court has erroneously interpreted paragraph 96 of the judgement rendered by the Constitution Bench in ***Bhartiya Alluminium Company Ltd. vs Kaiser Aluminium Technical Services*** **2012 (9) SCC 552**; to say that supervisory territorial jurisdiction for the purpose of Section 34 accrues to Courts situated both at the place of Arbitration, as well as where the cause of action has occurred. In other words, the jurisdiction is concurrent and not exclusively restricted to those courts located in place of Arbitration agreed to by the parties. Such an interpretation of paragraph 96 of *BALCO* (supra) is against a long line of judgements rendered by the Supreme Court and by various High Courts interpreting paragraph 96 to hold that

supervisory jurisdiction under Section 34 is not concurrent and must be restricted to Courts in the location selected by the parties as place of Arbitration exclusively, irrespective of where the cause of action arose.

8. The Learned counsel for the Petitioner has placed reliance upon paragraphs 20, 45, 54, 57, 58, 82, 97 and 98 of the judgement rendered by the Supreme Court in ***BGS SGS Soma JV versus NHPC Ltd,*** **2004 (4) SCC 234;** and has also placed reliance upon paragraph 19, 22 and 31 of judgement rendered by the Supreme Court in ***QUIPPO Construction Equipment Ltd versus Janardan Nirman Private Limited (2020) SCC online SC 419***; and ***Om Prakash and others versus Vijay Dwarka Dass Verma 2020 SCC online Bombay 796, L&T Finance Vs. Manoj Pathak (2020) SCC online Bombay 177*** and ***TNGQ Projects Ltd. Vs. Balaji Projects (2021) SCC Online Madras 409.***

9. It has been argued by the learned counsel for the Petitioner that the clauses of contract are determinative of the seat of Arbitration. The seat of Arbitration alone would be important for determination of the place where Section 34 Application would lie. He has also argued that where the clauses of contract leave it open for the parties to choose, and the contract did not specifically mention some place, even then the conduct of the parties would determine the seat of Arbitration. It has been argued that the parties when they entered into the contract had referred to two clauses, the first clause in the Tender Document itself i.e. clause 1.2 .54 (K) related to the Venue of Arbitration being either at Allahabad or at a place determined by the purchaser, and the second clause ie, clause number 64.1.(iii)(d)

which refers to 3 possibilities, the last one being determined by a written agreement between the parties. Since there was no written agreement between the parties, then the conduct of the parties would be relevant for a determination of the seat of Arbitration.

10. It has been argued for the petitioners that the judgement rendered by the Constitution Bench in *BALCO* having been interpreted by subsequent Benches of the Supreme Court later on, it was not open to the Learned Commercial Court to give its own interpretation to paragraph 96 thereof. Also ,the Tender Paper ELCORE clearly mentioned the parties intention to exclude any clause which is similar or identical to clause 64 (i)(iii)(d) of the General Conditions of Contract which has been relied upon by the Learned Commercial Court in holding that cause of action arose both at New Delhi and at Lucknow. Even if a part of cause of action did arise in Lucknow due to the execution of the project at Lucknow, that in itself is legally insufficient to confer upon the Learned Commercial Court at Lucknow any supervisory jurisdiction under Section 34 of the Act of 1996.

11. The learned counsel for the Petitioner has also drawn attention of this Court to the affidavit filed along with the Application for Condonation of Delay by the Respondents wherein the delay in approaching the Learned Commercial Court under Section 34 of the Act of 1996 has been explained as time having been taken in "*collecting documents and completing the formalities"*. It has been argued that government departments cannot take the defence of bureaucratic setup in their offices to get delay condoned. The Petitioner had relied upon judgement rendered by the Supreme Court in the case of ***Chief Postmaster***

General and others versus Living Media India Ltd **2012 (3) SCC 563,** but such argument has been arbitrarily rejected by the Commercial Court on the ground that in the case relied on by the Petitioner the delay was more than 427 days but in the case of the Respondents they had approached the Commercial Court with the delay of 26 days only.

12. Sri Brajesh Kumar Shukla appearing for the Respondents has raised a preliminary objection as to the maintainability of the petition filed on behalf of a Joint Venture by the Director of only one of the companies constituting it. It has been argued that the Deponent of the affidavit filed in support of the petition is one Mr Amresh Anand, who is the Director of only one of the companies which forms part of the Joint Venture. He has not been authorised by other members of the Joint-Venture for filing any petition before the High Court. He was authorised only to deal with matters relating to the bid offer and the completion of proceedings of tender and correspondence related thereto. The learned counsel for the Respondent has argued that Amresh Anand may have had the competence to have entered into contract as per the Authority letter given to him by all the partners of the Joint Venture, but this Authority ended with the signing of the Contract and was limited to the same only. There is no separate Authority Letter issued to Amresh Anand by the other two partners of the Joint Venture to file this Petition on their behalf. Mr Amresh Anand may be authorised only to sign the Application and to negotiate with the Railways for the contract but he could not file the petition on behalf of the other two partners of the Joint-Venture.

13. The learned counsel for the Respondent has also argued that this petition is not maintainable under Article 227 of the Constitution as the learned Commercial Court has passed an order under the provisions of Section 34 of the Act of 1996 against which remedy of appeal under Section 37 of the Act is available in case the order of admission of Application under Section 34 of the Act is treated to be of such nature as to give finality to the the rights of the parties under litigation. The Act of 1996 is a special act and a complete code in itself and no petition under Article 227 of the Constitution is maintainable against interlocutory orders.

14. With regard to the delay in approaching the Commercial Court the learned counsel for the Respondent has placed reliance upon Sub-Section (3) of Section 34 and the proviso thereof, which is that an Application may be filed even after three months from the date of receipt of the Award but within 30 days thereafter, subject to satisfaction of the Court regarding the reason for delay. The Award was received by Speed Post on 03.05.2019 and the Application under the Section 34 should have been filed ideally within three months that is latest by 03.08.2019, however, due to delay in collecting of documents and completing necessary formalities it could only be filed on 28th of August, causing a delay of 26 days in approaching the Commercial Court. The learned Commercial Court has considered the delay and also the judgement rendered by the Supreme Court in the case of *Chief Post Master General* (supra) and found that it was not a case of huge delay but only a case of slight delay which could be condoned looking into the facts and circumstances of the case.

15. On the merits of the case, Sri Pratiyush Chaube for the Respondents has pointed out from various clauses of the Agreement (a complete copy of which has been filed along with the Supplementary Affidavit) that in this case the purchaser is the President of India and he alone has been empowered to determine the seat of Arbitration. He has determined the seat of Arbitration at the place where the Headquarter of the Division of Railways is situated which has to supervise the work. The Learned counsel for the Respondent has referred to Tender Paper ELCORE and Clause 17 of the Preamble which says that the *"Indian Railways Standard General Conditions of Contract- July 2014 "with addendum and corrigendum slips issued by the Railway Board"* shall be applicable to the contract which may be obtained by the tenderer /contractor on payment from the Divisional Railway Manager's Office of the concerned Railway. In case of any difference between the provisions of General Conditions of Contract and any conditions contained in the tender documents, the provisions of General Conditions of Contract will prevail.

16. The learned counsel for the Respondent has also referred to Chapter 2 of the Tender Paper ELCORE Which contains the conditions of contract. It specifies that conditions of contract shall be governed not only by the Preamble to the Tender Paper, but also the instructions to tenderers and conditions of tendering as included in Part I of Chapter I and Conditions of Contract as included in Chapter II and also other specifications and conditions contained in following Chapters of the Tender Paper ELCORE.

The Learned counsel for the Respondent has referred to paragraph 1.2.54 (k) which provides that the Venue for Arbitration shall be the place from which the Letter of Acceptance of Tender is issued, or such other place as the purchaser at his discretion may determine; and has also referred to Clause 64 (i) (iii) (d) which refers to place of Arbitration as being within the geographical limits of the Division of the Railways where the cause of action arose, or the Headquarters of the concerned Railway, or any other place with the written consent of both the parties. It has been argued that since there was no written consent of both the parties to Arbitration being held at New Delhi and the Arbitral Tribunal held the proceedings at New Delhi only for convenience sake it cannot be said that New Delhi was agreed upon by the parties as being the place of Arbitration. Hence the preceding phrases relating to geographical limits of the Division of the Railway where the cause of action arose, or the Headquarters for the concerned Railway should be treated as determinative of the place of Arbitration. Both these phrases relate to Lucknow, and therefore the place of Arbitration should be treated as Lucknow, conferring supervisory jurisdiction under Section 34 of the Act of 1996 upon the Commercial Court at Lucknow.

17. The learned counsel for the Respondent has referred to Clause 7.0 of the Preamble of the Tender Paper ELCORE which directs performance Guarantee to be submitted by the contractor amounting to 5% of the contract value to the Chief Project Director, Railway Electrification Lucknow after the issuance of Letter of Acceptance but before signing of the Agreement in terms of Clause 19 of the Preamble. Reference has also been made to clause 11 of the Preamble which states

that the contract will be operated by the Chief Project Director, Railway Electrification, Lucknow. The agreement had been signed and delivered at Lucknow for and behalf of the Respondents on 14.07.2016. The cause of action arose at Lucknow and since the contract was operated at Lucknow as the project of electrification had to be conducted under the Divisional Headquarters with supervision and Lucknow was the place of correspondence. After the Award of contract a major part of cause of action arose at Lucknow. Reference has been made to clause 15 of the Preamble where all correspondence has to be undertaken after award of contract with the Chief Project Director, Railway Electrification, Lucknow in respect to matters relating to particular design, working and drawing, matters relating to basic design and drawing for fitting, components equipment and prototype test, and matters relating to progressing of fieldwork, scheduling of quantities and submission of bills. Under clause 1.1.2 which relates to Interpretation of Contract Agreement, "Purchaser" has been defined as the President of India acting through his accredited officers or anyone of them including the General Manager in charge of Railways Electrification and also the Chief Project Director. It has been argued that Section 31 sub-clause (4) and Section 20 of the Act of 1996 would be in applicable as no written consent was ever given to change the place of Arbitration by any of the parties.

18. The learned counsel for the has also placed reliance upon judgement rendered by the Supreme Court in the case of ***Mankastu Impex Private Limited versus Air Visual Ltd*** **2020 (5) SCC 399;** and has read out paragraphs 10 to 13, 17 to 20, and 24 to 26 of the judgement and has also read out the

impugned order passed by the Commercial Court.

19. The learned counsel for the Respondent has also placed reliance upon judgement rendered by Coordinate Bench of this Court in ***Hasmukh Prajapati versus Jai Prakash Associates Limited*** in a Petition under Article 227 of the Constitution No. 6890 of 2021, decided on 17.02.2022, where a distinction has been drawn between seat of Arbitration and venue of Arbitration. It has been argued that the venue of Arbitration may have been in New Delhi, in the case of the Petitioner, however the seat of Arbitration would only be determined on the basis of Clause 64 (1)(iii)(d) of the General Conditions of Contract.

20. It has also been informed to this Court that subsequent to the filing of the Application under Section 34 of the Act of 1996 before the Commercial Court at Lucknow the Petitioner preferred an Execution petition/Enforcement Application under Section 36 of the Act on 17.09.2019 before the Delhi High Court. The Delhi High Court while issuing notice to the Respondents has directed them to deposit the entire awarded amount with up-to-date interest before the Registrar General of the High Court of Delhi by its order dated 18.09.2019, passed ex parte. Further, the High Court of Delhi was pleased to release 50% of the deposited amount under the Arbitral Award to the Petitioner by its order dated 24.12.2019 subject to the outcome of the Objections filed by the judgement debtor. The decree holder had to submit a personal bond executed by all its Directors and supported by a Board Resolution that in the event of the decree holder being directed to refund the amount by the Court in the Objections under Section 34 of the Arbitration and Conciliation Act, the decree holder shall refund the

amount along with interest at such rate as directed by the Court within eight weeks of the order, irrespective of the right to challenge the order passed in proceedings under Section 34 of the 1996 Act. The balance 50% of the amount had to be kept in fixed deposit till further orders. In compliance of the order passed by the Delhi High Court on 24.12.2019, 50% of the amount was released against the personal bond of the Directors only. The Petitioner has filed an Application stating that it is not in a position to furnish bank guarantee to secure the judgement debtor against the payment of any funds. Further, after hearing on several dates and entertaining the Application under Section 34 of the Act of 1996, the Learned Commercial Court at Lucknow has been pleased to stay the operation and implementation of the Award dated 6.03.2019 by its order dated 09.02.2021. Subsequently the Petitioner has filed a further Application for seeking release of the remaining 50% of the amount before the Delhi High Court on which the Delhi High Court has been pleased to issue notice to the Respondents by its order dated 05.11.2020. After having approached Delhi High Court in this manner, the Petitioner has approached this Court in this petition under Article 227 only on 08.12.2020, after a lapse of almost one year from the date of the impugned order, 12.12.2019.

21. In rejoinder the learned counsel for the Petitioner has reiterated his earlier arguments and said that it is no doubt true that General Conditions of Contract would prevail over Tender Document ordinarily, however, in this case there is the phrase "*with the written consent of both the parties*". The counsel for the Petitioner argued that in this case the Tender document is the

written consent, and would override the General Conditions of Contract. The learned counsel for the Petitioner has placed reliance upon several judgements to say that even though the cause of action or part of cause of action may have arisen at Lucknow that would not determine the seat of Arbitration and has referred to the importance of the determination of the seat of Arbitration as discussed by the Supreme Court in the judgement rendered in *BGSSGS Soma* (supra). The Learned counsel for the Petitioner has argued that in this case the conduct of the parties would give rise to the presumption that it is a separate contract condition to hold Arbitration at Delhi, that was agreed upon between the parties, and the subsequent condition so created by implication would override the written consent given in the contract. It has also been argued that the judgement rendered in *Mankastu Impex* (supra) would not apply as it related to international Arbitration, whereas the controversy before this Court has been raised with respect to an Arbitration that has been held in India between the parties and is governed by Part I of the Act of 1996.

22. It has also been argued by the learned counsel for the Petitioner that where there is a conflict between written agreement among the parties and the conduct of the parties, the conduct of the parties would prevail. The learned counsel for the Petitioner has referred to judgement rendered by the Supreme Court in ***Inox Renewables Ltd versus Jayesh Electricals Ltd*** **2021 SCC Online SC 448**, and has relied upon paragraphs 11, 16 and 17 of the judgement.

23. With regard to the argument of the Learned counsel for the Respondent that this petition under Article 227 is not maintainable having been filed

through Director of one of the companies constituting the Joint Venture, it has been argued that the contract was awarded to a Joint-Venture partnership between three companies. The deponent of the affidavit in this petition is the Director of Zapdor / Under Order XXX Rule 2 C.P.C. and Order XXIX Rule 1 C.P.C., Amresh Anand is competent to file the Application/petition before this Court.

24. After hearing the parties at length, this Court finds that there are four issues which must be considered by this Court to decide this petition.

a) Whether this petition under Article 227 is maintainable ?

b) Whether Cause of Action or subject matter of the Suit would determine the Court which could exercise supervisory jurisdiction to decide the Section 34 petition?

c) Whether it would be the 'Venue' or the 'Seat' of Arbitral proceedings which would determine the Court which can exercise supervisory jurisdiction over the Arbitral proceedings ?

d) Whether in the absence of a specific mention in the contract agreement regarding 'Seat' of Arbitration, the conduct of parties would determine the 'Seat' and therefore act as an exclusionary clause for Courts at all other places to exercise supervisory control over the Arbitral proceedings ?

25. With regard to the first issue of maintainability of the petition on behalf of the J.V. Company filed only by one Director of one company, this Court finds that with regard to the question of maintainability of the petition on behalf of the Joint Venture company/ consortium; it has been argued by the learned counsel for the

Petitioner that three Companies had come together to make a bid for the contract relating to electrification of Jafarabad-Akbarpur-Tanda Section. The Director of Zapdor Mr Amresh Anand had been authorised by the Directors of all three Companies to enter into correspondence for the Award of Contract and also to do all that was needful with regard to arbitration proceedings. Mr Amresh Anand had been authorised by all to place their case before the Arbitrator. No objection was raised by the Railways with regard to the appearance of Mr Amresh Anand before the Arbitrator for pursuing the case of the Joint Venture. Now a challenge is being raised for the first time regarding the capacity of Mr Amresh Anand to file the petition. The learned counsel for the Petitioner has placed reliance upon judgement rendered by the Supreme Court in the case of ***United Bank of India versus Naresh Kumar and others*** **1996 (6) SCC 660,** where the appellant Bank had instituted a Suit for recovery of loan advanced to the Respondent together with interest thereon. The Suit having been filed in the name of the appellant bank, full amount of Court fees had been paid. The trial of the Suit also proceeded. Although the Trial Court found the Appellant Bank had indeed advanced money to the Respondent and its claim was justified, it rejected the claim of the bank only on the ground that the plaint was not duly signed and verified by a competent person. The First Appeal and Second Appeal were also dismissed. The Bank approached the Supreme Court.

26. The Supreme Court observed that procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. It also observed in paragraph 10 as follows –

"10. It cannot be disputed that a Company like the appellant can sue and be sued in its own name. Under Order VI Rule 14 of the Code of Civil Procedure, pleading is required to be signed by the party and its counsel if any. As a Company is a juristic entity it is obvious that some person has to sign the pleadings on behalf of the company. Order XXIX Rule 1 of the Code of Civil Procedure, therefore, provides that in a Suit by or against a Corporation, the Secretary or any Director or other principal officer of the Corporation who is able to depose to the facts of the case might sign and verify on behalf of the Company. Reading Order VI Rule 14 together with Order XXIX Rule 1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed, a person referred to in Rule 1 of Order XXIX can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition there to under Order XXIX Rule (1) of the Code of Civil Procedure, as a Company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf , and this would be regarded as sufficient compliance with the provisions of Order VI Rule 14 of the Code of Civil Procedure. A person may be expressly authorised to sign the pleadings on behalf of the Company, for example by the Board of Directors passing a Resolution to that effect, or by the power of attorney executed in favour of any individual. In the absence thereof, and in cases where the pleadings have been signed by one of its officers,

a corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The Court can, on the basis of the evidence on record, and after taking all circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleadings by its officer…"

This Court is of the opinion that considering the facts and circumstances of the case as pleaded and the substantial questions of law that arise, the petitioner cannot be nonsuited on technical grounds alone.

27. With regard to the issue of maintainability of this petition under Article 227 of the Constitution, this Court is bound by the observations of the Supreme Court in *Soma JV* (supra) where the project site was located in the States of Assam and Arunachal Pradesh and the agreement was signed at Faridabad. With regard to dispute resolution through Arbitration, the parties agreed that it shall be settled finally in accordance with the provisions of the 1996 Act and the Arbitration proceedings shall be held at New Delhi/Faridabad, India.

On 16.05.2011 the notice of Arbitration was issued to the Petitioner in regard to payment of compensation for losses suffered due to delays. The Arbitral Tribunal was constituted which held 71 sittings at New Delhi and then delivered a unanimous Award again at New Delhi, by which the claims of the Petitioner were allowed together with simple interest at the rate of 14% per annum till the date of actual payment. The Responden being aggrieved filed an Application under Section 34 before the Court of District and Sessions Judge, Faridabad Haryana. The Petitioner filed an Application

under Section 151 read with Order VII Rule 10 of the C.P.C. and Section 2 (1) (e) (i) of the 1996 Act seeking a Return of the petition under Section 34 for presentation before the appropriate Court at New Delhi, and/or the District Judge at Dhemaji Assam. The Special Commercial Court Gurugram, allowed the Application of the Petitioner to return the Section 34 petition for presentation before the proper Court having jurisdiction in New Delhi. The Respondent filed an appeal under Section 37 of the 1996 Act before the Punjab and Haryana High Court which held the appeal to be maintainable and also that Delhi was only a convenient "**venue**" where arbitral proceedings were held and not the "**seat**" of arbitral proceedings at Faridabad would have jurisdiction on the basis of cause of action having arisen in part in Faridabad. The Petitioner challenged such order before the Supreme Court.

28. It was argued that an order which allowed an Application under order VII Rule 10 CPC cannot amount to an order refusing to set aside an arbitral Award under Section 34 of the 1996 Act. it was also argued that even if both New Delhi and Faridabad had jurisdiction on the basis of part of cause of action arising at New Delhi and at Faridabad, the *ratio* laid down in the Constitution Bench decision in the case of BALCO (supra) would apply as understood by two subsequent decisions of the Supreme Court in ***Reliance Industries Ltd versus Union of India*** **2014 (7) SCC 603**; and in ***Indus Mobile Distribution (Private)Limited versus DataWind Innovation (Private)Limited*** **2017 (7) SCC 678**. It was also argued by the learned counsel for the Petitioners that the place of Arbitration as determined

in accordance with Section 20 of the 1996 Act was New Delhi therefore this being the **seat** as determined by the Tribunal in the case, challenge under Section 34 of the 1996 Act could only be made in the courts at New Delhi.

On the other hand the Additional Solicitor General supported the judgement under appeal saying that an order passed under Order VII Rule 10 C.P.C. would amount to refusal to set aside an Award and therefore appeal would be maintainable. Moreover the Arbitration clause only referred to the convenient **venue** and the fact that the sittings were held at New Delhi would not make New Delhi the **seat** of Arbitration under Section 20 (1) of the Act 1996. A part of cause of action clearly arose in Faridabad, as a result of which the Court in Faridabad would be clothed with jurisdiction to decide Section 34 Application.

29. The Supreme Court in *Soma JV* (supra) considered the question of maintainability of appeal under Section 37 of the Act and referred to Sub-clause (1) (a),(b) and (c), and held that the order passed by the Commercial Court at Gurugram was not referable to Section 8 or Section 9. It could also not amount to setting aside or refusing to set aside an Award under Section 34(1) (c). Therefore, Appeal under Section 37 would not be maintainable. It compared the provisions of Section 13 of the Commercial Courts Act and Section 37 of the Act of 1996. Section 13 of the Commercial Courts Act referred to grounds enumerated under Order 43 of the C.P.C. and Section 37 of the 1996 Act. Referring to judgement rendered in ***Fuerst Day Lawson Ltd versus Jindal Exports Ltd,*** **2011 (8) SCC 333**; it held that Section 13 of the Commercial Courts Act was a general provision vis-a-vis Arbitration, relating to

appeals arising out of commercial disputes and since Section 37 of the Act of 1996 was expressly included in the *proviso* to Section 13 (1), the Court held that the special statute that is the 1996 Act would be applicable vis-a-vis the more general statute namely the Commercial Courts Act. The general statute being left to operate in spheres other than Arbitration. Section 37(1) makes it clear that the appeals only lie from orders set out in sub clause (a), (b) and (c) and from no others. The refusal to set aside and arbitral Award must be under Section 34 , i.e., after the grounds set out in Section 34 have been applied to the Arbitral Award in question and after the Court has turned down such grounds. Admittedly on the facts of the case there was no adjudication under Section 34 of the 1996 Act – all that was done was that the Commercial Court at Gurugram had allowed an Application filed under Section 151 read with Order VII Rule 10 C.P.C., determining that Commercial Court at Gurugram had no jurisdiction to proceed further with the Section 34 Application, and therefore such Application would have to be returned to the competent Court situated at New Delhi. By virtue of the impugned order the Arbitral Award had not been set aside. The Supreme Court therefore held appeal under Section 37 before the Punjab and Haryana High Court was not maintainable.

30. This Court after the dictum as aforesaid of the Supreme Court in *Soma JV* (supra) is of the considered opinion that this petition under Article 227 of the Constitution is maintainable against the order rejecting an application for return of Application under Section 34 of the Act of 1996.

31. This Court shall now consider the issues c, d and e jointly by referring to various case laws relied upon by the counsel for the parties and recent developments of law, after case was heard and judgement was reserved by me. The first such judgment being that of the Constitution Bench in *BALCO Vs. Kaiser Alluminium* (supra). The Supreme Court in *BALCO* (supra) was considering an agreement between the Appellant and the Respondent which had a dispute resolution Clause in Article 17 which stated that the arbitration proceedings will be governed by English arbitration law and Arbitration shall be held wholly in London and use English language in the proceedings. Clause 22 of the Agreement stated that the agreement shall be governed by the prevailing law of India and in case of Arbitration, the English Law shall apply. Therefore the aforesaid clause indicated that by reason of the agreement between the parties, the governing law of the agreement was the prevailing law of India. However, the settlement procedure for adjudication of rights or obligation under the Agreement was by way of Arbitration in London and the English Arbitration law was made applicable to such proceedings. Disputes arose between the parties and arbitration proceedings were held in London. The Arbitral Tribunal made two awards in London.

32. The appellant thereafter filed applications under Section 34 of the 1996 Act for setting aside the aforesaid two Awards in the Court of District Judge Bilaspur. The District Judge Bilaspur, held such applications filed under Section 34 to be not maintainable and dismissed the same. Aggrieved by the two judgements, the appellant filed two miscellaneous Appeals before the High Court of Chhattisgarh. The

Division Bench dismissed the appeals by a common order. Such decision was challenged before the Supreme Court. The Supreme Court considered the questions that arose in several Special Leaves to Appeal which were connected with the main Appeal after its reference to the Constitution Bench and referred to such questions as: –

> "a) what is meant by the place of arbitration as found in Section 2 (2) and 20 of the Arbitration Act 1996?"
>
> "b) What is the meaning of the words "under the law of which the Award is passed" under Section 48 of the 1996 Act ?
>
> "c) Does Section 2 (2) bar the application of Part I of the Arbitration Act 1996 to arbitration where the place is outside India?"
>
> "d) Does part I apply at all stages of arbitration that is pre, during and post stages of the arbitral proceedings in respect of all arbitration, except for areas specifically falling under Part II and III of the 1996 Act ?"
>
> "e) Whether a Suit for preservation of assets pending an arbitration proceeding is maintainable?"

33. The Supreme Court clarified the use of the words "place", "seat", "situs", and "venue" in the context of arbitration and discussed the same in paragraphs 75, 76 and 95 to 100 of the judgement and Section 20 of the 1996 Act was referred to which recognised such

distinction. The Supreme Court observed that the seat of arbitration or the situs of arbitration or the place of arbitration indicates the jurisdiction or legal seat of arbitration which determines the Curial law i.e. the law that shall govern the arbitration proceedings. The Supreme Court said further that if the legal or Juridical seat of arbitration is outside India, Part I of the 1996 Act shall be inapplicable to such operations; and even in case a clause in the arbitration agreement purports to apply Part I of the 1996 Act to an arbitration where juridical seat of arbitration is outside India, Part I shall be inapplicable to the extent inconsistent with the arbitration law of the *seat* of arbitration. "*Venue of arbitration* " as distinguished from the place or the seat or the situs, is the actual physical location where the Arbitrators/ Arbitral Tribunal for reasons of convenience et cetera, might actually conduct their proceedings, which may be a location physically outside the jurisdiction or legal seat of arbitration.

34. The Supreme Court answered the reference by observing that the 1996 Act had accepted the territoriality principle which had been adopted in the UNCITRAL Model Law. Section 2 sub-clause (2) of the 1996 Act makes a declaration that Part I of the Act shall apply to all arbitration which take place within India. Part I of the 1996 Act would have no application to international commercial arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in part II of the 1996 Act. There can be no overlapping or intermingling of the provisions contained in part I with the provisions contained in part II of the 1996 Act . In a foreign seated international

commercial arbitration, no application for interim relief would be maintainable under Section 9 of the 1996 Act or any other provision of Indian law, as applicability of part I of the Act is limited only to all arbitration which take place in India. Similarly, no suit for interim injunction simplicitor would be maintainable in India on the basis of an international commercial arbitration with its seat outside India. Hence Part I of the Act is applicable only to all the arbitrations which take place within the territory of India.

35. The Supreme Court also observed *"the subject matter of Arbitration"* in Section 2(1) (e) of the 1996 Act 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 Courts having supervisory control over the Arbitration proceedings. Hence, it refers to a Court which would essentially be at the **seat** of the Arbitration process. The provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which gives recognition to party autonomy. The legislature has intentionally given jurisdiction to two courts ie 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, when neither of the parties are from Delhi (Delhi having been chosen as a neutral place as between a parties from Mumbai

and the other from Kolkata) and the Arbitral Tribunal sitting in Delhi passes an interim order under Section 17 of the 1996 Act, the appeal against such an interim order under Section 37 must lie to the Court at Delhi being the Court 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 ie the Court within whose jurisdiction the subject matter of the suit is situated and the Courts within the jurisdiction of which the dispute resolution ie Arbitration is located.

36. The object of selection of a neutral **seat** or place of Arbitration within India by the parties would be frustrated partially at least, if not wholly, if courts having jurisdiction over the said neutral **seat** of Arbitration did not have supervisory jurisdiction over such Arbitration. After all, the whole point of agreeing to a neutral **seat** of Arbitration is to avoid mutual inconvenience. It is certain that the parties cannot by agreement confer jurisdiction on a Court which does not otherwise have jurisdiction over the matter concerned; the parties can only restrict jurisdiction over the matter concerned to only one of the courts that otherwise have jurisdiction. The supervisory jurisdiction of the Court is located at the legal **seat** of Arbitration which can be said to be created by the parties by choosing that as the seat in the Arbitration agreement. The Supreme Court having held that the Court which has jurisdiction over the **seat** of Arbitration would have supervisory jurisdiction of Arbitration in addition to courts where the cause of action might have arisen clarifies the law.

37. One of the questions that the Constitution Bench dealt with was "what is meant by the place of Arbitration as found in Section 2(2) and 20 of the Arbitration Act 1996?

In paragraph 75 of the judgement the Supreme Court observed that the seat of Arbitration decides the applicability of law for regulation of the Arbitration. This however does not mean that all proceedings of Arbitration to have to take place at the seat of Arbitration. The arbitrators at times hold meetings at more convenient locations. This is necessary as arbitrators may often come from different countries. It may therefore be convenient to hold some of the meetings in a location which may be convenient to all. The Supreme Court referred to English caselaw with approval where it was observed:-

> *"the preceding discussion has been on the basis that there is only one "**place**" of Arbitration. This will be the place chosen by, or on behalf of the parties; and it will be designated in the Arbitration agreement or the terms of the reference, or the minutes of proceedings, or in some other way as the place or "**seat**" of the Arbitration. This does not mean however that the Arbitral Tribunal must hold all its meetings or hearings at the place of Arbitration. ....It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country for instance for the purpose of taking evidence....In such circumstances each move of the Arbitral Tribunal does not of itself mean that the **seat** of Arbitration changes. The **seat** of Arbitration*

remains the place initially agreed by or on behalf of the parties."

These observations were subsequently followed by the Supreme Court in the case of ***Union of India versus McDonnell Douglas Corporation*** **1993 (2) Lloyd's Report 48**, where the Supreme Court observed that the laws of the land of the country where the Arbitration took place usually govern the regulation of Arbitration. Part I of the Act of 1996 only applies when the seat of Arbitration is in India, irrespective of the kind of Arbitration.

38. While dealing with the arguments made by the learned counsel for the appellant regarding the Act being "*subject matter centric*" and not "*seat centric*" and therefore seat is not the centre of gravity as far as Arbitration Act 1996 is concerned, the Court observed in paragraph 96 while dealing with the definitions clause 2 (1) (e) that-

> *"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 Arbitration process.....where Arbitration is located. "*

The Supreme Court observed in paragraph 97 –

> *"The definition of Section 2(1)(e)includes "subject matter of the Arbitration" to give jurisdiction to the courts where the Arbitration takes place, which otherwise would not exist. – – – This has a clear reference to a Court within whose*

jurisdiction the asset/ person is located, against which the enforcement of international arbitral Award is sought.”'

39. The Supreme Court thereafter observed in paragraph 98 –

"We now come to Section 20, which is as under:

*"20. **Place of Arbitration** – (1) The parties are free to agree on the place of Arbitration.*

(2) failing any agreement referred to in Sub-Section (1) the place of Arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) notwithstanding sub-Section (1) or sub-Section (2), The Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members ,for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

A Plain reading of Section 20 leaves no room room for doubt that where the place of Arbitration is in India, the parties are free to agree to any place or seat within India, New Delhi or Mumbai et cetera. In the absence of parties agreement thereto, Section 20 sub-clause (2) authorises the Tribunal to determine the place/seat of such Arbitration. Section 20(3) enables the Tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties."

40. The Supreme Court thereafter considered the question of "venue " and observed in paragraph 99 –

> *"99. The fixation of most convenient **venue** is taken care of by Section 20(3). Section 20(3)has to be read in the context of Section 20(2)which places a threshold limitation on the applicability of Part 1 where the place of Arbitration is in India. ...."*

The Court observed in paragraph 100-

> *"True, that in an international commercial Arbitration, having its seat in India, hearings may be necessitated outside India. In such circumstances, the hearing of the Arbitration will be conducted at the venue fixed by the parties, but it would not have the effect of changing the seat of Arbitration which would remain in India.*

The Supreme Court thereafter referred to the commentary of Redfern and Hunter, "*The Law and Practice of International Commercial Arbitration*", and the following passage under the heading "*the place of Arbitration*":-

> "*the preceding discussion has been on the basis that there is only one place of Arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the Arbitration agreement or the terms of the reference or the minutes of proceedings or in some other way as the place or seat of the Arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the place of Arbitration. International commercial Arbitration often involves people of many different nationalities, from many different countries. In the circumstances it is by no means unusual for a tribunal travelling to hold meetings – or even hearings, in a place other than the designated place of Arbitration, either for its own convenience or for the convenience of the parties or their witnesses – – – it may be*

> *more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country – for instance, for the purpose of taking evidence ...in such circumstances each move of the Arbitral Tribunal does not of itself mean that the seat of Arbitration changes. The seat of Arbitration remains the place initially agreed by or on behalf of the parties."*

"This in our view, is the correct depiction of the practical considerations and the distinction between "seat" as given in Section 20 (1)and subsection 20 (2)and the Venue as given in Section 20 (3)."

41. Subsequently in 2018, the Supreme Court in the case of ***Union of India versus Hardy Exploration and Production (India) Inc*** **2019 (13) SCC 472**; considered an agreement relating to a production sharing contract between the parties. The arbitration agreement provided that the venue of conciliation or arbitration proceedings, unless the parties otherwise agreed, would be Kuala Lumpur and the arbitration proceedings shall be conducted in accordance with UNCITRAL Model law on International Commercial Arbitration.

The arbitration proceedings were held in Kuala Lumpur and the Award was signed and delivered in Kuala Lumpur. The Union of India sought to challenge the Award under the Act of 1996 before the Delhi High Court. It contended that Kuala Lumpur was merely the venue and New Delhi was the seat of arbitration. The Supreme Court held that the parties had not chosen the seat of arbitration and the Arbitral Tribunal had also not determined the seat of arbitration. It held that :-

"Kuala Lumpur was the venue of arbitration but it did not imply that it had become the seat of arbitration by any express agreement between the

parties. The venue could not by itself assume the status of the seat; instead a venue could become the seat only if something else is added to it as a concomitant."

42. The Five Judges Bench decision in BALCO (supra) has been interpreted and followed by Five Judges Bench in *Soma JV* (supra). The Supreme Court in *BALCO Vs. Kaiser Alluminium* (supra) referred to the observations made in ***Braes of Doune Wind Farm (Scotland) Ltd v Alfred MacAlpine Business Services Ltd*** **2008 EWHC 426 (TCC)** by the Queen Bench Division that a detailed examination is required to be undertaken by the Court to determine from the agreement and the surrounding circumstances the intention of the parties as to whether a particular place mentioned refers to 'Venue' or 'Seat' of the Arbitration. In that case, the Court upon consideration of the entire material, concluded that Glasgow was a reference to the Venue and the Seat of the Arbitration was held to be in London,England. The Court reiterated the principle that the selection of a 'place or seat' for an Arbitration will determine what "curial law"or "lex Fori" or " Lex arbitri "will be. It was also further concluded that where in substance the parties agreed that the law of one country will govern and control a given Arbitration, the place where the Arbitration is to be heard will not dictate what the governing law or controlling law will be.

43. The Supreme Court further observed that the ratio in *Alfred MacAlpine* was followed is *Shashoua v Sharma* 2009 EWHC 957(Comm). In the Shashoua case the Court was concerned with the construction of the shareholders agreement between the parties which provided that "*the venue of Arbitration shall be London,*

United Kingdom". Whilst providing that the Arbitration proceedings would should be conducted in English in accordance with the ICC Rules, and that the governing law of the shareholders agreement itself would be the law of India. The claimants made an Application to the High Court in New Delhi seeking interim measure of protection under Section 9 of the Arbitration Act 1996, prior to the institution of Arbitration proceedings. Following the commencement of the Arbitration, the defendant and the Joint-Venture Company raised the challenge to the jurisdiction of the Arbitral Tribunal, which the Tribunal heard as a preliminary issue. The Tribunal rejected the jurisdictional objection. The Tribunal then made an Award for the defendant to pay more than £300,000. The English Court gave leave to the claimant to enforce the Award as a judgement. The defendant applied to the High Court of Delhi under Section 34 (2)(a) of the Arbitration Act 1996 to set aside the Award. In the meantime, the claimant had obtained the charging order, which had been made final over the defendant's property in England. The defendant applied to the Delhi High Court for an order directing the claimants not to take any action to execute the charging order, pending the final disposal of Section 34 petition in Delhi seeking to set aside the Award. The defendant had sought unsuccessfully to challenge the Award in the Commercial Court under Section 68 and Section 69 of the UK Act and to set aside the order giving leave to enforce the Award.

44. The Supreme Court in Soma J.V. then referred to paragraph 110 of BALCO as follows: –

> "110. Examining the fact situation in the said case, the Court observed as follows: (*Shashua*)
>
> *"The basis for the Court's grant of an anti-suit*

injunction of the kind sought depended upon the seat of the Arbitration. An agreement as to the seat of an Arbitration brought in the law of that country as the curial law, and was analogous to an exclusive jurisdiction clause. Not only was there an agreement to the Curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the Arbitration, so that, by agreeing to the seat, the parties agreed that any challenge to an interim or final Award was to be made only in the courts of the place designated as the seat of Arbitration.

*Although, "**venue"** was not synonymous with "**seat**", in an Arbitration clause which provided for Arbitration to be conducted in accordance with the Rules of ICC in Paris (a supranational body of rules), a provision that "the venue of Arbitration shall be London, United Kingdom" did amount to the designation of the Juridical Seat…." The Queens Bench Division observed that "**a choice of seat for the Arbitration must be a choice of forum for remedies seeking to attack the Award**".*

(emphasis supplied)

45. The Supreme Court in BALCO observed thereafter that this principle was followed in Union of India Vs. McDonnell Douglas Corporation. In ***Union of India versus McDonnell Douglas Corpn*** **(1993) Lloyds Rep 48;** the agreement provided that the "*Arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any re-enactment or modification thereof…. The **seat** of arbitral proceedings shall be London, United Kingdom.*

Considering the aforesaid clause, the Supreme Court held that by agreement the parties have chosen English law as a law to govern their Arbitration proceedings, while contractually importing from the

Indian Act those provisions of that Act which are concerned with internal conduct of their Arbitration and which are not inconsistent with the choice of English arbitral procedure in law. The Supreme Court followed the Queens Bench Decision which laid stress upon the location of the **seat of Arbitration** as an important factor in determining the proper law of the Arbitration agreement.

46. The Supreme Court thereafter in *Soma J.V.* (supra) referred to paragraph-116 of BALCO that

"the legal position that emerges from a conspectus of all the decisions, seems to be, that the choice of another country as the seat of Arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of Arbitration will apply to the proceedings."

47. The Three Judges Bench of this Supreme Court in *Soma JV* (supra) was considering the question whether the **seat** of Arbitration proceedings was New Delhi or Faridabad, consequent upon which a petition under Section 34 of the Arbitration Act 1996 could be filed dependent on where the **seat** of Arbitration is located.

48. While considering the question of determination of the **seat** of the arbitral proceedings between the parties, it was observed that it is important to lay down the law on what constitutes "juridical seat" of the arbitral proceedings, and once the **seat** is delineated by Arbitration Agreement, the Courts at the place of the **seat** would alone thereafter have exclusive jurisdiction over the arbitral proceedings.

49. The Supreme Court considered the Arbitration Act 1940 which did not refer to Juridical seat of Arbitration proceedings at all. After the UNCITRAL Model law on International Commercial Arbitration was adopted by

this country the concept of "**place**" or "**seat**" of arbitral proceedings was introduced. The 1996 Act adopted the Model Law and referred to the **place** of Arbitration and defined the **Court** and indicated which courts have jurisdiction in relation to arbitral proceedings in several sections in Part I.

50. The Supreme Court referred to the Definition clause under Section 2 (1) (e) and Sub-clause (i) and (ii) thereof, and then to Section 20, 31 (4) and 42 of the 1996 Act.

51. The Supreme Court in *Soma JV* (supra) referred to the Five Judges Bench in *BALCO* (supra) because in earlier decisions of the Court it had not properly distinguished between **seat** and **venue** of an arbitral proceeding. After referring to paragraphs 75, 76, 96, 110, 116, 123 and 194 of *BALCO* (supra), the Supreme Court observed in paragraph 38 as follows: –

> *"38. A Reading of paras 75, 76, 96, 110, 116, 123 and 194 of BALCO would show that where parties have selected the "**seat**" of Arbitration in their agreement, such selection would then amount to an exclusive jurisdiction clause, as the parties have now indicated that the courts at the "**seat**" would alone have jurisdiction to entertain challenges against the arbitral Award which have been made at the **seat**. – – – the BALCO judgement, when read as a whole, applies the concept of **seat** as laid down by the English judgements (and which is in Section 20 of the Arbitration Act 1996) by harmoniously construing Section 20 with Section 2 (1)(e), so as to broaden the definition of "Court "and bring within its ken Courts of the "seat" of the Arbitration."*

52. The Supreme Court thereafter considered the import and purport of paragraph 96 of the *BALCO* (supra) in paragraph 39 to 43, and came to the conclusion that :-

> *"a judgement must be read as a whole, so that conflicting parts maybe harmonised to reveal the true ratio of the judgement. However, if this is not possible, and it is found that the internal conflicts within the judgement cannot be resolved, then the first endeavour that must be made is to see whether Ratio Decidendi can be culled out without the conflicting portion. If not, then as held by Lord Denning in Harper versus National Coal Board, the binding nature of the precedent on the point on which there is a conflict in a judgement, comes under a cloud "*

It thereafter observed in paragraph-44 as follows:-

> *"44. If para 75, 76, 96, 110, 116, 123 and 194 of BALCO ought to be read together, what becomes clear is 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 the UNCITRAL Model Law. The narrow construction of Section 2 (1) (e) was expressly rejected by the Five Judges Bench in BALCO (supra). This being so, what has then to be seen is what is the effect Section 20 would have on Section 2 (1) (e) of the Arbitration Act 1996."*

53. The Supreme Court then considered the observations made by it in ***Union of India Vs. Reliance Industries Ltd*** **2015 (10) SCC 213** which relied upon ***Videocon Industries Ltd versus Union***

of India **2011 (6) SCC 161;** and judgement rendered by the Court of Appeal in ***C v D***, **2007 EWCA Civ 1282 (CA)**; which was subsequently followed by the High Court of Justice, Queens Bench Division. The English courts had held that the effect of choice of **seat** of Arbitration would mean conferring exclusive jurisdiction for the purpose of regulating arbitral proceedings arising out of the agreement between the parties on the courts situated in that "**seat**" alone.

54. The Supreme Court in Soma JV referred to the observations made by it in ***Indus Mobile Distribution Private Limited versus Datawind Innovations Private Limited*** **(2017) 7 SCC 678**; distinguishing between **seat** of an arbitral proceedings and **venue** of such proceeding. In *Indus Mobile* (supra), the Supreme Court referred to the 246th Report of the Law Commission of India and the recommendations made with regard to amendment to be carried out in Section 20 of the 1996 Act replacing the word "**place**" by the word "**seat**".

55. The Court in *Indus Mobile* (supra) observed that amendment as proposed by the Law Commission could not be made because *"….the BALCO judgement in no uncertain terms had referred to the "place" as juridical seat for the purpose of Section 2 (2) of the Act. It had further made it clear that Section 20 (1) and Section 20 (2) where the word "**place**" is used refers to the juridical seat, whereas Section 20 (3) the word "**place**" is equivalent to **venue**. .."*

56. The Supreme Court referred to paragraph 19 of *Indus Mobile* (supra) where it was observed that *"the moment the **seat** is designated, it is akin to an exclusive jurisdiction clause. "Even if a part of cause of action had not arisen in such **seat**, nevertheless the*

*courts situated in the **seat** will have "exclusive jurisdiction for the purpose of regulating arbitral proceedings arising out of the agreement between the parties."*

57. The Supreme Court referred to judgement rendered in ***Brahmani River Pellets Limited versus Kamatchi Industries Ltd*** **2020 (5) SCC 462**; where judgement rendered in *Indus Mobiles* (supra) was followed. The Supreme Court observed in paragraph 49 of judgement rendered in *Soma JV* (supra) that if any other interpretation is taken for example, the interpretation given by the Respondents that Courts where a part of cause of action action had arisen would also have jurisdiction would mean that -*"….,,if part of cause of action arose in five places, even though the parties have contemplated that a neutral **seat** be chosen as the **seat** so that the courts of that place alone would have jurisdiction, yet, any one of the five other Courts in which a part of cause of action arises, including courts in remote corners of the country, would also be clothed with jurisdiction. This obviously cannot be the case. If therefore, the conflicting portion of the judgement of BALCO in para 96 is kept aside for a moment, the very fact that the parties have chosen a place to be the **seat** would necessarily carry with it the decision of both parties that the courts at the **seat** would exclusively have jurisdiction over the entire arbitral process."*

(emphasis supplied)

58. The Supreme Court further observed in paragraph 50:–

> *"50. In fact, subsequent Division Benches of this Court have understood the law to be that where the **seat** of Arbitration is chosen, it amounts to an*

*exclusive jurisdiction clause, in so far as the Courts at the **seat** of Arbitration are concerned. In **Enercon (India) Limited versus Enercon GMBH, 2014 (5) SCC 1**; this Court approved the dictum in Shashoua as follows:-*

> *"126. Examining the fact situation in the case, the Court in Shashoua observed as follows:*
>
> *"The basis for the Court's grant of an anti-suit injunction -- …,depended upon the **seat** of the Arbitration. An agreement as to the **seat** of an Arbitration brought in the law of that country as the Curial law and was analogous to an exclusive jurisdiction clause. Not only was their agreement to the Curial law of the **seat**, but also to the courts of the **seat** having supervisory jurisdiction over the Arbitration, so that, by agreeing to the **seat**, the parties agreed that any challenge to an interim order or final Award was to be made only in the courts of the place designated as the **seat** of the Arbitration.*
>
> *Although, "**venue**", was not synonymous with "**seat**", in an Arbitration clause which provided for Arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that the **venue** of the Arbitration shall be London, United Kingdom did amount to the designation of a juridical **seat**…"*
>
> *(emphasis supplied)*

59. After referring to several paragraphs of *Enercon* (supra), the Supreme Court in paragraph 51 observed as follows: –

> *"51. The Court in Enercon concluded:*
>
> > *"138. Once the **seat** of Arbitration has been fixed in India, it would be in the nature of*

exclusive jurisdiction to exercise the supervisory powers over the Arbitration ."

60. Referring to the test for determination of **seat** the Supreme Court observed that the English courts have examined the concept of 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. Referring to judgement in *Shashoua v Sharma,* the Court observed that wherever there is an express designation of **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 proceedings. The Supreme Court thereafter referred to the *McDonnell Douglas* judgement and *Enercon* judgement and judgement rendered in ***Dozco(India) Private Limited v Doosan Infracore Company Ltd*** 2011 (6) SCC 179; and the *Commentary of Redfern and Hunter on International Arbitration*, and *Alfred MacAlpine* (supra), and came to the conclusion that if the parties failed to mention any place as the juridical **seat** but only mentioned the **venue** or without mentioning the **venue** hold the entire sittings of the Arbitral Tribunal at any particular place, such place shall be treated as "**seat for the Arbitration**" and must also be the forum of choice for remedies seeking to attack the Award.

61. The Supreme Court observed in paragraph 82 as follows: – "

"82. On a conspectus of the aforesaid judgements, 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, coupled with there being no other significant contrary indicia that the stated **venue** is only 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….”*

62. The Supreme Court in *Soma JV* (supra) also approved of the judgement rendered in *Shashoua versus Sharma*, which according to it was also approved by the Constitution Bench in BALCO.

63. The Supreme Court again in a Three Judges decision in ***ManKastu Impex Private Limited versus Air Visual Ltd*** **2020 (5) SCC 399**; was considering an application by ManKastu an Indian company, for appointment of sole Arbitrator. The arbitration agreement provided that the arbitration shall be administered in Hong Kong and the place of arbitration shall be Hong Kong, but at the same time stated that the Memorandum of Understanding would be governed by laws of India and the courts at New Delhi should have jurisdiction. Learned counsel for the Petitioner had argued that since Indian law was governing law and the courts at Delhi had jurisdiction, the seat of arbitration was New Delhi. It relied on *Hardy Exploration* for this purpose. On the other hand *Air Visual* contended that since arbitration agreement provided the place of arbitration to be Hong Kong and the arbitration had to

be administered in Hong Kong, the seat of arbitration was Hong Kong accordingly Indian courts had no jurisdiction to appoint an Arbitrator. The Respondent relied on *Soma JV* for this purpose. The Supreme Court instead of affirming *Soma JV,* decided to adopt another way to determine the issue. It observed that the use of the expression "*place of arbitration*" could not decide the intention of the parties to designate that particular place as a seat of arbitration and such intention had to be determined from other clauses in the agreement between the parties and their contract . But because the parties had also agreed that such arbitration was to be administered in Hong Kong, the Supreme Court ultimately held that the parties had chosen Hong Kong as the seat of arbitration. The Supreme Court observed in *ManKastu* that the Memorandum of Understanding is clearly silent on the proper and Curial law of arbitration. It observed in paragraph 19 and 20 as follows: –

> *"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 hearings will be held. But it is all about which Court would have supervisory power over the arbitration proceedings. In Enercon (India)Ltd versus Enercon GMBH the Supreme Court had held that: (SCC pp 43 and 46 para 97 and 107)*
>
> > *"The 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 "

"20. It is well settled that the seat of arbitration and venue of arbitration cannot be used interchangeably. It has also been established that mere expression "place of arbitration "cannot be the basis to determine the intention of the parties that they have intended that place as the seat of arbitration. The intention of the parties as to seat should be determined from other clauses in the agreement and the conduct of the parties."

64. The Supreme Court declined to give a specific finding with regard to whether *Hardy Exploration* (supra) is no longer good law in view of the observation made by a Coordinate Bench in *Soma JV* or whether *Soma JV* could have declared Hardy Exploration to be *per incuriam* in view of the law of binding precedents and in paragraph 13 it observed

"…however, considering clause 17 of MOU in the present case and the definite clauses therein and in the facts and circumstances of the case, we are not inclined to go into the question on the correctness of BGS Soma or otherwise."

65. The Supreme Court observed that clause 17.2 in the Memorandum Of Understanding between the parties had provided that in case of a dispute it shall be referred to and finally resolved by arbitration administered in Hong Kong which clearly suggested that the parties had agreed that the arbitration be seated at Hong Kong, and that the laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award.

The Supreme Court placed reliance upon its earlier decisions in ***Eitzen Bulk A/S versus Ashapura***

***Minechem Ltd* 2016 (11) SCC 508**, and *Indus Mobile* (supra), to say that when the parties have chosen a place of arbitration in a particular country, that choice brings with it submission to the laws of that country. Once the seat is determined only that jurisdictional Court would have exclusive jurisdiction.

66. In ***Inox Renewables Ltd versus Jayesh Electricals Ltd,* 2021 SCCOnline Supreme Court 448**, a Two Judges Bench was considering the appeal arising out of judgement rendered by the High Court of Gujarat at Ahmedabad wherein the application under Section 34 filed by the appellant was rejected on the ground that the courts at Jaipur, Rajasthan would have jurisdiction to decide such application. The facts of the case were that a purchase order was entered into between Messers Gujarat Fluorochemicals Ltd and the Respondent Jayesh Electricals Ltd for manufacture and supply of power transformers at windfarms. The arbitration clause contained in the purchase order mentioned the venue of arbitration to be Jaipur. A package sale of the entire business of Gujarat Fluorochemicals Ltd took place by way of business transfer agreement between the appellant and GFL to which the Respondent was not a party. In this business transfer agreement the arbitration clause designated Vadodara as the seat of arbitration and the Court at Vadodara to have exclusive jurisdiction qua disputes arising out of the agreement.

67. On an application filed by the Respondent under Section 11 of the Act the High Court of Gujarat at Ahmedabad appointed a retired High Court judge as Arbitrator. The Arbitrator passed an Award. A Section 34 petition was filed by the appellant in Ahmedabad which was resisted by the Respondent referring to the

business transfer agreement and stating that the courts at Vadodara did not have jurisdiction. The Commercial Court at Ahmedabad accepted the respondents' plea and referring to the business transfer agreement returned the application saying that the courts at Vadodara alone would have exclusive jurisdiction. The appellant filed a Special Civil Application No.9536 of 2019 against the said order. The High Court referred to the arbitration clause contained in the purchase order and held that the courts in Rajasthan would have exclusive jurisdiction looking into the exclusive jurisdiction clause and observed that even assuming that Ahmedabad would have jurisdiction, exclusive jurisdiction being vested in the courts at Rajasthan, the appropriate Court would be the Court at Jaipur. The Special Civil Application being dismissed as not maintainable at Ahmedabad, the appellant approached the Supreme Court. It was argued that the business transfer agreement was between Gujarat Fluorochemicals and the appellant and the Respondent was not a party to the same . Hence the arbitration clause in the business transfer agreement was irrelevant however the impugned judgement had failed to consider that the Arbitrator had recorded in the arbitral award that the venue/place of arbitration was shifted by mutual consent to Ahmedabad as a result of which the place of arbitration or seat of arbitration became Ahmedabad resulting in the courts at Ahmedabad having exclusive jurisdiction in view of the laws set up by the Supreme Court in the case of *Soma JV*. On the other hand it was argued by the Respondent that even if the place of arbitration is shifted by mutual agreement, it cannot be done so without a written agreement between the parties. It was argued that the

finding that the venue was shifted by mutual consent from Jaipur to Ahmedabad has reference only to Section 20(3) of 1996 Act as Ahmedabad was in reality a convenient place for the arbitration to take place, the seat of arbitration always remaining at Jaipur. The Court having heard both the parties referred to the Award of the Arbitrator wherein it was mentioned that -"as per the arbitration agreement, the venue of the arbitration was to be Jaipur. However, the parties have mutually agreed irrespective of a specific clause , as to the venue of the arbitration would be Ahmedabad and not at Jaipur. The proceedings, thus have been conducted at Ahmedabad on the constitution of the Tribunal by the learned nominee Judge of the Honourable High Court of Gujarat."

68. The Court observed in paragraph 11 that-

> *"it is clear from the arbitral award that by mutual agreement parties have specifically shifted the venue/place of arbitration from Jaipur to Ahmedabad. This being so, it is not possible to accede to the argument made by the learned counsel for the Respondent that this could only have been done by written agreement and that the Arbitrator is finding would really have reference to a convenient venue and not the seat of arbitration.* "

69. The Supreme Court after referring extensively to *Soma JV* wherein *Indus Mobile* (Supra) and *Videocon* (supra) judgements were considered in detail; observed in para 16&17 that

> *"the moment the seat is chosen as Ahmedabad, it is akin to an exclusive jurisdiction clause, thereby vesting the Court at Ahmedabad with the exclusive jurisdiction to deal with Arbitration .*

Once the seat of arbitration is replaced by mutual agreement to be at Ahmedabad, the courts at Rajasthan are no longer vested with the jurisdiction as exclusive jurisdiction is now vested in the courts at Ahmedabad, given the change in the seat of arbitration."

70. In ***Quippo Construction Equipment Ltd versus Janardan Nirman Private Limited*** **2020 SCCOnline Supreme Court 419**; the Supreme Court was considering an appeal from the judgement of the High Court at Calcutta. There were four agreements entered into from time to time between the appellant and the Respondent for taking on rent construction equipment. In the general terms and conditions appended to the aforesaid agreements, for resolution of disputes between the parties an arbitration clause was provided. The parties agreed to refer such dispute to arbitration under Construction Industry Arbitration Association Rules and Regulations and the venue for holding such arbitration proceedings would be New Delhi.

On the other hand the relevant arbitration clause in the agreement that followed recorded that only Courts and Tribunals at Kolkata shall have exclusive jurisdiction in dispute arising out of terms of the agreement or its interpretation. The sole Arbitrator was appointed in terms of the arbitration clause who conducted the proceedings at New Delhi. A notice was issued to the Respondent who denied the existence of any agreement between the parties and it did not take any steps to participate in the arbitration proceedings. The Respondent on the other hand filed a Title Suit at Sealdah, praying that the agreements be declared as null and void and for a Permanent Injunction restraining the appellant from relying upon the arbitration clauses

contained in the agreements. Initially a restraint order was passed by the Trial Court as a result of which the proceedings before the Arbitrator were stayed. Later on the Trial Court accepted the application filed under Section 5 and 8 of the 1996 Act by the appellant. The Trial Court observed that the plaintiffs had signed a series of agreements and now they were claiming that they were non-existing. Therefore the dispute between the parties regarding of payments was within the scope of arbitration clause. The defendant was justified in referring the matter to arbitration. The Trial Court dismissed the suit as it had no jurisdiction to hear it. The plaint was directed to be returned.

71. The Respondent filed Miscellaneous Appeal before the Additional District Judge, Sealdah. During the pendency of the application for interim relief an *ex parte* Award was given by the Arbitrator accepting the claim preferred by the appellant. Soon after the Award a petition was filed by the appellant before the High Court of Delhi seeking relief under Section 9 of the Act. The Respondent being aggrieved by the Award filed a petition under Section 34 of the Act before the High Court at Calcutta. The said petition was then dismissed. The Respondent thereafter filed a Section 34 application in the Court of District Judge, Alipore. It was alleged that the venue of arbitration in terms of the agreement was at Kolkata. The Appellate Court dismissed the appeal as not maintainable. A petition was filed by the Respondent against the order of the Additional District Judge before the High Court at Calcutta. Such a petition was allowed by the High Court. An appeal was filed before the Supreme Court and the Supreme Court observed that though each of the four agreements provided for arbitration, in one of the agreements the

venue was stated as Kolkata, yet the proceedings were conducted at New Delhi. At no stage objections were raised by the Respondent before the Arbitrator and the Respondent had let the arbitration proceedings to conclude and culminate in an ex parte award. The Court thereafter considered Sections 4, 16 and 20 of the 1996 Act. Section 4 related to waiver of right to object. Section 16 related to the competence of the Arbitral Tribunal to rule on its jurisdiction, and Section 20 related to place of arbitration. Having quoted the three sections the Supreme Court observed that it was open for the Respondent to raise an objection at initial stage of the arbitration regarding its maintainability at New Delhi however, it let the proceedings continue without raising any objections therefore it would be deemed that the Respondent had waived its right and it could not be allowed to object at a later stage. Moreover, the matter had not arisen from an arbitration petition preferred under Section 11 (6) of the Act. In the case before the Supreme Court however, the question was of a domestic and institutional arbitration where Construction Industry Arbitration Association was empowered to and did nominate the Arbitrator.

72. The Supreme Court observed in para 30 that-

> *"The specification of place of arbitration may have significance in an international commercial of arbitration , where the place of arbitration may determine which Curial law would apply. However, in the present case the applicable substantive as well as Curial law would be the same…"*

The Supreme Court there after observed in paragraph 31 as follows: –

> *"31. It was possible for the Respondent to raise submissions that arbitration pertaining to each of*

the agreements be considered and dealt with separately. It was also possible for him to contend that in respect of the agreement where the venue was agreed to be at Kolkata, the arbitration proceedings be conducted accordingly. Considering the facts that the Respondent failed to participate in the proceedings before the Arbitrator and did not raise any submission that the Arbitrator did not have jurisdiction or that he was exceeding the scope of his authority, the Respondent must be deemed to have waived all such objections."

73. The learned counsel for the Petitioner has also placed reliance upon judgements of High Courts of Bombay and Madras and Delhi which have followed the judgement in Soma JV, ie ; *L&T Finance Ltd versus Manoj Pathak and another*; 2020 SCC online Bombay 177; *Om Prakash and others versus Vijay Dwaraka Das Varma* 2020 SCC online Bombay 796; *Engineering Projects India versus Balaji Projects* 2021 SCConline Madras 409; and *S.P. Singla Constructions Pvt Ltd versus Construction and Design Services UP Jal Nigam* ARB.P450/2021 decided on 23.9.2021; where the High Courts had held that subsequent to the signing of the agreement where the seat has been designated, it is the conduct of the parties which is important. If the venue is shifted to some place else where the entire arbitration proceedings are held then the place at which such arbitration proceedings are held would be deemed to be the seat of arbitration raising an exclusive jurisdiction clause and the courts situated in that place alone would have jurisdiction to deal with any application under Section 34/37 of the Act of 1996.

Even where no place of arbitration is specified in

the arbitration clause the parties could agree to a place of arbitration separately in writing and even in the absence of such place being specified in writing, it could be ascertained from the conduct of the parties. If the parties do not object before the Arbitrator appointed by a High Court and participate in the proceedings then such particular place by their conduct , would become the seat of arbitration creating an exclusionary jurisdiction clause for the courts situated in that place to have supervisory jurisdiction.

74. A Two judges bench of the Supreme Court in ***Ravi Ranjan Developers Private Limited versus Aditya Kumar Chatterji*** **2022 SCConline Supreme Court 568;** decided on 24.03.2022, was considering an order of the Calcutta High Court appointing a sole Arbitrator under Section 11 (6) of the 1996 Act. The appellant and the Respondent had entered into a development agreement for a property situated at Muzaffarpur in Bihar. Dispute arose in relation to such development agreement. The Respondent sent a notice to the appellant invoking arbitration clause under the development agreement. Notice was sent to the registered office of the appellant at Patna in Bihar outside the jurisdiction of the Calcutta High Court. Thereafter, the Respondent moved a petition under Section 11 sub-Section (6). The appellant denied that the Calcutta High Court had territorial jurisdiction to entertain such application. It submitted that the development agreement was executed and registered in the State of Bihar. The registered office of the appellant was also situated outside the jurisdiction of the Calcutta High Court. However, the Respondent submitted that the parties had agreed to submit to the jurisdiction of the Calcutta High Court by fixing Kolkata as the place

for arbitration proceedings to be held.

The Respondent had relied upon *Soma JV* and *Indus Mobile* and ***Hindustan Construction Company Limited versus NHPC*** 2020 (4) SCC 234, to argue that whenever there is designation of a place of arbitration in an agreement as being the venue of the arbitration proceedings, the expression arbitration proceedings would make it clear that the venue is really the seat of arbitral proceedings, and it would create an exclusionary clause with respect to the courts situated at such seat having exclusive supervisory jurisdiction over disputes arising out of five attrition agreement.

75. The Supreme Court observed in paragraph 37, 38, 39, 40, 41 as follows: –

> *"37.The Question before the Constitution Bench was whether Part I of the Arbitration and Conciliation Act applied to the arbitration, where the place of arbitration was outside India.*
>
> *"38. As observed by the Constitution Bench, Section 2 (2) of the Arbitration and Conciliation Act places a threshold limitation on the applicability of Part I, where the place of arbitration is not in India. The Constitution Bench in effect and substance drew a distinction between venue and place of arbitration, as contemplated in Section 20 and held that only if the agreement of the parties was construed to provide for seat/place of arbitration in India, hen Part I of 1996 Act be applicable. If the seat/place was outside India, Part I would not apply, even though the venue of a few sittings may have been in India, or the cause of action may have arisen in India.*
>
> *"39. The judgement of this Court in Soma JV*

(supra) ……..was also rendered in the context of Section 2 (2) of the Arbitration and Conciliation Act and the applicability of Part I of the Arbitration and Conciliation Act to an international commercial arbitration,where the seat of arbitration was not in India.

"40. In Hindustan Construction Company Ltd (supra), this Court held that where the seat of arbitration is designated, the same operates as an exclusive jurisdiction clause and only courts within whose restriction the seat was located, would have jurisdiction to the exclusion of all other courts. In the facts and circumstances of that case this Court found that courts at New Delhi alone would have jurisdiction for the purpose of challenge to the award.

"41. It is well settled that a judgement is a precedent for the issue of law that is reached and declared decided. The judgement has to be construed in the backdrop of the facts and circumstances in which the judgement has been rendered. Words, phrases and sentences in a judgement, cannot be read out of context. Nor is a judgement to be read and interpreted in the manner of a statute. It is only the law as interpreted in an earlier judgement, which constitutes a binding precedent and not every thing that the judges say".

76. The Supreme Court in *Ravi Ranjan Developers* (supra) thereafter observed that on careful perusal of the development agreement it was evident that the parties to the arbitration agreement had agreed to hold the sittings of the Arbitral Tribunal in Kolkata.

Referring to *Union of India versus Hardy*

Exploration and *ManKastu Impex* that mere expression "place of arbitration "cannot be the basis to determine the intention of the parties that they have intended that place as a "seat of arbitration", the Supreme Court held that Kolkata was only the venue for the sittings of the Arbitral Tribunal . In this case the parties had not agreed to refer their disputes to the jurisdiction of the courts in Kolkata. Referring to the Code of Civil Procedure and Sub-Section (2) of Section 2 of the 1996 Act, the Supreme Court observed that the Court having jurisdiction to decide the questions forming the subject matter of the arbitration subject to pecuniary and other limitations would be either where the immovable property was situated or where the defendant voluntarily resides or carries on business. A suit may also be instituted in a Court within whose jurisdiction the cause of action arises either wholly or in part. Admittedly the immovable property was situated at Muzaffarpur in Bihar and admittedly no part of cause of action had arisen within the territorial jurisdiction of the Calcutta High Court.

77. It observed in paragraph 28 as follows—

> *"28. It could never have been the intention of Section 11(6)of the Arbitration and Conciliation Act that arbitration proceedings should be initiated in any Court in India, irrespective of whether the Respondent resided or carried on business within the jurisdiction of that High Court, and irrespective of whether any part of cause of action arose within the jurisdiction of that Court, to put an opponent at a disadvantage and steal a march over the opponent.* "

78. The Supreme Court also observed that under Section 42 of the 1996 Act which was mandatory, any

application under Part I of the Act if made to a Court, that Court alone would have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that agreement, and the arbitral proceedings, would have to be made in that Court and in no other Court, unless of course, the Court in which the first application had been instituted, inherently lacked jurisdiction to entertain that application.

79. In a recent decision dated 18.5.2022 rendered by Two Judges Bench in Civil Appeal No.4130 of 2022: ***BBR (India) Private Limited versus SP Singla Constructions (Private) Limited***; the Supreme Court was considering a case where under the arbitration agreement a retired Justice of the High Court was appointed as sole Arbitrator who heard the proceedings at Panchkula, Haryana. Later on he recused for personal reasons. Another retired High Court Judge was appointed who held the arbitration proceedings at New Delhi. The Award was signed and delivered at New Delhi. The Respondent was awarded more than 3crores 35 lakhs with interest at the rate of 15% per annum. The arbitration clause was silent and did not state the seat or venue of arbitration. The contract and the Letter of Intent had been executed at Panchkula, Haryana. The Respondent filed an application for interim order under Section 9 of the 1996 Act before the Additional District Judge Panchkula, Haryana in terms of the Award. The said application was dismissed by the Additional District Judge, Panchkula, on the ground of lack of territorial jurisdiction by observing that jurisdiction to entertain the application rests solely with Delhi High Court where a prior petition under Section 34 had been filed by the appellant and was pending. The petition under Section 9 being a subsequent

petition would be barred under Section 42 of the Act. Such order was set aside by the High Court of Punjab and Haryana with finding that the Courts of Delhi did not have jurisdiction to entertain the objection under Section 34 of the Act and the Court at Panchkula, Haryana had the jurisdiction to deal with the case.

80. Such order was challenged before the Supreme Court. The Supreme Court observed after quoting Section 2(1)(e) and Section 20 and Section 42 of the 1996 Act and judgement rendered by the five judges in BALCO, that there was a distinction between jurisdictional seat and venue in the context of International arbitration. The arbitrators at times hold meetings at more convenient locations. The Court also noticed the three judges decision in *Soma JV versus NHPC Ltd*, where paragraph 96 of BALCO judgement had been interpreted and clarified by the Supreme Court. In *Soma JV*, the Supreme Court had observed that the term "*subject matter of the suit*" used in clause (1) is for the purpose of identifying the Court having supervisory control over the judicial proceedings . Hence, the clause refers to a Court which would be essentially a Court of the seat of the arbitration process. The seat of arbitration process has to be determined in terms of Section 20 of the Act as such that the term Court as defined in Sub-Section (1) of Section 2 which refers to the subject matter of arbitration is not necessarily used as finally determinative of the Court's territorial jurisdiction to entertain proceedings under the Act. In *Soma JV* the Supreme Court had observed that any other construction of the provisions would render Section 20 of the Act nugatory. The Court had held that the legislature had given jurisdiction to two courts: the

Court which should have jurisdiction where the cause of action is located; and a Court where the arbitration takes place. The seat of arbitration need not be the place where any cause of action has arisen as the parties may choose a neutral place for holding arbitration proceedings. However under Section 20 subsection (1), party autonomy to fix such seat of arbitration by agreement is recognised. It was therefore held that an agreement as to the seat of arbitration draws in the law of that country as the Curial law and is analogous to an exclusive jurisdiction clause.

81. The Supreme Court in *Singla Construction* (supra) observed that the principles relating to the seat of arbitration and the exclusive jurisdiction clause as in international arbitration was applied to domestic arbitration in the case of *Soma JV* (supra) and quoted paragraph 38 and 40 of the said judgement. It referred to judgement rendered in *Indus Mobile versus Datawind Innovations* and *Brahmani River Pellets Ltd versus Kamatchi Industries Ltd* and observed in para 20 thus:-

> *".....in the context of domestic arbitrations it must be held that once the seat of arbitration has been fixed, then the courts at the said location alone will have exclusive jurisdiction to exercise the supervisory powers over the arbitration. The courts at other locations would not have jurisdiction, including the courts where cause of action has arisen. As observed and held in Soma JV (supra), and Indus mobile (supra), the moment the parties by agreement designate the seat, it becomes akin to an exclusive jurisdiction clause. It would then vest the Court at that seat with the exclusive jurisdiction to regulate*

arbitration proceedings arising out of the agreement between the parties."

82. Referring to the judgement in *Soma JV* (supra), the Supreme Court in *Singla Constructions* observed that the said judgement also dealt with a situation where the parties have not agreed on or have not fixed the jurisdictional seat of arbitration. In *Soma JV*, the test to determine the seat of arbitration which would determine the location of the Court that would exercise supervisory jurisdiction was given in paragraph 61 Where it was observed:-"*.. 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 supra national 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 proceedings*"

83. The Supreme Court in *S.P. Singla* (supra) observed

"*– – accordingly, In Soma JV (supra), the law as applicable, where the parties by agreement have not fixed jurisdictional seat, is crystallised as under:*

"82. On a conspectus of the aforesaid judgements 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. – – – – further the fact that 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 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 purpose of arbitration..”

84. In paragraph 22 of *S.P. Singla (supra),* the Supreme Court referred to the observations made in *Soma JV* that the reasoning given in *Hardy Exploration and Production* (supra) is *per incuriam* as it contradicts the ratio as laid down in *BALCO* (supra). The Supreme Court thereafter considered the facts of the case before it where the earlier appointed sole Arbitrator had held hearing at Panchkula in Haryana and on his recusal, another sole Arbitrator was appointed who held the arbitration proceedings at Delhi, and delivered the award at Delhi. It referred to the arguments raised by the learned counsel for the appellant that on the appointment of the new Arbitrator the venue being fixed at Delhi, the juridical seat of arbitration had changed from Panchkula in Haryana to Delhi. The

Supreme Court observed that in so far as sub-Section (1) of Section 20 of the 1996 Act is concerned, the observations made by the Supreme Court in *Inox Renewable* (supra) is correct, but they cannot be read as a precept in cases governed by sub-Section (2) of Section 20 of the Act. *Inox Renewable* would apply in cases where the parties by consent agree mutually that the seat of arbitration would be located at a particular place. It would not apply when the Arbitrator fixes the seat in terms of sub-Section (2) of Section 20 of the Act. Once the Arbitrator fixes the seat in terms of sub-Section (2) of Section 20 of the Act, the Arbitrator cannot change the seat of arbitration, except when and if the parties mutually agree and state that the seat of arbitration should be changed to another location, which is not so in the present case.

85. The Supreme Court observed in paragraph 25 and 26 of its judgement in *S.P. Singla* that any other interpretation would lead to "*uncertainty and confusion resulting in avoidable esoteric and hermetic litigation as to the jurisdictional seat of arbitration.*" It observed that "..*, it would create a recipe for litigation and what is worse confusion which was not intended by the Act. The place of jurisdiction over the seat must be certain and static and not vague or changeable, as the parties should not be in doubt as to the jurisdiction of the courts for availing of judicial remedies. Further, there would be a risk of parties rushing to the courts to get first hearing or conflicting decisions that the law does not contemplate and is to be avoided*."

86. The Supreme Court further observed in *S.P. Singla* in para 28 thus:-

> *"….the legal question raised in the case must be answered objectively or not subjectively with*

reference to the facts of a particular case. Otherwise, there would be lack of clarity and consequent mixup about the courts that would exercise jurisdiction. There could be cases where the arbitration proceedings were held at different locations but the seat of arbitration, as agreed by the parties or as determined by the Arbitrator, may be different, and at that place ,"the seat",only a few hearings or initial proceedings may have been held. This would not matter, and would not result in shifting of the jurisdictional seat. Arbitrators can fix the place of residence, place of work, or in case of recusal , arbitration proceedings may be held at two different places, as in the present case. For clarity and certainty, which is required when the question of territorial jurisdiction arises, we would hold that the place or the venue fixed for arbitration proceedings, When subsection (2) of Section 20 applies, will be the jurisdictional seat and the Court having jurisdiction over the jurisdictional seat would have exclusive jurisdiction. This principle would have exception that would apply when by mutual consent the parties agree that the jurisdictional seat should be changed, and such consent must be express and clearly understood and agreed by the parties."

(emphasis supplied)

87. It further observed that paragraph 42 of the judgement in *Soma JV* supports the *"..reasoning that once the jurisdictional seat of arbitration is fixed in terms of subsection (2) of Section 20 of the Act, then, without the express mutual consent of the parties to the arbitration, the seat cannot be changed…."*

88. The learned counsel for the Respondent Railways has placed before this Court a judgement of a coordinate Bench of this Court in a petition under Article 227 No.6890 of 2021:*Hasmukh Prajapati versus Jaiprakash Associates Ltd;* decided on 17.2.2022.

89. The Petitioner before the Coordinate Bench had challenged the order passed by the Presiding Officer Commercial Court Gautam Budh Nagar, in an application preferred under Section 34 of the 1996 Act arising out of Award dated 16.02.2019 passed by the Arbitral Tribunal at New Delhi. The Petitioner had booked a flat with the respondents and had made full payment by taking a housing loan from a Non Banking Finance Company with interest at the rate of 13% per annum. The possession had to be delivered in three years. Jaypee Associates however did not deliver possession for more than nine years. The Petitioner preferred an arbitration application before this Court and this Court appointed a Retired Judge having his office at New Delhi, under Section 11(6) of the 1996 Act as there was no dispute between the parties that the place of arbitration will be New Delhi. The Arbitral Award was passed in favour of the Petitioner against which the Respondent preferred an arbitration application under Section 34 before the District Judge Gautam Budh Nagar. An application was filed by the Petitioner praying for Return of Plaint on the ground that it was not maintainable. Such application was rejected by the Commercial Court Gautam Budh Nagar. The Petitioner thereafter approached this Court in the aforesaid Article 227 petition.

90. This Court while considering the issue whether the Commercial Court at Gautam Budh Nagar had jurisdiction to hear the case under Section 34 of the

1996 Act recorded that the arbitral award having been passed at New Delhi after completion of entire arbitration proceedings at Delhi. The counsel for the Petitioner argued that in the arbitration agreement the seat of arbitration had not been specified. The venue of arbitration had been chosen to be New Delhi by both the parties out of convenience. In the absence of specified seat of arbitration in the agreement, the venue of arbitration will be the juridical seat of arbitration proceedings. The learned counsel for the Petitioner had placed reliance upon judgement rendered by three judges bench in *Soma JV* where the Court had interpreted the Constitution Bench judgement in *BALCO* and paragraph 96, to say that if both parties had chosen a seat of arbitration the courts situated in such seat will have exclusive jurisdiction to entertain and decide dispute under Section 34 of the Act. Since no seat of arbitration was specified in the agreement and the parties agreed upon the venue of arbitration to be New Delhi, the stated venue will be the Juridical seat of arbitration as held also in the case of *Roger Shashoua versus Mukesh Sharma and others* 2017 (14) SCC 722.

91. The Coordinate Bench went on to observe that the judgement in *Hardy Exploration* (supra) was rendered by Three Judges Bench. However in *Soma JV* which came in later, another Three-Judges Bench observed that the decision in *Hardy Exploration* is *per incuriam*. The Coordinate Bench thereafter observed that *"….there is uncertainty whether decision in Hardy Exploration or Soma JV holds the field as a concurrent bench could not have overruled the judgement in Hardy Exploration.."*

92. The Coordinate bench of this Court observed in paragraph 31 as follows:–

"31. From the above consideration of the judgement of the honourable Supreme Court regarding the seat and venue controversy, this Court finds that the judgement of the honourable Supreme Court in the case of BALCO (supra) still holds good. The judgement in the case of Hardy Exploration (supra) or Soma JV (supra) are of two Coordinate Benches of three Honble judges and their ratios are contrary to each other. While Hardy Exploration stipulated that a chosen venue could not by itself assume the status of seat of arbitration in the absence of additional Indicia, Soma JV (supra) prescribed that the chosen seat of arbitration proceedings would become the seat of arbitration in the absence of any significant contrary indicia. The recent judgement in the case of Messers Inox Renewables Ltd (supra) follows Soma JV (supra)."

93. The Coordinate Bench there after observed that in BALCO it was held that there was concurrent jurisdiction conferred on the courts seized with the subject matter in dispute and the courts where the arbitration was carried out. However, such concurrent jurisdiction will not replace "*significant contrary indicia test*" as per *Shashoua principle*.

94. It thereafter interpreted the clauses in the contract where under Clause 10.6 the governing law and jurisdiction of the Courts would be the Courts of Gautam Budh Nagar in UP; whereas such clause was made subject to Clause 10.9 of the Standard Terms and Conditions. The exception regarding Clause 10.9 constituted "*significant contrary indicia*" as per Shashoua principle in agreement regarding treating the venue of arbitration (New Delhi) as seat of arbitration

proceedings and not Gautam Budh Nagar where the cause of action arose. The Arbitrator conducted the arbitration proceedings at the agreed venue of New Delhi and passed the Award. The parties never clearly stated about the seat of arbitration but from Clause 10.6 of the agreement, the courts at Gautam Budh Nagar, UP India were agreed to have jurisdiction over all matters arising out of or relating to allotment/provisional allotment. This clause proved that the parties had chosen the seat of arbitration as Gautam Budh Nagar and venue of arbitration as New Delhi India. Moreover, the Petitioner had approached this Court for appointment of Arbitrator under Section 11 of the Act. It had also moved execution proceedings under Section 36 of the Act before the Court at Gautam Budh Nagar. If it was held by the Court now that the seat of arbitration was at New Delhi, it would create an exclusionary clause, and the appointment of the Arbitrator itself by this Court at Allahabad would become non est. The Coordinate Bench thereafter held that New Delhi was only the Venue of Arbitration and Gautam Buddh Nagar was the Seat of Arbitration and the Courts at Gautam Buddh Nagar had exclusive jurisdiction to deal with the challenge to the Award.

95. This court is of the considered opinion that the judgement rendered in *Soma J V* (supra) has been reiterated by the Supreme Court in *Quippo constructions* (supra) and *Singla Constructions* (supra) and the reason for following *Soma JV* as against *Hardy Exploration* (supra) have also been stated with quite clarity and definiteness in Singla Constructions. Soma JV (supra) was sought to be questioned by the Respondents in *ManKastu Impex* but the three judges Coordinate Bench refused to make any observations

with regard to the failure to follow the law of binding precedents in *Soma J V*. The Court observed in *ManKastu* while looking at the clauses of the contract, and the judgement rendered in *Shashoua* case held that the language of the contract gave sufficient indication of the intent of the parties to hold arbitration proceedings at Hong Kong which would therefore be also the juridical seat.

96. This Court has also considered observations made in *Ravi Ranjan Developers* (supra) but finds that the judgement in Ravi Ranjan Developers turned on its on facts where the respondents had themselves approached the courts in Bihar first, and hence were bound by *Non Obstante clause* in Section 42 of the 1996 Act . In any case, a Two Judges decision in *Ravi Ranjan Developers* could not be said to have decided the law against what has already been settled by three Judges Bench in *Soma J V* while following to 5 Judges Bench in *BALCO*.

97. This court has also considered the conduct of the parties which is very relevant for a decision to be taken,in view of what has been stated hereinabove with regard to Section 4 and Section 20 of the 1996 Act. The contract being governed by the Tender Paper ELCORe, It was open for the parties, more specifically the Railways, to determine the place of arbitration by way of written agreement. Instead of any written agreement or conditions in the Contract or even in the correspondence between the parties, specifying the seat of arbitration, the Railways agreed to participate in the arbitration proceedings at New Delhi without any protest. The Railways Hence can be said to have waived their right to object and by their conduct determined the venue of arbitration at New Delhi to be also the

seat of the arbitration proceedings. Issues b, c, and d consequently are also decided in favour of the petitioner and it is held that failure to specifically mention a Seat of Arbitration and participation in Arbitration proceedings at New Delhi by the Railways without any protest shall be considered as determination of the Venue of arbitration as also the Seat, giving exclusive jurisdiction to the Courts at New Delhi to supervise the Arbitral proceedings including any attack on the Award.

98. The order impugned dated 12.12.2019 is held to be vitiated and liable to be set aside. The Commercial Court at Lucknow has entertained the Section 34 Application without jurisdiction. Such inherent lack of jurisdiction makes the proceedings before it also liable to be set aside.

99. This petition stands ***allowed.***

100. The order impugned dated 12.12.2019 is set aside. Consequences to follow.

Order Date :- 1.9.2022

Rahul

[Justice Sangeeta Chandra]

Digitally signed by RAHUL TRIPATHI
Date: 2022.09.02 09:26:47 IST
Reason:
Location: High Court of Judicature at Allahabad, Lucknow Bench