REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8607 OF 2010

NOY VALLESINA ENGINEERING SpA,
(now known as Noy Ambiente S.p.a) ...APPELLANT(S)

VERSUS

JINDAL DRUGS LIMITED & ORS. ...RESPONDENT(S)

J U D G M E N T

S. RAVINDRA BHAT, J.

1. The appellant, which was granted special leave, challenges a judgment of the Bombay High Court[1]. It urges that the impugned judgment is erroneous because it concludes that proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") can be maintained to challenge a foreign award, defined as one, under that enactment.

The facts

2. The appellant company (hereafter "NV Engineering" or "the appellant") was the relevant time, incorporated under Italian law and involved in the setting-up

[1]Dated 28.4.2008 in Appeal No. 519/2002

and construction of plants for production of synthetic fibers, polymers and ascorbic acid. The respondent (hereafter "Jindal") is a public limited company incorporated under relevant Indian law. In1994, Jindal negotiated with a company - Engineering Chur AG of Sagenstrasse 97, 7001 Chur, Switzerland (hereafter,'Enco') and, on 30.01.1995 entered into four related agreements with Enco to set up an ascorbic acid plant in India. These were: (i) Engineering Contract for Ascorbic for Acid Plant (ECAAP, or "plant contract"); (ii) Supply contract for Ascorbic Acid plant (SCAAP or "supply contract"); (iii) Service agreement for Ascorbic Acid plant (SAAAP "service contract"); and (iv) License agreement for Ascorbic acid plant (LAAAP "license contract").

3. Under the plant contract, Enco agreed to provide Jindal with technical information and basic engineering documentation for the construction, commission, operation and maintenance of the Ascorbic Acid Plant ("the plant"). In consideration of Enco's obligations, Jindal was to pay a total fee of Swiss Francs 86,00,000/- in the manner provided in the Agreement. ECAAP as well as the other three agreements had an arbitration clause. In March 1995, with the consent of the respondent, Enco assigned ECAAP to NV Engineering. All the obligations of Enco towards Jindal were taken over by NV Engineering.

4. Disputes arose between Jindal and NV Engineering. The latter terminated the agreement and claimed damages. On 31.10.1996, Jindal filed a request for arbitration under the ECAAP, i.e. the plant contract, before the International Court of Arbitration (ICC), Paris. The appellant filed its reply to Jindal's claim and also made a counter claim. Jindal appointed Mr. Desai as its nominee on the arbitral tribunal. NV Engineering nominated Prof. ACC Alberto Santa Maria as its nominee. The appointment of Mr. Desai and Prof. ACC Alberto Santa Maria as Arbitrators was confirmed by the ICC. Mr. Richard Fernyhough Q.C. was appointed as Chairman of the Arbitral Tribunal.

5. After considering the claims and counter claims, the tribunal made a partial award on 01.02.2000; by that award, Jindal's claims were rejected. NV Engineering was awarded SFr.44,33,416 (Swiss Francs) towards its counterclaims under the ECAAP. The tribunal then called upon the parties to present written representations on interest and costs in terms of Article 20 of the ICC Rules of Arbitration to enable it to frame the final award.

6. On 20.2.2000 Jindal filed a petition[2] before the Bombay High Court under Section 34 of the Act challenging the partial award. The petition was admitted for final hearing on 01.03.2000 and notice was issued to the respondents (including the ICC and the tribunal). An interim injunction restraining the said respondents *"from receiving any further submissions, and/or passing any further direction and/or Ruling and/or Award in the arbitration proceedings…."* was issued. This order was continued from time to time till the petition was decided. The ICC tribunal in the meanwhile was of the view that the interim order passed by the high court was not binding on it and consequently, proceeded further. NV Engineering filed written submissions on interest and cost on 14.03.2001. Jindal, however, notified the tribunal that it did not intend to make any submission on the issue of interest and cost. Mr. Desai (the respondent's nominee) indicated that he was unable to continue on the tribunal due to the interim order passed by the court. Resultantly the ICC appointed Mr. Ashok Sancheti as a replacement co-arbitrator in place of Mr. Desai, and the tribunal made its final Award on 22.10.2001. When the final award was made, Jindal's challenge to the partial award, and the interim application[3] were both pending in the High Court.

7. The petition (under Section 34) challenging the partial award was decided by the High Court by an order of a Single Judge dated 6.2.2002[4], which held that the

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[2]Arbitration petition No. 49/2000.

[3]No. 98/2000, under Section 9 of the Act.

[4] Dated 06.02.2002, which is now reported as *Jindal Drugs Ltd v Noy Vallesina* 2002 (2) Mah. LJ 820.

since the partial award was a foreign award, a challenge through a petition was not maintainable under Section 34 of the Act. Jindal preferred an appeal against that order before the Division Bench[5] (hereafter "Jindal's challenge appeal"). During the pendency of the appeal, NV Engineering had applied for enforcement of the two awards, i.e. the partial and final awards, under Sections 47 and 48 of the Act, in the chapter relating to foreign awards. This petition was allowed and Jindal's objections against the two awards' enforceability were overruled. The single judge who decided the petition held, in a judgment (hereafter referred to as "the enforcement order")[6] that the two awards *"at Exh. A & B are enforceable, save and except that part of the award at Exh. A which directs payment of Swiss Fr.1,453,316"* by Jindal to NV Engineering. Jindal preferred an appeal (hereafter "Jindal's enforcement appeal") and NV Engineering filed a cross appeal[7].

8. By the impugned judgment, even as the later two appeals, which directly dealt with the same subject matter (enforcement of a foreign award were pending), the Division Bench decided Jindal's challenge appeal preferred in 2002, and set aside the single judge's order (which had ruled that a petition under Section 34 was not maintainable). The Division Bench relied on the judgments of this court, i.e. *Bhatia International v. Bulk Trading S. A. & Anr*[8] and *Venture Global Engineering v. Satyam Computer Services Ltd. & Anr*[9] to hold that proceedings under Section 34 of the Act could be validly maintained to challenge a foreign award.

The parties' contentions

9. Appearing for the appellant, NV Engineering, Mr. Joydeep Gupta, learned senior counsel, urged that the impugned judgment is unsupportable in law because a

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[5]Appeal No. 519/2002.

[6]*Noy Vallesina v Jindal Drugs Ltd* 2006 (3) Arb.LR 510 (Bom). The enforcement proceeding, under Sections 47/48 were registered as Arb. Petition No. 156/2005. The decision was rendered on 05.06.2006.

[7] Jindal's appeal was Appeal No. 492/2006; NV Engineering's appeal was Appeal. No. 740/2006

[8](2002) 4 SCC 105

[9]2008 (4) SCC 190

foreign award cannot be challenged under Section 34 of the Act. It was urged that the three-judge decision in *Bhatia International*[10] and the subsequent holding in *Venture Global*[11] were both held to be incorrect in the larger, five judges ruling in *Bharat Aluminium Company vs Kaiser Aluminium Technical Services Inc*[12](*"BALCO"* hereafter). Learned counsel submitted that even the caveat in *BALCO* that a class of foreign awards made prior to its pronouncement cannot aid Jindal's essential argument with respect to maintainability of a challenge under Section 34 and that such challenge under Part I is untenable.

10. Mr. Gupta relied on *BALCO* extensively in support of his argument that the foreign awards in this case, having been rendered outside India under the aegis of the ICC cannot be challenged merely because a condition in the underlying contract says that the law governing the agreement, would be Indian law. The following discussion in *BALCO* was pressed into service:

> *"117. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat/place of arbitration outside India, then the provision that the Arbitration Act, 1996 would govern the arbitration proceedings, would not make Part I of the Arbitration Act, 1996 applicable or enable the Indian courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the English procedural law/curial law. This necessarily follows from the fact that Part I applies only to arbitrations having their seat/place in India.*
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> *123. Thus, it is clear that the regulation of conduct of arbitration and challenge to an award would have to be done by the courts of the country in which the arbitration is being conducted. Such a court is then the supervisory court possessed of the power to annul the award.*

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[10] Supra n. 8

[11] Supra n. 9

[12] 2012 (9) SCC 552

This is in keeping with the scheme of the international instruments, such as the Geneva Convention and the New York Convention as well as the UNCITRAL Model Law. It also recognises the territorial principle which gives effect to the sovereign right of a country to regulate, through its national courts, an adjudicatory duty being performed in its own country. By way of a comparative example, we may reiterate the observations made by the Court of Appeal, England in C v. D [2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)] wherein it is observed that:

> *"It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award."*
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> *(emphasis supplied)*

In the aforesaid case, the Court of Appeal had approved the observations made in A v. B [(2007) 1 All ER (Comm) 591: (2007) 1 Lloyd's Rep 237] wherein it is observed that:

> *"... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy ... as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration."*
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> *(emphasis supplied)*

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133. The party which seeks to resist the enforcement of the award has to prove one or more of the grounds set out in Sections 48(1) and (2) and/or the Explanation of sub-section (2). In these proceedings, we are, however, concerned only with the interpretation of the terms "country where the award was made" and "under the law of which the award was made". The provisions correspond to Article V(1)(e) of the New York Convention, which reads as under:

> *"V(1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that—*
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> *(a)-(d)****
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> *(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of*

the country in which, or under the law of which, that award was made.

(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country."

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135. Thus, the intention of the legislature is clear that the court may refuse to enforce the foreign award on satisfactory proof of any of the grounds mentioned in Section 48(1), by the party resisting the enforcement of the award. The provision sets out the defences open to the party to resist enforcement of a foreign award. The words "set aside or suspended", in clause (e) of Section 48(1) cannot be interpreted to mean that, by necessary implication, the foreign award sought to be enforced in India can also be challenged on merits in Indian courts. The provision merely recognises that courts of the two nations which are competent to annul or suspend an award. It does not ipso facto confer jurisdiction on such courts for annulment of an award made outside the country. Such jurisdiction has to be specifically provided in the relevant national legislation of the country in which the court concerned is located. So far as India is concerned, the Arbitration Act, 1996 does not confer any such jurisdiction on the Indian courts to annul an international commercial award made outside India. Such provision exists in Section 34, which is placed in Part I. Therefore, the applicability of that provision is limited to the awards made in India. If the arguments of the learned counsel for the appellants are accepted, it would entail incorporating the provision contained in Section 34 of the Arbitration Act, 1996, which is placed in Part I of the Arbitration Act, 1996 into Part II of the said Act. This is not permissible as the intention of Parliament was clearly to confine the powers of the Indian courts to set aside an award relating to international commercial arbitrations, which take place in India.

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134. The aforesaid Article of the New York Convention has been bodily lifted and incorporated in the Arbitration Act, 1996 as Section 48.

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151.Redfern and Hunter [Blackaby, Partasides, Redfern and Hunter (Eds.), Redfern and Hunter on International Arbitration (5th Edn., Oxford University Press, Oxford/New York 2009).] at Para 11.96 state that the court which is competent to sustain or set aside an award is the court of the country in "alternative one" or "alternative two". The authors, however, further state that "this court will almost invariably be the national court at the seat of the arbitration". They point out that the prospect of an award being set aside under the procedural law of a State other than that at the seat of arbitration is unlikely. They point out that an ingenious (but unsuccessful) attempt was made to persuade the US District Court to set aside an award made in Mexico, on the basis that the reference to the law under which that award was made was a reference to the law governing the dispute and not to the procedural law (para 11.96). The learned authors had made a reference to International Standard Electric Corpn. (US) v. Bridas Sociedad Anonima Petrolera (Argentina) [(1992) 7 Ybk Comm Arb 639] . The Court rejected the aforesaid argument with the following observations:

> *"Decisions of foreign courts under the Convention uniformly support the view that the clause in question means procedural and not substantive (that is, in most cases, contract law)….*
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> *Accordingly, we hold that the contested language in Article V(1)(e) of the Convention ... refers exclusively to procedural and not substantive law, and more precisely to the regimen or scheme of arbitral procedural law under which the arbitration was conducted."*

152. The correct position under the New York Convention is described very clearly and concisely by Gary B. Born in his book International Commercial Arbitration (Kluwer Law International, Vol. 1), Ch. X, p. 1260 as follows:

> *"This provision is vitally important for the international arbitral process, because it significantly restricts the extent of national court review of international arbitral awards in annulment actions, limiting such review only to the courts of the arbitral seat (that is, the State where the award is made or the State whose procedural law is selected by the parties to govern the arbitration). In so doing, the Convention ensures that courts outside the arbitral seat may not purport to annul an international award, thereby materially limiting*

the role of such courts in supervising or overseeing the procedures utilized in international arbitrations.

At the same time, the New York Convention also allows the courts of the arbitral seat wide powers with regard to the annulment of arbitral awards made locally. The Convention generally permits the courts of the arbitral seat to annul an arbitral award on any grounds available under local law, while limiting the grounds for non-recognition of Convention awards in courts outside the arbitral seat to those specified in Article V of the Convention. This has the effect of permitting the courts of the arbitral seat substantially greater scope than courts of other States to affect the conduct or outcome of an international arbitration through the vehicle of annulment actions. Together with the other provisions of Articles II and V, this allocation of annulment authority confirms the (continued) special importance of the arbitral seat in the international arbitral process under the New York Convention."

(emphasis supplied)

153. In our opinion, the aforesaid is the correct way to interpret the expressions "country where the award was made" and the "country under the law of which the award was made". We are unable to accept the submission of Mr Sundaram that the provision confers concurrent jurisdiction in both the fora. "Second alternative" is available only on the failure of the "first alternative". The expression under the law is the reference only to the procedural law/curial law of the country in which the award was made and under the law of which the award was made. It has no reference to the substantive law of the contract between the parties. In such view of the matter, we have no hesitation in rejecting the submission of the learned counsel for the appellants.

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154. At this stage, we may notice that in spite of the aforesaid international understanding of the second limb of Article V(1)(e), this Court has proceeded on a number of occasions to annul an award on the basis that parties had chosen Indian law to govern the substance of their dispute. The aforesaid view has been expressed in Bhatia International [(2002) 4 SCC 105] and Venture Global Engg. [(2008) 4 SCC 190] In our opinion, accepting such an interpretation would be to ignore the spirit underlying the New York Convention which

> *embodies a consensus evolved to encourage consensual resolution of complicated, intricate and in many cases very sensitive international commercial disputes. Therefore, the interpretation which hinders such a process ought not to be accepted. This also seems to be the view of the national courts in different jurisdictions across the world. For the reasons stated above, we are also unable to agree with the conclusions recorded by this Court in Venture Global Engg. [(2008) 4 SCC 190] that the foreign award could be annulled on the exclusive grounds that the Indian law governed the substance of the dispute. Such an opinion is not borne out by the huge body of judicial precedents in different jurisdictions of the world."*

11. It was next argued that *BALCO*, a five-judge decision, clearly enunciated the principle that the seat of arbitration also indicated the choice of *the law governing the arbitration.* Learned counsel relied on the observations of the larger bench, and its emphasis on the *"Shashoua* principle"[13]. It was contended that according to that principle, the designation of *a* "seat" of the arbitration would carry with it "something akin to an exclusive jurisdiction clause*"*. Learned counsel referred to identical conditions in each contract, in the present case, which expressly stated that arbitration would be *"under the Rules of Conciliation and arbitration of the International Chamber of Commerce, Paris and Arbitration proceedings shall be in the English language and shall take place in London."* NV Engineering therefore, argued that the intention of the parties expressed unambiguously in the contract was that the arbitration was governed by the law of the seat, i.e. UK law. Therefore, the findings in the impugned judgment were clearly untenable.

12. The appellants also contended that *Union of India v Reliance Industries*[14] *Harmony Innovation Shipping Ltd v Gupta Goal India Ltd*[15] and *Roger Shashoua v Mukesh Sharma* [16] have now established that *pre-Balco* awards involving agreements which stipulate that the juridical seat is in India, and which stipulate or

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[13]The term based on the rule spelt out in *Roger Shashoua v Mukesh Sharma* 2009 EWHC 957 (Comm)

[14]2015 (10) SCC 213

[15]2015 (9) SCC 172

[16]2017 (14) SCC 722

can be read as stipulating that the law governing arbitration would be Indian law, would not be ruled by *BALCO*. However, cases where juridical seat is not in India, or the law governing arbitration is not Indian law, would be bound by *BALCO*. Therefore, the impugned judgment, which held to the contrary, cannot be sustained.

13. The appellant lastly relied on Section 50 of the Act and argued that the order holding that the petition under Section 34 was not maintainable was not appealable. Learned counsel also relied on *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*[17]in this context.

14. Mr. Jay Salva, learned senior counsel for Jindal, submitted that the impugned judgment is unexceptionable and not liable to be interfered with. He argued that Section 34 operates in a field different from Section 48. The latter enables the enforcement of a foreign award, and the court may only refuse enforcement, whereas under Section 34, the legality of an award can be gone into and the court has the jurisdiction to set it aside. This crucial difference was recognized by Indian courts, as is evident from the decisions in *Bhatia International*[18] and *Venture Global*[19].

15. Learned counsel contested the appellants' argument that the decision in *BALCO* would govern the dispute in the present case. He relied on the observations in *BALCO* that arbitration agreements entered into before the decision, and disputes which arose under them, would continue to be bound by the pre-*BALCO* rules. Since, in this case, the agreements were entered into, and awards too were rendered during the prevalence of *Bhatia*[20] principle, the later decision in *BALCO* or any subsequent judgment could not apply.

16. Learned counsel emphasized that though the ECAAP (the plant contract) stated that the arbitration was to be in London, under the ICC. Clause 12.4.1 clearly

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[17](2011) 8 SCC 333

[18] Supra n. 8

[19] Supra n. 9

[20] Supra n. 8

stated that the contract would be governed by Indian law, which unambiguously pointed to the fact that the parties intended that the law governing arbitration too was Indian law. Therefore, there is no question of the applicability of the *ratio* in *BALCO.*

Analysis & Conclusions

17. The decision in *Bhatia*[21], and later, in *Venture Global*[22], had ruled that resort to remedies under Part I of the Act can be made in respect of foreign awards, despite the clear dichotomy in the enactment between domestic awards (covered by Part I) and foreign awards (covered by Part II). This understanding was re-visited in *BALCO* where this court held as follows:

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

[21] Supra n.8

[22] Supra n.9

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

76. It must be pointed out that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments, namely, the New York Convention of 1958 and the UNCITRAL Model Law of 1985. It is true that the terms "seat" and "place" are often used interchangeably. In Redfern and Hunter on International Arbitration [Blackaby, Partasides, Redfern and Hunter (Eds.), Redfern and Hunter on International Arbitration (5th Edn., Oxford University Press, Oxford/New York 2009)] (Para 3.51), the seat theory is defined thus:'The concept that an arbitration is governed by the law of the place in which it is held, which is the "seat" (or "forum" or locus arbitri) of the arbitration, is well established in both the theory and practice of international arbitration. In fact, the Geneva Protocol, 1923 states

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95. The learned counsel for the appellants have submitted that Section 2(1)(e), Section 20 and Section 28 read with Section 45 and Section 48(1)(e) make it clear that Part I is not limited only to arbitrations which take place in India. These provisions indicate that the Arbitration Act, 1996 is subject-matter centric and not exclusively seat-centric. Therefore, "seat" is not the "centre of gravity" so far as the Arbitration Act, 1996 is concerned. We are of the considered opinion that the aforesaid provisions have to be interpreted

by keeping the principle of territoriality at the forefront. We have earlier observed that Section 2(2) does not make Part I applicable to arbitrations seated or held outside India. In view of the expression used in Section 2(2), the maxim expressumfacitcessaretacitum, would not permit by interpretation to hold that Part I would also apply to arbitrations held outside the territory of India. The expression "this Part shall apply where the place of arbitration is in India" necessarily excludes application of Part I to arbitration seated or held outside India. It appears to us that neither of the provisions relied upon by the learned counsel for the appellants would make any section of Part I applicable to arbitration seated outside India. It will be apposite now to consider each of the aforesaid provisions in turn.

96. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

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We are of the opinion, the term "subject-matter of the arbitration" cannot be confused with "subject-matter of the suit". The term "subject-matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order Under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to

be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.

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

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A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai, etc. In the absence of the parties' agreement thereto, Section 20(2) 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.

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

Only if the agreement of the parties is construed to provide for the "seat"/"place" of arbitration being in India — would Part I of the Arbitration Act, 1996 be applicable. If the agreement is held to provide for a "seat"/"place" outside India, Part I would be inapplicable to the extent inconsistent with the arbitration law of the seat, even if the agreement purports to provide that the Arbitration Act, 1996 shall govern the arbitration proceedings."

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110. *Examining the fact situation in the case, the Court observed as follows: (Shashoua case [2009 EWHC 957 (Comm)])*

> *"The basis for the court's grant of an anti-suit injunction of the kind sought depended upon the seat of the arbitration. An agreement as to the seat of an arbitration brought in the law of*

that country as the curial law and was analogous to an exclusive jurisdiction clause. Not only was there agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration.

Although, 'venue' was not synonymous with 'seat', in an arbitration clause which provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that 'the venue of arbitration shall be London, United Kingdom' did amount to the designation of a juridical seat…."

In para 54, it is further observed as follows: (Shashoua case [2009 EWHC 957 (Comm)])

"There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that Court, because it was best fitted to determine such issues under the Indian law. Whilst I found this idea attractive initially, we are persuaded that it would be wrong in principle to allow this and that it would create undue practical problems in any event. On the basis of what I have already decided, England is the seat of the arbitration and since this carries with it something akin to an exclusive jurisdiction clause, as a matter of principle the foreign court should not decide matters which are for this Court to decide in the context of an anti-suit injunction."

(emphasis supplied)

In making the aforesaid observations in Shashoua case [2009 EWHC 957 (Comm)] , the Court relied on the judgments of the Court of Appeal in C v. D [2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)] .

111. *In C v. D [2008 Bus LR 843: 2007 EWCA Civ 1282 (CA)] the Court of Appeal in England was examining an appeal by the defendant insurer from the judgment of Cooke, J. granting an anti-suit injunction preventing it from challenging an arbitration award in the US courts. The insurance policy provided "any dispute arising under this policy shall be finally and fully determined in London, England under the*

provisions of the English Arbitration Act, 1950 as amended". However, it was further provided that "this policy shall be governed by and construed in accordance with the internal laws of the State of New York…." (Bus LR p. 847, para 2). A partial award was made in favour of the claimants. It was agreed that this partial award is, in English law terms, final as to what it decides. The defendant sought the tribunal's withdrawal of its findings. The defendant also intimated its intention to apply to a Federal Court applying the US Federal Arbitration Law governing the enforcement of arbitral award, which was said to permit "vacatur" of an award where arbitrators have manifestly disregarded the law. It was in consequence of such intimation that the claimant sought and obtained an interim anti-suit injunction. The Judge held that parties had agreed that any proceedings seeking to attack or set aside the partial award would only be those permitted by the English law. It was not, therefore, permissible for the defendant to bring any proceedings in New York or elsewhere to attack the partial award. The Judge rejected the arguments to the effect that the choice of the law of New York as the proper law of the contract amounted to an agreement that the law of England should not apply to proceedings post award. The Judge also rejected a further argument that the separate agreement to arbitrate contained in Condition V(o) of the policy was itself governed by New York Law so that proceedings could be instituted in New York. The Judge granted the claimant a final injunction.

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116. *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 arbitrations will apply to the proceedings.*

117. *It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat/place of arbitration outside India, then the provision that the Arbitration Act, 1996 would govern the arbitration proceedings, would not make Part I of the Arbitration Act, 1996 applicable or enable the Indian courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the English procedural law/curial law. This necessarily*

> *follows from the fact that Part I applies only to arbitrations having their seat/place in India."*

The final conclusions in *BALCO* were recorded as follows:

> *"194. In view of the above discussion, we are of the considered opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 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 Arbitration Act, 1996. In our opinion, the provisions contained in the Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996."*

18. The *Shashoua* principle has been followed repeatedly in a series of decisions of this court, with respect to the law governing the seat as the law of the "seat" where the arbitration had been held.[23] In *Reliance*[24] this court answered the question, in the following terms:

> *"**18.** It is important to note that in para 32 of Bhatia International [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] itself this Court has held that Part I of the Arbitration Act, 1996 will not apply if it has been excluded either expressly or by necessary implication. Several judgments of this Court have held that Part I is excluded by necessary implication if it is found that on the facts of a case either the juridical seat of the arbitration is outside India or the law governing the arbitration agreement is a law other than Indian law. This is now well settled by a series of decisions of this Court [see Videocon Industries Ltd. v. Union of India [(2011) 6 SCC 161 : (2011) 3 SCC (Civ) 257] , Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd. [(2011) 6 SCC 179 : (2011) 3 SCC (Civ) 276] , Yograj*

[23]This court, in the facts of this case, is of the opinion that it is inessential to explain or notice the difference between the "venue" which is a matter of convenience, and "seat" – an expression that has definite legal connotations in regard to intention of parties, vis-à-vis jurisdiction of the courts.

[24] Supra n. 14

Infrastructure Ltd. v. Ssang Yong Engg. and Construction Co. Ltd. [(2011) 9 SCC 735 : (2011) 4 SCC (Civ) 864] , the very judgment in this case reported in Reliance Industries Ltd. v. Union of India [Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737] and a recent judgment in Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. [(2015) 9 SCC 172 : (2015) 4 SCC (Civ) 341]].

***19.** In fact, in Harmony case [(2015) 9 SCC 172 : (2015) 4 SCC (Civ) 341] , this Court, after setting out all the aforesaid judgments, set out the arbitration clause in that case in para 36 as follows: (SCC p. 193)*

> *"36. In view of the aforesaid propositions laid down by this Court, we are required to scan the tenor of the clauses in the agreement specifically, the arbitration clause in appropriate perspective. The said clause reads as follows:*
>
> > *'5. If any dispute or difference should arise under this charter, general average/arbitration in London to apply, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision or that of any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of court. Said three parties to be commercial men who are the members of the London Arbitrators Association. This contract is to be governed and construed according to English law. For disputes where total amount claimed by either party does not exceed US $50,000 the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association.'"*

It then held: *(SCC pp. 198 & 200, paras 45 & 50-51)*

> *"45. Coming to the stipulations in the present arbitration clause, it is clear as day that if any dispute or difference would arise under the charter, arbitration in London to apply; that the arbitrators are to be commercial men who are members of London Arbitration Association; the contract is to be construed and governed by English law; and that the arbitration should be conducted, if the claim is for a lesser sum, in accordance with small claims procedure of the London Maritime Arbitration Association. There is no other*

provision in the agreement that any other law would govern the arbitration clause."

*** *** *** ***

"50. Thus, interpreting the clause in question on the bedrock of the aforesaid principles it is vivid that the intended effect is to have the seat of arbitration at London. The commercial background, the context of the contract and the circumstances of the parties and in the background in which the contract was entered into, irresistibly lead in that direction. We are not impressed by the submission that by such interpretation it will put the respondent in an advantageous position. Therefore, we think it would be appropriate to interpret the clause that it is a proper clause or substantial clause and not a curial or a procedural one by which the arbitration proceedings are to be conducted and hence, we are disposed to think that the seat of arbitration will be at London.

51. Having said that the implied exclusion principle stated in Bhatia International [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] would be applicable, regard being had to the clause in the agreement, there is no need to dwell upon the contention raised pertaining to the addendum, for any interpretation placed on the said document would not make any difference to the ultimate conclusion that we have already arrived at."

20. *It is interesting to note that even though the law governing the arbitration agreement was not specified, yet this Court held, having regard to various circumstances, that the seat of arbitration would be London and therefore, by necessary implication, the ratio of Bhatia International [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] would not apply.*

21. *The last paragraph of BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] judgment has now to be read with two caveats, both emanating from para 32 of Bhatia International [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] itself — that where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, Part I of the Arbitration Act, 1996 would be excluded by necessary implication.*

Therefore, even in the cases governed by the Bhatia [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] principle, it is only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India that would continue to be governed by the Bhatia [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] principle. Also, it is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the Bhatia [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] rule.

22. *On the facts in the present case, it is clear that this Court has already determined both that the juridical seat of the arbitration is at London and that the arbitration agreement is governed by English law. This being the case, it is not open to the Union of India to argue that Part I of the Arbitration Act, 1996 would be applicable. A Section 14 application made under Part I would consequently not be maintainable."*

19. Again, in *Roger Shashoua*[25] this court spelt out the principle in the following terms:

"46. As stated earlier, in Shashoua [Roger Shashoua v. Mukesh Sharma, 2009 EWHC 957 (Comm)] Cooke, J., in the course of analysis, held that "London arbitration" is a well-known phenomenon which is often chosen by foreign nationals with a different law, such as the law of New York, governing the substantive rights of the parties and it is because of the legislative framework and supervisory powers of the courts here which many parties are keen to adopt. The learned Judge has further held that when there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is that London is the juridical seat and English law the curial law.

47. In BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] the Constitution Bench referred to Shashoua [Roger Shashoua v. Mukesh Sharma, 2009 EWHC 957 (Comm)] and reproduced certain paragraphs from the

[25] Supra n. 16

same. To appreciate the controversy from a proper perspective, we have already reproduced para 54 of the said judgment which has succinctly stated the proposition.

50. Proceeding further the Court in Enercon (India) Ltd. case [Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] approved the Shashoua [Roger Shashoua v. Mukesh Sharma, 2009 EWHC 957 (Comm)] principle and referred to McDonnell Douglas Corpn. [Union of India v. McDonnell Douglas Corpn., (1993) 2 Lloyd's Rep 48] wherein the principles stated in Naviera Amazonica Peruana S.A. [Naviera Amazonica Peruana S.A. v. Compania International de Seguros del Peru, (1988) 1 Lloyd's Rep 116 (CA)] were reiterated. Construing the clauses in the agreement, the said authority has held: (Enercon (India) case [Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , SCC p. 56, para 129)

> *"129. ... 'On the contrary, for the reasons given, it seems to me that by their agreement the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law."*

49. In Enercon (India) Ltd. [Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , the Court addressed to the issue of "seat/place of arbitration" and "venue of arbitration" for the purpose of conferment of exclusive jurisdiction on the Court. The Court appreciated the point posing the question whether the use of the phrase "venue shall be in London" actually refers to designation of the seat of arbitration in London. The Court did not treat London as seat/place of arbitration. The Court referred to Naviera Amazonica [Naviera Amazonica Peruana S.A. v. Compania International de Seguros del Peru, (1988) 1 Lloyd's Rep 116 (CA)], Alfred McAlpine [Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Business Services Ltd., 2008 Bus LR D 137 (QBD) : 2008 EWHC 426 (TCC)] and C v. D [C v. D, 2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)] and then opined: (Enercon (India) case [Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , SCC p. 54, paras 123-124)

> *"123. The cases relied upon by Dr Singhvi relate to the phrase "arbitration in London" or expressions similar*

> *thereto. The same cannot be equated with the term "venue of arbitration proceedings shall be in London". Arbitration in London can be understood to include venue as well as seat; but it would be rather stretching the imagination if "venue of arbitration shall be in London" could be understood as "seat of arbitration shall be London", in the absence of any other factor connecting the arbitration to London. In spite of Dr Singhvi's seemingly attractive submission to convince us, we decline to entertain the notion that India would not be the natural forum for all remedies in relation to the disputes, having such a close and intimate connection with India. In contrast, London is described only as a venue which Dr Singhvi says would be the natural forum.*
>
> *124. In Shashoua [Roger Shashoua v. Mukesh Sharma, 2009 EWHC 957 (Comm)], such an expression was understood as seat instead of venue, as the parties had agreed that the ICC Rules would apply to the arbitration proceedings. In Shashoua [Roger Shashoua v. Mukesh Sharma, 2009 EWHC 957 (Comm)] , the ratio in Naviera [Naviera Amazonica Peruana S.A. v. Compania International de Seguros del Peru, (1988) 1 Lloyd's Rep 116 (CA)] and Braes of Doune [Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Business Services Ltd., 2008 Bus LR D 137 (QBD) : 2008 EWHC 426 (TCC)] has been followed. In that case, the Court was concerned with the construction of the shareholders' agreement between the parties, which provided that "the venue of the arbitration shall be London, United Kingdom". It provided that the arbitration proceedings 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. ..."*

20. In *IMAX Corporation v. E-City Entertainment (India) (P.) Ltd*[26], this rule was again followed. The award was a pre-*BALCO* award. Taking into consideration the fact that the parties had expressly chosen to resolve the dispute through the ICC, in the form of a London based arbitration, the court stated that *"ICC having chosen London, leaves no doubt that the place of arbitration will attract the law of UK in all matters concerning arbitration."* After holding that the parties' choice of seat

[26]2017 (5) SCC 331

was outside India, though there was no express term, and that the ICC chose it under its rules, the court went on to hold:

> *"29. We find that in the present case, the seat of arbitration has not been specified at all in the arbitration clause. There is however an agreement to have the arbitration conducted according to the ICC Rules and thus a willingness that the seat of arbitration may be outside India. In any case, the parties having agreed to have the seat decided by ICC and ICC having chosen London after consulting the parties and the parties having abided by the decision, it must be held that upon the decision of ICC to hold the arbitration in London, the parties agreed that the seat shall be in London for all practical purposes. Therefore, there is an agreement that the arbitration shall be held in London and thus Part I of the Act should be excluded."*

The judgment in *BGS SOMA JV v. National Hydro Electric Power Corporation*[27], re-stated these principles in the following terms:

> ***"38.*** *A reading of paras 75, 76, 96, 110, 116, 123 and 194 of BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] would show that where parties have selected the seat of arbitration in their agreement, such selection would then amount to an exclusive jurisdiction clause, as the parties have now indicated that the courts at the "seat" would alone have jurisdiction to entertain challenges against the arbitral award which have been made at the seat. The example given in para 96 buttresses this proposition, and is supported by the previous and subsequent paragraphs pointed out hereinabove. The BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] judgment, when read as a whole, applies the concept of "seat" as laid down by the English judgments (and which is in Section 20 of the Arbitration Act, 1996), by harmoniously construing Section 20 with Section 2(1)(e), so as to broaden the definition of "court", and bring within its ken courts of the "seat" of the arbitration….*
>
> ****** ****** ******
>
> ***40.*** *Para 96 of BALCO case [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] is in several parts. First and foremost, Section 2(1)(e), which is the definition of "court" under the Arbitration Act, 1996 was referred to, and was*

[27]2020 (4) SCC 234

construed keeping in view the provisions in Section 20 of the Arbitration Act, 1996, which give recognition to party autonomy in choosing the seat of the arbitration proceedings. Secondly, the Court went on to state in two places in the said paragraph that jurisdiction is given to two sets of courts, namely, those courts which would have jurisdiction where the cause of action is located; and those courts where the arbitration takes place. However, when it came to providing a neutral place as the "seat" of arbitration proceedings, the example given by the five-Judge Bench made it clear that appeals under Section 37 of the Arbitration Act, 1996 against interim orders passed under Section 17 of the Arbitration Act, 1996 would lie only to the courts of the seat — which is Delhi in that example — which are the courts having supervisory control, or jurisdiction, over the arbitration proceedings. The example then goes on to state that this would be irrespective of the fact that the obligations to be performed under the contract, that is the cause of action, may arise in part either at Mumbai or Kolkata. The fact that the arbitration is to take place in Delhi is of importance. However, the next sentence in the said paragraph reiterates the concurrent jurisdiction of both courts.

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44. *If paras 75, 76, 96, 110, 116, 123 and 194 of BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] are 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-Judge Bench in BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] . 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.*

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50. *In fact, subsequent Division Benches of this Court have understood the law to be that once the seat of arbitration is chosen, it amounts to an exclusive jurisdiction clause, insofar as the courts at that seat are concerned…. In Enercon (India) Ltd. v. Enercon GmbH [Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , this Court approved the dictum*

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

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51. *The Court in Enercon [Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1:(2014) 3 SCC (Civ) 59] then concluded : (SCC p. 60, para 138)*

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

21. The latest decision on this issue is *Government of India v Vedanta Ltd*[28]. The dispute arose out of a pre-BALCO contract; the award was rendered on 18.01.2011 (prior to the *BALCO* decision). The seat of arbitration was Kuala Lumpur; however, the governing law of the agreement or contract, was English law. This court, in its three-judge decision, held that the *curial* law, i.e. the law governing the challenge to the award, was Malaysian law, in the following words:[29]

> *"(i) In the present case, the law governing the agreement to arbitrate was the English law as per Article 34.12 of the PSC, which provides that the arbitration agreement shall be governed by the laws of England. Even though there seems to have been some confusion in the application of the law governing the agreement to arbitrate by the seat courts, as pointed out by the learned Amicus, we will not dwell on this issue, since the enforcement court does not sit in appeal over the findings of the seat court. Furthermore, in view of the principles of comity of nations, this Court would not comment on the judgments passed by Courts in other jurisdictions.*
>
> *The enforcement of the award is a subsequent and distinct proceeding from the setting aside proceedings at the seat. The enforcement court would independently determine the issue of recognition and enforceability of the foreign award in India, in accordance with the provisions of Chapter 1 Part II of the Indian Arbitration Act, 1996.*

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[28]2020 SCC Online (SC) 749

[29]In fact, even the Government of India understood that to be the correct position, and had challenged the award, on a substantive basis, in Kuala Lumpur.

> *(ii) The courts having jurisdiction to annul or suspend a New York Convention award are the courts of the State where the award was made, or is determined to have been made i.e. at the seat of arbitration. The seat of the arbitration is a legal concept i.e. the juridical home of the arbitration. The legal "seat" must not be confused with a geographically convenient venue chosen to conduct some of the hearings in the arbitration. The courts at the seat of arbitration are referred to as the courts which exercise "supervisory" or "primary" jurisdiction over the award. The "laws under which the award was made" used in Article V (1)(e) of the New York Convention, is mirrored in Section 48(1)(e) of the Indian Arbitration Act, which refers to the country of the seat of the arbitration, and not the State whose laws govern the substantive contract."*

The court then proceeded to rely on *BALCO* especially Paras 76 and 123, and thereafter stated as follows:

> *"(iii) The courts before which the foreign award is brought for recognition and enforcement would exercise "secondary" or "enforcement" jurisdiction over the award, to determine the recognition and enforceability of the award in that jurisdiction.*
>
> *(iv) We will now briefly touch upon the four types of laws which are applicable in an international commercial arbitration, and court proceedings arising therefrom. These are:*
>
> *a) The governing law determines the substantive rights and obligations of the parties in the underlying commercial contract. The parties normally make a choice of the governing law of the substantive contract; in the absence of a choice of the governing law, it would be determined by the tribunal in accordance with the conflict of law rules, which are considered to be applicable.*
>
> *b) The law governing the arbitration agreement must be determined separately from the law applicable to the substantive contract.[44] The arbitration agreement constitutes a separate and autonomous agreement, which would determine the validity and extent of the arbitration agreement; limits of party autonomy, the jurisdiction of the tribunal, etc.*
>
> *c) The curial law of the arbitration is determined by the seat of arbitration. In an international commercial arbitration, it is necessary that the conduct of the arbitral proceedings are connected with the law of the seat of arbitration, which would regulate the various aspects of the arbitral proceedings. The parties have the autonomy to determine*

the choice of law, which would govern the arbitral procedure, which is referred to as the lex arbitri, and is expressed in the choice of the seat of arbitration.[45]

The curial law governs the procedure of the arbitration, the commencement of the arbitration, appointment of arbitrator/s in exercise of the default power by the court, grant of provisional measures, collection of evidence, hearings, and challenge to the award.

The courts at the seat of arbitration exercise supervisory or "primary" jurisdiction over the arbitral proceedings, except if the parties have made an express and effective choice of a different lex arbitri, in which event, the role of the courts at the seat will be limited to those matters which are specified to be internationally mandatory and of a nonderogable nature.[46]

d) The lex fori governs the proceedings for recognition and enforcement of the award in other jurisdictions. Article III of the New York Convention provides that the national courts apply their respective lex fori regarding limitation periods applicable for recognition and enforcement proceedings; the date from which the limitation period would commence, whether there is power to extend the period of limitation. The lex fori determines the court which is competent and has the jurisdiction to decide the issue of recognition and enforcement of the foreign award, and the legal remedies available to the parties for enforcement of the foreign award.

(v) In view of the above-mentioned position, the Malaysian Courts being the seat courts were justified in applying the Malaysian Act to the public policy challenge raised by the Government of India.

The enforcement court would, however, examine the challenge to the award in accordance with the grounds available under Section 48 of the Act, without being constrained by the findings of the Malaysian Courts. Merely because the Malaysian Courts have upheld the award, it would not be an impediment for the Indian courts to examine whether the award was opposed to the public policy of India under Section 48 of the Indian Arbitration Act, 1996. If the award is found to be violative of the public policy of India, it would not be enforced by the Indian courts. The enforcement court would however not second-guess or review the correctness of the judgment of the Seat Courts, while deciding the challenge to the award."

This court, therefore, categorically ruled that a substantive challenge to the award, correctly was adjudicated by the Malaysian court, because the *seat* of arbitration was Kuala Lumpur.

22. Article 12 of the contract[30] in this case deals with miscellaneous matters. Clause 12.4 reads as follows:

> *"12.4.1This Engineering Contract shall be governed by the laws of India.*
>
> *12.4.2 In case of disputes or disagreement between the parties as any matter arising out of or relating to this engineering That Contract and provided no understanding between the parties can be reached for the settlement of the difference, the matter shall be finally settled by arbitration. That under the rules of conciliation That and Arbitration That of the International That Chamber of commerce Paris, and Arbitration proceedings shall be in English language and shall take place in London. The decisions of such arbitration shall be final and binding on the parties."*

23. Having regard to the precedential unanimity, so to say, about the manner of applicability of *BALCO* in respect of agreements entered into and awards rendered earlier, with respect to the law of the seat of arbitration (or the curial law) excluding applicability of Part I of the Act, and the unambiguous intention of the parties in the present case (expressed in Clause 12.4.2) that the seat of arbitration was London, where the ICC arbitration proceedings were in fact held, and the awards rendered, this court is of the opinion that the impugned judgment cannot be sustained.

24. The above discussion would have been sufficient to dispose of this appeal. However, it is noticeable that the decision in *Feurest Day Lawson*[31] unambiguously ruled out the maintainability of any appeal against an order granting enforcement of a foreign arbitration award. In the present case, both the partial and final awards are foreign awards. Therefore, the provisions of Sections 47/48 were correctly invoked

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[30]ECAAP, i.e. the plant contract

[31] Supra n. 17

by NV Engineering, for *enforcement* of the awards (through Application No 156/2005). Jindal objected to the enforcement proceedings, in accordance with grounds articulated in Part II of the Act. A single judge substantially upheld the award, and proceeded to its enforcement, by a judgment dated 05.06.2006, at the same time rejecting the challenge to enforcement laid out by Jindal. Both parties appealed to the Division Bench; Jindal, on the challenge to the order rejecting its objection to enforcement (Appeal No. 492/2006), and NV Engineering, as to that part of the order of the single judge, refusing to enforce a part of the award (Appeal. No. 740/2006).

25. In the decision in *Fuerst Day Lawson*[32] this court had to interpret Section 50 of the Act (quoted in the footnote below[33]), which provides for a restrictive category of appealable subject matters, and prohibits appeals in other matters. The court after noticing previous judgments held as follows:

> *"88. Mohindra Supply Co. [Union of India v. Mohindra Supply Co., AIR 1962 SC 256] was last referred in a Constitution Bench decision of this Court in P.S. Sathappan [P.S. Sathappan v. Andhra Bank Ltd., (2004) 11 SCC 672] , and the way the Constitution Bench understood and interpreted Mohindra Supply Co. [Union of India v. Mohindra Supply Co., AIR 1962 SC 256] would be clear from the following para 10 of the judgment: (P.S. Sathappan case [P.S. Sathappan v. Andhra Bank Ltd., (2004) 11 SCC 672] , SCC pp. 689-90)*
>
> > *'10. ... The provisions in the Letters Patent providing for appeal, insofar as they related to orders passed in arbitration proceedings, were held to be subject to the provisions of Sections 39(1) and (2) of the Arbitration Act, as the same is a self-contained code relating to arbitration.'*
>
> *89. It is, thus, to be seen that the Arbitration Act, 1940, from its inception and right through to 2004 (in P.S. Sathappan [P.S.*

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[32] Supra n. 17

[33] *"50.Appealable orders.—(1) An appeal shall lie from the order refusing to—*
(a) refer the parties to arbitration under Section 45;
(b) enforce a foreign award under Section 48, to the court authorised by law to hear appeals from such order.
(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

> *Sathappan v. Andhra Bank Ltd., (2004) 11 SCC 672]) was held to be a self-contained code. Now, if the Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done" [The reference is to S.N. Srikantia and Co. v. Union of India, 1965 SCC OnLine Bom 133 : AIR 1967 Bom 347 at p. 354, para 9.] . In other words, a letters patent appeal would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded."*

These observations were quoted with approval in *Union of India v Simplex Infrastructures Ltd*[34] and the court further held:

> *"10. After this decision, there is no scope to contend that the remedy of letters patent appeal was available in relation to the judgment of the learned Single Judge in question. This legal position has been restated in the recent decision of this Court (to which one of us was party, Justice Dipak Misra), in Arun Dev Upadhyaya v. Integrated Sales Service Ltd. [Arun Dev Upadhyaya v. Integrated Sales Service Ltd., (2016) 9 SCC 524 : (2016) 4 SCC (Civ) 564]"*

This court, in *Kandla Export Corpn. v. OCI Corpn*[35] held that a further appeal by a party aggrieved by an order of enforcement, even under the later enacted Commercial Courts Act, 2015 is not maintainable:

> *"20. Given the judgment of this Court in Fuerst Day Lawson [Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178] , which Parliament is presumed to know when it enacted the Arbitration Amendment Act, 2015, and given the fact that no change was made in Section 50 of the Arbitration Act when the Commercial Courts Act was brought into force, it is clear that Section*

[34]2017 (14) SCC 225

[35](2018) 14 SCC 715

> *50 is a provision contained in a self-contained code on matters pertaining to arbitration, and which is exhaustive in nature. It carries the negative import mentioned in para 89 of Fuerst Day Lawson [Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178] that appeals which are not mentioned therein, are not permissible. This being the case, it is clear that Section 13(1) of the Commercial Courts Act, being a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration Act.*
>
> ********** **********
>
> *22. This, in fact, follows from the language of Section 50 itself. In all arbitration cases of enforcement of foreign awards, it is Section 50 alone that provides an appeal. Having provided for an appeal, the forum of appeal is left "to the Court authorised by law to hear appeals from such orders". Section 50 properly read would, therefore, mean that if an appeal lies under the said provision, then alone would Section 13(1) of the Commercial Courts Act be attracted as laying down the forum which will hear and decide such an appeal."*

In view of the categorical holdings in the judgments of this court, Jindal's appeal to the Division Bench, (Appeal No. 492/2006) is not maintainable. However, in view of the above decisions, and the express terms of Section 50, NV Engineering's appeal (Appeal. No. 740/2006), against the order of the single judge (to the extent it refuses enforcement) is maintainable.

26. This court has not considered the merits of the substantive challenge to the enforcement order, because the parties were not heard and therefore, it would not be fair to comment on it. Further, Jindal has proceeded on the assumption that its appeal to the Division Bench on this aspect is pending. In view of the finding of this court that such an appeal (against an order of enforcement) is untenable by reason of Section 50, the merits of Jindal's objections to the single judge's order, are open for it to be canvassed in appropriate proceedings. Such proceedings cannot also be a resort to any remedy under the Code of Civil Procedure. In the event Jindal chooses to avail of such remedy, the question of limitation is left open, as this court is

conscious of the fact that *Fuerst Day Lawson*[36] is a decision rendered over 10 years ago; it settled the law decisively and has been followed in later judgments. It cannot be said that Jindal was ignorant of the law.

27. In view of the foregoing discussion, the impugned judgment and order is hereby set aside; the appeal is allowed in the above terms. Costs quantified at ₹ 1,50,000/- shall be paid by the respondent No.1.

.....J
[INDIRA BANERJEE]

.....J
[S. RAVINDRA BHAT]

New Delhi,
November 26, 2020.

[36] Supra n. 17