2019 INSC 1349

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9307 OF 2019
(ARISING OUT OF SLP (CIVIL) NO.25618 OF 2018)

BGS SGS SOMA JV …Petitioner

Versus

NHPC LTD. …Respondent

WITH
CIVIL APPEAL NO. 9308 OF 2019
(ARISING OUT OF SLP (CIVIL) NO. 25848 OF 2018)
WITH
CIVIL APPEAL NO. 9309 OF 2019
(ARISING OUT OF SLP (CIVIL) NO. 28062 OF 2018)

J U D G M E N T

R.F. NARIMAN, J.

1. Leave granted.

2. Three appeals before us raise questions as to maintainability of appeals under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act, 1996"), and, given the

arbitration clause in these proceedings, whether the “seat” of the arbitration proceedings is New Delhi or Faridabad, consequent upon which a petition under Section 34 of the Arbitration Act, 1996 may be filed dependent on where the seat of arbitration is located.

3. At the outset, the facts in SLP (Civil) No.25618 of 2018 are set out as follows. On 16.01.2004, the Petitioner was awarded a contract for construction of Diversion Tunnels, Coffer Dams, Concrete Gravity Dams, Plunge Pools and Cutoff Walls of Subansri Lower Hydroelectric Project on river Subansri, with an installed capacity of 2000 MW, stated to be the largest Hydropower project yet in India. The project site is located in the lower Subansri districts in the States of Assam and Arunachal Pradesh. Clause 67.3 of the agreement between the parties provides for dispute resolution through arbitration. Clause 67.3 reads as follows:

> “Any dispute in respect of which the Employer and the Contractor have failed to reach at an amicable settlement pursuant to Sub-Clause 67.1, shall be finally settled by arbitration as set forth below. The Arbitral Tribunal shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer.
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> (i) A dispute with an Indian Contractor shall be finally settled in accordance with the In-

dian Arbitration and Conciliation Act, 1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the President of the Institution of Engineers (India). For the purposes of this Sub-Clause, the term "Indian Contractor" means a contractor who is registered in India and is a juridic person created under Indian law as well as a joint venture between such a contractor and a Foreign Contractor.

(ii) In the case of a dispute with a Foreign Contractor, the dispute shall be finally settled in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 and read with UNCITRAL Arbitration Rules. The arbitral tribunal shall consist of three Arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach a consensus within a period of 30 days from their appointment on the Presiding Arbitrator to be appointed subsequently, the Presiding arbitrator shall be appointed by the President of the Institution of Engineers (India). For the pur-

poses of this Clause 67, the term “Foreign Contractor” means a contractor who is not registered in India and is not a juridic person created under Indian Law. In case of any contradiction between Indian Arbitration and Conciliation Act, 1996 and UNCITRAL Arbitration Rules, the provisions in the Indian Arbitration and Conciliation Act, 1996 shall prevail.

(iii) Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employers, the Engineer, and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

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(v) If one of the parties fail to appoint its arbitrator in pursuance of sub-clause (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the President of the Institution of Engineers (India), both in cases of foreign contractors as well as Indian Contractors, shall appoint the arbitrator. A certified copy of the order of the President of Institution of Engineers (India), making such an appointment shall be furnished to each of the parties.

(vi) Arbitration Proceedings shall be held at New Delhi/Faridabad, India and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(vii) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration shall be borne in such a manner as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party on its behalf shall be borne by each party itself."

4. On 16.05.2011, a Notice of Arbitration was issued by the Petitioner to the Respondent, in regard to payment of compensation for losses suffered due to abnormal delays and additional costs as a result of hindrances caused by the Respondent. A three-member Arbitral Tribunal was constituted as per clause 67.3 of the agreement under the Arbitration Act, 1996. Pursuant thereto, the Petitioner filed its Statement of Claim seeking recovery of an amount of INR 986.60 crores plus CHF 1060619. Between August 2011 and August 2016, seventy-one sittings of the Arbitral Tribunal took place at New Delhi. The Tribunal then delivered its unanimous award at New Delhi on 26.08.2016, by which the claims of the Petitioner aggregating to INR 424,81,54,096.29 were allowed, together with simple interest at 14% per annum till the date of actual payment. On 04.10.2016, in view of certain computational and typographical errors in the arbitral award,

the figure of 424,81,54,096.29 was rectified to INR 424,70,52,126.66. On 03.01.2017, being aggrieved by the arbitral award and the rectification thereto, the Respondent filed an application under Section 34 of the Arbitration Act, 1996 seeking to set aside these awards before the Court of the District and Sessions Judge, Faridabad, Haryana. On 28.04.2017, the Petitioner filed an application under Section 151 read with Order VII Rule 10 of the Code of Civil Procedure, 1908 (hereinafter referred to as the "CPC") and Section 2(1)(e)(i) of the Arbitration Act, 1996, seeking a return of the petition filed under Section 34 for presentation before the appropriate Court at New Delhi and/or the District Judge at Dhemaji, Assam. In November, 2017, after the constitution of a Special Commercial Court at Gurugram, the Section 34 petition filed at Faridabad was transferred to the said Gurugram Commercial Court and numbered as Arbitration Case No.74 (CIS No. ARB/118/2017).

5. On 21.12.2017, the Special Commercial Court, Gurugram allowed the application of the Petitioner, and returned the Section 34 petition for presentation to the proper court having jurisdiction in New Delhi. On 15.02.2018, the Respondent filed an appeal under Section 37 of the Arbitration Act, 1996 read with Section 13(1) of the Commercial

Courts Act, 2015 before the High Court of Punjab and Haryana at Chandigarh. On 12.09.2018, the impugned judgment was delivered by the Punjab and Haryana High Court, in which it was held that the appeal filed under Section 37 of the Arbitration Act, 1996 was maintainable, and that Delhi being only a convenient venue where arbitral proceedings were held and not the seat of the arbitration proceedings, Faridabad would have jurisdiction on the basis of the cause of action having arisen in part in Faridabad. As a result, the appeal was allowed and the judgment of the Special Commercial Court, Gurugram was set aside.

6. Dr. Abhishek Manu Singhvi, learned Senior Advocate appearing on behalf of the Petitioner in SLP (C) No.25618 of 2018, has assailed the impugned High Court judgment on both counts. According to him, on a combined reading of Section 13 of the Commercial Courts Act, 2015 and Section 37 of the Arbitration Act, 1996, it becomes clear that Section 13 of the Commercial Courts Act, 2015 only provides the *forum* for challenge, whereas Section 37 of the Arbitration Act, 1996 - which is expressly referred to in the proviso to Section 13(1) of the Commercial Courts Act, 2015 - circumscribes the *right* of appeal. He contended that this when read with Section 5 of the Arbitration Act, 1996,

makes it clear that only certain judgments and orders are appealable, and no appeal lies under any provision outside Section 37 of the Arbitration Act, 1996. He contended that the High Court was manifestly wrong when it said that the present appeal was appealable under Section 37(1)(c) of the Arbitration Act, 1996 as being an appeal against an order refusing to set aside an arbitral award under Section 34 of the Arbitration Act, 1996. According to Dr. Singhvi, an order which allows an application under Section 151 read with Order VII Rule 10 of the CPC can by no stretch of the imagination amount to an order refusing to set aside an arbitral award under Section 34 of the Arbitration Act, 1996. For this proposition, he strongly relied upon on our judgment in **Kandla Export Corporation & Anr. v. M/s OCI Corporation & Anr.** (2018) 14 SCC 715. On the second point, he read out the impugned judgment in detail, and stated that the ultimate conclusion that New Delhi was only a “venue” and not the “seat” of the arbitration was incorrect, as the parties have chosen to have sittings at New Delhi, as a result of which it is clear that the Arbitral Tribunal considered that the award made at New Delhi would be made at “the seat” of the arbitral proceedings between the parties. He further added that it was clear that even if both New Delhi and Faridabad had

jurisdiction, New Delhi being the choice of the parties, the principle contained in **Hakam Singh v. M/s. Gammon (India) Ltd.**, (1971) 1 SCC 286, would govern. He referred in copious detail to many judgments of this Court, including the Five Judge Bench in **Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Service, Inc.**, (2012) 9 SCC 552, **Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited & Ors.**, (2017) 7 SCC 678, and various other judgments to buttress his submissions. According to him, the recent judgment delivered in **Union of India v. Hardy Exploration and Production (India) Inc.** 2018 SCC Online SC 1640 queers the pitch, in that it is directly contrary to the Five Judge bench decision in **BALCO** (supra). It is only as a result of the confusion caused by judgments such as **Hardy Exploration and Production (India) Inc.** (supra) that the impugned judgment has arrived at the wrong conclusion that New Delhi is not the "seat", but only the "venue" of the present arbitral proceedings. He, therefore, in the course of his submissions argued that this confusion should be removed, and exhorted us to declare that **Hardy Exploration and Production (India) Inc.** (supra) was not correctly decided, being contrary to the larger bench in **BALCO** (supra).

7. Dr. Singhvi in the course of his submissions also referred pointedly to paragraph 96 of **BALCO** (supra), and argued that not only was the example given in the said paragraph contrary to the theory of concurrent jurisdiction propounded therein, but was also contrary to subsequent paragraphs in the said judgment, in which it was clearly held that a clause in an agreement stating the "seat" of arbitration is akin to an exclusive jurisdiction clause, which would put paid to any theory of concurrent jurisdiction. As a matter of fact, two subsequent decisions have understood the ratio of **BALCO** (supra) to be that once the "seat" is indicated in an arbitration agreement, it is akin to an exclusive jurisdiction clause, which would oust the jurisdiction of courts other than courts at the seat. For this purpose he expressly referred to and relied upon **Reliance Industries Ltd. v. Union of India** (2014) 7 SCC 603 and **Indus Mobile Distribution Pvt. Ltd.** (supra).

8. Shri Arunabh Chowdhury, appearing in SLP (Civil) No. 25848 of 2018, argued that unlike the first SLP argued by Dr. Singhvi, in his case, the Notice for Arbitration was sent to the Assam site-office of the Respondent, and not routed through the Assam office to be sent to the Head Office at Faridabad, thereby making the observations based on Section 21 of the Arbitration Act,1996 in the impugned judgment inappli-

cable on the facts of his case. He supported Dr. Singhvi's argument that the appeal filed under Section 37 of the Arbitration Act, 1996 would not be maintainable, and cited several judgments, which will be dealt with a little later.

9. Shri Ankit Chaturvedi, appearing in SLP (Civil) No. 28062 of 2018, stressed one important difference in the facts of his case, which is, that the arbitral award made in his case expressly referred to Section 31(4) of the Arbitration Act, 1996, and stated that the place of arbitration, as determined in accordance with Section 20 of the Arbitration Act, 1996, was New Delhi. Therefore, this being the "seat" as determined by the Arbitral Tribunal in this case, a challenge under Section 34 of the Arbitration Act, 1996 could only be made in the courts at New Delhi.

10. Smt. Maninder Acharya, learned Additional Solicitor General, supported the judgment under appeal. She first argued that the reasoning of the impugned judgment, that an order passed under Section 151 read with Order VII Rule 10 of the CPC would amount to a refusal to set aside an arbitral award, is correct, and relied heavily upon a Division Bench judgment of the Delhi High Court in **Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.** 2018 SCC Online Del 9338 for

this purpose. On the second point, she argued that the arbitration clause did not expressly state that either New Delhi or Faridabad was to be the seat of the Arbitral Tribunal. Therefore, the arbitration clause only referred to a convenient venue, and the fact that the sittings were held at New Delhi, therefore, would not make New Delhi the seat of the arbitration under Section 20(1) of the Arbitration Act, 1996. According to her, since the agreements in the present case were signed in Faridabad, and since notices were sent by the Petitioners to the Respondent's Faridabad office, part of the cause of action clearly arose in Faridabad, as a result of which the courts in Faridabad would be clothed with jurisdiction to decide a Section 34 application. She stressed the fact that in **BALCO** (supra), even assuming that New Delhi was the seat of arbitration, both New Delhi and Faridabad would have concurrent jurisdiction - New Delhi being a neutral forum in which no part of the cause of action arose, and Faridabad being a chosen forum where a part of the cause of action has arisen. When read with Section 42 of the Arbitration Act, 1996, since the Court at Faridabad was first approached by filing an application under Section 34 of the Arbitration Act,1996, that Court alone would have jurisdiction, as a result of which the impugned judgment ought to be affirmed.

Maintainability of the appeals under Section 37 of the Arbitration Act, 1996

11. Section 37(1) of the Arbitration Act, 1996 reads as follows:

> "**37. Appealable Orders.-**
> **(1)** An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-
> **(a)** refusing to refer the parties to arbitration under section 8;
>
> **(b)** granting or refusing to grant any measure under section 9;
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> **(c)** setting aside or refusing to set aside an arbitral award under section 34."

12. Section 13 of the Commercial Courts Act, 2015 reads as follows:

> "**13. Appeals from decrees of Commercial Courts and Commercial Divisions.-**
>
> **(1)** Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.
>
> (1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division Bench of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment of order:

> Provided that an appeal shall lie from such orders passed by the Commercial Division or a Commercial Court that are specifically enumerated in Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).
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> **(2)** Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any other order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of the Act."

13. The interplay between Section 37 of the Arbitration Act, 1996 and Section 13 of the Commercial Courts Act, 2015, has been laid down in some detail in the judgment in **Kandla Export Corporation** (supra). The precise question that arose in **Kandla Export Corporation** (supra) was as to whether an appeal, which was not maintainable under Section 50 of the Arbitration Act,1996, is nonetheless maintainable under Section 13(1) of the Commercial Courts Act, 2015. In this context, after setting out various provisions of the Commercial Courts Act, 2015 and the Arbitration Act, 1996, this Court held:

> "**13.** Section 13(1) of the Commercial Courts Act, with which we are immediately concerned in these appeals, is in two parts. The main provision is, as has been correctly submitted by Shri Giri, a provision

which provides for appeals from judgments, orders and decrees of the Commercial Division of the High Court. To this main provision, an exception is carved out by the proviso…"

14. The proviso goes on to state that an appeal shall lie from such orders passed by the Commercial Division of the High Court that are specifically enumerated under Order 43 of the Code of Civil Procedure Code, 1908, and Section 37 of the Arbitration Act. It will at once be noticed that orders that are not specifically enumerated under Order 43 CPC would, therefore, not be appealable, and appeals that are mentioned in Section 37 of the Arbitration Act alone are appeals that can be made to the Commercial Appellate Division of a High Court.

15. Thus, an order which refers parties to arbitration under Section 8, not being appealable under Section 37(1)(*a*), would not be appealable under Section 13(1) of the Commercial Courts Act. Similarly, an appeal rejecting a plea referred to in sub-sections (2) and (3) of Section 16 of the Arbitration Act would equally not be appealable under Section 37(2)(*a*) and, therefore, under Section 13(1) of the Commercial Courts Act.

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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 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.

21. However, the question still arises as to why Section 37 of the Arbitration Act was expressly included in the proviso to Section 13(1) of the Commercial Courts Act, which is equally a special provision of appeal contained in a self-contained code, which in any case would be outside Section 13(1) of the Commercial Courts Act. One answer is that this was done *ex abundanti cautela*. Another answer may be that as Section 37 itself was amended by the Arbitration Amendment Act, 2015, which came into force on the same day as the Commercial Courts Act, Parliament thought, in its wisdom, that it was necessary to emphasise that the amended Section 37 would have precedence over the general provision contained in Section 13(1) of the Commercial Courts Act. Incidentally, the amendment of 2015 introduced one more category into the category of appealable orders in the Arbitration Act, namely, a category where an order is made under Section 8 refusing to refer parties to arbitration. Parliament may have found it necessary to emphasise the fact that an order referring parties to arbitration under Section 8 is not appealable under Section 37(1)(*a*) and would, therefore, not be appealable under Section 13(1) of the Commercial Courts Act. Whatever may be the ultimate reason for including Section 37 of the Arbitration Act in the proviso to Section 13(1), the *ratio decidendi* of the judgment in *Fuerst Day Lawson* [*Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.*, (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178] would apply, and this being so, appeals

filed under Section 50 of the Arbitration Act would have to follow the drill of Section 50 alone.

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.

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27. The matter can be looked at from a slightly different angle. Given the objects of both the statutes, it is clear that arbitration itself is meant to be a speedy resolution of disputes between parties. Equally, enforcement of foreign awards should take place as soon as possible if India is to remain as an equal partner, commercially speaking, in the international community. In point of fact, the raison d'être for the enactment of the Commercial Courts Act is that commercial disputes involving high amounts of money should be speedily decided. Given the objects of both the enactments, if we were to provide an additional appeal, when Section 50 does away with an appeal so as to speedily enforce foreign awards, we would be turning the Arbitration Act and the Commercial Courts Act on their heads. Admittedly, if the amount contained in a foreign award to be enforced in India were less than Rs 1 crore, and a Single Judge of a High Court were to enforce such award, no appeal would lie, in keeping with the object of speedy enforcement of foreign awards. However, if, in the same fact circumstance, a foreign award were to be for Rs 1 crore or more, if the appellants are correct, enforce-

> ment of such award would be further delayed by providing an appeal under Section 13(1) of the Commercial Courts Act. Any such interpretation would lead to absurdity, and would be directly contrary to the object sought to be achieved by the Commercial Courts Act viz. speedy resolution of disputes of a commercial nature involving a sum of Rs 1 crore and over. For this reason also, we feel that Section 13(1) of the Commercial Courts Act must be construed in accordance with the object sought to be achieved by the Act. Any construction of Section 13 of the Commercial Courts Act, which would lead to further delay, instead of an expeditious enforcement of a foreign award must, therefore, be eschewed. Even on applying the doctrine of harmonious construction of both statutes, it is clear that they are best harmonised by giving effect to the special statute i.e. the Arbitration Act, vis-à-vis the more general statute, namely, the Commercial Courts Act, being left to operate in spheres other than arbitration."

14. Given the fact that there is no independent right of appeal under Section 13(1) of the Commercial Courts Act, 2015, which merely provides the forum of filing appeals, it is the parameters of Section 37 of the Arbitration Act,1996 alone which have to be looked at in order to determine whether the present appeals were maintainable. Section 37(1) makes it clear that appeals shall only lie from the orders set out in sub-clauses (a), (b) and (c) and from no others. The pigeonhole that the High Court in the impugned judgement has chosen to say that the appeals in the present cases were maintainable is sub-clause (c). According to the High Court, even where a Section 34 application is or-

dered to be returned to the appropriate Court, such order would amount to an order "refusing to set aside an arbitral award under Section 34".

15. Interestingly, under the proviso to Section 13(1A) of the Commercial Courts Act, 2015, Order XLIII of the CPC is also mentioned. Order XLIII Rule(1)(a) reads as follows:

> "**1. Appeal from orders.-** An appeal shall lie from the following orders under the provisions of Section 104, namely-
> **(a)** an order under Rule 10 of Order VII returning a plaint to be presented to the proper Court except where the procedure specified in rule 10A of Order VII has been followed;"

16. This provision is conspicuous by its absence in Section 37 of the Arbitration Act, 1996, which alone can be looked at for the purpose of filing appeals against orders setting aside, or refusing to set aside awards under Section 34. Also, what is missed by the impugned judgment is the words "under Section 34". Thus, the refusal to set aside an 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 these cases, there was no adjudication under Section 34 of the Arbitration Act, 1996 - all that was done was that the Special

Commercial Court at Gurugram allowed an application filed under Section 151 read with Order VII Rule 10 CPC, determining that the Special 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 situate at New Delhi.

17. Shri Anurabh Chowdhury referred to a number of judgments in which a well-settled proposition was elucidated, i.e. that an appeal is a creature of statute, and must either be found within the four corners of the statute, or not be there be at all. In support thereof, he referred to **Municipal Corporation of Delhi & Ors. v. International Security & Intelligence Agency Ltd.** (2004) 3 SCC 250 (at paragraphs 14 and 15), and **Arcot Textile Mills Ltd. v. Regional Provident Fund Commissioner and Ors.** (2013) 16 SCC 1 (at paragraph 20). He also referred to a recent Delhi High Court judgment reported as **South Delhi Municipal Corporation v. Tech Mahindra** EFA (OS) (Comm.) 3 of 2019, in which the Delhi High Court held that an order of a Single Judge, which directed the deposit of 50% of the awarded amount, would not be appealable under Section 37 of the Arbitration Act, 1996

read with the Commercial Courts Act, 2015. In the course of discussion the Delhi High Court said:

> "**12.** In view of the above discussions, we conclude that the present appeal is not maintainable. The appellant's remedy clearly lies elsewhere. An attempt was made to urge that no litigant can be deprived of remedy if there is a grievance: ubi jus ibi remedium; however, that argument is wholly without substance because an appeal, it has been repeatedly emphasised, is a specific creation of statute and cannot be claimed as a matter of right. This was explained pithily in Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393, in the following terms:
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> "There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit howsoever frivolous the claim, that the law confers no right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute.
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> **13.** In view of the above discussion, it is held that the present appeal is plainly not maintainable by virtue of provisions of the Commercial Courts Act, 2015; the appeal is therefore dismissed. No costs."

18. Shri Chowdhury also referred to another Delhi High Court judgment reported as **Hamanprit Singh Sidhu v. Arcadia Shares & Stock Brokers Pvt. Ltd** 2016 234 DLT 30 (DB), in which a learned Single

Judge of the Delhi High Court allowed an application for condonation of delay in filing a Section 34 petition. The Division Bench, in holding that an appeal against such an order would not be maintainable under Section 37 of the Arbitration Act, 1996, read with the Commercial Courts Act, 2015 held:

> "**10.** Coming to Section 37(1), it is evident that an appeal can lie from Coming to Section 37(1), it is evident that an appeal can lie from only the orders specified in clauses (a), (b) or (c). In other words, an appeal under Section 37 would only be maintainable against (a) an order refusing to refer the parties to arbitration under Section 8 of the A&C Act; (b) an order granting or refusing to grant any measure under Section 9 of the A&C Act; or (c) an order setting aside or refusing to set aside an arbitral award under Section 34 of the A&C Act. The impugned order is clearly not relatable to Sections 8 or 9 of the A&C Act. It was sought to be contended by the learned counsel for the appellant that the present appeal would fall within Section 37(1) (c) which relates to an order "setting aside" or "refusing to set aside" an arbitral award under Section 34. We are unable to accept this proposition. By virtue of the impugned order, the arbitral award dated 10.09.2013 has not been set aside. Nor has the court, at this stage, refused to set aside the said arbitral award under Section 34 of the A&C Act. In fact, the appellant in whose favour the award has been made, would only be aggrieved if the award were to have been set aside in whole or in part. That has not happened. What the learned single Judge has done is to have condoned the delay in re-filing of the petition under Section 34. This has not, in any way, impacted the award."

19. The reasoning in this judgment commends itself to us, as a distinction is made between judgments which either set aside, or refuse to set aside, an arbitral award *after* the court applies its mind to Section 34 of the Arbitration Act, 1996, as against preliminary orders of condonation of delay, which do not in any way impact the arbitral award that has been assailed.

20. However, Smt. Acharya relied heavily upon the Division Bench judgment of the Delhi High Court in **Antrix Corporation Ltd.** (supra). On the facts of that case, on 28.02.2017, a learned Single Judge of the Delhi High Court ruled that Antrix's petition under Section 9 of the Arbitration Act, 1996 before the Bangalore Court was not maintainable, and that Devas' petition under Section 9 was maintainable, the bar under Section 42 of the Arbitration Act, 1996 being inapplicable. The order also held that consequently, Antrix's petition under Section 34 of the Arbitration Act, 1996 before the Bangalore City Civil Court would not be maintainable, inasmuch as Devas' petition filed in Delhi under Section 9 was filed earlier. The learned Single Judge then listed the matter for hearing on merits and directed Antrix to file an affidavit of an authorised officer, enclosing therewith its audited Balance Sheets, and Profit and Loss Accounts for the past three years. Antrix then ap-

pealed against this order, to which a preliminary objection was taken, stating that this appeal would not be maintainable under Section 37 of the Arbitration Act, 1996. After setting out Section 13 of the Commercial Courts Act, 2015 and Sections 37 and 42 of the Arbitration Act, 1996, the Division Bench noticed **Hamanprit Singh Sidhu** (supra) in paragraph 39, without at all adverting to paragraph 10 of the judgment (which is set out hereinabove). Thereafter, the Court held as follows:

> "**42.** While undeniably, the Learned Single Judge in the impugned order has not decided the Section 9 petition finally and had listed the matter for hearing on merits, Antrix states that the impugned order is indistinguishable from an order under Section 9. Devas however, argued that the sequence of events has not been completed. Antrix should face an adverse order under Section 9 before it can approach this court in appeal. On this issue, significant reliance has been placed on the decision of the Madras High Court in *Samson Maritime* (supra). In that case, the Court held:
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> "*Learned counsel appearing for the respondent made an attempt to contend that the application seeking for furnishing of details of assets cannot be construed as an interim measure or interim relief contemplated under section 9 of the said Act. I am not convinced to accept the said contention for the reason that those details are sought for by the applicant only to seek for consequential or follow up relief in the event of the respondent's failure to furnish securities. Therefore, as the relief sought for in this application is having a direct bearing on the relief sought for in the other applications seeking for furnishing securities, it cannot be said that this relief seeking for details of the assets is*

outside the scope of Section 9. Therefore, I find that the application filed seeking for details of the assets is also maintainable."

43. The Court in *Samson Maritime* (supra) reasoned that an application seeking for furnishing of details of assets would also amount to an interim measure under Section 9, because the reason that those details are sought are only to seek consequential or follow up relief in the event of the respondent's failure to furnish securities. Therefore, an order mandating a party to disclose his assets or file his accounts would also be an interim measure within the meaning of Section 9. In this case, through Paragraph 57 of the impugned order, the Learned Single Judge had directed Antrix to file an affidavit of an authorised officer, enclosing therewith its audited balance sheets and profit and loss accounts for the past three years. Keeping in mind the view of the Court in *Samson Maritime* (supra), which this Court is in agreement with, this would also in effect be a Section 9 order as those details are sought for the purpose of adjudicating whether consequential relief could be given to Devas of securing the amount due from the arbitral award against Antrix. Moreover, this Court cannot take a doctrinaire and unbending approach in this matter, when it is clear that Antrix has suffered all but one remaining blow through the impugned order, and therefore, the Court should not wait till it suffers the final blow (that of the final Section 9 order) before it can assume jurisdiction over the appeal. The court's direction to Antrix furnish an affidavit along with the particulars sought, is to aid its order with respect to a possible distraint, attachment or further such *consequential* order towards interim relief. Such an order would not be made unless the court directs this as a prelude, or important step towards the inevitable interim order, which would be just consequential. Therefore, the Court finds that Antrix's appeal against the impugned order is maintainable.

> **44.** This court also finds merit in Antrix's argument that as regards the single judge's observations that the Bangalore court cannot proceed with the matter, the impugned order is really final. It precludes in effect, Antrix from proceeding with its Section 34 petition before that court (in turn based on the pending Section 9 petition before that court). If Antrix were to accept the ruling, the effect would be to denude the Bangalore court of jurisdiction. It was contended-and correctly, in this court's opinion that whereas a court acts within jurisdiction in deciding whether it has or does not have jurisdiction over a cause of a matter, the declaration by it about the lack of jurisdiction of another court, based on the appreciation of the matter before the latter court is undeniably an adverse order. Allowing that to stand would prejudice Antrix for all times."

21. It can be seen that the reasoning in this judgment would have no application to the facts of the present case. The Division Bench held that directing Antrix to file an affidavit, enclosing therewith its audited Balance Sheets and Profit and Loss Account for the last three years, is itself an interim order passed under Section 9 of the Arbitration Act, 1996. The further reasoning of the Court that the direction to Antrix to furnish an affidavit is to aid a future interim order, which would be just consequential, does not commend itself to us. A step towards an interim order would not amount to granting, or refusing to grant, any measure under Section 9 of the Arbitration Act, 1996. The case is also distinguishable for the reason that, as regards the Bangalore Court,

which cannot proceed further with the matter, the impugned order therein is really final and would, therefore, also be appealable under Section 37. For all these reasons, this judgment is wholly distinguishable and would not apply to the facts of the present case. We may also advert to the fact that our judgment in **Kandla** (supra) was delivered on 07.02.2018, and was missed by the Division Bench in **Antrix Corporation Ltd.** (supra), as the Division Bench had reserved judgment on 06.12.2017, even though it ultimately pronounced the judgment on 30.05.2018. The judgment in **South Delhi Municipal Corporation** (supra) was decided after reference was made to **Kandla** (supra), resulting in a deposit order being held to be not appealable under Section 37 of the Arbitration Act, 1996.

22. It is clear, therefore, that the appeals filed in the present case do not fall within Section 37 of the Arbitration Act,1996 and are not maintainable.

23. We now examine the second part of the challenge made by the Petitioners to the impugned judgment, which relates to the determination of the "seat" of the arbitral proceedings between the parties. The impugned judgment of the Punjab and Haryana High Court referred to **BALCO** (supra) and **Indus Mobile Distribution Pvt. Ltd.** (supra),

and other judgments of this Court, in order to arrive at the conclusion that the arbitration clause in the present case does not refer to the "seat" of arbitration, but only refers to the "venue" of arbitration. Consequently, the impugned judgment holds that since a part of the cause of action had arisen in Faridabad, and the Faridabad Commercial Court was approached first, the Faridabad Court alone would have jurisdiction over the arbitral proceedings, and the courts at New Delhi would have no such jurisdiction. The correctness of these propositions has been vehemently assailed before us, and it is therefore important to lay down the law on what constitutes the "juridical seat" of arbitral proceedings, and whether, once the seat is delineated by the arbitration agreement, courts at the place of the seat would alone thereafter have exclusive jurisdiction over the arbitral proceedings.

The juridical seat of the arbitral proceedings

24. The Arbitration Act, 1940 did not refer to the "juridical seat" of the arbitral proceedings at all. Under the scheme of the Arbitration Act, 1940, Section 14 stated as follows:

> "**14. Award to be signed and filed.-**
>
> **(1)** When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.
>
> **(2)** The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.
>
> **(3)** Where the arbitrators or umpire state a special case under clause (b) of Section 13, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award.

25. When the award was signed and filed in Court, a judgment in terms of the award had then to be made as follows:

> "**17. Judgment in terms of award.**- Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for

making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgement according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such a decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."

26. It was in this setting that "Court" was defined by Section 2(c) of the Arbitration Act, 1940 as follows:

> "**2. Definitions.**- In this Act, unless there is anything repugnant in the subject or the context,
>
> xxx xxx xxx
>
> **(c)** "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under Section 21, include a Small Cause Court;"

27. Section 31, which dealt with the Court in which an award may be filed then stated as follows:

> "**31. Jurisdiction.**
>
> (1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.
>
> (2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the

agreement- or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings-, and all subsequent applications arising, out of that reference, and the arbitration proceedings shall be made in that Court and in no other Court."

28. It will be noticed that in this statutory setting, the "place" in which the award is made is not referred to at all. Given this fact, the "Court" was defined as any Civil Court having jurisdiction to decide questions forming the subject matter of the reference to arbitration if the same had been the subject matter of a suit.

29. The UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985) (hereinafter referred to as the "UNCITRAL Model Law") was then adopted by this country. The UNCITRAL Model

Law introduced the concept of “place” or “seat” of the arbitral proceedings as follows:

> “**Article 1. Scope of application**
>
> xxx xxx xxx
>
> **(2)** The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.
>
> xxx xxx xxx
>
> **Article 2. Definitions and rules of interpretation**
>
> xxx xxx xxx
>
> **(c)** “court” means a body or organ of the judicial system of a State;
>
> xxx xxx xxx
>
> **Article 6. Court or other authority for certain functions of arbitration assistance and supervision**
>
> The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]
>
> xxx xxx xxx
>
> **Article 20. Place of arbitration**
>
> (1) The parties are free to agree on the place of arbitration. Failing such agreement, 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.

(2) Notwithstanding the provisions of paragraph (1) of this article, 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 goods, other property or documents.

xxx xxx xxx

Article 31. Form and contents of award

xxx xxx xxx

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place."

30. The Arbitration Act, 1996 repealed the Arbitration Act, 1940. As is stated in its preamble, the Arbitration Act, 1996 adopted provisions of the UNCITRAL Model Law, as they had made a significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.

31. The Arbitration Act, 1996 refers to "the place" of arbitration and defines 'Court', and indicates which Courts have jurisdiction in relation to arbitral proceedings in several sections in Part I. Section 2(1)(e) and Section 2(2) of the Arbitration Act, 1996 are as follows:

"**2.Definitions.-**

(1) In this Part, unless the context otherwise requires,-

xxx xxx xxx

(e) "Court" means-

(i) in case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of a suit if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;

xxx xxx xxx

(2) This part shall apply where the place of arbitration is in India.

Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award

made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.

32. Sections 20, 31(4) and 42 of the Arbitration Act, 1996 read as follows:

"**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."

"**31. Form and contents of arbitral award**.-

xxx xxx xxx

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place."

"**42. Jurisdiction.-** Notwithstanding anything contained elsewhere in this Part or any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in any Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and no other Court."

33. It will thus be seen that the new provisions contained in Sections 20 and 31(4) of the Arbitration Act, 1996 are a replication of Articles 20 and 31(3) of the UNCITRAL Model Law, in which pride of place is given to the juridical seat of the arbitral proceedings. However, the definition of "court" in Section 2(1)(e) of the Arbitration Act, 1996 continues the definition contained in the Arbitration Act, 1940, but replaces any and every civil court by only the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary civil jurisdiction. Section 42 of the Arbitration Act, 1996 also substantially follows the drill of Section 31(4) of the Arbitration Act, 1940.

34. It can thus be seen that given the new concept of "juridical seat" of the arbitral proceedings, and the importance given by the Arbitration Act, 1996 to this "seat", the arbitral award is now not only to state its date, but also the place of arbitration as determined in accordance with Section 20. However, the definition of "Court" contained in Section 2(1)(c) of the Arbitration Act, 1940, continued as such in the Arbitration Act, 1996, though narrowed to mean only principal civil court and the High Court in exercise of their original ordinary civil jurisdiction. Thus, the concept of juridical seat of the arbitral proceedings and

its relationship to the jurisdiction of courts which are then to look into matters relating to the arbitral proceedings - including challenges to arbitral awards - was unclear, and had to be developed in accordance with international practice on a case by case basis by this Court.

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

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

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

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

which it is held, which is the ‘seat’ (or ‘forum’ or *locus arbitri*) of the arbitration, is well established in both the theory and practice of international arbitration. In fact, the Geneva Protocol, 1923 states:

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

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

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

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

“176(I). (1) The provision of this chapter shall apply to any arbitration *if the seat of the Arbitral Tribunal is in Switzerland* and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.” [*See* the Swiss Private International Law Act, 1987, Ch. 12, Article 176 (I)(1).]

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

xxx xxx xxx

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

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

“2. Definitions

(1) In this Part, unless the context otherwise requires

(e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

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

Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.

xxx xxx xxx

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

20. Place of arbitration

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

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

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

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai etc. In the absence of the parties' agreement thereto, Section 20(2) authorizes the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations

among its members for hearing witnesses, experts or the parties.

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

(emphasis supplied)

36. The Court then went on to refer to several English judgments and specifically italicised several parts of the judgment in **Roger Shashoua & Ors. v. Mukesh Sharma** [2009] EWHC 957 (Comm) as follows:

"**110.** Examining the fact situation in the case, the Court observed as follows:
The basis for the court's grant of an anti-suit injunction of the kind sought depended upon the seat of the arbitration. *An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause.* Not only was there agreement to the curial law of the seat, but also to the Courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, *the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration.*

Although, 'venue' was not synonymous with 'seat', in an arbitration clause which provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision

that 'the venue of arbitration shall be London, United Kingdom' did amount to the designation of a juridical seat..."

In Paragraph 54, it is further observed as follows:

There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that court, because it was best fitted to determine such issues under 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.*

In making the aforesaid observations, the Court relied on judgments of the Court of Appeal in C v. D (2007) EWCA Civ 1282 (CA)."

(emphasis in original)

37. Finally, the conclusion drawn in paragraph 116 was as follows:

"**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

38. Also, in paragraph 123, the Court held as follows:

"**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. 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*."

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*."

39. The Court then concluded in paragraph 194 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.

40. A reading of paragraphs 75, 76, 96, 110, 116, 123 and 194 of **BALCO** (supra) would show that where parties have selected the seat of arbitration in their agreement, such selection would then amount to an exclusive jurisdiction clause, as the parties have now indicated that the Courts at the "seat" would alone have jurisdiction to entertain challenges against the arbitral award which have been made at the seat. The example given in paragraph 96 buttresses this proposition, and is supported by the previous and subsequent paragraphs pointed out hereinabove. The **BALCO** judgment (supra), when read as a whole, applies the concept of "seat" as laid down by the English judgments (and which is in Section 20 of the Arbitration Act, 1996), by harmoniously construing Section 20 with Section 2(1)(e), so as to broaden the definition of "court", and bring within its ken courts of the "seat" of the arbitration[1].

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[1] Section 3 of the English Arbitration Act, 1996 defines "seat" as follows:

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

42. Paragraph 96 is in several parts. First and foremost, Section 2(1)(e), which is the definition of "Court" under the Arbitration Act, 1996 was referred to, and was construed keeping in view the provisions in Section 20 of the Arbitration Act, 1996, which give recognition to party autonomy in choosing the seat of the arbitration proceedings. Secondly, the Court went on to state in two places in the said paragraph that jurisdiction is given to two sets of Courts, namely, those Courts which would have jurisdiction where the cause of action is located; and those Courts where the arbitration takes place. However, when it

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"In this Part "the seat of the arbitration" means the juridical seat of the arbitration designated—

(a)by the parties to the arbitration agreement, or

(b)by any arbitral or other institution or person vested by the parties with powers in that regard, or

(c)by the arbitral tribunal if so authorised by the parties,

or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

It will be noticed that this Section closely approximates with Section 20 of the Indian Arbitration Act, 1996. The meaning of "Court" is laid down in Section 105 of the English Arbitration Act, 1996 whereby the Lord Chancellor may, by order, make provision allocating and specifying proceedings under the Act which may go to the High Court or to county courts.

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.

43. This Court has held that judgments of Courts are not to be construed as statutes, neither are they to be read as Euclid’s theorems. All observations made must be read in the context in which they appear. This was felicitously put in **Amar Nath Om Prakash v. State of Punjab** (1985) 1 SCC 345, where this Court stated:

> “**10.** There is one other significant sentence in *Sreenivasa General Traders* v. *State of A.P* [(1983) 4 SCC 353 : AIR 1983 SC 1246] with which we must express our agreement, It was said: (SCC p. 377, para 27)

“With utmost respect, these observations of the learned Judge are not to be read as Euclid's theorems, nor as provisions of a statute. These observations must be read in the context in which they appear.”

We consider it proper to say, as we have already said in other cases, that judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

In *London Graving Dock Co. Ltd.* v. *Horton* [1951 AC 737, 761 : (1951)-2 All ER 1, 14 (HL)] Lord MacDermott observed:

“The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge....

In *Home Office* v. *Dorset Yacht Co. Ltd.* [(1970) 2 All ER 294 : (1970) 2 WLR 1140 : 1970 AC 1004 (HL)] Lord Reid said:

“Lord Atkin's speech [*Donoghue* v. *Stevension*, 1932 All ER Rep 1, 11 : 1932 AC 562, 580 : 101 LJPC 119 : 147 LT 281 (HL)] ... is not to be treated as if it was a statutory definition. It will require qualification in new circumstances.”

Megarry, J. in (1971) 1 WLR 1062 observed:

“One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament.”

And, in *Herrington* v. *British Railways Board* [(1972) 2 WLR 537: (1972) 1 All Er 749 : 1972 AC 877 (HL)] Lord Morris said: “There is always peril in treating the words of a speech or a judgment as though they were

> words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."
>
> (emphasis supplied)

44. More recently, this Court in **Union of India v. Amrit Lal Manchanda** (2004) 3 SCC 75 held as follows:

> "**15.** Cases involving challenges to orders of detention before and after execution of the order stand on different footings. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes."
>
> (emphasis supplied)

45. In any case, a judgment must be read as a whole, so that conflicting parts may be harmonised to reveal the true ratio of the judgment. However, if this is not possible, and it is found that the internal conflicts within the judgment cannot be resolved, then the first endeavour that must be made is to see whether a *ratio decidendi* can be culled out without the conflicting portion. If not, then, as held by Lord Den-

ning in **Harper and Ors. v. National Coal Board** (1974) 2 All ER 441, the binding nature of the precedent on the point on which there is a conflict in a judgment, comes under a cloud.[2]

46. If paragraphs 75, 76, 96, 110, 116, 123 and 194 of **BALCO** (supra) are to be read together, what becomes clear is that Section 2(1)(e)

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[2] In **Harper** (supra), the decision in Central Asbestos Co. Ltd. vs. Dodd (1972) 2 All ER 1135, a House of Lords judgment, had to be applied. It was found that two learned Law Lords decided the question of law in favour of Dodd, whereas two learned Law Lords decided the question of law against Dodd, stating that his claim was barred. As Lord Denning stated, the fifth Law Lord, Lord Pearson, was the odd man out, in that he agreed with the two learned Law Lords that the law did not support Dodd's case, but agreed with the minority judges that Dodd's claim was not barred. This being the case, Lord Denning spoke of the precedential value of Dodd's case as follows:

"How then do we stand on the law? We have listened to a most helpful discussion by Mr. McCullough on the doctrine of precedent. One thing is clear. We can only accept a line of reasoning which supports the actual decision of the House of Lords. By no possibility can we accept any reasoning which would show the decision itself to be wrong. The second proposition is that if we can discover the reasoning on which the majority based their decision, then we should accept that as binding upon us. The third proposition is that, if we can discover the reasoning on which the minority base their decision, we should reject it. It must be wrong because it led them to the wrong result. The fourth proposition is that, if we cannot discover the reasoning on which the majority based their decision, we are not bound by it. We are free to adopt any reasoning which appears to us to be correct, so long as it supports the actual decision of the House.

In support of those propositions, I would refer to the speech of Lord Dunedin in Great Western Railway Co. v. Owners of S.S. Mostyn [1928] A.C. 57, 73–74, and of Lord MacDermott in Walsh v. Curry [1955] N.I. 112, 124–125, and of Viscount Simonds in Midland Silicones Ltd. v. Scruttons Ltd. [1962] A.C. 446, 468–469. Applying the propositions to Smith v. Central Asbestos Co. Ltd. [Dodd's case] [1973] A.C. 518, the position stands thus: (1) the actual decision of the House in favour of Dodd must be accepted as correct, We cannot accept any line of reasoning which would show it to be wrong. We cannot therefore accept

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** (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.

47. It was not until this Court's judgment in **Indus Mobile Distribution Private Limited** (supra) that the provisions of Section 20 were properly analysed in the light of the 246th Report of the Law Commission of India titled, 'Amendments to the Arbitration and Conciliation Act, 1996' (August, 2014) (hereinafter referred to as the "Law Commission Report, 2014"), under which Section 20(1) and (2) would refer to the

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the reasoning of a minority of two — Lord Simon of Glaisdale and Lord Salmon — on the law. It must be wrong because it led them to the wrong result. (2) We ought to accept the reasoning of the three in the majority if we can discover it. But it is not discoverable. The three were divided. Lord Reid and Lord Morris of Borth-y-Gest took one view of the law. Lord Pearson took another. We cannot say that Lord Reid and Lard Morris of Borth-y-Gest were correct: because we know that their reasoning on the law was in conflict with the reasoning of the other three. We cannot say that Lord Pearson was correct: because we know that the reasoning which he accepted on the law led the other two (Lord Simon of Glaisdale and Lord Salmon) to a wrong conclusion. So we cannot say that any of the three in the majority was correct. (3) The result is that there is no discernible ratio among the majority of the House of Lords. In these circumstances I think we are at liberty to adopt the reasoning which appears to us to be correct."

"seat" of the arbitration, and Section 20(3) would refer only to the "venue" of the arbitration. Given the fact that when parties, either by agreement or, in default of there being an agreement, where the arbitral tribunal determines a particular place as the seat of the arbitration under Section 31(4) of the Arbitration Act, 1996, it becomes clear that the parties having chosen the seat, or the arbitral tribunal having determined the seat, have also chosen the Courts at the seat for the purpose of interim orders and challenges to the award.

48. This Court in **Indus Mobile Distribution Private Limited** (supra), after referring to Sections 2(1)(e) and 20 of the Arbitration Act, 1996, and various judgments distinguishing between the "seat" of an arbitral proceeding and "venue" of such proceeding, referred to the Law Commission Report, 2014 and the recommendations made therein as follows:

> "**17.** In amendments to be made to the Act, the Law Commission recommended the following:
>
> *"Amendment of Section 20*
>
> In Section 20, delete the word "Place" and add the words "Seat and Venue" before the words "of arbitration".
>
> (i) In Sub-section (1), after the words "agree on the" delete the word "place" and add words "seat and venue"

(ii) In Sub-section (3), after the words "meet at any" delete the word "place" and add word "venue".
[NOTE: The departure from the existing phrase "place" of arbitration is proposed to make the wording of the Act consistent with the international usage of the concept of a "seat" of arbitration, to denote the legal home of the arbitration. The amendment further legislatively distinguishes between the "[legal] seat" from a "[mere] venue" of arbitration.]

Amendment of Section 31

17. In Section 31

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

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

19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in

courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction - that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Section 16 to 21 of the Code of Civil Procedure be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

20. It is well settled that where more than one court has jurisdiction, it is open for parties to exclude all other courts. For an exhaustive analysis of the case law, see Swastik Gases Private Limited v. Indian Oil Corporation Limited (2013) 9 SCC 32. This was followed in a recent judgment in B.E. Simoese Von Staraburg Niedenthal and Anr. v. Chhattisgarh Investment Limited: (2015) 12 SCC 225. Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the Respondents may take necessary steps Under Section 9 in the Mumbai Court. Appeals are disposed of accordingly."

This judgment has recently been followed in **Brahmani River Pellets Ltd. v. Kamachi Industries Ltd.** 2019 SCC Online SC 929 at paragraph 15.

49. In fact, the Law Commission Report, 2014 also recommended an amendment in the definition of "Court" under Section 2(1)(e) of the Arbitration Act, 1996, so that in the case of international commercial arbitrations held in India, the High Court alone should be the "Court" for the purposes of the Arbitration Act, 1996, even where such a High Court does not exercise ordinary original jurisdiction. The recommendation made by the Law Commission, which was followed, leading to an amendment of the Arbitration Act, 1996, is as follows:

> "26. It is recommended that in case of international commercial arbitrations, where there is a significant foreign element to the transaction and at least one of the parties is foreign, the relevant "Court" which is competent to entertain proceedings arising out of the arbitration agreement, should be the High Court, even where such a High Court does not exercise ordinary civil jurisdiction. It is expected that this would ensure that international commercial arbitrations, involving foreign parties, will be heard expeditiously and by commercial oriented judges at the High Court level…"
>
> Amendment of Section 2
>
> 1. In Section 2 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act),-
>
> xxx xxx xxx
>
> (ii) In sub-section (1), clause (e), after the words "Court means-" add sub-section (i) beginning with the words "in the case of an arbitration other than international commercial arbitration," before the

words “the principal Civil Court of original jurisdiction”

In sub-section (1), clause (e) replace sub-clause (ii) by following:
“(ii) in the case of an international commercial arbitration, the High Court exercising jurisdiction over the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Court of a grade inferior to such High Court, or in cases involving grant of interim measures in respect of arbitrations outside India, the High Court exercising jurisdiction over the court having jurisdiction to grant such measures as per the laws of India, and includes the High Court in exercise of its ordinary original civil jurisdiction.”

[NOTE: This is to solve the problem of conflict of jurisdiction that would arise in cases where interim measures are sought in India in cases of arbitrations seated outside India. This also ensures that in International Commercial Arbitrations, jurisdiction is exercised by the High Court, even if such High Court does not exercise ordinary original civil jurisdiction.]”

50. The aforesaid amendment carried out in the definition of “Court” is also a step showing the right direction, namely, that in international commercial arbitrations held in India, the High Court alone is to exercise jurisdiction over such proceedings, even where no part of the cause of action may have arisen within the jurisdiction of such High Court, such High Court not having ordinary original jurisdiction. In

such cases, the “place” where the award is delivered alone is looked at, and the High Court given jurisdiction to supervise the arbitration proceedings, on the footing of its jurisdiction to hear appeals from decrees of courts subordinate to it, which is only on the basis of territorial jurisdiction which in turn relates to the “place” where the award is made. In the light of this important change in the law, Section 2(1)(e)(i) of the Arbitration Act, 1996 must also be construed in the manner indicated by this judgment.

51. Take the consequence of the opposite conclusion, in the light of the facts of a given example, as follows. New Delhi is specifically designated to be the seat of the arbitration in the arbitration clause between the parties. Part of the cause of action, however, arises in several places, including where the contract is partially to be performed, let us say, in a remote part of Uttarakhand. If concurrent jurisdiction were to be the order of the day, despite the seat having been located and specifically chosen by the parties, party autonomy would suffer, which **BALCO** (supra) specifically states cannot be the case. Thus, if an application is made to a District Court in a remote corner of the Uttarakhand hills, which then becomes the Court for the purposes of Section 42 of the Arbitration Act, 1996 where even Section 34 applica-

tions have then to be made, the result would be contrary to the stated intention of the parties - as even though the parties have contemplated that a neutral place be chosen as the seat so that the Courts of that place alone would have jurisdiction, yet, any one of five other Courts in which a part of the cause of action arises, including Courts in remote corners of the country, would also be clothed with jurisdiction. This obviously cannot be the case. If, therefore, the conflicting portion of the judgment of **BALCO** (supra) in paragraph 96 is kept aside for a moment, the very fact that parties have chosen a place to be the seat would necessarily carry with it the decision of both parties that the Courts at the seat would exclusively have jurisdiction over the entire arbitral process.

52. 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. and Ors. v. Enercon GmbH and Anr.** (2014) 5 SCC 1, this Court approved the dictum in **Roger Shashoua** (supra) as follows:

> "**126.** Examining the fact situation in the case, the Court in *Shashoua case* [*Shashoua* v. *Sharma*, (2009) 2 Lloyd's Law Rep 376] observed as follows:

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

53. The Court then concluded:

> "**138.** Once the *seat* of arbitration has been fixed in India, it would be in the nature of *exclusive jurisdic-*

tion to exercise the supervisory powers over the arbitration..."

54. In **Reliance Industries Ltd.** (supra), this Court held:

"**45.** In our opinion, it is too late in the day to contend that the seat of arbitration is not analogous to an exclusive jurisdiction clause. This view of ours will find support from numerous judgments of this Court. Once the parties had consciously agreed that the *juridical seat* of the arbitration would be London and that the arbitration agreement will be governed by the laws of England, it was no longer open to them to contend that the provisions of Part I of the Arbitration Act would also be applicable to the arbitration agreement. This Court in *Videocon Industries Ltd.* [(2011) 6 SCC 161 : (2011) 3 SCC (Civ) 257] has clearly held as follows: (SCC p. 178, para 33)

"*33*. In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents."

xxx xxx xxx

55. The effect of choice of seat of arbitration was considered by the Court of Appeal in *C* v. *D* [2008 Bus LR 843 : (2008) 1 Lloyd's Law 239 : 2007 EWCA Civ 1282] . This judgment has been specifically approved by this Court in *Balco* [*BALCO* v. *Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] and reiterated

in *Enercon* [*Enercon (India) Ltd.* v. *Enercon GmbH*, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59 : (2014) 1 ALR 257] . In *C* v. *D* [2008 Bus LR 843 : (2008) 1 Lloyd's Law 239 : 2007 EWCA Civ 1282] , the Court of Appeal has observed: (Bus LR p. 851, para 16)

"*Primary conclusion*

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

conflicting decisions which the parties cannot have contemplated."

56. The aforesaid observations in *C* v. *D* [2008 Bus LR 843 : (2008) 1 Lloyd's Law 239 : 2007 EWCA Civ 1282] were subsequently followed by the High Court of Justice, Queen's Bench Division, Commercial Court (England) in *Sulamerica Cia Nacional de Seguros SA* v. *Enesa Engelharia SA — Enesa* [(2013) 1 WLR 102 : 2012 EWCA Civ 638 : 2012 WL 14764] . In laying down the same proposition, the High Court noticed that the issue in that case depended upon the weight to be given to the provision in Condition 12 of the insurance policy that "the seat of the arbitration shall be London, England". It was observed that this necessarily carried with it the English Court's supervisory jurisdiction over the arbitration process. It was observed that:

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

55. In **Indus Mobile Distribution Private Limited and Ors.** (supra), after clearing the air on the meaning of Section 20 of the Arbitration Act, 1996, the Court in paragraph 19 (which has already been set out hereinabove) made it clear that the moment a seat is designated by agreement between the parties, it is akin to an exclusive jurisdiction

clause, which would then vest the Courts at the "seat" with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

56. Despite the aforesaid judgments of this Court, discordant notes have been struck by some of the High Courts. In **Antrix Corporation Ltd.** (supra), a Division Bench of the Delhi High Court, after setting out paragraph 96 of **BALCO** (supra), then followed the reasoning of judgements of the Bombay High Court, in stating that the *ratio decidendi* of the 5 Judge Bench in **BALCO** (supra) is that Courts would have concurrent jurisdiction, notwithstanding the designation of the seat of arbitration by agreement between the parties. The Delhi High Court stated:

> "**52.** Having held that the statement in paragraph 96 of *BALCO* (supra) would apply to the present case as well, this court has to examine its legal consequence in light of the law declared in *BALCO* (supra). It is important to note that in the said paragraph (extracted above), the Supreme Court has noted that Section 2(1)(e) of the Arbitration Act confers jurisdiction to two courts over the arbitral process - the courts having subject matter jurisdiction and the courts of the seat. This is evident both from the substantive holding of the paragraph as well as the example given by the Court. The Court notes that "*the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place.*" This is further reinforced by

the example that the Court gave later in the same paragraph. In the example where the parties are from Mumbai and Kolkata and the obligations under the contract are to be performed at either Mumbai or Kolkata, and the parties have designated Delhi as the seat of the arbitration, in such a situation, both courts would have jurisdiction, i.e. within whose jurisdiction the subject matter of the suit is situated (either Mumbai or Kolkata) and the court within the jurisdiction of which the dispute resolution, i.e., arbitration is located (which is Delhi). Moreover, the fact that the court interpreted the term *"subject matter of the suit"* in the paragraph, also gives credence to the interpretation that the court recognized that Section 2(1)(e) gives jurisdiction to both the cause of action courts, and the court at the seat of the arbitration. If the Court were of the opinion that only the courts at the seat would have jurisdiction under Section 2(1)(e) and no other court, then it would be wholly unnecessary for the court to interpret the term *"subject matter of the suit"*, since that court would anyway not have jurisdiction. In sum therefore, paragraph 96 of *BALCO* (supra) gives jurisdiction to both courts at the seat and the courts within whose jurisdiction the cause of action arises, if the dispute were the subject matter of a suit. This is what the Bombay High Court in *Konkola Copper Mines* (supra) also interpreted *BALCO* (supra) as holding:

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

> *and the Court where the arbitration takes place. This is evident from the example which is contained in the above quoted extract from the decision*."

57. Having so stated, the Division Bench then went on to give a restricted meaning to **Indus Mobile Distribution Private Ltd.** (supra) in paragraph 56 as follows:

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

58. The Court then went on to state:

> "**58.** The court is of the opinion that in this case, only if the parties had designated the seat as New Delhi *and also provided an exclusive forum selection clause in favour of the courts at New Delhi*, could it be said that this court would have exclusive jurisdiction over all applications filed under the Arbitration Act. Indeed, it is open to parties to an arbitration to designate a particular forum as the exclusive forum to which all applications under the Act would lie. This would merely be an exercise of the right of the parties to choose one among multiple competent forums as the exclusive forum. This is a clearly permissible ex-

ercise of the right of party autonomy as held by the Supreme Court in *Swastik Gases* v. *Indian Oil Corporation Ltd.*, (2013) 9 SCC 32. Conversely, merely choosing a seat, cannot amount to exercising such a right of exclusive forum selection.

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

> case, is the Bangalore City Civil Court, cannot be said to have been excluded therefore. Accordingly, question (ii) is also answered in favour of Antrix..."

59. The view of the Delhi High Court in **Antrix Corporation Ltd**. (supra), which followed judgments of the Bombay High Court, does not commend itself to us. First and foremost, it is incorrect to state that the example given by the Court in paragraph 96 of **BALCO** (supra) reinforces the concurrent jurisdiction aspect of the said paragraph. As has been pointed out by us, the conclusion that the Delhi as well as the Mumbai or Kolkata Courts would have jurisdiction in the example given in the said paragraph is wholly incorrect, given the sentence, *"This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi"*. The sentence which follows this is out of sync with this sentence, and the other paragraphs of the judgment. Thus, **BALCO** (supra) does not "unmistakably" hold that two Courts have concurrent jurisdiction, i.e., the seat Court and the Court within whose jurisdiction the cause of action arises. What is missed by these High Court judgments is the subsequent paragraphs in **BALCO** (supra), which clearly and unmistakably state that the choosing of a "seat" amounts to the choosing of

the exclusive jurisdiction of the Courts at which the “seat” is located. What is also missed are the judgments of this Court in **Enercon (India) Ltd.** (supra) and **Reliance Industries** (supra).

60. Equally, the ratio of the judgment in **Indus Mobile Distribution Private Ltd.** (supra), is contained in paragraphs 19 and 20. Two separate and distinct reasons are given in **Indus Mobile Distribution Private Ltd.** (supra) for arriving at the conclusion that the Courts at Mumbai alone would have jurisdiction. The first reason, which is independent of the second, is that as the seat of the arbitration was designated as Mumbai, it would carry with it the fact that Courts at Mumbai alone would have jurisdiction over the arbitration process. The second reason given was that in any case, following the **Hakam Singh** (supra) principle, where more than one Court can be said to have jurisdiction, the agreement itself designated the Mumbai Courts as having exclusive jurisdiction. It is thus wholly incorrect to state that **Indus Mobile Distribution Private Ltd.** (supra) has a limited *ratio decidendi* contained in paragraph 20 alone, and that paragraph 19, if read by itself, would run contrary to the 5 Judge Bench decision in **BALCO** (supra).

61. Equally incorrect is the finding in **Antrix Corporation Ltd**. (supra) that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of Courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one Court exclusively. This is why the section begins with a *non-obstante* clause, and then goes on to state "…*where with respect to an arbitration agreement any application under this Part has been made in a Court…*" It is obvious that the application made under this part to a Court must be a Court which has jurisdiction to decide such application. The subsequent holdings of this Court, that where a seat is designated in an agreement, the Courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the Court where the seat is located, and that Court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several Courts where a part of the cause of action arises that may have juris-

diction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a Court in which a part of the cause of action arises would then be the exclusive Court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled.

Tests for determination of "seat"

62. The judgments of the English Courts have examined the concept of the "juridical seat" of the arbitral proceedings, and have laid down several important tests in order to determine whether the "seat" of the arbitral proceedings has, in fact, been indicated in the agreement between the parties. The judgment of Cooke, J., in **Roger Shashoua** (supra), states:

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

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

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

64. In **Enercon GmbH v. Enercon (India) Ltd.** [2012] EWHC 689, the arbitration clause between the parties read as follows:

> "18.3 All proceedings in such arbitration shall be conducted in English. The venue of the arbitration proceedings shall be London. The arbitrators may (but shall not be obliged to) award costs and reasonable expenses (including reasonable fees of counsel) to the Party(ies) that substantially prevail on merit. The

provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply."

65. The Court began its discussion on the "seat" of the arbitration by referring to **Roger Shashoua** (supra), and then referring to 'The Conflict of Laws', Dicey, Morris & Collins, 14th Ed. as follows:

> "Moreover, as Cooke J. noted, this conclusion is consistent with the views expressed in The Conflict of Laws, Dicey, Morris & Collins, 14th Edition at ¶16–035 where the authors state that the seat "is in most cases sufficiently indicated by the country chosen as the place of the arbitration. For such a choice of place not to be given effect as a choice of seat, there will need to be clear evidence that the parties … agreed to choose another seat for the arbitration and that such a choice will be effective to endow the courts of that country with jurisdiction to supervise and support the arbitration" .
>
> Apart from the last sentence in clause 18.3 (ie "The provisions of the Indian Arbitration and Conciliation Act 1996 shall apply"), it seems to me that the conclusion that London is the "seat" of any arbitration thereunder is beyond any possible doubt. Thus the main issue is whether this last sentence is to be regarded as "significant contrary indicia" (using the language of Cooke J.) so as to place the "seat" of the arbitration in India. A similar issue was considered by Saville J in Union v of India v McDonnell [1993] 2 Lloyd's Rep 48 which, of course, pre-dates the English 1996 Act . The arbitration agreement in that case provided as follows: "In the event of a dispute arising out of or in connection with this agreement…the same shall be referred to an Arbitration Tribunal…The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any enactment or modification thereof. The arbitration

> shall be conducted in the English language…The seat of the arbitration proceedings shall be London, United Kingdom." Saville J expressed the view that the arguments on both sides were "finely balanced" but in effect concluded that the reference to the Indian Arbitration Act 1940 did not have the effect of changing the "seat" of the arbitration designated by the parties. Rather, the phrase referring to the 1940 Act was to be reconciled with the rest of the clause by reading it as referring to the internal conduct of the arbitration as opposed to the external supervision of the arbitration by the Courts."
>
> (emphasis supplied)

66. The Court then held that although the word "venue" is not synonymous with "seat", on the facts of that case, London - though described as the "venue" - was really the "seat" of the arbitration. This was for the reason that London was a neutral place in which neither party worked for gain, and in which no part of the cause of action arose. It was thus understood to be a neutral place in which the proceedings could be "anchored". Secondly, the Court stressed on the expression "arbitration proceedings" in clause 18.3, which the Court held to be an expression which included not just one or more individual hearings, but the arbitral proceedings as a whole, culminating in the making of an award. The Court held:

> "<u>Second, the language in clause 18.3 refers to the "arbitration proceedings". That is an expression which includes not just one or more individual or particular hearings but the arbitration proceedings as a whole</u>

including the making of an award. In other words the parties were anchoring the whole arbitration process in London right up to and including the making of an award. The place designated for the making of an award is a designation of seat. Moreover the language in clause 18.3 does not refer to the venue of all hearings "taking place" in London. Clause 18.3 instead provides that the venue of the arbitration proceedings "shall be" London. This again suggests the parties intended to anchor the arbitration proceedings to and in London rather than simply physically locating the arbitration hearings in London. Indeed in a case where evidence might need to be taken or perhaps more likely inspected in India it would make no commercial sense to construe the provision as mandating all hearings to take place in a physical place as opposed to anchoring the arbitral process to and in a designated place. All agreements including an arbitration agreement should be construed to accord with business common sense. In my view, there is no business common sense to construe the arbitration agreement (as contended for by EIL) in a manner which would simply deprive the arbitrators of an important discretion that they possess to hear evidence in a convenient geographical location.

Third, Mr Joseph QC submitted that the last sentence of clause 18.3 can be reconciled with the choice of London as the seat. First, he submitted that it can be read as referring simply to Part II of the Indian 1996 Act ie the enforcement provisions. Mr Edey QC's response was that if that is all the last sentence meant, then it would be superfluous. However, I do not consider that any such superfluity carries much, if any, weight. Alternatively, Mr Joseph QC submitted that it can be read as referring only to those provisions of the Indian 1996 Act which were not inconsistent with the English 1996 Act."

(emphasis supplied)

67. The Court then held that the reference to the Indian Arbitration Act, 1996 would not make London the "venue" and India the "seat" of the arbitral process for several reasons, including the fact that in earlier agreements between the same parties, the seat of arbitral proceedings was India, which was changed by this agreement to London - the explanation for this change being to render an award enforceable in India under the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

68. In **Shagang South-Asia (Hong Kong) Trading Co. Ltd. v. Daewoo Logistics** [2015] EWHC 194, the Queen's Bench Division (Commercial Courts) dealt with a 'Fixture Note' in which the Respondent agreed to charter a vessel to Shangang, China. The Fixture Note provided:

> "Clause 23. ARBITRATION TO BE HELD IN HONGKONG. ENGLISH LAW TO BE APPLIED."

69. After referring to **Roger Shashoua** (supra) and **Enercon GmbH** (supra), the Court held:

> "In my judgment the approach adopted in Shashoua v Sharma and in other cases is appropriate in this case also. An agreement that the arbitration is 'to be held in Hong Kong' would ordinarily carry with it an implied choice of Hong Kong as the seat of the arbitration and of the application of Hong Kong law as the curial law. Clear words or 'significant contrary indicia'

> are necessary to establish that some other seat or curial law has been agreed."

70. In **Process and Indusrial Developments Ltd. v. Nigeria** [2019] EWHC 2241 the Court was concerned with a dispute that arose out of a gas supply and processing agreement. The arbitration clause in that case read as follows:

> "The Parties agree that if any difference or dispute arises between them concerning the interpretation or performance of this Agreement and if they fail to settle such difference or dispute amicably, then a Party may serve on the other a notice of arbitration under the rules of the Nigerian Arbitration and Conciliation Act (Cap A18 LFN 2004) which, except as otherwise provided herein, shall apply to any dispute between such Parties under this Agreement. Within thirty (30) days of the notice of arbitration being issued by the initiating Party, the Parties shall each appoint an arbitrator and the arbitrators thus appointed by the Parties shall within fifteen (15) days from the date the last arbitrator was appointed, appoint a third arbitrator to complete the tribunal. …
>
> The arbitration award shall be final and binding upon the Parties. The award shall be delivered within two months after the appointment of the third arbitrator or within such extended period as may be agreed by the Parties. The costs of the arbitration shall be borne equally by the Parties. Each Party shall, however, bear its own lawyers' fees. The venue of the arbitration shall be London, England or otherwise as agreed by the Parties. The arbitration proceedings and record shall be in the English language."

71. The Court then held that the gas supply agreement provided for the seat of the arbitration to be in London, *inter alia*, for the following reasons:

> "It is significant that clause 20 refers to the venue "of the arbitration" as being London. The arbitration would continue up to and including the final award. Clause 20 does not refer to London as being the venue for some or all of the hearings. It does not use the language used in s. 16(2) ACA of where the tribunal may "meet" or may "hear witnesses, experts or the parties". I consider that the provision represented an anchoring of the entire arbitration to London rather than providing that the hearings should take place there.
>
> Clause 20 provides that the venue of the arbitration "shall be" London "or otherwise as agreed between the parties". If the reference to venue was simply to where the hearings should take place, this would be an inconvenient provision and one which the parties are unlikely to have intended. It would mean that hearings had to take place in London, however inconvenient that might be for a particular hearing, unless the parties agreed otherwise. The question of where hearings should be conveniently held is, however, one which the arbitrators ordinarily have the power to decide, as indeed is envisaged in s. 16(2) ACA. That is likely to be a much more convenient arrangement. Clearly if the parties were in agreement as to where a particular hearing were to take place, that would be likely to be very influential on the arbitral tribunal. But if for whatever reason they were not in agreement, and it is not unknown for parties to arbitration to become at loggerheads about very many matters, then it is convenient for the arbitrators to be able to decide. If that arrangement was to be displaced it would, in my judgment, have to be spelled

> out clearly. Accordingly, the reference to the "venue" as being London or otherwise as agreed between the parties, is better read as providing that the seat of the arbitration is to be England, unless the parties agree to change it. This would still allow the arbitrators to decide where particular hearings should take place, while providing for an anchor to England for supervisory purposes, unless changed."
>
> (emphasis supplied)

72. Coming to the judgments of our Courts, this Court in **Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd.** (2011) 16 SCC 179, was concerned with the following arbitration clause contained in the agreement between the parties:

> "Article 22. Governing Laws — 22.1: This agreement shall be governed by and construed in accordance with the laws of The Republic of Korea.
>
> Article 23. Arbitration — 23.1: All disputes arising in connection with this agreement shall be finally settled by arbitration in Seoul, Korea (or such other place as the parties may agree in writing), pursuant to the rules of agreement then in force of the International Chamber of Commerce."

73. The Court then held:

> "**18.** In my opinion, there is essential difference between the clauses referred to in *Citation Infowares Ltd.* v. *Equinox Corpn.* [(2009) 7 SCC 220] as also in *Indtel Technical Services (P) Ltd.* v. *W.S. Atkins Rail Ltd.* [(2008) 10 SCC 308] on one hand and Article 23.1 in the present case, on the other. Shri Gurukrishna Kumar rightly pointed out that the advantage of the bracketed portion cannot be taken, particularly, in view

of the decision in *Naviera Amazonica Peruana S.A.* v. *Compania International de Seguros del Peru* [(1988) 1 Lloyd's Rep 116 (CA)] wherein it was held:

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

That is exactly the case here. The language of Article 23.1 clearly suggests that all the three laws are the laws of The Republic of Korea with the seat of arbitration in Seoul, Korea and the arbitration to be conducted in accordance with the Rules of the International Chamber of Commerce.

19. In respect of the bracketed portion in Article 23.1, however, it is to be seen that it was observed in *Naviera case* [(1988) 1 Lloyd's Rep 116 (CA)] :

"… It seems clear that the submissions advanced below confused the legal 'seat', etc. of an arbitration with the geographically convenient place or places for holding hearings. This distinction is nowadays a common feature of international arbitrations and is helpfully explained in *Redfern and Hunter* [**Ed.**: Redfern and Hunter on International Arbitration.] in 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 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 the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.’

These aspects need to be borne in mind when one comes to the Judge's construction of this policy.”

It would be clear from this that the bracketed portion in the article was not for deciding upon the seat of the arbitration, but for the convenience of the parties in case they find to hold the arbitration proceedings somewhere else than Seoul, Korea. The part which has been quoted above from *Naviera Amazonica Peruana S.A.* v. *Compania International de Seguros del Peru* [(1988) 1 Lloyd's Rep 116 (CA)] supports this inference.

20. In that view, my inferences are that:

(*i*) The clear language of Articles 22 and 23 of the distributorship agreement between the parties in this case spells out a clear agreement between the parties excluding Part I of the Act.

(*ii*) The law laid down in *Bhatia International* v. *Bulk Trading S.A.* [(2002) 4 SCC 105] and *Indtel Technical Services (P) Ltd.* v. *W.S. Atkins Rail Ltd.* [(2008) 10 SCC 308] , as also in *Citation Infowares Ltd.* v. *Equinox*

Corpn. [(2009) 7 SCC 220] is not applicable to the present case.

(*iii*) Since the interpretation of Article 23.1 suggests that the law governing the arbitration will be Korean Law and the seat of arbitration will be Seoul in Korea, there will be no question of applicability of Section 11(6) of the Act and the appointment of arbitrator in terms of that provision."

74. In **Videocon Industries Ltd. v. Union of India** (2011) 6 SCC 161, this Court was concerned with an arbitration agreement between the parties as follows:

"34.12. Venue and law of arbitration agreement.—The venue of sole expert, conciliation or arbitration proceedings pursuant to this article, unless the parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England."

75. Referring to Sections 3 and 53 of the English Arbitration Act, 1996, the Court held:

"**20**. We shall first consider the question whether Kuala Lumpur was the designated seat or juridical seat of arbitration and the same had been shifted to London. In terms of Article 34.12 of the PSC entered into by 5 parties, the seat of arbitration was Kuala Lumpur, Malaysia. However, due to outbreak of epidemic SARS, the Arbitral Tribunal decided to hold its sittings first at Amsterdam and then at London and the parties did not

> object to this. In the proceedings held on 14-10-2003 and 15-10-2003 at London, the Arbitral Tribunal recorded the consent of the parties for shifting the juridical seat of arbitration to London. Whether this amounted to shifting of the physical or juridical seat of arbitration from Kuala Lumpur to London? The decision of this would depend on a holistic consideration of the relevant clauses of the PSC.
>
> **21**. Though, it may appear repetitive, we deem it necessary to mention that as per the terms of agreement, the seat of arbitration was Kuala Lumpur. If the parties wanted to amend Article 34.12, they could have done so only by a written instrument which was required to be signed by all of them. Admittedly, neither was there any agreement between the parties to the PSC to shift the juridical seat of arbitration from Kuala Lumpur to London nor was any written instrument signed by them for amending Article 34.12. Therefore, the mere fact that the parties to the particular arbitration had agreed for shifting of the seat of arbitration to London cannot be interpreted as anything except physical change of the venue of arbitration from Kuala Lumpur to London."

76. In **Enercon (India) Ltd.** (supra), this Court was concerned with an arbitration clause which stated that the venue shall be in London. The Court held, on the facts of that case, that since the substantive law of the contract, the curial law of the proceedings, and the law governing the arbitration agreement were all India, the seat would be India - London only being the venue for holding meetings. The Court then held, following the **Naviera Amazonica Peruana S.A. v. Compania**

Internacional De Seguros Del Peru (1988) 1 Lloyd's Rep 116 (CA) case, that the *lex fori* of the arbitral proceedings, namely, the place in which arbitration is to be held, must be considered to be the seat of the arbitral proceedings, other things being equal, as follows:

> "**100.** On the facts of the case, it was observed in *Naviera Amazonica case* [*Naviera Amazonica Peruana S.A.* v. *Compania Internacional De Seguros Del Peru*, (1988) 1 Lloyd's Rep 116 (CA)] that since there was no contest on Law 1 and Law 2, the entire issue turned on Law 3, "the law governing the conduct of the arbitration". This is usually referred to as the *curial or procedural law, or the lex fori*. Thereafter, the Court approvingly quoted the following observation from *Dicey & Morris on the Conflict of Laws* (11th Edn.): "English law does not recognise the concept of a delocalised arbitration or of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law." It is further held that "accordingly every arbitration must have a 'seat' or 'locus arbitri' or 'forum' which subjects its procedural rules to the municipal law which is there in force". The Court thereafter culls out the following principle:
>
> "Where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate prima facie, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings."
>
> The aforesaid classic statement of the conflict of law rules as quoted in *Dicey & Morris on the Conflict of Laws* (11th Edn.), Vol. 1, was approved by the House of Lords in *James Miller & Partners Ltd.* v. *Whitworth Street Estates (Manchester) Ltd.* [1970 AC 583 : (1970)

2 WLR 728 : (1970) 1 All ER 796 : (1970) 1 Lloyd's Rep 269 (HL)] and Mustill, J. in *Black Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G.* [(1981) 2 Lloyd's Rep 446 at p. 453] , a little later characterised the same proposition as "the law of the place where the reference is conducted, the *lex fori*". The position of law in India is the same.

77. The Court then examined **Braes of Doune Wind Farm (Scotland) v. Alfred McAlpine Business Services Ltd.** [2008] EWHC 436 (TCC) in some detail, and concluded in paragraph 118 as follows:

"**118.** In *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)] , detailed examination was undertaken by the Court to discern the intention of the parties as to whether the place mentioned refers to *venue* or the *seat* of the arbitration. The factual situation in the present case is not as difficult or complex as the parties herein have only designated London as a *venue*. Therefore, if one has to apply the reasoning and logic of Akenhead, J., the conclusion would be irresistible that the parties have designated India as the *seat*. This is even more so as the parties have not agreed that the courts in London will have *exclusive jurisdiction* to resolve any dispute arising out of or in connection with the contract, which was specifically provided in Clause 1.4.1 of the EPC contract examined by Akenhead, J. in *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)] . In the present case, except for London being chosen as a convenient place/*venue* for holding the meetings of the arbitration, there is no other factor connecting the arbitration proceedings to London."

78. The Court then made a reference to **C v. D** [2007] EWCA Civ. 182, where the Court, following **C v. D** (supra), held:

> "**122.** Longmore, J. of the Court of Appeal observed: (*C* v. *D case* [[2008] Bus LR 843 : 2007 EWCA Civ 1282] , Bus LR p. 851, paras 16-17)
>
> "*16*. I shall deal with Mr Hirst's arguments in due course but, in my judgment, they fail to grapple with the central point at issue which is whether or not, by choosing London as the *seat* of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law. In my view they must be taken to have so agreed for the reasons given by the Judge. The whole purpose of the balance achieved by the Bermuda Form (English arbitration but applying New York law to issues arising under the policy) is that judicial remedies in respect of the award should be those permitted by English law and only those so permitted. Mr Hirst could not say (and did not say) that English judicial remedies for lack of jurisdiction on procedural irregularities under Sections 67 and 68 of the Indian Arbitration Act, 1996 were not permitted; he was reduced to saying that New York judicial remedies were *also* [**Ed.**: The word "also" has been emphasised in original.] permitted. That, however, would be a recipe for litigation and (what is worse) confusion which cannot have been intended by the parties. No doubt New York law has its own judicial remedies for want of jurisdiction and serious irregularity but it could scarcely be supposed that a party aggrieved by one part of an award could proceed in one jurisdiction and a party aggrieved by another part of an award could proceed in another jurisdiction. Similarly, in the case of a single complaint about an award, it could not be supposed that the aggrieved party could complain in one jurisdiction and the satisfied party be entitled to ask the other jurisdiction to declare its

satisfaction with the award. There would be a serious risk of parties rushing to get the first judgment or of conflicting decisions which the parties cannot have contemplated.

17. 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."

On the facts of the case, the Court held that the *seat* of the arbitration was in England and accordingly entertained the challenge to the award."

79. Reference was made to **Roger Shashoua** (supra) in paragraphs 124 to 128, and then to various other judgments, including **BALCO** (supra), as follows:

"**134.** It is accepted by most of the experts in the law relating to international arbitration that in almost all the national laws, arbitrations are anchored to the *seat*/place/situs of arbitration. *Redfern and Hunter on International Arbitration* (5th Edn., Oxford University Press, Oxford/New York 2009), in Para 3.54 concludes that "the *seat* of the arbitration is thus intended to be its centre of gravity". In *BALCO* [*Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] , it is further noticed that this does not mean that all proceedings of the arbitration are to be held at the *seat* of arbitration. The arbitrators are at liberty to hold meetings at a place which is of convenience to all concerned. This may become necessary as arbitrators often come from different countries. Therefore, it may be convenient to hold all or some of the meetings of the arbitration in a location other than where the *seat* of arbitration is located. In *BALCO*, the relevant passage from Redfern and Hunter has been quoted which is as under: (SCC p. 598, para 75)

"*75*. … 'The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the Arbitral Tribunal *must* hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an Arbitral Tribunal to hold meetings—or even hearings—in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses…. It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country — for instance, for the purpose of taking evidence…. In such circumstances each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of arbitration remains the place initially agreed by or on behalf of the parties.' (*Naviera case* [*Naviera Amazonica Peruana S.A.* v. *Compania Internacional De Seguros Del Peru*, (1988) 1 Lloyd's Rep 116 (CA)] , Lloyd's Rep p. 121)"

These observations have also been noticed in *Union of India* v. *McDonnell Douglas Corpn.* [(1993) 2 Lloyd's Rep 48]"

80. The Court finally concluded:

"**135.** In the present case, even though the *venue* of arbitration proceedings has been fixed in London, it cannot be *presumed* that the parties have intended the *seat* to be also in London. In an international commercial arbitration, *venue* can often be different from the *seat* of arbitration. In such circumstances, the

hearing of the arbitration will be conducted at the *venue* fixed by the parties, *but this would not bring about a change in the seat of the arbitration. This is precisely the ratio in 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)] . *Therefore, in the present case, the seat would remain in India*."

81. In **Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. and Anr.** (2015) 9 SCC 172, the Court dealt with an arbitration clause between the parties which read 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 the 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."

82. After referring, *in extenso*, to a large number of English decisions and the decisions of this Court, the Court concluded:

> "**48.** In the present case, the agreement stipulates that the contract is to be governed and construed according to the English law. This occurs in the arbitration clause. Mr Viswanathan, learned Senior Counsel, would submit that this part has to be interpreted as a part of "curial

> law" and not as a "proper law" or "substantive law". It is his submission that it cannot be equated with the seat of arbitration. As we perceive, it forms as a part of the arbitration clause. There is ample indication through various phrases like "arbitration in London to apply", arbitrators are to be the members of the "London Arbitration Association" and the contract "to be governed and construed according to the English law". It is worth noting that there is no other stipulation relating to the applicability of any law to the agreement. There is no other clause anywhere in the contract. That apart, it is also postulated that if the dispute is for an amount less than US $50,000 then, the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association. When the aforesaid stipulations are read and appreciated in the contextual perspective, "the presumed intention" of the parties is clear as crystal that the juridical seat of arbitration would be London."

83. Most recently, in **Brahmani River Pellets** (supra), this Court in a domestic arbitration considered clause 18 - which was the arbitration agreement between the parties - and which stated that arbitration shall be under Indian Arbitration and Conciliation Act, 1996, and the venue of arbitration shall be Bhubaneswar. After citing several judgments of this Court and then referring to **Indus Mobile Distribution** (supra), the Court held:

> "**18.** Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the "venue" of arbitration shall be at Bhubaneswar. Con-

> sidering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in *Swastik*, non-use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference.
>
> **19.** When the parties have agreed to the have the "venue" of arbitration at Bhubaneshwar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Since only the Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order is liable to be set aside."

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

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

Correctness of the judgment in Hardy Exploration and Production (India) Ltd.

85. **Roger Shashoua** (supra) was expressly referred to in paragraphs 108 and 109 of **BALCO** (supra), and followed in paragraph 110 as ex-

tracted above. **BALCO** (supra) then summed up the legal position as follows:

> "**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 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."

86. In **Roger Shashoua & Ors. v. Mukesh Sharma & Ors.**, (2017) 14 SCC 722, a Division Bench of this Court, after referring to a number of judgments, referred to the English Shashoua judgment[3] as follows:

> "**46.** As stated earlier, in Shashoua 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

[3] [2009] EWHC 957 (Comm).

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."

87. The Division bench then turned down an argument that **BALCO** (supra) had not expressly approved the Shashoua principle, as follows:

"**54.** We had earlier extracted extensively from the said judgment, as we find, the Court after adverting to various aspects, has categorically held that the High Court had not followed Shashoua principle. The various decisions referred to in Enercon (India) Ltd. (supra), the analysis made and the propositions deduced leads to an indubitable conclusion that Shashoua principle has been accepted by Enercon (India) Ltd. (supra). It is also to be noted that in BALCO, the Constitution Bench has not merely reproduced few paragraphs from Shashoua but has also referred to other decisions on which Shashoua has placed reliance upon. As we notice, there is analysis of earlier judgments, though it does not specifically state that "propositions laid down in Shashoua are accepted". On a clear reading, the ratio of the decision in BALCO, in the ultimate eventuate, reflects that the Shashoua principle has been accepted and the two-Judge Bench in Enercon (India) Ltd. (supra), after succinctly analyzing it, has stated that the said principles have been accepted by the Constitution Bench. Therefore, we are unable to accept the submission of Mr. Chidambaram that the finding recorded in Enercon (India) Ltd. (supra) that Shashoua principle has been accepted in BALCO should be declared as per incuriam."

88. The Court then set out the arbitration clause and the governing law on the facts of the case as follows:

> "**69.** Though we have opined that Shashoua principle has been accepted in BALCO and Enercon (India) Ltd. (supra), yet we think it apt to refer to the clauses in the agreement and scrutinize whether there is any scope to hold that the courts in India could have entertained the petition. Clause 14 of the shareholders agreement (SHA) refers to arbitration. The said Clause reads thus:
>
> 14. ARBITRATION
>
> 14.1 ...Each party shall nominate one arbitrator and in the event of any difference between the two arbitrators, a third arbitrator/umpire shall be appointed. The arbitration proceedings shall be in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce Paris.
>
> 14.2 Proceedings in such arbitrations shall be conducted in the English language.
>
> 14.3 The arbitration award shall be substantiated in writing and shall be final and binding on the parties.
>
> 14.4 The venue of the arbitration shall be London, United Kingdom."
>
> **70.** Clause 17.6 deals with governing law, which reads as follows:
>
> 17.6 GOVERNING LAW
>
> This Agreement shall be governed by and construed in accordance with the laws of India."

89. The court then went on to state:

"**72.** It is worthy to note that the arbitration agreement is not silent as to what law and procedure is to be followed. On the contrary, Clause 14.1 lays down that the arbitration proceedings shall be in accordance with the Rules of Conciliation and Arbitration of the ICC. In Enercon (India) Ltd. (supra), the two-Judge Bench referring to Shashoua case accepted the view of Cooke, J. that the phrase "venue of arbitration shall be in London, UK" was accompanied by the provision in the arbitration Clause or arbitration to be conducted in accordance with the Rules of ICC in Paris. The two-Judge Bench accepted the Rules of ICC, Paris which is supernational body of Rules as has been noted by Cooke, J. and that is how it has accepted that the parties have not simply provided for the location of hearings to be in London. To elaborate, the distinction between the venue and the seat remains. But when a Court finds there is prescription for venue and something else, it has to be adjudged on the facts of each case to determine the juridical seat. As in the instant case, the agreement in question has been interpreted and it has been held that London is not mentioned as the mere location but the courts in London will have the jurisdiction, another interpretative perception as projected by the learned senior Counsel is unacceptable.

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76. In view of the aforesaid analysis, we allow the appeals and set aside the judgment of the High Court of Delhi that has held that courts in India have jurisdiction, and has also determined that Gautam Budh Nagar has no jurisdiction and the petition Under Section 34 has to be filed before the Delhi High Court. Once the courts in India have no jurisdiction, the aforesaid conclusions are to be nullified and we so do. In the facts and circumstances of the case, there shall be no order as to costs."

90. The stage is now set for consideration of the recent judgment of a Three Judge Bench of this Court in **Hardy Exploration and Produc-**

tion (India) Inc. (supra). The precise question that had been referred to the Three Judge Bench in **Hardy Exploration and Production (India) Inc.** (supra) was as to whether the ratio of **Sumitomo Heavy Industries Ltd. v. ONGC Ltd. & Ors.** (1998) 1 SCC 305 - a judgment delivered under the Arbitration Act, 1940 - would have any impact on the "juridical seat" doctrine in arbitration law, as developed in England and by our courts. The Three Judge Bench answered the reference as follows:

> "**27.** In view of the aforesaid development of law, there is no confusion with regard to what the seat of arbitration and venue of arbitration mean. There is no shadow of doubt that the arbitration Clause has to be read in a holistic manner so as to determine the jurisdiction of the Court. That apart, if there is mention of venue and something else is appended thereto, depending on the nature of the prescription, the Court can come to a conclusion that there is implied exclusion of Part I of the Act. The principle laid down in Sumitomo Heavy Industries Ltd. (supra) has been referred to in Reliance Industries Limited (II) and distinguished. In any case, it has no applicability to a controversy under the Act. The said controversy has to be governed by the BALCO principle or by the agreement or by the principle of implied exclusion as has been held in Bhatia International.
>
> **28.** Thus, we answer the reference accordingly."

91. Having answered the reference, the Court then went on to consider the arbitration clause in the facts of that case, which was set out in paragraph 30 as follows:

> "**30.** Article 33 deals with "Sole expert, conciliation and arbitrator". Article 33.9 and 33.12 read thus:
> 33.9 Arbitration proceedings shall be conducted in accordance with the UNICITRAL Model Law on International Commercial Arbitration of 1985 except that in the event of any conflict between the Rules and the provisions of this Article 33, the provisions of this Article 33 shall govern.
> xxx xxx xxx
> 33.12 The venue of conciliation or arbitration proceedings pursuant to this Article unless the parties otherwise agree, shall be Kuala Lumpur and shall be conducted in English language. Insofar as practicable the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitration proceedings and any pending claim or dispute."

92. The Court then went on to see for itself Articles 20 and 31 of the UNCITRAL Model Law and then went on to state that under the UNCITRAL Model Law, either the juridical seat of the arbitral proceedings is indicated in the agreement between the parties, or if it is not, must be determined by the Arbitral Tribunal. Holding that the arbitration clause, on the facts of that case, referred to the "venue" as Kuala Lumpur, the Court went on to hold that there was no determination of any "juridical seat" by agreement, and would therefore have to be determined by the Arbitral Tribunal. As there was no such determination by the Arbitral Tribunal, the Court then concluded:

> "**40.** The said test clearly means that the expression of determination signifies an expressive opinion. In the instant case, there has been no adjudication and expression of an opinion. Thus, the word 'place' cannot be used as seat. To elaborate, a venue can become a seat if something else is added to it as a concomitant. But a place unlike seat, at least as is seen in the contract, can become a seat if one of the conditions precedent is satisfied. It does not ipso facto assume the status of seat. Thus understood, Kuala Lumpur is not the seat or place of arbitration and the interchangeable use will not apply in stricto sensu.
>
> **41.** In view of the aforesaid analysis, the irresistible conclusion is that the Courts in India have jurisdiction and, therefore, the order passed by the Delhi High Court is set aside. Resultantly, the appeal stands allowed and the High Court is requested to deal with the application preferred Under Section 34 of the Act as expeditiously as possible. There shall be no order as to costs."

93. The Three Judge Bench in **Hardy Exploration and Production (India) Inc** (supra) failed to apply the Shashoua principle to the arbitration clause in question. Had the Shashoua principle been applied, the answer would have been that Kuala Lumpur, which was stated to be the "venue" of arbitration proceedings, being governed by the UNCITRAL Model Law, would be governed by a supranational set of rules, and there being no other contrary indicator, it would be clear that Kuala Lumpur would therefore be the juridical "seat" of the arbitration.

94. As we have seen hereinabove, the judgement of Cooke, J. in Roger Shashoua and Ors. v. Mukesh Sharma[4], was expressly approved by the 5-Judge Bench in **BALCO** (supra), as was stated by the Supreme Court of India in Roger Shashoua and Ors. v. Mukesh Sharma and Ors.[5] By failing to apply the Shashoua principle to the arbitration clause in question, the Three Judge Bench in **Hardy Exploration and Production (India) Inc** (supra) has not followed the law as to determination of a "juridical seat", laid down by a Five Judge Bench of this Court in **BALCO** (supra). The result in **Hardy Exploration and Production (India) Inc** (supra) is that a foreign award that would be delivered in Kuala Lumpur, would now be liable to be challenged in the Courts at Kuala Lumpur, and also be challenged in the courts in India, under Section 34 of Part I of the Arbitration Act, 1996. This is exactly the situation that this Court encountered when it decided the case of **Venture Global Engineering v. Satyam Computer Services Ltd. & Anr.,** (2008) 4 SCC 190. The Five Judge Bench in **BALCO** (supra) expressly overruled **Venture Global Engineering** (supra) as follows:

> "**143**…With these observations, the matter was remanded back to the trial court to dispose of the suit on merits. The submissions made by K.K. Venugopal, as noticed in para 42, epitomise the kind of chaos

[4] [2009] EWHC 957 (Comm)

[5] (2017) 14 SCC 722

which would be created by two court systems, in two different countries, exercising concurrent jurisdiction over the same dispute. There would be a clear risk of conflicting decisions. This would add to the problems relating to enforcement of such decisions. Such a situation would undermine the policy underlying the New York Convention or the UNCITRAL Model Law. Therefore, we are of the opinion that appropriate manner to interpret the aforesaid provision is that "alternative two" will become available only if "alternative one" is not available.

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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."

95. The Five Judge Bench then went on to state:

> "**195.** With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International (supra) and Venture Global Engineering (supra). In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations 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 a seat outside India."

96. The decision in **Hardy Exploration and Production (India) Inc.** (supra) is therefore contrary to the Five Judge Bench in **BALCO** (supra), in that it failed to apply the Shashoua principle to the arbitration clause in question. The **Hardy Exploration and Production (India) Inc.** (supra) decision would lead to the result that a foreign award would not only be subject to challenge in the country in which it was made, but also subject to challenge under Section 34 of Part I of the Arbitration Act, 1996, which would lead to the chaos spoken of in paragraph 143 of **BALCO** (supra), with the concomitant risk of conflicting decisions, as held in **Venture Global Engineering** (supra) [overruled in **BALCO** (supra)], which would add to problems relating to enforcement, and undermine the policy underlying the New York

Convention and the UNCITRAL Model Law. We, therefore, declare that the judgment in **Hardy Exploration and Production (India) Inc.** (supra), being contrary to the Five Judge Bench in **BALCO** (supra), cannot be considered to be good law.

97. Coming to the impugned judgment in the present appeals, it is clear that the reasoning followed stems from the subject-matter test that flows from the definition of 'court' in Section 2(1)(e)(i) of the Act. According to the impugned judgment, since the agreement was executed at Faridabad, part of the cause of action would arise at Faridabad, clothing Faridabad courts with jurisdiction for the purposes of filing a Section 34 petition. The second part of the reasoning is that Faridabad is the place where the request for reference to arbitration was received, as a result of which part of the cause of action arose in Faridabad, which ousts the jurisdiction of Courts of New Delhi, in which no part of the cause of action arose.

98. We have extracted the arbitration agreement in the present case (as contained in Clause 67.3 of the agreement between the parties) in paragraph 3 of this judgment. As per the arbitration agreement, in case a dispute was to arise with a foreign contractor, clause 67.3(ii) would apply. Under this sub-clause, a dispute which would amount to

an ‘international commercial arbitration’ within the meaning of Section 2(1)(f) of the Arbitration Act, 1996, would have to be finally settled in accordance with the Arbitration Act, 1996 read with the UNCITRAL Arbitration Rules, and in case of any conflict, the Arbitration Act, 1996 is to prevail (as an award made under Part I is considered a domestic award under Section 2(7) of the Arbitration Act, 1996 notwithstanding the fact that it is an award made in an international commercial arbitration). Applying the Shashoua principle delineated above, it is clear that if the dispute was with a foreign contractor under Clause 67.3 of the agreement, the fact that arbitration proceedings shall be held at New Delhi/Faridabad, India in sub-clause (vi) of Clause 67.3, would amount to the designation of either of these places as the “seat” of arbitration, as a supranational body of law is to be applied, namely, the UNCITRAL Arbitration Rules, in conjunction with the Arbitration Act, 1996. As such arbitration would be an international commercial arbitration which would be decided in India, the Arbitration Act, 1996 is to apply as well. There being no other contra indication in such a situation, either New Delhi or Faridabad, India is the designated “seat” under the agreement, and it is thereafter for the parties to choose as to in which of the two places the arbitration is finally to be held.

99. Given the fact that if there were a dispute between NHPC Ltd. and a foreign contractor, clause 67.3(vi) would have to be read as a clause designating the "seat" of arbitration, the same must follow even when sub-clause (vi) is to be read with sub-clause (i) of Clause 67.3, where the dispute between NHPC Ltd. would be with an Indian Contractor. The arbitration clause in the present case states that "Arbitration Proceedings shall be held at New Delhi/Faridabad, India…", thereby signifying that all the hearings, including the making of the award, are to take place at one of the stated places. Negatively speaking, the clause does not state that the venue is so that some, or all, of the hearings take place at the venue; neither does it use language such as "the Tribunal may meet", or "may hear witnesses, experts or parties". The expression "shall be held" also indicates that the so-called "venue" is really the "seat" of the arbitral proceedings. The dispute is to be settled in accordance with the Arbitration Act, 1996 which, therefore, applies a national body of rules to the arbitration that is to be held either at New Delhi or Faridabad, given the fact that the present arbitration would be Indian and not international. It is clear, therefore, that even in such a scenario, New Delhi/Faridabad, India has been designated as the "seat" of the arbitration proceedings.

100. However, the fact that in all the three appeals before us the proceedings were finally held at New Delhi, and the awards were signed in New Delhi, and not at Faridabad, would lead to the conclusion that both parties have chosen New Delhi as the "seat" of arbitration under Section 20(1) of the Arbitration Act, 1996. This being the case, both parties have, therefore, chosen that the Courts at New Delhi alone would have exclusive jurisdiction over the arbitral proceedings. Therefore, the fact that a part of the cause of action may have arisen at Faridabad would not be relevant once the "seat" has been chosen, which would then amount to an exclusive jurisdiction clause so far as Courts of the "seat" are concerned.

101. Consequently, the impugned judgment is set aside, and the Section 34 petition is ordered to be presented in the Courts in New Delhi, as was held by the learned Single Judge of the Special Commercial Court at Gurugram.

102. The appeals are allowed in the aforesaid terms.

……J.
(R.F. Nariman)

……J.
(Aniruddha Bose)

……J.
(V. Ramasubramanian)

New Delhi;
December 10, 2019