

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

Reserved on: 12th March 2015
Date of decision: 21st April 2015

+ **O.M.P. 24/2015 & IA No. 680/2015**

PUNJ LLOYD LTD

..... Petitioner

Through: Mr. Rajiv Nayar, Senior Advocate and
with Mr. A.S. Chandhiok, Senior Advocate with
Mr. Rishi Agrawala, Mr. Akshay Ringe, Mr. Karan
Luthra, Mr. Saurabh Seth, Mr. Mayank Bamniyal
And Ms. Honey Kolwar, Advocates.

versus

GVK POWER (GOINDWAL SAHIB) LTD

..... Respondent

Through: Mr. Kapil Sibal, Senior Advocate and
Mr. Parag P. Tripathi, Senior Advocate with
Mr. Ankur Chawla, Ms. Kanika Singh, Ms. Heena
Khan, Mr. Arunabh Ganguli and Mr. Salim
Imandar, Mr. Abhimanyu Bhandari, Advocates.

With

O.M.P. 25/2015 & IA 676/2015

PUNJ LLOYD LTD

..... Petitioner

Through: Mr. Rajiv Nayar, Senior Advocate with
Mr. Rishi Agrawala, Mr. Akshay Ringe, Mr. Karan
Luthra, Mr. Saurabh Seth, Advocates.

versus

GVK POWER (GOINDWAL SAHIB) LTD Respondent
Through: Mr. Kapil Sibal, Senior Advocate and
Mr. Parag P.Tripathi, Senior Advocate with
Mr. Ankur Chawla, Ms. Kanika Singh, Ms. Heena
Khan, Mr. Arunabh Ganguli and Mr. Salim
Imandar, Mr. Abhimanyu Bhandari, Advocates.

And

O.M.P. 27/2015 & IA 678/2015

PUNJ LLOYD LTD Petitioner
Through: Mr. Rajiv Nayar, Senior Advocate with
Mr. Rishi Agrawala, Mr. Akshay Ringe, Mr. Karan
Luthra, Mr. Saurabh Seth, Advocates.
versus

GVK POWER (GOINDWAL SAHIB) LTD Respondent
Through: Mr. Kapil Sibal, Senior Advocate and
Mr. Parag P.Tripathi, Senior Advocate with
Mr. Ankur Chawla, Ms. Kanika Singh, Ms. Heena
Khan, Mr. Arunabh Ganguli and Mr. Salim
Imandar, Mr. Abhimanyu Bhandari, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G E M E N T

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21.04.2015

1. Punj Lloyd Ltd ('PLL') has filed these petitions under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act') seeking interim reliefs against the Respondent GVK Power (Goindwal Sahib) Ltd. ('GVK').

Background facts

2. GVK was awarded a contract by the State of Punjab for building, owning and operating a coal fired electricity power plant consisting of 2X270 MW Units (called Unit 1 and Unit 2) at Goindwal Sahib, Tarn Taran District, Punjab. GVK was permitted to appoint a sub-Contractor to carry out the works. Accordingly, GVK appointed the PLL as its sub-Contractor. Three contract agreements dated 14th September 2009 were executed between the parties. One was for 'balance of plant supplies ex-works for steel and cement' for Rs.257 crores. The second was for 'balance of plant supplies ex-works' for Rs.448 crores. The third was for 'construction and services' for Rs.250 crores.

3. It is not in dispute that 10% of the contract value was provided by GVK to PLL as 'advance' to be adjusted against the running bills against an advance bank guarantee ('ABG') for the like amount as security. Further, a BG representing 2% of the contract value had to be furnished by PLL to GVK as a performance bank guarantee ('PBG').

4. In relation to the contract for 'balance of plant supplies ex-works' for Rs.448 crores (which forms the subject matter of O.M.P. No. 24 of 2015), PLL furnished to GVK the following ABG and PBG:

(i) ABG No.007BG00132113 dated 31st August 2012 for Rs.44.80 crores.

(ii) PBG No.5073213BG0000182 dated 29th January 2013 for Rs.8.96 crores.

5. In respect of the agreement for 'construction and services' for Rs. 250 crores (which forms the subject matter of OMP No. 25 of 2015), the following ABGs and PBG were provided by PLL to GVK:

(i) ABG No.007BG00132413 dated 31st August 2012 for Rs.25 crores.

(ii) ABG No.21581GPER002712 dated 29th May 2012 for Rs. 30 crores

(iii) PBG No.5073213BG0000181 dated 29th January 2013 for Rs.5 crores.

6. In relation to the agreement for 'plant supply of ex-works for steel and cement' dated 14th September 2009 for Rs.257 crores (which forms the subject matter of OMP No. 27 of 2015), the following ABG and PBG were furnished by PLL to GVK:

(i) ABG No.007BG00132313 dated 31st August 2012 for Rs.25.70 cores

(ii) PBG No. 5073213BG0000183 dated 29th January 2013 for Rs. 5.14 crores.

7. The commencement date of the contract was 1st December 2009. Unit 1 was expected to be commissioned within thirty months from the date of commencement and Unit 2, within thirty three months from that date. According to PLL, extension of time was granted by GVK to PLL first on 3rd December 2012 and again on 26th March 2014.

8. The case of PLL is that the entire project was complete from an 'operational point of view'. According to PLL, the commencement of commercial operations was delayed due to non-availability of coal which according to PLL was not its obligation. PLL states that GVK was unable to arrange the coal on account of its coal mine allocation being cancelled pursuant to the order of the Supreme Court and also on account of GVK's own financial difficulties.

The present petitions

9. The trigger to the present petitions are three letters dated 24th December 2014 sent by GVK to PLL claiming liquidated damages ('LD') in the aggregate sum of Rs. 14,430,051,950.2 (approximately Rs. 1443 crores) in terms of Article 6.2 of the agreement for delay in milestone achievement as well as overall completion. It was stated in the letter that if the said amount was not paid along with the interest at 15% per annum within seven days from the date of the receipt of the notice, GVK "shall be constrained to take appropriate legal action". PLL sent three separate replies dated 31st December 2014 disputing its liability.

10. PLL states that immediately thereafter it received from GVK a caveat in respect of a suit in which it was stated that "for the reasons stated in the accompanying affidavit it is prayed that this Hon'ble Court may be pleased to order notice to the Caveator/Petitioner Company herein in the event any case is filed by the above stated Caveatee/Respondents and/or Proforma

Parties Nos. 1 to 3 against the Caveator/Petitioner for any ad-interim ex-parte injunction order restraining the Caveator/Petitioner from encashing the Bank Guarantee, in the interest of justice and equity”. Caveats were filed in Hyderabad and in this Court.

11. PLL claimed that it has supplied goods for the entire contract value which has been acknowledged and consumed in the execution of the works at the project site at Tarn Taran. It is stated that GVK by its email dated 2nd January 2014 acknowledged adjustment of the advance payment by the Respondent to the Petitioner and therefore the BGs stood automatically discharged. It is stated that from the running bills submitted by PLL from time to time, GVK used to release the payments after debiting and adjusting *pro rata* amounts against the advances that had originally been released. It is further stated that in its balance sheet for the Financial Year 2013-2014, the GVK had made disclosures to the effect that Unit 1 was already ready for commissioning and Unit 2 was also substantially complete. According to PLL a sum of Rs.43.03 crores was still payable to it. PLL states that the total sum claimed by GVK in its three letters dated 24th December 2014 was approximately Rs. 1443 crores which was much more than the entire contract value. PLL contends that apart from this being an 'afterthought', it is 'fraudulent and *mala fide*' on the part of GVK to recover from PLL the entire monies paid by GVK to PLL.

12. These petitions came up for hearing first on 5th January 2015. *Inter alia*, the Court took note of the submissions of Mr. Rajiv Nayar, learned senior

counsel for PLL, that in the report of the Board of Directors of GVK it was acknowledged that the coal handling and Ash handling systems for Unit 1 were ready and Unit 1 cooling tower was also completed and commissioned. It was further acknowledged that Unit 2 civil works were completed and commissioning works was in progress. It was further stated that units had not been commissioned on time due to non-availability of coal. GVK had filed an application before the Punjab State Electricity Regulatory Commission requesting for extension of time and hearings in that regard were in progress.

13. The Court in its order in OMP. No 24 of 2015 dated 5th January 2015 directed GVK to maintain status quo in respect of ABG No.007BG00132113 dated 31st August 2012 for Rs.44.80 crores and PBG No.5073213BG0000182 dated 29th January 2013 for Rs.8.96 crores. Similar orders were passed in OMP Nos. 25 of 2015 and 27 of 2015 in relation to the other two contracts.

Applications for vacation of stay

14. GVK filed three applications [IA No. 680 of 2015 in OMP No. 24 of 2015, IA No. 676 of 2015 in OMP No.25 of 2015 and IA No. 678 of 2015 in OMP No.27 of 2015] on 12th January 2015 praying that the ex-parte interim order passed by the Court on 5th January 2015 be vacated. On 12th January 2015, the Court directed notice to be issued to the PLL in the said applications.

15. The grounds on which the vacation of stay was sought were, *inter alia*, as under:

(i) No cause of action has arisen within the territorial jurisdiction of this Court. Clause 13 of the BG stated that in the event of any dispute or claim the jurisdiction shall be of the Courts at Hyderabad. The stamp papers on which the BGs were drawn up were purchased at Hyderabad.

(ii) In terms of Article 19.2 (d) of the agreements, the place of arbitration was Hyderabad. It is the Court at Hyderabad which would have supervisory jurisdiction vis-a-vis the arbitration proceedings.

(iii) Both the aforementioned facts showed that the parties had consciously exercised the choice of jurisdiction and only the Courts at Hyderabad would have jurisdiction. The registered office of GVK was at Hyderabad.

(iv) The subject matter of the dispute viz., the work to be executed was at district Tarn Taran in Punjab.

16. On merits it was contended by GVK that there was no fraud committed within the knowledge of the bank and that a bald assertion of fraud would not be enough for the Court to interfere with the invocation of BG. There were no special equities either since it was not the case of PLL that it had been rendered remediless. It was further pointed out by GVK that PLL had

suppressed an email dated 24th December 2014 where it admitted owing a sum of Rs.188.15 crores to GVK. It is submitted that on account of failure of PLL to demonstrate that any fraud was played on the bank or any irreparable injury or irretrievable injustice would be caused to it or that special equities accrue in its favour, there was no case made out for seeking any interim order restraining GVK from invoking the BGs. It is further submitted that all the BGs were unconditional. A demand by GVK to the bank would be conclusive as regards the amount payable under the BGs. It is stated by GVK that even after the expiry of more than two years from the stipulated date of completion, several works were yet to be completed by PLL. Enclosed with the said applications was a copy of the letter dated 10th September 2014 addressed by GVK to PLL listing out works which according to GVK were yet to be completed by PLL.

Orders passed by the Court

17. At the hearing on 19th January 2015, the Court took note of the above letter and passed the following order:

“1. Annexure A-5 to the application for vacation of stay is a copy of a letter dated 10th September, 2014 addressed by the Respondent to the Petitioner listing out works which according to the Respondent are yet to be completed by the Petitioner.

2. It has been agreed by senior counsel for the parties that a joint inspection by the senior personnel of both the Petitioner and the Respondent will be undertaken at the site of the GVK Power Goindwal Power Plant on 22nd January, 2015 at 10.00 am. After

inspection, minutes will be drawn up of the proceedings and decisions taken in respect of each item of work which according to the Respondent requires to be completed by the Petitioner. The Petitioner will indicate to the Respondent the time period which it can complete the works which according to the Respondent are incomplete. The minutes signed by both the parties be placed before the Court on the next date.

3. It will be open to both the parties to have further meetings before the next date to resolve their issues.

4. Renotify on 6th February, 2015 at 2.15 pm.

5. Interim orders to continue”.

18. The minutes of the joint inspection were then filed in the Court. At the hearing on 6th February 2015, learned senior counsel for the Respondent raised a preliminary objection as regards jurisdiction. Arguments continued on 9th, 10th, 18th, 20th, 26th, 27th February 2015, and 5th March 2015 both on the question of jurisdiction as well as on merits.

Submissions on the question of jurisdiction

19. Although extensive submissions were made also on the merits i.e, whether PLL could seek to restrain GVK from invoking and encashing the BGs, the Court considers it necessary first decide the issue of jurisdiction.

20. Mr. Rajiv Nayar and Mr. A.S. Chandhiok, learned senior counsel for PLL, made the following submissions on the issue of jurisdiction:

(i) There is no jurisdiction clause in the main agreements between the parties. In terms of Clause 4.9 of the contract , more than Rs.8 crores has been received by PLL in its designated account at New Delhi.

(ii) All notices were required to be issued by GVK to PLL at New Delhi and therefore even the letter dated 24th December 2014 which constitutes a trigger in these petitions was addressed to PLL and received by it at the notified address at New Delhi; the BGs were issued from New Delhi.

(iii) Through its notices dated 24th December 2014, GVK was seeking return of the monies paid to PLL at New Delhi. In a letter dated 19th February 2015 in response to PLL's letter invoking the arbitration clause, GVK stated that it had paid excess amounts to PLL. The notices having being issued to PLL in New Delhi, a part of the cause of action arose within the jurisdiction of this court.

(iv) The present petitions were in the nature of *quia timet* actions triggered by the letter dated 24th December 2014 issued by the Respondent. It is stated that PLL apprehended that GVK might without notice to PLL invoke and

encash the BGs. Till date there was in fact no invocation/encashment of BGs.

(v) Section 20(c) of the Code of Civil Procedure 1908 ('CPC') would apply to the Act as explained by the Court in *Swastik Gases Pvt. Ltd. v. Indian Oil Corporation Ltd.* (2013) 9SCC 32. Referring to the decision in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services INC* (2012) 9 SCC 552 (hereafter '*BALCO*'), it was submitted that while the Court within whose jurisdiction the seat of arbitration is located would have jurisdiction, the Court within whose jurisdiction 'subject matter of the suit' is situated, would also have jurisdiction. Reliance was placed on the decision of the Supreme Court in *ABC Laminart Pvt. Ltd. v. AP Agencies, Salem* (1989) 2 SCC 163 to urge that the parties did not intend to exclude the jurisdiction of Courts in Delhi.

(vi) PLL was not a party to the BGs and therefore the jurisdiction clause in the BGs would not apply to PLL.

(vii) The decisions in *ITI Ltd. v. Siemens Public Communications Network Ltd.* (2002) 5 SCC 510; *M. Venkatasamiappa v. Srinidhi* 63 LW 468 (Madras) (DB), *Ram Rattan Bhartia v. Food Corporation of India* ILR (1978) 1 Delhi 308 (FB), *Kamal Pushp Enterprises v. Chairman-cum-MD GAIL* 1994 (31)DRJ 651, *Garlapati Ramanaiah Naidu v. L&T Finance* (2012) 5 CTC 172 and *Gujarat Insecticides Ltd. v. Jainsons Minerals* (2009) 153 PLR 1, *K.S. Wahi v. Ganga Exports* 2001(58) DRJ

150, South East Asia Shipping Co. Ltd. v. Nav Bharat (1996) 3 SCC 443 and *State of West Bengal v. Associated Contractors 2015 (1) SC 32* were relied upon.

21. On behalf of GVK, Mr. Kapil Sibal, Mr. P. Chidambaram and Mr. Parag P Tripathi, learned Senior counsel submitted as under as regards the issue of jurisdiction:

(i) Section 2(1) (e) of the Act, defines a Court to be the one “having jurisdiction to decide the questions forming subject matters of the arbitration if the same had been a subject matter of a suit”. It is submitted that this Court, in terms of Section 9 of the Act, would not have jurisdiction to grant the reliefs claimed by the Petitioner if they had been made the subject matter of a suit.

(ii) Prayer (a) of the petitions pertains to anticipated ‘coercive’ action of GVK which, as made out in the petitions, is the possible invocation and encashment of the BGs. Prayer (b) is precisely for that relief. As far as the BGs are concerned Clause 13 thereof is unambiguous that for disputes arising therefrom the Courts in Hyderabad alone would have jurisdiction. The proforma of the BG enclosed as Appendix J-1 to the agreements contained Clause 13 and this proforma was signed by PLL as well.

(iii) The jurisdiction of the Court cannot be made dependent on who first raised the dispute. It is submitted on the strength of the decision in ***South East Asia Shipping Co.*** (supra) that the mere fact that the BGs were executed at Delhi and liability thereunder was enforced against the Banks in Delhi would not give jurisdiction to the Courts at Delhi.

(iv) Prayer (c) in the petitions seeks directions in relation to the work site at Goindwal Sahib in Tarn Taran, Punjab. Prayer (d) seeks directions to GVK to provide security against the material lying at the site which is at Tarn Tarn and, therefore, located outside the jurisdiction of the Court.

(v) Jurisdiction with reference to Section 20 CPC cannot be determined *de hors* the subject matter of the arbitration. In other words, cause of action would be relevant only in so far as it relates to the subject matter. Not each and every transaction between the parties would give rise to a cause of action so as to confer the Court jurisdiction over the subject matter. Reference is also made to the decision in ***Jatinder Nath v. Chopra Land Developers (2007) 11 SCC 453.***

(vi) The intention of the parties could be gleaned from the fact that under Article 19.2 (d) of the contract in OMP. No. 24 of 2015 [Clauses 20.2 (d) and 17.2 (d) in the contracts in OMPs. No. 25 and 27 of 2015 respectively] the place of arbitration is Hyderabad. As explained in ***BALCO*** (supra), the Court at Hyderabad would have supervisory jurisdiction over the arbitration

proceedings. In any event this Court is not the one within whose jurisdiction the subject matter is located.

Decision on jurisdiction

22. There have been a plethora of decisions on the issue of jurisdiction of a Court to entertain a petition seeking reliefs under Section 9 of the Act. The definition of ‘court’ under Section 2 (1) (e) is largely a repetition of corresponding definition under the Arbitration Act 1940 which under Section 2(c) defined it to mean 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”. In ***Venkatasamiappa*** (supra) the Division Bench of the Madras High Court formulated the following tests in order to determine which is the Court having jurisdiction in the matter. The Court observed as follows:

“In order to determine which is the Court having jurisdiction in the matter, you should first of all ascertain what the questions are, which form the subject matter of the reference to arbitration. You then proceed to ask; supposing these questions had arisen in a suit, which is the Court which would have jurisdiction to entertain the suit? That Court would be the Court having jurisdiction under the Arbitration Act also”.

23. In ***N.D. Sud v. Union of India ILR (1973) II Del 503 (DB)***, the Division Bench of this Court took a different view and stated that in view of the decision of the Supreme Court in ***Hukum Singh v. Gammon (India)***

Ltd. AIR 1971 SC 740: “The residence of the respondent thus would be relevant if it is related to the subject matter of the dispute or the reference for purposes of determining the jurisdiction of the court”. Consequently, the question of jurisdiction was not tied up only with the subject matter of the dispute but also to other factors like residence of one of the parties as long as it was “related to the subject matter of the dispute or the reference”. Later a Full Bench of this Court dealt with the issue in **Ram Rattan Bhartia v. FCI** (supra). It was held that “apart from a Court having jurisdiction to entertain the proceedings under the Arbitration Act within whose jurisdiction the cause of action to sue arises, the Court within the local limits of whose jurisdiction the defendant or each of the defendants at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, will also have jurisdiction to entertain the proceedings under the Arbitration Act in terms of clauses (a) and (b) of Section 20 of the Code”.

24. The Court does not consider it necessary to discuss at length the decisions on the question of jurisdiction under Section 20 CPC since the legal position has been summarised explained in recent decisions of the Supreme Court which will be discussed next.

25. In **South East Asia Shipping Co. Ltd** (supra), the contract was executed in Bombay. The contract was also to be performed there. The BG was, however, was executed by the Respondent in Delhi and then transmitted to Bombay for performance. The Respondents filed a suit in the Court in Delhi

seeking to restrain the Appellant from invoking the BG. The Supreme Court concluded that it was only the High Court of Bombay which had jurisdiction to entertain the suit. It observed as under:

“It is settled law that cause of action consists of bundle of facts which give cause to enforce the legal injury for redress in a court of law. The cause of action means, therefore, every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise. In view of the admitted position that contract was executed in Bombay, i.e., within the jurisdiction of the High Court of Bombay, performance of the contract was also to be done within the jurisdiction of the Bombay High Court; **merely because bank guarantee was executed at Delhi and transmitted for performance to Bombay, it does not constitute a cause of action to give rise to the respondent to lay the suit on the original side of the Delhi High Court.**” (emphasis supplied)

26. In *Jatinder Nath* (supra) the disputes arose under the Arbitration Act 1940. The question was whether the trial Court at Faridabad before which an application under Section 14 of the Arbitration Act 1940 was filed was right in dismissing the said application for want of jurisdiction. The application had been filed by the Respondent which had its registered office at New Delhi. Under the agreement the Respondent had agreed to construct a housing complex in New Delhi. The arbitration was to take place in Faridabad. There was an express clause that the Faridabad Courts alone

would have the jurisdiction in case of disputes between the parties. It was held that the parties could not confer jurisdiction on a court under Section 14 by consent if that court did not otherwise have jurisdiction. The Court emphasised that “residence or carrying on business of a party, apart from the place of accrual of cause of action is relevant for determining the territorial jurisdiction of the Court in arbitration cases, if the question so arises in connection with the subject matter of the dispute”. The Court proceeded to find on the facts of the case that “when dispute arises it will not be confined only to the immovable property. Such disputes also require accounts to be maintained. The disputes also involve rendition of accounts. In the circumstances, in our view Section 20 CPC alone is attracted”. Accordingly, it was held “The High Court was right in holding that the Faridabad court had jurisdiction to entertain the petition and make the Award the rule of the Court”.

27. In *Balaji Coke Industry Pvt. Ltd. v. Maa Bhagwati Coke Gujarat Pvt. Ltd.* (2009) 9 SCC 403 the contract between the parties stated that the arbitration would take place at Kolkata. Pursuant to the said agreement the parties entered into a high seas sale agreement (‘HSSA’) wherein it was specified that coal would be supplied to the Respondent at Gujarat. Clause 14 of the HSSA provided that the sale contract would be “subject to Kolkata jurisdiction”. When disputes arose, an application was filed by the Respondent in the Court of the Principal Civil Judge at Bhavnagar in Gujarat under Section 9 of the Act seeking injunction to restrain the Petitioner from disposing of the materials. The Petitioner then approached the Supreme Court with a petition under Section 25 CPC for transfer of the

suit to the Calcutta High Court. The Supreme Court reiterated the settled position that where two courts have jurisdiction to try a suit or proceedings under the provisions of the CPC, an agreement between the parties that one of such courts would have jurisdiction to decide the disputes would not be contrary to public policy and was, therefore, not hit by Section 28 of the Indian Contract Act, 1872. It was held that that the parties knowingly and voluntarily agreed that the contract arising out of the HSSA would be subject to Kolkata jurisdiction. The suit in the Gujarat court was asked to be transferred to the High Court at Calcutta.

28. In *Swastik Gases* (supra), after a discussion of the entire case law it has been again reiterated that where the parties have consciously agreed to refer their disputes to one of the Courts which has jurisdiction, it is that Court alone which would entertain the petition. Referring to Section 20 CPC the Court explained: “Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts”.

29. The decision of the Constitution Bench of the Supreme Court in *BALCO* (supra) arose in the context of international arbitration. It was held that if the legal seat of arbitration was outside India then Part I of the Act would be inapplicable to such arbitration. In that context, the Court also discussed Section 20 of the Act under which the parties were free to agree

on the place of arbitration. The Court observed as follows (SCC, paras 98, 99):

“A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any “place” or “seat” within India, be it Delhi, Mumbai, etc. In the absence of the parties agreement thereto, Section 20(2) authorises the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at a 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 1, as canvassed by the learned counsel for the appellants, so far as purely domestic arbitration is concerned”.

30. The Court in **BALCO** considered the definition of ‘Court’ under Section 2(1) (e) of the Act and observed as under (SCC, para 96):

“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 Bombay 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 could 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”.

31. A significant provision of the Act, which has a bearing on the issue of jurisdiction, is Section 42. It is a *non-obstante* provision which mandates that “with respect to an arbitration agreement” if any application under Part I of the Act (including an application under Section 9) has been made to a Court then “that Court alone shall have jurisdiction over the arbitral

proceedings” and all subsequent applications arising out of the agreement and the arbitral proceedings “shall be made in that Court and in no other Court.”

32. In *State of West Bengal v. Associated Contractors* (supra), the question that arose for determination was “which court will have the jurisdiction to entertain and decide an application under Section 34 of the Arbitration and Conciliation Act?” In that case, an application under Section 9 had been filed in the High Court of Calcutta. Later an application under Section 11 was filed also in the same High Court. After the Award was passed, it was challenged by the Appellants in a petition under Section 34 of the Act before the District Court at Jalpaiguri. The learned Single Judge of the High Court held that under Section 42 of the Act, the jurisdiction of the District Judge stood excluded. Only the High Court could entertain the application for setting aside the Award. The Supreme Court while upholding the said order, concluded:

“(a) Section [2\(1\)\(e\)](#) contains an exhaustive definition marking out only the Principal Civil Court of original jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part-I of the Arbitration Act, 1996.

(b) The expression "with respect to an arbitration agreement" makes it clear that Section [42](#) will apply to all applications made whether before or during arbitral proceedings or after an Award is pronounced under Part-I of the 1996 Act.

(c) However, Section [42](#) only applies to applications made under Part-I if they are made to a court as defined. Since applications made Under Section [8](#) are made to judicial authorities and since applications Under Section [11](#) are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section [42](#).

(d) Section [9](#) applications being applications made to a court and Section [34](#) applications to set aside arbitral awards are applications which are within Section [42](#).

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section [2 \(1\) \(e\)](#), and whether the Supreme Court does or does not retain seisin after appointing an Arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil court having original jurisdiction in the district as the case may be.

(f) Section [42](#) will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part-I.

(g) If a first application is made to a court which is neither a Principal Court of original jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section [42](#). Also, an application made to a court without subject matter jurisdiction would be outside Section [42](#).”

33. To summarise the legal position:

(i) Although Section 2 (1) (e) of the Act defines the word ‘Court’ occurring in Section 9 to mean the Court “having jurisdiction to decide the questions

forming subject matters of the arbitration if the same had been a subject matter of a suit”, it also includes Courts within whose jurisdiction the cause of action arises or the Respondent resides or carries on business as long as it is “relevant in relation to the subject matter of the reference”.

(ii) Only such transactions between the parties which relate to the subject matter would confer jurisdiction in the Court within whose territory they take place. For e.g., the mere fact that a bank guarantee is executed at a place would not by itself confer jurisdiction on the Court of that place to entertain a suit seeking injunction against its invocation.

(iii) The decision in **BALCO** draws a distinction between the “subject-matter of the arbitration” and the “subject-matter of the suit” and states that one should not be confused with the other. It recognises the jurisdiction of two Courts. One is the Court having supervision over the arbitral proceedings and the other the Court within whose jurisdiction the subject-matter of the suit is situated.

(iv) Where the contract specifies the jurisdiction of the court at a particular place and such court has jurisdiction to deal with the subject matter, an inference may be drawn that the parties intended to exclude all other courts.

(v) Under Section [42](#) of the Act, if an application under Section [9](#) is made to a court having jurisdiction, then all subsequent applications both arising out of the arbitration agreement and the arbitral proceedings shall be made to that Court alone “and in no other Court.” An application made to a court without subject matter jurisdiction would be outside Section [42](#).

34. Turning to the present case, there are four prayers in the petitions. Although the petitions themselves do not state that it is *quia timet* action, such plea was raised during arguments by Mr. Nayar. The trigger for the petitions were the letters dated 24th December 2014 which do not spell out any such threat. They only call upon PLL to pay GVK LD in the aggregate sum of Rs. 1443 crores in terms of Article 6.2 of the agreement for delay in milestone achievement as well as overall completion. The letters stated that if the said amount was not paid along with the interest at 15% per annum within seven days from the date of the receipt of the notice, GVK “shall be constrained to take appropriate legal action”. Prior to the filing of the present petitions admittedly there was no letter issued by GVK to the bank invoking the BGs.

35. Both from the pleadings as well as the submissions before the Court, the apprehension of PLL regarding the possible ‘coercive steps’ in terms of prayer (a) is the invocation of the BGs. Prayer (b) too concerns the possible invocation of the BGs. Therefore, for the purposes of the *quia timet* action, the ‘subject matter’ of the dispute would relate to the possibility of the BGs being invoked and encashed.

36. Clause 13 of the BGs states that for all disputes arising out of the BGs, the Courts at Hyderabad would have jurisdiction. Both PLL and GVK have signed the agreement including appendices, one of which is the proforma of the BGs containing the above clause. The plea of PLL that it could not be affected by the jurisdiction clause in the BGs as it was not a party to the BGs is to no avail since the BGs have been issued by the Banks concerned at its instance in favour of GVK. PLL must have ensured that its Bank issues the BG in the said proforma agreed upon by the parties. Consequently, even if a part of cause of action in relation to the BGs may have arisen within the jurisdiction of this Court since the BGs were issued in New Delhi, it is plain that the parties made a conscious choice as to the Court which would have jurisdiction in relation to the disputes arising out of the BGs.

37. In terms of the agreements, the seat of arbitration is Hyderabad. In terms of the decision in **BALCO**, the Court in Hyderabad would have supervisory jurisdiction over the arbitral proceedings. Clause 13 of the BGs evidences the conscious choice of the parties that in relation to disputes arising out of the BGs the Courts at Hyderabad would have jurisdiction. As explained in the decision in **Swastik Gases** (supra) an inference may be drawn that the parties intended to exclude courts other than those in Hyderabad. In the circumstances, it would be impermissible for this Court to exercise jurisdiction over the subject matter of the arbitral dispute between the parties arising out of the possible invocation of the BGs.

38. For the purposes of Section 42 of the Act, if this Court were to entertain the present petitions it would mean that any subsequent application, including one that challenges an interim or final Award or an interlocutory order of the Arbitral Tribunal under Section 17 of the Act, would have to be filed in this Court alone. That would be contrary to the intention of the parties to exclude the jurisdiction of all courts other than those at Hyderabad. This is an additional reason for the Court to decline to entertain these petitions.

39. Prayer (c) is for a direction to GVK to measure the work done by PLL; to restrain GVK from hindering PLL's egress and ingress into the plant and to access the men and material lying at the site. The subject matter of such a relief is certainly not within the jurisdiction of this Court since the project site is at Tarn Taran in Punjab. Prayer (d) seeks a direction to GVK to provide security against the "material lying at site". Therefore, the subject matter of such a suit will also not be within the jurisdiction of this Court.

Conclusion

40. Since the Court has reached the conclusion that it does not have jurisdiction to entertain the petitions, it is not necessary to examine the merits of the petitions.

41. Consequently, the petitions are dismissed on the ground of lack of jurisdiction. It is, however, open to the Petitioner to approach the appropriate Court for relief in accordance with law. The interim orders are vacated. The applications are disposed of. PLL will pay GVK costs of Rs. 50,000 in each of the petitions.

April 21, 2015
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S. MURALIDHAR, J

