

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 28.05.2015

+ **FAO(OS) 131/2015 & CM 5309/2015**

NHPC LIMITED

... Appellant

versus

HINDUSTAN CONSTRUCTION COMPANY LTD ... Respondent

Advocates who appeared in this case:-

For the Appellant : Mr S. B. Upadhyay, SrAdvocate with MsRanjana Roy Gawai
and Mr Shailesh Suman

For the Respondent : Mr Dayan Krishnan, Sr Advocate with Mr Rishi Agrawala
and Ms Malavika Lai

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J

1. This appeal is directed against the order dated 12.02.2015 passed by a learned single judge of this court in OMP No.536/2014 which was a petition filed by the respondent ('HCCL') under section 9 of the Arbitration and Conciliation Act, 1996 ('said Act). The learned single judge disposed the said OMP by making the ex parte order dated 09.05.2014 absolute during the pendency of OMP No.369/2014 which is a petition filed by HCCL under section 34 of the said Act challenging the award dated 17.01.2014. The effect

of this was that in case the appellant ('NHPCL') desired to invoke the bank guarantees mentioned in Schedule I of the petition during the pendency of OMP No. 369/2014, NHPCL would give one week's advance clear written notice to HCCL of its intention to do so.

2. Before the learned single judge an objection had been raised by NHPCL in respect of the jurisdiction of this court to entertain OMP No. 536/2014. Two contentions were advanced on behalf NHPCL. The first contention was that NHPCL had filed an application under section 14(2) of the said Act in the Court of the Civil Judge, Faridabad. Though that application was dismissed, since the court in Faridabad was the first court which had been approached, that court alone, in view of section 42 of the said Act, could entertain further applications concerning the arbitration between the parties. It was, therefore, urged that this court did not have jurisdiction to entertain the said OMP No. 536/2014 filed by HCCL under section 9 of the said Act. The second contention was that the agreement dated 10.05.2006 between the parties was signed at Faridabad, Haryana; the project was executed in West Bengal; the registered office of NHPCL is in Faridabad; the registered office of HCCL is in Mumbai; the bank guarantees were issued in Mumbai; and, no part of the cause of action arose in Delhi. It was submitted that, as such, this court did not have jurisdiction to entertain either the section 34 petition [OMP No. 369/2014] or

the section 9 application [OMP No. 536/2014]. Though, admittedly, Delhi was the place or seat of arbitration, it was submitted that this alone would not confer jurisdiction on this court to entertain the said petitions. Reliance was placed on the following decisions:-

- (i) **Apparel Export Promotion Council v. Prabhati Patni, Proprietor Comfort Furnishers: (2006) 86 DRJ 48 ;**
- (ii) **Jatinder Nath v. Chopra Land Developers (P) Ltd.: (2007) 11 SCC 453;** and
- (iii) **State of W.B. v. Associated Contractors: (2015) 1 SCC 32.**

3. With regard to the first contention, the learned counsel for HCCL submitted that the argument based on section 42 of the said Act was not available to NHPCL for the simple reason that the section 14 application which had been filed before the civil judge, Faridabad was in relation to dispute no. 2 which was yet to be decided by the Arbitral tribunal. Moreover, the present petition was not in respect of dispute no. 2 but, in respect of dispute no. 1, which was distinct and in respect of which the arbitration proceedings had already culminated in the Award dated 17.01.2014. As regards the second contention, the learned counsel for HCCL submitted that it is the settled position in law that the seat of arbitration confers jurisdiction upon courts of that place. Reliance was placed on the constitution bench decision of the Supreme Court in the case of **Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.: (2012) 9 SCC 552.** Reliance was also placed on a

division bench decision of this court in *Ion Exchange (India) Ltd v. Panasonic Electric Works Co.:* (2014) 208 DLT 597. It was also contended that Clause 67.3 (v) of the Conditions of Particular Application (COPA) specifically provided for “New Delhi/Faridabad” to be the seat of arbitration. And, since the entire arbitration had in fact been conducted in New Delhi, the court in New Delhi was also the forum of choice as agreed between the parties.

Clause 67.3 (v) of COPA reads as under:-

“(v) 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.”

It was, therefore, submitted that this court had jurisdiction to entertain OMP 536/2014.

4. The learned single judge negatived the plea on the part of NHPCL that section 42 of the said Act would apply in the present case. This was so because the section 14 application which was filed by NHPCL in the court of the civil judge at Faridabad was in respect of an entirely different and distinct dispute in relation to which the arbitration proceedings were still going on. It was not in respect of the present dispute and, therefore, section 42 would not be available to NHPCL. We are in agreement with this conclusion of the learned single

judge. And, to be fair to the learned counsel for the appellant (NHPCL), this aspect was not given too much emphasis in the appeal before us.

5. The entire debate before us centred around the plea of HCCL, based on *BALCO (supra)*, that the seat of arbitration was in itself sufficient to clothe the courts of that place with the requisite jurisdiction to entertain, inter alia, a petition under section 9 of the said Act. It is therefore necessary to examine, first of all, the decision in *BALCO (supra)*. The Constitution Bench, inter alia, held as under:-

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

“**2. Definitions.**—(1) In this Part, unless the context otherwise requires—

- | | | | | |
|-----|------|------|------|------|
| (a) | XXXX | XXXX | XXXX | XXXX |
| (b) | XXXX | XXXX | XXXX | XXXX |
| (c) | XXXX | XXXX | XXXX | XXXX |
| (d) | XXXX | XXXX | XXXX | XXXX |

(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.

97. The definition of Section 2(1)(e) includes “*subject-matter of the arbitration*” to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist. On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term “*court*” as a court having jurisdiction *over the subject-matter of the award*. This has a clear reference to a court within

whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India.”

(underlining added)

6. So, clearly, the Supreme Court in **BALCO** (*supra*) held that both courts would have jurisdiction, that is, the court within whose jurisdiction the “subject-matter of the suit” is situated and the courts within the jurisdiction of which the dispute resolution (arbitration) is located. The seat of arbitration in the present case was New Delhi and, going by the decision in **BALCO** (*supra*), this court would clearly have jurisdiction despite the fact that no part of the cause of action arose in New Delhi. Of course, the courts where part of the cause action arose would also have jurisdiction but as the first petition [OMP 369/2014 u/s 34] was filed in this court, only this court, in view of the provisions of section 42 of the said Act, would, thereafter, have jurisdiction.

7. It is true that one of us (Ahmed, J) had taken a view as a single judge in **AEPC** (*supra*) that the *situs* or seat of arbitration or the fact that the award was made at a particular place, would not be relevant for conferring jurisdiction. But, that decision was rendered prior to the Supreme Court decision in **BALCO** (*supra*). So, after **BALCO** (*supra*), the **AEPC** (*supra*) decision, even for persuasive value, would not come to the aid of the appellant. In fact, after the

BALCO (*supra*) decision, this question of jurisdiction has been considered by a division bench (which included one of us – Ahmed, J) in **Ion Exchange** (*supra*). This court, inter alia, held as under:-

“12. We are unable to agree with the view taken by the learned single Judge in his order dated 04.02.2014. Section 2(1)(e) of the Act defines the meaning of “Court” as, *inter alia*, the High Court exercising original civil jurisdiction to decide questions forming the subject matter of arbitration if the same had been the subject matter of a suit. As per Section 2(2) of the said Act, Part I is applicable where the arbitration is held in India. Further, Section 9 of the said Act, which falls in Part I of the said Act, sets out the various interim measures that the “Court” may direct either before, during or at any time after the making of the arbitral award. Section 20 of the Act gives the parties to the arbitration, the freedom to choose not only the seat of arbitration but also gives the parties the right to choose the venue of the arbitration. Section 42 of the said Act, which starts with a non obstante clause, states that where any application under Part I has been made to a Court, that Court alone will have jurisdiction over the arbitration proceedings and subsequent applications arising out of the Agreement.

13. In this backdrop, let us take an example where the cause of action has arisen in place ‘A’ and the place of arbitration is place ‘B’. If a party to the arbitration agreement were to move an application under Section 9 of the said Act, he could not file it in place ‘B’, if the view of the learned single Judge were to be accepted as, according to him, an application under Section 9 does not invoke the ‘supervisory jurisdiction’. And, because of Section 42, no other application under the said Act could ever be filed in place ‘B’ (i.e. the place of arbitration). So, the occasion to exercise supervisory jurisdiction would never accrue to the Courts at place ‘B’. This would run counter to the decision of the

Supreme Court in *Bharat Aluminium* (supra) where, at the cost of repetition, it was observed 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.”

14. In these circumstances, we find ourselves unable to agree with the view of the learned single Judge expressed in his order dated 04.02.2014. We agree with the view taken in *Sai Consulting* (supra) and hold that the Courts at the seat or place of arbitration would have territorial jurisdiction to entertain an application under the said Act subject to the provisions of Section 42 thereof, irrespective of the fact that the cause of action arose elsewhere and/or the respondent resides elsewhere.

(underlining added)

8. The learned counsel for the appellant had, as mentioned above, placed reliance on the Supreme Court decision in *Jatinder Nath* (supra). In that decision it was, inter alia, observed as under:-

“15.Section 31(1) of the Act provides that an award may be filed in any court having jurisdiction in the matter to which the reference relates. Under that section, the award can be filed in the court within whose jurisdiction the property in dispute lies. Parties cannot give jurisdiction to a court under Section 14 by consent if that court does not have jurisdiction. If an award refers to an immovable property, the court having jurisdiction in respect of the same will entertain an application under Section 14. In order to decide as to which court has jurisdiction to entertain a petition under Section 14, reference has to be made to Section 2(c) read with Section 31(1) of the Act. Merely because the arbitrator chooses to hold the proceedings in a place where no suit could be instituted, and chooses to make an award at that place, it would not give the court of that place territorial jurisdiction to decide the matter under the Act. In an arbitration without the intervention of the court, an award can

be filed in any court having jurisdiction in the matter to which the reference relates. The award can be filed only in the court which would have jurisdiction in respect of the subject-matter of the dispute. In order to decide the jurisdiction of the court, it is necessary to decide whether the court would have jurisdiction to try a regular suit between the parties in which the relief is claimed. Section 33 does not prescribe the court before which an application under this section may be filed, but Section 31 makes such provision. Section 31(2) provides that all questions regarding the validity, effect or existence of an award or an arbitration agreement shall be decided by the court in which the award has been filed or may be filed. Section 2(c) lays down the forum. The application has to be moved in the court within whose jurisdiction the opposite party resides or carries on business or within whose jurisdiction any part of the cause of action arises. Residence or carrying on business of a party, apart from the place of accrual of a 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.”

(underlining added)

9. While *Jatinder Nath* (*supra*) may tend to support the plea of the appellant that the seat or place of arbitration alone does not confer territorial jurisdiction upon the court of that place, there are several difficulties. First of all, *Jatinder Nath* (*supra*) is a decision under the Arbitration Act, 1940 whereas we are concerned with the provisions of the 1996 Act. And, as pointed out by the learned counsel for the respondent, the Supreme Court, in *Sundaram Finance Ltd. v. NEPC India Ltd.*: (1999) 2 SCC 479, observed that the 1996 Act must be interpreted independent of the 1940 Act as the two acts were different. The Supreme Court observed as under:-

“9. The 1996 Act is very different from the Arbitration Act, 1940. The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconstruction. In other words, the provisions of the 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions, it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act.”

10. So, *Jatinder Nath* (*supra*) which is in the context of the 1940 Act would not be of much help to the appellant. Secondly, *Jatinder Nath* (*supra*) (a decision of a bench of two judges) was prior to the Constitution Bench decision in *BALCO* (*supra*), which, in any event, would prevail.

11. The learned counsel for the appellant had also placed reliance on *Associated Contractors* (*supra*) with particular reference to paragraph 25 thereof, which reads as follows:-

“25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(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.”

12. In *Associated Contractors (supra)*, the question as to whether the seat of arbitration alone could confer jurisdiction on the courts of that place, was not considered. Moreover, there is nothing in *Associated Contractors (supra)*

which detracts from the decision in **BALCO** (*supra*). Nor could there be; **BALCO** (*supra*) having been rendered by a larger bench.

13. Finally, it was contended by the learned counsel for the appellant that **BALCO** (*supra*) would not apply because the Supreme Court itself had indicated that it would apply prospectively to agreements executed after 06.09.2012 (i.e., the date of the decision). It was submitted that the agreement in the present case had been executed on 10.05.2006 and, as such, **BALCO** (*supra*) would not apply to this case.

14. The learned counsel for the respondent submitted that the prospective application of **BALCO** (*supra*) was only in respect of non-applicability of Part I of the said Act to Part II thereof. We agree with the view espoused by the learned counsel for the respondent. The reason for this would be clear by referring to paragraphs 196 & 197 of **BALCO** (*supra*), which are reproduced below:-

“196. We conclude that Part I of the Arbitration Act, 1996 is applicable only to *all the arbitrations* which take place within the territory of India.

197. The judgment in *Bhatia International* [(2002) 4 SCC 105] was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in *Venture Global Engg.* [(2008) 4 SCC 190] has been rendered on 10-1-2008 in terms of the ratio of the decision in

Bhatia International [(2002) 4 SCC 105]. Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.”

15. Only that part whereby *Bhatia International* (*supra*) and *Venture Global* (*supra*) were overruled by *BALCO* (*supra*) has been made prospective in operation. The other observations and interpretations in *BALCO* (*supra*) which do not impinge on the specific issues concerning international arbitration which were the subject matter of *Bhatia International* (*supra*) and *Venture Global* (*supra*) are not subject to the prospective declaration of law envisaged in paragraph 197 of *BALCO* (*supra*).

16. On merits the learned single judge, while making the order dated 09.05.2014 absolute during the pendency of OMP 369/2014, observed that the said order only required the NHPCL to give one week’s advance ‘clear written notice’ to HCCL of its intention to invoke the bank guarantee. This, according to the learned single judge, did not cause any prejudice to NHPCL because after such notice it would be open to NHPCL to proceed to invoke the bank guarantee, subject to HCCL seeking appropriate remedies which may be available to it in law. We agree with this view of the learned single judge. The order does not operate as an injunction upon NHPCL from encashing/invoking the bank guarantee.

17. The appeal, therefore, fails on the point of jurisdiction as also on merits.

There shall be no order as to costs.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

MAY 28, 2015

HJ

