

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

% *Judgment reserved on: 24th February, 2016*
Judgment pronounced on: 8th March, 2016

+ **Arb. P. No.375/2015**

M/S. OVERSEAS MOBILES PVT. LTD. Petitioner
Through Mr.Pragyan Sharma, Adv. with
Mr.Ravi Kant, Adv.

versus

M/S. ZTE TELECOM INDIA PVT. LTD. Respondent
Through Mr.Neeraj Sharma, Adv. with
Ms.Archana Lakhotia & Ms.Shruti
Khanijow, Advs

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By way of this order, I propose to decide the petition filed by the petitioner under Section 11 (6) of Arbitration and Conciliation Act, 1996 for appointment of Arbitrators.

2. The brief facts as per the petition are that the petitioner is a company incorporated under the provisions of the Companies Act, 1956 and is in the business of import and supply of mobile handsets.

2.1. The petitioner entered into a Distribution Agreement (hereinafter referred to as the 'Agreement') with the respondent on 9th June, 2009 for import and distribution of mobile phones and related accessories. As per the above said agreement the petitioner had imported 97,000/- mobile sets worth Rs. 13,81,13,710/- from the respondent under the Letter of Credit (LC) by

making full payment. As per the Agreement dated 9th June, 2009 the petitioner had made total payment in advance of the invoice value of goods imported from respondent from China under letter of credit and as per usual business customs as alleged, the petitioner was entitled to claim from the respondent several incentives, commissions etc. of the mobile sets imported under the agreement.

2.2. Last purchases were made by the petitioner in February, 2010, till when petitioner had placed a substantial sum of money with the respondent in trust, by not deducting commissions, incentives and reimbursements while making full payments for invoices raised by respondent.

2.3. The substantial amount due towards payment of incentives and commission had already become payable and upon the payment not being made by the respondent, the petitioner had insisted the respondent and made strong representations before him for making the due payment. Accordingly after due deliberations and negotiations the petitioner and the respondent had entered into a Memorandum of Settlement (hereinafter referred to as the 'Memorandum') dated 14th April, 2010 whereby the respondent had agreed to pay the petitioner a sum of Rs. 5.22 Crores (Rs. 2.97 Crores towards agreed incentive @ 25% of total business under Marketing Budge, Rs. 60 Lacs towards reimbursement of Brand Building Expenses and Rs. 1.65 crores towards compensation for stocks sold at reduced price under instruction of respondent). Copy of MOU has been placed on record.

2.4. It is submitted that the respondent had also made sales in India through channels other than the petitioner, whereas under the agreement it was agreed between the parties that the respondent shall pay over-riding commission of 7%

of invoice value for all mobile phones sold in India through channels other than the petitioner. In terms of Memorandum dated 14th April, 2010 the respondent were to make calculation of amount payable as over-riding commission for the year 2009-2010 and made payment accordingly. In fact it has not been done by the respondent till date, despite letters dated 19th July, 2010, 26th July, 2010 and 27th July, 2010 sent by the petitioner to the respondent. The petitioner states that the respondent is also liable to pay over-riding commission for the year 2010- 2011 and 2011-2012.

2.5 But despite repeated letters the respondent failed to pay the dues of petitioner. Therefore having no option, the petitioner sent a legal notice to the respondent through counsel dated 31st July, 2010. Thereafter, the respondent had written a letter dated 22nd May, 2012 to the petitioner seeking details of claims of petitioner, the same was replied by the petitioner vide letter dated 30th May, 2012 followed by letter dated 9th July, 2012.

3. The clause 17.1 of Agreement dated 9th June, 2009 also provides for Mediation in case of disputes between the parties. As such a request was made to Delhi Dispute Resolution Society (Regd.) Delhi to initiate mediation and help settle the disputes in an amicable manner. Thereafter, the Delhi Dispute Resolution Society Delhi addressed a letter intimating initiation of mediation process to the respondent, where the respondent were represented by Mr. Deepak Thakur Manager-Legal and Ms. Manisha, but they failed to make any offer for settlement by mediation and the Mediator was constrained to close the mediation as unsettled on 2nd January, 2015.

4. Admittedly, the mediation having failed therefore the petitioner did not have any other option but to invoke arbitration by nominating

Mr.Abhishek Kumar, Advocate at chamber No.F-719, Karkardooma Courts, Delhi-110032 as one of the three arbitrators, in terms of clause 17.2 of Agreement dated 9th June, 2009.

5. The said clause reads as under:-

"17.2 Arbitration : any claim or dispute that cannot be settled by way of mediation section 19.1, including any question regarding the existence, validity or termination of this Agreement, shall be referred to and finally resolved by arbitration in New Delhi, India in accordance with the Arbitration and Conciliation Act, 1996, as amended ("Arbitration Act). The Tribunal shall consist of three (3) arbitrators to be appointed as follows: (a) ZTE shall appoint one arbitrator, (b) the distributor shall appoint one arbitrator and (c) the two arbitrators so appointed by the parties shall appoint the third or the presiding arbitrator. The language of the arbitration shall be English. Notwithstanding the above, nothing in this section shall be construed as applying to disputes regarding rights to intellectual property (including but not limited to confidential information), the enforcement of the parties respective intellectual property rights, or the enforcement of the parties respective obligations under this agreement with respect to the other party's intellectual property (including but not limited to confidential information)".

6. The respondent had not responded, therefore the petitioner had sent the notice to the respondent to nominate one of three arbitrators vide legal notice dated 17th February, 2015. But till date neither has the respondent replied to the notice nor appointed the Arbitrator.

7. The respondent has filed the reply to the petition under Section 11 of the Act filed by the petitioner.

8. The main case set up by the respondent is that the Distributor Agreement was signed between the petitioner and the respondent on 9th

June, 2009. The claim of the petitioner is based on alleged Memorandum of purportedly dated 14th April, 2010 which is not executed by the respondent and is an act of fraud being committed on the respondent by the petitioner. It is pointed out that from the date of signing of the Agreement dated 9th June, 2009, there was no claim or dispute raised by the petitioner till the date of alleged Memorandum dated 14th April, 2010.

8.1. The alleged Memorandum has neither been executed nor has it been signed by the respondent Company. It is submitted that no authorization has ever been granted by the respondent Company for either execution or signing of the alleged Memorandum. The alleged Memorandum does not even contain any authorization enclosed along with it. The alleged Memorandum was never in the knowledge of the respondent. The same was brought to the knowledge of the respondent only during the prior mediation process in the month of December, 2014. Upon internal scrutiny afterwards, it came to the knowledge of the respondent that the alleged Memorandum has purportedly been executed by one of the ex-employee of the respondent, namely Mr. Piyush Sharma, who was terminated from the services of the respondent Company in the year 2012 for discrepancies in his service with the respondent. The issue of termination of the services of Mr. Piyush Sharma is also pending adjudication before an Arbitral Tribunal, which is being strongly contested by the respondent. It is submitted that the alleged Memorandum is forged and fabricated and believed to be executed pre-dated by the said ex-employee being hand-in- glove with the petitioner. The same is illegally executed by the said disgruntled ex-employee to cause illegal and irreparable harm to the respondent. The respondent Company is also in the

process of filing complaint seeking registration of FIR against Mr. Piyush Sharma and the petitioner for the same. The present petition is liable to be dismissed for the aforementioned reasons and also inasmuch as the same is based on forged, fabricated, manufactured and pre-dated documents in connivance with the disgruntled ex-employee of the respondent to fasten illegal and baseless liability on the respondent.

8.2. The petitioner has not filed before this Court the original Agreement containing valid arbitration clause. The alleged Agreement is not adequately stamped and hence, the same cannot be looked into by this Court.

8.3. The petitioner fails to disclose any cause of action for appointment of Arbitrator as per the terms of the Agreement. The present petition filed by the petitioner has not been filed in consonance with the terms and conditions of the Agreement inasmuch as the same is in contravention of the Clauses 17.1 & 17.2 of the Agreement.

8.4. The petitioner, by way of this present petition seeks appointment of Arbitrator not for enforcement of the Agreement but for enforcement of alleged Memorandum dated 14th April, 2010. It is further submitted that neither does the said Memorandum contain any arbitration clause nor can it be said to be an incorporation to the said Agreement. There is no remedy available to the petitioner under the Act for enforcement of the Memorandum.

8.5. The alleged Memorandum is contrary to the terms of the Agreement and as such unenforceable. Even otherwise, the Memorandum dated 14th April, 2010 being contrary to the terms and conditions of the Agreement,

cannot be said to either amend the Agreement or even constitute any incorporation into the said Agreement. The alleged Memorandum does not contain any incorporation by reference into the Agreement and as such is not valid under the requirement of Clause 19.2 of the Agreement. The alleged Memorandum does not even contain any reference to the Agreement.

9. In addition it is stated in the reply that the present petition is also contrary to Clause 10.1 of the Agreement, which is being reproduced herein below:-

"10.1 The initial term of this Agreement (the "Initial Term") begins on the Effective Date and naturally expires 24 months thereafter. But this Agreement will automatically continue for successive one-year terms (each, a "Renewal Term "), unless within 60 days before the initial term expires or any Renewal Term expires, one party notifies the other in writing that it will not renew this Agreement upon expiration of the Initial Term or Renewal Term, as applicable Any such Renewal Term will constitute a full waiver and release by Distributor of any and all claims and damages against ZTE that may have arisen in the Initial Term or any prior Renewal Term of this Agreement. The number of Renewal Terms notwithstanding, this Agreement is and will always be interpreted as a fixed term agreement and not as an indefinite term agreement."

10. It is submitted that the Agreement was for an initial term of 24 months and expired after 36 months after a renewal term of 12 months. Whilst denying existence of any dispute, as per the allegation of the petitioner the alleged dispute arose during the initial term of the Agreement i.e. within first 24 months. The Agreement was renewed for a further period of 12 months and as per clause 10.1 of the Agreement this renewal term of 12 months constitutes full waiver and release by the petitioner of any and all

alleged claims against the respondent that may have arisen in the initial term of first 24 months.

11. There is no dispute between the parties which has arisen in the renewal term and the alleged dispute arisen in the initial term is deemed to be waived by the petitioner. The communications placed on record by the petitioner were never served to the respondent and the same also are forged and fabricated or being managed by the petitioner in connivance with the ex-employee of the respondent to fasten illegal and wrongful liability and cause wrongful loss to the respondent by playing fraud on the respondent.

12. Counsel for the respondent submits that the Agreement was entered prior to the judgment of *Bharat Aluminium Co. vs. Kaiser Aluminium Technical Service Inc.*, 2012 (9) SCC 552 rendered by the Supreme Court. The agreement was executed and duly stamped by the parties at Navi Mumbai, Maharashtra. The Agreement does not specify the place of performance of the contract or that part of it will be in Delhi. The respondent has its registered office and places of business at Gurgaon, Haryana and Navi Mumbai, Maharashtra respectively. The correspondences by the petitioner are addressed to the respondent's office in Haryana and the respondent has duly replied to the said correspondence from its office at Gurgaon, Haryana. Thus, the Agreement does not confer any territorial jurisdiction in Delhi Courts.

13. He submits that Delhi has no connection either with the cause of action or place of business of the respondent. Therefore, this Court does not have jurisdiction under Section 20 CPC, over the disputes arising out of the Agreement which is the subject matter of the present petition. The Supreme Court in the case of *ABC Laminart Pvt. Ltd. v. AP Agencies Salem*, (1989)

2 SCC163 holds that “the jurisdiction of the Court in matter of a contract will depend on the situs of the contract and the cause of action arising through connecting factors”.

14. He also submits that the proceedings under Section 11 of the Act are distinct and distinguished from the proceedings preferred under Section 9 of the Act and therefore, principles applicable for determination of appropriate jurisdiction under Section 9 of the Act cannot be applied *mutatis mutandis* to Section 11 of the Act.

The judgment relied upon by the petitioner, ***ION Exchange (India) Ltd. v. Panasonic Electric Works Co.Ltd.*** (2014) 208 DLT 597 passed by the Division Bench of this Court would also not be applicable to the present petition. The Division Bench judgment in ***ION Exchange case*** (supra) considered issues on jurisdiction in an application filed under Section 9 of the Act and relying upon the ratio of ***Balco case*** (supra) holds that even though no cause of action arose in Delhi, this Court would have territorial jurisdiction to hear the petition since the seat of arbitration was Delhi, the said principles are applicable for determining appropriate forum for entertaining Section 9 application and not in the petition filed under Section 11 of the Act as the Supreme Court has distinguished the treatment of Section 9 and Section 11 applications *vis-à-vis* Section 42 in its recent judgment in ***State of West Bengal v. Associated Contractors*** (2015) 1 SCC 32. The Apex Court relied upon its previous judgments, including ***S.B.P. and Co. v. Patel Engineering Ltd. & Anr.*** (2005) 8 SCC 618 and held that while applications under Section 9 and 34 fall within the purview of Section 42 inasmuch as exclusion/bar of all courts other than “Court” before which

application is initially made is concerned, the applications under Sections 8 and 11 would be outside Section 42.

15. The main arguments addressed by the counsel for the respondent is that this Court does not have territorial jurisdiction to entertain the present petition. It is submitted that no cause of action to file the present petition has ever arisen within the territorial jurisdiction of this Court. The alleged arbitration Agreement has not been executed within the territorial jurisdiction of this Court. The office of the respondent is not within the territorial jurisdiction of this Court. It is settled law that no jurisdiction can be conferred by an agreement on a particular court, which otherwise does not have jurisdiction.

16. Admittedly, the venue of the arbitration which was agreed by the parties in Clause 17.2 of the agreement in question is reproduced as under:

“17.2 Arbitration: Any claim or dispute that cannot be settled by way of mediation section 19.1, including any question regarding the existence, validity or termination of this Agreement, shall be referred to and finally resolved by arbitration in New Delhi, India in accordance with the Arbitration and Conciliation Act, 1996, as amended (Arbitration Act). The Tribunal shall consist of three (3) arbitrators to be appointed as follows: (a) ZTE shall appoint one arbitrator, (b) the distributor shall appoint one arbitrator and (c) the two arbitrators so appointed by the parties shall appoint the third or the presiding arbitrator.

The language of the arbitration shall be English. Notwithstanding the above, nothing in this section shall be construed as applying to disputes regarding rights to intellectual property (including but not limited to confidential information), the enforcement of the parties respective intellectual property rights, or the enforcement of the parties respective obligations under this agreement with respect to the other party's intellectual property (including but not limited to confidential information).”

17. A plain reading of the arbitration clause 17.2 of agreement in question suggests that this Court has the jurisdiction to entertain the present petition because at the time of execution of agreement in question both the parties were agreed to refer the dispute to New Delhi. As both the parties were agreed regarding the point of jurisdiction at the time of execution of agreement in question therefore at this stage the respondent even cannot raise any such dispute regarding the jurisdiction of this Court.

18. As far as other objections raised by the respondent that the Memorandum has not been executed by authorized person of the respondent, thus being fabricated document, it is not denied that the Memorandum was executed between the parties. The outstanding amount is admitted. In case it is not signed by the authorized person of the respondent, the said plea can be raised before Arbitral Tribunal. The same cannot be finally decided at this stage on the basis of bald statement. There is no cogent evidence available. The Division Bench of this Court in the matter of **NHPC Limited v. Hindustan Construction Company Ltd.** 2015(221) DLT 256 has interpreted the judgment of Supreme Court in **Balco case** (supra). The same reads as under :

“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 FAO(OS) 131/2015 Page 6 of 15 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.”

19. It is specifically averred that the agreement in question was executed by the petitioner in Delhi on 10th June, 2009. It is stated that all the terms and conditions of this agreement were discussed in a meeting held between representative of the petitioner and respondent held in New Delhi. It submitted that the petitioner is having office at Delhi only and no other office of the petitioner is there except in Delhi.

20. The petitioner had issued a notice dated 17th February, 2015 through their counsel for invocation of arbitration clause which was duly served on the respondent on 19th February, 2015 vide internet tracking report, but the respondent had not replied to the said notice and did not raise any objection whatsoever therefore at this stage the respondent cannot take any advantage of its own wrong by raising any such false issue of jurisdiction. Hence, this Court has the jurisdiction to entertain the present petition as per law.

21. A plain reading of arbitration clause 17.2 of the Agreement in question would show that this Court has the jurisdiction to entertain the present petition because at the time of execution of agreement in question both the parties agreed to refer the dispute to New Delhi being the jurisdiction of choice as also due to the fact that subject matter of the arbitration was also in New Delhi as a number of events happened in New Delhi.

22. Thus, in the present case, there is an additional factor also as there is *prima facie* material placed on record that part of cause of action has arisen in

New Delhi. Thus, even the objection of the respondent's counsel that the *Balco case* (supra) and other decisions would not apply in the facts of the present case as well as the other objections raised by the respondent's counsel, have no force in view of the judgment of the Division Bench headed by Hon'ble Mr. Badar Durrez Ahmed and Mr. Sanjeev Sachdeva, JJ. in the case of *NHPC Limited v. Hindustan Construction Company Ltd.*(supra). The learned Division Bench in addition to the view already taken in *ION Exchange* (supra) has also dealt with the submission of the counsel who has raised the question of jurisdiction as raised in the present case. The said discussions are mentioned in paras 8 to 15 which are reproduced hereas under:-

“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).

23. On the issue of limitation, the Arbitration clause of agreement in question has been invoked by the petitioner on 17th February, 2015 by serving a notice dated 17th February, 2015 to the respondent whereas last letter dated 22nd May, 2012 had been issued by the respondent stating as under:

“You are also requested to please provide account receivable from your side in order to successfully accomplish our contract/agreement dated 9th June, 2009 (and over the contract period), so that we can conclude our relationship.”

24. The above letter was allegedly sent by the respondent regarding the disputes related to the present claim therefore impliedly the respondent had acknowledged the liabilities by requesting to provide details of account therefore as per the Limitation Act, the limitation of present petition will be calculated from the date of letter dated 22nd May, 2012 till the notice dated 17th February, 2015 for invocation of arbitration clause of the agreement in question which clearly suggests that the claim of the petitioner is within limitation as per law.

25. The agreement in question was executed between the parties for three years from the date of execution i.e. 9th June, 2009 of agreement in question as per the clause 10.1 of agreement in question. Relevant portion of clause 10.1 is reproduced as under:-

Clause 10.1 “ the initial terms of this agreement (the “initial term”) begins on the effective date and naturally expires 24

months thereafter, but this agreement will automatically continue for successive one-year term.”

26. The above said clause would suggest that the agreement was for three years from the date of execution which means the agreement was valid till 8th June, 2012. Thus, upto 8th June, 2012 the agreement was alive as neither the petitioner nor the respondent had terminated the agreement in question at any point of time till date, nor did they show any inclination to do the same at any point of time. The letter dated 22nd May, 2012 it would show that respondent wishes to continue the relationship with the petitioner. Thus, limitation cannot start before expiry of the agreement in question. Even otherwise the letter dated 22nd May, 2012 itself is an acceptance of limitation of the present petition on behalf of the respondent.

The petitioner has replied the letter dated 22nd May, 2012 of respondent vide reply letter dated 30th May, 2012 and same was followed up by letter dated 9th July, 2012 and thereafter notice dated 17th February, 2015 for invocation of arbitration clause of agreement in question was issued by the petitioner but the respondent even has not responded to any letter of the petitioner. The act of the respondent would show that the respondent has impliedly accepted the contents of the letters of the petitioner. Therefore, at this stage, it cannot be considered that the claim is within limitation. The objection, if any, raised by the respondent before the Arbitral Tribunal, the same would be decided at the stage of evidence.

27. Again coming to the issue of territorial jurisdiction, it is the specific case of the petitioner before this Court that the Memorandum was signed at Delhi the same was sent to the respondent, the address of the respondent is

mentioned at Gurgaon. There is material placed on record that various communications had also been exchanged from Delhi. Thus, I am satisfied on otherwise part of cause of action had arisen in Delhi. Since the arbitration clause provides that the arbitration proceedings will be held at New Delhi and in terms of jurisdiction clause, the parties had submitted to the exclusive jurisdiction of the courts at New Delhi, therefore by agreement the parties had excluded the jurisdiction of this Court and had agreed for the jurisdiction of the Courts at New Delhi, where also a part of cause of action has arisen.

28. Even otherwise, it is for the Arbitral Tribunal to decide all the objections of the respondent including the issue of jurisdiction.

29. The following disputes and differences between the parties have arisen and are to be adjudicated by the Arbitral Tribunal:-

- a) The respondent had executed the Memorandum dated 14th April, 2010 to settle the dispute in question even then the respondent failed to make the payment and to perform various terms and conditions of the agreement dated 9th June, 2009 and Memorandum dated 14th April, 2010 executed between the parties. The respondent had kept himself silent even after several written representation made to him by the petitioner whereas the respondent is under huge liability of petitioner and whether the respondent is liable to pay legal recoverable amount of the petitioner as the written agreement and MOU.
- b) Whether the petitioner is entitled the claim as well damages for noncompliance of terms of agreement and MOU executed between the parties.

30. No doubt, both the parties would be entitled to file their claim and counter claims and the learned Arbitral Tribunal would decide the disputes as per its own merit and without any influence of my order. However, I am clear in my mind that *prima facie* it is evidenced that the agreement between the parties provide for arbitration and this Court has a jurisdiction to entertain the present petition. It is claimed that the respondent would be entitled to raise all objections as raised in the reply filed in the petition, however, the same would be decided as per law.

31. In the light of the above, the prayer made in the petition is allowed. Ms. Maninder Acharya, Senior Advocate (member), Mr. Ashish Jain, Advocate (member) and Mr. Amit George, Advocate (member) are appointed as Arbitrators in the matter as per clauses of the Agreement to adjudicate the dispute between the parties. Ms. Maninder Acharya, Senior Advocate would be presiding member of the panel of the three learned Arbitrators.

32. The findings arrived by this Court are tentative which shall have no bearing when the matter would be decided on merit after trial.

33. The arbitration shall take place under the aegis of Delhi International Arbitration Centre ('DAC'). The Arbitrators shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned Arbitrators shall be in terms of the Delhi International Arbitration Centre (Administrative Cost Arbitrator's Fees) Rules.

34. The petition is accordingly disposed of.

35. Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to the learned Arbitrators as well as Additional Coordinator, DAC forthwith.

(MANMOHAN SINGH)
JUDGE

MARCH 8, 2016