

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

(1) FAO-CARB No.13 of 2018

Date of Decision: September 12, 2018

NHPC Ltd.	 Appellant
Versus	
M/s Jaiparkash Associates Ltd. and Ors.	 Respondents

(2) FAO-CARB No.14 of 2018

NHPC Ltd.	 Appellant
Versus	
M/s Gammon India Ltd. and Anr.	 Respondents

(3) FAO-CARB No.15 of 2018

NHPC Ltd.	 Appellant
Versus	
M/s Jaiparkash Associates Ltd. and Ors.	 Respondents

(4) FAO-COM No.1 of 2018

NHPC Ltd.	 Appellant
Versus	
BGS SGS Soma JV and Anr.	 Respondents

(5) FAO-COM No.2 of 2018

NHPC Ltd.	 Appellant
Versus	
BGS SGS Soma JV and Anr.	 Respondents

(6) FAO-COM No.4 of 2018

NHPC Ltd.	 Appellant
Versus	
Chairman-cum-Managing Director M/s Patel-L&T	 Respondent

**CORAM: HONBLE MR. JUSTICE SURYA KANT
HONBLE MR. JUSTICE SUDIP AHLUWALIA**

Present: Mr. Aman Arora, Advocate for the Appellant
(In FAO-CARB-13 to 15 of 2018).

Mr. Puneet Bali, Senior Advocate with
Mr. Gaurav Chopra & Mr. Paramveer Singh, Advocates
for the Appellant (in FAO-COM-1, 2 and 4 of 2018).

S/Shri Arunabh Chowdhary, Vaibhav Tomar & Manju Goyal,
Advocates for Respondent No.1 (in FAO-COM-1 of 2018).

S/Shri Sumeet Goel & Manav Bajaj, Advocates for
Respondent No.1 (in FAO-COM-2 of 2018).

S/Shri Amitesh Mishra, Niteen Sinha & Alankar Narula,
Advocates for the Respondent (in FAO-COM-4 of 2018).

SUDIP AHLUWALIA, J.

A common question for determination has arisen in all these Appeals arising out of similar orders passed by the Special Commercial Court at Gurugram, whereby the separate Applications Under Section 34 of the Arbitration and Conciliation Act, 1996 (for short “the Act”) filed on behalf of the Appellant were ordered to be returned in view of the objections/contentions raised on behalf of Respondents challenging the territorial jurisdiction of the said Court to entertain those applications.

2. For the sake of convenience and brevity, the factual background is being extracted from FAO-COM No.1 of 2018. The Appellant-Corporation had awarded Contracts in favour of the respective Sets of Respondents for completion of certain Projects to be accomplished in some of the North-Eastern States of the Country. However, the disputes arose between the parties on account of which, the Arbitration was invoked in pursuance of

the relevant Clause No.67 of the Agreement, in which it was stipulated as follows -

“.....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.”

3. The parties nominated their respective Arbitrators, who in turn jointly appointed the Presiding Arbitrator to arbitrate upon the disputes. The final Award after completion of the Arbitration Proceedings was passed on 3.5.2013, after which the Appellant filed its Objections against the same Under Section 34 of the Act before the Civil Court at Faridabad. Those objection petitions were later on transferred to the Special Commercial Court, Gurugram on it being constituted under the Commercial Courts (Commercial Division and Commercial Appellate Division of High Courts) Act, 2015. It was resisted on behalf of the Respondent by way of filing of an application U/S 2 (1) (e) (i) of the Act challenging jurisdiction of the Civil/Commercial Court, Haryana to entertain the objections, which after hearing was allowed by the said Court, by holding that it had no territorial jurisdiction to entertain the proceedings, and therefore, directed return of the objections to the Appellant in following the provisions of Order VII Rules 10/11 of the Code of Civil Procedure for being presented to the Court of Competent Jurisdiction at Delhi.

4. The Appellant's side is aggrieved that the Ld. Court below misconstrued its own jurisdiction and thereby wrongly refused to entertain its objections Under Section 34 of the Act. It is the Appellant's contention

that the said Civil/Commercial Court is possessed of Territorial jurisdiction to entertain any proceedings in the District of Faridabad, which according to the Appellant was meant to be the appropriate 'Seat of Arbitration' in terms of the original Agreement between the parties in view of Clause No.67, reproduced in Para 2 earlier. The appeal has nevertheless been contested on behalf of the Respondents with a two-fold contention, firstly that the Appeal itself is not maintainable in view of the Statutory Bar Under Section 37 of the Act, and secondly, that actually only the competent Court in New Delhi is possessed of jurisdiction to entertain the objections Under Section 34, which has also been determined by the Special Commercial Court, Gurugram, and so there is no illegality or impropriety in its impugned Order.

5. The questions which have therefore, arisen before us are -

(I) Whether the present Appeal itself is maintainable in view of the bar under Section 37 of the Act, as urged by the Respondents ?,

(II) If so, whether the finding of the Ld. Court below that in the given facts and circumstances, only the competent Court in Delhi would have jurisdiction to entertain the dispute, is correct or not ?

Our observations Re: Question (I) -

6. The submission regarding non-maintainability of the instant Appeal(s) has been stressed on behalf of the Respondents by way of referring to Sections 5, 19 and 37 of the Act, which provide as follows -

*“5. **Extent of judicial intervention** – Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”*

*“19. **Determination of rules of procedure.**— (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).*

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

*“37. **Appealable orders.**—*

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

[(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34].

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal.—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take

away any right to appeal to the Supreme Court.” (Emphasis by us)

7. The emphasis from the Respondents' side is on the submission that the Act of 1996 by virtue of Section 19 overrides the ordinary provisions of the Code of Civil Procedure, and that in view of the highlighted portion in Sub-section (1) (c) of Section 37 as reproduced above, the impugned order would have become 'appealable' only in case it had the actual effect of 'setting aside' or 'refusing to set aside' the impugned arbitral award Under Section 34. But here according to the Respondents, the impugned order passed by the Ld. Court below neither has the effect of 'setting aside' nor of 'refusing to set aside' the impugned award Under Section 34, since the Ld. Court below has only confined itself to determining whether or not it is possessed of the requisite territorial jurisdiction to entertain the objections U/S 34, and consequently it has had absolutely no occasion to go into the merits of those objections. So the question of having allowed or disallowed those objections by way of either 'setting aside' or 'refusing to set aside' the concerned arbitral award, does not arise at all.

8. A number of decisions have been cited by the Respondents to support the above contentions. We proceed to refer to the same by briefly adverting to the background and nature of impugned orders vis-a-vis the ratio laid down in each of those citations.

9. In a recent decision in '**KANDLA EXPORT CORPORATION & ANR. VS. M/S OCI CORPORATION & ANR.**' 2018(2) SCALE 368, the Apex Court has held that where an appeal as envisaged U/S 50 of the Arbitration & Conciliation Act is not maintainable, the same can also not be

held maintainable U/S 13(1) of the Commercial Courts (Commercial Division and Commercial Appellate Division of High Courts) Act, 2015.

10. In '**FUERST DAY LAWSON LIMITED VS. JINDAL EXPORTS LIMITED**' (2011) 8 Supreme Court Cases 333, similarly it was held that where an order is not appealable U/S 50, no Letters Patent Appeal against the same would also lie.

11. The same was the decision in the older case of '**UNION OF INDIA V. MOHINDRA SUPPLY COMPANY**' 1962 SCR (3) 497, which was however, passed in the context of the pre-amendment Arbitration Act, 1940, in which, the relevant provision for appeal was contained in Section 39, now falling U/S 50 of the Amended Act.

12. In '**Smt. Sudershan Chopra and Others Vs. Vijay Kumar Chopra and Others**' 2002 SCC OnLine P&H 376, a Division Bench of this Court in complying with the direction of the Supreme Court was required to decide the objections as to maintainability of the aforesaid Company Appeal, and it came to the conclusion that the aforementioned appeal against an arbitral award which was entertained by the Company Law Board in exercise of its power Under Sections 397/398 of the Companies Act, was similarly non-maintainable in view of the bar Under Section 37.

13. In '**HARMANPRIT SINGH SIDHU VS. ARCADIA SHARES & STOCK BROKERS PVT. LTD.**' 234 (2016) DELHI LAW TIMES 30 (DB), a Division Bench of Delhi High Court had set aside the order of the Single Bench, which was restricted to the extent of condoning the delay of 55 days in re-filing of the Objection Petition U/S 34 of the Act, and it was

held that the (Letters Patent) Appeal against such order of condonation of delay was not maintainable.

14. In '**MUNICIPAL CORPORATION OF DELHI AND OTHERS VS. INTERNATIONAL SECURITY & INTELLIGENCE AGENCY LTD.'** (2004) 3 Supreme Court Cases 250, the appeal of the Respondent in the original Arbitration Proceedings against the Division Bench Order dismissing its first appeal, which had been directed against the Judgment and Decree dated 17.1.2001, whereby the arbitral Award had been made a Rule of the Court, was dismissed as being time barred, since it was filed after a delay of 230 days, and it was held by the Apex Court that it was not even available to be heard and decided as a Cross Objection.

15. In '**MAHANAGAR TELEPHONE NIGAM LIMITED VS. APPLIED ELECTRONICS LIMITED'** (2017) 2 Supreme Court Cases 37, the Supreme Court after having taken note of the controversy as to whether the Code of Civil Procedure, 1908 would also be applicable to the proceedings under the Arbitration & Conciliation Act, where the Delhi High Court had opined that the Cross Objections preferred by the Respondent were maintainable and had been entertained after condonation of delay, and so the Apex Court deemed it fit to refer the controversy for re-consideration by a Larger Bench.

16. In our opinion however, the argument raised on behalf of the Respondents, though apparently attractive, is but actually misconceived and untenable. It is to be noted that none of the above cited cases had dealt with a situation, in which a Court in the context of dealing with the objections

filed before it U/S 34 in the first instance, had itself gone on to hold that it was not competent/possessed of Territorial jurisdiction to entertain the same, which is the crux of the dispute in the case at hand.

17. No doubt, the scope for Judicial intervention in proceedings under the Arbitration Act is limited in terms of Section 5, and there is also a Statutory bar to entertaining appeals arising out of an arbitral award except when the Court concerned has 'set aside' or 'refused to set aside' such award Under Section 34. But what happens where the Court under a misconception of law holds itself incompetent to even consider those objections and then directs return of the same to the Objector, if actually it happens to be possessed of jurisdiction to have properly entertained and decided those objections ? Would that decision to not go into the merits of the objections under a legal misconception not amount to wrongfully 'refusing to set aside' the disputed arbitral award ?

18. We make it clear at this juncture that whether or not the Ld. Court below in the present case was correct in its finding that it had no Territorial jurisdiction to entertain the objections is immaterial for deciding the present Question No.(I), which is limited only to the maintainability of the appeal itself, and the actual correctness of the decision of the Ld. Court below is to be considered in deciding Question No.(II) as already noted in the earlier para 5. The answer to such question No.(II) can either be in the affirmative or in the negative viz., that the said Court was not possessed of, or actually possessed of the requisite Territorial jurisdiction. If the ultimate decision happens to be that the Court in fact was possessed of such jurisdiction, then

undoubtedly its refusal to enter into the merits of the objections would be a culpable denial of the objector's Right to impeach the disputed award Under Section 34, and therefore, would certainly amount to having wrongly 'refused to set aside' such award. In such eventuality, the objector certainly has the scope to invoke the appropriate remedy by way of an appeal against such implicit 'refusal to set aside' the award by the Court, under a misconception regarding its own jurisdiction.

19. We are therefore, not convinced by the assertion of the Respondents as made in Item 7.1 (Page 22) of their Written Submissions (Part A) to the effect -

“The provisions of Sections 5 & 37 of the Arbitration & Conciliation Act, 1996 must be given full effect regardless of the consequences that may follow. If the appeal is not provided under the Statute, a party cannot be heard to complain that it has been left remediless.”

Needless to say, such a sweeping conclusion is untenable in view of settled maxim '*ubi jus ibi remedium*' i.e. where there is a right, there must have to be remedy, more particularly in such a case where the right of the claimant is denied under any misconception of law. We therefore, conclude that there is no bar to entertaining the present appeal by us, since the decision of the Ld. Court below in not going into the merits of the objections, if at all it was actually possessed of territorial jurisdiction to entertain the same would amount to an incorrect 'refusal to set aside' a disputed award U/S 34 of the Act, for which there is certainly no bar to filing of an appeal even U/S 37 of the Act.

Re: Question (II)

20. Now we come to the real material question as to whether the concerned Civil/Commercial Court exercising the territorial jurisdiction over Faridabad did have such jurisdiction to entertain the objections u/s 34 of the Act in view of the Arbitration Agreement. To this end, we first proceed to take note of the citations relied upon by both the sides pertaining to the question of the Territorial jurisdiction of a Court to entertain any proceedings arising out of an Arbitration Agreement. The same are set out in the succeeding Paragraphs and the directly applicable observations in those citations have been consciously highlighted/emphasized with a view to accentuate the stress on the relevant points made by the contesting sides.

21. The decision of the Apex Court in '**BHARAT ALUMINIUM COMPANY Versus KAISER ALUMINIUM TECHNICAL SERVICES INC.'** (2012) 9 Supreme Court Cases 552 has been relied upon by both the sides. We therefore, proceed to set out its relevant Paragraphs 75 & 96 to 100 of the same as below -

“75. We are also unable to accept the submission of the learned counsel for the appellants that the Arbitration Act, 1996 does not make seat of the arbitration as the centre of gravity of the arbitration. On the contrary, it is accepted by most of the experts that in most of the National Laws, arbitrations are anchored to the seat/place/situs of arbitration. Redfern in Para 3.54 concludes that “the seat of the arbitration is thus intended to be its centre of gravity.” This, however, does not mean that all the proceedings of the arbitration have to take place at the seat of the arbitration. The arbitrators at times hold meetings at more convenient locations. This is necessary as arbitrators often come from different

countries. It may, therefore, on occasions be convenient to hold some of the meetings in a location which may be convenient to all. Such a situation was examined by the court of appeal in England in Naviera Amazonica Peruana S.A. Vs. Compania Internacional de Seguros del Peru wherein at p. 121 it is observed as follows :

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

(emphasis supplied)

These observations were subsequently followed in Union of India v. McDonnell Douglas Corpn.

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)-(d) * * *

(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.

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

“20. Place of arbitration – (1) The parties are free to agree on the place of arbitration.

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

(3) Notwithstanding sub-section (1) or sub-section (2), the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.”

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any “place” or “seat” within India, be it Delhi, Mumbai etc. In the

absence of the parties' agreement thereto, Section 20(2) authorizes the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

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

100. *True, that in an international commercial arbitration, having a seat in India, hearings may be necessitated outside India. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but it would not have the effect of changing the seat of arbitration which would remain in India. The legal position in this regard is summed up by Redfern and Hunter, The Law and Practice of International Commercial Arbitration (1986) at p. 69 in the following passage under the heading “The Place of Arbitration”:*

“The preceding discussion has been on the basis that there is only one “place” of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of the reference or the minutes of proceedings or in some other way as the place or “seat” of the arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these

circumstances, it is by no means unusual for an Arbitral Tribunal to hold meetings – or even hearings – in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.... It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country - for instance, for the purpose of taking evidence..... In such circumstances, each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.”

This, in our view, is the correct depiction of the practical considerations and the distinction between “seat” [Sections 20(1) and 20(2)] and “venue” [Section 20(3)]. We may point out here that the distinction between “seat” and “venue” would be quite crucial in the event, the arbitration agreement designates a foreign country as the “seat”/“place” of the arbitration and also select the Arbitration Act, 1996 as the curial law/law governing the arbitration proceedings. It would be a matter of construction of the individual agreement to decide whether:

(i) the designated foreign “seat” would be read as in fact only providing for a “venue” / “place” where the hearings would be held, in view of the choice of the Arbitration Act, 1996 as being the curial law – OR

(ii) the specific designation of a foreign seat, necessarily carrying with it the choice of that country’s Arbitration / curial law, would prevail over and subsume the conflicting selection choice by the parties of the Arbitration Act, 1996.

Only *if the agreement of the parties is construed to provide for the “seat” / “place” of Arbitration being in India — would Part I of the Arbitration Act, 1996 be applicable. If the agreement is held to provide for a “seat” / “place” outside India, Part I would be inapplicable to the extent inconsistent with the arbitration law of*

the seat, even if the agreement purports to provide that the Arbitration Act, 1996 shall govern the arbitration proceedings.”

22. The next reliance is from the Respondents' side on the decision of the Supreme Court in '**INDUS MOBIL DISTRIBUTION PVT. LTD. Versus DATAWIND INNOVATIONS PVT. LTD. AND ORS.'** (2017) 7 SCC 678, in which it was observed -

“If the dispute cannot be amicably resolved by such officers within thirty (30) days from the date of referral, or within such longer time as mutually agreed, such dispute shall be finally settled by arbitration conducted under the provisions of the Arbitration & Conciliation Act 1996 by reference to a sole arbitrator which shall be mutually agreed by the parties. Such arbitration shall be conducted at Mumbai, in English language.

13. This Court reiterated that once the seat of arbitration has been fixed, it would be in the nature of an exclusive jurisdiction clause as to the courts which exercise supervisory powers over the arbitration. (See para 138)”.

*14. In **Reliance Industries Ltd. v. Union of India**, (2014) 7 SCC 603, this statement of the law was echoed in several paragraphs. This judgment makes it clear that “juridical seat” is nothing but the “legal place” of arbitration. It was held that since the juridical seat or legal place of arbitration was London, English courts alone would have jurisdiction over the arbitration thus excluding Part I of the Indian Act. (See paras 36, 41, 45 to 60 and 76.1 and 76.2). This judgment was relied upon and followed by *Harmony Innovation Shipping Limited v. Gupta Coal India Ltd.* (2015) 9 SCC 172 (See paras 45 and 48). In *Union of India v. Reliance Industries Ltd.* (2015) 10 SCC 213, this Court referred to all the earlier judgments and held that in*

cases where the seat of arbitration is London, by necessary implication Part I of the Arbitration and Conciliation Act, 1996 is excluded as the supervisory jurisdiction of courts over the arbitration goes along with “seat”.

19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to “seat” is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction — that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been held above, the moment “seat” is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties. (Emphasis added)

23. Thereafter, the Respondents' side has cited a Division Bench decision of the Delhi High Court being '**NHPC LIMITED Versus HINDUSTAN CONSTRUCTION LTD.'** 221(2015) DELHI LAW TIMES 256 (DB), in which matter, the appeal incidentally was filed by the present Appellant itself, and the High Court held -

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 under Section 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.” (Emphasis added)

24. Another relevant reliance from the Respondents' side is on the Single Bench decision of this Court in '**Harish Goyal v. CITI Group Wealth Advisers India Pvt. Ltd.**', 2015 SCC OnLine P&H 17853, in which it was held -

“9. Since, I have already noticed above that the Arbitrator was appointed by the respondent under the Rules and Regulations of the National Stock Exchange and arbitration proceedings had already taken place in Delhi, I am of the view that the jurisdiction to entertain the objections will be only of Delhi Court” (Emphasis added)

25. The sum and substance of the contentions so raised on behalf of the Respondents in seeking to challenge the Territorial jurisdiction of the Designated Court for Faridabad/Haryana can thus be summarized as follows-

(i) That the competent Court to entertain any disputes arising out of Arbitration Agreement would be the one under whose supervisory jurisdiction the arbitration proceedings were held by the Tribunal;

(ii) That even though the competent Court within the meaning

of Section 2(e) happens to be the one with jurisdiction to decide the questions 'the subject-matter of the arbitration' if the same had been subject-matter of the suit, still in view of the over-riding provisions of the Arbitration and Conciliation Act, 1996 which in itself is a complete Code as against the ordinary provisions of the Code of Civil Procedure, 1908 or the Commercial Courts (Commercial Division and Commercial Appellate Division of High Courts) Act, 2015, the disputes arising out of Arbitration would appropriately have to be entertained in the Court concerned under the Arbitration Act itself; and,

(iii) That once the arbitral proceedings in pursuance of the original Agreement had all been conducted by the Arbitral Tribunal in Delhi, which was one of the two places identified for the purpose of Arbitration under Clause 67(3), the competency of the Court in Faridabad which otherwise was also mentioned as another place of arbitration, automatically stood ousted.

26. The Appellant's reliance is on the decision of the Apex Court in **'ENERCON (INDIA) LIMITED AND OTHERS Versus ENERCON GMBH AND ANOTHER' (2014) 5 Supreme Court Cases 1**, the relevant extracts of which are set out below -

“41. Mr. Nariman submitted that the interpretation proposed by the respondents that the venue London must be construed as seat is absurd. Neither party is British, one being German and the other being Indian. He submits that the respondents have accepted that the choice of law of the underlying agreement is Indian. But, if ‘venue of arbitration’ is to be interpreted as making London the seat of arbitration it would: (a) make the English Act applicable when it is not chosen by the parties; (b) would render the parties’ choice of the

Indian Arbitration Act, 1996 completely nugatory and otiose. It would exclude the application of Chapter V of the Indian Arbitration Act, 1996 i.e. the curial law provisions and Section 34 of the Indian Arbitration Act, 1996. On the other hand, interpretation propounded by the Appellants would give full and complete effect to the entire clause as it stands.

97. This now clears the decks for the crucial question i.e. is the ‘seat’ of arbitration in London or in India. This is necessarily so as the location of the seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. Therefore, understandably, much debate has been generated before us on the question whether the use of the phrase “venue shall be in London” actually refers to designation of the seat of arbitration in London.

98. We find much substance in the submissions of Mr. Nariman that there are very strong indicators to suggest that the parties always understood that the seat of arbitration would be in India and London would only be the “venue” to hold the proceedings of arbitration. We find force in the submission made by the learned Senior Counsel for the appellants that the facts of the present case would make the ratio of law laid down in Naviera Amazonica Peruana S.A. (supra) applicable in the present case. Applying the closest and the intimate connection to arbitration, it would be seen that the parties had agreed that the provisions of the Indian Arbitration Act, 1996 would apply to the arbitration proceedings. By making such a choice, the parties have made the curial law provisions contained in Chapters III, IV, V and VI of the Indian Arbitration Act, 1996 applicable. Even Dr. Singhvi had submitted that Chapters III, IV, V and VI would apply if the seat of arbitration is in India. By choosing that Part I of the Indian Arbitration Act, 1996 would apply, the parties have made a choice that the seat of arbitration would be in India. Section 2(2) of the Indian Arbitration

Act, 1996 provides that Part I “shall apply where the place of arbitration is in India”. In BALCO, it has been categorically held that Part I of the Indian Arbitration Act, 1996, will have no application, if the seat of arbitration is not in India. In the present case, London is mentioned only as a “venue” of arbitration which, in our opinion, in the facts of this case can not be read as the “seat” of arbitration.“ (Emphasis added)

27. In '**YOGRAJ INFRASTRUCTURE LIMITED Versus SSANG YONG ENGINEERING AND CONSTRUCTION COMPANY LIMITED**' (2011) 9 Supreme Court Cases 735, the Supreme Court observed -

“39. Mr. Routray then proceeded to the next important question as to whether choice of the “seat of arbitration” by the parties confers exclusive jurisdiction on the courts of the seat of arbitration to entertain matters arising out of the contract. The learned counsel submitted that choice of the seat of arbitration empowered the courts within the seat of arbitration to have supervisory jurisdiction over such arbitration. Mr. Routray has referred to various decisions of the English courts which had laid down the proposition that even if the arbitration was governed by the law of another country, it would not entitle the objector to mount a challenge to the award in a country other than the seat of arbitration. It is not necessary to refer to the said judgments for a decision in this case.

45. As far as applicability of Section 42 of the 1996 Act is concerned, the Jabalpur Bench of the Madhya Pradesh High Court had held that by express agreement parties had ousted the jurisdiction of the Indian courts, while the arbitration proceedings were subsisting. Accordingly, the jurisdiction of the Indian courts stood ousted during the subsistence of the arbitration proceedings and, accordingly, it is only the laws of arbitration as governed by

the SIAC Rules which would govern the arbitration proceedings along with the procedural law, which is the law of Singapore.”

Of course, the appeal was finally dismissed by the Supreme Court in view of the specific Agreement between the parties that the Arbitration proceedings would be conducted in accordance with the Singapore International Arbitration Centre (SIAC) Rules, on account of which there could remain no scope to challenge the proceedings under the Indian Law.

28. As such, the contentions from the Appellant's side can be summarized as follows -

i) That in the present case, Delhi which had been chosen as a place for arbitration along with Faridabad, can at best be treated as having been only the 'venue' of arbitration, which was chosen by the Tribunal and / or the parties only for reasons of convenience, and the choice of such venue does not automatically make it the exclusive 'seat of arbitration', nor in any manner can negate the competency of the Court at Faridabad which was also agreed by the parties to be one of the arbitration places alongwith Delhi;

ii) That even in view of the Judgment rendered in '**Bharat Aluminium Company (Supra)**', it has been settled by the Supreme Court that 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.

29. Before coming to a final decision on the question No.(II) at this stage, we deem it appropriate to take note of the fact that in '**NHPC LIMITED**'

(Supra) mentioned in Para 22 earlier relied upon by the Respondents, the Division Bench of Delhi High Court had itself held that not only the Delhi High Court had jurisdiction in view of the decision in **BALCO (Supra)**, even though, no part of the cause of action had arisen in New Delhi, but of course, the other Courts where the part of the cause of action arose, would also have jurisdiction, which however, would get curtailed the moment the first Petition was filed in the Delhi High Court, after which the exclusive jurisdiction would be retained there. This reliance of the Respondents is *ex facie* a double edged weapon. We say so for the reason that undoubtedly, the Court at Faridabad would also have had jurisdiction to entertain the application, since the Agreement between the parties, which itself is a part of cause of action, was admittedly executed at Faridabad. Now in the present case, it is the Commercial Court, Haryana exercising the Territorial jurisdiction over Faridabad, in which the 'first petition' U/S 34 of the Act was filed by the Appellant and therefore, from that stage, only the said Court would have exclusive jurisdiction to entertain the matter as observed by the Division Bench of the Delhi High Court. We therefore, have no hesitation in observing that this particular reliance from the Respondents' side ironically supports the Appellant.

30. Regarding the decision in **Harish Goyal (Supra)** mentioned in Para 23, it needs to be noted that in the said case, in terms of the Agreement between the parties according to Clause 5.2, which has been reproduced in Para 2 of the Single Judge's Judgment of this Court in Chandigarh, it was specifically mentioned that Delhi would be 'seat of arbitration' for the States

of Delhi, Haryana, Uttar Pradesh, Uttranchal, Himachal Pradesh, Punjab, Jammu & Kashmir, Chandigarh (where the Appellant was based) and Rajasthan. In view of the specific Agreement regarding the exclusive 'seat of arbitration' at Delhi for the State/UT of Chandigarh, there was in any case, no scope for the Court at Chandigarh to entertain the objections. Consequently, this decision of the Ld. Single Judge of this Court again does not help the Respondents.

31. As already noted earlier, the decision in **BALCO (Supra)** has been relied upon by both the sides and undoubtedly in the said case, the Apex Court had held that not only the Court under whose Territorial jurisdiction, the arbitral proceedings were held, would have jurisdiction to entertain the objections, but also the Court in which a part of the cause of action had arisen. The pending question before us at this stage therefore, gets confined for a determination as to whether in the given facts and circumstances, and in view of the original Agreement, in which two places for Arbitration had been mentioned, out of which one of the places undisputedly also empowers the local Court to entertain the proceedings, since in any case a part of cause of action (by way of the Agreement itself) had arisen, and incidentally where even the first application after completion of the arbitral proceedings was filed, can be regarded as having been divested of its jurisdiction as the arbitral proceedings themselves were held in the other place? In other words, whether there is any indication that holding of proceedings necessarily conferred upon New Delhi, the status of 'seat of arbitration' and not just as the 'arbitral venue' ?

32. Having carefully considered the import of the above mentioned decisions relied upon by both the sides, we proceed to record our final observations concerning this question in the context of the facts and circumstances of the present case in the following Paragraphs.

33. It is to be considered first of all as to where the arbitral proceedings in the case had commenced as according to Section 21 of the Act, which provides -

“21. Commencement of arbitral proceedings. -Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

34. Now in the present case, the request for reference to Arbitration was undisputedly made by the Claimant/Respondent and therefore, the arbitral proceedings in terms of Section 21 automatically commenced when such request for reference to arbitration was 'received by the Respondent'. Here the 'Respondent' would mean none other than the present Appellant, who was approached by the Claimant/present Respondent invoking the reference to arbitration. Undeniably, the Registered Office of that 'Respondent' (Appellant) happens to be in Faridabad, and therefore, when the request for such reference was received by it (i.e. in Faridabad), the arbitral proceedings are deemed to have commenced on that very date itself in terms of Section 21, which would also necessarily imply that the same commenced only at the place where the request was received on the relevant date.

35. In such circumstances, unless there had been any failure between the parties 'to agree on the place of arbitration', which in any case, had already

been agreed upon in the original Agreement itself as being Faridabad/New Delhi, there could have been no scope for the Arbitral Tribunal to 'determine the place of arbitration' within the meaning of Section 21(2), and therefore, the choice of Delhi for conducting the hearings without explicitly recording that by virtue of such choice, Faridabad no longer remained as the place of Arbitration, would clearly go to indicate that Delhi could not have been anything more than the choice of a 'venue' for the purpose of convenience, *having been considered appropriate for consultation among its members* within the meaning of Section 20(3) of the Act.

36. In this backdrop, the effect of our highlighted observations in the beginning of Para 98 of the Judgment of '**ENERCON (INDIA) LIMITED AND OTHERS' (Supra)**, would become a little more clear. The Supreme Court had observed -

“98. We find much substance in the submissions of Mr. Nariman that there are very strong indicators to suggest that the parties always understood that the seat of arbitration would be in India and London would only be the “venue” to hold the proceedings of arbitration.”

37. As such, there is a little doubt in holding that for determining what was or is the appropriate 'seat of arbitration', what the parties entering into agreement had understood or intended, would be of essence in the dispute. In other words, the final decision needs to be arrived at only after analyzing what must have been the intentions behind the parties' agreeing to mentioning of two different places in the original agreement. Undoubtedly, Faridabad happens to be the natural choice of the Appellant, since its Head

Office and Administrative Set up is based there, and so it would certainly have preferred that any judicial recourse arising out of the arbitral proceedings be conducted in that place which was most suitable to it. On the other hand, the Respondents' side would appear to have their own vital reasons for choosing Delhi as the place for such judicial recourse. However admittedly, no part of the cause of action towards 'subject-matter of the Suit', did actually take place in Delhi, since the alleged breaches in terms of the agreement occurred in the North-Eastern State(s) where the Project was meant to be completed, and the original agreement, which itself is a part of the cause of action, was signed in Faridabad. As already noted in the last two Paragraphs, while the arbitral Tribunal held its proceedings in Delhi, it nowhere observed that by doing so, the choice of Faridabad as another place of Arbitration, which had been also agreed upon by the parties before hand, stood negated.

38. This is not to suggest that there was any bar to invoking of the judicial intervention in New Delhi where the proceedings were held. But the fact of the matter is that no occasion whatsoever arose for either side to invoke the supervisory control of the appropriate Court in New Delhi during pendency of the arbitral proceedings, and after announcement of the final Award, the arbitral Tribunal itself became *functus officio*. Consequently, there can be no conceivable justification to hold that a challenge to the final Award could not be made at either of the two places agreed upon by the parties in their original Agreement, more so when in terms of Section 21 as reproduced earlier, those proceedings are deemed to have commenced at

Faridabad where the request for reference to Arbitration was received, and ultimately it was the competent Court for Faridabad itself, in which the first ever petition concerning the arbitral proceedings had been filed, and in any case the said Court undoubtedly also had the jurisdiction to entertain the 'subject-matter of the Suit' itself.

39. We therefore, conclude by observing that in a case where more than one place has been so agreed upon by the parties for the purpose of Arbitration and the Arbitration and Conciliation Act, 1996 applies in all those places, then in the absence of any specific/overt assertion by the parties subsequently, or even by the arbitral Tribunal, holding its proceedings at only one of those places to the effect that such place/venue would henceforth be treated as the exclusive seat of arbitration, neither of the contesting parties can be debarred from approaching the Court of its choice in terms of the original Agreement, where the proceedings have finally terminated after pronouncement of the arbitral Award, and supervisory control of the Court under whose jurisdiction the proceedings were held, has not been actually invoked at any earlier stage.

40. For the aforesaid reasons, we find that the Ld. Commercial Court has erred in holding that it is not possessed of Territorial jurisdiction to entertain the objections U/S 34 of the Act filed by the Appellant. The impugned Order passed by it is therefore, set aside. The Appeals consequently stand allowed with a liberty to the Appellant to pursue its objections again before the said Commercial Court for Faridabad at Gurugram, which is directed to dispose off the same on merits as

expeditiously as possible, and preferably within a period of four months from the date of communication of this Order.

(SURYA KANT)
JUDGE

(SUDIP AHLUWALIA)
JUDGE

September 12, 2018
AS/Bhumika

1. Whether speaking/reasoned ? Yes
2. Whether reportable ? Yes