BGS SGS SOMA JV V. NHPC LTD. SCC ONLINE SC 1585

Supreme Court of India; 3-judge bench, **RF Nariman**, Aniruddha Bose and V. Ramasubramanian JJ; decided on 10 December 2019

Which court has jurisdiction over an arbitral process clarified; BALCO's concurrent-jurisdiction theory is not its real ratio; seat v. venue debate discussed; Hardy held to be contrary to BALCO

(A) THE BACKGROUND FACTS AND PROCEEDINGS IN BGS

1. Award in favor of BGS. NHPC's Set-Aside Application Sent to Another Court on the point of Territorial Jurisdiction

The agreement between BGS and NHPC was signed in the State of Haryana at Faridabad.[5] It stipulated that the "***arbitration proceedings shall be held at New Delhi / Faridabad***". Notices under the agreement were sent by the petitioner BGS to the respondent NHPC's Faridabad office.

After arbitration commenced, the tribunal held seventy-one sittings at New Delhi. The award, in favor of BGS, was delivered in New Delhi.

NHPC filed in a Faridabad court an application under Section 34 of the ACA to set the award aside. In turn, BGS objected to the Faridabad court's territorial jurisdiction by filing an application under Order VII Rule 10 of the CPC[6] and seeking the return of the Section 34 application to an appropriate court in New Delhi and/or Assam. This application was allowed[7] to return the set-aside application for presentation before a court in New Delhi.

2. NHPC Appeals the Transfer Order in The High Court. Was Such an Appeal Maintainable Under the ACA? Which Court Had Jurisdiction?

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5 Construction contract relating to a hydropower project in Assam and Arunachal Pradesh.

6 This provision empowers the court to return a plaint to be presented to the court in which the suit should have been instituted.

7 This application was considered by a commercial court at Gurgaon. The case was transferred intra-state from Faridabad to Gurgaon, where a commercial court had been set up.

NHPC filed an appeal under Section 37 ACA[8] read with Section 13(1) of the Commercial Courts Act, 2015[9] before the High Court of Punjab and Haryana.

The High Court had to consider two questions: –

(i) which court had jurisdiction to decide the set-aside application; and

(ii) a question on maintainability–whether Section 37 of the ACA permitted to appeal against an order, made in a Section 34 proceedings, deciding territorial jurisdiction?

Let's first see what the High Court said on maintainability. It examined the provisions of the ACA, referred to several authorities which had discussed the scope of Section 37 of the ACA,[10] and concluded that: –

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8 Section 37 Appealable orders. (1) Notwithstanding anything contained in any other law for the time being in force, 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;
(b) setting aside or refusing to set aside an arbitral award under section 34.

9 13. Appeals from decrees of Commercial Courts and Commercial Divisions.—(1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.
(1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:
Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).
(2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.

10 Including *Kandla case* (cited infra).

1. No doubt, there is a statutory bar under Section 37 to hear appeals arising out of an arbitral award except when the court has 'set aside' or 'refused to set aside' such award under Section 34.

2. However, a refusal to enter the merits of the set-aside grounds (and not entertaining it on jurisdictional grounds) would amount to '*refusing to set aside*' the award.

3. The argument that a party cannot complain of being remediless if the statute does not provide appeal is untenable because of the maxim '*ubi jus ibi remedium*' (where there is a right there must be a remedy).

On the question of court's jurisdiction vis-a-vis the seat, the High Court (in the words of the Supreme Court) concluded that the arbitration agreement does not refer to the "seat" of arbitration, but only to the "venue." It then held that since part of the cause of action arose in Faridabad, and then Faridabad court was approached first, it alone and not the Delhi court would have jurisdiction over the arbitral process.

(B) THE SUPREME COURT'S DECISION IN BGS V. NHPC

BGS went to the Supreme Court in September 2018 some days before the judgment in *Hardy* (cited *infra*) came out (on 25 September 2018).[11]

Again, the two questions before the High Court were before the Supreme Court, too—maintainability of appeal and jurisdiction of the court.

1. On Maintainability—What Appeals are Permitted Under the ACA, Specifically Section 37?

The Supreme Court held that an order passed in a set aside proceeding, by which a court concludes it does not have jurisdiction and returns the set-aside application to an appropriate court does not amount to *refusing to set*

[11] On 28 November 2018, a 2-judge bench (R. F. Nariman and Indu Malhotra JJ) granted stay on the judgment of the High Court. Hearing concluded on 27-28 November 2019, and the judgment was reserved on 28 November 2019. It was pronounced on 10 December 2019.

aside and hence is not appealable. Closely looked, this conclusion was reached *via* a five-pronged reasoning process: –

(i) Firstly, the court discussed the scope of Section 37. It referred to a 2-judge bench decision in *Kandla Export Corporation and another* v. *OCI Corporation and another*, (2018) 14 SCC 715 (RF Nariman and Navin Sinha JJ) and reiterated that: –

   a. there is no independent right of appeal under Section 13(1) of the Commercial Courts Act, 2015. It merely provides the forum of filing appeals.

   b. Section 37, which alone must be looked at to determine whether the appeal is maintainable, makes it clear that appeals shall only lie from the orders set out in sub-clauses (a), (b) and (c) and from no others.

(ii) Secondly, the court specifically examined if the order in question amounts to "refusing to set aside an arbitral award under Section 34".[12] Concluding that it is not the court reasoned: –

   a. An order under Order VII, CPC returning a plaint to be presented to a proper court is appealable under Order XLIII, CPC. A provision like this is conspicuous by its absence under Section 37 of the ACA, which alone can be looked at.

   a. The High Court missed the words "*under section 34*". This expression means that the refusal to set aside an arbitral award must be *under* Section 34, that is, after the grounds set out in Section 34 have been applied to the arbitral award and turned down.

(iii) Thirdly, the court cited with approval the Delhi High Court's judgment in *Hamanprit Singh Sidhu* v. *Arcadia Shares & Stock Brokers Pvt. Ltd.*, 2016 234 DLT 30 (DB) (**Badar Durrez Ahmed** & Ashutosh Kumar JJ) where the High Court had concluded that an appeal against an order

[12] The High Court had recognised that an appeal was maintainable only under Section 37 but held that this appeal came within the purview of Section 37 (1) (c) of the ACA.

condoning delay (in filing the set-aside proceedings) was not maintainable because such an order is neither setting aside nor refusing to set aside. This reasoning of the High Court, the Supreme Court said, "commends itself to us."

(iv) Fourthly, the court noted those judgments where a "well-settled proposition was elucidated, i.e., that an appeal is a creature of statute, and must either be found within the four corners of the statute or not be there be at all."[13] The Delhi High Court's judgment in *South Delhi Municipal Corporation* v. *Tech Mahindra,* EFA (OS) (Comm.) 3 of 2019, was particularly noted in which the Delhi High Court had concluded that an order directing deposit of 50% of the awarded amount was not appealable.[14]

(v) Fifthly, the court disagreed with the division bench judgment of the Delhi High Court in *Antrix Corporation Ltd.* v. *Devas Multimedia Pvt. Ltd.*, 2018 SCC OnLine Del 9338,[15] which was cited by the respondent

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13 *Municipal Corporation of Delhi* v. *International Security & Intelligence Agency Ltd*., (2004) 3 SCC 250; *Arcot Textile Mills Ltd.* v. *Regional Provident Fund Commissioner*, (2013) 16 SCC 1.

14 S. Ravindra Bhat and Prateek Jalan JJ; on the concept of right to appeal the Delhi High Court in *Tech Mahindra* cited to Supreme Court's *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393 in which the court had "explained pithily". that right to sue is inherent. Anyone can sue anyone unless the statute bars it. But right to appeal inheres in no one, it is a creature of statute.

15 S. Ravindra Bhat and Yogesh Khanna JJ decided on 30 May 2018 (reserved on 06 December 2017).

NHPC, and said it "would have no application"[16] and is "also distinguishable."[17]

2. Which Court Has Jurisdiction? What Did *BALCO* Really Hold?

As discussed below, the court considered this central issue in four parts: –

(i) Firstly, the court considered the existing Indian law position. It examined *BALCO*, subsequent decisions, the *Antrix* case and concluded that *BALCO* had an internal inconsistency and properly read the court of the arbitral seat (if specified or determined) has exclusive jurisdiction.

(ii) Secondly, the court considered the test for the determination of seat.

(iii) Thirdly, the court considered the decision in *Hardy* and concluded it was decided contrary to *BALCO*.

(iv) Fourthly, the court then determined that in the facts of the *BGS* case, New Delhi was the arbitral seat.

3. *BALCO* and its Concurrent Jurisdiction Theory.

The court concluded that the concurrent jurisdiction theory of *BALCO* is not its real ratio because if the seat is designated or determined (even as per the dominant *BALCO* principle), only the seat court has exclusive jurisdiction. The court arrived at this conclusion via a seven-pronged reasoning: –

(i) Firstly, the court noted the provisions of the Arbitration Act, 1940, the UNCITRAL Model Law and of the ACA to set a background noting that: –

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16 *Antrix* was directed in a Section 9 proceedings (for interim measure) to disclose its financials so that the court could make consequential orders. The Supreme Court noted that the High Court (in appeal) considered this itself as an order granting a measure under Section 9 which was appealable. The further reasoning of the High Court's appellate bench was that this order also was in aid of an interim order. The BGS court disagreed with this reasoning and held that a step towards an interim order would not amount to granting, or refusing to grant, any measure under Section 9.

17 One effect of the order of the single judge was that another court in which too proceedings were filed under the ACA could not proceed with those proceedings. This was a final order (thus presumably, granting, or refusing to grant, any measure under Section 9".

a. The Arbitration Act, 1940, did not refer to the "juridical seat" of arbitral proceedings at all. The UNCITRAL Model Law introduced the concept of "place" or "seat" of the arbitral proceedings. The ACA adopted the UNCITRAL Model Law.

b. Different provisions in Part 1 of the ACA refer to the "place" of arbitration and indicate which court would have jurisdiction in relation to arbitral proceedings. For example, "Court" is defined in Section 2 (1) (e); Section 20 (1) and (2) refers to the "place" (or seat) of arbitration.

c. Though the ACA gives importance to the new concept of juridical seat, the relationship of "seat" with the jurisdiction of courts was unclear and had to be developed in accordance with international practice on a case by case basis by the Supreme Court.

(ii) Secondly, the *BGS* court then referred to the *BALCO* judgment, and how it made a proper distinction between the concept of "seat." But, on the point of court's jurisdiction, the *BGS* court said, there were internal contradictions in *BALCO*: –

a. There is a contradiction in the *BALCO* judgment in paragraph 96 (SCC version).

b. A reading of paragraphs 75, 76, 96, 110, 116, 123 and 194 of *BALCO* (SCC version) would show that where parties have selected the seat of arbitration, the selection would amount to an exclusive jurisdiction clause (that is, only the court where the seat would have jurisdiction). The example given in paragraph 96, buttresses this proposition. Read as a whole, *BALCO* applies the concept of "seat" (following English judgments) by harmoniously construing Section 20 with Section 2(1)(e), to broaden the definition of "court" and bring within its ken courts of the "seat" of the arbitration.

c. However, this proposition is contradicted when paragraph 96 speaks of the concurrent jurisdiction of courts.

(iii) Thirdly, after having noted that there was a contradiction in the judgment, the *BGS* court referred to the principles as to how a court's judgment and its ratio discerned/interpreted: –

a. Judgments of courts are not to be construed as statutes; neither are they to be read as Euclid's theorems. All observations made must be read in the context in which they appear. [citing to *Amar Nath Om Prakash* v. *State of Punjab*, (1985) 1 SCC 345; *Union of India* v. *Amrit Lal Manchanda*, (2004) 3 SCC 75 and several English authorities].

b. In any case, a judgment must be read as a whole, so that conflicting parts may be harmonized to reveal the true ratio of the judgment. However, if this is not possible, and it is found that the internal conflicts within the judgment cannot be resolved, then the first endeavor that must be made is to see whether a ratio decidendi can be culled out without the conflicting portion. If not, then the binding nature of the precedent on the point on which there is a conflict in judgment comes under a cloud [citing to Lord Denning's opinion in *Harper National Coal Board*, (1974) 2 All ER 441. The quite interesting facts of *Harper* and Lord Denning's relevant remarks are footnoted in the *BGS* judgment].

(iv) Fourthly, then, the *BGS* court held, if paragraphs 75, 76, 96, 110, 116, 123 and 194 of *BALCO* are to be read together, it will be clear that the definition of "Court" in Section 2(1)(e) has to be construed keeping in view Section 20 of the ACA.[18] As to the approach to such construction, the court added a preface that a narrow construction of Section 2(1)(e) was expressly rejected by *BALCO* (that is, the construction should be broad).

(v) Fifthly, then, the court's analysis segued into "the effect Section 20 would have on Section 2 (1) (e) of the [ACA]". In this course, the court

[18] Which the court noted gives recognition to party autonomy having accepted the territoriality principle in Section 2(2), following the UNCITRAL Model Law.

referred to *Indus Mobile Distribution Private Limited* v. *Datawind Innovations Private Limited*, (2017) 7 SCC 678, the Law Commission's Report of 2014, amendments made to the ACA in 2015, and concluded that if "**the conflicting portion of the judgment of BALCO in paragraph 96 is kept aside for a moment, the very fact that parties have chosen a place to be the seat would necessarily carry with it the decision of both parties that the Courts at the seat would exclusively have jurisdiction over the entire arbitral process**".

(vi) Sixthly, the *BGS* court then noted that "subsequent Division Benches of this Court (that is after *Indus*) have understood the law to be that once the seat of arbitration is chosen, it amounts to an exclusive jurisdiction clause for courts at that seat. The following judgments were referred (in addition to referring to *Indus* again): –

a. *Enercon (India) Ltd.* v. *Enercon GmbH*, (2014) 5 SCC 1: "Once the *seat* of arbitration has been fixed in India, it would be in the nature of *exclusive jurisdiction* to exercise the supervisory powers over the arbitration."

b. *Reliance Industries Ltd.* v. *Union of India*, (2014) 7 SCC 603: "it is too late in the day to contend that the seat of arbitration is not analogous to an exclusive jurisdiction clause."

(vii) Seventhly, the *BGS* court overruled the judgment of a 2-judge bench of the Delhi High Court in *Antrix*.[19] *Antrix* had distinguished Justice Nariman's authored judgment in *Indus*. It reasoned that under the *BALCO* principle, two courts have concurrent jurisdiction: the seat court and the court within whose jurisdiction the cause of action arises. *Antrix* then gave "a restricted meaning to *Indus* by stating that in *Indus* parties had designated seat *and* also specified that seat court would have exclusive jurisdiction (therefore, excluding by agreement jurisdiction of the cause-of-action court, which otherwise had jurisdiction). Lastly, *Antrix* also held that Section 42 of the ACA would be ineffective and

[19] S. Ravindra Bhat and Yogesh Khanna JJ.

useless if the seat were equal to exclusive jurisdiction clause, as that section presupposes there is more than one court of competent jurisdiction.[20]

(viii) The *BGS* court held that the view taken in *Antrix*, which followed the Bombay High Court judgment, "does not commend itself to us." It overruled *Antrix* and the Bombay High Court judgment for the following reasons: –

a. First and foremost, it is incorrect to state that the example given in paragraph 96 of *BALCO* reinforces the concurrent jurisdiction aspect of the said paragraph. The conclusion that the Delhi, as well as the Mumbai or Kolkata Courts, would have jurisdiction in the example given in the said paragraph is wholly incorrect, given the sentence:-"This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi."

b. Thus, *BALCO* does not "unmistakably" hold that two Courts have concurrent jurisdiction.

c. What is missed by these High Court judgments is the subsequent paragraphs in *BALCO*, which clearly and unmistakably state that the choosing of a "seat" amounts to the choosing of the exclusive jurisdiction of the Courts at which the "seat" is located.

d. What is also missed are the judgments of the Supreme Court in *Enercon (India) Ltd.* v. *Enercon GmbH*,[21] (2014) 5 SCC 1, and *Reliance Industries Ltd.* v. *Union of India*,[22] (2014) 7 SCC 603.

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[20] *Antrix* also noted that "only those few situations where parties do not actually designate any seat (and thus no exclusive competence is conferred on one forum) would Section 42 have any role".

[21] S. S. Nijjar and F.M. Ibrahim Kalifulla JJ decided on 14 February 2014.

[22] S.S. Nijjar and Dr. A.K. Sikri JJ decided on 28 May 2014.

e. Equally, the ratio in *Indus* is contained in paragraphs 19 and 20. Two separate and distinct reasons are given for concluding that courts at Mumbai alone would have jurisdiction. The first reason was that the seat was designated as Mumbai. The second was that in any case where more than one court can be said to have jurisdiction, parties could choose one over the other and in this case, parties made the choice by saying Mumbai has exclusive jurisdiction. Both are independent reasons and it is wholly incorrect to say that *Indus* has a limited ratio decidendi contained in paragraph 20 alone and that paragraph 19 if read by itself, would run contrary to *BALCO*.

f. Equally incorrect is the finding in *Antrix* that Section 42 of the ACA would be rendered ineffective and useless. Where a seat is designated in an agreement, it would require that all applications under part I be made only in the court where the seat is located. So read, Section 42 is not rendered ineffective or useless.

g. Also, where either no "seat" is designated, or the so-called "seat" is only a convenient "venue," or before the tribunal determines seat, there may be several courts where a part of the cause of action arises that may have jurisdiction. In both these situations, the earliest application having been made to a court in which a part of the cause of action arises would then be the exclusive court under Section 42, which would have control over the arbitral proceedings.

4. Tests for Determination of Seat

The court then addressed the issue of tests of determination of seat. It started by noting that the "the judgments of the English Courts have examined the concept of the "juridical seat" of the arbitral proceedings, and have laid down several important tests in order to determine whether the "seat" of the arbitral proceedings has, in fact, been indicated in the agreement between the parties".

It relied on a host of authorities, primary among them being the English judgment in *Roger Shashoua & others* v. *Mukesh Sharma* [2009] EWHC 957

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

The court then indicated the presence or absence of what language in the arbitration agreement would determine the issue one way or the other:

(i) Whenever there is the designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is the "seat" of the arbitral proceedings. This is so because the expression "arbitration proceedings" does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place.

(ii) The language above has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting.

(iii) The fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a clause designates a "seat" of the arbitral proceedings.

(iv) In an international context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996, as applying to

the "stated venue," which then becomes the "seat" for the purposes of arbitration.

5. The Judgment in Hardy Exploration was Incorrect

The petitioner BGS had argued that the 3-judge bench decision in *Union of India* v *Hardy Exploration* 2018 SCC Online 1640 was contrary to *BALCO,* and because of the confusion created by *Hardy*, the High Court concluded that New Delhi was not the "seat," but the venue.

The court, therefore, was "exhorted" to consider the "correctness of the judgment in *Hardy Exploration* …". In *Hardy*, the arbitration clause had provided that the "arbitration proceedings shall be conducted in accordance with the UNCITRAL Model Law …". Further, the venue of arbitration proceedings shall be Kuala Lumpur. The *Hardy* court had concluded that Kuala Lumpur was not the seat or place of arbitration.

The *BGS* court accepted the argument that *Hardy* was contrary to *BALCO* and held: –

(i) The fact that *BALCO* had expressly approved the principle laid down in the English *Shashoua* was stated in *Roger Shashoua* v. *Mukesh Sharma*, (2017) 14 SCC 722.

(ii) The *Hardy* court did not apply the English *Shashoua*. By failing to do so, *Hardy* did not follow the law as to determination of seat of arbitration, as laid down in *BALCO*.

(iii) Therefore, the decision in *Hardy* was incorrect in its conclusion that the stated venue of arbitration need not be the juridical seat unless there are concomitant factors that indicate that the parties intended for the venue also to be the seat. Had the English *Shashoua* principle been applied, the answer in *Hardy* would have been that Kuala Lumpur, which was stated to be the "venue" of arbitration proceedings, was the juridical "seat" of the arbitration.

(iv) Instead, by allowing Indian law to apply, the result in *Hardy* is that a foreign award delivered in Kuala Lumpur, would now be liable to be challenged both in the Courts at Kuala Lumpur, and also the courts in India under Section 34 of Part I of the ACA. This is exactly the chaos

contemplated in paragraph 143 of *BALCO* because of which *Venture Global Engineering case* was overruled.

6. The Seat in the BGS Case and the Court's Jurisdiction

The court concluded that New Delhi / Faridabad had been designated as seat of arbitration under the contract. However, given the fact that the proceedings were finally held at New Delhi, and the awards were signed in New Delhi, and not at Faridabad, both parties had chosen New Delhi as the "seat" of arbitration under Section 20(1) of ACA.