

Tussle Over 'Seat' and 'Venue' of Arbitration, "BALCO" comes to rescue
written by Priyanka Ajjannavar | May 18, 2020



The Hon'ble bench of the Supreme Court comprising Justice R.F. Nariman, Justice Aniruddha Bose, and Justice V. Ramasubramanian, in its Judgement dated December 10, 2019, in the matter of BGS SGS Soma JV Versus. NHPC Limited[1] held that " the Courts of New Delhi have exclusive jurisdiction over the matter, as both the parties have agreed on *New Delhi as the "seat" of arbitration according to Section 20(1) of the Arbitration Act, 1996.*"

The Court Takes a Stand Over Seat and Venue of Arbitration

Facts

In accordance with the agreement signed between BGS SGS SOMA ("Petitioner") and NHPC Limited ("Respondent"), the Petitioner was assigned with the large-scale Hydropower Project in the lower Subansri districts of Assam and Arunachal Pradesh, for the construction of diversion tunnels, coffer dams, concrete gravity dams, plunge pools and cut-off walls of Subansri Lower Hydroelectric Project on river Subansri, with an installed capacity of 2000 MW. In consonance with the agreement, in case of dispute, Clause 67.3 is to be invoked, to reach an amicable settlement between the parties.

The relevant portion of Clause 67.3 of the Agreement reads as follows:

67.3) *"Any dispute in respect of which the Employer and the Contractor have failed to reach at an amicable settlement pursuant to Sub-Clause 67.1, shall be finally settled by arbitration as set forth below. The Arbitral Tribunal shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate, or valuation of the Engineer.*

(vi) 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."

On May 16, 2011, a notice of arbitration was issued to the Respondent for the payment of the outstanding amount. A three-member bench is constituted in accordance with Clause 67.3 of the agreement. After considering the claim and counter claim on record, the Tribunal then delivered an Award at New Delhi on August 26, 2016, in favor of the Petitioner/Claimant. Being aggrieved by the Award passed by the Tribunal, the Respondent approached the Faridabad District Court by filing an application under Section 34 of Arbitration Act, 1996 to set aside the award dated August 26, 2016.

Conversely, the Petitioner filed an application under Section 151 r/w Order

VII Rule 10 of Code of Civil Procedure, 1908 and Section 2(1)(e)(i) the Arbitration Act, 1996 before the jurisdictional Court. Subsequently, the case was transferred to Gurugram, after the constitution of the Commercial Bench was allowed. Aggrieved by the order of Commercial Court Gurugram, Respondent filed an appeal before the High Court of Haryana. Hon'ble High Court allowed the appeal. Aggrieved by the Order of High Court, the Special Leave Petition came to be filed before the Supreme Court.

Question Of Law

The Hon'ble Court considered the following Questions of Law:

1. Whether impugned order under Section 37 of the Arbitration and Conciliation Act, 1996 appealable under Section 13 of the Commercial Courts Act, 2015?
2. Whether the Hon'ble High Court right in deciding the jurisdiction of Faridabad?

Submissions

The learned counsels appearing on behalf of the Petitioners contended that the impugned order passed by High Court allowing the appeal is against the principles established by law. Section 13 of the Commercial Courts Act, 2015 explicitly emphasizes on the forum for challenge wherein, Section 37 of Arbitration Act, which has been specifically mentioned in the proviso to Section 13(1) of Commercial Courts Act, 2015- regulates the right to appeal, further, when same is read with Section 5 of Arbitration Act, 1996, specifies the orders and judgments which are appealable thereby excluding the appeal which is outside the preview Section 37 of Arbitration Act, 1996.

Further, learned counsel contended that Section 151 read with Order VII rule 10 of the CPC doesn't fall under the realm of rejecting /setting aside an Arbitral award under Section 34 of Arbitration Act, 1996. It is pertinent to note that appeal under Section 13 of Commercial Courts Act, 2015 applicable only to the orders falls within the arena of Section 37 of Arbitration Act, 1996. Hence, the impugned order passed by the High Court needs to be struck down.

The learned counsel for the Petitioner relied upon *Hakam Singh v. Gammon (India) Ltd*[2]., *Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Service Inc.*[3], *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited*,[4], and made it clear before the court that the place of arbitration is chosen as per Section 20 of the Arbitration Act, 1996 as New Delhi. Therefore, New Delhi being the "seat" as determined, the courts of New Delhi have inherent/exclusive jurisdiction in regard to the matter.

On contrary, the learned for Solicitor General contended that the order passed under Section 151 read with Order VII Rule 10 of the CPC would amount to rejection/setting aside an arbitral award. And relied on profoundly upon the judgment of the Delhi High Court in *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.*,[5]. She further stated that the agreement doesn't specifically elaborate on the seat of arbitration. The clause in the agreement specifies only the suitable venue; on this ground, alone sittings were held in New Delhi and this would not make New Delhi the seat of the arbitration under Section 20(1) of the Arbitration Act, 1996.

She further vehemently argued on the point that, since the agreements were signed in Faridabad and notice(s) issued to the office located in Faridabad, hence the actual cause of action arose in Faridabad. Therefore, the District Court of Faridabad would be having jurisdiction over the matter. Hence,

judgment passed by High Court should be confirmed.

Observation and Judgement

While deciding the petition, the court considered the well-settled law enumerated under various judgments passed by the Supreme Court of India. While placing reliance on the following precedents, the Hon'ble Court upheld the principle enshrined in *BALCO(Supra)* and rejected the principle applied in *Hardy Exploration and Production (India) Inc.,[6]*

In *Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Service, Inc., (Supra)*

The Supreme Court held that where in the agreement the parties have decided on a seat of arbitration, such selection itself amounts to an exclusive jurisdiction clause. When there is a specific clause regarding the seat of arbitration in the agreement, such selection of clause leads to an exclusive jurisdiction clause in case of a dispute. Paragraph 96 of the said judgment makes it clear that orders passed under Section 17 of the Arbitration Act, 1996 would lie before the courts of the seat, having exclusive, supervisory jurisdiction, on the arbitration proceedings.

In *South Delhi Municipal Corporation v. Tech Mahindra EFA[7],*

The Hon'ble Delhi Court held that the order of deposit of amount by the Tribunal is not appealable order under Section 37 of Arbitration Act, 1996 R/w Commercial Courts Act, 2015. The hon'ble court further stated that the purpose of the statute is to provide a speedy remedy and to assure that no one should be deprived of justice. Hence, the construction of a specific clause in the statute cannot be claimed as a matter of right.

In *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited, (Supra)*

The Hon'ble Court held that it is a settled principle of arbitration law that the specification/determination of the seat leads to the supervisory/exclusive jurisdiction for the purpose of regulating the dispute arising out of arbitration proceedings between the parties, therefore, the jurisdiction of all the dispute with regards to arbitration proceedings falls where the seat is located.

In *Union of India v. Hardy Exploration and Production (India) Inc.,(Supra)*

The Hon'ble Supreme Court held that "place" and "seat" of arbitration can be used interchangeably as per Sec.20(1) of the Arbitration Act.

The *Hardy Exploration and Production (India) Inc.,(Supra)* judgment is contradictory to the Five Judge bench decision in *BALCO (supra)*.

However, in accordance with Section 20 of the Arbitration Act, 1996 the Arbitration proceedings were held in Delhi and further awards were passed in Delhi and not at Faridabad. Hence, it is clear from the facts that both the parties exclusively agreed on New Delhi as the "Seat" of Arbitration even though the agreements were signed at Faridabad and letters were sent to Faridabad.

Conclusion

Having regard to the facts of the case and firmly relying upon the various precedents, the Hon'ble Supreme Court is of the opinion that once the "seat" of arbitration is decided, the other components like a place of cause of action, signing of the agreement, issuance of notice has comparatively less impotence over the place where the arbitration proceedings were held, therefore, courts of Delhi would have exclusive/supervisory jurisdiction over

the subject matter as both the parties determined the place of arbitration as New Delhi.

- [\[1\]](#) 2019 SCC OnLine SC 1585
- [\[2\]](#) (1971) 1 SCC 286
- [\[3\]](#) (2012) 9 SCC 552
- [\[4\]](#) (2017)7 SCC 678
- [\[5\]](#) 2018 SCC OnLine Del 9338
- [\[6\]](#) 2018 SCC OnLine SC 1640
- [\[7\]](#) (OS) (Comm.) 3 of 2019

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