The seat-court prevails over the cause-of-action court (Supreme Court of India)

Update by Editor

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Hindustan Construction Company Ltd. v. NHPC Ltd. and others

Court: Supreme Court of India | **Citation**: MANU/SC/0299/2020 | **Bench**: RF Nariman, S Ravindra Bhat & V Ramasubramanian JJ | **Date**: 04 March 2020

A 3-judge bench of Rohinton Fali Nariman, S Ravindra Bhat and V Ramasubramanian JJ has reiterated, following *BGS SGS Soma JV* v. *NHPC Ltd.*, SCC OnLine SC 1585, that once the seat of the arbitration is designated, the courts at the seat have exclusive jurisdiction.

A. Section 34 petition entertained by the cause-of-action-court at Gurugram applying *BALCO*'s concurrent jurisdiction principle even though it determined the seat at New Delhi

In a petition under Section 34 ACA, Judge Alka Malik of the Special Commercial Court at Gurugram[1] decided on 14 November 2019 that the seat of the arbitration was New Delhi. She, however, also found that part of the cause of action had arisen in Faridabad. Therefore, she applied the concurrent jurisdiction principle of *BALCO*[2] and Section 42 ACA[3] because a prior application had been made in the matter at Faridabad. Section 42 ACA mandates all subsequent applications to be made in that court where the first application was made. Accordingly, the judge concluded she had jurisdiction.

Shortly later, the decision in *BGS* was delivered on 10 December 2019, holding, among others, that if the seat of the arbitration is specified (or determined by anyone), the seat-court has exclusive jurisdiction over the arbitral process.

B. The decision in *BGS Soma* came later, based on which a challenge was made to the Supreme Court along with a transfer petition

Hindustan Construction challenged Judge Malik's decision directly in the Supreme Court under Article 136 of India's Constitution and filed a transfer petition under Section 25 of the Code of Civil Procedure, 1908.[4]

C. The court transferred the matter to New Delhi. It said the first application made in the cause-of-action court was without jurisdiction

[1] Before whom the matter was presumably transferred from Faridabad, the adjoining district in the same state after commercial courts were set up at Gurugram.

[2] *Bharat Aluminium Company and ors.* v. *Kaiser Aluminium Technical Service, Inc. and ors.* (2012) 9 SCC 552 (*BALCO*). The 5-judge bench had said that the seat-court, as well as the cause-of-action-court, had concurrent jurisdiction. *BGS* later said that this understanding was wrong.

[3] Section 42—"Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

[4] This provides for the power of the Supreme Court to transfer any civil matter from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State. It appears that a total of three transfer petitions were filed for three different Section 34 applications. All cases were transferred.

The court applied the *BGS* decision and held that the courts at New Delhi alone would have jurisdiction. It said that when the first application was made in the Faridabad court (that is, before the *BGS* decision came out), it was without jurisdiction (following what *BGS* held later). Paragraph 61 of *BGS*, where that court had addressed the argument relating to Section 42, was explicitly referred to (see comments).

The case was transferred to the High Court of Delhi. Status quo for eight weeks was granted, and the respondent was given liberty to move an application under Section 36 ACA.

D. Comments

For a fuller context of this case, the reader might recall that the 5-judge bench of the Supreme Court had said in *BALCO* that the seat-court and the cause-of-action-court have concurrent jurisdiction.

Some latter cases focused on the principle that the designation of the seat is akin to conferring exclusive jurisdiction on the seat-court. This included Nariman J's authored judgement in *Indus Mobile Distribution Private Limited* v. *Datawind Innovations Private Limited*, (2017) 7 SCC 678.

The Delhi High distinguished *Indus* in *Antrix Corporation Ltd.* v. *Devas Multimedia Pvt. Ltd.*, 2018 SCC OnLine Del 9338. 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* had also relied on Section 42 ACA to say that the provision would be ineffective and useless if a clause as to the seat of the arbitration were equal to the exclusive jurisdiction clause, as Section 42 presupposes there is more than one court of competent jurisdiction.

Subsequently, the 3-judge bench in *BGS* decided that this understanding was wrong. It said that properly read, the court at the arbitral seat, if the seat is specified in the agreement or determined later, has exclusive jurisdiction.

In its reasoning process, the *BGS* court dealt with *Antrix* because it was cited by the respondent NHPC's counsel (in *BGS*). The *BGS* court overruled *Antrix*. Among the many reasons which Nariman J gave in overruling, he found that the Section 42 argument was wrong because 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.

The *BGS* court also said at paragraph 62 (SCC OnLine version) that 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.

The principle that the seat-court has exclusive jurisdiction, but the cause-of-action court would have jurisdiction if the seat is not specified or determined may run into several difficulties. Take a situation where it can be reasonably deduced that the seat is specified, and yet a party does not want to go the seat-court. It files an application to the cause-of-action court and argues that the seat is not specified. In another situation, there may be an agreement where the seat is not clearly discernible, and a party applies for an urgent interim measure to the cause of action court, which is granted. On its face, in both situations, the cause-of-action court can exercise jurisdiction under the *BGS* rule because paragraph 62 of *BGS* permits it.

It is not clear what the facts in *Hindustan Construction* were, but it will be seen that a prior application was filed in the cause-of-action court. A determination of seat was made later by that same court

(presumably on an application of a party) in the set-aside proceedings. What *Hindustan Construction* says is that the cause-of-action court did not have jurisdiction to entertain the prior application. But this is said on the basis of the determination of the seat made later.