REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 2841-2843 OF 2017
(@ S.L.P. (Civil) Nos. 22616-22618 of 2016)

Roger Shashoua & Others ...Appellant(s)

Versus

Mukesh Sharma & Others ...Respondent(s)

J U D G M E N T

Dipak Misra, J.

Though innumerable facts have been graphically stated in the petitions seeking leave to appeal as well as in the written note of submissions, yet regard being had to the centrality of the controversy, we shall refer to the facts which are absolutely necessary for adjudication of the *lis* in question. It may be stated that the High Court has narrated the facts in detail on various aspects, for it was deciding a writ petition and a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (for brevity, 'the Act') together and it was required to advert to the "seat of arbitration and venue of arbitration" to determine the maintainability of the petition in the Courts of India. That apart, the High Court was obliged to dwell upon the territorial jurisdiction of a petition under Section 34 of the

Signature Not Verified
Digitally Signed by GULSHAN KUMAR ARORA
Date: 2017.07.04 15:36:22 IST
Reason:

Act at Gautam Budh Nagar, Uttar Pradesh or High Court of Delhi, in case the Courts in India have the jurisdiction to deal with the objections as postulated under Part I of the Act. Be it noted, a petition under Section 34 of the Act was filed before the learned District Judge, Gautam Budh Nagar, Uttar Pradesh who vide order dated 06.07.2011 had not entertained the application on the ground of lack of territorial jurisdiction and returned it to be filed before the appropriate Court and the appeal arising therefrom, that is, FAO (D) 1304 of 2011, filed before the High Court of Allahabad was dismissed on the ground of maintainability. Thereafter, Writ Petition No. 20945 of 2014 was filed challenging the order dated 06.07.2011 of the District Judge, Gautam Budh Nagar. In the meantime, a petition under Section 34 of the Act came to be filed before the High Court of Delhi.

2. When the matter stood thus, ITE India Pvt. Limited approached this Court by filing Special Leave Petition (Civil) Nos. 22318-22321 of 2010. On 15.09.2015, the Court passed the following order:

> "In course of hearing, we have been apprised that on behalf of ITE India Private Limited, an application under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') is pending before the learned Single Judge of the High Court of Delhi.
>
> At this juncture, learned counsel for respondent no.2 submitted that he had filed an application under Section 34 of the Act before the learned District Judge, Gautam Budh Nagar, U.P. who had rejected the application to be filed before the proper court. Against the order passed by the District Judge, an FAO, i.e. FAFO (D) No.1304/2011

was filed before the High Court of Allahabad, Bench at Allahabad and same has been dismissed on the ground of maintainability. Be it stated, thereafter the 2nd respondent has challenged the order passed by the District Judge, Gautam Budh Nagar, UP in Writ Petition (C) No. 20945 of 2014 titled as International Trade Expo Centre Ltd. vs. Mukesh Sharma & Ors.

In our considered opinion, the writ petition and the petition filed under Section 34 of the Act in Delhi High Court should be heard together by one court and accordingly, we transfer the writ petition from Allahabad and accordingly it is ordered that the writ petition be transferred to the High Court of Delhi and be heard by the same learned Judge who is hearing the petition under Section 34 of the Act.

The Registrar (Judicial) is directed to send a copy of this order to the Registrar (Judicial) of the High Court of Allahabad for transmitting the record to the High Court of Delhi. A copy of the order be sent to the Registrar General of the High Court of Delhi. The learned Chief Justice of the High Court of Delhi is requested to nominate a Judge who will hear the writ petition as well as the application preferred under Section 34 of the Act. The nominated judge, we request, should to dispose both the matters by the end of November 2015. Let the matter be listed for further hearing on 08.12.2015."

3. It is worthy to mention that extension of time was sought for by the parties and was granted. Before the High Court the appellant took the stand that the application under Section 34 was not maintainable since Part I of the Act is not applicable regard being had to the arbitration clause in the agreement from which it is discernible that the courts in London have jurisdiction. Learned single Judge by the impugned order came to hold that application filed under Section 34 of the Act is maintainable and the Delhi High Court has the territorial jurisdiction to deal with the same and accordingly directed the

objection to be filed under Section 34 before the Court.

4. We may immediately state here that Special Leave Petition (Civil) Nos. 22318-22321 of 2010 had been de-tagged vide order dated 15.02.2017 passed by the Court.

5. Regard being had to what we have stated hereinbefore, as required at present, we shall only dwell upon the applicability of Part I or Part II of the Act to the controversy in question. If Part I is applicable, then we will be obliged to advert to the issue of territorial jurisdiction of Delhi or that of Gautam Budh Nagar, Uttar Pradesh. If Part II would be applicable, then the said issue will not warrant any deliberation.

6. Criticising the impugned order, Mr. Rakesh Dwivedi, learned senior counsel for the appellants contends that the High Court has fallen into an error in its appreciation of the arbitration clause and what has been postulated therein and come to hold that the Courts in India have jurisdiction. It is also canvassed by him that in the decision delivered between the parties, the commercial court in London, interpreting the clauses in the agreement, has determined that the courts in London have jurisdiction and the principle laid therein (***Shashoua v. Sharma***[1]) has been accepted in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.***[2]

1 2009 EWHC 957 (Comm)
2 (2012) 9 SCC 552

(BALCO) and further in ***Enercon (India) Ltd. v. Enercon GmbH***[3] and, therefore, the inescapable conclusion has to be that the Courts in India do not have jurisdiction and consequently Part I of the Act would not be applicable. Be it noted, the second proposition, as is seen from the impugned order, was not advanced before the High Court. Be that as it may, as it involves a pure question of law, we shall advert to the same.

7. Mr. Chidambaram, learned senior counsel for the respondent, in his turn, would submit that the arbitration clause specifically provides that London will be the venue for arbitration and venue can never be the seat of arbitration that vests jurisdiction in courts situate at London. It is his further submission that mere stipulation in the arbitration clause that the proceedings shall be in accordance with Rules of Conciliation and Arbitration of the International Chambers of Commerce, Paris is not to be interpreted that the parties had intended not to be governed by Part I of the Act. It is assiduously propounded by him that the Constitution Bench in ***BALCO*** has not approved the judgment in ***Shashoua*** and the view expressed by the two-Judge Bench in ***Enercon (India) Ltd.*** (supra) to that effect is *per incuriam*. That apart, the principle laid down in ***National Thermal Power Corporation v. Singer Company***[4] which deals with various aspects relating to covenants of the contract is applicable. It is argued by him

3 (2014) 5 SCC 1
4 (1992) 3 SCC 551

that ***Shashoua*** arose from an anti-suit injunction and views expressed therein are tentative and, therefore, cannot earn the status of a precedent. Lastly, it is urged by him that as the appellants had approached the Courts in India, they have waived their right to contest the issue of jurisdiction.

8. To appreciate the controversy, it is necessary to take note of the fact that the agreement has been executed before delivery of the judgment, that is, 12.9.2012, by the Constitution Bench in ***BALCO*** and, therefore, the principle stated in ***Bhatia International v. Bulk Trading S.A. and another***[5] is applicable and for the said purpose what has been stated in ***Bhatia International*** (supra) has to be appositely appreciated and understood. In ***Bhatia International*** (supra), an application was preferred under Section 9 of the Act before the learned IIIrd Additional District Judge, Indore, Madhya Pradesh and the appellant therein had raised the plea of maintainability of such an application on the ground that Part I of the Act would not apply where the place of arbitration is not in India. The Court referred to various provisions of the Act and came to hold thus:

> "32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part

5 (2002) 4 SCC 105

> I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

9. After recording the conclusion, the three-Judge Bench noted the stand of the learned counsel appearing for the appellant therein which finds place in paragraph 33 of the judgment. It is extracted hereunder:-

> "33. Faced with this situation Mr Sen submits that, in this case the parties had agreed that the arbitration be as per the Rules of ICC. He submits that thus by necessary implication Section 9 would not apply. In our view, in such cases the question would be whether Section 9 gets excluded by the ICC Rules of Arbitration. Article 23 of the ICC Rules reads as follows:
>
> "*Conservatory and interim measures*
>
> 1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the Arbitral Tribunal considers appropriate.
>
> 2. Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be

> notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof."

10. After so stating, the Court analysed Article 23 of the International Chamber of Commerce Rules and noted that the said Rules permit parties to apply to a competent judicial authority for interim and conservatory measures and, therefore, in such cases an application could be made under Section 9 of the Act. Eventual conclusion that was recorded by the three-Judge Bench is as under:

> "35. .... in our view a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act. On this interpretation there are no lacunae in the said Act. This interpretation also does not leave a party remediless. ..."

11. In ***Venture Global Engineering v. Satyam Computer Services Ltd.***[6] the Court followed the principle stated in ***Bhatia International*** (supra). Elucidating the principle of ***Bhatia International*** (supra), the Court stated:

> "33. The very fact that the judgment holds that it would be open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of Part I would apply. In any event, to apply Section 34 to foreign international awards would not be inconsistent with Section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public

6 (2008) 4 SCC 190

> policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance with the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. As observed earlier, the public policy of India includes — (*a*) the fundamental policy of India; or (*b*) the interests of India; or (*c*) justice or morality; or (*d*) in addition, if it is patently illegal. This extended definition of public policy can be bypassed by taking the award to a foreign country for enforcement."

12. In the said case, the Court scanned the shareholders agreement and came to hold that Part I of the Act was applicable and hence, though the award was a foreign award, its legal propriety could be called in question in India. The said authority, as is reflectible, lays down that it would be open to the parties to exclude the application of the provision of Part I by express or implied agreement and unless there is an express or implied exclusion, the whole of Part I would apply. The Court, in the said case, adverted to the agreement in question and eventually expressed the view that the clauses in the agreement neither expressly nor impliedly excluded the applicability of Part I of the Act.

13. In ***Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd.***[7], the designated Judge was called upon to decide the issue of appointment of an arbitrator. The clause that pertained to settlement of disputes read as follows:

---

7 (2008) 10 SCC 308

> "*6. … '13. Settlement of disputes*
>
> 13.1. This agreement, its construction, validity and performance shall be governed by and constructed in accordance with the laws of England and Wales;
>
> 13.2. Subject to Clause 13.3 all disputes or differences arising out of, or in connection with, this agreement which cannot be settled amicably by the parties shall be referred to adjudication;
>
> 13.3. If any dispute or difference under this agreement touches or concerns any dispute or difference under either of the sub-contract agreements, then the parties agree that such dispute or difference hereunder will be referred to the adjudicator or the courts as the case may be appointed to decide the dispute or difference under the relevant sub-contract agreement and the parties hereto agree to abide by such decision as if it were a decision under this agreement.'"

14. The Court referred to the authority in ***Bhatia International*** (supra) and ***Lesotho Highlands Development Authority v. Impregilo SpA***[8], and came to hold that it is fairly well settled that when an arbitration agreement is silent as to the law and procedure to be followed in implementing the arbitration agreement, the law governing the said agreement would ordinarily be the same as the law governing the contract itself. The Court referred to ***Singer Company*** (supra) and held that the proposition stated therein lent support to the view it had expressed. Thereafter, it noted that in ***Bhatia International*** (supra) this Court had laid down the proposition that notwithstanding the provisions of Section 2(2) of the Act, indicating

---

8 (2005) 3 ALL ER 789

that Part I of the Act would apply where the place of arbitration is in India, even in respect of international commercial agreements, which are to be governed by the laws of another country, the parties would be entitled to invoke the provisions of Part I of the Act and consequently the application made under Section 11 thereof would be maintainable.

15. In the course of hearing we have also been commended to the authority in ***Citation Infowares Limited v. Equinox Corporation***[9] wherein the Designated Judge opined that unless there is express or implied exclusion of the provisions of Part I of the Act, the entire Part I including Section 11 would be applicable even where the international commercial agreements are governed by the laws of another country.

16. As we find the principle stated in ***Bhatia International*** (supra) was followed in many an authority till it was prospectively overruled in ***BALCO***. The Constitution Bench in ***BALCO*** recorded its conclusion in this manner:

> "195. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in *Bhatia International* (supra) and *Venture Global Engg.* (supra). In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign-seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to

9 (2009) 7 SCC 220

> all arbitrations which take place in India. Similarly, no suit for interim injunction simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.
>
> 196. We conclude that Part I of the Arbitration Act, 1996 is applicable only to *all the arbitration*s which take place within the territory of India."

17. After expressing so, the Court took note of the fact that the ***Bhatia International*** (supra) has been followed by all the High Courts as well as by this Court on numerous occasions and, in fact, judgment rendered on 10.01.2008 in ***Venture Global Engineering*** (supra) had followed the ratio laid down in ***Bhatia International*** (supra). The Constitution Bench, as is manifest, declared the principles stated by it to be applicable prospectively to all the arbitration agreements executed from the date of the delivery of the judgment.

18. After the said judgment was delivered, the issue arose before this Court whether the parties to the agreement have expressly or impliedly excluded Part I of the Act. Reference to the said authorities is seemly to appreciate the perspective of this Court pertaining to exclusion of Part I of the Act.

19. In ***Reliance Industries Limited and another v. Union of India*** [10], the order of the High Court allowing the objections preferred by the Union of India pertaining to arbitrability of the claims made by the

---

10 (2014) 7 SCC 603

petitioner therein in respect of royalties, cess, service tax and CAG audit was rejected and for the said purpose, the Court referred to various agreements entered into between the parties. The issue that arose before this Court is whether Part I of the Act was excluded or not. The Court reproduced the relevant part of Article 33 and the clause that dealt with final partial award as to "seat". It took note of the fact that jurisdiction of the High Court of Delhi was invoked by the Union of India contending, inter alia, that the terms of the PSCs entered would manifest an unmistakable intention of the parties to be governed by the laws of India and more particularly the Arbitration and Conciliation Act, 1996; that the contracts were signed and executed in India; that the subject matter of the contracts were performed within India; and that the contract stipulated that they will be governed and interpreted in accordance with the laws of India. Various other clauses were pressed into service to stress upon the availability of jurisdiction in courts of India. The Court analyzing the postulates in the contract in entirety came to hold:

> "23. Upon consideration of the entire matter, the High Court has held that undoubtedly the governing law of the contract i.e. proper law of the contract is the law of India. Therefore, the parties never intended to altogether exclude the laws of India, so far as contractual rights are concerned. The laws of England are limited in their applicability in relation to arbitration agreement contained in Article 33. This would mean that the English law would be applicable only with regard to the curial law matters i.e.

> conduct of the arbitral proceedings. For all other matters, proper law of the contract would be applicable. Relying on Article 15(1), it has been held that the fiscal laws of India cannot be derogated from. Therefore, the exclusion of Indian public policy was not envisaged by the parties at the time when they entered into the contract. The High Court further held that to hold that the agreement contained in Article 33 would envisage the matters other than procedure of arbitration proceedings would be to rewrite the contract. The High Court also held that the question of arbitrability of the claim or dispute cannot be examined solely on the touchstone of the applicability of the law relating to arbitration of any country but applying the public policy under the laws of the country to which the parties have subjected the contract to be governed. Therefore, according to the High Court, the question of arbitrability of the dispute is not a pure question of applicable law of arbitration or *lex arbitri* but a larger one governing the public policy."

20. After so stating, the two-Judge Bench referred to Articles 32.1 and 32.2 that dealt with the applicable law and various other aspects from which it was perceivable that parties had agreed that juridical seat or legal place of arbitration for the purpose initiated under the claimants' notice of arbitration would be London. The Court posed the question whether such stipulations excluded the applicability of the Part I of the Act or not. In its ultimate analysis, it repelled the contention that there had neither been any express nor implied exclusion of Part I of the Act and ruled:

> "43. ... In our opinion, the expression 'laws of India' as used in Articles 32.1 and 32.2 has a reference only to the contractual obligations to be performed by the parties under the substantive contract i.e. PSC. In other words, the provisions contained in Article 33.12 are not governed by the provisions contained in Article 32.1. It must be

> emphasised that Article 32.1 has been made subject to the provision of Article 33.12. Article 33.12 specifically provides that the arbitration agreement shall be governed by the laws of England. The two articles are particular in laying down that the contractual obligations with regard to the exploration of oil and gas under the PSC shall be governed and interpreted in accordance with the laws of India. In contradistinction, Article 33.12 specifically provides that the arbitration agreement contained in Article 33.12 shall be governed by the laws of England. Therefore, in our opinion, the conclusion is inescapable that applicability of the Arbitration Act, 1996 has been ruled out by a conscious decision and agreement of the parties. Applying the ratio of law as laid down in *Bhatia International* it would lead to the conclusion that the Delhi High Court had no jurisdiction to entertain the petition under Section 34 of the Arbitration Act, 1996."

21. Be it noted, the Court opined that it was unacceptable that seat of arbitration is not analogous to an exclusive jurisdiction clause. It observed that once the parties had consciously agreed that juridical seat of the arbitration would be London and that the agreement would be governed by the laws of England, it is no longer open to propound that provisions of Part I of the Act would also be applicable to the arbitration agreement. It referred to the authority in ***Videocon Industries Limited v. Union of India and another***[11] and held thus:

> "47. … The first issue raised in *Videocon Industries Ltd.* was as to whether the seat of arbitration was London or Kuala Lumpur. The second issue was with regard to the courts that would have supervisory jurisdiction over the arbitration proceedings. Firstly, the plea of *Videocon Industries Ltd.* was that the seat could not have been changed from Kuala Lumpur to London only on agreement of the parties without there being a corresponding amendment in the PSC. This plea was accepted. It was held

11 (2011) 6 SCC 161

that seat of arbitration cannot be changed by mere agreement of parties. In para 21 of the judgment, it was observed as follows:

> "*21.* Though, it may appear repetitive, we deem it necessary to mention that as per the terms of agreement, the seat of arbitration was Kuala Lumpur. If the parties wanted to amend Article 34.12, they could have done so only by a written instrument which was required to be signed by all of them. Admittedly, neither was there any agreement between the parties to the PSC to shift the juridical seat of arbitration from Kuala Lumpur to London nor was any written instrument signed by them for amending Article 34.12. Therefore, the mere fact that the parties to the particular arbitration had agreed for shifting of the seat of arbitration to London cannot be interpreted as anything except physical change of the venue of arbitration from Kuala Lumpur to London."

48. The other issue considered by this Court in *Videocon Industries Ltd.* was as to whether a petition under Section 9 of the Arbitration Act, 1996 would be maintainable in the Delhi High Court, the parties having specifically agreed that the arbitration agreement would be governed by the English law. This issue was decided against the Union of India and it was held that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the Union of India under Section 9 of the Arbitration Act."

22. It is condign to note here that while discussing about the ratio in ***Videocon Industries Limited*** (supra), the Court studiedly scrutinized the agreement, mainly the relevant parts of Articles 33, 34 and 35 and opined:

> "50. … The arbitration agreement in this appeal is identical to the arbitration agreement in *Videocon Industries*. In fact, the factual situation in the present appeal is on a stronger footing than in *Videocon Industries Ltd.* As noticed earlier, in *Videocon Industries*, this Court concluded that the parties could not have altered the seat of arbitration

> without making the necessary amendment to the PSC. In the present appeal, necessary amendment has been made in the PSC. Based on the aforesaid amendment, the Arbitral Tribunal has rendered the final partial consent award of 14-9-2011 recording that the juridical seat (or legal place) of the arbitration for the purposes of arbitration initiated under the claimants' notice of arbitration dated 16-12-2010 shall be London, England. Furthermore, the judgment in *Videocon Industries* is subsequent to *Venture Global*. We are, therefore, bound by the ratio laid down in *Videocon Industries Ltd.*"

23. Explicating the concept of seat of arbitration, the Court observed:

> "51. ... "123. ... '... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy ... as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration'."

24. The Court, in the course of discussion, dealt with the principles set out in ***Dozco India Private Limited v. Doosan Infracore Company Limited***[12], ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd.***[13], ***Yograj Infrastructure Limited v. Ssang Yong Engineering and Construction Company Limited***[14] and ***Enercon (India) Ltd.*** (supra) and thereafter opined thus:

> "57. In our opinion, these observations in *Sulamerica Cia Nacional de Seguros SA* v. *Enesa Engelharia SA*[15] are fully applicable to the facts and circumstances of this case. The conclusion reached by the High Court would lead to the chaotic situation where the parties would be left rushing between India and England for redressal of their grievances. The provisions of Part I of the Arbitration Act, 1996 (Indian) are necessarily excluded; being wholly

12 (2011) 6 SCC 179
13 (1998) 1 SCC 305
14 (2011) 9 SCC 735
15 (2013) 1 WLR 102 : 2012 EWCA Civ 638 : 2012 WL 14764

> inconsistent with the arbitration agreement which provides 'that arbitration agreement shall be governed by English law'. Thus the remedy for the respondent to challenge any award rendered in the arbitration proceedings would lie under the relevant provisions contained in the Arbitration Act, 1996 of England and Wales. Whether or not such an application would now be entertained by the courts in England is not for us to examine, it would have to be examined by the court of competent jurisdiction in England."

25. It is patent from the law enunciated in the aforesaid decision is that stipulations in the agreement are required to be studiedly analysed and appropriately appreciated for the purpose of arriving at whether there is express or implied exclusion and further meaning of the term "seat of arbitration". The Court has also ruled that it is necessary to avoid inconsistency between the provisions in the agreement and Part I of the Act.

26. At this juncture, we may state that there are other subsequent authorities that have dealt with express or implied exclusion. There are also authorities which have declined to accept the stance of implied exclusion. We shall refer to the same at the subsequent stage when we shall refer to the Share Holders Agreement (SHA) and appreciate what interpretation needs to be placed on the Clause relating to arbitration. Prior to that we are disposed to think to address the issue as regards the approval of ***Shashoua*** principle in ***BALCO*** and the legal acceptability of the observations made by the two-Judge Bench in ***Enercon (India) Ltd.*** (supra) or it is *per incuriam*

as is proponed by the learned senior counsel for the respondents.

27. The Constitution Bench in ***BALCO*** has referred to the observations in ***Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Business Services Ltd.***[16] to lay down the principle that the observations made in the said case clearly demonstrate that the detailed examination which is required to be undertaken by the court is to discern from the agreement and surrounding circumstances the intention of the parties as to whether a particular place mentioned refers to the "venue" or "seat" of the arbitration. After dealing with the principles stated therein, it took note of the fact that the ratio laid down in ***Alfred McAlpine*** (supra) has been followed in ***Shashoua***. After stating the facts, it observed that the construction of the SHA between the parties had fallen for consideration in the said case. Be it noted, the larger Bench has reproduced few passages from ***Shashoua*** case. The analysis made by the Court in ***BALCO*** is as follows:

> "110. Examining the fact situation in the case, the Court observed as follows *(Shashoua case)* :
>
> > "The basis for the court's grant of an anti-suit injunction of the kind sought depended upon the seat of the arbitration. *An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause.* Not only was there agreement to the curial law of the seat, but also to the Courts of the seat having supervisory jurisdiction over the

16 2008 Bus LR D 137 (QBD) : 2008 EWHC 426 (TCC)

> arbitration, so that, by agreeing to the seat, *the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration.*
>
> Although, 'venue' was not synonymous with 'seat', in an arbitration clause which provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that 'the venue of arbitration shall be London, United Kingdom' did amount to the designation of a juridical seat……."

In Paragraph 54, it is further observed as follows *(Shashoua case)*:

> "There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that court, because it was best fitted to determine such issues under Indian Law. Whilst I found this idea attractive initially, we are persuaded that it would be wrong in principle to allow this and that *it would create undue practical problems in any event. On the basis of what I have already decided, England is the seat of the arbitration and since this carries with it something akin to an exclusive jurisdiction clause, as a matter of principle the foreign court should not decide matters which are for this court to decide in the context of an anti-suit injunction.*"
>
> [emphasis supplied]

In making the aforesaid observations in *(Shashoua case)*, the Court relied on judgments of the Court of Appeal in C v. D[17]."

28. The Constitution Bench analyzed the facts of ***C v. D*** (supra) which related to an order passed under the insurance policy which provided "any dispute arising under this policy shall be finally and

---

17 2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)

fully determined in London, England under the provisions of the English Arbitration Act, 1950 as amended" and that "this policy shall be governed by and construed in accordance with the internal laws of the State of New York…." (Bus LR p. 847, para 2). In the said case, a partial award was made in favour of the claimant. It was agreed that the partial award is, in England law terms, final as to what it decides and the defendant sought the tribunal's withdrawal of its findings. The defendant also intimated its intention to apply to a Federal Court applying the US Federal Arbitration Law governing the enforcement of arbitral award, which was said to permit "vacatur" of an award where arbitrators have manifestly disregarded the law. It was in consequence of such intimation that the claimant sought and obtained an interim anti-suit injunction. The learned Judge rejected the arguments to the effect that the choice of the law of New York as the proper law of the contract amounted to an agreement that the law of England should not apply to proceedings post award. He also rejected a further argument that the separate agreement to arbitrate contained in Condition V(*o*) of the policy was itself governed by New York Law so that proceedings could be instituted in New York. The learned Judge granted the claimant a final injunction. The Court of Appeal noted the submissions on behalf of the defendants and we think it appropriate to reproduce the same as they have been extracted in ***BALCO***:

> "112. … "14. The main submission of Mr Hirst for the defendant insurer was that the Judge had been wrong to hold that the arbitration agreement itself was governed by English law merely because the seat of the arbitration was London. He argued that the arbitration agreement itself was silent as to its proper law but that its proper law should follow the proper law of the contract as a whole, namely, New York law, rather than follow from the law of the seat of the arbitration, namely, England. The fact that the arbitration itself was governed by English procedural law did not mean that it followed that the arbitration agreement itself had to be governed by English law. The proper law of the arbitration agreement was that law with which the agreement had the most close and real connection; if the insurance policy was governed by New York law, the law with which the arbitration agreement had its closest and most real connection was the law of New York. It would then follow that, if New York law permitted a challenge for manifest disregard of the law, the court in England should not enjoin such a challenge.""

29. The finding of the Court of Appeal on the said submission which has been noted by the Constitution Bench is as under:

> "112. … "*16. I shall deal with Mr Hirst's arguments in due course but, in my judgment, they fail to grapple with the central point at issue which is whether or not, by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law*. In my view they must be taken to have so agreed for the reasons given by the Judge. The whole purpose of the balance achieved by the Bermuda Form (English arbitration but applying New York law to issues arising under the policy) is that judicial remedies in respect of the award should be those permitted by English law and only those so permitted. Mr Hirst could not say (and did not say) that English judicial remedies for lack of jurisdiction on procedural irregularities under Sections 67 and 68 of the Arbitration Act, 1996 were not permitted; he was reduced to saying that New York judicial remedies were *also* permitted. That, however, would be a recipe for litigation and (what is worse) confusion which cannot have been intended by the parties. No doubt New

> York law has its own judicial remedies for want of jurisdiction and serious irregularity but it could scarcely be supposed that a party aggrieved by one part of an award could proceed in one jurisdiction and a party aggrieved by another part of an award could proceed in another jurisdiction. Similarly, in the case of a single complaint about an award, it could not be supposed that the aggrieved party could complain in one jurisdiction and the satisfied party be entitled to ask the other jurisdiction to declare its satisfaction with the award. There would be a serious risk of parties rushing to get the first judgment or of conflicting decisions which the parties cannot have contemplated.
>
> *17. It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award.*"

30. Be it noted, on the facts of the case, the Court of Appeal held that the seat of the arbitration was in England and, accordingly, entertained the challenge to the award.

31. In ***Enercon (India) Ltd.*** (supra), a two-Judge Bench has observed thus:

> "143. Having said so, the High Court examines the question whether the English courts can exercise jurisdictions in support of arbitration between the parties, in view of London being the *venue* for the arbitration meetings. In answering the aforesaid question, the High Court proceeds on the basis that there is no agreement between the parties as regards the *seat* of the arbitration, having concluded in the earlier part of the judgment that the parties have intended the *seat* to be in India. This conclusion of the High Court is contrary to the observations made in *Shashoua* which have been approvingly quoted by this Court in *BALCO* in para 110. On the facts of the case, the Court held that the *seat* of the arbitration was in England and accordingly entertained the challenge to the award."

32. In ***Reliance Industries Limited***[10], a two-Judge Bench referred to the decision by the Court of Appeal in ***C v. D*** (supra) and opined that it has been specifically approved by the Constitution Bench in ***BALCO*** and reiterated in ***Enercon (India) Ltd.*** (supra). The Court reproduced the conclusions of the learned Judge who delivered the judgment in ***C v. D*** (supra).

33. In ***Enercon (India) Ltd.*** (supra), the Court referred to the decision in ***Shashoua*** where Cooke, J., analyzing the SHA, had opined:

> "26. The Shareholders Agreement provided that "the venue of arbitration shall be London, United Kingdom" whilst providing that the arbitration proceedings should be conducted in English in accordance with ICC Rules and that the governing law of the Shareholders Agreement itself would be the laws of India. It is accepted by both parties that the concept of the seat is one which is fundamental to the operation of the Arbitration Act and that the seat can be different from the venue in which arbitration hearings take place. It is certainly not unknown for hearings to take place in an arbitration in more than one jurisdiction for reasons of convenience of the parties or witnesses. The claimants submitted that in the ordinary way, however, if the arbitration agreement provided for a venue, that would constitute the seat. If a venue was named but there was to be a different juridical seat, it would be expected that the seat would also be specifically named. Notwithstanding the authorities cited by the defendant, I consider that there is great force in this. The defendant submits however that as "venue" is not synonymous with "seat", there is no designation of the seat of the arbitration by clause 14.4 and, in the absence of any designation, when regard is had to the parties' agreement and all the relevant circumstances, the juridical seat must be in India and the curial law must be Indian law.

27. In my judgment, in an arbitration clause which provides for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that the venue of the arbitration shall be London, United Kingdom does amount to the designation of a juridical seat. The parties have not simply provided for the location of hearings to be in London for the sake of convenience and there is indeed no suggestion that London would be convenient in itself, in the light of the governing law of the Shareholders Agreement, the nature and terms of that agreement and the nature of the disputes which were likely to arise and which did in fact arise (although the first claimant is resident in the UK)."

34. The learned Judge further observed:

"33. Whilst there is no material before me which would fully support an argument on estoppel, it is interesting to note that at an earlier stage of the history of this matter, the defendant had no difficulty in putting forward London as the seat of the arbitration. On 14th February 2006 the defendant's lawyers, when writing to the arbitral tribunal stated "the seat of the arbitration is London and the first respondent submits that the curial law of the arbitration is English law. That means the arbitration is governed by the Arbitration Act 1996". Further, when challenging the appointment of Mr Salve as an arbitrator, in its application to the ICC, the defendant said that "the fact that the present arbitration is an English seated ICC arbitration is undisputed. Accordingly ICC Rules shall be paramount in adjudicating the present challenge. Further, the curial seat of arbitration being London, settled propositions of English law shall also substantially impinge upon the matter. This position is taken without prejudice to the first respondent's declared contention that the law of the arbitration agreement is Indian law, as also that the substantive law governing the dispute is Indian law".

34. "London arbitration" is a well known phenomenon which is often chosen by foreign nationals with a different law, such as the law of New York, governing the substantive rights of the parties. This is because of the legislative framework and supervisory powers of the courts here which many parties are keen to adopt. When therefore

there is an express designation of the arbitration venue as London 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, to my mind, that London is the juridical seat and English law the curial law. In my judgment it is clear that either London has been designated by the parties to the arbitration agreement as the seat of the arbitration or, having regard to the parties' agreement and all the relevant circumstances, it is the seat to be determined in accordance with the final fall back provision of section 3 of the Arbitration Act."

And again:

"37. None of this has any application to the position as between England and India. The body of law which establishes that an agreement to the seat of an arbitration is akin to an exclusive jurisdiction clause remains good law. If the defendant is right, C v D would now have to be decided differently. Both the USA (with which C v D was concerned) and India are parties to the New York Convention, but the basis of the Convention, as explained in C v D, as applied in England in accordance with its own principles on the conflict of laws, is that the courts of the seat of arbitration are the only courts where the award can be challenged whilst, of course, under Article V of the Convention there are limited grounds upon which other contracting states can refuse to recognise or enforce the award once made.

x x x x x

39. In my judgment therefore there is nothing in the European Court decision in the Front Comor which impacts upon the law as developed in this country in relation to anti suit injunctions which prevent parties from pursuing proceedings in the courts of a country which is not a Member State of the European Community, whether on the basis of an exclusive jurisdiction clause, or an agreement to arbitrate (in accordance with the decision in the Angelic Grace [1995] 1 LLR 87) or the agreement of the parties to the supervisory powers of this court by agreeing London as the seat of the arbitration (in accordance with the decision in C v D)."

35. Coming back to ***Enercon (India) Ltd.*** (supra), the Court referred to the facts and quoted two passages and then adverted to the observations made by Cooke, J. and ruled:

> "128. In Shashoua case (supra), Cooke, J. concluded that London is the seat, since the phrase "venue of arbitration shall be London, U.K." was accompanied by the provision in the arbitration clause for arbitration to be conducted in accordance with the Rules of ICC in Paris (a supranational body of rules). It was also noted by Cooke, J. that "the parties have not simply provided for the location of hearings to be in London..."

36. Placing reliance on ***Reliance Industries Limited***[10] and ***Enercon (India) Ltd.*** (supra), submission of Mr. Rakesh Dwivedi, learned senior counsel for the appellants - Roger Shashoua and others, is that the Court has already returned a finding in their favour that the Courts in London, the seat of arbitration, will have jurisdiction and not the courts in India.

37. Mr. Chidambaram, learned senior counsel, in this regard contends that the interim order passed by the English Court in ***Shashoua*** is not binding on the respondent and is against the settled principles of law in India. According to him, the observations by the English Court holding that "When therefore there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supernational body of rules governing the arbitration and no other significant contrary

indicia, the inexorable conclusion is, to my mind, that London is the juridical seat and English law the curial law" is contrary to the principles stated in ***Bhatia International*** (supra). He has also pointed out that the view that "... in an arbitration clause which provides for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supernational body of rules), a provision that the venue of the arbitration shall be London, United Kingdom does amount to the designation of a juridical seat" is contrary to the Indian law. He further urged that the *lis* had arisen from an anti-suit injunction and the Court itself had observed that a mini trial would be required, and hence, the said ruling cannot be binding on the parties. Learned senior counsel would submit that the view expressed in ***Enercon (India) Ltd.*** (supra) that the opinion of Justice Cooke, who had simply followed the principles laid down in ***C v. D*** (supra), another anti-suit injunction matter, approvingly quoted by the Constitution Bench in ***BALCO*** is not correct and, therefore, conclusion of ***Enercon (India) Ltd.*** (supra) to that extent is *per incuriam*. For the aforesaid purpose, he has commended us to ***Sundeep Kumar Bafna v. State of Maharashtra and another***[18] and ***Fibre Boards Private Limited, Bangalore v. Commissioner of Income Tax, Bangalore***[19].

38. In ***Sundeep Kumar Bafna*** (supra), the Court referred to the

18 (2014) 16 SCC 623
19 (2015) 10 SCC 333

Constitution Bench decision in ***Union of India v. Raghubir Singh***[20] and ***Chandra Prakash v. State of U.P.***[21] and thereafter expressed its view thus:

> "19. It cannot be overemphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the *per incuriam* rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be *per incuriam* any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be *per incuriam* if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the *per incuriam* rule is strictly and correctly applicable to the *ratio decidendi* and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of *per incuriam*."

39. In ***Fibre Boards Private Limited, Bangalore*** (supra), the two-Judge Bench referred to a passage from G.P. Singh's Principles of Statutory Interpretation, 12th Edition and thereafter referred to the principles stated in ***State of Orissa v. M.A. Tulloch and Co.***[22] and ***Rayala Corporation (P) Ltd. v. Director of Enforcement***[23]. In the said case, the Court followed the principle stated in ***M.A. Tulloch*** (supra) and not the one enunciated in ***Rayala Corporation (P) Ltd.*** (supra). The submission of Mr. Chidambaram is that as the principle

---

20 (1989) 2 SCC 754
21 (2002) 4 SCC 234
22 (1964) 4 SCR 461 : AIR 1964 SC 1284
23 (1969) 2 SCC 412

laid down in ***Shashoua*** has really not been approved in ***BALCO*** and, therefore, the view expressed in ***Enercon (India) Ltd.*** to that extent deserves to be treated as *per incuriam*.

40. In this regard, we may usefully refer to the decision in ***State of U.P. v. Synthetics and Chemicals Ltd***.[24], wherein a two-Judge Bench of this Court held that one particular conclusion of a Bench of seven-Judges in ***Synthetics and Chemicals Ltd. and others v. State of U.P. and others***[25] as *per incuriam*. The two-Judge Bench in ***Synthetics and Chemicals Ltd.*** (supra) opined thus:

> "36. The High Court, in our view, was clearly in error in striking down the impugned provision which undoubtedly falls within the legislative competence of the State, being referable to Entry 54 of List II. We are firmly of the view that the decision of this Court in *Synthetics* (supra) is not an authority for the proposition canvassed by the assessee in challenging the provision. This Court has not, and could not have, intended to say that the Price Control Orders made by the Central Government under the IDR Act imposed a fetter on the legislative power of the State under Entry 54 of List II to levy taxes on the sale or purchase of goods. The reference to sales tax in paragraph 86 of that judgment was merely accidental or per incuriam and has, therefore, no effect on the impugned levy."

41. Be it noted, in ***Vikas Yadav v. State of Uttar Pradesh and others***[26] the Court has taken note of the aforesaid decisions and observed that it was not inclined to enter into the doctrine of precedents and the principle of *per incuriam* in the said case. That

---

24 (1991) 4 SCC 139
25 (1990) 1 SCC 109
26 (2016) 9 SCC 541

observation was made in the context of the said case. As far as the present controversy is concerned, we shall proceed to deal with the aspect whether principle stated in ***Shashoua*** which was based on the principle laid down in ***C v. D*** (supra) has really been accepted by this Court. If we arrive at an affirmative conclusion, the question of *per incuriam* would not arise. We may hasten to add that after such a deliberation, we shall also deal with the clauses in the agreement and scrutinize them whether the Courts in India will have jurisdiction or not and also address to the other contentions raised by the parties.

42. As stated earlier, in ***Shashoua*** Cooke, J., in the course of analysis, held that "London arbitration" is a well known phenomenon which is often chosen by foreign nationals with a different law, such as the law of New York, governing the substantive rights of the parties and it is because of the legislative framework and supervisory powers of the courts here which many parties are keen to adopt. The learned Judge has further held that when there is an express designation of the arbitration venue as London 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 London is the juridical seat and English law the curial law.

43. In ***BALCO*** the Constitution Bench referred to ***Shashoua*** and

reproduced certain paragraphs from the same. To appreciate the controversy from a proper perspective, we have already reproduced paragraph 54 of the said judgment which has succinctly stated the proposition.

44. It has to be borne in mind that the larger Bench gave emphasis on the aforesaid facts and further took note of the fact that the said judgment had relied upon ***C v. D*** (supra). Thereafter, as is manifest, the larger Bench has adverted to in detail the judgment in ***C v. D*** (supra). That apart, the Court has referred to ***Union of India v. McDonnell Douglas Corpn.***[27] and ***Naviera Amazonica Peruana S.A. v. Compania International de Seguros del Peru***[28] and concluded thus:

> "115. Upon consideration of the entire matter, it was observed in *SulameRica case*[29] that - "In these circumstances it is clear to me that the law with which the agreement to arbitrate has its closest and most real connection is the law of the seat of arbitration, namely, the law of England". (Para 14). It was thereafter concluded by the High Court that English Law is the proper law of the agreement to arbitrate. (Para 15)
>
> 116. The legal position that emerges from a conspectus of all the decisions, seems to be, that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings.
>
> 117. It would, therefore, follow that if the arbitration

27 (1993) 2 Lloyd's Rep 48
28 (1988) 1 Lloyd's Rep 116 (CA)
29 SulameRica CIA Nacional De Seguros SA v. Enesa Engenharia SA – Enesa, 2012 WL 14764 : 2012 EWHC 42 (Comm)

> agreement is found or held to provide for a seat / place of arbitration outside India, then the provision that the Arbitration Act, 1996 would govern the arbitration proceedings, would not make Part I of the Arbitration Act, 1996 applicable or enable Indian Courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the *English Procedural Law/ Curial Law*. This necessarily follows from the fact that Part I applies only to arbitrations having their seat / place in India."

45. In ***Enercon (India) Ltd.*** (supra), the Court addressed to the issue of "seat/place of arbitration" and "venue of arbitration" for the purpose of conferment of exclusive jurisdiction on the Court. The Court appreciated the point posing the question whether the use of the phrase "venue shall be in London" actually refers to designation of the seat of arbitration in London. The Court did not treat London as seat/place of arbitration. The Court referred to ***Naviera Amazonica*** (supra), ***Alfred McAlpine*** (supra) and ***C v. D*** (supra) and then opined:

> "123. The cases relied upon by Dr. Singhvi relate to the phrase "arbitration in London" or expressions similar thereto. The same cannot be equated with the term "venue of arbitration proceedings shall be in London." Arbitration in London can be understood to include venue as well as seat; but it would be rather stretching the imagination if "venue of arbitration shall be in London" could be understood as "seat of arbitration shall be London," in the absence of any other factor connecting the arbitration to London. In spite of Dr. Singhvi's seemingly attractive submission to convince us, we decline to entertain the notion that India would not be the natural forum for all

> remedies in relation to the disputes, having such a close and intimate connection with India. In contrast, London is described only as a venue which Dr. Singhvi says would be the natural forum.
>
> 124. In Shashoua, such an expression was understood as seat instead of venue, as the parties had agreed that the ICC Rules would apply to the arbitration proceedings. In Shashoua, the ratio in Naviera and Braes Doune has been followed. In this case, the Court was concerned with the construction of the shareholders' agreement between the parties, which provided that "the venue of the arbitration shall be London, United Kingdom". It provided that the arbitration proceedings should be conducted in English in accordance with the ICC Rules and that the governing law of the shareholders' agreement itself would be the law of India. …"

46. Proceeding further the Court approved the ***Shashoua's*** principle and referred to ***McDonnell Douglas Corpn.*** (supra) wherein the principles stated in ***Naviera Amazonica Peruana S.A.*** (supra) were reiterated. Construing the clauses in the agreement, the said authority has held:

> "On the contrary, for the reasons given, it seems to me that by their agreement the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law."

47. Further proceeding, the two-Judge Bench referred to ***Sulamerica Cia Nacional de Seguros SA*** (supra) wherein there has been reference to ***C v. D*** (supra) and further reproduced the observations from ***Sulamerica Cia Nacional de Seguros SA*** (supra)

which read thus:

> "In these circumstances it is clear to me that the law with which the agreement to arbitrate has its closest and most real connection is the law of the seat of arbitration, namely, the law of England"."

48. In the said case, the High Court had concluded that the English law is the appropriate law of the agreement to arbitrate. This Court did not accept the view of the High Court by holding thus:-

> "141. This conclusion is reiterated in para 46 in the following words: (*Enercon GmbH case*, Bom LR p. 3472)
>
> "*46*. The proposition that when a choice of a particular law is made, the said choice cannot be restricted to only a part of the Act or the substantive provision of that Act only. The choice is in respect of all the substantive and curial law provisions of the Act. The said proposition has been settled by judicial pronouncements in the recent past."
>
> 142. Having said so, the learned Judge further observes as follows: (*Enercon GmbH case*, p. 3474, para 49)
>
> "*49*. Though in terms of interpretation of Clause 18.3, this Court has reached a conclusion that the lex arbitri would be the Indian Arbitration Act. The question would be, whether the Indian courts would have exclusive jurisdiction. The nexus between the '*seat*' or the 'place' of arbitration vis-à-vis the procedural law i.e. the lex arbitri is well settled by the judicial pronouncements which have been referred to in the earlier part of this judgment. A useful reference could also be made to the learned authors Redfern and Hunter who have stated thus:
>
> 'the place or *seat* of the arbitration is not merely a matter of geography. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated….'
>
> The choice of *seat* also has the effect of conferring exclusive jurisdiction to the courts wherein the *seat* is situated." (emphasis supplied)
>
> Here the Bombay High Court accepts that the *seat* carries

> with it, usually, the notion of exercising jurisdiction of the courts where the *seat* is located."

49. After so stating, the two-Judge Bench proceeded to state that the conclusion of the High Court was contrary to the observations made in *Shashoua* which have been approvingly quoted by this Court in *BALCO* in para 110.

50. We had earlier extracted extensively from the said judgment, as we find, the Court after adverting to various aspects, has categorically held that the High Court had not followed ***Shashoua*** principle. The various decisions referred to in ***Enercon (India) Ltd.*** (supra), the analysis made and the propositions deduced leads to an indubitable conclusion that ***Shashoua*** principle has been accepted by ***Enercon (India) Ltd.*** (supra). It is also to be noted that in ***BALCO***, the Constitution Bench has not merely reproduced few paragraphs from ***Shashoua*** but has also referred to other decisions on which ***Shashoua*** has placed reliance upon. As we notice, there is analysis of earlier judgments, though it does not specifically state that "propositions laid down in ***Shashoua*** are accepted". On a clear reading, the ratio of the decision in ***BALCO***, in the ultimate eventuate, reflects that the ***Shashoua*** principle has been accepted and the two-Judge Bench in ***Enercon (India) Ltd.*** (supra), after succinctly analyzing it, has stated that the said principles have been accepted by the Constitution Bench. Therefore, we are unable to accept the

submission of Mr. Chidambaram that the finding recorded in ***Enercon (India) Ltd.*** (supra) that ***Shashoua*** principle has been accepted in ***BALCO*** should be declared as *per incuriam*.

51. At this juncture, we think it necessary to dwell upon the issue whether ***Shashoua*** principle is the *ratio decidendi* of ***BALCO*** and ***Enercon (India) Ltd.*** (supra) and we intend to do so for the sake of completeness. It is well settled in law that the *ratio decidendi* of each case has to be correctly understood. In ***Regional Manager v. Pawan Kumar Dubey***[30], a three-Judge Bench ruled:

> "7. … It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."

52. In ***Director of Settlements, A.P. and others v. M.R. Apparao and another*** [31], another three-Judge Bench, dealing with the concept whether a decision is "declared law", observed:

> "7. … But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. …"

---

30 (1976) 3 SCC 334
31 (2002) 4 SCC 638

53. In this context, a passage from ***Commissioner of Income Tax v. Sun Engineering Works (P) Ltd.***[32] would be absolutely apt:

> "39. ... It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. ..."

54. In this context, we recapitulate what the Court had said in ***Ambica Quarry Works v. State of Gujarat and others***[33]:

> "18. ... The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. (*See* Lord Halsbury in *Quinn* v. *Leathem*[34]). ..."

55. From the aforesaid authorities, it is quite vivid that a ratio of a judgment has the precedential value and it is obligatory on the part of the Court to cogitate on the judgment regard being had to the facts exposited therein and the context in which the questions had arisen and the law has been declared. It is also necessary to read the judgment in entirety and if any principle has been laid down, it has to

---

32 (1992) 4 SCC 363
33 (1987) 1 SCC 213
34 (1901) AC 495

be considered keeping in view the questions that arose for consideration in the case. One is not expected to pick up a word or a sentence from a judgment de hors from the context and understand the *ratio decidendi* which has the precedential value. That apart, the Court before whom an authority is cited is required to consider what has been decided therein but not what can be deduced by following a syllogistic process.

56. Tested on the aforesaid principle, we find that question that arose in ***BALCO*** and the discussion that has been made by the larger Bench relating to ***Shashoua*** and ***C v. D*** (supra) are squarely in the context of applicability of Part I or Part II of the Act. It will not be erroneous to say that the Constitution Bench has built the propositional pyramid on the basis or foundation of certain judgments and ***Shashoua*** and ***C v. D*** (supra) are two of them. It will be inappropriate to say that in ***Enercon (India) Ltd.*** (supra) the Court has cryptically observed that observations made in ***Shashoua*** have been approvingly quoted by the Court in ***BALCO*** in para 110. We are inclined to think, as we are obliged to, that ***Shashoua*** principle has been accepted in ***BALCO*** as well as ***Enercon (India) Ltd.*** (supra) on proper ratiocination and, therefore, the submission advanced on this score by Mr. Chidambaram, learned senior counsel for the respondent, is repelled.

57. It is submitted by the learned senior counsel for the respondent that even if the ***Shashoua*** principle is applicable, it arises from interim orders and Cooke, J. has himself observed that a mini trial would be necessary, therefore, the view expressed in an interim order and reasons assigned therefor are only tentative and cannot be treated as the *ratio decidendi*. For sustaining the said proposition, inspiration has been drawn from the authority in ***State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha***[35]. According to the learned senior counsel, in such a situation the judgment cannot bind the parties.

58. First we shall deal with principle laid down in the aforesaid authority. In the said case, the Court was dealing with the precedential value of the authorities in ***Kapila Hingorani (I)***[36] and ***Kapila Hingorani (II)***[37]. In that context, the Court said that a precedent is a judicial decision containing a principle, which forms an authoritative element termed as *ratio decidendi* and an interim order which does not finally and conclusively decide an issue cannot be a precedent. It further observed that any reasons assigned in support of such non-final interim order containing *prima facie* findings, are only tentative and any interim directions issued on the basis of such *prima facie* findings are temporary arrangements to preserve the

35 (2009) 5 SCC 694
36 *Kapila Hingorani v. State of Bihar*, (2003) 6 SCC 1
37 *Kapila Hingorani v. State of Bihar*, (2005) 2 SCC 262

status quo till the matter is finally decided, to ensure that the matter does not become either infructuous or a *fait accompli* before the final hearing. Dealing with the decisions in ***Kapila Hingorani (II)*** (supra), the Court opined that the observations and directions in said case were interim in nature based on tentative reasons, restricted to the peculiar facts of that case involving an extraordinary situation of human rights violation resulting in starvation deaths and suicides by reason of non-payment of salaries to the employees of a large number of public sector undertakings for several years, have no value as precedents. The Court further ruled that the interim directions were also clearly in exercise of extraordinary power under Article 142 of the Constitution and, therefore, it was not possible to read such tentative reasons, as final conclusions.

59. Thus, the analysis made in the said case, the two-Judge Bench has opined that a precedent is a judicial decision containing a principle which forms an authoritative element termed as *ratio decidendi* and any reasons assigned in support of such interim order containing *prima facie* findings are only tentative. There cannot be any quarrel over the aforesaid proposition of law. However, the controversy involved in this case has its distinctive characteristics. The Commercial Court in London, interpreting the same agreement adverted to earlier judgments (may be in anti-suit injunction) and held that in such a situation the Courts in London will have jurisdiction.

The analysis made therein, as has been stated earlier, has been appreciated in ***BALCO*** and ***Enercon (India) Ltd.*** (supra) and this Court has approved the principle set forth in the said case. Once this Court has accepted the principle, the principle governs as it holds the field and it becomes a binding precedent. To explicate, what has been stated in ***Shashoua*** as regards the determination of seat/place on one hand and venue on the other having been accepted by this Court, the conclusion in ***Shashoua*** cannot be avoided by the parties. It will be an anathema to law to conceive a situation where this Court is obligated to accept that the decisions in ***BALCO*** and ***Enercon (India) Ltd.*** (supra) which approve ***Shashoua*** principle are binding precedents, yet with some innate sense of creativity will dwell upon and pronounce, as canvassed by the learned senior counsel for the respondent, that inter-party dispute arose in the context of an anti-suit injunction and, therefore, the same having not attained finality, would not bind the parties. This will give rise to a total incompatible situation and certainly lead to violation of judicial discipline. We cannot conceive it to be permissible. Therefore, without any hesitation, we reject the said submission.

60. The other ground of attack is that the appellants had themselves approached the courts in India and, therefore, by their own conduct applicability of Part I has been accepted by the appellants and the right to raise the issue of jurisdiction has been waived.

61. Mr. Dwivedi, learned senior counsel appearing for the appellants submits that mere filing of an application under Section 34 of the Act will not clothe the court with the jurisdiction which it does not inherently have. It is his further submission that it is settled principle of law that consent cannot confer jurisdiction. He has commended us to the authorities in ***Videocon Industries Ltd.*** (supra), ***Kanwar Singh Saini v. High Court of Delhi***[38], ***Jagmittar Sain Bhagat v. Director, Health Services, Haryana,***[39], ***Zuari Cement Ltd. v. Regional Director, Employees' State Insurance Corporation***[40] and ***United Commercial Bank Ltd. v. Workmen***[41]. We have already reproduced paragraph 33 from the ***Videocon Industries Ltd.*** (supra) in a different context.

62. In ***Kanwar Singh Saini*** (supra), this Court has laid down that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes an order/or a decree having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the root of the cause. For the said purpose the two-Judge Bench has placed reliance upon ***United Commercial Bank Ltd.*** (supra), ***State of Gujarat v. Rajesh Kumar Chimanlal Barot***[42], ***Kesar Singh*** **v.**

---

38 (2012) 4 SCC 307
39 (2013) 10 SCC 136
40 (2015) 7 SCC 690
41 AIR 1951 SC 230
42 (1996) 5 SCC 477

Sadhu[43]**,** ***Kondiba Dagadu Kadam*** **v.** ***Savitribai Sopan Gujar***[44] and ***Collector of Central Excise, Kanpur*** **v.** ***Flock (India) Pvt. Ltd.***[45]

63. In ***Zuari Cement Ltd.*** (supra), the Court ruled that though the petitioner and the Corporation therein have subjected themselves to the ESI Court, the same could not confer jurisdiction upon the ESI Court to determine the question of exemption from the operation of the Act, for by consent, the parties cannot agree to vest jurisdiction in a court to try the dispute which the court does not possess.

64. In view of the aforesaid, there cannot be any trace of doubt that any filing of an application by the appellant in the courts in India can clothe such courts with jurisdiction unless the law vests the same in them.

65. Though we have opined that ***Shashoua*** principle has been accepted in ***BALCO*** and ***Enercon (India) Ltd.*** (supra), yet we think it apt to refer to the clauses in the agreement and scrutinize whether there is any scope to hold that the courts in India could have entertained the petition. Clause 14 of the shareholders agreement (SHA) refers to arbitration. The said clause reads thus:

> "14. ARBITRATION
>
> 14.1 .... Each party shall nominate one arbitrator and in the event of any difference between the two arbitrators, a third arbitrator/umpire shall be appointed. The arbitration

43 (1996) 7 SCC 711
44 (1999) 3 SCC 722
45 (2000) 6 SCC 650

proceedings shall be in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce Paris.

14.2 Proceedings in such arbitrations shall be conducted in the English language.

14.3 The arbitration award shall be substantiated in writing and shall be final and binding on the parties.

14.4 The venue of the arbitration shall be London, United Kingdom."

66. Clause 17.6 deals with governing law, which reads as follows:

"17.6 GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of India."

67. It is submitted by Mr. Dwivedi, learned senior counsel appearing for the appellants that the nature of the language employed in the aforesaid clauses clearly lay the postulate that the arbitration shall be carried only in London and the seat of arbitration shall be in London. Apart from relying upon the decision in ***Enercon (India) Ltd.*** (supra) for the said purpose, he has copiously referred to the Rules of Conciliation and Arbitration of the International Chambers of Commerce. *Per contra*, Mr. Chidambaram would submit that the arbitration agreement clearly lays down with regard to the venue and as has been held by this Court, venue cannot be equated with the seat/place of arbitration. As we perceive, the clause relating to the arbitration stipulates that the arbitral proceedings shall be in

accordance with the ICC Rules. There is a clause in the SHA that the governing law of SHA would be laws of India. The aforesaid agreement has already been interpreted by the English Courts to mean that the parties have not simply provided for the location of hearing to be in London.

68. It is worthy to note that the arbitration agreement is not silent as to what law and procedure is to be followed. On the contrary, Clause 14.1 lays down that the arbitration proceedings shall be in accordance with the Rules of Conciliation and Arbitration of the ICC. In ***Enercon (India) Ltd.*** (supra), the two-Judge Bench referring to ***Shashoua*** case accepted the view of Cooke, J. that the phrase "venue of arbitration shall be in London, UK" was accompanied by the provision in the arbitration clause or arbitration to be conducted in accordance with the Rules of ICC in Paris. The two-Judge Bench accepted the Rules of ICC, Paris which is supernational body of Rules as has been noted by Cooke, J. and that is how it has accepted that the parties have not simply provided for the location of hearings to be in London. To elaborate, the distinction between the venue and the seat remains. But when a Court finds there is prescription for venue and something else, it has to be adjudged on the facts of each case to determine the juridical seat. As in the instant case, the agreement in question has been interpreted and it has been held that London is not mentioned as the mere location but the courts in London will have the jurisdiction,

another interpretative perception as projected by the learned senior counsel is unacceptable.

69. Another aspect that was highlighted before us and with immense force and enthusiasm requires to be adverted to. It has been submitted that the arbitration agreement has the closest and most real connection with India and hence, the Courts in India would have the jurisdiction as per the principle laid down in ***Singer Company*** (supra). In the said case, it has been expressed thus:

"16. Where the parties have not expressly or impliedly selected the proper law, the courts impute an intention by applying the objective test to determine what the parties would have as just and reasonable persons intended as regards the applicable law had they applied their minds to the question.[46] The Judge has to determine the proper law for the parties in such circumstances by putting himself in the place of a "reasonable man". He has to determine the intention of the parties by asking himself how a just and reasonable person would have regarded the problem", *The Assunzione*[47]; *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.*[48]

> 17. For this purpose the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the courts having jurisdiction and such other links are examined by the courts to determine the system of law with which the transaction has its closest and most real connection."

And again:

46

47

48

> "44. It is important to recall that in the instant case the parties have expressly stated that the laws applicable to the contract would be the laws in force in India and that the courts of Delhi would have exclusive jurisdiction "in all matters arising under this contract". They have further stated that the "contract shall in all respects be construed and governed according to Indian laws". These words are wide enough to engulf every question arising under the contract including the disputes between the parties and the mode of settlement. It was in Delhi that the agreement was executed. The form of the agreement is closely related to the system of law in India. Various Indian enactments are specifically mentioned in the agreement as applicable to it in many respects. The contract is to be performed in India with the aid of Indian workmen whose conditions of service are regulated by Indian laws. One of the parties to the contract is a public sector undertaking. The contract has in every respect the closest and most real connection with the Indian system of law and it is by that law that the parties have expressly evinced their intention to be bound in all respects. The arbitration agreement is contained in one of the clauses of the contract, and not in a separate agreement. In the absence of any indication to the contrary, the governing law of the contract (i.e., in the words of Dicey, the proper law of the contract) being Indian law, it is that system of law which must necessarily govern matters concerning arbitration, although in certain respects the law of the place of arbitration may have its relevance in regard to procedural matters."

70. It is apposite to note that the said decision has been discussed at length in ***Union of India v. Reliance Industries Limited***[49]. The Court, in fact, reproduced the arbitration clause in ***Singer Company*** (supra) and referred to the analysis made in the judgment and noted that notwithstanding the award, it was a foreign award, since the substantive law of the contract was Indian law and the arbitration law was part of the contract, the arbitration clause would be governed by

---

49

Indian law and not by the Rules of International Chambers of Commerce. On that basis the Court held in ***Singer Company*** (supra) that the mere fact that the venue chosen by the ICC Court or conduct of the arbitration proceeding was London, does not exclude the operation of the Act which dealt with the domestic awards under the 1940 Act. The two-Judge Bench in ***Reliance Industries Limited***[49] quoted para 53 of ***Singer Company*** (supra) and thereafter opined:

> "13. It can be seen that this Court in *Singer case* did not give effect to the difference between the substantive law of the contract and the law that governed the arbitration. Therefore, since a construction of Section 9(*b*) of the Foreign Awards Act led to the aforesaid situation and led to the doctrine of concurrent jurisdiction, the 1996 Act, while enacting Section 9(*a*) of the repealed Foreign Awards Act, 1961, in Section 51 thereof, was careful enough to omit Section 9(*b*) of the 1961 Act which, as stated hereinabove, excluded the Foreign Awards Act from applying to any award made on arbitration agreements governed by the law of India.
>
> 14. This being the case, the theory of concurrent jurisdiction was expressly given a go-by with the dropping of Section 9(*b*) of the Foreign Awards Act, while enacting Part II of the Arbitration Act, 1996, which repealed all the three earlier laws and put the law of arbitration into one statute, albeit in four different parts."

71. We respectfully concur with the said view, for there is no reason to differ. Apart from that, we have already held that the agreement in question having been interpreted in a particular manner by the English courts and the said interpretation having gained acceptation by this Court, the inescapable conclusion is that the courts in India

have no jurisdiction.

72. In view of the aforesaid analysis, we allow the appeals and set aside the judgment of the High Court of Delhi that has held that courts in India have jurisdiction, and has also determined that Guatam Budh Nagar has no jurisdiction and the petition under Section 34 has to be filed before the Delhi High Court. Once the courts in India have no jurisdiction, the aforesaid conclusions are to be nullified and we so do. In the facts and circumstances of the case, there shall be no order as to costs.

.....J.
[Dipak Misra]

.....J.
[R. Banumathi]

New Delhi
July 04, 2017

ITEM NO.1501 COURT NO.2 SECTION XIV

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 2841-2843/2017

ROGER SHASHOUA & ORS. **Appellant(s)**

VERSUS

MUKESH SHARMA & ORS. **Respondent(s)**

Date : 04-07-2017 These appeals were called on for judgment today.

For Appellant(s) Ms. Mukti Chowdhary, AOR

For Respondent(s) Ms. Sneha Kalita, AOR

Hon'ble Mr. Justice Dipak Misra pronounced the judgment of the Bench consisting of His Lordship and Hon'ble Mrs. Justice R. Banumathi.

The appeals are allowed in terms of the signed reportable judgment. In the facts and circumstances of the case, there shall be no order as to costs.

(Gulshan Kumar Arora)
Court Master

(H.S. Parasher)
Court Master

(Signed reportable judgment is placed on the file)