

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****APPEAL (L) NO.112 OF 2016****IN****ARBITRATION PETITION NO.305 OF 2016****WITH****NOTICE OF MOTION (L) NO.774 OF 2016**

M/s. Prince Marine Transport Services Pvt. Ltd.,)
a company duly Registered under the Companies)
Act 1956, having its registered address at)
Roopam Building, 2nd Floor, 239,)
P'Dmello Road, Mumbai 400001.)...Applicant/Appellant
/Original Petitioner

Versus

M/s. Minescape Minerals Pvt. Ltd.)
a company duly registered under their Companies)
Act 1956, having its registered address at)
Minescape, M.G. Road, Panaji Goa – 403001.)...Respondent

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Mr. J.S. Kini, a/w. Ms. Dhvani Mehta, i/b. D.M. Law Chambers, for the Appellant.

Mr. Shiraz Rustomjee, a/w. Mr. Subodh Kurdukar, i/b. Kurdukar Associate, for the Respondent.

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**CORAM : ANOOP V. MOHTA &
S.C.GUPTE, JJ.**

15 MARCH 2016.

Oral Judgment (Per Anoop V. Mohta, J.) :

. This appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996 (Amendment Act, 2015) (with effect from 23

October 2015) by the Appellant/Original (Purchaser) Petitioner, as the learned Single Judge rejected Section 9 application filed by the Petitioner thereby refused to grant any protective order/injunction for short against the Respondent (Seller) from assigning, selling, transferring, alienating and/or creating third party rights, title or interest in respect of the two barges or parting with possession thereof in favour of any other person so described in **Exhibit M** to the petition.

2. The issue of jurisdiction, as stated to be raised specifically, however, not decided and dealt with on 25 February 2016 when Section 9 application was rejected finally. The Respondent applied for Speaking to Minutes. By order dated 2 March 2016, it is recorded as under :-

“5. Hence, the following line to be added in paragraph 6 in second last line i.e. after the word “arbitral tribunal”.

“The learned counsel for the Respondent also raised the objection about the maintainability of this petition before this court on the ground of jurisdiction. As the petitioner failed to pay the amount within stipulated time, I do not find any reason to entertain the said issue.” ”

The learned Judge has maintained the order on merit. We are not concerned with any ad-interim relief pending Section 9 Petition.

3. Admittedly, the issue of jurisdiction did not decide by the learned Judge. The requirement before passing order is that the “court”, as defined under Section 2(e) of (Arbitration Act), must be the “court” for passing any interim injunction or protective order under this Section. The term “court” is defined :

“2(1) In this Part, unless the context otherwise requires,-

(e) “Court means-

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of Courts subordinate to that High Court.

42. **Jurisdiction.**- 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. The Memorandum of Understanding (MOU) dated 15 January 2016 admittedly entered into at Panaji Goa which has an arbitration agreement also. The “subject matter”, the barges, are located at Senori at Bicholim Goa. The delivery as per agreement to be made at Senori at Navolim Goa. The payment also to be made by the Petitioner/Appellant though from Mumbai but to be in account at Goa. The Appellant/Petitioner is purchaser and the Respondent is seller. Admittedly,

time was made an essence of the contract.

5. Another requirement is that there must be an arbitration agreement before applying for any protective measures as contemplated under the Arbitration Act. The arbitration clause in the present matter is as under :

“17. Should any dispute be arise out of this memorandum of understanding, about the interpretation or about performance of these present, the matter of such dispute shall be settled mutually and amicably and only in the event such amicable settlement is not possible to arrive at, such issue shall be referred to an arbitrator of mutual standing, under the Indian Arbitration Act, 1996 and Amendments thereto.”

Admittedly, in the agreement there is no specific clause of court jurisdiction. There is also no fixed clause of “place or seat of arbitration”.

6. The Petitioner had received an e-mail dated 17 February 2016/ 22 February 2016 from the Respondent in Mumbai, as the Respondent terminated the MOU. The Appellant received the termination notice (e-mail) dated 17 February 2016 on 22 February 2016, in their Mumbai office. The Petitioner/Appellant, therefore, had filed the present petition on 24 February 2016, with specific averments about the jurisdiction as under :-

“19. The Petitioner states and submits that the Petitioner's office is at Mumbai and therefore this Hon'ble Court has jurisdiction to try and entertain the present Petition. Even otherwise, the cause of action has taken place in Mumbai as for the first time the Petitioner received an email dated 17 February 2016 r/w 22 February 2016 from the Respondent whereby the Respondent has wrongly threatened to cancel the MOU in Mumbai.

20. The Petitioner further submits that the termination notice dated 19th February and further termination notice issued on 22nd February 2016 was received by the Petitioner in their Mumbai Office. The substantial payment was made by the Petitioner to the Respondent from Mumbai.

21. The present Petition is well within the period of limitation and no part of cause of action is barred by the law of limitation.”

7. The learned Judge, after considering the rival submission of the parties based upon the material and the documents recorded the following finding :-

“6. On the other hand, the learned counsel for the respondent vehemently opposed the arbitration petition. He submits that as per the MOU dated 15/01/2016 the petitioner was supposed to make payment within stipulated time as stated hereinabove. He submits that time was made essence of the contract. He submits that considering the difficulties of the petitioner, they revised the schedule of payment by Email dated 11/02/2016. The petitioner by Email dated 12/02/2016 informed the respondent, that it is not possible for them to make the payment as per the revised schedule. Hence, the respondent, by their letter dated 17/02/2016 terminated the MOU. He submits that once the MOU is terminated by the respondent, there is no question of granting any injunction against the respondent. He submits that at the most, the petitioner can claim damages, if they are entitled, before the arbitral tribunal. Hence, there is no question of granting any relief in the petition.

7. Considering the submissions made by the learned counsel for the parties, it is to be noted that admittedly, the petitioner failed and neglected to pay the amount as per the MOU dated 15/01/2016 within stipulated time. Moreover, the petitioner, by their Email dated 11/02/2016 shown their inability to make the payment as per the revised schedule proposed by the respondent by their Email. Hence, the respondent terminated the MOU by letter dated 17/02/2016. Considering these facts,

I do not find any reason to pass any injunction order against the respondents.”

8. The Appellant, therefore, preferred this appeal and has raised various issues on merits and even on the aspect of Court's jurisdiction. The grounds are also raised that the learned Judge ought not to have decided the issue of jurisdiction in such fashion without giving the opportunity to the Appellant.

9. Both the Counsel submitted that the Appellate Bench as hearing finally the issue of jurisdiction and the merits of the matter be also, decided. Considering the scope and purpose of arbitration and in the fact and circumstances, as the Petitioner/Appellant, had filed present petition under Section 9, in spite of the above agreed clauses, mainly on the foundation of receipt of the termination notice/email and as the learned Judge, did not decide the issue of jurisdiction before passing the final order on merit, we have decided to hear this appeal on both counts. This is also in the background of the existing facts involved and based upon the agreements and averments so made in the petition.

10. Before considering the issue of jurisdiction the recorded clauses of arbitration agreement needs to be considered keeping in mind the amended provisions of the Arbitration Act, which is applicable to international and international arbitration matters and specifically Sections 2(e), 2(2), 9, 27, 34, 37(1)(b), 37(3) and 42. The Apex Court in the case of **State of West Bengal & Ors. v. Associated Contractors**¹, while dealing with the aspect of the mandate of Section 42 read with Sections 9, 11, 34

¹ (2015) 1 SCC 32

has reinforced the principles in following words :-

“25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.”

The Apex Court, while dealing with above aspects has taken note of the Constitution Bench judgment in **Bharat Aluminium Company v. Kaiser Aluminum Technical Services Inc. & Other matters (Balco)**².

11. This High Court (Coram: Anoop V. Mohta and G.S. Kulkarni, JJ) in **Anilkumar Phoolchand Sanghvi & Ors. v. Mr. Chandrakant P. Sanghvi & Ors.**³ based upon the above Supreme Court judgments on facts,

² (2012) 9 SCC 552

³Appeal (L) No.32 of 2016 dated 1 February 2016.

has recorded as under :-

“20. The scheme of Arbitration and the whole proceedings arising out of the same, depends upon the specific Arbitration agreement between the parties. The autonomy of the parties needs to be respected by all at every stage. The provisions of the Code of Civil Procedure (for short, “the CPC”) are not specifically made and/or applicable to the Arbitration proceedings. The parties are permitted, apart from selection of their own Arbitrator, to decide the procedure to deal with the Arbitration before the Tribunal. The various procedures and stages are prescribed for the parties to agree.

23. The “subject matter of the arbitration” as provided under Section 2(1)(e) gives jurisdiction to the Court, where the Arbitration takes place, which otherwise may not exist. The “subject matter of Arbitration” therefore, includes “the agreed process of resolution”. In the present case to resolve the family disputes between the parties/brothers/ family members including their companies at Pune, which would be subject to supervisory control of the Court. This also means that the Arbitration proceedings would be in the agreed place and/or location. This also means that the importance is to be given to the “subject matter of Arbitration” and not only to the “venue”. Therefore, the Court, where the Arbitration took place, would be required to exercise the supervisory control over the Arbitration process and the Tribunal. In Balco, it is also made clear that the Arbitration Act is subject matter Centric and not exclusively seat-centric. (para 95).

27. It is relevant to note the observation of the Supreme Court in Balco (Supra) in this background, with regard to the “subject matter of Arbitration” and the “subject matter of the Suit”.

“96.

We are of the opinion, the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court

which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy.”

34. The Supreme Court Judgment so read and referred by the 15 2012 (6) Mh.L.J. 931 learned counsel appearing for the Appellants on the aspects of part of cause of action referring to the provisions of CPC and the Letters Patent Act, are distinguishable on the facts itself. As observed in Sumer Builders (Supra), the Court is required to consider the facts and circumstances and the averments so made in the leave Petition and Application under Section 9, apart from the FSA between the parties. Those judgments are of no assistance.

35. Importantly, we cannot overlook the provisions of Section 42 of the CPC which is mandatory to the extent that once an application/petition is filed in the Competent Court, having jurisdiction, and if it is tried and entered, all subsequent Applications required to be filed in the same Court. Considering the provisions of section 2(1)(e) and the meaning of a “Court” and also mandate of Section 42, if Section 9 Petition so filed by the Petitioners is entertained at Mumbai, all subsequent Applications arising out of the Arbitration proceedings including of Sections 14, 34, 36, 37, 39(2), 42 and 43 would not lie in any other Court including, Pune Court, though there is no clause of exclusive Court jurisdiction and/or no specific clause of seat of Arbitration fixed, but merely because two “venues” are fixed by the Arbitral Tribunal, out of which one is Mumbai.

36. Section 20 of the CPC and/or the jurisdiction of the Civil Court, is different from the jurisdiction of the High Court under Clause XII of the Letters Patent Act. Section 20 of the CPC itself provides that Sections 16, 17 and 20 of the CPC are not applicable to the proceedings under the Letters Patent Act.

37 The subject matter of the Suit and the subject matter of Arbitration are distinct as reinforced even by the Supreme Court in Balco (Supra) therefore, at the time of considering to grant leave in Arbitration proceedings and/or the Petitions/Application, the Court is required to consider the purpose and object of Arbitration Act and its specific scheme including the power of the parties to appoint the Arbitrator of

their choice, place of Arbitration, specific Court for jurisdiction, out of the choices/Courts available and the scheme of Section 42 of the Arbitration Act, apart from scope and power of "Court" as provided under Section 2(1)(e) of the Arbitration Act. The admitted position on record is already recorded above, as basic cause of action even if entered into MOU/FSA arise at Pune and so also the dispute which needs to be resolved through the Arbitrator at the places of parties residence and their companies place of carrying business at Pune. The averments so made by the Petitioners and even otherwise considering the prayers so raised/made basically for and against the Directors and the company and its shares and incidentally prayers are also made for injunction for immovable property referring to two offices at Mumbai. The basic immovable properties, as noted, are at Pune and some other places, also including stated offices at Mumbai. In totality, this Petition under Section 9 and/or the main dispute between the parties is not of land or property. The injunction/reliefs only sought against the properties. The main reliefs are against the family members Directors and the Companies. Therefore, the grant of leave itself in the background apart from maintainability of such leave application for Arbitration Petition is rightly revoked. Mere part of cause of action therefore, as stated and based upon the meetings held by the Arbitrator for the convenience of the parties, at Mumbai and merely because some investments have been made through the Mumbai based company, that itself in our view, also not sufficient to accept the case in such Arbitration proceedings referring to the subject matter of Arbitration.

46. The objection therefore, so raised goes to the root of the matter and as if once such application under Section 9 is entertained, all other applications even of Application under Section 34 required to be filed in at Mumbai, irrespective of hearing and/or the conclusion of Arbitration proceedings by the Arbitrator by passing the award, at Pune or any other place. This is in the background that there is no agreed place and/or seat so fixed by the parties, to be at Mumbai and/or at Pune. No specific jurisdiction of Court at Mumbai, is agreed by and between the parties. The mandatory effect of Section 42, in our view is also important factor while deciding and/or before granting leave under Clause 12 of the Letter Patent Act. The objection, therefore, so raised and the impugned order so passed, based upon the facts and circumstances, therefore, in our view, there is no perversity and/or illegality.

49. The Arbitration agreements between the parties and the circumstances lead to signing of such agreement need to be kept in mind, even before granting *ex parte* leave or revocation such leave. Once Section 9 Application is entertained at Mumbai, it would automatically “fixed the place/ seat of arbitration” at Mumbai and so also the “Court” for all the future purpose, though not specifically agreed.”

12. Here, admittedly, there was no issue about the leave as contemplated under the provisions of the Bombay High Court (Letters Patent) Act, 1866. The leave or no leave but we are definitely concerned with the requirement of the “court” under Section 9 of the Arbitration Act, to decide the jurisdiction issue before passing any interim injunction or protective order. The “Court” has jurisdiction to pass any order based upon the agreement between the parties, but considering the scheme and object of the arbitration Act including the mandate of Section 42 read with other provisions. The effect of entertaining Section 9 petition by the “Court”, is that the court's jurisdiction get crystallised so far as the future and/or the subsequent court litigation/application/petition, which need to be filed by any of the aggrieved parties. Because that will be the “court” for all the purposes as per the mandate of Section 42. But situation where there are some issues and where parties have not agreed for any jurisdiction and/or where place of arbitration is unclear then it is necessary to resolve the same, at the earliest, before deciding finally Section 9 application, by the “court”.

13. In the present case, the learned Judge has disposed of the petition finally on 25 February 2015 itself. In a given case the Court before deciding Section 9 application, if situation comes and/or case is made out,

may pass an ad-interim order pending the decision of Section 9. The issue of jurisdiction still require to be considered before deciding Section 9 application finally. In the present case, we have noted that all these important ingredients are missing. The jurisdiction issue remained untouched. The result of this, is that hereinafter, having once entertained Section 9 application, in this “Court”, all the future application/petition needs to be filed by any of the parties in this Court at Mumbai only. The mandate of Section 42 as recognized even by the Supreme Court, if decides the future fate of arbitration proceeding so far as the “Court” is concerned, though parties have for reason known or for unknown not decided the specific court’s jurisdiction at least by the appellate court. Therefore, it is also necessary to consider as the learned Senior Counsel appearing for the Respondent is not agreeing to the jurisdiction of this Court as the specific jurisdiction objection was raised but not decided by the learned Judge.

14. The Petitioner had filed Section 9 petition on the foundation that the part of cause of action so recorded in quoted paragraphs. If we conclude the issue on merits only without deciding the issue of jurisdiction this itself means we are deciding and holding that in view of Section 42 and for all the future purposes this Court at Mumbai has jurisdiction in this arbitration proceedings. This is an unacceptable position as the parties never agreed for the same. The Court cannot compel the parties to proceed hereinafter in the Court where the Court's jurisdiction as contemplated under Section 2(e) to “court” was never agreed upon.

15. The Court's jurisdiction so provided is under the arbitration Act always with intention to have a supervision over the arbitration tribunal

which is constituted and/or which will be constituted to resolve the dispute around the subject matter of the disputes between the parties. The termination notice is not the subject matter of the arbitration though received at Mumbai. It was just an intimation given and received by the Petitioner. The aggrieved party, may or may not challenge and/or invoke the arbitration clause after receipt of such termination notice. It also follows that while invoking arbitration and after appointment of arbitrator tribunal, the party may fix even venues for arbitration proceedings. In this case, there is nothing on record to show the same. Therefore, what remains is to consider on the record the agreement between the parties and the paragraphs of jurisdiction so reproduced.

16. In **Balco** (supra), the Apex Court after considering the various Supreme Court judgments has recorded in para 182 as under :-

“A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. The Arbitration Petition so far was only for injunction when main arbitration proceeding not yet invoked and/or commenced and specifically when there is no such agreed clause. The parties still can aggrieve for place of jurisdiction and/or court of jurisdiction but at present in the fact and circumstances and as we are dealing with a domestic arbitration filing. The injunction so sought based upon the alleged particular cause of action therefore is not sufficient to entertain such petition in this Court at Mumbai. ”

(emphasis added.)

17. The clauses and the agreements entered into between the parties are at Goa. The basic “subject matter” of the agreement - two

barges, are at present situated at Goa. The other clauses show that the parties have agreed to act upon the agreement, at the address so given for the communications. Therefore, the substantial part of cause of action for the purpose of Arbitration proceeding or the future proceedings, is at Goa. Merely because the Petitioner has received these communications, that itself shall not give rise to cause for invoking Section 9 arbitration petition, and to proceed to claim the injunctive reliefs in the “Court” which has no jurisdiction, within the purview of arbitration Act. This is in the background, considering the scope and purpose of arbitration and future arbitration proceedings, to be initiated within the control and/or supervision of “the court”, where subject matter lies. In the present case, definitely, it is in Goa. Receipt of communication of termination and/or communication even if any, as it is agreed between the parties as mentioned in the agreement itself, referring to the seller's and/or purchaser's address, that itself is not sufficient reason to hold that this Court is a “court” as contemplated under Section 2(e) and 9 or 42 of Arbitration Act. Therefore, we are inclined to observe that this Court at Mumbai has no jurisdiction to entertain Section 9 petition in the present fact and circumstances of the case.

18. What remains is the merits of the matter that the learned Judge after considering the rival contentions has adjudicated. It is settled that the decision or observations, even if made on merits, in Section 9 application, at this stage when even the arbitration tribunal is not yet constituted, are only a prima facie view. The merits of their submissions if any and the effect of the claim and of the counter-claim, arising out of the disputes, ultimately has to be adjudicated by the arbitrator tribunal finally.

The observations on merit even if are so made therefore, anyway, are not conclusive for all the purposes. However, the issue of court jurisdiction is decided by this judgment. As noted in the present case, both the Counsel submitted that this appellate Court to decide the issue of jurisdiction based upon the material available on record. We have decided the same.

19. So far as the merit is concerned, after hearing parties and after going through the documents and the pleadings referred, we see there is no perversity and/or illegality in the order on merits. The fact of termination of contract cannot be restored back in this Section 9 application. No timely payment made. The time was the essence. No premium can be granted to appellant for its own wrong. The termination, whether illegal and/or legal, has to be decided in accordance with law by the arbitral tribunal, if so constituted. It is required to be constituted within sixteen days from the passing of order under Section 9 under the Arbitration (Amendment Act) 2015. No case is made for any interference on merit.

20. Thus, this Court on its Original Side has no jurisdiction to entertain Section 9 petition filed by the appellant/petitioner. The impugned order on merits also needs no interference. The observations, even if any, under Section 9 and/or confirmed by this Court in this appeal on merit, will not influence the Arbitral Tribunal to decide the merits of the claim or counter claim, if any, on all other grounds. The appeal is, accordingly, dismissed. No costs.

Per S.C. Gupte, J. :

21. Though I am in respectful agreement with the conclusion of

the appeal, that the appeal should be dismissed, my reasons for the same are entirely different and which I have indicated separately below.

22. The Respondent is the owner of two barges. By a Memorandum of Understanding dated 15 January 2016, these barges were agreed to be sold to the Appellant for a sum of Rs.4 crores. The entire price was to be paid before 15 February 2016. The Memorandum stipulated that if the price was not paid by that date, the agreement for sale would be cancelled, in which event the seller would be free to sell the barges to any other party of its choice. The only obligation of the seller in that case would be to return the advance payment made by the buyer without interest. The Memorandum contained an arbitration clause. By 10 February 2016, the Appellant had paid only a sum of Rs.70 lacs from out of the total consideration of Rs.4 crores. By its mail dated 10 February 2016, the Appellant requested for extension of time for making the balance payment, offering to complete the balance payment in instalments, the last of which by 15 March 2016. By its mail dated 11 February 2016, the Respondent communicated its unwillingness to accept the proposed revision of payment schedule and instead offered to accept a revised schedule with last instalment payable before 29 February 2016. By its mail of the following day, i.e. 12 February 2016, the Appellant expressed difficulty in making final payment by 29 February 2016 and requested the Respondent to consider the final date of payment as 10 March 2016. The Respondent did not agree to this revision and by its communication of 17 February 2016 informed the Appellant that the Memorandum of Understanding stood rescinded and cancelled. As a result of this cancellation, disputes arose between the parties. Pending invocation of the arbitration agreement,

the Appellant applied for interim relief in respect of the two barges (restraining the Respondent from creating third party rights) under Section 9 of the Arbitration and Conciliation Act, 1996 ("Act") by way of the present arbitration petition. The petition was opposed by the Respondent on the ground of lack of jurisdiction on the part of this Court as well as on merits. By the impugned order the learned Single Judge rejected the petition, finding no fault with the Respondent's termination letter dated 17 February 2016. The learned Single Judge noted that the Appellant admittedly failed to pay the amount by the stipulated date and even expressed its inability to make payment as per the revised schedule proposed by the Respondent. The learned Judge, in other words, rejected the petition on merits. The objection of want of jurisdiction was not considered by the learned Judge, since he was against the Appellant on merits.

23. There is no error in the impugned order so far as appreciation of merits of the Appellant's case is concerned. The mails of 10 February 2016 and 11 February 2016 are in the nature of a proposal and counter-proposal, respectively, for novation of the contract. Since the Respondent's counter-proposal of 11 February 2016 was, in terms, not accepted by the Appellant in its reply mail of 12 February 2016, no novation resulted. The original contract of 15 January 2016, which stipulated payment by 15 February 2016, thus, *prima facie* held the field. If the payment did not come by that date, the Respondent was *prima facie* justified in treating the contract as rescinded and cancelled. The Appellant's case for specific performance of the agreement for sale, thus, does not have any *prima facie* merits and the interim injunction was, in the premises, rightly refused by

the learned Single Judge.

24. We could have simply rejected the appeal on this ground, but my brother, Mohta J, is of the view that the issue of jurisdiction ought to be decided finally when an objection is raised to the jurisdiction of the Court to decide the application for interim relief under Section 9 of the Act. Both Counsel, in the premises, addressed us on the issue of jurisdiction. My brother, Mohta J, has in his judgment accepted the Respondent's contention that this Court has no jurisdiction to decide the arbitration petition. I am respectfully unable to agree either (i) that, as a matter of law, the issue of jurisdiction needs to be finally decided by the Court before a petition under Section 9 is rejected by the Court or (ii) that the issue of jurisdiction, in the present case, ought to be decided against the Appellant.

25. When, pending invocation of an arbitration agreement or pending an arbitration reference, an application for interlocutory reliefs made to the 'Court' is opposed on the grounds that the Court is not a 'Court' within the meaning of Section 2(1)(e) of the Act, or in other words, the Court lacks jurisdiction and also on merits and if the Court agrees with the respondent that the application lacks merits, there is no reason why the issue of jurisdiction should be finally decided by the Court. After all, even if the issue were to be decided in favour of the petitioner, the court would still decide the matter against him, being convinced that the interlocutory application lacked merits. It would be another matter if the Court were to grant the petitioner's application for interim relief, in which case it would necessarily have to decide the issue of jurisdiction raised by the Respondent. The reason which has weighed with my brother, Mohta J, to

hold otherwise is that under the scheme of the Act, particularly having regard to Section 42 thereof, once an application is entertained by a particular Court under Section 9, the jurisdiction of that Court gets fixed insofar as all future applications from the arbitration reference are concerned; and that therefore, it is imperative that the issue of jurisdiction is finally decided so as to avoid the Court being fastened with jurisdiction which it does not possess.

26. Section 42 of the Act reads as follows :

“42. Jurisdiction.- 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.”

It is apparent from a bare reading of Section 42 that the application under Part I referred to therein, for the purposes of applying the mandate of Section 42, must be made to a 'Court', that is to say, to a Court defined under Section 2(1)(e) of the Act. If it is not made to such 'Court' but to another Court, there is no question of that other Court exercising exclusive jurisdiction over the arbitral proceedings or all subsequent applications arising out of the arbitration agreement or the arbitral proceedings.

27. After all Section 42 makes the exclusive jurisdiction of the

Court for entertaining subsequent applications depend on the simple fact of one of the parties having applied to that Court under Part I. There may be cases where the party may have applied, but such application may not have been decided by that Court. It may also be that in a given case, the objection to jurisdiction is not raised by the opponent and as a result, the Court ends up entertaining the application. In such cases, there is no question of fastening exclusive jurisdiction on that Court unless that Court is a 'Court' within the meaning of Section 2(1)(e). To this category of cases belongs a case where an objection to jurisdiction is raised by the opponent, but the Court does not deem it necessary to decide the same since it is in any event not inclined to entertain the application. There is no warrant in law to then treat that Court as a Court of exclusive jurisdiction within the meaning of Section 42.

28. Our Court in the case of **Oil and Natural Gas Corporation Ltd. vs. Jagson International Ltd.**⁴ held that in order to invoke the bar under Section 42, the first application must be a 'competent application'. Whether or not a particular Court is a court of competent jurisdiction is a matter of law. Merely because the Court entertains an application, it cannot be said to possess jurisdiction to do so. In the present case, this Court actually rejected the application, though on merits and not on lack of jurisdiction, in which case there is no warrant for holding that this Court may be treated as a court of competent jurisdiction within the meaning of Section 2(1)(e) of the Act, or that it has even applied its mind to the issue of jurisdiction.

4 AIR 2005 BOMBAY 355

29. A similar question arose before the Supreme Court in the case of **Guru Nanak Foundation vs. Rattan Singh & Sons**.⁵ That was a case involving Section 31(4) of the 1940 Act. Section 31(4) of the 1940 Act reads as follows.

“31(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference, and the arbitration proceedings shall be made in that Court and in no other Court.”

Analysing this provision, the Court held as follows :

"It opens with a non-obstante clause and is comprehensive in character. The non-obstante clause excludes anything anywhere contained in the whole Act or in any other law for the time being in force if it is contrary to or inconsistent with the substantive provision contained in sub-section (4). To that extent it carves out an exception to the general question of jurisdiction of the court in which Award may be filed elsewhere provided in the Act in respect of the proceedings referred to in sub-section (4). The provision contained in sub-section (4) will have an overriding effect in relation to the filing of the Award if the conditions therein prescribed are satisfied. If those conditions are satisfied the court other than the one envisaged in Section 14(2) or Section 31(1) will be the court in which Award will have to be filed. That is the effect of the non-obstante clause in sub-section (4) of Section 31. Sub-section (4) thus invests exclusive

5 (1981) 4 SCC 634

jurisdiction in the court, to which an application has been made in any reference **and which that court is competent to entertain as the court having jurisdiction over the arbitration proceedings** and all subsequent applications arising out of reference and the arbitration proceedings shall have to be made in that court and in no other court. Thus sub-section (4) not only confers exclusive jurisdiction on the court to which an application is made in any reference but simultaneously ousts the jurisdiction of any other court which may as well have jurisdiction in this behalf. To illustrate the point, if an Award was required to be filed under Section 14(2) read with Section 31(1) in any particular court as being the court in which a suit touching the subject-matter of Award would have been required to be filed, but if any application in the reference under the Act has been filed in some other court **which was competent to entertain that application**, then to the exclusion of the first mentioned court the latter court alone, in view of the overriding effect of the provision contained in Section 31(4), will have jurisdiction to entertain the Award and the Award will have to be filed in that court alone and no other court will have jurisdiction to entertain the same." (Emphasis supplied.)

30. To the same effect, are the observations of Delhi High Court in the case of **Apparel Export Promotion Council vs. Prabhati Patni**⁶

“ A reading of Section 42 makes it clear that it is a non-obstante provision and that it indicates that if any application is submitted under Part I (which includes an application under Section 34) in a court, then that court alone would have jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement and the arbitral proceedings shall be made in that court and in no other court. Mr

6 (2005)) Supreme (Del) 1058

Rawal has construed this provision to mean that since the petitioner had filed his objections under Section 34 first in this Court and the respondent had thereafter filed its objections in the Court at Jaipur, this Court and this Court alone would have jurisdiction and the Court at Jaipur, notwithstanding anything contained elsewhere or in any other law for the time being in force, would not have jurisdiction. I am unable to agree with this submission of Mr Rawal. The primary reason being that Section 42 also uses the word 'court' which has to be construed in terms of the definition in Section 2(e). This court (i.e., Delhi High Court), clearly, is not the 'court', in the facts of the present case, which is referred to in Section 2(e) of the said Act. Therefore, the mere filing of the petition under Section 34 in this Court would not clothe this Court with jurisdiction in respect of the disputes between the parties for all times to come. Mere filing of the objections under Section 34 in a wrong Court would not clothe that Court with jurisdiction. This court does not otherwise have jurisdiction as indicated above and, therefore, the mere fact that the petition under Section 34 has been filed here would not confer jurisdiction on this Court.”

31. For all these reasons, I am of the view that there is no need for the Court to decide the issue of jurisdiction as a matter of law before rejecting an application under Section 9. The mere fact that this Court has entertained an arbitration petition under Section 9, though only to reject it, does not fix the exclusive jurisdiction of this Court and there is no prejudice caused to the principle of party autonomy thereby.

32. That brings us to the question, whether or not this Court has jurisdiction to entertain the petition under Section 9 of the Act. Section 2(1)(e) of the Act defines a 'Court' for deciding the questions forming the subject matter of the arbitration. The definition is as follows :

“2(1)(e) "Court" means in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes.”

This definition has been considered by the Supreme Court in a number of cases. Plainly what the definition says is that the Court having jurisdiction under the Act is the Court having jurisdiction to determine questions forming the subject-matter of the reference if the same had arisen in a suit. The test is to see what is the subject matter of the reference and then consider which Court could entertain the suit had that subject matter been the subject matter of a suit.

33. There is one more Court which comes within the definition of 'Court' under Section 2(1)(e) and that is the Court where the arbitration takes place, that is to say, the Court of the seat of arbitration, which has supervisory control over the arbitral process. This latter Court also has jurisdiction over the subject matter of arbitration. The Supreme Court in **Bharat Aluminum Company vs. Kaiser Aluminum Technical Services Inc.** explained the matter thus :

“We are of the opinion, the term “subject-matter of the arbitration” cannot be confused with “subject-matter of the suit”. The term “subject-matter” in Section 2(1)(e) is

confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisor control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.”

34. As held by the Supreme Court in **Jindal Vijayanagar Steel**

(JSW Steel Ltd.) vs. Jindal Praxair Oxygen Co.Ltd.⁷, insofar as the original civil jurisdiction of this Court is concerned, only the provisions of Clause 12 of the Letters Patent are required to be considered and the provisions of Section 20 of CPC have no application. Under Clause 12, this Court has jurisdiction over a subject matter if the defendant, or each of the defendants where there are more than one, resides or carries on business or the cause of action arises fully, or, in the case of a leave being granted under that clause, partly, within the local area of its jurisdiction. At the same time, so far as applications under the Act are concerned, the same, not being suits, do not require leave under Clause 12. This position was clarified by our Court in the case of **Harishankar Singhania vs. Gaur Hari singhanian**⁸, and later in the case of **National Community and Derivative Exchange Ltd. Indian Exchange of Metal Ltd.**⁹

35. An upshot of the above discussion is that this Court would have jurisdiction over an application under the Act, if the Respondent resides or carries on business, or the cause of action arises, whether fully or partly, within the local limits of its jurisdiction, or if the seat of arbitration is within its jurisdiction.

36. The Petitioner has approached this Court with the present arbitration petition on the ground that a part of cause of action has arisen within its jurisdiction. A cause of action is a bundle of facts which taken with law applicable to them gives the plaintiff a right to relief against the defendant (See **State of Rajasthan vs. M/s. Swastika Properties**¹⁰). It

⁷ (2006) 11 SCC 521

⁸ (1997) 1 Mah.L.J. 9

⁹ 2012(6)L.J. Soft 366

¹⁰ (1985) 3 SCC 217

includes every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court (**Mulla's Code of Civil Procedure, - 7th Edition, P. 454**). The fact alleged in the petition is that the Respondent (illegally) terminated the agreement for sale contained in the Memorandum of Understanding. This fact, if traversed, is necessary for the Petitioner to prove, whenever it approaches the Court in a suit for breach of contract, whether for claiming specific performance or for damages. The place where the contract is terminated by the Respondent is, thus, a place of accrual of a part of the cause of action. The communication of the Respondent terminating the contract or treating it as rescinded or cancelled is admittedly addressed to the Petitioner in Mumbai. A part of the cause of action has, thus, arisen in Mumbai. In that case, this Court would undoubtedly have jurisdiction to entertain the suit had the grievance of the Petitioner been the subject matter of a suit. This Court, thus, is a 'Court' within the meaning of Section 2(1)(e).

37. Accordingly, I hold that this Court has jurisdiction to entertain and decide the arbitration petition from which the present appeal arises.

38. Though this Court has the jurisdiction, as we have found the impugned order to be sustainable on merits, the appeal ought to be dismissed. It is ordered accordingly.

39. **Resulting Order :**

(1) Appeal is dismissed. No costs.

(2) For the reasons so recorded, the request to continue the interim statement so recorded by this Court is not accepted. It is rejected.

(3) In view of the dismissal of the appeal, nothing survives in the Notice of Motion and the same is also dismissed.

(S.C. Gupte, J.)

(Anoop V. Mohta, J.)