

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on May 03, 2016

Judgment delivered on May 12, 2016

+ O.M.P.(I) (COMM.) 164/2016, IAs 5473-5474/2016

PRIYA HIRANANDANI VANDREVALA

..... Petitioner

Through: Dr.Abhishek Manu Singhvi,
Mr. Rajiv Nayar & Mr.
Sandeep Sethi, Sr. Advs. with
Ms. Ruby Singh Ahuja, Mr.
Aman Ahluwalia,
Mr. Akhil Sibal, Mr. Jatin
Mongia, Ms. Suman Yadav,
Ms. Fesha Mohapatra and
Mr. Karan Dev Chopra,
Advs.

versus

NIRANJAN HIRANANDANI & ANR.

..... Respondents

Through: Mr. Dushyant Dave and Mr.
A.S. Chandhiok, Sr. Advs.
with Mr. Rishi Agrawala, Mr.
Karan Luthra, Ms. Sadapurna
Mukherjee, Mr. Sumit Rai,
Ms. Amruta Prathu & Ms.
Radhika Mehta, Advs.

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. This is a petition filed by the petitioner under Section 9 of the Arbitration & Conciliation Act, 1996 ('Act' in short) with the following prayers:-

“(a) Pending final payment of the amount due to the Petitioner in terms of final Award to be shortly rendered in the LCIA Arbitration No. LII002, this Hon’ble Court may be pleased to grant an injunction restraining the Respondents from selling, alienating, mortgaging, encumbering or otherwise transferring in any manner whatsoever their ownership interests (as Partner of firms referenced in Annexure H) in the Powai property, or anywhere else, including transferring such assets into any corporate entity, or converting these partnership firms to an LLP or a company;

(b) grant ex-parte ad-interim reliefs in terms of prayers (a) above;

(c) grant reasonable legal costs to the Petitioner; and

(d) Any other or further relief as this Hon’ble Court may deem just and proper in the circumstances.”

Facts:-

2. It is the case of the petitioner that she entered into a contract with her father (respondent No.1) and her brother (respondent No.2) to jointly undertake construction-cum-development in the Indian real estate sector. The contract, i.e. Business Association Agreement (hereinafter “BAA”), was executed on May 14, 2006. According to the petitioner, it set out the manner in which the contracting parties would set up a joint venture/corporate structure through which the business would jointly be undertaken. It is also averred that the BAA contained a narrow exception clause, by which certain expressly enumerated existing projects were

excluded from the scope of the BAA and respondents were permitted to continue these projects outside of the BAA.

3. Disputes between the parties began to emerge in the year 2009, when it came to her notice that the respondents were continuing to develop projects outside the BAA, even though these projects were not part of the excluded projects enumerated in the BAA. The petitioner invoked the arbitration agreement, by a notice of arbitration dated February 5, 2010. The Arbitral Tribunal consisting of three learned Members was constituted and the arbitration was held under the Rules and auspices of the LCIA. The seat of arbitration was in Delhi. It is her case that she filed a Statement of Claim but there was no counter claim by the respondents in the arbitration. According to her, arbitral tribunal bifurcated the arbitration proceedings into a Liability Phase and a Quantum Phase. By its Partial Award dated September 18, 2013, the Arbitral Tribunal ruled substantially in her favour on liability. According to her, the tribunal declared, inter alia, that it had jurisdiction over the dispute, that the BAA was valid and enforceable and the respondents had breached several clauses of the BAA, and that the petitioner was entitled to damages for lost profits in relation to the respondents' breaches in respect of the projects Kandivali, Maitri Park, Chennai Additional

Lands, Chennai Outside Lands, and Palur. According to her, the Tribunal also determined the costs against the respondents as 75% of the arbitration costs and 75% of the claimant's legal costs and fees through the liability stage, in an amount to be determined later. It is averred that the actual amount to be awarded in damages was to be quantified during the quantum phase of the arbitration proceedings.

4. It is her case that following the Partial Award on liability, the parties have agreed to abide by the Award, and not to challenge it. The operative part of the partial award on liability was issued in the form of a consent award dated October 23, 2013. It is averred that even the reasonable costs owed to the claimant also now stand accepted by the arbitral tribunal, such that 75% costs awarded to the claimant are approximately USD 7 million, which would roughly be in the range of Rs.45 Crores. It is her case, that the quantum of costs awarded to the claimant for the liability phase of the arbitration alone is itself an indication of the amounts that were claimed as damages, and that the final award is likely to be of a substantial sum. It is averred in the petition that the quantum phase of the hearing took place from May 31, 2014 to June 4, 2014, when the quantum experts were cross-examined at length. The Arbitral Tribunal issued a draft final award on September 14,

2015, in which the petitioner largely prevailed in terms of the findings reached by the tribunal, although the marginal calculations for two properties were yet to be finalized. It is also averred that a Review Application was filed to contest the findings reached by the Tribunal with respect to the valuation/quantification of damages flowing from the three Chennai projects. Arguments were heard from February 25, 2016 through February 26, 2016, following which the arbitral tribunal reserved its final award. A draft Final Award made further findings on the specifics of the petitioner's entitlement to 75% of her legal costs and fees through the liability stage, identifying which categories were and were not recoverable and in what percentage range. Based upon those guidelines in the draft final award, the parties determined and the Tribunal accepted that the amount of liability phase costs and fees due to the claimant is approximately USD 7 million.

5. It is her case that recently certain developments have created a apprehension that the respondents are taking steps to restructure a part of their key assets and business to shield their assets in a manner to defeat the enforcement or execution of the final award. It is averred that the timing of the respondents' scheme is all the more suspicious given that respondent No. 1 is party to an arbitration in Singapore in which he is

being separately sued for a significant amount of money, wherein hearings concluded last year, and the award is also imminent. The respondents' efforts to shield assets have taken two broad forms of which the petitioner is presently aware: (a) restructuring of partnership assets; (b) sale of assets. The two steps are part of a common scheme to restructure and then alienate assets. A reference has been made by the petitioner, who on March 30, 2016, noticed a report on the website moneycontrol.com, entitled “Hiranandani bags 2 bids worth \$1 billion for property in Powai”, which stated “Hiranandani brothers will begin the process of recasting their ownership to sell Powai property”. In other words, the respondents might be attempting to liquidate their fixed assets in India in advance of an arbitral award. It is also averred that the petitioner's counsel wrote to the respondents' counsel in the arbitration proceedings, seeking an explanation for how the respondents would honour an arbitral award if these assets were indeed being liquidated. On April 4, 2016, the respondents' counsel replied dismissing the news report as mere rumour and inaccurate, stating that it be disregarded. According to the petitioner, it was also stated that the Hiranandani Group had sufficient other assets, and the news report, even if true, would not materially alter the ability of the respondents to satisfy any damages

payable under an arbitral award. A reference is made in the petition to the communication sent to the Arbitral Tribunal, wherein the Arbitral Tribunal has stated that it would examine the issue only if a formal application was made, and not otherwise. A reference is made to a news report published in Economic Times, wherein it is stated "*Hiranandani Group starts restructuring partnership firm holding Powai office assets*". A reference is also made to the report quoted a Hiranandani group spokesperson as saying "*We are currently only restructuring the partnership firm into a single corporate entity*". The petitioner also refers to a news item in LiveMint.com, wherein it is stated "*Two investors offer to buy Hiranandani Developers' office, retail assets in Powai*". It is the case of the petitioner that the restructuring and sale of assets would have a direct bearing on the petitioner's ability to execute an arbitral award in her favour, and would substantially cripple such ability. It is also stated that the respondent(s) is/are partners in partnership firms that own fixed assets located in Powai and elsewhere. A reference is also made to the petitioner's counsel again writing to the respondents' counsel on April 25, 2016 demanding certain assurances and further requesting respondents to provide a sworn statement supporting their counsel's representation to the effect that the Powai

assets were not being alienated. A reference is also made to the communication dated April 27, 2016 of the respondents' counsel, facially denying any inconsistency, but admitting the correctness of the quotation attributed to the Hiranandani Group spokesperson, regarding corporatization, wherein the counsel took the position that a transfer to a corporate entity was not a sale of assets.

6. It is also averred, that a petition under Section 9 of the Act has been filed by the respondents in the Bombay High Court, which is a frivolous petition, in view of the overwhelming material on record, which shows that it is the respondents who would be paying petitioner amounts in these arbitration proceedings, and it is the petitioner who needs to be secured for such amount. It is also her stand that even assuming, without in any manner conceding, that respondents are correct to assume that quantum phase costs would be awarded to them, they have plainly overlooked the fact that there remains the awarded amount of damages and the quantified liability phase costs. It is averred that in the petition before the Bombay High Court, respondents admitted in para 8 that they only sought reconsideration of issue No. 5 (Chennai). According to the petitioner, even on respondents' best case, the Tribunal's award on Kandivali and Maitri Park, to which it has already

been firmly established that there will be a net award substantially in petitioner's favor, even if respondents were to prevail on all remaining issues. Under any circumstances, therefore, it is the respondents who are net payers to the petitioner, and there is no question of the respondents needing to be secured for any amount and even in the remote possibility that petitioner would have to pay costs for some part of the arbitration, those costs would only be offset against a much higher award amount in her favour.

7. On April 28, 2016, the Arbitral Tribunal issued an email informing the parties that the award has been sent to the LCIA for approval, and the tribunal is expecting that the award is issued very shortly and stated that the tribunal is not entertaining any unsolicited correspondence unless accompanied by a formal application. It was also stated that it is not encouraging any formal application at this stage. In other words, according to the petitioner, the Tribunal having become functus officio, she has approached this Court by filing the present petition.

Submissions:-

8. Mr. Rajiv Nayyar and Dr. Abhishek Manu Singhvi, learned Senior Counsels, who argued for the petitioner would submit that the issuance

of an arbitral award for payment of a substantial amount of damages in her favour is imminent. According to them, the petitioner is the successful party in an arbitration proceeding between her and the Respondents. The findings on liability stand accepted by the parties, and have been reissued in the form of a consent award, which includes an award of liability phase costs to petitioner and holds Respondents liable for various contract breaches. Following a detailed quantum hearing, the arbitral tribunal issued a draft quantum award on 14th September, 2015. The parties subsequently agreed – and the arbitral tribunal accepted – that Petitioner is entitled to liability costs of approximated USD 7 million. Damages for two of the breaches have already been quantified in a substantial amount. Petitioner, therefore, is likely to receive in excess of several hundred Crore Rupees.

9. They would state, respondents are conducting their affairs to defeat, delay and obstruct enforcement of the award by corporatizing their partnerships and alienating valuable assets just as the award is about to be issued. This is apparent from the first press report dated 30th March, 2016, the Petitioner's letter the next day, the Respondents' bald (and false) denial dated 4th April, 2016, the subsequent press reports undermining the Respondent's reply, the Petitioner's further letter

requesting an undertaking and the Respondent's letter dated 27th April, 2016 containing an admission as to corporatization. Petitioner is thus prima facie entitled to seek enforceable security for her imminent, substantial award.

10. Dr. Singhvi also states, the respondents have said very little on the merits at the hearing before this Court, nor have they offered any security in respect of the likely award amount. Instead, their limited defence is that respondents have other assets (which petitioner believes to also be held by partnership or corporate entities) and that they are wealthy individuals. As is only too well known and is evident even from other prominent cases of wilful defaulters that have been in public domain recently, the mere appearance of wealth provides no assurance of actual payment. The wealth seems to disappear when the time for payment comes. With the intent of defeating awards and / or decrees, machinations are used to dissipate assets from the debtors name.

11. With regard to jurisdiction, it is his submission:

- a. This Court has jurisdiction because it is the indisputable seat of the arbitration. The arbitration agreement designates Delhi as the 'place of arbitration'. The LCIA (India), under whose auspices the arbitration proceeding has been conducted, recognizes that the seat

of arbitration is Delhi (letter tendered during 3rd May, 2016 hearing). The Supreme Court in ***BALCO v. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552 at Para 76 (Tab-A)*** has recognized that the terms ‘seat’ and ‘place’ are often used interchangeably. The seat being Delhi, the parties have agreed that supervisory jurisdiction (including for Section 9) would be vested exclusively in the Delhi High Court.

b. He would rely on ***Ion Exchange v. Panasonic Electric Works Co. Ltd. (2014) 208 DLT 597 at Paras 12-14***, wherein according to him, this Court held that the Courts of the seat of arbitration had supervisory jurisdiction, and this included jurisdiction for the purposes of Section 9. This precludes any argument that this Court’s admitted supervisory role does not include injunction proceedings. This court can, and should, supervise conservatory measures.

c. He would state, this Court not only has jurisdiction – that jurisdiction is exclusive. In ***Reliance Industries v. Union of India (2014) 7 SCC 603 at Para 45***, the Supreme Court observed that the seat of arbitration was “analogous to an exclusive jurisdiction clause”. This is echoed in the decision of this Court in ***Prima***

Buildwell Pvt. Ltd. and Ors. v. Lost City Developments 2011 (125) DRJ 624 at Paras 28-30, wherein this Court has held that “choosing a seat of arbitration is akin to choosing an exclusive jurisdiction clause”. To similar effect, the Supreme Court in ***Enercon India Ltd. v. Enercon GMBH (2014) 5 SCC 1 at Para 97***, held that “the location of the seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings”. He also rely on ***Jyothi Turbopower Services Pvt. Ltd. v. Shenzhen Shandong Nuclear Power Construction Company Ltd. AIR 2011 AP 111; Salarjung Museum, Hyderabad and Anr. Design Team Consultants Pvt. Ltd. (2009) Supp. (2) ArbLR 463 at Para 11***, wherein, the Andhra Pradesh High Court held that *when the parties in exercise of their right under section 20 of the Act, agree on a particular city as place of Arbitration, it is a key to decide “the Court” for the purpose of Section 9 and Section 34 of the Act. The Court further held that in such an event, the principal Civil Court of the place of Arbitration alone will be “the court” for dealing the non-set aside as well as set aside application under the Act.*

d. He states, at any rate, the Respondents’ submission that this

Court lacks jurisdiction is completely belied by the Supreme Court's observations in ***BALCO at Para 96***, in which it is expressly stated that courts of the seat of arbitration are vested with supervisory jurisdiction.

e. According to him, assuming without in any manner conceding that this Court has concurrent (and not exclusive) jurisdiction, the jurisdiction of this Hon'ble Court cannot be ousted by the filing of a frivolous mala fide petition by the Respondents in the Bombay High Court by referring to ***Engineering Project (India) Ltd. v. Indiana Engineering Work Pvt. Ltd. 2004 (76) DRJ 119, at Paras 1, 4 and 6.*** He states, the Bombay High Court has reached the same conclusion, i.e., that a party cannot file a mala fide application solely to take advantage of Section 42. ***Ion Exchange Ltd. v. Paramount Ltd. (2006) 4 Bom CR 545 at Para 6.***

f. According to Dr. Singhvi, the Mumbai petition seeks that the petitioner herein post security for a potential cost award, but there is no circumstance in the arbitration where Claimant would have to pay any amount to Respondents. Their purported theory is that they will be entitled to a \$6 million costs award because they speculate the final award will be less than an open offer that they

made. While this is utterly unlikely, even if true, the net amount of the award will flow in petitioner's favour. He states, the Tribunal already has determined liability in favour of the petitioner, and damages already accepted by the Tribunal exceed the amount Respondents are seeking in security. Damages for two of the three breaches have been quantified and accepted by the Tribunal to be for a substantial sum, and the Tribunal already has accepted the parties' agreement that the Respondents owe Petitioner approximately USD 7 million for her liability phase costs, which alone is above the costs that the Respondents speculate they will be awarded for the quantum phase. Thus only petitioner can be *dominus litus* in a Section 9 petition.

g. He states, there is no reason for this Court to wait for the decision of the Bombay High Court. Even if the Bombay High Court otherwise had jurisdiction, a frivolous mala fide petition filed solely with the oblique motive of triggering Section 42, ought not to have that effect. Further, there is authority to suggest that jurisdiction is a matter to be proved by the party that raises the bar of Section 42, i.e., the Respondent in this case has to prove before this Court that the Bombay High Court has jurisdiction. He relies

on the judgment in *Surya Pharmaceuticals v. First Leasing Company of India Ltd. (2014) 2CTC 545*, decision of the Madras High Court.

h. It is stated in the written submission that, the present petition is the first-in-time. Judgment here stood reserved even before the Mumbai Petition was listed and the simple obtaining of a Lodging number, while the actual petition languishes in the registry, cannot be said to be the making of an application, in terms of Section 42. The reference to filing of an application in *Fiza Developers & Inter-trade Pvt. Ltd. v. Ami (P) Ltd. (2009) 17 SCC 796* (as relied upon by the respondents), is in an entirely different context as it relates to the automatic stay of the award upon filing Section 34 application. In that case, there is no question of a party who is no *dominus litus* foisting the choice of forum upon the party that is in fact *dominus litus*.

12. On the respondents' objection that the Petitioner ought to have approached the arbitral tribunal, it is stated as under:

a. The respondents filed a Section 9 petition in the Bombay High Court, but submit that the petitioner must approach the Tribunal First. Only a double standard would permit this. The

Respondents are stopped from contending that the Tribunal must be approached under Section 17, and have waived this argument by their conduct. Further, on 28th April, 2016 Respondents' counsel confirmed that they trust the award is already signed and that "the Tribunal may already be functus officio".

b. In any event, Article 25.3 of the LCIA India Rules expressly permits the parties to approach Court for interim measures even while the arbitral tribunal is seized of the matter, if the tribunal is for the time being unable to act effectively. The Tribunal's e-mail at page 78 reveals that the tribunal was not encouraging applications once the issuance of the award was imminent.

13. The Respondent's final jurisdictional argument is that the Powai partnership interest is not the subject matter of the arbitration, and consequently, cannot be the subject matter of injunctive relief. According to him, the petitioner is aiming to secure her position relative to the arbitration award. Being the court of the seat of arbitration, this Court is the appropriate forum for the petitioner to seek relief. The award in petitioner's favour will be a money award, for damages for breach of contract. The petitioner is entitled to enforce that award against any assets of the Respondents, and is not limited to the properties that

were the breaching projects in the arbitration. The choice of security lies with the petitioner. Dr. Singhvi distinguishes the *Sumer Builders case* (2016) 2 SCC 582:

a. There, the Court found that the dispute required a determination of possession of land, and a direction for recovery of possession of land. Since it was a suit for land, and the land in that case was located at Indore, i.e., outside the territorial jurisdiction of the Bombay High Court, the Court held that the Bombay High Court was correct in invoking leave granted under Clause 12 of the Letters Patent. In the present case, the dispute is a money claim, i.e., for damages for lost profits under a contract. It arises out of a right of first refusal clause in the agreement which has been violated by the Respondents. There is no relief granted in the Draft Quantum Award which impinges in any way on any interest in land, either at Powai or anywhere else.

b. Respondents overlook the critical fact that, in Sumer Builders, the seat of arbitration was not fixed by the parties. Instead, it was when one party demanded arbitration that the other party claimed that the arbitral tribunal had to be at Mumbai. In contrast, in the present case, the parties have chosen Delhi as the seat of the

arbitration, with all its attendant consequences.

14. He states, the respondents' reliance on *Sasken Communication* case is misplaced. There, Mumbai was the place of arbitration, and there was an exclusive jurisdiction clause in favour of the courts at Mumbai. The Delhi High Court therefore relegated the parties to the courts that they had chosen by agreement, which is precisely what the petitioner is seeking to do here. In *Rattan Singh*, also cited by Respondents, there was no expressly designated seat, which clearly exists here.

15. He also refers to the decision of the Supreme Court in ***State of West Bengal v. Association Contractors (2015) 1 SCC 32*** and refer to paragraph 22 of the decision, which makes it clear that parties can confer exclusive jurisdiction in a court, and there is nothing in Section 42 of the Act which overrides such an agreement.

16. It is the case of the petitioner in the written submission, as regards the new plea raised by Respondents in their now retracted Written Submissions filed post the hearing (and which was not argued at the oral hearing), Respondents claim that the partnership firms own the Powai property, and not the Respondents. The Respondents having not filed any documents to show the partnership assets, terms of partnership agreement, nor the proposed new corporate structure, this new plea is

waived. The Respondents overlook that the petitioner is seeking to safeguard the value of Respondents' share of the partnership interests, which will be completely eroded if the underlying assets are sold and / or protected through transferring them to some new, mysterious corporate structure or structures on the eve of the issuance of award. Order XXI, Rule 49 (2) expressly permits a judgment creditor to seek execution by "charging the interest" of a partner in the partnership property, and the petitioner today is seeking interim measures to preserve that option. Allowing the respondents to convert their partnership assets to corporate assets, and to alienate the Powai property, would preclude Petitioner's ability to so protect her interests once the award amount is crystallized and executable, petitioner accordingly seeks that the *status quo* be maintained with respect to the Respondents' interest in the partnerships referenced in the petition. The Respondents must be enjoined from altering the extent of their share in the partnership, or from changing the nature of their interest. As partners in the firm, they have an interest in the underlying property asset to the extent of their share in the partnership executable against them. Should the structure be corporatized, they would cease to have such interest. Therefore, to the extent the partnership firm continues to deal in partnership properties,

apart from an injunction against alienation, such dealing must also be subject to fair valuation and the maintenance of accounts of all proceeds of any sale would be charged to the extent of the share in the partnership of the Respondents herein.

17. On the other hand, Mr. Dushyant Dave, learned Senior Counsel appearing for the respondents would submit that the present petition claims reliefs in respect of immovable properties not belonging to the respondents and which do not form part of the “subject matter of arbitration”. Therefore, the present petition is not maintainable. He states, the arbitration proceedings between the parties relates to valuation of properties situated in Mumbai and Chennai. The petitioner at paragraphs (xii), (xiv) and Annexure-I of the petition admits that the properties in respect of which the reliefs are claimed belong to partnership firms. It is further submitted that the property at Powai stood specifically excluded in the Business Association Agreement (BAA) and is not a part of the “subject matter of dispute” between the parties, due to its exclusion in Exhibit 1 of the BAA. He would state, that Section 9 of the Act can only be invoked in respect of the “subject matter of arbitration”. Therefore, by necessary implication this Court has no jurisdiction under Section 9 of the Act in respect of the property situated

at Powai and accordingly, the respondents cannot be enjoined especially when the partnership firms are admittedly neither parties before the Arbitral Tribunal nor made parties in the present petition. It is a basic norm of jurisprudence that a relief cannot be sought against a person/entity who is not a party to the proceeding. Hence, the present petition under Section 9 of the Act is not maintainable in respect of the property at Powai or against stranger partners.

18. He states, this Court is not the “Court” within the meaning of Section 9 read with Section 2(1)(e) of the Act and therefore does not have territorial jurisdiction to entertain the present petition. Section 2(1)(e) of the Act refers to the Court which can be the “territorial” Court under the Code of Civil Procedure, 1908 since the said provision refers to a principle Civil Court having ordinary original civil jurisdiction as if a Suit had been filed. Admittedly, the present petition has been filed only in respect of the property at Powai. The cause title shows address of both the respondents at Mumbai. The address of the petitioner is also shown at London, which is outside the territorial jurisdiction of this Court. Accordingly, by operation of Section 20 of the Code there is no way that the petitioner can maintain the present petition before this Court. He states, it is an accepted principle of law that when the dispute

lies in connection or pertains to an immovable property then the Court having territorial jurisdiction over that property, alone, can exercise jurisdiction. This is as per Section 16 of the Code and it overrides the principles mentioned in Section 20 of the Code. Section 20 of the Code itself mandates this principle by using the words “*subject to the limitations aforesaid*”. This principle of Section 16 of the Code governing territorial jurisdiction of any dispute relating to immovable property must transact the boundary of the Code and enter the domain of Section 2(1)(e) of the Act. According to him, the judgment of the Supreme Court in the case of **BALCO** (*supra*), whereby the seat of arbitration has been provided “concurrent” jurisdiction shall stand excluded where the dispute relates to immovable property. He would state, that since the dispute between the parties before the Arbitral Tribunal relates to valuation of the properties situated at Mumbai and Chennai, it is only the Courts having territorial jurisdiction over such properties, that can exercise territorial jurisdiction in relation to the present petition. Under Section 2(1)(e) of the Act, the seat of arbitration being Delhi will accordingly have no relevance in the present case. Even if the above proposition is not accepted by this Court, it is a matter of fact that the petitioner has filed the present petition only in respect of

property at Powai and in view of the judgment of the Supreme Court in ***Sumer Builders***, this Court would not have the territorial jurisdiction to deal with the relief in respect of the said property. The judgment in the case of ***Sumer Builders*** squarely applies and it was based on the relief claimed in the said petition and the question of seat was irrelevant. It is a matter of fact that even the Supreme Court in BALCO has provided for the territorial jurisdiction of the Court where the seat of the arbitration is located, only on the basis of its “supervisory jurisdiction”. Therefore, this jurisdiction does not flow from the Code. In this regard, the Court which may have supervisory jurisdiction, will have to consider the principles of *forum conveniens* instead of seeing the isolated fact of supervision over the tribunal. In this regard, he would rely upon the judgment in the case of ***Sterling Agro Industries Ltd. (supra)***. He would submit that the seat of arbitration at Delhi was never agreed between the parties to provide territorial jurisdiction in view of the fact that Clause 13.4 of the BAA uses the expression “*court of competent jurisdiction*” for the purposes of filing interim applications. If the petitioner was right then the jurisdiction would have been agreed to be the courts at Delhi which is absent in the present Agreement. Clause 13.4 of the BAA has been suppressed by the petitioner. In any event the

reliance placed on the decision of BALCO clearly provides for “*concurrent*” jurisdiction of the seat court and the court where the cause of action arises as determined under Section 2(1)(e) of the Act read with Section 16 to 20 of the Code.

19. He would state, in view of the application of Section 42 of the Act, the Court “first approached” shall have the exclusive jurisdiction to deal with all subsequent applications under the Act between the parties. Even if it is held by this Court that the Courts at Mumbai (due to properties being at Mumbai) and courts at Delhi (due to the seat of arbitration being at Delhi), have “*concurrent*” jurisdiction due to the statutory bar under Section 42 of the Act, it will only be the High Court of Bombay which would have territorial jurisdiction to deal with all the applications including the present petition. It is a matter of fact that the arbitration between the parties has continued for almost six years. No application whatsoever has been filed by either of the parties during these six years before any Court. The first application was filed by the respondent on April 25, 2016 under Section 9 of the Act being Arbitration Petition No.716 of 2016 before the High Court of Bombay. The said petition was served on the petitioner on April 25, 2016 itself. The petitioner as a reaction/counter blast to the said petition filed the present petition to

somehow confer territorial jurisdiction to the contrary but belatedly only on May 2, 2016. He would state, that this Court cannot decide the territorial jurisdiction of the High Court of Bombay to deal with the said application. It is also a matter of law that the High Court of Bombay cannot decide the territorial jurisdiction of this Court. The only thing which is relevant is the timing of the filing. The filing of an application under the Act creates a bar under Section 42 and it has been construed by the Supreme Court that “making” an application is actually “filing” of an application. Since the High Court of Bombay was approached first, it would have been prudent for the petitioner to contest jurisdiction of the High Court of Bombay first and only then file the present petition before this Court. However, ignoring prudence the petitioner has jumped the gun and filed the present petition to somehow request this Court to ignore Section 42 of the Act and convert this Court to be that of exclusive jurisdiction and this attempt of the petitioner is clearly malicious. The respondents have relied upon the following judgments:-

- (i) Adhunik Steels Ltd. Vs. Orissa Manganese & Minerals Pvt. Ltd. (2007)7 SCC 125;***
- (ii) C.V. Rao Vs. Strategic Port Investments KPC Ltd. (DB) 2015 (218) DLT 200;***
- (iii) Addanki Narayanappa & Anr vs Bhaskara Krishtappa AIR 1966 SC 1300;***

- (iv) Harshad Chimanlal Modi Vs. DLF Universal Ltd. 2005 (7) SCC 791;*
- (v) Hakkam Singh Vs. Gammon (I) Ltd. (1971) 1 SCC 286;*
- (vi) Swastik Gases Pvt. Ltd. Vs. IOCL (2013) 9 SCC 32;*
- (vii) Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552;*
- (viii) Sumer Builders Pvt. Ltd. Vs. Narendra Gorani 2016(2) SCC 582;*
- (ix) Sterling Agro Industries Ltd. v. Union of India (2011) 181 DLT 658;*
- (x) M/s. Rattan Singh Associates (P) Ltd. Vs. M/S. Gill Power Generation Company Pvt. Limited. ILR (2007) 1 Del 275;*
- (xi) Kusum Ignots & Alloys Ltd. Vs. Union of India (2004)6 SCC 254;*
- (xii) State of W.B. Vs. Associated Contractors (2015) 1 SCC 32;*
- (xiii) State of Maharashtra Vs. Atlanta Limited (2014) 11 SCC 619;*
- (xiv) Sasken Communication Technologies Ltd. Vs. Prime Telesystems Ltd. (2002) 99 DLT 640;*
- (xv) SBQ Steels Ltd, Chennai Vs. Goyal MG Gases Pvt. Ltd. New Delhi (2013) 1 MWN (Civil) 838;*
- (xvi) Engineering Projects (India) Pvt. Ltd. Vs. Indiana Engineering Works (P) Ltd. 2004(76) DRJ 119;*
- (xvii) Indiana Engineering Works (P) Ltd. Vs. Engineering Projects (I) Ltd. along order dated 19.11.2010 in SLP (C) No.14767 of 2009.*
- (xviii) Fiza Developers & Inter-trade Pvt. Ltd. Vs. Ami (I) (P) Ltd. (2009)17 SCC 796.*

20. Before I deal with the submissions made by the learned counsel for the parties, suffice to state, on May 3, 2016 when I reserved the case

for orders, I directed the parties to file written submissions not exceeding three pages. The parties, on May 05, 2016 filed submissions exceeding three pages. On May 06, 2016, Mr. Rajiv Nayar, learned Senior Counsel for the petitioner had mentioned the matter at 1.15 pm, when Mr. Dushyant Dave was also present. Noting, that the submissions filed were beyond three pages, the same were returned back on May 06, 2016 with a direction to ensure, the submissions are within three pages. The submissions have been filed on May 07, 2016 in the afternoon.

21. Having heard the learned counsel for the parties, the first and the foremost question that arises for consideration is whether this Court has territorial jurisdiction to entertain the present petition. There is no dispute that Delhi is the seat of Arbitration. The LCIA under whose auspices the proceedings were held, recognized Delhi as the seat of Arbitration. The submission of Dr. Abhishek Manu Singhvi is that Delhi being the seat of Arbitration, this Court has the exclusive jurisdiction and not the Courts of Mumbai.

22. On the other hand, it is the submission of Mr. Dushyant Dave, learned Senior Counsel for the respondents that the prayer in the petition is in respect of property at Powai, Mumbai and Section 9 can only be invoked in respect of “subject-matter of arbitration”, this Court has no

jurisdiction.

23. The issue of territorial jurisdiction is no more res-integra in view of the judgment of the Supreme Court in *Balco's case (supra)*. In para 96, the Supreme Court has held that 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. The Court held, that it 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 supervisory control over the arbitral process. The Court has given an example, if the arbitration is held in Delhi, where neither of the parties are from Delhi and the Tribunal sitting in Delhi passes an interim order under Section 17 of the Act, 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. The question is whether the cause of action has arisen in Mumbai so as to confer jurisdiction on Mumbai Court. The petition filed by the petitioner is, inter-alia seeking a restraint order with regard to the Powai property in Mumbai. The claim before the Tribunal was for damages on the ground that projects being developed outside BAA. Out of these projects, two projects in Kandivali and Maitri Park are in Mumbai. The development of these two projects outside BAA gave a cause to the petitioner to raise a dispute, which led to arbitration. If the relief, as prayed for in the petition, is granted, the effect thereof would be on the land situated at Mumbai. It is a case where, at least a part of cause of action has arisen in Mumbai, for the purpose of initiating the arbitration proceedings or filing this application. In view of the aforesaid position, suffice to state, that in the absence of any stipulation conferring exclusive jurisdiction to the Courts in Delhi or Mumbai, the Courts at Delhi and Mumbai would have the jurisdiction.

Insofar as the judgments relied upon by Dr. Singhvi in ***Reliance Industries (supra)***, ***Prima Buildwell Pvt. Ltd. and Ors. (supra)*** and ***Enercon India Ltd. (supra)*** to contend the exclusive jurisdiction of

Delhi, are concerned, suffice to state, those judgments were in the context of an arbitration wherein, the arbitration clause stipulated, the seat of arbitration as London and arbitration agreement to be governed by laws of England and the Courts of which country would have the jurisdiction. It is not the case here.

Further, it may not be necessary for me to consider the other judgments as referred to by Dr. Singhvi and Mr. Dave on the jurisdiction issue in view of my conclusion above, relying upon para 96 of the judgment in *Balco's case (supra)*.

24. Having said so, the question, which now arises is whether the bar of Section 42 of the Act would come into play to make this petition non maintainable in this Court. The intent of Section 42 is very clear, inasmuch, where, with respect to arbitration agreement, an application under Part-I comprising Sections 1 to 43 of the Act has been made in a Court, that Court alone will have the jurisdiction over the arbitral proceedings and of subsequent applications, arising out of that agreement and arbitral proceedings, shall be made in that Court and in no other Court. The intent of Section 42 is to restrict to one Court, the adjudication of all disputes pertaining to the arbitration and thereby eradicating the possibility of multiplicity of actions and likelihood of

conflicting judgments/orders. The Supreme Court in *State of West Bengal v. Association Contractors (supra)*, has held that Section 9 applications being applications made to a Court, the same are applications, which are within Section 42. It is not disputed by the petitioner that the respondents have filed a petition under Section 9 of the Act before the Bombay High Court on April 25, 2016, before the petitioner filed this petition on May 02, 2016. No doubt, Dr. Singhvi has alleged that such a petition is a mala fide, only to oust the jurisdiction of this Court, which surely, has a supervisory jurisdiction as the seat of arbitration is in Delhi by contending, when the liability and the cost have been determined by the Arbitral Tribunal in favour of the petitioner and the draft award also shows what would be the final outcome, there is no reason for the respondents to approach by way of an application under Section 9 as nothing shall be payable to the respondents under the Award. Suffice to state, it is not for this Court to hold that the petition is frivolous or mala fide as contended by him. It is a ground, which may be available to the petitioner before the Bombay High Court seeking dismissal of that petition. Further, the same cannot be a ground to hold that this petition is maintainable overlooking the bar of Section 42 of the Act.

25. Insofar as the reliance placed by Dr. Singhvi on the judgment of this Court in the case of *Engineering Project (India) Ltd (supra)*, the facts therein were, that the petitioner has filed an application under Section 36 of the Act read with Order XXI Rule 1 CPC in this Court, which according to the Court was with oblique motive to confine jurisdiction to Courts in Delhi. An argument was raised by the petitioner that the objections under Section 34 filed before the Ranchi Court, the said Court has no territorial jurisdiction to decide them. This Court, has held that insofar as the question of jurisdiction of a Court is concerned, it is not proper for one Court to decide or pronounce upon the issue whether another Court has jurisdiction or not. Each Court must satisfy itself that it possesses jurisdiction whether territorial or pecuniary, especially when such a ground is asserted. It would offend judicial comity & propriety and would be impermissible even otherwise for the Court to pronounce upon whether the Court at Ranchi should desist from exercising jurisdiction. This Court has, in para 4 held as under:-

“4. Resort to Section 36 of the Arbitration and Conciliation Act, 1996 may not always be innocuous, in that Section 42 of the Act stipulates that where, with respect to an Arbitration agreement, any application under Part I comprising Sections 1 to 43 of the Act has been made in a Court, that Court alone shall have jurisdiction over the

Arbitral proceedings and all subsequent applications arising out that obligation and the Arbitral proceedings shall be made in that Court and in no other Court. The palpably obvious and salutary intendment of Section 42 is to restrict to one Court the adjudication of all disputes pertaining to the Arbitration, and thereby eradicating the possibility of multiplicity of actions and likelihood of conflicting judgments/orders. But this intendment would be vitiated if a party is permitted to file and maintain a petition under Section 36 which is devoid of merit and has the hidden agenda of ousting jurisdiction that are inconvenient to the petitioner.”

26. This Court has finally rejected the Section 36 petition on the ground of territorial jurisdiction. I may state here, the conclusion of this Court in para 4, that the petition under Section 36, was devoid of merit and has the hidden agenda of ousting jurisdiction that are inconvenient to the petitioner is with regard to the petition filed and decided by this Court and not the petition filed before Ranchi Court. Similarly, this Court cannot comment/hold that the petition filed before Bombay High Court is devoid of merit and to oust the jurisdiction of this Court. The judgment as referred to, shall be of no help to the petitioner.

27. Insofar as the judgment of the Bombay High Court in ***Ion Exchange (India) Ltd.(supra)*** is concerned, in the said case, the

Bombay High Court was concerned with a facts wherein the petitioner challenged the Award made by the Arbitrator directing the petitioner to pay certain amounts to the respondent. An objection to the maintainability of the petition before the Court was raised by the respondent. The objection raised by the respondent is that after the Award was made on May 5, 2005, an application under Section 9 of the Act was filed by the respondent in a Court at Baroda and therefore, in view of the provisions of Section 42 of the Act, the petition is not maintainable before the Court. It was contended that the petition was filed by the petitioner in the Court on June 29, 2005 and therefore, the said petition is the subsequent application and the Bombay High Court will not have jurisdiction to entertain the same. In the reply before the High Court on behalf of the petitioner, it was contended that the provision of Section 42 of the Act will not operate to oust the jurisdiction of the Bombay High Court to entertain this petition because of the filing of the application under Section 9 of the Act by the respondent before the Baroda Court, firstly because the application made under Section 9 before the Baroda Court was not a bona fide application and the application contemplated by Section 42 of the Act is a bona fide application. It was contended that the application to be termed as a bona

fide application for the purpose of Section 42 of the Act, would be an application of which the petitioner has received notice before the expiry of the period of limitation fixed by Section 34 of the Act. It is submitted that in that case, the Award was made on March 31, 2005. It was communicated on April 6, 2005. An application was filed by the respondent before the Baroda Court on May 5, 2005. The last date of limitation according to Section 34 of the Act for filing petition under Section 34 of the Act was July 7, 2005. But according to the petitioner, the notice of having filed petition under Section 9 before the Baroda Court was served on the petitioner on July 20, 2005. Though, according to the respondent, the date of service of notice is not July 20, 2005 but July 14, 2005, but it is an admitted position that the service of notice about the filing of application under Section 9 of the Act by the respondent before the Baroda Court was served on the petitioner after expiry of period of limitation fixed by Section 34 of the Act. It was contended on behalf of the petitioner before the Bombay High Court that in view of the fact that the provisions of Section 4 to 24 of the Limitation Act are not applicable to the petition filed under Section 34 of the Act, Section 42 of the Act may be so read as to oblige the respondent to intimate the petitioner about the filing of application under Section 9 of

the Act after the Award is made, immediately on filing the application so that the petitioner can arrange his business accordingly and can file his petition before that Court where application under Section 9 of the Act has been filed or take an informed decision about the Court in which he wants to file petition under Section 34 of the Act. The Bombay High Court has, in para 12, held as under:-

“12. It is clear from the observations of the Supreme Court that institution of any proceedings is likely to be adversely affected the interest of a person then that person is entitled to inform about the institution of those proceedings before his interest gets permanently prejudiced. In my opinion, therefore, in order to examine whether the jurisdiction of this Court to entertain the present petition stands ousted because of filing of application under Section 9 of the Act before the Baroda Court, I will have to consider the case of the petitioner that the application was filed in the Baroda Court with mala fide intention to deny the petitioner the remedy of filing petition under Section 34 of the Act against the Award. On behalf of the petitioner it is submitted that after the Award was communicated on 6.4.2005, the respondent filed an application under Section 9 of the Act on 5.5.2005. The respondent did not inform the petitioner that he has filed an application under Section 9 of the Act in the Baroda Court. According to the petitioner, the conduct of the respondent of filing application in the

Baroda Court and keeping that information to himself shows that the application was filed by the respondent with mala fide intention. Though it is an admitted Page 2070 position that the respondent after filing petition did not intimate to the petitioner that he had filed an application under Section 9 of the Act before the Baroda Court, according to the respondent immediately after filing petition before the Baroda Court he paid process charges for serving notice of that application on the petitioner. According to the respondent, the conduct of the respondent of paying process charges so that the Baroda Court could issue notice to the petitioner of the application filed under Section 9 of the Act by the respondent shows that the respondent had done everything within his power to intimate the petitioner about filing of petition under Section 9 of the Act by the respondent. In my opinion, it cannot be said that merely because the respondent paid process charges in the Court he did everything within his power to intimate the petitioner that he has filed an application under Section 9 of the Act. Considering that the act of the respondent of filing an application under Section 9 of the Act in the Baroda Court has drastic consequences and on that depends the jurisdiction of the Court to entertain the petition filed under Section 34 of the Act, in my opinion, it was the duty of the respondent to intimate independently of the Court to the petitioner immediately that he has filed an application under Section 9 of the Act, so that the petitioner

could have either filed his petition before the Baroda Court or could have moved the Baroda Court for appropriate orders. It was also urged on behalf of the respondent that though the petitioner had filed petition in this Court on 29.6.2005, he received notice from the Baroda Court on 14.7.2005, though by 14.7.2005 the period of three months provided by Subsection (3) of Section 34 of the Act for filing petition under Section 34 of the Act was over, the petitioner could have withdrawn his petition filed in this Court immediately and filed it before the Baroda Court and should have applied for condonation of delay, because the period of 30 days after the expiry of period of three months from the date of communication of the Award was not over. In my opinion, this submission has also no force, because by 14.7.2005 the period of limitation provided under Subsection (3) of Section 34 of the Act was over and therefore, the petitioner could have filed his petition before the Baroda court only by seeking condonation of delay in filing the petition. The order of condonation of delay in filing the petition is in the discretion of the Court and therefore, in my opinion, it does not lie in the mouth of the respondent who created this situation to claim that the petitioner should have withdrawn his petition filed in this Court and could have filed it before the Baroda Court by seeking condonation of delay. In my opinion, considering the consequence that an application filed under Part I of the Act has in view of the provision of Section 42 of the Act the

Court will have to read a duty in the applicant who files the application to intimate the other side about the fact of having filed the application at the earliest opportunity. Whether intimation has been given by the applicant at an appropriate time, so that it can be said that the applicant has discharged his duty, would be a question of fact, to be decided in each case, on the basis of the facts and circumstances of each case. If there is failure to perform this duty then the Court will be justified in assuming that filing Page 2071 of application is not bonafide and is malafide. In so far as the present case is concerned, it cannot be said that the respondent could not have filed the application under Section 9 of the Act before the Baroda Court because it is nobodies case that the Baroda Court did not have jurisdiction. But after having filed the application, considering the provisions of Section 42 and 34(3) of the Act, the respondent, had the application been filed with the bonafide intention to secure an order under Section 9 of the Act and not with the malafide intention to use the fact of filing the application to deny the statutory remedy under Section 34 of the Act to the petitioner, the respondent would have immediately, independently of paying process charges in the Baroda Court, informed the petitioner that it has filed the application before the Baroda Court. The only reason given by the respondent before me for not doing so is that there is no duty on the respondent under the law to give any such information to the petitioner. In the circumstances

therefore, in my opinion, it has to be held that the application under Section 9 of the Act before the Baroda Court was filed by the respondent with malafide intention and was not a bonafide application, and therefore, filing of that application before the Baroda Court does not oust the jurisdiction of this Court to entertain the petition because of the provisions of Section 42 of the Act. ”

28. I note, the case relied upon by Dr. Singhvi is distinguishable on facts. In the case in hand, the respondents had notice about the filing of the petition under Section 9 on April 25, 2016 itself, much before, this petition was filed.

29. In view of the above discussion, I hold, the present petition is not maintainable in this Court, in view of bar under Section 42 of the Act. The petitioner would be at liberty to file the same in the Bombay High Court. The petition is dismissed. No costs.

(V.KAMESWAR RAO)
JUDGE

MAY 12, 2016

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