

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

% *Judgment Reserved on : May 26, 2016*

Judgment Delivered on : May 30, 2016

+ **FAO (OS) (COMM) 37/2016**

PRIYA HIRANANDANI VANDERVALAAppellant

Represented by: Dr.Abhishek Manu Singhvi,
Mr.Rajiv Nayar and Mr.Sandeep
Sethi Sr.Advocates instructed by
Mr.Aman Ahluwalia, Ms.Ruby
Singh Ahuja, Ms.Eesha
Mohapatra, Mr.Karan Dev Chopra
and Mr.Utsav Trivedi, Advocates

versus

NIRANJAN HIRANANDANI & ANR. Respondents

Represented by: Mr.P.Chidambaram, Sr.Advocate
instructed by Mr.Chetan Kapadia,
Mr.Rishi Agrawala, Mr.Karan
Luthra, Ms.Aayushi Sharma and
Ms.Radhika Mehta, Advocates for
R-1
Mr.A.S.Chandhiok, Sr.Advocate
instructed by Ms.Anubha Goel and
Mr.Abhimanyu Mahajan,
Advocates for R-2

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. What is the ratio of the decision reported as 2012 (9) SCC 552 *Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Inc.* is the principal issue between the parties. And depending upon the answer thereto if other issues arise for consideration we shall state the same followed by our opinion thereon.

2. The debate hinges on paragraphs 95, 96 and 97 of the decision and therefore we extract the said paragraphs:-

“95. The learned counsel for the appellants have submitted that Section 2(1)(e), Section 20 and Section 28 read with Section 45 and Section 48(1)(e) make it clear that Part I is not limited only to arbitrations which take place in India. That these provisions indicate that the Arbitration Act, 1996 is ‘subject-matter centric’ and not exclusively ‘seat-centric’. That therefore, “seat” is not the “centre of gravity” so far as the Arbitration Act, 1996 is concerned. We are of the considered opinion that the aforesaid provisions have to be interpreted by keeping the principle of territoriality at the forefront. We have earlier observed that Section 2(2) does not make Part I applicable to arbitrations seated or held outside India. In view of the expression used in Section 2(2), the maxim ‘expressum facit cessare tacitum’, would not permit by interpretation to hold that Part I would also apply to arbitrations held outside the territory of India. The expression “this Part shall apply where the place of arbitration is in India” necessarily excludes application of Part I to arbitration seated or held outside India. It appears to us that neither of the provisions relied upon by the Learned Counsel for the Appellants would make any section of Part I applicable to arbitration seated outside India. It will be apposite now to consider each of the aforesaid provisions in turn.

96. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

“2. Definitions

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

(a) to (d)

(e) ‘Court’ means 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.

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 supervisory 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.

97. The definition of Section 2(1)(e) includes "subject-matter of the arbitration" to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist. On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term "court" as a court having jurisdiction over the subject-matter of the award. This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India."

3. We analyze the three paragraphs. In paragraph 95 the Supreme Court has dealt with the contention advanced by the appellants : that Part I of the Arbitration and Conciliation Act, 1996 is not limited to arbitrations which take place in India because the provisions indicate the said Act, to be subject-matter centric and not exclusively seat-centric, therefore seat is not the centre of gravity. Therefore, it would apply to Foreign Arbitrations as well. This is apparent from the first three sentences of the paragraph which note the contentions of the appellants. The three lines read : *'The learned counsel for the appellants have submitted that Section 2(1)(e), Section 20 and Section 28 read with Section 45 and Section 48(1)(e) make it clear that Part I is not limited only to arbitrations which take place in India. That these provisions indicate that the Arbitration Act, 1996 is 'subject-matter centric' and not exclusively 'seat-centric'. That therefore, "seat" is not the "centre of gravity" so far as the Arbitration Act, 1996 is concerned.'*

4. Thereafter the Supreme Court set the preamble to discuss the definition of ‘Court’ in Part I of the Arbitration Act, 1996. This is apparent from the remainder of the paragraph, comprising the next six lines, which read as follows : ‘*We are of the considered opinion that the aforesaid provisions have to be interpreted by keeping the principle of territoriality at the forefront. We have earlier observed that Section 2(2) does not make Part I applicable to arbitrations seated or held outside India. In view of the expression used in Section 2(2), the maxim ‘expressum facit cessare tacitum’, would not permit by interpretation to hold that Part I would also apply to arbitrations held outside the territory of India. The expression "this Part shall apply where the place of arbitration is in India" necessarily excludes application of Part I to arbitration seated or held outside India. It appears to us that neither of the provisions relied upon by the Learned Counsel for the Appellants would make any section of Part I applicable to arbitration seated outside India. It will be apposite now to consider each of the aforesaid provisions in turn.*’

5. The setting of the scene for the discussion brings out that the Supreme Court guided itself that the principle of territoriality has to be kept in mind while interpreting the statute. The Supreme Court also guided itself that the maxim *expressum facit cessare tacitum* also has to be kept in mind by the Court.

6. In para 96, after re-producing the definition of the word ‘Court’ in Part I of the Arbitration and Conciliation Act, 1996, the Supreme Court noted that one should not confuse the term ‘*subject-matter of the arbitration*’ with the term ‘*subject-matter of the suit*’. The Supreme Court thereafter noted that the twin words constituting the term ‘*subject-matter*’ in Section 2(1)(e) are confined to Part I and therefore deduced,

that it has a reference and connection with the process of dispute resolution; the purpose being to identify the Courts having supervisory control over the arbitration proceedings; and hence the further deduction that it refers to a Court which would essentially be a Court of the seat of the arbitration process. Immediately thereafter, the Supreme Court hastened to add that Section 20 which gave recognition to a party autonomy had also to be kept in mind and therefore opined that a narrow construction would render Section 20 nugatory. The conclusion arrived at is in the following words : *‘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’*. Thereafter the Supreme Court has explained with reference to an example. But immediately after the example the Supreme Court terminates the paragraph : *‘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’*.

7. The first sentence of para 97 makes is abundantly clear that the Supreme Court read Section 2(1)(e) to give jurisdiction to the Courts where the arbitration takes place, which otherwise would not exist.

8. The birth to the argument which was advanced by learned counsel for the appellants is with reference to the example given, which obviously has to be illustrative, and not the statement of the law. The example given is : *‘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*'. The use of the words **must lie**, which we have printed in bold is the source of the argument. The contention was that the example makes it clear that neither party was from Delhi which was chosen as a neutral place, between a party from Mumbai and the other from Kolkata, as the seat of the arbitration; and the Supreme Court held that any challenge to a decision of the Arbitral Tribunal must lie to the Courts in Delhi.

9. Now, the words '**must lie**' used in the paragraph mean '**may lie**, and this is evident from the fact that the paragraph concludes by the Supreme Court categorically opining that in the example given, both Courts would have jurisdiction i.e. the Court within whose jurisdiction the subject-matter of the suit is situated and the Court within the jurisdiction of which the arbitration is located. It is trite that a judgment is not to be interpreted as a statute. A word here or there cannot be torn out of the contextual reading and with reference to it the context given a colour. Twice in the paragraph, the Supreme Court has emphasized that the legislative intent was to give jurisdiction to two Courts : (i) Where the cause of action was located, and (ii) Where the arbitration was located. The first line of paragraph 97 makes it clear beyond a shadow of doubt, when the Supreme Court commences further discussion in paragraph 97 by writing that the definition confers jurisdiction to the Court where the arbitration takes place, which otherwise would not exist.

10. We therefore declare that the ratio of the decision of the Supreme Court is that Court(s) within whose jurisdiction the subject matter of the suit is located would have jurisdiction to take cognizance of applications or appeals contemplated by the Arbitration and Conciliation Act, 1996 and additionally, if the seat of arbitration is located in some other territory, even the Court where the arbitration takes place. The ratio is that both Courts would have concurrent jurisdiction. It is not the ratio that the seat of arbitration i.e. where the arbitration is held would confer exclusive jurisdiction on the Court within whose territorial jurisdiction the place where arbitration held is located and would oust the jurisdiction of the Court within whose jurisdiction the subject matter of the suit is located.

11. We find that this view has been taken by two Division Benches of this Court and the decisions are reported as 208 (2014) DLT 597 (DB) *Ion Exchange (India) Ltd. Vs. Panasonic Electric Works Company Ltd.* and 221 (2015) DLT 256 (DB) *NHPC Ltd. Vs. Hindustan Construction Co.*

12. It is the undisputed position that in the instant case the subject-matter of the dispute and hence the subject-matter of the arbitration as also the subject-matter of a suit are immovable properties situated in the cities of Mumbai and Chennai and the seat of arbitration was Delhi, keeping in view the arbitration clause and in particular 13.3 and 13.4, contents whereof we are not reproducing because learned senior counsel for the parties conceded that if the law would be as above declared by us, concurrent jurisdiction would be vested in the Courts at Mumbai, Chennai and Delhi to take cognizance of petitions filed under Section 9 of the Arbitration and Conciliation Act, 1996.

13. In that view of the matter, the view taken by the learned Single Judge that Court in the city of Mumbai would have jurisdiction to entertain a petition under Section 9 of the Arbitration and Conciliation Act, 1996 is upheld.

14. This takes us then to the ancillary issue which arises. Section 42 of the Arbitration and Conciliation Act, 1996 was debated between the parties. The Section reads:-

*“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.”*

15. To understand the legal issue arising out of the words ‘any application under this Part has been made in a Court’ occurring in Section 42, the scene created by the facts has to be set. Priya, her father Niranjan and her brother Darshan; of the well-known Hiranandani clan had entered into a business association agreement to jointly undertake construction-cum-development in the real estate sector in India. There existed an arbitration clause as per which the place of arbitration was New Delhi and the language of the arbitration proceedings was English. The clause expressly stated that issues concerning decision by the Arbitral Tribunal could be taken to any Court of Competent Jurisdiction and that notwithstanding any provision of law concerning conferring jurisdiction in a Court where arbitration is held or any award delivered the right of parties to approach a Court of law shall be unaffected. The Arbitral Tribunal comprising Cherie Booth (QC); Justice (Retd.) Ajit P.Shah; and Lucy.F.Reed, issued a partial award on July 27, 2013 fixing

liability upon the father and the son and in favour of Priya and made corrections thereto on September 18, 2013. The parties informed that they accept the partial award and thus on November 04, 2013 the Arbitral Tribunal issued the consent partial award fixing the liabilities. The date of signing of the partial award is November 04, 2013 but its index has the date October 23, 2013 thereon.

16. The Tribunal declared that Priya was entitled to recover claim damages, but upon proof and in amounts to be quantified concerning projects in the city of Chennai and Mumbai. Quantification of the costs was expressly recorded to be a part of the final award.

17. Hearings were held before the Arbitral Tribunal for quantification of the claims of Priya. A draft final award was circulated by the Arbitral Tribunal, and this act of transparency led to newspaper reports and litigation commenced in Mumbai and at Delhi.

18. With reference to the draft final award dated September 14, 2015 which had left blank the amounts which the Arbitral Tribunal intended to award, but indicated the reasoning thereof, the father came to know that he would be recompensed a portion of the arbitration cost incurred by him and his son (probably on account of a sum which the two had agreed to pay to Priya and she did not agree and as a result the Arbitral Tribunal had to hold sittings to record evidence and hear the parties). Aware of the partial liability award as per which a sum had to be quantified; payable by the father and son to Priya but some costs to be reimbursed by Priya, Niranjana filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 in the High Court of Judicature at Bombay pleading that with reference to the draft final award he estimate a recompense of ₹40 crores to him from his daughter. He pleaded that he

estimates further litigation cost in sum of ₹10 crores and thus sought security to be furnished by the daughter in said sum.

19. This petition was filed in the Registry of the Bombay High Court on April 25, 2016 and on a mention was got listed for May 03, 2016.

20. Priya filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 in the Delhi High Court on May 02, 2016 which was listed before the learned Single Judge on May 03, 2016. In her petition she claimed that the net sum awarded would be in her favour. Pleading that as per newspaper reports the father and son were trying to corporatize the assets and this may render the process of recovery of her dues cumbersome and time consuming, she prayed for an injunction against her father and brother to be issued restraining them from selling, alienating or transferring the ownership interests in the partnership firms including transferring such assets to a corporate entity.

21. With reference to Section 42 of the Arbitration and Conciliation Act, 1996 the debate took the parties to interpret the words '*has been made*' in Section 42 of the Act; for the father and son oppose the maintainability of the petition filed by Priya under Section 9 of the Act before the Delhi High Court on the plea that the father had instituted a petition under Section 9 in the Bombay High Court on April 25, 2016. Priya urged two points. The first was that '*has been made*' must mean to the Court, as in, laid before the Judge; as distinct from merely filing in the Registry of the Court. She urged that to pre-empt her from approaching the Court in Delhi, the act of merely filing a petition under Section 9 of the Act in the Registry of the Bombay High Court would not amount to the father making an application in the Court at Mumbai. Pithily put, the argument was that the mandate of Section 42, which took away the right of parties to approach a Court in case of concurrent jurisdiction of Courts,

and conferred exclusive jurisdiction to the Court which was first seized of an application filed by a party, meant the Court, as in, the Judge having before him/her the petition filed. The second limb of her stand was that a party cannot, under colour of a claim, which ex-facie is frivolous, approach any Court and claim that said Court is the one which would henceforth be the only Court where applications under the Act can be filed. The factual setting of said argument was that the final award had been pronounced, and she was the net recipient of the money from her father and brother. As per her the father and son knew that. Even in their pleadings in the application filed under Section 9 of the Act before the Bombay High Court the two had admitted that notwithstanding part of cost incurred by them being reimbursed to them from her, she would be the net recipient of money from her father and brother and thus the sole intention of the father was to appropriate jurisdiction in the Bombay High Court and not to enforce any bona-fide claim in the argument of Priya. It was urged that motivated and vexatious petitions need to be held as not maintainable and if a petition before a Court is held to be not maintainable, it would be a case where the Court would not be conferred with the exclusive jurisdiction envisaged by Section 42 of the Act.

22. Parties were not at variance that the mandate of Section 42 of the Act is that where more than one Court has jurisdiction to entertain applications under the Arbitration and Conciliation Act, 1996, the Court in which an application is made first would alone have jurisdiction over the arbitral proceedings and all subsequent applications arising out of the agreement and the arbitration proceedings have to be made in that Court alone.

23. On the interpretation of the words '*has been made*' which occur in Section 42 of the Act, sustenance can be sought from the judgment of the

Supreme Court reported as (2009) 17 SCC 796 Fiza Developers and Inter-Trade Private Ltd. Vs. AMCI (India) Pvt. Ltd. & Anr. Section 36 of the Act makes an award enforceable after the time for making an application to set aside the award under Section 34 of the Act has expired or where such application ‘*having been made*’ is refused. In para 20 of the decision the Supreme Court held that the very filing and pendency of an application under Section 34, in effect, operates as a stay of the enforcement of the award.

24. Every Court has a procedure for filing, scrutiny and listing of petition, applications and suits. Merely because the Registry of a Court takes time, as per the rules, and this resulting in a hiatus between the physical act of filing of a petition by a party and the ministerial act of the Court officers placing it before a Judge, would not mean that a petition or an application has not been made as contemplated by the statute. Thus, the first argument of Priya is rejected.

25. As regards the second argument, there is merit in the logic of the argument i.e. that if a frivolous application is filed and opined to be so, the Court dismissing the same with the reasoning that the application is an abuse of the process of the law and hence the Court dismissing it, effectively opining, that the application was not even maintainable, because no Court and especially one of record would allow its processes to be misused, would require it to be held that though de-facto a petition was first made in a Court, but de-jure none would be required to be treated as having been made.

26. Though stated in different words, this is the law declared by a learned Single Judge of this Court in the decision reported as 2004 (76) DRJ 119 Engineering Products India Pvt. Vs. Indiana Engineering Works Pvt. Ltd., in paragraph 4 whereof it was 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 of 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.”

27. But then this would be the opinion of the Court where a petition is first filed and the opposite party takes an objection. The principle of comity commands us not to comment upon the issue whether the petition filed by the father under Section 9 of the Act before the Bombay High Court is devoid of merit and has the hidden agenda of ousting jurisdiction that is inconvenient to the father and the son; who appear to be residing in the city of Mumbai.

28. We therefore refrain from noting the contentions advanced before us concerning the hidden agenda of the father in approaching the Bombay High Court and that the petition filed by him was devoid of merit as also the counter reply thereto. It would be for the High Court of Judicature at Bombay to take cognizance of said arguments and take a decision.

29. We therefore declare the law to be that a bona-fide petition filed under the Act first in point of time would exclude jurisdiction of other

Courts and vest exclusive jurisdiction in the said Court in view of Section 42 of the Act and the filing would mean a properly constituted petition filed in the Registry of the Court. But if the Court finds that there was a hidden agenda in ousting jurisdiction of another Court and that the petition filed was devoid of merit and the Court so expressly states, the cunning act of filing the petition in said Court would not be treated as the said Court being the first one to be approached and therefore excluding jurisdiction in the other Court and vesting jurisdiction in said Court alone; for the reason a mala-fide act with cunning and having a hidden agenda can never be countenanced by any Court of record; and Courts in India are not only Courts of law but even of justice and equity. In said situation it has to be held that no advantage accrues to the party which has resorted to cunning and had a hidden agenda to oust jurisdiction.

30. On facts of the instant appeal it only means this. If the High Court Judicature at Bombay dismisses the petition filed by Niranjan Hiranandani holding the same to be devoid of merits, an act of cunning having an hidden agenda intending to oust jurisdiction of the Court at Delhi, Priya would be entitled to file an application in the Delhi High Court praying for an interim measure or under any other Section. But if the Bombay High Court does not hold so, that would be the end of the matter concerning jurisdiction of the Courts at Delhi.

31. The appeal is accordingly disposed of declaring the legal position as above in paragraph 10 concerning the law declared by the Supreme Court in *Bharat Aluminium Company*'s case (supra) and in paragraph 23 above regarding the interpretation to the words '*has been made*' in Section 42 of the Arbitration and Conciliation Act, 1996; and conferring a right upon Priya as declared in para 30 above.

32. There shall be no order as to costs.

CM No.20104/2016

Dismissed as infructuous.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

MAY 30, 2016
mamta