

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

Judgment Reserved on : April 26, 2016

% *Judgment Delivered on : May 03, 2016*

+ **FAO(OS) 450/2015**

VIDEOCON INDUSTRIES LIMITED Appellant
Represented by: Mr.Rajiv Nayyar, Sr.Advocate
instructed by Mr.Anirudh Das,
Mr.Aashish Gupta and Mr.Dushyant
Manocha, Advocates

versus

UNION OF INDIA, MINISTRY OF
PETROLEUM & NATURAL GAS Respondent
Represented by: Mr.Sasiprabhu, Advocate with
Mr.Somiran Sharma and Mr.Raghu
Chander, Advocates

FAO(OS) 519/2015

CAIRN INDIA LIMITED & ORS Appellants
Represented by: Mr.Akhil Sibal, Advocate with
Mr.Anirudh Das, Mr.Aashish Gupta
and Mr.Arjun Pall, Advocates

versus

UNION OF INDIA Respondent
Represented by: Mr.Sasiprabhu, Advocate with
Mr.Somiran Sharma and Mr.Raghu
Chander, Advocates

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Though arising out of two separate proceedings and two separate orders being challenged in the above captioned appeals, the factual backdrop though different but giving birth to the same legal issue, is the reason why the two appeals are being decided by a singular decision. Whereas Videocon Industries challenges the order dated July 21, 2015 passed in CS (OS) No.2074/2015, wherein the learned Single Judge has, in an anti-suit injunction matter, directed the Arbitral Tribunal comprising Hon'ble Justice (Retd.) G.T.Nanawati, Hon'ble Justice (Retd.) J.K.Mehra and Sh.Soli J.Sorabjee, Senior Advocate to hold arbitral proceedings only at Kuala Lumpur (Malaysia) and has restrained the Tribunal from holding a hearing at Colombo (Sri Lanka); Cairn India Ltd., Ravva Oil (Singapore) and Videocon Industries Ltd. challenge the order dated August 14, 2015 passed in CS (OS) No.2445/2015 in a suit filed by the Union of India restraining the defendants in the suit from participating in the arbitration proceedings before the Arbitral Tribunal comprising Andrew Berkeley, Sir Anthony Evans and Justice (Retd.) A.S.Anand.

2. The two arbitration proceedings emanate from the same contract, having multiple parties thereto. It is the admitted position between the parties that as per Article 33.1 of the Contract it is governed by the laws in India. As per Article 34.12 the seat of the arbitration is at Kuala Lumpur (Malaysia) and therefore concededly curial remedies concerning any award pronounced by the Arbitral Tribunal has to be in Kuala Lumpur. As per the second limb of Article 34.12 of the Contract the arbitration agreement between the parties is governed by the laws of England and thus the constitution of the Arbitral Tribunal and the procedure to be adopted by the

Arbitral Tribunal and the proper law of the arbitration would be the laws of England. As per Article 35.2 the contract could not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the parties with the instrument stating the date upon which the amendment/modification shall become effective.

3. We do not intend to make a catalogue of decisions, which are legion, evincing that such kind of agreements, where the underlying law of the contract is of one municipal jurisdiction, curial remedies of another and procedure of arbitration of the third are a fertile ground of litigation in Courts frustrating the very purpose of arbitration. If not a cheap remedy but at least a remedy where decisions are arrived at in the least possible time. For, as was held by the Supreme Court of India in the decision reported as (2014) 7 SCC 603 Reliance Industries Ltd. & Anr. Vs. Union of India, three sets of law may apply under a contract : (i) proper law of the contract; (ii) proper law of the arbitration agreement/lex arbitri; and (iii) proper law of the conduct of arbitration/lex fori/curial law. The doctrine of severability was explained. Thus, under a contract parties are entitled to agree that law of one country would govern the substantive contract and laws of other country would apply to arbitration proceedings and the parties can also agree that conduct of reference to arbitration would be governed by laws of yet a third country.

4. The Union of India, as the custodian of natural resources including petroleum in the territorial waters of India, and therefore exercising the right as the owner thereof, through the Ministry of Petroleum and Natural Gas, entered into a Production Sharing Contract on October 28, 1994 at New Delhi. The contract was executed between the Union of India on the one

hand and a consortium of four companies comprising Oil and Natural Gas Corporation Limited (ONGC), Videocon Petroleum Limited, Command Petroleum (India) Private Limited and Ravva Oil (Singapore) Private Limited. In terms of the contract, the consortium was granted an exploration licence and mining lease to explore and produce hydro-carbon resources owned by the Union of India underlying a Contract Area called 'Ravva Oil and Gas Field' in the Offshore of Andhra Coast. Subsequently, Cairn Energy U.K. was substituted in place of Command Petroleum (India) Private Limited and the name of Videocon Petroleum Limited was changed to Petrocon India Limited, which merged with Videocon Industries Limited.

5. In the year 2000, disputes arose between the Union of India and three of the four consortium members and the result was the constitution of two Arbitral Tribunals to decide the dispute; and we highlight that two mutually exclusive issues arose which were capable of being referred to two Arbitral Tribunals.

6. The arbitration case relevant for FAO (OS) No.450/2015 and the further facts which are relevant to be noted concerning the said appeal are that on August 19, 2003 Arbitration Case No.3 of 2003 was registered before the Arbitral Tribunal comprising Hon'ble Justice (Retd.) G.T.Nanawati, Hon'ble Justice (Retd.) J.K.Mehra and Sh.Soli J.Sorabjee, Senior Advocate and the first meeting of the Tribunal at Kuala Lumpur, Malaysia was fixed for hearing because the seat of arbitration was Kuala Lumpur. But before the hearing could take place Malaysia was declared epidemic due to 'SARS'. Accordingly, after consultation and keeping in mind the convenience of all concerned and to ensure that the proceedings were not delayed, the Tribunal held sittings at Amsterdam at the first

instance and on November 15, 2003 the parties agreed to shift the sitting of further arbitration proceedings to London.

7. This has given birth to fertile litigation which has become the delight of the lawyers and the despair of the Judges.

8. As per the Union of India the seat of the arbitration was not changed and continued to be Kuala Lumpur and the agreement to hold sittings at London was purely a matter of convenience and not an agreement to amend the contract between the parties which stipulated that the seat of arbitration would be Kuala Lumpur. As per the consortium members the agreement was to shift the seat of arbitration to London.

9. The Arbitral Tribunal comprising Hon'ble Justice (Retd.) G.T.Nanawati, Hon'ble Justice (Retd.) J.K.Mehra and Sh.Soli J.Sorabjee, Senior Advocate passed a partial award on March 31, 2005 which was challenged by the Union of India on May 10, 2005 before the Malaysian High Court at Kuala Lumpur. Videocon questioned the jurisdiction of the Malaysian High Court on the ground that the seat had shifted to London and that Courts in Malaysia did not have the jurisdiction to grant any curial remedy concerning the award.

10. Since further proceedings in the reference before the Arbitral Tribunal were to take place and the epidemic in Kuala Lumpur was over, the Union of India requested the Arbitral Tribunal to hold further sittings at Kuala Lumpur, stating that the jurisdictional seat of arbitration was at Kuala Lumpur. This was opposed to by Videocon. By an order dated April 20, 2006 the Arbitral Tribunal decided that further sittings shall be held at London from June 30, 2006 to July 02, 2006.

11. Aggrieved by the order dated April 20, 2006 passed by the Arbitral Tribunal, on May 30, 2006 Union of India filed OMP No.255 of 2006 under Section 9 of the Arbitration and Conciliation Act, 1996, on the original side of the Delhi High Court seeking to injunct the Arbitral Tribunal from holding sittings in London upon a declaration that the seat of arbitration was Kuala Lumpur. Videocon raised an objection to the maintainability of the petition on the ground of jurisdiction pleading that Courts in India would have no jurisdiction to pass any such direction because as per the contract arbitration proceedings were governed by the laws in England and originally the seat of arbitration was Kuala Lumpur but with consent the seat got shifted to London.

12. By an order dated April 30, 2008 a learned Single Judge of this Court opined that Courts in India would have jurisdiction to decide the dispute raised by Union of India in OMP No.255/2006 and proceeded to fix a date to hear the same on merits. The said decision was challenged by Videocon before the Supreme Court of India and leave to appeal sought was granted resulting in CA No.4269/2011 being registered before the Supreme Court of India laying a challenge to the order dated April 30, 2008.

13. Before leave to appeal was granted and during the pendency of SLP (C) No.16371/2008, on August 05, 2009 the High Court of Malaysia dismissed the challenge to the partial award by the Union of India on the view taken that the seat of Arbitration had shifted to London, against which decision an appeal was filed by the Union of India before the Court of Appeals in Malaysia, and the decision by the Court of Appeals is awaited even till today.

14. On October 09, 2009, Videocon brought the decision of the Malaysian High Court on the record of the Petition seeking Special Leave to Appeal then pending before the Supreme Court of India.

15. On the plea that the issue of seat of arbitration being London and not Kuala Lumpur was settled by the High Court of Malaysia at Kuala Lumpur by its order dated August 05, 2009 and in spite thereof Union of India was refusing to appear before the Arbitral Tribunal and participate in the arbitration proceedings, on October 13, 2009, Videocon filed a Claim Petition No.2009, Folio 1382 before the High Court of Justice, Queen's Bench Division, Commercial Court, London seeking a declaration that the seat of arbitration was in London and therefore Union of India be directed to participate in the arbitration proceedings before the Arbitral Tribunal which should hold hearing in London.

16. On April 21, 2010 Union of India was served with notice in Claim Petition No.2009, Folio 1382 and thus on August 10, 2010 it filed an application registered as IA No.4/2010 in the pending petition seeking Special Leave to Appeal before the Supreme Court of India, in which application on September 06, 2010, the Supreme Court of India passed an order by consent recording that '*subject to completion of pleadings in the proceedings pending in the Courts in England as well as in Malaysia, neither the petitioner nor the respondent will proceed/take any pro-active steps for hearing in the proceedings/applications pending in the Court in England as well as in the Court in Malaysia, till the disposal of the present SLP*'.

17. On May 11, 2011, the Supreme Court of India pronounced the decision in Civil Appeal No.4269/2011, wherein it was held that Courts in

India would have no jurisdiction to pass any order under Section 9 of the Arbitration and Conciliation Act, 1996 because the seat of arbitration was not in India and the arbitration proceedings were governed by the law in England. But the Supreme Court of India categorically held that the seat of arbitration as per the contract was Kuala Lumpur and continued to be Kuala Lumpur because sittings firstly at Amsterdam and then at London was a mere change in the physical venue which did not amount to a change in the juridical seat of arbitration. The result was that OMP No.255/2006 had to be formally dismissed and this was so done by a learned Single Judge of this Court on May 30, 2011.

18. The decision of the Supreme Court of India dated May 11, 2011 would thus be a declaration by the highest Court in India and thus binding on every subordinate Court that concerning the contract in question the seat of arbitration was Kuala Lumpur and continued to be Kuala Lumpur notwithstanding Arbitral Tribunal by consent of parties holding sittings firstly at Amsterdam and then at London.

19. In *Videocon Industries'* case (supra) which is reported as (2011) 3 SCC 257 *Videocon Industries Ltd. Vs. UOI*, the first issue decided was as to whether the seat of arbitration was changed to London or Kuala Lumpur. The second issue was with regard to the Courts that would have supervisory jurisdiction over the arbitration proceedings. Plea of Videocon of the seat of arbitration shifting from Kuala Lumpur to London was rejected by the Supreme Court of India holding that the seat could not be changed by a mere agreement because Article 34.12 of the contract stipulated the manner in which the contract could be changed or amended, and required a written instrument signed by all parties to be executed. The Supreme Court of India

held that there was no written instrument signed by the parties to amend the contract and therefore the mere fact that the parties agreed before the Arbitrators for shifting of the seat of arbitration to London meant only that they agreed to a physical change of the venue of the arbitration. On the second issue the Supreme Court of India held that the parties having specifically agreed that the arbitration agreement would be governed by the English Law, Courts in India did not have jurisdiction.

20. In Reliance Industries' case (supra) the Supreme Court of India held with no uncertain mincing of the words that once the parties had consciously agreed that the juridical seat of the arbitration would be in a particular country or a city and that the arbitration agreement will be governed by the laws of that country it is no longer open to any party to contend that the provisions of Part I of the Arbitration and Conciliation Act, 1996 would be applicable to the arbitration proceedings. In the decision reported as (2012) 9 SCC 552 Balco Vs. Kaiser Aluminium Technical Service Inc. it was held that an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause.

21. Since Videocon persisted with its Claim Petition No.2009, Folio 1382 before the High Court of Justice, Queen's Bench Division, Commercial Court at London, Union of India filed an anti-suit injunction suit registered as CS (OS) No.3314/2011 on the original side of this Court seeking to restrain Videocon from pursuing Claim Petition No.2009. The plea taken in the said suit was that the highest Court of the land in India having declared vide its judgment dated May 11, 2011 that the seat of arbitration continued to be as per the contract at Kuala Lumpur and physical place of sitting to conduct hearings by the Arbitral Tribunal firstly at Amsterdam and then at

London did not shift the seat of arbitration outside Kuala Lumpur and much less to London, continuation of the proceedings by the consortium was before the Queen's Bench Division was vexatious and oppressive.

22. It being well-recognized in the jurisdiction of virtually every country in the world that a Court, where the mother contract was formed and where cause of action accrued and where one litigating party resided and was the one claiming to be the victim of oppression, could grant an anti-suit injunction, the learned Single Judge of this Court passed a reasoned decision on March 05, 2012 holding that in view of the decision of the Supreme Court of India dated May 11, 2011 Videocon's act of continuing with Claim Petition No.9 before the Queen's Bench Decision in London was vexatious and oppressive and thus the injunction prayed for was granted.

23. The injunction granted vide order dated March 05, 2012 in CS (OS) No.3314/2011 was challenged by Videocon before a Division Bench of this Court in FAO (OS) No.132/2012. The same was disposed of by consent vide order dated January 28, 2013. It reads as under:-

“Learned counsel for the appellants states that he has obtained instructions and his clients agree that they will withdraw the proceeding initiated by them in the High Court of Justice Queen's Bench Division Commercial Court, London. He thus submits that the result would be that the proceedings which are pending in Kuala Lumpur before the Federal Court would go on.

The cause of action for filing the ante suit injunction suit was the initiation of proceedings by the appellant in the Queen's Bench Division. In view of the submissions, we are of the view that the grievance of the respondent/original plaintiff in the suit does not survive.

In so far as the import of the order of the Supreme Court passed in Civil Appeal No.4269/2011 is concerned, that would be a matter to be agitated before the Federal Court in Kuala Lumpur.

The aforesaid arrangement is acceptable to the learned counsel for the respondent.

The result of the aforesaid is:-

i. The statement of the learned counsel for the appellant made on behalf of the defendant in the suit is taken on record.

ii. In view of the statement the grievance of the respondent/original plaintiff does not survive for consideration and the suit is liable to be disposed of accordingly.

iii. The appeal filed before us by the appellant has become infructuous and it is accordingly disposed of.

Accordingly the appeal stands disposed of in terms thereof.”

24. Following the order dated January 28, 2013, the Court of Appeal in Malaysia passed an order on April 08, 2014 framing a question of law : Whether the respondent (VIL) is precluded by estoppel and res judicata following the judgment of the Indian Supreme Court from contending that the juridical seat has shifted away from Kuala Lumpur.

25. Unless the Court of Appeals in Malaysia overrules the decision dated August 05, 2009 passed by the High Court of Malaysia at Kuala Lumpur holding that it had no jurisdiction to entertain the objection to the partial award dated March 31, 2005 because the seat of arbitration by consent has

been shifted to London, a very strange situation would permanently come into being. As regards the Courts in India, being bound by the decision of the Supreme Court of India the position would be that only Courts in Kuala Lumpur would have jurisdiction concerning arbitration disputes between the parties, but the Courts in Malaysia would be bound by their decision that they have none. The only way forward would be for the parties to enter into a fresh agreement by breaking the impasse. But since the highest Court in Malaysia had yet to pronounce upon the issue, we leave it at that with prayers on our lips that hopefully the highest Court in Malaysia passes an order which can break the impasse.

26. On July 10, 2014 the Union of India issued a show cause notice to the consortium and with reference to the subject matter of the show cause notice Videocon filed an application before the Arbitral Tribunal on July 24, 2014 praying that Union of India be restrained from proceeding ahead with the show cause notice. On March 05, 2015 the learned Presiding Arbitrator suggested that hearing could be held at Colombo and for which consent of the parties was sought. Union of India objected for hearings to be held at Colombo and insisted that hearings be held at Kuala Lumpur. Eschewing reference to correspondence explained between Union of India and the Presiding Arbitrator and noting that a stalemate ensued Union of India filed CS (OS) No.2074/2015 in which the impugned order dated July 21, 2015 was passed which has been challenged by Videocon in FAO (OS) No.450/2015.

27. The reasons given by the learned Single Judge are that once the Supreme Court of India held that the seat of arbitration was Kuala Lumpur, arbitration proceedings had to be held at Kuala Lumpur and at no other

place. This was on the merits obviously. On the issue of jurisdiction the learned Single Judge has held:-

“12(i) It also bears note that admittedly as per the subject Contract dated 28.10.1994, the substantive laws applicable between the parties are the Indian laws. Therefore, judgment of the Supreme Court dated 11.05.2011, is the Indian law, and this Indian law will bind the parties that Kuala Lumpur, Malaysia is to be the seat and venue of arbitration, as held in the judgment of the Supreme Court dated 11.05.2011.”

28. Relevant facts to be noted quo FAO(OS) No.519/2015 are that concerning a separate dispute relatable to the same contract the Arbitral Tribunal comprising Andrew Berkeley, Sir Anthony Evans and Justice (Retd.) A.S.Anand passed an award on January 18, 2011 granting declarations and expressing a confidence that both parties shall now settle the cost recovery issues in the light of the award. Costs awarded were in the following words:-

“(1) the costs of the arbitration (including fees and expenses of the Tribunal and the cost of hiring hearing rooms and transcribing the proceedings) shall be borne equally by the two parties:

(2) the Respondent shall pay to the Claimants fifty percent of the costs incurred by the Claimants.”

29. In terms of the cost awarded by the Tribunal Cairn laid a bill claiming GBP 633,031.23 from the Union of India and Union of India did not pay resulting in Cairn filing an application on February 23, 2011 before the Arbitral Tribunal which quantified the cost in response where to on April 28, 2011 Union of India took the position that after the award was pronounced

the Arbitral Tribunal was functus officio and had no jurisdiction to entertain any application.

30. On October 31, 2014 the Arbitral Tribunal gave a split verdict. Minority view taken by Justice (Retd.) A.S.Anand was that after the final award the Tribunal became functus officio and thus Cairn had to invoke such remedies as were available. The majority held that it had the jurisdiction to determine the cost. The cost was not quantified but a direction was issued for the parties to complete the formalities as were directed in the order so that the Tribunal could pass an appropriate order to quantify the cost. This resulted in Union of India filing CS(OS) No.2455/2015 in which the learned Single Judge has passed the order dated August 14, 2015 challenged by Cairn in FAO(OS No.519/2015. The learned Single Judge has restrained Cairn from participating in any further arbitration proceedings before the Arbitral Tribunal holding that the Arbitral Tribunal could not proceed further with only the majority i.e. Two Arbitrators determining the costs.

31. On the issue of jurisdiction the learned Single Judge has given same reason as in the order dated July 21, 2015 passed in CS (OS) No.2074/2015, but using different language, and we reproduce the same:-

“16. In my opinion, since the Production Sharing Contract specifically provides (Articles 33.1 and 33.2) that Indian law will be applicable between the parties and which will not be contravened, plaintiff will therefore be entitled to approach the Indian courts once nothing remains to be performed by the Arbitration Tribunal after passing of the Award and hence the arbitration proceedings now taking place cannot take place on the mandate of the Arbitration Tribunal having come to an end. Hence, Section 9 of the Code of Civil Procedure,

1908 read with the PSC between the parties that Indian law applies and which will not be contravened, the same entitles the plaintiff to approach this Court to declare the actions of the Arbitration Tribunal as without jurisdiction and void ab initio on account of the said Arbitration Tribunal being functus officio and seek appropriate consequential reliefs.”

32. The order dated October 31, 2014 passed by the Arbitral Tribunal comprises a majority opinion that the Arbitral Tribunal retained jurisdiction to quantify the cost and a minority view that the Tribunal did not retain any such jurisdiction. After recording the opinions as aforementioned, the order terminates in, if we may use the expression conceptually part III of the order, signed by the Three Arbitrators under the caption ***‘THE TRIBUNAL’S RULING (by a majority) AS TO ASSESSMENT OF COSTS*** is as follows:-

“(1) The Respondent’s contention that the Tribunal is functus officio as regards assessment of Claimants’ costs of the arbitration is DISMISSED;

(2) The Respondent shall pay to the Claimants their costs of this Application incurred after 28 April 2011 (the date of Respondent’s objection, see paragraph 8 above) until the date of this Ruling and Further Award; and

(3) The amount of costs to be paid by the Respondent in respect of Claimants’ costs of the arbitration and of this Application shall be assessed by the Tribunal, as follows-

(i) Within one month from the date of this Ruling, Claimants shall quantify their costs of this Application incurred after 28 April 2011 until the date of this Ruling;

(ii) Within one month after Claimants' notification, Respondent shall respond to (a) Claimants' claim for their costs of the arbitration, as set out in Claimants' solicitors' letters dated 10 February 2011 and 17 February 2011; and (b) Claimants' claim for their costs of this Application, quantified as aforesaid;

(iii) Within 14 days after Respondent's response, both parties shall inform the Tribunal whether they propose a further hearing before the Tribunal proceeds to assess the amount of the Claimants' costs of the Arbitration and of this Application, as aforesaid; and the Tribunal shall give further Directions as shall seem appropriate to it.

Dated 31, October 2014

Sd/-

(Andrew Berkeley, arbitrator)

Sd/-

*(The Hon'ble Justice (Dr.) Adarsh
Sein Anand, Arbitrator)*

Sd/-

(Sir Anthony Evans, Chairman)''

33. Before we deal with the order dated August 14, 2014 challenged in FAO(OS) No.519/2015, as a narrative of fact we need to note that challenge by Union of India to the award dated January 18, 2011 was dismissed by the High Court of Malaysia on August 30, 2012 and on June 27, 2014 the Court of Appeal in Malaysia dismissed the appeal and the matter currently awaits Leave to Appeal before the Malaysian Federal Court

where the matter is still pending at the stage of Leave to Appeal being granted.

34. The learned Single Judge has disagreed with the interpretation to the various articles of UNCITRAL MODERN LAW and UNCITRAL RULES interpreted by the majority Arbitrators in the decision dated October 31, 2014 and has highlighted that since the curial remedy concerning an award and an issue arising out of the award had to be as per the Law of Arbitration in Malaysia, the remedy had to be as per sub-Section (1) of Section 44 of the Malaysian Arbitration Act, which reads as under:-

“Section 44(1): Unless otherwise agreed by the parties-

(b) any party may apply to the High Court for the costs to be taxed where an arbitral tribunal has in its award directed that costs and expenses be paid by any party, but fails to specify the amount of such costs and expenses (within thirty days of having being requested to do so;)”

35. The learned Single Judge has held that the award being incomplete in that it was simply declaratory of the costs awarded and did not quantify the same, the remedy was to resort to a proceeding under Section 37 of the Malaysian Arbitration Act.

36. The objection by Cairn that the Court in India would have no jurisdiction to pass any direction concerning the order dated October 31, 2014 has been negated by the learned Single Judge with the reasoning:-

“16. In my opinion, since the Production Sharing Contract specifically provides (Articles 33.1 and 33.2) that Indian law will be applicable between the parties and which will not be contravened, plaintiff will therefore be entitled to approach the Indian courts once nothing remains to be performed by the Arbitration Tribunal after passing of the Award and hence the arbitration proceedings now taking place cannot

take place on the mandate of the Arbitration Tribunal having come to an end. Hence, Section 9 of the Code of Civil Procedure, 1908, read with the PSC between the parties that India law applies and which will not be contravened, the same entitles the plaintiff to approach this Court to declare the actions of the Arbitration Tribunal as without jurisdiction and void ab initio on account of the said Arbitration Tribunal being functus officio and seek appropriate consequential reliefs.”

37. The suit filed by the Union of India in which the impugned order has been passed seeks a declaration that the arbitral Tribunal lack jurisdiction to quantify the costs once it had pronounced the award and therefore seeks to restrain Cairn and other two consortium members from pursuing their application before the Arbitral Tribunal to quantify the costs. It is not the case of the Union of India pleaded that the proceedings before the Arbitral Tribunal is vexatious or oppressive, other than on the ground that the Arbitral Tribunal has become functus officio.

38. Argument of Cairn, Ravva Oil (Singapore) and Videocon Industries, the appellants, is that the learned Single Judge has completely misunderstood the law concerning an arbitration dispute and that the governing law of the contract being the Indian law and as regards the curial remedies the seat of arbitration would confer jurisdiction. Response by Union of India is that since the contract has to be performed in India and as per the law in India, Courts in India could entertain the suit and for which reliance was placed on the decisions reported as (2012) 1 C.L.C. 326 Claxton Engineering Services Ltd. vs. TXM Olaj. Decision of the Delhi High Court dated December 22, 2014 in CS(OS) No.962/2014 Vikram Bakshi vs. McDonald's Pvt.Ltd. and the decision of the Calcutta High Court

dated September 29, 2014 in CS No.220/2014 Board of Trustees of Port of Calcutta vs. Louis Dreyfus Armatures Sas and Ors.

39. It is settled law that an agreement between the parties can contemplate a trinity of laws applicable to a contract, but with respect to the different domains of a contract. The underlying law of the contract with reference whereto the contract would be interpreted and with reference to the law applicable can be of one municipal jurisdiction. In what manner arbitration proceedings concerning adjudication of a dispute under the contract or in relation to or arising out of the contract have to be conducted can be governed by a law of another municipal jurisdiction. What would be the curial remedies concerning decisions by the Arbitral Tribunal can be the subject matter of the jurisdiction of a third municipal law.

40. The reasoning given by the learned Single Judge that because the underlying law governing the contract is Indian law would mean that Courts in India have inherent jurisdiction to entertain the plaint is ex-facie contrary to law.

41. As we have highlighted hereinabove in the plaint the reasoning of the majority arbitrator is challenged and in effect the decision dated October 31, 2014 has been challenged. The curial remedies available to the parties are concededly in Kuala Lumpur where Union of India had challenged the award pronounced. There is an inherent contradiction in the impugned order because the learned Single Judge has relied upon Section 44 of the Malaysian Arbitration Act to hold, on the reasoning that any grievance relating to the award had to be as per the Malaysian Arbitration Act, that the remedy of Cairn, Ravva Oil (Singapore) and Videocon Industries i.e. the consortium members was to pursue the remedy as per clause B of sub-

Section 1 of Section 44 of the Malaysian Arbitration Act. If this be so, the logical corollary would be that any decision taken by the Arbitral Tribunal could be challenged in the Court of Competent Jurisdiction in Kuala Lumpur and not in any other jurisdiction and especially when the challenge was to the merits of the decision.

42. Decisions relied upon by Union of India are clearly distinguishable inasmuch as in Claxton Engineering Services' case the view taken was that if a Court which otherwise had jurisdiction but for an exclusive jurisdiction clause found and hence gave a declaration that there was no arbitration agreement between the parties could issue an anti-suit injunction to restrain the opposite party from pursuing an arbitration claim laid before a Tribunal in a foreign jurisdiction. In Vikram Bakshi's case clause 40(a) and 40(b) of the contract between the parties was considered which read as under:-

“40(a) Governing Law. This agreement shall be construed in accordance with and governed by this laws of India and will be subject to the jurisdiction of the Courts in New Delhi, India, except for any Indian choice of law or conflicts of law rules which might direct the application of the laws of any other jurisdiction.

(b) Arbitration. On demand of either JV Party, any unresolved dispute which may arise in connection with paragraphs 35, 36, 37, 38 or 39 of this Agreement shall be submitted for arbitration to be administered by the London Court of International Arbitration (the “LCIA”). Such arbitration proceedings shall be conducted in London, England and shall be conducted before a panel of three (3) arbitrators and shall be conducted in accordance with the then current commercial arbitration rules of the LCIA for international arbitrations. Partners and McDonald’s shall each appoint one arbitrator and the two arbitrators so appointed shall appoint a third

arbitrator to act as Chairman of the tribunal. If a JV Party fails to nominate an arbitrator within thirty (30) days from the date when the claimant's request for arbitration has been communicated to the other JV Party, such appointment shall be made by the LCIA. The two arbitrators thus appointed shall attempt to agree upon the third arbitrator to act as Chairman. If the two arbitrators fail to nominate the Chairman within thirty (30) days from the date of appointment of the second arbitrator to be appointed, the Chairman shall be appointed by the LCIA. The JV Parties shall have the right to broadest investigation of the facts surrounding the dispute, provided that any dispute between the parties relating to such investigation shall be submitted to the arbitral tribunal for resolution. The arbitrators shall have the right to award or include in their award any relief which they deem proper in the circumstances, including without limitation, money damages (with interest on unpaid amounts from date due), specific performance, injunctive relief, legal fees and costs. The award and decision of the arbitrators shall be conclusive and binding upon the JV Parties and judgment upon the award may be entered in any court of competent jurisdiction. Partners and McDonald's waive and right to contest the validity or enforceability of such award. The JV Parties further agreed to be bound by the provisions of any applicable limitation on the period of time in which claims must be brought."

43. Applying the principles of forum non convenience and finding prima-facie waiver to enforce remedy under the arbitration clause, the anti-suit injunction was granted. In the Board of Trustees of Port of Kolkata decision the Court found that the arbitration agreement was enforceable only against the Union of India and not KoPT it was held that continuance of arbitration

proceedings against KoPT would be oppressive in view of the reasons stated in the decision.

44. The three decisions are clearly distinguishable.

45. We terminate our discussion concerning FAO (OS) No.519/2015 that any decision pronounced by the Arbitral Tribunal quantifying the cost has to be challenged as per the Malaysian Arbitration Act before the Court of Competent Jurisdiction in Kuala Lumpur and therefore set aside the impugned order dated August 14, 2015 and allow FAO (OS) No.519/2015.

46. Concerning FAO (OS) No.450/2015 we note that in view of the decision dated May 11, 2015 pronounced by the Supreme Court of India in Civil Appeal No.4269/2011 the finding returned by the Supreme Court of India that seat of arbitration continues to be at Kuala Lumpur would bind a Court in India, and to this extent there can be no cavil on this aspect of the legal position. But whether or not the said decision would preclude the consortium by estoppel and res judicata from contending that the juridical seat has shifted away from Kuala Lumpur, the parties would be bound by the consent recorded in the order dated January 28, 2013 passed in FAO (OS) No.132/2012, contents whereof we have noted in paragraph 21 above. Thus, as regards the Union of India and the consortium members they would have to await the legal opinion pronounced by the Federal Court in Kuala Lumpur Malaysia on said subject of estoppel and res judicata emanating from the decision of the Supreme Court of India.

47. Granting the anti-suit injunction prayed for the reason given by the learned Single Judge in the order dated July 21, 2015 is that in view of the decision of the Supreme Court of India dated May 11, 2011 the seat of arbitration had to be Kuala Lumpur. The learned Single Judge has held that

since the underlying law of the contract was the laws in India, Courts in India would have jurisdiction and therefore the decision by the Arbitral Tribunal to hold a sitting in Colombo was illegal and that the illegality could be cured by a Court in India.

48. For the reasons given by us in paragraphs 35 and 36 above the reasoning of the learned Single Judge in the order dated July 21, 2015, of underlying law of the contract being governed by Indian Law results in jurisdiction of the Courts in India is overruled.

49. Said decision was also defended by Union of India with reference to the three decisions which we have already noted hereinabove and distinguishing while terminating our opinion qua FAO (OS) No.519/2015, and therefore we need not repeat.

50. The learned Single Judge has overlooked the fact that notwithstanding the Supreme Court of India deciding categorically in the decision dated May 11, 2011 that the seat of arbitration continued to remain in Kuala Lumpur and sitting by the Arbitral Tribunal at a venue to hear the parties outside Kuala Lumpur did not shift the seat of arbitration, the Supreme Court of India had held that Courts in India could not entertain the petition under Section 9 of the Arbitration and Conciliation Act, 1996 because the seat of arbitration was outside India. The learned Single Judge has held that in that view of the matter the Arbitrators could not suo motu decide the venue of arbitration. The impugned order has not returned any finding that by simply holding further hearing at Colombo would be oppressive to either party. The learned Single Judge has overlooked that if for an exigency the venue where the Arbitrators can meet is fixed is other than where the seat of arbitration is contemplated, it would be case of a decision akin to an

administrative decision where right of neither party is affected and thus the decision being incapable of a legal challenge. It is trite that unless an injury results no act is actionable. In this context we take on record the statement made by learned senior counsel for the appellants in FAO (OS) No.450/2015 that the Arbitral Tribunal holding hearing in Colombo would not be treated as seat of arbitration shifting and that the said issue would be resolved before the Federal Court of Appeal in Malaysia as agreed to by the parties in FAO (OS) No.132/2012 and as recorded in the order dated January 28, 2013, and in respect of which the Federal Court of Appeal in Malaysia has on April 08, 2014 framed a question of law taking note of the decision dated May 11, 2001 of the Supreme Court of India.

51. Frankly, the dispute before the learned Single Judge is the result of complete breakdown of communication between Union of India and the consortium members. A gridlock exists as of today because the Supreme Court of India has held that the seat of arbitration is Kuala Lumpur and not London. The Court of Competent Jurisdiction in Kuala Lumpur has held that the seat of arbitration is London and not Kuala Lumpur. The issue whether the decision by the Supreme Court of India estops the consortium members from urging to the contrary and/or operates as res judicata has been agreed to be settled by the Federal Court of Appeals in Kuala Lumpur. Since Arbitrators have to meet at the place where the seat of arbitration is there, really speaking the Arbitral Tribunal cannot proceed ahead. But this lock jam takes the party nowhere. The Arbitral Tribunal has simply pronounced an interim award and has yet to conclude the proceedings and regretfully we note that a Tribunal constituted way back in the year 2003 has yet not taken the parties to the destination and thirteen years have elapsed.

There may be considerable merit in the argument of learned counsel for Union of India that the three Hon'ble Arbitrators : Hon'ble Justice (Retd.) G.T.Nanawati, Hon'ble Justice (Retd.) J.K.Mehra and Sh.Soli J.Sorabjee, Senior Advocate are all domiciled in India and thus parties should consent that the venue of the arbitration, and not resulting in the seat of arbitration shifting, could be in India because this would save expenses for the parties and the arbitration reference would not be treated as an open ticket for travelling all over the world, but we are handicapped to issue any direction in this regard because the contract between the parties clearly envisages arbitration to be conducted as per law in England and curial remedies at the place where seat of arbitration exists. There is a dispute whether the seat of arbitration is in London or Kuala Lumpur but it would not mean that the situation would be akin to the proverbial two monkeys fighting over a bread to divide it into two equal halves and cat resolving the dispute by nibbling one piece and saying that the other is bigger and then nibbling the other to proclaim that now the first has become bigger and needs to be cut down to size so that it becomes the same as the latter and so on, and in the process eating the bread. The Courts in India cannot resolve this dispute. Either the parties agree to the place of sitting by expressly recording that it would only be the venue where the arbitrators meet to hear the parties and not become the seat of arbitration or they await a decision by the Federal Court of Appeals in Kuala Lumpur, but the dispute concerning sitting at Colombo cannot be brought before a Court in India. The learned Single Judge has not held it to be a case of hardship or inconvenience to either party if arbitration is held at a venue in Colombo and this aspect we are noting only to highlight

that the order impugned had not proceeded on applying the law of anti-suit injunction.

52. Situation is fairly paradoxical, but Courts are faced with such situations. It cannot be helped.

53. FAO (OS) No.450/2015 is also allowed and the impugned order dated July 07, 2015 in CS (OS) No.2074/2015 is set aside.

54. In a nut shell, both appeals are allowed and both order impugned order, one in each appeal, are set aside.

55. Parties shall bear their own costs in the appeals.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

MAY 03, 2016
mamta/skb