

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**COMMERCIAL ARBITRATION PETITION NO.102 OF 2016
WITH
PERJURY PETITION NO.2 OF 2018
WITH
NOTICE OF MOTION NO.1327 OF 2018
IN
PERJURY PETITION NO.2 OF 2018
IN
COMMERCIAL ARBITRATION PETITION NO.102 OF 2016**

Darshan Hiranandani

...Petitioner

Versus

Priya Hiranandani Vandrevale & Anr.

...Respondents

**ALONG WITH
COMMERCIAL ARBITRATION PETITION NO.103 OF 2016
WITH
PERJURY PETITION NO.3 OF 2018
WITH
NOTICE OF MOTION NO.1341 OF 2018
IN
PERJURY PETITION NO.3 OF 2018
IN
COMMERCIAL ARBITRATION PETITION NO.103 OF 2016**

Niranjan Hiranandani

...Petitioner

Versus

Priya Hiranandani Vandrevale & Anr.

...Respondents

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Mr. D.J. Khambata, Senior Advocate a/w Mr. Karl Tamboly and Mr. Pheroze Mehta I/b Dastur Kalambi and Associates for the Petitioner in Commercial Arbitration Petition No.102 of 2016 and for Respondent No.2 in Commercial Arbitration Petition No.103 of 2016.

Dr.Abhishek Manu Singhvi, Senior Advocate, Mr. Fredun DeVitre, Senior Advocate a/w Mr. Mustafa Doctor, Senior Advocate a/w Mr. Aman

Ahluwalia, Mr. Rohaan Cama, Mr. Avishkar Singhvi, Mr. Nidhi Ram, Mr. Dharmaesh Jain, Mr. Aamir Farooqui, Ms. Roshni Naik, Ms. Swikirti Singhania, Ms. Ashwati Balraj and Ms. Ayushi Anandpara I/b Mr. Anil T. Agarwal for Respondent No.1 in both the petitions.

Mr. N.H. Seervai, Senior Advocate a/w Mr. Chetan Kapadia, Mr. Sumit Rai, Ms. Bindi Dave, Mr. Ieshan Sinha and Ms. Varada Balachandran I/b Wadia Gandhi & Co. for Respondent No.2 in Commercial Arbitration Petition No.102 of 2016 and for the Petitioner in Commercial Arbitration Petition No.103 of 2016.

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CORAM : S.C. GUPTE, J.

DATE : 18 MARCH 2019

P. C. :

These commercial arbitration petitions challenge a final award dated 18 May 2016 (read with memorandum of corrections dated 17 July 2016). The award was made by an arbitral tribunal of three arbitrators in an international commercial arbitration covered by Part-I of the Arbitration and Conciliation Act, 1996 ('Act') between Respondent No.1, who was the claimant before the arbitral tribunal, and the Petitioners, who were the respondents to the reference. The disputes between the parties arose out of what was called a "Business Association Agreement" ("BAA") dated 14 May 2006. It was the case of Respondent No.1 before the arbitral tribunal that the Petitioners had committed breaches of BAA and as a result, she had suffered damages.

2 At the request of the parties, the arbitration proceedings were bifurcated into two phases. In the first phase, designated as 'liability phase', the arbitral tribunal decided the issue of factum of liability of the Petitioners arising out of the alleged breaches of BAA in respect of the

particular projects referred to by Respondent No.1. The arbitrators, by a partial award rendered at the liability phase, *inter alia* declared that Respondent No.1 was entitled to recover damages, if proven and in amounts to be quantified in the next phase, designated as 'quantum phase', in respect of 5 out of 19 projects for which she had claimed damages. This partial award was accepted by the Petitioners and was re-declared as a partial award on consent. This award does not form part of the subject matter of challenge in this petition.

3 The parties then went on to prosecute the quantum phase reference before the arbitral forum. The tribunal, after hearing the parties, rendered a final award ('award'), incorporating therein the partial award. In this award, the arbitrators have awarded Respondent No.1 (i) damages for breach of BAA together with pre-judgment and post-judgment interest thereon, (ii) costs, (iii) interest on costs, and (iv) tax gross up amount so as to make Respondent No.1 whole to the extent of the award of damages. Item (iv) involves detailed directions providing for a tax protection mechanism for enabling Respondent No.1 to receive the amount of damages awarded net of taxes. The present challenge pertains to all four aspects of the award.

4 After the matter has been fully heard on merits and orders are reserved, learned Counsel for the parties request the court to pass an order on the petition on all four aspects of the challenge without stating any reasons. I accordingly proceed to do so.

5 Though the parties do not require reasons to be stated and

have offered to accept the orders of this court on all four aspects of challenge, considering that any tax protection mechanism ordered by this court has to accord with, and satisfy, legal requirements, a few observations concerning it, i.e. item no.(iv) of the challenge referred to above, are in order.

6 The underlying idea behind providing such tax protection mechanism, both in the award and as required by the parties to be done by this court, is that the award is for payment of damages to Respondent No.1 net of taxes. In other words, any tax liability in respect of receipt of damages awarded to Respondent No.1 has to be borne by the Petitioners. The parties are *ad idem* on this as a matter of principle. In practice, though, there are some debatable aspects. These arise because Respondent No.1 is a non-resident and payment under the award has to be transmitted outside India. Under Section 195(1) of the Income Tax Act, 1961, a person responsible for paying to a non-resident, not being a company, any sum chargeable under the provisions of the Act (not being income chargeable under the head “salaries”) is required, at the time of credit of such income to the account of the payee, to deduct income-tax thereon at the rates then in force. There is no unanimity amongst the parties on whether income coming into the hands of Respondent No.1, a non-resident, as a result of award of damages, attracts income-tax under the Act, as that would depend on the nature of the receipt in her hands; whether it is a capital receipt or a revenue receipt? Though this aspect was sought to be debated before the arbitral tribunal, the arbitrators have evidently not decided it and, in any event, any decision in that behalf would not have been binding on the tax authorities. Faced with this situation, the tribunal set about

deciding the tax protection mechanism for making Respondent No.1 whole for the damages awarded. Various methods were proposed and debated before the arbitral tribunal. The Income Tax Act has various provisions for predetermining tax prior to assessee's regular assessment. Section 195(2) gives an option to the person responsible for paying any sum chargeable to tax under the Act to a non-resident, if he is of the view that the whole of such sum would not be income chargeable in the hands of the recipient, to make an application to the Assessing Officer to determine either by a general or a special order the appropriate proportion of the sum chargeable to tax, and upon such determination, deduct tax only on such sum. The other provision is under Chapter XIXB providing for an advance ruling on the tax liability of a non-resident under Section 245N of the Act. Applications under Section 145(2) and Section 245N, though they may have same implications for the person responsible for payment, have distinct implications for the recipient assessee. Any advance ruling under Section 245N is binding on the assessing authority as against the assessee, whereas determination of the proportion of income chargeable to tax under Section 145(2) is not so binding, though it gives a complete discharge to the person responsible for making the payment. The main issue before the arbitral tribunal concerned how to make Respondent No.1 whole for payment of damages under the award in the face of these circumstances and provisions. The solution proposed by the arbitrators in their award principally requires the Petitioners to pay the tax upfront under Section 145(1) and then claim its refund, with the cooperation of Respondent No.1 (assessee), on the ground that a part of it, which provides for payment of damages, being in the nature of capital receipt, does not attract any tax. (It is not in dispute that there is no provision in the award nor is there any

suggestion in the present petition that payment of costs ordered in the award should be net of taxes, if any.) This aspect of the award has attracted most of the debate at the Bar during the hearing.

7 Extensive submissions have been made by the parties on possible alternative tax protection mechanisms, each coming up with his own draft of suggestions in that behalf. Both, however, broadly agree that the best mechanism to adopt would be to invite a ruling under Section 195(2) of the Income Tax Act and approach the issue of taxation in accordance with such ruling. The Petitioners are confident that receipt of awarded sum of damages by Respondent No.1 would not attract any income tax since it is a capital receipt in her hands. Respondent No.1, however, still insists on an appropriate protection mechanism concerning the issue of taxation, since it is not yet known how the taxman will view it. Be that as it may, both parties agree that inviting an order under Section 195(2) is the best starting point. The differences in their respective drafts are on the footing that a decision under Section 195(2) might entail an indefinite delay in Respondent No.1 getting the awarded amount. The Petitioners' solution in this behalf is that there could be some time-limit set for payment of the awarded claims under the orders of this court. If the tax authorities do not decide the application under Section 195(2) within such time, the Petitioners submit, they would nevertheless go ahead and make payment and in that case, take the risk of whatever tax, interest or penalty is levied on such payment. The Petitioners submit that under law, the responsibility of deducting tax and its payment into the treasury is of the payer and they, anyway and even otherwise, are responsible for payment of all tax, interest and penalty outlays on the award of damages, which is

avowedly net of tax. The Petitioners submit that appropriate provisions in that behalf may be made in the order. Though I propose to do so, in my view, the grievance is really an imaginary fear. The Government of India, Ministry of Finance, Department of Revenue, by its Office Memorandum of 26 July 2018, has issued directions to all income-tax authorities engaged in the matter of issue of certificates under Sections 195 or 197 of the Income Tax Act to adhere scrupulously to a time-line of 30 days. These departmental instructions make it clear that any disposal of applications beyond the said time-limit of 30 days must be for justifiable reasons, which are to be recorded in writing and duly approved by CIT(TDS)/CIT (Intl. Tax) concerned. The department has made it clear that any delay without valid reasons would be viewed seriously and the concerned CIT(TDS)/CIT (Intl. Tax) would be held accountable. In view of this circular, the department is bound to dispose of any application made under Section 195(2) within 30 days and, and in any event, so soon thereafter as may be possible after stating reasons for such delay and seeking approval of the higher officials for it. In any event, as I propose to do, this order would lay down a time-frame which must be adhered to for disposal of any such application.

8 One more issue bears consideration and that is about the relevant assessment year. As a matter of law, and neither party disputes it, the relevant assessment year for the assessment of Respondent No.1 for receipt of income in the form of damages awarded in the reference is the assessment year relevant to the present order, i.e. Assessment Year 2019-20. Since the award has been under challenge in the present petition and any amount coming to Respondent No.1 as a result of the arbitration

reference can only be under an order passed in the present petition, no income could be said to have accrued or become due in the hands of Respondent No.1 until such order is passed. This court in **DSL Enterprises Pvt. Ltd. vs. N.C. Chandratre**¹ has made this position clear. This court has noted the observations of Supreme Court in **Commissioner of Income Tax vs. Hindustan Housing and Land Development Trust Ltd.**² citing with approval the following principle laid down in **Khan Bahadur Ahmed Alladin & Sons vs. CIT**³:

“Income-tax is not levied on a mere right to receive compensation; there must be something tangible, something in the nature of a debt, something in the nature of an obligation to pay an ascertained amount. Till such time, no income can be said to have been accrued...”

A tangible right to receive the awarded amount, which could be said to be in the nature of a debt, would arise in favour of Respondent No.1 only under the present order and thus, Assessment Year 2019-20, relevant to this order, alone can be termed as the relevant Assessment Year for the receipt of the awarded amount so far as Respondent No.1 is concerned. That is clear as a matter of law. Apprehensions of the Petitioners are, however, on the footing that for any reason the tax authorities were to consider Assessment Year 2017-18 as the year of receipt of income by Respondent No.1, considering the fact that she had in Financial Year 2016-17 withdrawn the amount payable under the award (also made in F.Y. 2016-17) from out of the deposit made in this court by the Petitioners, they should not be saddled with interest and penalty. These apprehensions, to

1 (2013) 355 ITR 209

2 161 ITR 524 (SC)

3 (1969) 74 ITR 651 (A.P.)

my mind, are also ill-founded. Any amount deposited in court pending an adjudication is held by the court or its registry as a custodian for the benefit of the party/parties who may eventually succeed in the matter. Just as it is no income in the hands of the court or the registry (even as a representative assessee), it is no income in the hands of a party who may have been allowed to withdraw it under interim orders of the court. Even that party holds the amount merely as a custodian and for the benefit of the successful party. In any event, this court, by way of abundant caution, makes it clear that the Petitioners cannot be visited with consequences of interest or penalty in the case of assessment being made of Respondent No.1 for A.Y. 2017-18. Except for such assessment (for receipt of damages awarded) in A.Y. 2017-18, in all cases of assessment of receipt of damages in her hands, the burden of interest and penalty, if any, has to be borne by the Petitioners. Appropriate provisions are accordingly made in the order below.

9 The parties agree that any appropriate tax protection mechanism that may be ordered by this court in substitution of the tax protection mechanism, including grossing up method, ordered in the award, would not amount to an impermissible modification of the award. The parties are, as noted above, prepared to leave such mechanism to this court and agree that no reasons be stated for it.

10 Thus, in keeping with the submissions of the parties and without having to state any reasons for this order, as submitted by the parties, the petitions are disposed of in terms of the following order. The parties have, respectively, given undertakings to this court for effectuating

the order, which are also recorded in the following order:

- (i) The Petitioners shall pay to Respondent No.1 an amount of Rs.282.49 Crores (principal amount of damages plus pre-award interest) net of tax as per the terms noted below.
- (ii) The Petitioners shall pay to Respondent No.1 an amount of Rs.6.46 Crores as post award interest on the principal amount of damages awarded as per terms noted below. This amount is towards interest calculated between 17 August 2016 (from which date such interest accrues) and 17 November 2016 (when the Petitioners deposited the amount of award in court). From 17 November 2016 till payment of the awarded amount by the Prothonotary & Senior Master as provided herein, Respondent No.1 shall be entitled to actual interest earned on the amount first deposited with Central Bank of India and thereafter to be re-deposited by the Prothonotary & Senior Master in Nationalised Bank/s as provided herein.
- (iii) The Petitioners shall pay to Respondent No.1 an amount of Rs.42.40 Crores as costs for the liability phase of the arbitration reference, and Rs.31.84 Crores as costs for the quantum phase of the

arbitration reference.

- (iv) The Petitioners shall pay to Respondent No.1 an amount of Rs.1.50 Crores as arbitration costs of London Court of International Arbitration ('LCIA'), India.
- (v) The amount of Rs.282.49 Crores (representing principal damages plus pre-award interest) has achieved finality on the date of this order, and in no other year, and shall be accordingly disclosed in the tax returns of Respondent No.1 for Assessment Year 2019-20 (Financial Year 2018-19). The parties undertake to this court accordingly.
- (vi) The Petitioners undertake to this Court to pay the amounts mentioned in clauses (i) to (iv) above and also all income tax, interest and penalty, if any, on the amount of Rs.282.49 Crores for A.Y. 2019-20 or any other assessment year excepting A.Y. 2017-18. For A.Y. 2017-18, the Petitioners shall be liable to pay only the income tax, if any, but not interest or penalty thereon, if any.
- (vii) A fresh bank guarantee for Rs.149 Crores shall be furnished by the Petitioners to the Prothonotary & Senior Master or the present bank guarantee shall

be amended/extended by the Petitioners till the issues of tax, interest and penalty are determined by the tax authorities and one month thereafter. The Petitioners undertake to the court to do so.

(viii) The Petitioners shall in any event pay the aggregate amount referred to in clauses (i) to (iv) above on the expiry of 180 days from the date of this order and undertake to this court to do so.

(ix) Central Bank of India, Nariman Point Branch, is directed to deposit into the account of the Prothonotary & Senior Master, the amount of Rs.370 Crores secured by Bank Guarantee dated 27 January 2017 as extended by Amendment Guarantees dated 8 November 2017 and 15 November 2018, within 60 days of the date of this Order and on such amount being received into the said account, the Bank Guarantee and all its amendments shall stand forthwith discharged and cancelled without any further orders of this court. The Prothonotary & Senior Master shall invest the said sum in fixed deposit/s with any Nationalized Bank initially for a period of 120 days, and renewable thereafter until the Prothonotary is required to pay the amounts ordered herein.

- (x)(a) In the event Respondent No.1 receives any demand for tax in relation to the said amount of Rs.282.49 Crores for any year other than A.Y. 2019-20, then, in such event, Respondent No.1 undertakes to this Court that: (i) she shall submit to the Income Tax Authorities that the said amount of Rs.282.49 Crores has accrued to her in A.Y. 2019-20 as set out in clause (v) above, and (ii) She shall not admit or accept the incidence of tax on the amount of Rs. 370 Crores or any part thereof withdrawn by her from this Court; and
- (b) In the event of any such demand for tax being made on Respondent No.1 for a year other than A.Y. 2019-20, the Petitioners shall pay towards such demand of principal amount of tax, an amount upto (but not exceeding) the difference, if any, between Rs. 158.07 Crores and the amount of tax, if any, already deposited by the Petitioners pursuant to the Section 195(2) order or otherwise. To the extent the Petitioners pay only the differential amount, as above, in view of their having earlier deposited tax, if they subsequently receive any refund of such tax earlier deposited on the basis that the income was taxed in any assessment year other than 2019-20, such refund along with interest shall be paid to Respondent No. 1. In no circumstances will the

Petitioners be responsible or liable for any tax (except to the extent above), interest or penalty which may be demanded from Respondent No.1 for A.Y. 2017-18; and

- (c) In the event the Petitioners have paid any amount towards the principal amount of tax for any year other than A.Y. 2019-20, to the extent of such payment, the Petitioners' liability for interest and penalty under clause (vi) above shall stand proportionately reduced; and
- (d) The bank guarantee referred to in clause (vii) above shall stand reduced by any amount paid by the Petitioners towards the tax demand for any year other than A.Y. 2019-20; and
- (e) Respondent No.1 undertakes to this Court to diligently challenge any such order demanding tax for any year other than A.Y. 2019-20 and further undertakes to this Court that from any refund obtained by Respondent No. 1 for the said year she shall refund / repay to the Petitioners (with interest) the amount of tax paid by them under clause (x)(b) above; and
- (f) The Petitioners shall not be responsible for any

further payment towards tax demanded by the Income Tax Authorities for A.Y. 2019-20 (F.Y. 2018-19) until the tax paid by them is duly refunded in accordance with clause (x)(e) above; and

- (g) At no point in time shall the principal amount of tax paid or payable by the Petitioners under clause (vi) above in the aggregate in respect of A.Y. 2019-20 and/or any other year other than A.Y. 2019-20 exceed Rs. 158.07 Crores.
- (xi) Payment ordered herein shall be made to Respondent No.1 by the Prothonotary & Senior Master from out of the amount brought in by Central Bank of India as provided in clause (ix) above and accretions thereto, if any; any amount less than or more than Rs.370 Crores shall be refunded to the Petitioners or deposited by the Petitioners, as the case may be, with the Prothonotary & Senior Master.
- (xii) Respondent No.1 undertakes to this court to provide all reasonable co-operation and furnish all available documents and information set forth in Appendix 'A' hereto to the Petitioners within 10 days of this order. In addition to these documents and information, Respondent No.1 shall also submit

within 30 days of this order particulars of costs incurred by her in relation to the award of damages (for example, legal fees, travel expenses, etc.) and evidence in relation thereto, to the Petitioners. It is agreed and understood between the parties that these particulars and documents shall only be used by the Petitioners for the purposes of their application under Section 195(2) of the Income Tax Act, and related proceedings and for no other purpose.

(xiii) Within 20 days of this order, the Petitioners undertake to the court to apply under Section 195(2) of the Income Tax Act for an order for preliminary determination of tax payable on the amount of Rs.282.49 Crores and deposit such tax as may be determined thereunder with the Tax Authorities within 15 days of such order. The Tax Authorities shall determine the application as expeditiously as possible and in any event within 160 days of such application.

(xiv) On deposit of the tax, the bank guarantee shall stand discharged and/or reduced by the amount of tax deposited. The Petitioners undertake to this Court that thereafter, the bank guarantee, if required, will continue to remain in force until an order is passed

in Section 143(3) proceedings of the Income-Tax Act. Respondent No.1 undertakes to this Court to fully co-operate in such Section 143(3) proceedings and/or any other proceedings under the IT Act in relation to the incidence of tax on the said payment of Rs.282.49 Crores including by giving an irrevocable power of attorney or authority, furnishing documents and information, not contradicting the Petitioners' submissions. Respondent No.1 shall, however, have the right to review or make appropriate alterations so as to ensure accuracy on all matters of fact stated therein. Refund, if any, will belong to the Petitioners alone.

(xv) All tax payments shall be without prejudice to the Petitioners' right to apply for determining or challenging the incidence of tax in appeal either in their own name or on behalf of Respondent No.1 but entirely at their costs on the said payment of Rs.282.49 Crores pursuant to this order.

(xvi) In the event the Petitioners fail to pay the tax determined in the assessment proceedings in accordance with this order, the bank guarantee provided as above can be invoked by the Prothonotary & Senior Master.

(xvii) The Petitioners shall not be responsible or liable for any payment of tax on post award interest or costs, (whether liability phase, quantum phase or arbitration costs) awarded by this Court. Respondent No.1 undertakes to this Court that she shall, within 180 days hereof, obtain a certificate under Section 197 determining the amount of tax to be withheld and paid and such net amount shall be paid to Respondent No.1. The Prothonotary shall pay the tax from the money held by him. Refund, if any, shall belong to Respondent No.1.

(xviii) This order shall substitute the operative part of the impugned award contained in paras 447, 448, 524, 525, 528, 532, 541, 550, 551 and clauses 1 to 7 of the portion entitled 'Final Award' in the award dated 18 May 2016 (read with Memorandum of corrections dated 17 July 2016).

(xix) Commercial Arbitration Petitions Nos.102 and 103 of 2016 stand disposed of as per the above order.

(xx) Perjury Petition Nos.2 and 3 of 2018 stand dismissed as withdrawn and all allegations made by the parties against one another stand withdrawn.

(xxi) In view of the disposal of the petitions, the notices

of motion do not survive and are disposed of as such.

(xxii) Each party shall bear his or her own costs of all these petitions.

(xxiii) Either party shall have liberty to apply to this court in case of any difficulty.

(S.C. GUPTE, J.)

APPENDIX A

1. Permanent Account Number ('PAN').
2. Self-Declaration in Form 10F.
3. No. of days presence in India of the Priya during FY 2017-18 and FY 2018-19.
4. A declaration as to existence or otherwise of a Permanent Establishment ("PE") of Priya in India for the current Financial Year 2018-2019 (assuming damages accrue in current FY 2018-2019) in which the damages is said to accrue in hands of Priya.
5. Nature of business carried on by Priya outside India and in India.
6. Full details of each business activity of the in India, including, the place of such business, shareholders, directors, key managerial personnel of such business and role played by Priya (either directly or through affiliates) in such businesses.
7. Details of investments made by Priya in India. Whether income from sale/ disinvestment of such investments is characterized as capital gains or business income.
8. Whether any business activities are carried in India by Priya through a fixed place of business or through any agent in India.
9. Whether similar agreements, like Business Association Agreements ('BAA') or similar Joint Venture Arrangements, have been entered into with other individuals/ companies (whether in India or outside India) or is the current BAA, a one-off transaction.
10. Income Tax Returns in India of Priya for the last three years and assessment orders received (if any adjustments are made therein).
11. Whether any appellate proceedings are pending in India in relation to adjustments in assessment orders. If yes, details of such appellate proceedings.

12. Any other relevant details/ information as may be sought by the tax authorities from time to time.

(S.C. GUPTE, J.)