
(2016) 02 BOM CK 0009

In the Bombay High Court

Case No : Appeal (Lodging) No. 32 of 2016 in Chamber Summons No. 905 of 2013 in Letters Patent Petition No. 226 of 2013 in Arbitration Petition No. 1036 of 2013 and Notice of Motion (Lodging) No. 246 of 2016 in Appeal (Lodging) No. 32 of 2016

Anilkumar Phoolchand Sanghvi and Others

APPELLANT

Vs

Chandrakant P. Sanghvi and Others

RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, Section 12, Section 13, Section 14, Section 16, Section 17, Section 19, Section 2, Section 2 (1)(e), Section 2(1) (e), Section 2(1)(e), Section 20, Section 20(2), Section 20(3), Section 34, Section

Citation : (2016) 2 AIRBomR 535 : (2016) 2 BCR 780

Hon'ble Judges : Anoop V. Mohta and G.S. Kulkarni, JJ.

Bench : Division Bench

Advocate : Rohan Cama, Smriti Singh and Upasana Mukharjee i/by Dastur Kalambi and Associates, for the Appellant; Milind Sathe, Senior Advocate, Sanjay Jain, Dharam Juman, Manik Joshi and Aditi Shukla i/by Crawford Bayley & Co., for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—1. This is an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, "the Arbitration Act"), filed by the Appellants-Petitioners, thereby challenging Judgment and order dated 22 December 2015, passed by the learned Single Judge, whereby Chamber Summons No. 905 of 2013 filed by Respondent Nos. 1 to 5, (Original Respondent Nos. 1 to 5) is allowed and revoked the leave granted to the Appellants under Clause XII of the Bombay High Court (Letters Patent) Act, 1866 (for short, "the Letters Patent Act"), by holding that "this High Court has no jurisdiction to entertain, try and dispose of the Arbitration Petition" filed by the Appellants under Section 9 of the Arbitration Act.

2. The Appellants and the Respondents and their relations with each other and

the Companies in question are described in the Appeal.

"Appellant No. 1 and Respondent No. 1 are brothers. Appellant No. 2 is the wife of Appellant No. 1 and Appellant Nos. 2 and 3 are the Directors of Respondent No. 6. Appellant No. 3 is the daughter of Appellant Nos. 1 and 2. Appellant Nos. 1, 2 and 3 together will be referred to as the "APS Group". Respondent No. 2 is the wife of Respondent No. 1. Respondent Nos. 3 to 5 are the children of Respondent Nos. 1 and 2. Respondent Nos. 1 to 5 together will be referred to as the "CPS Group". Respondent No. 6 is Maharashtra Erectors Pvt. Ltd. (for short, "MEPL"). Respondent Nos. 1 and 2 were the Directors of MEPL but claim to have resigned as Directors on 27 March 2014. The Applicant has become aware of the resignations only recently. MEPL is a glorified partnership of Appellant No. 1 and Respondent No. 1 and subsequently their respective wives, carrying on business together since 1978 i.e. for over 30 years. Respondent No. 7 is Sanghvi Hi-Lift Pvt. Ltd. (for short, "SHPL"). Respondent No. 8 is Sanghvi Movers Ltd., (for short, "SML"). Respondent Nos. 6 to 8 are family companies. Appellant No. 1 and Respondent No. 1 themselves or through their family members and/or through the said family companies (including the erstwhile Sanghvi Projects Limited) held and hold the family properties, assets and businesses."

3. There arose family disputes between the Appellants and the Respondents, including about their respective companies and therefore, to settle the dispute they entered into a Memorandum of Understanding (for short, "MOU") on 8 January 2006. Later on, the Appellants and Respondent Nos. 1 to 5 entered into a Deed of Family Settlement and Arrangement (for short, "FSA") on 24 April 2006, by superseding the MOU. This FSA provides an arbitration clause. Initially an Arbitrator was appointed but, ultimately by order dated 30 October 2010, the Arbitration proceedings were terminated. The family dispute could not be resolved. Arbitration Application No. 34 of 2012 was filed by CPS Group under Section 11 of the Arbitration Act. There were several disputes pending between the parties, therefore, it was resolved to refer those other disputes for mediation. The pending matters were adjourned by consent of the parties accordingly, including Arbitration Application. The Appellants filed Notice of Motion No. 167 of 2013 for ad-interim reliefs. By order dated 1 February 2013, the protective relief/injunction was granted in terms of prayer clauses (a), (b) and (c). The statement is made that the same has been in force till 2 February 2016. Another Notice of Motion No. 248 of 2013 was filed in view of stated breaches of the various orders. Application under Section 11 of the Arbitration Act was filed by the Appellants (APS Group) (Arbitration Application (Lodging) No. 493 of 2013) on 3 April 2013 and sought appointment of an Arbitrator in respect of the same family dispute between the parties.

4. After hearing the parties on various issues, by common order dated 20 June 2013, a Single Judge of this Court (Coram-Anoop V. Mohta, J.) by consent of the parties, appointed Mr. N.K. Sodhi (Retired) former Chief Justice of the Karnataka High Court, as a sole Arbitrator (The Arbitral Tribunal). Arbitration Application No.

34 of 2012 filed by Respondent Nos. 1 to 5 and two Notice of Motions so referred above, were disposed of. However, the interim order was continued for the period of eight weeks. By the said order, Respondent Nos. 6 to 7 in above Arbitration Application, which are the companies consist of the members of both these groups, though not signed the (FSA)/Arbitration agreement, but being necessary parties, permitted to participate in the Arbitration Proceedings before the Arbitral Tribunal, as appointed by consent of all the parties. All the Appellants and Respondents, including the companies, therefore are party to the Arbitration Proceedings in question. It is admittedly pending before the Arbitral Tribunal.

5. It is observed while allowing Section 11 Application as under:-

"50. The named Arbitrator in the application and specifically in prayer clause (a) thereof, was not in a position to take the matter, therefore, the submission is made to appoint Sole Arbitrator one who can adjudicate and take the arbitration proceedings considering the place of residence of parties or place of their business. Both the groups, in their respective Section 11 applications, prayed to appoint Arbitrator over than named Arbitrator. The earlier named mentioned in the application by APS group is not in a position to take the matter. The learned Senior Counsel for the CPS group, in view of order dictated in open court, without prejudice to their rights, suggested the name of Shri N.K. Sodhi, former Chief Justice of Karnataka High Court as an Arbitrator to which the learned Senior Counsel for APS group, on instructions, agreed to the same.

51. It is made clear that though points of reference are mentioned in petition as per notice dated 27 February 2013, a liberty is granted to both the parties to make additional point of reference, if any."

6. Admittedly, all the Respondents are residing in Pune. Their company's registered office is at Pune. The agreements, MOU and/or FSA signed in Pune. Various Suits are filed in the District Court, Pune. Admittedly, there is no express choice of fixed "venue" of the parties. The cause and real connection, therefore, as per the FSA is at Pune. This is a domestic Arbitration. All are governed by the Indian Laws. It is family dispute and the agreement is for appointment of the Arbitral Tribunal to resolve it.

7. By order dated 7 September 2012, in Arbitration Application No. 34 of 2012, this Court, (Coram- Dr. D.Y. Chandrachud, J.) observed that "the Mediator to hold the meetings in Pune since the parties reside in Pune and the disputes essentially originate there." This Court, in order dated 20 June 2013 passed in Arbitration Application, in paragraph No. 50, which is reproduced above, specifically recorded that "the submission is made to appoint Sole Arbitrator one who can adjudicate and take the arbitration proceedings considering the place of residence of parties or place of their business." These orders have attained finality.

8. On 31 July 2013, after the common Judgment so referred above, a leave under Clause XII of the Letters Patent Act was granted by the Single Judge on

the Application of APS Group, to file proposed Section 9 Application. The Application/Petition was filed accordingly. The interim protection/injunction so passed earlier, as referred above, dated 1 February 2013, was extended on 8 August 2013 till the final hearing of the Application. The same has been continuing till this date. Chamber Summons No. 905 of 2013 was filed by Respondent Nos. 1 to 5, on 26 August 2013, for revoking clause XII leave granted to the Appellants.

9. After hearing both the parties on 22 December 2015, the learned Single Judge has passed the impugned order. Hence the present Appeal filed on 23/25 January 2016 by the Appellants along with a fresh Notice of Motion in view of the new requisition notices dated 4 December 2015 and 30 December 2015 to appoint other individuals as Directors of the Board of Respondent Companies, by Respondent Nos. 1 and 2, on the ground that it is against the order of status-quo passed by this Court and therefore, should not be acted upon.

Basic laws-

10. Both the parties have read and referred various Judgments:-

"a) A.B.C. Laminart Pvt. Ltd. & Anr. v. A.P. Agencies, Salem , (1989) 2 SCC 163

b) Kusum Ingots & Alloys Ltd. v. Union of India & Anr. , (2004) 6 SCC 254

c) Booz Allen And Hamilton Inc. v. SBI Home Finance Limited & Ors. , (2011) 5 SCC 532

d) Bharat Aluminium Company v. Kaiser Aluminum Technical Services Inc. & Other matters , (2012) 9 SCC 552 (Balco)

e) Enercon (India) Limited & Ors. v. Enercon GMBH & Anr. , (2014) 5 SCC 1

f) Executive Engineer, Road Development Division No. III, Panvel and Anr. v. Atlanta Limited , AIR 2014 SC 1093

g) State of West Bengal & Ors. v. Associated Contractors , (2015) 1 SCC 32

h) Harmony Innovation Shipping Limited v. Gupta Coal India Limited & Anr. , (2015) 9 SCC 172

i) Sumer Builders Pvt. Ltd. v. Narendra Gorani , 2015 SCC OnLine SC 953 j) Mr. Chandrakant P. Sanghvi & Ors. v. Mr. Anilkumar P. Sanghvi & Ors.1

k) Konkola Copper Mines (PLC). v. Stewarts and Lloyds of India Limited2"

11. The following provisions are read and referred by the parties:-

Arbitration and Conciliation Act, 1996:-

"Section 2: Definitions-(1) In this Part, unless the context otherwise requires-

(a)

(b)

(c)

(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;

"Section 14: Failure or impossibility to Act-

(1) The mandate of an arbitrator shall terminate if-

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

"Section 19: Determination of Rules of Procedure-

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) -----

(4) ----- "

"Section 20: Place of Arbitration-

(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may,

unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties or for inspection of documents, goods or other property."

"Section 37(1) (b): Appealable Orders-

(1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

(a)

(b) setting aside or refusing to set aside an arbitral award under section 34.

(2)

"Section 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."

Code of Civil Procedure, 1908:-(CPC)

"Section 120:- Provisions not applicable to High Court in Original Civil Jurisdiction-The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

The Bombay High Court (Letters Patent) Act, 1866:-

*12. Original jurisdiction as to suits.- And We do further ordain that the said High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immovable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, or the Bombay City Civil Court.

*Amended by the Bombay High Court Letters Patents (Amendment) Act, XLI of 1948.

Pleadings and Contents of Clause XII Leave Application and Section 9 Arbitration Petition:-

12. The averments made for leave under clause XII on the basis of proposed

Petition under Section 9 of the Arbitration Act by the Appellants-original Petitioners show that, pending the final award, the main prayers against Respondent Nos. 1 to 5 were for restraining them; for altering the status-quo prevailing as on the date as regards the shareholding, the constitution of the Board of Directors of Respondent No. 6-MEPL, the operation of bank accounts and the operation of the movable assets of MEPL set out in Exhibit F. The prayers were also made for; directing Respondent Nos. 1 and 2 to provide the copies of the Board Resolutions and the correspondences exchanged between them; from taking any steps to hold shareholders' meetings with an agenda to alter the status-quo prevailing; any steps whatsoever to remove Petitioner Nos. 1 and 2 as Directors of MEPL; to alter/revoke the authority of Petitioner No. 1 to operate the Bank Accounts of MEPL and/or to vest such authority in Respondent Nos. 1 and/or 2; restraining Respondent No. 1 from exercising his casting vote as the Chairman of MEPL to the detriment of and against the interest of the Petitioners and/or MEPL.

13. The injunctions were also sought against Respondent Nos. 1 to 5 from selling, disposing of, transferring, creating third party rights in respect of the assets of Respondent Nos. 6 and 7 as set out in Exhibits "E" and "E-1"; from representing MEPL and SHPL in the Arbitration proceedings; restrain Respondent Nos. 1 to 5, their servants, agents or any other person from transferring of 1.45 crore shares of MEPL and 8,05,380 shares of SHPL in the name of third parties; creating rights in respect of and/or taking benefits on the said shares and/or giving effect even to the stated transfer of disputed shares in the name of Respondent Nos. 1, 2 and 5. The prayers were also made against Respondent Nos. 1, 2 and 5 for directing them to deposit the original share certificates and the dividends in respect of the said shares. Permission was also sought, pending the final award, by Petitioner No. 1 to represent MEPL in respect of the open property of 7 acres in Tathwade, Pune and to take all steps and actions in this behalf; to exploit commercially the property referred in Exhibit "E".

14. Reference was also made about the mediation hearing having taken place in Mumbai. Arbitration Application under Section 11 of the Arbitration Act, was filed in this Court. Earlier Arbitration proceedings before the Arbitrator were conducted in Mumbai. Securities and cash valued at approximately Rs. 45 crores are lying in the name of MEPL in Mumbai bank account and are managed by ENAM Asset Management Company, having its office at Mumbai. MEPL also owns office premises in Mumbai. Therefore, it was averred that a material part of the cause of action arose within the jurisdiction of this Court. However, it was specifically averred that the parties reside in Pune. Various proceedings are pending in Pune Court. Based upon these averments, the ex-parte leave was granted.

15. A Chamber Summons was taken out by original Respondent Nos. 1 to 5 on 26 August 2013 and prayed to revoke the said leave. In the affidavit in support of the Chamber Summons, it was averred that on 3 August 2013, the preliminary meeting of the Arbitration before the Arbitral Tribunal was going on in Pune,

where it had informed about the leave so granted. In the affidavit in support of the Chamber Summons, to revoke the leave, the averments were made that Section 9 Petition needs to be filed in Pune Court, which has jurisdiction to entertain such Arbitration Petition on the stated "cause of action", and which forms the "subject matter" of the Petition.

16. Referring to clause XII, it was averred that Respondent Nos. 1 to 5 do not reside in Mumbai and in fact reside in Pune. Respondent Nos. 6 to 8, MEPL, SHPL and SML respectively, are the companies having their registered office in Pune. Their entire business operation is from Pune, including the stated Board Meetings. "The subject matter of the dispute" is to resolve their family disputes by invoking the Arbitration clause. By letter dated 28 February 2013, sought a termination of FSA dated 24 April 2006, which was entered into by the parties in Pune. The averments and the reliefs so sought under Section 9 Petition against the Respondents, including SML and MEPL and its Managing Directors itself show that, no jurisdiction existing in this Court. Most of the movable and immovable properties are situated in Pune. All 11 Bank accounts of the Petitioners are in designated branches of Pune. The restraintment order against Respondent Nos. 1 to 5 from dealing with the movable assets of Respondent No. 6, as stated at Exhibit "D", consists of deposits lying with third parties. The machineries like cranes and trailers all are lying in Pune. Most of the immovable properties are situated outside the jurisdiction of this Court. The office premises situated at Bandra Kurla Complex, Mumbai, even if any one, as stated are not in possession of Respondent No. 6, but in possession of the Developer. The averments about offices at Nariman Point, Mumbai and BKC Mumbai, are of no assistance. The positive averments are made that there are 23 proceedings pending between the parties. Three suits, pending against the Respondents are in Civil Judge, Senior Division, Pune. In those Suits of the year 2011-12, partition of HUF assets; and 7500 shares of MEPL; transfer of 1.45 crores shares of SML; and transfer of 8,05,380 shares of SML are involved. Those Suits were pending at the relevant time, i.e. on the date of averments. The reliefs sought in those Suits and the reliefs so prayed in proposed Section 9 Petition were similar. Before the earlier Arbitrator, first meeting was in Pune and many meetings were held in Pune, though some meetings were held at Mumbai. In the Arbitration meeting dated 3 August 2013, the learned Arbitrator, as agreed by the parties, has directed that the preliminary hearing of Arbitration proceedings would be held, alternatively in Mumbai and Pune, till further directions. Therefore, alternative "venue" was fixed for holding the preliminary meetings only. The investment of Respondent No. 6 through ENAM Asset Management Co. at Mumbai through its portfolio Manager with the Mumbai branch cannot be sufficient to say that part of the cause of action arose in Mumbai. All the related movable and most of the immovable properties of the companies are also situated as their registered office is in Pune. One immovable property is outside the State of Maharashtra also. Section 11 Petition even if filed at the relevant time, that itself does not confer jurisdiction on this Court to entertain Section 9 Petition as sought to be contended by the

Petitioners. Therefore, it was prayed that the leave be revoked.

17. In affidavit-in-rejoinder, the Petitioners reiterated their stand and opposed to revoke the leave so granted. The submission was further made that the parties recognized Mumbai as the seat and the place of arbitration in the clause and also submitted that without prejudice to the other contentions, this Court would have concurrent jurisdiction in the matter, therefore would be the "Court" having jurisdiction under Section 2(1)(e) of the Arbitration Act. Therefore, as the material part of cause of action have arisen within the jurisdiction of this Court, the leave was correctly granted.

No Jurisdiction-reason to revoke the leave-

18. The learned Single Judge, after considering the provisions of the Arbitration Act, the Judgments, above facts and the rival submissions so made by the parties has held that; the material part of cause of action, which is subject matter of the FSA arose in territorial jurisdiction of Pune Court and not in Mumbai Court; that the learned Arbitrator in the outgoing Arbitration proceedings has decided the venue either at Pune and/or at Mumbai and the same could not be considered as the seat or place of Arbitration and therefore, this Court would not be "the Court" within Section of 2(1)(e) of the Arbitration Act; application under Section 11 and /or Arbitration Appeal under Section 37 of the Arbitration Act, are not the Applications as contemplated under Section 42 of the Arbitration Act and therefore, these Court proceedings, even if any, would not confer jurisdiction upon this Court; that Principal District Judge, Pune, and this High Court exercising the Ordinary Original Civil Jurisdiction, have no concurrent jurisdiction over the "subject matter of Arbitration proceedings/process" in absence of specific Arbitration agreement and; further that the substantial part of cause of action is in Pune and thus, the Principal District Judge, Pune would have to entertain, try and dispose of the Arbitration Petition filed by the Petitioners and not by the High Court exercising the Ordinary Original Civil Jurisdiction. The learned Judge, ultimately, after recording reasons has held that since the material part of the cause of action as arising within territorial jurisdiction of Court at Pune and even if leave was obtained by the Petitioners for filing Arbitration Petition, this court would not have granted such leave and thereby revoked the same.

19. The Appellants therefore, invoked Section 37 of the Arbitration Act (unamended Act), as the Arbitration agreement took place prior to 23 October 2015, and made submissions accordingly. Considering the scope and power of the Appellate Court under Section 37, we have proceeded to deal with the rival submissions made by the learned counsel appearing for the parties, based upon the material placed on record, including the reasons and conclusions so arrived at by the learned Judge. This is also on the foundation to see whether the reasons so provided are within the framework of law and the record.

The scheme of Arbitration and its applicability to the facts and circumstances:-

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

21. We are concerned with the domestic Arbitration based upon the Arbitration agreement, in the present case the FSA, which was executed admittedly at Pune, no situs or seat of Arbitration fixed by the parties. No specific Court jurisdiction is fixed or agreed by the parties. However, admittedly, the arbitrator after appointment, in a meeting at Pune fixed the "Venue" for the preliminary hearing/meeting at Pune, as well as, at Mumbai. Some meetings took place in Pune, in Mumbai and one meeting also at Chandigarh, the place of residence of the Arbitrator.

22. Section 2(1)(e) has expressed meaning of "Court" which means the Principal Civil Court of Original jurisdiction in a District Court, and includes the High Court in exercise of its Ordinary Original Civil Jurisdiction, having jurisdiction to deal with "the subject matter of the arbitration", if the same has been the "Subject matter of a Suit". The "subject matter of a suit" is a different concept than the "subject matter of the Arbitration". It is settled that the "Arbitration Petition" is not and/or cannot be treated as "Suit" as contemplated under the CPC.

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

"Subject matter of the Arbitration" and "Venue"-

24. The residence and the place of business of the parties are at Pune. The Respondent-companys" head office are at Pune. The prayers so made in the proposed Section 9 Petition and the averments so made for leave as contemplated under Clause XII, itself shows that the dispute arose between the parties, mainly refers to and related to the family issues within the jurisdiction of Pune Court. They have also decided therefore to resolve the dispute through the

Arbitration by the FSA. Therefore, the process of dispute resolution through the Arbitration of family matters is the "subject matter of the arbitration" which is within the jurisdiction of Pune Court. Therefore, the Pune Court would have to exercise the supervisory control over the arbitral process, in question.

25. The Arbitrator held majority of preliminary meetings at Mumbai and therefore, submission is made that the Mumbai be treated as "seat/situs of Arbitration and/or place of Arbitration" as contemplated under Section 20 of the Arbitration Act. We decline to accept this, as admittedly, there was no such clause to fix the seat. The Arbitrator has only fixed the "Venue" at Pune and at the Mumbai, for certain preliminary meetings.

26. We have noted that at the time of appointment of Arbitrator under Section 11, it is specifically observed in para 50 that the Arbitrator should be one, who is able to resolve the dispute at the place of residence of parties and so also at the place of their business which admittedly, in the present case, is within the jurisdiction of Pune Court. Even at the time of appointment of mediator, it is specifically observed that the dispute and a difference originated from the Pune.

27. It is relevant to note the observation of the Supreme Court in Balco (Supra) in this back-ground, with regard to the "subject matter of Arbitration" and the "subject matter of the Suit".

"96.

We are of the opinion, the term "subject-matter of the arbitration" cannot be confused with "subject-matter of the suit". The term "subject matter" in Section 2(1) (e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy."

"Place of Arbitration" and/or "Venue"-

28. To elaborate this issue further and to consider the purpose of meaning of words "seat", "situs" and "place" of Arbitration, as contemplated under Section 20. We are referring to the following observations in Balco (Supra):-

"98.

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai, etc. In the absence of the parties' agreement thereto, Section 20(2) authorises the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties."

29. The Supreme Court, further in Enercon (India) Limited (Supra) has dealt with the concept of "seat", "place" and "venue" and its distinction in various paragraphs, following Balco (Supra) has reinforced the position and observed in para 152 as under-

"152. In view of the above, we are of the considered opinion that the objection raised by the Appellants to the continuance of the parallel proceedings in England is not wholly without justification. The only single factor which prompted Respondent No. 1 to pursue the action in England was that the venue of the arbitration has been fixed in London. The considerations for designating a convenient venue for arbitration cannot be understood as conferring concurrent jurisdiction on the English Courts over the arbitration proceedings or disputes in general. Keeping in view the aforesaid, we are inclined to restore the anti-suit injunction granted by the Daman Trial Court."

30. Above position of law and in the facts and circumstance of the case, the convenient "venues" fixed by the Arbitral Tribunal as, Pune or Mumbai, that itself cannot be the reason to confer and/or to say that the Mumbai Court has concurrent jurisdiction over the Arbitration process, for the purpose of Section 9 Application.

31. We are accepting the reasons given by the learned Judge in this regard also, as we have gone through the relevant clauses of the agreement and scrutinized the reliefs sought in the proposed under Section 9 Petition. (Sumer Builders Pvt. Ltd. v. Narendra Gorani) , 2015 SCC OnLine SC 953. The above position has crystallized in favour of continuation of Arbitration proceedings under the supervisory control of Pune Court jurisdiction. The apex court in Union of India v. Reliance Industries Limited and Ors. , (2015) 10 SCC 213 has further reinforced the same concept of "venue".

Leave under Clause XII and its revocation

32. In the present case, the leave under Clause XII of the Letters Patent Act is necessary and/or not, is another issue. The learned Judge, however, not dealt with the said subject specifically, but as by providing reasons, dealt with the merits itself, therefore, we are also proceeding accordingly. We have noted following Judgments on this issue. National Commodity and Derivative Exchange Ltd. v. Indian Exchange of Metal Ltd. , 2012 (6) LJ Soft 366

"9. Leave under clause 12 of the Letters" Patent Act is not necessary :-

The submission is also that the Petitioner has not sought a leave, under clause 12 of the Letters Patent Act before filing the petition, therefore, it should not be entertained. The reliance was placed on Kotak Mahindra Finance Ltd. v. T. Thomas Educational Trust & Others , 2003 (10)LJSoft 115 : , 2003 (5) Bombay Cases Reporter 579. There was no such agreed jurisdiction clause in that matter. At least the part cause of action arose within jurisdiction of this Court. The parties have specifically agreed for this Court's jurisdiction, which is permissible.

The agreed clause and considering scope and the purpose of the nature of transactions. I am not inclined to accept in the present facts and circumstances that the leave is necessary. The Arbitration Act, nowhere provides such pre-requisite condition before filing petition under Section 9 of the Arbitration Act. The arbitration petition is not a suit. [Rajasthan State Electricity Board V. Universal Petrol Chemicals Ltd.: , (2009) 3 S.C.C. 107 and Balaji Coke Industry (P) Ltd. V. Mass Bhagwati Coke , (2009) 9 S.C.C. 403]."

This issue is also followed in Vodafone Spacotel Ltd. v. S Tel Pvt. Ltd. , 2012 (6) Mh.L.J. 931 by this Court.

33. Clause XII leave to file proposed Section 9 Arbitration, cannot be a determinative factor to fix the Courts jurisdiction as the parties have not specifically agreed for any place of arbitration and/or specific courts jurisdiction. Once the Court try and entertain even Section 9 Applications, after leave being granted, for the future purpose, such court become the "Court" under Section 2(1)(e), for all the subsequent applications, under the Arbitration Act. Such leave therefore, affects the purpose and object of the Arbitration Act and the Arbitration proceedings. The order of revocation of leave therefore, is within the framework of law and the record, needs no interference.

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

Mandate of Section 42 of Arbitration Act and subsequent applications in Court-

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

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

(supra) the Application was filed under Section 34 in the High Court in its jurisdiction on the Original Side, as well as, in the District Court, Thane on the same date. Therefore, the mandate of Section 42 in the facts and circumstances, was not made applicable. The Supreme Court in Atlanta (supra) has permitted the parties to continue the Bombay High Court proceedings, being a Superior Court. However, peculiarity of the case and the Judgments so cited, in any way, is of no assistance to give jurisdiction to this Court as sought to be contended by the Petitioners.

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

38. Section 11 Petition under the Arbitration Act so filed earlier in no way be treated as an Application Petition filed in the Court for filing present Section 9 Petition and/or Leave Petition, so also section 37(b), an Appeal filed earlier by the Respondents which were subsequently withdrawn. The order passed by the Tribunal under Section 17 at Mumbai, at the relevant time, in view of the specific provisions, challenged in Appeal under Section 37(b) in this Court. That itself, in our view, is not sufficient to overlook the specific averments made by the Petitioner in Section 9 Application and admitted position on record, so recorded

even by the learned Judge on the aspect of material cause of action. We are not concerned with an Appeal under Section 37 against the interim order passed by the Arbitral Tribunal under Section 17 Application.

39. The Judgment in Konkola Copper Mines (PLC) (Supra) is of no assistance as there was specific agreement between the parties, with regard to the place/seat/legal place of Court jurisdiction. Harmony Innovation Shipping (Supra) is also of no assistance, for the contentions so raised. We are not concerned with the Foreign seated commercial arbitration. There is no issue with regard to the governing law and/or applicability of part I of the Arbitration Act. In Enercon (India) Ltd. & Ors. (Supra), the venue of Arbitration was at London and the submission that the term "Venue" be read as "seat" was rejected. The Supreme Court in Enercon (India) Ltd. & Ors. (Supra), has observed that "the parties have chosen London only as the Venue of the arbitration. All the connected factors would place the seat firmly in India."

40. In Harmony (Supra) based upon the agreement that the party had agreed that the venue of the Arbitration would be at London and the contract was governed by the English law and which would be governed by the London maritime Associations procedure, and therefore, the Judicial seat of Arbitration be held to be London. It is relevant to note that even in Venture Global Engineering, which followed Bhatia, the Apex Court has dealt with the concept that "Venue had no connection with the contract of the parties except that it was a neutral place".

41. The Apex Court in Harmony Innovation (Supra) has reinforced the importance of seat/ place of Arbitration in paragraph 28, which reads thus:-

"28. The Court also referred to Balco, especially para 123, which is as follows: (Reliance Industries Ltd. case, SCC p. 629 para 51)

"51..... "123..... " an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy... as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration".(Balco case SCC p. 621)"

(Emphasis in original)

42. In Kusum Ingots (Supra) so referred and relied in support of the submission of part of cause of action was in reference to Article 226 (2) of the Constitution of India. The scope and purpose of power of Article 226 is unlimited and it is subject to the exercise of Judicial discretion by the Court. The Arbitration Act and/or Letter Patent Act provisions were not involved.

Arbitration Proceedings and Leave under Clause XII and effect of Section 42 of Arbitration Act:-

43. The ex-parte leave so granted was revoked after hearing both the parties. Clause XII specifically deals with the jurisdiction of Original Side of the Bombay

High Court, based upon the situation; if case of seats of land or other immovable suits within the ordinary original civil Jurisdiction or cause of action arises wholly; and if the defendants resides or carrying on business, within the local limits of the jurisdiction of the High Court, the High Court at Bombay is empowered to receive, try and determine the suits of every description. But in case, the cause of action arises in part within the local limits of High Courts jurisdiction then it is necessary for the Plaintiff/Applicant to obtain the leave before filing such suits. The Court, normally grants ex-parte order as provisions is available for other side to apply for revocation of the same. The other party can apply for revocation by filing supporting affidavit and documents. While granting the leave ex-parte, the Court is required to consider the averments so made in the leave Application as well as the proposed suit or application. As noted, in view of Section 120, the provisions of Sections 16, 17 and 20 of the CPC are not applicable to High Court in Ordinary Original Civil Jurisdiction. The principle even if applicable, still the Court needs to consider above, while dealing with the "Arbitration Petition", which is not "Suit", as contemplated under CPC and/or Clause XII of the Letter Patent Act.

44. The Apex Court in State of West Bengal (Supra), based upon the typical facts, reinforced the mandate of Section 42 read with Section 2(1)(e) referring to Sections 8, 11 Applications and emphasizing the importance of application filed under Section 9 though for the interim measure and its effects of subsequent application even under Section 34. The view of Atlanata (Supra), further approved by the Supreme Court in the State of West Bengal (Supra), to the extent of giving preference to the Ordinary Original Civil Jurisdiction of the High under Section 2 (1)(e) of the Arbitration Act.

45. In State of West Bengal (Supra), there was no issue about the venue and/or seat. There was no issue of jurisdiction raised at the earliest, though leave under Section XII of the Letters Patent Act was granted. In that case several orders were passed by the High Court about the Arbitration proceedings and ultimately the proceedings culminated into the award. Section 34 application was filed in the Civil Court of District Judge, though earlier the Application under Section 9 was filed in the High Court, apart from other orders in High Court. The Arbitration proceedings concluded as per the direction under Section 9 Application. The District Judge at Jalpaiguri, therefore, concluded that as the party had submitted to the jurisdiction of Calcutta High Court in its Ordinary Original Civil Jurisdiction in connection with the different proceedings arising out of the contract therefore, was barred in view of Section 42 of the Arbitration Act, and thereby rejected Section 34 Application for want of District Court jurisdiction. The Supreme Court, on facts and circumstances of that case, though approved the Atlanta view, revolving around Section 42 and Section 2(1)(e) of the Arbitration Act in paragraph Nos. 25 and 26 as under:-

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

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

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

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

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

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an Arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject matter jurisdiction would be outside Section 42.

The reference is answered accordingly.

26. On the facts of the present case, nothing has been shown as to how the High Court of Calcutta does not possess jurisdiction. It has been mentioned above that leave Under Clause 12 has been granted. In the circumstances of the present case, therefore, the judgment dated 11-4-2005 passed by the High Court of Calcutta is correct and does not need any interference. Civil Appeal No. 6691 of 2005 and Civil Appeal No. 4808 of 2013 are hereby dismissed."

46. Section 42 deals with an application filed under Part-I of the Act before the "Court" and not the "Appeal". Both these concepts are different. (M/s. Pandey & Co. Builders Pvt. Ltd. v. State of Bihar & Anr , 2007(1)SCC 467). On merits the Appeal was withdrawn in this case. However, in view of above, as Section 42 is not applicable to the Appeal, so the bar of Section 42 is also not applicable. This

Judgment supports the case of the Respondents with reference to the mandate of Section 42, as it deals in every respect with the arbitration agreement. However, Section 11 application does not fall within the purview of this Section as observed above, so also the effect of Section 37 (2) Appeal/Application. In the present case, admittedly, ex-parte leave was granted. It was objected by Chamber Summons to revoke the same. Based upon the averments and the agreements between the parties, and taking note of even Clause XII of the Letters Patent Act, the learned Judge who has granted the leave ex-parte, but after hearing the parties by the reasoned order revoked the same. The contents of FSA and the leave Application and Section 9 Application itself shows that the basic cause of action arose at Pune and the parties have to resolve, to settle the dispute by agreement which was entered into at Pune. The main reliefs claimed under Section 9 are against the Directors, who are family members and the companies having registered office at Pune. The objection therefore, so raised goes to the root of the matter and as if once such application under Section 9 is entertained, all other applications even of Application under Section 34 required to be filed in at Mumbai, irrespective of hearing and/or the conclusion of Arbitration proceedings by the Arbitrator by passing the award, at Pune or any other place. This is in the background that there is no agreed place and/or seat so fixed by the parties, to be at Mumbai and/or at Pune. No specific jurisdiction of Court at Mumbai, is agreed by and between the parties. The mandatory effect of Section 42, in our view is also important factor while deciding and/or before granting leave under Clause 12 of the Letter Patent Act. The objection, therefore, so raised and the impugned order so passed, based upon the facts and circumstances, therefore, in our view, there is no perversity and/or illegality.

47. In the matters before the Supreme Court, there was no such MOU or FSA to resolve the family dispute including arising out of the Petitioners and Respondents family companies, also. We have noted that in Atlanta (Supra) Application under Section 34 filed on same date in both the Courts, in High Court and in District Court also. In State of West Bengal (Supra) no issue of jurisdiction is raised at the earliest. In facts and circumstance, as clearly in paragraph 26, it is held that the High Court of Calcutta has jurisdiction to entertain under Section 34 Application. This was in the background of earlier Section 9 Application, as was filed, tried and entertained as there was no specific objection raised at the relevant time. In the present case, the objections to the jurisdiction raised at earliest, through such Chamber Summons to revoke the leave. The mandate of Section 42 of the Arbitration Act, will govern all the subsequent Petitions. The admitted position on record and facts and circumstances and the nature of dispute between the parties, distinguishes the present case from other, so also the effect of law.

48. All are bound by the agreed agreement clauses for all the purposes. The parties have agreed for two "Venues" only. There is no such "seat/place of Arbitration" fixed in the present domestic arbitration case. Therefore, it is necessary to decide the issue of jurisdiction at this stage itself. In the arbitration

matter, it is not all the time initiation of proceeding for interim reliefs/protection under Section 9 but importantly future cause of action for all subsequent Applications/ Petitions, by and between the parties.

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

50. Having regard to the nature of family dispute, the contracts of clauses of FSA, it would be unfair and unreasonable to fix and/or treat the "venue of arbitration" as seat of arbitration and so also the "Court".

Conclusion-

51. Therefore, it is necessary to deal with the issue of ex-parte case and revocation of it, taking into consideration the scheme and object of Arbitration Act and not only on the basis of stated ingredients of Clause XII of the Letters Patent Act or even CPC, but also upon the Arbitration agreement (FSA) and the "subject matter of Arbitration". On admitted facts and circumstances, therefore, we are convinced that no case is made out to interfere with the reasoned Judgment, also for the additional reasons so provided in this Judgment. In the result, the following order.

ORDER

"a) Appeal is dismissed.

b) In view of disposal of the Appeal, Notice of Motion (Lodging) No. 246 of 2016 also stands dismissed.

c) There shall be no order as to costs."

52. The learned counsel appearing for the Appellants, on instructions, seeks extension of interim order already granted on 1 February 2013, as has been continuing till this date for a period of six weeks. Considering the facts and circumstances and in the interest of justice, we are inclined to continue the stay for six weeks. Order accordingly.

1Arbitration Appeal No. 3 of 2010 dated 19 March 2010 (Coram: S. C. Dharmadhikari, J.)

2Appeal (L) No. 199 of 2013 and Anr. Dated 9 July 2013 (Coram: Dr. D.Y. Chandrachud & S.C. Gupte, JJ.)