
(2002) 07 BOM CK 0064
In the Bombay High Court
Case No : C.R.A. No. 710 of 2002

Rhodia Ltd. and Others

APPELLANT

Vs

Neon Laboratories Ltd.

RESPONDENT

Date of Decision : 15-07-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20, 9, 9A
Companies Act, 1956 — Section 46
Contract Act, 1872 — Section 28
Evidence Act, 1872 — Section 115

Citation : AIR 2002 Bom 502 : (2003) 1 BomCR 140 : (2003) 1 MhLj 373

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : V.V. Tulzapurkar, instructed by Little and Co, for the Appellant; Rohit Kapadia, instructed by Crawford Bayley and Co., for the Respondent

Judgement

A.M. Khanwilkar, J.

1.This Civil Revision Application takes exception to the order dated March 19, 2002 passed by the Civil Judge, Senior Division, Palghat below Exh. 1 in Special Civil Suit No. 9 of 2002. This special Civil Suit has been filed by the Respondent for declaration and specific performance and consequential reliefs against the Applicants. The Applicants Nos. 1 and 3 are the English Public Limited Companies incorporated under the English Law. Whereas, the Applicant No. 2 is an Indian Company and having its office at Mumbai; and whereas, the Respondent Company is incorporated under the provisions of the Indian Companies Act, 1956 having its registered office at Mumbai. The Respondent claims that it is engaged in the business of manufacture, sale, marketing and distribution of pharmaceutical products. The Respondent has its manufacturing facilities located at various places, including at Palghat. By a "Distribution Agreement" dated August 1, 1997, the parties agreed to give exclusive right to the respondent to market and distribute the products, Isoflurane and Halothane, in the territories of India, Sri Lanka, Bangladesh and Nepal, for an initial period of 3 years at 23%

margin of the price. The effective date under the agreement was the first day of the following month during which the respondent was granted the Product Licence. According to the Applicants, the effective date is 1-1-1998. For the purpose of deciding the question that arises in the present case, it will be useful to advert Article 15 of the said "Distribution Agreement", which reads thus :

"Article 15-Governing Language and Law

15.1 : The governing language of this Agreement shall be English. This agreement shall in all respects, including the formation thereof and performance thereunder, be governed by and construed in accordance with the English law.

15.2 : All differences on the interpretation or performance of this agreement which will not be settled by amicable means, will be settled by the English Courts."

2. It is common ground that subsequently on November 30, 1998 the parties entered into another agreement known as "Amendment 1 Mohit Project" whereunder the Applicants agreed to supply Isoflurane and Halothane exclusively to the Respondent in bulk for bottling and packaging and sale in India, Sri Lanka, Bangladesh and Nepal. According to the applicants, "Amendment No. 1 : Mohit Project" is not a separate agreement but only an amendment to the earlier agreement of "Isoflurane and Halothane Distribution Agreement India" dated 1-8-1997; whereas, the respondent contends that both agreements are separate agreements. It is not necessary to elaborate on this aspect of the matter because, the question that needs to be examined at this stage is confined to the purport of Article 8 of this Agreement. It is not in dispute that Article 8 of the latter agreement dated 30-11-1998 is verbatim Article 15 of the former agreement referred to above. In other words, the entire matter would revolve around the interpretation and construction of the aforesaid two clauses in the agreement which pertain to the governing language and the law of the subject agreements. To complete the narration of events, there was some disagreement between the parties for which the second applicant informed the respondent that the contractual relationship concerning distribution of the Isoflurane and Halothane was terminated with effect from 31-12-2000. This was informed by the 2nd Applicant by a written notice dated 21-12-2000. As a consequence to the said intimation, the parties exchanged correspondence asserting their respective stands. It will not be necessary to burden this judgment with those events or claim. Suffice it to point out that the respondent eventually instituted a suit before the Court of the civil Judge. Senior Division, Palghar being Special Civil Suit No. 9 of 2000 praying for the following reliefs :

"(a) For a declaration that the distribution agreement dated 1st August, 1999 is valid and subsisting and the purported termination thereof by the Defendants is Illegal and non est.;

(b) For a declaration that the Mohit Agreement dated 30th November, 1998 is valid and subsisting and the purported termination thereof by the defendants is

wrongful, illegal and non est.;

(c) That the defendants be ordered and decreed to specifically perform the Distribution Agreement dated 1st August, 1997;

(d) That the Defendants be ordered and decreed to specifically perform the Mohit Agreement dated 30th November, 1998;

(e) That only in case this Hon''ble Court is not inclined to award specific performance of the Distribution Agreement dated 1st August, 1997, the Defendants be ordered and decreed to pay to the plaintiff as damages, the sum of U.S. \$ 7,37,888/- together with further interest thereon at the rate of 18% per annum from the date of the filing of the suit till payment and/or realization as per statement annexed hereto and marked Exhibit DD;

(f) Without prejudice and in the alternative to prayer (e) above, in the event of the Defendants not making payment in US \$ as claimed hereinabove, the defendants be ordered and decreed to pay the amount and interest set out in prayer (e) in Indian Rupees at the rate of exchange prevailing on the date of the judgment;

(g) That, in case this Hon''ble Court is not inclined to award specific performance of the Mohit Agreement dated 30th November, 1998, the Defendants be ordered and decreed to pay to the plaintiff, as damages, the sum of US \$ 34,27,495/- together with further interest thereon at the rate of 18% per annum from the date of the filing of the suit till payment and/or realization, as per statement annexed hereto and marked Exhibit EE;

(h) Without prejudice and in the alternative to prayer (g) above, in the event of the Defendants not making payment in US \$ as claimed hereinabove, the Defendants be ordered and decreed to pay the amount and interest set out in prayer (g) in Indian Rupees at the rate of exchange prevailing on the date of the judgment;

(i) That, the Defendants be ordered and directed by a mandatory order and injunction Hon''ble Court to support to the plaintiffs, for distribution, products Isoflurane and Halothane required under the Mohit Agreement dated 30th November, 1998;

(k) That the Defendants, whether by themselves or through their servants or agents or officer be restrained by a perpetual order and/or injunction of this Hon''ble Court from committing breach of the distribution agreement dated 1st August, 1997 and from distributing the product Halothane and Isoflurane through any distributor other than the plaintiffs;

(l) That the Defendants, whether by themselves or through their servants or agents or other be restrained by a perpetual order and/or injunction of this Hon''ble Court from committing breach of the Mohit agreement dated 30th November, 1998 and from distributing the product Halothane and Isoflurane

through any distributor other than the plaintiff;

(m) That, pending the hearing and final disposal of the suit, the Defendants be ordered and directed by a mandatory order and Injunction of this Hon''ble Court to supply to the plaintiff distribution, products Isoflurane and Halothane, as required under the Distribution Area dated 1st August 1997;

(n) That, pending the hearing and final disposal of the suit, the defendants be ordered and directed by a mandatory order and Injunction of this Hon''ble Court to supply to the plaintiffs distribution, products Isoflurane and Halothane, as required under the Mohit agreement dated 30th November, 1998;

(o) That, pending the hearing and final disposal of the suit, the defendants be restrained by an order and injunction of this Hon''ble Court from appointing and/or authorising a person other than the plaintiff to market and/or distribute Isoflurane and/or Halothane in the territory of India, Sri Lanka. Bangladesh and Nepal;

(p) That, pending the hearing and final disposal of the suit, the defendants, by themselves and/or their agents/representatives be restrained and/or stayed from instituting and/or proceeding with legal proceedings for recovery of US \$ 176,013 + \$ 818 + interest under the invoices of the defendant No. 3 for supply of Halothane by the defendants to the plaintiff;

(q) For ad Interim reliefs in terms of prayer Clauses (m) to (o) (both inclusive) hereinabove;

(r) For the costs of the suit; and

(s) For such further and other reliefs as the nature and circumstances of the case may require."

3. This suit was filed on 22-1-2002 and on the same day the respondent filed application for interim injunction. The prayers in the said application read thus :--

"a) The defendants be restrained by an order of injunction from committing breaches of the Distribution Agreement dated 1-8-1998 and MOHIT Agreement dated 30-11-1998 and from appointing any distributor in the territory of India. Sri Lanka, Bangladesh and Nepal and from filing or instituting any proceedings for recovery of US \$ 176.013 + L 818 + interest under the invoice of defendant No. 2 for supply of Halothane by the defendants to the plaintiff.

b) Such further and other orders be passed as this Hon''ble Court may feel proper and expedient to grant."

4. The applicants were served with the said application for injunction as well as the plaint. The applicants appeared before the trial Court on 11-2-2002 when the injunction application was posted for hearing. On that day, Vakalatnama on behalf of the applicant No. 2 was filed and request was made for time to file appropriate application u/s 9A of C.P.C. questioning the jurisdiction of that Court.

The matter was accordingly posted on 28-2-2002 when the applicants filed the subject application (Ex.1) u/s 9A of the CPC as applicable to the State of Maharashtra, requesting for determining preliminary issue as to the jurisdiction of the Court. Besides filing this application, applicants simultaneously filed reply opposing the Injunction application. It is not necessary to advert to the contents of the said reply. In so far as the application u/s 9A of C.P.C. filed on behalf of the applicants, it is averred in para 4 that the suit as filed by the respondent was not maintainable against the applicants and that the respondent was not entitled to any relief whatsoever as claimed therein or in the application for interim relief or at all. In para 5 it is further averred that the court had no territorial jurisdiction to entertain or try the present suit against the applicants. In para 8 the applicants have further averred, without prejudice to their other contentions, that the parties have agreed by choice to be governed by the English law and that the Courts in England alone have jurisdiction to entertain the reliefs claimed in the present suit. To buttress this plea reliance is placed on Article 15 and Article 8 of the respective agreements. It is further stated in the same para 8 that the English Courts have jurisdiction to entertain this suit since the specified acts were performed in England under the "Isoflurane and Halothane Distribution Agreement India". In para 9, the applicants have further averred that in any case no part of the cause of action has arisen within the jurisdiction of court at Palghar. For that purpose, reference has been made to various events, which according to the applicants, the cause of action had arisen at best in "Mumbai". Further in para 13 the applicants have further averred without prejudice to their earlier stand that in any event the forum convenient in India for the parties to the suit including the plaintiff is only the Hon"ble High Court of Judicature at Bombay, for the plaintiff and defendant No. 2 have their offices in Mumbai. It is, however, relevant to point out that although these pleas, have been taken in paras 9 and 13 in the application, but during the course of argument before this Court, the only contention pressed before this Court is that:

(sic) have no jurisdiction to try and entertain the suit -- for the issues raised in the present suit could be tried and adjudicated by applying the English law and exclusively by the English Courts, having regard to the purport of Article 15 and Article 8 of the respective agreements. Be that as it may, it is further asserted that "Isoflurane and Halothane Distribution Agreement in India" amended by "AMENDMENT 1 : MOHIT PROJECT was signed by the defendant No. 1 in England and by the defendant No. 2 and the plaintiff in Mumbai. Therefore, none of these agreements were signed at Palghar and the whole endeavour is outside Palghar. This application was resisted by the respondent-plaintiff by filing a written reply.

5. It is relevant to note that none of the parties adduced any evidence either in the shape of affidavit or for that matter oral evidence, in support of their respective stands in respect of the issue of jurisdiction. The trial Court, therefore, decided the said application on the basis of the oral arguments and documents already placed on record along with plaint. The trial Court in essence has held that the respondent's plant is situated within the jurisdiction of the Court at

Palghar. The trial Court has also referred to fact that the head offices of the plaintiff and defendant No. 2 are at Mumbai (India) though the head offices of the defendant Nos. 1 and 3 were at United Kingdom. The trial Court however, applying the provisions of Section 20(c) of the Code of Civil Procedure, held that the suit could be filed in the Court within whose jurisdiction the cause of action wholly or in part arises. The trial Court has placed emphasis on the fact that the respondent's plant was situated within its jurisdiction as well as the activities of processing and bottling were also carried out within its jurisdiction. According to the trial Court the cause of action had arisen either in "England" where the agreements were signed by the applicant Nos. 1 and 3 and/or in "Mumbai" where the agreements were signed by the applicant No. 2 and respondent as well as where the determination of the contract took place at "Mumbai" and/or at "Palghar" where the plant was situated and processing and bottling and distribution activities under the subject agreements was being carried out. The trial Court has also held that under the agreements the respondent was entitled to distribute within the territories of India, Bangala Desh, Nepal and Sri Lanka and, therefore, in such a situation, laws of the respective countries would apply to the transaction. According to the trial Court, in the fact situation of the present case, the Indian laws in addition to the English laws will prevail. For all these reasons, it has held that the Indian Courts will also have jurisdiction. The trial Court has also observed that the applicants have not disputed and impliedly admitted the jurisdiction of the Indian Courts and its authority. This finding is however criticized by the applicants being error apparent on the face of the record. However, I shall advert to this a little later. In so far as the construction of the relevant clauses of the said agreements, the trial Court was of the view that since the agreements did not specifically mention the expression(s) "only", "exclusively", "specific bar of the courts", "alone", there would be no question of ouster of jurisdiction of the Indian Courts. For this purpose, the trial Court has mainly placed reliance on the decision of the Apex Court reported in A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, . The trial Court has held that on reading the entire plaint as a whole, part of the cause of action did arise within its jurisdiction. Accordingly, the trial Court answered the issue of the jurisdiction of the Court against the applicants and held that the Indian Courts also have jurisdiction to adjudicate the issues arising out of the subject agreements by applying the Indian laws.

6. According to the applicants, the trial Court has acted in exercise of its jurisdiction illegally and with material irregularity in deciding the application against the applicants. Mr. Tulzapurkar, learned Counsel for the applicants submits that on plain language of Articles 15.1 and 8.1 of the respective agreements, it is amply clear that the parties have agreed that the subject agreements shall in all respects be governed and construed in accordance with the English Laws. He, therefore, contends that if the parties have agreed upon this position it is not open to apply the Indian Laws even while examining the issue of jurisdiction of the Court. He further submits that the parties have

expressly agreed in Articles 15.2 and 8.2 of the respective agreements that all differences on the interpretation or performance of the subject agreements which will not be settled by amicable means will be settled by the English Courts. According to him, in view of this understanding, it will not be open for any of the parties to invoke the jurisdiction of any other court but the English Courts. He contends that the, interpretation of Articles 15.2 and 8.2 will necessarily have to be done as per the English Law and, if construed accordingly, the jurisdiction of the Indian Courts has been ousted. In support of his contention, reliance is placed on the decision of the Apex Court in National Thermal Power Corporation Vs. The Singer Company and others, . He has placed emphasis on paras 13, 14, 19 and 20 of the said decision. He has also relied on another decision of the Apex Court reported in British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Industries and Others, . (In particular paras 17, 22, 28 and 31). The above two authorities have been relied to contend that on the language of the Articles 15.2 and 8.2 of the respective agreements, the inescapable conclusion is that the parties have agreed that the agreements be construed in accord with the English Laws and that law will be the "proper law" of the subject agreements. He therefore contends that if this position is conceded then it necessarily follows that the English courts will have exclusive jurisdiction to try and decide the matter between the parties arising under the subject agreements. To buttress this contention reliance is placed on the decisions of the English courts as well as other authorities Including "Dicey and Morris on the conflict of Laws" to contend that on construction of Articles 15.2 and 8.2 of the respective agreements by applying the English Laws, English Courts will have exclusive jurisdiction over the subject matter. He has placed reliance on (1989) 1 LLR 588, Sohio Supply Co. v. Gatoil (USA) (at pages 588 to 592): (1990) 2 QB 631 S. and W. Berisford PLC v. New Hampshire Insurance Co. (at pages 634, 636 to 639); Dicey and Morris on the conflict of laws (12th Edition) (at pages 419 to 422, 424, 426 and 428) which pertains to the legal position in respect of "jurisdiction clauses". Reliance has also been placed on para 633 of Halsbury's Laws of England (Fourth Edition) Vol. 8(1) pertaining to the "jurisdiction derived from a choice of Court agreement". Reliance is also placed on the decision of 1992 Ch 196 Kruz v. Stella Musical Veranstaltungen G.M.B.H. (at pages 202 to 205).

7. Per contra, the learned Counsel for the respondent-plaintiff contends that the argument pressed before this Court that the parties have agreed to be governed by the English Laws and Articles 15.2 and 8.2 of the respective agreements be construed as per the English Laws, is being raised for the first time before this Court and should not be entertained. He further contends that reliance placed on the authorities referred to above by the Counsel for the applicants will be of no avail -- because the principle enunciated therein is applicable only relating to the parties residing in contracting States (European Countries) and will not govern the party such as the respondents, residing in India. He further contends that on close reading of the said authorities, it is not possible to conclusively hold that the jurisdiction of the Indian Courts has been ousted or that the English Courts

will have exclusive jurisdiction to try the dispute. He further contends that, if this Court were to accept the contention of the applicants, that would be opposed to the public-policy inasmuch as, person staying in India and transacting in India cannot agree that the Indian Laws shall have no application or for that matter agree that the remedy of the parties before the ordinary tribunals in India to be ousted. For this purpose, reliance is placed on Section 28 of the Indian Contract Act, 1872 as well as on the decision of the Delhi High Court in *Rajendra Sethia Vs. Punjab National Bank*, and of the Bombay High Court in *Se Se Oil Vs. Gorakhram Gokalchand*, . The learned Counsel has also placed reliance on Chitty on Contracts General Principles (13th Edition) para 30.025 at page 1518 to contend "that a Court must determine the validity of such an agreement according to its own law rather than the law chosen". He therefore contends that clauses 15.2 and 8.2 of the subject agreements will have to be construed in accord with the Indian Law. He has then relied upon the judgment of the Apex Court reported in *A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem*, . He submits that unless the agreement had expression like "only", "exclusively", "alone", only then it was possible to take the view that the jurisdiction of the Indian Courts was ousted and the English Courts had exclusive jurisdiction. He further contends that the application as filed by the applicants u/s 9A of C.P.C. was not maintainable inasmuch as the relief claimed in the said application is not of dismissal of the suit for want of jurisdiction but one for return of the plaint -- and such a relief cannot be entertained during the enquiry u/s 9A of the Civil Procedure Code. The learned Counsel further contends that, in the present case, though the applicants claim that the subject agreements have been signed by the applicant Nos. 1 and 3 in England, but from the documentary evidence available on record this fact is belied inasmuch as, from the said documents it would appear that the said applicants have signed the subject agreements in France and not in England. He therefore, submits that it cannot be conclusively held that the agreements were signed in England or that the jurisdiction of English courts can be said to be exclusive, especially when it is not in dispute that the said agreements have been signed by the plaintiff and defendant No. 2 in Mumbai. He further contends that assuming that the applicants were right in contending that the parties have agreed that the construction and interpretation or performance of the agreement shall be governed by and construed in accordance with the English Law, however, since the applicants have failed to prove the factum as to what is the settled legal position in England with regard to the construction of and interpretation of clause such as Articles 15.2 and 8.2 of the respective agreements, it will not be possible to hold that English courts have exclusive jurisdiction. He contends that the question of Foreign Laws is not only to be specifically pleaded but also proved as a question of fact and, if that is not done, the court cannot proceed to decide the same on the basis of some foreign decisions or authorities relied upon across the Bar during the course of arguments. Reliance is placed on paras 27 and 28 of the decision reported in *Hari Shankar Jain Vs. Sonia Gandhi*, as well as paras 75.237 and 75.238 of Halsbury's Laws of India Vol. 10, to support this proposition. The

learned Counsel then distinguished the decisions relied by the applicants reported in the case of National Thermal Power Corporation Vs. The Singer Company and others, as well as British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Industries and Others, . The learned Counsel further contends that in fact the applicants have submitted to the jurisdiction of the trial Court and in such a case it will not be open for this Court to answer the issue of jurisdiction against the plaintiff or in favour of the defendants. Undisputedly, this submission is raised for the first time before this Court. This contention has been strongly opposed by the Counsel for the applicants as the same is raised across the Bar. It is contended that plea of "waiver" should be specifically pleaded and established from the record. The learned Counsel for the applicants further submits that there is no question of waiver by submitting to the Jurisdiction of the Court inasmuch as, on receipt of the Court summons from the trial Court, the applicants appeared and asked for time to file the subject application for raising the issue of jurisdiction of the Court and in such a situation it will be wholly inappropriate to proceed on the premise that the party has submitted to the jurisdiction of the Court. He further points out that undisputedly the applicants filed application u/s 9A of the CPC as well as gave reply to the injunction application which was obviously without prejudice to the question of jurisdiction raised by them in the subject application u/s 9A of the Civil Procedure Code. He further contends that even the reply to the injunction application clearly avers that the applicants petitioners have already filed application questioning the jurisdiction of the Court and the reply was filed without prejudice to that plea. I find force in this contention. In the circumstances, it will be inappropriate for this Court to accept the plea of waiver and/or that the applicants have already submitted to the jurisdiction of the trial Court as pressed into service by the Counsel for the respondent for the first time before this Court.

8. After having considered the rival submissions, I think it appropriate to first advert to the law enunciated by the Apex Court in National Thermal Power Corporation Vs. The Singer Company and others, . In that case the parties had expressly agreed that the law that would govern their contract, was the law in force in India and the Courts of Delhi to have exclusive jurisdiction in all matters arising under the contract. The Apex Court, while considering the matter in that perspective, in para 13 has adverted, inter alia, to Dicey and Morris in the conflict of laws, 11th Edition, Vol. II(Dicey ,which refers to Rule 180. The Apex Court has reproduced the said Rule as well as the relevant portion of the opinion of Lord Herchell, L.C. in Hamlyn and Co. v. Talsker Distillery (1891-4) All ER R 849. The Apex Court in para 14 has observed that the expressed Intention of the parties is generally decisive in determining the "proper law of the contract". The only limitation on this rule is that the intention of the parties must be expressed bona fide and it should not be opposed to public policy. The apex Court in para 19 has observed that (at p. 1007 of AIR) :

"proper law is thus the law which the parties have expressly or impliedly chosen, or which is imputed to them by reason of its closest and most intimate

connection with the contract. It must, however, be clarified that the expression "proper law" refers to the substantive principles of the domestic law of the chosen system and not to its conflict of laws rules. The law of contract is not affected by the doctrine of *renvoi*. See Dicey Vol. II".

9. In the other decision which has been relied by the Counsel for the applicants in *British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Industries and Others*, , the Apex Court was dealing with a similar question. In that case, the question of jurisdiction was allowed to be raised by the Apex Court for the first time before it. Clause 3 of the bills of lading in that case, read thus :

"3. Jurisdiction. The contract evidenced by this bill of lading shall be governed by English law and disputes determined in England or, at the option of the carrier, at the port of destination according to English law to the exclusion of the jurisdiction of the courts of any other country."

In the backdrop of such agreement, the Apex Court in para 11 has observed that:

"For the purpose of jurisdiction the action of respondent 1 is an action in personam in Private International Law. An action in personam is an action brought against a person to compel him to do a particular thing. If Clause 3 of the bills of lading is held to be binding on respondent 1 the choice of law by the parties would also be binding. English courts would perhaps use their own Private International Law to decide the dispute. In the event of the English Court alone having the jurisdiction, the application of Indian statutes and the jurisdiction of the Indian Courts would be to that extent, inapplicable".

It would be apposite to advert to para 17 of the same decision. The Apex Court has observed that the parties to a contract in international trade or commerce may agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them. The chosen Court may be a Court in the country of one or both the parties, or it may be a neutral forum. The jurisdiction clause may provide for a submission to the courts of a particular country, or to a court identified by a formula in a printed standard form, such as a bill of lading referring dispute to the courts of the carrier's principal place of business. What is relevant for our purpose is that the Apex Court has further observed that:

"It is a question of interpretation, governed by the proper law of the contract, whether a jurisdiction clause is exclusive or non-exclusive, or whether the claim which is the subject matter of the action falls within its terms."

The Apex Court then observed that:

"If there is no express choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably, be proper law."

It will be useful at this stage to advert to the observations made by the Apex Court in the paras 18 and 19 of the same decision. In para 18, the Apex Court has observed :

"It is accordingly unlikely that respondent I would be without any remedy. If the terms of Clause 3 of the bills of lading are faithfully observed"

In para 19, the Apex Court further observed that:

"The question of jurisdiction in the case ought not to be determined by the High Court on the basis of the provisions of Section 28 of the Indian Contract Act in the absence of a specific provision making it applicable to transactions in international trade."

The abovesaid observations in this decision, to my mind, squarely deal with the contention raised on behalf of the respondent that if the subject agreement was to be construed in the manner contended by the applicants that would be opposed to public policy and contrary to the purport of Section 28 of the Indian Contract Act.

10. Having discerned the principles enunciated in the aforesaid two decisions, it will not (now?) be appropriate to revert to clauses 15-I and 8-I of the respective agreements. The same has been reproduced in para 1 above. The said clauses clearly provide that the governing language of the subject agreements shall be English. Further, the agreement shall in all respects, including the formation thereof and performance thereunder, be governed by and construed in accordance with the English law. From the principles deduced from *National Thermal Power Corporation Vs. The Singer Company and others*, , it will have to be held that the purport of Article 15.2 and 8.2 of the respective agreements, the parties have expressly intended the contract to be governed by and construed in all respects, including the formation thereof and performance thereunder, in accordance with the English law. Therefore, to my mind, English law will be the "proper law" of the subject agreements. In other words, the parties to the subject agreements have expressly intended their contract to be governed by the English legal system. In this case, the parties have expressly chosen that their contract to be governed by English law by reason of its closest and most intimate connection with the contract, for, inter alia, the applicant Nos. 1 and 3 are based in U. K. (English registered companies). The "proper law" refers to the substantive principles of the domestic law of the chosen system and not to its conflict of laws rules. As observed by the Apex Court in *National Thermal Power Corporation's case (supra)*, the only limitation to apply this rule is that the intention of the parties must be expressed bona fide and it should not be opposed to public policy. A priori, Articles such as 15.2 and 8.2 of the respective agreements, which pertain to the exclusive or non-exclusive jurisdiction of the English Courts, its interpretation will be governed by the "proper law" of the subject contracts i.e. the English Law (See *British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Industries and Others*, . In the present case, indubitably, the transaction between the parties is a contract in international trade or commerce and they have had expressly agreed in Articles 15.2 and 8.2 of the respective agreements that all differences on the interpretation or performance of the agreement which will not be settled by amicable means, will

be settled by the English Courts.

11. The next question is : what is the English law as to the interpretation of clause such as Article 15.2 and R. 2 of the respective Agreements? No doubt the applicants have relied on several authorities to buttress their contention that the said clauses such as Article 15.2 and 8.2 will mean that the English Courts will have exclusive jurisdiction over the matter in issue. However, to my mind, the respondent has rightly contended that the English law is a foreign law so far as the Courts in India are concerned. The respondent rightly relies on the decision of the Apex Court in *Hari Shankar Jain Vs. Sonia Gandhi*, to support this proposition. The Apex Court in paras 27 and 28 of the said decision has noted that it is well settled that a foreign law ought to be pleaded like any other fact and must be proved by evidence of experts in that law being matters of evidence requiring proof as questions of fact, if a party wants to rely on the same. Reliance is also placed on the Halsbury's Laws of India, 10th Edition which reads thus :--

"75.237. Need for proof; Foreign law is a question of fact. It must be specifically pleaded by the party or parties relying upon it. It must be proved to the satisfaction of the court like other plea set up by the concerned party or parties. Thus, the onus of proof of foreign law lies on the party relying on it."

Reliance is also placed on para 75.238, which reads thus :-

75.238. Mode of proof: In general, an Indian Court will not research into foreign law or the concepts which have foreign origin. The foreign law or the concepts must be proved in civil proceedings by properly qualified witnesses, that is a person who is suitably qualified to do so on account of his knowledge or experience and who is competent to give expert evidence as to the law of any country, irrespective of whether he has acted or is entitled to act as a legal practitioner there. If his evidence is not contradicted, the Court will normally accept it, unless it is obviously unreliable or extravagant. Where the witnesses deposit materials as part of their evidence into Court, the Court is entitled to examine those materials, and where there is conflict of evidence as to the interpretation to be placed upon the materials, the Court must scrutinise them and form its own conclusion on them.

Because foreign law or concepts of a foreign origin are questions of fact, courts may not generally at common law rely upon a previous Indian decision on foreign law."

12. Applying the abovesaid principles to the facts of the present case, and on reading the pleadings (Application u/s 9A of C.P.C.) as a whole, it is seen that the applicants have pleaded that the agreements were to be governed by the English law and the English Courts will have exclusive jurisdiction. However, as observed earlier, no evidence whatsoever either on affidavit or oral, has been adduced to prove as to what is the settled legal position in England relating to the construction of clause such as Articles 15.2 and 8.2 of the respective

agreements. In other words, the question of foreign law which ought to have been proved as a fact has not been done in the present case. As a necessary corollary, as observed by the Apex Court in *Hari Shankar Jain Vs. Sonia Gandhi*, , which also adverts to the decision of the Privy Council wherein it was held that, even though the foreign law has already been proved before the same Court in another case, that would be of no avail the Court must act upon the evidence before it in that actual case. If such is the standard, of proof, it will not be possible to examine the matter any further. It necessarily follows that it will not be possible for this Court to decisively hold that the construction of clause such as Articles 15.2 and 8.2 of the respective agreements would mean that English Courts have exclusive jurisdiction to try and decide the dispute and that the jurisdiction of Indian Courts is ousted in absence of proof in that behalf.

13. Reverting to another contention of the respondent that the decisions relied by the applicants have no application to person residing in India, to my mind, it will not be necessary to go into that aspect of this stage, for the same can be answered only after parties have adduced, evidence to establish the question of foreign law.

14. The next contention raised on behalf of the respondent that the relief claimed in the subject application was not available u/s 9A of the CPC and that the applicants have essentially made grievance of "Forum of inconvenience" and not of "jurisdiction" as the relief claimed in the application was for return of plaint and not for dismissal of the suit as such, to my mind, is devoid of any substance. Inasmuch as, upon reading the subject application as a whole, the gravamen of the grievance made by the applicants is that the Indian Courts have no jurisdiction to try and entertain the dispute between the parties. Even though the relief in the application is couched in such a way so as to pray for return of plaint, however, that would not denude the petitioner or for that matter the Court from dealing with the issue of jurisdiction of the Court. And if the Court were to hold that it had no jurisdiction to try and decide the dispute then it would be the bounden duty of the Court to mould the relief and pass such order as would be warranted in the fact situation of the case especially having regard to the mandate of Section 9A of C.P.C.

15. The next argument advanced on behalf of the respondent that, the fact as to whether the subject agreements have been executed by the applicant Nos. 1 and 3 in England is a disputed fact and is belied by the documents on record which go to show that the applicants Nos. 1 and 3 had signed the said agreements in France and not in England. However, applying the principle stated by the Apex Court in *British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Industries and Others*, , more particularly in para 17 thereof, that parties to a contract in international trade or commerce may agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them and the chosen Court may be a Court in the country of one or both the parties, or it may be a natural forum. If this is the settled position then, even if it

is found that the applicants 1 and 3 have signed the agreements in France and not in England, even then the parties will be governed by the English laws in terms of Articles 15.2 and 8.2 of the agreements which they have undisputedly executed and therefore the same will be binding on them.

16. The learned Counsel for the respondent has relied on judgment of the Delhi High Court reported in *Rajendra Sethia Vs. Punjab National Bank*, to contend that the respondent is a registered Company in India and could not agree to exclude application of Indian Laws in respect of the transactions in India or for that matter regarding the exclusion of the jurisdiction of the Indian Courts. However, the question is squarely answered by the Apex Court in *British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Industries and Others*, . The Apex Court has clearly dealt with the question as to whether clauses such as 15 and 8 of the respective agreements would be void and hit by the provisions of Section 28 of the Indian Contract Act, 1872. This very contention was raised before the Apex Court in *British India Steam Navigation Co. Ltd.'s case (supra)* as can be seen from para 4 of the said decision and while dealing with the said contention, the Apex Court has clearly negated the same by observing in para 19 that the question of jurisdiction ought not to be determined by the High Court on the basis of the provisions of Section 28 of the Indian Contract Act in the absence of a specific provision making it applicable to transactions in international trade. In this view of the matter the view taken by the Delhi High Court will be of no avail and in any case with utmost respect, not binding on this Court. Reliance was also placed on the decision reported in *Se Se Oil Vs. Gorakhram Gokalchand*, to contend that the agreements could not have been entered into by the parties as the respondent was undoubtedly a company registered in India and was operating in India and therefore could not have agreed to avoid the applicability of the Indian Law to the contract signed by them in India and/or to be performed in part or whole in India. This decision, to my mind, is clearly distinguishable on facts. Inasmuch as, in that case the Indian citizen had entered into contract whilst in India in respect of the transactions to be performed in part or whole in India; whereas, in the present case, the applicant Nos. 1 and 3 are based in U. K. and under the distribution agreement the respondent plaintiff was to act only as a distributor of the said Company. Moreover, as observed earlier, the agreements between the parties were transactions in international trade. As pointed out earlier the Apex Court has dealt with this question in *British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Industries and Others*, .

17. No doubt the learned Counsel for the respondent attempted to distinguish the judgment of the Apex Court In *National Thermal Power Corporation Vs. The Singer Company and others*, . However, to my mind, the basis on which the respondent wanted this Court to distinguish the judgment is untenable. On the other hand, I have already analysed the decision of the Apex Court elaborately and taken the view that the same has squarely answered the question that arises in the present case.

18. Now reverting to the view taken by the trial Court, the trial Court has not examined the matter in this perspective, which it ought to have done for examining the issue of jurisdiction. In that sense, the adjudication of the subject application u/s 9A of the CPC has been done by the trial Court illegally or with material irregularity. In the circumstances, this Court will have no option but to set aside the order passed by the trial Court and remit the case to the trial Court for fresh adjudication in accordance with law.

19. In the ultimate analysis, I hold that by virtue of Articles 15.2 and 8.2 of the respective agreements, the parties have expressly intended the subject agreements to be governed by and construed in accordance with the English law. And by virtue of Articles 15.2 and 8.2 of the respective agreements the parties have expressly agreed and so they would be bound by the condition that all differences on the interpretation or performance of the subject agreements which will not be settled by amicable means will be settled by the English Courts. Before we can decisively answer the question as to whether the English Courts have exclusive jurisdiction, it can be done only by construing the Articles 15.2 and 8.2 of the respective agreements by applying the English Law. For that it will be necessary to find out at least two relevant questions viz. :

a) Whether the intention of the parties is expressed bona fide and is not opposed to public policy as per the "proper law" of the agreements ?

b) Whether the purport and interpretation of Articles 15.2 and 8.2 of the respective agreements in accordance with the "proper law" of the agreements (i.e. the English law) is that the English Courts have exclusive jurisdiction over the subject-matter in this suit?

20. It is only on adduction of evidence on the above questions that the Court would be able to decisively answer as to whether the English Courts have exclusive jurisdiction. If the answer were to be in the affirmative, then obviously the Court at Palghar, which is otherwise a court of competent jurisdiction to try and decide the suit, albeit by applying the "proper law" of the agreements, will have no jurisdiction as it would mean that the jurisdiction of Indian Courts is ousted. In which case, the suit as filed by the respondent would not proceed. As no evidence has been adduced by the parties on the above questions which are questions of foreign law, coupled with the fact that question of jurisdiction would go to the root of the matter, in my view, the appropriate course *Ex Debito Justitiae* to do substantial justice is to relegate the parties to the trial Court to enable them to adduce necessary evidence on the relevant questions so that the trial Court may examine that evidence before taking a final decision in accordance with law.

21. In this view of the matter, the impugned order is set aside and the application u/s 9A of the CPC filed by the applicants is restored to the file of the trial Court. The same be decided in accordance with law. The trial Court may permit the parties to adduce necessary evidence for deciding the abovesaid

questions. It is relevant to note that none of the parties had addressed this Court to remand the case to the trial Court but in the interest of justice and to decisively answer the issue of jurisdiction. I thought it appropriate to relegate the parties to the trial Court to enable them to adduce necessary evidence relevant to decide the issue of jurisdiction.

22. Accordingly, the impugned order is set aside and the subject application (Ex.1) u/s 9A of the CPC is restored to the file of the trial Court. To be heard and decided in view of the observations made hereinabove on its own merits without being influenced by any of the observations in the impugned judgment or this order and in accordance with law. The trial Court to decide the matter as expeditiously as possible preferably within three months from the receipt of writ of this Court.

23. No order as to costs.

24. Certified copy expedited.