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

Reserved on: 06.12.2017
Pronounced on : 30.05.2017

\+ **FAO(OS)(COMM) 67/2017, C.M. APPL.11214 & 17730/2017**

ANTRIX CORPORATION LTD. ..... Appellant

Through: Sh. Gourab Banerji, Sr. Advocate with Sh. Arjun Krishnan, Ms. Aakanksha Kaul, Sh. Ankur Singh, Sh. Saket Sikri and Sh. Sahil Jagotra, Advocates.

versus

DEVAS MULTIMEDIA PVT. LTD. ..... Respondent

Through: Sh. Rajiv Nayyar, Sr. Advocate, Sh. Sandeep Sethi, Sr. Advocate, Sh. Ciccu Mukhopadhyay, Sr. Advocate with Sh. Omar Ahmad, Sh. Saurabh Seth, Sh. Vikram Shah and Sh. Sumer Dev Seth, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE YOGESH KHANNA

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MR. JUSTICE S. RAVINDRA BHAT

Facts

1. This appeal under Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereafter "CC Act") impugns the decision of a Learned Single Judge of this Court dated 28.02.2017 in OMP (I) 558 /2015.

2. The facts are that on 28.01.2005 an agreement was entered into at Bangalore for the Lease of Space Segment Capacity on ISRO/Antrix S-Band Spacecraft between Devas (referred to hereafter by its name, an incorporated company registered office at Bangalore), and the appellant (hereafter "Antrix"), a Union Government of India undertaking also with its registered office at Bangalore. Article 20 of the agreement provided for arbitration as the method for resolving disputes arising out of the agreement.

3. On 17.02.2011, the Union Cabinet Committee on Security ("CCS") resolved to deny orbital slot in S-band to Antrix for any commercial activities and

to direct annulment of the Agreement (dated 28.01.2005). Antrix consequently terminated the agreement by letter of termination issued to Devas, dated 25.02.2011. Subsequently, invoking the arbitration clause, on 29.05.2011, Devas approached the International Chamber of Commerce (Paris, hereafter "ICC") requesting for arbitration. The ICC notified the request, on 05.07.2011, to Antrix. In the letter to Antrix, the ICC stated that a portion of the arbitration clause in the agreement (Article 20), substantially departed from the ICC Rules and that it was not in a position to accept such a departure from its own Rules. The ICC further stated that should the parties wish the ICC Court to administer the case, then the arbitration will be conducted in accordance with Article 31 of its Rules and unless the parties objected within 5 days of this communication, it would be deemed that they have accepted to conduct the proceedings in accordance with the ICC Rules.

4. Antrix however did not accept the above stipulation. It wrote to the ICC on 11.07.2011 objecting to the ICC proceeding with the arbitration. On 30.07.2011, Antrix nominated a former judge of the Supreme Court of India as its Arbitrator in terms of Article 20 (a) of the Agreement. It also filed a petition (AA No. 20/2011) under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter "Arbitration Act") before the Chief Justice of India, seeking a direction to constitute an arbitral tribunal.

5. By letter, dated 13.10.2011, ICC, however, informed Antrix that it had appointed a former Chief Justice of India as Co-Arbitrator on its behalf (i.e. Antrix) under Article 9(6) of the ICC Rules. By the same letter, ICC also confirmed the appointment of the co-Arbitrator nominated by Devas under Rule 9 (1) of the ICC Rules. The two nominee Arbitrators were given 20 days to finalise the name of the third Arbitrator. They, however, sought more time in view of the pendency of AA No. 20/2011 before the Chief Justice of India. Therefore on 10.11.2011, the ICC itself appointed Dr. Michael Pryles as Chairman of the arbitral tribunal.

6. On 05.12.2011, Antrix filed AA No. 483/2011 before the Bangalore City Civil Court (hereafter "Bangalore court") under Section 9 of the Arbitration Act seeking certain reliefs, including restraining Devas from proceeding with the ICC arbitration contrary to the agreement between the parties, restraining Devas from getting the agreement between the parties modified or substituted by the ICC and restraining the arbitral tribunal constituted by the ICC from proceeding with the arbitration.

7. Devas entered appearance in AA No. 483/2011 before the Bangalore court on 07.12.2011 and sought time to file objections. On 09.04.2012 meanwhile, the Chief Justice's designate in AA No. 20/2011, stayed the ICC arbitration. On 10.05.2013, the Supreme Court dismissed AA No. 20/2011, by which time the arbitral tribunal under the ICC Rules had already been constituted. While dismissing this Section 11 application by Antrix, it was held that Antrix would nonetheless have the right to air its objections in appropriate proceedings.

8. On 14.09.2015, the ICC rendered its Award in favour of Devas in the sum of $ 562.5 million with simple interest at 18% from the date of Award to the date of payment. Further, pre-award interest was payable in the sum of USD LIBOR plus 4% simple interest from the date of the agreement to the date of the Award. Thereafter, on 28.09.2015, Devas filed a petition under Section 9 of the Arbitration Act, before this Court, being OMP (I) 558/2015.

9. On 19.11.2015, Antrix applied to the Bangalore City Civil Court under Section 34 of the Act challenging the Award dated 14.09.2015. In that petition, Devas (by AS No. 174/2015) challenged the Bangalore City Civil Court's jurisdiction to entertain Antrix's application. Thereafter, certain developments took place in these rounds of litigation, which are unnecessary to be set out in detail for the purposes of deciding the present dispute.

10. On 28.02.2017, a learned single judge of this Court, by the impugned judgment, ruled that Antrix's petition under Section 9 before the Bangalore court

(AA No. 483/2011), was not maintainable and Devas' petition under Section 9, being OMP (I) 558/2015, was maintainable and the bar under Section 42 (of the Arbitration Act) was inapplicable to the present case to exclude the jurisdiction of this court. The impugned order also held that consequently, Antrix's petition under Section 34 before the Bangalore City Civil Court would not be maintainable, because Devas' petition under Section 9 before this Court was filed earlier. The Learned Single Judge then listed the matter for hearing on merits and directed Antrix to file an affidavit of an authorised officer, enclosing therewith its audited balance sheets and profit and loss accounts for the past three years. Antrix is in appeal, against this order.

Contentions

11. Mr. C.A. Sundaram, learned senior counsel for Antrix, argued that the impugned decision of the Learned Single Judge is erroneous in law. He stated that the Section 9 petition of Antrix, which is still pending before the Bangalore City Civil Court, was a petition prior to the Section 9 petition filed by Devas before the Learned Single Judge, which resulted in the impugned order and as such the latter petition was barred by the operation of Section 42 of the Arbitration Act. The learned senior counsel contended that the effect of Section 42 was that once an application with respect to an arbitration agreement was made to a Court, only that Court would have jurisdiction for all subsequent applications in connection with the arbitration.

12. It is contended that the only exceptions to Section 42 are when an application is not required to be made to a "court" under the Arbitration Act, such as an application under Section 8 (where the application has to be made to a "judicial authority") or Section 11 (where earlier the application had to be made to the Chief Justice or his designate of the High Court or the Supreme Court, and now the High Court or the Supreme Court or any institution designated by it). In the

case of Section 8 or Section 11 therefore, since the Arbitration Act does not require the application to be filed before a "court" within the meaning of Section 2(1)(e) of the Act, Section 42 would have no application. However, Section 9 applications are required to be made to a "court" within the meaning of Section 2(1)(e), and hence once such an application was made to a "court", only that "court" would have jurisdiction over all subsequent applications made by either party under the Act, by virtue of Section 42 of the Act. For this, strong reliance is placed on the decision of the Supreme Court in *State of West Bengal v. Associated Contractors*, (2015) 1 SCC 32.

13. Relying further on *Associated Contractors (supra)*, Mr. Sundaram argues that doubtlessly, if an application under the Act is made to a court that lacks jurisdiction to entertain the application, then Section 42 would not operate. In other words, if an application is made to a court without jurisdiction, then the parties would not be obligated to file all subsequent applications before such court. However, it is emphasized that this lack of jurisdiction must be either because the court in question does not have subject matter jurisdiction over the dispute, or that it lacks pecuniary or territorial jurisdiction over the dispute. Here, it is highlighted, that the existence of jurisdiction is separate from the exercise of such jurisdiction. Lack of the former means that a court is *per se* denuded of jurisdiction, whereas incorrect exercise of jurisdiction is not on the same terms. Hypothetically, therefore, going to a court with jurisdiction, with a speculative or absurd case, would still mean that the court possesses jurisdiction and is in that sense a competent court, though its exercise of jurisdiction over such claim could be inappropriate. In other words, that the relief claimed in a petition cannot be granted is not a jurisdictional question. Jurisdiction, says Mr. Sundaram, is a *per se* argument.

14. Antrix questioned the impugned judgment and argued that it is clear from the Single Judge's order that it was undeniable that the Bangalore court in the

present case had jurisdiction (since cause of action arose there and further, the Devas's registered office was also in Bangalore). The reason that the Learned Single Judge nonetheless held that Antrix's Section 9 application before the Bangalore City Civil Court was one made to a court without jurisdiction, was because the reliefs claimed by Antrix were barred, in view of the law declared in *Bhatia International v. Bulk Trading S.A.*, AIR 2002 SC 1432. It is argued that while *Bhatia (supra)* undoubtedly held that a party may not claim the relief of restraining arbitration proceedings under Section 9, that is an anti-arbitration injunction cannot be claimed under Section 9, that is not the relief that Antrix sought in its Section 9 petition before the Bangalore City Civil Court. Instead, Antrix's prayer was that the dispute was arbitrable and therefore while arbitration must be resorted to, the parties must proceed with the conduct of the arbitration, in accordance with their agreement dated 28.01.2005. Therefore, Mr. Sundaram contends, Antrix's Section 9 petition was made to a competent court in terms of Section 2(1)(e) of the Act and since this application was made before Devas' Section 9 petition before this court, the assumption of jurisdiction was not possible, in view of Section 42 of the Act.

15. Mr. Sundaram next argued that the implication of Section 2(1)(e) of the Act, pursuant to the decision of the Supreme Court in *Bharat Aluminium Company v. Kaiser Aluminium Technical Service*, (2012) 9 SCC 552 ("*BALCO"* hereafter), was that two courts have jurisdiction over all applications filed under the Arbitration Act. The first is the court, which exercises subject matter jurisdiction over the dispute referred to arbitration. That is the court within whose jurisdiction the *cause of action* arose. The second, is the court of the seat of the arbitration. In this case, the court, which would have subject matter jurisdiction, would be the Bangalore City Civil Court, whereas the court, which would be the court of the seat of the arbitration, would be this court. Accordingly therefore, once one of these two courts was seized of an application filed under this Act, then all

subsequent applications would have to be filed in that court alone. In this case, since Antrix first approached the Bangalore court through its Section 9 petition, it would be that court alone which would have jurisdiction over all subsequent applications, including Devas' post award Section 9 petition.

16. Pre-emptively addressing Devas' possible reliance on the decision of the Supreme Court in *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*, (2017) 7 SCC 678, Mr. Sundaram argued that *Datawind (supra)* is authority for the proposition that when parties to an arbitration agreement designate both the seat for an arbitration, as well as specify through an exclusive jurisdiction clause that only such seat courts have jurisdiction, in that case, Section 42 would not have any application, because there would be only one court which would then exercise jurisdiction over all applications made under the Arbitration Act, i.e. the court designated by the parties who specify the seat *and* include an exclusive jurisdiction clause in favour of that court. It is urged as well settled that parties may by agreement confer exclusive jurisdiction on one court over all other courts that would otherwise have jurisdiction over the dispute, if that court was in itself a competent forum or in other words, possessed jurisdiction over the dispute. Therefore, parties may by agreement restrict jurisdiction to one of many competent courts. In the context of arbitration, *Datawind (supra)* specifies that specifying the seat along with providing for an exclusive jurisdiction clause may do this. Any other reading of *Datawind (supra)*, especially to say that designating seat is by itself tantamount to specifying an exclusive forum selection clause, would make it contrary to the decisions of the Supreme Court in *BALCO (supra), Associated Contractors (supra)* and *Swastik Gases Pvt. Ltd. v. Indian Oil Corporation Ltd.*, (2013) 9 SCC 32. Therefore, in the present case, *Datawind (supra)* would have no application since the parties have only designated the seat and the agreement does not provide for a forum selection clause. In fact, placing reliance on Article 20(f) of the arbitration agreement in question, which uses the term "any court of

competent jurisdiction", it is highlighted that through this clause, parties have in fact expressed intention to the contrary; that is to not confer exclusive jurisdiction on one court, but that "any court of competent jurisdiction" could exercise jurisdiction over the dispute. Since in the present case, the Bangalore City Civil Court had jurisdiction as cause of action arose in Bangalore and the respondent had its registered office in Bangalore, it would be a competent forum to entertain applications under the Arbitration Act and by virtue of Section 42, since Antrix's Section 9 was the first application made under the Act, all subsequent applications would have to be made before that court.

17. It is contended that in any case, *BALCO (supra)* was to apply prospectively and would not apply to pre-*BALCO* arbitration agreements. The law before *BALCO (supra),* as laid down in the decision of this court in *G.E. Countrywide Consumer Financial Services Ltd. v Surjit Singh Bhatia,* (2006) 129 DLT 393, and as impliedly also held by the Supreme Court in *Food Corporation of India v. Evdomen Corporation,* (1999) 2 SCC 446, was that under Section 2(1)(e) of the Act, the only courts which would have jurisdiction would be within whose jurisdiction the cause of action arose. Reliance is specifically placed on the following passage from *G.E. Countrywide (supra)*:

> "*The question as to whether situs of arbitration confers jurisdiction on the court was considered by a learned Single Judge of this Court on the case of Sushil Ansal v. Union of India AIR 1980 Del 43. In Sushil Ansal it was clearly held that the situs of arbitration did not confer jurisdiction in the courts and that while considering the question of territorial jurisdiction, it is vital to consider the competency of the court for deciding the subject-matter of the dispute had a suit been filed instead of invocation of arbitration. In Sushil Ansal the court, after examining the provisions of Sections 41, 31 and 2(c) of the Arbitration Act, 1940 held that:*
> *Thus one has to ascertain what are the questions forming the subject-matter of the reference to arbitration which resulted in the award. Suppose those questions arise in a suit then find out which would be the competent court to decide such suit. The court*

competent to decide such questions in the suit would be the court having jurisdiction to decide the present petition under the Arbitration Act for making the award a rule of the court.
This decision makes it clear that one has to first ascertain at the subject-matter which is sought to be referred to arbitration. Then, taking that subject-matter, it has to be presumed that there is no arbitration clause. And, upon such presumption, it is then to be seen as to where a suit could be filed with regard to the subject-matter. If the suit could be filed at a place where the parties had agreed to hold the arbitration proceedings then, obviously, the courts at such place would have jurisdiction. But, if the suit cannot be filed at a place where the parties had agreed to hold the arbitration proceedings then the courts at such a place would not have jurisdiction. If this was not the case, then any application under the Act would be maintainable at a place where the parties had agreed to hold the arbitration proceedings, even though no part of the cause of action arose at that place."

Relying on this decision, it is argued that since the present agreement was pre-*BALCO*, hence the only courts under Section 2(1)(e) which would have jurisdiction would be those where the cause of action arose, or in other words, the courts which would have subject-matter jurisdiction, if the dispute were not covered by the arbitration clause. On such analysis, the only court, which would have jurisdiction in the present case, is the Bangalore court. Therefore, without recourse to even Section 42, on this reasoning, this Court would not have jurisdiction over the matter.

18. On the maintainability of the present appeal, Mr. Sundaram contended that the present appeal is maintainable and is not hit by the proviso to Section 13 of the CC Act. Section 13 provides for the right of appeal to the Commercial Appellate Division of the High Court from the decision of the Commercial Division of the High Court. Further, it is contended that the proviso to Section 13 which states that appeals to the Commercial Appellate Division of the High Court lie from orders under Section 37 of the Arbitration Act, does not provide an exhaustive list of

circumstances in which an appeal may be allowed. To establish this, Mr. Sundaram highlighted the difference in wording between the draft provision in the Law Commission's 253rd Report, which was the catalyst behind enactment of the CC Act, and Section 13 of the Commercial Courts Act. Draft Section 14(1) of the 253rd Report of the Law Commission stated:

> "*An appeal shall lie only from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 as amended by this Act and Section 37 of the Arbitration and Conciliation, 1996 and from no other orders*."

The Law Commission draft hence provided an exhaustive set of circumstances in which appeal would lie, by using the term "an appeal shall lie *only*" and also using the term "and from no other orders". Therefore the draft envisaged that only those orders specifically enumerated in Order XLIII of the CPC, and Section 37 of the Arbitration Act were in fact appealable. No other appeals were maintainable. On the other hand, Section 13 of the CC Act does not use the word "only" and also omits the phrase "and from no other orders", thereby suggesting that the grounds mentioned in Section 13 are not exhaustive. Moreover, it is contended that unlike draft Section 14 of the Law Commission Report, Section 13 along with the word "order" also uses the word "judgment" and therefore, while the proviso may restrict the orders from which appeals would lie to the Commercial Appellate Division, it would not apply to "judgments", from which appeals would nonetheless be maintainable. It is highlighted that this difference in wording between the two is indicative of an intentional departure on part of the Parliament to not restrict the situations in which an appeal may lie.

19. It is moreover contended that even if proviso to Section 13 provides for an exhaustive list of appealable orders, it does not apply to "judgments", from which appeals may lie under Section 13 itself, since this Section itself uses both terms

("order" and "judgment") separately. Reliance is placed on the decision of the Supreme Court in *Shah Babulal Khimji v. Jayaben D. Kania*, AIR 1981 SC 1786, to argue that once an interlocutory order has the "trappings and characteristics" of finality or the attributes of a judgment, then an appeal would lie against such orders:

> "*This now brings us to the second limb of the argument of Mr. Sorabjee that even assuming that Order 43 Rule I does not apply to the High Court so far as the Trial Judge of the said court is concerned, there can be no doubt that the orders indicated in various clauses of Order 43 Rule 1 possess the attributes and incidents of a final order which conclusively decides a particular issue so far as the Trial Court is concerned. Thus, there can be no difficulty, even without applying Order 43 Rule 1 to hold by a process of analogical reasoning that the appeals and orders mentioned in the various sub-clauses would amount to a judgment within the meaning of Clause 15 of the Letters Patent because they contain the traits, trappings and qualities and characteristics of a final order. In other words, the argument advanced was that we could still apply the provisions of Order 43 Rule 1 by the process of analogy. We fully agree with this argument because it is manifest that the word 'judgment' has not been defined in the Letters Patent but whatever tests may be applied, the order passed by the Trial Judge appealed against must have the traits and trappings of finality and there can be no doubt that the appealable orders indicated in various clauses of Order 43 Rule I are matters of moment deciding valuable rights of the parties and in the nature of final orders so as to fall within the definition of 'judgment'*."

It is contended that the impugned order of the Learned Single Judge, in directing Antrix to file its audited balance sheets and profit and loss accounts of the last three years, has the "trappings" of a judgment and therefore an appeal would nonetheless lie against such an order, even after the coming into force of the CC Act.

20. It is further argued that in any case, a decision on jurisdiction, is also an appealable order and is considered to be an order under Section 37 of the

Arbitration Act, since it is considered to have "ripple effect". Reliance is placed on the decision of the Bombay High Court in *Nivaran Solutions v. Aura Thia Spa Services Pvt. Ltd.,* (2016) 5 MhLJ 234 to advance this proposition. It is argued that in any case, an order to file accounts is in itself equal to a Section 9 order, relying on the decision of the Madras High Court in *Samson Maritime Limited v. Hardy Exploration*, 2016 SCC Online Mad 9122. It is argued that if Antrix is not allowed to appeal the impugned order, then if after proceeding on the merits, the Learned Single Judge finds in favour of Antrix, then it would not be able to assail the jurisdictional finding of the Single Judge – that this court has jurisdiction over the present matter, in an appeal, since in that situation, Antrix would not be "aggrieved" by the order of the Learned Single Judge.

21. It is argued, lastly, that the principle of comity of courts was given a serious go-by in the impugned order. Through the impugned order, in essence, what the Learned Single Judge has done is to *de-facto* dismiss Antrix's Section 9 petition before the Bangalore court. Antrix's Section 34 petition before that court too stands rejected. Yet, despite such findings of the single judge, Antrix would not have the right to appeal against the dismissal of its Section 9 and Section 34 petitions before another court if the textual interpretation of Section 13 of the CC Act is given effect to. Further, if at this stage, Devas withdrew its Section 9 petition, then Antrix again would be unable get the impugned order set aside were it to be held that the present appeal were not maintainable. Mr. Sundaram lastly argued that the approach of a court in deciding a Section 9 petition, when another similar petition has been previously instituted, and is already pending in another court, has been highlighted in the decision of this Court in *Priya Hiranandani Vandervala v. Niranjan Hiranandani*, 2016 (4) ArbLR 18 (Del). This approach of restraint, dictated by the Court in *Priya Hiranandani (supra)* was not followed by the Learned Single Judge, despite Antrix's Section 9 petition being previously instituted and being already pending before the Bangalore City Civil Court.

22. Mr. Rajiv Nayyar, learned senior counsel for Devas, the respondent, argued that the present appeal is not maintainable. It is urged that after passing of the Commercial Court Act, the decision in *Shah Babulal Khimji (supra)* has no application. He argued that the proviso of Section 13 of the CC Act is categorical in its mandate. Only appeals that are maintainable were those under Order XLIII of the Code of Civil Procedure, 1908 and in the case of arbitration, those under Section 37 of the Arbitration Act. Therefore, so far as Section 13 of the CC Act is concerned, the decision in *Khimji (supra)* would have no relevance. This means that in the context of arbitration the only appeals maintainable are those under Section 37 of the Arbitration Act and no other. It is highlighted that Section 37 of the Arbitration Act uses the phrase *"and from no others"* while specifying the orders of a court from which an appeal may lie under the Act.

23. Reliance is placed on the decision of this Court in *Harmanprit Singh Sidhu v. Arcadia Shares & Stock Brokers Pvt. Ltd.*, 2016 (159) DRJ 514 and it is urged that in this decision, the interaction between Section 13 of the CC Act and Section 37 of the Arbitration Act was dealt with in detail and it was held that Section 13 of the CC Act did not amplify the scope of appealable orders specified in Section 37 of the Arbitration Act. Section 13 of the CC Act merely reiterates that in a matter of arbitration, appeals shall only lie from orders specified in Section 37 of the Arbitration Act.

24. Reliance is also placed on the decision of this Court in *HPL (India) Limited v. QRG Enterprises*, 2017 (166) DRJ 671, to contend that after the passing of Section 13 of the CC Act, the decision in *Shah Babulal Khimji (supra)* no longer holds the field insofar as commercial matters are concerned. It is also highlighted that in the said decision, the Court held that the word "judgment" used in Section 13 of the CC Act was actually a misnomer and it referred to a "decree" instead. On the strength of these two decisions of the Delhi High Court, it is contended that the

impugned order of the Learned Single Judge could not be appealed since it was not an order within Section 37 of the Arbitration Act.

25. Mr. Nayyar refuted Antrix's contentions on this point, and argued that the impugned order was not a Section 9 order, since the order directing Antrix to file balance sheets was not an order within the meaning of Section 9. In fact, the single Judge had listed the matter for hearing on merits and in effect, till now has not passed any adverse order. Antrix's claims on the merits of Devas' Section 9 petition are still open and can be made before the learned single judge. If after that, Antrix suffers any adverse order, it can approach this Court under Section 37 of the Arbitration Act. Till that time, Antrix's claims would not have crystallised into an actionable claim for appeal to this Court.

26. On Section 42 of the Arbitration Act, Mr. Nayyar submitted that the law on this issue has now been settled by the Supreme Court in its decision in *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*, (2017) 7 SCC 678. In the said decision the Supreme Court has noted that the designation of seat is equivalent to the specification of an exclusive forum selection clause, such that all applications under the Arbitration Act can only be made to the courts at the seat, and no other court. Since Article 20(b) of the agreement between the two parties provided that the seat of the arbitration would be New Delhi, it is only the courts at New Delhi which would have exclusive jurisdiction to entertain any application in respect of the arbitration proceedings and accordingly, Section 42 would have no application since there was only one competent forum to adjudicate applications under the Arbitration Act in this case, i.e. this Court.

27. It is contended that this position also emerges from *BALCO (supra)*, which was further interpreted in *Datawind (supra)*. On the issue that *BALCO (supra)* laid down the law only with prospective effect, it is contended that the prospective effect of *BALCO (supra)* was only with respect to the holding that Part-I of the Arbitration Act would not apply to international arbitrations. On the interpretation

of Section 2(1)(e) of the Arbitration Act, the holding in *BALCO (supra)* was merely declaratory and by necessary implication, applied retrospectively as well. Reliance is placed on the decision of the Bombay High Court in *Konkola Copper Mines v. Stewarts and Lloyds of India Limited*, 2013 (4) ArbLR 19 (Bom).

28. Mr. Nayyar argues that in any case, Section 42 inapplicable to the present case as Antrix's Section 9 petition before the Bangalore court, was not maintainable, and as correctly held by the impugned order, barred in law. It is urged that of the three reliefs claimed by Antrix in its Section 9 petition before the Bangalore City Civil Court, two of them (i.e. claims 1 and 3) essentially asked for stay of arbitration proceedings and the third (i.e. claim 2) sought a stay with respect to the constitution of the tribunal. All of these reliefs claimed were untenable in view of the decision of the Supreme Court in *Bhatia International (supra)*. This was correctly noticed in the impugned order. It is submitted that when someone claims reliefs barred by law, the proceeding would not be maintainable and hence such a petition cannot be considered as an application first filed in a court of competent jurisdiction, such as to attract the provisions of Section 42 of the Act. In this context, it is argued that the phrase "barred by law" includes not just legislative enactments, but also includes judicial pronouncements. Thus, if the decision of a court recognizes that a particular relief cannot be claimed, then such a relief too will be considered as being "barred by law". In support of this proposition, Mr. Nayyar relied on the decision of the Supreme Court in *Bhargavi Constructions v. Kothakapu Muthyam Reddy*, 2017 SCC Online SC 1053.

29. It is further argued that the mere first filing of an application or merely approaching a court is not sufficient for the purposes of Section 42. The application made to the court must be such that the reliefs claimed are capable of being granted. For this, learned senior counsel relies on the decision of the Madras High Court in *M/s. Surya Pharmaceuticals Ltd. v. M/s. First Leasing Co. of India*

Ltd., (2014) 2 CTC 545. Relying on *Associated Contractors (supra)*, it is therefore argued that an application made to a court that does not have jurisdiction would not attract Section 42 of the Arbitration Act.

30. It is urged by Mr. Nayyar that the petition before this court is an abuse of the process of law and Antrix's has indulged in forum shopping, disentitling it to any relief. It is stated that the Section 9 petition before the Bangalore court and the Section 11 petition before the Supreme Court (AA No. 20/2011) claimed the same reliefs and the latter was dismissed by the Supreme Court. Therefore, as far as the Section 9 petition was concerned, issue estoppel operated. Reliance is placed on the decision of the Supreme Court in *Hope Plantations Ltd. v. Taluk Land Board Peermade*, (1999) 5 SCC 590 in this regard.

31. To further substantiate that Antrix indulged in forum shopping, Mr. Nayyar relied on the decision of the Supreme Court in *Union of India v. Cipla Ltd.*, (2017) 5 SCC 262, where it was held:

> "*The decisions referred to clearly lay down the principle that the Court is required to adopt a functional test vis-à-vis the litigation and the litigant. What has to be seen is whether there any functional similarity in the proceedings between one Court and another or whether there is some sort of subterfuge on the part of a litigant. It is this functional test that will determine whether a litigant is indulging in forum shopping or not*."

Reliance is also placed on the decision of the Supreme Court in *K.K. Modi v. K.N. Modi*, (1998) 3 SCC 573:

> "*One of the examples cited as an abuse of the process of court is re-litigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the court. Frivolous or vexatious proceedings may also amount to an abuse of*

the process of court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted. Undoubtedly, it is a matter of courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised and exercised only in special cases. The court should also be satisfied that there is no chance of the suit succeeding."

On the basis of these decisions, it was urged that as Antrix's claims under Section 9 before the Bangalore court were in sum and substance the same as their claims under Section 11 before the Supreme Court, and the latter was dismissed, holding the former petition to nonetheless be maintainable, would amount to an abuse of process of the court.

Analysis and Conclusion

32. The present appeal raises a number of interesting questions with respect to the Arbitration Act and the Commercial Courts Act. In particular, three questions arise:

(i) Maintainability of Antrix's appeal in view of provisions of the Commercial Courts Act;

(ii) If appeal is maintainable, does this Court have exclusive jurisdiction to adjudicate any applications arising out of the arbitration agreement between Antrix and Devas?

(iii) If the answer to question (ii) is in the negative, will Section 42 of the Arbitration Act preclude Devas' Section 9 petition before this Court on account of Antrix's previous Section 9 petition before the Bangalore City Civil Court?

33. Before proceeding, it would be useful to reproduce the provisions of law involved in the present case:

"*Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015*

Section 13 – Appeals from decrees of Commercial Courts and Commercial Divisions

(1) Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of judgment or order, as the case may be: Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).

(2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.

Arbitration and Conciliation Act, 1996

Section 2- Definitions

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

(e) "Court" means--

(i) in the case of an arbitration other than international commercial arbitration, 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;

(ii) in the case of international commercial arbitration, 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, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;

Section 9- Interim measures etc. by Court

(1)A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure or protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

Section 37- 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) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

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

(2) An appeal shall also lie to a court from an order of the arbitral tribunal-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or taken away any right to appeal to the Supreme Court.

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."

Point No (i)

34. The first question concerns interpretation of Section 13 of the Commercial Courts Act. Section 13 provides for the right of appeal from decisions of the Commercial Courts or Commercial Divisions of the High Courts. The proviso to Section 13(1) states that an appeal shall lie from orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the CPC and Section 37 of the Arbitration Act. The two parties differ as to the meaning of the proviso. Antrix contends that the proviso does not restrict the right of appeal to only those orders specified therein and places reliance on the

difference in wording between the draft provision in the Law Commission's 253rd Report and Section 13; Devas contends that the proviso means that in case of an arbitration, the only appealable orders are those mentioned in Section 37. Section 13 and the proviso to Section 13(1) specifically, came to be interpreted in two decisions of Division Benches of this Court in *Harmanprit Singh Sidhu (supra)* and *HPL India Limited (supra)*. In *Sidhu (supra)*, the Court noted:

> "*Insofar as Section 13 of the Commercial Courts Act is concerned, while it is true that it speaks of appeals from a judgment or order, the proviso to Section 13(1) makes it clear that the appeal would lie from such orders passed by, inter alia, a Commercial Division that are specifically enumerated under Order 43 of the Code of Civil Procedure, 1908 (as amended by the Commercial Courts Act) and Section 37 of the A&C Act. The use of the word 'and' in the proviso to Section 13(1) is only to specify that an appeal would lie against any order passed by, inter alia, a Commercial Division, which finds mention in the list of orders specified in Order 43, CPC and Section 37 of the A&C Act. It is an admitted position that the impugned order having been passed in proceedings arising out of an arbitral award would have to be governed by Section 37 of the A&C Act. On a plain reading of Section 13 of the Commercial Courts Act, it is evident that it does not amplify the scope of appealable orders specified in Section 37 of the A&C Act. It actually reiterates that, in a matter of arbitration, an appeal shall lie only from the orders specified in Section 37 of the A&C Act. In fact, Section 13(2) reinforces this by providing that notwithstanding anything contained in any other law for the time being in force or the Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of the Commercial Courts Act*."

35. In *HPL (supra)*, the Court held:

> "*It is in this backdrop that we are of the view that the expression 'judgment' appearing in Section 13(1) is a misnomer and that, in fact, it pertains to a decree because appeals can only be from decrees or orders. Another thing which is clear is that the words 'judgment' and 'order' have been used disjunctively and cannot be interchanged for each other. This is particularly so because of the expression - 'as the case may be' - which follows the expression*

'judgment or order'. It is clear that the word 'decision' includes both decrees and orders. It is also clear that an appeal under the CPC is provided only from the decrees or orders.

[.....]We have already pointed out above, that there are only two kinds of appeals recognized under the CPC, namely, - 'Appeals from decrees' and 'Appeals from orders'. Section 104, which has been extracted earlier in this judgment, specifies the orders from which appeals lie. It clearly provides that an appeal shall lie from the orders enumerated in the said provision itself and, save as otherwise expressly provided in the body of the CPC or by any law for the time being in force, from no other orders. This means that appeals from orders are restricted to those orders which are either specified in Section 104 itself or expressly provided in the body of the Code or by any law for the time being in force. Insofar as the impugned order is concerned, it is clear that it does not fall within the orders specified under Section 104. We now have to look at Order XLIII Rule 1 which stipulates that an appeal shall lie from the orders enumerated therein under the provisions of Section 104. In other words, only an order specified under Order XLIII Rule 1 would be appealable and, read with the provisions of Section 104, no other order would be an appealable order under the CPC. In this backdrop, the proviso to Section 13(1) makes it abundantly clear that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are 'specifically enumerated' under Order XLIII of the CPC, as amended by the said Act and Section 37 of the Arbitration and Conciliation Act, 1996. Clearly, in our view, this restricts the appealable orders to only those orders which are specifically enumerated in Order XLIII. In the present case, the impugned order is admittedly not one specified under Order XLIII.

[.....]Reading the entire section 13 of the said Act the clear position is that an appeal lies from an order which is specifically enumerated under Order XLIII CPC. Furthermore, no appeal would lie from an order not specifically enumerated in Order XLIII CPC because of the incorporation of the expression "from no other orders" appearing in section 104 CPC (which is clearly applicable by virtue of section 16(2) of the said Act).

[.....]The learned counsel for the appellants, as noticed earlier, had argued that the word "judgment" must be construed in the wider sense as in Khimji's case (supra) and therefore an order which may have the trappings of a judgment (in the wider sense) would be appealable despite the proviso to section 13(1) of the said Act. We

have already indicated earlier in this judgment that the expression "judgment or order" uses the words "judgment" and "order" disjunctively. They are used in a mutually exclusive manner. This is fortified by the fact that the said expression is followed by the expression "as the case may be". Thus, in the context of section 13 of the said Act, we cannot bring "orders" within the fold of "judgments".

Moreover, as pointed out above, the CPC recognizes only two kinds of appeals - (1) appeals from decrees (both original and appellate) and (2) appeals from orders. Thus, in the context of the CPC (which is clearly applicable to commercial disputes of a specified value), the use of the word "judgment" in section 13(1) of the said Act is a misnomer; the word "judgment" actually means "decree".

[.....]On going through Khimji's case (supra), it is evident that the word "judgment" as used in the Letters Patent of the High Courts, is much wider and goes beyond the orders specifically enumerated under Order XLIII of the CPC. But, what must not be forgotten is that the word "judgment" in Khimji's case (supra) has been interpreted as appearing in and in the context of the Letters Patent of High Courts (which would also by analogy include Section 10 of the Delhi High Court Act, 1966). However, the meaning of the word "judgment" as appearing in the CPC, as defined in Section 2(9) thereof is clearly linked with the definition of a "decree". The word 'judgment' in Section 13(1) of the said Act has to be considered not in the context of any Letters Patent of a High Court or a provision such as Section 10 of the Delhi High Court Act, 1966 but, in the context of the Code of Civil Procedure inasmuch as (1) the Commercial Division and the Commercial Court are enjoined by Section 16 to follow the provisions of the CPC, as amended by the said Act, in the trial of a suit in respect of a Commercial dispute of a specified value; (2) Section 13(2) of the said Act specifically excludes the operation of the provisions contained in the Letters Patent of a High Court or any other law for the time being in force (which includes Section 10 of the Delhi High Court Act, 1966) insofar as appeals from any order or decree of a Commercial Division or a Commercial Court are concerned. We have already indicated that the word "judgment" as appearing in Section 13(1) of the said Act is actually a misnomer and the said word has to be construed as a reference to a decree."

36. From these two decisions, what clearly emerges is that *Shah Babulal Khimji (supra)* has no application in the context of Section 13 of the CC Act. As held in *HPL (supra)*, the term "judgment" in Section 13 is actually a misnomer and refers instead to only decrees. Therefore, the only appealable orders under Section 13 are those that are referred to in the proviso to Section 13(1). As held in *Sidhu (supra)*, this would mean that in the context of an arbitration, the only appealable orders are those mentioned in Section 37 of the Arbitration Act as Section 13 of the CC Act does not amplify the scope of appeals as provided in Section 37. While Antrix has stressed on the difference in wording between the draft provision in the Law Commission Report and the final Section 13 of the CC Act, in *HPL (supra)*, in the context of appealable orders under the CPC, the Court noted that the expression "from no other orders" occurring in Section 104 of the CPC would be applicable and would have to be given effect, and hence, Section 13 of the CC Act would have to be interpreted in that light. Similarly, in the context of arbitration, Section 37 of the Arbitration Act uses the expression "and from no others" to specify that the only appealable orders are the ones mentioned in that provision. Therefore, for an appeal to lie from the decision of the Learned Single Judge's order in the present case, it has to be shown that the order was appealable under Section 37 of the Arbitration Act. In this context therefore, it has to be seen whether this order amounts to an order *"granting or refusing to grant any measure under section 9"*.

37. While undeniably, the Learned Single Judge in the impugned order has not decided the Section 9 petition finally and had listed the matter for hearing on merits, Antrix states that the impugned order is indistinguishable from an order under Section 9. Devas however, argued that the sequence of events has not been completed. Antrix should face an adverse order under Section 9 before it can approach this court in appeal. On this issue, significant reliance has been placed on

the decision of the Madras High Court in *Samson Maritime (supra)*. In that case, the Court held:

> "*Learned counsel appearing for the respondent made an attempt to contend that the application seeking for furnishing of details of assets cannot be construed as an interim measure or interim relief contemplated under section 9 of the said Act. I am not convinced to accept the said contention for the reason that those details are sought for by the applicant only to seek for consequential or follow up relief in the event of the respondent's failure to furnish securities. Therefore, as the relief sought for in this application is having a direct bearing on the relief sought for in the other applications seeking for furnishing securities, it cannot be said that this relief seeking for details of the assets is outside the scope of Section 9. Therefore, I find that the application filed seeking for details of the assets is also maintainable*."

38. The Court in *Samson Maritime (supra)* reasoned that an application seeking for furnishing of details of assets would also amount to an interim measure under Section 9, because the reason that those details are sought are only to seek consequential or follow up relief in the event of the respondent's failure to furnish securities. Therefore, an order mandating a party to disclose his assets or file his accounts would also be an interim measure within the meaning of Section 9. In this case, through Paragraph 57 of the impugned order, the Learned Single Judge had directed Antrix to file an affidavit of an authorised officer, enclosing therewith its audited balance sheets and profit and loss accounts for the past three years. Keeping in mind the view of the Court in *Samson Maritime (supra),* which this Court is in agreement with, this would also in effect be a Section 9 order as those details are sought for the purpose of adjudicating whether consequential relief could be given to Devas of securing the amount due from the arbitral award against Antrix. Moreover, this Court cannot take a doctrinaire and unbending approach in this matter, when it is clear that Antrix has suffered all but one remaining blow through the impugned order, and therefore, the Court should not

wait till it suffers the final blow (that of the final Section 9 order) before it can assume jurisdiction over the appeal. The court's direction to Antrix furnish an affidavit along with the particulars sought, is to aid its order with respect to a possible distraint, attachment or further such *consequential* order towards interim relief. Such an order would not be made unless the court directs this as a prelude, or important step towards the inevitable interim order, which would be just consequential. Therefore, the Court finds that Antrix's appeal against the impugned order is maintainable.

39. This court also finds merit in Antrix's argument that as regards the single judge's observations that the Bangalore court cannot proceed with the matter, the impugned order is really final. It precludes in effect, Antrix from proceeding with its Section 34 petition before that court (in turn based on the pending Section 9 petition before that court). If Antrix were to accept the ruling, the effect would be to denude the Bangalore court of jurisdiction. It was contended- and correctly, in this court's opinion that whereas a court acts within jurisdiction in deciding whether it has or does not have jurisdiction over a cause of a matter, the declaration by it about the lack of jurisdiction of another court, based on the appreciation of the matter before the latter court is undeniably an adverse order. Allowing that to stand would prejudice Antrix for all times.

36. This court is of the opinion, for these reasons, that the present appeal is maintainable under Section 37 of the Arbitration Act and Section 13 of the CC Act.

Question (ii)

40. The second question requires this court to consider if it has exclusive jurisdiction over the dispute between Antrix and Devas. Antrix contends that the City Civil Court at Bangalore has concurrent jurisdiction because the cause of action arose in Bangalore and that its registered office is in Bangalore, and by the

operation of Section 42, since that court was approached first, it is only that Court which would have jurisdiction. Devas on the other hand contends that Section 42 does not apply as the parties had designated New Delhi as the seat of the arbitration, and by virtue of such designation, they conferred exclusive jurisdiction on the courts at New Delhi.

41. To adjudicate this question, the starting point has to be the decision of the Supreme Court in *BALCO (supra)* with respect to its interpretation of Section 2(1)(e) of the Arbitration Act. In paragraph 96 of *BALCO (supra)*, the Court noted:

> "*We are of the opinion, the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in Section 2(1) (e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the Learned Counsel for the Appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order Under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place*

> *in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located*."

42. Antrix contends that this holding of *BALCO (supra)*, would apply only prospectively, as declared by the Court itself in paragraph 200 of its decision. Since the present agreement between the parties was pre-*BALCO*, therefore the law declared by the Court in paragraph 96 would not apply to this agreement between the parties. It is contended that pre-*BALCO*, the courts at the seat of arbitration were not considered as falling within the definition of Section 2(1)(e) of the Act, as interpreted by this Court in *G.E. Countrywide (supra)*. Therefore, this Court, as the court at the seat would not have jurisdiction at all, since the agreement was pre-*BALCO*. It has to be however noted that through paragraph 200 of *BALCO (supra)*, the Court did not give retrospective effect to each aspect of the decision, but only to its decision that Part I of the Arbitration Act would only apply to domestic arbitrations. This is evident from a combined reading of paragraphs 199 and 200 of the decision:

> "*199. We conclude that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which take place within the territory of India.*
> *200. The judgment in Bhatia International (supra) was rendered by this Court on 13th March, 2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engineering (supra) has been rendered on 10th January, 2008 in terms of the ratio of the decision in Bhatia International (supra). Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.*"

43. Thus, it is evident that the Court when giving prospective effect to its decision in paragraph 200, was only referring to the holding in the preceding paragraph, i.e. Part I would apply only to arbitrations within India.

44. A similar view has also been taken by the Bombay High Court in *Konkola Copper Mines (supra)*, where the Court while addressing *BALCO's(supra)* interpretation of Section 2(1)(e) in paragraph 96, held:

> "*In our view, it would not be appropriate, while applying the ratio of the judgment in BALCO to hold that the reasons which are contained in the judgment would operate with prospective effect. What the Supreme Court has essentially ordered, while moulding the reliefs is that the declaration of law to the effect that Part-I shall apply only to those arbitrations where the place of arbitration in India shall take prospective effect after the date of the judgment. But equally, it would be impermissible to hold that the interpretation which has been placed by the Supreme Court on the provisions of Section 2(1)(e) would apply only prospectively. The judgment of the Supreme Court is declaratory of the position of law that the Court having jurisdiction over the place of arbitration can entertain a proceeding in the exercise of its supervisory jurisdiction as indeed the Court where the cause of action arises. The Supreme Court has also noted that the regulation of arbitration consists of four steps: (i) the commencement of arbitration; (ii) the conduct of arbitration; (iii) the challenge to the award; and (iv) the recognition or enforcement of the award. In the judgment of the Supreme Court, Section 9 has been held to be an ancillary provision that supports the arbitral process or one that is structurally ancillary. Once the provisions of Section 9 are regarded to be ancillary in nature, or in other words, a facilitative statutory instrument to support the arbitral process, it would be apparent that those provisions would apply where Part-I of the Act of 1996 is attracted. Consequently, where as in the present case, the place of an international commercial arbitration is in India, Part-I would apply and of which Section 9 is a necessary, if ancillary ingredient. Counsel appearing on behalf of the Respondent submitted that prior to the judgment of the Supreme Court, several High Courts had taken the view that the place of arbitration is irrelevant to the exercise of the jurisdiction under Section 2(1)(e). This, in our view, cannot make any difference to the outcome because once the Supreme Court has concluded what should be the correct interpretation of Section 2(1)(e), the binding principles laid down therein must necessarily apply*."

45. Therefore, the Bombay High Court held that *BALCO'S* ruling on Section 2(1)(e) would apply retrospectively as well. In that view of the matter, this Court cannot accept Antrix's contention that *BALCO's (supra)* interpretation of Section 2(1)(e) would not apply to this case.

46. Having held that the statement in paragraph 96 of *BALCO (supra)* would apply to the present case as well, this court has to examine its legal consequence in light of the law declared in *BALCO (supra)*. It is important to note that in the said paragraph (extracted above), the Supreme Court has noted that Section 2(1)(e) of the Arbitration Act confers jurisdiction to two courts over the arbitral process – the courts having subject matter jurisdiction and the courts of the seat. This is evident both from the substantive holding of the paragraph as well as the example given by the Court. The Court notes that "*the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place.*" This is further reinforced by the example that the Court gave later in the same paragraph. In the example where the parties are from Mumbai and Kolkata and the obligations under the contract are to be performed at either Mumbai or Kolkata, and the parties have designated Delhi as the seat of the arbitration, in such a situation, both courts would have jurisdiction, i.e. within whose jurisdiction the subject matter of the suit is situated (either Mumbai or Kolkata) and the court within the jurisdiction of which the dispute resolution, i.e., arbitration is located (which is Delhi). Moreover, the fact that the court interpreted the term *"subject matter of the suit"* in the paragraph, also gives credence to the interpretation that the court recognized that Section 2(1)(e) gives jurisdiction to both the cause of action courts, and the court at the seat of the arbitration. If the Court were of the opinion that only the courts at the seat would have jurisdiction under Section 2(1)(e) and no other court, then it would be wholly unnecessary for the court to interpret the term *"subject matter of*

the suit", since that court would anyway not have jurisdiction. In sum therefore, paragraph 96 of *BALCO (supra)* gives jurisdiction to both courts at the seat and the courts within whose jurisdiction the cause of action arises, if the dispute were the subject matter of a suit. This is what the Bombay High Court in *Konkola Copper Mines (supra)* also interpreted *BALCO (supra)* as holding:

> "*The Supreme Court held that the provisions of Section 2(1)(e) are purely jurisdictional in nature and can have no relevance to the question whether any part of the cause of action has taken place outside India. The observations which have been extracted above, clearly establish that the Court where the arbitration takes place would be required to exercise supervisory control over the arbitral process. The Supreme Court has held that Parliament has given jurisdiction to two courts – the Court which would have jurisdiction where the cause of action is located and the Court where the arbitration takes place. This is evident from the example which is contained in the above quoted extract from the decision*."

47. Therefore, *BALCO (supra)* unmistakably held that for the purpose of Section 2(1)(e), the courts at the seat do not have exclusive jurisdiction; rather, two courts have concurrent jurisdiction- the seat court and the court within whose jurisdiction the cause of action arises. Such being the case, this court now proposes to analyze the decision of the Supreme Court in *Datawind (supra)*, on which there has been debate on both sides. The second paragraph of the decision itself lays down the question that the Court in that case was faced with:

> "*The present appeals raise an interesting question as to whether, when the seat of arbitration is Mumbai, an exclusive jurisdiction Clause stating that the courts at Mumbai alone would have jurisdiction in respect of disputes arising under the agreement would oust all other courts including the High Court of Delhi, whose judgment is appealed against.*"

48. Thereafter, the decision goes on to record its findings on the merits of the dispute:

"*20. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction - that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Section 16 to 21 of the Code of Civil Procedure be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.*

21. It is well settled that where more than one court has jurisdiction, it is open for parties to exclude all other courts. For an exhaustive analysis of the case law, see Swastik Gases Private Limited v. Indian Oil Corporation Limited, (2013) 9 SCC 32. This was followed in a recent judgment in B.E. Simoese Von Staraburg Niedenthal and Anr. v. Chhattisgarh Investment Limited, (2015) 12 SCC 225. Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the Respondents may take necessary steps under Section 9 in the Mumbai Court. Appeals are disposed of accordingly."

49. Learned senior counsel for Devas argued that if *Datawind (supra)* were to be properly interpreted, then while the court in the second paragraph framed the question in terms of whether the seat along with an exclusive jurisdiction clause, would serve to confer exclusive jurisdiction on the courts of the particular place, while examining the merits of the case, and in particular, in rendering its findings, the court only had regard to the designation of the seat as Mumbai and after examining a conspectus of decisions on the point, unambiguously held that the

designation of a seat is tantamount to an exclusive forum selection clause, which would serve to oust the jurisdiction of all other courts. However, this Court is of the opinion, that the findings of the Court in *Datawind (supra)* have to be interpreted in their proper context. It is a well-settled proposition that the *ratio decidendi* of a judgment has to be appreciated in its proper context and in light of the particular facts and circumstances of the case and what the court explicitly ruled about them.

50. In *Datawind (supra)*, as the facts and the question framed by the Court in the second paragraph of its decision suggest, the Court was faced with a situation where the parties had designated both the seat *and* specified an exclusive forum selection clause. Therefore, its findings have to be interpreted in that light. In fact, were this Court to find otherwise, and interpret *Datawind (supra)* as holding that the designation of seat alone would amount to an exclusive forum selection clause in domestic arbitrations, then this would run contrary to the five-Judge decision in *BALCO (supra)*, which as noticed above, gave jurisdiction under Section 2(1)(e) to two courts – one of which was the court of the seat, thereby clearly implying that the designation of a seat would not amount to an exclusive forum selection clause. A similar conclusion was recently reached by a Single Judge of the Calcutta High Court in *Hinduja Leyland Finance Ltd. v. Debdas Routh*, 2017 SCC Online 16379 while interpreting the decisions in *Datawind (supra)* and *BALCO (supra)*:

> "*We have to assume that the seat of the arbitration, agreed to by the parties is in Bhubaneswar. The contract was executed and wholly performed within West Bengal. Nothing in relation to the underlying contract happened in Bhubaneswar or Orissa.*
>
> *When one tries to ascertain the subject-matter of this particular arbitration it is not only the dispute which arises out of the underlying contract. It also involves the dispute of the parties with the arbitrator arising out of the arbitration agreement. The phrase "subject-matter of the arbitration" has to be given a purposive meaning by including within its field of operation disputes arising out of the underlying contract as well as disputes arising out of*

appointment, conduct of arbitration, application of the Rules relating to arbitration by the arbitrator and finally the publication of the award.

If we assume that the arbitrator was challenged regarding his impartiality at the seat of the arbitration where the sittings were held and he ruled on that challenge from this place, it is not difficult to hold that a part of the cause of action arose at the place where the seat of the arbitration is located. Therefore, the Court having jurisdiction over the seat of the arbitration i.e. Bhubaneswar in Orissa may be approached by way of a Section 34 application. Mr. Justice Nijjar has very poignantly observed "in such circumstances both the Courts would have the jurisdiction i.e. Court within whose jurisdiction the subject matter of the suit is situated and the Courts within which the jurisdiction of which the dispute resolution i.e. arbitration is located".

However, the case of Indus Mobile rules that the Court in the place where the seat of arbitration is located, have natural jurisdiction over any dispute.

I would very humbly like to say that nomination of a seat does not oust the courts in other places where part of the cause of action has arisen, of their jurisdiction, as such a proposition would be contrary to the five judge bench decision of the Supreme Court in Balco. Hence, in choosing a Court under Section 2(1)(e)(i) we have now an additional forum, that is, the courts at the seat of arbitration.

[…] The summary of my views is as follows:—

i. The definition of Court in Section 2(1)(e)(i) has to be given a purposive interpretation. When it refers to the subject-matter of arbitration it is to mean that the subject-matter of dispute will not only comprise of disputes arising out of the underlying contract but also disputes arising out of the conduct of the arbitral proceedings making, publication of the award and so on.

ii. If the dispute between the parties is with regard to the conduct of the arbitration or with the arbitrator or the making and publication of the award, the Court situated in the seat of arbitration has natural jurisdiction.

iii. Even otherwise, the courts in the seat of arbitration have natural jurisdiction over any dispute, whether it stems from the underlying contract or from the arbitration, as per the Indus case.

iv. An application under Part I of the Arbitration and Conciliation Act, 1996, lies before any Court which has natural jurisdiction over the subject-matter of arbitration.

v. If the seat of arbitration and the place chosen by the parties as the place where litigation is to be instituted, by virtue of the forum selection clause, is the same, then the Courts of that place only have exclusive jurisdiction to try the case.

vi. A forum selected by the parties will only have jurisdiction if it also has natural jurisdiction over the subject-matter of the arbitration.

Therefore, I do not think that the decision in the case of Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited reported in (2017) 7 SCC 678 read with the Balco case (2012) 9 SCC 552 has so changed the law so as to oust the jurisdiction of this Court which is invoked, inter alia, on the ground that part of the cause of action has arisen within the jurisdiction of this Court. Therefore, the plea taken by the respondents in each of the applications fails."

51. Such being the view of the matter, the findings in *Datawind (supra)*are to be seen in the background of the larger bench decision in *BALCO (supra),* and cannot as Mr. Nayyar argues, be given its full effect, independently.

52. The court is of the opinion that in this case, only if the parties had designated the seat as New Delhi *and also provided an exclusive forum selection clause in favour of the courts at New Delhi*, could it be said that this court would have exclusive jurisdiction over all applications filed under the Arbitration Act. Indeed, it is open to parties to an arbitration to designate a particular forum as the exclusive forum to which all applications under the Act would lie. This would merely be an exercise of the right of the parties to choose one among multiple competent forums as the exclusive forum. This is a clearly permissible exercise of the right of party autonomy as held by the Supreme Court in *Swastik Gases v. Indian Oil Corporation Ltd.*, (2013) 9 SCC 32. Conversely, merely choosing a seat, cannot amount to exercising such a right of exclusive forum selection.

53. This court is of opinion that, holding otherwise would in effect render Section 42 of the Arbitration Act ineffective and useless. Section 42 of the Act presupposes that there is more than one competent forum to hear applications under the Arbitration Act, and hence to ensure efficacy of dispute resolution, this provision enacts that the court, which is first seized of any such application under the Act, would be the only court possessing jurisdiction to hear all subsequent applications. If seat were equivalent to an exclusive forum selection clause in Part-I arbitrations, then every time parties would designate a seat, that would in effect mean that Section 42 would have no application. Thus, only those few situations where parties do not actually designate any seat (and thus no exclusive competence is conferred on one forum) would Section 42 have any role. In fact, often, when parties do not agree upon a seat in the arbitration agreement, for convenience, the arbitral tribunal designates a particular seat of the arbitration, or the agreement vests the discretion in the tribunal to decide the seat (and not just the "venue"). In all those circumstances then as well, the decision of the tribunal to agree upon a "seat" would amount to an exclusive jurisdiction clause and Section 42 would have no application. This would dilute Section 42 and would accordingly, be contrary to Parliamentary intent. Undoubtedly, in the present case, the parties have only chosen the seat as New Delhi and have not specified an exclusive forum selection clause. Therefore, it cannot be said that the courts in Delhi have exclusive competence to entertain applications under the Arbitration Act in the present dispute. The jurisdiction of the courts where the cause of action arises, which in this case, is the Bangalore City Civil Court, cannot be said to have been excluded therefore. Accordingly, question (ii) is also answered in favour of Antrix. The court's conclusion also accords with the previous holding of a Division Bench in *Priya Hiranandani Vandervala v Niranjan Hiranandani* 2016 (4) Arb LR 18 (Del) (DB) where the court held as follows:

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

Question (iii)

54. Once it is held that the City Civil Court at Bangalore too had jurisdiction to entertain an arbitration application with respect to the present dispute, Section 42 of the Act would be applicable and the Court must examine whether Antrix's Section 9 petition before the Bangalore City Civil Court would constitute an "application under this Part" made in a court, as to attract the mandate of Section 42 and obligate parties to file all subsequent applications before that court alone. Section 42 of the Arbitration Act came to be interpreted by the Supreme Court in *Associated Contractors (supra)*, where the Court held:

> "*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."

55. From the above decision, particularly conclusion (g) of the judgment, it is clear that an application to a court which does not have jurisdiction under the Act, as it does not fall within the ambit of Section 2(1)(e) in the sense that it is neither a Principal Court of original jurisdiction in a district nor, as the case may be, a High Court exercising original jurisdiction in a State, or because it is a court that lacks subject matter jurisdiction, would not attract Section 42. In other words, an application made to a wrong court or a court without jurisdiction would not obligate parties to make all subsequent applications to that court alone. This is natural, since parties by their mistake cannot confer jurisdiction on a court which would otherwise not have jurisdiction over the dispute. Thus, in such a situation,

Section 42 would not apply. What then has to be seen is whether Antrix's Section 9 petition before the Bangalore City Civil Court was an application made to a court without jurisdiction.

56. Undoubtedly, the City Civil Court at Bangalore would have subject matter jurisdiction over the dispute, as the cause of action arose within its jurisdiction and the defendant's (in the case of Antrix's Section 9 petition that is Devas) registered office and place of business was also in Bangalore. In that sense, *prima facie*, the City Civil Court at Bangalore would be a competent forum to entertain a Section 9 petition in the arbitration between Antrix and Devas, and would be a court within the meaning of Section 2(1)(e) of the Arbitration Act. Devas however contends that Antrix's Section 9 petition before that Court was not maintainable and in that sense, was made in a court without jurisdiction; therefore, the bar under Section 42 could not be triggered by virtue of such a petition which was not maintainable. It is contended by Devas that Antrix's Section 9 petition was not maintainable since it claimed reliefs that were barred in view of the law declared by the Supreme Court in *Bhatia International (supra)* and that it claimed substantially similar reliefs in its Section 11 petition before the Supreme Court which was dismissed, thereby leading to an issue estoppel. Allowing Antrix to re-agitate similar claims in a Section 9 petition before the City Civil Court would amount to forum shopping and an abuse of process of the courts.

57. On this issue, this Court finds merit in Mr. Sundaram's submission that there is in law a difference between the existence of jurisdiction and the exercise (whether or not erroneous) of such jurisdiction. The existence of jurisdiction goes to the root of the competence of a forum, without which a court cannot entertain or adjudicate a matter at all. However, the exercise of or refusal to exercise jurisdiction implies analyzing whether there are reasons for which an otherwise competent forum should not entertain the application of a party.

58. This point was brought home recently, in the Supreme Court's decision, reported as *Indian Farmers Fertilizer Co-Operative Limited vs. Bhadra Products,* 2018 (2) SCC 534. The court observed as follows:

> *"21.That "jurisdiction" is a coat of many colours, and that the said word displays a certain colour depending upon the context in which it is mentioned, is well-settled. In the classic sense, in Official Trustee v. Sachindra Nath Chatterjee, (1969) 3 SCR 92 at 99, "jurisdiction" is stated to be:*
> *In the order of Reference to a Full Bench in the case of Sukhlal v. Tara Chand (1905) ILR 33 Cal 68] it was stated that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it: in other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. An examination of the cases in the books discloses numerous attempts to define the term 'jurisdiction', which has been stated to be 'the power to hear and determine issues of law and fact', the authority by which the judicial officer take cognizance of and 'decide causes'; 'the authority to hear and decide a legal controversy', 'the power to hear and determine the subject-matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them;' 'the power to hear, determine and pronounce judgment on the issues before the Court'; 'the power or authority which is conferred upon a Court by the Legislature to hear and determine causes between parties and to carry the judgments into effect'; 'the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution'.*
>
> *(Mukherjee, Acting CJ, speaking for Full Bench of the Calcutta High Court in Hirday Nath Roy v. Ramachandra Barna Sarma ILR 68 Cal 138)*
>
> *22. A Constitution Bench of this Court in Ittavira Mathai v. Varkey Varkey, (1964) 1 SCR 495 at 501-503, made a distinction between an erroneous decision on limitation being an error of law which is within the jurisdiction of the Court, and a decision where the Court acts without jurisdiction in the following terms:*
> *"The first point raised by Paikedy for the Appellant is that the decree in OS No. 59 of 1093 obtained by Anantha Iyer and his brother in the suit on the hypothecation bond executed by Ittiyavira*

in favour of Ramalinga Iyer was a nullity because the suit was barred by time. In assuming that the suit was barred by time, it is difficult to appreciate the contention of learned Counsel that the decree can be treated as a nullity and ignored in subsequent litigation. If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities. Learned Counsel, however, referred us to the decision of the Privy Council in Maqbul Ahmad v. Onkar Pratap Narain Singh AIR (1935) PC 85 and contended that since the court is bound under the provisions of Section 3 of the Limitation Act to ascertain for itself whether the suit before it was within time, it would act without jurisdiction if it fails to do so. All that the decision relied upon says is that Section 3 of the Limitation Act is peremptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The Privy Council has not said that where the court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Code of Civil Procedure. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.

23. It is in this sense of the term that "jurisdiction" has been used in Section 16 of the Act. Indeed, in NTPC (supra) at 460-461, a Division Bench of this Court, after setting out Sections 16 and 37 held:

"10. Now, the only question that remains to be decided in the present case is whether against the order of partial award an appeal is maintainable directly Under Section 37 of the Act or not. We have

considered the submissions of learned Counsel for the Appellant and after going through the counterclaim and the partial award, we are of the opinion that no question of jurisdiction arises in the matter so as to enable the Appellant to file a direct appeal Under Section 37 of the Act before the High Court. As already mentioned above, an appeal Under Sub-section (2) of Section 37 only lies if there is an order passed Under Sections 16(2) and (3) of the Act. Sections 16(2) and (3) deal with the exercise of jurisdiction. The plea of jurisdiction was not taken by the Appellant. It was taken by the Respondent in order to meet their counterclaim. But it was not in the context of the fact that the Tribunal had no jurisdiction, it was in the context that this question of counterclaim was no more open to be decided for the simple reason that all the issues which had been raised in Counterclaims 1 to 10 had already been settled in the minutes of meeting dated 6-4-2000/7-4-2000 and it was recorded that no other issues were to be resolved in first and third contracts. Therefore, we fail to understand how the question of jurisdiction was involved in the matter. In fact it was in the context of the fact that the entire counterclaims have already been satisfied and settled in the meeting that it was concluded that no further issues remained to be settled. In this context, the counterclaims filed by the Appellant were opposed. If any grievance was there, that should have been (sic raised) by the Respondent and not by the Appellant. It is only the finding of fact recorded by the Tribunal after considering the counterclaim vis-à-vis the minutes of meeting dated 6-4-2000/7-4-2000. Therefore, there was no question of jurisdiction involved in the matter so as to enable the Appellant to approach the High Court directly."

Interestingly, in a separate concurring judgment, P.K. Balasubramanyan, J., held:

17. In the larger sense, any refusal to go into the merits of a claim may be in the realm of jurisdiction. Even the dismissal of the claim as barred by limitation may in a sense touch on the jurisdiction of the court or tribunal. When a claim is dismissed on the ground of it being barred by limitation, it will be, in a sense, a case of the court or tribunal refusing to exercise jurisdiction to go into the merits of the claim. In Pandurang Dhoni Chougule v. Maruti Hari Jadhav AIR 1996 SC 153: (1996) 1 SCR 102] this Court observed that: (AIR p. 155, para 10)

It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party

raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code.

In a particular sense, therefore, any declining to go into the merits of a claim could be said to be a case of refusal to exercise jurisdiction.

18. The expression "jurisdiction" is a word of many hues. Its colour is to be discerned from the setting in which it is used. When we look at Section 16 of the Act, we find that the said provision is one, which deals with the competence of the Arbitral Tribunal to Rule on its own jurisdiction. SBP & Co. v. Patel Engg. Ltd. (2005) 8 SCC 618 in a sense confined the operation of Section 16 to cases where the Arbitral Tribunal was constituted at the instance of the parties to the contract without reference to the Chief Justice Under Section 11(6) of the Act. In a case where the parties had thus constituted the Arbitral Tribunal without recourse to Section 11(6) of the Act, they still have the right to question the jurisdiction of the Arbitral Tribunal including the right to invite a ruling on any objection with respect to the existence or validity of the arbitration agreement. It could therefore Rule that there existed no arbitration agreement, that the arbitration agreement was not valid, or that the arbitration agreement did not confer jurisdiction on the Tribunal to adjudicate upon the particular claim that is put forward before it. Under Sub-section (5), it has the obligation to decide the plea and where it rejects the plea, it could continue with the arbitral proceedings and make the award. Under Sub-section (6), a party aggrieved by such an arbitral award may make an application for setting aside such arbitral award in accordance with Section 34. In other words, in the challenge to the award, the party aggrieved could raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority, in passing it. This happens when the Tribunal proceeds to pass an award. It is in the context of the various Sub-sections of Section 16 that one has to understand the content of the expression "jurisdiction" and the scope of the appeal provision. In a case where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, it is clear from Sub-section (6) of Section 16 that the parties have to resort to Section 34 of the Act to get rid of that award, if possible. But, if the Tribunal declines jurisdiction or declines to pass an award and dismisses the arbitral proceedings, the party aggrieved is

not without a remedy. Section 37(2) deals with such a situation. Where the plea of absence of jurisdiction or a claim being in excess of jurisdiction is accepted by the Arbitral Tribunal and it refuses to go into the merits of the claim by declining jurisdiction, a direct appeal is provided. In the context of Section 16 and the specific wording of Section 37(2)(a) of the Act, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Act is only an acceptance of a plea of absence of jurisdiction, or of excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly.(at pages 463-464)

24. This judgment is determinative of the issue at hand and has our respectful concurrence. However, various judgments were referred to by learned senior advocate appearing on behalf of the Respondent, in which "jurisdiction" in the wide sense was used. Thus, a jurisdictional error Under Section 115 of the Code of Civil Procedure, 1908, dealing with revision petitions, was held to include questions which relate to res judicata and limitation. [See Pandurang Dhoni Chougule v. Maruti Hari Jadhav (1966) 1 SCR 102 at 107)]."

59. Thus, it is clear that the authority to *"decide a cause at all not the decision rendered therein is what makes up jurisdiction"*; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. The Full Bench ruling authored by Asutosh Mukerjee, (*Hriday Nath Roy)* also stated that:

"the extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraints attaching to the mode of exercise of that jurisdiction should be included in the conception of jurisdiction itself, is sometimes a question of great nicety.. But the distinction between existence of jurisdiction and exercise of jurisdiction has not always been borne in mind and has sometimes led to confusion. We must not thus overlook the cardinal position that in order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing as well as a determination. A judgment pronounced by a Court without jurisdiction is void, subject to the well-known reservation that, when the jurisdiction of a Court is challenged, the Court is competent to determine the question of

jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it."

60. In sum, the court's ability to entertain the particular *lis*, hear it, but refuse the relief claimed implies existence of jurisdiction to deal with the subject matter (of the *lis*). A court which deals with another court's ability to do so (such as in the present case, where the single judge considered the tenability of Antrix's claims before the Bangalore court, *on merits*) does so improperly and therefore, in clear error. Therefore, the fact that the reliefs claimed by Antrix in the Section 9 petition were barred in view of the law declared in *Bhatia International (supra)*, or that the reliefs claimed in the Section 9 petition were substantially the same or similar to the reliefs claimed in its Section 11 petition before the Supreme Court, can be reasons to possibly induce the City Civil Court at Bangalore to deny exercising its jurisdiction *to grant the relief sought* over the matter or deny Antrix's claims on merits. *However, those reasons do not go the root of the jurisdiction or competence of the City Civil Court itself, and neither would it make the application made a non-est or void application by itself*, such as to not come within the ambit of an application for the purposes of Part-I of the Arbitration Act. The applications made were not *coram non judice*. In fact, Devas' claims regarding the maintainability of Antrix's Section 9 petition should more aptly be made before the City Civil Court at Bangalore itself. The scope of jurisdiction of a Court when seized with a Section 9 petition, when another Section 9 petition which has been filed prior in a different court is pending, has been highlighted by this Court in *Priya Hiranandani (supra)*:

"*With reference to Section 42 of the Arbitration and Conciliation Act, 1996 the debate took the parties to interpret the words 'has been made' in Section 42 of the Act; for the father and son oppose the maintainability of the petition filed by Priya under Section 9 of the Act before the Delhi High Court on the plea that the father had instituted a petition under Section 9 in the Bombay High Court on April 25, 2016. Priya urged two points. The first was that 'has been*

made' must mean to the Court, as in, laid before the Judge; as distinct from merely filing in the Registry of the Court. She urged that to pre-empt her from approaching the Court in Delhi, the act of merely filing a petition under Section 9 of the Act in the Registry of the Bombay High Court would not amount to the father making an application in the Court at Mumbai. Pithily put, the argument was that the mandate of Section 42, which took away the right of parties to approach a Court in case of concurrent jurisdiction of Courts, and conferred exclusive jurisdiction to the Court which was first seized of an application filed by a party, meant the Court, as in, the Judge having before him/her the petition filed. The second limb of her stand was that a party cannot, under colour of a claim, which ex-facie is frivolous, approach any Court and claim that said Court is the one which would henceforth be the only Court where applications under the Act can be filed. The factual setting of said argument was that the final award had been pronounced, and she was the net recipient of the money from her father and brother. As per her the father and son knew that. Even in their pleadings in the application filed under Section 9 of the Act before the Bombay High Court the two had admitted that notwithstanding part of cost incurred by them being reimbursed to them from her, she would be the net recipient of money from her father and brother and thus the sole intention of the father was to appropriate jurisdiction in the Bombay High Court and not to enforce any bona-fide claim in the argument of Priya. It was urged that motivated and vexatious petitions need to be held as not maintainable and if a petition before a Court is held to be not maintainable, it would be a case where the Court would not be conferred with the exclusive jurisdiction envisaged by Section 42 of the Act.

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

[....]But then this would be the opinion of the Court where a petition is first filed and the opposite party takes an objection. The principle of comity commands us not to comment upon the issue whether the

petition filed by the father under Section 9 of the Act before the Bombay High Court is devoid of merit and has the hidden agenda of ousting jurisdiction that is inconvenient to the father and the son; who appear to be residing in the city of Mumbai.

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

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

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

61. Applying the *ratio* and decision to the facts of the case at hand, this would mean that while a vexatious or *mala-fide* petition, such as one which indulges in forum shopping or seeks to re-agitate claims already made and decided before

another forum, cannot attract the bar under Section 42, yet, the mandate of the law and the principle of comity of courts would require that that other court which is seized of the dispute first, in accordance with Section 42, decide on the application – and whether it is vexatious or an abuse of the process of law. This also because were the petition filed before the other court adjudicated to be *bona-fide*, then the bar under Section 42 would be operative and would serve to exclude the jurisdiction of the present court. In the facts of this case, this would mean that the Bangalore City Civil Court should first decide on Antrix's Section 9 petition and whether it is maintainable, vexatious or *mala-fide*. If the petition is found to be maintainable and *bona-fide*, then Section 42 would be applicable and all subsequent applications would have to be made by the parties before that Court. Holding otherwise and allowing parties to approach this Court, even though admittedly the Section 9 petition before the Bangalore City Civil Court was filed by Antrix prior to Devas' Section 9 petition before this Court, and without waiting for the decision of the Bangalore City Civil Court, would amount to giving a go-bye to the mandate of Section 42 and would also run afoul of the principle of comity of courts. Since Antrix's Section 9 petition was filed first, both Section 42 and the principle of comity of courts mandate that the Bangalore City Civil Court should be allowed to decide on that petition. Devas' objections on maintainability and *mala-fide* nature of Antrix's petition should be made before the appropriate court which is seized of that petition – which in this case, is the Bangalore City Civil Court. If that Court were to uphold Devas' objections and find Antrix's petition to be barred in law or vexatious, and declare it *non-est*, as if it never validly existed, then the first application would be Devas' Section 9 application before this Court, which would then not be hit by Section 42. If however, that Court finds Antrix's petition to be maintainable, then in terms of *Priya Hiranandani (supra)*, that would the end of the matter as far as the Delhi courts were concerned. Adopting a *prima facie* view of the matter therefore, since there is

nothing in law which causes this Court to find that the Bangalore City Civil Court inherently lacks jurisdiction over the arbitration proceedings between the parties, it must be held that Section 42 applies and the Bangalore City Civil Court being first seized of Antrix's Section 9 petition, must be allowed to first decide that petition, and depending on the outcome and findings, all subsequent applications may or may not have to be made in that court alone. Question (iii) framed therefore is also answered in favour of Antrix.

62. This court, in the light of the above reasoning, hereby records its conclusions as follows:

(1) The present appeal under Section 13 of the Commercial Courts Act is maintainable;

(2) This court does not possess the exclusive jurisdiction to deal with or adjudicate any applications arising out of the arbitration agreement between Antrix and Devas; and

(3) Section 42 precludes and bars this court from hearing and deciding the application preferred by Devas, in the facts and circumstances of the case.

63. For the above reasons, the appeal is allowed; the impugned judgment and order of the single judge holding that this court alone has jurisdiction over the award, is set aside. There shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

YOGESH KHANNA
(JUDGE)

MAY 30, 2018