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

% *Date of Decision: 21st August, 2023*

\+ O.M.P.(I)(COMM) 155/2023

LIBERTY FOOTWEAR COMPANY ..... Petitioner
Through: Mr. Rajshekhar Rao, Senior Advocate with Mr. Vipul Kumar, Mr. Areeb Amanullah and Ms. Meherunissa A.J., Advocates.

versus

LIBERTY SHOES LIMITED ..... Respondent
Through: Mr. Arun Kumar Varma, Senior Advocate with Mr. Ravinder Singhania, Mr. Vikas Goel, Mr. Abhishek Kumar, Mr. Harmandir Singh Sandhu and Ms. Garima Kaul, Advocates.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. Present petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '1996 Act') seeking the following reliefs :

> *"A. An order of interim injunction restraining the Respondent, its directors, partners, business associates, principal officers, agents, dealers, distributors, franchisees, manufacturers, and all others acting for and on their behalf, from directly or indirectly using the Petitioner's "LIBERTY" marks, and/or any other mark which is deceptively similar to the Petitioner's "LIBERTY" marks, in any manner whatsoever;*
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> *B. An order directing the Respondent herein to immediately remove any sign boards/indication/display of any of the "LIBERTY" trademarks from its premises, stationary, invoices, documents, publications, packaging material, websites, etc.;*

C. An order directing the Respondent to immediately withdraw any advertising/broadcasting/webcasting or third-party publication including any advertising or promotional materials bearing the "LIBERTY" marks;

D. An order restraining the Respondent, its directors, partners, business associates, principal officers, agents, dealers, distributors, franchisees, manufacturers, and all others acting for and on their behalf, from directly or indirectly disclosing, divulging and/or using any confidential information of the Petitioner acquired by the Respondent during the term or as a result of the Trade Mark License Agreement dated 03.04.2013;

E. An order directing the Respondent to immediately deliver to the Petitioner, all marking, printing, embossing, moulding & creating material owned or used by or on behalf of the Respondent, in the possession of the Respondent or under its control or in the possession of any third party manufacturer, including all materials, containers, packaging, labels, promotional materials, advertising materials and finished units of the products bearing the "LIBERTY" marks and which are in the possession of, held on behalf of, or in transit to the Respondent;

F. An order directing the Respondent to deposit a sum of Rs. 17.36 Crores being the shortfall in the license fees payable along with applicable interest payable to the Petitioner under the terms of the License Agreement, with the Registry of this Hon'ble Court;

G. Any ad-interim ex-parte orders in terms of the above prayers;

H. Any other order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present petition and in the interest of justice be passed in favour of the Petitioner and against the Respondent."

2. Factual matrix to the extent necessary and relevant and as captured in the petition is that Petitioner was established in 1954 as a registered partnership firm and since its establishment has been engaged in the business of marketing and manufacturing of footwear and fashion products and is the first user and proprietor of well-known trademark 'LIBERTY', which was coined and adopted in the same year. On 01.04.2001, Petitioner and Respondent entered into a Registered User Agreement in respect of trademark 'LIBERTY' in Class 25 for a period of three years. On 28.03.2003, Petitioner

became the exclusive owner of the 'LIBERTY' trademark and its formative marks. Trademark License Agreement (hereinafter referred to as the "License Agreement") was executed between the parties on 31.03.2003 for a period of 7 years commencing 31.03.2003 with automatic renewal for a further period of 3 years, if not terminated by either party. By this Agreement, Petitioner granted to the Respondent, an exclusive license to use the trademarks globally, on or in connection with goods manufactured or sold by the Respondent, in accordance with Petitioner's minimum quality standards and manufacturing specifications. Thereafter, another Trademark License Agreement was executed between the parties on 03.04.2013, commencing from 01.04.2013 for a period of 5 years with automatic renewal for further two terms of five years each, if not terminated by either party. Clause 16 of the License Agreement stipulated that disputes under the said Agreement shall be referred to arbitration.

3. According to the Petitioner, Respondent company defaulted on several obligations under the License Agreement since 2018-19 viz. (a) shortfall of over 17 Crores in license fee and consistent delay in payments of quarterly license fee since 2018-19; (b) failure to provide its audited annual accounts despite requests by the Petitioner; (c) outsourcing manufacturing of goods without obtaining a sub-license Agreement from the Petitioner in violation of Clause 7; and (d) outsourcing manufacturing to third-parties without sub-licensing and making the books of accounts available to the Petitioner for inspection in violation of Clause 8 of the License Agreement.

4. From 2019 onwards, Petitioner issued repeated notices and reminders to the Respondent pointing out persistent material breaches

of the License Agreement. A demand notice was issued to the Respondent on 04.11.2019 under Section 8 of the Insolvency and Bankruptcy Code, 2016 ('IBC') in respect of license fee due in 2019-20. Petitioner filed a petition under IBC before NCLT, Chandigarh on 20.02.2020 for a sum of Rs.9,51,15,334/- in respect of shortfall in license fee paid by the Respondent for the period 2019-20 and the same is currently pending.

5. On 27.09.2022, one of the partners of the Petitioner firm namely, Mr. Harish Gupta, issued notice to the Respondent to terminate the License Agreement. Respondent, in turn invoked the arbitration agreement vide notice dated 20.10.2022 but at the same time refusing to stop the use of LIBERTY marks or make payments, as per the agreed terms. On 22.11.2022, Petitioner replied to the Arbitration notice stating that no arbitrable claims had been raised by the Respondent and the latter was in breach of the obligations qua payment of license fee. This was followed by another response from the Respondent on 22.12.2022, expressing its intent to continue with the License Agreement by taking a position that its continuance was in compliance of all contractual obligations. Finally, on account of the alleged continuous material breaches of the terms of the License Agreement by the Respondent, Petitioner issued a notice dated 04.05.2023 to the Respondent, under Clause 9 of the License Agreement, terminating the said Agreement and calling upon the Respondent to forthwith cease use of Petitioner's LIBERTY trademarks. As the Respondent continues to use 'LIBERTY' marks, which according to the Petitioner, violates its statutory and common law rights, present petition has been filed.

6. Be it mentioned that Respondent entered appearance without receiving notice from this Court, on gaining knowledge of the filing of the present petition. Upon entering appearance, a preliminary objection was taken on behalf of the Respondent to the maintainability of the present petition under Section 42 of the 1996 Act. In the alternative, it was also the stand of the Respondent that even otherwise, this Court has no territorial jurisdiction to entertain the present petition. After the preliminary objections were raised by the Respondent, it was agreed between the parties that the matter be first heard and decided on the maintainability of the petition and therefore, arguments were canvassed limited to this issue. In view of the preliminary objections raised by the Respondent, I shall first refer to the arguments canvassed on behalf of the Respondent in support thereof.

ARGUMENTS AND SUBMISSIONS ON BEHALF OF THE RESPONDENT

7. Respondent is a listed company and one of the group entities of LIBERTY family using the trademark 'LIBERTY' since 1986. Currently, it employs approximately 5000 employees and has 5 factories besides 400 exclusive showrooms and 100 distributors across the country. Respondent's products are sold at various retail shops also. LIBERTY family members decided to restructure/organise their business and accordingly, parties entered into and executed a License Agreement dated 31.03.2003, last renewed and executed on 03.04.2013, whereby several trademarks owned by LIBERTY family were licensed to the Respondent, which is the only family entity engaged in manufacturing and sale of shoes. Petitioner is only entitled to receive license fee and is not engaged in any manufacturing or sale

of products. Several disputes are ongoing between the partners of the Petitioner's firm since last many years, some of whom are also Directors and shareholders in the Respondent company.

8. Primarily, two partners namely, Mr. Harish Gupta and Mr. Adarsh Gupta with total 18% share in partnership, are raising unnecessary disputes causing prejudice to the entire family business. Due to ongoing disputes amongst the Petitioner firm, Mr. Harish Gupta, issued a letter dated 29.09.2022, seeking to terminate the License Agreement, with the sole purpose of creating pressure and unjustly enriching himself. Majority partners of Petitioner firm holding 61% share were however not aggregable to this unilateral action and proceeded to issue a consent letter dated 28.10.2022 in favour of Respondent, confirming that the License Agreement must continue and this was endorsed by three more partners. A second consent letter dated 05.06.2023 was also issued re-affirming that the License Agreement must continue. The License Agreement is thus valid and subsisting between the parties, with the consent of partners holding 61% share in the Petitioner firm.

9. Apprehending termination, Respondent approached the learned District Court, Karnal, where registered offices of both the parties are situated, under Section 9 of the 1996 Act, seeking interim injunction against the Petitioner from taking any unlawful action, including termination of the License Agreement, which is otherwise valid till 31.03.2028. In the presence of the counsel for the Petitioner herein, the learned District Judge, vide order dated 16.03.2023 directed the parties to maintain *status quo* with respect to the License Agreement. Despite knowledge of the said interim order, Petitioner has chosen to

file the present petition in this Court, though this Court has no jurisdiction to entertain the same.

10. Petitioner filed the present petition on 17.05.2023, without disclosing that Respondent has already filed a petition under Section 9 of the 1996 Act bearing No. *ARB-04/2023*, seeking restraint against the Petitioner herein from terminating the License Agreement dated 03.04.2013, which is valid till 31.03.2028. Petitioner was duly represented by its counsel when the Court passed the order on 16.03.2023, directing the parties to maintain *status quo*. *Dehors* the issue of deliberate non-disclosure, it is the District Court, Karnal where the first petition has been filed pertaining to the Agreement in question and that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of the Licence Agreement. No other Court can entertain any subsequent application, by virtue of provision of Section 42 of the 1996 Act. Therefore, the present petition is not maintainable and deserves to be dismissed on this ground alone. Reliance was placed on the judgment of the Supreme Court in ***State of West Bengal and Others v. Associated Contractors, (2015) 1 SCC 32*** and judgments of this Court in ***AAA Landmark Private Ltd. v. M/s AKME Projects Ltd. & Anr., 2018 SCC OnLine Del 7586; Priya Hiranandani Vandrevala v. Niranjan Hiranandani & Anr., 2016 SCC OnLine Del 2906*** (Single Bench***)*** and ***Priya Hiranandani Vandervala v. Niranjan Hiranandani & Anr., 2016 SCC OnLine Del 3435,*** (Division Bench)***.***

11. Petitioner's contention that the proceedings before the District Court, Karnal are vitiated by fraud, collusion, *malafides* etc., is misconceived. *Albeit* this stand of the Petitioner is wholly incorrect

and false and is only with a purpose to overcome the bar created by Section 42, nonetheless it is only the District Court, Karnal which can rule on these allegations and thereafter its Revisional/Appellate Court. Nonetheless, till the petition is pending in the said Court, bar of Section 42 stares at the Petitioner and this petition cannot be entertained.

12. In support of the plea that this Court cannot rule on the petition before the District Court, Karnal, reliance was placed on the judgment of the learned Single Judge of this Court in ***Priya Hiranandani Vandrevala (supra),*** upheld by the Division Bench, wherein both Courts have held that principle of comity commands that the Court where the second petition is filed shall not comment on the issue whether the first petition filed under Section 9 of the Act before another Court is devoid of merit and/or had the hidden agenda of ousting jurisdiction that was inconvenient to the Petitioner in the first Court. In the said case, the first petition was filed before the Bombay High Court and the second petition was filed in this Court, both being petitions under Section 9 of the Act and the Division Bench held that until and unless the Bombay High Court upholds the allegations and dismisses the first petition filed before it on those grounds, bar under Section 42 shall subsist against entertaining the petition filed before this Court. SLP (C) No.27982/2016 with SLP(C) No.27893/2016 filed against the judgment of the Division Bench were dismissed on 18.09.2017.

13. Without prejudice to the aforesaid contention, even otherwise Courts at Delhi have no territorial jurisdiction to entertain the present petition. The License Agreement contains an Arbitration Agreement

whereby Delhi is not the seat of arbitration and in the absence of stipulation of a seat, this Court can have jurisdiction only if the cause of action arises within the territorial boundaries of this Court or the subject matter of the Agreement lies here, both of which parameters are not met in the present case. Petitioner has by clever drafting attempted to show that this Court has territorial jurisdiction because products under 'LIBERTY' marks are manufactured and sold by the Respondent in Delhi; Respondent's interactive website is accessible to and targets consumers in Delhi for sale of the products under 'LIBERTY' marks; and actual transactions have taken place on 07.05.2023 and 10.05.2023. All these are wholly irrelevant and inconsequential factors for the purpose of conferring territorial jurisdiction on this Court.

14. Mr. Adarsh Gupta, who has sworn the affidavit in support of this petition has falsely contended that Petitioner has its office at Delhi because it is a known and established fact that registered office of the Petitioner is in Karnal. As a matter of fact, only Mr. Adarsh Gupta resides at the address given in the petition but that would not confer jurisdiction on this Court. It is a settled law that in matters of territorial jurisdiction it is the residence or place of business of the Respondent which determines the territorial jurisdiction of a Court. Both License Agreements were executed in Karnal, registered offices of both the parties are in Karnal and the notice of termination has also been delivered outside the territorial jurisdiction of this Court. Further, even the alleged invoices based on which disputed payments were claimed by the Petitioner, bear the address of Karnal. Insofar as allegations of infringement and unauthorised use of the trademark

'LIBERTY' are concerned, it was held in ***Hero Electric Vehicles Private Limited and Another v. Lectro E-Mobility Private Limited and Another***, ***2021 SCC OnLine Del 1058*** by this Court, that where the disputes pertain to the Agreements such as the family settlements etc. and not to trademark infringement, Petitioner will be amenable to the jurisdiction of the Court where termination takes place, which is the District Court at Karnal in the present case.

15. Mr. Adarsh Gupta does not hold any authority on behalf of the Petitioner firm to file or pursue this petition as majority partners holding 61% shares in the firm have by separate consent letters dated 28.10.2022 and 05.06.2023, communicated their consent to continue with the License Agreement and on this score also the petition is liable to be dismissed in view of Section 12(c) of the Indian Partnership Act, 1932, which provides that any difference regarding ordinary matters connected with the business of the partnership firm may be decided only by the majority partners.

ARGUMENTS AND SUBMISSIONS ON BEHALF OF THE PETITIONER

16. This petition has been filed under Section 9 of the 1996 Act by the Petitioner/Licensor seeking interim reliefs against the Respondent/Licensee in furtherance of an Arbitration Clause being Clause 16 of the License Agreement executed by and between the parties thereto. Cause of action for filing the petition arose when the Licensee refused to cease the use of 'LIBERTY' marks despite termination of the License Agreement by the Licensor. The two-fold preliminary objections raised by the Respondent viz. bar of Section 42 and lack of territorial jurisdiction, have no merit and have been raised only with a view to impede and obstruct the grant of interim reliefs to

the Petitioner so that Respondent can continue to use the 'LIBERTY' marks, despite termination of the License Agreement.

17. Objection raised qua the bar of Section 42 is predicated on an application filed by the Respondent under Section 9 of the 1996 Act before the District Court, Karnal on 23.02.2023 and it is claimed that being the Court which was first approached, that Court alone shall have jurisdiction over arbitral proceedings and all subsequent applications arising out of the License Agreement and arbitral proceedings shall be made in that Court and no other Court, by virtue of Section 42. It is a settled position of law that for Section 42 to apply, the petition filed first in time must be a properly constituted petition filed before a 'Court' as defined in the 1996 Act and such Court must necessarily have subject matter jurisdiction over the dispute. Disputes concerning the parties in the present petition relate to licensing of Petitioner's trademark 'LIBERTY' and is a 'commercial dispute' under Section 2(1)(c)(ix) and (xviii) of the Commercial Courts Act, 2015 (hereinafter referred to as the 'CC Act'). However, the Section 9 petition filed by the Respondent before the District Court, Karnal does not invoke the jurisdiction of a Commercial Court and there are no pleadings qua the disputes being a 'commercial dispute'. Further, Statement of Truth has not been filed in support of the Section 9 petition, which is a mandatory requirement under the CC Act. Thus, the petition is a *non est* petition and void in the eyes of law and cannot be stated to be a properly constituted petition to come in the way of this Court in entertaining the present petition. Onus of establishing that the Court first approached has the jurisdiction is upon the party raising the plea of lack of jurisdiction

under Section 42 of 1996 Act, which onus Respondent has miserably failed to discharge.

18. In ***Devas Multimedia Private Limited vs. Antrix Corporation Limited, 2017 SCC OnLine Del 7229,*** this Court has held that the very object of Section 42 is to avoid multiplicity of proceedings and if it is the legislative intent that the first Court that is approached by either party to the Arbitration Agreement is the 'one stop' Court for all subsequent proceedings, it is important that petition under Part-I must be capable of being granted and the Court in which it is filed must be competent in law to entertain and grant the reliefs prayed for in the first petition. In other words, the Court must be a competent Court and the petition must be a valid petition. The Madras High Court in ***Surya Pharmaceuticals Ltd. v. First Leasing Company of India Ltd., 2013 SCC OnLine Mad 3384,*** held that mere filing of an application before a Court by itself will not oust the jurisdiction and the bar of Section 42 cannot be extended till the party raising the plea of lack of jurisdiction is able to establish that the Court which entertains the first application at the earliest point of time, has the jurisdiction to do so.

19. Petition under Section 9 filed before the District Court, Karnal is a collusive petition and is based on false statements. The *status quo* order was obtained by playing fraud on the Petitioner and the Court. A deliberate false statement was made that no reply was sent by the Petitioner to Respondent's arbitration notice dated 20.10.2022, whereas a reply was indeed sent on 22.11.2022, to which response was also sent by the Respondent on 22.12.2022. In addition to false statements, these documents have been concealed before the District Court, Karnal. There is collusion in filing the petition before the

District Court, Karnal inasmuch as the Section 9 petition was filed on the basis of termination notice issued by Mr. Harish Gupta, one of the partners of the Petitioner firm, however, Petitioner was impleaded through its partner Mr. Raman Bansal, who is also the Chief Operating Officer of the Respondent company. The petition filed before District Court, Karnal was first listed before the Court on 23.01.2023, on which date notice was issued to the Petitioner herein and on 16.03.2023, the returnable date, counsel for Petitioner firm herein appeared before the Court, under authority from Mr. Bansal and stated that he had no objection if parties were directed to maintain *status quo*. This order obtained by collusion was never communicated to the partners of the Petitioner or to Mr. Harish Gupta, against whom the main relief was sought. Pertinently, Mr. Raman Bansal was injuncted by this Court vide order dated 26.05.2020 passed in CS(COMM) 638/2019 from acting against the interest of the Petitioner. Even in the reply to the notice of termination dated 04.05.2023, giving rise to the present petition, Respondent made no mention of the order dated 16.03.2023, which clearly shows the *malafide* intention.

20. In ***Ion Exchange (India) Ltd. v. Paramount Ltd., 2006 SCC OnLine Bom 544,*** the Bombay High Court observed that considering that the act of the Respondent of filing an application under Section 9 of the 1996 Act in the Baroda Court had a drastic consequence and on that depended the jurisdiction of the Court to entertain the petition filed under Section 34, it was the duty of the Respondent to intimate independently of the Court to the Petitioner immediately that an application had been filed under Section 9, so that Petitioner could have either filed his petition before the Baroda Court or could have

moved the Baroda Court for appropriate orders. In ***A.V. Papayya Sastry and others v. Govt. of A.P. and others, (2007) 4 SCC 221,*** the Supreme Court has held that a judgement or decree or order obtained by playing fraud on the Court is a nullity and *non est* in the eyes of law and must be treated as a nullity by every Court, superior or inferior.

21. Even otherwise, the said petition under Section 9 before the District Court, Karnal is not maintainable and has been filed with the hidden agenda of ousting the jurisdiction of this Court, which is impermissible in law as held in ***Engineering Project (India) Ltd. v. Indiana Engineering Works Pvt. Ltd, 2004 SCC OnLine Del 517.*** The License Agreement is a determinable contract as Clause 9 provides for its termination. The only relief claimed in the petition under Section 9 at Karnal is a restraint order against termination of the Agreement, which cannot be granted in law because no injunction can be granted against termination of a determinable contract by virtue of Sections 14(d) and 41(e) of the Specific Relief Act, 1963, which provide that injunction cannot be granted to prevent the breach of the contract the performance of which cannot be specifically enforced. For all the aforesaid reasons, the bar of Section 42 does not come into play in the present case and this Court must exercise its jurisdiction to ensure that ends of justice are met.

22. Without prejudice to the above and in the alternative, this Court even otherwise has the territorial jurisdiction to entertain this petition. Clause 16 of the License Agreement, which is the Arbitration Clause, does not provide for a seat of arbitration and instead Clause 19 stipulates that parties submit to the exclusive jurisdiction of Courts in

India. It is a settled position of law that in the absence of a specified seat, an application under Section 9 of the 1996 Act may be preferred before a Court in which part of the cause of action arises. This is a clear and biding dictum of the Supreme Court in ***BGS SGS SOMA JV v. NHPC Limited, (2020) 4 SCC 234.*** In the present case, the License Agreement itself mentions the Delhi office address of the Petitioner. Notice of termination dated 04.05.2023 was issued from Delhi Branch office and further Respondent failed to cease the use of Petitioner's 'LIBERTY' marks despite notice and continues to sell and market its impugned products bearing the 'LIBERTY' marks within the territorial limits of Delhi. Thus, part of cause of action has arisen in Delhi and jurisdiction of this Court cannot be ousted to entertain the present petition.

23. I have heard the learned Senior Counsels for the parties and examined their respective contentions.

24. The first and foremost question that arises for consideration is whether this Court has the jurisdiction to entertain the present petition or the provision of Section 42 of the 1996 Act creates a legal bar. Before proceeding to examine and answer this question, it is important to mention that it is a common ground between the parties that the arbitration clause in the License Agreement does not provide a seat of arbitration and for a ready reference the same is extracted hereunder:

> ***"16. Arbitration:***
>
> *If any dispute shall arise between the parties here to concerning the construction interpretation or application of any of the provisions of this Agreement whether during the continuance of this Agreement of after the termination there of by whatever cause such dispute shall be referred to the arbitration of a single arbitrator and the parties hereto agree to bear the costs of such arbitration in equal share."*

25. Respondent has objected to the jurisdiction of this Court on the ground that a petition under Section 9 of the 1996 Act was filed by the Respondent prior to the present petition before the District Court, Karnal, in which a *status quo* order has been passed on 16.03.2023. It needs no reiteration that as a principle of law, a petition under Section 9 of the 1996 Act anchors arbitration. Section 42 provides that notwithstanding anything contained elsewhere in Part-I or in any other law for the time being in force, where with respect to an Arbitration Agreement, any application under Part-I 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 no other Court. This issue arose before the Supreme Court in ***State of West Bengal and Others (supra),*** in a reference by an order of a Division Bench of the Supreme Court for an authoritative pronouncement on Sections 2(1)(e) and 42 of the 1996 Act. The principles elucidated by the Supreme Court in the concluding paragraph, while answering the reference are as follows :

> ***"25.*** *Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:*
>
> *(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.*
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> *(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.*
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> *(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial*

authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

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

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

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

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

The reference is answered accordingly."

26. The Supreme Court made the following observations which are relevant for the adjudication of the controversy arising in the present petition:

"11. *It will be noticed that Section 42 is in almost the same terms as its predecessor section except that the words "in any reference" are substituted with the wider expression "with respect to an arbitration agreement". It will also be noticed that the expression "has been made in a court competent to entertain it", is no longer there in Section 42. These two changes are of some significance as will be pointed out later. Section 42 starts with a non obstante clause which does away with anything which may be inconsistent with the section either in Part I of the Arbitration Act, 1996 or in any other law for the time being in force. The expression "with respect to an arbitration agreement" widens the scope of Section 42 to include all matters which directly or indirectly pertain to an arbitration agreement. Applications made to courts which are before, during or after arbitral proceedings made under Part I of the Act are all*

covered by Section 42. But an essential ingredient of the section is that an application under Part I must be made in a court.

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18. *In contrast with applications moved under Section 8 and 11 of the Act, applications moved under Section 9 are to the "court" as defined for the passing of interim orders before or during arbitral proceedings or at any time after the making of the arbitral award but before its enforcement. In case an application is made, as has been made in the present case, before a particular court, Section 42 will apply to preclude the making of all subsequent applications under Part I to any court except the court to which an application has been made under Section 9 of the Act.*

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22. *One more question that may arise under Section 42 is whether Section 42 would apply in cases where an application made in a court is found to be without jurisdiction. Under Section 31(4) of the old Act, it has been held in F.C.I. v. A.M. Ahmed & Co. [(2001) 10 SCC 532] , SCC at p. 532, para 6 and Neycer India Ltd. v. GMB Ceramics Ltd. [(2002) 9 SCC 489] , SCC at pp. 490-91, para 3 that Section 31(4) of the 1940 Act would not be applicable if it were found that an application was to be made before a court which had no jurisdiction. In Jatinder Nath v. Chopra Land Developers (P) Ltd. [(2007) 11 SCC 453], SCC at p. 460, para 9 and Rajasthan SEB v. Universal Petro Chemicals Ltd. [(2009) 3 SCC 107 : (2009) 1 SCC (Civ) 770] , SCC at p. 116, paras 33 to 36 and Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd. [(2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] , SCC at pp. 47-48, para 32, it was held that where the agreement between the parties restricted jurisdiction to only one particular court, that court alone would have jurisdiction as neither Section 31(4) nor Section 42 contains a non obstante clause wiping out a contrary agreement between the parties. It has thus been held that applications preferred to courts outside the exclusive court agreed to by parties would also be without jurisdiction.*

23. *Even under Section 42 itself, a Designated Judge has held in HBM Print Ltd. v. Scantrans India (P) Ltd. [(2009) 17 SCC 338 : (2011) 2 SCC (Civ) 394] , that where the Chief Justice has no jurisdiction under Section 11, Section 42 will not apply. This is quite apart from the fact that Section 42, as has been held above, will not apply to Section 11 applications at all.*

24. *If an application were to be preferred to a court which is not a Principal Civil Court of original jurisdiction in a district or a High Court exercising original jurisdiction to decide questions forming the subject matter of an arbitration if the same had been the subject matter of a suit, then obviously such application would be outside*

> *the four corners of Section 42. If, for example, an application were to be filed in a court inferior to a Principal Civil Court, or to a High Court which has no original jurisdiction, or if an application were to be made to a court which has no subject-matter jurisdiction, such application would be outside Section 42 and would not debar subsequent applications from being filed in a court other than such court."*

27. In ***BGS SGS SOMA JV (supra),*** the Supreme Court reiterated that Section 42 is meant to avoid conflicts in jurisdiction of Courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one Court exclusively and the legislative intent is reflected from the fact that the provision begins with a *non obstante* clause. Where a seat is designated in an Agreement, the Courts of the seat alone will have jurisdiction and all subsequent applications under Part-I will be made only in the said Court. So read, Section 42 is not rendered ineffective or useless. It was further observed that where it is found on the facts of a particular case that either no seat is designated in the Agreement or the so called seat is only a convenient venue, then several Courts where cause of action arises may have jurisdiction and Section 9 application may be preferred before a Court in which part of the cause of action arises. In both situations, the earliest application having been made to a Court in which part of cause of action arises, would be the exclusive Court under Section 42, controlling all arbitral proceedings. Relevant paragraph is as follows :

> ***"59.*** *Equally incorrect is the finding in Antrix Corpn. Ltd. [Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., 2018 SCC OnLine Del 9338] that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one court exclusively. This is why the section begins with a non obstante clause, and then goes on to state "…where*

with respect to an arbitration agreement any application under this part has been made in a court…" It is obvious that the application made under this part to a court must be a court which has jurisdiction to decide such application. The subsequent holdings of this court, that where a seat is designated in an agreement, the courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the court where the seat is located, and that court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a court in which a part of the cause of action arises would then be the exclusive court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled."

28. Following the judgment of the Supreme Court in ***State of West Bengal and Others (supra),*** learned Single Judge of this Court in ***Priya Hiranandani Vandrevala (supra),*** held that the intent of Section 42 is to restrict to one Court, adjudication of all disputes pertaining to the arbitration, thereby eradicating the possibility of multiplicity of actions and likelihood of conflicting judgments/orders. In the facts of the said case, it was held that since a petition under Section 9 of the 1996 Act had been filed before the Bombay High Court on 25.04.2016, before the Petitioner filed the petition in Delhi High Court on 02.05.2016, the petition at Delhi will not be maintainable and further, it was not for this Court to hold that the

petition before the Bombay High Court was frivolous or *malafide*, as contended by the Petitioner. Relevant paragraphs of the judgment are as follows:

> *"**26.** Having said so, the question, which now arises is whether the bar of Section 42 of the Act would come into play to make this petition non maintainable in this Court. The intent of Section 42 is very clear, inasmuch, where, with respect to arbitration agreement, an application under Part-I comprising Sections 1 to 43 of the Act has been made in a Court, that Court alone will have the jurisdiction over the arbitral proceedings and of subsequent applications, arising out of that agreement and arbitral proceedings, shall be made in that Court and in no other Court. The intent of Section 42 is to restrict to one Court, the adjudication of all disputes pertaining to the arbitration and thereby eradicating the possibility of multiplicity of actions and likelihood of conflicting judgments/orders. The Supreme Court in State of West Bengal v. Association Contractors (supra), has held that Section 9 applications being applications made to a Court, the same are applications, which are within Section 42. It is not disputed by the petitioner that the respondents have filed a petition under Section 9 of the Act before the Bombay High Court on April 25, 2016, before the petitioner filed this petition on May 02, 2016. No doubt, Dr. Singhvi has alleged that such a petition is a mala fide, only to oust the jurisdiction of this Court, which surely, has a supervisory jurisdiction as the seat of arbitration is in Delhi by contending, when the liability and the cost have been determined by the Arbitral Tribunal in favour of the petitioner and the draft award also shows what would be the final outcome, there is no reason for the respondents to approach by way of an application under Section 9 as nothing shall be payable to the respondents under the Award. Suffice to state, it is not for this Court to hold that the petition is frivolous or mala fide as contended by him. It is a ground, which may be available to the petitioner before the Bombay High Court seeking dismissal of that petition. Further, the same cannot be a ground to hold that this petition is maintainable overlooking the bar of Section 42 of the Act.*
>
> ***27.** Insofar as the reliance placed by Dr. Singhvi on the judgment of this Court in the case of Engineering Project (India) Ltd. (supra), the facts therein were, that the petitioner has filed an application under Section 36 of the Act read with Ordder XXI Rule 1 CPC in this Court, which according to the Court was with oblique motive to confine jurisdiction to Courts in Delhi. An argument was raised by the petitioner that the objections under Section 34 filed before the Ranchi Court, the said Court has no territorial jurisdiction to decide them. This Court, has held that insofar as the question of jurisdiction of a Court is concerned, it is not proper for*

one Court to decide or pronounce upon the issue whether another Court has jurisdiction or not. Each Court must satisfy itself that it possesses jurisdiction whether territorial or pecuniary, especially when such a ground is asserted. It would offend judicial comity & propriety and would be impermissible even otherwise for the Court to pronounce upon whether the Court at Ranchi should desist from exercising jurisdiction. This Court has, in para 4 held as under : -

> *"4. Resort to Section 36 of the Arbitration and Conciliation Act, 1996 may not always be innocuous, in that Section 42 of the Act stipulates that where, with respect to an Arbitration agreement, any application under Part I comprising Sections 1 to 43 of the Act has been made in a Court, that Court alone shall have jurisdiction over the Arbitral proceedings and all subsequent applications arising out that obligation and the Arbitral proceedings shall be made in that Court and in no other Court. The palpably obvious and salutary intendment of Section 42 is to restrict to one Court the adjudication of all disputes pertaining to the Arbitration, and thereby eradicating the possibility of multiplicity of actions and likelihood of conflicting judgments/orders. But this intendment would be vitiated if a party is permitted to file and maintain a petition under Section 36 which is devoid of merit and has the hidden agenda of ousting jurisdiction that are inconvenient to the petitioner."*

28. *This Court has finally rejected the Section 36 petition on the ground of territorial jurisdiction. I may state here, the conclusion of this Court in para 4, that the petition under Section 36, was devoid of merit and has the hidden agenda of ousting jurisdiction that are inconvenient to the petitioner is with regard to the petition filed and decided by this Court and not the petition filed before Ranchi Court. Similarly, this Court cannot comment/hold that the petition filed before Bombay High Court is devoid of merit and to oust the jurisdiction of this Court. The judgment as referred to, shall be of no help to the petitioner.*

xxxx ***xxxx*** ***xxxx***

31. *In view of the above discussion, I hold, the present petition is not maintainable in this Court, in view of bar under Section 42 of the Act. The petitioner would be at liberty to file the same in the Bombay High Court. The petition is dismissed. No costs."*

29. This judgment was upheld by the Division Bench of this Court on 30.05.2016 in ***Priya Hiranandani Vandervala (supra)***, against which SLPs were dismissed on 18.09.2017. Relevant paragraphs from the judgment of the Division Bench are as follows :

"25. *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.*

26. *Though stated in different words, this is the law declared by a learned Single Judge of this Court in the decision reported as 2004 (76) DRJ 119 Engineering Products India Pvt. v. Indiana Engineering Works Pvt. Ltd., in paragraph 4 whereof it was held as under : -*

> *"4. Resort to Section 36 of the Arbitration and Conciliation Act, 1996 may not always be innocuous, in that Section 42 of the Act stipulates that where, with respect to an arbitration agreement, any application under Part I comprising Sections 1 to 43 of the Act has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out that obligation and the arbitral proceedings hall be made in that Court and in no other Court. The palpably obvious and salutary intendment of Section 42 is to restrict to one Court the adjudication of all disputes pertaining to the arbitration, and thereby eradicating the possibility of multiplicity of actions and likelihood of conflicting judgments/orders. But this intendment would be vitiated if a party is permitted to file and maintain a Petition under Section 36 which is devoid of merit and has the hidden agenda of ousting jurisdiction that are inconvenient to the Petitioner."*

27. *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.*

28. *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.*

29. *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.

30. *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."*

30. In this context, I may also allude to a recent judgment of the Supreme Court in ***General Manager East Coast Railway Rail Sadan and Another v. Hindustan Construction Co. Ltd., 2022 SCC OnLine SC 907,*** relevant paragraphs of which are as under :

*"**6.*** *We have heard Shri K.M. Natraj, learned ASG appearing on behalf of the appellants and Shri Amit Dubey, learned Counsel appearing on behalf of the respondent. We have gone through the impugned judgment and order passed by the High Court. A specific objection was raised by the appellant herein before the High Court on the entertainability and/or maintainability of the application under Section 11(6) of the Arbitration Act before the Orissa High Court. Reliance was placed on Section 42 of the Arbitration Act and it was submitted on behalf of the appellants that as the respondent - claimant had initiated proceedings under Section 9 of the Arbitration Act in the Court at Vishakhapatnam, only the High Court of Andhra Pradesh at Amaravati would have jurisdiction to entertain the application under Section 11(6) of the Act. Without deciding the said issue which goes to the root of the jurisdiction of the High Court of Orissa at Cuttack, the said High Court by the impugned order has entertained the application under Section 11(6) of the Act and has appointed the sole arbitrator by observing that since the*

appellants - East Coast Railway, in principle, has not opposed the appointment of an arbitrator, there is little purpose served in relegating the original petitioner to the concerned High Court as that will only delay the adjudication of the disputes. The appellants might not have opposed the appointment of an arbitrator (though the fresh appointment of an Arbitrator was also opposed by the appellants herein) by that itself it will not confer the jurisdiction upon the High Court if otherwise, the High Court had no jurisdiction.

7. *Heavy reliance is/was placed on Section 42 of the Arbitration and Conciliation Act, 1996 which reads as under:*

> *"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 proceeding shall be made in that Court and in no other Court."*

8. *It is not in dispute that before filing an application under Section 11(6) of the Act before the High Court of Orissa at Cuttack, the respondent - claimant moved an application before the Court at Visakhapatnam under Section 9 of the Arbitration Act. In that view of the matter considering Section 42 of the Arbitration Act, the High Court of Andhra Pradesh at Hyderabad alone would have jurisdiction to decide the subsequent applications arising out of the Contract Agreement and the further arbitral proceedings shall have to be made in the High court of Andhra Pradesh at Amaravati alone and in no other court. In that view of the matter the High Court of Orissa at Cuttack has committed a serious error in entertaining the application under Section 11(6) of the Act before it and appointing the sole arbitrator.*

9. *In view of the above and for the reason stated above, the present Appeal Succeeds. The impugned judgment and order passed by the High Court of Orissa at Cuttack in Arbitration Petition No. 10 of 2021 and appointing the sole arbitrator is hereby quashed and set aside solely on the ground that the High Court of Orissa at Cuttack would have no jurisdiction to entertain the application under Section 11(6) of the Act with respect to the contract agreement for which the respondent claimant earlier initiated the arbitration proceedings under Section 9 of the Arbitration Act in the Court at Vishakhapatnam. Present Appeal is accordingly Allowed. However, it is observed that it will be open for the respondent claimant to submit/move an application under Section 11(6) of the Act before the competent High Court having jurisdiction namely the High Court of Andhra Pradesh at Amaravati and if such an application is made*

before the High Court of Andhra Pradesh at Amaravati within a period of four weeks from today, the same be dealt with and considered in accordance with law and on its own merits at the earliest."

31. From a reading of the aforesaid judgments, it is palpably clear that once an application has been filed under Part-I comprising of Sections 1 to 43 of the 1996 Act in a Court, that Court alone will have jurisdiction over the arbitral proceedings and all subsequent applications arising out of the Agreement and Section 42 will bar the parties from approaching any other Court in respect of disputes arising from the said Arbitration Agreement.

32. Learned Senior Counsel for the Petitioner strenuously put forth the point that the petition filed first in time must be filed in a competent Court having subject matter jurisdiction over the dispute and must be a properly constituted petition. This is a settled and accepted statement of law. In ***State of West Bengal and Others (supra),*** the Supreme Court posed a question whether Section 42 would apply in cases where an application made in a Court is found to be without jurisdiction and answered it by holding that if an application were to be preferred to a Court which is not a Principal Civil Court of original jurisdiction in a district or a High Court exercising original jurisdiction as provided in Section 2(1)(e) to decide questions forming the subject matter of an arbitration, if the same had been the subject matter of the suit, then obviously such application would be outside the four corners of Section 42. The same observations were made by the Supreme Court in ***BGS SGS SOMA JV (supra)*** that Section 42 would apply only where the first application is made under Part-I to a Court which has jurisdiction to decide such an application. Petitioner has therefore rightly placed

reliance on the judgment of this Court in ***Devas Multimedia Private Limited (supra),*** to argue that the Court which is first approached must be a competent Court and the petition must be a valid petition and I may in this context extract hereunder few paragraphs from the said judgment :

> *"**31.** Here, the decisions of some the High Courts require to be referred to as well. In Surya Pharmaceuticals v. First Leasing Company of India (supra) the Madras High Court observed:*
>
> > *"7.1 The jurisdiction as referred to under Section 42 of the Arbitration and Conciliation Act, 1996, would only mean that the Court which entertain[s] the first application must have jurisdiction. In other words, Section 42 of the Act cannot be invoked unless the party, who raises the plea of jurisdiction demonstrate[s] that the Court which entertained the first application has got the jurisdiction.*
> >
> > *7.2 The further fact that the arbitration agreement has been entered into between the parties, is not in dispute. **Mere filing of an application before a Court by itself will not oust the jurisdiction**. It other words, by merely filing an application before any Court, the bar under Section 42 cannot be extended, when another application is filed by a party before another Court, which has got jurisdiction. Therefore, a party, who raises the plea of lack of jurisdiction, will have to establish the fact that the Court, which entertains the first application at the earliest point of time, has got jurisdiction…*
> >
> > *The object and intend enshrined in the Arbitration and Conciliation Act, 1996, is to avoid multiplicity of proceedings and the Forum shopping at the instance of one of the parties to an arbitral agreement. It can only be applied when the first application filed is before a Court of competent jurisdiction and thereafter, the second application is filed by either of parties to avoid the jurisdiction of the Court, which entertain the said earlier application."*
>
> *(emphasis supplied)*
>
> ***32.** In ONGC v. Jagson Intl. Ltd. (supra), the Bombay High Court held that for the bar under Section 42 to apply, the first application "must be a competent application and not just any application." In H.K.A. Agencies v. Actia India Pvt. Ltd. (supra), a DB of the Kerala High Court held that the "first application filed must be filed validly and legally. If such prior application is filed before a court which has no jurisdiction, the bar of Section 42 cannot obviously be applied. The expression an application under*

this part "has been made in a Court" must certainly be read in the circumstances "as validly made in Court"..."

33. *This Court in Sarovar Park Plaza Hotels & Resorts Pvt. Ltd. v. World Park Hotels (India) Ltd. 2005 Supp Arb LR 231 (Del) held:*

> *"6. ... It is only when the basic ingredient for filing of the arbitration proceedings before the Court of competent jurisdiction is satisfied that the bar contemplated under Section 42 of the Act can be enforced against the maintainability of a petition before another Court."*

34. *The above decisions emphasize a purposive interpretation of Section 42 of the Act in light of its object. The petition which is under Part I has to be a valid one capable of being granted. Secondly, the Court before which it is filed has to be a 'competent' Court. Talking of both a 'valid' petition and a 'competent' Court, three scenarios are possible. The Court may be the competent Court and the petition is such that the reliefs prayed for can be granted. In such an event, the requirement of Section 42 would stand satisfied; the second scenario is that the Court that is first approached is the competent Court but the petition that is filed in incapable of being entertained and granted; and the third scenario is that the petition filed is one which can be granted but it is filed in a Court that has no jurisdiction to entertain such petition."*

33. Therefore, there can be no quarrel or debate with the proposition that the first Court where a party to an Arbitration Agreement files an application under Part-I of the 1996 Act must be a Court of competent jurisdiction and the petition must be validly/properly constituted. Thus, the question which now arises is whether in the facts of the present case, the Section 9 petition filed by the Respondent before District Court, Karnal, admittedly prior to the present petition, meets the twin requirements.

34. Broadly understood, objections of the Petitioner focussed on the Section 9 petition before the District Court, Karnal are that: (a) Respondent has not invoked the jurisdiction of a Commercial Court under the CC Act; (b) pleadings do not confirm to the requirement under the CC Act since there is no pleading that the

dispute is a 'commercial dispute' and Statement of Truth has not been filed; (c) petition cannot be entertained on merits as no Court under Section 9 is empowered to stay the termination of a determinable contract; and (d) petition has been filed in collusion and for *malafide* reasons, deliberately to oust the jurisdiction of this Court and fraud has been played on the Petitioner and the Court there to obtain the *status quo* order.

35. It needs to be emphasized here that it is not the case of the Petitioner that the District Court, Karnal is not the Court of competent jurisdiction to deal with the subject matter of Arbitration Agreement as the subject matter of a suit. Definition of 'Court' in Section 2(1)(e) as amended by the 2015 Amendment Act provides that in case of domestic arbitrations, the 'Court' is the Principal Court of Civil jurisdiction including the High Court where it exercises original jurisdiction over the subject matter of the arbitration and the negative covenant is that once an application has been filed in such a Court having jurisdiction and being a competent Court, all subsequent applications shall not be made in any other Court. Therefore, there being no objection to the competency or jurisdiction of the District Court, Karnal, the first of the twin conditions stands satisfied.

36. Objection with respect to the second condition has three limbs. However, before dealing with them it would be imperative to answer a crucial question i.e. whether this Court can rule on the validity or merit of the petition filed before the District Court, Karnal and if so, to what extent?

37. To answer this question, I may first advert to the judgment of the learned Single Judge of this Court in ***Priya Hiranandani***

Vandrevala (supra). In the said case, a Section 9 petition was filed before the Bombay High Court on 25.04.2016 by Mr. Niranjan Hiranandani and his son i.e. Ms. Priya's brother. Subsequent thereto, Ms. Priya filed a petition before this Court under Section 9 on 02.05.2016. Objection was raised to the maintainability of the petition before this Court on the ground that the Court 'first approached' only shall have exclusive jurisdiction to deal with all subsequent applications between the parties filed under 1996 Act, in view of the bar created by Section 42, even if it is held that both Courts have concurrent jurisdiction. It was also urged by the Respondents that this Court cannot decide on the jurisdiction of the Bombay High Court to deal with the application filed before that Court as the only thing relevant is the timing of filing of the applications.

38. After deliberating on the issue, the learned Single Judge first came to a conclusion that in the facts of the case, Courts in Delhi and Mumbai would have jurisdiction as part of cause of action had arisen in both the Courts. Having said so, the Court examined the preliminary objection of the bar of Section 42. It was held that the petition before this Court was not maintainable since the first petition had been filed before the Bombay High Court and it was not for this Court to hold that the petition before the Bombay High Court was frivolous or *malafide,* which is a ground that may be available to Ms. Priya before the High Court of Bombay to seek dismissal of that petition but certainly cannot be a ground to hold that the petition before the Delhi High Court was maintainable overlooking the bar of Section 42.

39. This judgment was carried up in appeal before the Division Bench of this Court by Ms. Priya. Relying on the ratio of the judgment of the Supreme Court in ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552,*** the Division Bench upheld the view of the learned Single Judge that both Courts at Delhi and Mumbai would have concurrent jurisdiction to entertain the petition under Section 9. With reference to Section 42, the debate between the parties led to the controversy with respect to interpretation of the words *'has been made'* in Section 42. As recorded in the judgment, Respondents opposed the maintainability before the Delhi High Court on the plea that Respondent No. 1 had instituted a petition under Section 9 in the Bombay High Court on 25.04.2016 while Ms. Priya urged two points viz. the expression *'has been made'* must mean 'laid before the Judge', as distinct from merely filing in the Registry of the Court and secondly, a party cannot, under colour of a claim, which *ex-facie* is frivolous, approach any Court and claim that the said Court is the one which would henceforth be the only Court where applications under the 1996 Act can be filed. It was urged by Ms. Priya that motivated and vexatious petitions need to be held as not maintainable and if a petition 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. Parties were not at variance that mandate of Section 42 is that where more than one Court has jurisdiction to entertain applications under Part-I of the 1996 Act, the Court in which an application is first made would be the Court, which alone would have jurisdiction over all subsequent applications and arbitral proceedings.

40. On the first point urged by Ms. Priya, the Division Bench rejected her contention. As regards the second issue, Court found merit in the argument that if a frivolous application is filed and opined to be so and the application is dismissed by the first Court as an abuse of the process of law, it would require to be held that though *de facto* a petition was first made in the said Court, but *de jure* none would be required to be treated as having been made. However, the observation of the Division Bench, which is significant for the present case, is that the opinion as to whether the first application was frivolous or not would be of the Court where the application is first filed and the opposite party takes an objection in this regard. Division Bench observed that the principle of comity commands the Division Bench not to comment upon the issue whether the petition filed by Respondent No. 1 before the Bombay High Court was devoid of merit and/or had the hidden agenda of ousting jurisdiction of this Court, a position inconvenient to the Respondents, who appeared to be residing in the city of Mumbai and thus, the Division Bench observed that it would refrain from noting the contentions advanced concerning the hidden agenda in approaching the Bombay High Court or that the petition was devoid of merit. It was held that it would be for the High Court of Bombay to take cognizance of the said arguments and take a decision.

41. The Division Bench held that a *bona fide* petition filed under the 1996 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 *albeit* with a caveat that the filing would mean a properly constituted petition filed in the first Court. Having so held, the

Division Bench further observed that if the Bombay High Court dismissed the petition filed by the Respondents holding the same to be devoid of merits or an act of cunning having a hidden agenda intending to oust jurisdiction of the Court at Delhi, Priya would be entitled to file an application in the Delhi High Court for interim measures, 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.

42. In view of the aforesaid observations and ruling of the Division Bench, which binds this Court, this Court is unable to agree with the Petitioner on the first two points that this Court must rule on or adjudicate the questions whether the petition under Section 9 before the District Court, Karnal has merit or has been filed with a *malafide* intent or in collusion with a hidden agenda and/or if any fraud has been played with that Court in obtaining an order of *status quo*. It would be for the District Court, Karnal to decide these issues, as and when and if the opposition is laid before that Court. For this reason, reliance placed by the Petitioner on the judgment in ***Engineering Project (India) Ltd. (supra)*** will not aid the Petitioner.

43. This takes the Court to the third limb of the argument of the Petitioner relating to the Commercial Courts Act, 2015. Following the decision of the Division Bench in ***Priya Hiranandani Vandrevala (supra),*** this Court cannot decide or delve into whether the Section 9 petition filed before the District Court, Karnal is validly constituted and it would be for the said Court of competent jurisdiction to decide, as and when an objection is raised by the Petitioner herein. Needless to state that if District Court, Karnal dismisses the petition on the ground that it is not validly constituted or is devoid of merit or any

collusion or fraud is evident, Petitioner would be entitled to file the petition in the appropriate Court for interim measure, at that stage. However, if the District Court, Karnal does not so hold that would be the end of the matter as far as jurisdiction of any other Court is concerned.

44. Petitioner had placed strong reliance on the judgment of this Court in ***Devas Multimedia Private Limited (supra),*** to contend that in the said case this Court had negated the contention of the Respondent that the City Civil Court at Bangalore, where the first petition was filed under Sections 9 and 34 of the 1996 Act, should first decide on its jurisdiction, before this Court could exercise jurisdiction in the petition pending before it under Section 9 of the 1996 Act. Having given a thoughtful consideration to the plea of the Petitioner, this Court is of the view that in the wake of the judgment of the Division Bench of this Court in ***Priya Hiranandani Vandrevala (supra),*** it is not permissible for this Court to enter into the realm of adjudication of any issue pertaining to the Section 9 petition pending before the District Court, Karnal, as it is only that Court which can take cognizance of the validity of the petition filed before it. The judgment is even otherwise completely distinguishable not only on law but also on a host of facts. In the said case, the Respondent/Antrix Corporation Limited ('Antrix') had filed a petition under Section 9 of the 1996 Act being AA No. 483/2011 on 05.12.2011 in the City Civil Court at Bangalore seeking restraint against Devas Multimedia Private Limited ('Devas') from proceeding with the ICC Arbitration contrary to the Agreement between the parties, as also getting the Agreement modified or substituted and restraint against the Arbitral Tribunal

constituted under the ICC Rules from proceeding with the arbitration. During the pendency of the petition, however, ICC gave its award on 14.09.2015 in favour of Devas and on 19.11.2015 Antrix filed an application in the City Civil Court at Bangalore under Section 34 of the 1996 Act, challenging the award. Pertinently, before filing of the Section 34 application, Section 9 petition was filed in this Court by Devas on 28.09.2015 seeking directions to Antrix to secure the awarded amount by furnishing a bank guarantee/attaching bank accounts/receivables/other movable or immovable assets of Antrix.

45. One of the issues before the Court was the 'seat' and 'exclusive jurisdiction' interplay and the Court held that in the absence of a jurisdiction clause in the arbitration agreement, the mere fact that a seat is mentioned would not automatically confirm exclusivity on the seat Court as far as the jurisdiction is concerned. Having so held the Court observed that there was no exclusive jurisdiction clause between Devas and Antrix and while parties had specified the seat as New Delhi but by doing so, they did not intend to oust the jurisdiction of the Courts at Bangalore. On a finding that substantial part of cause of action had arisen within the jurisdiction of the Bangalore Court in terms of termination of the agreement being conveyed at Bangalore, agreement signed at Bangalore, registered offices being Bangalore, the Court rejected the plea of Devas that Delhi had exclusive jurisdiction only because the seat of arbitration was Delhi, without anything more. This position stands reversed by the Supreme Court in ***BGS SGS SOMA JV (supra),*** where the Supreme Court has held and which is a binding dictum before this Court, that where seat is designated in an agreement, the Courts of the seat alone will have jurisdiction and this

would require all applications under Part-I to be made only in the Court where the seat is located. Thus, only the seat Court will have jurisdiction over arbitral proceedings and all subsequent applications arising out of the arbitral agreement. This judgment therefore cannot help the Petitioner. Even for the sake of arguments if the observations in the said judgment are to apply, the Court had ruled that the jurisdiction of the Bangalore Court arose on account of substantial part of the cause of action being at Bangalore since that was the place where agreements were signed, parties had their registered offices and termination of the agreement was conveyed. In the present case, all the three events have occurred at Karnal and not at Delhi and therefore even by this yardstick this Court would have no jurisdiction.

46. Coming back to the judgment in ***Devas Multimedia Private Limited (supra),*** it is pertinent to mention that the Court did not finally adjudicate the Section 9 application filed by Antrix on 05.12.2011 on the ground that after the passing of the award it had become infructuous and purely academic. Insofar as the Section 34 petition was concerned, the Court ruled that this Court would have jurisdiction, importantly, on the ground that the Section 9 petition in Delhi High Court was filed earlier to the Section 34 petition in City Civil Court at Bangalore. On this parameter alone, the observation in the judgement in fact favours the Respondent and thus, the petition filed before the District Court, Karnal under Section 9, being first and prior in point in time, will bar this Court from entertaining the present petition.

47. Learned Senior Counsel for the Petitioner had also urged that even otherwise this Court has territorial jurisdiction to entertain the

petition as some part of the cause of action has arisen within the territorial boundaries of this Court if not whole and to substantiate this, it was argued that notice of termination was issued from Delhi, the license agreement mentions the Delhi office address and the products using the mark 'LIBERTY' are accessible from Delhi on the interactive website of the Respondent.

48. This Court is unable to accept this contention. It is undisputed that the registered offices of the parties are at Karnal; both License Agreements were executed and signed at Karnal; and notice of termination dated 04.05.2023 sent by Mr. Adarsh Gupta was received at Karnal. The mere fact that some office or residence of one of the partners of the Petitioner firm is at Delhi and/or the notice was dispatched from Delhi, in my view, does not confer territorial jurisdiction on this Court. As far as having access to the products of the Respondent on its interactive website from Delhi is concerned, the present petition is not an infringement suit and is concerned with the License Agreement and its termination. In these circumstances, the Court where termination has taken effect will have the jurisdiction to rule on the legality or otherwise of termination and its consequences, as clearly held by this Court in ***Hero Electric Vehicles Private Limited and Another (supra).***

49. Respondent has also pointed out that Mr. Harish Gupta, one of the partners of the Petitioner firm has filed a petition under Section 11 of the 1996 Act before the Punjab and Haryana High Court for appointment of Arbitrator and a copy of the same has been filed on record. In the said petition, it is stated that the said High Court has

jurisdiction since the registered offices of the parties as well as the execution of the License Agreements is within the territorial jurisdiction of that Court. Reference to this petition is made for a limited purpose of noting that Petitioner also understands that cause of action has arisen in Karnal. In fact, Respondent has also filed a petition for appointment of an Arbitrator and both petitions are currently pending in the Punjab and Haryana High Court. Assuming, for the sake of arguments and taking the case of the Petitioner at the highest in its favour, that part cause of action has arisen in Delhi, even then this Court cannot entertain the petition in view of the judgement of the Supreme Court in ***BGS SGS SOMA JV (supra).*** At the cost of repetition, it is reiterated that in the said judgment the Supreme Court has ruled that where in the facts of a particular case either no seat is designated by the Agreement or the so called seat is only a convenient venue, there may be several Courts where part of the cause of action arises, that may have jurisdiction. An application under Section 9 may be preferred before a Court in which part of the cause of action arises and in such a case the earliest application having been made to a Court in which a part of the cause of action arises would then be the exclusive Court under Section 42, which would have control over the arbitral proceedings. Therefore, even if it is assumed that both District Court, Karnal and this Court have jurisdiction predicated on 'part cause of action', the first application filed before District Court, Karnal, will anchor arbitration and this petition cannot be entertained. The same circumstance had arisen in ***Priya Hiranandani Vandrevala (supra),*** where even after holding that both the Courts at Delhi and Mumbai had territorial jurisdiction, the learned Single Judge held that

Section 42 will bar entertaining the petition in Delhi since the first petition had been filed before the Bombay High Court.

50. Reliance was placed by the learned Senior Counsel for the Petitioner on the judgment in ***Ion Exchange (India) Ltd. (supra).*** In the said judgment, the Bombay High Court has observed that in addition to the notice of the Section 9 petition being sent by the Court, it was the duty of the Respondent to intimate to the Petitioner immediately that he had filed an application, independent of the Court. In the present case, the District Court, Karnal had issued notice on 23.01.2023 returnable on 16.03.2023 and order was passed in the presence of counsels for both parties, *albeit* question has been raised by the Petitioner with respect to the authority of the said counsel, which would be a matter to be decided by the District Court, Karnal. While it may be an ideal situation for a party filing a petition to intimate the opposite party in addition to the Court notice, but I am not persuaded to hold that this is a mandate or an obligation so as to entertain this petition solely on that ground. In ***Surya Pharmaceuticals Ltd. (supra),*** the Madras High Court held that Section 42 cannot be invoked unless the party raising the plea of jurisdiction demonstrates that the Court which entertained the first application had the jurisdiction. This judgment would not aid the Petitioner for the reason that in the present case it is not the case set up by the Petitioner that the District Court, Karnal has no jurisdiction to entertain the Section 9 petition as a Court under Section 2(1)(e) of the 1996 Act. Judgment of the Supreme Court in ***A.V. Papayya Sastry and Others (supra),*** was relied on for the proposition that a decree/order obtained by playing fraud on the Court is a nullity.

Petitioner is right that this is the law of land. However, whether or not the *status quo* order dated 16.03.2023 has been obtained by Respondent by fraud, is a question which is yet to be decided and can only be decided by the District Court, Karnal before which, fraud has been allegedly committed. Judgments in ***Motorpresse International Verlagsgeseiischaft Holding mbH & Co. v. Mistrale Publishing Pvt. Ltd., 2005 SCC OnLine Del 346, Sheel International Ltd v. Shree Anu Milk Products Ltd, 2013 SCC OnLine Del 2287*** and ***Sorrel Hospitality Pvt. Ltd. v. Nakodar Hotels Pvt. Ltd., 2018 SCC OnLine Del 7730,*** were relied upon by the Petitioner to canvass that once the trademark license agreement is terminated, the permitted user/licensee cannot use an identical or similar trademark for the impugned goods. On the point of law, in these judgments there can be no debate. However, in none of these cases any objection was raised on the maintainability predicated on Section 42 of the 1996 Act and cannot inure to the advantage of the Petitioner. I may note that while a whole compilation of judgments was given during the course of arguments and subsequently with the written submissions but the parties had only relied on the judgments referred to above, which the Court has dealt with.

51. For all the aforesaid reasons, the petition is dismissed giving liberty to the Petitioner to take recourse to appropriate remedies available in law. It is made clear that this Court is dismissing the petition as not maintainable and no opinion has been rendered on the merits of the case and/or the disputes between the parties. It is also stated at the cost of repetition that if the District Court, Karnal dismisses the petition, Petitioner will have the remedy to file a petition

under Section 9 of the 1996 Act in an appropriate Court, having jurisdiction in the matter.

JYOTI SINGH, J

AUGUST 21, 2023*/ck/kks/shivam*