

# Dispute Resolution Hotline

March 23, 2012

## APPLICABILITY OF RES JUDICATA: SUPREME COURT OF INDIA DECISION VIS-A-VIS ISSUE BEFORE LONDON COURT

### INTRODUCTION

The Delhi High Court ("**Delhi HC**") in the instant case of *Union of India* ("**Plaintiff**") v. *Videocon Industries Limited*<sup>1</sup> ("**Defendant**") granted an anti-suit injunction in favour of the Plaintiff, passing an order of perpetual injunction restraining the Defendant from pursuing the claim before Commercial Court, London. The Delhi HC held that re-initiation of proceedings before the London Courts was oppressive and abuse of the process of law and in violation of the doctrine of res judicata and issue estoppel.

### FACTUAL MATRIX

In the present case, the Plaintiff entered into a Production Sharing Contract ("**PSC**") with a consortium of four companies consisting of Oil and Natural Gas Corporation Limited, Videocon Petroleum Limited (merged with Videocon Industries/"Defendant" herein), Command Petroleum (India) Private Limited and Ravva Oil (Singapore) Private Limited on October 28, 1994. By virtue of the PSC, the consortium was granted an exploration and mining lease to explore and produce hydro-carbon resources in the offshore of Andhra Pradesh coast.

As per the provisions of the PSC, the contract was governed and interpreted in accordance with the laws of India subject to the fact that the seat of arbitration shall be Kuala Lumpur and the arbitration agreement shall be governed by the laws of England. Further, the PSC clearly stipulated that the contract shall not be modified, amended, varied or supplemented in any respect except by an instrument in writing signed by all the parties.

Disputes arose between the parties in 2000, with respect to the correctness of certain cost recoveries and profit and the matter was referred to an Arbitral Tribunal.

### Chronology of Events

1. The matter was fixed for hearing before the Arbitral Tribunal at Kuala Lumpur, Malaysia however due to outbreak of epidemic "SARS", the Tribunal held sittings at Amsterdam in the first instance and later agreed to shift the seat of arbitration to London without any amendment to the arbitration agreement as contemplated in the PSC.
2. The Arbitral Tribunal passed a partial award on March 31, 2005. The same was challenged by the Plaintiff herein before the Malaysian High Court at Kuala Lumpur for setting aside the award. The Defendant opposed the same questioning the jurisdiction of the Courts contending that in view of clause 34.12 of the PSC only the English Courts have the jurisdiction to entertain any challenge to the award, as the seat was shifted to London.
3. Pending passing of the final award, the Plaintiff requested the Arbitral Tribunal to hold further sittings at Kuala Lumpur with the epidemic being over. However, the Arbitral Tribunal rejected the request and passed an Order to continue proceedings in London on April 20, 2006.
4. Being aggrieved by the said order, the Plaintiff filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 ("**Act**") before the Delhi HC seeking a declaration that the seat of arbitration is Kuala Lumpur. The Defendant objected to the maintainability of the petition and pleaded that the Courts in India do not have the jurisdiction to entertain challenge to the arbitral award. The Delhi HC passed an order in favour of the Plaintiff on April 30, 2008 and held that the said High Court has the jurisdiction to entertain the petition filed under Section 9 of the Act.
5. The Defendant filed a Special Leave Petition before the Supreme Court ("**SC**") challenging the order of the Delhi HC dated April 30, 2008 that was subsequently converted to a Civil Appeal.
6. Pending the hearing of the civil appeal before the SC, the Malaysian High Court dismissed the application filed by the Plaintiff challenging the partial award. The Plaintiff thereafter filed a Memorandum of Appeal before the High Court of Malaysia.
7. The decision of the Malaysian High Court was brought on record before the SC. Pending the final adjudication by the SC; the Defendant filed a claim before the High Court of Justice, Queen's Bench Division, Commercial Court, London ("London Court") for deciding on the issue of juridical seat of arbitration. The same was not disclosed before the SC nor was the Plaintiff herein served contrary to the order of the London Court. The Plaintiff was later served with notice about the claim pending before the London Court at a much later date. The Plaintiff consented to the hearing without prejudice to the issue of res judicata and participated in the proceedings.
8. Finally, on May 11, 2011 the SC passed its judgment in the civil appeal stating that Indian courts had no jurisdiction to entertain Section 9 petition because the parties had agreed that the law governing the arbitration will be English law. Further the SC also stated that mere change in the physical venue of hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration.

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9. Relying on the above judgment<sup>2</sup>, the Plaintiff requested the Defendant to withdraw the proceedings before the London Court. However, after several round of correspondences being exchanged, the Defendant re-commenced the proceedings. The London Court proceeded with the matter and passed order to decide whether the decision of the SC was binding and operated as res judicata between the parties.

This led to the present suit being filed by the Plaintiff seeking declaration and perpetual injunction to restrain Defendant from pursuing with the said claim before the London Court.

## ISSUE

The issue before the Delhi HC was whether the attempt of the Defendant to re-litigate the issue of juridical seat of arbitration before the London Courts after the same being settled by the SC was in breach of the contractual provisions and barred by *res judicata/issue estoppel*.

## ARGUMENTS

### Contentions of the Plaintiff

*The Plaintiff firstly contended that as per the provisions of the PSC, the seat of arbitration is Kuala Lumpur and none of the parties could claim anything contrary to the Indian laws, as per the provisions therein. The Plaintiff placed reliance on Articles 33.2 and 34.12 of the PSC and the same are reproduced hereinbelow.*

– Article 33.2

#### Laws of India not to be contravened

*Subject to Article 17.1, nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India.*

– Article 34.12

### Venue and Law of Arbitration Agreement

"The venue of the sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England."

Further, applying the doctrine of res judicata, the Plaintiff contended that the Defendant could not be permitted to indulge in forum shopping and re-agitate the same issue before the London Court when the SC has already decided on the issue. The Plaintiff relied on a series of judicial precedents and held that re-initiation of proceedings before London courts is barred by res judicata/issue estoppel and merely led to a second round of litigation.

The SC had clearly held that change in the venue of hearing to Amsterdam or London did not amount to change in the juridical seat of arbitration; as a result the matter was no longer res integra. Further, the same is opposed to the public policy of India and in breach of the PSC entered between the parties.

Secondly, with respect to the binding nature of the findings rendered by the SC, the Plaintiff submitted relying on judicial precedents that a judgment rendered by the highest court of the land is sacrosanct and is a precedent for itself and for all courts/tribunals and authorities in India. Further, the Plaintiff submitted that even if it is contended that the SC judgment is erroneous or alleged to be passed without jurisdiction, the same can be corrected by the SC itself and cannot be dealt with collaterally by any other court.

Thirdly, the Plaintiff submitted that the parties cannot vest a court with jurisdiction it does not otherwise have and the London Court did not have jurisdiction in the present case. The SC was the natural forum as it not only had personal jurisdiction but also could exercise jurisdiction from the territorial and subject matter perspective.

Fourthly, the Plaintiff contended that the Defendant had suppressed material facts from the SC and its mala fide intentions is clearly reflected as they did not disclose before the SC about the proceedings before London Court, neither did they disclose before the Malaysian High Court about the proceedings before SC, London Court and the present suit and nor did they get the service effected on the Plaintiff in contravention of the orders of the London Court.

### Contentions of the Defendant

The Defendant contended that none of the tests for grant of an anti-suit injunction as laid down in the SC decision of Modi Entertainment Network and Anr. v.W.S.G. Cricket Pvt. Ltd<sup>3</sup>. were met and the London Court is the appropriate Court to decide whether or not the Defendant's claim is barred by res judicata. The Defendant submitted that the bar operates in the forum where the issue alleged to have been decided is being re-agitated and res judicata does not arise in the abstract or prior to the subsequent suit. Further, the courts of the country whose law governs the arbitration agreement have the exclusive jurisdiction to decide all disputes.

The Defendant putting forth the principle of comity of nations as recognised by the Indian Courts argued that grant of anti-suit injunctions is precluded barring the rarest of rare cases. As the London Court has not proceeded with the matter on merits but only sought to complete the pleadings, grant of an injunction would be against the principle of comity of nations.

Further, refusal to grant anti-suit injunction would not cause any loss to the Plaintiff as the Plaintiff had itself participated in the proceedings before London Court and would be afforded a full and complete hearing. However, grant of an anti-suit injunction would stall the arbitration process as the Malaysian Courts had already refused to deal with the issue and SC had held that Indian Courts have no jurisdiction as Part I of the Act was expressly excluded.

The Defendant also contended that the decision rendered by the SC with respect to the seat of arbitration was an obiter as the issue before it was restricted to deciding the jurisdiction of the Indian Courts and was not called upon to decide which foreign court has jurisdiction to decide the seat of arbitration. The Defendant submitted as the SC had no jurisdiction to deal with the issue; such decision would not give rise to the bar of res judicata.

## JUDGMENT

The Delhi HC stated that firstly the Defendant had itself accepted in their pleadings that the issue of juridical seat of arbitration was decided by the SC however contended that the same would not be binding as it was a mere obiter. The Delhi HC placed reliance on judicial precedents and held that principles relating to precedent, per incurium, obiter have no application to the doctrine of res judicata. The Plaintiff had also satisfied all the grounds with respect to plea of res judicata.

Further, the Plaintiff though had participated in the proceedings before the London Court, the same did not amount to submitting to its jurisdiction as the Plaintiff had always maintained that the London Court did not have the jurisdiction to decide the issue of juridical seat of arbitration. Further, the Defendant itself having approached the SC to decide the issue of juridical seat of arbitration, the same amounted to a tacit understanding that the order passed was with the consent of both the parties. The SC had clearly held that in contrast to the provisions of the English Arbitration Act, the Act does not provide for any provisions to change the juridical seat of arbitration and with no amendment in the PSC, mere change of physical venue did not amount to change in the juridical seat of arbitration.

The SC had also clarified the fact that the Delhi HC had no jurisdiction to entertain Section 9 application as Part I of the Act was expressly excluded. The SC had clarified the distinction with regard to the governing law of the contract, the curial law and the distinction between the seat of arbitration and venue of arbitration. The Delhi HC held that subjecting the said decision of the SC before the foreign courts was against the principles of international commercial arbitration and their jurisdiction can be questioned only before the SC itself and not in collateral proceedings.

The Delhi HC stated that re-determination of the question of seat of arbitration would constitute abuse of the process of law and render the foreign proceedings vexatious and oppressive if the London Court concludes that principles of res judicata do not apply and re-examine the whole issue. The Delhi HC noted that the PSC had given primacy to Indian laws and no action could be taken by either party to contravene the same. The underlying object of doctrine of res judicata which encompasses the principle of issue estoppel, is public policy and safeguarding the same is of paramount importance.

Further, negating the arguments of the Defendant with respect to granting anti-suit injunction, the Delhi HC stated that the Courts need to be cautious prior to granting the same but the same operates against the party concerned and not against the court of foreign jurisdiction. As the parties by virtue of the PSC had granted primacy to Indian laws and no action could be taken in contravention of the same, the SC could adjudicate the said issue and the parties themselves by their mutual consent had submitted the issue of seat of arbitration.

## ANALYSIS

The main issue herein is whether the SC decision with respect to the juridical seat of arbitration formed part of the ratio or was a mere finding. It is pertinent to state that the issue before the SC was with regard to the maintainability of the Section 9 petition before the Delhi HC. The SC had rightfully allowed the appeal and stated that jurisdiction of Indian Courts was barred as the parties had chosen English law as law of the arbitration agreement.

The Delhi HC carefully analyzing the SC decision and series of judgments held that principles relating to obiter, per incurium have no application to the doctrine of res judicata, which is governed by cause of action estoppel and issue estoppel in order to ensure attainment of finality and giving a complete go-by to these principles would be against public policy and amount to abuse of process of law. Further, the Delhi HC has clarified that issue estoppel would operate in a case where findings on a particular issue have been rendered by the highest court of this country. Foreign courts including those in friendly jurisdictions re-examining them would be against principles of comity of nations. Both the parties by their tacit understanding having submitted the issue of juridical seat of arbitration before the SC were bound by its decision, thereby res judicata principles being applicable as all the four conditions<sup>4</sup> essential were established herein.

– Payel Chatterjee & Vyapak Desai

You can direct your queries or comments to the authors

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<sup>1</sup> CS (OS) 3314/2011

<sup>2</sup> <https://nishithdesai.com/SectionCategory/33/Dispute-Resolution-Hotline/12/57/DisputeResolutionHotline/5535/7.html>

<sup>3</sup> (2003) 4 SCC 341

<sup>4</sup> Syed Mohd. Salie Labbai & Ors. v. Mohd. Hanifa & Ors. (1976) 4 SCC 780

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