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

\+ **CS(OS) 3314/2011**

UNION OF INDIA ..... Plaintiff

Through: Mr. A.S. Chandiok, ASG with Mr. R. Sasiprabhu, Mr. Ritesh Kumar, Ms. Bindu K. Nair, Mr. Somiran Sharma, Mr. Sumit and Ms. Shweta, Advocates

versus

VIDEOCON INDUSTRIES LTD ..... Defendant

Through: Mr. Amit Sibal, Mr. Prashant Kalra, Mr. Rohan Dheman and Mr. Harsh Kaushik, Advocates

% Date of Decision : March 05, 2012

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

J U D G M E N T

: REVA KHETRAPAL, J.

IA No.21069/2011 (under Order XXXIX Rules 1 and 2 read with Section 151 CPC)

1. By way of present application, an anti-suit injunction is sought by the Plaintiff restraining the Defendant from pursuing Claim No.2009, Folio 1382 filed in the High Court of Justice, Queen's

Bench Division, Commercial Court, London. The aforesaid application is filed in a suit for declaration and perpetual injunction instituted by the Plaintiff to restrain the above named Defendant from pursuing the aforesaid claim in London in relation to the issue and matter already finally determined by the Hon'ble Supreme Court of India by its judgment and order dated 11.05.2011 between the parties.

2. The chronological factual matrix leading to the institution of the suit in which the present application is instituted is delineated as follows.

3. The Union of India, the Plaintiff herein, as the owner of natural resources including petroleum in the territorial waters of India, through the Ministry of Petroleum and Natural Gas, entered into a Production Sharing Contract (hereinafter referred to as "PSC") on October 28, 1994 at New Delhi. The said PSC was executed between the Union of India on the one hand and a consortium of four companies consisting of Oil and Natural Gas Corporation Limited (ONGC), Videocon Petroleum Limited, Command Petroleum (India) Private Limited and Ravva Oil (Singapore) Private Limited in terms

of which the consortium was granted an exploration licence and mining lease to explore and produce hydro-carbon resources owned by the plaintiff underlying a Contract Area called 'Ravva Oil and Gas Field' in the Offshore of Andhra Coast owned by the Plaintiff. These companies, including ONGC, are collectively referred to as "the Contractor" in the PSC. Subsequently, Cairn Energy U.K. was substituted in place of Command Petroleum (India) Private Limited and the name of Videocon Petroleum Limited was changed to Petrocon India Limited, which merged with the Defendant herein, i.e., Videocon Industries Limited.

4. The aforesaid PSC was entered into for and on behalf of the President of India with the desire that the petroleum resources in the Contract Area be exploited with the utmost expedition in the overall interest of India. As per Article 35.2 of the PSC, it was stipulated that the contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the parties, which shall state the date upon which the amendment or modification shall become effective.

5. The PSC dated 28.10.1994 also contained a stipulation in Article 33.1 that the contract shall be governed and interpreted in accordance with the Laws of India subject to Article 34.12, which, *inter alia*, provided that the seat of arbitration shall be Kuala Lumpur and the Arbitration Agreement as contained in Article 34 shall be governed by the Laws of England.

6. In the year 2000, disputes arose between the Plaintiff and the Defendant pertaining to the correctness of certain cost recoveries and profit, which along with a few other disputes was referred to an Arbitral Tribunal as contemplated in Article 34 of the PSC. The arbitration case relevant for the present purposes was registered on 19.08.2003 as Case No.3 of 2003 before the Tribunal at Kuala Lumpur, Malaysia and was fixed for hearing. However, before the hearing could take place, Malaysia was hit by the outbreak of the epidemic 'SARS'. Accordingly, after consultation and keeping in mind the convenience of all concerned and to ensure that proceedings were not delayed, the Tribunal held sittings at Amsterdam in the first instance and on 15.11.2003 the parties agreed to shift the seat of

arbitration to London. This was done, according to the plaintiff, without affecting the contractual and jurisdictional venue of Kuala Lumpur and without amendment of the arbitration agreement as contemplated in the PSC. Therefore, the jurisdictional seat of the arbitration remained and continues to remain in Kuala Lumpur.

7. The Arbitral Tribunal passed a partial award dated 31.03.2005 in the above Arbitration Case No.3/2003. The Plaintiff on 10.05.2005 challenged this partial award before the Malaysian High Court at Kuala Lumpur by filing a petition for setting aside the award. In those proceedings, the Defendant herein on 20.05.2006 questioned the jurisdiction of the Malaysian High Court on the ground that seat had shifted to London.

8. Since further proceedings in the matter were to take place for the passing of the final award and the epidemic in Kuala Lumpur was over, the Plaintiff requested the Arbitral Tribunal to hold its further sittings at Kuala Lumpur, the jurisdictional seat of arbitration. This was opposed by the Defendant/Videocon. The Arbitral Tribunal by

an order dated 20th April, 2006 decided that further sittings be held at London from 30th June, 2006 to 2nd July, 2006.

9. Aggrieved by the order dated 20.04.2006 of the Hon'ble Tribunal, the Plaintiff on 30.05.2006 filed **OMP No.255 of 2006** under Section 9 of the Arbitration and Conciliation Act, 1996, in this Court seeking a declaration that the seat of arbitration is Kuala Lumpur. The Defendant raised objection to the maintainability of the petition on the ground of jurisdiction. The aforesaid objection was decided by a learned Single Judge of this Court by order dated 30.04.2008 in favour of the Plaintiff, rejecting the objection of the Defendant and proceeding to fix dates for hearing on the merits of OMP No.255 of 2006.

10. On 08.07.2008, the Defendant filed a Special Leave Petition, being SLP(C) No.16371/2008 before the Hon'ble Supreme Court of India impugning the judgment dated 30.04.2008, which was subsequently converted to a Civil Appeal No.4269 of 2011.

11. On 05.08.2009, while the Special Leave Petition before the Supreme Court of India was pending, the High Court of Malaysia

dismissed the Plaintiff's challenge to the Partial Award on the ground that the seat of arbitration had been shifted to London. The Plaintiff filed a Notice of Appeal in Malaysia on 12.08.2009 and subsequently a Memorandum of Appeal was filed on 14.12.2010.

12. On 09.10.2009, the Defendant brought the decision of the Malaysian Court on the record of the Special Leave Petition pending before the Supreme Court. On 13.10.2009, while the matter was pending before the Supreme Court, the Defendant filed a Claim Petition No.2009, Folio 1382 before the High Court of Justice, Queen's Bench Division, Commercial Court, London. However, the Defendant did not disclose the above filing to the Supreme Court or to the Plaintiff, and, according to the Plaintiff, deliberately suppressed the same despite an order passed by the London Court on 20.10.2009 to serve the Plaintiff herein as soon as possible. On 11.11.2009, the judgment in Civil Appeal No.4269 of 2011 was reserved by the Supreme Court.

13. On 21st April, 2010, the Plaintiff was served with notice in the Claim Petition No.2009, Folio 1382 pending in the London Court.

Thereafter, on 10th August, 2010, the Plaintiff moved the Supreme Court by filing IA No.4/2010 in Civil Appeal No.4269/2011 pleading, *inter alia*, that the Supreme Court was seized of the matter **including the question as to whether the seat of arbitration continued to be at Kuala lumpur or the same had shifted to London**. Simultaneously, on 12th August, 2010, an application was filed by the Plaintiff before the London Court stating that the juridical seat was not London and in any case the issue of juridical seat was being contested in proceedings elsewhere, i.e., in the Supreme Court of India. In the light of these facts, it was prayed that the London Court did not have the jurisdiction to hear the claim of juridical seat. On the same day, i.e., on 12.08.2010, the Plaintiff's solicitors also wrote to the Defendant's solicitors clearly stating:-

> ***"For the avoidance of doubt, this letter and our client's application are not a submission to the jurisdiction of the Courts of England and Wales."***

14. On 06.09.2010, the Plaintiff's application IA No.4/2010 came up for hearing before the Supreme Court and after considering the matter, the Supreme Court by a consent order of the same date, i.e.,

06.09.2010 disposed of the said application by recording that "subject to completion of pleadings in the proceedings pending in the Courts in England as well as in Malaysia, neither the petitioner nor the respondent will proceed/take any pro-active steps for hearing in the proceedings/applications pending in the Court in England as well as in the Court in Malaysia, till the disposal of the present SLP".

15. On 11.05.2011, the Supreme Court delivered its judgment in Civil Appeal No.4269/2011, wherein it was held 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"** and negated the contention of the defendant that the seat of arbitration had shifted to London. It was further held by the Supreme Court that in view of the specific exclusion of Part I of the Arbitration and Conciliation Act, 1996, the Delhi High Court did not have the jurisdiction to entertain OMP No.255/2006 and the said petition was liable to be dismissed. Consequently, on 30.05.2011, OMP No.255/2006 was formally

dismissed by the High Court in view of the judgment of the Supreme Court rendered on 11.05.2011.

16. Subsequent to the decision of the Supreme Court, the Plaintiff on 02.06.2011 requested the Defendant to withdraw the proceedings bearing Claim No.2009, Folio 1382 dated 13.10.2009 before the Queen's Bench Division, Commercial Court, London. By way of a reply the plaintiff through its solicitors at London received a letter dated 08.06.2011 from the Defendant's solicitors addressed to the Commercial Court Listing Office, the Royal Courts of Justice, London, seeking to recommence the proceedings before the London Commercial Court. The Plaintiff through its solicitors replied to the said letter on 14.06.2011 stating that the Supreme Court of India had considered and finally decided that the juridical seat of arbitration (as opposed to the physical shift of sittings to London) remained at Kuala Lumpur. However, on 22.06.2011, the Defendant's solicitors wrote to the solicitors of the Plaintiff at London reiterating their position that the decision of the Supreme Court of India had not rendered the proceedings before the London Court unnecessary stating: **"Any legal**

issue arising from the judgment of the Indian Supreme Court are matters for the English Court to determine at the hearing……..."

17. The Plaintiff's solicitors responded to the above letter of the defendant by letter dated 29.06.2011 stating that the Hon'ble Supreme Court of India had finally and conclusively decided the relevant issue to the effect that the juridical seat of the arbitration was not changed to London but remained in Kuala Lumpur and the defendant was estopped from relitigating the point of juridical seat of arbitration before the English Courts. The plaintiff, however, **consented to the hearing without prejudice to the issue of *res judicata***. The solicitors of the Defendant replied to the aforesaid letter on 01.07.2011, stating that they disagreed with the Plaintiff's position that the decision of the Hon'ble Supreme Court of India had "finally and conclusively" decided the relevant issue pending before the English Court.

18. Thereafter, on 29.08.2011, the witness statement of Ms. Pallavi Shroff was filed on behalf of the Defendant and on 14.10.2011,

witness statements of Ms. Promila Jaspal and Ms. Simran Dhir were filed on behalf of the Plaintiff. The Plaintiff under the rules of practice in London also participated in the Case Management Conference held on 04.11.2011 without prejudice to its rights and contentions and without admitting, in any manner, that the London Court had jurisdiction to adjudicate on the question in issue. On 14.11.2011, pursuant to the Case Management Conference, the London Court issued orders fixing the dates for hearing and prior thereto dates for evidence by way of witness statements and expert evidence to be filed by both the parties on the status and effect in Indian law of the judgment of the Supreme Court of India dated 11th May, 2011 and in particular whether the decision of the Supreme Court of India as to the seat of the first and third arbitrations are *res judicata* or are otherwise binding on the parties.

19. Aggrieved therefrom, on 22.12.2011 the present suit has been preferred by the Plaintiff seeking declaration and perpetual injunction to restrain the Defendant from pursuing the aforesaid claim in London predicated on its stand that the matter had already been finally

adjudicated upon by the judgment of the Supreme Court rendered on 11.05.2011.

20. In the aforesaid factual backdrop, the learned Additional Solicitor General Mr. A.S. Chandiok made detailed submissions in support of his prayer for the grant of an injunction order, which, for the sake of convenience, are summarized below.

PLAINTIFF'S CONTENTIONS

21. The learned Additional Solicitor General contended that **the attempt on the part of the defendant to re-litigate the issue of juridical seat of arbitration before the English Court after having it settled/decided by the Supreme Court of India is in breach of the Production Sharing Contract (PSC) dated October 28, 1994** in particular, Article 33.2 of the PSC and barred by *res judicata/issue estoppel*. At the outset, he referred to the relevant clauses of the PSC, which, for the sake of facility of reference, are extracted below:-

> *"**33.1 Indian Law to Govern***
> *Subject to the provisions of Article 34.12, this Contract shall be governed and interpreted in accordance with the laws of India.*

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.

34.3 Unresolved Disputes

Subject to the provisions of this contract, the Parties agree that any matter, unresolved dispute, difference or claim which cannot be agreed or settled amicably within twenty one (21) days may be submitted to a sole expert (where Article 34.2 applies) or otherwise to an arbitral tribunal for final decision as hereinafter provided.

34.12 Venue and Law of Arbitration Agreement

The venue of 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.

35.2 Amendment

This Contract shall not be amended, modified, varied or supplemented in any respect except

> *by an instrument in writing signed by all the Parties, which shall state the date upon which the amendment or modification shall become effective."*

22. Learned Additional Solicitor General contended that as per Article 34.12 of the PSC, the seat of arbitration is Kuala Lumpur, and a bare glance at the relevant Articles of the PSC extracted hereinabove would suffice to show that Article 34.12 is an overriding provision *qua* Article 33.1 whereunder Indian Law is stated to be the governing law; however, Article 34.12 **does not** override Article 33.2 of the PSC, which provides that the Contractor shall not exercise the rights, privileges and powers conferred upon it by the contract in a manner which will contravene the laws of India. He further contended that the admitted position is that **nothing which is inconsistent to Indian Laws can be claimed by any of the parties** and this is evident from the written statement filed by the defendant, and in particular from Clause (xiii) of paragraph 16 of the written statement, wherein it is stated:-

> *"……..The Defendant in filing the English Court Proceedings is not in any manner*

claiming anything inconsistent in Indian Law as alleged…."

23. He submitted that re-litigating the same issue, i.e., issue of juridical seat of arbitration by the Defendant is against Indian Laws and consequently the Defendant is in breach of Article 33.2 of the PSC as alleged in the plaint. The Defendant cannot be permitted to indulge in **forum shopping** and to re-agitate the same issue before the English Court when the Supreme Court of India has already decided on the issue. This is opposed to the public policy of India embodied in the **doctrine of *res judicata*** and principles analogous thereto, intended to eliminate multiplicity of proceedings and potentially conflicting decisions and to preserve the integrity of the proceedings before the Supreme Court of India, which in the instant case culminated in the final judgment and order dated 11.05.2011 in the appeal filed by the defendant being Civil Appeal No.4269/2011.

24. Reference was also made by him in this regard to the decision of the Supreme Court in the case of ***Venture Global Engineering vs. Satyam Computer Services Ltd. and Anr., (2008) 4 SCC 190***. In the said case, the appellant, a company incorporated in USA entered into

a Joint Venture Agreement with the Respondent, a company registered in India, to constitute a company named Satyam Venture Engineering Services, registered in India. A Shareholders Agreement (SHA) was also entered into between the parties. The SHA, which was governed by Michigan Law, provided for arbitration of disputes at the London Court of International Arbitration (LCIA). The SHA in Section 11.05 clause (c) further provided that:-

> *"Notwithstanding anything to the contrary in this agreement, the shareholders* ***shall at all times*** *act in accordance with the Companies Act and other applicable Acts/Rules being in force, in India at any time."*

The Supreme Court after considering the aforesaid provisions in the SHA opined:- (SCC, at page 211, paragraph 44)

> *"……Notwithstanding that the proper law or the governing law of the contract is the law of the State of Michigan, their shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/Rules being in force in India at any time. Necessarily, enforcement has to be in India, as declared by this very section which overrides every other section in the Shareholders Agreement.* ***Respondent No.1, therefore, totally violated the agreement between the parties by seeking enforcement of***

> ***<u>the transfer of the shares in the Indian company by approaching the District Courts in the United States.</u>***"

25. The learned Additional Solicitor General further contended that Order XXXIX Rule 2 of the CPC specifically empowers the Court to grant injunction restraining the defendant from committing a breach of contract or other injury of any kind. Thus, in the case of ***Pioneer Publicity Corporation vs. Delhi Transport Corporation & Anr., 103 (2003) DLT 442***, a learned Single Judge of this Court with reference to the scope and ambit of Order XXXIX Rule 2 CPC opined: (DLT, at page 449, para 8)

> *"Keeping in view the provisions of Order XXXIX Rule 2 it is no longer possible to contend that the Court does not possess power to prohibit or prevent the breach of contract. If this is possible in the realm of private contracts, it is an obligation in the realm of pubic enterprises……."*

26. The learned Additional Solicitor General next contended that the **<u>proceedings re-initiated by the defendant before the English Court is barred by *res judicata*/issue estoppel.</u>** The plaintiff had on 30.05.2006 moved a petition under Section 9 of the Arbitration

and Conciliation Act, 1996 being OMP No.225 of 2006 before a learned Single Judge of this Court, *inter alia*, making the following prayers:-

> *"(a) direct the parties and the Arbitral Tribunal consisting of Hon'ble Mr. Justice B.N. Kirpal, Hon'ble Mr. Justice G.T. Nanavati and Hon'ble Mr. Justice J.K Mehra to continue hearing at Kuala Lumpur, the contractual and jurisdictional venue of arbitration as contemplated in Article 34 of the PSC;*
> *(b) declare that the contractual venue, i.e., Kuala Lumpur was and is contractual and jurisdictional seat of arbitration;*
> *(c) stay of the further proceedings of the arbitration as informed vide letter dated 20th April, 2006 by the Tribunal."*

27. A preliminary objection was raised to the maintainability of the said petition by the respondent (defendant herein) to the effect that the jurisdictional seat of arbitration had shifted to London and the petitioner was estopped from contending that the seat of arbitration continued to be at Kuala Lumpur. By his order dated 30th April, 2008, the learned Single Judge held that it had the jurisdiction to decide upon the petition. Aggrieved therefrom, the defendant approached the Supreme Court by way of SLP (C) No.16371/2008

(which was later converted to Civil Appeal No.4269 of 2011). In the said SLP, the defendant herein again raised the issue of juridical seat and even filed detailed written submissions before the Supreme Court on the issue of 'juridical seat of arbitration'. The judgment was delivered by the Supreme Court on May 11, 2011, wherein it was held that change in 'the venue of hearing' to Amsterdam or London did not amount to change in the 'juridical seat of arbitration'; and the contention of the defendant that the juridical seat had been shifted to London was negated. As a matter of fact, the Supreme Court gave a categorical finding that Kuala Lumpur would remain the seat of arbitration (paras 12, 13 and 14 of the judgment of the Supreme Court).

28. The learned Additional Solicitor General contended that in view of the above the issue of juridical seat is no longer *res integra* after the judgment of the Supreme Court. The defendant cannot under the garb of the claim made by it in the London Court seek to set aside a binding judgment and finding of fact on the aforesaid issue decided by the Apex Court. The law laid down by the Supreme Court

besides being binding between the parties, being a judgment *in personam* is in fact the law of the land, unless set aside in review. Admittedly, no review petition has been filed by the defendant and the judgment, therefore, acts as an estoppel against the defendant.

29. Reference was made by the learned Additional Solicitor General to a large number of precedents in support of his aforesaid contention, including the following:-

(i) ***Satish Nambiar vs. Union of India & Anr., 150 (2008) DLT 312 (DB)***, wherein a Division Bench of this Court held as under:- (DLT, at page 318, para 13)

> *"……The principles of res judicata applicable to writ proceedings prevent parties to a judicial determination from agitating the same question over again.* ***That is true even when the earlier determination may be erroneous. A party aggrieved of any such decision can no doubt challenge the same in appeal, but cannot institute fresh proceedings on the same cause of action nor can a party agitate any such issue as it constituted an essential element of the decision earlier rendered****……"*

(ii) ***Ishwar Dutt vs. Land Acquisition Collector and Anr., (2005) 7 SCC 190***, in which it was held as follows:- (SCC, at page 198, paras 18-19)

> *"18. …… The principle of res judicata is specie of the principle of estoppel. When a proceeding based* ***on a particular cause of action has attained finality****, the principle of res judicata shall fully apply.*
>
> *19. Reference in this regard may be made to Wade and Forsyth on Administrative Law, 9th Edn., p. 243, wherein it is stated:*
>
> > *"One special variety of estoppel is res judicata. This results from the rule, which prevents the parties to a judicial determination from litigating the same question over again,* ***even though the determination is demonstrably wrong. Except in proceedings by way of appeal, the parties bound by the judgment are estopped from questioning it****. As between one another, they may neither pursue the same cause of action again, nor may they again litigate any issue which was an essential element in the decision. These two aspects are sometimes distinguished as* ***'cause of action estoppel'*** *and* ***'issue estoppel'****."*

(iii) ***Swamy Atmananda and Ors. vs. Sri Ramakrishna Tapovanam and Ors., (2005) 10 SCC 51***, wherein it was observed as follows:- (SCC, at page 61, para 26)

> *"26. The object and purport of principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of* ***conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties****. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute book with a view to bring the litigation to an end so that the other side may not be put to harassment."*

(iv) ***M. Nagabhushana vs. State of Karnataka and Others, (2011) 3 SCC 408***, wherein the principles of *res judicata* were delineated as under:- (SCC, at pages 415-416, paras 12 and 13)

> *"12. The principles of res judicata are of universal application as they are based on two age-old principles, namely, interest reipublicae ut sit finis litium which means that it is in the interest of the State that there should be an end to litigation and the other principle is nemo debet bis vexari, si constat curiae quod sit pro una et eademn causa* ***meaning thereby that no***

> ***one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause***. *This doctrine of res judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest.*
>
> *13. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of res judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of res judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties."*

(v) ***Hope Plantations Ltd. vs. Taluk Land Board, Peermade and Anr., (1999) 5 SCC 590***, wherein the following apposite observations are set out:- (SCC, at page 607, para 26)

> *"26. It is settled law that principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again* ***even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation****. These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are of common law origin. Again, once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if available……."*

(vi) ***D.S.V. Silo-Und Verwaltungs – Gesellschaft M.B.H. vs. Owners of the Sennar and 13 Other Ships, (1985) 1 W.L.R. 490 (House of Lords)***, wherein the buyers of Sudanese groundnut expellers brought an action for damages in a Dutch Court, which was dismissed by the Dutch Court holding that it had no jurisdiction to entertain the claim by virtue of the exclusive jurisdiction clause. The

buyers then brought an action in the Admiralty Court in England, which held that the buyers' claim did not fall within the exclusive jurisdiction clause in the Bill of Lading and that the plaintiffs were not estopped by the decision of the Dutch Court of Appeal from so asserting. The Court of Appeal allowed an appeal by the defendants holding that the plaintiffs were so estopped. On appeal by the plaintiffs the House of Lords dismissed the appeal. The law, in the words of Lord Brandon of Oakbrook, was as follows:-

> *"....a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned. If the expression "on the merits" is interpreted in this way, as I am clearly of opinion that it should be, there can be no doubt whatever that the decision of the Dutch Court of Appeal in the present case was a decision on the merits for the purposes of the application of the doctrine of issue estoppel."*

(vii) ***Makhija Construction & Engg. (P) Ltd. vs. Indore Development Authority and ors, (2005) 6 SCC 304***, wherein a fine

distinction between the principle of precedent and the principle of *res judicata* is drawn in the following words:-

> *"They refer to the principle of precedent* ***which is distinct*** *from the principle of res judicata. A precedent operates to bind in similar situations in a distinct case. Res judicata operates to bind parties to proceedings for no other reason, but that there should be an end to litigation."*

(viii) ***S. Nagaraj (dead) by LRs and Ors. vs. B.R. Vasudeva Murthy & Ors., (2010) 3 SCC 353***, wherein the Supreme Court again reiterated the distinction between the doctrine of *res judicata* and the doctrine of precedent and held that the principle of per incurium and other principles related to the doctrine of precedent have no relevance to the doctrine of *res judicata* whereunder whether a decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as *res judicata*. The following apposite observations were made in the said case:-

> *"**The High Court has failed to appreciate that the principle of per incurium has relevance to the doctrine of precedents but has no application to the doctrine of res judicata.** To quote Rankin, C.J. of the Calcutta High Court in Tarini Charan Bhattacharjee v. Kedar Nath Haldar AIR 1928 Cal 777: (AIR p.781)*

> *"(1)* ***The question whether decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as res judicata.*** *The doctrine is that in certain circumstances the Court shall not try a suit or issue but shall deal with the matter on the footing that it is a matter no longer open to contest by reason of a previous decision. In these circumstances it must necessarily be wrong for a court to try the suit or issue, come to its own conclusion thereon, consider whether the previous decision is right and give effect to it or not according as it conceives the previous decision to be right or wrong. To say, as a result of such disorderly procedure, that the previous decision was wrong and that it was wrong on a point of law, or on a pure point of law, and that therefore it may be disregarded, is an indefensible form of reasoning. For this purpose, it is not true that a point of law is always open to a party."*

(ix) ***K.K. Modi vs. K.N. Modi and Ors., (1998) 3 SCC 573***, wherein the Court has termed re-litigation as one of the examples of an abuse of the process of the Court as follows:- (SCC, at page 592, para 44)

> *"44.* ***One of the examples cited as an abuse of the process of the court is relitigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to re-litigate the same issue which has already been***

> ***tried and decided earlier against him.*** *The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be reagitated, it also amounts to an abuse of the process of the court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the court.* ***Frivolous or vexatious proceedings may also amount to an abuse of the process of court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted****……"*

30. On the basis of the aforesaid decisions, the learned Additional Solicitor General contended that the principles of Section 11 of the Code of Civil Procedure would squarely apply in the present case. Therefore, a second round of litigation is barred by the principles of *res judicata* and the public policy of India, and by seeking to re-initiate the proceedings before the London Court, **the defendant is not only trying to breach the PSC between the parties, but is following a course of conduct which is vexatious and oppressive, besides being in breach of Article 33 of the PSC whereunder the**

parties had agreed that the laws of India were not to be contravened.

31. Relying upon the decision of the Court of Appeal (Civil Division) rendered in ***Munib Masri vs. Consolidated Contractors International Company SAL, Consolidated Contractors (Oil & Gas) Company SAL [2008] EWCA Civ 625***, the learned Additional Solicitor General, further contended that re-litigation in a foreign jurisdiction of matters which are already *res judicata* between the parties by reason of a prior judgment can be a sufficient ground for grant of anti-suit injunction. The following apposite observations are set out:

> *"82. I do not accept the judgment debtors' argument that there is a principle (whether it is expressed as a condition for the exercise of the jurisdiction, or as an aspect of comity, or as an element in exercise of the discretion) that the English court will not restrain re-litigation abroad of a claim which has already been the subject matter of an English judgment adverse to the person seeking to re-litigate abroad.* ***It has been established since at least 1837 that the fact that the respondent is seeking to re-litigate in foreign jurisdiction matters which are already re judicata between himself and the applicant by the reason of an English***

judgment can be a sufficient ground for the grant of an anti-suit injunction.*"*

32. Next, adverting to the binding nature of the findings rendered by the Supreme Court, the learned Additional Solicitor General contended that a five-Judge Bench of the Supreme Court in the case of ***Rupa Ashok Hurra vs. Ashok Hurra and Anr., (2002) 4 SCC 388*** has placed matters beyond the pale of controversy by laying down in no uncertain terms 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.** The relevant part of the judgment reads as under:- (SCC, at pages 406-407, 412 and 417)

"24. There is no gainsaying that the Supreme Court is the Court of last resort - the final Court on questions both of fact and of law including constitutional law. The law declared by this Court is the law of the land; it is precedent for itself and for all the courts/tribunals and authorities in India. In a judgment there will be declaration of law and its application to the facts of the case to render a decision on the dispute between the parties to the lis. ***It is necessary to bear in mind that the principles in regard to the highest Court departing from its binding precedent are different from the grounds on which a final***

judgment between the parties, can be reconsidered*……"*

"25. In Hoystead vs. Commissioner of Taxation, Lord Shaw observed: (All ER p.62 B-C)

> *"**Parties are not permitted to begin fresh litigation** because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result…... If this were permitted litigation would have no end, except when legal ingenuity is exhausted."*

*"40. ……..**In a State like India, governed by rule of law, certainty of law declared and the final decision rendered on merits in a lis between the parties by the highest court in the country is of paramount importance.** The principle of finality is insisted upon not on the ground that a judgment given by the apex Court is impeccable but on the maxim interest reipublicae ut sit finis litium."*

*"57. ……..There cannot possibly be any manner of doubt that the **matter once dealt with by this Court attains a state of finality and no further grievance can be had in regard thereto.** The founding fathers of the Constitution decidedly provided that the decision of this Court was final, conclusive and binding – **final and conclusive inter partes** and binding on all. But the makers have also*

conferred a power of review of the judgment of this Court and the perusal of the provisions of Articles 137 and 145 makes it abundantly clear."

33. The learned Additional Solicitor General further contended relying upon the decision of a three-Judge Bench of the Supreme Court in ***Kunhayammed and Ors. vs. State of Kerala and Anr., (2000) 6 SCC 359,*** that the nature and scope of the power of the Supreme Court under Articles 136 and 141 is such that even when a petition for leave to appeal is dismissed by a speaking or reasoned order, Article 141 of the Constitution would be attracted and if there is a law declared by the Supreme Court, the said law would be binding on all Courts and Tribunals in India and certainly the parties thereto. The relevant extract of the judgment is reproduced hereunder:- (SCC, at pages 377-378, para 27)

"27. ……..If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141

> *of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India* ***and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this Court being the apex court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court****……."*

34. The learned Additional Solicitor General highlighted that the present case stands on a higher footing, in that leave to appeal has been granted in the instant case, and the appeal disposed of by a detailed order passed by the Supreme Court dealing with every aspect of the matter. Therefore, the judgment of the Supreme Court in the instant case is final, binding and conclusive between the parties and the only remedy available to the defendant is to file a review petition under Article 137 of the Constitution. The judgment of the Supreme Court even if it is contended to be erroneous or alleged to be passed without jurisdiction, the same can be corrected by the Supreme Court itself and cannot be dealt with collaterally by any other Court.

35. Elaborating on the aforesaid, he referred to the Constitution Bench decision of the Supreme Court in the case of ***A.R. Antulay vs. R.S. Nayak and Anr., (1988) 2 SCC 602***, wherein the Court with great lucidity and with utmost precision laid down:- (SCC, at page 651, para 40)

> *"40. The question of validity, however,* ***is important in that the want of jurisdiction can be established solely by a superior court and that, in practice, no decision can be impeached collaterally by any inferior court. But the superior court can always correct its own error****……."*

36. Referring to a recent decision delineating the wide powers of the Supreme Court of India under Article 136 of Constitution of India rendered in the matter of ***A. Subash Babu vs. State of Andhra Pradesh and Anr., (2011) 7 SCC 616***, learned ASG contended that by virtue of the special jurisdiction vested in the Supreme Court by Article 136, the argument of the defendant that the Supreme Court did not have the jurisdiction to rule on the juridical seat of arbitration loses all tenability. The following extract from the judgment deserves to be noted:- (SCC, at page 638, para 65)

> *"65. As held in* ***Ramakant Rai v. Madan Rai*** *following* ***Arunachalam v. P.S.R. Sadhanantham*** *and* ***P.S.R. Sadhanantham v. Arunachalam****, the appellate power vested in the Supreme Court under Article 136 is not to be confused with the ordinary appellate power exercised by appellate Courts and appellate tribunals under specific statutes. It is plenary power exercisable outside the purview of ordinary law to meet the demand of justice. Article 136 is a special jurisdiction. It is residuary power. It is extraordinary in its amplitude.* ***The limits of Supreme Court when it chases injustice, is the sky itself.****"*

37. In the context of the wide amplitude of the powers of the Supreme Court as a superior Court of record constituted by the Constitution, he also placed reliance upon the judgment of the Supreme Court rendered in the case of ***Delhi Judicial Service Association, Tis Hazari Court, Delhi vs. State of Gujarat and Ors., (1991) 4 SCC 406***, wherein it was observed by the Supreme Court as under:- (SCC, at page 453, para 38)

> *"……It is true that courts constituted under a law enacted by the Parliament or the State Legislature have limited jurisdiction and they cannot assume jurisdiction in a matter, not expressly assigned to them,* ***but that is not so in the case of a superior court of record constituted by the Constitution. Such a court***

> ***does not have a limited jurisdiction instead it has power to determine its own jurisdiction. No matter is beyond the jurisdiction of a superior court of record unless it is expressly shown to be so, under the provisions of the Constitution. In the absence of any express provision in the Constitution the Apex court being a court of record has jurisdiction in every matter and if there be any doubt, the Court has power to determine its jurisdiction.*** *If such determination is made by High Court, the same would be subject to appeal to this Court,* ***but if the jurisdiction is determined by this Court it would be final.*** *"*

38. He also relied upon the case of ***Ravi S. Naik vs. Union of India and Ors., 1994 Supp (2) SCC 641*** to urge that even in the case of a High Court which is a superior Court of record, it is for the Court to consider whether any matter falls within its jurisdiction or not. The relevant portion of the judgment is extracted hereinbelow:- (Supp SCC, at page 662, para 40)

> *"It is settled law that an order, even though interim in nature, is binding till it is set aside by a competent could and it cannot be ignored on the ground that the Court which passed the order had no jurisdiction to pass the same. Moreover the stay order was passed by the High Court which is a Superior Court of Record and "****in the case of a superior Court of Record, it is for the court to consider whether***

> ***any matter falls within its jurisdiction or not. Unlike a court of limited jurisdiction, the superior Court is entitled to determine for itself questions about its own jurisdiction.***"

39. The learned Additional Solicitor General on the basis of the aforesaid decisions contended that firstly, no matter or issue is beyond the jurisdiction of the Supreme Court which is the highest Court of the land and secondly, even if there is any doubt as to the jurisdiction of the Supreme Court, the Supreme Court alone can decide upon the same. Therefore, the judgment of the Supreme Court is binding on the parties unless and until the Supreme Court itself holds that it did not have jurisdiction.

40. Without prejudice to his aforesaid contentions, learned ASG submitted that as per the amended provisions of Explanation VIII of Section 11 of the Code of Civil Procedure, an issue decided by even a Court of limited or special jurisdiction is binding between the parties [See ***Sulochana Amma vs. Narayanan Nair, (1994) 2 SCC 14]***. For the facility of reference, the aforesaid provision is reproduced hereunder:-

> *"Explanation VIII.– An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."*

41. Learned Additional Solicitor General next contended that in any case, it is fundamental law that parties cannot vest a Court with jurisdiction it does not otherwise have. Thus, the London Court which does not have jurisdiction to go into the issue of 'juridical seat' cannot assume jurisdiction. In contrast, the plaintiff at all times possessed the right at common law to institute a suit before this Court and the said right cannot be extinguished on some mistaken notion that only London Courts can decide the issue raised in the present suit. The case of ***Oil and Natural Gas Commission vs. Western Company of North America, (1987) 1 SCC 496*** is a case in point. In the said case, the appellant ONGC entered into a drilling contract with the respondent Western Company of USA. The contract provided for reference to arbitration in case of any dispute arising out of the contract. The arbitration proceedings were to be governed by

the Indian Arbitration Act, 1940 read with the relevant rules. A dispute having arisen between the parties, the matter was referred to arbitration. The agreed venue under the contract was in London. An award rendered by the umpire in London was sought to be enforced by the American company in New York. The appellant ONGC filed arbitration petition before the Bombay High Court under Sections 30 and 33 for setting aside the award, seeking *ex parte* interim order restraining the American company from enforcing the award in New York. The Supreme Court after considering the rival contentions of the parties opined that to oblige the Indian company to contest proceedings before the American Court would be oppressive to the Indian company given the situation which had been created by the American company of seeking enforcement of the award in New York while a petition to set aside the award was instituted and pending in the Indian Court at the time of the institution of the action in the US Court. This was enough to entitle the Indian company to a restraint order. It held:- (SCC, at page 510, para 15)

> *"15. We are of the opinion that the appellant, ONGC, should not be obliged to face such a*

> *situation as would arise in the light of the aforesaid discussion in the facts and circumstances of the present case. To drive the appellant in a tight corner and oblige it to be placed in such an inextricable situation as would arise if the Western Company is permitted to go ahead with the proceedings in the American Court would be oppressive to the ONGC. It would be neither just nor fair on the part of the Indian Court to deny relief to the ONGC when it is likely to be placed in such an awkward situation if the relief is refused. It would be difficult to conceive of a more appropriate case for granting such relief. The reasons which have been just now articulated are good and sufficient for granting the relief and accordingly it appears unnecessary to examine the meaning and content of the relevant articles of the New York Convention for the purposes of the present appeal."*

42. Significantly, in the aforesaid case, the High Court which at the first instance granted interim restraint order to the ONGC subsequently vacated the interim order granted by it earlier *inter alia* on the ground that it was open to the ONGC to contend before the US Court that the petition for setting aside the award which was sought to be enforced in the US Court was already pending in the Indian Court. Disagreeing with the aforesaid view of the High Court, the Supreme Court observed:- (SCC, at pages503-504, para 7)

"7. The High Court has examined the question as to whether the action instituted by the Western Company against ONGC was maintainable in the context of the New York Convention in the light of the relevant Articles of the Convention and has come to the conclusion that an action to enforce the award in question as a foreign award in the US Court was quite in order. The view is expressed that the mere fact that a petition to set aside the award had already been instituted in the Indian Court and was pending in the Indian Court at the time of the institution of the action in the US Court was a matter of no consequence, for the purposes of consideration of the question as to whether or not Western Company should be restrained from proceeding further with the action in the US Court. Now, there cannot be any doubt that the Western Company can institute an action in the US Court for the enforcement of the award in question notwithstanding the fact that the application for setting aside the award had already been instituted and was already pending before the Indian Court. So also there would not be any doubt or dispute about the proposition that the ONGC can approach the US Court for seeking a stay of the proceedings initiated by the Western Company for procuring a judgment in terms of the award in question. ***But merely on this ground the relief claimed by ONGC cannot be refused. To say that the Court in America has the jurisdiction to entertain the action and to say that the American Court can be approached for staying the action is tantamount to virtually cold-shouldering the***

> ***substantial questions raised by ONGC and seeking an escapist over-simplification of the matter. The points urged by the ONGC are of considerable importance and deserve to be accorded serious consideration.****"*

43. Learned ASG argued that the jurisdiction exercised by the Indian Supreme Court was well within its competence in view of the fact that the parties are Indian, domiciled in India, properties and assets under the contract which has been executed in Delhi are within the territory of India and the performance of the contract is also in Indian territory and the same is governed by the laws of India with an overriding stipulation that: *"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."* The Indian Supreme Court is thus the natural forum i.e the forum with which the parties and the contract has the most real and substantial connection. Thus, Indian Courts have not only personal jurisdiction but also subject matter and territorial jurisdiction. When the award is to be enforced either against the assets or the person of the award debtor, only the Indian Court can enforce the same.

Therefore, its determination on the seat issue, which was squarely raised and which was required to be determined for the purpose of deciding the applicability of or otherwise of Part I of the Act, was within the competence of the Apex Court of India. It has been held by the Hon'ble Supreme Court of India in the matter of ***Man Roland Druckimachinen Ag vs. Multicolur Offset Ltd and Anr., (2004) 7 SCC 447*** as under:-

> *"Undoubtedly, when the parties have agreed on a particular forum, the courts will enforce such agreement. This is not because of a lack or ouster of its own jurisdiction by reason of consensual conferment of jurisdiction on another court, but because the court will not be party to a breach of an agreement…."*

44. The Supreme Court was required to enter a finding as to where is the juridical seat of arbitration and what is the curial law governing the arbitration to rule upon the applicability or otherwise of Part I of the 1996 Act. Sub-section (2) of Section 2 of the 1996 Act requires the Court to decide where is the juridical seat of arbitration. That is what the Supreme Court has done and the relief was granted to the defendant on that basis alone. The defendant cannot and should not

be permitted to pick and choose from a judgment it has won. On this basis alone, it was argued, there was no merit in the contention of the defendant that the Indian Supreme Court did not possess the competence to decide the seat issue.

45. Learned ASG next contended that without prejudice to his contentions with regard to the width and amplitude of the powers of the Supreme Court and that it was not open to the defendant to contend that the High Court of Justice, Queen's Bench Division, Commercial Court, London is the Court which can render a finding on the juridical seat of arbitration, **it was open to the parties to invoke the jurisdiction of the Supreme Court to render a finding on the juridical seat of arbitration**. It was so laid down in the case of ***A.P. State Financial Corporation vs. M/s. Gar Re-Rolling Mills and Anr., (1994) 2 SCC 647***, wherein while dealing with the right vested in the Corporation under Section 29 of the State Financial Corporations Act, 1951, the Supreme Court opined that the right vested in the Corporation under the aforesaid Section is besides the right already possessed at common law to institute a suit or the right

available to it under Section 31 of the Act. The following pertinent observations were made by it:- (SCC, at page 660, para 15)

> *"15. The Doctrine of Election clearly suggests that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different. To hold otherwise may lead to injustice and inconsistent results."*

46. Learned Additional Solicitor General pointedly drew the attention of this Court to the conduct of the defendant throughout, highlighting that the defendant at every given point of time has suppressed material facts from the Court including the Supreme Court and its malicious conduct was evident from the following:-

(i) The defendant did not disclose before the Hon'ble Supreme Court that it had filed proceedings before the London Court on the same subject matter.

(ii) Despite a clear order dated 20.10.2009 from the London Court for service of the plaintiff, the defendant did not get the service effected on the plaintiff till April, 2010,

i.e., after the Supreme Court had reserved judgment in the case.

(iii) In the written statement filed on behalf of the defendant on 09.01.2012 before the Malaysian High Court, the defendant did not disclose:-

a. The Supreme Court proceedings.

b. The London proceedings.

c. The proceedings relating to the present suit.

47. To sum up, the learned Additional Solicitor General contended that the mere initiation of a proceeding in breach of the principle of *res judicata* is abuse of the process which makes the foreign proceedings vexatious and oppressive. It is this re-commencement of proceedings by the defendant in the English Court which is sought to be injuncted by filing the present suit. If the contention of the defendant is accepted that only the foreign court before whom the proceedings are pending can decide the said issue, then in that case the entire concept and purpose of anti-suit injunction would be lost and defeated. In the present case, there is a judgment in favour of the

plaintiff from the highest court, i.e., the Supreme Court of India, and, therefore, the proceedings initiated before the London Court are highly oppressive and vexatious. The contention of the defendant based on comity of courts is also misplaced for the reason that the Hon'ble Supreme Court by its order dated 06.09.2010 had earlier directed the parties not to proceed with the London proceedings. At that time, no such contention of comity of courts was raised and, therefore, this argument is only an after-thought and without any basis. Even otherwise, the reliance placed by the defendant on the principle of comity of courts loses sight of the fact that the grant of an injunction is not towards any foreign court but only against the parties who are amenable to the jurisdiction of this Court.

48. In view of the aforesaid, the learned Additional Solicitor General submitted that the plaintiff has made out a *prima facie* case in its favour justifying the grant of an injunction against the defendant. The balance of convenience is also tilted in favour of the plaintiff and irreparable injury is likely to be caused to the plaintiff if the plaintiff is forced to join the London proceedings, in which event the entire

suit will be rendered infructuous whereas, on the other hand, proceedings can be re-commenced before the London Court if ultimately the present suit is dismissed by this Court.

DEFENDANT'S CONTENTIONS

49. Responding to the arguments advanced by the learned Additional Solicitor General, Mr. Amit Sibal, the learned counsel for the defendant contended that the issue before this Court is not whether the observations in paragraphs 12 and 13 of the Supreme Court judgment operate as *res judicata* so as to bar the English claim.

The issue before this Court is whether:-

(a) The English Court deciding whether the defendant's English claim is barred by *res judicata* pursuant to the plaintiff's application is so abusive, oppressive and vexatious as to defeat the ends of justice and to perpetuate injustice; and/or

(b) The principle of Comity of Nations does not come in the way of barring this Court from exercising its jurisdiction to decide whether the English claim is

barred by *res judicata* pursuant to the plaintiff's application.

It is submitted that only if the answer to both the above is in the affirmative, can an anti-suit injunction be granted. It is further submitted that **the plaintiff has failed to make out a prima facie case on either of the abovementioned conditions and hence no relief ought to be granted to the plaintiff**.

50. For substantiating the aforesaid contention, the learned counsel for the defendant referred to the tests laid down by the Supreme Court in the case of ***Modi Entertainment Network and Anr. vs. W.S.G. Cricket Pvt. Ltd. (2003) 4 SCC 341*** in the following terms:- (SCC, at page 360, paragraph 24)

> *"24. From the above discussion the following principles emerge:*
>
> *(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:-*
>
> *(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;*
>
> *(b)* ***if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and***

(c) ***the principle of comity – respect for the court in which the commencement or continuance of action/ proceeding is sought to be restrained – must be borne in mind.****"*

(2) *In a case where more forums than one are available, the Court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (Forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexations or in a forum non-conveniens;*

(3) *Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case;*

(4) *A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of*

proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like;

(5) Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to non-exclusive jurisdiction of the court of their choice which cannot be treated just an alternative forum;

(6) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court

of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens; and

(7) The burden of establishing that the forum of the choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same.

51. Reliance was also placed by the learned counsel for the defendant on a decision rendered by the High Court of Justice, Queen's Bench Division, Admiralty Court in ***Seismic Shipping Inc., Westerngeco Ltd. vs. Total E&P UK Plc, The Western Regent (2005) EWHC 460 (Admlty)*** [as upheld by the Court of Appeal], and in particular on the following dictum laid down in the said case:-

> *"……the function of an anti suit injunction is to prevent unconscionable conduct and not, in effect, to ensure recognition of an English judgment in a friendly foreign jurisdiction."*

52. In support of his contention that **the tests for the grant of an anti-suit injunction as laid down in the aforesaid two decisions have not been met in the instant case**, the learned counsel for the

defendant vehemently contended that the proceedings before the English Court cannot be termed as abusive, oppressive and/or vexatious. He emphasized that the purpose of anti-suit injunctions is to prevent abusive proceedings and not to ensure enforcement of judgments in a *"foreign friendly jurisdiction"*.

53. The next plank of the contentions of the learned counsel for the defendant is that even otherwise, **the English Court is the appropriate Court to decide whether or not the defendant's claim in England is barred by *res judicata***. He contended that the bar of *res judicata* is a procedural bar that can only be raised as a defence to a claim in the forum where the claim is filed. Thus, the issue of whether or not a subsequent proceeding is barred by *res judicata* needs to be determined by the Court where the subsequent proceeding has been filed, in this case the English Court. To buttress his said contention, he referred to the four conditions required under Indian Law for the application of principle of *res judicata* as summarized by the Supreme Court in the case of ***Syed Mohd. Salie Labbai (Dead) by LRs and Ors. vs. Mohd. Hanifa (Dead) by LRs and Ors. (1976) 4***

SCC 780, which, he stated, were similar to the conditions applicable under the English Law. The said conditions are as set out below:- (SCC, at page 790, para 7)

> *"(1) that the litigating parties must be the same;*
> *(2) that the subject-matter of the suit also must be identical;*
> *(3) that the matter must be finally decided between the parties; and*
> *(4) that the suit must be decided by a court of competent jurisdiction."*

54. Relying upon the aforesaid principles laid down in ***Syed Mohd. Salie Labbai (supra)***, Mr. Sibal urged that Section 11 of the Code of Civil procedure, 1908 stipulates that no Court shall try any suit or issue which has been decided in a former suit between the same parties. Therefore, **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. Thus, there is no occasion for this Court to decide whether the claim before the English Court is barred by *res judicata*.

55. **Alternatively**, he contended on behalf of the defendant that **the Court of the country whose law governs the arbitration**

agreement has the exclusive jurisdiction to decide all disputes relating to the arbitration clause. Differently put, the contention is that where Part I of the Act has been excluded, the only role to be played by the Indian Courts is under Part II of the Act at the stage of enforcement of the Foreign Award, if and only if the successful party chooses to enforce the award in India under Part II of the Act. Any and all other proceedings must be filed in the Courts of the country whose laws apply to arbitration agreement. Since the issue of 'seat of arbitration' is contained in the arbitration clause, only the English Courts have jurisdiction to decide the said issue. Referring to the judgment of the Supreme Court in ***National Thermal Power Corporation vs. Singer Company and Ors. (1992) 3 SCC 551***, the learned counsel for the defendant contended that the law in this context was lucidly laid down in paragraph 26 of the said judgment as follows:- (SCC, at page 564, para 26)

> *"Whereas, as stated above, the proper law of arbitration (i.e., the substantive law governing arbitration) determines the validity, effect and interpretation of the arbitration agreement, the arbitration proceedings are conducted, in the absence of any agreement to the contrary, in*

accordance with the law of the country in which the arbitration is held. On the other hand, if the parties have specifically chosen the law governing the conduct and procedure of arbitration, the arbitration proceedings will be conducted in accordance with that law so long as it is not contrary to the public policy or the mandatory requirements of the law of the country in which the arbitration is held. If no such choice has been made by the parties, expressly or by necessary implication, the procedural aspect of the conduct of arbitration (as distinguished from the substantive agreement to arbitrate) will be determined by the law of the place or seat of arbitration. Where, however, the parties have, as in the instant case, stipulated that the arbitration between them will be conducted in accordance with the ICC Rules, those rules, being in many respects self-contained or self-regulating and constituting a contractual code of procedure, will govern the conduct of the arbitration, except insofar as they conflict with the mandatory requirements of the proper law of arbitration, or of the procedural law of the seat of arbitration. [See the observation of Kerr, LJ. in ***Bank Mellat v. Helliniki Techniki SA (1983) 3 All E.R. 428 (CA)****. See also* ***Craig, Park and Paulsson, International Chamber of Commerce Arbitration, 2nd edn. (1990)]****. To such an extent the appropriate courts of the seat of arbitration, which in the present case are the competent English courts, will have jurisdiction in respect of procedural matters concerning the conduct of arbitration. But the overriding principle is that the courts of the*

> *country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement. [See Mustil & Boyd, Commercial Arbitration, 2nd edn.; Allen Redfern and Martin Hunter, Law & Practice of International Commercial Arbitration, 1986; Russel on Arbitration, 20th edn. (1982); Cheshire & North's Private International Law, 11th edn. (1987)].*

56. A recent judgment of the Supreme Court rendered in the case of ***Yograj Infrastructure Ltd. vs. Ssang Yong Engineering and Construction Co. Ltd., 2011 (9) SCALE 567*** was also referred to by Mr. Sibal to fortify his contention that once the parties had specifically agreed that the arbitration proceedings would be conducted in accordance with the English Law, it was no longer open to the plaintiff to contend that Indian Courts have jurisdiction to entertain the plaintiff's defence of *res judicata*. In the case of ***Yograj Infrastructure (supra)***, an appeal under Section 37(2)(b) of the

Arbitration and Conciliation Act, 1996 for setting aside the interim order passed by the learned arbitrator was filed before the District Judge, Narsinghpur on behalf of the appellant. The learned District Judge dismissed the appeal accepting the submissions advanced on behalf of the respondent that the said appeal was not maintainable since the seat of the arbitration proceedings was in Singapore and the said proceedings were governed by the laws of Singapore. The Civil Revision filed against the order of District Judge was also dismissed by the High Court, against which a Special Leave Petition was filed. The Supreme Court noting that there was no ambiguity that the curial law with regard to the arbitration proceedings was the SIAC Rules and the seat of arbitration was Singapore, held that the question which arose was whether in such a case the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996, which indicate that Part I of the Act would apply where the place of arbitration is in India, would be a bar to the invocation of the provisions of Sections 34 and 37 of the Act, as far as the arbitral proceedings in the case before the Supreme Court were concerned. After considering the judgment in

Bhatia International vs. Bulk Trading S.A., (2002) 4 SCC 105 and noting that the decision therein had been subsequently applied in the case of ***Venture Global Engg. (supra)*** and ***Citation Infowares Ltd. vs. Equinox Corporation, (2009) 7 SCC 220***, the Court held that once the parties had specifically agreed that the arbitration proceedings would be conducted in Singapore in accordance with the SIAC Rules, which includes Rule 32 whereunder the International Arbitration Act is made applicable, the decision in ***Bhatia International (supra)*** and the subsequent decisions on the same lines would no longer apply, the parties having willfully agreed to be governed by the SIAC Rules.

57. The third contention of the learned counsel for the defendant is predicated on the principle of Comity of Nations as recognized by the Indian Courts, including the Supreme Court of India. **The principle of Comity of Nations**, Mr. Sibal urges, **precludes the grant of anti-suit injunctions barring the rarest of rare cases**. Such injunctions, in particular, cannot be granted where a party has already challenged a foreign Court's jurisdiction until such party has failed in such challenge. This principle, Mr. Sibal contends, has been recognized by

a Division Bench of this Court in the case of ***Horlicks Ltd. and Anr. vs. Heinz India (Pvt.) Ltd., 2010 (42) PTC 156 (Del.) (DB)*** where a judgment of the Canadian Supreme Court was quoted with approval as follows:- (PTC, at pages 192-193)

> *"In this respect the anti-suit injunction is unique in that the applicant does not have to establish that the assumption of jurisdiction by the foreign court will amount to an actionable wrong. Moreover, although the application is heard summarily and based on affidavit evidence, the order results in a permanent injunction which ordinarily is granted only after trial. In order to resort to this special remedy consonant with the principles of comity, it is preferable that the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and failed."*

58. It was emphasized that the English Court is respecting the principle of Comity, as the English Court has not proceeded with hearing the defendant's claim on merits. Instead, the English Court is only completing the pleadings so that the plaintiff's application contesting the jurisdiction of the English Court can be heard on the

dates fixed, i.e., on 5th and 6th March, 2012. In such circumstances, in the event the English proceedings are injuncted by this Court prior to the English Court even examining its own jurisdiction, it would amount to an irreparable affront to the Comity of Nations, which has been recorded as one of the guiding principles to be kept in mind by Courts in deciding whether or not to grant anti-suit injunctions. In any event, keeping in mind the principles laid down by the Supreme Court of India in ***Modi Entertainment Network (supra)***, this Court would have to apply a much higher standard of proof in considering whether the English proceedings in London are so abusive as to defeat the ends of justice and to perpetuate injustice.

59. The fourth contention of the learned counsel for the defendant is two pronged. The first prong is that **in the event anti-suit injunction is not granted by this Court, there would be no loss of legitimate juridical advantage to the plaintiff**, who would be then required to further pursue its application before the English Court. The second prong is that **if, on the other hand, an anti-suit**

injunction is granted by this Court, the arbitration proceedings would end in a stalemate.

60. Dealing first with the first limb of his argument that there would be no loss of legitimate juridical advantage to the plaintiff in case anti-suit injunction is not granted by this Court, Mr. Sibal urged the following points:-

(i) The plaintiff has been actively pursuing its application before the English Court challenging the jurisdiction of the English Court since June, 2011 and the expenditure already incurred by the plaintiff in the pursuit of its application before the English Court would also be wasted if the English proceedings are injuncted. It is the plaintiff's own case that the pleas raised by the plaintiff before this Court and the English Court are identical. There is no reason to pre-suppose that the plaintiff will not be given a full and complete hearing of its application before the English Court.

(ii) The principles of *res judicata* in India and England are substantially the same. In fact, the jurisprudence on the issue of *res judicata* as cited by the Supreme Court of India from time to time is largely quoted from an English authority, viz., ***Dicey, Morris & Collins on the Conflict of Laws,*** *14th Edn., Vol.I, Page 579 at para 14-027.* The relevant extract for the facility of reference is reproduced hereunder:-

> *"**Clause (2) of the Rule.** A foreign judgment may be relied on in English proceedings otherwise than for the purpose of its enforcement. A claimant who has brought proceedings abroad and lost may seek to bring a similar claim in England; or in proceedings on a different claim an issue may be raised which has been decided abroad. In such cases a foreign judgment entitled to recognition may give rise to res judicata, i.e., to a cause of action estoppel, which prevents a party to proceedings from asserting or denying, as against the other party, the existence of a cause of action, the nonexistence or existence of which has been determined by the foreign court, or to an issue estoppel, which will prevent a matter of fact or law*

necessarily decided by a foreign court from being re-litigated in England."

(iii) Since the year 1953, there has been a reciprocity between India and England in enforcing judgments which continues till today. In India, foreign judgments are being enforced under Section 44-A of the Code of Civil Procedure, 1908 provided the judgment is made in a reciprocating territory. United Kingdom and Northern Ireland have been notified as reciprocating territories by the plaintiff/Union of India vide Notification No.SRO 399 dated 01.03.1953. Likewise, the United Kingdom recognizes judgments from reciprocating territories as per the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (Section 8). Pursuant to this Act, India was notified as a reciprocating territory in 1953, which was amended in 1958 by way of Reciprocal Enforcement of Judgments (India) Order, 1958 (Sections 3 and 4).

(iv) In view of the above, the proceedings pending before the English Courts are not oppressive or vexatious in any manner whatsoever. It is also not understood how the plaintiff contends that it will suffer irreparable injury when there has been no change in circumstances or trigger between May 11, 2011 when the judgment of the Supreme Court was rendered and the filing of the instant suit.

(v) The plaintiff itself having invoked the jurisdiction of the English Court to decide the issue of *res judicata,* during the pendency of the plaintiff's application before the English Court there is no cause of action for filing the present suit. In this regard, the correspondence exchanged between the parties as also the record of the English Court amply demonstrates that the plaintiff has not only invoked the jurisdiction of the English Court but is actively pursuing its application before the English Court and cannot now be heard to say that it was

compelled to submit to the jurisdiction of the English Court to decide the issue of *res judicata*.

61. On the second limb of his argument that if an anti-suit injunction was to be granted, the arbitration would be left in stalemate, Mr. Sibal submitted that:

(i) The Malaysian Court by its judgment dated 05.08.2009 has refused to exercise jurisdiction, *inter alia*, on the ground that the seat of the arbitration was permanently shifted to London.

(ii) The Supreme Court has held that Indian Courts do not have the jurisdiction to decide whether the seat is London or Kuala Lumpur.

(iii) The defendant has always maintained that only the English Courts have jurisdiction to decide the issue of the seat of arbitration. On this conspectus, if this Court were to hold that the English Courts cannot decide the issue of seat, the arbitration would remain in a stalemate indefinitely. For this reason alone, the interpretation of

the Supreme Court judgment as submitted by the plaintiff ought not to be accepted.

62. The fifth contention put forth by the learned counsel for the defendant is that the defendant is eventually likely to succeed in showing that the observations made in paras 12 and 13 of the Supreme Court judgment would not operate as *res judicata* and, therefore, **the defendant's plea that the English claim is not barred is not unconscionable**. A four-fold argument is raised in support of this contention:-

(A) **Observations by the Supreme Court on the seat of arbitration were not necessary** for the decision of the case before the Supreme Court which related to whether or not the Indian Courts had no jurisdiction, **and were thus in the nature of obiter**.

(B) Observations of the Supreme Court in paras 12 and 13 of its judgment are in relation to the Indian Arbitration Act, 1996, which stands excluded in the latter part of the judgment of the Supreme Court.

(C) Even as per Indian Law, the observations in paras 12 and 13 of the Supreme Court would not operate as *res judicata*.

(D) The fact that OMP No.255/2006 stood dismissed and the appeal was allowed indicates that the Supreme Court never considered the question of juridical seat of arbitration.

63. Elaborating the aforesaid, the learned counsel for the defendant contended that OMP No.255 of 2006 was filed by the plaintiff, *inter alia*, seeking a declaration that the seat of arbitration remained at Kuala Lumpur. The High Court by its order dated 30th April, 2008 did not decide the issue of seat of arbitration nor entered into the merits of the case of the plaintiff. The High Court only held that it had jurisdiction to hear OMP No.255 of 2006. It was against this order that an appeal was preferred by the defendant to the Supreme Court. The thrust of the submissions before the Supreme Court was that the Indian Courts have no jurisdiction, since Part I of the Act has been excluded in view of the fact that the seat of arbitration is outside

India and the law governing the arbitration agreement was chosen by the parties to be English law. Thus **the issue regarding seat of arbitration was not before the Supreme Court and the Supreme Court was not called upon to decide which foreign court has jurisdiction to decide the seat of arbitration**. In fact, the Supreme Court in para 2 of its judgment identified the question which arose for consideration before the Supreme Court as follows:-

> ***"2. Whether the Delhi High Court could entertain the petition filed by the Respondents under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") for grant of a declaration that Kuala Lumpur (Malaysia) is contractual and juridical seat of arbitration and for issue of a direction to the arbitral tribunal to continue the hearing at Kuala Lumpur in terms of clause 34 of Production Sharing Contract (PSC) is the question which arises for consideration in this appeal."***

64. Mr. Sibal urged that the Supreme Court judgment is the best indicator of what was argued by the respective counsel and the reliance placed by Mr. Chandiok, the learned ASG on the written submissions of the defendant to contend that the defendant had invoked the jurisdiction of the Supreme Court to rule on whether the

seat of arbitration is Kuala Lumpur or London is misconceived. The then learned Solicitor General Mr. Gopal Subramaiam had made arguments on the merits of which is the seat of arbitration (See para 10 of the Supreme Court judgment). It is for this reason alone that the written submissions of the defendant clearly state that the submissions on the issue of seat of arbitration are being made without prejudice to the defendant's contention that the issue whether the seat is London or Kuala Lumpur is not relevant for the determination of the SLP and are only being made to respond to the submissions of the plaintiff in this regard. Thus, **it cannot be said that the defendant invited a decision from the Supreme Court on the issue of the seat of arbitration**. The defendant in fact has consistently contended that the English Courts are the Courts competent to decide the issue of seat. Without prejudice to this contention, even if it is said that the defendant invited a decision on the seat of arbitration, the Hon'ble Supreme Court subsequently held that Indian Courts would not have jurisdiction to decide the issue.

65. According to Mr. Sibal a close reading of paras 15 to 19 of the judgment of the Supreme Court which resulted in the dismissal of OMP No.255 of 2006 in para 20, shows that the conclusion of the Supreme Court was based on the fact that the seat of arbitration was outside India and the law of the Arbitration Agreement was English Law. This is also clear from the fact that the Supreme Court relied upon para 21 of ***Bhatia International (supra)*** which refers to the seat of arbitration being outside India as the relevant criteria to determine exclusion of Part I of the Act. Significantly also, he states, the Supreme Court did not dispose of the OMP No.255 of 2006 but dismissed the same in its entirety as not maintainable on the ground of lack of jurisdiction. This conclusion arrived at by the Supreme Court was based on the seat of arbitration being outside India and the arbitration agreement between the plaintiff and the defendant being governed by English law and no part of the reasoning depended on whether the seat of arbitration was at London or Kuala Lumpur. Mr. Sibal also pointed out that the plaintiff, in the review petition filed by it before the Supreme Court, accepts that the issue as to whether the

observations in paras 12 and 13 of the judgment are binding or not was an arguable one. In fact, it is expressly stated by the plaintiff as follows:-

> *"Because law as declared by this Hon'ble Court is binding under Article 141 of the Constitution of India, however, in the present case the order dismissing the petition under Section 9 of the Arbitration and Conciliation Act could lead to arguments about the binding nature of law declared by this Hon'ble Court."*

66. Next, adverting to his contention that the observations in paras 12 and 13 of the Supreme Court judgment are in relation to the Indian Arbitration Act, 1996 which stands excluded, Mr. Sibal, the learned counsel for the defendant, contended that what the Supreme Court in fact observed was that while the English Arbitration Act, 1996 allowed parties to alter the seat of arbitration, the Indian Act did not, as was evident from the following observations in paragraph 13:-

> *"A reading of the above reproduced provision shows that under the English law the seat of arbitration means juridical seat of arbitration, which can be designated by the parties to the arbitration agreement or by any arbitral or other institution or person empowered by the parties to do so or by the arbitral tribunal, if so authorised by the parties.* ***In contrast****, there is*

> *no provision in the Act under which the arbitral tribunal could change the juridical seat of arbitration which, as per the agreement of the parties, was Kuala Lumpur."*

67. Without prejudice to the aforesaid, Mr. Sibal contended that **even if the Supreme Court had made observations with regard to the seat of arbitration, the same would not operate as *res judicata* in view of the fact that the Supreme Court ultimately held that this Court had no jurisdiction to entertain OMP No.255 of 2006** filed by the plaintiff and pursuant to the Supreme Court judgment, this Court was pleased to dismiss the said OMP. In support of his contention that the observations in paras 12 and 13 of the Supreme Court judgment would not operate as *res judicata* even as per Indian Law, reference was made by Mr. Sibal to the decision rendered by the Supreme Court in ***Pawan Kumar Gupta vs. Rochiram Nagdeo, (1999) 4 SCC 243***, wherein it was observed as under:- (SCC, at page 250, para 19)

> ***"19. Thus the sound legal position is this: if dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit."***

68. On the basis of the aforesaid observations made in the case of ***Pawan Kumar Gupta (supra)***, it was argued that the observations made by the Supreme Court in paras 12 and 13 of its judgment are of no consequence in view of the decision contained in para 20 by which the OMP pending before the High Court was dismissed as not maintainable for want of jurisdiction.

69. Referring to the reliance placed by the plaintiff on Explanation (viii) of Section 11 CPC and the judgment of the Supreme Court reported in ***Sulochana Amma (supra)***, Mr. Sibal, the learned counsel for the defendant, submitted that the defendant has no quarrel with the submission of the plaintiff that even if there be a proceeding in a forum of limited jurisdiction or special jurisdiction, the final decision on the merits of an issue in that proceeding will be *res judicata* in a subsequent proceeding between the same parties, even if the said forum does not have jurisdiction to entertain the subsequent proceeding. This proposition, however, has no bearing on the present

case since indubitably the Supreme Court is not a Court of limited or special jurisdiction.

70. Referring to the consent order dated 06.09.2010 passed in IA No.4/2010, Mr. Sibal argued that it was open to the Supreme Court to decide that Indian Courts had jurisdiction to decide the seat and remand the matter back to the High Court for a decision on which is the seat of arbitration. It was for this reason that the defendant gave its consent and for no other. The contention of the learned ASG that the order on 06.09.2010 pursuant to IA No.4/2010 constitutes an agreement by the parties that the Supreme Court will decide the issue of 'seat of arbitration' is, therefore, wholly fallacious.

71. It was also contended that **even otherwise any decision of a Court passed without jurisdiction is a nullity and such a decision would not give rise to the bar of *res judicata***. [***Sri Athmanathaswami Devasthanam vs. K. Gopalaswami Ayyangar, (1964) 3 SCR 763*** at para 14***; Hasham Abbas Sayyad vs. Usman Abbas Sayyad and Others, (2007) 2 SCC 355*** *at para* 22; ***Muthavalli of Sha Madhari Diwan Wakf, S.J. Syed Zakrudeen and***

Anr. vs. Syed Zindasha and Ors., (2009) 12 SCC 280 at para 19; ***Syed Mohd. Salie Labbai (Dead) by L.R.s and Ors. vs. Mohd. Hanifa (Dead) by L.R.s and Ors., (1976) 4 SCC 780*** at para 7.]

72. It was also contended that **since an appeal is a continuation of the original proceeding, the Supreme Court could not have and in fact did not decide an issue which this Court did not have the jurisdiction to decide**. Emphasis was laid on the following observations made by the Supreme Court in the case of ***Rachakonda Narayana vs. Ponthala Parvathamma & Anr., (2001) 8 SCC 173***: (SCC, at page 178, para 10)

> *"……..An appeal is a continuation of the suit. When an appellate Court hears an appeal, the whole matter is at large. The appellate Court can go into any question relating to rights of the parties* ***which a trial Court was entitled to dispose of*** *provided the plaintiff possesses that right on the date of filing of the suit."*

73. Rebutting the contentions of the learned Additional Solicitor General, Mr. Sibal urged that in the instant case **it was not open to the plaintiff to rely either upon *'issue estoppel'* or upon *'cause of action estoppel'***. The defendant had succeeded on the issue

submitted to the Supreme Court that this Court did not have jurisdiction to entertain OMP No.255 of 2006. Therefore, it was not open to the plaintiff to plead *issue estoppel* against the defendant and in fact ***issue estoppel*** **was wholly inapplicable** to the present case, more so, in view of the fact that the Supreme Court did not apply the observations made by it in paras 12 and 13 to arrive at its conclusion at paras 19 and 20. Insofar as *cause of action estoppel* is concerned, he contended that the same was rightly not even pleaded by the plaintiff.

74. Mr. Sibal urged that it is trite that **parties by consent, waiver or acquiescence cannot confer jurisdiction upon a Court which it does not possess. A decision made by such a Court is *non est***. It was so held in ***Harshad Chiman Lal Modi vs. DLF Universal Ltd. and Anr., (2005) 7 SCC 791***, wherein the Supreme Court while classifying the jurisdiction of a Court into three categories, viz., (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter, opined that jurisdiction as to

subject-matter is totally distinct and stands on a different footing, observing: (SCC, at pages 803-804, paras 30 and 32)

> *"30. ……Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.*
> *31. ……*
> *32. In **Bahrein Petroleum Co.**, this Court also held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well-settled and needs no authority that "where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing." A decree passed by a court having no jurisdiction is non est and its invalidity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a court without jurisdiction is a coram non judice."*

75. The sixth contention of the learned counsel for the defendant is that **the present suit is oppressive, abusive, vexatious and malafide as it is the worst imaginable case of forum shopping by the plaintiff.** In this context, it is submitted that the plaintiff at its own instance is blatantly forum shopping before three separate

jurisdictions, viz., before the English Court, before the Court at Malaysia and before this Court. And as a matter of fact, the plaintiff has all along been forum shopping since the passing of the Partial Award on 31.03.2005 by challenging the Partial Award in different fora and has also been forum shopping on the seat of arbitration. It has been categorically admitted by the plaintiff that the pleas raised by the plaintiff before this Court and before the English Court are identical. This form of blatant forum shopping, Mr. Sibal contends, has invited the disapproval of this Court in the judgment rendered by a Division Bench of this Court in the case of ***Essel Sports Pvt. Ltd. vs. BCCI and Ors., 178 (2011) DLT 465 (DB)*** in the following words: (DLT, at page 488, para 27)

> *"27. Having concurred with the learned Single Judge that the UK action is a two or multiple forum lis, we shall venture forward to assess whether the UK action is oppressive or vexatious. Mr. Salve's contention in this regard has already been noted by us above. We agree that in a commercial dispute, the compulsion to defend an action in a foreign jurisdiction may not invariably lead to the conclusion that the foreign proceedings are oppressive; however,* ***having to defend the same allegations by the***

***same party in two different jurisdiction is unquestionably oppressive.**"*

76. Mr. Sibal next contended that **the plaintiff is not entitled to seek any relief by invoking the equitable jurisdiction of this Court** in view of the blatant concealment and mis-statements made by the plaintiff before this Court including suppression of documents having significance to the *lis* between the parties, such as application for clarification filed by the plaintiff; plaintiff's Notice of Motion and Memorandum of Appeal filed before the Court of Appeal, Malaysia; Written Submissions filed by the defendant before the Supreme Court; plaintiff's application dated 12th August, 2010 filed in the English Court along with affidavit of Mr. David Richard Brynmor Thomas; affidavits of Ms. Pomila Jaspal, Mr. Partha Sarathi Das and Ms. Simran Dhir; Case Management Information Sheet of the plaintiff before the English Court; correspondence between the plaintiff's English counsel and the defendant's English counsel including letters dated 3rd November, 2011, 7th November, 2011, 12th December, 2011 and 15th December, 2011; order dated 14th November, 2011 which was a consent order passed by the English

Court fixing the time schedule for the exchange of expert evidence and the order dated 15th December, 2011 which was also a consent order passed by the English Court extending the time line to 6th January, 2012 for the plaintiff to file its expert evidence.

77. Besides the aforesaid suppression of material documents by the plaintiff, Mr. Sibal contended that **it is malafide and abusive for the plaintiff to contend that the Supreme Court has conclusively decided the issue of seat of arbitration despite the fact that the Special Leave petition was allowed in favour of the defendant and OMP No.255 of 2006 was dismissed**. He contended that the malafide conduct of the plaintiff was clearly evidenced by the fact that the plaintiff during the pendency of the present suit filed an amendment to its Memorandum of Appeal filed in Malaysia contending that the issue of seat of arbitration is *res judicata* in view of the Supreme Court judgment, while there is not a whisper in the affidavit of the Indian Counsel filed in Malaysia about the actions of the plaintiff either before the English Court or about the present suit that has been initiated by the plaintiff against the defendant. Then

again, the malafide conduct of the plaintiff is clearly visible from the fact that the plaintiff, on one hand, on 12.12.2011 sought an extension of time from the English Court for filing its expert evidence on the specific ground of inability to identify such an expert; whereas, on the other hand, on 13.12.2011 the present suit and application were verified and affirmed by the plaintiff's authorised representative. The defendant's English counsel acting under a bonafide belief and completely unaware of the filing of the instant suit wrote to the plaintiff's English counsel on 14.12.2011 agreeing to the plaintiff's request for extension of time and the same was recorded in the consent order dated 15.12.2011. Before this Court, at the hearing on 03.01.2012, the counsel for the plaintiff sought time to file a rejoinder to the reply filed by the defendant on the ground that although the rejoinder had been prepared, the same was awaiting comments from the Union of India. When the said rejoinder was served upon the counsel for the defendant on 04.01.2012, the defendant's counsel found to his utter shock and surprise that the said rejoinder had been verified and affirmed by the deponent therein on 02.01.2012.

78. On the aspect of irreparable injury and balance of convenience, it was contended on behalf of the defendant that **the plaintiff cannot be heard to say that it would suffer irreparable injury or that the balance of convenience is in its favour to justify an injunction to prevent hearing of its own application**. In contrast, unless and until the plaintiff's application is heard and disposed of by the English Court, the defendant's claim will not be adjudicated. Dates before the English Court have been fixed with the plaintiff's consent and with great difficulty. There is no reason for the plaintiff to contend that it would suffer irreparable injury if the hearing takes place on the dates fixed. In contrast, the defendant would suffer irreparable injury in the event the dates granted by the English Court were to be lost as the proceedings would be further delayed indefinitely. Moreover, till date, all steps in the English proceedings have been taken with the consent of the plaintiff. Even today, until the order of 23.12.2011, there has not been a single letter by the plaintiff to the English Court protesting against the jurisdiction of the English Court to determine its own jurisdiction, including the issue of *res judicata*.

79. Mr. Sibal, the learned counsel for the defendant, also contended that the judgments cited on behalf of the plaintiff have no application to the facts of the present case as is clear from the following:-

(i) The decision in ***Venture Global Engineering (supra)*** is distinguishable on the ground that the law of the arbitration agreement had not been specified in the said case whereas in the present Arbitration Agreement, English Law has been specified as the governing law.

(ii) The decision in ***Pioneer Publicity Corporation (supra)*** dealt with the validity of termination of a contract by DTC without any justification. The facts of this case are entirely disconnected and irrelevant to the issue in the present case.

(iii) The judgments relating to *res judicata*, viz., ***Satish Nambiar (supra), Ishwar Dutt (supra), Swamy Atmananda (supra), M. Nagabhushana (supra), Hope Plantation Ltd. (supra), Makhija Construction and Engineering Private Limited (supra)*** **and** ***S. Nagaraj (supra)*** have no application because the appropriate Court to decide whether the claim filed in the

English Court is barred by *res judicata* is the English Court. The judgment in ***Swamy Atmananda (supra)***, which lays down that "if a Court lacks inherent jurisdiction, its judgment would be a nullity and thus principles of *res judicata* which is in the domain of procedure will have no application", supports the defendant's case that the observations in paras 12 and 13 of the Supreme Court judgment do not bar the English claim on grounds of *res judicata*.

(iv) The judgment in ***K.K. Modi (supra),*** which lays down that it is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him, has no application. In the present case, the issue of 'seat of arbitration' has not been tried and decided against the defendant in the judgment of the Supreme Court.

(v) In ***Munib Masri's*** case ***(supra)***, the Judgment Debtor having suffered a judgment on merits in England, intentionally filed parallel proceedings in other countries, including in Yemen in

an attempt to obtain a decision in conflict with the English judgment. The Decree Holder did not have the protection of reciprocal arrangements for enforcing the English judgment and thus the Judgment Debtor sought to take illegitimate advantage of this fact. The Court of Appeal in the ***Munib Masri's*** case ***(supra)*** in fact declined to grant anti-suit injunction in respect of countries which were parties to the Lugano Convention.

(vi) The decision in ***Rupa Ashok Hurra (supra)*** is irrelevant as the said case relates to the powers of the Supreme Court under Article 142 of the Constitution of India and no reliance has been placed on Article 142 on behalf of the Union of India in the present suit.

(vii) The judgment in ***Kunhayammed (supra),*** on which the plaintiff relies, in paragraph 13 contains an exposition of the scope of Article 136 which is not relevant to the present case, where the matter was heard as a Civil Appeal after granting leave to appeal under Article 136.

(viii) The judgment in ***Oil and Natural Gas Commission (supra)*** relating to stay of foreign proceedings supports the case of the defendant rather than the plaintiff. The arbitration clause in ONGC was governed by Indian Law specifically the Arbitration Act, 1940 and, therefore, the Court held that the appropriate Courts to decide any dispute relating to the arbitration clause were Indian Courts, and the filing of an action for confirming the award in a US Court was contrary to the contract and hence abusive. In the present case, the arbitration clause is governed by English Law and on the reasoning of ONGC, the present plaint which seeks to restrain approach to the English Court to resolve disputes relating to the arbitration clause is abusive.

(ix) The decision in ***A.P. State Financial Corporation (supra)*** relating to the 'Doctrine of Election' does not help the plaintiff in view of the fact that the plaintiff had earlier elected to pursue the remedy in the English Court and cannot be permitted to

pursue the same remedy in parallel proceedings before this Court in the present suit.

FINDINGS

80. Before I venture to render my findings on the rival contentions of the parties, a few glaring facts and the inferences to be drawn therefrom deserve to be highlighted:-

(i) In the present case, the defendant has admitted that the Supreme Court has decided the issue of 'juridical seat of arbitration' but the contention of the defendant is that the said decision would not be binding because it is merely by way of **obiter**. This is clear from the following extract from paragraph 15 of the written statement:-

> *"……Therefore, in the respectful submission of the Defendant, as the observations on seat of arbitration were not necessary to arrive at a final decision of exclusion of Part-I of the Arbitration and Conciliation Act, 1996,* ***the aforesaid judgment of the Hon'ble Supreme Court of India on the aspect of seat of arbitration, is by way of obiter.****"*

(ii) The defendant in paragraph 7 of its written statement filed in the present suit has stated:-

> *"……. as of today, the Plaintiff is also bound by the said decision of High Court of Malaya at Kuala Lumpur. Accordingly, granting any interim reliefs as prayed for by the Plaintiff qua the English Court proceedings would not curtail the likelihood of conflicting judgment as suggested by the Plaintiff. For the reasons that the conflict if any is already in existence between the judgment dated 5th August, 2009 of the High Court of Malaya at Kuala Lumpur and the judgment dated 11.05.2011 of the Hon'ble Supreme Court which, in the contention of the Plaintiff operates as res judicata on the issue of seat of arbitration……."*

(iii) In the Special Leave Petition filed by the defendant before the Supreme Court, the defendant explicitly submitted that the learned Single Judge who decided OMP No.255/2006 had committed an error in law in that he had failed to appreciate that it was incumbent upon him to have first determined the seat of arbitration before determining the question as to whether this Court had jurisdiction (the seat of arbitration having shifted to London). The following extracts from the

grounds taken in the Special Leave Petition filed by the defendant before the Supreme Court may be referred to in this context:-

GROUND E(iii)

> *"That assuming that the Arbitration Agreement was silent on the choice of curial law, it is not the law governing the contract that will govern the arbitration proceedings, but it is the law of the seat of the arbitration that will govern the conduct of the arbitration proceedings."*

GROUND N

> *"……..Moreover, the learned Single Judge has been unable to appreciate that in determining jurisdiction, the first issue to be determined is where the seat of the arbitration lies. Upon such determination, it is mandatory for the courts of that country to exercise jurisdiction over the Arbitration Agreement and the proceedings……."*

GROUND X

> *"FOR THAT the learned Single Judge has recorded submissions of the Petitioner but failed to deal with such submissions or has erroneously rejected the same. In this regard, it is submitted as follows:*
>
> *i. That the Respondents willfully suppressed the material fact that the*

Arbitral Tribunal had shifted the seat of the arbitration with consent of both parties vide order dated 15.11.2003. The said order was neither pleaded nor annexed with O.M.P. No.255 of 2006 and accordingly, the Respondent No.1 had willfully suppressed the said document on which ground O.M.P. No.255 of 2006 was liable to be dismissed. It is submitted that though the aforementioned submission as well as the response of the Respondent No.1 to the same has been recorded, the learned Single Judge has not made any finding on whether there had been willful suppression by the Respondent No.1. The gravity of such an omission cannot be over stated as the Petitioner had submitted that such suppression rendered O.M.P. No.255 of 2006 liable to be dismissed on that ground alone.

ii. ***That Respondent No.1 was estopped from contending that the seat of the arbitration continues to be at Kuala Lumpur as the Respondent No.1 had consented to the shift of the seat of arbitration to London and had participated in all arbitration proceedings at London till 31.03.2005. No hearings were ever held at Kuala Lumpur. These aspects were not dealt with in the Order.****"*

GROUND AA

"FOR THAT the learned Single Judge has erroneously recorded in paragraph 2.6 of the impugned Order that as Kuala Lumpur was reportedly struck by the epidemic SARS, the arbitral tribunal shifted the venue of arbitration from Kuala Lumpur to Amsterdam and later to London. It is respectfully submitted that the shift from Kuala Lumpur to Amsterdam was not on the same footing as the shift to London. The correct position as has been submitted is as follows:

i. The first arbitration hearing was fixed to be held at Kuala Lumpur but due to outbreak of the SARS epidemic in South East Asia, the venue was changed to Amsterdam vide Order dated 24.04.2003. The seat of the arbitration continued to remain at Kuala Lumpur, however, for convenience, the next hearing was to take place at Amsterdam.

ii. The next date of hearing at Amsterdam was fixed as 30.06.2003 vide Order dated 13.05.2003. This was the first hearing of the arbitration and thus, no hearing ever took place at Kuala Lumpur and this remains the position even today.

iii. Thereafter, vide Order dated 04.08.2003, the next hearing was fixed for London.

iv. Vide Order dated 15.11.2003, it was recorded that by consent of parties, the

seat of the arbitration was shifted to London.

It is submitted that the errors stated above go to the root of the impugned Order as the manner in which the facts with regard to the shift of the seat of the arbitration to London have been recorded clearly reflects that the Learned Single Judge has been unable to appreciate the consequences of the Order dated 15.11.2003 of the Arbitral Tribunal. *It is further submitted that if the sitting at London was merely for convenience, then the Order of 04.08.2003 was sufficient. There was no need for a separate order recording consent of the parties to shift the arbitral seat to London which was in accordance with Article 34.12 of the PSC and Section 3 of the English Act. These relevant facts have been completely ignored and omitted by the Learned Single Judge which is self evident from the manner in which facts have been recorded."*

GROUND FF

"……*The petitioner had challenged the maintainability of the petition on the following grounds:-*

i. That Section 5 of the Act does not contemplate judicial intervention of the nature as prayed for.

ii. The Respondent No.1 has suppressed material facts from this Court.

iii. That reliefs prayed for were beyond the scope of Section 9 of the Act.

iv. The reliefs sought were permanent in nature which was beyond the scope of Section 9 of the Act.

v. ***That the Respondent No.1 is estopped from contending that the seat of the arbitration continues to be at Kuala Lumpur.***

It is submitted that the learned Single Judge has demonstrated complete non-application of mind by failing to consider the submissions of the Petitioner, which were not limited only to jurisdiction, as stated above. ***It is submitted that this non-application of mind goes to the root of the decision and renders the impugned Order liable to be set aside on this ground alone****……."*

(iv) It was while the Special Leave Petition was pending in the Supreme Court that the defendant in October, 2009 moved the High Court of Justice, Queen's Bench Division, Commercial Court, London seeking a declaration that **'The seat of the first and third arbitration is in London'**. The order dated 20.10.2009 of the London Court directed the defendant to serve Union of India as soon as possible and practicable. However, the service of notice in the said Claim Petition No.2009, Folio No.1382 was got effected by the defendant on the plaintiff about six months later in the month of April, 2010.

(v) The plaintiff thereupon on 10th August, 2010 moved the Supreme Court by way of IA No.4/2010 in the pending appeal and almost simultaneously, i.e., on 12th August, 2010 filed an application before the London Court stating that the issue of juridical seat is being contested in proceedings elsewhere, i.e., in the Supreme Court of India. It was specifically stated therein as under:-

> ***"I understand that the Government of India will separately be taking up this issue with the Supreme Court in India."***

(vi) Simultaneously, the plaintiff's solicitors also wrote to the defendant's solicitors vide letter dated 12th August, 2010 clearly stating:-

> ***"For the avoidance of doubt, this letter and our client's application are not a submission to the jurisdiction of the Courts of England and Wales."***

(vii) On 11.05.2011, the judgment of the Supreme Court was pronounced and soon thereafter, i.e., on 02.06.2011, a letter was written on behalf of the plaintiff requesting the defendant

to withdraw the proceedings initiated before the London Court in view of the Supreme Court judgment.

(viii) On 8th June, 2011, a draft letter addressed to the Commercial Court Listing Office, The Royal Courts of Justice was sent by the defendant with a copy to the plaintiff's solicitors seeking to re-commence the proceedings before the English Court, to which the plaintiff replied by letter dated 14.06.2011 asking the defendant's solicitors **to indicate the basis on which the defendant proposed to continue their proceedings before the London Court after the final judgment of the Supreme Court that the juridical seat of the arbitration (as opposed to the physical change to London) remained Kuala Lumpur.**

(ix) In reply to the letter dated 14.06.2011, the defendant's solicitors by letter dated 22.06.2011 specifically wrote to state that any **legal issue arising from the judgment of the Indian Supreme Court were matters for the English Court to**

determine. Since this letter is significant, the relevant portion is reproduced hereunder for the sake of ready reference:-

> *"Accordingly, we do not see any reason for the present proceedings to be held in abeyance. Alternatively, if you are suggesting that the decision of the Supreme Court is simply another matter to which the Court should have regard, then we agree that a copy of the decision should be included in the hearing bundle……."*
>
> *"Under instructions, we further inform you that our client will proceed to serve the Court with a communication for the stay of the proceedings to be lifted* ***in the event that your client continues to insist that the present proceedings have become unnecessary. Any legal issue arising from the judgment of the Indian Supreme Court are matters for the English Court to determine****……."*

(x) The order dated 14.11.2011 passed by the English Court clearly recorded as under:-

> ***"For the avoidance of any doubt, neither this Order nor anything done pursuant to or in accordance with it shall constitute or give rise to any submission by the Defendant to the jurisdiction of the English Court or prejudice in any way the Defendant's challenge to that jurisdiction."***

(xi) Significantly, the draft order circulated in the first instance by the defendant's counsel did not include the above clause which was put in the English Court's order at the specific request of the plaintiff's solicitor.

81. From the aforesaid conspectus of facts, in my considered opinion, it is amply clear that the consistent stand of the plaintiff has been that the English Court does not have jurisdiction to go into the issue of 'juridical seat of arbitration' and cannot assume jurisdiction which it does not otherwise possess. It is also borne out from the record that all the proceedings on behalf of the plaintiff (defendant before the London Court) were **without prejudice** to its aforementioned stand and there is no question of the plaintiff's submission to the English Court for seeking adjudication on the issue of *res judicata* as suggested by the defendant. This is also borne out by the letter dated 29.06.2011 written by the plaintiff's solicitors to the defendant, wherein it is clearly stated as under:-

> *"On that basis **and without prejudice** to the res judicata point, we consent to a hearing being listed for a mutually convenient date……"*

82. Merely because the plaintiff participated in the Case Management Conference and filed witness statements would not, in my view, preclude the plaintiff from filing the present suit. More so, when the English Court itself recorded: **"For the avoidance of any doubt, neither this Order nor anything done pursuant to or in accordance with it shall constitute or give rise to any submission by the Defendant to the jurisdiction of the English Court or prejudice in any way the Defendant's challenge to that jurisdiction"**. In such circumstances, for the defendant to contend that the plaintiff voluntarily submitted to the jurisdiction of the English Court would be against the record of the English Court.

83. The Special Leave Petition filed by the defendant before the Supreme Court also bears out the contention of the plaintiff that the defendant invoked the jurisdiction of the Supreme Court to rule on the juridical seat of arbitration, which issue it claimed went to the root of the matter. That there was a tacit understanding that with the consent of the parties the Supreme Court would rule on the juridical seat of arbitration is also borne out by the order dated 06.09.2010

passed by the Hon'ble Supreme Court on the plaintiff's application, being IA No.4/2010, which reads as under:-

> "*Learned senior counsel appearing on behalf of the parties agreed that subject to completion of pleadings in the proceedings pending in both the courts in England as well as in Malaysia, neither the petitioner nor the respondent will proceed/take any proactive steps for hearing in the proceedings/applications pending in the Court in England as well as in the Court in Malaysia, till the disposal of the present SLP.*
>
> *In view of the aforesaid submission, I.A. No.4 is disposed of recording the same."*

84. Thus, while on the one hand the plaintiff submitted to the jurisdiction of the English Court without prejudice to its contention that by reason of the judgment of the Supreme Court the issue of juridical seat of arbitration was no longer open for examination, the defendant invoked the jurisdiction of the Supreme Court of India to decide upon the issue of the juridical seat of arbitration, which it stated went to the root of the matter. Faced with a finding from the Supreme Court that London was not the agreed juridical seat of arbitration, the defendant took a somersault and adopted the stand that any legal issue arising from the judgment of the Indian Supreme

Court was a matter for the English Court to determine. It is worth mentioning, at the risk of repetition, that although the defendant in October, 2009 had moved the High Court of Justice, Queen's Bench Division, Commercial Court, London seeking a declaration that **"The seat of the First and Third Arbitrations is in London"**, apparently it deliberately chose not to serve notice of the said Claim Petition upon the plaintiff until April, 2010, despite the order of the London Court to serve the Union of India as soon as practicable. This is clearly reflective of the fact that the defendant had sought the aforesaid declaration from the English Court only by way of abundant precaution. It was on 11.11.2009 that submissions were made by the parties before the Hon'ble Supreme Court on the issue of juridical seat and the judgment was reserved by the Supreme Court and it was not until 21st April, 2010 that the plaintiff was served with notice of the filing of the Claim Petition No.2009, Folio No.1382 pending in the London Court.

85. Even thereafter, it is noteworthy that the defendant consented to the Supreme Court ruling on the issue of juridical seat of

arbitration as is evident from the order dated 06.09.2010, whereby the defendant consented not to take any proactive steps for the hearing of its claim petition pending in the Court in England till the disposal of the SLP. However, finding that the decision in the SLP rendered on 11.05.2011 was in favour of the plaintiff, the defendant immediately re-commenced proceedings at London and adopted the stand that it disagreed with the plaintiff's position that the decision of the Supreme Court of India had "finally and conclusively" decided the issue pending before the English Court. The very fact that the defendant consented before the Supreme Court not to pursue its Claim Petition in London for declaration of the seat of arbitration, in my view, speaks volumes of the hope and expectation entertained by the defendant that the Supreme Court would eventually rule that the juridical seat of arbitration had shifted from Kuala Lumpur to London in view of the order of the Arbitral Tribunal dated 15th November, 2003. The said hope and expectation having been dashed, the defendant adopted the stance that the legal issues determined by the

Indian Supreme Court were matters for the English Court to determine.

86. A look at the judgment of the Supreme Court would suffice to show that the issue of seat of arbitration stood adjudicated by the judgment of the Supreme Court and the Supreme Court intended the said adjudication to be final and binding between the parties. Further, the said issue was addressed before the Supreme Court by both the parties and decided upon by the Supreme Court **as the first question raised before it**. In para 9 of its judgment, the Supreme Court noted that Shri Nariman had argued that after having expressly consented to the shifting of the seat of arbitration from Kuala Lumpur to Amsterdam in the first instance and effectively taken part in the proceedings held at London till 31.03.2005, the respondent No.1 (Union of India) was estopped from claiming that the seat of arbitration continued to be at Kuala Lumpur. In para 10 of its judgment, the Supreme Court noted the counter argument of the learned Solicitor General as follows:-

> *"10. Shri Gopal Subramaniam, learned Solicitor General submitted that as per the*

arbitration agreement which is binding on all the parties to the contract, a conscious decision was taken by them that Kuala Lumpur will be the seat of any intended arbitration, Indian law as the law of contract and English law as the law of arbitration and the mere fact that the arbitration was held outside Kuala Lumpur due to the outbreak of epidemic SARS, the venue of arbitration cannot be said to have been changed from Kuala Lumpur to London. Learned Solicitor General emphasised that once Kuala Lumpur was decided as the venue of arbitration by written agreement, the same could not have been changed except by amending the written agreement as provided in Clause 35.2 of the PSC. He then argued that the arbitral tribunal was not entitled to determine the seat of arbitration and the record of proceedings held on 15.11.2003 at London cannot be construed as an agreement between the parties for change in the juridical seat of arbitration. He further argued that the PSC was between the Government of India and ONGC Ltd., Videocon Petroleum Ltd., Command Petroleum (India) Pvt. Ltd. and Ravva Oil (Singapore) Pvt. Ltd. and, therefore, the venue of arbitration cannot be treated to have been changed merely on the basis of the so called agreement between the appellant and the respondents. Learned Solicitor General submitted that any change in the PSC requires the concurrence by all the parties to the contract and the consent, if any, given by two of the parties cannot have the effect of changing the same. He then argued that every written agreement on behalf of respondent No. 1 is

required to be expressed in the name of the President and in the absence of any written agreement having been reached between the parties to the PSC to amend the same, the consent given for shifting the physical seat of arbitration to London did not result in change of juridical seat of the arbitration which continues to be Kuala Lumpur……….."

In paragraph 12 of its judgment, the Supreme Court significantly observed:-

"We shall first consider the question whether Kuala Lumpur was the designated seat or juridical seat of arbitration and the same had been shifted to London."

The Supreme Court then went on to observe as follows:-

"In terms of Clause 34.12 of the PSC entered into by 5 parties, the seat of arbitration was Kuala Lumpur, Malaysia. However, due to outbreak of epidemic SARS, the arbitral tribunal decided to hold its sittings first at Amsterdam and then at London and the parties did not object to this. In the proceedings held on 14th and 15th October, 2003 at London, the arbitral tribunal recorded the consent of the parties for shifting the juridical seat of arbitration to London. Whether this amounted to shifting of the physical or juridical seat of arbitration from Kuala Lumpur to London? ***The decision of this would depend on a holistic consideration of the relevant clauses of the PSC. Though, it may appear repetitive,***

> ***we deem it necessary to mention that as per the terms of agreement, the seat of arbitration was Kuala Lumpur. If the parties wanted to amend Clause 34.12, they could have done so only by written instrument which was required to be signed by all of them.*** *Admittedly, neither there was any agreement between the parties to the PSC to shift the juridical seat of arbitration from Kuala Lumpur to London nor any written instrument was signed by them for amending clause 34.12.* ***Therefore, the mere fact that the parties to the particular arbitration had agreed for shifting of the seat of arbitration to London cannot be interpreted as anything except physical change of the venue of arbitration from Kuala Lumpur to London****……..”*

87. Thereafter, the Supreme Court proceeded to examine the provisions of the English Arbitration Act in juxtaposition to the provisions of the Arbitration and Conciliation Act, 1996. In paragraph 13, it held that under the English law the seat of arbitration means juridical seat of arbitration, which can be designated by the parties to the arbitration agreement or by any arbitral or other institution or person empowered by the parties to do so or by the arbitral tribunal, if so authorised by the parties. **In contrast, it was held, there is no provision in the Act (Arbitration and**

Conciliation Act, 1996) under which the Arbitral Tribunal could change the juridical seat of arbitration which, as per the agreement of the parties, was Kuala Lumpur.

It concluded:-

> ***"Therefore, mere change in the physical venue of the hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration."***

88. In the very next paragraph, i.e., paragraph 14, the Supreme Court referred to the following passage from ***Redfern v. Hunter***:-

> *"The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings - or even hearings - in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses....*

> *It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country - for instance, for the purpose of taking evidence....* ***In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.****"*

89. From paragraph 15 onwards, the Supreme Court considered **the next issue** as to "whether the Delhi High Court could entertain the petition filed by the respondents under Section 9 of the Act" and held that the three-judge Bench in ***Bhatia International (supra)*** and the two-judge Bench in ***Venture Global Engineering (supra)*** would not apply on account of the fact that in the present case the parties had expressly agreed to exclude the provisions of Part I of the Act by providing that the Arbitration Agreement contained in Article 34 shall be governed by the laws of England notwithstanding Article 33.1. As a corollary, it was held, the Delhi High Court did not have jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act.

90. Thus, in effect, what the Supreme Court held in the former part of its judgment was that the governing law of the arbitration would be Indian Law, as is clear from its finding that the Production Sharing Contract would be governed by Indian Law and it could not be varied to amend Clause 34.12 of the contract, which provided for the juridical seat to be at Kuala Lumpur, **except by written instrument to be signed by all the parties**. In the latter part of its judgment, it held that the Arbitration Agreement contained in Article 34 would be governed by the laws of England, thereby excluding the applicability of Part I of the Arbitration and Conciliation Act, 1996 and the jurisdiction of the Indian Courts to rule upon matters relating to the conduct of arbitration proceedings. It also clarified that regardless of the venue of arbitral sittings, the arbitral seat would remain at Kuala Lumpur; that the English Law was different in this regard from Indian Law inasmuch as under the English Law the parties to the arbitration, the arbitral tribunal or any other person or institution vested with the power to do so could change the seat of arbitration. In contrast, a provision made in a contract governed by Indian Law for the juridical

seat of arbitration could not be changed under the Arbitration and Conciliation Act, 1996, except by amendment of the contract itself. In Indian Law, there was no provision parallel to Section 3 of the English Arbitration Act.

91. It is thus clear that the Supreme Court in its aforesaid judgment clarified beyond an iota of doubt the governing law of the contract, the curial law and the distinction between the seat of arbitration and the venue of arbitration with a view to ensure that the arbitral proceedings were not stultified, delayed or abandoned. This the Court did at the behest and with the consent of the parties as is evident from the whole tone and tenor of the judgment. To render such a judgment susceptible to examination by a Court of foreign jurisdiction with the attendant risk of its overturning the judgment would, in my opinion, be against all settled principles of legal jurisprudence relating to international commercial arbitration, including principles governing the comity of nations, and would render *otiose* the judgment of the highest Court of this land. To be noted at this juncture that the English Court has required the parties to

tender **"expert evidence"** on the Supreme Court judgment, which concept itself is repugnant to Indian Law under which the sky is the limit of the powers of the Supreme Court and any law laid down by it is final and conclusive.

92. The plaintiff has instituted the present suit predicated on the doctrine of *res judicata*, which has been clearly enunciated and reiterated by the Supreme Court, time and again, and is based on the twin principles (i) that there should be an end to litigation, and (ii) that no person should be vexed twice for the same cause. Both the said principles, in my view, will be wholly negated if the defendant is permitted to drag the Union of India to the English Court for the re-determination of the question of issue of the juridical seat and it is this re-commencement of the proceedings which is sought to be injuncted by filing the present suit.

93. The plaintiff contends, and I think rightly so, that re-agitation of the question of seat of arbitration authoritatively pronounced upon by the Supreme Court would constitute abuse of the process of law and undoubtedly render the foreign proceedings vexatious and

oppressive due to the attendant consequences. One consequence as noted above is that the English Court may come to the conclusion that the principle of *res judicata* has no application. It would then be open to the English Court to re-examine the issue of juridical seat and quite obviously come to a conclusion contrary to that arrived at by the Supreme Court of India. This would undoubtedly result in a stalemate of the arbitration proceedings with the plaintiff insisting that the juridical seat of arbitration remains in Kuala Lumpur and the defendant proceeding with the matter in the English Court. Such a situation would lead to a virtual impassé in the arbitral proceedings and possibly an abrupt end to the arbitration, thereby placing the whole claim of the Union of India in jeopardy.

94. It is important to note at this juncture, at the risk of repetition, that the Hon'ble Supreme Court observed that under the Production Sharing Contract between the parties, the Indian Law has been given primacy and it has been specifically laid down in Article 33.2 that nothing in the contract shall entitle the defendant/contractor to exercise the rights, privileges and powers conferred upon it by this

contract in a manner which will contravene the laws of India. It was also noted by the Supreme Court that Article 33.1 also emphasizes that the contract shall be governed and interpreted in accordance with the laws of India, and that Article 34.12 which pertains to the law governing the Arbitration Agreement and the seat of arbitration is an overriding provision *qua* Article 33.1; however, the said Article 34.12 **does not** override Article **33.2**. Thus, the contract clearly lays down that contravention of the laws of India is wholly impermissible. *Res judicata* which encompasses within its fold the principle of *issue estoppel* is an intrinsic part of the laws of India and its public policy. Conversely, the underlying object behind the doctrine of *res judicata* and *issue estoppel* is the public policy of India. Due regard to the laws of India and its public policy must, therefore, in my view, be held to be of paramount importance.

95. The defendant's reliance on the judgment of ***National Thermal Power Corporation (supra)*** is also misplaced as the governing law in the present case is Indian Law under Article 33 and by virtue of Article 34.12, Article 33.2 which provides that the Laws of India shall

not be contravened is the overriding provision. The defendant in its written statement itself admits that it is not in any manner claiming anything inconsistent with Indian Law. In any event, the present suit is based on breach of contract and vexatious and oppressive proceedings. The plaintiff in the present suit is not seeking adjudication with respect to the seat of arbitration or the applicability of law. That part stands adjudicated by the judgment of the Supreme Court.

96. Significantly, the Supreme Court in the case of ***Laxman Prasad vs. Prodigy Electronics Ltd., (2008) 1 SCC 618*** after considering the ***National Thermal Power Corporation*** judgment held as under:- (SCC, at page 625, para 30)

> *"30. We find considerable force in the submission of the learned counsel for the respondent Company. In our view, "cause of action" and "applicability of law" are two distinct, different and independent things and one cannot be confused with the other."*

97. Further, as regards the contention of the defendant that an order of anti-suit injunction ought not to be granted as it would transgress the norms of judicial comity, indubitably the settled position in law is

that an anti-suit injunction should be granted only if there is an impending risk of conflicting judgments and, if and only if the proceedings in the Court of foreign jurisdiction would perpetuate injustice. This Court is not oblivious to the fact that while granting anti-suit injunction it must tread cautiously having regard to all the facts and circumstances of the case, but this Court is also mindful of the fact that an anti-suit injunction operates against the party concerned and not against the court of foreign jurisdiction. Moreover, this Court cannot turn a blind eye to the vexation and oppression which would be caused to the plaintiff by compelling it to re-litigate on an issue upon which the Supreme Court has given its final and conclusive determination. To compel it to do so would constitute the worst imaginable case of abuse of the process of the Court, besides giving a complete go-by to the principle of *res judicata* and *issue estoppel* which govern the public policy of India.

98. Reference may be made to the decision of Supreme Court rendered in ***M/s. V.O. Tractoroexport, Moscow vs. M/s. Tarapore***

and Company and Anr. 1969 (3) SCC 562, wherein it was observed as follows:

> ***"****The rule as stated in Halsbury's Laws of England, Vol. 21, at page 407, is that with regard to foreign proceedings, the court will restrain a person within its jurisdiction from instituting or prosecuting suits in a foreign court whenever the circumstances of the case make such an interposition necessary or, proper.* ***This jurisdiction will be exercised whenever there is vexation or oppression****. In England, Courts have been very cautious and have largely refrained from granting stay of proceedings in foreign Courts (Cheshire's Private Industrial Law, 7th Ed. pages 108-110).* ***The injunction is, however, issued against a party and not a foreign court****."*

99. Then again, while there can be no quibble with the proposition that the principle of Comity of Nations must always remain in the forefront of the judicial mind while ruling upon a matter relating to international commercial arbitration and England being a reciprocating territory, the English Courts must be given due deference, it cannot also be lost sight of that *issue estoppel* will operate in a case where the highest court of this country has rendered its findings on a particular issue. To render the said findings open to

re-examination and a re-look by a Court of foreign jurisdiction, even if it be a friendly foreign court, with the obvious intent from the side of the defendant to have the said findings reversed by the foreign court would be against all principles of Comity of Nations. In my view, the Supreme Court of India having rendered a decision on an issue, the Comity of Nations requires that due regard be given to the said decision and it must be held that the said decision ought not to be rendered susceptible to being declared *non est* by a Court of foreign jurisdiction. This would be undermining the significance of the judgment rendered by the highest Court of the country and the authoritative nature thereof, and that too at the behest of the defendant for its own limited ends.

100. A distinction deserves to be noted at this juncture between *res judicata* and precedent in view of the defendant's plea that though the Supreme Court has decided the issue of juridical seat of arbitration, the said decision would not be binding because it was merely by way of obiter. Placing the principle of *res judicata* on a higher pedestal than precedent, the Supreme Court in ***Makhija Construction and***

Engineering Private Limited (supra) held that a precedent operates to bind in similar situations in a distinct case, whereas *res judicata* operates to bind parties to proceedings for no other reason but that there should be an end to litigation. Further, in the case of ***S. Nagaraj (supra)***, the Supreme Court pertinently noted that the question whether the decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as *res judicata*. The Court also noted that the High Court had failed to appreciate that the principle of *per incurium* has relevance to the doctrine of precedent but has no application to the doctrine of *res judicata*. Thus, quite clearly **the principles relating to precedent, *per incurium*, obiter and the like have no application to the doctrine of *res judicata***, which is governed by *cause of action estoppel* and *issue estoppel* in order to ensure the attainment of finality, which is the ultimate object of all civilized systems of jurisprudence, for, otherwise legal ingenuity would ensure the unending and vexatious pursuit of a claim even if it is wholly spurious. Litigation would then become equivalent to an open and festering wound, rendering every decision

open to being impeached collaterally, turning judicial discipline into a dead letter.

101. Further, the reliance placed by the learned counsel for the defendant on the case of ***Pawan Kumar Gupta (supra)*** is also wholly misplaced. The observation of the Supreme Court in the said case that *"if dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit"* cannot be read in isolation and the judgment must be read in its entirety. In the very same judgment the Supreme Court held that there was *"no hurdle in law for the defendant to file an appeal against the judgment and decree in that first suit as he still disputed the decisions on such contested issues."* Admittedly, the defendant in the present case did not file any review against the judgment dated 11.05.2011 of the Supreme Court. The second and important point of distinction is that in the said case the Court was not dealing with an order passed by the Supreme Court.

102. The defendant's reliance on the judgment in ***Sri Athmanathaswami Devasthanam (supra)*** is also inapt for the same reason, namely, in view of the all-encompassing jurisdiction of the Supreme Court to decide any issue raised before it. Likewise, the reliance placed by the defendant upon the judgments of ***Hasham Abbas Sayyad (supra)*** and ***Muthavalli of Sha Madhari Diwan Wakf (supra)*** is misplaced, as in the present case the order was passed by the Supreme Court itself and it cannot be said that the Supreme Court lacked jurisdiction. In any case, the question whether the judgment of the Supreme Court is without jurisdiction can only be gone into by the Supreme Court itself and cannot be raised in collateral proceedings. Reliance on the judgment of ***Rachakonda Narayana (supra)*** is also of no avail to the defendant as in the said case it was laid down that the appellate court can go into any question relating to the rights of parties which a trial court was entitled to dispose of, an appeal being a continuation of a suit. To be noted that the said decision is not on the issue of *res judicata* and the aforesaid

observations were made by the Supreme Court in the context of powers of appellate courts and not with reference to its own powers.

103. The judgment in ***Syed Mohd. Salie Labbai (supra)*** relied upon by the defendant is in fact in favour of the plaintiff. It categorically lays down that before a plea of *res judicata* can be given effect to, the following conditions must be fulfilled:-

> ***"(1) that the litigating parties must be the same;***
> ***(2) that the subject-matter of the suit also must be identical;***
> ***(3) that the matter must be finally decided between the parties; and***
> ***(4) that the suit must be decided by a court of competent jurisdiction."***

All the above four conditions necessary for the applicability of *res judicata* stand satisfied in the present case.

104. The observation in ***Essel Sports Pvt. Ltd. (supra)*** relied upon by the defendant to the effect that ***"having to defend the same allegations by the same party in two different jurisdiction is unquestionably oppressive"*** also entirely supports the case of the plaintiff rather than the case of the defendant.

105. The defendant has cited ***Seismic Shipping Inc. (supra)*** as adjudicated by the High Court of Justice, Queen's Bench Division Admiralty Court and by the Court of Appeal for the proposition that anti-suit injunction cannot be granted solely in aid of a judgment. The said case stands adequately distinguished by the case of ***Munib Masri (supra),*** wherein to protect the jurisdiction of English Court, it was held that the English Court may injunct a foreign defendant against whom there is an English judgment (in proceedings to which the foreign defendant has submitted) from seeking to re-litigate the same issues abroad.

106. The defendant's reliance upon the judgment in ***Horlicks Ltd. (supra)*** is also misplaced as the said case was intrinsically not one of anti-suit injunction but was of applicability of 'forum non convenience' amongst domestic fora. The reliance placed upon page 193 of the said judgment wherein reference is made to a Canadian judgment noted by the Division Bench of this Court is also of no avail to the defendant as the same was neither the view of the Division Bench nor it endorsed the Canadian view. The question was only

whether the principle of 'forum non convenience' would apply to domestic fora. In fact, the proposition of law as sought to be advanced on behalf of the defendant based on the ***Horlicks*** case ***(supra)*** is neither followed in the said case nor in any other judgment of any Indian Court, namely, that the decision of the foreign Court cannot be pre-empted until a proceeding has been launched in that Court and the applicant for an injunction in the domestic Court has sought from the foreign court a termination of the foreign proceeding and failed. It merits recalling that in the ***ONGC*** case ***(supra),*** the Supreme Court specifically held that merely because the same relief can be obtained from the foreign court is no ground to refuse anti-suit injunction. The Division Bench of this Court in the case of ***Essel Sports Pvt. Ltd. (supra)*** also granted anti-suit injunction without asking the plaintiff to first approach the London Court.

107. The recent decision of the Supreme Court in ***Yograj Infrastructure Ltd. (supra)*** cited by the defendant is wholly inapplicable to the facts of the present case. In the said case, an appeal was filed under Section 37(2)(b) of the Arbitration and

Conciliation Act, 1996 for setting aside an interim order. After noting that there was no ambiguity that the Singapore International Arbitration Centre Rules (for short "SIAC Rules") would be the curial law of the arbitration proceedings and the seat of arbitration was at Singapore, the Court observed that the immediate question which arose was *"Whether in such a case the provisions of Section 2(2), which indicates that Part I of the above Act would apply, where the place of arbitration is in India, would be a bar to the invocation of the provisions of Sections 34 and 37 of the Act, as far as the present arbitral proceedings, which are being conducted in Singapore, are concerned."* On consideration of the decision in ***Bhatia International (supra), Venture Global Engineering (supra)*** and ***Citation Infowares Ltd. (supra)*** , the Court held that the said decisions would have no application once the parties agreed by virtue of Clause 27.1 of the agreement that the arbitration proceedings would be conducted in Singapore, i.e., the seat of arbitration would be in Singapore, in accordance with the SIAC Rules as in force at the time of the signing of the agreement. This effectively shut out the

applicability of Part I of the 1996 Act, including the right of appeal under Section 37 thereof. It is beyond cavil that this is precisely what has been held by the Supreme Court in paras 15 to 20 of its judgment in the present case.

108. As regards the test laid down by the Supreme Court in the case of ***Modi Entertainment Network (supra),*** there is no denying the fact that the same have been squarely met in the following manner:-

(a) It is not denied that the plaintiff and the defendant are amenable to the personal jurisdiction of this court.

(b) If the injunction is denied, ends of justice will be defeated as the plaintiff will be required to re-litigate on the aspect of 'seat of arbitration' before the English Court.

(c) In view of the clear finding of the Supreme Court that Kuala Lumpur was the seat of arbitration, it cannot be said that restraining the defendant from pursuing its claim before the English Court is against the principle of comity of nations.

109. While it is well established that an injunction is granted as an ancillary to the main relief and flows out of a cause of action which has accrued to the plaintiff and even *quia timet* injunctions are granted by Courts on the plaintiff's establishing to the satisfaction of the Court that some threatened action by the defendant will constitute an actionable civil wrong, in contrast in an anti-suit injunction action the plaintiff does not have to establish either accrual of a cause of action or apprehension of an actionable wrong. In that sense, an anti-suit injunction is unique in its conception and there is no denying that the equitable power to grant an anti-suit injunction in restraint of a litigation in foreign soil exists only to serve equity and shut out unconscionability. The grant or non-grant of such an injunction wholly depends upon whether the assumption of jurisdiction by a foreign court in the facts and circumstances of a particular case, taken in their entirety and viewed holistically, would be oppressive or vexatious or an abuse of the process or would amount to the loss of juridical or other advantage, in the context of all other factors, to one or the other party or an injustice would be perpetuated thereby.

110. Viewed from any angle, the present case *prima facie* appears to this Court to be one which could justify the passing of such an injunction order. On the other hand, if the injunction is declined, the plaintiff would be vexed twice over(that is, once in the natural forum and once in the foreign forum) for establishing its plea that Kuala Lumpur is the designated seat of arbitration which cannot be changed without altering the contract itself. It would be neither fair nor equitable to compel the plaintiff to re-commence pursuit of a matter in a foreign country when the highest court of this land has held in favour of the plaintiff, that too, on the defendant invoking its jurisdiction. This would amount to perpetuating injustice and possibly result in conflicting judgments of two courts causing significant harm to the arbitration proceedings and delaying the same for an indefinite period of time, possibly resulting in their abrupt termination.

111. In conclusion, it may be stated that judged by the tri-partite test of *prima facie* case, balance of convenience and irreparable injury, the present case is a proper case for the grant of an injunction in

favour of the plaintiff. *Prima facie* the initiation of proceedings by the defendant at London during the pendency of the Special Leave Petition before the Supreme Court of India was unconscionable, vexatious and oppressive and an abuse of the process of law. It would be unduly harsh on the plaintiff to put the plaintiff through the inconvenience and uncertainty of litigating more than once on the same issue at a prohibitively high cost in a foreign land. The balance of convenience also tilts in favour of the plaintiff, as a necessary outcome of multiplicity of proceedings could be potentially conflicting decisions. Most importantly, the preservation of the integrity of the proceedings before the Hon'ble Supreme Court of India, which culminated in the final judgment and order dated 11.05.2011, must necessarily be protected. The plaintiff has a high degree of probability of obtaining the relief sought for in the plaint, and as noticed hereinabove, the plaintiff, as is clear from the order of the English Court dated 14.11.2011, has made it expressly clear that its participation in the proceedings before the English Court is without prejudice to its challenge to the jurisdiction of the English

Court. Hence, the same cannot be an inhibiting factor in the grant of injunction based on comity of nations. The relief sought for in the application, if not granted, will cause irreversible loss and damage to the plaintiff without any juridical advantage enuring to the defendant.

112. Resultantly, this Court hereby passes an order of temporary injunction restraining the defendant from pursuing Claim No.2009, Folio 1382 filed in the High Court of Justice, Queen's Bench Division, Commercial Court, London against the plaintiff.

113. IA No.21069/2011 is allowed accordingly.

CS(OS) 3314/2011

List on 16th April, 2012 for laying down the time frame for the disposal of the above suit.

REVA KHETRAPAL
(JUDGE)

March 05, 2012
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