# Modi Entertainment Network & Anr vs W.S.G.Cricket Pte. Ltd on 21 January, 2003

## Equivalent citations: AIR 2003 SUPREME COURT 1177, 2003 AIR SCW 733, 2004 (3) KCCR 2007, 2003 (1) LRI 576, 2003 (4) SCC 341, 2003 (1) ARBI LR 533, 2003 (1) ACE 486, 2003 (3) SRJ 273, 2003 (1) SLT 478, (2003) 3 KCCR 2007, 2003 (2) ALL CJ 1484, (2003) 3 ALLINDCAS 766 (SC), 2003 (3) ALLINDCAS 766, (2003) 1 SCR 480 (SC), 2003 ALL CJ 2 1484, 2003 (1) SCALE 388, (2003) 1 JT 382 (SC), 2003 (1) JT 382, (2003) ILR (KANT) (4) 4114, (2003) 2 INDLD 675, (2003) 1 ARBILR 533, (2003) 3 LANDLR 349, (2003) 2 MAD LJ 98, (2003) 1 SUPREME 709, (2003) 3 ICC 457, (2003) 1 SCALE 388, (2003) 2 ALL WC 1261, (2003) 5 BOM CR 754, 2003 (2) BOM LR 642, 2003 BOM LR 2 642

## Author: Syed Shah Mohammed Quadri

## Bench: Syed Shah Mohammed Quadri, Arijit Pasayat

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           CASE NO.:
Appeal (civil)  422 of 2003

PETITIONER:
Modi Entertainment Network & Anr.

RESPONDENT:
W.S.G.Cricket Pte. Ltd.

DATE OF JUDGMENT: 21/01/2003

BENCH:
Syed Shah Mohammed Quadri & Arijit Pasayat

JUDGMENT:
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J U D G M E N T SYED SHAH MOHAMMED QUADRI,J.

Leave is granted.

This appeal is from the judgment and order dated April 1, 2002 made by a Division Bench of the High Court of Judicature at Bombay, in Appeal No.287 of 2002, allowing the appeal filed by the respondent and setting aside the order of the learned Single Judge granting anti-suit injunction against the respondent on the motion of the appellants.

The plaintiffs in Suit No.2422 of 2001 on the file of the High Court of Judicature at Bombay (ordinary original civil jurisdiction) are the appellants and the defendant therein is the respondent

in this appeal.

The short point that arises for consideration is: whether the Division Bench of the High Court erred in vacating the anti-suit injunction granted by a learned Single Judge restraining the respondent from proceeding with the action between the same parties pending in the English Court, the forum of their choice. It involves examination of the principles governing grant of an anti-suit injunction by a court of natural jurisdiction against a party to a suit before it restraining him from instituting and/or prosecuting the suit, between the same parties, if instituted, in a foreign court of choice of the parties. It will be appropriate to note, in brief, the factual background in which the aforesaid question has arisen. The International Cricket Conference (ICC) organised a tournament 'ICC Knockout Tournament' (referred to as, 'the Event') in Kenya between October 3 and 15, 2000. The respondent had the exclusive right to grant commercial rights relating to the Event. On September 21,2000, an agreement was entered into between the second appellant and the respondent granting exclusive licence to telecast the Event on Doordarshan and to sell advertisement slots thereon. The second appellant assigned its right under the said agreement to the first appellant on September 22, 2000. The agreement, inter alia, provided that the licence granted thereunder was restricted to exhibiting the Feed by terrestrial free to air television on Doordarshan only and the satellite broadcast licence for India was granted to "ESPN - Star Sports" (for short, 'ESPN'); the appellants were to pay a minimum guaranteed amount of USD 35 lakhs (Rs.15 crores); if the revenue derived by the appellants exceeded the aforementioned sum the parties would share the excess amount in the manner provided in the agreement. The Doordarshan used the PAS-4 Satellite to transmit the signal through its terrestrial transmitters. Soon after the commencement of the telecast the respondent registered a complaint with the Doordarshan that the signal was being received in the Middle East which would amount to breach of contract between the parties and violation of the licence granted to Middle East licensee, called upon the appellants to rectify the same and threatened that the Feed to the Doordarshan would be discontinued. The response of the Doordarshan that it was nothing but a natural spill over and that under the agreement such spill over of other satellite signals would not constitute a breach, was communicated to the respondent. However, the respondent was not satisfied with that explanation and kept on repeating the threat that if the Doordarshan did not switch from the PAS-4 satellite to the INSAT satellite it would discontinue the signal Feed to Doordarshan. It appears that during the period of the telecast nothing was done by the respondent pursuant to the threats. Even so, the appellants complained that on account of the open threats of the respondent the advertisers who had committed their advertisements on Doordarshan, pulled their advertisements out and switched them to ESPN and that caused tremendous loss of revenue to them. It was also alleged that diversion of advertisements from Doordarshan to ESPN enabled the respondent to benefit from the revenue sharing arrangement it had with ESPN. To resolve the disputes generated by cross allegations made by the parties against each other some negotiations were held and pursuant thereto the appellants paid, from time to time between December 2000 and February 2001, a sum of USD 7,13,714 to the respondent. They also addressed letters to the respondent seeking time till May 2001 to make payment of the balance amount.

While the matter stood thus, the appellants received a notice dated May 3, 2001 from the solicitors of the respondent demanding full minimum guaranteed amount. Anyhow, on May 9, 2001, the

appellants filed a suit in the Bombay High Court claming, inter alia, damages for the loss of advertising revenue due to alleged illegal threats of the respondent. On November 22, 2001, the respondent also filed an action in the High Court of Justice, Queen's Bench Division (referred to as, 'the English Court'), praying for a money decree for the minimum guaranteed amount and took out writ of summons, calling upon the appellants to notify the English Court of their intention to contest jurisdiction; it was also stated therein that failure to do so would amount to submitting to jurisdiction of the English Court and rendering them liable to a default judgment. The appellants entered appearance before the English Court on January 9, 2002 and sought time till January 31, 2002. Despite this move, on January 15, 2002, the appellants took out motion in the Bombay High Court praying for anti-suit injunction against the respondent in regard to the action in the English Court on the ground that the Indian Court was a natural forum for the adjudication of the dispute and that continuance of the proceedings in the English Court would, on the facts of the case, be vexatious and oppressive. The respondent contested the motion relying on the non-exclusive jurisdiction clause in the contract. After hearing both the parties, a learned Single Judge of the Bombay High Court granted an ad-interim injunction on January 30, 2002, in terms of clause (a) and ordered notice of motion returnable within six weeks. Aggrieved by the said order of the learned Single Judge, the respondent filed an appeal before the High Court. With the consent of the parties the Division Bench of the High Court which heard the appeal, disposed of the notice of motion itself finally along with the appeal by order dated April 1, 2002. The Division Bench set aside the order of the learned Single Judge, dismissed the motion of the appellants and thus allowed the appeal. It is against that judgment and order of the Division Bench of the High Court that this appeal is directed.

Mr.Ashok H.Desai, learned senior counsel appearing for the appellants, contended that the Indian Court was a natural and appropriate forum; the principle for granting anti-suit injunction was correctly noticed by the learned Single Judge who recorded the finding that the action initiated by the respondent in the English Court was vexatious and oppressive; the Division Bench without disturbing the said finding dismissed the motion erroneously taking the view that only if a party commenced litigation in a Foreign Court in breach of a contract stipulating that the Indian Courts would have exclusive jurisdiction, could an anti-suit injunction be granted. He submitted that reliance on Rule 32(4) of Dicey & Morris 'The Conflict of Laws' by the Division Bench was misconceived and that the correct rule applicable was Rule 31(5) which referred to the decision of the House of Lords in the case of Spiliada Maritime Corporation vs. Cansulex Ltd. [(1986) 3 All.ER 842] and of the Privy Council in SNI Aerospatiale vs. Lee Kui Jak & Anr. [(1987) 3 All.ER 510]. In his submission the English Court is a forum non-conveniens as the appellants have to take all the witnesses to London which would cause great inconvenience and economic loss and unless the court grants injunction against the respondent, it would result in disastrous consequences to the appellants. He further contended that the appellants could not have foreseen that the respondent who was contractually bound to supply Feed for telecast only through Doordarshan, would thereafter jeopardise the appellants' advertising revenue by publicly threatening to discontinue the signal Feed to Doordarshan on the alleged ground of spill over of the Doordarshan signal beyond India. He vehemently contended that the natural and appropriate forum which had jurisdiction to grant anti-suit injunction were Indian Courts so the Division Bench erred in dismissing the motion. He argued that the English Court had no nexus whatsoever with the parties or the subject-matter and that the contractual stipulation for non- exclusive jurisdiction of the English Courts (without

reference to English conflict of law rules) would not preclude the Indian2 Courts from granting anti-suit injunction.

Mr.Iqbal Chagla, the learned senior counsel for the respondent, argued that the prima facie finding of the learned Single Judge in regard to the action of the respondent in the English Court being vexatious and oppressive would not bind the learned Judge himself at the stage of final hearing of motion much less would it bind the Division Bench in appeal. According to the learned counsel the suit was filed in India to foreclose the right of the parties to approach the court of their choice, namely, the English Court. He pointed out that the parties had clearly stipulated in the contract for resolution of their disputes in accordance with the English Law and in the English Court, therefore, the appropriate forum would be the English Court. In any event, it being the court of choice of the parties no injunction could be granted against the respondent from prosecuting the case before that Court. It was submitted that the respondent continued the Feed during the stipulated period; the appellants had the advantage of telecasting the Event and receiving the benefit of the advertisement slots fully; they made payments till the end of February; and, therefore, they could not be allowed to evade the liability under the contract by seeking injunction. It was also submitted that the foreseeability test pleaded by the appellants was not relevant; the parties had chosen neutral forum in preference to natural forums - Indian Courts and Singapore Courts. In any event, submitted the learned counsel, when a party had approached an agreed jurisdiction under a contract, whether exclusive or non-exclusive, the other party could not be allowed to contend that the suit so filed was vexatious and oppressive; only in extra-ordinary and unforeseen circumstances which would justify a party to claim relief from its bargain of non-exclusive jurisdiction clause that an anti-suit injunction could be claimed but certainly not on the ground of convenience such as expenses and hardship of getting the witnesses to the agreed neutral forum. The Courts in India like the Courts in England are courts of both law and equity. The principles governing grant of injunction - an equitable relief - by a court will also govern grant of anti-suit injunction which is but a species of injunction. When a court restrains a party to a suit/proceeding before it from instituting or prosecuting a case in another court including a foreign court, it is called anti-suit injunction. It is a common ground that the Courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. This is because courts of equity exercise jurisdiction in personam. However, having regard to the rule of comity, this power will be exercised sparingly because such an injunction though directed against a person, in effect causes interference in the exercise of jurisdiction by another court.

In regard to jurisdiction of courts under the Code of Civil Procedure (CPC) over a subject- matter one or more courts may have jurisdiction to deal with it having regard to the location of immovable property, place of residence or work of a defendant or place where cause of action has arisen. Where only one Court has jurisdiction it is said to have exclusive jurisdiction; where more courts than one have jurisdiction over a subject-matter, they are called courts of available or natural jurisdiction. The growing global commercial activities gave rise to the practice of the parties to a contract agreeing beforehand to approach for resolution of their disputes thereunder, to either any of the available courts of natural jurisdiction and thereby create an exclusive or non-exclusive jurisdiction in one of the available forums or to have the disputes resolved by a foreign court of their choice as a neutral forum according to the law applicable to that court. It is a well-settled principle that by

agreement the parties cannot confer jurisdiction, where none exists, on a court to which CPC applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court; indeed in such cases the English Courts do permit invoking their jurisdiction. Thus, it is clear that the parties to a contract may agree to have their disputes resolved by a Foreign Court termed as a 'neutral court' or 'court of choice' creating exclusive or non- exclusive jurisdiction in it.

We shall now refer to Rule 32(4) on which reliance is placed by the High Court and Rule 31(5) on which learned counsel for the appellants relies. These Rules are formulated in the Conflict of Laws by Dicey and Morris, (13th Edition) on the basis of judgments of the House of Lords and the Privy Council. It would, therefore, be useful to quote them here.

> "31(5). An English Court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court, or the enforcement of foreign judgments, where it is necessary in the interests of justice for it to do so."
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> "32(4). An English Court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court in breach of a contract to refer disputes to an English (or, semble, another foreign) court."

A careful perusal of these Rules makes it clear that clause (5) of Rule 31 deals with a case not covered by a jurisdiction agreement whereas clause (4) of Rule 32 deals with a case involving jurisdiction agreement. Indeed, the learned authors themselves in para 12.123 state as follows:

> "The general principles upon which an English Court may order a party who is subject to its personal jurisdiction not to institute, or to discontinue, proceedings in a foreign court have been examined above [clause (5) of Rule 31]. But where the basis for the exercise of the court's discretion is that the defendant has bound himself by contract not to bring the proceedings which he threatens to bring, or has brought, in the foreign court, the principles which guide the exercise of discretion of the court are distinct from those which were examined under clause (5) of Rule 31."

Thus, it is clear that the principles governing the exercise of discretion by the court to grant anti-suit injunction against a person amenable to the jurisdiction where by contract the defendant has bound himself not to bring the proceedings which he threatens to bring or has brought in the foreign court, are different from the principles laid down in Rule 31(5) which deals with cases in general where an English Court may restrain a party over whom the court has personal jurisdiction from the institution or continuance of the proceedings in a foreign court. The test for issuance of the anti-suit injunction to a person amenable to the jurisdiction of the court in person has been varying; first it was 'equity and good conscience' as could be seen from the decision of the House of Lords in Carron Iron Company Vs. Maclaren (1855 5 HLC 416). The test later adopted was 'to avoid injustice' [See: Castanho Vs. Brown & Root (U.K.) Ltd. & Anr. (1981 Appeal Cases 557)]. The test adopted in the recent cases is whether the foreign proceedings are "oppressive or vexatious" SNI Aerospatiale's case

(supra). Even about this test it is commented, "In most decisions, the courts have considered whether the foreign proceedings were vexatious or oppressive. Historically, since the 19th century, these terms were used in the exercise of the court's jurisdiction whether or not to grant anti-suit injunctions. But, in the context of stay of proceedings on ground of another forum being the more appropriate forum, these terms were effectively abolished by the House of Lords in Macshannon vs. Rockware Glass Ltd. [(1978) 1 All ER 625]. This was because of the moral connotations attached to these words and the difficulty for the defendant to prove that there was something wrong in the character of the plaintiff.

Although Lord Goff explained, in SNI Aerospatiale vs. Lee Kui Jak & Anr.

[(1987) 3 All.ER 510], that these words could have different meaning in different contexts, he was inclined, in Airbus Industrie GIE vs. Patel & Ors. [(1998) 2 All ER 257], to agree, albeit obiter, with Judge Sopinka in Amchem Products Inc Vs. Workers Compensation Board [(1993) 102 DLR (4th) 96], who preferred to use, simply, 'ends of justice'. However, Lord Goff did not expressly abandon these words."* These expressions are not clearly defined but in C.S.R. Ltd. Vs. Cigna Insurance Australia Ltd. (1997 (189) C.L.R. 345), the High Court of Australia used them in the sense "only if there is nothing which can be gained by them over and above what may be gained in local proceedings". The Supreme Court of Canada adopted the test of the requirement of "the ends of justice". The essence or the ultimate objective is to enquire how best the interests of justice will be served; whether grant of anti-suit injunction is necessary in the interests of justice. However, in a case where a jurisdiction agreement exists it is not necessary, in all cases, to show that foreign proceedings are vexatious, oppressive or that the local court is a natural forum for the claim and there is no obligation upon the claimant to seek relief from foreign court first. The case on hand is a little different from the category which is subject of formulation in Rule 32(4). Here the appellants who are parties to the contract containing a non- exclusive jurisdiction clause of English Court and resolution of disputes in accordance with the principles of English law, are seeking anti-suit injunction against the respondent to restrain it from proceeding with the action brought by it in English Court.

Before endeavouring to discern the principles applicable to the type of the case on hand, we may with advantage refer to the cases cited at the Bar.

In Oil and Natural Gas Commission vs. Western Company of North America [1987 (1) SCC 496], this Court considered the question of granting anti- suit injunction. The appellant, Oil and Natural Gas Commission, entered into a drilling contract with the respondent Western Company of USA. Pursuant to the contract the parties referred their disputes to arbitration, governed by the Indian Arbitration Act, 1940. A non-speaking award was made which was followed by supplementary award without affording any hearing to the parties. At the instance of the foreign company the awards were filed in the Bombay High Court. But thereafter the foreign company filed a plaint in the US District Court, New York, seeking an order confirming the awards and a judgment for payment of interest till the date of judgment and costs. The ONGC filed an application under the Indian Arbitration Act for setting aside the awards of the umpire in the Indian Court and further prayed for an interim anti-suit injunction restraining the foreign company from proceeding further with the

plaint filed in the US Court. At the initial stage an interim injunction was granted by a learned Single Judge of the High Court but the same was vacated after contest. From the said order an appeal was taken to this Court. It was held by this Court that when it was necessary or expedient to do so or when the ends of justice so required, the High Court had undoubted jurisdiction to grant such an injunction and that it would be unfair to refuse the restraint order because the action in the foreign court would be oppressive in the facts and circumstances of the case. It was pointed out that although the Supreme Court would sparingly exercise its jurisdiction to restrain a party from proceeding further with an action in a Foreign Court, that case was one of those rare cases where the Court would be failing in its duty if it hesitated to grant the order of injunction. It was observed that since under the contract the parties were governed by the Indian Arbitration Act, and as such the Indian Courts had exclusive jurisdiction to determine the validity and enforceability of the awards, the American Court had no jurisdiction in that behalf. The appellant invoked the jurisdiction of the New York Court to pronounce on the same question which was required to be pronounced upon by the Indian Court and if the restraint order was not granted serious prejudice would be occasioned and a party violating the very arbitration clause on the basis of which the award had come into existence would also secure an order enforcing the award from a foreign court. However, it may be pointed out that in that case there was no stipulation agreeing to non-exclusive jurisdiction in the Foreign Court.

In British Indian Steam Navigation Co.Ltd. vs. Shanmughavilas Cashew Industries & Ors. [1990 (3) SCC 481], the respondent purchased from East Africa a specified quantity of raw cashewnuts which were shipped in a vessel chartered by the appellant-company incorporated in England. The bills of lading incorporated a clause to the effect that the contract evidenced by it shall be governed by English law and disputes determined in England or, at the option of the carrier, at the port of destination according to English law to the exclusion of the jurisdiction of the courts of any other country. There was short supply of cashewnuts so the first respondent filed a suit in the Court of Subordinate Judge, Cochin, seeking damages for the short supply. The appellant defended the suit on the ground that it was a mere charterer of the vessel and not the owner and that as per the bills of lading the court at Cochin had no jurisdiction and only the English Courts had jurisdiction. The suit was dismissed by the trial court, so also the appeal of the appellant by the High Court. On further appeal to this Court, it was held that for purposes of jurisdiction the action of the first respondent was an action in personam in Private International Law and that such action might be decided upon the parties themselves. The chosen court may be a court in the country of one or both the parties, or it may be a neutral forum. The jurisdiction clause may provide for submission to the courts of a particular country or to a court identified by a formula. It is a question of interpretation, governed by the proper law of the contract, whether a jurisdiction clause is exclusive or non- exclusive, or whether the claim which is the subject-matter of the action falls within its terms. If there is no express choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably, be the proper law.

In SNI Aerospatiale's case (supra), the Privy Council laid down the principles to be applied by a Court in deciding whether to restrain foreign proceeding. They are as follows :

> "The principles applicable to the grant by an English Court of an injunction to restrain the commencement or continuance of proceedings in a foreign jurisdiction were not the same as those applicable to the grant of a stay of English proceedings in favour of a more appropriate foreign forum, and where a remedy for a particular wrong was available both in an English Court and a foreign court the English Court would normally only restrain the plaintiff from pursuing the foreign proceedings if it would be vexatious or oppressive for him to do so."

In that case, a passenger in a helicopter was killed when it crashed in Brunei. The helicopter was manufactured in France by a French Company which had a subsidiary in Texas to whom the helicopter was sold. At the time of the crash, the helicopter was owned by an English company and operated and serviced by its Malaysian subsidiary under contract to a Brunei subsidiary of an international oil company. The widow of a passenger filed suits against the defendants in both Brunei and Texas. The defendants applied in Brunei for an injunction restraining the plaintiffs from continuing the Texas proceeding. The Trial Court did not grant injunction. In the Court of Appeal both sides agreed to accept that in any trial in Texas the liability of the defendants would be determined according to the law of Brunei. The Appeal Court held that Texas had become the natural forum by reason of the pre- trial discovery and in that forum the case could be more suitably tried, therefore, it dismissed the appeal. On further appeal to the Privy Council, it was held that Brunei was the natural forum at the time of the commencement of the proceedings because the fatal accident had occurred there, the deceased and the plaintiffs were resident there and the law governing the claim was the law of Brunei and there was nothing to connect the action with Texas, and pre-trial discovery and other steps taken by the attorneys in Texas would not change its position and had not made Texas the natural forum. The Court in Brunei remained the natural forum for the action and it would be oppressive for the plaintiffs to proceed in Texas because the defendants might well be unable to pursue in those proceedings their own contribution claim against the Malaysian company which serviced and operated the helicopter. The appeal was thus allowed. Though, in that case also there was no jurisdiction agreement for resolution of disputes the discussion suggests that a suit in breach of an exclusive jurisdiction clause is in itself not conclusive of being 'vexatious and oppressive'. It will be useful to refer to the following observations of Lord Goff :

> "In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him."

In regard to the test laid down in this case, in the Oxford Journal of Legal Studies*, Vol.17, it is rightly commented :

> "The focus is on the interests of the parties not just the appropriateness of the forum. Injunctions will henceforth be available only on a more limited basis; but that basis expressly balances both the fairness to the parties and the naturalness of the forum. It is open, sufficiently narrow in scope, even- handed and fair. In short, an entirely suitable contemporary test."

In Spiliada Maritime's case (supra), the House of Lords laid down the following principle:

> "The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice".

The criteria to determine which was more appropriate forum, for the purpose of ordering stay of the suit, the court would look for that forum with which the action had the most real and substantial connection in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English Court it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate, the court would normally grant a stay unless there were circumstances militating against a stay. It was noted that as the dispute concerning the contract in which the proper law was English law, it meant that England was the appropriate forum in which the case could be more suitably tried.

In Airbus Industrie GIE vs. Patel & Ors. [(1998) 2 All ER 257], some British citizens of Indian origin travelled in an Airbus-320 aircraft when it crashed at Bangalore airport. They commenced proceedings in Texas against the plaintiff-company. A similar claim was made by the American claimants in Texas court. The plaintiffs obtained a declaration from the City Civil Court, Bangalore that the defendants were not entitled to proceed against them in any court of the world other than in Bangalore, India. Thereafter, they approached the English Court to enforce the judgment obtained from the Bangalore court and to obtain an injunction restraining the defendants, who were resident in England, from continuing their action in Texas on the grounds that the pursuit of that action would be contrary to justice and/or vexatious or oppressive. The learned Judge at the first instance dismissed the application but the Court of Appeal allowed the plaintiff's appeal and granted injunction prayed for. On appeal of the defendants, the House of Lords held that as a general rule, before an anti- suit injunction could be granted by an English Court to restrain a person from pursuing proceedings in a foreign jurisdiction, comity required that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which such an injunction entailed. However, in cases where the conduct of the foreign state exercising jurisdiction was such as to deprive it of the respect normally required by

comity, no such limit was required in the exercise of the jurisdiction to grant an anti-suit injunction. Since, in the instant case, the English Court had no interest in, or connection with the matter in question the Court could not grant injunction sought as it would be inconsistent with the principles of comity. The injunction granted by the Court of Appeal was set aside and the appeal of the defendants was allowed. Two aspects underlying this decision are worth noticing - the first is the requirement of ends of justice and the second is respect for other court's jurisdiction (comity).

British Aerospace Plc vs. Dee Howard Co. [1993 (1) LLR 368], deals with stay of English action. In that case, a British Company (BAe) entered into an agreement with an American Company (DHC) to provide assistance and information in connection with a re-engining programme which it was undertaking. It was provided that the agreement should be governed by and be construed according to the English law and that the courts of law in England should have jurisdiction to entertain any action in respect thereof. The DHC suspended further work on the re-engining programme claiming that the BAe failed to carry out its obligation under the agreement. The DHC initiated action in Texas State Court. After service of notice of that action the BAe applied to the American Court to dismiss the proceedings in view of the jurisdiction clause in the agreement. The BAc also initiated proceedings in English Court duly impleading the parent company (Alenia) of the DHC, with the leave of the Court. While so, the DHC applied to the English Court for the following reliefs: (i) to set aside the leave and (ii) to stay the proceedings against the parent company in the English Court as the action was pending in American Court which was the appropriate forum. Waller,J. on construing the jurisdiction clause in the agreement held that the parties had agreed that the English Court should have exclusive jurisdiction and that even if it was not an exclusive jurisdiction clause, it showed that the parties had freely negotiated agreeing not to object to the English Court's jurisdiction, therefore, it should not be open to the DHC to argue the relative merits of contesting the case in Texas as compared with contesting the case in London as the relevant factors would have been eminently foreseeable at the time of entering into the contract and that the contentions that there would be two sets of proceedings one in Texas and another in London and that there would be inconvenience for witnesses having regard to the location of documents, the timing of a trial and all such like matters to support stay of English action could not be permitted to be urged. In Donohue vs. Armco Inc and others [2002 (1) All.ER 749], there were three contracts for the sale of shares in the Armco insurance group of companies (for short, 'the A group') containing exclusive jurisdiction clauses providing that the parties irrevocably submit themselves to the exclusive jurisdiction of the English Courts to settle any dispute which might arise out of or in connection with the agreement. Disputes having arisen the 'A group' initiated proceedings in New York against D and others. D applied to the English Court for an anti-suit injunction preventing the 'A group' from bringing claims arising from the sale of the shares against D in any forum other than England. The learned Judge at the first instance declined to grant the injunction prayed for but the Court of Appeal granted the prayer of anti-suit injunction. On the appeal of D to the House of Lords, it was held that where the parties had bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. The question whether strong reasons exist to displace the claim under the contract would depend on the facts and circumstances of each case. Lord Bingham of Cornhill with whom other Law Lords agreed held thus:

> "Where the dispute was between two contracting parties, one of which sued the other in a non-contractual forum, and the claims fell within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties were not involved, effect would in all probability be given to the clause. However, the court might well decline to grant an injunction or a stay where the interests of parties other than parties bound by the exclusive jurisdiction clause were involved or grounds of claim not the subject of the clause were part of the relevant dispute so that there was a risk of parallel proceedings and inconsistent decisions. In the instant case, D's strong prima facie right to be sued in England on claims made by the other parties to the exclusive jurisdiction clause insofar as those claims fell within that clause was matched by the clear prima facie right of the A group to pursue other claims in New York. The crucial question was whether, on the facts, the A group could show strong reasons why the court should displace D's prima facie entitlement. Moreover, if strong reasons were found, such reasons would have to lie in the prospect, if an injunction was granted, of litigation continuing partly in England and partly in New York, and that was a consideration to which great weight should be given."

Our attention was also invited to a decision of Court of Appeal in SABAH Shipyard (Pakistan) Ltd. Vs. (1) Islamic Republic of Pakistan (2) Karachi Electrics Supply Corporation Ltd.(2002) (2002 EWCA Civ 1643). In that case SABAH, a limited Company incorporated in Pakistan by its Malaysian parent, entered into an agreement with a state owned corporation - KESC, in regard to the design, construction, operation and maintenance of a barge-mounted electricity generation facility at Karachi. The Government of Pakistan (GOP) entered into a guarantee in favour of SABAH which, inter alia, provided that the parties consented to the jurisdiction of the Courts of England for any action under the agreement to resolve any dispute between them and waived the defence of inconvenience of forum in any action or proceeding between them in the Courts of England. The GOP brought an action in the Court of Senior Judge, Islamabad and obtained an anti-suit injunction against SABAH. However, SABAH also brought an action in English Court and sought an anti-suit injunction which was granted restraining the GOP from continuing proceeding in the Court of Senior Judge, Islamabad. Against the order continuing the injunction, the GOP went in appeal before the Court of Appeal. Waller, L.J. with whom the other members of the Court of Appeal agreed in reaffirmation of the principles laid down in SNI Aerospatiale's case (supra), held that the learned judge in the first instance was right in construing that the clause in the agreement was a non-exclusive jurisdiction clause and that as GOP had agreed to submit any disputes between the parties to the jurisdiction of the English Court and to waive any objection that any action brought in England was in an inconvenient forum, therefore, it could not have been the intention of the parties that if proceedings were commenced in England, parallel proceedings could be pursued elsewhere unless there was some exceptional reason for doing so. The action of GOP in seeking to prevent SABAH in commencing proceedings in the agreed jurisdiction was construed as a clear breach of contract and it was observed that the proceedings in Pakistan might also be vexatious if commenced after the English proceedings and/or simply to attempt to frustrate the jurisdiction clause which expressly dealt with the forum conveniens aspect so as to enable England to be the most likely forum for resolution of disputes and that England was the agreed jurisdiction to which neither party could object. It was noted that the GOP could not show any exceptional reason why parallel proceedings

were justified and that the fact that the GOP commenced the proceedings first, did not change the position because they did so as a pre-emptive strike.

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 vexatious 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 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.

Now adverting to the facts of this case, the jurisdiction clause in the contract runs thus :

> "This agreement shall be governed by and construed in accordance with English law and the parties hereby submit to the non-exclusive jurisdiction of the English Courts (without reference to English conflict of law rules)."

A plain reading of this clause shows that the parties have agreed that their contract will be governed by and be construed in accordance with English law and they have also agreed to submit to the non-exclusive jurisdiction of English Courts (without reference to English conflict of law rules). We have already observed above that recitals in regard to submission to exclusive or non-exclusive jurisdiction of a court of choice in an agreement are not determinative. However, as both the parties proceeded on the basis that they meant non-exclusive jurisdiction of the English Courts, on the facts of this case, the Court is relieved of the interpretation of jurisdiction clause. Normally, the court will give effect to the intention of the parties as expressed in the agreement entered into by them except when strong reasons justify disregard of the contractual obligations of the parties. In Donohue's case (supra) although the parties to the agreement stipulated to submit to the exclusive jurisdiction of the English Courts, the House of Lords found that it would not be in the interests of justice to hold the parties to their contract as in that case strong reasons were shown by the respondent. It was felt necessary that a single trial of all the claims of the parties by one forum would be appropriate and as all the parties to the New York proceedings were not parties to the agreement stipulating exclusive jurisdiction of the English Court and as all the claims before the New York court did not arise out of the said contract so they could not have been tried in the English Court. It was urged that in the circumstances parallel proceedings - one in England and another in New York - would have to go on which might result in inconsistent decisions. Those facts were considered as strong reasons to decline to grant anti-suit injunction though the parties had agreed to the exclusive jurisdiction of the English Court. In contrast in SABAH's case (supra) even though GOP filed the suit first in the court of natural jurisdiction and sought anti-suit injunction against SABAH restraining them from

proceeding with the action brought by them in the English Court, the Court of Appeal found that non- exclusive jurisdiction clause in the agreement of guarantee executed by GOP was binding on them. The action of GOP in filing the suit earlier in the court of natural jurisdiction was held to be clearly in breach of contract and in the context of the non-exclusive jurisdiction clause, oppressive and vexatious unless the GOP could show strong reasons as to why parallel proceeding would be justified. The only ground urged for continuance of proceeding in Pakistan Court was that it was a convenient forum which was considered not strong enough for the GOP to disregard the contractual obligation of submission to the jurisdiction of the English Court for resolution of disputes. The Court of Appeal, upheld the anti-suit injunction granted by the learned Judge at the first instance as also the order declining to stay the English suit.

In the instant case, though the learned single judge proceeded on the prima facie finding that the proceedings in the English Courts would be oppressive and vexatious, in our view, those findings, recorded at the stage of passing an ad-interim order, would not bind the same learned judge much less they would bind the appellate court or the parties thereto at subsequent stage of the same proceeding because it cannot operate as issue estoppel. It cannot be laid down as a general principle that once the parties have agreed to submit to the jurisdiction of a foreign court, the proceedings or the action brought either in the court of natural jurisdiction or in the court of choice will per se be oppressive or vexatious. It depends on the facts of each case and the question whether the proceedings in a Court are vexatious or oppressive has to be decided on the basis of the material brought before the court. Having perused the plaints in both the suits and the contract we are of the view that the proceeding in the English Court for recovery of the minimum guaranteed amount under the contract cannot, at this stage, be said to be oppressive or vexatious. It is true that the courts would be inclined to grant anti-suit injunction to prevent breach of contractual obligation to submit to the exclusive or non-exclusive jurisdiction of the court of choice of the parties but that is not the only ground on which anti-suit injunction can be granted. As is apparent the appellants brought the suit in the court of natural jurisdiction for adjudication of the disputes arising under the contract for which the parties have agreed to submit to the non-exclusive jurisdiction of the English Court in accordance with English law though the English Court has no nexus with the parties or the subject-matter and is not the natural forum. But then the jurisdiction clause indicates that the intention of the parties is to have the disputes resolved in accordance with the principles of English law by an English Court. Unless good and sufficient reasons are shown by the appellants, the intention of the parties as evidenced by their contract must be given effect to. Even when the appellants had filed the suit earlier in point of time in the court of natural forum and the respondent brought action in the English Court which is the agreed forum or forum of the choice having regard to the expressed intention of the parties, no good and sufficient reason is made out to grant anti-suit injunction to restrain the respondent from prosecuting the English action as such an order would clearly be in breach of agreement and the court will not, except when proceedings in foreign court of choice result in perpetuating injustice aid a party to commit breach of the agreement. To apply the principle in Donohue's case good and sufficient reasons (strong reasons) should be shown to justify departure from the contractual obligations. Here, two contentions have been urged; the first is that the English Court is forum non-conveniens in view of the alleged breach of the agreement by the respondent in the manner not foreseen. This, in our view, is far from being a good and sufficient reason to ignore the jurisdiction clause. Even otherwise the fact that the parties had agreed to

resolve their disputes arising under the agreement, shows that they had foreseen possible breach of agreement by any of the parties and provided for the resolution of the disputes which might arise therefrom. In the context, the foreseeability test would take in circumstances which render approaching the forum of choice impossible like the court of choice merging with other court and losing its identity or a vis major etc., which would make it impossible for the party seeking anti-suit injunction, to prosecute the case before the forum of choice. In our view, on the facts of this case, the foreseeability test cannot be extended to the manner of breach of the contract so as to turn the forum of choice into forum non-conveniens. Circumstances such as comparison of litigation expenses in England and in India or the hardship and incurring of heavy expenditure on taking the witnesses to the English Court, would be deemed to have been foreseen by the parties when they agreed to submit to the jurisdiction of the English Court in accordance with the principles of English law and the said reasons cannot be valid grounds to interdict prosecution of the action in the English Court of choice. And the second is that English Court has no connection with either of the parties or the subject-matter and it is not a court of natural jurisdiction. This reason can be taken note of when strong reasons are shown to disregard the contractual obligation. It cannot be a good and sufficient reason in itself to justify the court of natural jurisdiction to interdict action in a foreign court of choice of the parties.

We, therefore, find no valid reasons to grant anti-suit injunction in favour of the appellants, in disregard of jurisdiction clause, to restrain the respondent from prosecuting the case in the foreign forum of the choice of the parties - the English Court.

For the aforementioned reasons, interference in the order of the High Court, under challenge, is not warranted. The appeal fails and it is accordingly dismissed with costs.

* Modern Admiralty Law by Aleka Mandaraka-Sheppard (First Edition at page 275). ? Recognition of Foreign Judgments at Common Law - The Anti-Suit Injunction Link by Jonathan Harris.