ARBITRATION NEWSLETTER

JULY, 2022

M/S SAT KARTAR TOUR N TRAVELS, NEW DELHI v OIL AND NATURAL GAS CORPORATION LIMITED

ARB.P. 772/2021 & I.A. 11645/2021

FACTS

• The petitioner was awarded a contract from the respondent Company on November 27, 2020 for hiring services of 24 no. of SUVs by way of GEM Contract.

• In order to complete the pre-requisites, the petitioner's representative moved to Bokaro for the mobilization of SUVs. The petitioner's vehicles were parked outside the ONGC to provide the services to the Respondents.

• Due to an ongoing protest outside the gate of ONGC, the petitioner's vehicles were not allowed inside the respondent company's premises.

• The respondent company terminated the contract on February 15, 2021 by way of a notice. The petitioner sent a detailed reply to the notice denying all the claims of the respondent.

• The petitioner was thereafter, served with a legal notice invoking the arbitration clause under the agreement calling upon the respondent to appoint an arbitrator within thirty days.

• Thereafter the respondent unilaterally appointed Mr. ABL Srivastava as the sole arbitrator without taking consent of the petitioner.

• The petitioner therefore, filed an application u/s 11(6) of the Arbitration and Conciliation Act, 1996 praying to set aside the arbitrary appointment of the Arbitrator.

PLAINTIFF'S CONTENTION

• The unilateral appointment of the Arbitrator is illegal and arbitrary as it is against the settled principle of law laid down in Perkins Eastman Architects DPC v HSCC Ltd[1].

• The Court is requested to appoint a sole arbitrator as provided under the provisions of A &C Act, 1996 in order to adjudicate the dispute between the parties.

• This Court has the jurisdiction to entertain this petition as the respondent company ONGC is under the Ministry of Oil and Natural Gas, Government of India whose office is located in Delhi and therefore, Delhi is the place of contract and this court shall have the jurisdiction to entertain this petition.

RESPONDENT'S CONTENTION

• This petition is not maintainable on the ground that in terms of the contract, the seat of the Arbitration is at the place from where the contract has been placed by the buyer, therefore, the concerned Court shall be the High Court within whose jurisdiction Bokaro falls. The termination of the Contract was also affected from Bokaro.

• The location of the Buyer's office is Bokaro, Jharkhand and the Contract was placed from Bokaro. Clause 17(iii) stipulates that it is the place from where the contract has been made shall have the exclusive jurisdiction to settle the disputes between the parties.

• The decision of the Supreme Court in Indus Mobile Distribution Pvt. Ltd. v Datawind Innovations Pvt. Ltd.[2] Brahmani River Pellets Ltd. v Kamachi Industries Ltd.[3] and BGS SGS SOMA JV v NHPC Ltd.[4] is of relevance here as designating a seat in a contract amounts to exclusive jurisdiction of the Court at the seat.

ISSUES AT HAND

• Whether the Delhi High Court shall have jurisdiction to entertain the petition or not?

[1] (2019) SCC Online SC 1517
[2] (2017) 7 SCC 678
[3] (2020) 5 SCC 462
[4] (2020) 4 SCC 234

DECISION OF THE COURT

• As per the clause in the contract, the place of contract would that the place of arbitration would be Bokaro, Jharkhand as authority who appointed the Arbitrator is based in Bokaro, Jharkhand and which got proved by referring to many judgements.

• As per the observations made by the Supreme Court in the case of Indus Mobile Distribution Pvt. Ltd. v Datawind Innovations Pvt. Ltd.[5] that once a seat is designated, it is akin to an exclusive jurisdiction.

• Further the respondent is also correct in relying on Brahmani River Pellets Ltd. v Kamachi Industries Ltd.[6] and BGS SGS Soma JV v NHPC Ltd.[7] as the Supreme Court has held that where a contract specifies the jurisdiction of the court at a particular place, only such court shall have the jurisdiction to deal with the matter and the parties intended to exclude all other courts.

• In light of the above judgments, it can be included that the place of arbitration shall be the place where the contract has been issued i.e., Bokaro, Jharkhand. Therefore, the application is dismissed as infructuous.

[5] (2017) 7 SCC 678
[6] (2020) 5 SCC 462
[7] (2020) 4 SCC 234

PINK CITY EXPRESSWAY PRIVATE LIMITED v NATIONAL HIGHWAYS AUTHORITY OF INDIA & ANR.

FAO (OS) (COMM) 158/2022 & CM APPL. 28395/2022

FACTS

• The Appellant is a Special Purpose Vehicle promoted and incorporated specifically for the purpose of executing the work of Six-Laning Gurgaon-Kotlipur-Jaipur Section of NH-8 from KM 42.70 to KM 273.00 on Build, Operate and Transfer ('BOT') basis awarded by National Highways Authority of India (hereinafter referred to as the 'Respondent') in terms of Concession Agreement.

• In line with the clauses of the Concession Agreement, on 25.07.2018 the Respondent conducted a Traffic Sample Survey for the years 2016, 2017 and 2018 and it was determined that as the Actual Traffic was 14.86% below the Target Date's expectations, Respondent requested the Independent Engineer for factual determination qua modification in the Concession Agreement.

• According to the determination made by the Independent Engineer, the Concession Period was declared to have been extended by 28 month and 24 days i.e., till 26.08.2023.

• Even though the Independent Engineer made the factual determination, the Senior Lenders (Respondent No. 2) insisted on receiving a formal letter from the Respondent accepting the extension until 26.08.2023 before they would consider the Appellant's Resolution Plan. As a result, the Respondent was asked to provide a formal letter granting administrative approval by the Senior Lenders and the Appellant.

• But, despite assurances, a formal letter was never sent, and in its absence, the Senior Lenders began to consider of starting debt recovery proceedings against the Appellant.

• In W.P.(C) 6693/2020, the appellant asked the court to direct the respondent to grant administrative permission based on the IE's decision. The court ordered the respondent to tell the appellant its position within four weeks. Respondent acknowledged a 14-month interim extension on 10.12.2020.

• Senior Lenders also wrote to the Respondent to communicate its approval for the entire period of 28 months and 24 days as per Article 29 of the CA. However, due to the Respondent's rigid stand, they refused to consider the Resolution Plan and on 10.12.2021, initiated debt recovery proceedings against the Appellant and its promoter companies before the DRT in O.A. No.926/2021.

• Aggrieved by the said proceedings, the Appellant approached the Delhi High Court requesting to direct the Respondent to grant the approval, accordance with the Concession Agreement. In its order dated 29.04.2022, the Court directed the Respondent duly evaluate the prayer and communicate a response in respect thereof to the Appellant. The respondent thereafter informed that the interim extension granted up to 02.06.2022 was final and also threatened to forcibly takeover the toll plazas on 02.06.2022. The Respondent also issued Notice Inviting Tenders calling for bids from third parties to collect the toll from 02.06.2022.

• The Respondent’s action prompted the Senior Lenders to file W.P.(C) 7806/2022 to extend the Concession Period. Appellant filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 on 20.05.2022, seeking interim protection of its Concessionaire rights pending arbitration.

• On 24.05.2022, Respondent issued Letters of Awards (‘LOAs’) requiring selected entities to pay a fixed lump-sum amount, regardless of toll collection. According to the appellant, the highest bidders' LOA amounts are much lower than what the appellant collected/undertook as minimum guarantee. Appellant challenged the tendering process in W.P.(C) 8321/2022, which was dismissed as withdrawn on 25.05.2022, due to the Section 9 petition.

• On 24.05.2022, Respondent issued Letters of Awards ('LOAs') requiring selected entities to pay a fixed lump-sum amount, regardless of toll collection. According to the appellant, the highest bidders' LOA amounts are much lower than what the appellant collected/undertook as minimum guarantee. Appellant challenged the tendering process in W.P.(C) 8321/2022, which was dismissed as withdrawn on 25.05.2022, on account of pendency of Section 9 petition.

• The Single Judge vide judgment dated 03.06.2022 dismissed the Section 9 petition and the Respondent forcibly took possession of the toll plazas on 03.06.2022 itself and compelled the Appellant to file the present appeal assailing the said judgment.

APPELLANT'S CONTENTION

• Article 29 of the Concession Agreement states that concession is extended if Actual Traffic at Project Highway falls below the Target Traffic per Day on the Target Date. As per the survey conducted, the Actual Traffic had fallen short from Target Traffic and therefore, the extension was given up to 26.08.2023. The rigid approach of the Respondent of refusing to extend the concession up to 26.08.2023 is a violation of Article 29 of the Concession Agreement.

• Articles 29.1.2 and 29.2.1 show that the Concession Period is automatically extended if Actual Traffic is less than Target Traffic. Once the IE determined the extension, the Respondent had no say.

• Parties agree that the project was delayed due to Respondent's defaults and financial difficulties, so it was agreed that Respondent would infuse OTFIS of Rs.347 crores and a TPA was entered into for disbursing toll collected as per the waterfall mechanism.

• Respondent has called for bids from third parties to collect the toll after 02.06.2022, which is illegal because the CA has not been terminated. Appellant has completed 96% of the work and its promoters have invested Rs.735 crores.

• Learned Single Judge erred in holding that the extension was not automatic because the Appellant has not challenged Respondent's 14-month extension on 10.12.2020. In accordance with Article 29, the appellant was not required to challenge the letter and was only required to protect its rights until 26.08.2023.

• The Learned Single Judge erred in holding that the tendering process had attained its finality as the Appellant's withdrew the writ petition challenging the LOA's in favour of third parties. The petition was clearly withdrawn on account of pendency of the Section 9 petition and in any case, calling tenders from third-parties cannot curtail the rights of the Appellant.

RESPONDENT'S CONTENTION

• Respondent informed Appellant that the Concession Period would end on 02.06.2022 and no further extension would be granted. Appellant didn't challenge the decision, so no 15-month extension can be requested.

• The Appellant had filed W.P. (C) 6693/2020 seeking directions to the Respondent to decide the extension of the Concession period and the same was disposed of on 21.09.2020 directing the respondent to take a decision with respect to the extension, the leaving the discretion to the Respondent.

• Appellant failed to challenge the 10.12.2020 communication whereby a limited extension was granted with the condition that OTFIS infused by Respondent be refunded. Accepting the communication shows that the Appellant understood there was no automatic extension and that Appellant hasn't refunded the money.

• Appellant filed W.P.(C) 8321/2022 challenging the award of LOAs to third-parties, but withdrew it due to the Section 9 petition pending. However, there was no challenge to the LOAs in the Section 9 petition.

• The plea regarding 96% completion of work is misplaced. Sections 14(b), 16(c), 41(e), and 41(h) of the Specific Relief Act, 1963, prohibit specific performance in a Section 9 petition. In case the Appellant succeeds in Arbitration, it can be compensated by way of damages.

ISSUES

• Whether granting specific relief of the Contract is beyond the scope of the Court under Section 9 of the Arbitration and Conciliation Act, 1996?

DECISION OF THE COURT

• It is undisputed that Appellant had filed W.P. (C) 6693/2020 seeking directions to the Respondent to decide the issue of extension of concession period invoking Article 29 of the Concession Agreement. The respondent thereafter communicated that the concession period was only extended 14 months from the date of expiration of original concession period. However, the Appellant did not challenge the communication by the Respondent.

• Appellant further filed a W.P. (C) 4151/2022 for the Respondent to approve the Appellant's extension request based on the IE's assessment. This petition was disposed on 25.03.2022 leaving the decision on the respondent to duly evaluate the prayer.

• It is rightly observed that in the absence of a challenge to the communication dated 29.04.2022, the appellant is not allowed seek an extension beyond the 14-month concession period.

• Law on the scope of interference of Section 9 of the Arbitration and Conciliation Act, 1996 is no longer res integra. Section 9 can only be exercised for preservation of the subject-matter of the dispute till the decision of the Arbitral Tribunal and cannot be extended to directing specific performance of contract itself.

• There is no infirmity in the view that directing the Respondent to extend the contract for a further period, beyond the 14-month extension would constitute awarding specific relief of the contract, which is beyond the Court's powers under Section 9 of the Act.

• In the case of DLF Ltd. v Leighton India Contractors Private Ltd. & Anr.[1] it was observed that while exercising its jurisdiction under Section 9 of the Arbitration and Conciliation Act, 1996 the Court cannot ignore the underlying principles which govern the analogous powers conferred under Order 39 Rules 1 & 2 CPC and Order 38 Rule 5 CPC. The Court under Section 9 can only be exercised to order an interim measure of protection in respect of the matters specified in Section 9 (ii) (a) to (e). The scope of relief under Section 9 of the A&C Act cannot be extended to directing specific performance of the contract itself.

• Insofar as the issue of LOAs is concerned, Appellant is disentitled from raising the question of third-party LOAs for two reasons. Appellant filed W.P.(C) 8321/2022 seeking a writ of certiorari quashing the NITs for toll collection from third-party agencies and a writ of mandamus directing Respondent not to issue LOAs or take any other action pursuant to the NITs. The appellant withdrew the writ petition before the Division Bench on May 25, 2012, citing a pending Section 9 case. Therefore, it is correct to say that having withdrawn the petition, the Appellant is not allowed to challenge the award of LOAs in favour of third-parties as the Appellant had not challenged the LOAs in the Section 9 petition as well.

• Therefore, there is no merit in the appeal and the Appellant has been granted the liberty to seek such remedy as available in law.

[1] (2021) 4 SCC Online Del 3772

HIMANSHU SHEKHAR v PRABHAT SHEKHAR

High Court of Delhi, Judgement dated on 31.05.2022 in O.M.P. (T) (COMM.) 119/2021

FACTS

• The Petition has been filed under Sections 14(2) and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act") praying to terminate the mandate of the Arbitrator and to appoint an independent arbitrator in his place.

• The petitioner and respondent are brothers and the Arbitrator's son is married to the daughter of the eldest brother of the parties.

PETITONER'S CONTENTION

• The Arbitrator is related to the parties and they have not entered into any agreement waiving their right to waive ineligibility in terms of the proviso relating to Section 12(5) of the Act.

• The Arbitrator has conducted the proceedings in a manner which reflects bias. He has further passed interim reliefs to the respondents with out even any application moved to the aforesaid effect.

• The Arbitrators shares close family relations with the respondents which is listed as one of the grounds under Entry No. 9 of the Seventh Schedule of the Act. Therefore, his mandate is required to be terminated u/s 12(5) of the Act.

RESPONDENT'S CONTENTION

• The present circumstances do not attract any of the grounds provided in the Seventh Schedule of the Act and therefore, section 12(5) of the Act is not attracted here.

• The parties had entered into an agreement in writing after the disputes had arisen and therefore, the parties had waived off the right to challenge the appointment of Arbitrator by virtue of section 12(5) of the Act.

• There are certain email communications sent by the Petitioner to the Respondent which is indicates that the parties had a discussion over several other persons, one whom could be appointed as an arbitrator.

• An email dated 18.06.2021 sent by the Petitioner reflects that the Arbitrator was requested by the Petitioner to accept the appointment as an arbitrator.

ISSUES AT HAND

• Whether the Arbitrator is ineligible to be appointed as an arbitrator under Section 12(5) of the A&C Act? and

DECISION OF THE COURT

• It is important to note that in his application before the Arbitrator, the petitioner had clearly stated that he had no cast any aspersion on the character and integrity of the Arbitrator.

• It is pertinent to refer to Explanation I of the Seventh Schedule of the Act which provides for the definition of "close family relationship" where it says that the term means spouse, sibling, child, parent or life partner.

• If the family member of the Arbitrator has a financial interest, there is a likelihood of bias but only if such family member is "spouse, sibling, child, parent or life partner".

• The Entry No. 9 of the Seventh Schedule indicates that the Legislature did not intend to declare the Arbitrator ineligible only because he is distantly related to the parties. In this case as well, the Arbitrator is not a close relative of the parties.

• The Court found it unnecessary to determine whether the Arbitration Agreement constituted a waiver in terms of the proviso to section 12(5) of the Act.

• The Court held that the Arbitrator is a distant relative of the parties and is well-qualified to adjudge the dispute between the parties and provide an effective resolution of the disputes.

GMR KAMALANGA ENERGY LTD. v SEPCO ELECTRIC POWER CONSTRUCTION CORPORATION, SHANDONG, 250014, CHINA

ARBP ICA No. 1 of 2021

(An Application under S. 34 of the A & C Act, 1996)

FACTS

• The Petition (GMR KAMALANGA Energy Ltd hereinafter 'GKEL') entered into an agreement with the Opposite Party (SEPCO) for construction and operation of a Coal Fired Thermal Power Plant at Kamalanga village of Dhenkanal District of Orissa.

• GKEL and SEPCO signed four agreements that were later revised. Dispute arose between the parties due to plant construction delays and other technical concerns during construction and operation. Notice to initiate Arbitration was served by SEPCO to GKEL on 18th June, 2015.

• The seat of the Arbitration was India and the venue was Singapore.

• The Arbitration Tribunal passed the award on 07.07.2020. Both SEPCO and GKEL submitted motions to correct the award under Section 33 of the Arbitration Act, and the Tribunal issued an amended award on 17 November 2020. The GKEL has been ordered to pay SEPCO Rs.995 crores in accordance with the contested award.

• On February 15, 2021, the GKEL, who is the aggrieved party, submitted the current petition pursuant to Section 34 of the Arbitration Act.

PETITIONER'S CONTENTION

• The Tribunal acted unfairly towards the parties and attempted to establish a third case that didn't really pertain to either of the parties.

• It is also submitted that the Tribunal has effectively modified the contract by holding that the parties have waived the requirement to issue contractual notices.

• Although the issuance of notice was a pre-condition for SEPCO to make any claim for change in price or to seek an extension of time, the Tribunal erroneously held that the GKEL is estopped from seeking compliance with contractual notice based on its email dated March 18, 2012, without taking into account the context in which it was sent. Therefore, the finding that compliance with the contractual notice was waived with effect from March, 2012 is contrary to law.

• Because of holding that GKEL is estopped from seeking compliance of contractual notice, the Tribunal has barred GKEL from claiming that SEPCO failed to provide contractual notice in certain claims and due to which the Tribunal granted SEPCO's claims for time extensions and delay charges, which were barred by SEPCO's admitted failure to issue notices.

• The Tribunal established a case in favour of SEPCO that was never pleaded nor argued. It was not the case of SEPCO that there were separate agreements which constitute estoppels, i.e., (a) that there was a 2010 agreement that created an estoppel that lasted until the completion of the project execution; and alternatively; (b) that if there was no agreement of March 2010, then there was an agreement of March 2012 which constituted an estoppel not to give any further contractual notices. Therefore, the SEPCO did not plead the case of waiver or estoppel and the Tribunal itself made such a case for the SEPCO.

• Section 34(2)(a)(iii) of the Arbitration & Conciliation Act, 1996 provides for setting aside an award if a party challenging the award was not given proper notice or was unable to present its case. It is also well-established that an award can be set aside if natural justice principles or Section 18 of the Arbitration Act are violated.

• The Tribunal should have applied the parties' waiver of contractual notices to both SEPCO and GKEL which is not the case. Therefore, it is argued that the issue should be assessed on merit under Section 34 of the Arbitration Act.

• In the case of Ssangyong Engg. & Construction Co. Ltd. v NHAI[1] the Supreme Court held that principles of natural justice are valid grounds to challenge an arbitral award as per Section 18 and 34(2)(a)(iii) of the Act. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”.

RESPONDENT'S CONTENTION

• The Court must consider the extent and ambit of Section 34 of the Arbitration Act in terms of international commercial arbitration while determining the petition's admissibility. The scope and ambit of Section 34 does not permit the Petitioner to seek factual, evidentiary or legal review of findings of the award.

• As per the amendment in 2015, the scope of Section 34 of the Act restricts interference with the award on public policy grounds under S. 34(2)(b)(ii) of the Act on three heads, such as (i) fraud or corruption; (ii) contravention to public policy of Indian law; or (iii) conflicts with most basic notions of morality or justice (Explanation-I). A caveat is also added in Explanation-II according to which "no review on merits of the award is allowed".

• The claim of bias is made without any evidence, and it is made not just against the Arbitrator but also against the entire Tribunal, which includes its own nominee. In any event, challenge of bias under Sections 12 and 13 does not encompass a review on the merits of the dispute.

• Section 13 requires a party who intends to dispute the Tribunal's mandate on the ground of bias to do so within fifteen days of becoming aware of such circumstances. The Tribunal passed a unanimous award on 07.07.2020. The Arbitral Tribunal's mandate, however, persisted because the Tribunal was to give an award on interest and costs. The Petitioner continued to participate in the arbitral proceedings concerning interest and costs without objecting to the Arbitral Tribunal's bias.

ISSUES AT HAND

• Whether a court can judge the errors of facts while applying the public policy test to an arbitration award?

• Whether the Tribunal in the present case has acted in a biased manner to order to establish a case in favour of SEPCO?

DECISION OF THE COURT

• In the case of Associate Builder v DDA[2] the Supreme Court observed that where the court is applying the public policy test to an arbitration award, it does not act as a court of appeal and therefore, errors of facts cannot be corrected. If it is established that the arbitrator's approach is not arbitrary or capricious, then he is last words on facts.

• In the case at hand, the Arbitral Tribunal concluded that the email sent by GKEL instructed SPECO not to send formal notice to it in any matter in the future. As a result, it is impossible to deny that the finding regarding waiver of notice is perverse and based on no evidence. Further, a court on reappreciation of evidence cannot remark on the quantity and quality of evidence relied on by the Tribunal to reach a definitive conclusion unless it shocks the Court's conscience.

• The allegation of bias is of a serious nature and as per the Section 13 of the Act, the Petition had an opportunity to raise this issue before the Tribunal itself, however, no such allegation regarding the bias of the Arbitrators was raised by the Petitioner.

• The Petitioner itself raised the plea of estoppel/ waiver of contractual notice, relying upon the material on record. It is a case that the Petitioner itself raised the plea of waiver/estoppel and fell prey to it. In the case of Associate Builders[3] it was observed that a Court cannot interfere with the findings of the Tribunal, which is based on little evidence or on evidence which it has not measured up in quality of trained legal mined.

• The Petitioner had not made any case to come to a definite conclusion that the Tribunal did not treat the parties equally in violation of the provisions of Section 18 of the A & C Act, 1996.

• The Petitioner's claim that the Tribunal had rewritten the contract and acted in a biased manner to come to a conclusion that the parties agreed to waive the issuance of notices does not find any ground. Therefore, The Tribunal was obliged to respond on the basis of the materials on record.

• Therefore, the petition under Section 34 stands dismissed.

[1] (2019) 15 SCC 131
[2] (2015) 3 SCC 49
[3] Ibid

M/s India Media Services Private Limited v. M/s SBPL Infrastructure Limited,

CIVIL REVISION PETITION NO.507 OF 2021

FACTS

• In the present case, the Petitioner and Respondent had entered into a Nomination Agreement on 15.12.2005 but later disputes arose between them with respect to the Nomination Agreement and petitioner issued a letter dated 24.10.2011 invoking the arbitration clause in the Nomination agreement under Section 11 Arbitration and Conciliation Act, 1996.

• Justice Baskar Bhattacharya (Retired) was appointed as Arbitrator by The Calcutta HC and he was directed to conclude the proceedings by the end of August 2020. The award was passed on 27.10.2020. Challenging the award, petitioner filed petition under Section 34 of the Act before the Hon'ble Calcutta High Court.

• Further, the respondent filed Execution Petition under Order XXI Rule 11 (2) and Section 151 of CPC on the file of the IX Additional Chief Judge, City Civil Court, Hyderabad on the ground that the property was situated in Hyderabad city in the State of Telangana. The Civil Court allowed the Execution Petition without affording an opportunity to the Petitioner.

• However, the respondent had also filed an application u/s 9 of the Arbitration and Conciliation, 1996 before the Calcutta High Court during the course of the arbitral proceedings.

PETITIONER'S CONTENTIONS

• The City Civil Court, Hyderabad did not have the jurisdiction to entertain Execution Petition and therefore the orders passed by the City Civil Court is void ab initio.

• Once the parties have approached the High Court invoking its jurisdiction under Section 9 and Section 34 of the Arbitration and Conciliation Act, 1996, no other court can have the jurisdiction to entertain an Execution Petition after the conclusion of the arbitral proceedings.

RESPONDENT'S CONTENTIONS

• An arbitral award when passed by an Arbitrator can be enforced as a decree of Civil Court at any place in the Union of India. Therefore, as the property in dispute is situated in Hyderabad, the City Civil Court in Hyderabad has the jurisdiction to entertain the Execution Petition as per Section 36 of the Arbitration and Conciliation Act, 1996.

• In Sundaram Finance Limited v Abdul Samad & Ors[1] an Enforcement Application u/s 36 of the Arbitration and Conciliation Act, 1996 was returned by the Civil Court, Morena, State of Madhya Pradesh on the ground of lack of jurisdiction. Thereafter the Appellant directly approached the Supreme Court by seeking the leave to challenge the decision of the Civil Court. The Supreme Court held that an enforcement application can be filed anywhere in the court and there is no requirement to obtain transfer of a decree from the Court which would have jurisdiction over the arbitral proceedings.

ISSUES AT HAND

• Whether any court where the parties have not previously approached to seek a relief u/s 9 and/or Section 34 of the Arbitration and Conciliation Act can have the jurisdiction to entertain an application u/s 36 of the Act?

DECISION OF THE COURT

• The Court preceded on the premise of Section 42 of the Act. Section 42 deals with jurisdiction. It opens with a non-abstante clause. According to which only the Court where application under Section 9 and/or Section 34 was already filed alone has jurisdiction to deal with subsequent application including application for enforcement of award and no other Court has jurisdiction.

[1] (2018) 3 SCC 622

• The Court outrightly rejected the applicability of Sundaram Finance Case[2] on the ground that the Parties in that case did not approach any court u/s 9 of the Arbitration and Conciliation Act, 1996 to seek any relief. The arbitration award was also not challenged u/s 34 of the Act. Therefore, the Supreme Court did not have to deal with the applicability and scope of Section 42 of the Arbitration and Conciliation Act, 1996 as the parties did not submit to the jurisdiction of any court and straightway filed an execution application was filed u/s 36 of the Act.

• The High Court placed its reliance upon the case of State of West Bengal v Associated Contractors[3] where the Hon'ble Supreme Court observed that the applications u/s 9 and 34 filed before a Court would be within the scope of s. 42 of the Act which can be clearly determined from the text of the provision "with respected to an arbitration agreement" i.e., s.42 applies to all made before or during the arbitral proceedings or after the award was passed. Therefore, s. 42 is applicable to post-arbitral awards and application for execution of the arbitral award has to be filed in the Court where an application u/s 9 and 34 was earlier filed.

• Therefore, on the basis of the law laid down by the Supreme Court made in the case of State of West Bengal v Associated Contractors[4] and taking note of Section 42 of the Act, the High Court held that only the High Court would have the jurisdiction to entertain an execution application as the parties have earlier submitted to the jurisdiction of the High Court by making an application u/s 9 and 34 of the Act.

[2] Ibid
[3] (2015) 1 SCC 32
[4] Ibid

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