

IN THE HIGH COURT OF BOMBAY AT GOA

**APPEAL UNDER ARBITRATION NO. 7 OF 2018
WITH
APPEAL UNDER ARBITRATION NO. 8 OF 2018
WITH
APPEAL UNDER ARBITRATION NO. 9 OF 2018
WITH
APPEAL UNDER ARBITRATION NO. 10 OF 2018
WITH
APPEAL UNDER ARBITRATION NO. 11 OF 2018
WITH
APPEAL UNDER ARBITRATION NO. 12 OF 2018
WITH
APPEAL UNDER ARBITRATION NO. 13 OF 2018
WITH
APPEAL UNDER ARBITRATION NO. 14 OF 2018**

APPEAL UNDER ARBITRATION NO. 7 OF 2018

IFIN Commodities Limited,
a company incorporated under the
Companies Act, 1956, having
its office at continental Chambers,
3rd floor, 142,
Mahatma Gandhi Road,
Nungambakkam,
Chennai 600034 Tamil Nadu

(Respondent no.1 (original))

.... Appellant.

V e r s u s

1. Ayesha Madgavkar,
Having office at Nizari Bhawan,
5th floor, Menezes Braganza Road,
Panaji, 403001 Goa.
(Respondent no.1, original applicant)

2. Rashmi Sharma,
Proprietress of 3P-World,
Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,
Bangalore 560011, Karnataka.
(Respondent no.2,Original respondent
no.2)

3. Rajesh Sharma,
Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,
Bangalore 560011, Karnataka.
(Respondent no.2(original respondent
no.3)

.... Respondents.

APPEAL UNDER ARBITRATION NO. 8 OF 2018

IFIN Commodities Limited,
a company incorporated under the
Companies Act, 1956, having
its office at continental Chambers,
3rd floor, 142,
Mahatma Gandhi Road,
Nungambakkam,
Chennai 600034 Tamil Nadu
(Respondent no.1 (original)

.... Appellant.

V e r s u s

1. Aakash Madgavkar,
Having office at Nizari Bhawan,
5th floor, Menezes Braganza Road,
Panaji, 403001 Goa.
(Respondent no.1,(original applicant)

2. Rashmi Sharma,
Proprietress of 3P-World,
Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,

Bangalore 560011, Karnataka.
(Respondent no.2, Original respondent
no.2)

3. Rajesh Sharma,
Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,
Bangalore 560011, Karnataka.
(Respondent no.2(original respondent
no.3)

.... Respondents.

APPEAL UNDER ARBITRATION NO. 9 OF 2018

IFIN Commodities Limited,
a company incorporated under the
Companies Act, 1956, having
its office at continental Chambers,
3rd floor, 142,
Mahatma Gandhi Road,
Nungambakkam,
Chennai 600034 Tamil Nadu
(Respondent no.1 (original)

.... Appellant.

V e r s u s

1. Annand Madgavkar,
Having office at Nizari Bhawan,
5th floor, Menezes Braganza Road,
Panaji, 403001 Goa.
(Respondent no.1,(original applicant)
2. Rashmi Sharma,
Proprietress of 3P-World,
Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,
Bangalore 560011, Karnataka.
(Respondent no.2, Original respondent
no.2)
3. Rajesh Sharma,

Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,
Bangalore 560011, Karnataka.
(Respondent no.2(original respondent
no.3)

.... Respondents.

APPEAL UNDER ARBITRATION NO.10 OF 2018

IFIN Commodities Limited,
a company incorporated under the
Companies Act, 1956, having
its office at continental Chambers,
3rd floor, 142,
Mahatma Gandhi Road,
Nungambakkam,
Chennai 600034 Tamil Nadu
(Original Respondent no.1)

.... Appellant.

V e r s u s

1. Annika Madgavkar,
Having office at Nizari Bhawan,
5th floor, Menezes Braganza Road,
Panaji, 403001 Goa.
(Respondent no.1,(original applicant)
2. Rashmi Sharma,
Proprietress of 3P-World,
Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,
Bangalore 560011, Karnataka.
(Respondent no.2,Original respondent
no.2)
3. Rajesh Sharma,
Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,
Bangalore 560011, Karnataka.
(Respondent no.2(original respondent

no.3)

.... Respondents.

APPEAL UNDER ARBITRATION NO.11 OF 2018

IFIN Commodities Limited,
 a company incorporated under the
 Companies Act, 1956, having
 its office at continental Chambers,
 3rd floor, 142,
 Mahatma Gandhi Road,
 Nungambakkam,
 Chennai 600034 Tamil Nadu

(Respondent no.1 (original))

.... Appellant.

V e r s u s

1. Nisha Madgavkar,
 Having office at Nizari Bhawan,
 5th floor, Menezes Braganza Road,
 Panaji, 403001 Goa.
 (Respondent no.1,(original applicant))

2. Rashmi Sharma,
 Proprietress of 3P-World,
 Residing at D. No.801,
 Mantri Pride,
 Mountain Road, Jaya Nagar,
 Bangalore 560011, Karnataka.
 (Respondent no.2,Original respondent
 no.2)

3. Rajesh Sharma,
 Residing at D. No.801,
 Mantri Pride,
 Mountain Road, Jaya Nagar,
 Bangalore 560011, Karnataka.
 (Respondent no.2(original respondent
 no.3)

.... Respondents.

APPEAL UNDER ARBITRATION NO.12 OF 2018

IFIN Commodities Limited,
 a company incorporated under the

Companies Act, 1956, having
its office at Continental Chambers,
3rd floor, 142,
Mahatma Gandhi Road,
Nungambakkam,
Chennai 600034 Tamil Nadu
(Respondent no.1 (original)

.... Appellant.

V e r s u s

1. Celsa Madgavkar,
Having office at Nizari Bhawan,
5th floor, Menezes Braganza Road,
Panaji-Goa, 403001.
(Respondent no.1,(original applicant)
2. Rashmi Sharma,
Proprietress of 3P-World,
Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,
Bangalore 560011, Karnataka.
(Respondent no.2,Original respondent
no.2)
3. Rajesh Sharma,
Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,
Bangalore 560011, Karnataka.
(Respondent no.2(original respondent
no.3)

.... Respondents.

APPEAL UNDER ARBITRATION NO. 13 OF 2018

IFIN Commodities Limited,
a company incorporated under the
Companies Act, 1956, having
its office at continental Chambers,
3rd floor, 142,
Mahatma Gandhi Road,
Nungambakkam,
Chennai 600034 Tamil Nadu

(Respondent no.1 (original)

.... Appellant.

V e r s u s

1. Anil Madgavkar,
Having office at Nizari Bhawan,
5th floor, Menezes Braganza Road,
Panaji, 403001 Goa.
(Respondent no.1,(original applicant)

2. Rashmi Sharma,
Proprietress of 3P-World,
Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,
Bangalore 560011, Karnataka.
(Respondent no.2,Original respondent
no.2)

3. Rajesh Sharma,
Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,
Bangalore 560011, Karnataka.
(Respondent no.2(original respondent
no.3)

.... Respondents.

APPEAL UNDER ARBITRATION NO.14 OF 2018

IFIN Commodities Limited,
a company incorporated under the
Companies Act, 1956, having
its office at continental Chambers,
3rd floor, 142,
Mahatma Gandhi Road,
Nungambakkam,
Chennai 600034 Tamil Nadu
(Respondent no.1 (original)

.... Appellant.

V e r s u s

1. Nadisha Madgavkar,

Having office at Nizari Bhawan,
5th floor, Menezes Braganza Road,
Panaji, 403001 Goa.
(Respondent no.1,(original applicant))

2. Rashmi Sharma,
Proprietress of 3P-World,
Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,
Bangalore 560011, Karnataka.
(Respondent no.2,Original respondent
no.2)

3. Rajesh Sharma,
Residing at D. No.801,
Mantri Pride,
Mountain Road, Jaya Nagar,
Bangalore 560011, Karnataka.
(Respondent no.2(original respondent
no.3)

.... Respondents.

Shri Kunal Katariya, Advocate with Advocate Mr. P. Bandodkar for the
Appellants.

Shri A. D. Bhobe, Advocate for the Respondents.

CORAM: C. V. BHADANG, J.
Reserved on: 8th August, 2018.
Pronounced on: 27th August 2018.

JUDGMENT:

All these appeals involve common and connected questions of law and
fact and as such they are being disposed of by this common judgment.

2. The facts obtaining in these appeals are similar. It would be sufficient to set out the facts in Appeal Under Arbitration No.13/2018.

The respondent no.1, Mr. Anil Madgavkar and his family members (who are the respondent no.1 in the rest of the appeals) had invested various amounts in the Multi Commodity Exchange (MCX) through the appellant Ifin Commodities Ltd., which is a member of the MCX. Mrs. Rashmi Sharma (Respondent no.2) is the proprietress of 3P World, while Mr. Raj Sharma is its authorized person. According to the first respondent, Mr. Rajesh Chheda of Finance factory was a franchise of 3P world. According to the first respondent and his family members (who were the claimants before the Arbitrator in seven different claims, out of which these appeals arise) on account of illegal acts of the appellants and persons connected with the appellant, the first respondent and his family members had suffered a loss and erosion of the amounts invested. It was contended that the appellant and the persons connected with it have committed fraud by carrying out trades in the commodities market without the consent of the respondent no.1 and his family members. They had issued false weekly statements, showing profits although huge losses were incurred by the first respondent and his family members through unauthorized trades. It was contended that Mr. Rajesh Chheda of Finance factory had approached Mr. Anil Madgavkar, some where in the month of February 2011 and had represented that he can offer good and

safe investment opportunity in the commodities market and the first respondent and his family members could receive an assured return 30% per annum on the investment made. According to the first respondent and his family members the weekly statements from 3-P World were e-mailed to the respondent no.1 and his family members, from February 2011 to 16/4/2011, which showed regular profits with a few losses in between.

3. Be that as it may, according to the first respondent and his family members, it was informed to Rajesh Chheda by a letter dated 14/4/2011 to stop all further trades in the various accounts till the issues between the parties were sorted out. The respondent no.1 and his family members also asked the appellant by an email dated 8/5/2011 to reimburse and compensate for the loss caused on account of the illegal trades done by the appellant and the 3P- World. It appears that Mr. Raj Sharma, the authorized signatory of the 3P -World approached Mr. Anil Madgavkar on 11/5/2011 and had allegedly admitted about the illegal trading conducted and had agreed to unconditionally reimburse the entire loss and had passed a cheque of Rs.5.00 crores from the account of 3P World with HDFC Bank, as reimbursement of the losses of the respondent no.1 and his family members. It was however contended that Mr. Raj Sharma had no intention to honour the commitment. The appellant informed the first respondent and his family members by letter

dated 22/7/2011 that they had terminated the 'authorized person agreement' with 3P- World w.e.f 19/7/2011 and as such, they are no longer responsible for their actions. Subsequently, the first respondent and his family members received a statement of account showing substantial erosion of the capital invested which was on account of unauthorized trades conducted by the appellant and the persons connected with it.

4. It appears that the first respondent and his family members received separate cheques towards the refund of the amount. The amounts so refunded were substantially lesser than the amount originally invested. This led the first respondent and his family members to approach the MCX. The disputes and differences between the parties came to be referred to a panel of three arbitrators, in accordance with Clause 3.4(c) of Rule 37 of the Business Rules of the MCX.

5. The first respondent and his family members filed separate statements of claim seeking to recover different amounts being the balance due and payable by the appellant, to the respondent no.1 in these appeals, along with interest at the rate of 15% p.a. from 15/4/2011 till actual payment.

6. The appellant resisted the claim. It was contended that the trading

position was communicated to the first respondent and his family members daily by SMS/s, the contract notes and by e-mail and there was no protest ever made that the trades were unauthorized. It was contended that the first respondent and his family members had accepted the trades, as late as on 11/5/2011. It was specifically contended that any promise or assurance made by Mr. Raj Sharma or Rajesh Chheda was a private agreement between the respondent no.1 and his family members and Mr. Raj Sharma. It was contended that the appellant is not a party to any such promise or assurance made. It was contended that w.e.f 19/7/2011, 3P World had ceased to be the authorized entity of the appellant and as such there is no legal or contractual relationship between the appellant and Mr. Rajesh Sharma. It was contended that Mr. Rajesh Chheda of Finance Factory and Mr. Raj Sharma of 3P World have never been authorized by the appellant to represent them and they are not party to any of the documents which were subject matter of the arbitration reference. The appellant placed reliance on an email dated 13/5/2011 from Anil Madgavkar recording the fact that he wished to continue his account with the appellant, through 3P World and as such, he is now estopped from claiming otherwise. It was also contended that by letter dated 13/5/2011, Mr. Anil Madgavkar had withdrawn his allegations against the appellant.

7. It was contended before the Arbitral Tribunal, on behalf of the respondent no.1 and his family members that the investment of the amount was made in the nature of mutual fund deposits. The Arbitral Tribunal came to the conclusion on the basis of the disclosure document and the other record that the investment was not by way of a mutual fund deposit, but the amounts were invested in the hope of making profits in the commodity trade. The Arbitral Tribunal has then referred to the letter dated 13/5/2011 from Anil Madgavkar making a reference to the previous emails sent to the appellant on 8/5/2011. In a subsequent letter dated 13/5/2011 the respondent no.1 claimed that there was some difficulty in understanding the functionality between the markets, operating during the circuits and the email dated 8/5/2011 was sent due to lack of clarification which matter was now resolved. He further claimed that as instructed in his email dated 13/5/2011, he wished to continue his account with the appellant through 3P World. In short, the Arbitral Tribunal came to the conclusion that on 13/5/2011 the matter was resolved between the parties and therefore, it was not open to the first respondent and his family members to contend that, what was transacted with the appellant was a mutual fund account or that there were no orders placed for trading or that the appellant had carried on trading activities, without their knowledge and consent. The Arbitral Tribunal finally came to the conclusion that the cheque issued by Raj Sharma in the sum of Rs. 5 crores on his behalf and on

behalf of the 3P World was a private arrangement between Mr. Raj Sharma and the respondent no.1 “even though 3P World is the authorized person of the appellants”. In these circumstances the Arbitral Tribunal by an Award dated 30/06/2012 rejected the claim in all seven references. The record discloses that the Arbitral Tribunal has recorded reasons only in respect of the Arbitration Matter No.MCX/Legal/699A/12 in which the respondent Anil Madgavkar was the applicant/claimant. In so far as the other six references are concerned, the Arbitral Tribunal has adopted the same reasoning while rejecting the claims of the family members of Mr. Anil Madgavkar.

8. Feeling aggrieved the respondent no.1 and his family members filed separate petitions under section 34 of the Arbitration and Conciliation Act, 1996 (Act, for short) being Arbitration Petition no.53/2012 and others before the learned Principal District Judge, North Goa at Panaji. The learned District Judge by separate judgment and awards dated 26/2/2018 has allowed Arbitration Petition no.53/2012 in the following terms :

Application filed under section 34 of the Arbitration and Conciliation Act, 1996, is hereby allowed.

The impugned Arbitral Award dated 30/6/2012 passed by the Hon'ble Arbitral Tribunal in the matter of MCX/Legal/704A/12 is hereby quashed and set aside.

Application filed by the applicant in the matter of MCX/Legal/704A/12 is partly allowed in terms of refile

clause no.1.

It is held that the applicant is held entitled and the respondent no.1 is liable to pay balance amount of Rs.80,78,797/- along with interest at the rate of 15% per annum from 15th April, 2011 till the amount is actually paid.

The learned District Judge has come to the conclusion that the Arbitral Tribunal has not gone into the question of the appellant not having abided by the rules and byelaws of the MCX while executing the trades on behalf of the respondent no.1 and his family members. A similar award has been passed in the other petitions, albeit in different amounts depending upon the individual claim. Feeling aggrieved the appellants are before this Court, under section 37 of the Act.

9. Before proceeding further it would be necessary to note that the respondents no.2 and 3 are not parties to any of the agreements between the respondent no.1 and the appellant. Accordingly the respondents no.2 and 3 were not parties before the Arbitral Tribunal. The respondents no.2 and 3 filed intervention applications before the learned District Judge which came to be allowed on 23/3/2015 and accordingly they were arrayed as respondents no.2 and 3 before the learned District Judge. It is a matter of record that the order dated 23/3/2015 was unsuccessfully challenged by the first respondent and his family members before this Court in a batch of petitions being Writ

Petitions no.436/2015 and others which were dismissed on 8/10/2015.

10. I have heard Shri Katariya, the learned counsel for the appellants and Shri Bhobe, the learned counsel for the respondents.

11. In view of the preliminary objection raised on behalf of the first respondent the appeals were heard on the following points:

(i) Whether the learned Principal District Judge, North Goa at Panaji had jurisdiction to hear and decide the application under section 34 of the Act?

(ii) If yes, whether the learned Principal District Judge could have granted the claim of the respondent no.1 while setting aside the award passed by the Arbitral Tribunal by which the claim of the respondent no.1 and others was rejected?

(iii) Whether there is proper service on the respondents no.2 and 3? If not, what is the effect?

12. It is submitted by Shri Katariya, the learned counsel for the appellant that the once the notice by registered post A/D has been prepaid and addressed to the last known address of the respondents no.2 and 3, the service on the respondents no.2 and 3 can be held to be good. Reliance in this regard is placed on Section 27 of the General Clauses Act 1897 and the decision of the Supreme Court in the case of **Madan and Company Vs. Wazir Jaivir**

Chand (1989) 1 SCC 264 and of this Court in the case of **Crown Worldwide Holdings Ltd. & anr. Vs. Crown Relocations Movers and Packers 2016 SCC Online Bom 15503**.

13. In so far as the jurisdiction of the learned District Judge is concerned, it is contended that the contract notes issued by the appellant as also the Business Rules pertaining to arbitration state that the “seat” of the arbitration would be Mumbai. It is submitted that the Supreme Court in the case of **Bharat Aluminum Company Vs. Daisar Aluminim Technical Services (2012) 9 SCC 552** has made a distinction between the term “subject matter of arbitration” and “subject matter of the suit”. It is submitted that this being an arbitration governed by the rules and bylaws of MCX, the 'seat', as agreed between the parties was at Mumbai. Reliance is placed on Clause 24 of the Member-Client Agreement (MCX) which provides that the agreement is subject to the exclusive jurisdiction of the Courts in Mumbai only and all the disputes shall be determined in terms of the rules, byelaws and regulations of the exchange. It is thus submitted that the learned District Judge at Panaji had no jurisdiction to entertain the application under section 34 of the Act.

14. In so far as the learned District Judge granting the claim of the respondent no.1 in the face of the award the Arbitral Tribunal rejecting the

same, reliance is placed on the decision of this Court in the case of **M/s. Kaberi Mondol Vs. B.M.A Commodities Pvt. Ltd, 2015 SCC Online BOM 3353**, in order to submit that while setting aside the award of dismissal of the claim the learned District Judge cannot grant such a claim and has to leave the parties to opt for arbitration, afresh if so advised.

15. On the contrary, it is submitted by Shri Bhobe, the learned counsel for the respondent no.1 that section 27 of the Act cannot be called into aid in this case. It is submitted that the reliance in the case of **Madan and Company and Crown Worldwide Ltd. (supra)** is misplaced. It is pointed out that the postal remark in the present case in respect of the summons issued by registered post to respondents no.2 and 3 was to the effect that the addressee had left the premises unlike the remark in the case of **Crown Worldwide Holdings Ltd.** where the remark was that the notice was unclaimed. It is submitted that the appeal cannot be decided unless the respondents no.2 and 3 are properly served.

16. In so far as the jurisdiction of the learned District Judge at Panaji, is concerned, it is contended that there was no objection raised to the jurisdiction of the learned District Judge at Panaji in the reply filed to the application under section 34 of the Act and the said contention was sought

to be raised for the first time during the arguments. It is submitted that the appellant not having raised any objection to the jurisdiction at the first available opportunity/earliest opportunity, the same is liable to be rejected as it would amount to waiver. It is contended that the appellants have not even remotely shown as to how there has been failure of justice on account of the learned Principal District Judge at Panaji having taken up the application. Reliance in this regard is placed on the following decisions:

- (i) Mcdermott International INC Vs. BurnStandar Co. Ltd. and others (2006) 11 SCC 181.**
- (ii) Municipal Commissioner Vs. Salikumar Banerjee & others (2000) 4 SCC 108.**
- (iii) Narayanprasad Lohia Vs. Nikunj Kumar Lohia (2002) 3 SCC 572.**
- (iv) BSNL and others Vs. Subshachandra Kanchan and others (2006) 8 SCC 279.**

17. It is next contended that during the pendency of the petition before the learned Principal District Judge, the respondents no.2 and 3 sought intervention which was allowed and the respondent no.1 had challenged the said order before this Court in W.P. No.436/2015 and others. It is contended that the appellant having invoked the jurisdiction of this court, the provisions of section 42 of the Act would apply and the learned Principal District Judge

at Panaji would have jurisdiction to entertain the challenge under section 34 of the Act.

Reliance is placed on section 4 of the Act, which provides for waiver of right to object. Reliance in this regard is also placed on the decision of the Supreme Court in the case of **Naryanprasad Lohia Vs. Nikunj Kumar Lohia 2002 (3) SCC 572** (ii) **BSNL and others Vs. Subhashchandra Kanchan and others 2006 (8) SCC 279** and (iii) **Mantoo Sarkar Vs. Oriental Insurance Company Ltd. 2009 (2) SCC 244**. It is contended that the respondent no.1 and his family members are residing within the jurisdiction of the Principal District Judge, North Goa at Panaji. The amount invested was handed over to the Franchisee at Panaji. Reliance is also being placed on a letter dated 11/2/2011 passed by the respondent no.1 while handing over the cheque in which it was stipulated that in case of any disputes the jurisdiction shall be at Panaji. It is contended that Rules 5A and 5B of the Business Rules will indicate that the seat of arbitration could be decided by agreement and the appellant having accepted the amount in pursuance to the letter dated 11/2/2011 are estopped from raising any contention to the contrary.

18. Lastly in so far as the reliance placed by the appellant in the case of **Mrs. Kaberi Mondol Vs. B. M.A. Commodities Pvt. Ltd. 2015 SCC**

Online BOM 3353. (supra) is concerned, it is contended that the said judgment is based on the judgment of the Supreme Court in the case of **MacDermott International Vs. Burn Standar Company Ltd.** It is submitted that the Hon'ble Supreme Court in the case of **MacDermott International** was not considering an issue as to whether the Court adjudicating a petition under section 34 of the Act could grant the claim which is rejected by the Arbitral Tribunal. It is contended that the issue before the Supreme Court in the case of **MacDermott International** was, as to whether the Court exercising the powers under section 34 of the Act could correct errors of the Arbitrator.

19. On behalf of the respondent no.1 reliance is placed on the decision of the Madras High Court in the case of **Ms. Ms. G. Vs. ISG Novasoft Technologies Ltd.** (Original Petition No.463/2012) decided on 2/9/2014 which according to the learned counsel for the respondent no.1 directly involves the question as to whether in a petition under section 34 of the Act, the Court is entitled to modify the award, either by enhancing the amount awarded by the Tribunal or by granting the relief that was rejected. It is submitted that the Madras High Court has held in para 52 of the judgment that the power under section 34 (1), includes the power to modify and/or to vary the arbitral award. Reliance is placed on the decision of this Court in the

case of **Union of India Vs. Artetic India, 2007 (4) ARBLR 524 Bom.**, in order to submit that there is no bar under the act to modify the award, while exercising jurisdiction under section 34 of the Act. It is pointed out that even in the case of **MacDermott International**, the Supreme Court had modified the award of the Tribunal.

20. I have carefully considered the rival circumstances and the submission made and I have gone through the award of the Arbitral Tribunal as well as the judgment of the learned District Judge.

21. **Point No.1.**

This point has to be taken up first as it goes to the root of the matter. If it is found that the District Judge lacked jurisdiction to entertain the application under section 34 of the Act then the other points would pale into insignificance. Although the learned District Judge has not framed a specific point in this regard, the same is dealt with in paras 11 to 13 of the impugned judgment. The learned District Judge has negated the objection to the jurisdiction for the following reasons:

- i) That the said objection was not raised by the petitioners in their reply filed to the application under section 34 of the Act. The said objection was raised for the first time in the written notes of

arguments.

ii) That the petitioners challenged the order allowing impleadment of the respondents 2 and 3 before this court and has by this act had admitted the jurisdiction of the 'Panaji courts'. If the petitioners were “aggrieved by the jurisdiction of the Panaji Courts it should have raised an objection to that effect before this Court/ High Court of Bombay at Goa) or should have approached the High court of Bombay directly.

iii) That the transaction between the parties had taken place in Goa and the money was “rooted from Goa”

iv) The judgment in the case of **Bharat Alluminium Company (supra)** is distinguishable as it involved a international commercial arbitration unlike the present case where the agreements were entered in Goa and the claimants are from Goa.

22. It is not possible to accept the reasoning articulated or the findings recorded by the learned District Judge. An Application filed under section 34 of the Act, although styled as an application, is not an original proceeding. The jurisdiction exercised under section 34 of the Act is essentially appellate in nature, although the scope of the challenge is restricted and is circumscribed by section 34 of the Act. It is thus not possible to envisage a reply being filed to such an application. Thus the fact that such an objection

was not raised in the reply would be inconsequential. The said objection was indeed raised by the petitioners in their written arguments. That apart it is also not possible to accept that the objection was not raised at the first opportunity or that it was belated. An objection to jurisdiction, territorial, pecuniary or otherwise, goes to the root of the matter and in a given case can be taken up suo motu by the court. Reliance placed on behalf of the respondents on section 4 of the act in my view is misplaced for more reasons than one. In the first place section 4 of the act applies when the matter is before the arbitral tribunal. Secondly failure to raise such objection by a party has to be in spite of a knowledge that any provision of Part I (from which the parties may derogate) or any requirement under the arbitration agreement has not been complied. The objection as raised on behalf of the petitioners does not fall in any of these categories. Thirdly (and even assuming that section 4 applies) there is no undue delay in raising the objection in this case.

23. It is next contended by the learned counsel for the respondent no.1 that the petitioners have not shown as to how, there is failure of justice in consequence of the challenge to the arbitral award being taken up by the learned District Judge. This contention also in my considered view cannot be accepted for the reason that principles akin to section 21 of the Code of Civil Procedure cannot be imported or called into aid in this case. Section 21 of

CPC provides that no objection to the place of suing (which would apply to the trial court, assuming such jurisdiction and not the appellate court) shall be allowed by the appellate or the revisional court unless such objection was taken at the earliest possible opportunity and in all cases, where issues are settled, at or before such settlement and unless there has been a consequent failure of justice. The objection in this case is to the jurisdiction of the learned District Judge who cannot be equated to a trial court in this case. The judgment in the case of **Koopilan Uneen etc** (supra) cannot come to the aid of the petitioners, in as much as, it arose out of a civil suit and the question was whether the objection was raised in the court of first instance, at the earliest possible opportunity and whether there was a consequent failure of justice. In the present case essentially the question is whether the District Court at Panaji would be the court within the meaning of section 2(1) (e) of the Act which can exercise supervisory jurisdiction over the arbitration proceedings.

24. The decision in the case of **Salil Kumar Banerjee (supra)** also cannot come to the aid of the petitioners. In that case Municipal corporation had directed demolition of a structure constructed by the respondent The respondent challenged the same before the 'Building Tribunal', Constituted under the Calcutta Municipal Act. The tribunal having dismissed the appeal,

the respondent challenged the same in a writ petition before the High Court, inter alia contending that the tribunal was not properly constituted as it consisted of only two members and not three members as required by the act. The High Court accepted the contention and allowed the petition which was subject matter of challenge before the Supreme court at the instance of the Corporation. It was in these circumstances held by the Supreme Court that the respondent had not ever contended before the tribunal that it was improperly constituted and thus the High Court ought not to have exercised discretion in favour of the respondent. In the present case as held earlier the objection is raised before the District Court which also cannot be said to be belated.

25. The judgment in the case of **Narayan Prasad Lohia (supra)** turned on its own facts. The question therein was about the composition of the Arbitral Tribunal which consisted of only two arbitrators in the face of the provisions of section 10 of the Act which requires that the number of arbitrators shall not be an even number. The Supreme Court held that the objection to the composition of the arbitral tribunal can be raised under section 16 of the Act, not later than the submission of the statement of defence. It is difficult to see as to how the judgment can come to the aid of the petitioners in this case.

26. In the case of **BSNL (supra)** the appellants in an application under section 11 of the Act had initially consented for appointment of one of the persons named by the respondent as an arbitrator. The High Court acting on the consent had appointed the said person as an arbitrator. Subsequently the appellants moved the High Court for modification of the order on the ground that no such consent was given. The High Court refused to recall the order. It was in these circumstances held by the Supreme Court that by consenting to the appointment of the arbitrator the appellants had waived their rights to make the appointment.

27. In the case of **Mantoo Sarkar (supra)** a migrant labourer working in Nainital met with an accident while traveling in a bus of Madhya Pradesh Road Transport Corporation in Faridpur (UP). A claims petition filed before the motor Accidents Claims Tribunal at Nainital was allowed which judgment was set aside by the High Court on the ground that the Tribunal at Nainital lacked territorial Jurisdiction. The Supreme Court inter alia held that the provisions as to the jurisdiction of the tribunal are wider than for the Civil Court. It has been held that a distinction has to be made between jurisdiction as to the subject matter of the suit and that of the territorial and pecuniary jurisdiction . In a case falling in the former category the judgment

would be a nullity and in the latter it would not be so. Ordinarily an appellate court shall not entertain an appeal on the ground of lack of territorial jurisdiction on the part of the court below, unless prejudice is demonstrated. On facts it was held in that case that no prejudice was demonstrated.

28. Coming to the present case in my considered view the question is not about the territorial jurisdiction of the District Court at Panaji. The question is whether District Court at Panaji is a Court within the meaning of section 2(1) (e) of the Act which can exercise supervisory powers over the arbitral proceedings which would be a question relating to the “jurisdiction as to the subject matter” and not merely territorial jurisdiction.

29. This takes me to the act of the petitioners in challenging the order allowing impleadment of the respondent nos. 2 and 3 before the High Court of Bombay at Goa. It is difficult to accept as to how the same would amount to accepting or submitting to the jurisdiction of the “Courts at Panaji” The challenge in the said petitions was essentially to the order allowing impleadment of the respondent nos 2 and 3 on the ground that they were not parties to the arbitration agreement nor were (and could not have been) parties before the Arbitral Tribunal. It not possible to envisage as to how the petitioners could have challenged the said order before the principal seat of this court at Mumbai when the order was passed by the learned District Judge

at Panaji. Although the learned District Judge has not spelled out section 42 of the Act, for coming to the conclusion, that by approaching the High Court of Bombay at Goa, the petitioners have admitted the jurisdiction of the “Courts at Panaji”, the learned counsel for the respondent no.1 has tried to support the assumption of jurisdiction by the learned District Judge at Panaji, by placing reliance on section 42 of the Act which cannot be accepted. Section 42 of the Act reads thus:

Jurisdiction: Notwithstanding anything contained elsewhere in this part or in any other law for the time being in force, where with respect to any arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and also subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

(Emphasis supplied)

It can thus be seen that for section 42 of the act to apply, two conditions have to be satisfied. Firstly there has to be an application made under Part I of the act and secondly such an application has to be made to a 'Court' as defined in section 2(1) (e) of the Act. Neither of these conditions are satisfied in this case. The writ petition filed before this court, cannot by any stretch of imagination be construed as an application under Part I of the

Act, nor this Court is a 'Court', within the meaning of section 2(1) (e) of the Act, in as much as this court was not exercising its ordinary original civil jurisdiction (in fact the High Court of Bombay at Goa does not possess any ordinary original Civil Jurisdiction) while entertaining the challenge to the order allowing impleadment of the respondent nos 2 and 3. The Honble Supreme Court in the case of **State of West Bengal versus Associated Contractors (2015)1 SCC 32** has held that only applications under section 9 and section 34 of the act are within the sweep of section 42 of the act. Thus the submission based on section 42 has to be repelled.

30. Let us now consider whether the fact that the claimants are from Goa and that the agreements were entered into at Goa and the money having been “rooted from Goa” can clothe the District Judge at Panaji, with the jurisdiction to entertain the challenge, to the award, under section 34 of the Act. Clause 24 of the Member – Client Agreement (MCX) reads thus:

Arbitration: The Client and the Member agree to refer any claims and/or dispute to arbitration as per the Rules, Bye-laws and Regulations of the Exchange as amended from time to time and that this Agreement is subject to the exclusive jurisdiction of the court in Mumbai only. All disputes shall be determined in terms of the Rules, Bye-laws and Regulations of the Exchange.”

It can thus be seen that the arbitration in this case is governed by the Rules, Bye laws and the regulations of the MCX. The arbitration reference in this case was as per clause 3.4 (c) of Rule 37 of the Business Rules of MCX. Rule 5A and 5B of the Business Rules read thus: (which are reproduced in various contract notes):

Business Rules

5A. Seat of Arbitration

(a) The Relevant Authority may provide for different seats of Arbitration for different regions of the country either generally or specifically and in such an event the seat of arbitration shall be the place so provided by the Relevant Authority. Save as otherwise specified by the Relevant Authority, the seat of arbitration for different regions shall be as follows:

Seats of Arbitration – Regional Arbitration Centres (RAC)	States covered by the RAC
Delhi	Delhi, Haryana, Uttar Pradesh, Uttaranchal, Himachal Pradesh, Punjab, Jammu & Kashmir, Chandigarh, Rajasthan
Kolkata	West Bengal, Bihar, Jharkhand, Orissa, Assam, Arunachal Pradesh, Mizoram, Manipur, Sikkim, Meghalaya, Nagaland, Tripura, Chhattisgarh
Chennai	Andhra Pradesh, Karnataka, Kerala, Tamil Nadu, Andaman & Nicobar, Lakshadweep, Pondicherry
Mumbai	Maharashtra, Gujarat, Goa, Daman & Diu, Dadra & Nagar Haveli, Madhya Pradesh

(b) The premises/location where the hearing of arbitration shall take place shall be such place as may be identified by the Exchange from time to time and intimated to the arbitrator and the parties to the dispute accordingly.

5B. Criteria for selection of Seat of arbitration

Save as otherwise specified by the Relevant Authority, the criteria for

selection of Seat of Arbitration and place of hearing of a particular matter is as follows:

Parties to dispute	Criteria for selection of Seat by the Applicant for Arbitration	Place of hearing
Member Vs. Member	If the dealing offices of both the members from where the dealing was carried is situated in any one of the states covered by a particular RAC then the Applicant Member shall select the Seat of that RAC for arbitration.	Hearing shall be held at the RAC where the Applicant-Member has filed the Application for arbitration and the Respondent-Member shall attend the hearing in that particular RAC.
Member Vs. Client & Client Vs. Member	Where the Client ordinarily resides in any one of the states covered by a particular RAC, then the Applicant shall select the Seat of that RAC for arbitration.	Hearing shall be held at that RAC where the Applicant has filed the application for Arbitration and the Respondent shall attend the hearing in that particular RAC.

Notwithstanding anything contained hereinabove and unless otherwise specifically agreed in writing between the Member and the Client in respect of any claims, disputes and differences arising out of interact trading between the client and the member, the Seat of Arbitration shall be at the Regional Arbitration Centre having jurisdiction in any one of the states where the client ordinary resided at the time of relevant trading took place.

It can thus be seen that the seat of arbitration in respect of disputes arising from Goa would be the regional Arbitration centre (RAC) at Mumbai. Arbitration proceedings were in fact held at RAC Mumbai. The arbitration agreement as contained in Clause 24 would indicate that the parties had agreed that the agreement shall be subject to the exclusive jurisdiction of the courts in Mumbai only.

31. It would now be necessary to consider the legal position as to the court which exercises supervisory jurisdiction over the arbitration proceedings in such a case. The Supreme Court in the case of **Indus Mobile Distribution Pvt. Ltd (supra)** has held that designation of the seat of arbitration by the parties, is itself akin to an exclusive jurisdiction clause as to the courts exercising supervisory powers over the arbitration proceedings. In a given case the parties can even choose a neutral place as the place of arbitration, within the meaning of section 20 of the Act. Once such a judicial seat is agreed to between the parties, the court exercising jurisdiction over such place, would be the court, having powers to supervise the arbitral proceedings, although no part of the cause of action, may have arisen in the classical sense at such place and the provisions of section 16 to 21 of CPC are not attracted in such a case. The supreme court has noticed the constitution bench decision in the case of **Bharat Aluminium case (supra)** which in turn has quoted with approval the decision of the Court of Appeal in England holding that choice of seat for the arbitration is analogous to an exclusive jurisdiction clause and is also determinative of the forum for remedies seeking to challenge the award. In the present case apart from the fact that the seat of arbitration was Mumbai, there is also a specific exclusionary clause conferring exclusive jurisdiction on the courts at Mumbai. It is trite that where there are more than one courts, otherwise

having jurisdiction, the parties can choose one of them, to the exclusion of others.

It can thus be seen that even assuming that part of cause of action has arisen at Goa, (as the agreements were executed in Goa) in view of the fact that the seat of arbitration was RAC Mumbai (which itself would amount to a exclusive jurisdiction clause) and further there being a specific clause conferring exclusive jurisdiction on the Courts in Mumbai, the District Judge at Panaji would lack jurisdiction to entertain the challenge under section 34 of the Act.

32. In so far as the reliance placed on the letter dated 11/2/2011 is concerned, the same is issued by Anil Madgavkar to Finance Factory as a franchisee of 3-P World. The appellants are not party to the said communication. That apart, the respondent no.1 Mr. Anil Madgavkar could not have unilaterally stipulated that in case of disputes leading to litigation the jurisdiction was at Panaji-Goa. Thus, the reliance placed on the letter dated 11/2/2011 to my mind is misplaced and cannot be countenanced.

33. The learned counsel for the petitioners placed reliance on the Non Obstant clause appended to Rule 5B of the Business Rules which can not come to the aid of the appellant. A conjoint reading of the relevant clauses

makes it abundantly clear that in every case the seat of the arbitration is at the Regional Arbitration Centre. The non obstant clause applies to disputes arising out of internet trading between the client and a member. Clause 5B of the Business Rules provides both for seat as well as venue (place of hearing) of the arbitration . In the present case the seat of the arbitration as well as the hearing had taken place at Mumbai. None of these factors which are relevant and germane, have been considered by the learned District Judge while refusing to uphold the objection. I thus find that the application under section 34 of the Act was not competent before the learned District Judge.

34. **Point no.2:**

This takes me to the question as to whether the learned District Judge could have granted the claim of the respondent no1 while setting aside the award of the Arbitral tribunal rejecting the claim. Normally, when it is found that the learned Principal District Judge, North Goa, Panaji had no jurisdiction to hear and decide the application under section 34 of the Act, it would not be necessary to dwell on the question whether the Principal District Judge could have granted the claim by setting aside the award passed by the Arbitral Tribunal. However, considering the fact that the parties have addressed the Court on the said question at length , I find it appropriate to briefly deal with the same.

There are two sets of judgments, taking contrary view, one holding that the Court while setting aside the arbitral award can grant the claim which has been rejected by the Arbitral Tribunal. The said view has been taken by a learned Single Judge of the Madras High Court in the case of **Ms. G Vs. ISG Novasoft Technologies Ltd. (Original petition no.463/2012)** decided on 2/9/2014. On behalf of the respondent no.1 reliance is also placed on the decision of this Court in the case of **Union of India Vs. Artic India 2007 (4) MLJ 174**, in which a learned Single Judge of this Court had modified the award. This Court while holding that there is no bar under the Act to modify the award had placed reliance on the decision of the Supreme Court in the case of **MacDermott International (supra)**. This Court has noticed that in the case of **MacDermott International** the Supreme Court has modified the award on merits as well as on interest.

35. On behalf of the appellants, reliance is placed on the decision of this Court in the case of **Ms. B.M.A Commodities P. Ltd Vs. Ms. Kaberi Mondal, Arbitration Petition no.854/2013 decide don 17/12/2014** and yet another decision between the same parties, namely, **M/s. Kaberi Mondal Vs. B.M.A Commoditiies P. Ltd. (2015) 5 Bom CR 421**, in which a learned Single Judge of this Court again placing reliance on the case of the Supreme Court in the case of **MacDermott International (supra)** has held that,

under section 34 of the Act, the Court can only set aside the award wholly or partly and cannot correct the error and cannot make an award under section 34 of the Act. The appellants have also relied upon a Division Bench judgment of the Delhi High Court in the case of **Puri Constructions P. Ltd. Vs. Larson and Turbo Ltd. 2015 SCC Online Delhi 9126**, holding that in the light of the dictum of the supreme Court in the case of **MacDermott International** and difference in the provisions of the 1940 Act and the 1996 Act, there is no power to modify or vary the award under section 34 of the Act. While holding so the Division Bench of the Delhi High Court, has noted the observations and findings of the Full Bench of this Court in the case of **R. S. Jiwani Vs. Ircon International 2010 (1) BCR 529**.

36. It was submitted by Shri Bhobe, the learned counsel for the respondent no.1 that the Supreme Court in the case of **MacDermott International** was not dealing with the specific question as to whether the Court while setting aside the award can grant the claim which has been rejected by the arbitrator. It is submitted that the question before the Hon'ble Supreme Court was essentially about the scope of the powers under section 34 of the Act and therefore, the observations of the Supreme Court in para 52 of the judgment in the case of **MacDermott International** cannot be relied upon to hold that the Court while setting aside the award of the arbitrator, (refusing to grant

any claim) cannot grant such a claim. In my considered view the contention cannot be accepted. It is true that the question before the Hon'ble Supreme Court in the case of **MacDermott International** was about the role of the Court and the grounds for interference available under section 34 of the Act vis-a-vis the position as obtaining under section 30 and 33 of the Arbitration Act 1940. The Supreme Court also considered the question as to relief that can be granted under section 34 of the Act. This is what is held in para 52 of the judgment:

The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration, again if it is desired. So the scheme of the provisions aims at keeping the supervisory role of the court at minimum level and this can be justified, as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration, as they prefer the expediency and finality offered by it.”

(Emphasis supplied)

It can thus clearly be seen that the Supreme Court in no uncertain terms has held that the Court cannot correct the errors of the arbitrator and it can

only quash and set aside the award leaving the parties to begin the arbitration again, if the parties so desire. The modification which were done by the Supreme Court, were in the exercise of the jurisdiction under Article 142 of the Constitution of India, in order to do complete justice between the parties which is the exclusive jurisdiction available to the Supreme Court. Thus the fact that the Supreme Court had modified the award in the case of **Macdermot International (supra)** cannot be used to concede a similar jurisdiction to the 'court' entertaining an application under section 34 of the Act.

37. A learned Single Judge of this Court in the case of **Mrs. Kaberi Mondal (supra)** has held thus in para 67 of the judgment :

67. Insofar as submission of the learned counsel for the claimant that if this court comes to the conclusion that the arbitral tribunal has illegally rejected the claim of the claimant and the award is perverse and shows patent illegality, this court can allow such claim under [section 34\(2\)](#) is concerned, this issue raised by the petitioner was also raised when this court had heard this petition alongwith Arbitration Petition No.854 of 2012. In paragraph (69) of the said order and judgment dated 17th December, 2014, this court has already rejected this contention and has held that the court cannot correct the errors of the arbitral tribunal under [section 34](#) of the Arbitration and [Conciliation Act, 1996](#). It can set aside the

award wholly or partly and cannot correct an error and cannot make an award under [section 34](#) of the Arbitration Act. I do not propose to take any different view in the matter. The view taken by this court is based on the judgment of Supreme Court in case of [McDermott International Inc., vs. Burn Standard Co. Ltd. & Others](#) reported in (2006) 11 SCC 181, I am thus not inclined to accept the submission of the learned counsel for the claimant that this court can allow the claim made by the claimant before the arbitral tribunal even if it comes to the conclusion that the award was perverse and patently illegal.

(Emphasis supplied)

I am in respectful agreement with the view as expressed in the case of **Mrs. Kaberi Mondal (supra)**. In the case of **R.S. Jiwani Vs. Ircon International Ltd., 2010 (1) Bom CR 529 (supra)** before a Full Bench of this Court, the question was whether the Court under section 34 of the Act can partly set aside the award, which was answered in the affirmative. The Full Bench after considering the scope and ambit of the powers under section 34 of the Act has held thus :

“An award can only be set aside under the provisions of section 34 as there is no other provision except section 33 which permits the arbitral tribunal to correct or interpret the award or pass additional award, that too, on limited grounds stated in section 33. It is also true that there are no parimateria provisions like sections 15 and 16 of the Act of 1940 in the 1996 Act but still the provisions of section 34

read together, sufficiently indicate vesting of vast powers in the court to set aside an award and even to adjourn a matter and such acts and deeds by the arbitral tribunal at the instance of the party, which would help in removing the grounds of attack for setting aside the arbitral award.”

I thus find that the learned District Judge, after setting aside the award passed by the Arbitrator could not have substituted it by granting the claim of the respondent no.1 in these appeals.

38. **Point No.3:**

It is not necessary to dwell on the point as to whether there is proper service on the respondents no.2 and 3. The arbitral Tribunal had held that the contents of the affidavit of Mr. Raj Sharma dated 13/6/2011, reflects a private arrangement between the respondent no.1 and Raj Sharma which cannot bind the appellants herein “even though, 3-P World was an authorized person of the appellants”. The respondent no.2 and 3 had sought intervention before the learned District Judge on the ground that this finding would cause prejudice to them, in as much as the contents of the affidavit of Mr. Raj Sharma have been read to mean that it is a private arrangement between the respondent no.1 and Mr. Raj Sharma thereby exonerating the appellants. A perusal of the operative part of the judgment of the learned District Judge would show that the District Judge has not allowed any claim against the respondents no.2 and 3. The claim is allowed only as against the appellant/s

(the respondent no.1 before the learned District Judge). Even in so far as the finding given by the Arbitral Tribunal is concerned (about there being a private arrangement between the respondent no.1 and Raj Sharma), the same is rendered behind the back of the respondent nos. 2 and 3, in as much as the respondents no.2 and 3 were not parties to the arbitral proceedings and could not have been parties, as they are not signatories to the arbitration agreement. Thus the said finding cannot bind the respondent nos.2 and 3. In such circumstances it is unnecessary to dwell on the question as to whether they have been properly served in these appeals . In the result the following order is passed:

ORDER

- (i) The appeals are allowed.
- (ii) The impugned judgment and order passed by the learned District Judge in each of these appeals, are hereby set aside, on the ground that the learned District Judge at Panaji had no jurisdiction to entertain the petitions under section 34 of the Act.
- (iii) The respondent no.1 in each of these appeals, is left to take recourse to a legal remedy, if any, in accordance with law, before the appropriate forum and if so advised.
- (iv) In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

Ap/

At this stage, the learned counsel for the respondent no.1 submits that the signed copy of the Award, which is filed before the learned District Judge, be returned to the respondent no.1. The learned District Judge shall return the signed copy of the award in each of the appeals, subject to it being replaced by a xerox copy.

C. V. BHADANG, J.

Ap/