IN THE HIGH COURT OF BOMBAY AT GOA

MISC. CIVIL APPLICATION NO. 798 OF 2018
IN
APPEAL UNDER ARBITRATION NO. 8 OF 2018
WITH
MISC. CIVIL APPLICATION NO. 799 OF 2018
IN
APPEAL UNDER ARBITRATION NO. 7 OF 2018
WITH
MISC. CIVIL APPLICATION NO. 800 OF 2018
IN
APPEAL UNDER ARBITRATION NO. 9 OF 2018
WITH
MISC. CIVIL APPLICATION NO. 801 OF 2018
IN
APPEAL UNDER ARBITRATION NO. 10 OF 2018
WITH
MISC. CIVIL APPLICATION NO. 802 OF 2018
IN
APPEAL UNDER ARBITRATION NO. 11 OF 2018
WITH
MISC. CIVIL APPLICATION NO. 803 OF 2018
IN
APPEAL UNDER ARBITRATION NO. 12 OF 2018
WITH
MISC. CIVIL APPLICATION NO. 804 OF 2018
IN
APPEAL UNDER ARBITRATION NO. 13 OF 2018
WITH
MISC. CIVIL APPLICATION NO. 805 OF 2018
IN
APPEAL UNDER ARBITRATION NO. 14 OF 2018

***

Rashmi Sharma & Another ... Applicants
Versus
IFIN Commodities Ltd. & Another ... Respondents

***

Mr. A.F. Diniz with Mr. Pavithran A.V., Advocates for the Applicants.

Mr. Kunal Katariya with Mr. Pulkit Bandodkar, Advocates for the Respondent No. 1.

Mr. Ashwin D. Bhobe, Advocate for the Respondent No. 2.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 8th APRIL, 2019.

PRONOUNCED ON: 4th JUNE, 2019.

ORDER:

All these applications seek recall of the common judgment and order dated 27.08.2018 in AUA nos. 7 to 2018 to 14 of 2018 and as such, they are being disposed off by this common order.

2. The facts obtaining in these applications are similar. It would be sufficient to set out facts in AUA no. 13 of 2018.

The original appellant, IFIN Commodities Ltd. (IFIN, for short), is a stock broker and is a Member of the Multi Commodity Exchange of India (MCX). IFIN is based at Chennai. The applicant no. 1 herein/original respondent no. 1, Ms. Rashmi Sharma, is the proprietress of 3P-World, while respondent no. 2, Mr. Rajesh Sharma, is its authorised signatory. 3P-World which is based at Banglore is a sub-broker of IFIN, under an agreement dated 14.10.2010. These respondents had appointed Mr. Rajesh Chheda (the original respondent no. 3) of Finance Factory as their franchisee for Goa. The applicants who were not parties to the arbitration agreement, were the intervenors before the learned District Judge in the aforesaid appeals, under Section 34 of the Arbitration and Conciliation Act, 1996 (Act for short).

3. It appears that Mr. Rajesh Chedda had approached Mr. Anil Madgaonkar (original respondent no. 1) and his family members with an investment opportunity in commodity trades with good returns. Mr. Anil Madgaonkar and his family members (original claimants before the Arbitral Tribunal), invested various amounts in the MCX through the intervenors and IFIN Commodities Ltd. It appears that separate Member-Client agreements, were accordingly executed between Mr. Anil Madgaonkar and his family members and IFIN Commodities Ltd., which contained an arbitration clause no. 24 as under:

> *"24. 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 Courts in Mumbai only. All disputes shall be determined in terms of the Rules, Bye-Laws and Regulations of the Exchange."*

4. It appears that disputes and differences arose between the parties in respect of the investments made and the

trades executed by IFIN. In short, it was contended by Mr. Anil Madgaokar and his family members that certain trades were executed by IFIN without authorisation of the claimants, which resulted into losses and substantial erosion of the capital invested. It was also contended that the investments were by way of Mutual Fund deposits. According to the claimants, it was informed to Mr. Rajesh Chedda by a letter dated 14.04.2011 to stop all further trades till the issues between the parties are sorted out. By an e-mail dated 08.05.2011, the claimants also asked for reimbursement of the losses.

5. It appears that Mr. Rajesh Chedda of Finance Factory had approached Mr. Anil Madgaokar on 11.05.2011 and had allegedly admitted about the conduction of the unauthorised trades and had unconditionally agreed to reimburse the losses and had passed a cheque of Rs.5 crores from the account of 3P-World towards such reimbursement. However, it was claimed that Mr. Rajesh Chedda had no intention to honour the commitment. As the disputes could not be settled, they came to be referred to a panel of three Arbitrators at Mumbai as per Rule 37 clause 3.4(c) of the Business Rules (as amended) of the MCX. The claimants filed separate claims seeking recovery of various amounts alongwith interest. Some other reliefs seeking penal

action against IFIN and its authorised representative of 3P-World were also sought.

6. IFIN contested the claim denying conduction of any unauthorised trades as alleged. It was also claimed that by a letter dated 22.7.2011, the appellants were informed that IFIN had terminated the “authorised person agreement” with 3P-World w.e.f. from 19.07.2011 and as such, they were no longer responsible for their action. It was specifically contended that the claimants had accepted the trades as late as on 11.05.2011. It was contended that any promise or assurance made by Mr. Raj Sharma or Mr. Rajesh Chedda was a private agreement between the claimants and Mr. Raj Sharma. It was contended that IFIN was not a party to any such agreement and as such, was not liable. IFIN placed reliance on an e-mail dated 13.05.2011 from the claimant, Mr. Anil Madgaonkar that he wished to continue his account with IFIN and had withdrawn his allegations against IFIN. It was contended that now the claimants are estopped from claiming otherwise.

7. The Arbitral Tribunal by separate awards came to the conclusion that the investments made were not by way of Mutual Fund Deposits, but were made with a hope of making profit in

the commodity trades. The Tribunal also came to the conclusion that on 13.05.2011, the dispute was resolved and thus, it was not open to the claimants to claim that there were any unauthorised trades conducted in the matter. The Arbitral Tribunal also came to the conclusion that the cheque of Rs.5 crores issued by Mr. Raj Sharma on his behalf and on behalf of 3P-World was a private arrangement between Mr. Raj Sharma and the claimant, Mr. Anil Madgaonkar, "even though 3P-World was an authorised entity of IFIN". In these circumstances, the Tribunal by separate awards dated 30.6.2012 rejected all the seven claims.

8. Feeling aggrieved, the claimants filed separate petitions before the learned District Judge under Section 34 of the Act. The present applicants sought their intervention in the appeals, principally being aggrieved by the finding of the Arbitral Tribunal that the passing of the cheque of Rs.5 crores, was a private arrangement between Mr. Raj Sharma and the claimant, Mr. Anil Madgaokar. According to the applicants/ intevenors, this will prejudice their interest as they would be independently held liable, although, they were acting as sub-brokers/authorised persons on behalf of IFIN. The learned Principal District Judge by an order dated 23.03.2015 allowed the intervention. That order was unsuccessfully challenged by

IFIN in a batch of Writ Petitions being Writ Petition Nos. 436/2015 and others, which were dismissed on 08.10.2015.

9. The learned District Judge by separate judgment and award dated 26.02.2018 allowed the petitions in the following terms:

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

> *"The impugned Arbitral Award dated 30.06.2012 passed by the Hon'ble Arbitral Tribunal in the matter of MCX/Legal/699A/12 is hereby quashed and set aside.*
>
> *Application filed by the applicant in the matter of MCX/Legal/669A/12 is partly allowed in terms of relief clause no. 1.*
>
> *It is held that the applicant is held entitled and the respondent no. 1 is liable to pay balance amount of ₹18,55,943/- along with interest at the rate of 15% per annum from 15th April, 2011 till the amount is actually paid."*

10. The learned District Judge came to the conclusion that the Arbitral Tribunal had not gone into the question of IFIN not having abided by the rules and the bye-laws of MCX while executing the trades on behalf of the claimants.

11. Feeling aggrieved, IFIN filed separate appeals before this Court under Section 37 of the Act being AUA nos. 7 of 2018 to 14 of 2018. This Court by a common Judgment dated 27.08.2018 allowed the appeals, leaving it open to the claimants (respondent no. 1 in each of the appeals), to take recourse to a legal remedy, if any, in accordance with law before the appropriate forum, if so advised. It may be mentioned that in pursuance thereof, the claimants have approached the principal seat of this Court at Mumbai in petitions under Section 34 of the Act, challenging the award of the Arbitral Tribunal, which are said to be pending.

12. This Court framed the following points for determination:

(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 ?

13. This Court found that the learned Principal District Judge, North Goa had no jurisdiction to hear and decide the application under Section 34 of the Act as the seat of the arbitration was at Mumbai. This Court placing reliance on the decision of the Supreme Court in the case of **Mcdermott International Inc. Vs. Burn Standard Co. Ltd., (2006) 11 SCC 181** and of this Court, in the case of **Kaberi Mondal Vs. BMA Commodities 2015 (5) BOM CR 421** found that the learned Principal District Judge while setting aside the award of the Arbitral Tribunal could not have substituted it by granting the claim of the claimants.

14. Insofar as point no. 3 is concerned, which is relevant for the present purpose, this Court found that it was not necessary to dwell on the point as to whether, there was proper service on the present applicants (respondent nos. 2 and 3 in AUA nos. 7 of 2018 to 14 of 2018). This Court on a perusal of the operative part of the judgment of the learned Principal District Judge found that the learned Principal District Judge had not allowed any claim against the applicants and whatever claim was

allowed was only against IFIN. It was also found that the finding recorded by the Arbitral Tribunal (about there being a private arrangement between Mr. Anil Madgaonkar and Mr. Raj Sharma), was rendered behind the back of the applicants, in as much as these applicants were not parties before the Arbitral Tribunal and as such, the said finding cannot bind the applicants.

15. The applicants have filed these applications for recall on the following grounds:

(i) That the judgment and order dated 26.2.2018 has the effect of restoring the award passed by the Arbitral Tribunal, consequently resulting in the applicants being foisted with liability for acts not committed by the applicants, in as much as the Arbitral Tribunal by its award has fastened liability of IFIN on the applicants while exonerating IFIN from its liability.

(ii) That valuable rights of the applicants are affected on account of the judgment of this Court in AUA nos. 7 of 2018 to 14 of 2018.

(iii) That the appellant, IFIN was under an obligation to notify and serve the applicants in the appeals, the applicants, being parties as intervenors, before the learned Principal District Judge and the judgment of the learned Principal District Judge, being in favour of the applicants

(iv) That the applicants are in a position to produce material before this Court to indicate that the Court of learned Principal District Judge, North Goa had jurisdiction to entertain the petitions under Section 34 of the Act.

16. I have heard Mr. Diniz, the learned Counsel for the applicants and Mr. Katariya, the learned Counsel for the respondent no. 1. The parties have also filed written notes of arguments and I have gone through the same.

17. Mr. Diniz. the learned Counsel for the applicants has placed reliance on the decision of the Supreme court in the case of **Asit Kumar Kar Vs. State of West Bengal & Others (2009) 2 SCC 703,** in order to submit that an application for recall is different than a review. While in a review, the Court considers on merits, whether there is an error apparent on the face of record, in a recall application, the Court does not go to the merits, but simply recalls an order which is passed without giving an opportunity of hearing to an affected party.

18. Although, the principle as enunciated cannot be disputed, it presupposes that the party seeking recall is an

affected party and its rights are adversely affected by the judgment, which is sought to be recalled. It is not possible to accept that the judgment which is sought to be recalled, adversely affects the rights of the applicants for more reasons than one. Firstly, the said judgment does not have the effect of restoration, much less confirmation of the award passed by the Arbitral Tribunal, in as much as all that this Court has held is that the learned Principal District Judge North Goa lacked jurisdiction to entertain the petition under Section 34 of the Act, challenging the award of the Arbitral Tribunal and even otherwise the learned Principal District Judge, while setting aside the award of the Arbitral Tribunal, could not have granted the claim of the original claimants. Secondly, while setting aside the judgment of the learned Principal District Judge, this Court had left it open to the claimants to challenge the award of the Arbitral Tribunal before the appropriate forum, if so advised and the claimants, have indeed challenged the said award before the Principal seat of this Court in petitions under Section 34 of the Act, which are pending. The applicants are parties to the said petitions and can defend their interest therein. Thirdly, this Court has in categorical terms held that the finding by the Arbitral Tribunal that the passing of the cheque for Rs.5 crores in favour of Mr. Anil Madgaonkar was a private arrangement between the applicant Mr. Raj Sharma and Mr. Anil Madgaonkar and is not binding on the applicants, said finding having been rendered behind the back of the applicants, as they were not parties before the Arbitral Tribunal (and could not have been parties before the Arbitral Tribunal, as they were not parties to the arbitration agreement). Thus, the interest of the applicants in the face of the finding recorded by the Arbitral Tribunal have been sufficiently protected. It is necessary to emphasize that this Court has not confirmed the award of the Arbitral Tribunal on merits and merely relegated the claimants to approach the competent Court in this regard, which they have already done. Fourthly, in the wake of such a situation this court had found that it is unnecessary to dwell on the question whether the applicants (who were respondent nos. 2 and 3 in the appeals) were served or not.

19. The ground based on pendency of a Civil Suit no. 17/2017 before the District Court and prosecution under Section 138 of the Negotiable Instruments Act (NI Act, short), against the applicants also cannot be accepted. The pendency of these proceedings cannot be a ground to recall the judgment. At the cost of repetition, it is necessary to state that this Court has already held that the finding by the Arbitral Tribunal cannot bind

these applicants. The applicants have to contest the civil suit and the prosecution under section 138 of the NI Act on its own merits. For these reasons, it is not possible to accept that the judgment needs to be recalled. Nonetheless, in order to give a quietus to the matter, the parties were put to notice that this Court would also hear the parties on merits. As such, the applicants were called upon to show the material on the basis of which it can be said that the learned Principal District Judge, North Goa had jurisdiction to entertain the petition under Section 34 of the act and secondly, assuming that the learned Principal District Judge had such a jurisdiction, the learned Principal District Judge, while setting aside the award of the Arbitral Tribunal (dismissing the claim in its entirety), could have granted it. I have accordingly heard the parties on these aspect also.

20. Mr. Diniz, the learned Counsel for the applicants has made following submissions in this regard:

(i) That as per the arbitration agreement as contained in clause 24 of the Member Client Agreement (MCX), the parties had agreed to refer any dispute to arbitration as per the rules, bye-laws and regulations of the Exchange.

(ii) That the bye-laws of the exchange, which would govern the arbitration, would prevail over the Business Rules as is evident from clause 3 of the bye-laws, which empowers the relevant authority to make Business Rules subject to the bye-laws. This would also be evident from the definition clause 2.13.15(a) of the Business Rules that they would be subject to the bye-laws of the exchange.

(iii) That clauses 15.20 as also clause 15.40.4 of the bye-laws of 2016 mandate that an application under Section 34 of the Act has to be filed in the competent Court “nearest to the address provided by the client in the KYC form”, which in the case is at Panaji. Thus, the District Court at Panaji had jurisdiction to entertain the petitions under Section 34 of the Act.

(iv) That faced with this situation the original appellants IFIN then produced bye-laws and rules which were in force in the year 2010 (old bye-laws) claiming that the bye-laws earlier produced were mistakenly produced.

(v) That the bye-laws and the old Business Rules under the Forward Contracts (Regulation) Act 1952 (FCR Act), which are now sought to be produced and relied upon were not before this Court and this itself is sufficient to recall the judgment. It is thus necessary to decide which bye-laws would govern the case.

(vi) That saving clause 18 (i) of the 2016 bye-laws provides that all actions initiated under the existing bye-laws (i.e. the old bye-laws of 2010 under the FCR Act) including arbitration shall be conducted as per the corresponding provisions of the bye-laws of 2016.

(vii) Clause 18A (iii) and (v) would make it clear that anything done or any action initiated or pending as on September 2016 (the date on which the bye-laws of 2016 came in force) shall be governed by the corresponding provisions of the bye-laws of 2016.

(viii) As the petitions under Section 34 were pending before the District Court on September 2016, they were governed by the 2016 bye-laws, which in turn provide that the petition under Section 34 of the Act has to be filed in a Court "nearest to the address provided by the client in the KYC form", which was Panaji and thus, the District Court at Panaji had jurisdiction to entertain the said petition.

(ix) The judgment of this Court, which is rendered on the basis of the old bye-laws of 2010 and without considering the 2016 bye-laws is erroneous.

(x) The judgment of this Court, which is based on the concept of seat of the arbitration (as is culled out from the contract notes, which besides being one sided merely transcribe an extract of the old Business Rules, which are not applicable and in any event, are subject to the 2016 bye-laws, which would prevail), is not proper.

(xi) In the 2016 bye-laws, no seat of arbitration could be said to be stipulated as explained in the decision of this court in the case of **Municipal Corporation for the City of Kalyan & Dombivali Vs. Rudranee Infrastructure Limited 2018 (2) ALL MR 175.**

(xii) That in the case of **Emkay Global Financial Services Vs. Girdhar Sondhi, (2018) 9 SCC 49**, the Supreme Court has interpreted clause 4(a) (iv) and clause (xiv) of the bye-laws of the National Stock Exchange (NSE) and has held that even though the venue of the arbitration in terms of the said clauses was at Delhi the Mumbai Courts would have jurisdiction.

(xiii) That the parties cannot confer jurisdiction by consent and this would apply to a suit as well as to a petition under Section 34 of the Act, read with definition of a 'Court', as contained in Section 2(1) (e) of the Act.

(xiv) In the present case although, clause 20 of the agreement makes it subject to the exclusive jurisdiction of the Courts at Mumbai only, the said clause would not apply to a case where no part of cause of action has arisen at Mumbai. Reliance in this regard is placed on the decision of the Supreme Court in the case of **Interglobe Aviation Ltd. Vs. N. Satchidanand, 2011 (7) SCC 463**. It is submitted that in this case, the contract was entered into at Panaji and had to be performed at Panaji and as such the District Court at Panaji had jurisdiction. The parties to the arbitration agreement had never agreed upon the seat of the arbitration being at Mumbai.

(xv) The circular dated 11.08.2010 of Securities and Exchange Board of India (SEBI) produced and relied upon by IFIN has been modified by a later circular dated 05.07.2013, which provides that the petition under Section 34 of the Act shall be filed in the competent Court "nearest to the address provided by the client in the KYC form". This circular is binding on the parties and both the bye-laws and the Business Rules of the exchange would be subject to the said circular.

(xvi) The judgment of the Supreme Court in the case of **Mcdermott International Inc.** (supra) would not apply in this case, in view of bye-law nos. 15.41.1 and 15.41.2, which postulate, modification of the award by the Court.

(xvii) That after the 2015 amendment to the Act, which *inter alia* introduced sub-section 2A to Section 34 of the Act, the jurisdiction of the Court to interfere with the award of the Arbitral Tribunal has been enlarged and under the amended provision, the Court can in an appropriate case modify the award.

21. Mr. Katariya, the learned Counsel for the respondent no. 1 has made the following submissions:

(i) That in all probability, the applicants were aware of filing of AUA Nos. 7/2018 to 14/2018, but intentionally avoided to put in appearances and it is a malafide attempt by the applicants to seek the recall of the judgment.

(ii) That the judgment of this Court in the aforesaid appeals, neither casts any liability nor extinguishes any of the rights of the applicants and as such, the applicants cannot be said to be aggrieved by the said judgment and this Court, has rightly held that the question whether, the applicants were served or not, is immaterial. It is submitted that although, the applicants claim that they have material to show as to how the District Court at Panaji had jurisdiction to entertain the petition under Section 34 of the Act, they have failed to produce any such material in support of their claim.

(iii) That the dispute between the claimants and the applicants have no bearing on the appeals decided by the common judgment by this Court and the civil suit and any proceedings under Section 138 of the NI Act, filed against the applicants are distinct proceedings. It is submitted that the application is filed in collusion with the claimants.

(iv) That although, at the hearing of the appeals, the respondents had relied upon the bye-laws and rules of MCX of the year 2016, the said bye-laws are applicable only to the arbitral proceedings initiated on or after 29.09.2016. Thus, the reliance placed on bye-law no. 15.20 of 2016 bye-laws, is misplaced.

(v) The bye-laws applicable in this case are the bye-laws of the year 2010 (old bye-laws), in as much as the arbitral proceedings were initiated prior to coming into force of the 2016 bye-laws.

(vi) That as per clause 3.3 of the bye-laws of 2010, every member is mandated to expressly provide in the contract notes that only Courts at Mumbai shall have exclusive jurisdiction for claims in relation to any dispute arising out of or in connection with or in relation to such contract notes. Clause 15.2 of the bye-laws provides that such bye-laws and regulations relating to the arbitration, shall be consistent with the provisions of the Arbitration and Conciliation Act and the provisions not included in the bye-laws, but, which find place in the Act, shall be applicable, as if they were included in the bye-laws.

(vii) That as per clause 15.6 of the bye-laws, all parties to arbitration under the bye-laws, rules and regulations shall be deemed to have submitted to the exclusive jurisdiction of the Courts in Mumbai for the purpose of giving effect to the provisions of the Act, the bye-laws, rules and regulations in force.

(viii) That as per Rule 5A of the Business Rules of the Exchange, the seat of arbitration for clients based in Goa is Mumbai. The Business Rules were subsequently modified to include the Court before which the application under Section 34 of the Act has to be filed, as being the Court "nearest to such regional centre" i.e. Mumbai in the present case.

(ix) Reliance is placed on the decision of the Supreme Court in the case of **Bharat Aluminum Company Vs. Kaiser Aluminum Technical Services Inc. (2012) 9 SCC 552** and in the case of **Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited & Others (2017) 7 SCC 678**, in order to submit that there is distinction between the terms "subject matter of arbitration" and "subject matter of the suit". It is submitted that under arbitration law, the "seat" of the arbitration determines the Court, which would have supervisory jurisdiction over the arbitration proceedings. The seat of the arbitration in this case, being at RAC Mumbai, the Court at Mumbai, would have jurisdiction to entertain petition under Section 34 of the Act.

(x) That the statutory provisions as contained in the

Act, which is enactment of the parliament, would override over any rules or bye-laws made by the stock exchange.

(xi) That reliance placed on the decision of this Court in the case of **Rudranee Infrastructure Limited** (supra), is misplaced. It is submitted that in that case, no seat was determined, unlike in the present case.

(xii) That the contention on behalf of the applicants that the Amendment Act of 2015 expands or enlarges the scope of the Courts under Section 34 of the Act is entirely misplaced. It is submitted that the amendment has no effect on the well settled position that while setting aside an award of the Arbitral Tribunal, rejecting the claim, the Court cannot grant the same, as has been held by this Court in the case of **Kaberi Mondal** (supra), which is based on the decision of the Supreme Court in the case of **Mcdermott International Inc.** (supra). He, therefore, submits that the application be dismissed.

22. I have carefully considered the submissions made. This Court while holding that the learned District Principal Judge at Panaji had no jurisdiction to entertain the petition under Section 34 of the Act has relied upon Rule nos. 5A and 5B of the Business Rules, which *inter alia* provide that unless otherwise specifically agreed between the member and the client in respect

of any claims, disputes and differences arising between the client and the member, the seat of arbitration shall be at Regional Arbitration Centre (RAC) having jurisdiction over the State, where the client ordinary resided at the time when the relevant trading took place. This Court after taking note of Rule 5A of the Business Rules found that insofar as State of Goa is concerned, it is the RAC at Mumbai, which is the seat of the arbitration. This Court also took note of the arbitration agreement as contained in clause 24 of the Act, in which the parties had agreed that the agreement shall be subject to the exclusive jurisdiction of the Courts at Mumbai. This Court then noticed the decision of the Supreme Court in the case of **Indus Mobile Distribution Pvt. Ltd.** (supra), in which, the Supreme Court has held that the designation of the seat of the arbitration by the parties, is itself akin to an exclusive jurisdiction clause, as to the Courts exercising supervisory power over the arbitration proceedings and in a given case, the parties can even choose a neutral place as the seat of arbitration, within the meaning of Section 20 of the Act. This Court also noticed the constitution bench decision of the Supreme Court in the case of **Bharat Aluminum Company** (supra), which in turn has quoted with approval the decision of the Court of Appeal in England holding that choice of seat of arbitration is analogous to an exclusive jurisdiction clause and is also determinative of the forum for remedies seeking to challenge the award.

23. It is true that the 2010 Regulations were not before this Court when the said judgment was passed. It may be mentioned that earlier the MCX came under the FCR Act. The 2010 Regulations were framed in exercise of the powers conferred under the FCR Act. The FCR Act was repealed with effect from 20.09.2015 and the undertaking of the erstwhile forward market commission was transferred to SEBI with effect from 29.09.2015. The bye-laws of 2016 were framed by SEBI in exercise of the powers under Section 9 of the Securities Contracts (Regulation) Act, 1956 (SCR Act) and these bye-laws came into effect from 29.09.2016.

24. The learned Counsel for the applicant has raised two contentions. Firstly, that the Business Rules are subject to the bye-laws and thus, the bye-laws would prevail. It is thus contended that the reliance placed by this Court on Rule 5A and 5B of the Business Rules was not proper and what ought to be looked into are the bye-laws of 2016. It is also contended that once the applicants had demonstrated on the basis of the bye-law 15.20 that the District Judge at Panaji would have

jurisdiction, the applicants sought to support the said judgment on the basis of 2010 bye-laws. It is contended that the saving clause of 2016 bye-laws would show that the pending arbitration proceedings, which would include petitions under Section 34 of the Act, would be governed by 2016 bye-laws.

25. Now, there cannot be any manner of dispute that as per the arbitration agreement as contained in clause 24 of the Member Client Agreement (MCX) the parties had agreed to refer any dispute to arbitration as per the rules, bye-laws and exchange. It can also be accepted that in as much as clause 3 of the bye-laws empowers the relevant authority to make Business Rules subject to the bye-laws that the bye-laws would prevail, which would also be evident from clause 2.13.2. To this extent, the contention of the applicants can be accepted.

26. The next contention is that the matter would be governed by the bye-laws of 2016 and not of 2010. For this purpose, saving clause of 2016 bye-laws, which is relied upon, which is clause 18A.(i), reads thus:

> *"18. Saving Clause*
>
> *A. In pursuance of Section 28A of the Forward Contracts (Regulation) Act, 1952 (FCRA) the Bye-laws of the Exchange made under the FCRA*

(referred to as 'the existing Exchance Bye-laws'), shall not be applicable after a period of one year from September 29, 2015 due to repeal of FCRA with effect from September 29, 2015. Notwithstanding such repeal,

(i) All actions or activities pursuant to trades executed under the provisions of the existing Exchange bye-laws, including but not limited to clearing, settlement, auctions, dispute resolution or arbitration and default redressal shall be undertaken and enforced under the corresponding provisions of these bye-laws."

27. I would proceed on the assumption that the pending arbitration proceedings (including the petitions under Section 34 of the Act), would be governed by the new bye-laws of 2016. The moot question is whether, clause 15.20 on which heavy reliance is placed on behalf of the applicants can come to the aid of the applicants. The said clause reads as under:

15.20 Place of Arbitration: The arbitration and appellate arbitration shall be conducted at the regional arbitration centre of the Exchange nearest to the address provided by investor/client in the KYC form or as per the change of address communicated thereafter by the investor/client to the Member. The application under Section 34 of the Act, if any, against the arbitral award passed by the arbitrator(s) or the Appellate Arbitral Award passed by the Appellate Arbitrator shall be *filed in the competent court nearest to the address provided by investor/client in the KYC form or as per the change of address communicated thereafter by the investor/client to the Member.*

28. A careful perusal of the said clause shows that the application under Section 34 of the Act, if any, against the arbitral award passed by the Arbitrator or the Appellate Tribunal shall be filed before the competent Court nearest to the address provided by the investor in the KYC form “or as per the change of address” informed thereafter by the investor to the member. It is a matter of record that the client i.e. the original claimant had provided their address at Panaji. It is strongly urged on behalf of the applicants that thus, the nearest competent Court would be the District Judge at Panaji. I have given my anxious consideration to the contention as raised on behalf of the applicants and I am unable to accept the same. All that clause 15.20 provides is “the competent Court nearest to the address provided by the investor”. Only because there is a District Court nearest to the address provided by the client, which is nearer than the RAC at Mumbai would not clothe the District Court being the competent Court under Section 2(1)(e) of the Act. The bye-laws of 2016 have to be read as a whole and clause 15.20 cannot be read in isolation. In this regard clause 15.6, which

pertains to jurisdiction reads thus:

> *15.6 – Jurisdiction: All parties to a reference to arbitration under these Bye-Laws, Rules and Regulations and the persons, if any, submitting claims under them, shall be deemed to have submitted to the exclusive jurisdiction of the Court in Mumbai for the purpose of giving effect to the provisions of the Act, these Bye-Laws and Rules and Regulations in force.*

It can thus be seen that clause 15.6 contains a deeming provision that all the parties have submitted to the exclusive jurisdiction of the Courts at Mumbai for the purpose of giving effect to the provisions of the Act, bye-laws and rules and regulations in force. The Member Client Agreement (MCX) as well as the various contract notes also show that the parties had agreed to the jurisdiction of the Courts at Mumbai. It is now well settled that the “subject matter of suit” is not sine qua non with the “subject matter of arbitration” as held by the Supreme Court in the case of **Indus Mobile Distribution Pvt. Ltd.** (supra) and in a given case, the parties can also choose a neutral place as being the seat of arbitration. The seat of the arbitration governs the issue as to which Court would have supervisory jurisdiction over the arbitral proceedings. In this regard, clause 3.3 of the bye-laws may also be noticed with profit, which read as under:

3.3 - Jurisdiction

These bye-Laws shall be applicable on all the members and participants of the Exchange, authorised person, approved users, clients and all entities involved in trading, clearing and settlement of transactions, to the extent specified herein. These shall be subject to the jurisdiction of the Courts in Mumbai, where the Exchange is situated, irrespective of the place of business of the members of the Exchange in India or abroad. All transactions entered into or executed through the ATS or any other trading system of the Exchange located at the premises of the Exchange at any place shall be deemed to have taken place in the city of Mumbai only and the place of contracting as between the members of the Exchange shall be at Mumbai, irrespective of the locations of the Trader Workstations of the members connected thereto. All disputes under these Bye-Laws shall be subject to the exclusive jurisdiction of the Courts in Mumbai, irrespective of the location of the place of business of the members of the Exchange and of their clients or the place where the concerned transaction may have taken place.

The Bye-Laws, Rules and Regulations of the Exchange shall be governed by and construed in accordance with the laws in force in India. Every exchange member shall expressly provide in the contract notes to be issued by him that only the

> *Courts at Mumbai shall have the exclusive jurisdiction for claims in relation to any dispute arising out of or in connection with or in relation to such contract notes. The provisions of this Bye-law shall not object the jurisdiction of any court deciding any dispute as between members and their constituents to which the Exchange is not a party.*

29. Thus, reliance placed on clause 15.20 of the bye-laws to my mind is misplaced. At the cost of repetition, it needs to be stressed that all that the bye-law speaks about is the "competent Court nearer to the address of the client". In order to find out as to which is the competent Court, the bye-laws have to be read as a whole, including the individual contract between the parties in the form of Member Client Agreement (MCX) and the contract notes. Thus, it is not possible to accept that the District Judge at Panaji had jurisdiction to entertain the petition under Section 34 of the Act.

30. The case of **Rudranee Infrastructure Limited** (supra), is distinguishable on facts, in as much as in that case the seat of arbitration was not designated, either in contract between the parties or in terms of reference or in minutes of the proceedings or otherwise. On facts, this Court held that the seat of Arbitration being at Thane, the Thane Court would have

exclusive jurisdiction over the arbitral proceedings.

31. The SEBI had issued a circular dated 11.08.2010, in which, clause 8 pertaining to the place of arbitration states that the application under Section 34 of the Act, if any, against the decision of the appellate panel shall be filed in the competent Court nearest to such regional centre. By a subsequent letter dated 05.07.2013, clause 8.3 has been substituted as under:

> *“8.3. The application under Section 34 of the Arbitration and Conciliation Act, 1996, if any, against the decision of the appellate panel shall be filed in the competent Court nearest to the address provided by client in the KYC form.”*

32. The said clause is similar to clause 15.20 of 2016 bye-laws and again the question is which is the competent Court which is nearest to the address provided by client in the KYC form, which will have to be decided in the context of the bye-laws read as whole and in particular clause 15 of the bye-laws of 2016 and the agreement between the parties as contained in Member Client Agreement as also the contract notes. Looked from any angle, in my humble view, the District Judge at Panaji had no jurisdiction to entertain the petition under Section 34 of the Act.

33. This takes me to the next question as to whether, the District Court while setting aside the award passed by the Arbitral Tribunal, rejecting the claim in its entirety, can grant a claim. The decision in the case of **Mcdermott International Inc.** (supra) and **Kaberi Mondal** (supra) are to the contrary. The learned Counsel for the applicant has relied upon clause 15.41, which reads thus:

> *15.41. Setting Aside of Award and Fresh Reference:*
> *15.41.1 An arbitral award may be set aside or modified by the court on an application made under relevant provision of the Arbitration and Conciliation Act, on the grounds mentioned in that provision.*
> *15.41.2 When an award made under these Bye-Laws and Regulations of the Exchange is set aside or modified by the court, the matter shall be disposed of in accordance with the direction of the Court.*

34. It is contended that clause 15.41.1 *inter alia* provides for modification of the award by the Court. It is also submitted that in the face of the specific provisions as contained in clause 15.41.1 the decision in the case of **Mcdermott International Inc.** (supra) and **Kaberi Mondal** (supra) will not apply. The contention, in my considered view cannot be accepted. A bare perusal of clause 15.41.1 shows that the award may be set aside

or modified by the Court under the relevant provisions of the Arbitration and Conciliation Act and on the grounds mentioned in that provision. It can thus clearly be seen that even clause 15.41.1 provides that the challenge to the arbitral award has to be on the grounds as mentioned in the relevant provisions of the Act, which in the present case is Section 34 of the said Act. Thus, clause 15.41.1 cannot be read dehors of the requirement and grounds of challenge as contained in Section 34 of the Act. The Supreme Court in the case of **Mcdermott International Inc.** (supra) and this Court in the case of **Kaberi Mondal** (supra) has held that while entertaining the petition under Section 34 of the Act, the Court cannot grant a claim while setting aside an award of the Arbitral Tribunal refusing to grant such claim.

35. The next contention that the amendment Act of 2015 enlarges the scope of interference by the Courts, has only to be stated to be rejected. It is well settled that the Act, which is based on the UNCITRAL model aims at providing minimum interference by the Courts and merely because the 2015 amendment, which has introduced Section 2A of Section 34 of the Act (providing that the award can be set aside, if it is vitiated by patent illegality appearing on the face of the record) cannot

be taken to mean that the scope of such interference is enlarged. Even otherwise Section 2A of Section 34 of the Act also speaks of setting aside of award and not its modification or its substitution. Thus, the second ground urged on behalf of the applicants also fails.

The applications are without any merit and are accordingly dismissed, with no order as to costs.

C.V. BHADANG, J.

EV