

OCD-9 & 10

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE
(Commercial Division)

AO-COM/18/2024
WITH
AP/820/2023

STEEL AUTHORITY OF INDIA LIMITED
VERSUS
POSCO ENGINEERING AND CONSTRUCTION COMPANY LIMITED

Wt10

APOT/65/2024

STEEL AUTHORITY OF INDIA LTD.
VERSUS
POSCO ENGINEERING AND CONSTRUCTION COMPANY LTD.

BEFORE:

The Hon'ble JUSTICE SOUMEN SEN

AND

The Hon'ble JUSTICE BISWAROOP CHOWDHURY

Date : 18th November, 2024.

Appearance:

Mr. Sarathi Dasgupta, Adv.

Mr. Arijit Basu, Adv.

Ms. Ajeyaa Choudhury, Adv.

...for the appellant

Mr. Ratnanko Banerji, Sr. Adv.

Ms. Trisha Mukherjee, Adv.

Mr. Chetan Kabra, Adv.

...for the respondent

The Court: Both the appeals are heard together and disposed of by this
common judgment.

A preliminary objection is raised by the award-holder with regard to the maintainability of the appeal and hence we have decided to hear the maintainability issue first.

Mr. Ratnanko Banerji, learned senior counsel appearing on behalf of the award-holder, has submitted that the order impugned is not appellable since it has not set aside or refused to set aside an arbitral award under Section 34 of the Arbitration and Conciliation Act. It is submitted that the parties have entered into a commercial agreement in which the venue of the arbitral proceeding was mentioned as New Delhi. It is an international commercial arbitration. In view of catena of decisions where it has been held that the seat of arbitration is akin to exclusive jurisdiction of Courts where such proceeding is held the decision of the learned Single Judge was correct and does not call for any interference. In any event, it is submitted that the learned Single Judge has not decided the legality and validity of the arbitral award on merits. In view of the decisions of the Hon'ble Supreme Court in *Kandla Export Corporation vs. OCI Corporation*¹, *BGS SGS SOMA JV vs. NHPC Limited*² and *Hindustan Copper Limited vs. Nicco Corporation Limited*³, the order referring to admit an appeal for setting aside an award due to lack of jurisdiction is not maintainable. The decision in *BGS SGS SOMA (Supra)* has been specifically relied upon to show that in a similar situation where the Special Commercial Court, Gurgaon allowed the application of the petitioner and returned the petition filed under

¹ (2018) 14 SCC 715

² (2020) 4 SCC 234

³ (2009) 6 SCC 69

Section 34 for presentation to the proper Court having jurisdiction in New Delhi was challenged in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 it was held to be not maintainable as it does not fall within the purview of Section 37(1)(c) of the Arbitration and Conciliation Act, 1996.

Mr. Sarathi Dasgupta, learned counsel appearing on behalf of the award-debtor has submitted that when the Court is exercising a power under Section 34 of the Arbitration and Conciliation Act and passed an order refusing to entertain the application for setting aside an award, it becomes appellable under Section 37(1)(c) as in Section 37(1)(c) the expression used is “setting aside or refusing to set aside an arbitral award under Section 34”. It is submitted that the application was filed under 34 of the 1996 Act and it is that Court which passed the impugned order and declined to entertain the application for lack of jurisdiction in view of the interpretation of the venue of the arbitral proceeding mentioned in Article 10 of the agreement. Mr. Dasgupta has strenuously argued that the decision in *BGS SGS SOMA (Supra)* has been distinguished in *Chintels India Limited vs. Bhayana Builders Private Limited*⁴ in which it has been clearly stated that the said decision cannot be treated to be an authority for the proposition that if an application under Section 34 is rejected on the ground of lack of jurisdiction it cannot be treated to be an order appellable under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996. Mr. Dasgupta has drawn the attention of this Court to the observation of

⁴ (2021) 4 SCC 602

Justice Rohinton Fali Nariman in paragraph 32 of the decision and submits that Justice Nariman had also authored the judgment in *BGS SGS SOMA (Supra)* and in view of the clear observation made in paragraphs 32 and 35 where it has been clearly stated that the issue in *BGS SGS SOMA (Supra)* was with regard to the seat of the arbitral tribunal and in deciding the said issue observation has been made with regard to the return of the petition before the proper court. The observation in *BGS SGS SOMA (Supra)* with regard to the non-maintainability of the appeal arising out of an order passed for return of the award to the appropriate Court cannot be held to be binding.

Mr. Dasgupta, learned Counsel has made specific reference to paragraph 12 of *Chintels India Limited (supra)* to argue that it has been clearly observed in the said paragraph that Section 34 is not limited to grounds made out under Section 34(2) and, hence, a literal reading of the provision of Section 36(1)(c) would show that a refusal to set aside an arbitral award, (which in *BGS SGS Soma (supra)* was on the ground of delay) would certainly fall under Section 37(1)(c).

In our respectful reading of the decisions relied upon by the parties, we find that the present issue has been addressed and decided in *BGS SGS Soma (supra)* where a similar application was taken out for return of the award to the appropriate Court and such prayer was allowed by the Trial Judge. The appellability of the said order came up for consideration in which the Hon'ble Supreme Court has in construing Section 13(1A) of the Commercial Courts Act, 2015 read with Section 37 of the Arbitration & Conciliation Act, 1996 has

clearly observed that it is the parameter of Section 37 of the Arbitration & Conciliation Act, 1996 alone which have to be looked at in order to determine whether the appeals are maintainable. Section 37(1) makes it clear that appeal shall only lie from the orders set out in Sub-clauses (a), (b) and (c) and not from no others. Unlike Section 13 (1A) of the Commercial Courts Act, 2015 where an appeal could lie from an order under Order VII Rule 10, there is no specific reference of the said provision in Section 37 of the Arbitration & Conciliation Act, 1996. The absence of these words was noticed in paragraph 13 of the *BGS SGS Soma (supra)*. Admittedly, in the instant case, there has been no adjudication under Section 34 of the Arbitration & Conciliation Act, 1996. The learned Single Judge has merely observed that the High Court at Calcutta has no jurisdiction to entertain the application for setting aside of the award in view of the venue of the arbitral proceeding mentioned as New Delhi in the arbitration clause. There has been no adjudication on merits and, hence, it cannot be said to be an order passed under Section 37(1)(c) unlike a situation where an application under Section 5 of the Limitation Act filed along with an application under Section 34 of the Arbitration & Conciliation Act, 1996 was not entertained and dismissed. In the later situation, the award attains finality and it amounts to refusal to set aside an award. In paragraph 12 in *Chintels India Limited (supra)*, this was noticed where it has been observed as follows:

“The expression has to be read with the expression that follows – “under Section 34”. Section 34 is not limited to grounds being made out under Section 34(2). Obviously, therefore, a literal reading of the provision would show that a refusal to set aside an arbitral award as delay has not been

condoned under sub-section (3) of Section 34 would certainly fall within Section 37(1)(c). The aforesaid reasoning is strengthened by the fact that under Section 37(2)(a), an appeal lies when a plea referred to in sub-section (2) or (3) of Section 16 is accepted. This would show that the legislature, when it wished to refer to part of a section, as opposed to the entire section, did so. Contrasted with the language of Section 37(1)(c) where the expression “under Section 34” refers to the entire section and not to Section 34(2) only, the fact that an arbitral award can be refused to be set aside for refusal to condone delay under Section 34(3) gets further strengthened”

Mr. Dasgupta, learned Counsel has referred to paragraph 35 of the judgment to show that the Division Bench judgment of the Bombay High Court was set aside on the ground that the said judgment was rendered overlooking the ratio in *Essar Constructions –versus- N.P. Rama Krishna Reddy*⁵. The Bombay High Court in paragraph 11 had observed that the consequence of order of dismissal of the application for condonation of delay cannot itself amount to an appealable order under Section 34(1) for the purpose of appeal under Section 37(1) of the Act which clearly negates the “effect doctrine” enunciated in *Essar Constructions* (supra). The effect of a decision dismissing an application for condonation of delay is an affirmation of the order and the said order becomes final. However, in the instant case, as observed earlier no finality is attached to the award and the application was held to be ‘non maintainable’ for want of jurisdiction.

⁵ (2000) 6 SCC 1994

The argument advanced by Mr. Dasgupta, learned Counsel that the impugned order does not direct the return of the application for setting aside to the appropriate Court and dismiss the said application partakes the nature of finality which, we are unable to accept as the learned Single Judge in dismissing the application has clearly reserved such right as we find from the impugned order where the applications were dismissed as not being maintainable and not on merits. The learned Single Judge was of the view that New Delhi has been designated as the venue of the arbitration proceedings. In the absence of designation of a seat, Delhi High Court would have to be seen as the seat and the Delhi High Court would hence be the appropriate forum for entertaining any application with regard to the arbitration agreement. Although reference has been made to the arbitration and also the expression “jurisdiction clause” in Article 10 of the agreement and it is argued that the Court of Asansol is inextricably connected with the dispute as the agreement was executed, performed and breach had taken place within the jurisdiction of Asansol Court and even if it is assumed for the time being that it is an international arbitration agreement, then the High Court at Calcutta would have been the jurisdiction by reason of Section 2(1)(e) of the Arbitration & Conciliation Act, 1996 are, however, not gone into since we are on the issue of maintainability of the appeal. We hold that the order is not appealable under Section 37(1)(C) of the 1996 Act.

The appeal preferred by the award-holder with regard to enforcement of the award is also dismissed as the said application for enforcement is

maintainable in this court as the assets and properties of the judgment debtor are within jurisdiction. Mr. Dasgupta in all fairness has accepted the maintainability of the application for enforcement of the award in this court.

Mr. Dasgupta, learned Counsel has submitted that the claim of the decree-holder would be secured and has prayed for stay of operation of the order.

In view of the fact that the execution matter is fixed on March 20, 2025, and appellant has sufficient time to challenge this order we are not inclined to grant stay of operation of the order.

Both the appeals, accordingly, stand dismissed. However, there shall be no order as to costs.

(SOUMEN SEN, J.)

(BISWAROOP CHOWDHURY, J.)