

# Dispute Resolution Hotline

February 05, 2014

## HIGH COURT V. DISTRICT COURT, WHERE WILL YOUR SECTION 34 ARBITRATION PETITION LIE?

- Supreme Court considers the meaning of “Court” under Section 2 (1) (e) of the Arbitration and Conciliation Act, 1996.
- Supreme Court considers where petition will lie when both the contesting petitions are filed on the same day with courts having concurrent jurisdiction.
- Supreme Court holds that when a Section 34 petition is simultaneously filed in a District court and a High Court the High Court having ordinary original civil side jurisdiction will have primacy to hear the petition.

### INTRODUCTION

The Supreme Court (“SC”) in its recent judgment of *Executive Engineer, Road Development Division No.III, Panvel & Anr. v Atlanta Limited*<sup>1</sup> has analysed the definition of “Court” to determine which court would hear challenges to an arbitral award (or arbitral agreement, or arbitral proceeding) where jurisdiction lies with more than one court and the parties initiate proceedings in multiple courts simultaneously.

### FACTUAL BACKGROUND

Atlanta Limited (“Respondent”) was awarded a contract for construction of the Mumbra bypass by the Public Works Department, Maharashtra (“Appellant”). The contract stipulated that in the event of disputes arising between the parties, the same were to be resolved through arbitration with the seat at Mumbai.

Disputes arose between the parties in 2009, followed by an arbitral award being passed in 2012. This arbitral award was challenged under Section 34 of the Arbitration and Conciliation Act, 1996 (“Act”) before the District Judge, Thane by the Appellant and before the Bombay High Court (“Bombay HC”) by the Respondent on the same day, on August 7, 2012.

The Respondent filed an application for transfer of proceedings from the District Judge, Thane to the Bombay HC as the subject-matter of challenge arose out of the same arbitral award. The application was allowed by the Bombay HC for consolidation leading to the present appeal.

### ISSUES

The SC dealt with two issues:

**Preliminary Issue:** Whether a challenge to an arbitral award (wherein jurisdiction lies with more than one court), can be permitted to proceed simultaneously in two different Courts.

**Main Issue:** Which of the two courts, viz. the Bombay HC or the District Judge, Thane would have jurisdiction to hear the matter if the answer to the preliminary issue is in the negative.

### ARGUMENTS BY THE APPELLANT

It was submitted that:

- District Judge, Thane, alone had the jurisdiction to entertain petitions challenging the validity of the award. Reliance was placed on Section 2(1)(e) of the Act which defines the term “Court” as:

*“Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes”*

- The Appellant contended that the determination of the relevant court for exercising jurisdiction would have to be done in the same manner as in the case of civil suits. The definition uses the expression “subject matter” (which is only referable to the subject matter of the contract, i.e., the bypass and the tolls located in Thane in the present case) and not “cause of action” (which maybe referable to places where the contract is executed, or where arbitration proceedings were conducted). Thus, even if the Bombay HC is found to have jurisdiction, the District Court of Thane was “more natural”, “more suitable” and “more appropriate” for the adjudication of the claims raised by the parties as the subject matter was situated in Thane.
- It was further contended that even if the “ordinary original civil side” of the Bombay HC and the “principal Civil Court of original jurisdiction”, i.e. the District Judge, Thane, both have jurisdiction in the matter, as per Section 15<sup>2</sup> of the CPC, the District Judge would be the court of the lowest grade having jurisdiction and would be the appropriate forum to adjudicate the disputes.
- Section 24 of the CPC (general power of the High Courts and District Courts to transfer and withdrawal of any suit, appeal or other proceedings) ought not to have been relied upon by the Bombay HC for transferring the

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proceedings from the court of District Judge, Thane, to the Bombay HC since Section 24 of the CPC could not be invoked in a petition filed under Section 34 of the Act. In any case the proceedings in the Bombay HC ought to have been transferred to the District Judge, Thane.

## ARGUMENTS BY THE RESPONDENT

The Respondent contended that:

- The Bombay HC would have jurisdiction since the contract between the parties had been executed in Mumbai.
- Additionally, the parties had mutually agreed under the contract that the seat of arbitration would be at Mumbai.
- The Appellant in their Reply Affidavit before the Bombay HC had admitted that both courts had jurisdiction with respect to the subject-matter of arbitration.
- In light of the judgment passed by the Constitutional Bench of the SC in *Bharat Aluminium Company & Ors. v. Kaiser Aluminium Technical Services Inc & Ors.*<sup>3</sup> (“**BALCO**”) the court of the seat of arbitration, i.e., the Bombay HC in the instant case, would be required to exercise supervisory control over the arbitral process and therefore, would be the relevant court for the purposes of Section 2(1) (e) of the Act.

## JUDGMENT

In respect of the preliminary issue, the SC, referring to Section 42<sup>4</sup> of the Act (although inapplicable in Part I disputes), stated that though the jurisdiction for raising a challenge to the same arbitration agreement, arbitral proceeding or arbitral award, could arise in more than one court simultaneously, the court where the first challenge application is filed will alone have the jurisdiction to adjudicate upon the dispute(s) which are filed later on.

It was observed that in the present case Section 42 was not attracted since both the challenges had been filed on the same day. However, the SC held that it was clearly the legislative intention that all disputes arising out of same arbitral award would lie only before one court.

Considering the submissions of the Appellant regarding the applicability of Section 15 of the CPC for the determination of the appropriate “Court” under the Act, the SC negated the application of Section 15 for interpreting Section 2(1)(e) of the Act since, in the SC’s view, Section 15 of the CPC would defeat the inclusion of the High Court “in exercise of its ordinary original civil jurisdiction”, within the definition of the term “Court” as the “principal Civil Court of original jurisdiction in a district”, namely the District Judge concerned, being a court lower in grade than the High Court would always exclude the High Court from adjudicating upon the matter. The SC held that under the Act, it is the superior most Court exercising original civil jurisdiction, which would be termed as “Court” for the purpose of Section 2(1)(e) of the Act and negated arguments raised by the Appellant.

The SC held that it makes no difference “if the principal civil court of original jurisdiction” is in the same district over which the High Court exercises original jurisdiction or some other district. Further, if an option is to be exercised between a High Court (under its “ordinary original civil jurisdiction”) on the one hand and a District Court (as “principal civil court of original jurisdiction”) on the other, the choice under the Act has to be exercised in favour of the High Court.

## ANALYSIS

In this judgment the SC was posed with a very important issue of determining jurisdiction where parties file simultaneous challenges under the Act in more than one court, both of which enjoy jurisdiction to hear the matter. Though the conclusion may not have changed, the SC’s reasons in arriving at the conclusion appear to have overlooked some of the arguments made by the Respondent. The SC has failed to take into consideration the existing body of relevant case laws while resolving the query.

The SC in its latest decision of *Swastik Gases Private Limited v. Indian Oil Corporation Limited*<sup>5</sup> dealt with the issue of “exclusive jurisdiction” clauses in the context of arbitration and decided in favour of the court chosen by the parties. The SC did analyze the connecting factors shown by the parties however due to exclusive jurisdiction clause in agreement, decided otherwise.

In the present case, the SC should have also considered the various courts in which the jurisdiction would have resided by establishing the connecting factors. Thereafter, it could have favoured the court with the strongest connecting factors for the purposes of hearing the challenges. In the context of arbitration the court with the strongest connection is the seat court, in this case the Bombay HC since the seat was Mumbai.

Further, in para 18 of the decision, the SC holds that Section 15 of the CPC does not apply when interpreting 2(1) (e) of the Act since that would always oust the jurisdiction of the High Court and therefore the legislative intent in Section 2 (1)(e) differs from that behind Section 15. The High Court being the more superior court, the High Court would have jurisdiction. This interpretation can be distinguished on following counts –

- Although the judgment states that the question of pecuniary jurisdiction is not one before the Court, had the Court considered this question, it would’ve been amply clear that when the pecuniary ceiling of the District court is hit, even if the cause of action or subject matter is within the district, an applicant would be compelled to go to the High Court.
- Nothing in the language of Section 2 (1) (e) or the entire Act suggests that a hierarchically superior court will have jurisdiction. In fact reading Section 15, harmoniously with Section 2 (1) (e) it would have to be read in a manner which will result in different conclusion.
- In interpreting Section 2 (1) (e) the subject-matter of the arbitration has to be treated as if the same had been the subject-matter of a suit. Therefore, one could argue that Section 2 (1) (e) mandates that a petition be treated just as a suit for the purposes of interpreting the meaning of court. From such a reading as well, one could argue that a district court would be the first court of recourse and would aptly exercise jurisdiction.

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You can direct your queries or comments to the authors

<sup>1</sup> Civil Appeal No. 673 OF 2014 (Arising out of SLP (C) No.18980 of 2013)

<sup>2</sup> Section 15 of the CPC: Court in which suits to be instituted: Every suit shall be instituted in the Court of the lowest grade competent to try it.

<sup>3</sup> (2012) 9 SCC 559

<sup>4</sup> Section 42 of the Act: Jurisdiction: Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

<sup>5</sup> (2013) 9 SCC 32

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