A QUIPPO CONSTRUCTION EQUIPMENT LIMITED

v.

JANARDAN NIRMAN PVT. LIMITED

(Civil Appeal No. 2378 of 2020)

B APRIL 29, 2020

[UDAY UMESH LALIT AND VINEET SARAN, JJ.]

Arbitration and Conciliation Act, 1996 – ss.4, 16, 20 and 34 – Four agreements entered into between the parties – Dispute – C *Sole arbitrator appointed – In one of the agreements the venue was Kolkata but proceedings were conducted at Delhi – Litigation ensued both before the Courts at Kolkata and Delhi – Common* ex-parte *award passed – Respondent filed petition u/s.34 in the Court of District Judge, Alipore – Dismissed – Order set aside by High Court – Held: Arbitration in question is a domestic and an institutional* D *arbitration where Construction Industry Arbitration Association (CIAA) was empowered to and did nominate the Arbitrator – It is not as if there were completely different mechanisms for appointment of Arbitrator in each of the agreements – Only distinction is that as per one of the agreements, the venue was to be at Kolkata –* E *Specification of "place of arbitration" may have special significance in an International Commercial Arbitration, where the "place of arbitration" may determine which curial law would apply – However, in the present case, the applicable substantive as well as curial law would be the same – Further, respondent neither participated in arbitration proceedings nor objected to jurisdiction* F *of the Arbitrator, thus deemed to have waived all such objections – Now precluded from raising any objection as to the venue of arbitration – Conclusion drawn by the Court at Alipore was correct – Order of High Court set aside while that of the Court at Alipore is restored.*

G **Allowing the appeal, the Court**

HELD: 1.1 In the present case the arbitration in question is a domestic and an institutional arbitration where CIAA was empowered to and did nominate the Arbitrator. It is not as if there were completely different mechanisms for appointment of

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Arbitrator in each of the agreements. The only distinction is that according to one of the agreements the venue was to be at Kolkata. The specification of "place of arbitration" may have special significance in an International Commercial Arbitration, where the "place of arbitration" may determine which curial law would apply. However, in the present case, the applicable substantive as well as curial law would be the same. It was possible for the respondent to raise submissions that arbitration pertaining to each of the agreements be considered and dealt with separately. It was also possible for him to contend that in respect of the agreement where the venue was agreed to be at Kolkata, the arbitration proceedings be conducted accordingly. Considering the facts that the respondent failed to participate in the proceedings before the Arbitrator and did not raise any submission that the Arbitrator did not have jurisdiction or that he was exceeding the scope of his authority, the respondent must be deemed to have waived all such objections. [Paras 22-23] [288-A-D]

1.2 The respondent is now precluded from raising any submission or objection as to the venue of arbitration, the conclusion drawn by the Court at Alipore while dismissing Miscellaneous Case No.298 of 2015 was quite correct and did not call for any interference. The High Court was in error in setting aside said Order. In any case, the fact that the cause title showed that the present appellant was otherwise amenable to the jurisdiction of the Alipore Court, could not be the decisive or determining criteria. [Para 24][288-E]

Narayan Prasad Lohia v. Nikunj Kumar Lohia and Others **(2002) 3 SCC 572 : [2002] 1 SCR 1136 - relied on.**

Duro Felguera, S.A. v. Gangavaram Port Limited **(2017) 9 SCC 729 : [2017] 10 SCR 285 – referred to.**

Case Law Reference

[2017] 10 SCR 285	**referred to**	**Para 18**
[2002] 1 SCR 1136	**relied on**	**Para 20**

A CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2378 of 2020.

From the Judgment and Order dated 14.02.2019 of the High Court at Calcutta in appeal bearing No. CAN 10094 of 2018.

B Ritin Rai, Sr. Adv., Shashank Manish, Ms. Manasi Chatpalliwar, Ms. Prerita Aggarwal, Ms. Twinkle Kataria, Yash Kumar, Abhipsit Mishra, Arjun S.B., Mridul Godha, Advs. for the Appellant.

Kuriakose Varghese, V. Shyamohan, Surya Prakash, Ms. Isha Ghai (for KMNP Law), Advs. for the Respondent.

C The Judgment of the Court was delivered by

UDAY UMESH LALIT, J.

1. Leave granted.

2. In this appeal the Original Claimant challenges the final judgment D and order dated 14.02.2019 passed by the High Court at Calcutta in CAN No.10094 of 2018.

3. The basic facts culled out from the award dated 24.03.2015 passed by the Arbitrator in the present case are:-

E "That the respondent company who is engaged in the business of infrastructure development activities approached the claimant company who is also dealing in the business of providing equipments for infrastructure activities to provide on rent two Piing Rig HR-180 and (1) 300 CPM compressor (equipments) for carrying out the work as per the respondent's instructions. After F deliberations and negotiations, an agreement dated 1.8.2010 was entered into between the parties in respect of the abovesaid construction equipments for its work site C/o Janardhan Nirman Pvt. Ltd. L & TECC site, NTPC BARH site, BARH, Distt. Patna, Bihar. Being satisfied with the equipment services provided by the claimant company, the respondent further approached the G claimant company for taking on rent another one (1) Pilling Rig-MAIT HR 180 (equipment) for its same abovesaid work site, along with double set of crew/operator for each equipment for carrying out the works as per the respondent's instructions. After deliberations and negotiations, an agreement 2.10.2010 was entered into between the parties herein in respect of the abovesaid H

equipments. Thereafter, the respondent further entered into agreements dated 19.3.2011 and 14.4.2011 for taking on rent one (1) Pilling Rig HR 180 vide each of the said agreements for carrying out the work as per the respondent's instructions for its work site at C/o Janardhan Nirman Pvt. Ltd., SAIL, DSP, Durgapur, West Bengal and C/o Janardhan Nirman Pvt. Ltd., NH-34, Farakka-Dafkhola Road Project, Near Kaliachak, Distt. Malda, West Bengal, respectively."

4. In General Terms and Conditions appended to the aforesaid Agreements, resolution of disputes between the parties was provided for as under:-

4.1 The relevant clauses in respect of the agreement dated 01.08.2010 were to the following effect:-

"24. **Governing Law Jurisdiction & Arbitration:** The parties hereto agree that the courts and tribunals at New Delhi shall have the exclusive jurisdiction and shall be governed in accordance with the law in India.

24.1 **Arbitration:** In the event of any claim, dispute or difference arising out of or in connection with the interpretation or implementation of the agreement or out of or in connection with any breach, or alleged breach of the Agreement (hereinafter referred to as "the dispute") between the parties, the parties hereby agreed to refer such dispute to Arbitration under Construction Industry Arbitration Association (CIAA) Rules and Regulations save and except that on behalf of both the parties to the Agreement. The owners shall be entitled to select the sole Arbitrator out of the panel of CIAA. The proceedings shall be governed by the Arbitration and Conciliation Act, 1996 with any statutory modification thereto or re-enactment thereof. The venue for holding such arbitration proceedings would be New Delhi."

4.2 On the other hand, the relevant arbitration clause in the agreement dated 14.04.2011 was to the following effect:-

"**24. Governing Law Jurisdiction & Arbitration:** All and any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Kolkata in accordance with the arbitration Rules of the Construction Industry

A Arbitration Council ("CIAC Arbitration Rules") for the time being in force at the commencement of the arbitration, which rules are deemed to be incorporated by reference in this Clause. The owner shall be entitled to select the sole Arbitrator out of the panel of CIAC. This agreement is governed by the laws of India and the
B parties hereto agree that only that courts and tribunals at Kolkata shall have the exclusive jurisdiction the dispute arise out of the terms of the Agreement or its interpretation.

The language of the arbitration shall be in English language. The provision shall survive the termination/expiry of this agreement."

C 5. In pursuance of the aforementioned agreements, construction equipments were provided by the appellant to the respondent at the respective sites as per instructions of the respondent. According to the terms and conditions of the agreements the respondent was to make payment within seven days from the date of submission of monthly bills failing which the respondent would be liable to pay interest for delayed
D period. Since the payments were not forthcoming, the appellant by its letter dated 21.01.2012 asked the respondent to pay the outstanding dues. In its response dated 01.02.2012 the respondent accepted that every Rig hired by it was as per the agreement. Since the payments were not forthcoming, by communication dated 02.03.2012 the appellant gave
E notice invoking arbitration. Relying on clauses 24 and 24.1 as stated above, it was stated that Shri L.C. Jain, President Consumer Forum (Retd.) was appointed as the Sole Arbitrator who would be conducting proceedings at New Delhi to adjudicate upon the dispute between the parties. It was also stated:-

F "You are requested to reply and join the arbitration proceedings within 14 days from the receipt of this notice and/or make payment of the entire outstanding, amount of Rs.78,78,533/- (Rupees Seventy Eight Lakhs Seventy Eight Thousand Five Hundred Thirty Three Only) with interest @ 18%p.a. to the outstanding amount."

G A copy of this communication was marked to Construction Industry Arbitration Council ('CIAC', for short).

6. In its reply dated 15.03.2012 the respondent denied existence of any agreement between the parties. It, however, did not take any steps to participate in the arbitration. On the other hand, the respondent
H filed Title Suit No.189 of 2012 in the Court of Civil Judge, Junior Division,

Second Court at Sealdah, praying that the agreements be declared null and void and for permanent injunction restraining the appellant from relying on the arbitration clauses contained in the agreements. At the interim stage, a restraint order was passed by the Trial Court as a result of which the proceedings before the Arbitrator were stayed. An application under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996 (for short "the Act") was filed by the appellant submitting that the dispute between the parties be referred to arbitration.

7. While accepting the application moved on behalf of the appellant the Trial Court in its Order dated 26.5.2014 observed:-

> "The defendant has already stated that there are agreements between the parties containing arbitration clause. They referred the matter to arbitration in terms of the said arbitration clause to resolve payment related dispute. In support of their contention, the defendant produced a series of original agreements, signed by both parties. I fail to understand why the plaintiff signed in a series of documents, which they claim to be non-existing. As stated earlier, the plaintiff failed to give any explanation regarding falsity and forgery committed by the defendant in executing the said agreements. On perusal of the agreements, it transpires that all the agreements contain payment and usage terms in detail. The agreements also contain arbitration clause i.e. with regard to any claim and any dispute regarding implementation, execution and interpretation or breach of the agreements between the parties.
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> Therefore, the dispute between the parties regarding payments is within the scope of arbitration clause. The defendants are justified in referring the matter to arbitration. Rather the plaintiff filed this suit even after having knowledge of arbitration proceeding.
> … …
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> All the disputes between the parties being the matters covered by arbitration clause are to be adjudicated by the arbitrator. Therefore, this court has no jurisdiction to hear and try this suit."

The application preferred by the appellant was thus allowed and the plaint was directed to be returned.

8. The respondent filed Miscellaneous Appeal No.57 of 2014 in the Court of Additional District Judge, Second Court, Sealdah, challenging said order dated 26.05.2014. Pending appeal, interim relief was prayed

A for by the respondent and repeated adjournments on that count were sought by the respondent before the Arbitrator. The Arbitrator granted accommodation to the respondent on some occasions but as no interim order was passed by the appellate court, the proceedings before the Arbitrator continued. By ex-parte award dated 24.03.2015, the Arbitrator accepted the claim preferred by the appellant. The award was a common award covering claims in respect of all the four agreements. The award observed:-

> "The claimant company approached the Construction Industry Arbitration Council (CIAC), the institutional body set up for this purpose, for appointment of an arbitrator as per provisions of the agreement entered between the claimant company and respondents to resolve the dispute that arose in between the claimant company and the respondents. To resolve the dispute in between the parties, the CIAC assigned this matter to me (L.C. Jain) as sole arbitrator. Notice of reference sent by the claimant company is dated 02.03.2012 and thereafter the arbitrator was appointed and file was put up before the sole arbitrator who fixed the date for appearance of parties.
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> … … …
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> The respondent was provided ample opportunities and time to settle the account but the respondent failed to settle the account and ultimately the claimant issued notice dated 02.03.2012 invoking the arbitration clause of the abovesaid agreements in order to settle the dispute with the respondent in accordance to the provisions of CIAC manual and requested to CIAC for referring the matter to arbitration and accordingly the matter has been referred to arbitration. CIAC issued notice dated 30.05.2012 to the respondents and asked for appearance and filing of reply/ written statement on 04.07.2012.
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> … … …
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> On receipt of the notice by the respondent, the respondent wrote to CIAC that an appeal has been filed before the Ld. Additional District Judge, at Sealdah, Kolkata against the order of the Ld. Civil Judge and the matter may be adjourned and accordingly the matter was adjourned and intimation was sent to the respondents. The respondent was also informed that without obtaining a stay

order from the court of Ld. Additional District Judge, at Sealdah, Kolkata, the proceedings will not be adjourned but the respondents have not filed any stay order with CIAC in the arbitration proceedings in this matter. For not putting appearance or by not filing the reply/written statement, the respondent was proceeded ex-parte and intimation of the same was sent to respondent by CIAC. In fact, CIAC sent copy of all proceedings (orders) of each date to the respondent but the respondent every time on receipt of intimation from CIAC continued to send the request for adjournment of the proceedings before the Sole Arbitrator through CIAC and has never filed any copy of the stay order, if any passed by the Ld. Additional District Judge, at Sealdah, Kolkata, nor filed any reply/written statement or objections for consideration of the Sole Arbitrator.

… … …

The respondent has taken the plea before the Ld. Civil Judge that the agreements as mentioned above have not been entered by him and all the documents are forged and fabricated and the Ld. Civil Judge in his order in the Civil Suit No.189 of 2012 has considered these pleas of the respondent and after due consideration of these pleas, directed the respondent to join the arbitration proceedings. … …

Thus the claimant is entitled to receive from the respondent an amount of :-

i) Rs.78,78,533/- (Rupees Seventy Eight Lacs Seventy Eight Thousand Five Hundred Thirty Three only) i.e. claim amount.

ii) Interest @ 11% per annum on the amount of Rs.78,78,533/- (Rupees Seventy Eight Lacs Seventy Eight Thousand Five Hundred Thirty Three only) as pendente lite interest from 2.3.2012 i.e. from date of reference invoking arbitration till the date of award i.e. 24.03.2015;

iii) Interest @ 11% per annum from the date of award i.e. from 25.03.2015 till realisation;

iv) The claimant has deposited with CIAC the cost of arbitration i.e. arbitration fee and allied charges pertaining

A to the portion of respondent amounting to Rs.1,47,072/- (Rupees One Lac Forty Seven Thousand Seventy Two only) and the claimant is entitled to receive the same from the respondent.

Claimant has been directed to deposit stamp paper worth B Rs.12,000/- with CIAC for pronouncing the award and the claimant accordingly filed the stamp paper worth Rs.12,000/- with CIAC and the award has been pronounced. The award has been filed with CIAC."

Soon after the award, OMP No. 449 of 2015 was filed by the C appellant in the High Court of Delhi seeking relief under Section 9 of the Act post the passing of the award.

9. The respondent being aggrieved filed a petition under Section 34 of the Act before the High Court at Calcutta being AP No.1141 of 2015, which was dismissed by the High court on 17.07.2015 after D observing that it was not clear from the cause title how the petition could have been filed in the High Court.

10. Thereafter a petition under Section 34 of the Act was filed by the respondent being Miscellaneous Case No.298 of 2015 in the Court of District Judge, Alipore. The respondent reiterated its case about non-E existence of any agreement. It also stated, *inter alia,* that the venue of arbitration in terms of the agreement dated 14.04.2011 was at Kolkata.

11. On 20.02.2016 the Appellate Court dismissed Miscellaneous Appeal No.57 of 2014 as not being maintainable.

12. On 06.01.2007, OMP No. 449 of 2015 was rejected by the F High Court of Delhi, *inter alia,* on the ground that no *prime facie* case was made out by the appellant. It was, however observed that the dismissal would not have any bearing on the decision that may be rendered in the pending petition under Section 34 of the Act before the Court at Alipore.

13. Being aggrieved by the order dated 20.02.2016, the respondent G filed Revision Petitions being CO Nos.1320 and 1322 of 2016 in the High Court at Calcutta, which by its order dated 28.03.2017 dismissed said Revision Petitions as not being maintainable but reserved rights of the respondent to agitate all the issues within the ambit of Section 34 of the Act, in the proceedings pending before the Court at Alipore. Special Leave Petition (Civil) Nos.25279-25280 of 2017 arising therefrom were H dismissed by this Court on 06.10.2017.

14. The petition filed by the respondent under Section 34 of the Act, viz. Miscellaneous Case No.298 of 2015 was, thereafter, dismissed by the Court at Alipore on 13.08.2018 with following observations:-

> "After perusal of the case record I find that there was an arbitration clause in the agreement and the Arbitrator was appointed at New Delhi and the Ld. Arbitrator has passed the award in favour of the opposite parties. The question of jurisdiction of Section 34 has been raised. There are several case laws as cited by the Ld. Lawyer for the opposite parties. From the said case laws it is found that the jurisdiction of Section 34 is where the arbitration award was passed or in the place where the seat of arbitration was agreed by the parties. In the recent case laws reported in 2017 SCC Online SC 442[1], I find that the jurisdiction is exclusively in that place where the arbitration was done. Ld. Lawyer, for the petitioner referred the agreement in between the parties stating that there is a Clause of arbitration at Kolkata but in reply the Ld. Lawyer for the opposite parties stated that there are several agreements and the place of arbitration is mentioned in other agreements is at Delhi and accordingly the arbitration has made at New Delhi and this Court has no jurisdiction to entertain of this Misc. Case U/s 34 of the Act and only Courts at Delhi have the jurisdiction to entertain the same.
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> Accordingly, after careful scrutiny of the case record as well as the observation of the Hon'ble Apex Court I find that the arbitration award was passed at New Delhi and accordingly the Court of New Delhi has the jurisdiction to entertain the application u/s 34 of the Arbitration and Conciliation Act. This Court has no jurisdiction. So, the present case is bad for want of jurisdiction."

15. The respondent initially challenged the Order dated 13.08.2018 by filing Revision Petition (C.O. No.3400 of 2018) which was dismissed as not being maintainable by the High Court at Calcutta on the ground that a remedy of filing a petition under Section 37 of the Act was available. The respondent thereafter filed appropriate petition being CAN No.10094 of 2018 which was allowed by the High Court at Calcutta vide judgement dated 14.02.2019 with the following observations:-

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[1] Indus Mobile Distribution Pvt. Ltd. vs. Datavind Innovations Pvt. Ltd.: (2017) 7 SCC 678.

A "Accordingly, since it is evident from the cause title itself that the respondent herein was otherwise amenable to the jurisdiction of the Alipore court, the order impugned dated August 13, 2018 is set aside and Misc. Case No.298 of 2015 (R.No.385 of 2015) is restored to the board of the Additional District Judge, 16th Court at Alipore."

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Said Judgment of the High Court is presently under challenge.

16. In the circumstances, it is clear that:-

(i) Though each of the four agreements provided for arbitration, the award rendered by the Arbitrator was a common award; and

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(ii) In one of the agreements the venue was stated to be Kolkata and yet the proceedings were conducted at Delhi;

However, at no stage, the aforesaid objections were raised by the respondent before the Arbitrator and the respondent let the arbitral proceedings conclude and culminate in an ex-parte award. Therefore, the question that arises is whether the respondent could be said to have waived the right to raise any of the aforesaid objections.

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17. We heard Mr. Ritin Rai, learned Senior Advocate for the appellant and Mr. Kuriakose Varghese, learned Advocate for the respondent.

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18. Mr. Ritin Rai, learned Senior Advocate submitted that all the while the respondent was denying the existence of the agreements between the parties; that after seeing the agreements in original the Civil Court had accepted the application preferred by the appellant under Sections 5 and 8 of the Act; that the decision rendered by the Civil Court attained finality with the dismissal of Special Leave Petition by this Court; that the respondent chose not to participate in the arbitration proceedings; and that it was only at the stage of preferring petition under Section 34 of the Act that a submission was raised about the venue of arbitration. It was submitted that having chosen not to raise any objection on the issue of jurisdiction or competence of the Arbitrator to go ahead with the matter pertaining to issue covered by arbitration, the respondent must be taken to have waived any such objection. It was submitted that, in any case, the Arbitrator was appointed through Construction Industry Arbitration Association ('CIAA', for short) which was also the modality under the agreement dated 14.04.2011.

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In response, it was submitted by Mr. Varghese, learned Advocate that every arbitration agreement had to be considered independently and if an agreement specified the venue to be at Kolkata, the party autonomy in that behalf ought to be respected. Reliance was placed on the decision of this Court in ***Duro Felguera, S.A. vs. Gangavaram Port Limited***[2], where there were six arbitral agreements and each one of them was subject matter of independent reference to arbitration.

19. Before we deal with the nature of controversy, we may extract relevant provisions namely Sections 4, 16 and 20 of the Act.:-

"4. Waiver of right to object.- A party who knows that-

a) Any provision of this Part from which the parties may derogate, or

b) Any requirement under the arbitration agreement,

Has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

… … …

16. Competence of arbitral tribunal to rule on its jurisdiction.-

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, -

a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

b) A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea

[2] (2017) 9 SCC 729

A merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

B (4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes C a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

D … … …

20. Place of arbitration. - (1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place E of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any F place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

20. While dealing with a case where instead of an odd number of Arbitrators, as is contemplated under Section 10 of the Act, the parties G had agreed to arbitration of two Arbitrators and where objection in that behalf was not taken before the Arbitrators, a three Judge Bench of this Court in ***Narayan Prasad Lohia vs. Nikunj Kumar Lohia and others***[3] considered the amplitude and applicability of Section 4 of the Act. The relevant paragraphs of the decision are:-

H [3] (2002) 3 SCC 572

"5. On 22-12-1997 the 1st respondent filed an application in the Calcutta High Court for setting aside the award dated 6-10-1996. On 17-1-1998 the 2nd respondent filed an application for setting aside this award. One of the grounds, in both these applications, was that the arbitration was by two arbitrators whereas under the Arbitration and Conciliation Act, 1996 (hereinafter called "the said Act") there cannot be an even number of arbitrators. It was contended that an arbitration by two arbitrators was against the statutory provision of the said Act and therefore void and invalid. It was contended that consequently the award was unenforceable and not binding on the parties. These contentions found favour with a Single Judge of the Calcutta High Court who set aside the award on 17-11-1998. On 18-5-2000 the appeal was also dismissed. Hence this appeal to this Court.

… … …

8. Mr Venugopal submits that Section 10 of the said Act is a mandatory provision which cannot be derogated. He points out that even though the parties are free to determine the number of arbitrators such number cannot be an even number. He submits that any agreement which permits the parties to appoint an even number of arbitrators would be contrary to this mandatory provision of the said Act. He submits that such an agreement would be invalid and void as the Arbitral Tribunal would not have been validly constituted. He submits that composition of the Arbitral Tribunal itself being invalid, the proceedings and the award, even if one be passed, would be invalid and unenforceable.

9. Mr Venugopal submits that Section 4 of the said Act would only apply provided:

(*a*) a party knew that he could derogate from any provision of this part, or

(*b*) a party knew that any requirement under the arbitration agreement had not been complied with

and the party still proceeded with the arbitration. He submits that, this case does not fall under category (*b*) above. He submits that even category (*a*) would not apply because waiver can only be in respect of a matter from which a party could derogate. He submits that in respect of provisions which are non-derogable there can

A be no waiver. He submits that Section 10 is a provision from which a party cannot derogate. He submits that matters from which a party cannot derogate are those provided in Sections 4, 8, 9, 10, 11(4) and (6), 12, 13(4), 16(2), (3) and (5), 22(4), 27, 31, 32, 33, 34(2) and (4), 35, 36, 37, 38(1) and 43(3). He submits that, as against this, matters from which a party can derogate are those provided under Sections 11(2), 19(1) and (2), 20(1) and (2), 22(1), 24, 25, 26 and 31(3).

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… … …

14. We have heard the parties at length. We have considered the C submissions. Undoubtedly, Section 10 provides that the number of arbitrators shall not be an even number. The question still remains whether Section 10 is a non-derogable provision. In our view the answer to this question would depend on the question as to whether, under the said Act, a party has a right to object to the composition of the Arbitral Tribunal, if such composition is not in D accordance with the said Act, and if so, at what stage. It must be remembered that arbitration is a creature of an agreement. There can be no arbitration unless there is an arbitration agreement in writing between the parties.

… … …

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16. It has been held by a Constitution Bench of this Court, in the case of *Konkan Rly. Corpn. Ltd.* v. *Rani Construction (P) Ltd.*[4] that Section 16 enables the Arbitral Tribunal to rule on its own jurisdiction. It has been held that under Section 16 the Arbitral Tribunal can rule on any objection with respect to existence or F validity of the arbitration agreement. It is held that the Arbitral Tribunal's authority under Section 16, is not confined to the width of its jurisdiction but goes also to the root of its jurisdiction. Not only this decision is binding on this Court, but we are in respectful agreement with the same. Thus it is no longer open to contend G that, under Section 16, a party cannot challenge the composition of the Arbitral Tribunal before the Arbitral Tribunal itself. Such a challenge must be taken, under Section 16(2), not later than the submission of the statement of defence. Section 16(2) makes it clear that such a challenge can be taken even though the party

H [4] (2002) 2 SCC 388

may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator. Needless to state a party would be free, if it so chooses, not to raise such a challenge. Thus a conjoint reading of Sections 10 and 16 shows that an objection to the composition of the Arbitral Tribunal is a matter which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to so object there will be a deemed waiver under Section 4. Thus, we are unable to accept the submission that Section 10 is a non-derogable provision. In our view Section 10 has to be read along with Section 16 and is, therefore, a derogable provision.

… … …

20. Respondents 1 and 2 not having raised any objection to the composition of the Arbitral Tribunal, as provided in Section 16, they must be deemed to have waived their right to object."

Thus, even stipulation in Section 10 that number of Arbitrators *"shall not be an even number"* was found to be a derogable provision and since no objections were raised to the composition of the Arbitral Tribunal, as provided in Section 16, the concerned respondents were deemed to have waived their right to object.

21. In ***Duro Felguera***[2] the submission that for convenience of either side the original contract was split into five different contracts and as such there ought to be a composite reference to arbitration covering all the contracts was not accepted by this Court. It was found by this Court:-

"42. … … The case in hand stands entirely on different footing. As discussed earlier, all five different packages as well as the Corporate Guarantee have separate arbitration clauses and they do not depend on the terms and conditions of the Original Package No. 4 TR nor on the MoU, which is intended to have clarity in execution of the work."

Incidentally, it was a case of International Commercial Arbitration and in each of those agreements the seat of Arbitration was at Hyderabad. Moreover, the matter had arisen from an arbitration petition preferred under Section 11(6) of the Act.

A 22. In the present case the arbitration in question is a domestic and an institutional arbitration where CIAA was empowered to and did nominate the Arbitrator. It is not as if there were completely different mechanisms for appointment of Arbitrator in each of the agreements. The only distinction is that according to one of the agreements the venue was to be at Kolkata. The specification of "place of arbitration" may B have special significance in an International Commercial Arbitration, where the "place of arbitration" may determine which curial law would apply. However, in the present case, the applicable substantive as well as curial law would be the same.

C 23. It was possible for the respondent to raise submissions that arbitration pertaining to each of the agreements be considered and dealt with separately. It was also possible for him to contend that in respect of the agreement where the venue was agreed to be at Kolkata, the arbitration proceedings be conducted accordingly. Considering the facts that the respondent failed to participate in the proceedings before the Arbitrator D and did not raise any submission that the Arbitrator did not have jurisdiction or that he was exceeding the scope of his authority, the respondent must be deemed to have waived all such objections.

24. In the circumstances, the respondent is now precluded from raising any submission or objection as to the venue of arbitration, the E conclusion drawn by the Court at Alipore while dismissing Miscellaneous Case No.298 of 2015 was quite correct and did not call for any interference. The High Court, in our view, was in error in setting aside said Order. In any case, the fact that the cause title showed that the present appellant was otherwise amenable to the jurisdiction of the Alipore Court, could not be the decisive or determining criteria.

F 25. We, therefore, allow this appeal, set aside the Judgment and Order under appeal and restore the Order dated 13.08.2018 passed by the Court at Alipore in Miscellaneous Case No. 298 of 2015. No costs.

Divya Pandey Appeal allowed.