

## Whether the bar of jurisdiction under Section 42 applies to an application filed under Section 11 after the Arbitration & Conciliation (Amendment) Act, 2015

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By way of the Arbitration & Conciliation (Amendment) Act, 2015 (herein after referred to as the Amendment Act), inter alia, a significant change that has been brought about in Section 11 of the Arbitration & Conciliation Act, 1996 (Hereinafter called the Act), is the insertion of the words “High Court” and “Supreme Court ” instead of “Chief Justice” and “Chief Justice of India”.

This particular amendment has a direct bearing on the interpretation of Section 42 of the Act which envisages exclusion/bar of all courts other than ‘Court’ before which any application under Part I has been initially made with respect to an arbitration agreement. Section 42 of the Act reads as under:

*“42. **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 arbitration 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.”*

To examine the issue the definition of “Court” as defined under Section 2(1) (e) would be relevant which is as under:

**““Court” means:-**

- i) in the case of an arbitration other than international commercial arbitration, 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;*
- ii) in the case of international commercial arbitration, 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, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court”*

What clearly follows from the above definition is that as regards arbitrations, other than international commercial arbitrations, the principle Civil Court of original jurisdiction in a district, which has the jurisdiction to decide the question forming the subject-matter of the arbitration if the same had been subject-matter of a suit, would be the competent “Court” for the purpose of this Act. It specifically includes the High Court which has ordinary original civil jurisdiction, like Delhi High Court.

Prior to the amendment of 2015, the question as to whether application U/s 11 falls within the purview of Section 42 had been deliberated upon and answered in the negative in catena of judgments. In the

judgment of *M/s S.K. Brothers Vs. Delhi Development Authority*<sup>1</sup> the Single Bench of Delhi High Court was confronted with the question as to whether this court, notwithstanding the amount in the execution application of an arbitral award being below the minimum pecuniary jurisdiction of Rs. 20 lakhs, would have exclusive jurisdiction to entertain the said execution application by virtue of Section 42 merely because this court had exercised the jurisdiction under Section 11 (6) of the Arbitration and Conciliation Act, 1996 by appointing the arbitrator earlier.

The Hon'ble Court while elaborating the aforesaid issue had placed reliance upon the following judicial precedents:

**i) *Rodemadan India Ltd. Vs. International Trade Expo Centre Ltd*<sup>2</sup>.**

It was held in the said judgment in Para 8 that the power under Section 11(6) of the Act (1996 Act) is the power of a designate referred to under the section and not that of the Supreme Court, albeit that it has now been held to have judicial characteristics by reason of the judgment in *SBP & Co. Vs. Patel Engg. Ltd.*<sup>3</sup>. It was further held in Para 25 of the judgment that neither the Chief Justice nor his designate under Section 11(6) is a "Court" as contemplated under 2(1)(e) of the Act and further that the bar of jurisdiction under Section 42 is only intended to apply to a "Court" as defined in Section 2(1)(e).

**ii) *Union of India Vs. S.R. Constructions Company and Another*<sup>4</sup>**

It was held that mere passing of an order under Section 11(6) of the Act (1996 Act) by this court would not vest this court with the exclusive jurisdiction under Section 42 of the Act to entertain the objections under Section 34 of the Act, if otherwise this court did not have the pecuniary jurisdiction to entertain the said objections.

**iii) *Pandey & Co. Builders (P) Ltd. vs. State of Bihar and Another*<sup>5</sup>**

It was held that Section 42 only applies to applications and not to appeals under Section 37 of the Act. Applying the same reasoning, Section 42 would also not apply to execution applications. The execution application is not "arbitral Proceedings" within the meaning of Section 42 of the Act and is not a subsequent application arising out of the agreement and the arbitral proceedings. In fact, the arbitral proceedings come to an end when the time for making an application to set aside the arbitral award expires and the execution application is an enforcement of the award which takes the colour of a decree under the C.P.C., by virtue of the provisions of Section 36 of the Act.

Taking note of the ratio laid down in the aforesaid judicial pronouncements, the Hon'ble Delhi High Court, in *M/s S.K. Brothers* (Supra), had turned down the reason propounded by the decree holder and concluded that execution application does not lie before this Hon'ble court.

A similar question had arisen for consideration before the Division Bench of Delhi High Court in the matter of *Vijay Gupta vs. Renu Malhotra*<sup>6</sup> wherein the Hon'ble Court had reaffirmed the view taken in *M/s S.K. Brothers* (Supra) and denied the benefit of Section 42 on the basis of the rationale that the expression "Chief Justice" as contained in Section 11 of the Act (1996 Act), is not synonymous with the

<sup>1</sup> Ex. P. No. 234/2008, Delhi High Court, decided on 02.07.2008

<sup>2</sup> (2006) 11 SCC 651

<sup>3</sup> (2005) 8 SCC 618

<sup>4</sup> (2007) 144 DLT 580

<sup>5</sup> (2007) 1 SCC 467

<sup>6</sup> E.F.A (OS) No. 12/2008, Delhi High Court, decided on 19.12.2008

term the “Court” as defined in Section 2(1)(e) of the Act, and therefore merely because an arbitrator has been appointed by the chief justice, the same in itself would not be sufficient to vest jurisdiction with the High Court to entertain any other/subsequent applications relating to the said arbitral proceedings in which the arbitrator was appointed, irrespective of the pecuniary limits on its jurisdiction.

The Hon’ble Apex Court in its recent (pre-amendment) judgment in ***State of West Bengal vs. Associated Contractors***<sup>7</sup> had distinguished the treatment of Section 9 and Section 11 applications Vis-à-vis Section 42 and held that while applications under Section 9 and 34 fall within the purview of Section 42, the applications under Sections 8 and 11 would be outside Section 42. The Hon’ble Supreme Court had inter alia had arrived at the following conclusions (a) Section 2 (1) (e) contains an exhaustive definition marking out only the Principal Civil Court of original jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as “Court” for the purpose of Part-I of the Arbitration Act, 1996 and (b) Section 42 applies to applications made under Part-I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

From the foregoing decisions it is amply clear that the reason of taking the application under Section 11 out of the purview of Section 42 of the Arbitration Act, 1996 was that the expression “Chief Justice” as contained in Section 11 of 1996, Act was not synonymous with the term “Court” as defined in Section 2(1) (e) of the Act.

However, with the amendment to Section 11 which has done away with the expression “Chief Justice” and has rather conferred the power under Section 11 (6) on the “High Court”, the question which arises for consideration, post amendment, is whether the application for appointment of arbitrator under Section 11 would be sufficient to vest exclusive jurisdiction with the High Court to entertain any other/subsequent applications relating to the arbitral proceedings in which the arbitrator was appointed.

Will the amendment to Section 11 replacing the word “Chief Justice” with the “High Court” result in the applicability of Section 42 to the application under Section 11 as such application would no longer be made to the Chief Justice but to the High Court i.e. a Court as defined under Section 2(1) (e) of the Act?

Though the answer to the aforesaid question has to be in the affirmative, however, the effect of the amendment to Section 11 vis-à-vis the bar of jurisdiction under Section 42 is yet to be seen in light of a precedent dealing with this issue post amendment.



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<sup>7</sup> (2015) 1 SCC 32