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C.R.P.(PD) Nos.1641, 1647 & 1648 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	20.07.2022
Delivered on	02.09.2022

CORAM:

THE HONOURABLE Ms. JUSTICE R.N.MANJULA

C.R.P. (PD) Nos.1641, 1647 & 1648 of 2022

and

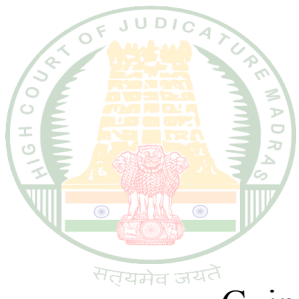
C.M.P.Nos.8183, 8220 & 8208 of 2022

1. Andal Dorairaj
2. Vidhya Sharathram
3. D.Sharathram

... Petitioners in all C.R.P's.

Versus

1. M/s. Rithwik Infor Park Pvt. Ltd.,
RR Towers III, TVK Industrial Estate,
Guindy, Chennai – 600 032
represented by its Authorised Signatory,
Priya Rajasekar
2. M/s. Hanudev Info Park P.Ltd.,
RR Towers III, T VK Industrial Estate
Guindy, Chennai – 600 032.
3. M/s. Rithwik Infrastructure P.Ltd.,
Rep. by its Authorised Signatory,
Priya Rajashekar,
registered office at
RR Towers III, TVK Industrial Estate,



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Guindy, Chennai – 600 032.

... Respondents in all C.R.P's.

Civil Revision Petitions are filed under Article 227 of Constitution of India, to strike off the petition in O.P.Nos.28, 29 & 30 of 2022 on the file of Principal District Court, Coimbatore.

For Petitioner
in CRP.1641 of 2022 : Mr.M.S.Krishnan,
Senior Advocate
for Mr.K.S.Karthik Raja

For Petitioner
in CRP.1647 of 2022 : Mr.Ar.L.Sundaresan
Senior Advocate
for Mr.Sundara Kadeswaran

For Petitioner
in CRP.1648 of 2022 : Mr.K.S.Karthik Raja

For Respondents
in all CRP's. : Mr. N.Sridhar
for R.Bharath Kumar

COMMON ORDER

These Civil Revision Petitions have been preferred to strike off the petitions in O.P. Nos.28, 29 & 30 of 2022 on the file of the Principal District Court, Coimbatore.



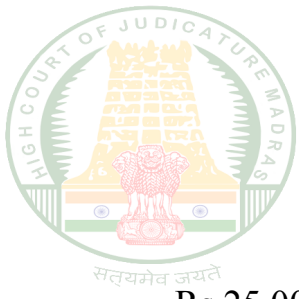
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2. The revision petitioners are the respondents 1,2 & 3 in the impugned Original Petitions filed by the first respondent herein in A.O.P. Nos. 28, 29 & 30 of 2022, challenging the arbitration award dated 27.10.2021 passed in Arbitration case No.9 of 2020.

3. Before adverting into the merits of the revision petitions, it is essential to have the bird's eye view on the facts of the case.

(i) The petitioners are the owners of properties measuring 2 acres 51 cents and 333 Sq.ft., in Savuripalayam Village, Coimbatore Taluk,. The first respondent approached the petitioners with a proposal of constructing an IT Park over the said property. The petitioners entered into a Joint Development Agreements dated 24.03.2006 & 06.07.2006 respectively and also a supplemental Memorandum of Agreement on 13.09.2007 with the second respondent. Based on the agreement, the second respondent assured to give 80,175 sq.ft of built up area in the proposed I.T. Park to the petitioners as consideration for transferring 80% of the undivided share of land in the property. In view of the Joint development agreements, the second respondent agreed to pay an advance of Rs.50,00,000/- and

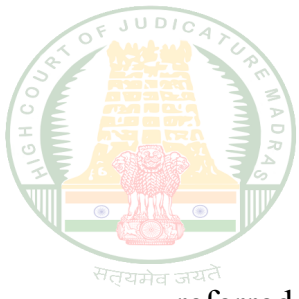


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Rs.25,00,000/- was paid as an advance on the date of agreement. The first respondent agreed to complete the project within a period of twenty four months from the commencement of construction.

(ii) As per Clause 17 of the Joint Development Agreement, it was agreed between the parties that in the event of any dispute or difference arising between them with regard to the agreement or the development of the subject property, they shall endeavour to settle the same by mutual negotiation / discussion. In the event of failure to arrive at an understanding, the matter shall be referred to arbitration. The Arbitrator shall be appointed by the parties and the decision of the Arbitrator shall be final and binding on both the parties. The venue of arbitration was agreed to be Coimbatore District. So the parties, in case of dispute, shall be entitled to seek reference jointly and not individually. As per Clause 18 of the Joint Development Agreement, it is agreed that the Courts at Coimbatore will have the jurisdiction in matters relating to the agreement.

(iii) Since misunderstanding has been developed between the parties, the first petitioner has filed a petition in A.O.P. No.808 & 824 of 2012 under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter



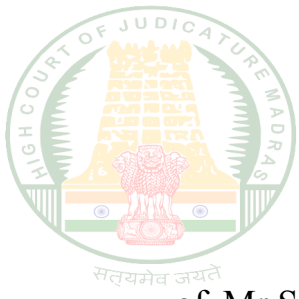
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referred to as 'the Act') for appointment of an Arbitrator before this Court.

The Hon'ble Chief Justice of Madras High Court, by an order dated 19.02.2016, has appointed an Arbitrator Mr.V.Sivasubramanian, a retired District Judge, as the Sole Arbitrator to enter upon reference and adjudicate the disputes *inter se* the parties and ordered that the arbitration proceedings shall be conducted under the aegis of the Madras High Court Arbitration Centre and the parties will be governed by the Rules of the Centre.

(iv) Since the Sole Arbitrator failed to complete the proceedings within the stipulated time, his mandate got terminated. Hence, the respondents filed an Original Petition under Section 11 of the Act, in O.P. No.362 of 2017 before this Court for appointment of a new Arbitrator. This Court, by an order dated 29.01.2019, appointed a Sole Arbitrator by name Mr.S.A.Sriramalu, retired District Judge. The arbitration proceedings were held at Madras High Court Arbitration Centre in view of the earlier order passed by this Court in O.P. Nos.808 & 824 of 2012.

(v) Both the parties agreed the arbitral proceedings to be conducted at Chennai. Subsequently, the respondents have filed an another Original Petition in O.P. No.694 of 2019 before this Court to terminate the mandate



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of Mr.S.A.Sriramalu and to appoint a new Arbitrator. This Court, by an order dated 08.09.2020 terminated the mandate of Mr.S.A.Sriramulu, and appointed an another Arbitrator by name Mr.Justice K.Kannan, retired Judge of High Court. Thereafter, the Arbitrator passed an order on the preliminary objection filed by the respondents on 15.12.2020.

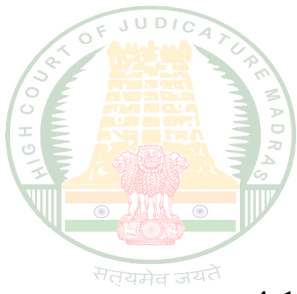
(vi) A Civil Miscellaneous Appeal was filed by the respondents herein under Section 37 of the Act before this Court and the same was dismissed by this Court vide order dated 29.04.2021 and thereafter, an award was passed by the sole Arbitrator on 27.10.2021. The said award was silent about the place of Arbitration. Challenging the same, the second respondent filed A.O.P. Nos.28, 29 & 30 of 2022 under Section 34 of the Act, before the Principal District Court, Coimbatore. The petitioners have entered appearance and filed a memo questioning the jurisdiction of the Court at Coimbatore and thereafter, the matter was adjourned to 01.06.2022 for filing counter affidavit. However, the revision petitioners filed a memo stating that they have obtained an interim order in I.A. No.1 of 2022 in O.P. Nos.28, 29 & 30 of 2022 on 22.06.2022. Aggrieved over the same, the petitioners filed these Civil Revision Petitions to strike off the petitions in O.P. Nos.28, 29 &



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30 of 2022.

4. Mr.Ar.L.Sundaresan, Senior Counsel for the petitioners in C.R.P.(PD) No.1647 of 2022 submitted that though the parties to the Joint Development Agreements have agreed the venue of arbitration as Coimbatore, by their subsequent conduct their preference to Coimbatore got waived; the first revision petitioner has filed the Original Petitions in O.P. Nos.808 & 824 of 2012 under Section 11(6) of the Act, before the High Court of Madras, for appointment of Arbitrator to resolve the dispute between the parties; the respondents have also participated in the said proceedings and subjected themselves to the jurisdiction of Chennai; again the respondent themselves filed another Original Petition in O.P. No.362 of 2017 for terminating the mandate of Arbitrator by name Mr.Sivasubramanian, District Judge (Retd.), who has already been appointed by this Court; thus the respondents themselves have chosen to file the petition before the High Court of Madras

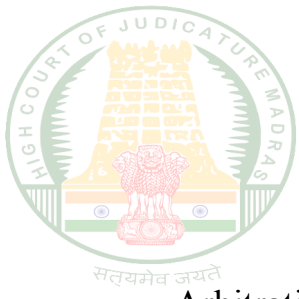


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4.1 The learned senior counsel further submitted that the respondents have once again filed a petition in O.P. No.694 of 2019 for terminating the mandate of Arbitrator by name Mr.S.A.Sriramalu and got an order dated 08.09.2020 from this Court and by virtue of which Mr.Justice K.Kannan, High Court Judge (Retd.) was appointed as an Arbitrator; all the above proceedings have taken place before the High Court of Madras and by the act of parties, the earlier reservation made with regard to the venue at Coimbatore was waived; the respondents once again filed an appeal under Section 37 of the Act in C.M.A. No.376 of 2021 challenging the order of the Arbitrator in dismissing the defense taken by the respondents in their preliminary counter statement and the said appeal was filed only before the High Court of Madras and not before the Court at Coimbatore.

4.2. Mr.AR.L.Sundaresan further submitted that since the parties have subjected themselves to the jurisdiction of Chennai, the appeal challenging the arbitral award dated 27.10.2021 ought not to have been filed before the District Court, Coimbatore; the respondents having waived the earlier agreement as to the venue of arbitration, had chosen to file the present



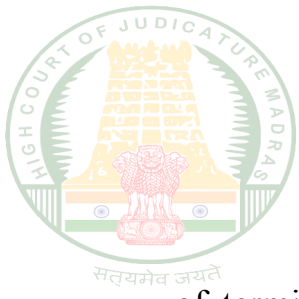
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Arbitration Petition challenging the award of the Arbitrator before the District Court, Coimbatore, only for the purpose of dragging the issue; since the Court at Coimbatore had lost its jurisdiction in view of the waiver, the Original Petitions filed before the Court at Coimbatore is not maintainable. A memo filed in the Principal District Court, Coimbatore by stating the above facts and to pass necessary orders. But the learned trial Judge without passing any order on the has kept the memo pending.

4.3.The respondents have suppressed the earlier proceedings filed before this Court and filed the Arbitration Original Petitions before the District Court, Coimbatore. The Court at Coimbatore does not have the jurisdiction to deal with the Original Petitions had taken the petition on file and the proceedings are now pending before the District Coimbatore in A.O.P. Nos.28, 29 & 30 of 2022 should be struck off.

5. Mr.M.S.Krishnan, learned Senior Counsel for the petitioners in C.R.P.(PD) No.1641 of 2022 submitted that the respondents have filed applications and appeal before the High Court of Madras for getting orders

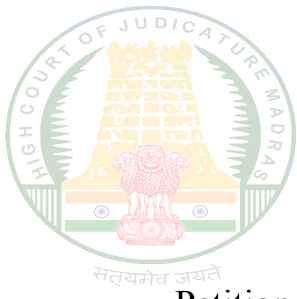


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of terminating the mandate of Arbitrators and by challenging the interim award passed by the Arbitrator. As per Section 4 of the Act, if the parties knowingly renounced any requirement under the Arbitration Act and continue to participate in the arbitration proceedings, they shall be deemed to have waived the right with regard to the said requirement. Since the parties did not take up the earlier proceedings before the Court at Coimbatore and thereby deviated and participated in the proceedings before Chennai, the original petitions filed by the respondents before the Principal District Court, Coimbatore is not maintainable.

5.1. Mr.M.S.Krishnan further submitted that the definition of word 'Court' under Section 2 (1)(e) of the Act would mean the Principal Civil Court having original jurisdiction in the district and it includes the High Court in its exercise of original jurisdiction and it does not include any Civil Court of a grade inferior to such principal Civil Court. The respondents have accepted the jurisdiction of Chennai and taken proceedings before the High Court of Madras under Section 14 (a) of the Act, for terminating the mandate of Arbitrator. Hence they ought to have filed the present Original



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Petition at Chennai and not at Coimbatore.

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5.2. It is further submitted that as per Section 42 of the Act, any application under Part One shall be made before the Court which has the jurisdiction over the arbitral proceedings and that 'Court' alone has the jurisdiction to deal the subsequent applications arising out of the same agreement. In the present case, the arbitral proceedings have been held at Chennai and the earlier Applications have been filed by invoking the jurisdiction of this Court and hence, the respondents are estopped from filing the present Original Petitions before any other Court other than the Courts at Chennai.

5.3 In support of the above contentions, the learned counsels for the petitioners submitted the following judgments:

- i) 2022 SCC Online SC 556 (Swadesh Kumar Agarwal Vs. Dinesh Kumar Agarwal and others)*
- ii) (2020) 18 Supreme Court Cases 277 (Quippo Construction Equipment Limited Vs. Janardan Nirman Private Limited)*



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iii) A judgment of this Court dated 05.02.2021 made in O.P. No.334 of 2020 and A.No.1497 of 2020. (M/s. Engineering Projects India Ltd., Vs. M/s. Balaji Projects.)

6. Mr.N.Sridhar, learned counsel for the respondents submitted that the place of arbitration cannot be equated to the seat of arbitration which was already agreed between the parties at Coimbatore and not at Chennai. the subject matter of the agreement is situated at Coimbatore and hence the respondents can very well invoke the jurisdiction of the Court at Coimbatore. Section 42 of the Act refers only Applications and it has no application for appeals. The District Court at Coimbatore alone will have the supervisory jurisdiction over the arbitration despite the venue of arbitration was agreed to be at Chennai. The fact that the seat of arbitration was agreed to be at Coimbatore cannot be lost sight of. If any interim order is passed by the Arbitrator under Section 17 of the act, appeal should be filed under Section 37 of the Act before the appropriate Court. But once an award is passed, the recourse open to the respondents is by way of challenging the same by filing the Original petition before the Court which has got the superintendence over the arbitration proceedings. Even though



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the place of arbitration was at Chennai, the Court which has power of superintendence over the arbitration proceedings is the District Court at Coimbatore and hence it is right for the respondents to invoke the jurisdiction of Court at Coimbatore and challenge the arbitration award and hence the proceedings pending at the Principal District Court is maintainable. .

7. The fact that in the Joint Development Agreement there are Clauses about the agreement to arbitration. As per Clause 18 of the Agreement, the venue for arbitration was agreed be at Coimbatore. Despite the parties had agreed the venue of arbitration at Coimbatore by virtue of Clauses 17 and 18 of the agreement, the first application was filed before the High Court of Madras under Section 11 of the Act, for appointment of an Arbitrator. But it is claimed by the learned counsel for the respondents that petitions under Section 11 of the Act, cannot be filed before the District Court and in view of the exclusive jurisdiction conferred on the High Court, the first Application was filed before the High Court of Madras for appointment of Arbitrator and hence that cannot be taken as waiver of jurisdiction.



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8. Apart from the said first application which was filed under Section 11 of the Act, the parties have filed other proceedings also before this Court. Another application was filed before this Court for terminating the mandate of Mr.V.Sivasubramanian, District Judge (Retd.), who was first appointed as the Sole Arbitrator. The said application was filed by the respondents themselves in O.P. No.362 of 2017 before this Court. By citing the above action of the respondents, learned counsels for the revision petitioners submitted that the application so filed by the respondents should be construed as waiver of the jurisdictional Clause, for the very reason that the respondents have chosen to file a petition before the High Court of Madras, instead of filing an application by invoking Section 14 (2) of the Act before the District Court, Coimbatore.

9. Though O.P. No.362 of 2017 was alleged to have been filed under Section 11 of the Act, in reality the said petition ought to have been filed under Section 14 (2) of the Act. As per Section 14(2) of the Act, the Court would make it obligatory for the parties to file any petition seeking to



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terminate the mandate of an Arbitrator before the 'Court'. The said position of law has been well settled by the Hon'ble Supreme Court of India in the case of ***Swadesh Kumar Agarwal Vs. Dinesh Kumar Agarwal and others***, reported in ***2022 SCC OnLine SC 556***. In the said judgment, it is held as under:

“34. Therefore, on a conjoint reading of section 13, 14 and 15 of the Act, if the challenge to the arbitrator is made on any of the grounds mentioned in section 12 of the Act, the party aggrieved has to submit an appropriate application before the Arbitral Tribunal itself. However, in case of any of the eventualities mentioned in section 14(1)(a) of the Act, 1996 and the mandate of the arbitrator is sought to be terminated on the ground that the sole arbitrator has become de jure and/or de facto unable to perform his functions or for other reasons fails to act without undue delay, the aggrieved party has to approach the concerned “court” as defined under section 2(e) of the Act, 1996. The concerned court has to adjudicate on whether, in fact, the sole arbitrator/arbitrators has/have become de jure and de facto unable to perform his/their functions or for other reasons he fails to act without undue delay. The reason why such a dispute is to be raised before the court is that eventualities mentioned in section 14(1)(a) can be said to be a disqualification of the sole arbitrator and therefore, such a dispute/controversy will have to be adjudicated before the concerned court as provided under section 14(2) of the Act, 1996.”



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10. The word 'Court' as per Section 2 (1)(e) of the Act reads as under:

““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;”

11. Admittedly the case in hand does not relate to any International commercial arbitration. The meaning of 'the Court' as seen in Section 2(1)(e) of the Act would mean the Principal Civil Court which has original jurisdiction in a district and it includes the original civil jurisdiction High Court.

12. Section 20 of the Act gives the freedom to the parties to Arbitration to choose the place of Arbitration. It can be either a place where the cause of action is located or any other place at their convenience. The parties to the present agreement agreed the place of arbitration at Coimbatore. In this context the word 'Court' in terms of its definition under



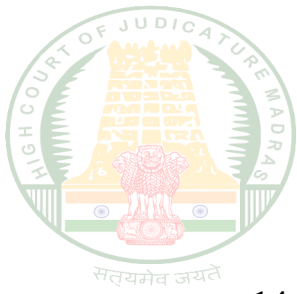
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sec. 2 (1)(e) of the Act would only refer to the Principal District Court, Coimbatore.

13. However, as per sec. 42 of the Act, if the parties to the proceedings have chosen to file any application under Part One before any particular Court, irrespective of their agreement as to the place of Arbitration, that Court alone shall have the jurisdiction over the arbitral proceedings all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court. The provision of Section 42 of the Act, which starts with the *non-obstante* clause reads as under:

“Sec.42 of the Arbitration Act

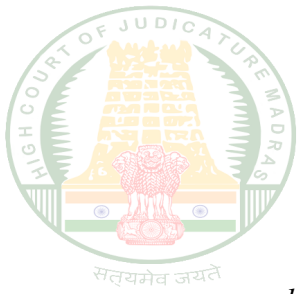
Sec.42-Jurisdiction. -Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court.”



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14. So according to the Revision Petitioners, in view of the earlier petitions filed before this Court and in terms of Section 42 of the Act the jurisdiction of the Principal District Court, Coimbatore got ousted. In the judgment of the Hon'ble Supreme Court held in ***Bharat Aluminium Company and others Vs. Kaiser Aluminium Technical Service, Inc. and others; reported in (2012) 9 SCC 552***, it is held that Section 2(1)(e) of the Act has to be construed keeping in view of the provision under Section 20 of the Act. It is so held as under:

“96. ... It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi,

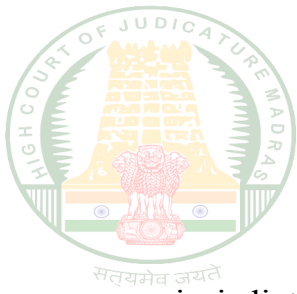


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where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.”

15. In the case in hand, the subject matter of the Joint Development Agreements situated within the jurisdiction of Coimbatore. So at the time of entering into the agreement, the parties have chosen Coimbatore as the their place arbitration. So without any confusion, the ‘Court’ would have meant only the Court at Coimbatore as the jurisdictional court, had they not waived the above reservation at Coimbatore by their subsequent actions of preferring the jurisdiction of Chennai.

16. In this connection it submitted by Mr. AR.L.Sundaresan, that though 'Venue' and 'Seat' are different, they are crucial to determine the



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jurisdictional Court and 'Seat' is more relevant only in the International Arbitration Proceedings. He elucidated the above concept by referring the judgment of the Hon'ble Supreme Court in the case of ***Bharat Aluminium Company and others Vs. Kaiser Aluminium Technical Service, Inc. and others, reported in (2012) 9 SCC 552***. For a better understanding the distinction that has been drawn between the 'Seat' and 'Venue', the relevant part of above said judgment is extracted under:

“98. We now come to Section 20, which is as under:-

“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 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 place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, good or other property.”*

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any “place”



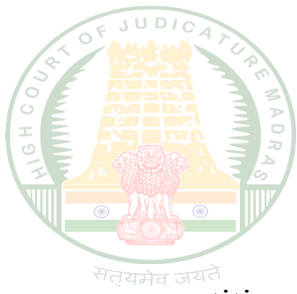
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or “seat” within India, be it Delhi, Mumbai etc. In the absence of the parties’ agreement thereto, Section 20(2) authorizes the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.”

17. The above interpretation would show that the venue of arbitration can be at different places though the seat of arbitration remains to be the same. In the cash in hand which is only domestic arbitration, there need not be much fuss about the seat of arbitration.

18. Mr. N. Shridhar, the learned counsel for the respondents submitted that there is no waiver of jurisdiction agreed in the agreement because Sec.42 is applicable only for Applications not Appeals and the Applications filed before the High Court cannot be construed as Appeals. The respondents have filed an another application in O.P. No.694 of 2019 for terminating the mandate of other Arbitrator namely Mr.A.S.Sriramalu. Though the said petition ought to have been filed only under Section 14(2) of the Act, the petition has quoted Section 11 to 15 of the Act. Whatever may be the provision of law quoted in the petition, the purpose of the



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petition would only show that it is a petition ought to have been filed under Section 14(2) of the Act.

19. It is submitted by the learned counsels for the petitioners that the Court which is referred under Section 14(2) would only mean the Principal District Court at Coimbatore and the respondents by their action of filing Proceedings under the Act within the jurisdiction of Chennai instead of Coimbatore, have waived the jurisdiction of Coimbatore.

20. However, it is claimed by the learned counsel for the respondents that Section 42 of the Act cannot be invoked for an appeal filed by the respondents before the Court at Coimbatore because Section 42 can be applied only for applications and no application can be filed before challenging the award, the respondents have chosen the jurisdiction of Coimbatore for filing the appeal challenging the award of the tribunal. It is further submitted by the learned counsel for the respondents that the award can be challenged only by way of preferring an appeal and not an application and only in view of that the respondents have chosen to file the



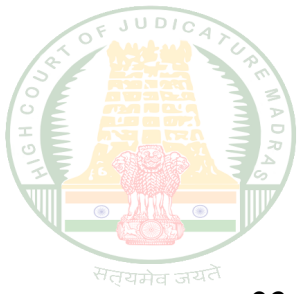
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appeal before the Court at Coimbatore irrespective of the previous Applications that might have been filed before the High Court.

21. By making the above submission, the learned counsel for the respondents attempted to draw a distinction between the earlier proceedings filed before the High Court in O.P. Nos.362 of 2017 and 694 of 2019 and the present proceedings filed before the District Court of Coimbatore in O.P. Nos.28, 29 & 30 of 2022.

22. Under the scheme of the Act, a party aggrieved can challenge the awards of the arbitral Tribunal under Section 34 and 37 of the Act. While Section 34 of the Act has to be invoked for challenging the final award, Section 37 has to be invoked for challenging certain orders enunciated therein. As stated already, the respondents had filed a preliminary objection by disputing the jurisdiction of the Arbitral tribunal. No doubt the respondents could have filed the said petition by invoking Section 16 of the Act. The preliminary objection made by the respondents by disputing the jurisdiction of Arbitral Tribunal was rejected by the Arbitral Tribunal.



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23. Aggrieved over the same, the respondents have filed an appeal under Section 37 of the Act, before the High Court of Madras in C.M.A. No.376 of 2021 only. Despite the Principal District Court, Coimbatore is also an authorised Court to hear appeals from the orders listed under Section 37 of the Act, the respondents have chosen to invoke the jurisdiction of High Court of Madras and not the jurisdiction of the Principal District Court, Coimbatore. While Section 37 of the Act entitles a party to raise an appeal on certain orders passed during the pendency of the arbitration proceedings, Section 34 of the Act entitles the party to file an appeal against the final award.

24. However, the proceedings filed by the respondent in C.M.A. No.376 of 2021 can only be called as an appeal and not an application. In fact, the word employed in the Act would show that the proceedings initiated under Section 34 of the Act is an 'Application' and the proceedings initiated under Section 37 of the Act is an 'Appeal'. The only difference for the application filed under Section 34 of the Act is that it is an application filed after receiving the final award. Section 37 of the Act would



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accommodate only those orders which are appealable in nature and over which appeals are filed.

25. Hence, the interpretation that Section 42 of the Act refers to 'Applications' and not to "Appeals" cannot be of much help to the respondents. The respondents have filed both the applications and appeal before the High Court of Madras before they had chosen to file the present application under Section 34 before the Principal District Court, Coimbatore. In fact the respondents could have filed the proceedings under Section 37 (2)(a) of the Act before the Principal District Court, Coimbatore, when such an occasion came to them, irrespective of their earlier applications filed before the High Court of Madras.

26. It is because the right conferred on an aggrieved party to challenge the order passed under Section 16 of the Act or any other appealable orders is by way of filing an appeal and not by way of filing an application. Even then, the respondents have not chosen to file an appeal before the Principal District Court, Coimbatore but have chosen to file a Civil Miscellaneous



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Appeal before the High Court of Madras. So the conduct of the respondents would only show that they have chosen to file both the application and appeal before the High Court of Madras, which is completely out of the benefit of the distinction attempted to be made between the applications and appeal, for the purpose of sec.42 of the Act.

27. As stated already, as per Section 14(2) of the Act, the controversy with regard to the termination of the mandate of the arbitrator has to be settled by way of filing an application before the Court having jurisdiction and not by way of filing any appeal. However, the respondents have filed applications twice and also an appeal one under Section 37 of the Act before the High Court of Madras and hence by their conduct they had chosen to waive the reservation made with regard to the jurisdiction of Coimbatore. In this regard, it is worthwhile to refer the judgment of the Supreme court rendered in *Quipppo Construction Equipment Limited Vs. Janardan Nirman Private Limited* reported in (2020) 18 SCC 277. In the said case, it is held that the waiver can be presumed from the conduct of the parties. The relevant portions of the judgment reads as under:



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“ 21.While dealing with a case where instead of an odd number of Arbitrators, as is contemplated under Section 10 of the Act, the parties 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 considered the amplitude and applicability of Section 4 of the Act. The relevant paragraphs of the decision are:-

“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. ...”

28. In the above case, the parties to the arbitration have chosen to waive the number of arbitrators by their own conduct and hence they cannot later claim the earlier reservation in this regard. It is submitted by the learned counsel for the petitioners that the jurisdiction is an act of law and it



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cannot be waived by the act of parties. But there is a special exemption provided under Section 20 of the Act and in view of the same, the parties have got the autonomy to chose the jurisdiction. The legal position on this point has also been dealt by the High Court of Madras in the case of *M/s. Engineering Projects India Ltd., Vs. M/s. Balaji Projects*, in *O.P. No.334 of 2020* dated *05.02.2021*, wherein the learned single Judge of this Court has held as under:

“23.This leaves us with the other question as to whether jurisdiction can be conferred ex post facto. Again in the classical sense of a civil suit, jurisdiction is a condition precedent qua legal proceedings and it cannot be ex post facto, but under the A and C Act, as AT itself is a private Tribunal which is a creature of contract, overarching legal philosophies being (a) party autonomy, (b) consent and (c) continuing consent, it certainly can be ex post facto and this theory is buttressed by waiver concept ingrained in section 4 of A and C Act. In this regard, it is to be borne in mind that anything that is derogable under A and C Act can be waived vide section 4. Section 20 captioned 'Place of Arbitration' is undisputedly derogable.”

29. When the parties to the agreement agreed to certain terms, they have to abide by the agreement. If the parties have chosen to deviate from the terms by not making much fuss about the terms, it would only mean that the parties have waived the same. Admittedly, the parties who have not



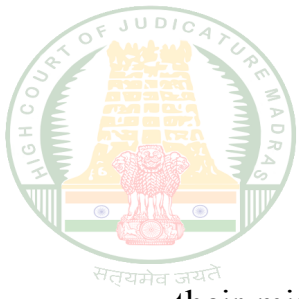
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chosen to object during the earlier instances when the jurisdiction clause is waived, cannot turn around and take a different route.

30. The revision petitioners and the respondents did not comply to the requirement of Clause 18 of the Joint Development Agreement, so far it relates to both place and jurisdiction and they continued to file applications and appeal before the High Court of Madras. Thus they substituted an implied new term on jurisdiction between themselves by their own conduct. The parties who have subjected themselves to a new jurisdiction by waiving the earlier agreement about jurisdiction can have no more diversions, in view of Section 42 of the Act.

31. The object of Section 42 of the Act as it is understandable from the said provision is that the parties should dispel any uncertainty about the courts before which the proceedings might be initiated against the orders or the award passed by the tribunal. Since there are possibilities to get different orders during the arbitration proceedings, the parties may need to challenge the same. During such course of actions there should not be any confusion in



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their minds about the Courts where they can challenge. The respondents to such proceedings also can not be pushed to lodge caveats in several courts, due to the repeated switching over between the Courts, whenever the orders are passed by the Tribunal and wherever occasions arise to challenge the same.

32. So it is settled under Section 42 of the Act that if parties have chosen to file an application before a particular Court then they cannot go on file other proceedings in other Courts and cause confusion in jurisdiction, irrespective of the fact that they had reserved a particular jurisdiction by contract. As the parties have got the liberty to deviate from the terms on jurisdiction, the number of such deviation is limited to only one. So it is right for the revision petitioners to claim that the respondents who had subjected themselves to the jurisdiction of the Courts in Chennai by their own conduct, ought to have filed the present application under Section 34 of the Act only before the Court at Chennai and not at Coimbatore.



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33. The learned Principal District Judge, Coimbatore ought to have passed an order in the memo filed by the learned counsel for the revision petitioners. Since the Court at Coimbatore has entertained the applications filed under Section 34 of the Act, unmindful of the earlier proceedings initiated before the high Court of Chennai, the Original Petitions filed in O.P. Nos.28, 29 and 30 of 2022 under sec.34 of the Act are liable to be returned to the respondents to be presented before the appropriate court.

In the result, the Civil Revision Petitions are **allowed** and the original petitions in O.P. Nos.28, 29 and 30 of 2022 on the file of Principal District Court, Coimbatore are ordered to be returned to the respondents to be presented before the appropriate Court, within the period of two weeks from the date of receipt of the copy of this order. No costs. Consequently, connected miscellaneous petitions are closed.

02.09.2022

Speaking order

Index: Yes

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R.N.MANJULA, J.,

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To

The Principal District Judge, Coimbatore.

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02.09.2022