



THE SUPREME COURT OF INDIA ON WAIVER BY PARTIES OF THEIR RIGHTS TO OBJECT UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

I. Introduction

Section 4 of the Arbitration and Conciliation Act 1996 ("Act") enumerates the circumstances wherein a party to an arbitration is deemed to have waived its right to object to any derogation by the other party from the provisions of Part 1 of the Act or such other party's non-compliance with the requirements of the arbitration agreement. Recently, in the case of *Quippo Construction Equipment Limited v. Janardan Nirman Pvt. Limited*, the Supreme Court of India was presented with the question whether a party could be said to have waived its right to raise such objections before the Hon'ble Court which were not raised before the arbitrator. This question was decided vide a judgment dated 29th April 2020. The present alert analyses the said judgment.

II. Facts of the Case

- i. The Appellant had agreed to supply various equipment to the Respondent and the parties entered into four separate agreements. Three agreements had an arbitration clause stating that the venue of arbitration would be at New Delhi. It also stated that Courts of Delhi would have exclusive jurisdiction and the Arbitration would be governed by the Construction Industry Arbitration Association ("CIAA") Rules.

The arbitration clause in the fourth agreement provided that the disputes would be resolved at Calcutta and the arbitration would be resolved in accordance with the CIAA Rules.

- ii. Disputes arose regarding payments to be made to the Appellant by the Respondent and the Appellant invoked arbitration vide a notice. A sole arbitrator was also appointed to conduct the arbitration in terms of the provisions of the agreement at New Delhi.

The Respondent replied to the notice invoking arbitration by denying the existence of an arbitration agreement. The Respondent also did not take any steps to participate in the arbitration.

Instead, the Respondent filed a suit in the Civil Court at Sealdah for a declaration that the agreements were null and void as well as a permanent injunction restraining the Arbitration. Accordingly, an interim restraining order was passed staying the arbitration. The Appellant filed an application under Sections 5 and 8 of the Act to refer the disputes to arbitration. Upon reviewing the documents on record and hearing the parties, the Civil Court at Sealdah directed that the plaint be returned to the Respondent. The Respondent filed an Appeal in the Civil Court at Sealdah challenging the order. However, as no interim order was passed, the arbitration proceedings continued.

The Ld. Sole Arbitrator passed an ex parte award dated 24th March 2015 accepting the Appellant's claim in all four agreements. The Appellant also filed an application before the Delhi High Court seeking post award relief under Section 9 of the Act. This application was later dismissed.

The Respondent, on the other hand, filed a Section 34 petition before the Calcutta High Court for setting aside the aforementioned award. However, the same was dismissed on 17th July 2015. The Calcutta High Court observed that it was unclear from the cause title of the petition as to how the same was filed before the High Court.

Thereafter, the Respondents filed another petition under Section 34 of the Act before the District Judge, Alipore, Calcutta on the basis that venue of arbitration of the last agreement was at Calcutta. The Respondent's petition was dismissed as being not maintainable on the grounds that the award was passed at New Delhi, thus the Court at Alipore had no jurisdiction. The Respondent then filed a Petition under Section 37 of the Act before the Hon'ble Calcutta High Court. The Petition was allowed and the case was remanded back to Alipore. The order passed by the Calcutta High Court dated 14th February 2019 was challenged by the Appellant in the Supreme Court, i.e. the present case.

Immediately after detailing the factual conspectus, the main point in dispute was framed by the Hon'ble Supreme Court as follows:

- i. Though there were four arbitration agreements, a common award was passed;
- ii. Though under one of the agreements, the venue was Kolkata, the proceedings were conducted at New Delhi.

However, the Respondent had not raised any objection and instead let the proceedings conclude pursuant to which an ex-parte award was passed. The question which thus arose for consideration was whether the Respondent had waived its right to raise any of the aforesaid objections.

III. Arguments on behalf of the Appellant

From the contents of the Supreme Court judgment, we have summarised the arguments which were primarily advanced on behalf of the Appellant and the Respondent:

- i. The Appellant contended that the Respondent chose not to participate in the arbitration and only raised an issue about venue of arbitration at the stage of the Section 34 petition. Thus, having not raised any objection before the Arbitrator, the Respondent must be taken to have waived any such objection.
- ii. The decision of the Civil Court at Sealdah in the application filed by the Appellant under Sections 5 and 8 of the Act, returning the Plaintiff to the Respondent had attained finality.
- iii. The Appellant contended that having chosen not to raise any objection on the issue of jurisdiction or competence of the Arbitrator at the time of the Arbitral proceedings and having chosen not to participate in the Arbitral proceedings, the Respondent must be taken to have waived any such objection.

IV. Arguments of the Respondent:

- i. The Respondent contended that every arbitration agreement must be considered independently, if an agreement specified the venue as Calcutta, party's autonomy in that aspect must be respected.
- ii. The Respondent relied upon the Supreme Court judgment in *Duro Felguera, S.A. v. Gangavaram Port Limited*, wherein there were six arbitration agreements and each one of them were the subject matter of an independent reference to arbitration.

V. Outcome:

The Hon'ble Supreme Court allowed the appeal and observed that the High Court erred in setting aside the order of the District Judge, Alipore, Calcutta. The order dated 13th August 2018 passed by the District Judge, Alipore, Calcutta was restored on the following grounds:

- i. The Court observed that the Respondent could have contended that (i) the arbitration agreements be considered separately and (ii) that in respect of the arbitration agreement which stated the venue to be Kolkata the arbitration should have been conducted there. However, the Respondent failed to raise any objection and chose not to participate in the proceedings. In view thereof, the Respondent must be deemed to have waived all objections.
- ii. As to the reliance placed by the Respondent on the judgment in the case of *Duro Felguera, S.A. v. Gangavaram Port Limited*, the Court distinguished it on facts. The Court stated that in the Duro case the facts related to an International Commercial Arbitration during which the concept of a 'seat' assumes significance; however, in the present case, the facts pertained to a domestic and institutional Arbitration. The Court observed that in all four arbitration agreements, the CIAA was empowered to appoint the arbitrator and that the only distinction was that one of the agreements specified the venue as Calcutta.

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PUNE The Court held that place of arbitration would have a special significance in an International Commercial Arbitration as it would determine which curial law would apply. But, in the present case, the substantial and the curial law would be the same.

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VI. Conclusion

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Whilst the Supreme Court did not express its views on the merit of the Respondent's objections and submissions, the same were rejected due to the deemed fiction under Section 4 of the Act. Owing to the fact that the Respondent failed to participate in the proceedings before the Arbitrator and did not raise any objection to the Arbitrator's jurisdiction or that he was exceeding the scope of his authority, the Respondent must be deemed to have waived all such objections. The Act provides for a mechanism by which a party can raise an issue of jurisdiction and/or challenge the appointment of the arbitrator. This judgment encourages parties to be more cautious and proactive in ensuring compliance with section 4 of the Act and raising timely objections in the manner prescribed by the Act. This would in turn promote the resolution of disputes in a timebound manner.

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