# IN THE HIGH COURT AT CALCUTTA

(CIVIL APPELLATE SIDE)

**F.M.A 254 of 2012**

**M/s. National Highway Authority of India**

**Vs.**

**M/s. B. Seenaiah & Company (Projects) Ltd.**

**CORAM : The Hon'ble Mr. Justice Tapen Sen**
**&**
**The Hon'ble Mr. Justice Indrajit Chatterjee**

For the Appellant : Mr. Jaydip Kar, Sr. Advocate,
Mr. Dipankar Das,
Ms. Ashish Shah.

For the State Respondent : Mr. Jayanta Kumar Mitra, Sr. Advocate,
Mr. Tilak Bose,
Mr. Aryak Dutta,
Mr. A.P. Agarwalla.

Heard On : 19.1.15, 21.1.15, 28.1.15, 18.2.15, 20.2.15.

C.A.V. on : 20.02.15

Judgment Delivered on : 13.03.15

**Tapen Sen, J.:**

This appeal is directed against the Order / Judgment dated 26.4.2011 passed in Misc. Case No. 50 of 2008 by the learned 4th Additional District Judge, Paschim Midnapore whereby and whereunder, while dealing with an application under Section 34 of The Arbitration and Conciliation Act, 1996, he was pleased to dismiss the said Misc. Case holding inter-alia that the arbitral award was not fit to be interfered with.

At this stage we would like to point out that during the course of his submissions, Mr. Jaydip Kar, learned Senior Advocate appearing for the appellants, raised a preliminary issue with

regard to the authority and the jurisdiction of the learned Additional District Judge in having proceeded with the matter under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to for the sake of brevity as the Arbitration Act). His submission was based on serious points of law and therefore, we thought it appropriate to decide such preliminary issue first and then, subject to our decision, either proceed with the matter on merits and if, we found that there was lack of inherent jurisdiction with the said Additional District Judge, then to pass appropriate orders as may be deemed fit and proper by us. Consequently, intensive arguments were raised on behalf of the appellants and equally intensively replied to by Mr. Jayanta Kumar Mitra, learned Senior Advocate appearing for the respondents. We will now therefore, deal with this preliminary issue.

The question that has been posed for our consideration is as to whether, under the provisions of Section 34 of the Arbitration Act, the reference to the learned Additional District Judge could at all have been made or whether, the same could only have been made before a "Court" as defined under Section 2(e) of the said Arbitration Act?

In short, Mr. Jaydip Kar has submitted that an application for setting aside an arbitration award can only be made before a "Court", as defined under Section 2(e) and not before an Additional District Judge. According to him, "Court" as defined under Section 2(e) of the Arbitration Act defines "Court" as being *the principal Civil Court of original jurisdiction in a district....* but

does not include *any Civil Court of a grade inferior to such principal Civil Court… .*

The definition of Section 2(e), for the convenience of all, is reproduced below:-

"2. Definitions. ----(1) In this Part, unless the context otherwise requires,--

(e) "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;"

Similarly, Section 34, for the convenience of all is reproduced below:-

"34. Application for setting aside arbitral award.--- (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

*Explanation.*—Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the

> said period of three months it may entertain the application within a further period of thirty days, but not thereafter.
>
> (4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it is order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

Mr. Kar submits that Section 2(e) clearly and in no uncertain terms lays down that a "Court", for purposes of Section 34, would obviously mean the principal Civil Court, i.e. the District Judge himself. According to him, when the statute itself mandates the principal Civil Court to deal with such matters, then he could not have delegated such power to a court which is a "grade inferior" to such District Judge. In support of such a contention, Mr. Kar has relied upon a judgment passed by the Hon'ble Allahabad High Court in the case of **M/s I.T.I Ltd., Allahabad vs District Judge, Allahabad & Ors.** reported in **AIR 1998 Allahabad 313**.

Mr. Jayanta Mitra, learned Senior Advocate, on the other hand, contended that under the provisions of The Bengal, Agra & Assam Civil Courts Act, 1887 (hereinafter referred to for the sake of brevity as the Civil Courts Act), the power of delegation has been provided for and therefore the Additional District Judge cannot be said to be a "Court" being a "grade inferior" to the said District Judge in the context of the provisions of the Civil Courts Act laying down inter-alia that the District Judge

has the power to assign certain cases to the Additional District Judge. He further submits that under Article 236 of the Constitution of India, the expression “District Judge” would include a Judge of a City Civil Court, Additional District Judge, Joint District Judge, Assistant District Judge, Chief Judge of a Small Cause Court, Chief Presidency Magistrate, Additional Chief Presidency Magistrate, Sessions Judge, Additional Sessions Judge & Assistant Sessions Judge.

Section 3 of the Civil Courts Act deals with the Constitution of Civil Courts and, provides that there shall be the following classes of Civil Courts under the said Civil Courts Act:-

(1) The Court of the District Judge;

(2) the Court of the Additional Judge (now nomenclated as the Additional District Judge);

(3) the Court of the Assistant District Judge (now nomenclated as Civil Judge Senior Division); and

(4) the Court of the Munsif (now nomenclated as Civil Judge, Junior Division).

Now under the provisions of Sections 8 of the Civil Courts Act which deals with Additional Judges, it has been provided that Additional Judges shall discharge any of the functions of a District Judge which the said District Judge may assign to them and, in the discharge of those functions, they shall exercise the same powers as the District Judge.

In view of the provisions of Sections 3 & 8 of the aforesaid Civil Courts Act read with Article 236 of the Constitution of

India, Mr. Mitra contended that the words "grade inferior" used in Section 2(e) of the Arbitration Act must be held to be a "loose drafting" by the legislature and it cannot take away the power of the District Judge to assign matters to an Additional District Judge who, by reason of Section 8(2) of the Civil Courts Act has been authorized to exercise the same powers as the District Judge.

Mr. Mitra then contended that the appellants had always submitted to the jurisdiction of the Additional District Judge and they had taken a chance for a judgment and therefore after delivery of the judgment they cannot be allowed to turn around and say that there was lack of jurisdiction. Mr. Mitra relies upon a judgment of the Hon'ble Supreme Court passed in the case of **Hira Lal Patni vs Sri Kali Nath** reported in **AIR 1962 SC 199.** He has also relied upon a judgment of this Court passed in the case of **Jupiter General Insce. Co. Ltd. vs Corporation of Calcutta** reported in **AIR 1956 Calcutta 470.** Mr. Mitra has also relied upon another judgment of the Hon'ble Supreme Court passed in the case of **Prasun Roy vs The Calcutta Metropolitan Development Authority & Anr.** reported in **AIR 1988 SC 205.**

In the cases cited above on behalf of the respondents, it is clear that if a person has not taken a point during the course of the proceedings then he would be deemed to have waived his rights to do so at a later stage. This principle of law is well settled and one need not to go into different judgments

of different courts. However, what is relevant to be taken note of in the facts and circumstances of this case is, whether the Additional District Judge had, at all, the right or the jurisdiction to proceed with the matter? This can be answered only in the context of the provisions of the Arbitration Act itself which is a special statute in the field and which creates or carves out a jurisdiction which, then, can be said to be jurisdiction "vested by law". The court of the Additional District Judge is undoubtedly a Civil Court as contemplated by the Civil Courts Act and by reason of the said Civil Courts Act it will be deemed to exercise the same powers of a District Judge in relation to matters assigned to it. However, we cannot lose track of the provisions of the Arbitration Act because that is a special statute, which must override the provisions of the general law of the land as per the principles enunciated in the legal principle, *generalia specialibus non derogant.*

In the context of this case therefore the provisions of the Civil Courts Act are provisions relating to consolidating and amending the law relating to Civil Courts and therefore it is a general law in the domain of the functioning of Civil Courts.

On the other hand, the need to frame effective laws relating to domestic and international commercial disputes was felt by the legislature because there was no specific general law on the subject of arbitration. With the increase in industrialization and the advent of commercial litigations, the Arbitration Act of 1940 became outdated whereafter the Law

Commission of India and several representatives from the trade and industry and, experts in the field of arbitration proposed amendments to the Act. It is in that context that the Arbitration and Conciliation Act, 1996 was framed and it came into effect on and from 22/8/1996. Therefore by the time Misc. Case No. 50 of 2008 had been initiated, the new Act was already in force. Article 236 of the Constitution of India deals with subordinate Courts and the provisions of Section 2(e) of the Arbitration Act has not been held to be ultra vires Article 236 and unless it is so done, strict interpretation will have to given to the provisions of the Arbitration Act of 1996 without drawing analogies from the general law of the land such as the Civil Courts Act.

The expression appearing in the Civil Courts Act under Section 8(2) cannot be read in isolation or in ignorance of Section 42 of the said Arbitration Act which lays down that "*notwithstanding anything contained elsewhere in this Part or in any other law for the time being 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 other subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."*

The word "Court" therefore has cropped up in different provisions of the Arbitration Act such as Sections 2, 9, 42 & 34 and therefore the intention of the legislature qua "Court", has to be interpreted in the light of the provisions and

definitions provided therein. If the word “Court” under Section 2(e) has clearly and specifically stated that it will not include a Civil Court being a grade inferior to the principal Civil Court, then the High Court or the Judiciary cannot be called upon to give an interpretation which is different from the intention of the legislature. The expression that an Additional District Judge shall exercise the same functions and powers of a District Judge as provided for in Section 8 of the Civil Courts Act does not mean that such a general law would take away the specific meaning of a “Court” ascribed under the special statute.

If therefore we hold that the District Judge could not have transferred a matter under Section 34 of the Arbitration and Conciliation Act, 1996 then as a natural consequence, we must also hold that the entire proceeding before the said Additional District Judge was wholly without jurisdiction as there was lack of inherent jurisdiction in the said Court to proceed with the matter. We are inclined therefore to hold that in view of Section 2(e) read with Sections 34 and 42 of the Arbitration Act, it was only the District Judge alone who could have dealt with the matter and any assignment made by the District Judge to a Court being a grade inferior to the said District Judge would amount to delegation of his own power without there being any such provision of delegation under the Arbitration Act and therefore such an act was wholly illegal and without jurisdiction.

Even if the appellant had taken part in the said proceedings before the Additional District Judge, they cannot be estopped from raising this point before us since this is a point of law and a point of jurisdiction that goes to the root of the matter. In a judgment of the Hon'ble Supreme Court passed in the case of **Kanwar Singh Saini vs High Court of Delhi** reported in **(2012)4 SCC 307,** it has inter-alia been held that there can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passes order / decree having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the root of the cause. Their Lordships have further held that such an issue pertaining to jurisdiction can be raised at any belated stage of the proceedings including in appeal or execution. It has also been held that acquiescence of a party should equally not be permitted to defeat the legislative animation. The Court cannot derive jurisdiction apart from the statute.

It is in the context of the aforesaid observations that we must also deal with the concept of "*coram non judice".* From the discussions made above we are satisfied that the impugned judgment can safely be said to suffer from the vice of "*coram non judice."* In our view therefore an award can be set aside under Section 34 of the Arbitration Act only by " Court" as defined under Section 2(e) thereof. The Additional District Judge, 4th Court is not the principal Civil Court of the

district. It is only the principal District Judge who has been clothed with the power to deal with an application under Section 34 of the Arbitration Act. He is also a delegate under the said statute qua Section 34 thereof. The statute has delegated the power to set aside an arbitration award to the principal District Judge being the principal Civil Court of original jurisdiction in a district, and therefore, he had no authority, in the absence of an enabling provision under said statute to redelegate of subdelegate the said power upon a Court which is not the principal Civil Court of original jurisdiction contrary to the well known concept of "*delegatus non potest delegare.*"

Following this analogy, the power under Section 8(2) of the Civil Court's Act being only a power of assignment, cannot be interpreted to mean that since the District Judge has the power to assign any of its functions to an Additional Judge, he would also have the power to subdelegate or to upset and render otiose, the provisions of the Special statute. The Special statute, in the facts and circumstances of this case is The Arbitration and Conciliation Act, 1996 and this Statute (Sections 2(e) + 34) mandates the principal District Judge ONLY to exercise powers under Section 34 thereof. Therefore, even if he has a general power of assignment under the general law, being the Civil Court's Act, such exercise of power in the context of the special statute, is clearly without jurisdiction.

Consequently, and in our opinion therefore, the impugned Order has been passed without jurisdiction and therefore, is a nullity. It is *coram non judice.* It is *non est* in the eye of law. Reference for this analogy can be made to paragraph 26 of the judgment of the Hon'ble Supreme Court of India passed in the case of **Chandrabhai K. Bhoir & Ors. vs Krishna Arjun Bhoir & Ors.** reported in **(2009)2 SCC 315.**

In a similar case, their Lordships in the Supreme Court, in the case of **Chief Engineer, Hydel Project & Ors. vs Ravinder Nath & Ors.** reported in **AIR 2008 SC 1315,** have held in Para 19 thereof that once an original decree has been held to be without jurisdiction and hit by the doctrine of *coram non judice,* there would be no question of upholding the same merely on the ground that the objection to the jurisdiction was not taken at the initial First Appellate or the Second Appellate stage.

This judgment also answers the submissions of learned Counsel for the respondents to the effect that the Appellants having all along submitted to the jurisdiction of the Additional District Judge, cannot be allowed to turn around after delivery of the judgment to say that there was lack of jurisdiction.

While we are on this issue, we would go a step further by saying that if the person who made the order did not have the authority to do so then such an order would not only be a nullity but in such cases even the principles estoppels, waiver, acquiescence and even the principles of res judicata would have absolutely no

application. This analogy finds support in the judgment of the Hon'ble Supreme Court passed in the case of **Hasham Abbas Sayyad vs Usman Abbas Sayyad & Ors.** reported in **AIR 2007 SC 1077.**

A similar point fell for consideration before the Hon'ble Supreme Court in the case of **Jagmittar Sain Bhagat & Ors. vs Director, Health Services, Haryana & Ors.** reported in **(2013)10 SCC 136.** In the said judgment their Lordships have held that *"Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the root of the cause. Furthermore an issue as to lack of subject-matter jurisdiction can be raised at any stage of the proceedings. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Similarly, if a court/tribunal inherently lacks jurisdiction, acquiescence of a party should not equally be permitted to perpetrate and perpetuate defeating of the legislative animation. The court cannot derive jurisdiction apart from the statute. A decree without jurisdiction is a nullity. It is a* coram non judice; *when a special statute gives a right and also provides for a forum for adjudication of rights, the remedy has to be sought only under the provisions of that Act and the common law court has no jurisdiction. The law does not permit any court/tribunal/authority/forum to usurp jurisdiction on any ground whatsoever in case such an authority does not have jurisdiction on the subject-matter."*

[ Quoted ].

In this context we would once again like to say that the special statute in this case being the Arbitration and Conciliation Act, 1996, while dealing with the definition of the word "Court" has clearly stipulated that *"Court"* means the principal Civil Court of

original jurisdiction in a district. Under the General Clauses Act, 1897, a "District Judge" has been defined under Section 3(17) thereof to mean that "District Judge shall mean the Judge of a principal Civil Court of original jurisdiction."

Thus, on a comparison of these two statutes, i.e. the General Clauses Act and the Arbitration Act, the common feature is that the words "principal Civil Court of original jurisdiction" shall only mean a "District Judge" of a principal Civil Court of original jurisdiction. The remaining portion of the definition ousting the High Court from the meaning of the word "District Judge" need not be gone into as a High Court is a High Court and it cannot be said to mean District Judge.

In view of our discussions referred to above we must also record that when a statute gives a right and provides a forum for adjudication of rights, the remedy has to be sought only under the provisions of that Act. Their Lordships in the aforementioned judgment of **Kanwar Singh,** *supra,* have held that when an Act creates a right or obligation and enforces the performance thereof in a specified manner, that performance cannot be enforced in any other manner.

In the instant case Section 34 enjoins that an application for setting aside an arbitral award can be made by an application before a Court and the definition of the word "Court" clearly lays down that it must be the principal Civil Judge of the District and such a principal Civil Judge cannot mean to include a Civil Court being a grade inferior to such principal Civil Judge. That being the position, the assignment to the Additional District

Judge who may be a Civil Court under the Civil Courts Act was clearly illegal in view of Sections 2(e) read with Sections 34 and 42 of the Arbitration Act. The question posed at the outset is therefore answered accordingly.

Having answered the question as above and having held that the very assignment to the Additional District Judge was wrong, there is no point in dealing with the merits of this case. Since the impugned order suffers from inherent lack of jurisdiction, it is accordingly set aside. The matter is now remanded to the concerned District Judge who will deal with the matter de novo, afresh and pass a fresh order in accordance with law.

The Appeal stands allowed to the extents indicated above.

No order as to costs.

The Registrar General of this Court is directed to take note of this judgment and circulate the same to all the District Judges in the State of West Bengal and to the concerned District Judge of the Andaman & Nicobar Islands.

This Judgment is approved for reporting.

**(Tapen Sen, J.)**

I agree,

**(Indrajit Chatterjee, J.)**