



2024:DHC:9434



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 20th September, 2024
Pronounced on: 02nd December, 2024

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O.M.P. 5/2017, I.A. 9676/2019

Suresh Shah

.....Petitioner

I & M Bank House,
2nd Ngong Avenue,
P.O. Box: 30238
00100 Nairobi GPO

Through: Mr. Vikas Dhawan, Sr.
Advocate with Mr. Sambit
Nanda & Ms. Samaya Khanna,
Advocates.

versus

Tata Consultancy Services Limited

.....Respondent

PTI Building, No. 4,
Parliament Street,
New Delhi - 110001

Through: Mr. Suhail Dutt, Sr. Advocate
with Ms. Ekta Kapil, Mr.
Munindra Dvivedi, Ms. Divya
Bhalla, Mr. Kartike Anand, Mr.
Abhishek Chauhan, Mr. Azhar
Alam and Mr. Raghav Dutt,
Advocates.

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O.M.P. 14/2017

TATA CONSULTANCY SERVICES LTD.

.....Petitioner

PTI Building, No. 4,
Parliament Street,
New Delhi - 110001

Through: Mr. Suhail Dutt, Sr. Advocate
with Ms. Ekta Kapil, Mr.
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2024:DHC:9434



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O.M.P. 9/2017

TATA CONSULTANCY SERVICES LTD.Petitioner
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CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. The present cross Petitions seek to challenge two Awards dated 16.12.2016 and 14.01.2017 under S.34 Of the Arbitration and Conciliation Act, 1996. The first two petitions have been filed by Mr. Suresh Shah (*hereinafter referred to as "Petitioner"*) and the other two Petitions have



been filed by TATA Consultancy Service (*hereinafter referred to as “TCS” “Respondent”*).

2. A preliminary Objection has been taken on behalf of the petitioner, Sh. Suresh Shah, that this Award being an *International Commercial Award*, the scope of challenge under S.34 (2A) of the Act, 1996 as introduced by the Arbitration Amendment Act, 2015, (which came into effect on 23.10.2015) is limited, and cannot be challenged on the ground of ***patent illegality***.

3. Since, this aspect would define the grounds of challenge of the Award; the arguments have been heard on the *preliminary issue*: ***“whether the impugned Awards were passed in an International Commercial Arbitration (ICA)?”***

4. The learned Senior Advocate Mr. Vikas Dhawan on behalf of the Petitioner has submitted that Mr. Suresh Shah is a permanent resident of Nairobi, Kenya, and this factum was duly disclosed during the Arbitration proceedings. The *Statement of Claim* filed by Mr. Suresh Shah mentions his address in Kenya. This fact is also evidenced from the *Power of Attorney* submitted by Mr. Suresh Shah during the Arbitration proceedings, which is part of the arbitral record and has been in knowledge of the defendant. Furthermore, the Arbitral Award dated 16.12.2016 also records the address of Mr. Suresh Shah as Nairobi, Kenya. Not only this, TCS had itself filed the copy of Mr. Shah’s passport along with an Application to bring on record the subsequent Lease executed by Mr. Shah, before the Arbitral Tribunal.

5. Further, TCS had filed an Application under S. 17 of the Act seeking interim measures of deposit as well as security on the ground of Mr. Shah was a resident of Kenya. The same is set out as below:



*“13. It is submitted that the **Respondent is a Non-Resident Indian and is based in Kenya and is represented by the authorised representative** all throughout the proceedings and to the best of counter claimant’s knowledge the Respondent has no assets in India apart from the present demised premises. **In any event, the fact that the Respondent is admittedly not a resident of India and stays in Kenya,** the amount claimed by the counter claimant is to be secured and the Respondent is liable to furnish security of the same as once the Counter Claimant vacates the demised premises there would be no way of recovering any amount awarded to the Counter Claimant and the award would be just a paper award.”*

6. It is further submitted by the learned Senior Advocate for the Petitioner that the learned Arbitral Tribunal also recorded the address of Mr. Suresh Shah as “Residing at Lr. No. 991/6, Riverside Drive, P.O. 30238 0000 Nairobi, 30238, Kenya” in Order dated 16.04.2014.

7. The Tribunal in its Award dated 23.10.2014 while recording the grounds on which the TCS sought interim measures, recorded “**that the claimant is a non-resident Indian** who doesn’t have any property in India other the leased premises... ..”.

8. It is argued that the aforesaid documents submitted during the Arbitral proceedings, overwhelmingly establish the factum of Kenyan Nationality of Mr. Suresh Shah, which was well within the knowledge of TCS throughout the arbitral proceedings.

9. It is further contended that the Respondent’s assertion that it was not aware of the nationality of the Petitioner or that the Passport showing his nationality has been filed for the first time in the court at the stage of Final Arguments in S. 34 proceedings, is falsified from the proceedings and the record of the Arbitral proceedings.



10. Learned Senior Advocate on behalf of the Petitioner has further argued that S. 2(1)(f) of the Act, 1996 is not a derogable provision for which reference has been made to the case of Narayan Prasad Lohia vs. Nikunj Kumar Lohia, (2002) 3 SCC 572, wherein the Apex Court examined the derogability of Section 10 of the Act, to observe that it was derogable. Likewise, in Hala Kamel Zabal vs. Arya Trading, 2024 DHC 6099, the procedure for appointment of an Arbitrator is held to be derogable. It is argued that neither of these cases pertains to the International Commercial Arbitration nor do they state that by consent, the parties can agree that the arbitration will be deemed to be Domestic and not an ICA.

11. It is contended that the nature of the arbitration being an ICA is a question of fact and law under S. 2(1)(f), which is clearly established from the Record and thus, the scope of challenge to the Award must be limited to the parameters defined under S.34 (2A) of the Act, 1996.

12. The reliance has been placed on Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, AIR 2019 SC 5041 wherein the Supreme Court held that the amended Section 34 would be applicable to all the Applications made after 23.10.2015, irrespective of the fact that the Arbitration proceedings commenced prior thereto.

13. Reliance on AMWAY India Enterprises Pvt. Ltd. Vs. Ravindranath Rao, (2021) 8 SCC 465 wherein the Supreme Court held that if any of the parties fulfil the requirements of S. 2(1)(f) of the Act, the arbitration would be an ICA, regardless of the nature of the transaction between the parties.

14. The ***learned Senior Advocate Sh. Suhail Dutt on behalf of the respondent*** has controverted these arguments and stated that there is no reference of International Dispute Resolution in the Contract defining the



legal relationship between the parties. The relevant pre-dispute correspondence by TCS were addressed Mr. Suresh Shah at the Mumbai Address and was duly replied. Further, Mr. Suresh Shah failed to plead his non-Indian citizenship or his habitual residence at the time of the constitution of the Tribunal or even thereafter, during the proceedings leading to the Awards dated 16.12.2016 and 28.01.2017.

15. It is further contended that *the Sole Arbitrator Hon'ble Justice Mr. Raveendran (Retd.)* was appointed by this Court under S.11 (6) of the Act. Had the parties contemplated it to be *International Commercial Arbitration*, the appointment of the Arbitrator would have been done by the Supreme Court under S. 11(6) of the Act. The Petitioner has deliberately and consensually derogated from the provisions of S. 2(1)(f) of the Act.

16. In this regard, reliance has been placed on Narayan Prasad Lohia (Supra) which was recently followed and relied upon a Coordinate Bench of this Court in Hala Kamel Zabal (Supra) wherein two parties being Foreign Nationals, did not raise the issue of there being an ICA at the time of constitution of the Arbitral Tribunal and did not file Application under Section 16 of the Act before the Tribunal; it was held that the parties have derogated from the provisions of S. 2(1)(f) of the Act.

17. Learned Senior Advocate for the respondent has vehemently contended that the reliance on pleadings of TCS, both in S. 11 Petition and Applications under S. 17 of the Act filed during the Arbitration Proceedings, is misconceived. *Firstly*, because Mr. Suresh Shah has not pleaded his residential status, and *secondly*, by the stage of the pleadings of the respondent, the parties had derogated from the provision of S. 2(1)(f). Having failed to raise this aspect at an earlier stage and later having



derogated from the provision of section 2(1)(f), Mr. Suresh Shah cannot raise this challenge at the stage of consideration of petition under Section 34 of the Act.

18. Further, neither any challenge to the appointment of the learned Arbitrator was made at any stage during the Arbitration Proceedings nor in S. 34 petitions, as originally filed by Mr. Suresh Shah, on the ground of the present arbitration being an ICA.

19. The *learned Senior Advocate for the Respondent* has argued that this challenge has been raised belatedly, i.e. 7 years after the Award has been passed and that too, at the stage of final hearing of Section 34 petition. In view of P Radha Bai vs. P Ashok Kumar, 2019 (13) SCC 445, and Arjun Mall Retail Holdings Pvt. Ltd. And Ors. vs. Gunocen Inc., in FAO (Comm) No. 21/2021 decided by the Division Bench of this Court, the limitation for filing S. 34 petition is unbreachable and no new ground which emerges after 90 days of the pronouncement of the Award, can be now raised.

20. The learned Senior Counsel has argued that there is no power for the court to *Suo motu* set aside an Award whether on ground of jurisdiction or otherwise, for which reliance has been placed on Consolidated Engg. Enterprises and Ors. vs. Principal Secy. Irrigation Deptt. And Ors., (2008) 7 SCC 169, Kinnari Mullick and Ors. vs. Ghanshyam Das Damani, (2018) 11 SCC 328, and Gas Authority of India Ltd. And Ors. vs. Ketu Construction (I) Ltd. And Ors., (2007) 5 SCC 38.

21. Finally, the learned Senior Advocate has relied on one of the fundamental principles of Arbitration i.e. *party autonomy*, which has been reiterated in BALCO vs. Kaiser Aluminium, (2016) 4 SCC 126, Centrotrade Minerals vs. Hindustan Copper, (2017) 2 SCC 228, and PASL Wind



Solutions Pvt.Ltd. vs GE Power Conversion India Pvt. Ltd., (2021) 7 SCC 1, to reiterate his argument that the ICA status got derogated by the Petitioner and it cannot be raised at this stage.

22. **Submissions Heard and the Arbitral Record perused.**

23. The question to be answered here is: “*whether the impugned Awards were passed in an International Commercial Arbitration (ICA)?*”

24. This question at the threshold of the consideration of Petition under S.34 of the Act, 1996 assumes seminal significance as the scope of challenge of Domestic Award and an International Commercial Award is remarkably different.

Party Autonomy Under the Arbitration & Conciliation Act,1996: -

25. With an objective to encourage International Trade and Commerce and to make the adjudicatory processes more vibrant and friendly towards stakeholders, Arbitration and Conciliation Act, 1996 was brought in with significant changes to minimize the Court interference with more recognition to the principle of “*Party Autonomy*”.

26. As observed by the Apex Court in the recent judgment of Central Organisation for Railway Electrification vs. M/s ECI SPIC SMO MCML (JV) A Joint Venture Company, 2024 INSC 857, the Act gives party autonomy great importance in the arbitral process and the same is evident from the use of “*phrases such as “unless otherwise agreed by the parties”, “failing any agreement”, “the parties are free to agree”, “failing such agreement” ...*” in the Section 3, Section 11(1)-(3) & (5), Section 13(1) & (2), etc. These are left to be ascertained by the Parties and are derogable in the sense that they may be modified or adjusted mutually. However, certain



Sections of the Act, like S.2 which is the definition section, form the basic structure of Law of Arbitration, and are non-derogable.

27. It is evident from the scheme of the Act, 1996 that while party Autonomy is duly recognized but it also has a basic structure which is mandatory and does not permit any modification by mutual consent of the parties.

On delay in raising a new ground in S. 34 proceedings: -

28. The first contention by the learned Senior Counsel for the Respondent that this is a new ground of challenge raised by the Petitioner, which cannot be permitted as only grounds agitated in the Petition under S.34 can be considered and this ground sought to be taken after seven years of filing the petition is barred under S.34 (3) Of the Act.

29. This argument of the Respondent is not tenable as the issue raised by the Petitioner is legal issue which can be raised any stage, as has been held by the Supreme Court in the case of Yeswant Deorao Deshmukh vs. Walchand Ramchand Kothari, 1950 SCR 852, that “*if the factual foundation for a case has been laid and the legal consequences of the same have not been examined, the examination of such legal consequences would be a pure question of law.*”

30. Likewise, in the recent judgement of K. Lubna & ors. vs. Beevi & Ors., (2020) 2 SCC 524, the Apex Court held that “*on a legal principle, it is trite to say that a pure question of law can be examined at any stage, including before this Court.*” Further, the

31. Thus, the contention of delay of 7 years in raising a “new ground of challenge” to the Award emanating from ICA in S. 34 proceedings and the



same being in contravention of the timeline prescribed by the Act, is not tenable.

International Commercial Award: -

32. The learned Senior Advocate for the Respondent has contended that they were not aware of the nationality of the Petitioner and that the same is a matter of fact which was required to be disclosed by Mr. Suresh Shah. However, a bare perusal of the arbitral record is indicative of facts to the counter and so, it does not favour of respondent to assert ignorance of a fact upon which they have relied during arbitration proceedings and were also the basis to claim certain interim reliefs under S.17 of the Act before the Arbitral Tribunal. The Respondent have known the fact that the Petitioner is a foreign national or a habitual resident of a country other than India and so, this plea of ignorance is not well founded. Once, it is established that the Petitioner is a national of a country other than India, then the next step is an analysis of S. 2(1)(f) of the Act to answer the question at hand.

33. To understand the question at hand, the concept of **International Commercial Award, needs to be understood.**

34. The S. 2(1)(f) of the Act defines an **International Commercial Arbitration**, as under:

“S. 2(1)(f) “International commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or



(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country;”

35. The S. 2(1)(f) sets out that if any of the aforesaid four conditions are satisfied, the arbitration is an *International Commercial Arbitration*. **One such situation is where an individual who is a national of, or habitually resident in, any country other than India.**

36. The Supreme Court in Amway India Enterprises Private Limited vs. Ravindranath Rao Sindhia and Anr., (2021) 8 SCC 465, has held that “an analysis of Section 2(1)(f) would show that whatever be the transaction between the parties, if it happens to be entered into between two persons, **at least one of whom is either a foreign national, or habitually resident in, any country other than India; or by the Government of a foreign country, the arbitration becomes an international commercial arbitration** notwithstanding the fact that the individual, body corporate, or government of a foreign country referred to in Section 2(1)(f) carry on business in India through a business office in India.”

On difference between ICA and Foreign Award: -

37. An analysis of the scheme of the Act would bring to fore a need to distinguish between “*International Commercial Arbitration*” and “*Foreign Award*”. The Act is divided in two parts; Part I deals with “Arbitrations seated within India” while Part II deals with “Arbitrations seated outside India and governed by New York Convention”. Part I also contains a distinction between Domestic (*non ICA*) and International Commercial Arbitration, as is evident from the Definition in Section 2(1)(f) of the Act.



38. This classification has been explained by a Division Bench of the Madhya Pradesh High Court in Sasan Power Ltd v North American Coal Corp India Pvt Ltd., 2015 SCC OnLine MP 7417. It was observed that when an arbitration contains an international element, it can be categorised on two parameters – **Nationality** and **Seat**. **“International Commercial Arbitration” is based on the nationality of the parties.** It affects the procedure of appointment of Arbitrator under Section 11 of the Act, the law governing the arbitration where the seat of arbitration is in India as provided for under Section 28 of the Act, and finally, the scope of challenge to which an award can be subjected to under Section 34 of the Act. On the other hand, the **Seat determines whether the Award is a Foreign Award** and accordingly, define the procedure of its enforcement, under Part-II and Part-III, whereas a Domestic Award is to be enforced under Part-I.

39. The distinctiveness of the ICA has also been discussed in Bharat Aluminium Company Ltd. vs. Kaiser Aluminium Technical Servies, Inc., (2012) 9 SCC 552 in the context of applicability of “*substantive law*” as per Section 28 of the Act. The Apex court observed *qua* Section 28 of the Act that “.... This section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which Section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide “the dispute” by applying the Indian “substantive law applicable to the contract”.The provision would have an overriding effect over any other contrary provision in such contract. On the other hand, where an arbitration under Part I is an **international commercial arbitration** within Section 2(1)(f) the parties would be free to agree to any other



*“substantive law” and if not so agreed, the “substantive law” applicable would be as determined by the Tribunal. **The section merely shows that the legislature has segregated the domestic and international arbitration.**”*

40. It is evident from these observations that there is evident distinction between the Domestic Arbitration and International Commercial Arbitration under the Act, with distinct provisions prescribed for the two.

On Derogability of Section 2(1)(f): -

41. The learned Senior Counsel for the Respondent has further sought to set up a defence to the effect that by opting for appointment of an Arbitrator by the Delhi High Court, the Petitioner has derogated from the provision of S. 11(6) of the Act and effectively derogated from S. 2(1)(f). The question thus arises as to ***whether the Petitioner has derogated from S. 2(1)(f) of the Act by consenting to appointment of an Arbitrator by the Delhi High Court in an International Commercial Arbitration?***

42. Classically, “derogable” would mean “from which it is possible to detract or annul. In the context of the Arbitration Act, it implies that in view of the principle of *party autonomy*, the parties have the freedom to derogate from certain provisions of law as is envisaged in certain sections of the Act, while other Sections are non-derogable (mandatory) and cannot be modified by the consent of the parties.

43. The question of definition of ICA as defined under S. 2(1)(f) being derogable or not was answered by the Apex Court in the case of Railway Electrification (supra) wherein it was observed that *Section 2(2) of the Act, a provision forming part of the definition clause defining the scope of application of Part-I is a mandatory provision. Another such provision is section 4 of the Act pertaining to the “waiver of right to object”.*



44. The Respondent has placed reliance on Narayan Prasad Lohia (supra) and Hala Kamel Zabal (Supra) wherein the Supreme Court was concerned with S. 10 of the Act and whether the parties could derogate from the same. The Supreme Court in Narayan Prasad Lohia (supra) had explained the derogability of S.10 of the Act, as under:

“14. We have heard the parties at length. We have considered the 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 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.

15. In the said Act, provisions have been made in Sections 12, 13 and 16 for challenging the competence, impartiality and jurisdiction. Such challenge must however be before the Arbitral Tribunal itself.

16. It has been held by a Constitution Bench of this Court, in the case of Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd²⁴ 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 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 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 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.”

45. Unlike S. 11(6) of the Act which relates to the procedure for appointment of an Arbitrator, S. 10 pertains to the *number of Arbitrators*. The language of S.10 itself gives an option to the parties to decide on the number of Arbitrators. By its very nature, it is a provision which is in the domain of parties who may agree to even vary the number of arbitrators and is evidently derogable. The Coordinate Bench of this court in Hala Zabal (supra) has relied on the reasoning of Narayan Prasad Lohia (supra) to assess the derogability of S. 11(6) of the Act. However, this issue pertains to the challenge of the Arbitration Award under S. 34 of the Act on merits, and is not in question at this stage, and need not be addressed when the only question for determination is the nature of the Arbitration proceedings and the consequent Award.

46. The Respondent has sought to argue that by accepting appointment of Arbitrator by this Court and not challenging the same before the Tribunal under S. 16 of the Act, the Petitioner has derogated from S. 2(1)(f) to the



effect that the resulting arbitration is not an International Commercial Arbitration.

47. S. 2(1)(f) of the Act, being a *definition provision* and is not derogable as held by Apex Court in the case of Railway Electrification (supra). It is meant to provide a structure for an effective and consistent application to the Arbitration law in India and no amount of “*Party Autonomy*” can be permitted to fiddle with the foundations of Arbitration law.

48. It can, thus, be safely concluded that the parties cannot derogate from a definition.

49. Undeniably and as evident from various documents produced and relied upon by the parties during the arbitration proceedings, the respondent is a national and resident of Kenya, thereby bringing these proceedings under the ambit of **International Commercial Arbitration. The scope and grounds of challenge to the Award including the procedure followed for appointment of Arbitrator shall be considered accordingly.**

Conclusion:

50. The impugned Awards were passed in arbitration proceedings which were International Commercial Arbitration.

51. The preliminary question is decided accordingly.

52. The Petitions be listed before the Roster Bench on 10.12.2024 for consideration of the petition under S.34 of the Act, on merits.

**(NEENA BANSAL KRISHNA)
JUDGE**

DECEMBER 02, 2024