

# RAJASTHAN HIGH COURT

M/s Godara Construction Company

Vs.

State of Rajasthan

Arbitration Application No. 37 of 2002

(Rahesh Balia, J.)

10.07.2003

## ORDER

**Rajesh Balia, J.**

1. Learned counsel appearing for the non-applicant raised a preliminary objection that this application under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') challenging the Award dated 08.02.2001 passed by the Arbitral Tribunal is not maintainable.
2. Mr. Dave, the learned counsel for the non-applicant contends that an application under Section 34 may be made only to a Court as defined in Section 2(e) of the Act. He submits that an application under Section 34 of the Act can only be made to the principal Civil Court of original jurisdiction in a district inclusive of 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.
3. Mr. Maheshwari, the learned counsel for the applicant submits that according to Section 42 of the Act, which is a non-obstante clause, where in respect of an arbitration agreement, any application under Part I has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of the agreement and the arbitral proceedings shall be made in that Court and in no other Court. It was pointed out by Mr. Maheshwari that the applicant on earlier occasion approached this Court by way of filing S.B. Civil Writ Petition No. 3657 of 1999 in respect of the subject matter of dispute in question and that writ petition was opposed by the non-applicants *inter alia*, on the ground that an

arbitration agreement exists between the parties and, therefore, writ petition is not maintainable.

4. He further submits that this Court in the above writ petition vide its order dated 01.10.1999 upheld the aforesaid preliminary objection that in view of availability of alternate remedy, the writ petition is not maintainable. However, it was directed that the applicant should proceed to make such a reference of the dispute within a week and the respondents were directed to refer the matter to the high power committee and the said committee was directed to conclude and decide the matter expeditiously, preferably within a period of six weeks.

5. Section 34 deals with recourse against arbitral award. It provides that recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with the provisions made there under. The term 'Court' has been defined in Section 2(e) of the Act as under:

"Court' means the principal Civil Court of original jurisdiction in a district and includes the High Court, in exercise of its 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."

6. A perusal of the above provisions makes it clear that application required to be made to a Court under the Act can be made to the High Court only where it exercises civil original jurisdiction, otherwise the application is to be made to the principal Civil Court of original jurisdiction in a District and does not include any Civil Court of a grade inferior to such principal Civil Court or any Court of small causes.

7. The contention of the learned counsel for the non-applicant is misconceived for the purpose of invoking the provisions of Section 42 of the Act in the facts and circumstances of this case.

8. However, the learned counsel for the non-applicant refers to Section 8 of the Act, which reads as under:

*"Power to refer parties to arbitration where there is an arbitration agreement :*  
(1) A Judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the

parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or duly certified copy thereof.

(3) notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be a commenced or continued and an arbitral award made."

9. Apparently, rising of an objection about the maintainability of the writ petition does not amount to making of an application under Section 8 of the Act for appointment of an arbitrator. Section 8(1) clearly provides that a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. Sub-section (2) of Section 8 of the Act makes it apparent that the application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or duly certified copy thereof. It is not the case of any of the party that any application was made to the Court in term of Section 8 of the Act for referring the parties to the arbitrator.

10. Moreover, Section 42 refers to any application made to a Court under Part I of the Act. In the context, this clause can be invoked only on fulfilment of condition referred to therein. Firstly, an application must have been made under Part I of the Act of 1996. Secondly, such application must have been made to a Court. Obviously, in the context, 'the Court' to which reference is made under Section 42 ought to be a Court as defined in Section 2(e) of the Act. High Court exercising extraordinary jurisdiction under Articles 226 and 227 of the Constitution does not come with its purview. Therefore, any plea raised by way of claim or dauphins in proceedings under extra-ordinary jurisdiction cannot bring into operation Section 42 of the Act.

11. In view thereof, the preliminary objection raised by the learned counsel for the non-applicant is sustained.

12. In the above facts and circumstances of this case, this application is ordered to be returned to the learned counsel for the applicant for presenting the same before the District Judge, Jodhpur. Both the parties are directed to appear before the District Judge, Jodhpur on 18.08.2003.

Order accordingly.