IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE PRADEEP MITTAL

ARBITRATION APPEAL No. 266 of 2023

THE STATE OF MADHYA PRADESH

Versus

M/S SMEC INTERNATIONAL PVT. LTD

Appearance:

Shri Abhijeet Awasthi – Deputy Advocate General for appellant/State.

Dr. Anuvad Shrivastava – Advocate for respondent.

WITH

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ORDER

Heard on : 16.03.2026

Pronounced on: 08.04.2026

Per*: *Justice Pradeep Mittal

Issue involved in these two Arbitration Appeals are similar in nature, thus they are being decided by this Common order.

1. The present appeal has been filed by the appellant Water Resources Department, Government of Madhya Pradesh (hereinafter "WRD" or "the appellant") under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act of 1996"), challenging the order dated 22.06.2023 passed by the learned Commercial Judge / 8th District Judge, Bhopal in M.J.C. (Arbitration Case No. 82/2018), whereby the application filed by the appellant under Section 34 of the Act of 1996 was dismissed.

2. The brief facts germane to the present appeal are as follows. The appellant Project Implementation Coordination Unit (PICU), Water Resources Department, Government of Madhya Pradesh issued a Request for Proposal (RFP) on 14.12.2005 for consultancy services for developing Capacity Building for Water User Associations (WUA) in the basins of Sindh, Ken, Tons, Chambal and Betwa in Madhya Pradesh. The project was financed by the International Bank for Reconstruction and Development / World Bank. In response, the respondent SMEC International Pty. Ltd., an Australian company with its registered address at 220, Sharp Street (PO Box 356), Cooma 2630, Australia submitted its technical and financial proposal. The said proposal was accepted by the appellant vide letter dated 28.03.2007 and a Lump Sum Contract (Agreement No. 16/EE/BVPP/SAC/225/06-07) was executed between the parties. The respondent was directed to commence work vide letter dated 29.03.2007 and the stipulated period of performance was 36

months, i.e., till 28.03.2010. The total contract value (inclusive of tax) was Rs.19,26,83,092/-. The period of the contract was subsequently extended till 30.06.2010 and further till 30.09.2010.

3. An advance payment of Rs.1,92,58,309/- (representing 10% of the contracted amount) was made by the appellant to the respondent against a bank guarantee of equivalent amount. It is the case of the appellant that the respondent failed to deploy the named key professionals, failed to submit deliverables of acceptable quality, and committed persistent breach of contract. The appellant consequently issued a termination notice dated 27.11.2010 calling upon the respondent to rectify the shortcomings within 30 days. As the respondent failed to do so, the contract was closed vide letter dated 27.12.2010 and the advance payment bank guarantee of Rs.1,92,58,309/- was encashed.

4. In view of the ensuing dispute, the respondent filed a writ petition (W.P. No. 7781/2013) for appointment of an arbitrator. By order dated 06.05.2015, the High Court appointed Justice V.K. Agarwal (Retd.) as Sole Arbitrator. The learned sole arbitrator passed the award dated 15.02.2018, allowing the claim of the respondent and directing the appellant to pay:

(i) Rs.8,17,43,319/- (which includes the bank guarantee amount of Rs.1,92,58,309/-) along with USD 1,85,578 and AUD 1,47,007;

(ii) Interest @ 9% p.a. on the bank guarantee amount from 28.12.2010 till payment, and interest @ 9% p.a. on the remaining amount from 28.02.2011 till payment; and

(iii) Costs of Rs.20,00,000/- (inclusive of stamp duty).

Subsequently, the respondent filed an application under Section 33 of the Act of 1996 for correction of the award. The learned arbitrator, vide corrected/modified award dated 13.03.2018, modified Clauses 1 and 2 of Para 102 of the original award, clarifying that the bank guarantee amount was already included in the principal INR amount and was not separately payable. The corrected award dated 13.03.2018 is the final award for the purposes of this proceeding.

5. Before proceeding to the issues, it is necessary to extract the dispute resolution clause. Clauses 8.2 and 8.3 of the agreement read as under:

> *"8.2(i) Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the following provisions:*
>
> *8.2(ii) Each dispute submitted by a Party to arbitration shall be heard by a sole arbitrator or an arbitration panel composed of three arbitrators…*
>
> *8.3 Rules of Procedure: Arbitration proceedings shall be conducted in accordance with procedure of the Arbitration & Conciliation Act 1996 of India unless the Consultant is a foreign national/firm, where arbitration proceedings shall be conducted in accordance with the rules of procedure for arbitration of the United Nations Commission on International Trade Law (UNCITRAL) as in force on the date of this Contract."*

6. The appellant filed an application under Section 34 of the Act of 1996 before the learned Commercial Court, Bhopal. The learned Commercial Court, by order dated 20.04.2022, dismissed the application on the grounds that the challenge did not fall within Section 34(2)(b)(ii) of the Act. The appellant preferred Arbitration

Appeal No. 46/2022 before this Court (along with connected A.A. No. 47/2022).

7. A Division Bench of this Court, vide judgment dated 15.09.2022, set aside the order dated 20.04.2022 and remanded the matter to the learned Commercial Court for rehearing afresh. The relevant extract from the remand order reads as below:

> "33. In view of foregoing analysis, in our opinion, it will not be proper to deal with the merits of the case and rival contentions raised before us.
>
> 34. Since in the impugned order, an incorrect finding is given that application was barred by limitation, it cannot sustain judicial scrutiny. Similarly, in the impugned order, the learned Court below has not dealt with the rival contentions of the parties by assigning minimum justifiable reasons... For these cumulative reasons, we deem it proper to set aside the order dated 20.04.2022 and remit the matter back before the learned Commercial Court to rehear the parties and decide the matter afresh in accordance with law. It is made clear that this Court has not expressed any opinion on the merits of the case.
>
> 35-36. …stand of learned counsel for the respondent is that this matter is arising out of an International Commercial Arbitration, whereas, learned counsel for the State has taken a diametrically opposite stand. Shri Seth, Deputy Advocate General submits that since award is a domestic award, it cannot be said to be arising out of an International Commercial Arbitration. Suffice it to say that Court below has not given any finding on this aspect. Thus, this question will also remain open to be raised by the parties and decided by the Court below in accordance with law…"

8. After remand, the learned Commercial Court vide the impugned order dated 22.06.2023 once again dismissed the application under

Section 34. On the question of limitation, the learned Commercial Court held as under:

> "Looking at the present case in light of the aforementioned provision, it is clear that the award was passed by the learned Arbitrator on 15.02.2018. If the applicant's contentions are accepted as they are, then according to him, he became aware of the said award on 13.03.2018. It does not appear that any application was filed by the applicant or non-applicant before the learned Arbitrator under Section 33 of the Central Act. Therefore… the challenged award could have been contested within 03 months from 15.02.2018 in the first instance, or secondly… from 13.03.2018 within a period of 03 months. After the expiry of the 03-month period, this could be extended by an additional period of 30 days with the permission of the Court. However, no application showing sufficient cause in this regard has been presented by the applicant before the Court. The period for challenging the award expired on 12.06.2018. But the applicant filed the application challenging the award on 06.08.2018, which is a delay of approximately one and a half months. The application is not within the time limit prescribed under the provisions mentioned in the Act."

On the question of International Commercial Arbitration, the learned Commercial Court noted the respondent's objection but did not decide the issue independently on merits, noting only that the appellant had not filed the relevant documents to substantiate the ground.

9. Learned counsel for the appellant submits that the impugned order dated 22.06.2023 is contrary to law and facts on record. It is submitted that the arbitral award dated 15.02.2018 (as corrected on 13.03.2018) is ex facie illegal and the Court below committed error in dismissing the Section 34 application. Learned counsel has raised the following grounds:

(i) The present arbitration constitutes an International Commercial Arbitration within the meaning of Section 2(1)(f) of the Act of 1996, inasmuch as the respondent-claimant is a body corporate incorporated in Australia consequently, challenge under Section 34 (Part I) is maintainable only to the extent permissible under Section 5 read with the scheme of Part II, and the appropriate forum and legal framework ought to have been applied accordingly.

(ii) The application under Section 34 was within limitation. The Section 33 application was filed by the respondent-claimant (not the appellant), and the corrected/modified award dated 13.03.2018 was received by the appellant thereafter. The limitation period under Section 34(3) therefore commenced from the date of receipt of the corrected award i.e. 13.03.2018, and the application filed on 06.08.2018 is within the prescribed period of three months plus thirty days.

(iii) The arbitral award is vitiated by patent illegality inasmuch as the arbitrator failed to appreciate that the respondent had failed to perform approximately 40% of contractual obligations, failed to deploy key professionals, and failed to submit deliverables of acceptable quality, the termination and encashment of bank guarantee were therefore justified.

(iv) The contract in question is a "works contract" within the meaning of the M.P. Madhyastham Adhikaran Adhiniyam, 1983, and therefore the Arbitral Tribunal lacked jurisdiction.

10. Learned counsel for the respondent submits that: (i) the Section 33 application was filed by the respondent-claimant, not the appellant, and hence the limitation period commenced from the date the appellant received the original award dated 15.02.2018; the Section 34 application filed on 06.08.2018 is thus barred by limitation, (ii) the present arbitration is an International Commercial Arbitration within the meaning of Section 2(1)(f) of the Act, governed by Part II thereof, and the challenge under Section 34 (Part I) is therefore not maintainable at all (iii) the award is a well-reasoned document passed after thorough consideration of evidence and does not suffer from any patent illegality.

ISSUES FOR CONSIDERATION

Having heard the learned counsel for the parties and perused the record including the arbitral award, the following issues arise for consideration:

Issue No. I: Whether the present arbitration is an "International Commercial Arbitration" within the meaning of Section 2(1)(f) of the Act of 1996, and if so, whether the application under Section 34 (Part I) is maintainable ?

Issue No. II: Whether the application filed under Section 34 of the Act of 1996 was barred by limitation under Section 34(3) of the Act ?

Issue No. III: Whether the arbitral tribunal lacked jurisdiction in view of the applicability of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 ?

ISSUE NO. I - INTERNATIONAL COMMERCIAL ARBITRATION AND MAINTAINABILITY OF SECTION 34 APPLICATION

11. The definition of "international commercial arbitration" is contained in Section 2(1)(f) of the Act of 1996, which reads as under:

> "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 a country other than India; or
>
> (iv) the Government of a foreign country."

12. In the present case, it is undisputed that the respondent-claimant before the arbitrator is SMEC International Pty. Ltd., which is an Australian company incorporated under the laws of Australia, with its registered/principal address at 220, Sharp Street (PO Box 356), Cooma – 2630, Australia. The respondent is thus a "body corporate which is incorporated in any country other than India" within the meaning of Section 2(1)(f)(ii) of the Act of 1996. The dispute arises from a commercial consultancy contract. Accordingly, the present arbitration is squarely an "International Commercial Arbitration" within the meaning of Section 2(1)(f).

13. Respondent company has been authorised to Mr. Gaurav Kumar Srivastava as a country head of SMEC(India) Pvt Ltd by power executing of attorney to represent SMEC International Pty. Ltd. before the Central /State/ Local Government Authorities of India and the Royal Government' of Bhutan, for any purpose connected with or relating to business activities of the Company. it is clear from the agreement that the respondent company was registered in Australia and its office in Australia. petitioner argued that the respondent company having its local office at Gurgaon therefore the agreement does not fall under the definition of international commercial arbitration. Respondent company issued a power of attorney to conducted the work at India and power attorney holder opened his office at Gurgaon it does not mean the respondent company registered at India hence the one parry of the contract is foreign nation and contract govern by foreign law therefore contract covered under the definition of 2a of the arbitration conciliation act 1996 and commercial court Bhopal failed to considered that aspects of the contract therefore we hold that the contract is a international contract arbitration and its govern by the foreign law as per the contract.

14. The Dispute Resolution Clause (Clause 8.3) of the contract itself recognizes this character by providing that "unless the Consultant is a foreign national/firm, where arbitration proceedings shall be conducted in accordance with the rules of procedure for arbitration of the United Nations Commission on International Trade Law (UNCITRAL)." Since the respondent is admittedly a foreign firm, the contract itself contemplated UNCITRAL rules, confirming the international character of the arbitration. Despite

this clear position, the arbitration was conducted under Part I of the Act by a domestic arbitrator appointed by this Court a circumstance that directly goes to the root of jurisdiction and maintainability.

15. The Apex Court authoritatively dealt with the interplay between Part I and Part II of the Act in the context of international commercial arbitrations seated in India in

In *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 (BALCO), a Constitution Bench of the Hon'ble Supreme Court held at paragraph 75:

> "75. We are of the considered opinion that the Parliament, while enacting the 1996 Act, intended to provide a different and distinct regime for international commercial arbitrations held in India. Part I is applicable to domestic arbitrations as well as international commercial arbitrations held in India. In contrast, Part II applies only to the enforcement of foreign awards."

Further, in *GE Power Conversion India Pvt. Ltd. v. PASL Wind Solutions Pvt. Ltd.*, (2021) 7 SCC 1, the Hon'ble Supreme Court held at paragraph 60 that Part I of the Act, including Section 34, is applicable to international commercial arbitrations seated in India:

> "Part I of the 1996 Act applies to international commercial arbitrations held in India. Therefore, an application under Section 34 can be made to set aside an award made in an international commercial arbitration held in India."

16. In *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.*, (2008) 14 SCC 271, the Hon'ble Supreme Court held that:

> "The purpose of the Act, thus, is to encourage arbitration as an alternative dispute resolution process. By reason of

Section 2(1)(f) of the Act, the term 'International Commercial Arbitration' has been defined. For an arbitration to be an international commercial arbitration, the requirement of the definition is that at least one of the parties must be a person of the kind specified in sub-clauses (i) to (iv) of Section 2(1)(f)."

17. Thus, the present arbitration with the seat in India and one party being a foreign body corporate is an International Commercial Arbitration to which Part I of the Act applies, and the challenge under Section 34 is therefore maintainable before the courts in India. However, the legal significance of the international character of arbitration cannot be overlooked, the ground of "patent illegality" contained in Section 34(2A) is available only in domestic arbitrations and does not apply to international commercial arbitrations**. As held by the Hon'ble Supreme Court in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)*, (2019) 15 SCC 131-**

" It will be noticed that Section 34(2A) applies only to a domestic award not involving an international commercial arbitration… The ground of "patent illegality" added by Section 34(2A) is, therefore, not available for international commercial arbitrations…

. …In the case of international commercial arbitrations held in India, a challenge can be made only on the grounds contained in Sections 34(2)(a) and 34(2)(b), and Section 34(2A) would not apply."

18. The learned Commercial Court, after being directed by this Court vide remand order dated 15.09.2022 to specifically adjudicate the question of ICA status, failed to return any substantive finding on merits. The Court below merely observed that the appellant had not filed the relevant documents to substantiate the ground an observation that is incorrect on the face of the record, inasmuch as the incorporation of the respondent as an Australian company is an undisputed fact and the contract itself discloses the respondent's Australian address and registration.

19. In view of the above, this Court holds that the present arbitration is an International Commercial Arbitration within the meaning of Section 2(1)(f)(ii) of the Act of 1996. The application under Section 34 of the Act is maintainable. However, the ground of "patent illegality" under Section 34(2A) is not available to the appellant. The challenge can succeed only if the award falls within the grounds enumerated in Section 34(2)(a) or Section 34(2)(b) of the Act. Issue No. I is answered accordingly.

ISSUE NO. II — LIMITATION UNDER SECTION 34(3)

20. The statutory provision governing the period for challenging an arbitral award is Section 34(3) of the Act of 1996, which reads as under:

> "Section 34(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."

21. The learned Commercial Court, in its impugned order, held that the period of limitation must be computed from 15.02.2018 (date of the original award) because the Section 33 application was filed by the respondent (claimant) and not by the appellant. The Court below held that the challenge period expired on 12.06.2018 (three months from 15.02.2018 + 30 days condonable delay), and since the application was filed on 06.08.2018, it was barred by limitation. This finding is legally erroneous for the reasons that follow.

22. A plain reading of Section 34(3) shows that where "a request had been made under Section 33," the limitation period runs from "the date on which that request had been disposed of by the arbitral tribunal." The section does not state that the request must have been made by the party filing the Section 34 application. The language of the provision is unambiguous, it uses the passive phrase "if a request had been made," without any qualification as to which party made it. The object of the provision is evidently to ensure that the party challenging the award has access to the final, corrected version of the award before the limitation period commences.

23. In the present case, it is an admitted position that the respondent filed an application under Section 33 of the Act, and the arbitrator passed a corrected/modified award on 13.03.2018. The original award of 15.02.2018 was thereby modified in material respects specifically, Clauses 1 and 2 of Para 102 were amended to clarify the inclusion of the bank guarantee amount. A party challenging an award must be entitled to challenge the final, operative version of

the award. Since the corrected award was passed on 13.03.2018, and the Section 34 application was filed on 06.08.2018, the application is within the maximum period of three months plus thirty days (13.03.2018 + 3 months = 13.06.2018 + 30 days = 13.07.2018). At the very best, even if the condonable period of 30 days is required, the delay is minimal and ought to have been condoned.

24. The Hon'ble Supreme Court in *State of Himachal Pradesh v. Himachal Techno Engineers*, (2010) 12 SCC 210, has held that the period under Section 34(3) commences from the receipt of the award by the party, and that a corrected award under Section 33 sets a fresh period of limitation running from the date of correction. This position has also been affirmed in *Union of India v. Tecco Trichy Engineers & Contractors*, (2005) 4 SCC 239, wherein the Court held at paragraph 8:

> "8. The period of limitation of three months provided under sub-section (3) of Section 34 commences from the date of receipt of the arbitral award. Such receipt has to be of a signed copy of the award, delivered to the party. If a request has been made under Section 33, the period of three months would commence from the date on which the request made under Section 33 has been disposed of by the arbitral tribunal."

25. The reasoning of the learned Commercial Court that the Section 33 request was made by the respondent and hence cannot extend the limitation for the appellant is contrary to the plain text of Section 34(3) and the above authorities. The corrected award is the final and operative award, and it is that award which the appellant has sought to challenge. The limitation period therefore runs from 13.03.2018. The application filed on 06.08.2018 is, at most, beyond

three months by approximately 26 days, which falls within the condonable period of 30 days. In any event, the appellant being a government department, adequate cause exists for the short delay.

26. During the course of hearing, learned senior counsel for the respondent did not dispute that on the question of limitation, the Court below already gave its finding on 03.07.2019 held that application is within limitation and dismissed the application of respondent filed under section 34(3) of the Arbitration Act. We find substance in the argument of learned counsel for the appellant that the final order of Court below on the question of limitation runs contrary to its previous order. After having dismissed the application under Section 34(3) of Arbitration Act filed by the respondent, it was no more open to the Court below to take a different view. Thus, the finding of Court below to the extent of limitation is certainly perverse and cannot sustain judicial scrutiny. Since in the impugned order an incorrect finding is given that application was barred by limitation, therefore we hold the application was within time. The application is held to be within limitation. Issue No. II is decided accordingly.

ISSUE NO. III - JURISDICTION UNDER M.P. MADHYASTHAM ADHIKARAN ADHINIYAM, 1983

27. Appellants take an additional objection that private arbitration could not be appoint according to *M.P. Act, 1983 and disputed only be resolve by the M.P. Madhyastham Tribunal. Respondent object on the grounds of that the rule of waiver applied, under section 4 of the act once waive the objection regarding the jurisdiciion, it cannot be raised after passing the award. These issues are no*

longer res integra. In Gayatri Project Ltd. v. M.P. Road Development Corpn. Ltd., (2025) 10 SCC 750, the Hon'ble Apex Court observed that it would be open for the parties to raise an objection regarding lack of jurisdiction, in view of the applicability of the M.P. Act, 1983, at the stage of Sections 34 and 37 of the Arbitration and Conciliation Act, 1996. However, such objections cannot be the sole ground for setting aside the award. In other words, if there are independent valid grounds for setting aside the award, this objection may be considered along with them. In such a situation, the dispute may then be referred to the M.P. Madhyastham Tribunal for adjudication in accordance with the M.P. Act, 1983. It is evident from the record that the high court appoint an arbitrator with the consent of the both party and both party allowed to passed an award by arbitrator, but this case is entirely deferent front the Gaitri case because in present case the contract is a internation contract therefore Indian law like M.P. Madhyastham Act, 1983 and arbitration conciliation act 1996 does not apply as per agreement of contract. Therefor the award passed by arbitration patently illegal.

28. It is not disputed that the contract in question is a "works contract" within the meaning of the Adhiniyam, 1983. The appellant has raised the ground that the Arbitral Tribunal lacked jurisdiction in view of the applicability of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter "the Adhiniyam, 1983"). It is submitted that the contract in question is a "works contract" within the meaning of the Adhiniyam, 1983, and hence the Madhyastham Tribunal had exclusive jurisdiction.

29. These issues are no longer res integra. In *Gayatri Project Ltd. v. M.P. Road Development Corpn. Ltd.*, (2025) 10 SCC 750, the Hon'ble Apex Court has comprehensively laid down the framework governing the interplay between arbitration under the Act of 1996 and the jurisdiction of the M.P. Madhyastham Tribunal. The relevant observations of the Apex Court, at paragraphs 66.1 to 66.6, read as under:

> "66.1. Where arbitration proceedings are ongoing and no statement of defence has been filed, it is open to the parties to raise an objection regarding lack of jurisdiction due to the applicability of the M.P. Act, 1983. The parties may also approach the High Court under Article 227 of the Constitution for transfer of the proceedings to the M.P. State Arbitration Tribunal.
>
> 66.2. Where arbitration proceedings are ongoing but the statement of defence has already been filed (i.e., the stage for raising jurisdictional objections has passed), such objection shall not be entertained. Since proceedings have substantially progressed, transfer to the M.P. State Arbitration Tribunal would not be appropriate, and the arbitration should be allowed to conclude.
>
> 66.3. As held in M.P. Rural Road Development Authority v. L.G. Chaudhary Engineers & Contractors, (2018) 10 SCC 826, where arbitration proceedings have concluded and an award has been passed, and no jurisdictional objection was raised at the appropriate stage, the award cannot be set aside solely on the ground of lack of jurisdiction.
>
> 66.4. Any award passed by an Arbitral Tribunal under the 1996 Act, in cases where the M.P. Act, 1983 was otherwise applicable, may be challenged under Section 34 and thereafter Section 37 of the 1996 Act, along with other relevant provisions.
>
> 66.5. Such an award must, however, be executed in accordance with the provisions of the M.P. Act, 1983.

> 66.6. Where an objection regarding applicability of the M.P. Act, 1983 was raised in the written statement or statement of defence, but no steps were taken to challenge jurisdiction under Section 16 of the 1996 Act, or such challenge was rejected under the legal position prevailing prior to the decision in L.G. Chaudhary (2), then, in light of Modern Builders v. State of M.P., (2024) 10 SCC 637, the award shall not be set aside solely on the ground of lack of jurisdiction."

30. Applying the principles laid down in *Gayatri Project Ltd.* to the present case, the arbitration proceedings have been concluded, and the award has been passed. The jurisdictional objection regarding the Adhiniyam, 1983 was raised if at all neither at the stage of filing a statement of defence, nor by way of a petition under Section 16 of the Act of 1996 before the arbitrator, nor under Article 227 of the Constitution during the currency of the proceedings. It has been raised for the first time at the post-award stage under Section 34. In terms of paragraph 66.3 of *Gayatri Project Ltd.*, the award cannot be set aside solely on the ground of lack of jurisdiction. Moreover, this is an International Commercial Arbitration, which raises a serious question as to whether the Adhiniyam, 1983 a state legislation could operate to oust the jurisdiction of an arbitral tribunal constituted under an agreement that itself contemplated UNCITRAL rules for a foreign consultant.

31. Furthermore, in terms of paragraph 66.4 of *Gayatri Project Ltd.*, the jurisdiction to challenge the award lies under Section 34 and Section 37 of the Act of 1996. Since we have found on Issue No. III that no valid ground under Section 34(2) has been made out for setting aside the award, the Adhiniyam objection cannot independently sustain the challenge. As clarified in paragraph 66.6,

the award cannot be set aside solely on the ground of lack of jurisdiction. Issue No. IV is answered accordingly.

32. Effect of International Commercial Arbitration is whether the award is Nulty due to appointment of the arbitrator by High Court in ICA. That objection neither raised by the petitioner nor the respondent during the arbitration proceeding nor the appeal under 34/37 of the Act.

33. As per the agreement clause 8.2 Disputes shall be settled by arbitration in accordance with the provisions given as under: -

8.2. Disputes shall be settled by arbitration in accordance with the following provisions:

(i) Any dispute controversy, or claim arising out of or relating to the contract or the breach termination or invalidity thereof shall be settled by arbitration in accordance with following provisions;

8.2 (ii) Each dispute submitted by a Party to arbitration shall be heard by-a sole arbitrator or an arbitration panel composed of three arbitrators, in accordance with the following provisions:

(a) Where the Parties agree that the dispute concerns a technical matter, they may agree to appoint a sole arbitrator or, failing agreement on the identity of such sole arbitrator within thirty (30) days after receipt by the other Party of the proposal of a name for such an appointment by the Party who initiated the proceedings, either Party may apply to the President, Institution of Engineers India, New Delhi, for a list of not fewer than five nominees and, on receipt of such list, the Parties shall alternate strike names there from, and the last remaining nominee on the list shall be the sole arbitrator for the matter in dispute. If the last remaining nominee has not been determined in this manner within sixty (60) days of the date of the list, the President, Institution of Engineers India, New Delhi, shall appoint,

upon the request of either Party and from such list or otherwise, a sole arbitrator for the matter in dispute.

(b). Where the Parties do not agree that the dispute concerns a technical matter, the Client and the Consultants shall each appoint one arbitrator, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel. If the arbitrators named by the Parties do not succeed in appointing a third arbitrator within thirty (30) days after the latter of the two arbitrators named by the Parties has been appointed, the third arbitrator shall, at the request of either Party, be appointed by Secretary, the Indian Council of Arbitration, New Delhi.

(c) If, in a dispute subject to Clause. 7.2 (ii) (b), one Party fails to appoint its arbitrator within thirty (30) days after the other Party has appointed its arbitrator, the Party which has named an arbitrator may apply to the Secretary, Indian Council of Arbitration, New Delhi, to appoint a sole arbitrator for the matter in dispute, and the' arbitrator appointed pursuant to such application shall be the sole arbitrator for that dispute.

8.3. Rules of Procedure Arbitration proceedings shall be conducted in accordance with procedure of the Arbitration & Conciliation Act 1996, of India unless the Consultant is a foreign national/firm, where arbitration proceedings shall be conducted in accordance with the rules of procedure for arbitration of the United Nations Commission on International Trade Law (UNCITRAL) asin force on the date of this Contract.

8.4 Substitute Arbitrators, If for any reason an arbitrator is unable to perform his function, a substitute shall be appointed in the same manner as the original arbitrator.

8.5. Qualifications of Arbitrators the sole arbitrator or the third arbitrator appointed pursuant to paragraphs (a) through (c) of Clause 7.2.(ii) hereof shall be an internationally recognized legal or technical expert with extensive experience in relation to the matter in dispute.

8.6 Miscellaneous

In any arbitration proceeding hereunder:

(i) Proceedings shall, unless otherwise: agreed by, the Parties, be held in Bhopal. (ii) the English language shall be the official language for all purposes‘ and.‘(iii) the decision of the sole arbitrator or of a majority of the arbitrators (or of the third arbitrator if there is no such majority) shall be final and binding and shall be enforceable in any court of competent jurisdiction, and the Parties hereby waive any objections to or claims of immunity in respect of such enforcement.

34. We considered the rule from the agreement which provided that Arbitration proceedings shall be conducted in accordance with procedure of the Arbitration & Conciliation Act 1996, of India unless the Consultant is a foreign national/firm, where arbitration proceedings shall be conducted in accordance with the rules of procedure for arbitration of the United Nations Commission on International Trade Law (UNCITRAL) as in force on the date of this Contract. Substitute Arbitrators, if for any reason an arbitrator is unable to perform his function, a substitute shall be appointed in the same manner as the original arbitrator.

35. We also considered the Qualifications of Arbitrators from the agreement which provided that the Qualifications of Arbitrators the sole arbitrator or the third arbitrator appointed pursuant to paragraphs (a) through (c) of Clause 8.2.2 here of shall be an internationally recognized legal or technical expert with extensive experience in relation to the matter in dispute.

36. We further considered the Miscellaneous provision from the agreement which provided that in any arbitration proceeding hereunder:

(i) Proceedings shall, unless otherwise: agreed by, the Parties, be held in Bhopal. ”(ii) the English language shall be the official

language for all purposes‘ and.‘(iii) the decision of the sole arbitrator or of a majority of the arbitrators (or of the third arbitrator if there is no such majority) shall be final and binding and shall be enforceable in any court of competent jurisdiction, and the Parties hereby waive any objections to or claims of immunity in respect of such enforcement.

37. After considered the above provision we are the opinion that each party was agreed that the place of the arbitration will be Bhopal and qualification of the arbitrator must be as Clause 8.2.2 that he shall be an internationally recognized legal or technical expert with extensive experience in relation to the matter in dispute. And Arbitration proceedings shall be conducted in accordance with procedure of the Arbitration & Conciliation Act 1996, of India unless the Consultant is a foreign national/firm, where arbitration proceedings shall be conducted in accordance with the rules of procedure for arbitration of the United Nations Commission on International Trade Law (UNCITRAL) as in force on the date of this Contract. Substitute Arbitrators, it is clear from the agreement that the respondent company is registered in Australia and its office at Australia. Respondent argued that the respondent company having its office also at Gurgaon therefore the agreement does not fall under the definition of international contract. Respondent company issued a power of attorney to conducted the work at India and power attorney holder opened his office at Gurgaon it does not mean the respondent company registered at India hence the one party of the contract is foreign nation and contract govern by foreign law therefore contract covered under the definition of 2a of the Arbitration Conciliation Act 1996 and Commercial Court

Bhopal failed to considered that aspects of the contract therefore we hold that the contract is a international contract arbitration and its govern by the foreign law as per the contract.

38. As per the condition of the agreement of contract, arbitrator shall be appointed by the President, Institution of Engineers India, New Delhi upon the request of either Party and from such list or otherwise, a sole arbitrator for the matter in dispute. In present case the sole arbitrator was appointed by the High court with the consent of both parties. But arbitrator does not possess the requisite qualification and knowledge of foreign law, which is applicable to the dispute, therefore the consent does not validate the appointment of arbitrator in the contravention of the provision of contract. It is clarified by the Apex court in internation contract **the jurisdiction of Indian courts is excluded.** 2025 Supreme (SC) 1960 **Balaji Steel Trade V/S Fludor Benin S.A. & Ors. The court reasoned that since the arbitration clause in the BSA clearly designated Benin as the seat, and governed by Benin law, the jurisdiction of Indian courts is excluded. Furthermore, established legal principles mandate that unless clearly demonstrated, subsequent contracts do not override original agreements unless intended to novate.**

39. The Supreme Court on dismissed a plea seeking the appointment of an arbitrator in an international commercial arbitration, holding that once the principal contract is governed by foreign law and provides for a foreign-seated arbitration, Indian courts lose jurisdiction, irrespective of the Indian nationality of any party. *"Indian Courts have no jurisdiction to appoint an arbitrator*

for a foreign-seated arbitration, irrespective of the nationality or domicile of the parties

40. 2025 LiveLaw(Del) 102 **Hala Kamel Zabal Versus Arya Trading Ltd. and Others Delhi High court opined that the Validity of the appointment of Arbitrator in International Commercial Arbitration by the High Court was not per se illegal as it conformed to the arbitration agreement, despite the argument for Supreme Court appointment. In above cited case the condition was that** in the event a dispute cannot be resolved through conciliation pursuant to Article 27.1 here of within (15) days of such extended period as parties may agree, a party may refer the dispute or difference to binding arbitration as hereunder provided in accordance with the Arbitration and Conciliation Act, 1996. The arbitration shall be held in New Delhi. A sole Arbitrator shall be appointed by the Chief Justice of the Delhi High Court upon a reference made to him as per the provision of the Arbitration and Conciliation Act, 1996. The applicable law shall be Indian Law.

41. 2025 Live Law (Mad) 479 Madras High court opined that appointment of arbitrator by a High Court in case of an international commercial arbitration renders the award a nullity. Sections 4 and 11(6), Arbitration and Conciliation Act (“ACA”) are non-derogable and it is only the Apex Court which can appoint an arbitrator in an international commercial arbitration. We are the opinion without the condition of that appointment by the High Court is against the public policy therefore we agreed the finding of the Madras High Court.

42. Vide order dated 17.07.2013 High Court at Calcutta has appointed sole arbitrator shri S.C Pandey by AP no 719/13, 720/13. no party has opposed the appointment order of arbitrator given by High Court at Calcutta. The conjoint reading of Section 11(6) and Section 11(12)(a), ACA makes it abundantly clear that the power to appoint an arbitrator in an ICA lies exclusively with the Supreme Court. The High Court has no jurisdiction to appoint an arbitrator in an international commercial arbitration, and such power is in the exclusive domain of the Supreme Court. The aforesaid provisions are non-derogable and any order passed by the High Court appointing an arbitrator in ICA suffers from complete lack of jurisdiction and is a nullity in law. As to the contention that jurisdictional objection cannot be raised for the first time at the stage of Section 34. The plea of lack of inherent jurisdiction is open for examination even at the stage of Section 34 petition even when the same has not been raised before the arbitrator under Section 16. Parties by consenting to the appointment of the arbitrator could not cure what was on the face of it a clear case of inherent lack of jurisdiction. Analysing the provisions of ACA, we are the view, while ACA grants parties the freedom to design their own procedure for arbitration, this cannot extend to tinkering with the statutory power of the Court under Section 11(6), ACA which is non-derogable. Therefore consequence of such an appointment would be that tribunal shall be a coram-non-judice, the entire arbitral proceedings including all hearings and the Award shall be a nullity in law.

43. Issue regarding the validity of an arbitral award rendered in an international commercial arbitration (ICA) where the

appointment of the arbitrator(s) was done by the High Court. The appointment of an arbitrator by the High Court, instead of the Supreme Court, as stipulated under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the Act"), rendered the resultant arbitral award invalid.

44. The petitioners contended that the arbitral award was vitiated by the invalid appointment of the arbitrator. As per the appellant, the appointment of an arbitrator in an ICA should be made by the Supreme Court under Section 11(6) of the Act. Since the High Court appointed the arbitrator, the entire arbitral process stood vitiated from its inception. The petitioners relied on the principle that an order passed without jurisdiction is a nullity, as laid down in Hindustan Zinc Ltd. v. Ajmer Vidyut Vitran Nigam Ltd. (2019) 17 SCC 82. They argued that jurisdictional defects cannot be cured by consent or by participation in the proceedings.

45. The respondents argued that the arbitrator's jurisdiction should have been raised at the earliest stage, as required under Section 16 of the Act. Since the petitioners participated in the arbitration without objecting, they had waived their right to challenge the appointment. The respondents pointed out that under Section 34(2)(a)(v), an arbitral award can only be set aside if the composition of the tribunal was not in accordance with the parties' agreement. Respondent heavily reliance the principles laid down in *Gayatri Project Ltd.* to the present case, we are the considered opinion that principle could not applicable to international commercial arbitration where lack of jurisdiction constitute a tribunal.

46. The respondents contended that the petitioners had failed to show how the arbitrator's appointment had prejudiced them. They (the appellant) had participated in the arbitration, filed counterclaims, and only raised objections after the award was passed. The appointment of the arbitrator by the High Court was inconsistent with the requirement under Section 11(6) of the Act, which mandates that arbitrators in ICA should be appointed by the Supreme Court. However, the procedural irregularity did not automatically invalidate the arbitral award. That objections to the composition of an arbitral tribunal must be raised before the tribunal under Section 16 of the Act. Since the petitioners did not object at the appropriate stage, they were deemed to have waived their right to challenge the arbitrator's appointment. *Narayan Prasad Lohia v. Nikunj Kumar Lohia* [(2002) 3 SCC 572], where the Supreme Court held that procedural defects in an arbitrator's appointment do not necessarily invalidate an award, especially if the party fails to object at the proper stage.

47. The respondent argued that the Section 4 of the Act states that a party who knowingly participates in arbitration without raising objections in time is deemed to have waived its right to object later. The petitioners actively participated in the arbitration, filed counterclaims, and only raised objections post-award, making their challenge legally untenable. While procedural irregularities existed, they did not constitute a violation of India's fundamental legal framework. The appointment of the arbitrator, though procedurally flawed, did not vitiate the award. The doctrine of *kompetenz-kompetenz*, which allows an arbitral tribunal to rule on its own jurisdiction. Parties to arbitration agreements must be

vigilant and assert their rights promptly to avoid losing them due to procedural default.

48. In case Hindustan *Zinc Ltd. v. Ajmer Vidyut Vitran Nigam Ltd.*, (2019) 17 SCC 82 it was held that it is settled law that if there is an inherent lack of jurisdiction, the plea can be taken up at any stage and in collateral proceedings. Followed the judgement *Kiran Singh* v. *Chaman Paswan* [*Kiran Singh* v. *Chaman Paswan*, (1955) 1 SCR 117

"*6.* … It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was *coram non judice*, and that its judgment and decree would be nullities."

49. We are the opinion that the appointment of arbitrator in international commercial arbitration by the High court is not a procedural flawed but it is a lack of jurisdiction. *Narayan Prasad Lohia v. Nikunj Kumar Lohia* (2002) 3 SCC 572 is not applicable to present case because that case was not related to the international commercial arbitration. We have fully agreed of the judgement of madras high court and disbarment of Delhi high court. Arbitrator appointed in international commercial arbitration by High Court with the consent of the party is not a procedural flawed, it is a lack of jurisdiction which is not confirmed by the consent of the parties.

50. In view of the above discussions, the only possible conclusion is that the order of High Court passed by order dated 06.05.2015 in writ petition (W.P. No. 7781/2013) for appointment of an arbitrator, in constituting the Arbitral Tribunal suffers from an inherent lack of jurisdiction. Resultantly, the impugned award dated 15.02.2018 passed by such a Tribunal shall be a coram-non-judice and a nullity in law. Appeal is allowed by setting aside the award dated 15.02.2018 along with the order dated 22.06.2023 passed by the learned Commercial Judge / 8th District Judge, Bhopal in M.J.C. (Arbitration Case No. 82/2018).

51. With the above, both the Arbitration Appeals disposed of.

(VIVEK RUSIA)
JUDGE

(PRADEEP MITTAL)
JUDGE

praveen