

**HIGH COURT OF JUDICATURE FOR RAJASTHAN  
BENCH AT JAIPUR**

S.B. Arbitration Application No. 117/2018

Continental Engineering Corporation Limited, Having Its Address At No. 95 Dun Hua South Road Section 2 Taipei 106 Taiwan City And Having Registered Address At Flat No. 211 Pocket A/3 Sector 7 Rohini New Delhi 110085 And Project Site Office At Old Police Head Quarter Near Jaleb Chowk Infront Of City Palace Near Fro Office Badi Chouper Jaipur Rajasthan Through Its Power Attorney Holder (Dgm Contracts) Mr. Lilanand Chaudhary

----Petitioner

Versus

Jaipur Metro Rail Corporation, Khanji Bhawan Tilak Marg C-Scheme Jaipur 302005

----Respondent

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| For Petitioner(s) | : | Mr. Anil Kher, Senior Advocate, Mr. Anant Kasliwal, Senior Advocate with Mr. Vaibhav Kasliwal and Mr. Shashank Kasliwal through VC |
| For Respondent(s) | : | Mr. Rajendra Prasad, Senior Advocate with Mr. Sandeep Pathak and Ms. Vertika Mehra through VC                                      |

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**HON'BLE MR. JUSTICE PANKAJ BHANDARI**

**Order**

**ORDER RESERVED ON** :: **27/01/2022**

**ORDER PRONOUNCED ON** :: **02/03/2022**

1. The applicant - Continental Engineering Corporation Limited has preferred this arbitration application under Section 10(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to as "the Commercial Courts Act") with the prayer that the

application be allowed and the matter be adjudicated on merits in the interest of justice.

2. It is contended by Mr. Anil Kher, Senior Advocate, appearing with Mr. Anant Kasliwal, Senior Advocate and Mr. Vaibhav Kasliwal appearing for the applicant that the award was passed on 20.12.2017. The applicant within 90 days filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") before the Commercial Court on 16.3.2018. The non-applicant raised objections to the maintainability of application under Section 34 of the Act before the Commercial Court on 22.10.2018. The Commercial Court vide order dated 22.11.2018 has held that since it is an international commercial dispute, the application is not maintainable before the Commercial Court. The Commercial Court has returned the application under Order 7 Rule 10 CPC for presentation before the appropriate Court. It is contended that file was taken back from the Commercial Court on 6.12.2018 and was filed before the High Court on 10.12.2018. In the application filed by the applicant, the Registry has pointed out certain defects and in view of those defects, a fresh application was filed by the applicant on 14.2.2019.

3. It is contended by learned counsel for the applicant that since the application under Section 34 of the Act has been returned for presentation before the appropriate Court and the same has been filed before the High Court, which has the jurisdiction to deal with the application under Section 34 of the Act when the matter pertains to an international commercial dispute, the High Court should therefore now adjudicate the objections raised under Section 34 of the Act.

4. Counsel for the applicant has placed reliance on *M.P. Steel Corporation Versus Commissioner of Excise*: **(2015) 7 SCC 58**; *Asif Ahmedally Porbunderwalla Versus Mrs. Daulat Akbarali Porbunderwalla & Ors.*: **2014 (2) Mh.L.J. 210**; *All India Reporter Limited Versus Ramchandra Dhondo Datar*: **AIR 1961 Bom 292**; *United Bank of India Versus Naresh kumar & Ors.*: **(1996) 6 SCC 660**; *Assam Ashok Hotel Corporation Ltd. Versus Northeast Chamber of Commerce and Industry (NECCI) & Ors.*: **(2016) 4 Gauhati Law Reports 532** and *International Continental Caoutchoue Compagnie Versus Mehta & Co.*: **AIR 1927 Cal 758**.

5. Mr. Rajendra Prasad, Senior Advocate, appearing with Mr. Sandeep Pathak, has vehemently opposed the application. It is contended that no application as such has been filed under Section 34 of the Act before the High Court. It is contended that under sub-clause (1) of Rule 4 of the Rajasthan Arbitration Rules, 2003 (hereinafter referred to as "the Rules") a signed application has to be filed, verification of which is mandatory. It is also contended that as per Rule 8 of the Rules, if the requirement is not fulfilled, the Court may reject the same after affording opportunity of hearing. It is further contended that as per Rule 125 of the Rajasthan High Court Rules, every application must carry a heading depicting the name of the High Court. However, the application under Section 34 of the Act, which was filed before the Court below, has been annexed with the application under Section 10(1) of the Commercial Courts Act. Thus, the presentation itself is not in accordance with the Rajasthan High Court Rules.

6. It is also contended that even assuming for the sake of argument that application under Section 34 of the Act is duly filed,

the same has not been filed within the prescribed time. The award was passed on 20.12.2017 and the application, which was filed before the Commercial Court, was filed on 16.3.2018 and thereafter, it was held by the Commercial Court that the application under Section 34 of the Act is not maintainable before the Commercial Court on 22.11.2018. The application before the High Court was filed on 10.12.2018 and the present application has been filed on 14.2.2019 after an inordinate delay. Attention of this Court is drawn to sub-section (3) of Section 34 of the Arbitration Act, which states that 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. Further, the proviso to sub-section (3) of Section 34 of the Arbitration Act provides 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. It is argued that application has not been filed within 120 days as provided and the Court is barred from entertaining an application after 120 days.

7. It is contended that there is no application as such filed under Section 34 of the Act. Further, application has not been presented before the appropriate Officer of the High Court. It is also contended that Section 5 of the Act does not apply. At the most applicant can have the benefit of Section 14 of the Limitation Act, but no application under Section 14 of the Limitation Act has been filed with the application. It is argued by learned Senior

Advocate that way back on 22.10.2018 itself it was informed to the applicant that the application is not maintainable before the Commercial Court. The applicant, however, pursued the application under Section 34 before the Commercial Court, which ultimately returned his application.

8. It is contended that the Commercial Court should have rejected the application rather than returning it under Order 7 Rule 10 CPC as Order 7 Rule 10 CPC would not apply. It is also contended that even if, for the sake of argument, it is considered that Order 7 Rule 10 CPC applies and the application has been returned for presentation before the appropriate Court, fresh application ought to have been filed before the High Court in accordance with the High Court Rules after duly signing and verifying the application. It is also contended that the applicant has not been diligent and the application is not bonafide and the same deserves to be rejected.

9. Counsel has placed reliance on *Simplex Infrastructure Ltd. Versus Union of India*: **(2019) 2 SCC 455**, *Harshad Chimanlal Modi Versus DLF Universal Ltd & Anr.*: **(2006) 1 SCC 364**, *Sri Amar Chand Inani Versus The Union of India*: **(1973) 1 SCC 115**; *Hanamanthappa Versus Chandrashekarappa*: **AIR 1997 SC 1307**; *Allahabad Bank Versus Shank's (Steel Fab Pvt.Ltd. & Ors.)*: **AIR 2008 Cal 96**; *Madhavrao Narayanrao Patwardhan Versus State of Bombay*: **1959 SCR 564**; *Ramji Pandey & Ors. Versus Swaran Kali*: **(2010) 14 SCC 492**; *Rabindranath Samuel Dawson Versus Sivakami & Ors.*: **AIR 1972 SCC 730**; *Firm Ramnath Ramchandra Versus Firm Bhagatram & Co.*: **AIR 1960 Rajasthan 219**; *Govinda Menon Raman Menon & Ors. Versus Krishna Pillai Kesava Pillai & Ors.*: **AIR 1955 Travancore-Cochin 51**; *Indira*

*Gandhi National Open University Versus Sharad Das & Associates Pvt. Ltd.: O.M.P. (COMM) 26/2019 and Salazar Luis Anthony Marques (since Deceased) thr Lrs. Versus Mohd. Haroon Japanwala & Ors.: (2015) 217 DLT 261.*

10. I have considered the contentions and perused the material available on record.

11. The application, which has been filed before the High Court is an application under Section 10(1) of the Commercial Courts Act read with Section 151 of CPC. Section 10(1) of the Commercial Courts Act deals with the jurisdiction in respect of arbitration matters. Sub-section (1) of Section 10 of the Commercial Courts Act reads as under:

**“10. Jurisdiction in respect of arbitration matters**

—Where the subject-matter of an arbitration is a commercial dispute of a Specified Value and—

(1) If such arbitration is an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 that have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.”

12. Section 10 therefore, just deals with the jurisdiction in respect of international commercial arbitration matters. The prayer made for in the application under Section 10(1) of the Commercial Courts Act reads as under:

“It is, therefore, most humbly prayed that this Hon’ble Court may allow this application and may kindly adjudicate and decide the matter on merits in the interest of justice.”

13. As far as facts of the case are concerned, it is not disputed that the award was passed on 20.12.2017. The application under Section 34 of the Act was filed before the Commercial Court on 16.3.2018. The non-applicant raised objections to the maintainability of application under Section 34 before the Commercial Court on 22.10.2018. The Commercial Court vide order dated 22.11.2018 held that the application is not maintainable, however, it directed that the application be returned under Order 7 Rule 10 CPC for presentation before the proper Court. Though the order passed by the Commercial Court is not under challenge before this Court, however, from plain reading of Order 7 Rule 10 CPC, it is apparent that it applies to plaint and not to application. Rule 11 of the Rajasthan Arbitration Rules, 2003 reads as under:

**"11.** (1) Save as otherwise expressly provided in this Act or these rules, the following provisions of the Code of Civil Procedure, 1908 and as amended by C.P.C. (Amendment) Act, 1999 and 2002 shall apply to the proceedings before a Court in so far as they may be applicable thereto, namely,

(i) Sections 28, 31, 35, 35-A, 35-B, 107, 133, 135, 148-A, 151 & 152 and

(ii) Orders III, V, VI, IX, XIII, XIV, XVI to XIX, XXIV, XLI and XLII

(2) (a) For the purpose of facilitating application of the provisions referred to under sub-rule (1) the Court may construe them with such alterations not affecting the substance as may be necessary or proper to adopt to the matters before it; and

(b) The Court may for sufficient reasons proceed otherwise than in accordance with the said provisions if

it is satisfied that interest of the parties shall not thereby be prejudiced.”

14. There is no mention of Order 7 CPC in the Rajasthan Arbitration Rules, 2003. This Court is of the firm view that Order 7 Rule 10 of CPC could not have been applied by the Commercial Court and the Court should have just rejected the application as not maintainable before the Commercial Court. However, even treating the order having been passed under Order 7 Rule 10 CPC, the applicant ought to have complied with the provisions under Order 7 Rule 10-A CPC and the Rajasthan Arbitration Rules, 2003. As per sub-section (1) of Section 4 of the Rajasthan Arbitration Rules, 2003, every application under Sections 9, 14, 27, 34, 39 and 43 of the Act shall be made in writing duly signed and verified by the applicant.

15. It is pertinent to note that there is no endorsement about the return under Order 7 Rule 10 CPC. Rule 125 of the Rajasthan High Court Rules has not been complied with, as the application under Section 34 of the Arbitration Act, which is filed before the Court does not carry the heading and the application under Section 34 of the Arbitration Act, which was filed before the District Court, is filed by the applicant as an annexure.

16. The application under Section 34 of the Arbitration Act has not been filed before the High Court, though, return of application under Section 34 of the Act does not fall within the purview of Order 7 Rule 10 CPC but even assuming that application was returned for presentation before the proper Court, the said application, which was returned, ought to have been filed before the proper Officer of the High Court. Annexing the application filed before the District Court under Section 34 with the application

under Section 10(1) of the Commercial Courts Act cannot be treated as filing of the application under Section 34 of the Act before the High Court.

17. In *Amar Chand Inani* (supra), the Apex Court has held that presentation afresh is mandatory. In *Simplex Infrastructure Ltd.* (supra) and *Harshad Chimanlal Modi* (supra), it is held by the Apex Court that even if Order 7 Rule 10 applies, fresh application has to be filed. This Court is of the considered view that as soon as an objection was raised by the non-applicant about the jurisdiction of the Commercial Court, the applicant should have withdrawn the application from the Commercial Court and should have preferred a fresh petition before the High Court after moving an application under Section 14 of the Limitation Act for condoning the delay for proceedings before the wrong Court. As per proviso to sub-section (3) Section 34, 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. Proviso to sub-section (3) of Section 34 further provides that if the Court is not 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.

18. The award was passed on 20.12.2017 and the application was filed before the Commercial Court on 16.3.2018 i.e. after 86 days of passing of the award. It was observed by the Commercial Court that an application under Section 34 of the Act is not maintainable before the Commercial Court vide order dated 22.11.2018. Application under Section 10(1) of the Commercial Courts Act was filed before the High Court on 10.12.2018. The

applicant did not pursue or remove the defects pointed out by the Registry and finally, filed the application on 14.2.2019.

19. No application for extension of time was filed by the applicant. This Court is therefore of the considered view that there is no presentation as such of any application under Section 34 of the Act before the High Court. This Court is also of the considered view that no application under Section 10(1) of the Commercial Courts Act is required to be filed as Section 10(1) only deals with the jurisdiction in respect of arbitration matters. Proper course for the applicant was to file a fresh arbitration application or present the arbitration application, which was returned before the proper Officer of the Court. No application under Section 34 of the Act has been filed in accordance with the Rajasthan Arbitration Rules, thus this Court is of the considered view that applicant is not entitled to any relief.

20. There being no application under Section 34 of the Act having been presented before a proper Officer of the Court, there being no application for condonation of delay, there being no relief claimed in the application under Section 10(1) with regard to the arbitration application, the present arbitration application therefore deserves to be and is accordingly dismissed. No orders as to cost.

(PANKAJ BHANDARI),J

SUNIL SOLANKI/PS