2026:CHC-OS:206

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/245/2024

IA NO: GA/1/2022

KESSELS ENGINEERING WORKS PVT. LTD.
VS
NEO METALICKS LIMITED

WITH

EC/143/2021

NEO METALIKS LTD.
VS
KESSELS ENGINEERING WORKS PVT. LTD.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 19th December, 2025.

Appearance:
Mr. Pradeep Chhindra, Adv.(via VC)
Mr. Pratik Ghose, Adv.
Mr. Avishek Roy Chowdhury, Adv.
...for Petitioner/Kessels Engineering.

Mr. Pranit Bag, Adv.
Mr. Dhruv Chadha, Adv.
Mr. Sidhartha Sharma, Adv.
Mr. Rishav Dutt, Adv.
Ms. Patrali Ganguly, Adv.
..for Neo Metaliks.

The Court: During arguments on the merits of the application under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act"), a query was posed by the Court as to whether the present applications under Sections 34 and 36 of the said Act are maintainable before this Court, by operation of Section 42 of the 1996 Act, since an earlier application under Section 14 of the said Act had been preferred before the Delhi High Court and was decided by it.

Learned Counsel appearing for the petitioner in the application under Section 34 of the 1996 Act contends that if the parties choose a particular forum as the seat of arbitration, the courts having jurisdiction over such seat will be the courts of competent jurisdiction for taking up applications arising out of the arbitral proceeding. It is pointed out that Section 42 of the 1996 Act uses the expression "Court", which, in turn, relates back to Section 2(1) (e) (i) of the said Act in case of a domestic arbitration and as such, the expression "Court" used in Section 42 has to be read as a "court of competent jurisdiction". Learned Counsel cites in support of the proposition the following Judgments:

1. *(2020) 4 SCC 234 [BGS SGS SOMA JV vs NHPC Limited];*
2. *(2020) 4 SCC 310*
   [Hindustan Construction Company Limited vs NHPC Limited];
3. *(2023) 1 SCC 693*
   [BBR (India) Private Limited vs SP Singla Construction Company Private Limited]

Learned Counsel appearing for the respondent in the application under Section 34, on the other hand, seeks to argue that although the bar under Section 42 may be applicable to an application under Section 34 of the 1996 Act by operation of Section 42, such fetter is not attracted in case of an application under Section 36 of the said Act. By virtue of Section 32 of the 1996 Act, it is submitted, an arbitration proceeding reaches its terminus with the passing of the award.

Section 36 of the 1996 Act provides for enforcement of the award akin to a Civil Court's decree and, as such, takes place only after termination of the arbitration proceeding. Coming back to Section 42 of the 1996 Act, it is pointed out that the expression used therein is "that Court alone shall have

jurisdiction over the *arbitral proceedings*". Thus, if the arbitral proceeding is itself terminated, an application under Section 36 does not acquire the character of an application in respect of the "arbitral proceeding" and, hence, cannot come within the purview of Section 42.

In support of such contention, learned Counsel cites *Sundaram Finance Limited Versus Abdul Samad And Another,* reported at *(2018) 3 SCC 622* where the Hon'ble Supreme Court, by placing reliance on Sections 32, 36 and 42 of the 1996 Act respectively, came to such conclusion.

Learned Counsel submits that in subsequent judgments as well, the same line of reasoning was followed.

Upon a careful perusal of the judgments in *BGS SGS SOMA JV (Supra)* and the subsequent judgments following the same, this Court is of the considered opinion that three possibilities have been envisaged by the Hon'ble Supreme Court in such situations as the present one.

First, if the parties do not choose a seat of arbitration at all, Section 42 of the 1996 prevails and the first application in connection with an arbitral proceeding or the arbitral agreement determines the Court which has jurisdiction to entertain all subsequent applications arising out of the said agreement or proceeding.

Under the second scenario, if the parties have chosen a seat, but after the first application is filed before one of the courts which might possibly have been a seat of arbitration, in such cases also Section 42 prevails and the Court where the first application was made would be the jurisdictional court for the subsequent applications, despite the parties having frozen their choice on one of the possible seats, but subsequent to the first application being filed.

In the third scenario, which fits the facts of the present case, if the parties have chosen one of the two alternative choices which were contemplated in the arbitration agreement to be the seat of arbitration, before the first application is filed, the Courts having jurisdiction over the seat of arbitration, as chosen by the parties by exercise of their party autonomy, will be the Court which has jurisdiction to entertain all applications.

In such cases, the mere fact of the first application having been filed in a different Court would be immaterial for the simple reason that such Court would not be construed to be a competent Court of jurisdiction as contemplated in Section 42, read with Section 2(1)(e)(i), of the 1996 Act.

In the present case, the relevant clause in the agreement between the parties stipulated the place of arbitration to be "Delhi or Kolkata". Already, prior to the first application being filed before Delhi High Court under Section 14 of the 1996 Act, multiple sittings of the arbitration proceeding had taken place in Kolkata and the parties had expressed their choice of seat to be Kolkata. Thus, the third proposition enumerated in *BGS SGS SOMA JV (supra)* would apply and it is the courts at Kolkata which would have jurisdiction. Although the first application was filed before the Delhi High Court, the same was not a court of competent jurisdiction for the purpose of attracting Section 42 of the 1996 Act.

It is also relevant to mention that even the Delhi High Court, while deciding the application under Section 14, had categorically observed that several sittings had already taken place in Kolkata and, as such, it is the courts at Kolkata which would have jurisdiction.

The said proposition has some similarity to quantum mechanics, inasmuch as the choice of the parties remained inchoate and in the realm of

mere possibilities till an option was exercised by the parties as to which of the two possibilities would be the chosen seat of arbitration. However, once such option is exercised by choosing Kolkata to be the seat of arbitration, the inchoate possibilities became frozen into reality and the other possibility, that is, Delhi, no longer remained the seat of arbitration.

With utmost respect, although the judgment rendered in *Sundaram Finance (supra)* is binding on this Court under Article 14 of the Constitution of India, some doubt may be raised inasmuch as the logic therein might have a touch of inherent contradiction. I say so with utmost deference, since the language used in Section 42 is not restricted to the expression "that Court alone shall have jurisdiction over the arbitral proceedings", but moves on to mention "and all subsequent applications *arising out of* that agreement and the *arbitral proceedings* shall be made in that Court and in no other Court."

Thus, even applications "arising out of" arbitral proceedings have been covered within the umbrella provision of Section 42, which is wider in connotation than the expression "in respect of" used in the earlier part of the said Section.

Going by such logic, an application under Section 34 as well as one under Section 36 of the 1996 Act are applications "arising out of" the arbitral proceedings, despite the arbitral proceedings have already been terminated by dint of Section 32 of the 1996 Act.

Hence, when faced with the dilemma as to whether the proposition in *BGS SGS SOMA (supra)*, as followed in *Hindustan Construction Limited (supra)* and *BBR (India) Private Limited (supra)* or that of *Sundaram Finance (super)* should be followed in the present case, the judgment in *BGS SGS SOMA JV (supra)* and the two judgments following it are found to be more apt in the

facts and circumstances of the instant case. As such, with humility, the principle laid in *BGS SGS SOMA JV (supra)* is the one which is required to be followed universally, both in respect of applications under Section 36 as well as Section 34 of the 1996 Act.

Hence, the issue of maintainability is decided in favour of the applicants in both the applications under Section 36 as well as Section 34 of the 1996 Act. This Court thus observes that it is this Court which has jurisdiction to take up the applications under Section 36 as well as Section 34 of the 1996 Act pending before it.

Accordingly, learned Counsel for the parties are requested to continue with their arguments addressing the merits of the matter.

Heard in part.

List the matter for further hearing on January 09, 2026.

(SABYASACHI BHATTACHARYYA, J.)

S.A./GH.
AR(CR)