



2026:CGHC:9189-DB

The date when the judgment is reserved	The date when the judgment is pronounced	The date when the judgment is uploaded on the website	
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31.01.2026	23.02.2026	--	23.02.2026

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HIGH COURT OF CHHATTISGARH, BILASPUR

ARBA No. 42 of 2023

- State of Chhattisgarh Through Secretary, Public Works Department, Represented By Project Manager, ADB Project, Mahanadi Bhawan, Mantralaya, Naya Raipur, Chhattisgarh.

... Appellant

versus

- SMEC International (Wrongly Mentioned In The Cause Title As Intercontinental) Pty. Ltd. S-559, First Floor, Rear Side, Greater Kailash -2, New Delhi - 110001

... Respondent

For Appellant	: Mr. Anand Dadariya, Dy. Advocate General with Mr. Avinash Singh, Govt. Advocate.
For Respondent	: Anmol Singh, Advocate on behalf of Mr. Prakash Tiwari, Advocate.

**D.B. : Hon'ble Smt. Justice Rajani Dubey &
Hon'ble Shri Justice Radhakishan Agrawal**

(CAV Order)

Per Rajani Dubey, J

1. The Appellant – State filed this arbitration appeal under Section 37 of the Arbitration and Conciliation Act, 1966 (for short 'the Act, 1966') read with Section 13 of the Commercial Courts, Commercial Court Act, 2015 (for short "the Act of 2015") against order dated 11.07.2023 passed by the learned Commercial Court (District Level), Naya Raipur in MJC No.23/2022, whereby the application preferred by the appellant herein under Section 34 against the arbitral award dated 18.07.2022 passed by the learned Sole Arbitrator was challenged and the learned Trial Court returned the original petition with documents holding that the learned Commercial Court has no jurisdiction to decide the case under Section 34 of the Act, 1966.
2. Brief facts of the case are that the applicant and a joint venture comprising SMEC India Pty. Limited and SMEC International Private Limited had entered into a contract for providing consultancy services in relation to the project of construction, supervision, rehabilitation, and up-gradation of Group 'A' Roads in Raipur. The total contract value was Rs.

25,06,90,736/- and USD 3,16,822/-, inclusive of service tax at the then prevailing rate of 13.36% on the quoted rates of items. The agreement between the parties was executed on 03.03.2015. Subsequently, a dispute arose between the parties with regard to payment of service tax and Goods and Services Tax (GST) by the respondent and its reimbursement by the applicant. According to the respondent, under the terms and conditions of the contract agreement, they were entitled to reimbursement of the service tax and GST paid by them, and such reimbursement was contractually payable by the applicant. However, the applicant denied its liability to reimburse the said taxes, which led to the emergence of disputes between the parties.

3. In terms of the arbitration clause contained in the agreement, the respondent, SMEC International Private Limited, filed an application under Section 11(6) of the Act, 1996 before the this High Court seeking appointment of an Arbitrator. The High Court then allowed the said application and appointed a Sole Arbitrator for adjudication of the claims and settlement of disputes between the parties. Before the learned Sole Arbitrator, the respondents filed their statement of claim and the appellant filed its statement of defence. Upon conclusion of the arbitral proceedings, the learned Sole Arbitrator passed a final award dated

18.07.2022.

4. Being aggrieved by the said arbitral award, the appellant preferred an application under Section 34 of the Act, 1996 before the learned Commercial Court (District Level) at District Raipur. The said application was registered as MJC No. 23/2022 and proceedings commenced on 31.10.2022. After receipt of the arbitral record, the matter was fixed for final hearing. Written submissions were filed by both parties, oral arguments were heard, and the matter was ultimately fixed for final orders on 11.07.2023. During the entire pendency of the proceedings before the learned Commercial Court, neither party raised any objection with respect to the jurisdiction of the said Court. However, the learned Commercial Court, by order dated 11.07.2023, held that in view of the provisions of Sections 2(e) and 2(f) of the Act, 1996, it lacked jurisdiction to entertain the application under Section 34. The learned Commercial Court observed that the matter fell within the ambit of "International Commercial Arbitration" and, therefore, the arbitral award could be challenged only before the Hon'ble High Court under Section 34 of the Act. It was further held that the Commercial Court has jurisdiction to entertain applications under Section 34 only in cases arising out of domestic arbitration proceedings.

5. Learned State counsel appearing for the State/appellant submits that the learned Commercial Court gravely erred in holding that it lacked jurisdiction to decide the application under Section 34 of the Arbitration and Conciliation Act, 1996 on merits. The finding on jurisdiction is wholly unsustainable in law and contrary to the scheme of the Act. The learned Commercial Court misread and misinterpreted the provisions of Sections 2(e) and 2(f) of the Act, 1996 while concluding that it was incompetent to entertain and decide the application under Section 34. The interpretation adopted by the learned Court is erroneous and contrary to the statutory framework. Learned counsel further submits that the respondent had invoked the jurisdiction of the High Court under Section 11(6) of the Act seeking appointment of an Arbitrator. The High Court, upon consideration of the application, appointed a Sole Arbitrator for adjudication of the disputes between the parties. It is contended that the dispute in question arose between the appellant, an entity incorporated and operating in India, and a Joint Venture of the respondent, out of which at least one constituent entity is incorporated in India and carrying on business within Indian territory. For all practical purposes, the contract was executed and performed within India between entities operating in India. Therefore, the arbitration in question

could not have been treated as an International Commercial Arbitration within the meaning of Section 2(f) of the Act, but was in the nature of a domestic arbitration. Learned counsel also submits that while determining the issue of jurisdiction, the learned Commercial Court, by holding that the arbitral award was squarely covered under the definition of “International Commercial Arbitration” under Section 2(f), has indirectly rendered a finding contrary to the position implicit in the order of the High Court appointing the Sole Arbitrator. The appointment of the Sole Arbitrator by the High Court under Section 11(6) proceeded on the premise of maintainability in accordance with law, and the learned Commercial Court could not have adopted a view inconsistent with the judicial determination already made. It is submitted that the observations and findings recorded by the learned Commercial Court run contrary to the decision rendered by the High Court in the arbitration application and are legally unsustainable. On this ground alone, the impugned order deserves to be set aside.

6. Learned counsel further contended that the action of the learned Commercial Court in declining to decide the application under Section 34 on merits and returning the same to the appellant is unjust, unfair, and the result of a patent misreading of Sections 2(e) and 2(f) of the Act, 1996.

The approach adopted defeats the object of expeditious adjudication contemplated under the Act. Lastly, learned counsel submits that at this stage the appellant is not pressing or raising any grounds on the merits of the arbitral award, inasmuch as the merits have not yet been adjudicated. It is contended that the application under Section 34 deserves to be decided on merits by the competent Court, which, according to the appellant, is the learned Commercial Court at the District Level, Raipur.

Reliance has been placed on the decision of Hon'ble Apex Court in the matter of **Daryao and Others. Vs. State of U.P. and Others and other connected matter** reported in **1961 SCC OnLine SC 21 : (1962) 1 SCR 574 : (1962) 1 SCJ 702 : AIR 1961 SC 1457.**

7. Learned counsel for the respondent, at the outset, raises a preliminary objection to the maintainability of the present appeal. It is submitted that the impugned order passed by the learned Commercial Court merely returns the application filed under Section 34 of the Act, 1996 for presentation before the competent Court, having recorded lack of jurisdiction. Such an order, it is contended, does not fall within the limited categories of appealable orders enumerated under Section 37 of the Act. Learned counsel submits that Section 37 of the Act exhaustively specifies the

orders from which an appeal shall lie, and expressly restricts appeals to those categories alone. An appeal under Section 37(1)(c) lies only against an order “setting aside or refusing to set aside an arbitral award” under Section 34. The impugned order, however, does not adjudicate upon any ground under Section 34(2) of the Act; it neither sets aside the award nor refuses to set it aside. It is purely jurisdictional in character. Therefore, it falls outside the ambit of Section 37. It is further submitted that Section 13 of the Act, 2015 merely regulates the forum and procedure for filing appeals that are otherwise maintainable under substantive law. Section 13 does not create any independent right of appeal nor does it enlarge the scope of appealability beyond what is expressly provided under Section 37 of the Act. The right of appeal must be expressly conferred; where the statute is silent, no appeal lies. Consequently, the appellant’s reliance on “Section 37 read with Section 13 of the Act of 2015” is misconceived and untenable in law.

8. Learned counsel further submits that the impugned order is akin to an order under Order VII Rule 10 of the Code of Civil Procedure, 1908, whereby a plaint is returned for presentation before the proper Court. Such an order preserves the lis for adjudication before the competent

forum and does not determine any substantive rights of the parties. It is pre-adjudicatory and procedural in nature and, therefore, cannot be equated with an order under Section 34 refusing to set aside the award. On the issue of jurisdiction, learned counsel submits that Section 2(1)(f) of the Act, 1996 defines “International Commercial Arbitration” (ICA) to include an arbitration where at least one party is a body corporate incorporated outside India. Section 2(1)(e)(ii) further provides that in the case of an ICA seated in India, the “Court” having jurisdiction is the High Court exercising ordinary original civil jurisdiction, or, as the case may be, the High Court having appellate jurisdiction over subordinate courts. It is submitted that the arbitral record consistently identifies the claimant as SMEC International Pty. Ltd., a body corporate incorporated outside India, though having office and operations in India. The mere fact that the said entity entered into a joint venture arrangement with an Indian company for execution of the project does not alter its foreign-incorporated status. Under Section 2(1)(f)(ii) of the Act, 1966 the presence of even one foreign-incorporated party renders the arbitration an International Commercial Arbitration.

9. Learned counsel also submits that the learned Sole Arbitrator, after considering the joint venture structure and

the identities of the contracting parties, proceeded on the basis that SMEC International Pty. Ltd. is a foreign-incorporated body corporate and adjudicated the dispute on merits accordingly. The Commercial Court, upon examining the statutory definitions under Sections 2(1)(e) and 2(1)(f), rightly concluded that the arbitration was an International Commercial Arbitration and that it lacked subject-matter jurisdiction to entertain the application under Section 34 of the Act 1996.

10. In support of the above proposition, learned counsel places reliance upon the judgment of the Hon'ble Supreme Court of India in **Amway India Enterprises Pvt. Ltd. v. Ravindranath Rao Sindhia and Anr., (2021) 8 SCC 465,** wherein it has been categorically held that if even one party to the arbitration agreement is a body corporate incorporated outside India, the arbitration assumes the character of an International Commercial Arbitration, notwithstanding the fact that such foreign entity may carry on business in India through an Indian office or operational arrangement. It is thus submitted that the classification of the present arbitration as ICA is automatic and statutory.
11. Learned counsel further submits that once the arbitration is held to be an ICA seated in India, the only competent "Court" under Section 2(1)(e)(ii) of the Act, 1996 is the High

Court, i.e. this High Court's Commercial Division Bench. Section 10 of the Commercial Courts Act, 2015 reinforces this position by allocating arbitration matters of specified value to the appropriate Commercial Division of the High Court in cases of ICA. Therefore, the learned Commercial Court at the District Level rightly declined jurisdiction and returned the Section 34 of the Act 1996 application for presentation before the proper forum.

12. It is contended that instead of adopting the correct course of re-presenting the Section 34 application before the competent High Court, the appellant has chosen to file the present appeal against a non-appealable order, thereby protracting proceedings and delaying the inevitable presentation before the appropriate Court. Such a course, it is submitted, is procedurally misconceived. Learned counsel further submits that subject-matter jurisdiction is fundamental and can be examined at any stage of the proceedings. It cannot be conferred by consent, waiver, acquiescence, or absence of objection. Therefore, the fact that no party raised a jurisdictional objection before the Commercial Court is wholly immaterial. The Commercial Court was duty-bound to examine its own jurisdiction and act accordingly.

13. It is also submitted that appeal provisions must be strictly

construed. The legislative policy underlying the Arbitration and Conciliation Act, particularly post the 2015 amendments, is to minimize judicial interference and confine appellate remedies to narrowly defined categories. Expanding the scope of Section 37 to include procedural return orders would defeat this policy and open the floodgates to appeals against interlocutory or threshold orders. Learned counsel clarifies that the respondent does not, at this stage, traverse any of the appellant's grounds on merits under Section 34 of the Act. All substantive defences and objections on merits are expressly reserved and shall be advanced only if this Court first holds that the present appeal is maintainable, which is emphatically denied.

14. It is lastly submitted that there is no order of stay under Section 36(2) or 36(3) of the Act, 1996. Consequently, the arbitral award remains enforceable in law, and the mere pendency of the present appeal does not operate as a bar to execution. In view of the aforesaid submissions, learned counsel prays that the present appeal be dismissed in limine as not maintainable.
15. We have heard learned counsel for the parties and perused the material available on record.
16. The question which arises for consideration before this Court whether an order for want of jurisdiction is appealable

under Section 37 of the Act, 1996 and whether the learned Trial Court rightly finds that the impugned award squarely covers under the definition of International Commercial Arbitration as defined in Section 2(f) ?

17. Perusal of the impugned order goes to show that the learned Commercial Court does not adjudicate upon any of the grounds raised under Section 34(2) of the Act, 1996. The learned Commercial Court has neither set aside the award nor refused to set aside the award. It has merely recorded a finding that it lacks jurisdiction in view of the arbitration being an International Commercial Arbitration and has directed return of the petition for presentation before the competent Court/forum. Such an order is jurisdictional and procedural in nature. It is similar to an order under Order VII Rule 10 of the Code of Civil Procedure directing return of a plaint for presentation before the competent Court. It does not determine the rights of the parties on merits.
18. It is clear from Section 37 of the Act, 1996 that it exhaustively enumerates the orders from which an appeal shall lie. Insofar as orders under Section 34 of the Act, 1996 are concerned, an appeal lies only against an order “setting aside or refusing to set aside an arbitral award.” The provision is restrictive in nature and uses the expression “and from no others,” thereby clearly indicating legislative

intent to confine appellate remedies strictly to the categories specified therein. The impugned order, being merely an order returning the petition on the ground of lack of jurisdiction, does not fall within the ambit of Section 37(1)(c) of the Act, 1996.

19. It is not disputed that the respondent Company is a joint venture which includes SMEC (India) Pvt. Ltd and SMEC International Pty. Ltd. For ready reference, the significant portion of the letter of Joint Venture dated 15.01.2014 is reproduced herein as under :-

LETTER OF JOINT VENTURE

“Dear Sir,

We, SMEC (India) Pvt. Ltd. are pleased to confirm our Joint Venture with SMEC International Pty. Ltd. for rendering the consultancy services for the above mentioned project.

We also confirm that SMEC International Pty. Ltd, Australia will be the Lead Consultant for the abovementioned project and will act as a spokesman and enter into the contract agreement on behalf of us. We empower SMEC International Pty. Ltd. to sign and submit the proposal & make legally binding contractual commitment for the above

mentioned project.”

20. The appellant/State has also filed copy of Power of Attorney To Lead Member of Joint Venture, which provides as under :-

“xxxxxx

We, SMEC (India) Pvt. Ltd, hereby designate SMEC International Pty. Ltd. as the Lead Member of the Joint Venture and hereby authorize Mr. George Lasek, Regional Manager, SMEC International Pty. Ltd to sign & submit the proposal and representing us in all matters before Client, and generally dealing with Client in all matters in connection with our bid for the said Project.”

21. It is clear from the letter dated 15.01.2014 that the Lead Consultant for the project was SMEC International Pty. Ltd, Australia and this letter was addressed to Project Director (PIU), ABD Project, O/o the Engineer-in-Chief, Chhattisgarh PWD, Sirpur Bhawan, Civil Lines, Raipur (C.G.).
22. It is also not in dispute that respondent company had filed an application before this High Court for appointment of Arbitrator and this Court vide order dated 13.05.2019, had appointed the Sole Arbitrator. Against the said order of appointment of Arbitrator, the State/appellant had filed

Special Leave Petition before the Hon'ble Apex Court, which was dismissed by Hon'ble Apex Court on 11.09.2019.

23. In the matter of **Amway (supra)**, Hon'ble Apex Court held in para 14 and 16 as under :-

“14. This case is distinguishable on facts, inasmuch as a final judgment between the parties made it clear that it would not be open for the consortium to rely upon their status as independent entities while dealing with MMRDA. This being the case, the consortium was held to be an association of persons falling under Section 2(1)(f)(iii), and that since the lead member is to lead arbitral proceedings, the central management and control of the consortium being exercised by Larsen and Toubro in India, it was held that Section 2(1)(f)(iii) would not be attracted on the facts of that case.

15. xxxx

16. In this view of the matter, the argument that there is no international flavour to the transaction between the parties has no legs to stand on. Indeed, 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 persons, at least one of whom is either a foreign national, or habitually resident in, any country other than India; or by a body corporate which is incorporated 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. This being the case, it is clear that the Delhi High Court had no jurisdiction to appoint an arbitrator in the facts of this case.”

24. In the light of aforesaid dictum of Hon'ble Apex Court in ***Amway (supra)***, it is clear that the lead member in this project is SMEC International Pty. Ltd., whose head office is situated in Australia, as such, the arbitration becomes an International Commercial Arbitration.
25. The case law relied upon by learned State counsel in ***Daryao (supra)*** would be of no help being distinguishable on the ground of facts.
26. Thus, this Court is of the considered opinion that the learned Trial Court has rightly passed the impugned order which is purely jurisdictional and procedural in nature. It does not amount to an order setting aside or refusing to set aside the arbitral award and Section 37 of the Act, 1996 does not provide for an appeal against such an order & Section 13 of the Commercial Courts Act does not enlarge the scope of appealability. Consequently, the present appeal is not

maintainable.

27. In the result, the appeal is **dismissed** as not maintainable at the admission stage. It is, however, clarified that dismissal of the present appeal shall not preclude the appellant from presenting the application under Section 34 of the Act, 1996 or appropriate petition before the appropriate forum, if so advised, and in accordance with law. No order as to costs.
28. Pending applications, if any, stand disposed of.

Sd/-

(Rajani Dubey)

Judge

Sd/-

(Radhakishan Agrawal)

Judge