Where Parties Choose The Seat Before The First Application Is Filed, Section 42 Cannot Confer Jurisdiction On Another Court: Calcutta High Court

Authors: **Vasanth Rajasekaran*** and **Harshvardhan Korada****

Introduction

In ***Kessels Engineering Works Pvt. Ltd. v. Neo Metaliks Limited*** [AP-COM/245/2024 with EC/143/2021, decided on 19 December 2025], the Calcutta High Court decided an important question regarding the interplay between Section 42 of the Arbitration and Conciliation Act, 1996 (the "**Act**") and the concept of the seat of arbitration as crystallised by party autonomy.

The Court held that where the parties had chosen one of two alternative seats contemplated under the arbitration agreement, by conducting multiple sittings of the arbitration at Kolkata prior to any application being filed, the courts at Kolkata alone had jurisdiction to entertain applications under Sections 34 and 36 of the Act. The mere fact that the first application (under Section 14) had been filed before the Delhi High Court did not attract the bar of Section 42, since the Delhi High Court was not a court of competent jurisdiction after the seat had crystallised as Kolkata.

Facts

The parties had entered into an agreement which stipulated the place of arbitration to be "*Delhi or Kolkata*." During the course of the arbitral proceedings, multiple sittings took place in Kolkata and the parties expressed their choice of seat to be Kolkata.
An application under Section 14 of the Act (relating to the termination of the arbitrator's mandate) was filed before the Delhi High Court. The Delhi High Court decided the application but itself observed that several sittings had already taken place in Kolkata and that it was the courts at Kolkata which would have jurisdiction.

Subsequently, an application under Section 34 of the Act (challenging the arbitral award) and an application under Section 36 of the Act (for enforcement of the award) came to be filed before the Calcutta High Court. During arguments on the merits of the Section 34 application, the Court raised a query *suo motu* as to whether the applications under Sections 34 and 36 were maintainable before the Calcutta High Court, given that an earlier application under Section 14 had been filed before and decided by the Delhi High Court, potentially attracting the bar under Section 42 of the Act.

Contentions of the Parties

The petitioner in the Section 34 application (Kessels Engineering) contended that where parties choose a particular forum as the seat of arbitration, the courts having jurisdiction over such seat are the courts of competent jurisdiction for all applications arising out of the arbitral proceeding. It was submitted that the expression "*Court*" used in Section 42 of the Act relates back to Section 2(1)(e)(i) and must be read as a "*court of competent jurisdiction*." Since the seat had crystallised as Kolkata before any application was filed, the Delhi High Court was not a court of competent jurisdiction, and the filing of the Section 14 application there did not trigger the Section 42 bar. Reliance was placed on the Supreme Court's decisions in ***BGS SGS SOMA JV v. NHPC Limited*** [(2020) 4 SCC

234], ***Hindustan Construction Company Limited v. NHPC Limited*** [(2020) 4 SCC 310], and ***BBR (India) Private Limited v. SP Singla Construction Company Private Limited*** [(2023) 1 SCC 693].

Neo Metaliks, the respondent in the Section 34 application, sought to argue that while the Section 42 bar may apply to an application under Section 34, it was not attracted in the case of an application under Section 36. It was submitted that by virtue of Section 32 of the Act, arbitration proceedings terminate with the passing of the award. Section 36, which provides for enforcement of the award akin to a civil court's decree, operates only after termination of the arbitral proceeding. Since Section 42 uses the expression "*that Court alone shall have jurisdiction over the arbitral proceedings*," an application under Section 36 does not acquire the character of an application "in respect of" the arbitral proceeding and hence falls outside the purview of Section 42. Reliance was placed on ***Sundaram Finance Limited v. Abdul Samad*** [(2018) 3 SCC 622].

Decision of the High Court

The Calcutta High Court decided the maintainability issue in favour of the applicants in both the Section 34 and Section 36 applications, holding that it was the Calcutta High Court which had jurisdiction.
The Court identified three scenarios that emerge from the Supreme Court's decision in ***BGS SGS SOMA JV*** (*supra*) and the judgments following it.

Under the *first scenario*, where the parties do not choose a seat of arbitration at all, Section 42 prevails in its classic form: the court where the first application in connection with the arbitral proceeding or agreement is filed determines the jurisdictional court for all subsequent applications.

Under the *second scenario*, where the parties have chosen a seat but only after the first application has already been filed before one of the courts which might possibly have been the seat, Section 42 again prevails and the court where the first application was made retains jurisdiction, despite the parties subsequently freezing their choice on a different seat.

Under the *third scenario*, which the Court found applicable to the facts at hand, where the parties have chosen one of two alternative possibilities as the seat of arbitration *before* the first application is filed, the courts having jurisdiction over the chosen seat are the competent courts for all applications. In such cases, the mere fact that the first application was filed in a different court is immaterial, because that other court would not qualify as a "*court of competent jurisdiction*" within the meaning of Section 42 read with Section 2(1)(e)(i) of the Act.

Applying this third proposition, the Court noted that the arbitration agreement had contemplated "*Delhi or Kolkata*" as the place of arbitration. Prior to the filing of the Section 14 application before the Delhi High Court, multiple sittings of the arbitral proceeding had already taken place in Kolkata and the parties had expressed their choice of seat to be Kolkata. The Delhi High Court itself had acknowledged this position. Accordingly, once the parties exercised their option in favour of Kolkata, the inchoate possibilities became frozen and Delhi ceased to be the seat of arbitration. The Court drew an analogy to quantum mechanics, observing that the parties' choice remained in

a state of mere possibilities until an option was exercised, at which point the chosen seat crystallised into reality and the other possibility collapsed.

On the question of whether Section 42 applies to applications under Section 36, the Court noted, with deference, that the reasoning in ***Sundaram Finance*** (*supra*) might carry a touch of inherent contradiction. The Court observed that the language of Section 42 is not restricted to the expression "*that Court alone shall have jurisdiction over the arbitral proceedings*" but goes on to state that "*all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court*." The expression "*arising out of*" is wider in connotation than "*in respect of*," and applications under both Section 34 and Section 36 are applications "*arising out of*" the arbitral proceedings, even if those proceedings have terminated by operation of Section 32. The Court concluded that the principle laid down in ***BGS SGS SOMA JV*** (*supra*) was the one required to be followed universally, both for applications under Section 34 and Section 36 of the Act.

Key Takeaways

The decision of the Calcutta High Court in ***Kessels Engineering*** (*supra*) is noteworthy for the following reasons:

The judgment provides a clear three-part framework, drawn from the Supreme Court's decision in ***BGS SGS SOMA JV*** (*supra*), for determining the interplay between Section 42 and the seat of arbitration. Where the parties crystallise their choice of seat before the first application is filed, the court of the chosen seat has jurisdiction regardless of where the first application was actually filed, since a court that is not the court of the seat is not a "*court of competent jurisdiction*" for the purposes of Section 42.

The decision underscores that where an arbitration agreement provides alternative seats (such as "*Delhi or Kolkata*"), the choice remains inchoate until the parties exercise their option. Once the option is exercised, whether by conducting hearings at a particular location, by express agreement, or by other indicia, the seat crystallises and the other alternative ceases to be a viable seat. The Court's analogy to quantum mechanics vividly illustrates the point that the seat exists in a state of superposition until an option is exercised.

The Court has, with deference, raised a doubt regarding the reasoning in ***Sundaram Finance*** (*supra*) to the extent it excludes Section 36 applications from the ambit of Section 42. The Court's observation that the expression "*arising out of*" in Section 42 is wider than "*in respect of*" and covers applications under both Section 34 and Section 36 is a notable contribution to the jurisprudence on this point and may invite further judicial consideration.

The decision reinforces the primacy of party autonomy in determining the seat of arbitration. The conduct of the parties in choosing where to hold hearings, coupled with the arbitration agreement's alternative choices, determines the jurisdictional court. Courts are expected to give effect to the parties' crystallised choice of seat rather than mechanically applying the first-application rule under Section 42.

* **Vasanth Rajasekaran** is the Founder and Head of Trinity Chambers, Delhi.

** **Harshvardhan Korada** is a Counsel at Trinity Chambers, Delhi.

For any query, help or assistance, please reach out at info@trinitychambers.in or visit us at www.trinitychambers.in.

Authors

Vasanth Rajasekaran
Founder & Head
vasanth@trinitychambers.in

Harshvardhan Korada
Counsel
harshvardhan@trinitychambers.in