The Quippo Construction decision conflates and confuses several concepts: A short comment

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Quippo Construction Equipment Limited v. Janardan Nirman Pvt. Limited

Court: Supreme Court of India | **Case Number**: Civil Appeal No. 2378 of 2020 | **Citation**: 2020 SCC OnLine SC 419 | **Judges**: UU Lalit and Vineet Saran JJ | **Date**: 29 April 2020

The *Quippo* judgment presents a problem of exposition. The primary question was about the jurisdiction of the court to hear a set-aside application against an award. The question was decided on the principle of waiver. But it is respectfully submitted that *Quippo* does not address the issues before it in a precise manner, and it conflates many aspects.

As a result, the rules which may be deduced from it rest on quite weak foundations. Some may not have value as precedent.

One of the issues that the decision touches upon is the preclusive effect of Section 16 ACA, which contains the principle of *Kompetenz–Kompetenz* or competence-competence. The noun is repeated in the expression to signify that an arbitral tribunal is competent to rule on its competence. But, Section 16 also says that a plea that the tribunal does not have jurisdiction or that it is exceeding the scope of its authority "shall be raised not later than the submission of the statement of defence." The tribunal may nonetheless admit a later plea if it considers the delay justified. What happens if a party does not raise a jurisdictional plea? Can it still be raised later before a court in a set-aside proceeding, or Section 16 precludes it?

The *Quippo* court has ruled on this question without tackling it directly and contrary to precedent (in fact, a decision by a 3-judge bench of which Lalit J himself was a member).

Because of its unique facts, it also mixes up the question of the seat of arbitration with the issue of arbitrator's jurisdiction.

It also makes inaccurate observations as to the significance of the place of arbitration.

This case comment tries to put the *Quippo* decision into perspective.

A. Background

Quippo Construction ("Quippo") and Janardan Nirman ("Janardan") had four separate agreements concerning hiring on rent of different construction equipment. Each agreement had an arbitration clause. One agreement stipulated New Delhi as the venue of the arbitration proceedings. Another agreement conferred exclusive jurisdiction on the courts in Kolkata, West Bengal.[1]

After disputes arose, Quippo gave notice of arbitration for recovery of money and indicated that the arbitration proceedings would be held at New Delhi. In response, Janardan denied the existence of the arbitration agreements. Later, it brought a suit in a civil court at Sealdah, West Bengal, praying for a declaration that the arbitration agreements were null and void. The court initially stayed the arbitration but, on Quippo's application, referred the matter to the ongoing arbitration.

Though Janardan appealed, no stay was granted, and the arbitration continued. Janardan did not participate in the proceedings (aside from making various requests for postponement). The arbitrator indicated he would

[1] The arbitration clauses in the other two agreements are not set out in the decision.

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continue with the proceedings unless there was a stay by the appellate court. Eventually, the arbitrator passed an *ex parte* award in favour of Quippo. The award decided disputes under all four agreements.

Janardan filed a set-aside proceeding in the civil court at Alipore, West Bengal. The court found that only a New Delhi court had jurisdiction and dismissed the application.

Janardan appealed in the High Court. The High Court said it was evident from the cause title itself that the Alipore court had jurisdiction (referring to the fact that Quippo conducted its business at Alipore).[2]

Now Quippo was before the Supreme Court. It argued among others that "having chosen not to raise any objection on the issue of jurisdiction or competence of the Arbitrator to go ahead with the matter pertaining to issue covered by arbitration, the respondent must be taken to have waived any such objection."

In turn, Janardan appears to have argued that the arbitrator had no jurisdiction and he exceeded the scope of his authority mainly because:

Every agreement had to be considered independently. [Citing to *Duro Felguerai v. S.A. Gangavaram Port Limited*, (2017) 9 SCC 729, "where there were six arbitral agreements, and each one of them was the subject matter of an independent reference to arbitration."

The venue of arbitration for one agreement should have the territory specified in the agreement, that is, Kolkata.

The court set aside the High Court's order. It ruled that Janardan failed to participate in the arbitration proceedings and did not raise any submission that the arbitrator did not have jurisdiction or that he was exceeding the scope of his authority. Accordingly, Janardan must be deemed to have waived all such objections. It also restored the Alipore court's order (which had said that the courts at New Delhi had jurisdiction).

This was the reasoning of the Supreme Court:

(a) First, it reproduced the text of Sections 4, 16 and 20 of the ACA:

(i) Section 4 ACA provides that if a derogable provision has not complied, an objection must be taken without undue delay or, where time is stipulated, within that time.

(ii) Section 16 ACA sets the principle of competence-competence. It also says that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Also, a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(iii) Section 20 provides that the parties are free to agree on the place of arbitration, and the tribunal can determine the place if the parties have not agreed.

(b) Second, the court referred to *Narayan Prasad Lohia Nikunj Kumar Lohia*, (2002) 3 SCC 572 and said that in *Narayan,* even a stipulation in Section 10 ACA that the number of Arbitrators "shall not be an even number" was found to be a derogable provision. Thus, since no objections were raised as to the composition of the tribunal, the objection was considered waived.

[2] See the High Court's judgment available on the website of the Calcutta High Court. Search FMA 51 of 2019 with CAN 10094 of 2018.

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(c) Third, it distinguished *Duro Felguera* (which *Janardan* had cited), saying that it was a case of international commercial arbitration. In each of those agreements, the seat of arbitration was at Hyderabad. In international arbitration, the specification of "place of arbitration" may have special significance, which is not the case here since the applicable substantive and curial law would be the same.

(d) Had Janardan participated in the arbitration, he could have contended that each agreement may be dealt with separately. Also, since the venue was Kolkata, the arbitration proceedings are conducted accordingly.

B. Comment[3]

B1. Conflating 'Seat' with arbitrator's jurisdiction and selection of venue (because of the unique facts?)

What was the issue before the Supreme Court?

Janardan's set-aside application under Section 34 ACA was rejected because the Alipore court concluded that only the courts at New Delhi had jurisdiction. It relied on *Indus Mobile Distribution Pvt. Ltd.* v. *Datavind Innovations Pvt. Ltd.*, (2017) 7 SCC 678. This was nothing but a determination that the seat of the arbitration was at New Delhi. It is reasonable to assume that the arbitrator did not decide as to the seat. Had that been so, the Alipore court would have referred to it. Instead, it relied on the fact that the arbitration proceedings were held at New Delhi, and the award was made at New Delhi.

The Calcutta High Court reversed that decision and sent the matter back to the Alipore court (on the ground that Quippo carries on business in the jurisdiction of Alipore court).

It is again reasonable to assume that the question before the Supreme Court was: what was the seat of arbitration? For it is the seat which would determine which court has jurisdiction to set aside the award.

Clearly, the question got mixed up in the arguments with the issue of arbitrator's jurisdiction and competence and selection of the venue to conduct arbitral proceedings, leading the court to decide that such objections could be, and indeed were, waived?

A question as to what is the arbitral seat usually has nothing to do with the arbitrator's jurisdiction or competence.

From the arguments (as extracted in the judgment) and from the decision, it is not entirely clear what was argued by Janardan on the issue of the seat of arbitration. It appears that since the arbitrator had clubbed six agreements to one proceeding, it was difficult to determine *the* seat of *the* arbitration legitimately. Had it been one agreement per one arbitration, it would be easy to make an argument as to the arbitral seat. Here, any argument on the seat specified in each of the agreements rested, by necessity, in assailing the fact that the arbitrator had no jurisdiction to club everything into one. The court concluded that this argument could not be run because it had been waived.

It is submitted that this distinction is not precisely articulated in the judgment.

B2. Ruling on the preclusive efect of section 16 contrary to precedent

Can a party who has not taken a timely plea on the question of arbitrator's jurisdiction raise the matter in a setting-aside or enforcement proceeding?

The reader would note that Section 4 ACA contains a general provision of waiver. Section 16 has its specific waiver-provision. Both are based on Model Law. Howard M Holtzmann and Joseph E Neuhaus,

[3] We acknowledge with thanks the research assistance of Parth Singhal, a student of University of Petroleum & Energy Studies, Dehradun.

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in their Guide to the UNCITRAL Model Law in International Commercial Arbitration, tell us that the legislative history of the Model Law is clear on the point that the Article 4-waiver was not limited to arbitral proceedings but extended to the subsequent court setting-aside and enforcement proceedings. However, the legislative history was not entirely clear (except for some exceptions noted below) on whether failure to raise a timely objection of jurisdiction under Article 16 barred invocation in later proceedings. Therefore, the issue of the preclusive effect of Article 16 was left open for interpretation by the States adopting Model Law and their courts.

In that light, consider these provisions under Section 34, under which an application for setting aside can be filed: –

(a) Section 34 (2) (a) (iv) under which an arbitral award may be set aside by the Court if it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains a decision on matters beyond the scope of the submission to arbitration

(b) Section 34 (2) (a) (v) under which an arbitral award may be set aside by the Court if the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing, such agreement, was not in accordance with this Part.

(c) Section 34 (2) (b) under which the arbitral award can be set aside if the Court finds that the subject matter of the dispute is not capable of settlement by arbitration, or if the award is in conflict with the public policy of India.

Of these, the objections under Section 34 (2) (b) on arbitrability ("not capable of settlement by arbitration") and public policy were considered as well recognized exceptions as they are cognizable by the court *sua sponte*. Clearly, those objections should be allowed–and are indeed allowed–to be raised.

The question of the preclusive effect of Section 16 ACA was considered by the Supreme Court directly in *MSP Infrastructure Ltd.* v. *MP Road Development Corpn. Ltd.*, (2015) 13 SCC 713 (05 December 2014). A 2-judge bench of J Chelameswar and SA Bobde JJ concluded that:

> *"The scheme of the Act is thus clear. All objections to the jurisdiction of whatever nature must be taken at the stage of the submission of the statement of defence, and must be dealt with under Section 16 of the Arbitration Act, 1996. However, if one of the parties seeks to contend that the subject-matter of the dispute is such as cannot be dealt with by arbitration, it may be dealt under Section 34 by the Court."*

But, these observations were overruled in *Lion Engg. Consultants* v. *State of M*P, (2018) 16 SCC 758, where a 3-judge bench of AK Goel, RF Nariman and UU Lalit JJ concluded that "both stages are independent."

The court in *Quippo* did not consider these issues and decisions.

Let us turn to *Narayan Prasad Lohia* v. *Nikunj Kumar Lohia*, (2002) 5 SCC 372, which the *Quippo* court did consider, but for a different point. This decision contains an acceptance that Section 16 does not have a preclusive effect. A 3-judge bench had been constituted to consider a question of law. A unanimous award had been passed in a family dispute by two arbitrators. It was challenged on the ground among others that it was against Section 10 ACA which provides that the number of arbitrators shall not be an even number. This objection was not taken before the tribunal. The matter travelled to the Supreme Court before a 2-judge bench, which referred to a 3-judge bench the question whether "a mandatory provision of [the ACA] can be waived by the parties."

The decision can, for convenience of reference, divided into two parts. The court first said that Section 10 is derogable. It reasoned that Section 10 provides for a matter that goes to the jurisdiction (the composition

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of the tribunal). Now, under Section 16, any objection as to jurisdiction must be taken in time (that is, not later than submitting the statement of defence). It means, the court said, a party is free not to object. Hence, it concluded that Section 10 is derogable. It then said that if a party chooses not to object, there will a deemed waiver under Section 4 ACA.

Then, secondly, the court turned to Section 34 (2) (a) (v) and examined if the award could be set aside on that ground. The thing to note is that the *Narayan* court concluded that Section 34 (2) (a) (v) did not apply because the requirements under the section were not made out.[4] The court did not say Section 34 (2) (a) (v) would not apply because the objection was not taken before the tribunal and that Section 16 ACA had a preclusive effect.

The *Quippo* court relied on the first part of the decision in *Narayan*. It did not refer to the second part of *Narayan* , and the implied recognition contained there that Section 16 was not preclusive.

Finally, the *Quippo* court also does not consider the effect of Section 16 (4) ACA. The tribunal itself can admit a later plea it is justified. Can the court not in a set-aside proceeding?

B3. Observations As to the effect of the place of arbitration

In *Duro*, the submission that "there ought to be a composite reference to arbitration" for six arbitration agreements was rejected. *Janardan* relied on *Duro*. The *Quippo* court distinguished *Duro* and after that made the following observations:

> *"The specification of "place of arbitration" may have special significance in an International Commercial Arbitration, where the "place of arbitration" may determine which curial law would apply. However, in the present case, the applicable substantive as well as curial law would be the same."*

It is submitted that these observations give an impression that the place/seat of arbitration does not matter in domestic arbitration. But, they do not recognize an essential consequence of the choice of seat in domestic arbitration, namely, jurisdiction of the court—the precise issue before the *Quippo* court.

It is fairly settled that a necessary consequence of the choice of seat is that the court at the seat has exclusive jurisdictions to deal with a set-aside application and several other matters (see for example *BGS SGS SOMA JV* v. *NHPC Ltd.*, 2019 SCC OnLine SC 1585).

[4] The court's reasons as to why Section 34 (2) (a) (v) ACA does not apply is, it is respectfully submitted, incorrect in light of the legislative history of the corresponding Model Law provision, and also in light of the plain text. This discussion is outside the scope of this case-comment.

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