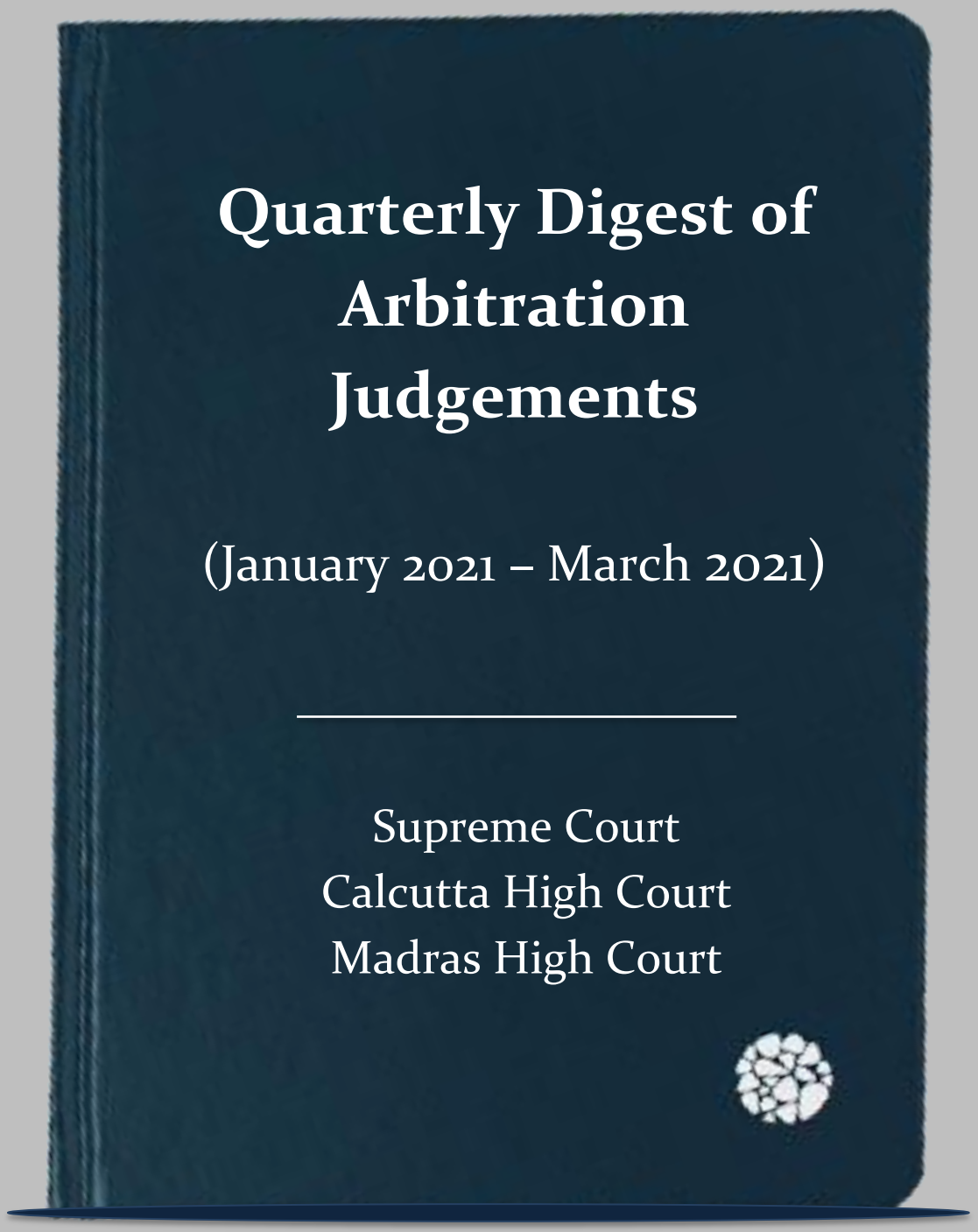
Quarterly Digest of Arbitration Judgements

(January 2021 – March 2021)

Supreme Court
Calcutta High Court
Madras High Court



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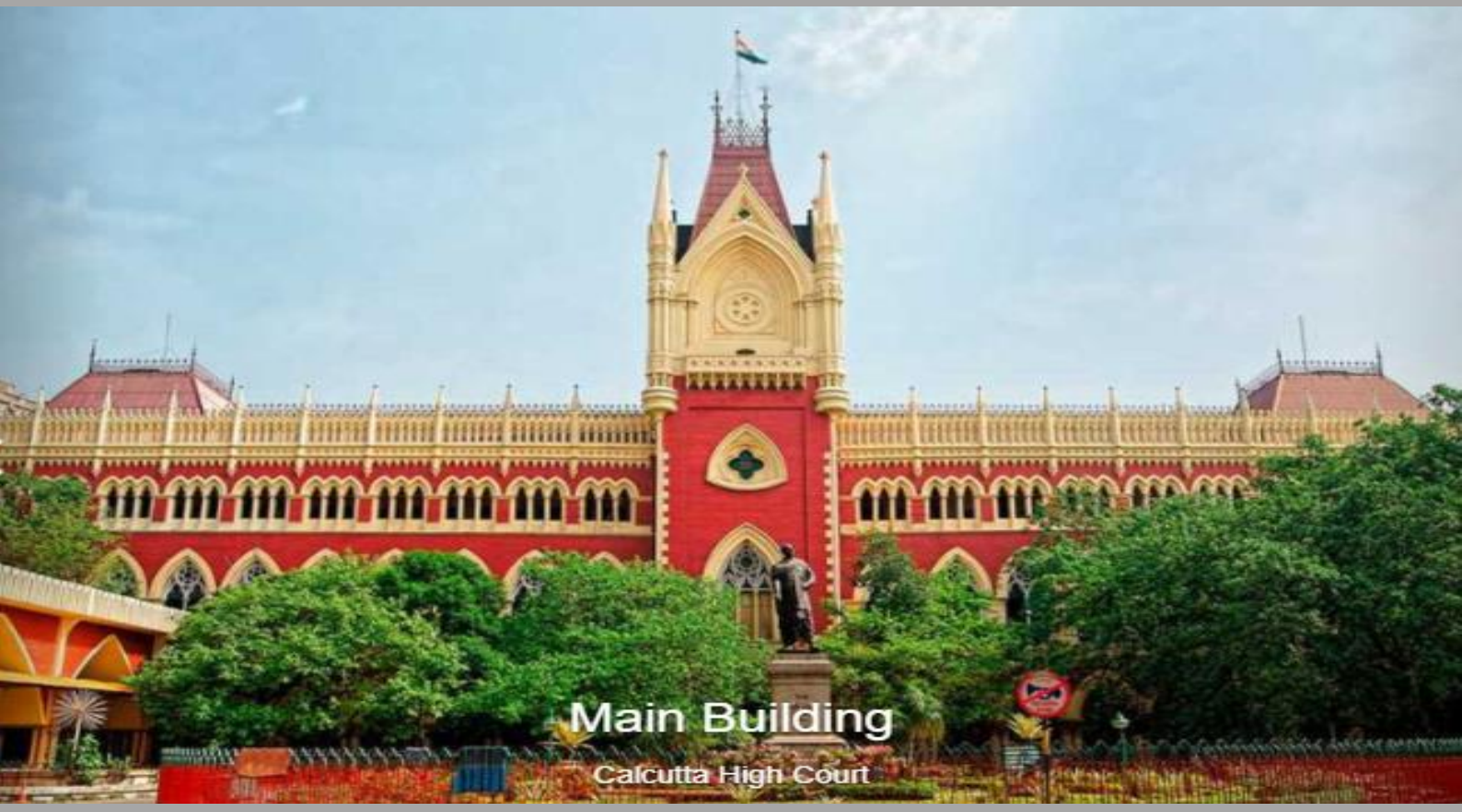

CALCUTTA HIGH COURT

MINA BEGUM V. KOLKATA PORT TRUST AND ANOTHER

2021 SCC OnLine Cal 62

CASE DETAILS:

Date of Application	9 November 2019
Date of Judgement	7 January 2021
Nature of Application	Writ Petition
Bench Strength	Single Judge
Judge(s)	Justice Sabyasachi Bhattacharyya
Provision(s) of the Arbitration and Conciliation Act, 1996	No provisions used; issue for determination was whether a writ petition could be filed in the high court when the contract provides for arbitration.

RATIO:

Presence of an alternative remedy, in the form of an arbitration clause included in the agreement between the parties, is not an absolute bar to the invocation of writ jurisdiction of the High Court or the Supreme Court. The constitutional court may interfere if there has been violation of fundamental/statutory rights, violation of principles of natural justice, lack of jurisdiction, or abuse of law.

CASE SUMMARY

Brief Facts

The Petitioner contracted KoPT for the upkeep of certain offices of the latter, and for the supply of tools to its employees. One of the terms of the Contract was that the Petitioner was bound to abide by the statutory obligations imposed on it in terms of compensation of its workers. The Civil Engineering Department however, found that the petitioner was failing to do so, and after multiple reminders went unresolved, the contract was terminated in accordance with the clauses mentioned therein. The contract also stipulated that in the case of a dispute, the matter must be referred to the Chairperson, and if the Petitioner was still unsatisfied by the decision, he could require the Chairman to refer the matter to arbitration.

Arguments

Relying on *Union of India v. Tantia Construction Pvt. Ltd*.[1] ("*Tantia Constructions*"), the Petitioner contended that an alternative remedy is not an absolute bar to the invocation of writ jurisdiction. The Respondents contended that since the dispute arises from a contract, it is beyond writ jurisdiction, and since the remedy provided in it has not been exhausted, writ court ought not to interfere. They relied on *Habanslal Sahnia v. Indian Oil Corpn. Ltd.*[2] ("*Habanslal Sahnia"*) which stated that the High Court may only exercise writ jurisdiction, in spite of an arbitration clause, in cases concerning enforcement of fundamental rights, failure of principles of natural justice, or where order or proceedings are without jurisdiction.

Decision

The Court noted that *Tantia Constructions* lays down that even when an arbitration clause exists, such a clause would not be an absolute bar to the invocation of the writ jurisdiction of the High Courts. The constitutional powers vested by the High Court or the Supreme Court cannot be fettered by an alternative remedy. It further noted the judgement of *Whirlpool Corporation* (1998) 8 SCC 1 (As mentioned in *Harbanslal Sahnia*) where it was held that

[1] (2011) 5 SCC 697

[2] (2003) 2 SCC 107

High Court may, at least, exercise its writ jurisdiction in the three contingencies as stated by the Respondent.

The Court ruled that writ jurisdiction was wide enough to interdict cases of patent injustice, especially by the state and its instrumentalities. The latter, therefore, are on an elevated level of obligations to adhere to law and natural justice than a mere individual. The scope of writ jurisdiction has to be filtered through the self-imposed restrictions of the High Court, and it has to be examined whether a case involves violation of fundamental or statutory rights, failure of the principles of natural justice, patent lack of jurisdiction or gross abuse of process of law to justify interference, and the action of the petitioner in filing a writ petition in this matter would only be justified if it meets the same grounds.

Since the GCC and the NIT recognised Petitioner's obligation to fulfil her statutory obligations, it ruled that the contractual obligations of the Petitioner's firm were forged into the statutory obligations, which made it impossible to distinguish between the two. Violation of statutes would lead to a violation of contractual obligations as well. The Court ruled that the Petitioner could not avoid her statutory and contractual liabilities by claiming disputes regarding overpayment and/or the rate of deposits. Ruling that the Petitioner had unduly profited by deducting statutory contributions of its employees and not depositing the same to the Respondents, and noting her failure to establish any illegality/irregularity on the part of the respondent, the Court dismissed the petition.

TANTIA CONSTRUCTIONS LIMITED V. UNION OF INDIA

2021 SCC OnLine Cal 61

CASE DETAILS:

Date of Application	11 January 2019
Date of Judgement	11 January 2021
Nature of Application	Application for the appointment of Sole Arbitrator
Bench Strength	Single Bench
Judge(s)	Justice Ashis Kumar Chakraborty
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 11(6); Section 12(5); Seventh Schedule

RATIO:

In an arbitration concerning the Railways department, a retired Railways Officer does not become ineligible for appointment to the tribunal solely on the ground that the Officer had retired from the department.

CASE SUMMARY

Brief Facts

The Applicant entered into a works contract in March 2013 with the Respondent, Eastern Railways. The dispute resolution clause provided that if any claim were to arise from the contract, then the Contractor would present it before the Railways. If the latter does not decide the matter within a given time period, then the Contractor would be entitled to initiate arbitration. Further, the General Manager (GM) of the Railways would then provide the Contractor with a list of more than 3 arbitrators who are Gazetted Railway Officers of a certain grade from which the Contractor will choose two of which one will be appointed to the Tribunal by the GM. The other two members will be appointed by the GM either from the names initially given or outside it to constitute the Tribunal. In 2016, after the introduction of Section 12(5) of the Arbitration & Conciliation Act 1996 [the Act], the Railways by a circular modified the dispute resolution clause to the extent that instead of serving Railways Officers, retired Railways Officers were to be appointed and mentioned in the list sent by the GM.

Presently, the Applicant sent a letter initiating arbitration in July 2017. In December 2017, the GM forwarded a list of four retired Railways Officers. The Applicant subsequently sent a letter stating that by virtue of Section 12(5) of the Act, the persons named in the letter are ineligible for appointment to the Tribunal. Furthermore, the Applicant urged that the Railways could not have unilaterally modified the clause vide a circular in 2016. In absence of a reply from the GM, the Applicant initiated the present proceedings under Section 11(6) of the Act for the appointment of a sole arbitrator.

Decision

The first question before the Court was whether the modified dispute resolution could be applied to the present case because the contract had been formed in 2013. In this regard, the Court relied on the Supreme Court (SC) decision in *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*[3] [CORE]. In this case, the SC had discussed the same modification done by the Railways and held that due to the contractual terms the

[3] Civil Appeal Nos. 9486-9487 of 2019 (The Supreme Court of India)

Railways had the power to unilaterally modify the terms and change the dispute resolution clause.

With respect to the second question, whether retired Railway Officers were ineligible to be appointed to an arbitration concerning the Railways department, the Court again relied on *CORE* and held that neither does the Seventh Schedule explicitly bar retired Officers, nor does being a retired officer, on its own, gives rise to justifiable doubts.

As a result, the Court dismissed the Section 11(6) application and ordered the Applicant to choose two names from the list given by the GM in December 2017.

COMMERCIAL DIVISION BOWLOPEDIA RESTAURANTS INDIA LIMITED V. DEVYANI INTERNATIONAL LIMITED

2021 SCC OnLine Cal 103

CASE DETAILS:

Date of Application	18 December 2020
Date of Judgement	21 January 2021
Nature of Application	Petition for interim protection
Bench Strength	Single Bench
Judge(s)	Justice Debangsu Basak
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 2(2)(e), Section 11, and Section 20

RATIO:

In cases where the agreement between the parties vests the jurisdiction with a certain court in the "forum selection clause" while specifying a "seat of arbitration" which falls under the jurisdiction of another court, the courts specified in the "forum selection clause" shall have jurisdiction provided such court otherwise has jurisdiction akin to Section 20 of the Code of Civil Procedure, 1908.

CASE SUMMARY

Brief Facts

The parties entered into a leave and license agreement dated July 11, 2019.

Clause 16.6 of the agreement vested the courts of Kolkata with exclusive jurisdiction to try disputes arising out of the contract. Clause 16.7 of the agreement, however, prescribed that the seat of arbitration shall be at New Delhi. A conflict arose as to which of the courts would have jurisdiction over the present dispute.

Arguments

The Petitioner contended that the agreement was entered into in Kolkata and the Petitioner also had its registered office in Kolkata. Therefore, the courts of Kolkata had original civil jurisdiction over the case. The Petitioner, relying on *Radha Sundar Dutta v. Mohd. Jahadur Rahim*[4], also contended that, since, the forum selection clause appears prior to clause prescribing the seat of arbitration in the agreement, the forum selection clause must prevail.

The Respondent, arguing on merits, contended that the Petitioner had not paid the license fee and had also not delivered the vacant possession of premises to the Respondent. Due to this, the Respondent was suffering losses. Therefore, the Respondent claimed a right of lien over the Petitioner's assets.

Decision

The Court framed the following issue - When there is a forum selection clause conferring exclusive jurisdiction to a court which is different from the court having jurisdiction over the seat of arbitration, in a domestic arbitration, which court will have jurisdiction over the arbitration proceedings?

The Court noted that in *Cars 24 Services Pvt. Ltd. v. Cyber Approach Workspace LLP*[5], the forum selection clause vested jurisdiction in the courts of Haryana while the seat of arbitration was prescribed to be at New Delhi. The Delhi High Court decided that a Section 11 petition was to be moved before the appropriate Court at Haryana.

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[4] AIR 1959 SC 24

[5] Arbitration Petition No. 328 of 2020 (The High Court of Delhi)

The Court also noted several cases wherein the Delhi High Court entertained petitions where the seat of arbitration was prescribed to be at Courts at New Delhi while the forum selection clause had prescribed different courts. These cases include *BGS SGS Soma v. NHPC Ltd.*[6], *Ramandeep Singh Taneja v.Crown Realty*[7], *Devyani International Ltd. v. Siddhivinayak Developers & Builders*[8], *N.J. Construction v. Ayursundra Healthcare Pvt. Ltd.*[9], *Cinepolis India Pvt. Ltd. v. City Projects Pvt. Ltd*[10] and *Aarka Sports Management Pvt. Ltd. v. Kalsi Buildcon Pvt. Ltd.*[11].

To resolve these conflicting stances, the Court relied chiefly on the principle of party autonomy and held that if the parties had agreed to a selected forum, then the selected forum must have precedence over the seat of arbitration. The Court reached the following conclusions for matters pertaining to domestic arbitration -

(i) Where the agreement has not prescribed the seat of arbitration and the parties have not selected any court to try the disputes, the court having jurisdiction over the subject matter of the arbitration will exercise jurisdiction;

(ii) Where the agreement prescribes a seat of arbitration but does not have a forum selection clause, the court having jurisdiction over the seat of arbitration, will have jurisdiction to try the arbitration petition;

(iii) Where the parties have prescribed the seat of arbitration as well as selected a forum, and there is no conflict between the two, then the court having jurisdiction on the seat of arbitration, will exercise jurisdiction as there is no conflict;

(iv) Where the parties have selected a seat of arbitration which is in conflict with the jurisdiction of the court selected under the forum selection clause, then, the court selected under the forum selection clause will have jurisdiction provided such court otherwise has jurisdiction akin to Section 20 of the Code of Civil Procedure, 1908.

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[6] Civil Appeal 9307 of 2019

[7] Arbitration Petition No. 444 of 2017

[8] 2017 SCC OnLine Del 11156

[9] Arbitration Petition No. 529 of 2017

[10] Arbitration Petition No. 334 of 2019

[11] Arbitration Petition No. 662 of 2019

The Court also held that in the present case, the order in which the clauses appear in the agreement has no relevance. The Court held that in matters pertaining to arbitration, the parties by mutual agreement can vest jurisdiction even upon a court, which has none in the given case.

Regarding the issue of lien, the Court decided that the right of lien cannot be determined at this stage and must be decided in the arbitration. At the *ad interim* stage, the Court allowed the Petitioner to remove its goods, sell the same, and keep the sale proceeds in a separate account pending decision in arbitration.

COMMERCIAL DIVISION QUIPPO INFRASTRUCTURE LTD. V. AZZ INFRASERVICES LTD. AND ANOTHER

2021 SCC OnLine Cal 102

CASE DETAILS:

Date of Application	15 September 2020
Date of Judgement	21 January 2021
Nature of Application	Petition for interim protection
Bench Strength	Single Bench
Judge(s)	Justice Debangsu Basak
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 9

RATIO:

In cases of claims in terms of allegedly receivable money, or where money is an adequate compensation, the Court may refuse to grant an interim order under Section 9 of the Arbitration and Conciliation Act, 1996.

CASE SUMMARY

Brief Facts

Respondent No. 1, specializing in asset management business, succeeded in the bid in a tender floated by South Delhi Municipal Corporation ("SDMC") for solid waste management. Respondent No. 2 was a special purpose vehicle incorporated at the instance of the Respondent No. 1 for carrying out the specific work of SDMC. A concession agreement was entered into between SDMC and the Respondents on December 2, 2016 for a period of 8 years for the purpose of solid waste management.

The Petitioner contended that it had also arranged for finance for setting up the business of Respondent No. 2 through a financer. The Respondent had entered into a Master Services Contract for a period of 8 years with the Petitioner on April 28, 2017. Respondent No. 2 had entered into a Master Lease Agreement with the financer. The parties had also entered into an escrow agreement. All payments received by the Respondents had to be deposited in the escrow account. Petitioner alleged that Respondent No. 1 had unlawfully diverted money received from SDMC and did not deposit the same in the escrow account and had also not made monthly payments in lieu of the Petitioner's consultancy services. The Petitioner sought an injunction on Respondent No. 1 from receiving any payment from SDMC except for the purpose of depositing the same in the escrow account and paying the parties.

Respondent No. 1 contended that the Petitioner had failed to perform its obligations under the Master Services Contract. Therefore, Respondent No. 1 had terminated the Contract on May 28, 2020 and had also demanded compensation for the losses caused due to deficiency in services and non-performance of contractual obligations. Respondent No. 1 contended that no amount was payable to the Petitioner.

Decision

The Court noted that the Respondents had not raised the issue of jurisdiction. Master Services Contract contained a forum selection clause and provided for the seat of arbitration to be at Kolkata. Therefore, the Court did not delve into the issue of jurisdiction.

The Court further noted that there is a dispute between the parties regarding the termination of the Master Services Contract and the amount payable between the parties. The same is to

be resolved in arbitration. Therefore, it would not be proper to grant any interim relief or to discuss the rights and liabilities of the parties pending the arbitration.

Moreover, since the claims were in terms of receivable money, the Court may refuse to grant interim orders. Hence, the petition was dismissed.

AMIT KUMAR GUPTA V. DIPAK PRASAD

2021 SCC OnLine Cal 2174

CASE DETAILS:

Date of Application	23 December 2020
Date of Judgement	3 February 2021
Nature of Application	Petition to substitute the arbitrator/ reconstitute the arbitral tribunal
Bench Strength	Single Bench
Judge(s)	Justice Debangsu Basak
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 11; Section 29A; Section 42

RATIO:

The meaning of the term "court" under Part I of the Act is subject to the requirement of context. In the context of Section 29A, the court having the power to appoint an arbitrator under Section 11 will have the power to substitute the arbitrator under Section 29A.

CASE SUMMARY

Brief Facts

The Petitioner entered into a contract with the Respondent in April 2015. The arbitration clause in the agreement allowed for both parties to nominate an arbitrator in case of a dispute. When such dispute arose, the petitioner nominated its arbitrator and on the respondent failing to nominate its arbitrator, the petitioner invoked Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act") and applied before Hon'ble High Court of Calcutta for constitution of the arbitral tribunal. The Court disposed of such petition by constituting the arbitral tribunal. The arbitral tribunal had entered into reference on August 17, 2018 and the time to conclude the arbitration reference had lapsed on September 4, 2020.

A petition under Section 9 of the Act of 1996 was filed and entertained by the Alipore District Court. It was the Respondent's contention that since a petition has been filed under the Alipore District Court, the Court cannot exercise jurisdiction under Section 29A of the Act in view of Section 42 of the Act.

Decision

The Court noted that the word 'court', as used in Sections 29A and 42 of the Act, has been defined by Section 2(1)(e). The power of appointment of an arbitral tribunal has been prescribed in Section 11 of the Act.

The Court was of the view that the word 'court' used in Section 29A of the Act partakes the character of the appointing authority as has been prescribed in Section 11 This is due to the fact that the Court exercising jurisdiction under Section 29A is required to substitute the arbitrator. This right of substituting can be exercised by a Court which has the power to appoint.

In the present case, a petition under Section 9 of the Act had been filed and entertained by the Alipore District Court. By virtue of Section 42, such Court would have jurisdiction to try and determine all subsequent petitions under the Act. However, such Court is not the appointing Court of an arbitrator under Section 11. The Court opined that since the arbitral tribunal was constituted by the Court, and not the Alipore District Court, the application under Section 29A of the Act is maintainable before it.

The power to substitute should be read in the context of the power of appointment under Section 11. The non-obstante clause of Section 42 will get attracted only when the Courts are dealing with matters other than appointment and removal of arbitrators under Section 11 and Section 29A of the Act of 1996 respectively.

The Court, in accordance with the ratio laid down in *Hanumandass Rajkumar Pvt. Ltd. v. Trilok Kumar Jha*[12] stated that although it has the jurisdiction to try and determine this petition, it is premature and therefore disposed of.

[12] AP 243 of 2020 (The High Court of Calcutta)

INSTITUTE FOR INDIAN LABOUR V. TERAI TEA COMPANY LIMITED

2021 SCC OnLine Cal 350

CASE DETAILS:

Date of Application	N/A
Date of Judgement	15 February 2021
Nature of Application	Civil Suit (CS 80 *of* 2020)
Bench Strength	Single Judge
Judge(s)	Justice Debangsu Basak
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 8

RATIO:

An Application under Section 8 of the Arbitration and Conciliation Act of 1996 is legally valid even without the original document containing the arbitration clause or a duly certified copy thereof being annexed to the application so long as the same is brought on record at the time when the Court is considering the application.

CASE SUMMARY

Brief facts

The Plaintiffs entered into a Tenancy Agreement and a Consolidated Charges Agreement (collectively "the Agreements") under which the Defendant was put into the possession of the suit premises as a tenant thereof. The Agreements contained stipulated arbitration clauses which stated that any related disputes have to be resolved through the forum of arbitration.

Presently, a Civil Suit ("the Suit") had been filed regarding a dispute which had arisen between the parties wherein the evidentiary validity of the documents relied upon by the Defendant's counsel was challenged by the counsel appearing for the Plaintiff who submitted that the tenancy agreement is essentially one of lease. The Plaintiff's counsel contended that the definition of a lease as appearing under Section 105 of the Transfer of Property Act, 1882 ("the TOPA") should apply and such lease deeds are compulsorily registrable under the law. It was contended by the Plaintiff's counsel that since the tenancy agreement is unregistered, the agreement does not warrant looking into and hence, the Defendant cannot be allowed to rely upon the same up till the payment of stamp duty.

The counsel appearing for the Defendant firstly placed reliance on the judgement passed in *Vidya Drolia v. Durga Trading Corporation*[13] (2020) in support of the contention that the disputes in the Suit can be referred to arbitration. Secondly, in furtherance of the ratio of *Ananthesh Bhakta v. Nayana S. Bhakta*[14] (2017) and *Paras Marketing Pvt. Ltd. v. Air India Ltd.*[15] (2017) it was submitted by the counsel that where the Arbitration Agreement is not in dispute, then, the necessity to produce the original Arbitration Agreement under Section 8(2) of the Act stands waived. Thirdly, the counsel submitted that as per Article 5 of Schedule IA of the Indian Stamp Act, 1899 the tenancy agreement is adequately stamped. Further, it was submitted that if required, the Defendant can produce the original Agreements before the Court.

[13] 2020 SCC OnLine SC 1018

[14] (2017) 5 SCC 185

[15] 2017 SCC OnLine Cal 13097

Decision

The Court laid down that in the present case, the Plaintiff had not established a case of non-existence of valid arbitration agreement by summarily portraying a strong case that it is entitled to such a finding. The contractual ingredients of the arbitration agreement had been fulfilled in the facts of the present case. The plaintiff had not established that the subject matter of the suit is not arbitrable.

The Court further opined that the Plaintiff did not take any steps for the purpose of having the tenancy agreement registered at any point of time therefore, the agreement cannot be said to be a lease agreement given the conduct of the parties and the provisions of TOPA 1882.

The Court held that there is no impediment in the Court considering an application under Section 8 of the Act without the original document containing the arbitration clause or a duly certified copy thereof being annexed to the application so long the same is brought on record at the time when the Court is considering the application. In view of the ratio of *Anantesh Bhakat* (2017) and *Paras Marketing* (2017), the present application is barred under the provisions of Section 8(2) of the Act as the defendant had produced the original documents and offered to deposit the same as when directed. Since the tenancy agreement is not a lease, the relevant article of the Indian Stamp Act, 1889 in Schedule I-A thereof is Article 5 and thus, has been adequately stamped. The parameters of consideration of an application under Section 8 of the Act have been laid down in *Vidya Drolia* (2020) and such parameters have been satisfied in the present case warranting the invocation of Section 8 of the Act. The case is further listed so as to record the original agreements and to pass consequential orders under Section 8 of the Act and the Suit is thereby disposed of accordingly.

KOLKATA MUNICIPAL CORPORATION V. JAIN INFRAPROJECTS LTD.

2021 SCC OnLine Cal 427

CASE DETAILS:

Date of Application	22 December 2020
Date of Judgement	22 February 2021
Nature of Application	Appeal against an Award/ Setting Aside application
Bench Strength	Single Judge
Judge(s)	Justice Moushumi Bhattacharya
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 34

Ratio

In matters of a delay in filing the application beyond the stipulated period prescribed under section 34(3), the additional extension of 30 days cannot be granted as a matter of course. The applicant must obtain the leave of the court and the additional 30 days period can only be used if the court is satisfied with the reasons condoning the delay.

CASE SUMMARY

Brief Facts

In the present case, an award under section 34 of the Arbitration and Conciliation Act ("Act") has been challenged. The first application before the commercial court against the award was filed on 18th June 2019, after having received it on 22nd February 2019, causing a delay of 22 days. On 15th October 2020, the court passed an order that under section 34 of the Act, the court did not have the jurisdiction to entertain the application. The certified copy of the order was received by the application on 20th October 2020. Finally, the application was filed at the appropriate court on 22nd December 2020, right after the additional documents were issued by the commercial court. The respondents contended that the petitioner's application was not maintainable by virtue of being hit by the provisions of the Limitation Act

Relying on several judgements, the counsel of the respondent argued that whenever a plaint was filed in the wrong court, the passage of time in the passing of order and re-filing of the plaint could not be excluded while calculating the limitation period. The petitioners, in turn, relied on the Suo Motu Petition (C) No. 3 of 2020 by the Hon'ble Supreme Court, through which the period of limitation was extended by the Court, in light of the Covid-19 situation.

Decision

The court noted that Section 34(3) of the Act stated that from the date of receiving the order, a three month period was allowed to challenge that order, exceeding which a further 30 day period might be granted if the court was satisfied that there was sufficient cause that prevented the applicant from filing the application within time.

The returning of the plaint by the commercial court by itself would not be a sufficient ground to excuse the initial delay of 20 days in filing the application. Additionally, the applicant did not provide any reasons to condone the 2 month delay to file the application at the appropriate court after receiving the order from the commercial court. Neither did the applicant take any measures to expedite the obtention of additional documents by the commercial court.

While analysing the ruling in Suo Motu Petition (C) No. 3 of 2020, which has been relied on by the petitioner, the learned Court noted that it had to be considered in the context of *Sagufa Ahmed v. Upper Assam Plywood Products Pvt. Ltd.*[16] ("*Sagufa Ahmed*"). In this case, although the limitation period was extended in light of the pandemic, no extension to the period of condonation given in the concerned stature was permitted. Therefore, following the ruling of *Sagufa Ahmed*, no extension to the period of limitation that falls outside the scope of the statute could be granted.

Following the above ruling, since the applicant failed to apply for the condonation of the initial delay of 22 days before the commercial court, and allowed the delay to continue till the filing of their application at the appropriate court, the application of the petitioner challenging the award passed by the court was found to be barred by limitation. Therefore, the appeal was dismissed without any costs.

[16] Civil Appeal Nos. 3007-3008 of 2020 (The Supreme Court of India)

MITESH MEHTA ALSO KNOWN AS MITESH KISHORE MEHTA V. SAREGAMA INDIA LIMITED

2021 SCC OnLine Cal 453

CASE DETAILS:

Date of Application	28 February 2013
Date of Judgement	2 March 2021
Nature of Application	Appeal against an Award/ Setting Aside application
Bench Strength	Single Judge
Judge(s)	Justice Moushumi Bhattacharya
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 34 and Section 28(3)

RATIO:

Construction of the terms of the contract is the exclusive domain of the Arbitrator. For an award to be set aside for violating Section 28(3) of the Arbitration and Conciliation Act, 1996 ("Act") it must be perverse or patently illegal or opposed to public policy.

CASE SUMMARY

Brief Facts

According to Clause 30 of the contract between the two parties, either party was empowered to terminate the agreement by giving a 30 days' advance written notice to the other party of its intention to do so and then terminate after such period. The Respondent sent a letter to the Petitioner on 10th September, 2008, terminating the agreement. The Petitioner responded to it on 13th September, 2008 and 30th September, 2008, enclosing the final bills. Since the Respondent's first letter had not mentioned the notice period of 30 days, the Respondent issued a second letter on 7th October, 2008 to which the Petitioner replied on 10th October, 2008 and 11th October, 2008 claiming outstanding amounts but accepting the termination.

The Arbitrator found the Claimant (now Respondent) to be entitled to a substantial part of claims made in the Statement of Claims. The award was contested by the Petitioner claiming that the Arbitrator failed to consider the terms of the Agreement as mandated by Section 28(3) of the Act by not considering Clause 30 of the agreement. Petitioner pleaded that the letter of termination sent on 10th September 2008 did not comply with the Clause, and the second letter could not be construed as curing the defect as the agreement had been terminated on 14thSeptember 2008 itself.

The Respondent pleaded that the award was reasoned and in accordance with the laws in force. Relying on *Associate Builders* v. *Delhi Development Authority*[17] ("*Associate Builder"),* he pleaded that The Arbitrator being the final word on the construction of the contract, the award cannot be interfered with unless found to be perverse. Since during Arbitration, the Petitioner did not make out the essential and material case in cross-examination, the evidence of the Respondent stood undisputed.

Decision

The Court found that the Arbitrator had considered the effect of Clause 30 in detail, and arrived at the specific decision that though the first termination letter did not refer to Clause

[17] 2015 3 SCC 49

30, the subsequent letter by the Claimant was issued by abundant caution to cure the defect. Both the letters were not denied by the Petitioner either, and that was a crucial consideration for ruling in favour of the Respondent/Claimant. Moreover, the Petitioner had not presented himself during the cross-examination in the arbitral tribunal and that had made it fit for the arbitrator to discount the evidence of the Petitioner. The Arbitrator did not take irrelevant considerations into account, and based the award on the documents before him.

The Court held that the award, therefore, did not disclose any basis for holding that it was illegal, against public policy, or perverse. Referring to *Associate Builder*, the Court ruled that such perversity or irrationality would arise when no reasonable person would have arrived at the decision, findings were not based on evidence, or the tribunal ignored vital evidence or considered irrelevant considerations. It held that the construction of the terms of the contract is for the Arbitrator to decide and his word is final.

Since the Award proved that Clause 30 was taken into account and weighed against the correspondence between the parties, the Petitioner did not have a standing. Further, the Court clarified that none of the three points made out in *Associate Builders* applied to the current case.

COAL INDIA LIMITED V. HYDERABAD INDUSTRIES LTD.

2021 SCC OnLine Cal 518

CASE DETAILS:

Date of Application	05 March 2020 (IA G.A. 01 of 2020) with A.P. 99 of 2009
Date of Judgement	15 March 2021
Nature of Application	Adjourning the setting aside proceedings to give the Arbitrator opportunity to eliminate the grounds of defect in arbitral award (Remittal of arbitral award proceedings)
Bench Strength	Single Judge
Judge(s)	Justice Moushumi Bhattacharya
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 34(4)

RATIO:

Section 34(4) of the Arbitration and Conciliation Act, 1996 ("Act") must be interpreted restrictively. It only allows the Arbitrator to "resume" proceedings to eliminate the grounds for setting aside the award. It does not allow the Arbitrator to give a fresh hearing to the parties, unless the award is contested on the ground that a hearing was not given to the parties.

CASE SUMMARY

Brief Facts

An Arbitral award was passed on 27 December, 2008 in the dispute between the parties. The Petitioner (award-debtor) filed the application for setting aside the award in February, 2009. The application was taken up for consideration in February, 2020. Before the application was allowed or the award was set aside, the Respondent (award-holder) filed the present petition under Section 34(4) of the Act, which allows a court to adjourn the proceedings in order to give the Arbitral Tribunal an opportunity to resume the proceedings or to eliminate the grounds for setting aside of the arbitral Award.

The Petitioner, relying on *Kinnari Mullick v. Ghanshyam Das Damani*[18], contended that since the award had not been set aside, the Court could adjourn the proceedings for granting the Arbitrator an opportunity to eliminate the grounds for setting aside of the arbitral Award.

The Respondent submitted that the present application was filed after eleven years from when the Section 34 application was filed while the six months is the outer limit.

The Respondent, relying on *Sundaram Fastener Limited v. Assistant Commissioner of Urban Land Tax*[19] to interpret the word "resume", submitted that Section 34(4) only gave the Arbitral Tribunal an opportunity to resume the Arbitral proceedings to eliminate the grounds for setting aside of the Award, but did not permit fresh arguments or hearings. The Respondent supported this contention with the doctrine of "functus officio" which mandated finality in dispute resolution.

Decision

The Court read the text of Section 34 to mean that the Arbitrator could not "perfect" the award but could only eliminate the grounds upon which the award is challenged.

The Court noted that the Petitioner had filed the present application after eleven years since it was notified of the contested grounds for setting aside the award. This delay was not reasonable and the Arbitrator would not be able to recall the arguments and the award.

[18] (2018) 11 SCC 328

[19] (1989) 1 Mad LJ 72

The Court found that if the Petitioner had not taken the ground in the Section 34 proceedings that the Arbitrator did not give Coal India Ltd. an opportunity of hearing, then the arbitrator could not give fresh hearing to the parties. The only ground taken by the Petitioner was that the Award does not contain reasons. Therefore, the primary issue to be decided was - *whether the Arbitrator could furnish reasons to make the Award withstand the challenge under Section 34 without hearing the parties once again?*

The Court undertook a comparative analysis of Section 16(1) of the Arbitration Act, 1940 which was later replaced by Section 34(4) of the Act of 1996. While Section 16(1) allowed "reconsideration" by the Arbitrator, Section 34(4) allowed the Arbitrator only to "eliminate the grounds". This was found to be in line with the UNCITRAL Model Law. The Court noted that in *Tan Poh Leng Stanley v. Tang Boon Jek Jeffrey*[20], on the basis of the principle of "finality" and in furtherance of "public policy to bring commercial disputes to an early end", it was found the Arbitrator cannot revisit or reconsider an award.

Thus, the Court decided that Section 34 was to be read restrictively. The Petitioner had not claimed that it was not given a hearing in the Section 34 proceedings. Hence, permitting the Arbitrator to hear the parties *de novo* would enlarge the mandate of Section 34(4). Further, the Court observed that after 13 years since the award was passed, the Arbitrator can also not be expected to supply reasons for the award without hearing the parties.

Thus, the Respondent's application to seek adjournment of court proceedings in order to resume arbitration proceedings was dismissed.

[20] [2000] SGHC 260 (The Singapore High Court)

MARMAGOA STEELS LTD. V. MSTC LTD

2021 SCC OnLine Cal 531

CASE DETAILS:

Date of Application	2 March 2016
Date of Judgement	19 March 2021
Nature of Application	Arbitration Petition against arbitral award
Bench Strength	Single Bench
Judge(s)	Justice Moushumi Bhattacharya
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 34; Section 35

RATIO:

If it is found that the arbitrator's approach is not arbitrary and capricious, the arbitrator must be taken as the last word on facts, and the arbitrator is the ultimate master of the quantity and quality of evidence.

CASE SUMMARY

Brief Facts

Marmagoa Steels Ltd. ("Petitioner") had filed a petition before the Calcutta High Court ("High Court"), challenging the arbitral award ("Award") dated 27 November 2015 which was passed by a solo arbitrator. The Petitioner was directed to pay Rs. 23,84,59,434/- to MSTC Ltd. ("Respondent") and the Respondent was directed to pay interest at a rate of 9% of the Award.

The dispute in the present case arose from an agreement that was entered into between the Petitioner and the Respondent, wherein the Respondent had agreed to procure LAM Coke from third party vendors after making the payment for the same and the Petitioner was then liable to compensate the Respondent for the payment that was made on its behalf. The Respondent invoked the arbitration clause upon failure of the Petitioner to clear an amount of Rs. 23,84,59,434/- that was due from the ten transactions between 2011 and 2012.

The Counsel appearing for the Petitioner argued that the Award could not have been passed in view of Section 22(1) of the Sick Industrial Companies Act, 1985 ("SICA") as the Petitioner was declared a sick company and thus no suit for recovery of money or for enforcement of any security against the Petitioner could be taken without the consent of the Board, the arbitrator had decided the award without adjudicating the disputes between the Petitioner and the Respondent which was against the public policy in India, and the Award was in contravention of Section 35 of the Arbitration and Conciliation Act, 1996 ("Act").

In response to this, the Counsel for the Respondent argued that the challenge to the Award was speculative as the Petitioner had admitted the claims of the Respondent without specifying the issues and disputes that it wanted the arbitrator to adjudicate upon, Section 22(1) of SCIA included coercive measures during execution of proceedings and thus did not fall within the jurisdiction of the arbitrator, and the Award was not against the public policy in India as the arbitrator had given their reasoning for the same and it could not be said that no reasonable man would have arrived at the findings.

Decision

The High Court dismissed the petition filed by the Petitioner on the ground that no merit was found in the challenge to the Award of the arbitrator dated 27 November 2015.

Addressing the first issue that was raised in the petition regarding bar of Section 22(1) of SICA on the arbitration proceeding, the High Court observed that the Award had clearly enumerated the reasons why the arbitrator was not disentitled from giving a relief against a sick unit. The High Court reiterated the Supreme Court's ("SC") decision in *San-A Tradubg Company Limited v. I.C. Textiles Limited*[21] to highlight that proceedings covered under Section 22 of SICA did not prohibit arbitration proceedings, and that Section 22(1) of SICA included *"proceedings for winding up of the industrial company or proceedings for execution and distress against any of the properties of the industrial company or even for the appointment of a receiver in respect of the properties of the industrial company"*. Therefore, observing that the SC had held an arbitration proceeding to be neither a suit nor proceedings under Section 22(1) of SICA, the High Court rejected the first ground for challenging the Award in view of lacking merit.

On the point of the Award being in contravention to Section 35 of the Act, the High Court found no infirmity in the findings of the arbitrator to conclude that the Award was inconclusive under Section 35 of the Act. In furtherance, the High Court observed that the Petitioner had not taken any ground with regard to the Award being 'inconclusive and not final' in the challenge made under Section 35 of the Act. In this context, the High Court stressed on the view that a *"sentence cannot be taken out of the context in which it has been used and construed devoid of the context"*.

With regard to the finality of Award, the High Court cited *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*[22] to observe that the Award in challenge before it was neither against the public policy nor against the most basic notions of morality or justice under the Explanation to Section 34(1)(b) of the Act, as no case was made by the Petitioner stating that the impugned Award had breached any fundamental principle of justice or was of a nature which would shock the conscience of this Court. Given that the arbitrator had specified enough reasons for giving the Award, the High Court was of the view that the Award could not be challenged under the scope of Section 31(3) of the Act.

[21] (2012) 7 SCC 192

[22] (2019) 15 SCC 131

Thus, ruling that the arbitrator is the ultimate master of the quantity and quality of evidence before it, the High Court dismissed the petition on the ground that the Petitioner's claims for challenging the Award lacked merit.

GANNON DUNKERLEY AND CO. LTD V. SREI EQUIPMENT FINANCE LTD.

2021 SCC OnLine Cal 566

CASE DETAILS:

Date of Application	18 January 2021
Date of Judgement	23 March 2021
Nature of Application	Appeal from the order of Single Judge Bench
Bench Strength	Division Bench
Judge(s)	Justice I.P. Mukerji & Justice Md. Nizamuddin
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 7

RATIO:

When the parties have entered into several contracts covering the same transaction, the test to determine whether an arbitration clause in one of the contracts applies to subsequent contracts that do not have arbitration clauses is to see whether the subsequent contracts supersede the prior or merely supplement it.

CASE SUMMARY

Brief Facts

Gannon Dunkerley ("Appellant") and SREI Equipment Finance ("Respondent") entered into a Master Facility Agreement ("MFA") in 2017, under which the Respondent was to provide finances to the Appellant for purchasing equipment. The Appellant would then repay the loan in various instalments. The MFA had an arbitration clause.

Due to non-payment of the dues, the Appellant and the Respondent entered into negotiations and signed the Memorandum of Understanding for Settlement ("MoU") in 2020. The MoU provided a new schedule for the repayment. Further, the MoU stated that it is supplementary to the MFA. Notably, the MoU did not have an arbitration clause.

In 2021, disputes arose between the parties, and the Respondent filed an application under Section 9 of the Arbitration and Conciliation Act 1996 ("Act") before the Calcutta High Court ("Court") for the appointment of a receiver of the equipment. A single-judge bench of the Court granted the interim relief and appointed a receiver. The Appellant filed a letters patent appeal before the division bench of the Court on the limited question of the existence of a valid arbitration agreement. The Appellant contended that the MoU is a separate agreement, superseding the MFA, without an arbitration agreement. As the alleged defaults pertained to the revised schedule in the MoU, the Section 9 application was not maintainable. Hence, the present proceedings came before the Division Bench of the High Court.

Decision

The Court, at the outset, stated that an arbitration agreement is a part of the contract, and if the contract is superseded by another contract, the arbitration agreement perishes. However, if the second contract merely supplements the first contract and the two-run concurrently, the arbitration agreement persists. The Court observed that when the parties enter into two or more contracts covering the same transaction, it is not necessary to incorporate the arbitration agreement present in one to each subsequent contract. The primary question then, before the Court, was whether the MoU completely superseded the MFA, thereby extinguishing the arbitration agreement, or whether both of them operated concurrently. The test to determine

the same is to look at the two documents and determine the parties' intention, which may be explicit or implied.

The Court noted that the MoU in its definitions section stipulated that it was to be supplementary to the MFA. Further, Clause 6 of the MoU stated that in case of any default by the Appellant under the document, the Respondent could enforce all rights under the MFA, including the arbitration clause. The Court held that on a cumulative assessment of the MoU, it was evident that the parties intended both the documents to run concurrently. Only those parts of the MFA which the MoU modified had become inoperative, like the payment schedule.

As a result, the arbitration agreement in the MFA, which the MoU mentioned and did not modify, persisted. The Court considered it irrelevant that the alleged breach was of the payment schedule in the MoU as both the contracts were in operation at the same time. Therefore, the Court held that the Section 9 application is maintainable.

MADRAS HIGH COURT

TAMIL NADU ROAD SECTOR PROJECT II, HIGHWAYS DEPARTMENT REPRESENTED BY PROJECT DIRECTOR V. IRCON INTERNATIONAL LTD. AND SUMBER MITRA JAYA AND ANR

2021 SCC OnLine Mad 181

CASE DETAILS:

Date of Application	20 January 2020
Date of Judgement	19 January 2021
Nature of Application	Petition for appointment of nominee arbitrator of the Respondents pursuant to the Arbitration Agreement
Bench Strength	Single Judge
Judge(s)	Justice P.T. Asha
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 11(6), Section 21

RATIO:

Wherever the appointment and composition of the arbitral tribunal differs in several contracts governing commercial transactions, one of the agreements alone cannot be chosen to dictate the composition of the arbitral tribunal, and composite proceedings cannot be instituted for the same purpose.

CASE SUMMARY

Brief Facts

In the present case, the Tamil Nadu Road Sector Project II, Highways Department had entrusted the construction and upgradation of certain roads and by-passes to IRCON International, which concluded the work in the year 2012. The liability defects period for such upgradation came to an end in 2012. Prior to engaging IRCON International, the petitioner entered into the contract with the second respondent to supervise the construction work. Upon an inspection conducted by the Director of the Highways Research Station in 2017 several defects were encountered. In this regard, the petitioner sought a cost estimate for the repair of the roads. While the second respondent submitted a reply, there was no response from the first respondent, leading to the repair work being effectuated by a third party causing huge losses to the petitioner. The petitioner issued separate legal notices to both the respondents invoking the arbitral clause under section 21 of the Act, and themselves appointed an arbitrator as per clause 8 and clause 67 of the contract with respondent 2 and respondent 1 respectively. As a response, both the respondents contended that both the contracts contained different arbitral clauses regarding the appointment of the arbitrator, therefore a single petition against both of them was inadmissible.

The petitioner submitted that since the contracts related to the same subject matter, a single petition under section 11 (6) of the Act was sufficient to implead both the parties. The respondents submitted that the petition was not maintainable since the contracts entered by the petitioner with both the respondents were separate and independent contracts, where neither of the respondents were party to the contract the petitioner had with the other respondent. Additionally, the procedure for the appointment of an arbitrator was vastly different in both the contracts and the respondents could not be impeded in a compound arbitration. Lastly, since the defect liability certificate had already been issued in 2012, the claim of the petitioner is not sustainable after 7 years had passed.

Decision

The Court clarified the position regarding the arbitral clauses in the petitioner's contracts with the 1st and the 2nd respondent. For the arbitral clause contained in the contract between the second respondent and the petitioner, the provision for the amicable settlement was provided. Should an amicable settlement may not be possible, alternate provisions were made

for appointment of a sole arbitrator or a panel of three arbitrators, depending upon the nature of the dispute being technical or otherwise.

Similarly, in the contractual clause between the first respondent and the petitioner, the dispute was stipulated to be resolved through arbitration, with each party nominating one arbitrator each, the two of whom would decide the presiding arbitrator through a mutual agreement. Thus, the Court noted that the provisions for dispute resolution were completely distinct in both the contracts.

The Court relied on the case of *Walter Bau AG v. Municipal Corporation of Greater Mumbai*[23], where the Supreme Court noted that the appointment of the arbitrator should be through the procedure agreed, any deviation from which would render the selection invalid. In another judgement of *Padam Chand Kothari v. Shriram Transport Finance Co. Ltd*.[24], where a single petition dealt with three separate arbitral agreements clubbed together, it was held that the appointment of the arbitrator was against the agreed terms of the agreement, thus rendering the award passed by the tribunal to be without jurisdiction as per section 34(2)(v) of the Act. The case of *Alaska Export Usa Inc. v. Alaska Export*[25] dealt with a similar situation where the Division Bench of this court held that in the presence of two different agreements governing the contractual relationship, where both of which contain a different arbitral clause, one could not pick the arbitral tribunal by choosing one of the agreements.

Analysing the contractual relationship between the parties, the Court held that though the work undertaken by both the respondents were intrinsically connected by virtue of the onus lying upon the shoulders of the second respondent to supervise the work of the first respondent, the agreement of the petitioner with Respondent 1 could still be carried independent of and in exclusion of the agreement with Respondent 2. Additionally, the procedure for the appointment of arbitrator in both the contracts differs vastly and is not reconcilable.

In light of the fact that the petitioner also failed to follow the procedural requirements provided in the contract before approaching arbitration, it was noted that separate remedies

[23] (2015) 3 SCC 800

[24] O.P. No. 521 of 2016 (The High Court of Madras)

[25] Appeal Suit No. 122 of 2013 (The High Court of Madras)

need to be sought against both the respondents and the petitioner could not institute composite arbitral proceedings against them.

Therefore, the petition was dismissed without costs.

EDAC ENGINEERING LIMITED V. STAR WORLD INTERNATIONAL SERVICE (INDIA) PRIVATE LIMITED

2021 SCC OnLine Mad 1147

CASE DETAILS:

Date of Application	17 October 2016
Date of Judgement	3 February 2021
Nature of Application	Petition for setting aside of arbitral award
Bench Strength	Single Judge
Judge(s)	Justice M. Sundar
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 11; Section 34

RATIO:

Section 34 of the Arbitration and Conciliation Act 1996 is a delicate balance between sanctity of finality of arbitral award ingrained in Section 35 of the Act read with minimum judicial intervention principle ingrained in Section 5 of the same Act on side, and the sacrosanct character of time honoured judicial review, forming part of substantive due process of law on the other side.

CASE SUMMARY

Brief Facts

Star World (Claimant/Respondent) had entered into an agreement (Agreement) with EDAC (Defendant/Appellant) for erection of stainless steel small bore piping work. The Claimant had filed a statement of claim before the Arbitral Tribunal (AT) demanding the amount of Rs.27.60 lakhs due for payment by Defendant on 1 August 2015. Thereafter, the Defendant had filed a statement of defense asserting that the work done by the Claimant was not satisfactory due to the internal damage caused to the coating done as per the scope of work under the Agreement. The AT after considering the evidence presented before it held the Defendant liable to pay Rs. 23.66 lakhs to the Claimant.

Pursuant to the order of the AT, the Appellant had filed a petition against it before the Madras High Court. The High Court considered the following issues framed by the AT during the hearing of the appeal on 17 February 2021:

a) *Whether the Respondent is entitled to the claims as mentioned in para 23 of the claim petition as due and payable?*

b) *Whether the Respondent has caused any damages which allegedly caused losses to the Appellant thereby disentitling the Respondents to make their claims?*

c) *If the Respondent is entitled for any dues from the Appellant, whether they are entitled for interest at 12% per annum?*

Arguments

The Counsel for the Appellant had argued before the High Court that the AT had failed to consider the "back to back" nature of the Agreement and that the norms regarding internal coating were ignored as well when delivering its award. To the contrary, the Counsel for the Respondent asserted that lack of necessary ingredients do not attract Section 28(3) of the Act to be invoked, the recitals in the Agreement do not mirror the "back to back" arrangement, and considering that there were other workers working under the Agreement, the internal coating damage caused cannot be attributed to the Respondent.

Decision

At the outset, the High Court observed that Section 34 of the Act is a balance between the finality of an award under Section 35 of the Act when read with Section 5 of the Act to reduce excessive judicial interference.

The High Court held that the Appellant had a burden of *song qua petitioner* i.e. the Agreement substantiating the "back to back" arrangement between the Appellant and the Respondent to be presented before the AT. However, the Appellant had failed to produce the same evidence supporting its claims before the AT, thereby ruling that the Respondent is entitled to the amount that was sanctioned and due to be paid by the Appellant. Turning to the next claim of the Appellant on the independent application of clause 14 of the Agreement and non-application of clause 15.1.4 of the same by the AT, the Court upheld that clause 14 is a mere reiteration of clause 15.1.4. In furtherance of this, High Court relied on the Hon'ble Supreme Court's ('Court') precedent in *Swan Gold Mining Limited v. Hindustan Copper Ltd.*[26], to opine that interpretation of Sections 34 and37 of the Act will only be necessitated when parties have arrived at a concluded contract and acted on the basis of terms and conditions therein and thereafter new terms are substituted by the Arbitral Tribunal or the court. However, concluding that no such instance had taken place in the present matter, the High Court decided to not delve into the interpretation of Sections 34 and 37 of the Act.

Moving ahead with the dismissal of the appeal filed before it, the High Court made a few more observations on when it can interfere with the interpretation of the Agreement that was made by the AT. Stating that the augmentation charges were rightly rejected by the AT, the High Court laid emphasis on the fact that unless the interpretation is so perverse, unreasonable and fanciful that no body of persons instructed in law and acting reasonably could have interpreted the contractual provision in the manner that has been done, it cannot interfere with the AT's reasoning. To corroborate these findings, reliance was placed on the 'working test' laid down by the Court known as: '*Nath principle'* and *'Kuldeep Singh principle'*. As per these principles, 'perversity' was defined as a finding that is outrageous and defies logic. Further, the High Court observed that a mere possible alternative reasoning cannot be a ground for interfering with the interpretation of the AT unless the established grounds necessitating interference are fulfilled.

[26] Civil Appeal No.9048 of 2014 (The Supreme Court of India)

Two principles were relied upon by the High Court to justify why the appeal made before it in the present case is liable to be set aside. Going ahead with the *Ssangyong* principle as was observed in the case of *Associate Builders v. DDA*[27], the High Court reiterated that if a finding is based on no evidence at all, then it is liable to set aside as patent illegality but no re-appreciation of evidence can take place. By relying on the second principle i.e. *Hodgkinson*, the High Court reaffirmed the settled law that the arbitrator is the sole and final judge to whom the difference in matters or cause are referred; except if such award is a result from corruption, fraud or one other. Thus, confirming the position of the existing laws on this, the High Court dismissed the appeal in the present matter after giving a dispositive reasoning on how the Appellant had not placed substantial evidence before the AT for its award to be set aside by the High Court.

[27] (2015) 3 SCC 49

ENGINEERING PROJECTS INDIA LTD. V. BALAJI PROJECTS

2021 SCC OnLine Mad 409

CASE DETAILS:

Date of Application	09 July 2020
Date of Judgement	05 February 2021
Nature of Application	Petition to determine the territorial jurisdiction of the Arbitral Tribunal
Bench Strength	Single Judge
Judge(s)	Justice M. Sundar
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 4; Section 11; Section 34

RATIO:

Jurisdiction can be conferred ex post facto and such novation can be caused and inferred from the conduct of the Parties. Additionally, parties to an arbitration can, by contract, confer jurisdiction on a Court which otherwise does not have jurisdiction.

CASE SUMMARY

Brief Facts

The Petitioner entered into a contract with the Respondent in July 2011 for the construction of a common computerized checkpost at Attibele, Bangalore. The agreement laid out an arbitration clause, with Chennai being the undisputed seat of arbitration, and also stated that the parties, if they agree to do so, may explore the possibility of conciliation before resorting to arbitration.

When a dispute arose, the Respondent triggered the arbitration clause and submitted an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act") before the Karnataka High Court which then passed an order constituting an arbitral tribunal ("the Tribunal"). The Claimant did not oppose the order and made its counter-claims before the Tribunal. The Claimant later submitted before the tribunal that it did not have territorial jurisdiction, which the tribunal rejected. Following this, the Petitioner challenged this order of the tribunal before the Madras High Court ("the Court") on the basis that it does not have the requisite territorial jurisdiction. Hence, the present case.

Decision

The Court, referring to the principle laid down in *Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd.*[28], stated that since the originally agreed seat and venue is Chennai, the Karnataka High Court did not have the jurisdiction and only the Madras High Court had the exclusive jurisdiction.

There were two questions of law before the Court. First, whether jurisdiction can be conferred ex post facto, and second, whether parties by contract can confer jurisdiction on a Court which otherwise does not have jurisdiction.

Sections 16 to 21 of the Code of Civil Procedure, 1908 ("the CPC") answer these questions in the negative but since the CPC is not applicable, the Court decided that parties by contract can confer jurisdiction on a court as far as an arbitration agreement is concerned.

[28] (2017) 7 SCC 678

Generally, jurisdiction is a condition precedent qua legal proceedings and it cannot be ex post facto, but under the Act, and because the Tribunal itself is private and a creature of contract, the Court determined that it certainly can be ex post facto. It is to be borne in mind that anything that is derogable under the Act can be waived vide section 4. Section 4 of the Act makes it clear that with regard to any requirement under an arbitration agreement, a party who knows that there is non-compliance with regard to such requirement but proceeds with the arbitration without stating its objection to such non-compliance is deemed to have waived his right to so object. Therefore, it is open to the parties to waive the arbitration agreement and change the seat.

In this case, the Petitioner accepted the order, submitted itself to the jurisdiction of the Tribunal, and made a counter claim before the Tribunal. Therefore, there was a clear novation, and once there is novation, the parties are under no compulsion to perform the original covenant.

The Court then came to the conclusion that it did not have jurisdiction to test the impugned award. It was no longer the supervisory court in the case on hand due to the shifting of the juridical seat from Chennai, Tamil Nadu to Bengaluru, Karnataka. Arbitral proceedings are anchored in the seat which has been agreed upon by the parties and in the case on hand; parties by conduct chose to move the center of gravity of arbitral proceedings, from Chennai, Tamil Nadu to Bengaluru, Karnataka.

Therefore, the court rejected the Petition of the Petitioner and directed it to instead approach the High Court of Karnataka.

OPG ENERGY PVT. LTD. V. PRECOT MERIDIAN INDUSTRIES LTD.

2021 SCC OnLine Mad 408

CASE DETAILS:

Date of Application	12 January 2016
Date of Judgement	05 February 2021
Nature of Application	Application to set aside the Arbitral Award
Bench Strength	Single Judge
Judge(s)	Justice M. Sundar
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 31(3), Section 34

RATIO:

In a Section 34 proceeding, the Court does not sit in appeal and is specifically prohibited from re-appreciating the evidence. It is presumed that the Tribunal is the best judge for the quantity and quality of evidence.

The Court has to consider if the award is proper, intelligible and adequate as per Section 31(3) of the Act in a Section 34 proceeding. The threshold for setting aside the award on these grounds is very high, and a simple disjunct between the narrative and the conclusion in the award will not satisfy the same.

CASE SUMMARY

Brief Facts

OPG Energy Pvt Ltd ("OPG") and Precot Meridian Industries Ltd ("Precot") entered into a Power-Sharing Agreement and signed an MoU (together referred to as "agreement") in 2008 wherein OPG would supply electricity to Precot. The agreement provided for arbitration for the resolution of any disputes arising from the agreement.

In 2009-10, there were various instances of short supply and no electricity supply by OPG. When Precot raised the issue with OPG in 2010 asking for compensation, OPG terminated the agreement. Subsequently, Precot initiated arbitration alleging wrongful termination of the agreement and claimed compensation. The Arbitral Tribunal ("Tribunal"), comprising of three arbitrators, ruled in favour of Precot. However, by a 2:1 split, the Tribunal was divided on the quantum of compensation to be given to Precot. The majority granted Rs 50 lacs as compensation compared to the lone arbitrator, who granted Rs 2 crores as compensation.

OPG filed an application under Section 34 of the Arbitration and Conciliation Act 1996 ("Act") for setting aside the award before the Madras High Court ("Court"). OPG alleged that the Tribunal had granted excessive compensation, which was patently illegal and against the public policy of India under Sections 34(2A) and 34(2)(ii) of the Act. Further, they alleged that the award had a non-sequitur fallacy violating Section 31(3) of the Act. At the same time, Precot filed an application under Section 34 of the Act alleging that the minority award was correct in giving higher compensation and ought to be enforced.

Decision

The Court dealt with the multiple issues arising in this case in the following manner:

I. The terminology to refer to the differing views.

The Court expressed displeasure on Precot using the term "minority award" to refer to the opinion of the lone arbitrator. The Court observed that an arbitral tribunal passes a single award that may have differing opinions. The correct terminology for these differing views would have been the "majority view" and the "minority view".

II. Excessive compensation being patently illegal and against the public policy of India.

OPG had argued that there was not enough evidence on the loss suffered by Precot and that limiting factors such as causation, remoteness and mitigation were not considered by the majority view while granting compensation. As a result, it was patently illegal and against the public policy of India.

To answer this question, the Court analysed the award and the reliance placed by the Arbitrators on the evidence produced. The Court found that both the majority and the minority view had considered the evidence, oral and documentary, in extenso. Further, all the limiting factors had been considered extensively based on the evidence produced before the Tribunal. The Court even reproduced specific excerpts from the award to buttress this argument.

Subsequently, the Court observed that in a Section 34 application, the Court is not sitting on appeal of the award and the Court is specifically forbidden to re-appreciate the evidence. The Court reiterated the Hodgkinson principle, which states that the Tribunal is the best judge of the quality and quantity of evidence before it.

As a result, the Court did not find any perversity with the impugned award on the grounds of patent illegality and public policy of India.

III. Non-Sequitur Fallacy

OPG argued that paragraph 15 of the majority view was a non-sequitur to paragraphs 1-14. This violates Section 31(3) of the Act, which requires the Tribunal to give reasons for the decision unless otherwise agreed. Relying on the Supreme Court decision in *Dyna Technologies v Crompton Greaves*[29] ("*Dyna*"), OPG argued the condition had to be read as requiring the Tribunal to give an award that is proper, intelligible and adequate.

At the outset, the Court observed that paragraphs 1-14 were in the nature of narrative and paragraph 15 was a self-contained paragraph. In any case, paragraph 15 started with

[29] (2019) 20 SCC 1

"however" and could at best be considered an exception to the other paragraphs but not a non-sequitur.

The Court admitted that *Dyna* required the Court to judge the award on the adequacy threshold under Section 31(3) of the Act in a Section 34 proceeding. However, as was said in *Dyna*, this inquiry had to be done based on the award as a whole and the issues for consideration. As per the Court, the facts of the present case did not meet the high standard for setting aside the award under the above provision.

IV. Minority view to be enforced

Precot relied on the Supreme Court decision in *Ssangyong Engineering v. NHAI*[30] ("*Ssangyong*") to assert that the minority view should be enforced.

The Court outrightly rejected this contention by stating that the Court would not evaluate the merits or demerits of the minority and majority views. The Court's limited scope was to look at whether the award made by the Tribunal fell under any ground under Section 34, regardless of the existence of differing views within the award.

The Court then noted that the Supreme Court enforced the minority view in *Ssangyong* under Article 142 of the Constitution, which provides the Supreme Court with the power to do complete justice. Even as per the Supreme Court, *Ssangyong* is an exception and not the rule. As a result, the minority view cannot be enforced.

[30] (2019) 15 SCC 131

HINDUSTAN PETROLEUM CORPORATION V. BANU CONSTRUCTIONS AND ANOTHER

AIR 2021 Mad 35

CASE DETAILS:

Date of Application	18 November 2020
Date of Judgement	09 February 2021
Nature of Application	Application for setting aside of arbitral award
Bench Strength	Division Bench
Judge(s)	Chief Justice Sanjib Banerjee & Justice Senthilkumar Ramamoorthy
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 34

RATIO:

Section 34 of the Arbitration and Conciliation Act, 1996 does not empower the Arbitral Tribunal to rewrite the arbitral award by ascribing reasons in support of the claims allowed or quantum awarded.

CASE SUMMARY

Brief facts

The Appellants, Hindustan Petroleum Corporation, filed an Appeal before the Division Bench of the High Court of Madras ("the Court") after being aggrieved by an arbitral award passed by the Arbitration Tribunal ("the Tribunal") pertaining to their dispute with the Respondents, Banu Constructions.

It was contended by the Appellants that the Tribunal was apparently silent on the reasoning behind passing the arbitral award and quantification of damages, under various heads. It was further submitted that the principles of arbitration law do not permit an "unreasoned order" to be justified by supplementing reasons after the announcement of the award, upon looking into the evidence or records pertaining to the arbitral reference.

Decision

The Court observed that while it was not necessary for an arbitral award to justify every denomination awarded to the claimant, the broad premise on which the quantum is founded had to be discernible from the award itself for the award to be meaningful or even intelligible in legal terms. The Court noted that the last few pages of the award, which recorded its operative portion, only mentioned an "excuse for reasons" given in six or seven lines while dealing one of three claim-heads.

The Court further emphasised that there was a statutory mandate to pass reasoned orders in civil litigation as well as under the Act itself - unless the parties dispense therewith by agreement. The Court added that in light of what appeared clearly from the face of the award, the Tribunal's observation that the award contained some reasons for its passage was exceptionable and not acceptable under Section 34 of the Act. The Court went a step further to elaborate that the arbitral award and the affirming judgement go against the most "rudimentary tenets" of the governing law and the jurisprudential philosophy established in the branch of arbitration over the years.

Thus, both the award and the consequent affirmative judgment of the erstwhile Tribunal were set aside and, with the consent of both parties, another arbitrator was appointed to conduct the arbitration afresh.

LANDMARK HOUSING PROJECTS PVT. LTD. V. SAVITRI NAIDU AND OTHERS

AIR 2021 Mad 114

CASE DETAILS:

Date of Application	N/A
Date of Judgement	17 February 2021
Nature of Application	Appeal filed under Clause XV of the Letters Patent read with Section 37 of the Arbitration and Conciliation Act, against the order dated 02.12.2020 made in O.P. No. 546 of 2020
Bench Strength	Division Bench
Judge(s)	Chief Justice Sanjib Banerjee & Justice Senthilkumar Ramamoorthy
Provisions of the Arbitration and Conciliation Act, 1996	Section 34; Section 37

RATIO:

Section 37 of the Act does not permit any appeal from an order passed under Section 34 of the Act unless such order sets aside or refuses to set aside an award.

CASE SUMMARY

Brief Facts

The order given by the Single Judge bench of the Madras High Court disregarded certain grounds taken under a challenge to an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act") and notice was issued on limited grounds rather than the full gamut of the challenge to the award as designed by the Appellant. The Appellant therefore appealed this order under Section 37 of the Act before the Division Bench of the Madras High Court ("the Court"). The Court was required to adjudicate on the maintainability of this appeal.

Decision

At the outset, the Court mentioned the fact that notice may be issued on limited grounds upon certain other grounds being rejected, was unexceptionable.

The Court disagreed with the full bench judgement of the Delhi High Court in the case of *National Highway Authority of India v. Oriental Structure Engineers Ltd*.[31] which stated that it recognized a right of appeal against an order rejecting some of the grounds of challenge to an arbitral award and confining the challenge to some limited grounds.

The Court envisaged two scenarios where an impugned award contains several heads- in the first case, the Court rejects certain heads. This immediately triggers off the right to appeal the Court's decision on those specific grounds. However, in the second case, if the Court refuses to entertain these grounds at all, the right to appeal is only available when the final order is passed.

The determining factor is whether any part of the award is enforceable. If the court repels a challenge to a part of the award, this part of the award becomes enforceable and can therefore be appealed.

The Court ultimately held that Section 37 of the Act does not permit any appeal from an order passed under Section 34 of the Act unless such order sets aside or refuses to set aside an

[31] (2012) 193 DLT 15 (The High Court of Delhi)

award. Parts of orders under Section 34 which confer finality pertaining to heads of claim or parts of award, whether set aside or refused to be set aside, are appellable.

The Court dismissed the appeal on the ground that it was premature.

BALAPREETHAM GUEST HOUSE PVT. LTD. V. MYPREFERRED TRANSFORMATION AND HOSPITALITY PVT. LTD.

(2021) 3 Mad LJ 181

CASE DETAILS:

Date of Application	21 September 2020
Date of Judgement	19 March 2021
Nature of Application	Petition under Section 11 for the appointment of Arbitrator
Bench Strength	Single Judge
Judge(s)	Justice P.T. Asha
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 2(1)(e); Section 11, Section 20

RATIO:

When the parties set the seat of arbitration at a particular place, only the Courts having jurisdiction over that place would have the supervisory jurisdiction over the arbitration process.

CASE SUMMARY

Brief Facts

The parties had entered into a Management Services Agreement on 30th September 2018. Article 10.1 of the Agreement conferred exclusive jurisdiction to the Courts in Chennai for all disputes arising out of the Agreement. However, according to Article 10.3 of the Agreement, the "place of arbitration" was set as New Delhi. The petition was filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("Act") for the appointment of an arbitrator. The Petitioner asserted that the use of the word 'place' in Article 10.3 is only akin to the "venue" of arbitration. He claimed that in view of the language of Article 10.1, the seat of Arbitration would only be Chennai.

The Respondent challenged the petition over the preliminary objection of jurisdiction, asserting that the word "place" is akin to the "seat of arbitration".

Decision

The Court, relying on *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*[32], held that when the parties agree to a place of arbitration as contemplated under Section 20(1) of the Act then the "place of arbitration" so decided would be the 'seat of arbitration'. The subject matter of arbitration as used in the definition of Section 2(1)(e) was distinct from the subject matter of the suit. The former had a connection with the process of dispute resolution and was used to give jurisdiction to the courts where the arbitration took place. Relying on *Indus Mobile Distribution Pvt. Ltd.* v. *Datawind Innovations (P) Ltd.*[33], the Court held that the usage of the term "seat" would only refer to a neutral place with jurisdiction. When parties would agree to a place for arbitration, they would do so to ensure the neutrality of the Arbitration proceedings. To maintain the same commitment, the jurisdiction of the Court at that place would also apply.

The Court further observed that Section 2(1)(e) of the Act was to be construed while keeping in mind Section 20 of the Act. The former could not be interpreted in a way that would deprive the latter of its meaning.

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[32] (2012) 9 SCC 552

[33] (2017) 7 SCC 678

Through harmonious construction of the Agreement, the Court ruled that according to Article 10.2 the dispute arising from it would be under the jurisdiction of the Courts in Chennai if the parties chose to abandon their right to arbitrate the dispute. The Court ruled that under Article 10.3, the seat of arbitration was fixed as New Delhi.

Therefore, the Court held that fixing the place of arbitration is akin to an exclusive jurisdiction clause in the agreement giving only the Courts in that place the supervisory jurisdiction over the arbitration proceedings.

P. SUBRAMANI V. P. RAJAGOPAL AND OTHERS

(2021) 4 Mad LJ 253

CASE DETAILS:

Date of Application	17 May 2011
Date of Judgement	31 March 2021
Nature of Application	Civil Miscellaneous Appeal
Bench Strength	Single Judge
Judge(s)	Justice G.K. Ilanthiraiyan
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 34, Section 37

RATIO:

For the award to be considered illegally valid, it should be signed by all the arbitrators arbitrating the dispute.

CASE SUMMARY

Brief Facts

This appeal arose against the award passed on 09.05.2016 that was challenged by the respondent. The appellant filed this appeal against the lower court's decision of setting aside the award passed by the arbitrator.

The award concerned a dispute regarding the determination and allocation of the immovable property between the appellant and the first respondent, who were brothers, where the property was purchased through the joint income of both. Both of them jointly appointed nine arbitrators to settle this dispute between them, however, only eight ended up conducting an investigation and passing the award.

The appellant argued that the lower Court (*Additional District Court*) wrongly applied the Old Arbitration Act ('*Arbitration and Conciliation Act, 1940*)' since the petition to set aside the award was filed after the ordinance for the New Arbitration Act (*Arbitration and Conciliation Act, 1996*) had already come into force. Under the new Act, the lower Court did not have jurisdiction under section 34 to entertain the suit since the jurisdiction to deal with questions forming the subject matter of arbitration was given to the Principal District Court.

Decision

At the outset, the Court noted that the new Act did not envision the definition of 'court' under section 2(1)(e) to include any civil court of a grade inferior to such Principal District Court or any Court of small clause. The Court where the first respondent had filed a petition challenging the validity of the award was the Additional District Court, which had equal powers as Principal District Court and could not be considered inferior to Principal District Court. Therefore, the court below exercised jurisdiction under section 34 of the Act validly.

The Court observed that the Additional District Court rightly applied the Old Act since the arbitration award had been passed before the New Act came into force. Under the Old Act, the reference was supposed to be made to a sole arbitrator unless expressly provided. If reference was made to an even number of arbitrators, an umpire needed to be appointed within one month of the appointment of arbitrators.

The Court further observed that although the dispute had been referred to nine arbitrators, only eight arbitrators participated in the arbitration proceedings. Thus, clause 2 of the First Schedule of the Old Act was violated since an even number of arbitrators conducted the

proceedings without the appointment of an umpire. Additionally, one arbitrator out of the remaining eight who participated in the proceedings did not sign the award, which was a mandatory provision under section 14(1) of the Old Act.

Since the award was invalid for vitiating the provisions of Section 14(1) and clause 2 of the First Schedule and failing to satisfy the procedure laid down in the Act, it was a sufficient ground for setting aside the award under section 30(c) of the Old Act. The Court upheld the judgement of the lower Court and dismissed the appeal.

THE SUPREME COURT

BHAVEN CONSTRUCTION THROUGH AUTHORISED SIGNATORY PREMJIBHAI K. SHAH V. EXECUTIVE ENGINEER SARDAR SAROVAR NARMADA NIGAM LTD. AND ANR.

2021 SCC OnLine SC 8

CASE DETAILS:

Date of Application	11 December 2015
Date of Judgement	6 January 2021
Nature of Application	Appeal against order of the Gujarat High Court
Bench Strength	Full Bench
Judge(s)	CJI N.V. Ramana; Justice Surya Kant & Justice Hrishikesh Roy
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 16; Section 34

RATIO:

Observing that the Arbitration and Conciliation Act, 1996 ("Act") is a code in itself, the Supreme Court ruled that the intention behind the non-obstante clause i.e. Section 5 in the Act was to reduce excessive judicial interference which is not contemplated under the Act.

CASE SUMMARY

Brief Facts

Sardar Sarovar Narmada Nigam Ltd. ("Respondent 1") entered into a contract with Bhaven Construction ("Appellant") to manufacture and supply bricks ("agreement"). When a dispute arose regarding payment in furtherance of manufacturing and supplying of bricks, a notice was issued by the Appellant for appointment of an arbitrator. The Respondent 1 replied stating two things in disagreement with the Appellant: that the dispute was to be adjudicated under Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 ("the Gujarat Act") as the agreement allowed for the arbitration to be conducted in accordance with the provision of the Indian Arbitration Act and any statutory modification thereof, and that neither party was allowed to appoint an arbitrator before the expiration of thirty days after the defect liability period. The Respondent 1 disputed the appointment of a sole arbitrator by the Appellant under Section 16 of the Act but the same was rejected by the arbitrator. Thereafter, a Special Civil Application ("Application") was filed by the Respondent 1 before the Gujarat High Court ("High Court") and the same was dismissed. A Letters Patent Appeal was filed wherein the Division Bench of the High Court allowed the appeal by the Respondent. Aggrieved by this, the Appellant filed a Special Leave Petition before the Court.

The issue before the Court was *whether the arbitral process could be interfered under Articles 226 and 227 of the Constitution, and under what circumstance?*

The Counsel for the Appellant argued that the Division of the High Court had erred in interfering with the decision of the Single Bench and that Section 16(2) of the Act mandated challenge to an award only under Section 34 of the Act. The Counsel for the Respondent 1 argued that the Gujarat Act had substituted the Act for dealing with work contract disputes, and that Articles 226 and 227 of the Constitution of India allowed the scope for invoking the writ jurisdiction of the High Court to set aside an arbitration which was a nullity.

Decision

The Court ruled that the High Court had erred in utilizing its discretionary power available under Articles 226 and 227 of the Constitution, and thus, the appeal was allowed consequent to setting aside of the High Court Order.

Following observations were made by the Court before arriving at its final ruling. The Court opined that basic ingredients of Section 7 of the Act need to be fulfilled by parties entering

into arbitration agreement. The Court then reiterated that the Appellant had acted in accordance with the procedure laid down in the Act when appointing the sole arbitrator and that the Respondent 1 had not judicially challenged the same. It was discussed that the Respondent 1 then chose to challenge the award of the arbitrator under Section 16(2) of the Act through a petition under Articles 226 and 227 of the Indian Constitution. Citing *Nivedita Sharma v. Cellular Operators Association of India*[34] the Court clarified that as the High Courts had the power to entertain writ petitions, they should not have gone against the settled law to entertain every petition where an effective alternative remedy was available to the petitioner. In the Court's view, the exceptional circumstance of 'bad faith' on the part of the Appellant was not established by the Respondent 1 to invoke Articles 226 and 227 of the Indian Constitution. Reliance was placed upon the "Unbreakability Principle" of time-limit and true to the "certainty and expediency" of the arbitral awards to outline that "*any grounds for setting aside the award that emerge after the three month time-limit has expired cannot be raised*". The Court was of the opinion that judicial interference with the arbitral process will diminish the efficiency of the process. Going forward, while determining whether the agreement was composite in nature, the Court ruled the following:

> *"It is a settled law that the interpretation of contracts in such cases shall generally not be done in the writ jurisdiction. Further, the mere fact that the Gujarat Act might apply may not be sufficient for the writ courts to entertain the plea of Respondent No. 1 to challenge the ruling of the arbitrator under Section 16 of the Arbitration Act."*

Finally towards interpreting the application of Section 16 of the Act, the Court ruled:

> *"The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34."*

Based on the above reasoning, the appeal was allowed and the High Court's impugned Order was set aside.

[34] (2011) 14 SCC 337

N.N. GLOBAL MERCANTILE PVT. LTD. V. INDO UNIQUE FLAME LTD. & ORS.

(2021) 4 SCC 379

CASE DETAILS:

Date of Application	3 November 2020
Date of Judgement	11 January 2021
Nature of Application	Appeal against order of the Bombay High Court on the point
Bench Strength	Three Judges
Judge(s)	Justice D.Y. Chandrachud; Justice Indu Malhotra & Justice Indira Banerjee
Provisions of the Arbitration and Conciliation Act, 1996	Section 5; Section 8; Section 16

RATIO:

The arbitration agreement is a separate and distinct agreement from the underlying commercial contract and would survive independent of the substantive contract. The arbitration agreement would not be rendered invalid, un-enforceable or non-existent, even if the substantive contract is not admissible in evidence, or cannot be acted upon on account of non-payment of Stamp Duty.

CASE SUMMARY

Brief Facts

The first Respondent (Indo Unique Flame Ltd.) entered into a contract with the Appellant (N.N. Global Mercantile Pvt. Ltd.) to transport coal from its washyard to the stockyard (Agreement), Clause 9 of which provided for furnishing a security deposit. The Respondent invoked this Bank Guarantee furnished by the Appellant under the Work Order. In turn, the Appellant alleged that the invocation of the Bank Guarantee was fraudulent and that the Work Order was unstamped. Following this, the Respondent filed an application under Section 8 of the Arbitration Act seeking reference of disputes to arbitration which Global Mercantile opposed and the Commercial Court of Nagpur rejected, stating that the arbitration clause in the Work Order was not a general arbitration clause, which would cover the Bank Guarantee.

Indo Unique then filed a Civil Revision Petition before the Bombay High Court ("High Court") challenging the Order passed by the Commercial Court. The High Court vide the Impugned Judgment held that it was the admitted position that there was an arbitration agreement between the parties, and therefore the application under Section 8 was maintainable. Additionally, with respect to the contention that the invocation of the Bank Guarantee was fraudulent, it was held that the allegations of fraud did not constitute a criminal offence which would entail recording of voluminous evidence and therefore the disputes could be resolved through arbitration. Aggrieved by the judgment of the High Court, the Appellant filed a Special Leave Petition before the Supreme Court ("Court"). The issues before the Court was

a) *whether an arbitration agreement would be invalid or unenforceable, if the underlying contract was not stamped as per the relevant Stamp Act;* and,

b) *whether allegations of fraudulent invocation of the bank guarantee furnished under the substantive contract, would be an arbitrable dispute.*

Decision

At the outset, the Court stated that it is well settled in arbitration jurisprudence that an arbitration agreement is a distinct and separate agreement, which is independent from the substantive commercial contract in which it is embedded. This autonomy of the arbitration agreement is based on the twin concepts of 'separability' and '*kompetenz – kompetenz*'.

The Court further held that the non-payment or deficiency of Stamp Duty on the Work Order does not invalidate the main contract. The arbitration agreement contained in the Work Order is independent and distinct from the underlying commercial contract. On the basis of the doctrine of separability, the arbitration agreement being a separate and distinct agreement from the underlying commercial contract, would survive independent of the substantive contract. The arbitration agreement would not be rendered invalid, un-enforceable or non-existent, even if the substantive contract is not admissible in evidence, or cannot be acted upon on account of non-payment of Stamp Duty.

One issue the Court addressed was whether there exists a requisite to stamp an arbitration clause in an agreement in order for such clause to be enforceable. The Court, on perusal of the Maharashtra Stamp Act, 1958 and Schedule I appended thereto, found that an arbitration agreement is not included in the Schedule as an instrument chargeable to Stamp Duty, and is therefore not required to be stamped.

The Court overruled the case of *SMS Tea Estates Pvt. Ltd. v. M/s. Chandmari Tea Co. Pvt. Ltd.*[35], and the following *Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited*[36] case with respect to two issues. Firstly, that an arbitration agreement in an unstamped commercial contract cannot be acted upon, or is rendered unenforceable in law; and secondly, that an arbitration agreement would be invalid where the contract or instrument is voidable at the option of a party. The court found these findings to be erroneous and that they did not lay down the correct position in law. Once the arbitration agreement is held to have an independent existence, it can be acted upon, irrespective of the alleged invalidity of the commercial contract.

Regarding the question of the allegation of the fraudulent invocation of the bank guarantee being an arbitrable dispute, the Court disagreed with the reasoning of the High Court, touting the view that allegations of fraud are not arbitrable, a wholly archaic one. It held that all civil or commercial disputes, either contractual or non-contractual, which can be adjudicated upon by a civil court, in principle, can be adjudicated and resolved through arbitration, unless it is excluded either expressly by statute, or by necessary implication and that the Arbitration Act does not exclude any category of disputes as being non arbitrable. The civil aspect of fraud is considered to be arbitrable in contemporary arbitration jurisprudence, with the only exception

[35] (2011) 14 SCC 66

[36] (2019) 9 SCC 209

being where the allegation is that the arbitration agreement itself is vitiated by fraud or the fraud goes to the validity of the underlying contract, and impeaches the arbitration clause itself. In the present case, the allegations of fraud with respect to the invocation of the Bank Guarantee are arbitrable, since it arises out of disputes between parties inter se, and is not in the realm of public law.

HARYANA SPACE APPLICATION CENTRE (HARSAC) & ANR. V. M/S PAN INDIA CONSULTANTS PVT. LTD.

(2021) 3 SCC 103

CASE DETAILS:

Date of Application	7 November 2020
Date of Judgement	20 January 2021
Nature of Application	Special Leave Petition against the Order of the Punjab and Haryana High Court granting extension of time for concluding of arguments and passing of arbitral award
Bench Strength	Three Judges
Judge(s)	Justice L. Nageswara Rao; Justice Indu Malhotra & Justice Ajay Rastogi
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 12(5); Section 29A(6)

RATIO:

Section 12(5) read with the Seventh Schedule is a mandatory and non-derogable provision of the Arbitration and Conciliation Act, 1996. The appointment of the Sole Arbitrator is subject to the declarations being made under Section 12.

CASE SUMMARY

Brief facts

In September 2010 the Appellant, HARSAC, invited a Request for Proposal from qualified vendors for the modernisation of Land Records. The contract was awarded to the Respondent - Pan India Consultants Pvt. Ltd. who failed to complete the work assigned within the stipulated period even after the grant of two extensions. Thereafter, the Appellant invoked the Performance Bank Guarantee which was challenged by the respondent by way of a Civil Suit before the Delhi High Court ("High Court").

The High Court disposed of the Suit, directing the respondent to keep the bank guarantees alive, and the Appellant was directed not to encash the bank guarantees, pending resolution of the disputes amicable or via an arbitral tribunal constituted by the parties. The Appellant invoked the arbitration clause in the Service Level Agreement and two arbitrators, nominated by one side each, were appointed to constitute the tribunal.

The respondent filed an application for the appointment of the presiding arbitrator under Section 10(1) of the Arbitration and Conciliation Act, 1996 ("the Act") which was declined by the tribunal, reserving the right to nominate the third arbitrator in the event of a disagreement between the two arbitrators. The tribunal failed to pronounce an Award till the very date of the present judgement and since the arbitral proceedings were not completed within the statutory period of 1 year as prescribed by the Act, or the extensions thereafter, the mandate of the arbitral tribunal would stand terminated.

The respondent was notified by the tribunal that the Award was in the process of preparation when a notice intimating the termination of the mandate of the tribunal was received. The respondent proceeded to file an Application under Section 29A(4) of the Act before the Additional District Judge, Chandigarh, wherein it was prayed that an extension may be granted as the Award was ready to be pronounced however the Director Land Records had not paid their share of the fee, but were delaying the matter, and had erroneously claimed that the mandate of the tribunal stood terminated. The Appellant herein opposed the Application and requested the same be dismissed due to lack of sufficient cause for the extension. The District Judge granted an extension of 3 months to the arbitral tribunal, which was challenged by the Appellant vide Civil Revision Petition under Article 227 of the Constitution before the Punjab and Haryana High Court. The learned Single Judge passed an Interim Order directing both parties to obtain instructions for grant of an extension of 3 months on account of the

prevailing pandemic. Aggrieved by the said order, the Appellant filed aSpecial Leave Petition.

Decision

The Hon'ble Supreme Court ("Court") observed that even though a period of over 4 years had elapsed since the constitution of the tribunal on 14.09.2016, the Award awaits pronouncement, even though the tribunal on two occasions has recorded that the award is ready to be pronounced forthwith. The Court opined that the appointment of the Principal Secretary, Government of Haryana as the nominee arbitrator of HARSAC was invalid under Section 12(5) of the Act as the same is a Nodal Agency of the Government of Haryana thereby falling under Item 5 of the Seventh Schedule to the Act. Additionally, the Court held that Section 12(5) read with the Seventh Schedule is a mandatory and non-derogable provision of the Act.

The Counsel for both parties consented to the substitution of the existing tribunal by the appointment of a Sole Arbitrator pursuant to which, the Court exercised its power under Section 29A(6) of the Act and appointed a substitute arbitrator to conduct the proceedings in continuation from the stage arrived at, and pass the Award within 6 months from the date of receipt of the present Order.

CHINTELS INDIA LTD. V. BHAYANA BUILDERS PVT. LTD.

(2021) 4 SCC 602

CASE DETAILS:

Date of Application	11 December 2020
Date of Judgement	11 January 2021
Nature of Application	Civil Appeal against an order refusing to condone delay in filing of application under Section 34
Bench Strength	Three Judges
Judge(s)	Justice R.F. Nariman; Justice Navin Sinha & Justice K.M. Joseph
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 5; Section 8; Section 16(3); Section 34 and Section 37

RATIO:

Judicial orders refusing to condone delay in filing an application under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act") are appealable under Section 37(1)(c) of the Act.

CASE SUMMARY

Brief Facts

The appeal to be determined concerned a certificate granted under Article 133 read with Article 143A of the Constitution, raising the question whether a single judge's order refusing to condone the delay in filing an application under Section 34 of the Arbitration and Conciliation Act, 1996 is an appealable order under Section 37(1)(c) of the Act or not.

The Appellant, relying on *Essar Constructions v. N.P. Rama Krishna Reddy*[37] ("*Essar"*), asserted that its judgement delivered under Section 39 of the Arbitration Act, 1940 ("Act of 1940") should apply to the case, as that provision is *pari materia* with Section 37 of the Act of 1996. It was held in this judgment that an appeal lies where a single Judge refuses to condone delay, resulting in an order refusing to set aside an arbitral award. It was argued by the Appellant that orders condoning delay are completely different from orders that do not, as the former do not impart any finality to the proceeding, as they could set aside the order later but cannot be said to have refused to set it aside just after condoning it. The effect of the dismissal of a condonation application is the same as the dismissal of an appeal against an award itself. It was asserted that where a right to appeal is granted by a statute, a dismissal on a preliminary ground is the dismissal of the appeal since it cannot be heard thereafter.

The Respondent refuted the fact that Section 37 of the Act is *pari materia* with Section 39 of the Act of 1940 since they are materially different, as the latter concerns itself grounds that were listed in Section 30 of the said Act and they were completely different from the grounds that are made out in Section 34(2) and 34(2A) of the 1996 Act. He also relied upon Section 5 of the Act by which it was made statutorily clear that judicial intervention is to be minimal in the arbitration process. It was further asserted that the appeal would fail because grounds for appeal under Section 37 were exhaustive and made explicit that the appeal shall lie only from them and "no others". Further, Section 37(1)(c) clearly states, "Under Section 34" has to be read with the preceding words which make it clear that the refusal to set aside the award can only be on merits and not on some preliminary ground which would then lead to a refusal to set aside the award.

[37] (2000) 6 SCC 94

Decision

The Court held that it is clear that an application to set aside an award has to be in accordance with both Sub-Sections (2) and (3) of Section 34. Such an application must be within a period of three months. If the three-month period is exceeded, the application must be accompanied with an application for condonation of delay, within a period of thirty days.

Literal reading of 37(1)(c) signifies that the expression "setting aside or refusing to set aside an award" would have to be read with the expression "under Section 34." Hence, the refusal to set aside an award as the delay has not been condoned under sub-section (3) of Section 34 would undoubtedly fall within Section 37(1)(c). The Act lays down that under Section 37(2)(a), an appeal lies when a plea specifically under Section 16(2) or Section 16(3) is accepted. This was used to infer that when the legislation found it necessary to refer to only certain subsections of a section, and not refer to it in entirety, it explicitly did so.

The Court further held that the "effect doctrine", as referred to in the *Essar* case, is implicit in the statutory provision for appeal Under Section 37 of the Act in a two-fold way: *First*. by giving the provision to appeal against an arbitration proceeding proved to be out of jurisdiction and *second* when the former is not proved, provision for appeal is lying under Section 34. Therefore, an appeal under Section 37(1)(c) of the Arbitration Act, 1996 would be maintainable against an order refusing to condone delay in filing an application under Section 34 of the Arbitration Act, 1996 to set aside an award.

UNITECH LIMITED & ORS V. TELANGANA STATE INDUSTRIAL AND INFRASTRUCTURE CORPORATION (TSIIC) & ORS

2021 SCC OnLine SC 99

CASE DETAILS:

Date of Application	06 April 2019
Date of Judgement	17 February 2021
Nature of Application	Appeal against judgement of Telangana High Court on maintainability of a Writ Petition under Article 226 of the Constitution where an Arbitration Clause is present
Bench Strength	Division Bench
Judge(s)	Justice D.Y. Chandrachud & Justice M.R. Shah
Provision(s) of the Arbitration and Conciliation Act, 1996	No provision invoked

RATIO:

If the facts show that the State has acted in an arbitrary and unfair manner in a contractual matter so as to violate Article 14, an arbitral clause in the contract will not be a bar to avail a remedy under Article 226.

CASE SUMMARY

Brief Facts

In August 2008, the Appellant entered into a development agreement with Andhra Pradesh Industrial and Infrastructure Corporation (APIIC), a State instrumentality. As per the agreement, the Appellant had to design, develop and construct a township and pay certain amounts towards the purchase of the project land. The agreement contained an arbitration clause for resolving all disputes arising out of the contract. The Appellant duly paid the full amount for the project land.

In 2011, a judgement of the Andhra Pradesh High Court held that APIIC did not have the title to the project land. The above judgement was confirmed by the Supreme Court ("Court") in 2015. Meanwhile, in 2014 Andhra Pradesh was reorganised to Andhra Pradesh and Telangana, and the Respondent became APIIC's successor.

In 2015, the Appellant filed a writ petition under Article 226 of the Constitution before the Telangana High Court (HC) requesting the court to direct the Respondent to return the amount already paid with interest. A Single Bench of the HC ruled in favour of the Appellant. The judgement was then slightly modified by a Division Bench of the HC to the extent of modifying the date from which the interest accrued. The Appellant appealed the judgement of the Division Bench to the Court. The Respondent, among other grounds, argued that the presence of the Arbitration Clause ousted the High Court's jurisdiction under Article 226.

Decision

The Court dealt with the multiple issues arising in this case in the following manner:

I. Maintainability of the writ petition under Article 226

At the outset, the Court reiterated that writ petitions under Article 226 for asserting contractual rights against the State or its instrumentalities are maintainable. At the same time, when other remedies are available, the plenary power of the High Courts to issue writs must be used cautiously.

II. Whether arbitration clauses in contracts between private parties and state instrumentalities would bar the remedy under Article 226

With respect to arbitration clauses in contracts, the Court relied on previous judgements to hold that an arbitration clause is not an absolute bar for availing remedies under Article 226.

The Court clarified that the guiding principle for High Courts while exercising writ jurisdiction is to enquire whether the State has acted in an arbitrary and unfair manner so as to violate Article 14 of the Constitution. When such circumstances exist, the arbitration clause cannot oust the jurisdiction under Article 226. The reason being, the State is not exempt from acting in a fair manner just because it is a contractual dealing.

On facts, the Court found that by retaining the amount paid by the Appellant even after the Court had confirmed the Respondent's lack of title over the project land in 2015, the Respondent had acted in an outright arbitrary and unfair manner. As a result, the Court affirmed the exercise of Article 226 jurisdiction by the HC.

DAKSHIN HARYANA BIJLI VITRAN NIGAM LTD. V. NAVIGANT TECHNOLOGIES PVT. LTD.

(2021) 7 Supreme Court Cases 657

CASE DETAILS:

Date of Application	2 September 2020
Date of Judgement	2 March 2021
Nature of Application	Appeal against order of the Punjab & Haryana High Court regarding the limitation period for filling an application under Section 34.
Bench Strength	Division Bench
Judge(s)	Justice Indu Malhotra & Justice Ajay Rastogi
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 34

RATIO:

The period of limitation for filing objections under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act") would have to be reckoned from the date on which the signed copy of the award is made available to the parties.

CASE SUMMARY

Brief Facts

Dakshin Haryana Bijli Vitran Nigam Ltd. ("Appellant" or "Defendant") executed a Service Legal Agreement ("Contract") in favour of Navigant Technologies Pvt. Ltd. ("Respondent" or "Claimant") for providing call centre services. The Defendant terminated the Contract on 16 October 2014 which gave rise to the dispute between the Claimant and the Defendant. Subsequently, the Claimant invoked Clause 13 of the Contract for resolution of disputes through arbitration by a three-member tribunal ("AT"). On 27 April 2018, the AT gave its majority award (2:1) in favour of the Claimant while the third arbitrator rendered his dissenting opinion separately on 12 May 2018. On 19 May 2018, the signed copy of the award was rendered to the Claimant and the Defendant.

An appeal was filed by the Claimant against the AT's award in the Civil Court of Hisar ("Civil Court") along with an application for condonation of delay ("Application"). However, the Civil Court while dismissing the Application ruled that the limitation period started from the date on which the majority award was delivered i.e. 27 April 2018. The Appellant again filed an appeal in the High Court of Punjab & Haryana ("High Court"). Nevertheless, the High Court also dismissed the appeal while ruling that there was no infirmity in the judgement of the Civil Court. Subsequently, aggrieved by the decision of the High Court, the Appellant filed an appeal under Section 34 of the Act before the Supreme Court of India ("Court").

Arguments:

The Appellant contended that the Civil Court and the High Court had erroneously dismissed its objections without any merits. The Appellant further argued that Section 31(2) of the Act which allows for an award to be rendered in terms of signature of the same by majority of the AT could not be applied in case any AT member delivers a dissenting opinion. Furthermore, Section 34 of the Act allows objections to be filed against the arbitral award and not just the majority award alone and not including dissenting opinion in the arbitral award would cause prejudice to the arbiter debtor. Lastly, the Appellant contended that a copy of the arbitral award was sent to the Appellant and the Respondent on 19 May 2018 after the dissenting arbitrator had rendered his decision separately.

In response to this, the Respondents contended that the appeal before the Court by the Appellant was barred by limitation since Section 34(3) of the Act which allows for objections to be filed within three months along with an extension for thirty days was available to the Appellants only till 26th August 2018. They argued that the limitation period under Section 34(3) of the Act commenced from the date when the award was passed i.e. 27 August 2018. Further, the decision of the dissenting arbitrator was not an award for the purposes of computing the limitation period prescribed under Section 34(3) of the Act. The Respondents also contended that the Section 31(2) requires signature of the award only by the majority members from the AT.

Decision

By upholding the appeal made by the Appellant, the Court observed that objections can be filed within the period of limitation prescribed under Section 34(3) of the Act from the date of receipt of the signed award. Consequently, the judgement of the Civil Court and the impugned order passed by the High Court were set aside.

The High Court made interpretations of several provisions of the Act and referred to precedents during the course of the judgement to arrive at its conclusion. The High Court observed that the Act recognized only one award that is made either unanimously or split in a majority and a dissenting opinion. It was further observed that an aggrieved party may rely on the reasoning and findings of the dissenting arbitrator. Reliance was placed upon Section 29 of the Act to establish that in case of more than one arbitrator, decision of the AT shall be made by the majority unless agreed otherwise by the parties. Further reference was made to Section 35 of the Act to rule that a minority opinion did not determine the rights and liabilities of the parties that were enforceable under Section 36 of the Act and only the majority award was enforceable under the Act. Going ahead, the Court held that an application for setting aside an award under Sections 34 or 36 of the Act could not be made by the parties.

On the point of legal requirement of signing the award, the Court referred to Section 31 of the Act which states that the signing of the award by majority of the AT shall suffice as long as reason for the omission of the signature of the dissenting arbitrator is available. It was held that an award made in writing became final only when the members of the AT authenticated it by their signature. The use of the word “shall” in the provision indicated that the requirement of signature was mandatory and the same could not be dispensed with. A

conjoint reading of Sections 31(1) and 31(4) of the Act by the Court clarified that an arbitral award was passed on a single date i.e. when the signed copy of the award was delivered to the parties, and this was supported by the precedent set in the case of *Union of India v. Tecco Trichy Engineers & Contractors*[38] ("Tecco Trichy"). Following the judgement in the case of *Tecco Trichy*, the Court further clarified that a *"copy of the award signed by the members of the arbitral tribunal / arbitrator, and not any copy of the award"* needs to be delivered. On the point of time of delivery of award, the Court relied on the case of *State of Himachal Pradesh v Himachal Techno Engineers*[39] to clarify that if the award was physically delivered on a non-working day, then the next working day shall be counted as the date of "receipt" of the award by the parties.

Since the procedural orders enumerated that a signed copy of the arbitral award containing the dissenting arbitrator's opinion was delivered to the parties on 19 May 2018, the Court was of the opinion that the period of limitation for filing objections was made available to the parties from the date of 19 May 2018.

[38] (2005) 4 SCC 239

[39] (2010) 12 SCC 210

AMWAY INDIA ENTERPRISES PVT. LTD. V. RAVINDRANATH RAO SINDHIA AND ANR.

2021 SCC OnLine SC 171

CASE DETAILS:

Date of Application	23 December 2020
Date of Judgement	04 March 2021
Nature of Application	Civil Appeal arising out of Special Leave Petition
Bench Strength	Division Bench
Judge(s)	Justice R.F. Nariman & Justice B.R. Gavai
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 11(6); Section 2(1)(f); Section 11(9)

RATIO:

Whenever the transaction is between two parties, one of whom is a foreign national or a habitual resident of another country than India, or a body corporate incorporated outside of India, the arbitration amounts to an international commercial arbitration regardless of whether the party conducts business operations within India.

CASE SUMMARY

Brief Facts

The respondents were appointed for sale, distribution and marketing of products as Amway Business Owners/Amway Direct Sellers (ADS), in the name of sole proprietorship 'Sindhia Enterprises.' After some years, the respondents issued a code of ethics for all the existing ADSs for governing their relationship. Although the business continued smoothly for a few more years, the respondents discovered that they had been locked out of their ABO account for not having compiled with the criteria of re-sale related purchases for the last year. When the appellants rejected the constant requests of the respondents for restoring their ADS account, the respondents issued the notice for arbitration under clause 12 of the Terms and Conditions for the Arbitral clause.

The Delhi High Court rejected the argument of the respondents noting that even though they were habitual residents of the United States of America, the case shall be covered under section 2(1)(f)(i) of the Act.

Arguments

The appellant argued that the Delhi High Court erred in exercising jurisdiction since when it was found that a party to the arbitration agreement was a citizen or habitual resident of any other country than India, the applicable section of the Arbitration and Conciliation Act ('Act') would be the section 2(1)(f)(i), and therefore, the dispute related to an international commercial arbitration.

On the other hand, respondent argued that as husband and wife, they would have had to be pigeonholed under 'association or body of individuals' under section 2(1)(f)(iii) of the Act instead of section 2(1)(f)(i) for the dispute to be international commercial arbitration.

Decision

The Court analysed the 'Rules of Conduct' under a document titled the Code of Ethics of Amway Direct Sellers' which stipulated for a legal entity authorisation form which must have been completed by the Direct seller for operation of a business under the name of the applicable legal entity. The form specified that a distributorship of husband and wife, as per the code of ethics clause 3.17, would be considered as a single distributorship which must be operated as a single entity. The respondents filled the form as a single distributorship as well, with the husband named as the sole proprietor.

The Court distinguished the case of *Larsen & Toubro Ltd. SCOMI Engineering Bhd. v MMDRA*[40], where the dispute arose between MMRDA and a consortium of Larsen & Tourbro and Scomi Engineering, the latter being a Malaysian company. The Court noted that the consortium would not be allowed to rely on their status as independent entities while dealing with MMRDA. Additionally, since the consortium was held to be an association of persons for which Larsen and Toubro was the lead member, section 2(1)(f)(iii) was not found to be applicable. The Court distinguished the above case on facts since in the present case the respondents themselves applied as the sole proprietorship for becoming distributors of Amway products in the relevant form.

The Court discovered that the transaction between the parties concerned was distinctly international in nature since it was entered into by parties one of whom was a foreign national or a habitual resident of a country other than India, as referred into in section 2(1)(f), would be determined as an international commercial arbitration. For that purpose, the Delhi High Court was found not to have the jurisdiction to appoint an arbitrator in this case. Therefore, the Court allowed the appeal.

[40] (2019) 2 SCC 271

PRAVIN ELECTRICALS PVT. LTD. V. GALAXY INFRA AND ENGINEERING PVT. LTD.

(2021) 5 SCC 671

CASE DETAILS:

Date of Application	8th March 2021
Date of Judgement	21st July 2020
Nature of Application	Civil Appeal against the Order passed by the Delhi High Court for the appointment of sole arbitrator
Bench Strength	Three Judges
Judge(s)	Justice R.F. Nariman; Justice B.R. Gavai & Justice Hrishikesh Roy
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 8; Section 11(6); Section 37

RATIO:

Whereas in cases decided under Section 8 of the Arbitration and Conciliation Act, 1996 ("the Act"), a refusal to refer parties to arbitration is appealable under Section 37(1)(a) of the Act. However, a similar refusal to refer parties to arbitration under Section 11(6) read with Sections 6(A) and 7 of the Act is not appealable.

CASE SUMMARY

Brief facts

A Special Leave Petition ("SPL") was filed by Pravin Electricals Pvt. Ltd. ("PEPL"), against Galaxy Infra Engineering Pvt. Ltd. ("Galaxy"), before the Hon'ble Supreme Court of India ("SC") challenging an order passed by the Hon'ble Delhi High Court ("HC"). Through said order, the HC had appointed a Sole Arbitrator ("SA") for adjudication of disputes between the parties under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the Act"). The petition was filed by Galaxy, after it had invoked the arbitration clause, under a Consultancy Agreement ("the Agreement"), executed between the parties.

Aggrieved by the order of the HC, PEPL filed the SLP before the SC, contending that the Agreement was a "concocted document", which was also clear from the Central Forensic Science Laboratory ("the CFSL") report, ordered by the HC to check the signature of the Managing Director of PEPL. It was further contended that since the Agreement itself did not exist, the arbitration clause could not be said to have existed either. The Counsel for Galaxy contended that even if the Agreement is not relied upon, an arbitration clause exists in the draft agreement that was exchanged between the parties, which culminated in a final agreement and if the correspondence between the South Bihar Power Distribution Company Ltd. ("SBPDCL") and Galaxy are to be observed, the same were being marked to PEPL, and it is clear that Galaxy acted as an intermediary and successfully obtained the bid for PEPL, and was thus entitled to commission.

Decision

The SC, upon hearing the parties, observed that due to the way the facts of the case present themselves, it would be unsafe to conclude that an arbitration agreement existed between the parties.

The Court observed that the parties were not *ad idem* on submission of the dispute to arbitration, in view of the fact that when the draft agreement was sent by PEPL to Galaxy, the same was sent back by Galaxy where various terms were disputed. Further, the Court opined that the finding that PCPL was a subcontractor of PEPL, was contrary to the pleadings between the parties, where the nature of entity varied from being a joint venture partner to PEPL to having Common Directors with PEPL, and thereafter to being described as the lead partner. The Court also observed that correspondence between SBPDCL and Galaxy do show

that there is some dealing between PEPL and Galaxy, with respect to the tender, but not sufficient to conclude that there is a concluded contract between the parties, which contains an arbitration clause and lastly, that the CFSL report did not express an opinion in favour of either party and thus, it was incumbent upon the learned Single Judge of the HC to determine whether the Agreement was entered into. Furthermore, the Court held that whereas in cases decided under Section 8 of the Arbitration and Conciliation Act, 1996 ("the Act"), a refusal to refer parties to arbitration was appealable under Section 37(1)(a) of the Act, however, a similar refusal to refer parties to arbitration under Section 11(6) read with Sections 6(A) and 7 of the Act was not appealable.

The Court further placed reliance on the ratio of *Vidya Drolia v. Durga Trading Corporation*[41], and observed that a deeper consideration of whether the Agreement existed must be left to an Arbitrator who is to examine the documentary evidence produced in detail. The Court partially set aside the HC judgement till the extent that it was held that an arbitration agreement existed between the parties.

[41] (2021) 2 SCC 1

BHARAT SANCHAR NIGAM LTD. (BSNL) AND ANR. V. NORTEL NETWORKS INDIA PVT. LTD.

(2021) 5 SCC 738

CASE DETAILS:

Date of Application	22 January 2021
Date of Judgement	10 March 2021
Nature of Application	Appeal through SLP against order of the Kerala High Court regarding limitation period for appointment of arbitrator
Bench Strength	Division Bench
Judge(s)	Justice Indu Malhotra & Justice Ajay Rastogi
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 11

RATIO:

All the provisions of the Limitation Act are applicable both in a court and arbitration, except in situations which have been expressly excluded by the Arbitration and Conciliation Act ("Act"). Further, pursuant to Section 9 of the Act, where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it.

CASE SUMMARY

Brief Facts

Bharat Sanchar Nigam Ltd. ("BSNL" or "Appellant") had floated a tender notification inviting bids for planning, engineering, supply, insulation, testing and commissioning of GSM based cellular mobile network in the southern region. Nortel Networks India Pvt. Ltd. ("Nortel" or "Respondent") was awarded the purchase order ("agreement"). Post completion of the Works under the agreement when Appellant withheld an amount of Rs. 99,70,93,031 towards liquidated damages and other levies, Respondent raised a claim for the payment of the same. Subsequently, the claim of Respondent was rejected, and the arbitration clause was invoked by Respondent on 29 April 2021 claiming that they were entitled to the amount of Rs. 99,70,93,031 under the agreement. Appellant had responded to the claim of Respondent stating that it was time barred under Section 43 of the Act. The Kerala High Court ("High Court") while approving the request of Respondent referred the matter to arbitration and subsequently passed an order that rejected the review petition challenging the order of the High Court that had referred the dispute to arbitration pursuant to a request which was made by Appellant. In response to this, Appellant filed a Special Leave Petition ("SLP") to the Supreme Court ("Court") challenging the order of the High Court that rejected its review petition.

Arguments:

The following submissions were made by Appellant before the Court: Pursuant to Section 11(6) of the Act, the High Court had an obligation to examine the existence of a valid arbitration agreement. It was contended that because Respondent had slept over its rights for 5½ years without invoking the arbitration clause, the same no longer existed pursuant to the time barred provision of the Act that had rendered the agreement invalid and that the High Court should have rejected the request of Respondent on this ground.

In response to the submissions made by Appellant, following arguments were advanced by Respondent: Pursuant to the amendment to Section 11 of the Act by the Arbitration and Conciliation Act, 2015 ("2015 Amendment"), the High Court only has the limited power to determine the existence of a valid arbitration agreement at the pre-reference stage of an arbitration under Section 11(6A) of the Act. It was claimed that *"In view of the doctrine of kompetenz-kompetenz, the objection with respect to the claims being allegedly time barred, could be decided by the arbitral tribunal".* Further, it was stated that the distinction between

the limitation for filing an application under Section11 of the Act, and with respect to the underlying claims did not survive post the 2015 Amendment. Thus, asserting that the starting point of limitation for initiating a proceeding under Section 11 of the Act was the expiry of 30 days from the date of issuance of notice of arbitration, it was concluded that the cause of action was a continuing one.

The Court framed two issues for discussion in the present dispute:

(i) Determination of period of limitation for filing an application under Section 11 of the Act; and

(ii) Whether the Court could refuse to make the reference under Section 11 where the claims were ex facie time-barred?

Decision

Addressing the first issue, the Court held that the application made under Section 11 of the Act was within the limitation period as prescribed under Section 137 of the Limitation Act, 1996 ("Limitation Act"). In discussing this, the Court observed that the Act was framed for an expeditious resolution of disputes and that there were several provisions supporting the same, such as Section 8, Section 9, Section 13, Section 16(2), Section 34(3), and so on. The Court noted that the 2015 Amendment was made to incorporate further provisions for expeditious disposal of arbitral proceedings such as the need for disposal of petitions filed before the High Courts or the Court within a period of 60 days under Section 11 of the Act, and that the arbitral proceedings must be completed within 12 months from the date of completion of pleadings under Section 29A of the Act. The Court then stressed on the fact that it must be examined whether the Act prescribed any period for limitation in order to decide on the issue of limitation under Section 11 of the Act. Since Section 11 of the Act did not prescribe any time period for filing an application under Section 11(6) of the Act, the Court opined that recourse must be made to the Limitation Act under Section 43 of the Act. Stating that the purpose of Section 43 of the Act *"was not to make the Limitation Act inapplicable to proceedings before Court, but on the other hand, make the Limitation Act applicable to arbitrations"*, the Court ruled that all the provisions of the Limitation Act were applicable both in a court and an arbitration, except in situations which had been expressly excluded by the Act. Going forward, as Section 11 of the Act did not provide a time period for filing an application for appointment of an arbitrator, the Court stated that Section 137 of the Limitation Act was to be applicable. The Court thus clarified that the period of limitation

applicable to the application for claims and application for appointment of an arbitrator were different.

The Court then examined the scope of jurisdiction under Section 11. Prior to the 2015 Amendment of the Act, the legislative scheme of Section 11 of the Act included appointment of an arbitrator either by agreement of the parties or, through the Chief Justice of the High Court or an individual or institution as designated by the parties, as the appointing authority of the arbitrator. The 2015 Amendment replaced the Chief Justice of the High Court with the concerned 'High Court' in domestic cases and Chief Justice of the Court with the 'Court' in international commercial arbitration cases. The significance of the 2015 Amendment was that if there existed no dispute with regards to the existence of an arbitration agreement, then the remaining issues was to be decided by the arbitral tribunal. Going ahead, the Court clarified that Limitation was a mixed question of fact and law however, there existed a distinction between jurisdiction and admissibility issues:

Jurisdiction was defined as the "power of the tribunal to hear a case", whereas admissibility meant "whether it is appropriate for the tribunal to hear it", and that the issue of limitation concerned maintainability or admissibility of the claim, which was to be decided by the arbitral tribunal.

It was further clarified that Section 9 of the Limitation Act stated "where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it. There must be a clear notice invoking arbitration setting out the "particular dispute" (including claims/amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail". The Court then noted that the notice invoking arbitration was issued 5½ years after rejection of the claims on 04.08.2014. Consequently, the notice invoking arbitration was ex facie time barred, and the disputes between the parties could not be referred to arbitration in the present case.

SECUNDERABAD CANTONMENT BOARD V. B. RAMACHANDRAIAH & SONS

(2021) 5 SCC 705

CASE DETAILS:

Date of Application	26 November 2019
Date of Judgement	15 March 2021
Nature of Application	Civil Appeal against the Order by Telangana High Court for appointment of arbitrator
Bench Strength	Division Bench
Judge(s)	Justice R.F. Nariman & Justice B.R. Gavai
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 11

RATIO:

The mere correspondence between parties does not extend the limitation period for filing a case under Section 11 of the Arbitration and Conciliation Act, 1996. The Courts are empowered to dismiss petitions under Section 11 for being barred by time as the same is not a jurisdictional issue but an issue of admissibility on merits.

CASE SUMMARY

Brief facts

The Secunderabad Cantonment Board ("the Appellants") had initially floated a Notice Inviting Tender ("NIT") for a contract to repair certain roads. Pursuant to the NIT, three agreements ("the Agreements") were entered into between the Appellant and the company B. Ramachandraiah and Sons ("the Respondents"). The contract was supposedly executed and it was undisputed that the final payment for the same had been issued by the Appellants in favour of the Respondents. However, after a brief hiatus a dispute pertaining to the issue of reimbursement due to "price variations" arose and the Respondents subsequently made a request for the appointment of an arbitrator to settle the dispute failing which the Respondents threatened to move the High Court of Andhra Pradesh in order to enforce the arbitration clause in the Agreements. It was contended by the Appellants that the relief sought by the Respondents is barred by the law of limitation as eight years had elapsed since the completion of the work.

The Appellants refused to appoint an arbitrator to settle the dispute and after a three year period, the Respondents filed a suit under Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act") in the High Court for the State of Telangana. The learned Single Judge held that the claims made under Section 11 of the Act were tenable as the same had been made within the period of three years from the date of letter rejecting the appointment of the arbitrator by the Appellants. The learned Single Judge went on to appoint an arbitrator and the matter regarding the law of limitation was left to be adjudicated by the arbitrator. Aggrieved by the order, the Appellants filed an appeal to the Supreme Court of India.

Decision

The Hon'ble Supreme Court ("the Court") relied on a myriad of cases such as *Geo Miller & Co. Pvt. Ltd. v. Rajasthan Vidyut Nigam Ltd.*[42] and *Inder Singh Rekhi v. DDA*[43] to hold that the cause of action arises on the date when the final bill is handed over or becomes due. The Court held that mere correspondence by the contractor by way of writing letters and reminders would not extend the time of limitation.

[42] 2020 14 SCC 643

[43] 1988 2 SCC 338

Further, the Court placed reliance on two contemporary judgements namely, *Bharat Sanchar Nigam Ltd. and Anr. v. M/s. Nortel Networks India Pvt. Ltd.*[44] and *Vidya Drolia v. Durga Trading Corporation*[45] to clarify that since limitation was not a jurisdictional issue but rather an issue of admissibility, the Court was empowered to decide the present dispute as the same was *ex-facie* time-barred and the same need not be referred to the arbitral tribunal.

In the present case, the Court noted that the demand for arbitration in the facts was made by the letter dated 07.11.2006. This demand was reiterated in another letter dated 13.01.2007 wherein it was also informed that the appointment of the arbitrator had to be made within thirty days from the date the letter was received. Therefore, even if the Court were to consider the 30-day notice period from the date of the first rejection of appointment of the arbitrator by the Appellant, a period of three years had already elapsed before the claim was formally filed. Thus, the Court held that the limitation period had undoubtedly elapsed. The Court concluded that no arbitrator could have been appointed by the High Court and appeals were allowed accordingly.

[44] (2021) 5 SCC 738

[45] (2021) 2 SCC 1

GOVERNMENT OF MAHARASHTRA V. BORSE BROTHERS ENGINEERS AND CONTRACTORS

(2021) 6 SCC 460

CASE DETAILS:

Date of Application	8 January 2021
Date of Judgement	19 March 2021
Nature of Application	Civil Appeal to determine the position of law regarding the condonation of delay and limitation period for filing of appeals under Section 37
Bench Strength	Three Judges
Judge(s)	Justice R.F. Nariman; Justice B.R. Gavai & Justice Hrishikesh Roy
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 34 and Section 37

RATIO:

Delay in appeals filed beyond 90 days under Section 37 of the Arbitration Act, 30 days under Articles 116 and 117 of the Limitation Act, 1963 ["Limitation Act"], or 60 days Section 13(1A) of the Commercial Courts Act, could only be condoned by way of exception and not as a rule.

CASE SUMMARY

Brief Facts

The case arose from three appeals against the verdicts of the Madhya Pradesh High Court, Bombay High Court and Delhi High Court respectively. The subject matter of the appeals was whether the Supreme Court ("Court") laid down the law correctly in *N.V. International v. State of Assam*[46] ("*N.V. International")*. In that case, the Court added a grace period of 30 days under Section 5 of the Limitation Act, to the period of 90 days as prescribed by Section 37 of the Arbitration and Conciliation Act, 1996.

The Delhi High Court and Bombay High Court had refused to condone the delay in filing of appeals under Section 37 of the Arbitration Act by the Union of India and the State of Maharashtra respectively. The Madhya Pradesh High Court had held that there was a conflict between the judgements of *N.V. International* and *Consolidated Engg. Enterprises* v. *Irrigation Deptt.*[47]["*Consolidated Engg.*"]; the latter being a judgement delivered by a larger bench. It, therefore, held that it was open for the High Court to condone the delay under Section 5 of the Limitation Act, and then condoned the delay of 57 days.

The counsel for the Government of Maharashtra contended that the Arbitration Act in its original avatar did not include the concept of expeditious resolution of disputes and was to be treated as a mechanism for alternate dispute resolution. The original objective was continued by the Arbitration and Conciliation Amendment Act, 2015 ["2015 Amendment"] which provided a time limit for arbitral awards and for the fast track procedure contained in Sections 29A and 29B of the Arbitration Act. *N.V. International* would only apply to orders under Section 34 orders but not on the other sections as mentioned in Section 37 of the Arbitration Act as there is no hard and fast 120 day limitation period when it comes to applications under any of those sections. Under Section 29(2) of the Limitation Act, the limitation period for applications under the Arbitration Act would be governed by Article 137, thus giving a much longer limitation period of three years.

[46] (2020) 2 SCC 109

[47] (2008) 7 SCC 169

The Respondent in the appeal filed by the Government of Maharashtra contended that the rationale of *N.V. International* can and should apply to Section 34 orders. He referred to the Statements of Objects and Reasons of the Arbitration Act and judgements to prove that the Arbitration Act provided not only alternate dispute resolution but also for speedy disposal.

Decision

The Court analyzed the Statement and Reasons of the Arbitration Act and concluded that speedy disposal of disputes through the arbitral process was one of the main objectives of the Arbitration Act.

Dismissing the arguments of the Government of Maharashtra, the Court held that Section 37 of the Arbitration Act, when read with the Section 43 made it clear that provisions of the Limitation Act would apply to all appeals filed under Section 37. The limitation period according to Articles 116 and 117 of the Limitation Act is 90 days and 30 days. The Court ruled that where the Limitation act provides for a period of Limitation for appeals or applications to any court and the special law in question does not prescribe the period, the provisions of Sections 4 to 24 of the Limitation Act would also apply. The very object of Section 29(2) of the Limitation Act is to ensure that principles contained in Sections 4 to 24 would apply to even a special law that provides for a period different from that prescribed in the Limitation Act, except where the application has been expressly excluded from any or all of those provisions.

The Court noted that the provisions of the Arbitration Act and the Commercial Courts Act made it clear that when Section 37 of the Arbitration Act is read with Article 116 or 117 of the Limitation Act, or with Section 13(1A) of the Commercial Courts Act, the object and context provided by these statutes as a whole provide for speedy disposal of appeals filed. The Court ruled that given the discernible object, the term “sufficient cause” is not elastic enough to cover long delays beyond the period provided by the provision itself. It was further observed that “sufficient Cause” is a pre-requisite in filing for the condonation of delay, however, this does not by itself compel the Courts to condone it. Sufficient cause must be made out by proving that the appellant had bona fide intentions and had not acted negligently and it could not have been alleged that the party had not acted diligently or had remained

inactive. Once the cause was made out, it was within the Court's discretion whether to condone the delay, and the same depends on the totality of the facts of the case.

The Court ruled that since in the Bombay High Court judgement, the Government of Maharashtra had not approached the Bombay High Court bonafide and had filed their appeal after a delay of 131 days against the 60 day period provided by the Commercial Courts Act, their appeal would be dismissed.

In the appeal arising out of Madhya Pradesh High Court, the Court ruled that the M.P. High Court was wholly incorrect in holding that the Consolidated Engg. Judgement applied the provisions of Section 14 of the Limitation Act and had nothing to do with the application of Section 5 of the Limitation Act. The Court ruled that the Madhya Pradesh High Court was bound to follow the *N.V International* judgement that applied Section 5 of the Limitation Act and held that no condonation of delay could be provided after 120 days in case of an appeal under Section 37 of the Arbitration Act. Further, in the appeal under question, there was a delay of 75 days beyond the 60 days provided by the Commercial Courts Act. In the appeal against the Delhi High Court verdict, there was a huge delay of 227 days, and a 200-day delay in refiling, without any facts proving sufficient cause to condone the delay.

The Madhya Pradesh High Court judgement was set aside, and the appeals against the Bombay High Court and Delhi High Court judgements were dismissed.

INDUS BIOTECH PVT LTD V. KOTAK INDIA VENTURE (OFFSHORE) FUND (EARLIER KNOWN AS KOTAK INDIA VENTURE LTD) & ORS.

(2021) 6 SCC 436

CASE DETAILS:

Date of Application	7 July 2020
Date of Judgement	26 March 2021
Nature of Application	Application to appoint an arbitrator; SLP from the decision of NCLT
Bench Strength	Three Judges
Judge(s)	Former CJI S.A. Bobde, and Justice A.S. Bopanna & Justice V. Ramasubramanian
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 8; Section 11

RATIO:

When a Section 7 IBC petition is admitted by the adjudicating authority, the proceeding becomes in rem, making the dispute between the financial creditor and corporate debtor non-arbitrable. CIRP will be initiated irrespective of any arbitration agreement between the two.

A Section 8 A&C Act application is not maintainable in a Section 7 IBC proceeding, and the natural consequences of the latter will befall the parties.

CASE SUMMARY

Brief Facts

Respondent No 1 was a foreign company, and Respondents Nos 2-4 were Indian sister concerns of Respondent No 1 (collectively referred to as "Respondents"). The Petitioner entered into various share subscription and sale agreements ("agreements") with different Respondents, through which the latter subscribed to Optionally Convertible Redeemable Preference Shares.

The Petitioner wanted to make a qualified initial public offering, for which it had to convert the Respondents' preference shares to equity shares as per SEBI regulations. The Petitioner invited the Respondents for discussion, but a dispute arose between them over the conversion formula.

According to the Respondents, the non-payment of the figure claimed by them for conversion amounted to a default on the part of the Petitioner. As a result, Respondent No 2 filed a petition under Section 7 of the Insolvency and Bankruptcy Code 2016 ("IBC") before the National Company Laws Tribunal, Mumbai ("NCLT") for the initiation of the Corporate Insolvency Resolution Process ("CIRP"). In response, the Petitioner filed an application under Section 8 of the Arbitration and Conciliation Act 1996 ("A&C Act"), contending that the Section 7 IBC proceedings should be stayed in light of the arbitration clause in the agreements. The NCLT allowed the Section 8 A&C Act application and dismissed the petition.

Since Respondent No 1 was a foreign entity, the Petitioner approached the Supreme Court ("Court") under Section 11 of the A&C Act to appoint an arbitrator on behalf of Respondent No 1 and the other Respondents. Further, the Petitioner prayed that a single arbitration occurs between the Petitioner and the Respondents since the dispute is related and Respondents No 2-4 were sister concerns of Respondent No 1, even though different contracts bind the Respondents and the Petitioner.

At the same time, Respondent No 2 filed a Special Leave Petition against the order of dismissal by the NCLT before the Supreme Court. The principal objection of the Respondents was that the default made by the Petitioner and the subsequent Section 7 IBC petition made the dispute non-arbitrable as a proceeding in rem was involved and the NCLT

wrongly dismissed the petition. The Court examined both the matters together. Hence, the present proceedings.

Decision

The Court dealt with the multiple issues arising in this case in the following manner:

I. Existence of an arbitration agreement

The Court, at the outset, noted that the existence of the agreements and the arbitration clause had not been disputed by the parties. Generally, the scope of the Court in a Section 11 A&C Act proceeding was limited to finding the presence of the arbitration agreement while all other issues were to be looked at by the arbitral tribunal. However, as a Section 7 IBC petition had been filed, the Court had to examine the issues of non-arbitrability.

II. Section 7 IBC and proceeding in rem

The Court discussed the legislative scheme of the IBC. It observed that when a Section 7 IBC petition was presented, the adjudicating authority would either find a default and proceed under Section 7(5)(a) IBC to initiate CIRP, or it could find no default and dismiss the petition under Section 7(5)(b) IBC. If the adjudicating authority found that a default had been committed, it became a proceeding in rem, the rationale being that a CIRP involved the rights of all financial and operational creditors of the corporate debtor rather than just the financial creditor who filed the Section 7 IBC petition. Therefore, on the admission of a Section 7 IBC petition, the proceeding became in rem as the rights of several persons were involved. The Respondents' argument that simply filing the Section 7 IBC petition made the proceeding in rem was rejected, the admission of the petition was required.

Further, the Court, while referring to *Vidya Drolia v. Durga Trading Corporation*[48] stated that one of the tests to determine whether a dispute is arbitrable or not was to see whether it involved an action/proceeding in rem or in personam.

Hence, the question before the Court was whether the Section 7 IBC petition had been rightly dismissed by the NCLT or not. If a default existed and the petition was wrongly dismissed, then it was an action in rem, and the dispute was non-arbitrable. On the specific facts of the case, the Court was of the view that the claim made by the Respondents did not constitute a default as per the IBC, and the petition was rightly dismissed.

[48] (2021) 2 SCC 1

III. Section 7 IBC petition and Section 8 A&C Act application

The Respondents had then contended that the petition before the NCLT was solely dismissed on the ground of the Section 8 A&C Act application and not on due consideration of the existence of default.

The Court, therefore, had to consider how a Section 8 A&C Act application had to be treated in Section 7 IBC proceedings. The Court observed that Section 238 IBC stated that the Code shall override all other laws. This implies that the adjudicating authority had to look at all the material presented before it for finding whether a default has been committed, independent of all other considerations like an arbitration agreement between the parties. If the adjudicating authority was satisfied after hearing the creditors and the corporate debtor that a default had occurred, then CIRP will be initiated irrespective of any arbitration agreement. Filing of a Section 8 A&C Act application would not impact this inquiry.

At the same time, if the adjudicating authority was of the view that no default had occurred, then the parties were at liberty to avail of other remedies, including arbitration. It was not necessary to pass any orders allowing a Section 8 A&C Act application in that scenario.

As a result, a Section 8 A&C Act application is not maintainable in a Section 7 IBC proceeding, and the natural consequences of the Section 7 IBC petition would befall the parties.

On facts, the Court noted that the NCLT had independently evaluated the material alleging the default on the Petitioners behalf. No infirmity lay with the dismissal of the petition.

IV. Nature of the arbitral tribunal

Since there are several agreements that bind the Petitioner and the Respondents individually, the Petitioner had urged that a single arbitral tribunal be constituted. The dispute was related, and the Respondents formed a group of companies. The Respondents had opposed a composite arbitration.

The Court noted that in the present case, there are four separate arbitration agreements having identical arbitration clauses. One of the Respondents was a foreign entity, while the rest were Indian. Further, the dispute under all the contracts dealt with the conversion of preference shares to equity shares.

In such a situation, the Court was of the view that the issues can be resolved by an arbitral tribunal comprising of the same members but separately constituted in respect of each

agreement. The arbitral tribunal will have the liberty to flesh out the modalities and can separate the international arbitration while clubbing the domestic arbitrations.

Hence, the Court appointed an arbitrator on behalf of the Respondents.

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