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NLU DELHI

CADR
CENTRE FOR ALTERNATE DISPUTE RESOLUTION

Quarterly Digest of Arbitration Judgements

(April 2021 – June 2021)

Supreme Court
Calcutta High Court
Madras High Court

Centre for Alternate Dispute Resolution | National Law University Delhi

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TABLE *of* CONTENTS

CALCUTTA HIGH COURT **1**

Universal Consortium of Engineers Pvt. Ltd. v. Kanak Mitra & Another 2

Regent Hirise Pvt. Ltd. & Ors v. Sanchita Chatterjee & Ors. 5

Jagdish Kishinchand Valecha v. Srei Equipment Finance Limited and Another 8

Sirpur Paper Mills Limited v. I. K. Merchants Pvt. Ltd 11

Pam Developments Pvt. Ltd. v. State of West Bengal 15

Amstar Investments Pvt Ltd & Ors v Shree Shree Ishwar Satyanarayanjee & Ors 19

Lindsay International Private Limited vs. IFGL Refractories Limited 22

MADRAS HIGH COURT **25**

Hanudev Infopark Pvt. Ltd., Represented by Authorised Signatory Mr. Niranjan Rao and Others v. Andal Dorairaj & Others 26

Aapico Investment Pvt Limited v. Manickam Mahalingam 29

R Venkataramaiah v. The Southern Railway 32

THE SUPREME COURT **35**

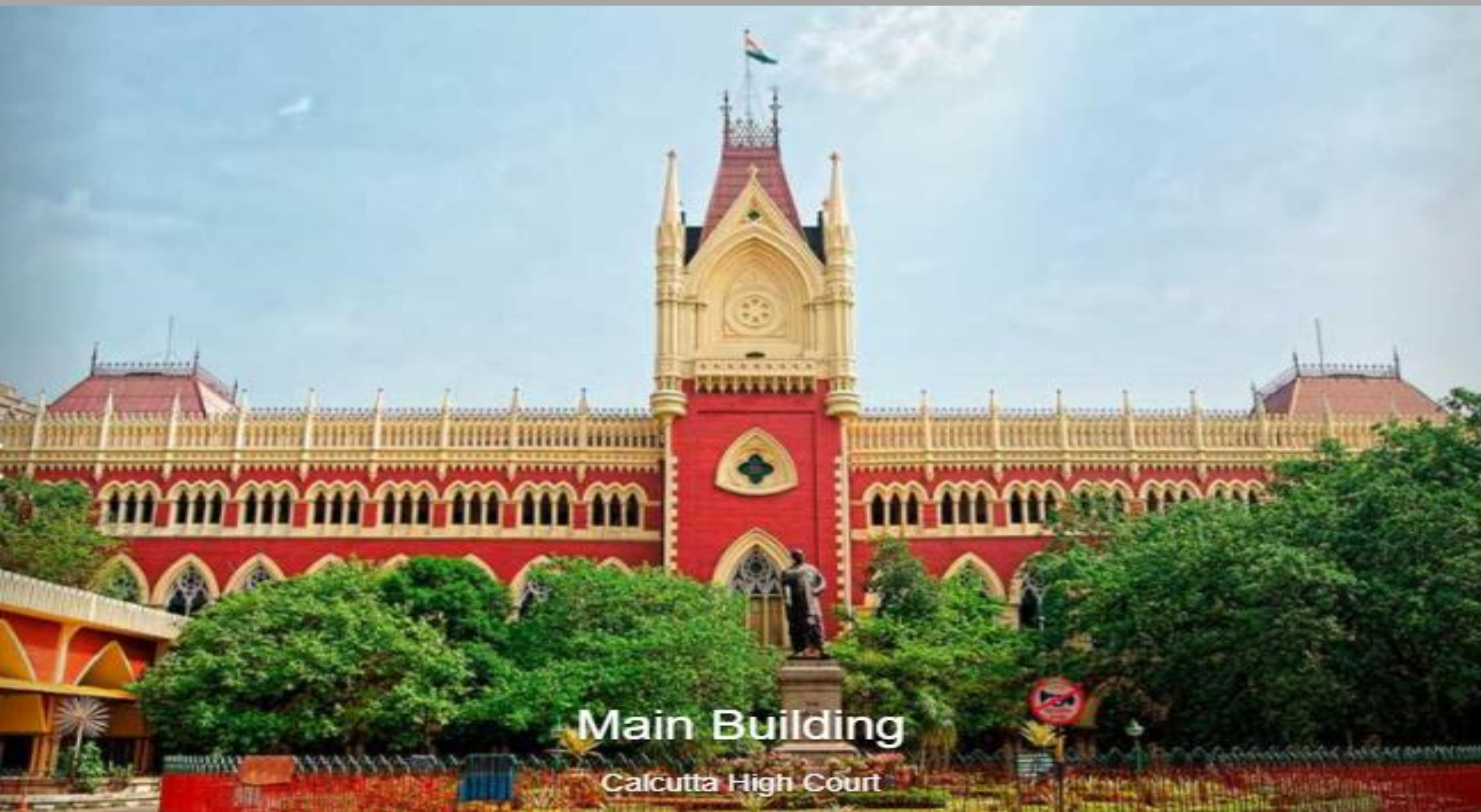
Sanjiv Prakash v. Seema Kukreja and Ors. 36

Inox Renewables Ltd. v. Jayesh Electricals Ltd. 39

PASL Wind Solutions v. GE Power Conversion India Pvt. Ltd. 42

Oriental Structural Engineers Pvt. Ltd. v. State of Kerala 45

M/s Silpi Industries v. Kerala State Road Transport Corporation 48



CALCUTTA HIGH COURT

UNIVERSAL CONSORTIUM OF ENGINEERS PVT. LTD. V KANAK MITRA AND ANOTHER

AIR 2021 Cal 127

CASE DETAILS:

Date of Judgement	07 April 2021
Date of Application	30 September 2020
Nature of Application	Application to appoint an arbitrator
Bench Strength	Single judge
Judge(s)	Justice Arijit Banerjee
Provisions of the Arbitration and Conciliation Act, 1996	Section 11; Section 21

RATIO:

There exists no mandate under Section 21 of the Arbitration and Conciliation Act, 1996 that a Section 11 application will not be maintainable unless a notice under Section 21 has been served by the petitioner to the respondent.

CASE SUMMARY

Brief Facts

The Petitioner and Respondent entered into a Development Agreement ("the Agreement") in 2006 for the construction of a building with the Petitioner being the developer and the Respondent being owners of the land. The Agreement contained an arbitration clause in case of any disputes arising. Once the construction of the proposed building was completed, the Respondent was handed their share in 2018.

In 2019, the Respondent sent a letter to the Petitioner raising certain disputes pertaining to the area of the owner's allocation. The Petitioner replied with two letters, with one of them stating that if the Respondent is not satisfied with the responses contained in the letters, they have the option to refer the dispute to the Arbitrator and that the Petitioner is ready to do the same. They then filed an application to appoint an arbitrator before the Calcutta High Court ("the Court").

The Respondents opposed the application primarily on two grounds. Firstly, they argued that no notice under Section 21 of the Act of 1996 was given by the Petitioner to the Respondents. Secondly, the Respondents had filed a complaint before the National Consumer Forum, New Delhi, and submitted that parallel proceedings ought not to be permitted.

Decision

Regarding the first contention of the Respondents, the Court spoke of Section 21 of the Arbitration and Conciliation Act, 1996 ("the Act") which laid down when the arbitral proceedings in respect of a particular dispute will be deemed to have commenced - when a request for the dispute to be referred to arbitration was received by the respondent. Disagreeing with the decision of the Delhi High Court in *Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.*, the Court held that it could not be read into Section 21 of the Act that there existed a mandate to the effect that a Section 11 application would not be maintainable unless a notice under Section 21 had been served by the petitioner to the respondent. Additionally, the Court, taking cue from the case of *State of Goa v. Praveen Enterprises*, stated that an application under Section 11 of the Act was itself a request by the petitioner for arbitration.

While it was held that it was not mandated for the Petitioner to serve a Section 21 notice, the Court opined that the Petitioner's letter clearly contemplated disputes between the parties and

resolution of such disputes through the process of arbitration, in the event the disputes were not resolved amicably and was therefore sufficient compliance with Section 21 of the Act.

The Court also found the second contention of the Respondent to be meritless since the Respondent could not be considered a consumer within the meaning of the Consumer Protection Act. Hence, the court was of the opinion that the pendency of the proceedings before the National Commission could not be a ground for disallowing the application.

The application was therefore allowed and an arbitrator was appointed by the Court to adjudicate the disputes between the parties.

REGENT HIRISE PVT. LTD. & ORS V. SANCHITA CHATTERJEE & ORS.

2021 SCC OnLine Cal 1441

CASE DETAILS:

Date of Judgement	08 April 2021
Date of Application	28 January 2021
Nature of Application	Civil Appeal
Bench	Division Bench
Judge(s)	Justice Harish Tandon and Justice Kausik Chanda
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 12(5)

RATIO:

The moment the Arbitrator is disqualified under Section 12(5) of the Arbitration and Conciliation Act 1996 ("the Act"), he becomes *de jure* and the challenge can be thrown under Section 14(1)(a) of the Act before the Civil Courts. However, the expression "judicial authority" contained in Sections 5, 8 and 41 of the Act denotes a court or a judicial authority other than the court defined in Section 2(1)(e) of the Act.

CASE SUMMARY

Brief facts

Regent Hirise Private Limited ("the Appellants") filed an appeal before the High Court of Calcutta ('the Court") pursuant to an ongoing dispute against the Respondents. The *ex parte* and interim order of injunction and its continuance till the disposal of the temporary injunction application was challenged in the appeal where the Civil Court in a suit seeking declaration that the mandate of the Arbitrator is extinguished on the ground of ineligibility under Section 12(5) of the Act as the Arbitrator would be restricted from continuing with the arbitration proceedings by way of anti-Arbitration injunction. It was submitted that once the competence of the Arbitrator is challenged, the Arbitrator is denuded of its power to proceed further and the proper remedy is by way of a civil suit and not to approach the Arbitrator to rule its own jurisdiction under Section 16 of the Act.

Decision

The learned Court held that by introduction of sub-section 5 of Section 12 of the Act with the non-obstante clause, the grounds of impartiality and independence were still retained but ineligibility to act as an Arbitrator had been added if the Arbitrator came within any of the eventualities and parameters enshrined in Schedule 7 appended thereto. The Court went on to identify three components of the provision namely, the waiver of the applicability of the said sub-section by the parties; waiver could take place subsequent to the dispute having arisen and lastly such waiver would have to be by way of an expressed way of writing.

The Court placed reliance on several judicial precedents laid down by the Supreme Court to enumerate that the law held that the moment the named Arbitrator fell within any of the categories enshrined in Seventh Schedule to Section 12(5) he became ineligible to act or function in such capacity and in such instance, he was disenfranchised from the power to nominate another Arbitrator. The moment the Arbitrator was disqualified, he would become *de jure* ineligible and the challenge can be thrown under Section 14(1)(a) of the Act before the Civil Courts. The Court stated that the expression "judicial authority" contained in Sections 5, 8 and 41 of the Act denoted a court or a judicial authority other than the court defined in Section 2(1)(e) of the Act. Thus, the said provision was deemed to exclude the jurisdiction of the judicial authority which was the court in ordinary sense to intervene in cases governed under the said Act and, therefore, a restrictive meaning would have to be

assigned to the Court wherever it appeared as per the definition under Section 2(1)(e) of the Act.

The Court held that since the present suit had been filed in the Fourth Court of Civil Judge (Senior Division), it was inferior in grade to a Principal Civil Court of original jurisdiction in a district and, therefore, was not competent to entertain such a suit. The order was deemed *per se* illegal and, thus, set aside.

JAGDISH KISHINCHAND VALECHA V. SREI EQUIPMENT FINANCE LIMITED AND ANOTHER

2021 SCC OnLine Cal 2076

CASE DETAILS:

Date of Judgement	13 April 2021
Date of Application	20 February 2021
Nature of Application	Appeal against order of the Arbitrator
Bench	Single Bench
Judge(s)	Justice Moushumi Bhattacharya
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 34

RATIO:

Upon recourse being sought under Section 34 of the Arbitration and Conciliation Act, 1996 (“Act”), adjudication must first be made on the grounds mentioned thereunder to determine whether the arbitral award (“award”) should be set aside or sustained. Moreover, the fundamental objective of Section 12 of the Act is to ensure that the arbitrator is independent and impartial.

CASE SUMMARY

Brief Facts

Jagdish Kishinchand Valecha ("Petitioner") challenged the award passed by the Sole Arbitrator ("arbitrator") on 5 October 2020, before the Calcutta High Court ("High Court"), on the ground that procedural lapses during the arbitration hearing had resulted in the Petitioner not being given an opportunity to be heard by the arbitrator. Srei Equipment Finance Limited and Another ("Respondent") however contended that the Petitioner had participated throughout the arbitration proceedings and thus had sufficient opportunity to make its case before the arbitrator. In any case, both the Petitioner and the Respondent agreed before the High Court for the appointment of a new arbitrator to hear the case afresh. The Petitioner and the Respondent are hereafter collectively referred to as "the Parties".

In light of the contentions that were raised in the Petition and arguments advanced by the Parties, the High Court listed two issues for discussion i.e. to determine the course of action to be charted for setting aside the award where an award-holder has expressed discomfort and appointment of a new arbitrator without affecting the rights of the Parties,

Decision

While setting aside the award dated 5 October 2020 passed by the arbitrator, the High Court ruled that Justice Sahidullah Munsh, a retired Judge of the High Court, was appointed as the new arbitrator for hearing the dispute between the Parties afresh. The Parties were allowed to take their submissions made before the High Court and present the same before the new arbitrator.

To arrive at its decision, the High Court first pointed out that Section 11 of the Act was not applicable to the dispute before it as contrary to the provision's wordings which allowed the High Court to appoint an arbitrator upon failure of the parties to agree on the choice of an Arbitrator, both the Parties had agreed to the appointment of a new arbitrator. Going forward, the High Court interpreted Section 34(4) of the Act to state that the award could be returned to the arbitrator who had passed it to remove all instances that could lead to setting aside of the award. However, observing that the arbitrator in the present case had previously been engaged as counsel for the Respondent group of companies in several other instances including as consultant for the Respondent, the High Court ruled that the award was liable to be set aside alone on the ground of perception of bias. This was substantiated further by the

High Court pinpointing to the fundamental objective behind Section 12 of the Act which was to ensure independence and impartiality of the arbitrator.

Next, the High Court placed reliance on a few precedents for the appointment of a new arbitrator without prejudicially affecting the rights of either of the Parties before it. The case of *Kinnari Mullick v. Ghanshyam Das Damani* was cited to highlight Supreme Court's ("Court") ruling that allowed parties to exercise their liberty in pursuance of their remedies in accordance with the law. Further, the Division Bench's ruling of the Kerala High Court in *Sulaikha Clay Mines v. Alpha Clays* was cited to highlight how Kerala High Court had considered a situation where an award could be set aside for *"procedural violation and determined whether it had power to remit the award to a different Arbitrator de hors the power under Section 34(4) of the Act"*. The Kerala High Court was reluctant to remit the matter to the same Arbitrator in view of the unequal treatment that was meted out to the parties.

The High Court further observed that although the Respondent had challenged the Petitioner's grounds for setting aside the award, the Parties had mutually agreed to the appointment of a new arbitrator. In view of this agreement, the High Court reiterated that Section 43(4) of the Act and Section 89 of the Code of Civil Procedure were enablers of alternative dispute resolution and that party autonomy had to be protected at levels through the dispute resolution mechanism.

Thus, in light of the above discussions, the High Court set aside the award and appointed a new arbitrator for a fresh hearing of the dispute between the Parties.

SIRPUR PAPER MILLS LIMITED V. I. K. MERCHANTS PVT. LTD.

AIR 2021 Cal 222

CASE DETAILS:

Date of Judgement	7 May 2021
Date of Application	31 October 2008
Nature of Application	Appeal against an arbitral award
Bench Strength	Single Judge
Judge(s)	Justice Moushumi Bhattacharya
Provisions of the Arbitration and Conciliation Act, 1996	Section 34; Section 36

RATIO:

Claims arising from an Arbitral award that are not filed under the Insolvency and Bankruptcy Code, 2016 are rendered infructuous after the approval of the resolution plan by the National Company Law Tribunal.

CASE SUMMARY

Brief Facts:

The case arose from an application filed by the Petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act") to set aside an arbitral award in arbitration proceedings against the Respondent. During the pendency of the proceedings under Section 34 of the Act, the Petitioner had Corporate Insolvency Resolution Proceedings ("CIRP") initiated against it in 2017, with a moratorium issued under section 14 subsequently.

The Petitioner had pleaded for abeyance of the Section 34 application before, asking for suspension in lieu of the CIRP proceedings but its plea was rejected by the Kolkata High Court in January 2021, and the appeal was rejected in February 2021.

However, after Supreme Court judgements in *Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta* ("Essar Steel") and Ghanshyam Mishra and Sons Private Limited vs. Edelweiss Asset Reconstruction Company Limited ("Edelweiss"), and the approval of the resolution plan of the company by NCLT, the Petitioner again filed an application challenging the maintainability of the Section 34 proceedings.

Arguments

The Petitioner contended that the proceedings under Section 34 had become infructuous since the management was taken by a new entity and the Resolution Plan for the Petitioner had been approved by the NCLT. Petitioner relied on Section 31 of the IBC and Essar Steel to state that an approved resolution plan is binding on the corporate debtor, its employees, members and other stakeholders. It contended that once a resolution plan has been approved, further undecided claims cannot be added in it. Citing Gaurav Dalmia vs. Reserve Bank of India & Ors.,[1] and Axis Bank Limited vs. Gaurav Dalmia; it contended that debts of corporate debtors stand extinguished save to the extent taken over by resolution applicant under the resolution plan approved. It was further contended that the Arbitral Award itself does not survive anymore as it has been rendered purposeless.

The Respondent contended that the submissions for maintainability of the proceedings were rejected twice by the High Court already and the same reasoning would apply again in rejecting under *res judicata*. It contended that since the Petitioner had filed an application

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[1] 2020 SCC Online Cal 668

challenging the award under Section 34 of the Act, it would fall outside the purview of the IBC. The Respondent further contended that since the application was filed much before the 2016 amendment to the Act, the award granting the claim to the Respondent was considered automatically stayed on the filing of the application under Section 34 by the Petitioner so it could not have filed a claim in the NCLT in its resolution proceedings.

Decision

The Court noted the judgments of the Supreme Court in *Essar Steel* and *Edelweiss* wherein it was ruled that a creditor cannot initiate proceedings for recovery of claims that do not form a part of the Resolution Plan approved by the NCLT. The Court noted that the claims that did not feature in the Resolution Plan stood extinguished and no one would be able to initiate or continue proceedings for the same.

The claims of the Respondent were also analysed through the lens of Sections 25, 29, 30 and 31 of the IBC. When these provisions are read with *Essar Steel* and *Edelweiss* it is clear that for a claim to be considered by Resolution Professional and later by Committee of Creditors for the approval of the resolution plan, it must be featured in the Information memorandum prepared by Resolution Professional and provided to the Resolution applicant who ultimately takes over the business.

The Court noted that the information memorandum did note the claim of the Respondent in it, however, it also noted that the Respondent had sufficient time to approach the NCLT for proper sufficient relief and that the CIRP regulations provide for specific procedural provisions for submission of claims that the Respondent should have taken as it was under an obligation to take those steps under the IBC instead of waiting for the Adjudication of the application filed under Section 34 of the Act.

The Court, taking note of Board of Control for Cricket in India vs Kochi Cricket Pvt. Ltd.[2] ("*Kochi Cricket*") rejected the contention of the Respondent stating that it did have the right to file the claim mentioned by the Award with the NCLT. In the *Kochi Cricket* judgement, the Supreme Court had held that the applications filed under Section 34 of the Act even before the 2016 amendment, would have the benefit of the amended Section 36 of the Act preventing the petitioner from getting an automatic stay order upon filing the application

[2] (2018) 6 SCC 287

under Section 34, giving the Award holder freedom to enforce the award against the award-debtor.

The Court concluded by ruling that since the claim of the Respondent under the Award had itself extinguished, so adjudicating the merits of the application under Section 34 of the Act would be purposeless.

PAM DEVELOPMENTS PVT. LTD. V. STATE OF WEST BENGAL

AIR 2021 Cal 230

CASE DETAILS:

Date of Judgement	03 June 2021
Date of Application	04 April 2019
Nature of Application	Arbitration Appeal
Bench Strength	Division Bench
Judge(s)	Justice I.P. Mukerji and Justice Md. Nizamuddin
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 34(2)(a)(iv), Section 28

RATIO:

If a claim has not been raised before the Arbitral Tribunal ("AT"), then a decision on that matter will be outside the scope of the AT making the award liable to be set aside under Section 34(2)(a)(iv) of the Arbitration and Conciliation Act, 1996 ("the Act").

If the decision reached by the AT is fair, reasonable, and plausible, the Court cannot replace its views with the AT's views.

Non-consideration of the terms of contract and the law laid down in India by the AT will violate Section 28(3) of the Act making the award patently illegal. If the AT has not discussed pertinent questions necessary to answer the claim or has not provided adequate reasons, the decision of the AT is patently illegal.

CASE SUMMARY

Brief Facts

Pam Developments ("Appellant") entered into a works contract with the State of West Bengal ("Respondent") to develop a highway in 2010. The work was supposed to be completed by June 2012. However, due to several delays, the work was eventually completed in November 2012. In June 2013, the Appellant raised a bill for escalation. On non-payment of the same, the Appellant initiated arbitration proceedings against the Respondent.

In the Arbitration, the Appellant raised several claims which asked for compensation for loss of business, payments for extra works and claims in damages. The AT decided the claims in favour of the Appellant. The AT dismissed the claim for loss of business as it was not proved by the Appellant. However, it gave the Appellant damages for “off-site expenses” which had not been claimed by the Appellant in its Statement of Claim.

The Respondent filed an application under Section 34 of the Act before the District Judge (“DJ”) challenging the award. The DJ set aside some parts of the award for being outside AT’s jurisdiction and patent illegality.

The Appellant had filed a Section 37 of the Act appeal against the order of the District Judge before the Calcutta High Court (“Court”). The Respondent also filed cross-objections against the remainder of the award. Hence, the present proceedings.

Decision

The parties, in essence, challenged every claim granted in the Award and the decision of the DJ. As a result, the Court analysed all the claims and their validity independently.

Deciding on matters outside the AT’s jurisdiction

The AT had disregarded the claim for loss of business but provided compensation of “off-site expenses”. The DJ had set aside the award on this ground because the same was outside the jurisdiction of the AT.

As per Section 34(2)(a)(iv) of the Act, an award can be set aside if it had decided on matters beyond the scope of the submission to arbitration. The Court observed that if a certain claim had not been made before the AT, then it was not in dispute and the AT did not have the jurisdiction to decide on that claim. Presently, the Appellant had not claimed compensation for “off-site expenses” and the decision on that ground was outside the AT’s jurisdiction. As

a result, the Court upheld the DJ's decision on this ground and set aside this aspect of the award.

Fair, reasonable, and plausible view of the AT

The Appellant had claimed that the machinery leased for the contract had remained idle for a long period of time due to excessive delays on behalf of the Respondent, because of which the Appellant became entitled to the extra hire charges.

The AT determined the number of wasted days to be 200 days and granted Rs 61 lacs as the extra expenses. The AT arrived at these figures by determining the ratio of the admissible hire charges to the total cost of hire. The DJ set aside the award with respect to this claim because, in its opinion, the AT did not consider the delay caused before the commencement of work.

The Court reiterated that the Court does not sit in appeal in a setting aside proceeding. It is settled that the AT is the sole judge of the quality of the evidence. The Court cannot interfere with the award by reappraising the evidence if the AT has taken a reasonable and plausible view. In the Court's opinion, the conclusion reached by the AT in the present case was a fair view of the situation. The DJ could not have replaced his own view for that of the AT. As a result, the Court upheld the award with respect to this claim.

Non-consideration of contractual provisions

The Appellant contended that due to the delay in the start of the work, the labour hired by the Appellant remained idle for lack of work. The Respondent said that the terms of the contract prohibited a claim on such a ground.

The AT concluded that the delay at the commencement was attributable to the Respondent due to which the claim was accepted. The DJ upheld this claim.

The Court noted that Section 28(3) of the Act obliged Arbitral Tribunals to consider all the terms of the contract. The Court observed that a clause prohibiting payment for idle labour did exist. Further, Supreme Court precedents are clear on the proposition that any extension of time in performance could not result in the contract being performed on altered terms unless explicitly mentioned.

As the AT did not consider the contractual terms and the law laid down by the Supreme Court, the AT violated Section 28(3) of the Act. This violation has made the award on this aspect patently illegal, subject to be set aside.

Non-engagement with pertinent questions

The Appellant contended that the delayed payment of running account bills acted as "blocked capital" which became a source of loss and damage to the Appellant.

The AT accepted this contention and granted interest on the running account bills and the DJ upheld it.

On facts, the Court observed that the Respondent had made all the payments in a timely manner after receiving the running account bills. In such a situation, the case for any interest was not made out. Furthermore, the AT did not determine whether any notice under the Interest Act 1978, a statutory requirement, was served on the Respondents by the Appellants or not. The Court noted that the award was silent on these extremely pertinent issues. As a result, the interest granted by the AT was completely unjustified making the award in this respect patently illegal.

Interest

The Appellant asked for the interest of 18% pa on the awarded sum. The AT, without specifying reasons, provided for the interest of 12% pa from April 2016 up to the date of award and a separate rate of interest after the award. The DJ upheld the interest.

The Court observed that there was an explicit clause in the contract which prohibited the grant of pre-reference interest. The AT reached its decision without considering the terms of the contract. Further, no reason was given for this date. For reasons mentioned for Claim 3, the Court set aside the award with respect to the pre-reference interest.

AMSTAR INVESTMENTS PVT LTD & ORS V SHREE SHREE ISHWAR SATYANARAYANJEE & ORS

AIR 2021 Cal 259

CASE DETAILS:

Date of Judgement	8 June 2021
Date of Application	20 July 2015
Nature of Application	Application for setting aside the award
Bench Strength	Single Judge Bench
Judge(s)	Justice Arindam Sinha
Provision(s) of the Arbitration and Conciliation Act, 1996	Sections 16 and 34

RATIO:

An agreement on the side regarding the time limit for rendering the award cannot be enforced under the Arbitration and Conciliation Act 1996, as applicable prior to the 2015 amendments.

CASE SUMMARY

Brief Facts

The Petitioner was leased a house by the Respondent under a lease agreement ("Agreement") in 1982. The Agreement expired due to the efflux of time. In 2004, the Respondent invoked the arbitration clause in the Agreement to resolve certain disputes over the leased property.

A significant duration after filing the counter statement in the arbitration proceeding, the Petitioner filed an application under Section 16 of the Arbitration and Conciliation Act 1996 ("A&C Act 1996"). The application alleged, for the first time, that the arbitration involved a tenancy dispute covered by the West Bengal Premises Tenancy Act 1997 ("WB Act"). As the WB Act provided for a specific exclusive forum for resolving disputes, the Arbitral Tribunal did not have jurisdiction over the matter. The application was dismissed.

During the pendency of the arbitration proceedings, the Respondent approached the Calcutta High Court ("Court") several times for the extension of time for making the award. In all such instances, the Court considered the petitions to be misconceived as the provision for extension under the Arbitration and Conciliation Act 1940 ("A&C Act 1940") was absent under the A&C Act 1996. However, it was recorded in such orders ("prior orders") that the Petitioner did not have any objections to the extensions.

In 2015, the Arbitral Tribunal rendered the award. The Petitioner filed an application under Section 34 A&C Act 1996 before the Court for setting aside the award. The Petitioner firstly alleged that the Arbitral Tribunal did not have the jurisdiction to hear the matter as it involved a tenancy dispute under the WB Act. Further, the Petitioner contended that the Arbitral Tribunal did not render the award in the agreed-upon time between the parties, as recorded in the prior orders. Hence the present proceedings.

Decision

Jurisdiction

On the question of jurisdiction, the Court noted that the Petitioner raised the contention of a tenancy dispute under the WB Act for the first time in its Section 16 application. The Petitioner's counter-statement was utterly silent on this aspect. The Court observed that Section 16 A&C Act 1996 requires such objections to be raised at the earliest and not later than the statement of defence.

Further, the Court also observed that the Arbitral Tribunal had ruled on facts that the matter is not a tenancy dispute under the WB Act in an interim award. As a result, the Court held that the Petitioner's Section 16 application was an afterthought, and the award cannot be set aside on this ground.

Time limit for rendering the award

The Petitioner had also argued that the award should be set aside as it was not rendered within the agreed-upon period. The Court, at the outset, noted that the petition was filed prior to the enforcement of the Arbitration and Conciliation (Amendment) Act 2015. Before this amendment, the A&C Act 1996 did not have any provisions dealing with the time limits for rendering an award.

The Court observed that in the present case, there was no agreement incorporated within the arbitration clause regarding the time in which the award has to be rendered. The observations made in the prior orders, where the parties did not object to an extension, could only be called an agreement on the side for fixing the time. The Court held that absent provisions in the A&C Act 1996 regarding time limits, the Court could not enforce such agreements on the side. As a result, the award suffers from no infirmity even though it has been made after a time prescribed in such a side agreement.

Due to the above reasons, the Court dismissed the Section 34 A&C Act 1996 application.

LINDSAY INTERNATIONAL PRIVATE LIMITED V. IFGL REFRACTORIES LIMITED

2021 SCC OnLine Cal 1979

CASE DETAILS:

Date of Judgment	25 June 2021
Date of Application	15 January 2021
Nature of Application	Petition for setting aside an order of the Arbitral tribunal under Section 34
Bench Strength	Single Bench
Judge(s)	Justice Moushumi Bhattacharya
Provision(s) of the Arbitration and Conciliation Act, 1996	Sections 23, 31, and 34

RATIO:

Rejection of an application to amend the statement of defense to introduce new claims which are not part of the subject matter of reference does not amount to an interim award under section 31(6) of the Arbitration and Conciliation Act, 1996 ("the Act"). Hence, it cannot be challenged under Section 34 of the Act.

CASE SUMMARY

Brief Facts

IFGL (Seller) entered into twelve Purchase Orders (POs) with Lindsay (Buyer) for supply of refractory goods. These goods were further supplied by Lindsay to Arcelor Mittal companies. The POs provided that Lindsay must pay IFGL within three days of receiving payment from Arcelor Mittal companies (AM). However, Lindsay defaulted in paying IFGL despite receiving payment from AM.

Later, an MoU was entered between IFGL and Lindsay, for reaching an agreement regarding the payment. However, IFGL alleged that Lindsay had breached the MoU. Therefore, IFGL terminated the same. IFGL further invoked the arbitration clause in the POs and claimed the due payments along with interests.

Lindsay contended that, contrary to their agreement, IFGL started dealing directly with AM. Hence, Lindsay withheld certain payments due to IFGL. Further, Lindsay claimed that to resolve these issues, the parties entered into the MoU which novated and superseded the POs. Lindsay also contended that unlike the POs, the MoU did not contain an arbitration clause. Hence, no arbitration agreement existed between the parties. Moreover, Lindsay contended that the MoU was unilaterally terminated by IFGL.

During the arbitration proceedings, Lindsay sought to amend its Statement of Defence (SOD) and introduce counter claims/equitable set-offs through an application under Section 23(2A) and 23(3) of the Act. The proposed counterclaim was of damages owing to breach of the MoU by IFGL. The application was rejected by the Arbitrator on the grounds that it is barred by limitation and the counter claims arise from the MoU and not from the POs which form the subject matter of reference. Lindsay filed the present appeal under Section 34 to set aside this rejection order.

Decision

The Court concluded that the arbitration was restricted only to the twelve Pos and the later MoU was not a part of the reference for arbitration. Anything outside the contours of reference would not constitute an interim arbitral award under Section 2(1)(c) and 31(6) of the Act. The Court further noted that under Section 23(2A) of the Act, a counterclaim or set-off must fall within the scope of arbitration agreement. Since, the MoU fell outside the scope

of arbitration agreement, the claim for damages arising out of its breach cannot be a part of counter-claims.

The Court differentiated the present case from previous cases wherein rejection of application for amendment of statement of defense was treated as an interim award. The Court noted that in all such cases relied upon by Lindsay, the counter claims sought to be incorporated by the amendment were not beyond the reference for arbitration.

Thus, since the impugned order of the Arbitral tribunal was not an interim award, the present case was found not to be maintainable under Section 34 of the Act.

The Court also noted that there was a delay on Lindsay's part with reference to the time frame provided under Section 23(4) of the Act. Giving an expansive reading to Section 23(3) of the Act, the Court held that the Arbitrator rightfully rejected the application on the grounds of bar of limitation as the application could be rejected on grounds of delay.

On the basis of above reasons, the Court dismissed the present petition.

MADRAS HIGH COURT

HANUDEV INFOPARK PVT. LTD., REPRESENTED BY AUTHORISED SIGNATORY MR. NIRANJAN RAO AND OTHERS V. ANDAL DORAIRAJ AND OTHERS

2021 SCC OnLine Mad 1718

CASE DETAILS:

Date of Judgement	29 April 2021
Date of Application	08 February 2021
Nature of Application	Petition under Section 37 of the Arbitration and Conciliation Act, 1996
Bench Strength	Single Judge Bench
Judge(s)	Justice P.T. Asha
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 11(6), Section 16(2), Section 21, Section 37

RATIO:

No orders of the arbitral tribunal, except those contemplated under Section 37 of the Arbitration and Conciliation Act, 1996 (“Act”) are appealable in the Court. It is within the arbitral tribunals’ jurisdiction to determine the arbitrability of pleas such as limitation, fraud etc.

CASE SUMMARY

Brief Facts

The first Appellant and the Respondents entered into three Joint Development Agreements ("JDA") with respect to certain properties. The properties were later reconstituted amongst the Respondents. Pursuant to the JDA and the reconstitution, three Sale Deeds were entered into between the Respondents (as vendors) and Appellants (as purchasers).

The Appellants failed to complete the work as undertaken, therefore, the Respondents issued legal notices against them. Upon not receiving any response to the notices, the 1st Respondent invoked the Arbitration Clause and filed petitions under Section 11(6) for appointment of an Arbitrator, pursuant to which an Arbitrator was appointed by the Court.

While the Arbitration was ongoing, the Appellants filed a petition for termination of the mandate of the learned Arbitrator and the appointment of a new Arbitrator. Accordingly, a new Arbitrator was appointed.

Before the new Arbitrator, the Respondents *inter alia* claimed monetary reliefs under various heads and the termination of JDA and the Sale Deeds. The Appellants submitted Preliminary Counter Statements thereto, making the following arguments - The Appellants had not consented to the Arbitration, Arbitration could not be initiated by the Respondent 1 alone, Appellants 2 and 3 were not parties to the JDA, Arbitration could only be initiated if negotiations had been undertaken had failed, the Respondents 2 and 3 had withdrawn their claims before the first Arbitrator and could not be allowed to make a fresh claim now, the claim was barred by limitation, the tribunal lacked competence and jurisdiction to hear the present claim. These arguments were rejected by the Arbitrator, which was challenged by the Appellants in the present case.

The Appellants chiefly argued that the notice required under Section 21 of the Act was issued only by the Respondent 1 and only with respect to the JDA. The reliefs sought - like cancellation of the JDA, declaration of the Sale Deeds as void, and direction to the Appellants to clear encumbrances - could not be considered in Arbitration. Respondents 2 and 3 had withdrawn their claim statements before the first Arbitrator without reserving the right to file fresh claims, hence, they could not raise fresh claims now. Appellants 2 and 3 were not parties to the JDA, which contained the Arbitration clause.

The Respondents argued that the preliminary counter statement which was rejected and whose rejection was challenged in the present case does not fall within the ambit of Section 37(1)(a) to (c) or Section 37(2)(a) to (b), hence the challenge was not maintainable. The Appellants' arguments in the present case had already been considered by the Court at a previous stage and could not be re-agitated.

Decision

The Court found that the grounds raised by the Appellant in the preliminary counter statement (that the Arbitrator lacks jurisdiction) fell within the ambit of Section 16(2) of the Act. Appeals would lie under Section 37(2)(a) only if such grounds were accepted by the Arbitral Tribunal, but herein these grounds were rejected. The Appellants themselves had consented to the transposition of the Respondents 2 and 3 during the Arbitral Proceedings, hence, they could not challenge the filing of fresh claims by them. The pleas of limitation, fraud, etc., could be raised and argued before the Arbitral Tribunal. The Appellants' argument regarding the lack of notice could not be accepted as the parties had proceeded with clear understanding that the Arbitration proceedings were with respect to all three JDA and all the Respondents.

Thus, the appeal was rejected. The Court directed that the Arbitration proceedings must continue and it shall remain open to the Appellants to challenge the Arbitral award under Section 34.

AAPICO INVESTMENT PVT LIMITED V. MANICKAM MAHALINGAM

2021 SCC OnLine Mad 2037

CASE DETAILS:

Date of Judgement	2 June 2021
Date of Application	12 December 2019
Nature of Application	Original Application
Bench Strength	Single Judge
Judge(s)	Justice P.T. Asha
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 2(2) and Section 9

RATIO:

High Courts would have the jurisdiction to pass interim orders under Section 9 of the Arbitration and Conciliation Act, 1996 ("the Act") in respect of agreements governed by foreign law and having a foreign venue unless the agreement implies an intention to the contrary.

CASE SUMMARY

Brief Facts

The Applicant had invested in SGAH, the group headed by the Respondent. The Applicant had invested in the SGAH and had loaned $50 Million on 25.5.17, and had further loaned $40 Million according to a loan agreement dated 29.9.18. According to AAPICO, SGAH had defaulted in respect of both the Loan Agreements in 2019. AAPICO demanded immediate payment of the principal amount outstanding, capitalized costs, and enforcement costs.

The Applicant had filed various applications seeking interim measures under Section 9 of the Act to prevent the respondent from disposing of further assets while the arbitration proceedings were going on between the two of them. The Respondent had been engaging in detrimental acts adverse to the interests of the Appellants.

The two personal guarantee deeds dated 25th May 2017 and 1st October 2018 stated that their agreement would be governed by the laws of England, and any dispute arising in connection to the guarantee would be resolved under the rules of Singapore International Arbitration Centre ("Rules"). The venue of arbitration was fixed as Singapore.

Arguments

The Appellant contended that the court was clothed with the jurisdiction to consider and pass orders on the applications. It contended that after the amendment to Section 2(2) of the Act in 2015, the Court now had the jurisdiction to pass orders under Section 9 for International Commercial Arbitrations. The SIAC Rules also contemplate approaching Domestic Courts for effective interim orders.

The Respondent primarily contended that the Court lacked the jurisdiction to consider the application under Section 9 of the Act. It was further contended that by agreeing that the SIAC Rules would apply, the place for arbitration would be Singapore and that the Agreement would be governed by the laws of England and Wales, the parties had impliedly agreed that Sections 9, 27 and 37(1)(b) and 37(3) would not apply to the agreements in question. The Respondent ruled that the Legislature had intentionally omitted the word "express" from the "agreement to the contrary" proviso of Section 2(2) of the Act, as the Law Commission Report had suggested using it.

Decision

The Court relied on precedents set by the Delhi High Court in the unreported judgement of *Raffles Design International India Private Limited* v. *Educomp Professional Education Limited* wherein the Court analyzed the UNCITRAL Model Law and the SIAC Rules(as the parties, in that case, had agreed to) and found that under the SIAC Rule 26.3 a request for interim relief made by a party to a judicial authority before the constitution of the tribunal is not incompatible with the rules. Therefore, the Court ruled that in their agreement, by agreeing to the SIAC Rules, the parties had also implicitly agreed to be under the jurisdiction of the Delhi High Court for orders under Section 9.

The Court also considered a similar case heard by its division bench wherein it checked the maintainability of a Section 9 application in an International Commercial Arbitration. The disputes covered three contracts and in one of them it was clearly stated that the Indian Arbitration Act, 1996 would not apply as only the British law would apply to the Arbitration Process and only for enforcement orders would the Indian Courts' support be taken. Section 9 would have been applicable in that case as well, but the agreement to the contrary prevented that.

Therefore, it was held that the application under Section 9 of the Act in the case under consideration was maintainable as there was no agreement to the contrary as contemplated by Section 2(2).

R VENKATARAMAIAH V. THE SOUTHERN RAILWAY

2021 SCC OnLine Mad 2036

CASE DETAILS:

Date of Judgement	02 June 2021
Date of Application	25 February 2015
Nature of Application	Application for setting aside the award under Section 34
Bench Strength	Single Judge
Judge(s)	Justice N. Sathish Kumar
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 34, Section 24

RATIO:

The non-participation of all members of the Arbitral Tribunal in the deliberations for the award, even if a majority award is authorised by reference, violates the fundamental policy of Indian Law as it breaches arbitral collegiality.

Non-consideration of vital documents by the Arbitral Tribunal is sufficient to constitute patent illegality under Section 34, resulting in the award being set aside.

CASE SUMMARY

Brief Facts

The Petitioner and the Southern Railways ("Respondent") entered into a works agreement for gauge conversion in 1995. Due to a dispute between the parties, the Respondent constituted the Arbitral Tribunal ("Tribunal") comprising three members in 2006.

The Tribunal held 17 sittings between 2006 and 2014. After the 17th sitting, one of the arbitrators was replaced with a new arbitrator. The reconstituted Tribunal only held one sitting, where it just delivered the final award. The parties were not given an opportunity to present their sides, either in the form of written submissions or an oral hearing, before the reconstituted Tribunal and the new arbitrator.

The Petitioner filed an application under Section 34 of the Arbitration and Conciliation Act 1996 ("Act") before the Madras High Court ("Court") for setting aside the award alleging that the award violated the fundamental policy of Indian Law as it did not follow principles of natural justice and the principle of collegiality. Further, the Petitioner alleged that the award is patently illegal as the Tribunal did not give due weight to essential documents in the award. Hence, the present proceedings.

Decision

Fundamental Policy of Indian Law

The principal submission pressed on this ground was that the new arbitrator had neither been consulted adequately for making the award nor had he participated in the deliberations of the Tribunal constituting a breach of collegiality, which was a part of the fundamental policy of Indian Law.

The Court, after referring to several judicial precedents, observed that even when the reference authorised the Tribunal to make a majority award, all the arbitrators had to participate in the deliberations. Failing this, the award was likely to be set aside as violating collegiality. Furthermore, Section 24 of the Act obliged the Tribunal to notify the parties of any hearing or meeting of the Tribunal to inspect documents.

In the present instance, the new arbitrator only participated in the sitting which delivered the award. Additionally, the award did not refer to notice being given to the parties for a meeting of the reconstituted Tribunal. The only meeting the reconstituted Tribunal held was to deliver the award. In such a scenario, the Court inferred that it was highly improbable that the new

arbitrator was a part of the Tribunal's deliberation in making the award. In the Court's opinion, the new arbitrator had not even gone over the case papers.

The Court considered that such non-participation of an arbitrator was a clear breach of collegiality. Further, the Court relied on judgements of various foreign courts to state that a breach of arbitral collegiality directly violates the right to a fair trial. As a result, the award was to be set aside on this ground.

Patent Illegality

The Court also found force in the Petitioner's argument on patent illegality of the award. At the outset, the Court reiterated that the Court does not sit in Appeal in a Section 34 proceeding. However, when very vital documents have been ignored or omitted by the Tribunal, the award was liable to be set aside. On the particular facts of the case and the content of the award, the Court agreed that Tribunal did not properly discuss two key supplementary agreements between the parties.

Due to all the above factors, the Court set aside the award and remanded it to a fresh arbitral tribunal.

THE SUPREME COURT

SANJIV PRAKASH V. SEEMA KUKREJA AND ORS.

(2021) 9 SCC 732

CASE DETAILS:

Date of Judgement	06 April 2021
Date of Application	04 February 2021
Nature of Application	Appeal under Section 11 against order of the Delhi High Court
Bench Strength	Three Judges
Judge(s)	Justice Rohinton Fali Nariman, Justice B.R. Gavai and Justice Hrishikesh Roy
Provisions of the Arbitration and Conciliation Act, 1996	Section 8; Section 11; Section 16

RATIO:

The question of whether an agreement containing an arbitration clause has been novated cannot be decided by the courts at the Section 11 stage.

CASE SUMMARY

Brief Facts

The Appellant (Sanjiv Prakash) and the Respondents, his family members (Seema Kukreja, Daya Prakash, and Prem Prakash) all own shares in the company, ANI Media Private Limited ("the Company") which was started by Prem Prakash. On collaboration with Reuters Television Mauritius Limited ("Reuters"), their collective shares reduced to 51%, and on the demand of Reuters, Sanjiv Prakash was handed over control of the votes of the Board by way of a Memorandum of Understanding, and any resolution by the Board required his assent.

The MoU contained an arbitration clause and also provided that if any members of the Prakash family wanted to sell/bequeath their shares, the same shall be offered to the Appellant. Post this, a Share Holders Agreement and a Share Purchase Agreement was executed between the Prakash family and Reuters, both of which contained arbitration clauses.

The dispute arose when Daya Prakash transferred her shares to Seems Kukreja and not the Appellant. He invoked the arbitration clause contained in the MoU but the Respondents, in response, denied that there was any arbitration clause between the parties as the MoU itself had been superseded and did not exist after the SHA. Subsequently, the Appellant moved the Delhi High Court under Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act").

The Delhi High Court dismissed the application under Section 11 of the Act and held that the invocation of the arbitration clause under the MoU was not justifiable, since the arbitration clause therein had perished due to the novation of the MoU. The Appellant then appealed this order before the Supreme Court of India ("the Court").

Decision

At the outset, the Court noted that the principles of kompetenz-kompetenz which provide that the Arbitral Tribunals are competent and authorized by law to rule as to their jurisdiction and decide non- arbitrability questions and that courts at the referral stage are not to decide on merits, except when permitted by the legislation. Such is supported by the Act as can be seen in Sections 8 and 16 of the Act.

The Court noted the case of *Vidya Drolia v. Durga Trading Corporation* that stated that the court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to

the Arbitral Tribunal for a decision on merits. The position is similar in the case of disputed "no-claim certificate" or defense on the plea of novation and "accord and satisfaction".

It was further held that in order to determine the validity of an arbitration clause, the courts are required to exercise the prima facie power of judicial review. Prima facie examination is not a full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. Courts can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp the jurisdiction of the Arbitral Tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism.

Additionally, the Court observed, as was also seen in the case of *Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engineering Pvt. Ltd.*, that when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the Arbitral Tribunal selected by the parties. In such cases, a full review by the courts at this stage would encroach on the jurisdiction of the Arbitral Tribunal and violate the legislative scheme allocating jurisdiction between the courts and the Arbitral Tribunal.

The Court opined that this reasoning was applicable to the facts at hand and finally held that that that it would be unsafe to conclude one way or the other that an arbitration agreement exists between the parties on a prima facie review of facts of that case, and that a deeper consideration must be left to an arbitrator, who is to examine the documentary and oral evidence and then arrive at a conclusion. A court, by way of a Section 11 application, cannot conduct a prima facie review about whether an agreement that contains an arbitration clause has or has not been novated.

The Court set aside the judgment of the High Court and referred the parties to the arbitration of a sole arbitrator, who would decide the dispute between the parties without reference to any observations made by the Court, which are only prima facie in nature.

INOX RENEWABLES LTD. V. JAYESH ELECTRICALS LTD.

2021 SCC OnLine SC 448

CASE DETAILS:

Date of Judgement	13 April 2021
Date of Application	10 December 2019
Nature of Application	Appeal against the judgement of the Gujarat High Court
Bench Strength	Division Bench
Judge(s)	Justice R.F. Nariman and Justice Hrishikesh Roy
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 34

RATIO:

Whenever there is designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression "*arbitration proceedings*" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place.

CASE SUMMARY

Brief Facts

M/s. Gujarat Fluorochemicals Ltd. (“GFL”) and Jayesh Electricals Ltd. (“Respondent”) had entered into an agreement (“purchase order”) on 28 January 2012, for the manufacture and supply of power transformers at wind farms. Jaipur was chosen as the venue of the arbitration in the purchase order. A slump sale of the entire business of GFL took place in favour of the Inox Renewables Ltd. (“Appellant”), by way of a business transfer agreement (“slump agreement”) between the Appellant and GFL on 30 March 2012. Vadodara was chosen as the seat of the arbitration with the exclusive jurisdiction to hear any disputes arising out of the slump agreement. The Respondent filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 (“Act”) on 5 September 2014 before the Gujarat High Court (“High Court”), invoking the appointment of an arbitrator under the purchase order. The High Court passed an order pursuant to a joint submission by the parties to the purchase order appointing Shri C.K. Buch (retired Judge of the High Court) as the sole arbitrator.

The arbitrator passed an award on 28 July 2018 in which the Respondent was awarded as sum of Rs. 38,97,150/- plus Rs. 31,32,650 as interest on the awarded amount from 10 March, 2017 till the date of the award plus Rs. 2,81,000/- as quantified costs. Future interest was awarded at 15% from the date of award till the date of payment. The Appellant had filed a petition under Section 34 of the Act in the Commercial Court of Ahmedabad (“Commercial Court”), but the Commercial Court passed an order in favour of the Respondent stating that the courts in Vadodara had the exclusive jurisdiction to hear the matter. A Special Leave Petition (“SLP”) was then filed by the Appellant against the order of the Commercial Court before the High Court. The High Court, despite finding that the exclusive jurisdiction for hearing disputes against the purchase order lied with the courts of Rajasthan, went ahead and dismissed the SLP on the ground that there was no error in the order passed by the Commercial Court. An appeal was filed by the Appellant against the order of the High Court before the Supreme Court (“Court”) under Section 34 of the Act.

The Counsel appearing for the Appellants argued before the Court the following: while the slump agreement not being between the Appellant and the Respondent was rightly considered as irrelevant, the High Court had failed to acknowledge that the arbitrator had recorded in the arbitral award that the place/venue had been shifted to Ahmedabad with mutual consent.

The Counsel for the Respondent made the following submissions: that any change in the place of the arbitration by mutual agreement had to be in a written agreement; that the exclusive jurisdiction with the courts at Rajasthan, being independent from the arbitration clause stating that the arbitration was to be held at Jaipur, indicated that the courts at Rajasthan alone had exclusive jurisdiction; and that the arbitrator's finding that the venue was shifted by mutual consent from Jaipur to Ahmedabad had reference only to Section 20(3) of the Act as Ahmedabad was in reality a convenient place for the arbitration to take place, as the seat of the arbitration always remained at Jaipur.

Decision

By declaring that the impugned judgement of the High Court was set aside, the Court referred the present dispute to the courts at Ahmedabad for the resolution of the Section 34 petition.

In arriving at its decision, the Court first observed that it was not possible to accede to the argument made by the Respondent’s Counsel that the change in the venue of the arbitration could only have been done by a written agreement and that the arbitrator's finding had reference to a convenient venue and not the seat of arbitration. Placing reliance on cases like *Indus Mobile Distribution (P) Ltd*, the Court concluded that *“whenever there is the designation of a place of arbitration in an arbitration clause as being the “venue” of the arbitration proceedings, the expression “arbitration proceedings” would make it clear that the “venue” is really the “seat” of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place”.*

The Court then reiterated the fact that the venue had been mutually agreed to be shifted from Jaipur to Ahmedabad, and that Jaipur did not continue to be the seat of the arbitration. The Court then went ahead to observe that clause 8.5 of the purchase order when read in entirety suggested that the jurisdiction of courts at Rajasthan could be considered to be independent of the venue at Jaipur. Thus, once the seat of arbitration was replaced by mutual agreement to be at Ahmedabad, the courts at Rajasthan were no longer vested with jurisdiction as exclusive jurisdiction was vested in the courts at Ahmedabad, given the change in the seat of arbitration.

PASL WIND SOLUTIONS V. GE POWER CONVERSION INDIA PVT. LTD.

AIR 2021 SC 2517

CASE DETAILS:

Date of Judgement	22 April 2021
Date of Application	21 April 2011
Nature of Application	Civil Appeal
Bench Strength	Three Judges
Judge(s)	Justice Rohinton Fali Nariman, Justice B.R. Gavai and Justice Hrishikesh Roy
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 9

RATIO:

The Supreme Court held that Indian parties to a dispute can validly choose a foreign seat of arbitration. In doing so, the remedy to seek interim relief is available to such parties under Section 9 of the Arbitration and Conciliation Act, 1996.

CASE SUMMARY

Brief facts

The parties to the dispute PASL Wind Solution Pvt. Ltd. ("PASL") and GE Power Conversion Pvt. Ltd. ("GE") executed a settlement agreement which provided for arbitration in Zurich under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. In 2017, PASL referred specific disputes to arbitration per the settlement agreement. During the arbitration proceedings, GE filed a preliminary application challenging the jurisdictional authority of the Sole Arbitrator on the ground that two Indian parties cannot choose a foreign seat of arbitration. The Sole Arbitrator rejected the objection, and the decision was not challenged by GE.

The final Award was passed in favor of GE and, therefore, filed enforcement proceedings under Section 47 and 49 of the Indian Arbitration and Conciliation Act, 1996 ("the Act") before the Gujarat High Court. The High Court held that although two Indian parties can validly choose a foreign seat of arbitration, the remedies made available under Section 9 cannot be claimed since it is only available to "international commercial arbitration". In the present case, the Gujarat High Court opined that the definition of "international commercial arbitration" pursuant to Section 2(1)(f) of the Act has not been fulfilled as at least one party must be a foreign entity. Aggrieved by the order, an appeal was filed to the Supreme Court.

Decision

On the aspect of choice of foreign seat, the Hon'ble Supreme Court ("Court") observed that two Indian parties could choose a foreign seat of arbitration. The Court held that there is nothing in the Indian Contract Act, 1872, which barred two Indian parties from adopting a foreign seat and thus maintained that freedom of contract must be balanced with public policy. The Court observed that for an award to be a 'foreign award' under Section 44 of the Act, there is no mandatory stipulation that one of the parties must be a foreign entity. It argued that Part I and Part II of the Act are mutually exclusive and opined that the definition of 'international commercial arbitration' under Part I will not apply to Section 44, which falls under Part II of the Act. Its application is restricted only to India-seated arbitrations. The Court held that Section 44 does not accord any nationality, residence or domicile, therefore, it is essentially a party-neutral but seat-centric provision.

On the availability of interim relief, the Court set aside the Gujarat High Court's findings and held that Section 9 applications for interim reliefs shall be maintainable to Indian parties who choose to adopt a foreign seat of arbitration. The Court opined that the proviso to Section 2(2) of the Act makes specific sections of Part I, for instance, Section 9 of the Act, that are usually applicable to only domestic arbitrations, applicable even to "international commercial arbitrations, even if the place of arbitration is outside India". The Court further held that the term 'international commercial arbitration' in the present context did not refer to the definition contained in Section 2(1)(f) of the Act, rather it was a seat-centric terminology that related to arbitrations taking place outside India. Therefore, the Court upheld the impugned judgement of the Gujarat High Court, except for the finding on the Section 9 application being made unavailable and non-maintainable. The appeal was disposed of accordingly.

ORIENTAL STRUCTURAL ENGINEERS PVT. LTD. V. STATE OF KERALA

AIR 2021 SC 2031

CASE DETAILS:

Date of Judgement	22 April 2021
Date of Application	21 April 2011
Nature of Application	Appeal against order of the Kerala High Court
Bench Strength	Division Bench
Judge(s)	Justice Surya Kant and Justice Aniruddha Bose
Provisions of the Arbitration and Conciliation Act, 1996	Section 34

RATIO:

An arbitral tribunal's award of interest to a party in a contract is valid, unless the contract specifically excludes it. Therefore, such an award of interest by a tribunal cannot be subject to judicial interference on grounds of 'patent illegality'.

CASE SUMMARY

Brief Facts

The Appellant entered into a contract with the Respondent in 2002 ("the Agreement"). Disputes arose between the parties on certain issues pertaining to making certain payments to the appellants. The Agreement provided for an 'entitlement' of the Appellant to interest on delayed interim payment under a clause but the Appellant had left blank the space available for recording the 'rate of interest' for payment to be made in local currency.

As per the Agreement, the dispute was first referred to the Disputes Review Board. Since the disputes were not resolved at this stage, they were referred to a three member arbitral tribunal which passed the award in favour of the appellants and directed the interest to be paid on delayed payment in relation to local currency component payable under the agreement.

The award of the Tribunal was assailed by the Respondent and appealed under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act") before the District Court at Ernakulam ("the District Court") and the ward of the Tribunal in favour of the Appellant on the point of interest on delayed payment was set aside. This decision of the District Court was sustained on appeal by a Division Bench of the Kerala High Court ("the Appellate Court"). The appeal at hand before the Hon'ble Supreme Court of India ("the Court") was against the said Bench decision of the High Court delivered on 17 September, 2009.

Decision

The Supreme Court held that there was no specific exclusion of 'payment of interest' on delayed payment. The Court, disagreeing with the view of the District Court and Appellate Court, opined that the blank space in the "appendix to the bid", cannot be construed as cancellation of the clause providing for payment of interest or delayed release of funds.

The Court relied on the case of *Secretary, Irrigation Department, Government of Orissa v. G.C. Roy* to state that the underlying principle guiding award of interest is that interest payment is essentially compensatory in nature. The Court observed that in the case before it, interest on delayed payment formed part of the contract itself. This case also provided the principle that "a person deprived of the use of money to which he is legitimately entitled has a right to be compensated and such compensation may be called interest, compensation or damages"

The Court also stated that the view expressed by the District Court in a proceeding under Section 34 of the Act, and upheld by the Appellate Court, breached the permissible boundaries for encroaching upon an award as laid down in *ONGC* v. *Saw Pipes.*

The Supreme Court therefore set aside the judgment of the Division Bench of the High Court of Kerala on the point of entitlement of the appellants to receive interest on delayed payment in relation to the local currency component of the contract. The award given by the arbitral tribunal was upheld and the Appeal was allowed.

M/S SILPI INDUSTRIES V. KERALA STATE ROAD TRANSPORT CORPORATION

AIR 2021 SC 5487

CASE DETAILS:

Date of Judgement	29 June 2021
Date of Application	29 January 2018
Nature of Application	Appeals from judgements of High Courts
Bench Strength	Division Bench
Judge(s)	Justice R. Subhash Reddy and Justice Ashok Bhushan
Provision(s) of the Arbitration and Conciliation Act, 1996	Section 23(2A), Section 43

RATIO:

The Limitation Act 1963 applies to arbitration proceedings under the MSMED Act.

Counter Claims and Set-Off defences are allowed in an arbitration proceeding under the MSMED Act.

If there is an arbitration agreement between a seller, covered under the MSMED Act, and a buyer, then the seller can choose the recourse under MSMED Act, notwithstanding the presence of the arbitration agreement.

CASE SUMMARY

<u>Brief Facts:</u>

M/s Silpi Industries ("Appellant") entered into a contract with Kerala State Road Transport Corporation ("Respondent") for the sale of rubber. When the Respondent did not pay the amount to be paid after a specified usage period, the Appellant approached the Industrial Facilitation Council ("IFC") under the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act 1993 ("IDPASC Act"). The IFC and the IDPASC Act was repealed and the same was changed to the Micro and Small Enterprises Facilitation Council ("MSEFC") under the Micro, Small and Medium Enterprises Development Act 2006 ("MSMED Act"). On the failure of the conciliation process, the parties were referred to arbitration which ruled in the Appellant's favour. The Respondents filed a petition under Section 34 Arbitration and Conciliation Act 1996 ("A&C Act") before the District Court, and then subsequently appealed to the Kerala High Court under Section 37 A&C Act.

The questions before the Kerala High Court were whether in arbitration proceedings under the IDPASC and MSMED Acts, the respondent-buyer could raise counter claims or set-offs and whether the Limitation Act 1963 applied to these proceedings. Both the questions were answered in the affirmative. Against this decision, the Appellant filed a Special Leave Petition ("SLP") to the Supreme Court ("Court").

There was another batch of appeals pending before the Court. Therein, the Seller had an arbitration agreement with the Buyer. Due to a dispute, the Seller approached the MSEFC. The Buyer, after making a representation before the MSEFC, filed a Section 11 A&C Act application before the Madras High Court for the appointment of arbitrator under their arbitration agreement. The Madras High Court held that since the Buyer wanted to raise counter claims, and the proceedings under the MSMED Act did not cover them, the recourse to arbitration is justified. The Seller filed an SLP before the Court.

Due to the similarity in questions, the Court clubbed the appeals. Hence, the present proceedings.

<u>Decision:</u>

<u>Application of Limitation Act 1963</u>

The Court observed that Section 43 A&C Act makes it explicit that Limitation Act 1963 applies to arbitration proceedings. Further, Section 18(3) MSMED Act stated that if

conciliation between the parties were to fail, the parties were to be referred to arbitration proceedings as if they had entered into an arbitration agreement under Section 7(1) A&C Act. As a result, the Court held that arbitration proceedings under the MSMED Act are based on the A&C Act, and the Limitation Act 1963 would apply to these proceedings by virtue of Section 43 A&C Act.

Maintainability of Counter Claims

The Appellants had argued that MSMED Act is a beneficial legislation whose sole intent was to protect the micro and small enterprises, due to which only claims of the supplier should be allowed. If counter claims by the buyer are allowed, then the scope of the Act will be expanded. The Respondent, on the other hand, contended that arbitration under the MSMED Act continues as if there was an arbitration agreement under the A&C Act, and there is no reason not to allow counter claims given the explicit mandate of Section 23(2A) A&C Act.

The Court accepted the Respondent's contention and held that there was no reason not to allow counter claims in arbitration proceedings under the MSMED Act. The Court reiterated that such proceedings continue as if they result from an arbitration agreement under A&C Act, and Section 23(2A) A&C Act specifically allows for counter claims and set-offs. Furthermore, the Court noted that not allowing buyers to raise counter claims would result in parallel proceedings before various fora leading to conflicting decisions. The Court further substantiated its conclusion by stating that if counter claims were not allowed, then the seller would be deprived of all the beneficial provisions if the buyer raised even a spacious plea of counter claim.

The decision of the Kerala High Court was upheld on both counts.

Relationship between the MSMED Act and the A&C Act

The second SLP had raised the issue of the recourse to arbitration directly when the dispute resolution mechanism under the MSMED Act is available to a seller.

On a perusal of the MSMED Act, the Court found that there were several beneficial provisions for the Micro and Small Enterprise sellers. Further, these provisions were given an overriding effect over all other laws by Section 24 MSMED Act. The Court noted that the special statute being preferred over the general statute was a settled principle of law. Therefore, the Court held that the special beneficial legislation, which is the MSMED Act, would take preference over the general legislation, which is the A&C Act. As a result, a seller

covered under the MSMED Act can take recourse under the MSMED Act, notwithstanding any arbitration agreement between the parties. As counter claims will be allowed in these proceedings, there would also be no need to approach other forums.

However, in the present case, the Seller was not allowed the recourse to the dispute resolution mechanism under the MSMED Act since it was not registered as per Section 8 MSMED Act. Therefore, the decision of the Madras High Court was upheld.

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