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## VOLUME II | ISSUE I

NFRAL is a forum for cutting-edge writing and research on arbitration. Our Biweekly Highlights review the latest cases and key developments in arbitration. We draw the material from courts across the country and endeavour to provide you with an accurate gist. Each issue is categorised topic-wise and linked to our [Category Cloud](#).

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## EXTENT OF JUDICIAL INTERVENTION

### A High Court exercising powers under Article 227 of the Constitution cannot dictate the procedure of conducting arbitration: the Delhi High Court

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04 January 2022 | Future Retail Ltd. v. Amazon.Com NV Investment Holdings LLC and others | CM (M) 02 of 2022 | Amit Bansal J | Delhi High Court | *Order and arbitration proceedings stayed in appeal in LPAs 6/2022 & 7/2022*

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A single judge of the Delhi High Court ruled that the arbitral tribunal's procedural orders could not be challenged in a petition under [Article 227](#) of the Constitution of India.

The court was hearing a petition in the widely reported Amazon—Future—Reliance litigation that had challenged some orders of the tribunal. Future and Reliance wanted the tribunal to hear an application to terminate the arbitration proceedings. However, the tribunal was going to attend to others pre-scheduled items first (hearing expert testimony) before hearing the termination application. [The Article 227](#) petition was on the footing that the arbitration agreement did not survive any longer because the Indian competition regulator suspended an approval granted earlier to the Future-Amazon deal.

The court examined the arguments and noted the tribunal was going to hear the termination application following the timetable set by it. It ruled that in the exercise of jurisdiction under [Article 227](#), the court cannot dictate to a duly constituted arbitral tribunal the manner and the procedure of carrying out the arbitration proceedings.

The interested reader would note that on 28 November 2019, the Competition Commission of India (“CCI”) had approved the “Combination” under Section 31(1) of the Competition Act, 2002 after arriving at the opinion that the Combination is not likely to cause any appreciable adverse effect on competition in India. Later, on Future's complaint, CCI found that Amazon, in a deliberate design, had failed in its obligations to notify the transaction appropriately, and it suppressed the actual purpose and particulars of the combination. Therefore, by [order of 17 December 2021](#), the CCI directed Amazon to give fresh notice to examine the combination afresh. Till then, the approval granted earlier has been put in abeyance. The CCI also imposed on Amazon a penalty of INR 202 crores.

Read the decision [here](#).

**Categories:** [Section 5 ACA](#) | [Extent of Judicial Intervention](#) | [Article 226 Constitution of India](#) | [Article 227 Constitution of India](#) | [Power of High Courts to Issue Certain Writs](#) | [Power of Superintendence Over All Courts by the High Court](#) | [Writ Petition](#) | [Writ Petition in Arbitration Matters](#) | [Judicial Review](#) | [Patent Lack of Inherent Jurisdiction](#) | [Certiorari](#) | [Bhaven Construction](#) | [Deep Industries](#) | [Mirajkar](#) | [Emta Coal](#) | [Self Contained Code](#)

## APPOINTMENT, TERMINATION OF MANDATE AND SUBSTITUTION OF ARBITRATORS

### Ineligibility created by the 2015 Amendments apply to prior agreements as a matter of law: Supreme Court of India

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04 January 2022 | Ellora Paper Mills Limited v. State of Madhya Pradesh | Civil Appeal No. 7697 of 2022 | Supreme Court of India | MR Shah J | 2022 SCC OnLine SC 8

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Applying the principle of independence and impartiality, the Supreme Court has terminated the mandate of a five-member committee appointed in 2000 to arbitrate the dispute. All of them were respondents' employees. Back then, the tribunal had rejected Ellora's jurisdictional challenge (grounds of challenge not discussed), and Ellora filed a writ petition against the rejection. This petition was rejected in 2017 with liberty. By this time, the appointees had retired. Ellora applied to the High Court under [Section 14 ACA](#) read with [Sections 11](#) and [15 ACA](#) to substitute the (dysfunctional) tribunal with independent members. It argued that given the 2015 Amendments and the precedent, a tribunal of respondent's employees was ineligible.

The High Court did not accept Ellora's contentions. It said, among other things, that: (i) the 2015 Amendments were not retrospective; (ii) the tribunal was appointed and (the agreement) acted upon. Furthermore, because the agreement referred to the tribunal members by designation and not names, individuals' retirement would not matter. See the High Court's decision [here](#).

Reversing, the Supreme Court noted [Section 12 \(5\) ACA](#) under which the grounds of ineligibility are attracted, notwithstanding any prior agreement to the contrary. It ruled that the tribunal "comprising of officers of the respondent – State are all ineligible to become and/or to continue as arbitrators in view of the mandate of [sub – section \(5\) of Section 12](#) read with Seventh Schedule." It declared that the tribunal "has lost its mandate by the operation of law." It found the High Court's decision was contrary to *TRF* (2017) 8 SCC 377, *Bharat Broadband* (2019) 5 SCC 755 and '*Jaipur Dairy*' (*Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited*) 2021 SCC OnLine SC 730. It highlighted that in *Jaipur Dairy* also, the court had "negatived the submission" of waiver resulting from participation in arbitration proceedings.

The court said it was "not considering whether those persons could have been continued" post-retirement. In its discussion, the court also noted that after the tribunal's constitution, "no further steps whatsoever have been taken in the arbitration proceeding and therefore technically it cannot be said that the arbitration proceeding ... commenced."

Read the decision [here](#).

**Categories:** [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Section 12 ACA](#) | [Section 12 \(5\) ACA](#) | [Grounds for Challenge](#) | [2015 Amendments](#) | [Applicability of 2015 Amendments](#) | [Fifth Schedule](#) | [Seventh Schedule](#) | [Independence and Impartiality of Arbitrator](#) | [Express Agreement in Writing](#) | [Section 14 ACA](#) | [Failure or Impossibility to Act](#) | [Section 15 ACA](#) | [Termination of Mandate and Substitution of Arbitrator](#) | [De Jure Ineligibility](#) | [Unilateral Appointment of Arbitrator](#) | [Party Appointed Arbitrator](#) | [Perkins](#) | [TRF](#) | [Voestalpine](#) | [Bharat Broadband](#)

## SETTING ASIDE ARBITRAL AWARDS

**An award cannot be remitted to find on a contentious issue not dealt with earlier but only fill up the reasoning gaps. More so because in the guise of additional reasons, the tribunal cannot alter the award: Supreme Court of India**

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03 January 2022 | I-Pay Clearing Services Private Limited v. ICICI Bank Limited | Civil Appeal No. 07 of 2022 | Supreme Court of India | R Subhash Reddy & Hrishikesh Roy JJ | 2022 SCC OnLine SC 4

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A 2-judge bench of the Supreme Court has given an important ruling on the scope of [Section 34 \(4\) ACA](#), the provision that gives the set-aside court a discretion to remit the award to the tribunal while keeping the set-aside proceedings pending. See *Kinnari Mullick* (2018) 11 SCC 328.

A central question before the tribunal was whether termination of the contract by ICICI was illegal. So, the tribunal was required to consider ICICI's defence that the contract had been discharged by accord and satisfaction. The tribunal awarded damages on the footing that the termination was illegal but did not consider the issue of accord and satisfaction.

Could the tribunal remit the award under [Section 34 \(4\) ACA](#)? The High Court ruled no. Accepting ICICI's arguments led by senior counsel Mr KV Viswanathan, the Supreme Court upheld the ruling. It said:

- (a) [Section 34 \(4\) ACA](#) “can be resorted to record reasons on the finding already given in the award or to fill up the gaps in the reasoning of the award.”
- (b) Finding is a decision on an issue. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions [citing *Muralidhar Bhagwan Das* AIR 1965 SC 342]. In the absence of any finding on the issue of accord and satisfaction, the court must consider if it amounts to patent illegality.
- (c) The power under [Section 34 \(4\) ACA](#) is discretionary. “It is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award. Under guise of additional reasons and filling up the gaps in the reasoning no award can be remitted ...”
- (d) If it *prima facie* appears that there is patent illegality by not recording a finding on the contentious issue, the court may not accede to the request of a party to remit the matter.
- (e) Further, if the tribunal wants to consciously hold that there was accord and satisfaction between the parties, it cannot alter the word itself.

The court distinguished *Dyna* 2019 SCC OnLine SC 1656 and *Som Datt Builders* (2009) 10 SCC 259.

Read the decision [here](#).<sup>1</sup>

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<sup>1</sup> The issue whether an award can be set aside and then remanded has been discussed in *Kinnari*. The 3-judge bench Supreme Court ruled that remand and set-aside are alternatives. Once an award is set aside, there is nothing to remand. Then, in *Radha Chemicals*, the 2-judge bench Supreme Court of RF Nariman and Navin Sinha JJ held that the set-aside court has no jurisdiction to remand the matter to the arbitrator for a fresh decision. This was in a context where the set-aside court found that the point of limitation had not been decided correctly and, therefore, remanded the matter to the arbitrator for the point be decided afresh. Because the court in *I-Pay* does not refer to it, it is unclear if *Radha Chemicals* was cited.

**Categories:** [Section 34 ACA](#) | [Recourse Against Arbitral Award](#) | [Application for Setting Aside Arbitral Award](#) | [Grounds for Setting Aside Arbitral Award](#) | [Standard for Setting Aside Arbitral Award](#) | [Section 34 \(4\) ACA](#) | [Section 34 \(2A\)](#) | [Patent Illegality](#) | [Section 31 ACA](#) | [Section 31 \(3\) ACA](#) | [Form and Contents of Arbitral Award](#) | [Form and Contents of Award](#) | [Duty to Give Reasons](#) | [Perverse Award](#) | [Reasoned Award](#) | [Reasoned or Speaking Award](#) | [Kinnari Mullick](#) | [Remand of Award](#) | [Remission of Award](#) | [Dyna](#)

**Award restored by upholding the tribunal’s power to grant compound interest and interpret the contract terms: Supreme Court of India**

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07 January 2022 | UHL Power Company Ltd. v. State of HP | Civil Appeal No. 10341 of 2011 | State of HP v. UHL Power Company Ltd. | Civil Appeal No. 10342 of 2011 | Supreme Court of India | NV Ramana, AS Bopanna & Hima Kohli JJ | 2022 SCC OnLine SC 19

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The case involved an award favouring UHL set aside under [Section 34 ACA](#) but restored by the appellate court except for the compound interest component. In further appeal by both parties under [Article 136 of the Constitution of India](#), the matter was decided by a 3-judge bench of the Supreme Court:

- (a) The court restored the award on compound interest also following its earlier 3-judge bench ruling in *Hyder Consulting* (2015) 2 SCC 189. To recap, as per [Section 31 \(7\) \(a\) ACA](#), unless parties otherwise agree, the tribunal may grant interest on the “sum for which the award is made” (for any period between the date on which the cause of action arose and the date on which the award is made). *Hyder*—a case mainly on post-award interest—ruled, *per SA Bobde CJ*, that the “sum” awarded may be only principal or principal plus interest. Sapre J supplemented but reasoned a bit differently. He said that the amount awarded under [Section 31 \(7\) \(a\) ACA](#) constitutes the “sum” (whether with interest or not). He added what the provision authorises is interest in the sum. So, the issue should not be looked at in terms of the expression “grant of interest on interest.”
- (b) The court upheld the appellate court’s decision to restore the award on an interpretation issue. The dispute was if the determination by the State of the contract was premature. The tribunal interpreted the contract terms and concluded that it was premature. The set-aside court “re-appreciating the tribunal’s findings” on the issue and set it aside. The Supreme Court agreed with the appellate court’s ruling that even a different view was possible, it was not open to set aside court to take a different view [referring to *MTC* (2019) 4 SCC 163, *K Sugumar* (2020) 12 SCC 539, *SEAMAC* (2020) 5 SCC 164, *Dyna* (2019) 20 SCC 1.
- (c) The court upheld the appellate court’s restoration of the award on the arbitrator’s jurisdiction. The judgment is not particularly clear on this point. Still, the State seems to have run an argument that because there were two separate agreements-- a memorandum of understanding of 1992 followed by an implementation agreement of 1997—the disputes under the latter agreement could not include a dispute under the former. The court affirmed the appellate court’s ruling that the memorandum merged with the implementation agreement. The court noted that the definition of “agreement” in the latter document included the memorandum (an appendix), and “it is apparent that the MOU was made part and parcel of the Implementation Agreement.”

Read the decision [here](#).

**Categories:** [Section 34 ACA](#) | [Application to Set Aside Arbitral Awards](#) | [Setting Aside Arbitral Award](#) | [Grounds for Setting Aside Arbitral Award](#) | [Standard for Setting Aside Arbitral Award](#) | [Section 34 \(2A\)](#) | [Patent Illegality](#) | [Section 34 \(2\) \(b\) \(ii\) ACA](#) | [Public Policy](#) | [Public Policy of India](#) | [Fundamental Policy of Indian Law](#) | [Reappreciation of Evidence](#) | [Revaluation of Evidence](#) | [Arbitrators Interpretation of Contract](#) | [Merits Based Review](#) | [Review on the Merits of the Dispute](#) | [Plausible View](#) | [Section 31 ACA](#) | [Form and Contents of Arbitral Award](#) | [Section 31 \(7\) ACA](#) | [Award of Interest](#) | [Pre Award Interest](#) | [Pre Reference Interest](#) | [Pendente Lite Interest](#) | [Post Award Interest](#) | [Hyder Consulting](#) | [Section 31A ACA](#) | [Regime for Costs](#) | [Section 31A \(5\) ACA](#) | [Arbitral Fees](#) | [Costs](#) | [Fees](#) | [Fourth Schedule](#) | [Section 31 \(8\) ACA](#) | [Section 38 ACA](#) | [Section 38 \(1\) ACA](#) | [Deposits](#)



## RECOGNITION AND ENFORCEMENT OF FOREIGN AWARD

### A foreign award can be enforced domestically in various jurisdictions: Madras High Court

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11 January 2022 | NCC Infrastructure Holdings Limited v. TAQA India Power Ventures Private Limited | Arb OP (Comm Div.) No. 410 of 2021 | NCC Limited v. TAQA India Power Ventures Private Limited | Arb OP (Comm Div.) No. 412 of 2021 | Madras High Court | Senthilkumar Ramamoorthy J

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The Madras High Court has said that more than one proceeding for recognition and enforcement of a foreign award may be brought by and against parties if assets fall within the jurisdiction of different High Courts.

Another question considered was, which court has jurisdiction under Explanation to [Section 47 ACA](#) to consider an enforcement action?

The tribunal had partly allowed the claim and partly the counterclaim too. So, one set of parties filed a petition to enforce the foreign award in the Delhi High Court. Another set applied to the Madras High Court.

Following the Supreme Court's *Brace Transport* AIR 1994 SC 1715, the court also ruled that for a money award, the "subject-matter" is money. Hence, the relevant test for deciding jurisdiction is whether the relief granted by the tribunal may be enforced or executed by issuing process for the attachment or sale of the award debtor's assets.

Following the same case, it also noted the distinction between recognition and enforcement: there can be no enforcement without recognition. Also, a party may not enforce an award but can use its recognition as a shield from re-agitation by the other party of issues decided by the tribunal.

Read the decision [here](#).

Categories: [Section 47 ACA](#) | [Section 48 ACA](#) | [Conditions for Enforcement of Foreign Awards](#) | [Section 48 \(2\) \(b\) ACA](#) | [Recognition and Enforcement of Foreign Award](#) | [Enforcement](#) | [Part II](#) | [Enforcement of Arbitral Awards](#) | [Section 49 ACA](#) | [Enforcement of Foreign Awards](#) | [New York Convention Awards](#) | [Challenge to Foreign Award](#) | [Public Policy](#) | [Public Policy of India](#) | [Most Basic Notions of Morality or Justice](#) | [Merits Based Review](#) | [Review on the Merits of the Dispute](#) | [Revaluation of Evidence](#) | [Arbitrators Interpretation of Contract](#) | [When Foreign Award Binding](#) | [Vijay Karia](#)

## ARBITRATION APPEALS

### The appellate court cannot conduct a merits-based review under Section 37 ACA: Supreme Court of India

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11 January 2022 | Haryana Tourism Limited v. M/S Kandhari Beverages Limited | Civil Appeal No. 266 of 2022 | Supreme Court of India | MR Shah & BV Nagarathna

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A 2-judge bench of the Supreme Court has restored an arbitral award upheld by the set-aside court but overturned by the appellate court under [Section 37 ACA](#). Without entering into the controversy and deciding the rival arguments, the Supreme Court noted that the High Court conducted a merit-based review.

The court noted that an award could be set aside only if it is contrary to the fundamental policy of Indian law, the interest of India, most basic notions of morality justice, or patently illegal. Because the court's description of the set-aside grounds may confuse, a reader new to arbitration should note that "patent illegality" is now a separate ground [[Section 34 \(2A\) ACA](#)] than public policy [[Section 34 \(2\) \(b\) \(ii\) ACA](#)]. Earlier, the decisions had considered the former a part of the latter.

Read the decision [here](#).

**Categories:** [Section 34 ACA](#) | [Section 34 \(2A\)](#) | [Section 37 ACA](#) | [Setting Aside Arbitral Award | Standard for Setting Aside Arbitral Award](#) | [Appealable Orders](#) | [Application for Setting Aside Arbitral Award](#) | [Fundamental Policy of Indian Law](#) | [Patent Illegality](#) | [Public Policy of India](#)