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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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24 December 2021 | M/s Tarun Aggarwal Projects LLP and another v. M/s Emaar MGF Land Ltd. | Arb P. No. 637 of 2021 | Delhi High Court | Suresh Kumar Kait J

Considering an application under Section 11 ACA, the Delhi High Court has enforced a clause in a development agreement that gave the parties a dual remedy. It enabled the parties to seek specific performance through the "appropriate court of law" and provided that, save and except the specific enforcement clause, all or any dispute shall be settled under the ACA.

In the court's view, "a party does have a right to seek enforcement of agreement before the Court of law, but it does not bar settlement of disputes through [arbitration]."

Read the decision here.

Categories: Section 11 ACA | Appointment of Arbitrators | Enforcement of Arbitration Agreement | Jurisdiction | Specific Performance

ARBITRABILITY, VALIDITY AND EXISTENCE OF ARBITRATION AGREEMENTS

Section 11 application rejected because the arbitration agreement did not exist, the application time-barred, the claims frivolous, and condition precedent not met: Allahabad High Court

17 December 2021| Manish Engineering Enterprises v. Indian Farmers Fertilizer Coop. Ltd. | Appl. U/s 11 (4) No. 112 of 2004 | Suneet Kumar | Allahabad High Court

The Allahabad High Court has applied several grounds to reject an application for appointment.

The arbitration agreement did not exist because:

(a) The purported agreement (work order of March 1985) filed in the court was an *ex facie* forged and manufactured document with interpolations writ large to the naked eye.

(b) Per *Vidya Drolia*, standards applied to Section 8 ACA also apply to Section 11 ACA. So, like Section 8 ACA, the original arbitration agreement or duly certified copy, if available with the applicant, ought to have been filed. Here, the applicant admitted that the agreement was in its possession but never placed it on record.

The application for appointment was barred by limitation[1] because:

(a) Payments became due, and the right to apply accrued in May 1986, i.e., thirty days after submitting the final bill. Unlike in *Inder Singh Rekhi* (1988) 2 SCC 338, the dispute was not about the finalization of the bill but payment after the final bills were submitted.

(b) Once limitation began to run, Manish's alleged reminders to IFFCO did not stop it [citing *Nortel Network* 2021 SCC OnLine 207 & *Geo Miller* (2020) 14 SCC 643].

(c) Acknowledgement of debt renews the debt and extends the period of limitation, but, on facts, there is no acknowledgement, nor does the applicant lay a foundation in the pleadings.

The condition precedent for maintaining an application under Section 11 ACA was not met because:

(a) To maintain a petition under Section 11 ACA, there must be a request by the applying party and the failure by the opposite party (to appoint or act per stipulated procedure).

(b) There cannot be a 'failure' unless the request by the applicant-sender has been delivered to and received by the addressee. Delivery and receipt in the manner set out in Section 3 ACA are conditions to exercise jurisdiction under Section 11 ACA.

[1]**Editor's Note:** Article 137 Limitation Act governs the limitation period under Section 11 ACA. It is three years from the date the right to apply accrues under Section 11 ACA. For Section 11 (4) ACA and 11 (5) ACA, this date is fixed, i.e., broadly speaking, from the date the 30 days-notice period ends. For Section 11 (6) ACA, the right to apply accrues from the date the stipulated appointment procedure fails.

In para 56 (website version), the court states that the limitation period for substantive claims should not be confused with the limitation period to apply under Section 11 ACA. But this difference has not been considered with rigour in its discussion, and the court has conflated two scenarios.

(c) There is no pleading and proof that the applicant's notice of arbitration was sent or given and delivered or received by IFFCO under Section 3 ACA.

The claims are *ex facie* frivolous and vexatious because:

(a) [Noting IFFCO's submissions] The applicant has filed multiple cases against IFFCO, including several applications under Section 11 ACA.

(b) The same communications relied upon in this application were considered in another application under Section 11, and those details have not been disclosed here.

(c) It was incumbent on the applicant to file the bills submitted to IFFCO. In the absence of such basic ingredients establishing the "honesty" and "validity" of the claim, there can be no appointment of an arbitrator.

Read the decision here.

Categories: Section 3 ACA | Receipt of Written Communications | Section 8 ACA | Power to Refer Parties to Arbitration | Section 8 (2) ACA | Section 11 ACA | Appointment of Arbitrators | Section 11 (5) ACA| Section 11 (6) ACA | Section 11 (6A) ACA | Section 21 ACA | Commencement of Arbitral Proceedings | Notice of Arbitration | Existence of Arbitration Agreement | Section 16 ACA | Competence of Arbitral Tribunal to Rule on its Jurisdiction | Competence Competence | Jurisdiction of Arbitral Tribunal | Kompetenz Kompetenz | Who Decides Question | Limitation | Limitation Under Section 11 ACA | Cause of Action | Accrual of Right to Apply | Time Barred Claim | Deadwood | Vexatious Claim | Pleading Requirement Under Section 11 ACA | Condition Precedent for Section 11 ACA | Vidya Drolia | Nortel Networks

INTERIM RELIEF BY COURTS AND TRIBUNALS

Section 9 does not lie to challenge a procedural order of the tribunal fixing fees: Delhi High Court

20 December 2021| Cement Corporation of India v. Promac Engineering Industries Limited | OMP (I) (Comm.) 410 of 2021 | Vibhu Bakhru J | Delhi High Court

The Delhi High Court has reiterated its view that a procedural order by the tribunal concerning arbitral fees cannot be challenged in a petition under Section 9 ACA. The arbitrator had fixed separate fees for counter-claims, which according to the petitioner, was not permissible as the total fee payable would exceed the maximum fees under the Fourth Schedule.

The court referred to its prior decision among the same parties concerning another arbitration. An identical petition was dismissed [OMP (I) Comm) 362 of 2020] by another single judge, and the appellate court upheld that dismissal [FAO (OS) (Comm) No. 92 of 2021].

See also highlight here of Madras High Court's similar decision (against the imposition of costs) in *Bharat Heavy Electricals Ltd.* 2021 SCC OnLine Mad 4906.

See also highlight here of Delhi High Court's decision in *Afcons* [OMP (T) Comm. 37 of 2021] that says tribunal can fix fees separately for the counter-claim.

Read the decision here.

Categories: Section 9 ACA | Interim Measures by Court | Section 9 (1) (ii) (e) ACA | Appealable Orders | Arbitral Fees | Costs | Deposits | Fees | Fourth Schedule | Section 31 (8) ACA | Section 31A ACA | Section 38 (1) ACA | Section 38 ACA | Counterclaim

Section 9 by a corporate debtor seeking stay on the termination of a contract dismissed: Delhi High Court

22 December 2021| Meenakshi Energy Limited v. PTC India Ltd. | OMP (I) (Comm.) 408 of 2021 | Sanjeev Narula J | Delhi High Court

The Delhi High Court has dismissed an application under Section 9 ACA that sought the stay of a termination notice and an order directing the respondent not to contract with another party. In the view of the court, "such reliefs are ex-facie misconceived and contrary to settled legal position."

The Bangladesh Power Development Board had issued a bid for power procurement. The respondent PTC applied, was successful and executed a power purchase agreement. It contracted with the petitioner MEL on a back-to-back basis to purchase power for onward supply to the Bangladesh Board. Subsequently, MEL was admitted to the insolvency resolution process. The power supply continued for some time but stopped later. The Bangladesh Board issued a notice of default based on which PTC sent notice to MEL, and because the supply did not resume, terminated its arrangement with MEL.

The court found that all three "important elements" for grant of injunction were not in favour of MEL but rather PTC: the contract was determinable (no reasoning is given for this conclusion); since the supply stopped totally, there was a material breach; merely because some parties had shown interest in the insolvency process to take over the MEL did not mean that PTC was obligated to continue with the contract; "the effort to resolve the corporate debtor cannot be at the cost of PTC suffering damages at the hands of Bangladesh party for contractual breaches"; the two contracts were back-to-back and co-terminus, but PTC's obligation under the Bangladesh agreement were independent.

Read the decision here.

Categories: Section 9 ACA | Interim Measures by Court | Determinable Contract | Conditions for Grant of Interim Measure | Scope of Section 9 ACA | Prima Facie Case | Irreparable Loss | Balance of Convenience | Specific Performance | Termination | Termination of Contract | Injunction Against Termination

Minority members of co-operative must bend to the majority's decision and allow redevelopment. Prayer to evict granted in Section 9: Bombay High Court

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23 December 2021| MP Space Dynamics Pvt. Ltd. v. Janardan Chavan & others | Arbitration Petition (L) No. 17007 of 2021 | BP Colabawalla J | Bombay High Court

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The Bombay High Court has reiterated that minority members of a co-operative society are bound by the decisions of the majority members and cannot hold up the re-development of the society. In this case, supported by 28 members of a society, the developer had applied for an order under Section 9 ACA to take forceful possession of the flats occupied by four dissenting members.

After considering the facts in detail, Colabawalla J granted the reliefs. On law, he relied on several precedents, including *Girish Mulchand Mehta* 2009 SCC OnLine Bom 1986. On facts, he also examined the argument that several resolutions passed by the general body of the society, including the ones that authorised the society to enter into a development agreement with the petitioner, were under challenge before a co-operative court, and the implementation of some stayed.

Read the decision here.

Categories: Section 9 ACA | Interim Measures by Court | Prima Facie Case | Balance of Convenience | Irreparable Harm | Order XXXVIII CPC | Order XXXIX CPC | Interim Mandatory Injunction | Mandatory Orders | Mandatory Injunction | Co-operative Societies

Tribunal's order securing the amount in dispute in arbitration is not patently illegal. But the deposit should be made to the tribunal rather than to the party: Delhi High Court

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24 December 2021| Dinesh Gupta and others v. Rajesh Gupta and others | Arb. A. 06 of 2020 | Dinesh Gupta and others v. Bechu Singh and others | Arb. A. 05 of 2020 | C Hari Shankar J | Delhi High Court

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While considering orders of an arbitral tribunal directing a party to deposit sums of money, the Delhi High Court has reiterated the scope of its appellate jurisdiction under Section 37 (2) (b) ACA. The court noted that "the restraints which operate on the Court, while exercising jurisdiction under Section 34 of the 1996 Act, would apply with equal, if not greater force while exercising" the appellate jurisdiction.

It also added that because it is "essentially a matter to be assessed by the arbitral tribunal" when considering an order of deposit, the appellate court should be additionally circumspect. Unless the tribunal's "assessment is perverse or suffers from manifest illegality, the approach of the court, ordinarily, should be one of restraint."

The court found that the tribunal's direction to pay sums of INR 6.6 crores, 11.28 cores, and 12 crores respectively were all found based on admissions or were justified conditions imposed on the paying party for granting reliefs he had sought.

The court reminds in the order that the directions were *pro tem* measures subject to the outcome of the arbitral proceedings and not an interim award.

However, considering that unlike in the set-aside jurisdiction, the court could "modify the impugned order *ex debito justitiae*", it directed the petitioner to deposit with the tribunal rather than the party [citing *Augmont Gold* 2021 SCC OnLine Del 4484 and *Edelweiss* MANU/DE/2017/2020].

In the other appeal before it [prior numbered Arb. A. 05/ of 2020], the court reversed the deposit of INR 2 crores. Though, citing his earlier decision, Hari Shankar J noted that "the absence of such a prayer may not necessarily be fatal … there must be due justification …". There was no justification because the interest of the party (in certain shareholding) was already secured by a status quo order [citing *Dinesh Gupta* 273 (2020) DLT 381].[2]

Read the decision here.

Categories: Section 9 ACA | Interim Measures by Court | Section 17 ACA | Interim Measures Ordered by Arbitral Tribunal | Section 9 (1) (ii) (b) ACA | Section 17 (1) (ii) (b) ACA | Conditions for Grant of Interim Measure | Just and Convenient | Prima Facie Case | Balance of Convenience | Irreparable Harm | Section 37 ACA | Appealable Orders | Section 37 (2) (b) ACA | Scope of Appeal Under Section 37 ACA | Scope of Appeal Under Section 37 (2) (b) ACA | Patent Illegality | Securing the Amount in Dispute in Arbitration | Admitted Liability | Order XXXVIII CPC | Order XXXIX CPC | Interim Mandatory Injunction | Mandatory Orders | Attachment Before Award | Applicability of Code of Civil Procedure | Jetpur Somnath | NHAI v. PNB | Valentine Maritime | Adhunik Steels

[2] **Editor's Note:** In *Soma Enterprises* v. *Rotec*, Arb. Appeal 70 of 2021 (16.12.21), another bench of the Delhi High Court of Sanjeev Narula J also modified a tribunal's deposit order by directing the party to deposit to the court.

SETTING ASIDE ARBITRAL AWARDS AND AWARD OF INTEREST

Power to grant pre-reference and pendente lite interest is subject to agreement, hence award for pendente lite interest set aside. But court's or tribunal's discretion to award costs under ACA overrides CPC and parties agreement (unless agreement is post-disputes): Delhi High Court

20 December 2021 | Union of India v. Om Vajrakaya Construction Company | OMP 299 of 2021 | Vibhu Bakhru J | Delhi High Court

Considering a challenge to an arbitral award, the Delhi High Court set aside the grant of interest pendente lite because it was contrary to a term of the GCC that stated, "where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made." The court noted:

(a) The Supreme Court's *Bright Power* (2015) 9 SCC 695 (3-judge) has held that where the parties' agreement "proscribes award of interest, award of pre-reference would be impermissible."

(b) The view was reiterated in *Jaiprakash Associates* (2019) 17 SCC 786 (3-judge), and the "question is no longer *res integra*." Thus, "the impugned award to the extent it awards pendente lite interest, is liable to be set aside."[3]

However, the court rejected the other ground of challenge that the tribunal granted costs contrary to the contract terms. The court ruled that because the argument was raised for the first time in the set-aside proceedings, the argument "is liable to be rejected on this ground alone." Nonetheless, the argument was without merit because:

(a) Unlike the power of the tribunal to award *interest* under Section 31 (7) (a) ACA (that starts with "unless otherwise agreed by the parties"), the courts or the tribunal's discretion to grant *costs* under Section 31A ACA is not fettered by parties' agreement.

(b) Also, because of the opening non-obstante wording of Section 31 A ACA, the discretion remains despite any repugnancy with the CPC ("notwithstanding anything contained in the Code of Civil Procedure").

(c) Section 31A (5) ACA "makes it amply clear that an agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration" is valid only if made after the disputes arise. In this case, the term of the contract --parties to bear their own costs—is an agreement for a party to pay the part of the costs and is invalid.

The court also examined a contention that the tribunal erred in holding the Railways responsible for the delay and rejected it after a "plain reading" of the award that indicated the tribunal's view was well considered.

Read the decision here.

[3]Subject to the parties' agreement, Section 31 (7) (a) ACA provides for the grant of interest between the date on which the cause of action arises, and the date of the award is made. Broken further, this involves two components: interest pre-reference (i.e., from the date of cause of action till the date of reference to the arbitrator) and pendente lite (from reference till the award). For convenience, the period covered by Section 31 (7) (a) ACA may also be termed pre-award interest. *Bright* concerned pendente lite interest and *Jaiprakash* both pre-reference and pendente lite.
For a discussion and survey of case laws under the 1940 Act and the changes brough in the 1996 ACA, also see *Reliance Cellulose* (2018) 9 SCC 266.
For post-award interest, see *Hyder Consulting* (2015) 2 SCC 189 and also our Biweekly Highlight here.

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | 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 | Interest | Award of Interest | Grant of Interest | 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

Set aside petition assailing grant of claims on additional work, overheads for variation, idling charges, award of interest dismissed: Delhi High Court

23 December 2021 | National Highways Authority of India v. KMC Construction Ltd. | OMP (Comm.) No. 461 of 2020 | Vibhu Bakhru J | Delhi High Court

The Delhi High Court has rejected a set-aside application reiterating the applicable standards. The contract was for widening and strengthening a few lanes in a section of NH-8 at Rajasthan. The tribunal partially allowed the claims and rejected NHAI's counterclaim. NHAI applied to set aside the award as regards four claims.

Variation ordered by NHAI: KMC had been asked to do additional work. For this variation, NHAI had to pay market rates. KMC submitted the rates for the new items and proceeded to execute the work. Later, NHAI fixed lesser rates, and KMC signed variation orders based on the lesser rate though treating it as provisional. The question was: was KMC bound by the variation orders? The arbitrator said no and awarded the claimed amount. It "evaluated and considered" all material and accepted KMC's argument that the rate was accepted without objection, and NHAI permitted the work to continue. The arbitrator also found that KMC had signed the variation orders because payments had already been unreasonably delayed.

The court said the tribunal's view was plausible and had no patent illegality (citing *PCL-Suncon* 2015 SCC OnLine Del 13192).

Overheads for variation exceeding contract price: KMC had also claimed additional overheads it had incurred in executing additional work (which exceeded the stipulated threshold limit of 15% of the original contract price). The tribunal interpreted a clause of the agreement [Clause 52 GCC] to find that KMC was entitled to overheads for the variation. It relied on *PCL-Suncon.*

The court said it was not for it to re-adjudicate the dispute, and the arbitrator's interpretation was final [citing *McDermott* (2006) 11 SCC 181].

Idling men and machinery: In addition, KMC had claimed compensation for idling men and machinery due to the transporter's strike and the Mining Department's instructions to stop work. These events were covered, the tribunal ruled, under the employer's risk set out in the contract [Clause 20.4 COPA].

The court said the view is plausible, and the construction of the contract is the tribunal's jurisdiction.

The court also rejected this challenge based on another ground, i.e., it was limitation barred, which the tribunal did not consider. The court said the tribunal did not deal explicitly with it, but it was apparent that it rejected the argument. The contract, it noted, was running, and all claims were within limitation.

In addition, the court also refused to entertain another argument, i.e., the tribunal simply accepted the

claim without KMC having substantiated it. The tribunal had relied on a data book of the government, which indicated usage charges in respect of machinery. NHAI argued that usage charges included the cost of operating the machinery and was not an appropriate measure of idling costs. The court ruled that estimating costs are involved, but the award cannot be questioned if the measure is based on some relevant material. It cited *Delhi Airport Metro* 2021 SCC OnLine SC 695 to reiterate that an award can only be impeached on the ground of patent illegality if the illegality goes to the root of the matter.

Award of interest: The court upheld an award of interest of 16% per annum. It reiterated that the tribunal has wide discretion.

Read the decision here.

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | 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 | Interest | Award of Interest | Grant of Interest | Section 31 (7) ACA | Award of Interest | Pre Award Interest | Pre Reference Interest | Pendente Lite Interest

Merely because the interest component is large is not a ground to deny it. The legal position on grant of interest summarised: Delhi High Court

23 December 2021 | KMC Construction Ltd. v. National Highways Authority of India v. | OMP (Comm.) No. 458 of 2020 | Vibhu Bakhru J | Delhi High Court

Did you read the Highlight just above or miss it? KMC had also mounted a separate challenge against partial or total rejection of some claims. Its petition was also dismissed except for the interest claim.

The contract provided an interest rate of 1% per month (12% per annum) compounded monthly. However, the tribunal awarded simple interest at the rate of 16% per annum (that is, 2% above the then prevailing prime lending rate of SBI). Thus, the tribunal increased the interest rate but deleted the provision for compounding interest. In the tribunal's view, the award of interest at the contracted rate would become exorbitant because it was compounded monthly.

KMC's contention that the award of interest ran contrary to the terms of the agreement was readily accepted by the court. It said, among others, that merely because the interest burden becomes large is not a ground to deny it. It also noted that the parties' commercial arrangement bound them as also the arbitrator –a "creature of the contract. In addition, it also acknowledged that finance obtained from banks is on interest compounded monthly or quarterly. Even SBI provides finance on compound interest and not simple interest.

It also noted that the increase in the quantum of interest was mainly due to the period spent by KMC in securing the award (including settlement talks amidst without prejudice). The court said that this could not be advantageous to NHAI and of disadvantage to KMC.

After noting the precedent, the court summarized the legal position. If the agreement expressly provides for payment of interest, the tribunal must conform to the terms of the agreement unless they are found invalid or inapplicable. Where the agreement prohibits it, the tribunal cannot grant interest. However, the tribunal has discretion under Section 31 (7) ACA, where the contract is silent on interest.

Read the decision here.

Categories: Section 34 ACA | Application for Setting 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 | Interest | Award of Interest | Grant of Interest | Section 31 (7) ACA | Award of Interest | Pre Award Interest | Pre Reference Interest | Pendente Lite Interest

ARBITRATION APPEALS

Group of companies doctrine applied to bind non-signatory, the preclusive effect of Section 16 and effect of pleadings in Section 11 considered: Kerala High Court

17 December 2021 | PK Kamala v. PK Manoharan and others & connected cases | Arb. A. No. 11/2016 | PB Suresh Kumar & CS Sudha JJ | Kerala High Court

Authoring for a 2-judge bench, CS Sudha J has made several important observations in the context of binding non-signatory to arbitration and the arbitral award.

A sole arbitrator appointed by the court passed an award for dissolution and rendition of account of three partnership firms: for convenience, Raja Mills, Kamala International (or Kamala Hotel), and Raja City. One Mr Nair had organized these firms. However, after his demise, the remaining partners, his wife Mrs Kamala and their daughters on the one side and the son Manoharan on the other, had several disputes. The arbitral tribunal made an award.

The set-aside court partially set aside the award in re Kamala International on the ground that the arbitrator exceeded the scope of reference. It reasoned that the claimant Mrs Kamala's application for the appointment under Section 11 ACA made no mention of Kamala International. Thus, it was never the subject matter of the reference.

The court restored the award and ruled as follows.

On the effect of the pleadings in the prior Section 11 ACA application:

(a) Exhaustive pleadings are not required in an application under Section 11 ACA [citing Supreme Court's *IOC* v. *SPS Engineering* (2011) 3 SCC 507. Moreover, there were clear pleadings relating to Kamala International.

(b) The statement of claim referred to it and prayed for its dissolution.

On the preclusive effect of Section 16 ACA, i.e., whether the respondent Manoharan, who did not raise the argument before the tribunal under Section 16 ACA, could raise it in the set-aside stage:

(a) The Supreme Court's *Lion Engineering* (2018) 16 SCC 758 holds that there is no bar to raising the plea of jurisdiction for the first time in the set-aside proceedings.

(b) But here, the question is "slightly different" because the respondent did not object to adjudication on Kamala International at any point in time.

On whether Kamala International---a partnership firm--could be "brought within the scope of the arbitration proceedings" by applying the group of companies' doctrine: -

(a) The Supreme Court's *MTNL* has said that the group of companies' doctrine can be invoked if the case demonstrates that it was the mutual intention of all the parties to bind the non-signatory affiliate, or sister, or parent concern. It could also be applied in a tight group structure with strong organizational and financial links to constitute a single economic unit or a single economic reality.

(b) If the doctrine can be applied to companies, "we do not see why it cannot be applied to partnerships, provided the … conditions (set out in MTNL) are satisfied.

(c) Here, Kamala International is the sister concern of the (main) firm Raja Mills. The partners are the same. Profits from one were being used for the other. It was a family business with a tight group structure with strong organizational and financial links.

Could the tribunal make another non-signatory individual (the respondent Manoharan's son, Amarjith) a party to the arbitration? He was impleaded in the Raja City arbitration, his preliminary challenges had failed, and the courts had reserved his rights for the set-aside stage. Concluding, yes, the court said:

(a) The arbitrator found that a decision could not be arrived at without Amarjith. He had obtained a substantial interest in the assets of Raja city, which was constituted to construct a shopping complex. The complex was built and leased out to Amarjith. Therefore, the lion's share of the firm's assets was in possession and control of Amarjith. He meddled in the assets and finances of Raj city, knowing fully well about the partnership deed. His business was intermingled and inseparable from the business of the other three firms, and it was practically impossible to adjudicate on the dispute and pass an award effectively.

(b) The set aside "cannot sit in appeal" and go behind the merits of the award or appreciate the evidence or substitute its findings with those of the arbitrator.

(c) Further, Amarjith can claim rights only through the lessor--his father--who is the partner in Raj city. Therefore, even if Amarjith had not been a party, the award would bind him considering Section 35 ACA, which says that an award shall be final and binding on the parties as well as on the persons claiming under them.

Lastly, the court said that the set-aside court erred in interfering with the tribunal's finding of Manoharan's malfeasance concerning the third firm.

Read the decision here.

Categories: Section 37 ACA | Appealable Orders | Application for Setting Aside Arbitral Award | Setting Aside Arbitral Award | Standard for Setting Aside Arbitral Award | Section 34 (2A) | Patent Illegality | Reappreciation of Evidence | Revaluation of Evidence | Arbitrators Interpretation of Contract | Merits Based Review | Review on the Merits of the Dispute | Plausible View | Section 7 ACA | Section 7 (5) ACA | Arbitration Agreement | Section 11 ACA | Pleading Requirement Under Section 11 ACA | Section 16 ACA | Jurisdiction of Arbitral Tribunal | Competence Competence | Kompetenz Kompetenz | Preclusive Effect of Section 16 ACA | Preclusive Effect of Kompetenz Kompetenz | Binding Non Signatory to Arbitration | Construction of Arbitration Agreement | Doctrine of Group of Companies | Composite Transaction | Interpretation of Arbitration Agreement | Joinder of Non Signatories | Necessary Party | Proper Party | Chloro Controls | MTNL | Section 35 ACA | Finality of Arbitral Awards

TIME LIMITATION

Supplying a copy of the award to the lawyer does not start the limitation Section 34 (3) ACA for filing setting aside application: Jharkhand High Court

16 December 2021| State of Jharkhand and others v. Maya Devi and others | Arbitration Appeal No. 13 of 2007 | Anil Kumar Choudhary J | Jharkhand High Court

Section 34 (3) ACA sets out the limitation for applying to set aside an award. The limitation period begins to run from the "date on which the party making that application had received the arbitral award". In an arbitration, a copy of the award was served on the lawyer representing the State. Did the limitation period begin to run? The set-aside court thought so and dismissed the State's application as time-barred.

But following *Tecco Trichy* (2005) 4 SCC 239, the Jharkhand High Court restored the set-aside application.

In *Tecco*, the Supreme Court ruled that the "party" in cases involving large organizations like the Railways would be "person directly connected with and involved in the proceedings and who is in control of the proceedings before the arbitrator."

Read the decision here.

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | Section 34 (3) ACA | Limitation | Limitation for Setting Aside | Limitation Under Section 34 Section | Section 33 ACA | Prescribed Period | Condonation of Delay | Correction and Interpretation of Award | Section 31 ACA | Form and Contents of Arbitral Award | Receipt of Award | Tecco Trichy

STATUTORY ARBITRATIONS

Award set aside because solatium and interest under the Land Acquisition Act not granted for lands acquired under the National Highways Act: Kerala High Court

20 December 2021 | PC Jose v. The Spl. Deputy Collector and others & batch matters | Arbitration Appeal 07 of 2013 & batch | PB Suresh Kumar & CS Sudha JJ | Kerala Court of India

The Kerala High Court has set aside arbitral awards in a batch appeal involving acquisitions under the National Highways Act, 1956 ("NH Act") because solatium and interest were not awarded. The court ruled that a judgment of the Punjab and Haryana High Court in *Golden Iron and Steel Forging* 2008 SCC OnLine P&H 498 had decided the issue. It was binding on everyone throughout India subject to the application of the NH Act [citing Supreme Court's *Kusum Ingots* (2004) 6 SCC 254]. Ignoring it, the court said, contravened the fundamental policy of Indian law.

The court also rejected an argument that the objection should not be considered because it was not taken in the set-aside petition. It said that the ground was available to the court on its own [*see* Section 34 (2) (b) ACA "(A)n arbitral award may be set aside by the Court only if ... the Court finds that …"]. On this point, see also our Biweekly Highlight on Supreme Court' *Sal Udyog* here.

The High Court noted the request for modification of the award but did not grant it in view of the law laid down in *M Hakeem* 2021 SCC OnLine SC 473. Read our Update on the Supreme Court's *M Hakeem* here. It also has a snapshot of the mechanism under the NH Act.

Read the decision here.

Some background information for the interested reader

The Land Acquisition Act, 1894—a pre-independence statute—dealt with compulsory land acquisitions for a public purpose. The NH Act, as originally enacted, did not provide for the acquisition of land. All acquisitions for National Highways were made under the Land Acquisition Act, and the owners were given, in addition to market value, solatium, as well as interest under the Land Acquisition Act. The National Highways Laws (Amendment) Act, 1997, brought several changes. Section 3(J) postulated that nothing in the Land Acquisition Act, 1894 shall apply to an acquisition under this Act, thus ousting the possibility of payment of solatium and interest. Section 3 (G) provided a mechanism to determine compensation (minus interest and solatium).

In *Golden*, a 2-judge bench of the Punjab and Haryana High Court, insofar as they affected solatium and interest, declared Sections 3 (J) and 3 (G) unconstitutional and struck them down. That High Court followed *Golden* in other judgments, some of which, in turn, went to the Supreme Court and were decided in *Tarsem Singh* (2019) 9 SCC 304. A 2-judge bench of RF Nariman and Surya Kant JJ approved *Golden* and other decisions in an elaborate judgment.

The LA Act was repealed by this time, and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, came into force. In 2015, a notification provided that the 2013 Act compensation provisions will apply to acquisitions under the NH Act. "The result is that both before the 1997 Amendment Act and after the coming into force of the 2013 Act, solatium and interest is payable to landowners whose property is compulsorily acquired for purposes of National Highways." [para 13, *Tarsem*]. Justice Nariman noted this as an "important" circumstance to

be borne in mind when judging the constitutional validity of the 1997 Amendment Act for the interregnum period from 1997 to 2015.

Categories: Section 34 ACA | Recourse Against Arbitral Award | Application for Setting Aside Arbitral Award | Setting Aside Arbitral Award | Grounds for Setting Aside Arbitral Award | Standard for Setting Aside Arbitral Award | Section 34 (2) (b) (ii) ACA | Public Policy | Public Policy of India | Fundamental Policy of Indian Law | Finality of Arbitral Awards | Modification of Arbitral Award | Award of Interest | M Hakeem

Substantive liability under the MSMED Act remains even if the arbitrator had been appointed under Section 11 ACA: Delhi High Court

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21 December 2021| Indian Highways Management Company Limited v. SOWil Limited | OMP (Comm.) 376 of 2021 | Vibhu Bakhru J | Delhi High Court

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SOWil, a supplier and small enterprise under the MSMED Act, had applied to the court for the appointment of an arbitrator and, thus, invoked arbitration under the ACA directly rather than via the procedure under the MSMED Act. The procedure under the MSMED Act is, broadly: the reference of the dispute under Section 18 to a Facilitation Council, followed by an attempt of conciliation, and then, if required, arbitration under the ACA.

The tribunal granted SOWil interest under Section 16 MSMED Act (20.25% per annum compounded annually).

Was SOWil disentitled to interest under the MSMED Act, and the tribunal commit patent illegality or contravened public policy of India? Answering, no, and dismissing the set-aside application, the court ruled that:

(a) Section 15 (buyer's liability to pay) and Section 16 of the MSMED Act create substantive obligations not contingent on the recourse to the (type of) dispute resolution mechanism. There is nothing in either of those provisions making them contingent on a reference under MSMED Act (Section 18).

(b) The ACA applies anyway, even to a tribunal appointed under the MSMED Act.

(c) The MSMED Act overrides any other law (Section 24). So, if repugnant, the MSMED Act (special legislation) would prevail over the ACA.

(d) The set-aside grounds are not attracted. Even if a tribunal errs in law, the court cannot interfere unless the illegality goes to the root of the matter and vitiates the award.

Read the decision here.

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | MSMED Act | Arbitration Under MSMED Act | Section 34 ACA | Setting Aside Arbitral Award | Grounds for Setting Aside Arbitral Award | Standard for Setting Aside Arbitral Award | Section 34 (2A) | Patent Illegality | Award of Interest | Special Act v General Act