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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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The benefit of Section 14 Limitation Act applies where a set-aside petition is withdrawn even without leave of the court and refiled later: Patna High Court

22 January 2022 | Dwivedi and Sons v. Bharat Petroleum Corporation Limited | Civil Writ Jurisdiction No 11279 of 2019 | Anil Kumar Sinha J | Patna High Court | 2022 SCC OnLine Pat 124

The Patna High Court has interpreted Section 14 Limitation Act ("LA") – the expression "defect of jurisdiction or other cause of like nature" -- to include a scenario where a set-aside application was withdrawn because it was filed without giving prior notice Section 34 (5) ACA to the opposite party, and refiled. The withdrawal was without leave of the court to institute a fresh petition.

The earlier filing was made on the 66th day from the award: hence, it was within limitation under Section 34 (3) ACA (three months, plus 30 days on court's discretion). However, by the time it was withdrawn, the limitation period had expired. A fresh petition was filed 14 days after the withdrawal, and in total, it was 239 days from the award. When the set-aside court admitted the new petition for hearing, the petitioner challenged the admission in a petition under Article 227 Constitution of India.

Apart from applying the benefit under Section 14 LA, the court also rejected the argument that the fresh petition was not maintainable without the court's leave because of Order XXII Rule 1 (4) Code of Civil Procedure. It said that a set-aside petition was not a suit and Order XXIII CPC would not apply.

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 | Judicial Review | Section 34 ACA | Application for Setting Aside Arbitral Award | Limitation | Limitation for Setting Aside | Limitation Under Section 34 ACA | Non Est Filing | Condonation of Delay | Section 14 Limitation Act

APPOINTMENT, SUBSTITUTION AND TERMINATION OF MANDATE OF ARBITRATORS

Appointment by a party of the same arbitrator in multiple arbitrations not absolutely barred by Entry 22 Fifth Schedule provided the arbitrator was independent and impartial in prior arbitrations: Delhi High Court

17 January 2022 | Panipat Jalandhar NH 1 Tollway (P) Ltd. v. National Highways Authority of India | Arb P No 820 of 2021 | Delhi High Court | Suresh Kumar Kait J | 2022 SCC OnLine Del 108

Could disputes be referred to a tribunal already in existence to decide questions relating to the same agreement? Was Justice (Retd.) GP Mathur's ("GPM") appointment by NHAI hit by Entry 22 Fifth Schedule because NHAI had nominated him as an arbitrator in three cases within the past three years?

A tribunal, of which GPM was a part, was constituted to decide questions relating to suspension and termination of the parties' agreement. Just a month later, the petitioner raised more disputes. NHAI nominated GPM again and wanted to constitute the same tribunal. Objecting to the respondent's nomination, the petitioner applied for the appointment of NHAI's arbitrator. If accepted, it would be GPM's fifth appointment for NHAI (including one made by the court on NHAI's behalf).

Answering yes to the first question of consolidation, citing *Gammon India* 2020 SCC OnLine Del 659, the court found and ruled:

(a) There could be multiple arbitrations if the cause of action continues or arises after the constitution of a tribunal. The petitioner could not establish that cause of action arose before the suspension/termination of the agreement. constituting another tribunal "would lead to multiple observations and findings."

(b) Proceedings in the prior arbitration might be delayed with the new reference. Still, the tribunal members are well conversant with the facts, and it would enable expedition of the (overall) dispute. Also, there would be no confusion or complexity in the outcome.

On the related argument based on Entry 22 Fifth Schedule, relying on Supreme Court's *HRD* 2018 SCC OnLine, the court ruled that the entry does not create an absolute bar on the appointment of the same person in multiple cases provided that the person was independent and impartial on earlier occasions. The petitioner did not suggest that GPM was earlier not independent or impartial. Its argument was based only on the number of appointments.

An additional argument that GPM's disclosures were not complete was also rejected.

Read the decision **here.**

Categories: Section 11 ACA | Appointment of Arbitrators | Fifth Schedule | Entry 22 Fifth Schedule | Seventh Schedule | Bias | Independence and Impartiality of Arbitrator | HRD Corporation | Disclosure by Arbitrator | Composite Adjudication | Composite Reference | Consolidation of Claims | IFFCO | Joinder of Claims | Multi-Contract Dispute | Parallel Arbitral Hearings | Parallel Arbitral Proceedings | Parallel Arbitrations

Construction of a power transmission station and supply of equipment is a commercial dispute for arbitration under the ACA: Allahabad High Court

17 January 2022 | CG Power and Industrial Solutions Ltd. v. UP Power Transmission Corporation Ltd. | High Court of Allahabad | 2022 SCC OnLine All 19

Under Section 86(1)(f) Electricity Act 2003, any dispute between the licensee and the generating company can be adjudicated by the State Commission or can be referred by the State Commission to arbitration? [per *Gujarat Urja* (2008) 4 SCC 755]

Is the construction of a power transmission station and supply of equipment for that construction a dispute under the provision above? The respondent argued yes while resisting the petitioner's application for the appointment of an arbitrator. It suggested that the electricity supply system is an integrated whole, and the construction of a transmission station is as much a part of a distribution licensee work as any other. It wanted the court to examine whether "generation' includes "transmission' as all are interrelated and "power system" includes generation, transmission and distribution.

Rejecting the arguments, the court ruled that the matter was a commercial dispute and the applicant was neither a licensee nor a generating company. Therefore, it neither generated electricity nor supplied it. The court also rejected the argument that while Section 86(1)(f) does not mention the word "transmission", *casus omisuss* must be supplied by the court.

Without going into the issue of discharge of contract by accord and satisfaction, the court appointed an arbitrator.

Read the decision **here**.

Categories: Section 11 ACA | Appointment of Arbitrators | Section 11 (6A) ACA | Existence of Arbitration Agreement | Electricity Act | Functions of State Commission | Section 86 (1) (f) Electricity Act | Section 86 Electricity Act | Statutory Arbitrations | Independence and Impartiality of Arbitrator | Perkins | TRF | Vidya Drolia

Intention and conduct of parties relevant for incorporation of an arbitration agreement by reference. Group of companies doctrine applies even in a case involving unincorporated entities (trust), and notice of arbitration need not set all claims: Delhi High Court

31 January 2022 | Ashav Advisory LLP v. Patanjali Ayurveda Limited & others | Arb P No 905 of 2021 | Delhi High Court | Vibhu Bakhru J | 2022 SCC OnLine Del 328

The Delhi High Court has appointed a sole arbitrator in a case that involved arguments on the incorporation of the arbitration agreement by reference and joinder of non-signatories.

The dispute revolved around two memoranda of understanding—MOU I and MOU II— executed among the parties. MOU I was executed on 25 November 2019 and had an arbitration clause. Several other agreements were executed on this date. MOU II was executed a few days later on 09 December 2019, and had a clause stating that "… all other documents executed on 25th November 2019 shall form part of this MOU." Two other entities were added to the MOU—both trusts under the Patanjali group.

On considering the matter:

(a) The court ruled that it is not necessary for a party invoking arbitration to set out all claims in the notice of arbitration under Section 21 ACA. It is sufficient if the disputes sought to be

referred is indicated. The court found that the requirement was met in the case, and therefore, rejected the argument that the notice was vague and *non-est*.

(b) The court found that the MOUs were not unconnected, and the dispute arose in connection with both MOUs. The issue arose because the respondents' case was the petitioner wanted the constitution of a tribunal under the MOU-I, but the dispute arose under MOU II: hence, a tribunal constituted under the MOU-II could not be referred to a tribunal under MOU I.

(c) The argument that MOU-I was terminated was also rejected, applying the doctrine of severability, which was also provided in MOU-I.

(d) The argument that the MOU-II did not incorporate the arbitration clause of MOU-I was also rejected considering the language of incorporation and the intention and conduct of the parties (to carry forward MOU-I's transaction). [citing *MR Engineers* (2009) 7 SCC 696]

(e) The court accepted the petitioner's argument that the two other parties of MOU-II could be compelled to arbitrate based on the group of companies doctrine. Note here that the MOU-I had an arbitration clause, and three respondents were parties to it. This left two respondents who were parties to MOU-II. The court rejected the respondents' contention that the group of companies doctrine applied only to incorporated entities—and not trusts. In addition, it found that the respondents together had an identity and were a group and had transacted with the petitioner as a group.

Read the decision **here.**

Categories: Section 11 ACA | Appointment of Arbitrators | Section 11 (6A) ACA | | Existence of Arbitration Agreement | Section 7 (5) ACA | Section 7 ACA | Arbitration Agreement | Arbitration Agreement in Writing | Construction of Arbitration Agreement | Form of Arbitration Agreement | Formal Validity of Arbitration Agreement | Incorporation | Incorporation by Reference | Incorporation of Arbitration Agreement | Interpretation of Arbitration Agreement | Competence Competence | Competence of Arbitral Tribunal to Rule on its Jurisdiction | Kompetenz Kompetenz | Binding Non Signatory to Arbitration | Composite Transaction | Doctrine of Group of Companies Joinder of Non Signatories | Chloro Controls | MTNL | Necessary Party | Proper Party | Vidya Drolia | Notice of Arbitration | Section 21 ACA

ARBITRABILITY, EXISTENCE & VALIDITY OF ARBITRATION AGREEMENTS

Sukanya Holding's dictum does not apply to Section 8 ACA post-2015 Amendments. Cause of action can be split: Calcutta High Court

21 January 2022 | Lindsay International Private Limited v. Laxmi Niwas Mittal and others | IA No GA 04 of 2017 in CS No 2 of 2017 | 2022 SCC OnLine Cal 171 | Lindsay International Private Limited v. Laxmi Niwas Mittal and others | IA No GA 02 of 2017 in CS No 2 of 2017 | 2022 SCC OnLine Cal 170
Moushumi Bhattacharya J | Calcutta High Court

The Calcutta High Court has considered the applicability of the Supreme Court's decision in *Sukanya Holdings* (2003) 5 SCC 531 to the present day Section 8 ACA. It has ruled that *Sukanya* no longer applies, and cause of action can be split.

In 2003, *Sukanya* had ruled that "where a suit is commenced in respect of a matter which falls partly within the arbitration agreement and partly outside and which involves parties some of whom are parties to the arbitration agreement while some are not so", the matter cannot be referred to arbitration under Section 8 ACA [quoted portion from SCC headnote]. The question arose because Section 8 ACA was amended in 2015 requiring a court to refer parties to arbitration "notwithstanding any judgment, decree or order of the Supreme Court or any court … unless it finds that prima facie no valid arbitration agreement exists."

The case emanates from the disputes between iron and steel baron LN Mittal ("LNM"), the Arcelor Mittal ("AM") group and his brother-in-law. LNM allegedly made some promises in 1996 to his brother-in-law. As a result, a company Lindsay was established due to that pre-incorporation oral contract [for pre-incorporation contracts See Section 15 (h) of Specific Relief Act, 1963. For some background on the dispute, see 2018 SCC OnLine Cal 52].

According to Lindsay, the pre-incorporation contract, subsequent oral and written arrangements and practice of 20 years proceeded on the footing that Lindsay would be the sole supplier of the AM group worldwide for goods and services originating from India. The dispute covered in this Highlight involves some suppliers/vendors Lindsay had contracted to make the onward supplies to the AM group. The suit was filed against LNM and the AM group on the one hand (defendants number 1 to 38) and the suppliers/vendors on the other (defendants number 39 to 42).

The vendors applied to refer the matter to arbitration based on the arbitration agreements contained in the purchase orders issued to them. The AM group had applied under Section 8 ACA earlier, but only three years after filing its written statement.

Legislative intent apparent from the text of present Section 8

On the plain text of the provision, unless a valid arbitration agreement does not exist, the court must refer the parties to arbitration notwithstanding earlier judgments. The earlier judgments include *Sukanya* [citing *Emaar MGF* (2019) 12 SCC 751].

Lindsay's case against the defendants

Independent reliefs have been claimed against the two sets of defendants. The relief against vendors was premised on a non-compete agreement. No conspiracy with the AM group is alleged. The pleadings belie the contention of inextricable inter-linkage. The cause of action pleaded against Lindsay and other vendors could easily be separated since independent reliefs had been claimed against each defendant.

The cause of action in the suit could be bifurcated

Order II Rule 6 Code of Civil Procedure Code, 1908 provides for bi-furcation by giving an option to the court to order separate trials. The suit could be bifurcated because the reliefs claimed against the groups are separate and independent.

It can reasonably be assumed that the plaint has been prepared with the object of avoiding the arbitration agreement between plaintiff no. 1 and the vendor group of defendants. In principle, all disputes can be adjudicated by arbitration (citing NN Global) except in some limited cases.

The interpretation supporting bi-furcation is destructive of the legislative intent to promote arbitration. Moreover, none of the decisions has held that an application under Section 8 ACA will only succeed if the entire suit can be referred to arbitration.

Is Sukanya relevant now?

Sukanya's dictum has been rejected in *NN Global* 2021 SCC OnLine 13. Applying Sukanya today would be recasting Section 8 to say, "notwithstanding any judgment, decree or order of the Supreme Court or any court … [except *Sukanya*] …."

The only requirement today is the existence of a valid arbitration agreement. Whether the AM group contracts are intertwined with the vendors' contracts is a matter for the arbitrator. In this case, an agreement exists, and it is wide enough to include all disputes arising out of or in connection with the purchase orders. The dispute is entirely between private parties.

Read the decision here**.**

Categories: Section 8 ACA | Power to Refer Parties to Arbitration | Prima Facie No Valid Arbitration Agreement Exists | Existence of Arbitration Agreement | Substantive Validity of Arbitration Agreement | Formal Validity of Arbitration Agreement | In Rem | Power to Refer Parties to Arbitration | Prima Facie | Test of Arbitrability | Validity | Competence Competence | Arbitrability | Section 16 ACA | Competence of Arbitral Tribunal to Rule on its Jurisdiction | Competence Competence | Jurisdiction of Arbitral Tribunal | Kompetenz Kompetenz | Who Decides Question | Validity | Booz Allen | Vidya Drolia | Global Mercantile | Cause of Action | Bifurcation of Cause of Action

Sufficiency of stamping of the arbitration agreement is a jurisdictional issue. A loan agreement is "executed" when it is signed by both parties: Delhi High Court

24 January 2022 | Religare Finvest Ltd v. Asian Satellite Broadcast (P) Ltd | Arb A (Comm) 02/2021 | Sanjeev Narula J | Delhi High Court | 2022 SCC OnLine Del 221

In a case involving the question of stamping of the arbitration agreement, following *NN Global Mercantile* 2021 SCC OnLine SC 13, the court has ruled that insufficiency of stamping is a jurisdictional issue within the meaning of Section 16 ACA. The petitioner had contended that it was "instead purely a question of fact", and the tribunal was wrong to deal with it as a preliminary issue of jurisdiction.

The court added that the doctrine of severability did not mean that the question of stamping, which makes the arbitration agreement inadmissible, could be ignored. Moreover, a tribunal is vested with broad powers to rule on its jurisdiction, which includes examining a question of existence or validity of

the arbitration agreement, which includes the question of enforceability of a document deficiently stamped.

Zee had taken a loan from Religare under several loan agreements and failed to repay. When Religare invoked arbitration, Zee applied under Section 16 ACA challenging the tribunal's jurisdiction based on the argument that the arbitration agreements were not sufficiently stamped under the Maharashtra Stamp Act, 1958 ("MSA"). The arbitrator adjourned the proceedings *sine die* and advised Religare to get the agreements stamped in Maharashtra and then continue with the claim if it wished.

However, in appeal, the court remanded back the matter to the arbitrator to consider whether MSA applied in the first place? The question arose because the loan agreements were signed first in Mumbai by Zee and then by Religare in Delhi. So, the specific question was whether the initial appending of signatures in Mumbai would render the documents chargeable to stamp duty under the MSA. The court ruled that:

(a) For an instrument to be "chargeable" under Section 3, read with Section 2(d) MSA, every instrument must be executed within the State of Maharashtra.

(b) The loan agreements were documents of such character that they became "executed" documents as defined by Section 2 (i) MSA only when both parties signed, that is, only when Religare signed it in Delhi.

(c) The phrase "first executed" in Section 2(d) MSA could not be construed to mean that signatures of only one of the parties to a bilateral or multilateral document are sufficient to attract stamp duty.

Read the decision **here.**

Categories: Section 37 ACA | Appealable Orders | Section 37 (2) (a) ACA | Section 37 (2) (b) ACA | Section 16 ACA | Competence Competence | Jurisdiction | Jurisdiction of Arbitral Tribunal | Kompetenz Kompetenz | Stamping of Arbitration Agreement | Stamping of Main Agreement | Unstamped Agreement | Instruments Chargeable with Duty | Section 3 Maharashtra Stamp Act | Severability | Stamp Duty |Stamping of Arbitration Agreement | Garware | Global Mercantile

Once stamp duty is paid, its adequacy is not a question going to existence or validity that the Section 11 court should consider: Supreme Court of India

24 January 2022 | Intercontinental Hotels Group (India) (P) Ltd v. Waterline Hotels (P) Ltd | Arb A (Comm) 02/2021 | NV Ramana, Surya Kant and Hima Kohli JJ | Supreme Court of India | 2022 SCC OnLine SC 83

The Supreme Court has appointed an arbitrator in an international commercial arbitration rejecting the argument of insufficient stamping. The petitioner conducted a "self-adjudication" and paid the stamp duty during the proceedings, but the respondent still objected to the petitioner's method of stamping and classification.

The court ruled that once the duty was paid, the issue of 'existence' and 'validity' of the arbitration clause "would not be needed to be looked into", and it "is a question that may be answered at a later stage as this court cannot review or go into this aspect under Section 11(6)."
If, however, the court said, "it was a question of complete non stamping, then this court, might have had an occasion to examine the concern raised in N.N. Global."

To briefly recap the context for a new reader:

(a) Section 11 (6A) ACA, introduced by the 2015 Amendments, provides that the court, while considering an application for appointment, "shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."
(b) In *Garware* (2019) 9 SCC 209, a 2-judge bench of the Supreme Court ruled that an agreement containing an arbitration clause, if unstamped, does not exist in the eyes of the law.
(c) Vidya Drolia (2021) 2 SCC 1, a 3-judge bench decision, approved *Garware*.
(d) In *NN Global Mercantile*, another 3-judge bench disagreed with Garware and referred the issue to a 5-judge bench. According to the Supreme Court's website, the case is likely to be listed before a 5-judge bench on 23 March 2021 [CA No 003802 - 003803 of 2020]

Read the decision **here.**

Categories: Section 11 ACA | Appointment of Arbitrators | Section 11 (6A) ACA | Existence of Arbitration Agreement | Section 16 ACA | Competence Competence | Jurisdiction | Jurisdiction of Arbitral Tribunal | Competence of Arbitral Tribunal to Rule on its Jurisdiction | Kompetenz Kompetenz | Stamping of Arbitration Agreement | Stamping of Main Agreement | Unstamped Agreement | Severability | Stamp Duty | Section 8 ACA | Prima Facie No Valid Arbitration Agreement Exists | Substantive Validity of Arbitration Agreement | Test of Arbitrability | Validity | Who Decides Question | Vidya Drolia | Garware | Global Mercantile

CONDUCT OF ARBITRAL PROCEEDINGS

Courts have not been conferred an adjudicatory role under Section 27 ACA: Bombay High Court

17 January 2022 | Dilip v. Errol Moraes | Arbitration Petition (L) No. 722 of 2022 | High Court of Bombay | GS Kulkarni J | 2022 SCC OnLine Bom 129

Section 27 ACA enables the arbitral tribunal, or a party to the dispute with the approval of the arbitral tribunal, to apply to the court for assistance in taking evidence. A single judge of the Bombay High Court has ruled that the court must not perform an adjudicatory role while considering such a request. If the requirements of locus are satisfied, the court must necessarily exercise its jurisdiction.

The tribunal had allowed Dilip's request to take the court's assistance and rejected Errol's objections by a detailed order. In the tribunal's view, the evidence of the proposed witness was material.

Errol's objection continued before the High Court, and he argued that even if the tribunal takes a *prima facie* view, the final decision lies with the court following Order XVI Rule 1 Code of Civil Procedure ("CPC") [citing Delhi High Court's *Hindustan Petroleum* (2006) 91 DRJ 591].

The court rejected the argument and ruled that:

a) Under Section 27 ACA, the court has not been attributed any adjudicatory role.

b) Section 27 ACA has to be read on the touchstone of Section 5 ACA (no judicial interference unless specified) and Section 19 ACA (tribunal not bound by CPC or Evidence Act).

c) The tribunal's approach was extremely fair. It considered the rival contentions and though not bound by the strict procedures of CPC, applied Order XVI Rules (2) and (3) *sub silentio*.

d) The tribunal is the master of the proceedings and has the ultimate jurisdiction to decide the appropriate and relevant witnesses.

a) *Hindustan Petroleum* did not support the respondent's case at all. Once the tribunal forms a *prima facie* opinion, the court cannot scrutinise it because Section 27 ACA proceedings are not appealed. Moreover, in the Delhi High Court case, the tribunal had not applied its mind to the request under a misconception that it had no role. Though the Delhi High Court noted that the procedure under Section 27 ACA would be of Order XVI CPC, it also said that a condition of prior approval of the arbitral tribunal is envisaged to avoid inundating the court with unnecessary requests.

Read the decision **here**.

Categories: Section 27 ACA | Court Assistance in Taking Evidence | Extent of Judicial Intervention | Section 19 ACA | Section 5 ACA | Applicability of Code of Civil Procedure | Applicability of Evidence Act

INTERIM RELIEF BY COURTS AND TRIBUNALS

Scope of Section 9 ACA versus Section 17 ACA revisited: Delhi High Court

20 January 2022 | Hindustan Cleanenergy Ltd v. MAIF Investments India 2 Pte Ltd. and others & connected matter | OMP (I) (COMM) 308/2020 and OMP (I) (COMM.) 211/2021 | C Hari Shankar J | Delhi High Court

Considering two connected cases, the Delhi High Court ordered interim measures, in one case, subject to orders of the tribunal, and in the other, operative for 90 more days after the tribunal makes any orders.

But while doing so, he has made several significant observations on the scope of Section 9 ACA [except Section 9 (i) (ii) (b), which he noted is "governed by its own set of principles"]. He also noted that different considerations apply at each of the three stages under Section 9 ACA--before arbitration, during, and after the award, but before enforcement.

The court heard two petitions concerning a Singapore seated arbitration against, *inter alios*, Investment Management Firms incorporated in Singapore.

On the scope of Section 9 ACA, the court said:

(a) Section 9 is not a pre-arbitral Section 17 and is not intended to choose between the two provisions. Instead, it is intended to provide interim protection to the parties to ensure that arbitral proceedings are not frustrated or the award is not reduced to a paper decree.

(b) The test for determining *prima facie* case is different for the Section 9 court. If the Section 9 court were to undertake the same exercise as a tribunal, the arbitral proceedings would be frustrated.

(c) The usual disclaimer that a Section 9 court gives in its decisions—that its views are only *prima facie*—is, in practice, more a caveat of form than substance. The arbitral tribunal invariably treats observations and findings of the Section 9 court with due deference, and it colours the tribunal's subjectivity to a greater or lesser degree.

(d) The Section 9 court should only examine whether a dispute worthy of consideration by the tribunal exists? Then, it is for the tribunal (and not the Section 9 court) to enter the intricacies of the matter and the arguments on contractual stipulations and other relevant factors.

(e) If the case is entirely ephemeral or moonshine, the test of a *prima facie* case is not met, and the Section 9 court may decline from examining the matter further.

(f) To not divest the tribunal of its jurisdiction under Section 17 ACA, it is appropriate to grant interim protection temporarily, subject to the orders to be passed by the arbitral tribunal.

In this case, applying the delineated scope, the court found that it was not possible without an "in-depth" examination—but which the Section 9 jurisdiction does not permit—to even *prima* facie give a finding on the issues involved. The issues related to, among others, the nature of the liquidated damages clause, if it was penal or not; the applicability of the contract law provisions; the compliance of contractual obligations; if time was of the essence.

Then, finding that the case was not a moonshine, the court considered the following reasons for granting interim measures:

(a) When the arbitral tribunal would enter on reference is anybody's guess because the tribunal's decision on consolidation has been challenged in Singapore court.

(b) There is no reasonable expectation that the tribunal would be constituted at any proximate point of time.

(c) Later on, there was a chance that the petitioner might be entitled to INR 95 crores. Respondents No. 1 and 2 are SPVs and do not have the assets to honour an arbitral award that may be passed. They are part of the Macquarie group, one of the world's leading financial institutions and asset management companies. Still, it was not suggested that the Macquarie group has agreed to meet the liabilities of Respondents 1 and 2.

Read the decision **here**.

Categories: Section 9 ACA | Interim Measures by Court | Scope of Section 9 ACA | Section 9 (1) (ii) (b) ACA | Securing the Amount in Dispute in Arbitration | Conditions for Grant of Interim Measure | Just and Convenient | Prima Facie Case | Balance of Convenience | Agreement to the Contrary | Interim Measures in Foreign Seated Arbitration | Arcelor Mittal | Avantha Holdings | Section 17 ACA | Section 9 v. Section 17 ACA |

Injunction refused in a determinable contract: Bombay High Court

24 January 2022 | Chetan Iron LLP v. NRC Ltd | Arbitration Petition (L) 1366 of 2022 | GS Kulkarni J | Bombay High Court | 2022 SCC OnLine Bom 159

The Bombay High Court rejected a petition for interim relief in a case that is an excellent example of a contract determinable in its nature and why it cannot be specifically performed.

The parties had a contract for the sale of scrap. Either party could terminate it by giving 15 days' notice. The petitioner applied for interim relief based on the argument that the respondent would award the contract work to a third party while the contract subsisted. It requested the court for a direction to the respondent to comply with the contract and, pending the final disposal of the petition, grant an injunction from creating any third party rights.

Kulkarni J noted the applicable provisions of the Specific Relief Act, 1963 ("SRA"): Section 14 (d) SRA under which a contract which is in its nature determinable cannot be specifically enforced. Section 41 (e) SRA provides that an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced.

He then noted the rationale behind such a provision (citing commentary) that it would "be idle to do that which might instantly be undone by one of the parties."

Other reasons given by the court included: Section 42 SRA did not apply, and because the final relief of specific performance could not be granted, a temporary injunction also could not be granted.

At the parties' request, however, the court appointed an arbitrator.

Read the decision **here.**

On the issue of determinable contracts, read our Highlights on *Golden Tobacco* & *DLF Home* (both Delhi High Court, Justice Bakhru), *ABP Network* (Delhi High Court, Justice C Hari Shankar).

Categories: Section 9 ACA | Interim Measures by Court | Scope of Section 9 ACA | Interim Mandatory Injunction | Mandatory Orders | Contracts Not Specifically Enforceable | Determinable Contract | Injunction To Perform Negative Covenant | Negative Covenant | Section 14 Specific Relief Act | Section 42 Specific Relief Act | Section 9 ACA | Specific Performance |Termination of Contract | Section 11 ACA | Appointment of Arbitrators

SEAT AND VENUE OF ARBITRATION

The BGS test for determination of seat applied in domestic ad hoc arbitration: Calcutta High Court

18 January 2022 | SPML Infra Limited v. East India Udyog Limited | AP No 406 of 2020 | Prakash Shrivastava CJ | Delhi High Court | 2022 SCC OnLine Cal 146

The parties' contract (purchase order) was unsigned, and Kolkata was stated as the venue of arbitration. Neither came in the way of the Calcutta High Court appointing an arbitrator.

The court noted that an arbitration agreement need not be signed [following *Govind Rubber* (2015) 13 SCC 477 & *Caravel Shipping* (2019) 11 SCC 461]. It determined that Kolkata was the seat of the arbitration because it was the specified venue, and the test set out in paragraph 61 of *BGS SGS Soma* (2020) 4 SCC 234 applied.

Paragraph 61 of *BGS* (SCC version) reads:

> 61. It will thus be seen that wherever there is an express designation of a "venue", and no designation of any alternative place as the "seat", combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding.

Read the judgment **here.**

Categories: Section 11 ACA | Appointment of Arbitrators | Section 20 ACA | Place | Place of Arbitration | Seat | Seat of Arbitration | Venue | Venue of Arbitration | Exclusive Jurisdiction | Choice of Seat | Designation of Arbitral Seat | Tests for Determination of Seat | BGS Soma

SETTING ASIDE ARBITRAL AWARDS

Allowing compensation for cost escalation and additional expenses during the delayed period where the other side causes the delay is not patently illegal under Section 28 (3) ACA: Kerala High Court

17 January 2022 | Southern Railway v. Santhosh Babu | Arb A No 36 of 2020 | PB Suresh Kumar & CS Sudha JJ | Kerala High Court | 2022 SCC OnLine Ker 189

See *Southern Railway* v. *Santhosh Babu* under Arbitration Appeals.

ARBITRATION APPEALS

Allowing compensation for cost escalation and additional expenses during the delayed period caused by the other side is not patently illegal under Section 28 (3) ACA: Kerala High Court

17 January 2022 | Southern Railway v. Santhosh Babu | Arb A No 36 of 2020 | PB Suresh Kumar & CS Sudha JJ | Kerala High Court | 2022 SCC OnLine Ker 189

A 2-judge bench of the Kerala High Court has ruled that the tribunal had the jurisdiction to allow claims of additional expenses for work done during the extended period, rejecting the argument that the contract did not provide for it, and a subsequent agreement precluded it. It ruled that while doing so, the tribunal did not contravene Section 28 (3) ACA or commit patent illegality.

The respondent had not completed the work in the original timeline, and the term was extended. A "rider agreement" was executed to provide that the respondent would complete the work on the original terms. After the completion, with 923 days delay, the respondent claimed in arbitration compensation for cost escalation and additional expenses for work done during the extended period. The tribunal found that the respondent was entitled to the claims above because the delay was attributable to Railways (hindrances and instructions to execute new work and extra quantities in assigned work). The set-aside court dismissed the challenge.

Before the appellate court, Railways invoked Section 28 (3) ACA to argue that the tribunal decided contrary to the contract terms. Rejecting the challenge, the court noted the scope of the provision and reiterated that the tribunal's interpretation of the contract could not be interfered with unless it is patently illegal. See our **note below** on the scope of Section 28 (3) ACA.

The court rejected Railways' main defence that voluntarily executed rider agreements were ignored by the tribunal. The court cited those authorities where the Supreme Court had upheld the tribunal's jurisdiction to award the claim in similar circumstances [*TP George* (2001) 2 SCC 758, *KN Sathyapalan* (2007) 13 SCC 43]. Even though the rider agreements in the cited cases were without prejudice, that was not considered an impediment because the point about rider agreements was not raised before the tribunal, depriving the respondent of a chance to establish that they were without prejudice. In addition, the court considered the rider agreements an unconscionable bargain [citing *Central Inland* (1986) 3 SCC 156].

The court also rejected Railways' arguments that other special terms (SCC) and general terms (GCC) precluded any claims for delay, whatever be the reason for delay. One, the court noted, no one had brought those provisions to the notice of the tribunal. Two, on analysis, those provisions had no application.

On the question of award of interest, the court ruled that 18% post-award interest per annum was not compensatory but penal in nature which was not permissible. It was also unreasonable and did not consider prevailing economic conditions. In the court's view, set-aside courts could modify interest rates [*citing* Vedanta (2019) 11 SCC 465]. Though *Hakeem* (2021) 9 SCC 1 ruled that set-aside courts could not modify an award, the decision was not on interest, which is an ancillary matter *per SL Arora* (2010) 3 SCC 690.

Scope of Section 28 (3) ACA

What does the post-2015 Amendment Section 28 (3) ACA mean when it states that "while deciding and making an award, the arbitral tribunal *shall, in all cases, take into account the terms of the contract …*" (emphasis added).

Before the amendment, the provision stated that the tribunal "*shall decide in accordance with the terms of the contract*." (emphasis added)

The old provision was explained in *Associate* (2015) 3 SCC 49 [paras 42.3 to 45]. The court had said that contravention of Section 28 (3) ACA (old) was a ground to set aside an award for "patent illegality" but with a caveat. Based on *Associate*, the 246th Law Commission Report suggested amending the provision. The amended provision was explained in *Ssangyong* (2019) 15 SCC 131.

The caveat of *Associate* and the subsequent explanation in Ssangyong is the law today (as of 11.02.2022) on Section 28 (3) ACA.

Associate para 42.3, after which the court cites other decisions until para 45, reads:

> "This … contravention [of Section 28 (3)] must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide *unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do*." (emphasis added)

Ssangyong para 40 reads [see also para 69 that clarifies how wandering outside contract might be "patent illegality" but not a ground under Section 34 (2) (a) (iv) ACA]:

> "The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate … in short, that the arbitrator's view is not even a possible view to take. *Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A)*." (Emphasis added)

Southern notes this scope and reiterates it.

Read the decision **here.**

Categories: Section 37 ACA | Appealable Orders | Section 34 ACA | Application for Setting Aside Arbitral Award | Section 34 (2A) ACA | Patent Illegality | Reappreciation of Evidence | Revaluation of Evidence | Arbitrators Interpretation of Contract | Merits Based Review | Review on the Merits of the Dispute | Plausible View | Associate Builders | Ssangyong | Unconscionable Contract | Section 31 (7) ACA | Section 31 ACA | Award of Interest | Form and Contents of Arbitral Award | Grant of Interest | Hyder Consulting | Interest | Post Award Interest |

Because views of members of a tribunal are separately recorded does not make each view an award: Kerala High Court

17 January 2022 | Lloyed Insulations (India) Ltd. v. Foremexx Space Frames | Arbitration Appeal No. 17 of 2013 | PB Suresh Kumar and CS Sudha JJ | Kerala High Court | 2022 SCC OnLine Ker 344

In a 3-member tribunal, the procedure followed for making the award was that:

(a) Arbitrator No.1 gave his findings on 24 February 2010.
(b) Arbitrator No.2 gave his findings on 19 March 2010.
(c) The presiding arbitrator concurred with the findings of Arbitrator No. 2 on 05 April 2010. This concurrence was recorded in a separate document.
(d) Then, on 05 April 2010 itself, the gist of the claims allowed and rejected by the majority members (Arbitrator No.1 & the Presiding Arbitrator) were listed on a stamp paper and authenticated by the two. This document was described as the "Majority Award."

Appended to the Majority Award were: (i) Appendix A: Arbitrator No.1 findings (ii) Appendix B**:** Presiding arbitrator's concurrence (iii) Appendix C: Arbitrator No.2's finding. Each of these documents described itself as an "Award."

The set-aside petition challenging the findings of the tribunal was rejected.

In a Section 37 ACA appeal before the Kerela High Court, Lloyed also contended that the majority award should be set aside because the ACA recognises only one award, but in this case, multiple awards of different dates had been passed. In addition, the majority award was unreasoned because the presiding arbitrator simply accepted the findings of another arbitrator without independent reasons, thus, violating Sections 29 and 31 ACA.

The court rejected the contentions:-

(a) There can only be one award. If the tribunal is constituted of a panel of members, the award is unanimous or the majority's decision. An award comes into being when it is signed. Though there is no specific provision in the ACA for passing a dissenting view, there is no prohibition. [citing *Dakshin Haryana Bijli Vitaran* (2021) 7 SCC 657]

(b) Appendix A matured into an award when the Presiding Arbitrator accepted it by recording his concurrence in Appendix B.

(c) So, there is only one final majority award in this case. It is three documents taken together: Appendix A, Appendix B, and the stamped document. Appendix C was the dissenting view and did not form part of the award.

(d) The argument that the award was unreasoned was also incorrect because Arbitrator No.1 had given detailed reasons wholly adopted by the Presiding Arbitrator and made part of the majority award.

The High Court also rejected the argument that once the set-aside court (district court) disagreed with the tribunal's findings on novation of the underlying contract under Section 62 Indian Contract Act, 1872, it should have set aside the award. The set-aside noted that though the tribunal found novation, it did not proceed on that premise. Instead, it relied on the underlying agreement, evidence that it applied Section 63 ICA. In view of the appellate court, no interference was required.

Read the judgment **here**.

Categories: Section 37 ACA | Appealable Orders | Section 34 ACA | Application for Setting Aside Arbitral Award | Section 34 (2A) ACA | Patent Illegality | Reappreciation of Evidence | Revaluation of Evidence | Arbitrators Interpretation of Contract | Merits Based Review | Review on the Merits of the Dispute | Section 29 ACA| Section 31 ACA | Form and Contents of Arbitral Award | Form and Contents of Arbitral Award | Making of Award | Delivery of Award | Signing of Award | Dissenting Opinion | Majority Award | Minority Award | Unreasoned Award | Novation

TIME LIMITATION

The "prescribed period" of limitation under Section 34 (3) ACA is three months and does not include the discretionary period under the proviso. The benefit of court's holidays is not available once three months expire: Bombay High Court

19 January 2022| NHAI v. Avinash Purushottam Supe | Arbitration Appeal No 105 of 2020 & connected matters | Bharati Dangre JJ | Bombay High Court | 2022 SCC OnLine Bom 202

Following *Assam Urban Water Supply* (2012) 2 SCC 624 and *Sagufa Ahmed* (2021) 2 SCC 317, the Bombay High Court has reiterated that the expression "prescribed period" of limitation under Section 4 Limitation Act does not include the discretionary period provided by the proviso to Section 34 (3) ACA.

So, the benefit of Section 4 of the Limitation Act that relaxes the limitation if the "prescribed period" for filing any suit, appeal or application expires when the court is closed, is not available where the prescribed period of three months got over before the court holidays began.

Section 34 (3) ACA sets the limitation period to file a set-aside application. It is three months, but the proviso gives another 30 days at the court's discretion.

In this case, the set-aside petition was not filed during the prescribed period of three months. The discretionary period of 30 days expired during the summer holidays of the court. The set-aside application was filed once the court reopened, but it dismissed it as time-barred. In appeal, the High Court found nothing wrong with the dismissal. It said that the law was not *res integra*.

Referring to the period under the proviso to Section 34 (3) ACA, the court noted that the function of a proviso is to qualify or exclude something from what is provided in the enactment which, but for the proviso, would be under the proviso's purview.

Read the decision **here.**

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | Limitation | Limitation for Setting Aside | Limitation Under Section 34 Section | Section 4 Limitation Act | Expiry of Prescribed Period When Court is Closed | Section 3 Limitation Act | Prescribed Period | Extension of Prescribed Period | Section 29 Limitation Act | Condonation of Delay

AWARD OF INTEREST

The set-aside or appellate court can modify interest rate: Kerala High Court

17 January 2022 | Southern Railway v. Santhosh Babu | Arb A No 36 of 2020 | PB Suresh Kumar & CS Sudha JJ | Kerala High Court | 2022 SCC OnLine Ker 189

See *Southern Railway* v. *Santhosh Babu* under Arbitration Appeals.