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Indian Arbitration Yearly Review 2022

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In recent years, several noteworthy judgments have been rendered by the Indian Courts in matters pertaining to the law of arbitration in India. This article covers ten such significant decisions rendered by the Supreme Court of India in 2022.

1. *Indian Oil Corporation Ltd. vs. NCC Ltd.*

While a Court acting under Section 11 of the Arbitration Act can consider the aspect of accord and satisfaction of claims of the arbitrating parties. However, cases with debatable facts and reasonably arguable matters should be left to the arbitral tribunal.

In *Indian Oil Corporation Ltd. v. NCC Ltd.*[1], the Supreme Court, while deciding a group of appeals all challenging orders passed under Section 11 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"), rendered some important findings on the principle of party autonomy and the scope and powers of a Court under Section 11 of the Arbitration Act. The Supreme Court opined that a Court acting under Section 11 of the Arbitration Act could consider the question of arbitrability of disputes provided the facts in such a case were clear and glaring in regard to the arbitrability of the matter. It was further held that while a Court could consider the aspect of accord and satisfaction of the claims under Section 11 of the Arbitration Act, it is always advisable and appropriate that in cases of debatable facts and reasonably arguable cases, the same should be left to the arbitral tribunal.

In addition to the above, the Supreme Court also discussed about party autonomy in arbitration. It was opined that parties to an arbitration agreement are free to agree on the applicability of the (i) proper law of the underlying contract, (ii) proper law of the arbitration agreement, and (iii) proper law for conducting the arbitration. The Supreme Court also clarified that parties to an arbitration agreement were empowered to decide which matters would be excluded from the purview of the arbitration agreement.

[1] *Indian Oil Corporation Ltd. v. NCC Ltd.*, 2022 SCC OnLine SC 896.

2. *Indian Oil Corporation Ltd. vs. M/s Shree Ganesh Petroleum Rajgurunagar*

An arbitral award would attract patently illegality if the arbitrator fails to act in terms of the contract or ignores the specific terms of a contract.

In *Indian Oil Corporation Ltd. v. M/s Shree Ganesh Petroleum Rajgurunagar*[2], the Supreme Court discussed about some instances in which the ground of patent illegality under Section 34 of the Arbitration Act would vitiate the award. The Supreme Court, relying on its decisions in *PSA Sical Terminals Pvt. Ltd.*[3] and *SSangyong Engineering*,[4] observed that an arbitral tribunal is a creature of the contract and, therefore, bound to act in terms of the contract under which it is constituted. When an arbitral tribunal fails to act in terms of the contract or ignores the specific terms of a contract, the award rendered would be vitiated by patent illegality.

As regards the scope and powers of a Court acting under Section 34, it was observed that a Court did not sit in appeal over the award in proceedings initiated under Section 34 of the Arbitration Act. Further, the Courts typically would not interfere with a plausible interpretation of the arbitration unless such interpretation is patently unreasonable and perverse.

3. *Mutha Construction vs. Strategic Brand Solutions (I) Pvt. Ltd.*

A Court acting under Section 34 of the Arbitration Act can remand the matter to the arbitrator for fresh decision only if both the parties consented to the same.

In *Mutha Construction v. Strategic Brand Solutions (I) Pvt. Ltd.*[5], the Supreme Court discussed about the circumstances in which a matter may be remitted to an arbitrator for a fresh decision. The Supreme Court opined that when an arbitral award is set aside under Section 34 of the Arbitration Act, the parties to arbitration can agree for a fresh arbitration to be conducted by the same arbitrator. In such cases the Court acting in Section 34 proceedings would be empowered to remit the matter for a fresh reasoned award. Further, the Supreme Court also clarified that when both parties agree to remit the matter back to the same arbitrator for a reasoned award, it is not open to either of them to contend that the matter may not be or ought not to have been remanded to the same arbitrator.

4. *National Highways Authority of India vs. P. Nagaraju @ Cheluvaiah*

It would not be open for the Court in the proceedings under Section 34 or in the appeal under Section 37 to modify the award, the appropriate course to be adopted in such event is to set aside the award.

In *National Highways Authority of India v. P. Nagaraju*[6], the Supreme Court observed that it is not open for a Court acting under Section 34 or Section 37 of the Arbitration Act to modify the arbitral award. The correct course to be adopted is to set aside the arbitral award. The Supreme Court while relying on the law laid in *M. Hakeem*[7] reiterated the following

[2] *Indian Oil Corporation Ltd. v. M/s Shree Ganesh Petroleum Rajgurunagar*, (2022) 4 SCC 463.
[3] *PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin*, (2021) 18 SCC 716.
[4] *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131.
[5] *Mutha Construction v. Strategic Brand Solutions (I) Pvt. Ltd.*, SLP(C) 1105 of 2022.
[6] *National Highways Authority of India v. P. Nagaraju*, 2022 SCC OnLine SC 864.
[7] *NHAI v. M. Hakeem*, (2021) 9 SCC 1.

observations: "*to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.*"

5. *Tantia Constructions vs. Union of India*

There cannot be two arbitration proceedings concerning the same contract/ transaction.

In *Tantia Constructions v. Union of India*[8], the Supreme Court observed that it was of the firm opinion that there cannot be two arbitration proceedings with respect to the same contract/ transaction. In this case, it was not a contested position that earlier, a dispute was referred to arbitration, and the arbitrator passed an award on the claims that were made by the respective parties. Thereafter, a fresh arbitration proceeding was sought to be initiated by one of the parties, and an application under Section 11 of the Arbitration Act was filed before the High Court of Calcutta ("High Court") with respect to some additional claim amounts. The High Court rejected the Section 11 application and refused to refer the matter to arbitration. In this regard, the Supreme Court held that it was in complete agreement with the view taken by the High Court.

6. *Essar House Pvt. Ltd. vs. Arcellor Mittal Nippon Steel India Ltd.*

A strong possibility of diminution of assets would be sufficient for the grant of relief under Section 9 of the Arbitration Act.

In *Essar House Pvt. Ltd. v. Arcellor Mittal Nippon Steel India Ltd.*[9], the Supreme Court made some important observations on the scope of powers vested in Courts under Section 9 of the Arbitration Act. The Supreme Court observed that the power under Section 9 should not be ordinarily exercised ignoring the basic principles of granting interim reliefs under Civil Procedure Code, 1908 ("CPC"). However, the technicalities of CPC for granting interim reliefs more specifically as captured under Order 38 Rule 5, cannot prevent the Courts from securing the ends of justice.

The Supreme Court further observed that the proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realization of the same is not imperative for the grant of interim relief under Section 9 of the Arbitration Act. In this regard, a strong possibility of a diminution of assets would suffice.

Lastly, the Supreme Court opined that to assess the balance of convenience, the Court is required to examine and weigh the consequences of the refusal of interim relief to the applicant for interim relief in case of success in the proceedings, against the consequence of the grant of the interim relief to the opponent in case the proceedings should ultimately fail.

[8] *Tantia Constructions v. Union of India*, Special Leave to Appeal (C) No. 10722/2022.
[9] *Essar House Pvt. Ltd. v. Arcellor Mittal Nippon Steel India Ltd.*, 2022 SCC OnLine SC 1219.

7. *Oil And Natural Gas Corporation Ltd. vs. Afcons Gunanusa JV*

Arbitrator's fee cap of ₹30 lakhs is applicable to individual arbitrators and not the tribunal as a whole.

In *Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*[10], the Supreme Court dealt with the question on the interpretation of the sixth entry in the Fourth Schedule of the Arbitration Act.

The moot point pertained to the applicability of the threshold of ₹30,00,000 (Rupees Thirty Lakhs) provided under the sixth entry of the Fourth Schedule of Arbitration Act. The following two cases emerged based on how the ceiling amount under the sixth entry in the Fourth Schedule was interpreted:

(i) *First*, if the ceiling were to apply to the sum of the base amount and variable amount, then the highest possible fee would be ₹30,00,000.

(ii) *Second*, if the ceiling limit were to apply only to the variable component, then the highest possible fee would be ₹49,97,500.

The Supreme Court answering the moot query, determined that the ceiling of ₹30,00,000 under the sixth entry of the Fourth Schedule of the Arbitration Act applies to both the base amount, and the variable amount. The Supreme Court further clarified that such an upper limit in terms of the arbitral fee was applicable for each arbitrator individually and not the arbitral tribunal as a whole. Thus, the highest fee that is payable per arbitrator under the Arbitration Act is of ₹30,00,000.

8. *Cox And Kings Ltd. vs. SAP India*

Supreme Court refers a matter to a larger bench for relooking the group of companies doctrine.

In *Cox and Kings Ltd. v. SAP India*[11], the Supreme Court extensively dealt with the group of companies doctrine and opined that the doctrine, as expounded, requires the joining of non-signatories as "*parties in their own right*". Such a joinder was not premised on non-signatories "*claiming through or under*". As per the Supreme Court, the group of companies doctrine had the effect of obliterating the commercial reality and the benefits of keeping subsidiary companies distinct.

The Supreme Court further observed that the aspects left open in the Chloro Control case have created a broad-based understanding of the doctrine, which may not be suitable and would clearly go against the distinct legal identities of companies and party autonomy. Therefore the Supreme Court concluded that there is a "clear need" for having a relook at the doctrinal ingredients concerning the group of companies doctrine. Accordingly, the matter was referred to a larger bench.

[10] *Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*, 2022 SCC OnLine SC 1122.
[11] *Cox and Kings Ltd. v. SAP India*, (2022) 8 SCC 1.

9. *Ellora Paper Mills Ltd. vs. State of Madhya Pradesh*

An arbitral tribunal constituted before the 2015 amendment to the Arbitration and Conciliation Act 1996 will lose its mandate if it violates the neutrality clause under Section 12(5) read with the Seventh Schedule.

In *Ellora Paper Mills Ltd. v. State of Madhya Pradesh*[12], the Supreme Court discussed about the impact of the introduction of Section 12(5) and the Seventh Schedule, which were incorporated in the Arbitration Act through the 2015 amendment. The Supreme Court relied on the decision in *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited*[13] and *TRF Ltd.*[14] to observe that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes ineligible to act or continue to act as an arbitrator. Further, the Supreme Court observed that where a person becomes ineligible to be appointed as an arbitrator there is no question of challenge to such arbitrator as the arbitrator becomes ineligible to perform his functions under Section 12(5) as a matter of law (i.e., *de jure*). In such cases, the mandate of the arbitrator automatically terminates, and another arbitrator shall then substitute him/her.

10. *BBR (India) Pvt. Ltd. vs. S.P. Singla Constructions*

The appointment of a new arbitrator who holds the arbitration proceedings at a different location would not change the jurisdictional 'seat' already fixed by the earlier or first arbitrator.

In *BBR (India) Pvt. Ltd. v. S.P. Singla Constructions*[15] the Supreme Court observed that the seat of arbitration would not be changed merely because a new arbitrator holds arbitration proceedings at a different place than the respective predecessor. The Supreme Court observed that it is highly desirable in commercial matters that there should be certainty as to the Court that should exercise jurisdiction. It was further observed that there are good reasons as to why the subsequent hearings or proceedings at a different location other than the place fixed by the arbitrator as the seat of arbitration should not be regarded and treated as a change or relocation of the jurisdictional seat. This would, in the Supreme Court's opinion, lead to uncertainty and confusion resulting in avoidable esoteric and hermetic litigation as to the jurisdictional seat of arbitration. Thus, the seat once fixed by the arbitral tribunal under Section 20(2), should remain static and fixed, whereas the venue of arbitration can change and move from the seat to a new location.

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[12] *Ellora Paper Mills Ltd. v. State of Madhya Pradesh*, (2022) 3 SCC 1.
[13] *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited*, (2021) 17 SCC 248.
[14] *TRF Ltd. v. Energo Engg. Projects Ltd.*, (2017) 8 SCC 377.
[15] *BBR (India) Pvt. Ltd. v. S.P. Singla Constructions*, 2022 SCC OnLine SC 642.