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10 Important Arbitration Judgments of 2023

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10 Important Arbitration Judgments of 2023

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Over recent years, the Indian courts have rendered various decisions aimed at reducing judicial intervention in the arbitral process and cultivating an arbitration-friendly atmosphere within India. The year 2023 was no exception, as it was marked by decisions that strengthened the arbitration jurisprudence in India. This article presents a concise overview of ten of the most noteworthy arbitration judgments delivered in the year 2023.

1. TATA Sons (P) Ltd. v. Siva Industries and Holdings Ltd.[1]

Under the amended provisions of Section 29-A, Arbitral Tribunals in international commercial arbitrations are merely encouraged to complete the proceedings within twelve months after the conclusion of pleadings. Unlike domestic

arbitrations, they are not obligated to adhere strictly to the specified time-limit.

The elimination of the mandatory time-frame for delivering an arbitral award in international commercial arbitrations does not bestow rights or obligations upon any party. As the amended provisions of Section 29-A are remedial in nature, they would be applicable to all ongoing/pending arbitral proceedings as of its effective date i.e. 30-8-2019.

Brief facts

In 2006, Tata Sons Private Limited (Tata Sons), along with Siva Industries and Holdings Limited (Siva Industries) and Tata Tele Services Limited (TTSL), entered into a share subscription agreement for the issuance/allotment of TTSL's shares to Siva Industries.

Subsequently, in November 2008, Tata Sons, TTSL, and NTT Docomo Inc (Docomo) entered into another share subscription agreement, wherein Docomo sought to acquire a 26% shareholding in TTSL, comprising both fresh and secondary shares. Siva Industries was invited to participate in the sale of secondary shares to Docomo. Accordingly, on 3-3-2009, Docomo and Siva Industries executed a share purchase agreement, resulting in Docomo acquiring 20.740 million equity shares of TTSL from Siva Industries. The mutual understanding among Tata Sons, TTSL, and Docomo in relation to Docomo's ownership of shares was documented in a shareholders agreement (SHA) dated 25-3-2009.

Following this, Tata Sons, TTSL, Siva Industries, and Mr C Sivasankaran, the promoter of Siva Industries (a resident of Seychelles), entered into an inter se agreement (inter se agreement). This agreement mandated Siva Industries and its promoter to purchase shares on a pro rata basis in the event Docomo exercised its sale option under the SHA.

Docomo initiated arbitration proceedings under the rules of the London Court for International Arbitration (LCIA) due to disputes with Tata Sons. The Arbitral Tribunal issued its award on 22-6-2016, directing Tata Sons to make payments to Docomo and acquire the shares of TTSL as per Docomo's request.

Consequently, Tata Sons called upon Siva Industries and its promoter to make proportionate payments per the inter se agreement. Disputes arose between Tata Sons and Siva Industries, leading Tata Sons to invoke arbitration. The arbitrator, appointed by the Supreme Court, entered the reference on 14-2-2018. It was agreed that the mandate to render an award would run until 14-8-2019. In the

interim, insolvency proceedings were initiated against Siva Industries, and a moratorium was imposed on 5-7-2019.

On 14-12-2019, Tata Sons filed a miscellaneous application before the Supreme Court, seeking an extension of the Arbitral Tribunal's mandate once the moratorium on Siva Industries was lifted. Meanwhile, Section 29-A of the Arbitration and Conciliation Act, 1996 (Arbitration Act) was amended, effective from 30-8-2019. Subsequently, on 3-6-2022, Siva Industries was released from the rigours of the corporate insolvency resolution process (CIRP).

In light of these developments, Tata Sons filed an interlocutory application, contending that due to the amendments to Section 29-A of the Arbitration Act and the release of Siva Industries from the CIRP, the arbitral proceedings should be allowed to continue automatically.

Decision

The Supreme Court examined Section 29-A of the Arbitration Act as it stood pre and post-2019 Amendment. Following the 2019 Amendment, the Supreme Court observed that the addition of the phrase "in matters other than international commercial arbitration" in Section 29-A(1) was aimed at exempting international commercial arbitrations from the strict timeline outlined in Section 29-A for delivering arbitral awards.

Interpreting both the pre and post-2019 Amendment versions of Section 29-A, the Supreme Court concluded that after the amendment, in international commercial arbitrations, the arbitral tribunal is, at most, obligated to make an effort to issue the arbitral award within 12 months. Consequently, the 12-month time-frame is specifically applicable to domestic arbitrations and serves as a non-binding guideline for international commercial arbitrations.

Regarding the prospective or retrospective application of the Section 29-A Amendment, the Supreme Court stated that the removal of a mandatory time-limit for international commercial arbitration does not establish new rights or liabilities. Therefore, Section 29-A(1) should be applicable to all ongoing arbitral proceedings as of the effective date i.e. 30-8-2019.

In light of these considerations, the Supreme Court directed the sole arbitrator to provide suitable procedural directions for time extension while simultaneously ensuring a prompt conclusion of the arbitration process.

2. Alpine Housing Development Corpn. (P) Ltd. v. Ashok S. Dhariwal[2]

The pre-2019 amendment version of Section 34(2)(*a*) is applicable to arbitration proceedings initiated and completed prior to the 2019 Amendment.

In extraordinary circumstances, if it is brought to the Court's attention that issues crucial to the resolution of matters under Section 34(2)(*a*) are not documented in the arbitral record, the party challenging the award based on the grounds specified in Section 34(2)(*a*) may be granted permission to submit an affidavit as evidence. However, such permission will only be granted when absolutely essential.

Brief facts

The respondent had filed an application under Section 34 of the Arbitration Act, contesting an ex parte arbitral award issued against him before the Additional City Civil and Sessions Judge in Bengaluru (Section 34 Court). In the course of the proceedings, the respondent sought approval from the Section 34 Court to present additional evidence but was denied this permission. Subsequently, the respondent filed a writ petition with the Karnataka High Court, seeking liberty to introduce additional evidence in the Section 34 court proceedings. On 1-9-2021, the Karnataka High Court granted permission to the respondent to submit additional documents.

Aggrieved with the decision of the Karnataka High Court, the appellant filed an appeal before the Supreme Court of India, contesting the order that permitted the respondent to submit additional documents as evidence in the Section 34 Court. The moot question before the Supreme Court revolved around whether a party could introduce supplementary documents as evidence during the Section 34 proceedings under the Arbitration Act.

The appellant asserted that the Karnataka High Court's ruling ran against the fundamental objective of amending Section 34(2)(*a*) of the Arbitration Act in 2019. Before the 2019 Amendment, Section 34(2) stipulated that "an arbitral award could be set aside by the court only if the ??(*a*) the party making the application furnishes proof …". The 2019 Amendment replaced the phrase "the party making the application furnishes proof" in Section 34(2)(*a*) with "establishes on the basis of the record of the Arbitral Tribunal".

According to the appellant, the primary intent of the 2019 Amendment was to expedite the resolution of arbitration proceedings and prevent unnecessary

delays. The appellant argued that even when considering Section 34 of the Arbitration Act before the amendment, the respondent had challenged the arbitral award based on grounds specified in Section 34(2)(*b*) of the Arbitration Act. Consequently, Section 34(2)(*a*) of the Arbitration Act should not be applicable in this case. The appellant further contended that Parliament possesses the authority to establish distinct procedures for obtaining the same remedy.

The appellant stressed on the fact that the respondent deliberately refrained from participating in the arbitral proceedings, and therefore, he should not be allowed to gain an advantage from his own actions by introducing new evidence.

In contrast, the respondent argued that he had contested the constitution of the Arbitral Tribunal, resulting in their non-participation and the subsequent issuance of an ex parte award. Additionally, the respondent withdrew from the proceedings and had also filed another application before the Arbitral Tribunal, alleging bias and excessive fees.

Decision

In the present case, the Supreme Court recognised that the arbitration proceedings were initiated, and the award was issued by the Arbitral Tribunal in 1998, predating the amendment of Section 34(2)(*a*) by the Arbitration and Conciliation (Amendment) Act, 2019. The Supreme Court held that, in this scenario, the pre-amendment version of Section 34(2)(*a*) would be applicable because the 2019 Amendment brought about significant changes to the language of Section 34(2)(*a*). Before the amendment, an arbitral award could be set aside if the party making the application "furnished proof" and the conditions outlined in both Sections 34(2)(*a*) and (*b*) were satisfied. However, following the amendment, the phrase "furnishes proof" was replaced with "establishes on the basis of the record of the Arbitral Tribunal".

Hence, the Supreme Court concluded that, for arbitration proceedings initiated and completed before the 2019 Amendment, the version of Section 34(2)(*a*) in existence before the amendment to the Arbitration Act would be applicable. In arriving at this decision, the Supreme Court cited various cases, including *Fiza Developers and Inter-Trade (P) Ltd.* v. *AMCI (India) (P) Ltd.*[3], *Canara Nidhi Ltd.* v. *M. Shashikala*[4], and *Emkay Global Financial Services Ltd.* v. *Girdhar Sondhi*[5].

The Supreme Court underscored that its previous rulings established the summary nature of applications under Section 34 of the Arbitration Act, whereby an arbitral award could only be annulled based on the grounds specified in

Sections 34(2)(*a*) and (*b*). The Supreme Court noted that the overarching aim of the Arbitration Act and subsequent amendments has been to expedite the resolution of arbitral disputes. Typically, a request to set aside an arbitral award would not require anything beyond the materials presented to the arbitrator. However, if there are matters not covered in such records but are pertinent to the issues outlined in Section 34(2)(*a*), these matters may be brought to the Court's attention through affidavits filed by both parties. Cross-examination of individuals providing these affidavits should only be permitted when absolutely essential, as the truth can often be discerned by simply reading the affidavits of both parties.

In summary, the Supreme Court held that the High Court had not made an error in allowing the respondents to submit affidavits and additional evidence in the proceedings under Section 34 of the Arbitration Act.

3. NTPC Ltd. v. SPML Infra Ltd.[6]

The jurisdiction of the referral courts under Section 11(6) of the Act is highly restricted and encompasses two specific inquiries. The primary investigation involves determining the existence and validity of an arbitration agreement, including an examination of the parties involved and the applicant's connection to the said agreement. The secondary investigation that may arise during the referral stage pertains to the non-arbitrability of the dispute.

Brief facts

NTPC Ltd. (NTPC) and SPML Infra Ltd. (SPML) entered into an agreement (agreement) for specific project works, wherein SPML provided performance and advanced bank guarantees totalling to INR 14,96,89,136 to secure NTPC. Upon project completion, NTPC issued a completion certificate, and in April 2019, communicated that the final payment would be released upon SPML's issuance of a noâ€'demand certificate.

Upon SPML's issuance of the no-demand certificate on 12-4-2019, NTPC released the final payment of INR 1,40,00,000. However, the bank guarantees were withheld due to ongoing disputes and liabilities concerning other projects in Bongaigaon, Barh, and Korba. NTPC officially notified SPML of this decision on 14-5-2019, leading SPML to object and claim INR 72,01,53,899 as recoverable liabilities from NTPC.

In an attempt to address disputes, on 12-6-2019, SPML requested the appointment of an adjudicator per the agreement's dispute resolution mechanism. NTPC took no action, prompting SPML to file a writ petition in the

Delhi High Court under Article 226 of the Constitution of India. The Delhi High Court, in an interim order on 8-7-2019, directed NTPC not to invoke the bank guarantees and instructed SPML to maintain them.

While the writ petition was pending, the parties settled their disputes through a settlement agreement (settlement agreement). As per the settlement agreement, NTPC released the bank guarantees on 30-6-2020, and SPML withdrew the writ petition.

However, three weeks after the release of the bank guarantee and two months after the settlement agreement's execution, SPML issued a letter of repudiation, alleging coercion and economic duress during the execution of the settlement agreement. Subsequently, SPML repudiated the settlement agreement and, on 10-10-2000, filed an application under Section 11(6) of the Arbitration Act with the Delhi High Court. In this application, SPML also asserted that NTPC had not appointed an arbitrator despite multiple requests, compelling SPML's approach to the High Court.

Decision

The Supreme Court, in its judgment, thoroughly examined the pre and post-2015 Amendment legal framework that governs pre-referral jurisdiction.

The Supreme Court categorised cases at the pre-referral stage into three distinct groups:

(*a*) cases necessitating the court's direct determination on aspects such as evaluating the existence and validity of the arbitration agreement;

(*b*) cases falling exclusively under the jurisdiction of the Arbitral Tribunal;

(*c*) cases where the court may opt to decide, especially those involving the determination of whether the parties had finalised the contract or transaction by mutually satisfying their rights and obligations or by making the final payment. This approach is commonly known as the "accord and satisfaction approach".

2015 Amendment of the Arbitration Act

In response to the recommendations put forth in the 256th Law Commission Report, the 2015 Amendment introduced Section 11(6-A) with the specific goal of confining the courts' role at the pre-referral stage to the determination of the existence of the arbitration agreement, "nothing more, nothing less". However, in specific instances, some courts continued to apply the pre-2015 amendment

"accord and satisfaction" approach.[7] Notably, in *Vidya Drolia* v. *Durga Trading Corpn.*[8], the Supreme Court limited the scope of pre-referral jurisdiction under Section 11(6-A) to include a prima facie examination of (*i*) the existence and validity of the arbitration agreement; and (*ii*) the arbitrability of the dispute's subject matter.

From this exploration of jurisprudence, the Supreme Court derived an "eye of the needle" approach, entailing a dual inquiry at the reference stage:

(*a*) The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the referral court.

(*b*) The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

Upon the prima facie review of the facts, the Supreme Court deemed SPML's claims to be an "afterthought", and the allegations of economic duress and coercion were found to lack genuineness. Consequently, the Supreme Court dismissed the application, characterising SPML's claims and allegations as "patently frivolous and untenable" and "obviously devoid of merit and made in bad faith".

In delivering this judgment, the Supreme Court underscored that supervisory courts should not act mechanically but instead have a "duty" to ensure that parties are not compelled to arbitrate disputes that are "demonstrably non-arbitrable". Neglecting this duty would undermine the effectiveness of the arbitration process.

4. Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899, In re (N.N. Global III)[9]

An unstamped or insufficiently stamped arbitration agreement is enforceable for the purpose of reference to arbitration.

Brief facts

In *N.N. Global Mercantile (P) Ltd*. v. *Indo Unique Flame Ltd. (N.N. Global I)*[10], a 3-Judge Bench of the Supreme Court dealt with the issue of the validity of an arbitration agreement within an unstamped or insufficiently stamped contract. In addressing this issue, the Supreme Court heavily relied on the principle of severability or

separability, asserting that an arbitration agreement is considered a distinct and independent agreement, separate from the underlying contract. Consequently, when parties enter into a contract with an arbitration clause, they are essentially entering into two separate agreements: (*i*) the main contract defining the rights and obligations arising from the transaction; and (*ii*) the arbitration agreement establishing the commitment to resolve disputes through arbitration. Moreover, the Supreme Court invoked the doctrine of kompetenz-kompetenz, as outlined in Section 16(1) of the Arbitration Act. This doctrine affirms that the Arbitral Tribunal alone has the authority to decide on its jurisdiction, including objections related to the existence, validity, and scope of the arbitration agreement.

The Supreme Court, in *N.N. Global I*[11], referred to the ruling in *SBP & Co*. v. *Patel Engg. Ltd.*[12], pointing out that it was based on the pre-amendment version of Section 11 of the Arbitration Act. Following the introduction of sub-section (6-A) in Section 11, the referring Court only needed to examine the existence of the arbitration agreement, as clarified in *Duro Felguera SA* v. *Gangavaram Port Ltd.*[13] and *Mayavati Trading (P) Ltd.* v. *Pradyuat Deb Burman* [14].

While delivering the judgment in *N.N. Global I*[15], the Supreme Court differentiated its stance from *SMS Tea Estates (P) Ltd.* v. *Chandmari Tea Co. (P) Ltd.*[16] and *Garware Wall Ropes Ltd.* v. Coastal Marine Constructions and Engg. Ltd.[17], affirming that the lack of stamp duty payment on the main contract would not invalidate the arbitration agreement. However, it expressed reservations about certain findings in *Vidya Drolia*[18] which aligned with the conclusion of *Garware Wall Ropes*[19]. Consequently, the matter was referred to a 5-Judge Bench for authoritative resolution.

In the subsequent case, *N.N. Global Mercantile (P) Ltd.* v. *Indo Unique Flame Ltd. (N.N. Global II)*[20], a 5-Judge Bench, through a majority decision, disagreed with the findings in *N.N. Global I*[21] regarding *SMS Tea Estates*[22], contending that the argument suggesting non-stamping or inadequate stamping of the main contract would not invalidate the arbitration agreement lacked merit. The majority opinion in *N.N. Global II*[23] asserted that the arbitration agreement, as an independent and separate instrument, would still be subject to stamp duty, contradicting the foundational premise laid in *N.N. Global I*[24].

Following the decisions in *N.N. Global I*[25] and *N.N. Global II*[26], a 7-Judge Bench of the Supreme Court of India was called upon in *N.N. Global III*[27] to resolve the matter and the pressing issues that arose in the context of three statutes i.e. the Arbitration Act, the Stamp Act, 1899 (Stamp Act), and the Contract Act, 1872

(Contract Act).

Decision

In *N.N. Global III*[28], the Supreme Court thoroughly examined various facets of arbitration law jurisprudence that were relevant for the determination of the issue at hand. These observations can be summarised as below:

(*i*) Inadmissibility versus voidness: The admissibility of a document is a distinct and separate element as compared to its legality or enforceability under law. The void status of an agreement does not necessarily impact its admissibility, and conversely, a valid agreement may still be inadmissible as evidence. The voidness of an agreement pertains to its enforceability, whereas inadmissibility focuses on whether a court can consider or depend on the agreement as a piece of evidence during legal proceedings.

(*ii*) Intent and purpose of the Stamp Act: The Stamp Act aims to generate revenue for the State and is not intended to arm litigants with the weapon of technicality to be used against opponents.

(*iii*) Intent and purpose of the arbitration under the Arbitration Act: Arbitration is designed to achieve a prompt, efficient, and conclusive resolution of disputes arising between parties concerning their substantive obligations.[29] The modern needs of commerce and business efficiency have led to a shift where the authority of national courts is subordinated to the intentions of the parties and the competence of the Arbitral Tribunal.[30] Central to the jurisprudence of Indian arbitration law is the principle of arbitral autonomy. This principle empowers parties to an arbitration agreement to exercise their contractual freedom, conferring upon the Arbitral Tribunal the authority to adjudicate disputes that may emerge between them.

(*iv*) Section 5 of the Arbitration Act: The primary objective of the Arbitration Act is to minimise the supervisory role of courts in the arbitration process. Section 5 of the Arbitration Act commences with the phrase "notwithstanding anything contained in any other law for the time being in force". This broad language signifies the legislative intent to curtail judicial intervention during arbitration.[31] In the specific context of Section 5 of the Arbitration Act, it mandates that the provisions outlined in Part I of the Arbitration Act should be fully effective and operational, regardless of any other existing laws. The incorporation of non obstante clauses by the legislature serves to eliminate obstacles that might hinder the operation of

the legislation.[32]

(*v*) Arbitration Act is a self-contained code**:** The Arbitration Act serves as a comprehensive and self-contained legal framework, encompassing various aspects such as the appointment of arbitrators, initiation of arbitration proceedings, issuance of awards including their execution, and the resolution of challenges to arbitral awards.[33] In instances where a self-contained code outlines a procedural method, the implication is that the application of a general legal procedure is implicitly excluded.

(*vi*) Separability of the arbitration agreement: The principle of separability recognises the distinct nature of the arbitration agreement, ensuring its persistence even if the underlying contract is terminated, repudiated, or frustrated. This upholds the genuine intentions of the parties and maintains the integrity of arbitral proceedings, reinforcing the sanctity of the arbitration process.

(*vii*) Doctrine of competence-competence**:** This doctrine implies that courts should abstain from considering challenges to the Tribunal's jurisdiction until arbitrators have had the opportunity to address them. Section 16 of the Arbitration Act empowers the Arbitral Tribunal to determine issues pertaining to its jurisdiction while excluding courts from intervening during arbitral proceedings.

(*viii*) Sections 8 and 11 of the Arbitration Act: The 2015 Amendment of the Arbitration Act establishes different criteria for judicial review under these sections. Section 8 focuses on the prima facie existence of a valid arbitration agreement, while Section 11 is limited to examining the mere existence of such an agreement. In Section 11(6-A) of the Arbitration Act, the phrase "examination of the existence of an arbitration agreement" is employed. The use of the term "examination" suggests that the legislature intends for the referral court to scrutinise or assess the interactions between the parties to determine the existence of an arbitration agreement. Importantly, the term "examination" does not imply a cumbersome or disputed inquiry.

(*ix*) Arbitration Act's silence on stamp duty: Although Parliament was aware of the provisions of the Stamp Act while enacting the Arbitration Act, the latter does not mandate stamping as a prerequisite for a valid arbitration agreement. Section 11(6-A) directs the Court to examine only the existence of the arbitration agreement, differing from Section 33(2) of the Stamp Act, which also mandates the examination of appropriate stamping.

Based on the above, the Supreme Court in *N.N. Global III*[34] held as below:

(*i*) Agreements lacking proper stamping or with inadequate stamping are deemed inadmissible in evidence as per Section 35 of the Stamp Act. However, such agreements are not automatically void, void ab initio, or unenforceable.

(*ii*) Non-stamping or insufficient stamping is a rectifiable/curable flaw.

(*iii*) Challenges related to stamping do not fall within the purview of determinations under Section 8 or Section 11 of the Arbitration Act. The referral court should only assess the prima facie existence of the arbitration agreement.

(*iv*) Objections regarding the stamping of the agreement fall under the jurisdiction of the Arbitral Tribunal.

(*v*) The rulings in *N.N. Global II*[35] and in *SMS Tea Estates*[36] are overturned. To that extent, the content in paras 22 and 29 of *Garware Wall Ropes*[37] are also overruled.

5. Larsen Air Conditioning & Refrigeration Co. v. Union of India[38]

A court acting under Section 34 of the Arbitration Act is not empowered to modify an arbitral award and can only set aside the same in part or in whole.

Interest, once granted by the Arbitral Tribunal in an arbitral award, cannot be modified by a court acting under Section 34 or Section 37 of the Arbitration Act.

Brief facts

A dispute arose between the appellant and the respondent based on a contract related to certain works awarded in a tender. On 22-4-1997, the respondent initiated arbitration proceedings to address the disputes. The arbitral award, issued on 21-1-1999, mandated the respondent to pay 18% interest during the dispute's pendency, along with future compound interest on specific claims. Aggrieved with the award, the respondent challenged it under Section 34 of the Arbitration Act before the District Court (Section 34 Court). However, the Section 34 Court rejected the challenge, citing its inability to act as an appellate authority over the award.

In 2003, the respondent appealed the Section 34 Court's decision. The Allahabad High Court (High Court) partially upheld the appeal, disagreeing with certain aspects of the arbitral award. It asserted that the INR 3 lakhs compensation for

the non-issuance of tender documents and subsequent business disruption should not have been granted. Additionally, the High Court contended that the case was not governed by the Arbitration Act, 1940, and thus, the 18% interest rate was inapplicable. Regarding pendente lite interest, the High Court concluded that a mere prohibition on interest under the contract did not preclude pendente lite interest. Consequently, the High Court reduced the interest rate from 18% to 9% per annum, emphasising a lack of any basis for interfering with the arbitral award.

Aggrieved with the High Court's decision, the appellant appealed to the Supreme Court of India. The moot question was whether the High Court erred in modifying the arbitral award, specifically in reducing the interest rate from 18% compound to 9% simple interest per annum.

Decision

The Supreme Court scrutinised Section 31(7)(*b*) of the Arbitration Act, amended with effect from 23-10-2015. While citing a similar case in *Shahi & Associates* v. *State of U.P.*[39], the Supreme Court observed that since the arbitration commenced in 1997, and the Arbitration Act took effect on 22-8-1996, the Arbitration Act was applicable to the present matter. In the pre-2015 Amendment provisions of Section 31(7), the statutory threshold for interest was set at 18% per annum in cases where the arbitral award did not specify a rate. The Supreme Court underscored that the High Court could not have intervened in the arbitrator's determination of this interest rate, contrasting it with the previous regime where courts had the powers and authority to modify awards.

Citing various cases[40] to delineate the restricted scope of interference in arbitration awards the Supreme Court opined that this limited jurisdiction permitted interference solely on the grounds of patent illegality. The Supreme Court stressed that as long as an arbitrator reasonably interpreted a contract term, the arbitral award remained immune to being set aside.

In summary, the Supreme Court decided to overturn the contested judgment to the extent of the modified interest rate, reinstating the interest at 18% per annum as awarded by the arbitrator on 21-1-1999. Additionally, the Supreme Court directed the respondent to settle the outstanding dues within eight weeks.

6. Hindustan Construction Co. Ltd. v. National Highways Authority of India[41]

A dissenting/minority opinion rendered in an arbitral proceeding cannot be

treated to be the award if the majority decision is set aside.

Brief facts

Disputes arose between the appellant contractor and the National Highways Authority of India (NHAI) regarding a contract for construction works related to the Allahabad bypass project. The appellant contended that the measurement method involved assessing the entire cross-section of the embankment and calculating its volume using the average end area method. Conversely, the supervising engineer employed a different approach, dividing the cross-section into soil and pond ash areas to determine the embankment's quantity. The appellant argued that this interpretation contradicted the technical specification clause in the contract, a stance opposed by NHAI. The dispute was submitted to arbitration.

Three technical experts served as arbitrators and issued a unanimous award on most issues, with a dissenting opinion on a few matters. The appellant raised objections against the unanimous and majority decisions under Section 34 of the Arbitration Act. Initially, a Single Judge ruled that the Tribunal's majority view on measurement aspects was reasonable and acceptable, warranting no interference. However, the Division Bench overturned this opinion, asserting that the majority view and award were based on an implausible interpretation of the contract.

Aggrieved with the Division Bench's decision, the appellant sought recourse in the Supreme Court of India.

Decision

The Supreme Court emphasised that the arbitrators, who were technical experts, had a profound comprehension of the intricacies within the contract and possessed practical experience as engineers overseeing similar contracts. Consequently, the Supreme Court raised doubts about the necessity of a court's intervention under Section 34 of the Arbitration Act when the prevailing consensus among these experts leaned strongly towards a unified measurement approach.

To support this understanding, the Supreme Court referred to the decision in *Voestalpine Schienen GmbH* v. *DMRC Ltd.*[42], which underscored the significance of having expert individuals serve as arbitrators, particularly when addressing technical disputes within their specific expertise. The Supreme Court highlighted that Judges typically employ a corrective lens in their decision-making process,

influenced by their training, predispositions, and background. However, when exercising jurisdiction under Section 34 of the Arbitration Act, this corrective lens was unavailable. Consequently, the Supreme Court suggested that courts should refrain from utilising primary contract interpretation as a means to facilitate a form of review explicitly prohibited by Section 34 of the Arbitration Act.

The Supreme Court unequivocally asserted that the Division Bench's exercise of appellate review, resulting in the reversal of the majority view of the Arbitral Tribunal was impermissible. This prohibition stemmed from the fact that the majority view of the arbitrators seemed reasonable, and the Supreme Court identified no compelling rationale to conclude otherwise. Additionally, the Supreme Court restated the well-established legal principle that awards incorporating reasoned interpretations of contractual terms should not be interfered with casually.

Moreover, the Supreme Court examined the significance of dissenting opinions in arbitration proceedings, particularly those involving multi-member tribunals. The Supreme Court supported the approach taken in *Dakshin Haryana Bijli Vitran Nigam Ltd.* v. *Navigant Technologies (P) Ltd.*[43] and referred to Russel on Arbitration while clarifying that a dissenting opinion is not inherently an award but can be admissible as evidence, particularly in procedural matters during challenges. Additionally, the Supreme Court cited Gary B. Born's insights on international commercial arbitration, highlighting that a dissenting opinion is a crucial element of the process, enabling parties to present their case and comprehend the Tribunal's decision.

The Supreme Court specified that a dissenting opinion cannot attain the status of an award if the majority award is set aside. Instead, it may provide valuable insights into procedural issues, which become crucial in contested hearings. Transforming a dissenting opinion into the Tribunal's findings or treating it as an award in such cases was deemed inappropriate and improper. Consequently, the Supreme Court allowed the appeal and overturned the challenged judgment, upholding and reinstating the arbitral award that was the subject of the challenge.

7. Cox and Kings Ltd. v. SAP India (P) Ltd. (Cox and Kings II)[44]

In an application in *Cox and Kings Ltd*. v. *SAP India (P) Ltd*. (*Cox and Kings I)*[45] under Section 11(6) of the Arbitration and Conciliation Act, 1996 (Arbitration Act) seeking the reference of disputes to arbitration, a three-Judge Bench of the Supreme

Court of India sought to examine the validity of the group of companies doctrine in the Indian context on the ground that it is premised more on economic efficiency rather than law. The Bench of three Judges doubted the correctness of the doctrine's application in Indian courts.

The then Chief Justice of India N.V. Ramana criticised the approach taken by another three-Judge Bench of the Supreme Court in *Chloro Controls India (P) Ltd*. v. *Severn Trent Water Purification Inc.*[46] , which relied upon the phrase "claiming through or under" in Section 45 of the Arbitration Act to adopt the group of companies doctrine.

CJI Ramana observed that the doctrine was predominantly a result of economic concepts such as tight group structure and a single economic unit, which, in his view, could not be the sole basis for binding a non-signatory to an arbitration agreement. Accordingly, CJI Ramana referred the matter to a larger Bench seeking clarification on the following questions:

(*i*) Could the phrase "claiming through or under" in Sections 8 and 11 of the Arbitration Act be interpreted to include the group of companies doctrine?

(*ii*) Is the group of companies doctrine, as expounded by *Chloro Controls*[47] and subsequent judgments, valid in law?

In his concurring opinion, Justice Surya Kant in *Cox and Kings I*[48] observed that a catena of decisions which were rendered on the group of companies doctrine adopted a rigid and restrictive approach by placing undue emphasis on formal consent and opined that the doctrine had gained a firm footing in Indian arbitral jurisprudence. However, as per Kant, J., the Supreme Court had adopted inconsistent approaches while applying the doctrine in India. Accordingly, Kant, J., culled out the following moot points for determination by a larger Bench:

(*i*) Should the group of companies doctrine be read into Section 8 of the Arbitration Act, or can it exist in Indian jurisprudence independent of any statutory provision?

(*ii*) Whether the group of companies doctrine should continue to be invoked on the basis of the principle of "single economic reality"?

(*iii*) Whether the group of companies doctrine should be construed as a means of interpreting implied consent or intent to arbitrate between the parties?

(*iv*) Can the principles of alter ego and piercing the corporate veil alone justify pressing the group of companies doctrine into operation, even in the absence of implied consent?

Following the decision in *Cox and Kings I*[49], a 5-Judge Bench of the Supreme Court of India was called upon in *Cox and Kings II*[50] to assess the validity of the group of companies doctrine and the jurisprudence surrounding the same in India. The doctrine essentially posits that an arbitration agreement made by one company within a group may extend to its non-signatory affiliates, provided the circumstances indicate a mutual intention to bind both signatories and non-signatories. The challenge presented to the Supreme Court was to determine whether the group of companies doctrine could be harmonised with established legal principles such as party autonomy, privity of contract, and separate corporate legal personality.

Decision

In *Cox and Kings II*[51], it was observed that in contemporary commercial scenarios, it is typical for a company that has signed a contract containing an arbitration clause not to be the entity negotiating or fulfilling the underlying contractual obligations. In such instances, a strict emphasis on formal consent would exclude these non-signatories from the scope of the arbitration agreement, resulting in unwarranted multiplication of proceedings and the fragmentation of disputes. As per the Supreme Court[52], multinational groups are increasingly adopting intricate corporate structures for the execution and delivery of complex commercial transactions, including construction contracts, concession contracts, licence agreements, long-term supply contracts, banking and financial transactions, and maritime contracts. These corporate structures may involve equity-based groups, joint ventures, and informal alliances. A multi-corporate structure provides flexibility for a group to implement commercially practical operational models, allowing different companies to participate at various stages of a single transaction. In this process, more often than not, individuals or entities not signatory to the underlying contract with the arbitration agreement are involved in negotiating, performing, or terminating the contract.

In view of the above analysis, the Supreme Court in *Cox and Kings II*[53] culled out the moot question that emerged: should non-signatories be excluded from arbitration proceedings, even if they were implicated in the dispute under arbitration? In view of the Supreme Court, it was only in response to this challenge, arbitration law jurisprudence evolved and embraced the group of companies doctrine, enabling or compelling a non-signatory party to be bound by an arbitration agreement. The Supreme Court also opined that in multi-party agreements, courts or Arbitral Tribunals must scrutinise the corporate structure to determine whether both signatory and non-signatory parties belong to the

same group. This assessment is fact-specific and must adhere to the relevant principles of company law. Once the existence of the corporate group is confirmed, the next step involves determining whether there was a mutual intention among all parties to bind the non-signatory to the arbitration agreement.

The Supreme Court, upon extensively examining the judicial precedents and other relevant authorities, summarised its final verdict as below:

(*i*) The definition of "parties" as per Section 2(1)(*h*) in conjunction with Section 7 of the Arbitration Act encompasses both signatory and non-signatory parties.

(*ii*) The actions of non-signatory parties may serve as an indication of their consent to be bound by the arbitration agreement.

(*iii*) The stipulation of a written arbitration agreement under Section 7 does not preclude the possibility of binding non-signatory parties.

(*iv*) Within the framework of the Arbitration Act, the term "party" holds a distinct and separate meaning from the concept of "persons claiming through or under" a party to the arbitration agreement.

(*v*) The foundation for applying the group of companies doctrine is rooted in maintaining the corporate separateness of group companies while establishing the mutual intention of the parties to bind the non-signatory party to the arbitration agreement.

(*vi*) The principle of alter ego or piercing the corporate veil cannot serve as the foundation for applying the group of companies doctrine.

(*vii*) The group of companies doctrine possesses an independent standing as a legal principle, derived from a cohesive interpretation of Section 2(1)(*h*) in conjunction with Section 7 of the Arbitration Act.

(*viii*) To invoke the group of companies doctrine, courts or Arbitral Tribunals must consider all the cumulative factors outlined in *ONGC Ltd*. v. *Discovery Enterprises (P) Ltd.*[54] Consequently, the principle of a single economic unit cannot serve as the exclusive foundation for applying the group of companies doctrine.

(*ix*) The expression "claiming through or under" in Sections 8 and 45 is intended to provide a derivative right; and it does not enable a non-signatory to become a party to the arbitration agreement. The expression "party" in Sections 2(1)(*h*) and 7 is distinct from "persons claiming through or under them".

(*x*) The Supreme Court's approach in *Chloro Controls*[55], insofar as it links the group of companies doctrine to the phrase "claiming through or under", is incorrect and contradicts established principles of contract law and corporate law.

(*xi*) The retention of the group of companies doctrine in Indian arbitration jurisprudence is advisable, given its efficacy in discerning the parties' intent in the context of intricate transactions involving numerous parties and agreements.

(*xii*) During the referral stage, the Court referring the matter should leave it to the Arbitral Tribunal to determine whether the non-signatory is bound by the arbitration agreement.

8. Chennai Metro Rail Ltd. v. Transtonnelstroy Afcons (JV)[56]

An Arbitral Tribunal will not become ineligible to act merely by attempting to revise the arbitral fee unilaterally.

An Arbitral Tribunal's mandate cannot be terminated on grounds which are not listed in the Arbitration Act.

Brief facts

In the course of an arbitration between Chennai Metro Rail Limited (Chennai Metro) and Transtonnelstroy Afcons (JV) (Afcons), a member of the Arbitral Tribunal passed away and was consequently replaced in a reconstituted Arbitral Tribunal. Subsequently, during the proceedings, the arbitral tribunal unilaterally raised the per session fee from the initially agreed INR 1,00,000 to INR 2,00,000. Chennai Metro objected to this revision, but Afcons deposited the increased fee. Concerned that Afcons' payment might result in biased treatment by the Arbitral Tribunal, Chennai Metro filed a Section 14 application under the Arbitration Act before the High Court seeking, among other things, the termination of the Arbitral Tribunal's mandate. The High Court, however, dismissed the Section 14 application. Consequently, Chennai Metro filed the present petition before the Supreme Court.

Chennai Metro referred to the decision in *ONGC Ltd.* v. *Afcons Gunanusa JV*[57], asserting that the Arbitral Tribunal's unilateral fee revision goes against the principle of party autonomy in arbitration. According to Chennai Metro, parties involved in arbitration have the freedom to determine fees, and any changes should only occur with mutual agreement. The insistence on charging the revised

fee, despite Chennai Metro's objections, was deemed by it as a potential source of bias, raising concerns about impartiality throughout the proceedings.

On the other side, Afcons challenged the validity of the Section 14 application, drawing on *HRD Corpn.* v. *GAIL*[58] to argue that such applications are only admissible when the Arbitral Tribunal's eligibility is contested based on Section 12(5) read in conjunction with the Seventh Schedule of the Act. Afcons contended that challenges related to doubts about the Arbitral Tribunal's independence or impartiality should be initially addressed to the Tribunal itself, and not directly to the Court. If unsuccessful, these grounds could then be used to challenge the award under Section 13(5) read with Section 34 of the Arbitration Act. In support of their position, Afcons cited another judgment[59], emphasising that establishing bias requires a significantly high threshold, necessitating a genuine likelihood of bias rather than mere suspicion.

Decision

The Supreme Court, upon scrutinising Sections 12, 13, 14 and 15 of the Arbitration Act, highlighted a deliberate omission of the term "bias" in favour of using expressions like "justifiable doubts about independence and impartiality" when referring to an Arbitral Tribunal.

The Supreme Court clarified that in situations where the grounds listed in the Seventh Schedule arise or are brought to one party's attention, it is automatically sufficient for that party to terminate the Arbitral Tribunal's mandate unless the objections are expressly waived by such party. Consequently, an aggrieved party has the option to directly challenge the Arbitral Tribunal's mandate in court under Section 14 of the Arbitration Act. If a party raises doubts about the independence or impartiality of the Arbitral Tribunal based on grounds set out in the Fifth Schedule, the remedy available is to first apply to the Arbitral Tribunal under Section 13(2) of the Arbitration Act. If unsuccessful, the Arbitral Tribunal must proceed with the proceedings, and only after the award is rendered can the aggrieved party challenge it under Section 34 of the Arbitration Act.

Relying on the decision in *ONGC Ltd.* v. *Afcons Gunanusa JV*[60], the Supreme Court affirmed that the Arbitral Tribunal's fee could not be revised unless agreed upon by the parties. If there's an objection, the Tribunal must revert to the agreed fee or decline to act. However, the Supreme Court emphasised that insistence on retaining the revised fee does not render the Arbitral Tribunal ineligible, and the mandate remains intact. Accordingly, Chennai Metro's application was set aside,

and the impugned order was upheld.

9. Lombardi Engg. Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.[61]

A referral court can examine if the arbitration agreement is arbitrary and violates Article 14 while considering an application under Section 11(6) of the Arbitration Act.

Brief facts

On 25 October 2019, a Switzerland-based company Lombardi Engineering Ltd. (Lombardi), entered into an agreement (agreement) with Uttarakhand Project Development and Construction Corporation Limited (UPDCC) for the provision of consultancy services linked to a hydro-electric project situated in Uttarakhand.

The aforementioned project, originally under the control of UPDCC, transitioned to the control of Uttarakhand Vidyut Nigam Limited (UVNL) via a tripartite agreement executed on 6-10-2020 (tripartite agreement). Through the tripartite agreement, the original agreement underwent novation, effectively transferring the responsibilities and commitments therein to UVNL, who succeeded UPDCC in this context.

The arbitration agreement between the parties provided, among other things, that (*i*) the party initiating arbitration must furnish a security deposit equivalent to 7% of the arbitration claim; and (*ii*) for claims amounting to INR 10 crores or less, a sole arbitrator, appointed by the Principal Secretary/Secretary (Irrigation), Government of Uttarakhand, would preside over the case.

As disputes arose between Lombardi and UVNL, Lombardi initiated the arbitration process by serving a notice to UVNL, invoking Clause 53 of the agreement and urging UVNL to designate an arbitrator. However, UVNL terminated the contract on 9-5-2022 citing alleged non-fulfilment of contractual obligations by Lombardi. Consequently, Lombardi approached the Supreme Court, seeking the appointment of an arbitrator under Section 11(6) of the Arbitration Act.

Lombardi argued primarily that UVNL's exclusive authority to appoint an arbitrator was unenforceable and contrary to the Supreme Court's decision in *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*[62], which established that a party with an interest in the dispute's outcome should not have the power to appoint a sole arbitrator. Additionally, it was asserted that the precondition for predeposit

was unjust, arbitrary, and violated Article 14 of the Indian Constitution.

In contrast, UVNL contended, among other points, that the contract's security deposit was refundable to ensure that only valid and bona fide claims were made, preventing the project's interruption due to frivolous claims. UVNL also argued that the arbitration agreement's validity ought not to be tested against the rigours of Article 14 of the Constitution while deciding the application under Section 11(6) of the Arbitration Act.

Decision

The Supreme Court rejected the claim that it could not assess the constitutionality of an arbitral clause while acting at the pre-reference stage under Section 11(6) of the Arbitration Act. The Supreme Court emphasised that all laws in India must align with the Constitution, the paramount source of law and the "grundnorm". Following the Kelsen's Pure Theory of Law, the Supreme Court outlined the three lawyers of the compliance hierarchy:

(*i*) Constitution of India.

(*ii*) Arbitration Act and any other Central/State law.

(*iii*) The arbitration agreement based on Section 7 of the Arbitration Act.

In view of the above, the Supreme Court dismissed UVNL's argument that Lombardi violated party autonomy by first agreeing to the pre-deposit clause and subsequently challenging its constitutionality.

The Supreme Court further ruled that the vague pre-deposit condition set out in the underlying arbitration agreement (*i*) violated Article 14 of the Constitution; and (*ii*) had no connection to preventing vexatious claims, contrary to UVNL's assertion. In this regard, reliance was also placed upon the decision in *ICOMM Tele Ltd.* v. *Punjab State Water Supply and Sewerage Board*[63] to highlight that if a claim is really found frivolous or vexatious, the Arbitral Tribunal can award costs under Section 31-A of the Arbitration Act. Even otherwise, deterring a party to an arbitration agreement from invoking the alternative dispute resolution process by requiring the party to predeposit certain percentage of the claim amount would not only discourage arbitration but also clog the traditional court systems.

On the validity of the portion of the arbitration clause which permitted the Principal Secretary/Secretary (Irrigation), Government of Uttarakhand, to appoint an arbitrator, the Supreme Court held it was squarely covered by the *Perkins Eastman*[64] which holds that unilateral arbitrator appointment without the other

party's consent is non est.

10. Unibros v. All India Radio[65]

An arbitral award for loss of profit without any substantial evidence is in conflict with public policy of India.

Brief facts

In the present case, the respondent granted the appellant a construction contract for the Delhi Doordarshan Bhawan, Mandi House. The project was initially set to commence on 12-4-1990 with a completion deadline of 11-4-1991. However, due to delays, the construction ultimately finished on 30-10-1994. Disputes arising from these delays led the parties to seek resolution through arbitration. The arbitrator determined that the appellant was entitled to compensation of INR 1,44,83,830, along with an 18% annual interest. This decision was based on the argument that the respondent was responsible for the project's delay. Furthermore, the appellant was retained beyond the original 12-month contract period for an additional 3½ years, causing a loss in the appellant's profit-earning capacity during this extended period. Aggrieved with the award, the respondent filed a challenge under Section 34 of the Arbitration Act.

A Single Judge set aside the initial award, and the claims were sent back to the arbitrator for reconsideration and a fresh award. The arbitrator issued a second award on 15-7-2002, reaffirming the compensation for loss of profit and interest as per the first award. However, the respondents once again objected to the second award under Section 34 of the Arbitration Act.

The Single Judge, in response to the objection, sided with the respondents, stating that the appellant failed to provide sufficient evidence to substantiate the claimed loss of profit. The absence of records detailing the alleged utilisation of resources in the contract performance, such as manpower, materials, machinery, and overheads, raised doubts about the legitimacy of the asserted losses amounting to INR 2,00,00,000. In an appeal against the Single Judge's decision, the Division Bench upheld the dismissal, holding that no evidence was presented to support the plea of loss of profit during the extended work period. Consequently, the arbitrator's findings were deemed contrary to law more specifically the provisions of the Contract Act. Aggrieved by the decision of the Division Bench, the appellant approached the Supreme Court.

Decision

The central issue presented to the Supreme Court in the appeal was whether a claim for loss of profit could prevail solely on the basis of the delay being attributable to the employer. In this regard, the Supreme Court cited *ONGC Ltd.* v. *Saw Pipes Ltd.*[66], asserting that the term "public policy of India" in Section 34 should be interpreted broadly and encompasses matters concerning public good and interest. The Supreme Court also referred to the decision in *Associated Builders*[67] holding that elements like compliance with fundamental legal principles, the need for a judicial approach, adherence to natural justice, Wednesbury test of unreasonableness, and patent illegality were a constituent element of the public policy of India.

Regarding the conflict with public policy, the Supreme Court concluded that the second award mirrored the flaws of the first. Despite the second award being phrased differently, the Supreme Court found no substantive changes and considered it an attempt to avoid mirroring the first award.

The Supreme Court asserted that any award attempting to override a binding judicial decision conflict with fundamental public policy and is unsustainable. Addressing the appellant's loss of profit claim, the Supreme Court cited *Bharat Cooking Coal Ltd.* v. *L.K. Ahuja*[68], reaffirming the requirement for adequate evidence to support such claims. It emphasised that evidence must demonstrate viable opportunities lost due to the delay and be credible. The Court specified that evidence could include contemporaneous records of potential projects, tendering opportunities declined due to delays, financial statements, and contract clauses related to delays and compensation.

The Court outlined conditions for successful loss of profit claims: (*i*) a delay not attributable to the claimant; (*ii*) the claimant's established contractor status; and (*iii*) credible evidence substantiating the claim. In the present case, the Supreme Court found the last condition unsatisfied, deeming the arbitral award illegal and in conflict with the public policy of India under Section 34(2)(*b*) of the Act. Consequently, the Supreme Court dismissed the appeal, citing a lack of merit.

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