TRINITY CHAMBERS

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Top 10 Arbitration Law Judgments [January To September 2023]

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Top 10 Arbitration Judgments [January to September 2023]

In recent times, several noteworthy judgments have been rendered by the Indian Courts in matters relating to the law of arbitration in India. Some decisions rendered from January to September 2023 that discuss the legal position concerning the interpretation and applicability of provisions of the Arbitration and Conciliation Act, 1996 have been summarised below:

1. *TATA Sons (P) Ltd. v. Siva Industries & Holdings Ltd.*

Supreme Court of India
Citation: (2023) 5 SCC 421

In terms of the amended provisions of Section 29A, arbitral tribunals in international commercial arbitrations are only expected to make an endeavour to complete the proceedings within twelve months from the date of competition of pleadings and are not bound to abide by the time limit prescribed for domestic arbitrations.

The removal of the mandatory time limit for making an arbitral award in the case of an international commercial arbitration does not confer any rights or liabilities on any party. Since Section 29A, as amended in 2019, is remedial in nature, it should be applicable to all pending arbitral proceedings as on the effective date i.e., 30 August 2019.

Brief Facts

In 2006, the applicant, *i.e.*, 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 issuance/ allotment of TTSL's shares to Siva Industries.

Thereafter, in November 2008, Tata Sons, TTSL, and NTT Docomo Inc (**Docomo**) entered into another share subscription agreement by which Docomo sought to acquire 26% shareholding of TTSL, which comprised of fresh shares and secondary shares. In this regard, Siva Industries was invited to participate in the sale of secondary shares to Docomo. Accordingly, Docomo and Siva Industries executed a share purchase agreement on 3 March 2009, whereby Docomo acquired 20.740 million equity shares of TTSL from Siva Industries. Docomo's ownership of shares of TTSL and the understanding in relation thereto between Tata Sons, TTSL, and Docomo was recorded in a Shareholders Agreement (**SHA**) dated 25 March 2009.

After that, 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**) which required Siva Industries and its promoter to purchase the shares on a pro-rata basis in the event Docomo exercised its sale option under the SHA.

Docomo instituted arbitral proceedings under the rules of the London Council for International Arbitration (LCIA) on account of certain disputes that had emerged between Tata Sons and Docomo. The arbitral tribunal rendered its award on 22 June 2016, directing Tata Sons to make payment to Docomo and acquire the shares of TTSL, which were put by Docomo.

Consequently, Tata Sons called upon Siva Industries and its promoter to make proportionate payments in terms of the Inter Se Agreement. As disputes emerged between Tata Sons and Siva Industries and its promoter, Tata Sons invoked arbitration. The arbitrator appointed by the Supreme Court entered reference on 14 February 2018. It was mutually agreed between the parties and the arbitrator that the mandate to render an award would run until 14 August 2019. In the interim, insolvency proceedings were instituted against Siva Industries, and a moratorium was announced by an order dated 5 July 2019.

On 14 December 2019, a miscellaneous application was filed by Tata Sons before the Supreme Court seeking an extension of the arbitral tribunal's mandate once the moratorium on Siva Industries was lifted. In the meantime, Section 29A of the Arbitration Act was amended with effect from 30 August 2019. Thereafter, on 3 June 2022, Siva Industries was also released from the rigours of CIRP.

Consequent to the above developments, Tata Sons filed an interlocutory application under which Tata Sons contended that as a result of amendments introduced to Section 29A of the Arbitration Act coupled with Siva Industries being released from the rigours of a moratorium, the arbitral proceedings ought to be allowed to continue automatically.

Decision

The Supreme Court culled out Section 29A of the Arbitration Act as it stood before and after the introduction of the 2019 amendment. Post the 2019 amendment, the words "*in matters other than international commercial arbitration*" were added to Section 29A(1) to carve out international commercial arbitrations from the rigours of the timeline prescribed under Section 29A for rendering the arbitral award.

Based on the reading of the pre and post 2019 amendment version of Section 29A of the Arbitration Act, the Supreme Court opined that post the 2019 amendment, in an international commercial arbitration, the arbitral tribunal is required to, at best, endeavour to render the arbitral award within 12 months. Hence, the time limit of

12 months is strictly applicable only to domestic arbitrations and is directory in nature for international commercial arbitrations.

On whether the amendments made to Section 29A would apply prospectively or retrospectively, the Supreme Court observed that removing a mandatory time limit for making an arbitral award in case of an international commercial arbitration does not have the effect of conferring any rights or liabilities. Hence, Section 29A (1) should be applicable to all pending arbitral proceedings as of the effective date, *i.e.*, 30 August 2019.

In view of the above, the sole arbitrator was directed to issue appropriate procedural directions for extension of time while at the same time endeavouring an expeditious conclusion of the arbitration.

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

Supreme Court of India
Citation: 2023 SCC OnLine SC 55

The pre-amendment version of Section 34(2)(a) would apply to arbitration proceedings commenced and concluded prior to the amendment of 2019.

In an exceptional case if it is brought to the Court that matters not contained in the record of the arbitrator are relevant to the determination of the issues arising under section 34(2)(a), then the party who has assailed the award on the grounds set out in section 34(2)(a) can be permitted to file affidavit in the form of evidence. However, the same shall be allowed only when absolutely necessary.

Brief Facts

The respondent filed an application under Section 34 of the Arbitration Act challenging an *ex-parte* arbitral award rendered against him before the Additional City Civil and Sessions Judge, Bengaluru (**Section 34 Court**). In the challenge proceedings initiated under Section 34 of the Arbitration Act, the respondent sought the permission of the Section 34 Court to adduce additional evidence. The permission to file additional documents was not granted to the respondent by the Section 34 Court. The respondent then filed a writ petition before the High Court of Karnataka (**Karnataka High Court**) seeking permission to file/ adduce additional evidence in the proceedings before the Section 34 Court. The High Court, by an order dated 1 September 2021, permitted the respondent to file additional documents.

Aggrieved by the decision of the Karnataka High Court, the appellant filed an appeal before the Supreme Court of India challenging the order granting permission to the respondent to file additional documents before the Section 34 Court. The moot question before the Supreme Court was whether a party could file additional

documents in evidence in the course of the proceedings held under Section 34 of the Arbitration Act.

The appellant argued that the order passed by the Karnataka High Court goes against the underlying purpose of amending Section 34(2)(a) of the Arbitration Act in 2019. Prior to the 2019 amendment, Section 34(2) of the Arbitration Act read that "an arbitral award could be set aside by the Court only if the (a) the party making the application furnishes proof…". By way of the 2019 amendment, the phrase "the party making the application furnishes proof" in Section 34(2)(a) was changed to "establishes on the basis of the record of the arbitral tribunal".

The appellant argued that the primary aim of the amendment introduced in 2019 was to expedite the resolution of arbitration proceedings and prevent unnecessary delays. The appellant contended that even when considering Section 34 of the Arbitration Act before the amendment, the respondent had challenged the arbitral award 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 to the instant matter. It was further argued that by the appellant that the Parliament has the authority to establish distinct procedures for obtaining the same remedy.

The appellant also emphasised that the respondents deliberately abstained from participating in the arbitral proceedings, and as a result, they should not be allowed to benefit from their own actions by presenting new evidence.

On the other hand, the respondent contended that he had challenged the constitution of the arbitral tribunal, leading to their non-participation in the arbitral proceedings and the subsequent issuance of an *ex-parte* award. Additionally, the respondent withdrew from the proceedings and filed another application alleging bias and excessive fees before the arbitral tribunal.

Decision

In the case at hand, the Supreme Court acknowledged that the arbitration proceedings were initiated, and the award was rendered by the arbitral tribunal in 1998, which was before the amendment of Section 34(2)(a) through the Arbitration and Conciliation (Amendment) Act, 2019. The Supreme Court opined that Section 34(2)(a) in its pre-amendment form would be applicable in this context. This position was taken because the 2019 amendment substantially altered the language of Section 34(2)(a). Prior to the amendment, an arbitral award could be set aside if the party making the application "furnished proof," and the conditions outlined in Section 34(2)(a) and Section 34(2)(b) were met. However, after the amendment, the phrase "furnishes proof" was replaced with "establishes on the basis of the record of the arbitral tribunal."

Therefore, the Court determined that for arbitration proceedings that were initiated and concluded prior to the 2019 amendment, the pre-amendment version of Section 34(2)(a) of the Arbitration Act would apply. In reaching this conclusion, the Court

referenced several cases, including ***Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited***[1], ***Canara Nidhi Ltd. v. M. Shashikala***[2], and ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi***[3].

The Court emphasised that these decisions established that applications under Sections 34 of the Arbitration Act are summary proceedings. An arbitral award can only be set aside based on the grounds articulated in Section 34(2)(a) and Section 34(2)(b). The objective of the Arbitration Act and its subsequent amendments has been to achieve a speedy resolution of arbitral disputes. Typically, an application to set aside an arbitral award would not necessitate anything beyond the record presented to the arbitrator. However, if there are matters not covered by such records but are relevant to the issues arising under 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 allowed when absolutely necessary, as the truth can often be ascertained by simply reading the affidavits of both parties.

In conclusion, the Supreme Court found that the High Court had not erred 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.*

Supreme Court of India
Citation: 2023 SCC OnLine SC 389

The pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. 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. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

Brief Facts

NTPC Ltd. (**NTPC**) and SPML Infra Ltd. (**SPML**) entered into a contract for certain project works (**Agreement**). In terms of the Agreement, SPML furnished a performance bank guarantee and advanced bank guarantee for a cumulative amount of INR 14,96,89,136 to secure the NTPC. Upon the successful completion of the project, NTPC issued a certificate of completion. NTPC subsequently communicated to SPML by way of a letter dated 10 April 2019 that the final payment would be released once SPML issued a no-demand certificate.

1 *Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited*, (2009) 17 SCC 796.
2 *Canara Nidhi Ltd. v. M. Shashikala*, (2019) 9 SCC 462.
3 *Emkay Global Financial Services Ltd. v. Girdhar Sondhi*, (2018) 9 SCC 49.

On 12 April 2019, SPML issued the required no-demand certificate, prompting NTPC to release the final payment of INR 1,40,00,000 in April 2019. However, the bank guarantees were not released at that time due to ongoing disputes and outstanding liabilities between the parties relating to other projects at Bongaigon, Barh, and Korba. NTPC formally notified SPML of this decision on 14 May 2019. In response, SPML raised objections, claiming a sum of INR 72,01,53,899 as recoverable liabilities from NTPC for actions attributable to NTPC.

In an effort to address the unresolved disputes arising from the Agreement, SPML wrote to NTPC on 12 June 2019, requesting the appointment of an adjudicator as prescribed by the Agreement's dispute resolution mechanism. NTPC did not take any action in response to this request from SPML. As NTPC took no action, SPML moved the Delhi High Court by filing a writ petition under Article 226 of the Constitution. The Delhi High Court, through an interim order dated 8 July 2019, directed NTPC not to invoke the bank guarantees and instructed SPML to maintain the guarantees in force.

While the writ petition was still pending, the parties managed to settle their disputes and executed a Settlement Agreement (**Settlement Agreement**). As per the Settlement Agreement, NTPC released the bank guarantees on 30 June 2020, and SPML withdrew the writ petition.

However, three weeks after the bank guarantees were released and two months after the Settlement Agreement was executed, SPML issued a letter of repudiation. SPML claimed that they had been subject to coercion and economic duress during the execution of the Settlement Agreement. Subsequently, SPML repudiated the Settlement Agreement and filed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, with the Delhi High Court on 10 October 2020. In this application, SPML also asserted that NTPC had not appointed an arbitrator despite multiple requests, which necessitated SPML's recourse to the High Court.

Decision

Upon appeal, the Supreme Court, in its ruling, extensively examined the legal framework governing pre-referral jurisdiction, both before and after the 2015 Amendment.

The Supreme Court classified pre-referral stage cases into three distinct categories:

(a) Cases requiring the Court's direct determination on aspects such as assessing the existence and validity of the arbitration agreement;

(b) Cases exclusively under the jurisdiction of the arbitral tribunal;

(c) Cases where the court may elect to decide, particularly 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 referred to as the "*accord and satisfaction approach*".

2015 amendment of the Arbitration Act

In response to the recommendations from the 256th Law Commission Report, the 2015 Amendment introduced Section 11(6A), aiming to limit the Courts' involvement at the pre-referral stage solely to the determination of the arbitration agreement's existence, "nothing more, nothing less". However, in certain cases, the Courts continued to apply the pre-2015 amendment "*accord and satisfaction*" approach.[4] Notably, in ***Vidya Drolia v. Durga Trading Corporation***[5] the Supreme Court restricted the scope of pre-referral jurisdiction under Section 11(6A) to encompass a *prima facie* examination of (i) the existence and validity of the arbitration agreement, and (ii) the arbitrability of the dispute's subject matter.

Drawing from this discussion on jurisprudence, the Court introduced an "eye of the needle" approach, involving a two-fold inquiry:

(a) The primary inquiry scrutinises the existence and validity of the arbitration agreement thoroughly.

(b) The secondary inquiry, related to arbitrability, includes a *prima facie* review of the facts, including an assessment of the genuineness of the assertion regarding arbitrability.

Based on the *prima facie* examination of the facts, the Court deemed SPML's claims to be an "afterthought," and the allegations of economic duress and coercion were found to lack genuineness. Consequently, the 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 reaching this decision, the Court emphasised that supervisory courts should not act mechanically but 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. *N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd.*

Supreme Court of India
Citation: 2023 SCC OnLine SC 495

An unstamped or insufficiently stamped arbitration agreement is not enforceable in law within the meaning of Section 2(h) of the Indian Contract Act, 1872

4 *Unique India Insurance Co. Ltd. v. Antique Art Exports Pvt. Ltd.*, (2019) 5 SCC 362.
5 *Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1.

Brief Facts

A three-judge bench of the Supreme Court in ***N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.***[6] (**N.N. Global – I**) on 11 January 2021, deliberated upon the legitimacy of an arbitration agreement contained within an unstamped or inadequately stamped contract.

The Supreme Court's ruling in N.N. Global – I emphasized on the concept that an arbitration agreement stands as an autonomous and distinct contract, entirely separate from the underlying commercial contract within which it might be embedded. This legal principle stems from the doctrine of severability or separability. According to this doctrine, when parties engage in a commercial contract that includes an arbitration clause, they are essentially entering into two distinct agreements: (i) the substantive contract outlining their respective rights and responsibilities arising from the transaction, and (ii) the arbitration agreement, which establishes their binding commitment to resolve disputes through arbitration.

In N.N. Global – I, the Supreme Court departed from the legal position set forth in the ***SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Co. Pvt. Ltd.***[7] and ***Garware Wall Ropes***[8] case. The Supreme Court opined that the absence of stamp duty payment on the underlying contract does not invalidate the arbitration agreement, meaning it remains legally valid. However, in the course of making this determination, the Supreme Court expressed reservations about the accuracy of certain conclusions reached by a similar bench in the ***Vidya Drolia v. Durga Trading Corporation***[9], which had upheld the findings in ***Garware Wall Ropes***[10] case. As a result, the Supreme Court referred the matter to a constitutional bench for an authoritative resolution of the issue.

Decision

In its majority opinion (**N.N. Global – II**), the Supreme Court relied on the key provisions of the Arbitration Act and the Stamp Act, 1899 (**Stamp Act**). The Apex Court also referred to the decision in ***Hindustan Steel Limited v. Dilip Construction Company***[11] to set out the fundamental principles regarding the stamping of legal instruments. The Supreme Court emphasized that the Stamp Act serves as a fiscal measure designed to be rigorously enforced, with its strict provisions aimed at generating and safeguarding revenue. It was underscored that

6 *N.N. Global Mercantile Private Limited v. Indo Unique Flame Limited*, (2021) 4 SCC 379.
7 *SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Co. Pvt. Ltd.*, (2011) 14 SCC 66.
8 *Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited*, (2013) 14 SCC 354.
9 *Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1.
10 *Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited*, (2013) 14 SCC 354.
11 *Hindustan Steel Limited v. Dilip Construction Company*, (1969) 1 SCC 597.

the Courts' role is to interpret the law in a manner that upholds its enforcement, rather than permitting it to be flouted without consequence.

It was also clarified that a document would only be admissible as evidence once it bears the endorsement mandated by Section 42(2) of the Stamp Act. An unstamped instrument is subject to mandatory impounding under Section 33 of the Stamp Act, and only upon the payment of the requisite penalty would the instrument be endorsed and thus enforceable under the law.

Similarly, the Supreme Court also observed that Section 35 of the Stamp Act explicitly prohibits the admission of unstamped or inadequately stamped instruments as evidence for any purpose. The Supreme Court opined that the conclusions reached in N.N. Global – I with regard to the ***SMS Tea Estates***[12] decision do not accurately reflect the law. The Supreme Court noted that the argument suggesting that an arbitration agreement, being an independent contract, remains valid even if the underlying contract lacks proper stamping, served no legitimate purpose.

The Apex Cout opined that an arbitration agreement, as an independent agreement, was indeed subject to stamp duty. The Supreme Court, expressing its majority opinion in N.N. Global – II, clarified that parties may execute transactions based on unstamped documents, and goods or services may change hands under such instruments that are otherwise subject to stamp duty. However, it was emphasized that the state will not extend legal protection through appropriate sanctions. The rights that would have been available if the instrument had been properly stamped would not exist.

5. *Larsen Air Conditioning & Refrigeration Co. v. Union of India*

Supreme Court of India
Citation: 2023 SCC OnLine SC 982

A Court acting under Section 34 of the Arbitration Act does not have powers to modify an arbitral award and can only set aside the same in part of full.

Interest once awarded 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 emerged between the appellant and the respondent stemming from a contract entered in relation to certain works awarded in a tender. On 22 April 1997, the respondent referred the disputes to arbitration. The arbitral award came to be rendered on 21 January 1999 and directed the respondents to pay an interest of 18% during the pendency of the matter along with future compound interest on certain claims. Aggrieved with the arbitral award, the respondent challenged the same in

12 *SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Co. Pvt. Ltd.*, (2011) 14 SCC 66.

proceedings instituted under Section 34 of the Arbitration Act before the District Court (**Section 34 Court**). However, the Section 34 Court dismissed the respondent's challenge citing its inability to act as an appellate authority over the award. In 2003, the respondent filed an appeal against the decision of Section 34 Court. The Allahabad High Court (**High Court**) partially upheld the appeal disagreeing with certain aspects of the arbitral award. It stated that the sum of INR 3 lakhs awarded for compensation due to the non-issuance of tender documents and the consequential business disruption could not have been granted. Furthermore, the High Court opined that the proceedings in this case were not governed by the Arbitration Act, 1940, and therefore, the 18% interest rate should not apply. The High Court also referred to a catena of decisions[13] when addressing the issue of *pendente lite* interest and concluded that the mere prohibition on awarding interest on amounts payable under the contract was insufficient to deny the payment of pendente lite interest. Consequently, the High Court reduced the interest rate from 18% to 9% per annum while emphasizing that there was no basis for interfering with the arbitral award.

Aggrieved by the judgement of the High Court, the appellant approached the Supreme Court of India. The moot point in the matter was whether the High Court erred in modifying the arbitral award to the extent that the rate of interest was reduced from 18% compound to 9% simple interest per annum.

Decision

The Supreme Court examined Section 31(7)(b) of the Arbitration Act, which was amended with effect from 23 October 2015. It was observed that this provision authorized the arbitrator to award both pre and post award interests, specifying that the awarded sum would carry an interest rate of 18% per annum until the date of payment unless provided otherwise. In this regard, the Supreme Court relied on the case of ***Shahi & Associates v. State of U.P.***[14], which had similar facts and was directly applicable to the current case.

Considering that the arbitration in this case commenced in 1997 and the Arbitration Act came into effect on 22 August 1996, the Supreme Court opined that the Arbitration Act was applicable to the present case. According to Section 31(7) of the Arbitration Act, the statutory threshold for interest rate was set at 18% per annum in cases where the arbitral award did not specify a rate of interest. The Supreme Court emphasized that the High Court could not interfere with the arbitrator's determination of this interest rate, unlike the older regime, where the Courts had powers to modify the award.

13 *K. Marappan v. TBPHLC*, (2020) 15 SCC 401; *Raveechee & Co. v. Union of India*, (2018) 7 SCC 664; and *Ambica Construction v. Union of India*, (2017) 14 SCC 323.
14 *Shahi & Associates v. State of U.P.*, (2019) 8 SCC 329.

The Supreme Court referred to various cases[15] to discuss the scope of interference in arbitration awards. Drawing from ***Associate Builders***[16], the Supreme Court explained that the Court's jurisdiction under Section 34 of the Arbitration Act was limited and narrowly circumscribed, allowing interference only on grounds of patent illegality, which must be substantial and not trivial. The Supreme Court emphasized that if an arbitrator interprets a contract term reasonably, the arbitral award cannot be set aside.

In conclusion, the Supreme Court decided to overturn the challenged judgment to the extent that it modified the interest rate and reinstated the interest at 18% per annum, as awarded by the arbitrator on 21 January 1999. The Supreme Court further directed the respondent to pay the outstanding dues within eight weeks.

6. *Hindustan Construction Company Ltd. v. National Highways Authority of India*

Supreme Court of India
Citation: 2023 SCC OnLine SC 1063

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

Certain disputes arose amongst the appellant-contractor and the National Highways Authority of India (**NHAI**) in relation to a contract for construction works pertaining to the Allahabad by-pass project. The appellant argued that the measurement method in question involved assessing the entire cross-section of the embankment and calculating its volume using the average end area method. On the other hand, the supervising engineer employed a different approach. The supervising engineer divided the cross-section area into two parts, one for soil and the other for pond ash, to determine the embankment's quantity. The appellant contended that the supervising engineer's interpretation contradicted the technical specification clause outlined in the contract. NHAI supported the supervising engineer's interpretation. The matter was escalated to arbitration.

Three technical experts were appointed as arbitrators. They issued a unanimous award on most matters, but there was a dissenting opinion on a few issues. The appellant raised objections under Section 34 of the Arbitration Act against both the unanimous and majority decisions. Initially, a single judge ruled that, concerning measurement aspects, the tribunal's majority view represented a reasonable and acceptable perspective that did not warrant interference. However, the division

15 *Associate Builders v. DDA*, (2015) 3 SCC 49, *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, and *Delhi Airport Metro Express (P) Ltd. v. DMRC*, (2022) 1 SCC 131.
16 *Associate Builders v. DDA*, (2015) 3 SCC 49.

bench overturned the single judge's opinion, asserting that the tribunal's majority view and award were grounded in an implausible interpretation of the contract.

Aggrieved by the decision of the division bench of the High Court, the appellant approached the Supreme Court of India.

Decision

The Supreme Court underscored that the technical experts acting as arbitrators possessed a deep understanding of the contractual nuances associated with the specific type of work and also had hands-on experience as engineers overseeing such contracts. Therefore, the Supreme Court questioned the role of a Court acting under Section 34 of the Arbitration Act when the prevailing consensus among the experts pointed in one direction, specifically towards a composite measurement approach.

In support of this stance, the Supreme Court relied on the case of ***Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.***[17] which highlighted the value of having expert personnel serve as arbitrators, especially in resolving technical disputes falling within their domain of expertise. The Supreme Court emphasized that judges often employ a corrective lens in their decision-making process, shaped by their training, inclinations, and experience. However, when exercising jurisdiction under Section 34 of the Arbitration Act, this corrective lens was unavailable. Consequently, the Supreme Court opined that Courts should refrain from using primary contract interpretation as a means to enable a form of review that Section 34 of the Arbitration Act explicitly prohibits.

The Supreme Court firmly held that the division bench's exercise of appellate review, which led to overturning the majority view of the arbitral tribunal, and in many instances, a unanimous view of the arbitral tribunal, was impermissible. This was because the majority view of the arbitrators appeared plausible, and the Supreme Court found no compelling reason to hold otherwise. The Supreme Court also reiterated the established legal principle that awards containing reasoned interpretations of contractual terms should not be interfered with lightly.

Furthermore, the Court delved into the relevance of dissenting opinions in arbitration proceedings, particularly those involving multi-member tribunals. The Supreme Court endorsed the approach taken in ***Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.***[18] and also referred to Russel on Arbitration, which clarified that a dissenting opinion is not inherently an award but can be admissible as evidence, primarily concerning procedural matters in case of challenges. Additionally, the Supreme Court referred to Gary B. Born's commentary on International Commercial Arbitration, emphasizing that a dissenting opinion is a

17 *Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.*, (2017) 4 SCC 665.
18 *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.*, (2021) 7 SCC 657.

crucial part of the process, allowing parties to present their case and understand the tribunal's decision.

The Court clarified that a dissenting opinion cannot be elevated to the status of an award if the majority award is set aside. Instead, it may offer valuable insights into procedural issues, which become critical when hearings are contested. Converting a dissenting opinion into a tribunal's findings or treating it as an award, in such cases, was deemed inappropriate and improper. Consequently, the Court allowed the appeal and set aside the impugned judgment. The arbitral awards that was the subject of challenge was upheld and reinstated.

7. *Yassh Deep Builders v. Sushil Kumar Singh*

High Court of Delhi
Citation: 2023 SCC OnLine Del 1499

The scope of Section 9 of the Arbitration Act does not envisage the restoration of the contract which stands terminated.

Brief Facts

The first respondent is the owner of a parcel of agricultural land (**Land**) situated in Haryana. Yassh Deep Builders (**Builder**) and the first respondent entered into a collaboration agreement (**Agreement**) in May 2018 for developing the land whereby the Builder was to undertake the development works at its own cost and expense against a consideration amount to be received as per prescribed timeline. The Builder was also required under the Agreement to apply and seek the requisite permits and approvals. In this regard, the landowner-respondent executed an irrevocable General Power of Attorney (**GPA**) in favour of the Builder to allow it to apply for requisite permits and approvals to convert the Land for the development of a residential complex. In May 2018, the Builder filed an application before the Directorate of Town and Country Planning, Haryana for grant of a license to undertake development works. In April 2019, the Builder's cheque for an amount of INR 1,46,50,000 for part payment of the security amount was dishonoured due to insufficiency of funds.

In due course, the First Supplementary Agreement (**First Supplementary Agreement**) was signed wherein the land area for development and the non-refundable earnest money were revised. The respondents alleged that the First Supplementary Agreement came to be signed to help the Builder cure the default of INR 1,46,50,000. In fact, the respondents alleged that the land area that was agreed to be developed was also reduced in the First Supplementary Agreement on this count.

Subsequently, a Second Supplementary Agreement (**Second Supplementary Agreement**) was purported to have been signed in August 2020. Eventually, the first respondent terminated the Agreement on 29 September 2021. However, the Builder claimed that it never received any such communication from the first respondent

terminating the Agreement. The Builder also vehemently disputed the execution of the Second Supplementary Agreement and stated that the same was a forged and fabricated document. As per the Builder, it was only in December 2022 that the Builder was confronted with Second Supplementary Agreement when it was informed that the property was put up for sale. Similarly, the Builder alleged that it was only in December 2022 that it was confronted with a deed of cancellation cancelling the GPA. Accordingly, the Builder filed a petition under Section 9 of the Arbitration Act, praying for orders to protect the creation of any third-party rights on the property under the Land agreed to be developed under the Agreement. The Builder also argued that under Section 10 of the Specific Relief Act, 1963 (**Specific Relief Act**), the first respondent could not evade its obligations under the Agreement.

Decision

At the outset, the Delhi High Court referred to Section 10 of the Specific Relief Act. It was observed that Section 10 of the Specific Relief Act provided for the specific performance of a contract and acts as an enabling provision for a party to seek enforcement of a contract with the intervention of the Courts. The Delhi High Court then clarified that the Courts no longer held the discretionary powers to grant specific relief as a consequence of the 2018 amendment made to the Specific Relief Act. At most, the Courts may be required to be satisfied on certain tests prior to the grant of specific relief. The Delhi High Court then placed reliance on the decision in ***Katta Sujatha Reddy v. Siddamsetty Infra Projects (P) Ltd.***[19] to hold that the amendments brought to the Specific Relief Act in 2018 were prospective and not retrospective in nature.

However, in the instant matter, the Delhi High Court, while adverting to the facts, observed that the Agreement had already been terminated. The said termination was not challenged either by the Builder or the second respondent. Thus, the moot point in the matter was whether the Builder could seek specific performance of a contract which no longer existed.

The Delhi High Court observed that in order for the Court to consider granting specific performance, it must ascertain the Builder's adherence to the continuous readiness and willingness criteria. In this regard, "readiness" pertained to the Builder's ability to fulfil the contractual obligations, while "willingness" pertained to the Builder's conduct. The Delhi High Court observed that due to the delay in obtaining the necessary license within a reasonable timeframe and the deteriorating financial position of the Builder, the Builder failed to demonstrate its readiness and willingness to fulfil the key terms of the Agreement.

Furthermore, the Delhi High Court opined that the Agreement, being a commercial transaction between private parties, is inherently determinable. Two conditions were to be met to transfer all development rights of the scheduled property, along

19 *Katta Sujatha Reddy v. Siddamsetty Infra Projects (P) Ltd.*, (2023) 1 SCC 355.

with physical possession to the Builder. The first condition, the payment of non-refundable earnest money by the Builder, was satisfied. However, the second condition, the allocation of plotted area to first respondent, could not be fulfilled due to the absence of the required license. Consequently, the question of transferring rights or physical possession did not arise.

Most importantly, the Delhi High Court observed that the Agreement's determinable nature meant that the Builder could not seek the relief of specific performance, as the same stood in conflict with the statutory prohibition outlined in Section 14(d) of the Specific Relief Act. Thus, pursuant to Section 14(d) of the Specific Relief Act, no injunction could have been issued to prevent the breach of a contract that cannot be enforced through specific performance.

Consequently, the Delhi High Court concluded that if the Builder was aggrieved by the termination of the contract and sought to challenge its validity, the Builder could resort to the arbitration clause to pursue any potential damages suffered. In view of the facts of the case, the Delhi High Court opined that the Builder was not entitled to the reliefs sought. Accordingly, the petition under Section 9 of the Arbitration Act was dismissed.

8. *Tomorrow Sales Agency Private Limited v. SBS Holdings Inc.*

High Court of Delhi
Citation: 2023 SCC OnLine Del 3191

Third-party funding is essential to ensure access to justice. In absence of third-party funding, a person having a valid claim would be unable to pursue the same for recovery of amounts that may be legitimately due.

It is essential for the third-party funders to be fully aware of their exposure. They cannot be mulcted with liability, which they have neither undertaken nor are aware of. Any uncertainty in this regard, would dissuade third party funders to fund litigation.

Brief Facts

Tomorrow Sales Agency Private Limited (**TSA**), a non-banking financial company (NBFC), was approached by three individuals/ promoters who sought funding for raising claims and representing their business – SBS Transpole Logistics Private Limited (**Claimants/ SBS Transpole**) in arbitral proceedings before the Singapore International Arbitration Centre (**SIAC**) against an entity namely SBS Holdings Inc. (**Respondent/ SBS Holdings**). TSA agreed to enter into a Bespoke Funding Agreement (**BFA**) under which the terms of funding stood finalised between TSA and the Claimants.

In the course of arbitration, the Claimants were unsuccessful and suffered an unfavourable award. As a result, the Claimants were directed to pay the entire costs of the arbitral proceedings, including the legal costs, to SBS Holdings. Eventually,

the Claimants failed to abide by the mandate of the award and failed to make due payments to SBS Holdings. Aggrieved by the non-payment of the awarded amount, SBS Holdings filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) against SBS Transpole before the High Court of Delhi (**Delhi High Court**). In the Section 9 petition, SBS Holdings sought interim reliefs and urgent measures that would enable the enforcement of the arbitral award. Amongst such reliefs, were prayers for directions to be issued to both the Claimants and TSA to (i) disclose their list of assets and (ii) secure the awarded amount.

The single judge of the Delhi High Court, allowing the Section 9 petition, directed TSA to furnish detailed disclosure of its assets and bank accounts. The single judge further restrained the Claimants and TSA from creating any third-party right, title, or interest in an unencumbered immovable asset for a sum of the awarded amount. The single judge's order came to be challenged by TSA before the division bench of the Delhi High Court.

Decision

The Delhi High Court's division bench allowed the appeal filed by TSA and set aside the impugned order to the extent it related to TSA. While the Delhi High Court accepted the argument that a non-signatory could be bound by an agreement to arbitrate in some instances, it was clarified that the instant case was not one such matter.

The Delhi High Court observed that in the present case, the award holder, *i.e.*, SBS Holdings, was attempting to enforce the award against a third-party funder (TSA), which otherwise had no liability as it never took part in the underlying arbitral proceedings. Even otherwise, the Delhi High Court opined that SBS Holdings did not demonstrate that the present case met the prescribed conditions for joinder under the SIAC Rules.

From a contractual perspective, the Delhi High Court held that none of the terms of the BFA provided for any obligation for TSA to fund an adverse award. Thus, if the Claimants are unsuccessful and suffered an award, the BFA would simply cease to be in effect.

In such circumstances, it was held that the question of enforcing an arbitral award against TSA did not arise. Accordingly, it was concluded that TSA was not obligated to pay any amounts that arose from the arbitral award rendered in the underlying arbitral proceedings.

9. *Nuovopignone International SRL v. Cargo Motors (P) Ltd.*

High Court of Delhi
Citation: 2023 SCC OnLine Del 3297

A consent foreign award rendered based on the mutually agreed settlement terms amongst the parties is enforceable under the New York Convention.

Brief Facts

Nuovopignone International SRL (**Nuovopignone**), the petitioner and the second respondent entered into an Equipment Purchase Agreement (**Agreement**). The first respondent executed a parent company guarantee (**Guarantee**) in favour of Nuovopignone and stood in the position of a guarantor for the second respondent, which is its subsidiary. Consequent to certain disputes arising between the parties under the Agreement, Nuovopignone submitted a request to refer all disputes to arbitration. In the course of arbitration, the parties settled the matters in dispute. Accordingly, the arbitral tribunal rendered a consent award (**Award**) basis the terms of a settlement agreement (**Settlement Agreement**) entered into between the parties.

As the respondents failed to comply with the terms of the Settlement Agreement and the Award, an enforcement petition was filed by Nuovopignone. The respondents argued that the enforcement petition was not maintainable and stated that a consent award was not covered under the scope of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**).

As per the respondents, the New York Convention did not contemplate awards rendered upon settlement. Hence, the enforcement action of Nuovopignone would not sustain. To buttress their submissions, the respondents relied on certain representations made by Germany and Austria captured in the Report of the Secretary General dated 31 January 1956. Both the said representations implored the international community to consider the idea of extending the scope of the New York Convention to arbitral awards arising out of settlements.

Since the requests for expansion of the terms of the New York Convention to include arbitral settlements were never given effect or incorporated, the respondents argued that consent awards fell outside the scope and ambit of the New York Convention.

To counter this proposition, Nuovopignone relied on a catena of decisions. Firstly, Nuovopignone argued that the objection that a foreign consent award could not be enforced came to be refused directly in the Supreme Court decision of ***Harendra H. Mehta v. Mukesh H. Mehta***[20]. Although the decision in ***Harendra H. Mehta***[21], came to be rendered in context of the Foreign Awards (Regulation and Enforcement) Act, 1961, Nuovopignone argued that the principles would still apply. Similarly,

20 *Harendra H. Mehta v. Mukesh H. Mehta*, (1999) 5 SCC 108.
21 *Harendra H. Mehta v. Mukesh H. Mehta*, (1999) 5 SCC 108.

Nuovopignone also referred to the decisions of the United States District Courts in ***Albtelecom SH.A v. UNIFI Communs., Inc.***[22] and ***Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corp.***[23].

Decision

At the outset, the Delhi High Court read through Article V of the New York Convention which deals with the recognition and enforcement of arbitral awards. In this regard, the Delhi High Court observed that Article V neither specifically excluded from its ambit nor did it declare that a consent award derived from a settlement between parties would fall within the scope of the New York Convention.

While it could have been true that the recommendations/ suggestions of Germany and Austria to incorporate settlement-based awards did not translate into provisions incorporated under the New York Convention, the Delhi High Court opined that the same was wholly insignificant for the purpose of answering the moot point.

The Delhi High Court then noted that none of the Articles of the New York Convention proscribed arbitral proceedings from being brought to a close on account of the parties arriving at a settlement. Accordingly, the Delhi High Court observed that it found no reason to take a contrary view to that expressed in ***Albtelecom***[24] and ***Transocean***[25].

In addition, the Delhi High Court also reviewed Article 33 of the ICC Arbitration Rules (the institutional rules under which the Award came to be rendered). It was held that Article 33 specifically dealt with awards rendered by consent of the parties. Even the UNCITRAL Model Law on International Commercial Arbitration also incorporated provisions for an award being rendered on consent of the parties. The Delhi High Court accordingly came to a conclusion that the argument of a consent award not falling within the scope of the New York Convention merited rejection.

The Delhi High Court held that there was a clear and apparent unanimity across jurisdictions for accepting the proposition that awards could be based on consent of the parties and be rendered in accordance with the settlement terms drawn between the parties. Consequently, Nuovopignone was allowed to take further steps to enforce the Award.

22 *Albtelecom SH.A v. UNIFI Communs., Inc.*, 2017 U.S. Dist. LEXIS 82154.
23 *Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corp.*, 2018 U.S. Dist. LEXIS 39494.
24 *Albtelecom SH.A v. UNIFI Communs., Inc.*, 2017 U.S. Dist. LEXIS 82154.
25 *Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corp.*, 2018 U.S. Dist. LEXIS 39494.

10. *G R Builders through its Prop. Sanjeev Kumar v. M/s Metro Speciality Hospitals Pvt. Ltd.*

High Court of Delhi
Case No.: Arb. P. 628/ 2023

The accrual of a cause of action would be of no consequence for determining the territorial jurisdiction of a Court under Section 11(6) of the Arbitration Act.

Brief Facts

The respondent issued a Letter of Intent (**LoI**) to the petitioner for certain civil works to be carried out in a hospital located in Haryana. The timeline for completion of works was 12 months from the date of issuance of the LoI. The petitioner claimed that it had completed the project in time and to the respondent's satisfaction. Nonetheless, the petitioner stated that it did not receive the complete payment and amounts under multiple heads including unpaid bills, security deposits, retention funds, etc. were still outstanding.

As per the petitioner, in accordance with the terms of the LoI, the respondent was obligated to release payments within 90 days from the date of receiving the invoice. However, despite several meetings and reminders, this requirement remained unfulfilled. On 7 April 2023, the petitioner issued a legal notice demanding the outstanding balance. In response, on 5 June 2023, the respondent informed the petitioner of the nomination/ appointment of a sole arbitrator for adjudication of disputes. The petitioner raised objections to the arbitrator's appointment through a rejoinder notice dated 12 June 2023 and also communicated these objections to the proposed arbitrator.

Accordingly, the petitioner filed a petition under Section 11(6) of the Arbitration Act seeking the appointment of an independent arbitrator. In this context, the petitioner contended that the respondent's appointment of the arbitrator did not align with the procedure outlined in the LoI which specifies that the sole arbitrator is to be appointed by the "Management Review Committee" in consultation with the petitioner/ contractor.

The respondent raised a preliminary objection regarding the jurisdiction of the Delhi High Court to hear and decide the present petition. The respondent argued that in terms of the LoI, Faridabad was designated as the place/ seat of arbitration, thereby making the High Court of Punjab and Haryana the appropriate Court with jurisdiction to entertain the Section 11 petition.

Decision

The Delhi High Court observed that an application under Section 11(6) of the Arbitration Act must be submitted to a High Court that holds supervisory jurisdiction over a Court as defined under Section 2(1)(e) of the Arbitration Act. In terms of the Supreme Court decision in ***Ravi Ranjan Developers Pvt. Ltd. v. Aditya Kumar***

Chatterjee[26], the Delhi High Court opined that the provisions under Section 11(6) and Section 2(1)(e) of the Arbitration Act must be read harmoniously to determine jurisdiction.

Thereafter, the Delhi High Court referred to the decision in ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.***[27] to hold that once a seat of arbitration is fixed, the same would be in the nature of an exclusive jurisdiction clause binding the parties to a specific court which alone could exercise the supervisory power. The observations in ***Bharat Aluminium***[28] were subsequently reiterated in ***Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.***[29], ***Hindustan Construction Company Ltd. v. NHPC Ltd.***[30], and ***BGS SGS Soma JV v. NHPC Ltd.***[31].

In view of the aforesaid legal position, the accrual of cause of action at a place for pursuing a substantive legal action was held to not be a consideration for determining jurisdiction in petitions filed under Section 11(6) of the Arbitration Act. Since the seat in the instant matter was located in Faridabad, Haryana, it was held that the Delhi High Court would lack territorial jurisdiction to entertain the petition filed under Section 11(6) of the Arbitration Act.

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26 *Ravi Ranjan Developers Pvt. Ltd. v. Aditya Kumar Chatterjee*, 2022 SCC OnLine SC 568.
27 *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.
28 *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.
29 *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*, (2020) 7 SCC 678.
30 *Hindustan Construction Company Ltd. v. NHPC Ltd.*, (2020) 4 SCC 310.
31 *BGS SGS Soma JV v. NHPC Ltd.*, (2020) 4 SCC 234.