

Appointment Of Arbitrator By High Court Instead Of Supreme Court In An International Commercial Arbitration Does Not Automatically Invalidate Arbitral Award: Delhi High Court

Authors: *Vasanth Rajasekaran and Harshvardhan Korada*

Introduction

In a recent ruling in *Hala Kamel Zabal v. Arya Trading Ltd.*¹, addressed a contentious issue regarding the validity of an arbitral award rendered in an international commercial arbitration (ICA) where the appointment of the arbitrator(s) was done by the High Court. The moot question before the High Court was whether the appointment of an arbitrator by the High Court, instead of the Supreme Court, as stipulated under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**the Act**"), rendered the resultant arbitral award invalid. This issue was examined in light of the arbitration agreement between the parties and prior Supreme Court rulings on the subject.

The High Court ruled that while the appointment of the arbitrator may have been procedurally flawed, it did not vitiate the arbitral award itself. The judgment reaffirms the doctrine that procedural objections must be raised at the earliest stage, failing which they are deemed to have been waived under the principles laid down in *Narayan Prasad Lohia v. Nikunj Kumar Lohia* [(2002) 3 SCC 572]. In this article, we navigate through the facts of the case, and the findings of the High Court.

Facts

The dispute arose between the petitioners, including Hala Kamel Zabal, and Arya Trading Ltd., regarding a shareholders' agreement executed on November 23, 2006. The agreement contained an arbitration clause that stipulated that any dispute arising between the parties would be resolved through arbitration under the Act, with the arbitrator being appointed by the Chief Justice of the Delhi High Court.

A dispute later arose between the parties, leading to arbitration proceedings. A sole arbitrator was appointed by the Chief Justice of the Delhi High Court through an order dated August 13, 2009. Following the proceedings, the arbitrator passed an award on February 14, 2012, directing the petitioners to pay Arya Trading Ltd. a sum of USD 104,190 along with interest. In return, Arya Trading Ltd. was required to transfer 6,43,865 equity shares of one of the petitioner companies to the petitioners.

Aggrieved by this award, the petitioners filed a challenge under Section 34 of the Act, contending that the appointment of the arbitrator was invalid, as the dispute was an ICA and, therefore, the appointment should have been made by the Supreme Court and not the High Court.

Arguments by the Petitioners

The petitioners, contended that the arbitral award was vitiated by the invalid appointment of the arbitrator. As per the petitioners, the appointment of an arbitrator in an ICA should

¹ 2024: DHC: 6099.

be made by the Supreme Court under Section 11(6) of the Act. Since the Chief Justice of the Delhi High Court appointed the arbitrator, the entire arbitral process stood vitiated from its inception. The petitioners relied on the principle that an order passed without jurisdiction is a nullity, as laid down in ***Hindustan Zinc Ltd. v. Ajmer Vidyut Vitran Nigam Ltd.*** [(2019) 17 SCC 82]. They argued that jurisdictional defects cannot be cured by consent or by participation in the proceedings.

Petitioner No. 1, Hala Kamel Zabal, contended that she had not received any notice under Section 21 of the Act (which marks the commencement of arbitration). Further, she was not served with any notice in the appointment proceedings before the High Court, making the arbitral proceedings a nullity.

The petitioners asserted that even though they participated in the arbitration, their challenge to the arbitrator's appointment could be raised at any stage, as it concerned a fundamental jurisdictional issue.

Arguments by the Respondents

The respondents argued that any challenge to the arbitrator's jurisdiction should have been raised at the earliest stage, as required under Section 16 of the Act. Since the petitioners participated in the arbitration without objecting, they had waived their right to challenge the appointment.

The respondents pointed out that under Section 34(2)(a)(v), an arbitral award can only be set aside if the composition of the tribunal was not in accordance with the parties' agreement. In this case, the arbitration clause explicitly stated that the arbitrator would be appointed by the Chief Justice of the Delhi High Court, which was duly followed.

The respondents relied on ***Narayan Prasad Lohia v. Nikunj Kumar Lohia*** [(2002) 3 SCC 572], where the Supreme Court held that procedural defects in an arbitrator's appointment do not necessarily invalidate an award, especially if the party fails to object at the proper stage.

The respondents contended that the petitioners had failed to show how the arbitrator's appointment had prejudiced them. They (the petitioners) had participated in the arbitration, filed counterclaims, and only raised objections after the award was passed.

High Court's Analysis and Decision

The Delhi High Court, in its analysis, recognised that the appointment of the arbitrator by the High Court was inconsistent with the requirement under Section 11(6) of the Act, which mandates that arbitrators in ICA should be appointed by the Supreme Court. However, the High Court found that this procedural irregularity did not automatically invalidate the arbitral award.

The High Court relied extensively on the ***Narayan Prasad Lohia*** judgment, which held that objections to the composition of an arbitral tribunal must be raised before the tribunal under Section 16 of the Act. Since the petitioners did not object at the appropriate stage, they were deemed to have waived their right to challenge the arbitrator's appointment.

Even otherwise, it was observed that the arbitration clause in the shareholders' agreement explicitly provided for the appointment of an arbitrator by the Chief Justice of the Delhi High Court. Since the appointment was in accordance with this clause, the petitioners could not challenge the award on the ground that it violated the agreement. The High Court observed that Section 4 of the Act states that a party who knowingly participates in arbitration without raising objections in time is deemed to have waived its right to object later. The petitioners actively participated in the arbitration, filed counterclaims, and only raised objections post-award, making their challenge legally untenable.

The High Court rejected the argument that the award was in conflict with India's fundamental public policy. While procedural irregularities existed, they did not constitute a violation of India's fundamental legal framework. In light of these findings, the Delhi High Court ruled that the appointment of the arbitrator, though procedurally flawed, did not vitiate the award. The High Court refused to set aside the arbitral award on this ground and directed the case to proceed on other remaining issues.

Comment

The ruling of the High Court reiterates a crucial principle in arbitration law, *i.e.*, procedural objections must be raised at the earliest opportunity, failing which they are deemed to have been waived. The judgment is significant for international commercial arbitration in India, as it clarifies that mere procedural defects in the appointment of an arbitrator do not automatically nullify an award. The decision also reinforces the doctrine of *kompetenz-kompetenz*, which allows an arbitral tribunal to rule on its own jurisdiction. Parties to arbitration agreements must be vigilant and assert their rights promptly to avoid losing them due to procedural default.

Contact

For any query, help or assistance, please reach out at info@trinitychambers.in or visit us at www.trinitychambers.in.

Authors

	
Vasanth Rajasekaran Founder & Head vasanth@trinitychambers.in	Harshvardhan Korada Counsel harshvardhan@trinitychambers.in