

MONTHLY ROUND-UP

NOVEMBER & DECEMBER 2022

INDIAN ARBITRATION
LAW REVIEW

SECTION 47 OF THE CPC WILL NOT BE APPLICABLE IN CASES WHERE THE MATTER IS OF EXECUTION OF ARBITRATION AWARD

In the case of *State of Tripura v. Ashes Deb*, the Tripura High Court held that in cases of enforcement of arbitration awards, Section 47 of the Code of Civil Procedure (“CPC”) which lays down certain questions to be determined by the courts granting the awards is not applicable. The Court reiterated the commercial court's ruling that the phrase "in accordance with CPC" used in Section 36 cannot be used out of context or in a manner that is contrary to other provisions of the Arbitration and Conciliation Act, 1996 (hereinafter “Act”). Section 34 of the Act would become unnecessary if Section 47 of the CPC were to be applied.

ARBITRATION CLAUSE CANNOT BE INVOKED IF THERE IS ANOTHER AGREEMENT WHICH IS INDEPENDENTLY OPERATING

In the case of *JSW Steel Limited v. Bellary Oxygen Company Private Limited & Anr.*, the Bombay High Court noted that a simple reference to a subsequent Agreement containing a clause of arbitration, will not bring about a result mentioned under Section 7(5) of the Act, to the extent up to which the arbitration Agreement was to be imposed on the subsequent Agreement. The applicant cannot avoid the second Agreement's particular exclusion of an arbitration provision by relying on the first Agreement's arbitration provision, the court said, because the two Agreements function separately and without any link.

CRIMINAL PROCEEDINGS CANNOT BE INITIATED FOR RECOVERY OF AMOUNT DUE AGAINST THE ARBITRAL ORDER

In the case of *Oil India Limited v. Ashok Kumar Bajoria*, the Calcutta High Court held that a party who has been aggrieved by the failure to make the payment required under a post-award settlement agreement should not file a criminal complaint, as doing so would be a misuse of the legal system, according to the Justice Tirthankar Ghosh bench. The Court decided that having the award carried out would be the appropriate course of action for the party.

SECTION 9 APPLICATION AGAINST CASHING UNCONDITIONAL BG; COURT TO CONSIDER ONLY TERMS OF BG

In the case of *U.P. Expressways Industrial Development Authority v. M/s. Sahakar Global Ltd.*, the Allahabad High Court held that when deciding on an application under Section 9 the Act that sought to restrain the invocation or encashment of the bank guarantee, the court was only required to take into account the terms of the bank guarantee Agreement and not the provisions in the parties' main contract which provided that the bank guarantee could not be invoked. The bench reaffirmed that if a bank guarantee is conditional, the court may issue an order of injunction prohibiting the party from encashing and invoking the bank guarantee if the terms have not been met however, if the bank guarantee is unconditional, an injunction may only be issued in instances of egregious fraud, irreparable wrongdoing, or exceptional circumstances.

ARBITRAL TRIBUNALS EXERCISING POWER UNDER SECTION 17 NOT STRICTLY BOUND BY TECHNICALITIES OF CPC

The Calcutta High Court in *Gainwell Commosales Private v. Minsol Limited*, while addressing the invocation of the Limitations clause of Section 37 of the Act, noted that arbitral tribunals cannot be strictly bound by the technicalities of the CPC when exercising their powers under Section 17 of the Act. It was held that the scope of Section 17, which provides power to Tribunals to grant interim relief, is *pari passu* to the Section 9 reliefs granted to Courts. To avoid the arbitral processes becoming infructuous and to balance the convenience of the parties, the tribunal may grant relief that is not specifically provided for in the Agreement.

OBJECTION TO JURISDICTION CANNOT BE INVOKED AT A LATER STAGE WHEN THE PARTIES PARTICIPATED IN THE ARBITRAL PROCEEDINGS WITHOUT ANY PROTEST

In the case of *State of Madhya Pradesh v. Nathuram Yadav*, the MP High Court held that objection to jurisdiction for the first time cannot be invoked under section 37 of the Act, at a later stage when the parties participated in the arbitral proceedings without any protest. The Court further noted that the award could not be revoked only since lack of an objection to the arbitration's jurisdiction at the pertinent stage.

PARTICIPATION IN ARBITRAL PROCEEDINGS, DOES NOT DISENTITLE PARTY TO CHALLENGE AWARD ON GROUND OF UNILATERAL APPOINTMENT OF ARBITRATOR

In the case of *Naresh Kanayalal Rajwani & Ors. v. Kotak Mahindra Bank Limited & Anr.* it was held that merely because a party participated in the arbitration proceedings, it is not disentitled from challenging the arbitral award on the ground that the arbitration proceedings were vitiated due to the unilateral appointment of the Arbitrator by the opposite party, falling foul of Section 12(5) read with the Seventh Schedule of the Act. Additionally, the Court ruled that Section 12(5) of the Act can only be waived in accordance with the proviso to Section 12(5).

CLAUSE MERELY PROVIDING DEPARTMENTAL REMEDIES, FOR FASTER RESOLUTION OF DISPUTES DOES NOT CONSTITUTE AN ARBITRATION AGREEMENT

The Bombay High Court in the case of *M/s. Mehra & Company v. State of Maharashtra* held that the power of appointment of arbitrator by the High Court under Section 11 of the Act, cannot be deemed to have a precedential value. However, it should not completely ignore the interpretation placed by the High Court in its previous decisions, in respect of the identical clauses contained in the Agreement, while dealing with an application under Section 11. The Court added that where a clause merely provides for departmental remedies to a contractor for faster resolution of disputes, the same would not constitute an arbitration Agreement.

CORRESPONDENCE BETWEEN PARTIES CANNOT OVERRULE CLEAR INTENTION PROVIDING FOR OPTIONAL ARBITRATION

The Bombay High Court in a recent case of *GTL Infrastructure Ltd. v. Vodafone India Ltd. (VIL)*, held that even if a clause said that the parties "may" be referred to arbitration and gave the arbitrator's ruling a binding nature, the clause did not establish an arbitration Agreement. The arbitration Agreement's mandatory nature is violated if a party is given the choice to opt out of arbitration. It further determined that the correspondence between the parties could not supersede or transcend their express intentions as expressed in the Agreement's terms. The Court noted that the Act makes no difference whether the words "Arbitration" or "Arbitrators" are used or not.

COURT EMPOWERED TO GRANT MONEY CLAIM UNDER SECTION 9 OF A&C ACT ON BASIS OF ADMITTED CLAIM

The Bombay High Court in the recent case of *J P Parekh & Son & Anr. v. Naseem Qureshi & Ors.*, has stated that the rules of the CPC do not have the same scope of authority as Section 9 of Act, which gives Courts the authority to award temporary protective orders. The Court further concluded that the applicant's clear purpose to use the arbitral procedures at the time of filing the Section 9 application must be considered by the Court when exercising its authority to provide interim measures. It further stated that the applicant's obvious purpose to submit the matter to arbitration may be determined from the relevant circumstances, including the issuance of the notice required under the Act.

TIME SPENT ON APPLICATION UNDER SECTION 8 OF A&C ACT, NOT EXCLUDABLE FOR COMPUTATION OF LIMITATION FOR COUNTER CLAIM

The time that the opposing party spent pursuing its application under Section 8 of the Act, cannot be excluded from the computation of the limitation period for the opposing party to file counterclaims before the Arbitral Tribunal, according to latest decision in the case of *Union of India v. Reliance Industries Limited* by the Delhi High Court. The Court further argued that the respondent's communication's contents did not meet Section 21 of the Act's essential requirements, and as a result, the court deemed the notices to be inaccurate.

DOCTRINE OF GROUP OF COMPANIES CANNOT IMPLEAD THIRD PARTY TO ARBITRATION

In the case of *Simran Sodhi v. Sandeep Singh*, the Court ruled that the doctrine of Group of Companies cannot be applied to implead a non-signatory third party to the arbitration, in disputes arising relating to partnership businesses. It permits the joinder to arbitration proceedings of non-signatories to the arbitration Agreement. Here, the petitioner was a Partner in a partnership firm and was endeavouring to bind the company to the arbitration Agreement between him and the respondent. This was held to be patently invalid, as a partnership cannot be likened to a company in order to apply the doctrine.

COURT WHILE CONSIDERING APPLICATION SEEKING APPOINTMENT OF ARBITRATOR CANNOT GO INTO THE QUESTION OF NOVATION OF CONTRACT

The Supreme Court in *M/s Meenakshi Solar Power Private Limited v. M/s Abhyudaya Green Economic Zones Private Limited & Ors.* reaffirmed that while examining an application seeking appointment of arbitration under Section 11 (6) of the Act, the Court cannot go into the question of novation of contract and merits of any claim involved in the arbitration. It was decided that even though the contract's performance has ceased, the contract can continue to exist for specific purposes in relation to disputes occurring under or in connection with it. The court stated that the arbitration clause is a collateral term of a contract as distinguished from its substantive terms but is still an integral part of it.

INCORPORATION BY REFERENCE OF AN ARBITRATION AGREEMENT INTO A CONTRACT

The Bombay High Court in the recent case of *JSW Steel Ltd. v. Bellary Oxygen Company Pvt. Ltd. and Anr.* has held that for the arbitration clause in an earlier Agreement to be incorporated by reference into a subsequent Agreement there should be an 'integral connection' between the two Agreements, such that the two Agreements are 'inter-dependent' on each other and in the absence of one, the other becomes 'unworkable'. The Court further stated that a mere recital or reference to the earlier Agreement would not constitute an 'integral connection' between the Agreements.

DISCRETION CANNOT PREVAIL OVER THE EXPRESS TERMS OF CONTRACT

In the case of *State of Madhya Pradesh v. Sew Construction Ltd. and Ors.*, the Hon'ble Supreme Court of India made observations on the extent to which the administrative principle of 'Discretion' can override the terms of the contract. The Court reiterated that the rights and duties of the parties are contained in the contract itself. Discretion has no place in contractual matters, unless expressly incorporated in the terms of the contract. Further, it emphasized that even if a government authority is party to the contract, there is no place for discretion.

THE REQUIREMENT OF 'NOTICE OF ARBITRATION' AS A MANDATORY REQUIREMENT FOR THE COMMENCEMENT OF ARBITRAL PROCEEDINGS

In, *Rahul Jain v. Atul Jain*, the Delhi High Court held that a notice of arbitration is a requirement in order to initiate arbitral proceedings and that an improper notice of invocation undermines the Court's authority to hear applications resulting from an arbitration. The Court decided that even if the instrument in question was a family settlement agreement, the demand for a notice of arbitration is not a simple technicality, and its absence cannot be excused.

DISCLOSURE BY ARBITRATOR UNDER SECTION 12 OF THE A&C ACT IS A MANDATORY REQUIREMENT AND CANNOT BE SUBJECTED TO THE DISCRETION OF THE ARBITRATOR

In the case, *Ram Kumar v. Shriram Transport Finance Co, Ltd*, the Delhi HC set aside the arbitral award and held that the arbitrator must disclose any information that could cast doubt on his independence or impartiality under Section 12 of the Act. The Court decided that the disclosure made by an arbitrator is a mandatory requirement under Section 12 of the Act rather than a discretionary one.

INVOKING OF CIRP WILL NOT RENDER DISPUTE NON-ARBITRABLE

In, *Brilltech Engineers Pvt Ltd v. Shapoorji Pallonji*, the Delhi HC while deciding the matter held that the petitioner had already filed a corporate insolvency application under Section 9 of the Insolvency and Bankruptcy Code of India before submitting the application for the appointment of an arbitrator and the dispute would not cease to be arbitrable as a result. The court further stated that just because a petition has been filed by the petitioner asserting that a specific amount is payable by the respondent does not mean that the claimed amount has been admitted.