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INDIAN ARBITRATION

Quarterly Roundup

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PHOENIX LEGAL

Background

Several noteworthy judgments have been rendered by Indian courts in recent times, in matters involving arbitration law. Some of the decisions that discuss and set out the legal position in relation to interpretation and applicability of provisions of the Arbitration and Conciliation Act, 1996 in the second quarter of 2020 (April – June 2020) have been summarized below:

Quippo Construction Equipment Limited v. Janardan Nirman Pvt. Limited

2020 (2) RCR (Civil) 666
Decided on: 29.04.2020

Brief Facts: The dispute was regarding non-payment of outstanding dues under the contracts entered between the parties for supply of construction equipment. The appellant sent a notice to the respondent, invoking arbitration against the respondent for recovery of outstanding dues. The respondent denied the existence of any arbitration agreement between the parties and refused to participate in the arbitral proceedings. Consequently, an ex-parte award was passed against the respondent, allowing claims of the appellant.

Thereafter, the respondent challenged the arbitral award by way of an application under Section 34 ("**Section 34 Application**") of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The Section 34 Application was dismissed for want of jurisdiction by the Court at Alipore, which held that the courts of New Delhi had the requisite jurisdiction to entertain the matter. The respondent then challenged the decision of the Court of Alipore by filing a petition before the High Court of Calcutta ("**High Court**") wherein it reiterated its case of non-existence of any arbitration agreement and further objected to the venue of arbitration being Delhi, as one of the agreements stated that the venue was Calcutta. This petition before the High Court was allowed. The appellant being aggrieved by the decision of the High Court challenged the same before the Hon'ble Supreme Court of India ("**Supreme Court**"). The moot question before the Supreme Court was whether the respondent could object to the venue of the arbitration, particularly when it failed to participate in the arbitral proceedings and raise any submission regarding the same.

Held: The Supreme Court held that the respondent was precluded from raising any submission or objection regarding the venue of the arbitration, given that it failed to participate in the proceedings before the arbitrator. The High Court of Calcutta had erred in setting aside the impugned order of the Court of Alipore. To arrive at this conclusion, the Supreme Court relied upon Section 4 of the Arbitration Act, as interpreted in the case of ***Narayan Prasad Lohia v. Nikunj Kumar Lohia and Ors [1].*** The Supreme Court observed that a conjoint reading of Section 10 and Section 16 of the Arbitration Act shows that an objection to the composition of the Arbitral Tribunal is a matter which is derogable, because a party is free to refrain from objecting within the time prescribed in Section 16(2), i.e., before filing the statement of defense. Therefore, if a party chooses not to oppose the arbitral tribunal's composition, then there will be a deemed waiver Under Section 4 of the Arbitration Act.

[1] (2002) 3 SCC 572.

Patel Engineering Ltd. v. North Eastern Electric Power Corporation Ltd. (NEEPCO)

Special Leave Petition (C) Nos. 3584-85 of 2020, Special Leave Petition (C) Nos. 3438-3439 of 2020 and Special Leave Petition (C) Nos. 3434-3435 of 2020
Decided on: 22.05.2020

Brief Facts: The respondent had filed three applications under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") challenging three arbitral awards passed in respect of contracts entered amongst the parties. The three applications under Section 34 of the Arbitration Act were rejected vide a common order by the Additional Deputy Commissioner (Judicial). Thereafter, the respondent filed three appeals under Section 37 of the Arbitration Act before the High Court of Meghalaya ("**High Court**"), which were allowed by the High Court. Aggrieved by the decision of the High Court, the petitioner preferred special leave petitions before the Hon'ble Supreme Court of India ("**Supreme Court**").

Upon hearing both the parties, the Supreme Court dismissed all the special leave petitions filed by the petitioner, indicating that it is not inclined to interfere with the judgment of the High Court.

Thereafter, the petitioner preferred review petitions before the High Court on the ground that the judgment of the High Court suffers from errors apparent on the face of the record. The petitioner asserted that the High Court had failed to take into consideration the amendments made to the Arbitration Act by the Amendment Act of 2015. The review petitions filed by the petitioner were dismissed by the impugned orders. The present special leave petitions arise out of the impugned order of the High Court which declined to entertain the review petitions filed by the petitioner for the lack for any ground for review and delay in applying for review.

Held: The Supreme Court carefully read through the judgment in ***Associate Builders[2]*** and further discussed the evolution of patent illegality as a ground for challenging an arbitral award. The Supreme Court reiterated the law laid in the case of ***Ssangyong Engineering and Construction Company Limited[3]*** to observe that the construction of the terms of the contract was primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; and that the arbitrator's view is not even a possible view to take.

The Supreme Court noted that in the present case, the High Court had referred to the judgment in Associate Builders case at length and arrived at a correct conclusion that the arbitral award can be set aside if it is patently illegal or perverse. Therefore, in conclusion, the Supreme Court held that even though the High Court referred to a ***judgment[4]*** which no longer holds good in law, the case has been rightly decided on the test set out in Associate Builders. Hence, there was no reason to interfere with the impugned orders, and the special leave petitions were dismissed.

South East Asia Marine Engineering and Constructions Ltd. v. Oil India Limited

Civil Appeal Nos. 673 and 900 of 2012
Decided on: 11.05.2020

Brief Facts: The parties in the present case had entered into a contract pursuant to a tender floated by the respondent. The contract was for well drilling and other auxiliary operations in Assam. During the subsistence of the contract, the price of High-Speed Diesel ("**HSD**"), an essential component for carrying out the contract, had increased. The appellant raised a claim against the respondent for the increase in the price of HSD, stating that the "change in law" clause of the contract had been triggered. The respondent kept rejecting the repeated requests of the appellant for reimbursement; therefore, the appellant invoked the arbitration clause.

The arbitral tribunal issued a majority award allowing the claim of the appellant along with interest from the date of award till the date of recovery of the money. The arbitral tribunal held that the circular issued by the State or Union for increase of the price of HSD might not be a 'law' in the literal sense, but it has the force of law and thus fell within the ambit of the "change in law" clause of the contract.

Aggrieved by the award, the respondent challenged the same under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The District Judge upheld the findings of the tribunal and rejected the petition of the respondent. The respondent then appealed against the order of the District Judge under Section 37 of the Arbitration Act. The High Court, by the impugned judgment, allowed the appeal and set aside the award passed by the arbitral tribunal. Hence, the present matter before the Hon'ble Supreme Court (" **Supreme Court**").

[2] Associate Builders v. Delhi Development Authority (2015) 3 SCC 49.
[3] Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI) (2019) 15 SCC 131.
[4] Oil & Natural Gas Corporation Ltd. v. Western Geco International Limited (2014) 9 SCC 263.

Held: The Supreme Court at first carefully examined how the arbitral tribunal and the High Court arrived at their respective conclusions. The arbitral tribunal held that the "change in law" clause of the contract required a liberal interpretation for assessing the expression 'law' or the change in the law.

According to the arbitral tribunal, in matters such as the present one, the beneficial rule of construction should be used to suppress mischief and advance remedies. It was not denied that an increase in operational cost is one of the subject matters of the contract enshrined in the "change in law" clause. It was also clear that at the time when the "change in law" was incorporated into the agreement, the change in oil prices was never made by any statutory legislation but only by government order, resolution or instruction, as the case may be. Therefore, the arbitral tribunal observed that the interpretation of expression 'law' or change in the law required an extended meaning to include the statutory law or any order, instruction and resolution issued by the concerned government.

The High Court, on the other hand, held that the "change in law" clause was inserted by parties in agreement to meet uncertain and unforeseen eventualities and not for revising a fixed rate within the contract. The High Court suggested that the "change in law" clause of the contract is akin to a force majeure clause and is *pari materia* to the "doctrine of frustration and supervening impossibility". In other words, the "change in law" clause was inserted keeping in mind Section 56 of the Indian Contract Act, 1872 ("**Contract Act**") which states that on the occurrence of an event which renders the performance impossible, the contract becomes void.

The Supreme Court, in its conclusion, held that it did not subscribe to either the reasons provided by the arbitral tribunal, or the High Court. It further observed that the position in ***Sumitomo Heavy Industries Limited v. Oil and Natural Gas Corporation Limited[5]*** did not apply to the present matter. In Sumitomo Heavy Industries Limited (supra) it was held that based upon the appreciation of evidence, an additional tax burden was covered within the scope of an indemnity clause. However, in the present case, there was no evidence to indicate that the parties envisaged ascribing a broad interpretation of the clause in question. Therefore, the interpretation of the arbitral tribunal to expand the meaning of "change in law" clause to include the change in the price of HSD was held to not be a possible interpretation of this contract, as the appellant did not introduce any evidence which proves the same.

Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd.

Civil Appeals Nos. 2652 and 2564 of 2006
Decided on: 02.06.2020

Brief Facts: The present dispute arose from a contract entered between the parties for the sale of copper concentrate. The dispute was concerning the dry weight of the copper concentrate delivered. The appellant invoked the arbitration clause, which contained a two-tier arbitration agreement.

The arbitration agreement provided that the dispute in the first tier was to be settled by arbitration in India. However, if either party disagreed with the result, an appeal could be made before the ICC in London. The first arbitration resulted in a NIL Award. Thereafter, the appellant filed an appeal before the ICC in London. Even before the award of the ICC was delivered, the respondent challenged the arbitration clause before the High Court of Rajasthan. The challenge before the High Court of Rajasthan resulted in an ad interim ex-parte stay granted in favour of the respondent. The ad interim ex-parte stay was ultimately vacated by the Hon'ble Supreme Court ("**Supreme Court**"), allowing the arbitral proceedings to continue.

Eventually, the arbitrator appointed by ICC delivered an award in London, allowing the claims of the appellant on several counts. When the award was sought to be enforced, the respondent objected to the enforcement. The matter after a series of litigation came before the Supreme Court wherein the moot question was whether the two-tier arbitration agreement was valid and whether the appellate award from ICC, London was enforceable. The division bench of the Supreme Court which adjudicated upon the matter arrived at a split decision, and the matter was therefore referred to a three-judge bench. The three-judge bench held that the two-tier arbitration procedure as provided in the present case was indeed valid and permissible under the laws of India. The appeals were listed again for deciding the second question as to whether the appellate award from the ICC, London was enforceable in India. Hence, the present matter.

Held: The Supreme Court, after a thorough examination of the facts of the case, held that the foreign award could be enforced in India. It observed that despite being requested time and again to appear before the tribunal and submit their response and evidence in support thereof, it is only after the arbitrator indicated that he was going to pass an award that the respondent's attorneys woke up and started asking for time to present their response. This too was granted by the learned arbitrator, by not only granting an extension of time but by extending this time even further upon a subsequent request for extension. Finally, when the legal submissions were sent even beyond the time that was given, the arbitrator took this into account and then passed his award. This being the case, on facts, the Supreme Court held that it could find no fault whatsoever with the conduct of the arbitral proceedings.

[5] Sumitomo Heavy Industries Limited v. Oil and Natural Gas Corporation Limited (2010) 11 SCC 296.

Halliburton Offshore Services Inc. v. Vedanta Limited and Ors.

O.M.P. (I) (COMM) and I.A. 3697/2020
Decided on: 20.04.2020

Brief Facts: The present matter involves a petition preferred under Section 9 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The petitioner sought interim protection against the first respondent, restraining it from encashing eight bank guarantees furnished in relation to a contract for certain development work. The petitioner asserts that it had sought an extension of time to complete the project granted by the first respondent. Although substantial work was completed before the deadline, owing to a complete lockdown post the COVID – 19 pandemic, the petitioner was inevitably handicapped and could not perform the contract.

The first respondent contended that invocation of bank guarantee could be stayed in only one circumstance under the law, i.e., in cases of egregious fraud[***6***]. The respondents further argued that the petitioner was attempting to piggyback on the COVID-19 crisis to reap benefits therefrom. Hence, the present matter as to whether the petitioner's application for interim relief could be allowed in law.

Held: The Delhi High Court ("**Court**") rejected the argument of the respondent that judicial interference with the invocation, or encashment of bank guarantees was permissible only in cases of egregious fraud. The Court relied upon a catena of decisions[***7***] to hold that there were two circumstances where invocation of bank guarantees could be interfered with. Firstly, in cases of egregious fraud and secondly, in cases where allowing the encashment of a bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.

The Court observed that the countrywide lockdown was prima facie in the nature of force majeure. Such lockdown was unprecedented and was incapable of being predicted either by the respondent or by the petitioner. Therefore, the Court was pleased to grant an ad interim injunction on the encashment of the bank guarantees by allowing the petition under Section 9 of the Arbitration Act.

Ashi Limited v. Union of India

O.M.P. 200/2015, O.M.P. 210/2015 and I.A. No. 4969/2015
Decided on: 19.05.2020

Brief Facts: The dispute here, is in relation to the suspension of a contract for the manufacture and supply of prestressed concrete ("**PSC**") sleepers. The petitioner asserted that it had to incur various expenses to maintain the factory during the timeline that the contract remained suspended. The petitioner, thereafter, filed a statement of claim before the arbitral tribunal claiming the monies expended during the suspension of the contract on various counts along with the pendente lite interest. The respondent, on the contrary, contended that the suspension of the contract was necessary given the concerns about the PSC sleeper's quality. The arbitrator decided all the issues and passed the award ("**Award**") wherein he allowed all but two of the claims pressed by the petitioner. Aggrieved by the Award, the petitioner assailed the same in the Delhi High Court ("**Court**").

Held: The Court carefully analysed the claims of the petitioner and held that the arbitral award deserved no interference. The Court reiterated the findings of the arbitrator that the respondent was entitled to suspend the contract given the defects found in the subject matter of the contract (PSC sleepers). A reference was made to the fact that a flaw in the PSC sleepers could be fatal and cause loss of lives, in case of accidents. It was observed that there need not be an explicit empowering provision for suspension of a contract where the purchaser was justified in doing so. However, the Court further held that the arbitrator correctly pointed out that such a suspension of the contract could be only for a minimal period, and there ought to be prompt action on the part of the purchaser.

On whether the arbitrator could grant pendente lite interest under Section 31(7)(a) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), it was held that the law was no longer res integra since the Arbitration Act under Section 31(7)(a) clearly stipulated that unless otherwise agreed by the parties, the tribunal may grant interest as it deems reasonable.[***8***] It was observed that the words "unless otherwise agreed by the parties" clarify that the arbitrator is bound by the contractual terms insofar as the award of interest is concerned. Therefore, where the parties had agreed that no interest should be payable, the Arbitral Tribunal cannot award interest between the date when the cause of action arose to the date of the award.[***9***]

[6] U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174; Svenska Handelsbanken v. Indian Charge Chrome (1994) 1 SCC 502; Itek Corporation v. First National Bank of Boston 566 Fed Supp 1210.

[7] Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. (2007) 8 SCC 110U.P.; Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174; Svenska Handelsbanken v. Indian Charge Chrome (1994) 1 SCC 502.

[8] Jaiprakash Associates Ltd. (JAL) v. Tehri Hydro Development Corporation India Ltd., Reliance Cellulose Products Ltd. v. ONGC Ltd. (2018) 9 SCC 266.

[9] Sree Kamatchi Amman Constructions v. Railways (2010) 8 SCC 767.

Ashwani Minda and Ors. v. U-Shin Ltd. and Ors.

OMP (I) (COMM.) 90/2020
Decided on: 12.05.2020

Brief Facts: The dispute in the present case relates to the alleged breach of a Joint Venture Agreement ("**JVA**") and a License and Technical Assistance Agreement ("**LTAA**") by the respondents. The applicants in the present case submitted before the Delhi High Court ("Court") that the first applicant had complete control over the Joint Venture ("**JV**") having a majority shareholding. However, due to the alleged breach committed by the respondents, the first applicant would lose the majority shareholding and the control over the JV. Therefore, the applicants filed a Section 9 application under the Arbitration and Conciliation Act, 1996 ("Arbitration Act") seeking interim reliefs in the form of a prohibitory interim injunction restraining the respondents from pursuing any action that would change the shareholding structure within the JV.

The respondents defended their case by arguing that they were obligated to act under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("**Takeover Code**"). The respondents also submitted that the applicants on an earlier occasion had resorted to emergency arbitration proceedings before a different forum wherein the emergency arbitrator passed a detailed order rejecting the relief sought by the applicants. Hence, it was argued that the applicants' petition was barred Section 9(3) of the Arbitration Act and the "doctrine of election"[***10***], since the applicants elected to approach the emergency arbitrator whose mandate continued to date.

Held: On the moot question as to whether the petition of the applicants was maintainable under Section 9 of the Arbitration Act, the Court held that the petition was not maintainable. The Court observed that the emergency arbitration in the present case was undisputedly an international commercial arbitration wherein the seat of arbitration was Japan and the rules applicable to the proceedings were those of the Japan Commercial Arbitration Association ("**JCAA**"). The Court relied upon the amended Section 2(2) of the Arbitration Act which provided that Sections 9, 27 and 37 of the Arbitration Act applied to international commercial arbitration even outside India unless the parties agreed to the contrary. The Court observed that Section 2(2) was founded upon the ethos of 'party autonomy' and since the parties in the present case had excluded the applicability of Part I of the Arbitration Act under the arbitration clauses, the petition of the applicants was not maintainable under Section 9 of the Arbitration Act. The Court added that even on the anvil of the doctrine of election, the applicants would fail for they had consciously chosen to proceed with the emergency arbitration proceedings.

[10] National Insurance Co. Ltd. v. Mastan and Anr. (2006) 2 SCC 641.

Union of India v. Satish Builders

O.M.P. (COMM) 156/2017
Decided on: 14.05.2020

Brief Facts: The present case involves a dispute concerning a contract entered between the parties for civil and electrification work of some CRPF quarters. The respondent awarded the contract to the appellant for a period of fifteen months. Disputes arose when the work was not completed within the stipulated time for which each of the parties placed responsibility on the other. The appellant rescinded the contract, citing delay as a reason; and consequently, the respondent invoked the arbitration.

Upon consideration of the claims and counterclaims, the arbitrator came up with a finding that the delay in completion of the contractual work was attributable to both the parties. It was observed that the repudiation of the contract was not the most appropriate remedy available to the appellant. Therefore, the arbitrator deemed it just and reasonable to consider the contract closed and proceed with the settlement of accounts in an equitable manner. Aggrieved by the decision, the appellant challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") before the Delhi High Court ("**Court**").

Held: The Court at the outset reiterated the position of law that the scope of interference under Section 34 of the Arbitration Act is extremely limited. The Court relied upon the decisions in the ***Associate Builders[11]*** and ***Ssangyong Engineering[12]*** to stress upon the principles upon which the arbitral awards must be tested. It was further observed that in the present case, the arbitrator had issued his findings in the award after appreciation of the evidence placed before him. In view of the Ssangyong Engineering dictum, the re-appreciation of evidence laid before the arbitrator was held to be beyond the scope of the proceedings under Section 34 of the Arbitration Act.

The Court also stressed upon the judgments in ***Delhi Development Authority v. Madan Construction Company[13]*** **and** ***IRCON International Limited v. Arvind Construction Company Ltd. & Anr.[14]*** to hold that an expert of technical matters was entitled to certain deference. Lastly, the Court concluded by holding that the approach of the arbitrator, treating the contract as closed and working out the rights and liabilities of parties on that basis was not an unreasonable or fanciful approach and is therefore not vulnerable to scrutiny under 34 of the Arbitration Act.

[11] Associate Builders v. Delhi Development Authority (2015) 3 SCC 49.
[12] Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (2019) 15 SCC 131.
[13] (2008) 1 Arb.LR 499.
[14] (1999) 81 DLT 268.

Spentex Industries Ltd. v. Quinn Emanuel Urquhart & Sullivan LLP

CS (OS) 568/2017
Decided on: 12.05.2020

Brief Facts: The plaintiff in the present case is a manufacturer of cotton and synthetic yarns, having a subsidiary based in the Netherlands. The defendant is an overseas law firm based in Washington DC, USA. Certain disputes had arisen between the plaintiff and its subsidiary on the one hand, and the Republic of Uzbekistan on the other. Therefore, the plaintiff approached the defendant for its legal services in connection with certain arbitration proceedings. The defendant issued an engagement letter ("**Engagement Letter**") in respect of the same, which the plaintiff and its subsidiary duly signed. When disputes arose between the plaintiff, its subsidiary and the defendant ("**Parties**") in relation to the memos/invoices raised by the defendant on the plaintiff, the defendant initiated arbitration in terms of Clause 16 of the Engagement Letter between the Parties, under the aegis of JAMS. On 01 September 2017, JAMS issued a notice for commencement of tripartite arbitration to the Parties. The plaintiff, in turn, approached the High Court seeking a declaration that the Engagement Letter, as well as the arbitration clause contained therein, are null and void, inoperative, incapable of being performed and also against the public policy of India. The defendant responded with an application under Order 7 Rule 11 of the Civil Procedure Code, 1908 read with Section 45 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") for rejection of the plaint and reference of Parties to arbitration. The Delhi High Court ("**Court**") was posed with the following moot questions:

a) Whether the suit brought by the plaintiff, seeking a declaration that the Engagement Letter, as well as the arbitration clause contained therein, are null and void, inoperative, incapable of being performed, is maintainable?
b) Whether there exists a "commercial" relationship between the Parties, being a client and law firm?
c) Whether the agreement is void on account of being a contingency fee agreement, which is barred by law in India?

Held: The court answered the first question in the affirmative but clarified that such a suit would be maintainable, only for the limited purpose of conducting an enquiry as to whether the arbitration agreement in question is null and void, inoperative and incapable of being performed. It also noted that courts have generally frowned upon suits containing vague, evasive and bald allegations to claim that the arbitration agreement between parties is null and void[***15***]. It observed that the clear practice being followed by Indian courts is to be extraordinarily circumspect and reluctant in any manner to interfere in arbitration proceedings and that the mandate is to refer parties to arbitration unless the arbitration agreement is on the face of it null and void, inoperative or incapable of being performed.

The Court then proceeded to discuss the nature of the contractual relationship between the Parties, to determine whether it would qualify as a "commercial" relationship. In terms of Section 44 of the Arbitration Act, a foreign award would mean an arbitral award arising out of a legal relationship considered as commercial under the law in force in India. However, the word "commercial" has not been defined in the Arbitration Act. The Court looked into a plethora of judgments cited by the Parties[***16***], discussing the meaning of "commercial", and finally concluded that transactions relating to services for valuable consideration would clearly qualify as commercial legal relationships, and would be covered by Section 44 of the Arbitration Act.

Lastly, the Court held that the charging of contingency fee by lawyers is prohibited under the Advocates Act, 1961 and the rules and regulations framed thereunder. However, in the present case, the defendant is a foreign law firm, not governed by the statutory regime prevailing in India, in relation to advocates. The Engagement Letter is also governed by the laws prevailing in the USA. Charging of contingency fee is not prohibited by law in the USA. Hence, the fact that the fee arrangement between the Parties involved a contingency fee is no reason to discard the Engagement Letter as being null and void.

[15] World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) PTE Ltd., (2014) 11 SCC 639; Sasan Power Ltd. v. North American Coal Corporation (India) Pvt. Ltd., (2016) 10 SCC 813.
[16] R.M. Investment and Trading Co. Pvt Ltd. vs. Boeing Co. & Anr., (1994) 4 SCC 541; New Delhi Municipal Council v. Sohan Lal Sachdev, (2000) 2 SCC 494.

Tata Advanced Systems Limited v. Telexcell Information Systems Limited

Arb. A. (COMM.) 29/2019 and I.A. 14057/2019
Decided on: 14.05.2020

Brief Facts: The present case involves an appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") challenging an interim order passed by the sole arbitrator requiring the appellant to furnish a bank guarantee.

The appellant is a leading provider of security services to various corporate entities and the government. The respondent is an advisor in the IT and telecom sector. Disputes arose amongst the parties on account of the appellant, making only partial payments to the respondent in contravention of the contractual terms. The matter was then referred to a sole arbitrator as per the arbitration clause in the contract. The arbitrator directed the appellant to file a statement showing the payments allegedly due to the respondent. The net balance that the appellant owed to the respondent was shown to be Rs. 1,39,63,482. The respondent filed an application seeking the payment of the net balance as an interim award. The arbitrator rejected respondent's prayer for an interim award but directed the appellant vide an order to furnish a bank guarantee for the unpaid 'net balance'.

The appellant challenged the order of the arbitrator asserting that it categorically disputed that any amount was payable to the respondent. Moreover, a net balance indicated in the statement of account could not be treated as an admission of liability. The next contention of the appellant was that the arbitrator failed to consider the principles for passing an order in the nature of an interim measure. Since the respondent never established that the balance of convenience was in its favour, no case was made for an interim order, especially when the respondent sought an entirely different remedy from what was granted.

The respondent, on the contrary, argued that the mere non-mentioning of Section 17 of the Arbitration Act on the application was not enough to prevent the tribunal from granting interim relief [***17***].

Held: On a careful consideration of the submissions advanced by parties, the Delhi High Court ("**Court**") held that it was a settled law that the interference by Courts in the orders of arbitral tribunals must be to the least possible extent. However, this could not be understood as laying down an absolute proposition that the orders of the tribunal are totally immune to the interference of the Courts. The Court then delved into the guiding principles for grant of relief by the arbitral tribunal under Section 17 of the Arbitration Act. It was held that in exercising discretion while granting an interim relief under Section 17 of the Arbitration Act, the tribunal should be extremely cautious. The tribunal must ensure that there was adequate material on record to show that the respondent will fritter away the subject matter of the arbitration to frustrate the award in case the claim succeeds. The Court relied upon the decision in ***Nimbus Communications Limited v. Board of Control for Cricket in India and Ors.[18]*** to hold that the tribunal has a mandate to consider the existence of a prima facie case, the balance of convenience and irreparable injury, in deciding whether it would be just in the facts of the case to grant relief.

In the present case, no application was filed by the respondent under Section 17 of the Arbitration Act. The Court noted that the respondent failed to set up a case that the appellant was about to remove its assets from the limits of the jurisdiction of the tribunal with the intent to obstruct the fruits of the award that might come to the respondent. Lastly, the Court observed that the tribunal gave no reasons for coming to a conclusion where it passed an interim order. Therefore, in view of the above considerations, the impugned order passed by the tribunal was held to be unsustainable and set aside.

[17] Court in Uppal Engg. Co. (P) LTD. v. Cimmco Birla LTD., 2005 (121) DLT 539.
[18] 2016 [44] S.T.R. 578 (Bom.).

Nangia Construction (I) Pvt. Ltd. v. National Buildings Construction Corporation Ltd.

CS (OS) 3299/2012
Decided on: 28.05.2020

Brief Facts: The arbitral proceedings in the present case arise out of an agreement between Nangia and National Buildings Construction Corporation Ltd. ("**NBCC**"). The State of Haryana had awarded a contract for the widening and strengthening of the National Highway – 1 ("**NH-1**") to NBCC which in turn awarded the work to Nangia on back to back basis. The terms of the contract were such that NBCC paid 10% of the total value of the contract as mobilisation advance, which was secured by a bank guarantee. Nangia also furnished a performance guarantee to NBCC. A controversy arose between NBCC and State of Haryana on whether the work could be sub-contracted to Nangia or not. In the meanwhile, NBCC terminated the agreement with Nangia on the grounds of alleged delay and defaults. Nangia contended that the termination of the contract was a result of the dispute between the State of Haryana and NBCC.

Thereafter, Nangia invoked Section 20 and Section 41 of the Arbitration Act, 1940 ("**Act**") and applied before the Delhi High Court ("**Court**") for reference to arbitration and an injunction against the invocation of the bank guarantees. The Court allowed Nangia's application and returned prima facie finding that NBCC had committed fraud.

In the meantime, the State of Haryana terminated its contract with NBCC and retendered the work of widening NH-1. Nangia participated in the tender floated by the State of Haryana and was successful. In arbitration proceedings invoked by NBCC, it was held that the termination of the contract by NBCC was illegal. Hence, the arbitrator directed NBCC to refund the amount invoked under the two of the bank guarantees.

NBCC challenged the first award before the Court invoking the provisions of Sections 30 and 33 of the Act. The division bench of the Court held that the arbitrator did not discuss the aspect of the unrecovered mobilisation funds and therefore, the matter was once again remanded back to a new arbitrator. The newly appointed arbitrator rejected Nangia's argument that the mobilisation advance was used to purchase machinery and resources for the contractual work. The arbitrator held that since Nangia was successful in getting the tender floated by the State of Haryana, the machinery and resources would ultimately be made available back to Nangia. Therefore, the arbitrator rejected all of Nangia's claims and directed the refund of unrecovered mobilisation advance to NBCC at an interest rate of 12% per annum.

Held: The Court emphasized upon the limited scope of interference with an arbitral award in a petition under Section 30 and 33 of the Act. The Court held that an arbitral award could be set aside under the Act if the error of finding of facts had prima facie bearing on the award and it was easily demonstrable without the necessity of carefully weighing various viewpoints. [***19***]

The Court further held that applying the tests discussed in the judgment, the impugned award was unsustainable. Several findings of the arbitrator were made with no evidence at all. Most importantly, the arbitrator just assumed without any proof that the confiscated machinery and resources were ever returned to Nangia for continuing the performance of the contract.

[19] K.P. Poulose vs. State of Kerala (1975) 2 SCC 236; State of Rajasthan vs. Puri Construction Co. Ltd. (1994) 6 SCC 485; Union of India vs. Jain Associates (1994) 4 SCC 665.

Entertainment City Ltd. v. ASPEK Media Private Ltd.

O.M.P. (T) (COMM.) 24/2020 and I.A. 4099-101/2020
Decided on: 03.06.2020

Brief Facts: In the present case, the facts are such that the parties at dispute had approached the Delhi High Court ("**Court**") for the appointment of an arbitrator. Consequent to the parties' request, the Court vide an order appointed a retired Judge of the Court as the arbitrator. The order of the Court did not fix any arbitrator's fee. It is also admitted that there was no fee fixed as payable to the arbitrator by the parties under the arbitration clause.

The arbitrator entered the reference and proceeded to hear the parties. Pursuant to the directions issued by the arbitrator, the petitioner pleaded that the fees demanded by the arbitrator infracted Section 11(14) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The arbitrator rejected the objection of the petitioner regarding the fees charged by her, relying upon the judgment in ***Delhi State Industrial Infrastructure Development Corporation Ltd. (DSIIDC) Vs. Bawana Infra Development (P) Ltd.[20].*** Aggrieved by the arbitrator's fee, the petitioner prayed before the Court through the present petition to terminate the mandate of the arbitrator. The petitioner relied upon Section 12(4) read with Section 14 of the Arbitration Act to assert that the fee which the arbitrator has required the parties to pay violates the provisions of the Arbitration Act. Therefore, the moot point is whether the fees chargeable by the arbitrator in the present case is subject to the statutory limits as argued by the petitioner.

Held: The Court first analysed Section 12 of the Arbitration Act and held that the use of the word 'only' in sub-section (3) of Section 12 evinces unmistakably that the grounds of challenging an arbitrator are limited to the two contingencies stipulated therein. The two conditions included in Section 12(3) are the existence of justifiable doubts regarding the independence of the arbitrator or the absence of the required qualifications. Concededly, neither of the situations arose in the present case.

Secondly, the Court observed that where the arbitrator's fee was charged in contravention of the provisions of the Arbitration Act, the arbitrator may be regarded as having become de jure unable to perform her or his functions. Therefore, in such cases, the mandate of such an arbitrator would be determinable under Section 14(1) of the Arbitration Act. However, in the present case, it was held that the fee charged by the arbitrator did not infract Section 11(14) of the Arbitration Act. It was observed that a similar challenge had come up before this Court in the case of ***NHPC Ltd. v. Larsen & Toubro Ltd. [21]*** in which it was noted that no rules, under Section 11(14) of the 1996 Act, had been framed by this Court. Since the same position continued, till date, the petitioner failed to justify the challenge on this count as well. Lastly, the Court considered the plea of petitioner relating to financial stringency. The petitioner had submitted that owing to the COVID-19 pandemic, the amusement parks owned by the petitioner were on the verge of dissolution. The Court held that these submissions were irrelevant to determine the matter at hand and accordingly, dismissed the petition.

[20] 2018 (4) ArbLR 168 (Delhi).
[21] Order dated 04 September 2018 in O.M.P. (T) (Comm.) 81/2018.