PHOENIX LEGAL

Indian Arbitration Quarterly Roundup

Quarterly Review of Significant Arbitration Judgments

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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 in the first quarter of 2022 that discuss the legal position concerning the interpretation and applicability of provisions of the Arbitration and Conciliation Act, 1996 have been summarised below:

1. *UHL Power Company Ltd. v. State of Himachal Pradesh*

Citation: 2022 SCC OnLine SC 19
Decision date: 7 January 2022

Arbitral tribunal has the power to grant post award interest on the interest awarded in arbitral award under the Arbitration and Conciliation Act, 1996.

Brief Facts: On 05 June 2005, the sole arbitrator had awarded a sum of INR 26,08,89,107 in favour of UHL Power Company Limited (**UHL**), the appellant, towards certain expenses claimed along with pre-claim interest capitalized annually, on the expenses so incurred. Further, compound interest was awarded in favour of UHL at a rate of 9% per annum till the date of realization of the claim. In the event the awarded amount was not realized within a period of six months from the date of making the award, future interest was awarded at a rate of 18% per annum on the principal claim with interest.

Aggrieved by the award, when the State of Himachal Pradesh, the respondent, filed a petition under Section 34 of the Arbitration Act, the Ld. Single Judge disallowed the entire claim of UHL. The judgment of the Ld. Single Judge was challenged by UHL, and an appeal was filed under Section 37 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**), before the Himachal Pradesh High Court (**High Court**). The High Court held that in the absence of any provision for interest upon interest in the contract, the arbitral tribunal does not have the power to award interest upon interest, or compound interest, either for the pre-award period or for the post-award period. Aggrieved by the judgment of the High Court, an appeal was filed by UHL before the Supreme Court.

Issues: Whether an arbitrator can grant post-award interest on the amount of interest awarded?

Decision: The appellant, UHL, relied on *Hyder Consulting (UK) Ltd. v. Governor, State of Orissa* (2015) 2 SCC 189, which overruled *State of Haryana v. S.L. Arora and Co*. (2010) 3 SCC 690. In *Hyder Consulting* the majority view was that post-award interest can be granted by an arbitrator on the interest amount awarded. To this, the Supreme Court observed that the decision in *S.L. Arora* wrongly decided that a sum directed to be paid by an arbitral tribunal and the reference to the award on the substantive claim does not refer to *pendente lite* interest awarded on the "sum directed to be paid upon award" and that in the absence of any provision of interest upon interest in the contract, the arbitral tribunal does not have the power to award interest upon interest, or compound interest either for the pre-award period or for the post-award period.

It was observed that the Parliament has the undoubted power to legislate on the subject and provide that the arbitral tribunal may award interest on the sum directed to be paid by the award, meaning a sum inclusive of principal sum adjudged and the interest, and this has been

done by Parliament in plain language. Accordingly, the findings returned by the High Court in the impugned judgment to the effect that the arbitral tribunal is not empowered to grant compound interest or interest upon interest and only simple interest can be awarded in favour of UHL on the principal amount claimed were quashed and the appeal of UHL was allowed in part.

2. Indian Oil Corporation Ltd. and Ors. v. M/s Tatpar Petroleum Centre

Case No.: Arbitration Appeal No. 80/2021
Decision date: 27 January 2022

An assertion by one party and denial of the said assertion by another is enough for germination of the concept of a dispute.

Brief Facts: An appeal was filed under Section 37(1)(b) of the Arbitration Act, before the Madhya Pradesh High Court (**High Court**), by the appellant, Indian Oil Corporation Ltd. (**IOC**) on an order passed by the Commercial Court of Jabalpur (**Court**), wherein the application of the respondent (M/s Tatpar Petroleum Centre) under Section 9 of the Arbitration Act, restraining IOC from cancelling a certain retail outlet dealership came to be allowed.

The appellant contended that it had issued a show-cause notice to the respondent for termination of dealership and also afforded the respondent a personal hearing. However, the appellant received a reply from the respondent refuting the notice. Eventually, the appellant did not take a final decision with regard to the termination. Thereby, no cause of action arose in favour of the respondent to invoke Section 9(1)(d) of the Arbitration Act. Thus, the appeal.

Issue: Whether in the absence of any termination of the dealership, any dispute arose between the rival parties to enable the respondent to invoke Section 9 of the Arbitration Act.

Decision: While addressing the above issue, the High Court dealt with the definition of "*dispute*" in detail. The High Court noted that the expression "dispute" was not defined in the Arbitration Act, though the expression finds reference in number of provisions contained in the Arbitration Act, and the principal object behind the enactment is to resolve disputes between rival parties through different modes including arbitration. After taking reference of the dictionary definition of the term, the High Court held that from meaning of expression "dispute", it is evident that for a dispute to arise there should exist an assertion/claim which is refuted by the other side. Thus, dispute would arise only where at least two rival parties have a disagreement over a particular aspect. A dispute cannot arise when only one party asserts and other remains silent. Whether the assertion made by one and the denial made by the other leaves to passing of any particular order by one of the party is not necessary for arising of a dispute. An assertion by one and denial/said assertion by another is enough for germination of the concept of a dispute.

In view of the above discussion, the High Court observed that there was no jurisdictional error committed by the Court in rendering the order under Section 9 as it is clear that on IOC issuing a show cause notice, the respondent refuted the same by way of reply. Further, in the personal hearing, as the dispute between the rival parties germinated, it gave sufficient cause of action to the respondent to invoke Section 9 of the Arbitration Act.

3. *Indian Oil Corporation Ltd. v. M/s Shree Ganesh Petroleum Rajgurunagar*

Citation: 2022 SCC OnLine SC 131
Decision date: 1 February 2022

An arbitral award would attract patently illegality if the arbitrator fails to act in terms of contract or has ignored the specific terms of a contract.

Brief Facts: The appellant, Indian Oil Corporation Ltd. (**IOC**), took a plot of land on lease for a term of 29 years from the respondents, M/s Shree Ganesh Petroleum Rajgurunagar. The lease agreement dated 20 September 2015 was valid for a term of 29 years, under which the lessee would set up a retail outlet for sale of its petroleum products at a monthly rent of INR 1750. Subsequently, the parties also entered into a dealership agreement dated 15 November 2006 under which the lessor was appointed as a dealer of the said retail outlet. Both parties executed two agreements i.e., a lease agreement and a dealership agreement. The lease agreement provided for reference of disputes to the managing director of the IOC for arbitration. As per the lease agreement, if the managing director was unable or unwilling to act as a sole arbitrator, then any other person designated or nominated by the managing director was to act as the sole arbitrator. On the other hand, the dealership agreement provided for reference of disputes to arbitration before the director (marketing) or their nominee or some other officer of IOC to act as the sole arbitrator**.** Thus, the lease agreement and the dealership agreement were two distinct agreements.

During a routine inspection, IOC noticed certain irregularities in the functioning of the retail outlet and proceeded to terminate the dealership. By a letter dated 24 August 2009, the respondent invoked the arbitration clause as provided for in the dealership agreement and requested the director (marketing) of the appellant to appoint an arbitrator. As the director (marketing) of the appellant appointed an arbitrator in terms of the dealership agreement, the respondent filed its statement of claim before the arbitrator challenging the order of termination of the dealership agreement. In addition to their prayer for setting aside of the order of termination of the dealership agreement and the prayer for damages, the respondent made an alternative prayer for amendment of the lease agreement to enhance the monthly rent of the said premises to INR 35,000 with a 20% increase after every three years. Consequently, the appellant filed its written statement to the statement of claim. Ultimately, the arbitrator passed an award observing that the dealership has been validly terminated by the lessee and cannot be restored, for it is binding between the parties. However, the arbitral tribunal accepted the alternative prayer in the SOC and increased the rent from INR 1750 per month to INR 10,000 per month, with a 10% increase after every three years w.e.f. the date of the termination of the dealership agreement. Further, the lease period was also reduced from 29 years to 19 years and 11 months.

The award was challenged by IOC under section 34 of the Arbitration Act before the District Court of Pune (**District Court**). The District Court observed that although the arbitral tribunal was not empowered to reduce the lease period, the enhancement of was justified. This order was challenged by both the parties under section 37 of the Act before the High Court of Bombay (**High Court**). The High Court, then, observed that the District Court erred in

interfering with the Award and upheld the award in its entirety. Finally, IOC challenged the award before the Supreme Court.

Issues: Whether the adjudication of the dispute under the lease agreement was beyond the jurisdiction of the arbitrator?

Decision: The Supreme Court observed that an arbitral tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to be patently illegal where the arbitral tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract. However, a distinction has to be drawn between failure to act in terms of a contract and an erroneous interpretation of the terms of a contract. An arbitral tribunal is entitled to interpret the terms and conditions of a contract, while adjudicating a dispute. An error in interpretation of a contract in a case where there is valid and lawful submission of arbitral disputes to an arbitral tribunal is an error within jurisdiction.

In this case, there were no findings rendered by the arbitral tribunal which held any condition of the dealership agreement as unconscionable. Further, the arbitral tribunal did not interfere with termination of the dealership agreement. The appellant and the respondent entered into the lease agreement in this case with their eyes open. The respondent had the option not to lease out its property to the appellant. Accordingly, the impugned award was set aside to the extent that the arbitrator had increased the monthly lease rent and reduced the period of leave.

4. *Mutha Construction v. Strategic Brand Solutions (I) Pvt. Ltd.*

Case No.: SLP (Civil) No. 1105 of 2022
Decision date: 4 February 2022

A court acting under Section 34 of the Arbitration Act can remand the matter to the arbitrator for fresh decision only if both the parties consented to the same.

Brief Facts: A party challenged an arbitration award before the High Court of Bombay (**High Court**) under Section 34 of the Arbitration Act. The High Court, by consent of the parties set aside the award and remanded the matter to the sole arbitrator to pass a fresh and reasoned award. Thereafter, the petitioner moved an application before the Ld. Single Judge seeking modification of the order, as it submitted that the consent had not been accorded for the matter being sent to the same arbitrator. However, the High Court dismissed the application.

The petitioner then filed a review petition, but the High Court rejected the same observing that the order, was in fact, passed by consent. The decision was further upheld by division bench of the High Court. Feeling aggrieved and dissatisfied with the order passed by the division bench of the High Court, the original applicant preferred a special leave petition before the Supreme Court.

Issue: Whether courts under section 34 of the Arbitration Act can remand matter to arbitrator for fresh decision?

Decision: The appellant relied on decisions such *as Kinnari Mullick and Anr. v. Ghanshyam Das Damani,* (2018) 11 SCC 328; *Dyna Technologies Private Limited v. Crompton Greaves Limited*, 2019 SCC OnLine SC 1656; and *IPay Clearing Services Private Limited v. ICICI Bank Limited,* 2022 SCC OnLine SC 4, to contend that in exercise of powers under Section 34 of the Act the appellate court cannot set aside the award on the ground that no reasons have been assigned and the matter cannot be remanded to the same arbitrator to give reasons.

The Supreme Court noted that the High Court had passed a consent order and the parties had agreed to have the award set aside and the matter remanded to the sole arbitrator for a fresh reasoned award. Therefore, the Apex Court opined that the decisions relied upon by the appellant shall not be applicable and/or be of any assistance. While dismissing the appeal, the Supreme Court held that the principle of law laid down by the Supreme Court and as relied by the appellant in the aforesaid decisions would be applicable where the appellate court decides the application under Section 34 of the Arbitration Act on merits. In the present case, both the parties agreed to have the award set aside and the matter remitted to the sole arbitrator for a fresh and reasoned award. Therefore, once the order was passed based on consent of the parties, it was not open for the petitioner to contend that the matter may not be and/or ought not to have been remanded to the same sole arbitrator.

5. *Hasmukh Prajapati v. Jai Prakash Associates Ltd. Through Its Managing Director*

Citation: Matters under Article 227 No. 6890 of 2021
Decision date: 17 February 2022

Two kinds of courts can have jurisdiction over arbitration applications i.e., (i) courts possessing the subject-matter/cause of action jurisdiction and (ii) courts where the place/seat of arbitration was designated.

Brief Facts: The dispute between the petitioner and the respondent pertained to payments in respect of an apartment. When the matter reached the stage of arbitration, the petitioner claimed that as per the agreement, in case of any dispute arising between the parties, the place of the arbitration will be at New Delhi. Subsequently, the High Court of Judicature at Allahabad (**High Court**) appointed a sole arbitrator, with the seat of the tribunal located at New Delhi. The sole arbitrator upon completion of proceedings rendered an award that partly allowed the claim of the petitioner.

Assailing the arbitral award, the respondent preferred a petition under Section 34 of Arbitration Act, before the court of district judge, Gautam Budh Nagar (Uttar Pradesh) (**District Court**) which proceeded with the case and issued notice to the petitioner. The petitioner then moved an application before the commercial court of Gautam Budh Nagar (**Commercial Court)**, questioning the legality and validity of proceedings under Section 34 at the District Court. The application filed before the commercial court came to be dismissed, following which, the petitioner approached the High Court through the present petition.

Issues: Whether the commercial court had the jurisdiction to hear the case under Section 34 of the Arbitration Act regarding the arbitral award passed by sole arbitrator, having its venue

at New Delhi, which has been specified in the arbitration agreement (not as the seat of arbitration)?

Decision: The High Court pointed out that initially, the juridical seat of arbitration, as a concept, did not find a place in the Arbitration Act of 1940. The High Court observed that while Section 20 of the Arbitration Act granted parties the autonomy to choose the 'place' of arbitration. It did so in an ambiguous manner without distinguishing between 'seat' and 'venue'. Addressing this ambiguity, the 246th Law Commission Report suggested replacing the words 'place' for 'seat' or 'venue.' However, the High Court also observed that these amendments were not enacted. As a result, the conflict between the juridical seat and jurisdiction of the court persisted along with the confusion pertaining to the distinction between 'seat' and 'venue'.

Finally, in 2009, the English judgment of *Shashoua v. Sharma* [2009] EWHC 957 (Comm), held that the seat of arbitration is to have an exclusive jurisdiction over all proceedings that arise out of the arbitration. It laid the significant *contrary indicia* test as per which a place of arbitration is a stipulation that such place shall be the seat of the arbitration and consequently determine the *lex fori* in the absence of any significant contrary indication. This position was confirmed by a division bench of the Supreme Court of India in *Roger Shashoua & Ors v. Mukesh Sharma & Ors*., (2017) 14 SCC 722. Subsequently, in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc*., (2016) 4 SCC 126 (**BALCO judgment**), the Supreme Court acknowledged that the terms 'seat' and 'place' can be used interchangeably. Further, the Apex Court also presented the principle of 'concurrent jurisdiction' that two courts can have jurisdiction over arbitration applications i.e., (i) courts possessing the subject-matter/cause of action jurisdiction and (ii) courts where the place/seat of arbitration was designated.

Accordingly, the Court noted that the arbitration agreement clearly showed that the parties agreed as per Clause 10.6 that the governing law and the jurisdiction of the courts would be vested with the courts of Gautam Budh Nagar. Hence, the High Court dismissed that the petitioner's application.

6. *Gujarat Housing Board & Anr. v. Vandemataram Projects Private Limited*

Citation: Civil Appeal No. 2093/2022
Decision date: 21 March 2022

The invocation of Article 226 of the Constitution of India for a contractual matter where there is an existing arbitration clause is not the appropriate remedy in law.

Brief Facts: Gujarat Housing Board floated a tender in the month of January 2018, the Mukhya Mantri Gruh Yojna, for the planning, designing and construction of flat type, high-rise buildings/commercial units for the various income group at Mahemdabad under the Vadodara Division. The respondents, V. Vandemataram Projects Private Limited, offered its bid to the Gujarat Housing Board (**Board**) and upon evaluation of the technical bid as well as the financial bid emerged as the successful bidder. Since the respondent was not able to commence with the work project, the Board on 7 June 2021 terminated the contract.

Aggrieved by this decision, the respondent approached the Gujarat High Court (**High Court**) for quashing and setting aside the order dated 7 June 2021.

Before High Court, objections were raised with regards to the maintainability of the writ-application on the ground of alternative remedy available to the writ-applicant in the form of invoking the arbitration clause. The High Court asked the Board to refund the amount of forfeit the entire amount INR 1,66,05,000 within a period of 15 days from the date of the receipt of the copy of the writ and also asked the Board to issue a fresh tender notice and proceed further with the project. The High Court also asked the Board to refund to the respondents the amount of INR 21,66,470 at the instance of the Board. Aggrieved by the judgment, the petitioner (Board) invoked Article 226 of the Constitution and brought the matter before the Apex Court.

Issue: Whether there is any remedy under Article 226 for contractual matters where there already exists an arbitration clause?

Decision: While setting aside the High Court's order and relegating the parties to the remedy under the Arbitration Act, the Supreme Court in its order observed that the invocation of Article 226 of the Constitution of India for a contractual matter where there was an existing arbitration clause was not the appropriate remedy nor could the High Court have examined the matter and granted the relief as granted in the instant matter.

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