NIRKA

LAW ADVISORY

Arbitration Newsletter

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SBI General Insurance Co. Ltd. v. Krish Spinning, 2024 SCC OnLine SC 1754 – *The Supreme Court provides clarification upon the Limits and Degrees of Judicial Intervention in Arbitration Proceedings* – According to the Supreme Court, when considering a Section 11(6) petition for appointing an arbitrator, the referral courts should avoid delving into a detailed examination of whether the claims raised by the applicant are time-barred. Instead, they should leave that determination to the arbitrator.

The Supreme Court has ruled that when considering a Section 11(6) petition for the appointment of an arbitrator, the referral courts should not delve into a detailed evidentiary investigation regarding whether the claims raised by the applicant are time-barred. Instead, they should leave that determination to the arbitrator.

The Court stated that the referral court should focus solely on determining whether the Section 11(6) application was filed within the three-year time limit. The bench clarified certain aspects of its previous judgment of *Arif Azim Co. Ltd. v. Aptech Ltd., (2024) 5 SCC 313*.

In the present case, the Court upheld the existing situation regarding both aspects. However, it provided clarification on the second aspect of Ariz Azim, specifically regarding claims that are clearly invalid due to time limitations. The Court made it clear that referral courts can determine whether the claims to be arbitrated are obviously invalid or not. However, the referral court does not need to conduct a detailed investigation to determine if the claims are obviously invalid or not. Instead, they should refer the question to the arbitrator for a decision.

Therefore, it is important to note that when considering the issue of limitation in exercising the powers under Section 11(6) of the Arbitration & Conciliation Act, 1996, (hereinafter "*The Act*") the referring court should focus solely on determining whether the application under Section 11(6) has been filed within the three-year time limit or not. The determination of the commencement date of the limitation period must be interpreted in accordance with the ruling in the case of Arif Azim. The approach taken in the Judgment reflects the legislative intention underlying Section 11(6A) of the Act, as well as the view expressed in *In Re: Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re, (2024) 6 SCC 1*. The aforementioned clarification was provided in response to the ruling in In Re: Interplay. The ruling emphasized the need for referral courts to exercise restraint when determining the validity of frivolous litigation or claims that are clearly time-barred and without merit.

The Court in In Re: Interplay noted that when the referral courts are faced with the task of determining the validity of claims based on evidence, the appropriate authority to make such a decision would be an arbitral Tribunal rather than the referral courts. The court, relying on the In Re: Interplay case, stated that if the referral court can recognize the lack of merit in the lawsuit based on minimal pleadings, it would be wrong to question the ability of the arbitral Tribunal to reach the same conclusion. This is especially true considering the Tribunal's access to comprehensive pleadings and evidence, which will likely allow them to make an informed decision in the early stages of the hearings.

In the case of Arif Azim Co. Ltd. v. Aptech Ltd., (2024) 5 SCC 313, the court emphasized the importance of considering the issue of limitation in relation to a petition under Section 11(6) of the Act, 1996. The court, in the decision stated that the courts should assess the aspects using a two-pronged test. Firstly, they should determine whether the petition under Section 11(6) is barred by any limitations. Secondly, they should ascertain whether the claims to be arbitrated are clearly dead claims and therefore barred by limitation at the commencement of arbitration proceedings. If either of these issues are ruled against the party seeking referral of disputes to arbitration, the court has the authority to decline the appointment of an arbitral Tribunal.

Ultimately, the court made it clear that the aforementioned clarifications should not be interpreted as impacting Arif Azim's verdict. The decision of Arif Azim will be fully enforced, regardless of the observations made in this case. The Court saw the need to clarify the law in order to align it with the changing principles of arbitration in today's world. This clarification also aims to prevent any potential conflicts between future decisions.

KLR Group Enterprises v. Madhu H.V., 2024 SCC OnLine Kar 65 - *Appeals for Ex-Parte Interim Measures allowed under Section 37 of the Arbitration Act, with Courts' Discretion in Allowing Appeals in Extraordinary Circumstances* - The Karnataka High Court division bench ruled that interim measures granted without the presence of the opposing party can be appealed under the relevant sections of the Arbitration and Conciliation Act, 1986.

The High Court ruled that ex-parte interim measures have a similar effect to final orders as they definitively deny the relief being sought. However, it was determined that interference should only occur in rare circumstances, as the party who feels wronged has the option to request the ex-parte order be revoked. Section 9 provides parties to an arbitration agreement with the option to seek specific interim measures from the court

at various stages of the arbitration process. The matter before the High Court revolved around the question of whether an order granting or refusing an ex-parte interim measure under Section 9 of the Arbitration Act can be appealed under Section 37 of the same act, or if such an appeal is prohibited under Section 13(1A) of the Commercial Courts Act, 2015.

The High Court highlighted the provisions of the Arbitration Act that deal with interim measures in arbitrable disputes and the possibility of appealing certain orders. Section 37, which was amended in 2019, begins with a non-obstante Clause and outlines the specific orders that can be appealed. The crucial issue before the Court was to determine whether the scope of "granting or refusing to grant any measure under Section 9" in Section 37 encompasses solely final orders or also ex-parte interim measures.

Rule 9 of the High Court of Karnataka Arbitration (Proceedings before the Courts) Rules, 2001, which bears resemblance to Order XXXIX Rule 3 of the CPC, specifies that ex-parte interim measures granted fall under Section 9 of the Arbitration Act. Rule 9 acknowledges the authority contained in Section 9, but does not grant it on its own.

The Court ruled that orders denying ex-parte interim measures are similar to final orders as they definitively reject the requested relief. Therefore, these orders can be appealed in accordance with Section 37 of the Arbitration Act. In the same vein, appealable orders granting ex-parte interim measures should be approached with caution, as the affected party has the option to challenge the order.

As per the ruling of the High Court, it has been determined that orders granting or refusing ex-parte interim measures under Section 9 of the Arbitration Act can be appealed under Section 37, regardless of whether they were filed before the Commercial Court. The extent of interference in such appeals was found to be restricted. Appeals against orders granting ex-parte measures should only be considered in rare circumstances.

Therefore, the case was sent back to the trial court to review the Section 9 application, the Petitioner was granted temporary protection in the meantime. It was further clarified that this temporary order should not imply the strengths of the Petitioner's claim.

BPL Ltd. v. Morgan Securities & Credits (P) Ltd., 2024 SCC OnLine Del 4893 – *Authority and Scope of the Courts' proceedings during Appeals under Section 37 delineated* – The Delhi High Court division bench emphasized that when considering an arbitration appeal under Section 37 of the Arbitration Act, the

court's role is restricted to determining if the exercise of power under Section 34 has gone beyond its intended scope. In such cases, the High Court has determined that courts are unable to conduct an independent evaluation of the merits of the award.

The Delhi High Court division bench emphasized that when considering an arbitration appeal under Section 37 of the Arbitration Act, the court's role is restricted to determining whether the exercise of power under Section 34 has gone beyond the scope of the provision. In such cases, the High Court ruled that courts are unable to conduct an independent evaluation of the merits of the award.

The division bench also determined that, according to Section 34, an award could be deemed against the public policy of India if it blatantly violated a statutory provision, lacked a fair and impartial approach, disregarded principles of natural justice, was irrational or unjust, or went against the best interests of India, justice, or morality.

The High Court cited the decision of *MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163* to establish that the level of interference allowed under Section 37 should not surpass the limitations set forth in Section 34 of the Arbitration Act. In accordance with Section 37, the courts are restricted from conducting an independent evaluation of the merits of the award. Their role is solely to determine whether the exercise of power under Section 34 has exceeded the scope of the provision. The Court also referred to the SC's decision of *NHAI v. M. Hakeem, (2021) 9 SCC 1* which clarified that the Court's authority under Section 34 does not extend to modifying or altering the terms of an award.

When discussing the concept of "public policy of India" as stated in Section 34(2)(b)(ii) of the Arbitration Act, the High Court made a reference to the case of *ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705]*, according to the which an award can be invalidated if it is clearly illegal, goes against the core principles of Indian law, undermines the interests of India, justice, or morality, or blatantly violates any substantive law of India or the Arbitration Act. The case of *S.V. Samudram v. State of Karnataka [(2024) 3 SCC 623]* was referred to, which established that an award can be considered against the public policy of India if it blatantly violates a statutory provision, lacks a fair and impartial approach, disregards principles of natural justice, is irrational or unjust, or goes against the best interests of India, justice, or morality.

The High Court examined the Petitioner's argument that it had not signed the bill discounting agreements. However, it was observed that this claim was not raised during the

arbitration or Section 34 proceedings. The High Court ruled that the sanction letters contained an arbitration Clause that had legal force on the Petitioner. In addition, the High Court observed that the Petitioner also did not contest the Arbitrator's conclusions regarding the claim amounts or identify any accounting mistakes. In addition, it was determined that the Respondent's claims fell within the applicable time frame. The High Court interpreted therefore the Petitioner's letter requesting an extension for payment as an admission of responsibility.

The High Court also discussed the Petitioner's failure to provide the post-dated cheques, highlighting that the Arbitrator had determined that this was a result of an agreement between the parties. The High Court concurred that the decisions made by both the Arbitrator and the Single Judge were grounded in evidence and devoid of any legal mistakes. The claims of non-liability or limitation made by the Petitioner were dismissed and the Respondent's right to the claims was affirmed.

The Arbitrator granted *pendente lite* interest in accordance with the parties' agreement, as specified in Section 31(7)(a) of the Arbitration Act. The transaction was a result of commercial dealings between corporate entities, with no allegations of threat, coercion, or unfair bargaining. The Arbitrator and Single Judge both reached the conclusion that the transaction in question was of a commercial nature, rather than being classified as a loan or debt.

Consequently, the appeal was dismissed by the High Court. The Arbitrator's or Single Judge's decisions were found to be free from any patent illegality or unfairness. The parties were instructed to cover their own costs.

Noble Chartering Inc v. SAIL, 2024 SCC OnLine Del 4843 – *Grounds for challenging disputed contracts defined by the court, specified that it such is only possible of the findings of the Tribunal are deemed unreasonable* – The Delhi High Court division bench ruled that the arbitral Tribunal has the authority to interpret a disputed contract, and such interpretation cannot be challenged under Section 34 of the Arbitration and Conciliation Act, 1996, unless it is deemed unreasonable.

In the disputed order, the arbitrator carefully analyzed the evidence and concluded that the Respondent's termination of the Contract of Affreightment (COA) was not justified according to Clause 62. The arbitrator determined that the Respondent did not have the right to terminate the COA without a valid reason, and that the Petitioner had the right to seek compensation for the losses caused by the breaches. The arbitrator had ruled in favor of the Petitioner.

Displeased with the decision of the sole arbitrator, the Respondent decided to challenge the award under Section 34 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") before the High Court. The judge ruled in favor of Respondent to some extent in their challenge against the arbitral Tribunal's award. The judge discovered a typographical error in the awarded sum and agreed with the Respondent's argument that the sole arbitrator had misunderstood Clause 62 of the COA. The arbitrator mistakenly believed that the ability to unilaterally terminate would make the Clause invalid. The arbitrator's interpretation that Clause 62 needed to be read in conjunction with other provisions was rejected. The interpretation of the Clause was strictly literal. The judge ruled that the arbitrator's interpretation of termination grounds was flawed, leading to the decision to set aside the damages awarded for post-termination failures. Only the damages prior to termination were upheld.

After hearing the arguments of the parties, the High Court had to consider whether the arbitrator's interpretation of Clause 62 was incorrect and if this made the award go against public policy according to Section 34(2)(b)(ii) of the Arbitration Act.

The High Court ruled that it was incorrect to argue that the COA's language could only be interpreted in a straightforward manner. The court

Unilateral Option Clauses are agreements that give one party or a group of parties (but not all of the parties) the choice between arbitration and litigation to settle a dispute are known as unilateral option provisions. These provisions are also known as sole option, asymmetrical, non-mutual, or one-sided Clauses. A unilateral option provision gives you the freedom to choose the form of dispute resolution that best suits your needs in this particular situation. These are frequently seen in finance contracts, where the lender wants to be able to defend its rights against a buyer who defaults and still have some leeway in recovering the loan.

emphasized the importance of considering the entire contract and understanding the parties' intentions, rather than relying solely on individual Clauses. The sole arbitrator had adopted a thorough approach.

The High Court ruled that the sole arbitrator has the authority to interpret contracts and is the ultimate decision-maker in such cases. The arbitrator's decisions on contract construction are not to be questioned unless they are considered implausible. The case of *Assam State Electricity Board & Ors. v. Buildworth (P.) Ltd. [(2017) 8 SCC 146]* was referred to, where it was established that the arbitral Tribunal has the authority to interpret contracts and such

interpretation is not open to merit review unless it is deemed unreasonable.

In addition, the High Court made reference to the case of *Associate Builders v. Delhi Development Authority [(2015) 3 SCC 49]*, in which the Supreme Court upheld the principle that an arbitrator's interpretation of a contract term cannot be the sole basis for overturning an award. After reviewing the relevant case laws, the High Court agreed with the sole arbitrator's interpretation of Clause 62, finding it to be reasonable and in line with the context of the COA.

The High Court ruled that the single judge did not take into account the fact that the arbitral award was part of an international commercial arbitration. In such cases, challenges based on patent illegality are not allowed under Section 34(2A) of the Arbitration & Conciliation Act. Instead, challenges should be evaluated based on whether the award is in line with the public policy of India.

In addition, it was determined that the grounds for challenging an arbitral award on public policy grounds are extremely limited. Interpreting contract terms incorrectly does not necessarily mean it violates public policy. In the case of *Ssangyong Engineering and Construction Co. Ltd. v. National Highways Authority of India [(2019) 15 SCC 13]*, the Supreme Court clarified that public policy does not encompass simple errors of interpretation. Instead, it is confined to breaches of fundamental principles of Indian law or morality.

Consequently, the High Court granted Noble's appeal and overturned the previous ruling made by the single judge. Each party was responsible for covering their own costs.

Gaurav Churiwal v. Concrete Developers LLP, 2024 SCC OnLine Cal 6951 – *Separate Appeals for the same Cause of Action from Multiple Partners of the same Entity are not allowed* - The Calcutta High Court single bench ruled that an LLP and its partners are not permitted to file separate appeals under Section 37 of the Arbitration and Conciliation Act, based on the principle of 'separate legal entity'. The application of the principle of res judicata would prevent the individual partners from raising the same issue under Section 37, if the previous appeal filed in the name of the LLP was dismissed.

In the case, the High Court analyzed whether the provisions of Section 34 of the Arbitration Act are applicable to Section 37. The Applicant made the point that the scope of an interim challenge under Section 37 should not surpass the scope of the final challenge, as Section 34 serves as the

ultimate challenge to an award. Nevertheless, the High Court dismissed this claim. The case of *GLS Foils Products (P) Ltd. v. FWS Turnit Logistic Park, 2023 SCC OnLine Del 3904* emphasized the importance of respecting well-reasoned interim measures granted by an arbitral Tribunal. It highlighted the need for caution when considering interference with such orders, particularly when they are comprehensive and carefully examined.

The High Court also emphasized that challenges under Section 37 do not need to be identical to those under Section 34. The document highlights the distinction between Section 37, which is labeled 'Appealable Orders', and Section 34, which is referred to as 'an application'. The High Court observed that Section 37 encompasses a range of orders and is not subject to the same limitations as Section 34. Thus, the challenge against an order under Section 17 would be subject to the limitations of Section 17, while an appeal against an order under Section 34 would be bound by the restrictions applicable to Section 34.

The High Court noted that the scope of a challenge under Section 37 is typically narrower compared to a challenge under Section 34, as it depends on the specific provision under which the order was issued. The appellate court must exercise caution and can only intervene in cases of clear error or obvious injustice.

The High Court also examined whether the previous appeal filed by the LLP's partners would prevent them from filing any future appeals. It has been observed that the LLP operates as an independent legal entity apart from its partners. However, the High Court ruled that the Appellants were obligated to abide by the decision of the earlier appeal since they had been given a chance to present their arguments and had taken advantage of that opportunity. The principle of res judicata was applied, which prevented the Appellants from reopening the same issues in a new appeal.

In Indian law, the principle of res judicata is codified in Section 11 of the Code of Civil Procedure, 1908. It serves as an example of how parties cannot reopen a topic in a later court proceeding once it has been determined by a competent court. "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has

been heard and finally decided by such Court," reads Section 11 of the legislation.

Consequently, the High Court opted not to delve into the details of the appeal, since the matters had already been definitively resolved in the prior appeal. As a result, the High Court rejected the appeal and did not require any payment for legal expenses.

Ambrish H. Soni v. Chetan Narendra Dhakan, 2024 SCC OnLine Bom 2280 – *Bombay High Court lays down restrictions to ensure Courts do not micromanage Arbitral Proceedings* – The Bombay High Court bench has ruled that the court should refrain from excessive interference and micromanagement of proceedings that are pending before Arbitral Tribunals. The court ruled that the extent to which the judiciary can intervene under Section 37(2)(b) of the Arbitration Act is restricted.

The court determined that the extent to which the judiciary can intervene under Section 37(2)(b) of the Arbitration Act is restricted in nature.

The Bench held the following:

i. The authority overseeing the arbitration process will refrain from interfering with the Arbitral Tribunal's decision-making, unless the Tribunal has acted in an arbitrary or capricious manner, or has disregarded established legal principles regarding the granting or denial of interlocutory injunctions.

ii. The material on which the Tribunal has based its decision cannot be reassessed as long as the Tribunal has considered it and taken a reasonable view.

iii. The authority should not impede the Tribunal's exercise of discretion, as long as the Tribunal has made a reasonable and thoughtful decision, even if one might have reached a different conclusion.

iv. The interpretation of the provisions of a contract is primarily within the domain of the Arbitral Tribunal.

v. The Court must refrain from excessive interference and micromanagement of ongoing proceedings before Arbitral Tribunals.

The High Court has established that the boundaries of judicial intervention under Section 37(2)(b) of the Arbitration Act are firmly established. The decisions it cited include *Elster Instromet B. V. vs. Mrunal Gandhi 2024BHC-OS : 1697, Max Healthcare Institute Limited vs Touch Healthcare Private Limited & Ors. 2023 : BHC-OS : 14949, Karanja Terminal & Logistics (P) Ltd. v. Sahara Dredging Ltd., 2023 SCC OnLine Bom 594, and Raymond Ltd. v. Akshaypat Singhania, 2019 SCC OnLine Bom 227*. The

bench ruled that the Court would refrain from intervening in the exercise of discretion by the Arbitral Tribunal, unless the Tribunal acted in an arbitrary or capricious manner, or disregarded established legal principles governing the granting or denial of interlocutory injunctions.

The court's ruling emphasized that once the Tribunal has considered the material and reached a plausible view, it cannot be reevaluated. The Arbitral Tribunal has the primary responsibility for interpreting the provisions of a contract, and the Court cannot excessively intervene or closely oversee proceedings that are currently before the Arbitral Tribunals.

Upon reviewing the Tribunal's order, the High Court determined that the arbitrator, after analyzing Clauses 11 and 17 of the Partnership Deed of the parties and examining the evidence, concluded that the status quo order issued by the High Court in the initial Section 9 Petition would also be applicable to the additional scope. The arbitrator's view was undoubtedly reasonable and well-supported by the evidence presented to the Tribunal.

In addition, the High Court observed that the Petitioner requested the appointment of the Court Receiver and contended that the actions of Respondent No. 1 violated the status quo order. The court ruled that an Arbitral Tribunal does not have the authority to appoint a Court Receiver, requiring the intervention of the court. **The High Court determined that the Petitioner presented a strong argument for the appointment of a Receiver, citing Respondent No. 1's clear defiance of the Tribunal's order. Thus, the High Court found it appropriate to designate the Court Receiver.**

Arbitral Tribunals have the sole authority to decide upon any case that has been brought to them under the internationally recognized principle of Kompetenz-Kompetenz, which gives Tribunals the power and authority to decide on their own jurisdiction.

In Indian Law, the principle of Kompetenz-Kompetenz is incorporated in Section 16 of the Arbitration and Conciliation Act, 1996, based on Article 16 of the UNCITRAL Model Laws, with the intent to save time and money of the parties to the dispute, ensure expediency in the arbitration procedure, and minimizes the interference of the judiciary in the arbitration proceedings.

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