



Arbitration Newsletter

June 2024

Deepak Maurya vs. Saraswathi Supari Processing Unit & Ors. MANU/DEOR/89868/2023 – The Delhi High Court while hearing a Petition u/s 11(6) of the Arbitration Act, underscores the importance of demonstrating the existence of arbitrable disputes and a valid arbitration agreement by the Petitioner, before the Court can refer the matter to arbitral tribunal observing that the Court should not behave in a mechanical manner.

The Petitioner entered into a Tripartite Agreement with the Respondents for the delivery of 1500 metric tons of Areca Nuts. However, the initial delivery of 150 metric tons of Areca Nuts by the Respondents was of unsatisfactory and defective quality. Even after a Settlement Agreement was reached between the Petitioner and the Respondents, the Respondents pursued legal action under Section 138 of the Negotiable Instruments Act, 1881, against the Petitioner alleging non-payment despite furnishing post-dated cheques by the Petitioner to settle the dispute. The Petitioner then initiated arbitration proceedings per the arbitration clause in the Tripartite Agreement and nominated three arbitrators. However, did not receive any response from the Respondents.

Consequently, the Petitioner sought the Delhi High Court's intervention for appointment of an arbitrator. But Respondent no. 1 challenged the petition's validity, claiming the absence of a valid arbitration agreement as per Section 7 of the

Arbitration and Conciliation Act, 1996 (“the Act”), arguing that a mere mention of an arbitration clause is insufficient.

The Petitioner countered by presenting the executed Tripartite Agreement, E-way bills, and tax invoices from Respondent no.1, asserting the proper invocation of the arbitration clause and the arbitrability of the disputes.

The Single Judge bench referred to the Supreme Court's ruling in *DLF Home Developers Limited vs. Rajapura Homes Private Limited & Anr*, in which it was concluded that, “*this Court or a High Court, as the case may be, are not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen Arbitrator. On the contrary, the Court(s) are obliged to apply their mind to the core preliminary issues, albeit, within the framework of Section 11(6-A) of the Act*”. The High Court found that the purpose of this review mechanism is to expedite the arbitration process rather than to infringe upon the Arbitral Tribunal's jurisdiction.

Section 11(6) of the Arbitration and Conciliation Act pertains to *inter alia* the appointment of an arbitrator in the event of the parties failing to make such an appointment. It outlines steps parties may take to appoint an arbitrator in a dispute, but it does not provide any limitation period.

Therefore, it was upheld that the Court has the authority to reject a prayer for reference to arbitration even in the presence of a valid arbitration agreement if the Petitioner has failed to show existence an arbitrable dispute between the two parties. The purpose of notice under Section 21 is also to apprise the other party about the disputes between the parties.

Delhi Tourism and Transportation Development Corporation vs. M/S Satinder Mahajan MANU/DEOR/139789/2022. - *The seat of arbitration shall be determined by its connection to the arbitral proceedings, rather than the cause of action.*

The Delhi High Court stated that if there is not a clear indication, such as an exclusive jurisdiction clause, the location where the arbitration takes place will be regarded as the arbitration's seat. This interpretation is in line with Section 18(4) of the MSME Act, which permits medium or small enterprises to resolve disputes through a facilitation council situated in their vicinity.

The High Court made reference to the arbitration provision found in the Agreement, which is particularly stated in GCC. This section, "Settlement of Disputes & Arbitration," outlined the processes by which disagreements between the parties involved would be settled. It set up arbitration as a backup plan if the initial process doesn't work out. Notably, the GCC didn't state

where arbitration should happen or have an exclusive jurisdiction clause. However, Clause 25 of GCC did grant the arbitrator the authority to choose the arbitration's location.

The Petitioner mentioned article 7(1) of the Integrity Pact which states that *disputes should be dealt with at the headquarters of the owner/principal's division*. However, it doesn't specify the jurisdiction of the court or the method of dispute resolution. Article 7(5) explicitly states that disputes under the Integrity Pact, including questions of interpretation, cannot be settled through arbitration. Therefore, the High Court

The seat of the arbitration proceedings is to be determined on the basis of connection with the arbitral proceedings, and not with the cause of action for the underlying disputes. The "seat" of arbitration is the place where the arbitral proceedings are anchored (*BGS SGS SOMA JV v. NHPC*); the determination of jurisdiction under Sections 16 to 20 of the CPC for the purposes of filing a suit has no relevance¹⁸.

concluded that the dispute resolution processes outlined in the main Agreement and the Integrity Pact are separate. Although the documents need to be considered together, their provisions must be interpreted in a way that makes them compatible. The High Court also observed that the Agreement did not explicitly mention the seat of arbitration, leaving this on to the arbitrator's discretion.

Section 18(4) of MSME Act provides that, “The Micro and Small Enterprises Facilitation Council or the centre or institution providing alternate dispute resolution services shall have the jurisdiction to act as an Arbitrator or Conciliator for disputes referred to it under sub-section (1) and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to the disputes as if the arbitration or conciliation were pursuant to an arbitration agreement referred to in sub-section (1) of section 7 of that Act.”

While citing *BGS SGS Soma JV vs NHPC and Inox Renewables Ltd. v. Jayesh Electricals Ltd.*, the High Court upheld that the place where the seat of the arbitration is decided by its connection to the arbitration process itself and not where the cause of action arose, thereby rejecting the Petitioner’s contention of considering Delhi as a seat of arbitration.

Further, the High Court referred to *Shreyas Marketing vs. Micro and Small Enterprises Facilitation Council* a Kerala High Court judgement where it was held that awards under Section 18 of the MSME Act, deemed to be under the Arbitration Act, can be challenged in the appropriate court at the seat of the concerned facilitation council. The High Court observed that the award was made in Pathankot, where the proceedings were conducted solely. It concluded that the arbitration's seat is still the location where it was held in the absence of any indication to the

contrary, such as an exclusive jurisdiction clause. **This interpretation is consistent with Section 18(4) of the MSME Act, which enables medium or small enterprises to approach a facilitation council at their location for dispute resolution.**

M/s Kimaya Buildtech LLP vs. K. C. Software Pvt. Ltd & Ors, SCC OnLine Del 3436 -The Delhi High Court ruled that the court may address the issue of limitation during a petition u/s 11 of the Arbitration Act but only under specific circumstances.

The Delhi High Court observed that at the beginning of the process, the court's should just check if there is a basic agreement to arbitrate. The issue of limitation can be addressed later when someone files a petition for arbitration under Section 11 of the Arbitration and Conciliation Act, 1996.

The Court deferred the final determination, including on limitation matters to the arbitral tribunal and observed that while hearing petitions under Section 11 (6) of the Arbitration and Conciliation Act, 1996, for the appointment of a sole arbitrator, Court should primarily deal with the presence of a valid arbitration agreement only, and should abstain from indulging into other issues unless there are specific circumstances.

After receiving negative responses by some of the Respondents on the arbitration invoking notice sent, the Petitioner approached the Delhi High

Court and filed a Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, to appoint a single arbitrator.

The High Court observed that the Respondents had only one objection against the Petition filed, that said petition was filed after the limitation period had passed and is barred by the Limitation Act, 1963.

While referring to *Vidya Drolia v. Durga Trading Corpn. and BSNL vs. Nortel Networks (India) (P) Ltd.* the High Court held that the Court may consider the question of limitation in a petition filed under Section 11 of the Arbitration Act, but only under specific circumstances, and the Court's job at this point is to check if there is a valid arbitration agreement between the parties or not. **The final decision, including whether the case is barred under limitation act, will be made by the arbitral tribunal, which is the forum chosen by the parties.**

The High Court observed the existence of a controversy while referring to the documentation presented and held that it was proper to put these issues on reserve for the arbitral tribunal to make a final decision. Subsequently, the High Court referred the dispute to arbitration at the Delhi International Arbitration Centre (DIAC) and specified that it would adhere to DIAC's rules, including those regarding the arbitrator's payment. DIAC was directed to select an arbitrator from its panel, and the arbitrator must provide a

declaration under Section 12 of the Arbitration Act before beginning the arbitration.

Mercator Ltd. vs. Dredging Corporation of India Ltd and Connected Matters, 2024 SCC OnLine Del 3075 – The Delhi High Court while analyzing the scope of public policy under Section 48 of the Arbitration Act, observed that only the violations of the fundamental public policies qualify as a ground for refusing enforcement of foreign arbitral awards and not all statutory breaches constitute grounds for refusing such enforcements.

The Delhi High Court ruled that raising objections about the composition of the tribunal cannot be a reason to refuse enforcing foreign awards. Even though these arguments could have been brought up before both the tribunal and the local court, they were not. It was determined that the party against whom the judgment was made did not raise any objections on this matter, even during the appointment of the arbitral tribunal.

Foreign arbitral awards refer to decisions made by arbitration panels in international or domestic arbitration proceedings. These awards, whether in India or abroad, include interim decisions. In India, their enforcement is governed by the Arbitration and Conciliation Act, 1996 and the Code of Civil Procedure, 1908.

The party against whom the judgment was made primarily contested the composition of the arbitral tribunal, alleging that it did not adhere to the arbitration agreement and breached significant provisions of the Indian laws, particularly the Merchant Shipping Act of 1958. Additionally, they argued that the award surpassed the claims made by Mercator Ltd., which, if enforced, would run counter to Indian public policy.

The High Court, referring to Section 48 of the Arbitration Act, affirmed that only courts situated at the arbitration's location hold the power to annul an award, while other courts possess limited jurisdiction focused on assessing enforceability. It stressed that the objections based on public policy against enforcement must meet specific international standards.

The execution of a foreign arbitral award is a critical aspect of international arbitration, ensuring that awards are not just symbolic but can be practically enforced across borders. The New York Convention plays a central role in facilitating this process, promoting consistency and reliability in the enforcement of international arbitration awards.

The Court also acknowledged its discretion to refuse enforcement even if the conditions under Section 48 are met, yet it cannot review the merits of the dispute. In the present case, the Party against whom the judgment was made argued that the arbitration panel, consisting of retired judges

and a lawyer, did not comply with the arbitration clause requiring LMAA members.

However, since this matter was not raised during arbitration or before the arbitration's location court, the High Court deemed the objection groundless and opportunistic. Consequently, it dismissed the challenge regarding the tribunal's composition and upheld the enforcement of the foreign awards, instructing the Party against whom the judgment was made to deposit Rs. 8 crores within four weeks.

Ajay Singh and Anr vs. Kal Airways Private Limited & Anr 2024 SCC OnLine Del 3666 - The Delhi High Court reversed orders of the single judge bench upholding an arbitral award ordering SpiceJet and its chairman, Ajay Singh, to repay media baron Kalanithi Maran and his company, KAL Airways, an amount of ₹270 Crores plus interest.

The division bench of the High Court of Delhi allowed the appeal u/s 37 of Arbitration and Conciliation Act, 1996, and noted that while the arbitrator has the power to award interest, it should be done judiciously considering relevant factors.

The dispute centred around a transaction involving the takeover of SpiceJet by Ajay Singh from Kal Airways Private Limited and Mr. Kalanithi Maran. Kal Airways Private Limited

and Mr. Kalanithi Maran filed a claim against SpiceJet Limited and Mr. Ajay Singh before the Arbitral Tribunal. The Appellants argued that the transaction aimed at acquiring the debt-ridden SpiceJet and relieving Mr. Maran of personal guarantees for loan repayments.

The Arbitral Tribunal in the present case heard a claim by KAL Airways Private Limited and Mr. Kalanithi Maran against SpiceJet Limited and Mr. Ajay Singh. The dispute arose from the takeover of SpiceJet by Ajay Singh from KAL and Mr. Maran. The Appellants argued that the transaction aimed to acquire the debt-ridden SpiceJet and relieve Mr. Maran of personal guarantees for loan repayments.

The High Court observed that the Single Judge's decision in the present case heavily relied on excerpts from the Award, which supported the refund of INR 2,70,86,99,209/-, the Single Judge noted that the Arbitral Tribunal considered KAL and Mr. Maran's alternative plea based on Section 65 of the Indian Contract Act, 1872 even though the contractual arrangements were not void.

The High Court found the Single Judge's judgment inadequate for failing to address significant contentions raised by the Appellants. The High Court considered the primary argument concerning the instruction to refund INR 270,86,99,209/-. The Appellants contended that this instruction should be assessed under Section 65 of the Indian Contract Act, 1872, which deals

with restitution when an agreement is deemed void. They claimed that the refund directive contradicted the SSPA, which did not specify such repayment, and any repayment obligation was supposed to arise after eight years.

An arbitral award can be set aside only on the grounds mentioned in Section 34 of the Arbitration and Conciliation Act, 1996. The purpose of setting aside is to modify in some way the award in part or wholly.

Salient Features of Section 34 of the Arbitration Act:

1. It prohibits any recourse against arbitral award other than the one provided for in Sub-section (1) of Section 34.
2. It limits the grounds on which the award can be assailed in Sub-section (2) of Section 34.
3. It promises a fairly short period of time in Sub-section (3) of Section 34 within which the application for setting aside may be made.
4. It provides for remission of award to the arbitral tribunal to cure defects therein.

The Appellants argued that the arbitration tribunal's directives contradicted contractual terms and that the AT's findings of contractual breaches by KAL and Mr. Maran made the ordered refund unjustified. The High Court emphasized the need for thorough scrutiny of

these issues and noted that the Single Judge did not substantively engage with arguments about Section 65 of the Indian Contract Act and contractual breaches.

Additionally, the High Court criticized the AT's and Single Judge's handling of interest awards, highlighting the lack of statutory basis and sufficient reasoning, especially in light of the 2015 Amendment Act, which mandates a specific post-award interest rate. Citing relevant Supreme Court decisions, the High Court stressed that arbitrators must provide detailed reasoning when awarding interest. **Consequently, the High Court allowed the appeals, set aside the Single Judge's judgment, and remanded the matter for reconsideration.**

Delhivery Limited vs. Far Left Retail Private Limited ARB.P. 481/2024 – The Delhi High Court held that the issue regarding the insufficiency of service is considered to be on merits and therefore should be raised before the Arbitrator and not in Section 11 proceedings before the Court. The Delhi International Arbitration Centre was instructed to appoint an arbitrator in compliance with the Arbitration Act as there is an established existence of a valid arbitration agreement.

The Delhi High Court bench ruled that a complaint about insufficiency of service is deemed merit-based and ought to be brought up before the arbitrator.

In the present matter, the Petitioner served the Respondent with a notice invoking arbitration in accordance with Clause 19 of the Service Agreement and Section 21 of the Arbitration and Conciliation Act, 1996. Despite this, the Respondent failed to reply or deposit the necessary funds. As a result, the Petitioner approached the Delhi High Court with the Petition under Section 11 (5) of the Arbitration and Conciliation Act for the appointment of a Sole Arbitrator.

The Court observed that endeavor has been made by the Petitioner for an amicable settlement before initiating the Arbitration proceedings thus, sufficient compliance of the Arbitration Clause was made.

The Petition was allowed considering that there is a valid Arbitration Agreement between the Parties. The Court further observed that the Respondent's objections that dealt with the purported insufficiency of service, was relevant to the case's merits. **According to the ruling of the High Court, these objections can be raised before the appointed arbitrator.**

The fees of the Arbitrators in the Arbitrations conducted under the aegis of Delhi International Arbitration Centre (DIAC) is fixed in accordance with the Delhi International Arbitration Centre Rules.

