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LAW ADVISORY

Arbitration Newsletter

May 2024

Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd. CURATIVE PET(C) No. 000108 - 000109 / 2022 - *Supreme Court allows DMRC's curative petition against Arbitral Award in favor of DAMEPL* - The Supreme Court on April 10th relieved the Delhi Metro Rail Corporation (DMRC) of a huge liability amounting to a figure along the lines of approximately Rs 8000 crores by setting aside its 2021 judgment which upheld the arbitral award won by the Delhi Airport Metro Express Private Limited (DAMEPL, Reliance Infrastructure subsidiary) against the DMRC.

The arbitral award was passed in 2017 and the liability, along with the interest and other charges, exceeded Rs 8000 crores on the present date. Allowing a curative petition filed by the DMRC, the bench comprising CJI DY Chandrachud, Justices BR Gavai and Surya Kant held that the Supreme Court erred in interfering with the 2019 Delhi High Court's judgment which had set aside the arbitral award passed against DMRC.

The bench observed that the Supreme Court ought not to have interfered with the Delhi High Court's judgment under Article 136 of the Constitution as it was a well-considered judgment. *"By setting aside the High Court judgment, this Court restored a patently illegal award which saddled a public utility with an exorbitant liability,"* the Court observed. The court noted that the result of the interference was a *"great miscarriage of justice"* which warranted the exercise of curative jurisdiction under Article 142 of the Constitution. **In allowing the curative petition, the Supreme Court thus set aside its 2021 judgment.**

Restoring the parties to their position in which they were on the date of pronouncement of the Delhi High Court's judgment, the Court directed that the amounts deposited by the DMRC to be refunded. Any amount paid by DMRC as part of coercive action is now to be refunded and the execution proceedings for the award must be discontinued. **The Court also clarified that its curative jurisdiction will be exercised only sparingly, only in the most deserving cases.**

Curative Jurisdiction is a power vested in the Supreme Court, established in the 2002 case of *Rupa Ashok Hurra v. Ashok Hurra, (1999) 2 SCC 103*, which vests the Apex Court with the authority to correct their own judgements even after said judgement has become final. However, the exercise of this power has often been debated upon, regarding the impact it has on judicial stability and the role of the SC in shaping legal precedents.

Ilwonhibrand Co. Ltd. v. Mahakali Foods (P) Ltd., 2024 SCC OnLine MP 1813 – *Section 9 Petition for interim relief in International*

Commercial Arbitration not classified as 'Arbitration Case', must be filed as 'Miscellaneous Civil Case'. **- The Madhya Pradesh High Court division bench dismissed a petition seeking interim relief under Section 9 of the Arbitration and Conciliation Act, stating that it should have been filed as a 'Miscellaneous Civil Case' rather than an 'Arbitration Case' based on Chapter 2 of the Arbitration and Conciliation (Conduct of Arbitral Proceedings) Rules, 2008.**

The Petitioner contended that the petition fell under the classification of arbitration cases, aligning with Rule 3 of Chapter II of the M.P. High Court Rules, 2008, referring to Sections 2(e) and (f) of the Arbitration Act to argue that the High Court held original civil jurisdiction to hear the petition as it pertained to International Commercial Arbitration.

The Respondent contended that the petition was not maintainable as per Chapter 2 Rule 3 of the Arbitration and Conciliation (Conduct of Arbitral Proceedings) Rules, 2008 ("2008 Rules"), which states that applications under Section 11 of the Arbitration Act are registered as 'Arbitration Cases', dealing with the appointment of arbitrators. The Respondent further contended that the Petitioner could have filed a 'Miscellaneous Civil Case' under sub-rule 8 of Rule 10 Chapter 2 of the 2008 Rules for seeking interim protection. Miscellaneous Civil Cases can be registered for matters not falling under specified categories and which are not interlocutory to any proceedings.

The High Court noted that the Petitioner, by availing the liberty granted by the Commercial Court, filed the current petition under Section 9 of the Act seeking interim protection. However, the High Court agreed with the reasoning provided by the Respondent that as per Chapter 2 Rule 3 of the 2008 Rules, applications under Section 11 of the Arbitration Act are registered as 'arbitration cases' dealing with the appointment of arbitrators.

In the High Court's opinion, it was evident that the nature of the case and the relief sought by the Petitioner did not align with the characteristics of an arbitration case. Instead, the High Court asserted that the petition should have been filed as a 'Miscellaneous Civil Case', falling under the broader category of civil applications not specified elsewhere, as stipulated by sub-rule 8 of Rule 10 of Chapter 2 of the 2008 Rules. **Consequently, the High Court dismissed the petition, while simultaneously granting the Petitioner the liberty to file a miscellaneous civil case under sub-rule 8 of the 2008 Rules.**

National Highway Authority of India v. MS Ssangyong Engineering & Construction Co. Ltd., 2024 SCC OnLine Del 2767 - ***An***

Arbitration Award with contradictory findings is liable to be set aside under Section 34 of the A&C Act. - **The High Court of Delhi held that an arbitration award, in which the Tribunal rendered findings contrary to its own observations, falls within the rubric 'Public Policy' under Section 34 of the Act. The bench also held that in a situation wherein the Arbitral Tribunal has given conflicting awards on an identical issue involving the same parties and with same contractual conditions, the Court would have to set aside the award in such an anomaly.**

The Court observed that since the Respondent is a foreign entity, the award is passed in an International Commercial Arbitration, ergo, it cannot be challenged on ground of 'Patent Illegality'.

The Court further observed that in terms of the agreement of the case at hand, a final payment certificate could only be issued after the contractor had given a written discharge and not otherwise. It also observed that no final payment certificate could be issued when a dispute was pending between the parties w.r.t. the amount due under the agreement.

The Court held that the Tribunal had initially observed that the Respondent had not given the mandatory written discharge which was a pre-requisite to the issuance of final payment certificate, however, it later held that the certificate dated 31.08.2014 could be considered as final, since there was no dispute between the Engineer and the Respondent with regards to the amount, thereby making the finding contrary to its own observations. It held that an award would become suspect to setting aside under Section 34 of the Act when the Tribunal makes an award that is inherently contradictory.

The Court then noted that the Petitioner had challenged the certificate dated 31.08.2014 by contending that the engineer had incorrectly applied the price formula which stood corrected in the subsequent certificates/bills. Moreover, it was pointed out that there were errors with respect to the price of materials put in by the Respondent, the quantity of work executed, variation items, etc. However, on these objections, the Arbitral Tribunal did not render any finding. The court held that the Tribunal wrongly concluded that the amount was accepted by the Petitioner without demur.

The Court held that non-adjudication by the Arbitral Tribunal on an issue that goes to the root of the matter would make the arbitral award opposed to public policy. It held that such an award would be set aside under Section 34 of the A&C Act, and that once the Tribunal duly notes the submissions of a party on an issue central to

the dispute but renders no finding on such submission/contentions, it would result in violation of principles of natural justice.

Patent illegality stands as a pivotal ground for challenging arbitral awards, although the Arbitration and Conciliation Act, 1996, does not explicitly define the term. This ground is invoked when an award is deemed contrary to substantive legal provisions, the Arbitration Act, or the contractual terms. The 2015 Amendment Act, following recommendations from the 246th Law Commission Report, formally incorporated patent illegality as a ground for setting aside domestic arbitral awards under section 34(2A) of the Arbitration & Conciliation Act, 1996.

Next, the Court examined the issue of a contrary finding by the Tribunal with regards to the finality of the certificate dated 31.08.2014 in a dispute under a different package agreement but under the same tender contract. It was observed that the Tribunal in the other package agreement has held that same certificate to be not final. Therefore, the court held that the Tribunal had given a completely contrary finding.

The Court relied upon the judgment of the Apex Court in ***National Highway Authority of India v. Progressive-MVR (JV), (2018) 14 SCC 688*** wherein the Court held that in a situation wherein the Arbitral Tribunal has given conflicting awards on an identical issue involving the same parties and under the same agreement, the interest of justice would require the Court to decide the finality of the issue. It held that an award would be set aside when it creates such an anomaly. **Accordingly, the Court allowed the petition and set aside the award.**

Gaurav Rice Industries v. The Haryana State Coop. Supply and Marketing Fed. Limited, FAO-CARB No. 58 of 2023 - ***Arbitrator committed no illegality in accepting a claim in toto when no written Statement of Defense was filed.*** **- The Division Bench of the High Court of Punjab & Haryana held that an arbitration award cannot be considered patently illegal on the grounds of arbitrator's acceptance of a claim in toto if the Respondent did not file any written statement of defense, nor led any evidence to contest the claimed amount.**

The Appellant contested against the impugned award on the grounds that no opportunity was granted to the Appellant to present their case, resulting in failure of justice and principles of fair play, and that the oral submissions made by the Appellant before the Arbitral Tribunal had not been considered by the Tribunal in the impugned award.

The Court observed that the Appellant did not file any written statement of defense before the arbitrator, did not provide any evidence to supplement their claim, or present any witnesses for examination. The Court reiterated that the award can be set aside as being patently illegal if it is against the public policy of India and the Court would not do a review of the award on its merit. **It held that the arbitrator did not commit any illegality in accepting the claim in toto especially when it was not seriously disputed by the appellant.**

The Court also held that the Appellant had made oral submissions before the arbitrator, therefore, it could not be said that no opportunity was given to them to present their case. Accordingly, the Court dismissed the appeal.

In the judgement of the Delhi High Court in the case of *Amazing Research Laboratories Ltd. v. Krishna Pharma, 2023 SCC OnLine Del 1498*, it was held that an Award passed in violation of the provisions of the Indian Contracts Act, 1872 would be liable to be set aside on account of "patent illegality." This decision further underscored the evolving nature of the concept, allowing its application to encompass violations of specific statutory provisions, such as those within the Indian Contracts Act, in the assessment of arbitral awards.

Kirloskar Pneumatic Co. Ltd. v. Kataria Sales Corporation, 2024 SCC OnLine Bom 941 - *No requirement of fresh Section 21 Notice for re-commencing the arbitration after the first award is set aside under Section 34.* - The High Court of Bombay held that there is no requirement of a notice under Section 21 for re-commencing the arbitration after the first award is set aside under Section 34 of the A&C Act. The bench reasoned that such a notice is not required as the opposite party would already be aware of the existence of the dispute.

The Respondent objected to the maintainability of the petition, stating that the petition was pre-mature since the notice under Section 21 had not been issued, and that jurisdiction of the Court under Section 11(6) could only be invoked after the parties had mutually failed to appoint the arbitrator and not otherwise.

The Court rejected the Respondent's argument that a fresh notice under Section 21 was necessary, and held that since the arbitration mechanism was already triggered and the proceedings had commenced, there was no need for a new notice, further stating that the dispute between the parties remained unchanged, and the Petitioner sought the appointment of a competent arbitrator, not a new invocation of arbitration.

The Court noted that there was no requirement of Section 21 notice for re-commencing the arbitration after the first award had been set aside under Section 34 of the A&C Act. **Accordingly, the Court allowed the petition and appointed a sole arbitrator.**

Cardinal Energy & Infra Structure (P) Ltd. v. Subramanya Construction & Development Co. Ltd., 2024 SCC OnLine Bom 964 - ***Absence of specific prayer for impleadment of non-signatory does not preclude the Arbitral Tribunal from applying the Group of Companies Doctrine.*** **- The Bombay High Court single bench held that the Arbitral Tribunal has the power to decide whether the non-signatory is bound by the Arbitration Agreement and to implead the non-signatory. The Court held that the absence of a specific prayer for the impleadment of a non-signatory in a Section 11 Application does not preclude the application of the Group of Companies doctrine by the Tribunal.**

The Petitioners argued that the Arbitral Tribunal lacked the inherent power to implead a non-signatory, and, as per the judgement of ***Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1***, the law does not grant Arbitral Tribunal the power to implead non-signatories.

The Respondents contended that the Tribunal derives its power from the agreement between the parties and relevant legal provisions, pointing out that Section 16 of the Arbitration Act empowered the Tribunal to decide on the existence of the Arbitration Agreement. Non-Impleadment in a Section 11 Application therefore did not preclude the application of the Group of Companies Doctrine, and that the Tribunal had the authority to consider impleadment of non-signatories based on judicial precedents.

The High Court referred to the decision of the Supreme Court in *Cox and Kings* case, which primarily dealt with the 'Group of Companies' doctrine and the impleadment of non-signatories to an Arbitration Agreement in arbitral proceedings. The High Court noted that the Supreme Court in this case held that the Arbitral Tribunal possesses the authority to determine if a non-signatory is bound by the Arbitration Agreement and to include them if necessary.

Impleadment refers to bringing in parties into a suit by way of including them in an existing suit as additional Respondents. The doctrine of Group of Companies allows for an Applicant to implead parties into a suit, which was established in India in the recent landmark judgement of *Cox and Kings*.

Moreover, the High Court found no indication in the *Cox and Kings* that the Arbitral Tribunal's power to apply the 'group of companies' doctrine is contingent upon a prayer for impleadment of non-signatories in a Section 11 Application. It held that merely by the fact that there was no prayer for impleadment of a non-signatory in the Section 11 Application, it could not be said that the applicability of the doctrine by the Arbitral Tribunal stood excluded.

Furthermore, the High Court held that under Section 16 of the Arbitration Act, the Arbitral Tribunal has the authority to determine issues of jurisdiction, including over non-signatories to an Arbitration Agreement. **Consequently, the High Court dismissed the Arbitration Petition, finding no valid grounds under Section 34 of the Arbitration Act to set aside the arbitral award.**

Startupwala (P) Ltd. v. Google India (P) Ltd., 2024 SCC OnLine Del 2148 - *Delhi High Court directs Google to maintain* status quo *in an advertisement agreement, citing irreparable loss due to ad blockage.* - The High Court of Delhi directed Google India to maintain *status quo* with respect to the advertisements displayed on its platforms by observing that the main revenue for a party in an advertisement agreement comes from the ad revenue, and *en-masse* blocking of ads would result in irreparable loss to that party. The Bench also reiterated that a Section 9 petition would be maintainable in an arbitration with a seat outside of India.

The Petitioner in the case argued that the advertisements displayed on their website were crucial for their revenue, and that Google's actions in disapproving the advertisements were causing significant financial losses to the Petitioner. Furthermore, the Petitioner stated that they had been in continuous correspondence with Respondent (Google) from August 2023 to February 2024, but the responses were unsatisfactory and mostly automated, while the Respondents contended against the maintainability of the petition, noting that the seat of arbitration for the case was set in the USA, and therefore, would not be maintainable in India.

The Court considered the arbitration clause, which stipulated arbitration in Santa Clara County, California, USA, under the International Centre for Dispute Resolution of the American Arbitration Association. The Court dispelled the argument by observing that a Section 9 petition is maintainable even in an arbitration with a foreign seat.

The Court observed that due to the Respondent's actions of blocking the Petitioner's ads, the Petitioner was deprived of their revenue on which they heavily relied. Keeping in mind the

irreparable loss to the Petitioner, the Court directed the Respondent to maintain the status quo on currently unblocked advertisements labelled as 'Eligible (limited)' until the next hearing.

HFCL Limited v. Bharat Broadband Network Limited ARB.P. 1314/2023 - *Party invoked Arbitration Clause by referring to work orders* - The Delhi High Court single bench appointed an arbitrator for a dispute where a Petitioner invoked arbitration by referring to the work orders signed by the parties. The High Court observed the identical nature of the arbitration clauses in the tender and the work orders and held that there was no ambiguity even if the tender prevailed over the work orders in case of any conflict or ambiguity.

The High Court noted that the Petitioner had referred to both the work orders in their arbitration notice, indicating a clear invocation of the arbitration clause. Furthermore, the High Court observed that the arbitration clause present in the tender document and that in the work orders were identical in content.

Referring to Clause 31.1 of the tender between the parties, which stipulated the procedure for arbitration, the High Court emphasized that it was comprehensive, covering any disputes arising under the agreement. It noted that the clause allowed for the appointment of a sole arbitrator by the Chairman-cum-Managing Director (CMD), BBNL, and provided a framework for arbitration proceedings.

In analyzing the relationship between the arbitration clauses in the tender document and the work orders, the High Court referred to Clause 29.6 of the Work Orders. It stated that in case of any conflict between the Work Orders and the tender document, the tender document would prevail.

The High Court held that the arbitration invocation made by the Petitioner was valid and in accordance with the terms laid out in both the tender document and the work orders. The petition was allowed. Consequently, the High Court appointed Justice Mukta Gupta (Retd.) as the Sole Arbitrator to adjudicate the disputes between the parties.

A work order in construction is a document that outlines the details of a specific project. Construction companies create these to define their expectations of the work they agree to do for their clients. Both the parties often sign these documents to agree on the terms of the project. Work orders can be for activities such as inspections, maintenance, emergencies, etc., with the primary purpose being to establish agreement between two parties to a contract.

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